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RECENT CHANGES IN KANSAS REAL ESTATE LAW 2021

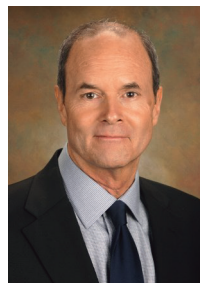
Adams Jones Attorneys



Mike Andrusak



Cody Branham



Mert Buckley



Pat Hughes



Susan Locke



Jason Reed



Brad Stout



Monte Vines

Preeminent Presence in Kansas Real Estate

Top Band in Kansas Real Estate. Chambers USA awarded Adams Jones, again its highest rating as a first band of leading firms for real estate in Kansas. Chambers USA says Adams Jones has: “excellent experience in property transactions, zoning issues and finance work” and “a strong reputation in all manner of real estate litigation, including zoning and easement disputes...and possesses additional expertise in general commercial cases” and “maintains a noteworthy strength in professional liability, estates and trusts and municipal government disputes.” Those attorneys selected from the firm in the area of real estate include **Mert Buckley, Brad Stout and Pat Hughes**. Selected for general commercial litigation were **Brad Stout, Monte Vines and Pat Hughes**. The rankings were compiled from interviews with clients and attorneys by a team of full-time researchers.



Selections for 2021 Best Lawyers in America:

Real Estate
Mert Buckley
Pat Hughes

Commercial Litigation
Pat Hughes
Monte Vines

Land Use and Zoning
Pat Hughes

Eminent Domain & Condemnation
Brad Stout

Litigation—Banking
and Finance
Monte Vines

Ethics & Professional
Responsibility
Monte Vines

Litigation-Real Estate
Brad Stout
Monte Vines

Legal Malpractice — Defendants
Monte Vines

Overview

This summary of recent changes in Kansas Real Estate Law was prepared by the Real Estate Group at Adams Jones. Our real estate attorneys continually monitor Kansas case decisions and legislation so we remain current on developments in real estate law in Kansas. This up-to-date knowledge prepares us to address client needs more quickly and efficiently because our “research” is often already done when a question arises.

This publication is intended for informational purposes only and should not be construed as legal advice for a particular matter. Portions of this material are derivative works of copyrighted material, written by us, reprinted with permission of the Kansas Bar Association.

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Legislation

2021 Legislation

Creation of Kansas Economic Recovery Loan Deposit Program; Deduction of interest income from agricultural and residential mortgages.



2021 Sen. Bill 15 § 10 amends K.S.A. 79-1109 to provide that for tax years after December 31, 2022, financial institutions can deduct from the Kansas taxable income of a corporation that portion of net income received from “qualified agricultural real estate loans attributed to Kansas” or from “single family residence loans attributed to Kansas.” A “Qualified agricultural real estate loan” is a loan (a) with a maturity dates between five and forty years; (b) secured by a first lien in favor of the institution, or by a second lien if the institution already holds a first lien; (c) with loan-to-value ratio not more than 85% in the absence of private mortgage insurance; and (d) on “real property that is substantially used for the production of one or more agricultural products.” A qualifying residential loan must be for improving a borrower’s principal residence in a qualifying rural area.

Kansas Real Estate Commission Regulations-2020

The Kansas Real Estate Commission (“KREC”) adopted and amended several regulations effective as of July 1, 2020: K.A.R. § 86-1-10 Approved courses of instructions; procedure; K.A.R. § 86-1-11 Minimum curricula and standards for course; K.A.R. § 86-1-12 Monitoring courses; withdrawal of approval; K.A.R. § 86-1-17 Responsibilities of schools and K.A.R. § 86-3-7 Advertising. Of particular note is K.A.R. § 86-3-7:

Changes in Advertising.

An affiliated licensee may no longer use a name or team name in his/her/its advertising which includes the terms “realty,” “brokerage,” “company,” or any other term that could “be construed as a real estate company separate from the supervising broker’s company.”

An affiliated licensee’s name or team name cannot be in a font size that is more than two times larger than the supervising broker’s business name or trade name.

An affiliated licensee’s name or team name must be adjacent to the supervising broker’s business name or trade name in all internet, website, social media and social networking advertisements.

