CECB Carnahan, Evans, Cantwell & Brown, P.C.

on the Subject

November 2015

Andrew T. Peebles joined the firm in August 2015 and is an associate and member of the Estate Planning Practice Group of Carnahan, Evans, Cantwell, & Brown, P.C. Mr. Peebles earned his Juris Doctor from the University of Missouri School of Law in May of 2015, graduating with a concentration in Estate Planning and Taxation. Mr. Peebles was awarded the 2015 Michelle Arnopol Cecil Award for Excellence in Taxation, and held numerous leadership positions during law school, including membership on the executive board of the Phi Alpha Delta legal fraternity. Mr. Peebles was a member of the Missouri Law Review editorial board from 2013-2015, and is the author of two published articles in the Missouri Law Review: "Challenges and Inconsistencies Facing the Posthumously Conceived Child: Astrue v. Capato" and "Supreme Court Decision on Juvenile Sentencing Results in Cruel and Unusual Difficulties for Missouri: State v. Hart." He received his bachelor's degree from the University of Missouri in 2011. Mr. Peebles is a member of the Springfield Metropolitan Bar Association (Probate and Trust Committee), the Missouri Bar (Probate and Trust Committee), the Greene County Estate Planning Council, and the American Bar Association (Real Property, Probate, and Trust Law section).

Piercing the LLC Veil

John Carnahan

Several years ago, an article appeared in our firm newsletter involving a case out of Massachusetts where a taxpayer formed a Limited Liability Company to develop real estate, and then failed to follow some of the business formalities associated with operating a business, for example, not having a separate checking account, and so forth. The taxpayer came back to regret those decisions in that the Internal Revenue Service, seeking recovery of unpaid taxes, was successful in "Piercing the Veil" to go after the individual taxpayer.

Across the country, there has been a continuous effort on the part of creditors to seek the ability to Pierce the Veil and go after the assets of the owners of the business. A new decision at year end from the Supreme Court of Wyoming in *Greenhunter Entergy, Inc., v. Western Ecosystems Technology, Inc.*, shows, once again, the dangers of not respecting some of the formalities of your business activities. In this particular case a Texas corporation as the parent formed a Wyoming LLC subsidiary to develop a wind farm in Wyoming. The LLC entered into an agreement with the Plaintiff to provide consulting services. The LLC paid some of its bills but not all, and the Plaintiff brought a breach of contract action against the LLC and obtained a judgment in the amount of $43,646.10 together with legal fees. Unable to collect upon the judgment, the Plaintiff brought the action against the parent Texas corporation, which was the sole member of the LLC, seeking to Pierce the LLC's Veil and hold the Texas corporation liable for the LLC's unpaid debt and judgment. The Wyoming Supreme Court confirmed the decision of the Trial Court, holding the parent entity was liable for its LLC's subsidiary's contractual obligations.

Most practitioners were a little surprised that this decision would come out of Wyoming, which is the "birthplace of LLCs", in that in 1977 the State of Wyoming was the first state to create, by statute, the ability to form a legal entity known as a Limited Liability Company, which had limited liability for the owners but could be a pass through entity for tax purposes. They did this trying to create the opportunity for new business in the State of Wyoming, for businesses to organize their new business in the state, and hopefully create headquarters or operations in the state to take advantage of the new law. It took almost 16 years after the initial statute for the concept of limited liabilities to catch on, and for example Missouri did not enact its law until 1993.

You have two primary factual patterns involving the organization and operations of Limited Liability Companies. At least following some of the discussion of the Wyoming Supreme Court in the Wyoming case, the first set of facts is probably more protected than the second. In the first set of facts, you have a group get together and form an entity together for a new separate business activity, and once again the entity can elect to be taxed as an S Corporation, a C Corporation, a disregarded entity, or probably more likely as a pass through partnership.

The second factual pattern, and probably becoming more common in the business world, is that an active business decides to segregate a certain line of activity and form a new Limited Liability Company and treat it as a "disregarded entity", meaning it probably doesn't file a tax return unless it has employees or for another specific reason. Unfortunately its operating subsidiary allows bad habits to develop. These fraudulent practices have been recognized as grounds for Piercing the Corporate Veil in the corporate world, for example see the Missouri decision in *66 Inc., v. Crestwood Commons Redevelopment Corporation, et al.* Once again, you are dealing with a factual pattern where a business creates a subsidiary, but could also apply even if you create a brother-sister relationship and you do not have independent separate business activity including adequate capitalization in the new business activity. You just drop money in when needed. Unfortunately that puts the parent in the situation, at least in the eyes of the Wyoming Supreme Court and

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Section 469 I.R.C. - The Sword That Cuts Both Ways

