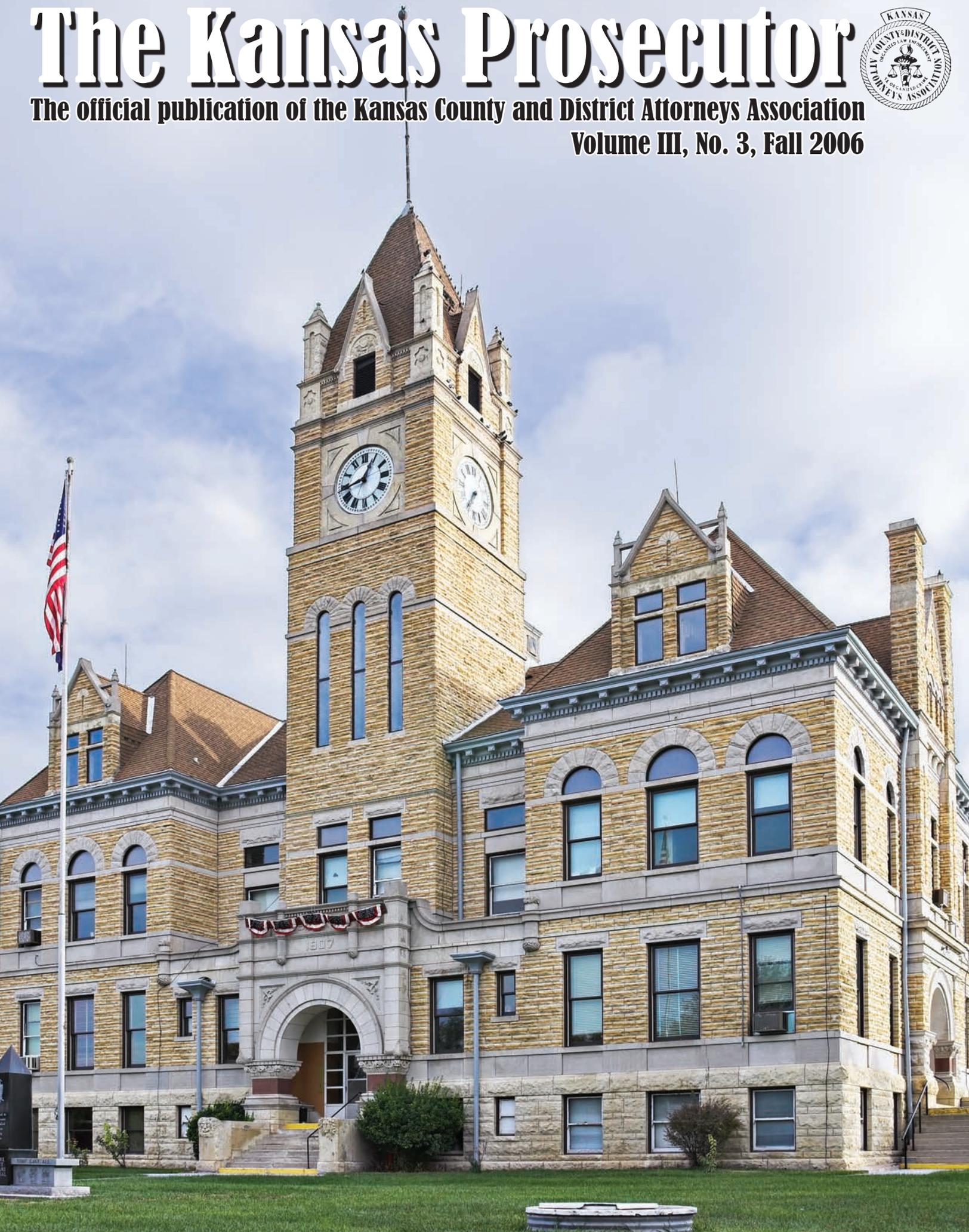


The Kansas Prosecutor

The official publication of the Kansas County and District Attorneys Association
Volume III, No. 3, Fall 2006



KCDAA Fall Conference 2006



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Overland Park, Kansas

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The KCDAA room rate is \$89 per night. The cutoff date to make reservations is October 9, 2006.

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The Kansas Prosecutor
 The official publication of the Kansas
 County and District Attorneys Association

Published by the Kansas County and District
 Attorneys Association, 1200 S.W. Tenth Avenue,
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 Phone: (785) 232-5822 Fax: (785) 234-2433



Our mission:
 The purpose of the KCDA is to promote,
 improve and facilitate the administration
 of justice in the State of Kansas.

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About the Cover

The Osborne County Courthouse shows the
 use of the area’s popular post rock material
 in its Romanesque Revival styling. Built in
 1907-1908 and listed on the National Register
 of Historic Places, the courthouse features
 notable stone carvings at the main entrance,
 including a very unusual Medusa. A facial
 likeness of John Wineland, a “sidewalk
 superintendent,” is carved on the south side of
 the clock tower.

The second floor corridor also features
 artifacts from early-day Osborne County.

Photo by John D. Morrison, Prairie Vistas Gallery



President's Page

by Doug Witteman, KCDA President

As I write, the better part of the summer is over, and the young people in our communities will soon be heading back to school. It has been a typical summer in that it has been a time of increased juvenile offender activity. Across the state I am sure that several young people have entered into diversions or been placed on probation. Many of these young people are being required to perform community service. Community service can be an effective tool to encourage offender reformation and to obtain community support for the work of our offices. In considering the usefulness of community service as a consequence for poor behavior, I have come to believe that it is important that we, as prosecutors, apply the concept of community service to our lives.

When community service is imposed, it has two basic benefits. Community service is good for the offender, and it is good for the community. Service to our communities should be a part of prosecutors' lives for the very same reasons. Community service is good for us, and it is good for our communities.

Our work as prosecutors, in and of itself, is a substantial commitment to community service. Many Kansas prosecutors

could earn more money in private practice, but instead have chosen a career in prosecution because of the satisfaction of doing work that directly benefits their community. A reasonable argument can be made that this alone should be all of the community service required. I would suggest, however, that a deeper involvement in our communities should be the higher standard we hold ourselves to.

In the grand scheme of things we are privileged in many ways. There are advantages and benefits that we enjoy that the majority of our constituents do not. We have received an extraordinary education. Our education permits us to earn a better than average living and to engage in interesting work. We represent some of the very best and brightest in our communities, and we have been educated and trained to be effective problem solvers. Every community needs people just like you and me to step forward and serve.

For the majority of Kansas prosecutors, our primary community service obligation should involve our families. We can provide no greater service to our communities than by being good parents. Raising our children to be good and productive citizens is a service that will benefit our communities beyond measure. There are many opportunities to be both a good parent and a community volunteer. We can volunteer at our child's school; coach summer sports; teach a Sunday school class; or involve

ourselves in scouting or some other organization. We will not only be helping our own kids, but also those kids whose parents do not have the time, opportunity or inclination.

Beyond our families, there are numerous other opportunities to give of our time and talents. Many charitable organizations would love to have a well thought of lawyer sitting on its board of directors. Your analytical skills and problem solving ability would be a positive asset to a school board or some other elective or appointive governmental body. Libraries, museums or any of the schools you have graduated from would welcome your participation. Consider becoming more actively involved in the Kansas County and District Attorneys Association. This is a vibrant and progressive organization that is helping to make a difference in the communities we serve. A relatively small number of our members spend a significant amount of time and energy making the KCDA an organization that fulfills its mission of promoting, improving and facilitating the administration of justice in the State of Kansas. We each need to step up and take our turn serving this organization and its members.

Every Kansas prosecutor should seek out opportunities to serve his or her community. The ways to do so are many. Our communities will be the better for it and so will we.

Editor's Page

by Mary Napier, Editor, The Kansas Prosecutor



The Fall issue of the Kansas Prosecutor is in the final stages as I sit to write my usual editor's page. This magazine is very young, and it just hit me that in the first two years of its existence, the magazine was only published three times a year.

This made me realize that 2006 could be a trademark year for the KCDAA's *Kansas Prosecutor* magazine. With the help of several KCDAA members and other contributors, it looks like we might be able to reach our goal of increasing it to four issues in 2006! I am really excited about this.

I want the magazine to be a publication that you look forward to receiving, that you come to expect every three months (or so), and a publication that is informative for you as prosecutors.

So, I wanted to say that we appreciate each and every one of you who take the time to research, attend meetings or use your own knowledge to write articles on important subjects that pertain to prosecutors across the state. Without your knowledge or time, this magazine would not be a publication at all. I am definitely not a lawyer, so you wouldn't want me trying to write them all. So, a BIG thank you to everyone who helps make this magazine a success!

I really don't know where the rest of 2006 went, but the end is going to be here before we know it. Publishing four issues was one of my goals as well as improving the publication for you as KCDAA members. The editorial board and

I have been working on this all year, but I'm sure there are things we can still improve on. If there is something you want to see in the magazine, if you want to write an article or if you have a question for me, please e-mail me at mary@napiercommunications.com. Without feedback, we don't know what to do better. Please let us know your thoughts.

Also, if you know of a company that would be interested in advertising, send them my way. We would love to have them!

Now that I probably jinxed us on publishing four issues, let's look at the Fall issue. We have lots of great stuff in this issue.

In the first few pages we have the president's view on community service as well as the executive director's view on exercising your right to vote. This is very appropriate with elections just around the corner. Then we have a look at some issues that might just pop up in the 2007 Legislative Session. Take a look at these issues, and talk with Michael or Steve if you want more information. This is followed by some KCDAA milestones. We are always taking these, so let us know what is new in your life.

Starting on page 8, we have a special feature in this issue. We have the voices of the attorney general candidates. We asked them both the same questions, and got their responses on particular issues of interest to KCDAA members. The answers are printed as written by the

candidates, so be sure to check this out. Again, elections are just around the corner, so this is very important. You can also catch these candidates at the KCDAA Fall Conference. Check out the conference brochure at www.kcdaa.org for more details.

Also in this issue are good resources on presentation skills for lawyers, voir dire 101, and qualifying prosecutorial immunity. These are great informational articles. Another great article with great information is the NHTSA Impaired Driving Assessment article. This article describes lots of items of interest that came from the assessment.

The magazine wraps up with an article in which we remember a KCDAA past president who passed away in July. We remember Nanette Louise Kemmerly-Weber through the eyes of another KCDAA president, John Gillette.

I hope you enjoy this issue of the magazine, and I hope you read the next issue as we celebrate our fourth issue in 2006, which will be our Winter issue. Thanks to the support and dedication of our contributors, this goal should be met.



