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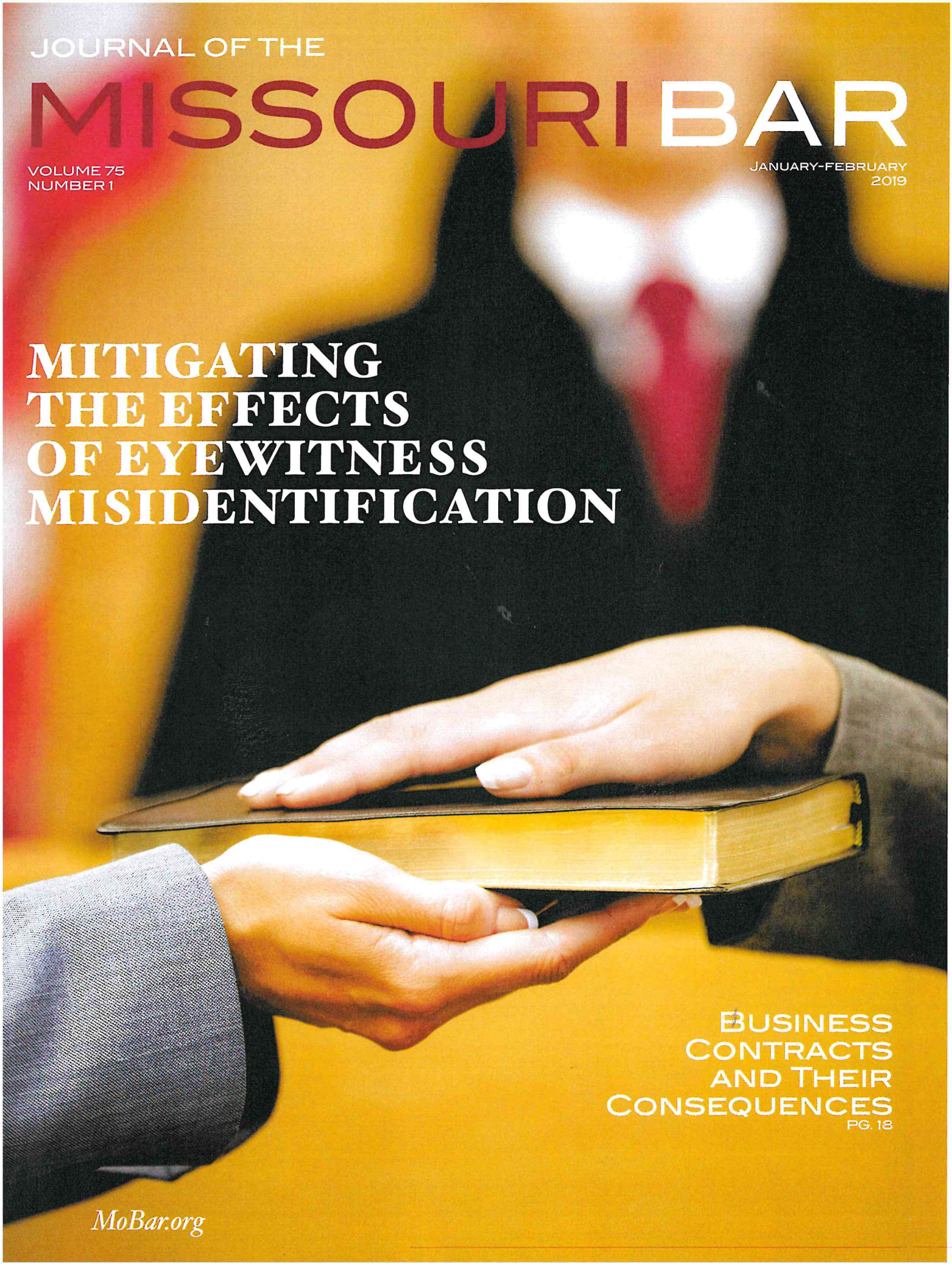

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BUSINESS CONTRACTS AND THEIR CONSEQUENCES
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OPERATING AGREEMENTS, PARTNERSHIP AGREEMENTS, AND SHAREHOLDER AGREEMENTS:

BUSINESS CONTRACTS AND THEIR CONSEQUENCES

GERARD V. MANTESE, THERESAMARIE MANTESE, & FATIMA M. BOLYEA[1]

MISSOURI LAW PERMITS PARTNERS, MEMBERS OF LIMITED LIABILITY COMPANIES (HEREINAFTER "LLCS"), SHAREHOLDERS OF CORPORATIONS, AND CO-OWNERS OF BUSINESSES TO ENTER INTO VARIOUS AGREEMENTS TO GOVERN THEIR RELATIONSHIPS WITH THE ENTITIES AND ONE ANOTHER, EVEN TO THE EXTENT OF WAIVING STATUTORY OR OTHER PROTECTIONS.

These type of business agreements can thus include a host of provisions to address virtually any potential issues that might arise in a business relationship. These provisions include: exit ramps in the event of discharge, resignation, death, or divorce; indemnification of officers and directors;[2] explicit provisions for – or prohibition of – salary payments to owners;[3] and specific buyout formulas in the event of an owner's departure.[4] This article reviews recent Missouri cases relating to an array of business relationships and agreements.

Types of Business Contracts and Agreements

In organizing their relationships, parties can choose from a variety of business formation structures, including partnerships, LLCs, corporations, joint ventures, or even a mix of different entities. The entity that a party chooses for the business relationship will have important consequences for taxation, and such decisions should be undertaken with the input of tax professionals. The selection of the entity will also have an impact on the statutes or case law that will apply, as discussed below.