John Carnahan

Enacted as part of the 1986 Tax Reform Act, Section 469 was intended to reduce or limit the use of tax shelters, which had become the dominant method of tax planning starting sometime in the 60s through the 1986 Tax Reform Act. High income taxpayers were able to make investments in cattle, railroad cars, apartments, office buildings, artwork, oil and gas wells, and the list goes on and on, and receive substantial up front losses which they could then use to offset their other income, primarily earned income such as salary and operating income from businesses. Section 469 was intended to limit this ability and imposed a set of rules requiring separation of your activities into different baskets and limiting the ability of a loss in one basket from offsetting the income in another basket. For example, a business man receiving subchapter S income from their operating manufacturing business would be substantially limited on their ability to use losses from their ranch, including depreciation on their cattle herd and feed and other expenses. These are also known as the Passive Loss Rules, meaning that if it was a passive activity measured by certain tests set forth in Section 469, including annual hourly test, then you are not allowed to currently use those losses. So unless your level of activity determined on an hourly basis (500 hours for most activities but 750 for real estate activities), then you could not use those losses until income was generated by that or a similar activity, or you disposed of the activity.

The Internal Revenue Service's activity in enforcing these rules was fairly quiet but they did issue fairly extensive regulations, once again, there has been very little activity.

Then in 2010, along comes the Health Care and Education Reconciliation Act with its Medicare Surtax provision imposed by Section 1411 I.R.C. effective for tax years beginning after December 31, 2012. This is not really a Medicare Surtax, in that the money doesn't go to Medicare but it is an additional tax of 3.8% on passive income if you are over certain income levels, for example $200,000 for a single taxpayer or $250,000 for a married taxpayer. If you are in this situation, then your capital gains, subchapter S income from your investments, rental income from your apartments or office buildings, and interest and dividends can all be subject to this additional tax. Rather than creating a new set of rules, Section 1411 turned and grabbed onto the 469 Rules and the hourly test, to make the determination, once again, whether for a particular taxpayer the income was either considered active or passive. In some ways this has a far bigger and financial impact on taxpayers than the limitations on losses.

As a result, we have started to see a dramatic increase in IRS audit activity, and a number of tax cases have recently come down.

These cases are trying to determine what type of proof the Internal Revenue Service should accept, in determining whether a taxpayer is active or passive.

Two recent cases in the last year and a half, include *Lewis v. Commissioner,* a December 2014 decision of the Tax Court and *Bogner v. Commissioner*, as of June 16, 2014 decision. Both cases deal with real estate activities, and the ability of taxpayers to deduct losses generated by their real estate to offset other income. One must remember that real estate has a harder test than other businesses, including the fact that over one-half of your working hours have to be in real estate related activities and that you have to satisfy a 750-hour test. If you have a fulltime job, not directly related to real estate and which you are a more than 5% owner, you are going to have a very difficult time ever satisfying this test. Sometimes you can perhaps have a spouse be an active real estate agent or broker, and allow them to satisfy the test, but once again you want to be very careful how you document your time spent.

Both in Lewis and Bogner cases, the issue was whether the taxpayer could support the satisfaction of the 750-hour test. Restated in Lewis,

> A taxpayer may establish hours of participation by any reasonable means. Section 1.469-5T(f)(4), Temporary Income Tax Regs.,... Contemporaneous daily reports are not required if the taxpayer can establish participation by other reasonable means. Id. Reasonable means includes "appointment books, calendars, or narrative summaries" that identify the services performed and "the approximate number of hours spent performing such services."

The key language here is that it is contemporaneous record keeping not post event ballpark guesses. The court was very lenient in applying the test in Lewis, in that the taxpayer had no other income, was 64 years old and during part of the years in question was a 60% disabled veteran and therefore found his testimony creditable that it took him more time than other people, to perform certain tasks. In Bogner, Mr. Bogner unfortunately had a fulltime job working for Northrop Grumman and therefore could not get to the 750-hour test and he failed to be able to show that he worked over more than half of his time in the real estate activities. Petitioner's logs would indicate that he spent almost every spare hour and years in question, working on the rental properties, including ten hours on July 4th of each year, and nine to ten hours on December 25th of each year, all the time only managing three rental properties.

With the new Medicare Surtax rules, and the 3.8% tax of passive activities, taxpayers are going to have to be far more diligent in maintaining records as to their time spent in their outside business and real estate activities. If you are having a loss, you needed to offset that loss against other income but if you are making money, you want those contemporaneous business records in order to avoid an additional tax on that income earned from that outside business activity.

Best Lawyers in America and "Best Law Firms"

CECB is pleased to announce that two of the firm's Shareholders, Joseph "Chip" D. Sheppard, III and Thomas D. Peebles, Jr. were selected by their peers to be among the elite professionals for inclusion in the 2016 edition of *The Best Lawyers in America*.

The firm also received a Metropolitan Tier 1 ranking in Trusts & Estates Law in the 2016 Edition of *U.S. News – Best Lawyers "Best Law Firms"*. Best Lawyers is regarded by both the legal profession and the public as the definitive guide to legal excellence in the U.S. Best Lawyers is based on a rigorous national survey involving more than 3.1 million evaluations of lawyers by other lawyers.

