

The Kansas Prosecutor

The official publication of the Kansas County and District Attorneys Association

Volume III, No. 1, Spring 2006



Now Available---

The Next Level for Criminal Justice

- § "...designed by Kansas Prosecutors for Kansas Prosecutors, keeping them on the forefront of technology."
Gordon E. Lansford - Director of Kansas Criminal Justice Information System
- § "This program makes updating cases a snap. A few clicks here and there and you're done. No more wasting time filling out journal entries, dismissals, etc. Within a minute they are done. It's great!!"
Tonia Driggs, Legal Secretary
- § "The software is very intuitive and easy to learn how to use. With very little training, I was able to become very comfortable using the software within about a week."
Patrick J. Cahill, Assistant County Attorney
- § "What used to take me a day and a half to do, I can now accomplish in one afternoon."
Bill Winzenburg, Victim/Witness Coordinator
- § "The functionality of KPS provides the efficiency necessary to accurately charge and prosecute an individual and track every step of the case...
...I look forward to the data exchange with the courts to improve upon the efficiency of both the FullCourt and KPS programs."
Kathy Carpenter, Office Manager



To learn how FullCase (KPS) can improve your office productivity; and, for additional information or product demonstration contact Justice Systems.

** For federal funding opportunities contact Gordon Lansford, Director of KCJIS - [785] 633-7700.*

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

Published by the Kansas County and District
 Attorneys Association, 1200 S.W. Tenth Avenue,
 Topeka, Kansas 66604.
 Phone: (785) 232-5822 Fax: (785) 234-2433



Our mission:

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

For questions or comments about
 this publication, please contact the editor:
 Mary Napier
mary@napiercommunications.com

Board of Editors

John Settle	Jerome Gorman
Dave Debenham	Michael White
Mary Napier	

Advisory Council

Angela Wilson, chair	
Brad Lippert	Ernie Richardson
Lee Davidson	Kimberly Knoll

KCDAA Executive Director

Steve Kearney

KCDAA Administrative Staff

Michael White	Leisa Shepherd
Andy Shaw	Kellie Kearney
Kari Presley	

This magazine is dedicated to professional prosecutors
 across the state of Kansas for public information. The
 KCDAA and the members of the Editorial Board
 assume no responsibility for any opinion or statement
 of fact in the substantive legal articles published in
The Kansas Prosecutor. We welcome your comments,
 suggestions, questions, information, etc. From time
 to time, *The Kansas Prosecutor* will publish articles
 dealing with controversial issues. The views expressed
 in *The Kansas Prosecutor* are those of the authors and
 may not reflect the official policy of the KCDAA. Send
 correspondence to: *The Kansas Prosecutor* editor, 1200
 S.W. Tenth Avenue, Topeka, Kansas 66604 or e-mail
 Mary Napier at mary@napiercommunications.com.

© *The Kansas Prosecutor* All rights reserved

Photocopying, reproduction or quotation is strictly
 prohibited without the written consent from the
 publisher or Editorial Board. Unsolicited material
 and/or correspondence cannot be acknowledged or
 returned, and becomes the property of *The Kansas
 Prosecutor*.

The Kansas Prosecutor

The official publication of the Kansas County
 and District Attorneys Association

Volume III, No. 1, Spring 2006

Table of Contents

President's Page by Doug Witteman.....	2
Executive Director's Page by Steve Kearney.....	3
Editor's Page by Mary Napier.....	4
Legislative Session Under Way by Phill Kline.....	5
The Re-Write of the Code for Children and the Juvenile Justice Code by Rep. Jan Pauls.....	7
A Thumbnail Sketch of Forfeiture Procedure by Colin D. Wood.....	9
The Office of the Kansas Securities Commissioner Prosecutes Securities Fraud by Chris Biggs.....	11
Ethics and the Criminal Prosecutor by Robert Don Gifford.....	12
KCDAA Milestones	19
Presentation Skills for Lawyers by Elliott Wilcox.....	20
Forgotten Victims: Workplace Aggression Encountered by Prosecutors by Patricia L. Fanflik.....	22
Former KCDAA Member Highlights:	
Making the Leap from Prosecutor to Judge by Mary Napier.....	29
Walking the Red Carpet by Nola Foulston.....	31



About the Cover

The Ellis County Courthouse was built in
 1942 and is made of native limestone. It was a
 Works Progress Administration project. This is
 the third courthouse in Ellis County. The first
 one was built in 1874, but burnt down. It was
 replaced in 1898 with the second courthouse,
 which was replaced by the current building at
 1204 Fort Street in Hays, Kan. The building
 is four stories high with lots of marble lining
 the hallways and courtrooms. One of the most
 amazing features is the spacious third floor
 courtroom.



President's Page

by Doug Witteman, KCDA President

Today I find myself sitting at my computer intent on fulfilling one of my first obligations as president of the KCDA: writing an article for the President's Page. My instructions were short and simple. I am to write a 750 to 900 word article on absolutely any topic. After having thought about this task for the past few weeks, I have determined to opine on the subject of balance, both as it relates to balancing the pressures and responsibilities within our work, but also in balancing our work with the rest of our lives.

Being a lawyer is not an easy line of work. Being a prosecutor is not an easy line of lawyering. On regular occasions the nature of our work as prosecutors can leave us feeling like the weight of the world is on our shoulders. Justice itself often depends on how successful we are at accomplishing the many tasks our work entails. Whether it is trying an important case to a jury, prosecuting an appeal to uphold a conviction or simply deciding how to deal with a youthful offender on a relatively small case, how well we do our work really does matter.

As prosecutors the law gives us broad discretion to make decisions. The decisions we make can have significant impacts on other people's lives. I have often thought that as much justice flows from behind our desks as flows from behind the bench. In slam dunk cases only a prosecutor gets to decide whether society is better served by charging and convicting someone with a felony or whether society and therefore justice is better served by charging and convicting that same person with a misdemeanor in order to give them a better opportunity to redeem themselves.

In my experience, judges give significant weight to our sentencing recommendations. Does justice in any specific case mandate that we argue for a prison sentence or agree to recommend probation? When dealing with serious crimes and serious criminals our work may be long and hard, but our decisions on how to deal with these cases are usually straightforward and clear. It is the lesser cases that I find weigh more heavily on me, and I suspect the same is true for many of you.

In handling any case, it is important to not let yourself get overloaded and mentally bogged down to the point that it is difficult to effectively handle your entire case load. We all know that preparing for and trying a big case may require late nights and weekends, and we are all prepared to do what it takes in those instances. For many of us, however, it is not the big case or trial that occupies the majority of our time. Year in and year out, it is all the other cases that occupy the majority of our time and decision making process. Because our decisions in these cases have profound effects on others, it is important that our decision making process be both efficient and effective.

I have been asked on more than one occasion by people from many walks of life how prosecutors deal with the responsibility and pressure associated with making these decisions. I have told them that my process is fairly simple. I gather all of the information I feel that I need in order to make a sound decision. In any given case this may include considering the police reports and evidence, talking with law enforcement officers, speaking with the victims and occasionally speaking with a defendant or his lawyer. I then make the decision and do the work necessary to execute that decision. Then, and perhaps most importantly, I do not engage in second guessing myself.

Frankly, as prosecutors we simply

do not have time to dwell on the decision that has already been made. Tomorrow we have another case, another defendant and another decision to make. This is not to say that we should not learn from the outcomes of our past decisions. We must. But it is to say that we cannot get bogged down or worry about the decisions we have already made. To do so would be counter-productive to making the decisions we must make today and the next day. In short, we must gather the necessary information, make the decision and move on.

By balancing the responsibilities of our work, we will be left with the time necessary to balance our work with the rest of our lives. I suspect, for most of us, our work plays an important role in defining who we are. It is, however, only a part of who we are. We must be able to put our work aside when we leave the office. We must put it aside to focus on our families, our friends, our relationships and on ourselves. Although we all know that this is not always possible, we must come to know that it is possible most of the time.

It is important that each of us take time away from our work. There are times we will need to work evenings and weekends. It is just as important, however, that we regularly schedule time away from the office. An annual vacation should be scheduled and enjoyed. If your work is caught up and your circumstances allow, take a weekday afternoon off. You will be better and more productive at your work if you become better and more productive with your time away from work.

We all know, or should know, the things in life that are truly important to us. One of those things may be our work, but there are so many other things that must occupy our time, our attention and our focus. For each of us to be effective prosecutors it is imperative that we balance our work and balance our work with the rest of our lives.

Executive Director's Page

by Steve Kearney, KCDA Executive Director

Charting the Future

The Board of Directors of the Kansas County and District Attorney's Association recently held a retreat to discuss charting the course for the future of the organization. It was an exciting planning and visioning effort on the part of the Board.

The first consideration by your Board of Directors was an evaluation of the current level of service being delivered to the membership and the quality of that service. The Board reviewed the past financial statements, conference attendance/growth, establishment of this very publication and the increased legislative visibility/success of the organization. It found that current services are on the right track and the areas set forth above have improved significantly over the past several years to the point that the KCDA and KPTAI respectfully, should consider what the next level of maturity for this organization should be.

The Board considered many different future endeavors to benefit Kansas prosecutors including the endowment of a chair at one or both Kansas law schools for prosecutorial instruction, scholarships for law students going into career prosecution and a political action committee to name a few.

The over-arching theme was the pursuit of development and support of career prosecutors. The Board recognizes the Kansas County and District Attorneys Association as the Bar Association for Prosecutors and is determined to direct the growth with that vision in mind.

This growth and expansion, just like any other, will take an infusion of funds at a time when none of the traditional funding methods show much elasticity. Conference

attendance is at an all time high, so increasing attendance is not a viable goal. Membership is at a level that gaining those still at large will bring some additional revenues, but certainly not enough to endow a law school Chair for example. So your Board of Directors has begun exploring other avenues of funding future endeavors.

As you might suspect, all the obvious revenue avenues were discussed first while the Board did its due diligence: 1) there has not been a dues increase for years; 2) the conference fees have likewise not increased; 3) costs of the conferences have of course continued to climb with the same inflation we have all experienced personally; and 4) room charges, food, speakers, travel, AV, printing, postage, also have all increased. These increases keep ratcheting up while charges to membership and member offices have not, resulting in revenues remaining flat.

While some increases in those revenue areas would yield short-term cash infusion, the Board was quick to recognize that anything beyond funding the current services for a little bit longer time, would likely not be realized from just that approach. Certainly the future vision of the organization could not be realized by nibbling around the edges of funding solutions.

That took the Board to the next level of planning, the real visioning part, with a more 30,000-foot approach to see what might be possible. The discussion turned to the establishment of a Prosecutors Foundation. The possibilities they discovered quickly are only limited by imagination and the IRS. The



ability to receive grants, bequeaths and donations of many different types were discussed.

The Board then received information regarding a capital campaign from a professional fundraiser. While the notion of many of us having any money to donate or bequeath to such a cause seems unlikely in most cases as public servants, the likelihood of other types of donors began to take more shape, as the foundation establishment and fundraising discussion continued.

The methodology for fundraising with donors willing to endow law school chairs and scholarships while an art, also embraces a certain amount of science. The science part is the feasibility study. It would encompass further visioning, identification of potential donors, and a testing of the message with other foundations and high level contributors. The Board is currently considering moving to the feasibility step to further explore the possibilities. While there is a cost associated with this first step, the benefit of arming the Board with sufficient information to make an informed decision likely outweighs them.

While most Board meetings of any organization end with a sense of relief that they are finally over, this meeting ended with a lot of electricity in the air about the future of this organization and the legacy that can be left by all of you for future prosecutors. Watch for more developments in the Advance Sheet and other issues of this publication as the Board "Charts the Course for the Future."



Editor's Page

by Mary Napier, Editor, The Kansas Prosecutor

I am the new editor of *The Kansas Prosecutor*. I have met a few of you, and I hope to meet more of you in the future. At this point, I have been through my first editorial board conference call, planned deadlines for each issue of the magazine, tracked down articles, waited on other articles, began the layout on my first issue of the magazine and so much more. Just let me say: "I'm loving it." Everyone that I have been working with is great and very helpful. To make this transition to a new editor even easier, I want to tell you about myself.

I graduated from Washburn University in 2004. (Yes, I am a fairly recent graduate, and I had no desire to go to law school. Sorry.) I originally went to Washburn for a broadcasting degree. After a few classes of that, I decided to turn in a different direction and fall back on my strong writing background. So, I fell right into the journalism and public relations sector of the Mass Media Department at Washburn. Luckily I never had to change my major and managed to graduate in three years. As my focus changed with my classes, so did my goals for life after college. My goal was to become a magazine editor. So, I started looking for a magazine editor position toward the end of college. But, big surprise, there just aren't a whole lot of those in Topeka.

I did manage to find a part-time editorial assistant position. But, I eventually decided a full-time job with benefits would be a better situation, so I became a communications specialist

for the Kansas Motor Carriers Association. That position taught me that I didn't want to just be a magazine editor, but I wanted to be a graphic designer, too. I wanted to design the magazine, design other publications, design conference materials, whatever. I really loved every aspect of the communications field that I was put into. So, I decided to go one step further.

I started my own contract and freelance communications business, Napier Communications, Inc. This allows me to work on a variety of projects for a variety of companies. Now, I am a magazine editor, and I get to work on a number of design projects. I am really excited about the opportunities with the KCDA and Kearney and Associates.

Now, let's talk about the magazine. I think you will find this issue has a variety of articles. As a prosecutor, sometimes it is hard to balance your work with everything else that is going on. KCDA President Doug Witteman has some tips for you about balancing these elements. You can find out about what is happening during the Legislative Session from Attorney General Phill Kline and Representative Jan Pauls. Also in this issue is an article describing forfeiture procedure in Kansas written by Colin D. Wood, forfeiture counsel for the Kansas Highway Patrol.

