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Opinions and positions stated in signed material are those of the authors and not necessarily those of The Missouri Bar or the JOURNAL. The material within this publication is presented as information for attorneys to use, in conjunction with other research they deem necessary, in the exercise of their independent judgment. The Missouri Bar does not provide legal or professional advice. The Editorial Board does not perform independent research on submitted articles.

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WHAT MAKES THE “BEST LAWYERS” THE “BEST”?  
(PART ONE OF A SIX-PART SERIES)

Morry S. Cole

What makes the best lawyers the best? Over the next year this column will examine this question we all have, which can have many different facets.

Some people say the best lawyers get the best results. We live in a results-oriented, what-have-you-done-for-me-lately world. Results matter! Many would rank lawyers among the best if they win, win often, and win big.

Some people say the best lawyers are the masterful researchers and writers. Clarity and persuasion in writing is important. Understanding, compiling, explaining, and arguing the law in a persuasive written format is key to being considered to be among the best lawyers.

Some people say the best lawyers are the deal makers – those who can bring parties together to close a win-win deal for all and further a synergistic result.

Some people say the best lawyers are the most articulate oral advocates. Oral advocacy is an art that is part talent, part gift, and part preparation. Only the best of the best speak with concise and persuasive clarity.

Some would say the lawyers who earn the most money are the best lawyers. They must be the best if clients pay that much for them.

Some would focus on the givers in our profession and identify them as the best. They would note that the many contributions by these attorneys – to both community and bar – esteem our profession and do much to promote the administration of justice.

Some would observe that the lawyers “in the trenches” are the best. Arguing detailed motions touching on constitutional rights makes a difference, for example, and protects our liberty at the most important level.

Suffice it to say, there are a lot of contributing factors to the perception that a lawyer is one of the “best.”

Now, having observed the above, stop… And think…

There is one commonality to every lawyer we know that is considered among the best—whether that person is a winner, a writer, a deal maker, an oral advocate, a rainmaker, a giver, or a deep-in-the-trenches lawyer:

*The best lawyers are generous with time.*

How many of the best work occasional weekends? How many of the best work past 5:00 p.m.? How many of the best spend extra time with clients? How many of the best ruminate on issues that are important to their clients—even when their minds should be elsewhere?

Many of our state’s best lawyers realize that being generous with time serves very important purposes; it improves your performance as an attorney and it improves the perception and functioning of our branch of government, the judiciary. Where do we see this “time generosity” in action? Look in any Missouri courthouse, at the judges and practitioners, and to our lawyer-legislators at the state Capitol.

When we look at our hard-working judges, we see dedicated and impartial arbiters who routinely stay at their courthouses late at night during jury deliberations or to prepare for the next day’s docket. They regularly call long dockets all morning and through lunch. They frequently draft orders, judgments, and opinions over weekends. And they find time to be active in our Bar. These efforts are examples of why Missouri courts are so well-regarded throughout the country.

Some of the finest examples of “time generosity” are found in Missouri practicing attorneys’ daily interactions. The practitioners in our courthouses can be seen huddling with clients, explaining the intricacies of weighty decisions. They routinely send an extra text to a client, or spend a few minutes visiting with the court clerk. They regularly do favors for opposing counsel, help a court reporter get equipment out to the car, or offer guidance to a confused *pro se* litigant. It is normal for practitioners to return phone calls at night or on weekends, to share their expertise by teaching a continuing legal education class, or to mentor a new lawyer. These actions by attorneys throughout our state esteem our profession. The “best” lawyers know these generous and kind acts build confidence in our lawyers, judges, and courts.

We also see “time generosity” in the efforts of our Missouri lawyer-legislators. Our lawyer-legislators routinely spend upwards of five months or more away from their families and their practices to serve their fellow Missourians in our state legislature. Without a doubt, their presence in the Capitol provides guidance and insight that helps ensure better drafting of legislation. In some instances, a lawyer provides direct knowledge of the law itself. At other times, he or she can still apply the legal skills learned in law school (critical thinking, reading and listening, applying the law to specific fact patterns, etc.) and the direct experience garnered from practice. Most importantly, a lawyer can promote awareness of the impact that a single misplaced comma or poorly chosen word might have on the life of every Missourian.

If we are inspired by these examples, we can take steps to be among the best lawyers in Missouri. Step one: Be generous with your time.

Endnotes

1 Morry S. Cole is an attorney with the St. Louis law firm of Gray, Ritter & Graham, PC.
Thank You
Mr. Cutler
for your
love & support
during my presidential year.
You make everything in my life
Good, Better, Best!

Love you,
Immediate Past President
Dana Tippin Cutler
EXECUTIVE SUMMARY

BAR FOUNDATION HONORS EXCEPTIONAL LAWYERS

H.A. “Skip” Walther

From time to time, the Executive Summary will feature contributions from the leaders of various entities and partners of The Missouri Bar.

This month’s column features a contribution from Columbia attorney H.A. “Skip” Walther, the new president of the Missouri Bar Foundation.

Sebrina Barrett
Executive Director

Imagine that you are looking to hire a new associate and several resumes are in a stack awaiting your attention. Your firm enjoys an excellent reputation, and you expect to find several very qualified applicants. You begin to make a list of unusual attributes in order to pare down the choices, and a few pop out. One applicant just received the Lon Hocker Award. Because you just moved to Missouri, you have no idea what that means. Another applicant landed the Spurgeon Smithson Award, and again, you are baffled. The last resume you see lists receipt of the W. Oliver Rasch Award, and your curiosity now overwhelms you. You set aside the hiring process to investigate the source of these awards, and what they mean.

It would certainly be the lucky firm that collected resumes containing these awards. All of them are annually bestowed by the Missouri Bar Foundation during the Annual Meeting of The Missouri Bar.

The Lon Hocker Award is given to trial attorneys under 40 years of age who excel at professionalism and ethical conduct, and who are able to balance zealousness, honor, courtesy, respect, quickness of wit, and meticulous preparation. The Foundation enlists the assistance of state and federal judges to screen and recommend awardees to the Foundation’s Board of Trustees. The identities of the judges are kept confidential to ensure that the selection process is fair, based on the merits of the candidates’ work, and free of outside influence. Mr. Hocker was a preeminent St. Louis trial attorney; his wife established this award, which includes a $750 stipend, in 1954.

The Spurgeon Smithson Award is typically given to a judge, a law professor and an attorney, each of whom must have rendered outstanding service to the increase and diffusion of justice. This award was created by Mr. Smithson – a respected Kansas City attorney – through a 1970 trust agreement, and the award is accompanied by a $2,000 stipend. The Foundation Board accepts nominations from anyone.

The W. Oliver Rasch Award recognizes authors of outstanding substantive articles that appear in the Journal of the Missouri Bar. The Editorial Board recommends the author and article to the Foundation Board, and the recipient also receives a $500 stipend. Mr. Rasch was a long-time member and former chair of the Editorial Board of the Journal.

You have a dilemma. You can only hire one associate, and you know you have a first class trial lawyer, a staunch advocate for justice, and a skilled writer. The other resumes are solid, but shrink by comparison. This is the kind of problem we should all want to handle.

The Missouri Bar Foundation presents even more awards, including: the David J. Dixon Appellate Advocacy Award, which is presented to outstanding young lawyers who have excelled in appellate practice; and the Purcell Professionalism Award, bestowed upon those who have consistently demonstrated an exceptional degree of competency, integrity, and civility in both professional and civic activities.

Recipients of any of these awards have been given a true honor and are almost always a consensus pick. Those of us who have been privileged to participate in the selection process see the very best our profession has to offer, and we are delighted to confer what are truly prestigious awards to our current and future stars of the legal community.

Beyond the awards process, the Foundation annually gives tens of thousands of dollars to worthy causes such as legal aid offices, citizenship education programs, bar associations, institutes and commissions devoted to justice, as well as child advocacy programs. Where does the money come from?

The Missouri Bar Foundation was formed in 1950 and is exempt from taxation under § 501(c)(3) of the Internal Revenue Code. Contributions to the Foundation are tax deductible and are received annually from attorneys and friends of the justice system. Membership in the Foundation is limited to Missouri attorneys in good standing who have made significant contributions to the legal community. There are three classes of

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NO PUBLIC POLICY EXCEPTION FOR TERMINATION OF INDEPENDENT CONTRACTORS

Bishop & Associates, L.L.C. (B&A), filed a multi-count action against Ameren Corporation [and] Union Electric Company d/b/a Ameren Missouri [“Ameren”] . . . alleging wrongful discharge in violation of public policy. . . . The suit arose after Ameren terminated its relationship with B&A, which provided commercial plumbing services at several of Ameren’s facilities. The circuit court entered summary judgment in favor of Ameren.2

Bishop appealed and the Supreme Court of Missouri affirmed in Bishop & Associates v. Ameren Corporation.3

Missouri does not recognize a common law cause of action for wrongful discharge in violation of public policy for independent contractors. Missouri courts have always described the public policy exception as a narrow exception to the at-will employment doctrine. And although this Court expanded the exception to contract employees alleging wrongful discharge, this Court has never applied the public policy exception outside the context of an employer-employee relationship.4

In Fleshner v. Pepose Vision Institute, P.C., 304 S.W.3d 81, 92 (Mo. banc 2010), this Court adopted the public policy exception to the at-will employment doctrine. The at-will employment doctrine provides that “at-will employee[s] may be terminated for any reason or no reason.” Id. at 91. Under the public policy exception, an at-will employee has a cause of action in tort for wrongful discharge if he or she has been terminated “for refusing to violate the law or any well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body” or “for reporting wrongdoing or violations of law to superiors or public authorities.” Id. at 92.5

Missouri courts, however, have always described the public policy exception as a “narrow” exception to the at-will employment doctrine. See Farrow v. Saint Francis Med. Ctr., 407 S. W.3d 579, 595 (Mo. banc 2013); Margiotta v. Christian Hosps. Ne. Nav., 315 S.W.3d 342, 346 (Mo. banc 2010). . . . And although in Keveney, this Court extended the public policy exception to contract employees, it did not extend the public policy exception outside of the employer-employee relationship.6

“This is consistent with several other jurisdictions that have confined the wrongful discharge cause of action to situations involving employment relationships.”7

[A] disparity in bargaining power traditionally exists between employers and employees in an employment relationship. Harvey, 634 N.W.2d at 684.8

In explaining the need for the public policy exception, Missouri courts have recognized this disparity in bargaining power. See Keveney, 304 S.W.3d at 103; Boyle, 700 S.W.2d at 878.9 That disparity is not present between independent contractors and their customers; therefore, independent contractors are not as susceptible to coercion as at-will or contract employees.10

Given the distinctions between independent contractors and employees and that the public policy exception is a narrow exception Missouri courts have applied only in the employer-employee context, the wrongful discharge of violation of public policy cause of action does not extend to independent contractors. Accordingly, the circuit court did not err in granting summary judgment on B&A’s wrongful discharge claim.11

B&A also alleged “breach of the implied covenant of good faith and fair dealing. ‘Under Missouri law, a duty of good faith and fair dealing is implied in every contract.’ Arbors at Sugar Creek Homeowners Ass’n v. Jefferson Bank & Trust Co., 464 S. W.3d 177, 185 (Mo. banc 2015).”

“Under the express terms of the purchase order, Ameren had the right to cancel its agreement with B&A at any time for any reason by providing advanced written notice.”12 “[T]he circuit court did not err in entering summary judgment on B&A’s breach of the implied covenant of good faith and fair dealing claim because the fact that Ameren’s actions were expressly permitted by the purchase order negates any claim by B&A that a breach occurred.”13

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO STRIKE A JUROR FOR CAUSE

Plaintiffs appeal the judgment entered by the trial court in favor of defendant hospitals following a jury trial. Plaintiffs allege the trial court abused its discretion by failing to strike for cause prospective juror 24 because she expressed a disqualifying bias in favor of defendants under section 494.470.1.14

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During voir dire, plaintiffs’ counsel informed the venire panel, “[T]his case involves Mercy Clinics, Mercy Clinic Physicians, as the defendant and Mercy Clinic Hospital. Just knowing that they are defendants in this case, is there anyone that feels they might start off the case a little bit more in favor of one party or the other?” Prospective juror 24 raised her hand, and [an] exchange took place [that ended with]:

****

PL COUNSEL: So ultimately, can you sit through this whole case without starting off a little bit in favor of Mercy or St. John’s, as you call them, or would you start off with them having a touch in favor of them?

JUROR: I don’t – maybe – yeah, probably.

PL COUNSEL: Maybe you would be slightly in favor of them?

JUROR: Yep, probably.15

“Before deciding whether the prospective juror was qualified, the trial court stated it would give counsel the opportunity to rehabilitate her. Plaintiffs’ counsel then continued to question prospective juror 24” and she stated that she would follow the court's instruction to the best of her ability. On questioning by defense counsel, she said that she had heard both good and bad about Mercy.16

Plaintiffs moved to strike juror 24 and that was denied. She was seated as a juror. The jury returned a verdict for defendants and plaintiffs appealed. The verdict was affirmed in Thomas v. Mercy Hospitals East Communities.

Litigants have a constitutional right to trial by a fair and impartial jury of twelve qualified jurors. Mo. Const. art. I, § 22(a); Catlett, 793 S.W.2d at 353. “The competent juror must be in a position to enter the jury box disinterested and with an open mind, free from bias or prejudice.” Catlett, 793 S.W.2d at 353 (quotation omitted). The trial court is in the best position to evaluate a potential juror and is afforded broad discretion in determining whether the potential juror is ultimately qualified to serve.17

Here, . . . prospective juror 24 had no “knowledge concerning the matter or any material fact in controversy” from which to form an opinion requiring her disqualification . . . . She only said her sister worked as a nurse in a separate hospital affiliated with defendants through a larger group and in the burn unit rather than in obstetrics, she had heard good and bad about the other hospital, and while she might start out “slightly” in favor of the hospital or nurses as a result, she could put that slight tilt aside and follow the trial court’s instructions.18

But here, counsel for both plaintiffs and defendants asked additional questions of prospective juror 24. Her initial reservations, therefore, must be considered in the context of the entire voir dire in deciding whether she showed an ability to be impartial, id., because “[m]ere equivocation is not enough to disqualify a juror,” id. at 890. Rather:

If the challenged venireperson subsequently reassures the court that he can be impartial, the bare possibility of prejudice will not deprive the judge of discretion to seat the venireperson . . . . Initial reservations expressed by venirepersons do not determine their qualification; consideration of the entire voir dire examination of the venireperson is determinative. State v. Pelto, 803 S.W.2d 1, 8 (Mo. banc 1991).

Id. at 890-91.

These principles apply directly here. Prospective juror 24 specifically stated she would not give defendants more credibility than plaintiffs.19

In these circumstances, it was up to the trial court to evaluate the prospective juror’s answers and determine whether she could be impartial and follow the trial court’s instructions. It was not improper for the trial court to rely on the juror’s assessment of her own ability to be impartial.20

The trial court independently considered the entire voir dire examination, determined prospective juror 24’s unequivocal testimony indicated she had been successfully rehabilitated, and found she was qualified to serve on the jury. This Court cannot agree with plaintiffs that the trial court abused its broad discretion by allowing prospective juror 24 to serve on the jury.21

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**INNKEEPER OWES TO GUEST DUTY OF ORDINARY, NOT HIGHEST, DEGREE OF CARE**

In Wilson v. KAL Motel, Inc., “Kimberly Wilson appeals from the judgment in favor of the defendant, KAL Motel, Inc., following a jury trial on her negligence claim against the motel.”22 “Wilson filed a negligence suit against KAL Motel alleging that while an invitee spending the night on property controlled by the defendant, she was injured when she was bitten by a brown recluse spider and incurred medical expenses, disfigurement, and impairment.”23

“At trial, the court gave verdict directing instruction (No. 6) patterned after MAI 22.05 (Tenant Injured on Premises Reserved for Common Use).”24

It also gave Instruction No. 7 patterned after MAI 11.05 (Ordinary Care):

The phrase “ordinary care” as used in these instructions means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

The court refused Wilson’s Instruction A, which substituted the phrase “the highest degree of care” for the phrase “ordinary care” in the verdict director.25
“The jury returned a verdict in favor of the defendant. This appeal by Wilson followed.” The court of appeals affirmed.

“In her sole point on appeal, Wilson contends that the trial court erred in instructing the jury on the proper standard of care. She contends that motels are held to the highest degree of care rather than ordinary care of their guests’ security and safety.”

Consistent with the Restatement (Third) of Torts § 40(b)(2)], the Missouri Supreme Court has found that a special relationship exists between hotel operators or innkeepers and their guests “so as to impose affirmative duties in the protection of persons and property.” Virginia D. v. Madesco Inv. Corp., 648 S.W.2d 881, 855 (Mo. banc 1983). Missouri cases uniformly state that innkeepers are not insurers of the safety of their guests. Id.; Lonnecker v. Borris, 229 S.W.2d 524, 526 (Mo. 1950). “[B]ut they are under a duty to their guests to exercise reasonable or ordinary care to keep and maintain their premises and furnishings in a reasonably safe condition.” Lonnecker, 229 S.W.2d at 526. [Other states have similarly recognized the duty of an innkeeper to exercise reasonable or ordinary care concerning the guest.] See, e.g., Lawrence v. La Jolla Beach & Tennis Club, Inc., 231 Cal.App.4th 11, 231 [sic] Cal. Rptr.3d 758 (Cal. Ct. App. 2014). . . . The trial court properly instructed the jury on the standard of care in this case. The point is denied.

The judgment is affirmed.

**HIGH SCHOOL FOOTBALL COACH HAS OFFICIAL IMMUNITY BUT PLAYER MAY NOT HAVE ASSUMED THE RISK THAT CAUSED HIS INJURY**

“Zachary Elias (‘Elias’) appeals the summary judgment entered by the Circuit Court of Clay County, Missouri (‘trial court’), in favor of Kenneth Davis (‘Davis’) and Sterling Edwards (‘Edwards’) on Elias’s claims for negligence and assault and battery.”

On October 19, 2010, Elias was a sixteen-year-old high school student at Winnetonka High School in the North Kansas City School District and played varsity football for the school. Edwards was the head coach, and Davis was a position coach. On that day, apparently thinking it was an exercise of good coaching judgment, Coaches Edwards and Davis decided to have a full-grown adult (i.e., Davis) dress out in full football helmet and padding to engage in live scrimmage full contact with the teenaged members of this high school football team. . . . In Elias’s attempt to tackle Davis and the ensuing bodily collision between adult and child, Elias’s ankle was broken.

Elias brought negligence and assault and battery claims against Edwards and Davis. The coaches filed a motion for summary judgment. . . . The trial court granted summary judgment for Edwards and Davis on Elias’s claims.

The court of appeals affirmed in part and reversed in part in Elias v. Davis.

The judicially-created doctrine of official immunity “is intended to provide protection for individual government actors who, despite limited resources and imperfect information, must exercise judgment in the performance of their duties.” Southers v. City of Farmington, 263 S.W.3d 603, 611 (Mo. banc 2008). “Its goal is also to permit public employees to make judgments affecting public safety and welfare without concerns about possible personal liability.” Id.

Official immunity protects public officials from liability for alleged acts of ordinary negligence committed during the course of their official duties for the performance of discretionary acts. Southers, 263 S.W.3d at 610; Woods, 471 S.W.3d at 391. It does not provide public employees immunity for torts committed when acting in a ministerial capacity. Southers, 263 S.W.3d at 610; Woods, 471 S.W.3d at 392.

Whether an act is discretionary or ministerial is a determination made on a case-by-case basis considering: (1) the nature of the public employee’s duties; (2) the extent to which the act involves policymaking or exercise of professional judgment; and (3) the consequences of not applying official immunity. Southers, 263 S.W.3d at 610; Woods, 471 S.W.3d at 393.