Executive Director's Page

by Steve Kearney, KCDA Executive Director

Time to Exercise Your FreedomVote

The election season is upon us. Our right to vote should be even more on the minds of every one of us in light of our friends and neighbors who are in harms way right this second defending democracy. Be sure to vote this year. It has never been more important to the well-being of your profession and the KCDA membership.

If you are not registered to vote, it has never been easier than it is today. Just go to www.kssos.org and download the application and return your completed application to your county election officers. The addresses for all of the county election offices are on the back of the application. Your county election officer will mail you a notice when your application has been processed. Be certain to postmark the application by the 15th day before the election in order to be eligible to vote in that election. It's simple: exercise your freedom, register, then vote.

With legislative races sometimes being settled by only one vote, once in the recent past by a dead tie resulting in the flip of a coin, do not doubt whether or not your vote counts. As this organization becomes more and more politically active on your behalf, your obligation to be

aware of the political climate and to participate at a minimum by voting is even more acute. For the KCDA to have maximum effectiveness in aiding the Kansas Legislature in their policymaking as they craft further changes to the statutes effecting the administration of justice, you must participate actively, and at a minimum vote.

During this cycle all 125 House seats are up, as well as all statewide offices. The Primary date this year was August 1. Of the 125 House Districts, 26 had primary races. Five of those had no General Election opposition, and were therefore determined on August 1. Additionally, 22 House seats had only one major party candidate file by the deadline on June 12, which results in a grand total of 27 of the 125 seats being settled following the August 1 Primary Election. The remaining 98 races have General Election contests on November 7.

The statewide races include:

- Democratic Governor Kathleen Sebelius pursuing her second term against Senator Jim Barnett of Emporia.
- Republican Attorney General Phill Kline seeking his second term against Democrat challenger, Johnson County District Attorney, Paul Morrison.

Coming into this election cycle

our immediate past president Tom Drees had these words of wisdom for all of you in his last article that may help you navigate these sometimes choppy waters:

“With the political season in full bloom, we can all expect personal visits, phone calls and letters from candidates requesting our endorsement. As elected officials and politicians, the decision whether or not to endorse another candidate is ours alone to make. Each elected official has their own comfort level on whether or not to endorse other candidates, or remain neutral. The important thing to remember is that we are all elected professionals who serve our constituents to the best of our ability. Whether you politically agree or disagree with other prosecutors should have no bearing on your ability to work with all prosecutors.

As prosecutors, we must keep the political process from adversely affecting our professional relationships. The citizens of Kansas expect and deserve this from us.”

As prosecutors and elected officials, many will look to you for advice on these political contests. Follow Tom's words and make every effort to “...keep the political process from adversely affecting our professional relationships.” As always, thank you for your support of our efforts on your behalf.

Legislative Progress, What's Next?

by Senator Derek Schmidt

From a legislative standpoint, the past few years have been good for public safety in our state.

We have made progress against methamphetamine manufacturing through enactment of the Matt Samuels Act restricting access to precursor chemicals and by effectively overturning the unhelpful Supreme Court decisions in *State v. McAdam* and *State v. Campbell*.

Through enactment of Jessica's Law, we strengthened Kansas laws against child molesters and included an important provision to facilitate the use of undercover sting operations against online predators.

We have extended the statute of limitations for most crimes to five years and, working with the Kansas County and District Attorneys' Association (KCDAA) and with law enforcement, have made several other changes to criminal law and procedure intended to give prosecutors and law enforcement officers the tools needed to keep our communities safe.

The question now is: What's next?

At this point, there is no looming public safety issue that already appears likely to dominate the 2007 legislative session the way that Jessica's Law dominated 2006 and the death penalty and the Matt Samuels Act dominated 2005. But there are several issues that clearly need attention and that have waited patiently in line for years while higher-profile matters bubbled to the top. Perhaps this is the year for progress on some of these fronts.

Prison capacity: Kansas prisons have been at or near capacity for years. Recent changes in the criminal law, including enactment of lengthy mandatory terms for sex offenders last legislative session, will push the prison population over the top. Kansas needs more prison space.

The most recent projections show the state prison system exceeding capacity in 2007. An analysis by the Sentencing Commission of legislation enacted during the 2006 session alone shows an increase in the demand for beds by 2016 ranging from a low of



1,892 to a high of 2,003. As many of us have argued for years, tougher criminal laws are almost meaningless unless they are coupled with a place to put the criminals they snare.

The legislature will grapple again in 2007 with options for increasing capacity in the state prison system. One option will be to issue taxpayer-financed bonds and build more state-owned space in the traditional manner. A second option -- made impractical by the multi-year commitment to increasing state aid to local school districts -- will be to pay cash for new state-owned space. A third option will be to contract with private companies to build new prison space and lease it to the State of Kansas, which would operate it. A fourth option will be to contract with private companies to build and operate private prisons in Kansas and to lease space to the state on an as-needed basis.

Each of these options has its supporters and its detractors. But we're at a time when the legislature needs to decide which it is going to pursue. New prisons don't sprout overnight, and to meet the projected needs of future years, a decision needs to be made in 2007. The consequence of failing to decide will be an absence of needed prison space, and that does not bode well for effective law enforcement and public safety in Kansas.

Property crimes: For the six years I have served in the legislature, we have consistently talked about property crimes. "Talked" is the operative word. The reality is that a criminal has to work rather diligently to get actual prison time for most property crimes in Kansas. In many cases, from a criminal's standpoint

it's smarter to commit a felony property crime because it is more likely to result in probation rather than actual time in the county jail for a misdemeanor.

That's nuts.

It's also disheartening to many, many citizens who have been victims of property crimes and feel the system has failed them. I frequently hear from rural constituents who no longer report property crimes because they feel it's a waste of their time and has no likelihood of resulting in justice being administered.

Perhaps this will be a year we can address this issue. There have been numerous proposals advanced in recent years to give repeat property criminals - particularly burglars -- a greater likelihood of time behind bars. The base of support in the legislature for this approach to me appears to be growing.

Recodification: The statutory Criminal Justice Recodification, Rehabilitation and Restoration Project Committee continues its wide-ranging work and is expected to produce a report and recommendations by year's end. The most exciting work of the project focuses on attempts to break the cycle of recidivism, but perhaps the most concrete of the project's work involves a recodification of the criminal code. This task, which has been underway for several years, is getting a new boost of support by the hiring of John White, retired chief judge in the 31st Judicial District, to be the project's recodification reporter. In the coming months, the project will renew its focus on proportionality of sentencing and the relationship among crimes, seek to identify gaps and redundancies in the criminal code, and attempt to turn its recommendations into a legislative proposal that can be submitted to the 2007 session of the legislature.

In-prison treatment: Kansas prisons have few treatment resources for criminals whose addiction to drugs was a contributing factor in their crime. In years past, budget cuts took their toll on in-prison treatment options, and a desire by some to use community-based treatment as a tool to manage prison populations left a sour taste in many mouths regarding treatment in general.

But the fact is that we're not going to get a handle on most crime if we don't get a handle on recidivism. Breaking the cycle of addiction is a key to breaking the cycle of addiction-driven crime.

Illinois has made in-prison treatment a priority with the dedication of the Sheridan Correctional Facility entirely to drug treatment. I visited the facility last year along with our Secretary of Corrections and was encouraged by the concept. Perhaps there is merit in again considering a proposal I advanced several years ago -- to build or rededicate a Kansas penal facility entirely to in-prison drug treatment, and to alter our sentencing system to provide incentives to inmates who are willing to participate in good faith in that specialized incarceration/treatment regimen.

The 2007 legislative session is, at this time, largely a blank slate as far as criminal justice priorities. This is an opportunity. Your many friends in the legislature, including me, look forward to working with KCDAA and all others involved in making our criminal justice system work to build an agenda for this next session. As always, I welcome your ideas. You can reach me at the State Capitol, Room 392-E, Topeka, Kansas 66612 or by phone at (785) 296-2497. You also can e-mail me through my Website at www.DerekSchmidt.com.

Thanks for all your hard work and commitment. We have made progress in recent years. We don't want to lose momentum now.

County Courthouse Portraits



Osborne County Courthouse

John D Morrison

Prairie Vistas Gallery
151 N Rock Island, Suite 1D
Wichita, KS 67202
316-214-7566

www.prairievistas.com

KCDAA Milestones

Births



Lara Blake Bors, Assistant Finney County Attorney and her husband Carl Bors, would like to announce the birth of their son, Henry Emerson Bors. The baby boy was born on May 19, 2006. He's exactly one year and four hours younger than his brother Carl.



New Faces

Chad J. Sublet, is the new assistant county attorney in the Franklin County Attorney's Office. He started in the position on July 31. He graduated from Kansas University in May 2006.



Send us your milestones today!

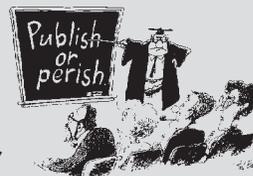
On the Move

Corey F. Kenney is no longer with the Miami County Attorney's Office. He is now the City of Lenexa Prosecutor. He can be reached at:

City of Lenexa
Legal Department
12350 W. 87th St. Parkway
Lenexa, KS 666215-2882
(913) 477-7620
ckenny@ci.lenexa.ks.us.



We want to share your news!



If you have something you would like to share with the KCDAA membership, please keep us informed.

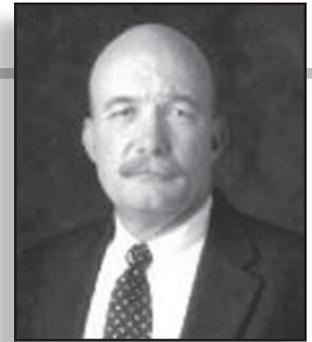
We'd like to publish baby announcements, new attorneys, anniversaries, retirements, awards won, office moves, if you've been published or anything else worth sharing with the KCDAA!

Information submitted is subject to space availability and the editorial board reserves the right to edit material. Send your information to:

KCDAA, attn: Mary Napier
1200 S.W. 10th Avenue
Topeka, Kansas 66604
(785) 232-5822
or e-mail:
mary@napiercommunications.com

Feel free to submit digital photos with your announcement if you have one!

Attorney General Candidate - Paul Morrison



Editor's Note: Each candidate for Attorney General in 2006, Paul Morrison and Phill Kline, were invited by the Kansas Prosecutor Editorial Board to express some of their views and opinions to KCDA members. Each candidate was given the same set of questions to answer. The answers are published as written by the candidates along with the questions.

