

Approved Arthur Douville 4-22-81
Date

MINUTES OF THE House COMMITTEE ON Labor and Industry

The meeting was called to order by Representative Arthur Douville at
Chairperson

9:00 a.m. on January 28, 1986 in room 526-S of the Capitol.

All members were present except:
Representative Snowbarger

Committee staff present:
All present.

Conferees appearing before the committee:

Larry Wolgast, Secretary, Dept. of Human Resources
Rob Hodges, Advisory Council
Wayne Maichel, Advisory Council
John B. Rathmel, Dir. Workers' Compensation
Karen McClain, KS Assoc. of Realtors

Secretary Wolgast introduced a bill that is in the process of being drafted referred to as 5RS1927. The bill follows the recommendations of the Employment Security Advisory Council. The bill will improve and update legislation, to make it a stronger law in the areas of contributions and benefits. Rob Hodges requested the committee to introduce the bill. Wayne Maichel also requested the committee to introduce the bill. Representative Acheson moved that this bill be introduced, seconded by Representative Friedeman. There were questions asked. A vote was taken and it was voted unanimously that the committee introduce the draft #5RS1927.

The next order of business was S.B. 176: An act concerning the workmen's compensation act; relating to application of act to qualified real estate agents; amending K.S.A. 1984 Supp. 44-505 and repealing the existing section.

Karen McClain gave her testimony, see attachment #1. A question and answer period followed. John Rathmel gave the committee some clarification on the ramifications of this bill. Questions were raised as to the definition of what is an independant contractor. No definitive explanation could be given.

With no other person to testify, the Chairman asked the committee if it would be alright to hold off on final action till next week. And, to change the agenda for tomorrow to be the Division of Workers' Compensation. There was no disagreement. The meeting was adjourned at 9:55 a.m.

HOUSE COMMITTEE ON
LABOR AND INDUSTRY

Guest List

Date 1-28-86

Name	City	Representing
Rob Hodges	Topeka	KCCI
Karen McClain	Topeka	KS. ASSN. RETIRES
Al Kotick	Topeka	PHR
John Wolgast	"	"
John B. Kuttimul	"	"
Wayne Macetho	Topeka	KS. ARZ-UI
Harry Kelsey	"	" "



Executive Offices:
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TO: HOUSE LABOR AND INDUSTRY COMMITTEE
FROM: KAREN MCCLAIN
DATE: JANUARY 28, 1986
SUBJECT: SB 176

Att. #1
1-28-86

ON BEHALF OF THE KANSAS ASSOCIATION OF REALTORS[®], I AM HERE TODAY TO ASK YOU TO PASS SB 176 OUT OF THIS COMMITTEE FAVORABLY.

WHAT THIS BILL PROPOSES TO DO IS VERY BASIC. THE BILL WOULD INSERT A STATUTORY EXEMPTION OF QUALIFIED REAL ESTATE PERSONS INTO THE CURRENT WORKMEN'S COMPENSATION STATUTES. A QUALIFIED REAL ESTATE PERSON IS DEFINED IN THE BILL, ROUGHLY AS ONE WHO IS LICENSED TO SELL REAL ESTATE, IS PAID WITH A COMMISSION RATHER THAN A SALARY OR WAGE BASIS, AND THE RELATIONSHIP BETWEEN THE BROKER AND SALESPERSON IS DECLARED BY A WRITTEN CONTRACT, SIGNED BY BOTH BROKER AND SALESPERSON, TO BE ONE OF INDEPENDENT CONTRACTOR.

THE WORKMEN'S COMPENSATION STATUTES APPLY WHERE THERE IS AN EMPLOYER-EMPLOYEE RELATIONSHIP. K.S.A. 44-501 STATES "IF IN ANY EMPLOYMENT TO WHICH THE WORKMEN'S COMPENSATION ACT APPLIES, PERSONAL INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT IS CAUSED TO AN EMPLOYEE, HIS OR HER EMPLOYER SHALL BE LIABLE TO PAY COMPENSATION TO THE EMPLOYEE IN ACCORDANCE WITH THE PROVISIONS OF THE WORKMEN'S COMPENSATION ACT."

