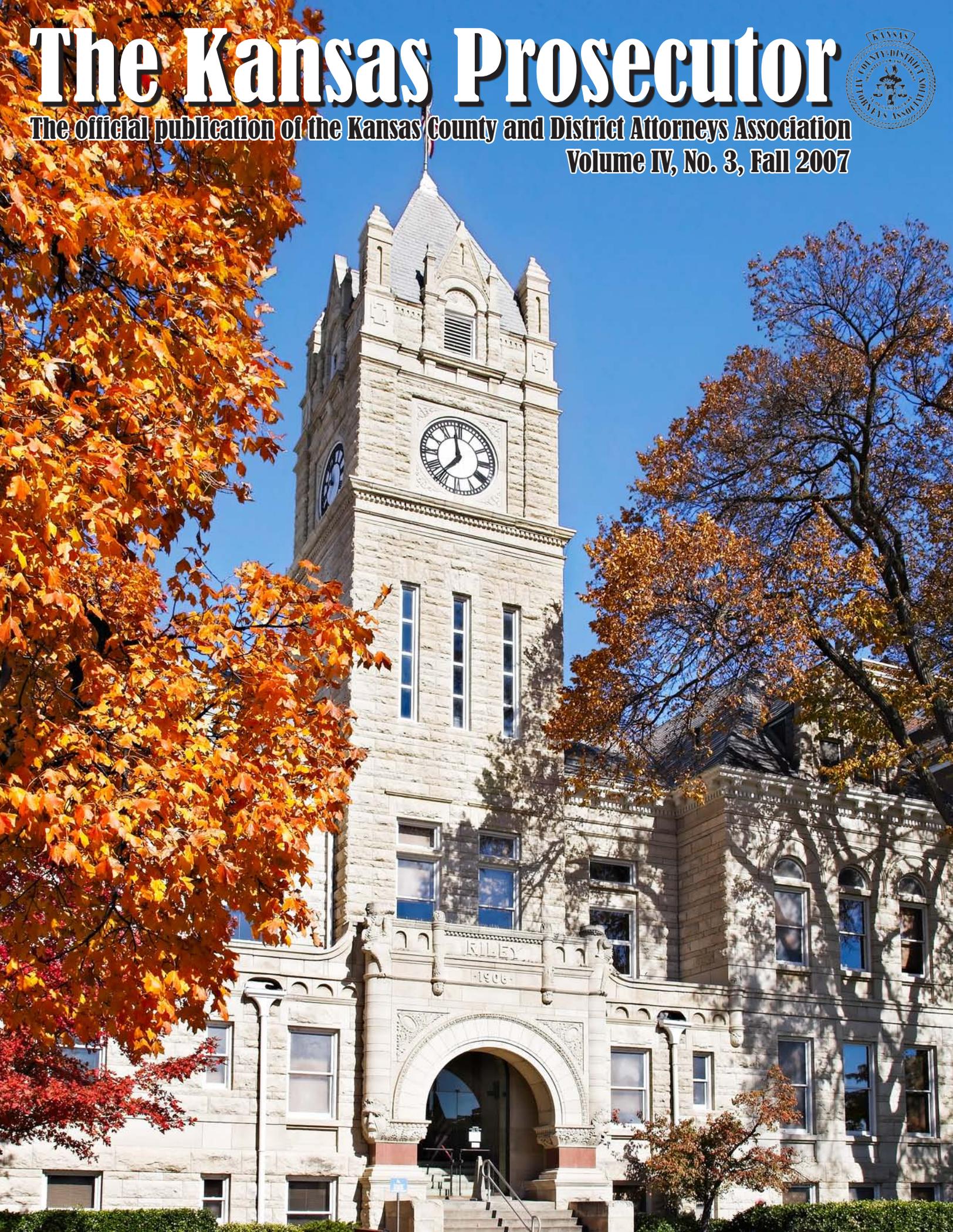


# The Kansas Prosecutor

The official publication of the Kansas County and District Attorneys Association

Volume IV, No. 3, Fall 2007



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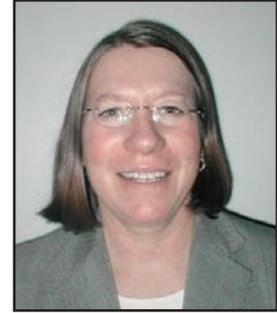
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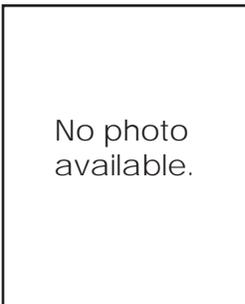
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The purpose of the KCDAA is to promote,  
improve and facilitate the administration  
of justice in the State of Kansas.

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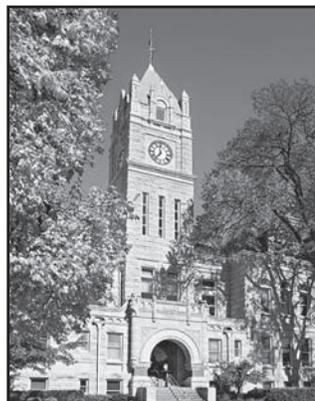
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## About the Cover

Listed on the National Register of Historic  
Places the dominating limestone Riley County  
Courthouse located in downtown Manhattan  
was completed in 1906.

It was built by Topeka contractor, J.B.  
Betts, and local contractor, Clarence Johnson.  
The citizens pledged \$1,000 for the tower clock.

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



# President's Column

by Ed Brancart, KCDA Immediate Past President  
Deputy District Attorney, Wyandotte County District Attorney's Office

## A Few Thoughts

### Thank You

Thank you to the membership for allowing me to serve on the board of directors for the last seven years. Thank you to the directors who have served on the board during my time. It has been my honor and pleasure to work for you and with you to make our prosecutor's bar association work for the good of our profession. Like other past presidents, I hope to be of continuing service to the organization in the years to come.

### Our Association

We come together as prosecutors associated for our common good, but we are also a business. In fact, we are now organized as three fully functioning corporations—The Kansas County and District Attorneys Association, the Kansas Prosecutors Training and Assistance Institute, and the Kansas Prosecutors Foundation. Board service in our association means committing to active engagement in the management of our many business interests in the areas of training, legislative and public affairs, and supplemental funding and philanthropy. The association needs the active support of its membership in order to continue achieving and growing.

### Kansas Prosecutor Foundation

Consider dedicating a portion of your estate to the Kansas Prosecutor Foundation. You can do this now in a number of ways, including changing your beneficiary designation in KPERS to include a percentage to go to the Foundation. A capital campaign is being planned,

and the Foundation will apply for grants where it appears appropriate.

### National Advocacy Center

Many of us have attended training courses at the NAC, so we know the great value it represents to Kansas prosecutors. That value is in danger of going away. Congress has not funded all of the current fiscal year, which has resulted in a loss of travel reimbursement to local prosecutor offices. Funding for FY2008 is not yet firmly in place, and that portion of the budget that would fully fund the NAC has been taken off the table in the House of Representatives. A conference committee is working to resolve Department of Justice funding issues, including that amount that will flow to the NAC.

The KCDA has contacted the Kansas delegation to the Congress, encouraging adequate funding of the National Advocacy Center.

### Legislative and Public Affairs

The KCDA continues to monitor the work of the recodification committee. Our designee to the committee is Kim Parker, Deputy District Attorney from Sedgwick County. This committee has had its share of organizational struggles, and its work is progressing at a snail's pace. We will continue to express to the committee members that even minor changes to the criminal code will result in significant litigation in the criminal courts. Regrouping or reordering statutes is one thing, but fundamental

---

changes to criminal statutes risks unimaginable consequences.

## Strategic Planning

The board of directors is working not only to ensure effective and efficient day-to-day operations, but also to engage in long-range planning that will take the association on a more deliberate course into the future. As such, the winter meeting of the board took place on December 1 and included a strategic planning session, which involved an independent facilitator with the participation of past presidents, section leaders, and standing committee chairs.

## And Lastly: Misconduct, or Trial Error?

From where did the name ‘prosecutorial misconduct’ come? I’ve heard tell that it came from a publisher of court opinions when the publishing company coined the phrase in order to categorize a note at the head of an opinion suggestive of an appellate issue—and it thereafter became part of the lexicon of courts of appeals. Maybe that is true, and maybe it is not, but what a term? Isn’t it unduly misleading? Is it not more accurate that the issues now lumped together under the category of prosecutorial misconduct are more correctly identified as trial error?

Misconduct is a term that connotes more than trial error, and we’re saddled with this name every time there is another case published that rules on a prosecutor’s expression or tactic during trial. Perhaps we have exacerbated and perpetuated the problem by repeating the phrase ourselves and by not working to cause the use of a more accurate industry term. Perhaps we should consider restating issues in briefs to get away from the term ‘misconduct’? For example, ‘Whether the prosecutor committed trial error when...’

A quick computerized search on a database of Kansas published opinions found 529 cases mentioning “prosecutorial misconduct.” There were 105 cases mentioning “judicial misconduct.” But the

search term “defense lawyer misconduct” resulted in the identification of just one case. A follow-up search for the term “defense attorney misconduct” found just one more, and it asked whether a mistrial had been caused by defense attorney misconduct **or error**—thus recognizing that attorney misconduct and error are on par with each other.

The term ‘misconduct’ is not only bad for prosecutors, it is bad for the practice of law. If what actually happened in a given case is trial error, then that is what should be recognized and dealt with according to trial error standards. We should frame arguments in terms of trial error, and not repeat terminology cast about by defendants in their appeals. We should argue to the courts that challenged conduct was or was not trial error, and avoid banging the ‘prosecutorial misconduct’ drum.

If ‘misconduct’ is an interchangeable term with ‘error,’ then there would be nothing wrong with identifying defense attorney error as ‘defense attorney misconduct.’ But, my research shows that criminal justice practitioners (judges, prosecutors, and defense attorneys) are not being treated with name-calling-equality. Perhaps there should be more cases recognizing defense attorney misconduct, or less cases branding prosecutors with prosecutorial misconduct? What we do...judges, prosecutors, and defense attorneys...does not amount to misconduct, ordinarily. As human beings, we all make errors, but an error in a trial does not necessarily amount to committing misconduct. We did not get to where we are (529 cases mentioning prosecutorial misconduct) overnight; and we won’t get back to trial error overnight. But if we don’t start working on it, we won’t get there at all.





# Legislator's Page

by Senator Derek Schmidt

## "Three Strikes" Law Will be 2008 Session Priority

Before the end of the year, I will introduce legislation to implement a modified "Three Strikes" law in Kansas to ensure that repeat felons actually serve at least some amount of time in prison instead of repeatedly receiving probation. Under current Kansas law, there are categories of felonies on the sentencing grid that never result in actual incarceration of a convicted felon regardless of how many times the person has been caught, charged, and convicted of a felony. Offenders in these categories keep receiving probation.

That is a frustration I have heard from prosecutors and law enforcement officers since I began serving in the Senate seven years ago. Over the years, we have tried various approaches to address the problem, mostly without success. But last year, we had a breakthrough. We enacted legislation, strongly supported by KCDAA, that creates a presumption of incarceration for any person convicted of burglary for a third or subsequent time. I'm hopeful that will be the formula for success for this year addressing the broader problem, not only with burglary but with all repeat felons.

