KADC

Spring 2011

Kansas Defense Journal

Inside this issue of *Kansas Defense Journal:*

Kansas Defense Journal is a quarterly publication of the Kansas Association of Defense Counsel. If you have any questions, comments, or ideas for future articles, please contact the *Journal*'s editor:

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GETTING CAUGHT IN THE WEB OF THE INTERNET - WHAT SHOULD A CORPORATION DO IF IT IS THE VICTIM OF INTERNET

Twitter, Facebook, Blogs; oh my! A disgruntled, "vocal" customer or an unscrupulous competitor can attempt to systematically destroy a business by posting defamatory statements on the Internet. Corporate clients, not unlike individuals, value their reputation. A corporate client should be, and typically is, acutely aware that the public's perception controls how their dollars are spent.

Today, the Internet provides a valuable way of disseminating information. The Internet has evolved into an arena of online communities and networks. Some of the potential ways information is shared on the Internet is via message boards, forums, blogs, and websites. One of the unique characteristics of the Internet is that search engines create a situation where the information posted takes on a viral permanency and a life of its own which is readily accessible at the touch of a few keystrokes. So, what do you do when one of your most valuable corporate clients comes to you and says that an unhappy customer or competitor is utilizing the Internet to post defamatory information about it?[1] This article seeks to provide you a framework for advising your corporate client on steps they can take to address untrue and unflattering ("defamatory") information posted on the Internet.

Some of the significant areas and potential pitfalls that should be considered are: A) deciding if the content is truly defamation; B) statute of limitations; C) jurisdiction issues; D) Communications Decency Act; and E) ability to discover the true identity of the poster of the defamatory information.

I. PROBLEM

DEFAMATION VS. OPINION

Rrachelle R. Breckenridge
Foulston Siefkin LLP

A common pitfall a corporate client might encounter when seeking advice about defamation is the determination whether the content is truly defamation based on a verifiable fact, or is it an opinion.

Defamatory statements have been defined in many ways, including:

1. A false publication causing injury to a person's reputation, or exposing the person to public hatred, contempt, ridicule, shame, or disgrace, or affecting the person adversely in his or her trade or business.
2. The publication of anything injurious to the good name or reputation of another or which tends to bring him or her into disrepute.
3. That which tends to injure reputation or to diminish the esteem, respect, good will, or confidence in the plaintiff or to excite derogatory feelings or opinions about the plaintiff.
4. Communications made by a defendant to a third party that cause some injury to the plaintiff's reputation by exciting derogatory, adverse, or unpleasant feelings against the plaintiff or by diminishing the esteem or respect in which the plaintiff is held.
5. The publication of material by a person without a privilege to do so that ridi-

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PRESIDENT'S MESSAGE: CHALLENGES TO INDEPENDENT AND OPEN COURTS

Never in my twenty-eight years of practice has the political landscape for Kansas courts appeared bleaker as controversy continues to swirl around the method of judicial selection for the appellate courts and as the revenue starved state budget continues to erode court funding.

House Bill 2101 eliminates the non-partisan nominating commission for the selection of Court of Appeals judges and provides instead for appointment by the Governor with the consent of the Senate and retention elections. It passed the House on a vote of 66-53 and is currently stalled in the Senate Judiciary Committee, whose chair, Senator Tim Owens, has publicly stated that the bill will not receive a hearing. Not content to let this bill slip into the night, the House amended Senate Bill 83 dealing with retired judges to include the language of House Bill 2101 and sent it to the Senate.

The debate over the methods of judicial selection—especially whether the existing system puts politics in or takes politics out—has become shriller and more politically divisive. Even among our membership there is no complete unanimity on this issue. Many of you know my personal view and I won't argue it here, except to note recent events in New Jersey that are pertinent to the continuing debate in the Kansas Legislature.

When HB 2101 was debated in the House Judiciary Committee, one of the conferees for the proponents was Professor Alan Tarr of Rutgers University. He testified generally that New Jersey uses a system to select its Supreme Court that is similar to the process described in House Bill 2101.

F. James Robinson, Jr.
Hite, Fanning & Honeyman, LLP

In New Jersey, the governor appoints justices to the Supreme Court followed by senate confirmation of the appointee. After serving for 7 years, justices may be reappointed with senate confirmation to serve until age 70.

For 62 years there was a tradition of political balance on the Supreme Court as successive governors followed a policy of replacing outgoing justice with someone of the same party or philosophy. Traditionally, there were three Democrats and three Republicans on the Supreme Court, with the chief justice belonging to the party of the appointing governor. For 62 years no New Jersey governor had failed to reappoint a sitting justice.

This tradition changed when Republican Governor Chris Christie assumed office on January 19, 2010.

On May 3, 2010, in what an editorial in the New York Times called "a case of political overreach," Governor Christie declined to nominate Justice John E. Wallace Jr., the court's only African-American justice, for tenure and his initial seven-year term expired on

(Continued on page 3)

WELCOME NEW KADC MEMBERS

Jeff Kennedy, Martin Pringle Oliver Wallace & Bauer, LLP, Wichita

Mark Lynch, Holbrook & Osborn, P.A., Overland Park

President's Report
(Continued from page 2)

May 20, 2010. In explaining his decision, the governor said that the justice had contributed to "out of control" activism on the court.

