Oregon Business Lawyer

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Why Transactional Attorneys Should Care About Client Estate Plans

Natalie E. Smith, Sussman Shank LLP

Business owners often reach out to their attorneys during times of growth (to structure a new endeavor, facilitate a transaction, or finance an expansion) and during times of despair (to avoid a bankruptcy or navigate a lawsuit). Rarely do business owners reach out to discuss how a possible untimely death may impact their business. That is why it is essential for business attorneys to ask the right questions to ensure that each client's business ownership and succession plan is fully integrated and consistent with their estate planning. Taking this crucial, extra step will add value and give your clients additional peace of mind.

They had an estate plan? Oh no!

Every good corporate attorney advises their closely held business clients to establish a shareholders' agreement, which can cover things like voting, management, and succession planning. The same applies to an operating agreement for a limited liability company or a partnership agreement for a partnership. Most shareholders want to keep control of the business with the remaining shareholders if a shareholder retires, dies, or becomes disabled. Therefore, it is common for a shareholders' agreement to obligate the estate of a deceased shareholder to sell that person's shares to the corporation or to the remaining shareholders.

But what happens when a deceased shareholder's estate plan disposes of the deceased shareholder's shares in a different way, such as to their surviving spouse or their children? Whether the shareholders' agreement or the deceased shareholder's estate plan governs the decision depends on the details, but the disconnect between the two could have been avoided if the corporate attorney had asked about each shareholder's existing estate plans. A corporate attorney could point out when a proposed transfer at death would not be permitted (or desirable) under the business and succession plan and work with a shareholder to ensure the totality of their planning is consistent.

Other issues arise when there is no open communication between the transactional attorney and their business client. Imagine that you assist with forming a limited liability company among four members, the purpose of which is to own and rent out apartment complexes ("Rent, LLC"). Rent, LLC is member-managed, and all of the members enjoy participating in the management of the business. The business is thriving and is operating smoothly with each member being involved in Rent, LLC's management. Two years later, one of the four members dies. At that time, you discover that the deceased member had established a joint revocable trust ("Family Trust") with her spouse—but the membership interest in Rent, LLC was held in her name, individually, not titled to the Family Trust. What happens?

A probate or simple estate proceeding would be required so that someone would have legal authority with respect to the deceased member's interest in Rent, LLC. While a probate may be initiated

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Natalie E. Smith is an Estate Planning, Tax, and Business Attorney at Sussman Shank LLP. She works closely with individuals, families, and business owners to create personalized, tax-sensitive plans that support long-term goals and preserve wealth. In addition to estate planning, Natalie assists clients throughout the life cycle of their business—from formation and operations to sales and transitions. She holds a BA from Willamette University and a JD and an LLM from the University of Oregon School of Law where she was an Estate Planning fellow. In her free time, Natalie enjoys taking her dog on adventures and reading a good book. Natalie can be reached at nsmith@sussmanshank.com or 503.243.1631

immediately after death, a simple estate proceeding may not be initiated sooner than thirty days after the date of death; notwithstanding, both a probate and a simple estate proceeding require a four-month creditor claim period during which the assets are restricted. Overall, it would be unusual to administer an estate in less than six months from date of death, and during the administration, the decedent's membership in Rent, LLC would be subject to court oversight and intervention, which could hinder the company's management and operations. Because Rent, LLC is member-managed, the personal representative or affiant of the decedent's estate would need to sign (or vote) as a member for each action of Rent, LLC requiring member approval. Further, the personal representative or affiant may even need court approval to take certain actions, such as approving the sale of Rent, LLC.

Additionally, the personal representative or affiant would have to work with the other members of Rent, LLC (potentially in court) to navigate the operating agreement's terms that govern with respect to the deceased member's interest in Rent, LLC. Court intervention would be necessary if the terms of the operating agreement contradict the dispositive provisions of the deceased member's Will, which presumably directs transfer of the decedent's membership interest to the Family Trust and administration for the beneficiaries of the Family Trust (what is often referred to as a "pour-over will").

Asking your client if they have an estate plan can prevent these types of delays and conflicts. Additionally, once you know your client's estate plan, you can help them get the most value out of it by ensuring that their business assets are properly titled and that their expectations match the reality reflected in their business and estate planning documents. This can be accomplished by discussing—often in excruciating detail—what they want to happen to their business operations when they die or become incapacitated and what would be required for the continued success of their business.

