PROFESSIONAL RESPONSIBILITY

— AND THE —

TRANSACTIONAL LAWYER

by

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I. INTRODUCTION: THE TRANSACTIONAL CONTEXT

A. LAWYER AS PLANNER

1. Many discussions of the Kansas Rules of Professional Conduct, found at Kansas Supreme Court Rule 226, address the adversary or litigation context.

   a. Note: The Kansas Rules were amended by the Kansas Supreme Court, effective July 1, 2007, to incorporate selected changes made to the Model Rules of Professional Conduct. Therefore, cases citing rules prior to July 1, 2007 may be dealing with a rule in its pre-2007 form.


2. However, the Rules also provide guidance for the lawyer functioning in a non-litigation context.

3. This presentation focuses on the Rules as they apply to the lawyer in a transactional context where the lawyer functions in many different roles.

4. One of those roles is as “planner.” Planning takes place at many different levels. For example, the plan will include all the various steps involved to accomplish a particular task for a client, such as sell a home or business.
5. The planner role includes the individual elements of a transaction. For example, how should the attorney “plan” to ensure that the liquidated damages clause in the contract is most likely to survive unchallenged?

B. LAWYER AS LEGAL ANALYST

1. Practicing law requires a much more sophisticated level of legal analysis than merely learning – or even teaching – the law.

2. The lawyer must collect the facts, understand the client’s goals, the client’s special needs and practical limitations, including limitations created by forces external to the client (other parties, government regulation, lenders, etc.). The lawyer must then analyze the applicable and relevant law to determine how best to proceed in accomplishing the clients’s goals in the most efficient, effective, and risk-limiting way possible.

3. As the Comment to RULE 1.1 Competence states: “Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve . . . .”

4. In the transactional setting the lawyer is engaged in “determining what kind of legal problems a situation may involve” often without any external indicators, such as a Petition asserting causes of action and claims for relief. Instead, the lawyer is making the determination based upon information provided by the client and the lawyer’s knowledge of the law.

C. LAWYER AS NEGOTIATOR

1. Achieving the client’s goals may require the lawyer’s involvement in negotiating with a number of third parties such as the other parties to proposed contracts, lenders, and governmental entities.

2. The “Preamble” to the Kansas Rules of Professional Conduct notes: “As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.”

3. The lawyer’s challenge when functioning as “negotiator” will be faithful compliance with RULE 4.1 Truthfulness in Statements to Others. This is where the lawyer must be prepared to interpret and apply the teachings of Comment [2] to RULE 4.1 which states, in part:
"Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of the transaction and a party’s intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.”


D. LAWYER AS DRAFTER

1. The “plan,” “legal analysis,” and “negotiation” results must be put into action through “drafting.”

2. As the Comment to RULE 1.1 Competence states: “Some important legal skills, such as analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems.”

3. Perhaps the most difficult ethical challenge in the area of “drafting” is faithful compliance with RULE 2.1 Advisor which provides, in part:

“In representing a client, a lawyer shall exercise independent professional judgment . . .”

a. This RULE can be implicated by the use of a form without careful evaluation of whether it is appropriate or adequate to accomplish the client’s goals.

b. The “exercise of independent professional judgment” when drafting documents would seem to require, at a minimum, that the attorney understand fully why each provision has been included in the document and is satisfied they are worded in the best manner possible to accomplish the client’s goals.

c. A violation of RULE 2.1 in this area will typically exhibit a violation of RULE 1.1 Competence as well.

E. THE “BIG THREE” ETHICAL RULES IN ORDER OF IMPORTANCE

1. Although there will be legitimate debate as to the order of importance of the Rules of Professional Conduct, I would place RULE 1.4
Communication at the front of the list.

a. I am assuming, of course, that the communication is honest and accurate.

b. Problems regarding diligence, and even competence, can be dealt with through timely, open communication with the client. For example: “I’m sorry, I can’t have it done by Friday as promised because I discovered it is much more complicated than I expected and I need to study the matter further to see what I need to do.” Or, “I’m sorry I am not going to be able to do this without associating with another attorney who has specific expertise in tax law.”

2. **RULE 1.3 Diligence.** I would even put diligence ahead of competence. If you diligently address the issue, you may find you are incompetent to handle it. Finding this out early in the process allows you to properly inform your client so they can obtain the necessary representation or they can authorize you to associate with someone having the required expertise.

3. **RULE 1.1 Competence.** You need to know what you are doing – or at least how to pursue a structured process by which you can learn what you need to know.

4. If you communicate with your client, and pursue tasks diligently in a competent manner, ethical issues should not arise unless you have a broken moral compass.

   a. The moral compass is most often impaired by drugs, including alcohol, or some other underlying emotional issue that impairs a person’s judgment.

   b. When the moral compass breaks down, the big three are often the first indicators of a problem.

   c. For those that lack a moral compass, **RULE 8.4 Misconduct** provides:

   “It is professional misconduct for a lawyer to:

   (a) Violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so
through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in any other conduct that adversely reflects on the lawyer’s fitness to practice law.”

d. The focus of this program is on attorneys who have a well functioning moral compass and seek to practice law in a professional manner and avoid running afoul of the Rules of Professional Conduct.

5. The goal of this program is to review the Rules of Professional Conduct that are likely to apply to a transactional practice and, along the way, demonstrate how these professional responsibility teachings can be applied directly to your transactional practice.

II. OBLIGATIONS TO CLIENT AND THIRD PARTIES

A. ENGAGEMENT LETTERS


1. The Kansas Rules of Professional Conduct do not expressly require the use of client engagement letters which detail, in writing, the terms of the contract for representation between attorney and client. For example, **RULE 1.5 Fees**, at §(b), states: “When the lawyer has not regularly
represented the client, the basis or rate of the fee shall be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation.”

2. However, the rules do require some things to be in writing. For example, RULE 1.5 Fees, at §(d), provides, in part: “A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, and the litigation and other expenses to be deducted from the recovery.” For additional guidance on attorney fees, see generally: Philip Ridenour, *Attorney Fees: Where Are We in Kansas?* 73 J. KAN. BAR ASS’N 6 (Sept. 2004).

3. The Kansas Supreme Court recently discussed a situation that demonstrates the value of an engagement letter in heading off a claim that an attorney provided unnecessary services to a client. Although the proceeding in *In re Kenny*, 289 Kan. 851, 217 P.3d 36 (2009), focuses on a demand letter prepared by attorney Kenny, it provides an opportunity to reaffirm the importance of the engagement letter.

4. The focus of the demand letter by Kenny was an insurance funded buy/sell agreement prepared by attorney Karstetter for clients Mr. and Mrs. Buel. Kenny asserted in his letter to Karstetter:

   “Sometime last March, 2006, Mr. & Mrs. Buel approached your office, possibly with the assistance of Mr. Heath Hampton, requesting advice concerning a buy-sell agreement for their corporation. Since that time, Mr. and Mrs. Buel have questioned the need for the buy-sell agreement, since they are married, and are also the only shareholders in the corporation.”

5. The facts were that the Buel’s did not seek advice from Karstetter concerning the need for a buy-sell agreement. Instead, they had been advised by Hampton (their CPA/financial advisor) that they needed a buy-sell agreement and when they contacted Karstetter they had already purchased the insurance and were seeking to hire Karstetter merely to draft the appropriate buy-sell agreement.

6. This is an excellent example of a RULE 1.2 Scope of Representation situation. RULE 1.2 provides, in part:
RULE 1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the lawful objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means which the lawyer shall choose to pursue.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

7. There are two requirements that must be met when the lawyer seeks to "limit the scope of the representation":

(1) The limitation must be "reasonable"; and

(2) The client gives "informed consent."

8. RULE 1.0 TERMINOLOGY provides the following relevant definitions:

a. "(f) 'Informed Consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

b. "(i) 'Reasonable' or 'Reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer."

9. The relevant "Comment" to RULE 1.2 Scope of Representation offers the following guidance:

a. "[4] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. . . . ."

b. "[5] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [Competence], or to
surrender the right to terminate the lawyer’s services or the right to settle litigation that the lawyer might wish to continue.”

10. An engagement letter in this situation might state:

“Client has received professional advice from their accountant/financial advisor and determined that they require an insurance-funded buy/sell agreement. Client has purchased the insurance recommended by their accountant/financial advisor and seeks to hire Attorney to perform the specific task of preparing the buy/sell agreement. Attorney is not being hired to provide tax advice or any other form of financial, estate, or business planning advice.”


   a. Ensure client understands the limited nature of your representation.

   b. This will assist in situations where client’s children, or other beneficiaries of the client’s wealth, assert the representation was broader or that the elderly client did not understand the limited scope of the representation.

12. See generally M.H. Hoeflich & Mike Davis, *Preventive Ethics*, 68 J. KAN. BAR ASS’N 5 (May 1999). The authors note:

   “There are many reasons beyond fee-dispute avoidance for uniformly using written engagement agreements. Among the more obvious are:

   1. To identify the client. While this aspect of a representation is less important in matters involving individuals or easily identifiable groups, it can become essential when the client is a business association or co-tenancy or when the matter concerns an intra-group dispute.

   2. To define the scope of representation. All counsel of experience know the discomfort and potential danger that arise when the client believes the lawyer has performed either less or more than the client’s authorization.
3. To clarify the client’s obligations. At the very least, the agreement can set out specifically the requirements of cooperation in providing information and documents, the need for client availability for further consultation and the client’s obligation to pay according to a written schedule.

4. To put into written form any consents or conflict waivers that are part of the undertaking. Many lawyers have learned, to their substantial discomfort, the difficulty of enforcing the oral versions of these basic arrangements."

a. Since this article was written the Rules have been amended to expressly require that a conflict waiver be with each affected client’s “informed consent, confirmed in writing.” RULE 1.7 Conflict of Interest: Current Clients, § (b)(4); RULE 1.8 Conflict of Interest: Current Clients: Specific Rules, § (a), (g); RULE 1.9 Duties to Former Clients, § (a) & (b); RULE 1.10 Imputation of Conflicts of Interest: General Rule, § (c).

b. See also Sheila Reynolds, Obtaining Valid Waivers of Conflicts of Interest, 74 J. KAN. BAR ASS’N 12 (June 2005) (noting that a writing was not required under the existing Kansas rule but that the ABA 2002 amendments to the Model Rules of Professional Conduct require conflict waivers to be in writing and that the Kansas Bar Association Board of Governors had recommended this change be adopted by the Kansas Supreme Court. The change was adopted by the court in 2007).

13. As noted by Professors Hoeflich and Davis, one of the functions of an engagement letter is to identify the client. This is probably best illustrated by Hall v. Mayfield, 83 P.3d 1270, 2004 WL 292095 (Kan. Ct. App. Feb. 12, 2004) (unpublished opinion), where the main function of the engagement letter was most likely to indicate who the attorney was not representing. As the court notes:

“Mayfield sent an engagement letter to Mary Hall specifying that he was only representing her in the action, not her son. . . . In addition to the engagement letter sent to Mary, Mayfield sent a letter to George acknowledging that he had been hired to represent George’s mother, and that Mary had given him permission to discuss the case with her son. The letter to George specifically stated that Mayfield was not representing George in any capacity.”
a. Nevertheless, even the greatest of care in specifying Mary was his client, and George was not, did not avoid dispute.

b. When Mayfield subsequently sued Mary for his unpaid legal fees, Mary answered and argued she was not responsible for the legal fees and alleged that Mayfield represented her and her son, George.

c. George then brought a separate lawsuit against Mayfield for legal malpractice and about a dozen other claims, asserting Mayfield was his attorney.


a. The Kansas Public Employees Retirement System (KPERS) entered into an “Investment Counselor Agreement” with Reimer & Koger Associates, Inc. (R&K) in 1975. R&K provided KPERS with investment advice, including direct investments in various business enterprises.


c. Kutak Rock was hired by R&K to assist R&K in making the investment in Sharoff for KPERS’ benefit.

d. Kutak Rock’s engagement letter indicated it would assist R&K in acquiring specific interests in Sharoff (subordinated debentures, shares of preferred stock, and warrants to purchase common stock).

e. The engagement letter also stated: “In addition we [Kutak Rock] will perform such *due diligence* inquiries and activities as may be required by the investors in connection with its investment.”

(1) KPERS focused on this language to argue the Kutak Rock did not discover that Sharoff was a bad or
imprudent investment.

(2) The evidence revealed that the scope of “due diligence” in the context of Kutak Rock’s role in the transaction was to do things such as determine that Sharoff was properly incorporated and had authority to do the things it was promising to do (sell stocks and bonds).

f. The agent for R&K (Mr. Hart) who executed the engagement letter testified:

“[T]hat the agreement was that Kutak Rock would prepare documents for the transaction. Asked what due diligence consisted of as the phrase was used in the commitment letter, Hart answered: ‘Assuming as the agent for the investors at that particular point in time I would have requested they determine that Sharoff was in legal standing in the State of Colorado.’

“Hart also testified that he did not intend for Kutak Rock to do any financial due diligence. Instead, any due diligence expected of Kutak Rock would be related to reviewing articles of incorporation, bylaws, minutes of board meetings, and verifying that the corporation was in good standing.”

g. In affirming the district court’s judgment in favor of Kutak Rock, the supreme court notes:

“The scope of the attorney-client relationship between Kutak Rock and R&K was set out in the engagement letter. KPERS’s trustees establish investment policies, and R&K was the investment manager for KPERS and authorized to make investments. There is no evidence that Kutak Rock agreed to or assumed any duty other than set out in the engagement letter. Kutak Rock’s duty as counsel for R&K did not include the duty to determine if the Sharoff investment was prudent. . . .”

B. DEMAND LETTERS


1. Attorney Kenny’s complete demand letter to attorney Karstetter stated:
“Sometime last March, 2006, Mr. & Mrs. Buel approached your office, possibly with the assistance of Mr. Heath Hampton, requesting advice concerning a buy-sell agreement for their corporation. Since that time, Mr. and Mrs. Buel have questioned the need for the buy-sell agreement, since they are married, and are also the only shareholders in the corporation.”

“To be frank, Mr. Karstetter, my clients believe they were mis-advised, and intend to file a complaint with the state Disciplinary Administrator concerning your part in drafting the buy-sell agreement. However, if you were to simply refund your fee to them, in care of this office, I believe they may relent, and not file anything with Director Hazlett.”

