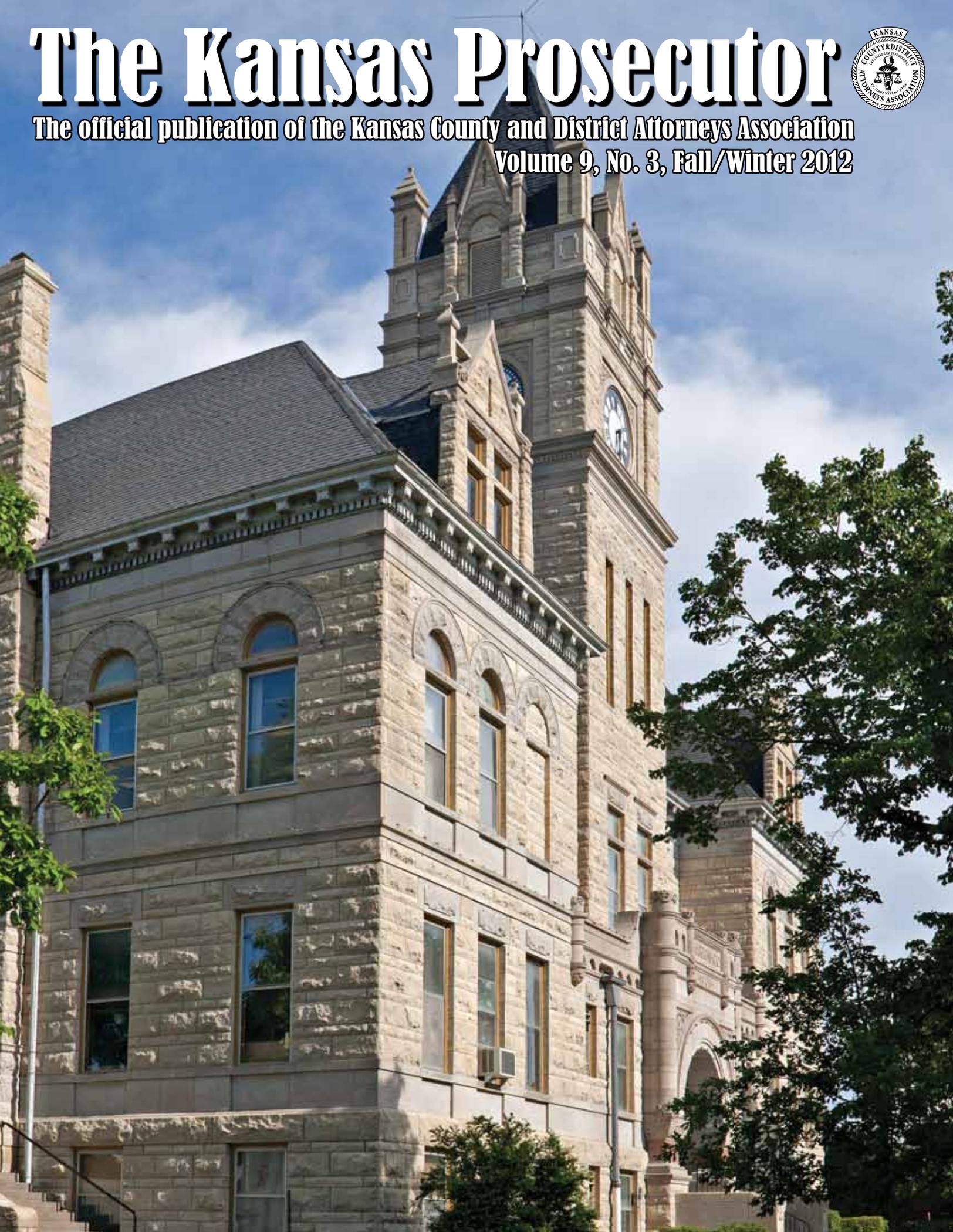


The Kansas Prosecutor



The official publication of the Kansas County and District Attorneys Association
Volume 9, No. 3, Fall/Winter 2012



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 County and District Attorneys Association

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 The purpose of the KCDA is to promote,
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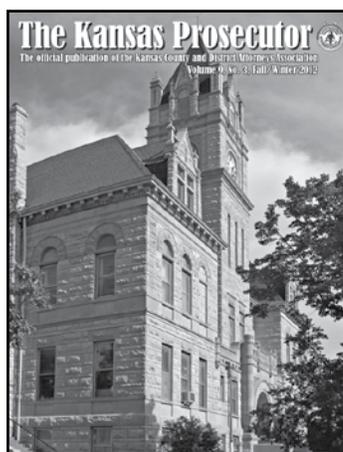
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About the Cover

The first two-story courthouse of stone in Marion
 County was built in 1867. The upper floor was used
 for county court purposes and the first story was used
 for a school. A high wall made it a place of refuge
 and defense in the event of an Indian attack. It was
 never needed for that purpose.

An addition was completed in 1879 and part of
 the original structure was remodeled in 1881. The
 present three-story native limestone structure was
 started in 1906 and completed in 1907. It remains in
 full use.

In 2006, the courthouse celebrated 100 years of
 service.

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



President's Column

by Mark Frame, KCDA President
Edwards County Attorney

Random Thoughts...

“The fundamental cause of trouble in the world is that the stupid are cocksure while the intelligent are full of doubt.”

~ Bertrand Russell

As President of the KCDA, I have the privilege to submit a column to our wonderful magazine the *Kansas Prosecutor*. Since I don't keep my train of thought long enough for a full, coherent column, I have adopted the random thoughts or the “Squirrel” approach...

