



# NAPSA NEWS

A Newsletter for Criminal Justice Professionals on Pretrial Release and Diversion Issues

NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES

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*NAPSA News* is published three times per year. Submissions for publications are welcome. Copy must be submitted electronically either on disk or by email. The editor will accept either MS Word or WordPerfect files. Call for specifications on artwork and photographs. Copyrighted material must be accompanied by a full citation, including the author's name, the original date of publication, the source of the material, and a brief statement indicating how the material serves the readership of *NAPSA News*.

#### Submission Deadlines:

- January 1 for the Spring issue
- June 1 for the Preconference issue
- November 1 for the Winter issue

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## President's Letter

Greetings Colleagues,

By the time you read this, I sincerely hope you will have begun making necessary plans and arrangements to attend the 34th Annual NAPSA Conference and Training Institute. Scheduled somewhat earlier than previous year's conferences, we will convene September 17 - 20, 2006 in Nashville, Tennessee. You should have received your registration materials by now, so please note registration and hotel deadlines.

The NAPSA Board of Directors met in July in Nashville to finalize the conference plans. The workshop agenda is set and speakers are ready. We have planned an agenda which will appease everyone - from line staff workers to managers and administrators; from release professionals to diversion professionals; and from new practitioners to seasoned practitioners.

The conference is an opportunity to meet informally with others in pretrial, and exchange ideas and information. In additions, we will be honoring some of the best and brightest in our profession at our annual awards luncheon and on Wednesday morning of the conference, we will conduct our annual business meeting.

At that time we will receive nominations for several positions on our board of directors. Serving on the board has been a highlight of my professional career, enabling me to learn about some of the most progressive and dynamic programs in the country,

as well as  
make  
some  
great  
friends  
who share  
my passion  
for the pretrial  
profession.  
In order for  
NAPSA to



continue to thrive, we need more leaders to serve on the board of directors. Please take this opportunity to step up and run for one of these positions.

This conference will certainly prove to be one of the best with great workshops and training opportunities by day and great music, shopping and sightseeing opportunities by night. Don't procrastinate. Get your registration in now!!! I hope to have the opportunity to meet and greet ALL of our members in Music City USA!

See you there.

Michelle Brown  
President, NAPSA

## Membership Drive Winners

Sherri Carrier  
Membership Committee Chair

Thanks to all who participated in the membership drive. I would like to announce the region recruitment winners!

**Southeast Region**  
Bettina Coghill  
Riverside Criminal Justice Agency  
Prince George, Virginia

**Northeast Region**  
Jan Egner  
Warren County Pretrial Services  
Lebanon, Ohio

**Central Region**  
Charlotte McPherson  
Kentucky Pretrial Services  
Frankfort, Kentucky

**West Region**  
Mychelle Sims  
LA County Probation  
Downey, California

## Secretary's Report

Mary Pat Maher

The NAPSA board held its summer board meeting on July 21st and 22nd in Nashville, Tennessee at the Airport Marriott - the site of this year's conference. Rick Jones and Jim Sadler, from the Davidson County Sheriff's Department provided some gracious southern hospitality and the board had a very productive meeting. The following board members were present at the board meeting: Miranda Boozer, Michelle Brown, Sherri Carrier, Jan Egner, Greg Johnson, Peter Kiers, Frank McCormick, Mary Pat Maher, Ken Rose and Pat Smith. Service Director Marilyn Walczak for also present for the entire meeting and Jim Sadler and Rick Jones were present for portions of the meeting.

## Call For 2008 Conference Bids

The NAPSA Board of Directors will accept bids for the 2008 conference at the 2006 conference in Nashville, Sunday, September 17, 2006 at 10:00 am. Those interested in making a presentation should bring materials that highlight the proposed site, such as hotel information, potential event locations and any other information that may help the Board in deciding the venue.

## Treasurer's Report

Treasurer Pat Smith reported that income was better than anticipated and that the association should have a fund balance of approximately \$58,000 by the end of the fiscal year, which is June 30th. The board also discussed having another financial audit completed and a motion was approved to do so.

## Service Director's Report

Service Director Marilyn Walczak announced that NAPSA's overall membership had increased, compared to the previous year, and that current membership stood at 255 paid members. The board credited the increase in membership to the great work of the membership committee and its membership drive. The board thanked Sherri Carrier for all her efforts in chairing this committee.

