

# PROFESSIONAL SKILLS INSTRUCTION

## Introduction to Legal Drafting

by

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### I. THE GOAL OF PROFESSIONAL SKILLS INSTRUCTION

Law school instruction generally consists of learning the law and how to spot issues in a fact pattern so we can select and apply the appropriate law to address an issue. For example, in Property we study the myriad interests that can be created in real property such as the “fee simple absolute” and forms of ownership such as “joint tenancy.” We learn, from bad experiences (cases in our casebook), how *not* to do something. We learn the rules and how to apply them to factual patterns provided by the casebook editors and the professor. Frequently we never move beyond this level of analysis in our classes.

The Professional Skills Instruction programs are designed to provide students with additional opportunities to learn how to “use” their knowledge of the law and its application to a set of facts to *control* the situation. Through the process of legal drafting students will learn how to structure their client’s factual world to make the law achieve their client’s goals. *The documents we draft can create the facts that trigger the legal response our client desires.* This is the essence of drafting and the function of the “transactional” lawyer. *We manipulate facts to achieve a predictable and planned legal result.*

### II. LEARNING THE “LEGAL DRAFTING” SKILL

The goal of this session is to begin teaching the skill of drafting. In subsequent sessions throughout the academic year you will work on your drafting skills through a series of exercises that require you to apply various drafting principles. Primary emphasis is placed upon what is referred to as the “validation” and “drafting” processes where students must analyze the legal issues presented by the drafting task, research the legal issues they have identified, and then apply their research to draft provisions which account for, and make use of, the relevant law and facts.

The validation and drafting processes are the core skills that must be perfected and therefore receive reinforcement throughout the Professional Skills Instruction series of presentations. However, each exercise also requires attention to editing and careful choice of language. During the process students also learn how to define the client’s needs and how to draft the document to ensure its efficient use and administration.

Each exercise will be preceded by a discussion of various research, analysis, and drafting

concepts. Students will form groups of approximately six students to work through the exercise, which typically requires analysis of the problem, research of the identified issues, and then preparation of a written document. Each group document will be returned to Professor Pierce (place it in his mailbox in Room 203), and he will review the documents and provide a group critique of the work in a subsequent session. During the group critique various papers are selected to illustrate research, analysis, and drafting strengths and weaknesses. These critiques are conducted using either the document camera or PowerPoint so the actual language used can be examined by the class. All critiques are anonymous. For every document students prepare, Professor Pierce will prepare a document which represents his approach to the exercise.

### **III. LEGAL DRAFTING BASICS**

“Legal” documents seek to effectively account for the facts and law that can impact the parties to a document. The lawyer’s role in “drafting” a legal document is to ensure they identify all the relevant facts and law and then apply them to prepare a document that accomplishes their client’s goals. Legal documents are typically a set of instructions for others to follow in an effort to fulfill the intent of one or more parties to the document. Clear, complete, and functional instructions promote the client’s goals.

#### **A. Summary of the Drafting Process**

The drafting process is examined in detail in the attached PowerPoint handouts. The process can be summarized and reduced to three steps:

- (1) Identify the facts that define what must be addressed in the document;
- (2) Research the law:
  - (a) implicated by the facts; and
  - (b) implicated by the subject matter of the document; and
- (3) Use the law and facts to state the terms of the document that will accomplish your client’s goals.

#### **B. The Drafting “Skill”**

Drafting consists of the following skills:

- (1) Obtaining information from the client and other sources necessary to fully understand the client’s goals and the commercial context in which the parties operate;
- (2) Preparing a rough draft expressing the basic agreement the client contemplates;

- (3) Analyzing the rough draft to identify the legal issues that impact each term of the rough draft;
- (4) Researching all legal issues to identify how the applicable law should be accounted for in the agreement;
- (5) Analyzing the rough draft and the applicable law to identify planning and structuring opportunities available to the client;
- (6) Redrafting the agreement by applying the applicable law to accomplish the client’s planning, structuring, and underlying business goals;
- (7) Using the client to test the document to ensure it will be appropriate for their business needs, including the client’s administration of the document; and
- (8) Editing and revising the document to ensure the deal is stated using a format and language that are clear, concise, and functional.

The ultimate goal of this process is to ensure that for any document a lawyer drafts, or reviews, they understand fully why each word, sentence, clause, or paragraph is being used, and the effect it will have on their client. Anything less is unacceptable lawyering.<sup>1</sup>

The drafting process is the same regardless of the type of document. The principles and goals are identical whether drafting a contract, conveyance, letter, settlement, interrogatory, or petition. In each situation the attorney must know what they desire to accomplish, the facts and law that apply, and how the document uses facts and law to create the desired legal relationships.