2. Karstetter replied noting the Buels had come to him after being advised by Heath Hampton that they needed to have an insurance funded buy/sell agreement and closed stating: “I would also point out to you that if you believe I have committed an ethics violation, it is your duty to report that to the disciplinary administrator’s office.”

3. Kenny wrote back noting how messy an ethics complaint would be and suggested that Karstetter may have assisted Hampton in taking advantage of the Buels. Kenny again offered to try and persuade the Buels not to pursue the matter if Karstetter would refund his fee.

4. Karstetter responded by sending all the correspondence to the Disciplinary Administrator which resulted in a disciplinary proceeding against Kenny.

5. The Kansas Supreme Court adopted the findings, conclusions, and punishment recommendations of the Hearing Panel and Disciplinary Administrator. The ethical violations found to exist included:

a. RULE 4.4 Respect for the Rights of Third Persons

“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”

(1) This was the version of RULE 4.4 as it existed prior to the July 1, 2007 amendment which combined the prior rule (as § (a)) and the new portion (as § (b)), which provides:
“(b) A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”

(2) The pertinent portion of the Comment to RULE 4.4, regarding Kenny’s actions, states:

“Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalog all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusion into privileged relationships, such as the client-lawyer relationship.”

b. RULE 8.3 Reporting Professional Misconduct

“(a) A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.”

(1) “Because the Respondent [Kenny] had knowledge of what he perceived to be a violation of the Kansas Rules of Professional Conduct, the Respondent had an obligation to report Mr. Karstetter to the Disciplinary Administrator.”

(2) Note that even if Kenny thought preparation of the buy/sell agreement was ill-advised, and that his clients had in fact sought advice regarding the need for the agreement, this would not, under normal circumstances, give rise to a violation of the Kansas Rules of Professional Conduct.

(a) It may be evidence of a mistake – but that does not necessarily translate into a lack of “competence” or other ethical violation.

(b) Here any subjective evaluation that the situation may have been something less than an ethical
violation was foregone by Kenny’s assertions in his demand letter.

c. RULE 8.4 Misconduct [§§ (d) & (g)]

“It is professional misconduct for a lawyer to:

(d) engage in conduct that is prejudicial to the administration of justice; . . .

(g) engage in any other conduct that adversely reflects on the lawyer’s fitness to practice law.”

(1) RULE 8.4 is a sort of catch-all provision, including § (c) which provides it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . .”

(2) The Hearing Panel concluded: “[W]riting the two letters to Mr. Karstetter and demanding that the Buels attorney fees be returned in exchange for refraining from filing a disciplinary complaint, adversely reflects on Respondent’s fitness to practice law.” It was also “conduct that is prejudicial to the administration of justice . . . .”

6. The Supreme Court agreed that under the circumstances of this case, Mr. Kenny’s positive response to the investigation, and his past history, made published censure the appropriate remedy.

7. See J. Nick Badgerow, Don’t Threaten Me: A Lawyer’s Duties Under Rule 8.3, 74 J. KAN. BAR ASS’N 14 (April 2005). Had Mr. Kenny read this article in 2005, it is doubtful he would have made the allegations against Mr. Karstetter. Badegrow notes such conduct could also be a “criminal act [such as extortion]” that would trigger Rule 8.4(b).

C. THE PREFERENTIAL RIGHT TO PURCHASE


1. In 1998 Ritchie Corp. sold 16.8 acres to BFI Waste Systems of North America, Inc. (BFI) [Waste Connections is the successor to BFI]. The
acreage consisted of a landfill and a waste transfer station. As part of the sale Ritchie retained a reversionary interest in the transfer station acreage which required BFI to pay a sum per ton of waste processed at the transfer station. At the end of 35 years Ritchie would receive the transfer station acreage back pursuant to its reversionary interest.

2. The agreement contained the following clause concerning the transfer station:

"Right of First Refusal. At all times this escrow agreement is in effect Buyer shall have a right of first refusal with respect to Seller's interest in this escrow agreement, including without limitation Seller's reversionary interest in the Property, however designated, to the effect that upon receipt by Seller of any offer to purchase Seller's interest in this Agreement or the Property by a third party, Seller shall give written notice to Buyer of the fact and terms of such third party offer. Buyer shall have forty-five (45) days after its receipt of such notice to notify Seller in writing of its election to purchase such interest(s) on such financial terms (the "Election Term"). In the event Buyer does not notify Seller of its election to purchase such interest(s), then Seller may sell such interest(s) on such identical terms to such third party so long as such sale is consummated within ninety (90) days after such Election Term. If such sale to the third party is not consummated within such period, then the Buyer shall again have the right of first refusal to purchase such interest(s) prior to any sale to any third party. This right of first refusal shall specifically not apply to any transfer or assignment by Seller to an affiliate of Seller or to any stockholder of Seller or any of their affiliates."

3. A detour to address a RULE 1.1 Competence consideration.

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

4. As an aside, since the escrow agreement was for 35 years, under the Kansas common law rule against perpetuities it could be argued the entire clause would be void.

a. Kansas has traditionally applied the rule against perpetuities to preferential rights to purchase. See generally Gore v. Beren, 254 Kan. 418, 867 P.2d 330 (1994) (rule not violated because interest would vest within a life in being at the time of its creation—
otherwise the court noted: “Agreements creating an option or preemptive right to purchase real estate constitute property interests which are subject to the rule against perpetuities.”).

b. Ritchie could elect to sell the transfer station at any time during the 35-year escrow term. This sale would trigger, at that time, the springing executory interest in BFI to acquire the interest which would be viewed as a non-vested future interest in the transfer station held by Ritchie.

c. Because it is not possible to state that the event triggering BFI’s future interest (sale by Ritchie) in the land will, or will not, occur (vest) within 21 years from the date of sale, December 29, 1998 (it could be up to 35 years after), the interest, at common law, would be void.

d. However, Kansas, effective July 1, 1992, adopted the Uniform Statutory Rule Against Perpetuities, K.S.A. §§ 59-3401 to 59-3404 (2005). This statute can save the preferential right from the rule in this case in two ways:

   (1) Under the “wait-and-see” provision which provides the interest is valid if it “either vests or terminates within 90 years after its creation.” K.S.A. § 59-3401(a)(2) (2005). In this case, Ritchie will either sell, or not sell, the interest within 35 years so we know it will either vest or terminate in 90 years.

   (2) Under the facts this commercial transaction is a “nondonative transfer” which is no longer subject to any rule against perpetuities restrictions pursuant to K.S.A. § 59-3404(1). Therefore, we would not have to resort to any of the savings provisions of the Act (such as the 90-year wait-and-see provision) because the transaction is taken completely out of the rule’s operation.

e. We have a potential problem in Kansas – caused primarily by me. I believe the Uniform Statutory Rule Against Perpetuities is void in Kansas because it was enacted in violation of Article 2, Section 16 of the Kansas Constitution which states:

“No bill shall contain more than one subject, except appropriation bills and bills for revision or codification of
The original bill which contained the Uniform Statutory Rule Against Perpetuities also contained two other provisions: repeal of the Bulk Sales Act and statutes adopting a conservation easement program. All three concerned some version of a “uniform law” as adopted by the National Conference of Commissioners of Uniform State Laws (Uniform Law Commission).

This precise issue was addressed in Larson Operating Co. v. Petroleum, Inc., 32 Kan. App. 2d 460, 84 P. 3d 626 (2004). The log-rolling history of the bill was not presented; the court of appeals’ decision is unconvincing. Review by the Kansas Supreme Court was not sought. Basic position of the court:

“Here the subject matter of the enactment did not embrace ‘dissimilar or discordant subjects’ but rather embraced a singular purpose: amendment and enactment of certain uniform acts in an attempt to harmonize them with Kansas legislative intent. [what?] Joinder of these enactments and amendments of uniform laws in a singular enactment did not offend the constitution, since there was no obvious intent to tie a matter of legislative merit to an unworthy matter.”

The court’s analysis amounts to: if you put the word “uniform” in the title of the act, then they all have one thing in common, they are “uniform” acts. So, the “uniform” death penalty act could be considered in conjunction with the “uniform” partial birth abortion act?


Holland & Hart represented Buell Development Corporation in connection with the sale of stock in Kings County Development Corporation to John Rocovich. The issue concerned an option in favor of Buell to
acquire from Rocovich a percentage of the Development Corporation’s minerals in California in the event Development Corporation ever decided to distribute these interests to its shareholders.

(2) Rocovich apparently had some level of control over Development Corporation where he could initiate the corporate action to cause the distribution of minerals to its shareholders.

(3) Dispute arose over whether this option violated the rule against perpetuities (among other claims), and Buell settled the matter by reducing its right to share in a distribution of minerals. The jury valued this reduction at $3,364,011, plus $2,125,195 in interest. Trial court: found the agreement violated the rule against perpetuities and the law firm was negligent for not addressing the matter properly.

(4) On appeal the court reverses noting that it was not possible for Buell and Rocovich to in any way contract to create a perpetuity as to property owned by a third party, Development Corporation. Therefore, the agreement did not violate the rule against perpetuities.

(5) But wait, we are not done with you. We are remanding the case so Buell’s malpractice claim can be considered in light of the fact the agreement did not violate the rule against perpetuities. Instead, the issue is whether the attorneys were negligent by not recognizing “the clear potential for dispute” associated with the rule against perpetuities, and then failing to take the necessary action by drafting the agreement to avoid a potential perpetuities claim.

5. Once we get past the rule against perpetuities, we come to the major problem with the preferential right to purchase: the package transaction.

a. Lots of litigation where a party has a preferential right to purchase property “A” which is subsequently sold in a transaction consisting of properties “A” and “B” and the selling/buying party tries to avoid an exercise of the preferential
right by loading up the purchase price on the “A” part of the transaction.

b. Package transactions have many other problems. For example, can the preferential rights holder insist that: (1) it can buy the entire package for the package price? (2) property “A” can only be sold separately? Can the preferential rights holder be forced to bid on the entire package or none at all? If they are not required, or able, to purchase the package — how will the package purchase price be allocated to the single preferential rights property? See generally Navasota Resources, L.P. v. First Source Texas, Inc., 249 S.W.3d 526 (Tex. Ct. App. 2008).

6. Risks for everyone:

a. **The attorney representing the seller of the property burdened by the preferential right.** To what extent can the attorney assist their client in avoiding the limitations of the preferential right by making literal use of the terms of the contract?

   (1) For example, the clause involved in the Waste Connections case states: “This right of first refusal shall specifically not apply to any transfer or assignment by Seller to an affiliate of Seller or to any stockholder of Seller or any of their affiliates.”

   (2) Could the seller’s attorney suggest that the asset burdened by the preferential right be transferred to “an affiliate of Seller” and then have the stock (not the asset) in the affiliate sold to the desired buyer?

   (3) **Rule 8.4 Misconduct.** “It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . .”

   (4) What if the conduct is approved by the Texas Supreme Court? Tenneco Inc. v. Enterprise Products Co., 925 S.W.2d 640 (Tex. 1996). Court holds that a transfer of stock is not a transfer of the company’s assets and therefore, unless the preferential rights provision states otherwise, a stock transfer is not a triggering event. This has given rise to the “Texas Two-Step” approach for
avoiding preferential rights provisions.

(a) Do you then have a duty to counsel your client on this available option?

(b) To what extent will Texas law on this issue transfer to other jurisdictions? Kansas?

(c) Practical considerations: litigation magnet.

<table>
<thead>
<tr>
<th>1. Before any relevant transactions:</th>
<th>2. Tenneco Oil transfers its ownership interest to Tenneco Natural Gas Liquids (the First Transfer).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tenneco Oil holds ownership interest in plant and owns all of Tenneco Natural Gas Liquids’ stock.</td>
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<tr>
<th>3. Tenneco Oil sells Tenneco Natural Gas Liquids’ stock to Enron Gas Processing; Tenneco Natural Gas Liquids’ name is changed to Enron Natural Gas Liquids (the Second Transfer).</th>
<th>4. Enron Gas Processing conveys Enron Natural Gas Liquids’ stock to Enron Liquids Pipeline Operating Limited Partnership (the Third Transfer).</th>
</tr>
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</table>

\* = ownership interest in fractionation plant
TOC = Tenneco Oil Company
EGP = Enron Gas Processing Company
ELP = Enron Liquids Pipeline Operating Limited Partnership
TNGL = Tenneco Natural Gas Liquids Corporation
ENGL = Enron Natural Gas Liquids Corporation
The attorney representing the seller of the property burdened by the preferential right. To what extent can the attorney assist their client in avoiding the limitations of the preferential right by manipulating the purchase price allocation?

(1) **Rule 8.4 Misconduct.** “It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . .”

(2) In *Waste Connections* the dispute was over purchase price allocation. The total purchase price was $4.95 million, the seller allocated $2 million to the transfer station, but the buyer, in the event BFI/Waste Connections exercised its option, would still be obligated to pay $3.5 million for the landfill portion of the package.

(3) No deceit here because all the relevant facts were clearly stated in the sales agreement between Ritchie (seller) and Cornejo (buyer). Their agreement stated:

“2.1 Purchase Price and Payment. The purchase price for the entirety of the Assets [landfill and transfer station] shall be Four Million Nine Hundred Fifty Thousand Dollars ($4,950,000), payable in cash or certified funds at Closing, of which Two Million Dollars ($2,000,000) will be allocated to and paid to Ritchie Corporation for the purchase of its rights and the assumption of its obligations under the Escrow Agreement.”

“In the event that Waste Connections of Kansas, Inc. shall, upon receipt and due and proper notice from Sellers, elect to exercise its right of first refusal under the Escrow Agreement, the parties agree that the purchase price for the remaining Assets shall be Three Million Five Hundred Thousand Dollars ($3,500,000.00), payable in cash or certified funds at Closing.”

(4) Notice of the sale was provided to Waste Connections, along with a copy of the Cornejo/Ritchie agreement. Ritchie indicated in the notice that is had “received an offer to acquire its interest in the escrow agreement for $2,000,000.00 cash as specified in the attached Asset Purchase Agreement. . . .”
(5) Waste Connections tendered $2 million but also sought to preserve its rights to argue the purchase price should be $1.45 million ($4.95 million - $3.5 million).