## Education Committee Report

Peter Kiers reported on the NIC Training Curriculum for Pretrial Executives. He said that NIC remains committed to this project and they would like to do 2 pilot trainings starting in the fall. Peter went on to say that NIC was organizing one additional meeting of some of the members of the curriculum development committee to finalize the curriculum and to identify faculty members and facilitators.

Mary Pat Maher then reported on the NIC DVD Project. NIC has decided to

## 2006 NAPSA Board of Directors

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### 34th Annual NAPSA Conference and Training Institute

Dozen's of sessions from the popular Pretrial 101 to Mental Health Court to US Drug Trends. Opportunities to network with new friends and colleagues. See you in Nashville.

September 17-20, 2006  
Nashville, Tennessee

Host: Davidson County Sheriff's Office, Pretrial Services Department

Location: Marriott Nashville Hotel

Accommodations: \$109 per night (single or double), \$129 per night (triple or quad). Reservation Deadline - August 23, 2006.

Advanced Registration must be post-marked by August 31, 2006.

### Affiliate to Meet at Conference

The NAPSA Affiliate Member meeting will take place during the NAPSA Conference in Nashville. Current affiliate member representatives and state or regional organizations that may be interested in becoming affiliate members are invited to meet on Monday, September 18th at 7:30 a.m.

We will gather in the conference exhibitor area where a continental breakfast will be offered and then retreat to a nearby meeting room. The intent of this meeting is to give affiliate organizations an opportunity to share information, ideas and initiatives involving their organizations and to learn what is happening across the nation with pretrial services.

Print this newsletter out and share it with colleagues. Please report broken links or comments to: [webman@napsa.org](mailto:webman@napsa.org).

### NAPSA Award Winner Timothy Murray to Deliver 2006 Keynote Address

Timothy J. Murray will deliver the keynote address at the 2006 conference. Tim was recognized for his many achievements with the Enis J. Olgiati award at the 1999 NAPSA Conference in Reno, Nevada

Tim was recently appointed Executive Director of the Pretrial Services Resource Center in Washington, DC. He comes to the PSRC from MGT of America Inc, a management consulting firm, where he served as a Senior Associate in their Criminal Justice and Public Safety practice areas and directed MGT's Washington DC office.

Tim started his criminal justice career over 35 years ago after serving with the Marine Corps in Viet Nam. Starting as a Staff Interviewer with the DC Pretrial Services Agency, he rose to Director of Pre-Release Services, supervising all courts-related activity for the agency.

In 1983 he was appointed Director of Pretrial Services and Offender Supervision for Miami - Dade County, Florida. In this position he directed numerous pretrial release and

diversion initiatives and earned "Exemplary Program" designation from the U.S. Department of Justice for Miami's efforts. In 1989 the Chief Judge and County Executive appointed him Director of the Miami-Dade Office of Substance Abuse Control. In that position he worked with both the public and private sectors as he coordinated all substance abuse related policies and services for Dade County. During this time he also served as Director of Outreach Services in the aftermath of Hurricane Andrew, linking vital services and assistance with those in most need.

Working with key local officials, Tim designed and administered the nation's first Drug Court and was called by Janet Reno's Justice Department to serve as their first Drug Court Program Office Director. While at Justice he also served as Director of Policy and Planning and Director of Program Development for the Bureau of Justice Assistance. During his tenure he worked closely with Community Justice and Problem Solving initiatives.

### Plan to Attend Conference Business Meeting to Learn, Nominate Board

Each year the conference wraps up with the annual business meeting. All members are encouraged to attend to meet the board and learn more about the various committee.

This year, members will have an opportunity to learn more from the Diversion Committee on the initiative it is working on with the support of the Bureau of Justice Assistance.

Nominations for election to the NAPSA Board of Directors will be

held during this meeting. This year, positions open for nomination include president, secretary, four regional directors, and affiliate director. To select the regional nominees, the current regional directors will hold brief caucus meetings with constituents from their region.

This is your chance to participate in the business of the association, give the board feedback on the conference and other initiatives, share ideas for future growth, and suggestions for future conferences. We hope you will all attend.

## 2006 Conference Preview: Conference Award Recipients

Each year the NAPSAs Board of Directors recognizes the accomplishments of deserving pretrial professionals at the Conference Awards Luncheon. The pretrial profession is honored to have the following recipients of this year's awards in our midst. Don't miss the opportunity to congratulate all award winners during the annual conference.