Here, it simply cannot be said that Davis’s physical participation in the scrimmage during practice was outside the course of his official duties as a football coach, and Davis’s argument ignores case precedent on the topic of official immunity. A scrimmage is a common tool used by a coach for the team to perform together on the field in simulated game situations and to develop game strategy. Under the limited facts in the summary judgment record, no evidence suggested that either coach was acting with any motive other than to teach and to prepare the football team during the football practice when Davis participated in the scrimmage.

A coach’s duty to conduct and supervise a football practice requires the exercise of discretion rather than the performance of routine tasks. See Woods, 471 S.W.3d at 393, 395 (determining how to conduct a wrestling practice is left to the discretion of the coach). It requires the coach to use his judgment. Though the wisdom of the judgment exercised by these coaches may be reasonably debatable, the record before us does not demonstrate a rule, regulation, policy, or direct order of a superior that was violated in exercising that judgment. . . . Their exercise of discretion was, therefore, protected by the
In amateur contact sports, liability for injury caused by a co-participant must be predicated on “willful and wanton or intentional misconduct.” *McKichan v. St. Louis Hockey Club, L.P.*, 967 S.W.2d 209, 211 (Mo. App. E.D. 1998). Ordinary negligence principles are inapplicable in such cases because “conduct which might be ‘unreasonable’ in everyday society is not actionable because it occurs on the athletic field. In contact sports, physical contact and injuries among participants are inherent and unwarranted judicial intervention might inhibit the game’s vigor.” *Id.* at 212.36

In amateur contact sport cases, the doctrines of assumption of risk and consent must be considered. *McKichan*, 967 S.W.2d at 212. The basic principle of these defenses is that if a person voluntarily consents to accept the danger of a known and appreciated risk, that person is barred from recovering damages for an injury resulting from that risk. *Coomer v. Kansas City Royals Baseball Corp.*, 437 S.W.3d 184, 191 (Mo. banc 2014); *Ross v. Clouser*, 637 S.W.2d 11, 14 (Mo. banc 1982). “In general, a voluntary participant in any lawful sport assumes all risks that reasonably inhere to the sport insofar as they are obvious and usually incident to the game.” *McKichan*, 967 S.W.2d at 212.37

“The concepts of assumption of risk and consent must be analyzed on a case-by-case basis, and whether one player’s conduct causing injury to another is actionable hinges upon the facts of an individual case.”38

By participating in high school football, Elias voluntarily consented to the risks that reasonably inhere to the sport. Those risks included physical contact and collisions with other players. The limited facts present in the summary judgment record, however, go beyond the circumstances of physical contact in the course of playing organized high school football. Davis was an adult in full pads and helmet scrimmaging with teen-aged members of the high school football team, which he had never done before that day.39

“Reasonable persons could disagree on whether sixteen-year-old Elias voluntarily consented to the collision with [Assistant Coach] Davis. At the very least, whether Elias consented to, or assumed the risk of, the contact with Davis is a proper determination for the jury.”40 “The summary judgment entered on Elias’s assault and battery claims is, therefore, reversed.”41

Endnotes

1 W. Dudley McCarter, a former president of The Missouri Bar, is a founding member and partner in the St. Louis law firm of Behr, McCarter & Potter, P.C.
3 Id.
4 Id. at 2.
5 Id. at 7.
6 Id. at 8 (citing Keene v. Missouri Military Academy, 304 S.W.3d 98 (Mo. banc 2010)).
7 Id. at 9.
8 Id. (citing Harvey v. Care Initiatives, Inc., 634 N.W.2d 681, 684 [Iowa 2001]).
9 Id. (citing Boyle v. Vista Eye care Inc., 700 S.W.2d 859, 878 [Mo App. W.D. 1985]).
10 Id. at 9.
11 Id. at 12.
12 Id. at 13.
13 Id. at 14.
15 Id. at 2-3.
16 Id. at 3-5.
17 Thomas at 6 (citing Catlett v. Ill. Cent. Gulf R.R. Co., 793 S.W.2d 351, 353 [Mo. banc 1990]).
18 Thomas at 8.
19 Id. at 10.
20 Id. at 11.
21 Id. at 12.
23 Id.
24 Id. at 2.
25 Id.
26 Id.
27 Id.
28 Id. at 5-6 (The correct citation for Lawrence v. La Jolla Beach & Tennis Club, Inc. is 179 Cal.Rptr.3d 758 (Cal. Ct. App. 2014)).
30 Id. at 3.
31 Id. at 5 (citing Woods v. Ware, 471 S.W.3d 385, 391 [Mo. App. W.D. 2015]).
32 Davis at 6.
33 Id. at 7.
34 Id. at 8.
35 Id.
36 Id. at 9.
37 Id. at 10-11.
38 Id. at 11.
39 Id. at 11.
40 Id. at 12.
41 Id.
FIGHTING WORDS, SUBSTANTIAL OVERBREADTH, AND MISSOURI’S NEW HARASSMENT CRIMES

Carl D. Kinsky

Missouri’s new criminal harassment statutes proscribe any act done “without good cause . . . with the purpose to cause emotional distress to another person.” The substantial overbreadth doctrine allows a defendant to challenge these statutes as facially invalid because they may criminalize conduct protected by the First Amendment even if the defendant’s own conduct is not so protected.

The new laws eliminate provisions in the previous criminal harassment statute which proscribed specific communications and instead substitute language similar to but broader than a catch-all provision in the previous version. This previous catch-all provision survived a substantial overbreadth challenge in *State v. Vaughn* but only through a narrowing construction which limited its scope to conduct that was tantamount to “fighting words.” This article examines whether this narrowing construction may apply and what the consequences of its application would be to the new statutes.

**Out With the Old, In With the New – The New Criminal Harassment Statutes and Their Predecessor**

Effective January 1, 2017, §§ 565.090 and 565.091 create the offenses of harassment in the first and second degree. If a person “without good cause, engages in any act with the purpose to cause emotional distress to another person,” he or she is guilty of a class A misdemeanor. If the act does cause emotional distress, it is elevated to a class E felony. Neither statute requires that the act be such that would cause emotional distress to a person of average sensibilities. The felony statute does not apply to law enforcement officers conducting investigations of law violations. The misdemeanor statute contains no such exemption for law enforcement officers.
In contrast, the previous § 565.090 created an offense of harassment with no degrees and no exemptions. It was “a class A misdemeanor unless [it was] [c]ommitted by a person [at least] twenty-one years of age … against a person [not more than] seventeen years of age,” or if it was committed by a person who had been found guilty of harassment or other like offenses. Under these circumstances, harassment became a class D felony, which had a similar range of punishment to the current class E felony.

The previous statute proscribed certain communications that fell into specific categories – threats, coarse language, anonymous telephone calls or electronic communications, communications with a person 17 years of age or less, and repeated unwanted communications. Many of these categories were enacted in response to the extensively publicized and tragic death of a 13-year-old girl, Megan Meier, in 2006. Lori Drew, an adult neighbor of Megan, opened a MySpace account under a fictitious name. After gaining Megan’s confidence, an email under the fictitious name was sent to Megan saying the world would be better off without her. Within minutes, Megan killed herself. The county prosecutor declined to bring criminal charges, believing that the conduct did not fall within the scope of the existing harassment statute. In response, the Missouri Legislature amended the older harassment statute, including adding the provisions relating to electronic communications and to communications with minors.

This amended statute also included a catch-all provision that proscribed “any other act with the purpose to frighten, intimidate or cause emotional distress to another person.” This catch-all provision, like many of the other provisions proscribing specific categories of communication, further required that the act succeed in causing the intended fright, intimidation, or emotional distress, and that the victim’s response be consistent with that of a “person of average sensibilities.” Missouri’s new criminal harassment statutes are, therefore, similar to but broader than the catch-all provision of their predecessor.

In one respect, Missouri’s new criminal harassment statutes may appear narrower than the previous catch-all provision. They require the act to be done with the purpose of causing “emotional distress” – not emotional distress, fright, or intimidation. The new harassment statutes incorporate a definition of “emotional distress” as “something markedly greater than the level of uneasiness, nervousness, unhappiness, or the like which are commonly experienced in day-to-day living.” Thus, emotional distress is now defined so broadly that it likely includes fright or intimidation.

**State v. Vaughn – The Substantial Overbreadth Doctrine and the Old Criminal Harassment Statute**

Missouri’s new harassment statutes, like their predecessor, raise issues regarding First Amendment free speech rights. Constitutionally protected communication and expressive conduct, from neo-Nazi marches in predominantly Jewish neighborhoods, to cross burning and flag burning, to protests by anti-LGBT groups at funerals for soldiers killed in combat, are frequently intended to cause emotional distress.

The new harassment statutes are, therefore, likely to face constitutional challenges under the substantial overbreadth doctrine. This doctrine allows a person who has engaged in conduct not constitutionally protected to challenge a statute on the grounds that the statute is so broad that it makes criminal conduct constitutionally protected. It is an exception to the general rule that a defendant to whom a statute may be constitutionally applied cannot challenge the statute on the basis that it could be applied unconstitutionally in different situations. The reason for allowing a facial challenge, not merely a challenge to the statute as applied, is that otherwise the statute’s very existence may have a “chilling effect” causing people to refrain from exercising their First Amendment rights.

In **State v. Vaughn**, the Supreme Court of Missouri faced a substantial overbreadth challenge to two provisions of the previous harassment statute, including the catch-all provision. Vaughn may provide guidance on how Missouri courts will construe the new harassment statutes and whether they will pass constitutional muster.

In **Vaughn**, the defendant was charged with burglary and harassment. The burglary count alleged that, for the purpose of committing criminal harassment, the defendant had unlawfully entered a building. The prosecution asserted that the harassment which was his purpose fell under subdivision (6) of the old statute, the catch-all provision. The state represented that its evidence would show that defendant entered the house of his ex-wife to scare her when she came home and found him inside.

The harassment count alleged that in the two weeks after the burglary the defendant had committed harassment against his ex-wife, which fell under subdivision (5) of the old statute. This subdivision proscribed making repeated unwanted communication. The state represented that its evidence would show the defendant repeatedly telephoned his ex-wife, even after she told him to stop. The trial court struck down both subdivisions as unconstitutionally vague and overbroad.

The Supreme Court of Missouri noted that the first step in substantial overbreadth analysis is to construe the statute. “If the statute may fairly be construed” to limit its “application to a ‘core’ of unprotected expression, it [can] be upheld.” The Court held that it could not so construe subdivision (5)’s proscription of knowingly making “repeated unwanted communication to another person.” The State proposed two narrowing constructions – first, that the “defendant know[s] or her] communication [with the victim] is both repeated and unwanted”; and second, that the “communication be directed to an individual and particularized person.” These constructions did not save the subdivision, because it would still restrict protected speech. The Court provided examples – picketers after being “informed their protestations were unwanted[,] a teacher” calling on a student after the student “asked to be left alone[,] Salvation Army bell-ringers” soliciting contributions after a passerby tells them he or she has already given and does not want to be asked again; and “[a]n advertising campaign [asking a public] official to change his or her position on [some] issue.”

The Court therefore found subdivision (5) unconstitutional. The Court noted, however, that § 560.090 contained six independent definitions of “harassment.” These independent definitions included four other provisions also relating to specific categories of communication and the catch-all provision. The Court severed subdivision (5) and held it unconstitutional, but did not strike down the entire statute.

The Court then turned to subdivision (6). It held that the
catch-all provision could be fairly construed to limit it to a core of unprotected expression and could, therefore, withstand a substantial overbreadth challenge. The Court noted that subdivisions (1) through (5) all explicitly proscribe communications. The Court therefore held that “subdivision (6)’s ban of ‘[a]ny other act’ does not apply to communications, only conduct.35

This narrowing construction did not fully resolve the substantial overbreadth challenge because the First Amendment protects expressive conduct.34 The Court held that the “good cause” exception in subdivision (6) meant that “the intended and resulting effects [of the conduct] must be substantial[,]” not trivial, thus protecting trick-or-treaters on Halloween.35

The Court then opined that “[a]cts that cause immediate substantial fright, intimidation, or emotional distress are [those] that inherently tend to inflict injury or provoke violence.”36 The Court held that constitutionally protected acts fell clearly within the “good cause” exception. The Court then concluded that restricting subdivision (6) to only unprotected “fighting words” comported with legislative intent.37 The combined effect of the Court’s narrowing constructions was to limit subdivision (6) to conduct that was tantamount to “fighting words.” The Court noted that “fighting words” were not protected by the First Amendment38 and upheld subdivision (6).39

The Vaughn decision has received both praise and criticism. One commentator observed that Vaughn makes it “now clear that narrowing constructions should be addressed and applied, if possible, before a law is struck down as substantially overbroad” and called the decision “the most significant step in the development of the consistent and coherent analysis of substantial overbreadth issues in Missouri.”40 Other commentators have written that “[t]he court apparently saved the constitutionality of subdivision six by adopting a ridiculously strained interpretation of it; under this interpretation, it only covers ‘fighting words’. . . .”41 Whether or not Vaughn was correctly decided, it suggests that Missouri’s new criminal harassment statutes will require narrowing constructions if they are to withstand a substantial overbreadth challenge.

Does Vaughn Save the New Harassment Statutes?

There were three narrowing constructions applied to subdivision (6) in Vaughn, all of which were based on specific statutory language. A comparison of the specific language in subdivision (6) of the old harassment statute with specific language within the new harassment statutes, therefore, may provide clues as to whether Vaughn’s narrowing constructions will save the new harassment statutes.

Vaughn construed “fright, intimidation, or emotional distress” to mean “substantial fright, intimidation, or emotional distress.” This construction was derived from the statutory language “without good cause.”42 The same language appears in the new criminal harassment statutes.43 Furthermore, the new statutes incorporate a definition of emotional distress as “something markedly greater than the level of uneasiness, nervousness, or unhappiness, or the like which are commonly experienced in day-to-day living.”44 This narrowing construction is therefore likely to apply to the new statutes.

The second narrowing construction was that “any other act” meant conduct, not communication.45 This construction was based on the statutory language in subsections (1) through (5) of the predecessor statute, which explicitly dealt with categories of communication.46 It appears to be an application of the statutory construction canon that when one or more things of a class are expressly mentioned, others of the same class are excluded.47 The new statutes do not expressly mention specific categories of communication. It therefore follows that this narrowing construction may not apply to the new statutes.

The third narrowing construction was that the conduct be tantamount to unprotected “fighting words.” This narrowing construction was based primarily on “[r]ead[ing] the elements of the crime in total.”48 These elements under subdivision (6) included that the act cause the victim “to be frightened, intimidated or emotionally distressed” and that the victim’s “response to the act [be] one of a person of average sensibilities considering the age of such a person.”49 These elements appear to correlate with a “fighting words” requirement that language, by its very utterance, tend to incite an immediate breach of the peace.

However, neither of the new harassment statutes requires that the victim’s response be consistent with that of a person with average sensibilities. Only harassment in the first degree as a felony requires that the act cause any effect on the victim.50 This may suggest that the “fighting words” narrowing construction will not save the new harassment statutes.

There exists, however, language in Vaughn which suggests that the phrase “without good cause” provides independent support for the third narrowing construction. The Vaughn Court noted, “Additionally, because the exercise of constitutionally protected acts clearly constitutes ‘good cause,’ the restriction of the statute to unprotected fighting words comports with the legislature’s intent.”51 If “without good cause” is sufficient alone to support the narrowing instruction, then the new harassment statutes may yet survive a substantial overbreadth challenge.

Why did the Vaughn Court apply the second narrowing construction, limiting the proscribed acts to conduct, in contrast to communication, if the third narrowing construction, limiting the statute’s application to “fighting words” alone, would have saved it? Vaughn recognized that in determining whether to invalidate a statute under the substantial overbreadth doctrine, the court weighs the extent to which both constitutionally protected acts and unprotected acts fall within the statute’s sweep.52 By excluding communications from subdivision (6), the Vaughn Court reduced its susceptibility to a substantial overbreadth challenge. Because the new statutes eliminated provisions regarding specific categories of communication, they may be more vulnerable to constitutional attack.

A Hollow Victory – The Limited Scope of “Fighting Words”

Even if the new statutes pass constitutional muster through a construction limiting their scope to “fighting words,” the result is a crime of harassment narrower than that of the previous statute and likely narrower than intended by the legislature. In Vaughn, acts tantamount to “fighting words” were defined as those “which by their very occurrence inflict injury or tend to incite an immediate breach of the peace.”53 Recent federal cases suggest that the “fighting words doctrine [now applies only] to face-to-face confrontations likely to provoke immediate violence,” effectively overruling the “inflict injury” language and restricting the “incite an immediate breach” language.54
Missouri cases prior to *Vaughn* similarly limited the fighting words doctrine to abusive language, “addressed in a face-to-face manner to a specific individual and uttered under circumstances such that the words have a direct tendency to cause an immediate violent response by a reasonable person.” While *Vaughn* included the “inflict injury” language, it did not examine in any detail the “fighting words” doctrine. *Vaughn* therefore does not appear to have changed Missouri’s interpretation of “fighting words.”

However, *State v. Wooden*, decided after *Vaughn*, may indicate that Missouri is poised to use the “inflict injury” language to broaden “fighting words.” In *Wooden*, the defendant was convicted under subdivision (2) of the old harassment statute. This subdivision proscribed knowingly using coarse language offensive to one of average sensibility, and thereby putting a person in reasonable apprehension of offensive physical contact or harm. The defendant did not raise a substantial overbreadth challenge, but instead alleged that subdivision (2) was unconstitutional as applied to him.

The defendant sent emails to an alderwoman that included an attachment where he called himself “a domestic terrorist,” called the alderwoman “a bitch,” and referred to sawed-off shotguns, assassinations, and domestic terrorism, in a menacing and occasionally maniacal voice. The Supreme Court of Missouri held that speech that causes a fear of physical harm is not speech protected by either the United States or Missouri constitutions. Rather, it falls into the category of words “[that] by their very utterance inflict injury or tend to incite an immediate breach of the peace” and do not receive constitutional protection.

It then affirmed the defendant’s conviction.

*Wooden*, however, never describes the defendant’s emails as “fighting words.” *Wooden* appears to conflate “fighting words” with true threats. True threats constitute a different category of expression from “fighting words,” which the government can proscribe without running afoul of the First Amendment.

Limiting the new law to abusive communication or conduct made face-to-face to a specific individual which tends to cause an immediate violent response effectively legalizes many of the acts that were criminal under the old harassment statute. Any communication that is not face-to-face, even a true threat, would no longer be proscribed. In *Vaughn*, the defendant was alleged to have unlawfully entered his ex-wife’s residence for the purpose of committing harassment by scaring her when she came home. Suppose instead the defendant intended to scare her by leaving photographs of himself or other evidence of having been present in her home. There would have been no face-to-face act; hence, no harassment. A letter, telephone call, text message, or email, even such as that sent to 13-year-old Megan Meier that led to her suicide or containing a true threat as in *Wooden*, would similarly fall outside the scope of the harassment statutes.

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**Congratulations, Morry**

We are proud to congratulate our friend and colleague, Morry Cole.

There’s no person more committed to or capable of leading the effort in bettering the legal profession on behalf of all Missouri attorneys.

