The Kansas Prosecutor

The official publication of the Kansas County and District Attorneys Association
Volume 18, No. 1, Spring 2021

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

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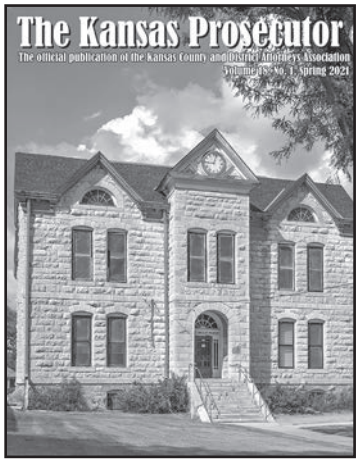


About the Cover

The cover features the historic Greeley County Courthouse.

The first courthouse, known as the Old Greeley County Courthouse, is two stories and constructed of sandstone by Allen and Oleson and William Ruff, both of Ness City, Kansas.

It was built 1889-90 and designed by William T. Heaps. The first courthouse is located on the east side of the present courthouse grounds and houses the Greeley County Historical Society Museum.

Photo by John D. Morrison, Prairie Vistas Photography

President's Column

By Brandon Jones, KCDAA President
Franklin County Attorney

2021 Legislative Activity

With the start of the new year, a new legislative session began, and KCDAA has been very active in Topeka this session. As I mentioned in my last article, KCDAA's top legislative priority this year was an effort to repeal K.S.A. 22-3402 - statutory speedy trial. When the COVID-19 pandemic hit the United States in mid-March of last year, jury trials across the country, including Kansas, immediately stopped. Since that time, only a few counties in Kansas have resumed jury trials. Here in Franklin County, we are still not setting jury trials, and we now have around 40 cases that are waiting to be tried. Other smaller counties across the state are facing similar situations, and the numbers for the bigger counties are staggering. In Sedgwick County alone, they have 115 people (at last count) being held on some type of murder charge! Needless to say, it is going to take us months, if not years, to get cases tried and get caught back up once we can start trying cases again. In many jurisdictions, we still do not know when that will be.

Thanks to the hard work of Steve Kearney, Marc Bennett, Todd Thompson, and others in KCDAA last spring, statutory speedy trial, along with most other deadlines, has been stayed by the Governor's emergency declarations since the pandemic began. However, that declaration is set to expire at the end of March, and many legislators in Topeka are opposed to continuing it due to its impact on small businesses, schools, etc. If no further action is taken, and the emergency declaration expires, prosecutors across the state will have 150-180 days to get all of their pending jury trials set and tried. That is clearly an impossibility, even for smaller counties like mine where there is no way we can try 40 jury trials in 180 days with only four prosecutors and one judge.

So, what is KCDAA's solution? House Bill 2078, and its identical counter-part Senate Bill 57, were drafted by the KCDAA and the Revisor's Office and introduced on January 20 and 21. The bills called for a suspension of speedy trial for all cases that were already on file, since it was our belief that the right to statutory speedy trial would have already vested in those cases, until May 1, 2024. It further called for the repeal of statutory speedy trial for all future cases filed after the new law went into effect. Marc Bennett and I testified before House Judiciary on January 26 and Marc, Steve Howe, and I testified before Senate Judiciary on February 4. What became immediately clear to us was that most legislators understood the situation and knew that something needs to be done, but complete repeal of the statute was dead on arrival. There was also a lot of concern that suspension of statutory speedy trial until May 1, 2024, seemed like too long to many legislators. They also encouraged us to work with the chief opponent of our bills, the Kansas Association of Criminal Defense Lawyers (KACDL).

Realizing that a compromise with KACDL was our best chance to get our bills passed, Marc and I worked with Jessica Glendening who was testifying against our bills on behalf of that organization. We agreed to remove the repeal provision from our bills and add the following language: "When prioritizing cases for trial, trial courts shall consider relevant factors, including but not limited to, the: (1) trial court's calendar; (2) relative prejudice to the defendant; (3) defendant's assertion of the right to speedy trial; (4) calendar of trial counsel; (5) availability of witnesses; and (6) the relative safety of the proceedings to participants as a result of the Covid-19 public health emergency in the judicial district." In return, she agreed to a suspension of statutory speedy trial until May 1, 2024, for all criminal cases including cases already filed and those filed in the future.

With the compromise, an amended HB 2078 passed favorably out of House Judiciary on February 22 and was passed by the entire House on a vote of 107 – 17 on February 25. The amended HB 2078

then moved to the Senate where it was assigned to Senate Judiciary. On March 11, a third committee hearing was held on this legislation in the Senate Judiciary on amended HB 2078. Marc Bennett and Steve Howe again testified on behalf of KCDAA. At the conclusion of the hearing, the committee began to work the bill and more amendments were added to the previously amended HB 2078. First, the Senate Judiciary was not comfortable with a suspension of statutory speedy trial until May 1, 2024, and so they amended the suspension until May 1, 2023. Further, they believed that the office of judicial administration needed to submit a report to the legislature in both 2022 and 2023 to report on the progress of the jury trial backlog and the continued need for the suspension of statutory speedy trial. To that end, the following language was added: "The office of judicial administration shall prepare and submit a report to the senate standing committee on judiciary and the house of representatives standing committee on judiciary on or before January 17, 2022, and January 16, 2023, containing the following information disaggregated by judicial district: (1) The number of pending criminal cases on January 1, 2022, and January 1, 2023, respectively; (2) the number of criminal cases resolved during fiscal years 2021 and 2022, respectively, and the method of disposition in each case; (3) the number of jury trials conducted in criminal cases during fiscal years 2021 and 2022, respectively; and (4) the number of new criminal cases filed in fiscal years 2021 and 2022, respectively."

With those additional amendments, HB 2078 passed favorably out of Senate Judiciary on March 16, and on March 17, it was passed by the entire Senate on a vote of 32 – 7. Now the bill will be referred back to the House Judiciary who can concur with the amendments made by the Senate, pass it as amended by the Senate, and send it off to the Governor for her signature. If the House does not concur with the Senate amendments, a conference committee will have to attempt to work out the differences. Then it will need to be approved by both the House and Senate again before it can go to the Governor. As of the writing of this article, it looks like we are close to the finish line!

I truly believe this is the most important piece of legislation I have been involved with in my 21 years as a member of this organization. Hopefully this law will be passed soon, and we will all have the time we need to work down our jury trial backlogs once we can safely resume jury trials again. This article is already too long, but I do want to let you know that the KCDAA board continues to meet weekly to discuss all legislative items that we think will have an impact on the members of our organization. I, along with other KCDAA members, have provided written and/or presented oral testimony on several other pieces of legislation this session. We have dealt with the definition of "absconding" and "possession," a bill to make expungements automatic and make it the responsibility of the prosecutor to file the paperwork for the same, and many other pieces of legislation dealing with our criminal justice system.

We should have a full legislative update at our spring conference and in our next magazine once all of the dust settles. Between now and then, please do not hesitate to contact KCDAA or board members with any concerns or questions you may have about any legislation or any ideas for future legislation. Wishing you all a great spring!!

We want to share your news!

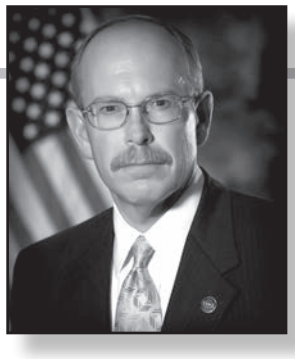
If you have something you would like to share with the KCDAA membership, please keep us informed.

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 and photos to:

Editor Mary Napier
mary@napiercommunications.com

Next Deadline:
Summer 2021: July 1



Guest Article

By Kirk Thompson, Director
Kansas Bureau of Investigation

Police Deadly Force:

Community Trust Starts with an Independent Investigation

When an officer-involved shooting (OIS) occurs, or a law enforcement officer is accused of a criminal act, how the incident is managed may cause one of two things. It can reinforce a community's confidence in its law enforcement agencies and in the larger criminal justice system, or instead create a sense of distrust and apprehension in these systems. Public impressions of many of these incidents has not always been well-informed and has resulted in rhetoric that has not been helpful to our relationships with the communities we serve. In this past year, we witnessed the importance of police and community relations when shocking use-of-force incidents occurred in several parts of the country. The result was countless occurrences of dangerous civil unrest and widespread cries for police reform, especially related to the use of force. As criminal justice and community leaders, we all discovered just how quickly public trust can waver.

We know that, with the sheer number of officers in our state tasked with preventing illegal acts and the volume of criminal activity they confront, some fatal interactions with police are likely. We also understand that, like all professions, law enforcement officers and government officials are comprised of human actors who sometimes make mistakes or act unethically, and can at times act criminally. The difference lies in that these individuals are appropriately held to a higher standard, and so their wrongdoings are newsworthy and have the ability to compromise the trust of the communities we serve.

