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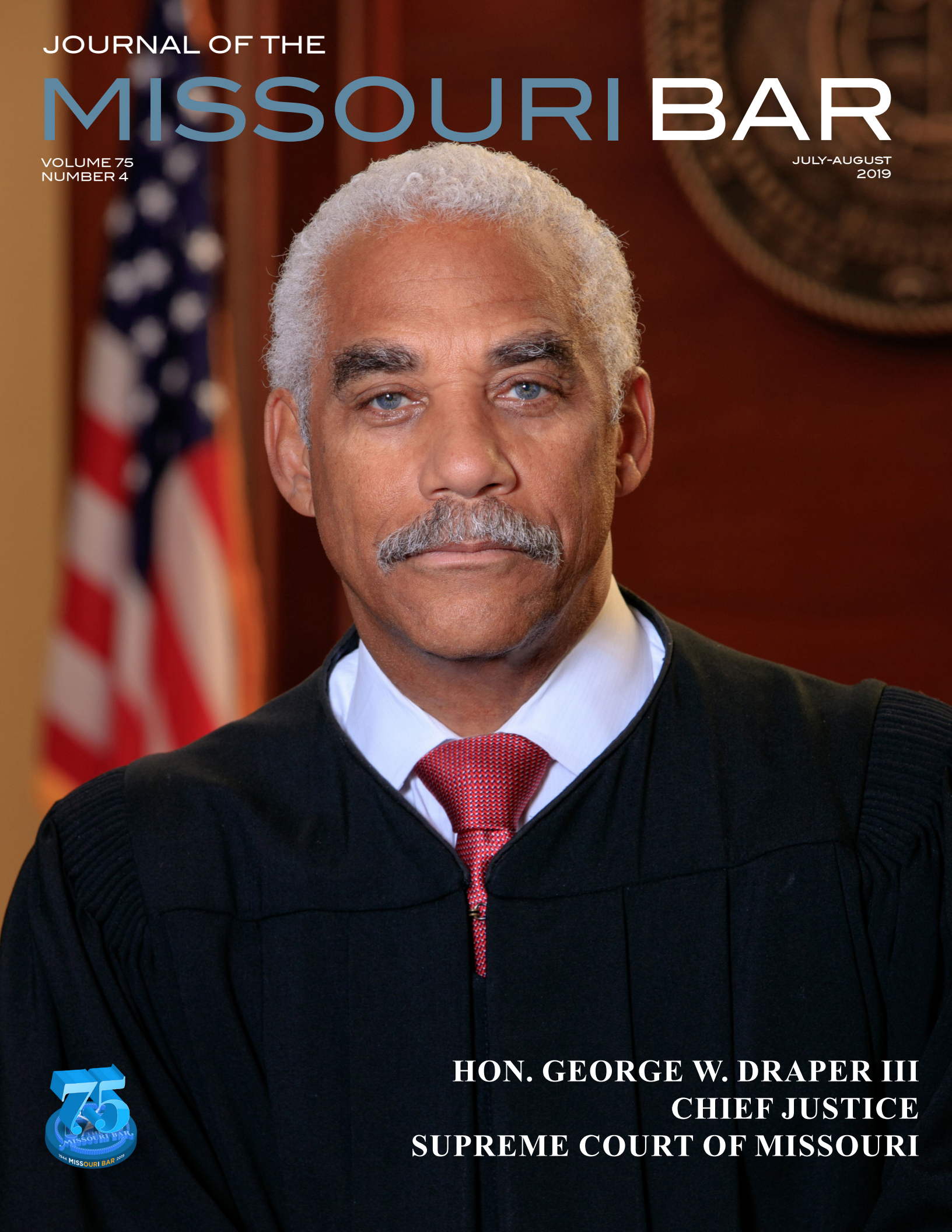

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PROTECTING RETIREMENT ASSETS FROM CREDITORS

by **Keith A. Herman & Jeffrey A. Herman**

REPORTS

JOURNAL OF THE
MISSOURI BAR

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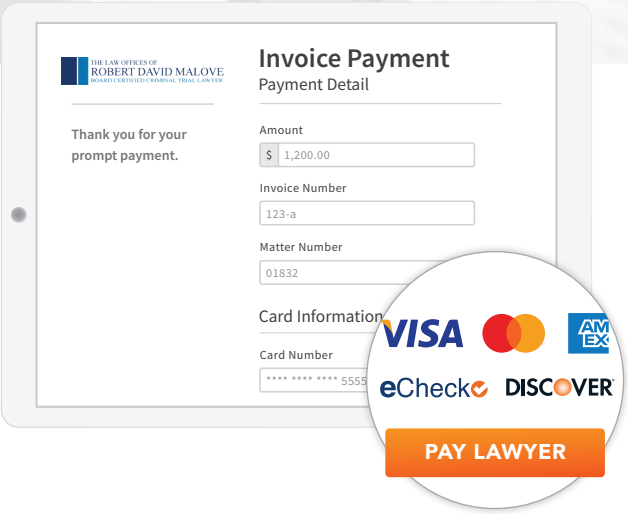

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PRESIDENT'S PAGE

DOING EVEN BETTER TOGETHER—FINAL THOUGHTS

RAYMOND E. WILLIAMS[1]

THE ESSENCE OF CIVILITY IS THAT I CAN HELP YOU, EVEN IF I DISAGREE WITH YOU.

BILL THOMPSON[2]

Due to publication schedules, I take up my last President's Page as Missouri Bar president near the time when we celebrate our country's independence.[3] Twenty-five of the 56 signers of our nation's Declaration of Independence were lawyers, and we have spent this past bar year celebrating that tradition of lawyer involvement and service by recognizing Missouri lawyers and their overwhelming commitment to serving their communities and clients.

While contemplating the content of this "farewell" message, I spent time reviewing the final *Journal* messages of many of my predecessors. By and large, it has become customary to offer farewell remarks, and to take stock of the past bar year, while sharing insights gained traveling around our state visiting with lawyers, judges, and Missouri citizens. More often than not, these presidents' words have highlighted the ongoing need for professionalism and civility among Missouri lawyers.

Raymond E. Williams

One of the highlights for officers of The Missouri Bar each June is to join judges of the Supreme Court of Missouri in a roundtable conversation with law students attending the Solo and Small Firm Conference. I find these conversations particularly refreshing, as we share our experiences with those embarking on their legal careers. During this year's conversation, Judge Paul Wilson offered advice worthy of sharing here when he explained "clients have opponents, but lawyers have colleagues."

Past Missouri Bar president Maurice Graham, a model of professionalism for us all, once shared with me that when the best lawyers go to trial, the courtroom is a remarkably quiet place to be. There is no need for loud voices, and there is no need for argumentative and speaking objections. Good lawyers respect one another as colleagues, present the evidence, and make compelling arguments – all without the need for posturing, shouting, or ill-advised behavior. I am fond of quoting our remarkably wise friend and past Missouri Bar president Dana Tippin Cutler, who said "we should be the ones showing that you can have an argument without being hateful. You can disagree without being disagreeable." "Whether we think each other right or wrong in our views on the issues of the day, we owe each other our respect."[4]

This is the essence of civility and professionalism. As lawyers, we are charged with serving as the guardians of the rule of law. In a world of ever-increasing politicizing, polarization, and tribalism, we can accomplish this mission only by continuing to work together with our professional colleagues to bring justice for our clients and real solutions for the people of Missouri.

Good fortune has allowed me to serve as The Missouri Bar president during the year of the 75th anniversary of our unified bar. I have witnessed the magnitude of what Missouri lawyers, working together, have accomplished in this time.[5]

As a personal example of what lawyers can do working together, one of my first opportunities after joining the Board of Governors in 2008 was to serve on the Committee to Assist Lawyers in a Changing Economy, a special committee formed shortly after the start of the economic recession in our state and country. Since the formation of that special committee, The Missouri Bar has enhanced its focus on providing meaningful member benefits and practice management tools to Missouri lawyers. I am very proud of the work that has been done to quickly deliver useful programs and services to Missouri Bar members during the past decade, and I hope that many Missouri lawyers will agree these tools have helped them even better serve their clients.

I believe that our Missouri Bar will continue to serve Missouri lawyers in an efficient and effective way in the future. By establishing a dynamic strategic planning process, with ongoing review of each and every program and activity, our bar is focused on assisting Missouri lawyers in their practices and improving the lives of our fellow Missourians.

As I near the end of my final column, I return to where we began in my first column. Thank you for the incredible commitment to, and your involvement in, your communities and the organizations that remain close to your hearts. Because of the opportunity to serve as your president, I have been able to befriend some of the most amazing lawyers and people across our state and country. I remain awestruck by their dedication to our profession, their talents in the practice of law, and their continuing belief in a better tomorrow. These lawyer-leaders inspire me, even on the days when the hours run thin and the tasks run long.

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EXECUTIVE SUMMARY

A LEGACY OF SERVICE: HELPING OUR NEIGHBORS NAVIGATE DISASTER RECOVERY

SEBRINA A. BARRETT[1]

AS I DROVE INTO THE OFFICE THIS MORNING, I COULD SEE THE BROWN AND MUDDY GROUND ALONG THE HIGHWAY WHERE FLOODWATERS ONCE STOOD. DURING TODAY'S LUNCH-TIME JOG, EVIDENCE OF THE TORNADO THAT HIT JEFFERSON CITY JUST WEEKS AGO EXISTED IN THE ROAR OF CHAINSAWS CUTTING THROUGH MANGLED TREES AND THE BRIGHT BLUE TARPS COVERING ROOF DAMAGE.

Sebrina A. Barrett

From the Bar Center's front door, one can see Simonsen Ninth Grade Center, its windows shattered and now covered by plywood. The Missouri Bar Center received only minor roof damage; we were so fortunate. Sadly, many of our friends and neighbors were not, and flooding continues in many areas across Missouri.

Our state is geographically positioned to get its share of natural disasters, including severe storms such as ice storms and tornados, as well as flooding. According to the Federal Emergency Management Agency (FEMA), Missouri has had 70 disasters since 1953, including the devastating Joplin tornado in 2011 and the floods of 1993. During both of these significant disasters, Missouri lawyers stepped up to help their fellow citizens, just as they have during the recent flooding and storms.

Each time the rivers rise, it's hard to avoid comparing the levels to that seen in the Great Flood of '93. For several months spanning the spring and summer of 1993, floodwaters affected nine states, covering 400,000 square miles and causing more than $15 billion in damage. Missouri Bar members assisted with the statewide sandbagging effort, where "[s]ore backs and good consciences were the only reward," wrote then-President John Black in September 1993. The Missouri Bar Young Lawyers' Section coordinated lawyer volunteers, who staffed Disaster Assistance Centers and helped people with insurance questions and legal documents that were lost in the flooding. Legal Services of Eastern Missouri prepared a training booklet for volunteer lawyers, and The Missouri Bar partnered with local bar associations across the state to help those impacted and working to rebuild.

As the floodwaters receded, consumer fraud became a concern. President Black wrote that "human vultures flock to the sites of disasters and prey on the downtrodden. Through an aggressive public education effort, lawyers helped alert flood victims to the risks posed by dishonest and exploitive people." In this next phase of assistance, The Missouri Bar partnered with local bar associations to hold "Call-A-Lawyer" programs across the state, and President Black and then-Attorney General Jeremiah "Jay" Nixon appeared on a statewide call-in radio program to provide consumer rights advice. Helping Missouri's citizens during this time was a huge team effort among legal services offices, the bar's YLS, and local bar associations – an effort that would be repeated in the wake of the devastating 2011 tornado in Joplin.

The EF-5 tornado on the afternoon of May 22, 2011 – the seventh-deadliest tornado in our nation's history – left more than 150 dead and 1,100 injured. With more than $2.8 billion in damage, many lost their homes, and six of our members lost their law offices. It's hard to describe the devastation and power – we found photographs and documents on my parents' farm, some 45 miles away as the crow flies. The Missouri Bar, aided by its YLS, provided free legal advice at multi-agency resource centers and through a legal hotline, as well as resources to help Missouri lawyers assist victims. As then-President John Johnston wrote at the time, despite their own losses, the Jasper County Bar "pushed aside its own sorrows, and is already giving free advice to other folks in distress."

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THE FLAG

W. Dudley McCarter[1]

ENTRY OF APPEARANCE IS NOT A RESPONSIVE PLEADING

"The Palmers (appellants Jimele and Joyce Palmer) appeal the trial court's denial of their motion to set aside the default judgment entered against them and in favor of the Irvins"[2] (trustees of the Leonard E. Irvin Trust).

"The underlying dispute here concerns the ownership of a parcel of real property located in Pike County, Missouri. On August 7, 2017, the Irvins sued the Palmers seeking to void a quitclaim deed that purported to convey ownership of the parcel from the Trust to the Palmers."[3]

The Palmers were served with the summons and petition on August 28, 2017. On September 14, 2017, the Palmers' attorneys filed with the court an entry of appearance and requested, on the Palmers' behalf, thirty additional days to respond to the petition. The court granted the request and ordered the Palmers to file their responsive pleading on or before October 13, 2017. No responsive pleading was filed by that date. On October 23, 2017, the Irvins moved for judgment by default. Neither the Irvins nor their counsel notified the Palmers formally through service of the motion for default judgment or by informally communicating their intentions to the Palmers or their attorneys…. The trial court heard and granted the Irvins' motion and entered a default judgment against the Palmers which voided the quitclaim deed.

W. Dudley McCarter

The same day the default judgment was entered, the Palmers learned of its entry and filed their motion to set it aside pursuant to Rule 74.05(d) claiming they had good cause for failing to timely file a responsive pleading and that they had meritorious defenses to the underlying lawsuit.[4]

"[T]he trial court denied the Palmers' motion to set aside the default judgment. The trial court found that the Palmers 'failed to show the existence of a meritorious defense' because the motion had no affidavit attached, it was not verified or signed by the Palmers, and because the Palmers failed to adduce any testimony whatsoever at the hearing."[5] The trial court's judgment was affirmed in *Irvin v. Palmer*.[6]

Missouri courts have been resolute on this issue – once properly served, a party who defaults is charged with notice of all subsequent proceedings in the case. *Bredeman v. Eno*, 863 S.W.2d 24, 26 (Mo. App. W.D. 1993). Thus, a party in default has no right to notice of the default proceedings. *Id.; Doe v. Hamilton*, 202 S.W.3d 621, 624 (Mo. App. E.D. 2006).

The Palmers seek to evade this jurisprudence by arguing that the entry of appearance filed by their counsel entitled them to notice of all future proceedings, including Rule 74.05 default proceedings, even though they were in default.[7]

The Palmers assert that because their counsel filed an entry of appearance they cannot be "in default for failure to appear" and were therefore entitled to notice of the proceedings.

The Palmers have misconstrued Rule 43.01 because in Missouri it is well settled that it is the failure to file a responsive pleading that causes a party to be in "default for failure to appear." *See State ex rel. Moore v. Ligons*, 532 S.W.3d 719, 721 (Mo. App. S.D. 2017).[8]

The Palmers contend that as a part of a lawyer's ethical duty of candor to other lawyers, Irvins' counsel owed the Palmers' counsel a duty to alert him that his clients were in default…. The Palmers further contend that Irvins' counsel acted unprofessionally in this regard. We disagree.

The Irvins' counsel owed his clients undivided loyalty and the duty to advance their interests. *See Donahue v. Shughart, Thomas & Kilroy, P.C.*, 900 S.W.2d 624, 628 (Mo. banc 1995).

We acknowledge the importance of civility, professionalism, and candor among members of the Bar. But ours is an adversarial system. And the boundary of those virtues lies at the point where the client's interests begin to suffer. Simply put, the client's interests may not be sacrificed at the altar of some unwritten rule of "professional courtesy" among the men and women of the Bar. To impose the duty the Palmers suggest would portend an endless number of ethical dilemmas for attorneys when they become aware of a critical mistake made by their opposing counsel – e.g., the running of the statute of limitations, the failure to file mandatory pleading such as the response to a motion for summary judgment or to a request for admissions.

Just as we would not fault a lawyer for failing to inform an opposing colleague that the statute of limitations was set to expire on the colleague's client's claim, we cannot fault the Irvins' counsel for failing to inform the Palmers he was taking up default proceedings because no such duty exists under law.[9]

A motion to set aside a default judgment is governed by the sound discretion of the trial court. *Klaus v. Shelby,* 42 S.W.3d 829, 831 (Mo. App. E.D. 2001). We will interfere with that discretion only if the record convincingly demonstrates an abuse. *Id.* While we afford the trial court broad discretion in granting a motion to set aside a default judgment and only narrow discretion in denying a motion to set aside a default judgment, a party moving to set aside a default judgment has the burden of proof to convince the trial court that they are entitled to relief. *Hinton v. Proctor & Schwartz, Inc.,* 99 S.W.3d 454, 458 (Mo. App. E.D. 2003).[10]

"[A] motion to set aside a default judgment does not prove itself and "*must* be verified or supported by affidavits or sworn testimony produced at the hearing on the motion." *Court of 5 Gardens Condo. Ass'n v. 10330 Old Drive, LLC,* 326 S.W.3d 834, 837 (Mo. App. E.D. 2010) (emphasis added).[11]

"The Palmers' conclusory and uncorroborated allegations are insufficient to satisfy the good cause element of their motion to set aside the default judgment."[12] "[T]he Palmers assert that their counsel's *argument* at the hearing on their motion – that he thought his partner was responsible for filing the answer – satisfied their burden of proof. It did not. Argument of counsel regarding the good cause element is not competent evidence on which the court can base its decision to set aside a default judgment. *See Agnello v. Walker,* 306 S.W.3d 666, 673 (Mo. App. W.D. 2010)…."[13]

"The Palmers' failure to establish the meritorious defense element by verified motion, affidavit, or sworn testimony is likewise fatal to their position. *Court Of 5 Gardens Condo. Ass'n,* 326 S.W.3d at 837."[14]

A MEDICAL EXPERT NEED NOT BE A MEDICAL DOCTOR

Mississippi Lime Company ("Employer") appeals the decision of the Labor and Industrial Relations Commission (the "Commission") awarding David Hogenmiller workers' compensation benefits based on a finding that Hogenmiller sustained a five-percent partial disability of the body as a whole as a direct result of work-related tinnitus. Employer contends that the Commission erred by finding that Hogenmiller's expert, Dr. David Mason, an audiologist with a Ph.D. in hearing science, was qualified to testify regarding the nature, extent, and cause of Hogenmiller's tinnitus.[15]

The decision was affirmed in *Hogenmiller v. Mississippi Lime Co*.[16]

Employer owns and operates a manufacturing plant where Hogenmiller worked for 41 years. Hogenmiller testified that he worked around loud machinery for over 20 years at the plant and for many years he was required to wear hearing protection due to workplace noise. Hogenmiller, who had military experience, testified that he would not have been able to hear an M14 rifle discharge over the sound of the machinery he worked around. Also, he testified that the motorcycles he owned and rode were quieter than the noise at the plant.

In his workers' compensation claim, Hogenmiller asserted that he suffers from tinnitus as a result of his work for Employer. The Administrative Law Judge ("ALJ") received testimony from Hogenmiller's expert Dr. Mason…. Dr. Mason testified that Hogenmiller suffered a five-percent permanent partial disability of the body as a whole as a direct result of his work-related tinnitus.[17]

Employer objected as to the admissibility of Dr. Mason's testimony, claiming Dr. Mason was unqualified to offer expert testimony on the nature, extent, and cause of Hogenmiller's tinnitus.

The ALJ overruled Employer's objections and found Dr. Mason's testimony to be admissible and credible and awarded Hogenmiller benefits representing five-percent of the body as a whole.[18]

A medical expert need not be a medical doctor, or physician. *Landers v. Chrysler Corp.,* 963 S.W.2d 275, 282 (Mo. App. E.D. 1997), overruled on other grounds by *Hampton,* 121 S.W.3d at 226. "[T]he question is whether [the] witness possesses a 'peculiar knowledge, wisdom or skill regarding the subject of inquiry, acquired by study, investigation, observation, practice or experience.'" *Emerson Elec. Co. v. Crawford & Co.,* 963 S.W.2d 268, 271 (Mo. App. E.D. 1997) (quoting *Seabaugh v. Milde Farms,* 816 S.W.2d 202, 208 (Mo. banc 1991)). "[I]t must be shown that due to the witness's education or specialized experience, he 'possesses superior knowledge' on a subject that persons without such education or experience would be incapable of forming an accurate opinion or drawing correct conclusions." *Penzel Constr. Co., Inc. v. Jackson R-2 School,* 544 S.W.3d 214, 229 (Mo. App. E.D. 2017).[19]

Dr. Mason's opinion as to the nature and extent of Hogenmiller's tinnitus was based upon (1) Hogenmiller's responses to a questionnaire concerning his history with tinnitus including the sounds he heard; (2) a sound-matching procedure in which Dr. Mason attempted to measure the decibel level of Hogenmiller's tinnitus by having him listen to other sounds of varying decibels and report the similarities and differences; and (3) Dr. Mason's review of Hogenmiller's hearing tests carried out by Employer.[20]

"Employer argues that Dr. Mason's training and practices as an audiologist do not qualify him to render opinions on the cause of tinnitus or the extent of disability caused by tinnitus."[21]

We reject Employer's argument that Dr. Mason was unqualified to testify about tinnitus because he has focused his practice on the field of audiology and not on tinnitus. Given Mason's background and experience in audiology, alongside his multitude of other credentials, and considering that he has developed informed

techniques to measure a claimant's tinnitus, we find that the Commission did not err in finding that Dr. Mason was qualified to testify as an expert on tinnitus.[22]

MOTION TO INTERVENE IS NOT AN AUTHORIZED AFTER-TRIAL MOTION

AJKJ, Inc., seeks a permanent writ of prohibition preventing the circuit court from continuing to exercise jurisdiction in the underlying case. The circuit court entered judgment in the matter but then vacated its judgment after sustaining a motion to intervene and motion to set aside filed by non-parties to the underlying action. Because the circuit court lost jurisdiction in the underlying action 30 days after entering final judgment, the court lacked jurisdiction to rule on the motions.[23]

State ex rel. AJKJ, Inc. v. Hellman.[24]

AJKJ, INC., and New Sites, LLC, co-developed the Birch Creek subdivision in Franklin County. Sometime after the project began, AJKJ transferred its interest in Birch Creek to New Sites. New Sites subsequently transferred its interest to Legends Bank, which then conveyed its interest to Bequette Construction, Inc. The deed AJKJ conveyed to New Sites failed to specify the transfer included developer rights.

On June 1, 2018, AJKJ filed a single-count petition against New Sites, Legends Bank, and Bequette Construction seeking to reform the deed conveyed to New Sites. AJKJ sought to reform the deed to specify it did, in fact, transfer developer rights to New Sites.[25]

The circuit court entered judgment on July 19, 2018, finding AJKJ and New Sites omitted the phrase "including developer rights" from the deed by mutual mistake and reforming the deed to specify it transferred developer rights.

On August 14, 2018, Ronald D. Ruff, along with numerous other residents of the Birch Creek subdivision ("Residents"), filed a motion to intervene and a motion to set aside the reformation judgment. The circuit court sustained the motion to intervene and the motion to set aside on September 13, 2018, vacating the reformation judgment.[26]

"The sole question in this matter is whether the circuit court possessed jurisdiction to sustain the motion to intervene and motion to set aside judgment on September 13, 2018."[27]

"Only parties may file authorized after-trial motions. *Spicer v. Donald N. Spicer Revocable Living Trust,* 336 S.W.3d 466, 470 (Mo banc 2011) (holding '[t]he provisions of Rule 81.05 are … expressly limited to parties')."[28]

"In other words, circuit courts may retain jurisdiction for 90 days after first entering judgment only if a party files an authorized after-trial motion within 30 days after the court enters judgment. *State ex rel. Hawley v. Pilot Travel Ctrs., Inc.,* 558 S.W.3d 22, 27 (Mo. banc 2018)."[29]

Motions filed by non-parties are not authorized after-trial motions that extend the circuit court's jurisdiction pursuant to Rule 81.05(a). *Spicer,* 336 S.W.3d at 470. A motion to intervene, therefore is not an authorized after-trial motion. *See id.; also see Taylor v. United Parcel Serv., Inc.,* 854 S.W.2d 390, 392 n.1 (Mo. banc 1993) (recognizing, in general, six authorized after-trial motions: (1) "a motion to dismiss without prejudice after the introduction of evidence is commenced under Rule 67.01;" (2) "a motion for a direct verdict under Rule 72.01 (a);" (3) "a motion for judgment notwithstanding the verdict under Rule 72.01(b)," (4) "a motion to amend the judgment, Rule 73.01(a)(3);" (5) "a motion for relief from judgment or order under Rule 74.06(a) and (b), but see, Rule 74.06(c);" and (6) "a motion for new trial under Rule 78")…. Because a motion to intervene is not an authorized after-trial motion,

Residents' motion to intervene did not extend the circuit court's jurisdiction to rule on the motion beyond 30 days after the court entered judgment.[30]

Although Residents filed their motion to intervene during the 30-day motion window in which the circuit court retained jurisdiction, the court did not rule on the motion to intervene until after the 30 days window expired. The circuit court, therefore, lacked jurisdiction to rule on the Resident's motion to intervene after the underlying reformation judgment became final. As a result, the court's ruling on Residents' motion to intervene was void.[31]

PROPERTY OWNER NOT ENTITLED TO DAMAGES FOR BOTH REPAIR COSTS AND DIMINUTION IN VALUE

Plaintiffs David and Leisa Jungers, individually and as trustees of the David A. Jungers Trust (collectively referred to as the Jungers), filed suit against Defendant Webster Electric Cooperative, Inc. (Webster) for damages allegedly caused by the negligent installation of a transformer in the Jungers' home. Webster paid to repair the damage. At the time the alleged damage occurred, the Jungers were in the process of selling their home under contract for deed, and the buyers later backed out of the sale. The Jungers sought damages from Webster resulting from the lost sale. The court decided that the Jungers were barred from recovering the additional damages they sought, either in the form of diminution of fair market value or for the loss of the benefit of bargain from the contract for deed.[32]

Judgment was affirmed in *Jungers v. Webster Electric Coop*.[33]

The material facts are not in dispute. Prior to or during the Jungers' residence at issue in the case, Webster installed a pad-mounted electrical transformer on the property. Webster ran an 800-amp electrical service from the transformer through underground conduits to the electrical panel in the basement of the house.