Have you seen Succession (on HBO Max)? Well, we need to talk…

It can be difficult to discuss business succession with clients, as it requires discussing their retirement, possible incapacity, and inevitable death—topics people often struggle facing head-on. When approaching this discussion with clients, it is important to have a roadmap that keeps you on track so that you hit on key topics rather than saying "So, what's next?" Guiding your clients through this conversation will make it easier for them to discuss these topics and will also create a clear succession plan that can then be mirrored in their estate plan.

For some clients, succession planning will be straightforward. For others, it can be extremely complex. Succession planning can touch on many sensitive subjects, such as upsetting family dynamics, difficult business partners, and long-time employees. Sometimes succession means no succession and winding up; sometimes it means selling the business and distributing out all assets or net sales proceeds. Other times, succession means leaving the business in the hands of key employees who are not currently owners. In this situation, it is essential that the corporate attorney is in contact with the estate planning attorney to ensure that the dispositive provisions of the owner's estate plan match their intended succession plan. It is often best to prepare a detailed shareholders' agreement, operating agreement, or partnership agreement (depending on the form of entity), to which the intended successor owners will be bound. The owner's estate plan must also require that the named fiduciaries (agent under a durable general power of attorney, trustee under a trust, and/or personal representative or affiant under a will) be bound to the terms of that agreement.

Often clients plan to leave their business—or the economic benefits of their business—to their surviving spouse and children, or to other family members who they hope will either continue their legacy or otherwise benefit from what they built during their lifetime. While this may seem straightforward, it is crucial to discuss the details. For example, let's say Tammy owns nine hundred shares in Timber Tammy, Inc., an Oregon corporation ("Timber"), and her children Tara and Timothy each own fifty shares of Timber. You have been Timber's corporate attorney since Tammy founded Timber more than thirty years ago. Timber is a successful timber harvesting and logging business located in Oregon, which supplies high quality wood products to vendors throughout the Pacific Northwest.

You schedule a meeting with Tammy to discuss business succession. To start the meeting, you outline the current ownership of Timber and ask about the children's involvement. You learn that Tara is excelling in the business and has become VP of Operations. Tammy is working with Tara daily and teaching her the ins and outs of Timber. Tara's older brother, Timothy, does not enjoy the "business" side of Timber, but loves being in the field, where he works closely with many of Timber's employees and supervises the timber harvesting.

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For Tammy, the business succession of Timber may seem clear—her two children will each receive one-half of the shares in Timber and run the business together. However, there are a few important questions you should ask: (1) When does Tammy want to retire from Timber? (2) Does Tammy intend to own all her shares in Timber until she dies? (3) Will her children own equal shares in Timber on her retirement and/or death? (4) Do her children want to co-own and together operate Timber after Tammy's retirement and/or death? (The older sibling does physical work, and the younger sibling is in the office, so their expectations and timelines may dramatically differ.) (5) Does Tammy have an estate plan that generally benefits her two children equally; does it specifically address the transfer of her shares in Timber on her death?

Tammy responds as follows: (1) She wants to retire in seven years. (2) She thinks she wants to maintain ownership of her shares in Timber after retirement, but she is not sure exactly what the benefits and consequences of that would mean. (3) She wants Tara to own a controlling interest in Timber since she will be running the business and Timothy will be boots-on-the-ground. (4) Yes, both Tara and Timothy plan to own and operate Timber for at least the next ten to fifteen years. (5) Yes, she does have an estate plan, and she "doesn't know what it says!"

After requesting copies of Tammy's estate planning documents, you learn that she has a grantor revocable trust ("Trust"), which owns only 500 of her 900 shares in Timber. It directs that 350 shares be distributed to Timothy and 150 shares be distributed to Tara, in trust for life. Finally, Timothy is named as a business trustee with respect to all of Tammy's shares in Timber (which presents issues, as only 500 of Tammy's 900 shares are titled to the Trust, so Timothy cannot act as Business Trustee with respect to those remaining 400 shares without some form of court intervention).

You realize that Tammy's current estate plan does not address her full ownership in Timber and is not aligned with her stated business succession goals. These differences can easily be resolved but do need to be addressed. Tammy's full nine hundred shares of Timber should be titled to the Trust (not in her individual name). The Trust should be amended and restated to change the dispositive provisions so that, on Tammy's death, all of her shares in Timber (whether it be nine hundred shares or some different amount, because Tammy may have more shares issued or some shares redeemed during her remaining lifetime as part of her retirement planning) be distributed 51 percent to Tara and 49 percent to Timothy. Tara should be named as the Business Trustee so that she would manage the shares of Timber (and make pertinent shareholder decisions) under the Trust's administration.