### **C. Applying the Drafting Process: A Hypothetical**

Cheryl Stice is the President of Acme Oil Company. She has been negotiating a drilling contract with Hughes Drilling Corporation which is located in Midland, Texas. Cheryl is concerned that the proposed oil and gas well location is in a populated area, adjacent to Topeka, Kansas, with the potential that third parties could be injured if they trespassed onto the location where drilling is taking place. Cheryl would like to shift this risk of injury to third parties onto Hughes Drilling. Cheryl wants you to draft the necessary clause, to be added to the drilling contract they ultimately negotiate, that will place this risk on Hughes Drilling and provide Acme Oil the maximum protection possible.

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<sup>1</sup>These are part of the lawyer’s basic duties to “provide competent representation” and to “exercise independent professional judgment . . . .” MODEL RULES OF PROF’L CONDUCT R. 1.1 (Competence) & R. 2.1 (Advisor) (1983).

**APPROACHING THE DRAFTING TASK ANALYTICALLY**

*STEP #1: Think about the task. Formulate your research plan.*

**Describe precisely what you are going to research.**

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**What key words you will use for your search?**

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**Are there any special issues you must resolve before conducting your substantive research?**

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*STEP #2: Research the issues identified in your research plan.*

**Identify and explain any statutes that impact your drafting.**

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**Identify and explain any cases that impact your drafting.**

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***STEP #3: Based on your research, identify any special matters that you will need to counsel your client about.***

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***STEP #4: Based on your research, identify any special matters you must address to have the most effective clause possible. For any item you list, explain why it must be addressed and how it will be addressed in your clause.***

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***STEP #5: Draft the clause that incorporates the information and principles identified in your analysis and research.***

**IV. EXERCISE #1: DRAFTING CONVEYANCES**

For this exercise assume you represent Dock Hillard. Dock informs you of the following:

Dock Hillard owns, in fee simple absolute, real property described as the:

Southeast Quarter of Section 3, Township 11 South, Range 15 East,  
from the 6<sup>th</sup> Principal Meridian, in Shawnee County, Kansas.

Dock received this land by inheritance from his grandfather, Thomas Hillard. Dock is married to Cheryl Hillard and they reside in Topeka, Kansas, but not on the land being sold. Dock informs you this is his “separate” property.

Dock desires to convey to Levi Pierce, Will Pierce, and Cody Pierce, a fee simple absolute in the Northeast Quarter of the Southeast Quarter of Section 3, Township 11 South, Range 15 East,

from the 6<sup>th</sup> Principal Meridian, in Shawnee County, Kansas. Dock wants the three to hold the conveyed land as joint tenants “so nobody has to worry about the probate court and lawyers.” Dock also wants to transfer the land at this time so it will not be part of his taxable estate at his death.

Dock, Levi, Will, and Cody want to make sure the transfer can be recorded to provide the world notice that Dock has transferred his interest to the Pierce brothers. Levi, Will, and Cody are providing no consideration for the conveyance by Dock. Dock does not want to guarantee title to the property but does want to provide Levi, Will, and Cody with all rights Dock has in the property now, or that he may become entitled to in the future.

### **A. Your Task**

Apply the drafting principles you learn today to Exercise #1 and draft the document you will use to accomplish Dock’s goals. For each word used in your document, be able to explain *why* it was used, relying upon your analysis of the relevant law. **The document should be typed and ready to effectively transfer the interest from Dock to Levi, Will, and Cody.** You do not want Dock to have to do anything further other than sign the document you prepare. If there are any procedural issues the parties need to be aware of (again from your analysis of the law and facts), be prepared to discuss them at our next session (**Noon, Wednesday, October 29, 2008, Room 102**).

To allow me time to review your work, and prepare my analysis for our October 29 session, **place your completed documents in my mailbox in Room 203 by Noon on Tuesday, October 28, 2008.** Put your names on the group document. Make and retain a copy of your work; I will not be returning your documents.

### **B. How To Approach This Drafting Task**

**First, you need to fully understand the law that is implicated by the drafting task.** The facts indicate several matters need to be addressed. For example: (1) How do you convey real property from an owner to a grantee? (2) How do you convey a “fee simple absolute?” (4) How do you make the grantees “joint tenants?” (4) What must be done with the document to make it recordable? (5) What must be done to convey the real property without any “guarantee” of title? (6) How do you convey property to include “all rights Dock has in the property now, or that he may become entitled to in the future?” (7) Is it possible to make a present conveyance without consideration? (8) Does it matter that this property is Dock’s “separate property”?