(6) Waste Connections sued Ritchie, trial court held for Ritchie and awarded Ritchie $108,972.15 in attorneys fees pursuant to the prevailing party attorney fees provision in their agreement. The court of appeals reverses finding that allowing Ritchie to obtain $2 million for what Cornejo was willing to pay only $1.45 million “would evade the ‘spirit of the bargain . . . .’”

(7) The court concludes: “Ritchie acted in bad faith by attempting to maximize its profits to ‘recapture opportunities foregone’ through granting of the right of first refusal.”

c. **The attorney representing the buyer of property subject to the preferential right to purchase.** The buyer cannot merely accommodate whatever scheme the seller may come up with to negate another party’s preferential right to purchase.

(1) Tortious interference issues.

(2) The attorney advising the buyer must be as attuned to the situation as the attorney advising the seller.

(3) The buyer may become the enabler.

7. **Observations by the Waste Connections court regarding the “package deal”:**

a. “The package deal is a risky situation in the terms of the right of first refusal. There is ‘a risk in package deals that the purchase price may be unfairly allocated or padded to defeat the rights of first refusal.’ . . . . In a package deal situation, more protection needs to be given to the right of first refusal to prevent collusion or bad faith. In a package deal, the purchase price should come under greater scrutiny and any doubt in the amount should be resolved to protect the right of first refusal.”

b. “In the context of a package deal involving a right of first refusal, the price for the total package generally should not fluctuate
based upon whether the right of first refusal is executed. Ritchie should not be able to receive more money after exercise of the right of first refusal. For the right of first refusal to be given its lawful effect, Ritchie should be in the same financial position regardless of whether WCK exercises the first refusal.”

c. “Because there are a multitude of ways that a sale can circumvent a grantee’s right of first refusal in a package deal, the duty of good faith and fair dealing should be applied prominently in cases like the one before us.”

8. The drafting response would be to address the problem head-on in the next document, having learned the most recent lessons of avoidance and abuse.

III. THE NOTARIZED DOCUMENT; THE MUNDANE AND THE CRIMINAL

A. SANCTITY OF THE NOTARIZED DOCUMENT

1. Beginning with law school, the sanctity of the notarized document should be emphasized so when students become lawyers they are never tempted to pursue one of the many illegal and unethical short-cuts associated with the notarized document.

2. Kansas Statutes Annotated, Chapter 53.—Notaries Public


b. Most common abuse is falsification of the “certificate” of notarial acts. The “certificate” is evidence that a “notarial act” has been performed in accordance with law.


“(a) In taking an acknowledgment, the notarial officer must determine, either from personal knowledge or from satisfactory evidence, that the person appearing before the officer and making the acknowledgment is the person whose true signature is on the instrument.”

a. Similar provisions for a verification and attesting a signature
require that it be by "the person appearing before the officer . . . ."

b. The purpose of the requirement is to have the notary certify that the person before them, executing the document in their presence, is in fact the named person. The other operative provision is found at § (f) of 53-503 which states:

"A notarial officer has satisfactory evidence that a person is the person whose true signature is on a document if that person is (1) personally known to the notarial officer, (2) identified upon the oath or affirmation of a credible witness personally known to the notarial officer or (3) identified on the basis of identification documents."

c. The "certificate" of acknowledgment, verification, or attestation, is a statement by the notary that they have properly performed the notarial act.

d. All of these actions must take place in the notary's physical presence.

4. **K.S.A. § 53-508. Certificate of notarial acts.** Provides, in part:

"(a) A notarial act must be evidenced by a certificate signed and dated by a notarial officer. The certificate must include identification of the jurisdiction in which the notarial act is performed and the title of the office of the notarial officer and may include the official stamp or seal of office. If the officer is a notary public, the certificate must also indicate the date of expiration, if any, of the commission of office . . . ."

a. § (c) states: "By executing a certificate of a notarial act, the notarial officer certifies that the officer has made the determinations required by K.S.A. 53-503."

b. **Drafting Tip:** Whenever a document requires a certificate of a notarial act, use the short forms at **K.S.A. § 53-509 (2005).**

(1) They accomplish in a few words what other forms of certificate do in several sentences.

(2) They are recognized by the Uniform Act so the words in Kansas will be the same as those in other states.

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You can tell at a glance if it contains what is required for an effective certificate.

B. ABUSES THAT MAY SEEM INNOCUOUS (BUT ARE STILL CRIMINAL)

1. You go to the client’s house, etc., they sign the document, you bring it back to the office to have it notarized. You tell the notary, who is also probably an employee, that the person signed it in your presence and the signature is good – and all of that is in fact true. The notary completes the certificate.

2. You have committed a crime, the notary has committed a crime, you have violated the Kansas Rules of Professional Conduct and if any other attorneys are aware of the practice, they have violated the Kansas Rules of Professional Conduct for not reporting your violation.

3. The notary:

   a. K.S.A. § 58-2218 (2005) False statement and certificate; penalty. deals with a certificate of acknowledgment regarding “all conveyances and other instruments affecting real estate” [K.S.A. § 58-2211] and states: “Any officer who knowingly states a material untruth, in either of the certifications herein contemplated, may be indicted, and fined in any sum not exceeding the value of the property conveyed or otherwise affected by the instrument on which such certificate is endorsed.”

   b. See Bellport v. Harkins, 104 Kan. 543, 180 Pac. 220 (1919) (imposter sold land he did not own to plaintiff; plaintiff sued notary who gave a certificate of acknowledgment on the deed signed by the imposter).

   c. In State v. Kraushaar, 264 Kan. 667, 957 P.2d 1106 (1998), the court noted that the attorney, who was also a notary, violated K.S.A. § 58-2218 under the facts and should not have been charged under K.S.A. § 21-3711 (making a false writing). The facts, as stated by the court, were as follows:

   “Yvonne Dunnigan requested Kraushaar, an attorney, to prepare a quitclaim deed. Kraushaar prepared the deed. Kraushaar explained to Mrs. Dunnigan that the deed required the signature
of both her and her husband. She informed Kraushaar that her husband was unavailable. Kraushaar told her to take the deed to her husband, have him sign it, and return it. *This is when Kraushaar should have said your husband must appear before me because it is a crime for me, as a notary, to allow him to sign out of my physical presence.* Mrs. Dunnigan returned the signed deed. Kraushaar was unaware that Mr. Dunnigan’s signature had been forged. *NOTE: This is why we require the signing to take place in the notary’s presence after the notary is satisfied the person signing is the person shown on the document.* Even though Mr. Dunnigan was not present, Kraushaar notarized the deed. The deed was filed for record.

4. The lawyer:
   
a. Interestingly, in Kansas the criminal penalties are even greater for a lawyer who obtains a notary’s certificate when the person who signed the document does not do so in the notary’s physical presence.

b. As noted in paragraph 3 above, in *State v. Kraushaar*, 264 Kan. 667, 957 P.2d 1106 (1998), the court did not apply K.S.A. § 21-3711 (making a false writing) because there was a more precise statute applicable to the wrongdoer acting as a notary. In most cases, however, the wrongdoer will be an attorney who is directing another person who is the notary.

c. K.S.A. § 21-3711. Making false information. states:

   “Making false information is making, generating, distributing or drawing, or *causing to be made*, generated, distributed or drawn, *any written instrument*, electronic data or entry in a book of account *with knowledge that such information* falsely states or represents some material matter or *is not what it purports to be*, and *with intent to* defraud, obstruct the detection of a theft or felony offense or *induce official action*.

   Making false information is a severity level 8, nonperson felony.”

d. Although the court in *State v. Kraushaar* found § 21-3711 (a prior version, the current version has more expansive language) was not the most specific statute applicable to a notary certifying signatures in a deed, the court discusses, at length, the operation
of 21-3711.

(1) The knowledge required is that the statement by the notary "that he witnessed the signing of the document" is false ("not what it purports to be").

(2) The "official action" they sought to "induce" was recording the deed with the register of deeds. "K.S.A. 21-3711 does not require that the official action intended ultimately occur; it only requires that the official action be intended."

(3) Attorney knew why the notary was certifying the acknowledgment: so the document would be eligible for recording to provide constructive notice of the conveyance.

5. Consider Committee on Professional Ethics and Conduct of the Iowa State Bar Ass’n v. Bauerle, 640 N.W.2d 452 (Iowa 1990). Concerned "a prominent attorney who has practiced law in Ottumwa, Iowa, since 1956."

a. Back-dated documents at client’s request to reflect a false state of affairs to obtain favorable tax treatment.

b. Attorney, acting as a notary, completed the notary certificate and then sent documents to client for the client’s signature. The court, characterizing the attorney’s conduct as "inexcusable," observes:

"Neither do we take the false notarization lightly. It is suggested in defense of the incident that the practice of notarizing known signatures of absent persons is neither uncommon nor unnecessarily deceitful. We think such a practice can never be excused. It is manifestly unprofessional for a lawyer, acting as a notary public, to certify that persons who did not do so personally appeared and attested to a document."

c. In light of the lawyer’s prominent position in the profession, and over 30 years of practice, the committee recommended a 30-day suspension. The Supreme Court of Iowa strongly disagreed with the recommendation and instead ordered indefinite suspension with no reinstatement opportunity for six months.
6. One consistent theme in most of the cases on this issue: the attorney was not taking the improper action for his or her own benefit, but rather to accommodate a client. Often violations in this area are the product of "poor judgment and faulty time-management." *Oklahoma Bar Ass'n v. Jaques*, 11 P.3d 621 (Okla. 2000).

7. Another category of cases: executing a deed from the parent to the kids, after the parent has died, to avoid probate. *In re Boyd*, 430 N.W.2d 663 (Minn. 1988) (lawyer prepared back-dated deed, had dead father's signature placed on it by the daughter, directed notary in his office to certify the false signature, had the deed recorded, -- and to top it off -- the lawyer prepared a title opinion on the property for the bank making a loan on the property). Court notes: "One goal of attorney discipline is to deter misconduct by members of the bar generally and by the respondent specifically."


a. From the author's discussions with Charles N. Faerber with the National Notary Association "there is more notarial abuse in the legal profession than in any other field" and "[i]n the course of a day, the National Notary Association receives between 200 and 300 phone calls from notaries who are asked to perform improper notarizations." FN 145.

b. Of these 200 to 300 daily calls: "More often than not, the person asking the notary to perform the improper notarization is an attorney." FN 145.

9. *See also* J. Nick Badgerow, "Notarize This": The Notary's and the Lawyer's Liability for Forged Signatures, 73 J. KAN. BAR ASS’N 18 (Sept. 2004).

C. A PARTIAL SOLUTION FOR WHEN THE NOTARY IS NOT AVAILABLE: THE UNSWORN DECLARATION

1. Think about it – the provisions we are about to study had to be designed for lawyers to avoid the problem presented by the inability to have a document signed, in person, before a notary.

2. After we discuss it, your main question will be – does it work? It does.
Although you may need to be prepared to educate the person to whom you are presenting the un-notarized, but nevertheless the-same-as notarized, document.

3. **K.S.A. § 53-601. Unsworn declarations; written declaration sufficient, form; exceptions; relationships to notarial acts.**

   "(a) Except as provided by subsection (b), whenever a law of this state or any rules and regulations, order or requirement adopted or issued thereunder requires or permits a matter to be supported, evidenced, established or proved by the sworn written declaration, verification, certificate, statement, oath or affidavit of a person, such matter may be supported, evidenced, established or proved with the same force and effect by the unsworn written declaration, verification, certificate or statement dated and subscribed by the person as true, under penalty of perjury, in substantially the following form:

   (1) If executed outside this state: "I declare (or verify, certify or state) under penalty of perjury under the laws of the state of Kansas that the foregoing is true and correct. Executed on (date).

      (Signature)"

   (2) If executed in this state: "I declare (or verify, certify or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

      (Signature)"

   (b) The provisions of subsection (a) do not apply to the following oaths:

      (1) An oath of office.

      (2) An oath required to be taken before a specified official other than a notary public.

      (3) An oath of a testator or witnesses as required for wills, codicils, revocations of wills and codicils and republications of wills and codicils.

   (c) A notarial act performed prior to the effective date of this act is not affected by this act. Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state or rules and regulations adopted thereunder.
(d) On or after July 1, 1989, whenever an officer or partner listed in subsection (b) of K.S.A. 17-2718, subsection (c) of K.S.A. 17-7503, subsection (c) of K.S.A. 17-7504, subsection (c) of K.S.A. 17-7505, subsection (d) of K.S.A. 56-1a606 or subsection (d) of K.S.A. 56-1a607 and amendments thereto is required to execute a report before a notary or swear an oath before an officer authorized to administer oaths, in lieu thereof, such person may execute an unsworn declaration if such declaration is in substantial conformity with subsections (a), (b) and (c) of this section.

(e) On or after July 1, 1990, subsections (a), (b) and (c) of this section shall have general application.”

a. Note this statute is fairly limited. If the act requires, in effect, the party to provide a sworn statement, in lieu of appearing before a notary who then provides the jurat or verification, the unsworn declaration may be used.

b. However, for a routine certificate of acknowledgment by a notary, the language in K.S.A. § 53-601 is too limited to supplant the notary where an acknowledgment is required.


(1) Noting that mechanic’s liens must be “verified” the Opinion indicates the unsworn declaration may be used.

(2) However, noting that mortgages and deeds must be “acknowledged,” the Opinion finds the unsworn declaration under 53-601 cannot take the place of a notary’s certificate of acknowledgment.

d. NOTE: If you were in a bind, and needed to get a deed of record but a notary is unavailable to notarize the grantor’s signature, an unsworn declaration could be prepared, which could be recorded the same as an affidavit, with the signed (but not notarized) deed attached. This would put the world on notice of the contents of the affidavit (unsworn declaration with deed attached).

"Whenever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proven by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: “I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)”.

(2) If executed within the United States, its territories, possessions, or commonwealths: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)”.


b. The wording in § 1746 would seem to be subject to the same limitations as noted for K.S.A. § 53-601. However, like 53-601 it provides a viable alternative in all situations where an affidavit or other sworn statement is required.
IV. DRAFTING: COMPETENCE AND MAKING THE DOCUMENT WORK

A. THE DRAFTING PROCESS

1. The drafting process involves gathering facts and identifying client goals. Once the client's situation is understood, the lawyer will use his or her independent professional judgment to identify the potential legal ramifications of the proposed transaction. This will suggest varying deal structures and approaches followed by potential contractual language that may be used to define the deal. For each clause comprising the contractual language, the lawyer will again engage his or her independent professional judgment, by researching the appropriate statutory, case law, and commentary research, to determine how to draft the document language.

