BEFORE THE COURT OF TAX APPEALS
STATE OF KANSAS

IN THE MATTER OF THE PROTEST OF LYERLA, KATHY L. -LIV. TRUST FOR THE YEAR 2011 IN JOHNSON COUNTY, KANSAS	Docket No. 2012-3110-PR

ORDER ON RECONSIDERATION

Now the above-captioned matter comes on for reconsideration and decision by the Court of Tax Appeals of the State of Kansas. The Court conducted hearings in this case and various other related cases on September 18, 2012. The Court issued its original order in this case on October 10, 2012 (the "Original Order"). Taxpayer timely filed a *Petition for Reconsideration* and a concomitant motion to strike. The *Petition for Reconsideration* was granted to consider the motion to strike, as a matter of law, all or part of the Original Order.

In its Order Granting Reconsideration, the Court indicated that the parties could brief any or all of the issues arising in the Original Order, any or all issues addressed in the Taxpayer's *Corrected/Amended Petition for Reconsideration*, as well as any of the following issues:

1. Is the defective signature on the notice of appeal form filed with the Small Claims Division of this Court in this case a fatal defect that deprives this Court of subject matter jurisdiction, or is it merely a technical defect that can be corrected after the time for appeal has run?

2. Does this Court have the power or authority – inherent or statutory or otherwise – to regulate its Court operations and proceedings so as to maintain legal, proper, and ethical conduct insofar as that conduct relates to cases pending before this Court?

3. Can and should this Court, pursuant to K.S.A. 77-524(f), K.S.A. 60-409, or K.S.A. 60-412, take official notice of that information set forth in the Original Order as Findings of Fact Numbers 92 through 95? [in this Order on Reconsideration, they are Findings of Fact 98 through 101]

4. Is the agreement and relationship between [tax representative] Jerry W. Chatam and/or J.W. Chatam & Associates, Inc. (collectively referred to herein as

"Chatam") and the Taxpayer in this case champertous, and, if so, is the agreement void and unenforceable insofar as it affects or authorizes conduct before this Court?

5. Has Chatam engaged in unauthorized practice of law in this case and other cases before this Court?

6. Has [attorney] Terrill engaged in conduct in this case and other cases before this Court that constitutes a violation or violations of the Kansas Rules of Professional Conduct, Ks. Sup. Ct. Rule 226?

Taxpayer timely filed a *Responsive Briefing* relating to the Court's reconsideration of the Original Order.

The Court now issues its Order on Reconsideration and, because the modifications and supplementations to the Original Order are numerous, this Order on Reconsideration replaces the Original Order in its entirety.

SUMMARY OF ORDER ON RECONSIDERATION

Having reconsidered all matters and issues relating to this case, and based on the Findings of Fact and Conclusions of Law set forth below, the Court hereby finds that it lacks subject matter jurisdiction of this case, and therefore this case must be and hereby is dismissed.

IT IS SO ORDERED.

FINDINGS OF FACTS

After reconsidering or considering, as applicable, (i) the evidence presented at the hearings held before the Court in this case and various other related cases on September 18, 2012, (ii) the pleadings, documents, and briefs filed in those same cases, and (iii) information noticed from the record of other cases before this Court, the Court makes the following findings of fact:

1. Linda Terrill ("Terrill") is an attorney licensed in the State of Kansas; her Kansas Supreme Court Number is 10983.[1]

2. J.W. Chatam & Associates, Inc. is a Kansas corporation that engages in the tax consulting business.[2]

3. Jerry W. Chatam is a principal and owner of J.W. Chatam & Associates, Inc.[3]

4. Jerry W. Chatam is not a licensed attorney in the State of Kansas or elsewhere. *Transcript,* 72:20-21. He is a certified general appraiser. *Transcript,* 72:22-24 and 73:6-8.[4]

5. On or about January 9, 2012, Jerry W. Chatam and/or J.W. Chatam & Associates, Inc. (collectively referred to herein as "Chatam") entered into an Agreement (the "Agreement"), with Kathy Lylerla and/or Kathy L. Lyerla and/or Kathy L. Lyerla, Trustee of the Kathy L. Lyerla Living Trust (the "Taxpayer"), by which Chatam would provide services to the Taxpayer related to evaluating and pursuing a property tax appeal in exchange for a fee. In most material respects, this Agreement is similar to and typical of all other agreements between Chatam and taxpayers presented to this Court in related tax appeal cases.[5] A full copy of this Agreement is appended at the end of these Findings of Fact as pages 40 and 41 hereof.

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[1] Taxpayer makes no objection to this Finding of Fact.

[2] Taxpayer makes no objection to this Finding of Fact.

[3] Taxpayer makes no objection to this Finding of Fact.

[4] Taxpayer makes no objection to this Finding of Fact.

[5] Taxpayer makes no objection to the factual substance of this Finding of Fact. Taxpayer only objects that the finding is unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below.

6. The Agreement provides that Chatam will determine, evaluate, and analyze whether the applicable tax assessment is excessive, and then determine whether to pursue actions to reduce such assessment and take such action as it determines is appropriate, including tax appeals. In particular, on page 1, the Agreement provides in pertinent part as follows:

> Chatam [will] determine whether, ***in Chatam's opinion***, the assessment established by the appropriate taxing authorities assessing jurisdiction (hereinafter referred to as "assessments") for [the subject property] is excessive. . . .
>
> Client hereby authorizes Chatam to take appropriate action to attempt to have any excessive assessment reduced.
>
> Chatam agrees:
> ***At its expense,*** to evaluate and analyze [the subject property] and to determine, ***in its own opinion,*** whether the assessment thereof is excessive. . . .
>
> Chatam agrees: . . .
> To be responsible for the ad valorem tax program designed for the [the subject property, which] will include the following services . . . :
>
> (1) Analysis of assessed values, including market research, ***case analysis,*** and preacquisition analysis.
> (2) ***Representation in tax assessment negotiations*** with the local tax officials.
> (3) Assessment Appeal Board or Board of Supervisors ***representation.***
>
> If Chatam determines, ***in its sole discretion,*** that said assessment is excessive, then Chatam will take those actions, which ***it deems appropriate*** to have said assessment reduced. Said actions may include, but shall not be limited to, appearing for the [Taxpayer] at informal and formal hearings, appeals before any board, tribunal, commission and ***employment, at its expense, of other professionals.***
>
> CLIENT agrees:
> Chatam has ***the sole authority*** to determine if the assessment of the [subject property] is sufficiently excessive to warrant reduction efforts, and ***to settle*** with the appropriate taxing authorities and assessing jurisdictions all ad valorem tax issues related to the [subject property].

> That Chatam is ***authorized to appear*** on its behalf before elective and administrative officials, panels, and boards responsible for developing and adjusting property assessment decisions.

(emphasis added).[6]

7. The Agreement in this case and the other agreements between Chatam and taxpayers control the relationships between and among taxpayers, Terrill, and Chatam. This was confirmed by Terrill at the hearings held on September 18, 2012 (the "September 18 Hearings"). *Transcript of the September 18 Hearings,* 35:16-21 and 40:23-25. This was also confirmed by Chatam's testimony both generally and specifically. Chatam testified generally that the agreements reflect the true relationship between the taxpayers and Chatam. *Transcript,* 67:11-18. Chatam also testified regarding a specific example in which he exercised his contractual authority to hire and fire the attorneys in all these cases:

> The client assigned authority to me. It [the Agreement] says that, "Chatam is authorized to employ an attorney, a law firm, of its choosing to handle all legal matters. . . ." Now, *I made that decision. I hired these folks [the attorneys],* and I - - and through conversations with Linda [Terrill], we talked about a time line that she would withdraw her appearance and Ashley [Mulcahy] would enter her appearance. . . . *I did make the decision myself,* sir, because - - . . . they

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[6] Taxpayer objects to this Finding of Fact as being unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below.

Taxpayer also objects that, in making this Finding of Fact, the Court ignores testimony which, according to Taxpayer, shows that Chatam does not exercise the extensive discretion and control expressly set forth in the Agreement. This Finding of Fact, however, merely sets forth the terms of the agreement. In any event, the latter objection is legally futile and factually ineffectual. It is legally futile because case law holds that an agreement such as this one cannot be ignored, and that evidence of actual conduct inconsistent with the applicable agreement is irrelevant and *is* to be ignored by the court. *See, e.g., Boettcher v. Criscione,* 180 Kan. 39, 45, 299 P.2d 806, 811 (1956); *Med Controls, Inc. v. Hopkins,* 61 Ohio App. 3d 497, 499-500, 573 N.E.2d 154, 155-56 (1989).

The latter objection is factually ineffectual for several reasons. First, as set forth in Finding of Fact 7 below, both Terrill and Chatam confirmed that the agreements in these cases control the relationships between and among taxpayers, Terrill, and Chatam. Second, there is contradictory testimony from the taxpayers as fully set forth in Finding of Fact 8 below. And finally, as set forth in Finding of Fact 9 below, the Court does not find credible Chatam's testimony or Terrill's representations to the effect that Chatam does not exercise extensive discretion and control of these tax appeal cases.

> [the taxpayers] authorized me to do that, and they *still authorize* me to do that.

Transcript, 98:19 to 99:2, and 99:23 to 100:2 (emphasis added). *See also Transcript,* 43:22-24.[7]

8. Testimony of other taxpayers in the related cases verifies that Chatam exercises extensive discretion and control of these tax appeal cases consistent with terms of the agreements. Mr. Kinney testified that he did not have personal knowledge about any settlement interaction between Chatam and his principal. *Transcript,* 152:25 to 153:3. Mr. Westerfeld's testimony showed that he did not have an idea even of how many appeals his principal was involved in, let alone the details of those appeals, and that he "he would have to talk to Jerry [Chatam] to see just how many we've appealed." *Transcript,* 156:23 to 157:2. *See also Transcript,* 159:16 to 160:2. Mr. Dean testified that, on behalf of his principal, he had "hired Mr. Chatam to manage [the tax appeal cases] as it goes through" and that "we made our deal with Jerry, and after that, I really don't follow [the tax appeal cases] until something comes up." *Transcript,* 164:13-16 and 167:2-7. Mr. Privitera testified that he "controlled" the tax appeal cases by hiring Chatam to handle them and turning the details over to Chatam. *Transcript,* 168:12-22 and 173:20 to 174:5. Mr. Craig testified that his principal hires Chatam to handle the tax appeal cases and

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[7] This is a new Finding of Fact. Taxpayer objects that the Court ignores testimony which, according to Taxpayer, shows that Chatam does not exercise the extensive discretion and control expressly set forth in the agreements. This objection is legally futile and factually ineffectual. It is legally futile because case law holds that an agreement such as the one here cannot be ignored, and that evidence of actual conduct inconsistent with the applicable agreement is irrelevant and *is* to be ignored by the court. *See, e.g., Boettcher, supra; Med Controls, Inc., supra.*

The objection is factually ineffectual because of the confirmations by Terrill and Chatam of the controlling aspect of the agreements as noted in this Finding of Fact. Taxpayer asserts in particular testimony of Chatam regarding settlement discussions with Taxpayer as an example to show that Chatam does not exercise the extensive discretion and control expressly set forth in the Agreement. *Transcript,* 47:24 to 49:9 and 51:2-6. Even if such testimony inconsistent with the terms of the Agreement were relevant, there was no opportunity for the Court to hear corroboration from Taxpayer of Chatam's testimony because Taxpayer defied the Court's order to appear at the September 18 Hearings. *See* Finding of Fact 50 below; *Transcript,* 6:4, 6:8-14, and 7:7-13. Moreover, as set forth in Finding of Fact 8 below, there is ample testimony from other taxpayers to demonstrate that Chatam exercises extensive discretion and control of these tax appeal cases. And finally, as set forth in Finding of Fact 9 below, the Court does not find credible Chatam's testimony or Terrill's representations to the effect that Chatam does not exercise extensive discretion and control of these tax appeal cases. These are attempts to contradict and disavow the terms of Chatam's agreements with taxpayers.

does not "get involved" in them until the end; Chatam is "in charge of the whole situation. . . ." *Transcript,* 175:25 to 176:11. Mr. Bean testified that he absolutely relied on Chatam's judgment to determine whether an appeal was appropriate. *Transcript,* 192:20-23. The testimony noted above and repeated testimony elsewhere in the *Transcript* evidences that the taxpayers relied very heavily on the advice and recommendations of Chatam (with no mention of Terrill in relation thereto). And Mr. Bleakley testified that, in half a dozen appeals handled by Chatam for his principal, they had never "opposed a recommendation that came from Chatam" and that they had "agreed [with Chatam's recommendations] in every case." *Transcript,* 207:20-25.[8]

9. Neither Chatam nor Terrill are credible regarding testimony and representations that are or may be self-serving, such as those that attempt to contradict and disavow the express terms of Chatam's agreements with taxpayers, or belie the course of performance under the agreements. An overt example of Terrill's and Chatam's lack of credibility arises in connection with the representations made and testimony given regarding the termination of Terrill as attorney and the hiring of replacement attorney Ashley Mulcahy ("Mulcahy"), and whether Taxpayers were informed of these decisions before the fact, or after the fact, or even at all (such termination and hiring are set forth in more detail herein in later Findings of Fact).

For example, Terrill represented to the Court that "[a]ll of the . . . clients who filed the appeals - - were notified that he [Chatam] was *going to hire* someone in-house and that I [Terrill] would not be counsel." *Transcript,* 31:10-13 (emphasis added). Similarly, she represented to the Court as follows: "I mean *as an officer of the Court,* I'm just telling you they [the taxpayers] were all notified [before the fact] that there was *going to be* new counsel." *Transcript,* 32:24 to 33:2 (emphasis added). And Chatam testified early on in the September 18 Hearings that he always runs the attorney by the taxpayers before Terrill enters her appearance in tax appeal cases. *Transcript,* 45:7-11. *See also Transcript,* 60:17-24. And Chatam testified that he notified every client that Mulcahy was no longer employed by Chatam, and that Terrill would continue as attorney. *Transcript,* 60:25 to 61:11. Chatam further testified that he notified taxpayers ahead of time before changing attorneys in the first instance:

> This is how that went down. We - - we told every client that, "Look. . . . [W]e're *going to* retain in-house counsel." Now, no one had a problem with that. That was *all agreed upon* that that was acceptable with the clients. Once we hired the in-house counsel, we realized we had the issue with Ms. Mulcahy working for our firm and being an employee

[8] This is a new Finding of Fact.

> and representing those clients. . . . We went back to the client and said, "Well, look. We - - we recommend - - that we just stay with Linda Terrill and let her continue to handle these appeals." *And they agreed.*

Transcript, 96:3-4, 96:7-14, 96:21-25 (emphasis added).

Indicative of Chatam's lack of credibility on this matter, however, is his own later testimony contradicting himself and Terrill on the issue of whether taxpayers were consulted, or even notified, before the fact that Terrill had been terminated as attorney or that Mulcahy had been hired. In questioning Chatam, the Court noted that there had been a large number of cases in which Chatam changed attorneys and then the Court inquired whether Chatam had truly contacted the taxpayers ahead of time:

Q. [By Chief Judge Sheldon:] [Y]ou obtained approval from them [the taxpayers], communication with them, to confirm that she [Terrill] should be - - should withdraw as counsel?
A. [By Chatam:] Say that - - say that again.
Q. We had approximately 200 plus cases in which motions to withdraw were filed. Did you - - was that request for withdrawal made by your taxpayer clients in all 200 cases?
A. The client assigned that authority to me, sir. . . . Now, *I made that decision.* I hired these folks. . . . Now I had conversations with the clients just as far as an updating process of what was going on and what we were doing. *I don't remember the exact time - -*
Q. . . . So that was your decision, you didn't communicate with all 200 plus taxpayers in that situation.
A. I *have communicated* with all of them.
Q. You've communicated since, but you made the decision yourself?
A. Not - - I - - I *did make* the decision myself, sir, because . . . they authorized me to do that, and they still authorize me to do that.

Transcript, 98:7, 98:9-17, 98:23-24, 99:3-6, 99:17-24, 100:1-2 (emphasis added). To summarize, Chatam first testified that he contacted all clients before the attorney changes were made, and that the taxpayers agreed to this, and then, set forth immediately above, he later changed his testimony to the effect that he at least updated all the taxpayers regarding the change of attorneys after the fact.

But even that testimony – that Chatam at least notified all the taxpayers after the fact – is still inconsistent with multiple instances of testimony from taxpayers that contradicted both Terrill and Chatam. Mr. Westerfeld testified that he did not even know who Mulcahy was and was not familiar with her being hired and brought in as attorney on the tax appeal cases. *Transcript,* 159:1 to 160:2. Mr.

Dean testified that he did not know who Mulcahy was and had never met her, although he had heard "at one time" that "Jerry [Chatam] *had hired* an attorney in-house." *Transcript,* 165:22 to 166:9 (emphasis added). Mr. Privitera testified that "he had no idea that [Terrill] was withdrawing" and had not been advised that Mulcahy was entering an appearance in the tax appeal cases. *Transcript,* 169:23 to 170:10. Mr. Craig testified that "if an attorney comes in or withdraws, that's Mr. Chatam's issue" and "that's fine with us." *Transcript,* 176:8-11. Mr. Craig further testified that he was not made aware of Terrill's withdrawal or Mulcahy's entry of appearance until after the fact. *Transcript,* 177:5-18. Mr. Bean testified that he did not "want to be involved in naming counsel." *Transcript,* 190:14 to 191:2. Mr. Collis testified that he would not care who was attorney or be concerned if a substitution occurred: "[I]f they change counsel, I assume they know what they're talking about." *Transcript,* 197:16 to 197:12.

For all these reasons, we do not find Chatam or Terrill credible regarding testimony and representations that are or may be self-serving.[9]

10. The Agreement provides that Chatam has authority to hire an attorney to assist in the tax appeal process, and that Chatam will pay all of the attorney's fees and all of the other expenses relating to the tax appeal process. On page 2, the Agreement provides in pertinent part as follows:

> Chatam is ***authorized to employ an attorney or law firm of its choosing*** to handle all legal matters arising from this tax program. Chatam will be responsible for One Hundred Percent (100%) of the legal fees and court expenses incurred for legal services performed on the [Taxpayer's] behalf.

(emphasis added).[10]

11. The expenses to be paid by Chatam pursuant to the Agreement include but are not limited to any filing fees, fees for experts including appraisers, attorneys fees, travel expenses, and document expenses.[11]

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[9] This is a new Finding of Fact.

[10] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[11] Taxpayer objects to this Finding of Fact as being unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer objects that testimony regarding the payment of filing fees contradicts the agreement. This Finding of Fact merely sets forth the terms of the agreement. In any event, as noted in fn.6, *supra,* case law holds that an agreement such as this one cannot be

12. The Agreement provides that, only after appeals have been exhausted at the Kansas Court of Tax Appeals, will the Taxpayer have an opportunity to participate with Chatam in determining whether an appeal to the Kansas Court of Appeals should be pursued on a mutually acceptable basis. On page 2, the Agreement provides in pertinent part as follows:

> The decision to continue legal proceedings *after appeals* on local, county, and/or state levels have been exhausted will be decided mutually by the parties to this Agreement.[12]

13. The Agreement provides that, for its services, Chatam will be paid a fee equal to 35% of any tax savings garnered, stating in pertinent part on page 2 as follows:

> [Taxpayer will] pay a fee to Chatam if the assessment for the [Taxpayer's subject property] is reduced for tax year 2012. ***The fee shall be Thirty-Five Percent (35%) of the tax savings*** resulting from the reduced assessment. . . .

(emphasis added).[13]

14. The percentage fee in the other agreements from the related tax appeal cases involving Chatam range from 25% to 40%. In some of the agreements from

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ignored, and that evidence of actual conduct inconsistent with the applicable agreement is irrelevant and *is* to be ignored by the court. *Boettcher, supra*; *Med Controls, Inc., supra*. For a more detailed discussion regarding payment of expenses, including filing fees and appraisal costs, *see* Findings of Fact 23, 87 through 89, and 91 through 92.

[12] Taxpayer objects to this Finding of Fact as being unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer also objects that testimony regarding the management, direction, and control of the tax appeal cases contradicts the agreement. This Finding of Fact merely sets forth the terms of the agreement. For an extensive discussion regarding Chatam's discretion and control, *see* Findings of Fact 7, 8, & 9. In any event, as noted in fn.6, *supra*, case law holds that an agreement such as this one cannot be ignored, and that evidence of actual conduct inconsistent with the applicable agreement is irrelevant and *is* to be ignored by the court. *Boettcher, supra*; *Med Controls, Inc., supra*.

[13] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

related tax appeal cases, taxpayers are supposed to pay the filing fees and in other cases Chatam is to pay the filing fees. In all agreements from the related tax appeal cases, Chatam is to pay for the attorneys fees, expert fees (with one exception), and all other expenses.[14]

15. The Agreement grants Chatam the exclusive right to represent the Taxpayer for the tax appeal case, stating in pertinent part on page 2 as follows:

> [The Taxpayer] grants to Chatam the ***exclusive right,*** with respect to [the subject property,] to represent [the Taxpayer] for the contract period and any subsequent tax years covered by this Agreement for the purposes set forth herein.

(emphasis added).[15]

16. Although not included in the Agreement set out above, most of the other agreements in the related tax appeal cases contained a clause providing for automatic renewal of the agreements from one tax year to the next, and such clause reads as follows:

> This Agreement will ***automatically renew*** on January 1st of each tax year following the initial . . . tax year, unless the [Taxpayer] notifies Chatam in writing Thirty (30) days prior to January 1st.

(emphasis added).[16]

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[14] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5. In one set of cases (involving Hy-Vee and its affiliated entities), the agreement provides that Hy-Vee will be responsible for some appraisal costs. The "Hy-Vee" agreement relates to approximately 300 separate properties for which Chatam is to handle the tax appeals. Pursuant to the agreement, if it becomes necessary for Chatam to obtain expert appraisal reports on any of the properties, Hy-Vee will pay for 75% of the first *two* appraisals. Chatam thus is obligated to pay for any appraisals required for any of the other 298 properties.

[15] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[16] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

17. Except as noted above and except for a very limited number of specially-tailored agreements, a vast majority of the agreements in the related tax appeal cases involving Chatam are essentially and materially the same as that of the Agreement set out above.[17]

18. The fee to be paid to Chatam pursuant to the Agreement is measured by and includes any result in the Regular Division of the Kansas Court of Tax Appeals.[18]

19. Pursuant to this Agreement, Chatam undertook to evaluate, handle, direct, and manage a tax appeal for the Taxpayer.[19]

20. Taxpayer or Chatam or an employee or associate of Chatam protested the payment of the Taxpayer's 2011 taxes for the subject property.[20]

21. On or about January 25, 2012, Chatam or an employee or associate of Chatam appeared at an informal hearing before a representative of the Johnson County Appraiser's office regarding the valuation of the subject property.[21]

22. The Johnson County Appraiser's Office issued its decision confirming the current appraised value of the subject property at $794,400, and the same was mailed to Chatam on February 9, 2012.[22]

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[17] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[18] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[19] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[20] Taxpayer objects to this Finding of Fact as being unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer also objects that this finding "is false," and proceeds to assert that Taxpayer "completed the payment under protest form, signed it and named JW Chatam & Associates as her tax representative." This is fully consistent with our Finding of Fact which states in part as follows: "*Taxpayer* . . . protested the payment of the . . . taxes. . . ." Therefore, this Finding of Fact is consistent with Taxpayer's assertion.

[21] Taxpayer makes no objection to this Finding of Fact.

[22] Taxpayer makes no objection to this Finding of Fact.

23. A notice of appeal form for the Taxpayer was timely filed with the Small Claims Division of the Kansas Court of Tax Appeals on March 12, 2012. The notice of appeal form, however, was not signed by the Taxpayer or a licensed attorney for the Taxpayer. The notice of appeal form showed Chatam as the "Representative" in Box 2 and was signed by nonlawyer Blake Newell, an employee and/or officer and/or associate of Chatam, and transmitted to the Court from Chatam's office. *Transcript,* 7:20-25. The filing fee check was written on a Chatam account.[23]

24. The time for properly filing a notice of appeal with the Small Claims Division in this case expired on March 13, 2012.[24]

25. On or about March 28, 2012, Taxpayer executed a Declaration of Representative (the "Declaration") appointing Chatam as representative and "attorney-in-fact" for the Taxpayer "to represent the property owner before the County Appraiser, Appraiser's Representative, Hearing Officer, Hearing Panel, County Board of Equalization, or the State Board of Tax Appeals ***pursuant to the board rules and regulations.*** . . . " (emphasis added)[25]

26. The Declaration of Representative was completed on a form generated by the Kansas Department of Revenue, Division of Property Valuation. [26]

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[23] Taxpayer objects to this Finding of Fact as being unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer also objects to this Finding to the extent that it implies Chatam paid the filing fee without reimbursement from the Taxpayer. It is true that Chatam testified that Taxpayer paid her own filing fees. *Transcript,* 43:18-19. There was no opportunity, however, for the Court to hear corroboration from Taxpayer of Chatam's testimony in this case because Taxpayer defied the Court's order to appear at the September 18 Hearings. *See* Finding of Fact 50 below. *Transcript,* 6:4, 6:8-14, and 7:7-13. Moreover, Chatam's agreement with Taxpayer expressly states that Chatam will pay all expenses, and it does not make an exception for filing fees. Case law holds that the agreement cannot be ignored, and that evidence of actual conduct inconsistent with the applicable agreement is irrelevant and *is* to be ignored by the court. *See, e.g., Boettcher, supra*; *Med Controls, Inc., supra.* And finally, when the notice of appeal was filed, and the filing fee submitted, in this case with the Small Claims Division, the correspondence transmitting the same (which is in the official court record for this case) is on Chatam letterhead and signed by Chatam.

[24] Taxpayer makes no objection to this Finding of Fact.

[25] Taxpayer makes no objection to the factual substance of this Finding of Fact.

[26] Taxpayer makes no objection to this Finding of Fact.

27. A hearing was held before the Small Claims Division of the Kansas Court of Tax Appeals on March 27, 2012, with a hearing officer. The tax representative appeared on behalf of Taxpayer.[27]

28. The hearing officer of the Small Claims Division of the Kansas Court of Tax Appeals issued his decision confirming the county's valuation of $794,400, and the same was mailed to interested parties on April 24, 2012.[28]

29. A notice of appeal form for the Taxpayer was timely filed with the Regular Division of the Kansas Court of Tax Appeals on May 24, 2012. This notice of appeal form was properly signed by Linda Terrill ("Terrill"), an attorney licensed in Kansas, and a principal of the Property Tax Law Group.[29]

30. The Notice of Appeal filed with the Regular Division was transmitted to the Kansas Court of Tax Appeals by Blake Newell, Executive Vice President of Chatam.[30]

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[27] Taxpayer makes no objection to the factual substance of this Finding of Fact.

[28] Taxpayer objects to this Finding of Fact as being unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer also makes an incongruous argument that the Small Claims decision was "void" because it was not mailed to the Board of County Commissioners of Johnson County and cites us to two cases: *Claus v. Kansas Dep't of Revenue,* 16 Kan. App. 2d 12 (1991), and *Anderson v. Kansas Dep't of Revenue,* 18 Kan. App. 2d 347 (1993). *Claus* involved a notice of appeal from an administrative decision that was not sent by appellant to the head of the administrative agency (the Secretary of Revenue) and the administrative agency objected. *Anderson* was a case in which service of a driver's license suspension was attempted on the proper party, but the suspension was not *personally* served on him as required by law. In both cases, the Kansas Court of Appeals dismissed the cases for failure of proper service. And nowhere did the Kansas Court of Appeals use the word "void" as a conclusion or descriptive term. In any event, *Claus* and *Anderson* are not applicable here. A cursory review of the applicable Kansas statutes indicates that it is the Johnson County Appraiser who has the applicable authority and responsibility regarding these matters. *See, e.g.,* K.S.A. 79-1412a. Second, application of the two holdings would only be triggered if mailing the order just to the Johnson County Appraiser was improper *and* Johnson County objected to this. Here, at a minimum, Johnson County is not objecting. Third, *Claus* involved a notice of appeal, not the mailing of court orders, and thus it is distinguishable from the present case. Fourth, *Anderson* was a case decided on the *type* of service, not on *whom* received service, and thus it too is distinguishable from the present case.

[29] Taxpayer makes no objection to the factual substance of this Finding of Fact.

[30] Taxpayer objects to this Finding of Fact as being unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI

31. The filing fee for filing the Notice of Appeal with the Regular Division was paid by Chatam.[31]

32. On June 21, 2012, the Regular Division issued a Notice of Hearing setting the Taxpayer's tax appeal case for an evidentiary hearing on September 6, 2012.[32]

33. On August 2, 2012, Terrill filed with the Regular Division a *Motion to Withdraw* as Counsel that stated as the reason for the motion that "J.W. Chatam and Associates, the tax representative for the Taxpayer, has retained alternative counsel." Terrill contemporaneously filed similar *Motions to Withdraw* in

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below. Taxpayer also objects that "[t]he record is devoid of who 'mailed' the appeal to COTA." This assertion by Taxpayer is inaccurate. This Finding of Fact is indeed indicated in the record in this case. When the notice of appeal was filed in this case with the Regular Division, it was transmitted with a Chatam cover letter signed by Blake Newell, Executive Vice President of Chatam. This cover letter is in the official court record for this case, and it unquestionably indicates that Chatam is submitting payment for the filing fees and that the check is written on a Chatam account because there was one check for approximately three dozen tax appeal cases.

[31] Taxpayer objects to this Finding of Fact as being unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer also objects that this finding is not supported by the record. But it is. *See supra* fn.30. Taxpayer also cites to testimony of Chatam regarding the payment of filing fees. For the Court's response to this objection and testimony, *see supra* fn.23. Finally, Taxpayer asserts that "because the 'facts' recited by COTA do not match the facts in the record, it arguably supports the conclusion that the [original October] Order was written prior to the [September 18] hearing." As already explained, this Finding of Fact *is* supported by the record herein. And the original October Order was not written by this Court prior to the September 18 Hearings.

[32] Taxpayer makes no objection to the factual substance of this Finding of Fact. Taxpayer objects that the finding is unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer also makes an immaterial point that neither assistant county counselor Robert Ford ("Ford") nor assistant county counselor Kathryn Myers ("Myers") have entered appearances in these cases. Although they are attorneys, their situations are distinguishable from those of Terrill and Mulcahy in that both Ford and Myers are employees of Johnson County and thus arguably do not need to enter their appearances.

approximately 170 other cases. The motions to withdraw were, according to their certificates of service, served on Chatam and the county, but not on the taxpayers.[33]

34. On August 8, 2012, an *Entry of Appearance* was filed by Ashley N. Mulcahy ("Mulcahy") as General Counsel of Chatam. The signature line for the Entry of Appearance showed the address and contact information for Chatam and was set out as follows:

> Ashley N. Mulcahy (KS # 24621)
> General Counsel
> **J.W. Chatam & Associates**
> 7301 West 129th Street, Suite 150
> Overland Park, Kansas 66213
> Phone: 913.239-0990
> Fax: 913.239.0990
> E-mail: amulcahy@jwchatam.com
> **Attorney for Kathy L. Lyerla**

Mulcahy contemporaneously filed similar *Entries of Appearance* in the same (approximately 170) cases referenced in Finding of Fact 33 above.[34]

35. Sometime after filing the *Entries of Appearance* but before the September 18 Hearings, Mulachy ceased to be employed by Chatam. *Transcript*, 8:3-5, 33:9-10, 33:12.[35]

36. On August 23, 2012, the Court issued its Order Denying Motion to Withdraw as Counsel, denying the motion filed by Terrill on the grounds that the motion had not been served on the Taxpayer. [36]

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[33] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5. As the *Motions to Withdraw* and Terrill's representations indicate, Taxpayers did not make or participate in the decision to terminate Terrill. Regarding Chatam's testimony and Terrill's representations about taxpayers' awareness of Terrill's withdrawal, *see* Finding of Fact 9 above.

[34] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[35] This is a new Finding of Fact.

[36] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5. At the September 18

37. On August 23, 2012, the Court also issued its Order to Show Cause in the present case scheduling a hearing for the same date (September 6, 2012) that the evidentiary hearing was originally scheduled to be held. The purpose of the "show cause" hearing was to determine the identity of the real party in interest and whether the Court could properly exercise subject matter jurisdiction in the case. The Order instructed Chatam, Terrill, Mulcahy, and the Taxpayer to appear in person on September 6, 2012.[37]

Hearings, Terrill asserted that she was not required to serve a copy of the motions to withdraw on the taxpayers:

> And I can't find anything that says that that's an obligation of me in front of this court. It is a District Court rule that you would notice, and that the only reason you do is so the Court can make sure that the interests of the client are maintained . . . I don't find any other rule that says I have to serve a copy of a withdrawal.

Transcript, 32:12-23. Terrill accurately references the rule applicable to district courts. *See* Ks. Sup. Ct. Rule 117. The reason for the rule – expressly mentioned by Terrill – would seem to be reason enough for her to have provided such notice here. Moreover, this Court notes that Rule 1.16(d) of the Kansas Rules of Professional Conduct, Ks. Sup. Ct. Rule 226, appears to make it an ethical obligation of an attorney to provide the client with notice of withdrawal regardless of the circumstances and regardless of the court in which a case may be pending.

[37] Taxpayer makes no objection to the factual substance of this Finding of Fact. Taxpayer objects that the finding is unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below.

Taxpayer also objects that this Court "did not cite any authority granting [it] the right to order parties to appear in person thus denying them the right to appear through counsel." This argument fails for several reasons. First, ordering a party to appear in person does not prevent an attorney from appearing on behalf of the party. It just means the party must also appear. Second, by filing an appeal with this Court, a party submits itself to the jurisdiction of this Court and its orders, including an order for the party to appear personally before the Court. If this Court has subpoena power, which it certainly does, then it should be even more capable of ordering parties themselves to appear in person. K.S.A. 74-2437a; K.A.R. 94-5-17. Third, the Kansas Administrative Procedures Act grants this Court the power, under threat of default, to require the presence of a party at a hearing. K.S.A. 77-518(c)(8). *See also* K.S.A. 77-520(a). And fourth, this Court's rules establish that a "[f]ailure of any party to appear at the time and place appointed by the court may result in dismissal or a default judgment." K.A.R. 94-5-24(a).

Taxpayer further complains that we ambushed the taxpayers and counsel; that we did not afford an opportunity to brief the issues of champerty, unauthorized practice of law, or ethical violations; and that we did not provide notice of or an opportunity for a hearing on these issues. We have thoroughly addressed these complaints in Part VI.C. below.

38. The Order to Show Cause was mailed to the Taxpayer, Chatam, Terrill, Mulcahy, the Johnson County Appraiser Paul Welcome, and the assistant county counselor Kathryn Myers ("Myers").[38]

39. At this point, Terrill fully re-engaged as attorney in this case and the related cases. *Transcript,* 33:13-19, 34:18-19.[39]

40. Similar Orders to Show Cause were issued by the Court in a number of other Johnson County tax appeals with similar, if not identical, issues.[40]

41. On August 27, 2012, a Stipulation was filed with the Court in this case by Terrill and assistant county counselor, and a proposed order adopting the stipulation was presented to the Court. The Stipulation indicated that the parties had agreed to reduce the valuation of the subject property from $794,400 to $669,000. The Stipulation was not signed by Mulcahy.[41]

42. In most of the other similar cases, Joint Motions for a Continuance of the September 6 "show cause" hearings were filed with the Court on August 29, 2012, by Terrill, putatively on behalf of the taxpayers therein, and the assistant county counselor Myers. In those Joint Motions, Terrill suggested that the Court order Terrill to provide the Court with copies of the existing Declarations of

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[38] Taxpayer makes no objection to the substance of this Finding of Fact. Taxpayer objects that the finding is unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer also repeats an incongruous argument based on the Order to Show Cause not being mailed to the Board of County Commissioners of Johnson County. This argument is fully answered in fn.28, *supra.* Taxpayer also makes an immaterial point that Myers has not entered an appearance in these cases. Although Myers is an attorney, her situation is distinguishable from that of Terrill and Mulcahy in that Myers is an employee of Johnson County and thus arguably does not need to enter her appearance.

[39] This is a new Finding of Fact.

[40] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[41] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

Representative and the agreements between Chatam and the taxpayers in the possibility that this might make the "show cause" hearings unnecessary.[42]

43. A Joint Motion for a Continuance was not filed in the present case.[43]

44. On August 31, 2012, the Court issued Orders Granting Continuance in this case and in the other similar cases – continuing the "show cause" hearings until September 18, 2012. The Order Granting Continuance in this case noted as follows:

> The Court received a stipulation in the above-captioned matter on August 27, 2012 after its Order to Show Cause was issued. The Court declines to approve the proposed order of stipulation at this time because it is unclear from the face of the [proposed] order whether a party having the statutory right to appeal has assented to the stipulation of value.
>
> The Court presumes that a Joint Motion for Continuance was not filed in this case because the proposed stipulation had been filed. In the interest of judicial economy, the Court will order the same . . . continuance in this case as those cases with the joint motion on record.[44]

45. The Orders Granting Continuance in this case and in the other similar cases ordered Terrill to file with the Court the Declarations of Representative and the agreements between taxpayers and Chatam in this case and in all the other similar cases by September 5, 2012. The Order Granting Continuance also noted and ordered as follows:

> 4. If, after receiving and reviewing all the documents . . . , the Court determines that the purpose of the hearings has been obviated, then the Court will cancel the hearings and issue an order to that effect and notify the taxpayers, attorneys, and any other interested party.

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[42] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[43] Taxpayer makes no objection to this Finding of Fact.

[44] Taxpayer makes no objection to this Finding of Fact.

5. Counsel Linda Terrill shall notify the taxpayer of the contents of this order.[45]

46. The Orders Granting Continuance were mailed to Chatam, Terrill, Mulcahy, and Myers.[46]

47. On September 5, 2012, the Declarations of Representative and the agreements between taxpayers and Chatam were filed in this case and in all the other similar cases from Johnson County.[47]

48. After the Court reviewed all the submitted Declarations of Representative and the agreements, the Court did not cancel the hearings scheduled for September 18, 2012.[48]

49. The "show cause" hearings in this case and all the other similar cases from Johnson County were held on September 18, 2012.[49]

50. Despite the Court's order that the Taxpayer appear in person, the Taxpayer defied the order and failed to appear at the hearing, and Terrill explained the absence as follows:

> She [the Taxpayer Lyerla] was planning on attending today. . . . Unfortunately for her, she called last night and said that her daughter's getting married in October, and the country club called and changed the meeting date to today at 11:00. So she called and - - and the conversation was basically that she was not going to be able to attend. . . . [S]he doesn't mean her appearance to be - - or non-appearance to be a matter of disrespect, but it just got trumped by the

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[45] Taxpayer makes no objection to the factual substance of this Finding of Fact. Taxpayer objects that the Order Granting Continuance was not properly served. This objection was fully addressed in fn.28, *supra*.

[46] Taxpayer makes no objection to the factual substance of this Finding of Fact. Taxpayer objects that the Order Granting Continuance was not properly served. This objection was fully addressed in fn.28, *supra*.

[47] Taxpayer makes no objection to this Finding of Fact.

[48] Taxpayer makes no objection to this Finding of Fact.

[49] Taxpayer makes no objection to this Finding of Fact.

> daughter and the wedding and the country club meeting for the reception because it just couldn't be changed. So she's - - that's that issue.

Transcript, 6:4, 6:8-14, and 7:7-13.[50]

51. At the beginning of the September 18 Hearings, this Court noted that, because two different attorneys had entered appearances, it was unclear to the Court what attorney was authorized to act on behalf of appellant, whoever that was determined to be.[51]

52. At the September 18 Hearings, Terrill confirmed that the Chatam agreement in this case was proffered as justification for purposes of establishing subject matter jurisdiction herein and that the agreements controlled the relationships between and among the taxpayers, Terrill, and Chatam. *Transcript,* 35:16-21, 40:23-25, and 67:11-18.[52]

53. At the September 18 Hearings, Terrill called Jerry W. Chatam as a witness, and Chatam was questioned by Terrill and by the Court.[53]

54. At the September 18 Hearings, after Jerry W. Chatam was excused as a witness, the Court heard from attorney Mulcahy. The Court asked Mulcahy if she, after hearing the testimony of Chatam, had any information to provide regarding that testimony and if she wished to present any supplemental information. *Transcript,* 109:8 to 112:1.[54]

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[50] Taxpayer makes no objection to the factual substance of this Finding of Fact. Taxpayer suggests that the order "was served illegally" and that we did not have the power or authority to order Taxpayer to appear in person. These arguments have been fully addressed in fn.28, *supra,* and fn.38, *supra,* respectively.

[51] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[52] Taxpayer makes no objection to this Finding of Fact.

[53] Taxpayer makes no objection to this Finding of Fact. Taxpayer only objects that the Court's inquiry of Chatam was outside its power and authority. This argument is addressed in Part VI above.

[54] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

55. While Chatam testified that there was no written agreement with Mulcahy, Mulcahy stated that she and Chatam *had* a written agreement based on a written offer letter from Chatam, which set out her proposed compensation. *Transcript,* 110:3-13.[55]

56. Attorney Mulcahy had filed *Motions to Withdraw* as attorney in most of the tax appeal cases before this Court in which she had previously filed entries of appearance. At the September 18 Hearings, attorney Mulcahy affirmed her desire to withdraw, and orally moved the Court to grant an order allowing her to withdraw in any and all tax appeal cases before this Court in which she had previously entered an appearance. *Transcript,* 110:18 to 112:4.[56]

57. After hearing from Mulcahy, the Court granted Mulcahy's motions to withdraw in any and all tax appeal cases before this Court in which she had previously entered an appearance. *Transcript,* 129:8-16.[57]

58. After hearing from Mulcahy, the Court granted attorney Terrill provisional authority to act as attorney for the Taxpayer in the present case and for the taxpayers in the other tax appeals cases scheduled for "show cause" hearings on September 18, 2012.[58]

59. After concluding the "show cause" hearing in the present case, the Court proceeded to hold hearings in all the other tax appeal cases scheduled for "show cause" hearings on September 18, 2012, and heard testimony from a number of taxpayers in those other tax appeal cases.[59]

60. After the Court issued its original Order herein on October 10, 2012, and long after the time for the appeal had run, Taxpayer filed – on October 19, 2012 – a

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[55] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[56] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[57] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[58] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[59] Taxpayer makes no objection to this Finding of Fact.

"corrected" notice of appeal form (in the Small Claims Division for this tax appeal) that had been signed by Terrill as attorney.[60]

61. In all tax appeal cases before this Court (and before its predecessor the Board of Tax Appeals ("BOTA")) involving Chatam, Chatam has and had no *natural* connection to the taxpayers – such as being a family member of the taxpayer or being an official, owner, or employee of an entity taxpayer – apart from the case itself, with the exception of *very rare* instances in which the tax appeal case involves or involved Chatam's own properties or those of his family members.[61]

62. In all tax appeal cases before this Court and its predecessor BOTA (hereafter all references to the "Court" will include both this Court and its predecessor BOTA) involving Chatam, Chatam had and has absolutely no connection to the taxpayers apart from the case itself, with the exception of *very*

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[60] This is a new Finding of Fact.

[61] Taxpayer objects to this Finding of Fact as being unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer also objects to the substance of the finding as follows:

> There is absolutely no evidence in the record to support the "finding" advanced herein. If this is a "fact" it was learned by the agency as a result of some conversations with others or as a part of an investigation into matters not before the agency here. Or it was not a fact but simply a conclusion.

This Court has had no ex-parte conversations regarding these matters. This finding of fact is based in part on testimony in the record indicating that Taxpayer learned about Chatam from a reference provided by a third party. *Transcript*, 43:2-5. Moreover, we can properly make reasonable inferences drawn from the evidence. *Kuxhausen v. Tillman Partners, L.P.*, 291 Kan. 314, 320, 241 P.3d 75, 80-81 (2010); *In re Appeal of ANR Pipeline Co.*, 276 Kan. 702 Syl. ¶ 5, 79 P.3d 751, 753 (2003); *Friends of Bethany Place, Inc. v. City of Topeka*, 43 Kan. App. 2d 182, 202, 222 P.3d 535, 549 (2010). This finding of fact is also in part a reasonable inference based on the agreements in the record between Chatam and taxpayers. If Chatam had a natural connection or relationship to any taxpayer – such as being a family member or an official, owner, or employee – no agreement with that taxpayer would have been necessary. Yet, *without exception*, in all these cases (approximately 170) in which Terrill filed her motions to withdraw, and in which Mulcahy entered her appearances, there *was* an agreement. Given that, it is reasonable to infer that Chatam had no natural connection or relationship to any of the taxpayers in these cases, and then it is also reasonable to infer further the finding of fact herein made by the Court.

rare instances in which the tax appeal case involves or involved Chatam's own properties or those of his family members.[62]

63. In all tax appeal cases before this Court involving Chatam, Chatam is and was a "stranger" to the taxpayers and the cases, with the exception of *very rare* instances in which the tax appeal case involves or involved Chatam's own properties or those of his family members.[63]

64. Chatam has, in this case and in a multitude of current and past tax appeals cases before this Court, directed and managed those tax appeal cases, with many of those cases pursued in the Regular Division of this Court *and with many of those cases receiving favorable results leading to the payment of a contingency fee to Chatam* as required by the Agreement in this case and agreements in the other cases. *Transcript,* 69:1-8 and 84:2 to 86:7.[64]

65. Chatam testified that after he hires Terrill to act as attorney in a case, his role is to coordinate the appeal efforts. *Transcript,* 56:9-17. Chatam explained that while the taxpayers are permitted to communicate with Terrill during the course of an appeal, they generally do not, opting instead to work directly with Chatam to obtain status updates and information about when and how their cases will be resolved. *Transcript,* 55:3-19 and 56:17 to 57:1. Chatam stated that taxpayers depend on him to follow the appeals "very, very closely" and to make recommendations about courses of action through the appeal process, including pursuit of the case in this Court's Regular Division after Terrill is engaged as attorney. *Transcript,* 59:3-17.[65]

66. During the hearings in the other tax appeal cases held in the afternoon on September 18, 2012, Terrill made an inquiry about whether it would be necessary to call as witnesses the remaining taxpayers who had appeared but had not yet testified, asking as follows:

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[62] Taxpayer makes the same objections to this Finding of Fact as Taxpayer did regarding Finding of Fact 61. For a full discussion of these objections, *see supra* fn.61.

[63] Taxpayer makes the same objections to this Finding of Fact as Taxpayer did regarding Finding of Fact 61. For a full discussion of these objections, *see supra* fn.61.

[64] *See also* Finding of Fact 72 below. Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[65] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

> MS. TERRILL: Okay. Is there anybody here that believes they have some different story than what we've already just testified to?

At this point in the hearing, Chatam contradicted Terrill as the following from the transcript indicates:

> [MR. CHATAM:] Oh, I think it's important that everybody testifies. They were subpoenaed up here, and they came here to testify.
>
> MS. TERRILL: Well, they didn't get subpoenaed. Okay.
>
> [MR. CHATAM:] I think everybody should testify.

Terrill then complied with Chatam's instructions. *Transcript,* 167:12-23.[66]

67. Chatam has and had full discretion and authority under the vast majority of Chatam's agreements with taxpayers to negotiate and conclude settlements of the tax appeal cases without taxpayers' input. In at least some of those cases before this Court, however, Chatam has consulted with taxpayers regarding settlement of the cases prior to completing the settlements. [67]

68. Chatam has, in this case and in a multitude of current and past tax appeals cases before this Court, evaluated the merits of those cases based on various factors (including applicable valuation concepts and legal principles relating to valuation) to determine whether to pursue the appeals or not. *Transcript,* 73:11 to 74:20.[68]

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[66] The transcript indicates the speaker of Mr. Chatam's words as "Mr. Priviterea," but the Court observed during the hearing that the speaker was actually Mr. Chatam, and the audio recording confirms this. Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[67] Taxpayer objects that, in making this Finding of Fact, the Court ignores testimony which, according to Taxpayer, shows that Chatam does not exercise the extensive discretion and control expressly set forth in the Agreement. This Finding of Fact, however, merely notes the discretion and control set forth in the agreements, and then acknowledges that Chatam has consulted with taxpayers on settlement in at least some instances. In any event, the objection is legally futile and factually ineffectual for all the same reasons set forth in fn.6, *supra. See also* Findings of Fact 7, 8, & 9 above.