The governor named lawyer Anne Patterson to fill the seat. The Democratic State Senate President refused to hold confirmation hearings for Patterson and has stated that he will continue to do so until 2012, when Justice Wallace would have reached the mandatory retirement age of 70.

In September 2010, the Supreme Court's Chief Justice tried to solve the problem by appointing a temporary justice.

However, in December 2010, Justice Roberto Rivera-Soto, a Republican appointee who is considered one of the court's most conservative justices, called the temporary appointment "unconstitutional" and announced that he would abstain from voting in cases until a justice appointed by the governor filled the open seat on the court. He has since moderated his position by saying that he wouldn't participate in any case where the temporary justice might have the deciding vote.

Democrats called for Justice Rivera-Soto's resignation and impeachment, saying he was failing to fulfill his duties as a Supreme Court justice.

On January 3, 2011, Justice Rivera-Soto announced that he will not seek reappointment in September. The governor has promised that he will not appoint Patterson to fill this vacancy but he has also said that he would not nominate a successor for Justice Rivera-Soto until Patterson receives a confirmation hearing.

On February 17, 2011, the State Senate adopted a resolution that called for Justice Rivera-Soto to resign if the Assembly doesn't begin impeachment proceedings against him.

In 1958, the voters of Kansas were so outraged by political shenanigans that they approved a constitutional amendment authorizing merit selection of Supreme Court justices. That same merit selection process was then extended to the selection of Court of Appeals judges. Given the recent turn of events in New Jersey there is good reason to question whether New Jersey's selection system is one that should be emulated in Kansas. New Jersey's experience shows that political elements can compromise impartiality and the integrity of courts.

An equally daunting problem for courts is the state budget. For fiscal year 2012 (beginning July 1, 2011), the House has approved a $6.3 million cut to the Governor's judicial budget. As if to add insult to injury, on March 31, 2011, there was a final amendment to the House budget bill to cut appropriations to state agencies by an additional 1.193%. This will result in an additional $1.3 million cut to the judicial budget. The House budget also defunds the Kansas Commission on Judicial Performance, which was created in 2006 by the Kansas Legislature to improve judicial performance.

On the other side of the Legislature, the Senate approved the Governor's judicial budget, but has required already underpaid judges to take a 2.5% pay cut.

Learned Hand once said: "If we are to keep our democracy, there must one commandment: Thou shall not ration justice." But over the past few years reduced funding for the judiciary has had a noticeable impact on core court functions. Courts are doing more with less. Unfortunately, they have reached a breaking point. Further funding cuts will require court closures.

Effective communication by lawyers to the members of the Legislature about the importance of open and vibrant courts is of vital importance. We must do what we can to ensure that the pernicious effects of further cuts are given fair consideration and that adequate funding is provided.

The challenges to courts are real. To those who cherish fair, impartial, and open courts your voices are needed now!▲

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KANSAS ASSOCIATION OF DEFENSE COUNSEL

MID-YEAR MEETING AND CLE

Friday, May 20, 2011

Courtyard by Marriott – Wichita at Old Town

820 East Second Street North
Wichita, KS 67202

1:15-1:30 p.m. Welcome

1:30-2:20 p.m. CLE Session I: **Wither Arbitration: A Look at 3 New Supreme Court Cases and Their Affect on Practitioners and Clients**
Presented by Michael Jones, Martin, Pringle, Oliver, Wallace & Bauer, L.L.P
Mr. Jones will discuss cutting edge issues concerning arbitration, including gateway issues of arbitrability and class waivers, the unconscionability defense and examine these issues in light three recent Supreme Court cases on arbitration, with an emphasis on how they may impact practitioners and their clients.

2:20- 2:30 p.m. Break

2:30-3:20 p.m. Session II: **There's a New Law in Town: Worker's Comp 2011**
Presented by Gary Terrill, Wallace Saunders Austin Brown Enochs
Mr. Terrill will highlight the recent changes to the Kansas Worker's Compensation laws, identify old problems which have been legislatively addressed, old problems and issues which remain, and identify emerging issues which may arise under the new law. This is a "must attend" for anyone who practices in worker's compensation.

3:20- 3:30 p.m. Break

3:30-4:20 p.m. CLE Session III: **Recent Cases Every Trial Lawyer Should Know**
Presented by Jerry Hawkins, Hite, Fanning and Honeyman, LLP
If you find yourself on the Kansas Supreme Court website each Friday checking whether the court has decided the constitutionality of the cap for pain and suffering under K.S.A. 60-19a02 and then leaving the site in haste without reading the posted decisions, you have missed key decisions that will affect your pre-trial and trial practice. This program will cover the long-awaited decision concerning the recoverability of medical expense write-offs, *Martinez v. Milburn Enterprises*. It will also cover: issues relating to discovery in civil cases, including one case which may cause you to reconsider what you object to producing as a defendant in discovery; two recent decisions finding that there are "teeth" to the notion that an expert's opinion on causation must have a sufficient factual basis to be admissible; a recent decision on intervening cause in medical malpractice cases which arguably could, in the future, set the stage to allow a health care provider to compare the fault of the plaintiff for causing the injury requiring treatment; and other topics of interest to the trial lawyer.