2. When properly applied, the drafting process ensures:

   a. You understand the client's unique situation in relation to the deal.
   b. You understand the client's goals.
   c. You have systematically worked through a plan to accomplish the client’s goals, considering their unique situation.
   d. You have identified the documents necessary to put the plan into effect.
   e. You have identified the necessary content for each document and fully understand each word, phrase, sentence, and paragraph used to express the deal.
   f. You have fully researched the content of the document and have chosen each word, phrase, sentence, and paragraph to fully implement the law gleaned from statutes, cases, and commentary.
   g. You have brought all your research current to incorporate the latest statutory and case law developments applicable to the transaction.

3. As noted previously, we are focusing on two Kansas Rules of Professional Conduct:
RULE 2.1 Advisor. “In representing a client, a lawyer shall exercise independent professional judgment . . .”

RULE 1.1 Competence. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

B. UNDER-DRAFTING

1. Under-drafting takes one or more of three forms:
   a. Abdication of “independent professional judgment” by blindly using forms prepared by others to do a transaction.
   b. Failing to fully analyze the client’s situation and suggest document options that can maximize the client’s position in the transaction.
   c. Failing to fully analyze a clause or approach used in a document to maximize its effect or chances of being fully enforced.

2. Abdication of “independent professional judgment” can best be avoided by making sure you engage in the drafting process before considering forms that may be available.
   a. Conduct your own independent review and analysis of what is required before looking at forms.
   b. If you immediately turn to a form (that you have not previously prepared or analyzed), then your thought process will invariably be channeled by the form.
   c. Consider available forms after you have conducted your analysis and after you have identified the type of document and clauses you think are necessary, and after you have prepared a draft of your document.

3. Failing to suggest document options that can maximize the client’s goals is often a product of not fully analyzing the client’s facts and goals.
   a. For example, a Southeast Kansas client entering into a contract with a Houston, Texas firm would surely want to negotiate for a
choice of forum provision to ensure disputes are settled in a local Kansas court instead of Harris County, Texas.

b. A choice-of-law provision will often be essential to ensure that your planning and structuring are undertaken applying the correct body of law.

c. An attorney fees provision may be called for – often, if your client is the economically weaker party – you would want to negotiate for a “one-way” attorney fees provision. If your client prevails, they get their attorney fees, if your client does not prevail, then each party is responsible for their own fees.

4. Failing to fully analyze a clause or approach is typically due to a failure to apply basic legal research techniques to determine the current status of a concept so it can be most effectively drafted and implemented.

a. For example, the indemnity clause is one of the most useful contract clauses available to the drafting attorney. It can be used to allocate the financial burden of a risk that cannot be readily or economically insured against.

b. However, courts and legislatures tend to provide the party giving indemnity with various protections to ensure they truly know what they are doing. For example, courts impose a greater degree of expression for an agreement to indemnify a party for their own negligence and in some cases such an indemnity is prohibited by statute.

c. Regarding indemnity, consider K.S.A. § 16-121 discussed at §VI. C. of this Outline.

C. OVER-DRAFTING

1. Over-drafting occurs when the lawyer tries to get too much out of their document and in the process crosses the line into the unenforceable.

2. Over-drafting can be intentional and unintentional.

a. Unintentional over-drafting may occur because the lawyer has not followed the proper drafting process so they know precisely what they can, and cannot, provide for in their documents.
b. Intentional over-drafting occurs when the client desires the *in terrorem* effect of the provision. Although it may not be enforceable, the other party will not know that and it can be used to coerce their performance.

3. Intentional over-drafting can be a violation of the Kansas Rules of Professional Conduct.

a. **RULE 4.1 Truthfulness in Statements to Others**

   "In the course of representing a client a lawyer shall not knowingly:

   (a) make a false statement of material fact or law to a third person; or

   (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by or made discretionary under Rule 1.6."

b. **RULE 8.4 Misconduct**

   "It is professional misconduct for a lawyer to:

   . . .

   (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

   (d) engage in conduct that is prejudicial to the administration of justice;

   . . .

   (g) engage in any other conduct that adversely reflects on the lawyer’s fitness to practice law."
V. COUNSELING AND SELECTING THE RIGHT APPROACH AND DOCUMENT

A. PROFESSIONAL RESPONSIBILITY AT THE MACRO LEVEL

1. At a macro level the lawyer, considering the needs, desires, and situation of their client, must exercise his or her professional judgment to select among a number of options that may be available to accomplish a client’s goal.

2. For example, assume the client, Dock Hillard, wants to “gift” a tract of land to his two sons, James Hillard and Jonathon Hillard.

   a. Dock’s main goal for wanting to “gift” the land to James and Jonathon is to avoid probate and ensure the land will go to his sons without delay or the need to open an estate.

   b. Dock is single. The total value of his estate, and the land at issue, do not make tax planning a major factor.

   c. Dock wants to “gift” the land to James and Jonathon, but really doesn’t want them to have any control over it until Dock dies.

   d. Must carefully explore exactly what Dock means when he uses the term “gift.”

B. MAKING A GIFT

1. The Kansas Reports contain numerous examples of situations where the grantor executed the deed but never quite relinquished control over the document prior to the grantor’s death.

2. The deed, if not delivered during the grantor’s lifetime, becomes an ineffective will and the land ends up in the grantor’s estate.

3. If the deed is delivered, the grantee will have complete and immediate control over the conveyed land – this is often not what the grantor intended.

4. If the grantee has current ownership of the property, it will be subject to claims by creditors and spouses and can be disposed of by the grantee.
C. THE INADEQUACIES OF PROBATE

1. One of the major perceived inadequacies of probate is the lawyer.

2. Not so much the fee, as failure to comply with RULE 1.3 Diligence: “A lawyer shall act with reasonable diligence and promptness in representing a client.”

3. Comment [2] to RULE 1.3 states:

   “Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client’s interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness.

4. A surprisingly large number of the reported ethical violation cases concern lawyer’s handling, or mis-handling, or not handling, estate matters.

D. THE INADEQUACIES OF THE DELAYED GIFT

1. Gifts take effect upon delivery which is the point in time when the grantor has parted with control of the item and lacks the power to recall it into his or her possession.

2. Failure to make delivery during the grantor’s lifetime makes the writing, or scheme of delayed delivery, a form of testamentary transaction that must comply with the statute of wills to be effective.

3. Because of these inherent problems with the delayed gift, in Kansas, and most of “farm country,” the public has turned to joint tenancy as a means of transferring property, presently, but retaining some element of control as an ill-defined cotenant of the property.

4. The Kansas Supreme Court has been surprisingly accommodating when it is necessary to “look behind” the joint tenancy conveyance and ascertain the true state of affairs – often at the expense of third parties relying upon what is expressed on the face of the deed.
5. As will be seen below in the discussion of the In re Kasparek case, the Bankruptcy Appellate Panel for the 10th Circuit Court of Appeals, and the Bankruptcy Code, are not so accommodating – providing one more reason to reconsider joint tenancy as an estate planning tool.

E. THE INADEQUACIES OF JOINT TENANCY

1. Joint tenancy can be a deceptively fragile relationship on which to plan a future.

2. A frequently over-looked issue upon death of a joint tenant is a study of events taking place under the joint tenancy relationship to determine whether it has, in fact, been severed so that the presumed deceased joint tenant is actually a cotenant that retains their undivided interest in their estate at death.
   a. The risks here can be significant because if the joint tenancy was severed during the decedent’s lifetime, the decedent’s undivided interest will not go to the surviving joint tenant but will instead pass under the decedent’s will or intestate succession – or by other means, such as a transfer-on-death deed.
   b. It is a high-risk proposition because it is generally “winner-take-all” meaning if there has been a “severance” of the joint tenancy the surviving joint tenants will take nothing from the decedent; the decedent’s heirs or devisees will take it “all.”

3. When the joint tenants entered into different oil and gas leases at different times (even though with the same lessee), did that act sever the joint tenancy and create a tenancy in common by operation of law?
   a. Issue has not been litigated in Kansas – probably because the prospect of a severance was not considered by anyone.
   b. The issue was recently the subject of litigation in Pennsylvania. In re Estate of Quick, 905 A.2d 471 (Pa. 2006) (no severance of the joint tenancy resulted because there was no “intent” to sever).

4. If one joint tenant enters into a mortgage will that cause a severance of their interest in Kansas?
   a. Because Kansas follows a “lien” theory of mortgages, as opposed to a “title” theory, it should not result in a severance because nothing has been conveyed to the mortgagee.
b. However, we have problems with "dicta law" on this subject in *Hall v. Hamilton*, 667 P.2d 350, 354-55 (Kan. 1983), where the court stated:

"It is undisputed that any joint tenant may sever his or her joint tenancy interest in real property by . . . mortgaging the joint tenancy interest . . . ."

c. Although the statement in *Hall* was *dicta*, it was picked up as "law" in *Hutchinson National Bank and Trust Co. v. Brown*, 753 P.2d 1299, 1301 (Kan. Ct. App. 1988), *rev. denied* (June 22, 1988), where the court states:

"The Bank contends that the plain language in *Hall* requires Kansas courts to find that a pledge acts as a severance of the joint tenancy interest because there is no legal distinction in the operative effect of a mortgage or pledge (other than the type of property encumbered). We agree."

d. What does the governing statute say regarding the mortgage/pledge issue?

(1) The governing statute is *K.S.A. § 58-501 (2005)* which has been around since 1939 and is one of the few provisions of the 1939 Property Act that was given complete retroactive effect: "The provisions of this act shall apply to all estates in joint tenancy in either real or personal property herefore and hereafter created . . . ."

(2) The last phrase of K.S.A. § 58-502 makes it clear that the mere granting of a lien on property is not viewed as the severing event, but rather the foreclosure of the lien that results in a change of title through an actual *sale* of the interest:

"[N]othing herein contained shall prevent execution, levy and sale of the interest of a judgment debtor in such estate and such sale shall constitute a severance."

(3) No court in Kansas has focused on this express language in the statute – at least not in the *Hall* or *Hutchinson National Bank* contexts.
e. The mortgage issue, and even the pledge issue, remain open issues in Kansas.

(1) K.S.A. § 58-502 takes the most appropriate approach to the issue by making an actual change of title to the encumbered interest the clear, defining event in which a severance will occur.

(2) Until a sale, and the resulting change in ownership, the joint tenancy would remain in effect. Not even the filing of a foreclosure action would cause a severance because no change in title will occur until the action has successfully run its course and a sale is completed.

(3) If a lender wants to protect itself from the winner-take-all aspects of joint tenancy, it should, as a condition to making the loan, require their borrower to sever the joint tenancy and convert it into a tenancy in common – unless, of course, the bank feels lucky and the borrower is the youngest and healthiest of the joint tenants.

5. Technical aspects of severance: “destroying” one of the “four unities.”

6. The “four unities” at common law required to create, and maintain, a joint tenancy are:

   a. **Interest:** the tenants must have one and the same interest.

   b. **Title:** the interests must accrue by one and the same instrument or conveyance.

   c. **Time:** the interests must commence at one and the same time.

   d. **Possession:** the property must be held by one and the same undivided possession.

7. If one of the “unities” is “destroyed,” or “lacking,” then the joint tenancy becomes a tenancy in common and the survivorship rights are eliminated.

8. Is it possible for a joint tenant to own less than an equal, undivided interest and still satisfy the unity of “interest” (tenants must have one **and the same** interest)? Not really – except, perhaps, in Kansas.
a. *In re Estate of Lasater*, 54 P.3d 511 (Kan. Ct. App. 2002), *rev. denied* (Dec. 17, 2002) (joint tenancy can be created when one joint tenant is conveyed 99% and the other 1% – this does not, according to the court, violate the unity of interest).

b. *Lasater*: right result, even though the unities analysis is open to challenge.

9. A strong argument can be made that courts need to abandon the unities analysis altogether.

a. The unities analysis never fit the cases dealing with bank accounts.

b. The Court of Appeals in *Lasater* properly focuses on the intent of the parties to resolve these issues. The intent was extremely clear in *Lasater*.

10. *K.S.A. § 58-501 (2005)* provides a statutory basis for abandoning the unities analysis and focusing on intent by providing:

“Real or personal property granted or devised to two or more persons including a grant or devise to a husband and wife shall create in them a tenancy in common with respect to such property unless the language used in such grant or devise makes it clear that a joint tenancy was intended to be created . . . .”

11. What happens, in the example I posed earlier, if Dock Hillard purchases land and has the deed drawn naming Dock Hillard, James Hillard, and Jonathon Hillard as grantees, as joint tenants with the right of survivorship and not as tenants in common – but later Jonathon files for bankruptcy protection?

a. The deed placed of record states: “[Grantor] conveys to Dock Hillard, James Hillard, and Jonathon Hillard as joint tenants with the right of survivorship and not as tenants in common the following land:”

b. The face of the deed says nothing about who paid all the consideration (Dock) and what his intent was regarding a present gift of 1/3rd to James and 1/3rd to Jonathon (Dock merely titled it this way to pass the property to James and Jonathon upon Dock’s death).
c. The trustee in bankruptcy views the deed as creating an undivided 1/3rd ownership interest in Jonathon that is an asset of the bankruptcy estate.

12. *In re Kasparek*, BAP No. KS-09-041, 2010 WL 1270341 (B.A.P. 10th Cir. April 5, 2010), the trustee in bankruptcy commenced a Bankruptcy Code 11 U.S.C. § 363(h) proceeding to sell all rights in the land in which Jonathon held legal title to a 1/3rd undivided interest as a joint tenant with his brother James and his father Wayne [Dock].

   a. When the requirements of § 363(h) are met the trustee can sell 100% of the jointly held property in order to maximize the value of the debtor’s undivided interest in the property.

   b. The non-debtor joint owners are forced to sell their interests; if they want to keep the land, they have to be the successful bidders at the sale.

   c. Separate from the right to sell Jonathon’s 1/3rd interest, a preliminary issue is whether Jonathon really owns a 1/3rd interest when it can be proven: the father paid all the purchase price, manages the property as his own, and intended the joint tenancy merely as an estate planning tool – with no intent to make a present gift of the interest to either of the two sons.

   d. In the past, Kansas courts have been willing to look behind the recorded document to ascertain the true intent of the parties to the conveyance – even though there is nothing ambiguous about the deed. Opportunity for courts to practice some equity to protect the party contributing the money – typically from a child’s creditor.