If you hadn't asked Tammy these questions, her goals with respect to Timber's succession would have been thwarted by her own estate plan. Further, her existing estate plan could have caused tension between her two children. For Tammy, your questions provide value and give her the opportunity to update her planning.

Tax savings? Say more.

Tammy is so thankful for your thoroughness and advice that she sets up a joint meeting with you and her estate planning attorney. At that meeting the three of you discuss her goals with respect to Timber and updates to be made to her estate plan. Together, the three of you realize that Tammy's shares of Timber and their disposition after her death will likely qualify for the Natural Resource Property Exemption under ORS 118.145. Under this exemption, up to $15 million of the value of a decedent's interest in natural resource property is exempt from Oregon estate tax. Timber owns qualifying natural resource property located in the state of Oregon, and Tammy intends to maintain ownership of Timber (as Trustee of her Trust, which is a revocable grantor trust) until her death (especially since she now knows this could reduce her Oregon taxable estate by an additional $15 million). Because Tammy has always intended for her children to take over the business after her death, and her children desire to do so, this exemption is a valuable savings to Tammy and her children.

Assuming Tammy's estate is able to take full advantage of the natural resource property exemption (in addition to the standard $1 million Oregon state estate tax exemption amount), you would have assisted her estate in saving approximately $2,062,500 in Oregon estate taxes. These savings may not have been achieved had you not met with Tammy with the goal of fully integrating her business succession plan and her estate plan.

What we can learn from Tammy's story is that corporate and transactional attorneys have a great opportunity to add value to their work by keeping estate planning considerations in mind. Corporate and transactional attorneys need not become experts in estate planning or tax to assist their clients in these areas. Engaging local counsel to work through these matters with your clients will save them time, money, and heartache in the future by ensuring that their assets are properly distributed after their death in accordance with their wishes. ◆

Call for Submissions: How Do You Use AI?

AI is becoming more prevalent in all areas of life. It's important to harness this tool ethically and thoughtfully. The OSB Business Law Section is seeking to highlight some examples of ethical AI use at law firms in Oregon to help form a road map for others to follow.

If you would like to submit examples of your firm's AI usage, either anonymously or not, please email the newsletter editor, Jackie Krantz, at jacqueline.krantz135@gmail.com by Friday, February 27, 2026 with the information you would like included.

To find more information about the Business Law Section and our newsletter, see our website, https://businesslaw.osbar.org/.

Barrister Banter: Daniel Gilbert

The purpose of the Barrister Banter series is to bridge the gap between junior and senior business lawyers in Oregon, fostering understanding and camaraderie. For this quarter's installment, we interviewed Daniel Gilbert, Senior Assistant Attorney General for the Oregon Department of Justice. Read on to learn how Daniel's cross-country law experience, from Washington, DC to Oregon, informs his words of wisdom for young lawyers.

1. Tell me about your path to being a lawyer. What inspired you to pursue this career?

I have always enjoyed logic and trying to piece together disparate pieces of information into a cohesive narrative. I also loved competing in games (sports and otherwise) and was good at learning esoteric rules and figuring out how to apply them when doing so would give me a competitive advantage. Law seemed like a good fit.

2. What is your practice area?

I am a government lawyer, serving as a Senior Assistant Attorney General in the General Counsel Division of the Oregon Department of Justice. In this role, I provide legal advice to numerous state agencies as they seek to carry out the duties assigned to them by the Oregon Legislature.

3. How long have you been in your current role?

I have been in my current position for a little more than two years and an attorney with the State of Oregon for about thirteen years.

4. How have you seen the practice change since you started practicing?

Client expectations around response times and attorney availability have increased significantly. There is also an increased desire to use quantifiable metrics to evaluate attorney performance.

5. What do you wish you had known before you started working as a new lawyer?

Three things. First, that you are in charge of your own career. It is critical for a young attorney to constantly step back, evaluate their career to date, and decide if they like the path they are on or if changes are necessary. Any organization, including law firms, defaults to using their employees in a way that best suits the organization's needs. A young attorney should continually evaluate and ensure that their career is developing in a way that is conducive to their long-term needs and desires.

