Report of Kansas Disciplinary Administrator

In Re: The Matter of Complaint against Kansas Attorney Linda Terrill, Bar No. 10983, Case No. DA11, 688

Investigator: Robert D. Hecht, Spt. Ct. # 05370

INVESTIGATIVE REPORT

List of Exhibits

Exhibit 1

Exhibit 1
Letter of October 4, 2012 of complaint signed by Chief Judge Sam Sheldon and Judge Trevor Wohlford of the Kansas Board of Tax Appeals.

Exhibit 2
Memorandum of Court of Tax Appeals dated October 4, 2012 of the subject: Ethical Implications of Coordinated Services Provided by lay tax consultant and licensed attorney

Exhibit 3
Statement of Indicated Facts and Conclusions, undated, prepared by COTA in support of Exhibit 1 but prepared prior to "Show Cause Hearing of September 18, 2012.

Exhibit 4
COTA letter of October 10, 2012 to Disciplinary Administrator transmitting its "Order" *In the Matter of the Protest of Lyerla, et al,* Case No. 2012-3110-PR of October 10, 2012.

Exhibit 5
Court of Tax Appeals Order of October 10, 2012 *In the Matter of the Protest of Lyerla, et al,* Case No. 2012-3110-PR containing many findings and conclusions regarding Respondent and implications of Kansas Rules of Professional Conduct.

Exhibit 6

(a) Black notebook containing factual and legal arguments *In the Matter of the Payment Under Protest of Cathy Lyerla Trust,* COTA Docket No. 2012-3110-PR containing hearing transcripts and Respondent's legal arguments, many orders in the tax appeal case.

(b) Black notebook containing transcripts and documents much as Exhibit 6 (a) but *In The Matter of Payment Under Protest of Chrysler Building, LLC* COTA Docket No. 2012-3752-PR.

(c) Black notebook containing transcripts, pleadings, documents *In the Matter of Payment Under Protest of MBS Barkley 1041,LLC,* COTA Docket 2012-5881-PR as well as Order of COTA and other cases and legal and factual arguments of Respondent herein.

Exhibit 7
Green notebook containing Respondent's answer and/or response to the complaint alleging of violations of KRPC.

Exhibit 8
Illustrative copy of Chatham tax consultant contract with property owners.

Exhibit 9
Affidavits of a series of property owners referred by Chatham to Respondent describing their involvement in the appeal process.

Exhibit 10
Respondent's affidavit regarding her professional relationship with Chatham.

Exhibit 11
Transcript of the interview of Chief Judge Sam Sheldon, Kansas Court of Tax Appeals with attached exhibits.

Exhibit 12
Transcript of the interview of Judge Trevor Wohlford, Kansas Court of Tax Appeals.

Exhibit 13
Transcript of Show Cause proceedings before the Court of Tax Appeals *In the Matter of Cathy L. Lyerla Living Trust et al*, Docket No. 2012-3110 PR, et al of September 18, 2012

Exhibit 14
Statistical information provided by complainants as to the number of cases of Respondent before the regular division of COTA and the number of dismissals and the resulting percentage of dismissals.

Exhibit 15
Statistical information provided by Respondent as to the statewide district court Chapter 60 civil cases filed and the percentage of the same that were dismissed.

Exhibit 16
Court of Tax Appeals Order on Reconsideration *In the Matter of the Protest of Lyerla, Cathy L. Living Trust*, docket no. 2012-3110-PR, dated February 20, 2013.

Exhibit 17
Lyerla, Cathy L. Trust Equalization Protest Form received by COTA March 12, 2012 to small claims division, Johnson County appraiser's notification of recommended values, Chatham letter to COTA transmitting appeal, COTA small claims division notification of decision of hearing officer in the Lyerla matter, the "Notice of Appeal" signed and filed by Respondent appealing the Lyerla matter to COTA, regular division filed May 24, 2012, Respondent's Entry of Appearance, Notice of Hearing, Respondent's Motion to Withdraw as Counsel of August 2, 2012, Entry Of Appearance by Ashley N. Mulcahy as general counsel for J.W. Chatham and Associates as attorney for Cathy L. Lyerla, letter of transmittal of Ashley Mulcahy, Order of COTA denying

Respondent's Motion to Withdraw as counsel dated August 23, 2012, Order to show cause August 23, 2012, Proposed Agreed Stipulation in Lyerla case, Proposed Order Adopting Stipulation in Lyerla case, Order granting continuance dated August 31, 2012.

Exhibit 18
Attorney General opinion 93-100, dated July 26, 1993, addressed to the general counsel of the Board of Tax Appeals (COTA's predecessor) advising that to permit non lawyer to examine witnesses file pleadings, make legal arguments or perform other functions deemed to be the practice of law is prohibited.

Exhibit 19
Transcript of interview of Respondent, Linda Terrill

Exhibit 20
Letters issued by Chatam to various property owners advising of Respondent's motion to withdraw and substitution of counsel and that she would re-enter the case if a trial was necessary and seeking any objection from them. .

Exhibit 21
Respondent's petition to COTA for reconsideration of its' Order of October 10, 2012.

Exhibit 22
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INVESTIGATIVE REPORT

IN RE: THE MATTER OF COMPLAINT AGAINST KANSAS ATTORNEY LINDA TERRILL, BAR # 10983, CASE # DA 11, 688

I. NATURE OF THE COMPLAINT:

Complainants are Chief Judge Sam Sheldon and Judge Trevor Wohlford of the Kansas Court of Tax Appeals which sits in the Eisenhower Building at 7th and Van Buren, Topeka, KS.

The complaint is against Linda Terrill, Kansas lawyer, bar number 10983, a lawyer practicing in Leawood, Johnson County, Kansas in a firm of the name and style of PTLG (Property Tax Law Group, LLC). Ms. Terrill will hereafter be referred to either as Terrill or Respondent.

The complaint is vast and complex and seemingly emanates from proceedings in a case before the Kansas Court of Tax Appeals entitled *In The Matter Of The Protest Of Lyerla, Cathy L. Living Trust*, Case No. 2012-3110-PR.

The complainants by letter of October 4, 2012 to the office of the Disciplinary Administrator provided a "summary of possible violations of KRPC" as hereafter set forth:

1. Rule 5.4(a) - Improper sharing of fees between a lawyer and a non-lawyer.
2. Rule 5.4(b) - A lawyer forming a "partnership" or business relationship with a non-lawyer in which any activities consist of the practice of law.
3. Rule 5.5(b) - A lawyer assisting a non-lawyer in the unauthorized practice of law.
4. Rule 5.4(c) – A lawyer being paid by a non-lawyer client third party as such third party directs or regulates the lawyer's professional judgment.
5. Rule 1.8(e) – A lawyer affording financial assistance to clients
6. Rule 1.8(f) – A lawyer accepting compensation from one other than the client.
7. Rule 1.8(j) – A lawyer (by association) acquiring a proprietary interest in litigation (or assisting another in the same).
8. Rule 3.4 – Regarding frivolous or non-meritorious claims.
9. Rule 1.7(a) – Regarding conflicts of interest.

It should be noted at the outset of the investigative report that complainants' three page "letter of complaint" dated October 4, 2012 was accompanied by a memorandum of October 4, 2012 of the subject "Ethical Implications of Coordinated Services By Certain Lay Tax Consultants and Licensed Attorneys in Kansas". This memorandum consisted

of 19 pages of alleged factual background and legal authorities/arguments all in the nature of an adversarial brief supporting the contentions in the letter of complaint.

Additionally, and although undated, complainants also provided the Office of the Disciplinary Administrator a "Statement of Indicated Facts and Conclusions (emphasis supplied) consisting of 8 pages of "indicated facts" and "indicated conclusions" with a 1933 Supreme Court of Illinois and a 1942 Supreme Court of Iowa, a 1916 Supreme Court of New York County (the trial court), a 1920 Supreme Court, Appellate Division, First Department of New York's Court case, and a 1996 New Jersey Unauthorized Practice of Law Committee opinion on who may sign a notice of appeal to the New Jersey Tax Board. This Statement of Indicated Facts and Conclusions (undated, but the attachments reflect they were printed on October 4, 2012), was also in the nature of an adversarial brief.

On October 10, 2012 complainants transmitted the Court of Tax Appeals Order in the Lyerla case – 2012-3110-PR referenced above – a summary of said order, although undated, has a certificate of service of October 10, 2012, consisting of 82 pages. The "Order" is one of dismissal for lack of subject matter jurisdiction although it also deals with such subjects as "champerty", "defective signature on notice of appeal", "unauthorized practice of law based on managing/directing litigation", and allegations of "substantial risk" of "solicitation", "feeder relationships", "horse trading", "multitude of frivolous tax appeal cases" and various complaints/allegations of the undue burden on the court and tax payers, sharing of legal fees, and all the allegations referenced in the judge's letter of complaint as above described.

Again. this Order is an adversarial document whereby the court, *sua sponte*, raises issues, sets forth an argument against the issue, and then extensively argues why the issue/allegation has been violated by Respondent and refutes the arguments they assert the Respondent might have raised.

The foregoing may raise questions of the motivation of the complainants whose extensive interest and research and legal arguments/conclusions go far beyond the issue in the litigation/appeal that needed to be decided – i.e. subject matter jurisdiction which, as decided by the Court of Tax Appeals, ends the case and deprives the court of jurisdiction to be otherwise involved. Be that as it may be this writer's role is to gather all facts which might be relevant and material as to the alleged ethical violations raised by complainants and the conduct of all parties to the circumstances as the same may implicate the Kansas Rules of Professional Conduct.

II. SCOPE OF THE INVESTIGATION:

This investigation involves unusual circumstances and factual material emanating from proceedings before the Kansas Court of Tax Appeals. There has been substantial material reviewed although much of it turned out to be either redundant or immaterial.

For the documentary evidence please review the exhibit list.

For testimonial evidence please review the exhibit list. The two complaining witnesses were interviewed and their testimony recorded and transcribed. They are Chief Judge Sam Sheldon of the Kansas Court of Tax Appeals (Exhibit 11) and Judge Trevor Wohlford of the Kansas Court of Tax Appeals (Exhibit 12).

Additionally the Respondent, Linda Terrill was interviewed (Exhibit 19).

In addition to the foregoing and in the nature of testimonial evidence there is a transcript of a show cause proceedings before the Court of Tax Appeals of September 18, 2012 (Exhibit 13) and set of affidavits from property owners involved in the tax appeals (Exhibit 9 being affidavits concerning property owners involvement in and decision making in the appeals) and Letters to Property Owners advising them of Respondent's motion to withdraw and related matters (Exhibit 20).

One would probably conclude that Exhibit 1 (October 4, 2012 letter to Disciplinary Administrator's office), Exhibit 2 (Memorandum of Court of Tax Appeals of October 4, 2012 entitled "Ethical Implications of Coordinated Services Provided by Lay Tax Consultants and Licensed Attorney) and Exhibit 3 (Statement of Indicated Facts and Conclusions, undated, preferred by the judges of the Court of Tax Appeals) constitutes the "complaint."

Exhibit 7, being a green notebook, contains what would be considered as Respondent, Linda Terrill's, answer or response to the complaints asserted by Judge Sheldon and Judge Wohlford.