There is a school of thought that the certainty of punishment

is at least as important to prevent crime as is the severity of punishment. I believe that law enforcement officials know only too well the stories of repeat felons laughing on the courthouse steps because they know that conviction for their crimes will not land them in prison. That's poor public policy and should be corrected.

This new legislation would provide that any person convicted of a third or subsequent felony would not be eligible for probation and would have to serve the prison sentence imposed by the court pursuant to law. Courts would retain their current-law authority for downward durational departures, but downward dispositional departures would be prohibited.

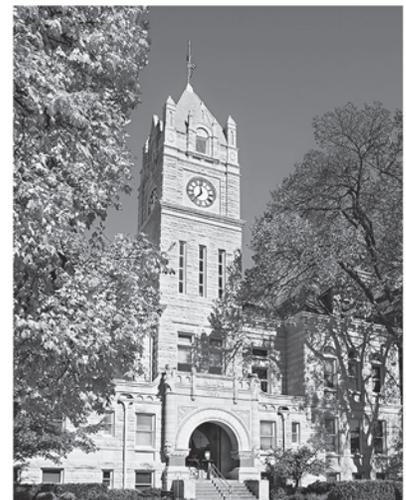
Unlike "three strikes" laws in other states, which often impose a lengthy mandatory term of imprisonment after a third conviction, this proposal would require that the three-time repeat offender serve the time for whatever crime he or she has committed. Commit theft, serve time for theft. Commit battery, serve time for battery. That is a reasonable, proportional policy to provide certainty of punishment without imposing harsh sentences that seem unjust.

I have been encouraged by the strong support from Kansas law enforcement and prosecutors that this measure has received to date. I have written all 39 of

my colleagues in the Senate and invited them to join me as a co-sponsor of this legislation, which I hope will be a top priority for all of us interested in improving public safety during the 2008 legislative session. If this strikes you as good public policy, please visit with your local state senator and encourage him or her to consider co-sponsoring the proposal.

As we move ahead with this proposal, I appreciate having the help, counsel, advice, and support of KCDAA and its members.

### County Courthouse Portraits



Riley County Courthouse

*John D Morrison*

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# Domestic Violence in Kansas

by Jacqueline Spradling, Assistant Attorney General of Kansas



Domestic violence is an insidious and cyclical problem that affects every level of our society. Last year, Kansas law enforcement officers responded to more than 23,000 domestic violence calls.<sup>a</sup> This is an increase of more than 5,000 cases in only two years.<sup>b</sup> Whether these numbers represent an increase in violence or a heightened willingness to report is unclear. What is clear, however, is that domestic violence is an area worthy of our attention and best efforts to eliminate it.

This summer, Kansas Attorney General Paul Morrison announced the creation of the first-ever Domestic Violence Unit in the Attorney General's office. This unit will be responsible for assisting counties with the prosecution of cases involving domestic violence and working with prosecutors and law enforcement officials to develop best practices for each profession. We also can be called upon to review current domestic violence practices and make recommendations that will strengthen the programs already in existence.

Every successful domestic violence policy begins with a written commitment to aggressively combat family violence. In doing so, we can reduce the number of homicides in this state and help protect Kansas families.

Prosecuting cases of domestic violence can be challenging because victims frequently recant their original statements to law enforcement and fail to appear at trial. Addressing both of these challenges is necessary for prosecutors and police officers who are committed to making a difference by ending violence in the home. The Attorney General's Office is committed to this goal.

## Recanting Victims

Law enforcement officers' best efforts while at the scene—including conducting a top-notch investigation—is the foundation necessary to build a strong case that will lead to successful prosecution. Training police officers on what prosecutors need to accomplish this goal is a necessary first step. With this in mind, we have created two investigation checklists, one for all domestic violence calls and the other to be used as an addendum when strangulation is reported. (You can find these checklists on the next page.)

It would be impossible for us to discuss everything important in the investigation of domestic violence crimes in this article. But it is our hope that the importance and benefits of stopping the violence early—despite numerous challenges—is apparent.

## Victims Not Appearing at Trial

Recent United States Supreme Court decisions have narrowed the occasions where hearsay evidence may be presented without concerns on appeal.<sup>c</sup> Historically, prosecutors have relied on the Excited Utterance exception to KSA 60-460 to offer a statement made to officers while at the scene when a victim is absent from court proceedings.<sup>d</sup> This exception allowed prosecutors to admit the statement of an unavailable victim to the trier of fact through the police officer who spoke to her, if the Judge found the statement:

....was made (1) while the declarant was perceiving the event or condition which the statement narrates, describes or explains, (2) while the declarant was under the stress of a nervous excitement caused by such perception or (3) if the declarant is unavailable as a witness, by the declarant at a time when the matter had been recently perceived by the declarant and while the declarant's recollection was clear and was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort.<sup>e</sup>

Now, however, prosecutors must focus their efforts on ensuring the victim's appearance to testify.

Victims fail to appear at preliminary hearings and trials for a variety of reasons. The State's challenge is to get and keep the victim involved in the criminal justice process. Accomplishing this begins with issuing a Notice to Appear.<sup>f</sup> Once present in court, the victim must be ordered to appear at the next hearing. This process not only keeps the victim involved in her case, it ensures her appearance at preliminary hearing and trial when needed.

## DOMESTIC VIOLENCE INVESTIGATION CHECKLIST

1. Note the time of your dispatch and arrival.
2. Describe the demeanor, emotions and physical conditions of the witness.
3. Use verbatim quotes in your report.
4. Ask the victim, "How long has this been going on?"
5. Note the details of the prior abuse: dates, offenses, etc.
6. Document the report number of all prior police contacts between the parties.
7. Attach copies of the prior reports.
8. Collect ALL evidence having to do with the dispute, within reason.
9. Obtain a handwritten statement from the victim, every witness, including children, the defendant and the caller.
10. Get full parental information of all children present.
11. Issue a Notice to Appear to the victim.
12. Fully document the degree of intoxication, if any, of all the parties.
13. Take digital pictures of all noticeable injuries, property before it is collected and the crime scene.
14. Always record your interviews with the parties and witnesses on an audio recorder.
15. Note in your report that there is an audio tape of your interviews.
16. Interview people at the scene in front of your patrol car with the video camera on.
17. If there are bite marks, take the right pictures and swab for DNA.
18. Remember that fingerprints can be lifted from a body.
19. Get medical and dental releases.
20. If strangulation is reported, use the strangulation checklist too.

## INVESTIGATION CHECKLIST FOR STRANGULATION CASES

1. Outward trauma may not be visible. ASK about:
  - a. Sore throat or difficulty swallowing.
  - b. Neck pain – ask about previous neck injury.
  - c. Hoarseness.
  - d. Light headedness.
  - e. Fainting or losing consciousness.
  - f. Nausea or vomiting.
  - g. Incontinence.
  - h. Ringing ears.
2. LOOK for outward signs of injury, including:
  - a. A discolored tongue.
  - b. Bruising behind the ears.
  - c. Signs of neck injuries such as finger impressions, scratches, bruising, impression marks, etc.
  - d. Petechial hemorrhaging.
  - e. Neck swelling – ask about previous neck injuries.
  - f. LISTEN for coughing.
3. Take pictures of the defendant's hands if injured or finger impressions are visible on the victim.
4. Collect the object(s) used to strangle the victim.
5. In your report writing, use the word "strangulation", not choke.
6. Use the phrase, "consistent with strangulation".
7. Ask the victim what the defendant said while strangling her. Use quotes.
8. Ask the victim to describe the defendant's demeanor and facial expressions during the attack.
9. Ask the victim what she thought was going to happen.
10. Ask about prior incidents of strangulation.
11. Remember the investigation checklist for non-strangulation cases.

---

## Conclusion

We've only addressed two of the problems encountered by domestic violence prosecutors. There are others. While prosecuting domestic violence cases can be a challenge, they are among the most rewarding. The opportunity to make a difference in someone's life is a privilege not given to everyone. Early and aggressive intervention often leads to safe families and communities growing together, not apart. As you continue to strive to protect others, please know that the Attorney General's Office will assist you every chance we can. *Please contact me at spradlij@ksag.org or (785) 368-8404 if I can be of further help.*

## Endnotes

- a KBI: A Report on Domestic Violence and Rape Statistics in Kansas: As Reported by Law Enforcement Agencies, 2006.
- b KBI: A Report on Domestic Violence and Rape Statistics in Kansas: As Reported by Law Enforcement Agencies, 2004.
- c See, e.g. *Crawford v. Washington*, 541 W.S. 36 (2004) and *Davis v. Washington*, 126 S.Ct. 2266 (2006).
- d See. KSA 60-460(d) – Contemporaneous Statements and Statements Admissible on Ground of Necessity Generally.
- e Id.
- f A Notice To Appear is a document given to the victim by the police officer while at the scene. It directs the victim to appear at the next regular hearing, or information session.

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# Meet the New Dean of Washburn University's School of Law - Thomas Romig

by Amanda Kiefer, Topeka Attorney

*Editor's Note: This article is reprinted with permission from the Topeka Bar Association Briefings newsletter, Vol. XXVIII No. 8.*



Dean Thomas Romig grew up in Manhattan, Kansas. He lived just west of the Kansas State University campus. He stated it was a wonderful place to grow up (take note KU fans). He remembers attending K-State football games for free and when K-State was a hub for great basketball. (Did we just enter the twilight zone?)

Dean Romig attended Kansas State University. He was involved in the Army ROTC program and was later commissioned through the program.

Like many of us, Dean Romig believed he had a plan for his life. He intended to spend two years in the Army, get the GI bill, and attend law school. Turns out, he enjoyed his time in the military and his plans did not stay on course. As he laughingly put it, "if

you want to see God smile, tell him your 'plans.'" It took four years, and a parachute accident, before he attended law school.

After the accident, he decided to try out for the highly competitive Army Fully Funded Law School program. He was selected and attended Santa Clara University School of Law. There, he served as an editor on the Santa Clara Law Review and as a member of the Honors Moot Court Board. He credits Santa Clara Law School for shaping his perspective of the study of law. He discovered the professors were accessible and caring and that the school valued the diversity of ideas. He believed these attributes to be essential to recruiting great students who will become dedicated alumni.

Dean Romig continued to serve in the Army after graduating from law school in 1980. His military positions included Chief of Army Civil Law and Litigation and Chief of Military Law and Operations; Chief of Planning for the JAG Corps; Chief Legal Officer for Army Air Defense forces in Europe; Chief Legal Officer for U.S. Army V Corps and U.S. Army forces in the Balkans; prosecuting felony and misdemeanor criminal cases; and teaching international law at the Judge Advocate General's School in Charlottesville, Virginia. He also served as the 36<sup>th</sup> Judge Advocate General of the Army. As the Judge Advocate General, he supervised more than 9,000 personnel, including active and reserve military and civilian attorneys, paralegals, and support staff.

It was the combined experiences of teaching at the Army's JAG school and serving as the Judge Advocate General that piqued his interest in becoming a dean at a law school. He realized while teaching that he enjoyed working with young people. In addition, he had the opportunity as the Judge Advocate General to create a legal center and a paralegal center. Through that process he learned he had the skills necessary to be a successful dean: leadership, administration, and vision. He had the desire and the skill set to make a difference at a law school.

Dean Romig retired from the Army after serving 34 years and living in numerous places, including Georgia, Arizona, North Carolina, Texas, Germany, and Washington D.C. He then served as deputy chief counsel for operations for the Federal Aviation Administration.