Chip Sheppard was selected for inclusion in *The Best Lawyers in America* in the practice area of Litigation – Securities.

Tom Peebles selected for inclusion in *The Best Lawyers in America* in the practice area of Trusts and Estates.

Hunting Season Landowner Liability

Christiaan Horton

Fall is upon us and so is the primary hunting season. Many hunters have been scouting and preparing for their hunts well before you read this article; however, landowners often inquire about their liability for allowing others to hunt on their land. Should a landowner obtain a release of liability before granting permission to hunt? Does the law provide any special protections? What can landowners do to minimize liability?

Missouri has passed a Recreational Use Act found at Section 537.346 of our Revised Statutes. Under this Act, landowners owe no duty of care to persons entering their property in certain circumstances. The purpose of the Act is to encourage the free use of land for recreational purposes, in order to preserve and utilize the state's natural resources. To invoke the Recreational Use Act (RUA), the general requirements are: (1) an owner of the land; (2) allows entry upon the land; (3) without charge; and (4) for recreational use. State ex rel. Young v. Wood, 254 S.W.3d 871 (Mo. banc 2008). Specifically, section 537.346 provides:

Except as provided in sections 537.345 to 537.348, and section 537.351, an owner of land owes no duty of care to any person who enters on the land without charge to keep his land safe for recreational use or to give any general or specific warning with respect to any natural or artificial condition, structure, or personal property thereon.

Section 537.345 sets forth key definitions under the RUA. These include the following:

(1) "Charge", the admission price or fee asked by an owner of land or an invitation or permission without price or fee to use land for recreational purposes when such invitation or permission is given for the purpose of sales promotion, advertising or public goodwill in fostering business purposes;

(2) "Land", all real property, land and water, and all structures, fixtures, equipment and machinery thereon;

(3) "Owner", any individual, legal entity or governmental agency that has any ownership or security interest whatever or lease or right of possession in land;

(4) "Recreational use", hunting, fishing, camping, picnicking, biking, nature study, winter sports, viewing or enjoying archaeological or scenic sites, or other similar activities undertaken for recreation, exercise, education, relaxation, or pleasure on land owned by another;

(5) "Trespasser", any person who enters on the property of another without permission and without an invitation, express or implied regardless of whether actual notice of trespass was given or the land was posted in accordance with the provisions of sections 569.140 and 569.145.

A landowner who directly or indirectly invites or permits any person to enter his or her land for recreational use, without charge, whether or not the land is posted, or who directly or indirectly invites or permits any person to enter his or her land for recreational use in compliance with a state-administered recreational access program, DOES NOT thereby:

(1) Extend any assurance that the premises are safe for any purpose;

(2) Confer upon such person the status of an invitee, or any other status requiring of the owner a duty of special or reasonable care;

(3) Assume responsibility for or incur liability for any injury to such person or property caused by any natural or artificial condition, structure or personal property on the premises; or

(4) Assume responsibility for any damage or injury to any other person or property caused by an act or omission of such person.

These are good protections for landowners under the law—but these protections are not "bullet proof". Under the RUA, nothing is construed to create liability, but it does not limit liability that otherwise would be incurred by those who use the land of others, or by owners of land for:

(1) Malicious or grossly negligent failure to guard or warn against a dangerous condition, structure, personal property which the owner knew or should have known to be dangerous, or negligent failure to guard or warn against an ultrahazardous condition which the owner knew or should have known to be dangerous;

(2) Injury suffered by a person who has paid a charge for entry to the land; or

(3) Injuries occurring on or in:

(a) Any land within the corporate boundaries of any city, municipality, town, or village in this state;

(b) Any swimming pool;

(c) Any residential area; or

(d) Any noncovered land (which means any portion of any land, the surface of which portion is actually used primarily for commercial, industrial, mining or manufacturing purposes; provided, however, that use of any portion of any land primarily for agricultural, grazing, forestry, conservation, natural area, owner's recreation or similar or related uses or purposes shall not under any circumstances be deemed to be use of such portion for commercial, industrial, mining or manufacturing purposes.

Landowners can also be held liable for trespassers – yes those on your property WITHOUT your permission—under Missouri law. Under Section 537.351, a possessor of real property, including an owner, lessee, or other occupant, or an agent of such owner, lessee, or other occupant, owes no duty of care to a trespasser except to refrain from harming the trespasser by an intentional, willful, or wanton act. A landowner may use justifiable force to repel a criminal trespasser as provided by section 563.074. Excluding specific liabilities to children set forth in 537.351.2(1), landowners can also be liable to trespassers in the following circumstances:

The landowner knew or should have known that trespassers consistently intrude upon a limited area of the landowner's land where the trespasser was harmed, the harm resulted from a dangerous artificial condition on the land; and

(a) The landowner created or maintained the artificial condition that caused the injury;

(b) The landowner knew that the condition was likely to cause death or serious bodily harm to trespassers;

(c) The landowner knew or should have known that the condition was of such a nature that trespassers would not discover it; and

(d) The landowner failed to exercise reasonable care to warn trespassers of the condition and the risk involved.