Morry S. Cole  
2017-2018 President  
The Missouri Bar
LEGISLATING IN THE TITLE: CONSTITUTIONAL AND INTERPRETIVE (MIS)USES

Jeremy Knee

We’re suckers for a good title. A recent empirical study found that article titles condition readers’ expectations and influence perceptions in the material that follows. Misleading and inaccurate titles effectively reduce readers’ ability to recall facts presented in articles, and in some cases impair readers’ ability to make logical inferences from the facts they remembered. In one experiment, for instance, a title casting doubt on the safety of genetically modified foods essentially negated the article itself, which espoused the opposite conclusion.
Missouri’s constitutional framers understood the power of a title. They enshrined rules in the constitution promoting simplicity and fidelity to legislative text, and in so doing buffered against the prospect of deceptive titling. But it turns out there are a good many nondeceptive, but equally dubious, uses for a title. Old conceptions as to what bill titles do (and don’t do) are enduring a quiet, but pointed challenge, especially in the appropriations context. The title’s recent transformation from overlooked descriptor to policymaking workhorse may test legal limits and broadly affect publicly funded organizations, programs, contractors, lessors, beneficiaries, students, and others connected to the state’s $27 billion budget. This article counsels the sucker in us all by spotlighting uses and limitations of title-driven lawmaking.

Rise of the Title

Legislative bill titles have always looked cluttered and overlong by comparison to the snappier realm of blogs, memes, and books. But despite their heft, bill titles have followed the traditional practice of describing the subject matter they precede. Beginning in 2011, however, appropriation bill titles broke from this tradition by adding substantive spending conditions to the usual subject matter preview. In 2014, the titles expanded further to comment on a variety of topics and issues. By 2016, titles had become capacious homes for substantive direction of all sorts. For example, the 2016 Department of Natural Resources (“DNR”) appropriation bill title specified, among other things, that DNR must notify members of the General Assembly about pending land purchases sixty (60) days prior to the close of sale, and further provided that the [DNR] not implement or enforce any portion of a federal proposed rule finalized after January 1, 2013, to revise or provide guidance on the regulatory definition of “waters of the United States” or “navigable waters” under the federal Clean Water Act, as amended, 33 U.S.C. Section 1251 et seq., without the approval of the General Assembly, and further provided the [DNR] not implement or enforce any portion of the federal Environmental Protection Agency’s “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” 80 Fed. Reg. 64,662 (October 23, 2015). The 2016 appropriation bill title for the Department of Elementary and Secondary Education warned against intrastate air travel. Another appropriation bill title prohibited the payment of funds to any entity that performs or counsels women regarding nonlife-threatening abortions. One such bill title curtailed all funding to any public higher education institution that offers in-state tuition rates to individuals with unlawful immigration status and forbade state scholarships for the same individuals. Another barred expenditures on bonds for a certain “entertainment and sports arena located in a city not within a county.”

The year 2017 inaugurated a closer political alignment of the executive and legislative branches. It also marked a sudden decline in appropriation titles. But despite the lull in verbiage, the 2017 session repeated most substantive title language of years past and even added a few new directives. New this year, for example, is a title prohibiting expenditure of “any funds to encourage the enactment of local ordinances regarding primary enforcement of seat belt laws.”

In all these examples, readers will search in vain for corresponding warnings, directions, and prohibitions in the enacting text. Contrasting with the title, the language in the body succinctly lists items and dollar amounts—typically without any mention or reference to the strident qualifications tucked in the title block. Appropriation titles are, perhaps for the first time, turning heads. Public colleges and universities—allegedly due to title warnings of curtailed public funding—opted last year to charge international tuition to certain Missouri residents who lack documentation of lawful immigration status. This, in turn, produced a spate of lawsuits filed by the American Civil Liberties Union that are still winding through the appeals process. In one such case, the trial court’s judgment ascribed meaning to an appropriation bill title. The only occasion to disregard the title or preamble, the court indicated, is when it contradicts the enacting portion of the statute. Increasingly meaty appropriation titles, therefore, are stirring poignant questions about interpretation and constitutional purpose.

The Intent of a Title

Constitutional Use

Article III of Missouri’s constitution sketches the essential process for making law, and offers clues about titles’ role in legislative transparency. “No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose.” Relatedly, “[t]he enacting part of a bill shall contain more than one subject which shall be clearly expressed in its title.” The Supreme Court of Missouri, in Hammerschmidt v. Boone County, held that “[t]ogether, these constitutional provisions serve ‘to facilitate orderly legislative procedure[, and ensure the issues] can be better grasped and more intelligently discussed.’“ In determining the
original, controlling purpose of the bill . . . , a title that ‘clearly’ expresses the bill’s single subject is exceedingly important” 21 — so important that, “[t]o the extent the bill’s original purpose is properly expressed in the title to the bill, we need not look beyond the title to determine the bill’s subject.” 22

In addition to aiding in the assessment of a bill’s “original purpose” and “single subject,” a clear title is itself a stand-alone constitutional virtue. 23 A title must “indicate in a general way the kind of legislation that was being enacted.” 24 Similar to the other title-related requirements in article III, “[t]he clear title requirement is intended to keep ‘legislators and the public fairly apprised of the subject matter of pending laws.” 25 Whatever its other functions, the title is unquestionably a constitutional mechanism for announcing a bill’s intended purpose, thereby bolstering transparency in the legislative process.

A bill title also operates as a symbol, thereby “economizing” the legislative process. The constitution demands that “[e]very bill shall be read by title on three different days in each house.” 26

In interpreting the statute.” 27

The constitution demands that “[t]he preamble is to be interpreted in a common sense way in light of the legislative purpose and its plain wording.” 28 In this case, however, “since the preamble language in question was only a [summary] description” 29 of the enacting portions, it was “not intended to have independent substantive effect.” 30 The court doesn’t clarify exactly how it would handle a title or preamble intended to have independent substantive effect.

The circuit court decision in Doe v. St. Louis Community College further suggests that Missouri courts may consider moving beyond the traditional interpretive use of titles as merely an aid to decoding the body. But on July 11, 2017, the Court of Appeals – Eastern District reviewed the circuit court’s reasoning in a decision sure to disappoint title enthusiasts. The court found “no precedent for using the preamble of a legislative enactment to clarify the meaning of a completely different Regulation.” 31 A preamble, the court observed, is not an interchangeable interpretive aid to be applied to different legislative acts, but rather is bound monogamously to its legislative enactment. 32

The Intent of an Appropriation

Recent appropriation bill titles have forcefully asserted an independent substantive effect. Whether they’re legally entitled to such effect is a (slightly) open question, thanks in large part to
Lett. Assuming they’re substantive law, however, appropriation bill titles must clear several additional hurdles unique to appropriations.

Unlike their nonappropriating counterparts, appropriation bills are subject to the governor’s constitutional line-item veto power. This power is designed “to prevent the legislature from forcing the governor into a take-it-or-leave-it choice.” Importantly, though, veto power is limited to dollar items and does not extend to language expressing purpose or conditions attached to a given dollar item. So, for example, a governor could not alter or eliminate disagreeable conditions attached to an otherwise agreeable sum of money. If no conditions or purpose language encumber an appropriation item, the recipient has wide latitude to spend as it wishes.

Much of the proliferating language in appropriation titles belongs in the veto-proof realm of purposes and conditions attached to appropriation items. But unlike in the leading case on this point, State ex rel. Cason v. Bond, this new breed of purpose-and-condition language isn’t located with a specific item and, in some cases, doesn’t seem to apply to any item in particular. It’s open to veto only if the whole bill is vetoed – a classic “take-it-or-leave-it choice.” Courts have yet to opine on whether appropriation conditions marooned in the title are subject to veto, and, if not, whether they violate separation of powers.

Appropriations, moreover, are traditionally regarded as nonsubstantive and met with wariness when they behave like general law. In State ex rel. Davis v. Smith, the Supreme Court of Missouri held that “legislation of a general character cannot be included in an appropriation bill.... There is no doubt but what the amendment of a general statute ... and the mere appropriation of money are two entirely different and separate subjects.” Also on single subject rule grounds, State ex rel. Gaines v. Canada held that general statutes “cannot be repealed or amended except by subsequent general legislation. Legislation of a general character cannot be included in an appropriation bill.” In State ex rel. Tolerton v. Gordon, the Court voided a substantive appropriation condition on separation of power grounds. The problem there didn’t involve a conflict with existing statutes, but rather the circumvention of existing statutes providing for removal of a gubernatorial appointee. More recently, the court of appeals restated the orthodox view that “[a]ppropriations of money for payment of state obligations and the amendment of a general statute are entirely different and separate subject for legislative action.”

This view is widely shared among states with similar constitutional requirements. “It is not enough,” announced the Louisiana Supreme Court, “that a provision be related to the institution or agency to which funds are appropriated. Conditions and limitations properly included in an appropriation bill must exhibit such a connexity with money items of appropriation that they logically belong in a schedule of expenditures.”

However, in its 1992 Rolla 31 School Dist. v. State decision, the Supreme Court of Missouri broke away from the constitutional analysis centered on legislative character – whether the appropriation condition actually behaves like general law. Instead, the Court focused on the question of statutory conflict. In that case, the plaintiff school districts contended that an appropriation bill contradicted a recently enacted statute, which forbade appropriating funds from the school foundation program. The Court, consistent with its holding in State ex rel. Davis v. Smith, confirmed that an appropriation that contravenes general law is unenforceable. But, the Court held, “[i]f the conflict between two statutes is less than direct, e.g., an ambiguity in the general statute, then such a conflict may be resolved by relying upon the appropriation as strong evidence of the legislature’s intention in adopting the general statute.” By deferring to the legislature’s presumed interpretation of a general statute, the Court found harmony between the appropriation and preexisting general statute while limiting its Davis holding to cases where an appropriation directly conflicts with a general statute.

Rolla 31 creates a uniquely high tolerance for appropriation bill language with tenuous connections to appropriation items. No longer fettered by character or function, appropriation lan-

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President Cole’s introduction reminds me of the headline in Missouri Lawyers Weekly after I made the panel for the Supreme Court of Missouri – “Least Known, Most Likely.” I later learned the paper’s editorial staff used as a working title, “Who the hell is Zel?”

One of the more serious issues facing our legal system is attacks on the judiciary by those who clearly do not understand or do not care about the difference between accountability and independence. These attacks on the judiciary by those willing to criticize the courts for their own political gain involve rhetoric specifically targeted to undermine confidence in the judicial system or influence judicial decisions.

As lawyers, we have been taught to honor a fair and impartial judiciary that carefully decides cases on the facts and in accordance with the law.

For us, a good judge is one who can set aside personal philosophy regardless of the controversy. A good judge is one who makes their decision based upon the facts in accordance with time-honored principles of law.

The function of courts is one of the most important in our society. Courts are where justice is meted out, where remedies are administered, the innocent are exonerated, and criminals are punished. The courts are not just a place where judges and attorneys make their livelihood. Courts are living monuments to the preservation of our freedom, fairness, and justice that we hold so dear. President George Washington declared “the administration of justice – is the firmest pillar of government.”

Without courts that are capable of fairly adjudicating wrongs or addressing injuries, society’s sense of justice diminishes. When people no longer believe the society in which they live is capable of justice they are less likely to believe in – or follow – the law.

This concept may seem obvious to us, and it should. Neither individuals nor businesses feel safe when the rules are always changing, or when the rules don’t apply equally to everyone.
In 2012, I asked a law clerk to pull news articles of politicians criticizing the courts.

These quotes come from public officials elected to state or federal government, who we all know have taken oaths to uphold the constitutions of the United States of America and of their respective state. His search turned up the following results.

A congressman said he would subpoena before Congress or seek to impeach justices he disagrees with.

Another congressman said he would give voters the right to oust federal judges they didn’t like.

A congresswoman said Congress could pass laws to prohibit courts from considering controversial issues.

A governor, who later ran for president, said he favored a constitutional amendment to give Congress veto power over the Supreme Court and end lifetime tenure for federal judges.

In a public statement preceding the Supreme Court of the United States argument challenging the constitutional validity of the Affordable Care Act, commonly known as Obamacare, then-President Obama stated: “Ultimately, I’m confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress.”

Obviously, the politicians who made these comments were trying to influence a court’s decision or undermine its legitimacy.

In preparation of my remarks today, I gave my current law clerk the same assignment. Regardless of where you get your news, you probably aren’t surprised that politicians have continued to criticize our courts. Things are no better now, and arguably worse.

President Trump has criticized the process of courts, implying judges solely make decisions for political reasons. He said: “Just cannot believe a judge would put our country in such peril. If something happens, blame him and court system.”

On the Senate floor, during the nomination process of Judge Neil Gorsuch, who received the American Bar Association’s highest judicial rating available, a Democrat senator used the public spotlight to instead criticize the Supreme Court of the United States:

Recent Supreme Court decisions have made it easier for corporate giants who cheat their consumers to avoid responsibility. Recent Supreme Court decisions have let those same corporations and their billionaire investors spend unlimited amounts of money to influence elections and manipulate the political process. And recent Supreme Court decisions have made it easier for businesses to abuse and discriminate against their workers.

These types of comments are not just made on the national stage.

This spring the Missouri Senate president pro tem told media he was upset with the Supreme Court of Missouri over recent decisions. He was widely quoted as saying the Court had “gone rogue.”

These disparaging comments have been bipartisan and relentless. The public officials who made these comments could learn from one of my father’s rules to live by: “The world works better when everybody just tries to do their own job well.”

With public distrust of governmental institutions at an all-time high, many public officials and individual citizens have called on the courts to make rulings that reflect not the applicable law and precedent, but rather the public opinion of the day— and publicly opposed those jurists who refused to compromise their sworn duty to uphold the law.

The public is increasingly being asked to hold judges accountable for the outcomes of specific cases, rather than the appropriateness of the process used to reach those outcomes.

Unfortunately, many seem to forget that democracy concerns itself not only with accountability of government to the majority will, but also with protecting the rights of individual citizens and political minorities.

A judiciary that is free from influence by those who wish to sway its decision-making process is a concept everyone ought to support, regardless of political beliefs or critical issues of the day. I am not surprised that, throughout history, the judicial branch has enjoyed a higher favorability rating than the legislative and executive branches. Could it be that in our society the judiciary is the only branch of government that is not perceived as being bought and paid for? Can we all agree that is a concept worth fighting for?

In 1788, Alexander Hamilton wrote about the importance of preserving the integrity and the autonomy of the courts. He explained:

Whoever attentively considers the different departments of power must perceive, that … the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in capacity to annoy or injure them. … The judiciary … has no influence over either the sword or the purse; no direction either of the strength or of the wealth of society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment ….

A court’s legitimacy does not depend on its structural prestige or the reputation of individual judges, but on the strength of its published opinions, which can be read, debated, and analyzed by anyone.

The persuasiveness of our reasoning is the only power at our disposal. The reasons for our decisions legitimate our place in government. Our willingness to demonstrate the logic of our reasoning is our most important role. And that is how we are accountable.

But when politicians call for “more accountability” in the courts, you can bet there was a case that was resolved contrary to their interest or world view. Most often, those cases failed to reflect what those politicians have determined is the “public opinion of the day,” and the criticisms have no consideration of the legal analysis.

If you have been wronged, your remedy should not depend on your politics, your ideology, your religion, race, creed, gender, or financial status.

The legitimacy of the judiciary has never and should never be measured on the “public opinion of the day.” This mistake led to one of the most infamous decisions ever issued by the Su-
In 1852, in *Scott v. Emerson*, the Court overturned decades of Missouri state precedent to find Dred and Harriet Scott, and their children, were still legally slaves. In deciding the case, the majority gave in to the so-called “public opinion of the day.” The holding begins: “Times are not now as they were when the former decisions on this subject were made.”

Judge Duane Benton, formerly of the Supreme Court of Missouri and now of the United States Court of Appeals for the Eighth Circuit, pointed out that the 1852 Supreme Court of Missouri made three major errors when it decided the case: 1) it ignored precedent, 2) it ignored the will of the legislature, and 3) it based its opinion on the judges’ personal biases.

The majority opinion overruled case law that allowed slaves to sue for freedom once they had been taken by their owners into free territory.

Only the dissenting judge got it right. Although a slaveholder himself, Judge Hamilton Gamble said the Court should follow prior law and recognize Scott’s freedom. Gamble wrote: “Times may have changed, public feeling may have changed, but principles have not and do not change; and, in my judgment, there can be no safe basis for judicial decision, but in those principles which are immutable.”

Public opinion is not limited by reason, precedent, or the facts presented to it. It is free to speculate and to let its premises run wild.

It is not our prerogative to change facts or law to suit a given outcome, though this is exactly what many of the people who call for judicial accountability would have us do. We have no purse, that is true – that is for the legislative branch; we have no sword, that is true – that is for the executive branch. Just because we are the least dangerous branch of government does not make us weak.

The Court’s accountability to the public is satisfied by openly publishing our opinions, which explain the reasons for our decisions. Any time our Court reverses a prior case decision, institutional integrity is questioned. Were we correct when the decision was previously made, or are we correct now?

Keeping the integrity and impartiality of the courts is not a concept that should be defined by whether a person is a Republican or Democrat, a conservative, a liberal or anywhere in between.

I would rather see a competent judiciary, full of those with integrity, legal knowledge, and impartiality, than a court constantly shifting to satisfy the whims of popular opinion. I would rather courts get it right, and be unpopular, than be perceived as right because they issued a decision designed to curry popular favor.

In Missouri, the nonpartisan merit selection plan has been the cornerstone of preserving the integrity of our appellate and urban courts. Combined with retention elections, the plan keeps judges accountable to the people while at the same time protecting them from undue influence of politics and special interests. More importantly, it has protected our judicial selection process from being taken hostage by the political-financial-consulting triad that currently dominates the other two branches of government.

The oath to support and uphold the constitutions of the United States and the State of Missouri is important, and we should hold accountable all those who have taken these oaths. As attorneys, you have taken the oath to uphold both. Being an advocate for a client’s interests is just part of your professional responsibility. The preamble to the Rules of Professional Conduct provides lawyers are not only representatives of clients and officers of the legal system, but also are “public citizen[s] having special responsibility for the quality of justice.” Your clients’ impressions of the court and the justice system begins with you.

How people are treated in any particular court determines how they perceive all Missouri courts. If they feel unjustly treated, or that the judge didn’t listen to them, they may believe all courts are unjust. To each person, his or her case is the most important case.

This ties in directly with article 2, section 4 of the Missouri Constitution:

“That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

My personal message for the lawyers is simple: I recognize some people expect a small town solo practitioner to prove he is worthy of his position on the Supreme Court of Missouri every day. I understand my Court is almost always the court of last resort for the people and legal issues involved.

For that reason, I commit to always do what I think is right according to the law, and I will always do my best to explain clearly in the opinions I write why I think the law requires the result reached.

My message for my colleagues on the bench is a little more lighthearted. In fact, I have an attempt at poetry for you –

“Thorns can hurt you, your man or woman desert you, your sunshine can turn to fog, but if you are a judge and want to make sure you are never friendless, do what I did and get yourself a dog.”

Thank you.
Free to members of the Missouri Bar.

Members of The Missouri Bar now have access to Fastcase’s entire legal research database for free. That means unlimited next-generation searching, printing, and reference support. To start using your member benefit log in to www.mobar.org and click the Fastcase logo. And don’t forget that Fastcase’s award-winning mobile apps for iPhone, iPad, and Android devices can be connected to your Missouri Bar account using Mobile Sync. Smarter research tools, brought to you by The Missouri Bar and Fastcase.
The advent of autonomous vehicles points to a seemingly inescapable shift in historical standards for auto crashes – from driver/owner liability to a product-liability regime. The emerging technology may change how traffic laws are enforced, and it will also implicate other privacy, criminal, insurance, and ethical quandaries.

Part I of this article [July-August 2017] discussed the state and federal governments’ legislative and regulatory approaches to automated driving. But given the federal government’s apparent appetite to permit the technology’s quick deployment, before exhaustive regulations could even be crafted – and because state regulations are either non-uniform or non-existent – litigators and courts will likely play a large role in shaping the common law’s approach to automated driving:

Part Two, below, will discuss potential liability shifts, as well as automated driving’s potential effects on insurance, criminal law, privacy law, and ethics.