Next we move on to securities fraud and how the Kansas Securities Commissioner prosecutes securities fraud. Chris Biggs, securities commissioner, describes the process and how he can help you.

In this issue, Robert Don Gifford gives us some insight into ethics and the criminal prosecutor. He discusses some ethical pitfalls as well as how to

conduct yourself in the courtroom. This is a good reminder of what you should and should not do regarding opening and closing statements. Then Elliott Wilcox lends us some advice about presentation skills in the courtroom and gives some tips on how to make your opening or closing statements more powerful.

Common acts of aggression toward prosecutors are physical aggression, surveillance, harassment via telephone calls, written letters or electronic communication. If this has happened to you, you are not alone. Patricia L. Fanflik of the American Prosecutors Research Institute describes violence against prosecutors, what to look for, and ways to protect yourself and the people around you.

Have you ever thought about what life was like as a judge or considered becoming a judge? If you said yes to either of those, you need to read the article about two former KCDA members making the leap from prosecutor to judge. They discussed some advice if you are thinking about ever being a judge, how prosecution has influenced them and how being a judge is different than prosecution.

We also get to hear from Nola Foulston about her experiences with the Supreme Court in Washington, D.C. She described the procedure of the case and her experiences.

From here, my goals as the editor are to make sure the magazine comes out quarterly, make sure it has informative articles that are relevant for Kansas prosecutors and make sure that I am doing the best job I can. Being an editor was my first goal out of college, so I want to make sure I am fulfilling my duties as the editor. If you have any questions or comments for me, please feel free to e-mail me at any time at mary@napiercommunications.com.

Legislative Session Under Way

by **Phill Kline, Attorney General of Kansas**

With the 2006 legislative session now well under way, our lawmakers are once again presented with the opportunity to strengthen state laws and provide much-needed funding to law enforcement agencies across the state.

For far too long, justice has taken a back seat in our state. Unfortunately, as an example, there are those who would use our prison space as a budget tool rather than as a tool for justice.

Over the years, we have seen firsthand the tragic consequences of this flawed philosophy. We saw it in 1999 when the legislature passed SB 149, a law that greatly reduced the penalties for many crimes, and again in 2000, with the passage of SB 323. That law, in an attempt to reduce the need to add needed prison beds and “save” a few hundred thousand dollars, released hundreds of felons directly from our state’s prisons and back onto our streets. It also significantly reduced the length or ended post-release supervision for hundreds of other felons.

SB 323 has had a devastating effect on the citizens of our state and upon those charged with protecting them. In fact, in only five years, hundreds of those who were released early have gone out, found new victims, committed new crimes, been caught, tried, convicted and are already back in prison.

This failed philosophy must change, and it must change now.

In December, I had the honor of standing with a man who has seen the tragic consequences of this revolving-door philosophy firsthand. Mark Lunsford is the father of a little girl whose story captivated America last year and made

lawmakers across the country begin to consider the very real threat posed by the growing predatory population among us.

In February 2005, Lunsford’s 9-year-old daughter, Jessica, known as Jessie to her family and friends, was taken from the safety of her grandparent’s home as she slept.

Three weeks later, her body was discovered in a shallow grave behind the house of her accused abductor less than 150 yards from the Lunsford’s home in a small north-central Florida town, not unlike many towns in our state. It was later determined that she had been sexually assaulted repeatedly before being buried alive.

Her alleged abductor was a convicted sex offender who had a lengthy criminal history that included 24 arrests for offenses including burglary, carrying a concealed weapon and indecent exposure.

During a house burglary in 1978, this person was accused of grabbing a girl in her bedroom, placing his hand over her mouth and kissing her. He was sentenced to 10 years in prison, but was paroled less than two years later. In 1991, he was arrested on a charge with a similar offense: fondling a child under the age 16.

Although the accused abductor was supposed to register as a sex offender at the address where he was staying, he did not. Nor did anyone in the neighborhood know that he was living among them.

Not long after being forced to do one of the most difficult things a parent could ever do, bury his child, Lunsford got to work to help effectuate change so that other



parents would not have to encounter the same horror that he had just experienced.

Within a matter of months, the Florida Legislature passed the “Jessica Lunsford Act,” legislation that provided for satellite tracking of sex offenders in that state for the first time and set a minimum 25-year sentence for anyone convicted of preying on a child under 12.

Since then, Lunsford has successfully lobbied four other states to adopt similar legislation. We intend to make Kansas the fifth state this session.

In the fall of 2005, I convened my Security and Firm Enforcement (SAFE) for Kansans Task Force, a group comprised of 29 lawmakers, law enforcement officers, prosecutors and victims’ advocates. This task force met on numerous occasions to identify policies, resources and partners vital to protecting the safety of Kansans by insuring the integrity of sex offender registration and providing strong and appropriate sentencing options. Their recommendations would be the basis of my legislative proposal, and their strongest recommendation was to pass a version of “Jessica’s Law” in Kansas this session.

Three weeks into its session, the Senate passed a version of the bill 35-4 (with most of the “no” votes reportedly cast out of concerns that long sentences will require the construction of more prisons), and

the House is poised to do the same.

The House bill would give 25-year sentences for first-time offenders who victimize children. Those convicted of a second offense would get 50 years, and a third conviction for a violent sexual crime would yield a lifetime sentence. The bill also directed the Kansas Criminal Justice Coordinating Council to conduct a detailed study and make recommendations to the legislature on the availability, capabilities, costs and effectiveness of requiring GPS electronic monitoring devices to be worn by offenders who are released into the community.

Over the past three years, we

have worked together to secure passage of some important and much-needed legislation. SB 27 (2005's Sheriff Matt Samuels Chemical Control Act) has helped lead to the reduction of meth lab busts by nearly 60 percent. SB 147, also out of the 2005 legislative session, gave all prosecutors a greater ability to secure justice by extending the statute of limitations for almost all felony and misdemeanor crimes from two years to five years. And HB 2271, passed in 2004, doubled the sentence of any individual who is convicted of the crime of forcible rape if the individual had previously been convicted of rape.

The passage of "Jessica's Law" in Kansas this year may very well be the most important piece of legislation in terms of the direct positive impact it will have on the safety of our state for years to come. I encourage you to follow this legislation as it makes its way to the governor's desk and welcome any questions or concerns you might have about this proposed law or any other initiative coming out of my office.

I am honored to serve as Attorney General of Kansas and to stand with you together in the cause of justice. Please let me or my office know if we can ever be of service to you.

KCDAA 2006 Spring Conference

June 11-13, 2006

Wichita Hyatt Regency

Wichita, Kansas

KCDAA 2006 Fall Conference

October 22-24, 2006

Overland Park Marriott

Overland Park, Kansas

Meetings

Speakers

Presentations

Banquets

Networking

**You won't want to miss the upcoming conferences!
Watch for conference materials coming out soon.**

The Re-Write of the Code for Children and the Juvenile Justice Code

by Representative Jan Pauls, D-Hutchinson

An old Chinese proverb, which is also a curse, says “May you live in interesting times.” The 2006 session is certainly such a time. The issue that casts a shadow over everything is, of course, school finance.

However, other issues are being dealt with by the legislature, including a number of crime bills that will dramatically increase sentences for sex offenders. The two major acts which this article will deal with are HB 2352, which revises the Kansas Code for Care of Children, and SB 261, which modifies the Kansas Juvenile Offenders Code. HB 2352 is 158 pages long and SB 261 is 164 pages. Both bills are the product of a four-year-long study by a committee of the Judicial Council. The committee is composed of judges, prosecutors, attorneys representing parents, GALS, legislators, and attorneys for SRS and the Juvenile Justice Authority.

HB 2352 was passed by the House last year, and is a re-write of the Kansas Code for Care of Children. The Senate also has passed the bill, and it is currently in conference committee. The House Chairman stated on the floor when requesting the conference committee that he did not believe he’d ever seen a bill with so many amendments, so it will be an interesting conference committee. Among other changes from current law, the bill:

- (1) States that the disability of a parent will not constitute a basis for a Child in Need of Care determination unless there is a causal

relationship between the disability and harm to the child;

- (2) changes certain language to insure compliance with the Federal Adoption and Safe Families Act. (Otherwise, we lose millions in federal funds);
- (3) clarifies the roles of participants in hearing by distinguishing between a “party” and an “interested party.” A “party” means the state, the petitioner, the child and any parent of the child. (A grandparent is no longer in that definition, but the grandparent has basically the same status as in the current law). An “interested party” is defined as a grandparent of the child, a person with whom the child has been living with for a significant period of time when the Child in Need of Care petition is filed, and any party made an interested party by court in a specific hearing which considers such things as emotional ties to the child;
- (4) was amended in the House Judiciary Committee to provide that if a child is in the protective custody of the Secretary of SRS, at least one supervised visit shall be allowed for a parent unless the court has prohibited such a visit;
- (5) prohibits stacking of the 72 hours in police protective custody on top of the 72 hours of the court order for



- (6) protective custody; provides that any person who willfully and knowingly submits a false report of child abuse or neglect is guilty of a class B misdemeanor;
- (7) makes changes in the notice and service of process. Currently, service on a parent is required of both the initial petition, and then again on the parent at the time a motion is filed for the termination of parental rights. An exception to the requirements of the second service occurs if service is done by publication because no other methods of service could be completed even with due diligence to locate a parent. Then, there is no further service required of a parent;
- (8) adds a new ground for appeal, that of an appeal from an order of temporary custody; and
- (9) provides that upon a motion by a party on an action for termination of parental rights, the chief judge shall re-assign the case from a magistrate judge to a district judge.

Most changes in the code are organizational; however, the practitioner in this area will want to

review the whole law. The effective date on this act is Jan. 1, 2007. The Judicial Council will prepare forms prior to the effective date of this act if the act is passed by the House and Senate through either a conference committee report or a motion to concur by the House with the Senate changes.

The Senate has passed SB 261, a major overhaul of the Juvenile Offender Code titled "An Act Concerning Juvenile Offenders, enacting the revised Kansas Juvenile Justice Code." This is a Judicial Council project, and a similar bill was passed by the House in the 2004 session. That bill died at the end of the 2004 session, as the Senate did not have a hearing on that earlier bill. SB 261 will now be heard in the House Judiciary Committee. SB 261 makes some policy changes but largely it makes technical changes. Some policy changes include:

- (1) the statute of limitations is changed to basically reflect the adult statute of limitations;
- (2) the bill provides that the termination of jurisdiction over a juvenile offender does not stop the offender's responsibility to pay restitution;
- (3) rape also is added to the list of crimes which cannot be expunged;
- (4) the bill makes some changes in the law on fingerprints and photos of juveniles. While a court may authorize the taking of fingerprints and photos of all juveniles taken into custody, otherwise fingerprints are only taken if

the juvenile offender is adjudicated for committing certain offenses, and other limited categories;

- (5) good time credits as currently awarded for juvenile offenders in the Commissioner's custody were controversial, and the Senate has restricted the good time credits to no more than 20 percent of the placement sentence;
- (6) the original bill would have required a jury trial if requested by the juvenile on all offenses equivalent to a felony, but the Senate Committee returned the bill language to the present permissive language in jury trials;
- (7) the notice of alibi or mental disease or defect is extended from five to 10 days prior to the adjudicatory hearing;
- (8) if the juvenile is taken into custody for self-destructive behavior the current law is changed so that the self-destructive behavior does not have to continue once in custody;
- (9) pre-trial hearings will no longer be called "pre-trials" but will be called "first appearances";
- (10) in deciding whether a hearing should be closed, the best interests of the victim as well as the alleged juvenile offender may be considered if the juvenile offender was under 16 at the time of the alleged offense;
- (11) appeals from a district

magistrate judge will be a trial de nova unless the parties agree to only a de nova review on the record. The right of the juvenile only to call witnesses is eliminated. The effective date of this bill is Jan. 1, 2007, if passed by the House. The Judicial Council will prepare forms for this act prior to the date.

Back in 1983, when one of the other major re-codifications in juvenile law occurred, I was an assistant county attorney in Reno County. After creating my own forms to file these actions, I'm sure all the prosecutors will be pleased that the Judicial Council Committee that proposed both these bills will be drafting forms for use before Jan. 1, 2007.



**HAVEN'T
RECEIVED YOUR KCDA
YEARS OF
SERVICE PIN?**

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

KCDA lapel pins are
available for members who
have served
5, 10 and 20 years in
prosecution.

A Thumbnail Sketch of Kansas Forfeiture Procedure

by Colin D. Wood



Forfeiture is the legal severing of some or all ownership interests in property, and placing those forfeited interests in the Sovereign. In Kansas, forfeiture of offending property is accomplished through a civil action pursuant to the Kansas Standard Asset Seizure and Forfeiture Act of 1994 (KSASFA).¹ KSASFA's 26 sections provide for inquisition, seizure, maintenance, due process, claims, discovery, litigation, and use or sale of the property. The statute of limitations is five years from the last conduct giving rise to the property's forfeiture.²

Property (meaning almost anything tangible or intangible), is subject to forfeiture under either of two theories or "acts giving rise to forfeiture." First, that the property represents the proceeds of a covered crime, such as cash from a drug violation. The second theory, and the one most often seen, involves property that has facilitated a covered crime or made the crime easier.³ Most facilitation cases involve vehicles that have transported drugs or been a haven for a drug transaction.

