

# **KANSAS PROBATE AND ESTATE ADMINISTRATION**

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Handling Ethical Issues in Probate  
Stephen M. Johnson  
19 August 2015

4. Handling Ethical Issues in Probate
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## Handling Ethical Issues in Probate

Stephen M. Johnson<sup>1</sup>

### 4. Handling Ethical Issues in Probate

The law has its own ethical rules and members of the bar are held to those standards.<sup>2</sup> Rarely must an attorney be prosecuted for criminal or civil misconduct since the legal profession polices and disciplines itself.<sup>3</sup> Much as the public loves to laugh at lawyer jokes and the brilliant comic opera duo of Gilbert & Sullivan mocked our profession in such classics as *Trial by Jury*, the legal profession conducts professional trials of its own members by a jury of peers in two ways.<sup>4</sup> First, the legal profession disciplines attorneys who fail to meet our noble professional's ethics standards.<sup>5</sup> Second, the legal profession honors rising stars and experienced attorneys who practice law well by serving clients with excellence and integrity.<sup>6</sup>

Kansas' legal ethics rules are located at Kansas Supreme Court Rule 226.<sup>7</sup> Numerous legal ethics issues arise in probate and estate planning work.<sup>8</sup> An attorney should use a written attorney client contract for each probate case or estate plan, outlining the client, the scope of representation, and other matters, to best protect the attorney and the client.<sup>9</sup>

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<sup>2</sup> Kansas' legal ethics rules were based in common law and were first codified at Chapter 7 of the Kansas statutes, specifically K.S.A. §7-104. *Kansas Ethics Handbook* (3<sup>rd</sup> ed. 2015), §1.2. Attorneys should consult two classic books on law firm management and practice development: *How to Start & Build a Law Practice* and *How to Get & Keep Good Clients*. Also highly recommended is John R. Price and Samuel A. Donaldson, *Price on Contemporary Estate Planning* (2015), Ch. 1.

<sup>3</sup> The legal profession's discipline does not *exclude* criminal or civil liability, but most of the law's ethical dictates can be enforced within the bar without resort to criminal prosecution or civil cases. Legal ethics are a layer of professional constraints to prevent the courts from being clogged with discipline cases.

<sup>4</sup> Gilbert & Sullivan, *Trial by Jury* (1874). This dynamic British duo was librettist (and attorney) Sir William Schwenck Gilbert (1836–1911) and composer Sir Arthur Seymour Sullivan (1842–1900). Intrepid souls who wish to indulge their literary and operatic taste should read Roger W. Badeker, "The Law is the True Embodiment: Gilbert & Sullivan for Lawyers," 84 J. Kan. Bar. 24 (No. 4, April 2015).

<sup>5</sup> Kansas' disciplinary process is outlined in *Kansas Ethics*, Ch. 11.

<sup>6</sup> The Martindale Hubbell and Chambers USA ratings. The media, informed by the legal community, also names Super Lawyers, the Best of the Bar, Rising Stars, and other awards. The American College of Trust and Estate Counsel (ACTEC) (whose excellent legal ethics commentaries are cited as "ACTEC commentary") is an invitation only group of distinguished estate planning and probate attorneys.

<sup>7</sup> Kansas rules are cited as "KRPC." Missouri's rules are located at Missouri Supreme Court Rule 4.

<sup>8</sup> Indeed, the Bar Plan estimates that "[c]orporate and estate and trusts" cases "were 25% of open claims." *Kansas Ethics*, §1.3.2.

<sup>9</sup> *Kansas Ethics*, Ch. 14.

## **A. Identifying your client**

### *1. Client*

Who is your client? Is the client the person who seeks out the attorney's services?<sup>10</sup> The person who pays for the attorney's services? The person who helps an elderly relative at the appointment? A client is "a person or entity that employs a professional for advice or help in that professional's line of work."<sup>11</sup> Several elements are in play: a client must be (1) a person or entity (2) employing (3) a professional (4) for advice or help (5) within the professional's realm of expertise. Kansas law holds that someone becomes a client when she "seeks legal advice" from an attorney.<sup>12</sup>

#### *A. Person or entity*

Just as a non-charitable trust must have ascertainable beneficiaries and a corporation or LLC must have a business purpose, so a client must be a person or entity.<sup>13</sup> Attorneys are not hired by causes or ideas or nebulous groups; attorneys are hired by concrete, discreet people or entities – these people pay an attorney's bills. And "it is essential to identify the person by whom the lawyer is retained."<sup>14</sup>

#### *B. Employing*

Most attorneys work as independent contractors for a client – we are hired to do a particular task for the client (or an ongoing series of tasks) – but we are not full time employees of the client.<sup>15</sup>

#### *C. Professional and Realm of Expertise*

This issue evokes our duty of competence (Rule 1.1), also discussed below. Kansas and Missouri do not have attorney specializations, but most of us confine our practices to particular areas, where we have interest, knowledge, experience, and expertise. A Kansas attorney may only call herself a "specialist" if she has been duly certified as a specialist in that practice field.<sup>16</sup>

As attorneys (and especially as solo or small firm attorneys), we must network, refer cases, and seek input from other professionals.<sup>17</sup> As professionals we know the devil is in the details. And experience is a most valuable tutor.

## *2. Duties to Our Clients*

An attorney owes duties of competence, good communication, "reasonable diligence and

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<sup>10</sup> Apparently so – "A person becomes a client for purposes of privilege and confidentiality rules when that person contacts an attorney seeking legal advice." *Kansas Ethics*, §5.4.4 (citing *City of Hutchinson v. Gilmore*, 16 Kan. App. 2d 646, 649 (1992)).

<sup>11</sup> Bryan A. Garner, *Black's Law Dictionary* (8<sup>th</sup> ed., 2004), 271.

<sup>12</sup> K.S.A. §60-426; *Kansas Ethics*, §4.2. The client need not have paid a fee, executed an attorney client contract; an attorney client relationship can be implied by the parties conduct. *Kansas Ethics*, §4.2.

<sup>13</sup> KRPC 1.13 (organization as client) and ACTEC commentary, pp. 127-130.

<sup>14</sup> *Kansas Ethics*, §3.3.2; KRPC 2.2, Comment 3.

<sup>15</sup> An attorney who is an employee of a client – e.g. in-house counsel at a company or a trust officer at a trust company – is not practicing law, since only a law firm owned entirely by attorneys can practice law.