### Olgiati Award

The Olgiati Award, established in memory of Ennis Joseph "Joe" Olgiati, is the highest honor bestowed by NAPSAs. Presented for the first time 1983, it recognizes individuals or organizations for lifetime achievement in the field of pretrial services.

Susan Schaffer, Director  
D.C. Pretrial Services Agency  
Washington, D.C.

### Member of the Year

The Member of the Year Award acclaims the year's most outstanding NAPSAs member, one who has made a significant contribution to the Association and the pretrial services profession. The award was first presented in 1984.

Mr. John Young, Manager  
Allegheny County Court of Common Pleas-Bail Agency  
Pittsburgh, PA

### Beaudin Award

The Beaudin Award, named for Judge Bruce Beaudin, acknowledges an exceptional line staff officer for his/her tireless efforts, day in and day out and who exemplifies the goals and objectives of the pretrial services profession. It was presented for the first time in 1995.

Ms. Megan Bell  
Gallatin County Office of Court Services  
Bozeman, MT

### NAPSAs Pioneer

The NAPSAs Pioneer Award is given from time to time by the Board of Directors to recognize those who have been instrumental in guiding the pretrial movement to where we are today, and/or to point to those who continue to "push the envelope" in addressing issues that arise as a result of injustice caused by changes in our society or our deepening realization of present unfairness.

Marie VanNostrand, Ph.D.  
Luminosity, Inc.  
St. Petersburg, FL

## Second Certificate Pretest Scheduled for August

Peter C. Kiers  
Vice President & Education Chair

In 2003, the NAPSAs board made a commitment to construct and offer Pretrial Certification to practitioners in our field. Thanks to the efforts of NAPSAs members such as Bruce Beaudin, Marie VanNostrand, and Ken Rose, the technology and pretest was developed to assess individual level knowledge about pretrial.

A group of pretrial volunteers graciously agreed to fill out electronic forms, review study materials, and take an up-coming pre-test. This test is now anticipated to be given in August.

These volunteers were also asked to participate in an evaluation of the process and review the on-line regis-

tration, access to study materials, the Level One Pretrial Certification exam, test submission and post-test follow-up.

Their participation and remarks were invaluable in assessing the process. As a result, this second pre-test will be offered with an eye toward finalizing the process.

As with the first group of volunteers, all participants of the second group who successful complete and pass the test will be granted Level One Pretrial Certification and a certificate from NAPSAs. It is anticipated that Level One Certification will be available to pretrial practitioners on an on-going basis in 2007.

This is an enormous achievement by our Association. At last year's Conference and Training Institute, I

outlined, in a second plenary session at the Wednesday Business Meeting, the Association's "Road Map" for the next few years. This included outreach for pretrial practitioners, outreach to programs and pretrial agencies, and outreach to outside policy makers.

This certification effort is one concrete step that the Association is taking to educate, and foster best pretrial practices, and to reach out to members. We will be updating the membership further at this year's conference, and we will be giving updates and information on how to apply for Certification in upcoming newsletters and at [www.napsa.org](http://www.napsa.org).

### Droege Scholarships Announced

There were a total of 13 applications for James B. Droege Scholarships this year! Regional Directors meet separately from the rest of the board to discuss the applications and do not choose the scholarship recipient from their own region so that there is no impropriety. Thanks again to all that applied! We look forward to meeting you at the conference in Nashville!

### Northeast

Jan Egnor  
Northeast Regional Director

#### *From the Northeast:*

Congratulations to Suzanne Ellis, of the Hamilton County Department of Pretrial Services in Cincinnati, Ohio, who was chosen as the recipient of this year's Northeast region James B. Droege Scholarship. Suzanne's qualifications are quite impressive! She has been employed by Pretrial Services in Hamilton County for the past 20 years and has participated in many facets of that organization including their Classification Unit, FTA Unit, Drug Court screening and Mental Health Case Management. Suzanne is currently on their Leadership Team, Quality Assurance Team and provides new staff orientation.

Suzanne was selected to attend NIC training on gender specific strategies and how to supervise women in the community more effectively. She is responsible for gate keeping and tracking for the Alternative Interventions for Women program. Suzanne has served on the OAPSA Board for the past six years holding offices of Secretary and At-Large Director.