The civil action is generally in rem,⁴ though there are in personam provisions to recover unavailable property through substituted assets.⁵ The matter is brought by the state, through the seizing law enforcement agency, and against the defendant property(ies). There need be no parallel criminal arrest, charge or conviction.⁶ So long as the property was used or intended to have been used to facilitate a covered crime or is the proceeds of a covered crime, it is subject to forfeiture to the state.

One exception to forfeiture in Kansas is real property that would qualify as a homestead, and is protected from forfeiture in a state court by the Kansas Constitution.⁷ However, that same property would still be subject to federal forfeiture because federal law does not recognize state homestead protections.⁸

A seizing agency has its choice of venues. It can

request federal adoption, or it can request the county/district attorney to represent the seizing agency. The CA/DA cannot stop a federal adoption, but may require that any seized property needed as evidence in a parallel criminal case remain available.⁹

Should the CA/DA agree to accept the case, civil practice-type ethical considerations, such as client settlement authority and the mixing of criminal and civil matters, become important. In fact, KSASFA prohibits conditioning the disposition of criminal charges on a forfeiture settlement.¹⁰ It would, therefore, be unwise to include anything about the civil forfeiture in a criminal journal entry and vice versa. Should the CA/DA decline or not answer a forfeiture request, the seizing agency may then either hire a private attorney or request a state agency's assistance.

Property may be seized upon probable cause, with or without a seizure warrant. The process for securing a civil seizure warrant is the same as for a search warrant, and the two can actually be combined when necessary.¹¹

When property is seized for forfeiture, and not as evidence, the state has 90 days to file the civil action. The remedy for failing to file within 90 days is, upon the owner's request, return of the property to the owner as a custodian of the court. The state then has an additional 90 days to file the action.¹² There is no provision for compelled dismissal should the 90 day deadline be missed. However, a state court sits in equity in a civil forfeiture, and certain courts may find a Due Process violation should the state sit on its hands.

A civil forfeiture is initiated with either a "Notice

Footnotes

1. K.S.A. 60-4101 et seq.
2. K.S.A. 60-4120.
3. K.S.A. 60-4105.
4. K.S.A. 60-4112; 60-4113.

5. K.S.A. 60-4114; 60-4115.
6. K.S.A. 60-4104.
7. *State v. A Tract of Land in Ellis County*, 251 Kan. 685 (1992); K.S.A. 60-4105.
8. *U.S. v. Wagoner County Real Estate*, 278

- F.3d 1091 (10th Cir. 2002).
9. K.S.A. 60-4107(g), (h), (i), (j).
10. K.S.A. 60-4107(a), (l).
11. K.S.A. 60-4107(a), (b).
12. K.S.A. 60-4109(a)(1).

of Pending Forfeiture” or a petition filed with the district court and given a Chapter 60 case number.¹³ Notice of the action is by far the most important task in a civil forfeiture.¹⁴ Since the state is moving to extinguish the world’s ownership interests, it is crucial to give all potential claimants of the seized property valid notice and an opportunity to be heard. Should we fail, the case remains ripe to be set aside, maybe years later.¹⁵ Should a potential claimant be in jail, then notice goes to the jail too.¹⁶ Claimants have 30 days from the date of their individual notice to file a claim.¹⁷

Should no claims be filed, the state would move for default judgment.¹⁸ Should a claim be filed and assuming the action had begun with a Notice of Pending Forfeiture, then the state answers the claim with a civil petition outlining the seizure, the acts giving rise to forfeiture and attaching an officer’s probable cause affidavit. To clean up the playing field, the state should also move to default everyone except those having filed a claim.

Civil litigation then begins. The state should immediately study claims to confirm they contain the required information and have been filed by a true owner or secured lienholder. If not, the claim is subject to summary judgment because the claimant lacks standing to contest the action.¹⁹

Unlike criminal cases, discovery in a civil forfeiture is open to both sides. Interrogatories, requests for admissions, depositions and requests for production of documents can be used.²⁰ To protect a parallel criminal case from discovery, the state may request a stay in the civil forfeiture.²¹ Settlement is available at any point in the case, even before filing the forfeiture.²²

Though most forfeiture cases settle, at a trial the state has the burden of production and the burden of persuasion by a preponderance of the evidence. The state is only required to show the defendant property is subject to forfeiture, and is not required, in its case-

in-chief, to negate any claimed defense or exemption.²³ Civil forfeitures are determined in bench trials only,²⁴ and can involve Fourth,²⁵ Fifth²⁶ and Eighth²⁷ Amendment defenses.

Upon the state’s showing of a prima facie case for forfeiture, the burden of persuasion shifts to the claimant(s) to show by a preponderance of the evidence that either:

- 1) the property did not commit the act giving rise to forfeiture; or
- 2) the property did commit the act, but the claimant is an innocent owner of the property.²⁸

Assuming a win, a journal entry is prepared forfeiting the defendant property to the seizing agency, subject to any preserved liens.²⁹ Unless the state requests any losing claimants to pay the state’s litigation expenses, the seizing agency is responsible to pay litigation costs and state attorney fees. Attorney fees are payable into the CA/DA’s special prosecutor’s trust fund in an amount up to 15 percent of the forfeited property’s auction value if the case was uncontested or up to 20 percent if contested. The monies in that fund may be spent for such additional law enforcement and prosecutorial purpose as the CA/DA deems appropriate.³⁰ There is no provision for a CA/DA to litigate a forfeiture case in a privately paid capacity.

About the Author

Colin D. Wood is forfeiture counsel for the Kansas Highway Patrol, and has taught asset forfeiture procedure since 1991. He is a retired KBI Senior Special Agent, served on the task force that authored KSASFA, and is cross-designated a Special Assistant Attorney General and Special Assistant U.S. Attorney. He can be contacted at (620) 845-6580 or (620) 440-0865.

13. K.S.A. 60-4109; Kan. Ct. R. 121.

14. K.S.A. 60-4110.

15. *State v. \$3,743.00 in U.S. Currency*, 25 Kan.App.2d 54 (1998).

16. *Id.*

17. K.S.A. 60-4111.

18. K.S.A. 60-4116(a).

19. K.S.A. 60-4111(a); 60-4102(j); 60-4113(f).

20. K.S.A. 60-4113(f); 60-4112(q).

21. K.S.A. 60-4112(p).

22. K.S.A. 60-4107(k).

23. K.S.A. 60-4113(g); 60-4112(h).

24. K.S.A. 60-4113(g).

25. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965).

26. K.S.A. 60-425.

27. K.S.A. 60-4106(c).

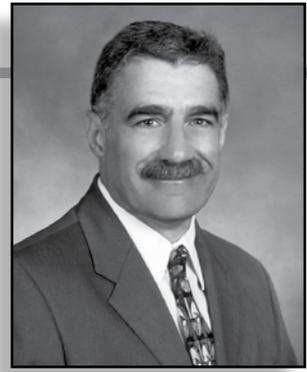
28. K.S.A. 60-4106; 60-4113(g).

29. K.S.A. 60-4116(b).

30. K.S.A. 60-4117(c)(3).

The Office of the Kansas Securities Commissioner Prosecutes Securities Fraud

by Chris Biggs, Kansas Securities Commissioner



I want to take this opportunity as Commissioner to formally introduce the Office of the Kansas Securities Commissioner and invite you to utilize our services. I will confess that during my 14+ years as a county attorney, I was unaware of the assistance provided by the KSC.

The Office of the KSC enforces what are referred to as the Kansas "Blue Sky Laws." This term refers to legislation originally enacted by Kansas in 1911 to protect Kansans from investment fraud. Kansas was the first state to pass such legislation. The term "blue sky" refers to an investment being worth only so much as Kansas' blue sky. In 1932, Kansas Supreme Court Justice Rosseau A. Burch wrote, "The inordinate birth rate of the 'sucker' is proverbial, and there is no birth-control measure adequate to inhibit the spawning of unscrupulous individuals who prey upon those who are easily duped. Hence we have a blue sky law." Our office is entrusted with the mission to protect and inform Kansas investors, to promote integrity and full disclosure in financial services and to foster capital formation.

The KSC is specifically charged with administration and enforcement of the Kansas Uniform Securities Act under Chapter 17 and the Kansas Loan Brokers Act under Chapter 50 of the Kansas Statutes. The KSC staff investigates and prosecutes securities fraud, the offer or sale of unregistered securities, the offer or sale of securities by unlicensed persons and loan fee scams. We license and also enforce ethical standards for stock brokers who sell securities and investment

advisers who give financial advice for money. We also determine whether investments which are securities are appropriate to sell in Kansas.

A "security" is not limited to stocks and bonds, but includes most investments of money for which there is an expectation of profit based upon the work of others. We usually have jurisdiction when someone has encouraged another to invest money. Occasionally, complaints concerning such matters are erroneously discarded by local agencies as being "civil" in nature.

The KSC is one of only a handful of state securities regulators which prosecutes criminal matters on an "in-house" basis. We have the authority to appear and prosecute securities and related matters when invited in by the local prosecutor and do so on a regular basis. **In Kansas, all securities crimes are felonies, and unlike other property crimes, they carry a presumption of imprisonment for cases involving losses of \$25,000 or more. Additionally, the level of the crime rises with the amount of loss, up to a level 4 non-person felony designation for a securities fraud with a loss over \$100,000.** The Commissioner also is authorized by statute to seek an asset freeze and injunctive relief through civil remedies. This provides for immediate protection of existing assets of a target which could be used to compensate victims.

Additionally, the KSC maintains a law enforcement staff, specially trained in securities and financial crimes. Located in Topeka

and Wichita, they receive referrals from city, county, state and federal law enforcement agencies. They often work in conjunction with investigators from other states, and are able to draw upon the resources of the National White Collar Crime Center. If eligible, cases in your jurisdiction could receive NWCCC funding to cover costs associated with witness expenses.

We will provide your office with our services in the form of investigators and/or prosecutors, specifically trained to handle and experienced with securities cases. The agency has developed strong ties with many county and district attorneys' offices, and we stand ready to assist you.

The KSC also has an active investor education program. We have a variety of resources designed to inform and educate the public on matters related to investment and securities fraud. Printed publications are free and are available in quantity. Staff members are available to give public presentations and would welcome the opportunity to speak at professional association meetings, civic group meetings or other events.

Please let us know if you have questions or if we can assist you. Contact us by calling (888) 40-SCAMS in Kansas, locally in Topeka at (785) 296-3307 or in our Wichita office at (316) 337-6280. You can also research our office on the web at www.dontgetscammed.com.

Ethics and the Criminal Prosecutor

Guilt shall not escape nor innocents shall suffer

by Robert Don Gifford

Editor's Note: This article is reprinted with permission and was originally published in the Oklahoma Bar Journal, Vol. 76, No. 34 (2005).

Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.

— *The Federalist No. 51 (James Madison) (1788)*

Abraham Lincoln once said, “Nearly all men can stand adversity, but if you want to test a man’s character, give him power.” Not unlike any other attorney armed with legal knowledge and training, a criminal prosecutor can affect a person’s life. Unlike other attorneys, a criminal prosecutor can affect a person’s life by taking away freedom, imposing monetary sanctions, and in the most severe of situations - seeking to impose the ultimate punishment of death. With these larger powers comes greater responsibility, thus subject to additional constraints and looked upon with greater scrutiny. As the Kansas rule governing ethical conduct of the prosecutor states in the committee comments, “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”¹ United States Supreme Court Justice William O. Douglas has stated that the prosecutor’s role “is not to tack as many skins of victims as possible to the wall, [but] to vindicate the right of the people as expressed in the law and give those accused of crime a fair trial.”² Regardless of the outcome, at the end of the day the duty of the prosecutor is to seek justice, not merely to convict.³

To the proverbial “man on the street,” a subject of a prosecutor and ethics⁴ may seem odd since one might assume that there is no need to distinguish prosecutorial ethics from any other trial attorney. The demands of the profession and its historical honor begin with the basic rules established to govern our conduct

as attorneys. All Kansas attorneys take an oath that requires one’s law practice to comply with the requirements of the rules of ethics and conduct. While the ethics rules apply to all attorneys, unarguably prosecutors are held to a higher standard of ethical behavior by Kansas rules, judiciary, and even the ever-watchful eye of “court of public opinion.” It is an easy thing to do for people trained in the adversarial ethic to think a prosecutor’s job is simply to win.⁵ It is not. The job is “not just to win, but to win fairly, staying well within the rules.”⁶

While the ethical rules and case law cannot cover every possible scenario, this article is to serve as a starting point for some of those instances that have arisen in various jurisdictions. While an appellate court may find a prosecutor’s actions do not require reversal of a conviction or that a prosecutor may have immunity to protect him from personal civil liability, he is still subject to professional discipline from the bar association.⁷ Arguments previously ruled improper by the appellate courts can be grounds for disciplinary complaints against the attorney.⁸

THE FIRST PITFALL: TO CHARGE OR NOT TO CHARGE

Power corrupts. Absolute power is kind of neat.
— John Lehman, Secretary of the Navy

1981-1987

Footnotes

1. See also National District Attorneys Association, National Prosecution Standards [2nd ed. 1991].

2. *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting).

3. American Bar Association Standards Relating to the Administration of Criminal Justice [1991]. Standard 3-1.2.

4. Rule of Professional Conduct, 5 O.S. 1991, Ch: 1, App. 3-A.

5. *United States v. Kojayan*, 8 F.3d 1315, 1324 (9th Cir. 1993).

6. *Kojayan* at 1323.

7. *State ex rel. Oklahoma Bar Ass’n v. Dobbs*, 94 P.3d 31 (Okla. 2004); See e.g. *Imbler v. Pachtmena*, 424 U.S. 409, 428-429 (1976) (noting that prosecutorial immunity from liability in civil suits brought under 42 § U.S.C.A. 1983 does not leave the public without recourse to censure prosecutorial misconduct because prosecutors remain subject to professional discipline).