<sup>16</sup> KRPC 7.4(d); *Kansas Ethics*, §10.3.

<sup>17</sup> Many legal ethics and malpractice cases involve solo practitioners or small firms, not large firms, since large firms often have more ethical and liability shields in place and good ways to manage risks.

promptness,” confidentiality, to avoid conflicts of interest with current clients, and to zealous advocate for her client, in exchange for reasonable and well defined fees. A good attorney client relationship has mutual loyalty and trust, good communication and candid advising and counselling, hard work producing excellence, and the attorney being rewarded by his fee and the client’s gratitude and friendship. The attorney must also satisfy her duties to former clients.<sup>18</sup> And the attorney has duties to her prospective clients.<sup>19</sup>

### *Loyalty*

Loyalty is the hallmark of an attorney’s relationship with clients.<sup>20</sup> Loyalty is the connective tissue, the nucleic binding force, which holds together the various threads of the attorney client relationship, weaving a rich tapestry of serving clients and the community. The Kansas Court of Appeals highlighted loyal attorney client relationships: “The relationship between an attorney and his client is one of the highest trust and confidence and . . . the attorney must observe the utmost good faith and candor and must not allow his private interests to conflict with those of his client.”<sup>21</sup> The “the duty to the client” is foremost.<sup>22</sup>

Undergirding the duty of loyalty to clients is acting as a client’s agent or advocate. An attorney’s interests must yield to the client’s interests. Attorneys should take care to avoid business transactions, information, gifts, literary or media rights, providing financial assistance, or other situations where the attorney’s personal interests would conflict with the client’s interests.<sup>23</sup>

### *Competence – Rule 1.1*

An attorney must competently represent a client.<sup>24</sup> If an attorney offers services in practicing probate law, estate planning, business law, and/or real estate law, competence to draft the documents is required.<sup>25</sup>

### *Communication – Rule 1.4*

An attorney must communicate with the client.<sup>26</sup> Good communication between an attorney and client requires accurately representing a case’s status, affirmatively

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<sup>18</sup> KRPC 1.9 and ACTEC commentary, pp. 123-126. Query: How does one ensure a former client is indeed a *former* client? Withdrawal from representation letter? Estate planning closing letter? See KRPC 1.16 (declining or terminating representation) and ACTEC commentary, pp. 140-143. *Kansas Ethics*, §2.5, Kan. S.Ct. Rules 1.09 and 117, D. Kan. R. 83.5.5 (terminating representation); *Kansas Ethics*, §2.5.1 (declining representation). When an attorney declines or terminates representation but has been paid an unearned fee or expenses, any unearned money must be refunded. KRPC 1.16(d) and *Kansas Ethics*, §2.5.4(b).

<sup>19</sup> KRPC 1.18 and ACTEC commentary, pp. 144-146.

<sup>20</sup> KRPC 1.7 comment [1] (“Loyalty is an essential element in the lawyer’s relationship to the client”).

<sup>21</sup> *Kansas Ethics*, §5.1 (quoting *Alexander v. Russo*, 1 Kan. App. 2d 546 (1977)).

<sup>22</sup> *Kansas Ethics*, §5.2.5.

<sup>23</sup> KRPC 1.8(b), (c), (d), and (e); *Kansas Ethics*, §§5.6 – 5.6.2.

<sup>24</sup> KRPC 1.1 (“A lawyer shall provide competent representation to a client”). ACTEC, pp. 15-31. *Kansas Ethics*, §2.4.1.

<sup>25</sup> *Kansas Ethics*, §2.4.1(c). But as attorneys and counselors, we are “more than” mere “legal technician[s]” as we serve our clients. *Id.*, §3.2.1.

<sup>26</sup> KRPC 1.4 and ACTEC commentary, pp. 56-61. *Kansas Ethics*, §2.4.3.

communicating with clients, and responding to client inquiries promptly.<sup>27</sup>

#### *Diligence and Promptness – Rule 1.3*

An attorney must work diligently on the client's behalf and promptly deliver a high quality work product.<sup>28</sup> Attorneys must work and communicate promptly and avoid procrastination.<sup>29</sup>

#### *Confidentiality – Rule 1.6*

An attorney must preserve client confidences.<sup>30</sup> When a client speaks candidly with the attorney or allows the attorney a glimpse into her mind, her goals, and what she hopes to achieve through the legal work, the attorney shows the client respect by keeping the information confidential. Closely related to confidentiality is the attorney client privilege.

Under Kansas law, four parts create the attorney client privilege: (1) a communication (2) between a lawyer and a client (3) in the course of their professional relationship (4) in professional confidence.<sup>31</sup> Confidentiality is the touchstone: part of being a discreet counselor and keeping a client's confidence is "avoid[ing] unnecessary disclosure," perhaps even of estate planning or probate client lists.<sup>32</sup>

#### *Conflicts of interest*

An attorney must avoid taking on cases that would cause conflicts of interest with current clients.<sup>33</sup> We discuss conflicts of interest in more depth later.

#### *Fees – Rule 1.5*

Attorneys work hard and an attorney is entitled to reasonable compensation for her work, but fees need to be discussed openly and honestly with clients, and should be in writing to protect the attorney and the client.<sup>34</sup> Rule 1.5 covers attorney fees.<sup>35</sup> Attorneys fees are granted to the party who brings a successful will contest.<sup>36</sup> While much estate planning and/or probate work involves great discretion and sensitive family dynamics and financial matters, fee data is subject to disclosure and not protected by our duty of confidentiality.<sup>37</sup>

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<sup>27</sup> *Kansas Ethics*, §2.4.3 and notes 91-92. Your communication duty includes communicating about settlement opportunities. *Id.*, §2.4.3.

<sup>28</sup> KRPC 1.3 and ACTEC commentary, pp. 51-55. *Kansas Ethics*, §2.4.2.

<sup>29</sup> KRPC 1.3's Comment adds "no professional shortcoming is more widely resented than procrastination ... unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." *Kansas Ethics*, §2.4.2 and n. 89 (collecting Kansas breach of diligence cases).

<sup>30</sup> KRPC 1.6 and ACTEC commentary, pp. 72-90. *Kansas Ethics*, §2.5.4(a); Ch. 4.

<sup>31</sup> K.S.A. 60-426; *Kansas Ethics*, §4.2.

<sup>32</sup> *Kansas Ethics*, §4.3.

