

Ethics Refresher and Disciplinary Highlights Government Attorney Edition

November 2022
Douglas County Brown Bag CLE

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By the end of this presentation, you will:

- Be familiar with the structure and functioning of the Kansas Disciplinary Administrator's Office.
- Be familiar with the most common bases for ethical complaints against Kansas lawyers.
- Be updated on selected published cases addressing attorney discipline.
- Be prepared to analyze a fundamental ethical quandary for the Government Attorney: "Who is my client"?

Office of the Disciplinary Administrator

- 1 Disciplinary Administrator:
Gayle B. Larkin
- 1 Chief Deputy Disciplinary Administrator: Matthew J. Vogelsberg
- 6 Deputy Disciplinary Administrators:
 - Gary C. West
 - Kathleen J. Selzler Lippert
 - Alice L. Walker
 - Julia A. Hart
 - Amanda G. Voth
- 1 Counsel to the Kansas Board for Discipline of Attorneys: Krystal L. Vokins
- 1 Director of Investigations: W. Thomas Stratton, Jr.
- 2 Assistant Disciplinary Administrators:
 - Crystalyn M. Ellis
 - Katie M. McAfee
- 3 Investigators:
 - Royetta F. Rodewald
 - Dave M. Brede
 - William T. Schilling

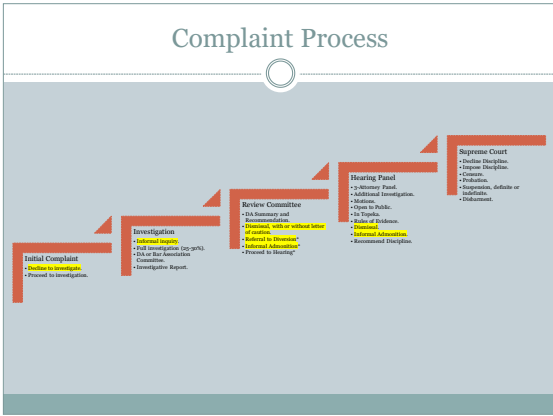
Number of complaints made each year

800-1000 Complaints

Disciplinary matters decided by the Kansas Supreme Court

- 2017 – 23
- 2018 – 28
- 2019 – 21
- 2020 – 9
- 2021 – 23
- 2022 – 16*

Complaint Process



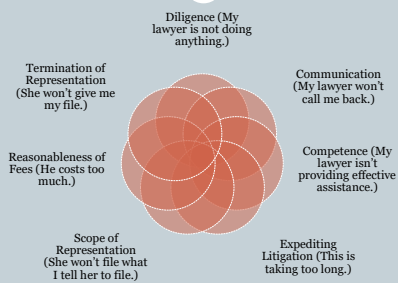
Disposition of docketed complaints per year

- 20 - 25 Hearings;
- 10 - 20 Informal Admonitions;
- 7 - 12 Surrender of Law License;
- 15 - 25 Diversion;
- 20 - 30 Dismissal (letter of caution); and
- Remainder of docketed cases dismissed after investigation

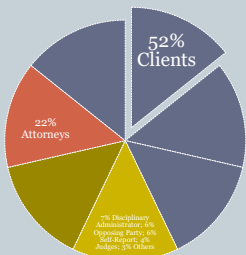
Practice Areas Generating the Most Complaints

- Criminal Defense
- Family Law
- Estate Planning
- Government Service

Common Complaints from the Public



Source of Complaints



Most violated rules

- Rule 8.4(d)—conduct prejudicial to the administrative of justice
- Rule 1.3—diligence
- Rule 1.1—competence
- Rule 8.4(g)—conduct adversely reflects on fitness to practice
- Rule 3.2—expediting litigation
- Rule 1.4—communication
- Rule 1.15—safekeeping
- Rule 5.3—supervision nonlawyer
- Rule 8.1—false statement, fail to disclose fact to correct misapprehension, or fail to respond

Impairments – Drug, Alcohol, Mental Health

- How many have some sort of impairment?
- 46%* of those whose conduct warrants a hearing.
- Look around.
- Offer help early.
- * Since 01/01/2010.

Practice Pointers

- The Kansas Rules of Professional Conduct can be found here:
 - <https://www.kscourts.org/KSCourts/media/KsCourts/Orders/2020-RL-134.pdf>
- If in doubt: Call Stan Gayle – (785) 435-8200.
- The DA will try to assist you in navigating a safe course of action.
- An ethics opinion can be requested from the Kansas Bar Association.