**From Human Negligence to Product Liability**

Automated-driving crashes are inevitable, so courts will likely need to determine the legal and factual standards for determining liability. Depending on the level of automation, the legal and factual analyses will likely differ substantially from today’s legal analyses.

Fully manual Level 0 is the status today, and Level 5 will be our autos’ self-driving future. But in the interim, much of the litigation will be focused on Levels 1–4. As long as humans and computers are co-pilots, determining “cause” will become increasingly complex.

During this time of transitional human-machine cooperation, insurance and litigation will likely develop criteria for determining a crash’s cause(s). Did the human override the computer? Was the human paying attention – and to a sufficient degree? Did the computer properly alert the human? Did the computer notify the human early enough? Did the computer misinterpret data? The fact-specific queries and aggregate test cases to determine liability will likely be crafted by insurers, litigators, and regulators.

Today, one factor that insurers and litigators consider when determining potential liability is a vehicle’s make and model. As automated systems assume more control, an increasingly important factor will be the automated vehicles’ software – in terms of both the version’s components and the timeliness of its updates.
Did the software company sufficiently update the algorithms to reflect evolving best practices? If so, did the manufacturer push the algorithm updates to all vehicles? If so, did the vehicle owner accept the update? Should the onus be on the owner to update the algorithms—or should the manufacturers design the systems to push updates automatically? (Modern software, operating systems, and browsers increasingly push updates without user intervention, ensuring that users integrate the most recent versions, and their security updates, automatically.)

One insurance industry group contemplates a future where burdens of proof might shift from drivers to manufacturers, who may be required to prove that their automation did not cause a crash. The website Law of the Newly Possible provides a helpful graph mapping potential responsibility for automated-vehicle crashes, noting that a significant actor in the civil liability analysis will be insurance companies.

Steering Toward Liable Parties

As with any emerging technology, the list of potential defendants may be initially broad. But as the law develops, liability may coalesce to certain defendant categories. Professor Bryant Walker Smith assesses that in a single crash, potential defendants might include vehicle owners, drivers, manufacturers, sensor suppliers, and data providers.²

Vehicle Owners: Override, Failure to Maintain

Of course, a vehicle owner might bear liability in several contexts. In Levels 1–4, owners might override the automation negligently, purposefully disable all automation, disable certain features, or fail to maintain the system (for example, by failing to accept software updates). Because owners are ostensibly the closest to the vehicle post-sale, courts and juries may find that they share potential liability.

Drivers: Disabling Features, Improper Use

If a human “driver” is not the owner, that driver may share a distinct liability. For example, even if the owner has maintained and enabled all safety features, the driver might disable them. Or the driver may use the automation features improperly. Or the driver might override the automation, contributing to a crash. Indeed, Google reports that nearly all of that company’s automated-driving crashes have been caused by human error. So in Levels 1 through 4, the potential liability of drivers and owners can be distinct.

Manufacturers and Software Creators: Failure to Warn

Some vehicle manufacturers, like Tesla, are developing their automated-driving technologies themselves; other manufacturers are working with an outside software vendor (Fiat and Google, for example, announced a partnership in May 2016). So, potential liability for an automated vehicle’s design may be split.

Today’s software disputes often hinge upon language in end-user license agreements (EULAs). For automated-driving disputes, liability may well be tied to what the manufacturers’ EULAs claim and disclaim. Do automated-vehicle purchasers own the entire vehicle—hardware and software? Or does the software remain the sole property of manufacturers? The likelier scenario is one where manufacturers own the vehicle’s software (General Motors and John Deere presently claim ownership) and customer owners merely license it.³ Despite manufacturers’ claims of ownership, the U.S. Copyright Office currently allows customer owners to break software encryption to repair vehicles⁴—potentially indicating that, even absent software ownership, consumers might be able to exert some control.

The interaction between software and hardware in automated vehicles raises interesting questions. Does a manufacturer that claims continued ownership of the software adopt a heightened duty to update, as well as potential liability from failure to warn? The issue of software ownership also relates to future auto sales. Could manufacturers who claim ownership over the software prevent consumers from selling automated vehicles—as Google’s license might have prohibited sales of Google Glass on eBay?⁵ Would a manufacturer’s attempted prohibition of automated-vehicle sales conform to copyright’s first-sale doctrine, which permits a purchaser of a copyrighted work such as a DVD to sell it? Does it matter that without the automated-driving software, the hardware (the vehicle itself) would be rendered useless?

Data Providers

In some instances, software designers (like Google) and other data providers might provide data independently, potentially resulting in a liability split. For example, automated-driving software might use a third party’s map data. If the automated vehicle follows incorrect map data—if, say, that data reflects the wrong direction on a one-way street—then the map-data provider might be liable, at least in part.

Autonomous vehicles will likely be programmed to follow the laws for any given GPS position, and they might also use third-party data to determine applicable laws. This is a complicated proposition, since any GPS point is usually governed by myriad, often-overlapping laws and regulations—local and municipal laws, county laws, state laws, federal statutes, federal regulations, and potentially others. If a data provider gets any one of those legal concentric circles wrong, or fails to timely reflect changes to legislation or case law, then the data providers could also bear some liability.

Potential Claims

During the transition to a driverless future, the legal standards associated with auto crashes—which have remained largely stable for decades—will likely evolve more quickly. As automated driving becomes more prevalent, improved safety may decrease
bodily injury claims, while sensor damage and AI failures will likely increase property damage claims and product liability claims.6

Lawsuits about automated driving might involve several types of traditional claims: negligence, product-liability claims, failure to warn, breach of warranty, and foreseeability. But isolated plaintiffs’ claims will likely differ depending upon their personal standing: Automated vehicles’ owners, “drivers,” passengers, and pedestrians will likely have distinct claims.

Negligence

Negligence claims in product liability cases often hinge upon whether a defendant used reasonable care to design products so they are safely used in reasonably foreseeable ways. For example, Minnesota law requires the following elements of negligence: (1) the existence of a duty of care, (2) breach of that duty, (3) injury, and (4) proximate cause.7 For manufacturers, “a supplier has a duty to warn end users of a dangerous product if it is reasonably foreseeable that an injury could occur in its use.”8

If an automated vehicle crashes on a wet road, plaintiffs will likely argue that manufacturers either foresaw or should have reasonably foreseen that automated vehicles would navigate wet roads, and the vehicle’s design caused injury. But in such a case, one salient question might be, “To what extent was the manufacturer’s design of the automated-driving system ‘reasonable’?”. When encountering wet roads, should the system have been designed to automatically reduce vehicle speed? Prevent driving altogether?

Strict Liability

Even if a manufacturer is not negligent, having exercised all requisite care, it might still ship vehicles with unsafe defects that trigger strict liability, regardless of manufacturer negligence. Strict liability cases generally fall into three categories: manufacturing defects, design defects, and failure to warn. The Second Restatement of Torts holds a manufacturer liable for “unreasonably dangerous” defects even if it “exercised all possible care” to prepare and sell the product – and even without a contractual or purchasing relationship with the user.9 For automated-driving cases, the vehicles’ “users” (including owners, passengers, and potentially third parties) may make similar claims. The Third Restatement10 slightly shifts liability to failure to warn of “foreseeable risks” – and “foreseeability” in the fast-moving area of automated driving will likely be a moving target.

Manufacturing Defects

In automated vehicles, manufacturing defects might involve either the software or the hardware. To prove a manufacturing defect under Minnesota law, plaintiffs must establish: (1) the product’s defective condition was unreasonably dangerous for its intended use, (2) the defect’s existence when the product left the defendant’s control, and (3) proximate cause.11 Hardware manufacturing defects are more familiar to product liability attorneys today, but in a world where algorithmic tweaks can make the difference between life and death, software manufacturing defects may play a larger role. What if a beta algorithm ships with a flaw that interprets a white semi-trailer as the sky? Or a typo-induced bug in the governing law (25 mph vs. 255 mph)? Are those manufacturing defects or design defects?

Design Defects

A more common claim might be that an automated vehicle has a defective design. In Minnesota, a manufacturer must take “reasonable care” when designing a product to “avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which the product was intended, as well as an unintended yet reasonably foreseeable use.”12 Courts understand that the “reasonable care” analysis balances likelihood and gravity of harm with the burden of effective precaution.13

Design, security, and safety updates.

Because automated-driving algorithms are improving daily, plaintiffs will likely argue that yesterday’s state-of-the-art algorithm is today’s defective design. If today’s state-of-the-art algorithms can make more subtle distinctions – but a manufacturer does not push the algorithmic improvements to a 10-year-old car’s system – is that a design “defect”? What is the burden of pushing the updated algorithm to an obsolete system? Does it matter that manufacturers could push improvements quickly and inexpensively through over-the-air updates?

Even today, this question is not hypothetical. In September 2016, Chinese researchers discovered security vulnerabilities in Tesla vehicles, permitting unauthorized remote activation of moving vehicles’ brakes. Tesla reportedly pushed a fix to vehicles within 10 days.14

Sunsetting and planned obsolescence?

Consumer technology manufacturers face a similar situation with software and operating system (OS) updates. As Microsoft, Apple, and Google improve their OSes, they “sunset” the operating systems – often leaving devices inoperable or vulnerable to malicious hacking. Microsoft, for example, stopped supporting Windows XP in 2014, leaving users of that ancient, 12-year-old OS vulnerable to security attacks. Smartphones and tablets have even shorter supported-OS lifespans. But while consumers might accept that a $300 tablet they bought in 2012 reached its end-of-supported-life in 2016, they will likely demand a higher standard from a $100,000 automated vehicle. Even with today’s smartphones, the FCC has pressured devicemakers to provide details about the frequency and timeliness of their security updates.15 Manufacturers, regulators, and the courts will likely make similar determinations for automated vehicles. What security-update and algorithm-update frequency is “reasonable”? And can manufacturers permissibly choose to “brick” obsolete vehicles?

Failure to Warn

While automated vehicles promise great safety improvements, plaintiffs will surely argue that they remain dangerous products that require warnings. In Minnesota, suppliers have a duty to warn end users of a dangerous product if “it is reasonably foreseeable that an injury could occur in its use.”16 If that duty is triggered, the supplier has two duties:

(1) the duty to give adequate instructions for safe use; and
(2) the duty to warn of dangers inherent in improper usage.17
Legally adequate warnings should:

1. **attract the attention** of those that the product could harm;
2. **explain** the mechanism and mode of injury; and
3. **provide instructions** on ways to safely use the product to avoid injury.\(^\text{18}\)

When determining whether the duty to warn exists, the “linchpin” is foreseeability. Minnesota courts analyze an allegedly negligent act, as well as the event causing the damage, by determining the following:

- **Court determines no duty:** Connection is too remote to impose liability as a matter of public policy.
- **Court determines duty exists:** Consequence was direct, the type of occurrence was or should have been reasonably foreseeable.
- **Jury considerations:** Adequacy of the warning, breach of duty, causation.\(^\text{19}\)

For Minnesota cases involving automated driving’s Levels 1–4, parties will likely cite the Minnesota Supreme Court’s decision in *Glorvigen*, which involved an airplane’s autopilot mode and the manufacturer’s alleged failure to warn. That court held that providing the pilot with written instructions was sufficient: “[T]here is no duty for suppliers or manufacturers to train users in the safe use of their product.”\(^\text{20}\)

Automated-driving vehicles will likely raise distinct legal questions. For partial automation, where NHTSA Level 2 requires operator intervention on “short notice,” what type of warning sufficiently defines “short”? May the manufacturers engage in a cost-benefit analysis, opting not to spend millions of dollars to provide faster notice where any user performance improvement would be negligible?

Full automation like Level 5 will likely raise even more interesting questions. In contrast to “autopiloted” airplanes, which still require training, expertise, and *shared control*, what standard would apply to fully autonomous vehicles, which might require no training? What type of written warning might be sufficient? Given automated driving’s potential benefits to the disabled, must manufacturers provide warning sufficient to accommodate “drivers” of fully automated vehicles who are deaf, blind, or both?

**Misrepresentation**

Injured plaintiffs will likely argue that automated-vehicle manufacturers’ advertising and statements reflect fraudulent or negligent misrepresentations. For example, for human-machine cooperation in Levels 1–4, to what extent can a manufacturer plausibly assert that human control is “rare”? What if the manufacturer cites testing data – regarding automation/human handoffs, crash data, injuries, or other parameters – and

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<th>3-hr GAL</th>
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| **October 27, 2017**  
St. Louis  
Holiday Inn Airport West (Earth City)  
3400 Rider Trail South  
314-291-6800  
**October 27, 2017**  
Independence  
Stoney Creek Hotel & Conference Center  
18011 Bass Pro Drive  
816-908-9600  
**November 8, 2017**  
ONLINE VIDEO REBROADCAST  
(9:00 a.m. - noon)  
**December 1, 2017**  
Jefferson City  
The Missouri Bar  
326 Monroe St.  
573-635-4128  
**November 3, 2017**  
St. Louis  
Holiday Inn Airport West (Earth City)  
3400 Rider Trail South  
314-291-6800  
**November 3, 2017**  
Independence  
Stoney Creek Hotel & Conference Center  
18011 Bass Pro Drive  
816-908-9600  
**December 13, 2017**  
ONLINE VIDEO REBROADCAST  
(9:00 a.m. - 5:00 p.m.)  
**December 15, 2017**  
Jefferson City  
The Missouri Bar  
326 Monroe St.  
573-635-4128 |
DEALING WITH ETHICAL ISSUES IN YOUR PRACTICE

Replays

<table>
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<th>PART</th>
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<td>I</td>
<td>Top Ten Ethical Traps &amp; How to Avoid Them</td>
<td>November 15, 2017</td>
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<td>II</td>
<td>Ethics and Emerging Technologies</td>
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<td>III</td>
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Time for all parts: 12:00 noon - 1:40 p.m.
Each part qualifies for **2.0 MCLE hours**
including **2.0 Ethics hours**

DIVIDING MARITAL PROPERTY
NOVEMBER 16, 2017
9:00 a.m. - 10:00 a.m.

HANDLING CRIMINAL MATTERS IN SPECIALITY COURTS
DECEMBER 14, 2017 9:00 a.m. - 10:00 a.m.
DWI AND TRAFFIC LAW UPDATE
What Practitioners Need to Know to Protect Their Clients

MISSOURI CRIMINAL CODE REVISION:
DRUG & ALCOHOL OFFENSES
Tuesday, November 21, 2017

HIGHLIGHTS
• Drug-Related Offenses
• Changes to Specific Drug-Related Offenses
• Alcohol-Related Offenses
• Changes to Specific Alcohol-Related Offenses

MISSOURI CRIMINAL CODE REVISION:
SEX OFFENSES
Tuesday, December 12, 2017

HIGHLIGHTS
• Definitions and Time Limitations
• Multiple Counts for Multiple Acts
  • Rape and Sodomy
  • Unlawful Sexual Contact
• Sex Offenses Against Children
• 6 Sex Offenses Against a Specific Class of Individuals
  • Child Pornography
    • Sentencing
• Restrictions on Convicted Sex Offenders
  and Registration Requirements
  • Defenses
• Miscellaneous Statutes Related to Sex Offenses

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■ Qualified Immunity
■ 10 Best Ways to Get Your Municipality Sued
■ Panel Discussion (get all your Section 1983 questions answered)
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In October of 1962, the world stood on the brink of war as the United States demanded that the Soviet Union dismantle offensive medium-range nuclear missile sites that it was constructing in Cuba for warheads that could potentially reach American cities.

From behind-the-scenes accounts, we know that an articulate best-selling book published just a few months earlier by historian Barbara W. Tuchman, a private citizen who held no government position, contributed directly to the delicate negotiated resolution of the Cuban Missile Crisis.

After chronicling Tuchman’s contribution to world peace, this article discusses her later public commentary about what she called the “art of writing,” commentary that remains instructive for lawyers who write as representatives of clients or causes in the private or public sector.

The Missiles of October

In the last week of January 1962, Barbara W. Tuchman was a little known historian whose three books had won only modest popular attention. Then she published The Guns of August, a military history of the antecedents and first month of World War I. The book presented a penetrating, carefully researched, and eminently readable account of the chain reactions that led European powers to stumble into the bloody four-year conflict in the summer of 1914, after an obscure 19-year-old Bosnian Serb assassinated Austrian Archduke Franz Ferdinand and his wife during a motorcade in Sarajevo.

Few European leaders wanted armed conflict, most thought that the fighting would last only a few weeks, but none could overcome the miscalculations, national resentments, and interlocking alliances that abruptly ended years of peace. By the time the guns fell silent more than four Augusts later, World War I (or the Great War, as it was called then) was the most barbaric conflict the world had ever seen. Thirty nations had suffered a total of 20 million military and civilian deaths, plus 21 million more wounded.

The Guns of August sold more than 260,000 copies in its first eight months, remained on the New York Times best seller list for nearly a year, and won Tuchman the first of her two Pulitzer Prizes. World War I’s origins continue to intrigue historians today, but the Modern Library ranks The Guns of August as number 16 on its list of the 100 best non-fiction books of all time.

One of the book’s earliest and most avid readers was President John F. Kennedy, who requested that his aides read it, distributed copies to U.S. military bases throughout the world, and reportedly gave copies as gifts to foreign dignitaries who visited the White House. In a world consumed by Cold War tensions, the president was particularly struck by Tuchman’s account of a late 1914 conversation between the former German chancellor and his successor about the blunders that sparked the outbreak of total war.

“How did it all happen?” asked the first. “Ah, if only one knew,” answered the other, without even trying to make sense of things.

As the United States stared eye-to-eye with the Soviet Union, President Kennedy explained the price of miscalculation to aides who had not yet read The Guns of August. “If this planet is ever ravaged by nuclear war – and if the survivors of that devastation can then endure the fire, poison, chaos, and catastrophe – I do not want one of those survivors to ask another, ‘How did it all happen?’ and to receive the incredible reply: ‘Ah, if only one knew.’

Some close advisors urged President Kennedy to order bombing of the Cuban missile sites that American reconnaissance flights had photographed. Military leaders urged a full-scale invasion of the island, but the president resisted escalation that might have slid the United States and the Soviet Union into World War III.

The Guns of August led President Kennedy toward restraint that enabled cooler heads to prevail. “I am not going to follow a course which will allow anyone to write a comparable book about this time,” he told his brother, Attorney General Robert F. Kennedy. “If anyone is around to write after this, they are going to understand that we made every effort to find peace.

Douglas E. Abrams
and every effort to give our adversary room to move.”11

“What Ifs” of History

When The Guns of August appeared in late January of 1962, President Kennedy was a busy man beginning the second year of the New Frontier, with little time outside the Oval Office for extracurricular reading. Tuchman’s book was more than 450 pages long, and any White House aide dispatched to the Library of Congress for an hour or two could easily have returned with an armload of other books to satisfy the president’s appetite for written history.12

What if President Kennedy found The Guns of August opaque, stodgy, or leaden? What if he put the book aside after plodding through the first few pages, and thus missed lessons that helped stiffen his resolve to give diplomacy a chance to avoid the sort of impetuous missteps that led Europe to “sleepwalk”13 into total war nearly a half century earlier?

We need not contemplate these chilling “What Ifs” because Tuchman delivered prose that observers have called “erudite and highly readable,”14 “elegant,”15 “illuminating,”16 lucid and graceful,17 and “transparenciously clear, intelligent, controlled, and witty.”18 Historiography held real-world consequences during the tense 1962 superpower standoff, and Tuchman’s best-seller delivered a powerful message with powerful writing that kept legions of readers (including the President of the United States) turning the pages.