<sup>33</sup> KRPC 1.7 and ACTEC commentary, pp. 91-110. See KRPC 1.8 (conflicts of interest for current clients with specific rules) and ACTEC commentary, pp. 111-122.

<sup>34</sup> KRPC 1.5 and ACTEC commentary, pp. 62-71.

<sup>35</sup> Cf. K.S.A. §59-1717.

<sup>36</sup> K.S.A. §59-1504; *Estate of Gardiner*, 23 P.3d 902 (2001).

<sup>37</sup> *Kansas Ethics*, §4.5.8(g).



### *Communication and Advertising (and Social Media)*

Good communication is vital to any relationship, and the attorney client relationship is no exception. A client should be comfortable talking with you during business hours, and phone calls, voice mails, letters, and emails need to be promptly returned. Good communication tools help tell your law firm's story and showcase you and/or your colleague's expertise. Attorneys are now allowed to advertise, within boundaries.<sup>38</sup> *Bates* and its line of cases teach four things: (1) the state may prohibit false or misleading speech; and (2) a state may limit truthful and non-deceptive communications if (a) the state has a substantial governmental interest, (b) the state's regulation directly advances the state's interest, and (c) the state's regulation is narrowly tailored to achieve the state's goal.<sup>39</sup>

Kansas' rule includes attorney advertising, but sweeps more broadly to encompass all communication – declaring that an attorney “shall not make a false or misleading communication” about (a) the attorney *or* (b) the attorney's services.<sup>40</sup> There are three tests of a “false or misleading communication”: (1) “a material misrepresentation of fact or law” or “omit[ting]” a “necessary” fact to provide context, (2) “likely to create an unjustified expectation about results the lawyer can achieve,” or (3) compares the lawyer's services with other lawyer's services without being “factually substantiated.”<sup>41</sup>

An attorney may “advertise services through written, recorded or electronic communication, including public media.”<sup>42</sup> Electronic or public media includes social media (e.g. LinkedIn, Facebook, or YouTube), firm websites, blogs, or other online advertising.<sup>43</sup> Firm names and letterhead and other communications tools or materials are regulated.<sup>44</sup> While most attorneys “race ahead to embrace the promises of the Internet,” take care since legal ethics “transcends formats and media.”<sup>45</sup> An attorney may communicate her practice areas, along with legal areas she does not practice.<sup>46</sup>

### *Delegation*

Take care when assigning or delegating work to your staff: the client has hired you as an attorney and is paying your fee, so be careful about outsourcing or off-shoring law practice activities.<sup>47</sup> Support staff can help streamline a law practice, keep clients comfortable and pleased, but the attorney, not the staff, is responsible for the law practice

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<sup>38</sup> *Kansas Ethics*, Ch. 10; *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (allowing newspaper advertising by attorneys); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) (allowing an advertisement with a product picture advising to make a claim before the statute of limitations expired); *Shapiro v Kentucky Bar Association*, 486 U.S. 466 (1988) (allowing direct mail advertising by attorneys).

<sup>39</sup> *Kansas Ethics*, §10.1.

<sup>40</sup> KRPC 7.1; *Kansas Ethics*, §10.1.1.

<sup>41</sup> *Id.*

<sup>42</sup> KRPC 7.2(a); *Kansas Ethics*, §10.1.2.

<sup>43</sup> *Kansas Ethics*, §10.5.

<sup>44</sup> KRPC 7.5; *Kansas Ethics*, §10.4.

<sup>45</sup> *Kansas Ethics*, §10.6.

<sup>46</sup> KRPC 7.4(a); *Kansas Ethics*, §10.3.

<sup>47</sup> *Kansas Ethics*, §1.1.11; ABA Formal Opinion 8-451 (2008).

and producing high quality client work product.<sup>48</sup> As President Truman's desktop plaque famously read: "The buck stops here."<sup>49</sup> The attorney client contract should clearly outline which attorney and/or staff will handle different parts of the case and how much their fee is.<sup>50</sup> If a probate pleading gets filed late or a trust is improperly executed, the attorney is responsible, not the staff.

### *Practice Well*

Attorneys practice law – *practice* implies we as attorneys do not have the law perfect yet and we are not masters yet (indeed, we may never be), and carries a mantle of humility.<sup>51</sup> Practicing law well "does not mean perfection" or "the ability to predict changes in the law."<sup>52</sup> But if a (1) "specific possibility of a change in the law exists, (2) the attorney is aware of it, and (3) it directly impacts the client's matter," the attorney may have a legal duty to disclose the possible change to the client.<sup>53</sup> A case in point is the estate tax: an attorney with clients who had estate tax issues before Congress raised the estate tax exemption level might well have a duty to inform the clients about tax law changes, so the clients could proactively decide whether to update their estate plan.

A wise attorney should know what she knows and do it well, but also know what she does not know, and not settle for a mediocre work product. This takes us back to the attorney's competence to serve a client on a case in a given field.

### *Advice or Help*

Different legal services required different levels of advice or help.<sup>54</sup> An attorney gives legal opinions, "exercis[ing] independent professional judgment" and has a duty to "render candid advice."<sup>55</sup> Indeed, Rule 2.1 is "a hub that links to" the core of an attorney's professional duties, reflecting "historic and valued principles," including "independence, detachment, competence, and fidelity to each client."<sup>56</sup> Rule 2.1 is about mandatory conduct – we *must* or *shall* give independent professional judgment and it's our duty to render candid advice. We owe our clients "straightforward advice" reflecting our "honest assessment," even where our advice is "unpalatable to the client."<sup>57</sup> Our unvarnished advice coupled with the confidentiality of our relationship allows our clients to "fully and frankly communicate" with us as their attorney.<sup>58</sup> Rule 2.1 commands us to (1) exercise judgment with (2) professional detachment.<sup>59</sup>

The attorney owes her client two kinds of judgment: first, *independent* judgment, and

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<sup>48</sup> *Kansas Ethics*, §1.8.3. Indeed, "when competent representation ... requires implementation of certain office procedures or staff training, the attorney is responsible for any failure to do so." *Id.*, §2.4.1(f).

<sup>49</sup> Harry S. Truman, *Where The Buck Stops* (Warner Books, 1989).

<sup>50</sup> *Kansas Ethics*, §§14.5 – 14.11.

<sup>51</sup> Pride goes before the fall. *Proverbs* 16.18.

<sup>52</sup> *Kansas Ethics*, §2.4.1(g).