1. Tell us why you want to be the Attorney General of Kansas.

I am a career prosecutor and public servant. Like you, I understand that oftentimes what is fair and right is not always what captures headlines. I am running because I believe I have a lot to offer the state in terms of judgment, experience and credibility. I offer a stark contrast to Phill Kline, who is a politician in every sense of the word. I believe that a real prosecutor and practicing lawyer would be a refreshing change to the attorney general's office.

2. What do you view as the most important issues facing prosecutors in the next four years and how would you address those issues as attorney general?

There are many. As we all know, there has been increasing pressure put on county and district attorneys with rising caseloads and unfunded mandates by a legislature that doesn't always seem to be as concerned as it should about our plight. As always, our number one priority is how we handle dangerous and violent offenders, including the new class of criminals who are exploiting the internet. As Attorney General, one of your own will be looking out for your interests in Topeka.

3. What do you consider the number one public safety issue facing Kansans?

Keeping Kansas families safe from violent criminals and sexual predators is the most important job of law enforcement. For 26 years, I have been

working in the trenches of district court to make Kansas safer.

As Attorney General, I will work diligently to strengthen sentences for violent predators and give prosecutors the assistance necessary to lock up dangerous criminals.

4. Describe your views of the Attorney General's role regarding prosecution in the state of Kansas as it relates to local prosecutors.

It is obvious that local County and District Attorneys should have the right of first refusal to file criminal cases that occur in their jurisdictions. However, because of workload issues, budgetary restraints, and the complexity of some cases, the AG's office should always be available to assist and partner with the local prosecutor, when needed.

5. What should Kansas prosecutors do to improve relations with the Kansas Legislature, the Kansas Supreme Court, and Kansas law enforcement officials?

As prosecutors, we need to do a better job of picking our battles with these groups. What is of great importance to us is not always at the top of their list, and vice versa. I would advocate that if we take a big picture view and be more selective about what we need, we will be more effective at getting that assistance. I think in the past, many of our efforts have not been well coordinated and sometimes we have done too little too late.

6. Describe your views on a statewide prosecutor system versus the present system, taking into account benefits or detriments to victims, court systems, law enforcement and prosecutors.

This is a thorny issue. The present system has worked well for the most part, throughout the state. I believe that there are several counties that have reached the size and caseload to warrant inclusion into the district attorney system. This would obviously involve significant raises for the county attorneys and hopefully more funding and resources for their offices. These mid-size counties are probably the most pinched with the present system. I believe there are between six and ten of these counties. I am against consolidation of counties into districts to make a large DA's office. I believe the present system works fairly well in the small counties.

7. Discuss your views of the success or failure of the Kansas Sentencing Guidelines.

Like most things, the Kansas Sentencing Guidelines have been a mixed blessing. When it comes to the issue of violent offenders, for the most part, the sentences they receive are tougher (and many times much tougher) than under the old system. Sentencing disparity has been reduced and prior convictions count against defendants when accumulating sentence lengths. This is a good thing. Unfortunately, our Legislature has refused to increase prison capacity, making it much more difficult to put property offenders in prison because the Sentencing Commission cannot increase sentences for property offenders. This has created quite a bit of frustration when one has a career thief that you cannot send to prison. This needs to be fixed.

Attorney General Candidate - Phill Kline



1. Tell us why you want to be the Attorney General of Kansas.

Increasingly, the law is viewed as ever changeable and as a tool for power or exploitation rather than a tool for justice. Virtually every issue we face as a society is colliding in the courtroom, and it is important that we stand for what is right and true. This means that we must stand together and enforce the law with impartiality regardless of personal consequences or political considerations and seek changes in the law to promote justice. I have had the honor to work with county and district attorneys, prosecutors and law enforcement toward these ends. Together we have made significant progress, and I seek the honor of continuing these efforts.

2. What do you view as the most important issues facing prosecutors in the next four years and how would you address those issues as attorney general?

We must continue our efforts to reverse the failed state policies of using our sentencing guidelines as a budget tool rather than a tool for justice. In the past four years we have significantly increased the penalties for child predators and those who commit rape. We have increased the statute of limitations

on all crimes. However, Kansas property crimes go virtually unpunished and SB 123 has virtually eliminated our ability to sanction those who violate parole in numerous drug crimes. We must continue to work to provide the proper focus to sentencing guidelines in the state legislature where we have experienced considerable success. We have eliminated the KBI DNA backlog and lab test results are now returned to local law enforcement in a timely manner. Just this session, I won approval from the legislature for the KBI Lab expansion in Great Bend and Topeka. Next session, I will seek a greater expansion of our criminal division. In the past 3.5 years we have significantly increased our criminal caseload and have doubled our homicide case load. We will continue to better serve our county and district attorneys. This has been accomplished with a smaller budget than my predecessor and now I believe budget enhancements will be supported by the legislature.

3. What do you consider the number one public safety issue facing Kansans?

The manipulation of sentencing guidelines to limit prison admissions by the Kansas Sentencing Commission is the principal public safety issue facing Kansas. I also consider limited training funds for local law enforcement, a lack of re-entry programs and assistance for those released from prison after serving a completed sentence to be significant public safety concerns.

4. Describe your views of the Attorney General's role regarding prosecution in the state of Kansas as it relates to local prosecutors.

I view myself in partnership with county and district attorneys. For this reason, my office has always responded in a positive way to your requests for assistance. Our job in the Attorney's General office is to help you. We shouldn't take over control of a case, cherry-pick or select a case for political reasons.

My record proves that we have taken the tough cases while working in partnership with you. Furthermore, we have extended this partnership to our legislative efforts and together we have been more successful in bringing needed legislative policy change to benefit local law enforcement than at any time in recent memory.

5. What should Kansas prosecutors do to improve relations with the Kansas Legislature, the Kansas Supreme Court, and Kansas law enforcement officials?

Currently, with the assistance of my office Kansas prosecutors have a productive relationship with legislative leadership. My experience in the legislature has allowed me to work directly with the leadership and staff of the KCDA and legislative leadership to accomplish major changes in state law and law enforcement funding over the past four years. These changes include:

- upholding the constitutionality of the state's death penalty statute before the United States Supreme Court
- Matt Samuels Law
- Jessica's Law
- creation of the abuse, neglect and exploitation unit (The Kaufman Fix)
- doubling the sentence for a second rape conviction
- fixing the child pornography loophole
- increasing the penalty for battering a law enforcement officer
- increasing the statute of limitations from two to five years
- increasing penalties for the mistreatment of dependent adults and the creation of a new white collar crime unit are but a few of the many legislative victories we have achieved during my first term.

In addition, with your help, my administration has successfully fought for additional monies for the Kansas Bureau of Investigation. As a result, the

KBI has, in turn, filled agent vacancies, improved lab facilities, eliminated the DNA backlog and acquired new building space for their operations in Topeka and Great Bend.

We have worked to coordinate our legislative message with all law enforcement. We have unified our legislative approach so that the important issues that we raise can be heard above the noise in Topeka. We must continue our off season legislative efforts, such as the Task Force I established for Jessica's Law, to meet with legislators outside of Topeka to build consensus on important issues.

6. Describe your views on a statewide prosecutor system versus the present system, taking into account benefits or detriments to victims, court systems, law enforcement and prosecutors.

I would oppose a statewide system of prosecution. Much of the disparity in experience and training can be reduced through the vigorous assistance of our office to your offices. As mentioned earlier, my office has increased our criminal caseload and doubled our homicide caseload. We have significantly increased the number of criminal prosecutors in the criminal division. My office has responded to your requests for assistance rather than engaging in an overly sensitive case selection process. The job of the Office of the Attorney General is to partner with you to enhance professional prosecutorial services to our citizens. To that end, next term I will seek a stable funding source for local prosecutor training, program enhancements and the establishment of a critical case rapid response team within the Attorney's General office and the KBI. Our efforts in the Gleason/Thompson case in Great Bend prove how effective such a response team can be. We were able to respond and work with local law enforcement to break the case. During the initial stages of the investigation, I assigned 3 KBI agents and had 4 prosecutors on site. This concept will greatly enhance all county and district attorneys who use this team and will increase the quality of professional prosecution in Kansas.

7. Discuss your views of the success or failure of the Kansas Sentencing Guidelines.

The guidelines have failed because they have been used as a budgetary tool not as a tool for law enforcement. I opposed and my opponent supported the passage of SB 149 (which reduced by 20 percent the penalty for crimes such as rape, aggravated sodomy and the attempted murder of a law enforcement officer). I opposed and my opponent supported passage of SB 323 (which gutted parole violation sanctions and released hundreds of violent felons from prison early – 1,529 of whom were sentenced on new crimes and sent back to prison). This is a law enforcement failure of the first magnitude. These measures were not supported by the KCDAA. In spite of that opposition, my opponent supported these measures anyway. When used with a focus toward justice and the proper sanction for a crime, sentencing guidelines can operate to prevent arbitrary sentencing, provide greater certainty in planning and enhance deterrence by expanding the knowledge and certainty of criminal sanctions.



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5, 10 and 20 years in
prosecution.**



Presentation Skills for Lawyers

It's Not About You

by Elliott Wilcox

Every single second of every single moment was filled with the sound of his voice when you think back upon it you have to admit you were just absolutely amazed I mean did this guy even need to breathe it didn't seem like it because he just kept going and going and going without regard to oxygen or audience expectations almost as if the thought of pausing would let someone else start talking and that would simply be unacceptable for him so rather than pausing for even a moment and letting you think about what he was saying he just kept talking and talking and...

Whoa, buddy! Stop! Take a breath!

One of the most powerful tools in your presenter's toolbox is the pause. That brief moment of silence after a profound thought can sometimes be more important than the words themselves.

WHY PAUSE?

Imagine reading a newspaper without a single comma, period, or paragraph indentation – just word after word after word. How far could you read before losing your train of thought? A speech without any pauses feels the same way to the listener.

Do you want the audience to remember your message? To understand it? Do you want them to take the message home, and incorporate it into their lives? If so, you need to give them a chance to stop and reflect upon what you've said.

A pause lets us think. Many speakers ask their audiences rhetorical

questions, and then move immediately to their next subject. This robs the audience of their chance to think about how your ideas could affect their lives. Pausing for a moment lets the audience answer the question or wrap their minds around your message.

A pause lets us laugh. Many humorous moments in speeches are lost because the speaker steps on the laugh line. It may take more than a second for the audience to catch the punch line – give them the chance to laugh.

A pause helps us absorb ideas. Your message travels at the speed of sound. Even in the largest of rooms, it travels from your mouth to the listener's ears almost instantly. Sometimes, it takes a few extra seconds for the message to travel those last few inches of its journey, from the ear to the brain. If you pause for a moment, you will let your message complete its journey.