To answer these questions you will need to research the applicable law. For this exercise you begin by searching statutory law for guidance. This involves choice of law issues at several levels: (1) Does state or federal law apply? (2) If state law applies, which state’s law? [For this problem, assume Kansas law applies.] What “law” of Kansas? Is this governed by a specialized body of Kansas law, such as the Uniform Commercial Code?

If you are at a complete loss regarding how to approach the issues, the first step may be to research the general subject matter in a treatise. For example, a treatise section on “conveying

land.” If you have a basic understanding of the issues involved, your first step will be to look for relevant statutory law on the subject. This means you will begin your research in the Kansas Statutes Annotated.

Once you have exhausted your study of the relevant statutes, you may need to examine, depending upon the subject matter, relevant regulations, orders, case law, commentary, and other information that can assist you in understanding a statute, or to address a matter not addressed by statute.

# Professional Skills Instruction: Introduction to Legal Drafting

Presented by  
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# The Basic Goal of “Drafting”

- You will learn how to prepare documents that make the law operate in such a manner as to accomplish your client’s goals.

# The Basic Goal of “Drafting”

- You have the opportunity to operate in the lawyer’s dream world: **a place where you can create the facts you need to achieve a desired legal result.**

# Drafting Basics

- **To draft effective documents you must:**
  - **Understand** the client's goals.
  - **Identify** the issues triggered by the project.
  - **Research** the law concerning the issues.
  - **Apply** the research to fashion your terms.
  - **Communicate** the terms to your audience.

# Forms Can Be an Ethical Violation

- Kansas Rules of Professional Conduct
- Supreme Court Rule 226
- **RULE 2.1 Advisor**

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

# Forms Can Be an Ethical Violation

- **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.”

# Forms Can Be an Ethical Violation

- Comment to **RULE 1.1 Competence:**  
“[2] **Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems.** Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve . . . .”

# The Proper Role of Forms

- Once you engage in your own “zero-base” drafting, the last step can include looking at a form to evaluate the content of your document.
- The goal is to merely see what “they” included that you did not, and evaluate why.
- Can evaluate your approach to issues compared to “theirs.”

# The Proper Role of Forms

- Professor Scott Burnham: “Zero-base” drafting: “[T]he agreement is built from the principles rather than from a model.”
- However, as a student, **DO NOT** follow Professor Burnham’s advice: “To begin zero-base drafting, start with an original form that can serve as an outline . . . .”
- **You can end with the form but NEVER begin with a form.**



# The Proper Role of Forms

- If you begin with a form, it will improperly channel your analysis of the problem.
- If you begin with a systematic analysis of the problem, you will understand **what should be in the document** and, equally important, you will understand **why** it is included, or excluded.
- You will also know **how** to state each clause.
- This will also assist you in reviewing documents tendered by others.

# The Proper Role of Forms

- Once you have analyzed the situation, and applied **your** analysis and the law to prepare an agreement, you now have **your form** that can be used in future transactions.
- You must modify your form to meet the facts and needs of your client and update it as the law and experience dictate.

# Boilerplate

- If you follow proper drafting techniques, then nothing you use in a document can be accurately classified as “boilerplate.”
- Is a limitation of warranty boilerplate?
- In an indemnity boilerplate?
- Is a merger clause boilerplate?
- Is a choice of law clause boilerplate?
- **NOT IF YOU DRAFT THEM.**

# Documents Instruct

- Most documents we draft are designed to instruct others regarding our client's rights, obligations, or status.
- Contract: a set of instructions regarding what the parties must do.
- For example, a real estate contract is designed to accomplish a specific goal: transfer property from seller to buyer.

# Documents Instruct

- Deeds instruct: who owns what sort of interest in what property?
- Doctrine of Merger: the deed may take the place of the contract.
- Contract/Property Interface: integration vs. merger.

# Documents Instruct

- To ensure your instructions are followed, you must know your audience so you can be sure and **communicate**.
- Communication involves:
  - Knowing what needs to be said.
  - Saying it in an accessible, usable format.
  - Saying it so it will be understood.

# Read and Use Richard Wydick's Plain English for Lawyers

- Avoid verbal clutter.
- Use words sparingly.
- Use ordinary language unless there is a need for special terms.
- **“Good legal writing does not sound as though it had been written by a lawyer.”**

Wydick at p. 5.

