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Kansas Defense Journal:

LITIGATING NONCOMPETE AGREEMENTS: A STRATEGIC GUIDE FOR KANSAS PRACTITIONERS

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Whether your legal practice involves representation of corporate employers or employees, you will likely be confronted with litigation issues related to noncompete agreements. These agreements typically provide that the employee will not, after his employment ceases, enter into employment with a competitor of his employer, contact or solicit customers of the employer, or disclose or utilize confidential information about the employer's business. These agreements usually provide for stated durations and apply to certain geographic areas. Such agreements ordinarily are intended to protect an employer's interest in his customer accounts, or his confidential business practices or trade secrets, or both.

In Kansas, "the paramount public policy is that freedom of contract is not to be interfered with lightly."[2] However, noncompete agreements are not *per se* enforceable. This article addresses conditions for enforceability of noncompete agreements. Second, this article focuses on employer remedies and employee defenses. And finally, litigation strategies are suggested.

I. Enforceability of Noncompete Agreements

Under Kansas law, freedom of contract is the driving force behind enforcement of noncompete agreements.[3] Noncompete agreements are not "disfavored" under Kansas law.[4] Examples of the types of employment involved in which Kansas courts have enforced noncompete agreements include the following:

1. Wholesale liquor salesman.[5]
2. Paint and varnish wholesale distribution.[6]
3. Physician.[7]
4. Barber.[8]
5. Development and sale of technical aircraft equipment.[9]
6. School memorabilia dealer.[10]
7. Business forms salesman.[11]
8. Maintenance products sales manager.[12]
9. Sale and servicing of water treatment products.[13]
10. Licensed Nurse Practitioner.[14]
11. Surgeons.[15]
12. Heating-element manufacturer employee.[16]
13. Engraving and embossing company employee.[17]

A threshold requirement to enforcement of a noncompete agreement is that the noncompete agreement must be, or be a part of, what otherwise would be a valid and enforceable contract under general principles of contract law.[18] In order to enforce a noncompete agreement ancillary to an employment contract, the noncompete agreement must also be reasonable under the circumstances and not adverse to the public wel-

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PRESIDENT'S MESSAGE

Anne Kindling
Stormont Vail

As I look back over the rich history of this organization, I am honored to lead the KADC during 2008. Beginning with William Kahrs in 1966, the list of past presidents, board members, and general members is a virtual Who's Who of Kansas lawyers. We have many nationally-recognized lawyers and more than a couple who have gone on to become district or appellate judges. I refuse to name names for fear of the Golden Globes Syndrome – I surely would exceed the time/space allotted and forget to mention someone! Each and every one of you contributes to our profession every day, so you only need to go to the list of members on our website to see who should be thanked for all they have done for KADC and our profession. The Golden Globe nominees this year didn't risk falling prey to the Syndrome due to the writer's strike. I, of course, don't have a hired pen so I will simply say: Thank you for this opportunity.

As an officer of KADC, I have attended several mid-region and annual DRI meetings which afford the opportunity to brainstorm with other SLDO leaders about what is going on in our organizations as we struggle to stay relevant to members of all ages and experience levels. Among KADC members there is an over 50-year age span between the oldest member and the youngest. Take a look at Wayne Stratton's article on page 3 to see how the practice of law has changed over his 50 years in practice!

It is an ongoing challenge to provide services and education that benefit seasoned and new attorneys alike. The 2007 Annual Conference began with the first of what will be an annual Trial Academy for newer attorneys. Fourteen attorneys were mentored by 3 seasoned members of KADC and 1 seasoned attorney from the dark side. Attendees were privileged to learn about opening statements from trial veterans Gene Balloun, Wayne Stratton, and Todd Thompson as well as Jerry Palmer of the plaintiff's bar. After seeing the veterans in action and learning some tricks of the trade, attendees gave their own opening statements and were critiqued by the veterans. This was a highlight of the conference for several attendees.

With the continuing trend of mediation and other alternative dispute resolution techniques, fewer and fewer cases proceed to trial. The disappearing jury trial has resulted in fewer and fewer trial experiences for younger, and even mid-level, attorneys. It is my hope that the Trial Academy can help offset the effects of the disappearing jury trial and allow newer attorneys to benefit from the wisdom of masters, so that the more inexperienced lawyers will nonetheless feel comfortable presenting to juries in the courtroom.

I also hope KADC can work to improve networking between newer attorneys so that they will feel camaraderie through the state and not only with their local bar associations.

While it may be easy to find ways to keep the KADC relevant to younger and mid-level attorneys, I fear we are struggling to provide a benefit to the veterans apart from social connections and the chance to tell war stories. I would be interested in hearing personally from more seasoned lawyers about what services KADC can offer so that we can serve your needs beyond continuing education hours or social ties.

We also need to find ways to increase membership. Our total membership numbers have remained fairly stagnate over the past few years at around 220, despite the gain each year of new members. What this means is that a roughly equal number of attorneys are leaving our ranks each year. I am going to challenge the Board this year to investigate whether the drop-outs are changing practice environments or simply don't find any great value to membership.

In addition, the Board is going to carefully investigate whether the format, timing, and location of the annual meeting is serving the needs of our members. We consistently have a 40% or so turnout for the annual meeting, and each year there are requests to avoid the holiday season or move around the state although there are also several who insist we should not change a thing. If you have strong feelings one way or the other, or ideas for improving the annual meeting in format, timing, or location, please contact a Board member to have your voice heard.

I look forward to keeping you posted on KADC happenings through out the year. In the meantime, Happy 2008!

FIFTY YEARS IN THE PRACTICE OF LAW

Wayne T. Stratton
Goodell Stratton Edmonds & Palmer, LLC

At the 2007 KADC Annual Conference, our association conferred its highest award, the William Kahrs Lifetime Achievement Award, on Wayne T. Stratton of Goodell Stratton Edmonds & Palmer, LLC. Wayne graduated from Washburn University School of Law in 1958 and has been with Goodell, Stratton, Edmonds and Palmer since 1961, joining that firm after serving as a judge advocate in the United States Air Force. The following is an article by Wayne that chronicles some of the changes in the legal profession over the years, as well as offers some guidance for younger attorneys...

I guess, because it has been 50 years since I graduated from law school, your editor thought that I might have something to say about the way it was then and the changes which have occurred in the practice of law since. There have been numerous changes. When I began there were probably 2,000 lawyers in Kansas, but that was before attorney registration. The current number of registered attorneys is 10,474. I was cautioned not to write anything substantive, but to keep it light. I guess I can reminisce a lot and even pontificate a little.

The quality of the legal education today is light years ahead of what I experienced.

PROCEDURAL CHANGES

When I began practice the Field Code was the code of civil procedure. Petitions had to be artfully drawn to avoid demurrer. Discovery consisted of motions to make more definite and certain, which was then followed by a demurrer. These motions were designed to obtain information. Countless hours were spent in drafting and arguing nonsensical matters, which generally avoided the evidence of the suit. The trick was to plead what would get by a demurrer and still keep the facts secret. In fact, one of the objections by a pleader was that the movant was just trying to find out evidence.

Kansas adopted the Federal Rules of Civil Procedure in 1964 and for the first time depositions and other forms of discovery were allowed. Excesses and abuses of the system were frequent, to the point that court rules limited the amount of permitted discovery. Speaking objections and interjections by counsel marked depositions. It became common for attorneys to tell their client that they did not need to answer a question. Again, rules of the court were adopted to stop these practices. Counsel became experts in non-answers to interrogatories, a practice which contributed to the change in the Federal Rules, obligating the parties to disclose relevant documents, things and witnesses.

Another abuse, which was too long tolerated, was the practice of failing to respond to discovery. Sometimes the practitioner would obtain an enlargement of time and then fail to provide a response until the eve of a hearing upon a motion to compel. A constant irritant was the practice of responding that the party objected to the interrogatory, but notwithstanding such objection, says..... The attorney did not sign the objection, as the rules require. This, of course, was neither an objection nor an answer, and too many courts failed to stop this practice for too long.

LEGAL EDUCATION

The quality of the legal education today is light years ahead of what I experienced. When I attended school, Washburn Law School had a fulltime faculty of 6 professors who were supplemented by 18 adjunct professors. The entire fulltime faculty had been practicing attorneys. They were all excellent and dedicated, but the curriculum did not compare with today's. The emphasis was on the practical rather than the theoretical. Today's curriculum is more detailed and intensive because of the explosion of statutes and regulations, as contrasted with the common law which was the subject of much of the teaching then. There was no LSAT testing, and the scholastic requirement for admission was an undergraduate degree, or one could obtain a combined degree with six years of college and law school. Law school tuition was, I believe, $14.00 an hour. The Board of Law Examiners customarily passed 95% or so, based solely on two days of essay

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2007 ANNUAL MEETING RECAP

Dustin J. Denning
Clark, Mize & Linville, Chtd.

Unlike in 2006 and the 10 plus inches of snow that buried the area, the weather in Kansas City held up for the 2007 annual meeting that went off without a hitch. 2007 saw a spike in attendance thanks in large part to our highlight speaker, James W. McElhaney, and the decent weather.

Annual Awards

KADC members were quite active in 2007 as evidenced by the full slate of award recipients. Outgoing President Scott Nehrbass received a plaque to acknowledge and thank him for his year of service as KADC President. Larry Pepperdine of Fisher Patterson Sayler & Smith was the gracious recipient of the Benedict Arnold award, which, though prestigious, is perhaps the least sought-after award given to one of our members (or not, depending on your perspective). This award is given periodically to a KADC member who represents a winning plaintiff in a case defended by a fellow member. Mr. Pepperdine will report at the 2008 meeting on his efforts to collect the substantial sum of money awarded by the jury to his client. Anne M. Kindling of Stormont-Vail HealthCare, Inc. in Topeka was awarded the Silver Helmet Award. The Silver Helmet is awarded intermittently by KADC to members who have made great contributions in legislative matters. F. James Robinson of Hite, Fanning & Honeyman, LLP in Wichita was given the Distinguished Service Award, primarily for his leadership and tireless work on the issue of judicial elections. And last, but certainly not least, the Board was thrilled to present Wayne Stratton of Goodell Stratton Edmonds & Palmer LLP in Topeka with the Kahrs Lifetime Achievement Award. The award is named after a co-founder of the KADC and longtime Wichita attorney, William A. Kahrs, of the former Kahrs, Nelson, Fanning & Hite firm. Mr. Kahrs had a long and distinguished legal and public service career spanning five decades. Without question, Wayne Stratton exemplifies those qualities, particularly with his work over the last several decades in the area of medical malpractice defense.