   (1) Part of this willingness may be the product of applying bank account and other personal property joint tenancy law to the real property context.

   (2) This is understandable since K.S.A. § 58-501 applies to “real or personal property granted or devised to two or more persons . . . .”

   (3) However, the world of personal property does not operate under the real property recording laws, such as K.S.A. § 58-2221 (2005) (providing for recording of
"[e]very instrument in writing that conveys . . . [r]eal estate . . . or . . . whereby any real estate may be affected . . . .") and K.S.A. § 58-2222 (2005) (recording imparts "notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice.").

(4) But, personal property often operates under its own unique bodies of law, such as the Uniform Commercial Code. *E.g.*, *Bridges v. Central Bank and Trust Co.*, 926 F.2d 971 (10th Cir. 1991) (certificate of deposit owned by five individuals in "or" form, and held in joint tenancy, could be pledged by any one of the five and allow the creditor to receive 100% of the proceeds upon default; relying upon UCC § 3-116(a) and § 9-1205).

e. The court in *Kasparek* explores the precise basis for allowing a court to look behind the recorded document and holds that in Kansas the theory is based upon an implied trust which implicates statutes that specifically address the concept in real estate transactions.

(1) K.S.A. §§ 58-2401 to 58-2408 (2005), is an act, that took effect in 1868, to address the use of trusts in land to defraud creditors.

(2) Under the facts the father Wayne (Dock) had the burden to establish that his son Jonathon had an agreement to hold the property in trust for the father.

(3) The court proceeds under the assumption Wayne was able to show an agreement that Jonathon held his interest in trust for his father – but then addresses the effect this unrecorded interest would have on a bona fide purchaser.

f. The court concludes: "The rights and powers of a bona fide purchaser include the right to obtain title to property free of certain unrecorded interests . . ." and, for purposes of the trustees avoidance powers under 11 U.S.C. § 544, it is not necessary to have a transfer by the debtor to trigger the trustee’s bona fide purchaser status.

g. The court’s opinion does an excellent job of collecting and
analyzing Kansas cases on a BFP’s obligation to make inquiry of facts beyond the recorded document.

(1) Issue: to what extent must the trustee (BFP) make inquiry regarding the nature of the holdings by the three named joint tenants?

(2) Held: the joint tenancy deed establishes as a matter of law that the parties each owned an undivided one-third interest in the property and absent special circumstances triggering a duty to inquire beyond the deed, no duty exists – merely because the property is held in joint tenancy.

(3) The court reasons:

“We believe that a duty to inquire about the possibility of an implied trust or other unrecorded agreements when title is held by joint tenants undermines the purpose of the Kansas recording statutes, imposes an undue burden on purchasers, and impairs the reliability of record title.”

13. Drafting Solutions?

a. Ascertain the intent of the party putting up the money and express it in the conveyance.

b. Put enough in the recorded conveyance to put the bona fide purchaser on inquiry notice.

14. Structural Solutions?

a. Avoid joint tenancy.

b. The court in Kasperek offered the following thoughts:

“We also note that, by statute, Kansas permits interests in real property to be titled in a ‘transfer-on-death’ form, so that the estate planning attempted by Wayne could have been accomplished by designating directly on the deed the beneficiaries in whom the Property would vest upon his death. See Kan. Stat. Ann. § 59-3501. Such a designation may be changed or revoked without the consent of the beneficiary. Id.
§ 59-3503. The availability of transfer-on-death deeds in Kansas obviates the need to resort to a joint tenancy deed as an estate planning tool, and increases the reliability of land records. The fact that Kansas has such a statute further weighs against imposing a duty on purchasers to inquire of joint tenants regarding whether their interests are subject to a secret trust and were intended to vest only on death of one of the joint tenants.”

F. THE LATEST POPULIST UPRISING: TRANSFER ON DEATH CONVEYANCES OF INTERESTS IN REAL ESTATE AND MOTOR VEHICLES

1. Kansas Statutes Annotated, Chapter 59, Article 35. – Transfer-On-Death
   c. K.S.A. § 59-3512 (other nontestamentary transfers).

2. Addresses all the testamentary issues regarding an incomplete, totally revocable, gift. K.S.A. § 59-3507 (“A deed in transfer-on-death form shall not be considered a testamentary disposition and shall not be invalidated due to nonconformity with the provisions of chapter 59 of the Kansas Statutes Annotated.”).

3. The only formality required: the deed must be recorded. K.S.A. § 59-3501(a).
   a. No delivery requirement.
   b. Grantee/beneficiary need not be aware that the conveyance exists. K.S.A. § 59-3501(b).

4. The only unique limitation: cannot be “revoked by the provisions of a will.” K.S.A. § 59-5503(c).

5. No alternative beneficiaries stated in the deed, the gift will lapse if the designated beneficiary predeceases the grantor. K.S.A. § 59-3504(c).

6. Transfer-on-death conveyance by a joint tenant will not sever the joint tenancy; the transfer-on-death beneficiary will receive the interest only
if the joint tenant grantor is the last surviving joint tenant. K.S.A. § 59-3505.

7. What follows is a drafting exercise, concerning Transfer-On-Death Deeds, given to my students at Washburn.

TRANSACTIONAL SKILLS
DRAFTING

Applying Legal Principles to Accomplish the Client’s Goals

Today among the most important estate planning tools are the durable power of attorney and transfer-on-death documents. Transfer-on-death documents are an improvement over the use of joint tenancy as a probate-avoidance tool because the donee does not currently receive an enforceable right in the property. This means the donee has no power over the property and the donor can change the deed at any time without the donee’s consent. If the donor fails to act, the property will pass to the currently listed donee at the donor’s death. Absent statutory authorization, these transfer-on-death arrangements would violate the Statute of Wills. (The Kansas version of the Statute of Wills is found at Kan. Stat. Ann. § 59-606 (2005)). Because the donor is free to change their mind, the gift is not complete until the donor dies. Until the donor’s death, they can alter the donee’s ability to receive the property.

This Exercise addresses the drafting of a transfer-on-death (“TOD”) conveyance. TOD conveyances are governed by Kan. Stat. Ann. §§ 59-3501 to 3507 (2005). However, you have a preliminary problem because the property being transferred is the right to receive a share of helium gas produced from wells drilled on land owned by Dock Hillard. In 1988 Dock received the interest described in the document labeled Exhibit A. Dock wants to use a TOD conveyance to transfer 76% of Dock’s helium rights to his son, Stephen Hillard.

Step One of the Drafting Process: Validation.

First Task: Prepare a one-page memorandum of law addressing whether the helium royalty Dock wants to transfer to Stephen is an “interest in real estate” as contemplated by Kan. Stat. Ann. § 59-3501(a) (2005). You can assume that unless the interest is a § 59-3501(a) “interest in real estate,” then the TOD procedures for “real estate” will not be available.

Third Task: Draft the TOD conveyance to transfer 76% of Dock’s helium royalty rights to Stephen.

Fourth Task: Draft a one page letter to Dock explaining what he needs to know about the TOD conveyance you have prepared. Dock has already asked you the following questions: (1) Do I have to give the TOD conveyance to Stephen? (2) Do I have to tell Stephen I have conveyed the interest to him? (3) After I sign and record the TOD conveyance to Stephen, can I later change my mind and transfer the interest to someone else? (4) Can I use the value of the 76% interest covered by the TOD conveyance as collateral for a loan? (5) Can Stephen encumber the 76% interest by borrowing against it? Provide Dock with the information he will need to know in order to understand the rights created by his TOD conveyance to Stephen.

EXHIBIT A

STATE OF KANSAS

COUNTY OF SHAWNEE

Witnesseth that on this 10th day of June 1988 Forrest Hillard, as the owner of the following land in fee simple absolute: Section 3, Township 11 South, Range 15 East of the 6th Principal Meridian, in Shawnee County, Kansas (the “Land”); hereby conveys and warrants to Dock Hillard, for a term of 21 years from the date of this conveyance and so long thereafter as helium is produced from the Land, one-eighth of all the helium produced and saved from the Land.

FORREST HILLARD

Prepare the documents and deliver your final product to Shirley in Room 302 by Noon on March 10, 2006. Obtain your examination number for this Exercise #8 from Shirley.

As appropriate, apply the principles set out in Richard Wydick’s Plain English for Lawyers and the citation format specified in the “Practitioners’ Notes” portion of The Bluebook. All citations should be imbedded in the text of your work; no footnotes. Edit your work.
MEMORANDUM OF LAW

TO: File
FROM: David E. Pierce
DATE: 2 October 2006

I. QUESTION: Can the transfer-on-death (“TOD”) device under Kan. Stat. Ann. § 59-3501 (2005) be used to transfer the right to a share of helium produced from land?

II. ANSWER: Most likely. An interest classified as personal property for “oil and gas law” purposes can still be “an interest in real estate” for purposes of the TOD statutes.

III. DISCUSSION: The meaning of the phrase “an interest in real estate,” as used in Kan. Stat. Ann. § 59-3501(a) (2005), is a matter of statutory interpretation requiring application of Kan. Stat. Ann. § 77-201 (Supp. 2005), which provides: “In the construction of the statutes of this state the following rules shall be observed . . . Eighth. ‘Land,’ ‘real estate’ and ‘real property’ include lands, tenements and hereditaments, and all rights to them and interest in them, equitable as well as legal.” This adopts a broad interpretation of “real estate” without any limitation on how the rights at issue might be classified for “oil and gas law” purposes. The critical inquiry is to ascertain the “intent of the legislature” when it used the phrase “an interest in real estate” to define the permissible scope of the TOD device. Mitchell v. Liberty Mut. Ins. Co., 24 P.3d 711, 719 (Kan. 2001).

In Dubowy v. Baier, 856 F. Supp. 1491 (D. Kan. 1994), the court applies a similar analysis to define the phrase “interest in . . . real property” as used in Kan. Stat. Ann. § 60-1002 (2005) (quiet title statute). The court surveys various sources defining the phrase “interest in real estate” and notes: “Among property rights that have been found by courts to constitute an interest in real estate are leases, easements, rights to royalties, right to profits and ownership of mineral rights.” Id. at 1497 (emphasis added). This encompasses Dock’s helium rights which are one of the metaphorical “sticks” comprising the bundle of sticks that make up the “real estate.” Creation of the right requires a conveyance evidenced by a writing and administered under the recording acts. It is not similar to a transfer of a car or other item of tangible personal property that might be located on the land, instead it is a right, an interest, carved from land itself, “an interest in real estate.”

The TOD statutes have not been addressed by Kansas courts. [As of 2006] Although for oil and gas law purposes Dock’s helium interest could be classified as personal property, under certain circumstances it may also be classified as real property. See In re Sellens, 637 P.2d 483, 486 (Kan. Ct. App. 1981) (distinguishing “accrued” royalty from “unaccrued” royalty). Perhaps because of these inconsistent approaches, the court in National Bank of Tulsa v. Warren, 279 P.2d 262, 285-86 (1955), refused to apply oil and gas law classifications when evaluating whether conveyance of a production payment “affected” real estate under a mortgage registration tax statute. In Platt v. Woodland, 246 P. 1017, 1020 (Kan. 1926), the court, interpreting the scope of the term “estate” in a statute, holds the term was used as a “general” term, not a “technical” term and encompassed “whatever the grantor could convey . . . .” The phrase “interest in real estate,” if similarly interpreted as a “general” term, would include Dock’s helium interest that was carved out of the real estate.
TRANSFER-ON-DEATH DEED

Dock Hillard as owner ("Dock") transfers on death to his son, Stephen Hillard, as grantee beneficiary, the following described interest in real estate:

An undivided 9.50% of 100% of all the helium produced from: Section 3, Township 11 South, Range 15 East of the 6th Principal Meridian, in Shawnee County, Kansas (the "Land"), for a duration continuing until 10 June 2009 and so long thereafter as helium is produced from the Land.

THIS TRANSFER ON DEATH DEED IS REVOCABLE. IT DOES NOT TRANSFER ANY OWNERSHIP UNTIL THE DEATH OF DOCK. IT REVOKES ALL PRIOR BENEFICIARY DESIGNATIONS BY DOCK FOR THIS INTEREST IN REAL ESTATE.

Signed 6 October 2006.

DOCK HILLARD, Owner

ACKNOWLEDGMENT CERTIFICATE

Shawnee County, Kansas

This Transfer-On-Death Deed was acknowledged before me on 6 October 2006 by Dock Hillard.

DONNA K. HAVERKAMP
Notary Public
My Appointment Expires: __________

Until notified otherwise, all tax statements that relate to the interest described in this Transfer-On-Death Deed should be sent to:

Dock Hillard, 1301 S.W. High, Topeka, Kansas 66604-1220.
Dear Dock:

Enclosed is the Transfer-On-Death Deed ("TOD" deed) you requested. Rights under a TOD deed are defined by several Kansas statutes. The TOD deed statutes apply to "an interest in real estate." This phrase is not defined and raises the issue whether a share of helium produced from land is "an interest in real estate." Complex classification principles create some risk the helium transfer could be challenged as not being an interest in real estate. My opinion is the statute will most likely be interpreted to include your helium interest. In the event I am wrong, it would mean the TOD deed to Stephen will not be given effect and the property will become part of your estate.

There are several things you should know about the Transfer-On-Death Deed rules in Kansas. First, the transfer will not have any effect at your death unless the deed is recorded with the Register of Deeds prior to your death. You do not have to give the deed to Stephen or even inform him that you have made the deed, although recording will make it a matter of public record. You can change your mind at any time during your life by conveying the property to someone else, or by following a simple statutory revocation procedure. However, you can not revoke the TOD deed by your Will. Although you do not hold the helium in joint tenancy, in the event you did, entering into this TOD deed would not sever or otherwise change your rights as a joint tenant. You will be able to deal with the interest covered by this TOD deed in any manner you desire during your lifetime. You can borrow against it and use it as collateral; it will be subject to the claims of your creditors and Stephen will take the property subject to any conveyances, liens, and other burdens occurring during your lifetime. If Stephen dies before you, his interest will lapse, which means the property will be part of your estate at your death. Although it is possible to designate alternative beneficiaries in the TOD deed, you have not chosen to do that in your deed. Stephen will not be able to borrow against, or otherwise encumber the property.