<sup>53</sup> *Id.*

<sup>54</sup> KRPC 2.1 (advisor); ACTEC commentary, pg. 147.

<sup>55</sup> KRPC 2.1; *Kansas Ethics*, §3.2.1.

<sup>56</sup> *Kansas Ethics*, §3.2.1 (citing Robert Contois, *Ethical Considerations*, 77 Tul. L. Rev. 1223 (2003)).

<sup>57</sup> KRPC 2.1, Comment 1 (2008); *Kansas Ethics* §3.2.2.

<sup>58</sup> KRPC 1.6; *In re Bryan*, 275 Kan. 202, 212 (2003); *Kansas Ethics*, §4.3.

<sup>59</sup> *Kansas Ethics*, §3.2.2.

second, *professional* judgment. Independent means serving as a legal and ethical sounding board for a client's ideas and advising the client if a court or another party is unlikely to accept the client's idea. Giving independent advice could put the attorney and her firm at odds with the client or potentially lose business, but the attorney has sworn an oath to uphold the rule of law and represent the client before all courts with honor and honesty.

Professional judgment connects to the attorney's expertise and maturity as a learned member of the bar. Attorneys often limit their practice areas to realms where they have knowledge and experience, deferring to the experience of older attorneys, and receiving deference from younger, less experienced, brethren at the bar defer.

### *Giving Candid Advice*

An attorney's duty to render candid advice arises from two sources: one, the knowledge that the attorney and client's conversations are confidential and as sacrosanct dialogue, are protected by the attorney client privilege, and two, that each attorney has sworn an oath to uphold and defend the U.S. Constitution, state law, and the rule of law and to present only reasonable arguments with a spirit of candor to any tribunal.<sup>60</sup> A good rule of thumb: if the client lies, the attorney's reputation at the bar dies. The attorney's duty of candor to the court "trumps" the attorney's duty of confidentiality to the client if a client seeks to perpetrate a fraud on the court.<sup>61</sup>

A sophisticated client may only want legal counsel and her request should be respected.<sup>62</sup> But many clients, including business clients, want attorneys to provide legal advice and counsel on other issues too.<sup>63</sup>

In the estate planning and probate and especially tax realm, competent representation is vital. Probate and estate planning involve arcane ideas and can be complex to the uninitiated.

### *Tax Advice*

Tax planning is vital for entrepreneurs, business owners, and wealthy clients. But navigating the IRS Code (or counselling a fiduciary to do so), knowing your Circular 230 responsibilities can be daunting.<sup>64</sup> If you advise clients on tax matters, when the IRS does an audit or asks questions, the client will rely on the attorney's advice. Will your tax advice stand up to an IRS audit or Tax Court scrutiny? If not, avoid tax law and defer to those with expertise to handle those cases. Practicing business law requires a working

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<sup>60</sup> This rule shares connective tissue with KRPC 3.3. ACTEC commentary, pp. 151-152. This also connects to other people. KRPC 4.1; ACTEC commentary, pg. 156.

<sup>61</sup> KRPC 3.3(b); *Kansas Ethics*, §4.5.8(d).

<sup>62</sup> KRPC 2.1, comment 3; *Kansas Ethics*, §3.2.3.

<sup>63</sup> Indeed, as Nobel Laureate attorney and statesman Elihu Root (1845-1937) stated: "half the practice of a decent lawyer . . . [is] telling would be clients that they are damned fools and should stop." *Kansas Ethics*, §3.2.3. Title opinions, loan opinions, securities opinions, and tax opinions raise Rule 2.2 issues and/or IRS Circular 230 issues too. *Kansas Ethics*, §3.3.

<sup>64</sup> See Circular 230 discussion in "Handling Tax Reporting Obligations" paper.

knowledge of business dynamics, market instincts, and even entrepreneurial savvy.<sup>65</sup>

### *Attorney Client Relationship*

The attorney client relationship is a paragon of society and a hallowed institution in the law, literature, and film.<sup>66</sup> But how is the attorney client relationship formed?<sup>67</sup> Attorneys take care: “In Kansas an attorney client relationship may exist without [1] payment of a fee *and* without [2] a contract or specific agreement to serve as an attorney.”<sup>68</sup> The attorney client relationship can “be implied from conduct alone” if there is “evidence of a confidential relationship” whether [1] legal advice is given or [2] confidential information was provided when the circumstances show “expectation” of an attorney client relationship.<sup>69</sup>

If someone calls you and you answer the question, or you listen to their story, are they a client of your firm?<sup>70</sup> What if they walk into your office without an appointment for a consult – do you owe them any duty? Does a client have to sign a written agreement? How about unsolicited emails, texts, voicemails, or social media encounters? When you go to a cocktail party with your spouse or dinner with your family, or someone asks you a question at the Symphony or Royals game, is that a client?

If you are representing an estate or trust, your client is the executor, personal representative, or trustee. What happens if a conflict arises between the executor and the beneficiary? What if the executor *is* the beneficiary?<sup>71</sup> What if there are several siblings or a surviving spouse and adult children who are all trustees, and they don’t agree?

A personal representative has the right to select her attorney.<sup>72</sup> The attorney represents the personal representative, not the estate as an entity.<sup>73</sup> The personal representative is a fiduciary.<sup>74</sup> The estate or trust heirs may be the attorney’s client.<sup>75</sup> Kansas law defines the boundaries of the attorney client privilege.<sup>76</sup>

Does an attorney have a duty to a non client? Kansas uses a six part test to see if the attorney has a duty to a non client: (1) the extent to which the transaction was intended to

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<sup>65</sup> Skadden Arps announced a mandatory MBA-style program for its business lawyers. Natalie Kitroeff, “Why a Top Law Firm Teaches Its Lawyers to Be More Like MBAs,” Bloomberg Business, 16 June 2015.

<sup>66</sup> *Kansas Ethics*, Ch. 2.

<sup>67</sup> *Kansas Ethics*, §2.2.

<sup>68</sup> *Kansas Ethics*, §2.2.

<sup>69</sup> *Kansas Ethics*, §2.2. Indeed, the Restatement says the relationship starts when (1) “a person manifests to a lawyer the person’s intent that the lawyer provide legal services” and (2) the lawyer (a) “manifests consent” or (b) “fails to manifest lack of consent . . . and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.” Restatement of the Law Governing Lawyers (2000), §14, quoted in *Kansas Ethics*, §2.2.

<sup>70</sup> Arguably so. *Kansas Ethics*, §4.2.

