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About the Cover

The present Rooks County Courthouse was built in 1921. The builder was Cuthbert & Sons, and the architect was F.C. Squires from Topeka. The structure was a Bedford Stone Structure with county offices on the first three floors and a jail on the fourth floor. The building was completed in 1923.

The staircases are made of solid marble and the corridors are lined from the floor up five feet with solid sheets of marble. The corridor floors are original ceramic tile. The doors and casings are all solid original oak. Near the end of 2000, the building was officially listed on the National Register of Historic Places.

Photo by John D. Morrison, Prairie Vistas Photography
President’s Column

by John Wheeler, KCDAA President
Finney County Attorney

KCDAA’s Legislative Role

When we were sworn in before the Bar, each of us swore to uphold and defend the constitution and laws of the state of Kansas. When we were respectively sworn in as prosecutors for the state of Kansas, we took the same oath. Each of us wants to uphold the peace and dignity of the people of the state of Kansas and keep our homes and communities safe.

Have we ever considered how difficult our jobs would be if the laws we have sworn to uphold and enforce were vague, overbroad, or just plain ineffective? To prevent “bad law” from becoming our law and to inform our legislature of serious public safety issues facing our communities, it is vitally important that we, as an association of prosecutors, dedicate our efforts to assist the legislature in passing, improving laws to protect the citizens of this state, or to repeal those laws that are problematic to effective enforcement of the law. It is for that reason that the KCDAA Board of Directors, Legislative Committee members, Executive Director, and staff expend a great deal of effort to the session. They spend time in anticipation of the legislative session and during the session to advancing our legislative agenda and lending an enlightened prosecutorial perspective to others’ bills we support, and against those we oppose or have concern.

I have been advised that some of our membership have questions about how we form our legislative agenda and choose our organizational positions to present to the legislature. Therefore, allow me the opportunity to walk you through the KCDAA’s legislative process.

Our annual legislative agenda always begins at the grass roots: our membership. You will recall at this year’s KCDAA Spring Conference, you were given a form called “2012 KCDAA Legislative Request for Proposal.” The form is also available on the KCDAA website (www.kcdaa.org) in the “Members Only” section. The request for proposals is the first step in the process of gaining the input of the membership for changes needed to the Kansas Statutes. The deadline to submit proposals is August 31.

The proposals from the membership are then directed to the Legislative Committee for their review and consideration. Typically, the Legislative Committee has a series of conference calls to sort the proposals, reconcile and merge duplicate proposals, and narrow the list down to a list of priority proposals. The list of legislative priorities are then submitted to the Board of Directors for determination of the KCDAA Legislative Agenda. Because of the myriad of issues the Legislature must face each year, the Board limits our legislative agenda to the five most important issues at their meeting at the Fall Conference. This allows our Executive Director and staff to draft the legislation and submit it to the Revisor of Statutes Office prior to the session.

I think it is important for our membership to know who comprises your Legislative Committee. The Committee is comprised of all section heads of the organization as well as other members of the organization who have expressed interest in serving on the committee. Currently our committee persons are as follows:

- Marc Goodman, Lyon County Attorney, Chair
- Greg Benefiel, Douglas County, DUI Section Head
- Marc Bennett, Sedgwick County, Sex Crimes Section Head
- John Fritz, Johnson County
- Jerry Gorman, Wyandotte County District Attorney, Homicide Section Head
- Don Hymer, Johnson County, CINC Section Head
- Margaret Mahoney, Decatur County
- Steve Obermeier, Johnson County, Appellate Section Head
Thomas Stanton, Reno County, Drug Section Head
Ann Swegle, Sedgwick County
Todd Thompson, Leavenworth County Attorney

Following the October Board meeting, the Board of Directors assumes the role of the Legislative Committee through the end of the Legislative Session. During this time, the Board may add additional items to the agenda that may arise as an urgent need to respond to or “fix” statutes as a result of any adverse appellate decisions that have been handed down subsequent to the determination of our legislative agenda. Once the legislature convenes, the Board of Directors convene via conference call once a week at a minimum. It is vitally necessary that the Board stay abreast of all actions the Legislature may take on a daily basis. We track hearings on our bills and determine whether to submit written testimony before the committee or whether we need to have a Conferee to testify on our behalf and who that Conferee will be. It is so important that we have active membership participation at this stage to testify on our behalf before the committees. I sincerely thank all those who have given their time, effort, and expertise to appear on our behalf over the years. Appearances are generally on short notice and require a quick response.

It is very important that our membership understand that if their legislative proposal does not make the final agenda, you are not precluded from submitting your suggested legislation on your own, perhaps through one of your friendly legislators. We ask that you let us know of your proposal and, even though it may not be on our agenda, the organization very well may be in a position to support your legislation either through written testimony or in person. Our agenda does not limit our participation in the legislative process. We routinely weigh in, either in support or opposition, on legislation proposed by other organizations or agencies.

I encourage your interest and participation in the legislative issues that face our organization. We are all in this together, so let’s work together. I ask that you take a more active interest by proposing legislation, participation on the Legislative Committee, and testifying on behalf of the association. If you have an interest, please call the KCDAA office and let your interest be known or feel free to contact me.

Lastly, and off topic, I extend my sincere appreciation to all of you who made a donation to the Kansas Prosecutor’s Foundation following our Spring Conference.

2012 KCDAA Legislative Request for Proposals
Submission Deadline: August 31, 2011

The KCDAA Legislative Committee is soliciting Legislative Proposals for the KCDAA legislative agenda for the 2012 Legislative Session. This input from the membership will be considered by the Committee in making its recommendations to the KCDAA Board of Directors.

This RFP is the first step in the process by gaining the input of the membership in changes needed to the Kansas Statutes for the benefit of prosecutors. Feel free to provide other information, background or cases that will aid the Committee in selecting and targeting the most critical issues. Thank you for your prompt attention to this matter.

Download the form at www.kcdaa.org in the members only section or use the form on the next page.
2012 KCDAA Legislative Request for Proposals
(One Proposal per page – use additional pages as needed)

The KCDAA Legislative Committee is soliciting Legislative Proposals for the KCDAA legislative agenda for the 2012 Legislative Session. This input from the membership will be considered by the Committee in making its recommendations to the KCDAA Board of Directors.

This RFP is the first step in the process by gaining the input of the membership in changes needed to the Kansas Statutes for the benefit of prosecutors. Please submit your proposals with the information below at a minimum. Feel free to provide other information, background or cases that will aid the Committee in selecting and targeting the most critical issues. Thank you for your prompt attention to this matter.

Name: ____________________________  Office: _____________________________
Phone Number: ____________________  E-mail: ________________________________

1. Statute to amend or affected: _________________

2. Please describe the need for this change as it applies to the membership of the KCDAA across the state as well as the specific concern in your jurisdiction.

3. Draft Language – Please attach and if you are amending an existing statute, please attach a copy of statute with the change noted.

4. Are you aware of any previous legislative efforts similar to this proposal? If so, when and by whom?

5. Other organizations that might support this legislative proposal? Oppose?

6. Legislators or others already contacted about the proposal:

7. Are you willing to testify regarding the proposed legislation?

Submit proposals to: KCDAA Office, 1200 W. 10th Ave, Topeka, KS 66604
Fax: (785) 234-2433 Email: skearney@kearneyandassociates.com

Deadline for submission is August 31, 2011
Executive Director’s Column
by Steve Kearney, KCDAA Executive Director

Annual KCDAA Processes and New Happenings

The Kansas County and District Attorneys Association and its sister education arm, the Kansas Prosecutors Training and Assistance Institute (KPT&AI), continue to strive to meet your needs as Kansas prosecutors. I would like to bring you up to speed on the latest happenings and remind you of some annual processes the KCDAA Board has put in place to most effectively and efficiently bring the organization’s services to you.

Development of the KCDAA Legislative Agenda

The Board of Directors and the Legislative Committee both encourage your active participation in the process of the agenda’s development and passage each year. The process established several years ago and refined over time by your Board of Directors begins as soon as last legislative session adjourns and the spring conference begins. The Board and Legislative Committee utilize a legislative RFP form that is posted on the KCDAA website, placed in each spring conference attendees’ packet, placed on the previous page, and e-blasted to the entire membership. The deadline for submission is August 31 this year.

For more details on this process and how you can get involved, please see the president’s article on pages 4-5 in this issue of the magazine. The development and passage of the KCDAA legislative agenda as well as the shaping of public policy on other criminal law matters requires all the effort and input you as members can muster. Please let me know how you would like to help in this important endeavor of the KCDAA. We are never without issues to shoot at pasted on a constantly moving political target.

CLE process

The development of the CLE agenda for the spring and fall of each year is through the CLE Committee with representation from the subject matter sections and others willing to serve. The CLE Committee is responsible for creating a relevant continuing education agenda for prosecutors. Once again the opportunity to participate on the committee is practically limitless with the intended backbone being that of the Section Leaders or their designee and the CLE Committee Chair, with all comers welcome. Don’t miss your opportunity to have input into the KPT&AI programming by not taking the time to serve. The CLE Committee is tasked with providing an average of 24 hours of quality programming a year including 2 hours of ethics at each conference. Duties include regular conference calls, face-to-face meetings at each conference typically preceding the Board meetings to enable the Board to act on recommendations, and on an as needed basis when circumstances dictate.

Quality programming is one of the main reasons KPT&AI exists. A great example is this fall’s October Conference in Shawnee County including a presentation by Katherine Ramsland on The Force of Narrative and Jury Perception, which uses the Jeffrey Dahmer case as the vehicle for the program. And ....back by popular demand, Thomas Lockridge, the Commonwealth Attorney for the 13th Judicial Circuit in Kentucky and his partner in crime (ethics) Steve Wilson, who is a former prosecutor and currently Circuit Judge for the 8th Judicial Circuit in Warren County, Kentucky, will present their sequel to their last ethics presentation “Ethics the Movie.” Their program was hands down our most popular ethics presentation to date and frankly one of our most popular presentations period.

Here is the description for this three-hour ethics presentation: ETHICS: THE MOVIE II - Judge Steve Wilson and Commonwealth’s Attorney Tom Lockridge will present a whole new movie and crime sequence and will build on the issues raised in
the first ethics movie. Young Assistant Prosecutor Andy Simpson returns to face ethical issues raised during a complicated drug investigation. Detective Owens works the new crime scenario and continues to create situations that cause ethical problems for Andy. The issues raised are a little more complicated this time and are ripe for lots of discussion of ways to help Andy overcome his problems and keep his law license. This time, Andy’s boss Tom Locker is there to provide more layers to the issues and opportunities to discuss the responsibilities created by the supervisor/subordinate relationship. This presentation will utilize the Rules of Professional Responsibility from Kansas and will make occasional reference to the National Prosecution Standards published by the NDAA.

Be part of putting these exciting programs together by volunteering to serve on the CLE Committee.

New Conference Policy for Speakers

Another CLE matter to make you aware of is that the Board has authorized the waiver of our member speaker’s registration fee at the conference where they present. The Board passed this measure as recognition of the contribution our members make in their presentations at each conference. This token of appreciation extends to all members making presentations or facilitating sessions at all future conferences, including the Section Chairs performing those duties at their sessions. Thanks to Charles Branson for his suggestion in this regard!