CASES & ATTORNEY GENERAL OPINIONS

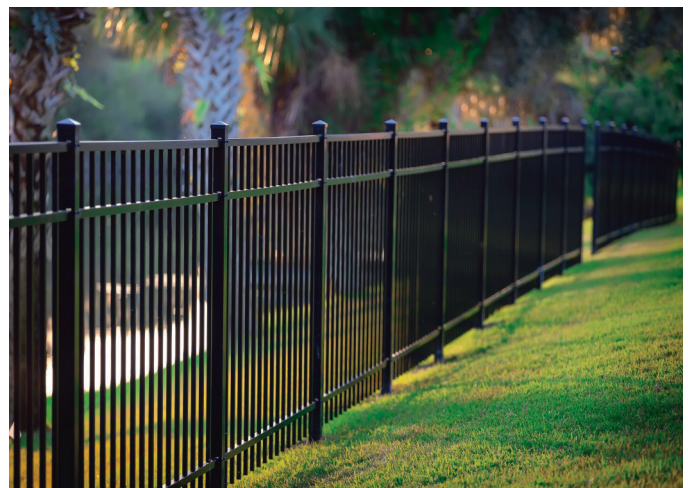
Adverse Possession

Existence of fence between two properties for over 40 years insufficient to prove good faith belief of ownership element of adverse possession.

Stewart v. Rader, No. 121,519, 2020 WL 4379049, 468 P.3d 344 (Kan. Ct. App. 2020) (unpublished opinion). Neither Stewart nor Rader obtained a survey before purchasing their neighboring properties that were separated by a fence that had been there for 40 years. Rader got a survey because he wanted to replace the old fence. The survey revealed that the fence was not on the boundary line. The Stewarts claimed ownership of the encroachment area by adverse possession under a good faith belief of ownership. The grounds for establishing adverse possession are:

“No action shall be maintained against any person for the recovery of real property who has been in open, exclusive and continuous possession of such real property, either under a claim knowingly adverse or under a belief of ownership, for a period of fifteen (15) years.” K.S.A. 60-503.

The Stewarts had owned the property for three years at the time of the lawsuit. They ultimately lost because the only evidence they had that prior property owners had a good faith belief of ownership of the encroachment area was the fence itself. That wasn’t enough to prove the “state of mind” of the prior owners.



City Land Banks

All taxes on real property, except special assessments, are removed and abated while the property is owned by a city land bank.



Op. Att'y Gen. No. 2020-10. A city land bank, by statute, has the power to acquire, manage, maintain, and repurpose vacant, abandoned and foreclosed properties. The Kansas Attorney General opined that when land is placed in a land bank it is to be removed from the tax rolls, along with any taxes, penalties, or interest applicable to the property at the time of acquisition. The city may also abate the special assessments owed at the time of acquisition, and re-amortize or defer payment the future assessments.

Deeds

In the absence of fraud or mutual mistake, the effect of a deed could not be modified by parol evidence (other documents or oral statements) of the parties' intent.

In re Nelson, 58 Kan. App. 2d 920, 475 P.3d 1284 (2020). When Terry and Sherry Nelson got divorced Terry argued that he mistakenly titled land he had purchased with his own separate property in joint tenancy with Sherry and that he was actually the sole owner. The district court found that, as he argued, he had not intended that they be joint tenants. Therefore, it concluded, the property was Terry's separate property notwithstanding the joint-tenancy deeds.

But the Kansas Court of Appeals ruled that testimony about Terry's intent could not be a basis for changing the terms of valid deeds in the absence of fraud or mutual mistake. The appellate court noted that neither party claimed the deeds were fraudulent and "the parties' conflicting testimony underscored that those deeds were not the result of any mutual mistake." Therefore, the deeds controlled, and the property was jointly owned.

Destruction of Trees

General rule for tree destruction damages is difference in property value, but exception allowing replacement value is possible if trees have "unique value."