The Board was thrilled to present Wayne Stratton of Goodell Stratton Edmonds & Palmer LLP in Topeka with the Kahrs Lifetime Achievement Award.

Annual Meeting Presenters

The KADC would also like to acknowledge and thank the following speakers who helped to make the meeting a success:

Planning to Win: The Hunt for the Winning Story – James W. McElhaney, Chama, New Mexico

Damages – Limiting Damages in the Invisible Injury Case – Lynn M. Roberson, Swift, Currie, McGhee & Hiers, LLP, Atlanta, Georgia

Hot Topics Combo: Can you have ex parte contacts with treating physicians about their Medicare write-offs in KCPA actions against health care providers? – Jerry D. Hawkins, Hite, Fanning & Honeyman, LLP

Tips and Traps for Practicing in Federal Court: Under Utilized Procedures that can Give you an Edge and Pitfalls for the Unwary – Steven F. Baicker-McKee, Babst, Calland, Clements and Zomnir, P.C., Pittsburgh, Pennsylvania

The Art of Building an Appeal – Justice Lawton R. Nuss, Kansas Supreme Court

Hollywood Ethics – Tim J. Moore, Morris, Laing, Evans, Brock & Kennedy, Chartered, and Julie Moore, Young, Bogle, McCausland, Wells and Blanchard, P.A.

Kansas Case Law Update – Stephen M. Kerwick, Foulston Siefkin LLP

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FDCC CREATES LEADERSHIP INSTITUTE

By Frank Ramos, *Clarke Silvergate & Campbell, Miami, Florida*

In July 2007, the Federation of Defense and Corporate Counsel announced a new program entitled Pathways to Leadership. The first annual FDCC Leadership Institute will take place April 23-25, 2008 at the University of Chicago Gleacher Center. This program is for lawyers and is the first of its kind in the nation.

The primary goal of the Leadership Institute is to foster the development of tomorrow's lawyer leaders.

The primary goal of the Leadership Institute is to foster the development of tomorrow's lawyer leaders. Specifically, the mission of the Leadership Institute is to "train future leaders by assisting them in the recognition and evaluation of their attributes, giving them the tools to develop their leadership skills and principles, and then providing a framework to effectively put those skills and principles into action – in their firms, companies, and communities".

The target participant for the Leadership Institute is an attorney who has been in practice for six to ten years. The program is not limited to Federation law firms or company representatives, although they will receive priority in the form of early registration. Perspective students will apply for admission, and upon selection, will be offered an appointment into the program. Upon acceptance into the program, each student will complete a detailed Leadership Assessment Form. The Leadership Institute will utilize a "hands-on" approach, with students being divided into groups and assigned to a faculty member with whom the group will work throughout the program. Each student will be provided with valuable feedback regarding both subjective and objective leadership skills. In addition, faculty members will follow-up with groups throughout the following year.

In addition to the group experience, students will hear from speakers who specialize in leadership training, from leaders in the Defense Bar, and from leaders in the community. The primary training expert will be Susan Manch of Shannon & Manch, LLP. Susan is regarded as the top leadership skill builder in the country. She is regularly retained by the largest and most successful law firms throughout the country to provide in-house training. She has developed an outstanding curriculum which will be of great value to both students and their sponsoring firms.

Information regarding the Institute's Mission Statement, a summary of the program, and an early registration form can be found now on the FDCC website (www.thefederation.org). A registration discount is available for any firm or company sending three or more participants.

The Leadership Institute is targeted for your best and brightest potential leaders. This unique opportunity will provide a valuable tool for firms and companies to ensure a steady stream of future leaders. I encourage you to include this in your budgeting process for 2008, and discuss with your colleagues, the candidates you would like to send to the Institute. Should you have any questions, please contact the Leadership Institute Chair, Mike Lucey at mlucey@gordonreeves.com or contact H. Mills Gallivan at mgallivan@gwblawfirm.com. ■

EXECUTIVE DIRECTOR'S REPORT

Scott Heidner
Executive Director

Happy New Year! The holidays are just behind us, as well as a GREAT Annual Conference. If you missed it, the 2007 KADC Annual Conference was one of the best ever. James McElhaney highlighted a fantastic lineup of speakers and topics, and attendance was strong. It's never too early to put the 2008 meeting on your calendar. This year's conference will be held December 5-6.

Looking ahead, the Kansas legislature has just convened a new session. Almost all bills from the 2007 session are still in play, and new bills are already rolling in. There are many major topics this year that do not fall under the interests of KADC, but will consume valuable legislative time. These include the debate over the coal fired power plants in Holcomb, education funding, immigration, health care, and much more. Throw in the fact that 2008 is an election year for all Representatives and Senators, and you have the makings of a tough session.

I would remind and urge you, if you have not already done so, contact your legislators while the session is still in the early stages. Establish a relationship with them and let them know the issues KADC has an interest in. Tell them you would like to be a resource to consult with on relevant issues. KADC, like any association, is much stronger if its membership has cultivated relationships with a large number of legislators. Remember, you may have two Representatives and two Senators with whom you can build a relationship if your office is in a different district than your home. These time investments can repay themselves many times over! ■

KADC, like any association, is much stronger if its membership has cultivated relationships with a large number of legislators.

WELCOME NEW KADC MEMBERS

Daniel Back - Hite, Fanning & Honeyman, LLP, Wichita

Roarke Gordon - Fleeson, Gooing, Coulson & Kitch, Wichita

Christopher Heigele - Sherman Taff & Bangert P.C., Kansas City

Melissa Hoag Sherman - Lathrop & Gage LLC, Overland Park

Bart Howk - Foulston Siefkin LLP, Overland Park

Lora Jennings - Martin Pringle Oliver Wallace & Bauer LLP, Wichita

Brooks Kancel - Fleeson, Gooing, Coulson & Kitch, Wichita

Mark Katz - Sherman Taff & Bangert P.C., Kansas City

David Lockett - Martin Pringle Oliver Wallace & Bauer LLP, Overland Park

Ali Marchant - Fleeson, Gooing, Coulson & Kitch, Wichita

Adam Pankratz - Martin Pringle Oliver Wallace & Bauer LLP, Wichita

Michael Smith - Sanders Conkright & Warren LLP, Overland Park

Harold Youngentob - Goodell Stratton Edmonds & Palmer LLP, Topeka

Litigating Noncompete Agreements *(Continued from pg 1)*

fare.[19] The reasonableness requirement is the most frequently litigated issue pertaining to noncompete agreements.

Kansas courts frequently cite to the Kansas Supreme Court's opinion in *Weber v. Tillman*, 259 Kan. 457, 464, 913 P.2d 84, 90 (1996), which set forth the following four factors to be considered in analyzing whether a noncompete agreement is reasonable and, therefore, enforceable:

A prerequisite to enforcing a noncompete agreement is that the agreement must be or be part of a valid and enforceable contract.

1. Does the noncompete agreement protect a legitimate business interest of the employer?
2. Does the noncompete agreement create an undue burden on the employee?
3. Is it injurious to the public welfare?
4. Are the time and territorial limitations contained in the agreement reasonable?[20]

Noncompete agreements ancillary to an employment contract are strictly construed against the employer.[21] There is a recognized distinction between noncompete agreements incident to the sale of a business and agreements incident to employment contracts. Noncompete agreements incident to employment contracts are construed strictly against the employer, while agreements incident to the sale of a business are not so strictly construed.[22]

The employer probably bears the burden of demonstrating the reasonableness of the restraint. Although each case is governed by its own particular set of facts, ultimately the issue of reasonableness is a matter of law for the court to determine based upon the subject matter of the noncompete agreement and the surrounding circumstances.[23]

A. Threshold Issue: Is the Noncompete Agreement Part of A Valid and Enforceable Contract?

A prerequisite to enforcing a noncompete agreement is that the agreement must be or be part of a valid and enforceable contract. Kansas courts have enforced noncompete agreements that were ancillary to at-will employment relationships on several occasions.[24] The Restatement (Second) of Contracts specifically provides that "[a] restraint may be ancillary to a relationship although, as in the case of an employment at will, no contract of employment is involved."[25]

The noncompete agreement, or employment contract of which it is a part, must be supported by valid consideration,[26] which presents a question of fact.[27] Under Kansas law, there is a rebuttable presumption that contracts are supported by consideration.[28] Typically, the employer's promise to hire the employee and pay him a salary constitutes sufficient consideration for the employee's covenant not to compete. A written employment contract may be modified later by the parties to include a noncompete agreement by the employee; however, in order to be enforceable the modification must be supported by new, additional consideration.[29]

If the noncompete agreement is entered into sometime after the employee is hired, there may be an issue as to whether continued employment alone constitutes sufficient consideration for the agreement.[30] Kansas courts have held that continued employment can constitute sufficient consideration, particularly where the employee is promoted and entrusted with significant company secrets or responsibilities.[31]

The employment agreement may not be illegal. Where an employer unlawfully provided its

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Litigating Noncompete Agreements *(Continued from pg 7)*

services or was not entitled to operate, the court has held that the non-competition agreement was likewise invalid.[32]

Because actions seeking injunctive relief are tried in equity, the trial court has broad discretion in determining the reasonableness of a competition agreement.

B. Does the Noncompete Agreement Contain a Reasonable Time and Geographic Scope?

To be reasonable, the temporal and geographic restrictions of a noncompete agreement must be no greater than necessary to protect the employer's interests.[33] Reasonableness of the time and geographic-area restrictions imposed by a noncompete agreement is determined by the particular facts and circumstances in each case, e.g., what is a reasonable restriction for an employee of a company selling highly sophisticated and technical products in a small market of customers nationwide, may not be reasonable for an employee of a medical services group serving patients in a single metropolitan area.