None of our public agencies or Kansas communities are immune from experiencing a fatal police shooting that receives national attention, or a comparable episode that is able to erode the trust the public has for its institutions of law and justice. At the KBI, we know this possibility very well. Since our agency's creation in 1939, we have conducted investigations of these incidents and often stood side by side with law enforcement, prosecutors, and community leaders during and after them.

In recognition of the critical importance of providing high quality independent investigations, we have taken numerous steps to improve our processes. First, we participated in a national effort to create investigative best practices for police use of force cases (2014 – 2016). We updated and modified our own procedures to match those nationwide best practices (2016-2018). We provided training to most sheriffs, chiefs, and prosecutors about our new protocols (2018) and prepared a booklet setting forth our procedures and expectations when called upon to conduct a use of force investigation. We made response and investigation of OIS events a top priority and set a completion target of 30 days for presentation of the cases to the prosecutors.

Of course, we expect critical incidents to happen in the state's largest jurisdictions, but we also experience them in our mid-sized communities. We even encounter these same use-of-force incidents in some of our smallest, and arguably safest rural communities. In 2020, they happened in Cimarron, Pawnee Rock, and Mayetta. Every community in Kansas can be shaken by a deadly force incident.

On average, the KBI investigates approximately 70% of the officer-involved shooting incidents that occur in the state of Kansas. We also investigate an average of 56 cases each year where law enforcement officers and other public officials are accused of criminal wrongdoing. Approximately 64% of these public official cases are law enforcement related, while the others involve a city, county, or state official or employee as the suspect.

So, how do we as government and law enforcement decision-makers respond to this call for reform related to police use of force, and to the community's insistence for further accountability and transparency? How do we handle a critical use-of-force incident, or respond when accusations are made against a police officer or government official without risking the trust our community places in us?

The answer is not an easy one. The first step is to make advanced plans for these situations. Thinking through basic guidelines and procedures for how these situations should be handled when they occur goes a long way during a critical incident. These plans need to ensure that ethical actions are taken and transparency is met at every stage of the response. Fortunately, in Kansas, we have a long-standing history of support of law enforcement and first responders by our citizens. However, this support is not imparted without conditions. For example, the public demands that legal and ethical guidelines be followed. They expect a thorough and timely examination of the facts. They expect that honesty, transparency, and accountability will emerge in each instance where possible criminality by a public official is in question.

National best practice, as well as public pleas for impartiality, have led most law enforcement leaders and prosecutors to the conclusion that officer-involved shootings and use-of-force incidents that result in death or serious injury should be conducted by an outside agency, and not the agency who employs the law enforcement officer involved in the event. The KBI, as an agency, has experienced the benefits of this level of impartiality as well.

In many incidents in the past, when the law enforcement agency opts to investigate the criminal matter internally, voices in the community accuse the agency of "policing themselves" because they may be biased by their relationship with the individuals involved or their interest in upholding the reputation of their agency. If a law enforcement leader or the prosecutor of a jurisdiction requests the KBI (or another qualified and specially trained agency) to conduct these investigations, this argument is mitigated from the onset.

At the KBI, when our assistance is requested to investigate an officer-involved shooting or other critical incident, the investigation is independent, professional, consistent, and timely. Each KBI special agent receives training specific to all aspects of investigating use-of-force incidents. Each agent is also taught techniques for interviewing public officials so they know what to expect and how to address this additional nuance. Additionally, the vast majority of our KBI agents previously worked as officers or deputies on patrol before being hired as a KBI agent, so they understand the dangers and challenges that accompany policing.

When the KBI is asked to investigate an officer-involved critical incident, we prefer to handle all facets of the investigation, including crime scene processing, laboratory testing of evidence, and cyber analysis, notwithstanding a formal memorandum of agreement with a law enforcement agency wherein the roles and responsibilities are otherwise clearly delineated. As the investigating agency, we work collaboratively with law enforcement leaders and prosecutors to respond to media inquiries in a transparent but impartial manner.

Due in part to an increasing demand for information and transparency following use-of-force incidents, we have taken steps to make our investigative processes for these cases more efficient. Our incident response times have improved across the state. Additionally, we have nearly always been able to hit our new target of 30 days for case completion. So, typically within 30 days we can provide all investigative results to the prosecutor of a jurisdiction, including the laboratory reports. We believe that when our investigation is both thorough and as timely as possible, it aids prosecutors in making their determination, and also helps the criminal justice community respond to the heightened public interest in these investigations. We also immediately engage with the injured person or family of the decedent to share information about the progress of the investigation.

In the end, even despite best efforts, there is no surefire way to ensure that a major incident or investigation will not harm the relationships built with our community partners. Yet, law enforcement and criminal justice leaders are judged by how these notable incidents are handled. The community trust we all strive for begins with an impartial investigation by an independent agency.

KCDAA Highlights: Newly Elected Prosecutors

The beginning of 2021 brought some new county and district attorneys to our ranks. We want to introduce them to you, even though some may be familiar to you, and welcome them to their new role. To help you learn more about them, we sent out a short questionnaire for them to fill out. Some were busy learning their new role and didn't have an opportunity to submit the information. However, in this article you will find information on some of them, and a list of the others.

If you are an experienced prosecutor, please reach out to the newly elected prosecutors and offer them your guidance and support or make sure to introduce yourself at an upcoming KCDAA event. If we missed anyone on the list, please email Editor Mary Napier at mary@napiercommunications.com, and we will include them in the next magazine.

Anderson County Attorney Elizabeth L. Oliver

Education:

- Associate of Science in Business, Neosho County Community College
- Bachelor of Public Administration, Washburn University
- Juris Doctorate, Washburn University School of Law
- Master of Library Science, Emporia State University
- Master of Arts in English, Emporia State University

Previous employment experience: Since graduating law school, I have worked zealously to advocate for individuals in the legal system. I am a dedicated public servant having worked for the State of Kansas as a public defender, and Kansas Legal Services as an attorney. As an Assistant County Attorney in Sumner County, and Montgomery County, I prosecuted rape cases, burglary cases, and drug cases.

Why did you decide to run for a county/ district attorney position? I grew up in Franklin county and attended sales at the Anderson County Sale Barn. My career has been focused on serving the poor and becoming a county attorney. After spending a legal career learning how other counties and districts handle cases, I ran for Anderson County Attorney. My passion for serving rural communities and my love for Anderson County motivated me to run for Anderson County Attorney.

What are your goals as the newly elected prosecutor? To ensure victim's voices are heard and defendants are held accountable.

Cherokee County Attorney Nathan R. Coleman

Education: Washburn University School of Law

Previous employment experience: I began my legal career practicing civil litigation for a law firm in the Kansas City area. I then opened my own practice in Cherokee County, Kansas in approximately 2007. I was elected as Cherokee County Attorney in 2012 and held that office from 2013-2016. I remained with the Cherokee County Attorney's Office as Deputy County Attorney from 2017-2020.

Why did you decide to run for a county/ district attorney position? I am in the somewhat unique position of filling the vacancy of an elected official who resigned the office. I sought the appointment because I continue to place great value on the service, we, as prosecutors, have the opportunity to provide the citizens of our communities and I continue to find fulfillment and challenge serving in the position.

What are your goals as the newly elected prosecutor? Generally, my goal is to carry out the duties of the office with professionalism, passion, and integrity, in pursuit of justice and in humble service to the citizens of Cherokee County. Specifically, one of my goals for the office is to improve implementation of information technology to manage the electronic data moving within our office in a manner that increases our efficiency in processing cases from start to finish.

Anything else you want to tell the KCDAA members? It really is an honor to continue serving with all of the KCDAA members, and I am looking forward to the day we can meet again in-person!

Clark County Attorney
Joseph H. Milavec

Education:

- Bachelor's of Legal Studies, Washburn University
- J.D. Washburn University School of Law

Previous employment experience:

- Office Manager/Victim-Witness Coordinator, Criminal Division, Kansas Attorney General's Office
- Private practice, mainly dealing with civil, probate and estate planning matter
- Paralegal at a private family law firm for about 5 years before opening my practice.

Why did you decide to run for a county/ district attorney position? I had two main reasons for running. First, I wanted to do right by the people in Clark County. Second, I realized I missed the prosecution side of things.

What are your goals as the newly elected prosecutor? My main goal would have to be building confidence in the process and to bolster communication between the different arms of the process.