[68] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

69. Chatam has, in this case and in a multitude of current and past tax appeals cases before this Court, conferred with taxpayers about their tax appeal cases. *Transcript,* 73:11-19 and 74:21 to 75:9.[69]

70. Chatam has, in this case and in a multitude of current and past tax appeals cases before this Court, advised taxpayers in those tax appeal cases about the merits of those cases based on various factors including applicable valuation concepts and legal principles relating to valuation. *Transcript,* 73:11-19 and 74:21 to 75:9 and 76:10 to 79:7.[70]

71. Chatam testified that he works with clients on tax increment financing projects and provides appeal recommendations based on this analysis of certain legal and procedural rules and case authorities involving tax appraisal and assessment law. *Transcript,* 75:11 to 76:8.[71]

72. Chatam has, in this case and in a multitude of current and past tax appeals cases before this Court, directed and managed those tax appeal cases in almost every way that is possible. *Transcript,* 73:11 to 83:23 (Chatam), 156:23 to 157:20 and 160:18 to 161:2 (Mr. Westerfeld), 164:5 to 165:7 (Mr. Dean), 169:6-17 and 171:11-16 and 173:5 to 174:5 (Mr. Privitera), 175:18 to 176:24 (Mr. Craig), 180:12 to 181:16 (Mr. Sulzer), 183:21 to 184:11 (Ms. Cummins), 186:9 to 187:1 (Mr. Alvey), 190:10-23 and 192:12-23 (Mr. Bean), 194:22 to 195:7 (Ms. Moore), 197:11 to 198:22 (Mr. Collis), and 206:5-14 and 207:13-25 (Mr. Bleakley).[72]

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[69] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[70] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[71] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[72] Taxpayer objects to this Finding of Fact as being unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer also objects to this Finding because it is "not a 'finding' but some conclusion drawn by the agency." This Finding of Fact, however, is based on the record as a whole, including Chatam's agreements with taxpayers, and Chatam's conduct as indicated by his own testimony and that of taxpayers at the September 18 Hearings. Among other things, Chatam testified and Terrill represented that the agreements control the relationships between and among taxpayers, Terrill, and Chatam, and that the agreements reflect the true relationship between the taxpayers and Chatam. *Transcript,* 35:16-21,

73. Chatam or its representatives have, in this case and in a multitude of current and past tax appeal cases, represented taxpayers in those tax appeal cases during informal hearings with county appraisers' offices. *Transcript,* 56:1-6, 72:16-19, 73:11-19, and 79:8 to 81:1.[73]

74. Chatam or its representatives have, in this case and in a multitude of current and past tax appeal cases, negotiated with county appraisers' offices regarding settlement of those tax appeal cases prior to an appeal to this Court. *Transcript,* 71:6-9, 72:16-19, 73:11-19, and 79:8 to 81:1.[74]

75. Chatam or its representatives have, in this case and in a multitude of current and past tax appeals cases before this Court, signed notices of appeal filed with this Court. *Transcript,* 71:11-15.[75]

76. Chatam or its representatives have, in this case and in a multitude of current and past tax appeals cases before this Court, represented taxpayers in those tax appeal cases in the Small Claims Division of this Court. *Transcript,* 71:6-9, 72:16-19, 73:11-19, and 81:2 to 83:3.[76]

77. Chatam or its representatives have, in this case and in a multitude of current and past tax appeals cases before this Court, negotiated on behalf of

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40:23-25, 67:11-18. For a more thorough discussion of these matters, *see* Findings of Fact 7, 8, & 9 above.

[73] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[74] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[75] Taxpayer makes no objection to the factual substance of this Finding of Fact. Taxpayer asserts that "signing appeal forms to the Small Claims Division" of this Court "has been the accepted practice for years before this agency." This assertion, however, flies in the face of our Court's rules, a 2008 case decision from this Court, Kansas Supreme Court rules, Kansas case law, and attorney general opinions, all as set forth in Parts IV and IX below.

[76] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

taxpayers with county appraisers' offices while the cases were in the Small Claims Division of this Court. *Transcript,* 71:6-9, 72:16-19, 73:11-19, and 81:2 to 83:15.[77]

78. Chatam has, in this case and in a multitude of past tax appeals cases before this Court, hired and retained (without consulting taxpayers) the attorney appearing in the Regular Division for those cases, paid for such attorney (without any reimbursement from the taxpayers), terminated and replaced the attorney (without consulting taxpayers). *Transcript,* 98:19 to 99:2 and 99:23 to 100:2 (Chatam), 159:1 to 160:2 (Mr. Westerfeld), 165:22 to 166:9 (Mr. Dean), 169:23 to 170:10 (Mr. Privitera), 176:8-11 and 177:5-18 (Mr. Craig), 190:14 to 191:2 (Mr. Bean), 197:16 to 197:12 (Mr. Collis).[78]

79. Regarding hiring of attorneys, Chatam specifically testified as follows to explain why it was appropriate for taxpayers to delegate that responsibility to Chatam: "Most of our clients really don't - - most of them don't have any expertise with selecting an attorney to come before this Board [the Court], and it's best that we have someone generally that has experience with the Board [the Court] to come up - - " *Transcript,* 43:24 to 44:4.[79]

80. Chatam has, in this case and in a multitude of past tax appeals cases before this Court and while such cases were in the Regular Division, received proposed settlement offers from Terrill (or other applicable attorney), presented them to taxpayers and, without the presence of the attorney, advised them about whether or not such offers should be accepted. *Transcript,* 47:24 to 49:9, 51:2-6, 73:11-19, and 83:9 to 83:15.[80]

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[77] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[78] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[79] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[80] Taxpayer makes no objection to the factual substance of this Finding of Fact. Taxpayer objects that the finding is unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer also sets forth an extensive list and discussion of this Court's decisions to support the suggestion that it is necessary for Chatam to be aware of and analyze these decisions so that he can give full and adequate settlement advice to his taxpayer clients. The analysis of such decisions, and the giving of settlement advice based thereon, seems to this Court, however, to be clearly within the scope of practicing law. *See* Part IX below.

81. Regarding discussions of the proposed settlement in this case, Chatam testified as follows to explain the process:

> We discussed that [the proposed settlement offer] with the client. And then they - - we made a recommendation to them as to, "Well, the reality is you probably should settle this. It's about the best we're going to do. *It's not worth going up to [an evidentiary hearing before] the Court of Tax Appeals for remaining value difference."* And she concurred with that and authorized to accept that.

Transcript, 49:2-9 (emphasis added). This testimony indicates that there might have been additional savings to the client by pursuing an evidentiary hearing. Given that Chatam was responsible for all expenses and fees related to pursuing an evidentiary hearing, it appears from his testimony that the reason for not pursuing the tax appeal case further was the economic interest of Chatam rather than the economic interest of the Taxpayer.[81]

82. Regarding the proposed settlement offer in this case, Terrill never discussed the offer with Taxpayer. Terrill transmitted the offer to Chatam. Chatam then discussed the offer with Taxpayer. Chatam then transmitted the written authorization for settlement to Terrill, who then contacted the county counselor to accept the offer. *Transcript,* 48:1 to 50:9.[82]

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[81] Taxpayer makes no objection to the factual substance of this Finding of Fact except to describe the Finding's portions after the quoted testimony as a "conclusion." This latter portion of the Finding is reasonable inference drawn from the evidence. *Kuxhausen v. Tillman Partners, L.P.,* 291 Kan. 314, 320, 241 P.3d 75, 80-81 (2010); *In re Appeal of ANR Pipeline Co.,* 276 Kan. 702 Syl. ¶ 5, 79 P.3d 751, 753 (2003); *Friends of Bethany Place, Inc. v. City of Topeka,* 43 Kan. App. 2d 182, 202, 222 P.3d 535, 549 (2010). In part, the reasonable inference is based on the agreements in the record between Chatam and taxpayers. Taxpayer also objects that the finding is unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer also repeats, albeit in briefer form, the argument made regarding Finding of Fact 80. For the Court's response to the latter argument, *see supra* fn.80.

[82] Taxpayer makes no objection to the factual substance of this Finding of Fact. Taxpayer objects that the finding is unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer also makes an immaterial comparison between Terrill's settlement conduct as attorney for Taxpayer and the settlement conduct of assistant county counselor Myers in representing Johnson County. *See State ex rel. Stovall v. Martinez,* 27 Kan. App. 2d 9, 16, 996 P.2d 371, 377 (2000), *rev. denied* (what others do does not mitigate against characterizing activity as misconduct). Taxpayer asserts that Myers does not communicate settlement offers to the

83. Regarding Chatam's discussions with taxpayers about proposed settlement offers for tax appeal cases, including while the cases are in this Court's Regular Division, Chatam testified that the taxpayers "rely on our [Chatam's] expertise to make recommendations to them. . . ." *Transcript,* 51:2-4.[83]

84. Any tax appeal case involving Chatam (with one exception) that is appealed to this Court's Regular Division without having received any reduction in value at earlier stages will generate no fee to Chatam if the case is then dismissed or if the outcome is unfavorable in the Regular Division, and this result has in fact occurred in tax appeal cases involving Chatam and Terrill. *Transcript,* 84:2 to 86:7, 88:9 to 89:6, and 92:18-22.[84]

Board of County Commissioners for Johnson County but only to the Johnson County Appraiser. Although we have not been presented by either party with any legal authorities on this issue, a cursory review of the applicable Kansas statutes indicates that it is the county appraiser who has the applicable authority and responsibility regarding these matters. *See, e.g.*, K.S.A. 79-1412a.

[83] Taxpayer makes no objection to the factual substance of this Finding of Fact. Taxpayer objects that the finding is unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer also makes an immaterial assertion that "each and every witness testified that they contracted for [Chatam's] expertise and wanted his opinion on valuation matters." For a partial response to this assertion, *see supra* fn.80. In addition, to the extent that Chatam's conduct constitutes unauthorized practice of law (*see* Parts VIII and IX below), how well Chatam performed or performs that conduct (or any client testimony to that effect) is irrelevant. As stated by the Kansas Court of Appeals:

> Because the court does not consider how well the defendant performs when considering a claim of unauthorized practice of law, this evidence would clearly *not* have been relevant to the unauthorized practice of law.

State of Kansas ex rel. Stovall v. Martinez, 27 Kan. App. 2d 9, 16, 996 P.2d 371, 377 (2000), *rev. denied* (emphasis added). *See also id.* at 12, 996 P.2d at 375 ("The court does not concern itself with the results of the service").

[84] Taxpayer objects that the finding is unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer also properly objects that the original Finding of Fact was "only partially true." We have now included a parenthetical clause in this Finding of Fact to correct its one minor inaccuracy. In one set of cases involving Hy-Vee and affiliated entities, the agreements provide that Chatam is to receive a flat fee of $300.00 per property, as well as a significant contingency fee in each case. In all other instances, the fee arrangement is based purely on a percentage or contingency fee.

85. In a multitude of past tax appeals cases before this Court involving Chatam and Terrill that were appealed to this Court's Regular Division without having received any reduction in value at earlier stages, favorable results were obtained in the Regular Division, generating significant contingency fees for Chatam, with the legal services in such cases being provided by Terrill, and thus such contingency fees paid to Chatam are and were based on and attributable to the legal services of Terrill provided in the Regular Division of this Court. *Transcript,* 53:8-21 and 69:1-8 (Chatam), 84:2 to 86:7 (Chatam), 157:10-15 (Mr. Westerfeld), 164:20 to 165:7 (Mr. Dean), 171:11-16 (Mr. Privitera), 175:18-22 and 176:20 to 177:1 (Mr. Craig), 180:12-21 (Mr. Sulzer), 194:22-24 (Ms. Moore), 198: 20-22 (Mr. Collis), and 207: 13-22 (Mr. Bleakley).[85]

86. Regardless of whether value reductions had been obtained prior to the Regular Division, Chatam has, in a multitude of tax appeals cases before this Court, received significant contingency fees based on favorable settlements or favorable decision results while the cases were in this Court's Regular Division, with the legal services in such cases being provided by Terrill, and thus such contingency fees paid to Chatam are and were based on and attributable to the legal services of Terrill provided in the Regular Division of this Court. *Transcript,* 53:8-21 and 69:1-8 (Chatam), 84:2 to 86:7 (Chatam), 157:10-15 (Mr. Westerfeld), 164:20 to 165:7 (Mr. Dean), 171:11-16 (Mr. Privitera), 175:18-22 and 176:20 to 177:1 (Mr. Craig), 180:12-21 (Mr. Sulzer), 194:22-24 (Ms. Moore), 198: 20-22 (Mr. Collis), and 207: 13-22 (Mr. Bleakley).[86]

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[85] Taxpayer objects that the finding is unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer makes no objection to the factual substance of this Finding of Fact except to describe it as a "conclusion." This Finding, however, is not a mere conclusion. It is a proper finding of fact based on the record herein, including but not limited to the cited testimony and Chatam's agreements with taxpayers. *See also* Finding of Fact 18 above, the factual substance of which was not objected to by Taxpayer.

[86] Taxpayer objects that the finding is unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer makes no objection to the factual substance of this Finding of Fact except to describe it as a "conclusion." This Finding, however, is not a mere conclusion. It is a proper finding of fact based on the record herein, including but not limited to the cited testimony and Chatam's agreements with taxpayers. *See also* Finding of Fact 18 above, the factual substance of which was not objected to by Taxpayer.

87. Chatam has in this case and in a multitude of current and past tax appeal cases before this Court, paid (without reimbursement from taxpayers) all expenses relating to pursuing those tax appeal cases. *Transcript,* 53:8-21 (Chatam and Terrill), 67:18 to 69:8 (Chatam), 65:20 to 66:11 (Terrill), 157:10-15 (Mr. Westerfeld), 164:20 to 165:7 (Mr. Dean), 171:11-16 (Mr. Privitera), 175:18-22 and 176:20 to 177:1 (Mr. Craig), 180:12-21 (Mr. Sulzer), 194:22-24 (Ms. Moore), 198: 20-22 (Mr. Collis), and 207: 13-22 (Mr. Bleakley).[87]

88. Chatam has, in this case and in a multitude of current and past tax appeal cases before this Court, paid (without reimbursement by taxpayers) the filing fees for those cases. *Transcript,* 53:8-21 (Chatam and Terrill), 67:18 to 69:8 (Chatam), 65:20 to 66:11 (Terrill), 157:10-15 (Mr. Westerfeld), 164:20 to 165:7 (Mr. Dean), 171:11-16 (Mr. Privitera), 175:18-22 and 176:20 to 177:1 (Mr. Craig), 180:12-

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[87] Taxpayer objects that the finding is unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer expressly objects that this Finding of Fact is "false" and that it leaves out information provided by "testimony of Chatam" relating to (i) payment of filing fees by Taxpayer (Lyerla); (ii) payment of filing fees by other taxpayers; and (iii) that some taxpayers pay for the appraisal costs. Taxpayer then asserts that "the inclusion of this [finding] gives the appearance that the order was written prior to the hearing and this [finding] was not cleaned up after the testimony was received." There are several reasons this Finding of Fact is fully supported by substantial and competent evidence in the record (without any implications of impropriety by the Court).

First and foremost, this Finding of Fact is not universal; it does not, by its language, apply to *all* of Chatam's tax appeal cases; it applies to this case and a *multitude* of tax appeal cases. It is true (without undercutting the accuracy of this Finding of Fact) that, in one set of cases (involving Hy-Vee and its affiliated entities), the agreement provides that Hy-Vee will be responsible for some appraisal costs. But the effect of this provision is so negligible as to be almost non-existent. The "Hy-Vee" agreement relates to approximately 300 separate properties for which Chatam is to handle the tax appeals. Pursuant to the agreement, if it becomes necessary for Chatam to obtain expert appraisal reports on any of the properties, Hy-Vee will pay for 75% of the first *two* appraisals. Chatam thus is obligated to pay for any appraisals required for any of the other 298 properties.

Second, regarding the payment of filing fees by Taxpayer (Lyerla), *see supra* fn.11 and fn.23. Third, regarding the general credibility of Chatam's testimony when it is self-serving, *see* Finding of Fact 9. Fourth, Taxpayer asserts that all the taxpayers (with the exception of Sunflower Bank) "now pay the filing fees. . . ." But many of the current agreements between Chatam and taxpayers still expressly state that Chatam will pay all expenses and do not make an exception for filing fees. And case law holds that the agreement cannot be ignored, and that evidence of actual conduct inconsistent with the applicable agreement is irrelevant and *is* to be ignored by the court. *See, e.g., Boettcher v. Criscione,* 180 Kan. 39, 45, 299 P.2d 806, 811 (1956); *Med Controls, Inc. v. Hopkins,* 61 Ohio App. 3d 497, 499-500, 573 N.E.2d 154, 155-56 (1989).

21 (Mr. Sulzer), 194:22-24 (Ms. Moore), 198: 20-22 (Mr. Collis), and 207: 13-22 (Mr. Bleakley).[88]

89. Chatam has, in a multitude of current and past tax appeal cases before this Court, hired and retained (without consulting taxpayers) appraisers and experts for those cases, paid for (without reimbursement from the taxpayers) all such appraiser or other expert fees, and paid for (without reimbursement from the taxpayers) all appraisal or other expert reports. *Transcript,* 53:8-21 (Chatam and Terrill), 67:18 to 70:12 (Chatam), 65:20 to 66:11 (Terrill), 157:10-15 (Mr. Westerfeld), 164:20 to 165:7 (Mr. Dean), 171:11-16 (Mr. Privitera), 175:18-22 and 176:20 to 177:1 (Mr. Craig), 180:12-21 (Mr. Sulzer), 194:22-24 (Ms. Moore), 198: 20-22 (Mr. Collis), and 207: 13-22 (Mr. Bleakley).[89]

90. Over the years, in a multitude of tax appeal cases, Terrill has served as attorney in this Courts' Regular Division in those tax appeal cases, having been hired by Chatam pursuant to Chatam's authority to act on behalf of taxpayers as set forth in the subject agreements. *Transcript,* 31:22-25, 53:8-21, 105:1-5.[90]

91. For Terrill's representation of all past and current tax appeal cases involving Chatam, Chatam directly paid and pays all Terrill's attorneys fees relating to such representation at least *through and including* a result in the Regular Division of this Court. *Transcript,* 46:16-18, 70:13-19, and 87:2-6.[91]

92. Chatam has testified and Terrill has stated that Chatam pays an hourly fee to Terrill for her legal services. Chatam has testified that Terrill bills monthly and is paid monthly by Chatam for the legal services she has provided in all the tax appeal cases in which she has been retained by Chatam. *Transcript,* 45:19-23, 87:2-6, 89:20-21, and 90:6-7.[92]

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[88] Taxpayer makes the same objections to this Finding of Fact as Taxpayer did regarding Finding of Fact 87. For a full discussion of these objections, *see supra* fn.87.

[89] Taxpayer makes the same objections to this Finding of Fact as Taxpayer did regarding Finding of Fact 87. For a full discussion of these objections, *see supra* fn.87.

[90] This is a new Finding of Fact.

[91] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[92] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

93. Regarding the tax appeal cases for which hearings were held on September 18, 2012, the Court neither requested nor received any documentation to confirm the hourly billing method or the regular submission of legal bills from Terrill to Chatam or the payment of the same by Chatam to Terrill.[93]

94. Regarding the reasons for replacing Terrill with Mulcahy as attorney in this case and in the other related tax appeal cases (in spite of Mulcahy's lack of experience in tax appeals), Chatam testified and Terrill stated that the replacement decisions had nothing to do with economic motivation on Chatam's part, but was motivated strictly because Terrill was overwhelmed by the workload involved in handling the tax appeals in which Chatam had hired Terrill. *Transcript,* 46:8 to 47:10, 96:3-8, 97:24 to 98:1, 100:3 to 102:11, 103:3 to 104:22, 105:7 to 106:3, and 108:1-16. As explained in Findings of Fact 9 above and 95 below, there are general reasons to question the credibility of Chatam's testimony and Terrill's statements denying that the replacement decisions were economically motivated. There are also several specific reasons.

First, Chatam replaced an attorney with significant experience in tax appeal cases with one who had practically no such experience. *Transcript,* 46:24 to 47:1, 101:24 to 102:1, 104:13-16. The taxpayers expressed no complaint about the quality or capability of Terrill's service. *Transcript,* 97:24 to 98:1 (Chatam), 104:24 to 105:6 (Chatam), 166:21 to 167:7 (Mr.Dean), 169:12 to 170:10 (Mr. Privitera), 180:12 to 181:25 (Mr. Sulzer), 183:21 to 184:11 (Ms. Cummins), 186:14 to 187:1 (Mr. Alvey), 190:24 to 191:2 (Mr. Bean), 195:8-10 (Ms. Moore), 198:10-12 (Mr. Collis), 202:21-24 (Mr. Bado), and 206:15-19 (Mr. Bleakley). And this change in attorneys was supposedly done to provide better service to Chatam's taxpayer-clients. *Transcript,* 47:7-10, 100:19 to 101:13, 103:15 to 104:16, 105:7 to 106:3, and 108:7-16.

A second specific reason to question Chatam's and Terrill's credibility on this issue is that, at Chatam's request and direction, Terrill fully re-engaged as attorney after Mulcahy quit (despite the putative overwhelming workload). *Transcript,* 33:12-19. Third, neither Chatam nor Terrill indicated there had been *any* effort to bring into the cases any other attorney to ease the putative overwhelming workload. *See, e.g., Transcript,*33:12-19, 96:10-21, 108:1-6. And finally, Chatam expressly testified as follows:

> [Y]ou know, most of our clients really don't - - most of them don't have any expertise with selecting an attorney to come before the Board

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[93] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

> [Court], and it's best that we have someone generally that has experience with the Board. . . .
>
> I knew that anyone that I hired would not be as qualified as you [Terrill].
>
> Q [from Chief Judge Sheldon]: [W]as there any economic motivation for replacing Ms. Terrill with Ms. Mulcahy?
> A [by Chatam]: I - - I don't really think it was economic motivation as much as it was for providing what I envisioned would be a better service to our client.

Transcript, 43:24 to 44:4, 104:14-16, and 100:19-25.[94]

95. Another instance during the September 18 Hearings in which testimony by Chatam was contradicted is when Mulcahy contradicted Chatam regarding the existence of a written employment agreement between them (*see* Finding of Fact 52 above).[95]

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[94] Taxpayer objects that this Finding of Fact is "offensive in as much as it questions the veracity of statements by Terrill therein." This Finding of Fact, however, is fully supported by the record as set forth. In particular, as referenced in this Finding of Fact, *see* Finding of Fact 9 above and 95 below.

Taxpayer objects to the Court's use of the phrase "overwhelming workload" in this Finding of Fact. But this phrase fairly characterizes the testimony about the putative reason for why Chatam replaced Terrill with Mulcahy. *See Transcript*, 46:10-11 (Chatam: "[W]e were worried about your [Terrill's] office and yourself, with your demands on your time."), 96:4-5 (Chatam: "There was going to be an issue with getting everything done. . . . "), 103:24-25 (Terrill: "And did I suggest to you [Chatam] that I thought it was more than we could do. . . . "), 104:12 (Chatam: "It was just going to be too much [for Terrill.]"), 105:13-15 (Chatam: "I mean that was a the whole - - that was the sole reason for it [replacing Terrill]. We were worried about being able to get everything done. . . . ").

Taxpayer lastly asserts that "[i]t should be clear that once COTA denied the Motion to Withdraw, I would remain fully engaged as counsel." That is not at all clear or required. The only reason that the Court denied Terrill's original motions to withdraw was because she failed to give notice thereof to taxpayers. *See* Finding of Fact 36 above. Terrill still could have withdrawn in these cases if she had properly provided notice to the taxpayers and taken any appropriate steps to ensure that taxpayers were not prejudiced thereby.

[95] Taxpayer objects that Chatam's testimony is subject to an alternative interpretation. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

96. The Court received no documentation or testimony regarding the fee structure or the payment of fees during the many years past in which Terrill provided legal services for cases in which Chatam was involved.[96]

97. Terrill has had a long-standing and persistent relationship with Chatam such that Terrill has provided legal services over the years in a multitude of tax appeal cases involving Chatam before this Court. *Transcript,* 31:22-25 (Terrill); 53:8-21 (Terrill and Chatam), 105:1-5 (Terrill and Chatam), 164:5 to 165:7 (Mr. Dean), 171:11-16 (Mr. Privitera), 180:12 to 181:25 (Mr. Sulzer).[97]

98. Based on official notice of this Court's official records in other cases, in a multitude of tax appeal cases before the Regular Division of this Court, Terrill has voluntarily dismissed those cases at very late stages, with most of those dismissals occurring within a few days of the scheduled evidentiary hearing dates and with many dismissed on the day before, or even the late afternoon or early evening before, the scheduled hearing dates.[98]

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[96] Taxpayer makes no objection to the factual substance of this Finding of Fact. For the Court's response to Taxpayer's non-factual objection, *see supra* fn.5.

[97] Taxpayer objects to this Finding of Fact as being unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer also objects to this Finding of Fact as a "conclusion" and as an improper attempt to establish that "Terrill and Chatam are in business together." As the *Transcript* citations indicate, however, it is a statement of fact based on Chatam's testimony and Terrill's representations to this Court, as well as the testimony of taxpayers. While the record does not indicate that Terrill and Chatam co-own a business as equity stockholders, members, or partners, it does indicate that they have a long-standing and persistent business "relationship" together. For example, Terrill specifically represented that "he [Chatam] - - for a number of years - - I [Terrill] don't even know how long - - but a number of years, he retains us - - or my [Terrill's firm], not just me." *Transcript,* 31:22-25. This clearly indicates a long-standing and persistent business relationship between Terrill and Chatam. That relationship includes Chatam hiring Terrill and compensating her for her legal services. *See, e.g.,* Findings of Fact 86, 90, and 91 above.

[98] Taxpayer objects to this Finding of Fact as being unnecessary to this Court's decision and outside its power and authority. These two arguments are addressed in Parts V and VI below. Taxpayer objects that the Court has not satisfied the requirements for taking official notice. For a discussion of the propriety of this Court taking official notice of these facts, *see* Part VII below. Taxpayer does not specifically object to the factual substance of this Finding of Fact. Instead it is stated that Taxpayer "welcomes the opportunity to rebut the conclusion drawn by COTA." Nowhere in the *Petition for Reconsideration,* however, does Taxpayer request an evidentiary hearing, request documentation verifying the facts, or assert that the facts officially noticed by us were inaccurate. Taxpayer's use of the word "conclusion" appears then to be a reference to our conclusions of law contained in Part XVII

99. Based on official notice of this Court's official records in other cases, in 2009, Terrill filed Notices of Appeal in 565 tax appeal cases involving Chatam with this Court. Of those 2009 cases, 255 cases (or 45%) were dismissed, 263 cases (47%) were stipulated to (or settled), and 47 cases (or 8%) held an evidentiary hearing and went to final decision by this Court. The ratio of dismissed cases to "evidentiary hearing" cases for 2009 was 5.4 to 1.[99]

100. Based on official notice of this Court's official records in other cases, in 2010, Terrill filed Notices of Appeal in 732 tax appeal cases with this Court. Of those 2010 cases, 365 cases (or 50%) were dismissed, 326 cases (44.5%) were stipulated to (or settled), and 41 cases (or 5.5%) held an evidentiary hearing and went to final decision by this Court. The ratio of dismissed cases to "evidentiary hearing" cases for 2010 was 8.9 to 1.[100]

101. Based on official notice of this Court's official records in other cases, in 2011, Terrill filed Notices of Appeal in 577 tax appeal cases with this Court. Of those 2011 cases, 304 cases (or 53%) were dismissed, 246 cases (42.5%) were stipulated to (or settled), and 27 cases (or 4.5%) held an evidentiary hearing and went to final decision by this Court. The ratio of dismissed cases to "evidentiary hearing" cases for 2011 was 11.3 to 1.[101]

102. Describing the merits of the tax appeal cases handled by Chatam, he testified as follows:

> And that's the beauty of our end of the deal, because I get a chance to look at the horses *before we bet on the race.* So I get to pick my fights. I don't have to go in and fight something that's a losing battle. I get to pick the winner *off the blocks.* That's like seeing the race ran and then

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below, rather than to our officially-noticed findings of fact. Taxpayer then proceeds not to dispute these "dismissal" Findings of Fact but to explain why so many dismissals occur and why they occur so late in the process. We will take up these arguments and points in Parts IX.D.4 and IX.D.5 below, and in Part XVII below.

[99] Taxpayer makes the same objections to this Finding of Fact as were made regarding Finding of Fact 98. For a full discussion of these objections, *see supra* fn.98.

[100] Taxpayer makes the same objections to this Finding of Fact as were made regarding Finding of Fact 98. For a full discussion of these objections, *see supra* fn.98.

[101] Taxpayer makes the same objections to this Finding of Fact as were made regarding Finding of Fact 98. For a full discussion of these objections, *see supra* fn.98.

> getting to bet. . . . I've done this for 30 years, sir, so I mean I consider myself to be an expert in this industry. . . . But I mean we're able to pick that horse. So it's not like I'm just drawing wild cards out of the deck in a hat. I mean I know what we're getting into, *to begin with.*

Transcript, 90:8-14, 90:18-20, and 91:3-7 (emphasis added). As hereafter set forth, this testimony indicates that most tax appeal cases involving Chatam and Terrill that are ultimately dismissed are recognized by Chatam to be lacking in merit or have only marginal merit to begin with – that is, at the time the appeals are filed with this Court.[102]

We make as additional findings of fact the following interpretations and reasonable inferences[103] regarding the quoted testimony:

A. The "bet" referred to is the expenditure of time and resources by Chatam to pursue the tax appeal. At the latest, the "bet" occurs at the time the case is appealed to this Court.[104]

B. Similarly, the phrase "off the blocks" refers, at the latest, to the time the case is appealed to this Court.

C. Similarly, the phrase "to begin with" at the end of the testimony refers to the time the case is appealed to this Court.

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[102] Although Taxpayer disputes that this sentence is supported by the testimony, Taxpayer admits that it "supports the conclusion that [Chatam's] appraisal experience tells him which cases are meritable." *Petition for Reconsideration*, pp.56-57. This Court has determined that the quoted testimony shows not just what Taxpayer admits, but much more, as is hereafter explained.

[103] *Kuxhausen v. Tillman Partners, L.P.*, 291 Kan. 314, 320, 241 P.3d 75, 80-81 (2010); *In re Appeal of ANR Pipeline Co.*, 276 Kan. 702 Syl. ¶ 5, 79 P.3d 751, 753 (2003) ("If the evidence, with all reasonable inferences to be drawn therefrom, when considered in the light most favorable to the prevailing party, supports the decision, it will not be disturbed on appeal."); *Friends of Bethany Place, Inc. v. City of Topeka*, 43 Kan. App. 2d 182, 202, 222 P.3d 535, 549 (2010).

[104] This is true when the tax case is appealed directly to this Court's Regular Division because, from that time forward, Chatam must hire and pay an attorney to prosecute the appeal. This is also true when the case is appealed first to this Court's Small Claims Division because, from that time forward, Chatam must expend his own time, or that of his staff, and his own resources to prosecute the small claims appeal, and to attend and participate in the small claims hearing.

D. The "fights" referred to are not all those tax cases that are appealed, as most of those are ultimately dismissed; rather, "fights" refers to those cases with merit that Chatam is willing to take, if necessary, to an evidentiary hearing in this Court's Regular Division.[105]

E. Similar to "fights," the word "winner" refers only to those cases with merit that Chatam is willing to take, if necessary, to an evidentiary hearing in this Court's Regular Division.[106]

F. The phrase "I get a chance to look at the horses before we bet," the sentence "I get to pick the winner off the blocks," the sentence "But I mean we're able to pick that horse," the sentence "So it's not like I'm just drawing wild cards out of the deck in a hat," and the sentence "I mean I know what we're getting into, to begin with" all mean the same thing – that, at the time the tax appeals are filed with this Court, Chatam already knows which appealed cases have merit, and which do not, and thus knows that the cases which are ultimately dismissed had no merit or only marginal merit to begin with.[107]

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[105] This interpretation is verified by the later sentence from Chatam's testimony: "I don't have to go in and fight something that's a losing battle." "Going in" and having a "fight" only make sense as references to an evidentiary hearing.

[106] This interpretation is also verified by the context of the prior sentence from Chatam's testimony, which is set forth in fn.105, *supra*.

[107] That these sentences all refer or allude to the time of filing the appeal is indicated by the use of the phrases "before we bet," "off the blocks," and "to begin with," as well as the context of the remainder of the quoted testimony.

Sep 04 12 02:04p K Lyerla

J.W. Chatam & Associates Inc.
Agreement
Real Property

By this Agreement, between _Kathy Lyerla___ (hereinafter referred to as the Client) and J.W. Chatam & Associates Inc. (hereinafter referred to as Chatam), Client retains Chatam to determine whether, in Chatam's opinion, the assessment established by the appropriate taxing authorities assessing jurisdiction (hereinafter referred to as "assessments") for property(ies) identified in exhibit 'A' (hereinafter referred to as "Client's Real Property") is excessive for the 2012 tax year. Client hereby authorizes Chatam to take appropriate action to attempt to have any excessive assessment reduced.

CHATAM agrees:

At its expense, to evaluate and analyze Client's Real Property and to determine, in its own opinion, whether the assessment thereof is excessive for the period covered by this Agreement.

To be responsible for the ad valorem tax program designed for the property(ies) identified in this Agreement as exhibit 'A'. The ad valorem tax program will include the following services for the property(ies) covered in this Agreement.

(1) Analysis of assessed values, including market research, case analysis, and preacquisition analysis.

(2) Representation in tax assessment negotiations with the local tax officials.

(3) Assessment Appeal Board or Board of Supervisors representation.

Chatam will not be responsible for auditing tax statements unless the Client specifically requests that this service be provided.

If Chatam determines, in its sole discretion, that said assessment is excessive, then Chatam shall, take those actions, which it deems appropriate to attempt to have said assessment reduced. Said actions may include, but shall not be limited to, appearing for the Client at informal and formal hearings, appeals before any board, tribunal, commission and employment, at it's expense, of other professionals.

CLIENT agrees:

Chatam has sole authority to determine if the assessment of the Client's Real Property is sufficiently excessive to warrant reduction efforts, and to settle with the appropriate taxing authorities and assessing jurisdictions all ad valorem tax issues related to the Client's Real Property.

To deliver in a timely manner an executed Agent Authorization/Declaration of Representation form and other records, information, or documents requested by Chatam to perform its duties hereinunder. Chatam has authority to utilize information provided by the Client for any purpose necessary for Chatam to conduct business. If this Agreement covers more than one property, then Client agrees to sign separate contract for each property, if so requested by Chatam.

That Chatam is authorized to appear on its behalf before elective and administrative officials, panels, and boards responsible for developing and adjusting property assessment decisions. Client also agrees to execute the Authorization of Representation form attached to this Agreement as exhibit 'B'.

That Chatam is authorized to employ an attorney or law firm of its choosing to handle all legal matters arising from this tax program. Chatam will be responsible for One Hundred Percent (100%) of the legal fees and court expenses incurred for legal services performed on the Client's behalf. The decision to continue legal proceedings after appeals on local, county, and/or state levels have been exhausted will be decided mutually by the parties to this Agreement.

To pay a fee to Chatam if the assessment for the Client's Real Property is reduced for tax year 2012. The fee shall be Thirty-Five Percent (35%) of the tax savings resulting from the reduced assessment for the 2012 tax year. For this Agreement, the term "tax savings" means the difference between the taxing authorities original assessment, and the current assessment, multiplied by the applicable tax rate(s), plus the reduction in any penalties and/or interest. Any reduced assessment shall be deemed solely attributable to the efforts of Chatam.

Upon the taxing authorities acceptance of a reduced assessment, Chatam will estimate the Tax Savings thereon and bill Seventy-five Percent (75%) of the fee entitlement, which the Client will pay within thirty (30) days from the date of Chatam's statement. Client will pay balance of Chatam's fee entitlement within thirty (30) days of the issuance of the real estate tax bills for Client's Real Property. Upon sale of all or any portion of Client's Real Property, all fees covered by this Agreement shall immediately become due and payable.

THE PARTIES HERETO FURTHER AGREE:

That Chatam has no liability for, nor shall be responsible for, any taxes, interest penalties or increased assessment that may result from any review or appeal of the assessment of the Client's Real Property, or from any action or interaction on the part of Chatam from any such liability.

Client shall pay interest at 1.0% /month on the unpaid balance of any fee which remains outstanding after its due date thereof. Client agrees to pay reasonable legal fees and cost incurred by Chatam to enforce this Agreement. Client grants to Chatam the exclusive right, with respect to Client's Real Property, to represent Client for the contract period and any subsequent tax years covered by this Agreement for the purposes set out herein.

This document includes all agreements of the parties and may not be changed except by mutual agreement in writing by the parties to this Agreement.

In witness whereof, the Agreement has been executed this 5th day of January, 2012.

J. W. CHATAM & ASSOCIATES

Signature

Jerry W. Chatam
Print Name

President
Title

CLIENT

Kathy L Lyerla
Authorized Agent

Kathy L. Lyerla
Print Name

home owner
Title

CONCLUSIONS OF LAW

I. SUBJECT MATTER JURISDICTION – GENERAL

A. Duty to Raise. The Court has a duty, even on its own motion, to raise the issue of subject matter jurisdiction, and to make suitable inquiry, if the record indicates there is an issue. *See, e.g. Board of County Com'rs of Sedgwick County v. City of Park City,* 293 Kan. 107, 111, 260 P.3d 387, 390 (2011); *Bruch v. Kansas Dept. of Revenue,* 282 Kan. 764, Syl. ¶ 1, 148 P.3d 538 (2006) ("Parties cannot confer subject matter jurisdiction by consent, waiver, or estoppel, nor can parties convey jurisdiction on a court by failing to object to its lack of jurisdiction."); *Harshberger v. Board of County Com'rs of Ford County,* 201 Kan. 592, 594, 442 P.2d 5, 7 (1968); *Board of County Com'rs of Meade County v. State Director of Property Valuation,* 18 Kan. App. 2d 719, 722-23, 861 P.2d 1348, 1352 (1993), *rev. denied* 253 Kan. 856.

If the Court determines that it lacks jurisdiction, then the appeal must be dismissed. *Meade County,* 18 Kan. App. 2d at 722-23, 861 P.2d at 1352 ("An appellate court has the duty of *questioning* jurisdiction on its own motion [and] [i]f the record discloses a lack of jurisdiction, the appeal must be dismissed.'") (quoting *Resolution Trust Corp. v. Bopp,* 251 Kan. 539, Syl. ¶ 2, 836 P.2d 1142 (1992) (emphasis added)). The Kansas Supreme Court has even chastised the Board of Tax Appeals (this Court's predecessor) for not seeing a subject matter jurisdiction issue when it was obvious. *Vaughn v. Martell,* 226 Kan. 658, 660, 603 P.2d 191, 193 (1979) ("It is difficult to understand how the state board or the district court could have concluded that the board of tax appeals had jurisdiction to grant any relief to the taxpayers.").

B. Burden to Establish. Generally, the appellant has the burden to file and establish the grounds for the appeal. An appellant seeks to have an administrative or court decision reviewed and changed by a higher tribunal. As discussed in Part I.A. above, if a court lacks subject matter jurisdiction, then the court must dismiss the case whether the issue is raised by the parties or by the court itself. Inherently then, if the appellant desires that a decision be reviewed, it must establish that the higher tribunal has jurisdiction over the subject matter of that appeal or the case will be dismissed. *Vaughn v. Martell,* 226 Kan. 658, 660, 603 P.2d 191, 193-94 (1979) ("In order for an appellant to maintain his right of appeal, he must bring himself clearly within the provisions of the statute which provides for such an appeal."); *Woods v. Unified Government of WyCo/KCK,* 294 Kan. 292, 275 P.3d 46 (2012) (an appeal from an eminent domain award lacked subject matter jurisdiction because the appeal to the district court was filed out of time, and the jurisdictional statute contained no express exception for untimely appeals).

C. General Standards. Kansas courts only have such appellate jurisdiction as is conferred by statute, and an absence of compliance with the statutory requirements compels a court to dismiss the appeal. *Woods v. Unified Government of WyCo/KCK,* 294 Kan. 292, 295, 275 P.3d 46, 49 (2012); *State v. Grant,* 19 Kan. App. 2d 686, 689, 875 P.2d 986, 989 (1994). In *Vaughn v. Martell,* 226 Kan. 658, 603 P.2d 191 (1979), the Kansas Supreme Court addressed the subject matter jurisdiction of this Court's predecessor, the Board of Tax Appeals ("BOTA"). In holding that the taxpayer's appeal to BOTA was untimely, the court stated as follows:

> The law in this state is well settled that administrative appeals from taxing agencies are a matter of statute and the right to appeal is specifically limited to the statute providing for such appeals. . . . [T]here is no appeal from tax agencies in the absence of statutory provisions therefor and the right to appeal is limited to the statute providing for such appeals.

Id. at 660, 603 P.2d at 193. This Court, like its predecessor BOTA, is a creature of the legislature. Its authority and power is only that which is expressly or impliedly granted to it by the legislature. *Id.* at 660-61, 603 P.2d at 194. Therefore, any attempt by this Court to exert jurisdiction over subject matters that are not conferred by the legislature leads to the Court's orders being without legal authority and thus void. *Id.*

There are only two jurisdictional pathways to this Court for the purposes of reviewing individual property valuations (that are locally determined) – K.S.A. 79-1448 and K.S.A. 79-2005. *In re Tax Protests & Grievances of Curtis Machine Co.,* 26 Kan. App. 2d 395, 399-400, 985 P.2d 725, 729-30 (1999), *rev. denied* 268 Kan. 847. K.S.A. 79-1448 relates to appeals from the county appraiser's determination of valuation and are commonly referred to as "equalization" appeals. K.S.A. 79-2005 relates to protest appeals filed in conjunction with payment of the property tax and are commonly referred to as "protest" appeals. Both statutes require, for subject matter jurisdiction, that the appealing party be the "taxpayer." *See e.g.,* K.S.A. 79-1448 & 79-2005(a) & (g). A separate statute – K.S.A. 79-1609 – deals with the procedures necessary for filing an appeal with this Court and it makes reference to "any aggrieved party." This term, however, refers back to the two jurisdictional statutes noted above and thus is restricted in its meaning to either the taxpayer or the county as the case may be. *See, e.g., Board of County Comm'rs of Meade County v. State Director of Property Valuation,* 18 Kan. App. 2d 719, 723, 861 P.2d 1348, 1352 (1993), *rev. denied* 253 Kan. 856 (holding that the term "aggrieved person" in K.S.A. 74-2438 requires reference back to the statute establishing the status sufficient to bring an appeal). Applicable to the present cases, K.S.A. 79-1448 states

that "[a]ny *taxpayer who is aggrieved* by the final determination . . . may appeal to [this Court]." And K.S.A. 79-2005 states that "the protesting *taxpayer may, if aggrieved* by the results . . . appeal to [this Court]." The term "aggrieved party" in K.S.A. 79-1609 is thus used so as to be broad enough to pick up either the taxpayer or the county, whichever is "aggrieved" by the decision. The term cannot be used to enlarge somehow the jurisdiction of this Court. Therefore, except for the county (if it is aggrieved), only a *taxpayer* can bring an appeal to this Court regarding property valuation issues. If anyone other than the taxpayer brings the appeal, then this Court lacks subject matter jurisdiction over that appeal and must dismiss it.

II. SUBJECT MATTER JURISDICTION – REAL PARTY IN INTEREST & ASSIGNMENT

As noted in Part I.C. above, this Court has statutory jurisdiction in valuation cases only if the appeal is brought by a county or the taxpayer. This means that, if the appeal is brought in the name of the taxpayer, then the taxpayer must be the real party in interest for this Court to have subject matter jurisdiction.

A. The Court's Authority and Obligation to Raise the "Real Party in Interest" Issue *Sua Sponte*. Taxpayer argues that "real party in interest" issues can be raised only by the adverse party; that, if not raised by the adverse party, these issues are waived; and that it is thus inappropriate for this Court to raise "real party in interest" issues *sua sponte*.[108] As support for these arguments, Taxpayer cites several cases that deal with "real party in interest" issues in the context of civil cases and the Kansas code of civil procedure. *See, e.g., O'Donnell v. Fletcher*, 9 Kan. App. 2d 491, 681 P.2d 1074 (1984); *Thompson v. James*, 3 Kan. App. 2d 499, 597 P.2d 259 (1979). Similarly, Taxpayer cites additional cases from other jurisdictions as support.[109] *See, e.g., Mid America Trailer Sales, Inc. v. Moorman*, 576 P.2d 1194 (Okla. App. 1977); *U.S. Fidelity & Guar. Co. v. Slifkin*, 200 F. Supp. 563 (N.D. Ala. 1961). Unlike this Court, however, judicial branch courts have broad, general jurisdiction over cases arising pursuant to the code of civil procedure. In Kansas, those cases are commonly referred to as "Chapter 60" cases, and they embrace cases of almost every type. Thus subject matter jurisdiction is rarely an issue for Chapter 60 cases. While "real party in interest" issues can and do arise in such cases, they arise merely as procedural issues *separate and distinct* from subject matter jurisdiction. Because the cases and legal principles asserted by

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[108] *Petition for Reconsideration*, pp.65-66; *Responsive Briefing*, p.6.

[109] *Responsive Briefing*, p.6.

Taxpayer did not arise in relation to questions of subject matter jurisdiction, they thus have no application in limiting this Court's authority or obligation to raise the issue of subject matter jurisdiction *sua sponte* in this case.

The *O'Donnell* case, for example, arose in the context of an injured party bringing an action for the benefit of the personal injury protection ("PIP") insurer which had paid the injured party's medical expenses and lost wages. In such circumstances, a statute gave the insurer certain subrogation rights. The district court raised the issue of real party in interest *sua sponte* and held in favor of the defendant. The Kansas Court of Appeals reversed the trial court. As pointed out by the Taxpayer here,[110] the Kansas Court of Appeals expressly indicated that the trial court in *O'Donnell* should not have raised the "real party in interest" issue *sua sponte*. 9 Kan. App. 2d at 494, 681 P.2d at 1077. The Kansas Court of Appeals also noted, however, that the issue in that case was merely "a defect in pleading" and "a procedural problem," and this formed the basis for the Court's decision. *Id.* at 493, 681 P.2d at 1077. The district court's subject matter jurisdiction over the case was never at issue in *O'Donnell.*

Similarly, the *Thompson* case involved the question of whether a tort claimant, who filed the Chapter 60 lawsuit, could be a real party in interest when the claim had been *partially* satisfied by the claimant's insurance company and that company had been subrogated to the insured's claim. Stated in the alternative, was the insured still the real party in interest or was the insurance company the real party in interest? The Kansas Court of Appeals held that the insured was still the real party in interest and could properly bring the tort claim. 3 Kan. App. 2d at 262, 597 P.2d at 502. The district court's subject matter jurisdiction over the case was never at issue in *Thompson.*

A further example of the "real party in interest" issue in a Chapter 60 case is *Torkelson v. Bank of Horton,* 208 Kan. 267, 491 P.2d 954 (1971). In that case, the cause of action related to a claim against a bank for failing to honor a check submitted as payment on a life insurance policy. Shortly thereafter, the proposed insured, who had written the check, died. The decedent's father, who would have been the beneficiary under the policy, attempted to pursue a claim against the bank. The bank asserted that the father was not the real party in interest. The trial court agreed, and held that any claim the decedent possessed against the bank required that decedent pursue it during his lifetime, or that it be pursued by his administrator or executor after his death. On appeal the Kansas Supreme Court affirmed, stating that "plaintiff had no right to bring the action, which is simply another way of saying his petition did not state a claim upon which relief could be granted." *Id.* at 269, 491 P.2d at 956-57. Subject matter jurisdiction was never an

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[110] *Petition for Reconsideration,* p.66.

issue in *Torkelson* and therefore never discussed. Moreover, the policy behind the "real party in interest" rules in Chapter 60 cases has nothing to do with subject matter jurisdiction:

> The requirement that an action be brought by the real party in interest has as one of its principal purposes the protection of the defendant from being repeatedly harassed by a multiplicity of suits for the same cause of action so that if a judgment be obtained it is a full, final and conclusive adjudication of the rights in controversy that may be pleaded in bar to any further suit instituted by any other party.

Id. at 270, 597 P.2d at 957.

As observed in *O'Donnell,* the "real party in interest" issue in a Chapter 60 case is a mere "defect in pleading" and "procedural problem." 9 Kan. App. 2d at 493, 681 P.2d at 1077. The issue in Chapter 60 cases is therefore a matter of proper pleading and assertion of civil claims. In contrast thereto, this Court's jurisdiction is generally limited to adjudicating tax and valuation disputes that arise under specific statutes. For example, as noted previously, equalization and protest tax appeals require that the appealing party be either the county or taxpayer. This means that, if the appeal is brought in the name of the taxpayer, then the taxpayer must be the real party in interest for this Court to have subject matter jurisdiction. Therefore, in the context of cases before this Court, the issue of real party in interest is inextricably bound up with subject matter jurisdiction. As such, this issue is both within the ambit of this Court, and properly raised *sua sponte.*[111]

Further supporting this conclusion are the two non-Kansas "real party in interest" cases cited by Taxpayer.[112] First, in *Mid America Trailer Sales,* the Oklahoma Court of Appeals (Div. 2) noted that the "real party in interest" issue can be waived and that generally the court should not raise the issue on its own. 576 P.2d at 1196. But the court also expressly identified exceptions to these rules. A

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[111] A second distinction between "real party in interest" issues in Chapter 60 cases and those arising in tax appeal cases before this Court relates to the nature of the underlying claim and its assignability. Such issues typically arise in Chapter 60 cases when choses in action are assigned, and there arises a procedural question about who should bring the claim. *See* Ks. Atty. Gen. Op. 2012-11 (April 25, 2012), at pp.3-4. In contrast, as discussed hereafter in Part II.C. below, tax appeal claims are not choses in action and are not assignable. In this Court, an assigned tax appeal claim cannot provide the basis for the "assignee" to file a tax appeal. Similarly, if a taxpayer has assigned away a tax appeal claim and then files a tax appeal in spite of the assignment, the question of the real party in interest arises entirely as a question of subject matter jurisdiction.