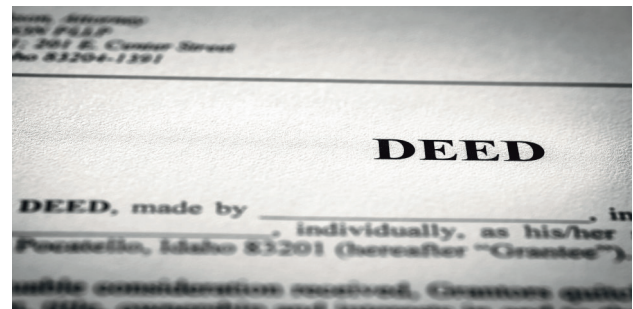
Ringneck Farms LLC v. Steuwe, No. 121,879, 2020 WL 5268234, 471 P.3d 33 (Kan. Ct. App. 2020) (unpublished opinion). Steuwe and Ringneck Farms were neighbors. A large hedge on Ringneck Farms' side of the boundary divided their two properties. It had approximately 156 trees which were around 70 years old. Steuwe came on to the Ringneck Farms property and cut down all of the trees, which were important to hunting on Ringneck Farms' property. Ringneck Farms sued, claiming replacement damages over \$1M.

Damages for the destruction of trees is generally the difference in the value of the property before and after. The \$1M claim was more than three times the land value. As a result the court excluded the evidence of that replacement value.

The Court of Appeals held that if the trees destroyed have a "unique value" apart from the land, then a plaintiff can recover the replacement value, but the damages must still be in proportion to the value of the property so that the property owner does not get a windfall. The Court noted that in this case, the cost to plant saplings might be an acceptable measure of damages. The court also found that Ringneck could recover the value of the severed trees since they had been hauled away.

Effect of Acceptance of Deed

Acceptance of deed satisfied signature requirement of statute of frauds as to restrictions on grantee, but did not necessarily constitute consent to reconveyance of homestead.



Estate of Seematter v. Seematter, No. 120,868, 2020 WL 5494493, 471 P.3d 37 (Kan. Ct. App. 2020) (unpublished opinion). Delmar Seematter sold property to his son Roger and daughter-in-law Colleen for their home. The deed claimed that he had a right to repurchase it if the couple divorced or one of them died. Roger died and Delmar sued Colleen to enforce the repurchase right. Colleen claimed she did not know about or agree to the repurchase right. She argued that the repurchase right in the deed was unenforceable under the statute of frauds because she had not signed the deed.

The Kansas Statute of Frauds reads: No action shall be brought ... upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them ... unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged

therewith, or some other person thereunto by him or her lawfully authorized in writing. K.S.A. 33-106.

The Court of Appeals found that acceptance of a deed satisfied the statute of frauds as to restrictions on the grantee contained in the deed. By “accepting the deed containing the repurchase provision, taking possession of the property, and building their home on it satisfies the statute of frauds.”

But Colleen also argued Delmar’s repurchase right was unenforceable because of her homestead rights to the property. While Colleen’s waiver of her homestead rights was not required to be in writing, her consent still needed to be proven by Delmar. The court held that acceptance of the deed did not establish her consent.

Foreclosures: Evictions

An assignee of an owner’s redemption rights who redeems foreclosed property obtains the owner’s rights in the property and a deed is not the only way to convey the property.



Bucklin Nat’l Bank v. Hayse Ranch, 58 Kan. App. 2d 715, 475 P.3d 1 (2020). After a foreclosure on Hayse’s property, Pruitt purchased Hayse’s redemption rights and exercised the right of redemption, including filing a notice of exercise of right of redemption in the foreclosure action stating that Pruitt was now the legal owner of the real property. Pruitt also filed an affidavit referencing the foreclosure case with the Register of Deeds stating she was the property owner. But she did not obtain or record a deed.

Even though Hayse had assigned away its redemption rights to Pruitt, Hayse later mortgaged the property to Bucklin. When Hayse defaulted Bucklin foreclosed. Of course, Pruitt claimed she owned the property and Bucklin had no right to foreclose. The Court of Appeals held that when a property owner assigns a statutory right of redemption the assignee, by exercising the right of redemption, obtains the same property rights that the owner would have obtained. No separate deed is necessary.

Moratoriums on Foreclosures and Evictions

Governor Laura Kelly through executive order prohibited the foreclosure of residential properties and the eviction of residential tenants when the cause of the default was COVID-19 related from the beginning of the COVID-19 pandemic through May 31, 2021. On June 1, 2021 the Kansas prohibition was lifted. However, at the time of this writing under a temporary order of the Centers for Disease Control, there remains a prohibition on residential evictions when the cause of the default is COVID-19 related, which is set to expire after July 31, 2021. The CDC has said this date is intended to be the final extension of the moratorium.



Mortgages

Lender may not obtain possession after default except: (i) with the borrower’s implicit or explicit consent or (ii) by court action.

