2007-2008 KCDAA Board

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KCDAA Member: 16 years

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KCDAA Member: 14 years

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KCDAA Member: 12 years

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KCDAA Member: 18 years

**Nola Tedesco Foulston**
NDAA Representative
Sedgwick County District Attorney
KCDAA Member: 18 years
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Phone: (785) 232-5822  Fax: (785) 234-2433

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

For questions or comments about this publication, please contact the editor:
Mary Napier
mary@napiercommunications.com
(785) 783-5494

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About the Cover

The McPherson County Courthouse is located at the corner of Maple and Kansas Ave. in McPherson.
It was added to the National Register of Historic Places in 1976 for its architecture and engineering. The architectural style is romanesque.

Photo by John D. Morrison, Prairie Vistas Photography
As Prosecutors We Can Change Laws

It has been said that an attorney's career would be considered successful if he or she tries one case, authors one statute, or appeals one issue that results in a change in the law. If we think about it, most attorneys labor daily at their profession controlled by the forces of statutory and common law without regard to actually having an influence on that law. The vast majority of attorneys are destined to react to the law, not act upon it.

One area of practice exists, however, where practicing counsel have an opportunity to affect the law, rather than simply be affected by the law. That area is criminal prosecution. It is an area of practice wherein each day brings a new challenge, and each case brings an opportunity to have an effect on the community, as well as on the law itself. As prosecutors, we must seize these opportunities to positively affect the law.

There are several avenues we can follow to affect the law. The first is to recognize issues within the statutory code which require change. As we work with the law, we are often in a position to evaluate statutory language which falls short of its intended effect, or which has unintended consequences or applications. When we see such issues, we should take the time to note the problem in order that the problem can be addressed. The issue can then be forwarded to the KCDAA Legislative Committee for action. Better yet, the attorney recognizing the problem can write legislation to overcome the problem, and the KCDAA will assist in putting the proposed legislation before the Kansas Legislature.

A second avenue for positive change in the law is through the appellate process. Many prosecutors have the opportunity to affect the law by researching appellate issues, authoring compelling appellate briefs, and making persuasive oral argument at the appellate level. These opportunities come in the form of defendant's appeals, and in the form of wisely selected State's appeals.

In the last 17 years, I have had the privilege of authoring legislation, and testifying on legislative issues on many occasions. I have also been able to affect the law through appellate casework. I could not have done these things but for the fact I am a Kansas prosecutor. The fact we serve the people of Kansas puts us in a position to be successful.

State-wide DA System

As publication of this issue of The Kansas Prosecutor approaches, an issue has arisen in the legislature which demands our attention. It is not a new issue (it has been around since 1962 according to Dennis Jones, the Kearny County Attorney), but it is an issue that has surfaced over the last couple of years. The issue is that of a state-wide district attorney system. There was legislation introduced in 2007, which sought to establish a method by which individual counties, or even groups of counties, could elect to form a district attorney's office. The legislation did not pass, but was amended during the interim session of the legislature. An amended bill sailed through the Senate this year, and the legislation was distributed throughout the state for feedback by elected county and district attorneys. The reaction was swift and clear: our Association was opposed to the provisions of the bill. That reaction has stalled further action on the legislation for this year.

Although the Association has never taken a position on the idea of a state-wide DA system, we all have a vested interest in the legislation which creates such a system. This was seen by the reaction to the bill proposed for passage this year. It is time for a serious discussion on this issue, and some hard work to develop a plan which we can live with if such a system becomes inevitable through legislative action. I hope to be able to schedule a meeting for elected county and district attorneys throughout the state in the near future to discuss this issue and work toward a consensus on the design of any legislation which might create such a system. We must provide our input to the Kansas Legislature if we want to help control our own destiny on this issue. I would encourage full participation at any conference we can put together for this purpose. ☐
Legislator’s Column
by Senator John Vratil

Addressing Prison Population

Editor’s Note: This article is adapted from an op-ed piece written by Senator Vratil and Texas State Senator John Whitmire, which appeared in the Washington Post, March 20, 2008, pg. A15.

Recently, the Pew Center announced that more than one in 100 adults are now behind bars in America. While many were shocked, we should not be surprised.

As you know, the national incarceration rate has increased for three decades driven by policy choices that increase the number of offenders placed in prison and that keep the offenders locked up for longer periods of time. Harsher sentencing laws, more restrictive parole policies, and the practice of locking up people who’ve broken the rules of their probation or parole have driven up the inmate population since the early 1980s.

A new report from the Pew Center on the States points out that some states, like Kansas, are finding effective ways to fight crime and punish criminals without increasing the cost of prisons. Locking up 2.3 million people has helped reduce the nation’s crime rate. I know this statement is true and I believe that violent, chronic criminals deserve to spend a long term behind bars.

At the same time however, large numbers of non-violent, lower-risk criminals are caught in the prison boom. Getting tough on these offenders costs taxpayers more but does not provide an adequate benefit for public safety. A prison cell today costs approximately $65,000 to build and $24,000 a year to operate. States spend nearly $50 billion a year on corrections, more than four times the amount 20 years ago; and they are projected to spend an additional $25 billion over the next five years to accommodate more inmates.

For this expenditure, the public expects lower recidivism rates and safer communities. Yet these rates remain high. Corrections’ spending is crowding out dollars for other priorities, like health care and education.

Many state legislators across our country are starting to ask if we are getting our money’s worth out of prisons. For violent and sex offenders, the answer is “Yes.” For many nonviolent offenders and probation violators, the answer is “No.” We need to find a better way to address the challenge.

For example, Texas has expanded a network of residential treatment centers for low-risk, substance abusing offenders in prison and under community supervision as well as intermediate sanction facilities for probation and parole violators. According to the latest projections, the state may now avoid increased incarceration costs for the next five years, saving taxpayers millions of dollars.

In Kansas, approximately two-thirds of our prison admissions are probation and parole violators; therefore, the legislature created an incentive program for local community corrections. Counties that cut their revocation rates by 20 percent will get a share of new state funding. The new funding will come from money made available through averted prison construction. The new program will help community corrections hold violators accountable without taking up a prison cell. We, and many other states, are becoming smart about how we address crime.

