

A FREE CONTINUING LEGAL EDUCATION SEMINAR

KUTAK ROCK LLP

PRESENTS ITS ANNUAL CLE SEMINAR

PROTECTING CORPORATE INTERESTS FROM INSIDE

CLE FOR IN-HOUSE COUNSEL ON CURRENT ISSUES

FRIDAY, JUNE 19, 2015

8:00 A.M.-1:30 P.M.

KUTAK ROCK LLP, 2300 MAIN STREET, SUITE 100, KANSAS CITY, MO 64108
(816) 960-0090

(ALSO AVAILABLE VIA VIDEO IN OTHER KUTAK ROCK OFFICES)

Thoughtful Use of the Attorney-Client Privilege and Work Product Doctrine

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Erin R. McClernon

Partner

Kutak Rock LLP

Erin.McClernon@KutakRock.com

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The Basics: Attorney-Client Privilege

► What information does the privilege protect?

– Federal definition:

- ◆ (1) Where **legal advice** of any kind is sought (2) from a **professional legal advisor** in his [or her] **capacity as such**, (3) the **communications** relating to that purpose, (4) made in **confidence** (5) by the client, (6) are at his [or her] instance permanently protected (7) from disclosure by himself [herself] or by the legal advisor, (8) except the protection be waived.

Great Plains Mut. Ins. Co. v. Mut. Reinsurance Bureau, 150 F.R.D. 193, 196 n.4 (D. Kan. 1993).

- State definitions will vary. In MO and KS the federal elements are generally consistent with state law.

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The Basics: Attorney-Client Privilege

► Element (5): “By the Client”??

- Despite this language, federal courts interpret the privilege to encompass communications from attorney to client (as long as all other elements are met).
 - ◆ *Williams v. Sprint/United Mgmt. Co.*, No. 03-2200-JWL-DJW, 2006 WL 266599, at * 2 (D. Kan. Feb. 1, 2006).
- In Missouri and Kansas, statutes explicitly extend the privilege to communications from the attorney to the client and vice versa.
 - ◆ K.S.A. 60-426(c)(2); Mo. Rev. Stat. § 491.060(3)

The Basics: Attorney-Client Privilege

► Purposes/goals served by the privilege.

- Encouraging uninhibited communication between client and attorney.
 - ◆ *State v. Longo*, 789 S.W.2d 812, 814-15 (Mo. Ct. App. 1990).
- Preserving client confidences and client expectations of confidentiality (i.e., allowing attorneys and clients to speak in secrecy)!
 - ◆ *State ex rel. Great American Ins. Co. v. Smith*, 574 S.W.2d 379, 383 (Mo. 1978);
State v. Stovall, 312 P.3d 1271, 1282 (Kan. 2013).
- Promoting observance of law and administration of justice.
 - ◆ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

The Basics: Attorney-Client Privilege

► Exceptions to the privilege.

- In Kansas, exceptions are codified at K.S.A. § 60-426(b); in Missouri and under federal law, look to common law.
- Examples:
 - ◆ Communications used to further a crime or fraud or (if in Kansas) a tort.
 - ◆ When a later dispute arises between joint clients of the same attorney, or between an attorney and his/her client.
 - ◆ When a dispute arises against a corporation by shareholders alleging the corporation acted contrary to the shareholders' interests.
 - ◆ When due process demands that the privilege yield to a criminal defendant's need for exculpatory evidence.

The Basics: Work Product Doctrine

► Work product defined.

- Tangible material or its intangible equivalent—in unwritten or oral form—that was either prepared by or for a lawyer or prepared for litigation, either planned or in progress.
 - ◆ Black's Law Dictionary (9th ed. 2009).

The Basics: Work Product Doctrine

- ▶ What information does the work product doctrine protect?
 - Tangible work product:
 - ◆ Trial preparation documents such as written statements, briefs and attorney memoranda.
 - Intangible work product:
 - ◆ An attorney's mental impressions, conclusions, opinions and legal theories.
 - Seminal case: *Hickman v. Taylor*, 329 U.S. 495 (1947) (recognized that discovery of tangible work product might disclose intangible work product of attorney and established requirement that opposing party demonstrate “substantial need” for tangible work product).
 - *Hickman* is codified in the “General Provisions Governing Discovery.”

The Basics: Work Product Doctrine

- ▶ Purposes/goals of the work product doctrine.
 - Encourages thoughtful case preparation by attorneys and discourages opposing counsel from reaping the benefits of that preparation.
 - ◆ *Ayers Oil Co. v. American Business Brokers, Inc.*, No. 2:09 CV 02-DDN, 2009 WL 4725297, at *3 (E.D. Mo. Dec. 2, 2009).
 - Promotes effective functioning of adversary system by allowing attorney to fully develop case without fear of disclosure.
 - ◆ *Wichita Eagle and Beacon Pub. Co., Inc. v. Simmons*, 50 P.3d 66, 84 (Kan. 2002).

The Basics: Privilege and Work Product

- ▶ Not all protected communications are created equal! Some enjoy greater protection than others.
 - Attorney-client privilege is absolute unless waived.
 - Work product
 - ◆ Intangible/opinion work product is essentially absolute unless waived.
 - ◆ Tangible/ordinary work product is discoverable upon showing of substantial need and undue hardship in obtaining equivalent.
 - ◆ BUT NOTE: work product is only shielded from discovery in the litigation in which/for which it was created. Work product can be discovered in later unrelated litigation!

The Basics: Privilege and Work Product

- ▶ Waiver
 - Waiver of attorney-client privilege can result when:
 - ◆ The client voluntarily makes or discloses the communications to an unrelated third party.
 - ◆ There is a failure to claim the privilege or object to disclosure.
 - ◆ The subject matter of privileged communication is placed in issue.
 - ◆ Fed. R. Evid. 502 – puts limits on extent of waiver.
 - Waiver of work product can occur when:
 - ◆ The product is voluntarily disclosed to an adversary, or to a third party if doing so increased chances that the adversary would gain access to it. *Riley v. U.S. Bank*, No. 4:08CV00206, 2009 WL 2170016, at *1-2 (E.D. Mo. July 20, 2009).

The Basics: Privilege and Work Product

► Miscellaneous points.

- Burden of proof: Party asserting privilege and/or work product has initial burden to demonstrate same. *Western Resources Inc. v. Union Pacific RR*, No. 00-2043-CM, 2002 WL 181494, at *3-4 (D. Kan. Jan. 31, 2002).
- Attorney-client privilege/work product in federal court:
 - ◆ Federal common law governs application of attorney-client privilege . . .
 - ◆ Except, where a federal court sits in diversity, state law will govern application of attorney-client privilege to the state law claims.
 - ◆ In federal court, application of the work product doctrine is always governed by federal law, irrespective of whether court sits in diversity.
- Privilege and work product doctrines are not intended to protect/shield underlying facts from discovery; however, privileged/work product material is not rendered discoverable just because it contains facts.
 - ◆ *Bishop Rink Holdings, LLC v. CIMCO Refrigeration, Inc.*, N. 12-2715-JAR-KGG, 2013 WL 4047143, at *3 (D. Kan. Aug. 9, 2013).

The Basics: Privilege and Work Product

► Where are some of the rules/guidelines relative to privilege/work product found?

- Evidentiary Statutes/Rules:
 - ◆ K.S.A. § 60-426 (“Attorney Client Privilege”)
 - ◆ Mo. Rev. Stat. § 491.060 (“Persons incompetent to testify . . .”)
 - ◆ Fed. R. Evid. 501 (“Privilege in General”)
 - ◆ Fed. R. Evid. 502 (“Attorney Client Privilege and Work Product; Limitations on Waiver”)
 - ◆ Proposed Fed. R. Evid. 503 (“Lawyer-Client Privilege”) (never enacted, yet regularly utilized/referenced by federal courts analyzing privilege)
- Case law (abundant).
- Rules of Civil Procedure .
 - ◆ “General Provisions Governing Discovery”: Mo. Rule 56.01(b)(1), (3); K.S.A. § 60-226(b)(1), (4); Fed. R. Civ. P. 26(b)(1), (3).
 - ◆ Rules regarding written and deposition discovery (e.g., privilege log requirements).

Privilege/Work Product Take Aways

- ▶ Privileged materials enjoy absolute protection from disclosure so . . . use and protect (i.e., don't waive) the privilege!
- ▶ As the proponent of the privilege/work product assertion, your client will have initial burden of proof to show applicability so . . . make it easy on yourself!
- ▶ When you are dealing with litigation or anticipated litigation, work product provides a second method of protecting corporate information so . . . keep that in mind!
- ▶ Opposing parties and counsel want to discover underlying facts so they can make a case against YOUR client: MAKE 'EM WORK FOR IT!

In the Corporate Context: Attorney-Client Privilege

- ▶ In the corporate context, what communications are privileged?
- ▶ Seminal case: *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
 - In connection with an internal investigation of “questionable payments” made by a subsidiary, general counsel:
 - ♦ Sent and received/reviewed questionnaires to foreign subsidiaries requesting information about payments.
 - ♦ Interviewed recipients and some 33 other company officers or employees and prepared accompanying notes/memoranda.
 - The IRS demanded production of these files; Upjohn refused on the basis of privilege and work product.
 - Holding: The questionnaires were privileged communications; the accompanying attorney notes/memos were privileged to the extent they revealed communications from employees, and opinion work product to the extent they did not.

In the Corporate Context: Attorney-Client Privilege

- ▶ *Upjohn* produced a test for determining when communications between corporate counsel and lower-echelon employees are privileged:
 - (1) The information is necessary to supply the basis for legal advice to the corporation or was ordered to be communicated by superior officers; (2) the information was not available from “control group” management; (3) the communications concerned matters within the scope of the employees’ duties; (4) the employees were aware that they were being questioned in order for the corporation to secure legal advice; and (5) the communications were considered highly confidential. 449 U.S. 383, 394-95.
 - Under *Upjohn*, “*Upjohn warnings*” are required when speaking with corporate employees:
 - ◆ Warnings that the attorney’s client is the corporation, not the employee.
 - ◆ Warnings that the communication is privileged, but belongs to the corporation alone and may be waived by the corporation.

In the Corporate Context: Attorney-Client Privilege

- ▶ NOTE:
 - Federal courts applying federal law are bound by *Upjohn*.
 - State courts and federal courts sitting in diversity are not.

- ▶ So . . . while *Upjohn* is instructive (and particularly important if you know or suspect you are dealing with a federal law issue), you really must pay attention to the law of the jurisdiction you are in to know how it interprets and applies the attorney-client privilege in the corporate context.