WHEN TO PAUSE

There are several opportunities in every speech where you might consider pausing:

- After you say something important.
- After you ask the audience a question.
- When you want the audience to think.
- When you ask the audience to remember a moment in their past.
- After you say something funny.
- When you hit an emotional moment.
- As a transition between points.

Look through the outline of your speech and find the moments where

your audience needs to mentally "breathe." Notate your outline or make a mental note, so that you purposely pause at the appropriate moment.

HOW TO PAUSE

Most speakers underestimate the amount of time they've paused. What seems like an eternity onstage may be only two or three seconds. Here are three tips for holding the pause for maximum impact:

Count silently. "One Mississippi, two Mississippi, three Mississippi, four Mississippi..." and then resume.

Look around. Make eye contact with three different members of the audience before continuing. If you look to members in the far corners of the room, you'll give the impression of making eye contact with everyone in the room.

Get uncomfortable. Pause for one second longer than feels comfortable. The pause won't be nearly as long as you think it is. You'll feel uncomfortable, but your audience won't.

Effective speakers know how to pause at the right moment. They hold their pauses long enough to let the audience think, feel or laugh. If you master the skill of pausing in your presentation, you will give your audience the opportunity to walk away with your message stuck firmly in their heads.

About the Author

Elliott Wilcox is creator of The Trial Notebook: Lessons Learned from the Courtroom. To sign up for his FREE weekly Trial Tips Newsletter, featuring trial advocacy tips and techniques, visit www.TrialTheater.com.

NHTSA Impaired Driving Assessment

by Karen C. Wittman, Senior Assistant District Attorney
Third Judicial District

Kansas experienced a large increase in their alcohol-related fatalities starting in 2001 through 2003 and was above the national average until 2004. The 2004 data indicates a huge drop in alcohol-related fatalities to 0.48 per 100 million miles traveled, one of the lowest states in the country. According to the Kansas Department of Transportation Bureau of Traffic Safety (2004) reports there were 18,303 DUI arrests in 2004. This number decreased from 21,235 arrests made in 2003 and 7,579 arrests below the number of 25,882 arrests made in 1996. Of the arrests made in 2004 only 41 percent resulted in convictions. In 2004, there were 117 alcohol-related fatalities or 25 percent of all traffic fatalities.

Pete Bodyk, Bureau Chief for the Bureau of Traffic Safety requested the National Highway Traffic Safety Administration (NHTSA) to conduct two assessments in reference to the prevention, investigation, prosecution and treatment of persons charged with alcohol related offenses.

NHTSA is dedicated to cultivating partnerships with state and local agencies to address the enforcement of impaired driving laws nationally. This article highlights some of the recommendations of both assessments, but it is not comprehensive.

SFST ASSESSMENT

The first assessment occurred March 14-15, 2006 in Topeka. This review focused on Standardized

Field Sobriety Testing (SFST). The purpose of this program assessment was to provide the state with a snapshot of the current conditions of the SFST program in Kansas.

A little background of SFST

Beginning in 1975, the NHTSA sponsored research, which led to the development of standardized methods for police officers to use when evaluating motorists who are suspected of Driving While Impaired (DWI). In 1981, law enforcement officers from across the United States began using NHTSA's SFST to help make arrest decisions at and above the 0.10 percent blood alcohol concentration (BAC). The tests consist of one leg stand, walk and turn, and HGN (Horizontal Gaze Nystagmus).

Recently states have lowered their BAC limits below 0.10 percent, thus raising the question of how well the SFST can identify motorists suspected of driving with BACs less than 0.10 percent. The BAC standard for Commercial Driver License holders is set nationally at 0.04 percent. Another study was conducted to show how the SFSTs can assist officers in making arrest decisions at or above 0.08 BAC. The SFSTs were found to not only indicate at or above 0.08 BAC, but they could also discriminate at or above 0.04 BAC.

Kansas case law is clear. It is acceptable for officer's to use SFSTs in determining impairment. However the Kansas Supreme Court has determined the HGN test

is scientific, but has not recognized it as achieving general acceptance with the relevant scientific community. Therefore at this time, HGN is not admissible in Kansas courts.

The assessment panel and participants

To conduct this assessment, individuals were interviewed who encompassed persons who train, evaluate, and use SFSTs on a regular basis. The participants were individuals from the Bureau of Traffic Safety; Sergeant Don O'Dell, Topeka Police Department; Deputy Steve Olson, Sedgwick County Sheriff's Office; Lt. Dave Week, KHP; Jeff Collier, KHP; Judge Karen Arnold-Burger, Overland Park Municipal Court; Undersheriff Kevin Cavanaugh, Johnson County Sheriff's Office; Sergeant Tom Hogard, Leawood Police Department; Deputy Bob Hamilton, Johnson County Sheriff's Office; Ted Griffith, City of Wichita Prosecutors Office; Director Ed Pavey, the Staff of the Kansas Law Enforcement Training Center, and me.

Robert Hohn and Bruce Stanford conducted the assessment. Hohn currently works for the U.S. Department of Transportation, NHTSA, where he is a Senior Highway Safety Specialist assigned to the Impaired Driving Division. Prior to joining NHTSA, Hohn retired from the Arizona Highway Patrol after 21 years of service. He was the arresting officer in State v. Blake (Arizona Supreme Court),

which provided the foundation for HGN being recognized as a valid SFST in court.

Stanford currently serves as a SFST/DRE (Drug Recognition Expert) instructor and the Georgia DRE coordinator at the Georgia Police Academy. Stanford has trained over 3,000 officers to date. Stanford also serves as coordinator of the Central Region Traffic Enforcement Network under the Governor's Office of Highway Safety.

The persons who were interviewed for this assessment did not have to prepare any specific presentation but were asked questions to determine the strengths and limitations of the SFST program in Kansas.

Problems

It became clear in the interviewing process there were two distinct SFST programs in existence within the state. One program is with the Kansas Highway Patrol Breath Alcohol Unit and the other is located within the KLETC. There is limited communication between these programs and a lack of standard training materials. These training materials were not being instructed in the order and in the time recommended in the Administrator's guide of the NHTSA curriculum package. The panel was clear in noting this did not imply the ability of the students to perform SFSTs properly has been compromised, but it reflected a need for standardization statewide. SFST training for prosecutors and judges was limited or non-existent

and many learn about SFSTs during court proceedings or on their own. It was also apparent to everyone involved in the interviewing that HGN needs to be accepted in Kansas courts.

Recommendations

Hohn and Stanford's recommendations were:

1. Assemble an advisory panel to oversee the Statewide SFST program. Among other duties, the advisory panel will review current state standards and make recommendations for changes as necessary.
2. Define the duties of the SFST Coordinator to include management of all SFST training activities statewide. The SFST coordinator shall maintain an open line of communication with all SFST instructors, law enforcement agencies, and training academies throughout the state.
3. Develop and implement an SFST course schedule consistent with the contents contained in the Administrator's Guide of the SFST Curriculum to maintain statewide standardization.
4. Facilitate and support the hiring of a Traffic Safety Resource Prosecutor to be utilized as a resource for less experienced prosecutors throughout the state regarding impaired driving issues.

5. Coordinate with the District Attorney's Association to recommend a prosecutor to assist in identifying a solid DWI case where the law enforcement officer utilized the SFSTs correctly to conduct a FRYE hearing, which is the legal means to gain court acceptance of HGN in the Kansas courts.

IMPAIRED DRIVING ASSESSMENT

The second assessment was conducted July 10-14, 2006 in Topeka. This assessment was to evaluate Kansas' alcohol and drug impaired driving countermeasures program. The purpose of this assessment was to provide the various branches and agencies of state government an independent opinion concerning what may or may not be working for us in Kansas as we try to reduce the damage and deaths caused by drunk drivers.

The assessment panel and participants

To conduct this assessment, presenters were requested to give briefings and provide support materials to the team on a wide range of topics over a three-day period. The panel listened to 21 hours of testimony from over 56 presenters. The presenters included persons from KDOT, CJIS, KBI, KDOR, Division Of Alcoholic Beverage Control, Kansas Licensed Beverage Association, Kansas Dept. of Motor Vehicles, KDHE,

judges, DUI Victims Center of Kansas, DARE program, Kansas Association of Beverage Retailers and numerous law enforcement officers. Ted Griffith, city prosecutor from Wichita Municipal Court, Heather Jones, Franklin County Attorney, and I testified.

The NHTSA panel consisted of Chief Thomas Michael Burns, Troy Costales, Robert P. Lillis, Manu Shah, and Judge G. Michael Witte.

Chief Burns was responsible for the Law Enforcement Sections of the NHTSA report. Burns is Chief of Police for the Macon Police



When statistics were presented, there were approximately 8,000-9,000 hearings a year. There were only four hearing officers to hear these cases throughout the state.



Department with 30 plus years of experience. He is a member of the FBI National Academy, Association of State Certified Evidence Technicians, and the Georgia Association of Chiefs of Police.

Troy Costales was responsible for the Program Management Section of the report. Costales is the Oregon Transportation Safety Division Administrator and Governor's Highway Safety Representative and has held those positions since September of 1997. He has over 19 years of Transportation Safety experience.

Rob Lillis was responsible for the Treatment and Prevention sections of the report. Lillis is

president of Evalumetrics Research. Lillis is a member of the International Committee on Alcohol, Drugs and Traffic Safety and the Mothers Against Drunk Driving Cultural Diversity Task Force. He has over 30 years of experience in impaired driving research and development of prevention and treatment programs.

Manu Shah was responsible for the Data and Records and Driver Licensing sections of the report. Shah has over 30 years experience in transportation and highway safety. He has extensive working

knowledge of grant-funded traffic safety programs, annual highway safety plans, business plans, and performance-based measures in highway safety. He is currently an assistant professor in mathematics for

Anne Arundel Community College in Maryland.

Judge G. Michael Witte, (no relation to Edwin Witte of the infamous Kansas Supreme Court--St. v. Witte) is currently judge of the Dearborn Superior Court. He served as judge of the Dearborn County Court from 1985-2000. Judge Witte has performed numerous consulting activities for NHTSA including assessments of impaired driving programs for Hawaii, Missouri, and Montana. He was responsible for the Prosecution, Adjudication, and Statute sections of the report.

Administrative licensing hearing problems

Participants expressed concern over the problems with administrative licensing revocation hearings. When statistics were presented, there were approximately 8,000-9,000 hearings a year. There are only four hearing officers to hear these cases throughout the state. Officers attending these hearings complained of misuse of the hearings by licensees and their counsel. There was a consensus of failing to take advantage of the use of interlock devices as well as impoundment of vehicles.