As a relatively new approach to disposing of property, it is important that if you ever decide to revoke the transfer, or make other dispositions of this property, please contact me so I can assist you by ensuring all statutory requirements are met. Let me know if you have any questions.

Sincerely,

David E. Pierce

DEP:dep
Enclosure: Transfer-On-Death Deed
VI. THE DRAFTING PROCESS: SPECIFIC APPLICATIONS

A. PROFESSIONAL RESPONSIBILITY AT THE MICRO LEVEL

1. At the micro level we have already determined how to structure the transaction and we are working through the language we will use in the various documents.

2. In this section I will demonstrate the drafting process by considering how to draft a liquidated damages clause. To discuss this issue I will again use a drafting problem posed to my students at Washburn.

B. LIQUIDATED DAMAGES

1. One of the odder foundations of contract law is that the lawyer can provide for compensation in the event the other party breaches the contract, but it is improper to include provisions specifically designed to coerce the other party to perform their contractual obligations.
   a. This is commonly expressed as the line between legal compensatory liquidated damages and illegal coercive penalties.
   b. Note this also supports the concept of "efficient breach." Liquidated damages assist the parties in determining whether it is more economic to breach a contract as opposed to perform the contract.

2. The Kansas Supreme Court recently provided some excellent guidance on this issue in Carrothers Construction Co. v. City of South Hutchinson, 288 Kan. 743, 207 P.3d 231 (2009).
ADVANCED OIL & GAS LAW
EXERCISE #13

INTRODUCTION TO DRAFTING LIQUIDATED DAMAGES CLAUSE FARMOUT AGREEMENT

Due Date & Time: Tuesday, April 6, 2010 at 9:00 a.m.
Turn In to Shirley Jacobson, Room 302

Goal of Exercise: To learn how to prepare a liquidated damages clause.

Resources: Use the information provided to you in conjunction with Exercise #9, use the form of Farmout Agreement you have been given, and conduct whatever additional research you deem necessary to accomplish the assigned task.

Procedure: Obtain an exam number for this exercise from Shirley Jacobson in Room 302. Draft a clause to address the issues identified in the Facts that follow. The clause will be used to replace paragraph 2.E. of the form Farmout Agreement you have been given.

Facts

Dock Hillard owns the following oil and gas leases:

| Lessors: | Will Pierce |
| Lease Date: | May 15, 2007 |
| Primary Term: | 3 Years |
| Bonus Paid: | $5,000 |
| Delay Rental: | $1,000 |
| Description: | North Half of Section 2, Township 27 South, Range 15 East of the 6th Principal Meridian in Wilson County, Kansas. |

| Lessors: | Cody Pierce |
| Lease Date: | May 15, 2007 |
| Primary Term: | 3 Years |
| Bonus Paid: | $5,000 |
| Delay Rental: | $1,000 |
| Description: | South Half of Section 2, Township 27 South, Range 15 East of the 6th Principal Meridian in Wilson County, Kansas. |
You can assume that the other terms of these leases are identical to the form we have been working with in the course (as well as in the basic Oil and Gas Law course). These leases will be listed as the farmout acreage on Exhibit A to the Farmout Agreement.

Dock is negotiating a Farmout Agreement with Acme Oil Company. The parties have agreed to work with the attached document. They have agreed to all the terms but are currently negotiating a liquidated damages clause to replace paragraph “2.E. Failure to drill.” As the clause reads now, the only effect of Acme failing to drill the test well described in section 2 is that the agreement will terminate and Acme will not have an opportunity to earn leased acreage under the Farmout Agreement.

This is not acceptable to Dock because his primary reason for farming out to Acme is to ensure a well is drilled that will, if productive, hold the farmout acreage by production. Therefore, Dock wants to do whatever he can to ensure Acme drills the well; but if he doesn’t, Dock wants to ensure he is fully compensated for the maximum amount possible. There has been successful drilling in the area around this leased land, resulting in substantial gas discoveries; Dock believes his leases are at an optimal location. However, Dock at this time does not have the funds to drill on this acreage so he is motivated to farm out to Acme if he can obtain the terms he desires.

[NOTE: The students were given a copy of a Farmout Agreement.]
Memorandum of Law

To: Dock Hillard
From: Exam #000
Date: 2 March 2010
Subject: Drafting a Liquidated Damages Clause

The liquidated damages clause is used to contractually agree in advance on what a party’s damages will be in the event the other party fails to perform. *Carrothers Constr. Co. v. City of S. Hutchinson*, 207 P.3d 231, 241 (Kan. 2009). Drafting the clause requires special care because it is against public policy to compel a party to perform their contractual obligations by imposing a financial “penalty” for non-performance. *Id.* Assessing an amount in excess of a party’s anticipated loss would be an improper award of punitive damages for a breach of contract. *Restatement (Second) of Contracts* § 356(1), cmt. a (1981). Therefore, the goal is to ensure the liquidated damage clause is designed to merely compensate the non-breaching party for the anticipated loss they will suffer from the other party’s non-performance. *Carrothers*, 207 P.3d at 241.

To have an enforceable clause, the Kansas Supreme Court requires that at the time the parties enter into their contract: (1) damages are difficult to calculate in the event of a breach; and (2) the liquidated damage figure used is a reasonable estimate of what the damages might be in the event of a breach. *Id.* In Kansas these issues are examined solely upon the facts and circumstances as of the time the parties enter into the contract; the court will not engage in any sort of comparison of the liquidated damage number with the actual damage number to evaluate the reasonableness of the liquidated number. *Id.*

Actions that can be taken to support the effectiveness of a liquidated damages clause include: (1) identifying in the document why it is difficult to determine, with accuracy, damages in the event of a breach; and (2) engaging in an analysis, at the time of contracting, of damages that might be incurred in the event of various failures to perform. This information can then be used to arrive at appropriate liquidated damages for stated events of non-performance and also alerts the other contracting party, and a reviewing court, to any consequential damages that might not be readily apparent. The clause should include a recitation of the potential damages and the efforts to ascertain likely damage ranges prior to selecting the ultimate liquidated damages figure. In upholding the liquidated damages clause in *Carrothers* the court was impressed with how the parties focused on the risk of a delay in performance, the difficulty in ascertaining damages while nevertheless engaging in an informed projection of probable loss resulting from a delay, and the parties’ clear intent to use liquidated damages to address delay. *Id.* at 242, 243.

Structural drafting guides include ensuring the provision is “plainly identified” in the contract by labeling the clause with an appropriate heading, such as “Liquidated Damages.” *Id.* at 236 (court notes the clause was “plainly identified”). Avoid any language that suggests coercion or penalty. Instead, speak in terms of compensating the non-breaching party for their losses. Focus on a desire to protect the contracting parties from the difficulty, uncertainty, and expenses associated with trying to ascertain actual damages in a judicial proceeding. *Id.* at 241.
[The following is to be added as ¶ E to “2. Test well” of the Farmout Agreement]

E. **Failure to drill; farmee must pay liquidated damages.** If farmee fails to drill the test well required by § 2, or otherwise fails to take action to maintain the leases as necessary to drill the test well and determine whether to complete it as a producer, farmee will be obligated to compensate farmor by paying farmor $875,000 in liquidated damages. Farmor and farmee acknowledge that:

1. Failure to comply with § 2 of this agreement would result in the leases terminating and an inability to confirm whether the leased lands contain valuable hydrocarbons;

2. The amount of damage resulting from farmee’s failure would not be easily and readily determinable;

3. They desire to protect themselves against the difficulty, uncertainty, and expenses associated with trying to ascertain actual damages; and therefore

4. They desire to stipulate, by agreement, what they mutually believe is a reasonable estimate of probable damages and in an amount they believe is conscionable considering the value of the subject matter of this agreement and the probable loss in the event farmee fails to perform.

In arriving at the amount of liquidated damages the parties have considered the following facts and circumstances: There has been successful drilling in the area around the leases, resulting in substantial gas discoveries, and the leases appear to be at an optimal location in relation to the discoveries. Although farmor has invested $14,000 in acquiring and maintaining the leases, their current market value exceeds $200,000. The only way to test the leases for the presence of oil or gas is to drill a well. Discoveries in the area have been made at depths ranging from 3,500 to 3,750 feet below the surface. To adequately test the leases a prudent operator would drill to a depth of 4,000 feet which would typically be done under a standard footage drilling contract for the area at a cost of approximately $475,000.

Farmee’s failure to drill will therefore likely result in farmor: Losing its leases valued at $200,000; losing the value of having the promised well drilled at a cost of $475,000; plus the potential loss of substantial profits in the event the gas reservoir trends under the leases as the parties predict. These lost profits are most difficult to predict but would certainly exceed $200,000 based upon the production rates and operating costs associated with surrounding wells.
C. INDEMNITY


   a. In the process of divorcing, William and Brenda entered into a separation agreement in which William was given control over the sale of a house with the proviso that: “Once the marital residence is sold, in the event a deficiency exists with regard to the second mortgage, Husband shall completely satisfy any such deficiency and hold wife harmless therefrom.”

   b. The divorce was precipitated in part by Brenda’s fraudulent procurement of $150,000 from William’s mother to purchase the house.

   c. Brenda pled guilty to one count of federal wire fraud and was ordered, as part of her sentence, to make restitution to William’s mother in the amount of $66,000. This amount represented the sum due after the house was sold and the first mortgage paid, which left $84,000 in sales proceeds that were paid to William’s mother.

   d. Following the federal court’s sentence requiring payment of the $66,000, Brenda sought a contempt order against William because he had failed to hold Brenda harmless for the $66,000, which also constituted the “deficiency” on the second mortgage held by William’s mother.

   e. After finding that the “hold harmless” agreement “is the same as an indemnity agreement,” the Court of Appeals concludes William must pay the $66,000 to his mother because it was encompassed by his indemnity agreement with Brenda.

   (1) In the process of arriving at its decision, the court states: “The rules governing the interpretation and construction of indemnity agreements are also the same as those relating to other types of contracts.”

   (2) Although the court cites court of appeals and federal
cases to support this proposition, it fails to acknowledge Kansas Supreme Court cases such as *Missouri Pacific R.R. Co. v. City of Topeka*, 213 Kan. 658, 518 P.2d 372 (1974), where it is noted that “hold harmless” clauses, also referred to as an “exculpatory agreement,” are construed strictly and limited to situations “plainly within the language used.”

(3) Nor were cases such as *Hunter v. American Rentals, Inc.*, 189 Kan. 615, 371 P.2d 131 (1962), examined which hold that an indemnity clause relieving the indemnified party from obligations it owes to the public generally, or as defined by statute, is not enforceable.

(4) Instead, the court gives Brenda the benefit of the doubt by holding the restitution order was within the scope of the hold harmless clause and under the circumstances did not violate public policy.

(5) Dissenting Justice Malone, applying the factors set out in Restatement (Second) of Contracts § 178, believed the indemnity provision violated public policy when used to negate the sentence for restitution.

(a) Arguably the court could have arrived at the same conclusion applying existing Kansas law applicable to indemnity agreements. Indemnity is an area where the Kansas Supreme Court has been more demanding of the drafter to ensure the other party is fully apprised, at the time they enter into the contract, of the nature and scope of their indemnity obligation.

(b) In this case it appears pretty clear that since there was a mother/son relationship the parties would control the mother’s demand for repayment by making the son liable through indemnity.

(i) It is doubtful the parties contemplated the indemnity would cover discharge of a sentencing condition in a federal criminal proceeding, even though it happened to be measured by the same deficiency.
amount.

(ii) This is the sort of situation where strict interpretation of the indemnity provision should limit it to the contemplated event: demand for repayment by the mother or her assignee.

2. 2008 Amendments to K.S.A. § 16-121, the Kansas anti-indemnity statute.

a. Limiting freedom of contract over indemnity agreements seems to be a favorite topic of the Kansas Legislature; they now get a chance to address the issue every year.

b. In 2008 their focus resulted in significant amendments to K.S.A. § 16-121 which took effect on January 1, 2009.

c. As originally enacted in 2004 the statute prohibited, as being “against public policy,” an “indemnification provision in a construction contract or other agreement . . . entered into in connection with a construction contract, which requires the indemnitor to indemnify the indemnitee for the indemnitee’s negligence . . . .”

   (1) Apparently one segment of the construction industry was losing in the bargaining process over who would be responsible for a party’s negligence.

   (2) In practice this determined who had to buy insurance to cover the risk. Since they couldn’t win at the bargaining table, they turned to the Kansas Legislature.

   (3) As with any situation where freedom of contract is ceded to a legislature, there will be unintended consequences. Having a legislature define the terms of a contract makes little sense unless it is acting to protect the general public, as opposed to stacking the deck for one commercial party against another.

d. After the enactment of K.S.A. § 16-121 there were other industries that rushed to try and have their contracts included in the prohibition on indemnity against negligence.
This process caused these other industries to focus on the utility of indemnity agreements; utility they were seeking to voluntarily surrender to the legislature.

Often a transaction will not take place unless certain risks can be allocated between the parties by contract.

The indemnity against "negligence" is used to avoid having to litigate a negligence defense every time a party desires to enforce a contractual indemnity.

e. The 2008 amendments to 16-121 demonstrate four trends: first, certain industries want to make it clear certain activities are not encompassed by the law; second, certain segments of other industries want to make it clear their activities are encompassed by the law; third, the scope of the prohibition on certain indemnities is more fully defined to allow for greater, and lesser, coverage in listed situations; and fourth, certain indemnities are expressly excluded from the prohibition.

f. To decipher 16-121 there are ten definitions in § (a) that must be carefully read; the 2008 amendments add seven new definitions and extensively revise the prior definition of "construction contract" to expressly exclude listed activities at oil and gas well sites.

(1) The addition of the term "contract" expands coverage of the prohibition to "motor carrier transportation contract" and "dealer agreement or franchise agreement." Each of these new "contracts" are also the subject of their own extensive definitions.