Kansas courts have upheld or enforced noncompete agreements in a variety of circumstances involving many combinations of time and area restrictions.[34] Generally, two-year time restrictions are common and are generally upheld in Kansas.[35] Even a world-wide restriction may not be patently unreasonable where, for example, the former employee performed his job responsibilities world-wide, the employer's confidential information could be transferred world-wide by computer, and the employer's product reached customers world-wide.[36]

Because actions seeking injunctive relief are tried in equity, the trial court has broad discretion in determining the reasonableness of a competition agreement. The equitable nature of the action empowers the court to fashion its own remedy by modifying the agreement and enforcing it only to the extent the court finds reasonable. Thus, a court may modify and enforce a noncompete agreement only as to the time period and/or geographic area which the court deems reasonable under the circumstances.[37] There was once a distinction between a divisible and indivisible territorial description in noncompete agreements, and the rule was that a court had the power to modify a territorial limitation only where the territory involved was somehow divisible. However, in *Foltz v. Struxness*, 168 Kan. 714, 719, 215 P.2d 133, 137 (1950), the Kansas Supreme Court rejected that distinction in favor of a rule allowing courts to enforce restrictive covenants to the extent reasonable, regardless of the divisibility of the territorial restriction. The power to modify a noncompete agreement includes the power to enforce it beyond the time period stated in the agreement where a trial court has erred in refusing to enforce the agreement before the stated time period has elapsed.[38]

Under these authorities, depending upon the circumstances, Kansas courts may enforce a noncompete agreement according to its terms, declare it unreasonable and therefore unenforceable, or effectively rewrite the restrictive covenant and enforce it only as to the time period or geographic area determined by the court to be reasonable.

C. Does the Noncompete Agreement Protect a Legitimate Business Interest?

In order to succeed in enforcing a noncompete agreement, the employer must have a legitimate proprietary interest to protect.[39] "While [courts] defer to the basic freedom of contracting parties, only legitimate business interests may be protected by a noncompete agreement since such an agreement is in derogation of the system of free and open

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Litigating Noncompete Agreements *(Continued from pg 8)*

competition that is the hallmark of our society."[40] Employers have a legitimate business interest in preventing unfair competition, or preventing a former employee from having an unfair competitive advantage.[41] An effort or desire to prevent ordinary competition is not a valid protectable interest, and is not sufficient justification to enforce a noncompete agreement.[42]

Courts are hesitant to enforce noncompete agreements beyond what is reasonably necessary to protect the employer.[43] The question of whether a legitimate proprietary interest has been demonstrated is a question of law for the court.[44] The classic proprietary interests which are recognized are the employer's proprietary rights in its trade secrets and customer accounts, or goodwill.[45]

The question of whether a legitimate proprietary interest has been demonstrated is a question of law for the court.

Employers have a protectable interest in and right to maintain confidentiality of trade secrets or other commercially sensitive information pertaining to the employer's business practices.[46] The existence of a trade secret is an issue for the trier of fact.[47] Kansas has adopted the Uniform Trade Secrets Act, which essentially codifies the common law of unfair competition as it relates to misappropriation of trade secrets. See K.S.A. 60-3320 *et seq*. An employee may be liable for the unauthorized use or disclosure of a trade secret owned by his employer, regardless of whether there exists any employment agreement specifically applicable to the employer's trade secrets. K.S.A. 60-3321.

Where there is an employment agreement imposing restrictions relating to trade secrets, the restriction must not unreasonably preclude general communication of ideas.[48] A court may modify an unreasonably broad restriction against communication in order to protect against infringement of an employee's right to earn a living elsewhere after termination of his employment.[49]

Another well-established protectable interest is customer contacts and relationships.[50] The "customer contacts" interest received extensive analysis by the Kansas Supreme Court in *Eastern Distributing Co. v. Flynn*, 222 Kan. 666, 567 P.2d 1371 (1977). The court discussed in detail the nature of evidence necessary to demonstrate a "customer contacts" interest, and relied heavily on an article by Professor Harlan M. Blake, "Employee Agreements Not To Compete," 73 Harvard Law Review 625 (1960). The court quoted from Professor Blake's article the following standards:

> The "customer contact" basis posts a substantial risk of loss of clientele to an employee because of the nature of his work. Whether the risk will be sufficiently great to warrant a restriction, and how broad a restriction will be permitted depends upon the extent to which the employee is likely to be identified in the customer's mind with the product or service being sold. The most important factors seem to be (1) the frequency of the employee's contacts with the customers and whether they are the employer's only relationships with those customers, (2) the locale of the contact, and (3) perhaps most important, the nature of the functions performed by the employee. (Pp. 657-659).

Eastern Distributing Co. v. Flynn, 222 Kan. at 672, 567 P.2d at 1377. An employer's customer contacts should be protected where the employee's relationship with the employer's customers was such that there is a substantial risk that the employee may be able to divert all or part

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Litigating Noncompete Agreements *(Continued from pg 9)*

of the business, such as where "the business is one in which the employee is the sole or primary contact with the customers and in which a close personal relationship with them is fostered."[51]

Referral sources are another legitimate business interest which may be protected by a noncompete agreement.[52] A medical employer has a legitimate business interest in referral sources and referral patterns. Other jurisdictions have recognized that an employer has a legitimate business interest in confidential business information, loss of clients, good will, reputation, and seeing that contracts with clients continue.[52]

An employer does not have a protectable business interest in specialized training where the training is nonexclusive and not unique, there was no special relationship between the former employee and any of the employer's clients, and there was no allegation that the former employee conveyed any trade secrets.[54]

D. Does the Noncompete Agreement Place an Undue Burden on the Employee?

As part of the reasonableness analysis, the court will consider whether the noncompete agreement creates an undue burden on the employee.

As part of the reasonableness analysis, the court will consider whether the noncompete agreement creates an undue burden on the employee.[55] This factor is not typically given as much consideration as the other factors as it is generally consumed by considerations of the reasonableness of the temporal and geographic scope of the noncompete agreement. The weight afforded this factor also may be arguably lessened where the employment contract affords the employee the option of paying liquidated damages in lieu of compliance with the noncompete agreement.[56]

A covenant under which a former employee "is not restricted from pursuing his chosen profession altogether" does not create an undue burden on the employee.[57] This is the era of the "cyberspace workplace" – a place where employees and employers utilize virtual work, remote employment and other aspects of employment.[58] "With the increase in employee mobility, the globalization of product markets, and the thrust of technology, the need for [protection to employers] is more pressing than ever and the use of noncompete agreements is more prevalent."[59]

E. Is the Noncompete Agreement Injurious to the Public Welfare?

Kansas courts also apply certain public policy considerations when evaluating the reasonableness of a noncompete agreement. Whether a restrictive covenant is contrary to public policy is a question of law.[60]

A noncompete agreement is not enforceable when it is "injurious to the public welfare."[61] A consistently recognized policy is the need to sustain the legality of contracts entered into freely and to refrain from interfering with the basic freedom of contract.[62] "It is the duty of the courts to sustain the legality of contracts in whole or in part when fairly entered into, if reasonably possible to do so, rather than to seek loopholes and technical legal grounds for defeating their intended purpose. The paramount policy is that freedom of contract is not to be interfered with lightly."[63] "[I]f there is one thing which more than another public policy requires, it is that [persons] of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."[64]

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Litigating Noncompete Agreements *(Continued from pg 10)*

However, "since non-competition agreements in an employer-employee setting can have draconian results for a suddenly unemployable former employee, such agreements are strictly construed against the employer."[65]

Practitioners representing either party should thus be familiar with the statutes, court rules, and case law governing injunctive relief.

Analyzing the effect on the public interest of enforcing a noncompete agreement against a medical professional, Kansas courts must "weigh the potential injury to the public welfare by a shortage of [physicians of that specialty in the restricted area] against the freedom to contract."[66] Where the employee was engaged in a medically necessary subspecialty, the court may find that enforcing the noncompete agreement threatens the public welfare.[67] Conversely, the court may be more inclined to enforce a noncompete agreement where the geographic area contains an adequate number of physicians and the employer is not attempting to create a monopoly.[68]

II. Remedies

An employer's remedy for an employee's violation of a noncompete agreement may be by an action for damages, for a declaratory judgment, or for an injunction. The employment contract may contain a liquidated damages provision by which the parties agreed on the available remedy in the event the restrictive covenant is breached.[69]

Most cases involving noncompete agreements involve injunctive relief. There are at least two significant reasons. First, actual damages caused by the violation of a noncompete agreement are usually difficult if not impossible to prove. Second, the employer typically prefers to enforce the employee's compliance with the agreement, rather than to recover monetary damages, where the agreement forbids solicitation of customers or disclosure of confidential information. Practitioners representing either party should thus be familiar with the statutes, court rules, and case law governing injunctive relief. In state court, K.S.A. 60-901 *et seq*. are the applicable statutes. In federal court, Rule 65 of the Federal Rules of Civil Procedure is controlling. To obtain preliminary injunctive relief in federal court, the movant must show (1) a substantial likelihood of success on the merits; (2) irreparable harm in the absence of an injunction; (3) the threatened harm outweighs the injury that an injunction may impose upon the opposing party; and (4) an injunction is not adverse to the public interest.[70]

In the following state cases, the courts either affirmed the entry of an injunction to enforce a noncompete agreement or ruled that enforcement by injunction should have been granted: *Idbeis v. Wichita Surgical Specialists*, 279 Kan. 755, 112 P.3d 81 (2005); *Weber v. Tillman*, 259 Kan. 457, 463, 913 P.2d 84, 89 (1996); *Puritan-Bennett Corp. v. Richter*, 235 Kan. 251, 679 P.2d 206 (1984); *Eastern Distributing Co., Inc. v. Flynn*, 222 Kan. 666, 567 P.2d 1371 (1977); *John Lucas & Co. v. Evans*, 141 Kan. 57, 40 P.2d 359 (1935); *Mills v. Ceveland*, 87 Kan. 549, 125 P. 58 (1912); *Foltz v. Struxness*, 168 Kan. 714, 215 P.2d 133 (1950); *Caring Hearts Personal Home Services, Inc. v. Hobley*, 35 Kan.App.2d 345, 130 P.3d 1215 (2006); *Mowery Clinic, L.L.C. v. Hofer*, No. 94-103, 2005 WL 3098729, at *2, 122 P.3d 838 (Kan. App. Nov. 18, 2005); *Graham v. Cirocco*, 31 Kan.App.2d 563, 69 P.3d 194 (2003); *Puritan-Bennett Corp. v. Richter*, 8 Kan.App.2d 311, 657 P.2d 589 (1983).