Additionally there are numerous documents, legal and factual arguments, in several cases before the Court of Tax Appeals (hereafter COTA) as to many issues raised *sua sponte* by the court regarding the relationship between the tax consultant (Chatham) and Respondent and the jurisdiction of COTA and ethical implications which COTA believe flowed there from.

There are documents (Exhibit 21) seemingly supportive of counterarguments/complaints that COTA judge's routinely allowed counties and other entities to appear represented by non-lawyers, i.e. unauthorized practice of law. And there are documents pertaining to the percentage of cases of Respondent that are dismissed as evidence of the filing of frivolous appeals (Exhibit 14). Then there are documents pertaining to the number of Chapter 60 civil cases in statewide Kansas district courts that reflect percentage of dismissals as countering the claim of frivolous appeals.

Whether to be considered as evidence entitled to any deference, or looking at the evidence before COTA and the evidence here developed, there are, at least as presented here, the Order of COTA of October 10, 2012 (Exhibit 5) and the Petition for Reconsideration (Exhibit 21) as well as the Order on Reconsideration (Exhibit 16).

It is from all of the exhibits reflected on the exhibit list, but primarily those exhibits referred to above that this report and its conclusions of recommendations are based.

a. EVIDENTIARY STANDARDS

1. Deference:

As briefly described above the complainants, as judges of the Court of Tax Appeals of Kansas, made a complaint to the office of Disciplinary Administrator by letter, with both a memo and a memorandum prepared, presumably, as reflected by either the identified date or the date certain attachments were printed. The issues raised by the complaints are also set forth in exhaustive detail of "findings of fact" and "legal arguments or conclusions" in an order of October 10, 2012 and an Order of Reconsideration of February 20, 2013.

Much of the aforesaid Order as may pertain to this investigation are suggested by complainants as tax court judges which involves their obligations, responsibility and authority to prescribe, regulate and otherwise manage the conduct and procedures of their court and those who appear before it and in furtherance of the proper fulfillment of their statutory responsibilities. As such is beyond the scope and jurisdiction of this investigation it is not for this investigator to comment thereon.

However, it is this investigator's understanding and opinion that the Kansas Court of Tax Appeals is, by statute, an administrative body/agency within the executive branch of state government and that it is not an Article III, Kansas Constitution, court or a part of the judicial branch of state government. As such it is this investigator's opinion that its findings, conclusions, and orders as pertain to the allegations in the complaint are entitled to, and extended, no deference. My understanding is, at most, deference is given to administrative agencies regarding their conclusions and orders when such relate to and are within their particular area of expertise. However, none of the alleged ethical violations are of a matter as to be specific to any expertise or unusual knowledge, skill or responsibility of the tax court. Even if such might be the case, see *Fort Hays State University vs. University Ch., Am. Assn. of Univ. Profs*, 290 Kan. 446, Sly.¶ 2, 228 P.3d 403(2008); *In re*: *Tax Appeal of Lemons*, 289 Kan. 761, 762, 217 P. 3d 41(2009); *Higgins vs. Abilene Machine Inc.* 288 Kan. 359, 361, 204 P. 3d 1156(2009) and *Kansas Department of Revenue vs. Powell,* 290 Kan. 564, 567, 232 P. 3d 856, 859(2010). All to the effect that interpretations of statutes by a quasi- judicial administrative bodies are entitled to no deference outside their area of expertise.

Therefore, pursuant to the foregoing authorities this investigator gives no deference to the Court of Tax Appeals factual determinations or legal conclusions and will seek to secure all relevant and material factual information

that may have property value as to the professional conduct of all concerned parties.

b. STANDARD OF PROOF

It is this investigator's understanding that any "hearing panel" that may serve as a fact determining tribunal conducting a due process hearing as to whether the subject attorney has committed an ethical violation may only find a violation has occurred if there has been presented such evidence that establishes the violations by "clear and convincing evidence".

CLEAR AND CONVINCING: Such standard is described *In the Matter of Scott C. Stockwell*, Supreme Court No. 108929, decided March 1, 2013 that attorney misconduct must be established by clear and convincing evidence see *In re Foster* 292 Kan. 940, 945, 258 P. 3d 375(2011); Supreme Court Rule 211(f) (2012 Kan. Ct. R. Annot 350). Clear and convincing evidence is "evidence that causes the fact finder to believe that "truth of a fact asserted is highly probable" (*In re Lober*, 288 Kan. 498, 505, 204 P. 3d 610(2009) "quoting *In re Dennis* 286 Kan. 708, 725, 188 P. 3d 1(2008).

This writer recognizes that the clear and convincing standard of proof is that which must be met in a decision by a hearing panel. However, it is the writer's hope that the investigation is sufficiently thorough, objective and has obtained all evidence from perspective of complaining parties and the Respondent that it suggests whether the clear and convincing standard can be met.

PROBABLE CAUSE: However, for purposes of the investigation this writer's determination will be governed by the "probable cause" standard of proof. That is to say any recommendation that there is sufficient evidence that the matter should be forwarded for hearing on a specific allegation of a violation of KRPC will be predicated on a standard of proof of probable cause.

There are several definitions of the term "probable cause" as a standard of requirement of proof. (*Black's Law Dictionary*, Deluxe 9th Edition.)

In constitutional law under the 4th Amendment as applied to searches the probable cause test is an objective one, for there to be probable cause the facts must be such as would warrant a belief by reasonable man. Subjective good faith is insufficient for such would cause the protection of the 4th Amendment to evaporate (See Wayne Lafave and Jerrold Hisrael criminal procedure section 3.3 at 140 (2nd Edition 1992)). See also *State vs. Weaver,* 41 Kan. App. 2nd 124, 204 P. 3d 490(2009) and *State vs. Washington*, 293 Kan. 732(2012). In tort probable cause may be defined as "a reasonable belief in the existence of facts on which a claim is based and in the legal validity of the claim itself."

"Probable cause for instituting a proceeding exists where there is reasonable grounds for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious or prudent person into belief that the party committed the act of which he or she is complaining" (See *Lindenman* 255 Kan. 624, *Nelson* 227 Kan. 277).

Probable cause to institute civil proceedings requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication (See *Professional Real Estate Investors Inc. vs. Columbia Pictures Industries Inc.*, 508 US. 49, 123 L. Ed. 2nd 611, 625, 113 SC 1920(1993) citing R [2nd] of Torts Section 675, at e, pages 454-455 (1977), (See also *Knight vs. Cordy*, 22 Kan. P. 2d 9, 913 P. 2d 1206, Syl, ¶ 3.)

III. SUMMARY OF EVIDENCE

a. SUMMARY OF JUDGE SHELDON STATEMENT (Exhibit 11).

Judge Sheldon, one of the complainants, sworn statement was taken on the March 6, 2013. Judge Sheldon was admitted to practice in 1983 and Missouri and Kansas in 1984. He first practiced law with a firm in Kansas City until 1985 when he moved to Ottawa, Kansas where he practiced law until he was appointed to the Kansas Court of Tax Appeals in 2012 (Exhibit 11 pages 1 & 2). In Kansas City he worked in the law firm's bank holding department and in Ottawa his practice was primarily estate planning, some real estate and entity practice (Exhibit 11 pages 2 & 3). He did not do civil cases, criminal cases or divorce (Exhibit 11 page 3). He did not litigate and has never handled a jury trial or a criminal case (Exhibit 11 page 3) nor did he represent anybody in regard to appeal or property tax cases (Exhibit 11 page 3).

Judges of COTA are administrative law judges and a part of the executive branch of state government (Exhibit 11 page 11).

Judge Sheldon testified that it was his understanding that a party, or an attorney for a party, may appear before COTA, Regular Division (Exhibit 11 page 13) but acknowledges that the attorney general issued an opinion (Exhibit 18 pages 93-100) that parties may participate in hearings but may not practice law and that the attorney general gave illustrations of situations which would involve the unauthorized practice of law to wit: cross examining witnesses, signing pleadings, signing appeal notices, making legal arguments (Exhibit 11 page 13).

Judge Sheldon referenced a case he referred to as "the Bade Houser", being a COTA small claims division case involving the issue of whether the president of a corporation can represent the corporation which would be a violation of the long standing rule that corporations must be represented by an attorney. Our Supreme Court, according to Judge Sheldon, ruled that because the small claims division was set up to deal with very small matters and retaining counsel would

be cost prohibitive, that exercising its constitutional authority it decided that a full time employee or officer could represent an entity but only in the small claims division (emphasis supplied) (Exhibit 11 pages 17-19).

Judge Sheldon further testified that non-lawyers appearing before the regular division of COTA may "participate" but could do nothing but testify. They could not cross examine witnesses, make legal arguments, file notices of appeal or file motions, etc. (Exhibit 11 page 21-25).

Judge Sheldon testified the primary basis for the fee sharing/unauthorized practice of law complaint deals with Chatham's (the tax consultant) unauthorized practice of law by virtue of his having a contingent fee contract in a "legal matter" which according to Judge Sheldon is per se the unauthorized practice of law. He bases the allegation on two Kansas cases he refers to as Depew II and the "Martinez case", cited on page nine of the Order on Reconsideration (Exhibit 11 page 26).

Judge Sheldon distinguishes the control that an insurance company exercises over who is retained to represent an insurer, the amount that can be expended in discovery expenses, settlement offers etc., on the fact that it is a defense action and premiums were already paid. Likewise, he distinguishes when the attorney general retains counsel to represent a public official because, again, it is a defensive action and is implicitly a part of the employment relationship (Exhibit 11 page 28-34). He then relates this circumstance to fee sharing in that the tax case is an affirmative action, not defensive, and if it is successful then the tax consultant gets a fee as the direct result of the attorney's activity (Exhibit 11 page 36) and then pays the attorney (Exhibit 11 page 37).

Judge Sheldon acknowledges he has no indication that Respondent was paid a portion of any fee recovery or a part of the contingent fee in a successful appeal (Exhibit 11 pages 37 – 38). He also acknowledged that Chatam's contract with the property owners were contingent fee (Exhibit 11 pages 38 – 39) and that Respondent was paid by Chatam an hourly rate whether the appeal was successful or not and that he had no evidence Respondent was paid any fee beyond the hourly rate (Exhibit 11 page 39).

As to the suggestion Respondent may have engaged in improper activity by financing litigation Judge Sheldon's allegation is that it was vicariously by which he explained Respondent had a long term relationship with Chatam, Chatam financed litigation and that Respondent's awareness of that vicariously imputes to her by purposely engaging in the relationship (Exhibit 11 page 41). He does not cite to any relationship other than Respondent being retained as counsel and paid her hourly rate (Exhibit 11 pages 40 – 43). Judge Sheldon described the process of appeals substantially as being the property owner is notified by the county appraiser in mid- March as to his property's valuation and he has 30 days to seek a review by the county who must make a decision by May 15. If property

owner is dissatisfied he has 30 days to appeal to COTA and assuming the appeal is directed to the regular division and thereafter it goes through the discovery, prehearing and hearing process (more fully described in Exhibit 19 Respondent's Statement pages 22 - 39).

