Title: PROFESSIONAL RESPONSIBILITY AND THE OIL & GAS LAWYER: THE DRAFTING CONTEXT

Date: October 19, 2012

Location: Wichita, Kansas

Program: KBA/KIOGA 37th Annual Oil & Gas Conference

Sponsor: Kansas Bar Association

Duration: One Hour
Section 7

Professional Responsibility
and the Oil & Gas Lawyer:
The Drafting Context

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PROFESSIONAL RESPONSIBILITY AND THE OIL & GAS LAWYER: THE DRAFTING CONTEXT

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I. The Professional Responsibility Implications of Drafting Documents

"Is it possible to violate the Model Rules of Professional Conduct by merely setting in your office, talking to no one, while enjoying the peaceful task of drafting a contract? There is no judge, no opposing counsel, no litigation – not even a dispute."

A. Drafting Requires the Exercise of "Independent Professional Judgment"

1. Model Rules of Professional Conduct, Rule 2.1 states:

   "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation."

2. Most of the focus on Rule 2.1 has been on the "independent" aspect of the advice and the nature of the non-legal advice a lawyer may feel compelled to offer their client.

3. The "independent" portion of the rule operates in conjunction with Rule 1.8 which lists a number of situations in which the lawyer's independence may be compromised, such as relationships with a client concerning business, a gift, literary rights, financial assistance, limitation of liability, family, a cause of action, and sex.

   a. Sexual relations with a client seem to be a common situation in which the lawyer's independent professional judgment toward the client may be jeopardized. E.g., In re Berg, 955 P.2d 1240 (Kan. 1998).
b. Another group of "independence" issues relate to the involvement of third parties that may impact the lawyer's judgment. For example, when a third party is paying the lawyer's fee or when the lawyer attempts to represent more than one party in a transaction.

4. The focus of this presentation is on the "professional judgment" element of the rule: "In representing a client, a lawyer shall exercise . . . professional judgment . . . ." 

a. The "professional judgment" element of Rule 2.1 relates closely to Rule 1.1 regarding "competence."

b. Rule 1.1 states:

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

5. To provide "competent representation" the lawyer must exercise "professional judgment."


7. Included in the competent lawyer's exercise of professional judgment is the ability to ascertain the relevant law and then put it into action for the client through the process of drafting documents.

B. Lawyer or LegalZoom.com?

1. What distinguishes the lawyer preparing a document from obtaining a document through LegalZoom.com?

2. Professional judgment.

3. LegalZoom.com's basic defense to the challenge that it is engaging in the unauthorized practice of law: the services it provides are devoid of any professional analysis of the "client's" circumstances; it is the mindless, mechanical completion of forms. Janson v.
LegalZoom.Com, Inc., 271 F.R.D. 506, 509 (W.D. Mo. 2010) ("it is a firing offense to come even close’ to providing legal advice").

C. Legal Drafting as an Active Exercise of Professional Judgment

1. Do you know your client’s general goals?
   a. Not just the immediate task they are asking you to address.
   b. Do you know how the task you have been assigned “fits” within the client’s “big picture”? 
   c. Randy Pharo has described this “big picture” concept in a presentation titled: “Get Me What I Want No Matter What I Say.”

2. Do you fully appreciate the factual context in which the client’s task will operate?
   a. The factual context at the time a document takes effect can often be shaped, or reshaped, to enhance the enforceability of the document and more clearly express its meaning.
   b. Major factual contexts will include:
      (1) Those of the client.
      (2) Those of the other party(ies) to the transaction.
      (3) Those of the property that is the object of the transaction.
      (4) Those of the relevant business or industry.
      (5) Those of the general economy.
      (6) Those of the regulatory environment.