The panel recommended the following:

- ◆ Streamline and improve the communication and dialogue between law enforcement and DMV hearing officers to improve the outcomes at the hearings and improve successful adjudication of DUI cases.
- ◆ Impose vehicle sanctions in a cost effective manner on repeat offenders and individuals who continue to drive with a license suspended or revoked for impaired driving.
- ◆ Permit the law enforcement officer at an ALR hearing to rebut his/her testimony after the defendant's case in chief.
- ◆ Eliminate from the scope of the administrative review

hearing determination of whether reasonable grounds for custody or arrest existed.

- ◆ Collect, analyze, and evaluate the data available on the use of ignition interlocks and vehicle impoundments.
- ◆ Impose vehicle sanctions in a cost effective manner on repeat offenders and individuals who continue to drive with a license suspended or revoked for impaired driving.

Problem with education

Anytime legislation is proposed it seems questions from legislators always extend outside the expertise of the presenter. There may be a request for changes in the punishment for DUI proposed by KCDAAs; but, there may be questions from legislators about treatment options, which may not be able to be answered by a prosecutor. No single focus group exists that brings together all of the partners and interest groups to one table for resource sharing, efficiency, or policy guidance. There was also concern from some of the members of the criminal justice system that judges may be less knowledgeable of the state's impaired driving statutes than law enforcement. It is common practice for less-experience prosecutors (and possibly interns) to manage DUI and other traffic offenses. By the time they acquire a good working knowledge of the complexities of DUI prosecution, they move on

to other assignments and another recruit takes over. Frequently the defendant's attorney is much more experienced and knowledgeable of DUI law and trial techniques than the prosecutor. Also, law enforcement officers, trained in SFST years earlier are required to testify in court without the benefit of receiving any re-training in SFST. Some presenters expressed concern about law enforcement officers' lack of confidence in their ability to adequately testify on SFST.

Recommendations

- ◆ Establish a Kansas DUI advisory Committee that is appointed by the Secretary of the Kansas Department of Transportation representing key partners and interest groups. (The panel thought if legislation was proposed there could be a united front from all aspects of DUI cases, and the committee could get the information to legislators more quickly.)
- ◆ Establish an impaired driving program coordinator for full program oversight, not just for grants management.
- ◆ Provide substantive DUI education regularly to all



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judges and DMV hearing officers who adjudicate DUI cases and include SFST, HGN, DRE, and CDL curriculum.

- ◆ Create a panel of prosecutors and law enforcement officials to meet quarterly and discuss issues with impaired driving prosecutions and officer's courtroom preparedness and testimony.
- ◆ Encourage experienced prosecutors to be involved in DUI prosecutions.
- ◆ Establish a statewide Traffic Safety Resource Prosecutor.
- ◆ Mandate SFST refresher training for all law enforcement officers completing the NHTSA/IACP approved SFST training a minimum of every two years.
- ◆ Offer a course on impaired driving statutes to officers of the court.
- ◆ Publish an Impaired Driving Data Report that includes state level reports from the

various agencies responsible for a portion of the impaired driving system.

- ◆ Require an evaluation of any new policy or law impacting the impaired driving system.

Problems with data collection and reporting

The Driver License System is maintained by the Kansas Motor Vehicle Division Driver License Bureau. It currently contains over 2 million licensed drivers in addition to 128,000 commercial driver licenses. The file supports the functions of license issuance and driver control as well as participation in the national Driver Register and Commercial Driver License information System. Prior laws allowed for DUI convictions older than five years to be deleted. Currently provisions have been made to rebuild the purged records. It is now not possible to determine the actual histories of prior DUI convictions. There also is no process to assure that all reportable convictions are submitted to DMV or to assure reports are in fact posted to the driver records.

Recommendations

- Seek either legislative relief or administrative alternatives to rebuild the driver history file and use it as the only legislatively mandated source document for adjudicating DUI offenses.

- Establish processes to improve the response to courts and prosecutors for certified driver histories.
- Design and implement a centralized statewide citation tracking system containing information about a citation from “cradle to grave.”
- Expand membership in the statewide Traffic Records Coordinating Committee to include participation by all stakeholders, including but not limited to ABC, Kansas Licensed Beverage Association, Kansas Association of Beverage Retailers, Kansas Social Rehabilitation Services, DUI Victim Center of Kansas, representation by county, district and municipal prosecutors.
- Develop a data dictionary for a uniform DUI arrest report form and plan for implementing a uniform DUI arrest report form statewide.

Problems with DUI laws

The panel was complimentary of how comprehensive the laws of Kansas are in regard to alcohol related laws encompassing underage drinking, DUI, and beverage control laws. There was concern of the use of part-time prosecutors and part-time judges. There was no process to assure that all reportable convictions for DUI

offenses are submitted to DMV or to assure that the reports are in fact posted to the driver records. Due to reporting problems, this has directly led to a recent Kansas Supreme Court decision (*State v. Elliott*) that could potentially render prosecution of DUI 3rd or subsequent offenses meaningless.

Recommendations

- ◆ Prohibit part-time prosecutors from practicing any criminal defense work outside of their prosecutorial jurisdiction.
- ◆ Improve accuracy and accessibility to records of prior DUI convictions and diversions.
- ◆ Enact a legislative remedy to the ruling in *State v. Elliott*.
- ◆ Prohibit part-time judges who preside over criminal cases from practicing any criminal defense work, including DUI, outside of their judicial jurisdiction.
- ◆ Enact legislation that specifically allows blood draw search warrants as a remedy in addition to license suspension when a breath test is refused.
- ◆ Repeal diversion for DUI offense.
- ◆ Enact an enhanced BAC offense for 0.15 or greater.

- ◆ Support the technology enhancement project of the state judiciary to include direct online access to driver records and creation of DUI online bench book.
- ◆ Enact a DUI causing serious bodily injury offense.
- ◆ Enhance maximum jail sentence and maximum driver license suspension for repeat DUI offenders.

Problems with prevention and treatment

The NHTSA panel took note that Kansas was the first state to enact prohibition in 1880. It remained a dry state through the national prohibition period ending in 1933. Even after that time, Kansas allowed highly restricted access to alcohol. Kansas was home to Carrie Nation, the fabled temperance leader made famous for destroying illegal bars with her axe. Currently, Kansas has a set of Alcohol Beverage Control laws that address most areas of alcohol control and the regulation of the sale of alcohol. With estimated consumption of less than two gallons of ethanol per capita, Kansas is among the lowest consumption states in the U.S. Kansas Bureau of Traffic Safety conducts approximately \$1 million federally funded programs of public information, media and education. The programs such as “You Drink, You Drive, You Lose” has been accepted as the state slogan and is supported by the media and local

advocates. The panel was particularly impressed the state programs are really statewide without smaller factions or groups creating their own campaigns---in other words a concerted effort toward the fight of impaired driving in Kansas. With all that said, there is still room for improvement.

Recommendations

- Structure designated driver programs so that they do not enable underage drinking or over-consumption by non-drivers.
- Improve monitoring and oversight of compliance with DUI sentence conditions.
- Provide traffic safety information, training, and materials to public and private organizations that provide workplace safety or Employee Assistance Program services.
- Integrate impaired driving information into all substance abuse prevention and health and wellness curriculums in schools.
- Continue to form working relationships with private and public partners in promoting and financing safe ride programs.
- Encourage alcohol servers and owners to recommend alternate transportation to visibly impaired patrons.
- Explore alternate ride outreach for public transit providers in the urban settings as a viable safe ride.
- Increase the number of law enforcement agencies and community programs that use the state selected theme for impaired driving mass media messaging.
- Assign the responsibility for DUI mass media, local outreach, and strategic communications to the Impaired Driving Program Manager.
- Track the number of exposures received through paid, earned, and donated media.
- Survey the residents on the retention and message recall of the paid media messaging.
- Explore the ability to use Variable Message Signing or permanent road signing as a supplement to the State’s mass media campaigns.

A Prosecutor’s View

I was very impressed with the Bureau of Traffic Safety’s preparation of this assessment. It was clear they put a lot of thought and effort into the selection of the persons who came and gave their thoughts on the entire impaired driving program. As a person watching

the process, it appeared the entire presentation went off without a hitch. NHTSA and the panel members should also be given kudos for their ability to identify the issues that are unique to Kansas and give some recommendations for the fix.

With that said, I must make a few comments on what they did propose. Requesting Kansas allow for stiffer penalties for a BAC at or over 0.15 was attempted in this last legislative session. SB 341 suggested stiffer penalties for aggravated involuntary manslaughter while driving under the influence and DUI without a death if a person had a BAC over 0.16. It was pointed out to the legislature at the present time, DUI Manslaughter without the aggravating feature is a level 4 person felony. To determine criminal history for this offense, if a person is convicted of the crime, each adult conviction or juvenile adjudication for DUI shall count as a person felony for criminal history purposes. This bill would make agg DUI Manslaughter a level 2 person felony and would not allow for enhancement of a person's criminal history if they had been convicted of a number of DUIs prior to the offense involving the death. The following example was given.

A person who has had three prior convictions for DUI and has a 0.15 blood alcohol level at the time he commits Involuntary Manslaughter while DUI would have a criminal history of "A" because of the prior DUIs. His sentence range would be 172-162-154 months.

A person who has three prior

convictions for DUI and has a 0.18 blood alcohol level at the time he commits Aggravated Involuntary Manslaughter while DUI would have a criminal history of "I" and his sentencing range would be 123-117-109 months.

The higher the BAC the less jail time a person would receive.

SB 341 also provided for all penalties for DUI under K.S.A. 8-1657 to be doubled. So if a person is charged and convicted of a second offense, the minimum jail sentence would be 10 days in jail rather than five days. Also, it required mandatory treatment for a first offender with a BAC over 0.16. For a fourth offender, the minimum time is 180 days in jail and would not allow for work release until 144 consecutive hours in jail were served. Overall the bill may have been a good idea; however it was flawed in its writing.

The NHTSA panel also suggests elimination of diversion. Although the panel had a lot of questions about diversion, I was surprised with this recommendation. I believe it was a result of the non-uniformity of how diversion is administered, the potential for no monitoring of persons on diversion, the inability to successfully track diversion granted in all jurisdictions and the ability of CDL holders to attempt to circumvent the law (pursuant to K.S.A. 8-2,150 that does not allow a CDL holder to obtain a diversion for any offense that is reportable and required to appear on a person's driving record) that would allow them to obtain a diversion. Diversion is a proper and valuable prosecutorial option, which should be available

for first offenders at least within the prosecutor's discretion. For all practical purposes it has much the same effect as a conviction and does constitute a prior conviction in a subsequent prosecution.