Injunctive relief granted at the federal court level is demon-

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strated in the following cases: *Universal Engraving, Inc. v. Duarte*, 519 F.Supp.2d 1140, 1151 (D. Kan. 2007); *American Fidelity Assurance Corporation v. Leonard*, 81 F.Supp.2d 1115 (D. Kan. 2000); *SizeWise Rentals, Inc. v. Mediq/PRN Life Support Services, Inc.*, 87 F.Supp.2d 1194, 1200 (D. Kan. 2000); *Heatron v. Shackelford*, 898 F. Supp. 1491 (D. Kan. 1995); *Inter-Collegiate Press, Inc. v. Myers*, 519 F. Supp. 765 (D. Kan. 1981); *Uarco, Inc. v. Eastland*, 584 F. Supp. 1259 (D. Kan. 1984); *Partsmaster, Inc. v. Johnson*, 475 F. Supp. 417 (D. Kan. 1979). *See also Olin Water Products v. Midland Research Laboratories, Inc.*, 596 F. Supp. 412 (E.D. Ark. 1984) (applying Kansas law).

Injunctive relief is available where the employer demonstrates the threat of irreparable injury and an inadequate remedy at law. Generally, an injunction remedy is uniquely appropriate in an action brought for violation of a noncompete agreement because the breach of such an agreement by its very nature results in irreparable injury to the employer for which relief is not available by an action at law for damages.[71] The rationale for allowing injunctive relief typically is that the object of a noncompete agreement can be attained only by the parties conforming expressly to the terms of the agreement.

The absence of proof of actual monetary damages suffered by the employer does not necessarily preclude enforcement by injunction of a covenant not to compete.[72] Indeed, the very fact that it is extremely difficult to prove the existence of actual damages caused by the breach can be sufficient to demonstrate irreparable injury.[73]

Where there is no dispute regarding the enforceability of the noncompete agreement, a former employee's defenses may follow the elements necessary to obtain injunctive relief.

III. Defenses to Enforcement of a Noncompete Agreement

Defenses available to an employee who has been sued for an alleged violation of a noncompete agreement generally follow the elements necessary to enforce a noncompete. In other words, proof that there was not a valid or enforceable contract,[74] that the covenant is unreasonable,[75] or that the employer has no legitimate protectable interest[76] would be available defenses in actions of this nature.

Although a noncompete agreement containing unreasonable restrictions is unenforceable, it should be remembered that this may not be a complete defense in view of the rule in Kansas that a court of equity has the power to modify an unreasonable covenant and to enforce it to the extent the court deems reasonable.[77] Therefore, the employee may be successful in convincing a court that a noncompete agreement is unreasonable, yet find that the court will nevertheless enforce the covenant in some other manner consistent with what the court determines to be reasonable under the circumstances.

Where there is no dispute regarding the enforceability of the noncompete agreement, a former employee's defenses may follow the elements necessary to obtain injunctive relief.[78] A former employee may also defend on the basis that he or she did not violate the noncompete agreement.[79] For example, absent an express contractual prohibition to the contrary, a party who covenants not to compete in a particular business is not necessarily precluded from leasing or selling property or loaning money to others engaged in that business, so long as the covenanting party does not engage in the business as a partner, organize a competing corporation, engage in a similar business under corporate form, or take an active interest in the

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encouragement of the business in other ways.[80]

While an employee may have a statute of frauds defense to enforcement of an oral covenant not to compete that cannot be performed within one year, the doctrine of promissory estoppel may provide a justification to overcome the statute of frauds defense where the party seeking to enforce the agreement can show reasonable reliance on the oral promise to sign the agreement.[81]

An employer's prior material breach of the employment contract may preclude the employer from recovering for the employee's subsequent breach of the noncompete agreement.[82] Moreover, an employer will probably not be successful in arguing that an employee waived a series of breaches by the employer by continuing to work for the employer following the first breach, at least where the underlying employment contract provides that waiver by either party of a breach of the agreement shall not operate as a waiver of any subsequent breach.[83] A former employee may also rely on other defenses generally available, such as unclean hands and equitable estoppel.[84]

While an employer's termination of an employee does not generally preclude enforcement of a restrictive covenant, it may preclude enforcement if the termination was wrongful,[85] constituted a prior breach of the employment contract by the employer,[86] or if the covenant expressly provides that it applies when the employee terminates the employment.[87]

Finally, a significant delay in asserting a claim for breach of a noncompete agreement can be the basis for a defense based on laches.[88]

IV. Litigation Strategies[89]

Tactics employed by counsel representing the employer or the employee in litigating disputes over noncompete agreements will be determined according to the unique circumstances present in each case. The strategic approach to a lawsuit involving a salesman-employee who solicited customers in a single state for the sale of a generic product will be quite different from the approach taken in a suit where a key engineer-employee who invented a secret process has become employed by the only competitor in a highly specialized industry. Flexibility and imagination are important ingredients in developing strategies for litigating these types of cases. The following are a few suggestions for counsel to consider.

A. Be Prepared to Act Quickly.

A lawsuit brought to enforce a covenant not to compete almost always involves a request for immediate injunctive relief. Typically a hearing on plaintiff's request for a preliminary injunction occurs within a relatively short period of time after the lawsuit is filed, and as a practical matter the case may be won or lost at this stage. Time limitations will not allow counsel to wait until discovery has been undertaken or completed to determine the theories for prosecution or defense. To the extent possible, counsel would decide immediately on a "game plan" for the injunction hearing. Counsel should then be prepared to gather evidence and conduct discovery on an expedited basis in preparation for the hearing.

B. Consider the Forum.

Choosing an appropriate forum can be a significant tactical consideration for the plaintiff-employer.

Choosing an appropriate forum can be a significant tactical consideration for the plaintiff-employer. Counsel should consider which court can acquire personal jurisdiction over the

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defendant-employee,[90] in which court may an injunction (once acquired) be easily enforced against the employee, and which court has the power to issue process compelling production of critical evidence. For example, if suit is brought in a state other than where the defendant-employee resides, issues may arise as to the court's personal jurisdiction or its power to enforce an injunctive remedy. Bringing suit in the jurisdiction where important witnesses or documents are located facilitates compelling this evidence by subpoena during discovery and at trial.

Counsel should also consider whether to file suit in state or federal court. Factors bearing on this decision include the relative ease in obtaining an early hearing date, the local practice of judges concerning ex parte temporary restraining orders, and the substantive law on the elements necessary to obtain injunctive relief. These same factors may make it desirable for counsel representing the defendant-employee to remove a case to federal court if there is a proper basis for such jurisdiction.

Counsel representing either side in these cases should emphasize the "reasonableness" issue in developing evidence for the hearing or trial.

C. Research the Judge.

Because these cases normally seek equitable relief, the court will be trier of fact. Also, the court will decide the critical legal issues such as whether the time and territorial restrictions were reasonable, and the court has the power to unilaterally modify the scope of the noncompete agreement if appropriate. It is therefore important, to the extent possible, for counsel to find out about the judge to whom the case has been assigned. Counsel should try to obtain copies of prior decisions authored by the judge, or consult with other members of the bar who have tried similar cases before that judge. As earlier indicated, the key issue in this type of litigation is whether the noncompetition restraint was "reasonable." What is reasonable to one judge may not necessarily be so for another. It is likely that different judges will have different philosophies and attitudes toward resolving the types of issues raised in these lawsuits, including the propriety of granting ex parte relief. Knowing about these philosophies and attitudes in advance can be an advantage over the opponent.

D Focus on the "Reasonableness" Issue.

Counsel representing either side in these cases should emphasize the "reasonableness" issue in developing evidence for the hearing or trial. A key objective is to discover, develop, and present evidence to persuade the court that the covenant in question is (or is not) a reasonable one. Counsel also should try to anticipate their opponent's position on this issue and be prepared to offer rebuttal evidence.

Counsel for the plaintiff-employer should remember that he has the burden to prove reasonableness, *i.e.*, it is insufficient to prove that there existed a noncompete agreement and that the defendant violated it. Plaintiff must be prepared to offer evidence that the time and territory restrictions in the agreement were reasonable and necessary to protect plaintiff's proprietary interests.

A very basic example illustrates the type of evidence with can be probative on the reasonableness issue. Evidence that the defendant-employee had called upon customers located in three different states while employed by plaintiff would tend to prove that a restriction prohibiting competition in those three states were

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reasonable. On the other hand, proof that a defendant called upon customers in only one state while employed by plaintiff would tend to demonstrate that a restriction against this competition in a ten-state area was unreasonable.

E. Consider the Need for Electronic Discovery.

Because nearly all employers and their employees transact business using computer-based processes, such as e-mail, many disputes involving noncompete agreements will have electronic discovery implications. Due to the volatile nature of electronic information, it is imperative that counsel act early and quickly to preserve and obtain relevant electronic information of one's client and the opposing party.

As soon as you learn of the dispute, notify your client in writing of the duty to preserve electronic data and institute a litigation hold. This may include disabling e-mail or document destruction policies currently in place. Make sure the litigation hold letter is disseminated to all persons within the company who may have relevant data, and make sure the letter explains the consequences of failure to preserve relevant information. If you do not already know your client's computer systems, practices, and processes or retention policies, you will need to familiarize yourself with them immediately.

Counsel should also consider the advantages of employing a forensic expert to assist with electronic discovery issues.

If you believe the opposing party may have electronic data relevant to the dispute, notify them at the outset of the duty to preserve such information and the potential consequences of spoliation. In the letter, identify the material issues and potential sources of electronic data.

