

The Kansas Prosecutor



The official publication of the Kansas County and District Attorneys Association
Volume 11, No. 2, Summer 2014



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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 KCDA is to promote,
 improve and facilitate the administration
 of justice in the state of Kansas.

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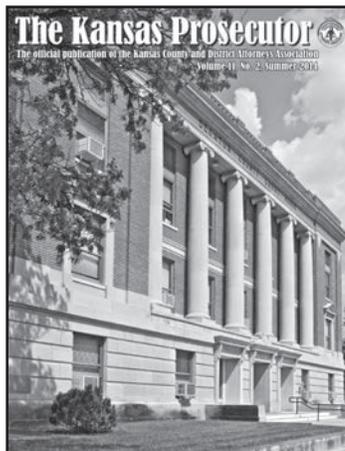
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About the Cover

The original Decatur County Courthouse was built in
 1886 as a corner building and was used until the new
 courthouse was erected in 1926. The current brick
 courthouse was designed by the firm of Squires and
 Ross and is located at 120 E Hall Street in Oberlin,
 Kansas. The original corner storefront has been
 converted into the Bank of Oberlin.

*Correction: The cover of the Spring 2014 Kansas
 Prosecutor was incorrectly labeled as Norton
 County. The photo was actually the Phillips
 County Courthouse in Phillipsburg, KS. We
 apologize for the error.*

*Photo by John D. Morrison, Prairie
 Vistas Photography*



President's Column

by Barry Wilkerson, KCDA President
Riley County Attorney

Trying to Bring Justice

This is my last article as the President of the KCDA, and after spending a few hours trying to come up with a clever article, I surrendered that endeavor. Instead, I settled on the topic that is supposed to define my career--justice. Applying the concept of justice, day in and day out, to every case is no easy task. Where do we look to find what is a fair and just disposition?

The quick answer, I suppose, would be to look at the criminal statutes in combination with the sentencing guidelines (or the penalty section for misdemeanor and traffic offenses) and proclaim victory in locating the answer. However, that is not always where justice is found. History, both in Europe and in this country, has shown that what is written in the statute books and called "the law" is not always the sacred recipe for justice. In fact, a law or a statute can be the weapon of injustice. Justice is not necessarily written in the black ink of the Kansas Statutes Annotated.

I was fortunate in many respects to have been influenced by the experience of two grandfathers. My grandpa Wilkerson, who passed away in 2004, was one of the first Allied soldiers to enter and liberate Dachau Concentration Camp outside of Munich, Germany, in April 1945. It was a time and place that haunted him, and he would only talk about the experience to a stubborn grandson who had a keen interest in WWII and saw his grandpa as a hero. In his later years, Grandpa Wilkerson did on occasion speak to high school history classes about the Holocaust.

My other grandfather, Grandpa Jack, observed injustice closer to home in Winfield, Kan. Grandpa Jack would sit on the bus and eat with a fellow high school teammate. This teammate was not allowed to eat inside the burger joints where the track team would stop after a meet, because he was African-American. This friend and teammate to Grandpa Jack was denied the rights of a free American

because of his skin color.

There were tribunals for war criminals following WWII, and there were changes in American society so that everyone could sit in the café. But for those who had already been denied basic human liberties, there was never any justice. In both scenarios, there were laws that permitted or encouraged injustice. Why were such gross examples of injustice legal? Simply put, it was easy to bully and subjugate people who are without political clout or resources to influence the law. I raise this issue, because we seek justice in the court system, but just as importantly, we seek justice in the legislature. We propose legislation through new criminal statutes or enhanced penalties that we believe will make Kansans safer. Likewise, we oppose legislation that will make our state less safe.

As prosecutors, we prosecute on behalf of the state of Kansas as elected county officials, or on behalf of a city for the municipality that pays our salary. Restoring a victim of a theft, forgery or other financial crime their financial loss or the return of their property while exacting some form or degree of punishment to deter future conduct makes it fairly easy to seek justice. Here, justice is measured to a degree.

In arresting and prosecuting a drunk driver, perhaps a life or an injury was spared, and we seek to impose a jail sentence and conditions of probation that we hope will deter future behavior that could result in a death or great bodily injury. For the drug dealer who peddles poison and misery for a profit, it is easy for me to end my search for justice with the goal of a reasonable prison sentence. For those who murder, rape, or molest a child stealing forever their innocence, locking them up and throwing away the proverbial key, is quite appropriate in my mind.

The difficulty, however, arises when we are prosecuting the defendant who is not violent and does not have a criminal record or a propensity for criminal behavior. This may be the person who

we can rehabilitate and make a productive member of society. We impose conditions of probation or post-release supervision that, in theory, are designed to discourage criminal behavior and encourage productive behavior. Catching and prosecuting criminal behavior takes resources. It requires law enforcement, prosecutor, court and supervision resources, and it seems reasonable that those who require the use of those resources should pay the cost. But is there a level at which the fees and costs become unjust?

Earlier this year, I prosecuted a man for disorderly conduct. He had attended a celebration in a local bar district, had too much liquid courage, and told the police officers what he thought of their efforts to curtail his celebratory mood. I granted the man a diversion. I thought paying court costs and a hefty diversion fee was an appropriate punishment for his behavior. However, when he brought his young daughter in during a meeting with the diversion officer, I discovered the young lady needed glasses as I watched her squinting in an attempt to read. The father, in light of his troubles, was not going to be able to afford glasses for his daughter and also pay the diversion fee and related expenses. Certainly it was the dad's decision to go drinking and violate the law, but I could not tell the young lady that I was sorry her dad could not afford glasses and that he should have thought about that before he got drunk and disorderly.

Unintended victims are certainly an unfortunate casualty, and I have on a great number of occasions asked a judge to send people to prison while children, spouses and family members were left to suffer. The difference for me in those circumstances is that it was for the purpose of protecting society, not for the purpose of adding money to the state or county's general fund. However when I look at a standard felony journal entry and compare it to a journal entry from 1990, or even 1993 when the sentencing guidelines took effect, I see an ever-growing number of fees and costs imposed upon convicted felons. For some of the offenders, it is money they would have spent on alcohol, drugs, and who knows what else. But for those who want to take a different fork in the road, who want to become a productive member of society despite limited job skills, how do they pay for daycare,

school lunches, etc., and also pay off the ever growing fees and costs associated with a conviction for a low level felony?

The KCDA has enough political influence and resources to go to the legislature and request that they include in a bill the imposition of higher fines, court costs, or additional fees, because felons and anyone else convicted of crime are an easy target politically. I would urge caution in the future. We should bear in mind the end result we are seeking to achieve is that of a safer community.

I anticipate there will be challenges for the KCDA in the legislature as a growing number of organizations and persons seek to change how we prosecute persons with mental health issues in the criminal justice system. Caution is again urged. Maybe communities and the state will benefit from drug courts, mental health courts, and mental health diversions for non-violent offenders if the correct conditions are imposed to correct criminal behavior. However, using a diagnosis of post-traumatic stress disorder to excuse violent crime would put the citizens of this state in increased danger. There are or have been attempts to consider releasing dangerous pedophiles from the Sexually Violent Predator Unit, which we have been able to stop. Citizens will be denied justice and the protection of the criminal justice system if we give a pass to a killer, rapist or child molester on the basis that the person who committed an evil act suffers from a mental affliction.

As the Kansas Supreme Court has stated, "Prosecutors are at all times professionals and have the responsibility of a minister of justice and not simply that of an advocate." History has shown us, in this country and in others, that it is not always the law as written that defines justice. Laws have many origins like fear, budget reductions, and other various motives that do not contribute to providing justice for the citizens of the state. As Ministers of Justice, we must continue to support only those that will truly promote justice and oppose those that do not promote justice.

It is an honor to be President of the KCDA, an organization of which I have been a member since August 1990. As we continue to write the history of our organization, let it be said the KCDA stood for justice--both in the courtroom and in the legislature. 🇺🇸

Kansas Prosecutors Foundation Award

2014 KPF Community Service Award Wade Bowie, II - Allen County Attorney

The Kansas Prosecutors Foundation created an annual award intended to recognize a Kansas prosecutor who has rendered outstanding service to his or her community in addition to the performance of the duties required by the position of a prosecutor. Nominations were accepted for the first award of this kind, and the winner was honored during the KCDAA Spring Conference in June 2014. The 2014 KPF Community Service Award winner is Wade Bowie II, Allen County Attorney.

Wade graduated from the Washburn School of Law in 2004. During law school, he participated in a number of organizations, including the Washburn Student Bar Association and the Shawnee County Youth Court. While attending law school, Wade worked as a clerk for the Kansas Court of Appeals. After law school, Wade moved to Iola to serve as Assistant Allen County Attorney. He served in that role from 2005-2011. After the departure of the Allen County Attorney in 2011, Wade was appointed to assume those responsibilities. He then won the 2012 election and was hired to serve as the Iola municipal court prosecutor. But, it is his work in addition to being a prosecutor that makes him a deserving winner of the Community Service Award.

According to his nomination, Wade has a passion for helping animals, youth, child victims, law enforcement, and lots of other causes in his community. First, he is a member of the board of the Allen County Rescue Facility (ACARF). His participation in this board over the last three years has ensured that the organization continues its important mission of caring for neglected, abused, and lost domestic animals. For youth, he used his discretion as County Attorney, to donate money to the Iola High School to fund a first ever after prom activity. The students boarded buses in Iola after the prom and traveled to Tulsa, where they had unlimited pizza, indoor go-karts, laser tag, and a game room. This alcohol free event was made possible with support from the community and the County Attorney's Office. Wade also went to the middle school and high schools to speak with students about the dangers of sexting. In addition, Wade is a member of the multi-disciplinary team for



the Hope Unlimited Child Advocacy Center. They meet monthly to discuss ongoing cases and efforts to assist child victims.

When not working for youth and children, Wade spends time advocating to acquire a local sexual assault nurse examiner in Allen County. The effort is being coordinated through several groups, and if approved, will help victims in the local community obtain easier access to important services.

For law enforcement, Wade began a tradition of sponsoring an annual law enforcement recognition night, funded through the diversion account. The event includes dinner for law enforcement, spouses, and other guests and includes a presentation from Wade summarizing the previous year's noteworthy criminal cases and how they were resolved in court. This effort is designed to show community appreciation for law enforcement's efforts in keeping Allen County safe and build rapport between law enforcement and the County Attorney's Office.

Wade has numerous other accomplishments in his community including: persuading law enforcement and county judges to approve a blood search warrant procedure for DUI refusal cases, helping city and county law enforcement obtain head cameras for use during investigations, donating money to the local CASA chapter, contributing to the annual Safety Day for youth, providing training on legal issues during the Kansas concealed carry classes, funding the 31st Judicial District's Drug Court, and much more that we don't have room to list!