8. *Garrison v. State*, 103 P.3d 590 (Okla. Crim. App. 2004).

The decision of whether to pursue charges against a potential defendant is often one of the most difficult aspects in attempting to achieve “justice.”⁹ Professor Irving Younger, a former prosecutor, wrote, “[a] prosecutor’s power to damage or destroy anyone he chooses to indict is virtually limitless.”¹⁰ Supreme Court Justice Felix Frankfurter also wrote that a prosecutor “wields the most terrible instruments of government.”¹¹ Kansas recognized the special responsibilities inherent of such power by adopting the rule requiring that a prosecutor should “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”¹² Quite simply, the prosecutor has more control over life, liberty and reputation than any other person in America.¹³

Misconduct by a prosecutor is usually invoked only in a few areas in the course of a criminal case. One of these target-rich areas is a claim of “outrageous prosecution.”¹⁴ Although one federal Circuit Court of Appeals has declared this doctrine “stillborn”¹⁵ while

another has called it “moribund,”¹⁶ challenges still arise based on claims of government misconduct. Such alleged misconduct usually come from complaints of entrapment,¹⁷ violation of grand jury secrecy,¹⁸ misleading of a grand jury with use of false testimony or deceptive evidence,¹⁹ or even where a prosecutor may have appeared to apply undue coercion on a grand jury.

It has long been considered a proper exercise of prosecutorial discretion to prosecute one defendant while others who may have committed the same offense are not prosecuted at all. However, this discretion becomes improper if based upon otherwise unjustifiable reasons such as race, religion or any other arbitrary classification.²⁰ A prosecutor also may not attempt to penalize a defendant for merely exercising a right plainly allowed by law.²¹ However a prosecutor is free to carry out a threat made during plea negotiations to bring additional charges against an accused who refused to plead guilty to the original charge.²² There also may be

a presumption of vindictiveness when a prosecutor engages in a practice of seeking a heavier sentence or seeks to bring more severe charges for a reconvicted defendant after a successful appeal.²³ However, there is no such presumption of vindictiveness in a decision to supersede charges with additional charges immediately after a defendant’s acquittal on separate charges in a previous indictment.²⁴ Finally, any lawyer cannot present, participate in presenting or threaten to present criminal charges “solely to give an advantage in a civil matter.”²⁵

DISCOVERY ISSUES: “YOU GET WHAT YOU GET, AND YOU WON’T THROW A FIT!”²⁶

Discovery in criminal cases is a creature that is relatively young in the overall scope of our judicial process. It was not until the 1960s, with the United States Supreme Court’s seminal

9. See Orvill C. Snyder, *The District Attorney’s Hardest Task*, 30 Am. Inst. Crim. L. & Criminology 167 (1939-1940); Newman F. Baker, *The Prosecutor — Initiation of Prosecution*, 23 Am. Inst. Crim. L. & Criminology 770 (1932-1933).

10. Irving Younger, *Memoir of a Prosecutor, Commentary*, vol. 62, no. 4, p. 66 (Oct. 1976).

11. See Letter to *The New York Times*, March 4, 1941, quoted, *Martin v. Merola*, 532 F.2d 191, 196 (2d Cir., 1976)(Lumbard, J., concurring).

12. See 5 O.S. Ch. 1, App. 3-A, Rule 3.8 Special Responsibilities of a Prosecutor.

13. Robert H. Jackson, *The Federal Prosecutor*, 31 Am. Inst. Crim. L. & Criminology 3 (1940-1941).

14. See *United States v. Meyers*, 527 F.Supp. 1206, 1223 (E.D.N.Y., 1981) for an extensive listing of factors to be considered in evaluating an alleged “outrageousness” of a prosecutor’s misconduct.

15. *United States v. Boyd*, 55 F.3d 339 (7th Cir. 1995).

16. *United States v. Santana*, 6 F.3d 1 (1st Cir. 1993).

17. *United States v. Russell*, 411 U.S. 423 (1973).

18. *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). See also Robert Don Gifford, *The Fifth Amendment & the Federal Grand Jury*, 76 Okla.B.J. 1799 (August 13, 2005).

19. *United States v. Hogan*, 712 F.2d 757 (2nd Cir. 1983).

20. *United States v. Adkins*, 464 F. Supp. 419 (1978).

21. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

22. *United States v. Goodwin*, 457 U.S. 368 (1982).

23. *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Blackledge v. Perry*, 417 U.S. 21 (1974).

24. *United States v. Wall*, 37 F.3d 1443 (10th Cir. 1994).

25. See *Iowa State Bar v. Michelson*, 345 N.W. 2d 112 (Iowa 1984); ABA Code DR 7-105.

26. Author unknown. Oft-used quote from many-a-parent to child.

opinion in *Brady v. Maryland*,²⁷ its progeny, and the subsequent expansion of the Federal Rules of Criminal Procedure with Rule 16 that an adequate framework was created. Despite the youth of the criminal discovery process, a defendant's right to some form of discovery can be traced as far back as the treason prosecution of Aaron Burr in 1807.²⁸ Chief Justice John Marshall, sitting as the traveling circuit judge, permitted the defense to discover a letter to President Jefferson impeaching a key witness for the government:

So far back as any knowledge of our jurisprudence is possessed, the uniform practice of this country has been, to permit any individual, who was charged with any crime, to prepare for his defense and to obtain the process of the court, for the purpose of enabling him so to do. This practice is as convenient and as consonant to justice as it is to humanity. It prevents, in a great measure, those delays which are never

desirable, which frequently occasion the loss of testimony, and which are often oppressive.²⁹

The modern law of discovery

carries forward Chief Justice Marshall's decision and focuses on the prosecutor's duties in the process and explains how he should go about fulfilling this obligation.

Under the applicable ethics rules and case law from nearly every jurisdiction in the land, the prosecuting attorney has a duty to make timely disclosure to the defendant of the existence of material evidence known to the prosecutor that tends to negate the guilt of the accused or mitigate the degree of the offense.³⁰ In Kansas, KRPC 3.8(d) requires timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. In connection with sentencing, it requires disclosure to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

...the prosecuting attorney has a duty to make timely disclosure to the defendant of the existence of material evidence known to the prosecutor that tends to negate the guilt of the accused or mitigate the degree of the offense.

YE OL' WOODSHED — WITNESS ISSUES

While it is not the least improper for a prosecutor to meet with witnesses to prepare a case, it too can be wrought with traps for the unwary. While appropriate to encourage a witness to look at the jury or judge, to speak clearly and act confident while testifying, going much beyond that may lead to unintended consequences. A suggestion that a witness who may not be all that certain of a particular fact to change that demeanor in order to appear more assertive may very well cross that boundary from simply "preparing" a prosecution witness to impermissible "coaching" or "wood shedding" of that witness.

One obvious example that may be perceived as impermissible coaching is the use of a "talking points" memorandum. Such a document, while merely to help an otherwise nervous witness prepare for his testimony, can be viewed as a document purposely instructing what that witness did or did not see.³¹

The law is also clear that a prosecuting attorney may be committing misconduct by calling a witness to testify knowing in advance that witness will invoke his Fifth Amendment rights.³²

However, this is improper only where the purpose was to invite

27. *Brady v. Maryland*, 373 U.S. 83 (1963).

28. *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807)(No. 14, 692d).

29. *Id.* at 32.

30. See *United States v. Agurs*, 427 U.S.

97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985).

31. See Michael Higgins, "Fine Line," *ABA Journal*, May 1998, p. 52 discussing the ethical quandaries of the President Clinton/Monica Lewinsky

investigation regarding whether attorney Vernon Jordan urged an intern to conceal a relationship with the President.

32. See *Namet v. United States*, 373 U.S. 179 (1963).

the jury to draw impermissible inferences from such invocation to infer the guilt of the accused. In addition, "... a witness may not be called and then impeached if the underlying purpose is to utilize hearsay evidence as substantive evidence against the defendant."³³

While not necessarily a "witness" issue, when a defendant actually takes the witness stand to testify, it is not without constraint when the prosecutor stands to cross-examine. A government attorney should not attempt to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving Miranda warnings at the time of arrest.³⁴

OPENING STATEMENTS

If thou tell'st the heavy story right, upon my soul, the hearers will shed tears; Yea even my foes...

— William Shakespeare, *Henry VI, Part III, Act I, Scene IV*

The opening statement is one of the most important moments in any trial. The poet T.S. Eliot once wrote, "In my beginning is my end." While Eliot may not have been talking about trial practice, the truth in these words is well understood. The opening statement

presents an opportunity to not only inform, but also to persuade. The purpose of a prosecuting attorney's opening remarks is to give the jury the broad outline of the case so a jury can better comprehend it. A prosecutor should not depart from that purpose with unsavory characterizations that may be overdramatic or that could poison a juror's mind against the defendant.³⁵ In addition, it is improper for a prosecutor to make remarks in an opening statement of his personal evaluation of the case to the jury.³⁶

Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict." This language mirrors that of the United States Supreme Court's discussion in *United States v. Dinitz*,³⁷ when Chief Justice Warren Burger succinctly stated the proper scope and purpose of the opening statement.

While the underlying questionable comments in *Dinitz* arose from the misconduct of a criminal defense attorney, it is the prosecuting attorney that is most often under the judicial and public microscope when argument goes too far astray.

In its opening statement to the finder-of-fact (judge or jury), the prosecution is entitled to describe the evidence and witnesses reasonably expected during the course of trial.³⁸ In contrast, it would be improper to discuss evidence that will not be introduced during the course of the trial.³⁹ Such misconduct during opening remarks may

// The opening statement is one of the most important moments in any trial...The opening statement presents an opportunity to not only inform, but also to persuade. **//**

result in a mistrial or the reversal of a conviction on appeal.⁴⁰ However, subsequent suppression of certain evidence, dismissal of certain counts or failure to introduce evidence referred to in the opening statement does not necessarily create grounds for reversal.⁴¹ The

33. *United States v. Carter*, 973 F.2d 1509, 1513 (10th Cir. 1992)(citations omitted).

34. *Doyle v. Ohio*, 426 U.S. 610 (1976).

35. *United States v. Somers*, 496 F.2d 723 93d Cir. 1974); but see *United States v. Helbling*, 209 F.3d 266 (3d Cir. 2000).

36. *United States v. Davis*, 548 F.2d 840 (9th Cir. 1977).

37. *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (C.J. Burger, concurring).

38. *United States v. Novak*, 918 F.2d 107 (10th Cir. 1990).

39. *United States v. Taren-Palma*, 997

F.2d 525 (9th Cir. 1993), cert. denied, 114 S.Ct. 1648 (1994).

40. *Novak*, supra.

41. *United States v. Tolman*, 826 F.2d 971 (10th Cir. 1987); *United States v. Ashman*, 979 F.2d 469 (7th Cir. 1992), cert. denied, 114 S.Ct. 62 (1993).

effect of an opening statement that discusses evidence that is not subsequently introduced will depend on the good faith of the prosecutor and the apparent impact of the statements in the context of the whole trial.⁴²

While certain otherwise improper conduct committed during a closing argument may be excused as an invited response to defense misconduct or attacks, the same is not true of improper statements made during opening statement. Courts take the view that the government's opening statement has been prepared in advance of the trial.⁴³ Additionally, an appellate court may conclude that the government's expectation that certain evidence would be admitted was so speculative that any reference to such evidence during opening statement would clearly be improper.⁴⁴ Discussing comments from a tip from an anonymous source that would still be subject to hearsay objections, discussing a confession of one co-defendant which could very well be inadmissible against other co-defendants⁴⁵ or referring to a defendant's jewelry as "jewelry worn by drug dealers"⁴⁶ are examples of the sort of comments that would be well advised to wait for a court's ruling

on its admissibility.

THE LAST TEMPTATION — CLOSING ARGUMENTS

Whenever a man does a thoroughly stupid thing, it is always from the noblest motives.

— Oscar Wilde, *The Picture of Dorian Gray*, (1891)

While no criminal trial is ever perfect,⁴⁷ prosecutorial misconduct in closing argument has been relatively well documented and extensively litigated. Parties on both sides have wide latitude in closing argument to discuss the evidence and reasonable inferences from that evidence. Appellate reversal is generally only required when it is grossly improper and affects a defendant's rights.⁴⁸ It is certainly within the bounds of fair advocacy for a prosecutor, like any lawyer, to ask the jury to draw inferences from the evidence that the prosecutor believes in good faith might be true. But it is clearly inappropriate for a prosecutor to propound inferences known to be false or at least good reason to doubt. The difference between an advocate "ask[ing] the jury to

infer only things that he believed in good faith might be true" and making "factual assertion he well knew were untrue" is "the difference between fair advocacy and misconduct."⁴⁹ While an entire bar journal could be dedicated to all of the ways that an improper closing argument can lead to problems, for the purposes of brevity and as a starting point the highlights of what a prosecutor should avoid in arguments are noted:

- **Name calling.** Prosecutors must not make derogatory remarks about opposing counsel or opposing parties.⁵⁰ Appellate courts look with disfavor on name calling.⁵¹
- **Inflaming the passions of a jury.** A prosecutor should not encourage jurors to let improper sympathy, sentiment or prejudice influence their decisions.⁵²
- **Sending a message.** In a discussion of the movies made by his studio, Samuel Goldwyn of Metro Goldwyn Mayer fame once said that if he wanted to "send a message" he would go to Western Union. Most courts condemn this methodology as it applies

42. *Novak, supra*.

