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About the Cover

Cottonwood Falls has been the Chase county seat since both town and county were established in 1859. The first log cabin courthouse was replaced in 1873 by the stately building of native limestone and walnut, which is the oldest Kansas courthouse still in use today. It was designed in French Renaissance style by John G. Haskell, who also was the first architect for the statehouse in Topeka. The courthouse is located at the south end of Broadway Street and is listed on the National Historic Register.
All Kansas county and district attorneys are elected. If you work in a county or district attorney’s office, you are an elected official or are appointed by an elected official. Therefore, all Kansas prosecutors are politicians—whether we like it or not. Some prosecutors view themselves as politicians first and prosecutors second. Others see themselves as prosecutors first and politicians second. And, some prosecutors deny they are politicians. Some prosecutors truly enjoy the political arena. Some prosecutors see politics as a necessary evil. And, some prosecutors hate politics. However, we are all elected to the prosecutor position, so we are all politicians.

With the next election cycle for county and district attorneys taking place in 2008, you may have thought you could put politics on the back burner for the next couple of years. Wrong. 2006 is the election year for state-wide offices including Attorney General. This is a good time to remind ourselves that as elected officials we must be vigilant to maintain our professionalism as prosecutors. Our sworn job is to serve all Kansans, whether they are “politically” for or against us.

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

I serve as a rural prosecutor. I have had the opportunity, and need, to solicit help and advice from both Attorney General Phil Kline’s office and Johnson County District Attorney Paul Morrison’s office. Both offices have made themselves available to give advice and help when needed. I trust that both will continue to do this during the campaign whether or not I support them or stay neutral. I remain hopeful that all prosecutors throughout the state also will be able to seek help and support from both offices during and after the campaign. As prosecutors, we must keep the political process from adversely affecting our professional relationships. The citizens of Kansas expect and deserve this from us.

One of the issues the board of the KCDAA will be addressing at our year-end meeting is whether or not to recommend the formation of a political action committee (PAC) within the Association. At our June board meeting, the directors requested Steve Kearney prepare a presentation for the board outlining the mechanics of setting up a PAC. The board’s intent is to explore the possibility of creating a PAC to further our goal of better legislation in Kansas. The board also will be exploring what political areas the PAC might become involved in. At this time, the discussion has focused strictly on the Kansas Legislature. Whether or not the KCDAA forms a PAC will be a topic of discussion at the June conference. In years past, the KCDAA has remained neutral on all statewide elections. In the foreseeable future, the KCDAA will continue to remain neutral in statewide elections, including the Attorney General’s race.

Legislative efforts for 2006 also will be discussed at the year-end board meeting. Mike Jennings, chair of the Legislative Committee, is currently assessing the proposals submitted by KCDAA members. The current plan is for the board to evaluate requested legislation issues and narrow the requests to approximately ten. This information will then be forwarded to KCDAA members who will be asked to rank the proposals. The board will then finalize the legislative agenda for 2006. It is incumbent upon all Kansas prosecutors to assist the Kansas Legislature in its efforts to pass legislation that benefits Kansas citizens and promotes the prosecutor’s ability to seek justice. If you have legislative issues you wish to discuss, please contact Mike Jennings at (316) 660-3670 or any of the KCDAA board of directors.

This will be my final President’s Page. Doug Witteman, Coffey County attorney, will assume the presidency of KCDAA at the year-end board meeting. For seventeen years, I have been privileged to serve as a prosecutor in the state of Kansas. I am thankful for the experience of serving on the KCDAA board of directors and have been honored to serve as president this past year. I look forward to many more years of service to the KCDAA as an active member, and encourage all of you to be active in the KCDAA as well.
Executive Director's Page

by Steve Kearney, KCDAA Executive Director

Going Down Range for a Constitution

I just got off the phone with one of my sons tonight. He is currently the soldier in my family. He is active duty Army at a time when it is tough for a proud parent to have a child serving when they could be going into harms way at some point. We spoke of his unit choices as his time to re-enlist is looming and the possibility of his “going down range” based on what assignment he chooses next. For those of you in my generation, you know who you are; the term then was “in country.”

Earlier today, I sat in a meeting filling in for a friend who has been deployed to Iraq, leaving his wife and three small children at home. My conversation with my son, the meeting today and with Veteran’s Day having just passed, brings me to consider a little more deliberately how history is repeating itself in a country other than our own in the struggle for democracy. The bedrock of that democracy is the right to vote and the adoption of a constitution.

The vast majority of the readers of this publication have taken an oath to uphold the Constitution of the United States and the Constitution of the State of Kansas. You have taken the oath in many capacities, some of you in more than one, as attorneys and prosecutors, as military reservists or National Guard members, as public office holders and elected officials. It is not an oath taken lightly by any of us when it was conferred upon us, an honor bestowed with a great weight of responsibility in each of our roles, one that must be adhered to in light of the many sacrifices that have been and are still being made to grant us this privilege.

Having passed a milestone birthday in the not too distant past, I look around and see others in this organization of similar vintage, Rucker, Morrison and Jennings, all whose fathers could easily have served in World War II like mine did. Many like Rucker and I have sons serving as we speak. Two distant generations of young men and women defending our right to have that constitution we have so readily agreed to uphold and defend. In my father’s case, he left for the Philippines a married man of 19 and returned four years later to a 3 1/2-year-old daughter he saw for the first time. Not a particularly remarkable story for the time or the generation, but illustrative of the kind of sacrifice almost every family was making then in defense of our constitution and very much like the sacrifices of those currently serving in the Middle East and elsewhere around the globe.

Something remarkable is taking place while the debate over the Weapons of Mass Destruction and our purpose for being in Iraq rages in the media and political halls throughout this country. Intentionally ignored by the talking heads that keep feeding us a steady diet of bad news of suicide bombers and roadside bombs, is the adoption of a constitution in Iraq.

That is constitution with a capital “C.” It took our founding fathers 11 years from the time our independence was declared to adopt our constitution. Nothing short of miraculous is taking place in Iraq.

In a part of the world that for 4,000 years has never had a democratic election and where the fear of being killed on the way to the polls to exercise this newfound freedom is very real, the voter turnout has been greater than our own. Many of our own neighbors won’t go to the polls if it is raining. How soon the sacrifice is forgotten even when it is blasted at us on the TV, the Internet and news updates on our phones and pagers—good grief, isn’t anyone paying attention?

The right to vote and to adopt a constitution, is living and breathing in a new incubator. It is happening because this generation is sacrificing like other generations so that others may be free. Free to vote, to self-govern and to adopt a constitution that fits the needs of their people and their country. Is it inconceivable that a publication like this could exist in Iraq someday? Someday soon maybe? That as many Iraqis will have been afforded the privilege to take an oath to uphold and defend their newly minted constitution just as you and I have for ours?

Our sons and daughters, friends and co-workers, who are serving today in Iraq, have gone “down range” for a constitution. Not just the defense of ours, but perhaps an even more noble purpose, the defense of another to enjoy the freedom to choose a constitution.
There are a good mosaic of articles to read in this issue. I believe that members and non-members alike should be able to garner useful information from the content presented in The Kansas Prosecutor. John Settle, David Debenham and Jerome Gorman, members of The Kansas Prosecutor editorial board, do a great job of keeping their finger on the association and current issues that face prosecutors. The advisory council has been a great help as well, and Angela Wilson from Douglas County has stepped in to take over where Deb Hughes left off as chair. For this issue, Wilson has written an article about computer forensics, something which she knows about firsthand, having just finished an incredible case based on circumstantial evidence from computer records.

Every prosecutor’s office has to deal with diversions of some kind, and Ann Swegle shares with us an article on diversions in the state that should be of particular interest to most of you. David Miller has written an article on his experience as chairman of the Prosecutor Ethics and Grievance Committee. Via his article, Miller has pointed out the important fact of what high standards prosecutors must adhere to. He reminds us that training and experience are key to using good judgment. I think his advice can apply to just about anyone: “Ethical dilemmas face us on a daily basis and the easiest way to resolve most of these questions is to merely do the right thing. Sometimes it is very difficult to know what the right thing is.”

Also in this issue, U.S. Attorney Eric Melgren has submitted a thought provoking article about the dangers our children face with online predators. It’s difficult to imagine having someone stalk your child while in your own home, but Internet predators are an unfortunate occurrence of the technologically advanced era we live in. Melgren mentions that a recent study indicates one in five children ages 10 to 17 have received unwanted sexual solicitations online. If you think about a classroom full of thirty kids, that would mean six of them have been targeted; and one child is too many. Unfortunately, sometimes criminals and their schemes, coupled with technology, advance faster than the law can keep up.

If any of you are into crime television programs or see the commercials, you’re aware that “CSI” is a popular show, having three different programs on each week: “CSI,” “CSI: Miami,” and “CSI: NY.” These shows and their popularity are changing juror’s expectations of proof and are having a sometimes troubling result for prosecutors and defense attorneys alike, and any size jurisdiction can be affected. This topic is appearing more often in the media, and was covered at the 2005 KCDAA Fall Conference in Overland Park. Nola Foulston sheds light on the complications of dealing with jurors wanting absolute proof and what has become the “CSI effect.”

A year ago, I interviewed Chris Kenney, who was then the Douglas County Attorney. She is now prosecuting for the U.S. Attorney’s office. She played an instrumental part of the KCDAA up until her ’04 D.A. election when she was defeated. I spoke with her and Terra Morehead, another U.S. attorney and asked them about their thoughts on the progression of the KCDAA. See pages 27 and 28 for more on these two influential prosecutors.