The recommendation prohibiting part-time prosecutors from practicing any criminal defense work outside of their prosecutorial jurisdiction is unworkable for smaller communities with less population. I know the panel was surprised this occurs; however to make a blanket policy of absolutely no criminal defense work outside their jurisdiction is overbroad.

I really liked the idea of permanent signs along the highways with slogans about the hazards of drinking and driving. I think the "give 'em a break" permanent signs on the road about slowing down for KDOT workers and "click it or ticket" has helped. A stark reminder about drinking and driving couldn't hurt.

I highly recommend you obtain and read the NHTSA assessments. As noted above, this article is just a short summary of the two. The report issued for the SFST assessment was 32 pages and the Impaired Driver assessment was 87 pages.

For copies of the assessments, contact Chris Bortz, Assistant Bureau Chief, Bureau of Traffic Safety 700 SW Harrison St., Topeka, KS 66603 or e-mail: cbortz@ksdot.org. An electronic copy can be sent to you via email or hard copy though the mail. I encourage anyone who wants further information to get a copy of them.

Voir Dire 101: Getting to Know You

by Peter B. Carlisle, Prosecuting Attorney, City and County of Honolulu

Editor's Note: This article is reprinted with permission of Peter Carlisle and Hawaii Bar Journal, Hawaii State Bar Association, 1132 Bishop Street, Suite 906, Honolulu, HI 96813. This article first appeared in volume 8, number 10, 2004 issue of the Hawaii Bar Journal.

The process of selecting a jury begins with a game of chance. A group of people selected from driver, voter and tax records is herded into a courtroom. A piece of paper with each of their names is placed in a tumbler. The tumbler spins and goes round and round. When this wheel of fortune stops, a name is plucked from the apparatus. The lucky (?) winner is then directed to the jury box. The process is repeated until the jury box is full. What are the odds that this person would be chosen to sit in this jury box for your case? What are the odds that this is a person who you actually want to decide the case? This is the stuff that Las Vegas thrives upon.

Most lawyers do not want to think they went through the joys of law school to work in a casino. The legal profession certainly does not want to be equated with the gambling industry with some of its baggage. So to make sure the perfect jury to determine the truth is selected, there is voir dire. That is, at least, the theory.

Many years ago when I joined the prosecutor's office, an ancient trial veteran explained to me his theory of voir dire. He told me "I don't need to ask all those questions. I just ask one question: 'Can you be fair?' When they respond, I look them right in the eye and can tell if they will be good for my case or not." Needless to say, this prosecutor lost lots and lots of cases.

"Voir" and "dire" are French words. "Voir" means to *see* while "dire" means to *say*. Lawyers being lawyers, many seem to believe that given these definitions, voir dire is a chance for the prospective jurors to get to *see* what the lawyer has to *say*—not great thinking. Voir dire is the best opportunity for the lawyer to learn something about how the people who will be deciding the case think and who they are. So voir dire is one of the multitudes of times

when a lawyer's ears are way more important than the lawyer's mouth. Given the size of my mouth, this concept did not come easily to me.

There are several distinct phases of voir dire. Two obvious ones are the "getting to know you" phase, and the indoctrination phase. The "getting to know you phase" of voir dire is a two-way street. You are watching the potential juror, and the potential juror is watching you. This is when you learn about who the potential juror is, and the potential juror begins to learn about and starts to listen to you. First impressions are formed. The goal should be conversation. While the idea of a personal conversation in a courtroom in front of dozens of other people might not cause a lawyer to experience deathly fear, there are many people confronted with this reality who make a deer frozen in the headlights look positively relaxed.

One of the foremost challenges during voir dire is to convince potential jurors to talk with you. So let us talk about whom you speak to, what you talk about and what types of questions you should ask. When you ask a question to a group of people, there is usually an awkward silence. Many people are intimidated by public speaking. For this reason, it is important to speak to individuals rather than the group. A one-to-one conversation is a whole lot easier for both participants than a one-to-12 exchange. Lay people need to be made comfortable speaking with you or else there will be a bunch of yes and no answers with little information exchanged.

First try to figure out what subjects people are comfortable speaking about in front of a group of strangers in a courtroom when the person asking the questions is that most questionable of characters, a lawyer. The familiar is a good place to start. Most people's lives revolve around their families and what they do for a living. Historic information such as

educational background, where they grew up and how long they have been living in your state or jurisdiction is also familiar ground. Once general history has been covered in such a manner that conversation has become easier and more fluid, then other matters can be discussed including questions about prior jury experience, contacts with the criminal or civil justice system, crime victimization and military experience.

The types of questions asked can help create a conversational atmosphere even in a courtroom. Leading questions that get nothing more than a yes or no answer are useless

during this phase of voir dire. My favorite is “Can you be fair?” Unless you are dealing with somebody who is floridly psychotic or is doing everything humanly possible to shirk jury duty, you can

bet the answer to this question will be “yes.” Also, if the potential juror speaks the English language and successfully completed kindergarten, he or she will wonder why you asked such an obvious and simple-minded question. This is because most people, even in those cases where there is a wealth of evidence to the contrary, believe that they are fair.

On the other hand, open-ended questions invite conversation. Compare the following series of questions:

I see from your juror card that you are married and have three children, correct?

I see from your juror card that you are a supervisor for X corporation, is that right?

You came to here five years ago from Moose Corner, Alaska, didn't you?

Compare those questions with the following:

Could you please tell us about your family?

What are your responsibilities as a supervisor?

What brought you here?

The first three questions will result in yes or no answers, great for cross-examination but not particularly valuable during jury selection. The next questions are open-ended and invite dialog. Once conversation has been established, then there can be more personal questions regarding the person's likes and dislikes, including what they like to do during their free time, what television shows they watch regularly and enjoy, if they belong to any community groups or organizations, if they are politically or religiously active, what they read, and similar matters. The responses may give you helpful information.

Remember that during this conversation, while you are evaluating the potential juror, that juror is also evaluating you. It is important for you to

create an impression that you are confident, focused with your questions and well-organized. A series of painfully repetitious questions to each juror, fumbling through notes and long and painful pauses will reflect negatively on you (as the attorney). If a positive first impression is achieved during voir dire, it will carry into the trial and give plus marks in the credibility column.

If you have the gift to be able to remember and address each juror by name without looking at your seating chart cheat sheet, you will impress and make each juror feel that you recognize that they are an important part of a significant event. This is one of my greatest shortcomings. I am chronically incapable of remembering names. I have called my daughter by my sister's name and my sister by my daughter's name several times within a single conversation with the two of them standing directly in front of me. If you add my brother and son to the conversation, I turn to jelly. As a result, I have little confidence that if I use a name it will be the right one. So if you have the gift of remembering names use it to your advantage.

Creating a light moment can also be valuable. During the course of conducting a voir dire, I learned

“ **One of the foremost challenges during voir dire is to convince potential jurors to talk with you.** ”

that a gentleman on the jury was a professor at the University of Hawaii who had a son. I asked the professor what his son did for a living. He told me "My son is a rocket scientist." I paused and asked "You mean a real, genuine, honest to goodness bona fide rocket scientist?" He smiled and said "yes." So I said "Well that is interesting, professor, because my parents, when they were talking about me, used to tell anybody who was willing to listen that I was NOT a rocket scientist." The point is that if there is an opportunity to put people at ease with tasteful and appropriate humor, it can go a long way in establishing rapport and conversation. It also helps dispel the notion that lawyers are arrogant, self-serving and self-possessed.

The indoctrination phase requires a different strategy than the "getting to know you phase." This is a chance to use *voir dire* to start selling your case as well as soften arguments you anticipate from the opposition. During the indoctrination phase, closed questions seeking only a yes or no response to the group are often appropriate. It is also necessary to scrupulously avoid over-selling during indoctrination. A presentation that leaves the impression of fairness and evenhandedness trumps any impression of skewed partisanship.

In criminal cases the indoctrination phase often involves general legal issues such as reasonable doubt, the presumption of innocence and the right to remain silent. Indoctrination is also specific to the particular case. Such specific indoctrination may involve a defense such as insanity or circumstances such as the use of a weapon, the use of drugs or the absence of physical evidence. This is an opportunity to try and guard against the "CSI effect."

Because indoctrination can involve legal concepts, it is painfully tempting for lawyers to use legalese. The use of legalese is a great way to confuse, confound and frustrate potential jurors. Remember you are speaking to real people and not lawyers who thrive on marvelous contortions, complications and distortions of the English language. Questions that sound like jury instructions should be scrupulously avoided.

A question about reasonable doubt such as "Are you willing to follow an instruction from the judge

that a reasonable doubt is a doubt in your mind about the defendant's guilt which arises from the evidence presented or from the lack of evidence and which is based upon reason and common sense?" may not only be objectionable to some judges but will also be difficult for many jurors to understand and follow. On the other hand, a question such as "Are you willing to use your reason and common sense in making a decision in this case?" is understandable and also lays the groundwork for discussion of reasonable doubt in closing argument.

When the time comes for peremptory challenges, you are not selecting jurors that you want to stay; you are excusing jurors you want to go. Excusing a juror has the feel of firing somebody from a job. The attorney thanks and excuses the juror who then has to stand up and take the long slow walk out of the courtroom. This is almost always an awkward moment and has the look of throwing someone out of a bar. As a result, some inexperienced attorneys seem to hesitate to exercise their challenges and waive most of them. Always bear in mind that this short uncomfortable moment is way less upsetting than an adverse verdict. When there is solid reason to doubt, throw them out. Do it politely but firmly and unapologetically.

Jury selection has been likened to gardening. In a garden it is necessary to eliminate weeds. The gardener culls what does not fit in. One way of weeding the jury is a sort of soft science that relies on social status, occupation, body language, demographics, psychology and other factors. Another way is reliance on instinct. We form first impressions, and they are often accurate. Both soft-science and instinct have their place in jury selection.

After having done a great number of *voir dices*, my own feeling is that the selection process is educated guesswork. By getting to know the perspective jurors you are in a better position to intelligently select those people who will probably listen. By leaving a favorable impression you increase the probability that you will be trusted as credible in argument.

Even with the process of *voir dire* there is still a large element of chance in the jury selection process. If you have selected jurors who are willing to listen to and have a favorable impression of you, then you have gone a long way toward creating your own good luck.