THE WORKMEN'S COMPENSATION STATUTES DO NOT APPLY WHERE AN INDEPENDENT CONTRACTOR IS INVOLVED. K.S.A. 44-508 (b) STATES, IN PART, "WORKMAN" OR "EMPLOYEE" OR "WORKER" MEANS ANY PERSON WHO HAS ENTERED INTO THE EMPLOYMENT OF OR WORKS UNDER ANY CONTRACT OF SERVICE OR APPRENTICESHIP WITH AN EMPLOYER..." THERE IS NO LANGUAGE IN THE STATUTE WHICH DEFINES "EMPLOYMENT" OR "CONTRACT FOR SERVICE".

Atch. 1
H.L+I
1/28/86

IT IS A LONG TRADITION IN THE LAW THAT A PERSON WHO IS HIRED AS AN INDEPENDENT CONTRACTOR IS NOT CONSIDERED AN EMPLOYEE, BUT SOMEONE WHO IS HIRED TO PERFORM A FUNCTION IN AN INDEPENDENTLY ESTABLISHED OCCUPATION. WE SUGGEST TO YOU THAT A QUALIFIED REAL ESTATE AGENT, AS DEFINED IN THIS BILL, IS AN INDEPENDENT CONTRACTOR BY THE VERY NATURE OF THE RELATIONSHIP BETWEEN THE BROKER AND THE SALESPERSON.

WE HAVE ASKED THAT QUALIFIED REAL ESTATE AGENTS BE SPECIFICALLY EXEMPTED OUT OF THE WORKMEN'S COMPENSATION STATUTES BECAUSE THERE HAVE BEEN PROBLEMS IN INTERPRETING THE STATUTE AND ITS APPLICATION AS IT NOW EXISTS. IT HAS BECOME A COMMON OCCURENCE FOR INSURANCE COMPANIES TO THREATEN BROKER-OWNERS TO EITHER CARRY WORKER'S COMPENSATION INSURANCE ON THEIR SALESPERSONS OR THE COMPANY WILL DROP THE WORKER'S COMPENSATION POLICIES HELD BY THE BROKER FOR THE CLERICAL EMPLOYEES IN THEIR OFFICE.

ON THE FACE OF THE STATUTE, WE FEEL THAT REAL ESTATE SALESPERSONS ARE NOT EMPLOYEES IN THE MEANING OF THE STATUTE AND THUS THE WORKMEN'S COMPENSATION STATUTE DOES NOT APPLY. HOWEVER, IN LIGHT OF THE PROBLEMS IN INTERPRETATION MENTIONED ABOVE IT SEEMS SOME CLARIFICATION MUST BE MADE. AND SO WE HAVE REQUESTED THAT THE SPECIFIC EXEMPTION FOR QUALIFIED REAL ESTATE PERSONS BE INSERTED IN K.S.A. 44-505.

THE PRIMARY TEST USED BY THE COURTS IN DETERMINING WHETHER THE EMPLOYER-EMPLOYEE RELATIONSHIP EXISTS IS WHETHER THE EMPLOYER HAS THE RIGHT OF CONTROL AND SUPERVISION OVER THE WORK OF THE ALLEGED EMPLOYEE, AND THE RIGHT TO DIRECT THE MANNER IN WHICH THE WORK IS TO BE PERFORMED, AS WELL AS THE RESULT WHICH IS TO BE ACCOMPLISHED. IT IS NOT THE ACTUAL INTERFERENCE OR EXERCISE OF THE CONTROL BY THE EMPLOYER, BUT THE EXISTENCE OF THE RIGHT OR AUTHORITY TO INTERFERE OR CONTROL, WHICH RENDERS ONE A SERVANT RATHER THAN AN INDEPENDENT CONTRACTOR."