Second, I wish I had understood the importance of relationships and of developing a reputation for excellence and good judgment (both internally and with clients). The same piece of legal advice can be treated differently depending on who delivers it and how it is delivered. You will have a happier and more successful career if you become known as a trusted advisor who understands the clients' needs and gives great legal advice that is tailored to those needs.

Third, keep an open mind with respect to career opportunities. When I started my career, I "knew" that I wanted to do international law. And I spent the first seven years of my career doing so while working at a large firm in Washington, DC with a practice that focused on investment treaty arbitration and representing foreign sovereigns before U.S. federal courts. But life brought me to Oregon, and I have ultimately been much happier working for state government than I was doing what I thought was my dream job.

6. What are your career highlights?

My career highlights involve successfully guiding clients through unsettled areas of the law. As a government attorney, one highlight was successfully advising the Oregon Legislature as it sought to retain the ability to conduct redistricting when (due to the COVID-19 pandemic) the Legislature would not receive the federal census data required to conduct redistricting before the deadline for state legislative reapportionment that is set forth in the Oregon Constitution.

7. What is your favorite part of the job?

My favorite part of the job is the number of novel issues I am asked to analyze and provide legal advice on. I have worked in state government for almost thirteen years, and it feels like nearly every week I am presented with a new circumstance to figure out.

8. What parts of the job do you wish you could outsource to AI?

Basic legal research/case law summaries.

9. What advice would you give a new business lawyer?

Work hard, develop a reputation for producing excellent work, and remember that professional relationships matter.

10. What advice would you give a senior lawyer who is charged with mentoring a new lawyer?

Take the responsibility seriously. This means taking the time to get to know the new lawyer as a person and trying to figure out what they actually want to accomplish in their legal career. Advice is much more helpful when the recipient feels understood. ◆

Crafting Non-Competition Agreements for Mergers and Acquisitions

Erich Merrill, Miller Nash LLP

The author acknowledges the research assistance of Vivian Hernández for this article.

In the December 2024 edition of this newsletter, Justin Monahan and I cowrote an article discussing considerations of buying and selling a business from the perspectives of the buyer and the seller. Among the considerations explored was the post-closing transition process, which Justin expanded upon in a subsequent article. Another consideration included in our first article was the importance of non-competition agreements in such merger and acquisition (M&A) transactions. This article delves into the details of crafting non-competition agreements in preparation for, or as part of, M&A transactions.

Terminology: non-competes vs. other restrictive covenants

Creating non-competition agreements (or "non-competes") is one contractual option for preventing employees from using their employer-company's intangible business assets (e.g., customer lists, manufacturing techniques, or knowledge about suppliers) to set up a competing business or to work for a competitor after leaving the company. Non-competes are agreements in which an employee commits not to provide services to, or own an interest in, a business that competes with the company. To be enforceable, non-competes must be limited in both market area (traditionally geographic) and duration.

Other contractual methods for protecting against competitive use of a company's business assets are non-solicitation agreements and nondisclosure agreements. For the purposes of this article, non-solicitation agreements are those under which an employee agrees not to hire or offer to hire the company's employees, not to offer products or services to the company's customers, or both. Nondisclosure agreements are agreements under which an employee agrees to refrain from disclosing or using information that the company considers proprietary.

Other protective agreements that companies often find desirable are work product assignment agreements and non-disparagement agreements. These agreements, while important tools for companies, are not the topic of this article.

Employee non-competes before the M&A transaction – state law restrictions

A number of business reasons can lead companies to decide that they will require non-competes from their employees. Companies that expect to engage in an exit transaction (i.e., an M&A transaction resulting in the sale of the company's entire business to a buyer) have an additional incentive to require employee non-competes: obtaining non-competes from key employees can enhance the value of a business in the eyes of a buyer.

Counsel to such a company (or to its owners) must consider state law restrictions on non-competes before the company requires employees to agree to them. Oregon, Washington, and California, for example, each highly regulate non-competes, and in different ways.