Douglas County District Attorney
Suzanne Valdez

Education:

- University of Nevada, Las Vegas (B.S. Business Administration 1991)
- University of Kansas, (J.D. 1996)

Previous employment experience: Kansas Legal Services (1996-99); University of Kansas School of Law, Clinical Professor of Law and Connell Teaching Chair, Director of Criminal Prosecution Field Placement (1999-2021); Special Prosecutor, Wyandotte County (2005-2008; 2017-2020); private civil litigation practice (2010-2021)

Why did you decide to run for a county/ district attorney position? I decided to run for office for the following reasons: (1) I felt it was time for a change of leadership in the DA's office, and I believed I had the right qualifications and experience to lead the office; (2) I am committed to public service, racial and gender equity, and achieving justice in our criminal justice system; and (3) I wanted to serve as a role model for women and people of color by running for office.

What are your goals as the newly elected prosecutor? Broadly speaking: (1) to employ a diverse, well-trained, and ethical staff to ensure equal access to justice; (2) to maximize rehabilitative programming and alternatives to incarceration so that prosecutorial resources can be allocated to the most serious, violent offenses; and (3) to make the justice system work for victims rather than creating new victims through the justice system.

Anything else you want to tell the KCDAA members? I am excited, honored, and humbled to serve the Douglas County community in this role.

Editor's Note: We also want to note that Joshua Seiden has joined the Douglas County District Attorney's Office as a Deputy District Attorney, and Emily Hartz, Jon Simpson, and Emma Halling have joined the office as Assistant District Attorneys. Welcome to all of you!

Elk County Attorney and Greenwood County Attorney
Jill R. Gillett

Education: KU undergrad, Washburn Law

Previous employment experience:

- Greenwood County Attorney - August 2020-Present
- Elk County Attorney - August 2020-Present
- Gillett Law Office, 2002-Present Attorney (2013-Present), Paralegal, and Office Manager (2002-2013)
- Montgomery County Attorney's Office,

Assistant County Attorney - August 2013-June 2014
- Allen County Attorney Office, Pro Bono Extern - Fall 2012
- Woodson County Attorney Office, Pro Bono Extern - Fall 2012 / Special Prosecutor - 2013-Present
- Jurgensen and Zook, Pro Bono Intern - Summer 2011
- Trial Court Clerk II, Office of Judicial Administration, Neosho County - June 01-Dec 02

Why did you decide to run for a county/ district attorney position? Our last child went to college and John (my husband) and I both became county attorneys.

What are your goals as the newly elected prosecutor? To establish good relationships with law enforcement and help find ways to reduce drug addiction and recidivism in our area. The sheriffs in both counties, and I, are working together to help the counties.

Ellis County Attorney Robert A. Anderson, Jr.

Education: Washburn University School of Law

Previous employment experience: private practicing attorney 2015 through 2021 (primarily criminal defense/ BIDS)

Why did you decide to run for a county/district attorney position? For that sweet government paycheck.

What are your goals as the newly elected prosecutor? Straight out of my policy/staff handbook: The Ellis County Attorney, and by extension his or her staff, has a duty to make Ellis County a safer place to live and to do so in an efficient and cost-effective manner for the taxpayers of Ellis County. The goals of this office shall be: (1) to prioritize all criminal investigations and cases that include death of a person, crimes and matters involving child victims (including Child in Need of Care cases), sex crimes, violent person crimes, property crimes, and drug distribution crimes; (2) to **effectively** prosecute as many cases as possible; and (3) to maximize office efficiency for the sake of our taxpayers.

Anything else you want to tell the KCDAA members? I am in the process of trying to get a Kansas Legislator to sponsor a bill that would amend Chapters 21 & 22 to allow for law enforcement officers to issue electronic citations/notice to appear/ complaints for nearly all misdemeanor offenses. It is my hope that I have the support of KCDAA and prosecutors around the state. This would greatly increase my office's ability to prosecute more cases without any increase in cost to my office's budget.

Harvey County Attorney Jason R. Lane

Education: Kansas State University – Industrial Engineering Bachelors of Science; Washburn Law School – Juris Doctor

Previous employment experience: Sedgwick County – District Attorney's Office – Assistant District Attorney (3 years); Law Office of Jason R. Lane (2 years); Harvey County Attorney's Office – Assistant County Attorney/Chief Deputy County Attorney (8 years)

Why did you decide to run for a county/ district attorney position? With the former county attorney retiring, I believed it was my time to step into that role. For many years I had increased my role in supervising the office. Becoming county attorney now allows me to institute my own policies and continue to serve the community.

What are your goals as the newly elected prosecutor? My main goal is to hold those who commit crime accountable for their actions. New policies and procedures are being implemented focused on best practices and on creating efficient system.

Anything else you want to tell the KCDAA members? I am very grateful for the advice and support that I received over the years from my fellow prosecutors across the state. This job would be impossible without their help.

Saline County Attorney Jeffery Ebel

Education: Washburn University and Washburn University School of Law

Previous employment experience: Solo practice "The Ebel Law Office, LLC" and assistant attorney at the Saline County Attorney's Office.

Why did you decide to run for a county/district attorney position? Having worked previously as a prosecutor for over eight years, I just felt it was time to go back to prosecution. I enjoy working with people and wanted to help the criminal justice system in my community to be more efficient and responsive to the desires of the community.

What are your goals as the newly elected prosecutor? To help guide the criminal justice system into a new era. What once worked in the past, is not necessarily ideal for our current society. I believe in incarceration of violent offenders and notorious repeat offenders, but realize, that at times, drug and alcohol treatment, mental health therapy, probation, and restitution can be just as effective toward the goal of offender reformation.

Anything else you want to tell the KCDAA members? I am excited to be back in the ranks of fellow prosecutors and look forward to the opportunity to meet and learn from others.

Other newly elected prosecutors include:

- Barber - Daniel O. Lynch
- Comanche - Cynthia Long
- Crawford - Reina Probert
- Jewell - Alexandria Carabajal
- Linn - Burton Harding
- Montgomery - Lisa Montgomery
- Ness County - Jacob T. Gayer
- Sumner - Larry L. Marczynski II
- Thomas - Christopher Rohr
- Wilson - John Gillett

Do you have an article idea you would like to know more about? We can try to find a writer, if you have an idea.

Or do you want to submit an article?

Send your idea/submissions to Editor Mary Napier at mary@napiercommunications.com.

Upcoming 2021 Kansas Prosecutor Deadlines

Summer - July 1

Fall/Winter - November 1

Designing a New Courthouse

By Chris McMullin, Chief Deputy District Attorney, Johnson County

When I graduated from law school way back in 1991, I knew that I wanted to be a prosecutor. I had six months of full-time prosecution internship under my belt. I secured a job with the Sedgwick County DA's office and was prepared to do prosecution stuff—trials, research, writing. Along the way I learned a lot more from many great mentors.

I have to admit, I missed out on the architecture training.

Fast forward a couple of decades, and I am housed in the brand-new, state-of-the-art Johnson County Courthouse. I spent a considerable amount of time over the past several years as part of DA Steve Howe's courthouse working group.

Our seven-story courthouse came into being because the taxpayers of Johnson County approved the funding to build it. But it took a months-long, county-wide promotional tour by Steve Howe and County Commission Board Chairman Ed Eilert to secure the special election victory. I was fortunate enough to get to be a substitute Steve on a couple of occasions and actually use my persuasive skills on public tours of the old courthouse.

Our working group helped select the contractors, and then spent hours and hours over months and months working with architects, engineers, builders, and other specialists to design our third-floor office space. We have gone from a tiny, cramped, makeshift office spread out over two floors to a custom-designed space the size of an NFL football field.

We also provided input into the design of the public spaces, and the courtrooms.

Here are some of the challenges we addressed:

- Making our space ADA compliant. One of the biggest drawbacks to the old courthouse was that it was wheelchair *unfriendly.* Our experience dealing with witnesses who had disabilities informed every aspect of our work, including our own office and our courtrooms.
- Managing the flow of people into the building. We spent a lot of time and effort to make it easy for the public to get to our high-use areas. For instance, traffic and first appearance court, along with jury assembly, are on the lower floors of the building. We are on the third floor. Courtrooms are on the upper floors. Ironically, due to COVID, our courthouse has yet to be open to the public to test these design concepts.
- DA reception area. We went from three reception areas spread over two floors to one central reception area. Our team delegated much of the design to the experts—our receptionists! They worked collectively with the architects and other building designers to come up with a practical design, which was built and is now in use. It is a great leadership lesson—our receptionists took real ownership in this important design task.
- Security. For decades, our office was so open that defense attorneys could wander around and visit ADAs unannounced. (Imagine doing that in a large private law firm!) Now, our office area is secured, and visitors must be escorted. We also added numerous conference areas so that on most days, if you want to meet with someone you can do so without bringing them into our secure office space. This helps with NCIC/III audits as well.
- Meeting space. We now have designated areas for interviews, protection orders, diversion meetings, and conferences. There are not a lot of those being done in person these days, and it will be interesting to see how many of these are still done remotely once we are able to meet in person again.
- Break rooms: the architecture team really pushed us to make sure that our office included spacious and inviting break areas.