Judge Sheldon acknowledges that many cases are not decided within 120 days of the hearing (Exhibit 11 pages 48-50) as provided by KSA 74-2426. That if the decision does not occur until April of the following year the taxpayer is in the position of seriously considering filing another appeal and going through the process in regard to the second March notice of evaluation because if they do not they could be saddled in the subsequent year with the decision result of the prior year (Exhibit 11 pages 48 – 49).

Judge Sheldon testified that he had no evidence that Respondent was in any way participating with Chatam in obtaining representation or involvement with property owners. She was not engaged in the process prior to the time it was necessary to take the case to the regular division (Exhibit 11 pages 53 – 54).

Further Judge Sheldon acknowledged that there was no evidence Respondent participated in the decision as to whether the property owner should appeal to the regular division of COTA (Exhibit 11 page 54). He further acknowledged that during the show cause proceeding COTA did not conclude there was a partnership between the Respondent and Chatam (Exhibit 11 pages 54 – 55). However he suggested that the because Respondent over a period of years was retained by Chatam to handle appeals that in a broad sense such would be such a business relationship as to trigger the ethical rule prohibiting lawyers non-lawyer partnerships (Exhibit 11 pages 54-57). Although he does not believe such a prohibitive relationship is created when liability insurance carriers retain the same lawyer over many years in a particular geographical area to represent insurers (Exhibit 11 pages 57 – 59).

In regard to the signature of Chatam on the notice of appeal, Judge Sheldon discussed at length that such was the unauthorized practice of law or it reflected the taxpayer was not in control of the litigation and that it was Chatam, not the property owner, who was the party in interest, acknowledged that evidentiary there was no indication that Chatam did not consult with the property owner or the property owner did not consult with Chatam regarding the litigation at any stage including the appeal (Exhibit 11 pages 59 – 65).

A question was raised during the show cause proceeding as to whether Respondent had notified her client the property owner or merely notified Chatam. During the show cause proceedings in response to such inquiry (Exhibit 11 pages 65 – 67) Respondent stated that as an officer of the court she was stating the clients/property owners were advised she was withdrawing and other counsel was entering her appearance (See Exhibit 11pages 65-67). Judge Sheldon's concerns seem to be that the representation was that the client was notified prior

to Respondent's withdrawal but that a property owner had testified during the show cause proceedings seemingly suggesting that notice was post withdrawal (Exhibit 11 pages 66 – 67).

Judge Sheldon testified he had no evidence that Respondent directly engaged in champerty (Exhibit 11 page 68) or that she improperly talked taxpayers/property owners into filing appeals (Exhibit 11 page 68) and that they never asserted Respondent even vicariously engaged in champerty (Exhibit 11 page 69).

In the Lyerla case (Seemingly the primary case giving rise to COTA Judge's complainants/ ethical concerns) it was developed as to the issue of champerty, or who controlled the litigation, that a settlement offer was made by the county, transmitted to Respondent, who transmitted the offer to Chatam, who discussed it with the taxpayers and made a recommendation, and that the taxpayer approved the settlement who so advised Respondent and who advised the county (Exhibit 11 page 78).

Frivolous cases were a concern of complainants based on the percentage of Respondent's cases she dismissed (Exhibit 11 pages 81 – 82). Judge Sheldon opined that because the cases were dismissed either they were meritless when filed or if they had merit and were dismissed then such would constitute a conflict of interest if its' being dismissed for Chatam's reasons or benefit (Exhibit 11 pages 82 – 83).

As to comments regarding suggestions of solicitation, feeder relationships, and horse trading, such although included in the memorandum, (Exhibit 2) they were not specific as to Respondent as reported by Judge Sheldon and he had received no reports of such activity from county appraisers or attorneys associated with counties (Exhibit 11 pages 96 – 99). The balance of Judge Sheldon's statement (Exhibit 11 pages 99 – 109) would not seem relevant to any of the issues here involved or as pertains to the allegations of possible violations of Kansas Rules of Professional Conduct because they mostly deal with process and whether Judge Wohlford might have certain information.

b. SUMMARY OF JUDGE WOHLFORD STATEMENT (Exhibit 12)

Judge Wohlford was admitted to practice in 1999 and practiced with the Foulson Seifkin firm for three years and then with the Hinkle Elkouri firm for two years. At Foulson his practice was in the area of commercial litigation and some insurance defense, as part of a team; and in the Elkouri firm his practice was primarily real estate transaction work (Exhibit 12 pages 3 – 4). His work was always under the supervision of another attorney (Exhibit 12 page 5). He was only involved in one jury trial but as "second chair" but he did not question witnesses. He was involved only in the written work (Exhibit 12 pages 7 – 8).

Judge Wohlford was not the author of the letter of complaint of October 4, 2012 (Exhibit 1) (Exhibit 12 page 8) but was the author of the undated Statement of Indicated Facts and Conclusions (Exhibit 3) approximately 8 pages long with several appellate decisions attached from other jurisdictions. He also authored Exhibit 2 the October 4, 2012 Memorandum to Stan Hazlett the subject of which being Ethical Implications of Coordinated Services Provided by Tax Consultants and Attorneys consisting of 19 pages with attachments (Exhibit 12 pages 8 – 9).

Judge Wohlford testified that what precipitated the drafting of Exhibits 2 and 3 was the motion to withdraw by Ms. Mulcahy which was prior to the September 18, 2012 show cause hearing (Exhibit 12 pages 10 – 11).

Part of the concerns precipitating exhibits 2 and 3 was that the Mulcahy's motion to withdraw suggested that Chatam had the right to determine who the lawyer would be that handled the appeal and had the authority to hire and fire and replace the lawyer (Exhibit 12 pages 15 – 16) That differed from the usual liability insurance case when the carrier determines who the defense lawyer would be and hires and pays the lawyer because that's based on an insurance contract and is a defensive action (Exhibit 12 pages 15 – 16).

Judge Wohlford has no knowledge as to whether there was or was not consultation between the property owner and Respondent regarding the appeals (Exhibit 12 pages 20 – 21) That he has no information regarding Respondent's knowledge of Chatam's contract with the property owner prior to the September 18, 2012 show cause proceedings (Exhibit 12 page 21).

Judge Wohlford has no knowledge of any contact by Respondent with any of the property owners prior to her being retained (Exhibit 12 page 22). Nor does he have any knowledge of Respondent's participation in some matter in Chatam obtaining contracts with the property owners (Exhibit 12 pages 22 – 23).

Additionally Judge Wohlford testified that he was unaware of any information that Respondent received a fee from Chatam other than her hourly rate (Exhibit 12 page 24) and that he had no information that Respondent paid any money to Chatam (Exhibit 12 page 24). Further, that he had no information other than that Respondent was paid her hourly fee on a monthly basis (Exhibit 12 page 25).

Judge Wohlford also testified he had no evidence that Respondent ever directly solicited clients, nor did he have any evidence she participated in "horse trading" of cases (Exhibit 12 page 25 – 26). He actually had no evidence, let alone credible evidence of "horse trading" by anyone (Exhibit 12 page 26).

As to the allegation of frivolous claims Judge Wohlford testified that there is a lot of appeals and many were dismissed in the 11th hour (Exhibit 12 page 28) and asserted there was no work done in the cases and the files were pretty thin (Exhibit 12 page 29). Yet he testified neither he nor any of COTA's staff

attorneys had taken an opportunity to explore the merits of the dismissed cases (Exhibit 12 page 29) Nor did any county seek sanctions for a frivolous case (Exhibit 12 page 30).

Judge Wohlford acknowledged in his testimony that counties are permitted to appear in COTA's regular division without counsel (Exhibit 12 pages 30 – 31) and to present evidence (Exhibit 12 page 31). He explained that county appraisers, or an employee of the county, appears but doesn't cross examine, doesn't present legal arguments, presents its' evidence, its appraisal evidence and that such is permitted by COTA under its' rules (Exhibit 12 page 32). Similarly such is permitted on behalf of corporations or partnerships so long as the person appearing has a natural connection to the entity (Exhibit 12 page 32 – 33).

From Judge Wohlford's testimony it is apparent that he has no knowledge as to how Chatam's relationship with property owners is initiated (Exhibit 12 pages 46 – 48).

Lastly it seems Judge Wohlford's major concern was that the contract between Chatam and property owners constituted an assignment and made Chatam the real party in interest (Exhibit 12 pages 51 – 61) which implicates the jurisdiction issue. Such, in this writer's investigatory opinion is not a matter of sufficient relevance to the issues under investigation to be further pursued.

c. SUMMARY OF THE TRANSCRIPTS OF THE INTERVIEW OF LINDA TERRILL (Exhibit 19)

Ms. Terrill graduated law school in 1981 and was employed as general counsel to the Board of Tax Appeals. While still employed she obtained a Master's degree in tax law from UMKC (Exhibit 19 pages 1 – 3). After leaving the Board of Tax Appeals she was with the Mitchell, Kristell and Lieber law firm in their Kansas office and was there for several years leaving to go with the Perry and Hamill law firm (Exhibit 19 page 3). Respondent's husband, Ben Neill, was a founding member of Perry and Hamill (Exhibit 19 page 4). He was formerly general counsel for the Kansas Department of Revenue (Exhibit 19 page 4).

Respondent has represented about half of the county appraisers in a valuation case. She and her husband formed their own law firm, with others; about 22 years ago (Exhibit 19 page 4). She does property tax cases almost exclusively (Exhibit 19 page 5 – 6).

During the show cause proceeding before COTA in September 2012, one of the COTA judges raised a question regarding the certificate of service on Respondent's motion to withdraw which did not show service on the property owners/client. During the following colloquy between Respondent and one of the COTA judges Respondent stated that as an officer of the court the client/property owner knew of the motion to withdraw (Exhibit 19 page 5 – 6).

In furtherance of her explanation Respondent produced a form (Exhibit 19 Statement Exhibit 1 entitled "Declaration of representative"). She had some difficulty in describing its application/ relevancy to the question (Exhibit 19 page 8 – 17) but, in a nutshell, it seemingly boiled down to the form being a state produced and generated form that was a notice that there was an agent for the property owner (Chatam being the agent) and notice should be to the agent (here Chatam) rather than the property owner (Exhibit 19 pages 15 – 17). That even COTA served Chatam rather than property owner (Exhibit 19 page 13).

This writer has otherwise been provided a series of affidavits from various property owners/clients in which they support Respondent's statement that the property owners knew of the withdrawal (See exhibit 20).

Respondent testified that she had no involvement with Chatam in regard to negotiating, drafting, or otherwise participating in the contract between Chatam and the tax payer or property owner (Exhibit 19 page 18).

Respondent testified she is not involved and knows nothing of the case until results notification comes from the informal meeting with the county appraiser and the taxpayer decides to appeal. Taxpayer can go to the expedited hearing division a/k/a small claims and if they do Respondent still is not involved (Exhibit 19 pages 20 – 21). If the taxpayer is not satisfied with the decision at that level, or decides to go to the regular division, then a form generally referred to as a notice of appeal is filed and it is at this point that Respondent is retained (Exhibit 19 pages 20 – 23).

Unless Respondent is already representing the property owner for prior years she has no contact with the client until the filing of the notice of appeal. It is at this point that she is retained (Exhibit 19 page 24).