In the Corporate Context: Attorney-Client Privilege

- ▶ As a *general rule* corporate counsel will have a better chance of attaching privilege to communications with/between corporate employees/representatives if . . .
 - Corporate counsel is involved in conducting and/or orchestrating the communication.
 - Corporate counsel reviews the communication.
 - It is crystal clear that the communication is made in connection with the seeking/rendering of legal advice.
 - The communication is shared only with those who to need/have a right to know.
 - There is documentation supporting all of the foregoing.

In the Corporate Context: Attorney-Client Privilege

- ▶ **Some enlightening examples:**
 - “The attorney client privilege encompasses documents prepared by an employee at the direction of the employer for the purpose of obtaining the advice of an attorney or for use in prospective or pending litigation.” *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 547-48 (Mo. Ct. App. 2008).
 - ♦ The “direction” to an employee does not necessarily have to come directly from counsel; it can come from a supervisor. *See id.*
 - ♦ Preliminary incident reports are protected if you can show that the purpose was to secure legal advice! *Id.*; *Enke v. Anderson*, 733 S.W.2d 462 (Mo. Ct. App. 1987).

In the Corporate Context: Attorney-Client Privilege

► Some enlightening examples:

- “[A] party may be able to demonstrate applicability of privilege by establishing that [a] communication [*between corporate management employees not in the presence of counsel*] was made in confidence for the primary purpose of obtaining legal advice.”
 - ◆ *Black & Veatch Corporation v. Aspen Ins. Co.*, 297 F.R.D. 611, 620 (D. Kan. 2014) (quoting *Williams v. Sprint/United Mgmt. Co.*, No. 03-2200-JWL-DJW, 2006 WL 266599, at *3 (D. Kan. Feb. 1, 2006).

In the Corporate Context: Attorney-Client Privilege

► Some enlightening examples:

- While in-house counsel status does not “dilute” the privilege, when in-house counsel serves in another capacity, such as vice president, his/her advice is privileged only upon a “clear showing” that it was given in a professional legal capacity.
 - ◆ *Marten v. Yellow Freight System, Inc.*, No. 96-2013-GTV, 1998 WL 13244, at *6 (D. Kan. Jan. 6, 1998).
- Corporate counsel’s presence at corporate meeting does not *ipso facto* make communications privileged. If your primary purpose in being there is to carry out a business function (e.g., here, serving as voting member of employment committee), the communications related to that purpose are not privileged!
 - ◆ *Id.* at *7-8.

In the Corporate Context: Attorney-Client Privilege

► The joint defense/common interest doctrine:

- “[A]ffords two parties with a common legal interest a safe harbor in which they can openly share privileged information without risking the wider dissemination of that information.” *Sawyer v. Southwest Airlines*, No. 01-2385-KHV, 2002 WL 31928442, at *3 (D. Kan. Dec. 23, 2002).
- Can only exist where the underlying communication being shared with the third party is privileged. *Id.*
- The “common interest” of the parties must be a legal interest (not a commercial interest), and be identical, and the communications must further their shared interest. *Id.*
- Considered an exception to the general rule that the attorney-client privilege is waived if the communication is disclosed to a third party. *Id.*

In the Corporate Context: Work Product Doctrine

► Some points to consider:

- To be work product, the material must be prepared *in anticipation of litigation*, and *by or for an attorney* (in-house or outside counsel).
- Unlike privileged communications, and although deserving of rigorous protection, work product can be discovered without a waiver (substantial need; later unrelated suit).
- Disclosure of work product material by in-house counsel to the client does not result in a waiver of work product immunity.
 - ♦ *Ayers Oil Co. v. American Business Brokers, Inc.*, No. 2:09 CV 02-DDN, 2009 WL 4725297, at *3 (E.D. Mo. Dec. 2, 2009).
- Disclosure of work product to a non-adversarial third party does not waive work product immunity unless disclosure increased the chances that an adversarial party would gain access to the materials. *Id.*
- If you can classify something as privileged and work product, do so.

**Attorney-Client Privilege and Work Product:
Practical considerations for the in-house practitioner**

▶ **Create a plan that fits within the context of your business:**

- Identify any states/jurisdictions where litigation is likely.
- Research privilege/work product rules to confirm any particular/specific issues unique to that jurisdiction.
- Review your corporate structure and identify persons in top management and within each department who are/will likely serve as primary points of contact for legal issues.
- Establish internal procedures designed to maximize privilege/work product protections. Such as . . .

**Attorney-Client Privilege and Work Product:
Practical considerations for the in-house practitioner**

- ▶ Establish written directives/policies *now* (coming from legal department) governing how disputes will be handled.
- ▶ Establish procedures designed to immediately get and keep in-house counsel involved in every dispute (e.g., workplace accidents, whistleblowers, sexual harassment claims, etc.).
- ▶ Identify and prepare ahead of time for situations where privilege/work product applicability may be an issue, with goal of rectifying any such issue.
- ▶ Establish recordkeeping procedures that help to clearly identify privileged communications and work product – “document, document, document.”
- ▶ Train primary points of contact on privilege/work product and on procedures being implemented by company to maximize protections.

Attorney-Client Privilege and Work Product: Practical considerations for the in-house practitioner

► Privilege/Work Product Do's and Don'ts

- DO educate yourself on evolving applications of privilege/work product.
- DO be organized.
 - ◆ Maintain good/separate files for privileged communications/work product; maintain lists of prominent players in disputes and their respective roles; create a paper trail to establish privilege.
- DO think proactively/thoughtfully about how the privilege and/or work product can protect your client and how to prevent waiver.
- DON'T assume something will be protected just because an attorney did it or was involved, or will not be protected because an attorney did not do it or was not involved!
- DON'T label every document "privileged," "confidential," "work product," etc. unless you truly believe that it is.

Once Again . . .

Privilege/Work Product Take Aways

- Privileged materials enjoy absolute protection from disclosure so . . . use and protect (i.e., don't waive) the privilege!
- As the proponent of the privilege/work product assertion, your client will have initial burden of proof to show applicability so . . . make it easy on yourself!
- When you are dealing with litigation or anticipated litigation, work product provides a second method of protecting corporate information so . . . keep that in mind!
- Opposing parties and counsel want to discover underlying facts so they can make a case against YOUR client: MAKE 'EM WORK FOR IT!

Contact

Erin R. McClernon
Partner
Kutak Rock LLP
Erin.McClernon@KutakRock.com

► **Kansas City Office**
Two Pershing Square
2300 Main Street, Suite 800
Kansas City, MO 64108
Direct: 816-502-4829
Office: 816-960-0090

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Top 10 Things We Hate to Hear During an Internal Investigation

June 19, 2015

Thomas J. Kenny
Partner
Kutak Rock LLP
thomas.kenny@kutakrock.com

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1. After we heard about the Compliance Hotline Report, we waited a few weeks to call you.

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▶ Corrective Action

- Stop the misconduct (and potential damages)
- Implement corrective action

▶ Ticking clocks

- 31 U.S.C. § 3729(2)(A) (False Claims Act) (Reduced damages). “If the court finds that the person committing the violation of this subsection furnished . . . the United States . . . with all information known to such person about the violation within **30 days after the date** on which the defendant first obtained the information...the court may assess not less than 2 times the amount of damages which the Government sustains...

▶ Civil False Claims Act (31 U.S.C. § 3729, *et. seq.*)

▶ Government’s Primary Civil Prosecution Tool

▶ Authorizes Significant Penalties

- \$11,000 per “claim”
- Treble damages
- Attorneys Fees

▶ Maybe Brought by Private Whistleblower (“Relator”)

▶ **Warning:** Company Doing Investigation May Not Know Who the Whistleblower Is (cases filed under seal)

-
2. Human Resources began our investigation and wrote up really good interview memos.

Investigative Issues

- ▶ Privilege Issues
- ▶ Documentation of investigation
 - ◆ Oral Report
 - ◆ Written Report
 - ◆ Interview Notes / Memos
- ▶ Which types of internal investigations should HR handle?
- ▶ Criteria for determining when to involve legal counsel (Investigative Protocols)

In re General Motors LLC Ignition Switch Litigation

- ▶ Commissioned outside law firm to conduct a thorough internal investigation into the defect and delays in recalling the affected vehicles.
- ▶ Internal investigation involved review of over 41 million documents and over 350 interviews.
- ▶ Investigative report provided to Board of Directors and to various government agencies, at least one of which made the report publicly available.
- ▶ *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 JMF, 2015 WL 221057 (S.D.N.Y. Jan. 15, 2015)

In re General Motors LLC Ignition Switch Litigation

- ▶ Report provided to plaintiffs in the subsequent products liability case, who then sought to compel production of any notes or transcripts of the interviews underlying the report.
- ▶ GM sought to protect from disclosure, as privileged: interview notes, summaries and formal memoranda prepared by investigative counsel.

In re General Motors LLC Ignition Switch Litigation

- ▶ The Court found that the materials at issue, to the extent they reflected the various witnesses communications, were conducted as part of the company's request for legal advice in light of the potential government investigations and civil suits facing GM.
- ▶ The Court found that although the Report prepared by counsel had been distributed to various government agencies, the underlying communications (interviews) had not been disclosed.
- ▶ The fact that outside counsel had conducted the interviews and prepared the material made the argument for privilege stronger than in *Upjohn* itself.

In re Kellogg Brown & Root, Inc.

- ▶ A former employee of Kellogg Brown & Root, Inc. (KBR), Barko, alleged that KBR and other defense contractors had violated the False Claims Act by inflating the costs of construction services on military bases in Iraq and accepting kickbacks.
- ▶ KBR had conducted an internal investigation in accordance with its Code of Business Conduct and as required by government procurement regulations.
- ▶ During discovery, Plaintiff sought documents related to the internal investigation, and filed Motion to Compel discovery.
- ▶ KBR objected on grounds of attorney-client privilege and work product doctrine.

In re Kellogg Brown & Root, Inc. (District Court)

- ▶ **District Court held** investigation the documents were not privileged because the investigation had not been conducted for the primary purpose of seeking legal advice but instead was a *routine compliance investigation* pursuant to regulatory law and corporate policy.
- ▶ In-house attorneys had conducted the investigation without consultation with outside lawyers;
- ▶ Many of the interviews during the investigation had been conducted by non-attorneys
- ▶ The employees interviewed were not advised that the purpose of the interview was to assist the company in obtaining legal advice.