<sup>71</sup> See ACTEC comment to MRPC 1.2, pg. 35.

<sup>72</sup> *Estate of Adams*, 237 Kan. 556 (1985); *Estate of Weaver*, 214 Kan. 550 (Kan. 1974).

<sup>73</sup> *Murdock v. First National Bank*, 220 Kan. 459 (Kan. 1976).

<sup>74</sup> *Estate of Heseflow*, 21 Kan. App. 2d 761 (1995); *Kerschen*, 12 Kan. App. 2d 370.

<sup>75</sup> *Pizel v. Zuspahn*, 247 Kan. 54 (1990).

<sup>76</sup> K.S.A. §60-426; V.A.M.S. §491.060(3) (attorney client privilege exists for the client’s benefit).

affect the plaintiffs, (2) the foreseeability of harm to the plaintiffs, (3) the degree of certainty that the plaintiffs suffered injury, (4) the closeness of the connection between the attorney's conduct and the injury, (5) the policy of preventing future harm, and (6) the burden on the profession of the recognition of liability under the circumstances.<sup>77</sup>

Kansas courts use a three-prong approach to analyzing these cases: (1) "First, if the client of the attorney and the third party are adversaries, no duty arises under *Nelson*." (2) "Second, if the attorney and client never intended for the attorney's work to benefit the third party, then no duty arises under *Bank IV Wichita* and *Jack*. Third, if it is possible to conclude that the attorney and client intended for the attorney's work to benefit the third party," the Court weighs the *Pizel* factors in the balance "to determine whether a duty arose in the particular circumstances at hand."<sup>78</sup>

### **B. Defining the scope of representation**

Attorneys advise and counsel clients.<sup>79</sup> Most of our work as attorneys involved detailed representation – discussing estate planning options with a client, recommending a course of action, drafting the documents, and witnessing the client signing the documents. Your attorney client contract should define your scope of representation for each client.<sup>80</sup> Kansas law helps define the scope and nature of the attorney client relationship.<sup>81</sup>

Of potential concern to attorneys, Rule 1.2(a) looks to "require the lawyer ... to specifically consult with the client about even strategy and tactical issues," but the lawyer must only consult, not abide by the client's strategy or tactics ideas.<sup>82</sup>

If you are drafting a trust for a client, are you talking with their bank or investment broker to re-title accounts and fund the trust? Are you filing a real estate deed to transfer the family home from husband and wife into the trust? Are you responsible for keeping in contact with the client over time as their life circumstances and needs change (marriage, divorce, remarriage, birth of children, grandchildren, retirement, inheritance, job loss or major promotion)? Are you responsible for advising the client of potentially relevant tax law changes (e.g. Congress lowers the estate tax threshold or changes the income tax laws, the IRS lifts the annual gift tax exclusion, or the IRS decides to audit any family limited partnership transaction)?<sup>83</sup> Does the client know and understand this? Is the client prepared to pay your firm for additional work? Does the client get a free document

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<sup>77</sup> *Wilson-Cunningham v. Meyer*, 16 Kan. App. 2d 197, 201-202 (1991), quoting *Pizel, supra*, 247 Kan. at 68-69. *Wilson* involved a divorcing husband who died intestate before the divorce decree was filed, so his soon-to-be ex wife received her spousal share of the husband's estate. The husband's children from another marriage sued the attorneys, arguing the attorney's failure to timely file the decree reduced the children's inheritance. But the *Wilson* Court found that the attorney "should not be found to owe a legal duty to the [children] for actions taken or not taken in their father's divorce." The *Wilson* Court noted that "[a]ll six [*Pizel*] factors must be considered and none can be deemed conclusive." 16 Kan. App. 2d at 205.

<sup>78</sup> *Estate of Johnson v. Weigers*, 46 P.3d 563 (2002).

<sup>79</sup> *Kansas Ethics*, §3.1.

<sup>80</sup> *Kansas Ethics*, §14.4.

<sup>81</sup> KRPC 1.2; *Kansas Ethics* §2.3.

<sup>82</sup> *Kansas Ethics*, §2.3.1(a); *In re Flack*, 272 Kan. 465, 47 (2001) (attorney disciplined for not doing client's estate plan goals when he knew of client's medical and mental disability).

<sup>83</sup> *Kansas Ethics*, §2.4.1(g).

review every year or few years? Do you bill the client if they call or email you six months from now with a question about the documents or need a copy of their will sent to them?

### *Multijurisdictional Law Practice*

As our society becomes increasingly mobile and the technology allows us to communicate in real time with people around America and the world, the multijurisdictional practice of law has become a looming issue.

### *Practice of Law*

Defining the practice of law is a murky issue, where one could say “I know it when I see it.”<sup>84</sup> Kansas defines the practice of law as “Doing or performing of services in a court of justice, in any manner depending therein, throughout its various stages and in conformity to the adopted rules of procedure.”<sup>85</sup> We know that going into court, claiming to represent a client, signing briefs on a client’s behalf, and arguing the client’s case before the court is the practice of law. We know most courts allow *pro hac vice* admission to argue a case or sign on the brief in a jurisdiction where we are not a member of the bar, if we retain local counsel. Kansas allows *pro hac vice* attorney admissions.<sup>86</sup>

We know that we can advise a client on a matter of federal law so long as we are admitted to practice in at least one federal court *and* we tell the client we are not licensed in the other state or advising them on that state’s law. But can a Kansas attorney advise a client on forming a Delaware LLC? Can a Kansas attorney counsel a Missouri client on her will or trust if she is only licensed in Kansas? Take care when your law practice encounters jurisdictions where you are not licensed: the safe route is to hire local counsel.

## **C. Avoiding conflicts of interest**

Appearance is a key facet of conflict of interest: for better or worse, perception becomes reality.<sup>87</sup> Kansas law covers three types of conflicts of interest: (1) conflicts with a current client (Rule 1.7), (2) conflicts with a former client (Rule 1.9), and (3) imputed conflicts (Rule 1.10).<sup>88</sup> Let’s explore these three areas in turn.

### *1. Conflicts with a current client – Rule 1.7*

We cannot represent directly adverse interests of two concurrent clients unless (a) we have actual and reasonable belief of no adverse effect from our concurrent representation and (b) after consultation, both clients gives informed consent in writing.<sup>89</sup> The

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<sup>84</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>85</sup> *Kansas Ethics*, §1.8.1, quoting *State ex rel. v. Perkins*, 138 Kan. 899 (1934) and *State ex rel Stephan v. Williams*, 246 Kan. 681 (1990).