The 2006 Kansas Legislative Session is upon us, and the KCDAA lobbyists are gearing up for another go ‘round. Every year, the KCDAA legislative committee is preparing the legislative agenda sooner than the year before. On page 12, Rep. Jim Ward, summarizes some points of interest on last year’s legislation. He also has good advice: Talk to your legislators. Who better for the legislators to get input from than the people who execute the laws?

Finally, a fond farewell to our fearless leader for the past year, Tom Drees. He has been a dedicated and conscientious president putting in a lot of time as well as hours on the road for the association. He remains on the Legislative Committee, and is involved in other committees and sections, so we know he’s not going anywhere anytime soon.

Best wishes to all of you and your families for a happy and safe holiday season.
As adults, we often concern ourselves with whether our children are watching too much TV and whether they are being improperly influenced by what they see. Now broaden the scope as professional prosecutors and concern yourselves with what potential jurors are watching; consider the “CSI effect”!

In Kansas, the only case to have mentioned this issue is a decision not designated for publication: State of Kansas v. Arlando T. Latham, No. 92, 521 opinion filed July 8, 2005. In this decision from Sedgwick County, the defendant complained about the prosecutor’s comments during voir dire examination that “certain types of forensic evidence were not technologically possible.” The defendant’s argument stems from the following remarks:

“This isn’t ‘Law & Order’ or any of the other shows, ‘The Practice’ or anything else. Okay. There’s also a show that I can’t help but talk about now because it is extremely popular. Okay. And everybody seems to be watching it. It’s ‘CSI,’ okay. Now they’ve got ‘CSI: Miami’ and gonna have ‘CSI,’ you know, Tulsa, Tuscaloosa. ‘Cause, once something works, they’ll beat it into the ground until nobody watches it anymore. But ‘CSI’s’ a very popular show. Does anybody here watch? Just a show of hands. There’s quite a few people watch ‘CSI’. Extremely popular. ‘CSI’ is a bunch of you know what. Okay. It doesn’t happen that way. Okay. First of all, the CSI investigator with the Wichita Police Department is an evidence collector. They go in. They pick up evidence, they bring it out, they bag it, they sort it, they put it in the proper place, make sure it gets to a certain place. They don’t do any investigation; they don’t do any talking to anybody or anything like that. So the guy on ‘CSI’ who’s now a heartthrob and everything else, this William Peterson, that might be – make for a good TV show, but that’s not reality, okay. And, in one of the shows, I think they even had where a guy was knifed and they poured some kind of substance into the wound to determine what the knife was, what kind of knife or where it was. That would be great if we could do that. That would be fabulous. But you can’t. Okay. In all the years I’ve been doing this, I’ve never had – that’s just not something that – technologically is not there yet. Does anybody here think that they’re gonna hear like ‘CSI’ evidence here in this courtroom? Nobody’s indicating that that is a concern for them.”

In Latham, the court found that the prosecutor’s comments were not prejudicial. The court found that the statement was made in an effort “to point out the differences between the real world investigations and those seen on television shows.” The court further stated that “the weapon used in the present case was a gun, not a knife… and noted no forensic evidence was presented to establish Latham’s guilt.” Finding a failure to show that statements by the prosecutor made in voir dire were improper, accordingly, the court held that he was not denied a fair trial by those statements.

While this opinion was unpublished, it does give an idea of how the court would view statements in voir dire by a prosecutor concerning the “CSI effect”. Counsel is entitled to make inquiry to the panel of those issues that are germane to the trial. Counsel should be careful not to inject personal opinions in voir dire, and not hold themselves out as experts before the jury. Merely inquiring as to the effect that certain media might have on their understanding of the case or how it might influence their decisions is a proper subject for inquiry when the issues are relevant.

Remember, the process of jury examination is the time you take to familiarize the panel with your theory of the case and any issues that may be presented. This is the time to ferret out problems before
you commence the presentation of evidence. If there is an issue with forensics or lack of forensic evidence, then surely take the opportunity to discuss this with the jury, and if the “CSI effect” is going to be problematic in your case, address it. If there is not a problem with this issue, don’t throw it in just for discussion sake. Why muddy the waters? Use common sense and your trial skills in voir dire examination of the jury panel to assure that they understand the law, the duties and responsibilities of a juror, and the issues that will be presented to them during the trial. This is the only opportunity that you will have to meet the jury and to have the time to discuss this case with them. Use your time wisely.

The following article is published by the The National District Attorneys Association which has evaluated this national phenomenon and presents information and ideas for prosecutors in the following “talking points article”.

THE “CSI EFFECT”

Shows like “CSI” and its spin-offs, “Law & Order” and its spin-offs, “NCIS,” “Cold Case” and other forensic crime programs, depict actors using the most advanced forensic equipment and techniques available to solve crimes. These types of shows are ranked among the top 20 in America. While these shows can be educational concerning forensic science, they are – first and foremost – entertaining fiction. Unfortunately, some viewers think the science, equipment and techniques used on these shows are infallible and readily available to all law enforcement. Because of this, there is evidence that the outcome of some trials (conviction/acquittal) has been based upon a juror and/or juror’s unrealistic expectation of being presented with an abundance of forensic evidence that will prove the guilt or innocence of a defendant – far beyond a reasonable doubt. In fact, it seems as if a new standard is being created where jurors will soon expect evidence that will prove BEYOND ALL DOUBT, the guilt or innocence of a defendant.

IS THE “CSI EFFECT” HAVING AN IMPACT ON OUR CRIMINAL JUSTICE SYSTEM?

1. Is there really a “CSI effect”?
   Yes. Prosecutors are increasingly encountering the “CSI effect” among jurors even when they have strong cases, with eye-witnesses and confessions by defendants. If they don’t have forensic evidence, there have been jurors who will not convict a defendant even if no such evidence was available, and the defendant was caught “red-handed.” When these defendants are found “not guilty” because of the “CSI effect” and a juror’s blind faith and belief in the truth of popular forensic crime shows — they are released back into society to continue committing the crime, beyond a reasonable doubt. But, a juror may have seen a forensic crime show where there was more evidence than DNA. For example, in the show there may have been carpet fibers from a criminal’s home – or other materials from a crime scene were found on the victim. The juror(s) may insist that more evidence should have been tested, even if virtually none existed. These types of juror expectations have resulted in finding defendants not guilty – even with irrefutable DNA test results. Ironically, some of these tests are really only valuable to give opinions about whether fibers or hair are consistent with a particular theory. But, based on what juror(s) see on TV, they expect an expert to give an opinion with certainty, when that is not possible with that kind of evidence.

2. Do TV forensic crime shows include technology that is questionable or not readily available?
   Yes. Some jurors expect certain scientific technology to be available because they’ve seen it used on a TV forensic crime show. In many instances, this is used to create a “Wow—I didn’t know that,” factor. Because these shows are “entertainment,” they may include highly advanced or experimental scientific technology to make the show more interesting. Some of the technology shown on TV may exist somewhere, but often only in research labs or in a few very advanced and sophisticated laboratories. The technology may well exist, but not in many jurisdictions.

3. How does an “actual crime lab” compare to those depicted in forensic crime shows?
Some jurors may believe that all state forensic laboratories are as well-equipped with the most advanced technology as they see in “CSI” Las Vegas, Miami and New York – and other forensic crime shows. This could not be further from the truth. Some of this advanced equipment is cost-prohibitive in many cities and states. While most state forensic labs make every effort to keep up-to-date on technological advancements and improved equipment, they don’t have the resources to match what audiences see being used on “CSI” and other forensic crime shows.

4. How long does it take to get results of forensic tests like DNA, etc.?

Unlike the shows on TV, results of DNA and other forensic tests cannot be available within the blink of an eye, an hour, a day or even weeks. This just does not happen! First, DNA and many other test results take much longer in real life, and second, many state crime labs have such a backlog that it can take several months, or longer, to receive results from evidence sent to be tested. It’s certainly understandable that a TV writer needs an ending to the show in 45 minutes, and not eight episodes just to find out a DNA result. But, realistically, that is just about how long it would take to get those results.

5. Have forensic crime shows caused an increase in the number and type(s) of evidence being tested?

Yes. Because of these forensic crime shows, in many instances, there now exists a much higher bar for police and prosecutors to reach in proving the guilt of defendants. Expensive tests are run on evidence such as fingerprints, DNA, etc. — even when the defendant was “caught in the act” — by police or another eyewitness – of committing the crime for which he/she is being tried.

6. How are defense attorneys using forensic crime shows to their client’s advantage?

Defense attorneys are using the “CSI effect” to their advantage by letting the jury know when prosecutors have little or no forensic evidence available to convict their client. They are telling the jury, that without hard forensic evidence – there can be no proof that their defendant is guilty. Defense attorneys claim the “CSI effect” is a good thing because it places a higher standard for investigators. Yet, jurors should never forget that the defense attorney’s job is to show doubt whether it really exists or not.

How Can Prosecutors Effectively Respond to the “CSI Effect”?

1. If you find evidence – TEST IT – even if you don’t think the test results are needed.

Test as much evidence as possible. A recent study conducted by the Maricopa County Attorney in Arizona found that, “More than 61 percent of Arizona prosecutors who ask jurors if they watch forensic crime TV shows feel jurors ‘seem to believe the shows are mostly true’.” One prosecutor said, “I have been asking to have evidence submitted for fingerprints and DNA on a regular basis, sometimes even with admissions of guilt, just to show the jury we are all doing our jobs.”

