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The Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.

The Kansas Bar Association Seeks Candidates for Executive Director’s Position

The Board of Governors of the Kansas Bar Association is seeking applications from qualified candidates who would like to be considered for the position of Executive Director of the Kansas Bar Association. Interested candidates should send resumes, along with specific salary and benefit requirements, to PO Box 780312, Wichita, KS 67278, by close of business, February 17, 2012. Qualified candidates will be interviewed thereafter and a final selection will be made in late March 2012. Specific questions on the selection or interview process may be directed to the Chairperson of the Search Committee:

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Kansas Bar Association, Topeka, Kan.
Before I report on my month of activities, I do want to encourage all of you to take the time to review the report of the Kansas Supreme Court’s Blue Ribbon Commission and the weighted caseload study. Both can be accessed online at http://www.kscourts.org/BRC-Report/ and http://www.kscourts.org/Weighted-Caseload-Study/. Both make for interesting reading. As lawyers, we are in a unique position to offer our thoughts on the recommendations and findings of these reports.

It was yet another wonderful month of local bar association meetings; I began my month with the Wichita Bar Association (WBA). Being from Wichita, I would think that my friends here have heard enough over the years, but they invited me anyway. I had the chance to talk to approximately 90 of our colleagues about what the KBA has been up to as of late and then to present two of our members with 50-year pins and to recognize the service of one of our World War II veterans. These recognitions have been a highlight of my local bar visits. I have been able to research those being recognized before I attend, and it has been great fun for me and those who are recognized. I was quite happy to award Mike Stout and Ron Badger with their 50-year pins. Then I had the distinct pleasure to recognize Aubrey “Brad” Bradley who was a pilot in WWII and was a prisoner of war as well. You can find details of his remarkable service and life in the March 2011 issue of the Journal of the Kansas Bar Association. That presentation was very special for me because Brad taught me some very important lessons about civility early in my practice. He is a gentleman and a fine lawyer and it made me proud to recognize him before friends and colleagues, who gave him a standing ovation. Many other friends attended, including Jay Fowler, WBA president; Hugh Gill, WBA president-elect; Jennifer Magana, WBA vice president; Jack Focht; Bob Hughes; Tom Garretson; and JoLynn Oakman.

Next, I went north to Harvey County. The Harvey County Bar Association meets monthly in Newton. When I arrived, Kevin Loeffler, the president, greeted me and there were about 30 attorneys in attendance. I asked Kevin about his term, and he is serving his first term as president. Lunch was wonderful (and free – thank you, Harvey County), and when I remarked about it, I was entertained with stories about the Harvey County “gravy wars.” Apparently, there are those members, like Randy Pankratz, who enjoy a lighter more healthy fare, such as that offered at the Prairie Harvest organic store, and those members, like Jim Gillmore who state “I ain’t eating anything unless it’s brown.” So for many years, lunch alternated between a local truck stop and a sandwich shop. Obviously, the non-gravy group won out; monthly meetings are at Prairie Harvest, where Jim Gillmore saved his appetite for something brown. Also, here is another interesting tidbit about Harvey County that I have not seen in any of the other local bar associations I have visited this year; there are a LOT of multi-generational law firms in Harvey County. Arnold and his son, Greg Nye; Levi Goossen, and his daughter, Sue Ann Jantz; Don and Harvey Snapp; Herb and his son, Mike Sizemore; George and his sons, Joe and John Robb; and Fred and Ted Ice. This is unusual, Ted Ice remarked, “because kids usually want to get away from their parents.”
I was able to honor both Arnold Nye and Ted Ice with 50-year pins at the bar meeting, which Ted's daughter Laura Ice also attended. While I don't have the space to relate all of the stories about Ted and Arnold that I was told during my research in anticipation of the meeting, it was filled with hilarious stories and outbursts of laughter.

My final bar visit found me at Fabiola's in Wellington for a meeting with the Sumner County Bar Association where Shawn DeJarnett is the president. There were about a dozen in attendance, including the local judges. Shawn noted that there were some “carpet-baggers” in attendance from Wichita (that would be you John Johnson) and some locals as well, including Kerwin Spencer, Evan Watson, and Matt Metcalf. Good company and some good folks.

KBA President Rachael Pirner may be reached by email at rpirner@ksbar.org, by phone at (316) 630-8100, or by posting a note on our Facebook page at www.facebook.com/ksbar.
It’s been about 15 years since my Boy Scout career came to an end. Even though my life has changed in enumerable ways since then, many of the lessons that I learned during my years as a Scout still stick with me today. I have applied those lessons to almost all of the roles that I play in life: citizen, husband, father, and attorney.

Most all of the principles that are taught in Scouts are summarized in the Scout Law:

A Scout is:

- Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, and Reverent.

I think the Scout Law could actually be renamed The Young Lawyers Law. Each of the concepts and ideas outlined in the Law provide a great guideline to young and new attorneys who are trying to make their way in the profession. It also applies equally to those attorneys who have been practicing for years and years.

**Trustworthy**

Trustworthiness is probably one of the most important traits that an attorney needs to have. Trust of other attorneys, judges, clients, and the public is an essential asset to a successful legal career. If you are a trustworthy person, and you exercise and display that trust, other attorneys and the courts will give you the benefit of the doubt, and your practice of law will be that much easier. If your word is your bond, you will be respected. If clients can trust you, they will stick with you, and your business will flourish.

**Loyal**

Loyalty to your clients goes without saying. It’s our ethical responsibility as lawyers. But, you can take loyalty beyond that required by the Rules of Professional Conduct. If you show loyalty to your clients, and others you work with, they will stick with you. Loyalty builds relationships, and relationships will be the foundation of your career.

**Helpful, Friendly, Courteous, Kind, Obedient, Cheerful**

It may sound too simple, but just being a nice, kind and helpful person will get you far in life, and far in your career. Be kind to your assistants, secretaries, paralegals, and other staff. You will find that they will save you over and over during the course of career, and will make your life easier. Additionally, they can teach you many things about the practice of law. Some of the most practical and useful information I have learned about the practice of law has come from non-lawyers. Be sure to be nice to court staff and clerks. They can also make your life much easier when you get into a bind.

**Thrifty**

Good management of your business and personal finances is a must in this profession. Unfortunately, the attorney discipline decisions of the Kansas Supreme Court are full of examples in which attorneys found themselves in desperate financial situations, which ultimately cost them their law licenses. Don’t let yourself get into that situation. Many young lawyers have certain expectations about the income and style of living they will have after they become an attorney. The bottom line is, in almost all instances, those expectations are unrealistic. Do everything you can to keep your debt to a minimum. Take financial planning classes. Do not stretch yourself to “keep up with the Joneses” or even other attorneys you know or work with. Being thrifty at the beginning of your career will pay off in the long run, and will allow you to reach your financial goals over time.

**Brave**

No matter if you’re a litigator, transactional attorney, government attorney, in house counsel, or any other type of attorney, this profession requires bravery. Day in and day out, you will be asked to go to bat for your client. You will have to put your neck on the line, make tough arguments, and even tougher decisions. That’s what makes this profession great. You may not feel very brave at first, but experience will empower you, and little by little, your bravery will surpass your expectations.

**Clean**

This one speaks for itself. Presentation means a great deal in our profession, especially when you are new to the profession, and still building a reputation. My advice is to dress sharp at all times. When in doubt, wear a suit, or courtroom attire. Also, do your best to keep your office clean. Your co-workers and assistants will greatly appreciate it, and you will look more organized and confident to other attorneys, and most importantly, to your clients.

**Reverent**

The Encarta Dictionary defines “reverent” as follows: “Respectful: Feeling or expressing profound respect or awe.” Always give the utmost respect to the law and the courts. I have seen lawyers who have lost that since of respect, and it isn’t becoming. At the end of the day, all of us are officers of the court, and we are dealing with issues that have great impact on the lives of others. Such responsibility requires the utmost reverence.

Take a moment and reflect on how these ideas apply to your life and your practice of law. It might help you make some improvements, as you embark on another year as an attorney.

**About the Author**

Vincent M. Cox is an associate with the Topeka firm of Cavanaugh & Lemon P.A., where he maintains a civil litigation practice. He received his bachelor’s degree from Benedictine College in 2002 and his juris doctorate from Washburn University School of Law in 2005, where he was a member of the Washburn Law Journal. Cox is a member of the Topeka and Kansas bar associations and is past president of the Topeka Bar Association Young Lawyers Division.
Casemaker's New Look
By Danielle M. Hall, Kansas Bar Association, Topeka, publications administrator, dhall@ksbar.org

Casemaker: Features and Functions for a Fast Paced Profession

The legal profession is one of multi-tasking and time-consuming projects, and all of us are familiar with the time it takes to do legal research for a client. What if there was a legal research product out there that could save you time in your research and as an added bonus be completely free? Well there is! As part of your KBA membership we offer Casemaker, an online legal research tool that provides you access to statutes, case law, and regulations for all 50 states in addition to other information.

We are pleased to announce that Casemaker is raising the bar even higher by providing a new version of its legal research product, which is designed to simplify your work. The new features of Casemaker will allow users to work on legal research with speed and ease, while providing the same accurate information that was available in Casemaker 2.2 and still being completely free for members. The new features include a new search bar, easier access to your work in one convenient location, and new features to help keep you organized. Here are some of the features to look forward to using in Casemaker.

Google-Like Search Bar

This new addition to Casemaker will make searching terms and citations easier. You will now see the search bar at the top of every page, and it is modeled closely to Google's familiar search bar, making the running of the database simple and easy. The new search method will save you time by being available on every screen, making it easier to navigate.

Within the new search bar you are able to search by phrases or citations using either simple or complex language. The search will eliminate filter words like “and” or “it” to increase speed and accuracy in the search. As you type in the search bar, it will begin to make suggestions of search terms, just like a Google search. Additionally, typing citations will be much easier in the new search bar. No longer will you have to worry about capitalization or periods. The auto correct feature will make sure your citations are being searched correctly by recognizing the misspelling and correcting it, so if you type “225kan572,” the citation will be corrected to “225 Kan. 572.”

Accessibility Features

Casemaker has taken steps to make it easier to access your research in one place. Elite provides your most used collections and most recently viewed documents on the right side of your screen in a new feature called “Quick Links.” As you use Casemaker, it will begin to tailor your Quick Links to your research. If you often look at a particular set of cases for a particular part of the Kansas Statutes, you will be able to easily access that information with a click of the mouse on the right side of the screen.

In addition to the Quick Links feature, you will now be able to create individual folders to store your research in simply by dragging and dropping those items into folders. That means you can do research from anywhere and come back to it later, even on a different computer. You will also still be able to access your search history if you happen to forget to put a case in a folder.

Organizational Features

Casemaker has added new features to help you with your organization and allow Casemaker to become more than just your average research library. Included in these new features is the notes tool. You will now be able to write, post and save notes directly to any document being viewed. No longer will you have to print and make notes in the margins or on a separate piece of paper. All of your notes will be saved directly into the document making important items easier to find later on when you need them.

Not only will you be able to save notes directly to a case, you will also be able to track your research time to particular clients. Casemaker has added the function to save your search histories under a particular client or case number. This new function will allow you to track exactly what you researched for a client and how long you conducted that research for the client, making it a tool that can be used to track your research time for billable hours.

Look Out for Casemaker

Casemaker will be implemented soon on our website. If you have not had the opportunity to try Casemaker, I suggest you take the opportunity before we transition completely. You can access it currently through a link contained within Casemaker 2.2. Also, if you or your local bar is interested in learning more about Casemaker please contact the KBA at (785) 234-5696.

About the Author

Danielle Hall is the publications administrator for the Kansas Bar Association. She received a bachelor’s degree in political science in 2006 and a juris doctorate in 2009, both from Washburn University. Prior to joining the KBA, she practiced primarily in civil litigation. In addition, she is also an adjunct professor at Washburn University School of Law, teaching trial advocacy and coaching the advocacy competition teams.
2012 Board of Governors Elections: Petitions Due February 10

District 5 (Shawnee County) is up for election in 2012. Candidates seeking a position must file a nominating petition, signed by at least 25 KBA members from that district, with Deana Mead by Friday, February 10. In addition, the KBA has seats up for election in Districts 1, 2, 4, 6, 7, and 10.