In February 2009, the Jungers agreed to sell the property for $4.45 million under contract for deed to the Edwards (hereinafter referred to as the Edwards' contract).[34]

"By early May 2009, water accumulated in the transformer and drained through the conduits into the electrical panel. Webster paid $4,780.84 to repair the damages to the property caused by the water intrusion. In mid-June 2009, Webster lengthened the conduits within the transformer and filled them with silicone caulking to prevent water from entering."[35]

"The Edwards filed suit against the Jungers to rescind the Edwards' contract. The suit was later settled, with the Edwards returning the property to the Jungers, and the Jungers refunding $1 million of the Edwards' initial payments to them. The Jungers retained $200,000 of that payment."[36]

[T]he Jungers filed a single-count petition alleging that Webster negligently installed the transformer, which permitted water to invade the property. The petition further alleged that Webster's negligence caused: (1) the value of the property to diminish by more then $1 million; and (2) the Jungers to lose the benefit of the bargain they had made under the Edwards' contract and incur other incidental damages.[37]

"'The goal of awarding damages is to compensate a party for a legally recognized loss.' *Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.* 155 S.W.3d 50, 54 (Mo. banc 2005)…."[38] "'The general rule is that the measure of damages for tortious injury to real property is the difference in the fair market value of the property before and after the injury or the cost of restoring the property, whichever is the lesser amount.' *Farmer's Mut. Fire Ins. Co. v. Farmer,* 795 S.W.2d 104, 108 (Mo. App. 1990)."[39]

"The Jungers argue the general rule established above 'is subject to exception' when cost of repair is 'insufficient to make plaintiffs whole.' To support that argument, they rely exclusively on *Casada v. Hambly Excavating Co.,* 575 S.W.2d 851 (Mo. App. 1978)."[40]

"Since *Casada* was decided, it has been repeatedly cited as supporting the general rule 'that the measure of damages for tortious injury to real property is the difference in fair market value of the property before and after the injury or the cost of restoring the property, whichever is the lesser amount.' *Id.* at 858…."[41]

The purpose in awarding damages is to "make the injured party whole by monetary compensation." *Turner v. Shalberg,* 70 S.W.3d 653, 658 (Mo. App. 2002). A plaintiff may not, however, be made whole more than once. *Cason v. King,* 327 S.W.3d 543, 548 (Mo. App. 2010). "While a single transaction may invade more than one right and an injured party may sue on more then one theory of recovery, a plaintiff may not receive more than one full recovery for the same harm." *BMK Corp v. Clayton Corp.,* 226 S.W.3d 179, 197 (Mo. App. 2007). Thus, a plaintiff must establish a separate injury on each theory, and may recover damages proved in two or more causes of action. *Id.*… However, "[I]f the damages associated in two causes if action are the same, the damage awards should be merged." *Id.*….[42]

Further, "benefit of the bargain" damages are typically the measure of damages in a breach of contract case. *Kincaid Enterprises, Inc. v. Porter,* 812 S.W.2d 892, 900 (Mo. App. 1991); see *Turner,* 70 S.W.3d at 658 (damages for benefit of the bargain are "the value of the performance of the contract"). Such damages are also inappropriate here because this is not a contract case….[43]

The Jungers cite no other cases in which a Missouri appellate court has ever upheld an award of money damages for a lost sale – the same measure as the diminution of value – and for the cost to repair the same damage to real property. Accordingly, the trial

court did not misapply the law in concluding that Webster's payment of the cost to repair the damage caused by Webster's alleged negligence precluded the Jungers from recovering additional damages for the loss of the benefit of Edwards' contract.[44]

LANDOWNER LIABLE FOR INJURIES TO LICENSEE ONLY FOR KNOWN DANGERS

"Sherri L. Scholdberg ('Ms. Scholdberg') appeals the trial court's grant of summary judgment in favor of Kurt Scholdberg ('Mr. Scholdberg') in Ms. Scholdberg's premises liability lawsuit."[45]

> Mr. Scholdberg owns a home located in Gladstone, Missouri. Ms. Scholdberg began living in Mr. Scholdberg's home in August 2014 because she had no car and needed to be able to walk to work. Ms. Scholdberg did not pay rent to Mr. Scholdberg.
>
> On April 22, 2015, Ms. Scholdberg leaned against a railing on the front porch of Mr. Scholdberg's home (the "top railing"). The top railing broke away, causing Ms. Scholdberg to fall.
>
> Ms. Scholdberg filed suit against Mr. Scholdberg alleging negligence on a premises liability theory. Mr. Scholdberg moved for summary judgment. Mr. Scholdberg alleged that Ms. Scholdberg was a licensee and could not establish that Mr. Scholdberg had actual knowledge that the top railing was in a dangerous condition, an essential element of Ms. Scholdberg's claim.[46]

The trial court granted Mr. Scholdberg's motion for summary judgment ("judgment"), finding "that Ms. Scholdberg admitted she was a licensee on Mr. Scholdberg's property, and that as such, Mr. Scholdberg owed Ms. Scholdberg 'the duty to make safe only those dangers of which he had knowledge.'"[47] Thej-Judgment was affirmed in *Scholdberg v. Scholdberg*.[48]

"All persons who enter a premises with permission are licensees until the processor has an interest in the visit such that the visitor 'has reason to believe that the premises have been made safe to receive him.'" *Carter v. Kinney,* 896 S.W.2d 926, 928 (Mo. banc 1995) (quoting 65 C.J.S. *Negligence* section 63(41), 719). "That makes the visitor an invitee." *Id.* "[W]hen the facts surrounding the status of visitor are not in dispute, the determination of whether the visitor is an invitee or a licensee is a question of law." *Anderson v. Accurso,* 899 S.W.2d 938, 941 (Mo. App W.D. 1995) (citing *Carter,* 896 S.W.2d at 927-28).

The distinction between licensees and invitees is of critical import in Missouri, as the distinction controls the duty of care owed by the possessor of land. "[T]he possessor owes a licensee the duty to make safe dangers of which the possessor is aware…" *Carter,* 896 S.W.2d at 928 (citing *Wells v. Goforth,* 443 S.W.2d 155, 158 (Mo. banc 1969), *overruled on other grounds by Rowe v. Farmers Ins. Co.,* 699 S.W.2d 423 (Mo. banc 1985)). In contrast, the duties owed by a possessor to an invitee are broader. "[T]he possessor owes invitees the duty to exercise reasonable care to protect them against both known dangers and those that would be revealed by inspection." *Id.* (citing *Harris,* 857 S.W.2d at 225-26).[49]

Missouri's adherence to the first Restatement's discussion of the duty of care owed by a possessor of land to a licensee has been reiterated on multiple occasions since *Wells.* In *Carter,* our Supreme Court expressly declined the invitation to abolish the distinction between licensees and invitees. 896 S.W.2d at 929-30. *Carter* acknowledged that "the current system recognizes a lower standard of care for licensees than invitees," and rejected the argument that the distinction is arbitrary. *Id.* at 929.[50]

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PROTECTING RETIREMENT ASSETS FROM CREDITORS

KEITH A. HERMAN & JEFFREY A. HERMAN[1]

WHEN INFAMOUS CRIMINAL WILLIE SUTTON WAS ASKED WHY HE ROBBED BANKS, HE ALLEGEDLY REPLIED: "BECAUSE THAT'S WHERE THE MONEY IS."[2] THESE DAYS, WILLIE MIGHT HAVE JUST ROBBED YOUR RETIREMENT ACCOUNT INSTEAD OF YOUR BANK ACCOUNT. IN 2018, U.S. RETIREMENT ACCOUNTS HELD ALMOST $30 TRILLION, ROUGHLY ONE-THIRD OF ALL HOUSEHOLD FINANCIAL ASSETS.[3]

Like Willie, modern creditors will not hesitate to go where the money is, including your retirement account, unless your account is protected.

Some of the law in this area is settled, some of it is evolving, and all of it is complicated. For example, the Supreme Court decided in 2014 that inherited IRAs are not "retirement funds" protected by the federal Bankruptcy Code (the Bankruptcy Code is herein referred to as "BR"), and the repercussions are still being felt.[4] Bankruptcy courts have now extended the Supreme Court's reasoning to find that retirement accounts received through divorce proceedings are not "retirement funds," and state courts are wrestling with whether their exemption statutes similarly expose inherited IRAs to creditors. With these new developments, attorneys should be counseling clients on ways to protect retirement assets from their own creditors, as well as their beneficiaries' creditors.

In the following sections, we discuss (1) creditor protection under federal law, (2) creditor protection under Missouri law, (3) exceptions that allow creditors to reach retirement assets, (4) how the rules change in bankruptcy, and (5) our conclusions.

ERISA and Other Federal Laws

If the Employee Retirement Income Security Act of 1974 (ERISA) protects retirement assets from creditors, then there is no need to analyze state law. ERISA is a federal law governing employee benefits, including retirement plans, and contains an "anti-alienation" clause in § 206(d) stating that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." In 1992, the U.S. Supreme Court held in *Patterson v. Shumate* that the anti-alienation clause protects a participant's retirement account from being subject to his or her creditors, both inside and outside of bankruptcy.[5]

Many types of plans and accounts are not protected by ERISA, however. First, certain retirement plans are not subject to ERISA at all. These include governmental plans,[6] church plans,[7] traditional and Roth IRAs, plans that cover only the sole owner of a trade or business (or only the owner and his or her spouse),[8] plans that cover only partners in a partnership (or the partners and their spouses),[9] and certain voluntary IRAs and Code § 403(b) plans where the employer lets a third party provide the program to employees.[10]

Second, other plans, while generally subject to ERISA, are

exempt from Part 2 thereof, which contains the anti-alienation clause. These plans and accounts include SEPs, SIMPLE IRAs, and unfunded "top hat" plans providing nonqualified deferred compensation (NQDC) to "a select group of management or highly compensated employees."[11] The anti-alienation clause does not apply to these plans. Oddly, it is also unclear if state creditor protection laws apply to these plans, or if such laws are preempted by ERISA.[12] Given the uncertainty, a debtor with a SEP or a SIMPLE IRA could better protect the assets therein (1) by rolling them into a separate employer-sponsored plan protected by ERISA, (2) by rolling them into a traditional IRA that is subject to state law protections, or (3) as a last resort, by filing for bankruptcy, where the Bankruptcy Code would protect the assets.[13]

In addition to ERISA, specific federal laws protect many types of benefits.[14] If one of these laws is applicable to your benefits, then relying on state law may be unnecessary.

Missouri Creditor Protection Laws

Choice of Law

It is important to understand when the Missouri laws discussed later in this article will apply. With respect to non-bankruptcy actions in a Missouri court, the Missouri exemption laws will apply to Missouri residents.[15] For non-resident debtors, Missouri courts will apply the exemption laws of the debtor's state of residence, provided the general policies of the two states are the same.[16] A court will not refuse to apply the exemption laws of the debtor's residence simply because the amount of the exemption is different in the states.[17]

If a Missouri debtor is sued in a non-Missouri court, then the state choice-of-law rule of the forum court will determine which state's exemption law applies. Under § 132 of the Second Restatement of Conflict of Laws, a court is to apply the law of its own state when determining "what property of a debtor within the state is exempt from execution," unless another state has the dominant interest in the question of exemption due to the debtor and creditor being domiciled in such other state.[18] In that event, the local law of the state where the debtor and creditor are domiciled will be applied.

However, if the retirement plan at issue is structured as a trust, then it may be argued that the law designated in the trust document applies. The Missouri Uniform Trust Code (MUTC) provides that the "meaning and effect" of the terms of a trust are determined by "the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue."[19] Whether the interest of a trust beneficiary can be reached by creditors is arguably a question of the legal "effect" of the terms of the trust, allowing a trust's choice-of-law clause to govern.[20]

Missouri Retirement Account Exemption Statutes

Here, we discuss (1) § 513.430.1(10)(f), RSMo ("§ 10(f)"), which provides complete creditor protection to a variety of plans and accounts, including inherited IRAs; (2) § 456.014, RSMo ("§ 456.014"), which provides complete protection to certain trusts, but does not provide much protection beyond § 10(f), and the MUTC; (3) § 513.430.1(10)(e), RSMo ("§ 10(e)"), which provides only limited protection to amounts necessary for support; and (4) certain governmental plan protections.

Section 10(f). This section protects qualified plans under Internal Revenue Code ("Code") § 401 (including but not limited to 401(k) plans, profit-sharing plans, and defined benefit plans), qualified annuity plans under Code § 403(a), certain retirement plans of tax-exempt organizations and public school systems under Code § 403(b),[21] employee stock ownership plans (ESOPs) under Code §§ 401 and 409, and all types of IRAs (traditional, Roth, inherited, SEPs, and SIMPLE IRAs) under Code §§ 408 and 408A.[22] There is no dollar limit on the amount of retirement assets subject to creditor protection.

Section 10(f) is a very broad, debtor-friendly statute. Missouri even added language in 2013 to specifically protect inherited IRAs from creditors ("including an *inherited* account or plan").[23] Missouri is one of just a handful of states that expressly protects inherited IRAs.[24] Section 10(f) also explicitly provides protection for ex-spouses who received a retirement plan upon divorce pursuant to a qualified domestic relations order (QDRO).[25] This is important, as two bankruptcy cases have held that retirement accounts received upon divorce are not "retirement funds" for purposes of BR §§ 522(b)(3)(C) and 522(d)(12).[26]

Trusts: Section 456.014 and the MUTC. Section 456.014 (originally enacted as § 456.072) protects a participant's interest – prior to payment or delivery of benefits – in certain retirement trusts containing a spendthrift provision.[27] If a retirement plan or account is not funded with a trust, then this section does not apply. There are also some grey areas with respect to this section's applicability. First, it may not apply to inherited retirement accounts, as it only protects a "participant's" interests prior to payment to the "participant." Second, it may not apply to NQDC plans funded through Rabbi Trusts, as the assets held in a Rabbi Trust are subject to the employer's creditors.[28] Third, the statute references "nonpublic pension plans," which may indicate an intent to exclude governmental retirement plans.[29] Finally, it may not protect certain owner-only or partner-only plans. A trust that benefits owners or partners may not be for the exclusive benefit of "*employees*."[30] If an owner-only or partner-only plan seeks to rely on the protections of § 456.014, the owners should be working owners who also receive compensation from the business in their capacity as common law employees. Case law on this section has not answered any of these open questions.

Similar to § 456.014, the MUTC protects trusts with "spendthrift" restraints on involuntary transfers.[31] For several reasons, the MUTC will not protect most retirement accounts from creditors. First, many retirement accounts are not held in trusts. Second, the MUTC is primarily intended to apply to trusts in an estate planning or other donative context and may not apply to retirement plan trusts, as § 456.014 specifically applies to retirement plans and trusts.[32] Third, even if the MUTC applies, such trusts may simply fail to meet the MUTC's requirements for creditor protection.[33] Finally, protection under the MUTC would not apply once the participant can withdraw assets from the trust without anyone's consent.[34]

Section 10(c). Section 10(e) only protects a person's interest in a retirement plan to the extent necessary for support of the person or his or her dependent.[35] Courts have looked at the following factors: (1) present and anticipated living expenses; (2) present and anticipated income; (3) age of the debtor and

his or her dependents; (4) health; (5) ability to work and earn a living; (6) job training and skills; (7) other assets; (8) asset liquidity; (9) ability to save for retirement; (10) special needs; and (11) other financial obligations.[36] For example, a 2018 decision held that § 10(e) protected the first $1,285.06 of monthly retirement payments as necessary for the debtors' support, but did not protect the last $1,000, focusing on the debtors' excessive monthly expenses, such as $1,060 for three vehicles.[37]

Similar to other creditor protection statutes discussed herein, § 10(e) only protects a right to future payments, not payments that have been received by the debtor.[38] Section 10(e) potentially covers more types of retirement plans than § 10(f). For example, while § 10(f) does not cover NQDC plans, § 10(e) does (at least in bankruptcy),[39] and though the beginning of § 10(e) appears intended to exclude governmental plans (as it only mentions "nonpublic retirement plan[s]"), the statute's specific reference to certain governmental "deferred compensation program[s]" at least covers governmental NQDC plans. To be protected by § 10(e), all payments must be "on account of illness, disability, death, age or length of service," which most retirement plans will satisfy.[40] Finally, unlike § 456.014, which only purports to protect payments to participants, § 10(e) appears to protect payments to any "person" on account of "death" when needed for the support of that "person" or his or her dependent. As a result, § 10(e) should apply to inherited retirement accounts.

Ultimately, very few retirement plans or accounts will require the limited protection of § 10(e), because most retirement plans will be completely exempt under ERISA, § 10(f), or § 456.014. Benefits under some NQDC plans, however, may have no protection other than the limited protection of § 10(e), although even that limited protection may be unavailable to top hat plans outside of bankruptcy as a result of ERISA preemption.[41]

Social Security and Missouri Governmental Plans. Benefits under many government retirement benefits are exempt from creditors under Missouri law, including:[42] (1) Social Security;[43] (2) the Missouri Local Government Employees Retirement System (MOLAGERS);[44] (3) the Missouri State Employees' Retirement System;[45] (4) municipal pension plans;[46] (5) police retirement systems;[47] (6) firefighters retirement systems;[48] (7) the Missouri Department of Transportation and Highway Patrol Employees' Retirement System;[49] and (8) the Public School Retirement System of Missouri.[50]

Exceptions to Creditor Protection

Despite the protections above, there are instances when certain creditors can reach the assets in a retirement plan or account.

Exceptions Under ERISA

Creditor protection under ERISA is not absolute. There are four specific exceptions to the anti-alienation clause set forth in § 206(d) of ERISA: (1) a voluntary and revocable assignment not to exceed 10 percent of any benefit payment, if permitted by a plan and if elected by a participant;[51] (2) payments pursuant to a QDRO, which allows benefits to be transferred as a result of a domestic relations proceeding related to the disposition of property in a divorce or related to spousal or child support; (3) offsets taken from the account of a participant who has been convicted of a crime involving the plan; or (4) offsets taken from the account of a participant who is also a plan fiduciary and is subject to a civil judgment or regulatory settlement regarding a breach of fiduciary duty.[52]

Exceptions Under Missouri Law

Each state creditor protection statute – §§ 10(e), 10(f), and 456.014 – contains one or more specific exceptions. For example, like ERISA, each statute allows retirement assets to be reached to enforce a QDRO or other claim for child support or spousal maintenance.[53] In addition, § 452.140, RSMo, contains a catch-all exception that says any property can be reached to enforce "a decree for alimony or for the support and maintenance of children."[54] Section 10(e) does not protect payments under certain NQDC plans established by "insiders." Section 10(f) explicitly does not protect certain fraudulent transfers in bankruptcy proceedings; however, none of the statutes discussed herein will protect a fraudulent transfer to a retirement account.[55] Finally, §§ 10(e) and 10(f) do not protect plans against claims for state and local taxes, or if a debtor is about to "leave" (*i.e.*, permanently depart) Missouri.[56]

Tax Liens and Restitution Orders

These two federal exceptions are important, as they supersede all of the creditor protection statutes discussed herein. First, if a taxpayer fails to pay any tax after demand by the IRS, the U.S. has a statutory lien on all of the taxpayer's property.[57] The Tax Code has its own list of property that is exempt from this lien, but no private retirement plans are included.[58] Tax liens supersede all other federal and state laws, including ERISA and the state law exemptions described above.[59] The tax lien attaches to a participant's vested interest in a retirement plan and future payments from the plan, even if the participant cannot withdraw the funds until a later date.[60]

Second, the Mandatory Victims Restitution Act (MVRA) requires that, for certain crimes, a defendant must pay restitution to the victim or the victim's estate.[61] An MVRA order of restitution imposes "a lien in favor of the United States on all property . . . as if the liability . . . were a liability for a tax assessed under the [Code]."[62] As no private retirement accounts are exempt from an IRS tax levy, they are also not exempt from a MVRA restitution claim.[63]

Bankruptcy

The rules discussed above generally apply to any attempt to execute on or attach retirement assets in order to satisfy a judgment against a participant. In contrast, if a debtor applies for bankruptcy protection (or is forced into bankruptcy by his or her creditors), there are two potential sources of protection under the Bankruptcy Code: BR §§ 541(c)(2) and 522.

BR Section 541(c)(2)

Section 541 describes what assets are generally included in a bankruptcy estate. It also identifies a number of assets that are categorically excluded from the bankruptcy estate. That includes BR § 541(c)(2), which excludes assets held in a trust containing a restriction on transfer that is "enforceable under applicable non-bankruptcy law." For our purposes, there are two such restrictions to consider: ERISA plans subject to the anti-alienation clause, which is enforceable under ERISA;[64] and non-ERISA plans subject to § 456.014, which is enforceable under Missouri

law. If either of these protections applies, a retirement plan or account will be excluded from the bankruptcy estate.

However, if a plan or account is fully subject to ERISA, but the assets are held outside of a trust, a participant's account may not qualify for creditor protection under BR § 541(c)(2).[65] Plans that are subject to ERISA but do not require a trust include Code § 403(b) annuity contracts and custodial accounts.[66] Some courts, however, are not so strict and still allow assets held in a 403(b) annuity contract to qualify as being held in a "trust" under BR § 541(c)(2).[67]

BR Section 522

If BR § 541(c)(2) does not apply, then a retirement account is included in the bankruptcy estate, but may still be exempt from creditors. BR § 522 includes several exemptions for retirement plans and accounts.[68] However, states have the option of ignoring most federal exemptions and supplying their own.[69] Missouri, like most states, is an opt-out state.[70] As a result, there are three sources of protection for Missouri debtors: (1) BR § 522(b)(3)(C), which applies even in opt-out states like Missouri; (2) § 10(f); and (3) § 10(e).[71]

Under BR § 522(b)(3)(C), "retirement funds" exempt from tax under Code §§ "401, 403, 408, 408A, 414, 457, or 501(a)" are exempt from the bankruptcy estate.[72] Qualified plans under Code § 401, qualified annuity plans under Code § 403(a), certain retirement plans of tax-exempt organizations and public school systems under Code § 403(b), governmental and tax-exempt NQDC plans under Code § 457, and all types of IRAs (traditional, Roth, SEPs, and SIMPLE IRAs) under Code §§ 408 and 408A are all protected. In addition, although not specifically referenced, it also protects ESOPs, a type of qualified plan under Code § 401.

BR § 522(b)(3)(C) has its limitations. In 2014, the U.S. Supreme Court held in *Clark v. Rameker* that assets in an inherited IRA are not protected, as such assets are no longer "retirement funds" after the original participant dies.[73] The Court pointed to the following reasons: (1) the beneficiary/owner cannot contribute his or her own funds to the retirement account; (2) the beneficiary/owner must withdraw funds prior to retirement age, at times completely unrelated to retirement; and (3) the beneficiary/owner may withdraw all of the retirement funds at any time and for any purpose without penalty.

Since *Clark v. Rameker*, at least two bankruptcy cases have now held that a retirement account received from a spouse in a divorce proceeding also does not constitute a "retirement fund."[74] It is unclear if the results would have changed had the spouses rolled over the retirement accounts into their own IRAs or employer-sponsored retirement plans. Some state courts have also applied the Supreme Court's reasoning when interpreting state bankruptcy statutes in a limited manner.[75]

Under BR § 522(n), the amount of a traditional or Roth IRA that can be protected is subject to a statutory maximum, currently set at $1,362,800; however, no maximum applies to amounts rolled over from a qualified plan, a qualified annuity plan, or a 403(b) plan.[76]

If BR § 522(b)(3)(C) is inapplicable, a Missouri debtor must look to state exemptions.[77] Section 10(f) is strikingly similar to BR § 522(b)(3)(C),[78] but there are six important differences, highlighted in the following table:

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ARBITRATION IS HERE TO STAY: KNOW HOW TO PREPARE AND PRESENT YOUR BEST CASE

STEPHEN DOUGLAS BONNEY[1]

BY FAILING TO PREPARE YOU ARE PREPARING TO FAIL.

— BENJAMIN FRANKLIN

The Status of Arbitration Today

"Arbitration is the voluntary submission of a dispute by the parties to a disinterested person for final determination,"[2] and it has a long pedigree in commercial, international, and traditional labor-management disputes. Arbitration advocates have proclaimed it as a pragmatic alternative to the formality, delays, financial burdens, and destructive effects of court litigation.[3] But early judicial decisions were often hostile to arbitration.[4] The business community pushed back against the courts, and – in 1920 – New York enacted the first modern arbitration statute.[5] New Jersey and Massachusetts quickly passed similar laws, and by the early 1930s, 12 states, including New Jersey and Massachusetts, had enacted "the Draft Act," a model arbitration statute prepared by the then-fledgling American Arbitration Association (AAA).[6]

In 1925, finding arbitration to be a more rational and workable system for dispute resolution than litigation and using the New York Arbitration Act as its model, Congress enacted the Federal Arbitration Act (FAA) "in response to widespread judicial hostility to arbitration agreements."[7] Among other things, the FAA affirms the validity and enforceability of private arbitration agreements, empowers courts to enforce such agreements and resulting arbitration awards, provides for arbitral subpoenas, and establishes extremely narrow grounds for vacating or modifying arbitration awards.[8]

In 1955, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Arbitration Act (UAA) using the FAA as a model. "A *primary* purpose of the 1955 UAA was to insure the enforceability of agreements to arbitrate and the finality of arbitration awards in the face of often hostile state law."[9] The UAA "in some form is the basis of arbitration law in 49 jurisdictions."[10] Missouri enacted the UAA in 1980.[11] In 2000, the NCCUSL approved the Revised Uniform Arbitration Act (RUAA),[12] but Missouri has not yet adopted it.

Over the years, the Missouri General Assembly has embraced arbitration as the preferred means of resolving a wide variety of disputes, enacting statutes that require or permit the arbitration of disputes involving tax issues,[13] public works contracts,[14] the receipt and expenditure of state funds by counties,[15] negligence

claims against the Missouri Department of Transportation,[16] highway construction contracts awarded by MoDOT,[17] the liability for and calculation of penalties under the prevailing wage statute,[18] and issues about "wages, hours of labor, and conditions of employment" arising between fire departments and their employees.[19]

Judicial responses to arbitration have changed over time. For many years, the U.S. Supreme Court interpreted the FAA narrowly.[20] But since 1967, with its decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,[21] the Supreme Court has consistently upheld commercial arbitration agreements and awards against nearly all challenges. During that time, moreover, the Court has vigorously enforced the FAA's "liberal federal policy favoring arbitration agreements."[22] In doing so, the Court has consistently extolled "the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[23]

More recently, the Supreme Court has expanded the arbitration universe by approving agreements to arbitrate disputes involving federal employment and consumer statutes.[24] In May 2018, in *Epic Systems Corporation v. Lewis*,[25] the Supreme Court continued the trend of support for arbitration, rejecting a robust challenge – rooted in the protections of the National Labor Relations Act – to employment arbitration agreements that include a class action waiver clause.

The commitment of Missouri's appellate courts to the liberal federal policy in favor of arbitration is disputed. Professor Michael A. Wolff, a former judge and chief justice of the Supreme Court of Missouri, has asserted that "Missouri law is not hostile to mandatory arbitration."[26] But Justin Arnold, the general counsel of the Missouri Chamber of Commerce and Industry, recently expressed a different view, observing that "Missouri courts have shown a continued hostility to enforcing [employment arbitration] agreements."[27] An academic study supports the perception of Missouri's business leaders.[28] Specifically, that study, based on a quantitative review of court decisions considering the enforceability of arbitration agreements, concluded that "Missouri['s] . . . appellate courts . . . appear to be very sympathetic to unconscionability arguments, but only if the challenged provision is part of an arbitration agreement."[29] In other words, statistics show that Missouri's appellate courts more closely scrutinize arbitration agreements than other types of contracts.

Recent case law developments suggest, however, that the era of judicial hostility to arbitration in Missouri may be on the wane. In two decisions from November 2017, the Supreme Court of Missouri upheld commercial arbitration agreements that delegated issues of contract formation to the arbitrators rather than to the courts.[30] In September 2018, furthermore, the Court heard arguments in three cases involving challenges to employment arbitration agreements.[31] In *Soars v. Easter Seals Midwest*, the Supreme Court of Missouri held that the parties' mutual promises to arbitrate contract formation issues constituted consideration so that the delegation clause was enforceable under generally applicable principles of Missouri contract law.[32] In the other two consolidated cases, the Court upheld the delegation clauses in the parties' arbitration agreements because the employees did "not raise challenges specific to the delegation provisions[.]"[33] Although the decision in the consolidated cases was unanimous, the procedural nature of the decision suggests that the Court has postponed the merits of the underlying dispute to a future case. Nonetheless, the overall trend suggests that a majority of the Court may look more favorably on arbitration.

Given these developments, a wise practitioner should get up to speed on arbitration practice and procedure because it is increasingly likely that your clients will at some point engage you to represent them in an arbitration.

Arbitration and Litigation Compared

Arbitration is different from litigation in a few substantive respects. First, rather than being assigned to a judge by lot, the parties select the decision-maker – the arbitrator. Second, because "arbitration is a matter of contract,"[34] the arbitration agreement – rather than a statute or a code of civil procedure – will dictate how your client initiates or responds to arbitration. Sometimes formal pleadings are required, but often the arbitration agreement or contract just requires a bare bones statement of the dispute in the form of a memo or letter. Third, rather than being bound by pre-determined rules of courtroom evidence and procedure, the parties select the rules by which the arbitration will proceed. Fourth, the parties generally agree that the arbitrator's decision will be final and binding so that judicial review of an arbitrator's award is very narrowly prescribed.[35]

Arbitration also differs from litigation in a few relatively trivial respects. For instance, arbitrations usually take place in mundane conference rooms rather than in stately courtrooms. Additionally, the arbitrator wears business attire instead of a black robe and is referred to as "madame [or mister] arbitrator" rather than "your honor" or "judge."