In re Kellogg Brown & Root, Inc. (D.C. Circuit)

- ▶ Defendants sought mandamus to the DC Circuit, which held that the fact that internal investigation was conducted by in-house counsel (not outside lawyers) did not undermine KBR's assertion of privilege;
- ▶ The attorney-client privilege still applied to interviews conducted by non-attorneys because in-house counsel directed them;
- ▶ The company's failure to use "magic words" to advise its employees about obtaining legal advice did not eviscerate the privilege: employees "knew that the company's legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected."
- ▶ Court held privilege will apply "if **one** of the significant purposes of the internal investigation was to obtain or provide legal advice"
- ▶ Remand to District Court to address other arguments supporting discovery

In re Kellogg Brown & Root, Inc. (Remand)

- ▶ “[District Court] concludes that the reports drafted by KBR investigators, to the extent they do not reveal confidential employee communications, are not attorney-client privileged.” *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-CV-1276, 2014 WL 7212881, at *6 (D.D.C. Dec. 17, 2014).
- ▶ Court concludes that: 1) witness statements gathered by investigators remain privileged, but 2) substantial portions of the reports constitute fact work product, and 3) that Barko has made an adequate showing of “substantial need” to overcome the work product protection. *Id* at * 10.
- ▶ *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014) cert. denied sub nom. *U.S. ex rel. Barko v. Kellogg Brown & Root, Inc.*, 135 S. Ct. 1163 (2015).

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3. Well, when the agents came to my house, we were eating dinner and they said “we just have a few questions,” so we talked for “just a little while.”

Investigative Procedures

- ▶ Inform Employees of Rights and Responsibilities
 - Right to Talk to Government
 - Right to Not Talk to Government
 - Right to Counsel
 - Contact Point for Company
 - Comfort Level
- ▶ Single Company Contact with Government
- ▶ “Messaging” to Employees, Government
- ▶ Employee “Advisory Memo”

-
4. Our system auto deletes our e-mails after 10 days. And, we forgot how to suspend it.

P.S. Our employees own their cell phones, so we didn't look at their text messages.

Preservation of Potential Evidence

- ▶ *Zubulake v. UBS Warburg LLC*, 220 FRD 212, 218 (S.D.N.Y. 2003). “Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”
- ▶ “Spoliation is defined as the intentional destruction of evidence.” *Stevenson v. Union Pac. R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004) (citing Arkansas law).
- ▶ Litigation Hold Procedures
- ▶ Duty to Preserve Potential Evidence
Obstruction 18 U.S.C. § 1512(b) “Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to-
 - (1) influence, delay, or prevent the testimony of any person in an official proceeding;
 - (2) cause or induce any person to-
 - (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding; and
 - (B) alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding.- shall be fined under this title or imprisoned not more than 20 years, or both.”

5. We had our accountants do a good report adding up all the false claims.

Privilege Issues

- ▶ Potential Admission
- ▶ Best Practices for Expert Opinions/Analyses
 - In-House Expertise/Third Party Consultant
- ▶ Accountant as Agent of Counsel
 - *In Re Bieter* 16 F.3d 929, 937 (8th Cir. 1994)
 - ▶ Extends the “client representative” privilege to communications between a non-employee contractor or consultant and a party's lawyer. An independent consultant may be a representative of the client for purposes of applying the attorney-client privilege and work product doctrine.

-
6. We had a couple of internal meetings to discuss the investigation and give everyone a “heads up.”

And we ordered everyone not to talk to the government.

Investigative Issues

- ▶ Communications among witnesses regarding subject matter of investigation
 - Perception Issue
 - Practical Issues (water cooler talk)
 - Legal Issue (witness tampering)
 - ▶ 18 U.S.C. § 1512(b)(2)(A). “Whoever knowingly...corruptly persuades another person...with intent to...cause or induce any person to...withhold testimony...in an official proceeding...shall be fined under this title or imprisoned not more than ten years, or both.”
- ▶ Communications Best Practices
 - Employee Advisory Memo
 - Communications with Corporate Counsel

-
7. We have a Compliance Program, but I'm not sure where it is.
And don't remember what it says.

Compliance Program

- ▶ Compliance Program sets standards for corporate conduct, promotes “organizational culture” of ethical conduct and legal compliance
- ▶ “Effective” Program affects government’s view of corporation, and is an important tool for counsel in an investigation (criminal prosecution, FCA intervention, exclusion, penalty amounts)

False Claims Act Statistics

- ▶ Government Intervention Decision In FCA Cases
 - (31 USC § 3730)
- ▶ Critical to Outcome of FCA Case
 - Of \$2.9 billion recovered in 2014, only 1% obtained when government did not intervene
 - Of \$30 billion recovered between 1987-2014, 97% obtained in cases where government intervened
 - Over 95% of intervened cases resulted in significant settlements or judgment for the government
 - Where government declines intervention, more than 90% dismissed with no recovery to Relator
- ▶ Effective Compliance Program: Factor in Government’s Intervention Decision.

-
8. Before the subpoena arrived, one of our employees was seen meeting with a government agent.

Investigative Issues

- ▶ In conducting internal investigations, must assume a current employee may be a whistleblower
- ▶ Everything he / she hears will be reported to the government
- ▶ Address “Complaint”
 - Implement Corrective Action, if necessary
- ▶ Avoid Company Conduct that Could be Viewed as Obstructive
- ▶ Whistleblower rewards
 - SEC (Dodd-Frank) (10 to 30% of recoveries over \$1 million)
 - False Claims Act (15 to 25% of total recovery)
 - IRS Whistleblower Program

-
9. The complaining employee reported us to the government, so we let her go.

Retaliation Issues

▶ FCA – Retaliation Provision

- Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee . . . is *discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against* in the terms and conditions of employment because of lawful acts done by the employee...in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter. 31 U.S.C. § 3730(h).

▶ Witness tampering 18 U.S.C. § 1512(b)(2)(A).

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10. Since our lawyer helped write our Policy, we thought we'd save some money by having him/her represent all the employees.

► Counsel – Multiple Representation

– Represent Company Employees

Rule 1.7. Conflict of Interest: Current Clients.

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Rule 1.7. Conflict of Interest: Current Clients.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

▶ Government View (e.g., SEC)

▶ Privilege Issue (Advice of Counsel)

11. Who is this Qui Tam Guy?

Concluding an Investigation

- ▶ Identify potential violations
- ▶ Document conclusions
- ▶ Decision on reporting obligations / voluntary disclosure
- ▶ Corrective action

Contact

Thomas J. Kenny

Kutak Rock LLP

thomas.kenny@kutakrock.com

- ▶ **Omaha Office:**
1650 Farnam Street
Omaha, NE 68102
402-346-6000

Health Care Reform & Same-Sex Spouse Benefits

June 19, 2015

P. Brian Bartels, Esq.

Associate

Kutak Rock LLP

P. Brian.Bartels@KutakRock.com

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Overview

- ▶ Patient Protection and Affordable Care Act (“ACA”) Updates
 - Reporting for 2015 Tax Year
 - *King v. Burwell*
- ▶ Wellness Program Update
- ▶ Same-Sex Spousal Benefits
 - *Obergefell v. Hodges*
 - Issues to Consider post-*Windsor*

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Code §§ 6055 and 6056 Reporting

- ▶ Mandatory reporting for 2015 tax year (due 2016)
- ▶ Two different reporting requirements
- ▶ Code § 6055: Minimum essential coverage reporting
- ▶ Code § 6056: Applicable large employer reporting
- ▶ Forms for reporting
 - 1094-B
 - 1095-B
 - 1094-C
 - 1095-C

Information Reported

- ▶ Information reported for each calendar month
- ▶ Examples:
 - Type of coverage offered
 - To whom coverage offered (employee, spouse, dependents)
 - Enrollment in coverage
 - Cost of coverage
 - Covered individuals' Social Security numbers
 - Enrollment information

Form 1095-C

Form 1095-C **Employer-Provided Health Insurance Offer and Coverage** VOID CORRECTED **OMB No. 1545-0045**
Department of the Treasury **14** OMB No. 1545-0045

Part I Employee **Applicable Large Employer Member (Employer)**

1 Name of employer 2 Social security number (SSN) 3 Name of employee 4 Employer identification number (EIN)
 5 Street address (including apartment no.) 6 Street address (including suite or suite no.) 7 Contact telephone number
 8 City or town 9 State or province 10 Country and ZIP or foreign postal code 11 City or town 12 State or province 13 Country and ZIP or foreign postal code

Part II Employee Offer and Coverage

14 Offer of coverage under employer plan
 15 Employee share of monthly premium, the full value of minimum value coverage
 16 Applicable federal tax on employer-provided coverage

(a) Calendar year	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
14												
15	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$
16												

Part III Covered Individuals Employer provided self-insured coverage, check the box and enter the information for each covered individual.

(a) Name of covered individual	(b) SSN	(c) COB or COB or not available	(d) Covered all 12 months	(e) Months of Coverage											
				Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
17			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
18			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
19			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
20			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
21			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
22			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions. Cat No. 101700A Form 1095-C (2014)



Reporting for Fully Insured Plans

- ▶ Insurer reports minimum essential coverage
 - Form 1095-B to employees
 - Forms 1095-B and 1094-B to IRS
- ▶ Employer reports offers of coverage
 - Form 1095-C to employees
 - Forms 1095-C and 1094-C to IRS
- ▶ Deadline for reporting



Reporting for Self-Insured Plans

- ▶ Minimum essential coverage and “employer mandate” reported on one form (Form 1095-C)
- ▶ Employer responsible for reporting on Form 1095-C
 - Due to employee January 31 (for 2015)
 - Due to IRS February 28 if filing on paper (March 31 if filing electronically) (for 2015)
- ▶ Employer transmits Forms 1095-C to IRS using Form 1094-C

Preparing To Report

- ▶ Start preparing now!
- ▶ Forms look simple ... but ...
- ▶ Questions to consider:
 - Where is the data?
 - How will the data be aggregated/analyzed?
 - Who is responsible for preparing, filing, and mailing?
 - Role of current vendors?
 - Implementation timeline?