He was not interested in following up on his desire to serve as a dean at a law school until he saw the advertisement for the open dean position at Washburn Law School. From the school's reputation, he believed the academic environment to be similar to his alma mater's. He became very excited at the prospect of obtaining the position.

Strangely, he enjoyed the grueling interview process. This confirmed his belief that Washburn was welcoming and warm. He learned that the faculty is dedicated and the staff, committed. The University lived up to its reputation, and Dean Romig feels honored to have been selected as Washburn Law School's new dean.

Dean Romig hit the ground running, arriving in Topeka on July 2, 2007, having already attended an

alumni gathering in Washington D.C. He plans to keep the alumni actively involved in the future of the law school, as the alumni are Washburn Law School's legacy and future.

Additionally, Dean Romig has already met with the deans of the regional law schools. He believes that there is healthy competition between the KU and Washburn law schools, which is good for each school, for the state of Kansas, and ultimately for our profession.

He also believes that the purpose of our profession is to make a better society through what we do, and it is incumbent upon law schools to inculcate this purpose in students.

While serving as dean, Dean Romig would like to capitalize on Washburn Law School's many opportunities, including its location in the Capital City. He sees an opportunity for a Center of Law and Government, focusing on state and national government. There is also potential for a Center for Law and National Security, given Washburn's proximity to Fort Riley and Fort Leavenworth. One of his main goals as dean is to help get Washburn University School of Law the credit it deserves. He believes it is a great school, and he hopes to make it even better.

Dean Romig and his wife, Pam, attended high school and K-State together. Accepting the dean position at Washburn had the added bonus of allowing them to return home. Much of their family still lives in Kansas. They have two sons, Chris and Adam, and two grandsons, Timothy and Daniel. Chris and his wife Robin live with their two children, Timothy and Daniel, in Florida. Adam lives in Illinois.

Dean Romig would like to encourage alumni to share ideas with him. He is looking forward to partnering with the Washburn Law School alum in his mission to make Washburn the best school to learn the practice of law.



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# KCDAA Member Highlight

By Mary Napier, Editor, Kansas Prosecutor

## From Police Officer to Prosecutor

Sherri Schuck had wanted to be a police officer and a judge since she was young. However, since she couldn't be both at once, she started in law enforcement.

Sherri's dad was in the military so she lived in several different parts of the country and world while she was growing up. Ultimately, she graduated from Junction City High School and found herself attending Kansas State University receiving her BA in English Literature in 1994.

"I have been very fortunate to live overseas in Germany and have lived in many states in our nation," said Sherri. "At heart though, I am a midwest girl and call Kansas home."

Just before graduating from K-State, Sherri took a job as a secretary and quickly decided that was not the job for her. Her first job in law enforcement was with the Riley County Police Department as a dispatcher. In 1995 she was hired by Riley County PD as a police officer and attended the Kansas Law Enforcement Training Center from April 1995 to June 1995. She graduated at the head of her KLETC class and began her duties as a patrol officer with Riley County PD immediately after graduation.

Sherri spent three years as a patrol officer before becoming a detective with the department. She specialized in crimes against children and sexual assault cases.

She also investigated residential burglaries and other person crimes.

Eventually Sherri made the list to become a sergeant with the Riley County PD. However, near the same time she made the sergeant list, she had also applied to attend Washburn University Law School and was accepted. Sherri still wanted to become a lawyer so she decided to pursue her dream of going to law school.

To accommodate the time demands of law school, Sherri returned to duty as a patrol officer. Once she completed her first semester of law school, she had to make a decision. She could become a sergeant or she could continue in law school. Obviously she opted for law school, and her life headed away from law enforcement and into prosecution. She graduated with her JD from Washburn in December 2001. "Going into prosecution was a natural transition after being in law enforcement," explained Sherri.

Sherri's prosecution career started at Butler County, but she quickly took a job working for Barry Wilkinson as the Assistant Pottawatomie County Attorney in April 2002. When Barry decided to run in Riley County, Sherri ran in Pottawatomie County and was elected Pottawatomie County Attorney, taking office January 10, 2005.

Helping Sherri with her duties



are an Assistant County Attorney and five staff members. In 2006, the Pottawatomie County Attorney's office handled a number of cases including: criminal – 680; traffic misdemeanors – 419; CINC – 41; JO – 138; C&T – 8; Fish & Game – 51. Like most county attorney offices in communities similar to Sherri's, her office handles a variety of cases, from serious felonies such as attempted homicides and sexual assault cases to many not so serious cases such as traffic offenses.

Sherri has handled quite a few interesting cases, but she enjoys the ones that go to jury trial the most. One case she pointed out was a rape case involving two suspects who both had the opportunity to commit the crime. Fortunately, the biological evidence recovered matched only one of the suspects. Sherri thought that was a great case to present.

One of the most difficult aspects of Sherri's job is dealing with the public's expectations of what they think her job is about. A lot of victims don't understand the limitations on sentencing, and it is hard to overcome the expectations of juries from what they see on TV. However, Sherri loves the

challenge of preparing a case for jury trial and the opportunity to tell the story in court.

Immediate goals for Sherri involve continuing to run a reputable office and running again for re-election. If re-elected, she would like to revamp their juvenile programs to hold more juveniles accountable and establish a Crime Victims Board in her jurisdiction. Later in her career, Sherri would like to sit on the bench (one of her childhood dreams) and perhaps teach criminal law.

“Turning in my badge was truly one of the hardest things for me to do. When I decided to run for county attorney, it was exciting to be doing that so quickly out of law school,” said Sherri. “But the best part was finally realizing that I loved prosecuting as much

as I loved being a police officer. I have been fortunate to work with some great prosecutors, who were also great bosses and mentors (Jan Satterfield and Barry Wilkerson).”

Sherri believes that those mentors and networking opportunities are VERY important, so she believes everyone should be involved in KCDAA.

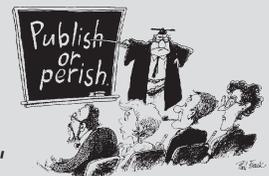
“The KCDAA is one of the best networking associations. I have met many prosecutors and received invaluable tips and held numerous productive discussions,” said Sherri. “The quest for assistance keeps you up-to-date on what issues are coming up and how other jurisdictions are handling the matters.” And according to Sherri, “It is also a great time to blow off steam about things that others completely understand.”

Sherri lives in Wamego with her husband Bill Schuck, a detective with the Riley County Police Department. She has three step-sons and four grandchildren. She LOVES KSU and holds season tickets to the football games.

In spite of the demands of her office, Sherri and her husband still find the time to enjoy the atmosphere of Las Vegas at least once a year and go on an occasional cruise. She has taken up running and would like to run a marathon. She also collects Barbie dolls, with over 400 in her collection, much to her husband’s dismay.

So, next time you are at a KCDAA Conference (or KSU football game), make sure you find Sherri for some great discussions and time to blow off some steam!

*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!*

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# KCDAA Milestones

## New Faces

Assistant County Attorney, **Lora D. Ingels**, has joined the Office of the Finney County



Attorney. Ingels attained her undergraduate degree at Wichita State University, graduating *Magna Cum Laude* with a BA in Political Science. She obtained her Juris Doctorate Degree from Washburn University and graduated in May 2006. She was admitted to the Bar in September 2006.

While in law school, Ingels was a Law Clerk for Alderson, Alderson, Weiler, Conklin, Burghart & Crow of Topeka, Kansas. Ingels accepted a position as Assistant Public Defender with Western Regional Public Defender Office and moved to Garden City in October 2006. She started her present position with the Finney County Attorney's Office on July 3, 2007. Ingels is originally from Atchison, Kansas.

**Kathleen "Katy" Britton** accepted a position on August 20<sup>th</sup> as an assistant district attorney for Douglas County District Attorney Charles Branson. Britton will prosecute domestic violence cases. Prior to joining Douglas County, she worked at the Lancaster County Attorney's Office in Lincoln, Nebraska. Britton received her JD from the University of Nebraska College of Law.

**Oscar Espinoza** joined the Miami County Attorney's office on August 6, 2007. He received his undergraduate degree at Baylor University and his JD from the Kansas University School of

Law. He will be handling traffic, misdemeanors, and Care and Treatment cases.



## Promotions

Charles Branson, Douglas County District Attorney, announces the promotion of two assistant district attorneys. **Amy McGowan** was promoted to Chief Assistant District Attorney with an emphasis on trial management, and **David Melton** was promoted to Chief Assistant District Attorney with an emphasis on administration.

McGowan has been with Douglas County since January 2005 following 16 years with the Jackson County Missouri DA's Office where she worked as a senior trial attorney in the general crimes unit, as a trial team leader in the sex crimes unit, the drug crimes unit, and the family support unit. She also worked at the Shawnee County District Attorney's Office prior to her work in Jackson County. McGowan is a 1984 graduate of the University of Kansas School of Law.

Melton has also been with Douglas County since January 2005 after 5 years with the Leavenworth County Attorney's Office where in addition to general felony and drug prosecution, he created the domestic violence prosecution unit. He worked at the Saline County Attorney's Office prior to his work in Leavenworth County and was a police officer with the Merriam Police Department. Melton is a 1998 graduate of the University of Kansas School of Law.



## On the Move

Renee Henry has left the Wyandotte County District Attorney's Office and has moved across the river to the Jackson County (Kansas City, Missouri) Prosecuting Attorney's Office. Renee, who worked 5 years in Wyandotte County, will specialize in sexual assault cases.



## Births

**Jess Hoeme**, Mitchell County Attorney and his wife, Jennifer, were blessed with the birth of their fourth child, Brynne Eloise, on March 13, 2007. Brynne was born in Beloit, weighed 6 lbs. 6 oz., and was 19" long. She joined her two sisters, Brooke (2), Blaire (6), and her brother, Jenson (4). This proud papa couldn't be happier, but could use some practical advice on raising all these girls!

**Angie McClure Kolenda**, Victim Advocate in the Wyandotte County District Attorney's Office, and her husband Paul announce the arrival of their daughter, Olivia, born on May 17. She weighed 8 lbs 8 oz. All are doing great.

**Heather R. Jones**, Franklin County Attorney, and **Brandon L. Jones**, Osage County Attorney, have a new son. His name is Landon Lance Jones, and he was born on June 28, 2007.





# Underage Drinking a Problem in Kansas

By Keri Renner, Kansas Leadership to Keep Children Alcohol Free

As prosecutors, you are probably more aware than most about the effects of alcohol in society and especially of the prevalence of alcohol-related issues among juveniles. In Kansas, the startling fact is that the average age a child begins to drink alcohol is 12 years-old.\* Children who begin drinking before the age of 15 are four times more likely to develop alcoholism than people who begin drinking after age 21. Kids who drink also are more likely to be victims and/or perpetrators of violent crimes, have problems with school work, and become more sexually active at earlier ages. They also have a higher chance of being injured or die from vehicle crashes, drowning, fire or suicide, according to the Substance Abuse and Mental Health Services Administration.

In response to underage drinking as a public health threat, *Leadership to Keep Children Alcohol Free* was launched in spring 1999 by the National Institute on Alcohol Abuse and Alcoholism in partnership with The Robert Wood Johnson Foundation (RWJF). The purpose was to bring the scope and dangers of early alcohol use to the public's attention and to mobilize national, state, and local action to prevent it. The Kansas Leadership to Keep Children Alcohol Free, a governor's spouse initiative, was formed in 2000. The committee is a unique coalition of state agencies, state organizations, and individuals from regional prevention centers and community coalitions, as well as representatives throughout the state. The committee works year-round toward educating the public, but specifically parents, regarding underage drinking and social hosting. The Honorable Judge Gary Sebelius is the official

spokesperson for the Kansas Leadership Committee.