Last, thank you for your membership and for letting us be of service. Please let us know if you have ideas about how the Association can better meet your needs. See you in Topeka this fall! ☛

Remember to Dedicate a Life Insurance Policy to KPF

Projects under Development by the Kansas Prosecutors Foundation, include:

- KCDAA Law School Scholarships
- KCDAA Undergraduate Honors Stipends
- KPT&AI National Speaker Bureau for Prosecutor Continuing Legal Education
- KCDAA Law Day Activities in Kansas High Schools
- ‘Finding Words’ – helping child victims speak
- Grant for a Statewide Victim/Witness Notification System
- Sponsor KVAA
- And so much more…

Learn more at [www.kpfonline.org](http://www.kpfonline.org)

Don’t Forget: A [tax deductible](http://www.kpfonline.org) contribution can be made out to KPF and sent directly to:

Kansas Prosecutors Foundation
1200 SW 10th Ave.
Topeka, KS 66604
The 2011 Legislative Session resulted in a number of new or modified law enforcement measures. Each of these changes was designed to further enhance the safety of Kansas communities, the personal responsibility of our citizens, the equal treatment of all Kansans under the law, and the fundamental fairness and decency of our social fabric, which remains the greatest strength of our great state. Among the changes are the following new laws:

The Adam Walsh Act

In 1981, the son of John Walsh, host of the popular television program “America’s Most Wanted,” was abducted from a Florida mall. The subsequent murder of six-year-old Adam Walsh spurred the creation of federal standards for offender registries for the listing of the names and addresses of those convicted of committing sexual crimes and other crimes against children. While Kansas has had offender registry laws for some time, House Substitute for Senate Bill 37 brings Kansas into compliance with the federal standards contained in the Adam Walsh Sex Offender and Registration and Notification Act. As such, Kansas is now eligible for federal funding to improve law enforcement access to offender databases and thus further improve the safety and protection afforded the most vulnerable among us.

Reducing Metal Theft

Metal theft is a growing problem in our country and in our state. By targeting the outsides of homes, public utilities, and agricultural infrastructure, metal thieves undermine in pernicious ways the sense of security in our communities and cause untold financial loss and economic harm. House Bill 2312 begins to address this growing problem by crafting a new, limited, and responsible scheme to regulate scrap metal dealers and thus limit the financial incentives that drive these metal thieves. House Bill 2312 will ensure that the trade in scrap metal in Kansas cannot lawfully be conducted in the shadows and outside the view of law enforcement.

Prohibition of Biased Policing

Senate Bill 93 prohibits racial profiling in all its forms and establishes practical ways Kansas communities can further extend the promise of equality under the law to all citizens. Senate Bill 93 establishes that all law enforcement agencies in Kansas will put in place a detailed written policy prohibiting biased policing and explaining the requirements of the law. Senate Bill 93 also sets forth a variety of mechanisms whereby the intent of the law to eliminate and prevent biased policing can be practically carried out, including: provisions for a community review board, provisions for receiving complaints of biased policing, and reporting requirements from local law enforcement agencies to the office of the Kansas Attorney General.

Increased Protections for Citizen Privacy

In this era of rapidly emerging new communication technologies, protecting the privacy of our citizens’ private conversations is an important function of law enforcement. As we have seen recently with the “phone hacking” scandal unfolding in Great Britain, citizens have a right to expect private communications will remain private, and any unauthorized exposure or intercept of those communications is a gross violation of the standards of decency and honesty that should form the foundation of our society. House Bill 2151 will strengthen Kansas’s breach of privacy statutes by, among other adjustments, making the intercept of
Dear Criminal Justice Colleague,

I am writing to tell you about three priorities I have established for our federal prosecutors in Kansas.

• Prosecuting offenders with lengthy criminal histories who are subject to stiff federal sentences as repeat offenders.
• Prosecuting human trafficking cases.
• Prosecuting hate crimes.

Repeat offenders

My office intends to identify and prosecute offenders with lengthy criminal histories who qualify under federal laws for stiff sentences as repeat offenders. Local law enforcement and prosecutors are the front line in prosecuting violent criminals. I believe this office has a role to perform, too, and we want to aggressively contribute to the effort.

Federal violent crime prosecutions will involve gun cases, violent drug and bank robbery cases, and, in certain circumstances, armed robberies of businesses. Felons who have three prior convictions for either drugs or violent crimes, and possess a firearm, or even just ammunition, face a 15-year mandatory minimum penalty with federal prosecution. We will prosecute every one of these cases. We will assess every case involving a felon with less than three drug or violent felonies to determine if they are appropriate for federal prosecution. We will look at factors such as the nature of prior convictions, the use of a gun, any pattern of violence, and gang membership.

If guns are possessed, used, or brandished during drug crimes or bank robberies, federal law provides a mandatory penalty of five or seven years, consecutive to the sentence for the underlying crime. For a second conviction under this statute, the penalty is a mandatory 25 years.

We have been making effective use of a federal law called the “Hobbs Act,” which makes it a federal crime to commit a robbery at a business involved in interstate commerce. In this context, “interstate commerce” simply means a business that orders some of its products from out-of-state. We have prosecuted several of these when individuals or groups have committed a series of armed robberies. We prosecute the underlying robbery under the Hobbs Act and add the mandatory consecutive penalties for using firearms.

Human trafficking

The United States Attorney’s Office, and the United States Department of Justice, is committed to combating human trafficking in all its forms,
from the sex trafficking of minors and adults, to the exploitation of workers. This office intends to actively pursue such investigations and prosecutions. Your active involvement is a necessary component in the fight to detect, disrupt and prosecute human trafficking offenders and organizations.

Recently, the Department of Justice has begun an initiative for detecting and prosecuting human trafficking crimes by increasing coordination with the Federal Bureau of Investigation, Immigration and Customs Enforcement and the United States Department of Labor. The Department of Justice has also stated its commitment to provide expertise and prosecutors from the Civil Rights Division to the United States Attorneys’ Offices to assist with these unique and often complex cases.

Hate crimes

I want to use every tool at our disposal to protect the rights of Kansans ensured under the Constitution. Violence, or the threat of violence, masquerading as political activism, will not be tolerated.

We have a new tool in the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (18 U.S.C. 249). It broadens existing statutes to allow federal authorities to be more involved in local hate crimes investigations. It expands the previous federal hate crime law to include crimes motivated by a victim’s actual or perceived gender, sexual orientation, gender identity, or disability. It removes the requirement that a victim be engaging in a federally-protected activity. It also provides federal funding to help state and local agencies pay for investigating and prosecuting hate crimes.

I have been reaching out to citizen groups across the state including Muslims, the gay community, immigrant groups and advocates for the disabled to tell them about our commitment to prosecuting hate crimes. I urge law enforcement agencies to contact our office with cases involving hate crimes.

Please keep these crimes in mind and call my office or the appropriate federal law enforcement agency to discuss potential federal prosecutions.

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

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

Feel free to submit digital photos with your announcement!

Upcoming Deadline:
Fall 2011: October 28
No matter how the public might perceive the issue of DUI, it can be summed up as a public safety issue. Approximately five years ago, it became apparent that the DUI program in Kansas was broken and needed to be fixed. The journey to Senate Bill 6, which passed with 100 percent of the vote in both houses of the Kansas Legislature in May of this year began with a report done by the Substance Abuse Policy Board. The SAPB was formed after it became apparent that too many people were driving on the streets in Kansas with multiple DUlIs with little or no corrective/rehabilitative action taken to cause them to alter their behavior. There were too many deaths and injuries caused by drunk drivers including one in Wichita where a mother and her daughter were killed by a driver who had in excess of half a dozen DUI convictions and was still driving. The public began putting pressure on the legislature to take action.

The SAPB report was scathing in its condemnation of the manner in which DUlIs were handled and the poor attention that had been paid to rehabilitation through drug and alcohol treatment for DUlI offenders. In response, I was appointed in my role as vice-chair of the House Corrections and Juvenile Justice Committee to chair a subcommittee to begin exploring legislative measures to address the concerns of the SAPB. Hearings were conducted and valuable information was received from a variety of disciplines that dealt in some manner with the DUlI offenders. From those committee hearings came a decision three years ago to form the DUI Commission, which was to do an extensive investigation into the problems and potential solutions to improve public safety by reducing the numbers of DUlI offenders on Kansas’ roadways.

The DUI Commission was comprised of 23 members from a wide variety of disciplines. This blue ribbon panel was given the task of drafting recommendations for the legislature and was asked to work on the task over a two-year period with a final recommendation for the legislature in the 2011 session. That task was accomplished with the recommendations that became Senate Bill 7 in the 2011 session.

Senate Bill 7 had one glaring deficiency, however, and was dead on arrival when it hit the Senate floor. While it had extensive hearings in the Senate Judiciary Committee and passed out of that committee with a strong majority vote, the fiscal note in excess of $10 million to implement all of the recommendations proved to be too heavy for a legislature that was strapped financially. Therefore, modifications in the recommendations had to be made and those eventually resulted in Senate Bill 6, which was the work of members of both houses right up to the closing days of the legislative session.

The major accomplishments in Senate Bill 6 were those that addressed some of the core needs for rehabilitating the weak DUlI system in Kansas and are major accomplishments in their own right toward strengthening public safety. The primary achievements of the new law, which went into effect July 1, 2011 are:

- Thanks in no small part to the Secretary of Transportation coming to the rescue regarding the financial issues surrounding the implementation of the Central Repository through a Memorandum of Understanding with the KBI, that repository will be implemented and will be the central resource that allows prosecutors and courts to have a clearer idea of how many DUlIs an individual offender may have so that appropriate prosecution and sentencing may ensue. It is the hope that through this program and the requirements of Senate Bill 6, there will be a uniform application of the law and sentencing across the state in every jurisdiction and in every court, whether...
District or Municipal. There must be uniformity in application of the law and the central repository creates the opportunity for that to occur.

- The new law addresses the issue of safety by requiring all DUI offenders to have an ignition interlock device installed on their own vehicle and no offender will be allowed to drive any vehicle that does not have an interlock device installed. The offense follows the offender, not the vehicle, so the offender is responsible for seeing to it that he/she does not drive without a device in place. This is significant in a number of ways, but it is hoped that more people will not drive drunk on the highways because they simply will not have the mechanical ability to do so. Heretofore, a drunk driver could get into a car with or without a license or insurance and drive, regardless of what a court order might say. While there will still be some who do so to their peril, many will understand that if the interlock does not allow them to start the car, they truly are too impaired to drive.
- The new law addresses professional licensing consequences for DUI.
- The new law amends the commercial DUI statute to make it consistent with the DUI statute.
- The new law creates a Community Corrections Supervision Fund and related funding provisions. It creates a DUI hearing fee and increases fines for DUI and Commercial DUI.
- The new law adjusts the implied consent provision as to urine samples and restructures alcohol and drug evaluations and treatment. It is imperative that earlier detection of drug and alcohol problems in an individual be done so as to hopefully prevent further abuse from happening and prevent the increases in deaths and injuries caused by impaired drivers.
- The new law adjusts administrative penalties for DUI, creates a DUI look-back date for previous convictions and allows expungement of a DUI after 10 years. It further addresses the blood or breath testing window for DUI and Commercial DUI in order to address the time constraints particularly in the rural areas of the state where it may take longer to get to the testing site.

It is the sincere hope of the DUI Commission and the Legislature that the changes brought about by Senate Bill 6 as a result of the extensive work done by the DUI Commission will put the state of Kansas back on the road to safer highways and a reduction in the number of DUls. However, it is not a finished product. There are issues that need to be addressed when there is an atmosphere of more funding availability, such as addressing the refusals to take the breath or blood tests at the time of the arrest. That alone causes more jury trials than any other single issue. The courts are interested in that issue being addressed, as are the prosecutors across the state.

There are other glitches in the new law that hopefully can be addressed in the 2012 legislative session, but as in any “change” environment there are bound to be adjustments that need to be made. How can the courts and prosecutors help in this effort? One important misconception that can be addressed is the issue of plea bargaining. It has never been the intent of the legislature that plea bargaining be allowed to reduce the charge of DUI to a lesser offense even though there have been jurisdictions, which interpret the language to allow it as long as the penalties are not reduced. It may be that it will take legislative corrective action to allay that confusion, but hopefully the courts and prosecutors can recognize the need to be consistent across the state and apply the law equally to all no matter where in the state they may be, within the restrictions that their locale might impose due to resources.

All of you need to communicate to individual and collective legislators the needs of the judicial branch and prosecutors in order to address our principle concern regarding DUls: Public Safety.