Accordingly, it is recommended to obtain a release from those hunting on your land even if you do not charge them for that privilege and to properly mark your property boundaries to warn trespassers that entry is prohibited. The Recreational Use Act is definitely beneficial for Missouri landowners, but like a hunter wearing orange in the woods, it is no guarantee that you will be free from "fire" should an accident arise. Should you need a general release prepared this hunting season for your permissive hunters or have any concerns about landowner liability, we will be glad to provide additional protection to you to minimize risks and liabilities for the use of your land.

Piercing the LLC Veil - Continued from Page 1

perhaps courts of other jurisdictions of having the ability to decide which creditors are to be paid and when they are to be paid. You get in a factual situation of incurring potential liabilities, i.e., contracting with parties to provide goods or services in the future, and then make a decision after that not to fund or allow the subsidiary to have adequate capital to make those payments, then arguably the creditor will have the ability to Pierce the Veil and go after the assets of the parent entity which made the decision.

What should the owners do in this situation? Once again the best answer is probably to make reasonable business decisions, and the first one being to provide an independent and adequate source of initial capital for the organization of the business and its anticipated future business activities and not be in a situation of just covering the overdrafts in the checking account when needed.

5 CECB Attorneys Selected for Inclusion on the 2015 Missouri-Kansas Super Lawyers List

Each year, *Law & Politics Magazine* invites lawyers in each state to nominate top Missouri and Kansas lawyers, they've personally observed in action. Research is then conducted on each candidate dividing them into practice areas. A panel of preeminent peers in each practice area then evaluates each candidate. From the original pool of candidates, only 5 percent of Missouri and Kansas attorneys are selected for inclusion in Super Lawyers. Meet the five CECB Attorneys that were included on the list.

John M. Carnahan III is a shareholder in the Transactional and Estate Planning Practice Groups of Carnahan, Evans, Cantwell & Brown, P.C. He concentrates his practice in the areas of tax planning, corporate transactions, estate planning, and business succession planning for family-owned businesses. Mr. Carnahan has been awarded an AV Rating by Martindale-Hubbell.

Mr. Carnahan's practice has included advice and assistance in real estate acquisitions and development, financial institution organization and compliance, business and estate planning, and acquisition and sale of businesses.

Mr. Carnahan has served as author and editor for the *Missouri Law Review*, the *Current Case Development ABA Section of S Corporations*, and *The Tax Lawyer*.

Mr. Carnahan was recently appointed as the American College of Tax Counsel (ACTC) Regent for the 8th Circuit. The ACTC is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The College is composed of Fellows (approximately 700 current members) chosen by their peers in recognition of their outstanding reputations and contributions in the field of tax law and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit and two Regents at large. Regents are primarily responsible for assisting in the nomination process for new ACTC Fellows.

In 2005, the Missouri Senate confirmed Mr. Carnahan's appointment by Governor Matt Blunt to serve on the University of Missouri Board of Curators, representing the Seventh Congressional District. The Board of Curators is a nine-person governing body of a four-campus system including the University of Missouri-Columbia, the University of Missouri-Kansas City, the University of Missouri-Rolla, and the University of Missouri-St. Louis.

Mr. Carnahan is also a member of the Springfield Metropolitan and American (Member, Sections on: Taxation, Business Law, and Real Property, Probate and Trust Law) Bar Associations, as well as The Missouri Bar (Chairman, Taxation Committee, 1984-1985). He is a Fellow of the American College of Tax Counsel, the American Bar Foundation, the Missouri Bar Foundation, and has been active in Bar Association activities involving continuing legal education. Mr. Carnahan has been included on the Missouri Kansas "Super Lawyers" list published by *Law and Politics* magazine since 2006.

John has been included on the *Missouri Kansas Super Lawyers*® list since 2006.

Clifford S. Brown who recently retired, practiced in the Estate Planning Practice Group at Carnahan, Evans, Cantwell & Brown, P.C. He concentrated his practice in the areas of estate planning, probate, and trust litigation, and related tax matters.

Mr. Brown served as the 84th President of the Springfield Metropolitan Bar Association in 2006. In September 2003, he was appointed to the Board of Law Examiners by the Supreme Court. As a Board member, his role involves the investigation and determination of the character and fitness of individuals seeking admission to the bar, determining the qualifications of practicing attorneys from other states seeking to be admitted to the Missouri Bar without examination, and in developing, administering, and grading the examinations of new applicants seeking admission to the bar.