Initial Steps in Arbitration Advocacy

Great arbitration advocacy requires the same thing that great trial advocacy requires: diligent and thorough preparation. Thus, "if it isn't possible to go into arbitration well prepared, the best advice [. . .] is, *don't go*."[36] So, when your client calls and asks you to handle an arbitration, the first thing you should do is discuss the costs and investment of time and energy required to properly prepare and present the case. If your client balks at the commitment required, encourage your client to seek mediation.

If arbitration is the right way to proceed, you need to review the arbitration agreement. It will tell you what rules apply to the arbitration process generally, including the critical steps of initiating the arbitration (if your client is the claimant) and selecting the arbitrator.

Since Congress passed the FAA in 1925, various organizations have developed rules governing arbitration proceedings. In labor arbitration, for instance, the Federal Mediation and Conciliation Service (FMCS) and the AAA have developed arbitration rules to govern labor-management dispute resolution.[37] In other areas, such as commercial and construction arbitration, the AAA's rules predominate. In employment arbitration, AAA, JAMS, and the Financial Industry Regulatory Authority (FINRA) have adopted the most commonly used rules.

After familiarizing yourself with the rules applicable to your client's arbitration, the first order of business is to understand how many arbitrators will serve and how the parties will select the arbitrator. Sometimes, the arbitration agreement or the applicable rules will provide for a single arbitrator, and sometimes they will provide for a board of arbitrators (commonly made up

of three people, a so-called "tripartite board"). The agreement or the applicable rules will also specify how the parties will select an arbitrator or arbitrators to hear their dispute.

At this early stage, you should devote significant attention to the facts of your case. First, get the basic story from the key players – usually your client and other insiders. Then, gather and review the relevant documents, identify the people who have direct knowledge of relevant facts, and interview those witnesses. This fact-finding will allow you to start developing the themes of your case and will inform all your subsequent decisions, including your selection of an arbitrator.

Demanding Arbitration

If your client is the party initiating arbitration, you should discuss the advisability and timing of arbitration. You can also draft any document demanding arbitration. If you participate in such drafting, you should keep the demand concise. Advance your strongest claims and leave the rest behind. Concentrating on your best claims and legal theories will help you when you get before the arbitrator because you will be operating from a position of confidence and strength. Dropping claims after the arbitration begins or spending time making losing arguments may make the arbitrator wonder about the strength of your main contentions.

Regarding the timing of the arbitration demand, consider whether the dispute involves a party with which your client has ongoing business or another relationship. If so, you should consider advising your client to move quickly in demanding arbitration and in pushing for an aggressive schedule for a final resolution of the dispute. A delay makes it more likely that the process of dispute resolution will cause bad feelings and ill will, potentially damaging future relations between the parties, perhaps to a breaking point. This is essentially the theory behind labor arbitration, which the Supreme Court has recognized as a substitute for industrial strife and economic warfare.[38] Prompt resolution of disputes – even when the process provides rough and imperfect justice – ensures that disputes do not spiral out of control and cause long-lasting damage to the parties' relationship and mutual interests.

Selecting the Arbitrator

Selecting the arbitrator is a critical stage in the arbitration process, and it is – at least potentially – a great advantage over litigation because it gives the parties opportunity to select a subject-matter expert as their arbitrator. So, an advocate should take great care in selecting the arbitrator.

Parties are entitled to an honest, intelligent, and experienced arbitrator who will hear their evidence, will find the facts fairly, and will make the ultimate decision based on evidence in the record and in harmony with the applicable law. But no party is entitled to a biased arbitrator. In fact, § 10(a)[2] of the FAA allows courts to vacate an award "[w]here there was evident partiality or corruption in the arbitrators."[39] Interpreting that section, the Supreme Court has held that arbitrators "not only must be unbiased but also must avoid even the appearance of bias" and that the FAA does not "authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another."[40]

The key qualities that parties typically want in an arbitrator include experience, knowledge, fairness, patience, diligence, open-mindedness, attentiveness, and an even temperament. A good arbitrator will control the hearing fairly but firmly, and will allow experienced advocates to try their cases with minimal interruptions and without unnecessary intrusions.

There are various ways to select an arbitrator. Occasionally, the arbitration agreement will name a specific person to serve in the role. Sometimes, the parties will be able to agree upon a particular arbitrator and will appoint that person directly. More often, however, the applicable rules of arbitration provide that an agency – FMCS or AAA in the case of a labor arbitration, for instance – will send the parties a list of a pre-determined number of potential arbitrators.[41] After researching the listed arbitrators, each party will rank the arbitrators in order of acceptability. Then, the parties' representatives alternately strike one arbitrator and then another until only one arbitrator remains. The last arbitrator standing is the one who will decide the parties' dispute.

Advocates who handle a significant number of arbitrations often know the pool of arbitrators from which they are likely to draw a panel.

If arbitration is not a significant part of your practice, you must be diligent in researching the potential arbitrators on your list. In conducting your research, other advocates will probably be your best source of information, and you can ask them about the potential arbitrators. You can find such practitioners through bar committees and business and industry organizations, among other places. You can also search the internet for any obvious conflicts of interest and arbitration databases for previous decisions rendered by the potential arbitrators.

Pre-Hearing Preparation

The extent of pre-hearing activities depends on the nature of the dispute you are arbitrating. For instance, while labor arbitration typically does not permit discovery or motions practice, rules applicable to employment arbitrations do.[42] In cases that allow discovery and motions practice, a good arbitrator will encourage the parties to agree to strict limits and will include such limits in a written scheduling order.

If discovery or motions practice is permitted by the rules applicable to your case, keep in mind that arbitration is designed to be quicker, cheaper, and more streamlined than litigation. With that in mind, limit your discovery requests to essentials, and only file a motion if it will dispose of the case in its entirety and if you are certain it will be granted. Otherwise, it will not be cost effective.

Before the hearing, the advocates should also try to agree on a written submission agreement, setting out the specific issue or issues the parties are asking the arbitrator to resolve. If the parties have difficulty formulating the wording of the submission agreement, they can ask the arbitrator to help with the drafting. If the parties reach an impasse and cannot agree on the submission agreement, they can leave it to the arbitrator to define the issues.

Advocates should also try to agree on the exhibits that will be offered at the hearing. A best practice is for the parties to agree on the exhibits, to mark them sequentially before the hearing, and to give the arbitrator a set of the marked exhibits – in a binder or on an electronic storage device – at the beginning of the hearing.

As you prepare for the hearing, determine what you need to

show the arbitrator to establish your claim. Then, select your witnesses and exhibits with that in mind. Avoid unnecessary, irrelevant, and cumulative testimony and evidence. Present a straightforward and streamlined case. Arbitrators are people and respond to a compelling narrative; they also get bored and lose concentration when testimony drags on or rambles. So, keep your case moving.

Readying your witnesses is an essential part of preparing for the arbitration hearing. Such pre-hearing witness preparation helps speed things up by making testimony more succinct and relevant to the themes and theories of your case. When done properly, it encourages lay witnesses not to ramble, contradict themselves, or offer irrelevant details or opinions.

According to the *Restatement of the Law Governing Lawyers*, a lawyer may ethically coach witnesses if doing so does not induce false testimony. In preparing your witnesses, you should explain how their testimony fits into your theory of the case. You should also discuss the appearance and demeanor you expect of the witness while testifying and review the witness's recollection and probable testimony. During that review, you can ethically reveal to your witnesses other testimony or evidence that will be presented, and you can ask your witnesses to reconsider their recollections or recounting of events in light of that other testimony or evidence. Witness preparation absolutely must include rehearsal of testimony on both direct examination and cross-examination. When preparing a witness, a lawyer may suggest the choice of words that might be employed to make the witness's meaning clear.[43]

But, as anyone who has prepared a witness knows, the possibility of a story changing or being modified during or after coaching is not a theoretical exercise. It happens, and it can present ethical issues. There are very few reported cases exploring the ethical limits of witness coaching. This may be because coaching usually happens in private, with little chance that those involved will complain or spill the beans.

Although coaching your witnesses is essential to the efficient presentation of your case, you must obey Rule 3.4(b), which provides that "[a] lawyer shall not . . . counsel or assist a witness to testify falsely."[44] Unfortunately, the rule fails to define a bright line between the permissible coaching of witnesses and unethical conduct. The courts have generally failed to remedy this deficit, often providing little more than tautologies such as "[a]n attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it."[45] One thing is certain, however: A lawyer who advises a witness to deny under oath a fact that the witness has acknowledged as true to the lawyer privately crosses the line and will result in severe disciplinary sanctions, including disbarment.[46]

In sum, before the hearing, you should:

- Gather your facts, identify your witnesses, and collect the relevant exhibits.
- Based on that evidence and the applicable law, you should determine your theory of the case and the themes you want to highlight.
- Prepare your witnesses carefully so that they know the roles they will play in painting the picture you want to put before the arbitrator.
- Coach your witnesses to speak in plain English and to provide factual details that will bring your case to life.
- Organize your witnesses and exhibits in a way that will develop your themes and theories in an engaging manner.
- Plan to present your case efficiently so that you focus the arbitrator's attention and keep him or her engaged in your narrative.

The Hearing

At the outset, the parties must tell the arbitrator what they expect him or her to do and provide a submission agreement. The parties should also tell the arbitrator the kind of decision they expect the arbitrator to prepare. A standard award is similar to a jury verdict form in that it simply states who won and, if applicable, the amount awarded. For instance, the AAA Construction Arbitration Rules provide for a bare-bones award unless the

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PRACTICAL EFFECTS OF THE NEW IRS AUDIT AND COLLECTION PROCEDURES FOR PARTNERSHIPS

NORMAN S. NEWMARK[1]

ANY ONE MAY SO ARRANGE HIS AFFAIRS THAT HIS TAXES SHALL BE AS LOW AS POSSIBLE; HE IS NOT BOUND TO CHOOSE THAT PATTERN WHICH WILL BEST PAY THE TREASURY; THERE IS NOT EVEN A PATRIOTIC DUTY TO INCREASE ONE'S TAXES.

— JUDGE LEARNED HAND[2]

As a result of the new IRS audit and collection rules related to partnerships and entities taxed as partnerships, certain partners may be responsible for paying the taxes of other partners — even if lawful measures are taken to reduce taxes on the returns, as suggested by Judge Hand. Moreover, the rights of partners to contest partnership-related taxes in court are curtailed or eliminated. While the new rules are bound to spark litigation among partners in future years, there are steps that can be taken to ameliorate the impact of the new rules in operating or other agreements.

Introduction

For federal income tax purposes, businesses and their owners pay taxes based upon various recognized forms of business under the Internal Revenue Code. Generally, these forms consist of the sole proprietorship, partnership, S corporation, and C corporation.[3] Business owners and their advisors can select the form of entity most suitable to the particular business for both tax and non-tax purposes, often called "choice of entity" decisions. Under these rules, the owners of an unincorporated entity such as a limited liability company ("L.L.C.") can generally choose any form of business taxation for the L.L.C. depending upon the number of owners and other factors.[4] In this connection, many L.L.C.s elect to be taxed as partnerships for a variety of tax reasons, the primary being the "pass-thru" of business income, loss, credits, etc. to the partners (called "pass-thru items" in tax parlance).[5]

Traditionally, the procedures under which the IRS audits returns, assesses taxes, and collects taxes related to partnership entities have not been at the forefront of entity choice decisions for investors and their advisors. Before now, there have been

two basic principles underlying IRS audit and collection procedures for partnership entities (and their equity owners, called "partners" generically for purposes of this article), and other taxpayers. *First,* each partner is responsible for reporting his or her share of pass-thru items. If the IRS audits the partnership's returns and finds improper reporting of such items, each partner for the reported year is also responsible for the payment of any additional tax, penalty, and interest on his or her share of additional income or reduced loss, etc.[6] Conversely, a new partner is not responsible for the pass-thru items of prior years.[7] *Second,* each partner is generally entitled to contest the IRS' determinations in court for his or her own account.[8] In short, each partner is responsible for, and has some degree of control over, his or her own tax bill for partnership pass-thru items and need not worry about paying other partners' taxes or turning over litigation control to some other person.

For entities taxed as partnerships, however, these underlying principles have changed dramatically for tax years beginning after December 31, 2017, under new procedures commonly referred to as the "BBA procedures" in tax parlance.[9] The BBA procedures may well influence the choice of entity decisions going forward or encourage existing partnership entities to change tax status to S or C corporations inasmuch as the basic principles underlying IRS audit and collection procedures no longer hold true for entities taxed as partnerships. These changes can be summarized as follows:

(1) The partners for the audited year are generally not responsible for additional taxes, penalties, and interest as assessed by the IRS in a later year. Instead, either the partnership as an entity, or the partners as of the time the IRS' determinations become final, will be required to pay the IRS.[10]

(2) The right of each partner to contest the IRS' determinations in court is gone, and such right is vested solely in a newly designated person or entity known as and denominated the "partnership representative" to speak on behalf of the partners and the partnership.[11]

These changes make the partnership form of entity less desirable, inasmuch as current partners will not want to pay the tax bills of the prior year partners, either indirectly due to payment of taxes from the business, or directly in the form of a personal IRS assessment. Moreover, few partners will want to assign their rights to litigate with the IRS to the partnership representative, who may have conflicting interests or simply fail to properly contest an IRS determination. In short, the BBA procedures provide a strong disincentive to create or invest in an entity taxed as a partnership, both as to the risk of an unknown amount of tax liability for prior tax years in which the partner was not affiliated with the partnership, and the inability of each partner to personally mount a defense against the liability in a court of law, regardless of whether the partner was so affiliated.

Part I of this article will discuss prior law IRS audit and collection procedures for partnerships under traditional IRS tax audit and collection principles. Part II will delve into the new BBA procedures, and Part III will conclude with some suggestions for mitigating the effects of the BBA procedures by making certain tax elections or drafting BBA provisions in partnership documents. Part IV will provide some examples and conclusions.

Part I: Prior IRS Procedural Law

Pre-1982 Rules

Prior to the enactment of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA),[12] the IRS would essentially audit individual partners on their respective shares of partnership pass-thru items and collect additional tax revenue through normal individual audit and collection procedures.[13] This proved difficult for the IRS to administer and sometimes produced inconsistent results, especially where a given partnership had partners subject to different assessment limitation periods or case law in various jurisdictions, with different results for partners in the same partnership.[14]

1982 TEFRA Rules

In 1982, as part of TEFRA, Congress added TEFRA audit rules to provide unified rules for adjustments at the partnership level in most circumstances.[15] The goal was to treat all partners uniformly, in one proceeding.[16]

Essentially, these audit rules provide for an IRS determination of partnership level items and allocations thereof for the audited partnership tax year in a single proceeding applicable to all partners of the audited years.[17] TEFRA audit rules also require the designation of a "tax matters partner" (TMP)[18] to receive various IRS notices, work with the IRS in resolving any audit, file or intervene in a lawsuit for a readjustment of partnership items as stated on an IRS notice of final partnership administrative adjustment, and provide various notices to partners in given circumstances.[19] However, generally other partners can also participate in administrative and court proceedings, with or without the concurrence of the TMP.[20] The TMP can bind only certain partners in any settlement.[21]

At the conclusion of any TEFRA administrative proceeding or court case, the IRS must assess and collect any additional tax, penalty, and interest from each of the affected partners based upon his or her share of additional income or reduced loss, etc. for the tax year(s) involved.[22]

It's key to note that both the pre-TEFRA rules and the TEFRA system follow the traditional principles of IRS audit and collection procedures, in that each partner for the tax year(s) in question must pay taxes on his or her share of additional taxable income or reduced loss as finally determined, and in general each such partner may contest the IRS' determinations in court. It is also worth mentioning that the TEFRA rules will continue to apply for partnership tax years beginning at or prior to December 31, 2017. This is the effective date of the BBA procedures, and thus will be used by the IRS and partnerships until the applicable statutes of limitation expire for such years.[23]

Part II: New BBA Procedures

BBA History

After more than 30 years' experience with the TEFRA rules, the IRS determined that it lacked the ability to audit and collect taxes on income from a substantial portion of partnership entities, given the increased complexity, size, and number of partnerships.[24] As evidence, the Treasury Department noted the audit rate for large partnerships under TEFRA (i.e., those with 100 or more partners or $100 million or more in assets) had been substantially less than the comparable audit rate for large corporations under traditional deficiency procedures, due in

part to difficulties in determining which partners were ultimately responsible for paying the tax bill in tiered partnerships, i.e., partnerships owning other partnership interests.[25]

In response to a request from Congress, the Government Accountability Office (GAO) issued a report in 2014 indicating that the IRS audit rate for partnership entities was comparatively low and that the IRS' ability to audit and collect taxes on partnership income would not improve under existing TEFRA rules. GAO recommended new legislation to address the matter.[26]

As a result of the GAO report and other activities, Congress passed the Bipartisan Budget Act of 2015, as amended by the Protecting Americans from Tax Hikes Act of 2015. In 2018, the Tax Technical Corrections Act of 2018 became effective, amending the BBA procedures.[27] The new BBA procedures replace TEFRA audit rules for partnership tax years that begin after December 31, 2017, except as otherwise elected by a partnership.[28]

BBA Mechanics

Under the new regime, partnerships will still be pass-thru entities and still file returns reporting pass-thru items to their partners for proper tax reporting.[29] However, in the event the IRS pulls a given partnership return or other items for examination, the new BBA procedures will come into play unless otherwise elected by a partnership.[30]

Unlike the TEFRA rules, the BBA procedures provide for a "centralized partnership audit regime" generally applicable to partnerships or entities taxed as partnerships. This allows the IRS to audit and collect taxes from the *partnership entity*[31] for the audited years (called "reviewed years")[32] instead of the individual partners as under TEFRA. Mechanically, the BBA procedures will work for a given partnership entity under the general rules[33] as follows:

First, the partnership will appoint a representative on its IRS 1065 partnership return for each tax year after the effective date of the BBA; this appointment cannot be revoked or amended unless in accordance with applicable regulations.[34] The actions of the partnership representative will be binding upon the partnership and the partners until the effective date of the termination of the partnership representative.[35]

Second, assuming the IRS selects the partnership's return for examination, the IRS will send the partnership and the partnership representative a notice of administrative proceeding to initiate the proceedings for the reviewed year.[36]

Third, after examining returns and other partnership information, the IRS may determine to adjust "partnership-related items" with respect to the partnership. Such adjustments in general are called "partnership adjustments" for BBA purposes.[37] The term "partnership-related items" means any partnership item or amount which is relevant in determining the federal income tax liability of any person (regardless of whether it appears on the partnership tax return) or any partner's distributive share of such item.[38]

The IRS will determine whether there is an "imputed underpayment" as to its partnership adjustments to partnership-related items, roughly meaning the tax which would have been paid by the reviewed year partners if the partnership adjustments were properly reported, but taxed instead to the partnership entity at the highest tax rate for the reviewed years in question.[39] Under these calculations, the IRS will group and sub-group and net like-items of partnership adjustment together (e.g., adjustments to capital gains and losses) to determine if there is an imputed underpayment of tax.[40] There are rules for separate groupings of partnership adjustments, including tax credits and reallocation of partnership-related items among the partners.[41] Also note that any calculation not resulting in an imputed underpayment is instead taken into account by the partnership and the partners in the year the adjustments become final.[42] The IRS will then send a notice of a proposed partnership adjustment (NOPPA) containing any imputed underpayment.[43]

Fourth, the NOPPA calculation of imputed underpayment is then subject to various reductions and modifications which can be requested via the partnership representative, as authorized and determined under BBA procedures (called "modifications").[44]

Fifth, the IRS will send a notice of the final partnership adjustment (FPA) to the partnership and partnership representative.[45] The imputed underpayment as so modified is subject to penalties and interest.[46]

Sixth, if the partnership (via the partnership representative) agrees with the FPA, the partnership may simply pay the IRS a set amount. After payment, the matter will be put to rest for federal purposes, if not for state tax purposes.[47] Alternatively, if the partnership disagrees with the FPA, the partnership representative may file a petition in the U.S. Tax Court, the federal district court for the district in which the principal place of business lies, or the U.S. Court of Claims for a readjustment within 90 days after the FPA is mailed if other procedures are followed.[48]

Seventh, once a final determination is made on the FPA, the IRS may proceed to assess and collect the imputed underpayment and penalties, as well as any interest, from the partnership entity as though it were a tax imposed upon the partnership.[49] The assessment is made for the "adjustment year," generally meaning the year in which the adjustment becomes final.[50] That said, payment is not due with the adjustment year IRS 1065 partnership return filed in the following year, but rather upon notice and demand from the IRS.[51] Tax attributes affected by the payment of the imputed underpayment – such as the tax bases of partnership assets and interests, and the partners' capital accounts – are adjusted under various rules contained in the regulations.[52]

Eighth, and finally, if the imputed underpayment, penalties, and interest are not paid by the partnership entity in full after IRS demand, the partners as of the end of the adjustment year may be assessed by the IRS for the balance owed on the basis of proportionate partnership interest.[53] This provision indicates that the liable partners for the imputed underpayment are determined *as of the close of* the adjustment year. Query if the IRS will face collection issues if there is a delay in assessment so that the adjustment year partners can be determined as of the end of the adjustment year.[54]

Special rules apply the tax to former partners if the partnership does not exist at the time a partnership adjustment occurs.[55] In addition, there are special rules if a given partner does not report pass-thru items consistently with the partnership tax return, allowing the IRS to immediately assess and collect additional taxes, penalties, and interest from the *partner* as though a mathematical error.[56] These are different from the general rule where

the partnership entity is liable for the tax, possibly because each partner must pay taxes on pass-thru items under general partnership tax principles, and the IRS wants to collect taxes from the responsible parties in the absence of business entity existence or fault.

III. Mitigating the Effects of BBA Procedures

In the long run, the BBA procedures could make life easier for the IRS' audit and collection efforts against partnership entities and investors, assuming no major court challenges or substantial amending legislation.[57] In the short term, tax administration in complicated cases could prove challenging. Additional legislation, regulatory activity, IRS rulings, and case law may be needed to iron out the wrinkles.[58]

The more immediate and practical concern for legal practitioners is the potential for, if not the probability of, litigation by or among partners and partnership representatives over payment of tax liabilities. If current partners end up paying the partnership tax bill of former partners, or if the partnership representative abuses or neglects his authority, someone is bound to be an unhappy taxpayer. The practitioner's near-term goal, then, is to figure out how to mitigate the litigation risks.

There are a couple of avenues to consider for such purpose. First, the BBA procedures themselves offer some relief. Second, the partnership, operating, or other agreement can be a vehicle to address potential conflicts. The following reviews these options in more detail.

Relief Provisions of the BBA

There are three provisions built into the BBA procedures to safeguard against or ameliorate the impact of the new rules on partnerships and partners.

Election Out. For certain partnership entities, it is possible to elect out of the BBA procedures and fall back on pre-TEFRA rules.[59] Such election-out procedures can only occur if the partnership has 100 or fewer partners as defined and determined in the statute and regulations.[60] Even then, each partner must be an "eligible partner" as defined in the statute and applicable regulations. Eligible partners include individuals, estates of deceased individual partners, C corporations, S corporations, and certain foreign entities, but do not include other partnerships, trusts, nominee holders, disregarded L.L.C.s, or other single-member entities, non-eligible foreign entities, or estates of individuals other than deceased partners.[61]

An election out will relieve each partner from concerns about paying for another partner's taxes and restore the individual right to mount a defense against the IRS in court. Arguably, relying on the election out provision for anything other than a given year or so is not advisable, considering the scope of ineligible partners and the chances of an otherwise eligible partner becoming ineligible. For example, if an individual partner becomes legally disabled and requires a conservatorship, the partnership can no longer make the election out for future years, presumably until the conservatorship is terminated by the partner regaining capacity or dying,[62] or perhaps more likely, until the partnership interest is sold to an eligible partner. In addition, an innocent transfer of an individual partner's partnership interest to a revocable living trust – for estate planning purposes, for example – would make the partner ineligible and prohibit the partnership entity from making the election out for the years in which the trust holds the interest.[63]

Moreover, even if the election out is successfully made for a given year, some partners may not be pleased. For example, inasmuch as under the pre-TEFRA audit rules the IRS will conduct individual partner audits, the IRS is likely to examine certain non-partnership (unrelated) items in addition to partnership items. Alternatively, a passive investor may want the partnership entity to bear the burden of any tax under BBA procedures, having dutifully reported the amounts shown on IRS Schedule K-1 forms for the years in question with little knowledge of the issues at hand and little ability to mount a defense in case of audit.

Modification of Imputed Underpayment. As mentioned, the partnership via the partnership representative may attempt to reduce the imputed underpayment in the NOPPA

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IN MEMORIAM

Thomas J. Alexander, age 92, of Kansas City, on April 25, 2018. Alexander served in the U.S. Army in WWII and received a J.D. from the University of Kansas. He joined The Missouri Bar in 1951 and was a senior partner with Kuraner & Schwegler. Alexander was also an instructor at the University of Missouri-Kansas City School of Law.

Hon. Winston V. Buford, age 89, of Union, on July 5, 2018. Buford served in the U.S. Marine Corps and joined The Missouri Bar in 1956 after attending the University of Missouri-Kansas City School of Law. He was appointed circuit judge for the 37th Judicial Circuit in 1970 and served in that position until his retirement in 1989.

George L. DeLapp, age 85, of Independence, on August 20, 2018. DeLapp earned a J.D. from the University of Missouri-Kansas City and joined The Missouri Bar in 1966. He was a member of the U.S. Air Force.

Thomas J. Erbs, age 82, of St. Louis, in March 2019. Erbs joined The Missouri Bar in 1960 and practiced with Erbs & Erbs, P.C.

Marvin J. Ferguson, of North Kansas City, on May 11, 2019. Ferguson attended law school at the University of Missouri-Kansas City under the G.I. Bill after serving in both the U.S. Army and U.S. Marine Reserves. He was an active part of the Parkville Board of Aldermen and most recently worked with his wife at the Law Firm of Ferguson & Ferguson.

Hon. Clifford Eugene Hamilton Jr., age 76, of Columbia, on April 29, 2019. Hamilton earned a J.D. from the University of Missouri and joined The Missouri Bar in 1967. He served as prosecuting attorney of Callaway County, as well as circuit judge for Boone and Callaway counties.

David Michael Linihan, age 77, of Naples, Florida, on April 14, 2019. Linihan graduated from the University of Kansas School of Law and served as a captain in the U.S. Army. He joined The Missouri Bar in 1969 and practiced law in St. Louis, including at McMahon, Berger, Hanna, Linihan, Cody & McCarth as well as Jackson Lewis.

Michael Peter Mannion, age 60, of St. Louis, on May 11, 2019. Mannion earned a J.D. from Saint Louis University School of Law and a LL.M. in taxation from Washington University School of Law. He joined The Missouri Bar in 1986 and was the founding member of The Mannion Law Firm, L.L.C.

Henry D. Menghini, age 83, of Fenton, on March 20, 2018. He served in the U.S. Army and earned a J.D. from Washington University School of Law. He received The Missouri Bar's Lon O. Hocker Award in 1967 and practiced nearly 40 years with Evans & Dixon, L.L.C. He later taught trial advocacy.

John Wabon Nichols, age 70, of Kennett, on January 31, 2019. Nichols joined The Missouri Bar in 1981 and served in the U.S. Army.

John R. Simms, age 74, of Neosho, on June 12, 2019. Simms joined The Missouri Bar in 1969 and later served on the state bar's Board of Governors. He was part of several private practice firms, including The Sims Law Office, and previously served as assistant prosecuting attorney and prosecuting attorney of Newton County.

