



Megan McCullough joined the firm in April 2016 as an associate in the Litigation/Dispute Resolution Practice Group. Ms. McCullough concentrates her practice in a wide variety of areas including real estate and construction law, commercial litigation, employment litigation, white collar criminal compliance and defense as well as various general civil litigation matters. She is a member of the Criminal Justice Act Panel of the United States District Court for the Western District of Missouri through which she accepts court appointments on federal criminal cases. Prior to joining Carnahan, Evans, Cantwell & Brown, P.C., Ms. McCullough practiced for six years at the respected law firm of Spilman Thomas and Battle, PLLC in Charleston, West Virginia. In 2015 and 2016, she was recognized by *Super Lawyers* magazine as a top-rated lawyer and named to the "Rising Star" list. She has been published twice in the Annual Meeting Notebook of the West Virginia Trial Advocacy Counsel and also served as a chapter editor on Lindemann & Kadue, *Age Discrimination in Employment Law* (2d Ed. 2015). Ms. McCullough graduated from Duquesne University Law School in Pittsburgh, Pennsylvania, where she served as an Executive Editor for the Duquesne Law Review. She was awarded the Shalom Moot

Court Award for outstanding trial advocacy and was awarded membership to the Louis L. Manderino Honor Society for her meritorious service to the trial advocacy program at Duquesne Law. Ms. McCullough is a member of the Missouri Bar, the Springfield Metropolitan Bar Association, the Christian County Bar Association, and Southern Missouri Women Lawyers. She is also an inactive member of the Pennsylvania Bar and West Virginia Bar.

Enforcing Non-Compete Agreements in Missouri



Christiaan Horton

Many employers have become wise with the protection of their legitimate business interests through the use of non-compete, non-solicitation and non-disclosure agreements. No question, high-level employees who have access to confidential and proprietary business information should be under restrictive covenants of this nature in our highly competitive business climate. Too many stories abound of corporate espionage in this technical age when large amounts of sensitive and trade secret data can leave the office in a matter of minutes on a thumb drive or be transmitted via an external link from the company's network to a laptop at the corner Starbucks.

Non-compete Agreements are not Favored in the Law

On the legal front, we start with the proposition that agreements containing restrictive covenants of this nature are not favored in the law. Courts will strain to find ways to limit their effect on former employees, especially if the agreements are poorly drafted. Our Missouri Supreme Court summarized the competing interests

in this area by pronouncing: "The law of non-compete agreements in Missouri seeks to balance the competing concerns between an employer and employee in the workforce. On one hand, *employers* have a legitimate interest in engaging a highly trained workforce without the risk of losing customers and business secrets after an employee leaves his or her employment. On the other hand, *employees* have a legitimate interest in having mobility between employers to provide for their families and advance their careers. Furthermore, although the law favors the ability of parties to contract freely, contracts in restraint of trade are unlawful." *Whelen Security Co. v. Kennebrew*, 379 S.W.3d 835, 841 (Mo. 2012).

The Balancing of Interests

In balancing these competing interests, Missouri courts generally enforce a non-compete agreement if it is demonstratively reasonable. "A non-compete agreement is reasonable if it is no more restrictive than is necessary to protect the legitimate interests of the employer." *Id.* A non-compete agreement must be narrowly tailored temporally and geographically and must seek to protect legitimate employer interests beyond mere competition by a former employee.

Accordingly, a non-compete agreement is enforceable "only to the extent that the restrictions protect the employer's trade secrets or customer contacts." *Id.* at 841. The employer has the burden to prove that the non-compete agreement protects its legitimate interests in trade secrets or customer contacts and that the agreement is reasonable as to time and geographic scope. *Courts enforce non-compete agreements only to the extent they protect the employer from unfair competition, not from all competition by a former employee.*

In 2001, Missouri Passed Special Provisions to Guide Employers

Under our law (§ 431.202, RSMo.), presumptions are now in place for non-solicitation:

1. A reasonable covenant in writing promising not to solicit, recruit, hire or otherwise interfere with the employment of one or more employees shall be enforceable and not a restraint of trade if:

(3) Between an employer and one or more employees seeking on the part of the employer to protect:

(a) Confidential or trade secret business

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information; or

(b) Customer or supplier relationships, goodwill or loyalty, which shall be deemed to be among the protectable interests of the employer; or

(4) Between an employer and one or more employees... so long as such covenant does not continue for more than one year following the employee's employment; provided, however, that this subdivision shall not apply to covenants signed by employees who provide only secretarial or clerical services.