As established in ORS 653.295, businesses with Oregon employees can require non-competes from employees but are subject to significant procedural and substantive limitations. Non-competes can be required only from salaried Oregon employees who are involved in administrative, executive, or professional roles and who make more than the threshold amount of $116,427, as of January 1, 2025. (This threshold is imposed under ORS 653.295 (1)(e).) With some exceptions, the employee must not be a licensed medical provider. The employer must have a protectible interest. Of particular significance for M&A purposes is Oregon's requirement that non-competes be entered into at the time of initial employment or in connection with bona fide advancement. A new employee must be told of the non-compete in the job offer for the position, at least two weeks before starting work. Oregon allows employee non-competes to last for no more than twelve months. The case of Oregon Psychiatric Partners, LLP v. Henry, 316 Or. App. 726 (2022) provides a recent example in which failure to comply with the non-compete statute voided the non-compete.

Companies with employees in Oregon have other alternatives that can be effective to provide protection in lieu of a non-compete. Oregon permits both nondisclosure agreements and non-solicitation agreements. Oregon also permits bonus-restriction agreements, as defined in ORS 653.295(5). Under

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these agreements, a former employee can be required to refrain from competing with the company as a condition to receiving a bonus that will be paid after employment has ended.

Washington State also allows employee non-competes in limited circumstances and of limited scope. Under RCW 49.62.020, employee non-competes are unenforceable unless the company provides advance written notice to the new employee at the time of the initial employment offer or the non-compete agreement is supported by adequate consideration if it is being required after an employee has already begun work for the company. Washington does not permit companies to require a non-compete from any employee making less than a threshold amount ($126,858.83 as of January 1, 2026). Washington law also includes a presumption that any employee non-compete longer than eighteen months is unreasonable and therefore unenforceable.

"Oregon permits both non-disclosure agreements and non-solicitation agreements. Oregon also permits bonus-restriction agreements..."

Washington law strongly discourages the use of unlawful non-competes by imposing clear statutory penalties: any person harmed by an unlawful non-competition covenant can bring an action to recover the greater of actual damages or $5,000, plus attorney fees and costs. Employees or a subsequent employer are among the parties who might be harmed and are therefore permitted to bring an action to recover these amounts.

The Washington penalties for imposing a non-compete in the wrong circumstances can affect the value of a business in an M&A transaction. Companies preparing for an exit transaction may therefore prefer to rely on other means of protecting against former employee competition, such as a nondisclosure agreement.

Companies with employees in California, in some ways, have the easiest decision to make as to whether employee non-competes are appropriate. They are not. California prohibits and will not enforce employee non-competes. Under Cal Bus. & Prof. Code § 16600, any contract that restrains an individual from engaging in a lawful profession, trade, or business is void, regardless of its scope, duration, or other factors. Businesses with employees in California must rely on other means, typically nondisclosure agreements, in order to protect the business against use of intangible proprietary business assets by former employees. Traditional intellectual property protections such as patents, copyrights, and trademarks/service mark registrations are tools that businesses with employees in Oregon, Washington, or California can use for this purpose.

Non-competes in M&A transactions

The restrictions on employee non-competes in Oregon, Washington, and California are specific to the employment arena. The restrictions do not apply to non-competes that owners (limited to owners of more than a 1 percent interest in Washington) may enter in connection with the sale of their business. (See ORS 653.295(4); RCW 49.62.010(4)(d); Cal Bus & Prof Code §§ 16601, 16602, and 16602.5.) Owner non-competes are subject only to the common law requirement that such restrictions be of reasonable scope and duration. (See e.g., Eldridge v. Johnston, 195 Or. 379, (1952); Perry v. Moran, 109 Wash. 2d 691, (1987); Samuelian v. Life Generations Healthcare, LLC, 324 Cal. Rptr. 3d 596 (2024).) In virtually all M&A transactions, the buyer will require that the seller refrain from competing with the buyer (or with the business being sold) for a specified period of time.

Key negotiating points as to M&A non-compete provisions include who will be subject to the non-compete, how competition is defined, what exclusions will be specified, and scope in terms of duration and geographical area.

In an exit transaction structured as a sale of assets, the non-compete is usually directed at the selling entity. The owners of the selling entity may also be required to enter into a non-compete. In an exit transaction structured as a stock or equity sale, at least the controlling owner will be required to agree to a non-compete. Often other substantial owners will also be required to agree to a non-compete. In both types of transactions, the buyer will sometimes also require that key employees also agree to a non-compete, especially if those employees are also owners.