Today, we have a million more prison beds in America than we had 20 years ago; however, the national average time served behind bars has increased only six months, to about three years. Keeping an inmate an extra six months is expensive. We can reduce the size of this expense by reducing recidivism through the alternative treatment and sanctioning programs.

For the same investment, we can put four offenders through a drug court or a re-entry program and alter the course of their criminal careers. Using new technologies and treatment strategies, research shows that community corrections programs can cut re-offense rates by 25 percent. Instead of claiming new victims, these offenders will have a decent shot at rejoining society, paying taxes, and supporting their children.

Public safety spending, like other areas of government responsibility, is finding itself less and less exempt from the test of cost-benefit analysis. Taxpayers in Kansas want the job to get done as effectively as possible. It’s up to our state legislators and policymakers to consider all of the options and create a diverse array of punishments and programs that deliver the biggest public safety “bang for the buck.”

Spring 2008
Meet Kansas’ New Attorney General - Stephen N. Six

When Kansas’ new Attorney General Stephen N. Six graduated from KU Law school in 1993, his father, Justice Fred Six, was serving on the Kansas Supreme Court. After graduation, Six served a federal clerkship, a few years later made partner at the Kansas City law firm of Shamberg, Johnson & Bergman, and then was appointed District Court Judge in the Seventh Judicial District in 2005.

The kids at his daughter’s birthday party got a real thrill out of skipping by, calling him “Mr. Attorney General.” But you can just call him “Steve.”

Soft-spoken but direct, Six is settling into his position as Kansas Attorney General, an office he assumed January 31, 2008 upon the resignation of outgoing Attorney General Paul Morrison. At his swearing in ceremony, he pledged to lead the Attorney General’s Office with integrity and independence.

“Over the years, I have been shaped by my relationships with people who set high standards, and through hard work achieved great things,” said Six. “As attorney general, I promise to serve with integrity and independence as I face the challenges ahead.”

Members of the KCDAA can expect regional training opportunities for new county attorneys, assistant county attorneys, and assistant district attorneys to be offered in the next few months in various parts of the state. The office of the Attorney General is also available to consult as requested. “It doesn’t mean we’ll take your case from you,” Six explained, but his office is “available if you want to call us out to work the case with you.”

Six is particularly interested in focusing efforts on prevention, investigation, and prosecution of computer-based crimes such as identity theft and fraud perpetrated over the internet. Help or referral is also available for investigations over which the Attorney General has concurrent jurisdiction with the County or District Attorney, such as the Kansas Open Records Act or the Kansas Open Meetings Act.

As for advice for prosecutors from a recent judge, Six encourages a focus on jury persuasion. “Try to think about, ‘is what I’m doing really persuasive?’ Take some risks,” he said, “but focus on what’s persuasive.”

Information about training opportunities and initiatives from the Attorney General’s Office is available online at www.ksag.org.

Steve Six was sworn in as the 43rd Attorney General of Kansas on January 31, 2008, stepping down as a district court judge to serve the people of Kansas in a new role.

Six grew up in Lawrence. He received his undergraduate degree in Economics from Carleton College in Northfield, Minn. Following in the footsteps of his father, Six went on to study law at the University of Kansas. His father, Justice Fred Six, served on the Kansas Supreme Court for more than 15 years before retiring in 2005.

In 1993, Six graduated second in his class from the KU Law School. He immediately went to work as a clerk for the Honorable Deanell Tacha of the United States Court of Appeals for the Tenth Circuit.

In 1994, Six joined the law firm of Shamberg, Johnson & Bergman in Kansas City, Mo. He handled complex litigation and trial work. In 2000, he was named partner in that firm.

As for representing the interests of everyday Kansans for nearly ten years, Six was appointed by Governor Kathleen Sebelius as a District Court Judge in the Seventh Judicial District in 2005. During his time on the bench, he gained respect as a fair, independent legal mind while presiding over criminal, civil and domestic violence dockets.

Six has actively served on bar organizations, including the Bench-Bar Committee for the United States District Court for the District of Kansas. He also served on the Kansas Bar Association Board of Governors, as Chairman of the Mandatory Malpractice Disclosure Committee and as a member of the Kansas Bar Foundation Board of Trustees. Six and his wife Betsy have four young children.
Generally an article in this magazine serves to educate and update prosecutors on the law in Kansas from the United States Supreme Court. This is not one of those articles. It is unfortunate that we must write this piece, but it is necessary to address a recurring problem as it relates to the appellate process. Over the past several months, Kansas prosecutors have failed to brief and subsequently appear for oral argument before both the Court of Appeals and the Supreme Court. This unfortunate trend has caught the attention of the judges and justices—as expected, they are troubled by it. It is particularly troubling in those instances where the Supreme Court has granted a petition for review, and counsel for the State intentionally waives supplemental briefing while failing to appear for argument.

Supreme Court Rule 7.01(d) reads as follows:

Not less than thirty (30) days before each sitting of the court, the clerk shall prepare and mail to all attorneys of record in causes assigned for hearing during such a sitting a docket showing the date on which the cases from the general and summary calendars will be argued and heard. The daily docket will be called in open court at the commencement of each day’s session. Failure of a party to be represented at the call of the day’s docket shall constitute a waiver of oral argument by such party.2

If you have entered your appearance and have filed a brief, you will receive notice as to when you should appear. If you failed to file a brief in the first place then the outcome is simple, you won’t be arguing on behalf of the State, nor will any other representative of the State. Indeed, the Court of Appeals has a hard and fast rule which states that “[a]ny party who does not have a brief on file will not be permitted an oral argument.”3 So, it should go without saying that failure to submit a brief carries an immediate consequence not only for the individual prosecutor, but for the State as a whole.