Richard H. Stevens, age 67, of Springfield, on June 12, 2019. Stevens practiced law for more than 42 years after joining The Missouri Bar in 1977.

Lawrence C. (Hardy) Sumner, age 89, of Clayton, on May 13, 2019. Sumner received his law degree from Saint Louis University School of Law and served in the U.S. Air Force. He joined The Missouri Bar in 1954 and was in private practice for 60 years.

Tim Thornton, age 64, of St. Louis, on June 23, 2019. Thornton graduated from Washington University School of Law and joined The Missouri Bar in 1982. He was most recently chief executive officer and president of Greensfelder.

Robert E. Wexler, age 86, of St. Louis, on April 2, 2019. Wexler attended George Washington University Law School and practice intellectual property law, most recently as patent counsel for Abbott Laboratories in Chicago, Illinois.

Henry Pack Willimon Jr., age 79, of Ellisville, on May 21, 2019. Willimon joined The Missouri Bar in 1992 after attending Washington University School of Law. He served in the U.S. Navy and worked in private practice for three decades.

The Journal of The Missouri Bar publishes items in the "In Memoriam" section as they are received. To honor the lives and achievements of deceased members, The Missouri Bar solicits additional information about these men and women from family members or printed obituaries. When that information is not provided or is otherwise unavailable, the Journal will print only the deceased's name, city of residence, and date of death.

BEYOND THE USUAL COURSE: ADDENDUM

FERNE P. WOLF[1]

Editor's Note:
Due to an oversight by Journal staff, the article by Ferne P. Wolf in the May-June issue ("Beyond the Usual Course: Producing Documents Under the Discovery Rules") did not include information regarding an amendment to Supreme Court of Missouri Rule 58.01(c)(4) regarding production of documents. At our request, Ms. Wolf has graciously provided an addendum to the original article that discusses the impact of the rule change. The Journal apologizes for the error and any confusion it may have caused among our readers.

Up until June 30, 2019, Rule 58.01(c)(4)'s plain language gave producing parties the option of producing documents as kept in "the usual course of business" with no qualifying language. The rule read:

> *Method of Production.* A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request. Rule 58.01(c)(4).

The rule changed effective July 1, 2019. Under the amended rule, a party can produce documents in the usual course only "so long as this form is reasonably usable by the requesting party." This is the amended Rule 58.01(c)(4):

> *Method of Production.* A party who produces documents for inspection shall produce them as they are kept in the usual course of business *so long as this form is reasonably usable by the requesting party,* or shall organize and label them to correspond with the categories in the request (amended language in italics).

This new language, about producing in a reasonably usable form, is much like F.R.Civ.P. 34(b)(2)(E)(ii). The federal rule relates to producing electronically stored information, or ESI. Under the federal ESI rule, "If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a *reasonably usable form* or forms (emphasis supplied.)"

Until the amendment, Rule 58.01(c)(4) and the related federal rule, Rule 34(b)(2)(E)(ii),[2] were essentially the same. So, as discussed in the original article, Missouri courts and practitioners could look to caselaw under the federal rule for guidance. But now that Missouri requires usual course production to be in a reasonably usable form, requesters can point out this added requirement. And they can cite federal interpretations of "reasonably usable" under Rule 34(b)(2)(E)(ii).

The federal cases interpreting "reasonably usable" will deal with ESI issues. But the discussion of what it means to produce documents in a form that is reasonably usable will have issues in common with production under the Missouri rule. After all, the Missouri production rule encompasses electronically stored information.

An example of the kind of reasoning under the federal rule that could apply to the new Missouri rule is in *White v. Graceland College Ctr. for Professional Dev. & Lifelong Learning, Inc.*[3] There, a district court found that defendant's production of emails as PDF documents was not in a reasonably usable form. The court was concerned with defendant's conversion of the documents from ESI – the form in which they were ordinarily maintained – to a form that made it harder for the plaintiff to use.

With the new language prohibiting producers from providing documents in a form that is not readily usable, enforcement of Rule 58.01(c)(4)'s amendment should lead to fewer "document dumps."

Endnotes

Ferne P. Wolf

1 Ferne P. Wolf is a partner at Silverstein Wolf in St. Louis. She focuses her practice on employment law. She wishes to thank two people whose research and editing were invaluable in the preparation of this article: Joshua M. Pierson, also of Silverstein Wolf, and Rebecca S. Craig, who researched while a student at Washburn University School of Law. Ms. Craig is now an assistant county attorney in Miami County, Kansas.

2 The Federal Rules were amended in 2006 to provide procedures for discovering electronically stored information (ESI). At that point, Rule 34's subparts were renumbered. So a search for relevant federal caselaw should include "Rule 34(b)," the old number for the usual course rule.

3 586 F.Supp.2d 1250, 1264 (D. Kans. 2008).

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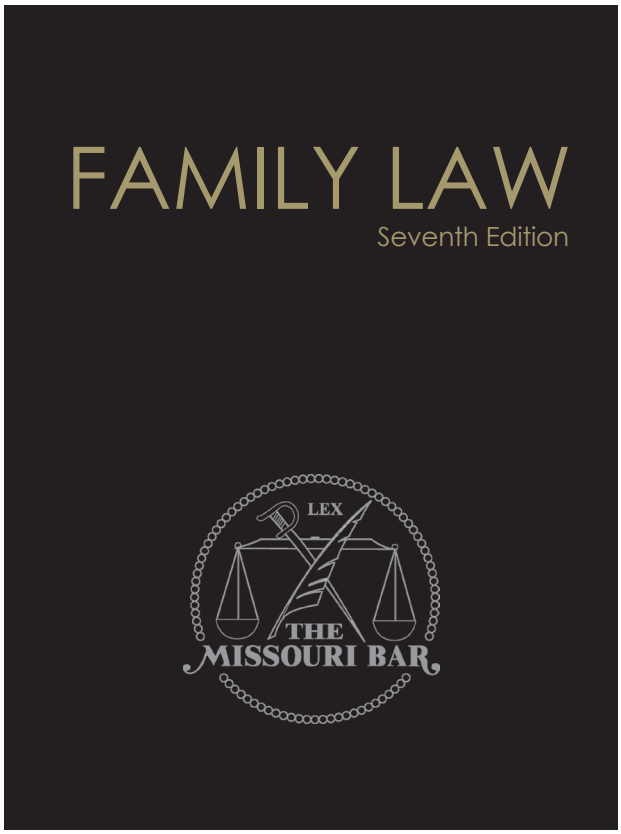

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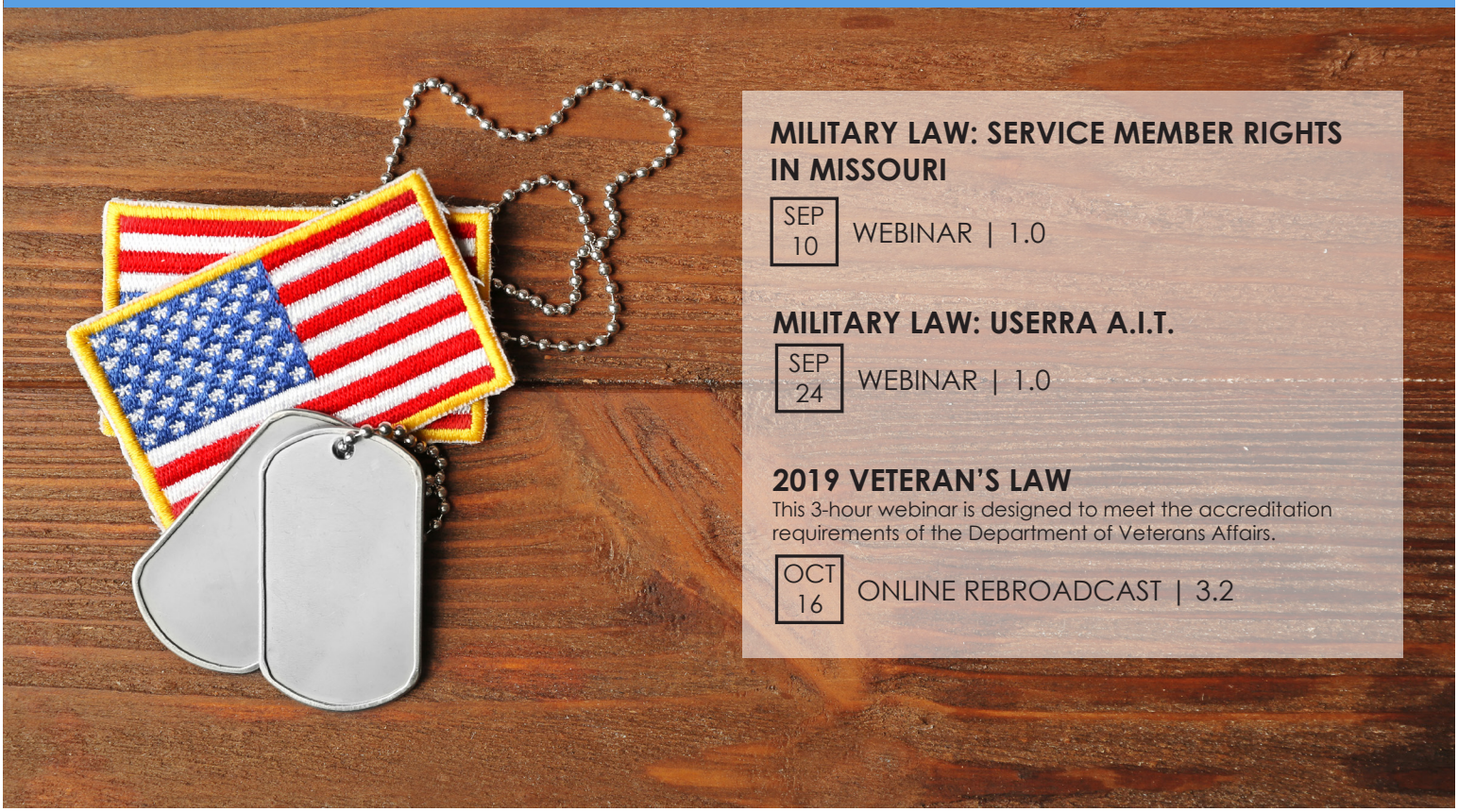

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ADMONITIONS: CONSIDER SOME EXAMPLES

MARK FLANEGIN[1]

NOT SURPRISINGLY, THE LOWEST FORM OF SANCTION IN THE DISCIPLINARY PROCESS IS ALSO THE MOST COMMON: THE ADMONITION.[2] LIKE OTHER SANCTIONS AUTHORIZED BY SUPREME COURT OF MISSOURI RULE 5, AN ADMONITION IS PART OF A LAWYER'S RECORD AND IS AVAILABLE TO THE PUBLIC.[3]

The Office of Chief Disciplinary Counsel, a Regional Disciplinary Committee and a Disciplinary Hearing Panel may issue an admonition.

The Office of Chief Disciplinary Counsel or a Regional Disciplinary Committee may issue an admonition to a lawyer if, after completion of an investigation, it is determined there is probable cause to believe a lawyer has committed professional misconduct and the misconduct is of such a nature that further proceedings are not warranted.[4] If the Office of Chief Disciplinary Counsel or a Regional Disciplinary Committee believes the issuance of an admonition is not appropriate, an Information may be filed.[5] A Disciplinary Hearing Panel assigned to hear an Information may, after a hearing, find that the Information should be dismissed, a written admonition should be issued, or that further proceedings are warranted.[6]

Consider

The following admonition summaries are intended to provide guidance to lawyers to avoid conduct that could result in the issuance of an admonition.

1. During the representation of a client, the lawyer loaned the client money so that the client would not feel forced to accept a settlement offer.

The lawyer received an admonition for violation of Rule 4-1.8(e), which prohibits a lawyer from providing financial assistance to a client in regard to pending or contemplated litigation. Although the rule allows for financial assistance in certain circumstances, none were relevant to the lawyer's conduct.

2. The lawyer's client made statements in a deposition that the lawyer believed made it unlikely the client would prevail in the case and subjected the client to other claims. The lawyer informed the client that the lawyer was not going to pursue the client's claim. The client requested the lawyer to continue representing the client. The lawyer did not withdraw from the case. The lawyer failed to appear at a hearing and the case was dismissed.

The lawyer received an admonition for violation of Rule 4-1.2 on scope of representation, which provides a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued. The lawyer also received an admonition for violation of Rule 4-1.3 on diligence.

3. While representing a client in a pending case the lawyer – knowing the opposing party was represented by counsel in the matter – spoke with the opposing party about the subject of the representation. The lawyer also sent a "friend" request on Facebook to the opposing party. Both communications were made without obtaining consent from opposing counsel.

The lawyer received an admonition for violation of Rule 4-4.2, which states a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the other lawyer has given consent or is authorized to do so by law or a court order.

4. The client terminated the services of the lawyer. The lawyer informed the client that the client would have to pay $100 for copying expense before the lawyer would return the client file.

The lawyer received an admonition for violation of Rule 4-1.16. Rule 4-1.16(d) provides that upon termination of representation, a lawyer must take steps to protect a client's interests, including surrendering papers and property to which the client is entitled.

Note: Missouri Advisory Committee Formal Opinion 115, as amended, addresses this issue. The Opinion provides that if a lawyer wants to keep a copy of the file, the lawyer must bear the costs of copying the file. A lawyer may retain those items contained in the file for which the lawyer has borne out-of-pocket expenses until reimbursement for the out-of-pocket expenses is made. Upon reimbursement, the items must immediately be provided to the client.

5. The lawyer represented a client at a time the lawyer was tax suspended in the state of Missouri.

The lawyer received an admonition for violation of Rule 4-5.5 for engaging in the unauthorized practice of law. A lawyer who is not admitted to practice in the state of Missouri cannot hold out to the public or otherwise represent that the lawyer is admitted to practice law in Missouri. Pursuant to Rule 5.245, a lawyer who is delinquent on a tax or has failed to file a tax return is subject to automatic suspension unless the matter is satisfactorily resolved within the time limit provided by the rule.

6. The lawyer represented a client on a guardianship and conservatorship matter. When it became necessary to terminate the guardianship and conservatorship, the lawyer failed to act in a timely manner to collect information and file the final settlement

required for the termination. The lawyer also failed to reasonably communicate with the client regarding the termination.

The lawyer received an admonition for violation of Rule 4-1.3 on diligence and Rule 4-1.4 on communication.

7. The lawyer represented a client in a personal injury case and dismissed the case without prejudice without the client's knowledge or consent.

The lawyer received an admonition for violation of Rule 4-1.4 on communication and Rule 4-1.2 (a) on scope of representation.

8. The lawyer was retained to represent a client on a dissolution for a flat fee, which was paid. The client did not sign any pleadings and the lawyer did not file any pleadings. The parties reconciled less than two months after the lawyer was retained. Although the client requested a refund, no refund was provided.

The lawyer received an admonition for Rule 4-15(a) for collecting an unreasonable fee and for violation of Rule 4-1.16(d) for failure to provide a refund to the client.

9. The lawyer submitted a proposed judgment to a judge during the time the lawyer's law license was suspended for noncompliance with the continuing legal education requirements of Missouri Supreme Court Rule 15.

The lawyer received an admonition for violation of Rule 4-5.5. Rule 4-5.5(e) states a lawyer shall not practice law in Missouri if the lawyer fails to comply with Rule 15.

10. The lawyer filed a motion in a domestic relations case. The motion included language that the client had read and understood the motion and that the client "has executed the same…" Although the client may have been present and authorized an individual to sign the client's name, the client did not sign the motion.

The lawyer received an admonition for violation of Rule 3.3(a)(1), which states a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made by the lawyer to the tribunal.

11. The lawyer moved out of his office and abandoned client files in the office. The lawyer was contacted by the Office of Chief Disciplinary Counsel and directed to make arrangements with the landlord to pick up the client files. Due to the lawyer's failure to do so, the Office of Chief Disciplinary Counsel took possession of the files.

The lawyer received an admonition for violation of Rule 4-1.6 and Rule 4-8.1(c). Rule 4-1.6(c) requires a lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information related to the representation of a client. Rule 4-8.1(c) states that a lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority.

12. An individual met with the lawyer and discussed a civil matter. The individual retained counsel, not the lawyer, for representation in a lawsuit. Without permission from the individual, the lawyer provided some information discussed with the individual to a title company.

The lawyer received an admonition for violation of Rule 4-1.18(b). This rule prohibits a lawyer from using or revealing information learned in a discussion with a perspective client, even when no client-lawyer relationship occurs. The rule does provide an exception pursuant to Rule 4-1.9 (duties to former clients) with respect to information of a former client.

13. The lawyer provided legal services in a dissolution. The marital settlement agreement included language that the lawyer represented only the wife. The lawyer had previously provided legal services to the husband regarding businesses in which the husband had an interest and the lawyer also assisted the husband, at or near the time of the dissolution, regarding a business owned by the husband. The parties signed an agreement that provided, in part, that the husband released and discharged the lawyer from any bar complaint the husband might have against the lawyer.

The lawyer received an admonition for violation of Rule 4-1.7, which prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest, and Rule 4-8.4(d), which states that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

Missouri Advisory Committee Formal Opinion 122 prohibits a lawyer from entering into, or attempting to enter into, a settlement that includes a term that a party to the agreement will withdraw or refrain from filing a complaint under Missouri Supreme Court Rule 5.

14. The lawyer's client advised the lawyer that the client did not want to proceed with the separation and property settlement agreement. Before a scheduled hearing, the lawyer sent correspondence that included confidential information to opposing counsel to present to the court. After judgment was entered, the lawyer did not send a copy of the judgment to the client.

The lawyer received an admonition for violation of Rule 4-1.4 on communication and Rule 4-1.6 on confidentiality of information. Rule 4-1.6 requires a lawyer not to disclose information related to the representation of a client. Under certain circumstances, including a client's informed consent, a lawyer may disclose information related to the representation.

15. The lawyer was hired by a law firm. The lawyer completed an application for employment and a second form. Both forms asked if the lawyer had been refused admission to practice, disbarred, suspended, or formally reprimanded, or been subject to any disciplinary inquiry, complaint, or proceeding for any reason except for non-payment of dues. The lawyer responded "no" on both forms. The Office of Chief Disciplinary Counsel records showed the lawyer had previously received an admonition.

The lawyer received an admonition for violation of Rule 4-84(c), which states that is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Conclusion

A lawyer's conduct that violates the Rules of Professional Conduct can result in the issuance of an admonition. Although an admonition is the lowest form of sanction in the disciplinary process, lawyers should consider that upon acceptance an admonition will become part of a lawyer's record. The issuance of an admonition may also assist in evaluating the lawyer's future conduct and compliance with the Rules of Professional Conduct.

Endnotes

1 Mark Flanegin is a staff attorney for the Office of Chief Disciplinary Counsel in Jefferson City.

2 Various subsections of Supreme Court Rule 5 authorize an admonition, a reprimand, probation, suspension (stayed or actual), and disbarment.

3 Effective July 1, 2012, an admonition becomes a public record upon its acceptance. Supreme Court Rule 5.31(b)(3). Prior to July 1, 2012, admonitions, subject to some restrictions, were available to the public for only three years from the date of acceptance.

4 Supreme Court Rule 5.11(b).

5 Supreme Court Rule 5.11(a).

6 Supreme Court Rule 5.16(a).

President's Page

Continued from page 164

One such example is the energetic group of local and specialty bar leaders from across Missouri I met at the new Missouri Bar Leadership Institute held in April. This program is just the beginning of bringing bar leaders together to share ideas and bar leadership techniques. I'm excited for the future of this new program and what it means for lawyers and those they serve across Missouri.[6] Through innovative programs such as MO BLI, The Missouri Bar is well-positioned to remain one of the strongest and most effectively run unified bars in the nation.

The practice of law can be a stressful and taxing profession, and presidents-to-be are already focused on addressing the lawyer well-being issues that arise therefrom. However, on even our toughest days, may we all remember the words of lawyer-legislator Jay Barnes, when during his farewell speech on the floor of the Missouri House, he summarized his service with the following advice: "Smile and have fun – even in the most stressful days." I would add, if you have the chance, take a break and come relax with us in the beautiful Missouri Ozarks.

As a solo, small-town lawyer, serving our Missouri Bar and the lawyers it represents has been one of the greatest honors and experiences I can imagine. I thank you for the opportunity to serve as president of our Missouri Bar.

Endnotes

1 Raymond E. Williams is an attorney with Williams Law Offices, LLC in West Plains.

2 Mr. Thompson is the retired clerk of the Supreme Court of Missouri, and offered this thought during his remarks at the Missouri Bar Fall Committee Meetings in 2016.

3 When this issue is published, we will be near the time for passing the gavel to our next president during the 2019 Missouri Bar Annual Meeting in Branson. I'm excited to host the Annual Meeting for the first time ever in Branson, and we hope you will join us at this fantastic venue on the Branson Landing.

4 John McCain and Mark Salter, The Restless Wave: Good Times, Just Causes, Great Fights, and Other Appreciations (Simon & Schuster) (2018).

5 See missourilawyershelp.org/events/mobar75/ for a timeline highlighting some of the many accomplishments of The Missouri Bar during the past 75 years.

6 There are many opportunities to be involved in The Missouri Bar, including civics education activities and The Missouri Bar Speakers' Bureau. A quick list with information about these programs and activities can be found on the Missouri Bar website at mobar.org/get-involved.htm.

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SUPREME COURT RULE CHANGES

In an order dated April 30, 2019, the Supreme Court of Missouri adopted a new subdivision 1.00, entitled "Judicial Records: Definition," of Court Operating Rule 1, entitled "State Court Automation."

In the same order, the Supreme Court of Missouri repealed subdivision 1.01, entitled "Missouri Court Automation Committee: Definition;" the heading title and subdivision 1.03, entitled "Court Automation Central Sites and Communications Links;" the heading title and subdivision 1.05, entitled "Uniform Criminal Charge Codes;" subdivision 1.06, entitled "Uniform Court Action Codes;" subdivision 1.07, entitled "Attorney Identification;" the heading title and subdivision 1.08, entitled "Data Processing Proposals;" subdivision 1.09, entitled "Developmental Projects;" and the heading title and subdivision 1.10, entitled "Control of Automated Systems," of Court Operating Rule 1, entitled "State Court Automation," and in lieu thereof adopted a new subdivision 1.01, entitled "Missouri Court Automation Committee: Definition;" a new heading title and subdivision 1.03, entitled "Statewide Court Automation System and Communications Link;" a new heading title and subdivision 1.05, entitled "Missouri Charge Codes;" a new subdivision 1.06, entitled "Uniform Court Action Codes;" a new subdivision 1.07, entitled "Attorney Identification;" a new heading title and subdivision 1.08, entitled "Information Technology Proposals Involving Judicial Records;" a new subdivision 1.09, entitled "Developmental Projects;" and a new heading title and subdivision 1.10, entitled "Control of the Statewide Court Automation System."

The order also repealed subdivision 4.01, entitled "Uniform Record Keeping System," of Court Operating Rule 4, entitled "Uniform Record Keeping System," and in lieu thereof adopted a new subdivision 4.01, entitled "Uniform Record Keeping System."

The order became effective July 1, 2019.

The complete text of the order may be read in its entirety at www.courts.mo.gov.

The Supreme Court of Missouri, in an order dated April 30, 2019, repealed subdivision (b) of subdivision 6.03, entitled "Election to Become Inactive," of Rule 6, entitled "Fees to Practice Law," and in lieu thereof adopted a new subdivision (b) of subdivision 6.03, entitled "Election to Become Inactive."

The order will be effective November 1, 2019.

The complete text of the order may be read in its entirety at www.courts.mo.gov.

In an order dated April 30, 2019, the Supreme Court of Missouri repealed subdivisions (a), (c), and (d) of subdivision 21.02, entitled "Distribution of Fees," and subdivision 21.11, entitled "Administrative Plan for Collection of Court Debt," of Court Operating Rule 21, entitled "Court Costs, Fees, Miscellaneous Charges and Surcharges," and in lieu thereof adopted new subdivisions (a), (c), and (d) of subdivision 21.02, entitled "Distribution of Fees;" and a new subdivision 21.11, entitled "Administrative Plan for Collection of Court Debt."

The order became effective July 1, 2019.

The complete text of the order may be read in its entirety at www.courts.mo.gov.

In an order dated June 4, 2019, the Supreme Court of Missouri repealed subdivision 8.09, entitled "Admission by Transferred Uniform Bar Examination Score," of Rule 8, entitled "Admission to the Bar," and in lieu thereof adopted a new subdivision 8.09, entitled "Admission by Transferred Uniform Bar Examination Score."

The order became effective July 1, 2019.

The complete text of the order may be read in its entirety at www.courts.mo.gov.

The Supreme Court of Missouri, in an order dated June 25, 2019, repealed subdivision 14.04, entitled "Application for Certification;" subdivision 14.05, entitled "Eligibility for Certification;" subdivision 14.06, entitled "Admission Without Examination;" and the heading title and subdivision 14.07, entitled "Appointment of Official Court Reporter – Temporary Appointment," of Rule 14, entitled "Certified Court Reporters," and in lieu thereof adopted of a new subdivision 14.04, entitled "Application for Certification;" a new subdivision 14.05, entitled "Eligibility for Certification;" a new subdivision 14.06, entitled "Admission Without Examination;" and a new heading title and a new subdivision 14.07, entitled "Appointment of Official Court Reporters and Limited Authority to Appoint Temporary Court Reporters."

In the same order, the Supreme Court of Missouri approved Regulations of the Board of Certified Court Reporter Examiners.

The order became effective July 1, 2019.

The complete text of the order may be read in its entirety at www.courts.mo.gov.

The Supreme Court of Missouri, in an order dated June 25, 2019, repealed subdivision (c) of subdivision 37.49, entitled "Local Violations Bureau – Violations Clerk – Schedule of Fines – Payment," of Rule 37, entitled "Statutory and Ordinance Violations and Violation Bureaus," and in lieu thereof adopted a new subdivision (c) of subdivision 37.49, entitled "Local Violations Bureau – Violations Clerk – Schedule of Fines – Payment."

The order will become effective January 1, 2020.

The complete text of the order may be read in its entirety at www.courts.mo.gov.

In an order dated June 25, 2019, the Supreme Court of Missouri repealed subdivision 74.09(a), entitled "When and by Whom," of Rule 74, entitled "Judgments, Orders and Proceedings Thereon," and in lieu thereof adopted a new subdivision 74.09(a), entitled "Where and by Whom."

The order will become effective January 1, 2020.

The complete text of the order may be read in its entirety at www.courts.mo.gov.

In an order dated June 25, 2019, the Supreme Court of Missouri repealed the heading title and subdivision 29.18, entitled "Probation Violations – Procedure," of Rule 29, entitled "Misdemeanors or Felonies – Verdict, Sentence and New Trial," and in lieu thereof adopted a new heading title and a new subdivision

29.18, entitled "Probation and Judicial Parole Violations – Procedure."

The order will become effective January 1, 2020.

The complete text of the order may be read in its entirety at www.courts.mo.gov.