Much of Respondent's interview involved her description of the process of the handling of tax appeals before COTA and why the complainants may have focused on the number of appeals dismissed as suggestive of frivolous cases (Respondent's testimony as set forth in exhibit 19 pages 20 – 85) clearly describes a process that nearly requires appeals and certainly fosters a requirement of "dismissals" very late in the proceedings for COTA's calendar (Exhibit 19 pages 20 – 85). It is also clear that complainants did not have any factual information or evidence as to why the cases might have been dismissed nor did they seek such in support of their allegations (Exhibit 19 pages 29-30).

In summarizing Respondent's description of the process and its' consequences this writer will try to be much briefer but still set forth the eight cogent points of her testimony.

The timetable of the procedure goes something like this: The county notifies the property owner in March of the property's valuation who then has thirty days to seek relief from the county appraiser which means mid -April, the county must decide by mid- May and, if the property owner is dissatisfied, then the property owner has thirty days thereafter – mid June to appeal. (Exhibit 19 pages 37-46).

For these purposes I am disregarding cases that go to the expedited or small claims division for Respondent is not involved in such cases.

So in mid- June an appeal would be filed, and then COTA would issue standard discovery order 45 days after the appeal is docketed – the end of July or early August (Exhibit 19 pages 26 – 27). At this point Respondent has 180 days to serve her expert's report (Exhibit 19 page 27) and discovery goes for a total of 240 days (Exhibit 19 page 29). COTA generally sets a prehearing approximately thirty days after Respondent is required to produce her expert report (Exhibit 19 pages 29 – 30) which now puts us in to January for Respondent to submit her expert report and February for the prehearing. At the prehearing (pretrial) the hearing (trial) is scheduled which will be four months hence for less complicated cases – late May or early June (Exhibit 19 pages 30 – 31) and six months or August for more complicated cases (Exhibit 19 pages 30 – 31)

Although statutorily cases are to be decided and the property owner notified within 120 days of the hearing (KSA 74-2426) it has been held such is directive and not mandatory (In re: Tax Complaint of Wine 46 Kan. App. 2nd, 134 at 139). Both Respondent and complainant, Judge Sheldon, seemingly agree that many, if not most, contested cases are not decided within the 120 days and it may be many months thereafter before a decision is received. (Exhibit 19 page 32).

As a result of the foregoing timetable the property owner in many of such cases would have received the counties notification of evaluation for the succeeding year and in order to protect the property owner's interest a subsequent appeal procedure would be commenced (Exhibit 19 pages 35 -39). Then when the decision for the preceding year is received if the property owner is satisfied such is provided the county appraiser who would then use that valuation for the succeeding year which would moot that appeal and result in a dismissal. But, clearly, there would have been nothing frivolous (Exhibit 19 pages 37 – 39). A stipulation in dismissal is filed which looks like any other dismissal form, it uses the same form (Exhibit 19 pages 39 – 41).

Another reason for "dismissal" of appeals is the lopsided time requirements. Respondent per the discovery order does not receive the county's expert report until 20 days prior to the hearing (trial) per COTA regulation (Exhibit 19 pages 42 – 43). Then Respondent must evaluate the county's expert's report verses all other discovery, her own expert's report and consult with the property owner (Exhibit 19 pages 44 – 45). All of which means it is at this point, just days ahead

of the hearing/trial that settlement discussions can occur. In some instances on receipt of the county's expert's report and after evaluating it. Respondent and her client may well decide that the county's offer is close enough to their position that a settlement can be accomplished which would result in a dismissal of the case (Exhibit 19 pages 45 – 48).

Respondent also explained if she were representing her condo client where there are 119 parcels with different owners in property cases before COTA she would file 119 cases and if it is settled there would be 119 dismissal whereas in district court such cases could be joined in one action and if dismissed the statistics would reflect one dismissal whereas in COTA the statistics would reflect 119 dismissals (Exhibit 19 page 77).

Some cases would start on the evidentiary basis of income and expenses and rent rolls and if settlement does not occur the client is confronted with the need to hire an appraiser at a cost estimated at $6500.00 with no assurance of success and/ or a timely resolution and might decide not to incur the expense and just move on resulting in a dismissal (Exhibit 19 pages 55 – 57).

Respondent illustrated instances where appeals involving millions of dollars of property where a settlement might be worked out covering several years. But because of the amounts involved, and the county's inability to refund with interest to the taxpayer, an agreement would be made that the reduced values might be averaged and spread forward over several years reducing tax payers liabilities in the future years all to the stipulation of all parties resulting in a dismissal of several appeals involving millions of dollars of tax relief. However COTA judges would only know that there were several dismissal which they might interpret as meaning the cases were without merit when it fact substantial relief was obtained (Exhibit 19 pages 51 – 57). In fact such a case involving millions of dollars of relief was settled just twelve hours prior to hearing (trial) (Exhibit 19 pages 52 - 54).

Respondent testified she had never participated in "horse trading" nor does she know of anyone who has. However a county once proposed such to her which she declined (Exhibit 19 page 57 – 58).

Regarding the allegation that Respondent participated or facilitated Chatam to engage in the unauthorized practice of law she testified in her cases Chatam has never examined witnesses, prepared memorandums of law, done oral arguments such as opening statements or closing arguments, etc. Nor has he drafted contracts or pleadings/motions nor does he prepare and sign documents in COTA's regular division (Exhibit 19 pages 59 – 60). Nor is she aware of Chatam giving property owners legal opinions other than perhaps advising them as to statutory filing deadlines (Exhibit 19 page 60 – 61).

Respondent further testified that Chatam does not determine what issues will be raised on appeal nor does he determine the nature and extent of discovery. Nor does he determine what the legal or factual position in the appeal will be (Exhibit 19 page 62).

Chatam has never suggested that the cost of discovery is getting expensive and it needs to be slowed down (Exhibit 19 pages 63 – 64).

Respondent does not advance discovery costs and she only bills for her time on her hourly rate and the rate she charges Chatam is the same rate that she charges other clients that she is representing on an hourly rate basis. Most of her clients, other than those referred by Chatam, are represented on a contingent fee basis (Exhibit 19 pages 65 – 66). Chatam gets no discount from her usual hourly rate (Exhibit 19 page 66).

In the event a case is successful and Chatam receives his contingent fee, Respondent never gets a portion of it and if the case is not successful Chatam does not get a discount from Respondent's hourly rate fee (Exhibit 19 page 67).

Respondent produced contractual documents utilized by Kevin Breer of the Polsinelli firm creating a relationship much like that between Respondent and Chatam except in the Polsinelli contract, an attorney client relationship is actually established between Polsinelli and the tax consultant (Exhibit 19 page 68 – 71) (Polsinelli contractors exhibit 2 – 19).

Respondent, considering comments made to COTA by Katherine Myers (apparently representing Johnson County) that if the practice of Respondent of receiving referrals from tax consultants as above described, as well as similar practices of other lawyers and tax consultants, that there would be an immediate reduction in cases before COTA but soon thereafter an increase of hundreds (800 hundred as opined by Katherine Myers) (Exhibit 19 page 72 – 76).

Respondent testified that in most, if not nearly all cases, other than referrals from Chatam her cases are contingent fee cases. As a member of the American Property Tax Council she is aware that contingent fees are almost the universal rule except in one state that prohibits them. (Exhibit 19 pages 80 - 81). The practice she follows is the common practice before COTA by the lawyers appearing there and has been for 30 years (Exhibit 19 page 84).

As to parties appearing before the Regular Division of the Board of Tax Appeals, Respondent testified that counties appear before COTA, Regular Division, without counsel all the time (Exhibit 19 page 84). She has provided copies of COTA orders as well as having provided charts of such cases (see Exhibit 15). Respondent testifies she has had cases where counties appear by an employee of the county appraiser's office and when the court asks if they have an opening statement she will object but COTA permits such non- lawyers to read and

discuss their appraisal and other documents they brought to the hearing. Respondent will cross examine and the judge may ask questions. Then when Respondent puts on her witnesses and when her direct is concluded the COTA judge will inquire of the county's non lawyer representative if they have any questions and Respondent objects on the basis that the person is not a lawyer. At this point sometimes COTA simply asks the non- lawyer what their concerns are and then a COTA judge ask questions. They facilitate the county engaging in the unauthorized practice of law (Exhibit 19 pages 84 – 86). These were all in Regular Division cases with non- lawyers prior to May of 2013 (Exhibit 19 page 89).

Respondent has represented Finney County and Meade County when non-government entities were allowed to appear with non- lawyer representatives in Regular Division of COTA (Exhibit 19 pages 90 – 91).

IV. PRIMARY COMPLAINTS

As set forth in complainants' various documents submitted to the Office of the Disciplinary Administrator , essentially exhibits 1, 2, 3, 4 and 5 It would appear that one of the primary complaints arise from the contract between Chatam, the tax consultant, and the property owner.

a. FIRST PRIMARY COMPLAINT—CHAMPERTY

First, the complaint asserts the issue of champerty. Champerty is a common law cause of action that is now mostly relegated to a contract defense rather than an affirmative cause of action.

It is recognized that COTA has, and must have, some power and authority to regulate the process, practice and procedure by which they address appeals and to provide for an orderly way to provide due process and permit proper evidence to be presented to resolve the dispute. It is, however, somewhat perplexing as to how, and under what authority, an administrative hearing judge, or a body that is non-judicial and a part of the executive branch of government, may conduct a hearing, determine that a private contract between an appealing property owner and a non-party to the lawsuit is champertous.

It is suggested that in as much as the show cause hearing was to determine jurisdiction of COTA to hear the case before it because of a claimed defective notice of appeal once COTA made that determination then it had no authority to conduct further proceedings or to make other findings of fact or enter other orders. That is not to say there may not have been other avenues available to COTA to seek determinations. Does it have contempt powers? Could it have sought authoritative opinions of the Attorney General? I know not so I will address the issue of champerty.

Champerty is defined in the 1956 case of *Boettcher vs. Criscione*, 180 Kan. 39, 299 P.2nd 806 as "... frequently exciting and stirring up quarrels either at law or otherwise... it largely turns on the facts and circumstances of each case" (id at 44-45).

What seems most compelling in behalf of a claim of champerty is "...frequently exciting and stirring up quarrels..." (Id at 44-45) where otherwise claims might not be brought. Comment 16 to KRPC1.8 referred to by COTA on page 26 of it's order (Exhibit 5) that the rule "...has its basis in common law champerty and maintenance and is designed to avoid the lawyer having too great an interest in the representation.

The record is clear that the Respondent has no ownership of, or great interest in the tax appeals other than as any lawyer might have in litigating a matter for a client i.e. professional responsibility and professional pride. Respondent's statement (Exhibit 19 pages 64-68) clearly establishes Respondent is paid monthly on an hourly basis. It further establishes that Respondent's hourly rate is the same for Chatam's contracts as for other clients of Respondent that are hourly rate clients and that Respondent receives no benefit from Chatam's contingent fee if the case is successful on appeal. Other than providing normal legal representation it cannot be said Respondent "had too great an interest in the representation."