Mr. Brown has served as an educator and speaker on behalf of the Supreme Court of the State of Missouri, the Missouri Bar Association, the University of Missouri - Columbia School of Law, and other organizations in providing continuing legal education to members of the legal profession. Mr. Brown is listed in Who's Who in American Law, as well as The Best Lawyers in America. Mr. Brown is the author of several publications, including the chapters on "Taxation" (Missouri Family Law Deskbook, The Missouri Bar, 4th and 5th Editions, published July 1988 and 1996, respectively), and as co-author of the chapter on "Trust Contests" (Missouri Trusts, Powers of Attorney, Custodianships, and Nonprobate Matters, 2d Edition, published 2006).

In 1991, Mr. Brown was elected as a Fellow of the American College of Trust and Estate Counsel. Additionally, Mr. Brown is a member of the American Bar Association where he is a Member of the Trust and Estates Group and the Missouri Bar, where he has served as Chairman of the Probate Law Subcommittee of the Probate and Trust Committee. Mr. Brown is also a member of the Greene County Estate Planning Council.

Mr. Brown's community involvement includes serving on the Board of Directors of the Burrell Center and the Community Foundation of the Ozarks.

Cliff has been selected to the *Missouri Kansas Super Lawyers*® list since 2005.

Joseph D. "Chip" Sheppard, III is a shareholder in the Litigation/Dispute Resolution Practice Group of Carnahan, Evans, Cantwell & Brown, P.C. He concentrates his practice in the areas of real estate, business, securities and intellectual property litigation, dispute resolution and transactions.

A substantial portion of Mr. Sheppard's practice includes securities and other fraud and fiduciary duty related claims, both as an arbitrator and as counsel for the parties. Mr. Sheppard has tried a combined total of more than 50 arbitrations, state and federal trials, both jury and non-jury, in his areas of concentration. Other areas of concentration are various business transactions, acquisitions, real estate development and related litigation and probate litigation.

Mr. Sheppard is a board member of the Springfield Metropolitan Bar Association, Chairman of the Non-Partisan Court Plan Committee, member of the American Bar Association, the Missouri Bar, and the Public Investors Arbitration Bar Association. In 2005 he was elected as a Fellow of the American Bar Association, an honor bestowed upon less than .5 percent of the Bar. In 2008, he Co-Chaired the Greene Countians for Fair and Impartial Judges Committee which was responsible for bringing the Missouri Court Plan to Greene County, was a finalist

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for Missouri Lawyer of the Year and received the Missouri Bar Association and Springfield Metropolitan Bar Association President's Awards in recognition of extraordinary service to those Associations and the legal profession. Finally, he has been named to the "Best Lawyers in America" list by the publication of the same name.

Mr. Sheppard is a former arbitrator for the American Arbitration Association, New York Stock Exchange, and is presently an arbitrator for the National Association of Securities Dealers (FINRA).

Mr. Sheppard's community involvement includes serving as a director of Hickory Hills Country Club (2003-present), as well as serving as a member of the Chamber of Commerce Governmental Relations Committee (1995-present). He also served as an Elder at the First and Calvary Presbyterian church and on various committees. Mr. Sheppard has also served on the Board of Directors for Leadership Springfield and the Housing Authority of Springfield.

Chip was selected to the *Missouri Kansas Super Lawyers*® list in 2005 and 2006 and again for 2010-2015.

Thomas D. Peebles, Jr Thomas D. Peebles, Jr. is a shareholder and member of the Estate Planning Practice Group of Carnahan, Evans, Cantwell & Brown, P.C. Mr. Peebles has concentrated his practice in estate planning and estate and trust administration matters since 1980.

Mr. Peebles has significant experience in the preparation of basic and sophisticated estate planning documents, and in wealth transfer planning for high net worth clients, closely held business owners and their families. He has been awarded an AV Rating from Martindale-Hubbell in recognition of his preeminent work in assisting his clients in achieving their estate planning goals and objectives. In 2004, Mr. Peebles was elected a Fellow of The American College of Trust and Estate Counsel in recognition of distinguished service in the practice of estate planning, probate and trust law.

Mr. Peebles has been honored since 2010 by being named to the "Best Lawyers in America" list. In 2007, Mr. Peebles was elected by his peers as a Fellow in the American Bar Foundation. Membership as a Fellow in the American Bar Foundation is limited to one-third of one percent of the lawyers in America and is in recognition of a lawyer whose professional, public and private career has demonstrated outstanding dedication to the welfare of the community and to the traditions of the profession.

Mr. Peebles is the author of several publications, including "Estate Planning Practice - The Fundamentals" (MoBAR, Annual Estate and Trust Institute, 2003), "Miscellaneous Estate Planning Techniques" (Missouri Bar Estate Planning Deskbook, 3rd Edition, 2010) "Basic Tax Considerations" (National Business Institute, How to Draft Wills and Trusts in Missouri, 1996), "Funding and Operating Living Trusts" (National Business Institute, Planning Opportunities with Living Trusts in Missouri, 1993), and "Funding the Living Trust" (MOBAR CLE, Effective Use of Living Trust, 1991). Additionally, Mr. Peebles is a frequent speaker on estate planning topics, including programs for The Missouri Bar.

