



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 84- 110

John R. Wurth
Securities Commissioner
503 Kansas Avenue, Suite 212
Topeka, Kansas 66603

Re: Corporations -- Securities -- Registration; Sub-
mission of Notice

Attorneys at Law -- Attorneys From Other States --
Appearances Before Administrative Agencies; Local
Counsel

Synopsis: Both K.S.A. 7-104 and Rule No. 116 of the Kansas Supreme Court (K.S.A. 60-2702a) require that an attorney who is licensed to practice in another jurisdiction associate with local counsel prior to transacting professional business before an administrative agency of the state. The submission of securities registration statements to the Kansas Securities Commissioner pursuant to K.S.A. 17-1256 does not involve any personal appearance unless and until the commissioner denies registration under K.S.A. 17-1260, and so does not constitute professional business before an administrative agency sufficient to invoke the provisions of the local counsel statute and rule. Accordingly, the local counsel requirements of K.S.A. 7-104 and Rule No. 116 do not apply to the filing of such statements. Cited herein: K.S.A. 7-102, 7-104, 17-1256, 17-1260, 17-1261, 60-2702a (Rule No. 116), K.A.R. 81-4-1, 81-11-1, 82-1-228 (amended 1977).

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Dear Mr. Wurth:

As Securities Commissioner for the State of Kansas, you request our opinion concerning the appearance of attorneys licensed to practice in other states before your office. Specifically, you inquire whether such attorneys are required, prior to submitting securities registration statements, to associate with local counsel. Although K.S.A. 7-104 and Rule No. 116 of the Kansas Supreme Court (found at K.S.A. 60-2702a) require that out-of-state counsel have such local associate counsel whenever they have "professional business" in the courts or "before" any administrative agency, the question has arisen whether the mere submission of registration statements constitutes business "before" your agency.

As you note in your letter, it was initially the practice of the Securities Commissioner to require a personal appearance by a representative of a company (or "issuer") which wished to offer non-exempt securities for sale in the State of Kansas. ["Non-exempt" refers to those securities which are not listed at K.S.A. 17-1261, and so must comply with registration provisions found at K.S.A. 17-1255 et seq.] Although subsequent amendments to the securities statutes made the filing of a registration statement a summary process which automatically took effect in the absence of any action on the part of the commissioner to postpone the effective date of the registration or seek a stop order [K.S.A. 17-1256(c), 17-1260], administrative rules and regulations continued to require a personal appearance. Specifically, K.A.R. 82-1-228(b)(2) [now at (d)(2)] prohibited corporations from appearing except by counsel, while K.A.R. 82-1-228(b)(3) defined the filing of a registration statement as entering an appearance before the commissioner.

The presence of such administrative rules and regulations was of importance due to the existence of other, separate requirements for the conduct of attorneys in the practice of their profession. K.S.A. 7-104 and Rule No. 116 of the Rules of the Kansas Supreme Court contain parallel (although not identical) provisions which govern the practice of law in this state by attorneys who are licensed to practice elsewhere. The rule, which is promulgated by the supreme court under its authority to admit attorneys to the practice of law and to likewise suspend them therefrom (K.S.A. 7-102), states as follows:

"Any regularly admitted practicing attorney in the courts of record of another state or territory, having professional business in the courts or before any board, department, commission or other administrative tribunal

or agency of this state, may on motion be admitted to practice for the purpose of said business only, in any of said courts, tribunals or agencies, upon it being made to appear that he has associated and personally appearing with him in the action, hearing or proceeding an attorney who is a resident of and duly and regularly admitted to practice in the courts of record of this state. The associated attorney must maintain an office for the practice of law in this state and be currently registered with the Kansas Supreme Court in accordance with Supreme Court Rule No. 209. Service may be had upon the associated attorney in all matters connected with said action, hearing or proceeding, with the same effect as if personally made on the foreign attorney, within this state, and the foreign attorney shall thereupon be and become subject to the order of, and amenable to disciplinary action by the courts, agencies or tribunals of this state. No court, agency or tribunal shall entertain any action, matter, hearing or proceeding while the same is begun, carried on or maintained in violation of the provisions of this rule. Nothing in this rule shall be construed to prohibit any party from appearing personally before any said courts, tribunals or agencies on his own behalf." (Emphasis added.)