<sup>86</sup> Kan. S.Ct. Rule 116; *Kansas Ethics*, §1.1.5. See Mark D. Hinderks, *On the Proper State of Things: Multijurisdictional Practice for the Kansas Practitioner*, 74 J. Kan. Bar Assn. 2, 20-23, 26-33 (2005), for a good discussion of multijurisdictional practice.

<sup>87</sup> KRPC 3.7 (lawyer as witness) and ACTEC commentary, pp. 153-155.

<sup>88</sup> *Kansas Ethics*, §5.1.

<sup>89</sup> KRPC 1.7(a); *Kansas Ethics*, §5.2. A property law analogy: it may be problematic for two people to own land together as joint tenants since they would be co-tenants and their interests might well conflict. But if the two people are married, their joint tenancy might work out better since their interests do not conflict. Consultation ought to include (a) “a complete disclosure of the adverse nature of the representation” and (b) “an understanding” that the attorney’s loyalty is limited to “the other client in the matter at hand.”

Restatement defines a conflict of interest broadly as “a substantial risk that the lawyer’s representation of the client would be materially and adversely affected [a] by the lawyer’s own interests or [b] by the lawyer’s duties to another client, a former client, or a third person.”<sup>90</sup> This conflicts rule arises from our duty of loyalty.<sup>91</sup> By contrast, joint representation, is allowed if both parties agree (such as drafting Wills for a husband and wife), but does raise “potential risks where multiple clients may later develop adverseness or a conflict.”<sup>92</sup>

If the attorney determines one client’s interest is directly adverse to another client’s interest, the lawyer must objectively determine whether her representation of and/or relationship with both parties will be materially limited by representing both parties.<sup>93</sup>

Even if the attorney believes the concurrent representation is appropriate, the clients must still consent in writing.<sup>94</sup> If the clients do consent in writing, the conflict may be waived.<sup>95</sup>

## 2. *Conflicts with a former client – Rule 1.9*

Rule 1.9 is the phoenix rising from the ashes of the former attorney client relationship, since “the lawyer’s duty of loyalty and confidentiality survive the termination of the [attorney client] relationship.”<sup>96</sup> Rule 1.9 analysis involves a multi step process. First, based on the facts, is the new case “the same” or “substantially related” to a prior case where the attorney served the client?<sup>97</sup> Second, what are the former client’s interests?<sup>98</sup>

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*Kansas Ethics*, §5.2.3. “Informed consent” is an “agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” KRPC Preamble; *Kansas Ethics*, §5.2.3.

<sup>90</sup> Restatement (Third) of the Law Governing Lawyers, §201 (2000) (quoted in *Kansas Ethics*, §5.2). Cf. Restatement (Third), §212 (conflicts of interest in corporate representation). Cf. KRPC 1.13; *Kansas Ethics*, §5.7.2 (corporate counsel “represents the corporation acting through its duly authorized constituents” and “the organization is the client”); *Professional Service Industries, Inc. v. Kimbrell*, 758 F. Supp. 676 (D. Kan. 1991). KRPC 1.7 notes “The lawyer’s own interests should not be permitted to have an adverse effect on representation of a client” KRPC 1.7 Comment [10]; *Kansas Ethics*, §5.2.5.

<sup>91</sup> “Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s informed consent.” KRPC 1.7 comment [1]; *Kansas Ethics*, §5.2.1. Viewing conflicts through the loyalty lens evokes the fact that we cannot “serve two masters.” *Matthew 7.24*.

<sup>92</sup> *Kansas Ethics*, §5.2.1.

<sup>93</sup> This is a non-waivable conflict and a large challenge to representing both clients. *Kansas Ethics*, §5.2.2.

<sup>94</sup> KRPC 1.7(b)(4) and Comment [20]; KRPC 1.7 and Comment [20]; *Kansas Ethics*, §5.2.3; Charles A. Redd, “Ethical Issues Arising in Concurrent Representation of Spouses and Other Family Members,” paper to 2015 KC Estate Planning Symposium (on file with the author).

<sup>95</sup> *Kansas Ethics*, Forms 5.1 (current client Rule 1.7 waiver), 5.2 (new client Rule 1.7 waiver), 5.4 (multiple representation waiver).

<sup>96</sup> *Kansas Ethics*, §5.4. One commentator notes “a client has the right to expect that the lawyer, entrusted with secrets and confidences during the representation, will not then use that information to the disadvantage of the former client after the relationship has been terminated.” *Kansas Ethics*, §5.4.5.

<sup>97</sup> KBA Ethics Op. 92-16; *Kansas Ethics*, §5.4.1.

<sup>98</sup> *Kansas Ethics*, §5.4.2 (“Unlike Rule 1.7, which prohibits direct adversity to ‘another client,’ Rule 1.9 prohibits adversity to the ‘interests’ of a former client ... [implying] a larger scope of prohibition” for representing former clients vis-à-vis current clients.)

Third, when does a client become a former client?<sup>99</sup> With informed consent, conflicts with a former client can be waived.<sup>100</sup>

Rule 1.9(a) hinges on four points: (1) an attorney client relationship, (2) the present case is the same or substantially related matter, (3) the new client's interests are adverse to the former client, and (4) the former client did not consent to the attorney's representation of the new client.<sup>101</sup>

### 3. Imputed conflicts – Rule 1.10

Rule 1.10 deals with three kinds of imputed conflicts. First, a law firm cannot take action that one of its attorneys practicing solo could not take.<sup>102</sup>

Second, incoming lateral hires under Rule 1.10(a). An attorney joining a firm brings all his conflicts of interests from his prior law firm if (1) the case is the same or substantially related to one where the attorney's prior law firm represented the client and (2) the attorney acquired confidential information from or about the client that is material to the new case.<sup>103</sup> So for incoming lateral hires, the imputed conflicts rule hinges on how involved the incoming lateral was with various cases at the prior law firm.

