



## Alerts

### Advocacy Statements Made by Attorney Cannot Later Be Used as Admissions in Legal Malpractice Action

April 4, 2019

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*Power Control Devices, Inc. v. Lerner*, 2019 Kan. App. LEXIS 5 (Ct. App. Jan. 25, 2019)

#### Brief Summary

An attorney's statements in the course of representing a client are not admissions and cannot be used as such against the attorney in a subsequent legal malpractice case.

#### Complete Summary

The Kansas Court of Appeals recently analyzed whether an attorney's statements in support of his client during the underlying litigation could be used as evidence against the attorney in a subsequent legal malpractice case.

The underlying case was highly technical and required the use of expert testimony; however, plaintiff did not present any expert testimony in support of its subsequent legal malpractice case. Instead, plaintiff in the legal malpractice case attempted to rely on the attorney's statements during the course of the underlying case as "admissions" to prove the malpractice case.

The appellate court determined the attorneys statements were not admissions; the statements were advocacy that could not be used as evidence against the attorney in the malpractice case. Specifically, the court noted "[a]n attorney is an advocate for his or her client and is always trying to put the best case forward. But in a legal malpractice action, an attorney's opinion of the case, the attorney's pleadings or filings in the case, or even the attorney's puffing about his or her abilities to prevail, is not evidence of any of the claims made in the underlying lawsuit." *Power Control Devices*, 2019 Kan. App. LEXIS 5, at \*19-20.

Because the legal malpractice plaintiff did not present expert testimony in support of its case and could not use the attorney's statements as admissions, the appellate court affirmed the trial court's judgment as a matter of law in favor of the attorney.

#### Attorneys

Terrence P. McAvoy

#### Service Areas

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## Significance of Decision

Kansas joins other courts across the country in recognizing that statements made by lawyers on their clients' behalf in underlying litigation are not admissions in subsequent legal malpractice actions. See, e.g., *Heinze v. Bauer*, 145 Idaho 232, 238, 178 P.3d 597 (2008).