The Supreme Court of Missouri, in an order dated June 28, 2019, repealed subdivision 37.15, entitled "Right to Release – Conditions;" subdivision 37.16, entitled "Officials Authorized to Set Conditions of Release – Conditions to be Stated on Warrant;" subdivision 37.17, entitled "Arrest Without Warrant;" subdivision 37.18, entitled "Officer Authorized to Accept Conditions of Release;" subdivision 37.19, entitled "Modification of Conditions of Release;" the heading title and subdivision 37.20, entitled "Right to Review of Conditions;" the heading title and subdivision 37.21, entitled "Re-Arrest of Accused;" the heading title and subdivision 37.22, entitled "Failure to Set Conditions or Setting of Excessive Conditions for Release – Application to Higher Court;" subdivision 37.23, entitled "Transmittal of Record by Clerk of the Releasing Court;" subdivision 37.24, entitled "Bonds – Where Filed – Certification by Peace Officer – Cash Bonds;" subdivision 37.42, entitled "Summons – Contents;" subdivision 37.43, entitled "Ordinance Violation – Summons or Arrest Warrant – When Issued – Failure to Appear;" subdivision 37.435, entitled "Statement of Probable Cause;" the heading title and subdivision 37.45, entitled "Warrant of Arrest – Contents;" the heading title of subdivision 37.46, entitled "Warrant of Arrest - Service;" subdivision 37.47, entitled "Initial Proceedings Before a Judge;" and subdivision 37.48, entitled "Arraignment," of Rule 37, entitled "Statutory and Ordinance Violations and Violation Bureaus," and in lieu thereof adopted a new subdivision 37.15, entitled "Right to Release – Conditions;" a new subdivision 37.16, entitled "Officials Authorized to Set Conditions of Release – Conditions to be Stated on Warrant;" a new subdivision 37.17, entitled "Arrest Without Warrant;" a new subdivision 37.18, entitled "Officer Authorized to Accept Conditions of Release;" a new subdivision 37.19, entitled "Modification of Conditions of Release;" a new heading title and a new subdivision 37.20, entitled "Release Hearing;" a new heading title and a new subdivision 37.21, entitled "Rearrest of Defendant;" a new heading title and a new subdivision 37.22, entitled "Relief From Inadequate or Excessive Conditions of Release;" a new subdivision 37.23, entitled "Transmittal of Record by Clerk of the Releasing Court;" a new subdivision 37.24, entitled "Bonds – Where Filed – Certification by Peace Officer – Cash Bonds;" a new subdivision 37.42, entitled "Summons – Contents;" a new subdivision 37.43, entitled "Ordinance Violation – Summons or Arrest Warrant – When Issued – Failure to Appear;" a new subdivision 37.435, entitled "Statement of Probable Cause;" a new heading title and a new subdivision 37.45, entitled "Warrant for Arrest – Contents;" a new heading title 37.46, entitled "Warrant for Arrest – Service;" a new subdivision 37.47, entitled "Initial Proceedings Before a Judge," and a new subdivision 37.48, entitled "Arraignment."

The order will become effective January 1, 2020.

The complete text of the order may be read in its entirety at www.courts.mo.gov.

In an order dated June 25, 2019, the Supreme Court of Missouri corrected the order of December 18, 2018, repealing and adopting subdivision 21.03, entitled "Misdemeanors – Summons or Warrant of Arrest – When Issued;" repealing and adopting subdivision 21.06, entitled "Misdemeanors – Warrant for Arrest – Contents;" and repealing and adopting subdivision 21.09, entitled "Misdemeanors – Appearance Under Warrant Before the Court," of Rule 21, entitled "Procedure Applicable to Misdemeanors Only."

In the same order, the Court corrected the order of December 18, 2018, repealing and adopting subdivision 22.04, entitled "Felonies – Warrant of Arrest – When Issued;" repealing and adopting subdivision 22.05, entitled "Felonies – Warrant for Arrest – Contents;" and repealing and adopting subdivision 22.07, entitled "Felonies – Appearance Under Warrant Before the Court," of Rule 22, entitled "Procedure Applicable to Felonies Only."

In the same order, the Supreme Court of Missouri corrected the order of December 18, 2018, repealing and adopting subdivisions (e) and (f) of subdivision 33.01, entitled "Misdemeanors or Felonies – Right to Release – Conditions;" repealing and adopting subdivision 33.05, entitled "Misdemeanors or Felonies – Release Hearing;" repealing and adopting subdivision 33.06, entitled "Misdemeanors or Felonies – Modification of Conditions of Release;" and repealing and adopting subdivision 33.08, entitled "Misdemeanors or Felonies – Rearrest of Defendant," of Rule 33, entitled "Misdemeanors or Felonies – Release Pending Further Proceedings."

The order was to become effective July 1, 2019; order vacated on June 30, 2019 (see order below).

The complete text of the order may be read in its entirety at www.courts.mo.gov.

The Supreme Court of Missouri, in an order dated June 30, 2019, vacated the order of June 25, 2019, regarding correction of order of December 18, 2018, repealing and adopting subdivision 21.03, entitled "Misdemeanors – Summons or Warrant of Arrest – When Issued;" repealed and adopted subdivision 21.06, entitled "Misdemeanors – Warrant for Arrest – Contents;" and repealed and adopted subdivision 21.09, entitled "Misdemeanors – Appearance Under Warrant Before the Court," of Rule 21, entitled "Procedure Applicable to Misdemeanors Only."

In the same order, the Court vacated the order of June 25, 2019, regarding correction of order of December 18, 2018, repealing and adopting subdivision 22.04, entitled "Felonies – Warrant of Arrest – When Issued;" repealed and adopted subdivision 22.05, entitled "Felonies – Warrant for Arrest – Contents;" and repealed and adopted subdivision 22.07, entitled "Felonies – Appearance Under Warrant Before the Court," of Rule 22, entitled "Procedure Applicable to Felonies Only."

In the same order, the Supreme Court of Missouri vacated the order of June 25, 2019, regarding correction of order of December 18, 2018, repealing and adopting subdivisions (e) and (f) of subdivision 33.01, entitled "Misdemeanors or Felonies – Right to Release – Conditions;" repealed and adopted subdivision 33.05, entitled "Misdemeanors or Felonies – Release Hearing;" repealed and adopted subdivision 33.06, entitled "Misdemeanors or Felonies – Modification of Conditions of Release;" and repealed and adopted subdivision 33.08, entitled "Misdemeanors or Felonies – Rearrest of Defendant," of Rule 33, entitled "Misdemeanors or Felonies – Release Pending Further Proceedings."

The order became effective June 30, 2019.

The complete text of the order may be read in its entirety at www.courts.mo.gov.

The Supreme Court of Missouri, in an order dated June 30, 2019, repealed subdivision 21.03, entitled "Misdemeanors – Summons or Warrant of Arrest – When Issued;" subdivision 21.06, entitled "Misdemeanors – Warrant for Arrest – Contents;" and the heading title and subdivision 21.09, entitled "Misdemeanors – Appearance Under Warrant Before the Court," of Rule 21, entitled "Procedure Applicable to Misdemeanors Only," and in lieu thereof adopted a new subdivision 21.03, entitled "Misdemeanors – Summons or Warrant of Arrest – When Issued;" a new subdivision 21.06, entitled "Misdemeanors – Warrant for Arrest – Contents;" and a new heading title and a new subdivision 21.09, entitled "Misdemeanors – Initial Appearance Under Warrant Before the Court."

In the same order, the Court repealed the heading title and subdivision 22.04, entitled "Felonies – Warrant of Arrest – When Issued;" subdivision 22.05, entitled "Felonies – Warrant for Arrest – Contents," and the heading title and subdivision 22.07, entitled "Felonies – Appearance Under Warrant Before the Court," of Rule 22, entitled "Procedure Applicable to Felonies Only," and in lieu thereof adopted a new heading title and a new subdivision 22.04, entitled "Felonies – Summons or Warrant of Arrest – When Issued;" a new subdivision 22.05, entitled "Felonies – Warrant for Arrest – Contents," and a new heading title and a new subdivision 22.07, entitled "Felonies – Initial Appearance Under Warrant Before the Court."

In the same order, the Supreme Court of Missouri repealed subdivisions (e) and (f) of subdivision 33.01, entitled "Misdemeanors or Felonies – Right to Release – Conditions;" subdivision 33.05, entitled "Misdemeanors or Felonies – Release Hearing;" subdivision 33.06, entitled "Misdemeanors or Felonies – Modification of Conditions of Release," and subdivision 33.08, entitled "Misdemeanors or Felonies – Rearrest of Defendant," of Rule 33, entitled "Misdemeanors or Felonies – Release Pending Further Proceedings," and in lieu thereof adopted new subdivisions (e) and (f) of subdivision 33.01, entitled "Misdemeanors or Felonies – Right to Release – Conditions;" a new subdivision 33.05, entitled "Misdemeanors or Felonies – Release Hearing;" a new subdivision 33.06, entitled "Misdemeanors or Felonies – Modification of Conditions of Release," and a new subdivision 33.08, entitled "Misdemeanors or Felonies – Rearrest of Defendant."

The order will become effective January 1, 2020.

The complete text of the order may be read in its entirety at www.courts.mo.gov.

In an order dated June 30, 2019, by order of December 18, 2018, the Supreme Court of Missouri Court repealed and adopted a new subdivision 21.03, a new subdivision 21.04, a new subdivision 21.05, a new heading title and subdivision 21.06, a new heading title and subdivision 21.09, a new heading title and subdivision 21.10, a new subdivision 22.03, a new subdivision 22.04, a new heading title and subdivision 22.05, a new heading title and subdivision 22.07, a new heading title and subdivision 22.08, a new subdivision 22.09, a new subdivision 33.01, a new heading title and subdivision 33.02, a new subdivision 33.04, a new heading title and subdivision 33.05, a new subdivision 33.06, a new subdivision 33.07, a new heading title and subdivision 33.08, a new heading title and a new subdivision 33.09, a new subdivision 33.10, and a new subdivision 33.11.

In the same order, by order of February 13, 2019, the Court corrected subdivision 33.01(c) of Rule 33 by correcting a typographical error in its December 18, 2018 order.

The order became effective June 30, 2019.

The complete text of the order may be read in its entirety at www.courts.mo.gov.

The Supreme Court of Missouri, in an order dated June 30, 2019, repealed Regulation 15.01.10 of subdivision 15.01, entitled "Definitions," of Rule 15, entitled "Continuing Legal Education," and in lieu thereof adopted a new Regulation 15.01.10, entitled "Cultural Competency, Diversity, Inclusion, and Implicit Bias Programs, Seminars, or Activities," and a new Regulation 15.01.11 of subdivision 15.01, entitled "Definitions."

In the same order, the Court repealed subdivision (e) of subdivision 15.05, entitled "Continuing Legal Education Requirements," of Rule 15, entitled "Continuing Legal Education," and in lieu thereof adopted a new subdivision (e) of subdivision 15.05, entitled "Continuing Legal Education Requirements."

In the same order, the Supreme Court of Missouri repealed subdivision (b) of subdivision 18.05, entitled "Continuing Judicial Education Requirements," of Rule 18, entitled "Municipal Judge – Continuing Education Requirements and Nonlawyer Certification," and in lieu thereof adopted a new subdivision (b) of subdivision 18.05, entitled "Continuing Judicial Education Requirements."

The order became effective July 1, 2019.

The complete text of the order may be read in its entirety at www.courts.mo.gov.

NOTICE OF LEGISLATIVE ACTION AMENDING SUPREME COURT RULES

On May 17, 2019, the General Assembly approved House Committee Substitute for Senate Substitute #4 for Senate Bill 224, to amend Supreme Court rules relating to discovery. The governor signed the bill into law on July 10, 2019. The effective date of the law will be August 28, 2019.

Pursuant to the authority granted in article V, § 5, of the Missouri Constitution, the law amends Supreme Court Rules 25.03 (Misdemeanors or Felonies-Disclosure by State to Defendant Without Court Order), 56.01 (General Provisions Governing Discovery), 57.01 (Interrogatories to Parties), 57.03 (Depositions Upon Oral Examination), 57.04 (Depositions Upon Written Questions), 58.01 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes), 59.01 (Request for and Effect of Admissions), and 61.01 (Failure to Make Discovery: Sanctions).

The complete text of the Truly Agreed To and Finally Passed bill is available at https://www.senate.mo.gov/19info/pdf-bill/tat/SB224.pdf.

TAXPAYER FIRST ACT OF 2019

SCOTT E. VINCENT[1]

THE TAXPAYER FIRST ACT OF 2019 ("ACT") MAKES A VARIETY OF CHANGES TO INTERNAL REVENUE SERVICE ("IRS") ORGANIZATION, OVERSIGHT, AND MANAGEMENT, AND ENACTS NEW SAFEGUARDS FOR TAXPAYERS IN DEALING WITH THE IRS AND PURSUING APPEALS.

The Act was signed into law on July 1, 2019, which is the effective date for many of the provisions, except as otherwise set forth in the Act. This article outlines selected provisions in the Act that may be applicable to lawyers, their clients, and taxpayers generally in dealing with IRS matters.

Scott E. Vincent

Title I – Putting Taxpayers First

Subtitle A – Independent Appeals Process

The IRS administrative appeals function was previously set by internal IRS rules. The Act codifies and establishes the IRS Independent Office of Appeals under the supervision of a chief of appeals reporting directly to the commissioner of Internal Revenue. The Independent Office of Appeals is intended to resolve tax controversies without litigation in a fair and impartial manner that promotes consistent application and voluntary compliance and enhances public confidence in the IRS. The right of appeal is to be generally available for all taxpayers, subject to reasonable exceptions that may be established by the IRS.

Under the new provisions, when the IRS issues a notice of deficiency to a taxpayer, the IRS must provide a detailed description of the facts involved, the basis for the decision, and a detailed explanation, as well as notice and protest procedures for taxpayers whose request is denied. The new rules also now require that the IRS administrative case file referred to appeals be available to individual taxpayers with adjusted gross incomes of $400,000 or less for the year in dispute and small business taxpayers with gross receipts of $5 million or less for the year in dispute.

The new appeals rules are generally effective on July 1, 2019, except regarding the change allowing taxpayer access to case files, which shall apply to appeals conferences occurring more than one year after July 1, 2019.

Subtitle B – Improved Service

Customer service strategy. The Act requires that the IRS submit a written comprehensive customer service strategy to Congress by July 2, 2020. The strategy must include a plan to provide secure assistance to taxpayers with private sector customer service best practices, including online and call back services and employee training. The strategy is also to include internal IRS assessments, phased proposals for IRS improvement (short, medium, and long term), Internal Revenue Manual updates, and key metrics and benchmarks for quantitatively measuring IRS progress in implementing the strategy.

Low-income exceptions for offer-in-compromise submission payments. For offers-in-compromise submitted after July 1, 2019, the Act formally adopts the current low-income taxpayer exception for the user fee and upfront partial payment with offer-in-compromise filings. The Act provides that these payments are not required for individual taxpayers with adjusted gross income in their most recent taxable year that does not exceed 250 percent of the applicable poverty level determined by the Secretary.

Subtitle C – Sensible Enforcement

Seizure requirements for structuring transactions. Section 5324 of Title 31, United States Code ("Code"), prohibits structuring cash and currency transactions involving financial institutions to evade reporting and recordkeeping requirements. The Act provides that property may only be seized by the IRS for a claimed violation of § 5324 if the property to be seized was derived from an illegal source or the funds were structured for the purpose of concealing a violation of a criminal law or regulation other than § 5324.

Exclusion of interest. The Act also amends the Code to provide that gross income shall not include any interest received from the federal government in connection with an action to recover property seized by the IRS pursuant to a claimed violation of § 5324.

Equitable relief from joint liability (innocent spouse relief). Effective for petitions or requests filed or pending on or after July 1, 2019, the standard of review for the Tax Court in equitable relief from joint liability cases shall be de novo and based upon both the administrative record as well as any newly discovered or previously unavailable evidence. The Tax Court is directed to consider all these facts and circumstances

in determining whether it is inequitable to hold the individual in question liable for any unpaid tax or deficiency when other categories of relief are not available. The Act allows taxpayers to request equitable relief with respect to an unpaid liability any time before the expiration of the period for IRS collection, or with respect to a paid liability during the period for filing a timely claim for refund or credit.

Third party summons. The Act provides that the IRS shall not issue a third party summons that does not identify the taxpayer, unless the information sought is narrowly tailored to information that pertains to the failure (or potential failure) of the person, group, or class of persons to comply with one or more identified provisions of the Code. The new summons limitation applies 45 days after enactment of the Act.

Private debt collection and special compliance personnel program. The Act excludes from private debt collection those taxpayers whose income is substantially from disability insurance benefits and those taxpayers whose adjusted gross income does not exceed 200 percent of the applicable poverty level. The Act requires that a qualified tax collection contract with a private debt collection agency must request full payment from a taxpayer of federal taxes due and, if such request cannot be met by the taxpayer, must offer the taxpayer an installment agreement providing for full payment of the taxes due during a period not to exceed seven years (replacing what was previously five years). The Act also changes the definition of inactive receivables eligible for collection under qualified tax collection contracts to those where at least two years has passed since assessment (replacing what was previously one-third of the applicable statute of limitation). The effective date for these provisions, except as otherwise specified in the Act, is after December 31, 2020; the Act does specify that the new seven-year maximum period for installment agreements is effective upon enactment of the Act.

Notice to taxpayer of IRS contact with third party. The Act provides that the IRS may not contact any person other than the taxpayer with respect to the determination or collection of a tax liability unless the contact occurs within a one-year period specified in a notice that informs the taxpayer third-party contacts are intended to be made. The notice must be provided to the taxpayer at least 45 days before the third-party contact period. The Act further provides that a third-party contact notice shall not be issued unless the IRS has an intent to contact third parties at the time the notice is issued. These provisions of the Act are effective after August 15, 2019.

Modified authority to issue designated summonses. The Act requires that the commissioner of the relevant operating division of the IRS and the chief counsel must review and provide written approval before issuing a designated summons (a summons issued to a corporation or a person in possession of the corporation's books and records). The written approval must state facts clearly establishing that the IRS has made reasonable requests for the information that is the subject of the summons and must be attached to the summons. These provisions of the Act are effective after August 15, 2019.

Limitation on release of documents to IRS contractors. The Act provides that the IRS cannot provide any books, papers, records, or other data to a contractor authorized under Code § 6103(n), except when the contractor requires such information for the sole purpose of providing expert evaluation and assistance to the IRS. These provisions of the Act are effective for all new and existing contracts on July 1, 2019.

Subtitle D – Organizational Modernization

Office of the National Taxpayer Advocate. The Act provides that, upon issuance of a National Taxpayer Advocate directive, the commissioner or a deputy commissioner has 90 days to modify, rescind, or ensure compliance with the directive. When modified or rescinded by a deputy commissioner, the advocate may appeal the directive to the commissioner, who shall either ensure compliance with the directive or provide the advocate with the reasons for upholding the modification or rescission. Congressional reporting is mandated when these provisions are not honored by the IRS. The Act also references reporting of the most serious taxpayer problems to Congress, and the advocate is directed to coordinate with the Treasury Inspector General for Tax Administration to ensure that research and study work by the advocate does not duplicate actions already undertaken or planned by that group.

Modernization of Organizational Structure. The Act requires that the IRS submit a comprehensive written plan to Congress for redesign of the IRS organization by September 30, 2020. The plan is required to ensure implementation of the Act, prioritize taxpayer services, streamline the structure of the IRS, combat cybersecurity and other threats, and address whether the IRS Criminal Investigation Division should report directly to the Commissioner of Internal Revenue.

Subtitle E – Other Provisions

Qualified return preparation programs and low-income taxpayer clinics. The Act directs the IRS to promote tax preparation through qualified return preparation programs (as defined in the Act). The IRS also is directed to provide taxpayers information regarding qualified return preparation programs receiving grants under the Act, as well as location and contact information for qualified low-income taxpayer clinics receiving funding under the Act. The IRS is also directed to provide at least 90 days' notice prior to proposed closure of a Taxpayer Assistance Center and identify relevant alternative sources of taxpayer assistance for taxpayers affected by such a proposed closure.

Seizure and sale of perishable goods. The Act strikes language from Code § 6336 regarding seizure and sale of property that may "become greatly reduced in price or value," effectively limiting seizure and sale authority under § 6336 primarily to perishable goods.

Whistleblower reforms. The Act allows the IRS to exchange information with whistleblowers to the extent such disclosure is necessary in obtaining information not otherwise reasonably available. The Act also requires that the IRS provide whistleblowers with notices regarding the status of investigations and the reasons for a determination of an award, provided that these disclosures are not required if the IRS determines that disclosure would seriously impair federal tax administration.

The Act also contains confidentiality provisions to protect taxpayer privacy of information provided to whistleblowers and provides anti-retaliation protections for IRS whistleblowers

Customer service information by phone. The Act

requires the IRS to provide helpful information to taxpayers placed on hold during a call to an IRS help line, including information about tax scams and how to report them as well as advice on how taxpayers can protect themselves from identity theft and tax scams.

Misdirected tax refund deposits. Within six months of enactment, the Act requires the IRS to prescribe regulations establishing procedures for reporting that a refund by electronic funds transfer was not transferred to a taxpayer's account, coordination with financial institutions regarding misdirected refunds, and delivery of the refund to the correct account of the taxpayer.

Title II – 21st Century IRS

This title of the Act includes provisions for cybersecurity and identity protection, development of information technology, expanded use of electronic systems, and related provisions on training. Please see the Act for the details in this title, which are beyond the scope of this article.

Title III – Miscellaneous Provisions

This title addresses reforms for laws governing IRS employees, including rehiring after misconduct and notification of unauthorized inspection or disclosure of return information. Title III also has provisions relating to exempt organizations, including mandatory e-filing and notice prior to revocation of status for failure to file returns. Please see the Act for the details regarding this title, which are beyond the scope of this article.

Conclusion

The Act makes a variety of changes to IRS organization and management, and has several changes affecting taxpayer rights. Some of these changes are minor modifications of existing law or IRS procedure, but others may have significant impact on the way practitioners and taxpayers interface with the IRS. Because of the variety and significance of the changes, the practical implementation of the Act may take a long period of time, even though many of the provisions were effective upon enactment on July 1, 2019.

Endnotes

1 Scott E. Vincent is the founding member of Vincent Law, LLC in Kansas City.

DISCIPLINARY ACTIONS

Disbarments

5/28/19 Steven V. Stenger
#45842
336 N. Forsyth
St. Louis, MO 63105

6/4/19 John Woodard Jr.
#35412
1001 E. Broadway, Ste. D
Monett, MO 65708

6/4/19 Mark Brian Moran
#36057
P.O. Box 314
Aviston, IL 62216

6/4/19 Robert B. Patterson
#23542
P.O. Box 682
Alexandria, VA 22313

7/9/19 William L. Miller Jr.
#42987
P.O. Box 336
Washington, MO 63090-0336

Suspensions

6/4/19 Jack B. Schiffman
#21551
P.O. Box 9336
Phoenix, AZ 85068-9336

6/4/19 Nancy J. Fisher
#62474
1658 E. Saint Louis
Springfield, MO 65802

6/25/19 Laura Lee Robinson
#41723
7129 Lake Dr.
Centreville, IL 62203

Reprimands

6/4/19 Jerome J. Dobson
#32099
5017 Washington Pl., Ste. 300, Fl. 3
St. Louis, MO 63108-1240

Probations

5/31/19 Sherrie Lynn Brady
#45705
P.O. Box 551
Blue Springs, MO 64014

6/4/19 Richard J. Magee
#29943
200 S. Hanley Rd., Ste. 500
St. Louis, MO 63105

6/4/19 John F. Washington
#53286
3115 S. Grand, Ste. 100
St. Louis, MO 63118

6/4/19 John Brian Loveless
#31609
380 S. Main St.
St. Clair, MO 63077

6/18/19 Roger C. Jones
#35415
601 S. Grant Ave.
Springfield, MO 65806

Reinstatements

4/30/19 James P. Barton Jr.
#34782
905 S. Odell Ave. #A
Marshall, MO 65340

5/1/19 Roland Sabeh Salloum
#62275
301 Clematis St., Ste. 204
West Palm Beach, FL 33401

6/4/19 Brian Stanley Witherspoon
#34505
5824 Waterman Blvd.
St. Louis, MO 63112

Completed Probation

4/22/19 Gregory David Williams
#32272
16533 North State Hwy. 5
Sunrise Beach, MO 65079

6/24/19 Brandon L. Williams
#55307
462 North Taylor, Ste. 105
St. Louis, MO 63108

NOTICES OF CORPORATE DISSOLUTION

Notice of Corporate Dissolution Rates: $1.25 per word for a member of The Missouri Bar; $2.00 for non-members. For purposes of the total word count, any element surrounded by spaces is considered to be a word. DO NOT SEND A CHECK with the notice. You will be invoiced in advance of publication, and all invoices must be paid prior to publication.

Copy must be received by February 20 (for March/April issue), April 20 (for May/June issue), June 20 (for July/August issue), August 20 (for September/October issue), October 20 (for November/December issue), and December 20 (for January/February issue).

Send notices by e-mail to ads@mobar.org.

NOTICE OF DISSOLUTION OF AGI-JACKSON MANOR, INC.

Effective February 6, 2019, AGI-Jackson Manor, Inc. (the "Company"), is dissolved. In accordance with Vernon's Annotated Missouri Statutes § 351.482, this notice is intended for entities and/or individuals with potential legal claims against the Company.

If you believe you have a claim against the Company, please mail a notice of claim to the Company at Attn: Cecil Harper, 1052 Highland Colony Pkwy., Ste. 100, Ridgeland, MS 39157, and include your name and address, the nature and details of the incident giving rise to the alleged claim, the date the incident allegedly occurred, any witness(es) to the alleged incident giving rise to the claim, any injuries and/or damages you allege arose out of the incident, and any other information that might be relevant to the Company in assessing such potential claims.

Any claim against the Company will be barred unless a proceeding to enforce the claim is commenced within two years after the publication of this notice.

NOTICE OF WINDING UP TO ALL CREDITORS OF AND CLAIMANTS AGAINST BARRY POINTE OFFICE PARK, LLC

On May 6, 2019, Barry Pointe Office Park, LLC, a Missouri limited liability company, filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State. The Notice of Winding Up was effective May 13, 2019.

Said company requests that all persons and organizations who have claims against it present them immediately by letter to the company at:

Barry Pointe Office Park, LLC

c/o BridgeBuilder Tax + Legal Services, P.A., Attn: Philip Growney

9325 Pflumm Rd., Lenexa, KS 66215

All claims must include the name and address of the claimant, the amount claimed, the basis for the claim, the date(s) on which the event(s) on which the claim is based occurred, the documentation of the claim, and a brief description of the nature of the debt or the basis for the claim.

NOTICE: Because of the dissolution of Barry Pointe Office Park, LLC, any claims against it will be barred unless a proceeding to enforce the claim is commenced within three years after the publication date of the three notices authorized by statute, whichever is published last.

NOTICE TO ALL CREDITORS OF AND CLAIMANTS AGAINST BEIMDIEK PROPERTIES, INC. F/K/A BEIMDIEK INSURANCE AGENCY, INC.

On June 12, 2019, Beimdiek Properties, Inc., a Missouri corporation ("Corporation"), was dissolved upon the filing of its Articles of Dissolution by Voluntary Action with the Missouri Secretary of State.

Said Corporation requests that all persons and organizations who have claims against it present them immediately by letter to the Corporation c/o Checkett & Pauly, PC, P.O. Box 409, Carthage, MO 64836, Attention: Sarah Kersh.

All claims must include (i) the name and address of the claimant, (ii) the amount claimed, (iii) the basis for the claim, (iv) the documentation of the claim, and (v) the date(s) of the event(s) on which the claim is based occurred.

Because of the dissolution of Beimdiek Properties, Inc., any claims against it will be barred unless a proceeding to enforce the claim is commenced within two years after the publication of this notice.

NOTICE OF CORPORATE DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST BERG EVENT SPACE, L.L.C.

On May 14, 2019, BERG EVENT SPACE, L.L.C., a Missouri limited liability company (the "Company"), filed its Articles of Termination for Limited Liability Company with the Missouri Secretary of State. Dissolution was effective on May 14, 2019.

All claims against the Company should be directed to the Company c/o Jean Maneke, Esq., The Maneke Law Group, L.C., 2345 Grand Blvd., Ste. 1600, Kansas City, MO 64108.

All claims must include: (1) the name and address of the claimant; (2) the amount claimed; (3) the basis for the claim; and (4) documentation of the claim. All claims against BERG EVENT SPACE, L.L.C., will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of this notice.

NOTICE OF WINDING UP FOR LIMITED LIABILITY COMPANY TO ALL CREDITORS OF AND CLAIMANTS AGAINST CJC CAPITAL INVESTMENTS, LLC

On May 14, 2019, CJC CAPITAL INVESTMENTS, LLC, a Missouri limited liability company, filed a Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State.