2. Whether a covenant covered by this section is reasonable shall be determined based upon the facts and circumstances pertaining to such covenant, but a covenant covered exclusively by subdivision (3) or (4) of subsection 1 of this section shall be conclusively presumed to be reasonable if its post-employment duration is no more than one year.

3. Nothing in subdivision (3) or (4) of subsection 1 of this section is intended to create, or to affect the validity or enforceability of, employer-employee covenants not to compete.

4. Nothing in this section shall preclude a covenant described in subsection 1 of this section from being enforceable in circumstances other than those described in subdivisions (1) to (4) of subsection 1 of this section, where such covenant is reasonably necessary to protect a party's legally permissible business interests.

5. Nothing in this section shall be construed to limit an employee's ability to seek or accept employment with another employer immediately upon, or at any time subsequent to, termination of employment, whether said termination was voluntary or involuntary.

Enforcement Requires Quick Decisions

Often, cases in this area of the law require immediate action. Employers have little time to waste as they contemplate the initiation of legal enforcement of restrictive covenants. Our Missouri civil court rules permit employers to seek Temporary Restraining Orders and Preliminary and Permanent Injunctions in the event of a breach, but certain procedural safeguards must be followed for that type of relief, not the least of which is the potential posting of a security bond before a court will issue its order, just in case it is improperly granted and later the

employee is able to prove damages as a result. These types of cases do receive preferential treatment on court dockets and will have expedited judicial review. Evidence must be gathered quickly before spoliation and so it is ready for presentation to the court--TRO hearings may be held within 10 days from the filing date or sooner if emergency relief is requested. No doubt, a "fast track" should be anticipated with this type of litigation.

Protection through Solid Agreements

How can employers be best protected in this dynamic area of the law? It first starts with a solid Agreement that takes into consideration the tailored drafting requirements to fit the specific industry and unique employer protections needed. A "one size fits all" approach will not carry the day. Although restrictive covenants generally must be tailored narrowly in both temporal and geographic scope, courts have enforced customer non-solicitation clauses without a geographic limitation when other limitations to the prohibited conduct exist or when the employee had significant contact with a substantial number of the employer's customers. In *Mills v. Murray* for instance, the court enforced a 3-year customer non-solicitation clause with no geographic limitation for an employer located in 11 states when the prohibition extended only to customers with whom the former employee dealt within the last 12 months. 472 S.W.2d 6, 11-12 (Mo. App. 1971); *see also Nat'l Starch & Chem. Corp., v. Newman*, 577 S.W.2d 99, 104-05 (Mo. App. 1978) (enforcing a 2-year customer non-solicitation clause that was limited to customers with whom employee dealt). In *Schott v. Beussink*, the court enforced a 15-month customer non-solicitation clause with no geographic limitation and a prohibition against contacting any of the employer's customers when it was a small, local employer. 950 S.W.2d 621, 626-27 (Mo. App. 1997). Furthermore, in *Systematic Business Services, Inc. v. Bratten*, the court enforced a customer non-solicitation clause despite it having no geographic limitation, prohibiting contact with all of the employer's customers, and involving a national company, when the employee utilized extensive customer lists and had substantial and significant contact with the employer's customers throughout the nation. 162 S.W.3d 41, 51 (Mo. App. 2005). Clearly, the employer's protectable interests must be evaluated based on the circumstances

of each employment scenario, and each case will be fact intensive indeed.

Consideration of Remedies

Employees, notwithstanding solid agreements, may test the waters by taking a job with a competitor who is all too eager to learn the trade secrets of a rival. The costs of protecting business interests in this event will be high. It is not uncommon to have litigation expenses in the range of \$15,000 just in the initial stages of a civil action to enforce an agreement of this type. Special provisions should be included in an agreement to shift the costs of litigation to the former employee which could have a deterrent effect for most. In addition, claims under Missouri's Uniform Trade Secrets Act could be maintained in certain circumstances. See § 417.450 - 417.467, RSMo. Under this Act, a party may obtain an injunction to prevent misappropriation of a trade secret or a court order that will protect the trade secret. A party may also seek damages for actual loss, unjust enrichment (in the case a new employer wrongfully benefits from the misappropriation), and punitive damages. A court could also award royalties based on the future use of a trade secret in exceptional circumstances.