King v. Burwell

- ▶ Background
 - Subsidized coverage through Exchanges (Marketplaces)
- ▶ Issue before the Court
- ▶ Potential implications

Wellness Program Background

- ▶ Generally considered a “group health plan”
- ▶ Primarily governed by HIPAA
 - Exception to general rule prohibiting discrimination based on a health factor
 - If it complies with the regulations, a group health plan may provide rewards (penalties) based on health factors
 - Examples:
 - ◆ Surcharge for tobacco use
 - ◆ Biometric screenings
 - ◆ Health risk assessments

Two Types of Wellness Programs

Participatory

- ▶ Does not provide a reward, or
- ▶ Does not include any conditions for obtaining a reward that is based on satisfying a standard related to a health factor
- ▶ Examples

Health-contingent

- ▶ Two sub-types
- ▶ Activity-only
 - Perform/complete activity relating to a health factor to obtain reward
 - Not required to attain specific health outcome
- ▶ Outcome-based
 - Must attain or maintain specific health outcome to obtain reward

New EEOC Proposed Regulations

- ▶ Federal Equal Employment Opportunity Commission (“EEOC”) concern: wellness programs violate Title I of the Americans with Disabilities Act (“ADA”)
- ▶ New proposed regulations:
 - Voluntary
 - Notice
 - Limitations on Incentives
 - Confidentiality
- ▶ Compliance steps

Same-Sex Spouse Benefits

▶ *Obergefell v. Hodges*

- Issues
 - ◆ Is there a constitutional right for individuals of the same-sex to marry?
 - ◆ Does the Constitution require one state to recognize same-sex marriages legally performed in another state?
- To be decided in June 2015 by United States Supreme Court

Post-*Windsor* Issues

- ▶ Definition of “spouse” in plan documents
- ▶ Selected health plan issues
 - HIPAA special enrollment
 - COBRA
 - Dependent care assistance plan limits
 - Controlled groups
- ▶ Tax issues
 - State versus federal tax treatment
 - Imputed income

Contact

P. Brian Bartels, Esq.

Associate
Kutak Rock LLP
P.Brian.Bartels@KutakRock.com

► **Omaha Office**

The Omaha Building
1650 Farnam St.
Omaha, NE 68102

402-231-8897

Do Software Patents Still Exist?

June 19, 2015

Bryan P. Stanley
Partner
Kutak Rock LLP
Bryan.Stanley@KutakRock.com

Types of Intellectual Property

► Patents

- Protects Inventions – embodiments of ideas
- Limited Monopoly - right to exclude others from making, using, selling, offering to sell for a period of time

Types of Intellectual Property (cont'd)

► Copyrights

- Protects works of authorship – fixed in a tangible medium of expression
- Limited Monopoly – right to copy, etc. for a period of time
- Software Code and screen prints, but not the ideas behind

Types of Intellectual Property (cont'd)

► Trademarks

- Product (or service) source identifier
- Stems from consumer protection

► Trade Secrets

- Protects information of commercial significance not generally known or discoverable through reasonable and proper means and subject of reasonable efforts to protect them
- Can last forever, as long as information can be kept secret

What is a Patent?

- ▶ “The Congress shall have Power To Promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;”
- ▶ U.S. Constitution Article I, Section, 8 Clause 8

The Patent System

- ▶ Quid Pro Quo
 - You disclose the invention to the public
 - The government gives you a limited monopoly (the patent)
- ▶ Confers to patent holder the right to exclude others from making, using, selling, or importing the invention
 - Does not confer to patent holder the freedom to operate the invention
- ▶ Inventor must disclose to the public in exact terms how to make and use the invention

Types of Patents

- ▶ Utility Patents (20 years from application date)
 - Monopoly in an invention for a limited period in return for full disclosure to the public.
- ▶ Design Patents (14/15 years from date of issue)
 - Monopoly in the ornamental design of an article of manufacture
- ▶ Plant Patents (20 years from application date)
 - For new variety of plants
 - May be required to deposit a sample
 - Actually filed as a utility patent

Patentability - Statutory Requirements

- ▶ 35 USC §101 - Statutory Subject Matter
- ▶ 35 USC §102 - Novelty
- ▶ 35 USC §103 - Non-obviousness
- ▶ 35 USC §112
 - Possession (written description)
 - Enabling disclosure
 - Best mode

Patentability – Subject Matter

- ▶ “Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”
- ▶ 35 USC §101

Patentable Subject Matter

- ▶ “Anything under the sun that is made by man”
 - Articles of Manufacture
 - **Processes or Methods**
 - Designs
 - **Computer Programs**
 - Compositions of Matter
 - Business Methods
 - Plants (asexually reproduced)

Non-Patentable Subject Matter

- ▶ Mathematical algorithms
- ▶ Naturally occurring organisms
- ▶ Laws of nature
- ▶ Abstract ideas
- ▶ Natural phenomenon

What is the big deal about *Alice*?

- ▶ Alice Corp. v. CLS Bank Int'l (134 S.Ct. 2347 (2014))
 - Alice Corp. Patent
 - ◆ Covers using a computer to reduce settlement risk during a financial transaction between two parties by using a 3rd party intermediary and real-time settlement verification
 - CLS Bank operates a global network providing currency transaction services
- ▶ Pre-Alice – Performed on computer = Patentable

Alice Decision

- ▶ Opinion issued June 19, 2014
 - Claims directed to abstract ideas ineligible under §101
 - ♦ Unless claim elements (considered individually and together) contain an “inventive concept” sufficient to “transform” the claimed abstract idea into a patent-eligible application
 - Distinguish between:
 - “Building blocks” of human ingenuity; and
 - Things that integrate building blocks into something else (does not tie up building blocks themselves)

Alice Decision (cont'd)

- ▶ Two-part test used by *Alice*:
 - Part 1: Are the claims directed to a patent-ineligible concept (e.g., an abstract idea)?
 - Part 2: If so, do the claim elements contain an “inventive concept” sufficient to “transform” the claimed abstract idea into a patent-eligible application?

Abstract Ideas

- ▶ Fundamental/longstanding economic practices
 - Mitigating settlement risk
 - Hedging
 - Creating a contractual relationship
 - Using advertising as an exchange or currency
- ▶ Certain methods of organizing human activity
 - Managing a game of bingo
- ▶ An idea of itself

Abstract Ideas (cont'd.)

- ▶ Mathematical relationships/formulas
 - The Arrhenius equation for calculating the cure time of rubber
 - Formula for updating alarm limits
 - Mathematical formula relating to standing wave phenomena
 - Mathematical procedure for converting forms of numerical representation

Abstract Ideas (cont'd.)

- ▶ Organizing, handling information
 - Processing information through a clearinghouse
 - Comparing new and stored information and using rules
 - Using categories to organize, store and transmit information
 - Organizing information through mathematical correlations

Significantly More than Abstract

- ▶ Improvements to another technology of field
- ▶ Improvements to the functioning of the computer itself
- ▶ Limitations satisfying the Machine-or-Transformation Test
 - Applying the judicial exception with, or by use of, a particular machine
 - Effecting a transformation or reduction of a particular article to a different state or thing

Significantly More than Abstract (cont'd)

- ▶ Adding a specific limitation other than what is well-understood, routine and conventional in the field
- ▶ Adding unconventional steps that confine the claim to a particular useful application
- ▶ Other meaningful limitations beyond generally linking the use of an abstract idea to a particular technological environment

Not Significantly More

- ▶ Adding the words “apply it” (or an equivalent) to idea
- ▶ Mere instructions to implement an abstract idea on a computer
- ▶ Simply appending well-understood, high-level, routine and conventional activities previously known to the industry to the idea
 - E.g., an abstract idea requiring no more than a generic computer to perform generic computer functions that are well-understood, routine, and conventional activities previously known to the industry.

Not Significantly More (cont'd)

- ▶ Adding insignificant extrasolution activity to the abstract idea
 - E.g., mere data gathering in conjunction with a law of nature or abstract idea
- ▶ Generally linking the use of the abstract idea to a particular technological environment or field of use

Pro-Patent Strategies

- ▶ New or pending applications
 - Focus on novel aspects of your invention
 - Work carefully with patent attorney to create full disclosure and focus claim language
- ▶ Already granted patents?
 - Consider Reexamination or Reissue Applications

Defense Strategies

- ▶ Use *Alice* as a sledge hammer in litigation
 - Assert *Alice* early in litigation
 - Reference in response to demand letters and in settlement negotiations
- ▶ Insist upon claim construction

Contact

Bryan P. Stanley
Partner
Kutak Rock LLP
Bryan.Stanley@KutakRock.com

- ▶ **Kansas City Office**
Two Pershing Square
2300 Main Street
Suite 800
Kansas City, MO 64108-2416
816-960-0090

Protecting Your Client Base Through Effective Restrictive Covenants

June 19, 2015

Juliet A. Cox
Partner
Kutak Rock LLP
Juliet.Cox@KutakRock.com

**NOT ALL RESTRICTIVE
COVENANTS ARE CREATED
EQUAL**

Step 1: What are you trying to protect?

► What is your “Legitimate Business Interest”?

- Customer Relationships
- Supplier Relationships
- Confidential Information
- Trade Secrets
- Workforce Stability
- Anything else?

**THE PROTECTION YOU SEEK
DICTATES THE BEST
METHOD TO USE**

Step 2: Identify the Best Method of Protection

► Covenant Not to Compete – Geographic Focus

- Must be reasonable in terms of time and geographic reach
 - ◆ Does not protect where geographic limitations are irrelevant
 - ◆ Do not rely on blue penciling
 - Ex: Court struck down as overbroad and oppressive restriction of employee “(x) within the metro area; (y) within 500 miles of the metro area; and (z) worldwide.”
 - » (x) alone may have been upheld
 - ◆ Must be narrowly tailored to the facts (job duties, information access, etc.)