3. Do you know the current statutory, regulatory, and case law that impact each clause or word you use in your documents?
   a. I refer to this as the “validation” process where the drafting attorney first identifies the statutory, regulatory, and case law minimum to create a valid document – whether a deed, contract, ratification, etc.
b. Once the minimum requirements are identified, the next step is to use the law to determine content that will maximize the client’s position. This will be explored fully in the next section on “making facts.”

c. As noted in § C. 1. & 2. above, the law must be carefully analyzed to determine what must, can, should, or should not be part of the document to complement the client’s goals, factual context, and the effective interpretation and enforceability of the documents comprising a transaction.

4. Are you able to translate the client’s goals, factual context, and the law into a document that effectively accomplishes the transaction?

a. This is what we refer to as “legal” drafting.

b. Obviously, it cannot be accomplished by merely selecting a “form.” That is the LegalZoom.com approach that is represented as being devoid of the exercise of “professional judgment.”

c. Even using a document prepared by the most respected, knowledgeable, and professional senior partner will not satisfy the independent professional judgment standard. Things you will often not know about the senior partner’s document include:

(1) How the facts of the senior partner’s client compare to your client.

(2) What sort of negotiation took place to create the document, and the bargaining position and the factual context (e.g. the price of oil, etc.) at the time the document was entered.

(3) The status of the relevant law.

(a) Are there other jurisdictions potentially involved? There may be choice-of-law opportunities to explore.

(b) What did the appellate courts do last week that might impact the document?
(i) What has taken place in the law since the document was prepared by the senior partner?

(ii) What was the research cut-off date used by the senior partner in the event the senior partner used a form document prepared at an earlier date for another transaction.

(iii) Has a validation process ever been conducted?

D. Have You "Created the Wheel"?

1. In the drafting context clients are often under-served instead of over-served. They often require more of the lawyer's professional judgment, not less.

2. Individually, lawyers do not need to re-create the wheel each time they approach a drafting task.

   a. Obviously, if a lawyer has "created the wheel" for transaction A, when a similar transaction comes along, the lawyer should be able to intelligently use his or her work product from transaction A to assist with transaction B.

   b. The difference in this situation is that the lawyer engaging in the drafting has indeed created the wheel for that particular type of document and is able to use prior work product with the following adjustments:

      (1) Adjust for the differences in client and situational factual contexts.

      (2) Adjust for changes in the law.

      (3) Adjust for past experiences with the document that reveal weaknesses that should be addressed.

      (4) Adjust for the negotiation context resulting in final document.

         (a) Negotiation context problems can be eliminated by preparing fully annotated alternative versions of a document that seek
to maximize the position of a client regardless of their position in the transaction (e.g., whether buyer/seller, farmor/farmee).

(b) This way, when the next deal comes along, you will be working from a clean document format that has not been compromised by the negotiation process in a particular transaction.

3. How do you “create the wheel” when the transaction requires use of a standard form—such as a Model Form Operating Agreement or COPAS exhibit?

(1) You still must conduct the validation process and fully understand the purpose of each clause—and each word—contained in the form document.

(2) The process, in many ways, is more difficult when beginning with a form document, because of the channeling effect it will have on your exercise of independent professional judgment.

4. How do you “create the well” when you are given a document for review that has been prepared by the other party’s counsel?

(1) As with the form document, the process is more difficult, but the same.

(2) You still must conduct the validation process and fully understand the likely purpose or function of each clause—and each word—contained in the document tendered by counsel on the other side of the transaction.

(a) In addition to the validation process, you must also consider how the document terms impact your client’s goals and the factual context of the transaction.

(b) The goal is not to turn the other lawyer’s document into the document you would have drafted; instead the goal is to ensure that, within the structure of the transaction, the client’s goals will be achieved with the document effectively expressing the rights and obligations of the parties and clearly reflecting who
“won” and who “lost” on each major issue in the negotiating process.

(3) A subsidiary goal should be to try and seize the opportunity to be the lawyer that drafts the documents. You want to be a “drafting hog.”

(a) If the other party attempts to seize the drafting task, suggest an unreasonably short time frame for the first draft.