43. *United States v. Johnson*, 767 F.2d 1259 (8th Cir. 1985).

44. *See Novak, supra*, (improper to discuss the substance of an anonymous tip because the substance of the tip was inadmissible hearsay).

45. *United States v. Killian*, 524 F.2d 1268 (5th Cir.), *cert. denied sub. nom., Rom v. United States*, 425 U.S. 935

(1976).

46. *United States v. Brockington*, 849 F.2d 872 (4th Cir. 1988).

47. *See Powell v. State*, 995 P.2d 510 (Okla. Crim. App. 2000), *cert denied*, 531 U.S. 935 (2000).

48. *Hanson v. State*, 72 P.3d 40 (Okla. Crim. App. 2003).

49. *United States v. Kojayan*, 8 F.3d 1315, 1318-19.

50. *See State v. Turner*, 538 P.2d 966 (Kans. 1975); *see also Professional Responsibility, The Army Lawyer* (Sept. 1978) ("lowly, dishonest welsher").

51. *Malicoat*, 992 P.2d 383, 401 (Okla. Crim. App. 2000), *cert. denied*, 531 U.S. 888 (2000).

52. *Robinson v. State*, 900 P.2d 389, 398 (Okla. Crim. App. 1995).



...always worthy of repeating, prosecutors must be diligent to refrain from expressing personal opinions.

to criminal prosecutions, and risking reversal of conviction by inflaming the passions of a jury is a quick way to do it.⁵³

- **Defendant saying “no.”** Commenting on a defendant’s refusal to consent to warrantless search of vehicle and contacting of a lawyer, while tempting is always dangerous.⁵⁴
- **A defendant saying nothing.** A prosecutor’s direct reference to a defendant’s failure to testify obviously violates the defendant’s privilege against compelled self-incrimination.⁵⁵ However, the U.S. Supreme Court has

ruled that a prosecutor’s comment that “[the defendant] could have taken the stand and explained it to you, anything he wanted to” did not violate the Fifth Amendment because it was fair response to an argument initiated

by defense counsel to the effect that counsel’s non-testifying client had not been given a chance to explain his side of the story.⁵⁶

- **Vouching.** Oliver Wendell Holmes once said, “When I say that a thing is true, I mean that I cannot help believing it.”⁵⁷ Vouching occurs when a prosecutor expresses a personal belief in a witness’s credibility — either through explicit assurances or by implying that other evidence not presented to the jury supports the witness’s testimony.⁵⁸ Improper vouching involves a perceived attempt by the

prosecutor to invoke a personal belief and implied credibility of the government, its office, the case, or prosecution witnesses.⁵⁹

- **Stay away from saying “I.”** Inherent with vouching and always worthy of repeating, prosecutors must be diligent to refrain from expressing personal opinions.⁶⁰ The government’s counsel is, as an individual, “properly and highly respected by the members of the jury for his integrity, fairness, and impartiality” ... ‘Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.’⁶¹ As the Oklahoma Court of Criminal Appeals has often commented, it defies common sense to use an improper argument that can snatch defeat from the jaws of victory.⁶²

53. See *Gaylor v. State*, 957 P.2d 855 (Wyo. 1998); *Williams v. State*, 522 So. 201, 209 (Miss. 1988); *Thorton v. Florida*, 767 So. 2d 1286 (Fla. App. 2000).
54. *Arizona v. Palenkas*, 933 P.2d 1269 (1996).
55. *Griffin v. California*, 380 U.S. 609 (1965); *But see Portuondo v. Agard*, 529 U.S. 61 (2000) (a prosecutor’s comment that a defendant who testified had the opportunity to tailor his testimony after hearing other witnesses does not violate the defendant’s Fifth and Sixth Amendment rights).

56. *United States v. Robinson*, 485 U.S. 25 (1988).
57. Oliver Wendell Holmes, Jr., *Ideals and Doubts*, *Collected Legal Papers* 303, 304 (1920).
58. *Pickens v. State*, 19 P.3d 866, 880, (Okla. Crim. App. 2001), *cert. denied*, 536 U.S. 961 (2001).
59. *United States v. Davis*, 15 F.3d 1393 (7th Cir. 1994) (“[S]he has to tell the truth. We will not use her otherwise.”); *United States v. Emmert*, 9 F.3d 699 (8th Cir. 1993) (prosecutor stated in rebuttal closing argument that prosecution

witness was “very candid, very open and very honest in her testimony.”); *United States v. Kerr*, 981 F.2d 1050 (9th Cir. 1992) (“The question is, were [the witnesses] hoodwinking you when they testified? I think not.”).
60. *Malicoat v. State*, 992 P.2d 383, 401 (Okla. Crim. App. 2000), *cert. denied*, 531 U.S. 888 (2000).
61. *Hall v. United States*, 419 F.2d 582 (5th Cir. 1969).
62. *Kutin v. State*, 1967 OK CR 134, ¶ 4, 430 P.2d 848, 849.

CONCLUSION

One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to "life, liberty and property" are in the professional keeping of lawyers.

— Justice Felix Frankfurter⁶³

The essence of the prosecutor's role is expressed in the oft-misquoted inscription on the wall paneling near the office of the U.S. attorney general: "The government wins its point when justice is done its citizens in the courts."⁶⁴ The lawyer who undertakes the legal path to represent the government, whether it be municipal, state, federal, or tribal, in criminal cases will find an array of ethics rules which guides the nature of the advocacy. Our criminal justice system grants extraordinary powers to a prosecuting attorney, but in exchange, places extraordinary burdens upon those shoulders as well. A prosecutor must not only vindicate the sovereign's interest in convicting the guilty, yet all the while be steadfast in mindset to protect the innocent. At the same time, he is constrained in his zealotry by a matrix of statutes, rules, constitutional mandates

and ethical standards designed to protect against an abuse of power.

Former United States Attorney General Benjamin R. Civiletti has written:

The lines which are so carefully drawn to limit the scope of advocacy do not, however, constrain prosecution and defense equally. The Sixth Amendment Right to counsel carries with it the right to zealous representation, and its force presses the defense lawyer to the outer boundaries of the system. Failure to be sufficiently vigorous risks the client's liberty and reputation, while zealotry risks little. The only immediate sanction for overstepping these boundaries is the contempt citation, a penalty rarely imposed. On the other hand, the prosecutor must be constantly alert that he does not even come close to the bounds of propriety, that there be not even the suggestion of overreaching. He must be cognizant of the specific rules which govern his conduct and of the risk that he will be perceived to be misusing his power, or the possibility that he will taint the proceeding through some generalized or cumulative violation of fair process.⁶⁵

It is not enough for the prosecutor to do the job adequately.

The prosecutor must stand for fairness and equality in the administration of justice and maintain that delicate balance of vigorous advocacy on behalf of the people of the sovereign he represents. No discussion of prosecutorial ethics is complete without reference to an opinion of the U.S. Supreme Court from 70 years ago and no better way to sum up the essence of the role of the prosecutor. In *Berger v. United States*, the Supreme Court noted:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.⁶⁶

About the Author

Robert Don Gifford graduated from Southwestern College in Winfield, Kan. He is currently an assistant U.S. attorney and Oklahoma Bar Association member residing in Reno, Nev. He has prosecuted in federal courts in Nevada and Kentucky, the Oklahoma state courts, as well as prosecuted and defended in military courts worldwide. Any views stated are of the author and not the departments of justice or defense.

63. *Schwartz v. Bd. Of Bar Exam'rs*, 353 U.S. 232, 247 (1957).

64. See James Cooper, Note, *The Solicitor General and the Evolution of Activism*, 65 Ind. L.J. 675, 696 n.8 (1990). See

also *Brady* at 87.

65. Benjamin Civiletti, *The Prosecutor As Advocate*, 25 N.Y.L. Sch. L. Rev. 1, 17 (1979).

66. 295 U.S. 78, 88 (1935).

Births



Darrin C. Devinney, Chief Assistant, Butler County Attorney, would like to announce the birth of his son, Gavin R. Devinney. The baby boy was born on Jan. 27, 2006 at 10:20 a.m., weighing 4 pounds, 7 ounces. Delivered at 35 weeks, this premature baby was sent home with no complications. He and wife Laura are thrilled for Gavin's sister, Darrah, 6, who now holds the title of "Big Sister."



Anniversaries

John J. Bryant, assistant district attorney II of the Wyandotte County District Attorney's office is pleased to announce that March will signify his fifth year with Wyandotte County. Congratulations to John.



Office Moves

The office of the **Mitchell County Attorney**, Beloit, Kan. and **Jess W. Hoeme**, County Attorney have moved to the third floor of the Mitchell County Courthouse. The new office address is

115 South Hersey
Beloit, Kansas 67420.



New Faces

Mary Thrower, juvenile prosecutor in the Saline County Attorney's Office was recently appointed to the magistrate judge position for Saline and Ottawa County. **Jaime Blackwell** has been hired as her replacement. Blackwell recently graduated from law school in San Diego.



We want to share your news!

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



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

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

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

Feel free to submit digital photos
with your announcement!



Presentation Skills for Lawyers

The Rule of Three

by Elliott Wilcox

Bill sat down at his desk and began writing. *Friends, Romans...Lend me your ears.* "Wait, that ain't right," he said, "let's try it again." *Friends, Romans, countrymen, noblemen...Lend me your ears.* "Nope, still not right." *Friends, Romans, countrymen...Lend me your ears!* "Aha! Music to my ears!"

Hundreds of years later, "Friends, Romans, countrymen" is still music to our ears. Why? Because Shakespeare followed a principle called the Rule of Three. Rather than using a single example or phrase, he grouped three samples together.

Why three? Why not two? Or four?

There is a certain musical quality to words or phrases when the Rule of Three is followed:

- I came, I saw, I conquered
- Life, Liberty and the pursuit of happiness
- Snap, Crackle, Pop

If you add or subtract a word from each grouping, it doesn't appeal as strongly to the ear. But when you combine them in groups of three, the words flow from the tip of your tongue.

As you prepare your presentation, consider opportunities to expand (or contract) the number of phrases you will use to demonstrate your point. Your audience won't remember every point of your speech, but the rhythm of three will help them remember elements of your speech. Adding alliteration makes the phrasing even more memorable. Consider the difference between "He spoke powerfully" and "He spoke with power, poise and panache." Starting all three phrases with a similar sound helps the audience "sing along" to the rhythm of your presentation and etches the phrase into their heads.

The humor of three

Comedians employ the Rule of Three to great

comic effect. Doug Stevenson, creator of the *Story Theater* program, uses a simple phrase to demonstrate how comedians establish (and then break) a pattern to create humor with the Rule of Three. To get the full effect, repeat the phrase aloud, pausing after each word for maximum impact: "Apples...Oranges...Plywood."

It's not the world's funniest example, but it shows how the pattern works. The first two words establish the pattern, sending the train down the tracks. Your brain starts looking for comparisons between the two items ("Let's see, they're both round, they're both fruits, they're both edible...") "Plywood" gets a laugh because it breaks the pattern. The third item derails the train. When the third item doesn't fit into the pattern, your brain reacts with surprise. Even famous comedians employ this pattern. In *A Wild and Crazy Guy...*, Steve Martin uses the Rule of Three when leading the audience in "The Non-Conformist's Oath."

- "I promise to be *different*..."
- "I promise to be *unique*..."
- "I promise not to repeat things other people say."

To get a bigger laugh with this pattern, pause after the second item. Give your audience a moment to process the pattern before you derail the train.

The memorable power of three

Your audience will remember your points more easily if you use three examples, three illustrations or three stories to highlight each point. Read through your speech and look for opportunities to take advantage of the Rule of Three. Start with the main point of your speech. If the audience doesn't remember anything else about your presentation, what one point do you want them to take home with them? What single idea do you want them to remember? What image do you want to brand into their memories? (Did you notice how the Rule of Three helped to highlight this issue?) Review your presentation. How many examples, illustrations or stories do you use to demonstrate the main point? If you have only one or two examples, create some

more examples and bring the total to three. Do you have more than three examples? Eliminate the weakest examples and keep only the three strongest. When you use three supporting examples, your audience will remember the point.

You also can highlight phrases by repeating them three times. Don't merely parrot the phrase over and over again. Instead, work the phrase into the presentation at three different times. For example, to show your audience the importance of speaking with a lawyer before making a major decision, you could emphasize a single phrase:

- Before you speak with the insurance company, talk to a lawyer first.
- Before speaking with the police, *talk to a lawyer first.*
- Before you sign that contract, ***talk to a lawyer first.***

By the time you reach the third repetition of the phrase, your audience will not only remember the

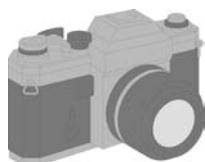
phrase, they will plug it into the statement for you.

The memorable power of three also applies to your speech organization. In a speech with a single point, you can use the Army's method of speech organization: "Tell 'em what you're gonna tell 'em, tell 'em, then tell 'em what you told 'em." In a presentation with multiple points, organize your speech around three major points. Four will be too many, two will be too few. Limit (or expand) your presentation to those three significant points. Your audience can't memorize your entire speech, but if you organize your presentation according to the Rule of Three, your presentation will be a success.

About the Author

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

© 2005 Elliott Wilcox – All Rights Reserved



Show off your courthouse!

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 Mary Napier, editor of The Kansas Prosecutor
1200 SW 10th Avenue, Topeka, Kansas 66604

Questions? E-mail Mary at mary@napiercommunications.com

Forgotten Victims: Workplace Aggression Encountered by Prosecutors

by Patricia L. Fanflik, Deputy Director, Office of Research & Evaluation, American Prosecutors Research Institute

Editor's Note: This article is reprinted with permission of the National District Attorneys Association and was originally published in The Prosecutor magazine, vol. 39, number 5, September/October 2005.