In *Fairfax Portfolio LLC v. Carojoyo LLC*, 312 Kan. 92, 472 P.3d 54 (2020) a lender acquired a promissory note and secured it by a mortgage on a commercial property. The mortgage gave Lender the right to take possession of the mortgaged property if Borrower defaulted. Borrower was in default. Lender took possession. Borrower later sued claiming Lender was not entitled to take possession and had caused damages to Borrower. The Kansas Supreme Court ruled in favor of Borrower. Without respect to what the mortgage says, a lender must proceed through court in order to take possession after default unless the borrower gives consent, explicitly or implicitly, other than in the mortgage.

Comment: Even if permitted by the mortgage, a lender cannot take possession after default unless the borrower consents or a court grants lender the right of possession.

Premises Liability

The fact that a plaintiff was physically attacked only after leaving the premises did not preclude holding a business liable for failing to protect the plaintiff from an attack by a fellow patron.

Hammond v. San Lo Leyte VFW Post #7515, 311 Kan. 723, 466 P.3d 886 (2020). Jeffrey Hammond was headbutted and kicked by Travis Blackwood and his friends on the public sidewalk and street outside of the Clyde, Kansas VFW Post. The beating occurred after the VFW manager, joined by Blackwood and his friends, had expelled Hammond from the premises and the manager had returned inside. The expulsion followed an argument between Hammond and Blackwood, in the VFW bathroom, in which Blackwood had threatened to beat up Hammond. Hammond sued the VFW.



The VFW argued that as a matter of law, whatever duty it might have had was restricted to the VFW premises; since the injury occurred off the premises, the VFW claimed it could not be liable.

The Kansas Supreme Court noted that in Kansas, the proprietor of a business can be liable for one patron's assault upon another when the defendant has reason to anticipate the assault and then "fails to exercise reasonable care to forestall or prevent the same."

Conceptually, a negligent failure to protect Hammond could have arisen while the parties were still in the building without respect to where the resulting injury occurred. Therefore, the VFW's liability would depend on whether the plaintiff's injury was reasonably foreseeable to the VFW, whether the VFW's conduct was such that it breached its duty of reasonable care, and whether there was a causal connection between a breached duty and Hammond's injury.

Prescriptive Easement

Permission from property owner to use pathway and property owner's use of pathway defeated prescriptive easement claim.

Myers v. Loechler, No. 121,650, 2020 WL 4032835, 466

P.3d 1233 (Kan. Ct. App. 2020) (unpublished opinion). The Myers claimed they had a prescriptive easement for vehicle access to their property over a pond dam on a neighbor's property. The Court of Appeals agreed with the district court that the Myers claim failed.



To have a prescriptive easement claim the plaintiff must prove (1) possession of the property for at least 15 years, (2) that is open, exclusive and continuous and (3) "under a claim knowingly adverse or under a belief of ownership." The Myers use was not sufficiently exclusive because both the neighbors and the Myers used the pathway. The fact that the Myers were the only ones to use the pathway for vehicular access was not enough. The Court noted that exclusive possession cannot be established "if occupancy is shared by the owner."

The Myers also failed to prove that they believed that they owned a right to continue to use the pathway. The neighbors they had given the Myers' permission. Mr. Myers testified that he thought the county owned the pathway.

Comment: A prescriptive easement is akin to adverse possession, except it establishes a limited right of access or use instead of ownership.

Residential Sale

Homeowners' insurance policy did not cover claims made by property buyer.

Krause v. Kerns, 59 Kan. App. 2d 1, 476 P.3d 829 (2020). James Krause and Patricia Ann Vanlear ("buyers") bought a home from the Kernses. The Kernses provided the buyers with a disclosure statement indicating that there were no problems. The buyers sued, claiming that there were many undisclosed problems with the home. The parties settled. In the settlement, the Kernses assigned to the buyers the Kernses' rights arising under their homeowners' insurance policy. Buyers then sued the Kernses homeowners' carrier.

The court found that the insurance policy provided coverage only for damages caused by an "occurrence" and excluded any duty for the insurer to indemnify the Kernses with respect to claims arising from disclosures they made or failed to make that were material to the sale of the property. The Court of Appeals concluded neither the closing nor the Kernses' failure to correct their disclo-

tures qualified as an “occurrence” and that the damages the buyers claimed were damages that arose before, and not as a result of, the disclosures.



