Start a State-of-the Art Artificial Intelligence Practice Area

Rottenberg, Lipman Rich, P.C.

Michael A. Santoro Joins RLR as Of Counsel

March 26, 2025—New York, New York

Michael A. Santoro has joined Rottenberg Lipman Rich, P.C. ("RLR") as Of Counsel to start a state-of-the-art Practice Area in Artificial Intelligence ("AI").

"We are delighted to welcome Michael to the RLR team to start the firm's AI Practice Area. Michael combines deep experience in corporate and transactional law with nearly a decade of experience with established technology companies and start-ups in Silicon Valley," said Mark M. Rottenberg of RLR. "We are at the dawn of the AI era in business and the practice of law. Michael's AI Practice fits nicely within RLR's practice and offers our clients access to a wide range of legal services related to AI," said Harry W. Lipman of RLR.

Michael added: "I am excited to join RLR, one of the leading boutique New York Metropolitan Area law firms, to establish a state-of-the-art AI Practice Area. In addition to traditional transactional and corporate law, the goal of my practice is to help clients navigate the brave new world of artificial intelligence, machine learning, and other technologies such as augmented reality and cloud computing. Technology is the future of data management and regulatory compliance. My approach is to work with cutting edge AI companies to provide reliable and cost-efficient services to clients. It is especially important for small to medium-sized companies to find cost-efficient solutions to the myriad compliance issues they face. For example, I advise clients regarding compliance with New York City's 's AI Bias Audit Law (Local Law 144), GDPR, HIPAA, and the recently passed European AI Act. I also offer cost-effective certification for ISO 27001, ISO 42002, well as B-Corp certification and compliance. The first step for companies new to AI is to discover whether and how these various compliance issues and certification opportunities might apply to them."

New and existing clients are invited to contact Michael to learn more about RLR's AI Practice and discuss potential areas of engagement and representation.

Michael's email address msantoro@rlrpclaw.com and his firm extension is Ext. 280. His cell phone number 917-589-8193.

FTC Approves Nationwide Ban on Non-Compete Agreements

On April 23, 2024 the FTC, by a 3-2 vote, approved a nationwide ban on non-compete agreements. A copy of the new Rule is available here. We expect immediate litigation seeking to stay the Rule and to vacate the rule as an improper exercise of administrative rule making.

RLR Obtains $25 Million Judgment Against Channel One Russia

April 17, 2024

Rottenberg Lipman Rich, P.C. has obtained a $25 million defamation judgment against the Russian state-owned television network Channel One Russia relating to the notorious poisoning death of Russian dissident Alexander Litvinenko. On April 15, 2024, Federal District Judge John Cronan of the Southern District of New York entered the Judgment.

After five years of litigation, RLR Partner Randy Sellier, together with co-counsel and noted defamation attorney Rodney Smolla, obtained the judgment against Channel One on behalf of their client, Dr. Alex Goldfarb. Although Dr. Goldfarb was close friends with Litvinenko, Channel One defamed Dr. Goldfarb by repeatedly claiming that Dr. Goldfarb orchestrated Litvinenko's murder. Judge Cronan awarded Dr. Goldfarb $20 million in compensatory damages and $5 million in punitive damages.

Litvinenko famously died in London on November 23, 2006 shortly after meeting with several former KGB officers. Litvinenko was an ex-Russian intelligence officer and a high profile Putin critic who fled Russia in 2000. He wrote several books critical of Putin's Russia and worked as a consultant for the British Secret Intelligence Service.

The morning after Litvinenko's death, Dr. Goldfarb, standing next to Litvinenko's father, read a statement to the media that Litvinenko had written on his deathbed accusing Putin of ordering his murder. Dr. Goldfarb had gained international prominence as a professor of microbiology, author, and human rights activist who had worked with, among others, Andrei Sakharov.

Years later, international attention again focused on Putin's apparent role in directing international assassinations, including Litvinenko's murder. In March 2018, two Russian nationals, Sergei and Julia Skripal, were subject to an apparent assassination attempt in Salisbury, England under circumstances remarkably similar to Litvinenko's death. The British government accused Russia of conducting the Skripal attack and noted the similarities with the Litvinenko murder twelve years earlier. The Skripal matter precipitated significant expulsions of Russian diplomats from the U.K. and other nations around the world.

Channel One, serving as the Russian government's mouthpiece, sought to deflect blame for the Skripal deaths as well as the Litvinenko murder. Channel One, therefore, broadcast numerous statements implicating Dr. Goldfarb in Litvinenko's murder and cover-up. Channel One has global viewership of over 250 million people.