2. Use voir dire to eliminate “true believers” in the infallibility of TV forensic crime shows.

During voir dire, or the jury selection process, prosecutors should ask jurors if they watch “CSI” and other forensic crime shows. They should also ask if a juror believes what they see on these shows is mostly entertainment – or largely based on fact. Prosecutors can then better determine who to strike, or eliminate, from becoming a member of the jury based on the probable high expectation by such candidates for a large amount of forensic evidence.

3. Educate the jury re: when forensic testing is – and is not – needed.

Prosecutors should explain to jurors why certain types of evidence were not available or – if available – were not tested. They should have the police, detectives and outside experts educate the jury about evidence that is, or is
not, available in cases, and explain the importance of such evidence. Prosecutors should also clarify why eyewitnesses and being caught while committing a crime would negate the need for forensic testing.

4. **Use opening and closing statements to let jurors know what to expect concerning forensic evidence during a trial.**

   In opening and closing remarks, prosecutors should talk in a straightforward manner to the jury to explain if they do – or don’t – have forensic evidence. They should tell the jury what this means, in terms of deciding the guilt or innocence of the defendant.

5. **Judges should instruct jurors to base verdicts ONLY on testimony and evidence (if any) presented at the trial – NOT on what they’ve seen on forensic crime shows.**

   Prosecutors should work with judges to impress upon them the importance of countering the “CSI effect.” They should stress the importance of adding language to a judge’s jury instructions that warns jurors not to base any of their decisions on what they’ve seen on TV forensic crime shows, but only on the evidence and testimony they heard during the trial. The recent Maricopa County Attorney’s report found that, “88 percent of prosecutors felt that judges rarely or never address the burden of overcoming the “CSI effect.”” One prosecutor indicated that, “Most judges think it’s silly I even address these questions in voir dire.”

6. **After you’ve taken the time to explain the forensic evidence available in a specific trial, let the jurors know you respect and trust them to do the right thing.**

   Most people who serve on juries take this responsibility very seriously. They don’t want to convict the wrong person, but they feel an equal responsibility to hold defendants they find to be guilty accountable for their actions. If prosecutors talk rationally about the “CSI effect” and why forensic evidence is not needed for a conviction in a specific trial, most jurors will respond in a reasoned and responsible manner.

**ARE THERE ANY POSITIVE ASPECTS TO “CSI” AND OTHER FORENSIC CRIME SHOWS?**

1. **Absolutely. Among the positive results of forensic crime shows – more people are interested in forensics as a career.**

   Before these shows became popular, there was a shortage of qualified candidates to become forensic technicians, scientists and pathologists. And, while the numerous TV forensic crime shows glamorize these positions; many more students entering college are interested in pursuing careers in these heretofore understaffed professions. In fact, it should be noted that people who serve in these positions ought to be the best and the brightest. They have an enormous responsibility within our criminal justice system.

2. **There are increasing numbers of “average” TV viewers who find forensic science fascinating.**

   Viewers of these shows do learn about techniques and equipment that are revolutionizing the accuracy with which we can determine who did – or did not – commit a crime. When you have jurors use terms like “Mitochondrial DNA” – you have jurors who may take as “gospel” what they see on TV forensic crime shows. However, it’s important that you remind jurors to remember that these shows are primarily “entertainment.” Again, take the time to help jurors understand the type of evidence they will be considering during a trial.

3. **Are forensic crime shows making police, prosecutors and other law enforcement officials work harder?**

   In more instances, yes. The “CSI effect,” in some cases, is making police, criminal experts, prosecutors and others do more forensic testing – even if it is unnecessary. Is this a bad thing? No, it’s not, especially if it makes it easier for a jury to convict a guilty defendant. However, more testing costs more money. And when there is NO evidence, but a significant amount of hard facts, and/or trustworthy eyewitnesses who can identify the person who committed a crime, common sense – not
TV fantasy and fiction – should prevail. If forensic crime shows like “CSI” had existed before the trial of O.J. Simpson, a more forensically educated jury may have seen no way out but to find him — and other defendants of that era — guilty.

Society will become much more safe as technological advancements continue to be made and there becomes little, if any, doubt about who committed a crime. Prosecutors should be seen as strong proponents of any sound technology — as they were with DNA — that helps takes the guesswork out of the guilt or innocence of a defendant. A well-educated public is a friend — not a foe — of justice within our criminal justice system. And, it’s up to prosecutors to help educate the public to differentiate between fact and fiction.

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Go to: www.kcdaa.org to see for yourself!
I have often been asked: “What has surprised you most since becoming United States Attorney?” I am sad to say it is this: The stunning cruelty and wickedness that some children suffer at the hands of adults.

Prosecutors see more than their share of human suffering. Even our victories tend to be bittersweet – at the same time that we put a dangerous offender behind bars; we may be taking a mother from her children, a husband from his wife and a son from his mother. Research tells us that even most criminal offenders put a high value on family relationships.

Child predators, though, are different. They seem not to be guided by that basic human desire to love and be loved, and to put a loved one’s welfare before one’s own. In their eyes, children – male or female, even infants – become mere objects to be used and discarded without regard to the life-threatening emotional injuries to the victims. Playing on children’s natural desire for attention, predators mask themselves as caring adults. They offer gifts and secret confidences. They flatter and deceive victims. They look for children who are naive, lonely, neglected, alienated or otherwise vulnerable.

These are not isolated cases. There is a community of these offenders. They prey on their victims, and they partner with one another across the globe. They build Web pages and back channels on the Internet to share their dark obsessions. They dial into our homes, using our own computers like back doors to which they have a key. They study the laws, compiling lists of the loopholes. And they disguise themselves to look like the rest of us: teachers, coaches, truck drivers and, yes, even police officers.

That is why the U.S. Attorney’s office in Kansas has been working closely with law enforcement officials and victim service providers throughout this region to turn the tables on child predators. Because these offenders represent such a danger to unsuspecting children who routinely use the Internet, law enforcement officers must defeat these offenders by the very technology that allows them to flourish. A recent study shows that one in five children 10 to 17 years of age has received unwanted sexual solicitations online. That explains the shocking fact that one in five girls and one in ten boys are sexually exploited before they reach adulthood.

Once a sexual predator is identified and arrested, his scope of reach needs to be thoroughly examined. A partnership with victim service agencies is essential at this point in the criminal investigation. Police officers are not trained to deal with the psychological injuries to the psyche of a victim of sexual exploitation. The identification of additional child victims should lead to the appropriate referrals for both short and long term treatment. A victim service professional can provide these essential referrals. It is through this multidisciplinary approach that law enforcement and victim service providers can work together to provide help to child victims.

Recognizing the need for collaboration to serve the needs of child victims, my office worked to bring together both law enforcement officers and victim service providers in a joint conference held recently in Kansas City, Mo. During this 2 1/2-day event, both professions learned how they can work together more effectively. Participants returned from the conference with tools that will allow them to be more effective partners in the fight against child sexual exploitation. The U.S. Attorneys’ offices in Kansas, Nebraska, western and eastern Missouri and southern Illinois participated in this training because they understood the value of creating partnerships to more effectively deal with child predators.

A related crime, indeed, a predicate crime is child pornography. Regrettably, many in our community are cavalier about child pornography, imagining that most of it involves nothing more than scantily clad teens. The truth is more disturbing. Collectors and distributors of child pornography are trading images depicting unimagin-
ably violent sexual acts against unbelievably young children – as young as infants. The younger the victim, the more violent or degrading the sexual abuse, the more child pornographers prize such trophies. In truth, every collector of child pornography is an accessory to the original violation of a child by creating the very market that pornographers seek to serve. Investigators and prosecutors often are shocked by the elaborate ways in which consumers of child pornography preserve organize and display their collections, some of which contain hundreds or thousands of images that even those hardened by years of experience in law enforcement may find disturbing.

Furthermore, research provides evidence that many collectors of child pornography are not merely passive observers. In a study by the U.S. Bureau of Prisons, researchers asked offenders who had been convicted of possessing child pornography about their sexual experiences. Seventy five percent of them told researchers that they had committed offenses involving direct sexual contact with children – on the average more than 50 times each!

For all these reasons, I will continue to make prosecuting such crimes against children a high priority for our attorneys. I urge every parent and every concerned member of the community to learn more about the danger that child pornography and child predators present. And I urge them to join the alliance we are seeking to promote between law enforcement officers and victim service providers. Too many children have already suffered because we didn’t act sooner.

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Send in photographs of your local courthouse, and it could be featured on the cover of *The Kansas Prosecutor.*

**Tips for taking photos:**
- Early morning and late afternoon are best lighting times for outdoor photos
- Take the photo from an angle, it makes for a more interesting picture
- Make sure there’s nothing in the background that distracts the viewer’s eye from your subject
  - Zoom in--don’t leave too much space around the subject
- Use a tripod to keep the camera steady; if you can’t do this, lean against something to steady your hand

Send your photos to Keri Renner, editor of *The Kansas Prosecutor*
1200 SW 10th Avenue, Topeka, Kansas 66604
Questions? E-mail Keri at krenner@kearneyandassociates.com
The Little Things

by Representative Jim Ward, D-Wichita

I had a football coach in high school who said over and over again it was the little things that made winners. Get the little things right and the big things will follow. He said a lot of other things that aren’t fit for print, but I have found he was correct about getting the little things right. In the last legislative session, the biggest change to criminal justice law was the Sheriff Matt Samuels Chemical Control Act that provided significant new tools in the fight against methamphetamines. There were several smaller changes that deserve some attention, too. I thought it might be helpful to review some of those legislative changes that didn’t get much press coverage, but hopefully will assist in effective and efficient law enforcement.