Partnership Agreements

"A partnership is statutorily defined as 'an association of two or more persons to carry on as co-owners [of] a business for profit.'"[5] "A partnership agreement [may] be . . . written . . ., expressed orally, or implied from the acts and conduct of the parties."[6] "[T]he intent of the parties" is the "primary [factor] for determining" whether such a relationship exists.[7] "The required intent necessary to find that a partnership exists 'is not the intent to form a partnership, but the intent to enter a relationship which in law constitutes a partnership.'"[8]

"The intent to form a partnership 'may be implied from conduct and circumstances of the party' and 'the parties are not required to know all the legal implications of a partnership.'"[9] In determining the intent to form a partnership, courts "consider[] 'all the conduct and words of the parties' to determine whether they are sufficient to imply an agreement."[10] "[W]hen the essentials of such an agreement have been established, expressly or by implication, [the agreement] is not to be avoided because of uncertainty or indefiniteness as to minor details and, in the absence of express agreement, it will be presumed that profits are to be shared equally."[11]

Due to the nature of partnerships, and their ability to exist regardless of the parties' intent to form a *partnership*, attorneys must counsel their clients carefully on their business interactions with others. A client may have established a partnership without realizing it, and may then be subject to the laws applicable to such relationship. For example, see *Finch v. Campbell*,[12] in which the Missouri Court of Appeals – Western District held that although the parties "did not have a written partnership agreement or operating agreement ... they effectively operated a 50/50 partnership with each partner equally sharing the expenses and profits of the partnership."

Operating Agreements

An LLC's governing documents, including its operating agreement, are construed according to the general rules of contracts.[13] The same is true for the governing documents of corporations and partnerships.[14] Pursuant to Missouri law:

> . . . [a]n operating agreement is defined as "any valid agreement or agreements, written or oral, among all members, or written declaration by the sole member concerning the conduct of the business and affairs of the limited liability company and the relative rights, duties and obligations of the members and managers, if any."[15]

Recently, the Missouri Court of Appeals – Eastern District interpreted an operating agreement in the context of a member dispute.[16] In *Nicolazzi v. Bone*, the court affirmed the trial court's ruling that Nicolazzi "breached the operating agreement by failing to [fulfill] his [required] initial capital contribution" to the LLC.[17]

> [E]ven though there was no deadline in the operating agreement . . . for when the parties . . . intended and understood that "initial" as used in "initial capital contribution" meant that the agreed-upon amount of $50,000 would be paid within six months of the execution of the LLC's operating agreement.[18]

The court held that it would "give effect to that incident."[19]

The *Nicolazzi* court went on to reverse the trial court's ruling that Nicolazzi "breached the operating agreement by discussing the [potential] sale of his interest in the LLC with a third party."[20] Although the operating agreement stated that "[n]either of the Members shall, without the written consent of the other Member, sell, assign, pledge, mortgage, or otherwise transfer [his] [her] interest in the LLE[,]" Nicolazzi only *discussed* the possibility of selling his interest in the LLC, which was not prohibited by the plain language of the agreement.[21] "While the operating agreement clearly establishes that a member may not sell or otherwise transfer his interest without the other member's written consent, the operating agreement does not necessitate that a member receive the other member's consent before soliciting purchase of his interest by a prospective buyer."[22] Because the operating agreement lacked such language, the court reversed "the trial court's conclusion that [Nicolazzi] breached the operating agreement by attempting to sell his interest in the business to a third party without [Bone's] consent."[23] *Nicolazzi* demonstrates that "[w]hile limited liability companies are creatures of statute, [courts] interpret an LLC's operating agreement according to the ordinary rules of contract law."[24]

"Although an operating agreement may be oral, there must still be an agreement."[25] In *Birkenheimer*, because "there was no agreement as to material terms between the parties to form the company[,]" the court held that there was *no operating agreement*, and the plaintiff could not have been a member of the LLC.[26] ". . . [T]here was no mutuality of agreement between Birkenmeier and the Kellers. Contract law explicitly holds that if the parties have reserved the essential terms of the contract for future determination, there can be no valid agreement."[27]

On the other hand, in *Arkansas-Missouri Forest Products, LLC v. Lerner*,[28] the Missouri Court of Appeals – Western District held that an oral agreement existed between the parties where both parties: (1) manifested themselves as and acted as partners; (2) were involved in business decisions and management; (3) were copied on emails regarding business deals; and (4) acted as though they were partners and joint-owners in their various

business transactions. The court held that this "evidence was sufficient as a whole for the jury to determine that" agreements existed between the parties to be joint owners and partners.[29] The court explained that, "[t]he fact that some terms of an agreement were not capable of ascertainment at the time the agreement was entered into and these precise terms were to be determined by mutual agreement in the future when they became ascertainable does not make the contract unenforceable."[30]

As such, business attorneys should counsel their clients to memorialize all agreements in writing. While courts will enforce oral operating agreements, the case law demonstrates that such enforcement may not occur if the terms are uncertain or nonexistent.

Restricted Stock Agreements

In *Guller v. Waks,*[31] two 50 percent shareholders executed a restricted stock agreement ("RSA"). Restricted stock agreements, including the contract in *Guller*, generally provide the parties with a roadmap in the event a shareholder is terminated, resigns, or receives a third-party offer to purchase his shares in the company. When the plaintiff in *Guller* was terminated, he sought to have the company dissolved pursuant to § 361.467, RSMo, which provides that if equal 50 percent shareholders are "*unable to agree upon the desirability of continuing the business of [the] corporation*, either stockholder may file a petition with the circuit court . . . stating that [the shareholder] desires to *discontinue the business* of such corporation and to *dispose of* [its] *assets*[.]"[32] The Eastern District affirmed the trial court's ruling that the statute *did not apply*, and the company would not be dissolved, because the RSA anticipated the possibility of a deadlock and explicitly provided a solution that ensured the company's continued existence.[33] The RSA's provision – not the statute – governed the party's relationship and future.