Past endeavors of the Kansas Leadership group have included: involvement regarding getting keg registrations passed in the state of Kansas; developing a movie slide that was placed in five cities in Kansas; distribution of thousands of underage drinking materials; engaging coalitions throughout the state to sign underage drinking prevention resolutions, and assisting with the implementation of state-wide town hall meetings regarding underage drinking in spring 2006.

During the 2007 Kansas Legislative session, the committee advocated to close the loophole in the social host law. The social host law, also known as "Paul's Law," was the result of a tragedy that often occurs in many Kansas communities—losing a youth to teen drinking. The law was named in honor of Lenexa teenager Paul Riggs, who died weeks after crashing into a tree on his way home from a friend's house where he and other teens had been drinking. His friend's parents were home while the teens were drinking. Paul's mother, Debbie, urged Kansas legislators to enact a law to enforce social hosting, and the

result was K.S.A. 21-3610c. Paul's Law makes it a crime for anyone to allow a person or persons under the age of 21 to consume alcohol on their property. Under the law, the penalties for conviction of social hosting in Kansas are fines up to \$1,000 and up to one year in jail. Changes to the law took place during the 2006 Legislative Session, where the fines were raised from \$200 to \$1,000, and it was changed from a Class B misdemeanor to a Class A. The original



The "Not In Our House" logo used for the Kansas Leadership to Keep Children Alcohol Free educational materials.

statute as it was established in 2004, defined a minor as “under 18.”

In late 2006, the committee adopted a campaign, “Not In Our House,” which was created by The International Institute on Alcohol Awareness, The Century Council, and Scholastic. The committee used the slogan and created their own education campaign materials targeted at key leaders, educators, and other professionals throughout the state, as well as legislators. The campaign outlined the need for a “fix in the flaw in the law.” In May 2007, the loophole was closed, and through SB 61, the definition of a minor was changed to under age 21.

Reducing underage drinking is a key goal of the Kansas Leadership to Keep Children Alcohol Free. One of the principal difficulties for decreasing underage drinking and social hosting is that some parents believe they are promoting responsible drinking by allowing their children to drink under their supervision. First and foremost, allowing youth to drink underage promotes the belief that it is safe and acceptable behavior, and that it is okay to break the law. Somehow, underage drinking appears to have become a “rite of passage.” Secondly, avoiding the possibility of drunk driving is not the only issue when it comes to social hosting. Even if a parent is home while a party takes place, violence, fighting, sexual assault, or alcohol poisoning are just a few other tragedies that can occur when teens and alcohol mix.

Yet another problem is that some adults say, “Well, if my kid is old enough to enlist in the military and fight in a war, then he/she can certainly drink.” It’s a debate that just won’t go away: the furor over the minimum drinking age of 21. According to the National Highway Transportation Safety Administration (NHTSA), raising the minimum legal drinking age laws (MLDA) to 21 has been accompanied by reduced alcohol consumption, traffic crashes, and related fatalities among those under age 21.

Furthermore, alcohol damages developing bodies and brains. In recent years, there have been many studies done on the adolescent brain and substance abuse. One researcher, Dr. Ken Winters with the University of Minnesota, has done extensive examination of this subject. Dr. Winters says that it is “now quite clear that the brain undergoes a tremendous



*Lots of underage drinking involves games such as the popular keg stand, where the participant attempts drinking upside down.*

amount of development during the teen years and continues to develop up until about age 24.” He also states that because of the changes occurring in the brain during the teen years, alcohol affects teenagers and adults differently – for instance, it appears to produce bigger impairments in learning and more widespread brain damage in adolescents than in adults. Repeated alcohol exposure might alter the path of teen brain development. He says, “The plasticity of the brain decreases as we enter the early 20s, which means that we might not be able to make up entirely for the poor decisions that we make as teenagers.”

The National District Attorney’s Association is a partner with Community Anti-Drug Coalitions of America (CADCA) in their Strengthening Partnerships Project and has formed a special committee focused on the issue of reducing substance abuse as a key element in reducing and preventing crime. Youth access to alcohol is a significant issue in the prevention of juvenile delinquency. It’s fair to say that the NDAA is substantially involved on a national level in reducing and preventing substance abuse, and The Kansas Leadership to Keep Children Alcohol Free encourages the KCDAA to become involved with prioritizing the prevention of underage drinking in Kansas.

There’s no question that social hosting and underage drinking are a problem in Kansas. Depending on your community, these may not be your *biggest* problems, but as Kansas prosecutors, you have a part in the equation in solving these issues. As a county or district attorney, you can have an impact on

reducing the access of alcohol and underage drinking/ social hosting by enforcing the law. You can help educate the youth and parents in your community about the Kansas statutes that pertain to underage drinking. Making certain that you are knowledgeable about the effects alcohol has on a young brain will assist you in underage drinking cases. Kansas Family Partnership and the Kansas Leadership to Keep Children Alcohol Free have free videos, free brochures and posters, and other information available to display in your office or to distribute in your community as helpful resources. When the full force of law enforcement is behind the resolution of a public safety issue, change can occur. By becoming involved in the initiative and becoming a partner of the “Not In Our House” campaign, there are many positives: increased public safety; strengthened community relationships; and saving young lives. There is no doubt that as county and district attorneys, your plate is very full, but consider this: strategic involvement in efforts to reduce underage drinking will pay you back in decreased crime in your community, increased successful prosecutions, and increased public safety—and that’s a good thing.

**About the Author:** *Keri Renner is the director of communications and statewide networker for Kansas Family Partnership. Keri is the co-chair of the Kansas Leadership to Keep Children Alcohol Free and has chaired the statewide Family Day Committee for the past two years. She also serves on the Kansas Alliance for Drug Endangered Children; the Shawnee County Drug Paraphernalia Task Force, and the Kansas Methamphetamine Prevention Project Advisory Board.*

### **Resources:**

\*Kansas Communities That Care Survey 2007.

- <http://www.stopalcoholabuse.gov>
- <http://www.alcoholfreechildren.org>
- <http://www.notnrhouse.org>
- <http://www.nhtsa.dot.gov/people/injury/alcohol/youthdui/section3.html>
- <http://www.csmonitor.com/2006/0112/p09s01-coop.html>
- [http://www.tresearch.org/resources/specials/2004Nov\\_AdolescentBrain.pdf](http://www.tresearch.org/resources/specials/2004Nov_AdolescentBrain.pdf)
- <http://www.brainplace.com/da>
- <http://www.kansasfamily.com/getinvolved-ksleadership.cfm>



## **Do you know the odds of your teenager drinking alcohol?**

Thirty-three percent of teens taking the Kansas Communities That Care Survey\* responded that it was easy to obtain alcohol from their own parents (knowingly), and this increases to 40 percent when it is from a friend’s parent. Providing alcohol to minors, or social hosting, is illegal in Kansas. For free information on how to educate yourself and others about the high stakes of underage drinking, contact Kansas Leadership to Keep Children Alcohol Free at (800) 206-7231. ***No one wins by providing alcohol to minors in Kansas.***



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

*\*Taken from 2006 Kansas Communities That Care Survey*

# The Benefit of Closure

by Douglas W. McNett, Assistant Pawnee County Attorney



## A Practical Guide to Plea Agreements in Kansas

If you prosecute criminal cases long enough, you will inevitably hear someone criticizing a fellow prosecutor by saying something along the lines as, “Why doesn’t that prosecutor ever try cases? All they ever do is plea them out.” While the general public may perceive them as simply “cutting deals,” the artfully drafted plea agreement is one of the prosecutor’s most effective tools in seeing that justice is done.

In *Morrow v. State*, 219 Kan. 442, 548 P.2d 727 (1976) the Kansas Supreme Court recognized “plea bargaining is a fundamental part of our criminal justice system and produces many benefits such as prompt adjudication, shortened pretrial detention, and enhanced opportunities for appropriate disposition.” *Morrow*, 219 Kan. at 445.

From a practical standpoint, the use of plea agreements, along with a reasonable diversion policy, can be an efficient way of managing ever increasing caseloads. In fact, the criminal justice system would virtually grind to a halt without the plea agreement as it would be impossible to try every case filed.

More importantly, however, these agreements should be used in conjunction with prosecutorial charging discretion to see that criminal defendants face a punishment that is appropriate in both the short and long-term in meeting the congruent goals of community safety and offender reformation. Vigorously pursuing convictions simply for the sake of convictions accomplishes nothing. Trust me, no one that matters, is keeping score.

Traditionally another benefit of negotiated plea agreements, unlike cases tried to a judge or jury, was that they provided both sides with the sense of having some control in the outcome of a case and resulted in closure as they foreclosed the possibility of endless appeals. That was until the Kansas Appellate Courts determined that the appellate court’s authority in K.S.A. 21-4721(e)(3) to review claimed errors in the

ranking of convictions’ severity level superseded the general prohibition of K.S.A. 22-3602(a), .... that no appeal shall be taken by the defendant from a judgment of conviction before a district judge upon a plea of guilty or nolo contendere.

To make matters worse, the Appellate Court’s rediscovery of the now infamous *Ortiz* exceptions has resulted in a plethora of long forgotten cases that have now become subject to possible appellate review. Just when all hope was lost, however, three Kansas Court of Appeals decisions during 2007 lend hope that the pendulum has begun to swing back in favor of well-drafted and considered plea agreements. Those cases are; *McPherson v. State*, 38 Kan.App.2d 276 (2007); *State v. Williams*, 37 Kan. App. 2d 404, 153 P.3d 566 (2007); and *State v. Patton*, 37 Kan. App. 2d 166, Syl. ¶4, 152 P.3d 1262 (2007).

In *McPherson*, the Court relying on previous case law held that “a defendant is permitted to plead to a non-existent or hypothetical crime as part of a plea agreement so long as the defendant (1) was initially brought into court on a valid pleading; (2) received a beneficial plea agreement; and (3) voluntarily and knowingly entered into the plea agreement.” *McPherson*, 38 Kan.App.2d at Syl. ¶2.

The *Williams* court declined on statutory grounds to review a challenge to a sentence following a plea agreement holding that “K.S.A. 21-4721(c) provides that an appellate court shall not review on appeal a sentence for a felony conviction that (1) is within the presumptive guidelines sentence for the crime, or (2) is the result of a plea agreement between the State and the defendant which the trial court approved on the record.” *Williams*, 37 Kan. App. 2d at 407.

It is, however, the *Patten* decision that provides the most promise for prosecutors of regaining the benefit of closure from plea agreements. In *Patten*, the Court held that “... [W]here a defendant bargained

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with the State and knowingly and voluntarily agreed to waive his or her right to appeal, in exchange for a sentence reduction and dismissal of additional charges, the district court cannot ignore the waiver because it stands as a bar to the defendant filing an appeal unless the plea agreement is set aside.” *Patton*, 37 Kan. App. 2d at Syl. ¶4.

While I’ve been using written plea agreements in conjunction with my felony plea offers for a number of years, I had honestly never researched the limits, if any, of what those offers may contain until I came across the *Patton* decision and contemplated its possible impact on my future plea offers. This article is a summation of that research, and I hope it helps you in your plea negotiations and in the drafting of effective and enforceable plea agreements.