Dr. Goldfarb immediately filed defamation claims against Channel One based on statements contained in several 2018 Channel One broadcasts. The statements stated or reasonably implied: (1) that Dr. Goldfarb murdered Litvinenko, (2) that Dr. Goldfarb murdered his own late wife to cover up his poisoning of Litvinenko; (3) that Dr. Goldfarb ran an unlawful business

aiding Russian criminal asylum-seekers; and (4) that Dr. Goldfarb convinced Litvinenko's wife to commit perjury at an inquiry conducted in the U.K.

Channel One was represented by Baker Hostetler's Washington D.C. office and appeared and defended itself against Dr. Goldfarb's claims for several years. Following the close of discovery, Channel One filed a motion for summary judgment which Judge Cronan denied in a lengthy well-reasoned decision reported at 663 F. Supp 3d 280 (S.D.N.Y. 2023). Judge Cronan then scheduled the case for trial in December 2023 but adjourned the trial until March 2024 based on Channel One's representation to the Court that it had authority to engage in good-faith settlement negotiations. In February 2024, however, Channel One announced to the Court that it would participate no further in settlement efforts and would take no further action to defend the case.

Dr. Goldfarb then moved for a default judgment against Channel One and Judge Cronan held a hearing on April 10, 2024 to decide that motion. Based on the extensive factual record before him, and a careful consideration of the relevant law concerning liability and damages, on April 15, 2024 Judge Cronan issued his Judgment vindicating Dr. Goldfarb's claim that he had been injured by Channel One's repeated broadcast of defamatory statements blaming him for Litvinenko's murder.

New York's Mixed-Up Law on Enforcement of Restrictive Covenants After Termination

New York's mixed-up law regarding enforcement of restrictive covenants after termination. . .

By Thomas E. Chase, Esq.

May 8, 2024

I love writing about legal landmines in my area of practice relating to employment and competition law. And boy, there are a lot of landmines!

One question that trips up many attorneys is whether an employer may enforce a restrictive covenant after terminating an employee. Many New York attorneys assume that employers may **not** enforce restrictive covenants if they terminate an employee. Woops, the law is not so clear. Here is a quick summary.

New FTC Rule Drops a Grenade On NY Competition Law

First, the Federal Trade Commission's recent rule barring non-competes throws much of New York restrictive covenant law into uncertainty. Many believe the FTC overstepped its rule-making authority and the rule will be found to be unenforceable. But even if the rule is found to be enforceable, it is not clear whether it applies only to "non-compete" agreements or to other non-solicit, non-recruit, and non-disclosure agreements restraining employees. I will write about this in later posts. Assuming that some New York restrictive covenants survive the FTC rule, the question remains, Can an employer enforce them after terminating an employee??

Cases Flunking Restrictive Covenants When Employee Terminated

Several New York courts have boldly held that employers cannot enforce restrictive covenants after they terminate employees. Practitioners with the bad luck of coming across these cases may search no further, confident that the issue has been decided in favor of employees. In *King v. Marsh & McLennan Agency, LLC*, 191 A.D.3d 507 (1st Dep't 2021), the First Department reviewed an appeal in which the central issue was whether the employee was terminated for cause or without cause. Either way, the Court concluded, the employee's restrictive covenant was unenforceable because the employer terminated the employee. *Id*. at 508 ("In light of the above, we need not reach the issue as to the enforceability of the non-solicitation agreement."). The Court cited what appeared to be a murderers' row of dispositive case law on the matter:

See Kolchins v Evolution Mkts., Inc., 182 AD3d 408, 409 [1st Dept 2020] ["these (restrictive) covenants are not enforceable because Evolution did not have a 'continued willingness' to employ Kolchins, despite Kolchins's continued desire to work for the company"]; *Buchanan Capital Mkts., LLC v DeLucca*, 144 AD3d 508, 508 [1st Dept 2016] [restrictive covenants "are not enforceable if the employer does not demonstrate continued willingness to employ the party covenanting not to compete"; *Grassi & Co., CPAs, P.C. v Janover Rubinroit, LLC*, 82 AD3d 700, 702 [2d Dept 2011] [because the employer terminated the employee without cause, both the forfeiture and the restrictive covenant were unenforceable]; *Borne Chem. Co. v Dictrow*, 85 AD2d 646, 649 [2d Dept 1981] [restrictive covenant was unenforceable where employee was terminated "without just cause"]). Concur—Acosta, P.J., Kapnick, Singh, Mendez, JJ. **[Prior Case History:** 67 Misc 3d 1203(A), 2020 NY Slip Op 50370**.]**

Many attorneys would stop researching after encountering such a daunting string cite. But they would be underestimating the frustrating complexity of New York law.