He truly does provide outstanding services to his community beyond his role as a prosecutor. Congratulations Wade! 🎉

Kansas Prosecutors Foundation Gives Scholarships

The KCDAA Board of Directors established the Kansas Prosecutors Foundation to further the administration of justice in the best interests of the public. In 2013, the KPF gave out its first law school student scholarships to a law school student from each regent law school. Recipients of KPF scholarships shall meet the following criteria:

- a Kansas resident;
- a 2L or 3L enrolled in a law school in Kansas;
- demonstrate a desire to become a prosecutor;
- exhibit previous or ongoing activities of public service;
- either be pursuing a career in prosecution or the administration of justice; and
- may not be a member within the first degree of relationship to either a member of the scholarship committee or the KPF board.

The \$1,000 scholarships were again awarded in 2014 and the winners were recognized at the KCDAA Spring Conference. Read more about the recipients below.

2014 KPF KANSAS LAW SCHOOL SCHOLARSHIP WINNERS

Xavier Andrews, II

Xavier Andrews grew up in Kansas City, Mo., where he graduated from Hickman Mills High School in 2006. He received a Bachelor of Science in Business Administration from Missouri Western State University, and a Master of Business Administration from Rockhurst University. Xavier recently graduated from the University of Kansas School Of Law, where he served as president of the Black Law Students Association and Business Manager of the Kansas Journal of Law and Public Policy. Xavier also served as a member of the Moot Court Council.

During his third year of law school, Xavier served as an intern at the Johnson County District Attorney's Office in the Economic Crime Unit and Consumer Protection Division. While there, he prosecuted criminal cases before juries and assisted in enforcing the Kansas Consumer Protection Act against area merchants who committed deceptive and unconscionable acts against consumers. Xavier will join the office on a permanent basis as an Assistant District Attorney after taking the July 2014 Kansas Bar Exam.

Kayla Roehler

Kayla Roehler graduated from high school in Topeka. After high school, she went to Kansas State University and received her undergraduate degree in elementary education and graduated with honors from the Delta Alpha Pi International Honors Society. During her time at Kansas State, she started the Kansas State Chapter of Delta Alpha Pi International Honors Society. She also worked as a chairperson for Disability Awareness Week, where she promoted awareness of various types of disabilities.

During her first year at Washburn Law, she was selected by her peers to be the class section's LARW Gladiator. During her second year, she organized a team from the law school to run and walk in that year's Race Against Breast Cancer. Her team included 60 students, faculty, and staff members. Also, during her second year, she decided to work on her Pro Bono Certificate. In her upcoming final year, she has been selected to be a student prosecutor with the Shawnee County District Attorney's Office, and will also be a research editor for the Washburn Law Journal, a student ambassador for the law school, the Barristers' Ball Chair, and will be completing her Advocacy and Pro Bono Certificates. Her plan is to be active--or more accurately put--extremely busy, pressing forward, and trying to be a force and voice for good. 



Recent scholarship winners hold their honorary checks and stand with members of the Board of the KPF. They were honored at the 2014 KCDAA Spring Conference. Left: Xavier Andrews, II, Right: Kayla Roehler



2014 KCDAA AWARD NOMINATIONS

Please take time to nominate a member of the KCDAA whom you believe to be deserving of an award. This is the opportunity to recognize the accomplishments of the hard-working prosecutors who make up the membership of the KCDAA and a policymaker who has helped with interests of the KCDAA.

FOUR categories of awards will be presented at the 2014 Fall Conference: **The Prosecutor of the Year, the Lifetime Achievement Award, Associate Member Prosecutor of the Year, and Policymaker of the Year.** The award winners are chosen by the KCDAA Board of Directors.

Award Qualifications:

The Prosecutor of the Year Award is presented to a prosecutor for outstanding prosecution of a case or cases throughout the year. Nominations may be made by either the prosecutor himself/herself or by a colleague. The nominee must be a regular member of KCDAA.

The Lifetime Achievement Award is presented to a regular KCDAA member for his/her longevity as a prosecutor. The nominee must have served no less than 25 years in a prosecutor position, and not previously received this award. Nominations may be made by either the prosecutor himself/herself or by a colleague.

The Associate Member Prosecutor of the Year Award is presented to a prosecutor for outstanding prosecution of a case or cases throughout the year from an office other than a County or District Attorney's office. Nominations may be made by either the prosecutor himself/herself or by a colleague. The nominee must be an associate member of KCDAA.

The Policymaker of the Year Award is presented to an individual who is determined to have made the most significant impact on policy related to county and district attorneys either during the past year or over an extended career of public service. One award is presented each year. The award is open to individuals having public policy making authority as evidenced by legislative support of the KCDAA.

The awards will be presented during the Fall Conference taking place October 13-14, 2014 in Overland Park, Kansas.

To nominate yourself or one of your colleagues, please use the nomination form found at www.kcdaa.org. You may send your nominations to:

KCDAA
Attn: Kari Presley
1200 SW 10th Avenue
Topeka, Kansas 66604
Fax: (785) 234-2433
E-mail: kpresley@kearneyandassociates.com

**All nominations MUST BE received by 5 p.m. on
Friday, August 29, 2014.**

For questions, please contact Kari Presley at (785)
232-5822 or via e-mail to
kpresley@kearneyandassociates.com.

Download the form at www.kcdaa.org and mail it, fax it, or e-mail it by August 29!

Legislative Update

by Steve Kearney, KCDA Executive Director & Patrick Vogelsberg, Associate

KCDAA Processes and Initiatives

At the time of writing this article it seems that the dust from the 2014 legislative session has finally settled. While campaigns for House seats and statewide offices are in full swing, KCDA staff is already preparing for the 2015 legislative session.

However, before we get too far into preparing the next legislative agenda for the association, we must first reflect on our approach to the previous session. In years past, the KCDA has brought legislative agendas that contained many bills of importance. And while, from our perspective, each are deserving of passage, whether a bill is deserving or even lacks opposition does not mean the bill will be successful. The most important consideration from a lobbyist perspective is the *process*. How does a bill successfully navigate a legislative process that is rife with traps, pitfalls, and hurdles? Our legislative process is one that is designed for bills not to pass. That is not some pessimistic observation, but a reality of the numbers. Only a fraction of the bills that are introduced every session become law. While there is only one common way for a bill to be passed (63 votes in the House, 21 votes in the Senate, and the Governor's signature), there are numerous ways for bills to be held up, tripped up, or just straight up killed.

So how is it that the KCDA introduced three measures this year and all three were successful? The answer starts with the fact that only the legislative proposals that survive *our* association's legislative process will make it onto the KCDA legislative agenda. First, our legislative committee vets each proposal, deliberates, and makes a recommendation to the KCDA board. This process takes place over many weeks between August and October. The board narrows the list even further. Last year there were 29 proposals by members for the association's agenda. The majority of the proposals were very deserving and hard decisions had to be made. By the end, 12 were recommended to the board and ultimately three were brought to the legislature for introduction. It should not be lost on anyone reading this article, that any bill the

KCDA introduces has not been introduced on a whim. Serious vetting takes place that is based first and foremost upon the State's need for the legislation. That need is then reconciled with the current political realities and the association's own political capital.

So why not introduce all proposals based upon the proverbial strategy of, "we'll see what sticks"? In a mythical legislative environment where our bills are the only ones that are introduced, that might work. However, for good or worse, that is not the reality of the situation and many other pieces of legislation that are introduced require our attention. Critically important issues – death penalty, death penalty appeals, and public access to search and arrest warrant affidavits - required more attention this session. While we predicted these issues would arise during the 2014 session, we could not predict the lengths to which the KCDA needed to go to have legitimate law enforcement concerns accommodated. Further, there was the close to 30 other bills that the association would testify on and roughly 100 that were tracked.

Compounding the intensity of the session is the fact that our members are prosecutors and must take time away from prosecuting the laws already on the books in order to deliberate and take a position on each piece of legislation – with time always being of the essence.

We say all this, not to sound dramatic, but rather to highlight the strategy of crafting the KCDA agenda. Only bills that can be seen as needed, not only by our membership, but the legislature, should be introduced. We cannot rely on, "because we said so," or, "we just don't like it," as our position. Any position that this association takes will need to continue to be defensible and verifiable. More so, the KCDA position must be substantive and many times in the form of testimony, which again, takes prosecutors away from their work in order to draft testimony and away from offices and court rooms in order to come to Topeka. In an ideal world, perhaps crime would halt and dockets and judges would take

a temporary hiatus in order for the membership to easily make this contribution for the profession and the citizens of Kansas. Until that occurs, all we can say is: thank you.

For some it may be easy to think that the work to effectuate law and justice of the state is complete when it is finalized under the dome of the Statehouse. In reality, the real work – the work that actually touches the lives of Kansans – is yet to be done. After all of the testimony has been submitted, hearings held, amendments drafted, floor debates, conference committee meetings, and final action votes, the laws that are passed and signed into law still need to be executed against those who choose to ignore them. That is why we believe it is paramount to hear from the experts – Kansas experts – that are in the field every day and see the policies that are set in Topeka in action across the state. From our experience, far too often, some obscure association, institute or coalition slaps whatever issue *de jure* is on a letterhead and introduces unvetted legislation with sweeping “reform” that is swollen with unintended consequences. While these critiques of our administration of justice are good from time to time, we are of the opinion that deference should be given to our fellow Kansans that deal with the laws on a daily basis: our sheriffs, police, prosecutors, CSOs, judges, etc. However, every election brings new legislators with a hunger to leave their mark on

our Kansas statutes. Chapter 21 and 22 always seem to be attractive targets.

The message that we try to instill is that our group should not be perceived as the abstract and faceless, big brother “government,” but rather the sons and daughters of Kansas. Most of you were born in Kansas, educated in Kansas, and have raised your own families in Kansas. We do not believe that we would go out on a limb to say that many of you have a vested interest in the well-being of this state. To you, Kansas is a personal matter. Therefore, it is important that you make the legislators that you send from your communities, a personal matter. Schedule a meeting. Invite them for coffee at your office. Put a name and face with the office. Establish a personal relationship. Vote.

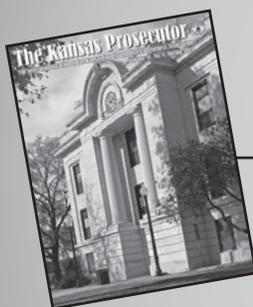
Nothing warms our lobbyist hearts during the session like a legislator indicating they will need to check with their local county or district attorney on a matter. At least they are checking in with one of their constituents.

With you keeping those relationships back home and the lobbyists closing the loop and reporting back on legislators’ activities in Topeka, the KCDAA will be on strong footing going into the next session.

Thank you for your contributions to Kansas on a daily basis. Furthermore, thank you for the opportunity to represent you in Topeka. 

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

Or do you want to submit an article?



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

**Upcoming Deadline:
Fall 2014 - October 22**



You can find archives of The Kansas Prosecutor at www.kcdaa.org. Starting with the Summer issue, these are available in a new digital format for easy viewing on tablets and mobile devices.



Legislator's Column

by Representative Lance Kinzer

Time for Reflection

Later this month, I will reach 10 years of service in the Kansas House of Representatives. Having decided not to run for a sixth term, I've been doing some reflecting on the accomplishments, disappointments, and lessons learned during that time. While there is certainly much to criticize in the political process, it is easy to become too cynical, when in fact there is good reason to be grateful regarding the way government operates in Kansas. Perhaps chief among these reasons is the extent to which elected officials in Kansas are truly a part of the communities they represent; living, working, worshiping, and re-creating alongside their constituents. Our elected County and District Attorneys share with our state legislators all of the benefits and limitations that come from attachment to a particular place with its peculiar history, people, and challenges.

