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Adams Jones Law Firm, Roger Hughey and Mert Buckley were named in the Legal 500 U.S. 2010 publication for “their expertise in real estate, including development, commercial leasing, financing, land use, zoning, condemnation, real estate tax appeals, bankruptcy, litigation and alternative dispute resolution.” No other Kansas-based firm was named in the real estate section of the book “The Clients’ Guide to the US Legal Profession.”



**Probate Avoidance**

by Mike Cannady

Many people have the mistaken impression that if they have a properly-prepared Will, they will avoid probate. That is not true. A Will basically means nothing until it is admitted to probate. While the probate process is not nearly as bad as what you might have heard, it can be costly and take a significant amount of time to complete. There are, however, a number of ways you can avoid probate, and this article will briefly discuss the most common methods which are used.

**Joint Tenancy**

Joint tenancy is accomplished by adding one or more persons’ names to an item of titled property which you own. It needs to be set out clearly that the property is held by the persons as joint tenants with rights of survivorship, and not as tenants in common.

When one joint tenant dies, the remaining joint tenant automatically becomes the owner of the property. Joint tenancy does, therefore, work effectively to pass property upon death, and does avoid probate. There are, however, at least a couple of drawbacks to joint tenancy.

First, the person or persons whom you add as joint tenants become actual owners of the property. This means that a creditor of any one of the joint tenants can attach a joint tenant’s interest in the property. In addition, in relation to real estate, since each joint tenant is an owner of the property, all of the joint tenants, and all of their spouses must sign a deed in order to transfer Joint Tenancy real estate.

Second, probate avoidance occurs only when there is still at least one joint tenant surviving. For example, if a husband and wife own property in joint tenancy, when the first spouse dies, the surviving spouse automatically becomes the sole owner of the property and no probate is needed. When the surviving spouse dies, however, or if both spouses die at the same time, probate would be necessary to transfer the property on to their children.

**POD/TOD/Beneficiary Designation**

Traditionally, insurance proceeds and individual retirement accounts have been paid out to a named beneficiary. Fairly recently, statutes have been passed which allow beneficiary designations on a number of additional types of property. Now bank accounts (including CDs), securities, motor vehicles, and even real estate can be transferred to named beneficiaries. The beneficiaries are named on forms referred to as Pay on Death (POD) or Transfer on Death (TOD). Following the death of the owner, all that is needed to transfer the property is a death certificate and in some cases some kind of a claim form. No probate is necessary to complete the transfer.

One drawback to estate planning with beneficiary designation forms is that they are fairly inflexible. They work pretty well as long as you want everything to go to specific persons in specific shares. But be careful as to what will happen if one of the named beneficiaries predeceases you, or if one of them is a minor or otherwise incapacitated. Different forms provide for different results, and in some cases, the prior death of a named beneficiary will result in a lapse of the gift.



## Anatomy of a Lawsuit—Part 2—Discovery

by Monte Vines

The three main stages of a lawsuit are the pleadings, discovery and trial. The discovery stage is to allow the parties

to obtain the information and evidence they need to effectively pursue or defend or settle the case.

Legal claims depend on how the law applies to a particular set of circumstances. There are a number of tools and strategies for obtaining the facts and evidence needed to understand that set of circumstances and resolve the case well.

### Sources of Information

There are usually three general sources for the facts and evidence needed. The first is yourself and those within your control, like your employees. The second source is the adverse party and those within his control. The third source is other parties not involved in the dispute.

Much of the information and documents you need can often be obtained informally. Pulling together the facts you already know, searching your records, and interviewing your employees and searching their records can yield a wealth of good information.

Sometimes the adverse party and third parties are cooperative and willing to informally provide their information as well. When you cannot get their information that way, or prefer to use more formal means, then the law provides several formal procedures for obtaining that information and evidence.

### Discovery Tools

One of the main principles of the rules governing lawsuits is that disputes are best resolved when all parties have the

opportunity to be fully informed about the facts and have all the relevant evidence to present or defend or settle the case. So the rules provide several tools for obtaining the facts and evidence. The main tools are:

- **Requests for Production of Documents**—formal requests for another party in the case to produce the documents or other things in their possession or control that you describe, for your inspection and copying.
- **Interrogatories**—written questions for another party in the case to answer in writing under oath.
- **Depositions**—opportunities for the lawyers to question the parties or witnesses orally, under oath. A verbatim transcript is created of the questions and answers by a court reporter.
- **Requests for Admissions**—written requests for another party to admit specific facts.

In most cases, these tools operate well and any problems are worked out between the attorneys. When disputes arise over the use of these tools, or when parties or witnesses fail to respond as court rules require, the court can intervene and order that responses be made, or control the discovery process so there is no abuse and it does not unfairly burden or damage a party or a witness. If a party or witness refuses to obey a court order regarding discovery, the court can impose sanctions to enforce the discovery process. These sanctions include monetary payments, summary determination of part or all of the claims in the case, and in unusual situations even jail time for a witness until he complies (such as a journalist who refuses to disclose a source).