“The Art of Writing”

Barbara W. Tuchman said years later that “the art of writing interests me as much as the art of history.”19 In 1981, she published Practicing History, a collection of essays drawn from her articles and speeches. The book opened with perceptive observations about what she called “that magnificent instrument that lies at the command of all of us—the English language.”20

Historians’ writing can yield helpful, though not perfect, analogies for lawyers’ writing. Lawyers can readily adapt these analogies to their own professional circumstances because there are only two types of writing—good writing and bad writing.21 Good historical writing is good writing about history, and good legal writing is good writing about law. Tuchman’s major observations about good writing, which appear in italics below, remain universal.

Personal and Professional Commitment

1. “Being in love with your subject . . . is indispensable for writing good history— or good anything, for that matter.”22

For practicing lawyers, “being in love” may often be an inapt phrase. “Being committed” may describe more accurately the inner drive that should sustain legal writers, even ones who are not moved by “love” of subject in the general sense of the word.

In the private and public sectors alike, a lawyer usually writes as a committed representative of clients or superiors, including ones the lawyer may find difficult or may not know very well. Lawyers sometimes advocate positions that would draw their distaste, ambivalence, or even rejection if the lawyers were writing for themselves and not for a client or cause.23

The Model Rules of Professional Conduct specify that an advocate “zealously asserts the client’s position under the rules of the adversary system.”24 Zealous advocacy may not afford lawyers personal autonomy to select topics that pique personal interest, and then to follow research wherever it leads.

Analogies that link legal writing and historical writing remain instructive, however, because personal and professional commitment matters to lawyers, as it does to historians. When fueled by commitment to client or cause, the lawyer’s writing can show the life and vitality that Tuchman achieved. But when legal writing remains unstimulated by commitment, the final product can sag. Readers can distinguish between legal writing that (in the words of former U.S. District Judge Charles E. Wyzanski, Jr.) “shines with the sparkling facets of a diamond,”25 and legal writing that appears dry and listless.

In 1980, Tuchman wrote a newspaper article that described what she perceived as the “decline of quality” in American life.26 “Quality,” she said, demands “investment of the best skill and effort possible to produce the finest and most admirable result possible.”27 Quality legal writing depends on lawyers who, in the exercise of professional responsibility, make the necessary investment by marshaling personal and professional commitment.

2. “Coupled with compulsion to write must go desire to be read. No writing comes alive unless the writer sees across his desk a reader, and searches constantly for the word or phrase which will carry the image he wants the reader to see and arouse the emotion he wants him to feel. . . . The reader is the essential other half of the writer. Between them is an indissoluble connection.”28

Lawyers marshal personal and professional commitment best by recognizing that just because they write something does not necessarily guarantee that anyone will read it, wholly or even in large part.29 This candid recognition led Catherine Drinker Bowen to keep a simple sign posted above her desk as she wrote her well-crafted biographies: “Will the reader turn the page?”30

“The writer’s object is— or should be— to hold the reader’s attention. I want the reader to turn the page and keep on turning to the end,” Tuchman said.31 Achievement of this desire does not normally follow from taking readership for granted.

Before lawyers turn to the keyboard, they should ask themselves a threshold question: “Who is likely to read this?” The answer is usually well within the lawyer’s grasp because court filings and most other legal writing usually targets a discrete audience readily identifiable in advance.

Once the legal writer identifies the intended audience, the writer can tailor style, tone, and content in ways that help engage readers. This rhetorical empathy is particularly important to quality writing in today’s frenetic legal practice. Federal and state judicial dockets, for example, have increased faster than population growth for most of the past generation or so, leaving judges with limited patience for submissions that remain bloated, sloppy, or off the point.32 Judges may sense when they have read enough of a brief. Advocates may have no choice but to plod through an opponent’s unwieldy brief or motion papers, or through unnecessarily verbose legislative or administrative regulations, but even here the writer risks obscuring important points amid the fog.

“I never feel my writing is born or has an independent existence,” Tuchman concluded, “until it is read.”33 In the legal arena and elsewhere, her “indissoluble connection” with readers depends on the writer’s understanding, as stage and screen actress Shirley Booth said after winning an Academy Award in 1952, that “the audience is 50 percent of the performance.”34

With U.S. and Soviet nuclear stockpiles poised in October of 1962, Barbara W. Tuchman’s sterling prose reflected advice delivered more than four decades later by historian David McCullough, recipient of two Pulitzer Prizes, the National Book Award, and the
Presidential Medal of Freedom: “No harm’s done to history by making it something someone would want to read.”

Corollary: No harm’s done to a lawyer’s brief, memorandum, or other writing by making it something someone would want to read.

Research and Expression

1. “The most important thing about research is to know when to stop. . . . One must stop before one has finished; otherwise, one will never stop and never finish. . . . I . . . feel compelled to follow every lead and learn everything about a subject, but fortunately I have even more overwhelming compulsion to see my work in print.”

Tuchman was right that “[r]esearch is endlessly seductive.”

Legal research, however, serves a mission different from the mission served by research that provides raw material for historians’ engaging narratives. Lawyers’ writing sometimes persuades best by storytelling, but usually only for a greater purpose.

The greater purpose is to establish or maintain someone’s status, rights, and obligations under the law. This “someone” is usually the client or agency that engages the lawyer. Legal research may involve a maze of precedents, statutes, administrative rules and decisions, court rules, and such unofficial sources as treatises, restatements, and law review articles. In legal matters writing about or disputes worth taking to formal or informal resolution, these sources may point in different directions without initial harmony or later resolution.

Lawyers too must “know when to stop,” but different contexts call for different conclusions about when that time comes. Court deadlines and other filing obligations directly or indirectly constrain lawyers who, for the sake of client or cause, must “see their work in print.” Lawyers exercising professional judgment must sense when to turn primary attention from efficiency, thorough research of fact and law to writing and then honing the final product. At some point, the lawyer determines that the salient arguments or advice can be delivered thoroughly and effectively, and that further research might diminish opportunity for translating raw materials into effective writing that meets applicable time constraints.

Quality legal research does not necessarily showcase the lawyer’s ability to plumb every crevice. “Judges do not need a show-and-tell exercise to reveal how smart you are,” said Judge Ruggero J. Aldisert. Legal writing usually fulfills its mission best when readers remember the message, not the messenger.

“People,” said Tuchman, “are always saying to me in awed tones, ‘Think of all the research you must have done!’ as if this were the hard part. It is not; writing, being a creative process, is much harder and takes twice as long.”

2. “The writer . . . must do the preliminary work for the reader, assemble the information, make sense of it, select the essential, discard the irrelevant. . . . What it requires is simply the courage and self-confidence to make choices and, above all, to leave things out.”

Besides time constraints imposed by court deadlines and other filing obligations, lawyers commonly encounter space constraints mandated by court rule. The latter may be direct (imposed by page, line spacing, margin, and font restrictions, for example), or indirect (imposed by the likely attention spans of busy readers). Taken together, constraints of time and space fashion a cardinal rule of good writing: The writer should finish writing before the readers finish reading.

“Structure is chiefly a problem of selection,” said Tuchman, “an agonizing business because there is always more material than one can use.” Lawyers without the wisdom and self-confidence to “make choices” can easily clutter the final product with string citations, distracting footnotes, extraneous commentary, or similar underbrush that overwhelms and disorients readers without illuminating the status, rights, and obligations that underlie the writing itself.

3. Words are seductive and dangerous material, to be used with caution. . . . “[C]areless use of words can leave a false impression one had not intended.”

Lawyers know what Tuchman was talking about. When a person reads personal messages or newspaper columns by writers friendly to the reader’s point of view, the reader sometimes re-creates words or sentences to help cure imprecision. “I know what they really meant to say,” the reader thinks silently, even if the words on the page do not quite say it.

Readers normally do not extend lawyers such help. Legal writers typically face a “hostile audience” that “will do its best to find the weaknesses in the prose, even perhaps to find ways of turning the words against their intended meaning.” Judges and law clerks dissect briefs to test arguments, but only after opponents have tried to make the arguments mean something the writers did not intend. Advocates strain to distinguish language that complicates an appeal or creates a troublesome precedent.

Parties seeking to evade contractual obligations seek loopholes left by a paragraph, a clause, or even a single word.

Some imprecision is inescapable in language. Justice Felix Frankfurter, a prolific writer as a Harvard law professor before he joined the Supreme Court, was right that “[a]nything that is written may present a problem of meaning” because words “seldom attain[] more than approximate precision.”

Imprecise tools though words may sometimes be, they remain tools nonetheless because (as Professor David Mellinkoff put it) “[t]he law is a profession of words.” Tuchman delivered universal advice when she flagged seduction, danger, and caution; achieving the greatest possible precision the first time remains a legal writer’s imperative.

3. “[S]hort words are always preferable to long ones; the fewer syllables the better, and monosyllables, beautiful and pure . . . , are the best of all.”

Novelists William Faulkner and Ernest Hemingway did a public thrust-and-parry about the virtues of simplicity in writing. Faulkner once criticized Hemingway, who he said “had no courage, never been known to use a word that might send the reader to the dictionary.” “Poor Faulkner,” Hemingway responded, “Does he really think big emotions come from big words? He thinks I don’t know the ten-dollar words. I know them all right. But there are older and simpler and better words, and those are the ones I use.”

“Use the smallest word that does the job,” advised essayist and journalist E. B. White. Will Rogers delivered advice that resembled Hemingway’s and White’s. Rogers is best known today as a humorist, but satire about public issues frequently conveys serious underlying messages. Rogers wrote more than 4,000 nationally syndicated newspaper columns, and he contributed wisdom about language. “[H]ere’s one good thing about
language, there is always a short word for it,” Rogers said. “I love words but I don’t like strange ones. You don’t understand them, and they don’t understand you.”

4. “[I]t is a pleasure to achieve, if one can, a clear running prose . . . . This does not just happen. It requires skill, hard work . . . . It is laborious, slow, often painful, sometimes agony: It means rearrangement, revision, addition, cutting, rewriting.”

From years at the bench and bar, Justice Louis D. Brandeis instructed lawyers that “there is no such thing as good writing. There is only good rewriting.” Literary giants concur. “To be a writer,” said Pulitzer Prize winner John Hersey, “is to throw away a great deal, not to be satisfied, to type again, and then again and once more, and over and over.”

**Thirteen Days: Remembering the Cuban Missile Crisis**

In October of 1962, my classmates and I were in the sixth grade at Bowling Green Elementary School in Westbury, New York. During lunchtime recess one day at the height of the Cuban Missile Crisis, a few fifth graders ran around the playground shouting that their transistor radios had just broadcast a news bulletin that the United States had sunk a Soviet ship and that the two nations were at war.

Our teacher, Sara Hurwitz, spent the afternoon reassuring the two nations were at war.

Endnotes

1 Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books. Four U.S. Supreme Court decisions have cited his law review articles. His latest book is *Effective Legal Writing: A Guide for Students and Practitioners* (West Academic 2016).


5 E.g., id.; Paul Ham, 1914: *The Year the World Ended* (2013); Sean Mcelwee, 1914-4 Countdown to War (2013); Margaret MacMillan, supra note 2.


The Supreme Court of Missouri, in an order dated June 30, 2017, adopted a “Notice of Rights for Defendants Appearing in Municipal Divisions” as Appendix C to subdivision 37.04, entitled “Supervision of Courts Hearing Ordinance Violations,” of Rule 37 (Statutory and Ordinance Violations and Violation Bureaus).

This order became effective July 1, 2017.

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

In another order dated June 30, 2017, the Supreme Court of Missouri adopted a “Lawful Enforcement of Legal Financial Obligations; a Bench Card for Judges” as Appendix D to subdivision 37.04, entitled “Supervision of Courts Hearing Ordinance Violations,” of Rule 37 (Statutory and Ordinance Violations and Violation Bureaus).

This order became effective July 1, 2017.

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 August 4, 2017, vacated the order of June 27, 2017 regarding the repeal of subdivision 5.28 and the adoption of a new Disciplinary Form A.

The Court, in the same order, repealed subdivision 5.28, entitled “Reinstatement,” of Rule 5 (Complaints and Proceedings Thereon), and adopted a new subdivision 5.28, entitled “Reinstatement.”

In the same order, the Court adopted a new Disciplinary Form A, entitled “Petition for Reinstatement to Practice Law Pursuant to Rule 5.28.”

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**Notice**

The Jefferson City firm of Williams Keepers, LLC, certified public accountants, has completed an independent audit, through December 31, 2016, of the finances of the following entities:

The Missouri Bar • The Advisory Committee Fund • The Missouri Bar Foundation
The Missouri Lawyer Trust Account Foundation • The Trustees of The Missouri Bar

Copies of the financial reports for each of these entities, including all notes and attachments, are available by going to The Missouri Bar’s website at www.mobar.org or you may link to http://www.mobar.org/governance/financial-audits.htm

In addition, printed versions of the audit materials may be obtained by contacting:

The Missouri Bar
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TAX COURT TREATS HOME SALE TO PARENTS AS PARTIAL GIFT

Scott E. Vincent

THE TAX COURT RECENTLY HELD THAT A TAXPAYER’S TRANSFER OF HIS RESIDENCE TO HIS PARENTS WAS A PARTIAL GIFT AND PARTIAL SALE, AND REVIEWED THE TAXPAYER’S BASIS IN THE HOME AND GAIN ON THE SALE. IN FISCALINI V. COMMISSIONER, TC MEMO 2017-163, THE TAX COURT DETERMINED THAT THE TAXPAYER’S GIFT OF EQUITY TO HIS PARENTS DID NOT ADD TO HIS GAIN ON THE SALE, AND FOUND THE TAXPAYER WAS ENTITLED TO BASIS FOR A PRIOR GIFT OF PART OF THE HOME FROM HIS PARENTS.

Background

Code § 1001(a) provides that gain from a sale of property is the excess of the amount realized over adjusted basis in the property. Under the § 1001 regulations, a transfer that is part sale and part gift is realized as gain to the extent the amount realized on the sale exceeds adjusted basis in the property. Section 1001(b) and related regulations provide that the amount realized on a sale includes money and the fair market value of any property received, and also includes any liabilities of the transferor discharged as a result of the sale.

In determining gain from a sale of property, Code §§ 1011 through 1016 establish that adjusted basis includes the transferor’s cost of the property, capital expenditures on the property and, for property acquired by gift, the donor’s basis in the property.

Code § 121 allows an exclusion from income of up to $250,000 ($500,000 for joint filers) of gain on sale of a home used as the taxpayer’s principal residence in at least two of the five years prior to the sale.

Facts

The taxpayer in this case purchased a home with his parents in 1993. The parents provided $40,000 cash, and the taxpayer took out a mortgage of $234,312 on the property. The taxpayer used the home as a residence and did work on the property, including addition of a swimming pool and renovation of a detached garage. The parents transferred their interest in the home to the taxpayer in 2003 without any consideration.

After refinancing several times, the taxpayer transferred the home to his parents in 2007 to avoid foreclosure. The closing statement for this transfer showed that the taxpayer made a gift of equity to his parents of $295,655, the parents borrowed funds to retire the taxpayer’s loans against the property of $664,048, and there were settlement charges and costs. The title company later issued taxpayer a Form 1099-S showing gross proceeds of $975,000 on the transfer, and no property or services received in return.

The taxpayer filed a late return for 2007, and did not report any gain on the sale of the home. The IRS proposed taxes relating to gain on the sale, and late filing and accuracy-related penalties. The taxpayer disputed the IRS calculation of his basis in the residence and amount realized from the sale.

Tax Court Decision and Holdings

The Tax Court first addressed the taxpayer’s argument that his basis should include $40,000 for the interest in the home that his parents gifted to him in 2003, as well as his additions and renovations to the home. The IRS argued that the taxpayer and his parents were co-owners, and that he was not entitled to increased basis for their gift. The Tax Court rejected the IRS argument, finding that the taxpayer did not provide his parents with any consideration upon the 2003 transfer of their interest to him. Based on this analysis, the Tax Court found that the taxpayer’s basis included his cost basis of $234,312 and...
his parents’ basis of $40,000, for a total of $274,312. The Tax Court did not find adequate evidence to allow additional basis for the taxpayer’s additions and renovations.

The Tax Court then considered the taxpayer’s disagreement with the IRS over the amount realized on sale of the property to his parents in 2007. The parties agreed that the amount realized included the taxpayer’s discharged liabilities of $664,048. The taxpayer maintained that the value transferred in excess of the discharged liabilities was a gift to his parents. The IRS argued that the amount realized on the transfer included the full fair market value of $975,000 reflected on the closing statements and Form 1099-S. The Tax Court again rejected the IRS position, finding that the taxpayer received no cash or other property from his parents as a result of the sale of property, other than the discharge of liabilities of $664,048. The Tax Court emphasized that the IRS failed to understand that the sale of the home to taxpayer’s parents was only in part a sale and was also in part a gift.

Based on the Tax Court findings, the taxpayer’s gain was calculated at $372,585, based on debt discharge realized less settlement costs and basis. After the personal residence exclusion of $250,000, the Tax Court found a recognized long-term gain for the taxpayer of $122,585 from the sale. The Tax Court also found that the IRS assessment of accuracy-related and late filing penalties was appropriate on this gain.

**Conclusion**

This case provides a good outline for calculation of gain on the sale of a principal residence in the context of fees, basis calculations, debt relief and the residence exclusion. Importantly, the case also demonstrates that a single transaction can have taxable gain and gift elements and implications, and highlights the importance of carefully characterizing all aspects of the transaction. Finally, the case shows the difficulty a taxpayer may have in establishing basis on the sale of a home, and the importance of maintaining records of additions, renovations, and other capital expenditures.

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**Endnote**

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

**Fighting Words**

**Continued from page 255**

**All Is Not Lost – Harassment Under Protection Order and Stalking Statutes**

A narrower definition of harassment than that of the criminal harassment statutes appears in Missouri’s protection order provisions. Section 455.010(1) provides that abuse includes harassment. “Harassment” is defined as “engaging in a purposeful or knowing course of conduct involving more than one incident that alarms or causes distress to an adult or child and serves no legitimate purpose.” The subsection further requires that “conduct must be such as would cause a reasonable adult or child to suffer substantial emotional distress and” that it have such a result. It also provides examples of conduct that may constitute harassment. Section 450.010(5) provides that abuse by a family or household member constitutes domestic violence. A “person who has been subject to domestic violence . . . may seek” orders of protection, the violation of which may constitute a criminal offense.

A similar, narrower definition of harassment appeared in Missouri’s previous criminal stalking statute. Section 565.225.1(3) defined “harasses” as “to engage in a course of conduct directed at a specific person that serves no legitimate purpose, that would cause a reasonable person under the circumstances to be frightened, intimidated, or emotionally distressed.” “A person commits the crime of stalking if he or she purposely . . . harasses or follows with the intent to harass another person.” “A person commits the crime of aggravated stalking” under a variety of circumstances, including if the person’s conduct violates a protection order.

Missouri’s new criminal stalking statute eliminates any reference to harassment. However, it defines “disturbs” in nearly identically language as “harasses” under its predecessor. It further has similar language enhancing stalking to stalking in the first degree under certain circumstances, including if the person’s acts violate a protection order.

Both the protection order and stalking provisions are narrower than the new criminal harassment statutes because they require a “course of conduct” by the offender, not merely a solitary act. They also are narrower because they employ a reasonable person (or child) standard. Furthermore, they are potentially narrower than the criminal harassment statutes in that they require that the offender’s conduct serve no legitimate purpose, as opposed to that the conduct be without good cause.

While neither the protection order statutes nor the stalking statutes have been subject to a substantial overbreadth challenge, Missouri cases suggest they would survive such attack without any “fighting words” limiting construction. A cautious prosecutor may, therefore, be wise to consider charging under protection order or stalking statutes, if applicable, rather than Missouri’s new criminal harassment statutes.

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**Endnotes**

1 Carl Kinsky is a graduate of Duke University School of Law and serves as the prosecuting attorney for Ste. Genevieve County, Missouri.