To obtain a nominating petition, please contact Christa Ingenthron at (785) 234-5696 or at cingenthron@ksbar.org. If you have questions about the KBA nominating or election process, or about serving as an officer or member of the Board of Governors, please contact Glenn R. Braun at (785) 625-6919 or at grbraun@haysamerica.com or Deana Mead at (785) 234-5696 or at dmead@ksbar.org.

Explore this Exciting Educational Opportunity … KBA Delegation to Cuba

The KBA has the unique opportunity of organizing a delegation to visit Cuba May 6-11 for the purpose of researching the country’s legal system. The delegation will undertake a comprehensive study of the Cuban legal system, from the teaching of law to the criminal justice and judicial systems; civil and family code; business and commercial rights; and resolving domestic and international commercial conflicts. This delegation will be travelling under a license for professional research and the estimated travel cost per delegation member is $4,595.

Space is limited, so if you are interested in attending or have questions regarding the delegation, contact our program representatives at Professionals Abroad, at (877) 298-9677 or please visit http://bit.ly/kba_cuba for more information.
A new year arrived and, given the apocalyptic potential for 2012, resolutions may seem superfluous. Nevertheless, in the event of apocalypse delayed, some of us will take a crack at self-improvement. Choosing a resolution was difficult: work on my temperament, improve organization at the office, put away more money for college, or go play? Really tough call and my choice a tutorial in selecting a resolution — choose the appealing ones! I will play.

That broad aim is a more focused goal; I want to be healthier. My own experience and science agree that simple, regular exercise (play) and diet produce profound results by moderating bad things like high blood pressure, diabetes, heart disease, and arthritis. Exercise and diet also produce positive things like better mood, more physical and mental stamina, higher energy levels, and better sleep. The barrier to claiming those benefits is usually our motivation deficit. We find it hard to begin exercise and to diet and even harder to maintain. An array of online tools, low-tech gimmicks, and communities take aim at the motivation problem.

Social Networks as Gym and Trainer

I frequent SparkPeople.com throughout each day for motivation. The site includes tracking tools with progress graphs for weight and exercise and the diet tracking is thorough with health information on close to a million foods, including many restaurant and prepared items. Other tools include meal plans with printed shopping lists (and great recipes), exercise plans with tutorial videos, and a community of local users for support or competition. The site is free and smart phone apps are available for on-the-fly diet and exercise tracking and meal shopping lists.

Fitocracy.com is another similar site though, in my opinion, it feels a bit more Spartan. Arranged a bit like Facebook, Fitocracy is primarily a fitness-based social network for friends and groups engaged in similar challenges and goals. Exercise is the focal point with no fluff about diet. Log workouts to build points and rise through the Leaderboards. While SparkPeople has a similar challenge system, Fitocracy puts friendly (or fierce) competition at the forefront. Right now, it’s a free beta but also invitation only. Both Fitocracy and SparkPeople optionally link to Facebook so your entire social network can cheer your progress and jeer your backsliding.

Low-Tech, Website-Assisted

Hopping into an online fitness community can be a bit daunting and some will go it alone or offline awhile before sharing performance with others. Running is possibly the simplest, cheapest cardio exercise and getting started is easy. Start with the Couch to 5K (c25k) program that has put thousands of new runners on the starting lines of 5K races. It is a simple program (available at coolrunning.com) using interval training — walk a little then run a little — to build stamina. Gradually, you walk less and run more until you can run a full 5K or 3.1 miles. A site like jog.fm will create custom music playlists for your training with songs to match your pace and a Nike+ sensor in a shoe or integrated into an iPhone/iPod will manage the intervals (and provide cheers from professional athletes when you reach personal bests).

Weight training is as important as cardio but often overlooked because people assume it requires special tools or gym memberships. However, the average American hauls around enough body fat for decent weight training. Pushups are simple and hundredpushups.com gradually works you from a half-dozen to at least 100 over the course of several weeks. Similar programs on the site perfectonline.com/daily_workout combine for full-body weight training conditioning you for a deck-of-cards workout. That plan assigns an exercise to each suit and a number of repetitions based on the face value; work through part of a deck even and you will feel it the next morning. If you fancy yourself more hardcore, then there is always a similar approach with a prison workout at felonyworkout.com — recreate the gym experience of a felon in solitary!

Survive and Thrive

Whatever your approach, physical well-being is a crucial component of our profession. The mental and physical stamina demands of the job are met more readily with exercise and proper diet while the pitfalls of depression and addiction can be held at bay. At the very least, we may live a little longer (apocalypse allowing) for our clients and families.

About the Author

Larry N. Zimmerman, Topeka, is a partner at Valentine, Zimmerman & Zimmerman P.A. and an adjunct professor teaching law and technology at Washburn University School of Law. He has spoken on legal technology issues at national and state seminars and is a member of the Kansas Credit Attorney Association and the American, Kansas, and Topeka bar associations. He is one of the founding members of the KBA Law Practice Management Section, where he serves as president-elect and legislative liaison.
You have heard it before: Do not attack the other side. Stay above the fray. Yet we all know how hard it is to do. The other side says you mischaracterized the holding of the key case when they have made numerous false and misleading statements in their brief. It is hard not to point it out. Perhaps it dates back to that time your sister told your mom you hit her and you instinctively yell back, “She hit me first.” But we also know that just like there was nothing more annoying to your mother than her kids fighting with one another, judges despise it when lawyers bicker. Falling into that trap makes the arguments you make less effective.

That is particularly true if the information the other side has taken liberties with is not material to the issue or to the argument you are making. No matter how hard it is, you must just ignore it. Do not waste your reader’s time pointing out a mistake that does not matter. It is just annoying.

If the information the other side has misstated is material to the case, then you should address it with the assumption that the other side has simply and inadvertently erred. Let the reader compare the truth to what your opponent has said. Do not give your reader an excuse to be annoyed with you rather than with your opponent.

The point can be taken even further. The most persuasive argument is the one that sounds objective. Take, for example, this sentence: The plaintiff was clearly mistaken. The addition of the word “clearly” does not make the statement any stronger. Really, it makes it weaker. It looks like you are trying too hard. Read, instead, this sentence: The plaintiff was mistaken. Isn’t this really stronger, more persuasive? It is not an argument; it is just a fact.

So, if you are trying to persuade someone, – the judge, the other side, your client, your supervising attorney – try to sound like you are simply providing objective advice. Language is more persuasive when it advises the recipient about what he or she needs to do. Below are some examples of parts of a brief written in a more adversarial style and how you could write them more effectively in an advisory style.

<table>
<thead>
<tr>
<th>Adversarial</th>
<th>Advisory</th>
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<tr>
<td>The defendants argue that the documents are discoverable.</td>
<td>A document is subject to the qualified immunity from discovery whenever it</td>
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<td></td>
<td>falls under the work product rule.</td>
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<tr>
<td>Despite their extensive arguments, the defendants have failed to show the</td>
<td>This document qualifies as work product.</td>
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<tr>
<td>necessity of obtaining the requested documents.</td>
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The challenge with adversarial language is that it looks more persuasive on the surface. If you are trying to impress your client or the senior partner with your advocacy skills, you can easily fall into the habit of peppering your language, either written or oral, with superficial proof that you are a rigorous advocate. And it often works to please the client or senior partner. The problem is they are not the people you are ultimately trying to persuade. If it is easy for the client to identify the adversarial language, it will be easy for the judge to identify it as well. Most of the time adversarial language just seems argumentative, not persuasive.

So, eliminate the “clearlys” and their synonyms, obviously, plainly, definitely, surely, certainly, absolutely, undoubtedly, etc. When you can, eliminate the other side entirely from your argument. Rather than say, “Plaintiffs argue this case is distinguishable from Johnson v. Jones, but they are wrong” just say, “This case cannot be distinguished from Johnson v. Jones.” Just address the law and the facts themselves directly. An effective advocate does not attack someone else’s argument, but rather simply explains what the law is and how it applies to the facts.

You will discover that your arguments are more effective when they do not sound like arguments at all.

About the Author

Betsy Brand Six is a Lawyering Skills Professor and Director of Academic Resources at the University of Kansas School of Law. Six, a native Kansan, has taught legal writing for eight years. Before she began teaching, she practiced environmental law for 13 years. Six received her juris doctorate from Stanford Law School in 1992. She can be reached at bsix@ku.edu.
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I carpool with a friend of mine every day to the Johnson County District Attorney’s Office where we work. Because, between law school and work, we effectively have no lives; our conversations often center on what we consider to be interesting legal topics. I chose to draw on one of those conversations for this article. I decided to focus on a discussion we had about how our jobs have caused us to take positions that, in the academic world we may not agree with, but in practice were able to take with little effort.

Despite working in two very different lines of work at the DA’s office, my friend and I have similar issues on the job. He slugs it out in the trenches of misdemeanor and low-level felony cases; I work in the appellate division. We’ve discussed that what we thought we knew in the beginning and what we’ve learned doing the job are markedly different. For him, it’s that justice does not always mean sticking the defendant with the highest charge possible. For me it is that what I believed in the academic world and the role I take on in my job are two very different things. But the interesting part is that because of what I’ve learned in school it doesn’t matter.

One of the earliest lessons that a student of the law is taught is the proverbial “how to think like a lawyer.” It’s something drilled into your head from the moment you set foot into the first class. Yet, it’s not something that you can learn in the traditional sense. There isn’t a landmark Supreme Court case on it, there isn’t a hornbook that tells you how it works. Rather, it’s something that must be internalized and understood. Law school overtly taught me how to analyze, recognize, and create an argument, and it taught me how to do that from both sides of the same issue. What I didn’t realize is that law school also taught me how to do that without having to consciously decide to see both sides. I realized this because of the diametrically opposed positions that I hold in the academic world from what my job requires of me.

I’ve always been interested in criminal law. Specifically I’ve always been interested in protections in defendants. I’m a strong believer that the exclusionary rule should be broadened, not narrowed. I believe that the onus should be firmly on the state to show that a confession is voluntary, and that Miranda was properly given. However, in my job, I have to defend the very things that academically I may disagree with. What I’ve noticed, though, is that I have no problem doing it. I attribute that to the lesson of “thinking like a lawyer” that I, evidently, so clearly learned in school.

I defend the state and the actions of the state essentially in every appeal I pen. Law school so clearly trains you to see both sides of an issue that, initially, in writing these briefs I didn’t even recognize that I was taking a position that in the academic world I would have disagreed with. I’d even find myself annoyed when I came across a case that was detrimental to our position; then of course immediately find a way to distinguish it. After about the fourth or fifth brief, I noticed what was going on. I was arguing to admit evidence, confessions, and to uphold convictions that, in school, I would have been opposed to. I think this is an indicator of the effectiveness and the type of learning one goes through in law school.

Learning to think like a lawyer was something that was overtly stated but subtly taught. Professors would ask us to present the other side of an argument; many used the Socratic method to pull answers out of us, forcing us to see every possible angle. The lesson was something that we all learned but I don’t think we realized we were learning. After two years of the lesson, I could easily see both sides of an argument, anticipate a counter argument, and know how to rebut it. What I didn’t realize was the extent to which I learned the lesson.

Not only was I able to take a position contrary to my beliefs, but I also took that position without realizing I was taking it. I learned so well to take a position contrary to my own view that, when my job required me to do it, I took it without even consciously deciding to take it. It’s one thing to learn to recognize a contrary view and anticipate the counter arguments to it. It’s quite another thing to learn so well that every issue has two positions that, when asked, you can immediately see both arguments without considering whether you agree to them.

The nature of this job requires lawyers be able to adopt a position that they may not agree with. Obviously, a lawyer doesn’t have to accept every client he gets, and need not defend someone or a position that he finds indefensible. However, learning this lesson allows one to take any position and effectively defend it. One thing I’ve always struggled with in my chosen career is whether I will be able to defend someone or some position that I disagree with. This experience, and the skills law school evidently taught me, has allayed these fears. While I still will not likely seek out positions I don’t agree with, at least I know that when presented with them I can effectively defend them. By far the most valuable lesson I will take from law school is the ability to “think like a lawyer.”