4:20-5:30 p.m. Reception

Kansas CLE Approved for three hours.

Sleeping rooms are available at the Courtyard Marriott at a rate of $129. Reservations can be made in the KADC block by calling 1-800-321-2211 or 316-264-5300.

REGISTER NOW AT WWW.KADC.ORG

EXECUTIVE DIRECTOR'S REPORT

Scott Heidner
Executive Director

Greetings from KADC HQ! I hope you are having a great spring and planning vacations and family adventures. We are in a (thankful) lull in the legislative storm as I write this, with legislators on first adjournment until late April. They will return with a vengeance, however, specifically in terms of cutting more state spending. The Judicial branch, along with everyone else, will be at risk. In addition to urging you to contact your state legislators to avert this possibility, I also want to encourage you to think about getting more involved in KADC.

If you are reading this, you are already a member of KADC. (Thank you for your support!) You probably also know that serving on the Board of Directors is one way to contribute to the success of the organization. There are many other ways to get involved, however, that are just as important. These efforts are critical to the success of KADC, and, if you ask anybody currently working on them, a significant value to those that volunteer and participate.

Lynn Judkins (Foland & Wickens, KC) chairs the KADC Membership Committee, which was only created within the last few years. Membership is the lifeblood of any professional association. Membership numbers for KADC have hovered between 230 and 240 for many years, but dipped into the 220s in 2010. The goal of this committee is to boost those numbers. The committee has several plans that they have executed or at least considered, including addressing law students, making presentations to the leadership of firms that are under-represented in KADC, and attending events of other stakeholder groups to help spread the word about the value of KADC membership. They have more ideas than time, but would welcome either from other KADC members.

Kyle Steadman (Foulston Siefkin, Wichita) is the editor of our newsletter. Kyle is always on the lookout for topics and authors to contribute to the newsletter. Contacting Kyle to volunteer is not only a way to help keep quality information in front of KADC members, it's a prestigious opportunity that is a boost to the credentials and career of the author.

Todd Thompson (Thompson Ramsdell & Qualseth, Lawerence) chairs the KADC Amicus Committee. This committee has always been active, but the volume of requests for amicus briefs has increased dramatically in the last two years. Anyone offering to author an amicus brief or serve on the Amicus Committee should contact me, Todd, or a KADC Board member to let us know of your interest. This is an increasingly critical topic. While there is a stipend paid to authors, for the most part this is an opportunity similar to the newsletter...a benefit to the KADC membership, but also a prestigious opportunity that boosts the credentials and career of the author.

Pat Murphy (Wallace Saunders, Wichita) heads up the team that plans the trial skills workshop which precedes the Annual Conference each year. This workshop provides the same value as similar sessions produced by national companies without the expensive registration fees and travel costs that are normally involved. The workshop has proved to be a dynamic way to get young attorneys involved in KADC activities, and Pat would welcome an offer to help.

Shifting from the state level to the national level, DRI has numerous committees and task forces that provide unique professional opportunities and produce valuable work product. If you have interest in those, Mike Jones (Martin Pringle, Wichita) is the DRI Representative for Kansas and would be happy to help you get involved in an appropriate area.

These committees and initiatives are the backbone of KADC. The majority of our members have not had the opportunity to participate in these efforts, but I'd ask that you help change that by volunteering for one or more of these groups. The benefit to KADC will be substantial. The benefit to your career and professional development will last forever!▲

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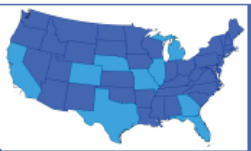

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DRI LIAISON REPORT

Michael G. Jones
Martin, Pringle, Oliver, Wallace & Bauer, L.L.P.

On March 24 and 25, I represented the KADC at the DRI State Rep meeting in Chicago. As with all DRI events, it presented opportunities to meet new friends and learn information of great value to defense lawyers everywhere. I was reminded of the many benefits of DRI and KADC membership and came away with renewed energy to spread the word. Fortunately, DRI makes that easy. Simply go to the DRI website (make the words "DRI website" into a link to http://www.dri.org/) and see the staggering amount of benefits DRI provides. This is the tip of the iceberg, as members get much more.

Of particular interest, I also learned that DRI is as concerned as we are in Kansas with current attacks on the independence of the judiciary. We were provided with a copy of Without Fear or Favor in 2011, a great publication that compiles excellent articles on the subject. It is being shared with individual judges across the country and certain legislators, as well. You can access it here (make the word "here" a link to http://www.dri.org/contentdirectory/public/reports/Without-Fear-or-Favor-2011.pdf). Feel free also to forward this publication to your own legislators, as this issue is clearly front and center in our state at this time.

