

Avoiding Contract Drafting Landmines

Monday, September 23, 2019 | Convene Conference Center | NYC

Tuesday, September 24, 2019 | NYSBA | Albany (Live Webcast)

9:00 a.m. – 12:00 p.m.

PROGRAM AGENDA

3.0 MCLE Credits; 3.0 Areas of Professional Practice

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| 8:30 a.m. – 9:00 a.m. | Registration |
| 9:00 a.m. – 9:10 a.m. | Introductory Remarks |
| 9:10 a.m. – 9:35 a.m. | Contractual Provisions Found in Non-Contractual Documents

Landmines of Drafting On-Line Contracts: Browsewrap and Clickwrap

<i>(0.5 MCLE Credit; 0.5 Areas of Professional Practice)</i> |
| 9:35 a.m. – 10:00 a.m. | Pitfalls in Drafting Common Contractual Provisions

Battle of the Forms--UCC Section 2-207

<i>(0.5 MCLE Credit; 0.5 Areas of Professional Practice)</i> |
| 10:00 a.m. – 10:25 a.m. | Warranties <ul style="list-style-type: none">• Drafting express warranties• Drafting disclaimers of implied warranties• Drafting warranties that extend to future performance and delay the running of the statute of limitations
<i>(0.5 MCLE Credit; 0.5 Areas of Professional Practice)</i> |
| 10:25 a.m. – 10:35 a.m. | Break |
| 10:35 a.m. – 11:00 a.m. | Merger Clauses <ul style="list-style-type: none">• The Parol Evidence Rule<ul style="list-style-type: none">- Integration – partial or complete- Merger Clauses turn even partially integrated into completely integrated contracts |

- Drafting Merger Clauses (using the language recognized by the courts; to disclaim “invisible” terms—trade usage and course of dealing).
- Limitations of Even Well-Drafted Merger Clauses (i.e. fraud)
- No Oral Modification Clauses and Anti-Waiver Clauses

(0.5 MCLE Credit; 0.5 Areas of Professional Practice)

11:00 a.m. – 11:25 a.m.

Limitations of Liability Provisions

- Drafting Exclusions of Consequential Damages
 - The fundamentals: the line between “direct” and “consequential” damages is hazy
 - “Lost profits” are not always consequential damages
 - Exclusion of consequential damages does not necessarily exclude tort damages
 - The presumption of cumulative remedies and how to draft around it
 - If a remedy fails of its essential purpose, it might eliminate the exclusion of consequential damages
 - Exclusion of consequential damages is sometimes not permitted if the remedy would not make the aggrieved party whole

(0.5 MCLE Credit; 0.5 Areas of Professional Practice)

11:25 a.m. – 11:50 a.m.

Miscellaneous Clauses

- Recitals and Effective Date Provisions
- Provisions Stating Time for Performance
- Indemnity Provisions
- Force Majeure Provisions
 - The default protections without a force majeure clause
 - Impossibility, impracticability, and frustration of purpose
 - How these default protections can be lost by improper drafting
 - Drafting force majeure clauses
- Termination
 - The problem in knowing whether a “material breach” occurred
 - Drafting to avoid the uncertainty as to what is a “material breach”
- Choice of Law
 - If scope is too narrow, may not include extra-contractual claims

- Opting out of The United Nations Convention on Contracts for the International Sale of Goods
- Choice of Forum and Arbitration

(0.5 MCLE Credit; 0.5 Areas of Professional Practice)

11:50 a.m. – 12:00 p.m. Question & Answer

12:00 p.m. Adjournment