## General Considerations

In *State v. Byrd*, 203 Kan. 45, 50-53, 453 P.2d 22 (1969), the Kansas Supreme Court approved the application of the ABA Standards for Criminal Administration as they relate to plea bargaining. At the time, prosecutors were prohibited from initiating plea negotiations as it “might reasonably appear to make justice and liberty subjects of bargaining and barter.” *Byrd*, 203 Kan. 45 at. 51-52. The standards have changed somewhat since the *Byrd* decision and the current ABA Standards Relating to the Prosecution Function provides at Part IV § 3-4.1(a), “The prosecutor should have and make known a general policy or willingness to consult with defense counsel concerning disposition of charges by plea.”

In 1992, the Kansas Legislature codified prosecutor’s authority to engage in discussions toward reaching an agreement for plea in K.S.A. 21-4713, which provides that the prosecutor may do any of the following: (a) Move for dismissal of other charges or counts; (b) recommend a particular sentence within the sentencing range applicable to the offense or to the offense to which the offender pled guilty; (c) recommend a particular sentence outside of the sentencing range only when departure factors exist and shall be stated on the record; (d) agree to file a particular charge or count; (e) agree not to file charges or counts; or (f) make any other promise to the defendant, except that the prosecutor shall not enter into any

agreement to decline to use a prior drug conviction of the defendant to elevate or enhance the severity level of a drug crime, or make any agreement to exclude any prior conviction from the criminal history of the defendant.

As noted above, a written plea agreement can be an effective tool in establishing the parties’ expectations by specifically describing each parties’ rights and obligations. The Kansas Supreme Court, however, has consistently held “a written plea agreement is not a substitute for the court’s compliance with the statutory requirements.” *State v. Anziana*, 17 Kan. App. 2d 570, Syl. ¶3, 840 P.2d 550 (1992). See also *State v. Moses*, 280 Kan. 939, 130 P.3d 69 (2006) where it was held “that although written plea agreement acknowledgments are encouraged, ‘such an acknowledgment is emphatically not a substitute for the requirements of K.S.A. 22-3210.’” *Moses*, 280 Kan. at 948 citing *State v. Browning*, 245 Kan. 26, 34, 774 P.2d 935 (1989).

K.S.A. 22-3210(a) provides that before or during trial a plea of guilty or nolo contendere may be accepted when: (1) the plea is made in open court; (2) the court has informed the defendant of the consequences of the plea, including the specific sentencing guidelines level of any crime, and of the maximum penalty provided by law which may be imposed; (3) the court has addressed the defendant personally and determined that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea; and (4) the court is satisfied that there is a factual basis for the plea.

## Statutory Notification Requirements

While plea agreements are often reached immediately prior to scheduled contested proceedings, there are two statutory notification requirements a prosecutor needs to keep in mind when negotiating an agreement, K.S.A. 22-2902 and K.S.A. 22-3436. The first of which is so straight forward it begs one to wonder why the legislature felt compelled to codify it. Subsection (6) of K.S.A. 22-2902 provides that “when a defendant and prosecuting attorney reach agreement on a plea of guilty or nolo contendere, the defendant and the prosecuting attorney shall notify the district court of such agreement and arrange for a time to plead,

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pursuant to K.S.A. 22-3210 and amendments thereto.”

The second notification requirement, however, is one that relates to victim notification. K.S.A. 22-3436 provides that the prosecuting attorney shall: (1) inform the victim or the victim’s family before any dismissal or declining of prosecuting charges; (2) inform the victim or the victim’s family of the nature of any proposed plea agreement; and (3) inform and give notice to the victim or the victim’s family of their rights to be present at any hearing where a plea agreement is reviewed or accepted and that the victim or the victim’s family may submit written arguments to the court prior to the date of the hearing.

## Construction and Interpretation

While there are several cases which have discussed the interpretation and enforcement of plea agreements, the decisions in *State v. Boswell*, 30 Kan. App. 2d 9, 37 P.3d 40 (2001), rev. denied, 276 Kan. 970 (2003), and *State v. Boley*, 279 Kan. 989, 130 P.3d 69 (2005), provide excellent reviews of the basic principles applied by the Kansas Appellate Courts. The *Boswell* and *Boley* Courts both noted that application of fundamental contract principles is generally the best means to fair enforcement of a criminal plea agreement, although the constitutional implications of the plea bargaining process may require a different analysis in some cases.

In a general sense, plea agreements are a bilateral contract whereby the defendant promised to plead guilty and, in exchange, the State promised to dismiss or reduce charges and/or recommend a certain sentence. Since the sentencing court is not a party to a plea agreement, the Court is not bound by its terms. *Boswell*, 30 Kan. App. 2d at Syl. ¶4-6. When a plea of guilty is tendered or received as a result of a prior plea agreement, the trial judge may give the agreement consideration but is not bound by its terms and can reach an independent decision on whether to approve a negotiated charge or sentence concessions. *Boley*, 279 Kan. at Syl. ¶2.

It must be noted that the Kansas Supreme Court has recognized that a defendant’s due process rights are involved when a defendant waives his or her constitutional rights in exchange for a promise by a prosecutor in a plea agreement. See *State v. Wills*,

244 Kan. 62, 67-68, 765 P.2d 1114 (1988) (citing *Santobello v. New York*, 404 U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495 [1971], and *Mabry v. Johnson*, 467 U.S. 504, 81 L.Ed.2d 437, 104 S.Ct. 2543 [1984]). *State v. Marshall*, 21 Kan. App. 2d 332, 335, 899 P.2d 1068 (1995). Accordingly, both state and federal courts have exacted meticulous standards in the creation and execution of plea agreement promises. *State v. Chesbro*, 35 Kan. App. 662, 674 (2006).

A plea agreement may be deemed ambiguous if it is silent as to some issue, condition, or fact known to both sides. A plea agreement reasonably susceptible to different interpretations is ambiguous and must be strictly construed in favor of the defendant. *State v. Woodling*, 264 Kan. 684, 688, 957 P.2d 398 (1998).

Where there has been a mistake of law in entering into a plea agreement, the risk of the mistake may fall to the State, which is presumed to be in a better position to know the applicable law. *Boley*, 279 Kan. at Syl. ¶6. However, in construing the terms of a plea agreement which provided that the State would not file any additional charges against the defendant for any crimes known by the county attorney’s office, the Kansas Supreme Court held in *State v. Smith*, 244 Kan. 283, 767 P.2d 1302 (1989), that information “which should be known by the county attorney’s office” does not include that information known only by a federal undercover agent.

## Prohibited Terms

Now that we have a basic understanding of the general rules of construction of the plea agreements, we should consider what we can and can’t agree to during the negotiation process. Obviously, as a prosecutor, it is not a good idea to agree to terms, which you don’t have the authority or ability to satisfy. See *State v. Hernandez*, 29 Kan. App. 2d 522, 28 P.3d 1031 (2001), in which the court held where a prosecutor lacks authority to make a plea agreement, the resulting agreement is invalid and will be set aside.

Interestingly enough, the legislature has not enacted many limitations on a prosecutor’s authority to enter into plea agreements, but there are a few statutory prohibitions you should be aware of. K.S.A. 21-4708(b)(2) and 21-4713(f) specifically prohibits the use of plea bargaining agreements to decline to use

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a prior drug conviction of the defendant to elevate or enhance the severity level of a drug crime, or make any agreement to exclude any prior conviction from the criminal history of the defendant. Additionally, K.S.A. 79-5205(c) provides that plea agreements cannot be used to avoid taxes under the criminal Drug Stamp laws as plea agreements are not binding on the Director of Taxation.

In DUI cases, plea agreements cannot be used to avoid suspending a defendant's driver's license or to waive a sanction solely within the authority of the Kansas Department of Revenue, as the Department is not bound by the plea agreement. See *Fehlhafer v. State*, 23 Kan. App. 2d 193, 930 P.2d 1087 (1996). Additionally, K.S.A. 8-1567(p) prohibits the use of plea agreements to avoid the mandatory penalties for convictions of driving under the influence of alcohol or drugs.

In *Re Care & Treatment of Hay*, 263 Kan. 822, 953 P.2d 666 (1998), it was held that "An involuntary commitment pursuant to the Sexually Violent Predator Act, K.S.A. 59-29a01 et seq., does not violate a plea agreement governing a prior conviction. Commitment under the Act is grounded solely on a mental ailment and present dangerousness. Prior convictions are not the basis for commitment under the Act and serve only to identify individuals as a member of the pool of people potentially subject to the Act. Civil commitment following the service of a sentence is collateral to a plea and independent of the criminal case." Accordingly, it would appear to be improper to incorporate considerations regarding possible involuntary commitment pursuant to the Sexually Violent Predator Act into plea agreements concerning sex crimes.

While prior courts had upheld the practice of including an upward durational departure in a plea agreement, in *State v. Santos-Garza*, 276 Kan. 27, 72 P.3d 560 (2003) the Court found that the practice was unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S.Ct. 2348 (2000), and *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001).

*State v. Dixon*, 279 Kan. 563, 612, 152 P.3d 89 (2005) held a condition of a plea agreement or probation order that requires an accomplice to testify consistent with his prior testimony in an inquisition is unenforceable. Plea agreements may only be conditional upon the accomplice witness testifying

"completely and truthfully," and consistency provisions in such agreements are not enforceable.

As a final note regarding prohibited terms, the Court held in *State v. Tryon*, 36 Kan. App. 2d 349, 351, 153 P.3d 566 (2006) that parties cannot through a plea agreement invest an appellate court with jurisdiction when it is otherwise lacking.

## Permissible Terms

In addition to those terms specifically authorized by K.S.A. 21-4713, the Kansas Appellate Courts have approved and upheld the inclusion of many other conditions. As discussed above, in *State v. Patton*, 37 Kan. App. 2d 166, 152 P.3d 1262 (2007), the Kansas Court of Appeals upheld the waiver of a defendant's right to appeal as part of the enforceable conditions of a plea agreement. 2d 662, Syl. ¶9, 152 P.3d 89 (2006).

The Court in *Edwards v. State*, 29 Kan. App. 2d 75, 25 P.3d 142 (2001) approved a prosecutor's plea bargain with a criminal defendant's accomplice, through which the prosecutor secured the accomplice's testimony against the defendant, holding that the agreement does not violate either Kansas Rule of Professional Conduct 3.4(b) or K.S.A. 21-3807(a)(1) on compounding a crime.

In *State v. Bey*, 270 Kan. 544, 17 P.3d 322 (2001), the Court held "package deal" plea agreements, pursuant to which leniency to a third party or disposition of a case or cases in which a third party is a defendant as a part of the plea agreement, are not per se invalid, but the trial court should be informed of the package deal in order that the court may make appropriate inquiry relative thereto in determining the voluntariness of the plea. *Bey*, 270 Kan. at Syl. ¶4.

Despite appearing at first glance to be contrary to the language of K.S.A. 22-2910, the Kansas Court of appeals held in *State v. Scheuerman*, 32 Kan. App. 2d 208, 82 P.3d 515 (2003), that a plea agreement whereby the defendant is required to enter a plea to one count of a multiple-count complaint as a condition to being granted diversion on another count of the complaint does not run afoul of the provisions of K.S.A. 22-2910, which provides, "No defendant shall be required to enter any plea to a criminal charge as a condition for diversion." See also *State vs. Chamberlain*, 280 Kan. 241, 245 (2005), where

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it was held that “entering into a diversion agreement pursuant to K.S.A. 12-4413 et seq. or 22-2906 et seq., and amendments thereto, shall not constitute plea bargaining.”