Mr. Peebles has, over the years, devoted a substantial amount of his time towards civic and charitable activities including the Community Foundation of the Ozarks, the Foundation for the Springfield Public Schools, the Springfield-Greene County Library Foundation, the History Museum of the Ozarks, the Hospice Foundation of Southwest Missouri, and the Child Advocacy Council. Mr. Peebles was recognized as one of ten "Volunteers of the Year" as part of the 2004 Gift of Time Awards sponsored by the Council of Churches of the Ozarks.

In addition to his membership in the American College of Trust and Estate Counsel, Mr. Peebles is a member of the Springfield Metropolitan Bar Association (Chair, Probate and Trust Committee, 1991 to 1992), the Missouri Bar (Member, Probate and Trust Committee), the Greene County Estate Planning Council (President, 1990-1991), and the American Bar Association (Member, Real Property, Probate and Trust Law Section).

Tom was selected to the *Missouri Kansas Super Lawyers*® list in 2005 and 2006 and again for 2010-2015.

Rodney H. Nichols is a shareholder of the firm and is part of the Banking, Litigation and Transactional Practice Groups of Carnahan, Evans, Cantwell & Brown, P.C. He concentrates his practice in the areas of banking and creditor's rights, commercial and real estate litigation and general corporate matters. He has served as Chairman and Vice Chairman of the Bank Counsel Section of the Missouri Banker's Association and remains a member of its advisory board. He has been a frequent speaker on current legal issues and trends impacting financial institutions, and along with another member of the firm's litigation team, successfully defended a large regional financial institution in a case brought against it in federal court by a customer involving a fraudulent wire transfer and the financial institution's online banking security. This was the first reported case in the United States where the financial institution prevailed in establishing the soundness of its online banking security under Article 4A of the Uniform Commercial Code. The case has received national attention and has been widely publicized in various banking publications.

Mr. Nichols has also served as an appointed member of the Federal Practice Committee for the United States District Court, Western District of Missouri and is a former Chairman of the Springfield Metropolitan Bar Association's Federal Bench and Bar, Commercial Law and Insolvency and Programs committees.

Mr. Nichols devotes a significant amount of time to the community and has served as Chairman of the Board of Directors for the Developmental Center of the Ozarks. In October 2004, Mr. Nichols was appointed by the Greene County Commissioners to serve as a Member of the Springfield/Greene County Library Board of Trustees and served two terms through July, 2011. In 2003, he was recognized by the Springfield Business Journal with their "40 Under 40" award, for his outstanding contribution to the community and his profession.

In January 2007, Mr. Nichols was appointed as a Member of the City of Springfield's Jordan Valley Park Tax Abatement and Tax Increment Financing Commission. In 2011 he was selected to serve as a member of a task force organized by the City of Springfield to evaluate the future use and development of a parcel of real estate owned by the City adjacent to the City's Exposition facility.

Rodney was previously named to the *Missouri & Kansas Super Lawyers* list as a Rising Star and was selected in 2013-2015 for inclusion on the *Missouri Kansas Super Lawyers*® list.

Depositions in Litigation and Arbitration

Christiaan Horton

Preparing for depositions has strategic and significant consequences for litigation and arbitration cases, though admittedly depositions are more rare in arbitration cases due to the fast-tracked nature of that process and limitations on discovery under arbitration rules.

Typically, plaintiffs and defendants approach this subject with different methodologies and plans in mind. Plaintiffs are trying to cast a wide net using this discovery tool to gather additional information to support their claims and to obtain key admissions to help prove the elements of their action.

Defendants, on the other hand, are attempting to avoid making errors with testimony that could expose weaknesses in their defenses and give the plaintiff "free" information to explore more subject matter in the discovery process.

A subpoena is required in most cases to initiate a deposition of a non-party unless that person desires to voluntarily cooperate with the attorney requesting the testimony. Our Missouri Supreme Court Civil Rules provide that parties must subject themselves to the deposition process, and a notice of deposition is all that is required to initiate it.

Often, deposition Notices or subpoenas are accompanied by lists of documents that must be produced at the deposition. In a companion article written in a prior CECB newsletter, this author detailed the process and procedure for subpoenas on third parties required to produce documents and Missouri's "new" Rule on that matter. Many attorneys will treat a document request served with a Notice of deposition upon a party as a request for documents pursuant to court Rule that allows them 30 days in which to gather that information. If the Notice of deposition is served with a short time setting of the deposition (within 30 days), there may be argument for not producing the documents for the deposition that should be addressed with the court in advance.