[112] *Responsive Briefing,* p.6.

court *can* raise the "real party in interest" issue on its own (and waiver cannot occur) when the issue relates to *"the jurisdiction of the court. . . . " Id.* (emphasis added). In *U.S. Fidelity & Guar. Co.,* the United States District Court for the Northern District of Alabama also noted the same rules and jurisdictional exception:

> " . . . An action prosecuted by one other than the real party in interest should not be dismissed by a court on its own motion, but only after seasonable objection by the opposing party, *unless the defect would deprive the court of . . . jurisdiction."*

200 F. Supp. at 573 (quoting 3 Moore, *Federal Practice,* Par. 17.07, at pp.1330-31 (2d ed. 1948)) (emphasis added).

B. General Principles Regarding Real Party in Interest. Although the cases and principles cited by Taxpayer neither restrict this Court's authority nor limit its obligation to raise subject matter jurisdiction issues, they nonetheless provide guidance in determining who is, for subject matter jurisdiction purposes, the real party in interest in the present tax appeals. So how does the law define "real party in interest"?

A real party in interest is "the party which *owns* the substantive rights to be enforced." *Star Mfg. Co., Inc. v. Mancuso,* 680 F.Supp. 1496, 1497 (D. Kan. 1988). The real party in interest is "the one entitled to the fruits of the action. . . . " *Torkelson v. Bank of Horton,* 208 Kan. 267, 270, 491 P.2d 954, 957 (1971). Therefore, if a taxpayer assigns to a third party its tax appeal claim relating to valuation, and then that third party pursues the tax appeal, the third party is the real party in interest. In that situation, however, this Court would lack subject matter jurisdiction because the real party in interest is not the taxpayer, and only a taxpayer can file an appeal regarding the issue of valuation under this Court's jurisdictional statutes.

In the present cases, when Terrill filed her *Motions to Withdraw* on or about August 2, 2012,[113] she stated as the reason for the motions that "J.W. Chatam and Associates, the tax representative for the Taxpayer, has retained alternative counsel." Moreover, Terrill's motions did not indicate service to the respective taxpayers. These circumstances raised the possibility that the taxpayers were not the real parties in interest, but that Chatam was. This possibility was reinforced when Mulcahy entered her appearances in all the same cases as general counsel of

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[113] The *Motions to Withdraw* were filed in approximately 170 separate tax appeal cases, including all the present cases.

nonlawyer Chatam. In the Court's view, the only way Mulcahy's *Entries of Appearance* would not be an ethical violation was if Chatam were the real party in interest – in other words, if Chatam were effectively acting *pro se* and using in-house counsel. Also, for those appeals that came through this Court's Small Claims Division, the notices of appeal were signed by Chatam or its associates when the Court's rules require that they be signed by the party or an attorney. *See* K.S.A. 60-211(a), incorporated by K.A.R. 94-5-1(a), and K.A.R. 94-5-4(b).[114] All these circumstances implied the possibility that the taxpayers' claims had been assigned to Chatam, and thus served as the impetus for the Court to issue its Orders to Show Cause to determine the identity of the real party in interest and whether the Court could properly exercise subject matter jurisdiction in the present cases.

C. The Assignability of Tax Claims. The principal Kansas case dealing with the assignability of tax claims is *In re Appeal of Ford Motor Credit Co.*, 275 Kan. 857, 69 P.3d 612 (2003). In that case, the Kansas Supreme Court held that sales tax refund claims could not be pursued by Ford Motor Credit Company ("Ford Motor Credit") in conjunction with installment contracts assigned to it even though debtors had defaulted and Ford Motor Credit had re-taken possession of the personal property that had generated the sales tax. The decision rested on two parallel points.

First, the statute providing for sales tax refunds required that the party seeking the refund be either the taxpayer or the retailer who had paid the sales tax as part of the installment contract transaction. Ford Motor Credit, the assignee of the retailer, was neither. For this reason, the Kansas Supreme Court held that Ford Motor Credit was not statutorily authorized to seek such refunds. *Id.* at 871; 69 P.3d at 621.

The second point rested on whether tax claims are legally assignable. Ford Motor Credit noted the rule that choses in action are generally assignable and then argued that the right to a tax refund is a chose in action. The nub of this argument was that the assignee steps fully into the shoes of the taxpayer or retailer, and thus becomes their functional equivalent for purposes of subject matter jurisdiction. The Kansas Supreme Court rejected this argument and held that tax refund claims are not choses in action and thus are not assignable:

> "A chose in action is the right to bring an action to recover a debt, money, or thing." *Bolz v. State Farm Mut. Auto. Ins. Co.*, 274 Kan. –, 52 P.3d 898, 901 (2002). Any right to a sales tax refund would be a statutory right, however, not a common-law principle. In *SunTrust Bank*, the Tennessee Court of Appeals rejected a similar argument

[114] For a more extensive discussion of the signature requirement, *see* Part IV.A. below.

> that the right to a tax refund can be assigned. The court noted that " . . . [I]n this context, the traditional principles of statutory construction applicable to statutes granting tax credits, deductions, or exemptions, should prevail over general assignment principles." 46 S.W.3d at 226. We find the rationale of the Tennessee court to be persuasive.

Id. at 871; 69 P.3d at 621. An important policy reason for prohibiting the assignability of certain claims is "an attempt to restrain *'the traffic of merchandising in quarrels, of huckstering in litigious discord.'" Star Mfg. Co., Inc. v. Mancuso,* 680 F.Supp. 1496, 1498 (D. Kan. 1988) (quoting *City of New York Ins. Co. v. Tice,* 159 Kan. 176, 180, 152 P.2d 836 (1944)) (emphasis added).

Ford Motor Credit stands for the general proposition that tax refund claims and tax appeal claims are not assignable. This holding should apply to the present cases. Tax appeal cases seeking a reduction in real estate valuation or seeking a refund based on a valuation reduction are, like sales tax refunds, statutory rights and not choses in action. Relative to sales tax refunds, the policy considerations are even stronger for holding that real estate tax refunds and claims are not assignable. In *Ford Motor Credit,* the Kansas Supreme Court disallowed the assignability of sales tax refund claims even though it would have promoted the free transferability of commercial paper. 275 Kan. at 871; 69 P.3d at 621. With real estate tax refunds and claims, however, that policy consideration is absent and thus there is even less reason here to buoy the legal effectiveness of an assignment.

The irony of the decision in *Ford Motor Credit* was that no one would be able to obtain the sales tax refunds. The statute allowed the taxpayer or the retailer to seek the sales tax refund. But the debtor-taxpayer had defaulted, lost possession of the subject property, no longer had any interest in the subject property, and thus could not be the real party in interest regarding the tax refund claim. Similarly, the retailer no longer had any interest in the subject property or the installment contract because it had assigned them to Ford Motor Credit, and so the retailer could not be the real party in interest regarding the tax refund claim. The real party in interest was Ford Motor Credit, but it could not qualify under the jurisdictional statute. The net effect of what the Kansas Supreme Court held was that Ford Motor Credit had a *factual* (or *de facto)* assignment of the tax refund claim, but it was not a *legal* (or *de jure)* assignment or at least not an assignment that was *legally effective* for jurisdictional purposes. That was the potential situation which this Court faced in the present cases. Even though tax appeal claims are not legally assignable or legally effective as assignments, a putative assignment could factually deprive the taxpayer of the claim such that the taxpayer would no longer be the real party in interest. If the circumstances showed that Chatam had factually received an assignment of the tax appeal claims, then

Chatam would be the real party in interest, and thus the Court would be deprived of subject matter jurisdiction because Chatam was not the taxpayer.

D. Conclusion Regarding Real Party in Interest and Subject Matter Jurisdiction. So, by way of the "show cause" orders and the hearings held pursuant thereto, the Court sought answers to the following factual and legal questions:

(a) Did Chatam factually obtain a full assignment of the tax appeal claims from the taxpayers?
(b) If not, did Chatam have a contingent fee arrangement with taxpayers?
(c) If so, would this contingent fee arrangement constitute a partial assignment of the tax appeal claims?

Based on the testimony elicited at the hearings held on September 18, 2012 (the "September 18 Hearings"), as well as the pleadings and documents filed in the present cases, it is now clear to the Court that the answer to (a) is "No" and the answer to (b) is "Yes." This leaves the legal question raised in (c) to be answered.

To restate the question: Would a contingency fee in favor of Chatam, a nonlawyer, constitute a partial assignment of the tax appeal claims? Such a fee arrangement certainly gives Chatam a "stake" in the outcome of the appeal. Yet, in the context of fees charged by attorneys, Kansas courts have been consistent in not treating contingent fees as a "partial assignment" of the underlying claim. In *Shouse et al. v. Consolidated Flour Mills Co.*, 128 Kan. 174, 277 P. 54 (1929), the Kansas Supreme Court held that an attorney's contingent fee on claims involving federal income tax refunds was not an assignment of the claims, stating as follows:

> Such an agreement did not give the attorney any interest or share in the claim itself nor any interest in the particular money paid over to the claimant by the government. It only established an agreed basis for any settlement that might be made, after the allowance and payment of the claim, as to the attorney's compensation.

Id. at 176, 277 P. at 55, (citation omitted). In *Miller v. Botwin*, 258 Kan. 108, 899 P.2d 1004 (1995), the Kansas Supreme Court upheld an attorney's contingent fee in property tax appeal cases that amounted to 50% or more of the tax savings and never considered that such a fee arrangement amounted to a partial assignment of the claim.

To similar effect outside the context of attorney's fees is an Attorney General's Opinion which recently opined that the assignor of less than the entire

claim (that is, an assignor who retains at least part of the claim) is still the real party in interest for purposes of pursuing the claim. Atty. Gen. Opin. 2012-11 (April 25, 2012). The assumed facts in the Attorney General's Opinion involved a collection agency (which is either a partial assignee or is to receive a contingent fee) and the underlying claim is a chose in action. Although, as discussed above in Part II.C., a tax appeal claim is *not* a chose in action, the principles outlined above regarding the Kansas view of partial assignments arguably should apply to tax appeal claims. For these reasons, even if a contingency fee in favor of Chatam is viewed as a partial assignment of the underlying tax appeal claim, it does not negate the taxpayer's status as the real party in interest.

III. SUBJECT MATTER JURISDICTION – CHAMPERTY

A. Champerty as a Subject Matter Jurisdiction Issue. Courts have used the concept of "champerty" as a basis for holding that subject matter jurisdiction is lacking for a tax appeal case. *See, e.g., Clark v. Cambria Co. Bd. of Assess. Appeals,* 747 A.2d 1242, 1245 (Pa. Cmwlth. 2000). The rationale is that a champertous situation is the functional equivalent of assigning a tax appeal claim from a taxpayer to a third party who is otherwise a stranger to the claim. If the taxpayer is not the one pursuing the tax appeal, then there may not be subject matter jurisdiction if only taxpayers are permitted by the applicable statute or statutes to pursue such tax appeals.[115]

Although Taxpayer undertakes some discussion of the champerty topic in the *Petition for Reconsideration* and in the *Responsive Briefing,* Taxpayer fails in either one to analyze the particulars of champerty – in terms of its legal elements and effect, or how those elements are applied to the facts of this case.[116] Instead Taxpayer primarily asserts that champerty is "far beyond" the authority of this Court.[117] To the extent that it implicates this Court's subject matter jurisdiction, however, champerty was and is clearly a relevant factual and legal issue in this case and is thus properly a matter of inquiry and evaluation by this Court.[118] The general question of this Court's authority is also important and germane to the issue of subject matter jurisdiction, as well as to other issues, and will be taken up

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[115] *See* Part I.C. and Part II above.

[116] *Petition for Reconsideration,* pp.66-69; *Responsive Briefing,* p.8.

[117] *Petition for Reconsideration,* p.66.

[118] *See* Parts I and II above.

at length in Part VI below. The sole direct legal argument asserted by Taxpayer regarding champerty itself is the assertion that it can be used only as a defense to a suit on a contract and can only be raised by a party to the contract. Taxpayer cites two cases – *Boettcher v. Criscione,* 180 Kan. 39, 299 P.2d 806 (1956) and *Security Underground Storage, Inc. v. Anderson,* 347 F.2d 964 (10th Cir. 1965) – as support for this argument.[119] Each case is thoroughly discussed below and neither supports Taxpayer's assertion.

Champerty[120] is prohibited conduct in Kansas. In *Boettcher,* a nonlawyer researched and found an heir and brought in an attorney to represent that heir in an estate, and the fee agreement provided that the attorney would receive a 25% contingency fee (and the heir hunter would receive a separate 25% fee) and that the attorney would fund the expenses of litigation.[121] The Kansas Supreme Court held

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[119] *Petition for Reconsideration,* p.69; *Responsive Briefing,* p.8. Taxpayer also cites, at p.69 of the *Petition for Reconsideration,* an unpublished decision from the Kansas Court of Appeals – *Levy and Craig v. D.S. Sifers Corp.,* Nos. 93,231 & 94,528, 147 P.3d 163, 2006 WL 3589792 (Kan. App. 2006). This case dealing with attorney's fees, however, did not involve issues of champerty (or even a contingent fee) and merely cited (at *4) *Grayson v. Grayson,* 184 Kan. 116, 118, 334 P.2d 341 (1959) for the parenthetical statement that a "contingent fee contract cannot be disregarded unless there has been a showing that the contract was champertous, was charging an unreasonable fee, or was unenforceable for another reason." If the 2006 case of *Levy & Craig* stands for anything, it verifies the continuing viability of the concept of champerty in Kansas.

[120] "Champerty" and "maintenance" are often used as though they are synonymous. Champerty, however, is one type of maintenance. *Clark v. Cambria Co. Bd. of Assess. Appeals,* 747 A.2d 1242, 1244 (Pa. Cmwlth. 2000). Maintenance is defined as "'[a]n officious intermeddling in a lawsuit by a non-party by maintaining, supporting or assisting either party, with money or otherwise, to prosecute or defend the litigation.'" *Id.* (quoting Black's Law Dictionary (6th Ed. 1990)). Champerty is defined as "'A bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration of receiving part of any judgment proceeds.'" *Id.* (quoting Black's Law Dictionary (6th Ed. 1990)).

[121] While *Boettcher* was decided before the repeal of the statute – K.S.A. 21-745 – that made common barratry a crime, that statutory repeal has no impact on the continuing effect of the holding in *Boettcher.* First, barratry and champerty are not the same legal concepts. *Boettcher v. Criscione,* 180 Kan. 484, 305 P.2d 1055 (1957) (clarifying the original *Boettcher* decision by holding that barratry and champerty are not the same legal concepts although they have "one thing in common in that each is contrary to the public policy of the state"). Second, *Boettcher* was a contract case and not a criminal case. The repeal of criminal penalties for barratry has no impact on the application of champerty in a civil contract case or in any other non-criminal context. Third and finally, as discussed below, the Kansas Rules of Professional Conduct ("KRPC"), Ks. Sup. Ct. Rule 226, prohibit conduct by a

that this situation constituted champerty on the part of the attorney (the heir hunter was not a party in this contract case) and stated as follows:

> [C]hamperty . . . is generally defined as . . . *frequently exciting and stirring up quarrels either at law* or otherwise. Whether champerty . . . is in violation of public policy cannot be determined by any one rule or statement; it turns largely on the facts and circumstances of each case. . . . Generally, in order to constitute the essential elements of champerty, *[a person] having otherwise no interest in the subject matter of [the] claim* [makes] an agreement to defray, in whole or in part, the expenses of litigation . . . whereby the fruits of the litigation would be divided. . . .

Id. at 44-45, 299 P.2d at 811 (emphasis added).

Taxpayer cites *Boettcher* for the proposition that champerty can only be raised by a party to the contract and can only be used as a defense to the attempted enforcement of a champertous contract.[122] While *Boettcher* encompassed a situation in which an attorney sought to enforce a champertous contract and the client was allowed to raise champerty as a defense, the opinion by the Kansas Supreme Court contained no language that would limit the concept's application only to that situation. Indeed, the court acknowledged that champertous contracts are "void":

> Plaintiff contends the contract in question is not one in *champerty and, therefore, void as against public policy,* but is only an ordinary contract for a contingent fee. We cannot agree with this contention. . . .

Id. at 45, 299 P.2d at 811 (emphasis added).

Although the decision in *Boettcher* dealt exclusively with an attorney's conduct, the principles enunciated were not limited to an attorney. Moreover, the case was a contract action in which the attorney sued the client for his fee, and thus the nonlawyer heir hunter was not a party to the case. There is no reason to believe that the Kansas Supreme Court would not have applied the same champerty principles to the heir hunter if presented with that situation. Indeed, that is what

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lawyer that would be traditionally classified as champerty and this verifies the continuing viability of the legal concept of champerty and the continuing importance of the policy considerations underlying that concept. *See, e.g.*, KRPC Rules 1.8(e) and 1.8(j). These KRPC rules are discussed at Parts XIV and XVI below.

[122] *Petition for Reconsideration,* p.69.

courts in other states have done and have done so in recent years, and have done so in the context of tax representatives and tax appeal cases. *See, e.g., Clark v. Cambria Co. Bd. of Assess. Appeals,* 747 A.2d 1242, 1245 (Pa. Cmwlth. 2000) (holding that the conduct of a nonlawyer tax representative in tax appeal cases was champertous); *People ex rel. Holzman v. Purdy,* 162 N.Y.S. 65, 67-69 (1916) (holding that a tax representative's agreement – identical in all material respects to the Chatam agreements – was champertous).

The holding and continuing effect of *Boettcher* is buttressed by *Clark,* the 2000 case from Pennsylvania noted above, and by the current Kansas Rules of Professional Conduct ("KRPC"), Ks. Sup. Ct. Rule 226, which prohibit conduct by a lawyer that would traditionally be classified as champerty.[123] KRPC Rule 1.8(e) prohibits a lawyer from paying for expenses of litigation if there is to be no reimbursement by the client. KRPC Rule 1.8(j) prohibits a lawyer from acquiring a proprietary interest in a cause of action. Comment 10 and Comment 16 to KRPC Rule 1.8 state the policy considerations behind such rules. Comment 10 states as follows:

> 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 added). Comment 16 states as follows:

> Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule *has its basis in common law champerty and maintenance* and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires.

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[123] *See also Levy and Craig v. D.S. Sifers Corp.,* Nos. 93,231 & 94,528, 147 P.3d 163, 2006 WL 3589792 (Kan. App. 2006), a 2006 unpublished decision of the Kansas Court of Appeals. That case cited (at *4) *Grayson v. Grayson,* 184 Kan. 116, 118, 334 P.2d 341 (1959) for the parenthetical statement that a "contingent fee contract cannot be disregarded unless there has been a showing that the contract was champertous, was charging an unreasonable fee, or was unenforceable for another reason." *Levy & Craig* verifies the continuing viability of the concept of champerty in Kansas.

(emphasis added). While the KRPC rules discussed above appertain only to lawyers, they show the continuing importance of the policy considerations underlying those rules, and such policy considerations should apply equally as well to nonlawyers who engage in champertous conduct.[124] Nonlawyers too, through champerty, can "excite and stir up quarrels." Nonlawyers can also gain too great a financial stake in litigation and pursue claims (such as tax appeal claims) that might not otherwise be brought. Nonlawyers too can acquire too much of an ownership interest in litigation so that they garner too much control over it, to the detriment of the client. And any attorney who knowingly assists a nonlawyer in such champertous conduct may be engaged in both champerty and vicarious activity that violates KRPC Rules 1.8(e) and 1.8(j).[125]

Taxpayer also points to the 10th Circuit case of *Security Underground Storage* as support for the argument that champerty is limited in Kansas to use as a defense to a suit on contract.[126] That case, however, holds no such thing. In *Security Underground Storage* plaintiffs Anderson and Latham, who were attorneys, and defendant Billue had engaged in a multitude of business dealings relating to Kansas properties. Bitter disputes arose. As part of a comprehensive settlement, various business assets were divided up. At some point Billue learned that Anderson may have funded a separate lawsuit pursued by a third party against Billue. This led Billue to stop making payments under the comprehensive settlement agreement. Anderson and Latham sued, and counterclaims were asserted, including one by Billue against Anderson based on Anderson's alleged funding of the lawsuit by a third party against Billue.

Addressing Billue's counterclaim under Kansas law, the 10th Circuit held that Billue could not assert champerty as an affirmative cause of action for recovery of money damages. 347 F. 2d at 969. The court noted that, for purposes of establishing liability based on conduct that would traditionally be classified as champerty, tort law now affords remedies pursuant to the concepts of malicious prosecution, abuse of process, and wrongful initiation of litigation. *Id.* The 10th

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[124] The Pennsylvania court in *Clark* noted similar policy considerations in holding that a nonlawyer tax representative engaged in champertous conduct in connection with tax appeal cases: "The activity of champerty has long been considered *repugnant to public policy against profiteering and speculating in litigation* and grounds for denying the aid of the court." *Clark*, 747 A.2d at 1245-46 (emphasis added).

[125] *See* Parts XIV and XVI below.

[126] *Responsive Briefing*, p.8.

Circuit also acknowledged, however, the continuing viability of champerty in other circumstances:

> It is generally accepted that a cause of action for damages arising out of the common-law doctrine of champerty and maintenance as it was then known, is not now recognized. . . . The decisional law of today dealing with the subject *usually involves the validity of contracts* asserted to be violations of the doctrine.

Id. (emphasis added). This was the only statement in the opinion relating to champerty. The case did not involve the assertion of champerty as a contract defense. The 10th Circuit did not limit the use of champerty to a mere contract defense. It did not preclude a court from raising champerty as a subject matter jurisdiction issue. It expressly acknowledged that champerty is still relevant to evaluating the validity of a contract. The only thing precluded was use of champerty as an affirmative cause of action for recovery of money damages. For these reasons, *Security Underground Storage* does not support Taxpayer's position. Champerty thus remains as an appropriate subject of inquiry and evaluation by this Court in relation to its jurisdiction.

B. <u>The Elements of Champerty</u>. We take up next the elements of champerty. In our Order Granting Reconsideration herein, we invited Taxpayer to brief the following question: *Is the agreement and relationship between Jerry W. Chatam and/or J.W. Chatam & Associates, Inc. (collectively referred to as "Chatam") and the Taxpayer in this case champertous, and, if so, is the agreement void and unenforceable insofar as it affects or authorizes conduct before this Court?* Given this opportunity to brief the merits, or substantive aspects of the issue, Taxpayer sets forth just three sentences:

> Champerty, in Kansas, is limited in scope to be used only as a defense to a suit on a contract. "It is generally accepted that a cause of action for damages arising out of the common-law doctrine of champerty and maintenance as it was then known, is not now recognized. *Security Underground Storage, Inc. v. Anderson,* 347 F.2d 964, 969 (10th Cir. 1965). COTA cannot legislate champerty back into law in Kansas from the executive branch. *In re Trickett,* 27 Kan. App. 2 651 (2000).

Responsive Briefing, p.8. The "champerty only as a defense" argument and the *Security Underground Storage* case, referenced in the first two sentences, are fully discussed in Part III.A. above. The last sentence focuses on the issue of this Court's power and authority. We have fully addressed that issue, including the *Trickett* case, in Part VI below. None of these three sentences addresses the merits or substantive aspects of whether the subject agreements and relationships are

champertous. Nor does Taxpayer discuss any such merits or substance in the *Petition for Reconsideration.*[127]

Accordingly, any objections to our substantive analysis and characterization of Chatam's agreement and relationship with taxpayers as champertous are now waived. K.S.A. 77-529(a); *In re Application of Strother Field Airport,* 46 Kan. App. 2d 316, 320-21, 263 P.3d 182, 185-86 (2011) (failure to assert, in a petition for reconsideration, a specific ground for review waives that issue and it cannot be raised on review); *Kansas Industrial Consumers v. Kansas Corp. Comm'n,* 30 Kan. App. 2d 332, 338, 42 P.3d 110, 114-15 (2002) (same); *Citizens' Utility Ratepayer Bd. v. Kansas Corp. Comm'n,* 24 Kan. App. 2d 222, 229, 943 P.2d 494, 501 (1997) (failure to brief an issue waives that issue and it cannot be raised on review). Therefore, beginning in the next paragraph, we set forth again the analysis contained in our original Order regarding champerty and provide some limited supplemental discussion and authority for our conclusions of law relating thereto.

So what exactly constitutes champerty? In Kansas, the essential elements of champerty are (1) a ***stranger*** to a claim or litigation (that is, a person who otherwise has no interest in the subject matter of a party's claim or litigation) (2) ***makes an agreement*** with the party (3) by which the ***benefits of the litigation results are divided*** between the stranger and the party, and (4) by which the ***stranger defrays, in whole or in part, the expenses*** of the claim or litigation. *Boettcher v. Criscione,* 180 Kan. 39, 44-45, 299 P.2d 806, 811 (1956). In similar language, the Pennsylvania court has defined champerty as a "'bargain by a *stranger* with a party to a suit, by which such [stranger] undertakes to carry on the litigation *at his own cost and risk,* in consideration of *receiving, if successful, a part of the proceeds* or subject to be recovered.'" *Clark v. Cambria Co. Bd. of Assess. Appeals,* 747 A.2d 1242, 1245 (Pa. Cmwlth. 2000) (citation omitted) (emphasis added).[128] Thus, if a stranger to the claim (even if an attorney) has a contingency

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[127] Taxpayer's discussion of champerty in the *Petition for Reconsideration,* like that in the *Responsive Briefing,* addresses only this Court's power and authority, and the argument that champerty can only be raised as a defense to a contract suit. *Petition for Reconsideration,* pp.66-69.

[128] The Pennsylvania court identified essentially identical elements for champerty as those identified by the Kansas Supreme Court: "First, the party involved must be one who has no legitimate interest in the suit. . . . Second, the party must expend his own money in prosecuting the suit. . . . Third, the party must be entitled by the bargain to a share in the proceeds of the suit." *Id.*

fee based on the claim's outcome, and funds the expenses of litigation without reimbursement, that situation constitutes champerty. *Id.*[129]

Based on the above definitions and elements, Chatam has clearly engaged in champertous conduct in tax appeal cases. First, Chatam is a stranger to the tax appeal claim. He is not the taxpayer, and he otherwise has no natural connection to the taxpayer or the claim. He is not a family member of an individual taxpayer. In those situations in which the taxpayer is an entity, Chatam is not an owner, stockholder, director, officer, member, manager, partner, or employee of that entity. Second, in all the subject tax appeal cases, Chatam has entered into agreements with those taxpayers. Third, all the agreements provide for Chatam to receive a contingent fee (ranging from 25% to 40%) based on the outcome of the tax appeal cases, and Chatam has in fact in a multitude of tax appeal cases been paid and received such fees. Fourth, the agreements provide for Chatam to pay all the attorneys fees relating to such tax appeal cases without reimbursement, and Chatam has in fact paid such legal fees, and not been reimbursed. Fifth, in almost all cases, Chatam has agreed pursuant to the agreements to pay *all* the expenses for such tax appeal cases, including court filing fees, and Chatam has in fact paid such expenses and fees, and not been reimbursed.[130] In some very recent tax appeal cases, the agreements have provided that the taxpayers would pay the court filing fees, but that all other expenses related to the cases would be paid by Chatam, and, in those cases, Chatam has in fact paid, with the exception of filing fees, all such expenses.[131]

C. <u>The Legal Effects of Champerty</u>. A champertous agreement may destroy subject matter jurisdiction. At least one court has held so. In *Clark v. Cambria Co. Bd. of Assess. Appeals*, 747 A.2d 1242, 1245 (Pa. Cmwlth. 2000), a nonlawyer tax representative pursued tax appeal cases under an agreement that provided for a 100% contingency fee in favor of the tax representative and payment by him of all litigation expenses. The Pennsylvania court held that this constituted

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[129] The Pennsylvania court expressly stated as follows: "A bargain to endeavor to enforce a claim in consideration of a promise of a share of proceeds, *or of any other fee contingent on success*, is illegal, if it is also part of the bargain that the party seeking to enforce the claim shall pay the expenses incident thereto unless such party has or reasonably believes he has an interest recognized by law in the claim." *Id.* at 1245 (emphasis added).

[130] Regarding the payment of appraisers' fees, there is one very limited factual exception, which is discussed in fn.87.

[131] Regarding the payment of appraisers' fees, there is one very limited factual exception, which is discussed in fn.87.

champerty and destroyed subject matter jurisdiction for the cases, stating as follows:

> *The activity of champerty has long been considered repugnant to public policy against profiteering and speculating in litigation* and grounds for denying the aid of the court. . . . A plaintiff who sues on what would be another's claim except for such champertous agreement will not be permitted to maintain an action . . . as such a plaintiff is *not a "real party in interest"* as required by [Pennsylvania law] and would not have standing to maintain the action.

747 A.2d at 1245-46 (emphasis added). A notable distinction in *Clark* compared to the present cases is the size of the contingent fee. In *Clark,* the fee was 100% for the first year's tax savings. Here, in the present cases, the contingent fee is much smaller, ranging from 25% to 40%. Yet the Pennsylvania court did not tie its holding to the 100% fee. Rather, it stated that, for champerty to exist, there only needed to be a "sharing" in the proceeds. *Id.* at 1245. A 100% fee was *not* a prerequisite to a finding of champerty. Moreover, in *Boettcher v. Criscione* – discussed in Part III.A. above – the Kansas Supreme Court found champerty to exist with a mere 25% contingency fee (combined, of course, with funding of all the litigation expenses). But that Kansas case did not arise in the context of a subject matter jurisdiction dispute.

So the question still remains: Is it legally possible for subject matter jurisdiction to exist notwithstanding a champertous situation? We believe the better view – and the better answer – is reflected in wisdom from a decision that is almost 100 years old, a decision based on facts that are almost identical to those in the present cases. In *People ex rel. Holzman v. Purdy,* 162 N.Y.S. 65 (1916), a nonlawyer – and a "stranger" to the litigation – entered into agreements with property owners to secure reductions of property tax assessments, and the agreements called for the nonlawyer to undertake responsibility for retaining and paying attorneys and experts in exchange for a 50% contingency fee. The New York Supreme Court, New York County, held that this arrangement violated public policy, stating that "[i]t should . . . be noted that the feature of the Tribelhorn agreement, which obligates him to retain lawyers and experts and pay for their services contravenes public policy and in itself justifies condemnation of the courts." *Id.* at 67 (citations omitted). Then the court turned to the question of subject matter jurisdiction:

> [T]aking into account all of the circumstances above mentioned, the court is disposed to permit the continuance of these proceedings *upon the condition that the illegal agreement with Tribelhorn be annulled, that [taxpayers] themselves retain counsel of their own selection upon*

> *their own agreement,* and that the [taxpayers,] Tribelhorn and the attorney *submit themselves to examination in open court* for the purpose of satisfying the court that the Tribelhorn contract has been abrogated in good faith and without any reservations, tacit or otherwise, and that the retainer of counsel to continue the proceedings was entered into in good faith and without qualifications.

Id. at 69 (emphasis added).

We believe this approach is sound. Although the Chatam agreement in this case is champertous, subject matter jurisdiction is not destroyed because of that champerty. *See also Robertson v. Town of Stonington,* 253 Conn. 255, 750 A.2d 460 (2000). This does not mean, however, that there is no consequence to such an arrangement.

For an attorney, direct champertous conduct indicates a violation of ethical rules as noted in Part III.A. above. Over the years, in a multitude of tax appeal cases involving Chatam, Terrill has served as attorney in this Courts' Regular Division in those tax appeal cases, having been hired by Chatam pursuant to Chatam's authority to act on behalf of taxpayers as set forth in the subject agreements. Thus Terrill has knowingly assisted and continues in knowingly assisting a nonlawyer in such champertous conduct, and therefore Terrill herself, by direct association and by business relationship, is engaged in champerty and thus in activity that violates Rules 1.8(e) and 1.8(j) of the Kansas Rules of Professional Conduct, Ks. Sup. Ct. Rule 226.[132]

For either an attorney or a nonlawyer (or both), the champertous agreement is void and unenforceable as against public policy based on the policy considerations discussed above. *Boettcher,* 180 Kan. at 45, 299 Kan. at 811; *Clark,* 747 A.2d at 1245; *Purdy,* 162 N.Y.S. at 67-69. *Cf. also Med Controls, Inc. v. Hopkins,* 61 Ohio App. 3d 497, 573 N.E. 2d 154, 155 (1989) (holding that a collection agency's agreement – nearly identical in all material respects to the Chatam agreements – involved the unauthorized practice of law, and was therefore unenforceable); *Augenti v. Cappellini,* 499 F. Supp. 50, 51 (D.C. Pa. 1980). In a decision rendered only a few years after *Boettcher,* the Kansas Supreme Court again acknowledged that champertous agreements are void and held that courts can strike them down:

> Generally speaking, the fixing of fees for professional services is a matter of agreement between the attorney and his client; courts do not regulate attorneys in that respect, and *strike down contracts only when*

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[132] *See* Parts XIV and XVI below.

> *they are champertous,* or where the fee charged is unreasonable, or where advantage is taken of the ignorance of the client, or for some other reason which would *render the contract void.*

Grayson v. Grayson, 184 Kan. 116, 118, 334 P.2d 341, 343 (1959). By negative implication, this quoted language authorizes a court to "regulate" conduct to the extent that it involves a champertous contract. In addition, the verb "strike down" strongly implies an approach that does not restrict champerty to a mere contract defense (as asserted by Taxpayer).

While this Court does not possess equitable powers or broad "judicial branch" power such that it can declare champertous agreements void and unenforceable *for purposes of the world at large*, it does have power and authority to regulate conduct insofar as that conduct relates to cases pending before this Court.[133] Accordingly, it has power and authority to declare void and unenforceable champertous agreements to the extent that they regulate or form the framework for the conduct of parties, attorneys, and other persons who appear before this Court or who have a role in connection with tax appeal cases before this Court.

As noted above, champertous agreements are void. A "void contract" is one "that does not exist at law" and has "no legal force or binding effect." Black's Law Dictionary (6th ed. 1990), p.1574. It is void *ab initio* – that is, "from the beginning." *Id.* It creates "no legal rights." *Id.* "Void" is further defined as "having no legal force or binding effect" and "nothing can cure it." *Id.* at p.1573. In contrast, a "voidable contract" is "valid, but . . . may be legally voided at the option of one of the parties." *Id.* at 1574. It is a contract with some "defect or illegality" in which "one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract." *Id.* Thus a voidable agreement requires affirmative action by a party to the contact – such as raising it as a contract defense – to convert and render the contract into one that is void. By arguing that champerty can only be raised by a party as a defense to contract liability, Taxpayer is asserting in effect that champertous agreements are voidable (rather than void). As noted above, however, case decisions in Kansas, as well as in other jurisdictions, unquestionably hold that champertous agreements are void (rather than voidable). The Taxpayer's argument is wholly unfounded. The champertous agreements, and the relationships arising pursuant thereto, should be ignored by this Court.

Terrill's role as attorney for Taxpayer in this case, and for taxpayers in the related cases, depends entirely on Chatam's champertous agreements. Pursuant thereto and under the terms thereof, Terrill was hired by Chatam; Terrill was and

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[133] *See* Part VI below.

is paid by Chatam; Chatam terminated the services of Terrill;[134] and Terrill was then re-hired by Chatam. Terrill's relationships with Chatam's clients are thus built on a foundation that is void and unenforceable. Therefore, every aspect of and authorization for Terrill's representation of Chatam's taxpayers, flowing as it does through champertous agreements, is likewise void and should be ignored by this Court.

If the subject matter jurisdiction issue were to be resolved in favor of Taxpayer, then this Court would model the approach of the *Purdy* case.[135] In that scenario, Taxpayer would remain as the real party in interest. But the champertous parties – being Chatam directly, and Terrill indirectly or as a facilitator or whose relationship with the taxpayers depends on a champertous agreement – would be effectively removed from the case.[136] Taxpayer would be allowed to proceed, but only with a new, independent attorney unassociated with Terrill or Chatam, or proceed in the case *pro se* (that is, without an attorney).

At the end of the September 18 Hearings, the Court imposed a stay not only in any case involving Chatam, but also in any case involving Terrill regardless of Chatam's involvement. The Court did this because, as noted on the record, "[w]e have been presented today with a lot of information that we need to process. . . ." *Transcript of the September 18, 2012 Hearing*, 220:17 to 220:19. When the Original Order was issued in the "non-dismissal" cases on October 11, however, the Court expressly noted and advised Terrill that "the stays are being lifted in any such cases that do not involve [Chatam]." The stay was lifted in the non-Chatam cases because there was no indication on the record in those cases of champerty or other improper practices.[137] The original Order in the "non-dismissal" Chatam cases continued the stay in those particular cases until the earlier of (a) an entry of appearance filed by a new, independent attorney unassociated with Terrill or Chatam or (b) a notification filed by the named taxpayer indicating that such taxpayer would proceed in the case *pro se* (that is, without an attorney); the original Order also

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[134] The terminations were not fully effected because this Court denied Terrill's *Motions for Withdrawal* on the basis that she did not give notice to the respective taxpayers.

[135] Regarding the final subject matter jurisdiction issue, *see* Parts IV and V below. For a discussion of why acknowledging this does not mean we are addressing or analyzing a hypothetical situation, *see* fn.195, *infra*.

[136] In that scenario, such an approach would also be separately justified based on unauthorized practice of law by Chatam and ethical violations by Terrill. *See* Part VI and Parts VIII *et seq.* below.

[137] Regarding improper practices, *see* below Parts VIII *et seq.*

indicated that, if neither (a) nor (b) occurred within a certain time frame, the case would be dismissed for lack of prosecution. *See Taylor v. Taylor,* 185 Kan. 324, 328, 342 P.2d 190 (1959) (upholding a trial court's dismissal of a case when the plaintiff refused to obtain new or additional counsel after it was determined that plaintiff's attorney did not qualify under Kansas law to provide representation in the case). If the subject matter jurisdiction issue in this case were to be resolved in favor of Taxpayer, then the Court would impose a similar stay and order in this case.[138]

IV. SUBJECT MATTER JURISDICTION – DEFECTIVE SIGNATURE ON NOTICE OF APPEAL

A. The Defectiveness of the Signature. The next issue relating to subject matter jurisdiction is this: Does a defective signature on the notice of appeal destroy this Court's subject matter jurisdiction? A tax appeal to this Court – whether such appeal is to the Small Claims Division or to the Regular Division – is initiated by filing a notice of appeal. K.A.R. 94-5-4(a).[139] The requirement to file a notice of appeal is also set forth in this Court's jurisdictional statutes relating to "equalization" appeals and "protest" appeals. *See* K.S.A. 79-1448, 79-2005, & 79-1609. This Court's rules further indicate that only the taxpayer or an attorney can sign notices of appeal. K.A.R. 94-5-4(b). This signature requirement is reinforced by K.S.A. 60-211(a), a provision of the general code of civil procedure which is incorporated into this Court's rules by K.A.R. 94-5-1(a). K.S.A. 60-211(a) requires that every document filed in a court be signed by either the party or an attorney who represents the party.[140] In this case, the notice of appeal to the Small Claims

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[138] For a discussion of why acknowledging this does not mean we are addressing or analyzing a hypothetical situation, *see* fn.195, *infra.*

[139] Tax "actions" other than tax appeals are initiated by filing an appropriate pleading with this Court. K.A.R. 94-5-4(a).

[140] The general signature requirement of K.S.A. 60-211(a) provides solid support for this Court's rule that only a party or the party's attorney can properly sign any pleadings or other documents filed with this Court, including notices of appeal. Some provisions of the civil procedure code do permit defective pleadings and other court documents to be corrected and, in some cases, corrected untimely. For example, in the *Petition for Reconsideration* at p.58, Taxpayer points to K.S.A. 60-211(c), which permits an omitted signature to be corrected promptly after it is "called to the attention" of the party. As discussed at length in Part IV.D.2 and Part IV.D.3 below, however, a notice of appeal to this Court is not a "pleading" that is subject to the civil procedure code's specific rules and exceptions relating to amendments of pleadings and relation back, requests for amendment of court judgments and orders, or other untimely pleadings. *See also State v. Grant,* 19 Kan. App. 2d 686, 691, 875 P.2d 986, 990 (1994) ("We conclude that a notice of appeal from

Division of this Court was not signed by the taxpayer or by a licensed attorney. Instead it was signed by nonlawyer Blake Newell as an employee or officer or associate of nonlawyer Chatam.[141] Under this Court's rules, the signature on the notice of appeal to the Small Claims Division was defective.[142]

Kansas case law supports this conclusion regarding the defective signature. In *Atchison Homeless Shelters, Inc. v. County of Atchison,* 24 Kan. App. 2d 454, 946 P.2d 113 (1997), *rev. denied,* the Kansas Court of Appeals rejected an appeal by a corporation whose notice of appeal was not signed by an attorney and the court allowed for no opportunity to correct the defective signature.[143] The court noted that corporations can only be represented in Kansas courts by an attorney duly licensed to practice law in Kansas:

> Kansas follows the common-law rule that an appearance in court of a corporation by an agent other than a licensed attorney is not proper since a corporation is an artificial entity without the right of self-representation.

Id. at 455, 946 P.2d at 114. The court then held that it did not have subject matter jurisdiction over the appeal. *Id.* The same principles apply here regarding representation by a nonlawyer who is not the party. Although an individual taxpayer can properly sign a notice of appeal, a nonlawyer who is *not* the taxpayer

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district court cannot be considered a 'pleading' within the meaning of K.S.A. 60-215(c) [dealing with relation back of amended pleadings]."). Similarly, an untimely signature correction of a notice of appeal is not controlled or authorized by K.S.A. 60-211(c).

[141] As discussed in Part IX below, tax representatives signing pleadings or notices of appeal is unauthorized practice of law. *See Atchison Homeless Shelters, Inc. v. County of Atchison,* 24 Kan. App.2d 454, 946 P.2d 113 (1997); Ks. Atty. Gen. Opin. No. 93-100 (July 26, 1993).

[142] This Court so held in 2008 in the context of a defective signature on the notice of appeal to the Regular Division. By an Order entered August 15, 2008, in *In the Matter of the Equalization Appeal of Pierson Investments, L.L.C. for the Year 2008 from Johnson County, Kansas,* Docket No. 2008-3974-EQ, this Court held that the signature of a nonlawyer tax consultant was defective, but allowed an attorney to correct the notice of appeal by signing it and then re-filing it. The *Pierson* decision will be discussed below at length in Part IV.D.6.

[143] The opinion in *Atchison Homeless Shelters* indicates that an attorney did *not* sign the notice of appeal, but gives no indication of who actually *did* sign the notice of appeal – whether it was a person with an ongoing and substantial connection to the corporation (such as an officer or full-time employee) or some nonlawyer who was otherwise unaffiliated with the corporation.

cannot. An attempt was made in this case to correct the defective signature. After the Court issued its Original Order on October 10, 2012, and long after the time for the appeal had run, Taxpayer filed a "corrected" notice of appeal form (in the Small Claims Division for this tax appeal) that had been signed by Terrill as attorney.[144]

B. The Tower Principle. Can a defective signature on the notice of appeal with the Small Claims Division deprive this Court of subject matter jurisdiction of the same case in the Regular Division? If the defective signature destroys subject matter jurisdiction at the Small Claims level, then it also destroys subject matter jurisdiction in the Regular Division for the same case.[145] Subject matter jurisdiction is a tower that is built on proper jurisdiction at each and every level of appeal. If such jurisdiction is defective at any prior level, then it is defective at all appellate levels thereafter. *Woods v. Unified Government of WyCo/KCK,* 294 Kan. 292, 295 275 P.3d 46, 49 (2012).

In *Woods,* the property owner in an eminent domain case appealed the appraisers' award to the district court. The district court, however, dismissed the appeal because it was filed out of time. The property owner then timely and properly filed an appeal from the district court's decision. The Kansas Supreme Court held that Wood's appeal from the eminent domain award to the district court lacked subject matter jurisdiction because it was untimely, and this in turn deprived the higher court of jurisdiction:

> [I]f a district court lacks subject matter jurisdiction over an issue, an appellate court does not acquire jurisdiction over the matter on appeal. . . . In other words, the district court had no other choice but to dismiss the untimely-filed appeal. Likewise, we have no choice but to dismiss

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[144] Taxpayer attempts to make a factual distinction between *Atchison Homeless Shelters* and the present case based on Taxpayer's untimely attempt to correct the defective signature. *Petition for Reconsideration,* pp.60-61. Taxpayer notes that no such attempt occurred in *Atchison Homeless Shelters,* and argues that this is a significant difference. This argument, however, begs the question. We are citing *Atchison Home Shelters* for the unquestioned proposition that the original signature here is defective. A subsequent attempt to cure a defective signature in no way undercuts the defectiveness of the original signature. This simply raises the next question: Can a defective signature on a notice of appeal be corrected after the time for appeal has run? This in turn depends on whether the defect is fatal or technical, which is thoroughly discussed in Part IV.C. below.

[145] This Order on Reconsideration does not address or reach the question of whether a defective appeal or protest at the initial tax appeal stage (that is, the appeal or protest that takes the case to an informal hearing with the country appraisers' office) would deprive this Court of subject matter jurisdiction.

> this appeal because we are powerless to review an issue over which the district court lacked subject matter jurisdiction.

Id. at 295, 299, 275 P.3d at 49, 51.

This tower principle of subject matter jurisdiction has also been applied in the context of tax appeal cases. Prior to 2008, valuation appeals from this Court's predecessor – the Board of Tax Appeals ("BOTA") – were taken to the local district court, and only after a decision there could the case be appealed to the Kansas Court of Appeals. In 2008, this Court replaced BOTA and was statutorily established as a "court of record" such that all appeals would be taken directly to the Court of Appeals (rather than first to the local district court). In a case that was decided prior to 2008, the Kansas Supreme Court applied the tower principle to tax appeal cases. In *Vaughn v. Martell,* 226 Kan. 658, 603 P.2d 191 (1979), taxpayers filed untimely tax appeals to BOTA but BOTA did not recognize the issue. The taxpayers obtained a favorable decision from BOTA, and the county appealed to the local district court, which also did not recognize the subject matter jurisdiction issue. The district court reversed a significant part of BOTA's decision, and the taxpayers then appealed to the Kansas Supreme Court. When this state's highest court analyzed the situation, it held that it lacked subject matter jurisdiction to hear the appeal because BOTA had lacked subject matter jurisdiction to hear the appeal:

> It is difficult to understand how [BOTA] or the district court could have concluded that [BOTA] had jurisdiction to grant any relief to the taxpayers. . . . [BOTA] had no jurisdiction to make any order in the appeal except to dismiss the appeal for want of jurisdiction. Likewise, the district court had no jurisdiction to make an order or enter judgment granting relief to the taxpayers.

Id. at 660-61, 603 P.2 at 193-94. And likewise then the Kansas Supreme Court had no jurisdiction and dismissed the appeal without reaching the merits of the case.

An appeal from a county level determination to the Small Claims Division of this Court is no less an appeal than an appeal from the Small Claims Division to this Court's Regular Division. *Id.* at 661, 603 P.2d at 194 ("The rule followed in Kansas is in accordance with the general rule applied throughout the United States that the time for taking an administrative appeal, as prescribed by statute, is jurisdictional. . . . "). Accordingly, applying the tower principle to this case, if the defective notice of appeal caused this Court's Small Claims Division to lack subject matter jurisdiction, then this case in the Regular Division also lacks subject matter jurisdiction. *See Woods,* 294 Kan. at 298-99, 275 P.3d at 50-51 (holding that the Kansas Supreme Court lacked subject matter jurisdiction over an appeal "[g]iven

that an appeal to the district court from an appraisers' award in an eminent domain action is nevertheless an appellate proceeding, . . . the district court, like the United States Supreme Court and Kansas Supreme Court, had no authority to create any equitable exception to the jurisdictional requirement that the notice of appeal be filed within 30 days of the appraisers' report.").

C. Fatal Defect Versus Technical Defect. As concluded above, if a defective notice of appeal caused this Court's Small Claims Division to lack subject matter jurisdiction, then this case in the Regular Division also lacks subject matter jurisdiction. This result depends on the sentence's "if" clause. And that then leads us back to the following question: What is the effect of a defective signature on a notice of appeal, and can it be corrected after the time for appeal has run? This in turn depends on whether the defective signature is fatal or technical. A *fatal* defect can *not* be corrected after the time for appeal has run, but a *technical* defect can. *See, e.g., Vaughn v. Martell,* 226 Kan. 658, 661, 603 P.2d 191, 194 (1979) ("[T]he time for taking an administrative appeal, as prescribed by statute, is jurisdictional and delay beyond the statutory time is fatal."). So the characterization of a defect as fatal versus technical is critical to this case.

Several Kansas cases have dealt with notice of appeal defects and their effect on subject matter jurisdiction. An example of a technical defect occurred in *City of Ottawa v. McMechan,* 17 Kan. App. 2d 31, 829 P.2d 927 (1992), a criminal appeal from a municipal court to a district court in which the Kansas Court of Appeals allowed an untimely amendment of the defendant's notice of appeal to correct the identification of the proper court when the district court was the only court to which the defendant could appeal. The court held that it is a technical defect if the appellate court is not properly named but there is only one court to which the case can be appealed. *Id.* at 32-33, 829 P.2d at 928. This case thus appears to stand for the proposition that, if a requirement for an appeal serves a particular purpose, then it is a technical defect if there is no doubt that the purpose is nonetheless met. Accordingly, in *McMechan,* because the proper appellate court could be identified without its reference in the notice of appeal, failure to identify it was a technical defect. *See also Alliance Mutual Casualty Co. v. Boston Insurance Co.,* 196 Kan. 323, 326-27, 411 P.2d 616 (1966).