I am particularly concerned and professionally bothered by COTA judges (herein the complainants) in its order (providing the support for their allegation to-wit Exhibit 5) referencing comment 10 to KRPC 1.8 and quoting it as:

> "Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients... because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in litigation."(Emphasis provided by tax court order)

From the foregoing as quoted by COTA it is made to appear that it was asserting the existence of a blanket bar to lawyers "subsidizing" (paying expenses of litigation). Such a projection of the rule is not only erroneous it is disingenuous causing concern as to COTA's motivations which may be discussed more fully later in this report.

What Rule 1.8(e) actually provides is:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

From the foregoing as quoted by the tax court it would clearly appear that what the tax court was asserting was the existence of a blanket bar to lawyers subsidizing "(paying expenses of litigation)" such a projection of the rule is not only erroneous it is disingenuous at best and at most an intent to misled.

Rule 1.8(e) actually provides:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
> (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
> (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

And comment 10 being asserted by the tax court to reflect a total bar actually says:

> [10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expense. Because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant prohibition on lawyer lending a client court costs and litigation expense, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

If the issue of champerty is to be determined by the unique facts and circumstances of a particular case then perhaps the Kansas case of *Vandegrift vs. Zinc Company*, 87 Kan. 376 (1912) is instructive in the instant matter as an analogy to present facts. *Vandegrift* involved brokers with a smelting company to procure at their own expense, for compensation of 50% of amount collected as a refund of excess duties exacted by revenue officers of importation of lead and zinc ore. Vandegrift was retained to recover and collect the excessive duties, penalties and charges, at their own expense for which they would be paid 50% of recovery. Said agreement being in most part quite similar to Chatam's contracts

with taxpayer. Vandegrift employed attorneys, who succeeded in arranging a test case and ultimately prevailing. It was argued that the contract was champertory. Although recognizing the doctrine of champerty our court stated:

> "The doctrine, however, has not been extended; and in view of the fact that the reasons by which it was formally supported have lost much of their force through the progress of society it ought not to be extended. Agreements to pay contingent fees for services rendered in securing by moral methods the allowance of claims of a legitimate character... have never been regarded as champertous and this is true even where the contingent fee also covers expenses incurred in the prosecution of the claim (Manning vs. Sprague, 148 Mass. 18, 18 N.E. 673, 12 Am. St. Rep. 508, 1 L.R.A. 516).

As recognized by our court in *Vandegrift* in citing *Taylor vs. Bemiss*, 110 U.S. 42 involving a contingent fee contract with an attorney in prosecuting claims against the United States that there were, like in the property tax appeals, well known difficulties and delays not within the ordinary course of things involving parties far from the venue might well work hardship in pursuing relief."

In *Vandegrift,* as in the present matter, there was no suggestion of fraud or any undue advantage taken.

Am. Jur. 2d in discussing champerty cites *McLaughlin vs. Amirsaleh*, 65 Mass. App. Ct. 873, 844 N.E. 2d 1105 (2006) and *Schmabel vs. Taft Broadcasting Co., Inc.* 525 S.W. 2d 819 and concludes "...however, the doctrines of common law champerty and maintenance are no longer recognized (See also *Saladini vs. Righellis*, 426 Mass. 231, 687 N.E. 2nd 1224 (1997); *Hardich vs. Homol*, 795 S.2d 1107 (Fla. DCA 5th 2001).

It is this writer's conclusion that the evidence does not support the claim of champerty. The Respondent had no unusual interest in the litigation. Complainants acknowledge that they have no evidence that Respondent solicited property owners to file appeals, or that she "stirred up" litigation that might not otherwise be brought, or that she had other contact with property owners prior to being contacted by Chatam, which, of course, was after the property owners and Chatam had to elected pursue possible relief.

Additionally I refer the reader to Security Underground Storage, Inc. vs. Anderson, 347 F.2d 964, 969, (10th Cir. 1965) for its conclusion that a cause of action for common law claims of champerty and maintenance for damages is no longer recognized and that such is the rule in Kansas. It may well be that if a lawyer engages in champertous conduct his client may have cause to void the contract but COTA has no such jurisdiction even if champerty was shown.

CONCLUSION AS TO CLAIM OF CHAMPERTY

Hence my conclusion is that not only is "clear and convincing evidence" of champerty lacking there is a lack of "probable cause" that the Respondent has engaged in champertous conduct and therefore such allegations should not proceed further and should be dismissed.

b. SECOND PRIMARY COMPLAINT-FRIVOLOUS CLAIMS

Second: The next primary complaint asserted by complainants involves the allegation of frivolous claims. A frivolous claim:
A claim that has no legal basis or merit, especially one brought for an unreasonable purpose such as harassment (FRCP 11(b))
Black's Law Dictionary, Deluxe 9th Edition)

> A claim is frivolous if the actual contention supporting the claim is clearly baseless or if the claim is based on a legal theory that is indisputably meritless (D. Kan. 1995, De Young v. Lorentz, 887 F. Supp. 254, affirmed 69 F.3d 547, cert. denied 116 S. Ct. 1695, 517 U.S. 1198, 134, L. ed.2d 795)

In the instant complaint it is alleged that Respondent filed numerous appeals before the Kansas Court of Tax Appeals and prior to hearing/trial dismissed many of them. In fact, complainants in their Statement of Indicated Facts and Conclusions state that in the past three (3) years Respondent has filed 1,874 (dockets) in cases wherein she was engaged by the tax consultant-Chatam and that she voluntarily dismissed 924 of those appeals, many at what is referred to as "the 11th hour" and "without explanation." Complainants do not define what is meant by having filed 1,874 "dockets." Is that merely filing notice of appeal which is then "docketed" by the tax court or does it mean something more. This writer having participated in over 500 Chapter 60 and Chapter 21 and 22 appeals to the Kansas Court of Appeals and Supreme Court must conclude that the word "docket" refers to the filing of a notice of appeal and the assignment of a case number or other indicia of filing by the tax court.

In any event the complainants have no knowledge or evidence as to the legal basis or factual support for such filing. Nor do they express any evidence that the contentions supporting the appeal were clearly baseless or predicated on legal claims that are indisputably meritless. In fact, the complainants (See Judge Wohlford's statement Exhibit 12) acknowledged they never received the files and they never reviewed the files of the dismissed cases. There is no evidence that any effort was made by the complainants to determine why the dismissed cases were filed, the evidence or legal theory relied on in those cases and there certainly is no evidence that the appeals were filed for the purpose of harassment or other improper purpose.

Here it might be appropriate to note that Judge Wohlford testified that, in a general way – the taxpayer receives from the county notice of their property's valuation in mid-March and they have 30 days to appeal to the county, once the county rules the taxpayer then has 30 days to appeal to the tax court – assuming that the county ruled by mid-April the appeal to the tax court must be filed by mid-May. Judge Wohlford testified it would generally be 6-8 months after discovery ends when a pre-trial is had, and a hearing/trial would then be held 6-8 months thereafter. Judge Wohlford also acknowledged that following the close of the record it is months by the time a decision is rendered and served. All this notwithstanding that K.S.A. 74-2426 provides that "...a final order of the court shall be rendered in writing and served within 120 days after the matter was fully submitted to the court unless this period is waived or extended with the written consent of all parties for good cause shown." (Emphasis supplied) Notwithstanding a rather definite legislative direction the Kansas Court of Appeals has held, consistent with the long express rule, that statutory provisions governing order and timing of procedures are more likely to be determined to be directory only. See *State v. Rasch*, 289 Kan. 911, 919-21, 219 P.3d 481 (2004). Although the 120 days as to the decision may be directory the Kansas Court of Appeals went on to state:

> "We note, however, that the statutes directory is not to be ignored, and a better practices for COTA to endeavor to comply with the timing directory provided by the legislature."
> *In re: Tax Complaint of Wine, 46 Kan. App. 3rd 134 at 139*

Why is this significant in the context of a complaint that Terrill filed a number of cases and dismisses approximately 50% of them?

First, it appears both from exhibits provided by Respondent, as well as this writer's observation of the rather uncomfortable response by Judge Wohlford that it is not at all unusual or uncommon for the 120 day requirement for appeal decisions to be uncomplied with and in fact a number of cases are decided substantially past the 120 days post trial (Exhibit 12 Wohlford's statement pgs. 44-46).

Second: As Judge Wohlford explained, as well as Respondent, if the case is not decided by the following March the property owner will need to appeal for that tax year as it is not known what COTA will decide. Of course if the decision that does come down is acceptable to the taxpayer the appeal for the following year may be dismissed ((See also Exhibit 19 pgs. 38 to 40) of Respondent's statement).

Lastly, on the issue of frivolous appeals the only evidence in support of such complainant suggested by the complainants is that Respondent dismissed over the past three years approximately 50% of the appeals filed. Is that such an exorbitant rate of dismissal as to give rise to probable cause of the cases being

frivolous? Such question may be answered by referring to Exhibit 15, the statistics on the district court's state wide dismissals of civil cases which show that over the past ten years in the state district courts Chapter 60 cases, excluding divorce, are dismissed at a comparable rate. Surely, it is not suggested that such establishes that they were frivolous cases.

From Wohlford's writing in the undated Statement of Indicated Facts and Conclusions, written by him prior to the show cause hearing on September 18, 2012, where questions were asked by the court sua sponte, and without complaint by any party (See Exhibit 12 Wohlford's statement (pgs. 9--12) it would appear that the suggestion (his conclusion that it is prima facie evidence) of frivolous claims is based solely on the belief that the contract by which Respondent is retained by Chatam to represent the property owners is likely champertous (See Exhibit 3, Statement of Indicated Facts and Conclusions and Exhibit 12 pg. 8)

Respondent provided summaries of Kansas District Court statewide civil case statistics for 2002 to 2012 (Exhibit 15). As a part of the exhibit she used 2012 as illustrative. In that regard of the civil cases filed – not including domestic cases – in 2012 there was a total of 25,197 – but there were 25,320 (presumably the additional cases left over from 2011) terminations. Of the 25,320 terminations 7,970 were by dismissal. The dismissal rate was 30.14%. Looking at the district court cases and taking into account the termination of the category of "uncontested cases" of 8,983 cases then the total of dismissal in uncontested cases would reflect a termination rate of 67%.

Respondent advises that in COTA there are no "uncontested" cases which is why it may be more accurate to reflect terminated by dismissal and uncontested in the same manner as we consider dismissal in COTA.

In the worst case scenario as to Respondent it appears she may dismiss 20% more of her cases than the curve statewide in district court civil cases. Considering dismissal rates in the scenario more favorable to Respondent it appears that she dismissed 17% fewer of her cases than were civil cases dismissed in district court statewide.

In viewing the foregoing it may be appropriate to consider Wohlford's testimony agreeing that many cases carry over in the following tax years without decision which would suggest taxpayers would need to file an appeal in the following year and maintain it at least until a decision is received on the previous year's appeal in order to protect the taxpayer's position (Exhibit 12 Wohlford's statement pgs. 43-44)

Because complainants offer nothing but the statistical information as to the percentage of Respondent's appeals she dismissed and acknowledging there was no review or examination of the dismissed files, hence no knowledge as to

their merit or lack of merit or reason for dismissal; and ,given the statistical information regarding civil case dismissals in district courts statewide, one should conclude there does not exist probable cause from the complainants as to frivolous appeals to go forward and the same should be dismissed.