Comment: A different result may have occurred if sellers had assigned a claim they had filed prior to signing the contract for a casualty loss, such as hail damage.

Restrictive Covenants

Amendment to restrictive covenants was allowed without consent of all property owners when governing instrument provided that designated owner could act on behalf of all.



Russell v. Treanor Invs. L.L.C., 311 Kan. 675, 466 P.3d 481 (2020). In 1997 the owner of two adjacent commercial properties in Lawrence recorded an Operation and Easement Agreement which among other things, restricted the building size and prohibited either property from being used for a grocery store unless it was a gourmet food market. The Agreement could be amended by agreement of all of the current owners in writing and provided that if either parcel became owned by multiple owners, all of the owners of that parcel would designate one owner to act on behalf of all.

The two parcels became owned by separate owners and in 2003 those two owners amended the Agreement to

allow for a multi-unit condominium building. The amendment also designated the responsible owner who had authority to act on behalf of all other owners as to the parcel on which the condominium building would be built.

Russell purchased a condominium unit. Treanor Investments acquired the other property that was subject to the Agreement. Treanor sought to amend the Agreement to increase the building size allowed and permit a grocery store. Russell sued, arguing that the Agreement could not be amended without the consent of the condominium owners.

The Kansas Supreme Court reviewed the instruments and concluded that the Agreement as amended was unambiguous in allowing the designated responsible owner to act on behalf of all owners of the property on which the condominium building was located. Nothing limited this authority to contexts other than agreeing to further amendments to the Agreement.

Comment: Don’t assume that amendments to restrictive covenants require the consent of all owners. That authority depends on the terms of the covenant.

Right of Redemption/Due Process

Notice of the results of a tax sale not required to be given to owner who was previously notified of the sale and had been provided contact information to obtain the results of the sale.

Hattrup v. United States, ___ F. App’x ___, 2021 WL 386985 (10th Cir. 2021). The United States seized Gregory Hattrup’s real property to satisfy an outstanding tax obligation. The IRS provided Gregory with notice of the date of the public auction, and telephone number and address for information about the sale. It also informed him that he had a right of redemption. Julia Deng bought the property at the sale. Gregory first learned the property had been sold to Julia when she served him with a notice to quit, after which she received a quitclaim deed at the end of the redemption period.



Gregory sued the United States and Julia, arguing that his due process right had been violated because he was not provided with notice after the sale telling him the buyer or the purchase price so that he could redeem the property.

The court concluded IRS's notice to Gregory had satisfied procedural due process. Gregory's redemption rights were entitled to due process protection, but the information he had been provided was constitutionally sufficient to protect his rights. The notice Gregory received provided him with two opportunities to obtain the information he needed: he could attend the sale or he could use the telephone number and address he had been provided to obtain more information. He had done neither.

Title in Trust

What happens when land is titled in the name of a trust and the trust cannot be located?



Mounkes v. Mounkes, No. 121,335, 2020 WL 4913012, 469 P.3d 109 (2020) (unpublished opinion) Duane and Dorothy Mounkes owned a quarter section in Lyon county which they conveyed to the Duane D. Mounkes Living Trust in 1997. In 2001, Duane, as trustee, conveyed the east half of that quarter to Carol and William Rankin. Duane later died and Dorothy became incompetent. No copy of the trust instrument could be found. Dorothy's conservator filed a quiet title action to determine the ownership of the west half of the quarter section that remained titled in the trust. The district court ruled that the trust was not valid when created and the 1997 deed to the trust had been a nullity.

The Kansas Court of Appeals disagreed: there was evidence that the trust was in place prior to Duane's death – property was deeded to the trust and the trust was paying taxes on the land, and the trust later conveyed part of the property to Carol and William.

The appellate court held that the trust was initially valid, but failed once the beneficiaries and purpose of the trust could no longer be determined. At that point, the trust property

was held in a resulting trust for the benefit of the grantors, Duane and Dorothy as joint tenants with right of survivorship (the way title had been held prior to the conveyance to the trust). The deed to Carol and William would be unaffected because at the time of that deed, the trust had not yet failed.

Transfer on Death Deed

Grantee's signature of grantor's name to a deed was valid under amanuensis rule.