“Qualifying” Prosecutorial Immunity

by Douglas W. McNett, Assistant Pawnee County Attorney



Remember how in the law school world everything seemed so black and white? Your professors primarily focused on the black letter law. They taught us how to find the law, and then apply it to their carefully crafted factual scenarios. It was only after we had passed the arduous bar exam (i.e. a collection of those carefully crafted factual scenarios) that we discovered the real legal world was truly composed almost entirely in a spectrum of gray.

If you have ever been in private practice, you appreciate malpractice insurance as simply being a necessary cost of doing business. As a prosecutor, however, have you ever wondered what your true liability is? Earlier this year, I pondered this question when the Kansas Supreme Court overturned the rape conviction of a particularly litigious defendant on procedural due process grounds. The defendant in my case had filed a number of lawsuits while incarcerated, ranging from inadequate access to a law library while in the county jail, to personally naming me in a lawsuit for money damages for the loss of his 1981 Lincoln when it was released after his arrest to the woman he claimed was his common-law wife. Yes you read that last one right. The basis for his cause of action regarding his auto was that had I adequately investigated the fact he was married to another woman at the time of his arrest, I would have advised the sheriff's department not to release the vehicle to the reputed common-law wife. Apparently the woman promptly sold the vehicle and didn't give him any of the money.

If you prosecute long enough eventually you also may encounter this kind of defendant. Obviously prosecutorial immunity will not prevent you from being named in a frivolous lawsuit, but it can help you get out of the suit quickly and hopefully without any court reviewing if you did anything wrong.

This article is not intended to be an academic piece on the subject, but rather to provide a general understanding of prosecutorial immunity and how state prosecutors can avoid possible liability. If you wish to explore the subject more thoroughly, an excellent starting place is “Prosecutorial Immunity: Removal of the Shield Destroys the Effectiveness of the Sword,” by James P. Kenner, Washburn Law Journal, Volume 33, No. 2 (Spring 1994).

From a distance prosecutorial immunity appears to be one of the areas of law that is to some extent black and white.

In 1927, the United States Supreme Court first addressed prosecutorial immunity in *Yaselli v. Goff*, 275 U.S. 503 (1927) and found that prosecutors were entitled to absolute immunity from common-law torts as their duties were of a quasi-judicial nature and intimately associated with the judicial process. Therefore actions against counsel for defamation, libel and slander were precluded if counsel made the offending statements during presentation of the case.

In 1975, the United States Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409 (1975), specifically extended prosecutorial immunity to actions brought under

§ 1983 of the Civil Rights Act. In extending the immunity, the *Imbler* Court held that prosecutors are absolutely immune when “initiating a prosecution and in presenting the State’s case.” *Imbler*, 424 U.S. at 431. In other words, acting as an advocate for the State.

While we all hopefully have a clear understanding of what it means to “present the State’s case,” where the gray arises is when we ask, “What did the court mean when it said prosecutors have absolute immunity in ‘initiating a prosecution?’”

The Kansas Court of Appeals first reviewed the issue in *Sampson v. Rumsey*, 1 Kan. 2d 191, 563 P.2d 506 (1977). Following a not guilty verdict, the criminal defendant sued the Sedgwick County District Attorney for invasion of privacy as a result of the preceding criminal investigation. In denying Sampson’s claim, the Court held that the “power of the district attorney to investigate alleged violations within his jurisdiction is unquestionable and his motive in doing so may not be the subject of a lawsuit against him.” *Sampson*, 1 Kan.2d at 197. In *Knight v. Neodesha Police Dept.*, 5 Kan. App. 2d 472, 620 P.2d 837 (1980), the Court of Appeals held “[t]he attorney general and the county attorney have absolute immunity for their conduct in investigation for potential prosecution. This immunity applies to

decision not to act as well as to the decision to file charges.” *Knight*, 5 Kan. App. 2d at Syl. ¶6. The only anomaly I found to this general rule in early Kansas caselaw was in the case of *State v. Greenlee*, 228 Kan 712, 620 P.2d 1132 (1980). In *Greenlee*, the criminal defendant challenged the prosecutor’s denial of the defendant’s request for a diversion on a drug offense. While the Kansas Supreme Court ultimately held that the criminal defendant failed to show that any of his constitutional rights were violated, the Court noted that while prosecutors possess wide discretion, they are not immune from judicial review as to whether discretionary decisions were arbitrary. The bright line rule of absolute immunity in decisions related to prosecution however, was upheld in *Massey v. Shepack*, 12 Kan. App. 2d 770, 775, 757 P.2d 329 (1988).

The bright line test remained the national standard until 1991 when the United States Supreme Court was asked to consider whether a prosecutor is entitled to immunity when he had improperly advised law enforcement with regards to hypnotism as being an acceptable form of interrogation technique in *Burns v. Reed*, 111 S. Ct. 1934 (1991). At the probable cause hearing, the prosecutor presented Burns’ confession of killing her children, but failed to inform the Court that the confession had been obtained while the defendant was under the suggestive state of hypnosis. The charges were eventually dropped, and Burns brought suit against the prosecutor under two theories: (1) improper advisement of law enforcement; and (2) conduct in

the probable cause hearing.

In deciding the case, the Court found that the prosecutor was entitled to absolute immunity as to his conduct at the probable cause hearing, but not when he was providing legal advice to law enforcement. As the court saw it, giving advice to law enforcement falls outside of the purview of being an advocate in a judicial proceeding. *Burns*, 111 S. Ct. at 1942-45. Thus, the functional approach to analyzing immunity was born.

The next major case in the development of the current status of prosecutorial immunity was *Buckley v. Fitzsimmons*, 113 S. Ct. 2606 (1993). *Buckley* involved the kidnap, rape and murder of a young girl. A boot print had been found at the crime scene. Three different crime labs analyzed the print, but were unable to match the prints to the defendant. Undaunted the prosecutor located another expert that would testify the defendant’s boot and the print found matched.

Based primarily on the boot print identification, the defendant was indicted by a grand jury for the crimes. Following a trial on the charges, the jury was unable to reach a verdict. Then, prior to retrial, another individual charged with a similar crime confessed to the murder in question.

Despite the conflicting confession, the prosecutor went forward with the retrial. The charges were eventually dropped more than three years after the defendant was incarcerated when the fourth expert died. Upon his release, the criminal defendant filed suit against the prosecutor, for among other things, attempting to fabricate evidence and

for making false statements to the press.

In deciding the *Buckley* case, the United States Supreme Court made an interesting distinction. First, the Court ruled that the presentation of the fourth expert’s testimony was entitled to the traditional absolute immunity. The prosecutor’s search for an expert, however, was only entitled to “qualified” immunity similar to law enforcement officers. In making this finding, the Court noted that while the role of advocate may begin prior to the actual initiation of prosecution, when acting as an advocate, the prosecutor evaluates evidence in preparation for presenting the state’s case.

The role of the detective, in contrast, is to obtain and corroborate evidence sufficient to provide probable cause. As such, the Court remarked that “a prosecutor neither is, nor should he consider himself to be, an advocate before he has probable cause to have anyone arrested.”

When a prosecutor evaluates evidence or interviews witnesses, the line between investigation and advocacy is drawn at the point of probable cause. Thus, the prosecutor crossed the line when seeking multiple expert witnesses in an effort to establish his case.

As for his statements to the press, the Court ruled that the prosecutor was only entitled to qualified immunity for any out of court statements. *Buckley*, 113 S. Ct. at 2515-19.

The most recent United States Supreme Court case with regard to prosecutorial immunity is *Kalina v. Fletcher*, 522 U.S. 118 (1997). In *Kalina*, the prosecutor commenced

criminal proceedings by filing three documents: an information; a motion for an arrest warrant; and a sworn affidavit supporting the motion for arrest warrant.

The defendant brought suit based on false statements contained in the sworn affidavit. Here the Court found absolute immunity with regards to the first two documents. Additionally, they found that drafting the supporting affidavit to ensure it contained sufficient probable cause was acceptable within the role of the advocate.

The Court, however, held that attesting to the facts in the affidavit stepped outside the role of the prosecutor and into the role of the complaining witness. *Kalina*, 522 U.S. at 130-31.

In *McCormick v. Board of County Commissioners of Shawnee*, 272 Kan. 627, 35 P.3d 815 (2001), the Kansas Supreme Court was asked to review a situation similar to that in *Kalina*.

In *McCormick*, an assistant district attorney had signed a probable cause affidavit at the time charges were filed. The charges were later dismissed, but the criminal defendant was detained for approximately an hour the day following the dismissal as the University of Kansas campus police confirmed the warrant's dismissal.

The criminal defendant later filed suit against a number of individuals including the assistant district attorney. Initially dismissed by the District Court, the Court of Appeals reinstated the claim against the assistant district attorney based on the *Kalina* decision. The Kansas Supreme Court affirmed the Court of Appeals decision to reinstate the

claim, but refused to bar the use of immunity outright. Instead, the Court took a hybrid view of the assistant district attorney's actions in holding that while she may have been acting outside the role of court advocate, she was still within her duties as a prosecutor for the State.

Noting the *Amicus* brief filed on behalf of the Kansas County and District Attorney Association, the Court reasoned that prosecutors should be afforded at least as much protection as law enforcement officers. As such, the court found the prosecutor might still be entitled to immunity under the Kansas Tort Claims Act.

The Court's ruling was accomplished by first holding that the signing of the probable cause affidavit was outside the scope of an advocate in accordance with the *Kalina* decision. Next, the Court remanded the matter for a *Franks* hearing to determine if the prosecutor in signing the affidavit had acted in bad faith. Finally, the Court held that the matter was only actionable if it was later determined using an objectively reasonable standard that the prosecutor had acted in bad faith. *McCormick*, 272 Kan. 649-51.

So what do the decisions in *Imbler*, *Burns*, *Fitzsimmons*, *Kalina*, and *McCormick*, mean to the Kansas prosecutor?

First, prosecutors need to be conscious of the role in which they are acting. If they are acting outside the traditional role of court advocate, they will only be afforded qualified immunity. As a practical matter, absolute immunity will now only be afforded to the acts of determining charges, preparation and filing of

documents, and the organization and presentation of evidence and arguments to the Court.

Absolute immunity has also been extended to non-criminal proceedings such as forfeitures. See *Amos v. State, Dept. of Legal Affairs*, 666 So. 2d 933, 935 (Fla. 2d D CA 1995). As noted above, however, with regards to the preparation of documents or presentation of evidence, the Courts have held absolute immunity is not available where the prosecutor personally attests to the accuracy of the allegations.