Plaintiffs attorneys will typically prepare their clients with the following in mind:

A review of a timeline of events to crystallize memory which will be tested in the deposition;

Consideration of key documents anticipated as exhibits at the deposition to address areas of inquiry;

A discussion with the client on the format and process of the deposition to alleviate any anxiety or stress which can lead to distraction, nervous responses, misunderstandings, ultimately detracting from the deposition game plan;

Reminding the client that only an answer to the question posed should be given and not to otherwise volunteer information that has not been requested or specifically asked;

Because the opposing attorney may inquire into the nature and extent of document review prior to the deposition, caution is given in this regard should there be any special or privileged documents that warrant protection from disclosure;

Reminding the client that questions should be carefully considered before answers are given, responses should be slow and deliberate, and that all responses should be truthful to avoid impeachment at time of trial with sworn deposition testimony.

On the other hand, attorneys who are taking the deposition are trying to combat many of the strategic plans of their rival counsel. To do so, detailed outline's covering all areas of subject matter for inquiry along with documents and exhibit references are crucial to keep the attorney on point and organized throughout the deposition.

It is not uncommon for attorneys who are preparing for depositions to spend two or three times the amount of time preparing as it will take to complete the deposition. Preparation is paramount if the deposition will have its best chance of success in gathering the information and admissions for the case. Accordingly, attorneys taking a deposition usually keep the following in mind as key elements of their plan to accomplish:

Gather information on the deponent's history, personal information, employment and educational background. Beginning the deposition with this subject matter usually bolsters confidence in the deponent to answer questions and to build a rapport with the attorney taking the deposition. This is an opportunity to get the witness to let the guard down. Caution must be exercised by the attorney defending a deposition to make sure voluntary information is not given by the witness.

The authentication of documents can also be accomplished through the recognition of signatures and an admission that the document is a true and genuine copy of an original. Laying the foundation of admissibility for documents will assist the attorney taking the deposition with dispositive motions in advance of trial when the genuineness of documents must be represented to the court.

Because it is human nature to not be truthful when pressed, it is important for the attorney to ask several lines of questions to elicit the truth in the case. This is especially true if the witness is evasive or showing signs through body language and testimony that answers are inconsistent or not conforming to other evidence in the case. If witnesses were forced to take a "truth serum" before each deposition, most likely depositions would be over in a very short period of time! Nonetheless, a good deposition outline will allow the attorney taking the deposition to elicit the information from the witness even if evasive.

The attorney taking the deposition can also inquire into the opinions and viewpoints of the witness regarding other testimony or evidence in the case. This approach can be helpful in developing a theme to the defense and additional angles for which other tools of discovery can be used to support defenses.

Often, attorneys defending a deposition will make objections during the deposition process, but very few objections are actually permitted under the Rules in the deposition setting. Attorneys can certainly protect information from being disclosed based on the attorney-client privilege. If a question seeks information of this type, the witness is usually instructed not to answer after the objection is made. Otherwise, the only significant objection that should be lodged during a deposition is to the form of the question so the question can be reworded and the problem solved at that moment. Once an objection of that nature is made, it is upon the attorney asking the question to consider whether the objection has merit and how he or she can solve it. Failure to correct a bad question can prevent that question and answer from being used subsequently in the preceding if the judge rules the objection proper.

Finally, once the deposition transcript is prepared by the court reporter, the witness will have an opportunity to have it "presented" to him or her (usually waived with the modern efficiencies of communication for the delivery of the transcript) and also has the right to "read and sign" the deposition to ensure that the court reporter has taken down the answers of the witness correctly. This is not an opportunity to change the substance of responses, but merely to catch typographical errors in the spelling of names and words. With modern court reporting, it is very rare that the witness is required to note changes in the deposition record although on occasion it does occur. Witnesses are usually encouraged to read and sign the deposition so if they are subject to impeachment at trial based on testimony given in it, they cannot argue or make the point that they did not read their deposition testimony they claim was in error.

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The ABLE Act: An Additional Planning Tool for Disabled Clients

Andrew T. Peebles

Planning for family members with special needs can often be a difficult and frustrating endeavor. Each decision made today has an impact on the quality of life of a disabled individual in the future. "Special needs planning," which assists in dealing with these issues, encompasses the legal, personal, and financial planning that seeks to enhance the quality of life and independence of a person with a disability. Disabled individuals are twice as likely as any other group to live in poverty due to the extraordinary costs associated with their disabilities. The number of clients who will require some level of special needs planning in the future is expected to increase dramatically over the next several years, due in part to the Baby Boomer generation growing older, the continued obesity epidemic in America, and the rapid increase in autism diagnoses in children. As a result, special needs planning will continue to take on greater importance in our legal practices.