A practice common in many jurisdictions was approved in *Spencer v. State*, 24 Kan. App. 2d 125, 942 P.2d 646 (1997) and *McPherson v. State*, 38 Kan. App.2d 276 (2007) in which the Court held that a defendant is permitted to plead to a non-existent or hypothetical crime as part of a plea agreement so long as the defendant (1) was initially brought into court on a valid pleading; (2) received a beneficial plea agreement; and (3) voluntarily and knowingly entered into the plea agreement.

It is also common for many prosecutors to require a defendant pay restitution relating to every count of a complaint, despite the fact that some counts may have been dismissed through a plea agreement. The Court in *State v. Ball*, 255 Kan. 694, 877 P.2d 955 (1994) held it permissible to require a defendant to pay restitution for each of the charged offenses in exchange for the State’s agreement to dismiss other charged offenses. When the court orders the amount of restitution specified in the presentence investigation report and that amount is not contested in the trial court, it is not incumbent on the prosecution to introduce additional evidence concerning the amount of restitution.

## Sentencing Recommendations

The provisions of plea agreements which most often raise concern of the appellate courts have been provisions relating to sentencing recommendations. When considering sentencing recommendations, it is important to remember that despite the fact that the district court is not bound in sentencing by a plea agreement, the State and the defendant are going to be bound to the agreement if accepted by the court. See *State v. Heffelman*, 256 Kan. 384, 395, 886 P.2d 823 (1994).

The need to use forward thinking and to be specific is well-illustrated by the decision in *State v. Marks*, 14 Kan. App. 2d 594, 796 P.2d 174 (1990), where a plea agreement under which the State promised to recommend a minimum sentence and not oppose probation at sentencing, but which did not address

the State’s obligation upon subsequent hearings concerning sentence modification, was deemed ambiguous and interpreted strictly against the State. Since the agreement was silent as to the issue, the Court found that the State was bound by the agreement at a hearing on a motion to modify the sentence. See also *State v. Wills*, 244 Kan. 62, 765 P.2d 1114 (1988).

Another case involving enforcement of the prosecution’s obligation under a plea agreement is *State v. McDonald*, 29 Kan. App. 2d 6, 26 P.3d 69 (2001), in which the Court held, “[W]hen it is clear from the record that a defendant entered a guilty plea in reliance on the State’s promise to recommend a specific disposition at sentencing, and the State fails to deliver, at a minimum the case must be remanded for resentencing before a different judge, and the State must specifically perform.”

However, where a defendant enters a plea of guilty in exchange for the prosecutor’s promise regarding sentence recommendation, an implied condition exists that circumstances surrounding the plea agreement will remain substantially the same, and a subsequent change is sufficient to relieve the State of its obligation. A violation of the conditions of suspended sentence and/or commission of an additional crime constitutes a change in circumstances sufficient to release the State from its part of the plea agreement in subsequent proceedings. See *State v. Richmond*, 21 Kan. App. 2d 126, 896 P.2d 1112 (1995) and *State v. Marshall*, 21 Kan. App. 2d 332, 899 P.2d 1068 (1995).

While many prosecutors might attempt to include a reference to the defendant’s criminal history in the written plea agreement, the appellate courts have held the practice unnecessary. “A criminal defendant is presumed to have known his or her criminal history when entering into a plea agreement.” *Porter v. State*, 37 Kan. App. 2d 220, Syl. ¶4, 152 P.3d 89 (2007). In fact, the Court in *State v. Haskins*, 262 Kan. 728, 731, 942 P.2d 16 (1997), held that even where the State and defendant believed the defendant’s criminal history score was F when they entered into the plea agreement, the defendant was properly sentenced based on a criminal history score of C. The Court’s decision was based in part on K.S.A. 21-4713(f), which prohibits the State from entering into a plea agreement that excludes prior convictions from a defendant’s criminal history.

“In construing the terms of a plea agreement in

which the State reserved the right to present comment concerning the sentencing factors of K.S.A. 21-4606, the State, having fulfilled all other terms agreed to, did not breach the agreement by commenting that, although it was not opposing concurrent sentences and was not requesting a maximum sentence over 20 years, the court should examine defendant's prior criminal history, the extent of harm, and whether the defendant intended to harm, i.e. the sentencing factors in K.S.A. 21-4606(2)(a), (b), and (c)." *State v. Crawford*, 246 Kan. 231, 787 P.2d 1180 (1990).

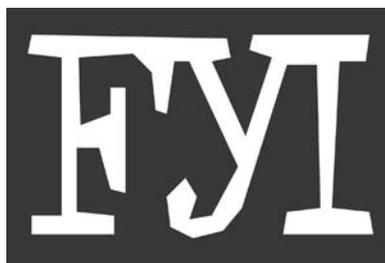
## **Conclusion**

As you can see, the legislature and courts have authorized a great deal of latitude to the parties by which to enter into fair plea bargaining. The possibilities for defendants range from simply obtaining dismissals or reduction of charges to favorable sentencing recommendations. In exchange the State is relieved of its duty to prove the case and may even

obtain vital testimony against other defendants. More importantly, the State is authorized to require a waiver of the defendant's right to appeal. Regardless of the specific terms, a well conceived and properly drafted written plea agreement can in fact provide the desired benefit of closure for all parties involved.

### **About the Author**

*Douglas W. McNett is a graduate of Kansas State University and the Washburn School of Law with Honors. He has served as an Assistant Pawnee County Attorney for the past eight years. In addition to his prosecution duties, Doug serves as the Court Trustee for the 24<sup>th</sup> Judicial District. He has previously served as a Staff Attorney for SRS and has engaged in private practice in Topeka and Larned. Doug has been a presenter for KCDAAs Conferences on the topics of Effective Methamphetamine Prosecution and Jury Voir Dire in Small Jurisdictions. His wife Jennifer is a Kindergarten teacher. They have three children: Ross, 7; Reed, 5; and Ella, 2.*



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# Searching for Medical Marijuana

## **Introduction by Executive Director Steve Kearney:**

The issue of legalizing the use of “Medical Marijuana” has gained notoriety here in Kansas in recent months. Several jurisdictions across the nation have experience with the impact of such legislation on their citizenry. The practical effects on prosecution and law enforcement in the aftermath of such legislation has proved problematic at best. The following is a reprint from our sister organization’s publication in California that should be illuminating for our readers, including our Kansas policy makers, as they assess the far reaching implications of such enactments.

*Editor’s Note: “This article originally appeared in Prosecutor’s Brief, Vol. 30, #1 (Fall 2007), a quarterly publication of the California District Attorneys Association. Reprinted here with permission.”*

## **Fourth Amendment Implications of California’s Compassionate Use Act and Medical Marijuana Program**

**by James J. Hosking**

When law enforcement officers have probable cause to search a person, vehicle, or place for evidence of a criminal marijuana offense, what is the impact when they are confronted with evidence that the suspect or suspects are facially valid “patients” under California’s medical marijuana laws? Very little, if any.

After a brief primer on California’s medical marijuana scheme, I will explain that while compliance with that scheme by a suspect is to be investigated and reported on, it is not sufficient to cause a cessation of the investigative process.

### **California’s Compassionate Use Act and Medical Marijuana Program**

On November 5, 1996, the voters of California approved Proposition 215—the Compassionate Use Act of 1996. The stated purpose of the act is to “ensure that seriously ill Californians have the right to obtain and use marijuana.”<sup>1</sup> The resulting statute states:

- (d) Section 11357 ... and Section 11358 ... shall not apply to a patient, or to a patient’s primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.
- (e) For the purposes of this section, “primary caregiver” means the individual designated

by the [patient] who has consistently assumed responsibility for the housing, health, or safety of that [patient].<sup>2</sup>

Then, in 2003, the California Legislature attempted to structure the implementation of the Compassionate Use Act by enacting Senate Bill 420. This is referred to as the Medical Marijuana Program law. Importantly, this added Health and Safety Code sections 11362.7–11362.9. Generally, these sections call for the implementation, county-by-county, of a Medical Marijuana Identification Card program. But these new laws also broadened the scope of medical marijuana, and attempted to clarify some issues.

### **Who Is “Seriously Ill”—Or Does It Matter?**

It does not matter if a person is seriously ill or not. Once a licensed physician recommends or approves marijuana use for a patient, a jury is not allowed to second-guess that patient’s need for medicinal marijuana.<sup>3</sup>

### **Is a “Recommendation” Different from an “Approval”?**

The appellate courts have held that a “recommendation” is when a physician takes the initiative and suggests that a patient use marijuana. On the other

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side, an “approval” is when a patient tells a physician that he or she wants to use marijuana for a certain condition, and the doctor acquiesces.<sup>4</sup> Either one is valid. Oral recommendations or approvals are likewise valid, subject to proof in court.<sup>5</sup>

Timing is important—the post-arrest approval by a physician of an arrestee’s prior use is not a defense. The approval or recommendation must precede the possession, cultivation, or use.<sup>6</sup>

### **Who Are Primary Caregivers?**

A primary caregiver is a person designated as such by a patient, and who has consistently assumed responsibility for a patient’s housing, health, or safety.<sup>7</sup> Primary caregivers, with a few exceptions, must be 18 years old.<sup>8</sup> The Medical Marijuana Program broadened who constitutes a primary caregiver to include “collectives” and “cooperatives,” but any such collaborative effort must still meet the definition of consistently assuming responsibility for a patient’s housing, health, or safety.

The court in *People v. Frazier*<sup>9</sup> rejected Frazier’s assertion that a “primary caregiver” is simply a person who “consistently grows and supplies physician-approved marijuana for a medical marijuana patient in order to serve the health needs of that patient.”<sup>10</sup>

### **What Quantities Are Permitted by the Compassionate Use Act and the Medical Marijuana Program?**

The Medical Marijuana Program included the first numerical limit: eight ounces of dried bud, six mature marijuana plants, or 12 immature marijuana plants.<sup>11</sup> In spite of these limits, physicians can recommend that their patients use more.<sup>12</sup> In the end, the courts have said that the amount possessed or grown has to be reasonably related to the patient’s current medical needs.<sup>13</sup>

Defendants regularly argue that since only bud marijuana is to be counted for the weight limit of eight ounces, they can possess unlimited quantities of marijuana leaves. But possession of marijuana for sale in violation of Health and Safety Code section 11359 can be based on the possession of leaves, bud, or a combination of the two.<sup>14</sup> While some marijuana dealers sell only high-priced bud, there are certainly those who deal “dirt weed.”

The California Attorney General has opined

that concentrated cannabis<sup>15</sup> is also allowed under the Compassionate Use Act and Medical Marijuana Program.<sup>16</sup> The Medical Marijuana Program, however, does not set forth a specific quantity of concentrated cannabis that is allowable under the Compassionate Use Act.

### **Where Can Medical Marijuana Be Ingested?**

Medical marijuana can be ingested anywhere, but there are exceptions. Health and Safety Code section 11362.79 prohibits smoking marijuana within 1,000 feet of a school (unless in a residence), on a school bus, in a motor vehicle while it is being operated, or while operating a boat.<sup>17</sup>

Additionally, employers do not have to let employees use marijuana at work, and prisoners can be disallowed from using marijuana in jail or prison.<sup>18</sup> Also, employers can fire employees based on marijuana usage—it is still a federal crime.<sup>19</sup>

### **California’s Compassionate Use Act and Medical Marijuana Program Meet the Fourth Amendment**

California courts are now dealing with the Fourth Amendment implications of California’s Compassionate Use Act and Medical Marijuana Program. California’s medical marijuana patients have asserted that probable cause to believe they are in possession of marijuana is not probable cause to believe that a crime has been committed, since their possession is pursuant to law. If accepted, this position would gut law enforcement’s ability to investigate suspected violations of Health and Safety Code section 11358, 11359, or 11360 in any case where a physician’s recommendation or approval was implicated.