ACCORDING TO THIS LANGUAGE A REAL ESTATE SALESPERSON IS AN INDEPENDENT CONTRACTOR RATHER THAN AN EMPLOYEE. A REAL ESTATE SALESPERSON CONTRACTS TO DO CERTAIN WORK FOR A BROKER, NAMELY, LISTING AND SELLING REAL ESTATE FOR THE BROKER. THE SALESPERSON DETERMINES HOW AND WHEN THEY WILL SELL AND/OR LIST THE PROPERTY. THE SALESPERSON DECIDES WHICH HOURS THEY WILL WORK DURING ANY GIVEN DAY OR WEEK. THE BROKER CANNOT TELL THE SALESPERSON HOW OR WHEN TO DO THE WORK, EXCEPT FOR INSURING THAT THE SALESPERSON MEETS THE OBLIGATIONS IMPOSED BY LAW, AND WHICH THE LAW MAKES THE BROKER LEGALLY RESPONSIBLE FOR. THE BROKER OFTENTIMES HAS OFFICES AVAILABLE FOR THE USE OF THE SALESPERSON, HOWEVER, A SALESPERSON CAN WORK ENTIRELY OUT OF THEIR HOME IF THEY SO DESIRE, AND NEVER SHOW UP AT THE OFFICE. IN ADDITION, IF THEY DO USE OFFICE SPACE AT THE COMPANY OFFICE, THE COST OF THE USE OF OFFICE AND ANY OFFICE SUPPLIES ARE TAKEN INTO CONSIDERATION AT THE TIME THE COMMISSION IS NEGOTIATED BY THE BROKER AND THE SALESPERSON. IN OTHER WORDS, IF A SALESPERSON IS GOING TO USE THE OFFICE AND THE SUPPLIES OR CLERICAL HELP, THE PERCENT OF THE COMMISSION WHICH THE SALESPERSON RECEIVES IS REDUCED BY A PROPORTIONATE AMOUNT TO COVER THE BROKER'S COST OF PROVIDING THOSE SERVICES.

I HAVE INCLUDED A COPY OF A MODEL CONTRACT WHICH THE BROKER AND SALESPERSON BOTH SIGN AND WHICH LAYS OUT THE RIGHTS AND DUTIES OF EACH PARTY TO THE CONTRACT. THIS CONTRACT CLEARLY DEMONSTRATES THAT THE NATURE OF THIS RELATIONSHIP IS ONE OF CONTRACTOR AND INDEPENEDNT CONTRACTOR, RATHER THAN EMPLOYER, EMPLOYEE. PARAGRAPH 10 ON THE BACK OF THE CONTRACT EXPLICITLY DEFINES THE RELATIONSHIP AND A DEFINITION SUCH AS THIS DESCRIBES WHAT THE COURTS HAVE DECLARED OVER THE YEARS TO BE, AN INDEPEDENT CONTRACTOR SITUATION, NOT AN EMPLOYER-EMPLOYEEE RELATIONSHIP.

IN ORDER TO GIVE YOU FURTHER GUIDANCE, IN 1982 THE UNITED STATES CONGRESS PASSED THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT (TEFRA). THAT ACT ADDRESSED THE QUESTION OF FEDERAL INCOME TAX WITHHOLDING, AND PROVIDED THAT FOR PURPOSES OF INCOME TAX WITHHOLDING, WHERE A QUALIFIED REAL ESTATE AGENT IS INVOLVED, THE INDIVIDUAL PERFORMING SUCH SERVICES SHALL NOT BE TREATED AS AN EMPLOYEE, AND THE PERSON FOR WHOM SUCH SERVICES ARE PERFORMED SHALL NOT BE TREATED AS AN EMPLOYER. THE SAME DEFINITION OF "QUALIFIED REAL ESTATE AGENT" WAS USED IN THAT STATUTE AS WHAT WE HAVE PROPOSED HERE. THUS THE FEDERAL GOVERNMENT HAS RECOGNIZED THAT THE REAL ESTATE SALESPERSON AND REAL ESTATE BROKER RELATIONSHIP IS NOT AN EMPLOYER, EMPLOYEE RELATIONSHIP.

IN ADDITION, THE 1984 KANSAS LEGISLATURE AMENDED K.S.A. 44-703 AND SPECIFICALLY EXEMPTED QUALIFIED REAL ESTATE PERSONS FROM THE MEANING OF THE TERM "EMPLOYMENT", IN RECOGNITION OF THE INDEPENDENT CONTRACTOR STATUS INVOLVED IN THE BROKER-SALESPERSON RELATIONSHIP.