About the Author

Andrew Dufour is a third-year law student at the University of Kansas. He received his degree in political science from Northwest Missouri State University. Dufour enrolled in law school in Kansas so that he and his wife could remain close to her family in Missouri. He has been interested the law since high school and enrolled in law school with the intent to pursue a career working on behalf of the public.

Andrew Dufour, University of Kansas School of Law, Lawrence
Members in the News

CHANGING POSITIONS

Kevin W. Babbit has joined Fagan, Emert & Davis LLC, Lawrence.

Aaron R. Bailey and Derek L. Brown have joined House, Welch, Babbott, and Babbott, LLP, Lawrence.

Carman Charles “Bud” Payne M.D.

Mitchell W. Rice has joined Mann Law Office LLC, Hutchinson.

David A. Williams has joined Raytheon Aircraft Credit Corp., Wichita.

CHANGING LOCATIONS

John E. Angelo has started his own practice, Angelo Law Office, 550 N. 159th St. E, Ste. 205, Wichita, KS 67230.

Courtney T. Henderson has moved to 108 E. Poplar, Ste. B, Olathe, KS 66061.

Osman & Smay LLP has moved to 7930 Sante Fe Dr., Ste. 100, Overland Park, KS 66204.

Wall Huntington Trial Law has moved to 20204 N. Woodlawn, Ste. 406, Wichita, KS 67208.

Mark A. Werner has started his own practice, Law Office of Mark A. Werner, 201 S. Broadway, Ste. C, Pittsburg, KS 66762.

Jennifer L. Wyatt has started her own practice, 228 S. Sante Fe, Ste. C, PO Box 3432, Salina, KS 67402.

MISCELLANEOUS

J. Nick Badgerow, Overland Park, has been selected as the recipient of the 2011 Robert L. Gernon Award for outstanding service to continuing legal education in Kansas.

Eric S. Namee, Wichita, has been appointed to the University of Kansas Law Alumni Board of Governors.

Editor’s note: It is the policy of The Journal of the Kansas Bar Association to include only persons who are members of the Kansas Bar Association in its Members in the News section.

Obituaries

Robert “Bob” Lesley

Robert “Bob” Lesley, 53, of Kansas City, Mo., died December 10. He was born August 20, 1957, in St. Louis, the son of Oliver Robert Lesley and Mary Belle (Haley) Lesley. He received a Bachelor of Arts degree, cum laude, from Westminster College in Fulton, Mo., and a Juris Doctor from Washington University School of Law in St. Louis, where he was editor of the law review and elected Order of the Coif.

Lesley’s law career began at Stinson Mag and Fizzell, where he became a partner of the firm and continued at Sonnenchein Nath and Rosenthal. Most recently he was a partner in the trial department at Lathrop and Gage. He served on the board of Westminster College for many years. Lesley’s commitment to the Kansas City community included leadership in the University Associates, and board leadership roles with Young Audiences and Kansas City Friends of Alvin Ailey.

He was preceded in death by his parents. Lesley is survived by his wife, Siobhan McLaughlin Lesley; and daughters, Cianna McLaughlin Lesley and Olivia Fiona Lesley.

Carman Charles “Bud” Payne M.D.

Carman Charles “Bud” Payne M.D., 86, of Prairie Village, died April 12 at St. Luke’s Hospital in Kansas City, Mo. He was the only child of Carman Green and Julia (Hames) Payne of Olathe.

After graduating from high school, Payne joined the Army Air Corps and flew the “Hump” during World War II, earning a Distinguished Flying Cross and two air medals. He received a bachelor’s degree from the University of Chicago and a juris doctorate from the University of Kansas School of Law. After practicing law briefly and serving as a law clerk in the 10th U.S. Circuit Court of Appeal, he earned a medical degree from Albert-Ludwigs-Universitaet Freiburg in Germany. Ill health prevented him from practicing medicine; however, he gave medical/legal evaluations upon returning home to the Kansas City area.

Payne is survived by his wife, Rhoda, and son, Christopher, of Washington, D.C.

Robert H. Thornburgh

Robert H. Thornburgh, 76, of Hiawatha, died November 10. He was born December 4, 1934, in Nortonville, one of four children of Hall and Geneva Reeves Thornburgh. After graduating from Nortonville High School and Baker University, he obtained his pharmacy and law degrees from the University of Kansas.

He was a Mason; a member of the Delta Tau Delta fraternity; a certified Dale Carnegie instructor; a volunteer who taught dozens of classes at the U.S. Army Disciplinary Barracks at Fort Leavenworth during the Vietnam War; was a Gideon; taught business law at Johnson County Community College; and was a member of the Brown County, Northeast Kansas, and Federal bar associations.

He is survived by Sharlyn and Sharply; a brother, Stan Thornburgh, of Topeka; a sister, Leda Smith, of Topeka; seven nieces and nephews; and numerous great-nieces and -nephews. He was preceded in death by his parents and his brother, Don.
Distinguished Service Award: This award recognizes an individual for continuous long-standing service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.

- The recipient must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public.
- Only one Distinguished Service Award may be given in any one year. However, the award is given only in those years when it is determined that there is a worthy recipient.

Phil Lewis Medal of Distinction: The KBA’s Phil Lewis Medal of Distinction is reserved for individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others.

- The recipient need not be a member of the legal profession or related to it, but the recipient’s service may include responsibility and honor within the legal profession.
- The award is only given in those years when it is determined that there is a worthy recipient.

Professionalism Award: This award recognizes an individual who has practiced law for 10 or more years who, by his or her conduct, honesty, integrity, and courtesy, best exemplifies, represents, and encourages other lawyers to follow the highest standards of the legal profession.

Outstanding Young Lawyer: This award recognizes the efforts of a KBA Young Lawyers Section member who has rendered meritorious service to the legal profession, the community, or the KBA.

Outstanding Service Awards: These awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the KBA and for recognizing nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.

- A total of six Outstanding Service Awards may be given in any one year.
- Recipients may be lawyers, law firms, judges, nonlawyers, groups of individuals, or organizations.
- Outstanding Service Awards may be given to recognize: Law-related projects involving significant contributions of time; Committee or section work for the KBA substantially exceeding that normally expected of a committee or section member; Work by a public official that significantly advances the goals of the legal profession or the KBA; and/or Service to the legal profession and the KBA over an extended period of time.

Pro Bono Award: This award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor. In addition to the Pro Bono Award, the KBA awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:

- Lawyers who are not employed full time by an organization that has as its primary purpose the provision of free legal services to the poor;
- Lawyers who, with no expectation of receiving a fee, have provided direct delivery of legal services in civil or criminal matters to a client or client group that does not have the resources to employ compensated counsel;
- Lawyers who have made a voluntary contribution of a significant portion of time to providing legal services to the poor without charge; and/or
- Lawyers whose voluntary contributions have resulted in increased access to legal services on the part of low and moderate income persons.

Distinguished Government Service Award: This award recognizes a Kansas lawyer who has demonstrated an extraordinary commitment to government service. The recipient shall be a Kansas lawyer, preferably a member of the KBA, who has demonstrated accomplishments above and beyond those expected from persons engaged in similar government service. The award shall be given only in those years when it is determined that there is a recipient worthy of such award.

Courageous Attorney Award: This award recognizes a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession. Examples of recipients of this type of award in other jurisdictions include a small town lawyer who defended a politically unpopular defendant and lost most of his livelihood for the next 20 years, an African-American criminal defense attorney who defended two members of the white supremacist movement, and a small town judge who lost his position because he refused the town council’s request to meet monetary quotas on traffic offenses. This award will be given only in those years when it is determined that there is a worthy recipient.

Diversity Award: This award recognizes a law firm; corporation; governmental agency, department, or body; law-related organization; or other organization that has significantly advanced diversity by its conduct, as well as by the development and implementation of diversity policies and strategic plans, which include the following criteria:
• A consistent pattern of the recruitment and hiring of diverse attorneys;
• The promotion of diverse attorneys;
• The existence of overall diversity in the workplace;
• Cultivating a friendly climate within a law firm or organization toward diverse attorneys and others;
• Involvement of diverse members in the planning and setting of policy for diversity;
• Commitment to mentoring diverse attorneys, and;
• Consideration and adoption of plans to continue to improve diversity within the law firm or organization, whereas;
• Diversity shall be defined as differences of gender, skin-color, religion, human perspective, as well as disablement. The award will be given only in those years when it is determined there is a worthy recipient.

KBA Awards Nomination Form

Nominee’s Name ____________________________

Please provide a detailed explanation below of why you have nominated this individual for a KBA Award. Attach additional information as needed.

☐ Phil Lewis Medal of Distinction
☐ Outstanding Service Award
☐ Outstanding Young Lawyer Award
☐ Distinguished Government Service Award
☐ Distinguished Service Award
☐ Diversity Award
☐ Professionalism Award
☐ Pro Bono Award/Certificates
☐ Courageous Attorney Award

Nomination Form by Friday, March 2, 2012, to:
KBA Awards Committee
1200 SW Harrison St.
Topeka, KS 66612-1806
**A Nostalgic Touch**

**Lewis Walked Into the Unknown and Made a Difference**

By Matthew D. Keenan, Shook, Hardy & Bacon LLP, Kansas City, Mo., mkeenan@shb.com

**Editor's note:** The Bar Journal is reprinting several of Matt Keenan's columns. This article, originally published three years ago, remains one of the most requested columns.

Lawyers, by the nature of their profession, seek to make a difference in the lives of their clients. Whether it’s writing a will, defending a civil suit, or representing someone on the brink of losing his or her civil liberties, this is what separates lawyers from doctors or any other profession. But as the writer Tom Peters once said, “unless you walk out into the unknown, the odds of making a profound difference are pretty low.”

One would be hard-pressed to find anyone who took a bigger leap into the unknown than Bob Lewis, the former Court of Appeals judge, who passed away four years ago. But if you think Bob Lewis was just an appellate judge, then you don’t know about his role as a criminal defense lawyer in one of the most notorious crime sprees in Kansas history. That would be his representation of James C. Hunter.

And if Hunter’s name is not familiar to you, all of that is about to change.

The paths of Hunter and Lewis converged in a dramatic way in the month of January 1985 when Lewis was assigned to defend Hunter against first-degree murder charges in Thomas County.

**The Crime**

Hunter was one of three people charged with a crime spree in Northwest Kansas. When the criminal justice system ran its course, there were three trials and their ultimate conclusions were something no one could have possibly anticipated. And through it all, a community torn by violence found ways to make peace.

While there are many facts in dispute, a few are not controverted. Hunter lived in Amoret, Mo., a small town just across the state line from La Cygne, Kan. On Feb. 13, 1985, he was hitchhiking from Texas to the Kansas City area. Near Wichita, the car that picked him up already had three passengers – Mark Walters, Lisa Dunn, and Daniel Remeta. What Hunter did not know was that at least one of those passengers had already murdered four people in Florida and Arkansas, and the number of victims was about to grow.

With Hunter as their new passenger, and driving north on I-135, they turned west, not east, on I-70. Four hours later Remeta would murder a 27-year-old worker at the Stuckey’s Restaurant at the Grainfield exit off I-70. By 4 p.m. author-

- [Image 218x294 to 398x570]

- [Image 568x36 to 783x570]

- [Image 186x31 to 273x57]
The Trial

Ben Albright, who survived multiple shots, was a key witness against Hunter. He testified that he believed the man who fired shots at him had, according to the Kansas Supreme Court’s opinion, “shoulder-length brown hair and a full beard.” That description matched Hunter. There were two guns used in the crimes, a .22 and a .38 caliber. Dunn and Hunter testified that Remeta used the .38 and never parted with it. He told anyone who would listen that “it was his baby.” Albright was shot with that gun.

The events at the Levant elevator also implicated Hunter. As described in the Kansas Supreme Court opinion: “The testimony concerning Hunter’s activities at the Levant elevator conflicted greatly. [Elevator manager Maurice] Christie testified that he observed ‘a bearded man,’ later identified as Hunter, holding a gun in the face of Rick Schroeder and forcing him into a pickup truck. [Assistant Manager Fred] Sager testified that he saw a bearded man with a gun in his hand and that Rick Schroeder got into the pickup by himself. [Grain elevator employee] Dennis Tubbs testified that Hunter held Schroeder’s arm and told him to get into the pickup.”