Persons with claims against the limited liability company should present them in accordance with the Notice of Winding Up. You must furnish your name, address, and telephone number together with the following: (i) amount of the claim; (ii) basis for the claim; and (iii) documentation of the claim.

Claims must be mailed to: Jayne D. Corley, The Corley Law Firm, P.C., 999 Executive Pkwy. Dr., Ste. 104, St. Louis, MO 63141.

A claim against the limited liability company will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of this notice.

NOTICE OF DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST ELITE FINANCIAL SERVICES, INC.

On June 17, 2019, Elite Financial Services, Inc., a Missouri corporation, filed its Articles of Dissolution by Voluntary Action with the Missouri Secretary of State. All claims against the corporation should be submitted in writing to James E. Ewan, 233 W. Walnut, Independence, MO 64050.

All claims must include: (1) the name and address of the claimant; (2) the amount claimed; (3) the date on which the claim arose; (4) the basis for the claim; and (5) documentation in support of the claim.

All claims against Elite Financial Services, Inc., will be barred unless a proceeding to enforce the claim is commenced within two years after the publication of this notice.

NOTICE OF WINDING UP OF LIMITED LIABILITY COMPANY TO ALL CREDITORS OF AND CLAIMANTS AGAINST GONNERMAN REINERT, LLC

On April 23, 2019, Gonnerman Reinert, LLC, a Missouri Limited Liability Company, filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State.

All claims against Gonnerman Reinert, LLC, should be submitted in writing to Mark A. Gonnerman, 525 Beauford Dr., St. Louis, MO 63122.

Each claim should include the following information: the name, address and telephone number of the claimant; the amount of the claim; a brief description of the nature of the debt, or the basis of the claim; the date(s) on which the claim accrued, or will accrue; and any documentation related to, or in support of, the claim.

All claims against Gonnerman Reinert, LLC, will be barred unless a proceeding to enforce such claim is commenced within three years after the publication date of this notice.

NOTICE OF WINDING UP TO ALL CREDITORS OF AND CLAIMANTS AGAINST HARTWIG GASCONADE FARMS, L.C.

On May 24, 2019, HARTWIG GASCONADE FARMS, L.C., a Missouri limited liability company, filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State. HARTWIG GASCONADE FARMS, L.C. requests that all persons and organizations who have claims against it present them immediately by letter to HARTWIG GASCONADE FARMS, L.C., c/o Carlson & Associates, L.C., 1901 W. 47th Place, Ste. 200, Westwood, Kansas 66205.

All claims must include the following information: (a) name and address of the claimant, (b) the amount claimed, (c) date on which the claim arose, (d) basis for the claim and documentation thereof, and (e) whether or not the claim was secured and, if so, the collateral used as security.

All claims against HARTWIG GASCONADE FARMS, L.C. will be barred unless a proceeding to enforce the claim is commenced within three years after the date of publication of this notice.

NOTICE OF WINDING UP AND DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST HAWTHORNE HOUSE, L.L.C.

On March 22, 2019, HAWTHORNE HOUSE, L.L.C. (hereinafter "the Company"), a Missouri limited liability company, filed a Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State.

Pursuant to Section 347.141 of the Missouri Limited Liability Company Act, persons with claims against the Company must furnish (1) the name, address, and telephone number of the Claimant; (2) the amount of the claim; (3) the basis for the claim; and (4) documentation of the claim, and mail the claim to: Michael A. Gould, 3401 NW 67th Ct., Kansas City, MO 64151.

A claim against the Company will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of this notice.

NOTICE OF WINDING UP AND DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST HAWTHORNE PROPERTY INVESTMENTS, L.L.C.

On April 16, 2019, Hawthorne Property Investments, L.L.C. (hereinafter "the Company"), a Missouri limited liability company, filed a Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State.

Pursuant to Section 347.141 of the Missouri Limited Liability Company Act, persons with claims against the Company must furnish (1) the name, address, and telephone number of the Claimant; (2) the amount of the claim; (3) the basis for the claim; and (4) documentation of the claim, and mail the claim to: Michael A. Gould, 3401 NW 67th Court, Kansas City, MO 64151.

A claim against the Company will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of this notice.

NOTICE OF DISSOLUTION OF JACKSON MANOR, LLC

On February 6, 2019, Jackson Manor, LLC (the "Company"), filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State. Dissolution was effective February 6, 2019.

If you believe you have a claim against the Company, please present them in accordance with the Notice of Winding Up filed with the Missouri Secretary of State by mailing a notice of claim to Jackson Manor, LLC, at Attn: Cecil Harper, 1052 Highland Colony Pkwy., Ste. 100, Ridgeland, MS 39157 and include: your name and address, the amount of the claim, the basis of the claim, and any documentation of the claim.

Any claim against the Company will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of this notice.

NOTICE OF WINDING UP AND TERMINATION OF LIBERTY SHOAL CREEK, LLC

On May 2, 2019, Liberty Shoal Creek, LLC (the "Company"), filed its Articles of Termination and Notice of Winding Up with the Missouri Secretary of State. The dissolution was effective May 2, 2019.

Any person having claims against Liberty Shoal Creek, LLC, should present them to Brett A. Weis, 203 W. 22nd St., Kearney, NE 68848. Such claims should include the amount, date, and description of items asked for on the claim.

Claims should be filed within three years of the third publication of the notice.

NOTICE OF CORPORATE DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST LIN-JO, INC.

On April 26, 2019, LIN-JO, INC., a Missouri corporation, filed its Articles of Dissolution by Voluntary Action with the Missouri Secretary of State. Dissolution was effective April 26, 2019.

All claims against the corporation should be sent to David L. Wieland, Wieland & Condry, LLC, 1548 E. Primrose, Springfield, MO 65804. Each claim should include the following: name, address, and telephone number of the claimant; amount of the claim; the date the claim accrued; and the basis of the claim and any documentation.

All claims against the corporation shall be barred unless a proceeding to enforce the claim is commenced within the two years after the date of this publication.

NOTICE OF WINDING UP FOR LIMITED LIABILITY COMPANY TO ALL CREDITORS OF AND CLAIMANTS AGAINST MY ETCHED LIFE, LLC

On April 25, 2019, My Etched Life, LLC, a Missouri limited liability company (the "Company"), filed its Notice of Winding Up for a Limited Liability Company with the Missouri Secretary of State.

All claims against the Company may be sent to My Etched Life, LLC C/O Teresa K. Soper, 1500 Ridgeway Dr., Liberty, MO 64068. Each claim must include the following:

(1) the claimant's name, address, and telephone number; (2) the amount of the claim; (3) the date on which the claim arose; (4) the basis for the claim; and (5) documentation in support of the claim.

A claim against the Company will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of this notice.

NOTICE OF WINDING UP TO ALL CREDITORS OF AND CLAIMANTS AGAINST M & T REAL ESTATE, LLC

On June 17, 2019, M & T REAL ESTATE, LLC, a Missouri limited liability company, filed Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State.

All claims against the limited liability company must be submitted in writing to Mr. Todd A. Gildehaus, 716 Crown Pointe Farms Dr., Defiance, MO 63341. All claims must include the name, address, and telephone number of the claimant; the amount of the claim; the date the claim arose; and a brief description of the basis for the claim.

All claims against the corporation will be barred unless a proceeding to enforce the claim is commenced within three years after the publication date of this notice.

NOTICE OF DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST NEOVOX GLOBAL, LLC

You are hereby notified that on June 19, 2019, NeoVox Global, LLC, a Missouri limited liability company ("LLC"), was dissolved upon the filing of its Articles of Termination for Limited Liability Company with the Missouri Secretary of State.

Said LLC requests that all persons and organizations who have claims against it present them immediately by letter to the LLC c/o Checkett & Pauly, P.C., P.O. Box 409, Carthage, MO 64836, Attention: Sarah Kersh. All claims must include (i) the name and address of the claimant; (ii) the amount claimed; (iii) the basis for the claim; (iv) the documentation of the claim; and (v) the date(s) of the event(s) on which the claim is based occurred.

Because of the termination of NeoVox Global, LLC, any claims against it will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of this notice.

NOTICE OF WINDING UP TO ALL CREDITORS OF AND CLAIMANTS AGAINST NEWCASTLE FINANCIAL LLC

Newcastle Financial LLC, a Missouri limited liability company (the "Company"), filed a Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State on May 28, 2019.

Pursuant to Section 347.141 of the Missouri Limited Liability Company Act, persons with claims against the Company should present them in accordance with such Notice of Winding Up.

In order to file a claim with the Company, you must first furnish the (i) name and address of claimant, (ii) amount of the claim, (iii) date on which the claim arose, (iv) basis for the claim, and (v) documentation of the claim.

Claims must be mailed to Matthew Fillo, 16600 Swingley Ridge Rd., Chesterfield, MO 63017-1706. All claims against the Company will be barred unless proceedings to enforce the claim are commenced within three years after the publication of the notices authorized by statute, whichever is published last.

NOTICE OF CORPORATE DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST NOB ASSOCIATES, INC.

On May 6, 2019, Nob Associates, Inc., filed its Articles of Dissolution by Voluntary Action with the Missouri Secretary of State. Dissolution was effective May 6, 2019.

All claims against the corporation should be sent in writing by mail to Stacee Cohn Bright, 7920 Ward Pkwy., Ste. 205, Kansas City, MO 64114. Each claim should include the name, address, and phone number of the claimant; the claim amount; basis of the claim; the date the claim arose; and documentation of the claim.

Claims against the corporation will be barred unless a proceeding to enforce the claim is commenced within two years after the publication of the last of the two notices authorized by law.

NOTICE OF DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST OM SHIV SAI, LLC

On May 10, 2019, OM SHIV SAI, LLC, a Missouri limited liability company, filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State.

All claims must include: the name, address, and telephone number of the claimant; the amount claimed; the basis of the claim; the date(s) on which the events occurred which gave rise to the claim; and any copies of any other supporting date. Claims should be in writing and mailed to: William Petrus, Petrus Law Office, LLC, P.O. Box 148, Mount Vernon, MO 65712.

Any claims against OM SHIV SAI, LLC, will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of this notice.

NOTICE OF CORPORATE DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST PAVILION MANAGING MEMBER, INC.

On May 31, 2019, Pavilion Managing Member, Inc., a Missouri corporation, filed its Articles of Dissolution by Voluntary Action with the Missouri Secretary of State. Dissolution was authorized on May 21, 2019.

Said corporation requests that all persons and organizations who have claims against it present them immediately by letter to the corporation at:

Pavilion Managing Member, Inc.
Attn: Mary Ann Mullenix
12474 S. 40 Dr.
St. Louis, MO 63141

or

Kristy Bourgeois, Esq.
Sandberg Phoenix & von Gontard, P.C.
600 Washington Ave. – 15th Floor
St. Louis, MO 63101

All claims must include the name and address of the claimant; the amount claimed; the basis for the claim; and the date(s) on which the event(s) on which the claim is based occurred.

NOTICE: Because of the dissolution of Pavilion Managing Member, Inc., any claims against it will be barred unless a proceeding to enforce the claim is commenced within two years after the publication date of the two notices authorized by statute, whichever is published last.

NOTICE OF DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST PRECISION ELECTRICAL SYSTEMS, INC.

On April 18, 2019, Precision Electrical Systems, Inc. filed its Articles of Dissolution by Voluntary Action with the Missouri Secretary of State. The dissolution was effective on April 18, 2019. You are hereby notified that if you believe you have a claim against said corporation, you must submit a summary in writing of the circumstances surrounding your claim to the corporation c/o Michael K. McVey, 15621 W. 87th St. #352, Lenexa, KS 66219.

The summary of your claim must include the following information:

1. The name, address, and telephone number of the claimant.
2. The amount of the claim.
3. The date on which the claim is based occurred.
4. A brief description of the nature of the debt or the basis for the claim.

All claims against corporation will be barred unless the proceeding to enforce the claim is commenced within two years after publication of this notice.

NOTICE OF DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST PRECLARUS MASTERY ACADEMY

On May 15, 2019, Preclarus Mastery Academy, a Missouri nonprofit corporation, filed its Articles of Dissolution by Voluntary Action for a Nonprofit Corporation with the Missouri Secretary of State. Dissolution was effective May 15, 2019.

Said nonprofit corporation requests that all persons and organizations with claims against it present them immediately by letter to: Danna McKitrick, P.C., 7701 Forsyth Blvd., Ste. 800, St. Louis, MO 63105.

All claims must include: the name and address of the claimant; the amount claimed; the basis for the claim; the date(s) on which the event(s) the claim is based occurred; and a brief description of the facts surrounding the claim.

Because of the dissolution of said nonprofit corporation, any claims against it will be barred unless a proceeding to enforce the claim is commenced within two years after the publication date of this notice.

NOTICE OF WINDING UP FOR LIMITED LIABILITY COMPANY TO ALL CREDITORS OF AND CLAIMANTS AGAINST PROVERBS 7:3, LLC

On April 25, 2019, Proverbs 7:3, LLC, a Missouri limited liability company (the "Company"), filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State.

All claims against the Company may be sent to Proverbs 7:3, LLC C/O Teresa K. Soper, 1500 Ridgeway Dr., Liberty, MO 64068. Each claim must include the following:

(1) the claimant's name, address, and telephone number; (2) the amount of the claim; (3) the date on which the claim arose; (4) the basis for the claim; and, (5) documentation in support of the claim.

A claim against the Company will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of this notice.

NOTICE OF DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST RECYCLED RUBBER ASPHALT PRODUCTS, LLC

On April 19, 2019, Recycled Rubber Asphalt Products, LLC, a Missouri limited liability company, filed a Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State. Dissolution was effective on April 18, 2018.

Said company requests that all persons and organizations who have claims against it present them immediately by letter to the company c/o Jeff Davison, 700 S. Riverside Rd., Ste. 200, St. Joseph, MO 64507.

All claims must include:

1) The name and address of the claimant;

2) The amount claimed;

3) The basis for the claim; and

4) The date(s) on which the event(s) on which the claim is based occurred.

NOTICE: Because of the dissolution of Recycled Rubber Asphalt Products, LLC, any claims against it will be barred unless a proceeding to enforce the claim is commenced within three years after the publication date of the notices authorized by statute, whichever is published last.

NOTICE OF CORPORATE DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST RONALD H. BERG, JR., AND SHERI L. STAMPER, L.L.C.

On May 14, 2019, Ronald H. Berg, Jr., and Sheri L. Stamper, L.L.C., a Missouri limited liability company (the "Company"), filed its Articles of Termination for Limited Liability Company with the Missouri Secretary of State. Dissolution was effective on May 14, 2019.

All claims against the Company should be directed to the Company c/o Jean Maneke, Esq., The Maneke Law Group, L.C., 2345 Grand Blvd., Ste. 1600, Kansas City, MO 64108.

All claims must include: (1) the name and address of the claimant; (2) the amount claimed; (3) the basis for the claim; and (4) documentation of the claim. All claims against Ronald H. Berg, Jr., and Sheri L. Stamper, L.L.C., will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of this notice.

NOTICE OF CORPORATE DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST S.O.T., LLC

On May 14, 2019, S.O.T., LLC, a Missouri limited liability company (the "Company"), filed its Articles of Termination for Limited Liability Company with the Missouri Secretary of State. Dissolution was effective on May 14, 2019.

All claims against the Company should be directed to the Company c/o Jean Maneke, Esq., The Maneke Law Group, L.C., 2345 Grand Blvd., Ste. 1600, Kansas City, MO 64108.

All claims must include: (1) the name and address of the claimant; (2) the amount claimed; (3) the basis for the claim; and (4) documentation of the claim. All claims against S.O.T., L.L.C., will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of this notice.

NOTICE OF CORPORATE DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST STAMPER/BERG 1534 McGEE LOT, L.L.C.

On May 14, 2019, Stamper/Berg 1534 McGee Lot, L.L.C., a Missouri limited liability company (the "Company"), filed its Articles of Termination with the Missouri Secretary of State. Dissolution was effective on May 14, 2019.

All claims against the Company should be directed to the Company c/o Jean Maneke, Esq., The Maneke Law Group, L.C., 2345 Grand Blvd., Ste. 1600, Kansas City, MO 64108.

All claims must include: (1) the name and address of the claimant; (2) the amount claimed; (3) the basis for the claim; and (4) documentation of the claim. All claims against Stamper/Berg 1534 McGee Lot, L.L.C., will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of this notice.

NOTICE OF DISSOLUTION TO ALL CREDITORS AND CLAIMANTS AGAINST THE WINDMILL GROUP, INC.

On May 29, 2019, The Windmill Group, Inc., filed its Dissolution by Voluntary Action with the Missouri Secretary of State.

All claims against the corporation should be submitted, in writing, to Michael B. Hunter, 4035 Central St., Kansas City, MO 64111.

All claims must include: (1) the name and address of the claimant; (2) the amount claimed; (3) the date on which the claim arose; (4) the basis for the claim; and (5) documentation in support of the claim.

All claims against The Windmill Group, Inc., will be barred unless a proceeding to enforce the claim is commenced within two years after the publication of this notice.

NOTICE OF WINDING UP OF LIMITED LIABILITY COMPANY TO ALL CREDITORS AND CLAIMANTS AGAINST UTILITY CONTRACTORS, L.L.C.

On March 19, 2019, Utility Contractors, L.L.C., a Missouri limited liability company (hereinafter the "Company"), filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State.

Any claims against the Company may be sent to: Bush & Patchett, L.L.C., Attn: Adam Patchett, 4240 Philips Farm Rd., Ste. 109, Columbia, MO, 65201. Each claim must include the following information: name, address, and telephone number of the claimant; amount of claim; date on which the claim arose; basis for the claim; and documentation in support of the claim.

All claims against the Company will be barred unless the proceeding to enforce the claim is commenced within three years after the publication of this notice.

Executive Summary

Continued from page 166

Each time disaster occurs, members of local bars, legal aid offices, and area attorneys come together to help those in need. As Johnston wrote, "Times like this define who we are. We are a great people. We demonstrate this every time something horrible happens to our neighbors. Together, we will help our neighbors get through this. On behalf of The Missouri Bar, our deepest gratitude to all our members who volunteer their expertise and make donations to those in need."

On our 75th anniversary, we salute each of you who have stepped forward to assist a neighbor during a time of crisis and disaster. You are a significant part of why we are proud to be Missouri lawyers. Unfortunately, help is still needed as recent floodwaters recede, and we also need to be ready when the next disaster strikes. If you would like to volunteer for the free Disaster Recovery Legal Assistance hotline, you can sign up online at www.mobar.org or contact Brett Rowles, our legal and community services coordinator, at 573-638-2242 or browles@mobar.org. You can also sign up to do pro bono your way through a virtual, walk-in clinic where Missouri lawyers answer non-criminal legal questions from low-income Missourians at a time and place that best fits your schedule. Go to Missouri.FreeLegalAnswers.org and click "Volunteer Attorney Registration" to get started. Thank you for all you do to continue our profession's legacy of service to Missouri citizens in need.

Endnote

1 Sebrina A. Barrett is executive director of The Missouri Bar.

Clarifications

An article appearing in the May-June issue of the *Journal* ("Learning, Serving, Leading: The Missouri Bar at 75") failed to clearly depict the differences between historical benefits and contemporary benefits for active duty military members.

Supreme Court of Missouri Rule 6.01 did waive enrollment fees for members of the armed forces until 1976. Currently, § 41.950(4), RSMo provides that a lawyer enrolled by the Supreme Court of Missouri who is called to active duty and whose enrollment fees come due while performing such military service may renew his or her membership within 60 days of completing such military service without penalty.

The pertinent language within the online version of the article (found at http://www.mobar.org/journal/mayjun2019/mobar75.htm) has been updated to read as follows:

"A Military Law Committee formed in 1967, shortly after the U.S. entered the Vietnam conflict. One of its main goals was to make sure active military lawyers knew their enrollment fees were waived, a benefit which continued through 1976. Today, state statute defers enrollment fees without penalty for those called to active duty within 60 days of completing such military service."

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In addition, an article in the same issue by Mary Beck and L. "Joanna" Beck Wilkinson ("Frozen Embryo Practice in Missouri") erroneously omitted edits made by the authors. An updated version of this article also appears online at http://www.mobar.org/journal/mayjun2019/pre-embryo.htm.

The Flag

Continued from page 171

"To conclude as Ms. Scholdberg argues would expand the duty a possessor owes a licensee in Missouri to include the duty to inspect to find dangerous conditions about which the possessor has reason to know, in direct contravention of *Wells.* 443 S.W.2d at 158…."[51]

"Though Ms. Scholdberg's evidence would likely have permitted her to survive summary judgment had Missouri adopted section 342 of the second Restatement of Torts, or had Ms. Scholdberg qualified as an invitee, neither scenario is applicable here. The trial court did not err in entering summary judgment in favor of Mr. Scholdberg."[52]

Endnotes

1 W. Dudley McCarter, a former president of The Missouri Bar, is a partner in the St. Louis law firm of Behr, McCarter & Potter, P.C.
2 *Irvin v. Palmer*, No. ED10636, 2019 WL 1997615 (May 7, 2019).
3 *Id.* at *1.
4 *Id.*
5 *Id.* at *2.
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.* at *3.
10 *Id.* at *4.
11 *Id.*
12 *Id.* at *5.
13 *Id.*
14 *Id.*
15 *Hogenmiller v. Mississippi Lime Co.*, No. ED107016, 2019 WL 1997612 (May 7, 2019).
16 *Id.*
17 *Id.* at *1.
18 *Id.*
19 *Id.* at *2.
20 *Id.* at *3.
21 *Id.*
22 *Id.* at *4.
23 *State ex rel. AJKJ, Inc. v. Hellman*, No. SC97461, 2019 WL 2347422 (June 4, 2019).
24 *Id.*
25 *Id.* at *1.
26 *Id.*
27 *Id.*
28 *Id.* at *2.
29 *Id.*
30 *Id.*
31 *Id.* at *3.
32 *Jungers v. Webster Electric Coop.*, No. SD35582, 2019 WL 2443146 (June 12, 2019).
33 *Id.*
34 *Id.* at *2.
35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.* at *3.
39 *Id.* at *4.
40 *Id.* at *5.
41 *Id.*
42 *Id.* at *6.
43 *Id.* at *7.
44 *Id.*
45 *Scholdberg v. Scholdberg*, No. WD81874, 2019 WL 2344263 (June 4, 2019).
46 *Id.* at *1.
47 *Id.*
48 *Id.*
49 *Id.* at *3
50 *Id.* at *4.
51 *Id.* at *5.
52 *Id.* at *7.

Protecting Retirement Assets from Creditors

Continued from page 175

Table 1: BR § 522(b)(3)(C) versus Section 10(f)

Does it Protect . . .	BR § 522(b)(3)(C)	Section 10(f)
Assets in Non-Bankruptcy Proceedings?	No	Yes
An Inherited IRA?	No	Yes
Traditional and Roth IRAs Without Monetary Limits?	No Limited under § 522(n), except for certain rollovers	Yes Unlimited in non-bankruptcy proceedings, unclear if limited by § 522(n) in bankruptcy proceedings[79]
NQDC Plans of State and Local Governments and Tax-Exempt Entities Under Code § 457?	Yes	No
Assets During a 60-Day Eligible Rollover Distribution Window?	Yes[80]	No
Assets Received Pursuant to a QDRO?	Maybe Not[81]	Yes

In a bankruptcy proceeding, a Missouri debtor can rely on either § 522(b)(3)(C) or § 10(f), whichever is more favorable.

Conclusions

We want to emphasize several important points. First, during a participant's life, ERISA provides the only guaranteed protection, subject to any applicable exceptions. For plans not protected by ERISA, a person can potentially be sued anywhere and be subject to any state's creditor protection laws (or potentially *no* state's laws in the case of SEPs, SIMPLE IRAs, and top hat plans).[82] State protections vary widely. Most states, for example, do not expressly protect inherited IRAs, and some barely protect retirement plans.[83]

Second, if creditor protection is important for the *beneficiaries* of a retirement account (which it always should be), then the account owner should name an irrevocable trust as the beneficiary of the retirement plan, as the law is much more settled – and debtor-friendly – in the trust area.[84] However, great care must be taken in drafting trusts to own retirement benefits to ensure favorable income tax consequences to the trust and its beneficiaries.[85]

Third, NQDC plans face the biggest challenges. In bankruptcy: (1) the right to payments from Code § 457 plans are fully protected by BR § 522(b)(3)(C) of the Bankruptcy Code; and (2) § 10(e) protects payments to the extent necessary for support. Outside of bankruptcy, it's not even clear that the limited protection of § 10(e) would apply to top hat plans, as § 10(e) might be preempted by ERISA.[86] To obtain complete protection (whether under ERISA or § 456.014), a NQDC plan would have to be funded by a trust.[87] While unusual, it is not unheard of.[88] This is a complex area that can lead to costly mistakes, however.[89]

Lastly, for individuals, the choice of what retirement plans or accounts to fund, or whether or where to rollover an account, should be carefully evaluated to determine the greatest potential to protect assets from creditors.

Endnotes

Keith A. Herman

Jeffrey A. Herman

1 Keith A. Herman is an officer in the Trusts & Estates Practice Group at Greensfelder, Hemker & Gale, P.C. in St. Louis and is a Fellow of the American College of Trust and Estate Counsel (ACTEC). Mr. Herman graduated from the University of Missouri-Columbia School of Law in 1999. Jeffrey A. Herman is an associate in the Employee Benefits Practice Group at Greensfelder, Hemker & Gale, P.C. He graduated from the Saint Louis University School of Law in 2010.

2 *Willie Sutton,* FBI.gov, https://www.fbi.gov/history/famous-cases/willie-sutton (last visited June 4, 2019).

3 ICI, Release: Quarterly Market Retirement Data – 4th Quarter 2018, https://www.ici.org/research/stats/retirement/ret_18_q4 (last visited June 17, 2019).

4 *See* page 175.

5 112 S. Ct. 2242 (1992).

6 29 U.S.C. § 1002(32).

7 *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017).

8 29 C.F.R. § 2510.3-3(b), (c). (It is not clear if a plan that covers only *joint owners* of a business [*e.g.*, physician shareholders in a professional medical corporation] is subject to ERISA or not. A majority of courts and the Department of Labor believe such plans *are* subject to ERISA. *See, e.g.*, Dep't of Labor Op. 76-67; *Melluish v. Provident Life & Acc. Ins. Co.*, No. 4:99-CV-144, 2001 WL 311243, at *3-4 (W.D. Mich. Feb. 26, 2001)).

9 29 C.F.R. § 2510.3-3(b), (c).

10 29 C.F.R. § 2510.3-2(d), (f).

11 *See* 29 U.S.C. § 1051.

12 Part 5 of ERISA contains the preemption clause, which provides that ERISA supersedes any state laws that relate to employee benefit plans subject to ERISA. *See* 29 U.S.C. § 1144. While the 6th Circuit has held that state creditor protection laws *were* preempted with respect to SEPs or SIMPLE IRAs, a district court held that such laws were *not* preempted. *See Lampkins v. Golden*, 28 F. App'x 409, 415 (6th Cir. 2002); *VFS Fin., Inc. v. Elias-Savion-Fox LLC*, 73 F. Supp. 3d 329, 341-48 (S.D. N.Y. 2014).

13 *See* page 175. There is no ERISA preemption of state creditor protection laws in bankruptcy, as the Bankruptcy Code requires the application of Missouri law, and ERISA does not preempt federal laws. *See* 29 U.S.C. § 1144(d).

14 *See, e.g.*, 5 U.S.C. § 8346 (civil service retirement); 22 U.S.C. § 4060(c) (foreign service retirement and disability); 38 U.S.C. § 1562(c) (veterans' benefits); 38 U.S.C. § 3101 (special pensions paid to winners of the Congressional Medal of Honor); 42 U.S.C. § 407 (Social Security); 45 U.S.C. § 231m(a) (Railroad Retirement Act).