THE FOLLOWING IS A SUMMARY OF THE ISSUE:

1. OTHER STATES

Fourteen other states have specifically exempted real estate salespersons who are independent contractors, from their workmen's compensation statutes. They are:

Arizona	Massachusetts
Florida	Missouri
Georgia	Oklahoma
Illinois	Louisiana
Maine	Maryland
Oregon	Texas
Virginia	Colorado

Note that Colorado just passed this piece of legislation in 1985. The rest of the states have enacted this legislation since the U.S. Congress passed the 1982 Tax Equity and Fiscal Responsibility Act (TEFRA).

2. INCOME TAX AND UNEMPLOYMENT COMPENSATION

The law, for purposes of income tax and unemployment compensation, at both the national and state level treats these very same persons as independent contractors. Therefore, brokers are not required to withhold income tax from the commission checks of these persons, and they are not required to pay into the unemployment compensation fund for these persons.

It makes absolutely no sense that these persons should be treated as independent contractors under every other form of the law but workmen's compensation. The brokers have to pay the consequences under all forms of the law, if they don't live up to their independent contractor agreements. Why should it be any different under workmen's compensation laws?

3. INDEPENDENT CONTRACTOR STATUS THREATENED

By paying for workmen's compensation insurance on these persons, the status of the independent contractor under income tax and unemployment compensation laws is brought into question. The IRS may begin wondering about a broker who doesn't have to withhold income tax, but pays for workmen's compensation insurance premiums.

4. BROKERS ARE RESPONSIBLE FOR THEIR OWN AGREEMENTS

Some may say that this is cheap insurance in the event that a broker is sued by a salesperson, and the court finds that there is not an independent contractor relationship being carried out. We do not intend to protect brokers who don't live up to their independent contractor agreements. They will have to pay the consequences, if in fact, a lawsuit is brought against them. However, it is inequitable to require the brokers to pay premiums for salespersons who are, in fact, independent contractors.

Under the Workmen's Compensation laws, anyone who is exempted out can voluntarily bring themselves under coverage of the law. If a broker wants to do this and provide himself with "cheap insurance", let him choose it voluntarily, rather than under the threat of an insurance company.

5. CASES

Wayne Regan	Premium amount: \$5,234	Attorneys Fees: \$1,000 to settle, \$3-\$5,000 to litigate.
J.P. Weigand	Premium amount: \$6,933	Attorneys Fees: Approximately \$4,000
Tim Holt	Premium amount: \$900	Attorneys Fees: \$3,500

6. TIM HOLT'S CASE

Tim Holt was sued by his insurance agent for nonpayment of premiums for his independent contractor salespersons. The district court held that, "The determination by Western (Casualty) was made by management based on his individual understanding of the law of Kansas as explained in defendant's Exhibit A. This is an incorrect assumption on his part and is insufficient as a matter of law to assess additional premiums. Western should be advised the status of whether a person is an employee, subcontractor or salesperson is a matter of fact based on all the surrounding circumstances. Western was in error in assessing the additional premiums..."

This case was a Sedgwick County District Case. It was not appealed. The decision confirms what we have been saying all along. That is, the insurance agent is not the appropriate party to decide whether or not a salesperson is an independent contractor or not. These are questions of law and fact to be decided by a judge or jury. Yet, the way the current law is operating, the insurance agent becomes judge and jury, at the cost of the broker.

This case is the only one like it in the country, according to the NATIONAL ASSOCIATION OF REALTORS®. All other cases like it have either been settled out of court or dismissed. But, the case is still insufficient to protect our brokers from insurance companies who would require premiums for these salespersons. This is only a district court case which does not have the precedent setting effect as would a Court of Appeals or a Supreme Court case.

How many more brokers will have to be taken to court and forced to pay out attorney fees before the issue finally gets appealed and decided by a higher court? Why should they have to when the ambiguity in the law can be handled once and for all by the state legislature which created the law in the first place?

7. EDUCATION OF MEMBERSHIP

Both the Kansas Association of REALTORS® and the NATIONAL ASSOCIATION OF REALTORS® recognize that brokers who do not carry Workmen's Compensation Insurance on their independent contractors may be open to a lawsuit in the event one of these salespersons is injured and sues on a common law basis. Some of you may feel we should not be opening up our brokers to this liability, and that the cost of a lawsuit would surely exceed the cost of the premiums. However, given that the independent contractor relationship permeates the real estate business at all levels, both groups are prepared to educate the membership on how to create and maintain independent contractor relationships with real estate salespersons, and thus protect themselves from lawsuits.