Editor’s Note: For more specifics on the DUI law that was passed, please read the article by KCDAA DUI Section Head Gregory Benefiel.
“A motor vehicle in the hands of a drunken driver is an instrument of death. It is deadly, it threatens the safety of the public, and that threat must be eliminated as quickly as possible.”1 We have long recognized the dangers impaired drivers pose to the safety of Kansas roads, yet every year there are countless headlines of drivers killed in impaired-driving crashes.

During the 2009 Kansas legislative session several bills were introduced to address perceived deficiencies in the Kansas DUI statutes and the DUI Commission was established.2 The recommendations of the Commission were introduced to the 2011 legislature as Senate Bill 7.

After significant amendment, SB 7 passed out of Senate judiciary committee only to stall in the Senate. Presently, the bill has been re-referred to the Senate judiciary committee which could act on it again during the 2012 legislative session. Although SB 7 stalled, the 2011 legislature passed a DUI bill, House Sub. for SB 6, which incorporated many, but not all, of the recommendations of the Commission.

The New Kansas DUI Statutes: House Sub. for SB 6
House Sub. for SB 6 contains numerous changes to the Kansas DUI statutes. The following summary is a simplistic overview of the breadth of the changes. Changes related to the municipal courts, primarily sections 20-25, are not covered here.

DUI in a Commercial Vehicle: KSA 8-2,144
Commercial vehicle DUI, KSA 8-2,144, has been changed to more closely reflect DUI as defined by KSA 8-1567, except that the blood or breath alcohol concentration (BAC) for a violation of 8-2,144 remains .04. The statute now allows a commercial DUI to be counted as a prior conviction for purposes of 8-1567 and clarifies that a conviction of 8-2,144 disqualifies a defendant from operation of a commercial vehicle for at least one year. A significant difference between 8-2,144 and 8-1567 is that commercial DUI continues to have unrestricted lifetime look back for prior convictions.

DUI: KSA 8-1567
• A per se DUI violation is now defined as a BAC of .08 or more within THREE hours of operation or attempted operation of a vehicle.
• Lifetime look back is now limited to convictions beginning July 1, 2001, so only those convictions beginning July 1, 2001, may be used to charge a second, third, or fourth and subsequent DUI offense.
• The confinement provisions of a DUI second offense now require 120 hours confinement, which requires an offender on work release to actually spend 120 hours confined either in jail or house arrest.
• Third offenses can now either be a misdemeanor or felony depending on when the prior DUI convictions occurred. If an offender has two prior DUI convictions, but no prior DUI convictions in the previous 10 years this violation would be a misdemeanor. If there is any DUI conviction in the previous 10 years, a third violation would be a non-grid, nonperson felony.
• Fourth and subsequent offenders are now eligible for house arrest after 72 hours. Post-release supervision has been eliminated, although a 12-month supervision period continues to be required, but will be supervised by court services or community corrections rather than parole.
• Fines for DUI first, second, and third offenses have increased $250 for creation of a community correction supervision fund.
• Community corrections is authorized to accept supervision assignment of DUI convictions for third or fourth and subsequent offenses, including third-offense misdemeanor convictions.
• While many repeat offenders may now be prosecuted for DUI, first offense, diversion is allowed only once during a person’s lifetime.

Footnotes
The plain language suggests that if you had a diversion prior to July 1, 2001, you have had a prior diversion in your lifetime and are not eligible for another diversion.

Alcohol and Drug Evaluations – Elimination of ADSAP: KSA 8-1008

The Alcohol and Drug Safety Action Program (ADSAP) system of providers approved by the court has been eliminated in favor of licensure of DUI-specialty providers by the Secretary of Social and Rehabilitation Services (SRS) or the Behavioral Sciences Regulatory Board, depending on the type of provider. Current ADSAP providers are ‘grandfathered’ into the new system until July 1, 2012, at which time they must be licensed. The $150 ADSAP fee has been eliminated as part of court costs. Providers will now collect their fees, not to exceed $150, at the time of service.

Administrative Sanctions: KSA 8-1014

Administrative driver’s license sanctions have been modified. First offenders with a test failure less than .15 BAC are required to obtain an ignition interlock for six months following a 30-day suspension. The driver’s license administrative sanctions for test refusals and test failures over 0.15 BAC are now identical. Drivers suspended for a DUI violation may apply to the Division of Vehicles for a restricted license after 45 days to operate a vehicle with an ignition interlock device installed in their vehicle. The restricted driving privileges allow limited driving such as to-and-from work or school. Permanent revocation of a driver’s privileges for DUI violations has been eliminated. The provisions of the administrative penalties were made retroactive, which allows any driver previously suspended for a DUI violation to apply for a restricted license beginning July 1, 2011.

It should be noted that the provisions enacted by the 2011 legislature mirror the Commission’s recommended administrative sanctions with two exceptions: the Commission did not recommend an ignition interlock requirement for first offenders with a BAC less than .15, and the Commission recommended retaining permanent revocation for the fifth DUI violation. The provisions recommended by the Commission were in conjunction with the criminalization of a chemical test refusal. Although the legislature did not enact criminalization of a chemical test refusal, it did not alter the recommended administrative driver’s license sanctions. As a result, the penalties for chemical test refusal and chemical test failure with a .15 BAC or greater are identical. Consequently, there is no incentive for any driver to submit to chemical testing, which may result in an increase in the number of DUI chemical test refusals.

Circumvention of an Ignition Interlock Device: KSA 8-1017

The administrative driver’s license sanction for circumventing an ignition interlock device, including operating a vehicle without an ignition interlock when one is required, has been reduced. Previously, a violation resulted in a two-year suspension of the offender’s driving privileges. The new sanction for a first offense is a 90-day extension of the restriction period. A second offense restarts the original period of restriction imposed for the original violation.

Preliminary Screening Tests: KSA 8-1012

Preliminary tests of saliva are now included in the preliminary screening tests that may be requested by an officer conducting an impaired driving investigation. The Kansas Bureau of Investigation (KBI) is required to adopt rules and regulations by July 1, 2012, to approve preliminary saliva screening tests.

Expungement: KSA 21-4619

Convictions for DUI (8-1567), including municipal DUI convictions, may be expunged 10 years after satisfying the terms of diversion or satisfying the terms of the sentence, including probation. Commercial DUI (8-2,144) convictions cannot be expunged.

Other Miscellaneous Changes

• The collection of urine for a chemical test is no longer required by a person of the same sex if the person collecting the sample is a health care professional.
• DUI filings are required to be reported by all courts, including municipal courts, by July 1, 2012.
• All reporting by courts, including municipal courts, must be transmitted electronically by July 1, 2012.
DUI Commission Recommendations Not Included in the New DUI Statutes

Several recommendations of the Commission were not included in SB 6, including criminalizing refusal to submit to chemical testing, aggravated battery DUI, Department of Corrections prison sanctions for felony DUI offenders, and transferring approval of ignition interlock devices to Kansas Department of Health & Environment.

Refusal to Submit to Chemical Testing

The Commission focused on accountability and treatment for offenders. Recognizing it is not possible to provide a driver with treatment who does not take responsibility for his/her actions, the Commission recommended adopting Nebraska’s model of criminalizing DUI refusals. Nebraska, which criminalizes the refusal of a chemical test, had only 6 percent of drivers arrested for DUI in 2005 refuse to submit to chemical testing. Kansas, by comparison, had a 27 percent refusal rate during this same period, which also exceeded the national average of 22.4 percent. A three-year study of DUI convictions in Omaha found a DUI conviction rate of 97.5 percent for drivers who refused chemical testing and a similar conviction rate for drivers who failed chemical testing. This data, combined with Nebraska’s 2009 alcohol-related fatality rate of 0.34 per 100 million vehicle miles travelled, suggests that the coercive effect of criminalizing refusals is effective in reducing DUI-related fatalities. By comparison, Kansas had a 2009 alcohol-related fatality rate of 0.52 per 100 million vehicle miles travelled.

As proposed, SB 7 would criminalize a DUI chemical test refusal. The penalty would be more severe than a test failure and the conviction would count as a prior DUI conviction for DUI criminal history purposes. Based on Nebraska’s experience of holding all impaired drivers accountable, the repeat offender who knows “the system” and refuses testing would be held accountable for driving impaired. That driver would be required to obtain treatment to address the underlying substance abuse issue with a goal of reducing recidivism and improving the safety of Kansas roads by reducing the number of impaired drivers operating on Kansas roadways.

Aggravated Battery DUI

Currently, if an impaired driver causes another person’s death, the driver can be charged with involuntary manslaughter while DUI, a level 4 person felony. The impaired driver who critically injures another person, absent some recklessness independent of DUI, is guilty of nothing more than a simple DUI even though the victim may spend weeks hospitalized and never fully recover. The disparity between a presumptive prison sentence and as little as a 48-hour jail sanction for simple DUI led to the recommendation of a new crime, aggravated battery while DUI. As proposed in SB 7, aggravated battery while DUI would be a level 5 person felony if the victim suffered great bodily harm or a level 8 person felony if the victim suffered bodily harm or disfigurement.

Prison Sanctions for Felony DUI Offenders

The Commission also focused on intervening earlier with more effective treatment for DUI offenders. The Commission recognized that an offender convicted of a fourth or subsequent DUI has demonstrated he/she is not amenable to treatment and poses a greater danger on Kansas roads. To combat these dangerous drivers, the Commission recommended removing these repeat offenders from our roads and incapacitating them by designating a DUI fourth or subsequent violation a level 7 nonperson felony. A special sentencing rule would mandate all DUI fourth or subsequent offenders be sentenced to KDOC based on either the offender’s traditional criminal history or through use of a formula taking into account prior DUI convictions.

3. Id.
5. Id. at 9.
8. SB 7, §2
10. SB 7, § 47, 108-111.
11. SB 7, §49
Testing and Approval of Ignition Interlock Devices

The Department of Revenue maintains drivers’ records through the Division of Vehicles, but it is also tasked with promulgating rules and regulations for approval and regulation of ignition interlock devices. Ignition interlock devices utilize fuel cell technology, which is similar to preliminary breath test devices regulated by the KDHE. Recognizing that KDHE has existing testing protocols for fuel cell devices and an expertise in the field, the Commission recommended that the approval and regulation of ignition interlock devices be transferred to KDHE.

Each of these rejected proposals carried additional costs. The Kansas Division of the Budget estimated that the additional prison population, district court caseload, indigent defense work, post-conviction supervision, and administration of the reporting system and ignition interlock devices related to SB 7 would cost the state an additional $11.5 million in fiscal year 2012. The legislature made the public policy decision that with the current budget shortfalls the state could not afford the additional expenditures that a comprehensive revision of the DUI statutes would require.

The Real Cost of DUI

A comparison of the costs of SB 7 with the annual costs of impaired driving fatalities and injuries suggests that $11.5 million is not such a large sum. Kansas reported 145 impaired-driving deaths and 2,117 impaired-driving injuries during 2009. The estimated annual cost of these DUI-related fatalities and injuries is $159.5 million and $10.37 million, respectively, not including estimated quality of life losses, a total of almost $170 million annually.

While the legislature determined that comprehensive DUI revision is too expensive, Kansans must decide which costs we would rather pay: $11.5 million related to stricter DUI enforcement and penalties or $170 million related to fatalities and injuries.

That choice is clear to Paul and Shelley Freeman, Lincoln, Nebraska, who know all too well the cost of impaired driving. Their son, Cameron, was killed by an impaired driver in the early morning hours of November 23, 2010, in Douglas County, Kansas. Cameron and three friends had driven to Lawrence from their home in Lincoln, Nebraska, to attend a concert. Riding home with a designated driver, they were struck from behind by an impaired driver. Cameron died aboard a helicopter enroute to KU Hospital.

Paul Freeman describes that the crash and Cameron’s death spread out and devastated family and friends like a “mushroom cloud” and hopes future penalties could be more severe for impaired drivers.