Next, the *Guller* court found that the defendant complied with the RSA in valuing the company. "[T]he RSA provide[d] that the 'purchase price per share' shall be 'fair market value of the company divided by the total number of shares issued and outstanding on the closing date.'"[34] The RSA provided that if the parties did not agree on value, then each shall appoint an appraiser.

> If a party fails to appoint an appraiser, then the other party may select a second appraiser. If the appraisals differ by less than 10%, then value shall be the average of the two. If the appraisals differ by more than 10%, then CHC's financial officer shall calculate value, with verification by the company's certified public accountant, and that value shall be averaged with the closest appraisal.[35]

The plaintiff refused to participate in the appraisal process and refused to choose an appraiser. As such, the defendant appointed the second appraiser. The Eastern District found that the defendant complied with the RSA.[36]

A similar outcome occurred in *LaRue v. Alcorn*,[37] where the statute

> provid[ing] for judicial dissolution of a corporation consisting of two equal shareholders if the shareholders were unable to agree upon the desirability of continuing the business . . . , did not apply to [the] shareholder's request to dissolve the [company]; . . . [where] the shareholder agreement created a buy out provision [applicable] when an employee shareholder was terminated from employment.[38]

Special Provisions in Business Agreements

Case law reflects three important provisions that parties sometimes include in business contracts: (1) restrictive covenants, (2) Texas shootout provisions, and (3) limitations on liability

Restrictive Covenants in Buy-Sell Agreements

One "purpose of [a] restrictive covenant is to protect an employer from unfair competition."[39] The Missouri Court of Appeals has held that "[r]estrictive covenants that limit individuals in the exercise or pursuit of their occupations, standing alone, are contracts in restraint of trade that are unlawful in [Missouri]. However, *a covenant not to compete that forms part of a legitimate transaction* is often described as an 'ancillary restraint.'"[40] Such ancillary restraints will be allowed. The courts in Missouri have found the following types of relationships and agreements as permitting ancillary restrictive covenants: employer-employee relationships; "buyer-seller relationships"; "partners against partnerships"; partnership agreements; independent contractor agreements; and shareholder agreements in close corporations.[41]

In *Mayer Hoffman McCann, P.C. v. Barton,*[42] the 8th Circuit U.S. Court of Appeals considered whether, under Missouri law, "a stock purchase agreement containing a noncompete clause" . . . [could] be supported by adequate consideration."[43] In reaching its decision, the *Barton* court relied on two Missouri cases: *Superior Gearbox* and *Sturgis.*

In *Superior Gearbox Co. v. Edwards,*[44] the Missouri Court of Appeals for the Southern District enforced a noncompetition covenant located in a stock purchase agreement without considering the issue of consideration. In contrast, in *Sturgis Equipment Co. v. Falcon Industrial Sales Co.,*[45] the Missouri Court of Appeals for the Eastern District refused to enforce a restrictive covenant found in a buy-sell agreement, holding that it was not supported by consideration and was greater in scope than fairly required for the company's protection. The *Sturgis* court based its holding on the fact that "[t]he agreement did not state that the purpose of the non-compete clause was to protect any special interest of the company. No additional consideration was specified in the contract."[46] "The *Sturgis* court distinguished *Superior*" by explaining that there, the "shareholders acknowledged that the milling machinery and procedures developed by the company were unique and were a valuable part of the company's assets. Additionally, as part of the same agreement, the shareholders received a five percent annual bonus for remaining with Superior."[47]

Applying *Superior* and *Sturgis*, the *Barton* court held that the restrictive covenant was enforceable under Missouri law. In the *Barton* stockholder's agreement, the shareholder-employees promised not to solicit the company's clients or employees or disclose or use the company's confidential information. As part of this agreement, the shareholders acknowledged that the restrictions were "reasonable and necessary to protect the

legitimate interests" of the company.[48] The specific interests were explicitly identified in the agreement and "included confidential information or knowledge relating to [the company's] business plans, strategies," and customers.[49] The court held that, because the agreement "clearly provides that the restrictive covenants are necessary to protect the legitimate interests of the business and identifies those interests, *Sturgis* does not bar enforcement of the restrictive covenants. Furthermore, the restrictions are not 'greater than fairly required' for MHM's protection, as was the case in *Sturgis*."[50] As such, the restrictive covenants were enforceable.

The court then considered "whether a restrictive covenant can be ancillary to a shareholder's agreement for a professional corporation."[51] The court held "that the Missouri Supreme Court would [likely] hold that a stockholder's agreement between a professional corporation and a shareholder falls within the class of contracts wherein restrictive covenants are appropriate."[52] This is because Missouri courts have held "that restrictive covenants can be ancillary to shareholder agreements in close corporations, and professional corporations are [considered] a special species of a close corporation."[5]

Texas Shootout Provisions

Closely-held companies, including corporations, LLCs, and partnerships, "often contain buy-sell provisions in their [governing] agreements."[54] Buy-sell provisions "provide an exit mechanism for owners who no longer wish to participate in the business venture."[55] One such exit mechanism is called a "Texas Shootout Provision." These provisions generally provide that one owner can name "a price and the other owner is compelled to either purchase the first owner's shares or sell his own shares at the named price."[56]

The intention of the Texas Shootout Provision is to provide a fair method of valuing stock. "Because the person naming the price can be forced to either buy or sell, he or she must act honestly."[57] Such provisions are particularly useful "[w]hen neither [party] faces any liquidity constraints and both are equally able to run the business[.]"[58] These provisions are "not necessarily [intended] to include winding up and separating all of the parties' business entanglements, but rather they are merely a means to ensure the parties are able to come up with a fair buyout price in an expedient manner."[59]

In *Forbush v. Adams*, the Texas Shootout Provision read as follows:

> 9.18 *Russian Roulette (aka Texas Shootout) Provision.* Notwithstanding any provision contained herein to the contrary:
> (a) Any shareholder ("Offeror") shall have the right to make an offer to purchase the shares of Stock owned by any other Shareholder upon the terms and conditions and at the price set forth in the Offeror's offer. The Shareholder receiving the Offeror's offer ("Offeree") must either accept the Offeror's offer or, alternatively, the Offeree must purchase the Offeror's shares of stock within sixty (60) days after receiving the Offeror's offer at a purchase price and on the same terms and conditions contained in the Offeror's offer.[60]

The *Forbush* court considered whether the provision's reference to "terms and conditions" encompasses terms and conditions *unrelated to the purchase price of the shares*.[61] Specifically, plaintiff "Forbush elected to exercise the Texas Shootout Provision by delivering a written offer" to defendant Adams which contained an offered purchase price *plus* additional conditions unrelated to the purchase price.[62] The unrelated conditions included that: Forbush would repay all outstanding loans; Forbush would release or indemnify Adams; and Adams would have a one-year consulting agreement with the company.[63] Adams responded to Forbush's offer by stating that he would pay the offered price for Forbush's shares but did not agree to the additional conditions in Forbush's offer. Forbush sought declaratory judgment against Adams, claiming that the cross-purchase agreement required

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Adams to either accept Forbush's offer in its entirety or purchase Forbush's shares on the same terms and conditions as contained in Forbush's offer (including the unrelated terms).

The court held that "[b]ecause Texas Shootout Provisions are focused on setting a fair buyout price and nothing in the cross-purchase agreement indicated the Texas Shootout Provision in this case was meant to encompass anything beyond that, . . . the additional terms and conditions in Forbush's offer were not contemplated by the Texas Shootout Provision."[64] Therefore, Forbush's offer did not conform to the requirements of the agreement's Texas Shootout Provision.

Although non-conforming, the Eastern District held that Forbush's offer was not entirely void, as the parties need not be confined to the dictates of the Texas Shootout Provision in winding up their business.[65] After considering Adams' partial acceptance of Forbush's offer, the Eastern District held that Adams' "purported acceptance" was in fact a "counteroffer" as it "introduce[d] new or variant terms[.]"[66] Because Forbush never responded to Adams' counteroffer, the counteroffer failed, and the parties never reached an enforceable agreement.[67]

Contractual Limitations on Remedies and Damages

Another provision that partners, shareholders, or members may include in their governing contractual business agreement is a "limitation of liability or damages" provision. Such a provision places limitations or prohibitions on a party's exposure to legal liability or damages. An example of such a provision was considered in *Jacobson Warehouse Co., Inc. v. Schnuck Markets, Inc.*[68] In *Jacobson*, the parties' agreement included the following "limitation of" provision:

> [U]nless otherwise prohibited by law, neither party shall be liable for incidental or consequential damages or indirect, special or punitive damages. Notwithstanding the foregoing limitations on types of damages, in the event that [the plaintiff, d/b/a XPO Logistics Supply Chain] would otherwise be liable to Schnucks for consequential, indirect, special or punitive damages, XPO shall be liable to Schnucks for such damages up to Schnucks' self-insured retention under any applicable insurance policy maintained by Schnucks, not to exceed Five Hundred Thousand Dollars ($500,000)[.][69]

The U.S. District Court for the Eastern District of Missouri considered whether such a provision barred the defendant's negligence claim. Defendant Schnuck contended that the provision applied only "to *contractual claims under the agreement,* and [did] not waive liability for damages consequential to a *negligence* claim."[70] The plaintiff, on the other hand, argued that the limitation of liability provision applied to Schnuck's negligence claim, and the claim must therefore be dismissed.

"It is well-settled in Missouri that sophisticated business entities may contractually limit future remedies."[71] Such "[c]ontractual limitations of liability . . . for consequential damages do not violate public policy where the language is 'clear, unambiguous, unmistakable, and conspicuous.'"[72] The *Jacobson* court considered the plain language of the operating agreement and held that the provision precluded recovery on Schnuck's negligence claim, and dismissed the claim to the extent it sought damages barred by the provision limiting liability.[73] *Jacobson* demonstrates both the wisdom in, and potential danger of, liability limitation provisions. These provisions can protect parties from future internal disputes, but may also have the effect of limiting legal remedies in the event of a total breakdown of the relationship.

Important Issues to Consider When Drafting Agreements and Litigating Claims

The Economic Loss Doctrine

The economic loss doctrine prohibits a plaintiff from seeking to recover in tort for economic losses that are contractual in nature.[74] "The doctrine exists to protect the integrity of the bargaining process, through which the parties have allocated the costs and risks."[75] "Missouri courts have recognized specific exceptions to the economic loss doctrine in cases involving a fiduciary relationship or negligence in providing professional services. Another recognized exception applies where the defendant breached a public duty."[76]

In *Jacobson*, plaintiff XPO entered into an operating agreement with defendant Schnuck "setting forth terms and conditions under which XPO would provide certain warehouse management services for [Schnuck's] new distribution facility."[77] Ultimately, the relationship deteriorated, and in the ensuing litigation between the parties, "Schnuck allege[d] that XPO was negligent in operating the Facility. Specifically, Schnuck claimed that XPO breached its duty of care by 'failing to conduct its operations pursuant to prevailing warehouse industry practices and inadequately planning, hiring, training, staffing, and supervising' at the Facility."[78]

> XPO [alleged] that Schnuck's negligence claim should be dismissed [pursuant to] the economic loss doctrine because it is not independent of its breach of contract claim; both claims reference the same subject matter of the Agreement – management of the Facility, and the same standard of care – "prevailing warehouse industry standards."[79]

The Eastern District disagreed with XPO and denied its motion to dismiss Schnuck's negligence claim on the basis of the economic loss doctrine. Although XPO's agreement "to adhere to [certain] performance requirements" originated in the operating agreement, Missouri law provides that "while a mere breach of contract does not provide a basis for tort liability, the negligent act or omission which breaches the contract may serve as a basis for an action in tort."[80]