### Southeast

Ken Rose  
Southeast Regional Director

This year there are a few board positions that will be up for election, including the Southeast Regional Director. It is with a heavy heart that I have decided not to run for another term on the NAPSAs Board. This is the end of my second term as the Southeast Regional Director. Without a doubt, this has been a one of the best experiences in my career. Words cannot describe what an honor it has been to serve the members of NAPSAs, the Southeast Region, and the board.

I want to emphasize, (in case you don't know) this is a hard working and dedicated board. We meet quarterly and for some, it's on their own dime. Our meetings are long and productive, but the work doesn't end there. There is usually a large amount of work that we take back to our offices which gets squeezed in during our work days, nights and weekends. Being on the board is a commitment-one each member takes seriously.

We should all be proud of our board and all of the countless volunteers that move our association forward. It's truly remarkable how many people step up to the plate when called upon, especially considering our busy work schedules. That speaks to the character of our membership. Because of this, our association is able to do many wonderful things that advance Pretrial Release and Diversion at the federal, state and local levels.

If you're ready to roll up your sleeves and contribute your time and talents, NAPSAs can always use your help. I encourage you to run for a board position or volunteer on a committee. You will be surprised what you get in return.

On a happy note, I am pleased to announce that we had several applications for the Droege Scholarship. Just like every year it was a difficult decision. This year the scholarship winner is Paula Walters-Ott from Kissimmee, Florida. Paula is a Pretrial Release Officer with the Osceola Department of Corrections. She is also a member of the Florida Association of Pretrial Services (APPF).

See you in Nashville!

### Western

Frank McCormick  
Western Regional Director

*I have returned to work after having knee replacement surgery several months ago. I want to thank all of my pretrial colleagues who sent their "well wishes" and words of encouragement during my recovery. I am happy to report that my knee is doing fine and I am finally getting caught up at the job.*

*As I previously mentioned, it is my intention to highlight one of the region's pretrial programs in each issue of the newsletter. Doug Erler from Colorado submitted the following article:*

#### **Jefferson County Anchors a Multi-County Project to Improve the Delivery of Pretrial Services in Colorado**

Jefferson County's lead Criminal Justice Planner, Mike Jones, and Court Services Program Manager, Doug Erler, are steering an effort with nine other counties to embark on a project that has never before been undertaken in Colorado. The Colorado Improving Supervised Pretrial Release (CISPR) project seeks to develop a statistically validated instrument to be called the Colorado Bond Conditions Assessment (COBCA). The COBCA will assess pretrial defendants' risk of committing new crimes or failing to appear (FTA)

for scheduled court hearings while on pretrial release supervision. This research effort also includes a determination of the most effective supervision strategies for managing defendants on pretrial release.

The CISPR project is long overdue. Most Colorado counties have been relying on subjectively derived instruments and procedures for which there have been few measured outcomes. A validated instrument will allow pretrial services programs to use reliable and valid data about the risk of FTA and the commission of new crime posed by defendants while they are on bond in the community. Pretrial services staff will be able to confidently provide the court with an evidence-based evaluation of each defendant's unique set of risk factors and recommendations for which supervisory practices best address these risks.

This project will address efficiency concerns about whether defendants are being under- or over-supervised. The deliberate matching of services to defendants' needs will help pretrial services programs in Colorado use their limited resources more efficiently and effectively.

Approximately 85% of Colorado's population resides in the ten participating counties, which include urban, suburban, rural, and mountain jurisdictions. As such, the CISPR project has the potential to benefit pretrial services programs statewide. For more information about the CISPR or COBCA project, please contact Mike Jones @ 303-271-4669 or [mjones@jeffco.us](mailto:mjones@jeffco.us).

The Jefferson County Justice Services Division operates both Criminal Justice Planning and Pretrial Services for the First Judicial District of Colorado. To learn more about Jefferson County or both of these programs, please go to

[www.jeffco.us](http://www.jeffco.us), click on departments, and then go to Justice Services.