However, additionally reference must be made to the testimony of the Respondent in Exhibit 19 and most particularly pages 42 to 48 and pages 77 as well as pages 55 to 57.

CONCLUSION AS TO COMPLAINT OF FILING OF FRIVOLOUS CLAIMS

It is patently obvious that the evidence reflect numerous and various reasons as to why very meritorious cases appealed to the Kansas Court of Tax Appeals would be dismissed prior to trial. Those reasons would include settlement, agreement by the county, the receipt of the county's expert report that is favorable to the taxpayer's decision, the fact that numerous cases would be filed for such situations as condo owners and dismissed whereas such cases if filed in district court would be filed as one consolidated case. Additionally, it is patently obvious that the complainants had absolutely no evidence tending to establish that any of the cases filed by Respondent were frivolous, that is that they were without merit in either fact or law and that they had made no inquiry as to determine the merit or lack of merit of her cases. They merely relied on the statistics as to the percentage of cases filed that were dismissed. Such hardly establishes probable cause to believe that the cases were without merit. The complaint of the filing of frivolous claims should be dismissed

c. THIRD PRIMARY COMPLAINT -- FEE SHARING

Third. The third primary complaint of the complaining witnesses involves the issue of "fee sharing." In Exhibit 3 (Statement of Indicated Facts and Conclusions, undated) prepared by Judge Wohlford prior to the September 18, 2012 show cause hearing, and presumably without any evidentiary basis, unless he engaged in extra judicial contact which he denies (Exhibit 12 Wohlford's statement pgs. 24) it is alleged that Respondent engaged in "improper fee sharing with a non-lawyer".

The record is replete with evidence that the Respondent was engaged by Chatam to represent property owners in appeals to COTA. That Respondent was paid on the basis of an hourly rate. She billed Chatam monthly and was paid monthly (Exhibit 13, transcript of the show cause hearing, pgs.45-46; Chatam contract with property owners Exhibit 8; Respondent's statement Exhibit 19 pgs.64-66). Nowhere in their statements do Complaintants assert they have knowledge of any payments to Respondent other than her hourly rate or any payments from Respondent to Chatam.

The testimony of Chatam in the show cause proceedings (Exhibit 13 pgs. 47-50). (Affidavit of Respondent (Exhibit 10); (Exhibit 19) statement of Respondent pgs.45-63 and (Exhibit 9)) affidavit of property owners establish that the taxpayer was the client who was consulted with by Respondent and who ultimately controlled such decisions as to whether to appeal, if so, whether to proceed to trial, accept settlement proposals or even dismiss. Attorney fees were paid by Chatam. Chatam was compensated by a percentage of the tax reduction obtained; if no reduction was obtained he received no payment and no reimbursement of expenses or attorney fees. Respondent was paid by Chatam monthly on an hourly rate basis, win, lose or draw. Such would seem to refute complainants allegations of impermissible "fee sharing."

However, KRPC 1.8(f) states:

"A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) The client gives informed consent;
(2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) Information relating to representation of a client is protected as required by Rule 1.6."

And Comment [11] thereto states:

> "Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an inseminator (such as a liability insurance company) or a corporate-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another)."

In the present facts the evidence establishes that the taxpayer anticipated and contractually knew and agreed that Chatam would retain counsel if and when such became necessary, and at Chatam's expense, with no reimbursement therefore. The evidence also establishes that the taxpayer retained ultimate decision making regarding the litigation. There is no reasonable evidentiary suggestion that Respondent did not maintain professional independence from Chatam nor that there was any interference by Chatam in Respondent's

professional judgment even though the Respondent would consult from time to time with both Chatam and/or taxpayer (Exhibit 19 Respondent's testimony pgs.45-49 & 62-65). (Exhibit 9 affidavits of taxpayer).

I am bothered by a judge, administrative or otherwise, that takes a position such as "...under the assumed facts certain tax consultants ... who, including...(but not identifying Chatam) entering into champertous arrangement with property owners, and there is ample evidence [without identifying same...] showing that this practice frequently excites and stirs up quarrels throughout the various levels of the tax appeal process – quarrels that would not otherwise occur. This phenomenon has been widely reported, anecdotally, by local taxing officials [no reference to any identification of any reliable information supporting the allegation] and is born out in the court's statistical data..." (Emphasis supplied).

Perhaps, in regard to the statistics the complainants should compare the tax court filings and percentages of dismissal with the regular civil case filings statewide in district court in percentage of dismissals. Complainants might find the high similarity informative. Looking at the statistical information provided by complainants (Exhibit 14) the following would appear as to Respondent:

2009 she dismissed 50.4% of her filed appeals.
2010 she dismissed 47.8% of her filed appeals.
2011 she dismissed 50.2% of her filed appeals.

CONCLUSION AS TO FILING OF FRIVOLOUS CLAIMS

Does Respondent's percentage of dismissals, without more information establish probable cause to believe the filings were frivolous, that is they had no legal basis or merit as alleged by complainants? Particularly important when District court, chapter 60 cases are dismissed at comparable rates. Remember, Judge Wohlford testified there was no review of the files of the dismissed cases by COTA judges or their staff attorneys so no determination of their possible merit was or could be made (Exhibit 12 Wohlford statement pgs.29-30).Hence the conclusion should be that the complaint of filing frivolous claims should be dismissed

d. FOURTH PRIMARY COMPLAINT: UNAUTHORIZED PRACTICE OF LAW

Fourth. The fourth primary complaint of the judges of the Court of Tax Appeals was the allegation that the Respondent engaged in, or facilitated, the unauthorized practice of law by the tax consultant Chatam.

Complainants have suggested Respondent has engaged in the unauthorized practice of law by permitting or facilitating the unauthorized practice of law by the tax consultant, Chatam. In those regards Complainants spent some 30 pages of their Order On Reconsideration (Exhibit 16) describing the basis for and their

determination that Chatam has engaged in the unauthorized practice of law. Their conclusion is seemingly predicated on two premises:

(1) that Chatam, as a non-lawyer, had contingent fee contracts with property owners to the effect that he would receive a percentage of any tax savings from favorable decisions by county appraisers and/or COTA; and,

(2) That Chatam derived fees from the services provided by a lawyer; that is in the cases in which Respondent was retained by Chatam that, as a result of Respondent's efforts or participation, if a favorable result was obtained the taxpayer would pay Chatam a percentage of the taxes saved.

I would here note that the record is bare of any evidence as to how Chatam actually was paid; did he bill the taxpayer on a final favorable ruling; did he wait until the county refunded to the taxpayer; did he receive the refund and deduct his fee and forward balance to the taxpayer. This was never inquired of by COTA or this writer.

In regard to the question of whether Chatam was engaged in the unauthorized practice of law by virtue of the aforesaid contract COTA and its Order On Reconsideration (Exhibit 16) provide substantial authority that seems to establish a rule that a non-lawyer having a contingent fee contract with one who he is assisting in the recovery of money is engaged in the unauthorized practice of law. In support COTA cites State ex rel. Stovall v. Martinez, 27 Kan. App.2d 9, 996 P.2d 371 (2000) review denied; Depew v. Wichita Association of Credit Men [Depew III] 142 Kan. 403, 49 P.2d 1041 (1935) as well as cases to similar effect from other jurisdictions] for complete review of such authorities see Exhibit 16 pgs. 119-126]

For the purposes of this report this writer accepts the proposition as laid out by COTA in Exhibit 16, and for these purposes only, agrees that there is reasonable grounds to believe Chatam has engaged in the unauthorized practice of law by virtue of his contingent fee contract (See Exhibit 8 as example thereof) on the basis of the above cited authority. What affect such has on, or implicates, Respondent will be discussed later.

Secondly, in regard to allegations that Respondent engaged in, or facilitated, the unauthorized practice of law COTA, in its Order On Reconsideration, (Exhibit 16 pgs. 126-144) essentially rested its' allegations on the supposition that Chatam directed and managed the litigation for third parties i.e. that Chatam directed and managed tax appeal litigation before COTA for and on behalf of the taxpayers.

In furtherance of the foregoing proposition COTA in Exhibit 16 cites Depew v. Wichita Association of Credit Men [Depew II] 142 Kan. 403, 49 P.2d 1041 (1935) also Perkins, supra; and State ex rel v. Shoemaker, 214 Kan. 1 519 P.2d 1116

(1974) and Attorney General Opinion 93-100 (Exhibit 18) and Atchison Homeless Shelter, Inc. v. County of Atchison, 24 Kan. App. 2d 454, 946 P.2d 113 (1997).

Additionally, COTA cites numerous cases and opinions of jurisdictions other than Kansas. For review of same please (Exhibit 16)

For purposes hereof it must be readily concluded that for a non-lawyer to manage, direct control and/or interfere with the independent professional judgment of a lawyer retained to handle a particular matter or litigation would be to engage in the unauthorized practice of law. For purposes of this investigation the question would not be whether Chatam's contract with property owners regarding the property tax implications of their property because it is contingent constitutes Chatam engaging in the unauthorized practice of law. The question for this writer is in what way is Respondent's ethical obligation/responsibilities implicated or violated.

In the Statement Of Indicated Facts And Conclusions (Exhibit 3, page 7) complainants allege/complain Respondent was assisting a non-lawyer in the unauthorized practice of law. It is asserted that Respondent "...permits Chatam to perform most of the work in connection with the taxpayer's ad valorem property tax program, which is (sic) entails a panoply of professional services which if performed by an attorney likely would be considered the practice of law." I offer no opinion as to whether all service performed by a lawyer constitutes the practice of law even though the lawyer would still be subject to the constraints of the KRPC. However does the "panoply of professional service" provided by a non-lawyer (Chatam) constitute the unauthorized practice of law?

To determine whether Respondent was assisting Chatam in the unauthorized practice of law the evidence must establish what "professional service" he provided that might constitute the practice of law and then in what way did Respondent knowingly assist, or facilitate such unauthorized practice of law?

There appears to be no question that a non-lawyer can assist in the challenge to property valuations at the county level and in the Special or Limit Division of COTA. Therefore it would appear that Chatam may properly consult with a property owner, review records, comparable sales, determine reproduction cost and income to arrive at a professional opinion as to the proper value of a client's property. Wohlford asserted Chatham was so well credentialed.

So at this juncture of the appeal process Chatam, in conjunction with the property owner must determine whether to seek relief in the Regular division of COTA if their prior efforts have been unsuccessful. The issue to be determined by COTA in such an appeal is simply what is the proper appraised value for tax purposes of the property and is the property appraised at a value the same or similar to comparable property. Surely Chatam's expertise is such as to make him qualified

to make recommendation to proceed to an appeal to the Regular division. It is at this point that Respondent is retained.

Complainants provided no evidence that Chatam signed or filed pleadings other than the questionable notice of appeal, or that he prepared legal memorandums, examined witnesses, or made oral argument to COTA. It appears that at most once the matter was before COTA he provided evidence either by way of testimony or preparation of exhibits that were considered. (Respondent's Statement Exhibit 19 pp 58 - 64)

In the Statement Of Indicated Facts And Conclusions (Exhibit 2 at p. 7) Wohlford seems to suggest that Respondent provided assistance to Chatam allowing him to have a "lucrative venture" from which she received "direct financial benefits". There is no evidence that Respondent received any financial benefit from Chatam other than to be paid on a monthly basis her hourly rate for service provided. She was so paid whether the appeal went to trial, settled, was dismissed of was unsuccessful at trial.