(b) When the other party’s counsel balks at the proposed time frame, retake the drafting momentum by agreeing to have the documents prepared on your time frame. But then you need to be prepared to meet the proposed time frame.

(c) It is always easier to achieve the client’s goals by being the party that fashions the transaction documents.

II. The Liberating World of the “Fact-Making” Transactional Lawyer

“The single most significant power available to the transactional lawyer is the ability to make facts.”

A. Fundamental Distinction Between Litigation and Transactional Work

1. With litigation you must accept the facts as they are; with transactional work the lawyer has the capacity to create the facts that will be used to judge their documents.

2. “Think about those situations involving litigation over the meaning of a document when you wished the document contained, or did not contain, a particular word or phrase; or the desire to go back and shape, or reshape, the factual context of the transaction.”

3. “The transactional lawyer, at the drafting stage, has it within his or her power to establish the context in which the deal is being made and to create, within the documents, the critical facts courts will be searching for to dictate the course of the transaction.”

4. The Model Code of Professional Responsibility noted the basic distinction with ethical consideration 7-3 distinguishing the “advocate” from the “adviser.”
a. "[A]n advocate . . . deals with past conduct and must take facts as he finds them." MODEL CODE OF PROF'L RESPONSIBILITY EC 7-3 (1980) (emphasis added).

b. An adviser “primarily assists his client in determining the course of future conduct and relationships.” Id. (emphasis added).

B. The Fact-Making Process

1. The transactional lawyer’s tasks in this area include:

   a. Determining the facts and context that need to be created; and

   b. The most effective means for creating the desired facts and context.

2. Once the client’s goals are clearly defined, the existing factual context identified, and the applicable law evaluated, the lawyer is ready to:

   a. Plan the transaction, the documents, and document contents;

   b. to identify what must be obtained in the negotiating process, and

   c. ultimately included in the operative documents, to accomplish the client’s goals.

3. The “facts” that need to be created – or at least highlighted in the relevant documents – will become evident as the law is identified and applied to the client’s situation.

4. The goal is to ensure that when a court goes looking for facts to support a particular clause, they can be found within the four corners of the documents.

   a. Much more powerful when the facts are within the documents.

   b. It is hard for a party to an agreement to deny the existence of facts they “agreed” existed when they, or their predecessor in interest, entered into the agreement.
C. A Quick Ethical Guide on Negotiations

1. Although the lawyer may not be directly negotiating the deal, they will often be in a position of vouching, by remaining silent, for statements made by the client’s landman or other negotiating employee.

   a. For example, the lawyer is present while the client’s landman or other negotiating employee makes a statement that may not be true but is facially an act of posturing: “puffing and bluffing.”

   b. By illustration: The landman declares the company/client will not farm out acreage for anything less than an 8% overriding royalty convertible at the farmor’s option to a 50% working interest. The lawyer knows the company/client is willing to accept a 4% overriding royalty convertible to a 40% working interest.


3. Two major areas of concern: First, puffing and bluffing vs. fraud; and Second, interacting with the other party’s representative (landman or other employee) when the party is represented by legal counsel.

4. Puffing and Bluffing.

   a. Model Rules of Professional Conduct, Rule 4.1 Truthfulness in Statements to Others, provides:

   “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 when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”

   b. The operative term in Rule 4.1 for distinguishing puffing and bluffing from fraud is “material fact.”
c. Comment [2] to Rule 4.1 states:

“This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statement of material fact.”

5. Dealing with a Represented Party.

a. The problem in the oil and gas context is not so obvious because the parties conducting the actual negotiations, the landmen, are often lawyers - but they are functioning in an employee status and not as legal counsel for the parties.

(1) The landman may be in close contact with the company’s attorney, who in turn is advising the landman regarding how issues should be approached with the other party.