The failure to brief or present oral argument undoubtedly raises ethical concerns as well. The pertinent language from Rule 1.3 encompasses the

Footnotes

1. State v. Moore, 166 W.Va. 97, 112, 273 S.E.2d 821, 831 (W.Va. 1980). This decision by the West Virginia Supreme Court is but one of a number of decisions where an appellate court will not hesitate to call out a prosecutor’s failure to represent the government’s interests on appeal. See also State v. Wichman, No. 96-1929-CR, 1996 WL 737268 at *2 (Wis.Ct.App. Dec. 27, 1996) (“Only because the issues were so easily resolved in this case and were so patently without merit did this court determine to address the merits of the appeal. The . . . district attorney’s office should be advised that this court will not hesitate to reverse based on the State’s failure to file a brief in the future when the appellant’s contentions present even a prima facie claim for relief.”); State v. Gray, 85 Ohio.App.3d 165, 168, 619 N.E.2d 460 (1993) (While defendant’s appeal is troubling for failure to provide an appropriate record, equally troubling is the State’s failure to provide any brief or argument). 2. Supreme Court Rule 7.02(d) covers hearings before the Kansas Court of Appeals and simply reads that “Not less than thirty (30) days before each sitting of the court, the clerk shall notify the attorneys in each case assigned for hearing of the place and time at which the case will be heard.” 3. Supreme Court Rule 7.02(e).
diligence required in our profession:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer . . . A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.

As prosecutors we have an obligation to our client, the State of Kansas. To that end, we also have a duty to the victims of crime and to the citizens as a whole. Failing to follow through with our duties on appeal violates that obligation. While a case may seem inconsequential or merely a waste of valuable time, it may nevertheless have great impact on other prosecutors in similar situations. Realizing then that a case impacts not only your immediate situation, but other prosecutions as well, should reinforce why even the simplest of cases can have long-term effects.4

Time and again we hear the quote that “[a prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”5 This principle generally applies in cases where prosecutorial misconduct is alleged; yet, it applies equally in those situations where a prosecutor has knowingly failed to uphold his or her responsibility to represent the sovereign on appeal. As the preamble to this article stated, “[w]ithout the appearance and statement of the law required of the State, justice cannot be done in our adversary system.”

This is certainly not an article that we ever envisioned writing, nor one that we particularly wish to submit for publication. But it is necessary to address this problem in a forum that will reach all prosecutors in this State. My hope is that, as prosecutors, we will never again need to speak of this problem, and that we will be mindful of our responsibilities to zealously advocate for the State of Kansas.

This article has stressed the label “prosecutor” because we often see ourselves in a different light than our peers in the bar. Many of us think of a prosecutor as the person addressing the jury to protect both the victim and society. The ethical and moral obligation of a prosecutor includes seeing these cases not only through trial, but also the appellate process. We are entrusted with a unique duty, and we owe it to the victims to avoid their suffering through a retrial; and we owe it to society to keep properly-prosecuted defendants behind bars. We also owe it to the court to respect its role in the process—no court warrants the blatant disrespect of foregoing briefing and argument. The court has taken the time to resolve the case, and we should be as equally diligent in presenting our side of the argument.6

We will finish by offering the assistance of our office in the event that you encounter a situation where you simply cannot appear at argument. No doubt there are times when an emergency requires your immediate presence and you must weigh whether to waive your appearance before the court.7 In those situations, please contact our office directly. The Attorney General is already a party to the case and our appellate team is committed to helping the State receive dutiful representation—representation that demands both briefing and oral arguments. We are here to ensure that a successful conviction stands through the appellate process.

Please contact the AG's office at (785) 296-2215 or 1-888-428-8436 if we can be of further assistance.8

4. For example, State v. McAdam, 277 Kan. 136, 83 P.3d 161 (2004) began as a run-of-the-mill drug prosecution and ended up being a monumental decision affecting every single county and district attorney.
6. It is equally disrespectful to opposing counsel; and I’m sure you would all agree that it is just as disrespectful to all other county and district attorneys.
7. I would hasten to add, however, that if you intend to waive argument never inform the court or clerk’s office on the day of the argument. If you must waive, immediately inform the Clerk’s Office of your intention not to appear.
Most of us can probably describe our job duties and how they vary from day to day. But, how do you think your job as a county or district attorney would change if an EF-5 tornado wiped out your town and office? We probably don’t want to think about this happening to us, but on May 4, 2007 the tornado that ravaged Greensburg, Kansas, also took the office of Kiowa County Attorney Candace Lattin. Her “normal” job duties changed instantly, and she has been trying to overcome the obstacles since that tragic event.

Luckily on the night of the tornado, Candace was at home in Pratt County, which was not majorly affected by the tornado. But, most of the other staff in the Kiowa County Courthouse lived in the county and lost pretty much everything including their homes. As for the courthouse, part of the roof was taken and water damaged almost everything. The county attorney’s office happened to be on the top floor, so you can imagine the damage. The next morning after the tornado, Candace and her assistant, Rhonda Hammond, set to work to put the office back together while Rhonda also tried to get her own life back in order after losing her house and dog.

An office was quickly established in the District Court in Mullinville, which is located about 11 miles east of Greensburg. By Wednesday of the next week, Court took place with the first appearances of the alleged looters. Rhonda was finalizing the petitions for the last ones to appear, while Candace was doing the first appearances for the first ones to appear. According to Candace, it was a madhouse, but they tried to get everything back to as “normal” as they could.

“Getting paperwork back and forth initially was a feat,” said Candace. “We were no longer in the same city with the officers, and you couldn’t just run over to talk or get paperwork. Further, we no longer had a jail, so now all inmates had to be transported from somewhere else. It wasn’t always the same place and logistics became a problem.”

Additional problems soon became apparent. With the need to transport inmates, the need for officers increased, but no rentals were available for new people to live. Then once FEMA trailers were brought in, new people coming to Greensburg couldn’t live there either, since they weren’t residents before the tornado. So, housing caused a problem with trying to get new people into the city to help.

Now almost a year after the tornado, the county attorney’s office is located in a trailer that is next door to another trailer that houses
the Courtroom. Both trailers sit just across the street from the old courthouse. Plans are underway to rehabilitate the old courthouse, but funding, blueprints, and differences of opinions have slowed the process. Candace is hoping that in another 18 months to two years, her office will be moved back to a permanent location in the new courthouse.

According to Candace, her job includes anything and everything in Kiowa County. That includes all criminal matters like traffic, fish and game, misdemeanor and felony, and CINC cases. In addition, she is the County Counselor. Through this position, she handles contracts, resolutions, and other miscellaneous matters for the county. To top it off, Candace is also the public defender in Pratt County.

While Candace still had all of these job positions after the tornado, her duties changed quite a bit.