The outworking of this reality means that in many cases even salutary reforms can be slow in coming. But as John Randolph of Roanoke put it, "Providence moves slowly, but the devil always hurries." Our system is rightly designed to ensure that changes in our law are carried out only after a full and fair opportunity for those with conflicting views to share their perspectives. This takes time of course, but even more importantly, it takes the willingness of all interested parties to engage in the process. During my years in the legislature, I have carried many criminal law related matters during floor debate (including Jessica's law and the Special Session Hard 50 reform bill), served on numerous non-legislative commissions tasked with recommending reforms to and recodification of our criminal laws, and acted as Vice-Chair of the Corrections and Juvenile Justice Committee and Chair of the House Judiciary Committee. In each of these roles, I have been left with a keen appreciation of how dependent legislators are on the advice and council received from those with real world

experience in our criminal courts.

Judges, prosecutors, defense counsel, and even former defendants have all provided valuable insights to the legislature that have assisted us in our task of establishing a criminal justice system that works for all Kansans. This includes protecting our citizens, providing justice for victims, and ensuring that the rights of defendants are protected. Legislating in the area of criminal law can be especially challenging because of the understandably emotional nature of the subject matter involved. Indeed, it is no stretch to say that legislators are perhaps more susceptible to overreaction and overreaching in the realm of criminal law than on any other matter before us. Again in these circumstances, the measured advice of prosecutors regarding what is warranted, what is workable, and what is fair, is simply invaluable.

But it is not merely emotion that complicates the legislative task in relation to criminal law, it is its substantive complexity as well. Virtually every year the legislature is faced with the task of revising our laws in an effort to effectuate legislative intent in response to judicial rulings at the state or federal level. Sometimes these issues can be difficult for attorneys to fully understand, let alone those legislators with no legal training or experience with the criminal justice system. Here again, the legislature simply cannot do its job without the assistance of prosecutors, and defense counsel, willing to offer even handed input on the practical impact of court decisions, and the most equitable ways to address such decisions. In these cases in particular, those who offer input do the greatest service when to the extent possible, they set aside their role as advocates and instead consider the matter from the perspective of the various interests legislators are duty bound to balance.

Taking the time to get to know your local legislative delegation, to follow matters being

considered by the legislature, and to provide input to legislators both publicly and privately (within the bounds of the Open Meetings Act of course!!), may seem like just another list of things to do in an already busy schedule. But, the effective administration of justice in our state requires not just competent prosecutors, zealous defense counsel, and an impartial judiciary; it also requires criminal law and procedure that is carefully crafted to achieve justice not merely in theory but in practice.

Having served as Trial Defense Council during my days in the Army JAG Corps, I know that there is no more important legal work than that which

involves the liberty interests of any individual. We are fortunate in Kansas to live in a state where prosecutors and legislators are accessible both to their constituents and to each other, so that they can build the trust and rapport needed to take on the many complex and challenging criminal law issues that confront the legislature every year. For my own part, I want to thank Kansas prosecutors for their willingness to engage in this often difficult process. Whatever good I was able to accomplish in working to improve criminal justice in Kansas simply could not have taken place without your input and assistance. 🙏



Endowing the Kansas County & District Attorneys Association

Enhancing Public Safety Through Professional Criminal Prosecutions

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and enhance public safety for the future.**

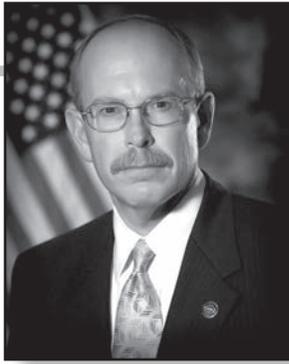
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Guest Column

by Kirk Thompson, Director, Kansas Bureau of Investigation

KBI - Forensic Science Center Groundbreaking

A year ago I reported to you that the Kansas Bureau of Investigation (KBI) had received legislative authority and was set to build a new forensic science center to serve the needs of the criminal justice community in our state. I was extremely proud of the collaboration and all the great work that was done by a long list of individuals and government agencies that made the project possible. I was elated to see that as a state we were going to commit to a serious effort to reduce backlogs within our laboratory system and improve the efficiency of our criminal justice system. Still, the reality that we were actually going to build a state-of-the-art crime lab had not quite set in.

On April 30, 2014, we held the official groundbreaking ceremony on the new site. Governor Sam Brownback, Attorney General Derek Schmidt, Washburn University President Jerry Farley, and Topeka Mayor Larry Wolgast joined me to kick off the project. I was very pleased to see those of you who braved the cold and wet weather to be there and wish us well. It was gratifying to see the level of support that was shown for what we all were attempting to accomplish. Still, for me, the reality and magnitude of what was happening had not fully been realized.

For me that reality finally set in at about 8:00 a.m. on Monday, May 19 when I watched the heavy equipment begin moving dirt and preparing the site for the structure. It was clear at that point that we were actually building a new crime lab! Since then I have watched daily as our contractors have turned an empty lot into a bustling construction site. The level of choreography between all of the workers has truly been impressive to watch. At the time of this writing, approximately 90 piers from 30 to 50 feet deep had been constructed and provide the strong base upon which the building will rest. Footings were being poured and the walls for the lower level were in progress as well. Storm sewers have been

laid and the main electrical and data/fiber feeds have been brought to the site. Soon they will begin pouring the slab on which the building will rest and we expect construction of the steel superstructure to begin in August. We are on schedule and on budget. Thanks to all of you for your support in the legislature and the participation of KCDA on the Laboratory Advisory Board. Both were critical to the success of the project.

For those of you who may not recall the details, let me step back for a moment and give you a quick recap of the project. The new KBI Forensic Science Center is being built on the campus of Washburn University in Topeka. The facility will have a total of 100,000 square feet of usable space; 12,000 of that space will consist of training rooms and research labs that will be jointly used by the KBI and Washburn. The \$55 million lab has been sized to meet international accreditation standards as well as the projected staffing and technology needs of the state for the next 20 years. Construction is expected to be complete in October 2015, and we hope to open the facility and commence operations before the end of the year.

The new facility is a major part of our ongoing efforts to provide a much enhanced level of service to your offices and to our law enforcement contributors. Our goal is to reach an average turnaround time of no more than 60 days on forensic analysis requests. While bringing online the new forensic laboratory is a huge part of our efforts to improve services, we are approaching that goal from a number of different perspectives.

As you know, once you have an adequate place to work, you must have the professional staff to occupy the space and do the work. In recognition of that fact we have increased staffing levels, over the past three years, to the point of filling every available work station. We have done that with the support of Attorney General Schmidt, who has



Group shot of the members of the KBI lab staff who have been involved in the project from the onset. They are referred to as the KBI Laboratory Technical Team.

approved the creation of several new positions that have been funded primarily from fee funds collected from offenders. We hope to be as fully staffed as possible when we move into the new facility. To improve our turnaround times and reach our productivity goals, we must also gradually increase staffing in key areas. We will be seeking those gradual increases in our operating budget over the next several years.

Finding and keeping highly qualified forensic scientists has proven to be a challenge for us in the past and has prevented us from reaching full staffing. That inability has greatly diminished our efforts to reduce backlogs. We calculated that on average it costs \$190,000 to train each forensic scientist, so it is clear that we must do a better job of preserving that investment. During the last legislative session, our message was heard and our recruiting and retention efforts received a big boost; we were given funding for a 10% pay increase for all forensic scientists. Couple that with the improved working conditions in the new lab and the long list of benefits gained from the great partnership with Washburn, we feel we have made significant strides forward in this critical area.

Lastly, we have begun a comprehensive review of many of our processes and procedures by utilizing the Lean Six Sigma methodology. Starting with our Biology/DNA section, we have engaged professional

Lean Six Sigma practitioners to help us find the most effective and efficient way to do business, while in no way diminishing the high quality standards expected of an accredited forensic lab. We are already seeing the benefits of this undertaking. Very soon we will be releasing new guidelines for the submission and testing of DNA evidence. The guidelines will be based upon the findings of the Lean Six Sigma process and the experiences of other forensic laboratories who have implemented the procedures. We appreciate greatly your cooperation as we work through those changes.

So what can you do to help us reach our goal of providing you with top quality service? Three things stand out. First, help us collect the statutorily authorized \$400 fee per forensic examination from the defendants that you prosecute. Our records indicate that our receipts from fee funds are declining. They also indicate that generally there is a fairly low level of compliance with regard to collections in comparison to the number of examinations completed. Anything that your office can do to help in that area would be greatly appreciated. Those fee funds help us to operate the laboratory and to maintain and acquire necessary technology.

Secondly, we would ask that whenever practical, to use the lab report as authorized by statute instead of requiring the attendance of the forensic scientist



The official groundbreaking (from left to right): Richard Wienckowski, Topeka Public Building Commission; Michael Van Stratton, KBI Laboratory Director; Derek Schmidt, Attorney General; Kirk Thompson, KBI Director; Sam Brownback, Governor; Jerry Farley, President, Washburn University; Larry Wolgast, Mayor, City of Topeka; William Sneed, Chairman, Washburn University Board of Regents; Cassandra White, President, Washburn Student Government Association.

at a preliminary hearing. The time that a scientist spends on the road and waiting for court does have an impact on productivity. If you need them they will come, but if the lab report would suffice for the purposes of preliminary hearing, it would help us to manage our backlogs.

Third, we would ask you to make a critical evaluation as to what items of evidence in each case you prosecute are really necessary for your efforts to be successful. We find that we do a significant number of exams that seem on the surface to be duplicitous and appear to have no real value to the case. Again, anything your office could do to assist us in this area would be a big help.

I appreciate the opportunity to contribute to the KCDA magazine, and on behalf of the staff at the KBI want to thank you for your partnership and support of our mutual efforts to keep Kansas safe. I would welcome any thoughts or suggestions that you may have for improving our services. 

County Courthouse Portraits



Decatur County Courthouse

John D Morrison

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KCDAA Former Member Highlight: Prosecutors to Judges

by Amanda G. Voth, Assistant Attorney General

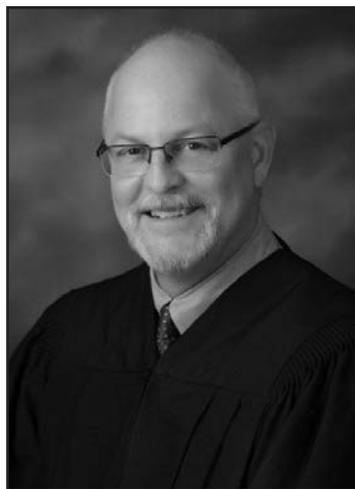
Judge David Debenham and Judge Michael Russell

Judge David Debenham and Judge Michael Russell took similar paths to becoming district court judges – both majored in Political Science, both worked as prosecutors at District Attorney’s Offices, both worked at the Attorney General’s Office, and both believed that after years of prosecution experience the next logical step was to become a district court judge.