A Constant Evolution and Call to Action

This area of the law is ever evolving, although Missouri cases decided long ago still remain good law in our jurisdiction. With the advent of the New Year, there is no better time than the present to consider implementing the use of these agreements in your business practices. If you have agreements in place, a thorough review of their provisions should be considered as well to ensure they are up-to-date and will serve their intended purpose -- protection of your legitimate business interests to the limits allowed by law. To learn more, or to have your existing agreements reviewed, simply contact us to schedule an appointment before you find yourself in need of enforcing an existing agreement that does not adequately protect your business and your bottom line.



PERMITLESS CARRY: What Business Owners Should Know About Missouri's New Gun Law



Megan McCullough

On January 1, 2017, permitless concealed carry became the law in Missouri. With the enactment, Missouri joins nine other states in the country with permitless carry laws: Alaska, Arizona, Idaho, Kansas, Maine, Mississippi, Vermont, West Virginia and Wyoming.

The bill enacted into law on the first of the year was Senate Bill 656. The bill makes a variety of changes to Missouri's gun law, the biggest of which is that all Missouri residents at least 19 years old who are not prevented from possessing firearms due to criminal or mental health history are now legally permitted to carry concealed firearms without any training or permit.

Before the new law, and since 2004, Missouri required all concealed carriers to have a concealed carry permit, which was obtained by paying a \$100 fee, passing a background check, and completing at least eight-hours of specified gun handling, use and safety training. Before the new law, it was a felony to carry a concealed weapon without this permit. That is no longer the case, in certain areas.

Under the new law, guns (whether concealed or open-carried) are still prohibited from police or other patrol stations, polling places on election day, prisons, jails, courthouses and court-occupied buildings, government meetings, places prohibited by federal law such as post offices, airports beyond security checkpoints, gated amusement parks, sports arenas, hospitals, schools and colleges, private property that has a "no firearms" sign posted, and unless given consent by the owner(s), bars, riverboat gambling operations, churches, and child-care facilities. A person who carries a concealed firearm onto one of these prohibited areas, but has a concealed carry permit or endorsement issued prior to 8/28/2013, has no longer committed a crime, but is merely subject to removal from the premises (or denial of access thereto). That person only commits a crime if he/she refuses to leave upon demand. On the other hand, a person who carries a concealed firearm onto one of these prohibited areas without a permit has committed a crime immediately upon entering the premises with the firearm.

In addition to the changes to concealed carry, the new law has made some other

expansions with respect to Missouri's so-called "Castle Doctrine." Before the new law, a property owner could use force, including deadly force, to defend him or herself on his or her property. Under the new Castle Doctrine, guests, babysitters, service persons, and any others who are lawfully present on the property have the same self-defense rights as the property owner. Additionally, the new Castle Doctrine applies not just to residences, but also to private property, such as a business. The new law has also expanded the "Stand Your Ground" law so that a person now has no duty to retreat (and may stand their ground) in any place they have the right to be.

In short, Missouri residents are now legally empowered to stand their ground and use deadly force (if reasonable) to defend themselves in any place they have the right to be present. This includes businesses on private property.

If you are a business owner allowing guns in your place of business:

In order to allow guns in your place of business, you do not need to take any action. By way of the new law, patrons are permitted to carry a concealed weapon onto your premises unless you have notified them otherwise.

There are some important things to consider if you are a business owner who has chosen to permit concealed weapons on your premises. First, be aware that in the event of an incident, a patron carrying concealed on your property – assuming they are there with your permission or for some other allowable purpose – has the right to use deadly force with his/her weapon in your facility as well as the right to stand his/her ground in your facility.

Second, be aware that the patron in your facility who has such legal rights may or may not have received any training in the use or discharge of a firearm. This, of course, poses the heightened risk of accidental injury to the patron, your employees, and other bystanders, were the patron to discharge the firearm inadvertently, incorrectly or inaccurately.