Hunter insisted Remeta committed the crimes and forced them to tag along, leaving them unable to get away without being shot. Hunter testified Remeta had bragged about having killed 12 people, including a hitchhiker, and made it clear he didn’t leave witnesses. Dunn likewise testified she had been raped and beaten by Remeta, who clearly was the ringleader. Remeta testified in the Colby trial and did not dispute these characterizations.

At the close of evidence, Lewis requested an instruction for compulsion; Judge Willoughby denied it, because at that time, compulsion was not recognized as a defense to felony murder. After 12 and a half hours of deliberation, jurors found Hunter and Dunn guilty on all counts. Both received four life-prison terms.

The Appeal

On July 17, 1987, the Kansas Supreme Court unanimously reversed the verdict against Hunter, saying the trial judge was wrong when he refused to allow jury members to consider whether Hunter was acting under “compulsion.” But this determination required a lengthy analysis by the Court. It noted: “[w]hether the defense of compulsion is available to a criminal defendant charged with felony murder under K.S.A. 21-3401 is an issue of first impression.” The opinion analyzed the issue and concluded: “The better view, consistently adhered to by commentators, is that any limitation to the defense of duress confined to crimes of intentional killing and not to killings done by another during the commission of some lesser felony.”

Remeta never went to trial. In May 1985, he pleaded guilty to three murders, two kidnappings, and two other shootings. In July 1985, Remeta was sentenced to five life-prison terms. He was executed in Florida for crimes in that state on March 31, 1998.

The Retrial

Hunter was tried again in January 1988 at Hays. Co-counsel Scott Beims described how this trial was different. “The original KBI investigator – the one who took the initial statements – was replaced after several days by investigators from Topeka. His early investigation was much more favorable to Hunter than the later witness interviews. In the retrial, we called him in our case in chief. It made a big difference. The implication was that Hunter became a focus of the second group of investigators, and with the passage of additional time, the witness statements became less favorable. We still had a lot of obstacles. Albright was pretty emphatic the person who shot him had a beard. But we demonstrated that Hunter was in the back seat of the car and he may have been the last person he saw before being shot. Plus the fact that Remeta never let anyone else use his gun.”

In his closing argument, Lewis underscored the only defense he had – compulsion – “I don’t know that I have ever talked to or heard the testimony of a more cold-blooded murderer than Daniel Remeta,” Lewis said. “Killing people, to Daniel Remeta, is about like swatting flies to you and me.”

Once the jury was given the case, the court discharged one alternate juror, Beims remembered: “It was a lady, and she approached us and started to cry. We didn’t know what she was about to say. And she said ‘I know he isn’t guilty and I’m not going to get the chance to tell anyone that.’ It left quite an impression on us. We obviously wished she was deliberating the case.”

The Ellis County jury acquitted Hunter on all seven charges. “It was bittersweet obviously because he came to appreciate that Hunter was no killer. But we also came to know and like the family of Rick Schroeder. He was shot in cold blood. It was a tragedy at so many levels,” Beims said.

Dunn’s conviction in state court was affirmed. But in 1992 a federal court of appeals ordered Dunn to receive a new trial because her defense team didn’t receive money to hire expert witnesses to develop a defense based on the battered-woman syndrome. Dunn’s new trial took place in Topeka. In September 1992, a jury found her “not guilty” on all seven counts.

In 1964, the American College of Trial Lawyers established the Lawyers Award for Courageous Advocacy. In 44 years, there have been only 13 recipients. All but five were members of the American College. Bob Lewis, not a member, was so honored in 1991.

Mike Corn, a reporter for the Hays Daily News, covered the retrial in Hays:

(Continued on next page)
Lewis Walked Into the Unknown and Made a Difference
(Con't. from Page 21)

For three years, through two jury trials and a successful appeal that forced the second trial, Lewis nearly lived the life of a defense attorney for Hunter. All the while, he remained low-key and ever humble. Rather than being boastful of anything, Lewis instead credited the system for Hunter's acquittal on the murder charges.

While the murders gained worldwide publicity, the kindness of some victims made publicity of a much different kind. The day after the Thomas County guilty verdict, this was the headline in the June 16, 1985, Seattle Times:

Friendship blooms in small crime-scarred Kansas town.

An extraordinary affection, like a flower thriving in the rubble left by war, has grown out of the horror and tragedy that rode into this placid community. William and Jean Dunn have been given solace, support, and no small measure of love by Thomas County Undersheriff Ben Albright, one of the men their daughter was convicted yesterday of trying to kill. 'We're just trying to get through a bad situation the best way we know how,' said Albright.

Albright and his wife, Pat, and the Dunns often sat together in the tiny Thomas County courtroom where Lisa Dunn, 18, and co-defendant James Hunter, 33, were convicted on charges of murder and kidnapping. The article continued: “I came out here to help Ben, and he wound up helping me,” said Dunn.

And even Remeta – who admitted his crimes – found peace with at least one family. Wesley Moore, son of Glenn Moore, one of the victims taken from the grain elevator, was quoted in the newspaper that, while at one time he wished Remeta would be put to death, he no longer believed that killing Remeta would do any good. He wrote a letter to Remeta, which was described in a news article – “I told him that I forgave him,” Moore said, “and I asked him for forgiveness for myself, because at one time when this first happened, I bore grudges against him and I had hatred in my heart against him.”

And on the day of Remeta’s execution, he released this statement: “I would give a thousand lifetimes to undo past deeds.” Lisa Dunn returned home to Michigan, where she lives today. And Hunter? Four days after his acquittal he died of a heart attack at the age of 36. The Wichita Eagle’s story said Bob Lewis “called his client’s death ‘devastating’... . He was just getting on with the rest of his life, which he didn’t think he had.”

Bob Lewis’ three-year odyssey as a criminal defense lawyer in the Hunter case not only made a profound difference in the life of his client, but it also changed Kansas criminal law forever. But his leap of faith was a journey shared with the other Kansas attorneys who were assigned the defense of this case — Jake Brooks, Jerry Fairbanks, and Scott Beims. Making a mark on the profession that’s worth revisiting 23 years later.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
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Helping the Small Business Raise Capital in Kansas

By Rick A. Fleming
I. Introduction

In 1911, Kansas was the first state to adopt a “blue sky law” to regulate the sale of securities.1 The original law was four pages long,2 but it served as the foundation for a comprehensive federal and state regulatory structure that now fills thick volumes with a vast web of statutes, regulations, and interpretive guidance.3 Those laws can seem complex and daunting to the general practice lawyer who occasionally advises a small business client, or even the corporate attorney who advises businesses on a daily basis but rarely deals with securities law.

Boiled down to its very essential elements, securities law is based upon three simple principles.4 First, if a company wants to raise capital by selling securities,5 the securities must be registered at the state and/or federal level, unless the offering qualifies for an exemption from the registration requirements.6 Second, a person who sells securities or gives advice concerning securities must have a license, unless the person qualifies for an exemption.7 Finally, and most obvious, if a person wants to sell securities, he or she can’t commit fraud.8

This article will explore the first of those fundamental rules, in hopes that a non-securities lawyer will be able to provide better advice to a small business that is in need of additional capital. If nothing else, perhaps it will help Kansas attorneys spot potential issues and recognize the appropriate time to consult with securities specialists or the Office of the Securities Commissioner.

II. Why Does it Matter?

If securities are sold in violation of the securities laws, it can have enormous repercussions for the company and any person engaged in the sale. Of course, violations of the Kansas Uniform Securities Act can lead to serious criminal9 and regulatory10 penalties, but those are sometimes the least of the company’s concerns. Even if a securities regulator never discovers the violation, the sale of an unregistered security creates virtually a strict liability upon the seller, and every investor could sue to recover his or her money.11 That creates a contingent liability that hangs like a dark cloud over the business and can have rippling effects.

For example, when a business wants to expand or needs significant capital, it will often obtain funds in two ways—through the sale of an equity-based security, such as stock in a corporation, and by borrowing from a bank or other lender. The bank financing may be conditioned upon a successful sale of securities, and many such deals have collapsed when the bank discovered that the securities offering was done in violation of the securities laws. If a project involves government financing or guarantees, those pieces will also be imperiled by an improper securities offering.

A successful, growing business may eventually become an attractive target for a venture capital fund, a private equity fund, or other large investor. Unfortunately, if those potential investors discover during the course of their due diligence that the company has conducted an illegal securities offering to achieve its growth, the company will become a far less appealing target.

III. Securities Registration

Every securities offering is either registered, exempt, or illegal.12 For the small company, the most popular option is to find an exemption that will allow the company to sell securities under limited circumstances without going through the expensive and time-consuming registration process. However, for some companies, registration may be the best option because it allows the company to sell securities to a broad array of investors with few conditions.

A. Registration by qualification

There are two types of securities registration. The first, “registration by qualification,” is used when the offering is exempt under federal law and the offering is only registered at the state level. K.S.A. 17-12a304 lists 18 categories of information

 Footnotes

1. For a discussion of the economic and political environment that led to the adoption of the act in Kansas, or the origin of the “blue sky” label, see Rick A. Fleming, 100 Years of Securities Law: Examining a Foundation Laid in the Kansas Blue Sky, 50 Washburn L.J. 583 (2011).
3. See Fleming, supra n.1, at 601.
5. The definition of a “security” is very broad, including not only common items such as stocks and bonds, but also specific investments like oil and gas interests and catch-all categories, such as “investment contracts” and “notes.” K.S.A. 17-12a102(28). An investment contract, as defined in K.S.A. 17-12a102(28)(D), will include virtually any passive investment. There is a presumption that all debt instruments called “notes” are securities, but the presumption can be rebutted by showing that a note is within a list of judicially crafted exceptions or bears a strong “family resemblance” to the items on the list. Reeves v. Ernst & Young, 494 U.S. 56, 110 S. Ct. 945 (1990). The judicially crafted exceptions include: notes in consumer transactions to facilitate financing; home mortgage notes; short-term notes secured by liens on the debtor’s assets; notes evidencing bank character loans; short term notes secured by accounts receivable; open account debts incurred in the ordinary course of business; and loans by commercial banks for current operations. Id. at 951.
6. K.S.A. 17-12a301. 7. See K.S.A. 17-12a402 and 17-12a404. In general, a person who sells securities on behalf of a company is exempt from the licensing requirements if the transaction qualifies for an exemption from the securities registration requirements and the person is not compensated. See K.S.A. 17-12a402(b).
8. K.S.A. 17-12a501. In securities law, fraud can include an omission of a material fact as well as an affirmative misrepresentation of a material fact. K.S.A. 17-12a501(2). A fact is “material” if there is a substantial likelihood that a reasonable investor would consider it important in deciding whether to invest. State v. Puckett, 6 Kan. App. 2d 688, 691, 634 P.2d 144, 149 (1981); State v. Ismaili, 269 Kan. 389, 7 P.3d 236, 240-41 (2000).
10. Among other sanctions, the securities commissioner can assess fines of $25,000 per violation, order restitution or disgorgement, and require the violator to cease and desist. K.S.A. 17-12a604.
11. K.S.A. 17-12a509(b) creates a private cause of action for a purchaser of a security if the security was not properly registered and did not qualify for an exemption.
12. K.S.A. 17-12a301.
that must be included in the registration statement that is filed with the Office of the Securities Commissioner and the prospectus that is given to potential investors. Among other things, the company must disclose the following types of information: contact information for the business and its control persons; a description of the business and its property and equipment; compensation data for officers, directors, and promoters; financial information for the business; the terms of the offering; the use of investor proceeds; and the risks associated with the company and its industry.