Debenham, an Abilene native, became a district court judge in 2008. After graduating from Bethany College with a degree in history and political science, he decided to go to law school. One of his professors during college helped develop his curiosity toward the law. Becoming a prosecutor seemed like the natural choice after interning his third year of law school in the Shawnee County District Attorney’s Office. Debenham was “fascinated by prosecution,” pointing out that although he couldn’t prevent crimes, he could help make sure individuals were held responsible for their actions and he could help the victims of crimes.

Debenham was hired as an Assistant District Attorney upon his graduation from Washburn Law School. He worked at the Shawnee County D.A.’s Office until 1986 when he went to the Kansas Corporation Commission. Debenham got back into prosecution when he returned to the District Attorney’s Office, and continued his prosecution career at the Kansas Attorney General’s Office, where he served as Deputy of the Criminal Litigation Division. In 2000, Debenham once again returned to the Shawnee County D.A.’s Office as First Assistant for Bob Hecht until his appointment to the bench in 2008.

During his time as a prosecutor, Debenham prosecuted a wide variety of crimes. He started out prosecuting white collar crimes, and in only his second year as a prosecutor, second chaired a homicide trial. At the time he took the bench, he was prosecuting severity level four felonies and above.



Judge David Debenham

Russell, originally from Hobbs, New Mexico, became district court judge in 2012 after being appointed by Governor Brownback. Russell then ran unopposed and began a four-year term in 2012. While Russell originally wanted to be an engineer, by the time he attended Texas Tech, he decided to turn to something he had always loved – the law. Interested in legal television shows, Russell decided he wanted to be a trial attorney, and earned his juris doctorate from the University of Kansas. Public service was always something Russell had wanted to do, so becoming a prosecutor was a good fit for his two desires of being a trial attorney and serving the public. Russell joined the Wyandotte County District Attorney’s Office immediately following law school, and stayed there until 1996 when he went to the Medicaid Fraud Division of the Kansas Attorney General’s Office. After three and a half years in this position, Russell returned to the Wyandotte County District Attorney’s Office. Russell prosecuted all kinds of cases from traffic to capital murder. When Russell was appointed district court judge, he was serving as Chief Deputy for Wyandotte County District Attorney Jerome Gorman.

Russell and Debenham were influenced in their decision to become district court judges by practicing in front of judges they respected. Russell states he had practiced before excellent judges in Wyandotte County, and that he learned a lot from those judges. Debenham states judges, including Justice Luckert, were very instrumental in his decision to become a judge. Many of the judges he practiced in front of “optimized what a proper judge should be” and were open to hearing everyone’s argument. “You always had a fair shot in front of those judges,” Debenham notes. “That’s the kind of judge I wanted to be.”

Both Judge Debenham and Judge Russell point to two experiences from their prosecution careers that have helped them in their current positions as judges: appellate work and

a vast working knowledge of evidentiary issues. Debenham states appellate work has helped him tremendously as a judge. The different approach appellate work took – looking purely at legal ramifications, as opposed to the emotional element of trial work – was enjoyable to him as a prosecutor. Russell points out that in Wyandotte County, the prosecutors handled their own appellate briefs, and the experience he gained conducting his own legal research and writing his own appellate briefs has served him well in his position as judge. Russell continues to conduct his own legal research and continues to read the appellate decisions every Friday.

Judge Debenham says that as a prosecutor he had to look at the evidence, decide how to get the evidence in and how to present the case, and he had to have a good working knowledge of the rules of evidence. He would have to locate answers through research and perform an analysis of the legal and evidentiary issues surrounding each case. The knowledge of the rules of evidence, as well as the ability to analyze the law, carries over to his position as judge. Russell says that trying such a wide variety of cases exposed him to all types of evidentiary issues. He has brought this knowledge to the bench.

After performing as advocates for decades, Judges Russell and Debenham take their role as neutral judges very seriously. Judge Russell heard juvenile cases for a period of time before making the transition to hearing criminal cases. He points out that his “role is to make sure both sides are treated fairly,” and to “fairly apply the law.” Judge Debenham presided over family law cases for a couple of years before transitioning into a criminal docket. While hearing family law cases, Debenham believes his experience as a prosecutor was helpful. He made sure he explained to parties what each proceeding entailed and made sure they were making informed, intelligent decisions.

Looking back, Debenham now realizes the importance of written motions from both parties. As a prosecutor, he oftentimes made an oral argument. Although oral arguments are important, Debenham now emphasizes the importance of a written response, so that the judge has time to understand the parties’ positions and research the

specific issues ahead of time. Russell emphasizes the importance of ensuring a good record. Referring to specific pieces of evidence by exhibit number, and describing actions in court are issues Russell realizes the importance of in presiding over cases.

In making the transition from prosecutor to judge, Judge Debenham was surprised at how *many* decisions he had to make each day. As a prosecutor, he would sometimes wonder why a judge couldn’t make a quick decision. But now that he’s in their place, Debenham has been surprised at how much time and research he conducts before he makes those same decisions. Judge Russell has been surprised at the ability to walk away from the job at 5:00 p.m. each evening. After years of phone calls in the middle of the night and constantly thinking about what he needed to do next, in his position as a judge, he has been able to leave his work behind each evening – and not be woken up at 2:00 a.m. with questions from officers.



Judge Michael Russell

Russell and Debenham both recognize the importance of associations and organizations in their careers. Both were members of the Kansas County and District Attorneys Association, and both believed KCDAA provided prosecutors with wonderful opportunities. Russell states the KCDAA is a “very important organization for prosecutors,” pointing out the opportunities for networking and CLE credit dedicated to prosecutors. Russell was serving as KCDAA Secretary/Treasurer at the time of his appointment to the bench. Debenham believes that KCDAA was “vitaly helpful,” presenting prosecutors with an opportunity to meet other prosecutors from all over the state. When Debenham had a bite mark case, he called and got the transcripts from the Ted Bundy case from then District Attorney Michael Malone. Debenham points out that because of KCDAA, he knew who

to call when faced with new issues. Debenham was serving as KCDA Vice President when he was appointed to the bench.

Although both judges work hard to ensure fairness in their courtrooms, they also take time for themselves outside of the law. Judge Debenham

and his wife enjoy spending time with their three daughters. Judge Russell and his wife make it a priority to spend time with their three sons. He currently assists in coaching their youngest son in basketball and baseball, and he has helped coach his older two sons in the past. 

KCDA Milestones

Adoptions

Assistant Ellis County Attorney **Brenda L. Basgall**, who has celebrated 10 years with the Ellis County Attorney's Office, and her husband, David, are happy to announce that they adopted a sweet baby boy, Samuel Ultan Basgall. He was born on Oct. 31, 2013. He weighed 6 lbs, 8 ounces and 19 inches long. They got to take him home on Nov. 2, 2013, and the adoption was finalized Dec. 5, 2013.



Births

Katy Britton, Assistant Douglas County Attorney, and her husband, Clay, had their second child on May 2. Her name is Cara Michelle, and she weighed 8 lbs. 3 oz. She was 20.5 inches long. Her big brother's name is Grant.

Jerome Gorman, Wyandotte County District Attorney, is the proud papa to his second grandson, Charles Joseph Hunn, born on April 25. Charlie weighed 9 lbs. 1 oz. Big brother William is excited to have Charlie as his little brother.



Jerome Gorman with grandson Charles

Julie Koon, Sedgwick County Assistant District Attorney, and her husband Morgan, welcomed a girl, Sydney Georgeann Koon, on January 6, 2014. She weighed 7 lbs. 7 oz. and was 20.5 inches long. Sydney is looking forward to her first University of Oklahoma football game.



Sydney Koon

Joan Lowdon, Assistant Leavenworth County Attorney and her husband Christopher, had Isaac Cooper Lowdon born March 31, 2014. He was 7 lbs. 10 oz.

Amanda Voth, from the Kansas Attorney General's Office, and her husband Anthony, had a baby girl on April 19. Her name is Lauryn Amanda Voth.



New Faces

Kristiane Bryant returned to the Wyandotte County District Attorney's Office on May 15, 2014 after serving for over three years as an Assistant Attorney General in the Criminal Litigation Division of the Kansas Attorney General's Office. Kristiane previously served as an Assistant District Attorney in Wyandotte County and Johnson County.



Kristiane Bryant

Lyndzie M. Carter has joined the Kansas Attorney General's Office, Criminal Litigation Division. Originally from Arizona, Lyndzie was stationed at McConnell Air Force Base in Wichita, Kan., before attending Washburn University School of Law. She came to the AG's Office from the City of Topeka Attorney's Office where she prosecuted DUI and drug offenses.

Derenda Mitchell has joined the Criminal Litigation Division of the Kansas Attorney General's Office. Derenda previously worked for years in the Civil Division of the Attorney General's Office. Derenda is the new Sexually Violent Predator Program Section Leader.

Phyllis K. Webster (Washburn University School of Law, Class of 1986) returned to the Butler County Attorney's Office as an assistant county attorney March 31, 2014. She is one of six assistants to Butler County Attorney Darrin C. Devinney. The past 15 years, Phyllis served Butler County as a full-time public defender to juvenile offenders and guardian *ad litem* for Children in Need of Care. She was also the Non-IV D Court Trustee to the Thirteenth Judicial District. Prior to that, she served for 10 years as Deputy Butler County Attorney to then county attorney, Mike Ward, who is now a district judge for the Thirteenth Judicial District, which includes Butler, Elk, and Greenwood Counties.

As of July 1, 2014, **Allison Kuhns** is the new Clark County Attorney. Allison graduated from the University of Chicago in 2008, and received her J.D. from the University of Iowa College of Law in 2012. She has been the assistant county attorney in Clark County since her admission in 2012. She has recently started updating a lot of the forms they use and will continue to do that. Because of the limitations of their courtroom, and to some extent the office technology, they aren't able to utilize fully—at least not without a big hassle—a lot of the

equipment that the sheriff's office uses on a daily basis. So, she is looking forward to introducing technology in the courtroom and updating the technology in the office. Allison replaced Gerald Woolwine after his resignation, but Gerry will continue as an Assistant County Attorney until the end of the year.



Other News

Alexander Webster Unrein, son of Assistant Butler County Attorney Phyllis K. Webster, and her husband, Kerry L. Unrein, graduated in May from Wichita State University with a Bachelor of Science degree in Electrical Engineering. Alex also received honors and awards along with members of his four-man team of graduating engineering students for their development of a new product, which they named FreezerGuard. Among those recognizing Unrein and his team for their invention were Westar Energies, NetApp, and the Wichita State University School of Engineering.



We want to share your news!



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

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

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

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Feel free to submit digital photos with
your announcement!