# Read and Use Richard Wydick's Plain English for Lawyers

- **Omit surplus words.**
- “Working Words” and “Glue Words”
- A trial by jury was requested by the defendant.
- Glue-to-Working Ratio: 5/4
- The defendant requested a jury trial.
- Glue-to-Working Ratio: 2/4



# Read and Use Richard Wydick's Plain English for Lawyers

- **Avoid Compound Constructions.**
- at the point in time (then)
- by means of (by)
- by reason of (because of)
- by virtue of (by, under)
- for the purpose of (to)
- for the reason that (because)

# Read and Use Richard Wydick's Plain English for Lawyers

- **Avoid Word-Wasting Idioms.**
- the fact that she had died (her death)
- despite the fact that (although)
- because of the fact that (because)
- he was aware of that fact  
that (he knew)

# Read and Use Richard Wydick's Plain English for Lawyers

- **Focus on the Actor, the Action, and the Object.**
- It is possible for the court to modify the judgment.
- The court can modify the judgment.  
[actor] [action] [object]

# Read and Use Richard Wydick's Plain English for Lawyers

- **Do Not Use Redundant Legal Phrases.**
- null and void
- totally null and void
- totally null and void and of no further force or effect
- totally null and void and of no further force or effect whatsoever--dude
- How about “void.”

# Read and Use Richard Wydick's Plain English for Lawyers

- last will and testament (Will)
- made and entered into (made)
- convey, transfer, and set over (convey)
- rest, residue, and remainder (residue)
- good and sufficient (good)
- suffer or permit (permit)
- true and correct (true)

# Read and Use Richard Wydick's Plain English for Lawyers

- “The old, redundant phrase has worked in the past; a new one may somehow raise a question. To check it in the law library will take time, and time is the lawyer’s most precious commodity. But remember **—once you slay one of these old monsters, it will stay dead for the rest of your legal career.**” Wydick at p. 21.

# My Favorite Writing Guide

- ***The Elements of Style*** by William Strunk, Jr. and E.B. White.
- First edition: 1935.
- Fourth edition: 2000.
- This is all you need to know about writing (in less than 100 pages).

# Exercise #1

## The Drafting Process

- Your client would like to solicit from area operators of gas wells an option to purchase all the gas a well is capable of producing while it seeks to obtain resale contracts for the gas.
- Your client would like to have at least 60 days to get its resale contracts into place.
- The price it will pay for gas it elects to purchase will be 90% of the resale price.



# The Drafting Process

- Your client informs you that in the industry contracts which base the seller's purchase price on what the buyer is able to resell the gas for are called "percentage of proceeds" contracts, or "POP" contracts.

# The Drafting Process

- **QUESTION:**
- **What is our first research task?**

# The Drafting Process

- **ANSWER:**
- **What “law” applies to the transaction?**
- Ask the client where the wells are located, where it will take delivery of the gas, where the parties reside, etc.
- Are we in Texas, Oklahoma, Kansas, Montana—offshore? Federal lands?
- Multiple jurisdictions?

# The Drafting Process

- **QUESTION:**
- If we conclude Kansas law applies:
- **What body of Kansas contract law will apply to this transaction?**

# The Drafting Process

- **ANSWER:**
- Is this a sale of goods or a non-goods transaction? UCC Article 2 (goods) or non-UCC law (non-goods).
- **Research Project:**
- When a seller produces gas and delivers it to a buyer, is this a sale of goods or some sort of real property transaction?

# The Drafting Process

- **QUESTION:**
- **Why does it matter whether we apply Article 2 or general contract law?**

# The Drafting Process

- **ANSWER:**
- If Article 2 applies the client may want to use U.C.C. § 2-205 regarding “firm offers.”
- If Article 2 does not apply, the client must use the common law of option contracts and deal with consideration issues.

# The Drafting Process

- **Results of Research Project #1:**
- What is a sale or transaction in “goods”?
- Go to definitions in Article 1. (U.C.C. § 1-201; no help).
- Go to definitions in Article 2. (U.C.C. § 2-103; index of terms directs us to § 2-105).



# The Drafting Process

- **U.C.C. § 2-105:**

(1) “Goods” means all things . . . which are movable at the time of identification to the contract for sale . . . . “Goods” also includes the unborn young of animals and growing crops **and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).**

# The Drafting Process

- **U.C.C. § 2-107:**

(1) A contract for the sale of minerals or the like (including oil and gas) . . . is a contract for the sale of goods within this Article **if they are to be severed by the seller** but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.”