The First and Third Districts of the California Court of Appeal, however, have rejected patients’ arguments based, in large part, on the California Supreme Court’s seminal *People v. Mower*<sup>20</sup> decision.

### **Search Warrants and the Compassionate Use Act**

In 2002, the Third District of the California Court of Appeal issued its decision in *People v. Fisher*,<sup>21</sup> dealing with the execution of search warrants in investigations implicating the Compassionate Use Act

and Medical Marijuana Program.

During an aerial flyover on July 30, 1999, a Siskiyou County sheriff's deputy spotted "at least" three marijuana plants in the rear yard of Fisher's property. Based on that cause, deputies sought and were granted a search warrant for Fisher's property. On August 4, 1999, deputies executed that warrant.<sup>22</sup>

Upon the deputies' arrival, Fisher presented a physician's "certificate" purporting to establish Fisher as a patient under the Compassionate Use Act. Based on that certificate, deputies were not certain that Fisher was committing a crime, but still entertained the "possibility" that Fisher's cultivation was a crime.<sup>23</sup> Pressing on, the deputies' resulting search revealed marijuana, a cane sword, and ammunition.<sup>24</sup>

Fisher's argument in the trial court, and again on appeal, was that once the officers were shown the certificate, probable cause for the search no longer existed," and that

*[u]pon realizing that [he] was, to all appearances, not committing any crime, [the officers] had a duty, at a minimum, to apprise the issuing magistrate of this change of circumstances, and request some guidance as to his course of action. [The officers] should not have continued with the search of [defendant's] home knowing that the circumstances that had once supported probable cause ... had drastically changed.*<sup>25</sup>

In language applicable outside the context of medical marijuana, the court noted that a "search warrant is not an invitation that officers can choose to accept, or reject, or ignore, as they wish, or think, they should. It is an order of the court."<sup>26</sup> Namely, once a judicial officer has determined that probable cause exists to conduct a search, that representative of the judicial branch then commands the executive branch to carry out that search. It is not optional.

Pressing further, the court indicated that

*[t]o the extent defendant suggests that the officers, themselves, should have, or even could have, chosen not to exercise the warrant, or had the option to make a redetermination of probable cause when they were confronted with defendant's claim that he possessed the marijuana legally, defendant misperceives the nature of a search warrant. He also misperceives who determines the existence of probable*

*cause; it is not the officers.*"<sup>27</sup>

Judges do not take kindly to assertions that law enforcement agents should reconsider their previous rulings.

While conceding that "there could be circumstances where law enforcement officers, at the time they execute a warrant, are confronted with facts that are so fundamentally different from those upon which the warrant was issued that they should seek further guidance from the court," the decision emphasizes that "this is not one of them."<sup>28</sup>

The *Fisher* court goes on to describe how its ruling is concordant with the arguments in favor of Proposition 215,<sup>29</sup> before concluding its ruling by saying, *Defendant's claim to the officers that he had a certificate that allowed him to legally possess marijuana for medicinal purposes asserted an affirmative defense. Investigation of the truth and legal effect of defenses to criminal charges is what motions and trials are for; to hold otherwise would create disorder and confusion. The defendant's argument has no merit.*<sup>30</sup>

This leaves only the situation where law enforcement knows of a suspect's status pursuant to the Compassionate Use Act and Medical Marijuana Program at the time they apply for a search warrant related solely to marijuana cultivation, possession, or use.

Interestingly, there is no longer an appellate decision directly on point. The use of "no longer" is intentional as well as accurate. In 2006, the Third District of the California Court of Appeal held in *People v. Russell*<sup>31</sup> that where a search warrant affidavit omits the fact that the affiant is known to be a patient under the Compassionate Use Act, not only does the search warrant lack probable cause, but that it is so lacking in probable cause that a reasonable officer should not have relied on the warrant.<sup>32</sup>

But later in 2006, the California Supreme Court, while declining to accept the *Russell* case for review, nonetheless ordered that the *Russell* decision not be published pursuant to California Rules of Court 976, 977, and 979. Of course, law enforcement is always urged to provide an issuing magistrate a complete picture of the facts known to the affiant,<sup>33</sup> but *Russell's* seemingly bright-line rule seems to have dimmed.

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## Warrantless Searches and the Compassionate Use Act

The Fisher decision seemed to rely heavily on the fact that a judicial officer had already made a probable cause determination and issued a search warrant that law enforcement was obligated to execute. That left the situation where a warrantless search was impacted by evidence of the suspect's status under the Compassionate Use Act.

The Third District of the California Court of Appeal recently addressed that less definitive situation in their Strasburg<sup>34</sup> decision.

On October 25, 2005, Strasburg was sitting in his car in a public gas station parking lot with a friend, smoking his medicine of choice—marijuana. When Napa County Sheriff's Deputy Aaron Mosely saw this, he parked nearby and approached Strasburg's car. As Deputy Mosely approached, Strasburg opened the door and Deputy Mosely could smell the odor of marijuana.<sup>35</sup>

Strasburg immediately claimed protection under the Compassionate Use Act by indicating he had "a medical marijuana card."<sup>36</sup> Deputy Mosely did not ask to see any such card, and instead asked Strasburg for any marijuana that was in the car. Strasburg surrendered a bag of about three-quarters of an ounce of marijuana to Deputy Mosely.<sup>37</sup>

Deputy Mosely asked Strasburg to exit the vehicle, and Strasburg complied. During Strasburg's exit from the car, Deputy Mosely could see a second bag of 2.2 grams of marijuana within the car in plain sight.<sup>38</sup>

Strasburg was then taken out of the car, detained, and patted down. Strasburg again pleaded with Deputy Mosely to consider his documentation. Deputy Mosely refused and replied "something along [the] lines" of "we don't buy that here in Napa County."

Deputy Mosely asked if there was any more marijuana in the car, and Strasburg admitted there was, and that it was more than the eight ounces allowed under the Medical Marijuana Program. Deputy Mosely's ensuing search of the car yielded almost a pound and a half of marijuana as well as a scale.

The Strasburg court begins its discussion with a brief summary of California's medical marijuana laws and then notes "Mower's guidance that the Act does not impair reasonable police investigations and searches. A physician's prescription or an identification card under Article 2.5[<sup>39</sup>] ... does not provide

an automatic protective aegis against reasonable searches."<sup>40</sup>

The court goes on to endorse the approach that the trial court took in denying Strasburg's motion to suppress:

*The operative issue is whether Mosely had probable cause to search defendant's car at the moment he smelled the odor of marijuana, at the outset of his encounter with defendant who was with another person in a parked car in a public parking area. If Mosely did have probable cause to search from the outset, we need not review the grounds for detention, or decide when, or if, the detention ripened into an arrest.<sup>41</sup>*

The court explains that the smell of marijuana equates to probable cause to search.<sup>42</sup> And not only had Deputy Mosely smelled marijuana, but Strasburg had handed him one baggie of marijuana, Mosely had seen a second baggie of marijuana in the car, and Strasburg had admitted to recently smoking marijuana.<sup>43</sup>

*Armed with the knowledge that there was marijuana in the car, "a person of ordinary caution would conscientiously entertain a strong suspicion that even if defendant makes only personal use of the marijuana found in [the passenger area], he might stash additional quantities for future use in other parts of the vehicle, including the trunk."<sup>44</sup>*

*The fact that defendant had a medical marijuana prescription, and could lawfully possess an amount of marijuana greater than that Deputy Mosely initially found, does not detract from the officer's probable cause. As Mower observes, the Act provides a limited immunity—not a shield from reasonable investigation.<sup>45</sup>*

Looking down the road from Mosely's investigation, the court further pointed out,

*Had defendant possessed only eight ounces, he presumably could have invoked the Act as a defense to prosecution of the case. But Mosely did not have to stop searching in the face of the marijuana prescription and the circumstances of how the smoking occurred. Otherwise, every qualified patient would be free to violate the intent of the medical marijuana program*

expressed in section 11362.5 and deal marijuana from his car with complete freedom from any reasonable search.<sup>46</sup>

Thus, the *Strasburg* court found that while a medical marijuana recommendation from a licensed physician may be a defense in court, it is virtually worthless in the field. *Strasburg* went further than *Fisher*, because *Fisher* avoided a catch-all ruling by relying on the pre-existence of the search warrant. *Strasburg*'s ruling expands what *Fisher* started.

To reframe the question: when law enforcement officers have probable cause to search a person, vehicle, or place for evidence of a criminal marijuana offense, what is the impact when they are confronted with evidence that the suspect or suspects are facially valid "patients" under California's medical marijuana laws? The answer is still very little, if any.

All relevant evidence should be investigated, reported on, and seized if appropriate. Evidence that a suspect may raise an affirmative defense under the Compassionate Use Act or Medical Marijuana Program is certainly relevant to any marijuana investigation—be it possession of less than an ounce, cultivation, or trafficking of thousands of pounds of marijuana.

The suggestion of such a defense, however, should have no impact on an ongoing investigation if there is still probable cause to believe that a criminal law may have been violated. Law enforcement should act accordingly, and prosecutors must defend those officers' efforts at enforcing our laws.

## About the Author

*James J. Hosking, Deputy District Attorney, graduated from Loyola Law School in 1998 and has worked for the San Bernardino County District Attorney's Office for more than eight years. Hosking was the Marijuana Suppression Deputy for the County for four years and is currently supervising the California Multijurisdictional Methamphetamine Enforcement Team (Cal-MMET) Unit.*

## ENDNOTES

1. Health & Saf. Code § 11362.5(b)(1)(A).
2. Health & Saf. Code § 11362.5.
3. *People v. Spark* (2004) 121 Cal.App.4th 259.
4. *People v. Jones* (2003) 112 Cal.App.4th 341.
5. *Id.*
6. *People v. Rigo* (1999) 69 Cal.App.4th 409.
7. Health & Saf. Code § 11362.5(e).
8. Health & Saf. Code § 11362.7(e).
9. *People v. Frazier* (2005) 128 Cal.App.4th 807, 823.
10. This assertion was based on an out-of-context quote from *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1399.
11. Health & Saf. Code § 11362.77(a).
12. Health & Saf. Code § 11362.77(b).
13. *Frazier*, supra.
14. Health & Saf. Code § 11018 defines "marijuana" as "all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination."
15. Health & Saf. Code § 11006.5 defines "concentrated cannabis" as "the separated resin, whether crude or purified, obtained from marijuana."
16. 86 Ops.Atty.Gen. 180 (2003).
17. Health & Saf. Code § 11362.79.
18. Health & Saf. Code § 11362.785.
19. *Ross v. Ragingwire Telecommunications, Inc.* (2005) 132 Cal.App.4th 590 [review granted November 30, 2005, S138130].
20. *People v. Mower* (2002) 28 Cal.4th 457.
21. *People v. Fisher* (2002) 96 Cal.App.4th 1147.
22. *Id.* at 1149.
23. *Id.*
24. *Id.*
25. *Id.* at 1150.
26. *Id.*
27. *Id.* at 1150–1151.
28. *Id.* at 1151.
29. As contained in the Ballot Pamphlet that was circulated at California's 1996 general election: rebuttal to the arguments against Proposition 215, at page 61.
30. *Fisher*, supra, 96 Cal.App.4th at 1152.
31. *People v. Russell* (Mar. 16, 2006) C048339, opn. ordered nonpub. Aug. 16, 2006.
32. Thus, also condemning the warrant to fail the "objectively reasonable good faith reliance" test announced in *United States v. Leon* (1984) 468 U.S. 897.
33. So as to not run afoul of the progeny of *Franks v. Delaware* (1978) 438 U.S. 154.
34. *People v. Strasburg* (2007) 148 Cal.App.4th 1052, review den. Jul. 11, 2007.
35. *Id.* at 1055.
36. *Id.*
37. *Id.*
38. *Id.*
39. Article 2.5 of the Medical Marijuana Program.
40. *Strasburg*, supra, 148 Cal.App.4th at 1059.
41. *Id.* at 1058–1059.
42. *People v. Dey* (2000) 84 Cal.App.4th 1318, 1320–1322; and *People v. Hunter* (2005) 133 Cal.App.4th 371, 378–382.
43. *Strasburg*, supra, 148 Cal.App.4th at 1059.
44. *Dey*, supra, 84 Cal.App.4th at 1322.
45. *Strasburg*, supra, 148 Cal.App.4th at 1059–1060.
46. *Id.* at 1060.