Among numerous other subjects, we discussed lighting, HVAC, technology (in the office and in the courtroom), how many toilets are needed (!!!), construction and move planning. Our move was scheduled one year in advance and was an incredible logistical accomplishment—facilitated by a subcontractor that specializes in moving big offices.

Although I am far, far from an expert in building design, I learned a lot about how a modern office building is created. I was privileged to be able to participate in this process, even though I apparently slept through the architecture portion of law school.

Clear Error and Harmless Error Are Not Interchangeable

By Natalie Chalmers, Assistant Attorney General

As you may know, the Office of the Kansas Attorney General is required to approve all criminal post-conviction appellate briefs pursuant to K.S.A. 75-768. One of the more frequent comments that I make when reviewing those briefs involves correcting the mistaken interchange of harmless error and clear error in jury instruction issues. This article more fully explains why.

In 2012, the Kansas Supreme Court overhauled many of its standards of review. One such overhaul involved the standard of review for jury instructions.[1] With that overhaul came multiple longer standards of review, and the court questioning the use of the nomenclature "clear error" for a standard of review.[2] Judging by the difficulty people are having applying the correct standard of review, it appears that the clarity the court strived for has since been diluted.

This article focuses on clarifying the final step of the jury instruction standards: reversibility.[3] If error occurred, preservation matters. Preserved erroneous instructional issues are subject to a harmless error reversibility standard, while unpreserved erroneous instructional issues are subject to a clear error reversibility standard.

So what's the difference between the two? For harmless error, the burden is on the *State* to prove the error is not reversible. This test is commonly referred to as the *Ward* harmless error standard. If the error is not a constitutional error, the *State* must prove there is no "reasonable probability that the error [affected] the outcome of the trial in light of the entire record."[4] If it is a constitutional error, the *State* must prove that "there is no reasonable possibility that the error affected the verdict."[5] But if clear error applies, the burden is on the *defendant* to firmly convince the reviewing court "that the jury would have reached a different verdict had the instruction error not occurred."[6]

As explained by the Kansas Supreme Court, when clear error applies, "the burden of establishing reversibility differs … from the harmless error analyses discussed in *Ward*. Whereas the burden to show harmlessness generally shifts to the party benefitted by the error, the burden to show clear error under K.S.A. 22-3414(3) remains on the defendant."[7] Thus, the *Ward* test simply does not apply to the clear error reversibility standard. This is why I suggest striking any reference to *Ward* or harmless error when the clear error reversibility standard is being applied.

But recently, the appellate courts have not consistently been precise with the difference between the two either. For example, in *State v. Timley*,[8] the Kansas Supreme Court explained the standard of review for an allegation of clear error for the failure to give a lesser-included instruction using both reversibility standards:

> Timley next argues the district court committed clear error by failing to instruct the jury on intentional second-degree murder as a lesser included offense of premeditated first-degree murder. When presented with a claim that a district court has committed an error by failing to issue a jury instruction:
>
> > "(1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally,

Footnotes

1. E.g. *State v. Plummer*, 295 Kan. 156, 163, 283 P.3d 202 (2012).
2. *State v. Williams*, 295 Kan. 506, 515, 286 P.3d 195 (2012).
3. This article will not address invited error, which bars consideration of the issue entirely. *State v. Willis*, __ Kan. __, 475 P.3d 324, 329 (2020).
4. *Plummer*, 295 Kan. at 168.
5. *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 (2011).
6. *Williams*, 295 Kan. at 516.
7. *Williams*, 295 Kan. at 516.
8. *State v. Timley*, 311 Kan. 944, 954-55, 469 P.3d 54 (2020).

> if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in [*State v.*] *Ward* [, 292 Kan. 541, 565, 256 P.3d 801 (2011)]." *State v. Plummer*, 295 Kan. 156, 163, 283 P.3d 202 (2012).

If a defendant does not object to a district court's jury instructions—as was the case here—the appellate court

> "appl[ies] the clear error standard mandated by K.S.A. 2017 Supp. 22-3414(3). Under that standard, an appellate court assesses whether it is 'firmly convinced that the jury would have reached a different verdict had the instruction error not occurred.' [The defendant] has the burden to establish reversibility, and in examining whether he has met that burden we make a de novo determination based on the entire record. [Citations omitted.]" *State v. Williams*, 308 Kan. 1439, 1451, 430 P.3d 448 (2018).

The problem with the above summary of the standard is that step four of the test comes from a case involving a preserved request for a lesser-included offense. Thus, it references the *Ward* harmless error inquiry. But no such inquiry exists in the clear error reversibility standard. The issue with this conflation is that the *Ward* reversibility part of the standard will *never* apply if the jury instruction was not objected to or requested. While the clear error reversibility standard may be "akin to…a harmless error test,"[9] the harmless error and clear error reversibility standards are not entirely interchangeable. Again, the party bearing the burden of proving the reversibility of the error differs between the two tests.

When providing the courts with a standard of review, the problem in the above quote could be fixed if the fourth step would be referenced as a "reversibility inquiry." In fact, in *State v. Buck-Schrag*,[10] that is exactly how the court referenced the reversibility standard. In doing so, it provided a better summary of the standard of review in an unpreserved jury instruction challenge:

> "We must first decide whether the issue has been preserved. Second, we analyze whether an error occurred. This requires a determination of whether the instruction was legally and factually appropriate. We exercise unlimited review of those questions. Next, if we find error, we conduct a 'reversibility inquiry.'" *State v. Williams*, 308 Kan. 1439, 1451, 430 P.3d 448 (2018) (quoting *State v. Williams*, 295 Kan. 506, Syl. ¶ 5, 286 P.3d 195 [2012]).
>
> "The standard for the reversibility inquiry depends on whether the instruction was properly requested in district court. ... If the instruction was not requested, this court applies a clear error standard to the reversibility inquiry. 'Under that standard, an appellate court assesses whether it is "firmly convinced that the jury would have reached a different verdict had the instruction error not occurred."' *Williams*, 308 Kan. at 1451 [430 P.3d 448] (quoting *Williams*, 295 Kan. at 516 [286 P.3d 195]). The burden to establish clear error is on the defendant. In examining whether a party has met its burden, we consider the entire record de novo. See *Williams*, 308 Kan. at 1451 [430 P.3d 448]." *State v. Gentry*, 310 Kan. 715, 720-21, 449 P.3d 429 (2019)." *State v. Gray*, 311 Kan. 164, 173, 459 P.3d 165 (2020).

Additionally, although not the focal point of this article, quoting the preservation step often is unnecessary. Yes, it tells the court which standard to use, but that seems more efficiently handled by simply telling the reader if the issue was preserved or unpreserved. The issue is either reviewable because it was preserved or the court unquestionably has jurisdiction under K.S.A. 22-3414(3) (the clear error test). The preservation issue only warrants further discussion if there is a dispute about whether the issue was actually preserved.

Regardless, when an instructional error was not preserved, care should be taken not to cite to *Ward* or any other harmless error test that places the burden on the State to prove the error is not reversible. The reversibility standards should not be interchanged.

9. *Williams*, 295 Kan. at 511.
10. *State v. Buck-Schrag*, __ Kan. __, 477 P.3d 1013, 1023 (2020).

Combatting Co-Sleeping Dangers for Children

By Todd Thompson, Leavenworth County Attorney

When police entered the bedroom, they could smell alcohol. They saw an empty Fireball whiskey bottle, multiple empty vodka bottles as well as one with about an inch of alcohol remaining in it. Along with officers and EMS, the Wichita Fire Department arrived on scene to check on a person not breathing. The first responders found a two-month-old infant, pale and without a pulse, and immediately began life saving measures. When they asked the mother what happened, she said the father must have rolled over on him. One EMS officer said, "you shouldn't sleep with your baby in the bed."

Every year 3,500 babies die in the United States due to sleep-related causes according to the Centers for the Disease Control and Prevention (CDC). Bedsharing is the most common cause of death, especially in children younger than three months. The CDC said that infant deaths in the last 20 years have quadrupled. The American Academy of Pediatrics (AAP) recommends that babies sleep on their backs, they have a firm surface to sleep on, no blankets or toys in the area, a cool well-ventilated environment, and room-sharing without bed-sharing. They recommend room-sharing without bed-sharing for at least 6 months but preferably a year. (Some literature refers to co-sleeping and bed-sharing synonymously when in fact bed-sharing is a type of co-sleeping.) Other factors the AAP recommends to reduce death of a baby is to avoid exposure to smoke, alcohol, and illicit drugs.