“Our hope is that there would be something positive to come out of it, and that there would be change, an absolute change,” Shelley Freeman said. “And that this culture of alcoholism, this culture of drinking alcohol and the acceptability of driving is just not tolerated, not accepted, especially by people who do it. It happens over and over again. If there’s any war that we need, it should be the war against drunk driving.”

Should House Sub. for SB 6 be amended?

There is something that can be done in the war against drunk driving. Specifically, the 2012 legislature should consider adoption of the chemical test criminalization or revision of the 2011 administrative sanctions. With virtually no penalty, criminal or administrative, why would any driver submit to chemical testing today? Nebraska’s experience indicates that Kansas’ refusal rate could be substantially reduced by adoption of similar legislation criminalizing DUI refusals. Reaching these hardcore impaired drivers through such deterrence-creating policy could drastically reduce the $170 million economic loss Kansans face each year, as well as save lives.

14. Based on a study by the Pacific Institute for Research and Evaluation which estimated the costs per fatality to be $1.1 million in monetary costs and $2.4 million in quality of life losses and $49,000 in monetary costs and $50,000 in quality of life losses per injured survivor. (Source: http://www.nhtsa.gov/people/injury/alcohol/impaired-drivingusa/US.pdf, accessed 07/11/2011.)
16. Id.
KCDAA Member Highlights: Brandon & Heather Jones and Boyd & Lesley Isherwood
by Amanda G. Voth, Assistant Attorney General

While Brandon and Heather Jones share a common county boundary in their roles as County Attorneys, Boyd and Lesley Isherwood share a common wall in the Sedgwick County District Attorney’s Office.

The Jones couple and the Isherwood couple both met while attending law school. Boyd Isherwood recalls sitting one row in front of Lesley in a law school class, listening to the guy next to her try a “horrible pick-up line.” Upon hearing the guy’s pathetic attempt, Boyd turned around and asked the two if that “really just happened.” Boyd now reflects: “Lesley, of course, could not resist my natural charm and good looks. We started dating shortly thereafter.” Boyd and Lesley Isherwood have been married for 10 years. After graduating from Washburn Law School, they both worked in the same civil law firm for a short time before beginning at the Sedgwick County DA’s Office.

“I just can’t get rid of him,” Lesley joked, pointing out she has worked at the DA’s Office for approximately six months longer than Boyd. Both Lesley and Boyd have worked in the Appellate Division for about 12 years. The Isherwoods were drawn to the particular position in the DA’s Office because of the research and writing aspect. The criminal aspect has grown on them, and they enjoy doing something positive for the community and giving back. Each of the Isherwoods has written more than 300 appellate briefs, argued 100-plus cases before the Kansas Court of Appeals, and argued more than 50 cases before the Kansas Supreme Court. Lesley and Boyd handle all types of appellate cases, from traffic to murder.

The Isherwoods enjoy being able to bounce ideas off of each other, and like the ability to carry work conversations home if necessary. “It’s good I’m able to correct Lesley,” Boyd pointed out. “Boyd does take a fair amount of editing,” Lesley quickly shot back. While the Isherwoods enjoy dinner with their twin daughters, the two do not share every meal together. “Lesley refuses to eat lunch with me, even upon repeated invitation,” Boyd joked.

Both couples agree that work, at times, can consume the topic of conversation at home. One person may not want to talk about work while at home, but the other may need to, Boyd explained.

Heather and Brandon Jones say it’s not just the work conversations that come home. “When the phone rings in the middle of the night, who is it going to be for?” Brandon asks rhetorically. Heather, the Franklin County Attorney, and Brandon, the Osage County Attorney, are both always “on call.” At times, both of them may need to be gone for issues in their respective counties. It is sometimes difficult to find a babysitter for their two children at the last minute if they both have activities to which they must attend.

A positive result of both of them being prosecutors and both being on call, is that if one of them is not available, the other can take the phone call and answer questions from law enforcement

The Jones Family
officers, no matter which county they are calling from. The couple agreed that law enforcement officers work together better across county lines because of their relationship.

Both Brandon and Heather Jones have prosecuted their entire career. They met in law school while attending KU. Heather and Brandon interned together at the Johnson County District Attorney’s Office, and then both began work as assistant county attorneys in Franklin County. Brandon left for the Douglas County District Attorney’s Office in 2003, and Heather was elected as the Franklin County Attorney one year later.

Having a close personal and professional relationship has been useful for Brandon and Heather Jones. In December 2006, as Brandon was preparing for a jury trial on an aggravated battery case in Douglas County, the victim in that case traveled from western Kansas to his mother’s home in Ottawa in preparation for his testimony the following day during jury trial. That night before trial, Brandon received a phone call from Heather in Franklin County, saying the victim in Brandon’s Douglas County case had just been shot, was lying in a hospital, and was in grave condition. Because of Heather and Brandon’s relationship, Heather knew who the gunshot victim was, why he was in Franklin County, and who the possible suspects could be. If it weren’t for them being married, Heather and Brandon pointed out, the attempted murder of Brandon’s Douglas County aggravated battery victim could have remained unsolved. Franklin County investigators quickly focused their attention on the Douglas County suspects, and four people remain in prison for their part in the attempted murder in Franklin County.

Since accepting the appointment of County Attorney in his home county in 2007, Brandon Jones has since been elected the Osage County Attorney. Now, the couple again shares a county line. Often, the two share the same defendants on different cases. They are able to easily exchange information regarding these defendants and the status of their cases in the two counties. Both Brandon and Heather noted they are happy they are able to serve the communities in which they work.

Both couples find time away from work – and time away from talking about work – to enjoy other activities. Brandon is a member of the Ottawa Optimist Club, Westminster Presbyterian Church, and is Vice-President of the Ottawa School Board. In his free time, he enjoys golfing, playing basketball, and watching sports – especially KU. Heather is a member of Rotary and recently completed a four-year stint on the State Board of Directors for Kansas CASA. She is also a board member for Big Brother Big Sisters of Franklin and Anderson Counties, a member of the 4th Judicial District Community Corrections Advisory Board, and a member of Franklin County SANE/SART. Heather is also on the board of Professionals Helping Children, a group that improves and renovates homes for families who have a child with a serious disability or illness. In her free time, Heather enjoys running and traveling.

Lesley Isherwood serves on the board of directors for the Junior League of Wichita. She also is involved with Dress for Success, a program that helps disadvantaged women get back into the work force. Boyd and Lesley also participate in an annual bicycle race on their wedding anniversary. They noted that last year they tied in the race. “I think I’ll be victorious this time,” Boyd said, as Lesley interrupted: “There is no way on earth you will beat me!”
**KCDAA Milestones**

**Anniversaries**
Sedgwick County Assistant District Attorney Randall Hubert and his wife Toni will celebrate their 25th wedding anniversary this August. The couple celebrated in advance with a week-long trip to the Bahamas in June.

**Birth**
Serena Hawkins-Schletzbaum, Wyandotte County Assistant District Attorney, and her husband Ryan welcomed their first child, William Terran Schletzbaum, June 10, 2011.

**Congratulations**
John Bryant, Deputy County Attorney for Leavenworth County and Kristiane Gray, Assistant Attorney General got married in August 2011 in Calgary, Alberta, Canada.

**News**
Preston A. Pratt was sworn in as Chief Judge of the 17th Judicial District on July 1 to replace the Hon. William B. Elliott who retired May 1. He was appointed by the Governor. Previously he was the Logan County Attorney and Assistant Decatur County Attorney.

Elizabeth Sweeny-Reeder, Assistant Miami County Attorney, was elected as President of the Kansas Women Attorneys Association for the 2011-2012 year. She then attended the National Conference of Women’s Bar Associations Annual Leader Summit on August 5 in Toronto, Canada.

**New Faces**
Franklin County has hired two new assistant county attorneys. Emily Haack joined Franklin County from the Kansas Attorney General’s Office, and Matt Franzenburg came from the Department of Revenue.

**Ford County Attorney’s Office**
The Ford County Attorney’s Office has a part-time summer intern: Austin Bangerter. Austin, a Dodge City native, graduated from Dodge City High School in 2006. He is in the 2013 class at the University of Kansas School of Law. His legal areas of interest are civil litigation and prosecution. When not in school, Austin enjoys wakeboarding, Harley-Davidson motorcycles, and aviation. Austin is spending his summer break in Dodge City and providing his skills as a part-time intern for the office of the Ford County Attorney.

Jaskamal Dhillon joined the office of the Ford County Attorney in February 2011. He was born and raised in northeastern Kansas. He obtained a B.A. in philosophy from the University of Missouri-Kansas City and a J.D. from the University of Kansas School of Law. Before going to law school, he worked as a web developer and e-commerce consultant in the crossroads arts district of Kansas City. Jacob enjoys Kansas basketball, Chiefs football, and Royals baseball. He is an avid New York Times crossword puzzle enthusiast. Jacob’s legal career focuses on criminal law, children in need of care, and care and treatment. He is an AmeriCorps VISTA alumnus.

Ford County Intern JP O’Hanlon grew up in Dodge City, and graduated from DCHS in 1997. After spending time living in Florida and Los Angeles, JP decided to move to Kansas City where he earned a bachelor’s of
science in business administration from Rockhurst University. He then spent a year working as marketing manager for Kansas City-based online auction company Equip-Bid.com Auctions while studying for the LSAT and applying to law schools. JP is currently a 2L at the University of San Diego School of Law, where he is 2L Class Representative for SBA and co-founder of the USD Law Business Law Society. When JP is not studying, he enjoys surfing at Ocean Beach. JP is interning for the office of the Ford County Attorney in Dodge City throughout the summer break and has been a valuable asset.

**Kevin Salzman** joined the office of the Ford County Attorney in April 2011 and sat for the Kansas Bar Examination in July 2011. Kevin was born and raised in Cincinnati, Ohio. He attended Cincinnati Christian University where he graduated *magna cum laude* with a bachelor’s degree in biblical studies. He graduated *cum laude* from St. Louis University School of Law, where he was a member of his school’s Jessup International Law Moot Court team and also participated in his school’s Public Interest Law Group and Phi Delta Phi legal fraternity. Additionally, he was inducted into Alpha Sigma Nu, the Jesuit Honor Society.

**Kansas Attorney General’s Office**

**Amanda G. Voth** joined the Kansas AG’s Office in February 2011. She is prosecuting in the Medicaid Fraud and Abuse Division. Previously, she worked as an assistant district attorney in Reno County.

The Kansas AG’s Office has appointed **Natalie Randall** as its new Southwest Drug Taskforce prosecutor. She will be stationed out of Dodge City. Natalie has been with the Kansas Attorney General since March 2011, when she was appointed to the Kansas Drug Enforcement Taskforce. Prior to her current appointment, Natalie served four years as Assistant Ford County Attorney, prosecuting a wide variety of criminal cases up to and including off-grid offenses. There, she also handled civil matters including child in need of care proceedings and civil commitments.

Natalie has a Master of Human Relations degree from the University of Oklahoma and a juris doctor from the University of Nebraska – Lincoln. While at UNL, Natalie completed a program of concentrated study in Criminal Litigation and served as a student prosecutor in the Lancaster County Attorney’s office.

**Leavenworth County Attorney’s Office**

**Joan Lowdon** has joined the Leavenworth County Attorney’s Office. She is originally from Conway Springs, Kan. She attended Kansas State University and received a Bachelor of Science in Philosophy and a Bachelor of Arts in French. Following graduation from Kansas State University, she went to law school and received her Juris Doctorate from the University of Kansas School of Law. Joan is licensed to practice in Kansas and Missouri. She primarily handles the juvenile offender docket and person and non-person misdemeanors.