In addition to the statutory list, Kansas and other states have adopted model regulations that govern specific aspects of an offering of corporate equity securities, such as the promoters’ equity investment, promotional shares, use of proceeds, underwriting expenses, loans and material affiliated transactions, options and warrants, unequal voting rights, etc.13 Other model regulations require further information for specific types of offerings. Those include asset-backed securities, cattle-feeding programs, church bonds, church extension funds, commodity pool programs, debt securities, equipment programs, mortgage programs, oil and gas programs, real estate investment trusts, real estate programs, and viatical investments.14 A model set of omnibus guidelines has also been adopted for other programs with no applicable statement of policy.15 Some of those requirements may be inapplicable to certain offerings or may be relaxed at the discretion of the securities commissioner.16

Small Company Offering Registration (SCOR) is a more simplified type of state-level registration by qualification. It is available for offerings that are exempt from federal registration under SEC Regulation A or Rule 504 of Regulation D, as explained below.17 SCOR utilizes a form with a question-and-answer format for the prospectus.18

B. Registration by coordination

A second type of registration is “registration by coordination.”19 It is used when the offering is being registered with the Securities and Exchange Commission (SEC) as well as one or more states. Once the registration statement is filed with the SEC, a copy is filed with the state along with a copy of the articles of incorporation, bylaws, underwriting agreement, etc.20 The state registration becomes effective simultaneously with SEC registration if the proper documents have been filed with the state for at least 20 days and the state has not issued a stop order or given written notice of deficiencies in the registration application.21

If a company applies for registration in multiple states, the applicant may request a coordinated review of the application by all of the relevant states. In this process, “lead” states are assigned to facilitate the discussion amongst the states and coordinate the resulting correspondence with the company issuing the securities.22 The process is designed to encourage consistency among the states.

C. Grounds for denying registration

The securities commissioner may deny an application to register securities – either a registration by qualification or registration by coordination – if the registration statement is incomplete or contains a false or misleading statement.23 In addition, the application can be denied if the proposed business activities would be unlawful,24 the offering involves unreasonable commissions or compensation,25 or it is subject to an injunction or other regulatory action brought by another regulator.26 In Kansas, an application for registration can also be denied if the offering is being made on terms that are “unfair, unjust, or inequitable.”27

D. The mechanics of the registration process

A company that intends to sell securities – called the “issuer” – should begin planning for registration several months before filing the application. For guidance, a pre-filing meeting with staff from the Office of the Securities Commissioner is recommended. Advance preparation should include the engagement of a CPA firm for an independent audit of the company’s financial statements.28

13. See K.A.R. 81-7-1 for the model rules that are adopted by reference. Copies of the model rules are available from the Office of the Securities Commissioner.
15. K.A.R. 81-7-2(b)(10).
17. K.A.R. 81-4-2. See infra notes 56 and 73 and accompanying text.
18. For further details, including a copy of Form U-7, see http://www.nasaa.org/industry_regulatory_resources/corporation_financ353.cfm.
20. Id.
21. K.S.A. 17-12a303(c).
22. For further information, see http://www.nasaa.org/industry_regulatory_resources/corporation_financ364.cfm.
23. K.S.A. 17-12a306(a)(1).
24. For example, a company could not conduct a securities offering in Kansas to finance the construction or operation of a brothel. See K.S.A. 17-12a306(a)(4).
27. K.S.A. 17-12a306(a)(7)(C). The authority for this type of “merit review” was contained in the original Kansas blue sky law and has been adopted by several states. Other states and the SEC utilize a “disclosure review” in which the merit or fairness of the offering is not evaluated as long as all material information and risks are disclosed. See Fleming, supra note 1, at 602-03.
28. For a SCOR offering, financial statements may be reviewed instead of fully audited.
begin. The registration is effective for one year, but can be extended for an additional year or until the offering is completed.32

IV. Exemptions from the Securities Registration Requirements

Given the length and expense of the securities registration process, it is not surprising that most small companies prefer to avoid it. However, they may give up significant growth opportunities by shying away from selling any securities at all, and there are many exemptions that allow a small company to raise capital without going through the registration process.

The exemptions fall into two categories. A “securities exemption”33 creates an exemption for all transactions in a particular security because, in theory, the security is inherently safe or there is an alternate regulatory structure for the issuer of that type of security. Examples include securities that are issued, insured, or guaranteed by the government34 and securities issued by banks, insurance companies, public utilities, and other highly regulated companies.35

In contrast, a “transactional exemption” only creates an exemption for a particular type of transaction,36 so an investor would have to find a separate exemption in order to resell the security without registration. For example, K.S.A. 17-12a202(12) provides an exemption for the sale of securities by an executor, but a person who buys a security from the executor would have to depend upon a separate exemption for any subsequent resale.37

A. State-level exemptions for small businesses

Under state law, three transactional exemptions have been especially useful for small businesses that want to sell securities.38 The first is an exemption for any sale to an “institutional investor,”39 which is defined to include banks, insurance companies, and other businesses with $10 million in assets.40 If the small business can find an institutional investor that is willing to purchase its securities, no registration is required.

Another exemption allows sales to “accredited investors.”41 In general, an accredited investor is a business with assets in excess of $5 million, or an individual with net worth of $1 million, excluding the primary residence, or annual income in excess of $200,000 (or $300,000 with spouse).42 A general announcement of a proposed offering may be disseminated

29. K.A.R. 81-7-1(a)(2) and K.A.R. 81-7-3(b) do not allow for prospective financial statements to be used in an offering unless presented in the form of a financial forecast and examined (not compiled) by an independent CPA.

30. See K.A.R. 81-4-1 for the required forms and fee. The fee is a sliding scale, with a minimum of $100 and maximum of $1,500 for each year the registration remains effective.


32. K.A.R. 81-4-1(d).

33. See K.S.A. 17-12a201 for a list of exemptions.

34. K.S.A. 17-12a201(1).

35. K.S.A. 17-12a201(3), (4), and (5).

36. See K.S.A. 17-12a202 for a list of exempt transactions.

37. A commonly-used exemption that would permit a resale of the security without registration is K.S.A. 17-12a202(1), which permits a “non-issuer” (i.e., someone other than the issuing company) to engage in isolated transactions as defined in K.A.R. 81-5-3.

38. A fourth exemption for small business, called the Invest Kansas Exemption, was recently adopted in K.A.R. 81-5-21. See infra nn. 80 through 106 and accompanying text.

39. K.S.A. 17-12a202(13).

40. K.S.A. 17-12a102(11).

41. K.A.R. 81-5-13. The exemption is not available for a company that is in the development stage and either has no specific business plan or has indicated that its plan is to engage in merger and acquisition activity. K.A.R. 81-5-13(b). The issuer may also be disqualified from using this exemption if it or one of its “control persons” has been sanctioned in the past for securities violations. Id.

to persons who are not accredited investors, but it may only include limited information and must state that sales will only be made to accredited investors.\(^43\) No telephone solicitation is permitted unless, before placing the call, the issuer reasonably believes that the prospective purchaser is an accredited investor.\(^44\) Then, within 15 days after the first sale, the issuer must file with the Office of the Securities Commissioner a notice on Form D, a copy of the general announcement, and the filing fee.\(^45\)

A third option is an exemption that allows an issuer to sell securities to as many as 25 investors per year without registering the securities.\(^46\) It is used frequently because the investors do not have to be wealthy and the issuer doesn’t have to make any filing with the state. However, the exemption has some important limitations: the issuer cannot use a general solicitation to obtain investors\(^47\) or pay sales commissions to unlicensed persons.\(^48\)

**B. Federal exemptions for small businesses**

Federal law, like state law, contains separate lists of exempt securities\(^49\) and exempt transactions.\(^50\) They are similar to the state-level exemptions, but one notable difference is the intrastate offering exemption found in section 3(a)(11) of the Securities Act of 1933\(^51\) and its safe harbor, SEC Rule 147.\(^52\) Under those provisions, a securities offering is exempt from federal registration when the issuer and all purchasers are in the same state.\(^53\)

Section 3(b) of the Securities Act of 1933 allows the SEC to create additional transactional exemptions if the SEC believes the protections of the Act are not necessary “by reason of the small amount involved or the limited character of the public offering.”\(^54\) The SEC has used that authority to create two exemptions for small offerings in Rules 504 and 505, which come under the umbrella of Regulation D.\(^55\)

Rule 504 allows a company to raise up to $1 million per year without federal registration, and there are no restrictions on the number or type of investors who may purchase the securities.\(^56\) However, the issuer cannot use a general solicitation to attract investors,\(^57\) and the issuer must file a Form D with the SEC within 15 days after the first sale of securities in the offering.\(^58\) In addition, the issuer must either register the securities at the state level (typically through the simplified SCOR process) or qualify for a separate state-level exemption.

Rule 505 allows a company to raise up to $5 million,\(^59\) but general solicitation is prohibited and no more than 35 of the investors can be non-accredited.\(^60\) The company must find an independent state-level exemption, but Kansas has adopted an exemption that is intended for use with offerings made under Rule 505. That exemption, the Uniform Limited Offering Exemption (ULOE), prohibits commissions unless the salesperson is appropriately licensed, requires the filing of a notice within 15 days after the first sale, and requires all sales to be suitable for any non-accredited investors.\(^61\) Neither Rule 505 nor ULOE can be used if the issuer or one of its control persons has had a felony conviction or a securities-related disciplinary event in the past.\(^62\)

Section 4(2) of the Securities Act of 1933 contains another very important exemption for small businesses. It says that the federal registration requirements do not apply to “transactions by an issuer not involving any public offering.”\(^63\) The SEC has

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43. K.A.R. 81-5-13(d).
44. Id.
46. K.S.A. 17-12a202(14).
47. A “general solicitation” is defined in K.A.R. 81-1-1(n) to include public advertisements and unsolicited telephone calls or electronic communications to persons with whom the issuer has no pre-existing business relationship or close family relationship.
48. K.A.R. 81-1-1(g) defines a “commission” broadly to include “any consideration, compensation, fee, or other remuneration that is directly or indirectly incurred, paid, or given” in connection with the solicitation of investors.
52. 17 C.F.R. § 230.147.
53. Note, however, that the offering would still have to be registered at the state level unless a state-law exemption applies.
55. Regulation D contains Rules 501 through 508, spanning 17 C.F.R. §§ 230.501 through 230.508. Three separate exemptions are found in Rules 504 through 506, with the general conditions for the exemptions found in the remaining rules.
56. 17 C.F.R. § 230.504.
57. 17 C.F.R. § 230.502(c). See also supra note 47 and accompanying text.
58. 17 C.F.R. § 230.503.
59. 17 C.F.R. § 230.505.
60. For the definition of an accredited investor, see supra note 42 and accompanying text.
62. 17 C.F.R. § 230.505(b)(ii) and K.A.R. 81-5-6(b).
issued reams of guidance on what constitutes a private offering as opposed to a public offering of securities, but generally speaking, five factors are most critical: (1) the number of offerees, (2) the relationship of the offerees to each other and to the issuer, (3) the number of units offered, (4) the amount raised, and (5) the manner of the offering.64 If the offering is made to a large number of investors or to unsophisticated investors, or the company uses a general solicitation to attract investors who are strangers to the company, the offering will generally be considered a public offering and will not qualify for this exemption.

Rule 506 has been adopted by the SEC under section 4(2), so a small company can be assured that it is exempt under 4(2) if it complies with the rule.65 Rule 506 is found in Regulation D alongside Rules 504 and 505, but it is the only one given the status of a “covered security” in section 18 of the Securities Act of 1933, which triggers preemption of state law.66 As a result, if an issuer complies with Rule 506, the offering is not only exempt from the federal registration requirements, but the states are pre-empted from requiring registration at the state level.67

That double-barrel exemption, and the lack of any limit on the amount that can be raised, make “506 offerings” a very popular option for companies that want to raise capital. However, counsel should be aware of the limitations in Rule 506. Like Rule 505, general solicitation is prohibited,68 and no more than 35 of the investors can be non-accredited.69 But, unlike Rule 505, those non-accredited investors must meet a financial sophistication test or use a purchaser representative.70 The issuer must also file a notice with the SEC and the Office of the Securities Commissioner within 15 days after the first sale in Kansas, along with a filing fee,71 and the exemption will no longer be available if the issuer or its control persons have had disciplinary problems.72

Regulation A contains an additional exemption that permits an offering up to $5 million without registration, but it is not used with great frequency.73 Even though technically an exemption from registration, it is commonly called “short form registration” because the company must file an offering statement with the SEC and be pronounced “qualified” before sales can be made in reliance upon the exemption.74 During the offering, the issuer must also file a report on sales and use of proceeds every six months.75 The streamlined state-level SCOR process was designed for use in conjunction with Regulation A because the offering must be registered with the state or qualify for an independent state-level exemption.76

V. A New Approach: The Invest Kansas Exemption

Occasionally, it becomes a community-wide effort to help a small business raise capital. Perhaps a small community wants to establish a new business, such as a grocery store or movie theater, or a popular local business is in financial distress. These situations can easily result in a well-meaning public appeal for small investors, often through the local newspaper, but restrictions on public solicitation ultimately make it very difficult for the company to raise capital.