As I write this, I am preparing to go to the DRI Product Liability conference in New Orleans. I hope to see some of you there. If you are unable to attend that or another DRI seminar this year, be sure at least to come to the DRI Annual Meeting in Washington D.C. in October. That's a fantastic event for seeing what DRI has to offer. (Make the words "DRI Annual Meeting" a link to http://www.dri.org/open/AnnualMeeting.aspx). Remember new DRI members have plenty of incentives and discounts to make this easier and more affordable. (make the word "incentive" a link to http://www.dri.org/open/Membership.aspx.▲

KADC SUMMARIZED COURT OPINIONS NOW AVAILABLE ONLINE

The KADC court summaries are now available for your online viewing. In addition to your regular KADC email notifications of released Court of Appeals and Supreme Court opinions, each month we will send an email notification when the opinions have been summarized. Thank you to KADC member Jacqueline Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C., for summarizing the opinions!

MEETING THE CHALLENGES OF CLE IN 2011

Shelley Sutton, Executive Director, Kansas CLE Commission

Kansas is poised to see the most extensive revision of continuing legal education rules since the original adoption of mandatory CLE in 1985. Effective July 1, there will be a more streamlined and user-friendly set of rules that take into consideration technology that wasn't even a thought when the rules were initially adopted. The annual requirement remains 12 hours of CLE credit, including 2 hours of ethics and professionalism credit, each compliance period.

Attorneys will see the most extensive changes in five major areas:

1. INSTRUCTIONAL MATERIALS

Under the new rules, the requirement to provide instructional materials can be satisfied by receiving printed copies or copies stored on electronic media, CD or via download. The materials still must be delivered *before or at* the program. If the provider does not provide printed copies to all attendees, they must make printed copies available to any attendee who requests them.

2. NONTRADITIONAL PROGRAMMING

Nontraditional programming is defined **as a program accessed solely by an individual attorney (one attorney/one computer/one telephone).** These types of programs have been grouped into the following categories:

- Live transmission -teleconference, videoconference or webconference,
- Pre-recorded video - videotape, video CD, DVD, videofile, or online video,
- Pre-recorded audio - audiotape, audio CD, podcast/mP3, or online audio.

The provider still must submit the Application for Approval of Nontraditional Activity but the application can be submitted anytime during the compliance period. In addition, the provider must have procedures in place to independently verify completion of the program but those verification procedures may vary.

How does nontraditional programming differ from self-study? It is the verification of the completion of the program, whether by teleconference or other format. Self-study without verification is not accreditable.

Nontraditional attendance is still limited to 5 hours per compliance period.

3. ETHICS AND PROFESSIONALISM (EP credit)

What was previously known as professional responsibility will now be referred to as ethics and professionalism. At least two hours of the 12 hour requirement must still be completed in this area.

Ethics refers to the standards set by the Kansas Rules of Professional Conduct with which attorneys must abide to remain in good standing as members of the Kansas bar.

Professionalism is conduct consistent with the tenets of the legal profession as demonstrated by a lawyer's civility, honesty, integrity, character, fairness, competence, ethical conduct, public service, and respect for the rule of law, the courts, clients, other lawyers, witnesses and unrepresented parties. Also included in the definition of professionalism is the promotion of racial, gender and ethnic diversity in the legal professionalism. The general goal of including professionalism as accreditable CLE is to create a forum in which lawyers, judges and legal educators can explore and reflect upon the meaning and goals of professionalism in contemporary practice.

Ethics and professionalism issues included as part of another topic does not qualify for EP credit and must be in an identifiable block of time on the program agenda.

The Commission occasionally receives applications for approval of ethics credit that do not pertain to the ethics or professionalism issues specifically applicable to attorneys. These programs may meet the requirements for general CLE credit, but are not eligible for EP credit. Examples of topics that would not qualify for EP credit would be: ethics in government, litigation tactics, or business, corporate or medical ethics. These topics would qualify for general CLE credit.

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Meeting the Challenges of CLE in 2011
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4. LAW PRACTICE MANAGEMENT (LPM Credit)

Beginning July 1, attorneys have the option to earn up to 2 hours of law practice management credit each compliance period. This is not a requirement but an option. It is important to note that the course must focus on the legal profession. Supreme Court Rule 802(j) defines LPM as "programming specifically designed for lawyers on non-substantive topics that deal with means and methods for enhancing the quality and efficiency of an attorney's service to the attorney's clients."

Topics may include issues relating to the development and management of a law practice, including client relations and technology to promote efficient, economical and competent delivery of legal services; technology, or economics. Programming accreditable under the ethics and professionalism requirement is not subject to the 2 hour law practice management cap.

5. ONLINE OPTIONS

Attorneys will notice changes to their online record. The transcript will eventually allow up to four compliance periods to be viewed at one time. The attorney record will also indicate any fees owed. For the first time, attorneys will be able to easily pay their annual CLE fee online using a secure link from their CLE record. Attorneys must have registered for online access to their record to take advantage of this option.