**Rooks County Attorney’s Office**

**Danielle N. Muir** has joined the staff at the Rooks County Attorney’s Office. She is an Assistant County Attorney.

**Saline County Attorney’s Office**

**Charles Ault-Duell** joined the Saline County Attorney’s Office in May 2011. He completed his undergraduate studies at Kansas Wesleyan University in Salina, Kan. in 2005, where he also served as the Student Government President during his senior year. He earned his Juris Doctorate from Washburn University in Topeka in 2008. During law school, Charles clerked for the Honorable Sam A. Crow on the United States District Court and for the United States Attorney’s Office for the Western District of Missouri. He also won five awards in Moot Court competitions as a 2L and 3L. After law school, Charles
clerked for the Honorable Patrick D. McAnany on the Kansas Court of Appeals for two years before returning to Salina to serve as an Assistant County Attorney. Charles is a native of western Kansas, and he and his wife DeMay live in Salina.

**U.S. Attorney’s Office**

**Jared Maag**, Assistant U.S. Attorney, has been appointed to chief of the district’s criminal division.

Maag is responsible for overseeing all criminal cases filed by Assistant U.S. Attorneys in Kansas City, Kan., Topeka, and Wichita. He also is the point of contact for state and local law enforcement agencies that have criminal cases for federal prosecution.

U.S. Attorney Barry Grissom said he was looking for someone with a strong work ethic and a talent for legal troubleshooting when he chose Maag. Maag’s duties will include advising prosecutors on selecting cases for prosecution, negotiating plea agreements, making recommendations for sentencing, and preparing cases for trial.

Maag joined the U.S. Attorney’s Office in 2004 as a Special Assistant U.S. Attorney while working as a prosecutor for the Kansas Attorney General’s Office. He joined the U.S. Attorney’s Office full-time in 2009. He also serves with the Kansas Air National Guard as a Staff Judge Advocate for the 190th Air Refueling Wing in Topeka.

He graduated from the Washburn University School of Law in 1995.

**Mike Warner** is now First Assistant to U.S. Attorney Barry Grissom. He is second in command in the District of Kansas, overseeing 49 Assistant U.S. Attorneys and 53 support staff working in offices in Kansas City, Kan., Topeka, and Wichita.

Warner earned his law degree from Washburn University in 1983 after graduating from the University of Missouri, Kansas City, with a bachelor’s degree in 1975 and a master’s degree in 1976.

**Wyandotte County District Attorney’s Office**

**Michael Duma** has joined the Wyandotte County District Attorney’s Office. Michael, the son of John Duma, is a second generation prosecutor in Wyandotte County. Michael received his bachelor’s degree in political science from Arizona State University and received his JD from Washburn University School of Law where he was a staff member and writer for the Washburn Law Journal. Michael graduated earning Dean’s Honor and received the John F. Kuether Memorial award for “Best Note” for a piece in the Washburn Law Journal. Michael will be primarily handling adult criminal cases.

**Alan Fogleman** has joined the Wyandotte County District Attorney’s Office. Alan, who is from Olathe, Kan., received both his bachelor’s degree in accounting, acknowledged with distinction and his law degree from the University of Kansas, and also received an advocacy certificate. Alan was a staff member for the Kansas Journal of Law and Public Policy in 2009-2010 and an articles editor in 2010-2011. Alan worked for KU’s Defender Project during the summer of 2009 and was a legal intern for the Johnson County District Attorney’s Office from May 2010 to May 2011 where he tried several bench trials, one jury trial, and second-chaired an attempted first degree murder bench trial. Alan will primarily be handling juvenile offender cases.
Update on Sex Crimes Prosecution in Kansas

by Marc Bennett, KCDAA Sex Crimes Division
Deputy District Attorney, 18th Judicial District, Sedgwick County

In the past year, several appellate cases have been published related to sex crimes prosecution in the state of Kansas.

This past Spring, State v. Spencer, 248 P.3d 256 (March 18, 2011) and State v. Jolly, 291 Kan. 796, 248 P.3d 256 (March 18, 2011) addressed, for the first time, the discretion of the district court to impose sentence following a departure in Jessica’s Law cases pursuant to K.S.A. 21-4643(d). Prior to these cases, some had argued that the statutory language – “[t]he departure sentence shall be the sentence pursuant to the sentencing guidelines act . . .” – meant the court had discretion to place a defendant from off-grid to anywhere within the sentencing guidelines grid. Spencer and Jolly made it clear the court can depart to the grid box applicable based upon the defendant’s criminal history score and the severity level that would apply to the crime absent Jessica’s Law. For instance, a departure on an Aggravated Indecent Liberties involving a defendant with no criminal history, leads to 55-59-61 months due to SL3, history “I.” Jolly additionally clarifies that once a defendant has been placed on the grid, the court is also free to then depart further durationally, within the limitations of Apprendi.

In another case published this Spring, State v. Sellers, 292 Kan. 117 (April 22, 2011), the court initially held that if the age of a defendant has not proven to be 18 or more (ala’ State v. Bello, 289 Kan. 191, 199-200 [2009]), imposition of lifetime post-release is an illegal sentence. The court published a modified opinion on June 22, 2011 making clear that lifetime post-release applies to any “sexually violent offense” per K.S.A. 22-3717(d)(1)(G) whether or not the crime fell within Jessica’s Law.

Finally, after K.S.A. 60-455 was amended effective April 30, 2009 following the State v. Prine, 287 Kan. 713 (2009) decision, we have been waiting for appellate review of the changes. The first appellate assessment of these changes to K.S.A. 60-455 was published in State v. Hart, 44 Kan. App.2d 486 (2010). The Hart Court held first that the amendment could be applied retrospectively, because the changes to K.S.A. 60-455 were procedural rather than substantive: the amendment “neither changed the definition of a criminal act nor prescribed a new punishment.” Hart, at 1014.

The Court rejected the State’s argument that the only question for the trial court’s analysis prior to admission of evidence under the amendments was whether the material sought to be introduced was relevant. The court recognized that since §(b) of K.S.A. 60-455 had been left unchanged by the amendments in 2009, the materiality threshold remained. Under this analysis, the court found the evidence was inadmissible because, “while the evidence may still have been relevant, the prior bad acts evidence had no real probative value” and were more prejudicial than probative. Hart, at 1019. Finally, as to propensity evidence, the Hart Court held that “under the plain language of [60-455], it is very apparent the legislature did not intend for 60-455(d) evidence be admitted just to show propensity.” Hart, at 1022.

In short, the first appellate review of the amendment to 60-455 rejected the use of prior bad acts simply to establish propensity – despite the invitation of the Prine Court to do so.

More to come as additional cases effecting sex crimes and Jessica’s Law specifically, are published.

HAVEN’T RECEIVED YOUR KCDAA YEARS OF SERVICE PIN?

Contact Kari Presley at the KCDAA office
(785) 232-5822 or kpresley@kearneyandassociates.com.
In response to KPERS’ long-term funding shortfall, the Legislature has made changes to future benefits and contributions, affecting both members and employers. Changes were necessary to make KPERS more sustainable and to pay promised benefits long-term.

The Governor has signed Senate Substitute for HB 2194 into law, but there are still steps to complete before the changes can take effect.

**KPERS Study Commission**

The legislation established a 13-member study commission to consider alternative plan designs and to recommend a plan to the Legislature for the long-term sustainability of the system. The study commission will review various options including defined contribution plans, hybrid plans that could include a defined contribution component, and other possible plans.

Of the 13 members, five are to be appointed by the Governor, four are to be legislators, and the remaining four are at-large members appointed by the Legislature.

**Trigger Steps for Other Provisions**

Legislation also defined future benefit and contribution changes. For these provisions to become effective, trigger action items need to be completed first.

1. The study commission is required to report on its recommendations by January 6, 2012.
2. Both a House committee and a Senate committee must vote on identical bills.
3. Either the full Senate or the full House must vote on one of the bills.

**Employer Contribution Increases**

Annual employer contribution increases are currently capped by statute at 0.6 percent per year. Sen. Sub. for HB 2194 raises the cap over the next several years. State and school employer increases begin July 1 of each fiscal year. Local employer increases begin January 1 of each calendar year.

<table>
<thead>
<tr>
<th>Year</th>
<th>Percent</th>
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<tbody>
<tr>
<td>2014</td>
<td>0.9 percent</td>
</tr>
<tr>
<td>2015</td>
<td>1.0 percent</td>
</tr>
<tr>
<td>2016</td>
<td>1.1 percent</td>
</tr>
<tr>
<td>2017+</td>
<td>1.2 percent</td>
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**Default Tier 1 and Tier 2 Provisions**

**Tier 1.** Member contributions will increase to six percent. The benefit formula multiplier will increase from 1.75 to 1.85 percent for future service. Both take effect January 2014. Changes do not include service already earned.

**Tier 2.** Member contributions stay at six percent, but the Tier 2 cost-of-living adjustment (COLA) is eliminated, even for past service. The benefit formula multiplier remains at 1.75 percent for both past and future service. Changes take effect January 2014.

**Active Member Election** *(pending IRS approval)*

If the IRS grants approval, active members will have a one-time election between the default provisions covered earlier and an alternative. If the IRS does not provide approval, the default provisions will take effect.

- 90 day-election period beginning July 2013
- Benefit and contribution changes take effect January 2014
- Changes only affect future service (except Tier 2 COLA)

**Tier 1 Option – Contribution increase or benefit decrease**

<table>
<thead>
<tr>
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<th>Alternative</th>
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</thead>
<tbody>
<tr>
<td>6% contribution</td>
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<tr>
<td>1.85% multiplier</td>
<td>1.4% multiplier</td>
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**Tier 2 Option – Loss of COLA or benefit decrease**

<table>
<thead>
<tr>
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<th>Alternative</th>
</tr>
</thead>
<tbody>
<tr>
<td>6% contribution</td>
<td>6% contribution</td>
</tr>
<tr>
<td>1.75% multiplier</td>
<td>1.4% multiplier</td>
</tr>
<tr>
<td>Lose COLA <em>(for all service, not just future)</em></td>
<td>Keep COLA</td>
</tr>
</tbody>
</table>

Inactive members returning to employment after July 1, 2013, will have the default provisions for their tier.

**Surplus Real Estate**

If the State sells surplus property, 80 percent of the proceeds will be used to pay down KPERS’ unfunded actuarial liability.
**KPERS’ Next Steps**

We recognize that Sen. Sub for HB 2194 will have a significant impact on both employers and active members. It’s important to remember that none of the plan changes will take effect unless the study commission and the 2012 Legislature complete their trigger action items. In addition, changes are not scheduled to take effect until 2014.

Some of our next steps include:

- Submitting a private letter ruling request to the IRS regarding the election provisions in the legislation.
- Planning for administration of elections, including identifying technology needs and any issues that may require “trailer” legislation.
- Providing support as needed for the study commission.
- Communicating with employers and members about changes and plans for implementation over the next two to three years.

As we move through this process, information will be available at www.kpers.org.

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**KPERS: How We Got to Where We Are**

_by Senator Jeff King_

In this edition of _The Kansas Prosecutor_, the KPERS office has done an excellent job of explaining the KPERS changes passed by the 2012 Kansas Legislature in Senate Substitute for HB 2194. I write this companion article not to repeat the details of that legislation, but to explain where we are in KPERS reform, how we got here, and why this and continued KPERS reform is so vital to our state.

Let me make one thing clear from the start, nothing in the 2011 KPERS reform legislation has taken away one dime of benefits earned by current retirees or KPERS-eligible employees. As the other article stated, the 2011 reform “legislation... defined future benefit and contribution changes.” In other words, all of the retirement benefits that you have earned to this point (and will earn through December 31, 2013) are exactly what you were promised. Most of you are Tier I KPERS members (i.e. in KPERS-eligible jobs before July 1, 2009), so I will use Tier I as the example here. Tier I members will receive 1.75 percent of the average of their three years of highest salary times the number of years they have worked in a KPERS-eligible job through the end of 2013.

The changes (if next year’s Legislature satisfies the conditions of the “trigger” explained in the KPERS article) will take effect for work performed on or after January 1, 2014. Prior to that date, Tier I members will choose between increasing their contribution from 4 percent to 6 percent of their salary and receiving a higher “multiplier” of 1.85 percent for future years of service or keeping their contributions at 4 percent and lowering their multiplier to 1.4 percent for future years of service. This new multiplier will apply for all years worked from January 2014 until retirement. The following example illustrates the practical impact of these reforms on a Tier I member who worked from January 1, 2004 through December 31, 2023.