Next Deadline:
Fall 2014: October 22



Measuring Prosecutorial Actions

by Shawn Minihan, Assistant District Attorney, Johnson County

Rampant Prosecutorial Misconduct

~ The New York Times, Jan. 4, 2014

The Untouchables: America's Misbehaving Prosecutors, And The System That Protects Them

~ The Huffington Post, August 5, 2013

Misconduct by Prosecutors, Once Again

~ The New York Times, August 13, 2012

Prosecutorial misconduct has become national news. To a layperson, the term “prosecutorial misconduct” expresses “intentional wrongdoing” or a “deliberate violation of a law or standard” by a prosecutor.¹

The above cited newspaper articles describe acts that would clearly fall within a layperson’s definition of prosecutorial misconduct. For example, the article *Rampant Prosecutorial Misconduct* discusses *United States v. Olsen*, where federal prosecutors withheld a report that revealed sloppy work on the part of the government’s forensic scientists, resulting in wrongful convictions.^{2,3} The article *The Untouchables: America’s Misbehaving Prosecutors, and the System that Protects Them*, discusses *State v. Thompson*, where prosecutors, among other acts of misconduct, withheld blood evidence that would have exonerated the defendant.^{4,5} The article, *Misconduct by Prosecutors, Once Again*, discusses *People v. Bedi*, where the prosecutor withheld

information that the district attorney’s office paid a key witness \$16,640 for hotel bills and \$3,000 in cash; facts the prosecutor knew but never disclosed to the defense.⁶

In the legal field, however, “prosecutorial misconduct” is a term of art that describes a wide spectrum of actions, ranging from innocent mistakes to malicious conduct.⁷ It is not equivalent to a finding of professional misconduct (e.g. an ethical violation).⁸ It does not even require that the prosecutor commit the act that gives rise to the misconduct finding. Any persons acting in cooperation with or under the prosecutor’s control can commit misconduct attributable to the prosecutor. Nor does it require that the prosecutor act in a malicious, knowing, intentional or reckless manner.⁹

When the court labels an act “prosecutorial misconduct,” however, it “may be perceived as reflecting intentional wrongdoing, or even

Footnotes

1. <http://www.merriam-webster.com/dictionary/misconduct>
2. Editorial Board of the New York Times, *Rampant Prosecutorial Misconduct*, January 4, 2014, available at http://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html?_r=0#.
3. *United States v. Olsen*, 704 F.3d 1172 (2013).
4. Radley Balko, *The Untouchables: America’s Misbehaving Prosecutors, and the System that Protects Them*, Huffington Post, August 5, 2013, available at http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html.

5. *State v. Thompson*, 825 So.2d 552 (2002).
6. Michael Powell, *Misconduct by Prosecutors, Once Again*, New York Times, August 18, 2012., available at <http://www.nytimes.com/2012/08/14/nyregion/new-charge-of-prosecutorial-misconduct-in-queens.html>.
7. ABA House of Delegates, Recommendation 100B, *1 (2010), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheck-dam.pdf>.
8. ABA House of Delegates, Recommendation 100B, *1 (2010).
9. ABA House of Delegates, Recommendation 100B, *1 (2010).

professional misconduct, even in cases where such a perception is entirely unwarranted....”¹⁰

The danger inherent in the court’s overbroad use of the term “prosecutorial misconduct” is two-fold. First, in cases where there is an innocent mistake or poor judgment on the part of the prosecutor, the term “prosecutorial misconduct” unfairly stigmatizes that prosecutor. A layperson may assume that the prosecutor intentionally committed a wrongdoing or deliberately violated a law or ethical standard.

In those cases where the prosecutor has, in fact, committed misconduct, the term “prosecutorial misconduct” may not impose a harsh-enough degree of stigmatization. If a layperson actually understands the legal term “prosecutorial misconduct,” he or she may diminish the egregiousness of the prosecutor’s actions. Certainly, other prosecutors, who are used to seeing the term used for even the most honest of mistakes, may not realize the gravity of the conduct committed by their fellow prosecutor.

ABA Recommendation 100B

Prosecutors and courts share a responsibility in delineating between misconduct and error. Prosecutors have not done enough to persuade district and appellate courts to distinguish between prosecutorial misconduct and error, and courts have failed to recognize that their decisions have implications beyond the court of law.

In Recommendation 100B, the American Bar Association (ABA) recognized a distinction between prosecutorial misconduct and error. It urges courts, when reviewing claims that a prosecutor has violated a Constitutional or legal standard, “to choose the term that more accurately describes prosecutorial conduct while fully protecting a defendant’s rights.”¹¹

Recommendation 100B was adopted with the full support of not only the ABA and the National

District Attorney’s Association, but also the National Association of Criminal Defense Lawyers.¹² It states:

RESOLVED, that the American Bar Association urges trial and appellate courts, in criminal cases, when reviewing the conduct of prosecutors to differentiate between “error” and “prosecutorial misconduct.”¹³

Delineating between misconduct and error

Recommendation 100B begs the question: how do we create a system that delineates between misconduct and error? The Office of Professional Responsibility for the U.S. Department of Justice (“OPR”), which is tasked with investigating federal prosecutors who may have acted improperly has tackled a similar issue.¹⁴

The OPR created a framework for dealing with its own attorneys that courts can employ to both delineate between prosecutorial misconduct and error and to aid in measuring that culpability with the harm to a defendant.

It should be noted, in most instances, under the OPR framework, the term “professional misconduct” is akin to the term “prosecutorial misconduct.” Because OPR created this framework to judge its own employees, the OPR framework has been broadened to include violations of DOJ regulation and policy.

The OPR has defined professional misconduct as when an attorney “intentionally violates or acts in reckless disregard of an obligation or standard imposed by law, applicable rule of professional conduct, or Department regulation or policy.”¹⁵

The OPR has divided professional misconduct into four categories. The first, and most egregious, category includes those situations where a prosecutor intentionally violates a clear and unambiguous obligation or standard imposed by law,

10. ABA House of Delegates, Recommendation 100B, *1 (2010)

11. ABA House of Delegates, Recommendation 100B, *1 (2010).

12. ABA House of Delegates, Recommendation 100B, *1 (2010).

13. ABA House of Delegates, Recommendation 100B, *1

(2010).

14. U.S. DOJ, Office of Professional Responsibility, *Analytical Framework*, July 6, 2005, available at <http://www.justice.gov/opt/framework.pdf>.

15. U.S. DOJ, Office of Professional Responsibility, *Analytical Framework*, July 6, 2005, *1.

applicable rule or professional conduct.¹⁶

A prosecutor's act is intentional when the prosecutor acts with the purpose of obtaining a result that an obligation (e.g. an ethical rule) unambiguously prohibits, or when the prosecutor engages in conduct with knowledge that the probable consequence of such action is prohibited by such obligation.¹⁷

The OPR's second category includes those situations where the prosecutor recklessly disregards a duty to comply with an obligation or standard. A prosecutor acts with reckless disregard when he or she knows, or should know, of an obligation and that there is a substantial likelihood that he or she will violate the obligation, but the attorney nonetheless engages in the conduct.¹⁸

The OPR, and courts, should only consider the first two categories as misconduct.¹⁹ If a court finds that the prosecutor met one of these first two categories, it should find that the prosecutor committed misconduct.

The OPR's third category includes those situations where the prosecutor exercises poor judgment. The OPR defines poor judgment as, when faced with alternatives, a prosecutor chooses a course of action in "marked contrast" to what the OPR would consider good judgment. "[A]n attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding."²⁰

The OPR's final category includes those situations where the attorney has made a mistake. A mistake results from an excusable human error, despite the attorney's use of reasonable care. Whether a prosecutor's error is excusable depends upon the facts surrounding the error, including:

- the attorney's opportunity to plan, and to reflect upon the possible and foreseeable consequences of, a course of conduct;

- the breadth and magnitude of the responsibilities borne by the attorney;
- the importance of the conduct in light of the attorney's overall responsibilities and actions; and
- the extent to which the error is representative of the attorney's usual conduct.²¹

The OPR, and courts, should not consider the last two categories as misconduct.²² If a court finds that a prosecutor has met one of the last two categories, it should find that the prosecutor committed error.

Courts already consider the degree of a prosecutor's culpability

It should be noted that, when considering prosecutorial misconduct, trial and appellate courts already engage in the weighing of a prosecutor's culpability. In *State v. Pabst*, the Kansas Supreme Court has required, as part of the prosecutorial misconduct analysis, that courts consider whether the actions of a prosecutor are gross and flagrant or show ill will.²³ Implementation of the OPR framework is simply a refinement of the analysis already required by the Kansas Supreme Court.

Conclusion

Courts should recognize the distinction between prosecutorial misconduct and error. Courts should also adopt a framework to distinguish between the varying levels of culpability of a prosecutor, which will aid courts in weighing the prosecutor's culpability with the harm to a defendant. Additionally, refining the terms "prosecutorial misconduct" and "prosecutorial error" will assist the public in fully understanding the gravity of the prosecutor's actions. 🌐

16. U.S. DOJ, Office of Professional Responsibility, *Analytical Framework*, July 6, 2005, *1.

17. U.S. DOJ, Office of Professional Responsibility, *Analytical Framework*, July 6, 2005, *2.

18. U.S. DOJ, Office of Professional Responsibility, *Analytical Framework*, July 6, 2005, *3.

19. U.S. DOJ, Office of Professional Responsibility, *Analytical Framework*, July 6, 2005, *1.

20. U.S. DOJ, Office of Professional Responsibility, *Analytical Framework*, July 6, 2005, *3.

21. U.S. DOJ, Office of Professional Responsibility, *Analytical Framework*, July 6, 2005, *4.

22. U.S. DOJ, Office of Professional Responsibility, *Analytical Framework*, July 6, 2005, *3.

23. *State v. Pabst*, 268 Kan. 501, 505, 996 P.2d 321 (2000).

KCDAA Best Practices Committee

On March 27, 2014, the KCDAA Board of Directors established the KCDAA Best Practices Committee to address emerging issues facing the criminal justice system. "Best Practices" is a concept aimed at identifying and developing prosecutorial practices and innovative strategies that will improve the criminal justice system.

One of the goals of the committee is to facilitate information sharing and allow prosecutors to share ways to do their jobs better. The committee will look at how county prosecutors can better handle forensic evidence, eyewitness testimony, the use of jailhouse informants, recorded interrogations, and how to pursue death penalty cases. Several other states have established this type of committee and spearheaded initiatives such as enhanced identification procedures, video interrogation protocols, an ethics handbook, and discovery training for law enforcement.

The committee's second goal is to focus on the public's perception of prosecutors and get ahead of the negative message often spun by the media. For the Kansas committee, addressing the

mischaracterization of trial error as prosecutorial misconduct is top priority. The committee will encourage prosecutors to advance this argument at both the trial and appellate level, relying on an ABA Resolution, adopted August 9 and 10, 2010, that states the following: "RESOLVED, That the American Bar Association urges trial and appellate courts, in criminal cases, when reviewing the conduct of prosecutors to differentiate between 'error' and 'prosecutorial misconduct.'"