The record clearly establishes that Chatam is responsible for attorney fees and expenses of litigation. There is no evidence of how "lucrative" Chatham's "venture" is and one might wonder given he pays filing fees and legal fees and other expenses but some 50% of the cases are dismissed and Complainants would suggest that they were without merit so there would be no fees paid to Chatam.

What constitutes the practice of law since our court spoke in the 1934 case of State ex rel Boynton v. Perkins, 138 Kan. 899, 28 P 2d. 765, (1934) cited by Wohlford in exhibit 2, Statement of Indicated Facts And Conclusions, has either changed dramatically or mass violations are occurring daily and are either ignored or ratified as acceptable by implication. Realtors and Title insurance companies regularly draft contracts for the purchase and sale of real estate. Banks draft wills and trust documents and even hospitals and medical providers assist in preparation of durable powers of attorney for medical decisions and end of life instructions let alone what is sold on T.V. in the way of legal documents. Boynton was decided in 1934 and the other appellate decisions referenced by Complainants were decided 1933 (People ex rel Courtney, an Ill. Case; Bump v District Court of Polk City an Iowa case-1942, and People ex rel. Holzman a New York case—1916).

This writer's conclusion is that the evidence is inadequate to establish probable cause to believe that Respondent participated in assisting, or facilitating chatam in the unauthorized practice of law

The evidentiary record does not reflect Respondent had any involvement in negotiating, drafting or preparing Chatam's contract with property owners (Exhibit

19 pgs.45-49, 62-65). In fact, the record reflects Respondent had no knowledge of the contract or its content.

Can Respondent be held ethically responsible for the proposition that Chatam by virtue of a contingent fee contract is engaged in the unauthorized practice of law if she was ignorant of the terms and conditions of said contract and/or its provisions? My conclusions must be that she cannot.

It might be a shade different if Respondent could be said to have an obligation of determining the nature and extent of Chatam's contract's provisions but I am not aware of such an obligation. Of course, intentional ignorance [in political circles the term might be plausible deniability] may necessitate a different conclusion. Such usually involves either a fact situation from which a reasonable person would have cause to believe something was amiss and intentionally "turned a blind eye" so as to intentionally not know or if there was an affirmative duty to inquire and an intentional failure to do so.

CONCLUSION AS TO UNAUTHORIZED PRACTICE OF LAW

Because the evidence establishes that Respondent had no knowledge of the content of Chatam's contract with the property owners prior to the September 18, 2012, "show cause hearing;" and because there does not seem to be either an affirmative duty to have inquired as to the terms of said contract nor any evidence that Respondent had reason to believe there was something amiss with said contract I find no support for an allegation that Respondent participated in or facilitated Chatam in the unauthorized practice of law by virtue of Chatam having a contingent fee contract. Therefore said complaint should be dismissed

e. FIFTH PRIMARY COMPLAINT-MANAGEMENT AND DIRECTIN LITIGATION BY A NON-LAWYER

Fifth: An additional primary complaint was the allegation that Respondent's representation was being managed and directed by a non-lawyer.

As a part of the allegation that Respondent participated in or facilitated Chatam in the unauthorized practice of law is the question of whether Chatam directed, managed, controlled the litigation or otherwise interfered with Respondent's exercise of independent professional judgment.

Unquestionably a lawyer who surrenders his/her independent, professional judgment to a non-client, third party, because that party is paying his fee would be violating his/her professional responsibility and engaged in or facilitating the unauthorized practice of law. That for a lawyer to permit or acquiesce in a non-lawyer non-client controlling, directing, managing or otherwise interfering with a lawyer's independent professional judgment is without question an ethical violation. The question here is did such occur.

There are some generally accepted situations where the argument can be made that such regularly occurs. The most prevalent would be in the liability insurance situation. Such is where a liability carrier hires the lawyer to represent the insured under a liability insurance policy. Clearly the insured is the client. It is also clear the carrier determines the limit of attorney's fees, establishes the budget for defense, discovery expenses and retention of experts. Often requiring retained counsel to submit a proposed budget at the outset of litigation and further the insured has no control over the litigation other than perhaps then to make demand that the liability carrier settle the case within the terms and limits of the insurance policy. Other than that the liability carrier and the lawyer retained manages the defense of claims. Complainants distinguish that from the present situation on the basis that the premium has already been paid for the insurance, and the action is defensive and if the action is successful the insurance carrier and/or the insured receive no affirmative benefit. One may wonder if that is a distinction without a difference in that a favorable result reduces the amount that the insurance and/or the insured would have to pay to the claimant which results in a benefit i.e. a negative liability. Be that as it may, please see Exhibit 19 pg. 64. for discussion thereon

Additionally, the record establishes that Chatam has never examined witnesses, prepared memorandums of law, done oral arguments such as opening statements or closing arguments nor has he drafted contracts or pleadings/motions nor does he prepare and sign documents in COTA's Regular Division (Exhibit 19 pgs. 59-60).

See also Respondent's statement (Exhibit 19 pgs.45-49, 62-65 and Exhibit 9 (affidavits of property owners) to the effect that Chatam never interfered with Respondent's professional and independent judgment and that Respondent consulted with the property owners as to the various issues and settlement questions and that the property owners made the ultimate decisions predicated upon the advice of the Respondent.

CONCLUSION AS TO COMPLAINT OF MANAGEMENT
OF LITIGATION BY A NON-LAWYER

It is clear that Chatam participated with the property owner in making decisions as to whether to commence the appeal process and was extensively engaged in the process up to the filing of the notice of appeal in the regular division of the Court of Tax Appeals prior to Respondent being retained to represent in the case. Once Respondent was retained and entered her appearance, the evidence would strongly suggest that Chatam's involvement thereafter was nothing more and nothing less than as a tax consultant dealing with issues of valuation. The evidentiary record establishes to the satisfaction of this investigator that Respondent never surrendered her professional independent judgment and did not permit or allow Chatam, or any other non-lawyer non-client,

to interfere with her judgment or independence or to otherwise manage, direct or control the litigation. The complaint as to the management and directing of litigation by a non-lawyer should be dismissed

V. COLLATERAL ISSUES

Unsupported inflammatory issues

I am particularly concerned with the "Order" of October 10, 2012, supplied by Complainants to the Office of Disciplinary Administrator (See Exhibit 5 pgs. 56-60) and for support of its complaint versus Respondent as well as the Order On Reconsideration (Exhibit 16 pgs. 144-149) wherein allegations, suggestions and/or it is implied that the following has occurred with Respondent's involvement.

1. Solicitation (Exhibit 5, pg. 56, Exhibit 16, pg. 144);

2. Feeder relationships (Exhibit 5, pg. 56, Exhibit 16, pg. 145);

3. Horse trading (Exhibit 5, pg. 56, Exhibit 16, pg. 145);

4. Filing a multitude of frivolous tax appeal cases (Exhibit 5, pg. 57, Exhibit 16,pg.145).

Such allegations, suggestions, or the implying of same as to the conduct of a lawyer can only be considered as inflammatory and an effort to create hostility. To make such allegations, or to raise such issues, in a true judicial body without a good faith basis of law and fact would subject a lawyer to sanctions in the courts of this state.

As to the present matter the Complainants acknowledge that, in fact, they have no evidence of Respondent engaging in solicitation. The only evidence is that Respondent never participated in seeking or obtaining representation and was not involved until Chatam, the tax consultant, retained her after the case was appealed to COTA's regular division (Exhibit 19, pgs. 20-23)

Horse trading, i.e. the egregious practice of offering unjustified benefits to the other side in a number of cases in return for unjustified reduction of benefits or dismissal of claims in a number of cases. In parochial terms it is "I'll give you five and you give me five." Not only would such create a conflict of interest as found by COTA in its Order of October 10, 2012, (Exhibit 5) and it's Order On Reconsideration (Exhibit 16) it would be an egregious violation of attorneys' duties and responsibilities to a client. However, Complainants acknowledge they have no evidence of such conduct. (Exhibit 11, pgs. 95-99Judge Sheldon's statement; Exhibit 12, pgs.26=27 Judge Wohlford's statement) and, Respondent not only denies participating in such conduct but recounts when a county made such a proposal to her which she refused (Exhibit 19, pg. 58. Respondent's statement).

To include such an allegation in material forwarded to the Office of Disciplinary Administrator as support for complainants' efforts to secure sanctions while knowing there was no evidentiary support must be presumed to be an effort to taint the environment and to appeal to passion and prejudice. Hardly the role for one who cloaks themselves with the title of judge.

Finally, in section D of Exhibit 5 and Section 1x of Exhibit 16 being the Order of October 10 and the Order On Reconsideration complainants assert in No. 4 at pages 145-149 that filing a multitude of frivolous cases allegation and number 5 last minute dismissals of vast number of cases in the Regular Divisions, constitutes unethical conduct. These allegations have heretofore been referred and discussed above (See 1V. B. above). For purposes here the writer merely comments that the evidence does not establish the filing of frivolous appeals by Respondent and amply establishes why COTA's own procedures, policies, and practices would contribute to (if not require) "last minute dismissals."

Paragraphs 6, 7 and 8 of Exhibit 5 Section D and V1.-V11 of Exhibit 16 would appear to be policy and/or political considerations reflecting concerns as to how the process works in actual practice. Perhaps some of the concerns of last minute dismissals could be minimized if COTA required counties to more timely provide the "expert report" and/or other evidence that they will rely on which might well expedite settlement discussions.

CONCLUSION AND OBSERVATIONS AS TO COLLATERAL ISSUES

One of complainants' primary allegations is that the Rspondent participates in and/or facilitates Chatam, the tax consultant, to engage in the unauthorized practice of law. Of course, if such was supported by the evidence it would be a serious violation of the KRPC. It does seem, however, that the evidence does establish reasonable grounds to believe that the complainants engaged in permitting and/or facilitating the unauthorized practice of law by permitting counties and other entities to appear in COTA's regular division and to present a counties' or entities' position and oppose taxpayers by non-lawyer representatives, particularly in light of the Attorney General's Opinion 93-100, Exhibit 18 ,which was provided to COTA's predecessor, the Board of Tax Appeals, while Judge Wohlford was a member of that agency.

As to the other inflammatory and unsupported suggestions or allegations I believe the review set forth above is probably the extent of proper comment given this writer's assignment.

VI. FINDINGS OF FACT

1. Respondent is a lawyer practicing in a firm established by her husband and herself. They office in Leawood, Johnson County, Kansas. She was admitted to practice in 1981, and has her bar number is 10983.

2. Complainants are Judge Sam Sheldon of the Kansas Court of Appeals of which he has been a member since 2012 and Judge Trevor Wohlford has been a member of COTA two years but he was a member of its predecessor and/or an employee of the Board of Tax Appeals since2005.