Numerous approaches can be taken as to the definition of competition or what constitutes a competing business. In some agreements, there is no definition of this concept, relying on the common understanding of competition to define the scope of the provision. More often, M&A agreements define a competing business as one that sells products or services that are substitutes for those sold by the acquired business, either as of the time of the transaction or at the time of the competing act after the transaction. For early stage or rapidly developing businesses, competing businesses can be defined as including those that are contemplated by the company's research and development activities. While such a clause is desirable from the buyer's standpoint, sellers should be cautious about agreeing to this flexible definition since it may be difficult after the transaction to understand exactly what business activities are prohibited.

Exclusions from the definition of competing business can be critical if a seller is selling one business but retaining another business. The retained business should be excluded from the non-competition clause. The seller should also consider whether the retained business is likely to expand into additional sectors, in which case those should also be excluded from the definition.

The geographic (or market) scope and duration of the non-compete are also items that are commonly negotiated. The appropriate market scope of the non-compete will depend on what business is being sold, where its customers and operations are, and whether it is a bricks-and-mortar or virtual busi-

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ness, among other things. Attorneys for a buyer need to keep in mind that courts can strike down overly broad geographic or market scopes that the courts find unreasonable.

The duration of an M&A non-compete is typically three to five years after the closing date of the transaction, as to owners. If employee non-competes are part of the acquisition agreement, the duration will usually be substantially shorter, must be tailored to comply with applicable state statutes, and runs from termination of employment rather than from the closing date of the transaction.

Common non-compete mistakes by buyers

Buyers often stumble when formulating the non-compete provisions of an M&A transaction. A common mistake that buyers make is requiring existing employees to sign non-competes at the time of the business acquisition, without any significant consideration other than continued employment. In Oregon, amending an employee's existing agreement to include a non-compete results in an unenforceable agreement if no bona fide advancement accompanies the amendment. In other states without statutory restrictions on non-competes, such an amendment can be subject to a challenge that there was no consideration, or inadequate consideration, for the amendment.

A less frequent (in my experience) but still surprising mistake is for buyers to require non-competes from employees in California or other jurisdictions where such provisions are clearly prohibited or unenforceable. This mistake usually occurs when the buyer and their attorney are located in states where non-competes are not restricted.

"The duration of an M&A non-compete is typically three to five years after the closing date of the transaction..."

In both cases, attorneys representing buyers need to familiarize themselves with the laws of the states where the acquired business and its employees are located, to make sure that non-compete requirements comply with applicable state laws.

Diligence considerations

Both buyers and sellers should include the topic of non-competes in their diligence review and preparations for a potential M&A transaction. For the seller, the diligence review should include confirming that all existing non-compete agreements with employees have been appropriately documented, and that any agreements complied with applicable state law at the time they were entered into.

For the buyer, the diligence review for non-competes should focus on which non-compete obligations have been imposed on employees, whether obligations that do exist comply with applicable law and will be enforceable by the buyer, and whether any non-compete agreements that the seller has put in place may violate applicable law and subject the buyer to claims or penalties. For example, a buyer of a business with employees in Washington could be held liable to the employee or a former employee's new employer for non-competition agreements entered into by the seller if those agreements did not comply with Washington's requirements for such agreements.

Federal Trade Commission

On April 23, 2024, the Federal Trade Commission (FTC) issued a final rule that would have significantly restricted the ability of employers to require employees to agree to non-competes. The final rule has been stayed by the U.S. District Court for the Northern District of Texas (Civil Action No. 3:24-CV-00986-E) and remains the subject of litigation as well as uncertainty as to future action by the FTC. Unless and until the rule takes effect, restrictions under state law rather than federal law determine the limits on non-competes.

Practice tips

Attorneys representing sellers in M&A transactions, or representing companies preparing for an exit transaction, should consider the following factors when advising a client on non-compete agreements:

• When advising a company on non-competes prior to an M&A transaction, confirm whether applicable state law permits the non-compete for the employees of interest. If a non-compete is permitted, explore with the client whether a non-compete may be unacceptable as a business matter and whether other restrictive covenants or traditional intellectual property protection may provide adequate protection against competition by former employees. As to any non-competes that are permitted and desired, provide the client with appropriate documentation of the non-compete and assist the client in obtaining the non-compete from employees in accordance with procedures required by applicable state laws.

• When advising a seller in an M&A transaction, counsel the seller or owner who will be subject to the non-compete as to what parameters of the non-compete can be negotiated. The extent to which a non-compete requested by the buyer may be acceptable will likely depend to a large extent on the seller's or owner's future business plans. For example, an owner planning to retire may be unconcerned about a broad non-complete with a long duration and wide geographic scope.