ADDITIONAL NOTES FROM THE CLE COMMISSION

FILING CREDIT

For traditional programming, the provider or the attorney may submit the Application for Approval of CLE Activity. Our recommendation for programming attended outside the state is that the attorneys file all paperwork directly with our office. The application is a very quick and simple form.

Kansas is an affidavit-based state. A notice of accreditation/affidavit is executed after each program. Providers hosting a program within the borders of Kansas will submit the affidavit for the attorneys. If the program is outside of Kansas, even Kansas City, Missouri, it is the attorney's responsibility to return the form to our office to be recorded in their file. If the attorney has registered for online access, and the hours are filed as required, they will be able to review the file anytime at www.kscle.org.

CLE COMMISSION WEBSITE

Attorneys are able to access all CLE related information at www.kscle.org. There are links to the rules, guidelines, forms, calendar and transcripts.

The calendar will show any programs that have been approved for Kansas CLE credit. Attorneys can attend programs anywhere in the world but an Application for Approval of CLE Credit must be submitted by the sponsor or an attorney. The CLE Commission does not maintain specific information on each program. If a program is listed on the CLE Commission calendar, the attorney will need to contact the provider for specific information. There is a phone number on the calendar and a link to the website where available.

Change is good and these changes will help us all meet the challenges of CLE. If you have questions, as always, please don't hesitate to contact us.

Kansas CLE Commission
Phone: (785) 357-6510
www.kscle.org▲

ARE YOU ENROLLED IN THE KADC LISTSERVE?

Membership in KADC offers you a moderated, secure listserve where you can exchange information with your peers regarding expert witnesses and other issues. It offers an invaluable way to reach out to the almost 250 members of KADC.

To join your KADC list serve go to http://groups.yahoo.com/group/kadclistserve/ and click the "Join this Group" button or email Brandy Johnson at brandy@kadc.org and she will add you to the group.

Getting Caught in the Web of the Internet
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cules or treats a plaintiff with contempt.

6. An unprivileged publication of false statements which naturally and proximately results in injury to another.

See 50 Am. Jur. 2d, Libel and Slander § 6.

"Defamation is an invasion of the interest in reputation and good name. This is a 'relational' interest since it involves the opinion which others in the community may have, or tend to have, of the plaintiff." *Gomez v. Hug*, 7 Kan. App. 2d 603, 611, *rev. denied*, 231 Kan. 800 (1982) (citing Prosser, Law of Torts, 4th ed. 1971 at 737). In Kansas, any plaintiff in a defamation action must allege and prove actual damages and may no longer rely on the theory of presumed damages. *See Zoeller v. American Family Mut. Ins. Co.*, 17 Kan. App. 2d 223, 228, *rev. denied* 251 Kan. 942 (1992). "The tort of defamation includes both libel and slander. The elements of the wrong include false and defamatory words communicated to a third person which result in harm to the reputation of the person defamed." [Citation omitted.] *Dominguez v. Davidson*, 266 Kan. 926, 930 (1999). To establish a defamation claim under Kansas law, a plaintiff must show 1) false and defamatory words; 2) communicated to a third person; 3) which resulted in harm to reputation. *Heckman v. Zurich*, 2007 U.S. Dist. Lexis 14720, at *17 (February 28, 2007) (citing *Hall v. Kan. Farm Bureau*, 274 Kan. 263, 276 (2002)).

Two of the more significant hurdles to a defamation claim are the interpretation or classification of the information conveyed as an "opinion" and establishment of definitive damages. In Kansas, damages for defamation may not be presumed but must be established by proof of actual damages. *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F.Supp.2d 1032 (D. Kan. 2006); *Gobin v. Globe Pub. Co.*, 232 Kan. 1, 5 (1982); *Bosley v. Home Box Office, Inc.*, 59 F. Supp.2d 1147, 1150 (D. Kan. 1999). One dilemma faced by many victims of defamation is how to prove the actual damages sustained, and another dilemma is how to characterize the content sufficiently to sustain a claim of defamation. Defendants have found a receptive ear in the legal system when characterizing their defamatory statements as matters of opinion. *See Milkovich v. Lorain Journal Company,* 497 U.S. 1 (1990); *Imperial Apparel, Ltd. V. Cosmo's Designer Direct, Inc.*, 227 Ill.2d 381 (2008); *Penn Warranty Corp. v. DiGiovanni,* 10 Misc. 3d 998, 810 N.Y.S. 2d 807 (N.Y.Sup. 2005). Courts seem to take the view that it is an opinion when the maker of a comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character. After you determine that the content is defamatory, then you must decide if the discovery of the defamation was timely.