2 Section 565.090, RSMo 2016 (effective January 1, 2017); § 565.091, RSMo 2016 (effective January 1, 2017).

3 State v. Vaughn, 366 S.W.3d 513, 518 (Mo. banc 2012). There are some Missouri cases which have applied the substantial overbreadth doctrine involving constitutional protections outside the First Amendment. See, e.g., State v. Beine,
20 Section 565.090, RSMo 2016 (effective until December 31, 2016). This previous version proscribed certain communications of the following types: a threat to commit a felony, § 565.090.1(1); using coarse language, § 565.090.1(2); making an anonymous telephone call or electronic communication, § 565.090.1(3); communications to a “person who is, or . . . purports to be, seventeen years of age or younger. . . .” § 565.090.1(4); and “repeated unwanted communication,” § 565.090.1(5).

3 Section 565.090.1(6), RSMo 2016 (effective until December 31, 2016). This catch-all provision provided that a person committed the crime of harassment if he or she:

[w]ithout good cause engages in any other act with the purpose to frighten, intimidate, or cause emotional distress to another person, cause such person to be frightened, intimidated, or emotionally distressed, and such person’s response to the act is one of a person of average sensibilities considering the age of such person.

6 State v. Vaughn, 366 S.W.3d 513 (Mo. banc 2012). Vaughn also included a challenge to the catch-all provision on the grounds “that the terms ‘frighten,’ ‘intimidate,’ and ‘emotional distress,’” and “good cause” were “unconstitutionally vague.” This challenge was rejected.

11 Section 565.091, RSMo 2016 (effective January 1, 2017).

12 Section 565.090.2, RSMo 2013 (effective until December 31, 2016).

13 Id. The new class E felony has a maximum fine of $10,000 or if the “person has gained money or property through the commission of the offense” two times the amount of the gain. Section 558.002, RSMo 2016 (effective January 1, 2017). The old class D felony had a maximum fine of $5,000 or if the defendant “gained money or property through the commission of the offense, to pay a amount . . . not exceeding” two times the amount of the gain not to exceed $20,000. Section 560.011.1, RSMo 2016 (effective until January 1, 2017). The new class E felony has a maximum term of imprisonment of four years. Section 558.011.1(5), RSMo 2016 (effective, January 1, 2017). The old class D felony had the same maximum term of imprisonment. Section 558.011.1(4) (effective until December 31, 2016).

14 Section 565.090.1(4) (effective until December 31, 2016).

15 Lyris Lidsky & Andrea Pinzon Garcia, How Not to Criminalize Cyberbullying, 77 Mo. L. Rev. 605, 711 (2012).

16 Section 565.090.1(6), RSMo 2016 (effective until December 31, 2017).

17 Id.

18 Section 565.090.1, RSMo 2016 (effective January 1, 2017); § 565.091.1 (effective January 1, 2017).

19 Section 565.090.1(6), RSMo 2016 (effective until December 31, 2016).

20 Section 565.090(7), RSMo 2016 (effective, January 1, 2017).

21 See, e.g., Collin v. Smith, 578 F.2d 1197, 1205-06 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978) [holding that a neo-Nazi march through the predominantly Jewish city of Skokie, Illinois was constitutionally protected notwithstanding that it may result in the “tort of intentional infliction of . . . emotional distress.”].

22 See, e.g., Virginia v. Black, 538 U.S. 343 (2002). Missouri has its own statute criminalizing cross burning with the intent to intimidate any person or group. Section 574.1409, RSMo 2016 (effective January 1, 2017).


25 Vaughn, 366 S.W.3d at 518-19; City of Houston v. Hill, 482 U.S. 451 (1987);


27 Id.

28 Id. at 518-19 (citing State v. Moore, 90 S.W.3d 64, 67 (Mo. banc 2002)). See also, New York v. Ferber, 456 U.S. 747, 773 (1982).

29 366 S.W.3d 519.

30 See also

31 Vaughn, 366 S.W.3d at 519-20. The Supreme Court of Missouri also rejected the argument that repeated, unwanted communication “does not receive First Amendment protection because it inhibits another constitutional right: the privacy interest in avoiding unwanted communication.” Id. at 519. Such “[u]nwanted speech may be regulated [in places such as the home] “where the ‘degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.” Id. at 519-20 (citing Hill v. Colorado, 530 U.S. 703, 718 (2000)).

32 Vaughn, 366 S.W.3d at 520-21.

33 Id. at 521. (“The other five categories of harassment outlawed by section 558.090.1 explicitly proscribe communications. In contrast, subdivision (6)’s ban of “[a]ny other act’ applies only to conduct.”)

34 Vaughn, 366 S.W.3d at 521 (“The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.”) (quoting Virginia v. Black, 538 U.S. 343, 358 (2003)). The Court therefore concluded that “[a]ny other act’ necessarily includes expressive conduct not governed by subdivisions (1) through (5).”)

35 Vaughn, 366 S.W.3d at 521 (“Because the legislature intentionally excluded the sort of acts for which there could be good cause, both the intended and resulting effects must be substantial.”) Id. (“‘Good cause’ in subdivision (6) means ‘a cause that would motivate a reasonable person of like age under the circumstances under which the act occurred.’”) Id. at 522. This definition of “good cause” has been incorporated in the Missouri Approved Instructions for the new harassment statutes. MAI-CR 1st 419.20, 419.21 (July 1, 2017).

36 Vaughn, 366 S.W.3d at 521.

37 Id.

38 Id. (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

39 Vaughn, 366 S.W.3d at 521.


41 Lyris Lidsky & Andrea Pinzon Garcia, How Not to Criminalize Cyberbullying, 77 Mo. L. Rev. 693, 711 (2012).
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 4-1.15, 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)(7); Comment 18.

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
## DISCIPLINARY ACTIONS

### Disbarments

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<td>Ryan J. McMillin</td>
<td>#50167</td>
<td>1470 NW 64th Terrace, Kansas City, MO 64118</td>
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<tr>
<td>8/8/17</td>
<td>Mark J. Schultz</td>
<td>#35066</td>
<td>9140 Ward Pkwy., Suite 200, Kansas City, MO 64114-3313</td>
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<tr>
<td>8/16/17</td>
<td>Scott C. Hinote</td>
<td>#33069</td>
<td>204 W. Elm St., P.O. Box 1360, Ozark, MO 65721</td>
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<td>8/22/17</td>
<td>Christopher F. Arbuckle</td>
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<td>Jason M. Pottenger</td>
<td>#43334</td>
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<td>8/15/17</td>
<td>Michael T. Yonke</td>
<td>#42821</td>
<td>1111 Main St., Suite 700, Kansas City, MO 64105-2116</td>
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<td>9/12/17</td>
<td>Randall D. Crawford</td>
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<td>8/2/17</td>
<td>Michael Bradley Katz</td>
<td>#38231</td>
<td>11136 Apache Trail, St. Louis, MO 63146</td>
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<tr>
<td>8/15/17</td>
<td>Rebecca J. Tatlow</td>
<td>#39346</td>
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<tr>
<td>9/5/17</td>
<td>Melissa A. Bay</td>
<td>#47274</td>
<td>316 Greenbriar Estates Dr., St. Louis, MO 63122-3350</td>
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### Completed Probation

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<td>7/19/17</td>
<td>Allan H. Bell</td>
<td>#19459</td>
<td>2022 Swift, Suite 202, North Kansas City, MO 64116</td>
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<tr>
<td>7/31/17</td>
<td>David A. Hardy</td>
<td>#61201</td>
<td>16521 Bluejacket, Overland Park, KS 66221</td>
</tr>
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NEW RULE 5.28 – REINSTATEMENTS: AN OVERVIEW OF THE NEW REQUIREMENTS

MARK FLANEGIN

The Chief Disciplinary Counsel is appointed by the Supreme Court of Missouri to serve as counsel in disciplinary hearings and to conduct investigations as provided by Supreme Court Rule 5.2. An investigation may result in the matter being presented to the Supreme Court of Missouri for a final order of discipline. If the Court finds that professional misconduct occurred, it will impose appropriate discipline. The discipline imposed may result in an order of suspension or disbarment of a lawyer.

A lawyer’s license to practice law may also be suspended for failure to pay the annual enrollment fee, for failure to complete and report continuing legal education requirements, or for failure to file or pay state taxes.

A lawyer’s license to practice law may be suspended or the lawyer disbarred if a lawyer is unable to competently represent clients by reason of the mental or physical condition of the lawyer, for involvement in criminal activities, or for violations of the Rules of Professional Conduct.

Individuals wishing to have their licenses to practice law reinstated must comply with the requirements of Rule 5.28. The Supreme Court of Missouri, by Order dated August 4, 2017, repealed Rule 5.28 and enacted a new Rule 5.28. This article will address how the new Rule will affect the reinstatement process. This article is not intended to be an in-depth review of the requirements of reinstatement.

Perhaps the most obvious change to Rule 5.28 is the adoption of a standardized Petition for Reinstatement, entitled Disciplinary Form A. Individuals who are disbarred or suspended, except for a suspension for less than three years for failure to pay the annual enrollment fee or failure to comply with CLE requirements, start the reinstatement process by submitting a Petition for Reinstatement to Practice Law that is substantially in the form of Disciplinary Form A. The Form asks for contact information and contains 13 “Threshold Requirements” that must be answered. Failure to complete the petition or a “No” response to any of the requirements will cause the petitioner to be ineligible for reinstatement. The Petition for Reinstatement advises the petitioner that the petition is continuing and the petitioner must provide new and updated responses to any question while the petition is pending.

Averments in Disciplinary Form A specifically address requirements for reinstatement provided in Rule 5.28. Of particular interest is “Requirement 11”:

I understand that I carry the burden to establish, by clear and convincing evidence, that I have good moral character and that the best interest of the public will be served by my reinstatement to practice law.

Rule 5.28(i) states that a petitioner for reinstatement “must establish, by clear and convincing evidence, that the person is of good moral character, is fit to practice law, and the best interest of the public will be served by reinstatement of the person’s license to practice law.” Any doubts or arguments that persons seeking reinstatement did not have the burden to establish their fitness to practice are laid to rest.

Subsection (i) also provides 11 factors to consider in determining whether the petitioner has met this burden. These factors include:

- Acceptance of responsibility for wrongdoing with sincerity and honesty;
- The extent of rehabilitation as shown by good current reputation for character and moral standing in the community;
- The nature and severity of the misconduct leading to discipline;
• The person’s conduct since discipline;
• The time elapsed since discipline;
• Other instances of dishonesty, criminal behavior, professional discipline, unauthorized practice of law, academic and employment misconduct, financial responsibility or involvement in or neglect of legal and professional matters;
• The cumulative effect of all misconduct;
• The person’s current competency and qualifications to practice law;
• Restitution;
• Candor in the discipline and reinstatement processes; and
• Positive social contributions since the misconduct.

Reinstatement applications will continue to be submitted to the Chief Disciplinary Counsel for a Report and Recommendation. Under the old Rule 5.28, applications for reinstatement were referred to the Chief Disciplinary Counsel for a Report and Recommendation. The new Rule 5.28 provides that petitions for reinstatement will be referred to the Chief Disciplinary Counsel for a “character and fitness investigation” of the petitioner and a Report and a Recommendation.

Some reinstatement petitions are eligible for expedited processing. Pursuant to Rule 5.28(k), if a petitioner was suspended indefinitely with leave to reapply in a period of six months or less and is not on probation or was suspended for failure to pay tax for three years or less, then the petitioner’s license may be reinstated as a matter of course 30 days after the Petition for Reinstatement is referred to the Chief Disciplinary Counsel for a report and recommendation. However, if within that 30-day period the Chief Disciplinary Counsel files a motion to respond to the Petition for Reinstatement, the license will not be issued, the matter will proceed, and a comprehensive character and fitness investigation of the lawyer will be conducted.

New Rule 5.28 permits the Chief Disciplinary Counsel to contract with the Board of Law Examiners for the Board to conduct a character and fitness investigation. The Rule authorizes the Board to provide its investigative documentation and information to the Chief Disciplinary Counsel for its review in connection with the report and recommendation.

The Rule does not change the procedure that the report shall be served on the petitioner. The petitioner may, but is not required to, send to the Chief Disciplinary Counsel a written response to the report. The report, recommendation and any response must be filed with the Court. A decision by the Court regarding reinstatement of the petitioner’s license will be made on the basis of the petition, report, recommendation and response.

The new Rule provides that if the Court denies a reinstatement petition, it may state a period of time before a subsequent petition will be considered. The Court may also provide guidance to the petitioner regarding concerns or conditions that the petitioner should address before the submission of another Petition for Reinstatement.

Petitioners for reinstatement of their licenses pursuant to Rule 5.28 must complete CLE hours as a requirement for reinstatement. The new Rule 5.28 makes it clear that the number of CLE hours that must be completed is based on the time the petitioner’s license “has been suspended” at the time the petitioner files a Petition for Reinstatement. A petitioner who has been suspended less than three years as of the filing date of the petition must specifically aver that, within one year prior to the date of filing the petition, the petitioner has completed at least 15 hours of CLE credit, including at least three hours of ethics credit. For a petitioner whose license has been suspended three years or more as of the filing date of the petition, 30 hours of CLE credit, including at least six hours of ethics credit, must be concluded within two years prior to the date of filing the Petition for Reinstatement.

This requirement to complete CLE credit hours does not apply to petitioners seeking reinstatement if their license to practice law was suspended for more than three years only for the failure to comply with CLE requirements or for failure to pay the annual enrollment fee.

Conclusion

Persons who had their licenses to practice law suspended or have been disbarred should review Rule 5.28 and Disciplinary Form A to understand the reinstatement process. The new Rule 5.28 makes it clear that the burden is on petitioners for reinstatement to comply with the threshold requirements before a Petition for Reinstatement will be considered, and that once an investigation is commenced petitioners have a continuing burden to establish their fitness for reinstatement.

Endnotes

1 Mark Flanegin is staff counsel for the Office of Chief Disciplinary Counsel in Jefferson City.
2 Rule 5.06. All citations are to the Missouri Supreme Court Rules.
3 Rule 6.01.
4 Rule 15.06.
5 Rule 5.245.
6 Rule 5.23.
7 Rule 5.21.
8 Rule 5.19.
9 Rule 6.01. Lawyers who are suspended for failure to timely pay the annual enrollment fee for less than three years will be retroactively reinstated upon paying the enrollment fee for each calendar year of the suspension plus the accumulated penalty.
10 Rule 15.06. Any lawyer suspended for failing to comply with Rule 15 shall be retroactively reinstated upon certification by The Missouri Bar to the clerk of the Supreme Court of Missouri that the lawyer is in full compliance with Rule 15 within three years of the date of the lawyer’s suspension and the payment of a $100 late fee.
11 Disciplinary Form A, Rule 5.28. The petition would be subject to dismissal on a motion filed by the Chief Disciplinary Counsel. Disciplinary Form A is available at the Missouri Courts website, www.courts.mo.gov, under Appellate Court Forms.
12 Id.
13 Id.
14 Id.
15 Rule 5.28(c).
Melanie R. Adams-Swearengen, of St. Louis, on August 2, 2017, at age 35. She earned her J.D. from Saint Louis University in 2010. She was an associate with the Edwardsville, IL office of the Napoli Shkolnik law firm.

Beverly J. Alkire-Schaeffer of Osage Beach, on July 16, 2017, at age 68. She received her J.D. from the University of Missouri-Kansas City, and joined The Missouri Bar in 1992. Her law practice was in Camdenton. She was a member of the 26th Judicial Circuit Bench Bar.

Elaine C. Bachman of St. Louis, on October 6, 2016, at age 85. In 1976, she received her J.D. from Washington University. She practiced law with Anderson, Pruess & Zwibelman for 10 years, and at Snyder, Wier, Shaller & Bachman for an additional 10 years. She retired from full-time practice in 2005.

Fred J. Baehr, Jr. of Pittsburg, PA, on February 7, 2016, at age 85. He served as a tail gunner and surveyor in the U.S. Air Force during the Korean War. In 1968, he received his J.D. from Saint Louis University. Prior to his retirement in 1992, he worked at the Westinghouse R & D Center in Churchill, Pennsylvania. He then designed, built, and lived in a retirement home in Keowee Key, S.C. before moving back to Pennsylvania in 2013.

Robert P. Baine, Jr. of Florissant, on July 31, 2017, at age 85. During the Korean War, he served as a captain in the U.S. Air Force. He received his J.D. from Saint Louis University, and joined The Missouri Bar in 1955. He was a founding charter member of the Lake Regional Health Center.


Michael “Burns” G. Burnworth of Belleville, IL, on June 10, 2017, at age 58. In 1984, he received his J.D. from Saint Louis University. He practiced law in the firm of Gori Julian & Associates, P.C.

Milton C. Clarke of Kansas City, on February 24, 2017, at age 88. In 1953, he earned his J.D. from Northwestern University School of Law in Chicago, IL. Afterwards he served with army intelligence in Tokyo during the Korean War. He practiced law for 35 years with Swanson Midgeley, L.L.C. After retirement, he served as of counsel with Olson & Tapers, P.C. on a limited basis. In addition, he served on the Kansas City Board of Zoning Appeals for years, including as chair from 1972-1973.

Sanford F. “Frank” Conley, IV of Columbia, on April 11, 2017, at age 84. He served in the U.S. Army. In 1956, he earned his J.D. from the University of Missouri. He served as the prosecuting attorney for Boone County from 1962-1970. He was later an elected circuit judge for Boone and Callaway counties, and served from 1972 until his mandatory retirement in 2002.


Stacey Diamond Goodwin of St. Louis, on July 25, 2017, at age 30. She earned her J.D. from Saint Louis University in 2013. She served as a Rule 13-certified student lawyer when she worked in the SLU-School of Law Child Advocacy Clinic. After graduation, she joined The Wilbers Law Firm.

Thomas R. Green of St. Louis, on March 27, 2017, at age 83. His contributions as a lawyer, businessman, and public servant were significant. He earned his J.D. at Washington University in 1958. While maintaining a private practice, he served as assistant county counselor for St. Louis County and assistant attorney general of Missouri. In the 1960s, he founded Royal Banks of Missouri, National Real Estate Management, and National States Insurance Company. He also co-founded the Holocaust Museum of St. Louis, and once chaired the board of the Jewish Federation of St. Louis. In addition, he was a member of the Washington University School of Law’s national council and funded a professorship to the law school.

Ellis Gregory, Jr. of St. Louis, on August 12, 2017, at age 90. He enlisted in the U.S. Marine Corps in 1945. In 1954 he earned his J.D. from Washington University. He practiced law for 24 years before being appointed associate circuit judge by Gov. Joseph Teasdale. Judge Gregory served on the bench from 1978-1997. After retirement, he was reappointed senior judge for the State of Missouri, a position he held until his retirement at age 85.

Robert S. Harris of Ballwin, on February 10, 2017, at age 85. He was a U.S. Army veteran. He earned his J.D. from Washington University, and joined The Missouri Bar in 1959. After 40 years of service, he retired from the Internal Revenue Service.


William L. Johnson of De Soto, on August 2, 2017, at the age of 65. Prior to attending law school, he taught at the South Reynolds County R-II and De Soto public school districts. In 1982, he received his J.D. from Hamline University in St. Paul, MN, and was a solo practitioner in De Soto. He also served as Jefferson County Prosecuting Attorney as well as being a long-time member of the De Soto School Board.
Weldon C. Judah of St. Joseph, on July 13, 2017, at age 68. He served as a medic with the 139th Air National Guard Unit and was honorably discharged, after six years, in 1973. He received his J.D. from the University of Missouri-Kansas City in 1980. He served as a judge in the St. Joseph Municipal Court (1986-1988), as a Buchanan County associate circuit judge (1989-1995), and finally as a circuit judge of the 5th Circuit until his retirement in 2016. In total, he served on the bench for 30 years.