### Western Region 2006 Droege Scholarship Awarded to Jennifer Wilcox, Yakima County Pretrial Services, Washington

*I am pleased to announce that Jennifer Wilcox of Yakima County Pretrial Services in the State of Washington was selected as the Western Region's Droege Scholarship recipient for the 2006 NAPSA Conference and Training Institute to be held in Nashville, Tennessee. The following are excerpts from Jennifer's winning application:*

I live and work in Yakima County which is a mostly rural area encompassing much of central Washington State. I am one of five program representatives working for the Pretrial Department at the Yakima County Department of Corrections. At any given time there are about 200 clients on our program.

None of the Program Representatives in my department have ever attended the NAPSA Annual Conference or any other conference for that matter. Our budget is extremely limited as Yakima County is a relatively poor county and the Department of Corrections budget is extremely tight.

Though there are a number of reasons I would like to attend this year's NAPSA conference, the most important is that our department is facing an uncertain future. The Yakima County Department of Corrections is going through an adjustment period. Many departments are being streamlined as a result of this. My department is currently holding meetings with the attorneys and judges we work with in order to determine what our role should be in this restructuring. Some judges feel the program should be done away with entirely. Others feel our department should be under Probation/Parole or the courts

themselves. No one really seems to know what a revamped pretrial program would look like or how it would most effectively operate.

My department has always been under the Department of Corrections. We have recently learned we are one of the few pretrial programs in the nation that are under Corrections and not Probation/Parole or the courts. It is vital that our department learn how other pretrial departments across the county are managed.

I feel it is important to be able to network with other program representatives that are under Probation/Parole or the courts. This would allow me to better understand and learn how that relationship works. I would then be able to return to my department and advise them on what the best course of action is for our restructuring.

If my program is to survive the changes that are coming our way we must learn about new case management techniques, how to operate under the courts or Probation/Parole and how to better work with both our clients and the legal community.

Thank you for considering me for the James B. Droege Memorial Scholarship. I hope you realize how very important it is for me to attend and how grateful my department and I would be were I able to do so.

### California Association of Pretrial Services Agencies (CAPS) Completes Draft of Pretrial Release Standards

The CAPS Pretrial Release Standards Committee completed the first draft of the California Association of Pretrial Services - Pretrial Release Standards earlier this year. The draft document was distributed to the membership at the CAPS conference in March. The draft was also submitted to knowledgeable and respected pretrial practitioners

and administrators, whose feedback will certainly enhance the quality and organization of the final product. The committee has addressed their comments and suggestions, and made appropriate revisions. It is anticipated that a final draft document will be published prior to the NAPSA conference in September.

### Los Angeles County Criminal Record Certification Project

The Los Angeles County Probation Department's Criminal Record Certification Project has completed the pre-test, training, and post-test phases of the pilot project, which was initiated within the Pretrial Services Division.

The pre-test was developed to include multiple-choice questions and an analytical section that tested specific aspects of the curriculum content including the following: Basic Criminal Justice Knowledge, Multiple Databases, Booking Information, Offender Status, Multiple Jurisdictions, and Juvenile Criminal History. The identification of the less well-known areas served as a focus for the training component.

The post-test has been administered, and preliminary indications are positive. The project's academic consultant is currently conducting statistical data analysis. Upon completion of the data analysis, a comprehensive report will be prepared for review and approval for implementation.

### Central

Sherri Carrier  
Central Regional Director

Hello to my friends in the Central Region. I hope you all are well and enjoying the summer.

I would like to announce that the Central Region Droege Winner is Kory Cassidy. Mrs. Cassidy is employed by Tulsa County Court Services in Tulsa, Oklahoma. Based on available records, this is the first Central Region winner to ever come from Oklahoma.

*I would like to thank Julie Saylor, from the great state of Kansas, for a terrific article that she found and wanted to share with the NAPSA readers. This article is reprinted with permission and was originally published in the Kansas Prosecutor, Vol. 2, No. 3, Winter 2005.*

### Diversions in Kansas

*by Ann Swegle, Deputy District Attorney for the 18th Judicial District*

One of the most important powers exercised by a prosecutor is the power to charge a criminal offense or to decline such a prosecution. Ethical, legal and practical considerations merge to guide our exercise of discretion in the charging decision. Is there sufficient admissible evidence to support a conviction? Do the victims support criminal charges, and are they available to testify? Are there alternatives to criminal prosecution that would promote the ends of justice?