Third, be aware of the potential for liability in the event a patron in your business were to brandish or use their firearm on your property. Although there may be no criminal prosecution of the individuals involved, your business could be included in civil litigation brought in connection with the patron's brandishing or use of the firearm.

Finally, while there is little supporting

empirical data on this point, allowing guns on your premises may actually boost your business. Gun rights advocates are becoming increasingly less tolerant of businesses that ban weapons from their facilities. In industries where gun owners have a choice as to where they do business, it is reasonable to expect that they will patronize "gun friendly" businesses as opposed to those providing the same services but prohibit guns.

If you are a business owner prohibiting guns from your place of business:

In order to prohibit guns from your place of business, you must post signage on the

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Best Lawyers in America and "Best Law Firms"

CECB is pleased to announce that two of the firm's Shareholders, **Joseph "Chip" D. Sheppard, III** and **Thomas D. Peebles, Jr.** were selected by their peers to be among the elite professionals for inclusion in the 2017 edition of *The Best Lawyers in America*.

The firm also received a Metropolitan Tier 1 ranking in Trusts & Estates Law in the 2017 Edition of "Best Law Firms" by *U.S. News & World Report* and *Best Lawyers*®. *Best Lawyers* is regarded by both the legal profession and the public as the definitive guide to legal excellence in the U.S. *Best Lawyers* is based on a rigorous national survey involving more than 3.1 million evaluations of lawyers by other lawyers.



Chip Sheppard

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



Tom Peebles

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

5 CECB Attorneys Selected for Inclusion on the 2016 Missouri-Kansas *Super Lawyers* List

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



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

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

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

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

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

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



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

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

Mr. Sheppard is a board member of the Springfield Metropolitan Bar Association, Chairman of the Non-Partisan Court Plan Committee, member of the American Bar Association, the Missouri Bar, and the Public Investors Arbitration Bar Association. In

2005 he was elected as a Fellow of the American Bar Association, an honor bestowed upon less than .5 percent of the Bar. In 2008, he Co-Chaired the Greene Countians for Fair and Impartial Judges Committee which was responsible for bringing the Missouri Court Plan to Greene County, was a finalist for Missouri Lawyer of the Year and received the Missouri Bar Association and Springfield Metropolitan Bar Association President's Awards in recognition of extraordinary service to those Associations and the legal profession. Finally, he has been named to the "Best Lawyers in America" list by the publication of the same name.

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

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

Chip was selected to the *Missouri Kansas Super Lawyers®* list in 2005 and 2006 and again for 2010-2016.



Thomas D. Peebles, Jr is a shareholder and member of the Estate Planning Practice Group of Carnahan, Evans, Cantwell & Brown, P.C. Mr. Peebles has concentrated his practice in estate planning and estate and trust administration matters since 1980. Mr. Peebles has significant experience in the preparation of basic and sophisticated estate planning documents, and in wealth transfer planning for high net worth clients, closely held business owners and their families. He has been awarded an AV Rating from Martindale-Hubbell in recognition of his preeminent work in assisting his clients in achieving their estate planning goals and objectives. In 2004, Mr. Peebles was elected a Fellow of The American College of Trust and Estate Counsel in recognition of distinguished service in the practice of estate planning, probate and trust law.

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

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

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

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

Mr. Peebles was selected to the *Missouri Kansas Super Lawyers®* list in 2005 and 2006 and again for 2010-2016.



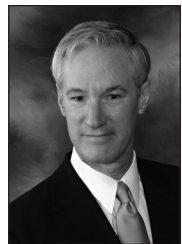
Rodney H. Nichols is a shareholder of the firm and is part of the Banking, Litigation and Transactional Practice Groups of Carnahan, Evans, Cantwell & Brown, P.C. He concentrates his practice in the areas of banking and creditor's rights, commercial and real estate litigation and general corporate matters.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

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

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

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

Rodney was named to the Missouri & Kansas Super Lawyers Rising Stars list in 2008 and 2009 and was selected in 2013-2016 for inclusion on the *Missouri Kansas Super Lawyers®* list.