When a dispute involves electronic information, it is helpful to develop an electronic discovery plan for preserving your client's relevant electronic data to avoid spoliation and obtaining the opposing party's relevant electronic data. First, consider where relevant data may be located, in regard to both your client and the opposing party. Potential sources may include, for example, hard drives, servers, backup media, e-mail servers, business applications (word processing, databases), internet applications (e-mail, web traffic), peripheral or mobile devices (laptops, printers, faxes, pagers, blackberries, wireless telephones), computer-based record storage (disks, backup tapes, internal/external drives, CD Roms, zip drives), home computers or laptops, digital phone records, and GPS systems. Do not forget to consider potential outside recipients of relevant data.

Due to the nature of these disputes, key electronic data is often found in the form of metadata or deleted data that has not yet been overwritten by a computer and may still be recoverable. Counsel should also consider the advantages of employing a forensic expert to assist with electronic discovery issues.

Discovery of electronic information is governed by the generally applicable rules of civil procedure. Information about the opposing party's computer and e-mail systems and retention programs is discoverable.[91] Counsel may also want to depose corporate designees to learn more about the opposing party's computer systems and its efforts to comply with electronic discovery obligations.

Requests for the production of documents should focus on obtaining information from specific sources in specific locations and should identify key sources as

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mandatory, but not exclusive. When answering discovery requests pertaining to electronic data, be sensitive to inadvertent production of privileged information. To protect privileged information when producing electronic data, counsel should consider the need for a clawback agreement, which allows the producing party an opportunity to review any recovered data for privilege before producing it to the requesting party.

F. Obtain Evidence Sensitive to the Opponent.

In this type of litigation it is usually possible for both sides to compel production of evidence which may be highly sensitive to the opponent. Often this type of evidence can be critical to the case. For example, the defendant-employee may want to take statements or depositions from the plaintiff-employer's customers. Other former employees of the plaintiff-employer, who may not longer have any loyalty to plaintiff, is another possible source of evidence. If the plaintiff-employer claims that the defendant-employee has misappropriated trade secrets or confidential information such as customer lists, defense counsel should require production and disclosure of the specific proprietary information at issue. Counsel for plaintiff should consider taking depositions from key officials of defendant's new employer, and obtaining records by subpoena from the new employer.

G. Be Aggressive.

The very nature of this litigation requires the plaintiff-employer to take an aggressive approach and to act quickly. Normally suit is filed against the former employee only. However, consideration should be given, where the facts warrant it, to joining the former employee's new employer as an additional defendant, e.g., if the new employer knowingly induced the employee to change positions in violation of an employment agreement.

Under the Kansas Uniform Trade Secrets Act, a finding that the subsequent employer of a former employee subject to a duty not to disclose its former employer's trade secrets intended to profit from such disclosure is "sufficient to categorize [the subsequent employer] itself as a user of a trade secret. . . ."[92] Moreover, a former employee's subsequent employer cannot shield itself from liability by characterizing its relationship with the former employee as an independent contractor relationship where the subsequent employer has knowledge the former employee is disclosing information with respect to which he was subject to a fiduciary duty of secrecy.[93]

However, a competitor's act of hiring a plaintiff rival's employees in violation of a noncompete agreement executed between the plaintiff and its employees falls within the competitor's privilege doctrine and does not constitute intentional interference with prospective economic advantage.[94]

Counsel representing the plaintiff-employer should consider whether to seek monetary damages in addition to declaratory judgment.

Counsel representing the plaintiff-employer should consider whether to seek monetary damages in addition to declaratory judgment. Counsel should keep in mind that the right to a jury trial is unavailable where the action is only one for declaratory judgment.[95]

Counsel representing the defendant-employee should also consider methods for taking the offensive. If a dispute has arisen regarding a noncompete agreement but the employer has not yet filed suit, counsel for the employee may want to file a declaratory judgment suit for an interpretation of the validity of the contract and its enforceabil-

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ity. After the employee has been sued, defense counsel should explore whether his client has any counterclaims against the employer. Any such claims may well be compulsory.

H. Consider the Use of Experts.

Expert witnesses may be extremely effective in prosecuting or defending cases of this nature. Counsel should consider using experts to testify about the nature of the business or industry in question, the type of market involved, or the nature of competition in the market place. Expert witnesses would be particularly persuasive in assisting the court in understanding highly technical or complex products or markets. Experts may also be appropriate if there is a disputed issue as to the existence of a trade secret or other confidential proprietary information. Where the noncompete agreement involves a medical professional in a medically necessary subspecialty, an expert will likely be necessary to show, for example, the doctor to patient ratio in that subspecialty in order to prove that enforcement would or would not be injurious to the public welfare. Generally, sources of expert witnesses would include employees of the plaintiff-employer or employees of other competitors in the industry.

I. Prove the Equities.

As in any equity case, it is important to develop and emphasize elements of the case which will appeal to the court's sense of fairness.

As in any equity case, it is important to develop and emphasize elements of the case which will appeal to the court's sense of fairness. A court sitting in equity has broad discretion in determining the issues and fashioning relief. The court can consider and may be persuaded by any evidence which tends to tip the scales in favor of one side as opposed to the other.

Evidence favoring the employer or the employee on a variety of issues may be probative in balancing the equities. For example, what were the circumstances under which the employee signed the noncompete agreement? Did anyone have the advice of counsel? How was the employee treated by the employer during this employment? What were the relative levels of sophistication of the employee and employer? What were the reasons for and circumstances surrounding the employee's leaving his employment? What was the extent, if any, of the employee's access to proprietary information of the employer? Were any proprietary information, data, or materials acquired by the employee through improper means? How much time, effort, and expense for the employee's training and education was invested by the employer? Has the employer suffered any demonstrable monetary loss? Under what circumstances was the employee hired by his new employer? These types of issues should be considered by counsel in marshalling evidence for the injunction hearing or trial.

V. Conclusion

The legal principles governing the validity and enforceability of noncompete agreements in Kansas are not complex. Counsel representing their party can quickly become familiar with these principles. The real challenge in litigating these disputes is to act fast and to be creative in designing strategies for discovery and trial and in developing the evidence. ■

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1. This article expands on co-author Steve Ruse's 1986 article on this subject: "Litigating Noncompetition Agreements in Kansas," Vol. 55, No. 3, *Journal of the Kansas Bar Association* (April 1986).
2. *Weber v. Tillman,* 259 Kan. 457, 463, 913 P.2d 84, 89 (1996) (quoting *Foltz v. Struxness,* 168 Kan. 714, 215 P.2d 133 (1950)).
3. *Universal Engraving, Inc. v. Duarte,* 519 F.Supp.2d 1140, 1151 (D. Kan. 2007).
4. *American Maplan Corp. v. Heilmayr,* 179 F.Supp.2d 1249, 1252 (D. Kan. 2002).
5. *Eastern Distributing Co. v. Flynn,* 222 Kan. 666, 567 P.2d 1371 (1977).
6. *John Lucas & Co. v. Evans,* 141 Kan. 57, 40 P.2d 359 (1935).
7. *Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp.,* 45 F.Supp.2d 1164 (D. Kan. 1999); *Foltz v. Struxness,* 168 Kan. 714,

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215 P.2d 133 (1950); *Mills v. Cleveland,* 87 Kan. 549, 125 P. 58 (1912).

8. *Pohlman v. Dawson,* 63 Kan. 471, 65 P. 689 (1901).
9. *Puritan-Bennett Corp. v. Richter,* 8 Kan.App.2d 311, 657 P.2d 589 (1983), *on appeal after remand,* 235 Kan. 251, 679 P.2d 206 (1984).
10. *Inter-Collegiate Press, Inc. v. Myers,* 519 F. Supp. 765 (D. Kan. 1981).
11. *Uarco, Inc. v. Eastland,* 584 F. Supp. 1259 (D. Kan. 1984).
12. *Partsmaster, Inc. v. Johnson,* 475 F. Supp. 417 (D. Kan. 1979).
13. *Olin Water Services v. Midland Research Laboratories, Inc.,* 596 F. Supp. 412 (E.D. Ark. 1984) (applying Kansas law).
14. *Caring Hearts Personal Home Services, Inc. v. Hobley*, 35 Kan.App.2d 345, 130 P.3d 1215 (2006).
15. *Idbeis v. Wichita Surgical Specialists,* 279 Kan. 755, 112 P.3d 81 (2005).
16. *Heatron v. Shackelford,* 898 F. Supp. 1491 (D. Kan. 1995).
17. *Universal Engraving, Inc. v. Duarte,* 519 F.Supp.2d 1140 (D. Kan. 2007).
18. *Heatron, Inc. v. Shackelford,* 898 F. Supp. 1491, 1499 (D. Kan. 1999); *see also Eastern Distributing Co. v. Flynn*, 222 Kan. 666, 670, 567 P.2d 1371, 1376 (1977); *H&R Block, Inc. v. Lovelace*, 208 Kan. 538, 543-544, 493 P.2d 205, 210 (1972); *Puritan-Bennett Corp. v. Richter,* 8 Kan. App.2d 311, 313, 657 P.2d 589, 591 (1983).
19. *See Weber v. Tillman,* 259 Kan. 457, 462, 913 P.2d 84, 89 (1996).
20. *Weber v. Tillman,* 259 Kan. 457, 464, 913 P.2d 84, 90 (1996); *see also Universal Engraving, Inc. v. Duarte,* 519 F.Supp.2d 1140, 1151 (D. Kan. 2007); *Graham v. Cirocco,* 31 Kan.App.2d 563, 568, 69 P.3d 194, 198 (2003).
21. *Universal Engraving, Inc. v. Duarte,* 519 F.Supp.2d 1140, 1151 (D. Kan. 2007); *American Fidelity Assurance Corp. v. Leonard,* 81 F.Supp.2d 1115, 1120 (D. Kan. 2000); *Sprint Corp. v. DeAngelo,* 12 F.Supp.2d 1188, 1190, 1193 (D. Kan. 1998); *Idbeis v. Wichita Surgical Specialists,* 279 Kan. 755, 762, 112 P.3d 81, 87 (2005); *General Surgery, P.A. v. Suppes,* 24 Kan.App.2d 753, 755, 953 P.2d 1055, 1057 (1998); *c.f., American Maplan Corp. v. Heilmayr,* 179 F.Supp.2d 1249, 1252 (D. Kan. 2002) (noting this rule of construction did not apply because contract was unambiguous).
22. *Eastern Distributing Co. v. Flynn,* 222 Kan. 666, 670-71, 567 P.2d 1371, 1376 (1977); *H&R Block, Inc. v. Lovelace,* 208 Kan. 538, 544, 493 P.2d 205, 211 (1972); *Wright v. Belt,* 6 Kan.App.2d 854, 857, 636 P.2d 188, 191 (1981).
23. *Eastern Distributing Co. v. Flynn,* 222 Kan. at 670-671, 587 P.2d at 1376; *H&R Block, Inc. v. Lovelace,* 208 Kan. at 544, 493 P.2d at 210.
24. *See Weber v. Tillman,* 259 Kan. 457, 913 P.2d 84 (1996); *Puritan-Bennett Corp. v. Richter,* 8 Kan.App.2d 311, 657 P.2d 589 (1983), *on appeal after remand,* 235 Kan. 251, 679 P.2d 206 (1984).
25. Restatement (Second) of Contracts § 188, cmt. g (1981); *see also Morriss v. Coleman Co.,* 241 Kan. 501, 518, 738 P.2d 841, 851 (1987) (considering whether the implied contractual duty of good faith and fair dealing should be incorporated into at-will employment relationships and referring to an at-will relationship as an "employment at-will contract.").
26. *Heatron, Inc. v. Shackelford,* 898 F. Supp. 1491, 1499 (D. Kan. 1999); *Puritan-Bennett Corp. v. Richter*, 8 Kan.App.2d 311, 313, 657 P.2d 589 591 (1983).
27. *Evco Distributing, Inc. v. Brandau,* 6 Kan.App.2d 53, 59, 626 P.2d 1192, 1198 (1981).
28. *Heatron, Inc. v. Shackelford,* 898 F. Supp. 1491, 1499 (D. Kan. 1999); *Uarco, Inc. v. Eastland*, 584 F. Supp. 1259, 1262 (D. Kan. 1984).
29. *Evco Distributing, Inc. v. Brandau*, 6 Kan.App.2d 53, 58, 626 P.2d 1192, 1196 (1981).
30. *Puritan-Bennett Corp. v. Richter*, 8 Kan.App.2d 311, 314, 657 P.2d 589, 592 (1983); *see also Heatron v. Shackelford,* 898 F. Supp. 1491, 1499 (D. Kan. 1995).
31. *Id.*
32. *Early Detection Center, Inc. v. Wilson*, 248 Kan. 869, 811 P.2d 860 (1991); *but see*