(2) This can result in the attorney for one party negotiating (through the client’s landman) directly with the landman for the other party – knowing the other party is represented by counsel (but not the other lawyer/landman).

b. Model Rules of Professional Conduct, Rule 4.2 Communication with Person Represented by Counsel, provides:

“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

c. The comment to Rule 4.2 addresses the lawyer “employee” situation by stating:

“In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the
matter may be imputed to the organization for purposes of civil or criminal liability.”

III. ILLUSTRATING THE DRAFTING PROCESS: THE FARMOUT AGREEMENT

A. The Client’s Goals and the Factual Context

You represent Acme Oil Company that has four separate leases, each covering a different quarter section of land in § 30, Township 11 South, Range 15 East, from the 6th Principal Meridian, in Shawnee County, Kansas. The primary term of each lease expires in six months. Bayside Oil Corporation is a major competitor of Acme in the area with considerable knowledge regarding the area. There has been no development on any of the Acme leases. However, there is development on adjacent lands owned by Bayside. The leases have an estimated value of $200,000. The price of oil is high but drilling costs are still relatively low; there is general interest in the area, and state regulation would allow the drilling of up to four wells into the formation of interest on the farmout lands. It costs approximately $1,000,000 to drill a well to the formation of interest. Acme wants to maintain the leases but presently has all its available drilling funds dedicated to other prospects. Acme is willing to farm out its leases so a farmee can maintain them with development, and possible production. Acme recognizes the leases may be productive, but Acme has greater technical and economic interests, and obligations, in its other prospects.

Preliminary discussions between the landmen representing Acme and Bayside reveal the parties are agreeable to a deal that gives Bayside three months to commence drilling a well on the farmout acreage. The farmout acreage will consist of all of Acme’ leases covering § 30 with Bayside able to earn rights in all the acreage it is able to maintain through its drilling and development operations.

1. A major deal point that is too frequently left unaddressed is whether Bayside will be obligated to drill any well on the farmout acreage within the three-month period.

2. Selecting a commonly encountered form of farmout agreement will not solve the issue – or may solve the issue in a manner that is inconsistent with the client’s goals. Consider the problems associated with the form farmout agreement in John S. Lowe, et al., Forms Manual to Accompany Cases and Materials on Oil and Gas Law 256-71 (5th ed. 2008). The authors of the Forms Manual describe the origin of the sample farmout form as being furnished by “Kanes Forms.” Id. at 272.
3. A fact regarding the business or industry would be that farmout agreements are often drafted as unilateral contracts where the farmee, upon commencing performance, has a reliance interest in being able to complete performance. However, before that time either party can abandon the transaction: the farmor by revoking the offer; the farmee by failing to take any action regarding the offer. See generally, John S. Lowe, Analyzing Oil and Gas Farmout Agreements, 41 SOUTHWESTERN L. J. 759, 788, 792 (1987) ("the vast majority of farmout agreements make drilling an option rather than an obligation.").

4. If Acme wants an "obligation" farmout, for at least one well, it must clearly provide for it in the farmout agreement.

5. Imposing an obligation on Bayside to drill a well creates another issue: what happens if Bayside fails to drill the required well?
   a. Will Acme’s damages be the $200,000 value of the leases that terminate?
   b. Does it matter that Acme would have a remaining three months to do something to save the leases? Will that reduce the $200,000 loss?
   c. Will Acme’s damages be the $1,000,000 it would cost to drill the well that Bayside was obligated to drill?
   d. If before Bayside drills an operator on a tract adjacent to § 30 drills a dry hole, will that alter in any way Acme’s damages?

6. Uncertainty regarding damages should suggest to the attorney representing Acme – or Bayside – the need to explore the potential benefits of a liquidated damages clause.

B. The Validation Process

1. The validation process would be applied to each major issue suggested by the client’s goals and the surrounding facts. For example, it would reveal the "obligation" vs. "option" issue regarding the nature of the farmee’s drilling, and how it might be effectively addressed.