Cases Enforcing Restrictive Covenants When Employees Are Terminated

Other recent New York courts have enforced restrictive covenants even though the employer terminated the employee. *See Kelley-Hilton v. Sterling Infosystems Inc.*, 426 F.Supp.3d 49, 59 (S.D.N.Y. 2019) (holding that restrictive covenant was enforceable "whether [the employee's] employment was terminated with or without cause"); *Davis v. Marshall & Sterling, Inc.*, 217 A.D.3d 1073, (3rd Dep't 2023) (rejecting employees' defense that they were terminated without cause, stating "the circumstances of their terminations are irrelevant to the question of enforceability of the employment agreements"). It is impossible to reconcile these cases with the cases cited above.

Conclusion

Attorneys and businesses should be aware of the unsettled law in this area. Particularly frustrating is the conclusiveness with which New York courts write on the topic. Practitioners encountering either line of cases might justifiably believe the issue is settled under New York law, but that would be a mistake.

Common Law Chaos: NY's Unsettled Law on Employee Non-Solicitation Provisions

By Thomas E. Chase, Esq.

February 13, 2024

New York law regarding the enforcement of employee non-solicit provisions (AKA "non-recruitment" provisions) is a mess. It is an area of the common law that needs an authoritative appellate court decision to provide order where there is now chaos.

Disputes frequently arise when one company hires a group of employees from another. Such

"lift-outs" spawn claims that the departing employees wrongfully solicited each other in violation of the non-recruitment provisions in their employment agreements. Despite the frequency of such disputes, New York law is unclear whether restrictions prohibiting employees from recruiting fellow employees are enforceable.

No Controlling Law

Initially, trial courts frequently note the lack of controlling appellate law on the topic. See Parella Weinberg v. Kramer, 78 Misc.3d 124, *7 (N.Y. Co. 2023)("New York caselaw on provisions prohibiting the solicitation of employees is scant"); Admarketplace Inc. v. Salzman, 2014 WL 1278504, *4 (N.Y. Co. 2014)("there is scant case law on the enforceability of non-recruitment clauses"); OTG Management, LLC v. Konstantinidis, 40 Misc.3d 617, 621 (N.Y. Co. 2013) ("Only one state court has discussed the standard" applicable to non-recruit provisions). Given the absence of controlling authority, there is significant disagreement among trial courts regarding the enforcement of non-recruitment provisions.

Non-Recruitment Provisions Held Unenforceable

The first reported NY case to directly address the issue held that non-recruitment provisions are enforceable only if they serve the ancillary purpose of protecting confidential information, trade secrets, or uniquely valuable employees. Lazer Inc. v. Kesselring, 13 Misc.3d 427, 433 (Mon. Co. 2005). More recent cases, particularly two decisions by Federal District Judge Jed Rakoff, also flunked non-recruitment provisions on the ground that employers have no legitimate interest in deterring solicitation of their employees. In In re Document Technologies Litigation, 275 F.Supp.3d 454,468 (S.D.N.Y. 2017)(Rakoff, J.), the Court held that the prevention of coordinated "en masse" resignations was not a legally cognizable interest that could be protected by non-recruitment restraints on trade. "The legitimate interest of the employer must protect against unfair competition, not simply avoid competition in a general sense." Non-recruit provisions impermissibly "keep departing employees in the dark about job opportunities . . . the public interest most strongly supports the free flow of information concerning alternative employment." Id. See also QBE America, Inc. v. Allen, 2022 WL 889838, *11 (S.D.N.Y. 2022) (Rakoff, J.)(refusing to enforce a non-recruitment provision, stating "there is nothing unfair about coordinated departures of workers marketing themselves as a package deal"). Other cases similarly refuse to enforce non-recruitment provisions as written, holding that they protect no legitimate interest of the employer. See National Tax and Financial Services, Inc. v. Ciocia, 2021 WL 860179 (N.Y. Co. 2022) (following In re Document Tech); Parmanens Capital, L.P. v. Bruce, 2022 WL 3442270, *9 (S.D.N.Y. 2022)(flunking non-recruitment provision); Reed Elsevier Inc. v. Transunion Holding Co., Inc., 2014 WL 97317, *9

(S.D.N.Y. 2014)(flunking non-recruit provision).