Committee members are Lyon County Attorney Marc Goodman, Wyandotte County District Attorney Jerome Gorman, Assistant Attorney General Amy Hanley, Johnson County Assistant District Attorney Kevin O'Connor, Sedgwick County Chief Deputy District Attorney Kim Parker, and Pawnee County Attorney John Settle. The committee plans to meet on at least a quarterly basis in addition to meetings held at the KCDAA spring and fall conferences. Committee delegates will attend the Regional Best Practices Committee Meeting in St. Louis on October 9 and 10 to discuss the direction of the state and national best practices movement. 

Sex Crimes Update Re: Gregg

by Marc Bennett, District Attorney, 18th Judicial District of Kansas

Pursuant to K.S.A. 60-407(a) & (c), "every person is qualified to be a witness" and "no person is disqualified to testify in any manner." Specifically, "a witness is not disqualified due to age; a witness, no matter how young, is presumed competent to testify." State v. Correll, 25 Kan. App.2d 770, 771-72 (1999). In fact, the only way to be disqualified in Kansas is if the moving party can show that the witness fails to understand the obligation to tell the truth. See K.S.A. 60-417; see also State v. Thrasher, 233 Kan. 1016 (1983).

Since 1979, however, sex crime victims in Kansas have been routinely excluded from receiving the statutory benefit of qualification to testify. In State v. Gregg, 226 Kan. 481, 602 P.2d 85 (1979), the Kansas Supreme Court held that a trial judge has the "discretion to order a psychiatric evaluation of the complaining witness in a sex crime case if the defendant presents a compelling reason for such

examination."

In support of its effort to avoid "the danger of psychotically induced charges," the Gregg court cited the following rationale from Ballard v. Superior Court, 64 Cal.2d 159 (1966):

"[A] woman or a girl may falsely accuse a person of a sex crime as a result of a mental condition that transforms into fantasy a wishful biological urge. Such a charge may likewise flow from an aggressive tendency directed to the person accused or from a childish desire for notoriety." Gregg, at 487.

It also relied upon Professor Wigmore's 1970 proposition that women falsely accuse men of rape :
"No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to

by a qualified physician.” Gregg, at 487-488.

Interestingly, Kansas has rejected efforts to extend this rationale to require victims of other, non-sexual crimes, to submit to psychological examinations. See, State v. Cook, 281 Kan. 961, 986 (2006), and State v. Jones, 267 Kan. 627 (1999). And while few convictions have been set aside due to a trial court’s failure to grant such an examination (see State v. Price, 30 Kan.App.2d 569 [2002], and State v. Bourassa, 28 Kan.App.2d 161 [1999]), Gregg motions have long been a source of anxiety for victims and a point of contention for prosecutors.

On June 27, 2014, in State v. Simpson, ___ P.3d ___, 2014 WL 2916854 (2014), a dissenting opinion signaled a possible change. At the district court, the child-victim’s mother refused to submit her child to the Gregg exam. Consequently, the child’s testimony was suppressed. For reasons having to do with the adequacy of the record, the Court refused to set aside that ruling on the State’s interlocutory appeal.

In her dissenting opinion, however, Justice Moritz laid the groundwork for future attacks on the Gregg decision itself.

“Put simply, the basis for this court’s decision in Gregg is unsound, based not on statute or the Constitution but on misogynistic and out-dated notions.”

She goes on to question not just the weak premise underpinning the Gregg decision, but the admissibility of the results of such an evaluation should one be ordered:

“Further, even if the defendant did not already have other means to test the complaining witness’ veracity, I question whether a Gregg evaluation would be admissible even if ordered and performed. Kansas law forbids an expert from directly commenting on a witness’ credibility and any expert would be limited to speaking generally, something the expert likely could not do without invading the privacy of the complaining witness. See State v. Wells, 289 Kan. 1219, 1235-36, 221 P.3d 561 (2009).”

Since the enhancement of penalties brought by

the passage of Jessica’s law in 2006, the defense bar’s reliance on Gregg motions has exploded. When facing a Gregg Motion, I encourage Kansas prosecutors to fight the effort on two fronts:

1. Challenge the existence of the common-law exception created and perpetuated by Gregg. See, e.g., State v. Gunby, 282 Kan. 39, 144 P.3d 647) (“This case provides an opportunity to end this particular confusion of thought, and we hereby do so.”) A written response to the Gregg motion should include citation to the Moritz dissent, identifying the flawed nature of the rationale that gave rise to the Gregg decision 35 years ago.
2. Demand specific factual allegations and specific findings of fact and conclusions of law before proceeding and then fight to limit the scope of any exam. Though flawed in its overall reasoning, Gregg did set the bar fairly high and no victim should be compelled to submit to the evaluation absent very specific findings.

Justice Moritz exposed what, upon reflection, is truly an embarrassing and antiquated decision. See also “Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant,” 153 U. Pa. L.Rev. 1373 (2005):

“The introduction of psychiatric testimony intended to impeach the complainant’s credibility can serve as an end-run around the rape shield laws; it contributes little relevant evidence, but humiliates the accuser and prejudices the jury against her.”

The Simpson dissent signaled a sea change in sex crimes prosecution. Gregg is not yet dead but, if we are dedicated and diligent, it can be laid to rest. Thanks to Justice Moritz for signaling the change before leaving for the 10th circuit. 🙏

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Riding Horses to the Moon¹: The digital age of Fourth Amendment Jurisprudence in the U.S. Supreme Court

by Angela Wilson, Senior Assistant District Attorney, 18th Judicial District of Kansas

Cellular phones seized incident to arrest of a suspect generally may not be searched without a warrant.² This was the bright-line rule set out by the United States Supreme Court in companion cases *Riley v. California* and *United States v. Wurie*, 573 U.S. ___, decided June 25, 2014. While the Court left open the possibility that other exceptions to the warrant requirement may apply, “[The Court’s] answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple – get a warrant.”³

The decision settles a split in the circuits and provides prosecutors with a much-needed framework for analysis of cellular telephone searches. While many prosecutors have encouraged law enforcement to obtain a warrant under the very circumstances presented in the *Riley* and *Wurie* cases, until now there has been a colorable argument that a warrant was not necessary.

Reliance on a search incident to arrest exception to the warrant requirement for searching a cell phone seized upon arrest traced to the cases of *Chimel v. California*⁴, and *United States v. Robinson*.⁵ The Court’s holding in *Chimel* limited the search of *Chimel*’s house incident to his arrest to the area immediately within his reach, for items that could compromise officer safety or evidence that *Chimel* could destroy. In *Robinson*, the Court found constitutional a search of a cigarette package containing heroin retrieved from the defendant’s shirt pocket incident to his arrest for driving with a revoked license. The *Robinson* Court found that as long as the arrest was supported by probable cause, the search incident to that seizure of the person was

lawful.

Riley, however distinguished both of these precedents, finding that modern cellular phones are simply different from all other things that may be found on a person at the time of arrest.⁶ The Court separated the analysis of seizure of the cellular device itself from the seizure and search of the data contained on the cellular device.⁷ Seizure of the *device* incident to arrest is not changed by the *Riley* holding, while search or analysis of the *data contained thereon* is.

Chief Justice Roberts’ opinion recognizes that the founders had no precise guidance for the evolving digital technology, and opts for a balancing test between the “degree on which it [the seizure] intrudes upon an individual’s privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”⁸ The rationale for departing from the *Robinson* analysis is the “vast quantities of personal information literally in the hands of individuals,” and how much more significant an intrusion the search of cell phone data is than the search of *Robinson*’s crumpled cigarette package.⁹

The balancing test in this instance weighs in favor of personal privacy, declining to extend the *Robinson* rationale to the data on a cellular phone, requiring instead for officers to obtain a warrant to search the data.

The Court then systematically dismantles the arguments in favor of extending *Robinson*. The rationale for the search incident to arrest exception to the warrant requirement includes officer safety; however, “data stored on a cell phone cannot itself

Footnotes

1. From *Riley v. California*, 573 U.S. ___ (2014), “The United States asserts that a search of all data stored on a cell phone is ‘materially indistinguishable’ from search of these sorts of physical items. [...] That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by a search of a cigarette pack, a

wallet or a purse.” Slip opinion at 16-17.

2. Slip opinion at 25.

3. Slip opinion at 28.

4. 395 U.S. 752 (1969)

5. 414 U.S. 218 (1973).

6. Slip opinion at 8.

7. Slip opinion at 25.

8. Slip opinion at 9, quoting, *Wyoming v. Houghton*, 526 U.S. 259, 300 (1999).

9. Slip opinion at 9-10.

be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape."¹⁰ Since the physical properties of the phone could be used as a weapon, an arresting officer can seize and secure the phone itself, but the search of the data requires either an independent finding of probable cause or another exception to the warrant requirement.

Destruction of evidence, traditionally an exigency exception to the warrant requirement¹¹, is implicated when a phone is seized to be searched later with a warrant. The government expressed concern that both remote wiping and data encryption are possible, and therefore justify a on-the-scene search incident to a custodial arrest. Remote wiping can be accomplished by the suspect or another sending a signal to the phone to erase all data, or the removal of the device from a particular geography could trigger such a signal. Data encryption occurs when a computer program renders the information stored on the device unusable without a particular code-breaking key, generally in the form of a password.

The Court dispenses with this argument by suggesting the use of Faraday bags¹² or other methods of taking the phone off the network, such as removing the battery or placing the device in "airplane mode".¹³ Further, the Chief Justice summarily concludes that the "ability to conduct a warrantless search would [not] make much of a difference," because phones do not generally stay in their unlocked state for more than a few minutes.¹⁴

When an officer does encounter a situation that constitutes an exigent circumstance, as the Court describes a "now or never" situation that involves imminent destruction of evidence, the officers "may be able to rely on exigent circumstances to search

the phone immediately."¹⁵

Though not detailed, the opinion suggests that efforts to prevent data destruction follow the decision in *Illinois v. McArthur*,¹⁶ which held that law enforcement officers may prevent a suspect from entering his own home unaccompanied while police secure a warrant. The *McArthur* majority held that under the totality of the circumstances the officers articulated exigent circumstances to justify the intrusion. There the officers had probable cause to believe there was contraband in the home, they reasonably believed that if left unattended the excluded suspect would destroy evidence, the restraint was limited, officers acted with diligence to obtain the warrant, and the restraint was tailored to accomplish the goal of searching for contraband.¹⁷

Reference to the *McArthur* opinion suggests that any effort by law enforcement be limited to *preserve the data* and not exceed that objective. Arguably any effort to preserve data involves some type of search or manipulation of the object, in this case a cell phone.¹⁸

The key questions to address in a *McArthur* analysis are as follows:

1. Are there "exigent circumstances": a good faith claim of urgent law enforcement need, some reason to believe that data destruction is a realistic possibility?
2. Is the preservation practice at issue narrowly tailored to the objective of preserving evidence without intruding into the data on the phone?
3. Is the case a serious offense, generally defined as a "jailable offense"?

One challenge to law enforcement in data preservation will be the officer's personal knowledge

10. Slip opinion at 10.

11. See, e.g. *Kentucky v. King*, 563 U.S. ___, 131 S.Ct. 1849 (2011)

12. Faraday bags are a variation on a Faraday cage, a device to block the current of an electrical charge by diverting the electrical current around the cage, protecting the center of the cage from an electrical current. Faraday bags to block cellular signals are suggested for use by the Department of Justice, but experts disagree about whether they are effective to prevent a cellular signal from initiating a wipe of the data on a seized cellular phone.