A couple years later, in *State v. Grant,* 19 Kan. App. 2d 686, 875 P.2d 986 (1994), the Kansas Court of Appeals again took up the issue of a defective notice of appeal in a criminal case. In his original notice of appeal, the defendant identified one ground for his appeal. In an untimely *amended* notice of appeal, the defendant attempted to identify a second ground for his appeal. The Kansas Court of Appeals rejected consideration of the amended notice, and the second ground for appeal contained therein, stating as follows:

> "We have often recognized that jurisdiction in any action on appeal is *dependent upon strict compliance* with the statutes. However, when there is a valid controversy whether the statutory requirements have been complied with, we are required to construe those statutes liberally to assure justice in every proceeding. . . ."
>
> Here, there is no "valid controversy whether the statutory requirements were complied with." The amended notice of appeal raising additional issues was filed out of time.

Id. at 690-91, 875 P.2d at 990 (quoting *State v. Griffen,* 241 Kan. 68, 69, 734 P.2d 1089 (1987)) (emphasis added). Applying this language to the present case, there is no controversy. The signature on the notice of appeal here was defective.

The requirement for stating the grounds of appeal serves to identify and focus the appellate court's attention on disputed issues in a timely fashion. Because Grant's untimely amended notice of appeal did not serve this purpose, the failure to state the second ground in the original notice of appeal was a fatal defect concerning that second ground. And this is so "even assuming a lack of prejudice to the opposing party." *Id.* at 691, 875 P.2d at 990. Strict requirements regarding appeals also serve the purpose of sound judicial management -- avoiding chaos in, and bringing closure to, the appeals process:

> The appellate procedures and rules are, and have been, in place *to bring some orderly closure to appeals.* A literal reading and application of the statutes and rules is not only necessary from a legalistic view, but also from a real world view of appellate practice. *To find otherwise is to invite chaos to a system based on the orderly disposition of appeals.* It should be strongly discouraged.

Id. at 692, 875 P.2d at 991 (emphasis added).

Grant thus stands for the proposition that an untimely amended notice of appeal cannot relate back and cure a fatal defect. *Id.* at 692-93, 875 P.2d at 991. Worthy of further note, the Kansas Court of Appeals in *Grant* rejected any analogy to or application of K.S.A. 60-215(c) – the rule in the civil procedure code which controls when a pleading can be amended out of time with relation back – to determine whether a defective notice of appeal can be amended out of time. 19 Kan. App. 2d at 691 ("We conclude that a notice of appeal from district court cannot be considered a 'pleading' within the meaning of K.S.A. 60-215(c).").[146]

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[146] This point will be applied in Part IV.D.2 below as part of the analysis of the decision in *Architectural & Engineered Products Co. v. Whitehead,* 19 Kan. App. 2d 378, 869 P.2d 766 (1994), *rev. denied* 255 Kan. 1000. It should not be inferred from the Court's analysis and

Taxpayer tries to distinguish *Grant* on the basis that a notice of appeal to this Court's Small Claims Division is not, for jurisdictional purposes, equivalent to a notice of appeal from a district court to the court of appeals.[147] This argument flies in the face of Kansas case law. For example, in *Woods v. Unified Government of WyCo/KCK*, 294 Kan. 292, 275 P.3d 46 (2012), the Kansas Supreme Court applied jurisdictional principles to the appeal of an appraisers' award in an eminent domain case to a district court, and held that the property owner's notice of appeal was untimely and therefore destroyed the district court's appellate jurisdiction to hear the matter. This Court's Small Claims Division is, as its name entails, a division of this Court and an appeal to it is undoubtedly an appeal to a court. Thus a tax appeal from a county level determination to the Small Claims Division of this Court is no less an appeal than from the Small Claims Division to this Court's Regular Division. The key characteristic is that it be "an appellate proceeding." *Id.* at 298-99, 275 P.3d at 50-51. Moreover, as noted in *Vaughn*, any administrative appeal is conditional on subject matter jurisdiction as prescribed by the applicable statute. 226 Kan. at 661, 603 P.2d at 194.

Similar to the prior argument, Taxpayer also cites Kansas Attorney General Opinion No. 2012-24 (October 9, 2012), and, based thereon, makes the following statement, which mischaracterizes the attorney general's opinion in the process:

> [In the opinion,] General Schmidt clearly concludes COTA is not a court and the actions before it are not civil suits. Reliance on the *Grant* decision and reliance on any conclusion about a notice of appeal in a civil suit is misplaced.

Petition for Reconsideration, p.62.[148] It is difficult to see how the latter sentence in this quote logically follows from the former sentence. In any event, the latter sentence is fully refuted in the prior paragraph of this Order on Reconsideration,

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discussion of *Grant* that this Court views notices of appeal in tax appeal cases as generally limiting the grounds or issues on which those appeals may be pursued. Unlike the statutes controlling the criminal appeals in *Grant*, which required specification of the appeal's grounds, our jurisdictional statutes (with one very limited and rarely applicable exception) do not require or specify that the grounds for appeal be identified. *See, e.g.*, K.S.A. 79-1448, 79-2005, & 79-1609.

[147] *Petition for Reconsideration*, pp.61-62.

[148] In the *Responsive Briefing*, at p.8, Taxpayer refers to Kansas Attorney General Opinion No. 2012-12 for a similar point. This appears to be a typographical error and perhaps was intended as a citation to Kansas Attorney General Opinion No. 2012-24.

and *the former sentence mischaracterizes* the attorney general's opinion. The opinion dealt with the narrow question of whether K.S.A. 60-2005 (exempting municipalities from having to pay filing fees for civil actions) applied to exemption applications filed with this Court, the Court of Tax Appeals ("COTA").

While the attorney general did conclude that actions before COTA are not "Chapter 60" civil suits,[149] the attorney general did *not* conclude that COTA is not a "court." Indeed, the Attorney General stated instead that "proceedings before COTA might be considered judicial in a certain sense" (Ks. Atty. Gen. Opin. No. 2012-24, at p.3); that "COTA is an independent agency as well as an administrative law court" (*id.*); that administrative agencies such as COTA "may perform quasi-judicial functions" (*id.* at p.4); and that agencies such as COTA "are not courts *that exercise judicial power under Article III of the Kansas Constitution" (id.)*. The opinion did not conclude (as asserted by Taxpayer) that COTA was not a court; it only concluded that COTA was not a "judicial branch" Article III court.

Moreover, even the scope of the opinion's legal conclusion regarding the term "civil action" was very narrow, dealing only with the characterization of tax *exemption* proceedings: "But COTA tax exemption proceedings are a far cry from the judicial proceedings one usually associates with the term 'civil action.'" *Id.* at p.3. Thus the opinion did not directly address or characterize tax appeals. The possibility remains of drawing an analogy between tax appeals and "civil actions," as well as between this Court and a district court. In support of such analogies, several points can be noted. For example, this Court is a "court of record." Appeals from this Court proceed directly to the Kansas Court of Appeals. K.S.A 74-2426(c)(2). *See also* K.S.A. 74-2426(c)(1) (unlike decisions by other administrative agencies, this Court's decisions upon appeal do not involve this Court as a party; rather, the parties upon appeal are the same parties as appeared before this Court). And this Court, like a district court, is bound by the doctrine of *stare decisis*. K.S.A. 74-2433(a).[150] For all these reasons, Kansas Attorney General Opinion No. 2012-24 does not undermine *Grant* in any way and thus does not help Taxpayer in this case.

Taxpayer further asserts that the *Grant* decision has been "called into doubt" by *State v. Patton,* 287 Kan. 200, 195 P.3d 753 (2008), and distinguished by *State v. Unruh,* 39 Kan. App. 2d 125, 177 P.3d 411 (2008).[151] Neither case diminishes *Grant*

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[149] This Court acknowledges it is not part of the state's judicial branch and thus it is not a court that exercises broad judicial power under Article III of the Kansas Constitution. *See* Part VI below discussing this Court's power and authority.

[150] For a further discussion of this Court's power and authority, *see* Part VI below.

[151] *Petition for Reconsideration,* p.62.

or its applicability to the present case. Both cases dealt with specialized exceptions (to strict appeal requirements) that apply only in criminal cases in which violations of fundamental fairness or ineffective assistance of counsel are indicated. These so-called *Ortiz* exceptions derive from the Kansas Supreme Court case of *State v. Ortiz,* 230 Kan. 733, 640 P.2d 1255 (1982). These exceptions obviously have no application to tax appeal cases like this one. In *Grant,* the Kansas Court of Appeals considered and rejected application of the *Ortiz* exceptions in that case. 19 Kan. App. 2d at 693-95, 875 P.2d at 991-93. So both *Grant* and the present case are parallel situations in that the *Ortiz* exceptions do not apply, and therefore *Grant* provides solid authority for viewing the defective signature here as fatal.

Patton is distinguishable from *Grant* and from the present case in that the Kansas Supreme Court held that the *Ortiz* exceptions applied in *Patton.* The only references to *Grant* merely describe the case and state that it falls into a category of cases which refer to *Ortiz* exceptions but do not discuss their application in any detail. 287 Kan. at 207, 195 P.3d at 759. *See also id.* at 214-15, 195 P.3d at 763 (noting *Grant* as a case that did not discuss whether counsel for a criminal defendant was appointed or retained). The opinion in *Patton* thus barely mentions *Grant* at all and certainly does not overrule it or even modify it. Therefore, the opinion in *Patton* does not "call into doubt" the decision in *Grant* or otherwise help Taxpayer in this case.

Similar to *Patton,* the *Unruh* case can also be distinguished from *Grant* and the present case because the Kansas Court of Appeals held that the *Ortiz* exceptions applied in *Unruh.* The only references to *Grant* acknowledge that *Unruh* is distinguishable from *Grant* (as Taxpayer noted). *See, e.g.,* 39 Kan. App. 2d at 132, 177 P.3d at 416. In the *Petition for Reconsideration* at p.62, however, Taxpayer quotes and emphasizes the following language from *Unruh* as though this quoted language has an impact on the present case:

> Although the appeal in *Grant was dismissed during the appellate process; it was immediately reinstated as the dismissal was in error. Therefore, the original notice of appeal controlled the issues in the case.*

This quote accurately states the situation in *Grant,* as does this Court's discussion above regarding *Grant.* Proper appellate jurisdiction in *Grant* related only to the issues raised in the original appeal; the court was without jurisdiction to consider the additional grounds stated in the untimely amended notice of appeal because the latter amended notice was fatally defective and thus could not relate back to the earlier notice.

Unruh did not over-rule or undercut *Grant.* The principles derived from *Grant* are good law and fully apply to this case as discussed above. In *Grant,* the

fatal defect was failure to give timely notice in its appeal of a particular ground for appeal, and that ground therefore could not be salvaged by an untimely amended notice of appeal. Here, the defect was lack of a proper signature on Taxpayer's appeal, and, if fatal, that defect cannot be corrected by Taxpayer through an untimely corrected notice of appeal signed by Taxpayer's attorney. Taxpayer's reliance on *Unruh* to subvert *Grant* as applied here is unfounded and misplaced.

As noted from several cases discussed above, in analyzing whether a defect is fatal or technical, it is instructive to look at the purpose of a particular requirement for a notice of appeal. This Court's jurisdictional statutes do not mention the requirement of a signature. *See* K.S.A. 79-1448 & 79-2005. *See also* K.S.A. 79-1609. A signature on a notice of appeal is generally required, however, on *any* notice of appeal. *See Atchison Homeless Shelters, Inc. v. County of Atchison,* 24 Kan. App. 2d 454, 946 P.2d 113 (1997), *rev. denied* (lack of signature by the party or party's attorney on notice of appeal is fatally defective). Moreover, this Court's rules require that the taxpayer or the taxpayer's attorney sign the notice of appeal. K.A.R. 94-5-4(b). *See also* K.S.A. 60-211(a), which is incorporated by K.A.R. 94-5-1(a).[152] *Cf. Becker v. Montgomery,* 532 U.S. 757, 763, 121 S.Ct. 1801, 1805, 149 L.Ed.2d 983 (2001). So why is a signature required? It serves the important purpose of showing that the taxpayer indeed assents to the appeal. Stated another way, it serves the purpose of affirmatively establishing that the *taxpayer* has assented or determined to make the appeal as required by the jurisdictional statutes. *See* K.S.A. 79-1448, 79-2005, & 79-1609. No one other than the taxpayer or the taxpayer's attorney can indicate the taxpayer's assent and thus no else (besides the taxpayer or taxpayer's attorney) can sign a notice of appeal. To determine then whether a defective signature is fatal or technical, we must look to this purpose for the signature requirement – the purpose of establishing the taxpayer's assent.

Fully instructive in this regard is a "signature" case decided by the United States Supreme Court in 2001. In *Becker, supra,* an Ohio state prisoner (Becker) filed a *pro se* civil rights action in the federal district court. It was dismissed for failure to state a claim for relief. Becker sought to appeal to the Sixth Circuit Court of Appeals. Using a government form, he typed up his notice of appeal. The form did not indicate the necessity of a signature. Becker typed in his address. On the signature line, which was tagged "Counsel for Appellant," he typed but did not sign his name. Becker then transmitted and timely filed the notice of appeal. The Attorney General of Ohio admitted that there was no uncertainty about Becker's intention to pursue the appeal despite the lack of a signature. The Sixth Circuit held that the lack of a signature was a fatal jurisdictional defect. Upon appeal, the United States Supreme Court reversed the decision. 532 U.S. at 760, 121 S.Ct. at

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[152] *See also* the discussion of K.S.A. 60-211(c) in Part IV.A. above and in Part IV.D.2 below.

1804. It first held, agreeing with the Sixth Circuit, that the lack of a signature was a defect. 532 U.S. at 760, 763, 121 S.Ct. at 1804, 1805. The court then went on, however, and held that it was only a technical defect, which could be corrected after the time for appeal had run. 532 U.S. at 760, 121 S.Ct. at 1804.

The decision in *Becker* revolved entirely around the fact that Becker clearly assented to the appeal despite the lack of his signature on the notice of appeal. Becker typed the notice himself; he typed his address on the notice; he typed his name on the signature line; he himself then transmitted the notice of appeal for filing with the Sixth Circuit. And thus there was no uncertainty about Becker's intention to pursue the appeal:

> Other opinions of this Court are in full harmony with the view that imperfections in noticing an appeal should not be fatal *where no genuine doubt exists about who is appealing,* from what judgment, to which appellate court. . . . In sum, the Federal Rules require a notice of appeal to be signed. . . . *On the facts here presented,* the Sixth Circuit should have accepted Becker's corrected notice as perfecting his appeal.

532 U.S. at 767-68, 121 S.Ct. at 1808 (emphasis added).

In holding that the notice of appeal's defect was technical only (rather than fatal) and thus could be corrected after the appeal time had run, the United States Supreme Court analogized to rules that focus on the authenticity of the submission and the objectively measured intention of the appealing party. The court looked at electronic filing rules: "The local rules on electronic filing provide some assurance, as does a handwritten signature, *that the submission is authentic."* 532 U.S. at 764, 121 S.Ct. at 1806 (emphasis added). The court also analogized to parallel rules of federal appellate procedure:

> The current Rule 3(c)(2), like other changes made in 1993, the Advisory Committee Notes explain, was designed "to prevent the loss of a right of appeal through inadvertent omission of a party's name" when *"it is objectively clear that [the] party intended to appeal."* Advisory Committee's Notes on Fed. Rule App. Proc. 3, 28 U.S.C.App., p.590. . . . [W]e [also] find corroboration in a related ameliorative rule, Appellate Rule 3(c)(4), which provides: "An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party *whose intent to appeal is otherwise clear from the notice."*

532 U.S. at 766-67, 121 S.Ct. at 1807 (emphasis added).

The key then, as indicated in *Becker* and in the Kansas cases discussed above, is that the determination of whether a defective signature (or lack of a signature) is fatal (and thus jurisdictional) or technical only (and thus correctable after the time for appeal has run) depends on whether the appellant's assent to the appeal is "assuredly authentic" or "objectively clear." That is the standard we apply in this case to determine whether the defective signature on the notice of appeal in this case is fatal. Based on its facts and rationale, and as noted by the court itself, *Becker* should be viewed as limited to the situation in which the appellant's assent, or intention to appeal, is objectively clear. And on this basis the factual circumstances and holding in *Becker* are easily and decisively distinguishable from the circumstances presented in this case.

Here, although timely filed, the notice of appeal to the Small Claims Division was not signed by the taxpayer or an attorney. The notice of appeal was transmitted and filed by someone (Chatam) other than the taxpayer or an attorney. The filing fee check (Chatam's check) was written on an account that did not belong to the taxpayer or an attorney. The taxpayer had no objective connection to the transmittal or filing of the appeal. Thus there is no indication based on this notice of appeal that the taxpayer assented to it or had any intention to file it. It might be argued that Chatam's agreement with the taxpayer, and the Declaration of Representative, gave him authority to assent on the taxpayer's behalf. This argument fails, however, on at least two grounds. First, as Chatam is neither the taxpayer nor the taxpayer's attorney, Chatam cannot properly assent to the appeal. *See Atchison Homeless Shelters, supra.*[153] Second, as discussed in Part III above,

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[153] Taxpayer argues that the case of *Babe Houser Motor Co., Inc. v. Tetreault,* 270 Kan. 502, 14 P.3d 1149 (2000) modifies *Atchison Homeless Shelters* so that the latter case does not apply to the present case. *Petition for Reconsideration,* p.61. This argument is addressed in detail in Part IV.D.5 below.

Taxpayer further argues that *Atchison Homeless Shelters* "does not address whether an Authorized Representative [like nonlawyer Chatam] can sign or assent on behalf of taxpayer." *Petition for Reconsideration,* p.61. But in fact it does. The Kansas Court of Appeals expressly stated as follows:

> Kansas follows the common-law rule that an appearance in court of a corporation by an agent other than a licensed attorney is not proper since a corporation is an artificial entity without the right of self-representation.

24 Kan. App. 2d at 455, 946 P.2d at 114. The right precluded in that case was the right of self-representation. The person who signed the notice of appeal in *Atchison Homeless Shelters* was a nonlawyer and not the party. Therefore, the signature was fatally defective. Even if the party had been an individual (*with* the right of self-representation), the holding in *Atchison Homeless Shelters* would have been the same if the notice of appeal was signed

the arrangement arising through the agreement and the Declaration of Representative constitutes champerty and is thus void and unenforceable for purposes of cases and conduct before this Court.[154] Thus they cannot provide the basis, contractual or otherwise, for the taxpayer's assent. All they show perhaps is Chatam's assent to the appeal, not that of the taxpayer. For all these reasons, it is *not* objectively clear from the notice of appeal, and its attendant circumstances,[155] that the taxpayer assented to the appeal or determined to make the appeal as required by the jurisdictional statutes. No one other than the taxpayer or the taxpayer's attorney can indicate the taxpayer's assent and thus no one else (besides the taxpayer or taxpayer's attorney) can sign a notice of appeal. Therefore, in this case, the defective signature on the notice of appeal is fatal, and deprives this Court of subject matter jurisdiction over the appeal.[156]

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by a nonlawyer who was not the party. Thus the decision is directly applicable to the situation here of Chatam – the "Authorized Representative" – because Chatam is a nonlawyer who is not the party.

Finally, Taxpayer attempts to distinguish *Atchison Homeless Shelters* on the basis that, unlike the present case, the party in *Atchison Homeless Shelters* "was never represented by counsel and no effort was made by counsel to cure the defective signature." *Petition for Reconsideration,* p.61. But this statement ignores several points. First, in *Atchison Homeless Shelters,* the defective signature was fatal, and as such, the defective signature could not be cured after the time for appeal had run, even if such an attempt had been made. Second, the Kansas Court of Appeals in *Atchison Homeless Shelters* did not offer or provide the appellant with an opportunity to cure the defective signature. This reinforces the analysis that the defect was thus fatal. Taxpayer here also argues that this Court should have provided such an opportunity to cure. *Petition for Reconsideration,* pp.58, 61. For further discussion of this last argument, *see* Part IV.D.6 below. Third, Taxpayer's attempt to cure here occurred after the time for appeal had run, and thus, if the original signature was fatally defective (as in *Atchison Homeless Shelters),* any later representation by an attorney or any untimely attempt to correct the defect by that attorney, is ineffective as a cure. So these facts are immaterial to the legal analysis. Accordingly, Taxpayer has pointed to no meaningful factual distinctions between the present case and *Atchison Homeless Shelters.*

[154] Even if Chatam's situation were not champertous (and thus void), the signature on the notice of appeal would still only show the assent of Chatam, and not the taxpayer. *See Atchison Homeless Shelters, supra,* as well as the discussion in fn.153, *supra.*

[155] *See also* Part V and Parts VIII *et seq.* below.

[156] The decision in this case does not reach or address whether the following situations are fatally defective, or merely technical defects, for purposes of subject matter jurisdiction:

1. A notice of appeal that totally lacks a signature when the notice of appeal clearly was transmitted by the taxpayer or an attorney, and is accompanied by the taxpayer's check or the attorney's check for the filing fee.

Taxpayer counters that sufficient assent is shown by Taxpayer's actions prior to any appeal reaching this Court.[157] The argument is that Taxpayer's assent is indicated at the informal hearing level – that is, by the Taxpayer completing and signing the protest form and filing it with the county treasurer when she paid her taxes. These asserted facts, however, show nothing about the Taxpayer's intention to appeal to this Court. All they show is the Taxpayer's desire to obtain an informal hearing at the county level. Many taxpayers file protest forms with the county, receive an adverse result, and never pursue an appeal to this Court. Many cases pursued in this Court's Small Claims Division result in an adverse decision, and yet are never appealed to or pursued in the Regular Division. Many cases pursued in the Regular Division result in an adverse decision, and yet are never appealed to the Kansas Court of Appeals. The mere fact that a taxpayer files a protest or appeal at a lower level shows absolutely nothing about an intention to pursue an appeal at a higher level.[158] If Taxpayer's argument were to be accepted, then it would not even be necessary for the Taxpayer to file a notice of appeal to either the Small Claims Division of this Court or its Regular Division, or even to higher courts. Pursuant to Taxpayer's argument, the mere filing of a protest form with the county treasurer would operate as the necessary assent for all later appeals without further action. This argument is untenable.

D. Other Counterarguments.

1. Lack of Prejudice to the County. As stated above, this Court has concluded that the defective signature on the notice of appeal in this case is fatal, and deprives this Court of subject matter jurisdiction over the appeal. It might be argued that there is no prejudice to the county in allowing the defective signature to be cured out of time. Indeed, the county in this case has no objection to allowing the taxpayer an opportunity to cure the defective signature. Prejudice to the other party or lack thereof, however, is irrelevant to whether an untimely amended notice of appeal should be allowed. *State v. Grant*, 19 Kan. App. 2d 686, 691, 875 P.2d 986, 990 (1994).[159] It might also be argued that the holding in *Grant* arose in a criminal

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2. A properly signed notice of appeal is transmitted to the Court but the proper filing fee is not presented.

[157] *Petition for Reconsideration*, p.60.

[158] Indeed, the Court notes that Taxpayer failed to appear personally at the September 18 Hearings despite an order from this Court to do so.

[159] The *Grant* decision is discussed in detail in Part IV.C above. See *also* the discussion below in Part IV.D.3 regarding the Kansas Supreme Court's rejection of judicial or

case and thus should not be applied to a tax appeal case. This argument too fails because criminal cases like *Grant* involve the more significant issues of liberty and personal freedom rather than, as here, less important issues of property and money. Therefore, applying strict rules to notices of appeal in the case of the incarcerated appellant in *Grant* has even more applicability (rather than less) to tax appeal cases.

2. *Architectural & Engineered Products Co. v. Whitehead* (1994). Taxpayer argues that the case of *Architectural & Engineered Products Co. v. Whitehead,* 19 Kan. App. 2d 378, 869 P.2d 766 (1994), *rev. denied* 255 Kan. 1000, justifies treating the signature defect in this case as a mere technical defect and allowing the taxpayer an opportunity to correct the defect even after the time for an appeal has run.[160] In that case, an attorney from another state, who was unlicensed in Kansas, signed and filed the plaintiff's petition to initiate a civil action. The petition was not signed by a Kansas attorney. The defendants moved for dismissal of the case with prejudice. The opinion does not indicate any statute of limitations issue or any other timing issue. Plaintiff moved for leave to have the petition signed by a Kansas attorney. The district court, however, dismissed the action with prejudice.

On appeal, the Kansas Court of Appeals reversed and remanded, holding that lack of a proper signature on the petition was a technical defect and allowing the amendment of the petition to cure the defect. *Id.* at 382-83, 869 P.2d at 769. The *Architectural & Engineered Products* decision (hereinafter referred to as *AEP),* however, has no application to the present case. It is distinguishable for three reasons.

First, unlike here, there is no indication in *AEP* that correction or amendment of the document would have run afoul of timing issues such as the statute of limitations. So *AEP* is not a good analogy to defectively signed notices of appeal with strict time deadlines. In *AEP,* if the district court or court of appeals had determined to dismiss the action *without* prejudice, the plaintiff could have simply re-filed its petition with a proper signature. So it made sense, from the standpoint of judicial efficiency, for the court of appeals to hold as it did in *AEP.*

Second, unlike the district court in *AEP,* this Court is an administrative tribunal, and its subject matter jurisdiction is strictly limited by statute. In *Vaughn v. Martell,* 226 Kan. 658, 660, 603 P.2d 191, 193 (1979), the Kansas Supreme Court held that "[t]he law in this state is well settled that administrative

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equitable exceptions as applied to the strict requirements of subject matter jurisdiction for appeals.

[160] This argument was set forth in Taxpayer's original, pre-reconsideration *Brief,* p.9.

appeals from taxing agencies are a matter of statute and the right to appeal is specifically limited to the statute providing for such appeals."[161] In contrast to this Court's strictly limited subject matter jurisdiction, the jurisdiction of a district court (as in *AEP)* – being part of this state's general court structure pursuant to Article III, Section 1 of the Kansas Constitution – has plenary jurisdiction over general civil and criminal matters.

Third and perhaps most importantly, regarding treatment of a filed document's defectiveness, Kansas courts distinguish between notices of appeal and subject matter jurisdiction for appeals, on the one hand, and petitions and pleadings in civil cases, on the other hand. In a decision made only three months after *AEP*, the Kansas Court of Appeals in *State v. Grant,* 19 Kan. App. 2d 686, 691, 875 P.2d 986, 990 (1994) refused to apply or analogize the civil procedure rule for amending petitions to notices of appeal.[162] Instead the court held that "*a notice of appeal from* district court cannot be considered a 'pleading' within the meaning of the [civil procedure amendment provisions] of K.S.A. 60-215(c)." *Id.* (emphasis added). *See also Board of County Com'rs of Sedgwick County v. City of Park City,* 293 Kan. 107, 118, 260 P.3d 387, 393-94 (2011) (noting the critical difference and distinction between the jurisdictional time requirements for notices of appeal and the nonjurisdictional time limitations pursuant to statutes of limitation). An appeal to this Court's Small Claims Division is triggered by filing a notice of appeal. *See, e.g.,* K.S.A. 74-2433f; K.A.R. 94-5-4(a). Accordingly, the "district court pleading" case of *AEP* has no application to the effectiveness of notices of appeal (whether filed with this Court or any other appellate court).

Similar to the unsuccessful argument made by the defendant in *Grant,* Taxpayer attempts to use another provision of the code of civil procedure to justify an opportunity to cure the defective signature in this case. Taxpayer points to K.S.A. 60-211(c), which permits an omitted signature on a pleading to be corrected promptly after it is "called to the attention" of the party.[163] As noted in the prior paragraph, however, a notice of appeal (whether to this Court or any other court) is *not* a "pleading" for purposes of the civil procedure code's specific rules and exceptions relating to amendments of pleadings and relation back, requests for amendment of court judgments and orders, or other untimely pleadings.[164]

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[161] The *Vaughn* decision is discussed in Part IV.B and Part IV.C. above.

[162] The *Grant* decision is discussed in detail in Part IV.C. above.

[163] *Petition for Reconsideration,* p.58.

[164] *See also* Part IV.D.3 below regarding this point.

Similarly, an untimely signature correction of a notice of appeal is not controlled or authorized by K.S.A. 60-211(c).

3. Judicial or Equitable Exceptions. It might next be argued that this Court should employ the concept of judicial or equitable exceptions to establish subject matter jurisdiction in this case to allow an untimely correction of a defective signature on the notice of appeal.

Of course, subject matter jurisdiction for this Court is strictly limited by statute. In *Vaughn v. Martell,* 226 Kan. 658, 660, 603 P.2d 191, 193 (1979), the Kansas Supreme Court held that "[t]he law in this state is well settled that administrative appeals from taxing agencies are a matter of statute and the right to appeal is specifically limited to the statute providing for such appeals."[165] Our jurisdictional statutes contain no language setting forth an exception or procedural mechanism for extending the time allowed for an appeal to this Court. Nonetheless, it might be argued that this Court should analogize to concepts, arising in general civil cases, of "cause shown" (K.S.A. 60-206(b)), "good cause shown" (K.S.A. 60-260(b)), and "excusable neglect" (K.S.A. 60-260(b) and 60-2103(a)). Or that this Court should employ the federal concept of "unique circumstances." This argument, however, utterly evaporates in the face of two very recent Kansas Supreme Court cases.

In *Board of County Com'rs of Sedgwick County v. City of Park City,* 293 Kan. 107, 260 P.3d 387 (2011), the Kansas Supreme Court rejected the use of the equitable doctrine of "unique circumstances" to extend the period for a timely appeal in any situation, even though, in that case, the district court had misled the appealing party into believing that the appeal deadline had been extended. The "unique circumstances" doctrine originally developed in a series of decisions from the United States Supreme Court in the 1960s. *Id.* at 113, 260 P.3d at 391. Kansas courts then picked up the doctrine and applied it over the years to various cases, including a case from the Board of Tax Appeals (this Court's predecessor). *Id.* at 115, 260 P.3d at 392 (referencing *In re Tax Appeal of Sumner County,* 261 Kan. at 317, 930 P.2d 1385, in which an untimely petition for reconsideration was excused when the Board of Tax Appeals made an erroneous statement about the filing period). But then, in 2007, the United States Supreme Court reversed itself and rejected the continued use of its "unique circumstances" doctrine. *Id.* at 108, 260 P.3d at 388 (citing *Bowles v. Russell,* 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007)). Acknowledging all that, the Kansas Supreme Court in 2011 in *Park City* rejected the continued use of the "unique circumstances" doctrine in Kansas: "[W]e

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[165] The *Vaughn* decision is discussed in Part IV.B and Part IV.C. above.

conclude the doctrine cannot be used to extend a statutory deadline that is jurisdictional." *Id.* at 108, 260 P.3d at 388.

Then, in *Woods v. Unified Government of WyCo/KCK,* 294 Kan. 292, 275 P.3d 46 (2012), the appellant filed with the local district court an appeal from an eminent domain award. Like tax appeals to this Court, the appeal of an eminent domain award is "'a special statutory proceeding and is not a civil action covered by the code of civil procedure.'" *Id.* at 296, 275 P.3d at 49 (quoting *Miller v. Bartle,* 283 Kan. 108, Syl. ¶2, 150 P.3d 1282 (2007)). Wood's appeal was untimely. The untimeliness of the appeal may have been due to the appellant not being advised of the filing date of the appraisers' report. *Id.* at 298, 275 P.3d at 50. Nevertheless, the Kansas Supreme Court held that there is no basis or justification for judicial or equitable exceptions to appellate jurisdiction. *Id.* at 298-99, 275 P.3d at 50-51. Rejecting an analogy to rules of civil procedure, the court stated as follows:

> [A] district court is "without jurisdiction to enlarge the time for filing a notice of appeal in an eminent domain proceeding pursuant to K.S.A. 2004 Supp. 60-206(b) or to permit a filing out of time for excusable neglect as provided by K.S.A. 60-260(b)."

Id. at 297, 275 P.3d at 50 (quoting *In re Condemnation of Land v. Stranger Valley Land Co.,* 280 Kan. 576, 586, 123 P.3d 731 (2005)). This holding applies equally well to our Court as its subject matter jurisdiction is also based on a specialized statutory scheme for reviewing valuation matters.

Moreover, according to the Kansas Supreme Court, it does not even matter whether the subject matter jurisdiction is based on specialized or general jurisdictional statutes, or which court is involved, or what level of appeal:

> Given that an appeal to the district court from an appraisers' award in an eminent domain action is nevertheless an appellate proceeding, . . . the district court, like the United States Supreme Court and the Kansas Supreme Court, *had no authority to create any equitable exception* to the jurisdictional requirement that the notice of appeal be filed within 30 days of the appraisers' report.

Id. at 298-99, 275 P.3d at 50-51.

This Court is bound by the *Park City* and *Woods* cases decided by the Kansas Supreme Court. Thus, similar to and in accordance with those cases, this Court has no authority to create, or even follow, a judicial or equitable exception to the strict requirements arising under the statutes that control this Court's subject matter jurisdiction. Like the appellant in *Woods,* the taxpayer here cannot be afforded

relief *"regardless of the facts or equities"* in the case. *Id.* at 298, 275 P.3d at 50 (emphasis added).

4. Statutory Authorization. Taxpayer argues that Kansas statutes allow nonlawyers, such as tax representatives, to represent taxpayers in tax appeal cases and that this authorizes tax representatives to sign notices of appeal.[166] The statutes relating to this Court state that, in small claims hearings, "[a] party may be represented by an attorney, a certified public accountant, a certified general appraiser, *a tax representative or agent,* a member of the taxpayer's immediate family or an authorized employee of the taxpayer." K.S.A. 74-2433f (f) (emphasis added).[167] The Kansas Administrative Procedures Act also provides that "any party may be represented at the party's own expense by counsel or, if permitted by law, other representative." K.S.A. 77-515(b).

There are several problems, however, with this argument. First, this Court's rules clearly indicate that a notice of appeal can be properly signed only by the taxpayer or an attorney.[168] Second, this Court's jurisdictional statutes require that only a taxpayer can bring an appeal to this Court regarding property valuation issues.[169] Third, the Kansas statutes noted above do not authorize practice of law in tax appeal cases by unlicensed persons.[170] *See, e.g.*, Ks. Atty. Gen. Opin. No. 93-100 (July 26, 1993).[171] These statutes merely establish that a taxpayer "may *participate*" in the cases "through a duly authorized representative" (for example, such representative may present testimony as a witness), but such representative (if not an attorney) cannot "engage in the practice of law." *Id.* (emphasis added). *See also* K.S.A. 77-515(a). In particular, nonlawyers cannot sign pleadings or notices of appeal. *State ex rel. Stephan v. Williams*, 246 Kan. 681, 689, 793 P.2d 234, 240 (1990); *Atchison Homeless Shelters, Inc. v. County of Atchison*, 24 Kan. App. 2d 454, 455, 946 P.2d 113, 114 (1997), *rev. denied;* Ks. Atty. Gen. Opin. No. 93-100. Fourth, Kansas statutes can *not* sanction unauthorized practice of law. *Williams*, 246 Kan. at 690-91, 793 P.2d at 241-42 (nonlawyer cannot sign pleadings

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[166] This argument was set forth in Taxpayer's original, pre-reconsideration *Brief*, pp.11-12.

[167] *See also* K.S.A. 79-1606(c) & 79-2005(a).

[168] *See* Part IV.A. above.

[169] *See* Part I.C. above.

[170] *See* Part IX below.

[171] For discussion of a possible analogy to judicial branch small claims, *see* Part IV.D.5 below.

or otherwise engage in unauthorized practice of law even if a statute arguably authorizes it). For these reasons, this argument is wholly unpersuasive.

As an apparent attempt to maneuver around *Williams* and the attorney general's opinion, Taxpayer asserts a notice of appeal is not a "pleading" (citing to K.S.A. 60-207, a provision of the civil procedure code), and therefore (goes the argument) signing a notice of appeal is not the unauthorized practice of law and thus should be permitted conduct by tax representatives under the Kansas statutes noted above. This argument also fails. We have already noted that notices of appeal, for many purposes related to the civil procedure code, are not "pleadings."[172] Nonetheless, signing a notice of appeal is the unauthorized practice of law if done by a nonlawyer who is not the party. In *Atchison Homeless Shelters,* the Kansas Court of Appeals held that only a party[173] or an attorney representing that party can sign a notice of appeal. 24 Kan. App. 2d at 455, 946 P.2d at 114.[174] The only possible logical conclusion from this holding is that any other nonlawyer person attempting to sign a notice of appeal is attempting to do what only a licensed attorney can do, and thus is engaged in the unauthorized practice of law. As such, it is not conduct that is or can be properly authorized by Kansas statutes.

5. *Babe Houser Motor Co., Inc. v. Tetreault* (2000) and Analogy to Judicial Branch Small Claims. As discussed above, the case of *Atchison Homeless Shelters, Inc. v. County of Atchison,* 24 Kan. App. 2d 454, 946 P.2d 113 (1997), *rev. denied,* stands for the proposition that only a party or an attorney representing such party can sign a notice of appeal; in other words, that nonlawyers cannot sign notices of appeal.[175] Based on *Atchison Homeless Shelters* and other legal authorities, we have concluded in Part IV.D.4 above that Kansas statutes do not and cannot authorize nonlawyer tax representatives to sign notices of appeal for tax appeal cases.

Taxpayer points us, however, to K.S.A. 74-2433f, which created this Court's Small Claims Division in 1998.[176] This statute's adoption occurred after the date of

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[172] *See* Part IV.D.2 and Part IV.D.3 above.

[173] And because the corporation in that case was an artificial entity, it did not have the right of self-representation through nonlawyer agents.

[174] For a more detailed discussion of the *Atchison Homeless Shelters* case, *see* Part IV.A. and Part IV.C. above.

[175] *See* Part IV.A., Part IV.C., and the prior portions of Part IV.D. above.

[176] *Petition for Reconsideration,* p.63.

many of our cited legal authorities. Taxpayer also directs our attention to the case of *Babe Houser Motor Co., Inc. v. Tetreault,* 270 Kan. 502, 14 P.3d 1149 (2000).[177] Taxpayer argues that these developments effectively modify *Atchison Homeless Shelters* and the other legal authorities cited by us in Part IV.D.4 above so that those authorities no longer apply to the present case. The essence of the argument is that an analogy should be drawn between tax appeals in this Court's Small Claims Division and small claims cases in the judicial branch ("Judicial Branch Small Claims") so that a nonlawyer can represent, and in effect act as attorney for, taxpayers and thus sign notices of appeal.[178] This analogy argument requires close examination of Judicial Branch Small Claims and the *Babe Houser* case.

The district courts of Kansas are part of the judicial branch under Article III of the Kansas Constitution. Judicial branch district courts have general jurisdiction over legal cases and exercise broad judicial power. Cases before the district courts generally fall into one of three categories: (i) regular "Chapter 60" cases pursuant to the code of civil procedure (K.S.A. Chapter 60);[179] (ii) limited action cases pursuant to the code of civil procedure for limited actions (K.S.A. Chapter 61); and (iii) Judicial Branch Small Claims pursuant to special provisions in the code of civil procedure for limited actions (referred to as the small claims procedure act and set forth in K.S.A. 61-2701 *et seq.).* In Chapter 60 and limited action cases, parties can only be represented by attorneys (or they can act *pro se* – that is, for themselves); they cannot be represented by nonlawyers. *See, e.g., Atchison Homeless Shelters,* 24 Kan. App. 2d at 455, 946 P.2d at 114. Judicial Branch Small Claims, however, embrace the polar opposite: Attorneys are generally *prohibited* from representing parties therein. K.S.A. 61-2707.

Judicial Branch Small Claims are strictly limited in terms of value. The amount of money or property involved in the claim cannot exceed $4,000. K.S.A. 61-

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[177] *Petition for Reconsideration,* p.61.

[178] In the *Petition for Reconsideration* at p.63, Taxpayer alleges an instance in this Court's Small Claims Division in which the hearing officer allowed a nonlawyer employee of a county appraiser's office to cross-examine the taxpayer's witness. The judges of this Court, of course, do not preside over cases in the Small Claims Division. This Court, however, took note of Taxpayer's allegation and sent a memorandum, dated November 8, 2012, to all Small Claims Division hearing officers reminding them about the law regarding unauthorized practice of law and enclosing a copy of Kansas Attorney General Opinion No. 93-100 (July 26, 1993).

[179] This "Chapter 60" category also includes cases arising under other statutory chapters such as probate cases pursuant to K.S.A. Chapter 59.

2703(a).[180] As noted above, attorneys are generally prohibited from representing parties: "[N]o party in any such action shall be *represented* by an attorney prior to judgment." K.S.A. 61-2707.[181] In the very next sentence of that statutory provision, the small claims procedure act expressly authorizes "a party [to] *appear* by a full-time employee or an officer. . . . " *Id.* (emphasis added). The use of the word "appear" should be particularly noted relative to the word "represented" used in the immediately prior sentence. Although this statutory provision also purports to authorize a party to appear by "any person in a representative capacity so long as such person is not an attorney," its effect is severely limited by another statutory provision that expressly excludes from Judicial Branch Small Claims any claim filed for a party by a person who "is not a full-time employee or officer" of the party. K.S.A. 61-2703(a)(2). This last point has major significance in the *Babe Houser* case discussed below.

It was not long before it became an issue how to reconcile the prohibition against attorneys in Judicial Branch Small Claims with the common law rule that corporations could only appear in court *through* an attorney. Was the small claims procedure act an improper usurpation of the judiciary's inherent power to regulate and define the practice of law? This issue was directly addressed by Kansas Attorney General Opinion No. 95-100 (October 10, 1995). It concluded that "a corporation may *participate* in small claims court through an agent who is not licensed to practice law." *Id.* at p.3. The opinion also analyzed whether this conduct constituted the unauthorized practice of law and stated as follows: "We cannot conclude that every representative of a corporation engages in the practice of law simply by filling out a [statement of claim] form and appearing in small claims court." *Id.* at p.4. The Attorney General then noted the following important qualification:

> We hasten to note that our interpretation of the small claims procedure act only extends to allowing corporate agents to *participate*. It does *not authorize corporate representatives to practice law*. A corporate representative who appears in small claims court and conducts direct and cross examination of witnesses, presents and objects to evidence and makes legal arguments may be engaging in the

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[180] This dollar limitation is exclusive of interest and costs. *Id.*

[181] There are a few exceptions to this rule. For example, an individual party who also happens to be an attorney can appear on his or her own behalf in Judicial Branch Small Claims. K.S.A. 61-2714. Also, an entity party can be represented by an officer or employee who also happens to be an attorney. *See* K.S.A. 61-2707(a) and 61-2714(a). In such limited circumstances when an attorney is permitted, then all other parties in the case can use an attorney as well. K.S.A. 61-2714(a).

> practice of law. (Attorney General Opinion No. 93-100). . . . We have no facts upon which to base a conclusion that the unauthorized practice of law is occurring in small claims courts throughout the state of Kansas and, therefore, it is our opinion that the legislature is not usurping the judiciary's power to regulate the practice of law by allowing nonlawyer corporate representatives to *appear* in small claims courts.

Id. (emphasis added).

A few years after the attorney general opinion, the issue finally reached the Kansas Supreme Court in *Babe Houser*. In that case, a corporation filed a claim in Judicial Branch Small Claims against a customer who had failed to pay a repair bill. Mr. Houser was the president and a full-time employee of the corporation. He filed the claim for and appeared on behalf of the corporation in small claims court. The small claims court, however, applied the *Atchison Homeless Shelters* decision and dismissed the case because the corporation was not represented by a licensed attorney. The corporation appealed to the district court, which affirmed the dismissal, holding that corporations could only be represented in court by a licensed attorney and parties could appear in small claims only if they did not have an attorney; thus, corporations could not take advantage of Judicial Branch Small Claims. The case was then appealed to the Kansas Supreme Court.

The court began its analysis by noting that the small claims procedure act was a legislative response to the "perceived need for a practicable and economic way in which parties may litigate small claims simply, without the benefit or expense of an attorney." 270 Kan. at 503-04; 14 P.3d at 1151. "The [small claims procedure act] was designed to foster simplicity of pleading and provide a forum for the speedy trial of small claims." *Id.* at 504; 14 P.3d at 1151. The court held that the small claims procedure act, including its provision allowing corporations to be represented by nonlawyers, was a sound and proper response to the identified needs and purposes. *Id.* at 507; 14 P.3d at 1153. Such an approach for very small claims – which, among other things, excludes attorneys and thus seeks to authorize corporations to appear through nonlawyers – is necessary because "'justice should not be a rich man's luxury' and . . . 'the expense of employing an attorney and paying normal court costs is more than the cause will bear.'" *Id.* The court also noted that the decision in *Babe Houser* did not undermine the holding in *Atchison Homeless Shelters* because the latter case did not involve Judicial Branch Small Claims. *Id.* at 508; 14 P.3d at 1153. In other words, the court limited the effect of *Babe Houser* so that it applies only to Judicial Branch Small Claims. *Id.* at 509; 14 P.3d at 1154 ("We limit our decision to the facts of this case."). Therefore, *Atchison Homeless Shelters* remains as good law for all other circumstances and cases, including tax appeals before this Court. *Id.* at 508; 14 P.3d 1153-54.

In its decision, the Kansas Supreme Court took special note of the provision in the small claims procedure act – K.S.A. 61-2703(a)(2) – that excludes any claim filed for a party by a person who "is not a full-time employee or officer" of the party. *Id.* at 505; 14 P.3d at 1152. Another provision of the small claims procedure act, however, states that "a party may appear by a full-time employee or officer *or any person in a representative capacity.*" K.S.A. 61-2707(a) (emphasis added). A question of concern arose from one of the justices during oral argument regarding the proper construction of K.S.A. 61-2707(a), and "whether this language unduly expanded representation to include third parties not otherwise associated with the corporation." 270 Kan. at 508; 14 P.3d at 1153. The corporation's counsel, in response to this question, pointed the court to the severely limiting language of K.S.A. 61-2703(a)(2). 270 Kan. at 508; 14 P.3d at 1153. The Kansas Supreme Court then held as follows:

> . . . [W]e read the [small claims procedure act's] inclusion of the "full-time" modifier in both K.S.A. 1999 Supp. 61-2703(a)(2) and K.S.A. 1999 Supp. 61-2707(a) as a prophylactic measure designed to ensure that only those who have *an ongoing and substantial connection* with a corporation will be permitted to represent it in small claims court. The legislature's inclusion of this limiting language means that *unrelated third parties are not permitted to file or pursue small claims on behalf of corporations.* We believe this interpretation balances the interest protected by the rule in *Atchison Homeless Shelters, Inc.*, 24 Kan. App. 2d 454, 946 P.2d 113, for district and appellate court proceedings, with the Act's interest in providing accessible, affordable justice to those whose claims are too small to merit attorney involvement.
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> Finally, our decision should in no manner be construed as an abandonment or limitation of our mandated control over the court system or the practice of law.
>
> We limit our decision to the facts of this case. . . .

Id. at 508-09; 14 P.3d at 1153-54. In other words, implementing its constitutional authority pursuant to Article III of the Kansas Constitution, the Kansas Supreme Court held that it was not unauthorized practice of law for a corporation to be represented in Judicial Branch Small Claims by a nonlawyer representative *who is a full-time employee or officer of that corporation.* The court thus gave its seal of approval to the small claims procedure act authorizing such nonlawyer representation with the noted limitations. The impact for other court situations, including cases in this Court's Regular Division and its Small Claims Division, is clear: At a minimum, it *is* unauthorized practice of law if there is an attempt to represent a party (or taxpayer) by a third person who does not have *an ongoing and*

substantial relationship with that party (or taxpayer) such as being an officer or full-time employee.

Taxpayer argues that this Court's Small Claims Division is analogous to Judicial Branch Small Claims; that, based on the analogy, *Babe Houser* should be applied to the present case, limiting the effect of *Atchison Homeless Shelters* (and presumably other legal authorities relied on by us); and that this thus permits the notices of appeal herein, signed by tax representative Chatam, to be deemed proper and effective. Of course, one glaring problem with this argument is that, as noted above, the Kansas Supreme Court expressly limited its holding in *Babe Houser* to Judicial Branch Small Claims. We are bound by the doctrine of *stare decisis.* K.S.A. 74-2433(a). We are thus obligated to follow *Atchison Homeless Shelters* and other published decisions of the Kansas appellate courts until those decisions are overruled or modified in terms of how they apply to this Court.

Even if we had authority to extend and apply *Babe Houser* to other situations, the analogy argument presented by Taxpayer in this case fails because of the significant differences between Judicial Branch Small Claims and this Court's Small Claims Division. That is not to say there are no similarities. For example, both courts are designed to provide a forum for the speedy trial of cases: very small claims in the former, and relatively small tax appeals in the latter. Also, decisions from both courts may be appealed to the next level (to a district judge with the former, and to this Court's Regular Division for the latter), where the applicable court conducts a *de novo* hearing and determination. *See* K.S.A. 61-2709 and K.S.A. 74-2433f(d).

The differences between the two types of courts, however, are significant and far outweigh any similarities. First, claims filed in Judicial Branch Small Claims are original claims initiated by a simple statement of claim or petition. In contrast, tax appeals to this Court are exactly that: appeals of a prior governmental administrative decision (and not an original claim). Second, attorneys are prohibited in Judicial Branch Small Claims. Attorneys are permitted, however, in this Court, including its Small Claims Division. The purpose for Judicial Branch Small Claims is to provide a forum in which small claims can be handled simply and cost-effectively without attorneys. The whole point of Judicial Branch Small Claims is to mandate minimal cost in resolving small cases. If attorneys were generally permitted in Judicial Branch Small Claims, such claims might well be effectively precluded because the cost of pursuing or defending them with an attorney would be severely prohibitive. That is not the situation with this Court's Small Claims Division, where attorneys are permitted and the potential amounts at issue are much larger than with Judicial Branch Small Claims. The latter point is the third significant difference between the two types of courts.