The National Prosecution Standards promulgated by the National District Attorneys Association state that the availability of suitable diversion and rehabilitative programs should be considered by prosecutors in making an initial screening decision on criminal charges.<sup>1</sup> Diversion programs, an alternative to formal adjudication and sentencing, can advance the ends of justice by providing rehabilitative services to suitable offenders who are willing and able to account for their misdeeds through restitution and services to the community whose laws they offended. If the defendant fulfills the specified conditions agreed to in the diversion

contract, the charges against him will be dismissed with prejudice at the conclusion of the contract term.

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

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

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

The statutes adopted in 1977 sought to establish a uniform procedure for a function which was already in existence

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

*Id.* at 717.

The statutes governing diversion by prosecutors in adult criminal cases are found in K.S.A. 22-2906 through 22-2911. "Diversion" is defined as the referral of a defendant in a criminal case to a supervised performance program prior to adjudication.<sup>3</sup> Thus, our statutory schema presumes the existence of formal charges rather than a "diversion" granted through an agreement not to file charges provided that certain contractual conditions are met by the would-be defendant. Juvenile offenders may be diverted from a formal adjudication through participation in an intermediate intervention program provided for in K.S.A. 38-1635.

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

elsewhere are ineligible for diversion. These restrictions apply to juvenile diversion as well.

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

The consideration of those factors appears to be directory rather than mandatory. In addressing this issue in *Greenlee*, *supra*, the Kansas Supreme Court noted that our diversion statutes are modeled after Oregon's and cited the Oregon Court of Appeals opinion in *State v Haas*, Or. App. 169, 602 P.2d 346 (1979) with approval:

"If a district attorney's decision is discretionary, he necessarily must have authority to regard any particular factor or combination of factors - including but not necessarily limited to those specified in ORS 135.886(2) - as being dispositive for or against diversion. Nothing in ORS 135.886(2) suggests that the district attorney must weigh the factors listed in that subsection in a particular way, or that he cannot give deci-

sive weight to any one or any combination of the factors in arriving at a decision regarding diversion.

"A particular district attorney might conclude that he will never exercise his discretion by offering diversion to persons charged with particular kinds of offenses, e.g., offenses of a given degree (such as Class A felonies), or offenses which he feels are susceptible to and in need of deterrence (such as shoplifting). ORS 135.886(2)(a) provides that one of the factors for the district attorney to consider is '[t]he nature of the offense.' If the district attorney has decided that he will never offer diversion in cases involving offenses committed in a particular manner, the subsection would be rendered absurd by an interpretation which requires, in cases where such offenses are involved, that he consider all of the factors it enumerates when one of the factors conclusively determines how he will exercise his discretion. *Greenlee*, 228 Kan. at 720."

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

### Determining Suitability

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

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

### What You Must Do

Certain provisions appear to be mandatory for all agreements. 4 These are a waiver of all rights pertaining to speedy trial and certain pretrial proceedings and a provision that upon successful completion of the program, the case will be dismissed with prejudice. If the diversion is for a DUI charge, the agreement also is to include a stipulation of facts upon which the defendant will be tried if diversion is revoked; a fine or community service as specified in K.S.A. 8-1567; successful completion of an alcohol and drug safety action plan or treatment program and payment of the associated assessment fee; a waiver of right to counsel and trial by jury.5 If the diversion is for certain misdemeanor drug or alcohol offenses committed by certain minors, there must be a drug and alcohol evaluation by a certified ADSAP provider.6

All diversion agreements are to be filed with the court.7 A copy of any DUI diversion agreement is to be provided to the Kansas Division of Motor Vehicles.8 A copy of all other diversion agreements is to be forwarded to the Kansas Bureau of Investigation.9 Diversions for offenses specified in K.S.A. 72-1397(b)(1) must be reported to the State Board of Education within thirty days of the agreement.10

### What You Can Do

All agreements may include, but are not limited to, provisions concerning payment of restitution, including court costs and diversion costs, residence in a specified facility, maintenance of gainful employment and participation in programs offering medical, educational, vocational, social and psychological services, corrective and preventive guidance and other rehabilitative services. 11

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

Since diversion agreements are contractual in nature, provisions that are otherwise lawful and do not violate public policies should be upheld by the courts. See, *Petty v. City of El Dorado*, 270 Kan. 847; 19 P.3d 167 (2001). Such provisions might include ones typically used as conditions of probation - calling for the performance of community service work, restricting the type of employment that could be maintained,

prohibiting the consumption of certain substances and requiring testing for compliance with the prohibition, setting curfew or travel restrictions, prohibiting Internet access or contact with identified individuals and similar conditions. Others could provide for an agreement that the defendant would be in violation of the contract if he withheld information or lied about criminal history during the pre-acceptance process, or requiring the defendant to testify against others or cooperate in specified criminal investigations.