Early in the morning of June 5, 2000, prosecutor Fred Capps was shot and killed inside his family residence just outside the bedroom where he and his wife had been sleeping. Capps was the prosecuting attorney for a case involving an individual charged with two counts of first-degree sexual abuse of a young child. Facing child molestation charges, the defendant, while free on bond pending trial, broke into the Capps' home and shot Capps with a semi-automatic rifle. Fortunately, homicides of local prosecutors are not common but acts of physical aggression, surveillance, harassment via telephone calls, written letters or electronic communications against prosecutors are. While this particular incident did not occur within the physical confines of the workplace, it is a difficult reminder of the work-related dangers prosecutors face everyday.

Unfortunately, no workplace or occupation is immune to episodes of workplace violence and aggression (Chenier, 1998; Eisele, Watkins, & Matthews, 1998; Fisher and Gunnison, 2001; Flannery, 1996; Keashly, 2001; Rogers & Kelloway, 1997). According to the National Institute for Occupational Safety and Health (NIOSH), approximately 20 individuals per week are murdered at work or on duty and another 18,000 are victims of non-fatal assaults (NIOSH, 1996). Although fatal work injuries have declined in

recent years, findings from the National Census of Fatal Occupational Injuries (1996) indicate that homicide in the workplace is the second leading cause of fatal work injuries among workers and accounts for 15 percent of all job-related deaths (Riopelle, Bourque, Robbins, Shoaf, & Kraus, 2000; Toscano & Weber, 1995). Given these statistics, it is not surprising that violence in the workplace has emerged as a significant public health and safety problem with devastating consequences that accrue for the individual, the organization, and for society (Barling, Rogers & Kelloway, 2001; Fisher & Gunnison, 2001; Hashemi & Webster, 1998; LaMar, Goodwin Gerberich, Lohman, & Zaidman, 1998).

Although research examining potentially lethal workplace environments exist, one occupation is notably absent from research on personnel working in law enforcement-related occupations. Specifically, prosecutors, investigators and other personnel in prosecutors' offices typically interact with the same kinds of violent offenders and suspects, as do police officers. Yet, despite the level of violence potentially faced by representatives

of local prosecutors' offices, little research exists investigating workplace aggression among these professionals. Even more discouraging, unlike law enforcement personnel, local prosecutors lack the specialized training in dealing with potentially violent individuals and typically lack special equipment such as bulletproof vests and firearms. Thus, a prosecutor often faces high levels of violence but lacks the means by which to protect him/herself against the potential threat.

Research conducted by Freeman, Fox, Burr, and Santasine (1996) suggests several workplace conditions that increase the probability of violent behavior and place an individual at higher risk for workplace violence. For example, police officers are in a higher risk category as they often encounter violence on a regular basis (Sygnatur & Toscano, 2000). Given the nature of their work, these law enforcement professionals are more susceptible to workplace violence than most other occupations. Moreover, Peek-Asa (2001) compiled a list

// **...a prosecutor often faces high levels of violence but lacks the means by which to protect him/herself against the potential threat.**

of variables that placed individuals at a higher risk of violence, and among these variables were enforcing laws, regulations, and policies. There is evidence to suggest that job require-

ments and employment settings commonly encountered by prosecutors have been associated with nonfatal workplace violence. Specifically, routine face-to-face contact with a large varied group of people, a regular work travel schedule, and multiple work sites or satellite offices have been related to an increase risk of workplace aggression (Scalora, O'Neil Washington, Casady, & Newell, 2003). These various risk factors are all characteristic of the job responsibilities and corresponding face-to-face interactions by prosecutors and their staffs.

Significant media attention surrounding sensational acts of co-worker fatal workplace violence has sparked widespread public awareness of the problem of workplace aggression. (Barling, 1996; Folger & Baron, 1996; Lord, 1998; Neuman & Baron, 1997; Scalora et al., 2003; Sinclair, Martin, & Croll, 2002; Sygnatur & Tuscano, 2000). Although literature examining the etiology of workplace aggression exists, there has been a paucity of empirical research specific to forms of aggression less severe than homicide (Greenberg & Barling, 1999; Neuman & Baron, 1997; Sadler, Booth, Cook, Torner, & Doebbell, 2001). Ironically, most cases of workplace aggression typically encompass relatively mild forms of aggressive behaviors

“ ...for every workplace fatality from physical assault, there are a sizable number of non-fatal events that result in injuries.

(Baron & Neuman, 1998; Lord, 1998).

Research conducted by Riopelle and colleagues (2000) suggests that for every workplace fatality from physical assault, there are a sizable number of non-fatal events that result in injuries. Unfortunately, non-fatal violence is far more likely to go unreported to law enforcement officials, especially under circumstances in which the victim knows the perpetrator (Scalora et al., 2003; Warren, Brown, Hurt, Cook, Branson, & Jin, 1999). In addition, the lack of comprehensive reporting methods for non-fatal workplace injury hinders the examination of milder forms of aggression in the workplace (Peek-Asa, Howard, Vargas, & Kraus, 1997; Peek-Asa, Schaffer, Kraus, & Howard, 1998). Although workplace aggression is typically defined in terms of co-worker aggression (e.g., a disgruntled postal worker returns to the office), workplace aggression can emerge from sources both internal and external to the organization. Less is known about external threats of violence that occur as a result of one's job. This further implies that research on and solutions to workplace violence, in local prosecutors' offices and elsewhere, must identify a specific workplace's susceptibility to violence.

Further complicating matters is

the existing ambiguity regarding how to define workplace violence and the behaviors that constitute such aggression. Researchers are in disagreement regarding what kind of actions are involved

in “workplace violence” (Bowie, 1996; Greenberg & Barling, 1999; Hurrell, Worthington, & Driscoll, 1996; Peek-Asa, McArthur, & Kraus, 1997; Scalora et al., 2003). In general, the term workplace violence has been taken to refer to violent behavior including homicide, physical assaults, and threats of assaults, directed toward individuals at work. On the other hand, Neuman and Baron (1998) suggest that workplace violence limits research attention to a small subset of harmful behaviors. Consequently, they recommend the use of the phrase workplace aggression, to broaden the scope of behaviors recognized as violent to incorporate all types of destructive acts that are designed to overtly or covertly harm another individual (Warren et al., 1999).

Workplace aggression can be described on a continuum from subtle forms of aggression or psychological harassment (e.g., showing up in court routinely or surveillance of daily activities) to more severe forms of aggression. As a result, for the purposes of this article, workplace aggression is defined as behaviors that range from no to little physical contact (e.g., surveillance or sending letters) to the least physically injurious (e.g., pushing and shoving) to the most severe physical attacks (e.g., assault and

murder) that are inflicted in the course of or in response to one's job responsibilities (Barling, 1996).

The level of workplace aggression experienced by local prosecutors and the staff working in prosecutors' offices is not surprising given the key role these professionals play in the criminal justice system. Research conducted by Lord (1998) concluded the following:

Individuals responsible for the enforcement, detention, and other functions that often deal directly with violent situations, reported the highest percentage of victimization. Some violence is to be expected from suspects seeking to escape or prisoners with a history of violence; therefore, the need to provide the necessary protection for employees becomes crucial. (p. 499)

Protecting local prosecutors is hindered by the lack of research investigating this particular group of individuals. Specifically, the research conducted by Flannery (1999) noted that some professionals such as lawyers were not included in the review of workplace aggression, as no published research existed

for this group of potential victims. Unfortunately, without research, preventative solutions for workplace violence will either not occur or will take place in a vacuum where conjecture regarding what will deter violence takes the place of empirical evaluation (Hales, Seligman, Newman, & Timbrook, 1988; Loomis, Marshall, Wolf, Runyan, & Butts, 2002).

Recognizing the need for research, in 2001, the federal Bureau of Justice Statistics (BJS) conducted the first and only published study examining workplace aggression as it relates to prosecutors and office personnel. This research revealed that 41 percent of local prosecutors' offices reported at least one work-related assault or threat against an employee of the office (DeFrances, 2001, 2002). This rate of violence escalates when one focuses on the largest offices in the country (those jurisdictions with a population of one million or more). Of these larger offices, 81 percent indicated that at least one staff person had been assaulted or threatened during the previous year (DeFrances, 2001, 2002).

The chief prosecutor and his or her assistant prosecutors seem particularly prone to experiencing workplace aggression. Specifically, approximately one-third of chief prosecutors and one in four assistant prosecutors had been threatened or assaulted. It is worth noting, however, that the available BJS data do not allow researchers to determine the degree to which local prosecutors' offices are experiencing actual physical violence. The BJS measurement of workplace violence includes "threatening letters or phone calls, face-to-face threats, and battery or assault" (DeFrances, 2001, 2002).

Furthermore, the BJS data on the prosecutorial responses to this climate of violence are limited to security measures taken. Approximately one in five local prosecutors' offices have implemented electronic security systems, metal detectors or building guards. Interestingly, the proportion of local prosecutors' offices using building guards and metal detectors has more than doubled since 1994. Roughly 10 percent of the offices used electronic surveillance or police protection. Finally, more than 20 percent of the chief prosecutors, nearly 20 percent of the assistant prosecutors and more than 30 percent of staff investigators had taken it upon themselves to carry firearms for personal security. While such information is helpful, prosecutors lack detailed information about the risks of workplace aggression, its manifestations and implications for security policies and practice.

Unfortunately, these security measures are symptomatic of a great majority of proposed strate-

Approximately one in five local prosecutors' offices have implemented electronic security systems, metal detectors or building guards. Interestingly, the proportion of local prosecutors' offices using building guards and metals detectors has more than doubled since 1994.

gies to prevent workplace violence, almost exclusively based on personal experience, anecdote and intuition, rather than empirical evidence. There is, in fact, very little information on the efficacy of different interventions or prevention strategies. One notable exception is the work of Loomis, et al. (2002), who examined the effectiveness of different environmental and administrative procedures for reducing workplace homicide. They found the following interventions had a statistically significant impact on reducing workplace homicides:

- Installing bright exterior lighting;
- Prohibiting employees from working alone at night;
- Establishing physical barriers between employees and non-employees;
- Using security alarms;
- Keeping entrances closed or locked; and
- Conducting screening and background checks of prospective employees.

Whether these or other possible interventions are effective in preventing less severe physical violence in work settings remains to be seen. Further, whether interventions such as these have been implemented or are effective in deterring violence in local prosecutor's offices is still unknown.

Although security precautions are the best line of defense for prosecutors and the staff working in these offices, many harmful encounters occur outside the confines of the office, making office-based security measures ineffectual. Moreover, while security measures help to identify

potentially harmful individuals entering the office, these measures do not protect employees from other forms of harassment. Psychological harassment in the form of letters or phone calls act to scare or threaten prosecutors and staff. Unfortunately, these more subtle forms of aggression can be just as destructive for the individual, but are less likely to be identified and taken seriously.

Little is known about the continuum of violence as it relates to workplace aggression and prosecutors. For example, does workplace aggression mirror the dynamics found in domestic violence in that aggression tends to escalate in frequency, duration and intensity over time? Researchers examining domestic violence contend that most relationships do not begin with one partner seriously injuring the other. Frequently, in the absence of an effective intervention, the aggressor will begin the abuse using moderate forms of abuse and then over time will resort to more severe levels of aggression (Barnett & LaViolette, 1993; O'Leary, 1993). Little evidence exists to substantiate the notion that prior threats of workplace violence may escalate to severe forms of physical aggression. However, it is not inconceivable to conclude that subtle forms of workplace aggression may progress to more severe physical aggression.

As previously noted, violent physical aggression against prosecutors is uncommon; however, stalking behaviors and other psychological forms of harassment are a growing phenomenon experienced by prosecutors. In 2002, the American Prosecutors Research

Institute's, Office of Research and Evaluation, conducted an informal survey to assess the level of aggression experienced by prosecutors. The survey revealed that prosecutors across the nation had experienced different forms of prolonged harassment or stalking behaviors as a result of their job responsibilities. Gang associates or family members of defendants thought to be treated unjustly by the criminal justice system, or specifically the prosecutor, were cited most frequently as possible stalkers or those most likely to engage in stalking behaviors.

Over the past 10 years, interests in the etiology of stalking and the behaviors that constitute this aggression have grown dramatically (Rosenfeld & Harmon, 2002). Similar to workplace aggression, the definition of stalking and the behaviors typically associated with stalking can vary thus making it more difficult to investigate. According to the literature, stalking behaviors rarely occur in isolation and typically persist over an extended period of time (Meloy, 1997). Stalkers may employ various tactics to harass their victim and generally begin stalking with mildly disconcerting behaviors (Meloy, 1997). Some of the more common forms of aggression include repeated public approaches, telephoning, taking photographs, sending letters, physical assaults, destruction of property, surveillance and following the targeted individual (Sheridan, Blaauw, & Davies, 2003). When mild forms of harassment are employed, victims are generally more likely to ignore or minimize such acts of aggression as random acts or

harmless behaviors. However, while most stalkers will not progress to violence, the occurrence of violence is high enough to warrant a serious response (Meloy, 1997). Determining which stalkers represent the most significant level of risk versus those who pose less risk of physical harm is still a fundamental question for researchers (Rosenfeld & Harmon, 2002). Nevertheless, it is critically important for prosecutors to be responsive to lower levels of aggression, as these behaviors may progress to more injurious forms of aggression.