The amount of money or property involved in Judicial Branch Small Claims cannot exceed $4,000. K.S.A. 61-2703(a).[182] In stark contrast thereto, tax appeals to this Court's Small Claims Division can have tens of thousands of dollars at issue. For example, the Small Claims Division can hear valuation appeals of commercial properties and vacant (non-agricultural) land with valuations up to $2,000,000. If a county values a commercial property at $1,900,000, and the taxpayer appeals and asserts that the value should be $900,000, then $1,000,000 in valuation difference would be at issue. Given the assessment of commercial property at the rate of 25%[183] and an assumed mill levy of 150 mills, the tax at issue would be **$37,500** – representing the following calculation: $1,000,000 x .25 x .15. If a county values vacant land at $1,900,000, and the taxpayer appeals and asserts that the land is wasteland (perhaps because of toxic contamination) and should be valued at $0, then $1,900,000 in valuation difference would be at issue. Given the assessment of vacant land at 30%[184] and an assumed mill levy of 150 mills, the tax at issue would be **$85,500** – representing the following calculation: $1,900,000 x .3 x .15. Because all valuation appeals relating to single-family residential property must be appealed to the Small Claims Division, regardless of the residence's value,[185] the tax amounts at issue could exceed **$100,000**. Thus the amounts that can be at issue in this Court's Small Claims Division are vastly disproportionate to the $4,000 limitation that applies to Judicial Branch Small Claims and destroys any attempted analogy between the two types of courts. As expressly stated by the Kansas Supreme Court, allowing nonlawyers to provide representation in Judicial Branch Small Claims was justified only because such claims "are too small to merit attorney involvement." *Babe Houser,* 270 Kan. at 508-09, 14 P.3d at 1153-54.

For all these reasons, this Court's Small Claims Division is fully distinguishable from Judicial Branch Small Claims, and thus Taxpayer's attempt to analogize the two totally fails.

In any event, even if we were to find Taxpayer's analogy persuasive and that we somehow had authority to extend and apply *Babe Houser* to other situations (besides Judicial Branch Small Claims), that case not only would not help Taxpayer here, it would still lead to the conclusion that the tax representative's signature on the notice of appeal in this case is fatally defective. Let us assume that, applying

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[182] This dollar limitation is exclusive of interest and costs. *Id.*

[183] Ks. Const. Art. XI, § 1(a).

[184] *Id.*

[185] K.S.A. 74-2433f(b).

Babe Houser to this Court's Small Claims Division, we were to find and hold that third party representatives are authorized to represent taxpayers in tax appeal cases before the Small Claims Division. This would not end the analysis under *Babe Houser*. *Babe Houser* expressly held that, even in Judicial Branch Small Claims, a third person who "represents" a party therein *must* have an "ongoing and substantial connection" to that party such as being a "full-time employee or officer." 270 Kan. at 508-09, 14 P.3d at 1153-54. No one else can represent a party in Judicial Branch Small Claims. *Id.* If this latter prohibition applies even in Judicial Branch Small Claims, then it certainly would apply to all other situations involving cases and appeals.[186] In other words, in all other situations, *Atchison Homeless Shelters* still fully applies. *Id.* The prohibition against "unconnected" nonlawyer third persons providing representation (or even participating) thus applies no matter whether the cases are Judicial Branch Small Claims, limited actions, "Chapter 60" cases, tax appeals before this Court's Regular Division, or tax appeals before this Court's Small Claims Division. A nonlawyer third person who does not have an "ongoing and substantial connection" to the party (or taxpayer) absolutely cannot, under any circumstances, sign a notice of appeal, sign other court documents, or otherwise engage in the practice of law on behalf of such party (or taxpayer). That is exactly the situation we have here. The third party tax representative has, apart from the tax appeal, no meaningful connection to the Taxpayer. Therefore, application of *Babe Houser* principles reinforces (rather than undercuts) the conclusion that the signature on the notice of appeal here is both defective and fatal.

6. *In the Matter of the Equalization Appeal of Pierson Investments, L.L.C. for the Year 2008 from Johnson County, Kansas* (2008). Finally, Taxpayer points to a 2008 decision from this Court as an argument for allowing the defective signature in this case to be cured out of time.[187] In *In the Matter of the Equalization Appeal of Pierson Investments, L.L.C. for the Year 2008 from Johnson County, Kansas* (2008), Docket No. 2008-3974-EQ, this Court allowed a taxpayer to amend and correct a defective signature (by a nonlawyer tax representative who was also a certified public accountant) on the notice of appeal that sought to take the case from the Small Claims Division to the Regular Division.[188] In the opinion itself, there is no indication that a subject matter jurisdiction challenge was raised based on the

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[186] *See, e.g., id.* at 507, 14 P.3d 1153 (the Kansas Supreme Court makes express reference to statutory authorization for nonlawyer "participation" in administrative hearings arising under the Kansas Administrative Procedures Act – K.S.A. 77-515(a)).

[187] *Petition for Reconsideration*, pp.58-59.

[188] None of this Court's current judges was on the Court in 2008 when *Pierson* was decided.

defective signature or any indication of whether the corrected or amended notice of appeal would be untimely.[189] This Court held that the original signature was defective and should be treated as unsigned. *Id.* at p.2. This Court then held – based on *Architectural & Engineered Products Co., Inc. v. Whitehead,* 19 Kan. App. 2d 378, 869 P.2d 766 (1994), *rev. denied*, 255 Kan. 1000 (1994) – that the defective signature could be corrected and that the taxpayer should be afforded such an opportunity.

The *Pierson* case supplies no opening here for relief to the taxpayer. First, as noted above, the issue adjudicated by the court was not one of subject matter jurisdiction and, therefore, it is not proper to read the *Pierson* case as reaching the subject matter jurisdiction issue that we face in this case.[190] Taxpayer nonetheless argues that *Pierson*, based on its actual facts, applies to a jurisdictional situation and thus stands for the proposition that a defective signature on a notice of appeal does not destroy this Court's subject matter jurisdiction under any circumstances. To the extent that one attempts to apply *Pierson* to this case, it does not alter the result. If *Pierson* is viewed as a subject matter jurisdiction case, it was either bad law when written or has been inherently overruled by subsequent developments.

If it is assumed that the defective notice of appeal in *Pierson* could not be corrected until after the time for appeal had run, this Order on Reconsideration exhaustively demonstrates why, in that situation, this Court lacks subject matter jurisdiction. In particular, this Order on Reconsideration shows why the primary precedent relied on by the 2008 Court – *Architectural & Engineered Products Co., Inc. v. Whitehead* – has no application to the present case. It is fully distinguishable for several reasons.[191] If viewed as a subject matter jurisdiction case, *Pierson* in effect created an exception to the timing requirements arising under this Court's jurisdictional statutes. Thus *Pierson* would be overruled by the Kansas Supreme Court in its *Park City* and *Woods* decisions discussed in Part IV.D.3 above. Given

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[189] Taxpayer asserts that a detailed review of the case file in *Pierson* shows that, when the defective signature issue was raised, the time for appeal had run. This may very well be the case as a factual matter. As noted below, however, such facts would not change this Court's analysis of the *Pierson* decision and its applicability here.

[190] Even if *Pierson* were on point, this Court is only bound, through the doctrine of *stare decisis,* to follow published opinions of the Kansas Court of Appeals or the Kansas Supreme Court. K.S.A. 74-2433(a). *See also In re K-Mart Corp.*, 238 Kan. 393, 396, 710 P.2d 1304 (1985) ("[T]he doctrine of stare decisis is inapplicable to decisions of administrative tribunals. There is no rule in Kansas that an administrative agency must explain its actions in refusing to follow a ruling of a predecessor board in a different case. . . . ").

[191] *See* Part IV.D.2 above.

that, even if a reading of *Pierson* somehow misled Taxpayer (or Taxpayer's attorney or Taxpayer's tax representative) in this case, it does not matter.[192] In *Park City,* the district court judge misled the appellant regarding the time available for an appeal, and still the Kansas Supreme Court denied subject matter jurisdiction. Taxpayer here, like the appellant in *Woods,* cannot be afforded relief "*regardless of the facts or equities*" in the case. 294 Kan. at 298, 275 P.3d at 50 (emphasis added).

E. Conclusion: Fatal Defective Signature. Having refuted and negated any counterarguments in Part IV.D. above, the Court iterates its conclusion and its holding that the defective signature on the notice of appeal in this case is fatal, and deprives this Court of subject matter jurisdiction over the appeal. Without subject matter jurisdiction over the case, this Court has no authority to approve the proposed stipulation (settlement agreement) filed herein regarding the subject property's valuation, and therefore cannot accept or approve the same.[193]

V. STANCHION AND REINFORCEMENT FOR THE FATAL NATURE OF THE DEFECTIVE SIGNATURE

This Court has concluded in Part IV above that the defective signature on the notice of appeal in this case is fatal based on the lack of taxpayer assent and deprives this Court of subject matter jurisdiction. Taxpayer repeatedly objects that this Court's consideration and analysis of any facts or circumstances other than the defective signature is unnecessary to this Court's decision.[194] An examination of the

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[192] In the *Petition for Reconsideration* at p.63, Taxpayer cites *Pierson* as the basis for the proposition that "the practice approved by [this Court] since the adoption of the Small Claims Division has been to permit tax representatives to sign all notices of appeal [and] [t]o change this practice now . . . can only be viewed as punitive." This is not an accurate statement. At the time of the *Pierson* decision in 2008, and as noted therein, notices of appeal were required by this Court to be signed by the party or the party's attorney. The Court's rules today establish the same requirement. *See* Part II.A. above. It is difficult to see how anyone could genuinely assert a claim of being misled based on *Pierson* as the Court clearly noted in its 2008 decision that the original signature *was defective.* Such a circumstance, requiring a full awareness of the *Pierson* decision, would involve the knowing and purposeful filing of a notice of appeal that is defective.

[193] In its Order Granting Continuance herein, the Court notified the parties that it declined to approve the stipulation because of possible jurisdictional issues, held a hearing regarding those issues, and the parties have been afforded a full opportunity to present arguments and authorities regarding the same.

[194] *See, e.g., Petition for Reconsideration,* pp.1, 7, 9, & 77. *See also id.* at pp.5-6 & 10-57.

real forces animating these tax appeals as set forth in the Findings of Fact, however, is relevant to and confirms the lack of Taxpayer's assent to the appeal. The fatal nature of the defective signature is thus reinforced by the stanchion of unauthorized practice of law and unethical conduct that underlie this case and the related cases. Absent a proper signature by Taxpayer or Taxpayer's attorney, the conduct by Chatam and Terrill in these cases (as analyzed below in Parts VIII *et seq.*) confirms the lack of taxpayer assent to these appeals. In other words, without a proper signature on the notice of appeal, conduct by Chatam and Terrill inherently precludes assent to the appeal that is "assuredly authentic" or "objectively clear" on the part of Taxpayer. Such conduct therefore verifies and buttresses the fatal nature of the defective signature in this case.[195]

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[195] Even if an analysis of Chatam's and Terrill's conduct were somehow considered to be unnecessary to our decision regarding subject matter jurisdiction, it would still be appropriate for this Court to address that conduct in this Order on Reconsideration. We recognize that, if the subject matter jurisdiction issue were to be resolved on appeal in favor of Taxpayer and the case remanded to us, this Court would have to consider, take up, and deal with the conduct of Chatam and Terrill. We would be compelled in that scenario to address their unauthorized practice of law and ethical violations insofar as it affects this case. *See* Part VI and Parts VIII *et seq.* below. Moreover, we would still view the champertous agreement herein as void and unenforceable to the extent that it regulates or forms the framework for the conduct of Taxpayer, Taxpayer's attorney, and other persons who appear before this Court or who have a role in the present case before this Court. *See* Part III above.

In such scenario, this Court would model the approach of the *Purdy* case. *See* Part III above. Upon a theoretical remand of this case to us, Taxpayer would be allowed to proceed only with a new, independent attorney unassociated with Terrill or Chatam, or proceed *pro se.* Acknowledging this does not mean we are addressing or analyzing a hypothetical situation. Such an order is being issued contemporaneously herewith in the related September 18 "non-dismissal" cases (those cases which do not involve defective signatures).

If, in the theoretical remand scenario, Taxpayer were thereafter to refuse to obtain a new attorney or proceed *pro se,* the tax appeal would be dismissed. Then this case might very well be appealed again to a higher court for review and decision regarding the matters that are delineated hereafter. To avoid that circumstance, it remains in any event appropriate for us to analyze, in *this* Order on Reconsideration, whether unauthorized practice of law and ethical violations have occurred in this case. This approach clearly serves the interests of judicial economy. *See, e.g., In re Equalization Appeal of Brocato,* 277 P.3d 1135 (Kan. App. 2011), in which the Kansas Court of Appeals reached issues not before it, stating as follows:

> Because remand is required, . . . we must note other critical errors . . . that have not been challenged by the County. No cross-appeal was filed by the taxpayer, so we are without the ability to direct any reduction in value, but we must simply note these errors *in the interest of judicial economy and in order to assure that a perpetuation of the same errors on remand does not lead* to further inequities or *to another judicial review of COTA's order on remand.*

VI. POWER AND AUTHORITY OF COURT OF TAX APPEALS TO ADDRESS AND REGULATE ITS COURT OPERATIONS AND PROCEEDINGS

A. General Principles. The issues addressed hereafter are serious and pervasive. The cases to which such issues apply number approximately 170. The issues may ultimately have impact on many more cases beyond that. They thus necessitate thorough treatment, extensive presentation of legal authorities, and exhaustive analysis.[196] Before we proceed, however, to a detailed analysis of the conduct engaged in by Chatam and Terrill, a paramount and overriding issue must be addressed. Does this Court have the power or authority – inherent or statutory or otherwise – to address and regulate its operations and proceedings so as to maintain legal, proper, and ethical conduct insofar as that conduct relates to cases pending before this Court? As far as we are aware, it is an issue of first impression.

It is a given that this Court has only those powers expressly or impliedly granted to it by the legislature. *Pork Motel, Corp. v. Kansas Dept. of Health & Environment,* 234 Kan. 374, 378, 673 P.2d 1126, 1132 (1983); *Vaughn v. Martell,* 226 Kan. 658, 660-61, 603 P.2d 191, 194 (1979); *Sage v. Williams,* 23 Kan. App. 2d 624, 627, 933 P.2d 775, 779 (1997). It is an independent agency and administrative law court within the executive branch of state government. K.S.A. 74-2433a. It thus is not a judicial branch court that exercises broad judicial power under Article III of the Kansas Constitution. *Pork Motel, Corp.,* 234 Kan. at 378, 673 P.2d at 1132; *Sage,* 23 Kan. App. 2d at 627, 933 P.2d at 779. Administrative agencies, like this Court, are creatures of statute and their power depends upon authorizing statutes, and therefore any exercise of authority claimed by this Court must come from within its statutes. *Pork Motel, Corp.,* 234 Kan. at 378, 673 P.2d at 1132; *In re Appeal of Trickett,* 27 Kan. App. 2d 651, 655, 8 P.3d 18, 23 (2000).

On the other hand, unlike any other administrative court in the state, this Court is a "court of record." Appeals from this Court proceed directly to the Kansas Court of Appeals. K.S.A 74-2426(c)(2). *See also* K.S.A. 74-2426(c)(1) (unlike other

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Id. at 1140 (emphasis added).

[196] We concede that this Order on Reconsideration is long when looked at as a singular matter. But, when compared to the number of cases (approximately 170) similarly situated that will require parallel analysis and orders, this opinion works out to be approximately one page per case.

administrative agencies, this Court is not a party to any action for judicial review of its decisions; rather, the parties on appeal are the same parties as appeared before this Court). The Kansas Code of Judicial Conduct, Ks. Sup. Ct. Rule 601B, applies to this Court and its judges the same as it does to district court judges. K.S.A. 74-2433(a). This Court, like a district court, is bound by the doctrine of *stare decisis*. *Id.* In some instances, this Court is viewed as comparable to a district court. *Trickett,* 27 Kan. App. 2d at 656, 8 P.3d at 23 ("When performing a judicial function such as holding a contested hearing, BOTA [the Court of Tax Appeal's predecessor] is analogous to a district court. . . . ").

Taxpayer asserts that this Court has no "inherent" powers and cites *Trickett.*[197] Kansas case law including *Trickett,* however, appears to contradict this statement. The Kansas Supreme Court has stated that this Court's predecessor – the Board of Tax Appeals ("BOTA") – has not just powers expressly given by statute, but also those "impliedly given" thereby. *Vaughn,* 226 Kan. at 660-61, 603 P.2d at 194. Moreover, "[a]dministrative agencies such as [the Board of Tax Appeals (now the Court of Tax Appeals)] may perform quasi-judicial functions *reasonably necessary* to the proper performance of their administrative duties." *Sage,* 23 Kan. App. 2d at 627, 933 P.2d at 779 (emphasis added). *See also* Ks. Atty. Gen. Opin. No. 2012-24 (October 9, 2012). "Quasi" means "[s]eemingly but not actually; in some sense or degree; resembling; nearly." Black's Law Dictionary (9th ed. 2009). "[Q]uasi-judicial is a term applied to an officer who is empowered to investigate facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of a general nature." *Pork Motel, Corp.,* 234 Kan. at 383, 673 P.2d at 1134. In *Trickett* itself, the Kansas Court of Appeals held that quasi-judicial functions include those administrative actions in which an agency ascertains facts, holds hearings, weighs evidence, makes conclusions to justify its actions, "and *exercises discretion of a judicial nature.*" 27 Kan. App. 2d at 656, 8 P.3d at 23 (emphasis added). The Merriam-Webster Dictionary website defines "quasi-judicial" as "*essentially judicial in character* but not within the judicial power or function. . . . " http://www.merriam-webster.com/dictionary/quasi-judicial (emphasis added). It additionally defines "quasi-judicial" as "having a partly judicial character by possession of the right to hold hearings on and conduct investigations into disputed claims and alleged infractions of rules and regulations and to make decisions in the general manner of courts." *Id.* Based on all this, it appears that this Court has some powers that are judicial "in some sense or degree," even though it does not possess the full panoply of an Article III court.

For example, in *Behrmann v. Public Emp. Relations Bd.,* 225 Kan. 435, 591 P.2d 173 (1979), the Kansas Supreme Court held that the Kansas Constitution did not require decisions by administrative tribunals to be reviewed *de novo* by "Article

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[197] *Responsive Briefing,* p.7.

III" courts in the judicial branch. In *Woods v. Midwest Conveyor Co., Inc.*, 231 Kan. 763, 770, 648 P.2d 234, 241 (1982), the supreme court held that, absent a statutory grant of power, administrative tribunals did not have power to determine damages or award a personal money judgment.[198] In *Sage*, the Kansas Court of Appeals held that this Court does not have the power to hear equitable claims or apply equitable doctrines such as equitable estoppel. 23 Kan. App. 2d at 628, 933 P.2d at 779.

B. Regulating Court Operations and Proceedings.

1. "Inherent" or "Quasi-Judicial" Power and Authority to Regulate Court Operations and Proceedings. Taxpayer asserts that this Court has no "authority, jurisdiction or power" to address a laundry list of areas that generally encompass conduct related to cases pending before this Court, including unethical conduct by attorneys or unauthorized practice of law.[199] There do not appear to be any Kansas cases directly addressing this Court's power or authority to manage its courtroom and the conduct of those involved in a case before this Court. It is beyond question, however, that this Court has the power and authority to prevent a person unlicensed to practice law in Kansas from acting as an attorney in the Regular Division of this Court as implicitly acknowledged in Kansas Attorney General Opinion No. 93-100 (July 26, 1993). Indeed, at oral argument on a motion to recuse essentially identical to the one filed herein, counsel for Taxpayer's attorney conceded that this Court has such power and authority. So the questions become: Apart from the powers expressly precluded for the Court in the cases discussed in Part VI.A. above, which other judicial or quasi-judicial powers does this Court have and which does it not? What are the limits on this Court's power or authority to regulate the conduct of those involved in cases before the Court to ensure that such conduct comports with the law and legal ethics? Specifically, does this Court have the power or authority to regulate its Court operations and proceedings so as to maintain legal, proper, and ethical conduct insofar as that conduct relates to cases pending before this Court?

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[198] Similarly but more narrowly, in *Bd. of County Comm'rs of Johnson County v. Duffy*, 259 Kan. 500, 508, 912 P.2d 716, 721-22 (1996), the Kansas Supreme Court has held that this Court's predecessor – the Board of Tax Appeals ("BOTA") – did not have power to order a statewide reappraisal of agricultural property because no statute authorized it. Likewise, in *Salina Airport Authority v. Board of Tax Appeals, State of Kansas*, 13 Kan. App. 2d 80, 87, 761 P.2d 1261, 1267 (1988), the Kansas Court of Appeals held that BOTA had no power to order the county appraiser to investigate property that was not involved in the subject tax appeal.

[199] *Petition for Reconsideration*, pp.2-3 & 74-75. *See also Responsive Briefing*, pp.6-7 ("[T]he entire premise of the 'frolic' by COTA was without basis or foundation in Kansas law."); *id.* at p.9 ("COTA [attempts] to usurp the powers reserved to the legislature, the attorney general and the Kansas Supreme Court. . . . ").

As mentioned above, this Court has the power and authority to prevent a person unlicensed to practice law in Kansas from acting as an attorney in the Regular Division of this Court. This is an inherent "quasi-judicial" power not expressly set forth in any statute. Similarly, it would seem necessary that this Court has the power and authority to determine who is authorized to represent taxpayers in cases before this Court. In this case and related cases numbering approximately 170, Terrill filed *Motions to Withdraw* and these motions did not indicate service to the taxpayers. Then Mulcahy entered her appearances in all the same cases as general counsel of Chatam. Thereafter, this Court denied Terrill's motions to withdraw on the grounds that the motions had not been served on taxpayers, and issued orders to show cause regarding whether we could exercise subject matter jurisdiction over the cases. Who was authorized to represent taxpayers – Terrill or Mulcahy or both – was a parallel issue to resolve along with jurisdiction. It seems obvious that this Court had and has the inherent "quasi-judicial" power to determine who is so authorized in such circumstances.

Such power is not only "reasonably necessary" to this Court's courtroom operations, it is absolutely essential. Consistent with this approach, we take the view that we have the power to regulate this Court's operations and proceedings so as to maintain legal, proper, and ethical conduct insofar as that conduct relates to cases pending before this Court. Such power and authority is "reasonably necessary" to the proper performance of our "administrative duties." *Sage v. Williams*, 23 Kan. App. 2d 624, 627, 933 P.2d 775, 779 (1997). Our administrative function is to be an administrative law court. K.S.A. 74-2433a. This Court is the functional equivalent of a judicial branch district court "[w]hen performing a judicial function such as holding a contested hearing." *In re Appeal of Trickett*, 27 Kan. App. 2d 651, 656, 8 P.3d 18, 23 (2000). The proper performance of our administrative function requires that we maintain control of our courtroom such that we do not permit illegal, improper, or unethical conduct as it relates to cases pending before this Court. *See, e.g., Ellis v. Dep't of Industrial Accidents*, 463 Mass. 541, 551 fn.18, 977 N.E. 2d 49, 58 (2012) ("We do not conclude that the [administrative court] lacks authority to impose . . . case-specific sanctions for [attorney] misconduct that occurs in the course of representation in a workers' compensation proceeding."). We thus conclude that this Court has the inherent "quasi-judicial" power and authority to address and regulate such conduct to uphold the integrity and professionalism of its proceedings.

2. Kansas Cases and Kansas Supreme Court Rules. Taxpayer argues that this Court has no power or authority to address ethical violations by an attorney or unauthorized practice of law by nonlawyers.[200] According to Taxpayer, only the

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[200] *Petition for Reconsideration*, pp.76-77.

Kansas Supreme Court has authority to address such activities.[201] In particular, regarding ethical violations, Taxpayer cites Kansas Supreme Court Rules 201, 204, and 205. Rules 204 and 205 create, respectively, the Kansas Board for Discipline of Attorneys and the Office of Disciplinary Administrator.[202] Then, of particular note is Taxpayer's reference to Rule 201 and the argument made by Taxpayer pursuant thereto. In the *Petition for Reconsideration* at p.70, Taxpayer quotes in full Subsection (a) of Rule 201, which states as follows:

> Any attorney admitted to practice law in this state and any attorney specially admitted by a court of this state for a particular proceeding is *subject to the jurisdiction of the Supreme Court* and the authority hereinafter established by these Rules.

(emphasis added). Taxpayer next notes that the Disciplinary Administrator and the Kansas Board for Discipline of Attorneys have responsibility for investigating ethical violations and making recommendations to the Kansas Supreme Court. Based on this, Taxpayer then asserts that "it is the Supreme Court who has *exclusive jurisdiction* to determine" whether ethical violations have occurred and what penalties to exact. *Petition for Reconsideration,* p.70 (emphasis added). This last assertion, however, is a blatant mischaracterization of the Kansas Supreme Court Rules. First, Rule 201(a) does not contain the word "exclusive." Second and much more importantly, section (b) of Rule 201 – *unmentioned by Taxpayer in any briefing* – expressly states just the opposite:

> Nothing herein contained [such as Rule 201(a)] shall be construed to deny to *any court* such powers as are necessary *to maintain control over proceedings* conducted before that court.

Ks. Sup. Ct. Rule 201(b) (emphasis added). This rule alone utterly destroys Taxpayer's argument about the exclusive jurisdiction of the Kansas Supreme Court over ethical violations, and simultaneously suggests, in very strong terms, that this Court has the power and authority to regulate its operations and proceedings so as to maintain legal, proper, and ethical conduct insofar as that conduct relates to cases pending before this Court.

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[201] *Petition for Reconsideration,* pp.69-70. *See also Responsive Briefing,* p.7 ("COTA's actions to step into the shoes of the Kansas Supreme Court by adjudicating ethical issues are a clear violation of the separation of powers."), p.8, & p.9 ("COTA [attempts] to usurp the powers reserved to the legislature, the attorney general and the Kansas Supreme Court. . . .").

[202] *See also Petition for Reconsideration,* p.3.

Further negating Taxpayer's argument are several other Kansas Supreme Court Rules that will be discussed in detail in Part VI.B.4 below. And finally, at least one Kansas case demonstrates the power of courts (in addition to the supreme court) to address ethical violations.

In *Taylor v. Taylor*, 185 Kan. 324, 342 P.2d 190 (1959), plaintiff's attorney, Martin, was not properly qualified to represent the plaintiff in a Kansas case even though he was licensed in Kansas. The district court issued an order requiring the plaintiff to obtain "local counsel" by a certain date or else the divorce case would be dismissed. Plaintiff refused to comply with the order, insisting that "she had faith in [Martin], and that she would not have other counsel associated in the case." *Id.* at 328, 342 P.2d at 194. The district court dismissed the case and the Kansas Supreme Court upheld the dismissal. *Id.* This case thus establishes that, if improper conduct is indicated, a district court's prohibition of such conduct and dismissal of the case are appropriate actions. It does not matter whether the attorney's license is "in dispute" or whether the attorney has "been disbarred." *Id.* at 328, 342 P.2d at 193. *Taylor* thus stands for the proposition that district courts have the power to control and manage the conduct of those appearing before them in cases and to ensure proper and ethical conduct therein. This "district court" approach to dealing with misconduct should be equally and directly applicable to this Court insofar as this Court addresses conduct in, and limits its orders to, cases pending before this Court. As previously noted, this Court is analogous to a district court when "performing a judicial function." *In re Appeal of Trickett*, 27 Kan. App. 2d 651, 656, 8 P.3d 18, 23 (2000).

In regard to unauthorized practice of law, Taxpayer first argues that we cannot even address the conduct of a person who is not a party or attorney in this case.[203] It is true that Chatam is not an attorney and is not the taxpayer herein, and we have determined as well that Chatam is not the "real party in interest" in these tax appeal cases.[204] On the other hand, Chatam or its representative signed the notice of appeal for this case in this Court's Small Claims Division, and Chatam

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[203] *Petition for Reconsideration*, p.2 (This Court has no power or authority to address "contractual issues where neither the contract nor persons and/or entities . . . are even parties before the Court" or to make comment "regarding the propriety of actions and issues of persons and entities not even before the Court."); *Responsive Briefing*, p.9 ("COTA [attempts] to usurp the powers reserved to . . . the attorney general and the Kansas Supreme Court. . . . "). *Cf. also Responsive Briefing*, pp.6-7 ("[T]he entire premise of the 'frolic' by COTA was without basis or foundation in Kansas law."); *Petition for Reconsideration*, pp.65-66.

[204] *See* Part II above.

"appeared" on behalf of or "represented" Taxpayer in the Small Claims Division. Chatam's conduct, which is evaluated by this Court in Parts VIII and IX below to determine whether it constitutes unauthorized practice of law, is not the subject of a general "charge" or "complaint" regarding such activities. We address Chatam's conduct only insofar as it affects pending cases before this Court. *See Taylor, supra* (dismissal of a singular case in district court based on unauthorized practice of law). It is evaluated by this Court for two primary purposes: (i) as a stanchion to reinforce the conclusion that the defective signature in this case is fatal;[205] and (ii) to determine the propriety of Terrill's conduct as attorney in this case and the related cases.[206]

Taxpayer next asserts, regarding unauthorized practice of law, that the only way it can be addressed is through a *quo warranto* action instituted by the Kansas Attorney General.[207] In support of this argument, Taxpayer cites three Kansas *quo warranto* cases: *State ex rel. Boynton v. Perkins,* 138 Kan. 899, 28 P.2d 765 (1934); *State ex rel. Stephan v. Williams,* 246 Kan. 681, 793 P.2d 234 (1990); and *State ex rel. Stovall v. Martinez,* 27 Kan. App. 2d 9, 996 P.2d 371 (2000), *rev. denied.*[208] There are several significant problems with this argument as well.

In *Perkins,* the Kansas Attorney General, on behalf of the state, brought an original *quo warranto* action in the Kansas Supreme Court against a lawyer (Perkins) licensed in Missouri but not in Kansas.[209] The *quo warranto* action sought to prevent him from practicing law in Kansas. The court held that Perkins engaged in conduct that constituted unauthorized practice of law and ordered him to cease continuing such conduct. *Id.* at 908-09, 28 P.2d at 770. In the opinion, and contrary to Taxpayer's assertion, the Kansas Supreme Court acknowledged that *quo warranto* actions are not the exclusive means by which the issue of unauthorized practice of law can be raised:

> The form in which the matter is called to the court's attention is not so important. Since the court has jurisdiction of the subject matter, any

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[205] *See* Parts IV and V above.

[206] *See* Parts X through XVII below.

[207] *Petition for Reconsideration,* pp.69-70. *See also Responsive Briefing,* p.8, & p.9 ("COTA [attempts] to usurp the powers reserved to the legislature, the attorney general and the Kansas Supreme Court. . . . ").

[208] *Petition for Reconsideration,* pp.69-70.

[209] The *Perkins* case is addressed in more detail in Part IX.A. below.

> recognized procedure by which a charge or complaint is entertained, and the one charged is given proper notice, and in which there is a full hearing fairly conducted, would appear to be sufficient.

Id. at 906, 28 P.2d at 769.[210]

Two Kansas cases decided after *Perkins* reinforce the principle that unauthorized practice of law can be addressed by procedural means other than a *quo warranto* action, thus further undercutting Taxpayer's argument. In *Depew v. Wichita Retail Credit Ass'n [Depew I],* 141 Kan. 481, 42 P.2d 214 (1935), eight licensed attorneys filed a case in district court, on behalf of themselves and all other licensed attorneys in Wichita, seeking to enjoin the Wichita Retail Credit Association from engaging in unauthorized practice of law. The Kansas Supreme Court acknowledged the *Perkins* decision and the language quoted above. *Id.* at 483, 42 P.2d at 215. The court then held that an injunction action brought by private parties in district court "is a proper remedy to restrain a corporation from the unlawful practice of law." *Id.* at 487, 42 P.2d at 218. *See also Depew v. Wichita Retail Credit Ass'n [Depew II],* 142 Kan. 403, 49 P.2d 1041 (1935).

In *Taylor,* discussed above, a person was engaged in unauthorized practice of law even though he had a law license. In that case, the Kansas Supreme Court held that, if unauthorized conduct is indicated, a district court's prohibition of such conduct and dismissal of the case are appropriate actions. It does not matter whether the attorney's license is "in dispute" or whether the attorney has "been disbarred." 185 Kan. at 328, 342 P.2d at 193. *Taylor* was not a *quo warranto* action and did not involve the attorney general.

Depew I and *Taylor* thus stand for the proposition that district courts have the power to control and manage the conduct of those appearing before them in cases, to prevent unauthorized practice of law in those cases, and even to enjoin such misconduct in situations beyond those cases. Such district court actions do not require the institution or existence of a *quo warranto* action by the Kansas Attorney General. Although this Court clearly does not have the equitable power to issue an

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[210] As noted previously, Chatam is not a party in this case or in the related cases, and Chatam's conduct is not the subject of a "charge" or "complaint." We address such conduct only insofar as it affects pending cases before this Court. One primary purpose for such evaluation is to determine, in turn, the propriety of Terrill's conduct as attorney in this case and the related cases. Terrill's role as attorney in these cases flows through and depends entirely on Chatam's relationships with the taxpayers. The language from *Perkins* is thus quoted to show that a *quo warranto* action is not the only procedural mechanism by which unauthorized practice of law can be addressed or evaluated by a court.

injunction (as occurred in *Depew I),* it does have the power and authority (as occurred in *Taylor)* to manage and control its courtroom and those who appear before it in pending cases to ensure proper and ethical conduct therein. The latter situation is not an exercise of equitable power. Rather, it employs this Court's statutory and inherent "quasi-judicial" power as outlined above. The "district court" approaches to dealing with misconduct should be equally and directly applicable to this Court insofar as this Court addresses conduct in, and limits its orders to, cases pending before this Court. As previously noted, this Court is analogous to a district court when "performing a judicial function." *Trickett,* 27 Kan. App. 2d at 656, 8 P.3d at 23.

Taxpayer also calls our attention, with nominal discussion, to *State ex rel. Stephan v. Williams,* 246 Kan. 681, 793 P.2d 234 (1990), to support the argument that unauthorized practice of law can only be addressed in a *quo warranto* action.[211] *Williams* was indeed a *quo warranto* action, in which the court enjoined a nonlawyer from filing pleadings and otherwise handling litigation for third parties.[212] But nowhere in the opinion does the Kansas Supreme Court state, or even intimate, that *quo warranto* actions are the exclusive procedural method for addressing unauthorized practice of law.

Finally, Taxpayer cites, with minimal discussion, to *State ex rel. Stovall v. Martinez,* 27 Kan. App. 2d 9, 996 P.2d 371 (2000), *rev. denied.*[213] *Martinez* too was a *quo warranto* action, in which the Kansas Court of Appeals enjoined a nonlawyer insurance consultant from engaging in unauthorized practice of law by providing representation for insurance claims. The court does state that "an action in quo warranto is the *appropriate procedural vehicle* to inquire into a person's authority to practice law." *Id.* at 15, 996 P.2d at 376 (emphasis added). But this statement was only made to justify the district court's amendment of the pretrial order to specify the claim of unauthorized practice of law as a *quo warranto* claim. *Id.* at 14-15, 996 P.2d at 376. In *Martinez,* the Kansas Court of Appeals does not hold that a *quo warranto* action is the *exclusive* procedural method. And nowhere in the opinion does the court use the word "exclusive" in describing *quo warranto* actions.

The citation by Taxpayer to the three cases – *Perkins, Williams,* and *Martinez* – is reminiscent of Taxpayer's blatant mischaracterization of Kansas Supreme Court Rule 201(a) discussed above. Not only does the *Perkins* opinion not

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[211] *Petition for Reconsideration,* pp.69-70.

[212] The *Williams* case is addressed in more detail in Part IX below.

[213] The case is addressed in more detail in Parts VIII.A. and IX.A. below.

describe *quo warranto* actions as the exclusive procedural method for addressing unauthorized practice of law, it acknowledges that other methods are available. 138 Kan. at 906, 28 P.2d at 769. And in neither *Williams* nor *Martinez* do the Kansas courts describe *quo warranto* actions as the exclusive methods. If we analogize to ethical violations by a licensed attorney and look to Subsection (b) of Rule 201, we come to the conclusion that *quo warranto* actions are not the exclusive procedural method for addressing unauthorized practice of law. "Nothing . . . shall be construed *to deny to any court* such powers as are *necessary to maintain control over proceedings* conducted before that court." Ks. Sup. Ct. Rule 201(b) (emphasis added).

3. Cases from Other Jurisdictions. Taxpayer points this Court to two cases from other jurisdictions – *Ellis v. Dep't of Industrial Accidents*, 463 Mass. 541, 977 N.E. 2d 49 (2012) and *Robertson v. Town of Stonington*, 253 Conn. 255, 750 A.2d 460 (2000) – for the argument that ethical issues belong to the judicial branch of government and we are thus violating separation of powers by addressing them in this Court.[214] Neither case, however, supports this argument as applied to this Court in these circumstances. Rather, they both support this Court's approach.

In *Ellis*, the Massachusetts Supreme Court took up the question of whether administrative law courts handling workers' compensation claims could, based on ethical violations by an attorney in a particular case, generally prevent that attorney from appearing in any and all workers' compensation cases. The state legislature had passed a statute granting such authority to those administrative law courts. The Massachusetts Supreme Court held that this statute impermissibly assigned a judicial function to a department within the executive branch (the workers' compensation administrative law courts) and thus violated the doctrine of separation of powers. 463 Mass. at 542-43, 548-50, 977 N.E.2d at 52, 56-59. Importantly, however, the Court excluded from its holding the express factual situation involved here:

> We do not conclude that the department [of workers' compensation administrative law courts] lacks authority to impose . . . *case-specific sanctions for misconduct* that occurs in the course of representation in a workers' compensation proceeding.

Id. at 551 fn.18, 977 N.E.2d at 58 (emphasis added). On this basis alone, the present situation is fully distinguishable from the situation in *Ellis*. We are not engaged in actions that can be characterized as an attempt to impose general discipline of an attorney. This Court is not attempting to suspend the ability of

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[214] *Responsive Briefing*, p.7.

Terrill to handle any and all cases in Kansas or even any and all cases before this Court. Our current orders in this case and the related cases address Terrill's conduct only in those cases pending before this Court in which ethical violations are indicated.[215] Therefore, not only does *Ellis* not undercut this Court's orders in these cases, by negative implication it reinforces our approach and prevents the conclusion that our actions somehow violate the doctrine regarding separation of powers.

In *Robertson,* a tax appeal case, the taxing authority appealed the trial court's decision reducing the tax assessment on the plaintiff's real property. The plaintiff had entered into a champertous agreement similar, in most respects, to Chatam's agreements in the present cases. At the trial court and on appeal, the taxing authority argued that the agreement barred the plaintiff's tax appeal in its entirety. The Connecticut Supreme Court held, however, that the champertous agreement did not bar the tax appeal:

> . . . In challenging the validity of this [champertous] contract, the defendant does not seek to extinguish the contractual obligations between plaintiff and Merola, but, rather, to deny the plaintiff his statutory right to a property tax appeal. We conclude that the alleged validity of the contract is irrelevant *to the plaintiff's right to appeal.*
>
> Furthermore, we conclude that the plaintiff's property tax appeal is not barred by the common law of champerty.

253 Conn. at 260, 750 A.2d at 463 (emphasis added).

The holding in *Robertson* is fully consistent with our approach in the present cases. We have concluded, as the court did in *Robertson,* that Chatam's champertous agreements do not destroy subject matter jurisdiction in these cases.[216] The taxpayer in each tax appeal case here is allowed to proceed (unless the case involves a fatal defective signature). We have also taken steps here that were not at issue in *Robertson,* or even addressed or mentioned therein. For purposes of regulating conduct before this Court in the related pending cases, we have addressed the unauthorized practice of law by Chatam and ethical violations

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[215] *See* Part III.C. above for a discussion of this Court's orders in these cases, including the imposition of a stay at the end of the September 18 Hearings. Shortly thereafter, when the Court issued its original orders in these cases in October 2012, the Court lifted the stays in any cases that do not involve Chatam because there was no indication on the record in those cases of champerty, unauthorized practice of law, ethical violations, or other improper practices.

[216] *See* Part III.C. above.

by Terrill. Moreover, we have determined that the champertous agreements are void and unenforceable for purposes of these cases, and should thus be ignored. For the present cases in which subject matter jurisdiction exists, taxpayers are being allowed to proceed, but only *pro* se or with a new, independent attorney. Because these latter elements were not at issue in *Robertson,* that case has no negative impact on the present cases.

4. Statutory Authority and Power to Regulate Court Operations and Proceedings. We have concluded in Part VI.B.1 above that this Court has inherent "quasi-judicial" power and authority to maintain control of our courtroom such that we do not permit illegal, improper, or unethical conduct as it relates to cases pending before this Court. That is not, however, the end-all or the entirety of our analysis regarding the general issue of power and authority. We need not rely solely on the concept of implied power or inherent "quasi-judicial" power, for we are not without statutory authorization to regulate misconduct in proceedings before this Court.

One of this Court's authorizing statutes – K.S.A. 74-2433(a) – establishes that this Court and its judges "shall be subject to the supreme court rules of judicial conduct applicable to all judges of the district court." This incorporates, among other rules, the Kansas Code of Judicial Conduct ("KCJC"), Ks. Sup. Ct. Rule 601B. In particular, Rule 2.15(D) of the KCJC states that "[a] judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Kansas Rules of Professional Conduct *shall take appropriate action.*" (emphasis added). This rule is mandatory. When it is triggered, judges *must* take "appropriate action." The Comments thereto elaborate on what this constitutes:

> [Appropriate] actions to be taken in response to information indicating that a lawyer has committed a violation of the Kansas Rules of Professional Conduct may include *but are not limited to* communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority.

KCJC, Rule 2.15 Comment 2 (emphasis added). So appropriate action includes direct communication with the lawyer or reporting such lawyer. But other action, if appropriate, is implicitly authorized by the "may include but are not limited to" language. Indeed, if other action is deemed appropriate, it appears to be *mandatory.*

So what other additional actions would be appropriate and thus even required? The only possible interpretation is that appropriate action also includes regulating and controlling such conduct through contempt proceedings or

precluding such activities in specific cases pending before the judge. This interpretation is strongly reinforced by other supreme court rules. Rule 2.12(A) of the KCJC states another mandatory rule for judges: "A judge shall require court staff, court officials, *and others subject to the judge's direction and control* to act in a manner *consistent with the judge's obligations under this Code [the KCJC]."* This rule thus applies to parties appearing before this Court in pending cases, as well as their attorneys. Moreover, Kansas Supreme Court Rule 207(d) – which applies to district judges and thus also to this Court and its judges[217] – establishes that "[i]t shall be the duty of each judge in this state to report to the Disciplinary Administrator any act or omission on the part of an attorney appearing before the court, which, in the opinion of the judge, may constitute misconduct under these rules [relating to discipline of attorneys]."[218] The rule adds an important point in the last sentence: "Nothing herein shall be construed in any manner as limiting the powers of such judge in contempt *or other proceedings." Id.* (emphasis added).[219]

Thus, taken together, all this authority and obligation arising pursuant to Kansas Supreme Court Rules – flowing as they do to us through K.S.A. 74-2433(a) – clearly provides this Court with power and authority to regulate its operations and proceedings so as to maintain legal, proper, and ethical conduct insofar as that conduct relates to cases pending before this Court. Indeed, under such rules, this Court has a mandatory statutory obligation to do so. This power and authority then reaches any unethical conduct by Terrill, a licensed attorney. It also reaches the conduct of nonlawyer Chatam to the extent that Chatam's activities constitute the unauthorized practice of law, and especially if those activities cause Terrill to be in violation of the Kansas Rules of Professional Conduct.[220]

These conclusions regarding statutory power and authority for this Court are further reinforced by a second and separate look to the Kansas Supreme Court

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[217] *See* K.S.A. 74-2433(a).

[218] Another route by which Rule 207 applies to this Court is through Rule 1.1 of the KCJC, which provides that "[a] judge shall comply with the *law* and the Kansas Code of Judicial Conduct."

[219] Obviously we do not have contempt powers as those are held only by judicial branch Article III courts. But we have the capability of issuing orders in pending proceedings.

[220] For example, such situations could include the improper sharing of legal fees *(see* Part X below), "partnership" with a nonlawyer *(see* Part XI below), assisting the unauthorized practice of law *(see* Part XII below), being directed by a nonlawyer *(see* Part XIII below), third-party payers *(see* Part XIV below), improper proprietary interest *(see* Part XV below), and frivolous claims and conflict of interest *(see* Part XVII below).

Rules. Because district courts have the power to address misconduct by private injunction actions *(Depew v. Wichita Retail Credit Ass'n [Depew I],* 141 Kan. 481, 42 P.2d 214 (1935)) and by dismissal of actions *(Taylor v. Taylor,* 185 Kan. 324, 342 P.2d 190 (1950)),[221] then such "action" would be drawn into the realm of possibilities for "appropriate action" to be taken by judges under the Kansas Supreme Court Rules when faced with misconduct. As we are equally subject to the KCJC and the Kansas Supreme Court Rules and required thereby to take "appropriate action" in indicated circumstances, this authorizes and empowers such actions by this Court (if limited to orders issued in cases pending before this Court). *Depew I* and *Taylor,* therefore, when read in conjunction with the KCJC and the Kansas Supreme Court Rules, provide strong supplemental support for this Court's approach in the present case (if the final subject matter jurisdiction were to be resolved on appeal in favor of Taxpayer and the case remanded to us) and its orders in the related non-dismissal cases, all as outlined in Part III.C. above.[222]

C. Raising the Issues; Notice and Opportunity for Hearing; Opportunity to Brief. Taxpayer complains about this Court making inquiry into both the issue of subject matter jurisdiction *sua sponte* and then making inquiry into matters that, Taxpayer asserts, reach beyond subject matter jurisdiction such as champerty, unauthorized practice of law, and ethics.[223] First, the latter issues *do* impact on subject matter jurisdiction as explained in Part V above. Second, we did not initiate the activities that led to all these issues. The impetus for this entire matter was the filing by Terrill of approximately 170 *Motions to Withdraw* in this case and other related cases, and the ensuing circumstances.

In the motions to withdraw, Terrill stated as the reason for the motions that "J.W. Chatam and Associates, the tax representative for the Taxpayer, has retained alternative counsel." Moreover, Terrill's motions did not indicate service to the taxpayers. These circumstances raised the possibility that the taxpayers were not the real parties in interest, but that Chatam was. This possibility was reinforced when Mulcahy entered her appearances in all the same cases as general counsel of Chatam. In the Court's view, the only way Mulcahy's *Entries of Appearance* would not be an ethical violation was if nonlawyer Chatam were the real party in interest – in other words, if Chatam were effectively acting *pro se* and using in-house counsel. Also, for those appeals that came through this Court's Small Claims Division, the notices of appeal were signed by Chatam or its associates when the

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[221] *Depew I* and *Taylor* are discussed in detail in Part VI.B.2 above.

[222] *See also supra* fn.195.

[223] *Petition for Reconsideration,* pp.65-66; *Responsive Briefing,* pp.6-7 ("[T]he entire premise of the 'frolic' by COTA was without basis or foundation in Kansas law.").

Court's rules require that they be signed by the party or an attorney. All these circumstances implied the possibility that the taxpayers' claims had been assigned to Chatam, and thus served as the impetus for the Court to issue its Orders to Show Cause to determine the identity of the real party in interest and whether the Court could properly exercise subject matter jurisdiction in the present cases.

The Court properly raised the issue of subject matter jurisdiction on its own. As discussed at length in Parts I and II above, Kansas law is absolutely clear that a court has a duty, even on its own motion, to raise the issue of subject matter jurisdiction and to make suitable inquiry. The Court issued an Order to Show Cause and scheduled a hearing for September 6, 2012, for the purpose of determining the identity of the real party in interest and whether the Court could properly exercise subject matter jurisdiction in the case. Joint Motions for a Continuance were filed with the Court in these cases, and therein Terrill suggested that the Court order Terrill to provide the Court with copies of the existing Declarations of Representative and the agreements between Chatam and the taxpayers in the possibility that this might make the "show cause" hearings unnecessary. On August 31, 2012, the Court issued Orders Granting Continuance in this case and in the other similar cases – continuing the "show cause" hearings until September 18, 2012. The Orders Granting Continuance, as suggested by Terrill, ordered her to file with the Court the Declarations of Representative and the agreements between taxpayers and Chatam in this case and in all the other similar cases. She did so. At the September 18 Hearings, Terrill confirmed that the Chatam agreement in this case was proffered as justification for purposes of establishing subject matter jurisdiction herein, and both Chatam and Terrill confirmed that the agreements controlled the relationships between and among the taxpayers, Terrill, and Chatam.

Once the agreements were presented to the Court, the Court had clear indications on the record of the possibility of unauthorized practice of law by Chatam and ethical violations by Terrill. The possibility of misconduct was reinforced at the September 18 Hearings by confirmation that the agreements controlled the relationships between and among the taxpayers, Terrill, and Chatam. Assuming this Court had and has the power and authority noted in Parts VI.A. and VI.B. above, the Court was warranted in making further inquiry at the September 18 Hearings regarding the extent and nature of the relationships and the conduct pursuant thereto. Indeed, given the provisions of K.S.A. 74-2433, the Kansas Code of Judicial Conduct, and other Kansas Supreme Court rules, this Court was *obligated* to "take appropriate action" when faced with such conduct. This Court could not ignore the situation once documents in the record (and later, testimony) indicated the possibility of unauthorized practice of law and ethical violations. It was therefore proper for this Court to pursue questioning related to those issues,

and ultimately to address and make conclusions regarding those matters in this case and in the related cases.