In determining whether a claim is prohibited by the economic loss doctrine, the following should be considered: "If the duty arises solely from the contract, the action is contractual. The action may be in tort, however, if the party sues for breach of a duty recognized by the law as arising from the relationship or status the parties have created by their agreement."[81]

Applying this, the Eastern District held that because

> Schnuck allege[d] that XPO was obligated to "perform the services necessary for the proper, accurate and efficient operation of the Facility" and to perform those services

> "in a good, professional, workmanlike, expeditious, and economical manner, consistent with the most efficient operation of the warehouse in accordance with the standards and prevailing practices in the warehouse industry," . . . Schnuck's negligence claim [did] not arise *solely* in contract and [would] not be dismissed [pursuant to the economic loss doctrine.][82]

Additionally, the Eastern District held that where, as in *Jacobson*, the "contracting parties 'require the exercise of reasonable skill, diligence, and care in the handling of business given over or entrusted to' a defendant, a special relationship . . . is created by [that] contract."[83] In that case, "[a] tort action may be pursued 'if the party sues for breach of a duty recognized by the law as arising from the relationship or status the parties have created by their agreement.'"[84]

Lastly, Schnuck "assert[ed] that because XPO provided professional services to Schnuck and held itself out as a professional by representing it was skilled in the warehousing business and capable of operating the Facility consistently with prevailing practices in the warehousing industry, the professional services exception to the economic loss doctrine applie[d]."[85] The professional services exception to the economic loss doctrine "is applied to negligence claims involving [individuals] who have been held to a professional, rather than an ordinary, standard of care and who have provided professional services to the plaintiff."[86] The court agreed that this exception could apply, and declined to rule that Schnuck's negligence claim arose solely in contract and was barred by the economic loss doctrine.

Joint Ventures and Morley v. Square, Inc.

A "joint venture" is subject to the same legal principles as a partnership.[87] "Indeed, the legal principles for determining the existence of a joint venture have been said to be identical to those for determining a partnership, and the two may be created in the same ways."[88] In *Morley*, the U.S. District Court for the Eastern District of Missouri, Eastern Division, applied Missouri law to determine whether a joint venture existed between plaintiff Morley and defendants McKelvey and Dorsey. Plaintiff Morley "allege[d] that Dorsey, McKelvey, and Morley 'agreed to create and develop a mobile credit card transaction business' which 'used [plaintiff] Morley's inventions [and ideas].'"[89]

> Plaintiff [Morley] allege[d] that McKelvey and Dorsey breached the [joint venture] agreement by refusing to recognize Morley's one-third ownership and control interests, incorporating a new company, funneling all assets out of the joint venture and into that new company, and excluding Morley from ownership in and control of that company.[90]

McKelvey and Dorsey sought summary judgment on Morley's joint venture claim, arguing that Morley could not "overcome the steep standard of proof required to establish [the] claim."[91] This argument required the court to determine which burden of proof standard is required "to establish a joint venture"; i.e., "a preponderance of the evidence standard" or "a clear and convincing evidence standard." The court acknowledged that Missouri law was confusing on the issue, but that the

> . . . last pronouncement by the Supreme Court of Missouri...in *Grissum [v. Reesman]*, 505 S.W.2d 81, noted that the burden is a preponderance of the evidence unless the joint venture at issue involves "an oral contract to convey real estate or the establishment of a resulting trust in real property," in which case the higher clear and convincing burden applies.[92]

Relying on this Supreme Court of Missouri precedent, the *Morley* court held that the correct standard in determining whether a joint venture exists is *preponderance of the evidence*.[93] "The clear and convincing standard . . . is simply the exception to the general rule for those two particular categories of cases."[94]

Applying the preponderance of the evidence standard, the *Morley* court considered whether there was a dispute of fact regarding the existence of a joint venture. Plaintiff Morley argued there was "ample evidence of the parties' . . . intent to carry on . . . as co-owners[,]"[95] including:

> (1) the circumstances of Morley's invitation to be part of the enterprise; (2) the transformative nature of Morley's . . . contribution; (3) the lack of a consulting agreement [with Morley] in light of the fact that other "consultants" had such agreements; . . . ([4]) verbal and written representations by the parties and others; and ([5]) [the defendants'] final negotiations with Morley.[96]

> Defendants, on the other hand, argue[d] that [a joint venture did not exist because] Morley did not share in the company's profits or risk of losses, had no voice in management or role in the direction of the company, had no role in employment decisions, had no ability to enter contracts for the company, was not held out as a partner [to third-parties, and was willing to] accept[] a mere 1% . . . stake in the company."[97]

The court considered the parties' arguments and explained that "when one party contributes the capital and the other the labor, skill or experience for carrying on a joint enterprise, such a combination constitutes a partnership unless something appears to indicate the absence of a joint ownership of the business and profits."[98] Further, the court explained that, pursuant to Missouri law, "'there need not necessarily be an agreement to share losses" in order to find an implied partnership."[99] The court ultimately denied defendants' motion for summary judgement, finding that it was

> clear to this Court that McKelvey and Dorsey intended to work with Morley to build a business in the mobile payments industry. Whether or not that intention rose to the level of a joint venture or partnership appears to this Court to be a question for the jury.[100]

An important factor for the court was that Morley's idea in using a cell phone to read a credit card's magnetic strip (as opposed to defendants' original idea of using the phone *camera* to *capture* credit card numbers) was *transformative* because it changed the entire direction of defendants' thinking and business plan:

> Plaintiff asks how defendants could pursue an entire business on that idea, in collaboration with Morley, and

> not believe that such a pursuit and collaboration was significant, probative evidence of whether or not the parties intended to carry on as co-owners. This Court agrees.
>
> Morley had not suggested a mere logo or a company name – his idea and prototype shaped the company itself.[101]