When officers went to talk to the baby's mother, they noticed she could not smoke her cigarette without dropping it. She wobbled when she walked, and would hold on to the door so she would not fall. She was still intoxicated from the night before. In discussions with officers, she said that she and the father began drinking around noon. They left in an Uber to get McDonald's and vodka. When they came back, they continued drinking. The mother slept on the floor with one of the babies, and the father slept with the other baby cradled under his right armpit.

There is a growing trend for families to bed-share with their babies in the U.S. According to data through the AAP, since 1993, the practice of bed-sharing has grown from about 6 percent of parents to 24 percent in 2015. Bristol Professor of Epidemiology and Statistics, Peter Blair, has said that a baby sleeping next to an intoxicated parent is 18 times more likely to die from Sudden Infant Death Syndrome (SIDS). Infants have the same rate of potential death when placed on sofas, due to potential suffocation. Studies have shown smoking around infants can be another cause of SIDS generally due to respiratory issues.

When the mother woke, she found her baby snuggled against the right side of the father's chest. The baby wasn't breathing. She rolled the baby over and noticed blood. She woke the father up who responded, "Oh, sh@! I must've rolled over on him," and then, "They told us not to sleep with the baby."

Blair, who has been studying SIDS deaths for nearly 25 years has said that certain bed-sharing deaths should be criminalized. In numerous instances around the country, parents have been charged and convicted for the deaths of their infants due to bed-sharing. In Minnesota, Ohio, Florida, Maryland, Georgia, Michigan, Pennsylvania, Texas, Wisconsin, Utah, and Kansas, parents have been charged with a manslaughter or criminal negligence charge. Bed-sharing cases are generally difficult to prosecute due to lack of evidence and uncooperative witnesses.

After the investigation into the death of the baby, it was determined the infant died due to suffocation. The Sedgwick County District Attorney's office filed charges against the mother and father for involuntary manslaughter and four counts of endangering a child resulting in the death of their child and negligence of the twin.

When reviewing a case like this for charges, one should look at extenuating circumstances beyond mere bed-sharing. There are many people who believe in the benefits of bed-sharing. People who support bed-sharing often say the infant sleeps better, the infant develops healthy sleeping habits, is easier to breastfeed, and connects with the parents. The rise of this philosophy, and the fact that many parents have at one time slept with their infant in their bed, make it difficult to prove any case where co-bedding occurred without any other contributing factors. A study by BMJ on bed-sharing found that 1-in-16,400 low-risk babies die when sleeping with parents. (That statistic is opposed to the 1-in-46,000

that die when sleeping in a crib in the parent's bedroom). At this time, the mere act of sharing a bed with an infant will probably not rise to the level of endangering a child, even though bed-sharing is strongly discouraged by the AAP.

K.S.A. 21-5601 defines child endangerment as "willfully and unreasonably causing or permitting child under age of 18 years to be placed in situation in which its life, body or health may be injured or endangered." The child endangerment statute was written broadly because it's designed to cover a broad range of conduct and circumstances.[1] In this statute, the word "may" means more than just a chance, but a reasonable probability that harm would occur.[2] The issue to think about in prosecuting this is the unreasonableness that is necessary in the statute. *State v. Fisher*, said the unreasonableness would be doing something or not doing something an average person with normal mental facilities would not do or do. The fact that people have started believing bed-sharing has benefits and actually started doing it more weighs against the unreasonableness factor necessary to have a conviction. This is why I believe it is an extraneous factor.

State v. Bolze-Sann[3] affirmed there was enough evidence to uphold a conviction of involuntary-manslaughter and aggravated endangering a child when a daycare provider left a six-month baby on an adult bed with only a pillow border to prevent the child from falling. The infant subsequently died of a respiratory failure after becoming trapped between the mattress and footboard of the adult bed. In *State v. Bolze-Sann*, Bolze-Sann had told the parents repeatedly she would not leave the child on the bed. Also, Bolze-Sann knew that a licensed day-care required a play-pen or crib for infant sleep. The court found that the use of a pillow-border was indicative of her understanding that an infant on a bed was not safe. Evidence at trial showed that Bolze-Sann listened to the baby cry for 15-30 minutes without checking to see what was wrong.

On February 3, 2012, KDHE Child Care Regulations were updated to reflect the following legislation:

> K.A.R. 28-4-114a. Initial and ongoing professional development (at least two clock-hours of training on safe sleep practices and sudden infant death syndrome if the individual will be caring for children under 12 months of age.) K.A.R. 28-4-115a. Supervision. (Each child who is napping or sleeping shall be within sight or hearing distance of the provider and shall be visually checked on by the provider at least once every 15 minutes.) Parents are not held to the same regulations.

The first-mentioned couple pled guilty to involuntary manslaughter and the four counts of child endangerment. Involuntary manslaughter in this matter is under K.S.A. 21-5405(a)(2), or the killing of a human in the commission of a misdemeanor that is enacted for the protection of human life or safety. Prosecutors in this case had evidence the parents knew bed-sharing was dangerous. They had the alcoholism of both parents, particularly being extremely intoxicated at the time of the suffocation of the baby. All these factors gave prosecutors the reasonableness necessary that the infant may be at risk or may be injured, which in fact did occur. The statement by the father corroborated his knowledge that bed-sharing can be dangerous. This is something almost all pediatricians and obstetricians are now telling new parents and caregivers. We may still need extraneous circumstances to get a conviction in these cases, but education is what it will take to prevent many other countless infant deaths.

The Kansas Infant Death and SIDS (KIDS) Network, a statewide non-profit with a mission to provide grief support and community education to eradicate infant mortality, knows consistent safe sleep messages are required to eliminate these senseless sleep-related deaths. Christy Schunn, executive director of the KIDS Network states, "It takes all of us doctors, childcare providers, parents, and caregivers alike to implement and practice infant safe sleep to keep our youngest and most vulnerable population safe."

Footnotes

1. *State v. Wilson, 267 Kan. 550, 987 P.2d 1060 (1999).*
2. *State v. Fisher, 230 Kan. 192, 631 P.2d 239 (1981).*
3. *State v. Bolze-Sann, 302 Kan. 198, 352 P.3d 511 (2015).*

Voluntary Intoxication

By Kendall Kaut, Assistant Johnson County District Attorney

A Sober Mind Attempts to Navigate the Difficult Landscape

Whether a court had to legally instruct on voluntary intoxication used to be the easiest flow-chart in prosecution. If the crime was specific intent, give the instruction. If it was general intent, don't give the instruction.

Unfortunately, the simplicity of that chart ignored the difficulty of figuring out whether something is general or specific intent. The United States Supreme Court noted, "At common law, crimes generally were classified as requiring either 'general intent' or 'specific intent.'" This venerable distinction, however, has been the source of a good deal of confusion.[1] A decade ago, Professor Thomas Stacy at KU law suggested eliminating the category. The legislature did not heed that suggestion.

To add to the uncertainty, it's no longer sufficient to know if the crime is general or specific intent. Starting with a 2015 decision, the Kansas Supreme Court said—in the context of an aggravated battery instruction requiring a bit more than the traditional PIK language—that a statutory change in K.S.A. 21-5202, "leads us to conclude that the legislature does not intend for 'general intent' to necessarily mean what it once did…"[2]

That clarification about general intent having a different meaning came to a head in the voluntary intoxication context two years ago. A voluntary intoxication instruction remains available if an offense is a specific intent crime. But now, voluntary intoxication may be a defense when, "a defining mental state is a stand-alone element separate and distinct from the actus reus of the crime."[3]

The key question becomes, if the crime is general intent, how would the litigants know when "a defining mental state is a stand-alone element separate and distinct from the actus reus of the crime?" Some might opine, "Isn't that just another way of saying specific intent?" The *Murrin* Court establishes there is a distinction.

The *Murrin* decision provides some guidance on parsing that phrase. First, we're told that when the legislature uses "knows" instead of "knowingly," a defendant is likely entitled to a voluntary intoxication instruction. As the *Murrin* Court noted, "The Legislature's use of 'knows' differs from its use of 'knowingly' as a marker of a general intent."[4] That doesn't necessarily mean that if a prosecutor sees "knowingly" they'll be in the clear; aggravated battery may warrant a voluntary intoxication instruction. The Court went on to explain it does mean when the statute uses "knows" that a voluntary intoxication instruction is likely required.[5] So criminal trespass, under K.S.A. 21-5808(a)(2)'s language that "a person who knows such person is not authorized…" makes the instruction necessary.