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<td>Employee contribution (% of total salary)</td>
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<td>Multiplier earned each year</td>
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<td>Benefit earned in each period</td>
<td>Earned 17.5% of average of 3 highest years salary as retirement benefit</td>
<td>Earned additional 18.5% of average of 3 highest years salary as retirement benefit</td>
<td>Earned additional 14% of average of 3 highest years salary as retirement benefit</td>
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<td>Retirement benefit earned if average of highest 3 years of salary is $75,000</td>
<td>$27,000/year</td>
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In short, if you are retired, your KPERS will not change at all. If you are still working, none of the KPERS benefits you have earned (or will earn through the end of 2013) will change.

The changes made through HB 2194 were an effort by the Legislature to address a growing problem with KPERS unfunded liabilities. Even by the most conservative estimates, KPERS has $7.7 billion in unfunded liabilities. This does not mean that current retirees face a danger of losing their KPERS benefits. The KPERS system has more than $11 billion in assets, makes annual retirement payments of $1.1 billion, and receives more than $700 million annually in government and employee contributions for current workers. What it does mean is that the KPERS faces a gap of $7.7 billion between its pension obligations and the money that actuaries estimate it will need to pay those benefits over the next 30-60 years.

The KPERS unfunded liability crisis has three main origins. First, in 1993, the Kansas Legislature greatly expanded KPERS benefits by raising the retirement credits for each year of work (known as the “multiplier”) by 25 percent. It also enacted the “85-point rule” that allows employees to retire when their age plus years of service reaches 85. Unfortunately, an outside actuary incorrectly estimated the cost of these reforms by about $2.5 billion through 2011.

Second, from 1993-2011, the Kansas Legislature underfunded KPERS by approximately $2.5 billion. In short, the Legislature paid more than $125 million per year less than the actuary told them to pay and the benefits provided in 1993 were about $125-150 million per year more expensive than the actuary indicated.

Third, the stock market declines of 2002 and 2008 took a heavy toll on the KPERS fund, as they did with almost everyone’s retirement portfolios. These poor investment performances caused KPERS investment returns to fall about $2.5 billion below projections. Thus, the current $7.7 billion in KPERS unfunded liabilities results almost equally from: (1) more costly pension benefits than anticipated; (2) state underfunding; and (3) underperforming investments.

Although the effect of this problem is decades away, the time to address it is now. With a combination of higher state contributions and future benefit changes, HB 2194 will allow the state of Kansas to narrow the unfunded liability gap much quicker and less expensively than it otherwise would. Through HB 2194, the Kansas taxpayers will pay more than $3 billion less than they would without KPERS reform and likely eliminate the KPERS unfunded liability many years (if not decades) earlier than would otherwise occur.

As the husband of a Kansas County Attorney, I know well what Kansas prosecutors do to protect Kansans, especially the youngest among us. For that, I certainly thank you. Through HB 2194 and the additional reforms for new employees that will be examined by the KPERS study commission, I hope we will relieve future generations of the need to pay for our current KPERS unfunded liabilities while protecting the benefits of current and future KPERS retirees.

About the Author
Jeff King is Senator for the 15th Senate District, representing all or part of Montgomery, Elk, Chautauqua, Wilson, Woodson, Allen, Coffey, Anderson, and Franklin counties in southeast Kansas. He was the lead Senate negotiator for the KPERS reform legislation, is Vice-Chair of the Senate Judiciary Committee, and serves on the Senate Education, Taxation, and Agriculture Committees. He is a private practice attorney in Independence and his wife, Kimberly, is Elk County Attorney.
Financial Mistreatment Cases: Where to Begin

by Amanda G. Voth, Assistant Attorney General

Financial abuse of the elderly is on the rise. Many say elder financial abuse is the crime of the 21st century. One recent study revealed it has risen 12 percent since 2008. Elderly Americans are estimated to lose $2.9 billion each year. Prosecutors have accepted the duty and have the honor to prosecute, prevent, and educate people about this increasingly common crime.

Civil case vs. criminal case

In the context of financial abuse, both civil and criminal liability may be present. Civil and criminal cases are not mutually exclusive. Even after a civil case or a criminal case is complete, the other type of case may be filed.

Several causes of action may be available to the victim. These could include basic civil causes of action such as conversion and breach of contract (express or implied). Under these causes of action, civil liability will likely be limited to the actual amount stolen, much like an order of restitution in a criminal case. Extreme conduct, however, may support an award of punitive damages. The award of punitive damages will more likely occur under certain tort causes of action such as fraud, breach of fiduciary duty, intentional infliction of emotional distress, and outrage. The existence of a Durable Power of Attorney (hereinafter “DPOA”) may increase the likelihood of an award of punitive damages because a jury could view the defendant as having enticed the plaintiff into the DPOA through undue influence or fraudulent inducement.

In some cases, the suspect has been appointed as the victim’s conservator. K.S.A. 59-3078 sets out the duties and responsibilities of conservators. It provides that a conservator “shall at all times act in the best interests of the conservatee and shall exercise reasonable care, diligence and prudence.” When there has been a breach of the conservator’s duty, the statute provides for specific penalties. If the court finds by a preponderance of evidence that the conservator innocently misused the conservatee’s funds or assets, the court shall order the conservator to repay the funds or assets. If the court finds the conservator embezzled or converted the conservatee’s funds or assets for the conservator’s own personal use, the court shall find the conservator liable for double the value of the amount of the funds or assets.

It is important to be aware of a couple of scenarios that are sometimes misinterpreted by investigators. Law enforcement officers often uncover the existence of a DPOA, and immediately believe this means the defendant cannot face criminal liability. Law enforcement officers are often trained that the existence of a “contract” prohibits criminal liability. To the contrary, the existence of a DPOA is not determinative of whether a case is civil or criminal, and in fact, a DPOA can often be helpful evidence for the prosecution in a mistreatment case. Also, sometimes the law enforcement community has the misperception that the financial mistreatment of a victim is a “family matter,” much like the previous mindset regarding domestic violence as a “family matter.” While family may often be involved in mistreatment scenarios, that, in and of itself, does not remove the possible criminal aspect from the case.

It is also important to note in some instances, it is possible there is neither criminal nor civil liability. Just because a nursing home bill is not being paid or a family member believes he is not getting his fair share of his mother’s money does not imply a criminal case necessarily exists. Look to the elements of the statute and the pattern instructions for guidance.

Jurisdiction

Proper jurisdiction in financial mistreatment cases may exist in more than one county. In some cases, the victim and suspect live in different jurisdictions, or the bank accounts may be in a different jurisdiction. “Where two or more acts are requisite to the commission of any crime and

Footnotes

5. Id.
such acts occur in different counties the prosecution may be in any county in which any of such acts occur.”⁶ “When property taken in one county by theft or robbery has been brought into another county, the venue is in either county.”⁷ Additionally, a person may be prosecuted in Kansas if a crime is partly committed within this state.⁸ Jurisdiction in financial mistreatment cases depends upon the facts of the case, and oftentimes the case may be filed in either of a couple of counties.

While counties retain original jurisdiction in mistreatment cases, the Medicaid Fraud and Abuse Division of the Kansas Attorney General’s Office may get involved in these types of cases when a Medicaid nexus exists. A Medicaid nexus most often exists when the victim is either on Medicaid, or when the specific victim resides in a facility that receives Medicaid or Medicare funding. In addition, the Criminal Division of the Attorney General’s Office may review and possibly handle mistreatment cases even when there is no Medicaid nexus. As with any case referred to the Attorney General’s Office for prosecution, the Attorney General has the discretion to accept or decline any case presented for prosecution.⁹

Alternative Means?

The mistreatment statute can be slightly confusing because of all of the ways in which the crime of financial mistreatment of a dependent adult may be committed. In many ways, mistreatment of a dependent adult is similar to the crime of theft, with the added element of a dependent adult. Because the victim in these cases is most often a “dependent adult”¹⁰ these cases are, and sometimes must be, prosecuted under K.S.A. 2011 Supp. 21-5417 (the former K.S.A. 21-3437). The “State cannot elect to prosecute the defendant for the general crime of theft when the defendant’s acts constitute the specific crime of mistreatment of a dependent adult.”¹¹ K.S.A. 2011 Supp. 21-5417 contains seven ways in which the crime may be committed: undue influence, coercion, harassment, duress, deception, false representation, or false pretense. Only one of these seven methods is defined by statute. “Deception” is defined as “knowingly and willfully making a false statement or representation, express or implied, pertaining to a present or past existing fact.”¹² For the remaining methods, prosecutors should consult Black’s Law Dictionary for effective definitions that can be used for jury instructions on the different ways the defendant can take personal or financial advantage of a dependent adult.

Some jurisdictions, such as Johnson County, charge any relevant method in the same count, simply separated by the word “or.” Other agencies, such as the Attorney General’s Office, charge each method of committing the crime “in the alternative.” In light of recent appellate court decisions,¹³ prosecutors need to consider whether the statute is setting out alternative means. Defense may argue that any criminal statute which uses the conjunction “or” is an alternative means statute. If the mistreatment statute is an alternative means statute, a “jury must be unanimous as to guilt for the single crime charged. As long as substantial evidence supports each alternative means, jury unanimity is not required as to the means by which the crime was committed.”¹⁴

The Kansas Supreme Court in State v. Wright¹⁵ found that because there was sufficient evidence that the defendant committed the crime of rape by force or fear or by unconsciousness, the guilty verdict would be upheld.¹⁶ Similarly, in State v. Stevens,¹⁷

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7. K.S.A. 22-2609.
9. See State ex rel. Stephan v. Reynolds, 234 Kan. 574, 579, 673 P.2d 1188 (1984) (“Once a request is made by a county attorney to the attorney general to prosecute a case, the attorney general has discretion. If members of his staff have time to handle the prosecution, the attorney general’s office may take over that function; if staff members are otherwise occupied, the attorney general may decline the invitation. He is not bound to take over every local prosecution in which his assistance is requested.”)
13. see Wright, infra
16. See K.S.A. 21-3502 (the crime of rape occurs when there is “sexual intercourse with a person who does not consent [ ], under any of the following circumstances: (A) When the victim is overcome by force or fear; (B) when the victim is unconscious or physically powerless. …”)}
17. supra
the defendant was charged with DUI. The statute stated that “[n]o person shall operate or attempt to operate any vehicle within this State while… under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle.”18 The Kansas Court of Appeals, while finding this to be an alternative means case, found that the State presented sufficient evidence on both of the alternative means.19 The Kansas Court of Appeals upheld the conviction.

To avoid the alternative means argument on appeal, consider charging mistreatment in the alternative or charging only the means in which evidence will be presented. One appellate court recently stated that many of the alternative means problems could be avoided “if the State would draft its charging documents to charge only those means where they present evidence, or present the alternative means in separate counts…”20

State v. Parsons-Anderson21 involved a mistreatment case where the district court instructed the jury on undue influence, false pretense, and deception. On appeal, the defendant argued that undue influence, false pretense, and deception were alternative means and that the State failed to prove all three means. Parsons-Anderson was recently argued before the Kansas Court of Appeals. The decision in this case may provide more guidance on alternative means specific to mistreatment cases.

Building a Financial Mistreatment Case

The inquisition powers set forth in K.S.A. 22-3101, et seq., can be extremely useful. Obviously, the facts of each case may differ dramatically. Some important documents to consider subpoenaing through an inquisition are:

1. Bank records from the victim’s accounts, including statements, signature cards, and cancelled checks
2. Bank records from the suspect’s accounts, including statements, signature cards, and cancelled checks
3. Medical records regarding the victim to show his/her status as a “dependent adult”
4. Nursing home billing statements, account information, notes from a nursing home, etc.
5. Credit card statements and transactions, stock records, etc.
6. Insurance and annuity policies
7. Mortgage documents, car titles, and registration, etc.
8. Utility bills
9. Wills, conservatorships, DPOAs (health, general, or financial)
10. Credit reports
11. Records from vendors of purchases made using the victim’s funds

All of these documents should help establish whether there are patterns of transactions or behavior that the suspect engaged in to take money or other resources from the victim.