The court rejected defendants' argument that the court's denial of their motion for summary judgment would "open the floodgates to partnership claims by every entry level startup employee."[102] The court explained:

> [D]efendants once again downplay the importance of Morley's contribution and role within the business. Considering the totality of the circumstances – the parties' preexisting relationships, McKelvey's invitation to "play" and earlier communications about entrepreneurial activity with Morley, the transformative nature of Morley's idea and his work in bringing that idea to life, Morley's continued role within the business and his work to patent the card reader (paid for by McKelvey), the promise of a "stock deal," just to name a few – there is at least a question of fact as to whether the parties intended to carry on this business as co-owners.[103]

The court went on to deny defendants' motion for summary judgment as it related to plaintiff Morley's fraud-based claims. Morley contended – and the court agreed – that when the evidence was presented to the jury, "the same facts that support Morley's joint venture claim could alternatively lead the jury to a slightly different conclusion: that is, although defendants may not have intended to start a business as co-owners with Morley, they did intend to defraud him in order to obtain, without compensation, his contributions."[104]

Morley is an important case for business attorneys to be familiar with, as it provides an example of individuals coming together to perform business without drawing clear lines as to what their relationship will consist of, resulting in a fight over a joint venture claim. *Morley* also demonstrates that in the event a plaintiff is wrong that a partnership or joint venture existed between the parties, the plaintiff may still have a viable fraud claim on which he can recover.

Who Can Be Held Liable for Breach of Contract?

A person can be held liable for breaches of a corporate agreement *if that person signed the agreement in their individual capacity*. This is distinguishable from a situation in which a person signs in a *representative capacity*, such as on behalf of an entity or trust. In that situation, the person will not be held liable in his individual capacity.

In *Gryphon Investments III, LLC ex rel. Schenk v. Wehrle*,[105] for example, the court dismissed a breach of contract claim where the plaintiff sought to hold a defendant individually liable based on the defendant's signature on the operating agreement in his capacity as a trustee. The court stated: "Gryphon III alleges that Wehrle's actions of diverting funds from Gryphon III breached the Operating Agreement. However, Wehrle is not a party to the Operating Agreement. He signed that document in his capacity as the trustee of the John S. Wehrle Revocable Living Trust."[106] As such, Wehrle could not be held liable in his individual capacity for breach of the operating agreement.

This standard similarly applies to arbitration provisions in operating agreements.[107] In *Springfield Iron & Metal, LLC v. Westfall*, the Missouri Court of Appeals – Southern District considered whether individuals who sign an operating agreement in their *representative capacities* could enforce an arbitration provision located in the operating agreement for claims they bring *individually*. The company at issue – Springfield Iron & Metal, LLC – had two members: Westfall (an individual) and Griesedieck Brothers (an LLC with two owners – Paul and Chris). Westfall signed Springfield Iron & Metal, LLC's operating agreement in his *individual* capacity.[108] Paul and Chris signed the operating agreement in their *representative* capacities as members of Griesedieck Brothers, LLC.[109] During an ensuing lawsuit between the parties in which Paul, Chris, and Springfield Iron & Metal brought claims against Westfall, Paul and Chris moved to compel arbitration on all claims based on Springfield's operating agreement.[110]

Westfall contended that only the agreement's signers were subject to arbitration.[111] Paul and Chris first argued that they were "'entitled to the benefit of arbitration' because [they] each had a 'close relationship' with [Griesedieck Brothers, LLC (which signed the operating agreement)] and non-arbitration of their claims 'would eviscerate' [Springfield's] operating agreement."[112] The court disagreed, holding that "[t]o compel arbitration of non-signatory claims – even those 'inextricably intertwined' with signatory claims – 'is inconsistent with the overarching rule that arbitration is ultimately a matter of agreement between the parties.'"[113]

The court further rejected the argument that, as the agents for Griesedieck Brothers, LLC, Paul and Chris share the LLC's "power to compel arbitration under the operating agreement[:]"

> The agreement does not name the Griesediecks as parties or treat them as such, nor did they sign it as individuals, but only as members of [Griesedieck Brothers, LLC]. By signing only as agents in a representative capacity, the Griesediecks are not bound by or to the agreement as individuals.... It is the principal that can be bound by the signature of the agent, not the agent that can be bound by the signature of the principal.[114]

The court similarly found unconvincing Paul's and Chris's argument that it was "'only logical' and efficient for everyone to arbitrate" all claims together and that "inconsistency [may arise] if some claims are arbitrated while others are not."[115] The court held that the Supreme Court of Missouri "deems arbitration a matter of agreement, even if arbitrated and non-arbitrated issues are 'inextricably intertwined.'"[116] "We are not free to erode arbitration's voluntary nature for the sake of judicial convenience."[117]

Business Contracts – Unlimited Power?

While parties have broad discretion to enter into contractual agreements to govern their business relationships, such discretion

is not unlimited. For example, business owners may not enter into agreements that violate state or federal laws. This was demonstrated in *Grillo v. Global Patent Group LLC*,[118] in which the Missouri Court of Appeals – Eastern District held that a nonlawyer officer manager's alleged agreement with a lawyer to share in the profits of the lawyer's firm was unenforceable, as it violated a Missouri statute prohibiting the splitting of compensation with nonlawyers.

Additionally, minority shareholders, members, and partners may have claims against majority shareholders, managers, or controlling partners if the corporate agreements between the parties are breached, applied oppressively, or applied in ways that breach the defendants' fiduciary duties.[11]

Conclusion

Attorneys representing business clients must be familiar with the types of agreements and provisions that can be useful, or should be avoided, in business entities. What type of entity and what type of agreement best suits the client? Should the agreement include exit ramps, with buyout formulas, in the event of disability or death? What fiduciary duties should be explicitly discussed in the agreement? Attorneys well-versed in the statutory provisions related to partnerships, LLCs, corporations, and joint ventures, along with the applicable case law, will be best able to assist their business clients. Absent clear agreements, the parties' rights when things go wrong will then often depend on case law dealing with fiduciary duties and shareholder and member oppression.