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

The opinion states "...[I]t is our opinion that a county attorney could legitimately require a defendant to pay those expenses which stem from the negotiations leading up to, as well as the final execution of, a diversion agreement. These could include charges for evaluations of the defendant by court or county personnel and for obtaining documents necessary to determine the defendant's eligibility and suitability for diversion. In our opinion, the term diversion costs does not include general expenses incurred by the county attorney's office such as salaries for legal or secretarial staff, office equipment or maintenance and overhead costs. For example, we do not believe that a county attorney could require a defendant to pay a portion of the attor-

ney's salary (for the number of hours spent in drafting the diversion agreement) or a secretary's salary (for the time spent in preparing documents). Court costs do not include charges for the salary of the judge or court personnel, and in the absence of any legislative intent we are not prepared to imply a different meaning for diversion costs. Neither court costs nor diversion costs should be used as means of raising revenue for day-to-day operations of the judicial or law enforcement system. This function is performed in part by the fines which defendants are assessed as part of the diversion agreement, and should not be augmented through the imposition of non-specific 'costs.'"

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

the county treasurer pursuant to K.S.A. 28-175."

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

### What You Can't Do

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

There is no statutory or other authority that allows a prosecutor to collect fines and do anything other than deposit them with the clerk of the district court. K.S.A. 20-2801 provides that fines are to be paid by the clerk of the district court to the state treasurer except as otherwise provided by statute. The only fine that expressly may be assessed under the diversion statutes is the fine specified for DUI offenses.<sup>13</sup>

Arguably, other fines can be assessed as a corrective or rehabilitative measure. If such fines are assessed, they must be paid to the court. You are not required to assess and collect court costs, but if you do, court costs are to be paid to the clerk of the district court pursuant to K.S.A. 60-2001, K.S.A.28-170, K.S.A.28-172a and K.S.A. 28-176. The term "debts owed to courts" as defined in K.S.A. 75-719 includes "any assessment of court costs, fines, fees, moneys expended by the state in providing counsel and other defense services to indigent defendants...." Thus, a diversion agreement also might appropriately include payment of attorneys' fees for appointed counsel.

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

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

While K.S.A. 22-2910 prohibits you from requiring a defendant to enter a plea to a charge to receive diversion on that charge, you can negotiate a plea on multi-count information that includes diversion on some charges and guilty

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

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

### Starting and Terminating Diversion

A diversion agreement, providing for trial on stipulated facts if it is breached, is not tantamount to a guilty plea and need not be treated as such. And, in the absence of fraud, undue influence or mutual mistake, an individual who is represented by counsel and who signs a diversion agreement is presumed to

have read and understood the terms of that agreement. In re Application of Tolle, 18 Kan. App. 2d 491, 856 P.2d 944 (1993).

Time attributable to an agreed request for a continuance to obtain diversion should generally be attributed to the defendant for the purpose of computing speedy trial compliance. *State v. Biarda*, 27 Kan. App 2d 570, 7 P.3d 317 (2000).

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

A court cannot shorten the length of a diversion without the consent of the prosecution. *State v. Hurla*, 274 Kan. 725, 56 P.3d 252 (2002).

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

### Conclusion

Diversion programs are useful tools in the criminal justice system. They provide prosecutors the ability to ensure accountability for criminal wrongdoing while giving suitable individuals the ability to receive corrective services and avoid the lasting stigma of a criminal conviction. Under prosecutor diversion programs, crime victims often feel their concerns are quickly and properly addressed and that they

have a role in determining how they are to be compensated for the harm done to them. In the right cases, diversion programs can offer the illusive, often sought but rarely attained, win-win situation.

(Footnotes)

1 National Prosecution Standards, Second Edition (1991) Sec. 42.3, p 126, National District Attorneys Association

2 The court also held that the newly enacted diversion statutes did not violate the separations of powers doctrine by the legislature unduly encroaching on prosecutors' discretionary powers.