The DPOA document itself may be helpful. K.S.A. 58-651 et seq. sets forth the provisions of the Kansas Power of Attorney Act (hereinafter “Act”). In part, the Act specifically states: “All acts done by an attorney in fact pursuant to a durable power of attorney shall inure to the benefit of and bind the principal and the principal’s successors in interest, notwithstanding any disability of the principal.”22 Ideally the DPOA should contain language that the principal’s assets should be used “for the benefit” or “in the best interest” of the principal. If the DPOA does not contain this language, it could create potential for doubt, which is the reason other evidence is so important. The records obtained through subpoenas often demonstrate how the expenditures could not have been “in the best interest” of the victim. These records may lead investigators and prosecutors to potential witnesses who can corroborate this evidence.

Another useful tool for the prosecution of a financial mistreatment case is K.S.A. 60-245a. This statute allows one party to issue a subpoena duces tecum, commanding the production of business records. The business records must then

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18. K.S.A. 8-1567. (Emphasis added.)
21. Appellate Case Number 103484
be delivered by the business to the clerk of the court with an accompanying affidavit from the records custodian. This subpoena and affidavit can remove the necessity of laying a foundation for the documents to be entered into evidence. Proper notice to opposing counsel is required by statute. Opposing counsel may object to the subpoena, and may require the records custodian to appear with the original documents.

Testimony from the victim in financial abuse cases is not always imperative. Sometimes the victim may make a good “witness/exhibit”, for lack of better term, by showing his or her frail mental state. If a victim’s testimony seems confused, or the victim answers questions inappropriately, this is great evidence to show how easily the defendant could have taken advantage of the victim. There is a perception that if a victim dies before a trial takes place, the case must be dismissed. However, this is not an absolute. The documentation and witnesses still exist and may serve to show how and to what extent the defendant took advantage of the victim, even without the actual victim present. Strong circumstantial evidence, such as forged signatures, withdrawals beginning as the victim’s dementia set in, withdrawals increasing as the victim’s health worsened, and annuity surrenders shortly after the victim purchased a policy, for example, may evidence a lack of the victim’s consent. Thus, a victim’s testimony is not necessarily essential to a successful prosecution of a financial mistreatment case. In situations in which a victim is unavailable or unable to testify, it can be important to compare medical records to the time periods during which the defendant began taking financial advantage of the victim.

There are some instances in which the victim may actually be a hindrance to the mistreatment case. Perhaps the victim does not know what the suspect has done, or maybe the victim has forgotten what they once knew about the suspect’s bad acts. In a case where the victim’s mental health is rapidly declining, a videotaped deposition may be helpful in preserving the victim’s testimony to demonstrate the victim’s position when the victim remembered what was happening to his or her resources. In a case where a victim’s physical health is declining and it is questionable whether the victim will live for the duration of the case, a recorded deposition may be great evidence at trial.

In the event that the victim is deceased at the time of trial, showing a picture of the victim (which may be obtained from the nursing home or a family member) puts that very important “face” with the case. It can also allow bankers, relatives, or other witnesses an opportunity to identify the victim as the person with which they dealt. In the event law enforcement is able to interview the victim while he or she is still living, they should also be able to take or obtain a picture of the victim.

Additionally, if both the defendant and the victim are signators on a bank account, prosecution is not automatically precluded. (Also watch for the Parsons-Anderson decision on this issue.) The application form or signature card may show the defendant on the account as “DPOA.” In some instances, the defendant may sign the checks “as DPOA,” which is relevant evidence to use in trial. The financial contribution each party made to the account(s) in question may be relevant to determine whether the defendant took financial advantage of the victim.

Finally, remind law enforcement officers to interview employees of nursing homes, as well as SRS workers. Working closely with SRS/APS (Adult Protective Services) can be extremely valuable in financial mistreatment cases. In many cases, APS will have conducted an “investigation” to determine whether exploitation has occurred. Their files can reveal potential witnesses otherwise unknown to law enforcement officers, as well as potentially identify bank accounts for which subpoenas should be issued. All of these witnesses and evidence can be extremely helpful in building a strong mistreatment case.

**Additional charges**

Frequently, suspects in financial mistreatment cases commit additional crimes. Suspects may sign the victim’s name to checks or pass checks they know to be fraudulent, thereby committing forgery. They may use the identity of the victims to write checks, make online purchases, or use credit cards, thereby committing identity fraud or

identity theft. They may use the victim’s credit or debit card, thereby committing criminal use of a financial card. A suspect also may use a computer to execute a scheme with the intent to defraud, thus committing computer crime. Obtaining a search warrant for the suspect’s computer may turn up helpful evidence. These are important options to keep in mind while building a financial mistreatment case.

**Penalties**

Previously, the financial mistreatment penalties closely mirrored penalties set out in the theft statute. Due to recent changes, the mistreatment statute now sets higher severity levels when the defendant takes more money. For cases in which the aggregate amount of the value of the resources taken is over $1,000,000, for example, the defendant faces a severity level two person felony. When a defendant takes at least $1,000, for example, it is now a severity level seven person felony. A major distinction between the theft statute and the mistreatment statute is that under K.S.A. 2011 Supp. 21-5417, the crime is a person felony.

Motions for upward departures are useful ammunition in financial mistreatment cases. Aggravating factors found in K.S.A. 2011 Supp. 21-6815 include: 1) the victim’s vulnerability due to age, infirmity, or reduced physical or mental capacity, and 2) a fiduciary relationship between the defendant and the victim. Considering that one report indicates trusted professionals, family members, caregivers, and skilled nursing facilities are responsible for more than 60% of financial abuse of the elderly, a fiduciary relationship may be an important factor in asserting a basis for departure.

Out of the 52 financial mistreatment cases the Medicaid Fraud and Abuse Division has investigated in the last five years, approximately 85 percent of the suspects have been family members or caretakers. The remaining 15 percent were close family friends, attorneys, and a pastor. The number of mistreatment cases the Medicaid Fraud and Abuse Division has investigated jumped 400 percent between 2007 and 2008. Although these statistics are not precise, as these cases are only cases that were referred to Medicaid Fraud and Abuse by APS, law enforcement, and prosecutor’s offices, and those cases that meet the Medicaid nexus, the numbers exhibit the reality of the problem. The numbers also reveal the increasing commission of this type of crime, and demonstrate the importance of protecting those who may be unable to protect themselves.

As stated earlier, it is recognized that original jurisdiction on mistreatment cases exists at the local level. The Medicaid Fraud and Abuse Division of the Kansas Attorney General’s Office has been, and is willing, to assist local law enforcement and local prosecutors who are investigating and prosecuting financial mistreatment cases, whether that be through training, answering questions, or prosecuting cases jointly.


Stay current by checking the KCDAA web site and reading e-mail blasts!

www.kcdaa.org

New information is updated regularly and information relevant to KCDAA members is added to the members only section. Just login and check it out.
Over the past 18 years, I have had the privilege of working for five Attorney Generals, and two United States Attorneys. When I was asked to reflect on the differences between the state and federal systems, my first response – which undoubtedly would be the same as any Assistant United States Attorney who matured on the state side – was “Thank God for the grand jury system.” This immediate response was expected, as I’m sure you have all either experienced the grand jury process or conversed with other prosecutors about it, and thus understand its attraction versus that of the preliminary hearing. I won’t dwell on this particular point, other than to say “Thank God for the grand jury system.”

Presenting before a grand jury is the glaring example, but it is the subtle differences that, when combined, cause genuine reflection. One of the first things that struck me about the federal system was its sense of formality; and while this may have largely been driven by my experiences at the United States Supreme Court, a similar atmosphere exists at the district court and circuit level as well. Now this is not to say that state court proceedings lack any sense of formality, quite the contrary. However, I can guarantee you that “summer rules, judge?” is not a phrase you will hear from attorneys in federal court. For those of you who are unfamiliar with the term “summer rules,” please consult your local county or district attorney west of Salina. They can better explain the process and under what circumstances such a request can be made. Suffice it to say, open window-let wind blow is not the federal system’s method of cooling its courthouses.

The formality is sensed in various ways, one of which is the effect it appears to have on defendants who have made a habit of moving through state system and then graduating to federal court. The moment a repeat state offender recognizes that he has “made it to the big leagues” can be rather telling, and some are even prone to verbally expressing their dismay at the prospect of a federal conviction. The crying generally starts when a defendant realizes that having racked up a sufficient number of state drug offenses he or she is now eligible for a sentence of life without parole for their latest foray into the world of narcotics distribution. While this may seem a difference in sentencing regimes, its impact on the defendant is compounded by the fact that he or she is usually flanked by two (sometimes three) Deputy United States Marshals, an imposing presence to be sure.

Formality aside, subtleties exist in the various differences in trial settings, to include voir dire, where the judge is intimately involved in questioning jurors, to the generally unquestioned right to have the lead agent at the side of the prosecutor throughout the trial. Also, with Kansas being a single federal district (as opposed to California which has four districts), we draw our potential jurors from across the entire state. So, at one moment you may be questioning a potential juror from Hays and then begin questioning someone from Manhattan. This wide swath of jurors, however, guarantees that you must remind the panel early on that you carry no allegiance to either KU or K-State, a fact I learned all too well when my trial began the day of the second KU and K-State basketball game this year and many of the potential jurors were adorned with their respective colors. Lucky I went to school in Washington DC, lest I should have to commit myself to lying to the jury right out of the chute.

Sentencing is also a distinct difference, and not for the reasons you would think. The federal system of course carries severe (oft-described as “Draconian”) sentences, to include mandatory minimum sentences of usually five or 10 years. And, yes, life without parole can be administered by the Court for a drug offense in the federal system.
Severe sentences are arguably a reflection of the federal system’s approach to those defendants who are considered career offenders. However, it is the process by which a federal judge reaches his or her decision on what sentence to impose that highlights the difference between the state and federal systems. As you are well aware, the state system focuses on criminal history and the level of offense to reach the appropriate sentence. The federal system, at its core, is similar in that regard. However, numerous other factors play into the ultimate sentence apart from the initial criminal history / offense calculation. To bring with, the federal system applies a series of enhancements in calculating a potential sentence. For example, in a typical drug case, a base offense level is calculated on the amount of narcotics involved. From there, a defendant can receive a number of enhancements if the case involved firearms (irrespective of whether a firearm offense was charged), or if minors were employed to further the offense, or if the defendant was a leader or organizer in the conspiracy. In firearms cases, enhancements are applied if the case involved firearms that can hold a high capacity magazine, or if the firearm was stolen. These enhancements are added to the base offense level and a number is generated. Once the defendant’s criminal history is applied, a sentencing range is produced. However, it doesn’t end there. Reductions are also applied in the federal system, which, in simplest terms, means that a defendant can lessen his or her exposure to a much greater sentence if they enter a guilty plea and timely inform the government of this decision. And it doesn’t end there.

If a defendant agrees to cooperate with the government and provide substantial assistance, generally providing information on other defendants or related criminal activity, the government can move to have the defendant’s sentence reduced to a particular term of months. And it doesn’t end there.

The presentence report in the federal system covers an entire range of topics to include the defendant’s family history, education and many times, their personal statement as to their role in the charged offense. A federal judge will take all of this into consideration in determining what sentence to hand down. With the federal guidelines now being rendered advisory by the United States Supreme Court, a sentence can vary from the projected sentencing range based upon the factors the court deems pertinent.

Becoming familiar with the federal sentencing guidelines is time-consuming and, like most federal prosecutors, you learn by experience. Simply pick up a Federal Sentencing Guidelines manual and flip through it, and you’ll immediately realize the differences between the state and federal systems.