John E. Price is a shareholder in the Litigation/Dispute Resolution Practice Group of Carnahan, Evans, Cantwell & Brown, P.C. He concentrates his practice in the areas of civil and business litigation, environmental law, corporate and real estate law and appellate practice.

Mr. Price has significant experience in environmental law over the last 20 years. He has handled litigation with government agencies and private parties under the Clean Air Act, Clean Water Act, Superfund and toxic torts. He regularly advises business clients on environmental regulation, permitting issues and real estate transactions.

Mr. Price also has many years experience with large and complex real estate and business transactions, and with commercial litigation involving leases, contracts and insurance disputes. He has argued over 75 appeals in federal and state appellate courts.

Mr. Price has served on the Boards of the Wilson's Creek National Battlefield Foundation, the Visiting Nurse Association, and Project Parkway in Springfield. Additionally, Mr. Price is currently serving a two-year term as President of the Springfield Sister Cities Association Board of Directors.

Mr. Price received his bachelor's degree from the University of Northern Iowa, with honors, in 1975 and his law degree, cum laude, in 1979 from the University of Missouri at Columbia (Member of Order of the Coif, and Note and Comment Editor of the Missouri Law Review).

Mr. Price is a member of the Springfield Metropolitan and American Bar Associations (Natural Resources Law Section), as well as the Missouri Bar (District 16 Representative, Young Lawyers Section Counsel, 1983-1988; Young Lawyer representative to the American Bar Association House of Delegates, 1984-1986; Energy and Environmental Law Committee). He has been awarded an AV Rating by Martindale-Hubbell.

Mr. Price was selected to the *Missouri Kansas Super Lawyers®* list in 2007-2013 and again for 2016.

Five Reasons to Avoid Estate Planning (and Why They're Wrong)



Andrew T. Peebles

According to several recent polls taken by various organizations, between 55-65% of American adults pass away without any type of personal estate planning

documents in place. This means that *over half* of all U.S. citizens have provided absolutely no direction to their loved ones as to how their property should be managed and distributed following their death. Furthermore, a shocking 38% of individuals with assets of \$1 million or more have not yet consulted with a professional to establish an estate plan. That is a large amount of money to leave unprotected! This percentage continues to grow for those with assets under \$1 million.

It should come as no surprise that estate planning is not exactly the most exciting topic to discuss. In fact, a poll taken by The Virtual Attorney shows that 32% of Americans would rather do their taxes, get a root canal, or give up sex for an entire month than create or update their estate plan! (Seriously, how bad can it be?) However, the process of estate planning does not have to be as difficult or complicated as one might think. The purpose of this article is to debunk the most common reasons people avoid setting up an estate plan, and help you think of the process in a more positive light, providing suggestions for you to consider along the way.

To that end, the following list provides the most common reasons people avoid estate planning, and arguments for why these excuses are unsupported:

1. Don't want to think about death! As uncomfortable as discussing our deaths may be, we all need to accept that death is a certainty that we all have to face sooner or later. Why not plan for this event while you're healthy? The sooner we come to terms with our own mortality, the more we can enjoy our lives, and the easier the estate planning discussion will be.

2. Too busy. Many people spend a lifetime accumulating wealth and assets, but most refuse to spend even a few hours working to protect those assets. The average time our office spends preparing a client's estate plan is about 2-3 weeks from beginning to end. And throughout that time period, clients only need to spend a handful of hours determining the details of that plan; the attorneys handle the rest. Let's face it: we're all busy. But there are certain important matters that require us to deliberately take time

out of our busy schedules to consider. Estate planning is certainly one of them.

3. Estate is not large enough to require a plan. One common misconception with estate planning is that it is intended only for the wealthy. This is absolutely not the case -- everyone needs some sort of estate plan. Even those with less substantial estates require at least a Simple Will and Powers of Attorney to ensure their estate is not depleted by court costs and attorney fees, and to ensure their affairs are taken care of during any periods of incapacity. The size of your estate only matters in the type of documents needed.

4. Too complicated/Too many difficult decisions. Attorneys are called "counselors at law" for a reason. An experienced estate planning attorney can offer advice and guidance throughout the entire process, as they have witnessed firsthand what techniques work and which do not. While the final say is always with the client, we can help you make the best decisions for your specific situation while simplifying the process along the way.