2. The validation process is best illustrated by considering the liquidated damages clause, because such clauses have been the
object of considerable judicial scrutiny. Therefore, to determine whether a liquidated damages clause is advisable for Acme, and if so, the content of the clause, will require research to identify all the relevant law on the subject together with analysis of what the law offers as to how a liquidated damages clause should be drafted.

a. Because the law of liquidated damages varies from state-to-state, a choice of law clause should be considered to ensure the correct body of law will be applied to test the liquidated damages clause.

b. The choice of law clause also triggers consideration of an appropriate choice of forum clause because the court hearing a matter is more apt to look favorably at applying fully the chosen law if it is the law of the court’s jurisdiction.

c. Under the facts presented, and in light of a recent decision of the Kansas Supreme Court, it will be seen that Acme will want to choose Kansas law and, assuming no overriding considerations, support the choice of Kansas law with choice of a Kansas forum.

C. Liquidated Damages Clause

1. The first consideration in the validation process is whether Kansas law offers Acme anything worth pursuing in the area of liquidated damages.

a. For example, prior Kansas Court of Appeals decisions held that a two-step, retrospective analysis should be applied to liquidated damages clauses.

   (1) Under the Court of Appeals’ analysis, you must first consider whether the liquidated damages figure, at the time the contract was entered, represented a reasonable estimate of damages that could not be ascertained with precision.

   (2) If the clause survives the first inquiry, it still must meet a second: is the liquidate damages figure, at the time of the breach, reasonable in light of the actual damages?

b. If you are in a jurisdiction that limits the liquidated damages figure to damages that are reasonable in light of
the actual damages at the time of breach, the liquidated damages clause becomes nothing more than a cap on potential damages – which would not operate in Acme’s favor so Acme would not want to enter into an agreement with a liquidated damages clause.

c. However, your research reveals that the Kansas Supreme Court, in Carrothers Construction Company v. City of South Hutchinson, 207 P.3d 231 (Kan. 2009), expressly rejected the Court of Appeals’ prior opinions which adopted a retrospective review comparing actual known damages to the projected damages. This means Acme can potentially benefit from a liquidated damages clause under Kansas law.

2. Not so free, freedom of contract. It is a rather odd aspect of contract law that despite the broad freedom the parties have in fashioning their agreements, they cannot include express terms designed to encourage the other party’s performance.

a. You can “compensate” for non-compliance but cannot “coerce” compliance.

b. You cannot “penalize” a party for their non-compliance.

c. This rule supports the concept of “efficient breach” and the idea that there is no punishment for non-performance except for compensation of the other party for damages authorized by the contract.

d. Therefore, a liquidated damages clause must be designed to “compensate” the performing party as opposed to “compelling” or “punishing” the non-performing party.

e. This also becomes the first principle to follow in drafting liquidated damages clauses: speak in terms of compensation while avoiding language of compulsion or retribution.

3. Kansas law places a premium on “making” the right facts concerning the process the parties go through, at the time of contracting, to try and project damages in the event of a future breach.

a. Facts must reveal that damages would be difficult to calculate.
b. Facts must reveal that despite the difficulty, the liquidated damages figure chosen by the parties is a reasonable estimate of damages in the event of a breach.

(1) Somewhat of an odd state of affairs because in the first instance the number must be something that cannot be readily calculated but in the second instance the parties must engage is a reasoned process to arrive at a precise number.

(2) This state of affairs merely highlights that the parties are trying to do the best they can, under the circumstances, to arrive at a number that will adequately compensate the non-breaching party for not receiving the benefit of their bargain.

(3) In the farmout situation, with a firm obligation to drill, Acme has a strong argument that its damages, in the event of a breach, will be $1,000,000 (drilling cost) not $200,000 (lease value), because its benefit of the bargain was to drill a well.

c. In each case, the agreement should narrate what the parties did and considered to arrive at the damage figure.

d. The term “parties” is used because if these issues are appropriately documented in the contract, the facts and conclusions will be those of both parties to the agreement.