Endnotes

Gerard V. Mantese

Theresamarie Mantese

Fatima M. Bolyea

1 Gerard V. Mantese is the CEO of Mantese Honigman, PC, with offices in St. Louis, New York City, and Troy, Michigan. He handles complex business litigation in courts around the country, focusing on shareholder and member disputes, partnership litigation, fiduciary duties, and contract disputes. Theresamarie Mantese is a partner at Mantese Honigman, P.C., with more than 35 years' experience as a business and health care attorney. She focuses her practice primarily on representing and advising health care providers and professionals in matters such as group practice and other business organizations, contracts, third party payer audits and reimbursement, fraud-and-abuse issues, professional license disciplinary actions, hospital staff privilege actions, legislative issues and joint ventures. Fatima M. Bolyea is an associate at Mantese Honigman, P.C. and she focuses her practice on complex commercial litigation, shareholder business disputes, and health care law.

2 *See CB3 Enterprises LLC v. Damas*, 415 S.W.3d 163, 166 (Mo. App. W.D. 2013).

3 *See McGuire v. Lindsay*, 496 S.W.3d 599 (Mo. App. E.D. 2016).

4 *See Weber v. Moerschel*, 313 S.W.3d 220 (Mo. App. E.D. 2010).

5 *Hillme v. Chastain*, 75 S.W.3d 315, 317 (Mo. App. S.D. 2002) (citing § 358.070, RSMo 1994).

6 *Morrison v. Labor & Indus. Relations Comm'n*, 23 S.W.3d 902, 908 (Mo. App. W.D. 2000).

7 *Binkley v. Palmer*, 10 S.W.3d 166, 169 (Mo. App. E.D. 1999).

8 *In re Reuter v. Reuter*, 427 B.R. 727, 757 (2010).

9 *Morley v. Square, Inc.*, Nos. 4:14cv172, 4:10cv2243 SNLJ CONSOLIDATED, 2016 WL 1615676 at *7 (E.D. Mo. April 22, 2016).

10 *Id.*

11 *Grissum v. Reesman*, 505 S.W.2d 81, 86 (Mo. 1974).

12 541 S.W.3d 616, 621 (Mo. App. W.D. 2017).

13 *CB3 Enterprises LLC*, 415 S.W.3d at 166.

14 *Exec. Bd. of Mo. Baptist Convention*, 280 S.W.3d 678, 687 (Mo. App. W.D. 2009).

15 *Birkenheimer v. Keller Biomedical, LLC*, 312 S.W.3d 380, 391 (Mo. App. E.D. 2010), quoting § 347.015(13), RSMo 2016.

16 *Nicolazzi v. Bone*, No. ED 106292, 2018 WL 6052144 (Mo. App. E.D. Nov. 20, 2018).

17 *Id.* at *7.

18 *Id.* at *6.

19 *Id.*

20 *Id.* at *5.

21 *Id.* at *2.

22 *Nicolazzi* at *7.

23 *Id.* at *6.

24 *Id.* at *4.

25 *Id.*

26 *Id.*

27 *Id.* at 393.

28 486 S.W.3d 438, 448-49 (Mo. App. E.D. 2016).

29 *Lerner* at 449.

30 *Id.*

31 550 S.W.3d 505 (Mo. App. E.D. 2017).

32 *Guller* at 508, quoting § 361.467, RSMo 1994.

33 *Id.* at 509.

34 *Id.* at 511.

35 *Id.*

36 *Id.* at 512.

37 389 S.W.3d 215 (2012).

38 *LaRue*, 389 S.W.3d 215 (West Headnotes 2).

39 *Schmersahl, Treloar & Co. v. McHugh*, 28 S.W.3d 345, 350 (Mo. App. E.D. 2000).

40 *JTL Consulting, L.L.C. v. Shanahan*, 190 S.W.3d 389, 396 (Mo. App. E.D. 2006) (citations omitted) (emphasis added).

41 *Id.*; *Renal Treatment Centers–Mo., Inc. v. Braxton*, 945 S.W.2d 557, 563 (Mo. App. E.D. 1997).

42 614 F.3d 893 (8th Cir. 2010).

43 *Id.* at 904.

44 869 S.W.2d 239 (Mo. App. S.D. 1993).

45 930 S.W.2d 14 (Mo. App. E.D. 1996).

46 *Barton*, 614 F.3d at 904 (citations omitted) (discussing *Sturgis*, at 17).

47 *Id.* at 905.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.* at 906.

53 *Id.* (citations omitted).

54 *Forbush v. Adams*, 460 S.W.3d 1, 6 (Mo. App. E.D. 2014).

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.* (citing Douglas G. Baird and Donald S. Bernstein, *Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain*, 115 YALE L.J. 1930, 1953 (June 2006)).

59 *Forbush*, 460 S.W.3d at 6.

60 *Id.* at 5.

61 *Id.*

62 *Forbush*, 460 S.W.3d at 3.

63 *Id.* at 3.

64 *Id.* at 7.

65 *Id.*

66 *Id.*

67 *Id.*

68 No. 4:17-CV-00764 JAR, 2017 WL 5885669 (E.D. Mo. Nov. 29, 2017).

69 *Jacobson*, 2017 WL 55885669 at *13, n. 3.

70 *Id.* at *4 (emphasis added).

71 *Id.* (citing *Sports Capital Holding, LLC v. Schindler Elevator Corp.*, No. 4:12-CV-1108-SNLJ, 2014 WL 1400159, at *2-3 (Mo. App. E.D. 2014)); *Purcell Tire & Rubber Co. v. Exec. Beechcraft, Inc.*, 59 S.W.3d 505, 508 (Mo. banc 2001).

72 *Jacobson*, 2017 WL 55885669 at *4.