While K.S.A. 7-104 is virtually identical, it does contain a provision for the taking of an oath by an attorney seeking temporary admission to practice in Kansas. However, given the re-enactment of the above rule in 1983 (the statute was last changed in 1977) and the plenary power of the supreme court over the admission of attorneys to practice, the validity of the oath requirement may be questioned, but is not necessary to determine here.

In 1977, K.A.R. 82-1-228 was amended to remove subsection (b)(3), which defined entry of appearance as including the submission of a registration statement. Existing regulations of the Securities Commissioner (found at chapter 81 of the K.A.R.) contain no such requirement, and reiterate the summary nature of the filing procedure, with a hearing provided only the event of denial. K.A.R. 81-4-1, 81-11-1. In light of the deletion of the requirement for a personal appearance, the question has arisen as to whether what remains (i.e. the submission of registration statements through the mail) still constitutes an "action, hearing or proceeding" which requires the presence of local associate counsel. In our opinion, the presence of such counsel is not required.

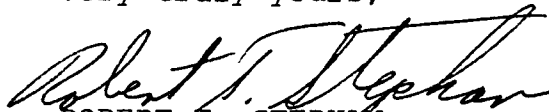
We base this conclusion upon the wording of the supreme court rule which requires local counsel whenever an attorney from another state has an "action, hearing or proceeding" "before" an administrative agency of this state. As you note, Black's Law Dictionary defines each of these three words in terms of the enforcement of legal rights, generally in a hearing before a tribunal or agency. Put another way, each word contemplates that an adjudication, as opposed to an investigation, takes place. See s.g., Atchison, T. & S. F. Ry. Co. v. Kansas Commission on Civil Rights, 215 Kan. 911, 918 (1974). Here, no action, hearing or proceeding will ever occur in most cases where the registration statement is accepted without comment by your office. Only in those cases where an examination (i.e. investigation) indicates deficiencies in the statement or other problems will a denial occur or stop order be issued. Clearly, at that time the issuer can choose, by requesting a hearing, to become involved in an action, hearing or proceeding in which its counsel, if foreign, would require a local associate. However, until such time, no appearance "before" an administrative agency has taken place sufficient to invoke the provisions of Rule No. 116 or K.S.A. 7-104.

As an ancillary issue, you also request our opinion on the question of whether an attorney from another state practices law in Kansas through the act of preparing a registration statement for filing in this state. We assume that the issuer of the securities is located outside the state as well, and that all steps in the preparation of the documents were preformed by the attorney outside the state. Given these facts, we do not believe that an out-of-state attorney engages in the practice of law in Kansas by simply mailing a securities registration statement to your office which he has prepared and which bears his signature as counsel. Clearly, such an attorney is engaged in the practice of law, for he is providing legal advice and counsel and preparing legal instruments by which legal rights are secured. Skahan v. Powell, 8 Kan.App.2d 204 (1982). However, if such advice and preparation occurs, for example, in Missouri, it is there the practice of law takes place, even if the subject matter involved interpretation and application of Kansas statutes. Since, as noted above, no action, hearing or proceeding takes place upon the initial filing of a registration statement, in the absence of any requirement that a personal appearance be made at this state we are of the opinion that no unauthorized practice of law takes place. Again, it should be emphasized that this conclusion is based upon the above assumptions, which include no direct activity by the attorney in the State of Kansas. Additional facts could render a different conclusion to a situation, as the borderline between no practice and practice of law is approached.

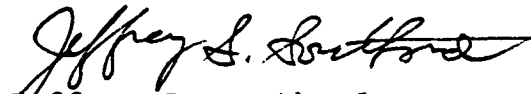
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In conclusion, both K.S.A. 7-104 and Rule No. 116 of the Kansas Supreme Court (K.S.A. 60-2702a) require that an attorney who is licensed to practice in another jurisdiction associate with local counsel prior to transacting professional business before an administrative agency of the state. The submission of securities registration statements to the Kansas Securities Commissioner pursuant to K.S.A. 17-1256 does not involve any personal appearance unless and until the commissioner denies registration under K.S.A. 17-1260, and so does not constitute professional business before an administrative agency sufficient to invoke the provisions of the local counsel statute and rule. Accordingly, the local counsel requirements of K.S.A. 7-104 and Rule No. 116 do not apply to the filing of such statements.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Deputy Attorney General

RTS:JSS:crw