(1) Avoids the need to try and offer evidence of the surrounding circumstances.

(2) Makes it difficult for the other party to deny a “fact” or “conclusion” that they have already agreed existed at the time the contract was entered – and before the contours of any subsequent dispute were known – and before they could evaluate, with precision, whether the liquidated damages clause would operate in their favor (e.g., a figure that is less than actual damages at the time of the breach).

4. The Kansas Supreme Court, through its Carrothers decision, provides guidance on the sort of pre-contracting analysis Acme should engage in, and document, to provide maximum enforceability of any resulting liquidated damages clause.
a. The Farmout Agreement should identify why it is difficult to accurately determine damages in the event of a breach.

(1) Uncertainty as to oil prices, drilling costs, lease values, demand for acreage, other developments in the field, ability to drill or obtain others to drill, etc. that make it difficult to estimate damages with precision.

(2) Uncertainty as to the total consequences of a breach.

b. The Farmout Agreement should identify the thought process used to arrive at the liquidated damages number.

(1) Identify what the parties agree is the “benefit of the bargain” to be protected by the clause.

(2) Indicate how the current cost of drilling ($1,000,000) was arrived at as an appropriate estimate of reasonable damages.

(a) Note that other states have used this as a damage figure.

(b) Drilling costs are likely to change; the current number reflects reasonable costs paid by prudent operators in arm’s-length transactions at the time of contracting.

(c) The figure is consistent with what the drilling party would pay if they complied with the contract and drilled a dry hole. It is a reasonable amount to pay in lieu of performance and represents the non-drilling party’s benefit of the bargain.

(3) Evaluate damage ranges and show how the chosen figure falls within the ranges evaluated.

5. Other Considerations. Label the clause prominently. Recite the desire of the parties to be protected from the difficulty, uncertainty, and expense associated with trying to ascertain actual damages in a judicial proceeding.
6. Farmout Forms. It is highly unlikely you will find a farmout form with a liquidated damages clause. In the unlikely event one is found, it is even more unlikely it will reflect the current state of the law in the jurisdiction that will govern your farmout agreement.

IV. THE “BIG THREE” ETHICAL RULES APPLICABLE IN ALL CONTEXTS

“Many of the transactional lawyer’s ethical problems can be avoided by following what can be legitimately labeled the ‘big three’ ethical rules: communication, diligence, and competence.”

A. Communication

1. The most important rule for staying out of trouble is to communicate with the client.

2. Timely and honest communications can avoid diligence problems, and even competence problems.

3. Rule 1.4 Communication, provides:

   “(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

   (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

4. For a client to make informed decisions, they must understand the issue and be given the necessary legal advice. This relates to Rule 1.4(b).

   a. To the extent the client is not given the necessary information to make an informed decision, the decision, in effect, becomes that of the lawyer.

   b. Lawyers want all decisions to be informed so that when it turns out to be a “bad” decision, it is a “client” decision, not that of the lawyer.

5. Rule 1.4(a) addresses one of the areas where lawyers are most frequently found lacking.
a. Foundational rule of practicing law #1: always call the client you least want to talk to -- first.

b. Often a reluctance to communicate is because the attorney has not been diligent in addressing the client’s matter.

B. Diligence

1. Rule 1.3 Diligence is pretty simple: “A lawyer shall act with reasonable diligence and promptness in representing a client.”

2. Foundational rule of practicing law #2: if you can’t get something done when promised, let the client know -- immediately.