3 K.S.A. 22-2906(3)

4 K.S.A.22-2909(a)

5 K.S.A. 22-2909(c)

6 K.S.A. 22-2909(g)

7 K.S.A. 22-2909(f)

8 K.S.A. 22-2909(j)

9 K.S.A. 22-2909(i)

10 K.S.A. 72-1397(e)

11 K.S.A.22-2909(a)

12 K.S.A.22-2909 (a)

13 K.S.A.22-2909 (c)(1)

I hope you enjoyed the article, and if anyone has other articles that they would like to see in the NAPSA Newsletter, please let me know.

### NEWS FLASH

The Energizer Bunny was recently arrested - charged with BATTERY!

### Reminder

2006 NAPSA Conference and Training Institute

Nashville, Tennessee

Marriott Hotel

September 17-20

I look forward to seeing you all in Nashville for the NAPSA 2006 conference.

## Secretary's Report (cont)

produce a training DVD on pretrial services, as another way to promote pretrial services and its critical role in the criminal justice system. NIC held a DVD planning meeting in Washington, DC May 9th and 10th.

The following people participated in the meeting: Bruce Beaudin, Barb Darby, John Dupree, Mary Pat Maher, Tim Murray, and Sharon Trexler. Marcus Hodges, Phyllis Modley and Ed Wolahan, all from NIC.

The planning group determined that the goal of the DVD will be to inform pretrial decision making by using principles and legal values as expressed in the NAPSA and ABA standards with a focus on key practices and challenges.

The desired outcome of the DVD will be that the viewer will know what good pretrial practice looks like. The primary target audience for the DVD will be pretrial services supervisors and line staff, but the DVD will be presented in such a way so that other actors from the criminal justice system will be represented throughout the DVD so that it should be appeal to other audiences as well.

The DVD will contain several different modules and will include interviews with pretrial services practitioners and their responses to key talking points.

To obtain the footage for these interviews, NIC will be filming at the NAPSA conference and will be looking for volunteers who are interested in being interviewed. So look for the NIC filming crew at the conference if you are interested in being part of this very exciting project!

The rest of the filming for the DVD will be completed in mid-November at NIC's film studio in Spokane,

Washington. The DVD should be released early 2007, just in time for the Academy Awards!

### Code of Ethics

The board reviewed the feedback received from the membership regarding the draft Code of Ethics. They then re-drafted and approved a final Code of Ethics. The board is proud that NAPSA now has a formal Code of Ethics in place and they will be pre-

senting the code to the membership at the annual business meeting at the conference.

The final Code of Ethics follows this report. Take a look and see what you think! There will be a workshop on ethics at the conference where the new Code of Ethics and the importance of having a Code of Ethics will be discussed.

### NAPSA CODE OF ETHICS

August 2006

#### NAPSA Code of Ethics for Pretrial Release and Diversion Practitioners

As a Pretrial Practitioner, I will:

1. Assist the criminal justice system in its dealings with pretrial defendants to the best of my ability and will conduct myself as a professional at all times;
2. Respect the dignity of the individual, be they defendants, victims, or fellow criminal justice professionals;
3. Respect the dignity and integrity of the court;
4. Respect the presumption of innocence of all defendants, until proven guilty beyond a reasonable doubt, and to uphold the fundamental right of every accused person who has been arrested and is facing prosecution under the U.S. criminal justice system;
5. Pledge that the information I provide to the court and the decisions I make are as accurate and objective as possible;
6. Treat all people equally regardless of race, national origin, disability, age, gender, sexual orientation or religion;
7. Protect the confidentiality of all information obtained, except when necessary to prevent serious, foreseeable, and/or imminent harm to a defendant or other identifiable person(s);
8. Avoid impropriety or the appearance of impropriety;
9. Avoid any conflicts of interest and will not evaluate, supervise and/or provide services to anyone I have an existing relationship with, nor enter into a personal or business relationship with anyone I evaluate, supervise or provide services to;
10. Continue to pursue my own professional development and education to further my expertise in the field;
11. Promote the growth of pretrial services, as well as encourage and cooperate with research and development in advancing the field;
12. Respect and promote the fundamental principles and professional standards which guide pretrial services and will implement these best practices to the extent I am able;
13. Refrain from providing legal advice to any pretrial defendants; and lastly,
14. Promise to conduct myself as an individual of good character who will act in good faith in making reliable ethical judgments.