Attorneys representing buyers in M&A transactions should consider the following matters when advising a client on non-compete agreements:

• Confirm that any non-compete requested by the buyer has a scope that will likely be considered reasonable and will therefore be enforceable.

• Confirm that any non-compete requested of the seller's employees (or an owner in their role as an employee) complies with applicable state law. In particular, if a non-compete will be required of an existing seller employee who is not currently subject

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to a non-compete, confirm that the new non-compete is structured in such a way as to meet any requirements of applicable state law (if permitted at all).

• Counsel the buyer that employee non-competes cannot always be relied on. For example, if an employee moves to California, courts will no longer enforce a non-compete that may have been enforceable in the state in which it was originally entered (when the employee lived in or worked from another state).

Conclusion

Non-competition agreements from sellers, owners, and key employees are an important part of most M&A transactions. Business owners preparing for an exit transaction should consider the extent to which obtaining non-competes from new and existing employees may be desirable. Attorneys advising sellers or buyers in connection with an M&A transaction need to be familiar with the statutory limitations on non-competition agreements and ensure that any such agreements are structured to be enforceable to the extent permitted by applicable law. ◆

Ambyr O'Donnell: 2025 Castles Award Winner

Congratulations to Ambyr O'Donnell, the winner of the 2025 James B. Castles Leadership Award!

Ambyr O'Donnell advises companies through transformational periods, such as strategic acquisitions and initial public offerings. She epitomizes professionalism as a business lawyer and has made substantial contributions to the practice of business law in Oregon.

Ambyr has served in the senior executive roles at high-growth technology companies for more than 20 years. Prior roles include Chief Legal Officer of Truckstop.com, SVP and General Counsel of UserTesting, Inc., and VP and General Counsel of Tripwire, Inc. In 2021, Ambyr led UserTesting's initial public offering. Prior to that, she guided Tripwire through its Form S-1 filing and subsequently led its sale to a private equity sponsor, then its sale to a strategic buyer. She has led M&A and strategic partnerships at both public and private companies.

Throughout her career, Ambyr has been recognized for her strategic judgment, operational rigor, and her ability to navigate complex transactions with clarity and integrity. She brings a pragmatic, business-first perspective to legal leadership and is known for building trusted partnerships with executives, boards, and investors.

Ambyr's dedication to the legal community and the profession is extensive. She is a past chair of the Oregon State Bar Business Law Section Executive Committee and has served as a speaker for the Business Law, Intellectual Property, and Corporate Counsel sections. Ambyr also has served as Co-Chair of the Business Law & Innovation Board at her alma mater, Lewis and Clark Law School, and as a member of its Board of Visitors.

In 2013, the Association of Corporate Counsel recognized Ambyr as one of the "Top 10 30-Somethings" for her innovation, professional contributions, and pro bono work. In 2018, Lewis and Clark Law School honored her with the Distinguished Business Law Graduate Award for her leadership in technology law and her advocacy for women in the legal and technology fields. Beyond the legal sphere, Ambyr serves on the board of directors of Urban Gleaners, an Oregon nonprofit organization dedicated to eliminating food waste and food insecurity.

The Castles Award was established in 1998 to recognize an Oregon lawyer for excellence in the practice of business law, professionalism among fellow business lawyers, and outstanding community leadership. It is the highest recognition that the Business Law Section can bestow on one of its members.

If you would like to nominate an Oregon business lawyer for the Castles Award, please email the name of the nominee, together with the pertinent details regarding the nominee's qualifications for the award, to Michael Walker, the Chair of the James B. Castles Leadership Award Subcommittee of the Executive Committee of the Business Law Section, at mdw@samuelslaw.com. ◆

Oregon State Bar Business Law Section

The mission of the Oregon State Bar Business Law Section is to provide excellent service to the diverse group of business law practitioners throughout the State of Oregon by providing regular, timely, and useful information about the practice of business law, promoting good business lawyering and professionalism, fostering communication and networking among our members, advocating improvement of business law, and supporting Oregon's business infrastructure and business community.

Articles in this newsletter are for informational purposes only, and not for the purpose of providing legal advice. The opinions expressed in this newsletter are the opinions of the individual authors and may not reflect the opinions of the Oregon State Bar Business Law Section or any attorney other than the author. Comments may be sent to the editor at jacqueline.krantz135@gmail.com.