Third, outgoing lateral hires under Rule 1.10(b). Running in parallel with the incoming lateral hire rule is the outgoing lateral hire rule. Just as an attorney joining a new firm bring all his conflicts of interest with him, so an attorney leaving an old firm takes all his conflicts of interest with him, as long as the remaining attorneys in the old firm did not obtain confidential information about the client or case from the client before the attorney left the firm and took his client and book of business.<sup>104</sup>

### *Disclosure to Avoid Conflicts*

Limited disclosure is allowed to “detect and resolve” a conflict of interest arising from an attorney's change in employment or changes of personnel or ownership at a law firm, but only if the disclosure does not “compromise the attorney client privilege” or “prejudice

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<sup>99</sup> *Kansas Ethics*, §5.4.3. An attorney “has more freedom to take action against a former client than against a current client,” but the attorney “cannot convert a ‘current client’ into a ‘former client’ by dropping the current client ... [when] the potential conflict arises”; rather, the attorney must deal with the current client conflict under Rule 1.7 or avoid the conflict by not representing the new client. *Kansas Ethics*, §5.4.3.

<sup>100</sup> *Kansas Ethics*, §5.4.3 and Form 5.3. “[I]nformed consent confirmed in writing” or “knowing consent” is sufficient to waive conflicts with current or former clients under Rules 1.7 and 1.9. *Kansas Ethics*, §5.8.1. *Id.*, §5.3 (former client Rule 1.9 waiver).

<sup>101</sup> *Kansas Ethics*, §5.4.4 (citing *City of Hutchinson v. Gilmore*, 16 Kan. App. 2d 646, 648 (1992)).

<sup>102</sup> The “entire” law firm is “disqualified if a member of the firm has a conflict that prevents him from handling a matter adverse to a current client of the firm or adverse to the interests of a former client in the same or substantially related matter.” *Kansas Ethics*, §5.5. A “member of the firm” is any attorney practicing law in the firm (regardless of age, experience, or compensation) – so an associate, a non equity partner, or a counsel, senior, counsel, or of counsel attorney would be a “member of the firm.”

<sup>103</sup> *Kansas Ethics*, §5.5.1 (citing *Pac. Mut. Ins. Co. v. Hoidale, Inc.*, 782 F. Supp. 737 (D. Kan. 1992)).

<sup>104</sup> *Kansas Ethics*, §5.5.2. “Actual knowledge” - not “potential knowledge” - is the pivot point for confidential information. Having client files on a shared computer server or access to confidential information without actually opening the files or accessing the information is potential knowledge, not actual knowledge. KRPC 1.10 Comment [3]; *Kansas Ethics*, §5.5.2.



the client.”<sup>105</sup>

### *Chinese Walls*

Crucially, while the ABA’s Model Rule 1.9 allows Chinese walls (and the Restatement concurs), Kansas does not recognize the Chinese wall for imputed conflicts.<sup>106</sup> Indeed, “in Kansas [s]tate courts, Chinese Walls are not appropriate” and the “taint” of the “incoming lawyer” cannot be “cured by screening” or by “erecting a Chinese wall” or imposing a “cone of silence.”<sup>107</sup> The Kansas Supreme Court thus categorically rejects Chinese walls “unless agreed to by all parties to the litigation” under the knowing consent exception to waive the conflict.<sup>108</sup> The Kansas Supreme Court has affirmed *Parker*’s across the board rejection of Chinese walls.<sup>109</sup> Applying Kansas law on Chinese walls through the (not too eerie) lens of *Erie*, Kansas federal courts likewise reject Chinese walls as viable ways to avoid a conflict, declaring that one firm’s “implementation of the Chinese Wall [could] not avert ... disqualification.”<sup>110</sup> Any attorney or law firm practicing in Kansas would do well to avoid using Chinese walls to avoid conflicts of interest.

### *Estate Planning and Probate Conflicts of Interest*

In estate planning, two conflicts of interests are common. First, a waivable conflict of interest exists between husband and wife. Second, a waivable conflict of interests exists among generations, if the attorney represents multiple generations – say grandparents, parents, and children, or even great grandchildren. When meeting with estate planning clients, the attorney should alert the clients to these conflicts as applicable and present waivers to be signed.

Conflicts of interest also arise in probate law, and some can be waived, while others cannot be waived.<sup>111</sup> What if the estate’s interests are adverse to a beneficiary’s interests? Perhaps a beneficiary was disinherited or received a smaller share of the family estate?<sup>112</sup> Maybe a beneficiary demands an accounting or disagrees with the estate’s professional advisors? Maybe you represent multiple executors or trustees serving alongside each other? Or a client’s power of attorney appoints several attorneys in fact? What about successor executors, trustees, or attorneys in fact?

### *Communicating with Other Parties and Counsel*

If another party in a case is represented by counsel, the attorney must communicate with

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<sup>105</sup> KRPC 1.6(b)(5); *Kansas Ethics*, §4.5.6.

<sup>106</sup> *Kansas Ethics*, §5.8.3(a). The 10<sup>th</sup> Circuit upheld a “Chinese wall” as a “functional approach” to imputed conflicts and law firm disqualification. *Geisler v. Wyeth Laboratories* (quoting *Smith v. Whatcott*, 757 F.2d 1098, 1101-1102 (10<sup>th</sup> Cir. 1985)), 716 F. Supp. 520, 526 (D. Kan. 1989). Serious questions have arisen about *Geisler*’s status as good law. The 10<sup>th</sup> Circuit Court of Appeals includes Kansas, Colorado, New Mexico, Oklahoma, Utah, and Wyoming.

<sup>107</sup> *Kansas Ethics*, §5.8.3(a) (quoting *Parker v. Volkswagenwerk AG*, 245 Kan. 580, 589 (1989)).

<sup>108</sup> *Id.*

<sup>109</sup> *Lansing-Delaware Water District v. Oak Lane Park, Inc.*, 248 Kan. 563, 574 (1991).

<sup>110</sup> *Koch v. Koch Industries*, 798 F. Supp. 1525, 1539 (D. Kan. 1992); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>111</sup> Waivers of notice in probate law are quite handy, but a different topic.