15 *See, e.g.*, *Ferneau v. Armour & Co.*, 303 S.W.2d 161, 167 (Mo. App. E.D. 1957) ("the laws of Nebraska have no extraterritorial effect"); *Beneficial Fin. Co. of Houston, Tex. v. Yellow Transit Freight Lines, Inc.*, 450 S.W.2d 222, 227 (Mo. App. W.D. 1969).

16 *Beneficial Fin. Co. of Houston, Tex. v. Yellow Transit Freight Lines, Inc.*, 450 S.W.2d 222, 227 (Mo. App. W.D. 1969).

17 *Id.*

18 Note that § 273 of the Second Restatement of Conflict of Laws provides a different rule regarding whether creditors of a beneficiary can reach the beneficiary's interest in a trust of "movables" (*i.e.*, anything other than land). However, that rule only applies "to trusts created by way of gift . . . [and] does not deal with the use of trusts in business transactions, or with trusts created under a contract, such as in the case of a compromise or a contractual settlement on divorce or marriage." Restatement (Second) of Conflict of Laws 10 Intro. Note (1971).

19 Section 456.1-107, RSMo.

20 *See Commerce Bank, N.A. v. Bolander*, 239 P.3d 83, 95 (Kan. 2007) (holding that a choice-of-law clause pursuant to the UTC and/or the "most significant relationship" test support application of Kansas law, including exemptions to attachment).

21 403(b) plans are sometimes referred to as "tax-sheltered annuities" or "tax-deferred annuities," even though the assets can be held in annuity contracts, custodial accounts, or retirement income accounts. *See* Daniel J. Schwartz and Jeffrey A. Herman, *Funds, Fees, and Annuities –A Guide to 403(B) Investment Options*, 29 Tax'n Exempts 23, (2018) WL 1064716 (discussing 403(b) investment options and their differences).

22 Section 10(f) protects a person's right to receive "[a]ny money or assets, payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan, profit-sharing plan, health savings plan, or similar plan, including an inherited account or plan, that is qualified under §§ 401(a), 403(a), 403(b), 408, 408A or 409 of the Internal Revenue Code of 1986, as amended, whether such participant's or beneficiary's interest arises by inheritance, designation, appointment, or otherwise."

23 S.B. 100, 2013, 97th Gen. Assemb., Reg. Sess. (Mo. 2013).

24 *See*, *e.g*, Alaska Stat. § 09.39.017(a) (2018); Ariz. Rev. Stat. Ann. § 33–1126(B) (2019); Fla. Stat. § 222.21(c) (2019); Idaho Code Ann. § 55-1011 (2019); N.C. Gen. Stat. § 1C–1601(a)(9) (2018); Ohio Rev. Code. Ann. § 2329.66(A)(10)(e) (2019); S.C. Code Ann. § 15-41-30(A)(13) (2019); Tex. Prop. Code. Ann. § 42.0021(a) (2019). *See also* The American College of Trust and Estate Counsel, 50 State Inherited IRA Chart (Sep. 2018), *available at* https://www.actec.org/assets/1/6/50_STATE_INHERITED_IRA_CHART.pdf.

25 *See* § 513.430.1(10)(f), RSMo ("the interest of any and all alternate payees under a qualified domestic relations order shall be exempt from any and all claims of any creditor, other than the state of Missouri through its division of social services").

26 *See Lerbakken v. Sieloff and Associates, P.A.*, 590 B.R. 895 (B.A.P. 8th Cir. 2018); *In re Kizer*, 539 B.R. 316 (Bankr. E.D. Mich. 2015). *See also* Sandra D. Glazier, *Lerbakken v. Sieloff and Associates, P.A. – A Rose by Any Other Name May Not Smell As Sweet, Retirement Benefits Received Pursuant to a QDRO Are Not Entitled to Federal Bankruptcy Treatment,* LISI Asset Protection Plan. Newsl. #378 (Leimberg Information Services Inc.) January 2, 2019.

27 Section 456.014 reads: "A trust created as part of a stock bonus plan, nonpublic pension plan, disability or death benefit plan, profit-sharing plan, or retirement plan, for the exclusive benefit of employees to which contributions are made by an employer, or participant, or both, for the purpose of distributing to such participant the earnings or the principal, or both earnings and principal of the fund so held in trust, shall be deemed to be a spendthrift trust if the plan or trust includes a provision restraining the assignment, alienation, or other voluntary or involuntary transfer of the interest of a participant in the trust."

28 A Rabbi Trust holds assets only to pay benefits to participants (or their beneficiaries), but *subject to the claims of the employer's creditors*. *See* P.L.R. 8113107. As a result, it may not be "for the exclusive benefit of employees," as required by § 456.014 and similar rules elsewhere in ERISA and the Tax Code. *See, e.g*, 26 U.S.C. §§ 401(a), 457(g); Treas. Reg. 1.403(b)-8(d)(2)(iii); 29 U.S.C. §§ 1104(a)(1), 1103(c)(1). Unfunded NQDC plans under Code §§ 409A and 457 (except for governmental 457 plans, which are held in traditional trusts) may not qualify for protection.

29 *See, e.g*, §§ 105.662, RSMo (referring to "public pension funds"), 105.663, RSMo (referring to "each public retirement plan"), and 513.430.1(10)(e), RSMo ("nonpublic retirement plan").

30 Section 456.014's exclusive benefit rule raises another issue: whether a trust exclusively benefits employees if assets can be used to benefit an employee's *beneficiaries*. The answer must be yes. Otherwise, § 456.014 would provide virtually no protection at all, as nearly every retirement plan provides benefits to beneficiaries in the event of a participant's death.

31 *See* § 456.5-502.3, RSMo; Keith A. Herman, *Asset Protection Under the New Missouri Uniform Trust Code*, 62 J. Mo. B. 196 (2006).

32 The official comment to the Uniform Trust Code states that "[c]ommercial trusts . . . such as to pay a pension . . . are often subject to special-purpose legislation and case law, which in some respects displace the usual rules stated in this Code." Scope., Unif. Trust Code § 102 (citing John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165 (1997)).

33 For example, if a beneficiary contributes his or her own money to a trust (i.e., a "self-settled" trust), then there is no creditor protection if, at the time the trust became irrevocable, "[t]he settlor was one of a class of beneficiaries and retained a right to receive a specific portion of the income or principal of the trust that was determinable solely from the provisions of the trust instrument." Section 456.5-505.3, RSMo. *See also* Herman, *Asset Protection*, *supra* note 33.

34 Sections 456.1-103(16), 456.5-505.1, 456.5-505.6(1), RSMo.

35 Section 10(e) protects a person's right to receive "[a]ny payment under a stock bonus plan, pension plan, disability or death benefit plan, profit-sharing plan, nonpublic retirement plan or any plan described, defined, or established pursuant to section 456.014, … the person's right to a participant account in any deferred compensation program offered by the state of Missouri or any of its political subdivisions, or annuity or similar plan or contract on account of illness, disability, death, age or length of service, to the extent reasonably necessary for the support of such person and any dependent of such person."

36 *In re Guentert*, 206 B.R. 958 (Bankr. W.D. Mo. 1997).

37 *In re Wallace Howard Shields & Deborah Jo Shields*, No. 17-30321, 2018 WL 1363451, at *6 (Bankr. W.D. Mo. Mar. 15, 2018).

38 *See In re McCollum*, 287 B.R. 750 (Bankr. E.D. Mo. 2002).

39 *See* discussion at notes 10, 11, *supra*; *In re Wallace Howard Shields & Deborah Jo Shields*, No. 17-30321, 2018 WL 1363451, at *3 (Bankr. W.D. Mo. Mar. 15, 2018) (applying the provision to a NQDC plan governed by Code § 409A). Outside of bankruptcy, preemption remains a concern for top hat plans.

40 *See In re Wallace*, 2018 WL 1363451 at *3-5 ("The SERP required Wallace to work for SMB for a specified number of years and reach one of the several specified retirement ages before becoming eligible to receive the SERP payments. . . . The SERP satisfies the second requirement because it entitles Wallace to receive payments because of both his age and length of service").

41 *See* discussion at notes 10, 11, *supra*.

42 *See* Missouri Bankruptcy Practice (MoBar), § 3.55.

43 Section § 513.430.1(10)(a), RSMo.

44 Section 70.695, RSMo.

45 Sections 104.540, 104.1054, RSMo.

46 Section 71.207, RSMo.

47 Sections 86.190, 86.353, 86.1040, 86.1430, RSMo.

48 Sections 87.090, 87.365, 87.485, RSMo.

49 Sections 104.250, 104.1054, RSMo.

50 Sections 169.090, 169.587, RSMo.

51 *See also* Treas. Reg. 1.401(a)-13(d)(1).

52 29 U.S.C. § 1056(d).

53 Sections 456.014, 513.430.1(10)(e), 513.430.1(10)(f), 513.430.2, RSMo.

54 Section 452.140 RSMo; *see also Pugh v. St. Louis Police Relief Ass'n*, 179 S.W.2d 927 (Mo. Ct. App. 1944) (Police Retirement System); *Davis v. Thompson*, 619 S.W.2d 754 (Mo. Ct. App. W.D. 1981) (Firefighters Pension System); *Patton v. Patton*, 573 S.W.2d 71 (Mo. Ct. App. S.D. 1978) (workers' compensation); *Rusk v. Rusk*, 859 S.W.2d 751, 753 (Mo. Ct. App. E.D. 1993) (Public School Retirement System). Although seemingly consistent in their favorable treatment of QDROs, § 452.140 may conflict with Sections 10(e) and 456.014, as those exceptions only apply to QDROs issued in a proceeding for divorce, legal separation, or the disposition of property following a divorce; the statutes do not reference orders for child support issued in other proceedings. Those more specific statutes may supersede the language of § 452.140 and prevent certain child support orders from being enforced against retirement plans or accounts. *See Smith v. Missouri Local Gov't Employees Ret. Sys.*, 235 S.W.3d 578, 582 (Mo. Ct. App. W.D. 2007) (claim for spousal support under § 452.140 was not permitted pursuant to § 70.695, which only permits child support claims – not maintenance – under MOLAGERS).

55 *See* § 428.024, RSMo.

56 Sections 513.425, 513.465, RSMo; *State ex rel. & to Use of Macke v. Randolph*, 186 S.W. 590, 592 (Mo. Ct. App. S.D. 1916).

57 26 U.S.C. § 6321; *United States v. National Bank of Commerce*, 472 U.S. 713 (1985).

58 26 U.S.C. § 6334; *In re Jacobs*, 147 B.R. 106 (Bankr. W.D. Pa. 1992).

59 *See In re Barbier*, 896 F.2d 377 (9th Cir. 1990); *United States v. Rodgers*, 461 U.S. 677 (1983); 29 U.S.C. § 1144(d); Treas. Reg. 1.401(a)-13(b)(2).

60 *In re Connor*, 27 F.3d 365 (9th Cir. 1994); *In re Wesche*, 193 BR 76 (Bankr. M.D. Fla. 1996).

61 18 U.S.C. §§ 3663A(a)(1), (c)(1)(A), (c)(1)(B).

62 Section 3613(c).

63 *See United States v. DeCay*, 620 F.3d 534 (5th Cir. 2010); *United States v. Irving*, 452 F.3d 110, 126 (2d Cir .2003); *United States v. Lazorwitz*, 411 F.Supp.2d 634, 637 (E.D. N.C. 2005) (holding that "neither ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1), nor the anti-alienation provision in the Internal Revenue Code, 26 U.S.C. § 401(a)(13), provide a bar to the garnishment of a qualified pension plan").

64 This area of law is complex, and even federal courts can get it wrong. The U.S. Bankruptcy Court for the Eastern District of Missouri, for example, held that ERISA prevented a SEP IRA from becoming part of the bankruptcy estate, which is incorrect. The court completely missed the fact that SEP IRAs are exempt from ERISA's anti-alienation clause. *In re Mehra*, 166 B.R. 393, 396 (Bankr. E.D. Mo. 1994). *Mehra* is critically flawed on this point and should not be relied on.

65 *See, e.g*, *In re Adams*, 302 BR 535 (6th Cir. BAP 2003); *Orr v. Yuhas (In re Yuhas)*, 104 F.3d 612 (3rd Cir. 1997).

66 *See* 29 U.S.C. § 1103(b); 29 C.F.R. § 2550.403b-1; *see also* note 23, *supra*.

67 *See, e.g*, *In re Laher*, 496 F.3d 279 (3d Cir. 2007) (403(b) annuity was a trust under New York law); *In re Quinn*, 327 B.R. 818, 829 (Bankr. W.D. Mich. 2005) (403(b) annuity "functionally indistinguishable from a spendthrift trust"); *In re Gould*, 322 B.R. 741 (Bankr. W.D. Pa. 2005) (403(b) annuity).

68 *See* 11 U.S.C. §§ 522(d)(10)(E), 522(d)(12).

69 Section 522(b)(1).

70 Section 513.427, RSMo.

71 To determine if Missouri's exemptions apply, bankruptcy courts use the "730 day rule." Under this rule, a debtor can use Missouri's state law exemptions if he or she was domiciled in Missouri for the 730 days before the bankruptcy petition was filed or, otherwise, if the debtor was domiciled in Missouri for the 180 days before the 730-day period or "for a longer portion of such 180-day period than in any other place." 11 U.S.C. § 522(b)(3)(A). If this rule results in a debtor ineligible for any exemption, the debtor may elect to exempt property under § 522(d) of the Bankruptcy Code. § 522(b)(3).

72 *See also* 11 U.S.C. § 522(b)(4) (describing when retirement plans are deemed to satisfy such Code sections). The references to Code §§ 414 and 501(a) in § 522(b)(3)(C) are odd, as there are no "414 plans" or "501(a)" plans. Section 414 sets forth definitions and special rules but does not authorize the creation of plans. Likewise, § 501(a) simply describes tax-exempt entities and does not generally authorize the creation of plans. *But see* 26 U.S.C. § 501(c)(11) (local teachers' retirement fund associations).

73 *See Clark v. Rameker*, 134 S. Ct. 2242 (2014). It is not clear if *Rameker* would also apply to a surviving spouse who rolls the assets over into his or her own IRA.

74 *See supra* n. 28.

75 *See, e.g*., *In re Todd*, 585 B.R. 297 (Bankr. N.D. N.Y. 2018), aff'd sub nom. *Todd v. Endurance Am. Ins. Co.*, 596 B.R. 79 (N.D. N.Y. 2019); *In re Hamm*, 586 B.R. 745, 752 (Bankr. N.D. Ill. 2018).

76 11 U.S.C. § 522(n). An argument can be made that this also applies to rollovers from a governmental 457(b) plan pursuant to Treas. Reg. 1.457-7(b)(2).

77 As discussed in note 11, *supra*, state exemptions may still be applied to a SEP, a SIMPLE IRA, or a top hat plan in bankruptcy.

78 Section 522(b)(3)(C) is identical to § 522(d)(12), which is applicable in states that have not opted out of the federal bankruptcy exemptions.

79 *See also* H.B. 422, 99th Gen. Assemb., Reg. Sess. (Mo. 2017) (unsigned bill that would have added to Section 10(f): "The exemption amount for individual retirement arrangements shall be unlimited if allowed by federal law and otherwise limited to the maximum exemption allowed under federal law").

80 11 U.S.C. § 522(b)(4)(D)(i).

81 *See* note 28, *supra*.

82 *See* note 11, *supra*.

83 *See* note 26, *supra*.

84 *See* Herman, Asset Protection, *supra* note 33.

85 *See* Keith A. Herman, *How to Draft Trusts to Own Retirement Benefits*, 39 ACTEC L.J. 207 (2013).

86 *See* discussion at notes 10, 11, *supra*.

87 Funding a NQDC plan takes it out of the "top hat" plan exemption to Part 2 of ERISA.

88 *See, e.g*., P.L.R. 9548014; P.L.R. 9548015; P.L.R. 9031031.

89 In P.L.R. 9212019, for example, a poorly-designed plan and trust were potentially subject to the following taxes: (1) highly compensated participants were taxed on their vested accrued benefits; (2) non-highly compensated participants were taxed on the employer's contributions to the trust; (3) the trust was taxed separately on its income; (4) distributions from the trust were taxable in the year paid or made available, including amounts advanced to participants to pay taxes; and (5) distributions could be subject to an additional 10 percent tax penalty under Code § 72(q).

Are Your Trust Accounting Procedures Up to Speed? (A Checklist for Trust Accounting Practices)

Ever wonder if you are keeping your trust account in accordance with every provision of the Rules of Professional Conduct? The Office of Chief Disciplinary Counsel (OCDC) wants to help you protect your clients, reduce risks and avoid (often accidental) overdrafts by providing a self-audit. It is intended to help any firm or solo practitioner set up – and review – trust accounting policies and procedures. This 26-point checklist contains references to Supreme Court rules and comments, and may be downloaded for your law firm's use.

Questions in the checklist include:

4(a) Before any disbursements are made from my trust account, I confirm that:

A. I have reasonable cause to believe the funds deposited are both "collected" and "good funds." *Rule 4-1.15(a)(6) and Rule 1.15, Comment 5.*

B. I have talked with my banker and I understand the difference between "good funds," "cleared funds" and "available funds." *Rule 4-1.15, Comment 5.*

C. I have allowed a reasonable time to pass for the deposited funds to be actually collected and "good funds." *Rule 4-1.15(a)(6).*

D. I have verified the balance in the trust account.

6(c). All partners in my firm understand that each may be held responsible for ensuring the availability of trust accounting records. *Rule 4-1.15, Comment 12.*

7(a).As soon as my routine bank statements are received, I reconcile my trust account by carefully comparing these records:

- bank statements;
- related checks and deposit slips;
- all transactions in my account journal;
- transactions in each client's ledger; and
- explanations of transactions noted in correspondence, settlement sheets, etc. *Rule 4-1.15(a)(7); Comment 18.*

To obtain the self-audit, go to the websites for the OCDC or The Missouri Bar: www.mochiefcounsel.org/articles *or* www.mobar.org/lpmonline/practice

parties specifically request differently.[47] If you fail to specify the type of award you expect, you may be in for a surprise.

Next, you will need to decide whether to make an opening statement. Although opinions vary, my advice as both a former advocate and as a current arbitrator is this: Never waive or reserve your opening statement. Generally, arbitrators want to hear your opening immediately so they have an idea of what to expect as the hearing proceeds. With labor arbitration, the arbitrator usually comes into the hearing without any foreknowledge of the dispute and thus needs some context for the evidence the parties will present. Jury behavior research shows the party that makes the first strong opening statement gains a distinct advantage.[48]

If your opponent presents a strong opening statement but you reserve until the presentation of your case in chief, the arbitrator might view the initial evidence exclusively through the lens your opponent provided in opening statement, and you could allow the other side to control the narrative throughout a key part of the hearing.

The main goals of an opening statement are to: (1) Present your theme, bolstered by a clear picture of your evidence, including a brief description of the major events, actors, disputes, and contentions involved in the case; (2) arouse the arbitrator's interest in your case and in your theory; and (3) show the arbitrator – if you go second – that there is another side to the story.

Here is a bullet list of my suggestions for making a good opening statement:

• Be lively, but don't be too dramatic. Convey a sense of commitment and sincerity while avoiding impassioned pleas, emotional outbursts, or bombastic rants. There is little chance that such theatrics will help your cause before an arbitrator.

• Be prepared. Give your opening some thought. Don't wing it, but understand you probably don't need to write it down verbatim. You know your facts. Go with what you know. If you need notes, prepare a short keyword outline. If you do write out your opening, avoid reading it to the arbitrator.

• Be short and sweet. Get out the salient facts – the who, what, where, when, and why; tell the arbitrator what remedy you will request and then stop.

• Don't ignore bad facts or weaknesses in your case. Address them directly in your opening. Don't stick your head in the sand and pretend that there aren't any. Bring out these little problems while putting your spin on them.

• Don't over-state your case or over-promise what your evidence will show too aggressively. I say "too aggressively" advisedly because the jury behavior research suggests that taking some liberties with the evidence in opening statement can sway jurors to see evidence your way.[49] In other words, spinning the evidence can work if done in a reasonable way.

• Don't pander to, lecture, or patronize the arbitrator.

Several of these suggestions apply generally to all stages of arbitration advocacy. For instance, arbitrators are unlikely to be swayed by histrionics and are quite likely to respond negatively to pandering or similar behavior by an advocate. Similarly, arbitrators are experienced experts and have likely heard many previous cases. Thus, they will appreciate a well-honed and highly efficient presentation of evidence that has a high yield of wheat kernels and little chaff. So, spend time on the front end reducing your evidence to the essentials that present your facts in an interesting and compelling way. You will reap rewards for such skilled advocacy.

Formal rules of evidence do not apply in arbitration hearings.[50] But this fact should not lull you into a false sense of security or cause you to become lazy. Courts developed evidentiary rules in order to ensure that evidence is reliable and probative of the truth. Thus, you should heed those principles even if – as is likely – the arbitrator will permit the introduction of hearsay and irrelevant evidence. There is a difference between admitting evidence and relying on it. An arbitrator will only rely on hearsay if the record contains other evidence that buttresses the hearsay statement's reliability.[51] Moreover, the arbitrator will not rule for you if your case is based exclusively or even substantially on hearsay,[52] as hearsay declarations cannot be tested by cross-examination. If you must rely on hearsay, tell the arbitrator why the witness with direct knowledge of the facts is unavailable to testify and make sure that you introduce other reliable evidence that corroborates the hearsay.

Similarly, despite the fact that formal rules of evidence do not apply in arbitration, you may want to raise an objection from time to time. Although you should not pepper the record with objections, you may want to make well-placed objections if your opponent is relying too heavily on irrelevant evidence or hearsay testimony. These objections will highlight such deficiencies for the arbitrator.

At the conclusion of the evidence, you will need to decide whether to present a closing argument or to submit a brief. Although I have heard many arbitrators proclaim in seminars that briefs rarely influence their decisions, my experience in practice was inconsistent with such declarations. Writing a brief gives the advocate time to soak up the evidence and to mold that evidence into the most effective argument. On the other hand, if the facts and law are straightforward, a closing argument will get your client a final decision faster and with less expense. Ultimately, your decision about closings will depend on the circumstances of your case, what your opponent wants to do, and your skill set as an advocate – specifically whether you are better on paper or at a lectern. If the arbitrator asks for briefs, however, you would be well advised to comply with that request.

Conclusion

The key to effective arbitration advocacy is thorough preparation. Among other things, that means creating a clear, crisp record that contains all the evidence the arbitrator will need to adopt your theory of the case and to reject your opponent's theory. It also means presenting your evidence in an efficient, imaginative, and compelling way that will focus the arbitrator's attention on the facts necessary to decide the case in your client's favor.

Endnotes

Stephen Douglas Bonney

1 Stephen Douglas Bonney is a labor and employment arbitrator with offices in Kansas City, Missouri, and Seattle, Washington. From 2008 until 2018, he was the legal director of the American Civil Liberties Union of Kansas (formerly the ACLU of Kansas & Western Missouri). Before that, he spent nearly 25 years in private practice as a labor and employment lawyer, primarily representing union clients. Overall, he has more than 30 years of experience in litigation and arbitration.

2 J. Nobel Braden, *Recurring Problems in Grievance Arbitration in* Preparing & Presenting Arbitration Cases: Selected Papers From The 1954 Conf. On Arb. & Lab. Rel. at 28 (Inst. of Indus. Rel., Univ. of Calif., Berkeley), available at http://digitalassets.lib.berkeley.edu/irle/ucb/text/ir000516.pdf (last checked 10/16/18).

3 Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform,* 5 Ohio St. J. Disp. Resol. 231 (1990).

4 Thomas E. Carbonneau, *The Reception of Arbitration in United States Law,* 40 Me. L. Rev. 263, 266-68 (1988).

5 Frank D. Emerson, *History of Arbitration Practice and Law,* 19 Clev. St. L. Rev. 155, 161 (1970).

6 Katherine V. Stone, *Rustic Justice: Community and Coercion under the Federal Arbitration Act,* 77 N.C. L. Rev. 931, 985 (1999).

7 *AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011).

8 9 U.S.C. §§ 1-14.

9 Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law,* 2001 J. Disp. Resol. 1 (2001).

10 Timothy J. Heinsz, *Arbitration Law: Is There a RUAA in Missouri's Future?*, 57 J. Mo. B. 86, 90 (2001).

11 Sections 435.012 – 435.470, RSMo 2018.

12 Heinsz, 57 J. Mo. B. 86.

13 Section 32.200, RSMo 2018.

14 Section 34.058.3(4), RSMo 2018.

15 Section 50.032, RSMo 2018.

16 Section 226.095, RSMo 2018; *see also Murray v. Mo. Highways & Transp. Comm'n*, 37 S.W.3d 228 (Mo. banc 2001) (holding mandatory arbitration under § 226.095 is constitutional).

17 Section 226.096, RSMo 2018.

18 Section 290.250, RSMo 2018.

19 Section 290.350, RSMo 2018; *see also State ex rel. Burke v. Cervantes*, 423 S.W.2d 791 (Mo. 1968) (statute unconstitutional as to charter cities).

20 *Wilco v. Swan*, 346 U.S. 427, 435 (1953), *overruled*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

21 *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

22 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

23 *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

24 *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (statutory employment claims, such as under the Age Discrimination in Employment Act, are subject to arbitration); *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (upholding consumer arbitration agreement that included a class action waiver).

25 200 S. Ct., L. Ed. 2d 889 (May 21, 2018).

26 Michael A. Wolff, *Is There Life After* Concepcion*? State Courts, State Law, and the Mandate of Arbitration,* 56 St. Louis U. L.J. 1269, 1275 (2012).

27 Justin Arnold, *U.S. Supreme Court Reaffirms Favor for Arbitration*, Mo. Bus. (June 12, 2018), available at https://mobizmagazine.com/2018/06/12/us-supreme-court-reaffirms-favor-for-arbitration/ (last checked Oct. 5, 2018).

28 Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 Marq. L. Rev. 751 (2014).

29 *Id.* at 787. *See also* p. 788 for additional statistics on how Missouri's appellate courts have treated arbitration agreements.

30 *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36 (Mo. 2017), and *State ex rel. Reg'l Convention & Sports Complex Auth. v. Burton*, 533 S.W.3d 223 (Mo. 2017).

31 *State ex rel. Newberry v. Jackson*, No. SC96985 and 96986, 2019 WL 2181859 (May 21, 2019); *Soars v. Easter Seals Midwest*, SC97018, 563 S.W.3d 111 (Mo. banc 2018).

32 *See Soars,* 563 S.W.3d 111.

33 *See Newberry,* 2019 WL 2181859.

34 *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013).

35 *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).

36 John B. Lauritzen, *The Preparation of Arbitration Cases,* Preparing & Presenting Arbitration Cases: Selected Papers from the 1954 Conf. on Arb. & Lab. Rel. at 9 (Inst. of Indus. Rel., Univ. of Calif., Berkeley), available online at http://digital-assets.lib.berkeley.edu/irle/ucb/text/ir000516.pdf (last checked 10/16/18).

37 29 C.F.R. §1404.7(C)7 ("Procedures for Arbitration Services") and § 1404.16(D) ("Expedited Arbitration"); AAA Arbitration Rules and Mediation Procedures (Rules Amended and Effective November 1, 2009), available at adr.org/employment.

38 *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960).

39 9 U.S.C. § 10

40 *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968).

41 29 C.F.R. § 1404.11(b) (2019).; AAA Lab. Arb. R. 10, 11, & 12 (2013).

42 AAA Emp. Arb. R. 10 (2009).

43 Restatement (Third) of the Law Governing Lawyers, § 116, comment b.

44 Mo. S. Ct. R. 4-3.4(b).

45 *Geders v U.S.*, 425 U.S. 80, 90 n.3 (1976).

46 *In re Storment*, 873 S.W.2d 227, 230 (Mo. banc 1994) (lawyer disbarred for advising client to deny his actions).