“Prior to the tornado, there was always something that needed to get done,” explained Candace, “but after the tornado, the County Counselor side of the work immediately expanded exponentially. Needless to say, the contractual and real estate issues have grown considerably.” In February 2008, Candace hired a part-time assistant to help with the growth of her county counselor duties.

“[My job] is definitely not as isolated as it was. There is more variety, more change, more realization of how everything done in any one county department affects everyone else,” said Candace. “And, immediately after the tornado, everything needed a quick fix or band-aid, and now we have to go back and expand on contracts and documents that just had to be done in a hurry without any real preparation or research.”

While things are slowly expanding and residents are meeting the challenges, Greensburg will be forever changed by this event. About half of the town decided to move and not return, but the town is expected to ultimately grow. Candace explained that it will be a wonderful place to live in a few years as everything comes to fruition.

Now, with things returning to as normal as they can, Candace is focusing on her experience as a county attorney and her future. She is up for re-election this year, so her first short-term goal is to get re-elected. Another short-term goal for her is to continue assisting with the rebuilding as much as possible while watching in amazement as the community rebuilds and recreates itself. Her ultimate goal is “to make the Kiowa County Attorney’s office as good as it can
be, to grow and evolve with the community and the county, and to take on anything and everything that is thrown her way [literally].”

Candace’s legal experience started after she graduated from Washburn University’s School of Law in 1985. Her first plan was to practice law with her father after graduating. However, her plans changed when her father passed away in her final semester of law school. So, she passed the bar and went to work for Stinson, Lasswell, and Wilson in Wichita doing mostly estate and tax work. In 1988, she started work as a Child Support Enforcement Attorney for the SRS in Great Bend. Then her life took a different path when she was elected Stafford County Attorney in December 2004 and as Assistant County Attorney in Pratt and Kiowa counties in January 2005. In May 2006, County Attorney Ernie Richardson resigned, and Candace was appointed as acting Kiowa County Attorney until being officially elected in November 2006. In January 2007, she contracted with the City of Pratt to do city defense work and was appointed by the County of Pratt as the Public Defender. So, she definitely has a variety of experience to help with all of these jobs. She even passed the CPA exam during law school and uses that knowledge as an attorney.

Once Candace became a county attorney in 2005, she joined the KCDAA because she thinks associations are extremely important. She explained that the tornado really brought that to light like nothing else could.

“It is absolutely vital to us that
The Kiowa County Attorney’s office is currently located in a trailer right next to the trailer for the Kiowa County District Court. The trailers are across the street from the old courthouse.

Candace is married to her husband, Robert, and has two children and two stepchildren. When she is not working, she likes to read books with entertainment value (nothing depressing or real life, since she gets enough of that at work), go fishing and camping, and do crafts.

**You hold your child’s future in your hands.**

Teens who drink may not be aware of the harmful effects that alcohol has on their brain.

Research shows that the human brain is still maturing during the adolescent years, with changes continuing into the early 20s.

Drinking alcohol at a young age can impair adolescent brain development, trigger addiction and cause other risk-taking behavior.

Educate yourself and others about the dangers of underage drinking. For free information, contact Kansas Leadership to Keep Children Alcohol Free at (800) 206-7231, because what you don’t see and what they don’t know could be harmful to your child’s health.

www.kansasfamily.com/getinvolved-ksleadership.cfm

Supported by Kansas Social and Rehabilitation Services/Addiction and Prevention Services and the Kansas Leadership to Keep Children Alcohol Free
Wedding

On October 20, 2007, Matt Maloney, assistant district attorney in the appellate division in Sedgwick County married Kristen Wheeler. Kristen is an attorney with Morris, Laing, Evans, Brock & Kennedy in Wichita. Congratulations!

Birth

Corey and Jill (Bachman) Kenney are the proud parents of a daughter, Amelia Kay Kenney. She was born on Monday, December 17, 2007 at Olathe Medical Center in Olathe, Kansas. Amelia weighed 7 lbs, 4.7 oz and was 19 1/2 inches in length. Amelia was welcomed home by her 2-year-old brother Asher.

Corey is the City Prosecutor for the City of Lenexa. Jill is an Assistant District Attorney for Johnson County.
Advice for New Prosecutors

By Victor S. (Torry) Johnson III

Recent events have many of us pondering what it means to be a prosecutor and, more specifically, what it means to be one with ethics and integrity. We thought we knew, but then came the Duke University lacrosse debacle, and soon our profession was the target for criticism and claims of widespread prosecutorial misconduct along with calls for reform. Even though our critics exaggerate the problem, it would be a mistake to think that all their points are without merit. It is worthwhile to consider what constitutes a good prosecutor and how good prosecutors develop.

Although I have been out of law school for a long time, I do not think it has changed that much when it comes to preparing a law student for a career in the district attorney’s office. Really there is no preparation beyond a cursory discussion of the Rules of Professional Conduct that cover the special responsibilities of a prosecutor. Since most law students will not be practicing criminal law much less be a prosecutor, the subject simply doesn’t merit the time. As a result, the new hires we get from law school are unprepared for the array of ethical challenges and conundrums that will confront them daily. Our individual offices and our profession must provide the training and mentoring necessary.

Most newly-minted assistant district attorneys come with little practical or theoretical understanding of their special role in the criminal justice system. They are thrown into the fray and are expected to survive and along the way to learn to recognize and deal with ethical dilemmas. Probably they have only a loose grasp on what it means to represent “a sovereignty” instead of an actual client and how that changes their perspective. They struggle to balance the demands of the victim or the police with what common sense says a case is really worth. And it is too easy for them to focus on the importance of winning that first trial, regardless of how trivial it might be. In the pursuit of justice, these prosecutors must learn that not every arrest is for the “crime of the century” and many defendants are more pitiful than terrifying.