As a result of the situation that arose in the Kobe Bryant case out of Colorado, the Kansas Legislature took action to change the Kansas Rape Shield law expanding its protections to any and all judicial proceedings where the alleged crime is a sex offense. Prior to this change, the prohibition against evidence of a victim’s sexual history was limited to the jury trial, but now victims of sex offenses are protected throughout the judicial proceedings.

The law dealing with inherently dangerous felonies also was expanded to include fleeing or attempting to flee a law enforcement officer. This will allow prosecutors to consider charges of felony murder in those situations when someone is killed as a result of a suspect refusing to stop his or her motor vehicle in response to a pursuing police vehicle.

The Legislature closed a loophole in the DUI law regarding implied consent identified in State vs. Jones. Kansas law now clearly states a preliminary test of a person’s blood, breath, urine or other bodily fluids is included within the implied consent provisions of K.S.A. 8-1012. This will, hopefully, eliminate any question that such testing as used by law enforcement officers on the street to assist in establishing probable cause in potential driving under the influence cases are subject to the implied consent law and refusal will affect driving privileges and can be used as evidence in court.

We also eliminated the requirement that a law enforcement officer had to provide a written description of stolen property, the property owner’s name, the name of the photographer, along with several other details before a photograph of the stolen property could be admitted into evidence. Now photographs of stolen property are admissible once basic foundation requirements under the rules of evidence used for all other photographic evidence are met.

Another law expanded last session was K.S.A. 21-3150, which prohibits acts of consensual sexual intercourse, lewd touching, fondling or sodomy, between unmarried adults when one of the participants is employed by the department of corrections and the other is an inmate, probationer or parolee. Now included in this prohibition are Community Corrections Officers and employees of the Juvenile Justice Authority or Juvenile Community Supervision Agency. Amended K.S.A. 21-3150 also includes contractors of any above listed agencies and requires that the inmate, probationer or parolee involved must be under the said employee’s direct supervision. The state must also prove the offender knew their sex partner was under such direct supervision. A definition of the various agency employees is provided in the new law.

As a result of changes made by the 2005 Legislature, an adult convicted of rape or sexual battery is prohibited from getting that conviction expunged. The prior law had allowed for the expungement of all sexual battery crimes and rape, unless the victim was under the age of 14. While juvenile offenders can still get their rape or sexual battery convictions expunged, they can no longer get convictions of forcible rape or aggravated sexual battery expunged.

Finally, in my experience, everyone who serves in the Legislature wants to make good decisions that improve their communities. Many times, the difference between good outcomes and the not-so-good results is the quality of information. The KCDAA has very good representatives, Steve Kearney and Michael White. They are well informed, accessible and articulate advocates on your behalf, but nothing is more effective than working prosecutors from home taking the time to explain an issue as it relates to people and places a legislator knows.
Ethics Issues Affecting Prosecutors:
by David Miller, Miami County Attorney and Ethics Chair

In April of this year, I had the pleasure of attending the National Prosecution Ethics Symposium in Charleston, S.C., that was presented by the National College of District Attorneys. In addition to receiving very valuable information and training, I was able to learn from prosecutors throughout the country about the various systems in place to deal with ethics complaints against prosecutors. I was pleased to discover that the procedure in Kansas for addressing complaints against prosecutors is far ahead of many other states.

In Kansas, ethics complaints are filed with the Disciplinary Administrator. Upon receiving the complaint, the Disciplinary Administrator will docket the complaint unless it is determined to be frivolous or without merit, in which case the Disciplinary Administrator may dismiss the complaint.

Once a complaint is docketed, it is referred to the chairman of the Kansas Prosecutor Ethics and Grievance Committee for investigation. The chairman assigns a committee member to investigate the complaint. When the investigation is complete, a report is sent to the Disciplinary Administrator who makes a recommendation to a three-member review committee, which is appointed by the Kansas Board for Discipline of Attorneys.

The recommendation of the Disciplinary Administrator to the committee can be for dismissal of the complaint, referral to the Attorney Diversion Program, informal admonition or prosecution of formal charges before a hearing panel. The procedures for a formal hearing are set forth in Rule 211.

Where we differ from most other states is in the investigative stage, as complaints against Kansas prosecutors are investigated by other prosecutors. The propriety of this is obvious. Who better to evaluate alleged violations than lawyers who have been in the trenches as prosecutors? This is not to say our fellow prosecutors will be lenient in their investigation or will attempt to protect prosecutors who have truly violated the rules of ethics. We as prosecutors must maintain a reputation of honesty, integrity and fairness; after all, we are the good guys. We cannot afford to have our reputations tarnished by the acts of a few.

Fortunately, there are very few ethics complaints against prosecutors. In the year that I have been chairman of the Prosecutor Ethics and Grievance Committee, seven complaints have been referred to me. One has been dismissed while the other six are either still under investigation or are being reviewed by the Office of the Disciplinary Administrator or the review committee.

Two of the complaints were for statements made during closing argument and two were for extrajudicial statements made by prosecutors. The remaining three are of such a specific nature that they should not be publicly discussed while they are pending.

According to information received from the Office of the Disciplinary Administrator, there are approximately 1,000 complaints against attorneys received by that office each year. One third of those are docketed and the rest are handled by letter without further proceedings. In 2002, three complaints against prosecutors were docketed; one of which resulted in some form of discipline. In 2003, seven complaints were docketed, three resulting in discipline, and in 2004, seven complaints were docketed, four resulting in discipline.

These figures are a positive reflection upon prosecutors in Kansas. It indicates that we can be successful advocates for justice, and can do so in a fair and ethical way. What is frightening is that there are ethical pitfalls that prosecutors can slide into without realizing that they have done anything wrong and certainly not intending any unethical conduct.

According to a pre-symposium survey of the attendees at the National Prosecution Ethics Symposium, the top three bases for disciplinary complaints were discovery, closing argument and dealing with opposing counsel.

We all know that we cannot call the defendant or his witnesses liars in closing argument. We know that we cannot intentionally
withhold discoverable material. We know that we cannot lie to or withhold information from defense counsel to induce a plea. If we intentionally do these things, we deserve to be disciplined. These types of violations will result in reversals of convictions and injustices to victims. They are not the problem.

The problems are not that obvious. In closing argument, for example, we must be able to point out to the jury that the defendant or his witnesses lied without calling them liars. We must strive to know the limits of our advocacy without taking a beating from defense counsel for fear of saying something the appellate courts will find to be error or in the case of prosecutors, “misconduct.” We must do our best to know our limits and stay well within them regardless of defense counsel’s argument or how heinous the crime.

We all know what the statute says about discovery, and we know we also have to comply with Brady v. Maryland and State v. Gammill. Must we disclose to defense counsel during plea negotiations that a material witness has disappeared and may not be available for trial? What obligation do we have to look for impeachment evidence concerning one of our witnesses? Must we disclose that a material witness has been provided mileage, a witness fee, meals or lodging? These and many other discovery issues can result in overturned convictions, ethical complaints and civil liability.

The purpose of this article is not to answer these questions but to heighten awareness. Ethical dilemmas face us on a daily basis and the easiest way to resolve most of these questions is to merely do the right thing. Sometimes it is very difficult to know what the right thing is. Through training and experience, we can minimize the danger of committing an ethical violation. Future articles in “The Kansas Prosecutor” hope to address ethical issues and provide answers to some of these very difficult questions. In the meantime, if it doesn’t feel right, don’t do it.
Tom Stanton and Nick Tomasic, along with friends, family and peers, were honored at a luncheon taking place on the first day of the 2005 Fall Conference at the Sheraton Overland Park Hotel. Each was presented a commemorative plaque. KCDAA President Tom Drees introduced Tom Stanton, and current Wyandotte County District Attorney Jerome Gorman introduced his predecessor, recently retired Nick Tomasic.

### 2005 Prosecutor of the Year Award

**Tom Stanton**

*Reno County Deputy District Attorney*

Tom Stanton has been a prosecutor for 15 years and is currently a drug prosecutor, which is becoming more and more important in the state. Stanton is a Deputy District Attorney in Reno County, and has carried the banner of the McAdams and Frazier decisions to the Kansas Supreme Court in the Campbell case. He has fought for tougher drug laws before Legislative committees at the Kansas State Capitol. While managing one of the highest caseloads in the state, Stanton has shared his expertise with many. He was an originating member of Kansas' Top Gun Program and serves as the Chief Attorney for the Top Gun legal staff. He is involved with the Kansas Methamphetamine Prevention Project, and has served KCDAA in many capacities. He has served as a member of the Prosecutor Ethics, Legislative, Continuing Legal Education and 3R Initiative Committees. He most recently suggested to the board to create a committee to review appellate decisions and trends with the Kansas Court of Appeals and the Kansas Supreme Court. The KCDAA is proud to honor Stanton with the Prosecutor of the Year Award.