Moore v. Miles (In re Estate of Moore), 310 Kan. 557, 448 P.3d 425 (2019). Roxie Moore suffered a stroke in 1991 which significantly impaired her ability to communicate. In 2004, she asked Maureen, her ex daughter-in-law, to have an attorney draft a transfer on death deed (TOD) which conveyed 360 acres of land to Maureen. Roxie wanted the land to someday go to her grandchildren, the children of Maureen and her ex-husband (and Roxie's son) Harvey Jr.

Roxie asked Maureen to sign the deed, saying that she was in too much pain to do so, and Maureen signed the deed in Roxie's name.

In 2009, Roxie died without a will. Under the law of intestate succession, the property would have gone to Harvey but instead, under the TOD deed, the property became Maureen's. Maureen deeded the property to the sons she had with Harvey. Litigation ensued over whether Maureen had legal authority to sign Roxie's name to the deed and transfer Roxie's property to herself at Roxie's death.



The Kansas Supreme Court upheld the deed to Maureen. It held that the signature of an "amanuensis," a person signing the name of another at their direction, is effective as the signature of the person who directed the signature to be made. Further, that the use of an amanuensis in signing a transfer on death deed is proper.

As to policing the risk of a self-interested amanuensis, the Court held that the benefitting amanuensis needs to rebut a presumption of undue influence by clear and convincing evidence. The Court then reviewed the record and district court's fact findings and concluded that there was clear

and convincing evidence that Roxie did not want the property to go to Harvey Jr. and instead, wanted the property to go to Maureen and eventually from Maureen to Roxie's grandsons.

Finally, the Court concluded that Harvey Jr. had failed to prove by clear and convincing evidence that Roxie lacked capacity.

Comment: Although signing someone's name at their direction as an amanuensis can be enforceable, it should be used sparingly when needed.

Comment to real estate licensees: The Kansas Real Estate Brokers' and Salespersons' License Act prohibits a licensee from signing or initialing a contract on behalf of another person in a real estate transaction "unless authorized to do so by a duly executed power of attorney." K.S.A. 58-3062 (a)(25).

NOTES

Real Estate Services of Adams Jones

Brokers and Salespersons. Advise licensees of responsibilities under Kansas law, including the Real Estate Brokers' and Salespersons' License Act and the Brokerage Relationships in Real Estate Transactions Act.

Commercial Leasing. Work with a variety of commercial leases including office, warehouse, retail, and ground leases for commercial landlords and tenants.

Commercial Purchases and Sales. Assist clients in completing real estate transactions through contract preparation, due diligence review, title examinations, and closings.

Condemnation. Represent landowners in condemnation actions by governmental entities.

Condominiums. Prepare condominium declarations and governing documents.

Construction Law. Prepare and enforce mechanics' liens and claims against payment and performance bonds. Prepare and review construction contracts. Represent owners, contractors and subcontractors in disputes.

Covenants & Restrictions. Create community associations, covenants and restrictions for commercial and residential properties.

Creditors' Rights. Represent commercial creditors and financial institutions in protecting and recovering assets and property in foreclosures and workouts.

Developer Incentives. Assist developers utilizing Community Improvement District funding, Tax Increment Financing, tax abatements, and other development incentives.

Financing. Represent borrowers and lenders in financing of commercial real estate and businesses.

Land Use/Zoning. Appear before the Board of Zoning Appeals and appellate bodies on land-use issues for landowners and governmental entities.

Litigation/Alternative Dispute Resolution. Resolve disputes for clients in the most appropriate forum available for their controversy, including negotiation, mediation, arbitration, and litigation. We believe our strong real estate practice gives us an edge when called upon to convince a decision maker of our client's position. Cases have included enforcement of contracts, boundary disputes, nuisances, and brokerage commission claims. Available to serve as mediators and arbitrators of real estate disputes and expert witnesses in real estate cases.

Natural Resources. Represent quarry owners in leasing and selling rock quarries. Represent oil and gas operators, lease owners and contractors over lease operations.

Tax Appeals. Prepare and process appeals of real estate tax valuations and assessments, including actions before the Board of Tax Appeals. Resolve issues with special assessments and improvement districts. Particular experience with taxation, oil and gas interests, hotels, and income-producing properties.

Practice Areas
Business & Corporate
Condemnation & Tax Appeals
Employment Law
Estate Planning & Probate
Estate & Trust Disputes
Land Use & Zoning
Litigation
Real Estate



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