<sup>112</sup> Or one beneficiary gets their inheritance outright, while another beneficiary’s interest is held in trust?

opposing counsel, not directly with the other party. But the rule extends further yet: if we are interacting with an unrepresented person (perhaps a family member with a potentially adverse interest in an estate or trust, or a less wealthy would be spouse in the prenuptial agreement setting), we owe a duty to disclose that we represent an interested party.<sup>113</sup>

#### *Estate Plan Documents*

If an attorney prepares estate planning documents for a client naming the attorney as executor or trustee, various ethics rules come into play.<sup>114</sup> Similarly, if the attorney prepares estate planning documents for a client naming a trust company which is also the attorney's client or which the attorney holds a financial stake in, the same ethics rules are implicated.<sup>115</sup> And if the attorney names themselves as attorney for the executor or trustee in the estate planning documents, potential conflicts of interest or solicitation of business issues could arise.<sup>116</sup> The Probate Court has jurisdiction over claims against fiduciaries and venue lies in the county court where (a) the fiduciary was appointed or (b) the fiduciary resides.<sup>117</sup> If the named executor has a claim against the estate (whether the executor was the drafting attorney or someone else entirely), the executor's claim against the estate is included in the probate claims process.<sup>118</sup>

If an attorney prepares a Will for a family member or friend and the attorney or a family member of the attorney is a beneficiary of the Will, the beneficiary designation is valid unless the bequest is more than the beneficiary would receive as an intestate heir.<sup>119</sup> If an attorney prepares a Will naming a nonprofit organization where the attorney is a board member, officer, or otherwise heavily involved, a similar conflict of interest may arise. To remedy this conflict, the attorney needs to fully disclose the relationship with the charity in writing or have the client seek independent counsel.

#### **D. Working with elderly clients**

The chief issue with elderly clients is diminished capacity.<sup>120</sup> Clients with diminished capacity are clients under disability.<sup>121</sup> When an attorney is working with a client with diminished capacity, the attorney must still consult and actively communicate with the attorney, notwithstanding the client's potential difficulty or even inability to understand the attorney and the legal implications the attorney describes.<sup>122</sup>

As attorneys, we can expect a veritable maelstrom of litigation about elderly clients and diminished capacity. The U.S. population is rapidly aging. And the testamentary intent

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<sup>113</sup> KRPC 4.3 (dealing with unrepresented person) and ACTEC commentary, pp. 157-158.

<sup>114</sup> KRPC 1.8, 7.1, 7.2, and 7.3.

<sup>115</sup> *Id.*

<sup>116</sup> Rules 1.8, 7.1, 7.2, 7.3.

<sup>117</sup> *Quinlan v. Leech*, 5 Kan. App.2d 706 (1981); K.S.A. §59-2207.

<sup>118</sup> K.S.A. §59-1205.

<sup>119</sup> K.S.A. §59-605 and Rule 1.8c (barring the attorney or family member from receiving "any substantial gift from a client" unless "the client is related to the donee").

<sup>120</sup> Model Rule 1.14 and ACTEC commentary, pp. 131-139.

<sup>121</sup> KRPC 1.14; *Kansas Ethics*, §2.3.3.

<sup>122</sup> *In re Brantley*, 260 Kan. 605 (1996) (attorney disciplined for violating KRPC 1.14 by failing to consult with elderly client on conservatorship).

and diminished capacity statutes only require a moment of clarion clarity amidst the foggy sea of dementia or senility. To protect our clients and our firms, attorney should create and embrace best practices for testamentary capacity. Document everything and write a memo to your client file when you meet with a client or execute a document. In exceptional cases, extra witnesses, photographs, or video of the document execution could be helpful.

### **E. Understanding fiduciary duty**

What is a fiduciary duty? To whom is it owed? As we discussed earlier in the tax paper, a fiduciary is (1) a person who (2) acts for another person's benefit, and (3) is bound to act in that other person's best interest.<sup>123</sup> Fiduciary relationships include a personal representative, executor, administrator, guardian, conservator, or a trustee.<sup>124</sup> When a fiduciary or personal representative is appointed to represent an estate and/or a trust in the decedent's place, the individual or corporate fiduciary will owe duties to the estate and/or trust: duties of loyalty, of care, of serving the estate and/or trust's best interest, and so on.<sup>125</sup> Justice Benjamin Cardozo warned that a fiduciary duty is very high indeed: "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is ... the standard of behavior... the level of conduct for fiduciaries [is] .... kept at a level higher than that trodden by the crowd."<sup>126</sup> A Kansas fiduciary has various duties: (1) the duty to administer the estate in good faith, (2) the duty of loyalty "solely" to the beneficiaries' interests, (3) the duty of impartiality, (4) the duty of prudent administration, and (5) the duty to inform and report.<sup>127</sup>

If a fiduciary embezzles the estate or trust's money or betrays the fiduciary trust by converting the estate or trust's personal property for the fiduciary's own use, the fiduciary is liable to pay the estate for twice the amount taken.<sup>128</sup> Kansas law also requires higher standards for greater expertise and experience – attorneys, CPAs, banks, trust companies vis-à-vis individual or family members – as the adage goes, to whom much is given, much will be required.<sup>129</sup>

As we conclude our legal ethics journey for today, may it be said of us as attorneys, as

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<sup>123</sup> *Black's Law Dictionary*, 658.

<sup>124</sup> K.S.A. §§59-102(2) (personal representative), 59-102(3) (fiduciary), 59-701 (executor), 59-705 (administrator), 59-3051(d) (conservator), 59-3051(e) (guardian), 58a-103(19) (trustee). Giving bond is a pledge of the fiduciary's call to duty. K.S.A. §58a-702 (trustee's bond); 59-1101 ("Every fiduciary ... before entering upon the duties of his ... trust shall execute and file a bond").

<sup>125</sup> *Black's Law Dictionary*, 545.

<sup>126</sup> *Meinhard v. Salmon*, 249 N.Y. 458, 464 (N.Y. 1928) (Cardozo, J.)

<sup>127</sup> K.S.A. §§58a-801 (administer), 58a-802 (loyalty), 58a-803 (impartiality), 58a-804 (prudent administration), 58a-813 ("reasonably inform" and report to trust beneficiaries). The 58a-801 administration duty is read through 58a-804's prudent administration lens. Prudent administration requires the trustee to "exercise reasonable care, skill, and caution." K.S.A. §58a-804. The duty to administer includes taking "reasonable steps to take control of and protect the trust property" and collect trust property from a prior trustee. K.S.A. §§58a-809, 58a-812. The trustee also takes "reasonable steps" to (1) "enforce" the trust's claims and (2) "defend" the trust against claims. K.S.A. §58a-811.

<sup>128</sup> K.S.A. §59-1704.

<sup>129</sup> *Luke* 12.48.

the chorus in *Trial by Jury* declares of the Judge, that we are attorneys and “good [attorneys] too!”<sup>130</sup>

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<sup>130</sup> Gilbert & Sullivan, *Trial by Jury*. Or eulogized: “well done, good and faithful servant.” *Matthew* 25.23.