### 2005 Lifetime Prosecutor Award

**Nick Tomasic**

*Retired Wyandotte County District Attorney*

In 1967, Nick Tomasic joined the staff of the Wyandotte County Attorney's office as an assistant. In 1970, he was promoted to Chief Deputy. Then in 1972, the office of District Attorney was created and made a full-time position. Tomasic was a leader in the successful effort to create the office of the District Attorney with full-time assistants to handle criminal prosecutions in Wyandotte, Johnson, Sedgwick and Shawnee Counties. He was a past president of the KCDAA in 1975. He served on the Law Enforcement Committee for Criminal Administration, was an original member of the Law Enforcement Training Commission, and a member of the Bench and Bar Committee of the Kansas Bar Association. He also served as a member on the Kansas Citizens Justice Initiative and the Access to Justice Task Force. Involved in many high profile cases, Tomasic has earned the respect of many—his peers, law enforcement, the courts and his community. The KCDAA is proud to honor him with the Lifetime Achievement Award.
Diversions in Kansas
By Ann Swegle, Deputy District Attorney for the 18th Judicial District

One of the most important powers exercised by a prosecutor is the power to charge a criminal offense or to decline such a prosecution. Ethical, legal and practical considerations merge to guide our exercise of discretion in the charging decision. Is there sufficient admissible evidence to support a conviction? Do the victims support criminal charges, and are they available to testify? Are there alternatives to criminal prosecution that would promote the ends of justice? The National Prosecution Standards promulgated by the National District Attorneys Association state that the availability of suitable diversion and rehabilitative programs should be considered by prosecutors in making an initial screening decision on criminal charges.1

Diversion programs, an alternative to formal adjudication and sentencing, can advance the ends of justice by providing rehabilitative services to suitable offenders who are willing and able to account for their misdeeds through restitution and services to the community whose laws they offended. If the defendant fulfills the specified conditions agreed to in the diversion contract, the charges against him will be dismissed with prejudice at the conclusion of the contract term.

The majority of county and district attorneys’ offices in Kansas offer diversion to some class of offenders. Some limit eligibility to traffic offenders while others offer diversion to a broad range of criminal defendants and juvenile offenders. Some diversion programs substitute for problem-solving courts such as drug courts or mental health courts. Others work with a restorative justice model and offer programs such as family group conferencing, where the victim, offender and members of their respective support systems gather together to decide on an appropriate method of compensating the victim and the community for the harms caused and ways to assist the offenders to increase the likelihood that he will not re-offend.

The Supreme Court reviewed the historical background and function of diversion in State v. Greenlee, 228 Kan. 712, 620 P.2d 1132 (1980): 2

The discretion whether or not to prosecute has long been the sacred domain of the prosecutor and stems from the common law nolle prosequi. “A nolle prosequi is a formal entry of record by the prosecuting attorney by which he declares that he is unwilling to prosecute a case, or that he will not prosecute a suit further.” 21 Am. Jur. 2d, Criminal Law § 512, p. 503. It has generally been held that “[i]n the absence of a controlling statute or rule of court, the power to enter a nolle prosequi before the jury is impaneled and sworn lies in the sole discretion of the prosecuting officer.” 21 Am. Jur. 2d, Criminal Law § 514, p. 504.

The statutes adopted in 1977 sought to establish a uniform procedure for a function which was already in existence in a number of counties across the state. The statutes do not enable the prosecutor to do anything that could not be done before. The prosecutor has always had the discretion to decide whether to file charges, to enter into plea bargaining, to reduce charges or to dismiss without prosecution. The statutes allow the prosecutor to file charges but postpone trial for a period of time while the accused participates in various rehabilitation programs. If the program is successfully completed, the charge will be dropped. Before the statutes were enacted, the prosecutor could, and many did, agree not to bring charges against an accused on the condition that he complete certain rehabilitation programs. A waiver of the statute of limitations and the right to a speedy trial could be signed and the effect was the same as that now provided by statute. Id. at 717.

The statutes governing diversion by prosecutors in adult criminal cases are found in K.S.A. 22-2906 through 22-2911.
“Diversion” is defined as the referral of a defendant in a criminal case to a supervised performance program prior to adjudication. Thus, our statutory schema presumes the existence of formal charges rather than a “diversion” granted through an agreement not to file charges provided that certain contractual conditions are met by the would-be defendant. Juvenile offenders may be diverted from a formal adjudication through participation in an intermediate intervention program provided for in K.S.A. 38-1635.

Only certain crimes can be diverted. Off-grid crimes, severity level 1, 2 and 3 nondrug crimes and severity level 1 and 2 drug crimes are ineligible for diversion. Persons charged with DUI who were at the time involved in a vehicular accident involving injury or death, or who have previously been diverted or convicted for DUI here or elsewhere are ineligible for diversion. These restrictions apply to juvenile diversion as well.

K.S.A. 22-2908(a) provides that the following non-exclusive factors shall be considered in determining whether diversion is in the interest of justice and of benefit to the defendant and the community: the nature of the crime charged and the circumstances surrounding it; any special characteristics or circumstances of the defendant; whether the defendant is a first-time offender and if the defendant has previously participated in diversion, according to the certification of the Kansas Bureau of Investigation or the Division of Vehicles of the Department of Revenue; whether there is a probability that the defendant will cooperate with and benefit from diversion; whether the available diversion program is appropriate to the needs of the defendant; the impact of the diversion of the defendant upon the community; recommendations, if any, of the involved law enforcement agency; recommendations, if any, of the victim; provisions for restitution; and any mitigating circumstances.

The consideration of those factors appears to be directory rather than mandatory. In addressing this issue in Greenlee, supra, the Kansas Supreme Court noted that our diversion statutes are modeled after Oregon’s and cited the Oregon Court of Appeals opinion in State v Haas, Or. App. 169, 602 P.2d 346 (1979) with approval: “If a district attorney’s decision is discretionary, he necessarily must have authority to regard any particular factor or combination of factors — including but not necessarily limited to those specified in ORS 135.886(2) — as being dispositive for or against diversion. Nothing in ORS 135.886(2) suggests that the district attorney must weigh the factors listed in that subsection in a particular way, or that he cannot give decisive weight to any one or any combination of the factors in arriving at a decision regarding diversion. “A particular district attorney might conclude that he will never exercise his discretion by offering diversion to persons charged with particular kinds of offenses, e.g., offenses of a given degree (such as Class A felonies), or offenses which he feels are susceptible to and in need of deterrence (such as shoplifting). ORS 135.886(2)(a) provides that one of the factors for the district attorney to consider is ‘[t]he nature of the offense.’ If the district attorney has decided that he will never offer diversion in cases involving offenses committed in a particular manner, the subsection would be rendered absurd by an interpretation which requires, in cases where such offenses are involved, that he consider all of the factors it enumerates when one of the factors conclusively determines how he will exercise his discretion. Greenlee, 228 Kan. at 720.”

K.S.A. 22-2907 requires that each prosecutor develop written policies and guidelines for the implementation of a diversion program and to provide those to each defendant in writing. This requirement can be difficult to meet when dealing with traffic offenses that may be charged by citation with the defendant simply paying a fine without ever having contact with the prosecutor’s office. The Attorney General’s Office has opined that even though it may be
impossible to notify each offender, the notice provisions of the statute do not prevent a prosecutor from offering a traffic diversion program, when viewed in light of the purpose of the entire diversion act. However, such programs should generally comply with the diversion statutes in order to carry out the legislative objective to create uniform diversion policies. Attorney General Opinion 97-70.

DETERMINING SUITABILITY

In assessing a defendant’s suitability for diversion, K.S.A. 22-2907 allows you to require the defendant to provide you information that might otherwise be confidential. It specifically lists data related to criminal history, education, work history, family, residence, medical history including psychiatric or psychological treatment or counseling and “other information relating to the diversion program.”

The provision for “other information” may allow you to require a defendant to take certain actions or provide information such as mental health or substance abuse testing or evaluations or information regarding the crime itself. Requiring a defendant to take a polygraph examination to assist in determining his suitability for diversion was found to be proper in State v. Boydston, an unpublished Kansas Court of Appeals decision, 761 P.2d 1281; 1987 Kan. App. LEXIS 1091.

WHAT YOU MUST DO

Certain provisions appear to be mandatory for all agreements. These are a waiver of all rights pertaining to speedy trial and certain pretrial proceedings and a provision that upon successful completion of the program, the case will be dismissed with prejudice. If the diversion is for a DUI charge, the agreement also is to include a stipulation of facts upon which the defendant will be tried if diversion is revoked; a fine or community service as specified in K.S.A. 8-1567; successful completion of an alcohol and drug safety action plan or treatment program and payment of the associated assessment fee; a waiver of right to counsel and trial by jury. If the diversion is for certain misdemeanor drug or alcohol offenses committed by certain minors, there must be a drug and alcohol evaluation by a certified ADSAP provider.

All diversion agreements are to be filed with the court. A copy of any DUI diversion agreement is to be provided to the Kansas Division of Motor Vehicles. A copy of all other diversion agreements is to be forwarded to the Kansas Bureau of Investigation. Divisions for offenses specified in K.S.A. 72-1397(b)(1) must be reported to the State Board of Education within thirty days of the agreement.

WHAT YOU CAN DO

All agreements may include, but are not limited to, provisions concerning payment of restitution, including court costs and diversion costs, residence in a specified facility, maintenance of gainful employment and participation in programs offering medical, educational, vocational, social and psychological services, corrective and preventive guidance and other rehabilitative services.