Step 2: Identify the Best Method of Protection

► Covenant No to Compete

- Cannot restrict employment based on customer locations
- Employee agreed not to work for 2 years after termination “in any business that is engaged in any work or activity that involves a product, process, service or development on which I worked or with respect to which I had access to Confidential Information while with the Company anywhere the Company markets or sells any such product or service.”
- Held: “lack of a geographic limitation here renders the non-compete provision unenforceable without accompaniment by any specificity of limitation on the class with whom contact is limited.”
 - ◆ *Sigma-Aldrich Corp. v. Vikin*, 451 S.W.3d 767 (Mo. App. E.D. 2014)

Step 2: Identify the Best Method of Protection

▶ Non-Solicitation of Customers – Protection of Customer Base

- “The employee’s relationship with the client he owes to the employer, and he holds it in a kind of fiduciary capacity for the employer.”
 - ♦ *Property Tax Representatives, Inc. v. Chatam*, 891 S.W.2d 153 (Mo. App. W.D. 1995)
- Customer lists/contacts are legitimate business interests in most states
- Many customers are no longer geographically focused
- In *Chatam*, non-compete was deemed unenforceable because employee was terminated without good cause; non-solicitation may be enforced; remanded to determine if scope more extensive than reasonably necessary to protect legitimate business interests

Step 2: Identify the Best Method of Protection

▶ Non-Solicitation of Employees

- Protection of stable work force – Missouri Presumption – Mo. Rev. Stat. § 431.202.1

▶ Confidentiality and Non-Disclosure Agreement

- Protection of information that may not rise to the level of a trade secret
- Split among states whether claim for breach of confidentiality agreement is preempted by UTSA
- Contract shows efforts to protect trade secrets
 - ♦ Define clearly to keep confidential information and trade secrets separately protected
 - ♦ Impose specific requirements on return of documents/equipment and use upon termination

▶ Agreement governing ownership of IP

- Protection of innovations and developments

SPECIFICITY INCREASES ENFORCEABILITY

Step 3: Drafting with Specificity

- ▶ Identify the specific threat posed by the employee at issue
 - Duties and responsibilities
 - Is the employee the “face” of the company (e.g., sales)
 - What information is entrusted to the employee internally
 - What information will the employee develop through external connections
 - Does the employee have access to trade secrets
 - Will the employee be leading a “team”

Step 3: Drafting with Specificity

- ▶ Identify each state which may have an interest in the outcome
 - Enforcement differs from state to state – choose the best state that has an interest in the outcome
 - ◆ The employee’s residence
 - ◆ The company’s headquarters/satellite office
 - ◆ The company’s place of incorporation
 - ◆ The states serviced by the employee
 - ◆ If possible, draft to ensure protection in most conservative forum

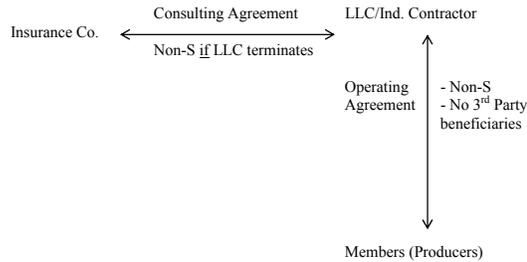
Step 3: Drafting with Specificity

- ▶ Narrowly Tailor Agreements
- ▶ One size does NOT fit all
- ▶ Getting greedy often renders covenants unenforceable
- ▶ Example of simple non-solicitation enforced in 1969:
 - Employee agreed “Upon the termination of his employment to deliver to the Company all lists of customers, samples, price lists and all other property belonging to the Company. For a period of one year from the termination of his employment not to directly or indirectly, as to products competitive to those sold by the Company, solicit or accept business from any of the Company’s customers that he had contact with in the territory he last serviced for the Company prior to the termination of his employment.”

Step 3: Drafting with Specificity



Bells and whistles may have unintended consequences



- Consulting Agreement did not address Member termination
- Operating Agreement did not expressly state Insurance Co. was 3rd party beneficiary / LLC had no protectable interest in insurance company's client base
- Neither company could enforce against departing member
- Issue with breadth of covenant not addressed

JTL Consulting, LLC, et al v. Shanahan, 190 S.W. 3d 389 (Mo. App. ED 2006)

Step 4: Ongoing Maintenance



Monitor and update agreements

- Each time a new compensation structure is implemented
- Each time the employee receives a promotion/changes positions/duties expand
- Each time an employee is transferred to another state
- Whenever necessary to ensure the agreement is narrowly tailored to meet the company's legitimate business needs given the employee's position

Conclusions

- ▶ There is no “one size fits all”
- ▶ Effective drafting requires consideration of
 - What you are protecting
 - The applicable jurisdiction
 - An understanding of the employee’s role in the company
- ▶ Narrow drafting increases the likelihood of enforcement
- ▶ Broad drafting decreases the likelihood of enforcement

Contact

Juliet A. Cox
Partner
Kutak Rock LLP
Juliet.Cox@KutakRock.com

- ▶ **Kansas City Office**
2300 Main, Suite 800
Kansas City, MO 64108
816-502-4631

Concealed Carry Laws and the Business Owner

June 19, 2015

Joseph O. Kavan
Partner
Kutak Rock LLP
Joseph.kavan@KutakRock.com

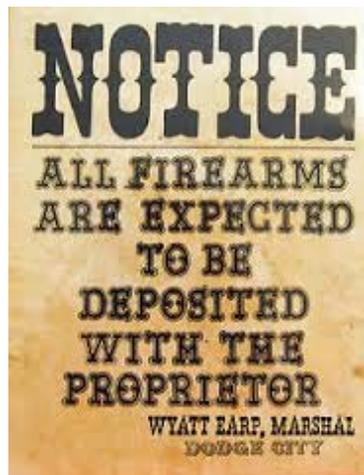
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Concealed Carry Laws and the Business Owner

► I. Background



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Concealed Carry Laws and the Business Owner

► I. Background

- In 1813, Louisiana and Kentucky passed bans on the carrying of concealed firearms.
- By 1859 the list of states included Indiana, Texas, Virginia, Alabama and Ohio.
- By 1900 Texas, Florida and Oklahoma followed suit.
- By 1950 most states had criminalized some form of carrying of a concealed weapon.

Concealed Carry Laws and the Business Owner

► I. Background

- Beginning in the late 1970s and early 1980s states were passing statutes to allow limited exceptions to these concealed carry prohibitions.
- The greatest number of new state statutes providing for concealed carry occurred between 2000 and 2010.

Concealed Carry Laws and the Business Owner

► I. Background

- Illinois was the last state to allow for concealed carry in March 2014, but only after a court order mandated the legislature to do so.
- Today all states permit some form of concealed carry.
- The rules vary greatly from state to state, and in many states it's still difficult to obtain a permit.

Concealed Carry Laws and the Business Owner

► I. Background

- It's easy in South Dakota, where the fee to obtain the four-year permit is only \$10 and there is no training requirement.
- In Pennsylvania, the permit costs only \$19 for five years and there is no training requirement.
- Alaska, Arizona, Arkansas, Montana, Vermont, Wyoming and as of July 1, 2015, Kansas, do not require a permit to carry a concealed firearm.

Concealed Carry Laws and the Business Owner

► I. Background

- By contrast, Illinois charges a \$150 fee and requires 16 hours of training. With training and range time in Illinois costing around \$450 to \$500, total dollar costs of getting a permit are over \$600.
- Not surprisingly, concealed carry is much more popular in states where permits are relatively inexpensive and easier to obtain.

Concealed Carry Laws and the Business Owner

► I. Background

- Gun rights and gun control are the two ends of an extremely alienating spectrum.
- But what do these laws mean to the proprietor of a business or owner of a premises?
- Do you, can you or should you disarm a person carrying a concealed weapon?
- Can you or should you place limits on how, when and where an employee or customer can carry a concealed firearm?

Concealed Carry Laws and the Business Owner

► I. Background

– What is a Concealed Carry Permit?

- ◆ A concealed carry permit or license is generally an exception, defense or excuse to a violation of a criminal statute prohibiting or limiting the carrying of a concealed firearm.
- ◆ Note, we are talking about a “concealed firearm” not a concealed weapon. The term “weapon” is a much broader term and a concealed carry permit or license only applies to firearms, and only to legal firearms.
- ◆ Concealed carry statutes do not authorize the concealed carry of a prohibited firearm or a weapon other than a firearm.

Concealed Carry Laws and the Business Owner

► I. Background

– What is a Concealed Carry Permit?

- ◆ Nebraska Revised Statutes 28-1202. ...any person who **carries a weapon** or weapons **concealed on or about his or her person, such as a handgun**, a knife, brass or iron knuckles, or any other deadly weapon, **commits the offense of carrying a concealed weapon**.
- ◆ Kansas Statutes Annotated 21-6302. **Criminal carrying of a weapon** is knowingly **carrying...any pistol**, revolver or other firearm concealed **on one's person** except when on the person's land or in the person's abode or fixed place of business.

Concealed Carry Laws and the Business Owner

▶ I. Background

- What is a Concealed Carry Permit?
 - ♦ Missouri Revised Statutes 571.030. 1. A person **commits the crime of unlawful use of weapons** if he or she knowingly **carries concealed** upon or about his or her person... **a firearm**...
 - ♦ Colorado Revised Statutes 18-12-105. A person **commits a class 2 misdemeanor** if such person knowingly and **unlawfully...carries a firearm concealed** on or about his or her person.

Concealed Carry Laws and the Business Owner

▶ I. Background

- What is a Concealed Carry Permit?
 - ♦ Under the laws of most states, the carrying of a concealed firearm is a crime.
 - ♦ Concealed carry permits are by definition **permits or licenses** providing for the holder of the permit to carry a concealed firearm.
 - ♦ But there are other ways to carry a firearm:
 - Open Carry
 - Automobile Carry
 - Constitutional Carry

Concealed Carry Laws and the Business Owner

▶ I. Background

- What is a Concealed Carry Permit?
 - ◆ **Open Carry** - Not Concealed
 - Most states do not prohibit open carry of a firearm.
 - Some local jurisdictions do.
 - Most jurisdictions that prohibit open carry provide exceptions for open carry to concealed carry permit holders, or concealed carry statutes provide for preemption of the local ordinances.

Concealed Carry Laws and the Business Owner

▶ I. Background

- What is a Concealed Carry Permit?
 - ◆ **Automobile Carry**
 - Again, a split of authority.
 - Some states provide that carrying a firearm in a vehicle is not concealed carry.
 - Some states prohibit this as a concealed carry.
 - Some provide that it is concealed only if it is not in plain view.
 - Most all allow a firearm to be carried in a vehicle in a locked container.

Concealed Carry Laws and the Business Owner

► I. Background

- What is a Concealed Carry Permit?
 - ◆ **Constitutional Carry** - No permit required
 - Constitutional carry states have statutes that allow for the issuance of a concealed carry permit by the state.
 - Those state permits add little to the rights of the permit holder in-state.
 - But...

Concealed Carry Laws and the Business Owner

► I. Background

- What is a Concealed Carry Permit?
 - ◆ **Reciprocity** - The ability to carry concealed in other states.
 - Nebraska Permits are honored in all states except:
 - » California, Connecticut, Delaware, Georgia, Guam, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, New York City, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Virgin Islands, Washington, West Virginia, American Samoa, District of Columbia, N. Mariana Islands **(19 States)**.

Concealed Carry Laws and the Business Owner

► I. Background

– What is a Concealed Carry Permit?