(2) The definitions also distinguish between "mutual" and "unilateral" indemnity obligations.

g. The basic prohibition is found in § (b) which now applies to any "contract" which is defined to include "construction contract" and the additions noted above. Subsection (b) provides:

"An indemnification provision in a contract which requires the promisor to indemnify the promissee for the promissee's negligence or intended acts or omissions is against public policy and is void and unenforceable."
h. The amendment adds a prohibition on indemnity for any “intended acts or omissions.”

(1) Does this mean that if the promissee takes action that is not negligent, but nevertheless “intentional,” resulting in a loss to the venture, the promissee must alone bear the loss?

(2) This puts the party to a venture that is the “doer” or the “operator” at a distinct disadvantage. The passive party could set back, enjoy the benefits of the operator’s actions, but force the active party to shoulder all the risk, and therefore loss, under their contract.

i. Subsection (c) expands the indemnity prohibition to insurance coverage by providing:

“A provision in a contract which requires a party to provide liability coverage to another party, as an additional insured, for such other party’s own negligence or intentional acts or omissions is against public policy and is void and unenforceable.”

This provision takes away from the parties the flexibility of placing the burden of insurance on the party who may be best able to insure the risk.

j. Recognizing that indemnity agreements can serve a useful purpose in some situations, subsection (d) was added to specifically exempt certain transactions from the prohibition.

(1) Exemptions include: a contractor’s agreement to provide “general liability insurance;” indemnification of a contractor against “strict liability under environmental laws;” indemnification as part of certain settlement agreements; insurance contracts and bonds issued by “an insurer or bonding company;” and certain indemnity agreements which “will be supported by liability insurance coverage to be furnished by the promisor” subject to specific limitations.

(2) The broadest exemption, however, is found at § (d)(5) and includes:
“(5) a separately negotiated provision or provisions whereby the parties mutually agree to a reasonable allocation of risk, if each such provision is: (A) Based on generally accepted industry loss experience; and (B) supported by adequate consideration; . . .”

(a) Subsection (5) has the potential to negate the 16-121 prohibition when the provision is “separately negotiated.”

(b) This is an invitation for the party drafting the agreement to ensure the indemnity clause receives the appropriate attention by being conspicuous and containing recitations regarding allocation of risk and the industry context for the allocation.

(c) The “adequate consideration” requirement should be satisfied by the underlying deal that prompted the parties to contract with one another. It is possible, however, that “adequate” consideration is being used as a statutory equity to allow courts to limit the effect of the indemnity even though all “contract” consideration requirements have been met.

k. To avoid using choice of forum and choice of law to circumvent the indemnity prohibition, subsection (e) provides:

“Notwithstanding any contractual provision to the contrary, the laws of the state of Kansas shall apply to and govern every contract to be performed in this state. Any litigation, arbitration or other dispute resolution proceeding arising from such contract shall be conducted in this state. Any provision, covenant or clause in such contract that conflicts with the provisions of this subsection shall be void and unenforceable.”

(1) An immediate question is whether Kansas law must be applied only to the extent necessary to give effect to 16-121, or whether any contract which has an indemnity provision must apply Kansas law, in a Kansas forum, as to all issues.
For example, could a party to a construction contract subject to 16-121 agree not to enforce the indemnity provision but still litigate contractual performance issues in a forum outside of Kansas?

Under similar facts, would they be compelled to apply Kansas law to the non-indemnity issues?

Could a party to the contract allege it contains language that is tantamount to an indemnity so as to compel application of Kansas law in a Kansas forum?

Although there are no reported appellate cases regarding K.S.A. § 16-121, I predict the statute will be widely used to try and negate allocations of risk within contracts and to negate choice of law and choice of forum clauses that would otherwise be enforceable absent 16-121.

It will become a litigation tool to try and avoid contractual provisions that have proven very useful and beneficial in making deals work that might otherwise fail.

It is an example of legislation to address matters that are best left to the market place where commercial parties can adjust to the realities of the industry in which they operate.

Indemnity drafting exercise given to Washburn students (prior to the K.S.A. § 16-121 amendments).
COMMERCIAL DRAFTING

Exercise #4
The Validation Process

Your firm represents Amalgamated Junk Corporation ("AJC") which is engaged in a variety of manufacturing and service businesses. You are a new associate at the law firm of Allai, Stuckey & Stice. Mark Allai, the senior partner, has asked you to research the law concerning a contract clause Mark is drafting for AJC.

AJC has been sued on several occasions where its personnel were doing work on property owned by one of its customers. For example, last month several of AJC’s employees were installing a boiler manufactured by AJC at a power plant facility owned by Mountain Fuels Corporation. During the installation one of Mountain Fuels’ employees was injured. Although their injury may ultimately be attributed to the actions of Mountain Fuels’ other employees, AJC will surely be sued because the injured employee is not able to sue its employer, Mountain Fuels, due to the worker’s compensation laws.

AJC wants Mark to draft a clause, to be included in all of its contracts with all of its customers, which obligates the customer to reimburse AJC for any damages it may be required to pay to third parties for incidents occurring on the customer’s property. To avoid having to fuss over whether AJC is to blame for any accident, AJC wants to ensure the obligation to reimburse damages applies even to cases in which AJC may be negligent.

Confine your research to Kansas and assume Kansas law will be used to test the validity of any clause you prepare for AJC.

YOUR TASK: Prepare a one-page memorandum to Mark discussing the law Mark will need to consider and apply in order to draft the clause for AJC.
COMMERCIAL DRAFTING

Exercise #5 (Solution Part I)
The Validation Process

Mark Allai, the senior partner, has asked you to review the attached statute and case list and prepare a one-page memorandum to Mark discussing the law Mark will need to consider and apply in order to draft the indemnity clause requested by Amalgamated Junk Corporation ("AJC"). Prepare the required memorandum and turn it in to Shirley in Room 302 by Noon on Friday, February 10, 2006. Obtain your examination number for this Exercise #5 from Shirley.

When preparing your memo apply the principles set out in Richard Wydick’s Plain English for Lawyers and the citation format specified in the “Practitioners’ Notes” portion of The Bluebook. All citations should be imbedded in the text of your work; no footnotes. Edit your work.

READING AND ANALYZING THE AVAILABLE INFORMATION

STATUTE & CASE LIST

Indemnity clause in construction contract covering a party’s negligence is “against public policy and is void and unenforceable.” “Construction contract” defined in § (a).
Does not limit ability to require contractor to provide general liability insurance.

Exclusive remedy provisions of Kansas Workmen’s Compensation Act.

Definitions of “Consumer,” “Consumer transaction,” “Property,” and “Services.” § 50-624. Unless expressly authorized by the KCPA you cannot contract away rights under the Act. § 50-625. Contractual limitations on the implied warranty of merchantability or fitness for a particular purpose are prohibited, void, and can give rise to damages and civil penalties (§ 50-639); it can also constitute an “unconscionable act or practice.” § 50-627.

Kansas Supreme Court Cases:

County’s indemnity of KDOT covered: “all costs, liabilities, expenses, damages, suits, judgments and claims of any nature whatsoever arising out of or in connection with [the
project].” 135. This broad, seemingly all encompassing language, was not specific enough to include those losses when associated with KDOT’s own negligence. 136.

(5) **Corral v. Rollins Protective Services Co.,** 732 P.2d 1260 (Kan. 1987). Clause in security system contract limiting liability for the supplier’s “negligence, active or otherwise,” was not contrary to public policy. 1265. However, there could have been an implied warranty which was not encompassed by the limitation of liability. 1269. The Kansas Consumer Protection Act (§ 50-639) restricts a supplier’s ability to limit a consumer’s remedies for breach of the implied warranties of merchantability or fitness for a particular purpose. 1269-70. Claims based upon the “unconscionable acts” section (50-627) were not preserved for review. 1270. The court remands the case to the trial court to address issues of fact regarding the implied warranty and KCPA issues. 1271-72. If this had been a “sale” of a “consumer product” as defined under the Magnuson-Moss Warranty Act, that Act may have also nullified the limitation of warranties. The court holds the Act does not apply to this sort of “lease” or “service” transaction. 1276-68.

(6) **Kennedy v. City of Sawyer,** 618 P.2d 788 (Kan. 1980). Court notes similarity of claims for negligence, strict liability, and implied warranty, and the application of comparative liability principles to all of these situations—at least in the products liability context. 797. When Kansas adopted its comparative negligence statute it abolished joint and several liability between joint tortfeasors and also limitations on contribution among joint tortfeasors. 797. This also abrogated distinctions made as to types or degrees of negligence that would permit “implied indemnity” to get around the contribution limitations. Percentages of causal responsibility now replace “distinctions between primary, secondary, active and passive negligence . . . .” 799. “The nature of misconduct in such cases is to be expressed on the basis of degrees of comparative fault or causation, and the all or nothing concepts are swept aside.” 799. The court adopts a “form of comparative implied indemnity between joint tortfeasors.” 803.

(7) **Dennis v. Southeastern Kansas Gas Co.,** 610 P.2d 627 (Kan. 1980). A “circle of indemnity” existed when plaintiff settled with Gas Company. 630. Because Gas Company agreed to indemnify City, suit by plaintiff against City would result in an obligation to indemnify by Gas Company. Plaintiff had agreed to indemnify Gas Company for any amounts it might be obligated to pay arising out of the explosion. 630. Gas Company did not contest City’s indemnity claim so court did not have to interpret the scope of the clause. 633.

(8) **Belger Cartage Service, Inc. v. Holland Construction Co.,** 582 P.2d 1111 (Kan. 1978). The contract contained two clauses, one stating the crane operator and oiler were employees of Holland, and a second in which Holland agrees to indemnify Belger “regardless of its own fault or negligence.” 1116. Court holds it is not possible to
change reality by the terms in a contract: the operator and oiler were, under the facts, employees of Belger, not Holland. 1117-18. The court adopts the trial court’s “findings of fact” and affirms its holding that the indemnity clause was unenforceable. 1120. Although it is not clear why the Supreme Court finds the indemnity is unenforceable, it appears to be based upon whether the parties ever agreed to the terms that were “in small print” on the “reverse side of the work order” which nobody read. It was also disputed whether the work order was ever signed by Holland’s employee. 1113. The court discusses “conspicuous” requirements under the UCC. 1120. This case suggests the importance of drawing attention to the indemnity by “having them pointed our to him or the clauses themselves being conspicuous . . . .” 1120.

The court finds general indemnity language sufficient to cover the lessor’s negligence, even though the agreement did not expressly use the term “negligence.” Instead the court relied upon the unique relationship of the lessor and lessee, noting the lessee had total control over the facility and the lessor’s negligence was “passive” in comparison to that of the lessee. 808. Indemnity contracts should be interpreted applying general rules of contract interpretation to ascertain the intent of the parties. 807.

Clause limiting steel supplier’s damages for delay to those contractor must pay to third party was enforceable. Not unconscionable under U.C.C. § 2-719. Sophisticated parties who were aware of the clause.

Wording of indemnity in ordinance did not entitle city to reimbursement for track relocation costs incurred by railroad under urban renewal project. “Indemnity” is an agreement to compensate a party for defined losses. 375-76. The scope of the indemnity obligation depends upon the intention of the parties as expressed in the agreement. To obtain indemnity for a party’s own negligence or activities, the indemnity agreement must clearly specify that it includes those items. 376. These “hold harmless” clauses, also referred to as an “exculpatory agreement,” are construed strictly and limited to situations “plainly within the language used.” 377. [NOTE: Always be alert to cases cited by the court you may not have already found in your search. In this case that could include the Riddle Quarries and Talley cases.]

Court denies indemnity because contractor’s agreement to indemnify city did not specify that it encompassed events arising out of the city’s own negligence. 1273. Applying the law of Missouri. 1274.
[13] **Cason v. Geis Irrigation Co.,** 507 P.2d 295 (Kan. 1973). Indemnity protecting gas producer from liability associated with “the handling or use of such gas or use of the facilities employed in the connection therewith” did not include injury to a contractor arising out of the producer’s negligent design and construction of a drip tank. 299. Indemnity provisions will be construed strictly against the party relying on them. 299.

[14] **Talley v. Skelly Oil Co.,** 433 P.2d 425 (Kan. 1967). Skelly (“Lessor”) had an indemnity clause in its lease which required the lessee to indemnify Skelly for listed events “whether due to negligence of Lessee, Lessor, or otherwise.” 428. The lessee argued the clause violated public policy. The court rejects this argument noting the clause did not violate any statute which would make it against public policy to enforce the indemnity. 430. Court holds the clause encompassed the lessee’s negligence claims against Skelly. 432. This case is good authority for enforcement of an express indemnity for a party’s negligence.

[15] **Kansas Power and Light Co. v. Mobil Oil Co.,** 426 P.2d 60 (Kan. 1967). This case has nothing to do with the issues.

[16] **Hunter v. American Rentals, Inc.,** 371 P.2d 131 (Kan. 1962). Indemnity clause in trailer rental agreement violated public policy and was unenforceable because it would relieve the indemnified party from the consequences of not complying with its statutory duties. 134. The agreement “tends to interfere with the public welfare or safety” by attempting to insulate the indemnified party from liability for a failure to properly perform a duty it owed to the traveling public. 133-34. “To allow defendant to escape liability by reason of its alleged contract would be defeating the purpose and intention of the legislature as provided in the mentioned statute.” 134. Note that the statute was directed at the general public, not specifically trailer rental companies. 133. The court has to distill the public duty owed by the trailer rental company from the general “purpose and intention” of the legislature in passing the statute.

**Kansas Court of Appeals Cases:**

[17] **Moler v. Melzer,** 942 P.2d 643 (Kan. Ct. App. 1997). Court enforces clause limiting house inspector’s liability to the cost of the inspection. 644. Court found the clause was “clear,” the plaintiff was aware of the clause, and it was presented to them in a clear manner. Court refuses to apply § 50-639(a)(2) of the Kansas Consumer Protection Act (prohibiting limitation of implied warranties and related remedies) because 50-639(a) is limited to “property” as opposed to “services.” 645.