A. The shortcomings of the current exemptions

The difficulty is that the most commonly-used exemptions, as discussed above, are limited in one of two ways. First, they

65. 17 C.F.R. § 230.506(a).
67. However, note that federal law does not pre-empt state anti-fraud authority. Securities Act of 1933, § 18(c), 15 U.S.C. § 77r(c).
69. 17 C.F.R. § 230.506(b)(2).
70. 17 C.F.R. § 230.506(b)(2)(ii).
72. Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the SEC to include this type of disqualification in Rule 506. See SEC Release No. 33-9211, 76 Fed. Reg. 31518 (June 1, 2011).
73. 17 C.F.R. §§ 230.251 through 230.262. Despite its lack of popularity, Regulation A does have some advantages. There is no limit on the number or types of investors, no holding period before resale, no audit unless required for state registration, and the issuer may “test the waters” with limited advertising and general solicitation. In addition, a more attractive exemption may be enacted soon. Congress is currently considering a new exemption that is similar to Reg A for offerings up to $50 million. See H.R. 1070, 112th Cong. (2011), and S. 1544, 112th Cong. (2011).
74. 17 C.F.R. § 230.251(d).
75. 17 C.F.R. § 230.257.
76. See supra note 18 and accompanying text.
may require the securities to be sold primarily to accredited investors. The idea behind that requirement is that wealthy investors can afford to hire financial advisors to protect their interests, so they do not need all the governmental protections that are derived from the securities registration process. The second limitation is that the company cannot use advertising or any kind of general solicitation to promote the sale of the securities. The theory behind that limitation is that the protections of the registration process are unnecessary if the offering is only directed to people who have a substantial pre-existing business relationship with the issuer and are in a better position than the general public to judge the trustworthiness of the investment.

Those types of exemptions simply do not work in the context of a community-wide effort to save a business. In the absence of enough “deep pockets” in a community, entrepreneurs and community leaders may logically assume that many people could each invest a small sum to save a popular business, but any type of broad appeal to numerous non-accredited investors will run afoul of the securities laws.

B. A new type of exemption

A newly-adopted exemption tries another approach for Kansas companies. Instead of limiting the offering to investors who are wealthy or have a pre-existing relationship with the issuer, the theory behind this new state-level exemption is that an investor does not need the full protection of the registration process if the possible loss is small. For the securities practitioner, the most novel feature of the exemption is that it allows a public solicitation.

Under federal law, it appears that the best – and perhaps only – alternative for selling unregistered securities in a community-wide fashion is under the exemption for intra-state offerings in section 3(a)(11) of the Securities Act of 1933. Therefore, to help Kansas issuers avoid liability under federal law, the new state-level exemption is explicitly tied to this federal exemption. As a result, it requires the securities to be offered and sold only to residents of Kansas, and the company offering the securities must be a business or organization formed under the laws of Kansas and registered with the secretary of state. Because of those conditions, the new exemption has been named the Invest Kansas Exemption (IKE).

C. The requirements of the new exemption

Under IKE, the maximum allowable investment by any single person is $1,000, unless the person is an accredited investor. The maximum amount of securities that can be sold in the offering is $1 million, and the exemption looks back to include all sales of securities within a 12-month period for purposes of determining whether the threshold has been reached. Larger offerings must either go through the registration process or qualify for a separate exemption. Another important limitation is that a commission or other remuneration cannot be given to any person for selling the securities unless the person is registered as a broker-dealer or agent with the Office of the Securities Commissioner.

Because IKE is designed for use by small companies, the exemption is not available to an issuer that is already a “reporting company” or would become one as a result of the offering. A reporting company is a company that has previously registered securities with the SEC or a company with more than 500 shareholders and assets in excess of $1 million. A reporting company is subject to the rather onerous reporting requirements of sections 13 or 15(d) of the Securities Exchange Act of 1934, and IKE refers to these requirements so that a small company will not trigger them inadvertently.

Similarly, IKE prohibits the issuer from becoming an “investment company” as a result of the offering. This limitation is important because it prevents the issuer from being regulated like a mutual fund. An investment company is defined in section 3 of the Investment Company Act of 1940. Highly summarized, an investment company is an issuer of securities that is engaged primarily in the business of trading in securities. A fund in which investors pool their money to create an open-ended resource for economic development would likely be deemed an investment company. To prevent that, IKE requires people to invest directly in a specific company as opposed to an economic development pool.
It is very important to note that IKE is not a self-executing exemption. In other words, an issuer of securities must notify the Office of the Securities Commissioner of its intention to rely upon the exemption. The notice is required before the 25th sale of the security or the use of any general solicitation, whichever occurs first, because those are the two things that typically signify an illegal offering and trigger an investigation or the issuance of a cease and desist order. There is no fee required for the notice filing, and it can be done very easily by email or in writing. In addition to a simple statement that the issuer is conducting an offering in reliance upon the Invest Kansas Exemption, the notice needs to contain contact information for the company issuing the securities and any salespersons, plus the name of the bank in which the investor funds will be deposited.

To ensure that investors are knowledgeable about what they are doing, IKE requires the issuer to inform all purchasers that the securities have not been registered and, therefore, cannot be resold unless they are registered or qualify for a separate exemption from registration. Moreover, the federal exemption for intrastate offerings requires other written disclosures to be made, and IKE adopts those requirements by reference. For example, the issuer must tell investors that resales of the securities can only be made to Kansas residents until nine months after the offering is completed. In addition, the issuer must obtain a written representation from each investor that acknowledges where the investor resides.

If all the requirements of the exemption are followed, it provides relief not only from the requirement to register the securities, but also from the licensing requirements for the salesperson. However, there is no such thing as an exemption from the anti-fraud provisions of the securities laws, so the company issuing the securities and the person selling the securities must be completely truthful and careful to disclose the relevant risks to all purchasers.

To prevent fraudulent activities and protect investors, IKE includes a few additional safeguards. First, the exemption is not available if the issuer has no specific business plan. It is also not available if the issuer or one of its affiliates has been the subject of a prior criminal prosecution or regulatory action, as specified in K.A.R. 81-5-13(b), unless the issuer first obtains a waiver from the securities commissioner. To make the use of funds easier to track, the exemption requires all proceeds from investors to be deposited in a financial institution doing business in Kansas. Of course, all funds must also be used in accordance with representations made to investors.

VI. Conclusion

The decision to raise capital is an important one, and the method for raising the capital should not be chosen haphazardly. A small company should carefully explore its options, not merely to avoid regulatory actions, but to determine its best course of action. A registered offering can be promoted widely with few limitations, so it may be a company’s best option in spite of the cost.

If a company prefers to conduct an exempt offering, counsel should help the company understand that not all exemptions are created equal. Some exemptions may fit the needs of the company, while others have conditions that make them unworkable under some circumstances. IKE is not a panacea for all small companies in need of capital, but it creates an additional choice for a company and its counsel to consider.

About the Author

Rick A. Fleming is a former general counsel for the Office of the Kansas Securities Commissioner. During his 15-year tenure, he created the Invest Kansas Exemption and took other steps to promote legitimate capital formation and economic development in Kansas. He is currently employed as the deputy general counsel for the North American Securities Administrators Association in Washington, D.C. Fleming was raised in LeRoy, graduated summa cum laude from Washburn University with a bachelor’s degree in finance and economics, and is a graduate of Wake Forest School of Law in Winston-Salem, N.C. Valuable assistance was provided for this article by Steven C. Wassom and Michelle Lancaster from the Office of the Kansas Securities Commissioner.
ATTORNEY DISCIPLINE

INDEFINITE SUSPENSION
IN RE SHELLEY KURT BOCK
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 106,284 – DECEMBER 2, 2011

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against Shelley Kurt Bock, of Lawrence, an attorney admitted to the practice of law in Kansas in 1979. Bock's disciplinary matter involved his representation of clients for expungement of criminal convictions, child in need of care cases based on his service on the juvenile panel, guardian ad litem, representing Spanish speaking criminal defendants, and other criminal matters.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that the respondent be indefinitely suspended.

HEARING PANEL: On October 8, 2010, the office of the disciplinary administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on December 9, 2010, at which the respondent was personally present and was represented by counsel. The hearing panel determined that respondent violated KRPCs 1.1 (competence); 1.3 (diligence); 1.4 (communication); 3.2 (expediting litigation); 8.1(b) (failure to respond to lawful demand for information from disciplinary authority); and Kansas Supreme Court Rule 207(b) (failure to cooperate in disciplinary investigation). The respondent also violated the terms and conditions of his probation, as ordered by this court in its order of February 1, 2008. The hearing panel unanimously recommended that the respondent be suspended from the practice of law for an indefinite period of time.

HELD: Court held the evidence before the hearing panel established the charged misconduct of the respondent by clear and convincing evidence and supported the panel’s conclusions of law. As the hearing panel noted, the respondent has been disbarred by the Missouri Supreme Court for his criminal convictions in that state. When this action were considered along with the respondent’s multiple offenses in this case, including violations of KRPC 8.4(b) (commission of a criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer); Supreme Court Rules 203(c)(1) (failure to notify disciplinary administrator of felony charge); and 208(c) (failure to notify Clerk of the Appellate Courts of change of address). The hearing panel unanimously recommended that the respondent be disbarred.

CIVIL

ECONOMIC LOSS DOCTRINE
DAVID V. HETT
MARION DISTRICT COURT – REVERSED IN PART AND REMANDED
COURT OF APPEALS – REVERSED ON THE ISSUE FOR WHICH REVIEW WAS GRANTED
NO. 98,419 – DECEMBER 30, 2011

FACTS: The Davids acted as their own general contractor in order to build their home. They performed some of the work themselves, such as framing, roofing and finishing, but hired contractors for other aspects of the construction. Hett Construction performed the office of the disciplinary administrator against Eric T. Tolen, of Jefferson City, Mo., an attorney admitted to the practice of law in Kansas in 1987. Following a trial, on September 19, 2008, a jury convicted the respondent of two counts of statutory sodomy, first degree, unclassified felonies, 34 counts of statutory sodomy, second degree, class C felonies, and one count of victim tampering, a class D felony. The respondent was found not guilty of attempted statutory sodomy, a class C felony. On November 7, 2008, the Court sentenced the respondent to serve 65 years in prison. The respondent remains in prison in Missouri.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that the respondent be disbarred.

HEARING PANEL: A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on January 21, 2011, at which the respondent was not personally present and was not represented by counsel. The hearing panel determined that respondent violated KRPC 8.4(b) (commission of a criminal act reflecting adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer); Supreme Court Rules 203(c)(1) (failure to notify disciplinary administrator of felony charge); and 208(c) (failure to notify Clerk of the Appellate Courts of change of address). The hearing panel unanimously recommended that the respondent be disbarred.

HELD: Court held the evidence before the hearing panel established the charged misconduct of the respondent by clear and convincing evidence and supported the panel’s conclusions of law. As the hearing panel noted, the respondent has been disbarred by the Missouri Supreme Court for his criminal convictions in that state. When this action were considered along with the respondent’s multiple offenses in this case, including violations of KRPC 8.4(b) (2010 Kan. Ct. R. Annot. 603); Kansas Supreme Court Rules 203(c)(1) (2010 Kan. Ct. R. Annot. 276); and 208(c) (2010 Kan. Ct. R. Annot. 320), the Court found disbarment was the appropriate discipline.
the excavation, basement and concrete work. The plans called for 30-inch deep footings for the basement. Hett advised the Davids that he would instead pour a 12-inch footing as he had always done. The Davids accepted Hett’s completed work and paid $20,000. Five years later the Davids began experiencing unusual settling in their garage and basement areas. They sued Hett for breach of contract, negligence, fraud, fraudulent concealment, and violations of the Kansas Consumer Protection Act (KCBA). After Hett filed for summary judgment and the Davids failed to answer, the district court treated Hett’s statements as admissions by the Davids. The admissions effectively devastated many of the Davids’ claims. The district court granted summary judgment in favor of Hett on all claims. The court found that the contract allegations and action under the Kansas Consumer Protection Act were barred by the statute of limitations. The court also held that the uncontroverted facts demonstrated Hett made no untrue statements nor took any action with intent to deceive the Davids, which were essential elements to plaintiffs’ fraud counts, so those claims failed as well. The district court also held that the economic loss doctrine supplied an additional bar to plaintiffs’ fraud claims. The Court of Appeals affirmed the district court’s decision in all respects.