A. STATUTE OF LIMITATIONS

A defamation cause of action arises when the defamatory statement was published and not upon discovery of the published statements. *KMMentor, LLC v. Knowledge Mgmt. Prof'l Soc'y, Inc.*, 2009 U.S. Dist. LEXIS 64932 (D. Kan. July 22, 2009); *Wenner v. Bank of Am., NA*, 637 F.Supp. 2d 944, 955 (D. Kan. 2009). An action for defamation must be brought within one year. K.S.A. 60-514(a). A tortious interference with prospective business advantage cause of action must be brought within two years. K.S.A. 60-513(a)(4). *Masters v. Daniel Int'l Corp.*, 1992 U.S. Dist. LEXIS 20489 (D. Kan. Dec. 3, 1992). "[A] plaintiff will not be permitted to escape the bar of the statue of limitations by calling a defamation action a tortious action for interference with a business advantage." *Meyer Land & Cattle Co. v. Lincoln County Conservation Dist.*, 29 Kan.App.2d 746, 750-51 (2001), *rev. denied* 273 Kan. 1036 (2002) (quoting *Taylor v. Int'l Union of Electronic Workers, et al.*, 25 Kan.App.2d 671, 680 (1998), *rev. denied* 267 Kan. 889 (1999).

Another nuance to be mindful of is Kansas law holds the view that the one year statute of limitations begins with the date of publication. Courts do not view it as an ongoing process; it has strictly been held to one year from first date of publication. *KMMentor, LLC v. Knowledge Mgmt. Prof'l Soc'y, Inc.*, 2009 U.S. Dist. LEXIS 64932 (D. Kan. July 22, 2009); *Wenner v. Bank of Am., NA*, 637

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F.Supp. 2d 944, 955 (D. Kan. 2009). Once you ascertained the facts from your client regarding the statute of limitations, then your next step is to determine the appropriate venue for your lawsuit.

B. FEDERAL JURISDICTION

Presumably defamation causes of action can always be brought in state court, but strategically it may be more prudent to bring your action in federal court. Kansas federal courts have recently held: 1) allegations that the defendant had an on-going business relationship with a company in Kansas; 2) the defendant committed tortious acts arising out of that relationship; and 3) the effects of those acts were felt in Kansas, are insufficient elements alone to support the minimum contacts required to exercise personal jurisdiction. *Jayhawk Capital Mgmt., LLC v. Primarius Capital LLC*, 2008 U.S. Dist. LEXIS 71410, at *15 (D. Kan. Sept. 18, 2008); *Oxion, Inc. v. O3 Zone Co*., 2007 U.S. Dist. LEXIS 54480 (D. Kan. July 25, 2007). The Tenth Circuit noted "merely posting information on the internet does not, in itself, subject the poster to personal jurisdiction wherever that information may be accessed. This principle has particular salience for defamation cases." *Shrader v. Biddinger*, 633 F.3d 1235, 2011 U.S. App. LEXIS 3797 at *22-23 (10th Cir. 2011)

"Defamatory postings may give rise to personal jurisdiction if they are directed specifically at a forum state audience or otherwise make the forum state the focal point of the message." *Id.* at *23(citing *Johnson v. Arden*, 614 F.3d at 785, 797 (8th Cir. 2010)); *Revell v. Lidov*, 317 F.3d 467, 473 (5th Cir. 2002); *Young v. New Haven Advocate*, 315 F.3d 256, 262-63 (4th Cir. 2002). "The thrust of this case law is consistent with [the Tenth] circuit's restrictive reading of *Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984)*: Some courts have held that the expressly aimed portion of *Calder* is satisfied when the defendant individually targets a known forum resident. We have taken a somewhat more restrictive approach, holding that *the forum state itself must be the focal point of the tort*." *Shrader* at *23 (citation and quotations omitted). Once you address any potential procedural hurdles, it is equally important to allege the appropriate defendant.

C. COMMUNICATIONS DECENCY ACT

Suing the proper defendant can prevent a fast and embarrassing exit from litigation. Be certain to familiarize yourself with any law that offers protection to certain individuals or entities. "Congress enacted §230 to promote freedom of speech . . . by eliminating the 'threat of tort-based lawsuits' against interactive services for injury caused by the 'communications of others.'" *Ben Ezra, Weinstein, & Co. v. Am.Online Inc.,* 206 F.3d 980, 985 (10th Cir. 2000) (*quoting Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). This adds another potential layer of interference for the attorney who is advising his corporate client.

47 U.S.C. § 230 creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third party. *See id.* § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."). Specifically, § 230(c)(1) provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Section 230(f)(2) defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . ." For example, if one of the information content providers, such as *AOL*, allows a user to post defamatory information, that in and of itself is not sufficient for legal liability. Section 230(f)(3) defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Inter-

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net or any other interactive computer service."

As the law currently stands, publishers and distributors on the Internet are shielded from any liability for speech that did not originate with them. If the poster of the defamatory information is not readily identifiable, then the corporation has to take reasonable steps to discern the identity of the poster.