We feel that education on the subject is a much preferred means of handling the workmen's compensation problem than having our brokers going to court to resolve an ambiguity in the law.

8. PARADE OF HORRORS

Some of you may be afraid of what I call the parade of horrors, i.e., that other groups will be parading in, wanting to be exempted out of the Workmen's Compensation laws, on the same basis. This committee, and other legislators can feel confident in permitting this exemption because real estate salespersons are the only group of persons who are specifically exempted out of the income tax withholding provisions and the unemployment compensation statutes. NO OTHER PROFESSIONAL GROUP HAS BEEN SPECIFICALLY EXEMPTED OUT OF BOTH OF THESE STATUTES AT BOTH THE STATE AND NATIONAL LEVEL. Therefore, these real estate salespersons are unique and have been recognized as such. Legislators can point to this uniqueness in the future, if other groups do come knocking, and confidently refuse their request.

9. LICENSE LAW

It has been pointed out that the license law uses the term "the supervising broker", and that this indicates that all salespersons, due to the nature of the license law, are employees, if they are being "supervised" by the broker. However, the term "supervising broker" is merely a term of art utilized in the license law to distinguish the designated broker from associate brokers in same office.

Throughout the license law, a distinction is made between a salesperson who is "associated with" a broker, and one who is "employed by" a broker. For example, K.S.A. 58-3039 (f) provides, "An application for an original license as a salesperson shall be accompanied by the recommendation of the broker with whom the salesperson is to be associated, or by whom the salesperson is to be employed, certifying that the application is honest, trustworthy and of good reputation."

Similar provisions are found throughout the license law, thus indicating that the legislature recognized the difference between salespersons who are employees and those who are independent contractors. The term "supervising broker" does not diminish the distinctions so carefully made in the remainder of the law.

10. COMMON SENSE

This clarification which we request is basic common sense. Workmen's Compensation was created to protect employees, not independent contractors. Laws which are ambiguous, and unclear can be clarified by the legislature to insure that the true intent of the law is being carried out. There is an ambiguity in the law as to whether real estate salespersons who are independent contractors are covered under the existing law. The legislature can clarify this ambiguity by passing S.B 176.

INDEPENDENT CONTRACTOR AGREEMENT

AGREEMENT entered into this _____ day of _____, 198_____, by and between _____ ("BROKER") and _____ ("SALESPERSON").

RECITALS

BROKER is engaged in business as a general real estate broker in _____, State of Kansas, among other places, and is qualified to and does operate a general real estate business and is duly qualified to and does procure the listings of real estate for sale, lease or rental, and prospective purchasers, lessees and renters thereof and has and does enjoy the good will of, and a reputation for fair dealing with the public; and

BROKER maintains an office in _____, State of Kansas properly equipped with furnishings and other equipment necessary and incidental to the proper operation of its business, and staffed with individuals capable of serving the public as a real estate broker; and

SALESPERSON is engaged in business as a licensed real estate salesperson and has enjoyed and does enjoy a reputation for fair and honest dealing with the public as such; and

It is deemed to be the mutual advantage of BROKER and SALESPERSON to form the association as set forth in this agreement.

IT IS AGREED:

1. **Listings and Cooperation**—BROKER shall make available to SALESPERSON all current listings of the office, except such as BROKER for valid and usual business reasons may place exclusively in the temporary possession of some other salesperson. BROKER may, upon request, assist SALESPERSON in his or her work by advice and instruction. BROKER shall provide to SALESPERSON full cooperation in every way possible. Nothing herein shall be construed to require that SALESPERSON accept or service any particular listing or prospective listing offered by BROKER; nor shall BROKER have any right or authority to direct that SALESPERSON see or service particular parties, or restrict SALESPERSON'S activities to particular areas. BROKER SHALL have no right, except to the extent required by law, to direct or limit SALESPERSON'S activities as to hours, leads, open houses, opportunity or floor time; production, prospects, reports, sales, sales meetings, schedules, services, inventory, time off, training, vacation, or other similar activities.