# The Drafting Process

- **So is our transaction a sale of goods?**

# The Drafting Process

- **YES.** The buyer is purchasing the output of the well (the gas that is severed, produced, by the seller).
- This means we can consider U.C.C. § 2-205 as something our client may want to consider.
- It is our duty to identify it as a possible option so our client can make their decision.

# The Drafting Process

- **QUESTION:**
- **How can our research and analysis of U.C.C. § 2-107 assist in drafting our contracts?**
- **Does § 2-107 suggest any language we might want to include in our documents?**

# The Drafting Process

- **ANSWER:**
- How about expressly noting that the gas is being purchased after “**it is severed by the seller.**”
- This removes any doubt that this is a “goods” transaction governed by Article 2 of the U.C.C.

# The Drafting Process

- **QUESTION:**
- **Why not just say “this contract is for a sale of goods”?**

# The Drafting Process

- Saying it is a “duck” instead of a “cow” does not make it so.
- We want to create the factual basis so that a court must, as a matter of law, conclude it is indeed a “duck” and not a “cow.”



# The Drafting Process

- After advising our client about the “firm offer” provisions of U.C.C. § 2-205, they tell us: “I want one of those.”
- **QUESTION:**
- **How will we determine the content of our conversation with our client regarding the U.C.C. “firm offer”?**

# The Drafting Process

- **ANSWER:**
- We study U.C.C. § 2-205, the official comments, and existing case law, and determine what our client may want, or need, to know—considering what we know about the proposed transaction.
- For example, the “period of irrevocability” cannot “exceed three months.”

# The Drafting Process

- We know we have a sale of goods.
- We know Article 2 of the U.C.C. applies.
- We know our client would like to use the firm offer provisions of U.C.C. § 2-205.
- How do we draft to give our client the benefits of U.C.C. § 2-205?
- How about: “**Buyer hereby triggers all the benefits under U.C.C. § 2-205.**” (not likely)

# The Drafting Process

- **UCC § 2-205. Firm Offers.** An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

# The Drafting Process

Acme Oil Company (“Acme”) **gives its assurance** to Dock Hillard (“Dock”) that Dock will **have the irrevocable right**, until April 1, 2005 at 5:00 p.m. Topeka, Kansas time, to elect whether to purchase all the production output of Acme’s natural gas wells producing from the lands described in Exhibit A.

# The Drafting Process

In the event Dock elects to purchase Acme's gas, the purchase price will be an amount equal to 90% of the price Dock resells the gas to a third party. . . .

Specify how the election will be made.

# The Drafting Process

## **OPTION TO PURCHASE GAS OUTPUT**

Acme Oil Company (“Acme”) gives its assurance to Dock Hillard (“Dock”) that Dock will have the irrevocable right, until April 1, 2005 at 5:00 p.m. Topeka, Kansas time, to elect whether to purchase all the natural gas produced from Acme’s natural gas wells located now, or in the future, from the lands described in Exhibit A.

# The Structure of a Contract

- **Describe the Document**
- **The Parties** (short-form references)
- **Date** (avoid multiple dates)
  - 12 January 2005
- **Time**
  - Do not force the reader to count days and then deal with the “midnight” issue.
  - This agreement terminates on May 1, 2006 at 5:00 p.m. Topeka, Kansas time.



# Law of Options

- To determine content of the document (what to include, what to avoid, how to structure and state the rights being created), must thoroughly research the applicable body of law concerning options.
- From that research you will come up with **annotated language** you can use to build **your own form file**.

# Review: The Drafting Process

- What do you do (first, second, third, etc.) when you are tasked with drafting a document?
- **STEP #1: Understand the basic nature of the transaction.** This may require that you consult a treatise or other basic resource to obtain a general understanding of the subject matter.

# Exercise: The Drafting Process

- Dock Hillard informs you he has been talking with his neighbor about using some of the neighbor's land to obtain a more convenient access to the client's barn. They have a general understanding and they want you to *give them what they need*.

# Everything Has an Ethical Issue

- What is this “they” stuff?
- Who is your client?
- I represent Dock, not the neighbor.
- Advise neighbor to obtain counsel to review whatever you draft.

# The Drafting Process

- **Analysis:** What do they need? Must use your knowledge of the law to classify the facts to determine the discipline(s) we must consider.
- Property? Contract? Tort? Business Associations?
- This is law school stuff.