5. Estate planning is too expensive. Frankly, anything worth doing is going to cost you something. However, the cost on the front end in setting up an estate plan is more than worth it when you consider the costs associated with handling the estate of an individual who dies without a plan. For example, fees associated with dealing with probate administration can be much higher when no estate plan exists. Additionally, higher taxes will likely be owed on the estates of high net worth individuals who failed to plan ahead. Most importantly, the emotional burden on family members and friends during a time of grief is multiplied when confusion as to your final wishes exists. Therefore, it benefits both you and your loved ones to pay the necessary costs now in order to avoid the higher expense (both financial and emotional) that would otherwise come later.

Now that all of your prior excuses for not setting up an estate plan have been discredited, what are you waiting for? It is never too early to begin thinking about an estate plan. Every individual, regardless of age or financial status, needs some level of estate planning. There are a wide variety of tools and techniques which exist to manage the specific situations of each unique individual. However, the following are the most common documents you may want to consider for your own estate plan:

1. Simple Will. The simplest and most recognizable estate planning tool, this

document provides for the distribution of your estate to the individuals named or described in the Will. A Will may also provide for guardianship appointments for minor children. Distributing your estate under a Simple Will, however, does not avoid the probate process, which may result in greater costs, delays, and publicity. Additionally, under a simple Will, it is not possible to hold a child's share in a continuing trust for their benefit until a certain age of maturity, as it is under a Trust. Instead, all property must be distributed immediately.

2. Revocable Trust. Revocable trusts have become the most widely recommended estate planning tool for many reasons. First of all, this trust is "revocable", which means you have the absolute right during life to amend the terms of the trust and to revoke the trust. Therefore, it provides great flexibility in managing your estate. Additionally, a revocable trust is used for your support during your lifetime and provides a more efficient distribution of your estate for the benefit of your children at death. The Trustee of your trust can be directed to manage and distribute your property for your children's health, education, and support until an age at which you believe they can properly manage that property. Furthermore, a trust avoids the time, delays, expense, and publicity that comes with the probate process.

3. Irrevocable Trust. This type of trust is most often used to ensure that the assets held within the trust are not counted as part of your estate, thereby avoiding estate taxes at death. This type of trust also allows you to hold property in trust until children reach an age of financial maturity, provides for a more efficient distribution of your estate following death, and allows you to avoid the probate process. However, an irrevocable trust is much more difficult to amend or revoke than is a revocable trust, and therefore is usually only useful for those with large estates.

4. Qualified Spousal Trust. For married couples in Missouri, the Joint Qualified Spousal Trust has become an incredibly useful estate planning tool. Not only does this trust carry the same advantages of a revocable trust, it also provides an added level of creditor protection for your property. All property held within the trust will be protected from any claims of the creditors of only one spouse

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Five Reasons to Avoid Estate Planning (and Why They're Wrong)

- Continued from Page 6

during their joint lifetimes. In other words, a creditor must have a claim against both spouses, jointly, in order to reach trust assets. This trust is also revocable, so either spouse has the ability to amend or revoke the trust during their lifetime.

5. Powers of Attorney. Powers of attorney are a vital piece of the estate planning process for any individual, regardless of age or financial status. A Durable Power of Attorney grants another person, as your agent, the authority to act on your behalf while taking care of your personal financial matters, and may be set up to take effect immediately or only during periods of your incapacity.

A Health Care Directive/Power of Attorney allows your named agent to make all health care decisions on your behalf during periods of your incapacity. This document also expresses your wishes regarding your health care in the event of a catastrophic injury, such as a coma.

Keep in mind that the value of an estate plan goes far beyond the time and money it can save your loved ones once you are gone; it also provides assurance that those individuals will be taken care of when you are no longer around. Avoid procrastinating before it's too late. After all, as Benjamin Franklin noted, *You may delay, but time will not.* Contact any member of our Estate Planning Practice Group to schedule a time to begin (or review) your personal estate plan.