Non-Recruitment Provisions Held Enforceable

A similar number of New York cases hold that non-recruitment provisions are enforceable and show little concern about their anti-competitive effects. These cases reason that non-recruitment provisions pose fewer anti-competitive concerns than do non-compete provisions because an employee subject to a non-recruitment provision remains free to pursue his or her career. "Non-recruitment clauses are inherently more reasonable and less restrictive that non-compete clauses." OTG Management, 40 Misc.3d at 621 (enforcing non-recruitment provision); Renaissance Nutrition, Inc. v. Jarrett, 2012 WL 42171 (W.D.N.Y. 2012) (enforcing non-recruitment provision, stating "a non-recruitment clause, as opposed to a non-compete clause, does not infringe on an employee's ability to engage in an occupation, but merely infringes on his ability to recruit former co-workers"). See also Parella Weinberg, 78 Misc.3d 124, *8 (enforcing non-recruitment provision); Admarketplace, 2014 WL 1278504, *4 (same); Oliver Wyman, Inc. v. Eielson, 282 F.Supp.3d 684 (S.D.N.Y. 2017)(same).

Conclusion

In conclusion, there is little uniformity in the enforcement of non-recruitment provisions under New York law. The cases addressing the issue reach wildly different results and provide little compelling rationale for their conclusions. No appellate court has issued an authoritative decision guiding the lower courts. The state and federal trial courts, therefore, feel free to chart their own course regardless of the resulting inconsistency and unpredictability. Both employers and employees deserve better guidance on this important and commonly occurring issue. Hopefully, an appellate court will soon fill the vacuum with a decision defining the rules of the road regarding employee non-recruitment provisions.

Christopher Robinson publishes article in ABA Journal: "Art Commission

Agreements and VARA Moral Rights”

Features

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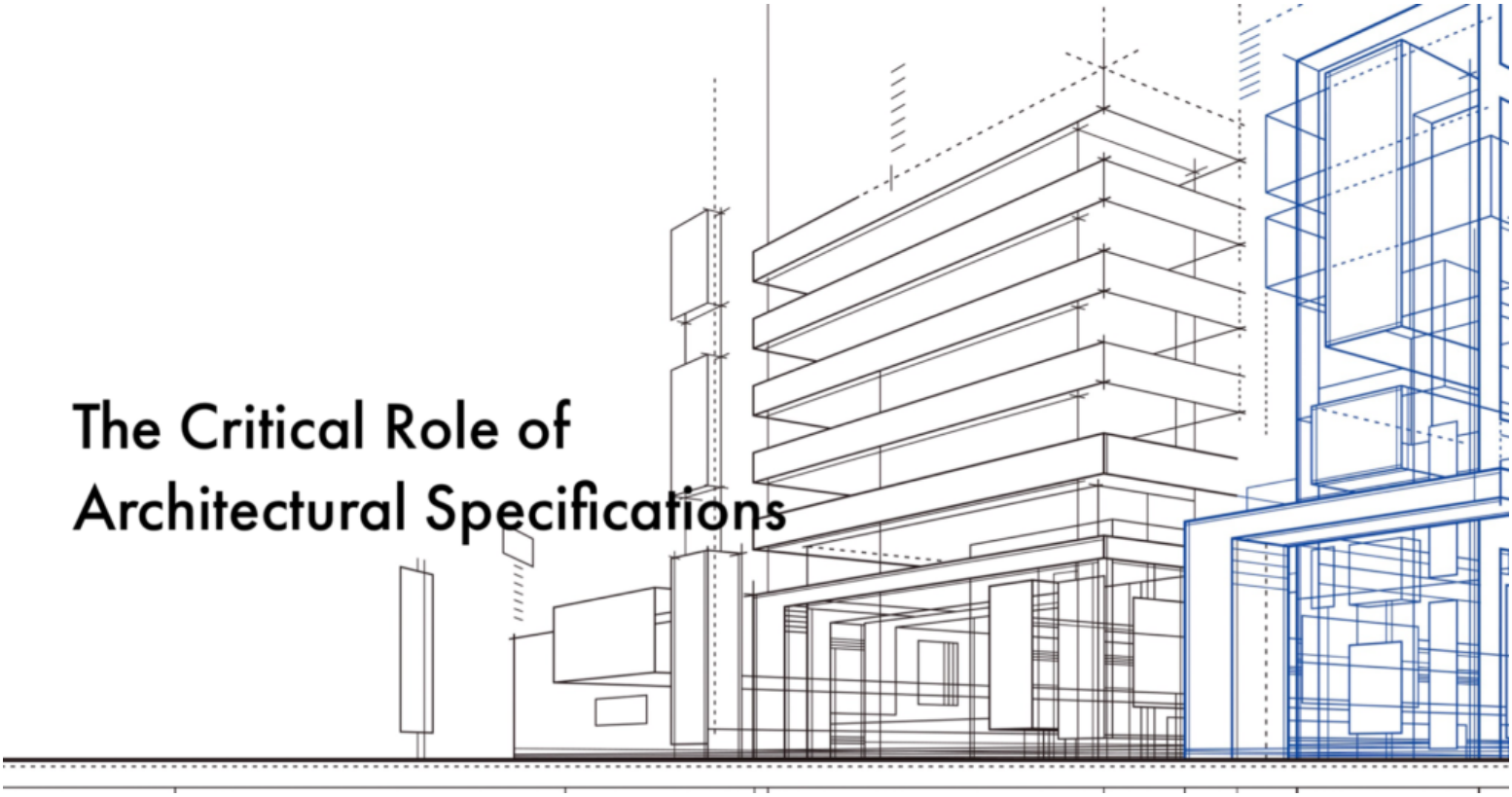
Art Commission Agreements and VARA Moral Rights

