

Traps, Pitfalls, and “Gotcha” Moments to Avoid with Business Contracts

Law Department Management



To say Rachel Barnett knows contracts would be an understatement. As general counsel of Travelzoo, a global internet media company that publishes travel deals, Barnett combines her practical business sense and legal knowledge to manage all aspects of the company's domestic and international legal affairs. Now with her new book, Barnett is bringing readers her practical tips for understanding and drafting contracts. We talked to Barnett to get a first look at The Short & Happy Guide to Business Contracts. She shared three major clauses that the book helps lawyers to master.

The "gotcha" moment: Non-solicitation clauses

The Short & Happy Guide to Business Contracts covers what every lawyer wants to know: how to avoid mistakes. "There are many tricks of the trade and pitfalls that can be avoided that are explained in the book," says Barnett. For example, Barnett covers one of the most common traps: the non-solicitation clause. Everybody in business at one point in time will be handed a non-disclosure agreement (NDA) and asked to sign and send it back. "Most of the time, an NDA follows a similar, routine cookie-cutter format," explains Barnett. "However, every once in a while a party will slip in a non-solicitation clause that prohibits the other party from soliciting or hiring anyone from their company."



Sometimes these clauses make sense. For example, during merger discussions, the seller may not want a potential buyer to steal its employees and then not buy its company. But Barnett warns that in most everyday business discussions, lawyers should “watch out for that provision. Then cross it out.”

Barnett also shares a practical example. “Once, a competitor reached out and asked to do business together. Because the parties were sharing confidential information, it was natural for the competitor to ask the company to sign an NDA. The business person in charge did not run the NDA through legal and thought it was a standard document,” she shares. “The parties exchanged a few documents and the competitor passed on working together. A few weeks later, the competitor contacted the company’s HR department, highlighting the non-solicitation clause in the NDA and threatening to sue if the company hired anyone from their business.” This “gotcha” moment is exactly what Barnett’s book helps lawyers avoid.

The one to watch: Termination clauses

It’s hard to pinpoint the most “important” clause in a contract. “It can depend on the circumstances of the business relationship and there are a number of terms that can create headaches down the road if not reviewed properly,” explains Barnett. However, most contracts will require a termination clause. “Putting aside risk allocation provisions (such as the limitation of liability and the indemnification clause), perhaps the most important clause in the contract is the termination clause,” she emphasizes. “How else do you exit the relationship when things don’t work out?”

Barnett’s book shares many practical tips for how to handle contracts. For example, she recommends that companies looking to purchase technology spend time with the IT team walking through every termination clause. “Down the road, the IT team will likely call the lawyer at some point in time and ask, ‘How do we get out of this contract?’” she explains. “You will want to prepare for this scenario ahead of time.” She also offered a back-up plan for difficult termination clause

negotiations: “If you decide on a longer-term agreement without the ability to terminate easily, make sure you bargain for a discounted price for giving up those rights.”

The messy edit: Mutual indemnification clauses

Barnett also identified a major contract drafting mistake: the messy mutual identification clause. “One mistake that happens all the time is that attorneys try to simply change a few words in an indemnification clause in an attempt to make it ‘mutual,’” she says. “But many times the edited clause does not make sense.”

Indemnification clauses typically deal with third-party lawsuits that can arise from the business relationship. For example, Barnett shares, “In the online world, it is common that a party will supply a photo to another party, and then find out the hard way that someone else claims rights over that photo.” Indemnification clauses are important when the inevitable lawsuit appears. “Your business arrangement for the content and photo may have generated US$1,000 in revenue, but now you are slapped with a copyright lawsuit seeking US$10,000 for using the photo,” Barnett continues.

How should lawyers handle this situation? “In this case, you will want to ensure that the indemnification clause covers claims that the content or photo infringes any intellectual property right (including copyright),” says Barnett. “If you did not do so, but instead changed a few words in the indemnity language, for example, modifying simply the clause to ‘each party’ will be indemnified for claims, you may not be covered for IP claims.”

These are just a few of the clauses lawyers need to watch for, but *The Short & Happy Guide to Business Contracts* has much more to offer. “The book walks through the main mistakes that people make when reviewing a contract,” Barnett explains. “It also has an entire chapter on *Ten Common Pitfalls in a Business Contract*.”

Ultimately, Barnett’s book is a practical way for lawyers to truly understand the business and commercial implications of the language that they are signing. In a profession where our training focuses heavily on theory — everyone remembers the law school cases on offer, acceptance, and the Statute of Frauds — *The Short & Happy Guide to Business Contracts* is a must-read for any practicing corporate lawyer.

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Olga V. Mack is a fellow at CodeX, The Stanford Center for Legal Informatics, and a Generative AI Editor at law.MIT. Mack shares her views in her columns on ACC Docket, Newsweek, Bloomberg, VentureBeat, Above the Law, and many other publications.

Mack is also an award-winning (such as the prestigious ACC 2018 Top 10 30-Somethings and ABA 2022 Women of Legal Tech) general counsel, operations professional, startup advisor, public speaker, adjunct professor, and entrepreneur. She co-founded SunLaw, an organization dedicated to preparing women in-house attorneys to become general counsels and legal leaders, and WISE to help female law firm partners become rainmakers.

She has authored numerous books, including Get on Board: Earning Your Ticket to a Corporate Board Seat, Fundamentals of Smart Contract Security and Blockchain Value: Transforming Business Models, Society, and Communities. She is working on her next books: Visual IQ for Lawyers (ABA 2024), The Rise of Product Lawyers: An Analytical Framework to Systematically Advise Your Clients Throughout the Product Lifecycle (Globe Law and Business 2024), and Legal Operations in the Age of AI and Data (Globe Law and Business 2024).