Into this picture comes the Achieving a Better Life Experience (ABLE) Act of 2014, a piece of federal legislation enacted in December of last year as part of the Tax Increase Prevention Act of 2014, providing an additional tool for the special needs planner. Fundamentally, the ABLE Act, codified in Internal Revenue Code § 529A, permits a state to establish and maintain a savings program (i.e. "qualified ABLE program") under which contributions may be made to an account (the "ABLE Account") that is established to meet the qualified disability expenses of the beneficiary of the account. These accounts are very similar to currently-existing § 529 college savings accounts, ensuring that all funds within the account grow tax free as long as the funds are used for qualifying expenses. The beneficiary of the ABLE account may deposit funds into the account without affecting the beneficiary's eligibility for Social Security or other government benefits. However, to maintain SSI eligibility, the ABLE account balance may not exceed $100,000, whereas Medicaid coverage may be maintained no matter the amount that has accrued in the account.

All assets held in an ABLE account are exempt from taxation. Contributions to an ABLE account by anyone other than the beneficiary are treated as completed, present interest gifts and will thus qualify for the annual gift tax exclusion. However, the total contributions in a single year from all contributors cannot exceed the annual exclusion amount. Any money deposited into an ABLE account may be distributed income tax-free for "qualified disability expenses," which include health care, education, transportation, and similar expenditures. Distributions that are not used for qualified disability expenses are treated as taxable income to the beneficiary and are assessed an additional tax of 10%, unless certain exceptions are met.

Any resident of a state that has enacted the ABLE Act may become a beneficiary of an ABLE account as long as they are eligible for government benefits due to blindness or disability as defined under the Social Security Act, or if a disability certification is filed with the IRS each year showing that the beneficiary has a "medically determinable physical or mental impairment which results in marked and severe functional limitations." The disability must have occurred before the beneficiary reached 26 years of age, however. The beneficiary must also be the owner of the account, but if they are unable to establish the account, a guardian, parent, or agent under a durable power of attorney may do so for them. Finally, upon the death of the beneficiary, the funds remaining in the account must be paid to the state in which the account is established if the state files a claim for such payment.

To be clear, the ABLE Act is not meant to replace, but rather to work in conjunction with, existing special needs planning tools, such as specifically tailored Special Needs Trusts or the Midwest Special Needs Trust. While all special needs planning techniques are intended to supplement, rather than supplant, government benefits, there are several distinctions that should be recognized that may assist in determining which tool will be more effective for each individual client. To begin, special needs trusts are generally more expensive and complicated to establish and administer. However, if the beneficiary of the trust dies, the funds in the trust will be released to designated family members and not back to the government, as they would be with ABLE accounts. ABLE accounts, on the other hand, are easier to establish and less costly to create and administer. Funds are allowed to grow tax free in the account, and the beneficiary or his family can manage the account him/herself rather than a government entity retaining control over distributions. However, there is the negative aspect that the beneficiary must have had the disability before the age of 26, preventing anyone who sustained an injury or disability after that age from opening an ABLE account. Additionally, a disabled individual may only maintain a single ABLE account, total annual contributions to the account may not exceed the annual exclusion amount ($14,000), and if the account balance ever exceeds $100,000 (including appreciation), the beneficiary of the ABLE account will be denied SSI eligibility. None of these things are true of special needs trusts.

Thus, it is important to consider the advantages and disadvantages of each planning technique when charting a course for each unique client. Given the significant limitations on the use of ABLE accounts outlined above, the traditional special needs trust may remain the preferred strategy in this area. However, ABLE accounts may be preferable in the following situations: (1) the beneficiary has a job that pays low wages and the individual wants a tax-exempt account to save up for a car, down payment on a home, or other expenditures; (2) the beneficiary's disability has the potential to resolve itself before the beneficiary's death; or (3) the amount of money involved is too small to make a complex special needs trust worthwhile.

A majority of state legislatures have already adopted ABLE programs, and more continue to do so each month. Missouri governor Jay Nixon recently signed this legislation into law in June 2015, drawing praise from disability experts across the state. The legislation became effective on August 28, 2015, and the creation of ABLE accounts is now possible. The ABLE Act is an important step toward increasing economic self-sufficiency for many clients with disabilities, and ensures that they and their families will be able to save for necessities without negatively impacting access to vital government benefits. However, it is vital that each client weigh the pros and cons of all available options with an experienced estate planning attorney in order to determine which special needs tool fits best with their unique situation.

Depositions in Litigation and Arbitration - Continued from Page 6

Depositions are very powerful tools in the litigation and arbitration process, and preparations should be made before they are taken or defended to make sure that they will be accurate and will strategically support the claims or defenses that each party intends to prove at trial. Seasoned litigators will approach depositions with a battle plan, and will also have a host of contingency plans in the event that the witness is a difficult one or the attorney taking the deposition uses tactics that are not customarily deployed. Our litigation group at Carnahan, Evans, Cantwell and Brown stands ready to engage with effective strategies to protect our clients and advance their interests through effective depositions in litigation and arbitration cases.

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