2. **Use of Facilities**—SALESPERSON may share with other salespeople all the facilities of the office now operated by BROKER at _____ (address), in _____ (city), Kansas in carrying out this agreement.

3. **Efforts by Salesperson**—SALESPERSON shall work diligently and with his or her best efforts to sell, lease or rent any and all real estate listed with BROKER, to solicit additional listings and customers for BROKER, and otherwise promote the business of serving the public in real estate transactions to the end that each of the parties to this agreement may derive the greatest profit possible. BROKER agrees that thereby BROKER obtains no authority or right to direct or control SALESPERSON'S activities, except as may be required by the statute of the State of Kansas and the rules and regulations of the Kansas Real Estate Commission, and SALESPERSON assumes and retains discretion for methods, techniques and procedures in soliciting and obtaining listings and sales, rentals, or leases of listed property.

4. **Conduct of Business**—SALESPERSON shall conduct his or her business in such a manner so as to maintain and to increase the good will and reputation of BROKER and SALESPERSON and shall conform to and shall abide by all laws, rules and regulations and codes of ethics that are binding upon or applicable to real estate brokers and real estate salespeople.

5. **Compensation of Salespersons**—The compensation of the SALESPERSON shall be based upon a proportionate share of the commissions charged by the BROKER for services rendered in real estate transactions in which the salesperson may be involved. When SALESPERSON shall perform any service pursuant to this agreement, whereby a commission is earned, the commission shall, when collected, be divided between BROKER and SALESPERSON pursuant to the schedule set out in Exhibit A, a copy of which is attached hereto and incorporated herein by this reference, and which SALESPERSON acknowledges he or she has received. BROKER shall advise SALESPERSON of any special contract relating to any particular transaction which SALESPERSON may undertake to handle in

the event of special arrangements with any client of BROKER or SALESPERSON on property listed with BROKER or controlled by SALESPERSON, a special division of commission may apply, such rate of division to be agreed upon in advance by BROKER and SALESPERSON. In the event that two or more salespeople participate in such a service, or claim to have done so, the amount of commission over that accruing to BROKER shall be divided between the participating salespeople according to agreement between them, or in the absence of an agreement, in accordance with the Uniform Arbitration Act, Kansas Statutes Annotated 5-401, et seq. In no case shall SALESPERSON be personally liable to BROKER for any commission, but, when the commission shall have been collected from the party or parties for whom the services were performed, BROKER shall hold it in trust for SALESPERSON and BROKER to be divided according to the terms of this agreement.

6. Payment of Commissions—The division and distribution of earned commission as set out in paragraph 5 of this agreement, shall take place as soon as practicable after collection of such commission from the party or parties for whom the services may have been performed.

7. Expenses—BROKER shall not be liable to SALESPERSON for any expenses incurred by SALESPERSON or for any of his or her acts, nor shall SALESPERSON be liable to BROKER for office help or expenses. SALESPERSON shall have no authority to bind BROKER unless specifically authorized in a particular transaction. The expenses of attorney's fees, multiple listing fees, costs, title expenses, and similar fees or expenses which must, by reason or necessity, be paid from the commission, or are incurred in the collection of or the attempt to collect the commission, shall be paid by the parties as provided for in this agreement in the division of the commission or as otherwise agreed to by the parties. Suits for commission shall be maintained only in the name of the BROKER.

8. Termination—This agreement and the association created hereby may be terminated by either party at any time, upon written notice given to the other, but the rights of SALESPERSON to any commissions which accrued prior to such notice shall not be divested by the termination of this agreement. Upon termination, all listings and prospects shall be those of BROKER as its sole property, and SALESPERSON shall return all listings, manuals and materials, forms and sales literature loaned to SALESPERSON by BROKER.

9. Unfair Advantage—SALESPERSON shall not, after the termination of this agreement, use to his or her advantage, or the advantage of any other person, firm or corporation any information gained for or from the files or business of BROKER.

10. Legal Status and Responsibilities—It is intended that the relationship established hereby is one of independent contractor and not that of servant, employee, joint venturer, agency or partnership. It is understood as follows:

(a) The BROKER has the right to control the result of the work and not the means or methods for accomplishing the result.