When it comes to trying to define the special role of a prosecutor, I am partial to what my own state supreme court said nearly two hundred years ago:

_He is to judge between the people and the government; he is to be the safeguard of the one and the advocate for the rights of the other; he ought not to suffer the innocent to be oppressed or vexatiously harassed, anymore than those who deserve prosecution to escape; he is to pursue guilt; he is to protect innocence; he is to judge the circumstances, and according to their true complexion, to combine the public welfare and the safety of the citizens, preserving both, and not impairing either; he is to decline the use of individual passions and individual malevolence, when he cannot use them for the advantage of the public; he is to lay hold of them where public justice, in sound discretion, requires it._

By means of this description, the court explained the inherent advantage of having an independent public prosecutor instead of a private prosecutor hired by an individual victim. The court also grappled with the legal balancing act that is unique to prosecutors—the obligation to pursue guilt as well as to protect innocence and to do so in a way that preserves the rights of all concerned. While I think the Tennessee Supreme Court captured the essence of prosecution, I decided to distill some practical principles that, if followed, can guide a young lawyer’s career and lead them past many professional pitfalls.

### The Golden Rule

We are all familiar with the precept, “Do to others as you would have them do to you” and, just as in our daily lives, it should be the guiding principle for a prosecutor.

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**Footnotes**

1. Berger v. United States, 295 U.S. 78, 88 (1935). “The United States Attorney is the representative not of an ordinary party to a controversy, but a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a prosecution is not that it shall win a case, but that justice shall be done.”

2. Fout v. State, 4 Tenn. 98, 99 (1816).
Used in this context, the golden rule demands that the assistant district attorney give his or her best effort on behalf of the state and vicariously, to the victim. Stated another way, if you or a close relative were standing in the shoes of the victim, would you have been well represented by a prosecutor who took the job seriously or were you mistreated by an assistant who considered you a nuisance and your case as unimportant. Although the result may not have been what you wished, from an objective point of view, did the assistant handle this prosecution professionally. The principle of the golden rule expects that the assistant will act honorably during the prosecution by not cutting corners or overlooking illegalities. And it assumes that a prosecutor will treat all involved, the defendant included, with respect—often whether they deserve it or not.

**Pursue Guilt But Protect Innocence**

Only a prosecutor has this dual role. Much is made of our obligation to pursue guilt, but we also are required to stand as a bulwark to protect the innocent, sometimes in the face of intense pressure as in the Duke lacrosse allegations. The public expects us to pursue the guilty with zeal while not crossing the line to zealotry. We get accolades for securing the conviction of a wrongdoer, but the ends of justice are also well-served when we decide that the evidence does not support a prosecution. The goal of an investigation and later prosecution is to find and convict the guilty and to clear those under a cloud of suspicion. Any diligent investigator or prosecutor should have an open mind and a willingness to examine a case from every angle. Often it leads to a deserved conviction, but declining to charge someone with a crime can take courage and should not be considered a failure.

**It Is Not Whether You Win or Lose**

Famed sportswriter Grantland Rice once wrote:

> For when the One Great Scorer comes  
> To write against your name,  
> He marks not that you won or lost  
> But how you played the game.³

Rice’s poem emphasized the importance of playing by the rules, giving your best effort, and accepting the results with grace and dignity. While sometimes derided in sports circles, it is an apt principle for a prosecutor. First, the person charged with enforcing the law must themselves observe the law—play by the rules. Sometimes one can be blinded by the righteousness of their cause and lose sight that a worthy end should not be achieved by any means available. “[W]hile he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”⁴ It is the height of hypocrisy to enforce the law while breaking it. For a good prosecutor, it does matter how you play the game, how you deal with your adversaries, how you give your best effort, and how you abide by the results.

For those of us who were Boy Scouts, we learned the motto “Be Prepared.” That same motto is an important lesson to prosecutors. Simply put, if you want to be successful at trial or during plea negotiations, you must be prepared—more prepared than the lawyer on the other side. On rare occasions, we see a truly exceptional trial lawyer who breaks this rule and does not prepare his case. He doesn’t read the file or interview all the witnesses or go to the scene or even look at the law, but most of us do not possess that kind of talent. Whatever success we have come from hard work and by out-preparing the other side. With apologies to Damon Runyan, “The victory is not always to the most prepared or to the hardest working, but that is the way to bet.”⁵ You should critique yourself after every trial. Watch others, ask for advice, never quit trying to improve, but always remember to be yourself and do what you are comfortable doing and nothing else.

**The Truth Is Somewhere in the Middle**

As singer Marvin Gaye struggled to come to grips with a deteriorating relationship, he observed that you should believe only half of what you see and none of what you hear.⁶ This is excellent advice for budding

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5. “The race is not always to the swift, nor the battle to the strong, but that’s the way to bet.” Attributed to Damon Runyon (1884-1946) American journalist and author.
prosecutors. Healthy skepticism coupled with common sense can help you navigate through the shoals of prevarication where defendants, victims, and witnesses give testimony that is often contradictory, mistaken, misperceived, shaded, or fabricated. Frequently, neither the victim’s nor the defendant’s version is precisely true. The victim may still be a victim but just not as innocent as initially depicted, and the defendant may not be as malevolent as first thought.

Defendants are people too. There are those who are inherently evil, utterly depraved and without redeeming qualities, but thankfully there are few of them. The rest represent a wide spectrum of human frailty marked by a lack of intelligence, an inability to solve problems, pent up anger and frustration, an addiction to drugs and alcohol, an unstable home life—the list goes on and on. Yes, they broke the law and for that they should be punished. But what is just or fair may depend on the comparative fault of victims who may bear responsibility for placing themselves in harm’s way or acting as instigators. It is a prosecutor’s role to see the “true complexion”7 of the case.

An important corollary is that you should never accept as true the word of someone with an obvious motive to lie. While informants and cooperating defendants can be critical to a case, they also have a strong incentive to make themselves look better than they are, to protect another, or to minimize their own guilt. More often than not, they will not tell you the truth, but rather only what they think you want to hear or what they believe you already know. They hope to get the maximum return for the least amount of investment on their part. Because the pitfalls are so numerous and potentially devastating, it is essential to verify every material fact.

Loose Lips

During World War II, soldiers and civilians alike were admonished that “Loose lips might sink ships.” In other words, a careless comment could be overheard and lead to a tragedy. The same warning holds true for a prosecutor. By the nature of the job, we hear all manner of confidential information, some of which is true and some of which is false. Disclosing such information recklessly can undermine an investigation, warn a target, jeopardize someone’s life, or ruin a reputation. Of course, it can be tempting to reveal some secret information to impress one’s friends. How else can they really appreciate how important you are and what responsibilities you have, but that is the point—the fact that you are a prosecutor carries with it the burden to be discreet for the benefit of all concerned.