Requiring a defendant to make a monetary donation to a charitable organization was held to be within the discretion of the prosecutor in Attorney General Opinion No. 93-120, though prosecutors were strongly cautioned to ensure there is no appearance of favoritism or prejudice in the selection of charities and to develop written guidelines as to the amount and recipients of donations. Presumably, such donations are considered “restitution” to the community at large or a corrective or rehabilitative activity.

Since diversion agreements are contractual in nature, provisions that are otherwise lawful and do not violate public policies should be upheld by the courts. See, Petty v. City of El Dorado, 270 Kan. 847; 19 P.3d 167 (2001). Such provisions might include ones typically used as conditions of probation - calling for the performance of community service work, restricting the type of employment that could be maintained, prohibiting the consumption of certain substances and requiring testing for compliance with the prohibition, setting curfew or travel restrictions, prohibiting Internet access or contact with identified individuals and similar conditions. Others could provide for an agreement that the defen-
dant would be in violation of the contract if he withheld information or lied about criminal history during the pre-acceptance process, or requiring the defendant to testify against others or cooperate in specified criminal investigations.

The nature of charges that could be properly called diversion costs is not defined in the statutory framework. Several Attorney General opinions have addressed issues related to diversion costs. Attorney General Opinion No. 84-15 states that the term “diversion costs” can be construed to include specific expenses actually incurred by personnel of the prosecutor’s office in drafting and executing the diversion agreement but do not include general expenses incurred such as salaries for legal or secrearial staff, office equipment or maintenance or overhead costs.

The opinion states “...[I]t is our opinion that a county attorney could legitimately require a defendant to pay those expenses which stem from the negotiations leading up to, as well as the final execution of, a diversion agreement. These could include charges for evaluations of the defendant by court or county personnel and for obtaining documents necessary to determine the defendant’s eligibility and suitability for diversion. In our opinion, the term diversion costs does not include general expenses incurred such as salaries for legal or secretarial staff, office equipment or maintenance or overhead costs. For example, we do not believe that a county attorney could require a defendant to pay a portion of the attorney’s salary (for the number of hours spent in drafting the diversion agreement) or a secretary’s salary (for the time spent in preparing documents). Court costs do not include charges for the salary of the judge or court personnel, and in the absence of any legislative intent we are not prepared to imply a different meaning for diversion costs. Neither court costs nor diversion costs should be used as means of raising revenue for day-to-day operations of the judicial or law enforcement system. This function is performed in part by the fines which defendants are assessed as part of the diversion agreement, and should not be augmented through the imposition of non-specific ‘costs.’”

Attorney General Opinion No. 97-34 dealt in part with the distinction between fees and fines in county attorneys’ diversion programs. “We next address your question concerning the disposition of the fee required by the ‘County Speeding Policy Guidelines’ you enclose. You refer in your letter to a ‘fine’ rather than a ‘fee’; however, the ‘County Speeding Policy Guidelines’ refer only to a ‘fee.’ As you point out in your letter, fines are to be paid through the clerk of the district court to the state treasurer for deposit into the state general fund. K.S.A. 20-2801. Fees received by a county officer are to be paid to the county treasurer and credited to the county general fund. K.S.A. 28-175. A fine is generally defined as a pecuniary punishment imposed by a court upon conviction of a crime. Black’s Law Dictionary 632 (6th ed. 1990). A fee is generally a charge fixed by law for a service by a public officer or for the use of a privilege under the control of the government. Black’s Law Dictionary 614 (6th ed. 1990). It is our opinion that the fee referred to in the ‘County Speeding Policy Guidelines’ is a fee rather than a fine and, therefore, should be paid to the county treasurer pursuant to K.S.A. 28-175.”

Prosecutors in those counties that have a local fund under the property crime restitution and compensation act may also assess a diversion fee up to $100 to be disbursed as restitution under the act.12

WHAT YOU CAN’T DO

While prosecutors have a great deal of discretion in deciding who should be placed on diversion, you cannot be arbitrary in your eligibility requirements, approval criteria or revocation decisions. “A prosecutor, although possessing wide discretion, is not immune from judicial review of the exercise of that discretion for arbitrariness.” State v. Greenlee, 228 Kan. 712, Syl.4 (1980).

There is no statutory or other authority that allows a prosecutor to collect fines and do anything other than deposit them with the clerk of the district court. K.S.A. 20-2801 provides that fines are to be paid by the clerk of the district court to the state treasurer except as otherwise provided by statute. The only fine that expressly may be assessed under the diversion statutes is the fine specified for DUI offenses.13
Arguably, other fines can be assessed as a corrective or rehabilitative measure. If such fines are assessed, they must be paid to the court. You are not required to assess and collect court costs, but if you do, court costs are to be paid to the clerk of the district court pursuant to K.S.A. 60-2001, K.S.A.28-170, K.S.A.28-172a and K.S.A. 28-176. The term “debts owed to courts” as defined in K.S.A. 75-719 includes “any assessment of court costs, fines, fees, moneys expended by the state in providing counsel and other defense services to indigent defendants...” Thus, a diversion agreement also might appropriately include payment of attorneys’ fees for appointed counsel.

You may not condition diversion on an agreement that the defendant serve a set amount of jail time. In Petty v. City of El Dorado, 270 Kan. 847; 19 P.3d 167 (2001), the Kansas Supreme Court analyzed the statutes controlling municipal court diversions, which closely resemble the statutes controlling diversion in district courts, and the statute authorizing a municipal court judge to commit defendants to jail. The court held that a court cannot order a defendant to serve 48 hours in jail as a condition of a DUI diversion agreement. “A diversion agreement is the specification of formal terms and conditions which a defendant must fulfill in order to have the charges against such defendant dismissed. Diversion is, therefore, a means to avoid a judgment of criminal guilt. See K.S.A. 12-4413. Inasmuch as no judgment of guilt is entered when diversion is granted, the district court was correct in finding that the municipal court judge had no authority to order Petty to a period of jail confinement as a condition of diversion.” Id. at 852-853.

The court also stressed that diversion was designed to be an alternative method of rehabilitation rather than the traditional forms of incarceration or probation. Finding the contract provision for jail time violated the public policy of the state, the court held that provision should be voided while the rest of the contract should be upheld. “It is the duty of courts to sustain the legality of contracts in whole or in part when possible. Courts may void only those portions of a diversion agreement that violate the intent of the legislature and order enforcement of the remaining provisions.” Id. at 847, Syl. 6

While K.S.A. 22-2910 prohibits you from requiring a defendant to enter a plea to a charge to receive diversion on that charge, you can negotiate a plea on multicount information that includes diversion on some charges and guilty pleas on others. “Just as discretion rests with a prosecutor as to whether to dismiss criminal charges against a defendant, it is the prosecutor who decides whether to offer a diversion agreement to a defendant. See K.S.A. 22-2907(1). The prosecutor is not required to exercise his or her discretion identically for each and every count of a complaint...It is reasonable and sensible to permit a prosecutor to utilize the diversion alternative in combination with any of the other available alternatives when working out a plea arrangement on a multicount complaint. The defendant is free to reject the proffered combination of alternatives. The only prohibition is that the defendant cannot be required to enter any plea to the charge(s) subject to the delayed adjudication of diversion.” State v. Scheurman, 32 Kan. App. 2d 208, 211, 82 P.3d 515 (2003)

K.S.A. 22-2910 also bars the use of any statement made by the defendant or counsel during meetings held to discuss diversion in any criminal proceeding on the crimes for which diversion was sought. However, assuming confrontation clause concerns are met, such statements can be introduced against a co-defendant. “We hold that the provisions of K.S.A. 1983 Supp. 22-2910 making statements of a criminal defendant or defense counsel during a diversion conference inadmissible in a subsequent trial may only be invoked by that defendant and not by a codefendant, even though both are charged in the same complaint.” State v. Wilkins, 9 Kan. App. 2d 331,333, 676 P.2d 159 (1984).

STARTING AND TERMINATING DIVERSION

A diversion agreement, providing for trial on stipulated facts if it is breached, is not tantamount to a guilty plea and need not be treated as such. And, in the absence of fraud, undue influence or mutual mistake, an individual who
is represented by counsel and who signs a diversion agreement is presumed to have read and understood the terms of that agreement. *In re Application of Tolle*, 18 Kan. App. 2d 491, 856 P.2d 944 (1993).


A diversion contract will be terminated upon successful completion of its terms at the date specified in the contract. If a defendant breaches the conditions, the state can move the court to revoke the diversion or extend or modify the contract terms with the agreement of the defendant. However, a trial court’s order denying revocation of a diversion agreement is not a pretrial order suppressing or excluding evidence within the meaning of K.S.A. 22-3603 and is not an appealable order. *State v. McDaniels*, 237 Kan. 767, Syl. 4, 703 P.2d 789 (1985).


If a defendant fails diversion and is subsequently acquitted, she may not recover the diversion costs that were previously paid. *State v. Bullock*, 18 Kan. App. 2d 164; 849 P.2d 137 (1993).

**CONCLUSION**

Diversion programs are useful tools in the criminal justice system. They provide prosecutors the ability to ensure accountability for criminal wrongdoing while giving suitable individuals the ability to receive corrective services and avoid the lasting stigma of a criminal conviction. Under prosecutor diversion programs, crime victims often feel their concerns are quickly and properly addressed and that they have a role in determining how they are to be compensated for the harm done to them. In the right cases, diversions programs can offer the illusive, often sought but rarely attained, win-win situation.