D. INTERNET USER ANONYMITY

There are a number of ways a person can post anonymous "speech" on the Internet, including blogs, chat rooms, e-mail, and the creation of individual websites. Courts are left struggling with the Constitutional protections afforded free speech and the necessity of disclosing the identity upon subpoena. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997); *Doe v. Shurtleff*, 628 F.3d 1217, 1220 (10th Cir. 2010). Currently there is no uniform test that has been adopted to balance the First Amendment right of an anonymous defendant to remain anonymous, and the right of a plaintiff to have the identity disclosed. There are no cases in Kansas that have addressed how this balancing act will be accomplished in the Internet defamation arena or what factors will be considered.

II. THE SOLUTION

Even the most inexperienced attorney should identify defamation and tortious interference as possible causes of action to assist a corporate client who is the victim of a defamatory posting on the Internet. Injunctive relief is another tool that might provide relief for the corporate client. A creative suggestion that could afford your corporate client some relief outside the legal confines of the court system would be implementing an online reputation management strategy.

A. ONLINE REPUTATION MANAGEMENT

Many savvy social network connoisseurs are unaware that there are companies who are devoted to online reputation management. Online reputation management is the practice of monitoring the Internet reputation of a person, brand, or business with the goal of suppressing negative mentions entirely, or pushing them lower on search engine result pages to decrease their visibility.[2] It is apparent that the pervasiveness of negative information on the Internet has generated a niche for businesses that specialize in offering a number of services to assist the public in addressing unfavorable information. Think back to the last time you utilized a search engine on the Internet for a company you were considering using. How many pages did you actually review? Chances are you only looked at the first few pages, and if the information was generally positive you felt comfortable enough with the "informal background check" to conclude your investigation.

A good piece of advice for the corporate client would be to provide the company information technology department with proper training regarding online reputation management. This enables the company to respond to negative information in a prompt fashion. If the corporate client does not have the internal resources to implement the online reputation management strategy, then hiring an outside company that specializes in online reputation management is advisable. Generally, online reputation management companies will use sophisticated techniques to promote positive and neutral content, while at the same time, repairing any damage to the reputation of the company.[3] If the informal attempts at addressing the negative content posted on the Internet are unsuccessful, it may be feasible to consider a more formal approach.

B. INJUNCTIVE RELIEF

K.S.A. 60-901 defines injunction as "an order to do or refrain from doing a particular act. It may be the final judgment, and it may also be allowed as a provisional remedy." A preliminary injunction is one form of a provisional remedy. "The purpose of a preliminary injunction is to preserve the status quo pending the outcome of the case." *Sprint Corporation v. DeAngelo*, 12 F.Supp.2d 1188 (D. Kan. 1998) (quoting *Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986). A party seeking a preliminary injunction is required to show: 1) the moving party will suffer irreparable injury unless the injunction issues; 2) the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party; 3) the injunction, if issued, will not be adverse to the public interest; and 4) there is a substantial likelihood that the moving party will eventually prevail on the merits. *Sprint Corporation* at 1189 (citations omitted).

Kansas courts have not addressed the issuance of injunctive relief in the context of Internet defamation, but the issue has been addressed in other states. *See Allen v. Ghoulish Gallery*, 2007 Lexis 37514 (Cal. 2007) (defamatory statements cannot be restrained; the remedy for defamation is a damages action after publication). In *Allen*, the defendants sought to enjoin the plaintiff from posting disparaging comments on the Internet regarding the defendants and the pending litigation. The court noted that an injunction enjoining speech is an example of a prior restraint on speech. *Id*. at *7 (citations omitted). "Courts presume prior restraints are unconstitutional. *Id.* at *7

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(citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)). Prior restraints are allowed in narrow circumstances constituting "exception circumstances", such as to protect military secrets or trademark violations. *Id*. at *7 (citing *Near v. Minnesota*, 283 U.S. 697 (1931); *San Francisco Arts & Athletics v. U.S.O.C.*, 483 U.S. 522 (1987)). The *Allen* court boiled it down to "plaintiff is at risk of suffering first amendment violations while defendants have not identified a possibility of irreparable harm." *Allen* at *11. The court also noted that defamatory statements cannot be restrained, the remedy for defamation is a damages action after publication. *Id.* at *7 (citations omitted).

Although there is no guidance on how Kansas courts would view injunctive relief in the context of Internet defamation, it is probable that they would look to how other jurisdictions have handled it, and unfortunately, the standard to attain injunctive relief appears almost unattainable. After you have advised your client about the preceding approaches, and the likelihood of success of those approaches, then one final, and somewhat creative approach, although it could be more costly, is to allege a tortious interference cause of action.

C. TORTIOUS INTERFERENCE

There are two types of tortious interference: 1) tortious interference with contract rights occurs where the tortfeasor convinces a party to breach its contract with the plaintiff and 2) tortious interference with business relationship occurs when the tortfeasor acts to prevent the plaintiff from successfully establishing or maintaining business relationships. The context for the interference with business relationship is when the first party's conduct intentionally causes a second party not to enter into a business relationship with a third party that would otherwise probably have occurred. Basically, it addresses false accusations made against a business's reputation for the purpose of driving potential business away.