3. Comment [3] to Rule 1.3 observes: “Perhaps no professional shortcoming is more widely resented than procrastination.”

C. Competence

1. Rule 1.1 Competence, provides:

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

2. Comment [2] lists some of the “important legal skills” of the competent lawyer as including “analysis of precedent, the evaluation of evidence and legal drafting . . . .”

a. These three coincide with ascertaining the client’s goals and factual context (“evaluation of evidence”) and pursuing the validation process to identify all relevant law (“analysis of precedent”), and then using these facts and law to accomplish the client’s goals through the process of “legal drafting.”

b. Comment [2] also observes: “Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve . . . .”

(1) Drafting involves evaluating the client’s situation, identifying the associated legal problems, and then devising effective ways to deal with each problem through the documents you prepare.
(2) All of this requires the exercise of independent professional judgment.

3. As related to communication and diligence, competence includes the ability to competently practice law as a business.

4. An inability to properly manage client communications and workload are indicators of a dysfunctional law office that is not providing competent representation.

V. SIMPLE PITFALLS: THE NOTARIZED DOCUMENT

"The dysfunctional law office may also give rise to practices that may seem relatively harmless but which constitute serious ethical violations and, in many states, may also be a crime."

A. The Notary Public

1. Many transactions require the services of a notary public.

2. Every law office should have specific guidelines on how notary services must be used and performed.

3. 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.

4. Section 2 of the Uniform Law on Notarial Acts, requires that the notarial officer, in taking an acknowledgment, "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." (Emphasis added).

5. The lawyer professional misconduct in this area relates to some form of failing to have the person signing the document do so simultaneously with his or her appearance before the notary.

6. The Iowa Supreme Court has stated that a failure to adhere to the requirement that the party signing a notarized document appear in person before the notarial officer is "manifestly unprofessional.

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1 In State v. Kraushaar, 957 P.2d 1106 (Kan. 1998), the court discusses the appropriate crime to be charged when an untrue statement is made, or procured, relating to a notarized document.
conduct” and “inexcusable.” Comm. on Prof’l Ethics and Conduct of the Iowa State Bar Ass’n v. Hutcheson, 504 N.W.2d 898, 899 (Iowa 1993) (among other infractions, lawyer would send out unsigned documents to clients, with a notarization signature and seal, and the clients would procure signatures).

7. The notary abuse cases have a common theme: the lawyer was trying to accommodate the client by allowing them to sign documents in a more convenient manner. Okla. Bar Ass’n v. Jaques, 11 P.3d 621, 625-26 (Okla. 2000) (forging notary public’s signature “not motivated by a desire for personal gain nor causing harm to his clients” but is nevertheless “a severe offense”).

8. The “everybody does it” defense, as might be expected, has been resoundingly rejected. Comm. on Prof’l Ethics and Conduct of the Iowa State Bar Ass’n v. Bauerle, 640 N.W.2d 452, 454 (Iowa 1990) (“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.”). In re Finley, 261 N.W.2d 841, 845 (Minn. 1978) (“We categorically reject the defense . . . .”)

B. Help With Affidavits and Other Sworn Documents

1. Some states have “unsworn declaration” statutes which allow the declarant to comply with a statutory statement instead of a verification (jurat) before a notary. E.g., Kansas Statutes Annotated § 53-601.

   a. Major limitation under most of the statutes is that it will not allow for a self-“acknowledgment” of a document signature.


2. There is a federal “unsworn declaration” statute applicable for federal matters: 28 U.S.C. § 1746.


   b. Many states have held the federal statute cannot be used to satisfy state notary requirements. E.g., Bennett v. Weimar,
VI. CONCLUSION; THE LAW SCHOOL CHALLENGE

"Legal drafting is a recognized 'skill' that law schools need to better incorporate as part of the law school curriculum. . . . Legal drafting is nothing more than a higher level of applied legal analysis to achieve a desired outcome in a transaction. As with any aspect of the practice of law, it requires the skilled application of 'independent professional judgment.'"

For further reading on this topic, see: David E. Pierce, Professional Responsibility and the Transactional Lawyer: The Drafting Context, 57 ROCKY MTN. MIN. L. INST. 19-1 (2011).