Your Credibility

Nothing is more important than your credibility. In a system dominated by nonstop negotiations and representations, your word has to be your bond. As a prosecutor, you need to develop a reputation for candor with the court and with the defense bar. They need to understand that you mean what you say and that you are willing to stand behind any offer or representation that you make. While the enforceability of plea agreements is generally governed by contract law, on another level, a prosecutor should be reluctant to withdraw an offer, even if legally permissible, just because it was unwise or ill-advised. Such a mistake should be rare if you are prepared and have a thorough knowledge of the facts of the case and the applicable law. Of course, there can be exceptions such as when material facts have been misrepresented to you, but your own negligence is not reason enough to refuse to honor an agreement.

Likewise, judges learn quickly which lawyers they can believe without reservation and which lawyers they cannot. You do not want to be in that latter category. It is refreshing both to the court and to other lawyers when you stand by what you have said, accept responsibility for your decision, and do what you have committed to do.

Withstanding the Heat in the Kitchen

Nothing grabs the attention of the general public like a sensational crime. An entire cottage industry of media types has cropped up for the sole purpose of generating ratings and revenues and not for advancing intelligent public discourse about the criminal justice system. This can be particularly frustrating when prosecutors are circumscribed in what they can say while a host of talking heads can make all kinds of outrageous statements based upon virtually no knowledge of the facts or the law. As a result, the pressure from the media, the public, and even from law enforcement, can be intense; but the role of the prosecutor is to see the case for what it truly is and not how it has been misrepresented to the general public. While our system

7. Fout, supra at 99.
of criminal justice can be cumbersome and slow, it is this very process that allows time to pass and the true facts to come into clear focus. It is at that time that a prosecutor can make a reasoned decision not one based upon passion or misinformation.

Believe in the Jury System

It is often said that one never knows what a jury is going to do, and anyone who claims they do know has never tried a case. That being said, the peculiar institution that is a jury works well. The decision-making process that requires 12 people from varied backgrounds and different life experiences to hash out the facts and work through the testimony usually produces a just result. Sometimes a jury decision may seem difficult to understand but upon reflection, you will realize that the decision was a reasoned and sensible one based upon the available evidence. It is an amazing process to see how, as a group, the jury has greater wisdom than they may have as individuals. Moreover, as a group, they take their responsibility and their oaths as jurors seriously. They do listen to the admonitions from the court. They do give the defendant the benefit of the doubt. They do require the state to prove its case. As such, juries and their decisions deserve our respect.

Just Because You Have a Law Degree

With the myriad of things that young prosecutors must learn, it is often easy for them to overlook the really important people in the system. Although it is critical to work well with judges and other lawyers, they only make up a small portion of the court system. The people who can make a real difference in how you, as a prosecutor, are able to do your job are the court officers, court clerks, secretaries, and office support staff of every description. These are people who perform absolutely vital functions and are not impressed with you simply because you have a law degree. Instead, their impression of you is formed by how you conduct yourself in court and out of court and how you treat them on a daily basis. They expect you to take your job, not yourself, seriously. These people are the ones that can help you in a difficult situation or simply let you flounder.

On a related point, just because you are an assistant district attorney does not entitle you to special treatment. You don’t go to the front of the line, get in without paying, or tear up your traffic tickets. Defense attorneys may want to buy your dinner or pay for a round of golf and have no ulterior motive, but it compromises your independence all the same.

Conclusion

As a prosecutor, you are making decisions that result in a person being charged or not charged, arrested or not arrested, jailed or freed, tried or allowed to enter a plea. It can be deceptively easy for a prosecutor to be caught up in the adversarial nature of the criminal process and to concentrate more on winning a case than doing justice. It is important to realize that justice may require declining to prosecute or agreeing to probation just as much as it may mean holding out for the maximum punishment. In a culture that prizes winning, it can be a difficult concept to understand how our form of constitutional government can be validated by a dismissal or a decision not to prosecute.

The demands on a prosecutor are great, but so are the rewards. To do this job and do it well is fundamental to one of government’s greatest obligations: the protection of its citizens. Federal judge and former prosecutor Stephen Trott reflected upon the meaning of being a prosecutor. He highlighted what makes being a prosecutor special:

It’s a luxury of a lifetime to be able to pursue only those things that are right. You are unencumbered by the bad ideas of a client who is paying you money. You are only encumbered by your own desire to do the right thing and to make sure that justice is done.8

Justice can be an elusive concept, but there is no higher duty than to pursue it purposefully, honestly and impartially. While individual victims may not appreciate the role the prosecutor plays in the criminal justice system, we must strive each day to provide the victims and society as a whole with quality representation and professional conduct. We need to assure the public that criminal cases will be examined thoroughly and handled impartially without regard to inappropriate considerations, such as race, social standing, financial means, political influence, national origin, etc. If we do not, the criminal justice system loses its credibility and legitimacy with the people it is to protect.

What is a Traffic Safety Resource Prosecutor (TSRP)?

It is an attorney who is or will become an expert in a particular state’s traffic and DUI related laws. This person will provide support to enhance the capability of the State’s prosecutors to effectively prosecute traffic safety violations: specifically DUI and DUI fatal cases. The underlying purpose of establishing a TSRP in each state is to help ensure that all prosecutors have immediate access to information and resources they need to help overcome obstacles in DUI prosecutions. The TSRP also serves as a liaison between prosecutors and law enforcement officers. The TSRP will conduct training for prosecutors as well as cross training with law enforcement. At the present time, there are 37 states that have TSRPs.

Let’s face it, defense attorneys are very good at networking when it comes to filing challenges to a DUI investigation. The prosecutor in one county may very well have successfully dealt with a particular issue for a number of months but another county has not ever heard of the issue and is really struggling with where to start. It is time that we all join together and provide a united front!!! Having a central location to share ideas, motions, and arguments will only strengthen our ability to successfully prosecute DUI cases.

I am very honored and privileged to say that I have been chosen to be the first Kansas TSRP. I will continue to serve as a Senior Assistant District Attorney for the Third Judicial District during 2008.