While that provides some guidance, there are still plenty of additional situations that could come up post *Murrin*. As of March 1, 2021, only eight appellate cases have mentioned *Murrin* and voluntary intoxication. Not all of those have gone in-depth on the issue.[6]

The second method—and what will probably become the main method for litigants in the years ahead—will be focusing on whether a higher court

Footnotes

1. *U.S. v. Bailey*, 444 U.S. 394, 403, 100 S.Ct. 624 (1980).
2. *State v. Hobbs*, 301 Kan. 203, 211, 340 P.3d 1179 (2015).
3. *State v. Murrin*, 309 Kan. 385, 397, 435 P.3d 1126 (2019).
4. *Murrin*, 309 Kan. at 398.
5. In *Murrin*, the Court declares, "The Legislature's use of "knows" differs from its use of "knowingly" as a matter of general intent." 309 Kan. at 398. One could argue that language makes the instruction legally necessary, but the Court did not explore "knows" in all contexts in *Murrin*.
6. For example, *State v. Kittle*, No. 120,577, 2020 WL 1969433 (Kan. App. 2020) (unpublished opinion) deals with whether, after the instruction was given, a rational jury could have convicted. Or *State v. Morris*, 311 Kan. 483, 463 P.3d 417 (2020) where premeditated first-degree murder is a specific intent crime that necessitates the instruction.

has already addressed if the crime has "the stand alone" element that requires a voluntary intoxication instruction. This may not be dispositive. One panel may rule one way, and another panel may reach the opposite conclusion.

Unfortunately, many of the post-*Murrin* decisions side-step if the voluntary intoxication instruction is legally appropriate and just say that it is not factually appropriate. In declining to address whether conspiracy to commit aggravated robbery permits a voluntary intoxication instruction, the Kansas Supreme Court provided, "We need not resolve that question, however, because the record demonstrates a voluntary intoxication instruction was not factually appropriate in Craig's case, so this claim of error fails on that basis."[7]

For now, Kansas appellate courts have weighed in on just two crimes while citing *Murrin*. One panel reaffirmed a prior panel's decision that a voluntary intoxication instruction is proper if the rape statute uses the charging language, "which condition as known by the offender or was reasonably apparent to the offender."[8]

The other case provides some additional guidance beyond whether reckless second degree murder legally demands a voluntary intoxication instruction (no but maybe sometimes). In that case[9] the Kansas Supreme Court held that a defendant with a BAC of .211 was not entitled to a voluntary intoxication instruction because, "The common thread in all of these cases is that evidence of intoxication was treated by the courts as evidence of recklessness."[10]

But the Kansas Supreme Court did not go all the way in ruling that recklessness—as a culpable mental state—forecloses a voluntary intoxication instruction. While there are many lines in the opinion that suggest that recklessness precludes a voluntary intoxication instruction ("courts have allowed the prosecution to introduce evidence of voluntary intoxication to prove recklessness, which is the contrary of Claerhout's position that intoxication should be considered a defense to recklessness.")[11] the Kansas Supreme Court ultimately ruled—like so many appellate courts have—that the facts did not warrant the instruction.

The potential mess over whether a voluntary intoxication instruction is proper may make considering a statutory fix advisable. That fix doesn't have to narrow when the instruction is given, but it should make things clearer. One easy fix would be to have the legislature clarify the offenses where voluntary intoxication is indeed a defense. Maybe criminal trespass shouldn't have a voluntary intoxication defense. Maybe reckless second-degree murder should. But clarity does not have to mean things become easier for the State in stopping the defendant from offering his preferred defense. Hopefully a push for clarity can unify prosecutors and defense attorneys because it would mean both parties would have clarity about whether the defense is available.

That change may never come though. The legislature may be reluctant to go through every offense, or at least the arguable ones, and clarify if a voluntary intoxication defense is applicable. When a body needs to make a massive change, fights over one or two crimes could torpedo the effort. Maybe that means that reform advocates should focus on a few ambiguous offenses and ask the legislature to clarify if an instruction is legally compulsory when the facts show the defendant was voluntarily intoxicated.

Until those statutory changes come—if they ever do—prosecutors should diligently study whether a voluntary intoxication may be legally appropriate in their case. The era of "general v. specific intent" is no longer sufficient to grasp voluntary intoxication. Instead, Kansas prosecutors will have to decide if the new framework from *Murrin* compels a voluntary intoxication instruction. And if that still leaves things unclear, determine if the risk of reversal from not giving one outweighs the benefit from not providing it.

7. *State v. Craig*, 311 Kan. 456, 465, 462 P.3d 173 (2020).
8. See *State v. Roberson*, No. 121,037, 2020 WL 1814273 (Kan. App. 2020) (unpublished opinion).
9. *State v. Claerhout*, 310 Kan. 924, 453 P.3d 855 (2019).
10. *Claerhout* at 938.
11. *Claerhout* at 937.

Well-being is No Longer Optional

By Kirsten Pabst, County Attorney, Missoula County (MT)
and Mary Ashley, Deputy District Attorney, San Bernardino County (CA)

Our profession must implement structural changes now to account for secondary trauma, promote organizational health and ensure employee resilience

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I was out of law school only a few months, just into my role of prosecuting misdemeanors and traffic offenses, before being called-out to my first crime scene in the middle of the night. The suspect had slashed the victim's neck and fled on foot, leaving the victim bleeding out on the dirty floor of the old trailer, amidst garbage, half-finished crosswords and animal waste. By the time I got there, the victim had been taken to the hospital and detectives were already processing the scene—taking photos, gathering evidence, and swabbing for forensics. As I stared at the coagulating pools, I was struck by two things that have stayed with me for the last 25 years: my awe of the human body's capacity to hold and lose so much fluid, and that smell—the distinct mixture of blood, alcohol, and squalor.

In the decades to follow, there were countless more crime scenes, gruesome photographs, horrific stories, and jury trials. On the way to my kids' grade school, I look left and think about the college student who was strangled in the ground-level apartment and then dumped on Blue Mountain Road. The slant streets area conjures images of a schoolteacher who was bludgeoned with an iron on an Easter Sunday decades before. Before long, my physical and internal landscapes, like most prosecutors who handle crimes of violence, were dotted with bloody icons of human tragedy and suffering.

Prosecutors are exposed to and susceptible to secondary trauma stress

Career prosecutors who handle crimes of violence and human tragedy will often say that the most effective prosecutors are those who deeply connect with people and authentically convey to jurors the elusive essence of human tragedy. Serving as front-line warriors fighting for justice on behalf of those who have experienced tragedy at the hands of another is noble and necessary work but is often not sustainable—at least the way we've been doing it. It is no surprise that prosecutors often display classic symptoms of long-term exposure to secondary trauma, which can mirror the symptoms of PTSD. Many once exuberant ADAs pivot from, "This is God's work—I don't do it for the money," to "You can't pay me enough," as they pack their diplomas for a lucrative practice in a law firm with less rewarding work, lots more money, and very little gore.

For those who stick it out, the rewards of a career in prosecution are great but the cost can be very high. In my 25 years, I've lost colleagues to suicide, heart disease, and addiction, and seen others gradually go from young, vibrant, enthusiastic public servants to barely recognizable, burnt-out, cynical, and badly degraded copies of their former selves.

As a professional community, we recently started discussing the need to address secondary trauma stress [STS] in front-line professionals who work with victims of abuse. And we just now started embracing the idea of holistic well-being in the field of criminal prosecution, a profession saturated with violence and trauma. Professor Rachel Naomi Remen, Osher Center of Integrative Medicine at the University of California, San Francisco, said,

> "The expectation that we can be immersed in suffering and loss daily and not be touched by it is as unrealistic as expecting to be able to walk through water without getting wet."[1]

It is time to turn the crystal and see our profession both as it is—survivable—and as it can

Footnotes

1. Rachel Naomi Remen: *Kitchen Table Wisdom: Stories that Heal*, Penguin, New York, 1996.

be—thrivable.[2] Well-being is no longer optional. We must pivot and implement structural changes which account for prosecutors' unique challenges, promote organizational health, and prevent our mentees from flaming out.