- ◆ Reciprocity - The ability to carry concealed in other states.
 - Kansas Permits are honored in all states except:
 - » California, Connecticut, Delaware, Guam, Hawaii, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, New York City, Oregon, Puerto Rico, Rhode Island, Virgin Islands, American Samoa, District of Columbia, N. Mariana Islands **(13 States)**.

Concealed Carry Laws and the Business Owner

► I. Background

– What is a Concealed Carry Permit?

- ◆ Reciprocity - The ability to carry concealed in other states.
 - Missouri Permits are honored in all states except:
 - » California, Connecticut, Guam, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nevada, New Jersey, New York, New York City, Oregon, Puerto Rico, Rhode Island, Virgin Islands, Virginia, American Samoa, District of Columbia, N. Mariana Islands **(13 States)**.

Concealed Carry Laws and the Business Owner

► I. Background

- What is a Concealed Carry Permit?
 - ◆ Reciprocity - The ability to carry concealed in other states.
 - Colorado Permits are honored in all states except:
 - » **California**, Connecticut, Guam, **Hawaii**, **Illinois**, **Maine**, **Maryland**, **Massachusetts**, Minnesota, Nevada, New Jersey, **New York**, New York City, Oregon, Puerto Rico, Rhode Island, South Carolina, Virgin Islands, Virginia, Washington, American Samoa, District of Columbia, N. Mariana Islands (**16 States**).

Concealed Carry Laws and the Business Owner

► I. Background

- State Data Concerning Permits
 - ◆ Permit Holders in the United States.
 - As of June 30, 2014 there were nearly **12 million permit holders** in the United States.
 - The number is probably much higher as New York and some other states do not report this information.
 - Constitutional Carry States also do not report those who also possess a permit.

Concealed Carry Laws and the Business Owner

► I. Background

– State Data Concerning Permits

- ◆ Permit Holders in the United States.
 - Nebraska 30,505 (2.71%) (December 2013)
 - Kansas 75,099 (3.46%) (December 2013)
 - Missouri 171,000 (3.68%) (February 2013)
 - Colorado 170,636 (4.23%) (December 2013)
 - Florida has the most - 1,278,246
 - South Dakota has the highest percentage - 2.03%
 - Hawaii has the fewest - 83, and the lowest percentage - .02%

Source: Crime Prevention Research Center

Concealed Carry Laws and the Business Owner

► I. Background

– Crime Statistics

- ◆ Few permits holders have had their permits revoked as a result of committing a crime.
- ◆ Florida - 168 from 1987 to 2014
- ◆ Texas - 120 during same period

– Deterrence

- ◆ According to a 2014 Study by the Crime Prevention Research Center (based on 2007 data) a 1% increase in the percent of the adult population holding a concealed carry permit is roughly associated with a 1.4% drop in the murder rate.

► II. Rights of Permit Holders

– General

- ◆ State statutes and local ordinances provide for the parameters of concealed carry permit or license.
- ◆ States issue permits or licenses. These are not rights and as such are subject to limitations.
- ◆ Constitutional Carry states generally provide that the carrying of a concealed firearm is not prohibited and provide restrictions on when and where a concealed firearm may not be carried.

► II. Rights of Permit Holders

– Kansas

- ◆ Kansas Statutes Annotated 21-6302.
Criminal carrying of a weapon.
 - (a) Criminal carrying of a weapon is knowingly carrying:
 - » (1)... (4) any pistol, revolver or other firearm concealed on one's person except when on the person's land or in the person's abode or fixed place of business.
 - (c) Subsection (a) shall not apply to:
 - » (1)...(9) any person carrying a concealed handgun as authorized by K.S.A. 2014 Supp. 75-7c01 et seq., and amendments thereto.

Concealed Carry Laws and the Business Owner

▶ II. Rights of Permit Holders

— Kansas

- ◆ K.S.A. 2014 Supp. 75-7c01 et seq. The Personal and Family Protection Act.
 - 75-7c03. License to carry concealed handgun .
 - » (a) The attorney general shall issue licenses to carry concealed handguns to persons who comply with the application and training requirements of this act and who are not disqualified under K.S.A. 2014 Supp. 75-7c04, and amendments thereto. Such licenses shall be valid throughout the state for a period of four years from the date of issuance

Concealed Carry Laws and the Business Owner

▶ II. Rights of Permit Holders

— Kansas

- ◆ Kansas Senate Bill No. 45.
- ◆ Amends Kansas Statutes Annotated 21-6302.
 - Criminal carrying of a weapon.
 - » (a) Criminal carrying of a weapon is knowingly carrying: (1) . . . (4) ~~any pistol, revolver or other firearm concealed on one's person except when on the person's land or in the person's abode or fixed place of business.~~
- ◆ Amends other references in the criminal statute referencing possession of a concealed firearm by a license holder.
- ◆ Authorizes the carrying of concealed handguns in the state without a license or a training requirement.

▶ II. Rights of Permit Holders

– Kansas

- ◆ Agency 16 Regulations
 - Permit holders may carry a firearm in an automobile.

▶ II. Rights of Permit Holders

– Missouri

- ◆ Missouri Revised Statutes 571.101. 1.
 - All applicants for concealed carry permits issued pursuant to subsection 7 of this section must satisfy the requirements of sections 571.101 to 571.121.
 - **If the said applicant can show qualification as provided by sections 571.101 to 571.121, the county or city sheriff shall issue a concealed carry permit authorizing the carrying of a concealed firearm on or about the applicant's person or within a vehicle.**
 - A concealed carry permit shall be valid from the date of issuance or renewal until five years from the last day of the month in which the permit was issued or renewed. The concealed carry permit is valid throughout this state.

▶ II. Rights of Permit Holders

– Missouri

- ◆ Missouri Revised Statutes 571.030. 1.
 - A person commits the crime of unlawful use of weapons if he or she knowingly: (1) Carries concealed upon or about his or her person... a **firearm...Subdivisions (1), (8), and (10) of subsection 1 of this section shall not apply to any person who has a valid concealed carry permit** issued pursuant to sections 571.101 to 571.121, a valid concealed carry endorsement issued before August 28, 2013, or a valid permit or endorsement to carry concealed firearms issued by another state or political subdivision of another state.

▶ II. Rights of Permit Holders

– Nebraska

- ◆ Nebraska Revised Statutes 69-2428. Permit to carry concealed handgun; authorized.
 - **An individual may obtain a permit to carry a concealed handgun in accordance with the Concealed Handgun Permit Act.**

▶ II. Rights of Permit Holders

– Nebraska

- ◆ Nebraska Revised Statutes 28-1202. Carrying concealed weapon; penalty; affirmative defense.
 - (1)(a) Except as otherwise provided in this section, any person who carries a weapon or weapons concealed on or about his or her person, such as a handgun... commits the offense of carrying a concealed weapon...
 - (2) **This section does not apply to a person who is the holder of a valid permit issued under the Concealed Handgun Permit Act if the concealed weapon the defendant is carrying is a handgun.**

▶ II. Rights of Permit Holders

– Colorado

- ◆ Colorado Revised Statutes 18-12-214. Authority granted by permit-carrying restrictions.
 - (1) (a) **A permit to carry a concealed handgun authorizes the permittee to carry a concealed handgun in all areas of the state, except as specifically limited in this section.** A permit does not authorize the permittee to use a handgun in a manner that would violate a provision of state law. A local government does not have authority to adopt or enforce an ordinance or resolution that would conflict with any provision of this part 2.

▶ II. Rights of Permit Holders

– Colorado

- ◆ Colorado Revised Statutes 18-12-105. Unlawfully carrying a concealed weapon - unlawful possession of weapons.
 - (1) A person commits a class 2 misdemeanor if such person knowingly and unlawfully... (b) Carries a firearm concealed on or about his or her person... (c) A person who, at the time of carrying a concealed weapon, held a valid written permit to carry a concealed weapon issued pursuant to section 18-12-105.1, as it existed prior to its repeal, or, **if the weapon involved was a handgun, held a valid permit to carry a concealed handgun** or a temporary emergency permit issued pursuant to part 2 of this article; except that it shall be an offense under this section if the person was carrying a concealed handgun in violation of the provisions of section 18-12-214.

▶ III. Rights of Property Owners, Establishments and Employers

– General

- ◆ The United States Constitution grants firearms owners certain rights - The Second Amendment.
- ◆ State Constitutions grant firearms owners certain rights.
- ◆ The Supreme Court ruled in the *District of Columbia v. Heller* 554 U.S. 570 (2008), and in *McDonald v. Chicago* 561 U.S. 742 (2010) that **states and cities cannot totally ban guns because there is a fundamental, individual right to self-defense.**
- ◆ State Statutes provide for certain rights to firearms owners and possessors of firearms subject to regulation.

▶ III. Rights of Property Owners, Establishments and Employers

– General

- ◆ State Statutes and State and local regulations can and do limit the rights of individuals carrying concealed firearms, irrespective of whether that individual is carrying pursuant to a permit or license or pursuant to a constitutional carry statute or provision.
- ◆ Irrespective of rights and restrictions of carrying a weapon provided by statute or regulation, there are also general property right considerations, such as trespassing laws, that further restrict the carrying of firearms.

▶ III. Rights of Property Owners, Establishments and Employers

– General

- ◆ Just because you have a driver's license, it does not confer the right to drive on or park on private property.
- ◆ A license to hunt does not give that person the right to hunt on private property.
- ◆ Private property owners have the right to remove individuals from their property.

► III. Rights of Property Owners, Establishments and Employers

– General

- ◆ Private enforcement versus police enforcement.
 - In the absence of a statute or regulation prohibiting an individual from carrying a firearm on an owner’s premises, that property owner has the right to have that person removed from the premises.
 - Some statutes or regulations allow a property owner to post a “no firearms” sign on the property.
 - If the statute or regulation provides for such a sign, there is usually an accompanying statute or regulation that provides that such a premises then becomes a prohibited location and subject to police enforcement.

► III. Rights of Property Owners, Establishments and Employers

– General

- ◆ Private enforcement versus police enforcement.
 - In the absence of a specific statute or regulation providing for the posting of a ‘no firearms’ sign, a property owner may generally post such a sign to indicate that if a person enters the premises, that person is subject to removal. Not as a firearms violation, but rather as a trespass violation.
 - A property owner may place restrictions on invitees to a property.
 - “No shirt, no shoes, no service.”
 - Must be enforced in a non-discriminatory manner.