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Caring Hearts Personal Home Services, Inc. v. Hobley, 35 Kan.App.2d 345, 130 P.3d 1215 (2006).

33. *Universal Engraving, Inc. v. Duarte,* 519 F.Supp.2d 1140, 1153 (D. Kan. 2007); *Puritan-Bennett Corp. v. Richter,* 235 Kan. 251, 254, 679, P.2d 206, 211 (1984).

34. *SizeWise Rentals, Inc. v. Mediq/PRN Life Support Services, Inc.,* 87 F.Supp.2d 1194, 1200 (D. Kan. 2000) (one year, barring distributor from leasing competitor's bariatric equipment to supplier's customers); *American Fidelity Assurance Corp. v. Leonard,* 81 F.Supp.2d 1115, 1120-21 (D. Kan. 2000) (two years; nine-county sales territory); *Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp.,* 45 F.Supp.2d 1164 (D. Kan. 1999) (three years; one county); *Uarco, Inc. v. Eastland,* 584 F. Supp. 1259 (D. Kan. 1984) (two years; sales territory assigned); *Inter-Collegiate Press, Inc. v. Myers,* 519 F. Supp. 765 (D. Kan. 1981) (two years; eleven-state sales area); *Partsmaster, Inc. v. Johnson,* 475 F. Supp. 417 (D. Kan. 1979) (18 months; multi-county sales territory); *Weber v. Tillman,* 259 Kan. 457, 913 P.2d 84 (1996) (two years; 30-mile radius); *Eastern Distributing Co. v. Flynn*, 222 Kan. 666, 567 P.2d 1371 (1977) (one year; four-county sales territory); *Foltz v. Struxness*, 168 Kan. 714, 215 P.2d 133 (1950) (ten years; five-mile radius of Hutchinson); *John Lucas & Co. v. Evans,* 141 Kan. 57, 40 P.2d 359 (1935) (five years; "Topeka or vicinity"); *Pohlman v. Dawson,* 63 Kan. 471, 65 P. 689 (1901) (no time restriction; city of Russell); *Puritan-Bennett Corp. v. Richter,* 8 Kan.App.2d 311, 657 P.2d 589 (1983), *on appeal after remand,* 235 Kan. 251, 679 P.2d 206 (1984) (one year; no territorial restriction).

35. *Graham v. Cirocco,* 31 Kan.App.2d 563, 570, 69 P.3d 194, 199 (2003); *see, for example, Hearts Personal Home Services, Inc. v. Hobley*, 35 Kan.App.2d 345, 130 P.3d 1215 (2006).

36. *Universal Engraving, Inc. v. Duarte,* 519 F.Supp.2d 1140, 1153-54 (D. Kan. 2007).

37. *Puritan-Bennett Corp. v. Richter,* 8 Kan.App.2d 311, 316, 657 P.2d 589, 593 (1983); *see, for example, Universal Engraving, Inc. v. Duarte,* 519 F.Supp.2d 1140 (D. Kan. 2007) (enforcing world-wide noncompete agreement, but reducing temporal scope from five to two years); *American Fidelity Assurance Corp. v. Leonard,* 81 F.Supp.2d 1115 (D. Kan. 2000) (reducing scope of two-year covenant to apply only to former employee's nine-county sales territory and not to all customers former employer); *Mowery Clinic, L.L.C. v. Hofer,* No. 94-103, 2005 WL 3098729, at *2, 122 P.3d 838 (Kan. App. Nov. 18, 2005) (reducing territorial scope where covenant prohibited physician's subsequent employment by VA clinic that was not in competition with former employer); *Graham v. Cirocco,* 31 Kan.App.2d 563, 69 P.3d 194 (2003) (holding 150-mile noncompetition restriction on solicitation was acceptable, but modifying a 25-mile limitation on office placement and prohibition of practice in the entire Kansas City metropolitan area that the court found exceeded reasonable scope).

38. *Puritan-Bennett Corp. v. Richter,* 8 Kan.App.2d 311, 316, 657 P.2d 589, 593 (1983), *appeal after remand,* 235 Kan. 251, 257, 679 P.2d 206, 212 (1984).

39. *Universal Engraving, Inc. v. Duarte,* 519 F.Supp.2d 1140, 1151-52 (D. Kan. 2007); *Uarco, Inc. v. Eastland,* 584 F. Supp. 1259, 1262 (D. Kan. 1984); *Idbeis v. Wichita Surgical Specialists,* 279 Kan. 755, 762, 112 P.3d 81, 86 (2005); *Weber v. Tillman,* 259 Kan. 457, 462, 913 P.2d 84, 89 (1996); *Eastern Distributing Co. v. Flynn,* 222 Kan. 666, 671, 567 P.2d 1371, 1376 (1977); *Evco Distributing, Inc. v. Brandau,* 6 Kan.App.2d 53, 58, 626 P.2d 1192, 1197 (1981).

40. *Caring Hearts Personal Home Services, Inc. v. Hobley*, 35 Kan.App.2d 345, 353, 130 P.3d 1215, 1222 (2006).

41. *Universal Engraving, Inc. v. Duarte,* 519 F.Supp.2d 1140, 1152 (D. Kan. 2007); *Weber v. Tillman,* 259 Kan. 457, 467, 913 P.2d 84, 92 (1996).

42. *Weber v. Tillman,* 259 Kan. 457, 462, 913 P.2d 84, 89 (1996); *Idbeis v. Wichita Surgical Specialists,* 279 Kan. 755, 762, 112 P.3d 81, 87 (2005); *Evco Distributing, Inc. v. Brandau*, 6 Kan.App.2d 53, 58, 626 P.2d 1192, 1197 (1981).

43. *See Puritan-Bennett Corp. v. Richter,* 235 Kan. 251, 256-57, 679 P.2d 206, 210-11 (1984).

44. *Idbeis v. Wichita Surgical Specialists,* 279 Kan. 755, 766, 112 P.3d 81, 89 (2005).