73 *Id.* at *6.
74 *Trademark Med., LLC v. Birchwood Labs., Inc.*, 22 F. Supp. 3d 998, 1002 (E.D. Mo. 2014); *Jacobson,* 2017 WL 55885669 at *3.
75 *Jacobson,* 2017 WL 55885669 at *3.
76 *Trademark Med., LLC*, 22 F. Supp. 3d at 1002-03 (citations omitted).
77 *Jacobson,* 2017 WL 55885669 at *1.
78 *Id.* at *3.
79 *Id.*
80 *Id.*
81 *Id.*
82 *Id.* (emphasis added).
83 *Id.*
84 *Id.*
85 *Id.* at *4.
86 *Id.*
87 *Morley v. Square, Inc.*, Nos. 4:14cv172, 4:10cv2243 SNLJ CONSOLIDATED, 2016 WL 1615676 at *6 (E.D. Mo. April 22, 2016).
88 *Id.* (quoting 48A C.J.S. Joint Ventures § 3).
89 *Morley*, 2016 WL 1615676 at *6.
90 *Id.*
91 *Id.* at *7.
92 *Id.*
93 *Id.*
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.* at *8.
98 *Id.* at *8 (*citing Van Hoose v. Smith*, 198 S.W.2d 23, 27 (Mo. 1940)).
99 *Morley,* 2016 WL 1615676 at *8 (citing *Beatty v. Garner*, 458 S.W.2d 288, 291 (Mo. 1970); *Bussinger v. Ginnever*, 213 S.W.2d 230, 236 (Mo. App. E.D. 1948).
100 *Morley,* 2016 WL 1615676 at *9.
101 *Id.*
102 *Id.* at *10.
103 *Id.*
104 *Id.*
105 No. 4:15 CV 464 RWS, 2015 WL 4537711 (E.D. Mo July 27, 2015).
106 *Id.* at *1.
107 *Springfield Iron & Metal, LLC v. Westfall*, 349 S.W.3d 487 (Mo. App. S.D. 2011).
108 *Id.* at 489.
109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.* at 490.
113 *Id.*
114 *Id.* (internal citations omitted).
115 *Id.*
116 *Id.*
117 *Id.* at 491.
118 471 S.W.3d 351 (Mo. App. E.D. 2015).
119 *See, e.g., Fix v. Fix Material Co.,* 538 S.W.2d 351, 358 (Mo. App. E.D. 1976); *Virgil Kirchoff Revocable Trust Dated 06/19/2009 v. Moto, Inc.*, 482 S.W.3d 834, 840 (Mo. App. E.D. 2016).

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Because courts call counsel's hope for dramatic courtroom surprise "pure fantasy"[68] and a "prayer,"[69] appellate courts citing the fictional Mason normally affirm the trial court's exercise of discretion to exclude a witness or to limit cross-examination. In *United States v. Beck*,[70] for example, the convicted defendant contended that the trial court violated the Sixth Amendment by limiting his counsel's questioning of a hostile witness. The U.S. Court of Appeals for the 7th Circuit found harmless error.[71] "It is unlikely that counsel expected [the witness] to break down on the stand and admit that his perjury was part of an elaborate scheme to frame the defendants. Only Perry Mason enjoyed such moments."[72]

Courts also cite *Perry Mason* to reject claims that the assigned counsel's assertedly ineffective assistance denied the defendant a fair trial. One federal district court explained that "the Constitution guarantees only representation which is reasonably competent, not the perfection which exists only in fiction."[73] In yet another case, a dissenting judge observed that on ineffectiveness claims, courts "compare counsel's performance not to an ideal, Perry Mason-style defense . . . but to what a reasonably competent counsel could accomplish under the circumstances of the case."[74] In 2015, however, the Tennessee Supreme Court provided this advice: "[A] lawyer who represents criminal clients may be interested in watching *Perry Mason* . . . on television, and may even pick up a useful tidbit or two from doing so."[75]

The U.S. Court of Appeals for the 5th Circuit has invoked defense counsel Mason to discuss prosecutors' professional responsibilities: "[T]he prosecutor's aim is justice. . . . [W]hen it becomes apparent during the trial of a criminal case, a la the celebrated fictional career of Perry Mason, that the accused is innocent of the crime with which he stands charged, the prosecutor has not 'lost.'"[76]

L.A. Law

Among television dramas about lawyers and law enforcement, the runner-up to *Perry Mason* for the number of citations in federal and state court opinions is undoubtedly *L.A. Law*, which has also led courts to distinguish fiction from reality. Commentators suspected that during its run from 1986 to 1994, the show's fictional portrayal of law practice not only left Americans with unrealistic visions about what lawyers do, but also encouraged many applicants to pursue law school based on unrealistic visions of careers in the fast lane.[77]

Law school applications rose as *L.A. Law* presented the practice, according to one writer, as "a lifestyle package that involved clothes, friends, relationships, social status and that elusive ingredient: getting paid for championing social justice causes. . . . There was never a dull client, never a boring case and in court they were poised and articulate."[78] After the show left the air, law school application numbers fell nationwide.[79]

Decisions accenting *L.A. Law's* unrealistic visions include *United States v. Prince*,[80] which affirmed the defendant's convictions for bank robbery and unlawfully using a firearm during commission of a violent crime.[81] The U.S. Court of Appeals for the 10th Circuit began *Prince* with words of caution: "[T]he would-be lawyer raised on the hit television series, *L.A. Law*, to believe a law degree is that golden ticket to a glamorous career of big money, fast cars and intimate relationships among the beautiful people may think twice before sending in his or her law school application when word of this case gets out."[82]

After the trial court twice denied the assigned federal public defender's requests to withdraw from the case because defendant Prince refused to talk to him, the defendant dropped his pants and urinated in front of the jury as the panel was being sworn.[83] A court-ordered psychological examination found the defendant