► III. Rights of Property Owners, Establishments and Employers

– General

- ◆ Private enforcement versus police enforcement.
 - Most statutes and/or regulations specify certain establishments where the carrying of a firearm is prohibited by anyone, including permit holders: schools, churches, hospitals, court houses, etc.
 - Some statutes and/or regulations specify that if a property owner posts a “no firearms” sign, that premises becomes a statutorily prohibited area.
 - Enforcement of firearms carry in statutorily or regulatorily prohibited areas is not private enforcement, but police enforcement, and violators are subject to being charged with a crime.

► III. Rights of Property Owners, Establishments and Employers

– Kansas

- ◆ Kansas Statute Annotated 75-7c10.
 - Subject to the provisions of K.S.A. 2014 Supp. 75-7c20, and amendments thereto:
 - » (a) Provided that **the building is conspicuously posted** in accordance with rules and regulations adopted by the attorney general as a building where carrying a concealed handgun is prohibited, **no license issued pursuant to or recognized by this act shall authorize the licensee to carry a concealed handgun into any building.**

► III. Rights of Property Owners, Establishments and Employers

– Kansas

◆ Kansas Statute Annotated 75-7c10.

– b) Nothing in this act shall be construed to prevent:

- » Any public or private employer from restricting or prohibiting by personnel policies persons licensed under this act from carrying a concealed handgun while on the premises of the employer's business or while engaged in the duties of the person's employment by the employer, except that no employer may prohibit possession of a handgun in a private means of conveyance, even if parked on the employer's premises; or

► III. Rights of Property Owners, Establishments and Employers

– Kansas

◆ Kansas Statute Annotated 75-7c10.

- (2) any private business or city, county or political subdivision from restricting or prohibiting persons licensed or recognized under this act from carrying a concealed handgun within a building or buildings of such entity, provided that the building is posted in accordance with rules and regulations adopted by the attorney general pursuant to subsection (h), as a building where carrying a concealed handgun is prohibited.

► III. Rights of Property Owners, Establishments and Employers

— Kansas

- ◆ Kansas Statute Annotated 75-7c10.
 - (c) (1) Any private entity which provides adequate security measures in a private building and which conspicuously posts signage in accordance with this section prohibiting the carrying of a concealed handgun in such building as authorized by the personal and family protection act shall not be liable for any wrongful act or omission relating to actions of persons licensed to carry a concealed handgun concerning acts or omissions regarding such handguns.

► III. Rights of Property Owners, Establishments and Employers

— Kansas

- ◆ Kansas Statute Annotated 75-7c10.
 - (2) Any private entity which does not provide adequate security measures in a private building and which allows the carrying of a concealed handgun as authorized by the personal and family protection act shall not be liable for any wrongful act or omission relating to actions of persons licensed to carry a concealed handgun concerning acts or omissions regarding such handguns.
 - (3) Nothing in this act shall be deemed to increase the liability of any private entity where liability would have existed under the personal and family protection act prior to the effective date of this act.

► III. Rights of Property Owners, Establishments and Employers

— Kansas

◆ Kansas Statute Annotated 75-7c10.

- (d) The governing body or the chief administrative officer, if no governing body exists, of any of the following institutions may permit any employee, who is licensed to carry a concealed handgun as authorized by the provisions of K.S.A. 2014 Supp. 75-7c01 et seq., and amendments thereto, to carry a concealed handgun in any building of such institution, if the employee meets such institution's own policy requirements regardless of whether such building is conspicuously posted in accordance with the provisions of this section:

► III. Rights of Property Owners, Establishments and Employers

— Kansas

◆ Kansas Statute Annotated 75-7c10.

- (1) A unified school district;
- (2) a postsecondary educational institution, as defined in K.S.A. 74-3201b, and amendments thereto;
- (3) a state- or municipal-owned medical care facility, as defined in K.S.A. 65-425, and amendments thereto;
- (4) a state- or municipal-owned adult care home, as defined in K.S.A. 39-923, and amendments thereto;
- (5) a community mental health center organized pursuant to K.S.A. 19-4001 et seq., and amendments thereto; or
- (6) an indigent health care clinic.

► III. Rights of Property Owners, Establishments and Employers

– Kansas

◆ Kansas Statute Annotated 75-7c10.

- (e) (1) **It shall be a violation of this section to carry a concealed handgun in violation of any restriction or prohibition allowed** by subsection (a) or (b) if the building is posted in accordance with rules and regulations adopted by the attorney general pursuant to subsection (h). **Any person who violates this section shall not be subject to a criminal penalty but may be subject to denial to such premises or removal from such premises.**

► III. Rights of Property Owners, Establishments and Employers

– Kansas

◆ Kansas Statute Annotated 75-7c10.

- (i) The attorney general shall adopt rules and regulations prescribing the location, content, size and other characteristics of signs to be posted on a building where carrying a concealed handgun is prohibited pursuant to subsections (a) and (b). Such regulations shall prescribe, at a minimum, that:

► III. Rights of Property Owners, Establishments and Employers

— Kansas

◆ Kansas Statute Annotated 75-7c10.

- » (1) The signs be posted at all exterior entrances to the prohibited buildings;
- » (2) the signs be posted at eye level of adults using the entrance and not more than 12 inches to the right or left of such entrance;
- » (3) the signs not be obstructed or altered in any way; and
- » (4) signs which become illegible for any reason be immediately replaced.

► III. Rights of Property Owners, Establishments and Employers

— Missouri

◆ Missouri Revised Statutes 571.107.

– No concealed carry permit...shall authorize any person to carry concealed firearms into:

- » (1) Any police, sheriff, or highway patrol office or station without the consent of the chief law enforcement officer in charge of that office or station. Possession of a firearm in a vehicle on the premises of the office or station shall not be a criminal offense so long as the firearm is not removed from the vehicle or brandished while the vehicle is on the premises;

► III. Rights of Property Owners, Establishments and Employers

– Missouri

- ◆ Missouri Revised Statutes 571.107.
 - (2) Within twenty-five feet of any polling place on any election day. Possession of a firearm in a vehicle on the premises of the polling place shall not be a criminal offense so long as the firearm is not removed from the vehicle or brandished while the vehicle is on the premises;
 - (3) The facility of any adult or juvenile detention or correctional institution, prison or jail.

► III. Rights of Property Owners, Establishments and Employers

– Missouri

- ◆ Missouri Revised Statutes 571.107.
 - (4) Any courthouse solely occupied by the circuit, appellate or supreme court, or any courtrooms, administrative offices, libraries or other rooms of any such court whether or not such court solely occupies the building in question.
 - (5) Any meeting of the governing body of a unit of local government; or any meeting of the general assembly or a committee of the general assembly.

► III. Rights of Property Owners, Establishments and Employers

– Missouri

- ◆ Missouri Revised Statutes 571.107.
 - (6) The general assembly, supreme court, county or municipality may by rule, administrative regulation, or ordinance prohibit or limit the carrying of concealed firearms by permit or endorsement holders in that portion of a building owned, leased or controlled by that unit of government.
 - (7) Any establishment licensed to dispense intoxicating liquor for consumption on the premises, which portion is primarily devoted to that purpose, without the consent of the owner or manager.

► III. Rights of Property Owners, Establishments and Employers

– Missouri

- ◆ Missouri Revised Statutes 571.107.
 - (8) Any area of an airport to which access is controlled by the inspection of persons and property. Possession of a firearm in a vehicle on the premises of the airport shall not be a criminal offense so long as the firearm is not removed from the vehicle or brandished while the vehicle is on the premises;
 - (9) Any place where the carrying of a firearm is prohibited by federal law;

► III. Rights of Property Owners, Establishments and Employers

– Missouri

◆ Missouri Revised Statutes 571.107

(10) Any higher education institution or elementary or secondary school facility without the consent of the governing body of the higher education institution or a school official or the district school board, unless the person with the concealed carry endorsement or permit is a teacher or administrator of an elementary or secondary school who has been designated by his or her school district as a school protection officer.

► III. Rights of Property Owners, Establishments and Employers

– Missouri

◆ Missouri Revised Statutes 571.107.

- (11) Any portion of a building used as a child care facility without the consent of the manager. Nothing in this subdivision shall prevent the operator of a child care facility in a family home from owning or possessing a firearm or a concealed carry permit or endorsement;
- (12) Any riverboat gambling operation accessible by the public without the consent of the owner or manager pursuant to rules promulgated by the gaming commission.

► III. Rights of Property Owners, Establishments and Employers

– Missouri

- ◆ Missouri Revised Statutes 571.107.
 - (13) Any gated area of an amusement park. Possession of a firearm in a vehicle on the premises of the amusement park shall not be a criminal offense so long as the firearm is not removed from the vehicle or brandished while the vehicle is on the premises;
 - (14) Any church or other place of religious worship without the consent of the minister or person or persons representing the religious organization that exercises control over the place of religious worship.

► III. Rights of Property Owners, Establishments and Employers

– Missouri

- ◆ Missouri Revised Statutes 571.107.
 - (15) Any private property whose owner has posted the premises as being off-limits to concealed firearms by means of one or more signs displayed in a conspicuous place of a minimum size of eleven inches by fourteen inches with the writing thereon in letters of not less than one inch.

► III. Rights of Property Owners, Establishments and Employers

– Missouri

- ◆ Missouri Revised Statutes 571.107.
 - (16) Any sports arena or stadium with a seating capacity of five thousand or more. Possession of a firearm in a vehicle on the premises shall not be a criminal offense so long as the firearm is not removed from the vehicle or brandished while the vehicle is on the premises;
 - (17) Any hospital accessible by the public. Possession of a firearm in a vehicle on the premises of a hospital shall not be a criminal offense so long as the firearm is not removed from the vehicle or brandished while the vehicle is on the premises.