Areas of concern requiring additional carefulness include: giving legal advice to law enforcement; the directing of law enforcement investigations; taking an active role in the execution of search warrants, rather than simply assisting law enforcement in their procurement; the interviewing of witnesses prior to the filing of charges; and communications with the media (See Model Rule 3.6 concerning acceptable content of pretrial publicity).

Second, even when they are acting within their traditional scope, prosecutors must conduct themselves with good faith. In *Manning v. Miller*, 355 F. 3rd, 1028, 1032-33 (7th Cir. 2004), the Seventh Circuit recently denied qualified immunity to a prosecutor who willfully withheld exculpatory evidence. Additionally, the Tenth Circuit recently refused to dismiss a case on qualified immunity grounds where there was evidence the supervising attorney acted with deliberate indifference to the risk subordinates were using false testimony. See *Pierce v. Gilchrist*, 359 F 3rd 1279 (10th Cir. 2004).

If the issue of prosecutorial immunity and the role of an advocate is still not black and white to you, take solace in the words contained in the syllabus of the *McCormick* decision, “The defense of qualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”

In the event the action in question falls outside the traditional role of an advocate, the Courts have used a two or three prong approach to determine whether qualified immunity is available. First, the court inquires whether, “taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right?” *Saucier v. Katz*, 533 U.S. at 201. If the answer is in the affirmative, the court must then determine if the right allegedly violated was

“clearly established” at the time. *Brosseau v. Haugen*, 125 S. Ct. 596, 599 (2004). If the right was clearly established, then the court reaches the final query: “whether a reasonable official, situated similarly to the defendant(s), would have understood that the conduct at issue contravened the clearly established law.” *Saucier*, 533 U.S. at 202. Even if an official is mistaken regarding whether his conduct violated clearly established law, qualified immunity protects the official when his “mistake as to what the law require is reasonable.” *Saucier*, 533 U.S. at 205.

As a final note, it is important to remember that immunity, whether absolute or qualified, is a defense from suit (i.e. not to face a trial), rather than merely a defense from liability. That means the defense must be raised at the beginning of the proceeding. In *McCormick*, the Kansas Supreme Court held

that immunity is lost if the case is allowed to go to trial. *McCormick*, 272 Kan. at Syl. ¶3.

About the Author

Douglas W. McNett is a graduate of Kansas State University and the Washburn School of Law with Honors. He has served as an Assistant Pawnee County Attorney for the past eight years. In addition to his prosecution duties, Doug serves as the Court Trustee for the 24th Judicial District. He has previously served as a Staff Attorney for SRS and has engaged in private practice in Topeka and Larned. Doug has been a presenter for KCDAAs Conferences on the topics of Effective Methamphetamine Prosecution and Jury Voir Dire in Small Jurisdictions. His wife Jennifer is a Kindergarten teacher. They have three children: Ross, 5; Reed, 4; and Ella, 1.

Former KCDAAs Member Highlight:

Remebering a KCDAAs Past President

by John J. Gillett, KCDAAs Past President

Nanette Louise Kemmerly-Weber, or as we referred to her, Nan, was the County Attorney for Allen County, Kan. from 1985 to 2004. Nan and I were in the same law school class at Washburn University, graduating in 1979.

After law school she was in private practice and then became the Allen County Attorney. Nan was a Democrat in a county in which we used to tease her that she was the only Democrat. Allen County was and is predominately a Republican county. She was aggressive and tenacious in the courtroom. She sought justice for all but, because I had known her for so long, I could tell a difference in her demeanor when she was prosecuting a case where a child or woman was a victim.

Nan met Alan Weber who was a practicing attorney in Humboldt, Kan. They developed a romantic relationship and were married. Nan being the independent sort that she was, did not want to give up her maiden name so she became Nan Kemmerly-Weber. They made a great couple and were a good balance for each other. They had one daughter, Katherine, who was the light of both their lives.

While Nan was County Attorney in Allen County, I was County Attorney in Wilson County, Kan. Both counties are in the 31st Judicial District. We renewed our friendship from law school when she came to southeast Kansas. There were plenty of defendants who had charges in both counties pending at the same



Nanette Louise Kemmerly-Weber accepting the 2004 KCDAA Lifetime Achievement Award. She passed away on July 8, 2006 at 51 years old.

time, so we would discuss how to handle and resolve cases on defendants we had in common. She was easy to work with, and we developed cooperative prosecution strategies. Having children equivalent in age, we would discuss different children's activities and events.

When Katherine was younger, one of Nan's biggest joys was reading books to her. Nan took great delight in that. As Katherine got older they would go to movies together. The public does not think of prosecutors as having any life beyond being a prosecutor, but being a good mother was always first with her.

Alan had some medical problems develop, and Nan was a Rock of Gibraltar to see him through those and help him close his private practice down. It seems as time went by more was thrown on her plate. For a time she was the single bread winner for her family, yet she never complained.

There were plenty of times that she would work late into the night on a criminal case coming up or on civil matters for the county. She would have rather been home with Katherine and Alan, but she worked hard as a prosecutor and public official. It could get lonely at times. Being the sole prosecutor in a county with a 17,000 population, there were times when she felt like she was the only person rowing the boat. She finally got the recognition she deserved for all her hard

work and being away from her family while working for the public good when she received the KCDAA Lifetime Achievement Award in 2004.

When she got a budget where she could have an assistant, she proved adept at picking people who were good assistant county attorneys. Two remained in the area in private practice. A third is now the Allen County Attorney, Jerry B. Hathaway.

During the time I was on the Board of Directors for the KCDAA, she was involved in various committee activities for the association. When I was the President of the Association, she was on the nominating committee for board positions in the upcoming election. I and others commented to her that she should try for a position on the board. She was hesitant at first. Finally, I told her that when I was no longer an officer and not on the board, there was no one else from Southeast Kansas who was in a position to be on the board or serve as an officer. Since a member of the nominating committee could not be nominated for a position on the board, I asked her to resign from the nominating committee and stand for election to the board. I pointed out that with the population we had in Southeast Kansas, and the caseloads prosecutors here had, we needed to continue to have representation for Southeast Kansas on the board. She thought about it some more and decided to do it. She was elected to the board and later served as President of the KCDAA.

I will admit that I did give Nan a lot of hassle through the years about giving up smoking. She would give a quick retort like, "I did, it lasted three hours," or "I quit 40 times last year." Nan developed a tumor on her brain and then in her left lung. She had surgery to remove the tumor on her brain. She lost most of her hair and had a scar on the back of her head. She would wear a hat to court to cover the loss of hair and scar. Then she stopped wearing the hat. She had surgery on her left lung. She returned to work after each surgery and carried out her duties. She was on several medications that at times made her seem different than she had been before, but she carried on. She had been the rock in her family, but as time went by her loving and patient husband, Alan, became the rock. She had check ups and testing, which she didn't like, but knew she had to endure to make sure the tumors did not return. Her concern was always for her family and the impact of her medical condition on them. There came a time

when she could not drive anymore and Alan would take her to work every morning. Then he would pick her up and take her home in the evening. We would take recesses in court in mid-morning and mid-afternoon, so she could get something to eat. She had many friends in her community of Humboldt and in the court system who were amazed at how she continued to perform under the circumstances she found herself in. Then she started losing her eyesight. When it dawned on me during a contested proceeding with her that she was having difficulty seeing, it hit me hard. I see plenty of people who look for any excuse not to work and here was a person with the medical and physical problems she had in the courtroom trying a case. She set an example of courage, perseverance and determination. I certainly don't know that I could have done it. After she lost sight in one eye, she would walk sideways to use the sight she had in her other eye to go up to court or take papers to the judges to be signed. When in the hallways at the courthouse, she would find the wall with her hand and follow it to where she was going.

Some local attorneys finally talked with her about not running for office again under the circumstances. Jerry Hathaway, her assistant, told her he would run and keep her on as an assistant county attorney in the event that he won. Jerry Hathaway was elected and true to his word, he kept Nan on as Assistant Allen County Attorney. She continued to do courtroom work. When a judge was taking appearances, she would state Nanette Kemmerly-Weber, Assistant Allen County Attorney. I wonder how hard it was for her to do that after all the years of being the Allen County Attorney. She did it and did it in a voice that showed no signs of letting up in any way.

However, her physical condition continued to deteriorate, and it got to a point where she knew she could not continue. She resigned her position and went home to spend time with her family. She ultimately became completely blind. Her friends Lynn and April would take her places, and she especially liked going out to eat even though she was beginning to lose her appetite. Her friends had to tell her who people were when they met people in public. Nan could still walk, but had to be escorted places.

Later she was hospitalized and a new tumor was found growing on her brain. She passed away July 8, 2006 at just 51 years old.

The church, where the funeral was held, was overflowing with people from all over. There was a slide presentation that showed Nan laughing, smiling, enjoying good times and having fun with her family. It showed her doing the things most important to her, being with family and friends, and at the courthouse performing her duties as County Attorney.

This has been difficult to write as Nan was a friend for a lot of years. We were the same age, born four days apart. I think of Nan when I am driving between courthouses. Nan was a worker, and you could always count on her. She obviously did a good job for the citizens of Allen County, or they would not have continued to re-elect the lone Democrat in that county to public office. There were victims who did not remain victims when Nan was arguing their case. She instilled confidence in the timid and meek and was the only female prosecutor in the 31st district for a long time. She made it easier for people in the area to picture women as prosecutors and that women can get the job done. There are now two elected female prosecutors in the district and one assistant who is female.

None of us know what cards we will be dealt in the game of life. Nan was fully aware of her medical situation and never complained. She was lucky in that she got to spend virtually her entire legal career as a prosecutor and feeling good about wearing a white hat every day. She had the same frustrations other prosecutors have, poor reports, no reports, recanting witnesses, lying witnesses, etc., but she never let these minor distractions in a prosecutor's life get in the way of what was really important to her, seeking justice for crime victims. Her legacy lives on in that her husband, Alan, is the County Counselor for Allen County, and her daughter, Katherine, is a sophomore at the University of Kansas.

The family and friends of Nanette Kemmerly Weber are working to establish a scholarship at Washburn Law School in Nan's name. In order to endow a scholarship, funds of \$15,000 must be raised within five years. This scholarship will be known as the Nanette Kemmerly Weber Scholarship. If you wish to donate, you may send your donations to Washburn Law School Foundation, 1700 SW College Ave., Topeka, KS 66604, Attn: Joel Lauer. Please put in the memo part of the check that it is for the Nanette Kemmerly Weber Scholarship. If you have any other questions, call Joel Lauer at Washburn Law School, (785) 670-1702 or e-mail joel.lauer@washburn.edu.

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