*Footnotes*

2 The court also held that the newly enacted diversion statutes did not violate the separations of powers doctrine by the legislature unduly encroaching on prosecutors’ discretionary powers.
3 K.S.A. 22-2906(3)
4 K.S.A. 22-2909(a)
5 K.S.A. 22-2909(c)
6 K.S.A. 22-2909(g)
7 K.S.A. 22-2909(f)
8 K.S.A. 22-2909(j)
9 K.S.A. 22-2909(i)
10 K.S.A. 72-1397(e)
11 K.S.A. 22-2909(a)
12 K.S.A. 22-2909 (a)
13 K.S.A. 22-2909 (c)(1)
Assistant Johnson County Attorney Jill Kristin Bachman Kenney and her husband Corey Kenney, assistant Miami County attorney, announce the birth of their son, Asher Francis Kenney. He was born on July 26, 2005, weighed 8 lbs., 14 oz. and was 20 1/2 inches long.

Assistant Attorney General Kevin Graham and his wife Peggy, are pleased to announce the birth of their son, Joseph Arthur Graham, who was born April 15, 2005. Welcoming him home are older sisters, Katie, 6, and Emily, 4.

Mandee L. Schauf recently joined the Office of the District Attorney of the 18th Judicial District as an Assistant District Attorney in the Traffic Division. She was born and raised in Wichita. Schauf received her undergraduate degree from Wichita State University in May 2002, and her Juris Doctor from Washburn School of Law in May 2005. While interning for the District Attorney’s Office in Sedgwick County during her second year of law school, Schauf developed a passion for prosecution.

Wade H. Bowie II recently joined the Office of the Allen County Attorney as Assistant County Attorney. Bowie earned his undergraduate degree from Washburn University in Criminal Justice, and he earned his Juris Doctor from Washburn School of Law in May 2004. He previously clerked for Carol Green at the Kansas Supreme Court and was a CINC attorney in Shawnee County. His father, Wade Bowie, Jr., recently took an Assistant District Attorney’s position in Douglas County after working for the Juvenile Justice Authority.

Patrick Y. Broxterman recently joined the Office of the District Attorney of the 18th Judicial District as an Assistant District Attorney in the Traffic Division. He was born and raised in Hutchinson, Kan. Broxterman received his undergraduate degrees in Life Sciences and Speech from Kansas State University in 1998, and his Juris Doctor from University of Kansas School of Law in May 2005.

Michee L. Schauf

Special Announcements

Paul J. Morrison, District Attorney for Johnson County, announced on Oct. 25, 2005, that he is running for Attorney General in the 2006 election. Morrison has been at the Johnson County DA’s office since 1980, and became District Attorney in Johnson County in 1989. He completed his undergraduate degree in Criminal Justice at Washburn University in Topeka, and is a graduate of Washburn University School of Law. Born in Dodge City, Kan., he grew up in Hays, Plainville, Bonner Springs and Kansas City, Kan.
Looking into a person’s computer is like looking at electronic DNA: a profile of the mind and behavior of a person.

Computer forensics places investigators inside the hard drive of a computer and can allow police to follow the movements of a cyber criminal. Initially, computer forensic applications were designed to investigate financial crimes and “hackers.” Since its inception, investigators have discovered computer forensics are useful in cases other than so-called “cyber crimes.”

The serial killer from Sedgwick County who called himself “BTK,” eluded law enforcement for years but was located in large part through the use of computer forensics. Two homicides in Douglas County were recently solved and prosecuted successfully through investigation of the information stored on the computers of the offenders. None of these crimes were traditionally considered “computer crime” but an autopsy of the computer provided investigators with key evidence for solving the cases.

What is “computer forensics”? Computer forensics is quite simply a method for examining the contents of a computer for use in a forensic setting. As with all types of evidence collection, care is taken to insure that the original evidence is maintained intact and that the processes of analysis can be replicated by another examiner.

What can we learn from a computer? From preschool to well past retirement age, people use computers for communication, entertainment and education. Criminals are no exception. Drug dealers may keep detailed transaction histories in their handheld computers or their personal computers; pedophiles may search for victims in chat rooms and may save transcripts of their virtual conversations; murderers may search the Internet for ways to kill someone without getting caught.

Why would someone keep this information in their personal computer, just waiting for a technogeek investigator to come snooping around for it? Many people believe that when they “delete” a file from their computer that the information is gone. In reality there are different layers of deletion and unless a “wipe” program is employed to completely obliterate all information from certain sections of the computer disk, the information may still be available. Some files, such as “deleted” Internet history files, may not be generally accessible to the user, but may only be available to a forensic examiner who knows where to look for such information. Deleted files: the majority of computers on the market employ a complex system for keeping track of the location of certain data contained on the hard disk. This system is called a “file allocation table” also known as FAT. The file allocation table keeps track of the various sectors of the disk, which is analogous to an “old-fashioned” library using a card catalog. The FAT is the card catalog that will tell the computer which shelf contains the piece of information (book) the user is trying to access. When a user deletes a file, the FAT removes the card catalog entry, and notes that the space on the shelf is available for another book to be placed there. Even though that book is still in place, the space it occupies becomes “unallocated” and then another file could “overwrite” that file. If new information is introduced and overwrites only a portion of the space formerly occupied, the part that is not yet overwritten is called “slack.”

Returning to the analogy, if the librarian decides to remove War and Peace from the shelf and replace it with a single copy of The Kansas Prosecutor, there will be a large amount of space still on the shelf. Because the new information (The Kansas Prosecutor) only overwrites as much as it needs, the first 15 pages of War and Peace would be displaced, leaving the
The remainder of the epic intact and retrievable by a forensic examiner.

The forensic examiner also can determine from the computer’s internal clock system when documents have been written to the computer and when the computer’s processor has been activated. Some processes may be automated, while others require user input to run. This analysis can be used to establish habits and customs of a user or may allow the prosecutor to show that a particular computer was being used at a time that corresponds with other important facts of the case.

The potential uses of information gleaned from a suspect or victim’s computer is unlimited. The process of collecting and analyzing the computer must be executed within defined protocols for the integrity of the evidence to be maintained.

The Heart of America Regional Computer Forensic Laboratory in Kansas City, Mo., provides services for law enforcement agencies throughout Kansas to assist with collection and analysis of computer evidence. In addition, these specially trained officers and agents are extensively skilled in both the practical and legal aspects of computer forensics and are available to assist with the drafting of search warrants that will hold up under judicial scrutiny.

Search warrants for computer information must be carefully drafted to correlate probable cause with the scope of the search. A suspect may own a single computer or an entire network of computers, printers, scanners and modems together with external media such as floppy disks, compact disks or writable DVD disks. Forensic examiners are trained to examine only those items which are authorized by warrant, but also to recognize what information might be found in “plain view” within the scope of the original authorized search. This information may lead the examiner to seek additional search warrants and to uncover additional evidence of criminal activity.

The FBI aims for its forensic examiners to be dispassionate scientists akin to the DNA technician who simply conducts an examination and reports the results. The forensic examiners who staff the RCFL are law enforcement officers from various jurisdic-

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**What is an RCFL?**

An RCFL is a one-stop, full service forensics laboratory and training center devoted entirely to the examination of digital evidence in support of criminal investigations such as, but not limited to:
- Terrorism
- Child Pornography
- Crimes of Violence
- The Theft or Destruction of Intellectual Property
- Internet Crimes
- Fraud

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**State v. Thomas E. Murray**

The Internet history files of Kansas State University professor Thomas Murray revealed an interesting pattern of searches that coincided with mediation sessions about custody. The day after each mediation session, Murray used his office computer to search such terms as “colorless, odorless poisons” and “how to commit murder and not get caught.” The day between the final mediation session and the day Carmin Ross was murdered, the only search was for a way to reach the victim’s house without using the Kansas Turnpike. Murray revealed in his 10-hour interview that he believed there were cameras to record traffic entering and exiting the turnpike.

In addition to this Internet activity, a pattern of usage emerged. Nearly every Thursday from the beginning of the semester, Murray checked his e-mail through a web client on his laptop computer at home. The only two exceptions to this usage pattern were a day he was in Missoula, Mont. for a conference, and the morning his former wife was being killed.

May 6, 2005, Murray was sentenced to life in prison for first-degree premeditated murder. The couple’s 6-year-old daughter is being raised by her aunt and uncle.
tions. These officers should be provided with essential facts of the case to help them direct their own piece of the investigation and to determine what information is relevant or helpful.

The process of analysis of a suspect’s computer

The first step in analysis of the contents of an individual computer is in the collection of the computer. Properly trained forensic examiners will know the proper way to collect a computer to avoid loss of transient data that might be stored in the volatile memory of the computer. The volatile memory will contain such information as the last input and login on the computer. A “shutdown” may overwrite this information, so a trained expert should be called in to do the collection.

The forensic examiner will make a copy of the evidentiary disk and then all work will be done with this copy, known as an “image” of the disk. The image is then converted into a text-only version of itself to allow searching by certain text strings. Any occurrence of the search term will be flagged for the investigator to review. The search terms employed by the forensic examiner must be specifically authorized by the warrant.

If the examiner finds evidence of additional criminal activity beyond that described in the warrant, he or she will seek an additional search warrant to obtain authority for expanding the scope of the investigation. This can occur when the examiner discovers in plain view such contraband as child pornography.