The effects of secondary trauma stress are cumulative

As a profession, we've been catching up on studying primary trauma as we begin to understand the profound effects of traumatic experiences on the human brain. We are learning that when a person or child suffers ongoing or intense abuse, the experience actually changes the physiological structure of the brain and ushers in psychological effects that change the person's view of and response to stress, to others and to the world. Trauma affects the brain's ability to process information, recall events, and communicate to others.[3]

Similarly, indirect exposure to others' trauma such as listening to details of abuse, preparing cases for court, and pouring over photographic evidence accumulates over time and, unless the person utilizes strategies for preventing and addressing STS, that cumulative exposure can significantly impact the professional's work life, personal life, and mental health.[4]

Secondary trauma—sometimes referred to as vicarious trauma, compassion fatigue, or burnout—is just gaining recognition in the legal field and is the manifestation of long term, repetitive exposure to work-related human tragedy. STS largely impacts professionals on the front lines of the helping fields such as social work, emergency medicine, law enforcement, mental health and, in our case, prosecution. Constant and cumulative exposure to violence and trauma through work has documented negative effects, personally, and professionally. Secondary trauma, like primary trauma, alters brain function.[5]

Trauma psychologists tell us—and we've seen firsthand—that those who work with victims of crime for prolonged periods of time often experience symptoms similar to those of PTSD, such as difficulty concentrating, headaches, stomachaches, depression, intrusive images, nightmares, strained personal relationships, fatigue, difficulty sleeping, and compromised parenting.[6] Andrew Levin, M.D., Assistant Clinical Professor of Psychiatry at Columbia, wrote, "[T]here is a consensus that STS and VT (vicarious traumatization) degrade the professional's ability to perform his or her task and function in daily life beyond the job."[7]

Like criminal investigators, prosecutors and staff who work with victims of violent crime are at very high risk to suffer the effects of STS and the best ones often are affected to a greater degree. In fact, according to secondary trauma expert Andrew Laue, LCSW,

> "Professionals who are the most successful, because of their ability to openly and effectively engage with victims, suffer the greatest negative consequences of secondary trauma."[8]

Reactions to the cumulative effects of STS vary and are influenced by internal and external factors. Unmitigated, STS can be destructive and—especially coupled with other challenges prosecutors face, and can lead to physical, psychological, and social problems.

The legal profession is in turmoil

Chronic exposure to stress hormones is detrimental to body and brain. What was once an adaptive survival response has become chronic and maladaptive. The result is that our ability to regulate the physiological response to stress decreases over time and returning to stasis takes longer and longer, exposing us to long-term consequences.[9]

Attorneys seem particularly susceptible to the ill-effects of poorly managed work stress and are

2. Author's word
3. *Reducing Compassion Fatigue, Secondary Traumatic Stress and Burnout*, William Steele, Routledge 2020.
4. Id.
5. Id.
6. Id.
7. *Vicarious Trauma in Attorneys*, A. Levin and S. Greisberg, Pace Law Review, 2003.
8. Andrew Laue, LCSW, Developer of the STAR-T program (Secondary Trauma Activates Resiliency)
9. *Vicarious Trauma in Public Service Lawyering: How Chronic Exposure to Trauma Affects the Brain and Body*, Zwisohn, Handley, Winters, Reiter, Richmond Public Interest Law Review, 2019.

at an elevated risk of substance use and mental health disorders.[10] According to a study conducted by the American Bar Association (ABA), published in 2016, with over 12,000 practicing lawyers participating, up to 36% qualify as problem drinkers, and up to 28% are struggling with some level of depression, anxiety, and stress.[11]

Prosecution: a recipe for distress

Exposure to STS is one of many compounding factors leading to burnout in prosecutors.[12] Combined with other unique stressors such as burgeoning caseloads, long and densely packed schedules, dwindling resources, decades of racial and gender inequality, virulent accounts of police misconduct, and lack of authentic peer support, all set in an intentionally competitive and adversarial role, this career that we love often isn't viable in the long term. Even though STS is considered a normal response to this kind of work, it often results in decreased productivity and interest in work, increased use and abuse of substances and high turnover. And responding to employees in crisis is expensive and disruptive, as is training new attorneys to replace ADAs who leave.

Despite the level of suffering and negative personal and financial effects of secondary trauma on prosecutors—particularly those working in domestic and sexual violence, child abuse, and homicide—there remains a notable lack of programming designed to prevent and mitigate the negative effects on those dedicated employees. How can we make our work sustainable?

Implementing organizational resilience starts at the top

Changing an ingrained culture takes time but has to start with leadership. The role of the public prosecutor is unique and rapidly evolving and must allow for adaptation and growth. Altering the course of a freightliner at sea takes time, intention, and most definitely involves the captain. Instituting a culture of well-being necessitates buy-in from all of the team and, consequently, must start with leadership.

Erika Tullberg, an expert on secondary trauma and assistant professor at New York University's Child Study Center explained the importance of making changes at the institutional level. Tullberg said, "The most important component of mitigating the impact from secondary trauma (and the best way to limit employees from developing it in the first place) is through organizational changes."[13] Similarly, the ABA recommends organizational programs designed to counter secondary trauma in the legal system,[14] stressing that larger scale strategies and systemic changes are key in addressing STS.

How leaders can cultivate a culture of well-being

Leaders bear much responsibility for employees' well-being and should provide sustainable work environments, understanding that employees' self-care, though important, isn't enough. That expectation implies that there is a pathology or depletion that is the responsibility of the individual alone. We must make structural and organizational changes that build in secondary trauma processing and employee resilience as competencies, acknowledge the depletion inherent in the job, and provide mechanisms to neutralize it.

1. **Start with your mission statement.** Does your mission statement contemplate sustainability of the staff? Examine and refine your department's core values and consider incorporating well-being into your stated values and mission statement and include resiliency skills as required

10. *The Path to Lawyer Well-being: Practical Recommendations for Positive Change*, Nat. Task Force on Lawyer Well-being Report (2017).
11. Id.
12. *Vicarious Trauma in Public Service Lawyering: How Chronic Exposure to Trauma Affects the Brain and Body*, Zwisohn, Handley, Winters, Reiter, Richmond Public Interest Law Review, 2019.
13. American Bar Association, *Understanding Secondary Trauma*, Vol. 34. No. 9, Sept. 2015 (pg. 136)
14. ABA, Center for Children and the Law, *Understanding the Impact of Secondary Trauma on Lawyers Working with Children and Families*, presentation by Carly Baetz, psychologist at Mount Sinai Health System, Center for Child Trauma and Resilience, New York, 2016.

professional competencies.

2. **Offer a plausible work landscape** (PWL). Prosecutors' caseloads are notoriously high. New ones sink or swim. The tough survive. Sort of. Like Pavlov's hierarchy, the prerequisite to organizational health requires hosting a PWL, in which leaders look at staff caseloads with new eyes and adjust. Learn to identify signs of burnout or disengagement and provide opportunities for respite. Check your best litigators' vacation banks and insist they use it. Another approach is turning one of your less-stressful full-time employee (FTE) slots into rotating temporary placement where trial attorneys can rest for a few months and recharge. Although it is important for us to teach resiliency skills and foster peer connection, none of that matters if unmanageable caseloads keep your people in crisis. We must make sure the landscape is compatible with life before we look at improving the quality of that life.

3. **Initiate an office-wide well-being program.** Many organizations have jumped onto the wellness bandwagon and, to their credit, initiated "wellness" programs. Others have rolled out "well-being" programs. What is the difference? Are the terms interchangeable? Not really. While wellness is the primary responsibility of the employee, well-being is best accomplished when employers provide adequate opportunities and secure funding for well-being. When organizations offer well-being programs — and workers seize the opportunities therein — everyone benefits. Employers who offer comprehensive well-being programs report higher productivity, better results, and less adverse medical and emotional stress amongst workers.[15] Other strategies include incorporating resiliency skills in professional competencies, providing training on brain science and teaching resonate listening skills.

4. **Host an in-house secondary trauma group.** About five years ago, I started a formal Secondary Trauma Group [STG] as a major component of our well-being program.[16] Working together with an expert in secondary trauma, our employees learn the fundamentals of trauma and secondary trauma; practice using resiliency tools while understanding the basics of neuroplasticity; participate in peer-facilitated critical incident support, which includes investigators and, in one instance, our jury. The expense and time commitment were minimal and the results—less turnover, better morale—have been significant.[17]

5. **The importance of a formalized peer support program.** Peer support groups provide prosecutors and staff a place to share their experiences and receive informal support. While not every member of a district attorney's office needs formal assistance or suffers from secondary trauma, nearly everyone at some point in his or her life is in need of compassion and empathy—at the very least, a friendly ear or shoulder when a bad day or personal challenge leaves one struggling. The Substance Abuse and Mental Health Services Administration (SAMHSA) has long advocated and utilized research to reinforce the power of peer support.

   "Peer support encompasses a range of activities and interactions between people who share similar experiences. This mutuality, called 'peerness,' between a peer support person and a person seeking help promotes connection and inspires hope.

15. *Reducing Compassion Fatigue, Secondary Traumatic Stress and Burnout*, William Steele, Routledge 2020.
16. Did You Know? Prosecutor Wellness, Prosecutors' Center for Excellence.
17. Missoula Deputy CAs, along with other human service workers, video discussion about burnout from STG in this STAR-T video and the benefits of STG in this STAR-T trailer.