Taxpayer complains that we targeted and ambushed Chatam and Terrill on these issues.[224] But, as delineated above, we did not file 170 *Motions to Withdraw*. We did not file 170 *Entries of Appearance*. We did not demand the agreements between Chatam and taxpayers on our own initiative. Terrill volunteered them. In the Joint Motions for Continuance, she suggested that the Court order her to provide them in the possibility that this might make the "show cause" hearings unnecessary. Without these agreements and without any further indications in the record, the issues (unauthorized practice of law and ethical violations) would never have been addressed by us *sua sponte*. *See, e.g., Taylor v. Taylor,* 185 Kan. 324, 342 P.2d 190 (1959) ("Martin has not been singled out or made an example of and he has not been deprived of any right to practice law . . . but rather, by his own choice, he has brought himself within [the applicable supreme court rule].").

Taxpayer further complains that we did not provide notice of or an opportunity for a hearing on these issues.[225] Taxpayer has complained that we did not afford an opportunity to brief these issues after the September 18 Hearings and before we issued our original orders in October 2012.[226] At the hearing, the Court identified four issues, all related to subject matter jurisdiction, to be briefed.[227] We also indicated at the hearing that we had a lot of information to process, and that we might identify additional issues to be briefed and, if so, we would advise Terrill by September 20.[228] The Court, however, did not contact Terrill with additional issues. Thus the Court did not request briefing on the issues of champerty, unauthorized practice of law, or possible ethical violations before addressing those issues in the Court's original orders issued in October 2012.

Proceedings before this Court are conducted in accordance with the Kansas Administrative Procedures Act ("KAPA"). K.S.A. 74-2426(a). KAPA provides that parties must be given the opportunity to respond, provide evidence, and present arguments. K.S.A. 77-523(b). The question thus arises whether Taxpayer has had

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[224] *Petition for Reconsideration,* pp.21 & 73.

[225] *Petition for Reconsideration,* pp.4 & 21.

[226] *Petition for Reconsideration,* pp.20-21.

[227] *Transcript,* 217:14 to 220:15.

[228] *Transcript,* 220:17 to 221:2.

an adequate opportunity to address (i) champerty, (ii) unauthorized practice of law, and (iii) ethical violations.

Champerty is an issue that relates to Chatam's conduct and agreement with taxpayers, through which Terrill was hired, through which Terrill is paid, and through which Terrill's attorney-client relationship flows. At the September 18 Hearings, Terrill acknowledged her awareness of the champerty issue and its relationship to the question of subject matter jurisdiction. This is shown by the following exchange regarding the four issues expressly identified for briefing:

> CHIEF JUDGE SHELDON: . . . But second issue: Are tax appeal claims assignable?
>
> MS. TERRILL: To a non-lawyer.
>
> CHIEF JUDGE SHELDON: Assignable. That's just a general question.
>
> MS. TERRILL: Because I think it's different. I think there's some provisions - -
>
> CHIEF JUDGE SHELDON: Well, you can address that if you think it's different.
>
> MS. TERRILL: Yeah. Some provisions for attorneys taking *champerty* on a tort case.
>
> CHIEF JUDGE SHELDON: Are you ready for the third one?
>
> MS. TERRILL: Yes, I am.
>
> CHIEF JUDGE SHELDON: Can there be subject matter jurisdiction for an assigned tax appeal claim?
>
> MS. TERRILL: For – okay, an assigned - - okay.
>
> CHIEF JUDGE SHELDON: Number four: Is a contingent fee in favor of Chatam & Associates effectively a partial assignment, question mark.

Transcript, 219:4 to 220:1 (emphasis added). This exchange acknowledges the possible connection between champerty, contingent fees, and subject matter

jurisdiction, and Terrill's awareness of that connection. For this reason it was not necessary for the Court to identify champerty as an issue that needed to be briefed.

The Court also did not request briefing by Terrill on the issue of unauthorized practice of law by Chatam. At the September 18 Hearings, Terrill clearly indicated that she was not acting as attorney for Chatam: "For the record, I don't have authority to represent J.W. Chatam, only the taxpayers." *Transcript,* 138:10 to 138:12. *See also Transcript,* 38:3-5, 38:7-8, and 47:11-13. This cut against identifying unauthorized practice of law as an issue for Terrill to brief.

Finally, the Court did not request briefing on possible ethical violations by Terrill. If Chatam were to be determined to have engaged in unauthorized practice of law, this also would have an impact potentially on ethical violations by Terrill. Attorneys, however, are charged with responsibility to know and understand the rules of professional conduct. Kansas Rules of Professional Conduct ("KRPC"), Ks. Sup. Ct. Rule 226, Preamble. Section 5 of the KRPC Preamble states that "[a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs." Section 12 of the Preamble states that "[e]very lawyer is responsible for observance of the Rules of Professional Conduct."[229] Therefore, both before and after any proceedings relating to the September 18 Hearings, Terrill was charged with full knowledge of the KRPC and the possible implications of her conduct.[230]

In these cases and in the other proceedings, in Orders Granting Continuance entered on or about August 31, 2012, the Court invited counsel to address *all* issues: "The Court invites counsel to submit any other information, including briefs with argument and authorities, relevant to the issues raised herein." Orders Granting Continuance, p.2, ¶7. No time limit was placed on any such briefing. Although Chatam's agreements had not been presented to the Court at that point, apparently Terrill was aware of them and their contents because it was in the Joint Motions for a Continuance filed with this Court on August 29, 2012, that Terrill suggested the Court order her to provide the Court with copies of the Chatam agreements. Terrill provided the Chatam agreements to the Court on or about September 5, 2012. Yet,

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[229] *Cf.* KRPC Rule 5.1, which provides that one attorney supervising another attorney has the responsibility to make sure the other attorney conforms to the rules of professional conduct. Inherent in this is the concept that the supervising attorney is charged with full knowledge of the rules.

[230] There are some intimations in the record that Terrill was aware, at the September 18 Hearings, of the issue of unauthorized practice of law and possible ethical violations. *See Transcript,* 114:2-19.

despite this and despite that Terrill was aware (or should have been aware) of the ethical rules in Kansas, Terrill did not brief those issues or any other issues prior to the September 18 Hearings. Given all this, it was not necessary after the September 18 Hearings for the Court to identify ethical violations as an issue or issues that needed to be briefed.

Moreover, in any event, this Court granted reconsideration in this case and the other related cases for the purpose of reconsidering *all* issues presented therein. This thereby provided the taxpayers and Terrill additional opportunity to address, among other things, champerty, unauthorized practice of law, and possible ethical violations, and to provide full briefing with arguments and authorities thereon. We will note hereafter, in Parts VIII *et seq.* the actual briefing submitted by Taxpayer on these issues. And finally, despite the opportunity to do so in the petition for reconsideration, neither Taxpayer in this case nor the taxpayers in the related cases requested an evidentiary hearing on these issues. Accordingly, any objection based on lack of an evidentiary hearing on these issues is now waived. K.S.A. 77-529(a); *In re Application of Strother Field Airport,* 46 Kan. App. 2d 316, 320-21, 263 P.3d 182, 185-86 (2011); *Kansas Industrial Consumers v. Kansas Corp. Comm'n,* 30 Kan. App. 2d 332, 338, 42 P.3d 110, 114-15 (2002). Through the reconsideration procedure, Taxpayer has had full notice of, and a full opportunity to respond and present arguments on, champerty, unauthorized practice of law, and possible ethical violations. Through the reconsideration procedure, Taxpayer had an opportunity to request an evidentiary hearing to provide evidence on these issues, but waived that opportunity by failing to request it. For all these reasons, the statutory requirements of K.S.A. 77-523(b) – relating to the "opportunity to respond, provide evidence, and present arguments" – have been satisfied or waived herein.

D. Other Counterarguments.

1. Presence of a Lay Judge. In the *Petition for Reconsideration,* Taxpayer states that "it is curious that an administrative tribunal that includes a non-lawyer would even begin to weigh questions of legal ethics and the unauthorized practice of law."[231] This statement appears to be an argument that Judge Cooper should not evaluate such questions because he is not an attorney, or that, in doing so, he himself is engaged in the unauthorized practice of law simply by being a *nonlawyer* judge. Similar arguments were raised in *In re Platt,* 269 Kan. 509, 529, 8 P.3d 686, 698-99 (2000). There a judge's conduct was evaluated by the Commission on Judicial Qualifications, which contained two lay members. The Kansas Supreme Court rejected those arguments, stating as follows:

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[231] *Petition for Reconsideration,* p.3.

> This argument goes . . . nowhere. . . . We have in Kansas lay judges with powers far greater than that of the lay Commission members.
>
> The presence of lay members on the Commission is decidedly important. Lay members bring unique qualifications and perspectives to the Commission. For example, in determining whether a particular set of circumstances give rise to 'an appearance of impropriety,' a lay member's opinion may be insightful.

Id. at 529-30, 8 P.3d at 699.

2. Recusal or Disqualification. Taxpayer asserts that this Court and all its judges were "subject to disqualification."[232] Taxpayer at times intimates, and at times expressly states, that this Court has a bias, a prejudice, or an agenda against Terrill and nonlawyer tax representatives.[233] This Court's actions are stated to "border on the outrageous" and described as a "path of frolic and detour solely to address what appears to be an agenda and an animus."[234] Taxpayer further states as follows:

> For reasons unknown, this Court of strict limited authority, jurisdiction and power has *taken it upon itself* to immerse in a bevy of issues about and for which it has no statutory authority or other legal interest, business, authority, jurisdiction or power.

(emphasis added).[235] These assertions and similar ones were later made in Taxpayer's *Motion for Recusal* filed herein on November 2, 2012, in which Taxpayer sought the recusal or disqualification of all this Court's judges. We issued our Order Denying Recusal herein on November 27, 2012, addressing these assertions and the motion. We incorporate our prior Order Denying Recusal in its entirety into this Order on Reconsideration as full explanation for why such recusal or disqualification was and is unnecessary.

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[232] *Petition for Reconsideration*, pp.6 & 77.

[233] *Petition for Reconsideration*, pp.73-74, 76-77.

[234] *Petition for Reconsideration*, p.1.

[235] *Petition for Reconsideration*, p.2. This Court did not initiate the activities that led to the issues of unauthorized practice of law and ethical violations. For a discussion of the impetus for the entire matter, *see* Part VI.C. above.

Taxpayer further questions "how the cases selected for the 'Order to Show Cause' were identified" by this Court and set for hearing.[236] Taxpayer notes that not all 170 cases (in which Terrill had filed motions to withdraw) were set for hearing, and that the cases were selected "apparently randomly" and only on "certain selected cases."[237] In reality, the cases were not selected randomly. The Johnson County cases were selected because two of those cases already had evidentiary hearings scheduled for September 6, 2012, the original date set for the "show cause" hearings. Thus both Terrill and the attorney for Johnson County were already scheduled to appear before this Court on that date. Proceeding first with the Johnson County cases also made sense because the largest number of the 170 cases were from Johnson County, and thus taking up the Johnson County cases first employed the most efficient use of judicial resources given the number of other counties and other cases involved. This is the simple – and *rational* – explanation for why we selected the cases we did for the "show cause" hearings.

3. Right to an Attorney. Taxpayer makes the argument that this Court "is . . . without authority to prohibit *someone* from being represented by the attorney of their choice."[238] This invokes the right to an attorney of one's choice. We have fully explained our holding, in Parts VI.A. and VI.B. above, that we do have the power and authority to address and regulate the conduct of attorneys in cases before this Court to ensure that such conduct comports with the law and legal ethics. Such action does not impinge on the right to an attorney. In *Taylor v. Taylor*, 185 Kan. 324, 342 P.2d 190 (1959), for example, the district court properly prohibited attorney Martin from representing the plaintiff without local counsel, and the Kansas Supreme Court upheld the dismissal of the case when the plaintiff refused to use any attorney other than the one of her choice (Martin).

It is worth probing in this case who exactly is the "someone" whose right to an attorney is putatively being impinged. Is it Chatam? He is the one, under the agreement with Taxpayer, who has the power to hire the attorney and pay the attorney. Indeed, in this case on the record, Chatam hired Terrill and fired Terrill as indicated by Terrill's *Motion to Withdraw*. If he is the "someone," he is not the Taxpayer and he is not the real party in interest in this tax appeal case.[239] So it seems his right to an attorney is not our concern in this case. Or is the "someone"

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[236] *Petition for Reconsideration*, p.70.

[237] *Petition for Reconsideration*, pp.70-71.

[238] *Petition for Reconsideration*, p.76 (emphasis added).

[239] *See* Part II above.

mentioned above the Taxpayer herein? If so, Taxpayer's Agreement with Chatam gives Chatam "sole discretion" to take those actions which Chatam "deems appropriate" regarding the tax appeal case. In particular, under the terms of the Agreement, Taxpayer has no right to control the choice of attorney. The choice of attorney is Chatam's contractual right and responsibility, and Chatam has exercised it by hiring Terrill, firing her, and then re-hiring her. Terrill's relationship with Taxpayer flows through Chatam. If Chatam's agreement is void and unenforceable, as we have held it is based on its champertous character,[240] then every aspect of and authorization for Terrill's representation of Chatam's taxpayers is likewise void. Terrill's attorney-client relationship with Taxpayer thus evaporates. In a very real sense, this Court is not impinging on the relationship; it is ignoring what does not properly exist.

4. Disparate Treatment. Taxpayer intimates that there is a disparity of treatment between Terrill and other attorneys.[241] Differing treatment, however, is permitted as long as there is a "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour v. City of Indianopolis,* 132 S.Ct. 2073, 2080 (2012). If this Court has the power to regulate its Court operations and proceedings so as to maintain legal, proper, and ethical conduct insofar as that conduct relates to cases pending before this Court, then the "rational basis" test permits this Court to treat situations and persons differently based on divergent facts and circumstances as they are indicated on the record. *Pork Motel, Corp.,* 234 Kan. at 385, 673 P.2d at 1136 (citing *Moog Industries, Inc. v. F.T.C.,* 355 U.S. 411, 78 S.Ct. 377, 2 L.Ed2d 370 (1958)). *See also Taylor v. Taylor,* 185 Kan. 324, 328, 342 P.2d 190 (1959) (rejecting an attorney's claim that he had been singled out and made an example of when he engaged in conduct that prevented him from practicing law in Kansas courts); *In re Platt,* 269 Kan. 509, 529, 8 P.3d 686, 698 (2000) (rejecting a disciplined judge's claim of being singled out or made an example of and citing to *Taylor).* In any event, as discussed at length in Part VI.C. above, we did not initiate the activities that led the Court to these issues; but there are now clear and substantial indications on the record that cannot be ignored.

5. Unprecedented Actions. Finally, Taxpayer appears to argue that this Court's actions in this case and the related cases are improper on the simple basis that they are "unprecedented."[242] We concede that our actions may well be

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[240] *See* Part III above.

[241] *See e.g., Petition for Reconsideration,* pp.43-44. For the Court's discussion of the particular argument asserted therein by Taxpayer, *see* fn.82, *supra.*

[242] *Petition for Reconsideration,* p.1.

unprecedented, but that alone cannot be the litmus test for the propriety of this Court's actions if the existence, extensiveness, and, in this Court's opinion, prohibited nature of the conduct on the record is also unprecedented.[243] We are not aware of any Kansas situation in which such pervasive conduct has been indicated on the record. This entire situation – the factual background, the extensiveness of the conduct, and this Court's application of the law to those facts – is thus likely unprecedented in Kansas. The propriety of our orders should be measured by the record, the findings of fact, and the law. The Kansas Code of Judicial Conduct admonishes us not to dodge, sidestep, or shy away from difficult decisions. *See, e.g.*, Ks. Sup. Ct. Rule 601B, Rule 2.4(A) & Comment, and Rule 2.7 & Comment.

VII. USE OF OFFICIAL NOTICE

In this Order on Reconsideration, the Court has employed official notice in Findings of Fact 98 through 101 to establish, for evidentiary purposes herein, certain information and dismissal data derived from prior proceedings before this Court involving Chatam and Terrill.[244] Tax appeal cases before this Court are conducted in accordance with the Kansas Administrative Procedures Act ("KAPA"). K.S.A. 74-2426(a). The KAPA provision controlling official notice states as follows:

> Official notice may be taken of (1) any matter that could be judicially noticed in the courts of this state [or] (2) the record of other proceedings before the state agency. . . . Parties shall be notified before or during the hearing, or *before the issuance of any initial or final order* that is based . . . in part on matters or material noticed, of the specific matters or material noticed and the source thereof, including any staff memoranda *and data,* and be afforded an opportunity to contest and rebut the matters or material so noticed.

K.S.A. 77-524(f) (emphasis added).

Taxpayer first asserts that this Court cannot invoke official notice on its own initiative.[245] K.S.A. 77-524(f), however, appears to permit this. The statute does

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[243] *See* Parts VIII *et seq.* below.

[244] These Findings of Fact are used by the Court to form the conclusions of law contained in Part XVII below relating to frivolous claims and conflict of interest.

[245] *Responsive Briefing,* p.7. *Cf. also Petition for Reconsideration,* pp.5 & 53.

not require a request from a party. Nor does it prohibit a Court from doing so on its own. If this Court has the power and authority to raise an issue *sua sponte*,[246] then it seems beyond question that this Court should be able, on its own intiative, to take official notice of facts relevant to those issues. As further support for this conclusion, we note that the Kansas rules of evidence generally permit courts to take judicial notice without the request of a party. *See* K.S.A. 60-609(b).

Taxpayer then, more generally, asserts that this Court has "failed to follow the rules" for taking official notice here and in particular that we are in violation of K.S.A. 77-524(f).[247] This statute, however, expressly authorizes official notice of information available from the record of proceedings before this Court, including data derived therefrom. That is exactly the type of information we have noticed in Findings of Fact 98 through 101 hereof.

K.S.A. 77-524(f) also sets forth certain procedural requirements that must be met before official notice can properly be taken by this Court in this case. First, Taxpayer must be notified "before the issuance of any initial or final order." This Order on Reconsideration is a final order in this tax appeal case. Taxpayer was notified by this Court of the official notice to be taken prior to the issuance of this Order on Reconsideration. In the original Order issued by this Court in October 2012 (the "Original Order"), the Court set forth the exact same findings of fact as those at issue here, and those findings expressly indicated that they were "[b]ased on official notice." That alone was notification prior to this Order on Reconsideration. In addition, we included in the Original Order a footnote stating as follows:

> The authorization to take such official notice derives from K.S.A. 77-524(f); *Bd. of Shawnee County Comm'rs v. Brookover,* 198 Kan. 70, 75-76, 422 P.2d 906 (1967). *Cf.* K.S.A. 60-409(b). The documentation supporting these metrics will be promptly provided to the taxpayer upon written request to the Court filed in this case. If taxpayer objects to the propriety of the Court's action in taking such official notice, the matter or matters can be raised and included in a timely petition for reconsideration. *See* K.S.A. 77-524(f). *Cf.* K.S.A. 60-412(d).

Original Order, pp.16-17 fn.2 (the "Official Notice Footnote"). This was further notification about our official notice.

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[246] *See* Parts I.A., II.A., and VI.C. above.

[247] *Responsive Briefing,* p.7; *Petition for Reconsideration,* pp.5 & 53.

Second, Taxpayer must be notified "of the specific matters or material noticed and the source thereof, including any . . . data." In the Original Order in the findings of fact, we indicated that the official notice was based on "this Court's official records in other cases" and we set forth the detailed data derived from those cases. We further indicated, in the Official Notice Footnote, that the supporting documents for such data had been compiled and were available. This gave Taxpayer notification sufficient to satisfy the second requirement.

Third, Taxpayer must "be afforded an opportunity to contest and rebut the matters or materials so noticed." This requirement has been satisfied through the process of reconsideration herein. In the *Petition for Reconsideration*, Taxpayer could have requested an evidentiary hearing regarding our official notice; Taxpayer could have requested the documentation setting forth the metrics and the data verifying them;[248] Taxpayer could have asserted that the information and data officially noticed by us was inaccurate. But Taxpayer did not do any of these things.[249] Nor did Taxpayer assert in the *Responsive Briefing* that the information and data were inaccurate.[250] Taxpayer had the opportunity – in both the *Petition for Reconsideration* and the *Responsive Briefing* – "to contest and rebut" the facts officially noticed by us, but did not take advantage of it. Accordingly, any objection based on such lack of an opportunity, or the accuracy of the information and data, is thus waived. K.S.A. 77-529(a); *In re Application of Strother Field Airport,* 46 Kan. App. 2d 316, 320-21, 263 P.3d 182, 185-86 (2011); *Kansas Industrial Consumers v. Kansas Corp. Comm'n,* 30 Kan. App. 2d 332, 338-39, 42 P.3d 110, 114-15 (2002);

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[248] Taxpayer could have requested the documentation even before filing the *Petition for Reconsideration*, but did not do so.

[249] In the *Petition for Reconsideration* at p.53, it is stated that Taxpayer "welcomes the opportunity to rebut the conclusion drawn by COTA." But, as noted in the main text, nowhere in the *Petition for Reconsideration* did Taxpayer request an evidentiary hearing, request the documentation setting forth the metrics and the data verifying them, or assert that the information and data officially noticed by us was inaccurate. In particular, the dismissal information and statistics themselves are nowhere challenged by Taxpayer. Taxpayer's use of the word "conclusion" at p.53 appears then to be a reference to our conclusions of law contained in Part XVII below, rather than to our officially-noticed findings of fact. Taxpayer then proceeds, at pp.53-55 of the *Petition for Reconsideration*, not to dispute the "dismissal" information and statistics, but to explain why so many dismissals occur and why they occur so late in the process. We will take up these arguments and points in Parts IX.D.4 and IX.D. 5 below, and in Part XVII below.

[250] In the *Responsive Briefing*, the only discussion of our use of official notice occurred at p.7, where the Taxpayer set forth a short paragraph dealing with procedure, and not with the accuracy of the information or data itself.

Citizens' Utility Ratepayer Bd. v. Kansas Corp. Comm'n, 24 Kan. App. 2d 222, 229, 943 P.2d 494, 501 (1997).

All the requirements of K.S.A. 77-524(f) having been satisfied, it is proper for this Court to take official notice of the information and data set forth in Findings of Fact 98 through 101 hereof. Our official notice herein has complied with the necessary procedures. Further support for the propriety of our official notice herein can also be found through another permitted mechanism under KAPA.

K.S.A. 77-524(f) authorizes official notice of "any matter that can be *judicially noticed* in the courts of this state." (emphasis added). The Kansas rules of evidence applicable to "the courts of this state" authorize judicial notice as follows:

> Judicial notice may be taken *without request by a party*, of . . . specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.

K.S.A. 60-409(b) (emphasis added). As discussed above, the subject information and data was derived from this Court's official records in other cases. *See Board of County Comm'rs of Shawnee County v. Brookover*, 198 Kan. 70, 76, 422 P.2d 906, 912-13 (1967) ("All of the matters to which the objection is directed are public records of the Board of Tax Appeals or its related departments and are facts which may be judicially noticed."). The subject information and data is "easily capable of immediate and accurate determination" by resort to this Court's official records, which are "easily accessible." And such official records are "of indisputable accuracy" for purposes of the metrics generated.[251] Judicial notice may be taken in a case's later proceedings even if subsequent to the evidentiary hearing. K.S.A. 60-412(a).[252] The only requirement is that the court "shall afford the parties reasonable opportunity" to present relevant information relating to such judicial notice. K.S.A. 60-412(d). As described previously, such an opportunity has been afforded here to Taxpayer through the process of reconsideration.

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[251] Moreover, despite a full opportunity to do so, as detailed above, Taxpayer has not requested the documentation or disputed the data's accuracy or requested an evidentiary hearing regarding the same.

[252] In the *Petition for Reconsideration* at p.53, Taxpayer contends that any application here by this Court of K.S.A. 60-412 is "misplaced," but gives no explanation of why or how this is so. Taxpayer has failed to identify specific grounds for this "misplacement" objection. Therefore, such objection is waived. K.S.A. 77-529(a); *Strother Field Airport*, 46 Kan. App. 2d at 320-21, 263 P.3d at 185-86; *Kansas Industrial Consumers*, 30 Kan. App. 2d at 338-39, 42 P.3d at 114-15.

For all the reasons set forth above, the official notice taken herein by this Court in Findings of Fact 98 through 101 is proper and fully justified under applicable law.

VIII. UNAUTHORIZED PRACTICE OF LAW BASED ON A NONLAWYER'S CONTINGENCY FEE OR OTHERWISE DERIVING FEES FROM AN ATTORNEY'S SERVICES

We concluded, in Part VI above, that this Court has the power and authority to address and regulate its operations and proceedings so as to maintain legal, proper, and ethical conduct insofar as that conduct relates to cases pending before this Court. We turn now to an analysis of whether Chatam has engaged in unauthorized practice of law.

In our Order Granting Reconsideration herein, we invited Taxpayer to brief the following question: *Has Chatam engaged in unauthorized practice of law in this case and other cases before this Court?* Given this opportunity to brief the merits, or substantive aspects, of the issue, Taxpayer sets forth the sum total of three sentences in the *Responsive Briefing*:

> There has been no finding of the unauthorized practice of law. COTA is without any authority to address, raise or litigate the issue. COTA cannot assume the responsibility given specifically by statute to the Attorney General of Kansas. *In re Trickett,* 27 Kan. App. 2d 651 (2000); *Robertson v. Town of Stonington,* 253 Conn. 255, 750 A.2d 460 (2000)[253] [and *Ellis v. Dept. of Industrial Accidents,* 463 Mass 541, (2012)[254]].

Although unclear, the first sentence may refer to "no finding" pursuant to a *quo warranto* action brought by the attorney general. None of these three sentences even remotely touches upon the merits or substantive aspects of whether Chatam has engaged in unauthorized practice of law.[255] Nor does Taxpayer discuss any

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[253] *Responsive Briefing,* p.8.

[254] The citation to the *Ellis* case was added by Taxpayer in a document entitled and filed herein as *Corrected Citation in Requested Responsive Briefing.*

[255] These three sentences focus only on the issue of this Court's power and authority. We have fully addressed this issue – including *Trickett, Robertson,* and *Ellis* – in Part VI above.

such merits or substantive aspects in the *Petition for Reconsideration.* Accordingly, any objections to our substantive analysis and characterization of Chatam's conduct as unauthorized practice of law are now waived. K.S.A. 77-529(a); *In re Application of Strother Field Airport,* 46 Kan. App. 2d 316, 320-21, 263 P.3d 182, 185-86 (2011) (failure to assert, in a petition for reconsideration, a specific ground for review waives that issue and it cannot be raised on review); *Kansas Industrial Consumers v. Kansas Corp. Comm'n,* 30 Kan. App. 2d 332, 338, 42 P.3d 110, 114-15 (2002) (same); *Citizens' Utility Ratepayer Bd. v. Kansas Corp. Comm'n,* 24 Kan. App. 2d 222, 229, 943 P.2d 494, 501 (1997) (failure to brief an issue waives that issue and it cannot be raised on review). Therefore, beginning in Part VIII.A. below and continuing through Part IX below, we set forth again the analysis contained in our original Order regarding Chatam's unauthorized practice of law, although the order of presentation has been modified, and we provide some supplemental authority for our conclusions of law relating thereto.

A. <u>Kansas Case Law.</u> Unauthorized practice of law can arise simply based on a nonlawyer receiving a contingent fee from a legal matter whether or not an attorney is involved. *State ex rel. Stovall v. Martinez,* 27 Kan. App. 2d 9, 996 P.2d 371 (2000), *rev. denied.*[256] In *Martinez,* a nonlawyer represented insurance claimants pursuant to an agreement that provided he would be paid a contingency or percentage fee on any insurance amounts received. The Kansas Court of Appeals held that this conduct constituted the unauthorized practice of law and expressly stated as follows:

> Defendant's financial interest in settlement without litigation conflicted with the client's interest in getting a fair settlement. . . . Defendant's business is distinguished from the service offered by, for instance, ombudsmen and union representatives *by his profit motive and potential conflict of interest.* The court does not concern itself with the results of the service. . . . Unquestionably, the trial court did not err in finding defendant's consulting services involved the practice of law.

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[256] Taxpayer objects to our focus on a tax representative's contingency fee as a basis for unauthorized practice of law, stating that "this is a policy question" and that "the opinions of COTA on this subject should be . . . presented to the Kansas legislature." *Petition for Reconsideration,* p.76. But, as demonstrated in *Martinez* and the cases to be discussed hereafter, the Kansas appellate courts have already determined that nonlawyer contingency fees constitute unauthorized practice of law, and thus violate public policy. And characterization of conduct as unauthorized practice of law appears to be more properly within the purview of the Kansas courts than of the Kansas legislature. *See, e.g., State ex rel. Stephan v. Williams,* 246 Kan. 681, 689-91, 793 P.2d 234, 241-42 (1990) (nonlawyer cannot engage in unauthorized practice of law even if a statute arguably authorizes it); *State ex rel. Boynton v. Perkins,* 138 Kan. 899, 904, 28 P.2d 765, 768 (1934).

Id. at 12, 996 P.2d at 375. This is exactly the factual situation involving Chatam in these tax appeal cases, both before and after they reach this Court's Regular Division. Prior to filing an appeal with the Regular Division, when Terrill then becomes engaged as attorney, Chatam handles and directs the appeal without an attorney, and receives a contingency fee for any favorable outcome. For the reason alone of receiving a contingency fee in a legal matter, Chatam is engaged in the unauthorized practice of law.

Unauthorized practice of law can also occur when a nonlawyer retains a stake in the legal matter after an attorney is engaged, and this is especially so if the generation of a contingent fee depends on the outcome of a legal case as a result of a court hearing. In *Depew v. Wichita Ass'n of Credit Men [Depew II]*, 142 Kan. 403, 49 P.2d 1041 (1935), nine Wichita attorneys filed a case in district court, on behalf of themselves and all other licensed attorneys in Wichita, seeking to enjoin the Wichita Association of Credit Men ("WACM") from engaging in the unauthorized practice of law. WACM handled collection matters for various creditors with its fee being a contingency fee (a percentage of the amount collected). Its representatives filled out claim forms to institute collection suits, filed those suits with "justice of the peace" courts, negotiated settlements, hired attorneys to handle the suits in court (if settlement failed), and fed such collection suits to an attorney. In those suits, even after an attorney was brought in to handle the court hearings, WACM received a contingency fee based on the amount recovered. The district court granted the injunction request. In Part IV of the district court's decision, it made the following specific conclusion of law: "'[T]he furnishing of such [collection] business to an attorney and collection and retention of a portion of the fee or a percentage allowed for collection, constituted the [unauthorized] practice of law.'" *Id.* at 408-09, 49 P.2d at 1041, 1044 (quoting the district court's Findings of Fact and Conclusions of Law). On appeal, the Kansas Supreme Court affirmed the district court decision, including the district court's conclusion that it is unauthorized practice of law when, after an attorney is engaged in a case, a nonlawyer retains a contingency fee on the amount recovered as a result of the outcome in that case. *Id.* at 416, 49 P.2d at 1049 ("We approve of all the other conclusions made by the trial court and hold that the acts, transactions, and conduct of the defendants eunumerated and contained in findings Nos. 3, 4, 5 and 6 are within the general understanding and definition of practicing law and should be enjoined.")

In reaching its decision in *Depew II*, the Kansas Supreme Court refuted arguments made by WACM that are similar to arguments made by Taxpayer here. First, WACM asserted at great length the merits and benefit of its activities for creditors. *Id.* at 412, 49 P.2d at 1047. Here, in similar fashion, Taxpayer notes that tax representatives like Chatam provide "tax consulting services and assistance" to

"Kansas property owners."[257] The supreme court held that, even assuming such merits and benefit, they cannot justify unauthorized practice of law. *Id.* at 412-13, 49 P.2d at 1047. Second, WACM cited "numerous instances of similar organizations doing the same line of business" as WACM, as well as the cooperation of thousands of attorneys with this business model. *Id.* at 413, 49 P.2d at 1047. In the same vein, Taxpayer alludes to the many tax representatives who engage in the same conduct as Chatam, and the large and small law firms that have tax appeal cases referred to them by such tax representatives.[258] The supreme court, however, rejected this argument too, holding that not even numerous instances of similar conduct can justify unauthorized practice of law. *Id.*

The contingent fee situation in *Depew II* is the same factual situation we face here involving Chatam and Terrill. The only difference, and it is immaterial, is that the underlying action in *Depew II* involved debt collections, while the underlying actions here are appeals of real property valuation. Moreover, a tax appeal case in the Regular Division of this Court can only be pursued through the efforts of a licensed attorney. Therefore, applying the holding in *Depew II* to the present cases, a nonlawyer tax representative receiving a contingency fee based on favorable results in this Court's Regular Division constitutes the unauthorized practice of law based simply and solely on that contingency fee. Accordingly, Chatam is engaged in these cases in the unauthorized practice of law.

B. Practical and Logical Analysis. The legal conclusion in Part VIII.A. above is reinforced by a practical and logical analysis of the nonlawyer's fee arrangement. If the generation of a contingent fee depends solely on the outcome of a legal case as a result of a court hearing, and the case can only be pursued in court through the efforts of a licensed attorney, then any contingent fee earned or actually paid based on the results from that court hearing is due solely to the legal services provided by the licensed attorney. Applied to tax appeal cases before this Court, any contingent fee paid to a tax representative based on favorable results in this Court's Regular Division are necessarily due to and *solely* due to the court-related services provided by a licensed attorney.

This is exactly the factual situation involving Chatam and Terrill. Any case involving Chatam that is appealed to this Court's Regular Division (without having received any reduction in value at earlier stages) will generate no fee for Chatam if the case is then dismissed or if the outcome in the Regular Division is unfavorable in the Regular Division, and this result has in fact occurred in tax appeal cases involving Chatam and Terrill. In many other tax appeal cases involving Chatam

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[257] *Petition for Reconsideration*, pp.1-2. *See also id.* at p.76.

[258] *Petition for Reconsideration*, pp.1-2, 71.

and Terrill that were appealed to the Regular Division without having received any reduction in value at earlier stages, favorable results were obtained in the Regular Division, generating significant contingency fees for Chatam, with the legal services in such cases being provided by Terrill, and thus such contingency fees paid to Chatam are and were based on and attributable solely to the legal services of Terrill provided in the Regular Division of this Court.

Thus, even without looking to the holdings in *Martinez* and *Depew II*, these circumstances lead to the logical conclusion that a tax representative receiving such a contingent fee, based (as it is) solely on legal services rendered by a licensed attorney, constitutes a legal fee paid to the tax representative and therefore in and of itself constitutes the unauthorized practice of law by the tax representative.[259]

C. Cases and Opinions from Other Jurisdictions. Cases from other jurisdictions buttress the conclusions we have reached in Parts VIII.A. and VIII.B. above regarding a nonlawyer receiving contingency fees. One case from another jurisdiction directly addresses the issue and reinforces the holding in *Depew II*. That case is *Bump v. District Court of Polk County*, 232 Iowa 623, 5 N.W.2d 914 (1942), a contempt action against a nonlawyer tax consultant who contracted with property owners to investigate their property tax assessments and employ lawyers to bring refund suits on the property owners' behalf. The tax consultant was responsible for all expenses relating to the suits and received, as its fee, 50% of any refunds. The tax consultant turned over the in-court responsibilities to a licensed attorney hired by the consultant, but this did not and could not alter the court's characterization of the consultant's activities as the unauthorized practice of law. *Id.* at 635, 5 N.W.2d at 920. The Iowa Supreme Court tied its holding directly to the activity of providing an attorney for a fee and receiving a fee based on that attorney's activities, an activity in which Chatam has clearly engaged: "Unauthorized practice of law is the *attempt by laymen . . . to make it a business . . . to employ and furnish for profit, directly or indirectly, the services of lawyers* who may be willing to sabotage professional ethics in order to secure employment." *Id.* at 922 (emphasis added). Thus, based on the facts and holding in *Bump*, a nonlawyer (like Chatam) receiving a fee based on the results obtained through the in-court services of a licensed attorney (like Terrill) constitutes the unauthorized practice of law by that nonlawyer.

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[259] It also indicates an ethical violation on the part of the attorney who knowingly participates in such an arrangement, as will be discussed below in Parts X, XI, and XII below, because the conduct constitutes a sharing of legal fees with a nonlawyer, an improper business relationship with a nonlawyer, and facilitating the unauthorized practice of law.

This conclusion is further fortified by an opinion issued by the Committee on the Unauthorized Practice of Law (appointed by the New Jersey Supreme Court). Supplement to Opinion 25, 143 N.J.L.J. 542 (February 12, 1996), stated as follows in the last paragraph:

> Therefore, we reiterate our holding in Opinion 25, . . . 130 N.J.L.J. 115 [January 13, 1992], that a lay tax consultant may not solicit a property owner to enter into a *contingent fee arrangement* whereby the consultant will, on the property owner's behalf, prepare and file a tax appeal and, if necessary, *retain an attorney for the prosecution of the appeal*. . . . A tax consultant who represents a taxpayer by performing *any* of the aforementioned services is engaged in the unauthorized practice of law.

(emphasis added). Based on this opinion, the unauthorized practice of law does *not* require all of these activities; any one activity in isolation is sufficient for the characterization. And thus the one activity of receiving a contingent fee in exchange for retaining an attorney to prosecute the tax appeal is, in and of itself, the unauthorized practice of law.

Although no other case could be found that directly addresses this issue, language from some cases provides general, albeit sometimes nebulous, support. For example, in *Clark v. Cambria Co. Bd. of Assess. Appeals,* 747 A.2d 1242 (Pa. Cmwlth. 2000), the Pennsylvania appellate court held that the nonlawyer tax representative (Rodgers) engaged in conduct that constituted the unauthorized practice of law. In supporting this conclusion, the appellate court relied on the trial court's findings of fact, and one of the important facts noted was that "Rodgers has or will share in the benefits of the appeals as Rodgers has received or will receive *a fee, a portion . . . of the tax reduction for the first year.*" *Id.* at 1247.

In *Med Controls, Inc. v. Hopkins,* 61 Ohio App. 3d 497, 573 N.E.2d 154 (1989), the Ohio Court of Appeals decided a contract lawsuit in which a collection agency sued for recovery of fees under an agreement that gave the collection agency a 20% contingency fee for non-lawsuit amounts recovered and *a 35% contingency fee for amounts recovered through a lawsuit.* The agreement also required the collection agency to pay all expenses including attorneys fees, and gave the collection agency discretion whether to pursue legal action and what attorney to employ. The court held that the agreement was unenforceable because it involved the unauthorized practice of law and violated public policy. The Ohio Court of Appeals paid special note to the fee received by the collection agency based on the results of litigation pursued by the attorney hired by the collection agency, stating as follows:

> [I]t is specifically understood that the [collection agency] will employ counsel of their own and separate choosing, and shall be responsible for the payment of any and all legal fees. . . .
>
> . . . If litigation were required, [the collection agency] would receive the funds directly from the debtor and would be entitled to a thirty-five percent [35%] commission.
>
> Contracts in which collection agencies are allowed to prosecute claims before a court of justice [through a hired attorney] on behalf of creditors are generally unenforceable since they authorize a collection agency to practice law.

Id. at 155. Although the court did not expressly link a direct connection between the payment of the fee based on in-court results and unauthorized practice of law, it did draw the latter conclusion immediately after noting the fee.

D. Kansas Supreme Court Rules. The concept that unauthorized practice of law can arise based simply on a nonlawyer receiving fees produced as a direct result of legal services provided by an attorney is further supported by looking to the Kansas Rules of Professional Conduct ("KRPC"), Ks. Sup. Ct. Rule 226. KRPC Rule 5.4(a) states that "[a] lawyer or law firm shall not share legal fees with a nonlawyer. . . ."[260] KRPC Rule 5.4(b) states that "[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."[261] Although these rules prohibit conduct by a licensed attorney, they provide guidance regarding what conduct by a nonlawyer should be classified as the unauthorized practice of law. A major purpose standing behind both KRPC rules is to prohibit a nonlawyer from benefiting economically because of legal services provided by an attorney. [262]

E. Conclusion. Based on Kansas case law, practical and logical analysis, cases and opinions from other jurisdictions, and the ethical rules presented above, we conclude that either of the following constitute unauthorized practice of law: (i) a nonlawyer receiving a contingency fee from a legal matter whether or not an attorney is involved; and (ii) a nonlawyer receiving fees produced as a direct result of legal services provided by an attorney. Applied to tax appeal cases before this Court, any contingent fee paid to a tax representative based on a tax appeal is

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[260] *See* Part X immediately below.

[261] *See* Part XI below.

[262] These rules serve, perhaps among other reasons, to "protect the lawyer's professional independence of judgment." Comment 1 to KRPC Rule 5.4.

unauthorized practice of law. This is especially so when the contingency fee is based on favorable results in this Court's Regular Division, which are necessarily due to and *solely* due to the legal services provided by a licensed attorney. These exact situations are factually indicated in a multitude of tax appeal cases before this Court involving Chatam and Terrill.

IX. UNAUTHORIZED PRACTICE OF LAW BASED ON MANAGING / DIRECTING LITIGATION

While unauthorized practice of law can occur based on a nonlawyer's contingency fee or based on a nonlawyer receiving fees produced as a direct result of legal services provided by an attorney, it can also arise because of a nonlawyer directing and managing litigation for a third party.[263]

A. Kansas Law. Kansas courts have long prohibited the unauthorized practice of law. The seminal Kansas case is *State ex rel. Boynton v. Perkins,* 138 Kan. 899, 28 P.2d 765 (1934), a *quo warranto* action in which the Kansas Supreme Court enjoined a lawyer (Perkins) licensed in Missouri but not in Kansas – and thus effectively engaged in the unauthorized practice of law in Kansas – who gave legal advice to clients, received fees from clients, and arranged for an attorney licensed in Kansas to handle any in-court matters. The court held that Perkins engaged in conduct that constituted unauthorized practice of law and ordered him to cease continuing such conduct. In defining what is the "practice of law," the court stated the following:

> *One who confers with clients, advises them as to their legal rights, and then takes the business to an attorney and arranges with him to look after it in court is engaged in the practice of law. . . .* And an attorney at law who conducts such an association with one unauthorized to practice law is guilty of knowingly and intentionally aiding and abetting an unlicensed person to practice law . . . and subject to discipline.

Id. at 908; 28 P.2d at 770 (emphasis added). If the activities outlined in *Perkins* constitute unauthorized practice of law for an out-of-state attorney, who at least has legal training, then the analysis should apply even more to a nonlawyer, who has no

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[263] As discussed in the introductory portions of Part VIII above, Taxpayer has waived any objections to our substantive analysis and characterization of Chatam's conduct as unauthorized practice of law.

such legal training. *See, e.g., Bump v. District Court of Polk County,* 232 Iowa 623, 5 N.W.2d 914 (1942).

A year after *Perkins,* the Kansas Supreme Court rendered its decision in *Depew v. Wichita Ass'n of Credit Men [Depew II],* 142 Kan. 403, 49 P.2d 1041 (1935). In that case, nine Wichita attorneys filed a case in district court, on behalf of themselves and all other licensed attorneys in Wichita, seeking to enjoin the Wichita Association of Credit Men ("WACM") from engaging in the unauthorized practice of law. The district court granted the injunction request. On appeal, the Kansas Supreme Court affirmed the district court decision, and re-affirmed the definition adopted in *Perkins*:

> "One who confers with clients, advises them as to their legal rights, and then takes the business to an attorney and arranges with him to look after it in court is engaged in the practice of law."

Id. at 412, 49 P.2d at 1047.

The court in *Depew II* also expressly held that the following activities by WACM constituted the unauthorized practice of law: (i) filling out blank claim forms to institute collection suits, (ii) filing collection suits with "justice of the peace" courts, (iii) negotiating settlements, (iv) hiring attorneys to handle the suits in court (if settlement failed), (vi) feeding such collection suits to an attorney, (v) collecting flat fees from the creditors for providing an attorney for the suits, (vi) retaining and collecting percentage fees (based on amounts collected in the suits) after the suits were turned over to an attorney, (vii) soliciting collection business to represent creditors before federal bankruptcy courts, (viii) using a power of attorney to represent creditors in federal bankruptcy courts, (ix) advising creditors about non-bankruptcy business liquidations, and (x) handling such non-bankruptcy business liquidations for creditors without attorneys. *Id.* at 408-10, 416, 49 P.2d at 1044-45, 1049.

As discussed in detail in Part VIII.A. above, in reaching its decision in *Depew II,* the Kansas Supreme Court refuted arguments made by WACM that are similar to arguments made by Taxpayer here. First, the court rejected the argument that benefit from the nonlawyer's activities can justify unauthorized practice of law. *Id.* at 412-13, 49 P.2d at 1047. And, second, the court also rejected the argument that numerous instances of similar conduct can justify such misconduct. *Id.*

Based on the standards recognized in *Perkins* and *Depew II,* Chatam has engaged in the unauthorized practice of law. In a multitude of tax appeal cases, Chatam has done the following:

(i) conferred with taxpayers about their tax appeal cases;
(ii) has advised them about the merits of those cases based on applicable valuation concepts (including legal principles relating to valuation);
(iii) has procured the services of a licensed attorney for prosecution of the cases in the Regular Division of this Court.
(iv) directed and managed the tax appeal cases;
(v) signed and filed notices of appeal to the Small Claims Division of this Court;
(vi) possessed and continues to possess the "sole discretion" and the "sole authority" to make determinations about tax appeals and how to proceed, and has in fact frequently exercised that discretion and that authority;
(vii) entered into contingent fee agreements and been paid contingent fees; and
(viii) engaged and paid attorneys at no additional cost to the taxpayers.

Indeed, Chatam has even arguably entered its appearance directly as "attorney" in a multitude of these cases in the Regular Division of this Court by way of Entries of Appearances filed by Mulcahy, a licensed attorney who signed as general counsel of J.W. Chatam & Associates and which showed the attorney and the attorney contact information as "J.W. Chatam & Associates" and Chatam's contact information.

The Kansas Supreme Court has addressed the issue of unauthorized practice of law in other cases besides *Perkins* and *Depew II*. In 1974, the Kansas Supreme Court decided *State v. Schumacher,* 214 Kan. 1, 519 P.2d 1116 (1974), a contempt proceeding in which the court extended the license suspension of an attorney (Schumacher) based on his post-suspension activities (which effectively amounted to unauthorized practice of law) in which he held himself out as available to clients, continued to work with clients, received payment from clients, advised clients, negotiated settlements for the clients, and hired another attorney (Grant) to handle any in-court matters. The Kansas Supreme Court reviewed the *Perkins* decision and re-affirmed its holding and its definition:

> The court, in *Perkins,* also pointed out that "[o]ne who confers with clients, advises them as to their legal rights, and then takes the business to an attorney and arranges with him to look after it in court is engaged in the practice of law."

Id. at 9, 519 P.2d at 1121 (citation to *Perkins* omitted).[264]

Again in 1990, the Kansas Supreme Court faced the issue of unauthorized practice of law in *State ex rel Stephan v. Williams*, 246 Kan. 681, 793 P.2d 234 (1990), a *quo warranto* action in which the court enjoined a nonlawyer from filing pleadings and otherwise handling litigation for third parties. In the process of summarizing Kansas law on the definition of "practice of law," the Kansas Supreme Court reviewed and re-affirmed the holdings and the definitions in both *Perkins* and *Schumacher*. The Court specifically stated as follows:

> In determining what constitutes the "practice of law" no precise, all-encompassing definition is advisable, even if it were possible. Every matter asserting the unauthorized practice of law must be considered on its own facts on a case-by-case basis. In *State v. Schumacher*, 214 Kan. 1, 519 P.2d 1116 (1974), we stated:
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> "Although it may sometimes be articulated more simply, one definition [of "practice of law"] has gained widespread acceptance, and has been adopted by this Court . . . [T]he practice of law is the doing or performing of services in a court of justice. . . . *But in a larger sense it includes legal advice and counsel. . . . State, ex rel., v. Perkins,* 138 Kans. 899, 907, 908, 28 P.2d 765 (1934). The court, in *Perkins*, also pointed out that *'[o]ne who confers with clients, advises them as to their legal rights, and then takes the business to an attorney and arranges with him to look after it in court is engaged in the practice of law.'* 138 Kan. at 908. . . ."

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[264] Admittedly, the Kansas Supreme Court in *Schumacher* also noted that "some actions which may be taken with impunity by persons who have never been admitted to the practice of law, will be found in contempt if undertaken by a suspended or disbarred attorney." *Id.* at 15, 519 P.2d at 1125. Although at first blush this quoted language would appear to limit the holding in *Schumacher* to suspended or disbarred attorneys engaging in the practice of law, the court does *not* say that a nonlawyer can direct litigation, or hire or retain an attorney, for a third party. Indeed, if the activities outlined in *Schumacher* constitute the practice of law for a suspended or disbarred attorney, who at least has legal training, then the analysis should apply even more to a nonlawyer, who has *no* such legal training. *See, e.g., Bump v. District Court of Polk County*, 232 Iowa 623, 5 N.W.2d 914 (1942). Moreover, in *State ex rel. Stephan v. Williams*, 246 Kan. 681, 793 P.2d 234 (1990) (discussed below) and *Perkins* (discussed above), the Kansas Supreme Court stated just the opposite – that such activities constituted the unauthorized practice of law – and the court did not qualify this rule as applying only to those who, somewhere else or at some time previously, held a law license.

Id. at 689 (emphasis added).