Courtrooms are typically open to the public and prosecutors are often in the public eye, which adds to the complexity of an already problematic situation thus fostering the stalker/victim dynamic. Unfortunately, simply doing one's job can "encourage" stalking behaviors. Complicating matters even more, the court setting is often fueled by an adversarial, even hostile atmosphere that can be misconstrued by the average person. A heated environment coupled with an individual perceived as unjustly treated makes for a potentially dangerous encounter. Although there are no absolute characteristics that can positively identify potential victims, research suggests that victims are often individuals working in highly visible jobs (e.g., public service, politics or mass media). Moreover, stalking victims come from various socioeconomic backgrounds but are typically well educated and tend to occupy high-level professions (Sheridan, et al., 2003). No one is immune to a potential stalker, but to remain vigilant in documenting and taking any encounter or threat seriously

is a first step in protecting prosecutors and staff working in these offices.

It is imperative for prosecutors and staff to be aware of the potential dangers they may encounter everyday. Individuals working in these offices should document any behaviors that seem out of the ordinary or suspicious. There have also been numerous suggestions on how to improve the workplace in order to eliminate possible violence. Suggestions include changes in the workplace environment, administrative interventions and psychologically based techniques to deter violence.

A common theme on how to improve safety in the workplace encourages organizations to conduct both internal and external risk or threat assessments (Barrett, Riggart, & Flowers, 1997; Fletcher, Brakel, & Cavanaugh, 2000). This involves scanning the organizational environment to identify factors (or individuals) that may serve to escalate the level of threat for violence. Other suggestions include forming emergency response teams (Barrett, et al., 1997; Johnson & Indvik, 1994); providing outlets such as employee assistance programs, where individuals can articulate frustrations or to receive counseling (Barrett, et al. 1997; Johnson & Indvik, 1994); providing opportunities for training and development, either in context-specific skills such as how to deal with emergencies such as stalkers or more personal qualities such as having a sense of empowerment (Barrett, et al., 1997; Johnson & Indvik, 1994); and designing the

“Courtrooms are typically open to the public and prosecutors are often in the public eye, which adds to the complexity of an already problematic situation...”

physical work environment so that maximum protection is provided (e.g., designing office layout so that occupants cannot be trapped), by providing bright lighting and by placing barriers between employees and “the public”(Barrett, et al., 1997; Calway, 2001). It is critically important for local prosecutors to design interventions that are targeted to best protect the employee groups at greatest risk of violence, thus enhancing the effectiveness of workplace violence-prevention programs.

It is clear that research on workplace aggression involving local prosecutors is lacking. Additional information will not only help to improve the safety and effectiveness of local prosecutors' offices, but will improve the functioning of the criminal justice system. Additional research is needed for a better understanding of the level of aggression experienced by local prosecutors in an effort to ensure that events like the Fred Capps murder described at the beginning of this article do not become more common. Prosecutors will directly benefit from knowing the types of physical violence to which they are exposed, and what measures they can implement to successfully ameliorate any possible workplace aggression.

REFERENCES

- Barling, J. (1996). The prediction, experience, and consequences of workplace violence. In G. Vandenberg and E. Bulatao (Eds.), *Violence on the job: Identifying risk factors and developing solutions* (pp. 29-49). Washington, DC: American Psychological Association.
- Barling, J., Rogers, A. G., & Kelloway, E. K. (2001). Behind closed doors: In-home workers' experience of sexual harassment and workplace violence. *Journal of Occupational Health Psychology, 6*, 255-269.
- Barnett, O. W., & LaViolette, A. D. (1993). *In could happen to anyone: Why battered women stay*. New-Bury Park, CA: Sage.
- Baron, R. A., & Neuman, J. H. (1998). Workplace aggression--the iceberg beneath the tip of workplace violence: Evidence on its forms, frequency, and targets. *Public Administration Quarterly, 21*, 446-463.
- Barrett, K. E., Riggat, T. F., & Flowers, C. F. (1997). Violence in the workplace: Preparing for the age of rage. *Journal of Rehabilitation Administration, 21*, 171-188.
- Bowie, V. (2002). Defining violence at work: A new typology. In M. Gill, B. Fisher, and V. Bowie (Eds.), *Violence at Work: Causes, Patterns, and Prevention* (pp. 1-19). United Kingdom: Willan Press.
- Calway, R. C. (2001). Workplace violence: Protecting your practice from an epidemic. *Journal of Medical Practice Management, 17*, 79-82.
- Chenier, E. (1998). The workplace: A battleground for violence. *Public Personnel Management, 27*, 557-569.
- DeFrances, C. J. (2001). State court prosecutors in large districts, 2001. Bureau of Justice Statistics Bulletin. Washington, DC: U.S. Department of Justice.
- DeFrances, C. J. (2002). Prosecutors in state courts, 2001. Bureau of Justice Statistics Bulletin. Washington, DC: U.S. Department of Justice.
- Eisele, G. R., Watkins, J. P., & Matthews, K. O. (1998). Workplace violence at government sites. *American Journal of Industrial Medicine, 33*, 485-492.
- Fisher, B. S., & Gunnison, E. (2001). Violence in the workplace: Gender similarities and differences. *Journal of Criminal Justice, 29*, 145-155.
- Flannery, R. B. (1996). Violence in the workplace, 1970-1995: A review of the literature. *Aggression and Violent Behavior, 1*, 57-68.
- Fletcher, T. A., Brakel, S. J., & Cavanaugh, J. L. (2000). Violence in the workplace: New perspectives in forensic mental health services in the USA. *British Journal of Psychiatry, 176*, 339-344.
- Folger, R., & Baron, R. A. (1996). Violence and hostility at work: A model of reactions to perceived injustice. In G. Vandenberg and E. Bulatao (Eds.), *Violence on the job: Identifying risk factors and developing solutions* (pp. 51-85). Washington, DC: American Psychological Association.
- Freeman, C., Fox, S., Burr, B., & Santasine, J. (1996). Workplace violence in federal agencies. In G. Vandenberg and E. Bulatao (Eds.), *Violence on the job: Identifying risk factors and developing solutions* (pp. 199-206). Washington, DC: American Psychological Association.
- Greenberg, L., & Barling, J. (1999). Predicting employee aggression against coworkers, subordinates and supervisors: The roles of person behaviors and perceived workplace factors. *Journal of Organizational Behavior, 20*, 897-913.
- Hales, T., Seligman, P. J., Newman, S. C., & Timbrook, C. L. (1988). Occupational injuries due to violence. *Journal of Occupational Medicine, 30*, 483-487.
- Hashemi, L., & Webster, B. S. (1998). Non-fatal workplace violence workers' compensation claims (1993-1996). *Journal of Occupational and Environmental Medicine, 40*, 561-567.
- Hurrell, J. J., Worthington, K. A., & Driscoll, R. J. (1996). Job stress, gender, and workplace violence: Analysis of assault experiences of state employees. In G. Vandenberg and E. Bulatao (Eds.), *Violence on the job: Identifying risk factors and developing solutions* (pp. 163-170). Washington, DC: American Psychological Association.
- Johnson, P. R., & Indvik, J. (1994). Workplace violence: An issue of the nineties. *Public Personnel Management, 23*, 515-523.
- Jordan, C. E., Logan, T., Walker, R., & Nigoff, A. (2003). Stalking: An examination of the criminal justice response. *Journal of Interpersonal Violence, 18*, 148-165.
- Keashly, L. (2001). Interpersonal and systemic aspects of emotional abuse at work: The targets perspective. *Violence and Victims, 16*, 233-268.
- LaMar, W. J., Goodwin Gerberich, S., Lohman, W. H., & Zaidman, B. (1998). Work-related physical assault. *Journal of Occupational and Environmental Medicine, 40*, 317-324.
- Loomis, D., Marshall, S. W., Wolf, S. H., Runyan, C. W., & Butts, J. D. (2002). Effectiveness of safety measures recommended for prevention of workplace homicide. *Journal of the American Medical Association, 287*, 1011-1017.
- Lord, V. B. (1998). Characteristics of violence in state governments. *Journal of Interpersonal Violence, 13*, 489-503.
- Meloy, J. R. (1997). The clinical risk management of stalking: "Someone is watching over me...". *American Journal of Psychotherapy, 51*, 174-185.
- National Census of Fatal Occupational Injuries. (1996). United States Department of Labor, Bureau of Justice Statistics. USDL 96-266. National Institute for Occupational

- Safety and Health. (1996). Violence in the workplace: Risk Factors and Prevention Strategies. DHHS (NIOSH) Publication No. 96-100.
- Neuman, J. H., & Baron R. A. (1997). Aggression in the workplace. In R. Giacalone and J. Greenberg (Eds.), *Antisocial Behavior in Organizations* (pp. 37-67). Thousand Oaks, CA: Sage Publications.
- Neuman, J. H., & Baron R. A. (1998). Workplace violence and workplace aggression: Evidence concerning specific forms, potential causes, and preferred targets. *Journal of Management*, 24, 391-419.
- O'Leary, D. K. (1993). Through a psychological lens: Personality traits, personality disorders, and levels of violence. In R. J. Gelles and D. R. Loseke (Eds.), *Current Controversies on Family Violence* (p. 7-30). Newbury Park, CA: Sage.
- Peek-Asa, C. (2001). Workplace violence in municipal occupations. *Occupational Medicine: State of the Art Reviews*, 16, 109-123.
- Peek-Asa, C., Howard, J., Vargas, L., & Kraus, J. F. (1997). Incidence of non-fatal workplace assault injuries determined from employer's reports in California. *Journal of Occupational and Environmental Medicine*, 39, 44-50.
- Peek-Asa, C., McArthur, D. L., & Kraus, J. (1997). Determining injury at work on the California death certificate. *American Journal of Public Health*, 87, 998-1002.
- Peek-Asa, C., Schaffer, K. B., Kraus, J. F., & Howard, J. (1998). Surveillance of non-fatal workplace assault injuries, using police and employers' reports. *Journal of Occupational and Environmental Medicine*, 40, 8, 707-713.
- Riopelle, D. D., Bourque, L. B., Robbins, M., Shoaf, K. I., & Kraus, J. (2000). Prevalence of assault and perceptions of risk of assault in urban public service employment settings. *International Journal of Occupational and Environmental Health*, 6, 9-17.
- Rogers, K. A., & Kelloway, E. K. (1997). Violence at work: Personal and organizational outcomes. *Journal of Occupational Health Psychology*, 2, 63-71.
- Rosenfeld, B., & Harmon, R. (2002). Factors associated with violence in stalking and obsessional harassment cases. *Criminal Justice and Behaviors*, 29, 671-691.
- Sadler, A. G., Booth, B. M., Cook, B. L., Torner, J. C., & Doebbeling, B. N. (2001). The military environment: Risk factors for women's non-fatal assaults. *Journal of Occupational and Environmental Medicine*, 43, 325-334.
- Scalora, M. J., O'Neil Washington, D., Casady, T., & Newell, S. P. (2003). Nonfatal workplace violence risk factors: Data from a police contact sample. *Journal of Interpersonal Violence*, 18, 310-327.
- Sheridan, L. P., Blaauw, E., & Davies, G. M. (2003). Stalking: Known and unknowns. *Trauma, Violence, & Abuse*, 4, 148-162.
- Sinclair, R. R., Martin, J. E., & Croll, L. W. (2002). A threat-appraisal perspective on employees' fears about antisocial workplace behavior. *Journal of Occupational Health Psychology*, 7, 37-56.
- Sygnatur, E. F., & Toscano, G. A. (2000). Work-related homicide: The facts. *Compensation and Working Conditions*, Spring, 5, 3-8.
- Toscano, G., & Weber, W. (1995). Violence in the workplace: Patterns of fatal workplace assaults differ from those of nonfatal ones. *Compensation and Working Condition* (pp. 43-50). Washington, DC: Bureau of Labor Statistics.
- Warren, J., Brown, D., Hurt, S., Cook, S., Branson, W., & Jin, R. (1999). The organizational context of non-lethal workplace violence: Its interpersonal, temporal, and spatial correlates. *Journal of Occupational and Environmental Medicine*, 41, 567-581.

Violence Against Prosecutors in Kansas

In response to this article, the editorial board would like to know if any Kansas prosecutors have experienced any acts of violence against themselves, their staff or their families, whether it was a subtle form of aggression or an aggressive form. We want to know what you have experienced, how you handled the situation and what you have done to prevent future acts of aggression toward yourself or others around you. We want to print a follow-up to this article regarding Kansas Prosecutors in the next issue of the Kansas Prosecutor.

Please send your information/experiences to the editor, Mary Napier, by e-mail: mary@napiercommunications.com or mail to:

KCDAA
Attn: Mary Napier
1200 SW 10th Ave.
Topeka, KS 66604

*Your experience may
just help someone else
from becoming a victim.*

Former KCDA Member Highlights:

Making the Leap from Prosecutor to Judge

by Mary Napier, Editor, Kansas Prosecutor

Both Douglas County District Court Judge Michael Malone and 16th Judicial District Court Judge Leigh Hood worked in prosecution and were members of KCDA for several years before moving on to what they saw as the next step: becoming a judge.

Malone received an undergraduate degree from Kansas State University in political science before going on to law school at Kansas University. He graduated law school in 1973, and began working for the county attorney's office during his last semester of law school. After graduation he became an assistant county attorney and worked in that capacity for four years. He then ran for county attorney and was elected. He really appreciated all of the experience he gained his first few years in prosecution.

"The day after I graduated law school, I was thrown into it rather seriously. At that time, there were two assistants and one county attorney," said Malone. "So, I was exposed to [different cases] early and often. I was pretty much assigned to do anything and everything, which could have been anything from traffic to murder or rape cases. That helped me more than anything."