2021-22 Disciplinary Cases

- *Matter of Ahrens*, 312 Kan. 689, 479 P.3d 211 (2021)



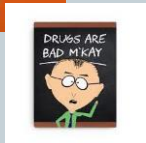
2021-22 Disciplinary Cases

- *Matter of Ayesh*, 313 Kan. 441, 485 P.3d 1155 (2021)



2021-22 Disciplinary Cases

- *Matter of Lindberg*, 313 Kan. 599, 485 P.3d 1194 (2021)



2021-22 Disciplinary Cases

- *Matter of Kenney*, 313 Kan. 785, 490 P.3d 1194 (2021)



Due Diligence

[duh-uh-luh-jen-uh-s]

An investigation, audit, or review performed to confirm facts or details of a matter under consideration.

2021-22 Disciplinary Cases

- *Matter of Starsota*, 314 Kan. 378, 499 P.3d 458 (2021)



2021-22 Disciplinary Cases

- *Matter of Sweet*, 314 Kan. 602, 501 P.3d 890 (2022)
- *Matter of Long*, 315 Kan. 842, 511 P.3d 952 (2022)

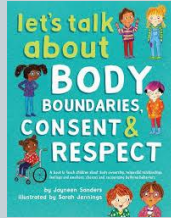
what are other words for dereliction of duty?

dereliction, negligence, neglect, carelessness, defection, irresponsibility, delinquency, heedlessness



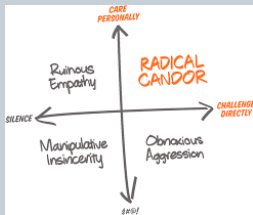
2021-22 Disciplinary Cases

- *Matter of Whinery*, 512 P.3d 1162 (2022)



2021-22 Disciplinary Cases

- *Matter of Spradling*, 315 Kan. 552, 509 P.3d 483 (2022)
- *Matter of Huffman*, 315 Kan. 641, 509 P.3d 1253 (2022)



*For Government Lawyers

1. Simple Question, Tough Answer:
"Who is your client?"
Not a defined term in KRPC 1.0.
2. Implicated Rules:
KRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13, 1.14, 1.15, 1.16, 1.17, 1.18, etc.
3. KRPC 1.13: Organization as Client
"(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

*For Government Lawyers

4. Comment 7 to KRPC 1.13:

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. **Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context.** Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

*For Government Lawyers

5. "Government Counsel and Their Obligations."

https://harvardlawreview.org/wp-content/uploads/pdfs/government_counsel.pdf

6. Single Client.

"attornati regis" <https://ag.ks.gov/about-the-office/aghistory>

Service to an officer who has the legitimate (read: democratically elected / lawfully appointed) power to decide upon the course of action

Ensures proper separation of power and democratic processes

But most Government Practice is non-adversarial, most opinions not subject to judicial review / checks and balances of democratic republic.

7. Public Interest.

"...whereupon, in open court, said attorney took an oath to support and bear true allegiance to the Constitution of the United States and the Constitution of the State of Kansas; neither to delay nor deny the rights of any person through malice, for lucre, or from any unworthy desire; not to knowingly foster, or promote, or give assent to any fraudulent, groundless or unjust suit..."

But too vague to be meaningful, and it is arguably anti-democratic.

8. "Yes."

*For Government Lawyers

In re Kline, 298 Kan. 96, 311 P.3d 321 (2013)—promotes "public interest" model.

- "As Attorney General of the State and District Attorney for a county, an attorney's client is the public." (at 213—14)
- "A government attorney 'has for a client the public.' (citation omitted)." (at 214)
- "The ABA Standards [for Imposing Lawyer Sanctions] note the public entrusts lawyers with property, liberty, and their lives. Therefore, the public is entitled to expect lawyers to behave with the highest standards of honesty and integrity and not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice." (at 214)

*For Government Lawyers

Proposal - Consider all angles:

- i. Single Client.
 - 1. Is the proposed course of action desired by the democratically elected / appointed officer responsible for the action?
- ii. Hybrid.
 - 1. Would the proposed course of action be beneficial to the office of the elected official? Consistent with purposes and Oath?
- iii. Public interest.
 - 1. How would the proposed action effect the best interest of the Kansas public?

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