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45. *See Universal Engraving, Inc. v. Duarte,* 519 F.Supp.2d 1140, 1151-52 (D. Kan. 2007) (trade secrets); *American Fidelity Assurance Corp. v. Leonard,* 81 F.Supp.2d 1115, 1120 (D. Kan. 2000) (customer contacts).
46. *Universal Engraving, Inc. v. Duarte,* 519 F.Supp.2d 1140, 1151 (D. Kan. 2007); *Heatron, Inc. v. Shackelford,* 898 F. Supp. 1491, 1500 (D. Kan. 1995); *Puritan-Bennett Corp. v. Richter*, 235 Kan. 251, 256-57, 679 P.2d 206 (1984).
47. *Universal Engraving, Inc. v. Duarte,* 519 F.Supp.2d 1140, 1151 (D. Kan. 2007).
48. *Puritan-Bennett Corp. v. Richter,* 235 Kan. at 256-257, 679 P.2d at 211.
49. *Id.*
50. *Caring Hearts Personal Home Services, Inc. v. Hobley,* 35 Kan.App.2d 345, 354, 130 P.3d 1215, 1222 (2006).
51. *American Fidelity Assurance Corp. v. Leonard*, 81 F.Supp.2d 1115, 1120 (D. Kan. 2000) (quoting *Eastern Distributing*, 567 P.2d at 1376-77 (quoting Professor Harland M. Blake, Employee Agreement Not To Compete, 73 Harv.L.Rev. 625 (1960))).
52. *Idbeis v. Wichita Surgical Specialists,* 279 Kan. 755, 768, 112 P.3d 81, 90 (2005).
53. *Weber v. Tillman,* 259 Kan. 457, 467, 913 P.2d 84, 91 (1996).
54. *Allen, Gibbs, & Houlik, L.C. v. Ristow,* 32 Kan.App.2d 1051, 1057-58, 94 P.3d 724, 728 (2004).
55. *Idbeis v. Wichita Surgical Specialists,* 279 Kan. 755, 763, 112 P.3d 81, 87 (2005).
56. *See Idbeis v. Wichita Surgical Specialists,* 279 Kan. 755, 763, 112 P.3d 81, 87 (2005).
57. *Weber v. Tillman,* 259 Kan. 457, 465, 913 P.2d 84, 91 (1996).
58. *See* Joan T.A. Gabel, Nancy R. Mansfield, *The Information Revolution and Its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 Am. Bus. L.J. 301, 302 (2003).
59. *Id.* at 321 (citation omitted).
60. *Graham v. Cirocco,* 31 Kan.App.2d 563, 569, 69 P.3d 194, 198 (2003).
61. *Weber v. Tillman,* 259 Kan. 457, 469, 464, 913 P.2d 84, 93 (1996); *Idbeis v. Wichita Surgical Specialists,* 279 Kan. 755, 770, 112 P.3d 81, 91 (2005).
62. *Foltz v. Struxness,* 168 Kan. 714, 721-722, 215 P.2d 133, 139 (1950); *Eastern Distributing Co. v. Flynn,* 222 Kan. 666, 676, 567 P.2d 1371, 1378 (1977).
63. *Caring Hearts Personal Home Services, Inc. v. Hobley,* 35 Kan.App.2d 345, 351, 130 P.3d 1215, 1221 (2006) (quoting *Weber v. Tillman,* 259 Kan. 457, 913 P.2d 84 (1996)).
64. *Engbrecht v. Dairy Queen Co. of Mexico, Mo.,* 203 F. Supp. 714, 720 (D. Kan. 1962) (citation omitted); *see also Uarco* 584 F. Supp. at 1262 (enforcement of valid contracts is in public interest).
65. *Caring Hearts Personal Home Services, Inc. v. Hobley*, 35 Kan.App.2d 345, 354, 130 P.3d 1215, 1222 (2006).
66. *Weber v. Tillman,* 259 Kan. 457, 475, 913 P.2d 84, 96 (1996).
67. *Graham v. Cirocco,* 31 Kan.App.2d 563, 571-72, 69 P.3d 194, 200 (2003); *see also Weber v. Tillman,* 259 Kan. 457, 470-73, 913 P.2d 84 (1996) (summarizing cases from other jurisdictions in which courts refused to enforce noncompete agreements where they would result in shortages of physicians in medically necessary specialties).
68. *Foltz v. Struxness,* 168 Kan. 714, 722, 215 P.2d 133, 139 (1950).
69. *Idbeis v. Wichita Surgical Specialists,* 279 Kan. 755, 773, 112 P.3d 81, 92 (2005); *see also Weber v. Tillman,* 259 Kan. 457, 913 P.2d 84 (1996). Lack of a liquidated damages clause does not make the contract or restrictive covenant unenforceable. *Idbeis,* 279 Kan. at 773.
70. *SizeWise Rentals, Inc. v. Media/PRN Life Support Services, Inc.,* 87 F.Supp.2d 1194, 1198 (D. Kan. 2000).
71. *Universal Engraving, Inc. v. Duarte,* 519 F.Supp.2d 1140, 1148-49 (D. Kan. 2007) (holding disclosure of engraving and embossing business' trade secrets by former employee that could allow competitor to attain competing product sooner by access to employer's research and development process would cause irreparable harm); *Heatron v. Shackelford,* 898 F. Supp. 1491, 1502 (D. Kan. 1995) (heating-element manufacturer entitled to preliminary injunction barring former cartridge-heater division employee from accepting employment with rival given real,

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Litigating Noncompete Agreements *(Continued from pg 20)*

substantial threat of disclosure of confidential and proprietary information; the resulting loss of the former employer's competitive advantage, which it had spent years and millions of dollars to obtain, could not be adequately compensated by damages).

72. *Uarco, Inc. v. Eastland,* 584 F. Supp. 1259, 1262 (D. Kan. 1984). Of course, a party seeking to recover for breach of contract must prove that the purported breach caused the claimed damages or injury. *See American Maplan Corp. v. Heilmayr,* 165 F.Supp.2d 1247, 1253 (D. Kan. 2001) (finding that former employer failed to present evidence that it had lost customers or sales as a result of alleged breach of nondisclosure agreement); *see also ORI, Inc. v. Lanewala*, 147 F.Supp.2d 1069, 1079 (D. Kan. 2001) (holding plaintiff's lack of evidence that it suffered damages as a result of the alleged breach of contract by defendant by hiring plaintiff's employees warranted summary judgment against plaintiff).
73. *See Universal Engraving, Inc. v. Duarte,* 519 F.Supp.2d 1140, 1148-49 (D. Kan. 2007); *Uarco, Inc. v. Eastland,* 584 F. Supp. 1259, 1262 (D. Kan. 1984) (finding irreparable harm would result where "[t]he evidence also suggests that it is impossible to calculate exactly how much damage the loss of customers and the loss of these relationships will cause to the plaintiff. It is impossible to foresee exactly how much business the plaintiff will lose as a result of competition by defendants . . . ."); *see also Equifax Services v. Hitz,* 905 F.2d 1355, 1361 (10th Cir. 1990) (affirming finding of irreparable injury based upon evidence suggesting that it would be impossible to precisely calculate amount of damage former employer would suffer due to its loss of customers in insurance investigation business).
74. *Early Detection Center, Inc. v. Wilson*, 248 Kan. 869, 880, 811 P.2d 860, 868 (1991) (illegal contract); *Evco Distributing, Inc. v. Brandau*, 6 Kan.App.2d 53, 626 P.2d 1192 (1981) (no consideration).
75. *H&R Block, Inc. v. Lovelace*, 208 Kan. 538, 493 P.2d 205 (1972).
76. *Allen, Gibbs, & Houlik, L.C. v. Ristow,* 32 Kan.App.2d 1051, 1057-58, 94 P.3d 724, 728 (2004).
77. *Puritan-Bennett Corp. v. Richter,* 8 Kan.App.2d 311, 316, 657 P.2d 589, 593 (1983).
78. *Sprint Corporation v. DeAngelo,* 12 F.Supp.2d 1188 (D. Kan. 1998) (denying injunctive relief).
79. *Sprint Corp. v. DeAngelo*, 12 F.Supp.2d 1188, 1190, 1193-94 (D. Kan. 1998); *see also Wright v. Belt*, 6 Kan.App.2d 854, 636 P.2d 188 (1981).
80. *See Jensen International, Inc. v. Kelley,* 29 Kan.App.2d 836, 841-42, 32 P.3d 1205, 1210 (2001).
81. K.S.A. 33-106 (statute of frauds); *Fireworks Spectacular, Inc. v. Premier Pyrotechnics, Inc.,* 147 F.Supp.2d 1057, 1064 (D. Kan. 2001) (holding doctrine of promissory estoppel did not justify enforcement of noncompete agreement because there was no reasonable reliance).
82. *Alexander & Alexander, Inc. v. Feldman,* 913 F. Supp. 1495, 1501 (D. Kan. 1996).
83. *Id.* at 1502.
84. *American Fidelity Assurance Corp. v. Leonard,* 81 F.Supp.2d 1115, 1121 (D. Kan. 2000).
85. *American Fidelity Assurance Corp. v. Leonard,* 81 F.Supp.2d 1115, 1121 (D. Kan. 2000) (holding defendant failed to show that plaintiff's actions were legally and factually discriminatory where defendant claimed plaintiff had unclean hands because it fired plaintiff in retaliation for engaging in "protected opposition" to a discriminatory practice in violation of the Age Discrimination in Employment Act (ADEA).
86. *Alexander & Alexander, Inc. v. Feldman,* 913 F. Supp. 1495, 1501 (D. Kan. 1996) (holding employer's breach of the employment contract in unilaterally changing the former employee's compensation precluded it from recovering for the former employee's alleged breach of noncompete clause).
87. *General Surgery, P.A. v. Suppes,* 24 Kan.App.2d 753, 754-55, 953 P.2d 1055, 1057 (1998) (holding noncompete agreement was not breached where employer terminated employee and noncompete agreement implied that covered employee must actively end employment before covenant could be enforced against employee).
88. *Christenson v. Akin,* 183 Kan. 207, 210-212, 326 P.2d 313, 318 (1958).
89. This section was originally written by Mr. Ruse for and was reprinted with permission

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by 1A WEST'S FEDERAL PRACTICE MANUAL, Chapter 21.15 (West Publishing Company, 1986).

90. *See, for example, Equifax Services, Inc. v. Hitz*, 905 F.2d 1355 (10th Cir. 1990) (jurisdiction over California employee in non-compete litigation); *Sprint Corp. v. DeAngelo*, 12 F.Supp.2d 1184 (D. Kan. 1998) (jurisdiction over Virginia employee existed under Kansas long-arm statute in noncompete litigation).
91. *See Sonnino v. University of Kansas Hospital Authority,* 220 F.R.D. 633, 655 (D. Kan. 2004).
92. *Curtis 1000, Inc. v. Pierce,* 905 F. Supp. 898, 902 (D. Kan. 1995).
93. *Id.*
94. *IT Network v. Shell,* 21 F.Supp.2d 1280, 1283 (D. Kan. 1998) (citing with approval *Occusafe v. EC&G Rocky Flats, Inc.,* 54 F.3d 618, 622-23 (10th Cir. 1995) (applying Colorado law)).
95. *Jensen International, Inc. v. Kelley,* 29 Kan.App.2d 836, 843, 32 P.3d 1205, 1210-11 (2001).
96. *See Graham v. Cirocco,* 31 Kan.App.2d 563, 571-72, 69 P.3d 194, 200 (2003); *Weber v. Tillman,* 259 Kan. 457, 470-73, 913 P.2d 84 (1996).

50 Years in Practice of Law *(Continued from page 3)*

testing. We appeared on the third day with our family for the swearing-in, without really knowing whether we were to be admitted. There was no interstate exam. Such screening as was done was by the faculty flunking 30-50% in the freshman year.

We see law students today who are adept in legal analysis, research and writing. In the 1950's there was no requirement to take courses in research or jurisprudence.

Cell phones, voice mail, Internet research and other modern tools have greatly improved efficiency.