3. Complaint was made to the Office of Disciplinary Administrator by letter of October 4, 2012 (Exhibit 1) and Memorandum of Court of Tax Appeals dated October 4, 2012 subject of Ethical Implications of Coordinated Services Provided By Lay Tax Consultant And Licensed Attorney (Exhibit 2) and accompanied by an undated Statement of Indicated Facts and Conclusions prepared by Judge Wohlford in support of Exhibit 1 (Exhibit 3).

4. Exhibit 3, Statement of Indicated Facts And Conclusions was prepared by Judge Wohlford prior to the September 18, 2012, show cause hearing.

5. The September 18, 2012, show cause hearing was, primarily, supposedly to deal with who signed the notice of appeal and whether the signature was sufficiently defective or improper as to defeat subject matter jurisdiction and who was the real party in interest.

6. The judges of the Kansas Court of Appeals by virtue of Exhibit 3, Statement of Indicated Facts And Conclusions had determined, at least preliminarily, that Chatam engaged in the unauthorized practice of law and Respondent participated, assisted, or facilitated Chatam in engaging in the unauthorized practice of law. Further, that Respondent had engaged in the filing of frivolous cases and assisted or participated with Chatam in champertous conduct. All prior to the show cause hearing of September 18, 2012, (See Wohlford's statement Exhibit 12 pgs. 10-11).

7. Respondent never drafted or participated in negotiating or otherwise participating in arranging for the contract between Chatam and property owners/taxpayers.

8. Respondent never knew of the content of the contract between Chatam and the property owners/taxpayers or its terms and conditions prior to the September 18, 2012, show cause hearing.

9. Respondent never participated, or had any role, in Chatam obtaining representation of property owners/taxpayers or the determination that a challenge/appeal to the property tax or property valuation should be commenced.

10. Respondent never participated until she was engaged/retained to provide legal services once the process reached the stage of a notice of appeal to the regular division of the Kansas Court of Tax Appeals.

11. Respondent was paid for such representation monthly on the basis of her regular hourly rate.

12. Respondent charged Chatam, the tax consultant, her regular hourly rate and he never received any discount.

13. Respondent was paid her regular hourly rate for the services rendered whether the appeal was successful or not.

14. Respondent never received any portion of the fee received by Chatam if the appeal was successful; she only received her regular hourly rate for services rendered.

15. Respondent never paid any money to Chatam.

16. Respondent never surrendered her independent, professional judgment nor did she permit Chatam, the tax consultant, to direct, manage or control the litigation once she was retained.

17. Respondent consulted with the property owners/taxpayers on issues such as settlement, trial, or dismissal and they made the final decisions.

18. COTA rules and practices required Respondent to provide her expert witness report by 180 days from discovery order but 60 days before discovery concluded.

19. COTA rules and practices only required counties to provide Respondent their expert witness report 20 days prior to hearing (Trial).

20. Because the county's expert witness report was received only 20 days prior to hearing (Trial) Respondent may only then consult with client regarding settlement, negotiations with county, trial, or dismissal.

21. Many cases are dismissed because the county agrees with Respondent's position.

22. Many cases are dismissed because Respondent and the property owners determine that they and the county are not so far apart that they and the county cannot arrive at an agreed valuation and enter a stipulation and settlement and dismissal.

23. Some settlements which result in a dismissal actually result in agreed future reduction of valuations for future years because the county has insufficient funds to have the current year valuation reduced and have to refund taxes already paid and to do so with interest.

24. Some appeals are filed on the basis of income and expenses and rental rolls but when a settlement cannot be agreed on the taxpayer determines that they do not wish to pay the cost of hiring a professional appraiser and spending the months (or longer) awaiting an uncertain result and decides to dismiss.

25. Neither the Judges of the Court of Tax Appeals, complainants herein, nor the staff attorneys, ever examined the files of the appeals dismissed nor did they determine their content hence they have no basis for a conclusion that the case was frivolous.

26. Respondent's percentage of cases filed that were dismissed is:
2009 – 45.1%
2010 – 49.5%
2011 – 50.2%

27. In Kansas District Courts, statewide, the percentage of civil cases, not including divorces, for the past ten years, as reflected in Exhibit 15, the number of filings and terminations may vary slightly from year to year but it would appear fiscal year 2012 summary is representative of the prior years. If you do not consider the category of "uncontested cases" in the statewide district court summary the dismissal rate would be 48.8%. If you consider uncontested cases together with all other cases then the percentage of dismissal goes up from 48% to 67%. In comparing statewide district court case dismissals with Court of Tax Appeals case dismissals it must be remembered that all cases before the Court of Tax Appeals are contested cases.

28. All cases before COTA are contested cases.

29. The statistical information does not establish reasonable grounds, let alone probable cause, that the dismissed cases were frivolous cases.

30. Complainants have no evidence, or offered no evidence, other than the statistics that Respondent has filed frivolous cases and neither they, or their COTA staff attorneys reviewed the files for reasons why they were dismissed.

31. Respondent has asserted that she has filed or litigated no frivolous cases and believed her cases were all meritorious.

32. Respondent has not shared her fees with a non-lawyer.

33. A non-lawyer, Chatam the tax consultant, has not shared any of his contingent fees with Respondent, rather he paid Respondent her fee based on her normal hourly rate, on a monthly basis, whether the case was successful and he received his contingent fee or not.

34. Respondent never advanced expenses of litigation.

35. Respondent never had a conflict of interest in the representation she provided.

36. Respondent never engaged in, and Complainants acknowledged they had no evidence of her or anyone else engaging in:
(a) Solicitation; or
(b) Horse-trading

37. Complainants, in material provided the Office of Disciplinary Administrator included the inflammatory allegations, suggestions, or implied that Respondent engaged in the egregious conduct of "horse trading," that is agreeing to dismiss certain cases in return for getting what she wanted in certain other cases. Complainants have no evidence or knowledge of such conduct. The inclusion of such an allegation or suggestion can be for no purpose but to create bias and prejudice in the minds of the reader.

38. Further, as to the allegation or suggestion of solicitation, there is no evidence Respondent engaged in solicitation of clients, her only outreach was by lecturing or providing informational material to professional or business groups.

39. There is reasonable grounds to believe complainants have allowed counties and other entities to appear before the Court of Tax Appeals and present evidence while being represented by a non-lawyer.

40. There is some evidence that COTA judges actually dealt with objections to non-lawyer representatives examining a witness by asking the non-lawyer what their concerns were and then asking the question on behalf of the non-lawyer representative.

41. Complainants, as judges of the Kansas Court of Appeals, as successor agency to the Kansas Board of Tax Appeals, have had in their possession since 1993, Attorney General opinion 93-100 which opines that it would constitute the unauthorized practice of law to allow non-lawyers to appear and examine witnesses, make legal arguments or file pleadings.

42. Presumably arising from COTA decisions in the cases before it out of which these complaints arose the legislature has decided to clarify its intentions.

43. Pending before the Kansas House of Representatives, Committee on Appropriations, is House Bill No. 2413 the practical effect of which would be to rename and return the Court of Tax Appeals back to the Board of Tax Appeals as it was prior to the creation of the Court of Tax Appeals.

44. House Bill No. 2413 specifically provides, as an expression of legislative intent and clarity, that that it has no authority to determine who may sign appeal forms; determine who may represent taxpayers before the Board of Tax Appeals; decide what constitutes the unauthorized practice of law; nor to decide whether or not a contingent fee agreement is a violation of law.

45. At least some members and/or some committees of the Kansas legislature, through House Bill No. 2413, are expressing their concerns as to the conduct of the Kanas Court of Tax Appeals in connection with the matters that gave rise to the complaints filed herein.

46. The Kansas Court of Tax Appeals, being an administrative agency and a part of the executive branch of Kansas government its rulings and decisions are only entitled to deference within the area of its special knowledge and expertise.

47. The Kansas Rules of Professional Conduct, and their application and interpretation, are not within the special knowledge and expertise of the Kansas Court of Tax Appeals and therefore its' determinations in regard to supposed or alleged violations of KRPC are here given no deference.

VII. CONCLUSIONS AND RECOMMENDATIONS

CONCLUSION:

This matter involves a vast amount of documentary information of which this investigator spent many hours reviewing. Having participated as an investigator for the Office of Disciplinary Administrator in several matters and having in my professional career investigated numerous civil and criminal matters and conducted numerous inquisitions and grand jury proceedings I admit that this matter is unusual.

I believe the most relevant, material and probative information is contained within the transcripts of the interviews of the two Complainants and the Respondent.

The lack of evidence as to many of the allegations; the inclusion of inflammatory allegations or suggestions totally unsupported by any evidence; the reliance on statistics as to COTA cases without comparison to such statistics of other courts, as well as the preparation of legal and factual arguments prior to the September 18, 2012, show cause hearing suggest a bias or pre-determination by the COTA judges, complainants herein.

As a former prosecutor I recognize the longstanding rule that the bias and motives of a prosecutor in filing charges is immaterial as long as the charges are supported in fact and law. My conclusion is that the evidence seemingly supports a bias and pre-judgment by the complainants while serving as COTA judges, although such would not necessarily make their complaint inappropriate if it was supported in law and fact.

Further, it is my conclusion that the relevant, material and credible evidence of probative value does not establish reasonable grounds to believe that the Respondent violated the Kansas Rules of Professional Conduct as alleged and the complaint should be denied and dismissed.

VIII. RECOMMENATIONS:

Having concluded that there is no reasonable grounds, let alone probable cause, to believe Respondent has violated the Kansas Rules of Professional Conduct perhaps a recommendation would not be appropriate.

Further, I am of the impression that the Office of Disciplinary Administrator, on review of this report and a review of exhibits, is empowered to come to its own conclusion, perhaps some recommendations may be appropriate.

Because of the unusual background, circumstances, and actions of Complainants serving as judges of the Kansas Court of Tax Appeals, an administrative body of the executive branch, would it be appropriate and beneficial in the administration of the KRPC to request the Kansas Bar Association and its advisory committee to provide its expertise on the following questions:

1. Are administrative agencies which act in a quais-judicial manner entitled to determine if an attorney appearing before them has violated KRPC and, if so, are their determinations entitled to deference by the Office of Disciplinary Administrator?

2. Does a lawyer who bills monthly one who hires the lawyer on an hourly rate basis when the one who hires him is an intermediary between client and lawyer, and the intermediary is paid by the client on a contingent fee basis but there is no contingency to the lawyer's fee, violate the Kansas Rules of Professional Conduct by such an arrangement?

3. If the answer to number two above is in the affirmative does it matter that the lawyer, legitimately, has no knowledge of the terms and conditions of the arrangement between the intermediary and the client and/or does the lawyer have an affirmative obligation to determine the terms and conditions of the arrangement between the intermediary and the client?

4. Does a lawyer who files a complaint with the Office of Disciplinary Administrator violate KRPC if the complainant possesses no evidence in support of some of the allegations or suggestions of ethical violations?

IX. Time Involved:

I quit keeping track of the time expended in reviewing documents, conducting legal research, examining witnesses after expending 60 hours. I would estimate I have spent over 100 hours on this matter. Some of such time may have been occasioned simply by being perplexed by the nature of the complaint and possible motivations. But since I am not charging a fee perhaps my lack of proper timekeeping can be forgiven.

Respectfully Submitted,

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