To recover on a tortious interference with contract cause of action, the plaintiff must prove: 1) the existence of a contract between plaintiff and a third party; 2) actual or constructive knowledge of the contract by the defendant; 3) intentional acts by defendant inducing the third party to breach the contract with plaintiff; 4) such acts constituting the proximate cause of the breach; and 5) damages suffered by plaintiff as a direct result of defendant's actions. *Petroleum Energy, Inc. v. Mid-America Petroleum, Inc.*, 775 F. Supp. 1420, 1429 (D. Kan. 1991) (citing *V.C. Video, Inc. v. National Video, Inc.*, 755 F.Supp. 962, 970-71 (D. Kan. 1990)).

To recover on a tortious interference with a prospective business relationship cause of action, the plaintiff must prove: the existence of a business relationship or expectancy with the probability of future economic benefit to the plaintiff; (2) knowledge of the relationship or expectancy by the defendant; (3) that, except for the conduct of the defendant, plaintiff was reasonably certain to have continued the relationship or realized the expectancy; (4) intentional misconduct by defendant; and (5) damages suffered by plaintiff as a direct or proximate result of defendant's misconduct. *Petroleum Energy, Inc. v. Mid-America Petroleum, Inc.*, 775 F. Supp. 1420, 1429 (D. Kan. 1991) (citing *Turner v. Halliburton Co.*, 240 Kan. 1, 12 (1986)). Tortious interference with a contract is aimed at preserving existing contracts and tortious interference with prospective business advantage is aimed at protecting future or potential contractual relations. *Turner v. Halliburton Co.*

CONCLUSION

The corporate client should be advised of the potential approaches to address defamatory information posted on the Internet. The least costly method would be to try to manage the negative content internally and informally. Seeking an injunction will be costly and would require bringing litigation, as would defamation or tortious interference causes of action. The likelihood of success that a corporation will find relief via an injunction or litigation alleging defamation and/or tortious interference is questionable.

You should encourage your corporate client to do a cost benefit analysis before taking any steps. There is very little legal precedence in Kansas regarding remedies for corporate victims of maligning data published in cyberspace. One possible reason for the lack of litigation in this area is that a corporate client might decide to forego litigation to address the defamatory information because the financial benefits may not outweigh the costs of litigation. Unfortunately that has left us without a succinct body of law addressing recourses for Internet defamation, and thus we remain tangled in the web of the Internet.

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1. This article does not attempt to address every potential issue that an attorney will encounter if filing a lawsuit alleging Internet defamation as the chosen course of action.
2. Kermit Pattison, Managing an Online Reputation, N.Y. Times, , July 20, 2009.
3. Some of the companies that provide online reputation management services are 1) Reputation Changer; 2) Reputation Advocate; 3) Reputation Management Consultants; and 4) Internet Reputation Management.▲

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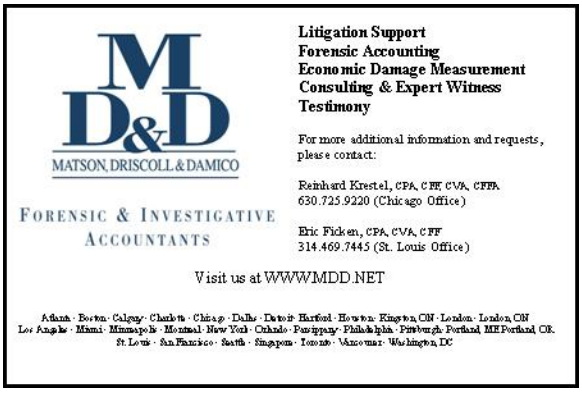

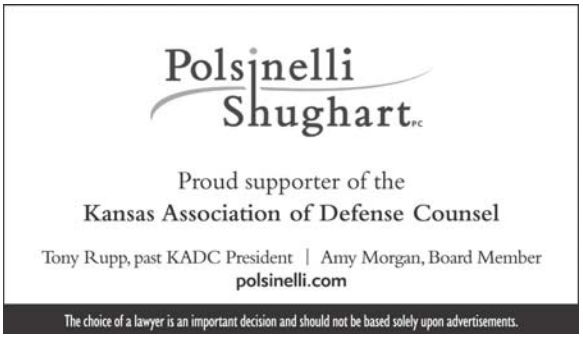

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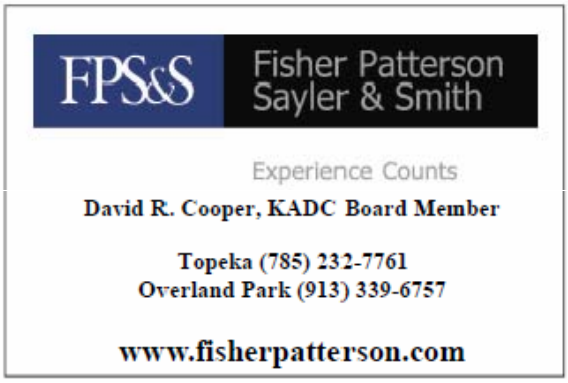

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