13. Slip opinion at 12-13.

14. Slip opinion at 13.

15. Slip opinion at 15, citing, *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552 (2013). In *McNeely* the Court found that the fact that alcohol metabolizes from the human blood system does not constitute an exigent circumstance

16. 531 U.S. 326 (2001).

17. 531 U.S. at 337.

18. Credit for the analysis of this point goes to Robert Morgester, Senior Assistant Attorney General for the eCrime Unit in the Office of the California Attorney General. The opinions expressed by Mr. Morgester are his opinions and are not necessarily the opinions of the California Attorney General.

of how the particular phone in question works. For example, Apple's iPhone has a pre-installed feature¹⁹ that allows a user to remotely trigger a program to erase the phone's content or lock the phone. Android phones have the same functionality.²⁰ A Blackberry can also be accessed by a third party to delete data, and once locked the manufacturer will not unlock the device.²¹

At the time the preservation actions are made, the officer taking the actions in preserving the data should be able to articulate the details giving rise to the reasonable belief under #1 that the preservation is necessary, and under #2 that the effort is narrowly tailored to achieve the objective. The level of acceptable intrusion may be different based on the specific device at issue.

Exigent circumstances that justify the preservation of data do not necessarily compel the conclusion that further search will be supported by probable cause when a warrant is sought. In some circumstances an ability to describe exigent circumstances, such as a function that deletes all text messages after a day, could give rise to *preservation* of the phone contents via a complete UFED²² extraction. However, if law enforcement is unable to articulate probable cause to believe the preserved content of the phone contains evidence of a crime, law enforcement would not be allowed to conduct a search of that extracted data.

Of particular note throughout the opinion in *Riley* is the Court's recognition that cellular phones are different from other items that an arrested person may have in his pocket. The opinion refers back to the 2012 GPS tracking opinion in *U.S. v. Jones*²³, to Sotomayor's concurrence that the search of a

cellular phone, much like tracking a person with a GPS system, provides a great deal more information about that person's personal life than any analogous pre-digital pocket content. For example, a couple of photographs of a suspect's children or family cannot be compared, per this opinion, to the volume of hundreds of photos, videos and messages that are contained on the average cellular device. A slip of paper with a phone number on it cannot be compared to a complete log of all incoming and outgoing phone calls to that number.

The Court also addressed searches of remotely stored data, or "the cloud," as being distinct from any precedent when searching a cellular device. "Such a search would be like finding a key in the suspect's pocket and arguing that it allowed law enforcement to unlock and search a house."²⁴ By raising, and then dismissing the government's argument about cloud-stored data as related to a search incident to arrest, the Court implies that a search warrant for data would cover a search whether the data is stored on the cellular device or in the cloud.

Practitioners should note that the opinion in *Riley*, like the opinion in *Jones*, demonstrate a Supreme Court that is mindful of protecting individual privacy, and it recognizes that the price of privacy is an increased burden on law enforcement.²⁵ While this decision does not apply retroactively²⁶, law enforcement should consider the Supreme Court's signal toward a protection of privacy interests in the realm of technological data either gathered or stored. The best practice, as courts have consistently opined, is "when in doubt, get a warrant." 

19. "Find my iPhone" allows the user to remotely find, track or erase an iPhone, iPad, iTouch or Mac computer through the iCloud service.

20. "Android Device Manager" is a free product through Google that will allow the user to track, lock or erase the device.

21. Unlike Apple, Blackberry will not unlock a locked phone even with a warrant.

22. Universal Forensic Extraction Device, sometimes referred to by the brand name CelleBrite. The UFED creates a copy of the entire content of the cellular device and preserves the data for later analysis, or search. More details are available at the company website www.cellebrite.com

23. 565 U.S. ____ (2012)

24. *Riley*, Slip opinion at 21.

25. "We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost." Slip opinion at 25.

26. *Davis v. U.S.*, 131 S.Ct. 2419 (2011), *holding* search conducted in good faith reliance on an existing precedent is not subject to exclusionary rule.

Elders: New Class of Protected Victim in Kansas Criminal Code

by Josh Ney, Kansas Securities Commissioner

During the 2014 legislative session, a new class of vulnerable victims—senior citizens—was given additional protection within the state criminal code. KCDA endorsed bills SB 256 (mistreatment of an elder person) and HB 2433 (securities fraud against an elder person) became effective July 1, 2014 and added both a new crime and enhanced punishments for fraudulent or abusive acts committed against elder persons.¹ While the term elder person was defined differently in each bill, the term applies most generally to persons 70 years of age or older.² As a result, elder persons now join other “vulnerable victim” classes such as children³ and dependent adults,⁴ and other “targeted victim” classes such as law enforcement officers, school employees, and mental health employees for whom the severity levels of certain crimes committed against such persons are greater than those of other victims.⁵ This article will provide a brief survey of the increased law enforcement focus on elder issues in Kansas and across the nation, before examining the new statutory language created by SB 256 and HB 2433. The article will conclude with a look toward ways the law enforcement community in Kansas can apply and build on this solid statutory foundation in the protection of Kansas seniors going forward.

Kansas Landscape of Elder Fraud and Abuse Law Enforcement

SB 256 and HB 2433 were passed at a time when the financial and physical abuse of senior citizens

has received increased policymaking attention at the state and national levels. In part driven by the swelling of the senior class due to the aging baby boomer population, elder abuse and fraud has been the focus of study by legislative and governmental advisory bodies for several years.⁶ But while there exists plentiful academic research documenting the widespread reasons that aging persons are at an increased risk of exploitation or abuse, many families and local communities do not need formal studies to understand the devastation caused by criminals preying on senior citizens.

In Kansas, several local prosecutor offices have instituted Financial Abuse Specialty Teams, or “FAST” teams, a concept that originated in Los Angeles law enforcement community in 2000 that incorporates a multidisciplinary team of professionals who can respond rapidly to reports of financial abuse.⁷ As pioneered by the Sedgwick and Johnson County District Attorney’s offices, the FAST concept has been especially effective in rapidly responding to financial exploitation of elders, given that many victims are unaware of the extent of the fraud until investigated by law enforcement.⁸ Additionally, the Kansas Attorney General’s office maintains consumer protection and abuse, neglect, and exploitation initiatives as part of ongoing efforts in improving senior fraud prevention across the state.⁹ These law enforcement resources, coupled with the ongoing collaboration between law enforcement agencies through KCDA and other

Footnotes

1. See SB 256, 2014 Sess. (Kan. 2014) (effective July 1, 2014); HB 2433, 2014 Sess. (Kan. 2014) (effective July 1, 2014).

2. Compare SB 124 (2014) (defining an elder person as a person 70 years of age or older) with HB 2433 (2014) (defining, by reference, an elder person as a person 60 years of age or older).

3. Compare K.S.A. 21-5506 (indecent liberties with a child, severity level 5 felony) with K.S.A. 21-5505 (sexual battery, class A misdemeanor).

4. See K.S.A. 21-5417 (Supp. 2013);

5. See K.S.A. 21-5413 (establishing higher penalties for battery when committed against a law enforcement officer, school employee or mental health employee)

6. See Julie Goldsmith Reiser & Michael B. Eisenkraft,

Dodd-Frank’s Protections for Senior Citizens: An Important, Yet Insufficient Step, 81 U. Cinn. L.R. 521, 521-30 (2013) (describing policymaking debates leading up to passage of Dodd-Frank Act’s elder protection provisions).

7. See Susan J. Aziz, *Los Angeles County Fiduciary Abuse Specialist Team: A Model for Collaboration*, 12 J. of Elder Abuse & Neglect 79 (2000).

8. See Financial Abuse Special Team (Sedgwick County District Attorney’s Office webpage), available at <http://www.sedgwickcounty.org/da/fast.asp> (last visited July 21, 2014) (describing Sedgwick County F.A.S.T. teams); Johnson County District Attorney webpage, available <http://da.jocogov.org/about-da> (last visited July 21, 2014) (describing development of Johnson County F.A.S.T. teams in 2010).

9. See Abuse, Neglect and Exploitation, Kan. Att’y Gen. webpage, available at <http://ag.ks.gov/public-safety/abuse-neglect-and-exploitation> (last visited July 21, 2014).

means, are now further strengthened by the added criminal statutory protections for seniors in SB 256 and HB 2433.

Analysis of SB 256 and HB 2433

SB 256 and HB 2433 built upon existing statutory language when creating additional punishments for mistreating or defrauding elders. Adopting the statutory language passed in 2010 criminalizing the mistreatment of a dependent adult, SB 256 created the new crime of “Mistreatment of an Elder.” Similarly, HB 2433 amended to the Kansas Uniform Securities Act (KUSA), adding a sentencing enhancement for securities related felonies committed against elder persons.

SB 256

The elder fraud provisions in SB 256 that became effective July 1, 2014, were originally introduced as a separate bill by Senators Michael O’Donnell and Jeff King at the beginning of the 2014 legislative session.¹⁰ These new statutory provisions both broadened the scope of the existing crime of Mistreatment of a Dependent Adult (defined as “an individual 18 years of age or older who is unable to protect the individual’s own interest”),¹¹ and created the new crime of “Mistreatment of an Elder Person.”¹² Given the scope of this article, only the new elder-specific provisions will be addressed.

Under the act, Mistreatment of an Elder Person is committed by:

1. Taking the personal property or financial resources of an elder person for the benefit of the defendant or another person by taking control, title, use or management of the personal property or financial resources of an elder person through: (A) Undue influence, coercion, harassment, duress, deception, false representation, false pretense or without adequate consideration to such elder person; (B) a violation of the Kansas power

of attorney act, K.S.A. 58-650 et seq., and amendments thereto; or (C) a violation of the Kansas uniform trust code, K.S.A. 58a-101 et seq., and amendments thereto; or

2. Omission or deprivation of treatment, goods or services that are necessary to maintain physical or mental health of such elder person.¹³

Under the new crime, an elder person is defined as “a person 70 years of age or older,” and establishes a range of offense classifications between a class A misdemeanor (unauthorized taking of the property of an elder person less than \$5,000) to severity level 2 (unauthorized taking of the property of an elder person in excess of \$1,000,000).¹⁴ Notably, Mistreatment of an Elder Person does not include the physical abuse or unreasonable confinement, unlike the additional protections afforded dependent adults, so physical abuse of elder persons still must be prosecuted under other generally applicable criminal statutes.¹⁵

HB 2433

HB 2433 was introduced by the Office of the Kansas Securities Commissioner at the beginning of the 2014 session.¹⁶ In its final form, the bill contained two substantive provisions: 1) a sentencing enhancement for securities-related felonies committed against elder persons; and 2) expansion of the Investor Education and Protection Fund, administered by Commissioner under KUSA, to authorize expenditures out of the fund to assist counties with the cost of prosecuting securities fraud across the state.¹⁷ Only the elder fraud related provision will be addressed in this article.¹⁸

The sentencing enhancement for elder fraud contained in the bill provides:

A conviction for an intentional violation of the Kansas uniform securities act, K.S.A. 17-12a101 et seq., and amendments thereto,

10. See SB 354, 2014 Sess. (Kan. 2014) (introduced Feb. 7, 2014); SB 256 (Kan. Leg. webpage), available at http://www.kslegislature.org/li/b2013_14/measures/sb256/ (last visited July 21, 2014).