# The Drafting Process

- Easement, license, conveyance in fee?
- **Research Project:** what are these and how do they differ?
- **Questions for Client:** Temporary (license); transfer all rights (in fee); or grant perpetual right to use (easement)?
- Duration? Personal? Benefit that runs with the land? Depends on who you are representing (grantor vs. grantee).

# The Drafting Process

- **Analysis:** From your client interview, and research of the general topic (or your knowledge), you conclude the client is asking for, and needs, an “easement.”
- At this stage you may want to do more general background reading on easements, depending upon your existing base of knowledge on the subject.

# The Drafting Process

- **STEP #2:** (Part of the “validation” process). **What state’s law will apply to the transaction?**
- In this case, where is the land located?
- Assume they are in Kansas.



# The Drafting Process

- **STEP #3:** (Part of the “validation” process). **What body of law within the state will apply to the transaction?**
- For example, sale of goods, consumer transaction, residential landlord and tenant, mobile homes, etc.
- The subject matter of the transaction may trigger a special body of law.

# The Drafting Process

- In our situation we are dealing with private landowners who do not have any special status such as “consumer” or “landlord and tenant.”
- This is not a sale of goods.
- **This is a transaction impacting real estate.**
- What sort of issues does this revelation trigger?

# The Drafting Process

- Because the transaction impacts real estate, we begin to think about rules governing conveyances, land titles, and recording statutes.

# The Drafting Process

- **STEP #4** (Part of the “validation” process). **Research statutory law to identify all possible provisions that may impact our transaction.**
- Depending on the subject matter, we may want to begin by researching the State constitution. (Judgment call based upon your initial analysis of the issues.)

# The Drafting Process

- Sometimes hard-copy research is much more efficient than computer research.
- The term “computer research” includes WestLaw, Lexis, and use of the web.
- Lets examine the Kansas Statutes on easements.
- Hard-copy or computer?
- Search term(s)?

# The Drafting Process

- **STEP #5** (Part of the “validation” process). **Research case law to identify all possible provisions that may impact our transaction.**
- As with the statutory research, it may be more efficient to use hard-copy as opposed to computer resources.
- Digest search to identify relevant case law.

# The Drafting Process

- Steps 4 & 5 are designed to provide you with a substantive base for drafting.
- As with our analysis of the firm offer using U.C.C. § 2-205, we are gathering the legal context for our document.
- Note how “basic” this analysis is: it even “informs” us how to title the document, “Easement.”

# The Drafting Process

- **STEP #6** We have completed the validation process and are now ready to use our knowledge to begin drafting the document to meet our client's needs.
- **Outline the document using the information we have gathered.**



# The Drafting Process

- **Information we have gathered:**
- This is a transaction impacting real property.
- Conveyance of rights.
- Recording requirements to give notice to third parties.
- Express appurtenant easement.
- Legal description of the property involved.

# The Drafting Process

- Problems identified through our case research.
  - Things the parties in past cases failed to do when the document was created.
  - Ambiguities.
  - Language that does not work.
  - Issues not addressed that should have been.

# The Drafting Process

- Collateral Issues (Ethics Alert): Can we represent the neighbor<sup>s</sup>?
- Pierce Rule: Pick a client. You [A] are my client; you [B] are not.
- Prepare the document for your client and advise the other party to obtain counsel to evaluate what you have drafted.

# The Drafting Process

- **STEP #7 Draft document, edit, test, and revise.** Follow-up research; comparison with other documents used for this type of transaction.

# The Drafting Process

- **STEP #8 Counsel the client on what you have done and what must be done to ensure your work is, and remains, effective.**
- Recording (will you do this?)
- Administration requirements?
- Future Issues: don't take precipitous action; call me for advice (this is particularly important for contracts).

# Exercise: The Drafting Process

- The importance of checking all available case law.
- The “farm lease.”
- Termination of Farm or Pastureland Tenancy. K.S.A. § 58-2506 & § 58-2506a.
- Did you address the rights of the parties in the event the farmer dies? What if the landlord dies?

# The Drafting Process

- Would you like to have Justice Luckert and a unanimous Kansas Supreme Court assist in drafting your farm lease?
- See ***In re Estate of Sauder***, 283 Kan. 694, 708-09 (2007), where the Court instructs:

# The Drafting Process

- **“Ideally, parties to a farm lease would clearly express their intent regarding the effect of the death of a tenant, the issue we have in this case, or the death of a landlord. Indeed, we would encourage scriveners of such agreements to include a provision expressing the parties’ intent.”**
- The Court has just informed us about an item that should be addressed in every farm lease.