(b) The SALESPERSON shall pay any amounts due as a result of the Federal Insurance Contributions Act (FICA), the Federal Unemployment Act (FUTA), and federal or state income tax in regard to the SALESPERSON'S earnings and to furnish proof of said payment in a form reasonably requested by BROKER.

(c) The SALESPERSON shall not be required to meet any sales quota.

(d) The SALESPERSON shall be entitled to engage in any other kind of work, besides real estate sales or leasing, for any other person.

(e) The SALESPERSON may hire other people to assist with clerical and accounting work as needed.

(f) The company manual does not contain any mandatory rules.

(g) The BROKER shall not make appointments for SALESPERSONS or determine whether appointments are kept.

(h) No draw or other form of minimum income shall be provided by BROKER to the SALESPERSON.

(i) SALESPERSON shall not be treated as an employee with respect to the services performed hereunder for federal tax purposes.

(j) The SALESPERSON will not be treated as an employee with respect to the services performed by such SALESPERSON as a real estate agent for all Kansas tax purposes, including, but not limited to, income tax, unemployment insurance tax, and workman's compensation.

(k) All of the SALESPERSON'S remuneration (whether or not paid in cash) for the services performed as a real estate agent will be directly related to sales or other output rather than to the number of hours worked.

IN WITNESS WHEREOF, the parties hereby have signed or caused this contract to be signed, all on the day and date first written above.

BROKER

SALESPERSON

INDEPENDENT CONTRACTOR AGREEMENT

EXHIBIT A

This exhibit shall become a part of the Agreement between _____, Broker and _____, Salesperson, dated _____, 19____
If revised, a revision date shall be shown on the revised copy and copies shall be given to both Broker and Salesperson.

IT IS AGREED:

1. Listing commissions shall be divided as follows:

Salesperson _____ %
Broker _____ %

2. Sales commissions shall be divided as follows:

Salesperson _____ %
Broker _____ %

3. Rental and/or leasing commissions shall be divided as follows:

Salesperson _____ %
Broker _____ %

REVISED: _____

DISTRICT COURT
EIGHTEENTH JUDICIAL DISTRICT
SEDGWICK COUNTY COURTHOUSE
WICHITA, KANSAS
67203

ELLIOTT FRY
JUDGE

RECEIVED MAY 17 1985

April 29, 1985

Jeffrey L. Willis
Minter & Willis
1527 N. Broadway
Wichita, Kansas 67214

William R. Wood
Attorney at Law
609 N. Broadway
P.O. Box 126
Wichita, Kansas 67201

RE: Sayre & Associates, Inc. v. Tim Holt, Inc.
Case No. 84 L 2357

Gentlemen:

I have reviewed the file, evidence and considered the legal authorities and arguments of counsel.

The facts disclosed that Western Casualty issued a policy to defendant covering, among other things, Worker's Compensation for defendant's employees. The actual premium was to be determined as a result of an audit of defendant's business and determination of how many employees defendant had for a given time. After their audit a premium was billed by Western Casualty and Surety Company to plaintiff who paid Western, then in turn, billed defendant who refused to pay resulting in this action.

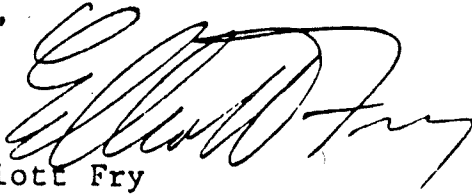
The issue is whether Western was correct in determining salespersons were employees.

The answer is no. The determination by Western was made by management based on his individual understanding of the law of Kansas as explained in defendant's Exhibit A. This is an incorrect assumption on his part and is insufficient as a matter of law to assess additional premiums. Western should be advised the status of whether a person is an employee, subcontractor or salesperson is a matter of fact based on all the surrounding circumstances. Western was in error in assessing the additional premium and was in error in billing Sayre & Associates, Inc., an innocent party caught in the middle. Western should refund to Sayre the monies he paid.

Judgment is rendered for defendant. Mr. Wood may draw an

appropriate Journal Entry.

Sincerely,

A handwritten signature in cursive script, appearing to read "Elliott Fry". The signature is written in dark ink and is positioned to the right of the word "Sincerely,".

Judge Elliott Fry

EF:rk

original: file
cc: Jeffrey L. Willis
William R. Wood