Foley’s employee, Bryant, was injured in an accident, that was in part the fault of APAC. APAC had an indemnity agreement which required Foley to indemnify APAC against APAC’s negligence (but not for events relating to APAC’s sole negligence). Because the indemnified liability related to Bryant’s successful suit against APAC, Foley asserted indemnity was barred by the “exclusive remedy” provisions of the Worker’s Compensation Act (§ 44-501(b)). 1299-1300. The court follows prior Court of Appeals precedent, and what it describes as the “majority rule,” that Foley’s liability arises out of its separate contractual relationship with APAC, not its status as an employer. 1300. The court discusses the “dual capacity doctrine” which distinguishes Foley’s capacity as an employer from its capacity as an entity contracting with third parties. 1300-01. As an independent obligation in Foley’s non-employer status, it is not affected by the “exclusive remedy” provisions of § 44-501(b). 1301.


Indemnity under a surety contract requires the surety to act reasonably and in good faith when it makes a payment on behalf of the principal. 880-81. Seemingly broad, and incorrect, statement regarding unconscionability. 878.


Hold harmless clause in coop management agreement held not explicit enough to protect indemnified party from its negligent mismanagement. 887-88. Court notes it is possible to indemnify against your own negligence if done in clear and unequivocal terms. 888. The court holds that in a service contract there is an “implied warranty of workmanlike performance” to provide the service “skillfully, carefully, diligently, and in a workmanlike manner.” 891.


Sales contract contained limitation on warranty and remedy (“repair or replace”) for refrigerated truck trailer. 1198. The unit broke down causing meat to spoil. Court finds the clause did not preclude recovery on “strict liability in tort” theory. 1200-01, 1202. Any disclaimer, waiver, or indemnification, to encompass a party’s negligence, must be explicit. 1202. Clause in this case was not clear enough to encompass the indemnified party’s own negligence. 1203. Issue of fact whether the repair or replace “limited remedy failed of its essential purpose” so as to trigger UCC § 2-719(2). 1204-05. “On the present record, the printed warranty and disclaimer does not preclude recovery by Elite [purchaser] on its asserted strict liability, negligence, or warranty theories as a matter of law.” 1205.


Court holds that form A201 was part of the AIA form contract used by the parties. The
indemnity in the form A201 covered the owner’s liability to the person injured on the owner’s premises while performing work for the indemnifying contractor.

Employee can sue employer for injury suffered on the job where the basis for the employer’s liability is as a successor by merger of a different company that manufactured a defective product causing the employee’s injury. The exclusive remedy provision of the Kansas Workmen’s Compensation Act (§ 44-501) did not preclude the suit because under the “dual capacity doctrine” this employer’s liability is based on its contractual liability as the successor by merger to another company—as opposed to its status as employer. 912.

Lease agreement between manufacturer of airplane engine (“P&W”) and aircraft owner (“M-A”) contained an assumption of liability by M-A, and corresponding indemnification of P&W, for any loss associated with the engine. Trial court held the clause violated public policy and was void. 1382. Court notes the imposition of strict liability for a defective product is not the same as a statute prohibiting indemnification. The court recognizes the ability to indemnify against strict liability in tort. 1386-87. Under the facts there is no disparity in bargaining power or other basis to find the clause unconscionable. 1387. The clause does not limit the ability of third parties to sue P&W for their injuries. 1387. The contract should be enforced. 1387.

Indemnity clause included attorney fees necessary to enforce the indemnity. 256. Court applies basic rules of contract interpretation to indemnity contract.

Court holds it is a violation of the exclusive remedy provision of the Kansas Workmen’s Compensation Act (§ 44-501) to allow a third party to recover from the employer under an active/passive negligence implied indemnity theory. 833. There is no independent basis for holding the employer liable; here the liability is associated with the specific act of negligence giving rise to the employee’s injury—and their right to workmen’s compensation. 835. Judge Rees concurs noting the active/passive negligence concept has been eliminated by the comparative negligence statute. 836.

**Kansas Federal District Court Cases:**

(27) **Kansas City Power & Light Co. v. United Telephone Co.,** 458 F.2d 177 (10th Cir. 1972).
Power pole agreement with broad indemnity provision did not cover a loss associated with the indemnified party’s sole negligence. Court suggests a specific reference to “negligence” should be contained in the agreement to alert the other party to its scope
SUIT by contractor to enforce indemnity clause in contract with subcontractor. Court holds the express terms of the indemnity cover only losses associated with the subcontractor’s negligence. Under the Kansas comparative negligence system, and the terms of this indemnity, the contractor will be liable for their assessed share of the fault. One possible exception would be where the contractor is held responsible for the subcontractor’s negligence under a respondeat superior or agency theory.

Indemnity provision may not be express enough to cover contractor’s negligence, it still encompasses losses associated with the subcontractors’ negligence and breach of contract and warranty claims.

Indemnity clause in paint sprayer rental contract containing “only general broad and all-inclusive language with no specific references to Higgins [the lessor] negligence” will not encompass losses associated with the lessor’s negligence.

Construction contract indemnity clause would protect the owner from any claim arising out of its negligence, so long as the loss was not due to the owner’s sole negligence. The court discusses the broader effect of the phrase “arising out of” which encompasses a more liberal concept of causation than proximate cause. The indemnity agreement also covers the owner’s agents.

**Article:**

MEMORANDUM OF LAW

TO: Mark Allai
FROM: David Pierce
SUBJECT: AJC’s Ability to Obtain Indemnification from its Customers
DATE: 12 January 2006

I. QUESTIONS: Can Amalgamated Junk Corporation (“AJC”) require its customers to indemnify AJC for third party claims arising out of AJC’s work on its customers’ property? If so, can AJC be indemnified for losses attributable to its own negligence?

II. ANSWERS: Indemnity agreements are enforceable and for some types of contracts it is possible to indemnify a party even when the loss arises out of their own negligence.

III. DISCUSSION: Indemnity agreements will be enforced but will be interpreted narrowly to encompass only events clearly defined in the agreement. Missouri Pacific Railroad Co. v. City of Topeka, 518 P.2d 372, 375-76, 377 (Kan. 1974). For example, attorney fees incurred to enforce the indemnity can be recovered only if provided for in the agreement. Chetopa State Bancshares, Inc. v. Fox, 628 P.2d 249 (Kan. Ct. App. 1981).


B. Negligence Limitations. AJC can be indemnified even for losses associated with its own negligence so long as the agreement does not meet the statutory definition of a “construction contract.” Kan. Stat. Ann. § 16-121(a)(1) (Supp. 2005). If the agreement is for “the design, construction, alteration, renovation, repair or maintenance” of listed improvements to real property, it is not possible for a party to be indemnified against their own negligence. Id. at § (b). In all other cases indemnity for a party’s own negligence is permissible so long as the agreement makes it clear that is the intent. Talley v. Skelly Oil Co., 433 P.2d 425, 432 (Kan. 1967). Although it is not necessary to use the term “negligence,” that appears to be the only safe way to ensure the party’s negligence is encompassed by the indemnity. See Johnson v. Board of County Commissioners, 913 P.2d 119, 136 (Kan. 1996) (broad, seemingly all encompassing language not specific enough to cover party’s own negligence). The clause should expressly apply to losses associated with AJC’s strict liability or negligence, regardless of AJC’s degree of comparative fault or causation. See generally Kennedy v. City of Sawyer, 618 P.2d 788, 797-99 (Kan. 1980).
VII. ASSISTING CLIENTS IN NON-TRANSACTIONAL SETTINGS

A. COMPETENCE AND OTHER CLIENT OBLIGATIONS

1. Transactional lawyers are often the first persons contacted when a former client has a non-transactional problem, such as a personal injury.

2. Even though a lawyer is known not to have expertise in an area, the potential client may contact them because of their reputation as an honest and capable lawyer in the community.

3. **RULE 1.1 Competence** will often dictate that the lawyer decline the opportunity to represent the prospective client in the personal injury or other litigation matter. However, that does not mean the lawyer cannot provide the client with valuable assistance in finding the best lawyer who is competent to handle the matter.

B. REFERRAL FEES

1. In Kansas, can an attorney receive a referral fee for simply connecting the prospective client with the appropriate lawyer to handle their matter? Yes, if it is done right.

2. **RULE 1.5 Fees** addresses the referral in § (g) which states:

   “A division of fee, which may include a portion designated for referral of a matter, between or among lawyers who are not in the same firm may be made if the total fee is reasonable and the client is advised of and does not object to the division.”

3. Comment [4] states:

   “A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist, or when a lawyer refers a matter to a lawyer in another jurisdiction. Paragraph (g) permits the lawyers to divide a fee by agreement between the participating lawyers if the client is advised, does not object, and the total fee is reasonable. It does not require disclosure to the client of the share that each lawyer is to receive.”

a. Interpleader action filed by the Shamberg, Johnson & Bergman firm for court direction on who was entitled to $582,881.90 referral fee.

b. Michael P. Oliver was a member of the Wallace, Saunders, Austin, Brown & Enochs, Chartered law firm when he was contacted by the family of Sara Hotchkiss to assist them with her serious medical problems which eventually became the focus of a potential medical malpractice claim.

c. Because Wallace, Saunders engaged in primarily medical malpractice defense work, it had a policy against suing medical care providers. Therefore, Oliver proposed referring the case to another firm and accompanied the Hotchkiss family to meet with two attorneys. Ultimately, they selected Victor Bergman of the Shamberg firm to represent them.

d. On January 8, 2003 Sara Hotchkiss and her husband entered into an employment agreement with the Shamberg firm in which they agreed to a contingent fee of 40% of the net recovery after expenses.

e. The parties ultimately agreed to the following fee sharing arrangement:

10% of the first $100,000 of net attorney fee; plus
15% of any net attorney fee from $100,001 - $250,000; plus
20% of any net attorney fee from $250,001 - $500,000; plus
25% of all net attorney fee greater than $500,001.

"The letter said that Shamberg would be responsible to advance all of the expenses of litigation and do all of the work. It also stated that if the Hotchkisses needed assistance with obtaining governmental benefits, Wallace Saunders would either help them or assist them with an appropriate referral. Bergman also requested Oliver to accompany him for an off-the-record visit with a physician."

f. This lawsuit arose when Oliver left the firm effective January 31, 2005. The Hotchkiss family asked that Oliver continue acting as
their attorney. Some of the physicians settled with Hotchkiss on July 11, 2005; the other defendants settled during trial with the settlement being approved on September 2, 2005. These settlements resulted in the $582,881.90 referral fee which was claimed exclusively by Oliver and by the Wallace, Saunders firm. Shamberg filed the interpleader action on September 16, 2005.

g. For a discussion of the Hotchkiss trial, and how the $6.5 million settlement arose, see the discussion in the Shamberg firm’s Winter 2005 Newsletter which can be accessed on-line at: http://www.sjblaw.com/CM/Newsletters/2005-winter.pdf

h. The trial court held the referral fee belonged to the Wallace, Saunders firm; the supreme court held that under the firm’s Deferred Compensation Agreement had the Hotchkiss family elected to keep the case with Wallace, Saunders, Oliver would be entitled to payment of $5.22 as full compensation for his interest in the case. However, since the Hotchkiss family requested that Oliver continue to represent them, under the Deferred Compensation Agreement the Wallace, Saunders firm was fully compensated for its interest in the case when Oliver paid them $150. Therefore, Oliver, as the owner of the file, was solely entitled to the $582,881.90 referral fee.

5. Observations regarding referral fees by the Kansas Supreme Court in the Shamberg case:

a. The supreme court characterizes the trial court’s view of the referral agreement as follows:

"Apparently, the district court viewed the referral agreement as a stand-alone contract for the sale of the medical malpractice claim and determined that Wallace Saunders had completed its performance and earned it referral fee when the client was delivered to Shamberg. We cannot accept that characterization. ‘A client is not an article of property in which a lawyer can claim a proprietary interest, which he can sell to other lawyers expecting to be compensated for the loss of a property right.’"

b. Instead, the supreme court states: “The referral agreement must be viewed in the context of the duties which are owed to the client.”
c. At the time Wallace Saunders entered into the referral agreement, it had committed to representing Hotchkiss, through its agent Oliver.

(1) Wallace, Saunders argued its duties to Hotchkiss ended when it turned her over to competent trial counsel to handle her case.

(2) This timing issue was important because Wallace, Saunders was later handling matters for the hospital that was being sued by Hotchkiss.

(3) The court refused to consider this conflict issue noting this was a contract dispute between Oliver and his former law firm. It is not a suit by Hotchkiss seeking any sort of redress against Wallace, Saunders.

(4) The court notes that if Oliver believed Wallace, Saunders violated the Kansas Rules of Professional Conduct, Oliver had a duty to report the matter to the Disciplinary Administrator pursuant to RULE 8.3(a): "A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority."

(5) Neither the supreme court, or the trial court, exhibited any willingness to consider ethical arguments to bolster Oliver’s contract claims against the law firm. The court recites the following from the “SCOPE” introductory material to the Kansas Rules of Professional Conduct (now found at ¶ [20]):

"Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the
rules can be subverted when they are involved by opposing parties as procedural weapons.”

6. Basic guiding principles for referral fees in Kansas:

a. Whatever fee is made with the client must be “reasonable.”

b. Assuming the contingent fee arrangement is reasonable, the attorney entitled to the fee can enter into an agreement with a referring attorney to share part of the fee.

c. The most important aspect of the “reasonableness” of the fee-sharing arrangement is that it will not in any way result in an increased fee to the client.

(1) The fee charged the client would be the same even if there was not a fee sharing arrangement with a referring attorney.

(2) This was a point stressed by the court in the Shamberg case.

d. The second requirement is that the “client is advised” that a referral fee will be paid to the referring attorney – and the client “does not object to the division.”

e. The referring attorney need not take any active involvement in the referred case. However, the referring attorney could be responsible for a referral to an attorney not equipped to competently handle the matter.

f. See Ryder v. Farmland Mutual Ins. Co., 248 Kan. 352, 807 P.2d 109 (1991); Think Ethics, Getting Paid for Doing It Right! 64 J. KAN. BAR ASS’N 4 (Oct. 1995) (“Hopefully, lawyers put the rule to good use these days, not only to get paid for referring a fee, but to make it worthwhile to refer the case properly. Referring the case properly insures the client gets the best possible advice.”).

7. Rationale for Kansas’ liberal policy promoting referral fees: The client is benefitted because the referring attorney has the incentive to find them the best counsel possible to address their problem – and the ultimate fee to the client will be the same.