James W. Klobnak of Kansas City, on August 22, 2017, at age 64. He earned his J.D. from the University of Missouri-Kansas City in 2003. He was a Jackson County prosecutor, and also served as the union representative for IAFF Local 42 before eventually opening his own private practice.

Daniel G. Nichols of St. Louis, on July 9, 2017, at age 65. He received his J.D. from Saint Louis University in 2000. He joined the St. Louis Metropolitan Police Department in 1973, was promoted to sergeant in 1988, and retired in 2009 after serving as a homicide detective for 11 years.

Raymond I. Plaster of Springfield, on July 16, 2017, at age 55. He joined The Missouri Bar in 1987, and was a solo practitioner.

J. Max Price of Salem, on August 15, 2017, at age 81. He served in the U.S. Marine Corps. In 1966, he earned his J.D. from the University of Missouri. He practiced law for more than 30 years, and was a former Missouri assistant attorney general, former Dent County prosecuting attorney, and circuit judge and senior judge for the 42nd Judicial Circuit.

Todd A. Rohr of Overland Park, KS, on May 31, 2017, at age 53. He received his J.D. from the University of Missouri-Kansas City, and joined The Missouri Bar in 1989. Most recently he served as senior counsel for Teva Neuroscience, Inc.

Erwin R. Sackin of Overland Park, KS, on September 4, 2017, at age 102. He received his J.D. from the University of Missouri-Kansas City in 1936. He practiced law until his enlistment in the U.S. Navy in 1942. During World War II, he served three years in Guam as a first lieutenant. He received the Distinguished Service Medal from the Veterans of Foreign Wars and the Award for Distinguished Service from the Kansas City Auxiliary Police for his service during and after the war. He served as CFO, in-house counsel, and director of S-G Metals Industries, Inc. He was also an officer and director of National Compressed Steel Corp. Being civic-minded, he served on the board of directors of many organizations, including the National Conference for Community and Justice and the Kansas City, Kansas Chamber of Commerce.

John S. Steiner of St. Louis, on February 28, 2017, at age 71. He earned his J.D. from Tulane University in New Orleans, LA. His legal career began as a law clerk for the U.S. District Court of Louisiana. After returning to St. Louis, he practiced at Armstrong Teasdale and Fordyce & Mayne before starting his own practice. He served as a municipal judge for Ladue and as a member of the Region 10 Disciplinary Committee from 1999-2007.

Mark G. Stingley of Kansas City, on July 9, 2017, at age 64. In 1977 he received his J.D. from the University of Missouri-Kansas City. He joined Bryan Cave in 1995 as a partner in the Kansas City office. He served as an adjunct professor at the University of Missouri-Kansas City School of Law from 2007-2016. He was named 2016 Lawyer of the Year for Kansas City Bankruptcy/Insolvency Law in Best Lawyers in America.

Edward L. Thomeczek of Osage Beach, on May 23, 2017, at age 80. He served in the U.S. Navy from 1959-1962. He joined The Missouri Bar in 1967, and was an attorney for the public administrator’s office in St. Louis before becoming the executive director of the Hotel/Motel Association of Greater St. Louis. He spent the last 10 years in Osage Beach, continuing the private practice of law.

Lawrence E. Tittle of Lee’s Summit, on June 27, 2017, at age 85. After an industrial accident in 1959, he lost all of his vision. In 1967, he earned his J.D. With the help of his reader, Betsy Ann Stewart, he was the first blind student to graduate from the University of Missouri-Kansas City School of Law. He practiced law for more than 40 years in Independence.

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.
Conclusions

The general rule is that titles are not independently substantive law. This conclusion applies to both the ordinary and appropriation varieties of a bill. Missouri’s Lett decision, however, cracks the door for arguments to the contrary. If that door opens for appropriation bills, in particular, such titles must nonetheless tiptoe the existing statutory landscape to avoid conflict. It must also avoid the governor’s veto (or, if held veto-proof, a separation of powers challenge). So when a title purports to condition items in an appropriation bill, such conditions are probably unenforceable.

Still, counsel can ignore bill titles only with great peril. Titles are ready judicial instruments for navigating ambiguous statutory language. If the operative language lends itself to more than one reasonable interpretation, then the relevant title may sway the law’s meaning.

Finally, it’s no secret that this whole issue nests itself in an intricate political reality. Whatever its legal effect, title language likely reflects legislative priorities that can manifest in other ways. Counsel in this arena, perhaps more so than any other, must exercise a pragmatic and holistic view of risk and success.

Endnotes

1 Jeremy Knee is general counsel at the Missouri Department of Higher Education and a graduate of Boston University (J.D.), Brown University (A.M.), and Palm Beach Atlantic University (B.S.). The views expressed in this article are the author’s alone, and not those of the State of Missouri.


3 Id.

4 Titles contained the caveat “provided that no funds from these sections shall be expended for the purpose of costs associated with the offices of the Governor, Lieutenant Governor, Secretary of State, State Auditor, State Treasurer, or Attorney General.”


15 Id.


18 Hammerschmidt v. Boone Cty., 877 S.W.2d 98, 101 (Mo. banc 1994).

19 Id. at 103.

20 Id. at 102.


22 Fast v. Attorney General, 947 S.W.2d 424, 429 (Mo. banc 1997).

23 “Jackson Cty. Sports Complex Auth., 226 S.W.3d 161 (quoting Home Builders Ass’n v. State, 75 S.W.3d 267, 269 (Mo. banc 2002)).


25 Hammerschmidt, 877 S.W.2d at 105, n.3.

26 See, Jackson Cty. Sports Complex Auth., 226 S.W.3d at 161 (“Only if the title is (1) underinclusive or (2) too broad and amorphous to be meaningful is the clear title requirement infringed.”) Id.; State ex rel. Fire Dist. v. Smith, 184 S.W.2d 593, 596 (Mo. banc 1945) (holding bill provision that prohibited cities from annexing any part of a fire district violated art. III, § 23 because the bill’s title described only, and particularly, the establishment and incorporation of fire districts.)

27 Id.


29 See Lincoln Credit Co. v. Pouch, 636 S.W.2d 31, 38 (Mo. banc 1982) (“It is noteworthy that the title of an act, ‘though performing a most important function, is still not strictly a part of the act proper.’”) Id.


31 Goeritz v. City of Maryville, 333 S.W.3d 450, 455 (Mo. banc 2011) (emphasis added); In re Graves, 30 S.W.2d 149, 152 (Mo. banc 1930) (“When the language of a statute is ambiguous, recourse may be had to the title in order to ascertain the true meaning of the act.”) Id.; Doemker v. City of Richmond Heights, 18 S.W.2d 394, 398 (Mo. 1929) (“There is no ambiquity at all about the ordinance; and where this is so, there is no necessity of looking to the preamble for any purpose whatever.”) Id. (emphasis added).


33 Luckland, 52 S.W. at 430; Doemker, 18 S.W.2d at 398 (expressly following Luckland v. Walker).

34 Goeritz, 333 S.W.3d at 455.


37 30 S.W.2d 149, 152 (Mo. banc 1930).

38 448 S.W.2d 577 (Mo. banc 1969).

39 Id. at 581.

40 Id.

41 498 S.W.2d 614, 617 (Mo. App. E.D. 1996) (citing Doemker and using preamble to interpret ambiguous term).
42 Id. at 616 (“They argue that a City’s power to tax is necessarily limited by the language of its enabling ordinances and, in this case, the language in the preamble . . . precludes taxation of the deferred compensation plans.”).

43 Id.

44 Id. at 618.

45 948 S.W.2d at 617. See also City of Rolla v. Studley, 120 S.W.2d 185, 187 (Mo App. S.D. 1938) (considering the preamble to be a substantive part of a city resolution).


47 Id.

48 Mo. Const., art. IV, § 26 (“The governor may object to one or more items or portions of items of appropriation of money in any bill presented to him, while approving other portions of the bill. On signing it he shall append to the bill a statement of the items or portions of items to which he objects and such items or portions shall not take effect. If the general assembly be in session he shall transmit to the house in which the bill originated a copy of the statement, and the items or portions objected to shall be reconsidered separately.”).

49 Hammerschmidt, 877 S.W.2d at 102.

50 State ex rel. Cason v. Bond, 495 S.W.2d 385, 392 (Mo. banc 1973).

51 Schweich v. Nixon, 408 S.W.3d 769, 778 (Mo. banc 2013) (per curiam) (“Once appropriated, unless otherwise restricted by law, it is within the discretion of the office holder or agency to use the appropriation within the broad categories allowed by the [appropriation] bill.”).

52 State ex rel. Cason v. Bond, 495 S.W.2d 385, 392 (Mo. banc 1973).


54 Hammerschmidt, 877 S.W.2d at 102; see also a similar constitutional question in Henry v. Edwards, 346 So.2d 153, 158 (La. 1977).

The Governor’s constitutional power to veto bills of general legislation cannot be abridged by the careful placement of [substantive legislative] measures in a general appropriation bill, thereby forcing the Governor to choose between approving unacceptable substantive legislation or vetoing “items” of expenditure essential to the operation of government…. Nor can [the legislature] circumvent the Governor’s veto power over substantive legislation by artfully drafting general law measures so that they appear to be true conditions or limitations on an item of appropriation.

55 75 S.W.2d 828, 830 (Mo. 1934); see Mo. Const. art. III, § 23 (“No bill shall contain more than one subject which shall be clearly expressed in its title, except [bond issuances] and general appropriation bills, which may embrace the various subject and accounts for which moneys are appropriated.”).

56 113 S.W.2d 783,790 (Mo. 1938), rev’d on other grounds, 305 U.S. 337 (1938).

57 139 S.W. 403 (Mo. 1911).

58 Id. at 408-09 (“By depriving [the Commissioner] of any compensation … his enforced removal from office would be effectually brought to pass as if ordered and enforced by a direct mandate of a court.”) Id.


60 See Henry v. Edwards, 346 So.2d 153, 159 (La. 1977) (discussed and followed by South Dakota Supreme Court in South Dakota Educ. Assoc. v. Barnett, 582 NW.2d 386, 391 (S.D. 1998); State v. Angle, 91 P2d 705, 708 (Ariz. 1939) (phrasing the relationship between items and conditions as “nothing but the appropriation of money for specific purposes, and such other matters as are merely incidental and necessary to seeing that the money is properly expended for that purpose only. Any attempt at any other legislation in the bill is void.”).

61 Rolla 31 Sch. Dist. v. State, 837 S.W.2d 1 (Mo. banc 1992).

62 75 S.W.2d 828 (Mo. 1934); see also State ex rel. Gaines v. Canada, 113 S.W.2d 783,790 (Mo. banc 1938), rev’d on other grounds, 305 U.S. 337 (1938) (holding condition on appropriation item violated the Missouri Constitution’s single subject rule on account of its conflict with an existing general statute) (“This [general] statute cannot be repealed or amended except by subsequent general legislation. Legislation of a general character cannot be included in an appropriation bill.” Id. at 790.)

63 Rolla 31 School Dist. v. State, 837 S.W.2d 1, 4 (Mo. banc 1992) (emphasis added).

64 Id. at 4. The legislature, in other words, is presumed to have held an interpretation of the preexisting statute that harmonizes with the new appropriation (or other statutory) language, and the court is “aided, although not controlled” by a legislative construction of the general act in harmony with its action in making the appropriation in question.” (quoting State ex rel. Davis v. Smith, 75 S.W.2d 828, 832 (Mo. 1934) (Leedy, J., dissenting)).
EXECUTIVE SUMMARY
Continued from page 246

membership; each carries a separate dues obligation that helps support the mission of the Foundation.

A significant portion of the Foundation's assets are restricted for use in one of the various award categories or for scholarship purposes. Unrestricted assets are almost always retained by the Foundation in order to generate income to be annually gifted.

The Foundation currently has approximately 232 attorneys who are either Fellows, Life Fellows or Sustaining Fellows.

Many more Missouri lawyers are eligible to become Foundation members (Fellows), and the Board encourages all interested attorneys to request inclusion in this worthy organization so that we may continue to improve the administration of justice, to aid needy members of the Bar, to contribute to the study and improvement of legal education, and to help preserve our constitutional form of government.

Endnotes
1 H.A. “Skip” Walther, a former president of The Missouri Bar, is a partner in the Columbia law firm of Walther, Antel & Stamper. He is the president of the Trustees of the Missouri Bar Foundation.

Make Gifts to the Missouri Bar Foundation Part of Your Charitable Giving

As the end of the year approaches, please consider gifts and donations to the Missouri Bar Foundation as part of your charitable giving. The Bar Foundation is a 501(c)(3), and your gifts are tax deductible.

Through gifts, contributions and donations of all sizes, the Foundation is able to continue its long tradition of support for outstanding projects, including citizenship education, legal assistance for veterans, programs to foster greater diversity, and assistance to lawyers struggling with addiction and depression.

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Online donations to the Missouri Bar Foundation can be made at any time on its website, www.mobar-foundation.org. The website features information about grant recipients and projects; recipients of Missouri Bar Foundation awards; the Foundation’s mission and Board of Trustees; and opportunities to give.
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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 to Cynthia Heerboth at The Missouri Bar, P.O. Box 119, Jefferson City, MO 65101, by e-mail to cheerboth@mobar.org.

NOTICE OF DISSOLUTION OF LIMITED LIABILITY COMPANY
TO ALL CREDITORS OF AND CLAIMANTS AGAINST
GUILING AUCTIONEER, LLC

On June 29, 2017, Guiling Auctioneer, LLC, a Missouri limited liability company (hereinafter the “Company”), filed its Notice of Winding Up for a Limited Liability Company with the Missouri Secretary of State.

Any claims against the Company may be sent to: Gail Guiling, 858 State Highway 77, Charleston, Missouri 63834. Each claim must include the following information: name, address, and phone number of the claimant; amount claimed; date on which the claim arose; the 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.

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

On July 10, 2017, Persafy, LLC, a Missouri limited liability company (the “Company”), filed its Notice of Winding Up with the Missouri Secretary of State.

All persons and organizations with claims against the Company must submit a written summary of any claims against the Company to Persafy, LLC Claims Administrator, c/o Evans & Dixon, LLC, 501 Cherry Street, Suite 200, Columbia, MO 65201, which summary shall include the name, address, and telephone numbers of the claimant; the amount of the claim; date(s) the claim accrued a brief description of the nature and basis for the claim; and any documentation of the claim.

Claims 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
AMERICAN SPOTTING COMPANY OF NEW YORK, INC.

American Spotting Company of New York, Inc., a Missouri corporation, filed its Articles of Dissolution by Voluntary Action with the Missouri Secretary of State on July 14, 2017.

Any and all claims against American Spotting Company of New York, Inc. must be sent to Gregory D. Vescovo, Atty. at Law, 10009 Office Center Avenue, Suite 100, St. Louis, Missouri 63128. Each claim must include the following: the name, address, and telephone number of the claimant; the amount of the claim; the basis of the claim; and the date(s) of the event(s) giving rise to the claim.

Any and all claims against American Spotting Company of New York, Inc. will be barred unless a proceeding to enforce the claim is commenced within two (2) years after the date of publication of this notice.

NOTICE OF CORPORATE DISSOLUTION TO ALL CREDITORS AND CLAIMANTS AGAINST
SANDUSKY INVESTMENTS, INC.

Notice is given that Sandusky Investments, Inc., with its registered office at 124 Washington Street, Doniphan, MO 63935, has been dissolved as of July 1, 2017 in accordance with the Missouri General Corporation Law.

Sandusky Investments, Inc. requests that persons with claims against the corporation present the claims in accordance with the Missouri Corporation Code. The claim must include the name of the claimant, the claimant’s mailing address, and information describing the claim with specificity. The claim must be sent to Christopher J. Miller, Christopher J. Miller, P.C., Attorneys at Law, 124 Washington Street, Doniphan, MO 63935.

A claim against Sandusky Investments, Inc. will be barred unless a proceeding to enforce the claim is commenced within two years (2) after the publication of this notice.

NOTICE OF CORPORATE DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST
WILKINSON HUMAN SERVICES, INC.

Wilkinson Human Services, Inc., a Missouri corporation filed its Articles of Dissolution with the Missouri Secretary of State. All claims against the corporation should be sent to J. Michael Conway, Conway & Blanck, L.C., Attorney at Law, 213 Main Street, PO Box 412, Boonville, MO 65233. Each claim should include the following: name, address, and telephone number of the claimant; amount of the claim; 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 two years after the date of this publication.

NOTICE OF DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST
LANE STEPHENSON, D.D.S., P.C.

Lane Stephenson, D.D.S., P.C., a Missouri professional corporation, filed its Articles of Dissolution by Voluntary Action with the Missouri Secretary of State on July 31, 2017. Any and all claims against Lane Stephenson, D.D.S., P.C. may be sent so Kenneth P. Reynolds, 1548 E. Primrose, Springfield, MO 65804. Each claim should include the following:
information: the name, address, and telephone number of the claimant; the amount of the claim; the basis of the claim; and the date(s) on which the event(s) on which the claim is based occurred.

Any and all claims against Lane Stephenson, D.D.S., P.C. will be barred unless a proceeding to enforce such claim is commenced two (2) years after the date this notice is published.

NOTICE OF DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST RICK KERNS CUSTOM MILLWORK & WOODWORKING, INC.

On June 26, 2017, RICK KERNS CUSTOM MILLWORK & WOODWORKING, INC. filed its Articles of Dissolution with the Missouri Secretary of State. The dissolution was effective on June 26, 2017.

You are hereby notified that if you believe you have a claim against RICK KERNS CUSTOM MILLWORK & WOODWORKING, INC., you must submit a summary in writing of the circumstances surrounding your claim to the corporation at 18770 Evergreen Dr., Country Club, MO 64505. 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 event 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 RICK KERNS CUSTOM MILLWORK & WOODWORKING, INC. will be barred unless the proceeding to enforce the claim is commenced within two (2) years after the publication of this notice.

NOTICE OF DISSOLUTION OF CORPORATION TO ALL CREDITORS OF AND CLAIMANTS AGAINST DAVID G. WASINGER, P.C.

On June 30, 2017, David G. Wasinger, P.C., a Missouri corporation (“Company”), filed its Articles of Dissolution with the Missouri Secretary of State, effective on the filing date.

All persons and organizations must submit to Wasinger Daming, LC, c/o David G. Wasinger, 1401 S. Brentwood Blvd., Ste. 875, St. Louis, Missouri 63144, a written summary of any claims against Company, including: 1) claimant’s name, address, and telephone number; 2) amount of claim; 3) date(s) claim accrued (or will accrue); 4) brief description of the nature of the debt or the basis for the claim; and 5) if the claim is secured, and if so, the collateral used as security.

Because of the dissolution, any claim against Company will be barred unless a proceeding to enforce the claims is commenced within two (2) years after publication of this notice.

NOTICE OF DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST CASH ‘N’ DASH, INC.

Notice is hereby given that Cash ‘N’ Dash, Inc., a Missouri corporation, the principal office of which was located in Nevada, Vernon County, Missouri (the “Corporation”), has filed its Articles of Dissolution with the Missouri Secretary of State. Any claims against the Corporation must be sent to the Corporation at the address below. Each claim must include: name, address, phone number, and e-mail address of the claimant; date on which claim arose; basis for the claim; amount claimed; and documentation for the claim. Claims should be sent to the attention of J. Lee Guthrie at P.O. Box 698 in Nevada, Missouri 64772.

All claims against the Corporation 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 FOR LIMITED LIABILITY COMPANY TO ALL CREDITORS OF AND CLAIMANTS AGAINST NALLE FEED & GRAIN, LLC

On August 24, 2017, Nalle Feed & Grain, LLC filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State. The Notice was effective on August 24, 2017. YOU ARE HEREBY NOTIFIED that if you believe you have a claim against Nalle Feed & Grain, LLC, you must submit a summary in writing of the circumstances surrounding your claim to the said Nalle Feed & Grain, LLC at the following address:
Nalle Feed & Grain, LLC, 15999 160th Street, Pattonsburg, MO 64670.
Telephone: (660) 663-5372.