Four years after becoming an assistant county attorney, Malone ran for county attorney unopposed. During his first year as county attorney, there were seven homicides in Douglas County, which is a lot for even now. As the case load increased, some re-structuring was done to have a full-time prosecutor.

So, Malone was the last county attorney and then became the first district attorney when they changed the divisions around. As head prosecutor, he was again exposed to very serious cases early.

After a total of nine years with the county attorney's office, Malone was appointed by Governor John Carlin to the position of Douglas County District Court Judge. The year was 1982. His experience up to that point included five years of prosecution experience as a county/district attorney, more than 100 jury trials, and he was seen as a fair and experienced person by members of the Douglas County Bar Association. Recently, Malone began his sixth retention as a judge.

"You can't become a judge without the support of attorneys," said Malone. "I also can't see being a judge without working in the [county] attorney's office. It showed my qualifications, skills and abilities."

Hood has a different background when it comes to how he got into prosecution. He graduated with an undergraduate degree in criminal justice from Wichita State University in 1977. After graduation, he returned to the family farm for two years during which he realized that farming was a tough way to make a living. So, he took the LSAT and applied to Washburn Law School. He graduated from Washburn Law School in 1982.

After graduation, Hood applied for an assistant county attorney position in the Ford County Attorney's office, and Dan Love,



District Court Judge
Michael Malone

former KCDA president, gave him a job in October 1982.

"I was primarily assigned traffic and juvenile cases. As time went on, I was given a variety of cases that covered every aspect of the prosecutor's job," said Hood. "I was assigned my first homicide case 14 months after beginning work in the office."

In the summer of 1989, Love was appointed to the bench, which gave Hood a great opportunity. He was appointed to fill out Love's term as county attorney, and then he ran unopposed for the position staying as Ford County Attorney until January 2001 when he ascended to the district court bench. He had worked in the county attorney's office for more than 18 years either as an assistant or as the county attorney before becoming a judge.

Hood ran for the position of district court judge after District Judge Jay Don Reynolds retired. He ran unopposed and was elected in November 2000, taking office in January 2001. He was re-elected in November 2004 and just started his sixth year on the bench.

Prosecution definitely influenced both men to become judges, but they had other reasons for becoming a judge, too.

"After 18 years as a prosecutor, I was ready for a change," said



District Court Judge
Leigh Hood

Hood. “The opportunity to become a judge was available, so I took a chance and was fortunate to be elected.”

For Malone, prosecution influenced him because he gained a great respect for judges from his position as a prosecutor. He believed they were fair-minded individuals, and he looked to them to do the right thing. They also had the final word, so that appealed to him. Becoming a judge was the next step up for him.

“I thought there would be more order to my life, and I thought I would enjoy it,” said Malone. “It was a matter of changing careers and jobs to add order to my life.”

Hood also believed that prosecution influenced him to become a judge. From his years as a county attorney, he became well known in Ford County, which helped him establish a good base of community respect and support. He also thinks that by being in court a lot, he established a good working knowledge of the rules of evidence and procedure, which helps him on the bench.

They both agreed that the lifestyles of a prosecutor and a judge are very different.

“One of the things I am able to do now that I couldn’t do as a prosecutor, is I am able to turn off the job at the end of the day,” said

Hood. “As the county attorney, the job never shut off, it never left. I was always thinking about cases or trials coming up, what I could do to make the system better, or what I could do better to help my assistants with their cases. The job never let up.”

“I missed prosecution terribly the first year. It took me a long time to deprogram myself from the [rigorous] schedule of a prosecutor,” said Malone. “Two differences I noticed the most between the DA’s office and my judge’s chambers were that the phones weren’t ringing off the walls and the amount of discretion I lost. I realized very quickly after I became a judge that I had a greater amount of discretion as a prosecutor rather than a judge. That surprised me.”

If a prosecutor decides to become a judge, there are a few pieces of advice from both judges. Hood emphasized that prosecutors should try lots of different cases, so that they have a working knowledge of evidence and procedure. He also stated that prosecutors should get involved in their community and local bar association to the extent possible. An important thing to keep in mind is that you need to try to have good working relationships with the attorneys and the court in your district if you want to move up. Hood had one last piece of advice, which is “Be the minister of Justice you took an oath to be, and it will go far if you make a run at a judgeship.”

Malone’s advice is to “return phone calls, be fair and respectful at all times, remember that duty is determined by the constitution and prosecutors should never belittle their responsibility.” He stated that you always need to be fair and open

in your dealings with the defense, and don’t disrespect the other side. His last piece of advice for prosecutors wanting to become a judge was “Remember you are not the in-house counsel for law enforcement, but rather the in-house counsel for the public.”

Both judges also emphasized the importance of associations when you are in prosecution, and they both talked about how valuable the KCDAA was to them. Hood commented about the networking provided by the KCDAA.

“I think that the KCDAA is the most important association that a prosecutor can be involved in. You get CLE crafted just for a prosecutor, you get a voice in the legislature, and you get a network of other prosecutors who can and will help you when you have a question or a case that you need help with,” said Hood. “Without being involved in the KCDAA, I would never have had that network of friends to draw on. I cannot imagine trying to be a prosecutor, especially in a smaller county, without being in the KCDAA.”

Malone was active in the KCDAA for several years and was on the board.

“I thoroughly enjoyed my time there,” said Malone. “I found the meetings very valuable, because you could go and discuss issues with other attorneys and get good advice. The meetings and socializing was invaluable, and you made contacts so that when you had a problem you could always pick up the phone and call someone. I don’t know of any prosecutor who is truly dedicated who would not want or benefit from the association.”

Walking the Red Carpet

by District Attorney Nola Tedesco Foulston,
18th Judicial District of Kansas

It takes quite a bit more than just being a celebrity to walk the red carpet... That is, if the carpet is in the hallowed halls of the United States Supreme Court.

Early in the morning of Dec. 7, 2005, together with my colleagues Chief Deputy District Attorney Kim Parker and Deputy District Attorney Kevin O'Connor, I arrived at the front door of the Supreme Court Building at One First Street North East. The day was cold and blustery, but we ignored that in favor of our burning desire to advance the cause of justice with scheduled arguments in the case of *State of Kansas v. Michael Marsh*.

We had arrived earlier in the week while preparations for the argument were still under way. Phill Kline and staff had been working long and hard under the exceptional tutelage of Washington's rock solid Constitutional lawyer, Theodore Olson, who was the 42nd Solicitor General of the United States, nominated by President Bush and confirmed by the United States Senate in June of 2001. Olson's wife, Barbara K. Olson, was a passenger on the hijacked aircraft that crashed into the Pentagon on Sept. 11, 2001 (his 61st birthday). Olson, who has argued more than 200 cases before the court was considered a potential nominee to fill Sandra Day O'Connor's post. He re-entered private practice as a partner in the Washington, D.C. office of the law firm Gibson, Dunn & Crutcher LLP where he practices constitutional law, appellate practice and general

litigation. This is the man you definitely want on your team in preparing to argue before the Court.

While there had been significant preparation by Kline in several moot courts in Kansas, these final hours in Olson's office were critical in fixing one's mind to the issues at hand and presenting a cogent and legally sound argument to support our case. We entered an enormous conference room, only the likes of which would be seen in a prominent east coast firm, and we placed ourselves around the table in the final hours before argument. It became obvious that Kline was ready for his assignment. He fielded hard balls from the left and right... he was most articulate in his discussion of applicable law and its relationship to our Kansas case. While he was decked out in casual clothes and wearing a KU ball cap, it was obvious to see that he was well primed for his assignment. Theodore Olson nodded his head approvingly. He knew, as we did that Kline was prepared for the Pearl Harbor Day argument to follow.

There is no such thing as "flying by the seat of your pants" in the Supreme Court. The case preceding Marsh involved an appeal from the Oregon Supreme Court on a criminal case. My friend and fellow National District Attorney board member District Attorney of Clatsop County Oregon Josh Marquis was present. He had a good seat, but envied my place in the courtroom. While I have watched arguments in this



court on other occasions, and was present for the argument of *State of Kansas v. Hendricks*, a case that I had prosecuted personally, there was nothing like being up front and personal with the court. As invited counsel on the case, I had the best seat in the house. I was mesmerized by the opening of the court, and my eyes followed every move the black robed jurists made. My name was called at the preliminary proceedings for motions, and I walked assuredly to the podium as my motions for the admission of Ms. Parker and Mr. O'Connor were called. The newly appointed Chief Justice of the Supreme Court, John Roberts presided. On my best behavior, I followed the instructions given me, and as I finished my presentation, I was rewarded by a smile from the Chief Justice. That was a good feeling, especially since I did not trip or fall, mumble my words or have an apoplectic response to this presentation. You are done. Sit down.

The chairs were solid wood and not very forgiving. They make you want to sit at the edge as if you are at the highest level of intensity! It worked. I listened intently to all that they said, marveling at their choice of words, sharp intellect and yes, even their criticism of counsel

for defendant in the Oregon case. It was excruciating to watch and listen to the justices pick apart his argument, challenge him on the law, and yes, even suggest that he might be better served by having *amicus* argue his case. This counsel folded his tent and limped back to the back seats. He was whipped and pummeled, and it was obvious that the Court would brook no palaver from any counsel that chose to appear before them. And they do mean business.

At the conclusion of the first argument, as if choreographed, counsel on case number two moves from their position behind the first set of counsel tables to those that are immediately in front of the justices. There at your place, set up as if you would use the antique writing tools, was a set of quills that magically appeared for each counsel. As I would find out later, these quills are in demand, and I barely got away with my feathers...for all the counsel grabbing the quills as a memento.

Dressed in a conservative dark suit, blue tie and no ball cap, Kline was called to argue the case. He barely got in two breaths and some forty-seconds before the barrage of questioning from the justices commenced. Justice Souter wanted to get to the “nub” of the issue...where in equipoise, the Kansas death penalty had a presumption in favor of death. The discussion was off and rocking... Scalia jumped in to state “Capital murder, as its name implies, warrants a judgment of death unless there are mitigating factors

that – which indicate that that is not proper.”

Thirty minutes does not seem like a long time, unless you are standing at the podium playing name that tune with the justices.... First **Souter**, then **Scalia**, then **Breyer** and **Roberts**. On **Kennedy** and **O’Connor** and **Stevens** for starters. Comes **Ginsberg** to inquire as to whether Kansas had moved in the legislature to change the law so the state would not be in the situation where there is no death penalty. Some laughter was afforded by comments of Justice Stevens, and the discussion quickly moved through all significant aspects of the appeal. **Justice Clarence Thomas** was as quiet as a church mouse except for his constant asides to Justice Kennedy and their shared smiles. It made you wonder if they were panning the audience and ripping jokes about the people that had come to watch this non-televised event. Someone should tell them it was distracting...not me.

From the edge of my seat, I watched and listened. Kline was unflappable. He rolled with the questions, put the issues out front, agreed with the justices where appropriate and bounced “molecules” around with Justice Breyer!

Then the first round was over. The light at the podium signaled “caution,” and Kline wrapped up his argument reserving his remainder of the time, four minutes, for rebuttal.

Counsel for respondent had prepared her case, but it was not as well reasoned. There was

some humor in the argument of counsel for the appellate defender, Rebecca Woodman. She had the court laughing when she likened the jurisdictional issue as: “What they’re trying to do in this case is yoke a live horse to a dead one to form a plowing team, and it doesn’t work...” All’s well that ends well. She retired to her seat with aplomb.

Wrapping up the argument, Kline succinctly redirected the court to the error of our own Supreme Court in overruling *Kleypas* and to the great deference the State of Kansas has given to the United States Supreme Courts’ role as the “final arbiter of the meaning of the Constitution.”

The case was submitted at 12:08 p.m. Dec. 7, 2005.

We left the building feeling exhilarated. It was certainly a momentous day for the State of Kansas and for Attorney General Phill Kline. While the Attorney General and I have not always agreed, I realized that you cannot put aside the hard work and dedication that he had invested in seeing this case to the Supreme Court. The weather had taken a turn for the worse. There was a barrage of reporters trying to thaw out when Phill Kline, Ted Olson and I walked out to meet them. I told Phill that he deserved the thanks and appreciation of his constituents for a job well done. He had eloquently and effectively represented the people of Kansas before the United States Supreme Court. No one could ask for more.

Photos of Nola Foulston's Supreme Court Experience



Theodore Olson, the Clerk of the Supreme Court, Nola Foulston and Attorney General Phill Kline inside the Supreme Court.



Nola Foulston, Phill Kline and Theodore Olson address the media after finishing their argument inside the Supreme Court in the case of the State of Kansas v. Michael Marsh.



Nola Foulston, Kim Parker and Kevin O'Connor standing outside the Supreme Court.



The outside of the Supreme Court building in Washington, D.C.



Kansas County and District Attorneys Association

1200 S.W. Tenth Avenue
Topeka, Kansas 66604

PRSR STD
U.S. Postage
PAID
Permit No. 688
Topeka, KS

Your Goals..... Our Solutions.



JustWare Prosecutor™ enables Kansas County and District Attorneys to achieve their goals. New Dawn Technologies assists over 150 agencies including several statewide implementations in attaining and exceeding their goals. Our products, experience, and dedicated staff deliver the best support and service in the industry demonstrated by our unprecedented customer retention rate.

Contact us today at justware.com/kansas or toll free at 1. 877. 587. 8927 to arrange an online demonstration of JustWare Prosecutor or to learn more about our Kansas customers.

Let New Dawn Technologies place the right tools in the hands of your staff to make your office automation, integrated justice, and prosecution goals a reality.