47 *See, e.g.*, AAA Constr. Arb. R. & Med. Proc., Rule 47(b) (2015) ("The parties may request a specific form of award, including a reasoned opinion, an abbreviated opinion, findings of fact, or conclusions of law").

48 T. Pyszczynski & L. Wrightsman, *The Effects of Opening Statements on Mock Jurors' Verdicts in a Simulated Criminal Trial,* 11 J. of Applied Soc. Psychol. 301, 309 (1981). *See also* G. Wells, P. Miene, & L. Wrightsman, *The Timing of the Defense Opening Statements: Don't Wait Until the Evidence is In,* 15 J. of Applied Soc. Psychol. 758, 769 (1985) (waiving or delaying opening statement disadvantages the litigant, but content of opening may be less important than timing).

49 T. Pyszczynski, J. Greenberg, D. Mack, & L. Wrightsman, *Opening Statements in a Jury Trial: The Effect of Promising More than the Evidence Can Show,* 11 J. of Applied Soc. Psychol. 434-444 (1981).

50 *See, e.g.*, AAA Emp. Arb. R. and Med. Proc., Rule 30: "The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary"; JAMS Comprehensive Arb. Rules, Rule 22(d): "Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. . . . The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence" (2014); FINRA Code of Arb. Proc. – 10300, Rule 10323, Evidence: "The arbitrators shall determine the materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence."

51 Edgar A. Jones, Jr., *Evidentiary Concepts in Labor Arbitration: Some Modern Variations of Ancient Legal Themes,* 13 UCLA L. Rev. 1241, 1278 (1966) ("Unless corroborated by truth-tending circumstances in the environment in which it is uttered, [hearsay] is unreliable evidence and should be received with mounting skepticism of its probative value the more removed and filtered it appears to be"). *See also Bamberger's*, 59 Lab. Arb. Rep. (BNA) 879, 882 (Glushien, 1972) ("Some kinds of hearsay no doubt are more compelling than others and carry a certain degree of probability. But in all or substantially all cases which the arbitrator can envisage, there must be apart from the hearsay a core of competent, reliable and credible evidence which the hearsay corroborates.").

52 *See, e.g., Pipe Coupling Manufactures, Inc.*, 68-1 Lab. Arb. Awards (CCH) 8088 (McDermott, 1967) (suspension of employee rescinded where no evidence other than hearsay advanced; vagueness and inconclusiveness of such evidence requires that it be supported by other evidence).

by means of modification.[64] There are several means to do this under the statute and regulations. A few examples include:

(a) A modification for the reviewed year partners filing amended tax returns taking into account (and paying for) the partnership adjustments;[65]

(b) A modification for reviewed year partners using an alternative to amended returns, called the "pull-in" procedure, wherein the partners pay applicable taxes, penalties, interest, etc. by agreeing to adjust tax attributes and provide information in lieu of amended returns;[66] and

(c) A modification to the tax rate applied in the imputed underpayment in cases of C corporation partners or individual partners with partnership capital gain or qualified dividend income.[67]

Generally, modifications must be requested by the partnership representative within 270 days of the date the IRS mails the NOPPA, unless extended by the IRS.[68] Modification procedures may be of limited value where the reviewed year partners are unenthusiastic about filing amended returns, using the pull-in procedure, or paying additional taxes, penalties, and interest, and where no other modification avenues exist under the circumstances.

Push-Out of Imputed Underpayment. The partnership may elect to "push out" the imputed underpayment to the reviewed year partners.[69] That means reviewed year partners will be liable for the imputed underpayment (or its equivalent) and associated penalties and interest, instead of the partnership entity.[70] To make the election, the partnership representative must file completed and signed IRS forms within 45 days of the date the IRS mails the FPA, and the partnership must seasonably send appropriate statements of adjustments to the reviewed year partners and the IRS, i.e., within 60 days of when the partnership adjustments become final.[71]

Mechanically, the "push-out" adjusts the tax bill for the partner in the year in which the statements are sent, roughly by re-computing the amount of tax owed by the partner in the reviewed year (and other years in which tax attributes are affected) as if his or her partnership adjustments had been properly taken into account, and subtracting the actual tax reported.[72] Penalties and interest apply and the applicability of penalties is determined at the partnership level; however, the calculation of the penalty and interest for each partner is determined at the partner level, and penalty defenses may apply.[73]

At first blush, the "push-out" might seem like the ideal solution because the reviewed year partners will bear the tax burden as finally determined. However, bear in mind these drawbacks:

(a) The push-out must be made within 45 days of the FPA and there is no extension date for a late filing, even if, for example, the partnership representative becomes incapacitated before a replacement can be made.

(b) The push-out must be made by the partnership representative, who may be a reviewed year partner but not a partner at the time of the FPA. In this case, he or she could have a selfish incentive not to push out the tax liability to himself or herself but let the partnership entity bear the tax.

(c) The reviewed year partners have no ability to contest the push-out amounts shown in the statements, and the partnership representative may not be willing to go to court, especially if he or she is not also a reviewed year partner or if his or her tax is *de minimis*.[74]

(d) There is no ability for reviewed year partners to remove and replace the partnership representative unless it is approved by the partnership at the time of or after the notice of examination or the notice of administrative proceeding. Additionally, there may be a delayed removal beyond the 45-day time limit even if the partnership representative is conflicted.[75]

In summary, the built-in procedures may work in given circumstances from time to time, but should not be relied on when a practitioner drafts documents or otherwise plans for future partnership taxes. Instead, the practitioner should consider contractual remedies first and only fall back on the built-in procedures when it is possible and more desirable to achieve the intended result or avoid partner litigation.

Possible Relief Provisions in Partnership-Related Agreements/Contractual Remedies

No doubt the BBA procedures will evolve as new legislation, regulations, IRS rulings, and case law come about. In any event, practitioners should consider taking remedial steps in partnership entity documentation to avoid or reduce the chances for partner and partnership representative conflicts while the mechanisms of the BBA procedures are clarified. Practitioners may also want to consider the circumstances of each partnership entity before inserting standard or boilerplate language. And, of course, as new law appears, the agreements can occasionally be updated.

As practitioners become more familiar with the BBA procedures, they can consider these examples of possible contractual provisions:

1. Rules for the selection and removal of the partnership representative, for example, upon majority vote of the partners or as selected by the L.L.C. manager, and mandatory use of third-party partnership representatives to avoid potential conflicts of interest;

2. "Safe harbor" or *de minimis* rules for the partnership representative's conduct in such areas as pre-approved dollar amounts for IRS settlements or professional fees, i.e. without prior partnership consent, or even mandatory partnership entity payments for the benefit of passive investors, and perhaps tax reserves for such purposes;

3. Requirements for the partnership representative to obtain pre-approval of the manager or partners in the selection and payment of counsel, accountants and experts, any communication with the IRS, any settlement above the safe-harbor amount, and for any extension of the applicable statute of limitations;

4. Compensation, confidentiality, exculpation, fiduciary, and indemnification provisions for the partnership representative;

5. Requirements for the partnership representative to include the manager and perhaps other partners as part of strategic decision-making with counsel (subject to attorney/client privilege considerations) and to provide all IRS notices and periodic status updates to management;

6. Rules for the "push-out" election, e.g. mandatory push-out unless the imputed underpayment is at or below the safe-harbor amount for partnership-level IRS settlement;

7. Requirements that the partnership representative obtain

manager or partnership approval before engaging in litigation with the IRS, and perhaps for reviewed year partner approval and indemnification of the partnership representative for legal expenses and costs where the push-out has been elected;

8. Mandatory cooperation of reviewed year partners in filing and seasonably notifying the partnership representative of amended returns or using the "pull-in" option for modification of the imputed underpayment, and for other pertinent information (e.g., tax status as a C corporation for the reviewed years);

9. Mandatory cooperation of the partnership to provide reviewed year partners information, not only as mandated for the push-out but for filing amended returns or the pull-in under circumstances where the push-out is not viable;

10. Liquidated damage provisions for partnership representative misconduct, such as gross negligence or malfeasance;

11. Reviewed year partner indemnification provisions to the partnership or the last partners before the partnership's termination, if, for example, the push-out or pull-in is not available, at least for imputed payments above the safe-harbor amount;

12. Restrictions on transfer so that the partnership may elect out of the BBA procedures; and

13. Automatic indemnity provisions requiring a partner who sells his interest to another partner or a third party to indemnify the buying partner for any taxes directly or indirectly paid in connection with reviewed and related years during which the selling partner was a partner.

Part IV: Examples and Conclusion

Examples

Here's how the BBA procedures might work out in practical terms by looking at some examples.

Example 1. Ella, Bella, and Stella form EBS, L.L.C. on January 1, 2017 ("EBS"). Ella is an individual, Bella is a domestic C corporation (wholly owned by Bella, an individual), and Stella is the trustee of a revocable trust. EBS is taxed as a partnership with calendar tax year reporting.

Ella, Bella, and Stella contribute equally to EBS and each has an equal share of EBS interests (i.e., profits, losses, etc. are divided equally). EBS is not eligible to elect out of the BBA rules because Stella has transferred her member interest to a revocable trust for estate planning purposes. Ella is appointed as the partnership representative on the IRS 1065 partnership tax return for 2018 as filed in 2019, and, in accordance with regulations, no election out of the BBA procedures is made. However, the operating agreement is not updated to include provisions for BBA procedures.

In 2020, there is a falling out among the EBS members, and Ella is asked to leave. She sells her interest in equal shares to Bella and Stella, at fire-sale prices. Later that same year, the IRS audits the 2018 partnership return and finds that $300,000 of ordinary income was not reported, resulting in an imputed underpayment of $111,000 ($300,000 x 37 percent) and penalties and interest of $30,000.

Ella is the partnership representative under BBA procedures, even though she is no longer a member. Due to an ongoing dispute between Bella and Stella, Ella is not replaced as partnership representative before she settles with the IRS for the amount in the FPA. Ella does not elect the push-out inasmuch as Ella is a reviewed year partner and would otherwise bear an equal share of the tax bill personally. Moreover, Ella does not attempt to modify the imputed underpayment, even though Bella was a C corporation during the 2018 reviewed year and hence subject to a lower tax rate in 2018 (21 percent).

EBS and its members are bound by the determinations of Ella for BBA tax purposes and have no appeal rights to any court to litigate the tax bill. Hence, under BBA procedures, EBS must pay the IRS the full $141,000, effectively borne by Bella and Stella. If EBS has insufficient funds to pay the $141,000 in full, the IRS may assess Bella and Stella personally for the balance, in equal shares. Ella pays nothing and has the last laugh until the matter is litigated in state court; even so, there are no contractual remedies for Bella and Stella, so Ella may be victorious.

Example 2. The facts are the same as in Example 1, except the IRS determines that EBS has sufficient equity in some real estate to cover the $141,000 due. They file a notice of federal tax lien on the property before proceeding against Bella and Stella. The real estate is worth $600,000 with a pre-existing bank mortgage of $400,000. The bank forecloses on the real estate and sells it for $475,000, paying off the mortgage and the IRS to the extent of $45,000, after costs. The IRS will personally assess Bella and Stella for the balance owed ($96,000) in proportion to their membership interests, or $48,000 each. Once again, Ella pays nothing.

Example 3. The facts are the same as in Example 1, except that Ella sells her membership interest to third party Della, an individual. EBS pays the IRS in full, meaning that Della has indirectly paid Ella's tax bill to the extent of about $46,953 (33 1/3 percent x $141,000). If EBS can only pay $100,000, the IRS can assess Della personally for her share of the balance owed or $13,653 (33 1/3 percent x $41,000).

Example 4. The facts are the same as in Example 1, except that before the IRS settles with Ella, Bella and Stella replace Ella with Stella as partnership representative. Moreover, Stella agrees with the IRS to allocate the entire imputed underpayment, penalties, and interest to Ella and Bella and uses the push-out, with the result that neither EBS nor Stella bear any portion of the tax bill.

Example 5. The facts are the same as in Example 1, except that the EBS operating agreement has been modified for the BBA procedures such that the partnership representative is personally liable in the event there is no push-out. If the push-out is not viable, the reviewed year partners must reimburse or indemnify EBS and adjustment year partners for the reviewed year partners' respective shares of any imputed underpayment, penalties, and interest. As a result, EBS and perhaps Bella and Stella must pay the IRS. However, they have the contractual right to sue Ella in state court for breach of contract and for indemnity.

Conclusion

The BBA procedures represent a sea change in partnership taxation, not only as to audits and collections, but as to a very real and practical possibility of litigation among partnership constituencies outside of the taxation arena. Practitioners should review existing and new partnership, L.L.C. operating, or other agreements in conjunction with BBA rules and determine the best means of avoiding or reducing conflicts for each partnership client and its constituencies. Alternatively, where appropriate, the practitioner may want to review the possibility of S corporation (or even C corporation) status to avoid such conflicts in the first place.

Endnotes

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2 *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), aff'd, 293 U.S. 465 (1935).

3 For unincorporated entities, s*ee generally* Treas. Reg. § 301.7701-1(a)(4) and Treas. Reg. § 301.7701-3(b)(1)(ii) (sole proprietorships), and I.R.C. § 761(a) and I.R.C. § 7701(a)(2), and Treas. Reg. § 301.7701-3(b)(1)(i) (partnerships). For corporations, s*ee generally* I.R.C. § 1361, I.R.C. § 1362, I.R.C. § 7701(a)(3), Treas. Reg. § 1.1361-1(b), and Treas. Reg. § 301.7701-2(b) (S corporations), and I.R.C. § 7701(a)(3), Treas. Reg. § 301.7701-2(b) and Treas. Reg. § 301.7701-3(a) (C or regular corporations). A detailed comparison and discussion of various tax and non-tax attributes, benefits, and detriments of these kinds of businesses is beyond the scope of this article.

4 *See* I.R.C. § 7701 and Treas. Reg. § 301.7701-3.

5 *See generally* I.R.C. §§ 701-761 ("Subtitle A, Subchapter 1, subchapter K – Partners and Partnerships"), as in effect for tax years beginning after 12/31/2017.

6 *See* I.R.C. § 701 and I.R.C. § 704 for the flow-through of partnership income, etc. and allocations thereof among the partners, and *see generally* I.R.C. §§ 6221-6234 ("Subtitle F, chapter 63, subchapter C – Tax Treatment of Partnership Items"), as in effect for tax years starting at and prior to 12/31/2017, for audit and collection procedures under prior law.

7 *Id.*

8 *See* I.R.C. § 6226, as in effect for partnership tax years starting at and prior to 12/31/2017, for jurisdiction and procedures in U.S. Tax Court, federal district court, and U.S. Court of Claims.

9 Bipartisan Budget Act of 2015, P.L. 114-74, as amended by P.L. 114-113 and P.L. 115-141, commonly known as the "BBA" for short, generally effective for partnership tax years beginning after 12/31/2017.

10 *See* I.R.C. § 6221(a), I.R.C. § 6225, and I.R.C. 6232, as in effect for partnership tax years beginning after 12/31/2017.

11 I.R.C. § 6223, as in effect for partnership tax years beginning after 12/31/2017.

12 Tax Equity and Fiscal Responsibility Act of 1982, P.L. 97-248, as amended.

13 *See generally* I.R.C. §§ 6201-6216 ("Subtitle F, chapter 63, subchapter A – In General, and subchapter B – Deficiency Procedures in the Case of Income, Estate, Gift and Certain Excise Taxes").

14 *See generally* NPRM 136118-15, filed with the Federal Register on June 14, 2017, TD 9, for a brief history.

15 *See generally* I.R.C. §§ 6221-6234 ("Subtitle F, chapter 63, subchapter C – Tax Treatment of Partnership Items"), and I.R.C. §§ 6240-6255 ("Subtitle F, chapter 63, subchapter D – Treatment of Electing Large Partnerships"), as in effect for tax years starting at and prior to 12/31/2017.

16 *See* NPRM 136118-15, *supra.*

17 *See* I.R.C. § 6221, as in effect for tax years starting at and prior to 12/31/2017, and the regulations thereunder. *See generally* I.R.C. § 704 and applicable regulations, under which items of income, loss etc. of the partnership entity are allocated among the partners on the basis of the partnership agreement, or the interests of the partners as determined by the IRS if the agreement does not have "substantial economic effect" as determined under applicable regulations. Those regulations are too numerous and complex to summarize here.

18 *See* I.R.C. § 6231, as in effect for tax years starting at and prior to 12/31/2017, and Treas. Reg. § 301.6231(a)(7)-1 and Treas. Reg. § 301.6231(a)(7)-2, as in effect for tax years starting at and prior to 12/31/2017, for procedures to designate the TMP. Note that under those procedures, the TMP must be either a general partner or a member-manager in an L.L.C.

19 *See generally* I.R.C. § 6223, I.R.C. § 6224, and I.R.C. § 6226, as in effect for tax years starting at and prior to 12/31/2017, and the regulations thereunder.

20 *Id.*

21 *See* I.R.C. § 6224(c), as in effect for tax years starting at and prior to 12/31/2017.

22 *See* I.R.C. § 6231(a)(6), as in effect for tax years starting at and prior to 12/31/2017, and Treas. Reg. § 301.6231(a)(6)-1, as in effect for tax years starting at and prior to 12/31/2017, with respect to computational adjustments on the partners' returns as a result of a TEFRA adjustment.

23 *See* I.R.C. § 6229, as in effect for partnership tax years starting at and prior to 12/31/2017, for applicable limitation periods. *See also* I.R.C. § 6235 for limitations under BBA procedures for tax years beginning after 12/31/2017.

24 *See* NPRM 136118-15, *supra*.

25 *Id.*

26 *See* U.S. Gov't Accountability Off., GAO-14-732, Large Partnerships: With Growing Number of Partnerships, IRS Needs to Improve Audit Efficiency, 13 (2014).

27 Bipartisan Budget Act of 2015, P.L. 114-74, as amended by P.L. 114-113 and P.L. 115-141.

28 *See* § 1101(g)(4) of P.L. 114-74 and Treas. Reg. 301.9100-22 (right to elect to apply the BBA procedures for tax years beginning after Nov. 2, 2015, and before Jan. 1, 2018).

29 *See* I.R.C. § 701 and I.R.C. § 6031.

30 *See* I.R.C. § 6221(b), as in effect for partnership years beginning after 12/31/2017, Treas. Reg. § 301.6221(b)-1, and discussion in Part III on an election out of the BBA for certain partnerships.

31 *See* I.R.C. § 6221(a) and I.R.C. § 6225, as in effect for partnership tax years starting after 12/31/2017.

32 *See generally* I.R.C. § 6241 as in effect for partnership tax years starting after 12/31/2017 and Treas. Reg. § 301.6241-1(a) for definitions including "reviewed year" under the BBA procedures.

33 *See* discussion on I.R.C. § 6226 in Part III for special additional rules where the tax liability is "pushed-out" to the reviewed year partners.

34 *See* I.R.C. § 6223(a) as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6223-1.

35 *See* Treas. Reg. § 301.6223-1 and Treas. Reg. § 301.6223-2.

36 *See* I.R.C. § 6231(a)(1) as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6231-1(a)(1).

37 I.R.C. § 6241(2)(A) as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6241-1(a)(6)(i).

38 I.R.C. § 6241(2)(B), as in effect for partnership tax years starting after 12/31/2017. Such items might include, for example, not only ordinary pass-thru income items, but items relating to the tax basis of a partnership interest (if related to an item required to be reflected on the partnership's tax return or in its records) or the partnership's basis in partnership property. *See* Joint Committee on Taxation, *Technical Explanation of the Revenue Provisions of the House Amendment to the Senate Amendment to H.R. 1625 (Rules Committee Print 115-66), JCX-6-18* (March 22, 2018), and Treas. Reg. § 301.6241-1(a)(6)(ii)-(vi).

39 *See* I.R.C. § 6225(a)(1) and I.R.C. § 6225(b)(1), as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6225-1.

40 *See* I.R.C. § 6225(b) as in effect for partnership tax years starting after 12/31/2017, Treas. Reg. § 301.6225-1.

41 *See* I.R.C. § 6225(b)(2), as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6225-1(b) and (c). *See also* I.R.C. § 704 and Treas. Reg. § 1.704-1(b) regarding proper allocation of partnership items among the partners.

42 *See* I.R.C. § 6225(a)(2), as in effect for partnership tax years starting after 12/31/2017, Treas. Reg. § 301.6225-3, and Treas. Reg. § 301.6225-1(f).

43 I.R.C. § 6231(a)(2) as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6231-1(a)(2).

44 *See* I.R.C. § 6225(c), as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6225-2, and discussion in Part III..

45 I.R.C. § 6231(a)(3) as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6231-1(a)(3).

46 I.R.C. § 6233, as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6233(a)-1, related interest and penalties for the reviewed year. *See also* Treas. Reg. § 301.6233(b)-1 for penalties and interest related to the adjustment year for the failure to pay an imputed underpayment after assessment by the due date.

47 Not all states will adopt procedures similar to the BBA procedures, so we will see what happens on a state-by-state basis. Some states have already adopted BBA procedures, *See* Cal. Rev. & Tax Code §18622.5, conforming California tax laws with the BBA, and W. Va. Code Ch. 11, Art. 21A *et seq.* (effective July 1, 2019, to same effect for West Virginia). *See also* Jerald David August, *Repeal of the TEFRA Entity Level Audit Rules Under the Bipartisan Budget Act of 2015: The Adoption of a New Paradigm for Assessing and Collecting Income Taxes from Partnerships*, J. of Tax Practice and Procedure, Aug-Sept.2016.

48 *See* I.R.C. § 6234 as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6234-1. *See also* I.R.C. § 6223(b), as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6223-2, stating the sole authority of the partnership representative to act on behalf of

and bind the partnership and partners under BBA procedures.

49 Assuming the partnership loses in court. *See* I.R.C. §6221(a), I.R.C. § 6225(a)(1), and I.R.C. § 6232, as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6232-1(a).

50 *See* I.R.C. § 6225(a)(1) and I.R.C. § 6232, as in effect for partnership tax years starting after 12/31/2017, Treas. Reg. § 301.6232-1(a), and Treas. Reg. § 301.6241-1(a)(1). The adjustment year can also occur in the year there is an administrative adjustment request under I.R.C. § 6227, as in effect for partnership tax years starting after 12/31/2017, not relevant for purposes of the analysis here.

51 *See* I.R.C. § 6232, and Treas. Reg. § 301.6232-1(b).

52 *See* Prop. Reg. § 301.6225-4 and Treas. Reg. § 301.6241-1(a)(10), and *see generally* Prop. Reg. 1.704-1(b)(1)(viii), and the proposed regulations cited therein. *See also* I.R.C. § 6226(b(3) for tax attribute changes in the case of the "push-out" discussed in Part III.

53 *See* I.R.C. § 6232(f). *See also* I.R.C. § 6232(f)(2) for rules on assessing partners that are themselves pass-thru entities, i.e., partnerships or S corporations. *See also* I.R.C. § 6226(b(4) and Treas. Reg. § 301.6226-3(e)(4) with respect to assessments against pass-thru entities in the case of the "push-out" discussed in Part III..

54 *See* I.R.C. § 6241(11) as in effect for partnership years beginning after 12/31/2017, giving the Treasury Department the ability to promulgate regulations as to special enforcement matters, e.g., jeopardy assessments and other rules for enforcement of the BBA procedures. As of press, these rules have yet to be written, though the IRS has announced there will be regulations forthcoming on matters unrelated to determinations of partners under I.R.C. § 6232(f), i.e., rules where the BBA may not be strictly applied and rules for partners that are qualified subchapter S subsidiaries ("QSUBS") electing out of the BBA. *See* IRS Notice 2019-6.

55 *See* I.R.C. § 6241(7) as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6241-3.

56 *See* I.R.C. § 6222 as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6222-1(b). *See also* Treas. Reg. § 301.6232-1(d) for mathematical or clerical assessments against a partnership entity.

57 *See* James R. Malone Jr., *All Partners are Small Partners: The Due Process Implications of the New Partnership Audit Regime*, J. of Tax Practice & Procedure, April, 2017.

58 *See*, e.g., T.D. 9844 (2018) in which the Treasury Department has issued final regulations for much of the BBA, but nonetheless has reserved several areas for future regulation. *See also* J. Leigh Griffith, *PASSTHROUGH PARTNER-TEFRA IS DEAD AND CPAR LIVES: The 2018 Partnership Audit and Collection Rules Under Proposed Regulations and Technical Corrections in the Consolidated Appropriations Act, 2018—Part III*, TAXES-The Tax Magazine (May, 2018), in which the author discusses several complex matters related to the BBA but not finally resolved.

59 *See* I.R.C. § 6221(b) as in effect for partnership tax years starting after 12/31/2017.

60 *See* I.R.C. § 6221(b)(1)(B) as in effect for partnership tax years starting after 12/31/2017, I.R.C. § 6031(b), and Treas. Reg. § 301.6221(b)-1(b)(2).

61 *See* I.R.C. § 6221(b)(1)(C), as in effect for partnership tax years starting after 12/31/2017 and Treas. Reg. § 301.6221(b)-1(b)(3).

62 *See* § 475.083, RSMo Supp. 2017, and Treas. Reg. § 301.6221(b)-1(b)(3)(ii)(E).

63 *See* Treas. Reg. § 301.6221(b)-1(b)(3)(ii)(B).

64 *See* I.R.C. § 6225(c), as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6225-2.

65 *See* I.R.C. § 6225(c)(2)(A), as in effect for partnership tax years starting after 12/31/2017, Treas. Reg. § 301.6225-2(b)(2)(i), and Proposed Reg. § 301.6225-2(d)(2).

66 *See* I.R.C. § 6225(c)(2)(B), as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6225-2(d)(2)(x). Under that regulation, technically the partnership provides the IRS with the information on behalf of each partner.

67 *See* I.R.C. § 6225(c)(4), as in effect for partnership tax years starting after 12/31/2017, Treas. Reg. § 301.6225-2(b)(3), and Treas. Reg. § 301.6225-2(d)(4).

68 I.R.C. § 6225(c)(7), as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6225-2(c)(3).

69 *See generally* I.R.C. § 6226, as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6226-1.

70 *See* I.R.C. § 6226(a) and (b), as in effect for partnership tax years starting after 12/31/2017, Treas. Reg. § 301.6226-1(b), and Treas. Reg. § 301.6226-3. *See also* I.R.C. § 6226(b(4) and Treas. Reg. § 301.6226-3(e) for rules on push-outs for partners that are themselves pass-thru entities, i.e., partnerships or S corporations, so-called tiered arrangements.

71 *See* I.R.C. § 6226(a), as in effect for partnership tax years starting after 12/31/2017, Treas. Reg. § 301.6226-1(c)(2) and Treas. Reg. § 301.6226-2. For purposes of determining when partnership adjustments become final for the 60-day period to send statements, partnership adjustments become final at the later of the date on which the time to file a court petition expires or the court decision becomes final, Treas. Reg. § 301.6226-2(b)(1).

72 *See* I.R.C. § 6226(b), as in effect for partnership tax years starting after 12/31/2017, and Treas. Reg. § 301.6226-3.

73 *See* I.R.C. § 6226(c), as in effect for partnership tax years starting after 12/31/2017, Treas. Reg. § 301.6226-3(c) (calculation of interest), and Treas. Reg. § 301.6226-3(d) (calculation of penalties and assertion of partner level defenses after payment of penalties). Note that payment of the penalty and claim for a refund are first required before the penalty will be abated. Treas. Reg. § 301.6226-3(d)(3).

74 *See* I.R.C. § 6222, I.R.C. § 6223, and I.R.C. § 6226(d), as in effect for partnership tax years starting after 12/31/2017; Treas. Reg. § 301.6226-1(e); and Treas. Reg. § 301.6223-2, as to the binding nature of the statements on the reviewed year partners and the sole right of the partnership representative to contest the IRS' determinations. *See also* Treas. Reg. § 301.6226-1(f) affirming the right of the partnership, through the partnership representative, to contest the FPA under I.R.C. § 6234, even after an election out.

75 *See* Treas. Reg. § 301.6223-1(e)(2).

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