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 event for which the claim is based occurred; and
4. A brief description of the nature of the debt or the basis for the claim.

All claims against Nalle Feed & Grain, LLC will be barred unless the proceeding to enforce the claim is commenced within three (3) years after the publication of this Notice.

NOTICE OF WINDING UP OF LIMITED LIABILITY COMPANY TO ALL CREDITORS OF AND CLAIMANTS AGAINST NORTHLAND HOSPITALISTS, LLC

Effective August 18, 2017, Northland Hospitalists, LLC, a Missouri limited liability company (the “Company”), filed its Notice of Winding Up with the Missouri Secretary of State.
Any claims against Company may be sent to Forbes Law Group, LLC, Attn: Northland Hospitalists, 6900 College Blvd., Suite 840, Overland Park, KS 66211. Each claim must include the following information: name, address, and phone number of claimant; amount of claim; date on which claim arose; basis for claim; and documentation in support of claim.

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

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car minus driver
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real-world data varies dramatically? Can a manufacturer tout the benefits of reading email or watching movies? In a 2016 fatal crash involving Tesla’s Autopilot, the driver was reportedly watching a Harry Potter movie.19 What evidentiary support must manufacturers compile to support claims that their automation is “safe”?

Breach of Warranty

Plaintiffs will also likely argue that automated-vehicle manufacturers have breached their warranties of quality that were created through sales and marketing. The UCC’s applicable provisions include those on express warranties and implied warranties.20

Express warranties.

What if a manufacturer expressly advertises that its fully autonomous vehicle is “as safe as human drivers”? Under UCC section 2–313, does the statement set some standard of warranted performance? As safe as an average driver? The best drivers? Distracted drivers? The worst? Or is the claim of “safety” so ambiguous that it’s mere advertising puffery? What if that statement comes not from a manufacturer, but from a dealer who accompanies an oral statement with a written agreement’s merger clause?21

Implied warranties.

Under UCC section 2–314(2)(a)-(f), what are potential implied warranties? In this new product category, what attributes make automated vehicles “fit for the ordinary purpose for which such goods are used”? And what of other categories, which require products to “conform to the promise or affirmations of fact” and “pass without objection in the trade”?

Third-party beneficiaries?

Who beyond the immediate buyer does the warranty benefit? Many jurisdictions will extend warranties to third-party beneficiaries, potentially including family, household members, guests, or any other person, with different jurisdictions providing varying levels of protection.

Who sold to whom?

Another consideration is privity: What if buyers purchase vehicles directly from manufacturers? Tesla, for example, eschews dealerships for “stores,” establishing a direct relationship with buyers. In those direct purchases, third-party and pass-through warranties under UCC § 2-318 may be inapplicable. But section 2–318 would likely apply to more traditional dealership models, where warranties would probably pass through to third-party beneficiaries.

Disclaimers beware.

What if the manufacturer includes a disclaimer? Indeed, most implied warranties can be disclaimed unless barred by state statute or by the Magnuson Moss Warranty Act. Express warranties cannot be disclaimed, but manufacturers can include well-drafted merger clauses to limit potential liability to written warranties. As such, manufacturers’ and dealers’ disclaimers could well extinguish many potential warranty claims.

Contracts: Effectiveness of EULAs, Clickwrap, and Browsewrap Agreements

Agreements constitute another means for manufacturers to potentially limit or eliminate liability. Automated-driving cases might be complicated by issues that have long plagued the tech-law world: end-user license agreements (EULAs), licensing vs. ownership, and copyright.

Browsewrap and Clickwrap

No doubt, some manufacturers and software developers will seek to avoid liability by requiring vehicle users to view a long license agreement (EULA) and click “I Agree.” While most software EULAs are enforceable, even if ordinary users do not actually read or understand the text, it remains to be seen whether courts will enforce them for automated vehicles. Courts may view enforcing a smartphone app’s privacy policy as wholly different from disclaiming damages in an auto crash. Could a manufacturer avoid liability by simply requiring a user, upon first “driving” an automated vehicle, to click “I Agree” as a prerequisite to movement?

Unconscionability

If EULA terms fully disclaim property damage, personal injury, or death, it’s unclear whether courts would enforce those terms, or instead strike them as unconscionable or against public policy.

Non-Privity

Another issue is whether manufacturers could impose the EULA terms on non-signatories. That might include subsequent owners, non-owner “drivers,” passengers, or pedestrians.

Copyright’s First-Sale Doctrine

Beyond the contractual issues from preventing sales, another open question is whether a manufacturer’s disabling vehicle software—effectively preventing hardware (vehicle) sales—would violate copyright’s first-sale doctrine. That common-law-turned-statutory doctrine allows people to resell their purchased physical books, physical music (e.g., CDs), and physical videos (e.g., DVDs, Blu-Ray). Courts may also look to the first-sale doctrine when questioning manufacturers’ ability to prohibit automated vehicles’ hardware/software combination.

Licensing Cars?

Some courts have upheld software makers’ ability to use EULAs to prevent end users from reselling software discs, since the original purchasers did not own the software (which is protected by copyright), but merely licensed it.22 But those cases relate to pure software (a copyright-protected intangible product), and an open question is whether courts would similarly prevent automated-car owners from reselling their vehicles (very expensive tangible products).

EULAs Prevent Used Car Sales?

Courts’ enforcement (or non-enforcement) of EULAs might affect consumers’ ability to sell automated vehicles. Removing a Level 5 self-driving car’s software would render the car useless. So if an automated-driving manufacturer or software developer disables the software—perhaps because of a EULA issue—then
that would dramatically affect subsequent sales, as the car would be practically useless. A similar situation occurred in 2014, when Google Glass Explorers, a beta-test group, began selling the $1,500 gadgets on eBay—despite Google's terms of service, which stated that the software license was nontransferable, tied solely to the first purchaser. Many wondered whether Google would remotely disable Glass devices sold to third parties, but Google later clarified that it would not “brick” them. Because the issue was never litigated, it’s unclear whether the courts would have agreed with Google’s initial position. Manufacturers' ability to pull a software "kill switch" raises questions of device and vehicle "ownership," when software and hardware cooperatively create the product, and remotely disabling the software (through EULA issues with privity, non-agreement, or other factors) would effectively render the hardware useless.

Global No-Fault Compensation Act?

To address the thorny liability issues, the policy think tank RAND has suggested implementing, for automated driving, a no-fault insurance system—similar to the 1986 National Childhood Vaccine Injury Act (a no-fault system to compensate vaccine recipients with serious adverse reactions). Like the vaccine act, which sought to reduce the possibility of lawsuit-besieged manufacturers scaling back vaccine production, a no-fault auto-insurance act could strike a similar balance. Such a policy might encourage the development of life-saving technology, while minimizing market forces that might encourage technological stagnation. Existing no-fault laws like Minnesota's might serve as a model.


Few businesses have a greater interest in regulating automated driving than insurers. Large insurance groups have opined that, while traditional underwriting criteria (such as the driver's number of accidents, miles driven, and parking location) will probably still apply, automated driving might lead to greater emphasis on the car's make, model, and style. Also important will be the use of telematics devices ("black boxes") that monitor driver and vehicle behavior, leading to potential premium discounts and increases.

Currently, the insurance industry offers discounts for cars with black boxes, but adoption has been lukewarm—likely because of the privacy implications. The National Association of Insurance Commissioners believes that in the next five years, usage of black boxes will increase to 20 percent of drivers. If the automated-driving industry's forecasts are accurate, automated driving's prevalence will explode. If automated vehicles achieve higher safety than today's vehicles, insurers may well provide discounts for automation.

On the other side of the coin, Tesla CEO Elon Musk has opined that manual driving—which he views as objectively unsafe—might eventually be outlawed. Of course, the current vehicle fleet's enormous economic value will make outlawing manual vehicles unlikely in the short term. But if that vision eventually proves true, we may see a world where only the wealthy can drive, and grandchildren beg to hear stories about "when you used to drive yourself!"

Criminal Implications: Algorithmic Law Enforcement?

Observance of today's traffic laws is encouraged through fines and potential imprisonment; tomorrow's laws may simply be programmed. Today's enforcement of driving laws depends upon several factors: (1) observing the behavior, (2) determining that a law was broken, and (3) gathering evidence. As such, today's human enforcement system has limited success, if gauged by the percentage of drivers who abide by posted speed limits. With automated vehicles, by contrast, laws might be enforced universally, automatically, and algorithmically. Any potential "recklessness" can be virtually eliminated by algorithm.

Self-driving cars could be programmed to obey the law. Automated vehicles could recognize laws of overlapping jurisdictions (city, county, state, federal), import traffic rules (e.g., speed limits, turn on red), and implement those laws through the automated-driving system. In our fully automated (Level 5) future, the number of traffic violations could theoretically be reduced to nearly zero.

Of course, the systems could also be programmed to recognize legal exceptions currently permitted by human judgment. For example, ambulances would likely be permitted to speed, and vehicles might be permitted to cross a double center line to avoid stalled cars or fallen trees.

But in partially automated Levels 1–4, where the human and computer co-operate the vehicle, to what extent will (or should) manufacturers be required to implement and enforce driving laws? For example, should a Level 4 or Level 5 system permit a human driver to speed in order to take an injured child to the emergency room? To avoid an attacker? To make a flight? To meet a client?

In addition, if humans override the laws and systems’ algorithms, will those deviations be logged as violations? And for whom? Should manufacturers be compelled to compile and report infractions to requesting governmental entities (police, federal agencies), corporations (insurance companies, employers), or individuals (spouses, parents of teens)? Of course, these questions raise significant privacy implications.

No doubt, implementing legal code through algorithmic code is tempting, and could well bring significant benefits. But if regulators choose to implement legal codes through computer code, the questions about potential effects of those programmed laws—and their permitted exceptions and privacy implications—will be many.

Requiem for Pretextual Stops?

Today, many criminal charges stem from police stopping a vehicle for an alleged infraction (such as speeding, or an incomplete stop) and then discovering evidence of a more serious crime. In 1996, a unanimous Supreme Court held that traffic stops do not violate the 4th Amendment "even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective." But public defender and technologist David Collarusso correctly questions whether pretextual stops will be rendered extinct in a world where automated vehicles obey every traffic law. Since automated vehicles’ routes will likely be logged, will courts instead permit police to use data analytics (based on driving patterns from “flight plans”) to justify an automated vehicle’s detention? (“You probably realize that I pulled you over because you made nine five-minute stops in a neighborhood with statistically high rate of drug crimes.”)
Privacy Implications: Why Did My Car Drive Me to McDonalds?

The promise of automated driving is accompanied by potential privacy concerns. Automation’s benefits include a vehicle’s ability to take users on the most-efficient routes, as well as the vehicles’ communication with other vehicles to both expedite trips and increase safety. But those activities all involve data, and that data could be tracked. As such, automated driving implicates several privacy concerns.

If automated vehicles log trip routes (as Google Maps and Apple Maps currently log users’ routes, depending upon privacy settings), and if those routes are readily shared with manufacturers, will riders still have a “reasonable expectation of privacy”? Would a governmental subpoena of Google’s location logs differ from the warrantless GPS tracking of a vehicle, which the Supreme Court in 2012 held unconstitutional? The following year, police officers used the Stored Communications Act to request mobile-phone carriers’ location data for three suspects – without a warrant or probable cause – and the 5th Circuit held that the request was not a per se violation of the 4th Amendment. The 7th Circuit has held similarly.

Would the warrantless subpoena of automated-driving logs be different? The Supreme Court has held that smartphones are “a digital record of nearly every aspect of [Americans’] lives – from the mundane to the intimate,” but would the same hold true for a utilitarian, single-purpose vehicle? Also, as the public becomes increasingly aware of the ability of software companies and governmental entities to track them, does the “reasonable expectation of privacy” change over time on a sliding scale?

Advertising may also play a role in any privacy debate. One company that has invested heavily in automated driving is Google, which derives significant revenue from advertising. Any advertising company’s business plan might include leveraging automated driving by advertising nearby services. Could an advertising company permissibly extend advertising benefits to include unplanned stops at advertisers? Encourage fuel-ups at advertisers? Track users’ trips to sensitive destinations (e.g., psychiatrist, mosque, gay bar, abortion clinic)? To some extent, the ability to track is already present in today’s smartphones. But automated driving – and the ability to physically change users’ locations – may heighten any perceived privacy implications.

Ethical Implications: Algorithms as God

As automated vehicles make more driving decisions, developers will program algorithms to decrease the probability of injury or death. But to avoid injury, the algorithms might well cause other injuries. Consider this “trolley problem” variation: A single-passenger fully automated car on an icy mountain road encounters 10 pedestrians. The car calculates two options:

**Option 1:** Stay on the icy road, save its passenger, and kill the 10 pedestrians.

**Option 2:** Swerve off the mountain road, kill its passenger, but save the 10 pedestrians.

Option 2 is the most utilitarian: It results in one death, not 10. But the car’s driver and purchaser would obviously prefer Option 1, which kills more people but saves the purchaser. In this way, algorithms can and will determine ethical quandaries beforehand – something the law has considered in matters of human liability (e.g., premeditation), but more rarely with machines.

If a manufacturer chooses Option 1, might lawyers representing the 10 dead pedestrians claim that the fault lies with:

1. the owner for enabling Option 1 (if it was optional)?
2. the vehicle manufacturer for implementing Option 1 (as a default, or even as an option)?
3. the software developer for even considering Option 1 as a factor in the first place?

Even if the manufacturer chooses to implement Option 2, lawyers will likely make similar arguments. Of course, one could argue against programming any algorithm – omitting Option 1 and Option 2. But since the vehicle would continue on the road, killing the pedestrians, that non-choice is really a choice of Option 1.

Professor Bryant Walker Smith believes that under either Option 1 or Option 2, plaintiffs will likely sue – and under both scenarios, they will likely succeed. It’s easy to understand the view that for automated-vehicle manufacturers, liability will be an inevitability.

As such, it’s not difficult to consider that manufacturers may take that liability into account when creating algorithms. Besides calculating the number of injuries or deaths (utilitarianism), one can easily imagine the algorithm considering other potential factors:

- Save the youngest (i.e., children)?
- Save the middle-aged (i.e., those with the most earning power)?
- Save the healthiest? (Or forego the best organ donors?)
- Save advertisers?
- Save U.S. citizens?

These questions are, no doubt, uncomfortable, perhaps even ghoulish. But with our automated-driving future careening toward us, questions about algorithmic factors to consider (and exclude) will eventually need answering – by software designers, manufacturers, regulators, legislators, or courts.

Focus on Utilitarian Good – or On the Means to An End?

Beyond an individual case, as discussed above, experts have had fascinating discussions about the murkiness of ethics on autonomous vehicles generally – including their societal effect. For example, if the current death rate from vehicles is 32,000 per year, and under autonomous vehicles, that net rate is 16,000 deaths, then society would have “saved” 16,000 lives. Which is good, right? But that is just the net rate. What if all 16,000 of the new deaths were computer-caused – and wouldn’t have happened pre-autonomy? If autonomy saves 16,000 lives, in other words, but the algorithms choose – Skynet-style – those who live and those who die, is that okay? Or does society (as reflected in our laws and regulations) prefer our pre-automation randomness and its 16,000 additional deaths? These are not easy questions.

Bringing It Home

Automated driving is already here, and its development is progressing steadily. Gauging by the NHTSA’s enthusiasm for potential safety benefits, as well as manufacturers’ space race...
to deliver, automated driving may arrive sooner than many of us expect. If so, the question of how our laws and regulations should apply or adjust to automated driving will be firmly within the province of our legislators, regulators, insurers, litigators, and judges. It’s certain to be a bumpy ride.

This article originally appeared in the November 2016 issue of Bench & Bar of Minnesota, the official publication of the Minnesota State Bar Association, and is reprinted with permission.

Endnotes

1 Damien Riehl is a technology lawyer with experience in software design, data privacy, and security. After clerking for the chief judges of state appellate and federal district courts, he practiced in complex litigation for a decade at Robins, Kaplan, Miller & Ciresi. His practice experience includes data privacy (CIPP/US), patents, copyright, trademarks, business torts, breaches of contract, antitrust, financial litigation, and appeals. He is currently a vice president at Stroz Friedberg, managing cybersecurity engagements to bolster clients’ data security and resilience. The author is grateful for the insights and assistance of Professors Christina Kunz, Michael Steenson, and David Prince—who provided helpful guidance through the myriad contract, UCC, warranty, tort, and product liability issues.

2 http://cyberlaw.stanford.edu/blog/2015/05/tesla-and-liability
3 http://www.autoblog.com/2015/05/20/general-motors-says-owns-your-car-software/
4 https://www.eff.org/de/dep/links/2015/04/help-eff-defend-right-tinker-your-car
5 https://www.wired.com/2013/04/google-glass-resales/
7 Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995).
9 Restatement (Second) of Torts § 402A (1965).
12 Mack v. Stokley Corp., 748 F.3d 845, 849 (8th Cir. 2014) (quoting Bilotta v. Kelley Co., Inc., 346 N.W.2d 616, 621 (Minn. 1984)).
13 Id.
15 Id.
16 Glorvigen v. Cirrus Design Corp., 816 N.W.2d 572, 582 (Minn. 2012) (quotation omitted).
17 Glorvigen, 816 N.W.2d at 582 (quotation omitted, emphasis added).
18 Glorvigen, 816 N.W.2d at 582 (emphasis added).
19 Glorvigen, 816 N.W.2d at 582 (paraphrase).
20 Glorvigen, 816 N.W.2d at 582 (emphasis in original).
21 http://www.theguardian.com/technology/2016/jul/01/tesla-driver-killed-self-driving-car-barry-pottle
23 UCC § 2–313.
24 Verner v. Autodesk, Inc., 621 F.3d 1102, 1111 (9th Cir. 2010).
26 42 U.S.C. §§ 300aa-1 to 300aa-34
27 http://www.iii.org/issue-update/self-driving-cars-and-insurance
28 Id.
31 https://lawyerist.com/119062/driverless-cars-undermine-war-drugs-dispatch-future/
33 In re U.S. for Historical Cell Site Data, 724 F.3d 600, 602 (5th Cir. 2013).
37 This article discusses some of these ethical quandaries: http://www.businessinsider.com/the-ethical-questions-facing-self-driving-cars-2015-10
38 http://cyberlaw.stanford.edu/blog/2013/07/ethics-saving-lives-autonomous-cars-are-far-murkier-you-think

CORPORATE DISSOLUTIONS

NOTICE OF DISSOLUTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST NEW HOME SALES, LLC

On August 11, 2017, New Home Sales, LLC, a Missouri limited liability company, filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State.

Said limited liability company requests that all persons and organizations who have claims against it present them by letter immediately to the company in care of: Rick J. Muenks, Attorney at Law, 3041 S. Kimbrough Avenue, Suite 106, Springfield, Missouri 65807.

Claims must include name and address of claimant; amount of claim; basis of claim; and documentation of claim. Pursuant to Section 347.141 RSMo, any claim against New Home Sales, LLC, 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 HUMBLE PROPERTIES, LLC

On August 22, 2017, Humble Properties, LLC, a Missouri limited liability company, filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State.

The company requests that all persons and organizations who have claims against it present them by letter immediately to the company in care of: Rick J. Muenks, Attorney at Law, 3041 S. Kimbrough Avenue, Suite 106, Springfield, Missouri 65807.

Claims must include name and address of claimant; amount of claim; basis of claim; and documentation of claim. By law, any claim against Humble Properties, LLC, will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of this notice.
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