ISSUE: Economic loss doctrine

HELD: Court stated that the economic loss doctrine should not bar claims by homeowners seeking to recover economic damages resulting from negligence performed residential construction services. The court overruled Prendiville v. Contemporary Homes Inc., 32 Kan. App. 2d 435, 83 P.3d 1257, rev. denied 278 Kan. 847 (2004). Court held that a homeowner’s claim against a residential contractor may be asserted in tort, contract, or both, depending on the nature of the duty giving rise to the claim. Court held that the Court of Appeals and the district court erred in applying the economic loss doctrine to bar negligence claims brought by homeowners arising from the performance of residential construction services. Court remanded to determine whether the plaintiffs allege any breach of a common-law or statutory duty that would form the basis of a negligence claim against Hett. Court stated that it remanded to the district court to determine whether the Davids’ claims arise in tort or contract. If the district court finds that the claims arise from the parties’ contract, those claims are barred based upon the prior district court rulings that were affirmed by the Court of Appeals and constitute the law of the case. If the district court determines that some tort claims arise independently from the contractual duties between the parties, further proceedings will be required.


GARNISHMENT, CONSENT JUDGMENTS, DORMANCY, AND JURISDICTION
ASSOCIATED WHOLESALE GROCERS INC. ET AL. \ V. \ AMERICOLD CORPORATION ET AL.

WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS

FACTS: Americold I involved lawsuits arising out of a fire in Americold’s 170 acre underground cold storage facility. Americold had primary general liability coverage for tenant claims of $1 million through National Union Fire Insurance Co. (National Union), with $25 million excess coverage through NPIC. TIG Insurance Co. (TIG) provided $15 million excess coverage to National Union and NPIC. National Union eventually tendered the $1 million policy limit to Associated Wholesale Grocers and the other plaintiffs, who were various tenants and their subrogated insurers. Although the fire burned only a part of the stored goods, smoke and other contaminants discharged by the fire damaged other goods stored in the facility. NPIC disclaimed coverage, reasoning that the claimed damages were excluded by the policy’s pollution exclusion. Concluding that NPIC and TIG were denying coverage, Americold negotiated a settlement with plaintiffs. The settlement included consent judgments totalling $58,670,754, a covenant by plaintiffs not to execute against the assets of Americold and an assignment of Americold’s claims against its
excess insurers, NPIC and TIG. After the settlement, plaintiffs filed a garnishment action against NPIC. The district court granted summary judgment in favor of plaintiffs. The Supreme Court reversed. TIG settled while Americold I was on appeal. Ultimately, in the fall of 2005, the district court conducted a 10-week bench trial on the remand issues identified by Americold I. On January 10, 2006, the court conducted a hearing on NPIC’s motion to dismiss, in which the garnishee contended that the consent judgments entered in 1994 and 1995 had become dormant and extinguished pursuant to the provisions of K.S.A. 60-2403 and K.S.A. 60-2404. Therefore, NPIC argued, without valid judgments for Plaintiffs to collect, the district court did not have subject matter jurisdiction to proceed with a garnishment action. By journal entry filed January 19, 2006, the district court overruled the motion, finding that enforcement of the consent judgments had been stayed or prohibited within the meaning of K.S.A. 60-2403(c) and that the Supreme Court’s remand with directions stayed the time provisions of the dormancy and revivor statutes and prohibited plaintiffs from executing on their judgments. The court found that the settlement agreement between the plaintiffs and Americold represented a reasonable, good faith settlement and that NPIC’s denial of coverage was in bad faith, as was its refusal to participate in the settlement conferences and its refusal to settle plaintiffs’ claims within policy limits. The trial court found NPIC liable for the entire amount of the consent judgments, including the amounts in excess of its policy limits. NPIC filed a notice of appeal. Plaintiffs cross-appealed, claiming the district court erred in denying their claim for punitive damages and complaining about the trial court’s exclusion of an exhibit.

ISSUES: (1) Garnishment, (2) consent judgments, (3) dormancy, and (4) jurisdiction

HELD: Court held that when the district court entered its judgment against NPIC in this garnishment proceeding, the plaintiffs’ underlying consent judgments against Americold had been extinguished by operation of the dormancy and revivor statutes, K.S.A. 60-2403 and K.S.A. 60-2404. Because Americold was not legally obligated to pay an unenforceable judgment, NPIC was no longer indebted to Americold under its contract to pay the judgments for which Americold was legally liable. Accordingly, without an indebtedness from NPIC to Americold, the district court lacked subject matter jurisdiction to grant Plaintiffs judgment against NPIC in a garnishment proceeding. Court reversed the district court and remand with directions to dismiss these garnishment proceedings.

DISSENT: Judge Greene, chief judge of the Kansas Court of Appeals, sitting on special assignment with the Kansas Supreme Court dissented, believing the majority had fundamentally erred in dismissing the appeal based solely on the perception that the consent judgments have become dormant. First, Judge Greene suggested that the dormancy period has been tolled by K.S.A. 60-2403(c) as a result of and ever since this court’s decision in Americold I. Second, Judge Greene stated the dormancy or extinction of the consent judgments was an affirmative defense that was never pled or preserved in the pretrial order by NPIC and has been waived as a matter of law. Third, even if there was no tolling or waiver, the plaintiffs have always held direct assignments of Americold’s rights against its insurers and could pursue NPIC without regard to the consent judgments.

STATUTES: K.S.A. 20-3017; and K.S.A. 60-208, -721(a)(4), -2403(a), (c), -2404

EMINENT DOMAIN
MILLER V. GLACIER DEVELOPMENT COMPANY LLC
WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED
NO. 101,097 – DECEMBER 23, 2011

FACTS: Appraiser awarded Glacier Development LLC, $2.19 million as fair market value for property taken in KDOT eminent domain proceeding, and district court clerk distributed landowner’s share to Glacier. KDOT appealed the appraiser’s award. Jury found property’s value was $800,000, with resulting $1.39 million judgment to KDOT against defendants. While landowner’s appeal was pending, Lester Dean, as sole and managing member of Glacier, sought nunc pro tunc order for removal of his name from that judgment because he did not own the property in his personal capacity, was not personally named as a defendant in KDOT’s petition, and was not served in personal capacity. District court denied the motion, and found no jurisdiction to address substantive claims because appeal was pending. After Supreme Court affirmed jury’s valuation, Dean sought relief from judgment in district court, asserting he was not a proper party defendant in the eminent domain appeal. District court denied the motion per res judicata based on its prior order. Dean appealed.

ISSUES: (1) Res judicata and (2) jurisdiction

HELD: District court’s reliance on res judicata was erroneous. No final judgment was entered when pending appeal barred district court’s jurisdiction to rule on merits.

In appeal of appraisers’ award in an eminent domain proceeding, district court’s subject matter jurisdiction is limited to issue of compensation, i.e., to a determination of fair market value of property in question. District court lacks subject matter jurisdiction to determine issue of whether a member and/or manager of a limited liability company should be held personally liable for the obligation of the limited liability company to return to the condemnor the excess of the appraisers’ award over the compensation finally awarded on appeal. In such an action, district court’s order adjudging the member/manager personally liable is void. District court’s decision is reversed. Remanded with directions to vacate the personal judgment against Dean.

DISSENT (Rosen, J., joined by Herbert, J., assigned): Agrees that reliance on res judicata was erroneous. Dissents from majority’s finding that district court lacked subject matter jurisdiction to enter judgment against Dean personally for return of funds. Under facts, Dean was a proper party defendant in the district court appeal, and had invoked jurisdiction of district and appellate courts by placing himself in the litigation and personally challenging the amount of the award on appeal. Outcome of the appeal should be governed by Dotson v. State Highway Commission, 198 Kan. 671 (1967).

STATUTES: K.S.A. 2008 Supp. 26-501(a), -507, -508(a); K.S.A. 17-7688(a); K.S.A. 25-501 et seq., -510(b), -511, -517; and K.S.A. 60-203, -260(a), -260(b)

HABEAS CORPUS
MATTOX V. STATE
SHAWNEE DISTRICT COURT – REVERSED
NO. 101,078 – DECEMBER 30, 2011

FACTS: Mattox convicted of aiding and abetting second-degree murder and criminal discharge of firearm. In unpublished opinion, Court of Appeals affirmed in part and reversed in part, finding reversible error in admission of Mattox’s statements to Topeka detectives. In K.S.A. 60-1507 motion, Mattox claimed other evidence would have been thrown out had his appellate lawyer appeal pursued argument regarding Mattox’s reinvocation of Miranda rights. District court granted relief, finding deficient performance and prejudice, with reference to Court of Appeals decision in Mattox’s direct appeal that constitutional harmless error standard not met. Appeal filed.

ISSUE: Ineffective assistance of appellate counsel

HELD: Claim defeated by United States v. Patane, 542 U.S. 630 (2004), decided after Mattox’s direct appeal. Applying Patane, as in State v. Schultz, 289 Kan. 334 (2009), even if Mattox could show his attorney’s work was substandard, he cannot show prejudice. District court’s decision is reversed.

STATUTES: None
STATE V. HYCHE
SEDGWICK DISTRICT COURT – SENTENCE AFFIRMED IN PART AND VACATED IN PART
NO. 102,912 – DECEMBER 2, 2011

FACTS: Ricky Hyche pled guilty to a Jessica's Law offense, i.e., aggravated indecent liberties with a child, and received a hard 25 sentence pursuant to K.S.A. 21-4643(a)(1). He raised three sentencing issues on appeal: (1) he should be eligible for parole after 20 years, not 25, pursuant to K.S.A. 22-3717(b)(2); (2) lifetime electronic monitoring is an invalid component of his sentence un-
ISSUES: (1) Jessica’s Law, (2) electronic monitoring, and (3) departure sentence

HELD: Court reaffirmed prior case law that notwithstanding the overlap in the parole eligibility rules contained in K.S.A. 2008 Supp. 22-3717(b)(2) and (b)(5), an inmate sentenced to an off-grid, indeterminate hard 25 life sentence pursuant to K.S.A. 21-4643 shall not be eligible for parole until that inmate has served the mandatory 25 years in prison. Court held the sentencing court has no authority to impose lifetime electronic monitoring as a condition of Hyche’s sentence. Consequently, Court vacated that portion of the sentence. The Court also held that the sentencing court’s decision to deny Hyche’s motion for departure was not an abuse of discretion. Court discussed the mitigating and aggravating factors and found the aggravating factors to prevail including nature of the relationship between the victim and the perpetrator, the vulnerability of the victim, and the special type of harm the crime caused to the familial relationship.

STATUTES: K.S.A. 21-3504, -4643(a)(1), (d), -4701; and K.S.A. 22-3601(b)(1), -3717(b)(2)

STATE V. KIDD
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 101,809 – DECEMBER 2, 2011

FACTS: Kidd convicted of first-degree murder, aggravated assault, criminal discharge of a firearm at an occupied dwelling, and aggravated battery. On appeal he claimed: (1) trial court erred in refusing to instruct jury on defense of voluntary intoxication; (2) prosecutor committed misconduct by violating duty to inform witnesses about order in limine prohibiting reference to Kidd’s prior crimes; (3) cumulative error denied him a fair trial; and (4) trial court unconstitutionally used Kidd’s prior convictions to enhance sentence without proof to jury beyond a reasonable doubt. In a pro se supplemental brief, Kidd also: (5) challenges the sufficiency of the evidence; (6) contends trial counsel was ineffective; (7) and claims he was denied his right to a speedy trial.

ISSUES: (1) Voluntary intoxication jury instruction, (2) prosecutorial misconduct, (3) cumulative error, (4) sentencing, (5) ineffective assistance of counsel, (6) ineffective assistance of trial counsel, and (7) speedy trial

HELD: No error in trial court’s refusing to instruct jury on voluntary intoxication. Under facts of case, insufficient evidence that Kidd was so intoxicated that he was unable to form specific intent necessary for first-degree murder.