PERMITLESS CARRY: What Business Owners Should Know About Missouri's New Gun Law

- Continued from Page 3

premises identifying it as being off-limits to concealed firearms. The sign(s) must be at least eleven inches by fourteen inches with writing in letters measuring at least one inch. There are no specific requirements on where you must place the sign beyond the mandate that the sign(s) must be conspicuous.

Be aware that your employees and patrons can still have a concealed weapon inside their vehicle even if it is on your property (so long as it is kept in their vehicle and not brandished).

In the event you discover that someone has violated your policy by carrying a concealed weapon onto your property, you should

ask them to leave. If they refuse to leave, you should then call the police to report the incident.

Perhaps the most important thing for a business owner who has chosen to prohibit firearms from their property to consider is the risk of lost business. Quite simply, with the enactment of this new law, Missourians may refuse to patronize your business for your decision to prohibit firearms. Many citizens feel very passionately about their constitutional right to bear a firearm and with the new legislation, feel even more inclined to exercise those rights.

Fueled by the widespread use and significant impact of social media in today's world, we have seen customers stage impassioned boycotts of major companies like Starbucks, Target, Panera Bread Co, and Levi Strauss & Co., (and those companies did not employ an actual ban, they merely issued "requests" to customers to refrain from bringing weapons onto their properties). There is significant publicity on the internet designed to encourage those who feel strongly about this issue to boycott businesses who ban guns. You may encounter phrases such as "no guns = no business" and "No Guns, No Money," which have become a few of the mantras for organizations devoted to encouraging these boycotts.

In short, before you determine to make your business an off-limits premises, the risk of pushback from current clientele and future potential customers is well worth your consideration.

The IRS posted a Warning on Dangerous W-2 Phishing Scam Evolving; Targeting Schools, Restaurants, Hospitals, Tribal Groups and Others



Frank Carnahan

The Internal Revenue Service, state tax agencies and the tax industry issued an urgent alert to all employers that the Form W-2 email phishing scam has evolved beyond the corporate world, and is spreading to other sectors, including school districts, tribal organizations and nonprofits.

Cybercriminals use various spoofing techniques

to disguise an email sent to an employee in the payroll or human resources departments requesting a list of all employees and their Forms W-2 to make it appear as if it is from an organization executive. They then misuse that information.

In the latest twist, the cybercriminal follows up with an "executive" email to the payroll or comptroller and asks that a wire transfer also be made to a certain account.

Organizations receiving a W-2 scam email should forward it to phishing@irs.gov and place "W2 Scam" in the subject line. Organizations that receive the scams or fall victim to them should file a complaint with the Internet Crime Complaint Center (IC3, <https://www.ic3.gov/default.aspx>) operated by the Federal Bureau of Investigation (FBI).

Employees whose Forms W-2 have been stolen should review the recommended actions by the Federal Trade Commission at www.identitytheft.gov or the IRS at www.irs.gov/identitytheft. Employees should file a Form 14039, Identity Theft Affidavit if the employee's own tax return rejects because of a duplicate Social Security number or if instructed to do so by the IRS.

Taxpayers and tax preparers should be leery of using search engines to find technical help with taxes or tax software. Selecting the wrong "tech support" link could lead to a loss of data or an infected computer. Taxpayers or tax preparers looking for tech support for their software products should go directly to the provider's web page. Also, software "tech support" will not call users randomly. This is a scam.

Taxpayers searching for a paid tax professional for tax help can use the IRS Choosing a Tax Professional lookup tool (<https://www.irs.gov/tax-professionals/choosing-a-tax-professional>). Taxpayers needing free help can review the Free Tax Return Preparation Programs (<https://www.irs.gov/individuals/irs-free-tax-return-preparation-programs>). Taxpayers searching for tax software can use Free File, which offers 12 brand-name products for free, at www.irs.gov/freefile.





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|--------------------------------------|---|---------------------------------------|
| ■ Business Organization and Planning | ■ Real Estate and Construction | ■ Intellectual Property and Franchise |
| ■ Corporate | ■ Taxation | ■ Arbitration and Mediation |
| ■ Estate Planning | ■ Employee Benefits | ■ Mechanics’ Liens and Foreclosures |
| ■ Probate | ■ Banking | ■ Pension and Profit Sharing |
| ■ Trust Administration | ■ Commercial Litigation and
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