### The Key to the Case

These tools, and some less common ones, typically provide an opportunity to obtain all the information and evidence you need to fully understand the dispute and prepare for a court hearing to resolve it or to settle it wisely. There are costs involved in conducting discovery, so it is a judgment call as to what tools to use and how much to use them. It depends on the size of the dispute and how important any particular witness or party's information or testimony is to the case.

Many depositions last just a few hours, but some take much longer. I once took a deposition that lasted several days. It was the deposition of the plaintiff in a large case. He was claiming that his large farming operation failed because some expensive farm equipment did not perform as advertised. Modern farms are sophisticated operations, and his deposition was our main way of investigating the many other possible causes of the failure of his operation.

With so much information now in digital form such as emails, computer files and text messages, possibly located on many different devices, gathering all the information needed for a case can be a challenge. But without good information and evidence, it is very difficult to prepare a case for a successful trial or a good settlement.

The facts are what primarily determine how a legal dispute should be resolved. So the discovery process can be the most important part of a case.

Submit your comments and questions on this article to Monte Vines at [mvines@adamsjones.com](mailto:mvines@adamsjones.com).

## Kenneth Gale Selected as Magistrate Judge

**Kenneth G. Gale** has been selected to become a United States Magistrate Judge in Wichita, Kansas. Ken received his undergraduate degree from Loyola University in 1977 where he graduated with honors. In 1980, he graduated from Washburn University Law School with Dean's Honors. Following graduation, he served in the United States Army, the U.S. Army Reserves and the Kansas Army National Guard as an attorney and a Judge Advocate. In 2001, he was appointed to be the Judge Advocate General for the Kansas National Guard where he served until his retirement from military service in 2008 as a Colonel. Ken has been a shareholder at Adams Jones Law Firm in Wichita since 1998. Prior to that, he worked at Matlack & Foote and Focht, Hughey & Calvert.



Ken is a member of the Kansas Bar Association, Wichita Bar Association, American College of Mortgage Attorneys and Wesley E. Brown Inn of Court. In 2005, he deployed to Afghanistan and served as the Rule of Law Officer where he was the U.S. Military representative to the Afghan Supreme Court and the Afghan Ministry of Justice on Rule of Law, Judicial Reform and civil rights issues. Ken also served for several years on the Criminal Justice Act Panel for the Kansas federal court. He will succeed Magistrate Judge Donald W. Bostwick (also an "Adams Jones alum" who will retire on August 1, 2010).

*(Continued from page 1-Probate Avoidance)*

One significant advantage of beneficiary designation over joint tenancy is that beneficiaries do not become part owners of the property until the owner's death occurs.

### Living Trusts

With a Living Trust you can avoid probate and, at the same time, have a great deal of flexibility in estate tax planning and dealing with beneficiaries who die, are incompetent or are too young or immature to properly manage money. Any property which is held by the Trustee of a properly-drafted Trust will avoid probate. The Trustee of the Trust can be you or you and your spouse. Therefore, while you are living, you have total control over your assets and you pay no trustee's fees. Furthermore, upon your death, you can name anyone you wish as the successor Trustee. That person simply distributes your property just as your executor would if you had a Will. Your successor Trustee, however, can make those distributions with

little delay and without going through the probate process.

There are also other advantages of having a Living Trust. One would be the ability of the successor Trustee to manage your assets for you while you are living (in case you become incompetent). Another is that, upon your death, the administration of your Trust remains private, as opposed to the administration of an estate, which is done through the probate process and becomes public record.

There are a couple of misconceptions relating to Living Trusts which should be corrected. As long as you are living and competent, you do not give up any control over your assets. You can continue to buy and sell assets just as you did before setting up your Trust. Also, while you are living, no special tax returns have to be filed. The income earned by assets in the Trust is reported on your personal tax return, and generally your social security number is the tax ID number for the Trust.

## 2010 Recipient of the WBA Howard C. Kline Distinguished Service Award

**Roger Hughey** of the Firm has been awarded the 2010 Howard C. Kline Distinguished Service Award. This is bestowed by the Wichita Bar Association upon a lawyer who, as stated by the WBA, "through the years of his practice has exemplified integrity, professionalism and service to the Bar" and "whose qualifications and accomplishments are undeniably exemplary and whose services are widely acclaimed as having made significant contributions to the honor and practice of the law." It recognizes long-standing service and is given no more than once each year. **Phil Bowman** of the Firm is a prior honoree of this award.



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## Real Estate Changes Covered

The Adams Jones Real Estate Group presented its annual seminar on “Recent Changes in Real Estate Law in Kansas” in June to over 120 business professionals from the real estate industry at the Courtyard by Marriott Wichita at Old Town. Attendees included real estate brokers, developers, lenders, contractors, title insurance

agents, government officials, architects and others in the local real estate profession.

Speakers at the seminar were **Brad Stout, Mike Cannady, Patrick Hughes, Sabrina Standifer, and Mert Buckley**. They discussed 2010 legislation affecting real estate in Kansas and real estate cases from the past year.

A booklet summarizing recent legislation, regulations and cases was provided to all attendees of the seminar. It can be found under the “Publications” section on the firm’s web site—[www.adamsjones.com](http://www.adamsjones.com).