There is also a recognizable difference during the investigative phase of a case. This distinction is arguably the by-product of a system that allows the Office of the United States Attorney to cover not only the district of Kansas, but to reach out and tag defendants in other jurisdictions, namely in large conspiracy cases. A classic illustration of this point involves the landing of a private plane in Kansas for refueling. While in the process of exiting the plane, the lone passenger is met by the local constable who queries our ne’er-do-well about his travel plans; in other words, a ramp-check. This, of course, leads to the discovery of a titanic-sized amount of carefully prepared and delicately wrapped cocaine. After the “that’s not mine” reflexive response from the now future federal inmate, he realizes that cooperation is his best outlet and agrees to give up the source of supply. Given the overt act in Kansas (the landing of the plane), we now have the authority to begin investigation and reel in all those individuals associated with the conspiracy; and in many instances, not one of the defendants (save our unlucky passenger) will have set foot in our wonderful, albeit humid and wind-blown, state. An investigation of this size, however, requires the assistance of several federal agents in multiple jurisdictions. It is not uncommon in large drug distribution conspiracies to employ agents from DEA, ICE, FBI, and ATF in several cities throughout the United States. As you can well-imagine, coordination is critical, and unlike the state system, the long, paperwork intensive extradition process from California to Kansas does not enter into the mix in the federal system. Here, a defendant is picked up in San Diego, arraigned in the United States District Court for the Southern District of California, and promptly booked on a no-frills flight on Con-Air, only to land in Kansas and be heard to say, “I’ve never been to Kansas before, how can I be
The range of offenses that can be prosecuted in the federal system is also a unique difference between the separate sovereigns. There are certainly a range of state offenses, but it was only when I became an Assistant United States Attorney that I realized I could prosecute someone for knowingly profiting from the misuse of the character Woodsy Owl and the associated slogan of “Give a Hoot, Don’t Pollute.” Seriously, look it up. 18 U.S.C. § 711a. These types of laws, of course, feed the argument that the federal government over-regulates in the criminal arena, but it goes without saying that many of these laws are seldom if ever employed. The point to be made here is that federal jurisdiction is uniquely structured to cover a host of offenses that are best presented in that particular forum. Bank robberies, wire fraud, mail fraud, immigration violations, offenses that range across several states, sizeable money laundering offenses, significant drug conspiracies (to include international suspects), and the oft-indicted felon in possession, are just a small example of the types of cases that are commonly investigated and presented for indictment.

In the end, all of us don the White Hat and put our own self-interests aside to promote the protection and security of our fellow citizens through the prosecution of those who seek to violate our laws both state and federal. On the surface the differences between the systems may seem significant, but in each case an Assistant United States Attorney and an Assistant County Attorney are a mirror-image when considering the vital role each plays in the process of bringing someone to justice. This article simply highlights a few of the differences that I have recognized over my career as both a state and federal prosecutor. I’m certain that many of my fellow AUSAs, who similarly began their careers as state prosecutors, would point out the same distinctions and provide additional insight.

The privilege of having practiced at both levels allows me this opportunity to impart a somewhat limited explanation of the differences between state and federal prosecution. In the coming years, I will undoubtedly recognize other distinctions, but with the understanding that while these distinctions may exist, my role remains the same as it was when I started years before the iPod existed. Yikes!!!

About the Author
From 1993 to 2009, Jared Maag served as a law clerk, an Assistant Attorney General, Deputy Attorney General, and Deputy Solicitor General for Attorneys General Bob Stephen, Carla Stovall, Phill Kline, Paul Morrison, and Steve Six. In 2009, Jared joined the Office of the United States Attorney, and this past June was named the Criminal Chief by United States Attorney Barry Grissom.
Assistance from Prosecutors Needed to Keep Kids Safe
by Cheryl Whelan, General Counsel, Kansas State Department of Education

The Kansas State Board of Education is always concerned about the safety of the children in our K-12 public schools. Recently, the Board extensively discussed whether to require background checks for all licensed educators as a means of ensuring the safety of our school children. Opponents of background checks encouraged the Board to seek enforcement of current law rather than imposing another requirement. It is with the enforcement K.S.A. 72-1397(e) that I seek your assistance.

By way of background, the Kansas State Board of Education (Board) licenses educators who teach, or serve as administrators and other school personnel (such as counselors and librarians) in K-12 schools. When an educator is convicted of or enters into a diversion agreement for certain offenses, the Board may revoke or suspend the educator’s license. The current problem is that the Board often is not aware of the convictions or diversions so that appropriate action is not taken. If an educator still has a valid license, that educator may continue working with school children.

K.S.A. 72-1397(e) is designed to alleviate that issue. Subsection (e) requires county and district attorneys to file a report with the Board when a person has been determined to have committed an act or entered into a criminal diversion agreement for certain offenses. The report must include the name, address, and social security number of the person, and must be filed with the Board within 30 days. The intent is to provide notification to the Board, and the Kansas State Department of Education (KSDE), of criminal conduct for which the Board may not issue or renew an educator’s license.

Two categories of convictions exist – those for which the Board is permanently prohibited from issuing or renewing a license, and those for which the Board may issue or renew a license, provided the statutory requirements are met. K.S.A. 72-1397(a) lists the offenses for which the Board shall not issue a license and includes such offenses as rape, other sexual offenses involving a child, abuse of a child, murder, manslaughter, and attempts or conspiracies to commit those offenses. K.S.A. 72-1397(b) lists the convictions and diversions for which the Board may issue a license. Those offenses include, for example, felony crimes involving controlled substances, felony crimes against persons not previously mentioned, felony sex crimes not previously mentioned, crimes affecting family relationships and children, felony property crimes, felony DUIs, battery, and domestic battery.

Currently, however, very few county and district attorneys send the reports required by K.S.A. 72-1397(e). Doing so is easy and greatly assists the Board with ensuring the safety of our children at school. Once a month, simply send a copy of the journal entry or diversion agreement to the following:

Pam Coleman  
Director, Teacher Education and Licensure  
Kansas State Department of Education  
120 SE 10th Avenue  
Topeka, KS 66612-1182

With your assistance, county and district attorneys will lend valuable assistance to the Kansas State Board of Education in ensuring the safety of children in public schools. Please feel free to contact me at (785) 296-3204 or cwhelan@ksde.org if you have questions or require additional information.

About the Author
Cheryl Whelan was a former Assistant District Attorney in Shawnee County and was an Assistant Attorney General for two years. She was also a former member of the KCDAA before joining the KSDE.
The National District Attorneys Association Summer Conference was a rousing success with more than 250 attorneys attending in this beautiful and very temperate location. While Kansas was melting with temperatures in the 100s, Sun Valley was cool both day and night, which was the benefit of being over a mile high.

At this summer’s conference, our 2011-2012 National District Attorney President Jan Scully, District Attorney of Sacramento, California was installed and appointed her Executive Committee that includes District Attorney Nola Foulston of Wichita. Kansas has been well represented on the board. Deputy District Attorney Kim Parker was appointed to the Executive Committee as the representative of the Associates’ Committee for 2010-2011, and continues to serve as one of the Vice Presidents of NDAA, so we have been involved to every degree in the leadership of this organization.

Justice and Generosity Benevolent Fund Silent Auction

On Sunday evening, as the jazz band played and welcomed conferencees, we produced our first benefit auction for the Justice and Generosity Fund. The donations were extraordinary including tickets to the Kentucky Derby, tickets to the Indianapolis 500, fabulous bed and breakfast packages around the country, country music memorabilia, etc… we raised over $15,000 in our first auction. I was pleased to be the chair of this committee, and I had excellent assistance from staff and prosecutors in making this inaugural event a success.

Next year’s summer conference Benefit Auction will promise to be even more exciting. If you have any items that you would like to donate to this national benevolent fund for prosecutors in need, please let me know. We appreciate your support in this endeavor. You are also able to donate to the fund, 501(c) 3 corporations that make your cash or credit card donation tax deductible. For more information, please contact Foulston@sedgwick.gov.

“Strike Forces”

In the Current Issues Roundtable, presented by Chief Deputy District Attorney Kim Parker and District Attorney William Fitzpatrick of Syracuse, New York, we were updated on emerging issues of prosecutorial misconduct, Brady/Giglio issues, human trafficking, and Drug Interdiction. In the area of prosecution misconduct, we continue to work in pulling together data from court cases around the nation in an effort to better define misconduct issues from court decisions, and we will work diligently to implement the ABA Resolution to define trial error as the overarching statement rather than misconduct by prosecutors.

The Criminal Justice Section of the ABA, Resolution 100B by the ABA House of Delegates: RESOLVED, that the American Bar Association urges trial and appellate courts when reviewing the conduct of prosecutors to differentiate between “error” and “prosecutorial misconduct.”

In continuing with the theme of ethics and education, our conference provided exceptionally
qualified speakers including **Cydney Batchelor** who is the Deputy Trial Counsel for the State Bar of California, and **Stephen Salzburg of the American Bar Association** who stressed the importance of education in the office and monitoring of case law changes. Of particular concern on a nationwide basis is that prosecution offices develop protocols for dealing with allegations of prosecutorial misconduct. At this time, Chief Deputy District Attorney Kim Parker and I are working on a Kansas policy and procedure manual that will be shared statewide through the KCDAA. This document should be ready by the fall conference.

Hot button issues concerning Brady/Giglio presentations were also well attended. **Prosecuting Attorney Jacqie Spradling** from Shawnee County was a panelist on this topic, and **DA Chad Taylor** also made an appearance at the conference.

Following our executive meetings, the conference attendees gained extraordinary insights from our guests and lecturers who joined us in Idaho including **CBS News Correspondents Erin Moriarity and Richard Schlesinger** who kicked off the conference and found a great audience for their interaction on media and the prosecution. Our luncheon speaker was **Elizabeth Devine** who is a producer for the TV series CSI, along with Los Angeles District Attorney Steve Cooley.

**Science and Technology Update**

Our board continues to monitor suggested updates to the 1986 *Electronic Communications Privacy Act*. Congress is working to reauthorize different aspects of the law and this would certainly affect law enforcement’s day-to-day ability to access electronic information through wire taps and could place burdensome restrictions on law enforcement’s ability to access stored electronic communications in order to solve a crime, including e-mails, text messages, and other electronic messaging methods. NDAA continues to work closely with both the House and Senate Judiciary Committees, along with its law enforcement advocacy partners, to preserve law enforcement’s lawfully authorized electronic surveillance capability while maintaining the privacy rights of individuals.

**NDAA National Advocacy Center**

Our Advocacy Center in Columbia, South Carolina is no longer operational due to funding constraints and a “takeover” by the federal prosecutors of the entire facility. We are working to continue negotiating with the University Of Utah School Of Law that has presented an option to our organization to house its Advocacy Center. This is a long-term project, and we are appreciative of the cooperative efforts expended by the University to assist us in maintaining high quality advocacy education for prosecutors.

In the interim, we will continue to have National College Courses scheduled around the country:

**Digital Evidence**
Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation
August 16-17, 2011, Richmond, Virginia

**Successful Trial Strategies**
August 28-September 1, 2011, Seattle, WA
803.705.5005

**Prosecuting Drug Cases**
September 11-15, Las Vegas, NV 803.705.5005

**Strategies for Justice:**
Advanced Investigation and Prosecution of Child Abuse and Exploitation
September 26-30, 2011 Crowne Plaza Denver, CO

**Demystifying SMART DEVICES**
October 31- November 4, 2011, Chicago
Check the website for summary and registration information when it is available

**NDAA Capital/Spring Conference**
February 2-5, 2012, Washington, D.C.
The Liaison Capitol Hill 866.233.4642
Photos from the 2011 KCDAA Spring Conference

Photos by Angela Wilson

June 9-10 • Hyatt Regency Hotel • Wichita, KS
MARK YOUR CALENDARS

KCDAA Fall 2011 Conference

Capitol Plaza Hotel
Topeka, KS

Watch www.kcdaa.org for more details

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