Peer support offers a level of acceptance, understanding, and validation not found in many other professional relationships."[18]

Some positive reported outcomes for individuals who receive peer support are increased self-esteem and confidence, increased sense of control and ability to bring about changes in their life, raised empowerment, and a feeling that treatment can be responsive and inclusive of their needs.[19] Workers trust peers over supervisors, because they understand your job, the atmosphere, and experiences within the profession. Peer support programs have done well in the fields of law enforcement, emergency, fire, and first responders.

The responsibility of every prosecutor

The responsibility of well-being is equally carried by each worker and management. Stress, adversity, and trauma are unavoidable realities in a prosecutor's world. Despite swimming in life's most horrific stories, we can control how we respond to such challenges, learn to metabolize work stress by practicing resiliency skills, support our colleagues through resonate listening, and reframe how we look at stress as an impetus for personal and professional growth.[20] Being good to yourself takes effort and intention and daily maintenance. Here's your assignment:

1. **Schedule and prioritize self-care**[21], like exercise, outside activities, social connection. Self-care alone, as noted above, isn't enough, but remains a crucial part of sustainability.
2. **Try meditating.**[22] Take time every day to quiet your mind, like going for a walk, checking in with a friend, or single tasking a cup of tea.
3. **Practice gratitude**. Take the gratitude challenge.[23]
4. **Manage anxiety**. Practice noticing where you harbor stress in your body and teach your brain to forge new neuropaths.[24] Stay in your window of tolerance between hyper-arousal and numbness.
5. **Learn and practice resiliency skills**. Build your own, personalized resiliency toolbox.[25] It is important to understand that resilience requires 1) awareness—paying attention to how our bodies and brains respond to stress, and 2) connection—through resonant listening and peer support.
6. **Offer support** to colleagues through resonant listening and peer support. If your office doesn't have a formal peer support program, start one!

I know.

To most of us old-timers, this all seems a little touchy-feely, a little woo-woo. But the reality is that using proven techniques to make our work sustainable is not only supported by science[26], it is rapidly becoming our ethical obligation[27], and is well on its way toward mainstream. The ABA is recommending that all states modify the rule of competence to include well-being. If we are

18. Shery Mead & Cheryl McNeil, *Peer Support: What Makes It Unique*, 10 INT'L J. PSYCHOSOCIAL REHAB. no. 2. 2006, at 29–37.
19. Substance Abuse & Mental Health Servs. Admin., Value of Peers, 2017.
20. Optimizing our response to stress, J. Hollway, *In Recess*, Nov. 11, 2020.
21. Small Steps to Well-being, K. Pabst, In Recess.
22. Clearing the Crime-Scene Cobwebs: Meditation for Skeptics, Old-Schoolers & Beginners, K. Pabst, *In Recess.*
23. An Attitude of Gratitude, S. Broderick, *In Recess.*
24. Toolbox Tip: One-minute Anxiety Buster, K. Pabst, *In Recess*.
25. The Vicarious Trauma Toolkit, Office for Victims of Crime.
26. Clearing the Crime-Scene Cobwebs: Meditation for Skeptics, Old-Schoolers & Beginners, K. Pabst, *In Recess.*
27. *The Path to Lawyer Well-being: Practical Recommendations for Positive Change*, Nat. Task Force on Lawyer Well-being Report (2017).

knowledgeable and prepared enough to try a case, shouldn't we also be emotionally and mentally strong? Let's not watch any more of our colleagues fall as we stand by admiring our own grit or worse, feeling responsible.

Remember why you chose this work and recall that moment you knew that you were on the right path, regardless of what obstacles lay ahead. You handled it, sure, but what about those who didn't? So many of our prosecutor friends over the years, have taken their own lives, died way too young, or succumbed to addiction. And, of those who handled it, who didn't handle it well? And should we have to "handle" it? Why not crush it? Why not thrive?

NDAA's new Well-being Task Force

NDAA President Nancy Parr has made prosecutor well-being one of her priorities for 2021, and we couldn't be more excited! President Parr assembled a taskforce that hit the ground running last Fall by launching weekly blogs, planning future retreats and conferences, and organizing a series of webinars that kicked off in December 2020 and are scheduled to run through 2021. Missoula County Attorney Kirsten Pabst was named Chair of the Task Force, with DDA Mary Ashley from San Bernardino County as Vice-Chair. The taskforce members, consisting of a circle of career prosecutors—plus one well-being professional—with shared expertise and/or special training in secondary trauma, burnout, vicarious trauma, and compassion fatigue have been remotely convening monthly to address the challenges that face prosecutors from across the nation and help make our critical work more sustainable.

Our current projects include writing and publishing *In Recess*, our dedicated weekly blog filled with short articles, everyday tips, videos, and other good, easily digestible information. Check it out and sign up for a free account to get weekly notifications.

And . . . coming soon . . . we are rolling out a national peer connection and support service for all prosecutors (stay tuned). Additionally, we will be launching a resource hub on the NDAA site, where we'll offer a collection of resources, articles, books, and other materials. Whether interested in your own well-being, concerned about a colleague or

Additional Resources & Links:

- **Coping during COVID** (CDC) - https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html
- **ABA page to lawyer assistance crisis hotlines in each state** - https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/
- **NDAA's Prosecutor well-being blog, *In Recess*** - https://ndaajustice.medium.com
- **Did You Know? Prosecutor Wellness, Prosecutors' Center for Excellence** - https://pceinc.org/prosecutor-wellness/
- **STAR-T program: Secondary Trauma Activates Resiliency** - https://www.activateresiliency.com/
- **Suicide prevention programs by state** - https://www.fosterwebmarketing.com/blog/a-state-by-state-list-of-suicide-prevention-resources-for-attorneys.cfm
- **The Institute for Well-Being in Law** - https://lawyerwellbeing.net/
- **Secondary Trauma Group wins NACo's Brilliant Ideas at Work award** - https://www.naco.org/brilliant-ideas/secondary-trauma-group-implementing-organizational-resiliency-prosecutors
- **Public Radio, Prosecutors Recognized For Fighting 'Secondary Trauma'** - https://www.mtpr.org/post/missoula-prosecutors-recognized-fighting-secondary-trauma

contemplating implementing an in-office program, we hope to provide a centralized hub for you to find what you need, to support your colleagues, office, and profession.

Finally, we are also working on hosting—at a site TBD—a retreat for prosecution team members where we'll learn the latest in the neuroscience of well-being while physically and mentally unwinding for a few days. Education, food, relaxation, nature, and CLE credits will be featured.

Conclusion

We invite, encourage and challenge you to take this new journey with us into a stronger, prioritized and focused area of well-being for prosecutors across the nation. It will only get better from here.

For many career prosecutors, the years of being subjected to violent images, human suffering, and the hypervigilance it creates takes its toll, even on the "toughest" of prosecutors. In 2021, we need to create a new "toughness," one that acknowledges the struggles and incorporates time for self-care and a commitment to the appropriate work-life balance. Training and education for prosecutors to build their resiliency skills and allow healthy space for peer support and other well-being strategies has become critical.

A prosecutor who is emotionally supported by their organization and trained to manage stress is a far better reasoned and capable decision maker who can exercise good judgement and perspective on each case. Thriving organizations foster vibrant team members who then provide better services to the victims and communities we serve. Win, win, win.

NDAA's Well-being Task Force Members:

1. Kirsten Pabst, Chair, Missoula County Attorney, MT
2. Mary Ashley, Vice Chair, San Bernardino County, CA
3. Jennifer Webb-McRae, Cumberland County, NJ
4. Joe Dallaire, City of Fairbanks, AK
5. John Hollway, Quattrone Center
6. Kimberly Spahos, North Carolina Conference of District Attorneys
7. Lou Anna Red Corn, Fayette County, KY
8. Michael Rourke, Weld County, CO
9. Susan Broderick, NDAA Staff Liaison

If you have questions, need information/ resources, or have good ideas for us, let us know by sending an email to Susan Broderick at **sbroderick@ndaajustice.org** or any of the task force members.

ABOUT THE AUTHORS

Kirsten Pabst is the Missoula, Montana County Attorney and chairs NDAA's Well-being Task Force. Mary Ashley is a Deputy District Attorney in San Bernardino County and serves as the task force's Vice-chair.

Upcoming 2021 Kansas Prosecutor Deadlines

Summer 2021 - July 1
Fall/Winter 2021 - November 1

Send your idea/submissions to Editor Mary Napier at mary@napiercommunications.com.

Kansas County & District Attorneys Association

Save the Date For Our Spring Conference:

June 17th & June 18th Via Zoom

Check the kcdaa.org website for more information on this event.

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Topeka, Kansas 66604