Christopher J. Robinson

RLR partner Christopher Robinson recently published an article entitled “Art Commission Agreements and VARA Moral Rights” in the American Bar Association’s publication *Landslide*. See Landslide December/January 2024 digital issue. The article provides an in-depth analysis of the Second Circuit’s recent controversial decision in *Kerson v. Vermont Law School*.

WHY DO YOU NEED AN ARCHITECT? THE SPECIFICATIONS!



By Thomas E. Chase, Esq.

February 6, 2023

Architectural specifications play a critical role in construction projects but are poorly understood by owners with little construction experience. Clients often believe that architects are responsible only for the aesthetics of a project: its look, feel, flow, etc. They do not understand the important role that an architect's "specifications" play in the contract process. In fact, when hiring an architect, probably the most important thing to consider is not the architect's aesthetic vision but the quality and quantity of the architect's standard specifications. Inexperienced or unprofessional architects often have poor specifications and view them as an afterthought.

Architectural Specifications

Architectural plans include both (1) the familiar drawings depicting the building or renovation and (2) the "architectural specifications" consisting of numerous paragraphs of fine print accompanying the drawings. Indeed, architectural specifications often appear in print that is so small that they are impossible to read unless viewed on full-size 24" x 36" architectural plans.

Despite the tiny print, architectural specifications play a big role in construction contracts. Architectural specifications prescribe the litany of materials and methods that go into a high-quality construction project. Any material or method above the minimum required by code must be set forth in the architectural specifications. Thoughtful specifications identify specific fixtures, finishes, and building techniques for every component of construction: mechanical, electrical, plumbing, foundations, framing, thermal and sound insulation, windows, floors, etc. Architectural specifications, therefore, distinguish professional/craftsmen construction from that which is merely the minimum accepted in the trade.

Construction Contracts Incorporate Architectural Specifications

Architectural specifications form the heart of a strong construction contract. Contracts between owners and general contractors define the parties' rights and obligations regarding payment, timing, cancellation, etc., but do not define the actual work performed. The actual work to be performed is set forth in architectural plans and specifications, which contracts incorporate by reference.

Consequently, in most construction disputes regarding the quality or scope of construction, the most important question is whether the architectural specifications address the issue. If the specifications address the issue, the GC is required to build the project in conformity with the specifications. If the specifications are silent on the issue, the GC may have little or no obligation to construct the project in a certain manner.

So, the lesson for owners is to pay attention to the fine print in the architect's plans. Discuss the specifications with your architect, understand what they contain, and insist that your architect develop comprehensive specifications requiring high-quality materials and methods that are tailored to every aspect of your project. If things go

wrong on your project, the specifications will be very important in determining the general contractor's responsibility to make things right.

Steve Kayman and Harry Lipman to Present at Trade Secrets Conference

RLR partners Steve Kayman and Harry Lipman will be participating in this year's seventh annual "Hot Topics in Trade Secrets Protection, Enforcement, and Litigation Conference." The Conference is hosted by Paul Weiss at its New York City office and is sponsored by Sandpiper Partners LLC. Steve will be a Co-Moderator and Harry will be a Faculty member. This year's distinguished panelists also include the Hon. Loretta A. Preska, Federal District Judge of the S.D.N.Y., the Hon. Charles E. Ramos, former Justice of the Commercial Division of the Supreme Court, New York County, and Sarah L. Cove, U.S. Magistrate Judge, S.D.N.Y. The conference will be held, in person, at Paul Weiss' offices at 1285 Avenue of the Americas from 9:00 a.m. to 1:30 p.m. on Wednesday, February 14, 2024. Click here to register.