► III. Rights of Property Owners, Establishments and Employers

– Nebraska

- ◆ Nebraska Revised Statutes 69-2441.
 - (1)(a) A **permit holder may carry a concealed handgun anywhere in Nebraska, except** any:
 - » Police, sheriff, or Nebraska State Patrol station or office;
 - » detention facility, prison, or jail; courtroom or building which contains a courtroom;
 - » polling place during a bona fide election;
 - » meeting of the governing body of a county, public school district, municipality, or other political subdivision;

► III. Rights of Property Owners, Establishments and Employers

— Nebraska

- ◆ Nebraska Revised Statutes 69-2441.
 - » meeting of the Legislature or a committee of the Legislature;
 - » financial institution;
 - » professional or semiprofessional athletic event;
 - » building, grounds, vehicle, or sponsored activity or athletic event of any public, private, denominational, or parochial elementary, vocational, or secondary school, a private postsecondary career school as defined in section 85-1603, a community college, or a public or private college, junior college, or university;
 - » place of worship;

► III. Rights of Property Owners, Establishments and Employers

— Nebraska

- ◆ Nebraska Revised Statutes 69-2441.
 - » hospital, emergency room, or trauma center;
 - » political rally or fundraiser;
 - » establishment having a license issued under the Nebraska Liquor Control Act that derives over one-half of its total income from the sale of alcoholic liquor;
 - » place where the possession or carrying of a firearm is prohibited by state or federal law;

► III. Rights of Property Owners, Establishments and Employers

– Nebraska

- ◆ Nebraska Revised Statutes 69-2441.
 - » a place or premises where the person, persons, entity, or entities in control of the property or employer in control of the property has prohibited permit holders from carrying concealed handguns into or onto the place or premises; or
 - » into or onto any other place or premises where handguns are prohibited by state law.

► III. Rights of Property Owners, Establishments and Employers

– Colorado

- ◆ Colorado Revised Statutes 18-12-214.
 - (1) (a) A permit to carry a concealed handgun authorizes the permittee to carry a concealed handgun in all areas of the state, except as specifically limited in this section.
 - A permit does not authorize the permittee to use a handgun in a manner that would violate a provision of state law.
 - A local government does not have authority to adopt or enforce an ordinance or resolution that would conflict with any provision of this part 2.

► III. Rights of Property Owners, Establishments and Employers

– Colorado

- ◆ Colorado Revised Statutes 18-12-214.
 - (2) A permit issued pursuant to this part 2 does not authorize a person to carry a concealed handgun into a place where the carrying of firearms is prohibited by federal law.
 - (3) A permit issued pursuant to this part 2 does not authorize a person to carry a concealed handgun onto the real property, or into any improvements erected thereon, of a public elementary, middle, junior high, or high school;

► III. Rights of Property Owners, Establishments and Employers

– Colorado

- ◆ Colorado Revised Statutes 18-12-214.
 - (4) A permit issued pursuant to this part 2 does not authorize a person to carry a concealed handgun into a public building at which:
 - » (a) Security personnel and electronic weapons screening devices are permanently in place at each entrance to the building;
 - » (b) Security personnel electronically screen each person who enters the building to determine whether the person is carrying a weapon of any kind; and
 - » (c) Security personnel require each person who is carrying a weapon of any kind to leave the weapon in possession of security personnel while the person is in the building.

▶ III. Rights of Property Owners, Establishments and Employers

– Colorado

- ◆ Colorado Revised Statutes 18-12-214.
 - (5) Nothing in this part 2 shall be construed to limit, restrict, or prohibit in any manner the existing rights of a private property owner, private tenant, private employer, or private business entity.

▶ IV. Practical Application

– Kansas:

- ◆ No license required to carry a concealed firearm in Kansas as of July 1, 2015
- ◆ The carrying of a concealed firearm is prohibited in the Capital Complex, the Governor's residence, on the grounds of the Governor's complex, any state-owned building that is posted, any county courthouse, a school, a state- or municipal-owned medical facility.
- ◆ Any building may restrict the carrying of a concealed firearm by posting a sign (however, not a criminal violation).

▶ IV. Practical Application

- Kansas:
 - ◆ Any employer may restrict or prohibit, by personnel policies persons licensed from carrying a concealed handgun while on the premises of the employer's business or while engaged in the duties of the person's employment by the employer.
 - ◆ No employer may prohibit possession of a handgun in a private means of conveyance, even if parked on the employer's premises.
 - ◆ "building" shall not include any structure, or any area of a structure, designed for the parking of motor vehicles.

▶ IV. Practical Application

- Missouri:
 - ◆ Concealed Carry Permit required to carry a concealed firearm.
 - ◆ Concealed carry is not allowed in a law enforcement office, a polling place on election day, jails, courthouses, any meeting of a governmental body, a bar, an airport, where prohibited by federal law, schools, child care facilities, riverboat gambling facilities, amusement parks, churches, sports arenas or stadiums (over 5,000), hospitals, or where posted.
 - ◆ Private establishments may prohibit concealed carry with the posting of a sign.
 - ◆ Violation is a criminal offense.

▶ IV. Practical Application

- Missouri:
 - ◆ Possession of a firearm in a vehicle of any prohibited premises is not a violation so long as it is not removed from the vehicle, or brandished while in the vehicle.
 - ◆ Missouri allows transport of a firearm in the passenger compartment of a vehicle without a permit.

▶ IV. Practical Application

- Nebraska:
 - ◆ A permit is required to carry a concealed firearm.
 - ◆ Permit holder may carry anywhere in the state except: law enforcement office, prison or jail, courthouse, school, polling place on election day, meeting of a governmental body, financial institution, professional, semi-professional, or school athletic event, church, hospital, political rally or fundraiser, bars or where posted.
 - ◆ Carrying of a concealed firearm in a posted area is a criminal act.
 - ◆ Must be locked in a vehicle prior to exiting.

▶ IV. Practical Application

- Colorado:
 - ◆ A permit is required to carry a concealed firearm.
 - ◆ Permit holder may carry anywhere in the state except: a school, a public building with security screening.
 - ◆ Must be unloaded in a vehicle in Denver.
 - ◆ University of Colorado ban was ruled unconstitutional in 2013.
 - ◆ “Nothing in this section shall apply to limit, restrict or prohibit in any manner the existing rights of any private property owner, private tenant, private employer or private business entity.”
 - ◆ No statutory provision for signage.

▶ V. Summary

- Private employers may restrict employee’s carry rights.
- Property owners may restrict the carrying of concealed firearms either as a criminal violation of firearms carry laws, or through trespass laws.
- Parking facilities may generally not be restricted except through personnel policies.

Concealed Carry Laws and the Business Owner

▶ V. Summary

- Avoid private enforcement.
- Avoid empowerment of employees to enforce.
- Specific employee policies.
- Clear and obvious signage.

Concealed Carry Laws and the Business Owner

▶ VI

- Questions and Comments

Contact

Joseph O. Kavan
Partner
Kutak Rock LLP
Joseph.kavan@KutakRock.com

▶ **The Omaha Building**
1650 Farnam Street
Omaha, NE 68102
402-231-8808

The Many Hats of Corporate Counsel

Avoiding the Ethical Perils of Multi-Role Employment

June 19, 2015

Richard A. Olmstead
Partner
Kutak Rock LLP
Richard.Olmstead@KutakRock.com

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The Many Hats of Corporate Counsel

- ▶ Functions of Corporate Counsel
 - General Counsel / Asst. Gen. Counsel
 - Corporate Officer
 - Director of Internal Affairs
 - Board of Directors
 - Registered Agent
 - Counselor to Officers/Employees
 - Business Advisor

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Ethical Hazards

► Unauthorized Practice of Law

– Rule 5.5

- ◆ Counsel must be authorized to practice law in the state in which the lawyer has an office and, if different, in the state (or states) in which counsel advises the corporate client.

Ethical Hazards (cont'd)

► Unauthorized Practice of Law

– Traps

- ◆ Legal advice to corporate client regarding law of a foreign jurisdiction: e.g., counsel based and admitted in Missouri providing legal opinion regarding a contract to be entered into between a division of the corporate client based in Kansas and incorporated in Delaware and a Texas entity, which is governed by Delaware law (*see* Rule 5.5(c)).
 - when pro hac admission is not required, must be based on advice of counsel admitted to the jurisdiction.

Ethical Hazards (cont'd)

► Unauthorized Practice of Law

– Traps

- ◆ Litigation in a foreign jurisdiction: no direct representation without pro hac admission; cannot represent anyone other than the corporate client without written consent from the corporate client (e.g., suit naming corporation and various employees/officers).
- ◆ Advising the corporate client on litigation strategies.

Knowing the Corporate Client

► MRPC 1.13(a): Corporate counsel represents the organization acting through its duly authorized constituents.

- *Commonwealth v. Timothy M. Curley, et al.*, Ct. of Cmn. Pl., Dauphin Cty., Penn., Nos. 3614 CR 2013, 3616 CR 2011, 3615 CR 2013 (Jan. 14, 2015).
- MRPC 1.13(f), Upjohn Warnings, and Broadcom (*United States v. Nicholas*).
- Friendly legal advice: MRPC 1.7, 1.9(c).
- Representing Corporate Affiliates: Compensation and subsequent adversity (MRPC 1.7, 1.8, 1.9).

Perils of Board Membership

- ▶ GC as Board Member: Not *per se* ethically impermissible (ABA Formal Op. No. 98-410).
 - Traps
 - ◆ Being asked to advise the corporation on the action of other directors;
 - ◆ Resignation compelled by conflict of interest;
 - ◆ Knowledge of privileged corporate communications that do not need to be reported to the Board, but which may impact Board decision-making;
 - ◆ Creation of confusion regarding whether the privilege attaches to Board communications.

Perils of Board Membership (cont'd)

- ▶ Best Practices
 - Inform Board of potential conflicts
 - Advise participants at Board meetings of the scope and nature of privilege
 - Designate specific portions of minutes relating to provision of legal advice

Not Your Average Employee

► Engagement

– MRPC 1.8

- ◆ Fair and reasonable terms, reduced to writing;
- ◆ Client given the opportunity to seek independent legal counsel on the transaction; and,
- ◆ Client consents to the representation, in writing.

Not Your Average Employee (cont'd)

► Compensation (Fees)

– MRPC 1.5

- ◆ Must be reasonable; including any non-monetary compensation, incentives, or options.
 - e.g., stock options may be viewed as unreasonable when the options vest and the “fee” is collected.
- ◆ Compensation should be reduced to writing, with provision that client was advised to seek independent legal counsel, specifically referencing all aspects of compensation, including benefits, incentives, or options. May consider articulating the factors contained in Rule 1.5.

Not Your Average Employee (cont'd)

► Resignation (Withdrawing from Representation)

– MRPC 1.16

- ◆ Does withdrawal have a material adverse effect on the interests of the client?

– Post-Resignation Perils

- ◆ Representation of, or employment with, competing companies (MRPC 1.9).
- ◆ Protection of confidential information—more than just contractual, may result in ethics charge (MRPC 1.6).

Contact

Richard A. Olmstead

Partner
Kutak Rock LLP
Richard.Olmstead@KutakRock.com

► **Wichita Office**

Omni Center IV, Suite 110
111 S. Whittier St.
Wichita, KS 67207

816-502-4669 (direct)