In 1993, this Court's predecessor – the Board of Tax Appeals ("BOTA") – requested guidance and an opinion from the Kansas Attorney General about what conduct by nonlawyers was permitted in cases before BOTA. In its opinion, the Attorney General gave the following synopsis:

> In board of tax appeals proceedings conducted in accordance with the Kansas administrative procedures act, . . . a non-attorney representative may not engage in the unauthorized practice of law and therefore may not examine witnesses, *file pleadings,* make legal arguments, or perform other functions deemed to be the practice of law.

Ks. Atty. Gen. Opin. No. 93-100 (July 26, 1993) (emphasis added). In support of its opinion, the Attorney General quoted at length from *Williams* and applied the definitions and principles set out in that case, as well as those set out in *Perkins* and *Schumacher*. The attorney general concluded by stating that examination of witnesses, presenting and objecting to evidence, making legal arguments, and *filing pleadings* "are functions that we believe the courts would consider as the practice of law and therefore can only be performed . . . by an individual or entity representing itself, or by [a licensed attorney]." *Id.* In many prior and current tax appeal cases in this Court, Chatam or its representatives have signed and filed notices of appeal to the Small Claims Division of this Court, thereby engaging in an additional activity that constitutes the unauthorized practice of law. *See Atchison Homeless Shelters, Inc. v. County of Atchison,* 24 Kan. App.2d 454, 946 P.2d 113 (1997).

The holding in *Atchison Homeless Shelters* has a reach broader than just a defective signature on a notice of appeal. This 1997 case effectively addresses the issue of unauthorized practice of law. Taxpayer argues that *Atchison Homeless Shelters* "does not address whether an Authorized Representative [like nonlawyer Chatam] can sign or assent on behalf of taxpayer."[265] But in fact it does. The Kansas Court of Appeals expressly stated as follows:

> Kansas follows the common-law rule that an appearance in court of a corporation by an agent other than a licensed attorney is not proper since a corporation is an artificial entity without the right of self-representation.

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[265] *Petition for Reconsideration,* p.61.

24 Kan. App. 2d at 455, 946 P.2d at 114. The right precluded in that case was the right of self-representation. The person who signed the notice of appeal in *Atchison Homeless Shelters* was a nonlawyer and not the party. Therefore, the signature was fatally defective. Even if the party had been an individual (*with* the right of self-representation), the holding in *Atchison Homeless Shelters* would have been the same if the notice of appeal was signed by a nonlawyer who was not the party. The only possible logical conclusion from this holding is that any nonlawyer person (who is not the party) attempting to do what only a licensed attorney can do is thus engaged in the unauthorized practice of law. Thus the decision is directly applicable to the situation of Chatam – the "Authorized Representative" – because Chatam is a nonlawyer who is not the party.

In 2000, the Kansas Court of Appeals took up the issue of unauthorized practice of law in *State ex rel. Stovall v. Martinez,* 27 Kan. App. 2d 9, 996 P.2d 371 (2000), *rev. denied.*[266] This *quo warranto* action involved a nonlawyer insurance consultant (Martinez) who provided representation for insurance claims. He advertised his services as an alternative to representation by an attorney. He represented insurance claimants pursuant to an agreement that provided he would be paid a contingency or percentage fee on any insurance amounts recovered. The court described his activities as follows:

> In representing a claimant, defendant compiled a settlement packet of relevant information, made written demand upon the insurance company, advised the claimant regarding the reasonableness of a settlement, and negotiated with the insurance company.

Id. at 10, 996 P.2d at 374. This is essentially the same conduct as that of Chatam – only in an insurance claims context rather than that of tax appeals.

Martinez argued that he was performing the same services that he had as an employee of State Farm Insurance Company and he was either not engaged in unauthorized practice of law or all insurance adjusters and claims examiners were unlawfully practicing law. *Id.* at 11, 996 P.2d at 374. Despite Martinez's argument, the Kansas Court of Appeals held that he was engaged in unauthorized practice of law, and noted as follows:

> *Purporting to be an expert,* defendant offered a service, the performance of which clearly required knowledge of legal principles. Defendant induced his clients to place their trust in his judgment and skill in framing their claims. Defendant's financial interest in

[266] The *Martinez* case is also addressed in Part VI.B.2 above and Part VIII.A. above.

> settlement without litigation conflicted with the client's interest in getting a fair settlement. . . . Defendant's business is distinguished from the service offered by, for instance, ombudsmen and union representatives *by his profit motive and potential conflict of interest. The court does not concern itself with the results of the service. . . .* Unquestionably, the trial court did not err in finding defendant's consulting services involved the practice of law.

Id. at 12, 996 P.2d at 375 (citing *State ex rel. Schneider v. Hill,* 223 Kan. 425, 426, 573 P.2d 1078 (1978)) (emphasis added). This language and holding is devastating to Chatam's situation. Again, the conduct recited in *Martinez* embraces nearly the exact same conduct as that of Chatam, in terms of managing and directing the tax appeal cases both before and after they reach this Court, as well as the aspects of profit motive founded on the contingency fee.

Finally, it should be noted that Martinez wanted, in the district court, to call as witnesses consumers who were satisfied with his services, but the district court prevented this. *Id.* at 16, 996 P.2d at 377. The Kansas Court of Appeals upheld the district court's exclusion of such evidence and stated as follows:

> . . . Because the court does not consider how well the defendant performs when considering a claim of unauthorized practice of law, this evidence would clearly not have been relevant to [that] claim. . . .
> . . . What others do . . . does not prove defendant did not . . . engage in the practice of law as defined in Kansas courts.

Id. Thus, even if Chatam's and Terrill's clients were satisfied with the services provided, this would not avail Chatam or Terrill, or mitigate their misconduct.

Based on all these Kansas cases, which consistently apply the same principles from 1934 through 2000, it is clear that Chatam has engaged here in the unauthorized practice of law by managing and directing tax appeal claims prior to reaching this Court and tax appeal cases in this Court.

B. <u>Cases and Opinions from Other Jurisdictions</u>. Cases and opinions from other jurisdictions are consistent with the Kansas cases defining practice of law and, further, hold in factual circumstances similar to, and in some cases nearly identical to, those of Chatam that the conduct constituted the unauthorized practice of law. In *Clark v. Cambria Co. Bd. of Assess. Appeals,* 747 A.2d 1242, 1246, 1247 (Pa. Cmwlth. 2000), the court noted that the tax representative (Rodgers) "*directed the [tax] litigation*" and "possessed *the sole discretion* to determine whether an attorney should be hired and to decide how and whether to proceed with the appeals," and the court held that he engaged in unauthorized practice of law. One

of the reasons this activity constitutes the "practice of law" is that one must be familiar with a variety of statutes and court rulings to be able to determine the propriety and advancement of a tax appeal case. Unauthorized Practice of Law Committee, Pennsylvania Bar Ass'n, Opin. No. 98-101, at p.3. Similar to the *Clark* case, Chatam has, in a multitude of tax appeal cases, directed the litigation and possessed, under the terms of the agreements, the "sole discretion" and the "sole authority" to make determinations about the tax appeals and how to proceed, and has in fact frequently exercised that discretion and that authority.

In New Jersey, the Committee on the Unauthorized Practice of Law (appointed by the New Jersey Supreme Court) opined that the unauthorized practice of law is indicated by a nonlawyer property tax consultant who solicits homeowners to enter into contingent fee arrangements by which the consultant is authorized to engage attorneys as needed for assessment appeals at no additional cost to the homeowners. Opinion 25, 130 N.J.L.J. 115 (January 13, 1992). The Committee stated as follows:

> The New Jersey Supreme Court has explicitly held that where an individual, who is not an attorney, contracts to procure reduction in real estate taxes which necessitates an appeal to a county tax board, that individual is illegally engaging in the unauthorized practice of law. *Stack v. P.G. Garage, Inc.*, 7 N.J. at 121. Specifically, the Court articulated that " . . . [I]n agreeing to prosecute [an] appeal for the defendant, [the licensed realtor] was contracting to furnish legal services without being licensed to do so."

Id. An important component characterizing such conduct as the unauthorized practice of law was the nonlawyer hiring and paying attorneys to pursue the litigation. *Id.*[267] The Committee specifically cited the following supportive cases from other jurisdictions: *Frazee v. Citizens Fidelity Bank & Trust Co.*, 393 S.W.2d 778 (Ky. Ct. Apps. 1965); *Judd v. City Trust & Savings Bank*, 133 Ohio St. 81, 12 N.E.2d 288 (Ohio 1937); *Rhode Island Bar Ass'n v. Automobile Services Ass'n*, 55

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[267] The Committee concluded its Opinion with the following sentence: "Accordingly, this Committee finds that the solicitation of tax appeals by individuals not licensed to practice law or tax consulting groups constitutes the unauthorized practice of law." *Id.* This language makes the opinion seem limited to just solicitation situations. But the Supplement to Opinion 25, 143 N.J.L.J. 542 (February 12, 1996), clarified the situation and stated as follows in the last sentence of the Supplement: "[A] lay tax consultant may not solicit a property owner to enter into a contingent fee arrangement whereby the consultant will, on the property owner's behalf, prepare and file a tax appeal and, if necessary, retain an attorney for the prosecution of the appeal before the county tax board. *A tax consultant who represents a taxpayer by performing* ***any*** *of the aforementioned services is engaged in the unauthorized practice of law."* (emphasis added).

R.I. 122, 179 A. 139 (RI 1935). *Id.* Chatam has, in a multitude of tax appeal cases, engaged in the conduct identified in the New Jersey Committee's Opinion: Chatam has entered into contingent fee agreements and been paid contingent fees, and has engaged and paid attorneys at no additional cost to the taxpayers.

In *Med Controls, Inc. v. Hopkins,* 61 Ohio App. 3d 497, 573 N.E.2d 154 (1989), the Ohio Court of Appeals decided a contract lawsuit in which a collection agency sued for recovery of fees under an agreement that gave the collection agency a 20% contingency fee for non-lawsuit amounts recovered and a 35% contingency fee for amounts recovered through a lawsuit. The agreement also required the collection agency to pay all expenses including attorneys fees, and gave the collection agency discretion whether to pursue legal action and what attorney to employ. The court held that the agreement was unenforceable because it involved the unauthorized practice of law and violated public policy. The court noted that the act of a *nonlawyer entity interposing itself as an intermediary* between the licensed attorney and the client was itself the unauthorized practice of law. *Id.* at 499, 573 N.E.2d at 155. The court specifically stated as follows:

> In effect, [the medical clinic,] the real party in interest, had no control over its own attorney since [the collection agency] was responsible for hiring and paying the attorney. . . . [The collection agency] argues that a material issue of fact exists as to whether [it] was an independent contractor or an agent of [the medical clinic]. *The apparent import of this argument is that the past course of conduct under the contract showed that [the medical clinic] retained a sufficient degree of control to protect its attorney-client interests.* . . . As stated before, the contract in question is unenforceable since it violates public policy. The clear and unambiguous language of the contract gives [the medical clinic] no authority to control [the collection agency's] choice of attorney or exercise a right of approval over each case to be litigated. . . . The contract itself authorizes conduct on [the collection agency's] part that is prohibited. *Past conduct beyond that authorized by the contract is irrelevant for purposes of enforcement.*

Id. at 499-500, 573 N.E.2d at 155-56 (emphasis added).

In the present situation, it is clear that, in a multitude of tax appeal cases before this Court, Chatam has entered into agreements that give Chatam wide discretion and authority to determine whether to pursue the appeals, to direct and manage the tax appeal cases if pursued, and to hire and pay for an attorney as necessary to pursue the appeals. It is also clear that, in a multitude of such cases, Chatam has in fact exercised such discretion and authority, frequently without any communication to or from the taxpayer-clients prior to such decision-making by

Chatam. Yet it also appears, in at least some limited instances, that Chatam has kept taxpayers advised about the status of their appeals, has consulted with them regarding proposed settlements, and has advised them (after the fact) when an attorney has been hired or replaced. Such communication and consultation, however, does not diminish the characterization of Chatam's conduct as the unauthorized practice of law. As noted by the Ohio Court of Appeals in *Med Controls,* if the agreement gives the client no authority and discretion in the litigation, past conduct – such as consulting with the client – does not diminish the improper arrangement or change its characterization.

In 1979, the Indiana Supreme Court addressed the issue of unauthorized practice of law in *In re Perrello,* 270 Ind. 390, 386 N.E.2d 174 (1979). That case was a contempt action against a suspended attorney (Perrello) who continued to engage in the unauthorized practice of law despite the suspension by discussing legal matters with clients, giving them legal advice, collecting fees from them, and arranging for another attorney to represent them in court. The court rejected Perrello's argument that the practice of law could be divided into a practice side and a business side. *Id.* at 397, 386 N.E.2d at 179. The court held that Perrello had violated his suspension by continuing to engage in the practice of law:

> The evidence conclusively shows . . . that the respondent was practicing law in violation of the suspension order. . . . The core element of practicing law is the giving of legal advice to a client and the placing of oneself in the very sensitive relationship wherein the confidence of the client, and the management of his affairs, is left totally in the hands of the attorney. The undertaking to minister to the legal problems of another creates an attorney-client relationship *without regard to whether the services are actually performed by the one so undertaking the responsibility or are delegated or subcontracted to another. It is the opinion of this Court that merely entering into such a relationship constitutes the practice of law.*

Id. at 398, 386 N.E.2d 179 (emphasis added).

The Iowa Supreme Court considered the issue in *Bump v. District Court of Polk County,* 232 Iowa 623, 5 N.W.2d 914 (1942), a contempt action against a nonlawyer tax consultant who contracted with property owners to investigate their property tax assessments and employ lawyers to bring refund suits on the property owners' behalf. The tax consultant was responsible for all expenses relating to the suits and received, as its fee, 50% of any refunds. The court defined practice of law to include not just in-court activities but also the *management* of such actions on behalf of clients. *Id.* at 631, 5 N.W.2d at 918. The tax consultant turned over the in-court responsibilities to a licensed attorney hired by the consultant, but this did

not and could not alter the court's characterization of the consultant's activities as the unauthorized practice of law. *Id.* at 635, 5 N.W.2d at 920. The Iowa Supreme Court tied its holding directly to tax representatives and situations like those of Chatam: "[T]he employment to secure the reduction of the assessment of real estate taxes for taxation purposes, and the suing . . . to review an assessment . . . contemplates and necessarily includes the practice of law." *Id.* at 636, 5 N.W.2d at 920 (emphasis added). The court also tied its holding directly to the activity of providing an attorney for a fee, an activity in which Chatam has clearly engaged: "Unauthorized practice of law is the attempt by laymen . . . to make it a business . . . *to employ and furnish for profit, directly or indirectly, the services of lawyers who may be willing to sabotage professional ethics in order to secure employment.*" *Id.* at 639, 5 N.W.2d at 922 (emphasis added).

In *People ex rel. Courtney v. Ass'n of Real Estate Taxpayers*, 354 Ill. 102, 187 N.E. 823 (1933), the Illinois Supreme Court considered a contempt action against a nonprofit organization that solicited property owners and charged them a membership fee to have the organization prosecute actions for property tax reductions at the organization's own expense and through lawyers it retained. The Illinois Supreme Court held that this conduct constituted the unauthorized practice of law. *Id.* at 110, 187 N.E. 826.[268]

Finally, a case from New York looked at the issue of unauthorized practice of law in circumstances that are nearly identical to those of Chatam in the present cases. In *People ex rel. Holzman v. Purdy,* 162 N.Y.S. 65 (1916), a nonlawyer – and a "stranger" to the litigation – entered into agreements with property owners to secure reductions of property tax assessments, and the agreements called for the nonlawyer to undertake responsibility for retaining and paying attorneys and experts in exchange for a 50% contingency fee. The New York Supreme Court, New York County, held that this conduct constituted unauthorized practice of law, and stated as follows:

> It should . . . be noted that the feature of the Tribelhorn agreement, which obligates him to retain lawyers and experts and pay for their services contravenes public policy and in itself justifies condemnation of the courts.

Id. at 67 (citations omitted).

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[268] The Illinois Supreme Court also noted the irrelevance of whether the nonlawyer's conduct was criminal: "Whether the acts of the respondent in soliciting membership and promoting litigation is in violation of any provision of the Criminal Code of Illinois is not decisive in this case." *Id.* at 109, 187 N.E. at 826.

C. Counterarguments.

1. Statutory Authorization. Taxpayer argues that Kansas statutes allow nonlawyers, such as tax representatives, to represent taxpayers in tax appeal cases in this Court's Small Claims Division.[269] The statutes relating to this Court state that, in small claims hearings, "[a] party may be represented by an attorney, a certified public accountant, a certified general appraiser, *a tax representative or agent,* a member of the taxpayer's immediate family or an authorized employee of the taxpayer." K.S.A. 74-2433f (f) (emphasis added).[270] The Kansas Administrative Procedures Act also provides that "any party may be represented at the party's own expense by counsel or, if permitted by law, other representative." K.S.A. 77-515(b).

These Kansas statutes, however, do not authorize practice of law in tax appeal cases by unlicensed persons. *See, e.g.,* Ks. Atty. Gen. Opin. No. 93-100 (July 26, 1993).[271] These statutes merely establish that a taxpayer "may *participate*" in the cases "through a duly authorized representative" (for example, such representative may present testimony as a witness), but such representative (if not an attorney) cannot "engage in the practice of law." *Id.* (emphasis added). *See also* K.S.A. 77-515(a). Moreover, Kansas statutes can *not* sanction unauthorized practice of law. *State ex rel. Stephan v. Williams,* 246 Kan. 681, 690-91, 793 P.2d 234, 241-42 (1990) (nonlawyer cannot sign pleadings or otherwise engage in unauthorized practice of law even if a statute arguably authorizes it). In *Williams,* the Kansas Supreme Court noted the constitutional limitations on the legislature's power to authorize unlicensed persons to practice law:

> "It is clearly the prerogative of the Supreme Court to define the practices of law:
> It is unnecessary here to explore the limits of judicial power conferred by [Article III, Sec. 1, of the Kansas Constitution], but suffice it to say that the practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to regulate the practice naturally and logically belongs to the judicial department of government. . . . Included in that power is

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[269] *Petition for Reconsideration,* p.63. This argument was also set forth in Taxpayer's original, pre-reconsideration *Brief,* pp.11-12. *See also* our discussion refuting an almost identical argument relating to signing notices of appeal in Part IV.D.5 above.

[270] *See also* K.S.A. 79-1606(c) & 79-2005(a).

[271] For discussion of a possible analogy to judicial branch small claims, *see* Part IV.D.5 above and Part IX.C.2 below.

> the supreme court's inherent right to prescribe conditions for admission to the Bar, to define, supervise, regulate and control the practice of law, whether in or out of court, *and this is so notwithstanding acts of the legislature in the exercise of its police power to protect the public interest and welfare."*

246 Kan. at 689, 793 P.2d at 240-41 (quoting *State v. Schumacher,* 214 Kan. 1, 519 P.2d 1116 (1974)) (emphasis added). *See also State ex rel. Boynton v. Perkins,* 138 Kan. 899, 904, 28 P.2d 765, 768 (1934).

For these reasons, this argument based on statutory authorization is wholly unpersuasive.

2. *Babe Houser Motor Co., Inc. v. Tetreault* (2000) and Analogy to Judicial Branch Small Claims. Taxpayer points us to K.S.A. 74-2433f, which created this Court's Small Claims Division in 1998,[272] and to the case of *Babe Houser Motor Co., Inc. v. Tetreault,* 270 Kan. 502, 14 P.3d 1149 (2000).[273] From these developments, Taxpayer argues that an analogy should be drawn between tax appeals in this Court's Small Claims Division and small claims cases in the judicial branch ("Judicial Branch Small Claims") so that a nonlawyer can represent, and in effect act as attorney for, taxpayers. This same argument was made by Taxpayer regarding the defective signature herein. It was not persuasive regarding that issue, and the argument utterly fails here to redeem Chatam's unauthorized practice of law.

To begin with, this argument by its own parameters has absolutely no application to conduct in this Court's Regular Division. A substantial portion of Chatam's conduct that constitutes unauthorized practice of law has occurred in connection with cases in the Regular Division. Terrill's conduct, as attorney hired and paid by Chatam, relates almost entirely to the Regular Division. Even when the argument is viewed only in the context of our Court's Small Claims Division, the argument still totally collapses for all the same reasons that we have thoroughly set forth in Part IV.D.5 above. A summary of those reasons, without citations, is set forth in the next paragraph.[274]

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[272] *Petition for Reconsideration,* p.63.

[273] *Petition for Reconsideration,* p.61.

[274] For a full discussion with citations, *see* Part IV.D.5 above.

First, in *Babe Houser,* the Kansas Supreme Court held that it is not unauthorized practice of law for a nonlawyer to represent a corporation in Judicial Branch Small Claims as long as the nonlawyer has an ongoing and substantial connection with the corporation such as being an officer or full-time employee. Second, the Kansas Supreme Court strictly limited its holding in *Babe Houser* to its facts, those being a case in Judicial Branch Small Claims and a nonlawyer who was an officer of the corporation. Third, even if the *Babe Houser* decision had not been limited to its facts, this Court's Small Claims Division is not analogous to Judicial Branch Small Claims. Fourth, even if the *Babe Houser* decision had not been limited to its facts and even if the analogy were a good one, *Babe Houser* not only would not absolve Chatam's conduct, it would lead to the same conclusion that Chatam is engaged in the unauthorized practice of law. This is because, applying the standard established by *Babe Houser*, Chatam does not have an "ongoing and substantial connection" to the taxpayers.

For all these reasons, the argument based on *Babe Houser* and an analogy to Judicial Branch Small Claims fails.

3. Power of Attorney. In the *Petition for Reconsideration,* Taxpayer references Chatam's status as an "Authorized Representative" as a justification for his conduct.[275] This alludes to an argument that Chatam has, based on Chatam's agreements with taxpayers and the Declarations of Representative, power of attorney to direct and manage the taxpayers' cases. It might then be further argued that this situation is indistinguishable from a family member or an entity official holding a power of attorney to direct and manage litigation. This argument and analogy, however, fail decisively on several levels.

First, the Kansas cases discussed in Part IX.A. above – *Perkins, Depew II, Schumacher, Williams,* and *Martinez* – all stand in direct opposition to this argument, as does Kansas Attorney General Opinion No. 93-100 discussed above. Second, apart from the tax appeal cases themselves, tax representatives in the position of Chatam have *no natural or legitimate connection* to the taxpayers such as being a family member of the taxpayers, or such as being an official, owner, or employee of an entity. *Cf.* Kansas Rules of Professional Conduct, Ks. Sup. Ct. Rule 226, Rule 1.8, Comment 11. Third, this lack of connection is a significant impediment to nonlawyer representation based on *Babe Houser Motor Co., Inc. v. Tetreault,* 270 Kan. 502, 14 P.3d 1149 (2000). The decision in *Babe Houser* establishes that, even in the special and very limited instance of nonlawyer representation in judicial branch small claims cases, there still has to be an "ongoing and substantial connection" apart from the litigation, such as the nonlawyer being an officer or full-time employee of the party. *Id.* at 508-09, 14 P.3d

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[275] *Petition for Reconsideration,* p.61.

at 1153-54. Fourth, as discussed in Part III above, the requirement that a person engaging in champerty be a *stranger* to the litigation emphasizes the importance of a "natural connection" or an "ongoing and substantial connection" (apart from the litigation) to avoid that characterization. All this strongly suggests, in the context of tax appeal cases, that whether the holder of a power of attorney is permitted to direct and manage litigation (including the hiring of an attorney) should depend in large part on whether the holder otherwise has a "natural connection" or an "ongoing and substantial connection" to the taxpayer. Fifth, in the typical situation involving family members, the power of attorney is usually a *general* power of attorney such that the holder has been granted authority over the grantor's entire range of financial affairs; here, Chatam's authorization is strictly limited to handling tax appeal claims. Sixth, in the typical "power of attorney" situation that involves a family member or an entity official, it is *not* usually the family member or entity official who is responsible for paying attorney fees; rather, it is the individual or entity who has granted the power of attorney who remains responsible. And finally, in the typical "power of attorney" situation, the grantor still retains the ultimate control and authority over the grantor's affairs unless and until an individual grantor becomes incapacitated. In contrast, in the present situation, the agreements with taxpayers have expressly established for Chatam "sole discretion" and "sole authority." For all these reasons, the "power of attorney" argument utterly fails in helping Chatam avoid the characterization of engaging in unauthorized practice of law.

Indeed, the existence of an attorney-in-fact relationship (a power of attorney) in favor of a "nonlawyer stranger"[276] for the sole purpose of directing and managing litigation can arguably do nothing else *except create an inherent (but unauthorized) attorney-at-law relationship.* In other words, a stranger holding such a power of attorney actually reinforces the characterization of the situation as unauthorized practice of law (rather than countering it). *See Depew v. Wichita Ass'n of Credit Men [Depew II],* 142 Kan. 403, 409, 416, 49 P.2d 1041, 1044-45, 1049 (1935) (nonlawyer exercising power of attorney granted by creditors to represent them in bankruptcy court constituted unauthorized practice of law). *Cf. also Med Controls, Inc. v. Hopkins,* 61 Ohio App. 3d 497, 573 N.E.2d 154 (1989); *In re Perrello,* 270 Ind. 390, 386 N.E.2d 174 (1979). For all the reasons discussed above and based on all Chatam's conduct as outlined in the Findings of Fact, Chatam is clearly engaged in the unauthorized practice of law by reason of directing and managing tax appeal cases, and the counter-arguments presented above do little or nothing to absolve this situation.

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[276] As used here, the term "nonlawyer stranger" means a nonlawyer third person who has no "natural connection" or no "ongoing and substantial connection" to the party (taxpayer).

D. Policy and Practical Considerations Regarding Unauthorized Practice of Law. This Court is in the executive branch of government and has no authority to legislate or set public policy. *Republic Natural Gas Co. v Axe,* 197 Kan. 91, 96, 415 P.2d 406, 411 (1966) (citations omitted). Taxpayer attempts to use this legal principle to challenge our authority to address conduct before this Court that may be illegal, improper, or unethical, and especially challenges the propriety of our looking to policy and practical considerations to inform our analysis of such conduct.[277] Taxpayer asserts that we are thus attempting to set "tax policy."[278] We firmly disagree with such contention. We were not setting tax policy in our original orders in these cases, and we are not now setting tax policy in this Order on Reconsideration. We are merely identifying existing policies that have already been set by or flow from statutes, case law, and Kansas Supreme Court Rules, and noting practical considerations derived therefrom. Then we are using those existing policies and practical considerations to inform our analysis of unauthorized practice of law and ethical violations in this case and the related cases.

In any event, this Court can properly take into account existing, enunciated policies in analyzing legal issues and rendering decisions. This is authorized by the Kansas Administrative Procedures Act. K.S.A. 77-526(c) states as follows:

> A final order . . . shall include, separately stated, findings of fact, conclusions of law and *policy reasons* for the decision if it is an exercise of the state agency's discretion, for all aspects of the order, including the remedy. . . .

(emphasis added). To similar effect is K.S.A. 77-529(b): "An order on reconsideration . . . shall include findings of fact, conclusions of law and *policy reasons* for the decision."

Moreover, to the extent that we are somehow deemed to be setting policy, it is policy that relates to this Court's operations and management, and to practice and procedure before this Court.[279] Such policy setting would be properly within our administrative purview as reflected by our enabling statutes, the Kansas Code of Judicial Conduct (the "KCJC"), Ks. Sup. Ct. Rule 601B (expressly incorporated by

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[277] *Petition for Reconsideration,* pp.4, 76.

[278] *Id.* at p.76.

[279] For a full discussion of this Court's power and authority to address and regulate its operations and proceedings, *see* Part VI above.

our enabling statutes),[280] and by the Kansas Rules of Professional Conduct, Ks. Sup. Ct. Rule 226 (incorporated by the KCJC). Analysis of unauthorized practice of law and ethical violations necessarily demands consideration of the underlying polices for the law and rules applicable thereto.

Taxpayer references a Memorandum authored by Judges Sheldon and Wohlford that was submitted to the Office of Disciplinary Administrator as part of an ethics complaint filed by them against Terrill and suggests that it shows a bias or agenda against all tax representatives, and the attorneys who work with them, in all circumstances.[281] Taxpayer even engages in speculation about the sources for the information in the Memorandum: "Has COTA had meetings with county officials? Has COTA solicited assistance on these issues from county counselors?"[282] This Court has had no meetings or other ex-parte communications with county officials regarding these matters. Nor has this Court solicited or received any assistance on these issues from county counselors. While the Memorandum is based in large part on recent testimony and documents of record in cases before this Court, it does not specifically address any particular case or incident.

The Memorandum does not exhibit universal bias or prejudice against tax representatives and the attorneys who work with them; it merely identifies and disapproves conduct by them that is illegal, improper, or unethical. The Memorandum in fact recognizes and acknowledges a proper role for tax representatives in the tax appeal process if structured appropriately to comport with legal and ethical requirements:

> To be clear, we are not suggesting here that all tax consultants in Kansas are engaging in [unauthorized practice of law] or that all are conducting themselves in a mercenary and unseemly manner. There certainly must be tax consultants who work for property owners under circumscribed arrangements that limit the scope of their engagement to non-legal activities such as appraisal reviews, audits, fact investigation, and appropriate representation at informal hearings. And certainly there must be tax consultants who respect the line between legal and non-legal work – however blurry it may be – and cleanly refer their clients to licensed attorneys at the appropriate time

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[280] *See* K.S.A. 74-2433(a). *See also* Part VI.B.4 above.

[281] *Petition for Reconsideration,* p.73 (The memorandum "gives the impression that COTA has an agenda."); p.74 ("COTA carries the banner for the counties again.").

[282] *Id.* at p.73.

> without retaining a stake in or exercising influence over their clients' cases thereafter.

Id. at p.9. Later, the Memorandum also states as follows:

> Collaboration among lawyers and non-lawyers can be beneficial to clients who require a panoply of professional services. Such arrangements also can be structured in keeping with the lawyer's ethical obligations, assuming the rules of professional conduct are observed.
>
> The rules do not prohibit side-by-side, arm's length arrangements whereby the lawyer and non-lawyer refer business to each other without one or the other serving in a supervisory role. Likewise, the rules do not prohibit lawyer/non-lawyer strategic alliances for the provision of professional services on a continuing basis, so long as the nonlawyer has no right to direct or supervise the lawyer or share in the legal fees generated by the allied operation. The rules do, however, strictly prohibit lawyer/nonlawyer partnerships and inhibit the formation of strategic alliances, contractual arrangements and other associations that do not provide appropriate protections for the client and the profession.

Id. at p.18. These quotes demonstrate a lack of prejudgment regarding tax consultants or the attorneys who work with them. This Court is addressing the conduct of tax representatives and attorneys only when improper relationships and improper conduct are indicated on the record in cases before this Court. *See, e.g., State ex rel. Stovall v. Martinez,* 27 Kan. App. 2d 9, 13, 996 P.2d 371, 375-76 (2000), *rev. denied* (A nonlawyer insurance claims consultant was "not entirely precluded from pursuing his business" as long as he did not engage in "unauthorized practice of law.").

Thus, if arrangements like those established by Chatam and Terrill are deemed *improper and impermissible,* this does not mean that taxpayers with legitimate valuation concerns lose access to an independent tribunal or access to justice.[283] If pursued properly, taxpayers should have more than adequate

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[283] The Court acknowledges the paramount judicial concern with ensuring access to justice. Chief Judge Sheldon recently served on the Kansas Supreme Court's Blue Ribbon Commission on Kansas Courts, which sought to protect access to justice as one of its primary policy concerns and objectives. Judge Wohlford and Judge Cooper share the view that access to justice is a primary concern and objective.

protection through the tax appeal process to remedy inaccurate valuations. They can certainly proceed with the assistance of an independent licensed attorney or proceed *pro se*. Indeed, as noted above, if structured properly, there is a legitimate role for tax representatives or tax consultants.

On the other hand, many practical negative effects could arise if it is deemed *permissible* to pursue tax appeal cases pursuant to arrangements like those established by Chatam and Terrill. As explained above, it is proper for this Court to undertake consideration of already existing policies and allow those to inform and undergird our analysis of whether conduct occurring in this Court is illegal, improper, or unethical. This in turn justifies rational extrapolation of the possible effects of such conduct for purposes of juxtaposing and measuring it against those policies. We proceed now *not* to set new policy, but to look to existing policy, and the practical considerations flowing therefrom, so that they can inform our analysis of unauthorized practice of law and ethical violations. Although not all the following are indicated, the Court notes a substantial risk of improper conduct that may arise, including but not limited to the following:[284]

1. Solicitation. Tax representatives may solicit taxpayers to become clients for tax appeal purposes. *See, e.g., Depew v. Wichita Ass'n of Credit Men [Depew II],* 142 Kan. 403, 409, 416, 49 P.2d 1041, 1044-45, 1049 (1935) (holding that a nonlawyer soliciting collection business and then feeding it to an attorney is unauthorized practice of law and thus impliedly violative of public policy). *See also* New Jersey, the Committee on the Unauthorized Practice of Law (appointed by the New Jersey Supreme Court), Opinion 25, 130 N.J.L.J. 115 (January 13, 1992) (the unauthorized practice of law is indicated by a nonlawyer property tax consultant who solicits homeowners to enter into contingent fee arrangements by which the consultant is authorized to engage attorneys as needed for assessment appeals at no additional cost to the homeowners). Such solicitation is prohibited if done by a licensed attorney. Kansas Rules of Professional Conduct, Ks. Sup. Ct. Rule 226, Rule 7.3.

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[284] Taxpayer complains about this sentence, especially its introductory clause, and then states the following: "On appeal this order will be judged based on whether or not there is substantial evidence in the record to support the findings therein. Why would COTA include speculation and then make conclusions . . . in this order?" *Petition for Reconsideration*, p.73. We agree with the first sentence of Taxpayer's statement. Regarding its question, the answer is, as already discussed, that the remaining portion of this Part IX.D. is proper consideration of already existing policies and rational extrapolation of the possible consequences of improper and unethical conduct.

2. Feeder Relationships. Tax representatives may obtain large numbers of tax appeal cases by engaging in conduct (such as solicitation)[285] not permitted of licensed attorneys, and then "feed" the cases to attorneys. *See, e.g., Depew v. Wichita Ass'n of Credit Men [Depew II]*, 142 Kan. 403, 408-09, 416, 49 P.2d 1041, 1044-45, 1049 (1935) (holding that a nonlawyer feeding collection lawsuits to an attorney and retaining a stake therein is unauthorized practice of law and thus impliedly violative of public policy).

3. Horse Trading. In negotiating with county appraiser offices, tax representatives might "horse trade" cases. In other words, tax representatives might indicate a willingness to and then dismiss certain tax appeal cases (involving one set of taxpayer-clients) in exchange for reduced valuations in other tax appeal cases (involving a different set of taxpayer-clients). This situation would create a conflict of interest, and would be conduct that is not permitted of a licensed attorney. Kansas Rules of Professional Conduct, Ks. Sup. Ct. Rule 226, Rule 1.7(a). It would harm those taxpayers whose appeals are dismissed at least to the extent that their tax appeal cases have merit. Based on Rule 1.7(a), this type of conduct is a legitimate policy concern.

4. Filing a Multitude of Frivolous Tax Appeal Cases. Tax representatives (and their attorneys in the Regular Division cases) might file hundreds and perhaps thousands of tax appeal cases that totally lack merit or that have marginal merit.[286] Such meritless claims are frivolous. *See* Rule 3.1 of the Kansas Rules of Professional Conduct ("KRPC"), Ks. Sup. Ct. Rule 226. The purpose for bringing frivolous or meritless claims might be to overwhelm county appraiser offices and county counselors with the sheer volume of cases, and this would allow tax representatives (and their attorneys in Regular Division cases) to leverage negotiating pressure on the county appraiser offices and county counselors who would be overwhelmed in the face of a huge workload, limited time, and finite resources. This type of conduct is a legitimate policy concern identified in Comment 2 to KRPC Rule 3.1, which associates meritless claims with the potential for harassment. Another applicable policy is restraining "'the traffic of merchandising in quarrels, of huckstering in litigious discord.'" *See Star Mfg. Co., Inc. v. Mancuso*, 680 F.Supp. 1496, 1498 (D. Kan. 1988) (quoting *City of New York Ins. Co. v. Tice*, 159 Kan. 176, 180, 152 P.2d 836 (1944)); *Clark v. Cambria Co. Bd. of Assess. Appeals*, 747 A.2d 1242 (Pa. Cmwlth. 2000) (the conduct therein was "repugnant to public policy against profiteering and speculating in litigiation"). *See also* Comment

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[285] *See* Part IX.D.1 above.

[286] This is factually indicated by the conduct of Chatam and Terrill based on Findings of Fact 98 through 102 above. For further analysis of this, *see* Part XVII below.

10 to KRPC 1.8 (subsidization of lawsuits or administrative proceedings "would encourage clients to pursue lawsuits that might not otherwise be brought").

As a counterargument to this point, Taxpayer simply notes the short time frame (30 days) for filing a tax appeal to this Court from an adverse decision at the informal, county-level hearing, and then states that "[t]he purpose of filing the appeal [that is later dismissed] would be to preserve the rights of the clients." *Petition for Reconsideration,* p.74. The implication appears to be that such a short timeframe requires filing an appeal without evaluating its merits. Of course, by the time of the county-level decision (30 days before the appeal has to be filed), a taxpayer will already have the county's appraisal and other valuation information from the informal hearing process, and the Taxpayer will have already gathered and presented contrary evidence. So the 30-day timeframe should not be an undue hindrance to evaluating whether an appeal has merit (that is, a good faith basis). Regardless of the timeframe, signing a notice of appeal to this Court is a certification that the matter has been reasonably reviewed and a determination made that the appeal has merit and is not frivolous or being filed for any improper purpose. K.A.R. 94-5-5; K.S.A. 60-211 (applied to this Court's proceedings through K.A.R. 94-5-1(a)); KRPC Rule 3.1.

5. Last-Minute Dismissals of Vast Numbers of Cases in the Regular Division. A multitude of cases in the Regular Division of this Court have been voluntarily dismissed by taxpayers' counsel at very late stages, with most of those dismissals occurring within a few days of the scheduled evidentiary hearing dates and with many dismissed on the day before, or even the late afternoon or early evening before, the scheduled evidentiary hearing dates.[287] This suggests a dichotomy that either (a) the dismissed appeals *lacked merit* to begin with or (b) the appeals are being dismissed despite *some* merit. Either way it indicates an ethical violation by the attorney.[288]

Why would tax representatives and their hired attorneys file so many cases and then dismiss them at late stages in the Regular Division of this Court? Taxpayer asserts that "[i]t is because COTA does not require the county to exchange its expert report until 20 days prior to the hearing." *Petition for Reconsideration,*

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[287] This is factually indicated by the conduct of Chatam and Terrill based on Finding of Fact 98 above.

[288] *See* Part XVII below. If the dismissed appeals were meritless to begin with, then this would constitute a violation of KRPC Rule 3.1. If the appeals were dismissed despite their merits, then this would indicate a violation of KRPC Rule 1.7.

p.74.[289] Taxpayer further argues that "[n]o attorney would dismiss until such time as the other side exposes its arguments." *Id.* at p.75.[290] This cannot explain, however, the multitude of tax appeal cases dismissed at very late stages. The expert report to which Taxpayer refers is *not* the mass appraisal (USPAP standard 6)[291] report generated by the county. The mass appraisal reports, which constitute the foundation of counties' valuation cases in most situations, are available to taxpayers long before the ultimate evidentiary hearing in this Court's Regular Division. The expert report to which Taxpayer refers (which must be provided to the opposing taxpayer at least 20 days prior to the evidentiary hearing) occurs only in those rare instances in which the county obtains (i) a "supplemental" private appraisal (USPAP standard 2) report to buttress or bolster its mass appraisal of the subject property or (ii) a private "rebuttal" review appraisal (USPAP standard 3) to impeach or rebut the taxpayer's expert appraisal report.

In reality, taxpayers typically have a significant portion of the county's valuation information by the end of the informal hearing process at the county level, which is before a tax appeal is even filed with this Court. Once a tax appeal is filed with this Court, Taxpayer can, through discovery, obtain all of the county's information that is available at that time. Thus, taxpayers typically have substantially all of the county's valuation information by the time of the pretrial conference, which is many months before the evidentiary hearing. Also, by the time of the pretrial conference, taxpayers know the value being defended by the county. Once taxpayers know the county's number, they should have completed enough investigation and analysis of their own to know whether it can be impeached. Indeed, Chatam gave testimony in these cases which indicated that, at the time the tax appeals are *filed* with this Court, Chatam already knows which appealed cases have merit, and which do not.[292] Finally, the county obtains a "supplemental" USPAP 2 or "rebuttal" USPAP 3 appraisal report only in very limited instances. In the vast majority of cases, the county does not obtain such an appraisal report, relying instead entirely on its mass appraisal report. Therefore, the procedural requirement relating to a county's supplemental or rebuttal report cannot explain away why so many dismissals occur at very late stages especially in those cases in which the county does not even obtain such a report. Even in the limited instances in which the county obtains such an expert report, does it take almost 20 days to

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[289] *See also Petition for Reconsideration,* pp.53-55.

[290] *See also Petition for Reconsideration,* p.55.

[291] USPAP refers to the Uniform Standards of Professional Appraisal Practice.

[292] *See* Finding of Fact 102.

review it? Or is there another reason why so many cases are dismissed the day before, or even the late afternoon or early evening before, the scheduled evidentiary hearing?

The court record usually does not indicate the reason or reasons for the dismissals. Similar to the analysis in Part IX.D.4 above, it may have to do with seeking to maximize negotiating pressure on the county appraiser offices and the county counselors.[293] Counties typically have the burden of production and the burden of proof at the evidentiary hearings, and thus they must fully prepare for the evidentiary hearings in the days before the scheduled hearing dates so that they can meet their evidentiary burdens at the hearings. *See, e.g.*, K.S.A. 74-2438, 79-1609, & 79-2005. The taxpayers have no such evidentiary burden, and thus no necessity on their attorneys' part to prepare for the hearing. Even if the hearings are held, the taxpayers' attorneys can simply show up and do nothing more than attempt to impeach the county's evidence of valuation. Rather than even doing that (which requires at least *some* time, resources, and effort to come to Topeka and attend the hearing), the taxpayers' attorneys may simply dismiss the cases at the last minute. The net result of all this – counties having to prepare fully for the hearings and taxpayers not having to do so – *may* be that counties settle more cases to avoid the wasted effort of time, preparation, expert fees, and document preparation for cases that are ultimately dismissed at the last minute by tax representatives or their hired attorneys.

6. Wasted Tax Dollars. Dealing with tax appeal cases maintained by strangers with no natural connection or no substantial and ongoing connection to taxpayers leads to considerable waste of government resources, and thus also of tax dollars, *when* those cases are ultimately dismissed as discussed in Part IX.D.4 above. It wastes this Court's judicial resources, as well as county resources. And, as discussed in Part IX.D.5 above, last-minute dismissals of appeals leads to county appraisers and county counselors, in a wasteful exercise, preparing extensively for evidentiary hearings that are never held.

Taxpayer objects to consideration of this policy or concern, and asks, "What is the fixation of COTA relative to the preservation of the tax base to the detriment of persons that have the constitutional right to have their property valued uniformly

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[293] This is a reasonable inference based on the factual record here and the law regarding evidentiary burdens as discussed hereafter. *See Kuxhausen v. Tillman Partners, L.P.*, 291 Kan. 314, 320, 241 P.3d 75, 80-81 (2010); *In re Appeal of ANR Pipeline Co.*, 276 Kan. 702 Syl. ¶ 5, 79 P.3d 751, 753 (2003) (reasonable inferences drawn from the evidence are proper); *Friends of Bethany Place, Inc. v. City of Topeka*, 43 Kan. App. 2d 182, 202, 222 P.3d 535, 549 (2010).

and equally at fair market value?" *Petition for Reconsideration*, p.75.[294] We have no fixation. And certainly we agree that taxpayers have the right asserted. If we have a concern (which Taxpayer may view as a "fixation"), it is to provide a fair and impartial forum for resolution of tax disputes, and to uphold the integrity and professionalism of our proceedings so as to maintain legal, proper, and ethical conduct therein. If arrangements like those established by Chatam and Terrill are deemed improper and impermissible, this does not mean that taxpayers with legitimate valuation concerns lose access to an independent tribunal or access to justice.[295]

X. LEGAL ETHICS – KRPC RULE 5.4(a) – SHARING OF LEGAL FEES

We have already concluded, in Part VI above, that this Court has the power and authority to address and regulate its operations and proceedings so as to maintain legal, proper, and ethical conduct insofar as that conduct relates to cases pending before this Court.[296] Before proceeding to a substantive analysis of Terrill's conduct under ethical standards, we take note of the "standard of proof" question.

Taxpayer points to K.S.A. 77-621 and makes the general assertion that our orders are based on findings of fact that are not supported "to the appropriate standard of proof."[297] Taxpayer's objections to particular Findings of Fact have been addressed in the early portions of this Order on Reconsideration. We have applied the "preponderance of the evidence" standard for determining whether our findings of fact are supported by substantial and competent evidence. *See* K.S.A. 77-621(c);

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[294] A similar objection is made at p.76 of the *Petition for Reconsideration*.

[295] For a more detailed discussion regarding the "access to justice" issue, *see* the introductory portions of this Part IX.D above.

[296] Taxpayer argues that we cannot address the unethical conduct of an attorney in this case or in any other case. *See, e.g., Responsive Briefing*, p.9 ("COTA [attempts] to usurp the powers reserved to the legislature, the attorney general and the Kansas Supreme Court. . . . "). *Cf. also Responsive Briefing*, pp.6-7 ("[T]he entire premise of the 'frolic' by COTA was without basis or foundation in Kansas law."); *Petition for Reconsideration*, pp.65-66. For a broad discussion of this Court's power and authority to address the issue of an attorney's unethical conduct, *see* Parts VI.A. and VI.B. above. The question of whether it is proper for this Court to raise such issue on its own initiative is addressed at length in Part VI.C. above.

[297] *Petition for Reconsideration*, pp.5 & 6.

K.S.A. 77-526(d); *Frick Farm Properties v. Kansas Dep't of Agriculture,* 289 Kan. 690, 709, 216 P.3d 170, 183 (2009).

Taxpayer's reference to the "appropriate standard of proof" is noted here merely to show our awareness that the standard applicable to attorney disciplinary hearings is the higher "clear and convincing evidence" standard. *See* Ks. Sup. Ct. Rule 211(f); *In re Miller*, 290 Kan. 1075, 1085, 238 P.3d 227, 235 (2010). Nowhere in the *Petition for Reconsideration* or in the *Responsive Briefing* does Taxpayer mention the "clear and convincing" standard or what the appropriate standard of proof is. Given that, we view any objection to our use of the "preponderance of the evidence" standard to be waived. K.S.A. 77-529(a); *In re Application of Strother Field Airport,* 46 Kan. App. 2d. 316, 320-21, 263 P.3d 182, 185-86 (2011) (failure to raise, in a petition for reconsideration, a specific ground for review waives that issue and it cannot be raised on review); *Kansas Industrial Consumers v. Kansas Corp. Comm'n,* 30 Kan. App. 2d 332, 338, 42 P.3d 110, 114-15 (2002) (same); *Citizens' Utility Ratepayer Bd. v. Kansas Corp. Comm'n,* 24 Kan. App. 2d 222, 229, 943 P.2d 494, 501 (1997) (failure to brief an issue waives that issue and it cannot be raised on review). And, in any event, this Court holds that the "preponderance of the evidence" standard is the appropriate one to be applied in this case and the related cases on all matters, including the issues of both unauthorized practice of law[298] and ethical violations. *Steadman v. S.E.C.,* 450 U.S. 91, 100-02, 101 S.Ct. 999, 1007-08 (1981). As explained in Part VI above, our orders in these cases cannot be equated with an attorney disciplinary action because our orders are not universal. *Taylor v. Taylor,* 185 Kan. 324, 342 P.2d 190 (1959). By our orders, this Court does not attempt to prevent or prohibit certain conduct by an attorney in any and all circumstances. This Court is only regulating attorney conduct in pending cases before this Court in which improper or unethical conduct is indicated. *See Taylor, supra. See also Ellis v. Dep't of Industrial Accidents,* 463 Mass. 541, 977 N.E. 2d 49 (2012).[299]

We turn now to a direct application of the Kansas Rules of Professional Conduct ("KRPC"), Ks. Sup. Ct. Rule 226, to Terrill's conduct in this case and the related cases. In our Order Granting Reconsideration herein, we invited Taxpayer to brief the following question: *Has Terrill engaged in conduct in this case and other cases before this Court that constitutes a violation or violations of the [KRPC]?* Given this opportunity to brief the merits, or substantive aspects, of the issue, Taxpayer sets forth two sentences:

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[298] *See* Parts VIII and IX above regarding unauthorized practice of law.

[299] The *Ellis* case is discussed in detail in Part VI.D.1 above.

> Again, COTA, addressed an issue not before the court, actions reserved to parties. More egregiously, however, it adjudicated the issue as if it were the Kansas Supreme Court, a clear violation of separation of powers. *Robertson v. Town of Stonington,* 253 Conn. 255, 750 A.2d 460 (2000)[300] [and *Ellis v. Dept. of Industrial Accidents,* 463 Mass 541, (2012)[301]].