11. See SB 256 at § 1 (amending existing crime of mistreatment of a dependent adult under K.S.A. 21-5417).

12. See *id.* (creating new crime of mistreatment of an elder person).

13. *Id.* at § 1(b).

14. *Id.* at § 1 (d).

15. Compare *id.* at § 1(a)(1) with *id.* at § 1(b).

16. See HB 2433 (Kan. Leg. webpage), available at http://www.kslegislature.org/li/b2013_14/measures/hb2433/ (last visited July 21, 2014).

17. See HB 2433 §§ 1-2.

committed against an elder person, as defined in K.S.A. 50-676, and amendments thereto, shall be ranked on the nondrug scale at one severity level above the appropriate level for the underlying or completed crime, if the trier of fact finds that the victim was an elder person at the time of the crime. It shall not be a defense under this paragraph that the defendant did not know the age of the victim or reasonably believed that the victim was not an elder person.¹⁹

Securities-related offenses KUSA range in classification between severity level 2 felonies (fraud with victim loss of over \$1 million) and severity level 7 felonies (various securities registration related felonies).²⁰ With the enactment of the sentencing enhancement, these offenses, if committed against a person who was sixty (60) years at the time of the crime, would be one severity level higher than the underlying crime.²¹ For example, as of July 1, 2014, committing securities fraud against an elder person where the victim's loss is greater than \$1 million will now be ranked at a severity level 1 felony, resulting in significantly more prison time for the offender, regardless of his or her criminal history. The bill also has the effect of making the lowest-level crimes under KUSA a severity level 6 felony, thereby increasing the likelihood that most offenders convicted under KUSA will see prison time.

HB 2433 functions as an effective counterpart to the new crime of "Mistreatment of an Elder Person" under SB 256. Under SB 256, the top crime is mistreatment of an elder person resulting in a loss of more than \$1 million is a severity level 2 felony.²² Under HB 2433, securities-related fraud committed against an elder for the same financial loss amount is a severity level 1 felony. This relationship is consistent with the history of Kansas public policy on financial crimes, which has traditionally punished securities related fraud at a higher level than general

fraud.

Prior to HB 2433, the Kansas Securities Commissioner had the authority under KUSA to levy additional administrative fines against persons who committed a KUSA violation against an elder person.²³ HB 2433 expanded that protection to provide both administrative and criminal penalties for such violations, thus diversifying the law enforcement tools available to state and local prosecutors under KUSA.

Definition of "Elder Person"

As evident above, the definition of "elder person" under SB 256 and HB 2433 are distinct definitions. Under SB 256's new crime of Mistreatment of a Dependent Adult, the term "elder person" is defined as a person 70 years of age or older.²⁴ Under HB 2433, by referencing the definition provided in the Kansas Consumer Protection Act, the term "elder person" is defined as a person 60 years of age or older for purposes of securities-related prosecutions.²⁵ Going forward, public policymakers should consider standardizing the statutory treatment of the term "elder person" for purposes of establishing enhanced criminal, civil, and administrative penalties.

Conclusion

The addition of elder persons as a newly protected class of vulnerable victims within the Kansas criminal code will give prosecutors more tools to hold those who harm our most vulnerable victims accountable for the severity of their actions. Moreover, the added statutory protections in SB 256 and HB 2433 provide an expanded body of law that, coupled with the investigatory and collaborative resources available through local FAST teams, the Attorney General's office, and other state agencies, will help Kansas families avoid the devastation caused by the exploitation of their aging loved ones. 🏠

18. *See id.* at § 1(a)(6).

19. *Id.*

20. *See* K.S.A. 17-12a508 (a)(2) (establishing various penalties for securities-related felonies).

21. *See* HB 2433 at § 1(a)(6).

22. *See* SB 256 at § 1(d)(1)(A).

23. *See* K.S.A. 17-12a412(c)(3) (providing for an additional civil penalty of \$15,000 against a person who commits a KUSA violation against an elder person).

24. *See* SB 256 at § 1(g)(3).

25. *See* HB 2433 at § 1(a)(6) (defining elder person by reference to K.S.A. 50-676).

Looking at Specialty Courts in Kansas

by Honorable Steve Leben, Kansas Court of Appeals

Several trial courts throughout Kansas have established specialty or problem-solving courts that coordinate services provided to offenders with direct supervision by a judge. Most of these are drug courts, which national research has shown can be effective in reducing recidivism.

At present, the Kansas state courts have no statewide standards for specialty courts and no requirement that local specialty courts meet any specific standards. To help determine whether statewide standards were needed, the Kansas Supreme Court appointed the Kansas Specialty Courts Commission in March 2013. That 13-member group was drawn from personnel within the court system itself—eight judges and five members working as either Court Services officers or Community Corrections staff. I chaired the Commission, and Sedgwick County District Court Chief Judge James Fleetwood served as vice-chair.

Specialty Courts in Kansas Today

We started by trying to identify the specialty courts already in existence. Such courts can be created simply by assigning a certain type of case to a particular judge, who then coordinates how those cases are handled. Accordingly, it's hard to say exactly how many such courts exist in Kansas. Because no state-level approval is required, no statewide records are generated when a specialty court—or a specialized docket—is established. In addition, with no statewide standards, there is no universally accepted definition of what constitutes a specialty court.

We surveyed the chief judges of the 31 judicial districts in Kansas. From that information, as of fall 2013, we were aware of nine judicial districts that had set up adult drug courts, serving citizens in 13 different Kansas counties: Allen, Chase, Cowley, Geary, Lyon, Neosho, Saline, Sedgwick, Seward, Shawnee, Wilson, Woodson, and Wyandotte. In addition, the Wichita Municipal Court has a drug court and a mental-health court. Two judicial districts have juvenile drug courts, which provide services in Franklin and Johnson counties.

Three judicial districts had established truancy courts, serving Franklin, Geary, and Seward counties. One judicial district recently established

a “home court,” serving Chase and Lyon counties. That court handles cases in which there is a possibility that a juvenile offender will be placed in the custody of the Juvenile Justice Authority for out-of-home placement. The court coordinates the services provided to that family with a goal of preserving the family and preventing out-of-home placement (and its associated costs and expenses) if possible.

Also, some judicial districts have set up special dockets to handle domestic-violence cases.

Various Groups Were Surveyed

To learn about the views of various groups with an interest in specialty courts, the Commission prepared an online survey and invited members of those groups to participate. We sent invitations to complete the survey in late October to district judges, district magistrate judges, legislators, several organizations representing Kansas attorneys (including the KCDA), organizations representing law-enforcement officers, treatment providers, and individuals who had asked to be notified of Commission activities. We received responses from 158 individuals, including 18 law-enforcement officers, five prosecutors, nine defense attorneys, and 88 district and district-magistrate judges.

Overall, there was broad agreement on several propositions:

- Kansas would benefit if more judicial districts established drug courts (74% agreed) or specialty courts in general (70% agreed).
- Statewide standards should be adopted for drug courts (70% agreed) and specialty courts in general (65% agreed).
- Drug courts should be certified, initially and periodically, by an entity with statewide oversight (59% agreed, 20% disagreed, and 20% were neutral).
- Specialty courts generally should be certified in the same manner (53% agreed, 21% disagreed, and 27% were neutral).
- Local judicial districts should be able to establish a specialty or problem-solving court without specific Supreme Court approval (65% agreed).

- Each specialty court should collect sufficient data to allow an assessment of its performance (83% agreed).

In addition to the formal survey, Commission members had contact with representatives of several groups and other interested parties. Barry Wilkerson made contact with me on behalf of the KCDAA, and some other prosecutors submitted comments.

The Commission's Recommendations

The Commission submitted a report to the Kansas Supreme Court on Dec. 18, 2013. That report recommended that the Kansas Supreme Court adopt statewide standards for specialty courts. To draft those guidelines, the report recommended appointing a new, more broadly representative group (to include prosecutors, defense attorneys, and treatment providers). Once statewide standards have been developed, the Commission recommended that specialty courts be required to obtain initial certification and periodic recertification from the Office of Judicial Administration.

The Commission recommended one specific statutory change to allow specialty courts already in existence in Kansas to be more effective. Currently, when a criminal defendant who resides in one Kansas county commits an offense in another county and is convicted, Kansas law allows transfer of that defendant's probation supervision by a probation officer to the defendant's county of residence. However, we found no statute that allows transferring the court case itself so that—in counties with drug-court programs, for example—the drug-court judge can assist in supervising the defendant's probation. We proposed an amendment to K.S.A. 21-6610 that would allow a defendant convicted of an offense in another Kansas county to participate in the defendant's home-county drug court.

For districts considering the creation of a specialized court before any statewide standards are adopted, the Commission recommended that courts review the "Problem-Solving Justice Toolkit" published by the National Center for State Courts for a comprehensive resource on questions to ask, steps to take, and resources available to use. The

Commission also recommended that educational programming on evidence-based practices in treating offenders with drug-abuse and substance-abuse issues be offered regularly at the state judicial conference.

A New Committee Is Appointed to Continue the Work

Effective July 1, 2014, a new Kansas Specialty Court Standards Committee has been appointed to draft statewide standards for specialty courts. The Kansas Supreme Court order establishing the Committee, filed June 26, 2014, made its main task to "[r]ecommend mandatory, statewide standards to be adopted for specialty courts by the Kansas Supreme Court." I will be chairing the Committee; Chief Judge Bradley Ambrosier of the 26th Judicial District (Grant, Haskell, Morton, Seward, Stanton, and Stevens counties) will serve as vice-chair.

The Committee has 16 members. Two members are prosecutors: Douglas McNett, Assistant Pawnee County Attorney, and Christopher Smith, Cowley County Attorney. We also have two defense attorneys: David Freund of Wichita and Michael McCulloch of Olathe, as well as additional judges, probation officers, and treatment providers. In addition, Major General (Ret.) Clyde Tate, now a senior fellow at Justice for Veterans in Alexandria, Virginia, and a native Kansan, is serving as an advisor to the Committee for veterans' issues as substantial interest has been expressed about possibly starting some veterans-treatment courts in Kansas.

No timetable has been adopted at this point for the Committee's work. From my perspective, there are many questions we'll need to consider carefully to be sure that we propose statewide standards that will be useful while making sure that we don't prevent appropriate local initiatives.

If you have thoughts or questions about the Committee's work, please feel free to contact me at lebens@kscourts.org. 

About the Author: Steve Leben has been a judge on the Kansas Court of Appeals since 2007. He served as a district judge in Johnson County from 1993 to 2007.

2014 KCDA Spring Conference Photos

Kansas Prosecutors Foundation Golf Tournament, June 11 & 2014 KCDA Spring Conference, June 12-13, 2014



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