Even assuming prosecutor violated his duty to inform state’s witnesses about order in limine, under facts of case, state demonstrated beyond a reasonable doubt that prosecutor’s violation of duty to inform witnesses of order in limine, and one witness’ subsequent violation of limine order by a single reference to Kidd’s mug shot followed by a curative instruction, did not affect outcome of the trial.

No merit to cumulative error claim where only one potential error identified.

Claim of sentencing error is rejected pursuant to existing Kansas Supreme Court decisions.

Sufficient evidence supported Kidd’s convictions.

Kidd’s pro se claims of ineffective assistance of counsel, raised for first time on appeal, are not considered.

Kidd’s pro se speedy trial claim is rejected as conclusory when Kidd specified neither the nature of the claim nor any supporting facts.

STATUTES: K.S.A. 21-3208(2); and K.S.A. 60-404
COURT OF APPEALS

CIVIL

TAX APPEAL, VALUATION, AND CHRONIC AND LONG-TERM VACANCY
IN RE TAX APPEAL OF BROCATO
COURT OF TAX APPEALS – REVERSED AND REMANDED WITH DIRECTIONS
NO. 102,565 – MOTION TO PUBLISH
OPINION ORIGINALLY FILED JULY 23, 2010

FACTS: Brocato owned a retail strip shopping center consisting of 17,948 square feet and located on the northwest corner of Quivira and 135th Street in Overland Park. The property has been divided for multiple tenants, but it has experienced a 50 percent vacancy since at least 2004. The County urged a value of $2,871,100 for the property, and the taxpayer opined that the value of the property should not exceed $1,794,800. The County presented evidence through its valuation specialist, Linda Clark, who did not initially appraise the property for the County, but rather examined the work of others in her office and then supplemented that work with her own property observation and market study. She relied exclusively on the income approach to value, testifying as to each input required for her income model. With the exception of a rent loss calculation, she used market data rather than actual data to determine the various inputs for her model. Clark testified that the market rental rate for the subject property should have been $17, but she used $16 in her final model because the County had not appealed the value determined at the County level. For expenses, Clark selected $1.25 per square foot for her expense input, based on “parameters ... from market data.” For vacancy rate, Clark utilized 4 percent from her market study for retail strip centers and did not make any adjustment for the vacancy rate experienced by the subject property. She testified, however, that she allowed a rent loss adjustment to the final valuation indicator “below the line.” The adjustment reflected a 45 percent additional vacancy and was based on the present value of one year of rent attributable to that additional vacancy, or a valuation reduction of $163,722. For capitalization rate, Clark utilized 8.25 percent based on a comprehensive market cap rate study conducted by an independent appraiser. Brocato testified in his own behalf, offering a challenge to the County’s inputs for the income approach to value and opining that the value of the property should not exceed $1,794,800, the rental rate should be $14, and expenses were $3.77 per square foot before taxes and tenant reimbursement. Although he did not dispute the County’s capitalization rate, he stressed the problem with access to the property and provided a lengthy narrative to support the historic and chronic vacancy rate experienced on the subject property. COTA’s order concluded that the value of the subject property should be $2,225,000, which was established using the County’s income model but plugging in two alternative inputs selected from Brocato’s testimony.

ISSUES: (1) Tax appeal, (2) valuation, and (3) chronic and long-term vacancy

HELD: Court held that under the facts of this case, the county did not carefully analyze the property-specific factors that affected the property’s future income and expense streams in applying the income approach to value. In applying a market vacancy rate without regard for the property’s historic and chronic vacancies, the rate clearly failed to account for the actual reduction in potential income for the subject property. That was a failure to follow prescribed procedure required by USPAP. Court stated that a county’s use of a rent loss adjustment “below the line” in an income approach to value is not the proper vehicle to adjust for an egregious vacancy rate experienced on the subject property. Rent loss adjustments “below the line” are intended to compensate for a known short-term loss of rent due to a period prior to occupancy, between tenants, or necessary to tenant improvements prior to a new lease. When the evidence establishes a chronic and long-term vacancy problem with the property under appraisal, that must be accounted for in the vacancy rate – not as rent loss.

STATUTES: K.S.A. 77-621; and K.S.A. 79-505, -506, -1609

CRIMINAL

STATE V. BOYD
JOHNSON DISTRICT COURT – AFFIRMED
NO. 104,282 – DECEMBER 23, 2011

FACTS: Boyd convicted on charges of aggravated robbery and aggravated assault both as principal and as aider and abettor. On appeal he argued aiding and abetting, as basis for imposing criminal liability, amounts to alternative means to acting as a principal. He also claimed trial court’s use of his past convictions in determining an appropriate sentence violated Apprendi v. New Jersey, 530 U.S. 466 (2000).

ISSUES: (1) Alternative means – aggravated robbery, (2) alternative means – aiding and abetting, (3) alternative means – liability as aider and abettor or as principal, and (4) sentencing

HELD: Taking property from the person of the victim and taking property from the presence of the victim do not constitute alternative means of committing aggravated robbery.

Serial terms in K.S.A. 21-3205(1) defining aiding and abetting do not create alternative means of committing a crime.

Analytical merit to argument that aiding and abetting, as a basis for imposing criminal liability, amounts to alternative means to acting as a principal. Under facts of case, however, sufficient evidence supports Boyd’s conviction for aggravated robbery as both a principal and as an aider and abettor. When aggravated assault occurred during course of an aggravated robbery, and criminal conduct during course of the robbery was foreseeable from Boyd’s partner’s wielding a deadly weapon, Boyd’s aggravated assault convictions upheld independent of any alternative means considerations.

Sentencing claim defeated by controlling Kansas precedent.

STATUTE: K.S.A. 21-3205(1), -3205(2), -3209, -3427

STATE V. DUNLAP
ATCHISON DISTRICT COURT – AFFIRMED
NO. 105,560 – DECEMBER 2, 2011

FACTS: Jury found Dunlap guilty of aggravated robbery and felony obstruction of official duty. Dunlap declined trial court’s in-
Appellate Decisions

vitation to have jury polled, but he claims for first time on appeal reversible error in trial court's failure to comply with K.S.A. 22-3421 in not asking jury whether the verdict read in open court was the jury's verdict.

ISSUE: Accepting jury's verdict in criminal case

HELD: K.S.A. 22-3421 is interpreted as requiring trial court to follow two separate steps in accepting a jury verdict. The judge must first inquire whether verdict read in open court is the jury's verdict. Second, the trial judge must poll the jury if either party requests polling. *State v. Gray*, 45 Kan. App. 2d 522, rev. denied (2011), is discussed and criticized. When trial judge in criminal case explicitly asks parties if they want jury polled, which would accomplish same purposes as having trial judge inquire into accuracy of the verdict, and the defendant declines the request for polling, the appellate court should not consider a challenge to the procedure for accepting the verdict for the first time on appeal based on concepts of waiver or invited error.

Even if trial court erred in failing to inquire into accuracy of the verdict, the error was not structural and is subject to harmless error analysis. Gray mistakenly referred to right to a unanimous verdict as a constitutional rather than a statutory right. And even if issue were properly preserved for appeal, there is no reasonable probability in this case that outcome of trial was affected.

STATUTES: K.S.A. 2010 Supp. 60-261; and K.S.A. 22-3421

**STATE V. ORAM**

**WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS**

**NO. 104,163 – DECEMBER 2, 2011**

FACTS: On October 2, 2008, at approximately 10:20 p.m., sheriff's deputies conducted a routine traffic stop that eventually resulted in the arrests of the driver Oram (for obstruction) and the passenger Butler (for an outstanding warrant). The deputies handcuffed both Oram and Butler and placed them in the back seat of separate patrol cars. The deputies then searched the car and found a white paper bag behind the driver's seat which they believed to be marijuana. It was later determined that the substance in the white paper bag was marijuana. After finding the marijuana, Oram was read her *Miranda* rights which she later waived and agreed to answer questions. Oram confirmed that the marijuana in the car was hers and admitted that she uses it to medicate herself. Oram was then arrested for possession of marijuana. Oram filed three separate motions to suppress. In the first motion, Oram argued that her arrest was unlawful and that the later search was unlawful because it took place while she was secured and away from the vicinity of her car. The trial court determined that the deputies had probable cause to arrest Oram for obstruction. The trial court then determined that although the state contends that the search was an inventory search, it was clearly a search incident to arrest. After determining that the search was unlawful, the trial court determined that because the deputies acted in good-faith reliance on the law when the search was made, the evidence would not be suppressed. Oram filed two later motions in which she argued that her confession should be suppressed because it was the fruit of an illegal search. The trial court again denied her motions. The trial court held that although the search was improper, the search was done in good faith and, as a result, the statement was voluntary.

After her motions were denied, Oram waived her right to a jury trial and proceeded to a bench trial on stipulated facts. The trial court found Oram guilty of possession of marijuana. Oram was sentenced to 12 months' probation.

ISSUES: (1) Search and seizure and (2) motion to suppress

HELD: Court held the search incident to arrest was unreasonable because there was no reasonable basis for the deputy to believe that the car contained evidence of Oram's crime of arrest (for
obstruction). Consequently the search was illegal. Court also held the search was unreasonable because the car was no longer within Oram's immediate presence in order to justify the search. However, court stated that K.S.A. 22-2501(c) allowed the deputies to search the car for evidence of “a” crime rather than just for “the” crime that Oram was originally arrested for – obstruction. Court held the good-faith exception to the exclusionary rule was applicable to the search. Court concluded that well-trained deputies in Kansas would not have believed in good faith that they had the authority to search a car after the defendant had been handcuffed, searched, and placed in the back seat of a patrol car. Court found that the deputies should have been aware of Kansas case law that a car was no longer in the immediate presence of the arrestee and that the search would have violated statutory limits. The good-faith exception did not apply. Court also held the state failed to meet its initial burden to show that the inventory search of Oram’s car was conducted in accordance with a standardized or an established routine procedure. Court held that because it determined that the inventory search of Oram’s car was improper, the state’s inevitable discovery argument failed as well. The state failed to show that the marijuana evidence ultimately or inevitably would have been discovered by lawful means. Last, court held that under all of the circumstances, the connection between Oram’s illegal search of the car and Oram’s confession could not be deemed “so attenuated as to dissipate the taint.” Because Oram’s confession resulted from the exploitation of the unlawful search of her car, Oram’s confession was inadmissible and should have been suppressed. Accordingly, court reversed and remanded the case to the trial court with directions to vacate Oram’s conviction.

STATUTE: K.S.A. 22-2501

STATE V. SMITH
SALINE DISTRICT COURT – AFFIRMED
NO. 104,839 – DECEMBER 16, 2011

FACTS: Smith pled guilty before a magistrate judge to DUI and related charges. In appeal to district court he filed motion to suppress the Intoxilyzer 8000 test results, claiming that officers failed to comply with Kansas Department Health and Environment (KDHE) protocol for administering the test. District court denied the motion and found Smith guilty on stipulated facts. On appeal Smith claimed trial court erred in denying the motion to suppress.

ISSUE: Motion to suppress Intoxilyzer test results

HELD: Smith’s motion to suppress did not satisfy requirements of K.S.A. 22-3216. He did not allege an unlawful search or seizure, and admitted that he agreed to a breath test. An alleged failure of law enforcement officer to follow KDHE protocol for administering a breath test to determine blood-alcohol level of a suspected drunk driver is not itself a violation of a constitutional right and is not legally sufficient to support a motion to suppress. Because the alleged failure goes to the evidentiary foundation of admission of test results, such evidence might be challenged before trial by a motion in limine. Under facts of case, such a motion would not have been successful.

CONCURRING (Arnold-Burger, J.): Kansas cases have significantly blurred the distinction between motions in limine and motions to suppress, particularly as applied to foundational requirements for admission of Intoxilyzer results. Agrees with majority’s distinction, and finds there was overwhelming evidence to find Smith guilty of DUI even if breath tests had been excluded.

STATUTE: K.S.A. 22-3216, -3216(1), -3216(2), -3609a

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The Journal of the Kansas Bar Association | February 2012 | 37
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