None of these sentences even remotely touches upon the merits or substantive aspects of whether Terrill has engaged in unethical conduct.[302] Nor does Taxpayer discuss any such merits or substantive aspects in the *Petition for Reconsideration.* Accordingly, any objections to our substantive analysis and characterization of Terrill's conduct as ethical violations are now waived. K.S.A. 77-529(a); *In re Application of Strother Field Airport,* 46 Kan. App. 2d 316, 320-21, 263 P.3d 182, 185-86 (2011); *Kansas Industrial Consumers v. Kansas Corp. Comm'n,* 30 Kan. App. 2d 332, 338, 42 P.3d 110, 114-15 (2002). Therefore, beginning in the next paragraph of this Part X and continuing through Part XVII below, we set forth again the analysis contained in our original Order regarding Terrill's ethical violations and provide some limited supplemental discussion and authority for our conclusions of law relating thereto.

KRPC Rule 5.4(a) states that "[a] lawyer or law firm shall not share fees with a nonlawyer. . . ."[303] This rule serves in part to protect a lawyer's professional independence of judgment. KRPC Rule 5.4, Comment 1. In a multitude of tax appeal cases involving Chatam and Terrill that were appealed to this Court's Regular Division, favorable results were obtained in the Regular Division, generating significant contingency fees for Chatam. The court-related legal services in such cases were provided by Terrill, and thus such contingency fees paid to Chatam are and were based on and attributable to the court-related legal services of Terrill provided in this Court's Regular Division. Terrill, with full awareness of Chatam's fee arrangements with taxpayers, has knowingly and persistently acted as attorney in such tax appeal cases, having been hired by and paid by Chatam. These facts alone strongly suggest that Terrill has violated Rule 5.4(a) continually

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[300] *Responsive Briefing,* p.8.

[301] The citation to the *Ellis* case was added by Taxpayer in a document entitled and filed herein as *Corrected Citation in Requested Responsive Briefing.*

[302] These three sentences focus only on the issue of this Court's power and authority. We have fully addressed this issue, including *Robertson* and *Ellis,* in Part VI above.

[303] Rule 5.4(a) contains four exceptions to this general rule, but none of these exceptions has any application to the present cases.

over many years. Taxpayers have paid contingency fees to Chatam, based on Terrill's legal services, and Chatam has then paid fees to Terrill:

Actual Fee Flow: Taxpayers → Chatam → Terrill

If taxpayers had paid the fees to Terrill, based on Terrill's legal services, and then Terrill paid Chatam his "cut" (less Terrill's share of the overall fee, whether her share was based on a percentage or an hourly rate), the fee flow would look like this:

Notional Fee Flow: Taxpayers → Terrill → Chatam

It is absolutely clear, under Kansas law, that the latter situation constitutes an improper sharing of fees prohibited by Rule 5.4(a). *See In re Flack,* 272 Kan. 465, 33 P.3d 1281 (2001) (attorney Flack shared legal fees with a nonlawyer by paying fees to a company involved in soliciting and counseling trust and estate clients and then referring them to Flack). *See also* Committee on the Unauthorized Practice of Law (appointed by the New Jersey Supreme Court), Opinion 25, 130 N.J.L.J. 115 (January 13, 1992).[304] It would raise form over substance to an absurd level if Rule 5.4(a) could be circumvented by merely changing the direction of the fee flow (given that Chatam and Terrill would each end up respectively with the exact same amount of fees). At least one court outside Kansas has found a violation of Rule 5.4(a) when the fees flowed from the client to the nonlawyer and then to the attorney. *Nat'l Treasury Employees Union v. U.S. Dept. of Treasury,* 656 F.2d 848 (C.A.D.C. 1981) (attorney employed to provide legal services to organization's client members violated Rule 5.4(a) when the organization charged its members fees exceeding the amount it paid to the attorney). The economic effect of the actual payment arrangement in these tax appeal cases is that Chatam is paying Terrill from the fees received or expected to be received by Chatam from the taxpayers. Otherwise, neither Chatam nor Terrill have any economic incentive to continue the situation. The net economic effect is that Chatam is receiving fees *directly* from the taxpayers, and that Terrill is receiving fees *indirectly* from the taxpayers (but nonetheless from the taxpayers), all based on court-related legal services provided by Terrill. This is a sharing of fees between a nonlawyer and an attorney that is prohibited by Rule 5.4(a).

Moreover, in the present cases, there is actually an inherent, substantial, and unavoidable risk of the attorney's judgment being impaired by the tax representative's financial interest. This is clearly so because legally, under the agreements, and factually, as indicated in the record (including testimony elicited

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[304] A more detailed discussion of Opinion 25 is set forth below.

from both Chatam and taxpayers at the September 18 Hearings), the tax representative has the absolute "right" and "authority" to hire and fire the attorney, and in fact Chatam has exercised that right. How can an attorney exercise judgment independent of the tax representative's financial interests, if the attorney is constantly subjected to the threat of being fired by the tax representative? The attorney cannot. This alone establishes the existence of the very problem that Rule 5.4(a) – and Rule 1.8(f)[305] – are designed to prevent.

KRPC, and the ABA's Model Rules of Professional Conduct upon which KRPC is based, are relatively recent in their formulation, and there are very few court cases in Kansas or elsewhere that have applied Rule 5.4(a). Yet cases and opinions, even those that predate these modern rules, provide guidance regarding what constitutes unethical conduct on the part of an attorney in the present circumstances.

In *Perkins* (1934), discussed above, a *quo warranto* action in which the Kansas Supreme Court enjoined a lawyer [Perkins] licensed in Missouri but not in Kansas (and thus effectively engaged in the unauthorized practice of law in Kansas) who gave legal advice to clients, received fees from clients, and arranged for an attorney licensed in Kansas to handle any in-court matters. The court noted as follows:

> One who confers with clients, advises them as to their legal rights, and then takes the business to an attorney and arranges with him to look after it in court is engaged in the practice of law. . . . *And an attorney at law who conducts such an association with one unauthorized to practice law is guilty of knowingly and intentionally aiding and abetting an unlicensed person to practice law . . . and subject to discipline.*

138 Kan. at 908 (emphasis added).

The Committee on the Unauthorized Practice of Law (appointed by the New Jersey Supreme Court) opined that the unauthorized practice of law is indicated by a nonlawyer property tax consultant who solicits homeowners to enter into contingent fee arrangements by which the consultant is authorized to engage attorneys as needed for assessment appeals at no additional cost to the

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[305] *See* Part XV below.

homeowners.[306] Opinion 25, 130 N.J.L.J 115 (January 13, 1992). The Committee stated as follows:

> [T]he attorney would receive a portion of the fee the [tax consulting] group received as compensation, as per its contingent fee arrangement with the homeowner. *It is the view of this Committee that such an arrangement unequivocally contravenes both RPC 5.5(b) and 5.4(a).*

Id. (emphasis added). The Committee then noted that the flow of the fees from the taxpayer to the tax representative and then to the attorney (see the fee flow diagrams above) did not prevent characterizing the arrangement as a sharing of fees:

> Under the proposed arrangement, an attorney would receive a percentage of the [tax representative's] fee charged to the client, with the remainder attributable to the tax consulting group for its role in facilitating the arrangement. *Such a division of fees creates the appearance of an attorney compensating the group for obtaining a client for the attorney and as such, is prohibited.*

Id. (emphasis added). While Opinion 25 addressed the situation of a contingency fee being paid by the tax representative to the attorney, its legal analysis applies as well to an hourly fee arrangement between them. A "division of fees" occurs either way, and creates the appearance of a "feeder arrangement," in which the tax representative gets compensation for obtaining a "client" for the attorney.

In *Bump v. District Court of Polk County,* 232 Iowa 623, 5 N.W.2d 914 (1942), the Iowa Supreme Court considered a contempt action against a nonlawyer who contracted with property owners to investigate their property tax assessments and employ lawyers to bring refund suits on the property owners' behalf. The nonlawyer was responsible for all expenses relating to the suits and received, as his fee, 50% of any refunds. The Iowa Supreme Court held that this conduct constituted the unauthorized practice of law and stated as follows:

> An attorney is subject to the discipline of the court for irregular practices, while the layman who engages in similar actions can be reached only by the more difficult processes of injunction and contempt. It would be strange to permit a layman what is condemned and forbidden to an attorney. . . . "Unauthorized practice of law is the

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[306] The existence of solicitation is not critical to the Committee's conclusions. *See supra* fn.267.

> attempt by laymen . . . to make it a business . . . to employ and furnish for profit, directly or indirectly, *the services of lawyers who may be willing to sabotage professional ethics in order to secure employment."*

5 N.W.2d at 921-922 (emphasis added) (quoting in part from an American Bar Association report on unauthorized practice of law).

It might be argued that a tax representative hiring and paying for an attorney is no different than any other "third-party payer" situation. The rules of KRPC permit such situations as long as the attorney maintains independent judgment. *See* KRPC Rule 1.8(f). Comment 11 to Rule 1.8 implies that there should otherwise be some natural or legitimate connection between the third-party payer and the "client" apart from the litigation itself.[307] Comment 11 outlines some of the limited situations in which a third-party payer is acceptable (insurance company, family member, close friend, entity relationship) and the "tax representative" situation is not mentioned. The negative implication is that not all third-party payer situations are appropriate. Comment 11 also notes the possible concerns with third-party payer situations:

> 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.

Moreover, the permissible "third party payer" situations under Rule 1.8 and Comment 11 are clearly distinguishable from the present cases involving a tax representative paying for the taxpayer's attorney. The insurance company situation, for instance, is inherently different as a structural matter. First, the insurance company does *not* receive additional payment from the client when the client wins. Here, the tax representative does. Second, the insurance company keeps its fee (the insurance premium) regardless of the litigation outcome and even if there is no litigation. Here, the tax representative only receives a fee if there is a favorable outcome on the tax appeals. Third, the funds "divided" by an insurance

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[307] For additional discussions of the "natural connection" concept, as well as the "ongoing and substantial connection" concept, *see* Part III above relating to champerty and the requirement of a "stranger," *see* Part IV.D.5 above regarding nonlawyer signatures on court documents, and *see* Part IX.C.2 above relating to unauthorized practice of law.

company and the insured's attorney are monies generated by insurance premiums (that is, by a means *other* than contingency fees generated by court-related legal services). Here, the contingency fee paid to the tax representative based on favorable results in cases before this Court's Regular Division are necessarily due to and *solely* due to the court-related legal services provided by a licensed attorney. Fourth, in the insurance context, legal services are provided as an ancillary part of the insurance company's primary business and are paid for by the insurance company on behalf of the insured. Here, legal services are provided as the core function of the tax representative's business, and are effectively paid for by the taxpayer notwithstanding that the fees are funneled through the tax representative. Fifth, for insurance companies (like most organizations), legal services are one of many expenses of doing business. Here, for Chatam, providing legal services is the *entirety* of the business. Sixth, an insurance company pays the insured's attorney to defend against a liability case (a defensive action) while the tax representative here pays the attorney to pursue or assert the tax appeal case (affirmative action). Seventh, there is no insurance policy in place in the tax representative situation. Eighth, unlike the insurance company situation, the tax representative situation (as discussed above) raises a very real risk that the attorney's independent judgment *would be impaired* or at least would be at substantial risk of impairment.[308] The foregoing distinctions go to the very heart of the mischief that Rule 5.4 is intended to prevent – the exploitation by lay businesses of the professional services of attorneys and, concomitantly, the unauthorized practice of law by those nonlawyers engaged in such businesses.

When a family member or close friend is the third-party payer, there is little risk of the attorney's independent judgment being impaired. Typically the paying family member has no involvement in the litigation apart from paying the fees, and no right to fire the attorney. Here, in contrast, the tax representative is consistently and pervasively involved in the directing and management of the tax appeal cases.[309] Further, as noted above, the tax representative situation raises a very real risk of the attorney's independent judgment being impaired because of the tax representative's control over hiring and firing the attorney. Finally, the "entity" third-party payer situation is also distinguishable from the present situation. Typically, the financial interests of the entity and its employee or official are aligned because of their natural connection, or ongoing and substantial connection, to each other. This is especially so when the entity and its employee or official are

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[308] This is based on the attorney being constantly subjected to the threat of being fired by the tax representative. *See also* Part IX.D. above discussing the substantial risk of improper conduct that might arise in the tax representative situation.

[309] *See* Parts IX.A. and IX.B. above.

together being sued as co-defendants and represented by the same attorney. In contrast, the financial interests of the tax representative and the taxpayer are not necessarily aligned.[310]

XI. LEGAL ETHICS – KRPC RULE 5.4(b) – "PARTNERSHIP" WITH A NONLAWYER

Similar to the analysis in Part X above, the factual circumstances involving Chatam and Terrill indicate that Terrill may also have violated KRPC Rule 5.4(b). That rule states that "[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." The point of this Rule is to prohibit a business relationship in which a nonlawyer benefits from legal services provided by an attorney. Like Rule 5.4(a), Rule 5.4(b) serves in part to protect a lawyer's independence of judgment. KRPC Rule 5.4, Comment 1.

Terrill has had a long-standing and persistent business relationship with Chatam such that the relationship has included activity that constitutes the practice of law, and such that economic benefits have flowed from the relationship to both Chatam and Terrill. Chatam has hired Terrill, and Terrill has provided legal services over the years in a multitude of tax appeal cases involving Chatam. For Terrill's legal services, Chatam has directly paid and pays all Terrill's attorneys fees relating to such legal services. In a multitude of tax appeal cases involving Chatam and Terrill that were appealed to this Court's Regular Division, favorable results were obtained in the Regular Division, generating significant contingency fees for Chatam. The legal services in such cases were provided by Terrill, and thus such contingency fees paid to Chatam are and were based on and attributable to the legal services of Terrill provided in this Court's Regular Division. Terrill, with full awareness of Chatam's fee arrangements with taxpayers, has knowingly and persistently acted as attorney in such tax appeal cases, having been hired by and paid by Chatam. These facts alone strongly suggest that Terrill has violated Rule 5.4(b) continually over many years. *See* Committee on the Unauthorized Practice of Law (appointed by the New Jersey Supreme Court), Opinion 25, 130 N.J.L.J 115 (January 13, 1992).

Moreover, in the present cases (as discussed fully in Part X above), there is actually an inherent, substantial, and unavoidable risk of the attorney's judgment

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[310] *See* Part IX.D. above discussing the substantial risk of improper conduct that might arise in the tax representative situation. Moreover, there is a substantial risk of the attorney's judgment being impaired by the tax representative's financial interests because of the constant threat of being fired by the tax representative.

being impaired by the tax representative's financial interest. Part X above also sets forth a discussion of Opinion 25 that is similar to that which here follows. The Committee on the Unauthorized Practice of Law (appointed by the New Jersey Supreme Court) opined that the unauthorized practice of law is indicated by a nonlawyer property tax consultant who solicits homeowners to enter into contingent fee arrangements by which the consultant is authorized to engage attorneys as needed for assessment appeals at no additional cost to the homeowners.[311] Opinion 25, 130 N.J.L.J 115 (January 13, 1992). The Committee expressly stated as follows:

> *It is the opinion of this Committee that the engagement of a lawyer by a tax consultant and the subsequent fee sharing between the two contravenes RPC 5.4(b).* Under the proposed arrangement, an attorney would receive a percentage of the [tax representative's] fee charged to the client, with the remainder attributable to the tax consulting group for its role in facilitating the arrangement. *Such a division of fees creates the appearance of an attorney compensating the group for obtaining a client for the attorney and as such, is prohibited.*

Id. (emphasis added). While Opinion 25 addressed the situation of a contingency fee being paid by the tax representative to the attorney, its legal analysis applies equally to an hourly fee arrangement between them. Either way a "division of fees" occurs, and a business relationship exists, and this creates the appearance of a "feeder arrangement," in which the tax representative gets compensation for obtaining a "client" for the attorney.

Much of Part X above – such as the discussions of the 1934 *Perkins* case decided by the Kansas Supreme Court and of the *Bump* case decided by the Iowa Supreme Court – applies as well to an analysis of the present cases under Rule 5.4(b).

It might be argued that the business relationship here between Chatam and Terrill is not technically a "partnership." A technical partnership, however, probably is not and should not be required for a violation of Rule 5.4(b). For example, why would the rule limit its application to a technical partnership when essentially the same prohibited conduct could be conducted in the form of a corporation or a limited liability company?[312] The Comments to Rule 5.4 make no

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[311] The existence of solicitation is not critical to the Committee's conclusions. *See supra* fn.267.

[312] A separate rule – KRPC Rule 5.4(d) – addresses the situation involving a professional corporation or professional association.

reference to the technical requirements of a partnership for a violation, but focus instead on the independence of the attorney's professional judgment. The point of Rule 5.4(b), it would seem, is to prohibit a business relationship of *any* type in which a nonlawyer affirmatively benefits from legal services provided by an attorney because of the risk that the attorney's judgment will be impaired. Thus, for example, an employment relationship in which the employer is not the client, or a regular and consistent business relationship in which the attorney is retained and paid for by one who is not the client, is exactly the type of relationship or "partnership" that is prohibited by Rule 5.4(b) if the third-party payer derives profits from that relationship. The weight of authority seems to reject a technical interpretation of the word "partnership." Rather, the cases and opinions make the general point that an attorney is prohibited from engaging in any business relationship, association, or strategic alliance with a nonlawyer if it involves the practice of law.

Finally, it might be argued that the relationship between Chatam and Terrill is no different than the "third-party payer" relationships permitted by KRPC. As noted in Part X above, however, those analogies fail completely. The discussion in Part X above fully distinguishes those permitted situations from the present relationship involving Chatam and Terrill.

XII. LEGAL ETHICS – KRPC RULE 5.5(b) – ASSISTING THE UNAUTHORIZED PRACTICE OF LAW

KRPC Rule 5.5(b) provides that "[a] lawyer or law firm shall not: . . . (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." A violation of Rule 5.5(b) requires two basic elements: (1) unauthorized practice of law by a nonlawyer and (2) an attorney "assisting" such unauthorized practice of law.

The first element is satisfied in these cases involving Chatam and Terrill. As set forth in detail in Parts VIII and IX above, Chatam has engaged in the unauthorized practice of law. The second element is also satisfied in that Terrill has significantly facilitated, assisted, and aided such activities by Chatam.

Terrill has had a long-standing and persistent business relationship with Chatam such that economic benefits have flowed from the relationship to both Chatam and Terrill. Chatam has hired Terrill and Terrill has provided legal services over the years in a multitude of tax appeal cases involving Chatam. It is a reasonable inference that the ability to engage Terrill once a case was ready to go to this Court's Regular Division has likely enhanced and leveraged negotiating pressure, to the benefit of Chatam, in tax appeal cases prior to those cases reaching

the Regular Division.[313] Chatam has directed and managed the tax appeal cases on behalf of taxpayers even after the cases have reached this Court's Regular Division. By hiring Terrill in a multitude of tax appeal cases, Chatam has in effect been a "feeder" of such cases to Terrill. For Terrill's legal services, Chatam has directly paid and pays all Terrill's attorneys fees relating to such legal services. In a multitude of tax appeal cases involving Chatam and Terrill that were appealed to this Court's Regular Division, favorable results were obtained in the Regular Division, generating significant contingency fees for Chatam. The legal services in such cases were provided by Terrill, and thus such contingency fees paid to Chatam are and were based on and attributable to the legal services of Terrill provided in this Court's Regular Division. Terrill, with full awareness of Chatam's fee arrangements with taxpayers, has knowingly and persistently acted as attorney in such tax appeal cases, having been hired by and paid by Chatam.

All these facts, combined with the characterization of Chatam's activities as the unauthorized practice of law,[314] indicate that Terrill has violated Rule 5.5(b) continually over many years. *See In re Flack*, 272 Kan. 465, 33 P.3d 1281 (2001) (attorney Flack acted as attorney for estate and trust clients brought or "fed" to him by a nonlawyer engaged in the unauthorized practice of law). *See also In re Thrasher*, 661 N.E.2d 546 (Ind. 1996); Committee on the Unauthorized Practice of Law (appointed by the New Jersey Supreme Court), Opinion 25, 130 N.J.L.J. 115 (January 13, 1992). Much of Part X above – such as the discussion of the 1934 *Perkins* case decided by the Kansas Supreme Court, the discussion of the *Bump* case decided by the Iowa Supreme Court, and the discussion of Opinion 25 promulgated by the Committee on the Unauthorized Practice of Law (appointed by the New Jersey Supreme Court) – applies equally well to an analysis of the present cases under Rule 5.5(b).

XIII. LEGAL ETHICS – KRPC RULE 5.4(c) – DIRECTION BY A NONLAWYER

KRPC Rule 5.4(c) provides that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal

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[313] *Kuxhausen v. Tillman Partners, L.P.*, 291 Kan. 314, 320, 241 P.3d 75, 80-81 (2010); *In re Appeal of ANR Pipeline Co.*, 276 Kan. 702 Syl. ¶ 5, 79 P.3d 751, 753 (2003); *Friends of Bethany Place, Inc. v. City of Topeka*, 43 Kan. App. 2d 182, 202, 222 P.3d 535, 549 (2010). *See also* Parts IX.D.4 and IX.D.5 above.

[314] *See* Parts VIII and IX above.

services." Chatam's agreements with taxpayers provide that Chatam has "sole discretion" and the "sole authority" to make determinations about the tax appeals and how to proceed, and Chatam has in fact frequently exercised that discretion and that authority. Chatam's agreements also provide that Chatam has the absolute "right" and "authority" to hire and fire Terrill, and Chatam has actually exercised such authority. That Terrill attempted to withdraw as attorney from the present cases at the instruction of Chatam further indicates, in and of itself, that Chatam has directed and regulated the singular and utmost exercise of professional judgment – whether the attorney should continue as attorney for the client. In any event, the indicated facts suffice to show that Rule 5.4(c) has been violated.

Taxpayer asserts that she has maintained her independent professional judgment so that Chatam does not, in fact, direct or regulate her judgment or her conduct. Chatam's agreements, however, contradict that assertion. And both Chatam and Terrill confirmed, at the September 18 Hearings, that the Chatam agreements in these cases control the relationships between and among the taxpayers, Terrill, and Chatam.[315] Moreover, Terrill's conduct in these cases contradicts that she exercises her independent professional judgment at all times. As indicated by Finding of Fact 82 above, rather than discussing any settlement offer directly with Taxpayer (and having an opportunity to provide professional advice relating thereto), she turned over all responsibility to Chatam for giving advice and consulting with Taxpayer herein. Finally, case law expressly holds that the applicable agreement cannot be ignored, and that evidence of actual conduct inconsistent with the applicable agreement is irrelevant and *is* to be ignored by the court. For example, in *Boettcher v. Criscione,* 180 Kan. 39, 299 P.2d 806 (1956),[316] the Kansas Supreme Court held as follows in a case involving a champertous agreement:

> [I]t is clear that [the plaintiff attorney] accepted the arrangement of attorney and client procured by him as a result of the longhand contract above set out and while ratifying and receiving the fruits thereof, he also, as a matter of law, undertook all the liabilities and burdens involved. *Plaintiff either had to repudiate the entire transaction or accept it as a whole.*

Id. at 45, 299 P.2d at 811 (emphasis added). Here, Terrill has fully accepted the benefits of the Chatam agreements. Terrill's role as attorney in these cases flows through and depends entirely on Chatam's agreements with the taxpayers. Through Chatam's agreements, Terrill was hired in these cases and Terrill is paid.

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[315] *See* Findings of Fact 7 & 52 above.

[316] For a full presentation of the *Boettcher* case, *see* Part III above.

Therefore, Terrill cannot now seek to have this Court look past the agreements and consider any actual conduct that might have occurred, especially when a substantial quantity of conduct is indicated which is fully consistent with Chatam directing and regulating these tax appeal cases and Terrill's conduct therein.

To the same effect is *Med Controls, Inc. v. Hopkins,* 61 Ohio App. 3d 497, 573 N.E.2d 154 (1989), a case dealing with unauthorized practice of law. The Ohio Court of Appeals specifically stated as follows:

> In effect, [the medical clinic,] the real party in interest, had no control over its own attorney since [the collection agency] was responsible for hiring and paying the attorney. . . . [The collection agency] argues that a material issue of fact exists as to whether [it] was an independent contractor or an agent of [the medical clinic]. *The apparent import of this argument is that the past course of conduct under the contract showed that [the medical clinic] retained a sufficient degree of control to protect its attorney-client interests.* . . . The clear and unambiguous language of the contract gives [the medical clinic] no authority to control [the collection agency's] choice of attorney or exercise a right of approval over each case to be litigated. . . . The contract itself authorizes conduct on [the collection agency's] part that is prohibited. *Past conduct beyond that authorized by the contract is irrelevant for purposes of enforcement.*

Id. at 499-500, 573 N.E.2d at 155-56 (emphasis added).

For all these reasons, the indicated facts, including Chatam's agreements with taxpayers, suffice to show that Rule 5.4(c) has been violated in this case and the related cases.

XIV. LEGAL ETHICS – KRPC RULE 1.8(e) – FINANCIAL ASSISTANCE TO CLIENTS

KRPC Rule 1.8(e) provides that "[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. . . . "[317] Comment 10 and Comment 16 to KRPC Rule 1.8 state the policy considerations behind this rule. Comment 10 states as follows:

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[317] A second exception, which applies to indigent clients, does not pertain here.

> 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 added). Comment 16 states as follows:

> [P]aragraph (e) . . . *has its basis in common law champerty and maintenance* and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires."

(emphasis added).[318]

If Chatam were an attorney, Chatam's conduct would violate Rule 1.8(e). Chatam's agreements with taxpayers provide that Chatam will fund all expenses[319] related to pursuing the tax appeal cases, including expert fees and attorneys fees, without reimbursement from the taxpayers. Indeed, as noted in Part III above, Chatam has engaged in classic champerty.

Over the years, in a multitude of tax appeal cases, Terrill has served as attorney in this Courts' Regular Division in those tax appeal cases, having been hired by Chatam pursuant to Chatam's authority to act on behalf of taxpayers as set forth in the subject agreements. Thus Terrill has knowingly assisted and continues in knowingly assisting a nonlawyer in such conduct. Terrill also has received significant economic benefits from her relationship with Chatam. Terrill is directly associated with (and has a business relationship with) Chatam and Chatam's champertous conduct. Therefore, Terrill is engaged in activity that violates KRPC Rule 1.8(e). *See* KRPC Rule 8.4(a) (prohibiting attorneys from doing indirectly that which they cannot do directly).

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[318] *See* the discussion of champerty in Part III above.

[319] A minor exception arises in some of the Chatam agreements in that the taxpayers must pay for court filing fees, and there is also one very limited factual exception regarding the payment of appraisers' fees. *See supra* fn.87.

XV. LEGAL ETHICS – KRPC RULE 1.8(f) – THIRD-PARTY PAYERS

KRPC Rule 1.8(f) provides that "[a] lawyer shall not accept compensation for representing a client from one other than the client. . . ." Here, it is undisputed that Terrill is paid by "one other than the client" – that is, by Chatam. An exception to this prohibition exists if three requirements are met, one of which is that "there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship. . . ." KRPC Rule 1.8(f)(2). Comment 11 to Rule 1.8 states the following:

> 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*. . . .

(emphasis added).

Circumstances in these tax appeal cases indicate that Chatam – the third-party payer – has interests that frequently differ from those of Chatam's taxpayer-clients.[320] Moreover, there is an inherent, substantial, and unavoidable risk of Terrill's judgment being impaired by Chatam's financial interests. This is clearly so because legally, under the agreements, and factually, as indicated in the record (including testimony elicited from both Chatam and taxpayers at the September 18 Hearings), Chatam has the absolute "right" and "authority" to hire and fire the attorney, and in fact has exercised that right. Moreover, Chatam and Terrill both confirmed that the Chatam agreements in these cases control the relationships between and among the taxpayers, Terrill, and Chatam.[321] How can an attorney exercise judgment independent of the tax representative's financial interests, if the attorney is constantly subjected to the threat of being fired by the tax representative? The attorney cannot. This alone establishes the existence of the

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[320] Reasonable inferences can properly be drawn from the evidence. *See Kuxhausen v. Tillman Partners, L.P.*, 291 Kan. 314, 320, 241 P.3d 75, 80-81 (2010); *In re Appeal of ANR Pipeline Co.*, 276 Kan. 702 Syl. ¶ 5, 79 P.3d 751, 753 (2003); *Friends of Bethany Place, Inc. v. City of Topeka*, 43 Kan. App. 2d 182, 202, 222 P.3d 535, 549 (2010). *See, e.g.*, Findings of Fact above, Items 98 through 102. For general policy and practical concerns about tax representatives' interests frequently differing from those of their clients, *see* Part IX.D. above.

[321] *See* Findings of Fact 7 & 52 above.

very problem that Rule 1.8(f) is designed to prevent, and also confirms that the exception set forth in Rule 1.8(f)(2) does not apply here.

Regarding Taxpayer's assertion that she has maintained her independent professional judgment in these cases, we have fully addressed and rejected that assertion in Part XIII above. As with other KRPC rules, it might be argued that the relationship between Chatam and Terrill is no different than the "third-party payer" relationships referenced in Comment 11 to Rule 1.8. As noted in Part X above, however, those analogies fail. The discussion in Part X above thoroughly distinguishes those permitted situations from the present relationship involving Chatam and Terrill.

In these cases, Terrill has been paid and continues to be paid by a third party who is not the client. No exception contained in Rule 1.8(f) applies here. Accordingly, Terrill is engaged in activity that violates KRPC Rule 1.8(f).

XVI. LEGAL ETHICS – KRPC RULE 1.8(j) – PROPRIETARY INTEREST

KRPC Rule 1.8(j) states that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client. . . ."[322] Comment 16 to Rule 1.8 provides additional guidance about the rule and the policies behind it:

> Paragraph (j) states the traditional rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its *basis in common law champerty and maintenance* and is designed to avoid giving the lawyer too great an interest in the representation. In addition, *when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires.*

(emphasis added).

While Terrill does not appear to have a *direct* proprietary interest in the tax appeal cases, the person who hired her – Chatam – *does* have a proprietary interest. As fully discussed in Part III above, Chatam is engaged in champertous conduct relating to tax appeal cases. Terrill has facilitated that conduct. Over the years, in a multitude of tax appeal cases, Terrill has served as attorney in this Courts' Regular Division in those tax appeal cases, having been hired by Chatam pursuant

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[322] An exception for attorney's liens has no application to the present situation.

to Chatam's authority to act on behalf of taxpayers as set forth in the subject agreements. Thus Terrill has knowingly assisted and continues in knowingly assisting a nonlawyer in such champertous conduct, in which Chatam effectively has a proprietary interest in the tax appeal cases. Terrill has received significant economic benefits from her relationship with Chatam and from Chatam's champertous agreement and activities. Terrill is directly associated with (and has a business relationship with) Chatam. Therefore, Terrill assists, benefits from, and thus is engaged in activity that violates KRPC Rule 1.8(j). *See* KRPC Rule 8.4(a) (prohibiting attorneys from doing indirectly that which they cannot do directly).

This conclusion is reinforced by the very nature of Chatam's authority to hire the attorney. Legally, under the agreements, and factually, as indicated in the record (including testimony elicited from both Chatam and taxpayers at the September 18 Hearings), the tax representative has the absolute "right" and "authority" to hire and fire the attorney, and in fact Chatam has exercised that right. Moreover, both Chatam and Terrill confirmed that the Chatam agreements control the relationships between and among the taxpayers, Terrill, and Chatam. The concern expressed in Comment 16 is that a proprietary interest in favor of one other than the client makes it more difficult for the client to discharge the attorney. That concern applies fully to the present situation. The one with the direct proprietary interest (Chatam), factually and under the agreements, controls who is the attorney for the tax appeal cases. Terrill has a direct association and business relationship with Chatam that is long-standing and persistent. Despite a short-lived attempt to replace Terrill in these recent tax appeal cases, Terrill has fully re-engaged in those cases at the request and instruction of Chatam. Chatam's agreements with taxpayers also purport to give Chatam the "exclusive" right to represent the taxpayers in the tax appeal cases. In summary, all this means that it is, under the agreements, difficult (if not impossible) for the taxpayers to discharge Chatam, and, because Chatam controls the hiring and firing of the attorney, this means taxpayers effectively have no control over who the attorney is, and thus it would be severely difficult for them to discharge Terrill or, for that matter, any other attorney hired by Chatam. This certainly runs afoul of the policy consideration identified in Comment 16 to Rule 1.8.

XVII. LEGAL ETHICS – KRPC RULES 3.1 & 1.7(a)(2) – FRIVOLOUS CLAIMS AND CONFLICT OF INTEREST

In a multitude of tax appeal cases before the Regular Division of this Court, Terrill has voluntarily dismissed those cases at very late stages, with most of those dismissals occurring within a few days of the scheduled evidentiary hearing dates and with many dismissed on the day before, or even the late afternoon or early

evening before, the scheduled hearing dates.[323] In 2009, Terrill's cases with Chatam had a ratio for dismissed cases to "evidentiary hearing" cases that was 5.4 to 1.[324] In 2010, the ratio for Terrill's cases was 8.9 to 1.[325] In 2011, the ratio for Terrill's cases was 11.3 to 1.[326] Testimony elicited from Chatam indicated that most cases involving Chatam and Terrill that are ultimately dismissed are recognized by Chatam to be lacking in merit or have only marginal merit to begin with.[327]

Part IX.D.4 and Part IX.D.5 above noted the possible motivations for filing a multitude of tax appeal cases and for last-minute dismissals of a vast numbers of cases in this Court's Regular Division. Although the Court may not have enough testimonial evidence to indicate with certainty the intentions of Chatam and Terrill in dismissing so many tax appeal cases, the available statistical information set forth in the prior paragraph, combined with the testimony from Chatam, provides substantial and competent evidence of the following dichotomy – that either (a) the dismissed appeals *lacked merit* to begin with or (b) the appeals are being dismissed *despite some merit*. Either way it indicates an ethical violation by the attorney.

If the dismissed appeals lacked merit to begin with, then filing those tax appeal cases violated Rule 3.1 of the Kansas Rules of Professional Conduct ("KRPC"), Ks. Sup. Ct. Rule 226. That rule provides as follows: "A lawyer shall not bring . . . a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous." Comment 2 to Rule 3.1 provides clarification:

> What is required of lawyers . . . is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. . . . The action *is* frivolous, however, if the client desires to have the action taken primarily for the purpose of *harassing* . . . a person or if the lawyer is *unable either to make a good faith argument* on the merits of the action taken or to support the action taken. . . .

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[323] *See* Finding of Fact 98 above.

[324] *See* Finding of Fact 99 above.

[325] *See* Finding of Fact 100 above.

[326] *See* Finding of Fact 101 above.

[327] *See* Finding of Fact 102 above.

(emphasis added). Given that Chatam directs and manages the tax appeal cases,[328] and that Terrill facilitates and participates in this conduct,[329] translating the last sentence of Comment 2 to the present situation leads to the following principle: *The action **is** frivolous if Chatam or Terrill (or both) desire to have a particular tax appeal case pursued primarily for the purpose of **harassing** county appraiser offices and county counselors.* The Court may not have enough testimonial evidence to indicate conclusively the motivations of Chatam and Terrill in filing and then dismissing so many tax appeal cases. The purpose might be to leverage negotiating pressure on county appraiser offices and county counselors through the sheer volume of cases.[330] Nonetheless, the available statistical information set forth above regarding dismissals and especially the last-minute nature of many of those dismissals, combined with the testimony from Chatam, indicates that Terrill has, over many years, filed a multitude of tax appeal cases that lacked merit and thus violated Rule 3.1.

Taxpayer notes the short time frame (30 days) for filing a tax appeal to this Court from an adverse decision at the informal, county-level hearing, and then states that "[t]he purpose of filing the appeal [that is later dismissed] would be to preserve the rights of the clients." *Petition for Reconsideration,* p.74. The implication appears to be that such a short time frame requires filing an appeal without evaluating its merits. Of course, by the time of the county-level decision (30 days before the appeal has to be filed), a taxpayer will already have the county's appraisal and other valuation information from the informal hearing process, and the Taxpayer will have already gathered and presented contrary evidence. So the 30-day frame should not be an undue hindrance to evaluating whether an appeal has merit. Regardless of the time frame, signing a notice of appeal to this Court is a certification that the matter has been reasonably reviewed and a determination made that the appeal has merit and is not frivolous or being filed for any improper purpose. K.A.R. 94-5-5; K.S.A. 60-211 (applied to this Court through K.A.R. 94-5-1(a)).

Even if it could be demonstrated that some or all of the dismissed cases possessed merit to begin with, then the dismissals have occurred *despite* the merits of the tax appeal cases. What would be the possible motivation for dismissal in that scenario? The factual record indicates that Chatam is bearing most or all of the expense associated with pursuing the tax appeals. Because of this, the taxpayer

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[328] *See* Part IX above.

[329] *See* Part XII above.

[330] *See* Part IX.D.4 and Part IX.D.5 above.

has no reason *not* to pursue a meritorious tax appeal. If that meritorious tax appeal is nevertheless dismissed, then it necessarily must be for some reason other than the taxpayer's interest. According to Terrill and Chatam, Terrill's attorneys fees are paid regardless of the outcome. This leaves only Chatam's financial interests as the deciding or tipping point for what merit-based appeals should be pursued to and through an evidentiary hearing before this Court.[331] This analysis therefore indicates a violation of KRCP Rule 1.7 relating to conflicts of interest.

Rule 1.7(a) provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Rule 1.7(a)(2) then sets forth the following definition: "A concurrent conflict of interest exists if: . . . (2) there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or *third person* or by the personal interest of the lawyer." (emphasis added).[332] If, as discussed above, dismissals of tax appeal cases involving Chatam and Terrill are adverse to the client's interest but made to further Chatam's financial interests, then clearly there is a violation of Rule 1.7(a). The necessity and probity of such conclusion is buttressed by Chatam's own testimony at the September 18 Hearings:

> And that's the beauty of our end of the deal, because I [Chatam] get a chance to look at the horses before we bet on the race. So I get to pick my fights. I don't have to go in and fight something that's a losing battle. I get to pick the winner off the blocks. That's like seeing the race ran and then getting to bet. . . . I've done this for 30 years, sir, so I mean I consider myself to be an expert in this industry. . . . But I mean we're able to pick that horse. So it's not like I'm just drawing wild

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[331] As demonstrated, this is a reasonable inference drawn from the factual record. *See Kuxhausen v. Tillman Partners, L.P.*, 291 Kan. 314, 320, 241 P.3d 75, 80-81 (2010); *In re Appeal of ANR Pipeline Co.*, 276 Kan. 702 Syl. ¶ 5, 79 P.3d 751, 753 (2003) ("If the evidence, with all reasonable inferences to be drawn therefrom, when considered in the light most favorable to the prevailing party, supports the decision, it will not be disturbed on appeal."); *Friends of Bethany Place, Inc. v. City of Topeka*, 43 Kan. App. 2d 182, 202, 222 P.3d 535, 549 (2010). *See also* Finding of Fact 94 above regarding Chatam's decision to replace an attorney with significant experience in tax appeal cases with one who had practically no such experience.

[332] Another instance of a concurrent conflict of interest is when the representation of one client will be directly adverse to another client. KRPC Rule 1.7(a)(1). Although not indicated on the record in the present tax appeals, there is a substantial risk of horse-trading cases (agreeing to dismiss one taxpayer's case in exchange for settling another taxpayer's case) when tax representatives negotiate with county appraisers offices. *See* Part IX.D.3 *et seq.* above.

> cards out of the deck in a hat. I mean I know what we're getting into, to begin with.

This testimony indicates that most tax appeal cases involving Chatam and Terrill that are ultimately dismissed are recognized by Chatam to be lacking in merit or have only marginal merit at the time the appeals are filed with this Court.[333]

[333] *See* Finding of Fact 102 above.

IT IS THEREFORE ORDERED that, for the reasons stated above, the Court lacks subject matter jurisdiction of this case, and therefore this case must be and hereby is dismissed.

This is a final order of the Court of Tax Appeals and constitutes final agency action. Any party choosing to appeal this order must do so by filing a petition for judicial review within 30 days from the date of certification of this order. *See* K.S.A. 77-613(c). The petition for judicial review shall be filed with the Kansas Court of Appeals. *See* K.S.A. 2011 Supp. 74-2426(c)(2). The Court of Tax Appeals shall not be a party to the petition for judicial review but shall receive service of a copy of the petition. Pursuant to K.S.A. 2011 Supp. 77-529(c), any party choosing to petition for judicial review of the Court's decision is hereby notified that the Secretary of the Court of Tax Appeals is to receive service of the petition for judicial review.

IT IS SO ORDERED

S E A L

ATTEST:

THE KANSAS COURT OF TAX APPEALS

SAM H. SHELDON, CHIEF JUDGE

(CONCURRING OPINION)
TREVOR C. WOHLFORD, JUDGE

JAMES D. COOPER, JUDGE

JOELENE R. ALLEN, SECRETARY

CONCURRING OPINION

I credit the thoroughness of work done by my colleagues in this matter of considerable importance. I concur in the dismissal of this case. I also concur with all of the findings and conclusions set forth in the majority opinion, except that I would not extend the logic of *People ex rel. Holzman v. Purdy*, 162 N.Y.S. 65 (1916), to bring this case under the jurisdiction of the Court. Therefore, in the main, this concurring opinion is offered not as an alternative rationale, but as an alternative perspective. And, where I differ with the majority, it is not because I believe the majority went too far, but that it did not go far enough.

The majority opinion negotiates a wide range of legal doctrines, from contract enforcement to legal ethics to the unauthorized practice of law. Petitioner strenuously objects to any examination of these doctrines, for any reason, admonishing the Court to abandon its "path of frolic and detour" and to hew closely to its narrow purpose. That narrow purpose, Petitioner submits, is to determine the fair market value of the tax parcel in the case at bar without paying any attention to how the case got here or how it is now being maintained. Petitioner's argument is spurious, serving to obfuscate rather than illuminate. It takes an abstract view while ignoring the proper context.

The orders of the Court are meticulously researched, to be sure. Yet while incisive in analysis, they are also narrow in compass. We are not overreaching or wading into closed and uncharted territory here, as Petitioner suggests. On the contrary, we are taking care to examine the evident jurisdictional facts so that we may ensure that the Court is empowered to hear this case on the merits.

I find the judgment of the Court to be well taken, both in fact and in law, and to be consistent with the agency's limited authority, jurisdiction and power. Petitioner's discursions notwithstanding, at no time has this body claimed broad powers to adjust private rights and obligations under contract; that power rests with the courts of general jurisdiction. Nor has this body sought to exercise concurrent—much less exclusive—jurisdiction over attorney discipline or multidisciplinary practices; that power rests with the Supreme Court. And never has this body attempted to exert plenary authority to regulate the enterprises of tax consultancy or litigation finance; that authority falls squarely within the legislature's police powers.

Still, the gravity of the issues now before this Court should not be diminished. At bar we concern ourselves with far more than ministerial matters, form documents and technical signature requirements. This case goes to the very

substance of the Court's jurisdiction and its authority to protect the integrity of its own sanctum, as well as the integrity of the tax appeals system at large.

In this judge's estimation, the Court's orders are grounded in two fundamental principles. The first principle is that *locus standi*, or the standing of the parties in controversy, is an essential dimension of jurisdiction. The second principle, a necessary adjunct of the first, is that an administrative tribunal may—and indeed must where cause is evident—look behind the styling of the pleadings to scrutinize all relevant jurisdictional facts, including the status of the parties actually in controversy, before exercising jurisdiction over the case.

Yet Petitioner declares the jurisdictional facts of this case beyond the Court's purview and thus out of bounds—which is to argue, in effect, that an absolute and irrefutable presumption of authenticity attaches to a case by mere virtue of naming parties in a suit. No such presumption exists under Kansas law. It is entirely appropriate for the Court to look behind the pleading vestments to uncover the true forces at work in this case. Our examination of the contractual and professional relationships of those who claim a licit role in this cause should not be seen as "using the sanctum of the tribunal as a sword," as Petitioner suggests. Our examination is merely to ascertain who, in reality, is exercising authority and control in a case over which we are presiding. The Court must have the jurisdiction to determine the bounds of its own jurisdiction, at least in the first instance; and to that end, it must be empowered to examine facts of record which lie outside the face of the pleadings. To suggest otherwise is to place form over function and illusion over reality.

Petitioner's characterization of this case is misguided. Here we are not presented with an authentic challenge brought and maintained by a taxpayer with a *bona fide* interest in the property levied and a statutory right to appeal. If those were truly the circumstances at bar, jurisdiction could not be questioned. For in an authentic challenge, the taxpayer is entitled to prosecute the case, either *pro se* or by legal counsel, and the taxpayer may freely employ consultants and other professionals to provide appropriate assistance and expert opinion evidence during the course of the proceedings.

At bar, we are met with a different fact pattern altogether. Here we have a taxpayer who transferred by private agreement all power and authority over the case to Chatam, an intermeddler in the business of appealing other people's tax assessments. The taxpayer retained no autonomy to participate in decisions concerning how—or even if—this case would be pursued. Chatam was given nearly unfettered control over the cause, including matters of litigation strategy, settlement and legal representation. In exchange, the taxpayer was promised a share of any eventual recovery.

As the majority explains, the agreement between the taxpayer and Chatam is fraught with legal problems. The agreement attempts to effectuate a bare transfer of statutory rights which may not, by law, be transferred. It calls for the maintenance of litigation by champerty. It opens the door to unauthorized practices by a non-attorney in a court of record. And it presents myriad ethical concerns for attorneys engaged in these enterprises. The foregoing issues are important because they shed light on the legal infirmity of the relationships at bar, which is relevant to the question of jurisdictional standing.

But a more basic point must not be overlooked. Valid or not, the agreement between the taxpayer and Chatam is, by all accounts, the historical basis in fact for the case at bar. It is under the auspices of the agreement that Chatam caused this case to be filed, and it is under the auspices of the agreement that Chatam is now exercising control over the litigation. Although the named taxpayer may be participating in certain aspects of the case, having a stake in the outcome, it is Chatam who is ultimately in control of the subject matter. Chatam is therefore the actual party appellant, while the taxpayer serves merely as a nominal party, a conduit through which public modes of redress are being used to reap the benefits of an illicit private bargain.

The operative question becomes: Is the actual party appellant, Chatam, authorized under Kansas law to be heard on the merits? In other words, does Chatam's interest in this case, which derives solely from an illicit agreement with the named taxpayer, fall within the zone of interests the Kansas Legislature intended to protect when it established this state's tax appeals scheme and delegated final adjudicative authority to this Court? The answer is decidedly no.

At this point, additional context may be useful. In broad terms, it can be said that all Kansas taxpayers have at least some interest in ensuring that each constituent parcel of the tax base is uniformly and fairly assessed. Property taxation is a "zero-sum game" in which the assessment levied upon one parcel impacts the relative burdens borne by all others. This generalized interest is protected, however, not by the tax appeals system, but through other regulatory means.[334] The tax appeals system is a process for case-by-case corrections to the tax base through quasi-judicial adjudication. Thus, in order to come under the jurisdiction of this system, the proper litigant must timely prosecute a proper claim in the mode and manner prescribed by statute.

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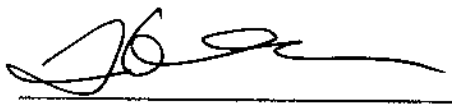
[334] Such mechanisms include statutory penalties for unlawful conduct by tax officials, state oversight authority by the director of the Property Valuation Division of the Kansas Department of Revenue, and protections afforded under the Kansas Real Estate Study Act.

Tax appeal standing in Kansas is narrow and particularized. It does not extend to mortgagees, licensees, or owners of sundry other partial interests or intangible rights. It cannot be created by subrogation, syndication, or assignment. The right to appeal cannot be transferred to a neighbor, a homeowners association, a third-party payer, a financier, a tax protest organization, or a friend. Counties have no right to intervene in state-assessed property tax appeals. School districts have no right to be heard in appeals involving local business property. Parent-teacher associations have no right to seek tax warrants on behalf of school districts. The list of those without tax appeal standing is virtually endless.

In Kansas, property taxes are charged to, and they remain the responsibility of, the person holding title to the property levied. With limited exception, the incidences of taxation derive from fee simple ownership.[335] Thus standing to appeal a property tax assessment lies with the property owner and must remain with the property owner. Petitioner cites no authority for the proposition that tax appeal rights in Kansas may be severed from their underlying public charges and then commoditized, factored and exploited for profit by one in the business of diversifying his own risk and maximizing his own gain.

The upshot is that an intermeddler who causes a tax appeal in this state to be brought and maintained on his own account lacks jurisdictional standing, regardless of whose name may appear on the face of the pleadings. And the rule holds true no matter the merits of the cause or whether the intermeddler maintains the action gratuitously, for profit, in malice, as a matter of principle, or for some other purpose.

I would therefore conclude, even without a fatal defective signature, that Petitioner has failed to establish a substantial and credible basis in fact for standing, giving the Court no jurisdiction in this case except to dismiss.



TREVOR C. WOHLFORD, JUDGE

[335] Exceptions to this rule include certain ground-lease property (K.S.A. 79-412), partitioned land (K.S.A. 79-419), mineral interests (K.S.A. 79-420), wireless communication towers (K.S.A. 79-430), and public utility property (K.S.A. 79-5a01).

CERTIFICATION

I, Joelene R. Allen, Secretary of the Court of Tax Appeals of the State of Kansas, do hereby certify that a true and correct copy of this order in Docket No. 2012-3110-PR and any attachments thereto, was placed in the United States Mail, on this 20th day of February, 2013, addressed to:

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IN TESTIMONY WHEREOF, I have hereunto subscribed my name at Topeka, Kansas.

Joelene R. Allen, Secretary