After the text search is completed, a software tool is employed to determine the location of the files in which the searched word or words are found. Some of the search terms may be found in text documents, spreadsheets or Internet pages saved or “cached” on the computer. By reviewing the locations of the files, certain documents which may have evidentiary value can be reviewed. If the document containing the search terms has been deleted or partially deleted, the forensic examiner can then go about recovering or restoring the files.

Usage patterns

In addition to determining where certain documents are housed within the layers of data on a computer disk, the forensic computing software can determine when activity occurs on a computer. This can be used to monitor usage patterns of a suspect and can be used to examine such things as what kinds of computer activities are performed habitually at certain times. For example, if a suspect habitually uses his computer every morning between 9:00 and 11:00 a.m., except on the morning of the crime, the variation from habit can be helpful to the investigation and prosecution.

Preparation for presentation of computer forensic evidence

The qualified computer forensic examiner should have completed several weeks of training. The FBI’s Computer Analysis Response Team (CART) requires an FE to obtain several sub-certifications in computer hardware repair, a

State v. Dennis Rader

After years of taunting detectives in Wichita with the sheer randomness of his brutal killings, the self-named “BTK” serial killer was found through a computer disk he used to communicate with law enforcement. Information encoded within documents created by commercial programs can trace the creation of documents to a particular computer. This information, called “metadata,” is inserted into documents by software developers to improve their products. The resulting boon to law enforcement is simply an unintended consequence of excellence in customer service.

Shortly after Rader was sentenced to 10 consecutive life terms for his killings, the Heart of America Regional Computer Forensic Laboratory was honored for its contribution in stopping the criminal.
written proficiency test in operating system specifics and a week-long basic data recovery before attending a two-week boot camp to learn the CART procedures. After the coursework is complete each examiner must complete a real-world practical skills test and then be subjected to direct and cross examination regarding the procedure and the content of the forensic report. There are several advanced certifications that can also be obtained by these examiners. A thorough understanding of the extent of training these witnesses have achieved can help to convey their qualifications to a jury.

The CART-trained forensic examiners are well qualified to testify about the examination they have conducted, but no prosecutor should try to “wing it” with a forensic examiner as a witness. To understand the significance of the evidence collected it is important to schedule pre-trial conferences with the forensic examiner and be certain that the prosecutor is confident with the information to be presented. It is also important that the prosecutor determine whether the forensic examiner is educated in all the areas of computer information that must be presented. For example, your forensic examiner may not be an expert on Internet operations or the process of buying and selling property in online auction sites such as eBay.

Additional training in the field of computer forensics is available at no cost to law enforcement agencies through the National White Collar Crime Center (NW3C) toll free at (877) 628-7674 or on the Web at www.cybercrime.org. Training or services are available through the Heart of America Regional Computer Forensic Laboratory at (816) 584-4300 or on the Web at www.harcfl.org.

State v. Martin K. Miller

Within an hour of when Mary Miller was strangled in her bed, her husband searched the Internet for “deepest sleep patterns.” The morning he “found” his wife dead in the couple’s bed, Martin Miller sent his lover a message telling her that his wife was dead. A forensic examination of the computer revealed thousands of images of pornography including photographs Miller himself had taken documenting sexual relations with his lover. Shortly before his wife’s murder, Miller had registered for several on-line services to meet women. In one under “marital status” he told subscribers to “ask [him] later.”

July 21, 2005, Miller was sentenced to life in prison for first-degree premeditated murder. The couple’s two teenaged children are being raised by a foster family.
KCDAA Member Highlights:

Two long-time active, influential members of KCDAA
by Keri Renner

Christine Kenney and Terra Morehead have a lot in common. Both are former head prosecutors working as a district attorney and county attorney, respectively. They both come from small towns, and both currently work for Eric Melgren, the U.S. Attorney for the District of Kansas. Possibly the most important common trait these women share is that they both have contributed to the Kansas County and District Attorneys Association.

Kenney was a former assistant district attorney in the Douglas D.A.’s office and served as the Douglas County District Attorney for eight years. She is now working as an Assistant U.S. Attorney in Topeka. Her work involves general criminal cases with more focus on white-collar crime. The most notable case she’s had to date was assisting with the trial of former Westar Energy, Inc., Executives David Wittig and Daniel Lake, who were convicted of looting the company.

Morehead was a former Kiowa County Attorney and Assistant Wyandotte County District Attorney. She now works as an Assistant U.S. Attorney in the Kansas City, Kan. office. She handles criminal cases running the gamut of drug trafficking to kidnapping to child pornography. She recently won a case as lead prosecutor against Demetrius Hargrove, who was found guilty on three capital murder counts and one count of conspiracy to kill a federal witness.

Kenney, a Katy, Texas native, came from a small town near Houston. Her interest in law first began in high school during a social studies class discussing the U.S. Supreme Court. She went on to attend college at the University of Houston and earned her bachelor’s degree in 1984. She earned her J.D. from the University of Kansas School of Law in 1987.

After graduating from law school, Kenney went into private practice with a law firm in Law-rence, Kan., Berkowitz and Chappell. She began her career in prosecution in 1989 when she became an assistant D.A. for then District Attorney Jim Flory. That same year, she attended her first KCDAA conference and was impressed.

“The seminars focused on what prosecutors needed to know, and prosecutors could have input on relevant and timely issues they faced,” said Kenney.

Morehead grew up in the small southwestern town of Greensburg, Kan. She knew from a young age that she wanted to be involved in law enforcement. If she wasn’t going to be a lawyer, then she wanted to work for the police department. She attended undergraduate school at Washburn University in Topeka and completed a double major in political science and criminal justice. She then began graduate school at Wichita State University, not knowing if she would be accepted to law school. She got in to Washburn’s School of Law and earned her J.D. three years later in 1986.

After law school, Morehead went back to Greensburg. The current Kiowa County Attorney had been in that position for 14 years, and had two years left in his term. He knew that Morehead wanted to be a prosecutor, so he resigned his position and Governor Hayden appointed her to fill the vacancy in October of 1986.

Morehead first became aware of the KCDAA from a mailing she received from then Executive Director Jim Clark, who was from her hometown.

“He knew I had been appointed to the position, and I thought it sounded like a great opportunity to network with other prosecutors,” said Morehead.

She was glad to have an environment in which she could communicate with others with the same interest in prosecuting criminals. Many of her former classmates from Washburn also became prosecutors, so it was an opportunity to network with them as well.

Kenney became involved in the association after being asked to serve as a director on the board, and eventually moved her way up to the president’s position in December 2004. Her role as president was short-lived, as she lost her D.A. race the month before to challenger Charles Branson. “I will always be very proud to have been a part of the organization,
and I am sorry that my position is such that I could not finish out my board membership,” she said.

Kenney was on the search committee who hired Steve Kearney to become the new executive director of the KCDAA. Kenney has been excited to see the progressive transformation of the organization.

“The reality was, the organization had been trying to make do with one full-time staff member and one part-time staff member, and in order to do all of the things that the membership desired to do, that just wasn’t a reality,” said Kenney. “A full-time management team which has different specialties has multiplied the areas that we can focus on.”

Morehead contributed to the association by giving advice to less experienced prosecutors in areas that she had a lot of knowledge in, and at times, she said her advice was based on errors she had made along the way.

“Because I have always had a passion for prosecution, I’ve always wanted to give guidance however I could,” she said.

Morehead said the Association has advanced for the better from the time she first became a member.

“The content of the meetings has definitely improved. But, the most important quality is the proactive approach to getting involved in legislative matters to improve laws,” said Morehead.

Kenney echoes those sentiments.

“I think now we have more of a presence in the Legislature than we were able to have before; I think we have more of a voice statewide, which still needs to be worked on—there’s always room for improvement, and I think the association has been moving in a very positive direction,” said Kenney.

Kenney said that when she first joined the association back in 1989, few, if any, had access to e-mail. The fact that most prosecutors now have access to electronic communication makes the organization run much smoother. When she was hiring prosecutors, she would get more responses from the KCDAA web site than she would from newspaper ads.

With the association covering 105 counties across the state, getting all prosecutors involved with KCDAA issues isn’t a simple task.

Kenney said that the KCDAA board has tried many different ideas to get the membership as a whole more engaged.

“I almost think that you need to have a face-to-face sit down to say, ‘Ok, I’m not from a small office. Tell me what you do during the day. Tell me what’s going to be helpful to you.’ I think that’s been tried to some extent when we have counties that don’t join because they don’t see the benefit,” she said.

Morehead has worked in small and large jurisdictions, and she realizes the dynamics of both.

“It’s important to address the specific needs of the smaller jurisdictions and make certain that they have a network of prosecutors available to assist with answering questions or providing courtroom help,” said Morehead.

Kenney said she believes it’s necessary to engage each office at some level.

“I think it’s important to remember that each county attorney’s office is different from the next, and each district attorney’s office is different from the next, and they all have different interests, but the ultimate goal or desire of every county and district attorney is to make sure that our laws are solid, that they’re uniformly enforced and when we have dangerous people out there, we have a place to put them,” she said. “It’s important not to lose sight of the ultimate goal of every prosecutor in this state is the same.”

Both women agreed that the KCDAA has been a constructive part of their careers.

“I think the association kept me from being too focused on an individual county,” Kenney said. “The work we did at the state level affected the citizens on the local level. It made me see prosecution in Kansas on a statewide scale.”

“The association certainly allowed me to build friendships and make contacts that I continue to value and utilize in my daily work,” said Morehead. “It also was a support mechanism to becoming a career prosecutor.”

Terra Morehead
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