**by District Attorney Nola Tedesco Foulston, 18th Judicial District  
Kansas State Director, NDAA Board of Directors**

Portland, Oregon was the site of this year's National District Attorneys Association summer conference and Board of Directors meeting. Members of the board meet prior to the conference to conduct the business of the association, and we had a full agenda.

There are many issues in the forefront for today's prosecutors...including proposed changes to the Rules of Professional conduct, loan forgiveness, sexual offender registries and other issues that require our knowledge and attention to these matters.

### **Prosecution Loan Forgiveness**

Recognizing the need to encourage qualified individuals to enter and continue employment as prosecutors and defenders, the **John R. Justice Prosecutors and Defenders Incentive Act of 2007** is moving its way through Congress. This act was offered and accepted as an amendment to S. 1642, the "Higher Education Act of 2007." As amended, it was passed by the senate (95-0).

In brief, the bill provides for full-time state or local prosecutors licensed to practice law and prosecute criminal cases at the State or local level and public defenders who are licensed to practice law as a full-time employee of a State or local agency or nonprofit organization that provides legal representation to indigent persons in criminal cases to benefit under the act. The act applies to loans made, insured or guaranteed under certain sections of the Higher Education Act of 1965 to the extent that such loans were used to repay a Federal Direct Stafford Loan, or a Federal Direct Unsubsidized Stafford Loan.

Under the proposed provisions of the act, the Attorney General would establish a program under which the Department of Justice assumes the obligation to repay a student loan, by direct payments on behalf of the borrower to the holder of such loan for any borrower who is employed as a prosecutor or public defender and is not in default on the loan for which the borrower seeks forgiveness.

To be eligible to receive repayment benefits under this act, the borrower must enter into an agreement that specifies that they will remain employed as a prosecutor or public defender for a required period of service of not less than 3 years, unless involuntarily separated from that employment. There are rules that provide if the borrower is involuntarily separated from employment on account of misconduct, or voluntarily separates from employment before the end of the period specified in the agreement; the benefits received are required to be repaid to the Attorney General. The student loan repayments as contemplated by the act would not exceed \$10,000 for any borrower in any calendar year; or an aggregate total of \$60,000 in the case of any borrower.

The house bill received support from our Congressional representatives Moran, Boyda, Moore and Tiahr. On July 24, 2007, the Senate approved S.1642, its Higher Education Act reauthorization bill, by a vote of 95-0. Senator Roberts voted in support of the bill. Senator Brownback was absent from the vote.

By a vote of 44-0 the House Education and Labor Committee passed the Higher Education Act reauthorization bill, which includes the John R. Justice Prosecutors and Defenders Incentive Act, out of committee. The timing of a full House vote is not certain.

There are some differences between the House and Senate passed versions of the student loan repayment assistance legislation and they are as follows:

### ***Award Basis & Priority***

Both pieces of legislation would require that the Attorney General determine a fair allocation of repayment benefits among prosecutors and defenders, and among employing entities nationwide give priority to borrowers who have the least ability to repay their loans.

The House-passed version, however, specifies that the Attorney General in making a determination as to the borrowers with the least ability to repay their loans will consider whether the borrower is a beneficiary of any other student loan repayment program (i.e. state/local & law school LRAPS).

### ***Study of the Program***

Both pieces of legislation would require within a year of enactment that the Government Account-

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ability Office conduct a study and report to Congress on the impact of law school accreditation requirements and other factors on law school costs and access, including the impact of such requirements on racial and ethnic minorities.

The House-passed version would in addition require that the Inspector General, United States Department of Justice within 3 years of enactment conduct a study and report to Congress the cost of the program and the impact of such a program on the hiring and retention of prosecutors and public defenders.

### ***Funding Authorization***

Under the House-passed version the program would be authorized for funding in the amount of \$25 million per fiscal year for fiscal years 2008-2013 at which time the program will sunset. The program would then need to be reauthorized.

The Senate-passed version provides that the program would be authorized for funding in the amount of \$25 million for fiscal year 2008 and “such sums as may be necessary for each succeeding fiscal year.” There is no sunset provision in the Senate.

## **Sex Offender Registration and Notification Act: Title I of the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 248-109)**

At the NDAA Board meeting, we received a presentation on the federal Sex Offender Registration and Notification Act [SORNA] that requires prompt sharing of information among jurisdictions and disclosure of information to the general public and specified entities. The deadline for substantial implementation is July 27, 2009. Jurisdictions that fail to substantially implement SORNA by July 27, 2009 are subject to a mandatory 10 percent reduction in funding under 42 U.S.C. 3750 et seq. (“Byrne Justice Assistance Grant” funding).

SORNA aims to close potential gaps and loopholes that existed under prior law and generally strengthens the nationwide network of sex offender registration and notification programs. The Federal Government is working to assist with the implementation of SORNA and protect the public from sexual abuse and exploitation through stepped up federal investigation and prosecution efforts, providing for the development of software tools for use by jurisdictions and establishing the Office

of Sex Offender Sentencing, Monitoring, Apprehending, Registration and Tracking [SMART] office to administer national standards for sex offender registration and notification. The SMART Office is authorized by law to administer the standards for sex offender registration and notification that are set forth in SORNA. It is further authorized to cooperate with and provide assistance to states, local governments, tribal governments, and other public and private entities in relation to sex offender registration and notification and other measures for the protection of the public from sexual abuse or exploitation. The SMART Office is a key federal partner and resource for jurisdictions as they continue to develop and strengthen their sex offender registration and notification programs.

There are a number of reforms under SORNA, including extending jurisdiction beyond the 50 states, the District of Columbia, and the principal U.S. territories, to include federally recognized Indian tribes. It incorporates a more comprehensive group of sex offenders and offenses for which registration is required and mandates periodic in person appearances to verify and update registration information. In addition, SORNA will expand the amount of information available to the public regarding registered sex offenders. The convictions for which SORNA requires registration include convictions for sex offenses by any U.S. jurisdiction, including convictions for sex offenses under federal, military, state, territorial, tribal or local law. Foreign convictions are also covered if certain conditions are satisfied.

As we work in Kansas toward implementation of SORNA, we will continue to provide information and assistance through the National District Attorneys Association and the Kansas County and District Attorneys Association.

For more information on the SORNA Program, see the Office of Justice Programs web site [http://www.ojp.usdoj.gov/smart/pdfs/sorna\\_faqs.pdf](http://www.ojp.usdoj.gov/smart/pdfs/sorna_faqs.pdf).

**Note: Effective July 1, 2007 the Kansas Offender Registration Act** has been amended to include additional crimes that require registration (including some drug crimes) and the jurisdictional issues have been settled by the new statute. In addition, the burden is placed upon the registrant to appear in person to comply with registration requirements and Kansas driver’s licenses will now designate if the person is a registered offender. These changes to Kansas law are in connection with the SMART program referenced above.

## National Advocacy Center News

The National District Attorneys Association has yet to receive news that the Advocacy Center in Columbia, South Carolina will receive necessary governmental funds to support this vital training center.

This year, no funds were specifically ear-marked for the Advocacy Center. This means that the NDAA is competing in open grant funding in order to provide operational funds for the remainder of 2007 and into 2008. There is a \$5 million dollar request in, but we are not sure if Congress will make this award. I have been in contact with Senator Brownback's office, as he is on the committee that is responsible for review of the funding, but I have not heard from him.

Because of deficits in funding, the Advocacy Center is unable to offer full funding for attendance at programs. Transportation to and from the Ernest F. Hollings National Advocacy Center will be the responsibility of students and faculty. The center will continue to provide lodging, breakfast and lunch, however per diem must be assumed by the local agency; however, housing is still available. See the NDAA web site for further information on available courses. (<http://www.ndaa.org>)

## Testimony Before Congress

Consistent with its role as the "voice of America's prosecutors," representatives of the National District Attorneys Association Board of Directors have made frequent appearances on the "hill." The following listing

details some of the significant legislative efforts that the NDAA is supporting and following closely:

- Restore Justice Assistance Funding FY 2008 – This funding is critical to continue effective programs that are essential in the fight against drug and gang related crime in addition to programs that assist in the prevention of drug use, treating non-violent offenders and improving the effectiveness of prosecution, courts and corrections practice. The NDAA supports funding for the Byrne Justice Assistance Grants (KAG), and the Justice, Science and Related Agencies Appropriations Act.
- Support for Methamphetamine Production Prevention Act of 2007
- Gang Abatement and Prevention Act of 2007 (S.456)
- Funding for the National Center for Prosecution of Child Abuse in Alexandria, Virginia and the National Child Protection Training Center in Winona, Minnesota. DAA Child Abuse Programs

## And...In the courts

The National Association of Prosecutor Coordinators has filed an amicus letter with the 9<sup>th</sup> Circuit in the case of Goldstein v. Van de Kamp, et al. [Court of Appeals No. 06-55537]. The ruling in this case has the potential to make prosecutors liable for improper charging, discovery, and trial decisions under a failure to train theory.

## Training Resources

February 17-21, 2008	<b>Evidence for Prosecutors*</b>	Las Vegas, NV
March 2-6, 2008	<b>Prosecuting Homicide Cases*</b>	Orlando, FL
March 2-6, 2008	<b>Solving Prosecution Problems</b>	Mesa, AZ
March 30-April 3, 2008	<b>Prosecuting Drug Cases</b>	Myrtle Beach, SC
April 6-10, 2008	<b>Contemporary Trial Issues</b>	Lake Tahoe, NV
April 20-24, 2008	<b>Meeting Challenges in Prosecution and Victim Advocacy*</b>	Chicago, IL
May 4-8, 2008	<b>Special Prosecutions Course*</b>	San Diego, CA
May 18-22, 2008	<b>Office Administration Course</b>	Marco Island, FL
June 1-11, 2008	<b>Career Prosecutor Course</b>	Charleston, SC
June 22-26, 2008	<b>Crime Scene Investigations*</b>	Las Vegas, NV



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