If you are not familiar with my background, let me take a few moments to explain. Prior to accepting this position, I have nine years experience in prosecuting traffic cases. I have been involved with 23 DUI fatal crashes resulting in charges being filed. In one of those cases the driver was convicted of 2nd Degree murder. I have evaluated and charged out 1000s of DUI cases. I have made a policy of going out to fatal crashes in my district, day or night, to observe the crash scene firsthand. And in nine years, I have attended over 50 scenes. I even prepared search warrants for forensic autopsies on vehicles. In some instances, I have even observed the execution of the warrant to get a firsthand look at the evidence I have in a case.

Also, I have attended training with accident reconstruction officers to get a feel for the equations and equipment they use. I am currently certified by the manufacturer of the Intoxilyzer 8000 to perform analysis and instruct others in its operation. I have participated in wet workshop training of officers for field sobriety testing. I have observed active DUI check lanes and successfully defended their constitutionality.

In addition, I have prepared a DUI manual of case law pertaining to all aspects of DUI prosecution. The manual is in its third edition. Prior to getting this job, I have worked with many different county and district attorney’s offices dealing with DUI issues.

I have been honored to appear before the Kansas Legislature to advocate for stronger traffic safety laws. I have participated with law enforcement, the Department of Revenue, and health care professionals in crafting the current DUI law for the state. And, I have prepared and presented legislation to change the penalties for leaving the scene of an accident.

This assessment was to review and make recommendations for the prevention, investigation, prosecution, and treatment of persons charged with alcohol related offenses.

At the present time, I am on the Breath Alcohol Advisory Committee as well as the SFST Advisory Committee. Both these committees are setting the standards that will be followed in the state regarding breath testing and officers conducting field sobriety testing.

Prior to going to law school, I was a forensic chemist and worked in a forensic lab for six years. My job in the lab was to analyze suspected drug substances and testify in court as to my findings. I have been deemed an expert in the field of forensic chemistry in the state and federal courts in Florida. I helped train officers in the collection and packaging of drugs and drug paraphernalia. I am familiar with the instrumentation used by the KBI to determine blood alcohol content. And, I have successfully defended protocols the KBI follows dealing with the gas chromatograph, internal standard method and chain of evidence.

The TSRP position requires me to give training to prosecutors, and law enforcement relating to DUI prosecution, and DUI related fatal crashes. It requires publishing a newsletter to inform everyone in the state of case law, legislative developments, new technologies, innovative ideas, and upcoming events concerning DUI prosecution.

I think the most critical part of the TSRP job is to provide assistance to prosecutors and other traffic associates on a wide variety of legal and technical issues.

You may contact me at (785) 230-1106 or kstsrp@gmail.com

What does that mean to you?

That means, CONTACT ME:
• If you need help with a legal issue dealing with traffic.
• If you want training on a specific issue dealing with DUI.
• If you want training for law enforcement officers in your area concerning DUI issues.
• If you wish to obtain a copy of the DUI manual.
• If you are interested in exploring a FRYE hearing in a case you have.
• If you wish to begin receiving the TSRP Newsletter.

So, let us UNITE and make Kansas a safe place to travel!

Stay current by checking the KCDAA web site!

New information is being updated regularly in the members only section. Just login and check out:

✓ Unpublished Opinions & Summaries of those Opinions
✓ The 2008 Legislative Agenda, other KCDAA legislative news, and a Bill Tracking Report
✓ Attorney General Opinions
✓ A schedule of prosecutor seminars around the nation
✓ And much more...

www.kcdaa.org
The NDAA Struggles With Finances, Personnel Issues

It’s been a long year for the National District Attorneys Association. Lacking promised funding from Federal grants to support critical programs, the NDAA has found itself in a financial crisis. With the departure of our former Executive Director, Tom Charron, the interim director Mary Galvin (former Dean of the Advocacy Center) and the Board of Directors have been enacting sweeping changes to keep our national prosecutors association viable and financially secure.

The Problems:

Lack of Funding for the National Advocacy Center

Since opening day in May of 1998, the National Advocacy Center at Columbia, South Carolina has been funded through the Appropriations Act for the Department of Justice, specifically through the Byrne Grants (discretionary grants). In 2006, the NAC received $4.5 million in funding from Byrne Grants however; all earmarks were eliminated under that program leaving the NAC uncertain as to future funding. In FY 2007, no Byrne funds were received but the NAC did obtain $2 million dollars in funding from the State and Local Prosecutors National Training Program. During the appropriation process for FY 2008, a request for $6.5 million dollars was presented to Congress, however, the Consolidations Appropriations Act was passed by both houses and signed by the president without providing any funding for NAC. We were then informed that the Department of Justice had $16 million in Byrne competitive grants available by application, unfortunately it is unlikely that the NDAA will receive the requested $6.5 million given the limited amounts of funds and the potential number of grantees.

The National Advocacy Center training was offered to prosecutors nationwide at no cost to the participating offices. Many Kansas prosecutors have had the opportunity to be trained in Columbia and a number of Kansas prosecutors have also been involved as training instructors. The NAC trains approximately 3000 local prosecutors each year and has provided valuable education to over 20,000 state and local prosecutors since the initial course in 1998. Until the FY 2007 reduction in funding, students attending the courses had their expenses paid by NDAA, including travel and lodging and in addition received a per diem. Presently, students must pay their own travel expenses and do not receive a per diem.

Current training

The advocacy center has been required to cancel its Cross Examination course at the South Carolina location and has substituted two regional courses as follows: June 29 –July 2nd in Houston, Texas and a second offering in Chicago on August 4-7th, 2008. These training programs cost $375.00 in addition to airfare and lodging. In addition, the Chicago venue will also offer an Advanced PowerPoint course on the afternoon of August 7th at the cost of $99.99.
Loss of revenue and overriding expenses at NDAA  
In 2006, NDAA merged to include all entities under one umbrella. No longer would APRI (American Prosecutors Research Institute), the National Advocacy Center (NAC), and the National College of District Attorneys (NCDA) be stand-alone programs. In 2006, our funding started to wane, and NDAA was using other program money to make ends meet. We know now that there was also poor fiscal control, engagement of unnecessary debt, and wasteful spending that contributed to the declining financial position. Because the record keeping was inadequate or misleading, the NDAA did not know the full extent of the fiscal crisis until this past summer in 2007. At our summer meeting in Portland, the problems were brought forward for examination and immediate rectification. The NDAA went into an austerity budget, where programs were cut and employees were furloughed. Many solid employees left the NDAA programs because of the financial crisis and for their own personal security, or they left to take other jobs where they were assured that they would receive a paycheck.