TECHNOLOGY

In the 1950's copy machines used a thermo fax process, producing thin and impermanent copies. Secretaries, sometimes using up to 8 carbons, painstakingly typed foreclosure petitions and pleadings. Obviously, their anxiety grew as they reached the lower part of the page, as a mistake might mean starting over. Secretaries using shorthand usually took dictation, although a rudimentary form of a Dictaphone, utilizing belts, was also available. Many court reporters used pen and ink or, in the military and in the South, voice-masks were common.

Of course, there was no electronic library. The Kansas statutes were published in 1951 in one volume, with supplements published every few years. The single practitioner had a set of Kansas Reports, a statute book and a digest. Larger firms had Am Jur or CJS and, perhaps, ALR. The State Law Library was the source for all extensive research.

Cell phones, voice mail, Internet research and other modern tools have greatly improved efficiency. The e-mails have speeded up communication but, sometimes, it seems that they have resulted in less time for reflective thought. Now, few secretaries take dictation but the modern day machines get the dictation to the secretary's desk immediately. It is my observation that many of the younger attorneys prefer to create on the computer and feel uncomfortable attempting to dictate. Since one can speak 4 to 6 times faster than they can type, this may not lead to improving productivity.

THE LAW

There was not the identification of lawyers as plaintiff's or defendant's lawyers. All of us handled everything, from real estate matters, probate, tax and divorces to criminal law. There was no advertising and no identification

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50 Years in Practice of Law *(Continued from page 22)*

as belonging to one side or the other, although the larger firms had the corporate and insurance clients. Some of the attorneys practicing primarily plaintiff's personal injury law had formed the National Association of Claimant's Counsel (NACCA), which morphed into the American Trial Lawyer's Association (ATLA), and the members have recently decided that they should have "Justice" in the name of the organization. Sometime ago they began to aggressively stake out a segment of the practice and intensively advertise. The defense lawyers formed the International Association of Insurance Counsel, DRI and later the KADC. Where before the annual State Bar meeting was a gathering place of all the lawyers, the various specialty groups have supplanted it with their own meetings.

There are judges who consider a trial to be a failure of the process.

Now, each of these practice areas is a specialty, although not judicially recognized in Kansas, and a lawyer should not lightly venture out of his area of expertise. A sales manager told me once that a good salesman could sell anything and I think a good trial lawyer can try anything, but he or she had better have backup with the substantive knowledge of the subject.

Tort and negligence actions have seen many changes. Contributory negligence became comparative fault. In the 1950s the wrongful death limit was $10,000 and was then raised to $25,000. There were no other caps on damages or limits on punitive damages, although a punitive verdict was practically unknown. Automobile collision cases were the bread and butter of many lawyers. This field of litigation was drastically reduced by the Personal Injury Protection No Fault legislation.

A number of reasons led to the enactment of tort reform. There was an enormous disparity in the awards for similar injuries depending upon the nature of the defendant. A person whose leg was broken by a negligently manufactured product was likely to receive four to six times as much as he would be awarded in a slip and fall accident on a neighbor's porch. The corporate defendants and professionals believed that the only way to control the mounting costs of insurance was to legislatively cap damages and change some of the procedural rules. The comprehensive legislation passed in the 1980s was struck down, in part, as being unconstitutional but much of it was upheld.

The judiciary began to understand that mediation could result in enormous savings of time and expense. Subtle, and sometimes not so subtle, pressures were applied to settle cases. There are judges who consider a trial to be a failure of the process.

All of these factors have caused the growth in the number of litigators versus trial lawyers. Now, some younger attorneys are trained in the techniques of discovery, but if they cannot obtain summary judgment, believe the case must be settled. This is unfortunate as it compounds the difficulty in obtaining experience and, if one's opponent knows that the lawyer is reluctant to try a case, difficulty in obtaining an advantageous settlement. Most clients today are more inclined to weigh the costs of litigation in deciding to settle.

There is a difference in the techniques one must utilize to discover a case and those necessary to try a case. Too few attorneys are skilled in the latter. Three years of law school are spent training people to talk like lawyers, which is the worst thing they can do before a jury.

CIVILITY

Are the lawyers of today more civil or less civil than those of a generation ago? This can be argued either way. It was expected that young lawyers were to be abused and advantage taken of them in the early years. Now, we have rules of conduct adopted by the courts and some of the professional organizations, which have changed some of

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50 Years in Practice of Law *(Continued from page 23)*

these practices. At the same time the Bar is less collegial and seemingly distrust is more common. When the Bar was smaller, each person was easier to know and reputations were protected with pride. The distance with which young lawyers hold each other apart and the lack of personal interaction seems now to lead to a breakdown in the respect they show each other.

DEDICATION

When I was in law school and in the early years of practice we were repeatedly told that the "law is a jealous mistress." I had the luxury that many now do not, in that my wife did not work outside the home. I am sure that I devoted more hours to the practice and fewer to the raising of my children than I should have. When I joined my present firm, I inherited the desk of a retired lawyer, Margaret McGurnahan, and I remember a clipping she had on her desk:

> If you work for a man, in heaven's name work for him!
>
> If he pays you wages that supply you your bread and butter, work for him – speak well of him, think well of him, stand by him and stand by the institution he represents.
>
> I think if I worked for a man I would work for him. I would not work for him a part of the time, and the rest of the time work against him. I would give an undivided service or none.
>
> If put to the pinch, an ounce of loyalty is worth a pound of cleverness.
>
> *Elbert Hubbard (1856-1915.)*

The practice of law is not a job; it is an all-encompassing profession, which requires constant attention and continuing education.

The practice of law is not a job; it is an all-encompassing profession, which requires constant attention and continuing education.

ADVICE FOR THE NEWBIES

Some of the things I have learned, sometimes the hard way, are really just common sense:

- Learn from older lawyers. Most lawyers are pleased to give advice to a new graduate. Develop a mentor, if possible.
- Learn from secretaries and legal assistants. Some of them have been around for a long time and can impart a lot of knowledge. I have seen too many young lawyers who think a degree entitles them to be disrespectful to non-lawyers and they do not take advantage of this source of assistance.
- Be punctual with the court and with other lawyers. Constantly being late is really just a habit which can be changed. Meet the deadlines imposed upon you and avoid asking for extensions. At the same time, be generous in acceding to requests of other lawyers if it does not prejudice your client.
- Begin keeping a file, either on paper or on the computer, of pleadings and decisions. As time goes by, you will find that, if you don't, you will be unable to call up information when you have a similar case, but you will spend an inordinate amount of time searching for documents.
- Be candid with the court and develop a reputation for truthfulness.

THE FUTURE

The number of changes in the practice, which I have witnessed, will undoubtedly continue. More and more graduates are going into corporate and public positions as contrasted to private practice. I suspect the number of jury trials will continue to decline except in criminal cases. Obviously, more legal work will be required in dealing with the plethora of statutes and regulations that now seem to govern all areas of our life. Commercial litigation will likely grow. As in the past, other areas will have growth and some will decline. I anticipate there will be fewer lawyers handling divorces. There already is an enormous decline in real estate lawyers and the probate of estates has been replaced by living trusts. The examination of abstracts has been replaced by the use of title insurance. Realtors draft the contracts, and the banks or title insurance companies close the sale. Probate and divorce litigation has become more formalized to require less discretion and judgment. The courts will likely become more active in managing litigation.

We all have enjoyed and profited from the law. More than that, we have the satisfaction of knowing that we have contributed to an orderly society upon which our government is based. ■

I would like to acknowledge the hard work of our Executive Director, Scott Heidner, and his staff that includes Dale Walden and Brandy Johnson.

Annual Meeting Recap *(Continued from page 4)*

John Hayes Libation Break Sponsor

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Finally, I would like to acknowledge the hard work of our Executive Director, Scott Heidner, and his staff that includes Dale Walden and Brandy Johnson. Without them, we would not be able to pull this meeting off on an annual basis.

See you all at the annual meeting in 2008! ■

Kansas Association of Defense Counsel
Application for Membership

The undersigned hereby makes application for membership in the Kansas Association of Defense Counsel and submits the following information in connection therewith (membership restricted to an individual)

1. Name _____
   (Last Name) (First Name) (Middle Initial)
2. Firm Name _____ Years Associated _____
3. Address: Office _____
   (Street or Building)
   _____
   (City/State/Zip) (Phone)
   _____
   (FAX) (Email)
   Residence _____
   (Street)
   _____
   (City/State/Zip) (Phone)
4. Send correspondence to: ☐ Office ☐ Residence
5. Date admitted to the Bar in the State of Kansas _____
6. Are you a member of the Defense Research Institute (DRI)? ☐ Yes ☐ No
7. List names of and year of admission of all courts of last resort in which you are admitted to practice: _____
8. List all bar associations and all other professional organizations and law societies to which you belong:_____
9. State all legal and public offices held: _____
   _____
10. List any articles and books you have written:_____
    _____
11. Are you in private practice? If so, state number of years: _____
12. Is your interest in litigation principally defense oriented? _____
13. I have enclosed annual dues for the following membership category:
    ☐ Admitted to the Bar 5 years or more $175.00
    ☐ Admitted to the Bar less than 5 years $85.00
    ☐ Governmental attorney $85.00

Dated this_____ day of_____, 20_____

_____
(Signature of Applicant)

Proposed by:

_____
(Name)

_____
(City and State)

Membership Benefits

Being a member of KADC allows you to take advantage of benefits such as:

- **Continuing legal education**
- **Legislative liaison**
- **A quarterly newsletter to keep you abreast of legal changes and events in Kansas**
- **Amicus Briefs**
- **Weekly emails with hotlinks to Supreme Court and Court of Appeals published opinions**
- **Weekly posting on the KADC website of unpublished Supreme Court and Court of Appeals opinions**
- **Representation to the Defense Research Institute (DRI)**
- **One year free membership in DRI for new KADC members who have not previously been a member of DRI**
- **With both KADC and DRI membership you have the opportunity for exchange of ideas with some of the best attorneys in the state, region and nation**

When completed, this application, together with admission and initiation fee, should be mailed to the Kansas Association of Defense Counsel,
825 S. Kansas Ave., Suite 500
Topeka, KS 66612
Phone (785) 232-9091