After a full audit, debt has been estimated at about $800,000 and climbing as each month goes by. There has not been enough money to pay expenses, including rent, and staff had to be dramatically reduced to cover costs. The NDAA has not had comparable income in the form of grants or earmarks to keep things afloat.

Executive Director Leaves NDAA  
The board took immediate and appropriate action and the Executive Director Tom Charron was required to resign his position. In the interim period, Mary Galvin has been performing two functions – Dean of the NAC and Interim Executive Director for the NDAA. Mary is quite frugal and is also realistic that the NDAA is required to cut expenses and reduce debt immediately.

Reduction of Lease Expense  
National Headquarters is located at 99 Canal Center Plaza in Alexandria, Virginia. A number of years ago the NDAA entered into an escalating lease for 20,000 square feet of space. The current monthly rent is $65,000, which the NDAA cannot afford and is too much space for existing personnel. The staggering amount of $65,000 per month for the lease placed NDAA in a precarious financial position. Only recently, the lease has been re-negotiated to a manageable sum with a reduction of space to about 9,000 square feet at the cost of $30,000 per month.

New Horizons  
The Board of Directors for the National District Attorneys Association has finally gotten down to the root causes of the financial problems and as individual state directors, we are working diligently to make necessary changes in the organization.

Representing Kansas, I have requested an austerity policy for all future executive board travel. Our association meets in the fall, the spring, and at the summer conference. In the meantime, there are two other meetings of the Executive Board whose expenses for the 11 members plus staff, have been at the expense of the National Association. After four years of requesting documents regarding travel expenses, it was not until this spring that I received only partial accounting information. From that information, I prepared financial papers that were submitted at our last board meeting in April detailing the exorbitant costs of these executive meetings in an effort to create a moratorium on this unnecessary travel and additional expenses. I have also drafted and submitted to the board a travel policy for the organization that would require them to follow federal per diem/lodging and expenses in line with national averages. Everyone has to tighten their belt.

NOTE: The following other NAC courses have also been cancelled:

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<tr>
<th>Date Range</th>
<th>Course</th>
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<tbody>
<tr>
<td>April 28-May 2</td>
<td>Trial Advocacy II</td>
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<tr>
<td>May 19-22</td>
<td>Arson and Explosives</td>
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<tr>
<td>June 23-27</td>
<td>Appellate Advocacy</td>
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<tr>
<td>June 30-July 2</td>
<td>Gang Response</td>
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<tr>
<td>July 28-August 1</td>
<td>Trial Advocacy I</td>
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<td>August 4-8</td>
<td>Unsafe Havens I</td>
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<td>August 25-28</td>
<td>Cross Examination</td>
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See the National Advocacy Web site for further information.
http://www.ndaa.org/education/nac_index.html
As you may know, my expenses in representing the State of Kansas as its Director, and the expenses of Ms. Kim Parker who was appointed as an Associate Director to the national board, have always been paid by our office. **The KCDAA does not fund any expenses for this participation.**

In addition to curbing spending, the NDAA is currently evaluating the qualifications and responsibilities of the State Director system. I am serving on that sub-committee to define the role of the State Director and their responsibility to our nation’s prosecutors. As a senior member of the NDAA board, it is incumbent that we all work as diligently as possible to correct problems and ensure a healthy organization for the prosecutors that we represent around the nation and to continue offering them quality services and training that they have come to expect.

As always, should you require further information or need assistance, please contact me at foulston@sedgwick.gov or by telephone at (316) 660-3737.

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**The Prosecutor’s Calendar**

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<tr>
<th>Date</th>
<th>Event</th>
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<tr>
<td>May 4-8, 2008</td>
<td>Special Prosecutions Course</td>
<td>San Diego, CA</td>
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<td>May 18-22, 2008</td>
<td>Office Administration</td>
<td>Marco Island, FL</td>
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<td>June 8-10th</td>
<td>KCDAA Spring Conference</td>
<td>Wichita, Kansas</td>
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<td>June 1-11, 2008</td>
<td>Career Prosecutor Course</td>
<td>Charleston, SC</td>
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<td>June 23-27, 2008</td>
<td>Crime Scene Investigation</td>
<td>Las Vegas, NV</td>
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<td>July 13-16</td>
<td>NDAA SUMMER CONFERENCE</td>
<td>Tucson, Arizona</td>
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<tr>
<td>September 7-11, 2008</td>
<td>Experts</td>
<td>San Diego, CA</td>
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<td>September 21-25, 2008</td>
<td>Financial Crimes</td>
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<td>October 4-7, 2008</td>
<td>National Conference on Domestic Violence</td>
<td>San Diego</td>
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<td>October 11-15, 2008</td>
<td>The Executive Program</td>
<td>Marco Island, Fla.</td>
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<td>October 12-16, 2008</td>
<td>Evidence for Prosecutors</td>
<td>Mesa Arizona</td>
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<td>October 26-30, 2008</td>
<td>Prosecuting Drug Cases</td>
<td>TBA</td>
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<td>November 2-6, 2008</td>
<td>Prosecuting Homicide Cases</td>
<td>San Francisco</td>
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<tr>
<td>November 16-20, 2008</td>
<td>Prosecuting Sexual Assaults and Related Violent Crimes</td>
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<td>December 7-11, 2008</td>
<td>Forensic Evidence</td>
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<tr>
<td>December 7-11, 2008</td>
<td>Government Civil Practice</td>
<td>Savannah, GA</td>
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**HAVEN’T RECEIVED YOUR KCDAA YEARS OF SERVICE PIN?**

Contact Kari Presley at the KCDAA office (785) 232-5822.

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KCDAA lapel pins are available for members who have served 5, 10 and 20 years in prosecution.
Mark your Calendars for the next KCDAA Conference.

**KCDAA Spring 2008 Conference**

**June 9-10, 2008**

**Hyatt Regency Hotel**

**Wichita, Kansas**

AG Stephen Six will address the group during lunch on Tuesday, June 10, so plan now to attend. More information will be available soon.