I have prosecutors come up to me and say “What does the KCDA do?” Before I got on the Board six years ago, I didn't have a very good answer. I always attended the conference. I vaguely paid attention at the luncheon, and I generally enjoyed seeing friends. Now, I consider the KCDA the only organization that truly is set up solely to help prosecutors do their job in Kansas. During my tenure on the board, the organization has had an ever increasing presence in the legislature as a watchdog organization that comments on legislation that seems unworkable to prosecutors and to champion legislation that is necessary for proper administration of justice by prosecutors.

In addition, the KCDA is a great organization to use for your volunteerism needs. It seems in my years of volunteering, the biggest obstacle in getting people to help or volunteer is an organization's inability to properly ask. How many times have you heard, “If you would've just asked, I would've happily helped.” Well, this is my formal request...

Random thought: I apologize weekly to my three boys for making them Royals and Chiefs fans.

Back in 1989, I was sitting in Judge Terry Bullock ethics class at Washburn Law School. He said something to the class that has always stuck with me. When you're in a situation that you

think is tenuous or you're in over your head, “Get educated or get help or get out.” That was some of the best ethics advice I ever received. I have revamped that a little in my practice, I “get educated and get help or get out.” The biggest resource for information that lawyers have is other lawyers. I am always calling a colleague about an issue or problem for help, support, or simple reassurance.

Random thought: I always chuckle when the national news talks about a “small town” of 30,000 people.

Speaking of advice, my grandfather, who passed away in 1992, told me when I was fresh out of law school that, as an attorney, there will be situations in which I will have an opportunity to embarrass someone in court or in a case. He said this opportunity will present itself but won't help your case. He also said that if I'm a county attorney, as he was back in the 1930s, there will be many situations where I will be in a position to make life altering decisions for people. Finally, he said, “Mark, what I'm trying to tell you is that just because you have an opportunity to be an ass, doesn't mean you have to be one.” I think of that a lot.

Random thought: I despise the Yankees but didn't want Jeter to go out this season like that. If he were on any other team, I would love that guy.

There are going to be many challenges for the KCDA in the next year. There will also be many opportunities for the organization to succeed. It is my hope that I will follow the advice that I learned in law school and look to you to get educated and get help, then I promise I will get out. 🍀

New KCDAA Website Launched

by Mary Napier, Editor, Kansas Prosecutor and KCDAA Webmaster

Check out the new website at www.kcdaa.org



This new website features:

- a new look;
- updated information;
- an updated membership directory for the public and one for members only;
- a new members only section with updated information for members;
- CAs and DAs now have the ability to update their profiles and add/remove staff from their membership;
- Individuals can also update their own profiles;
- and more!

If you are a member, activate your account in the upper right by clicking on the “forgot password” link. This will send an e-mail to the address we have on file, and it will provide you with directions to set your password. Then come back and login to gain access to your profile information and the members only section that includes KCDAA documents, legislative news, and more! Watch your e-mail for more instructions on how to take advantage of all the benefits of the new website. 

KCDAA=Legislators Resource for Prosecutors

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

The Kansas County and District Attorney's Association is proud to be the resource for Kansas Policymakers on matters involving Kansas public policy regarding our justice system. The KCDAA provides input on issues impacting prosecution, sentencing, and needed adjustments to Kansas law to keep pace with the latest Appellate Court decisions.

Each year the KCDAA brings a short list of carefully vetted issues to the Kansas Legislature for consideration to enhance Kansas statutes in the pursuit of justice. The process begins almost as the previous Session adjourns Sine Die.

The KCDAA began work on the 2013 initiatives in June 2012 by requesting bill proposals from all members. Following a deadline in August the KCDAA legislative committee, made up of roughly 15 prosecutors from across the state, met on a weekly basis to vet all the proposals.

The legislative committee then made a final recommendation to the KCDAA Board of Directors at their October meeting. The board approved six bills that it felt should be a priority for the 2013 session. The following is a brief description of those bills:

1. Create an aggravated battery DUI.
2. Expand the crime of burglary to include entering to commit certain domestic crimes.
3. Enhance the penalty when an offender possesses a firearm during the commission

of a drug felony rather than in furtherance of the drug felony.

4. Create a contractor fraud statute.
5. Strengthening the crime of unlawful possession of pharmaceutical drugs.
6. Allowing that forensic DNA testing can be used after the offender has been convicted when the results would exonerate the offender.

In keeping with our role as a Legislative resource, the KCDAA is frequently asked to comment on other bills that are making their way through the legislative process regarding the justice system in Kansas. The KCDAA members and legislative staff are always available to answer any question that legislators may have.

With the unprecedented number of new legislators, we ask the our members make an effort to get to know their legislators and be of counsel to them when policies and laws are being considered that affect the criminal justice system.

As the bar association for Prosecutors in Kansas, the KCDAA stands ready to assist our lawmakers in their deliberations on the criminal justice issues they face each and every Session. The KCDAA legislative team is eager to begin work on its 2013 initiatives and looks forward to having discussions regarding these priorities with the 2013 Legislature. 🌐

Don't Forget: Your tax deductible contribution can be made out to KPF

Projects under Development by the Kansas Prosecutors Foundation, include:

- KCDAA Law School Scholarships
- KCDAA Undergraduate Honors Stipends
- KPT&AI National Speaker Bureau for Prosecutor Continuing Legal Education
- KCDAA Law Day Activities in Kansas High Schools
- 'Finding Words' – helping child victims speak
- Grant for a Statewide Victim/Witness Notification System
- Sponsor KVAA
- And so much more...

Learn more at www.kpfonline.org

Send donations directly to:

Kansas Prosecutors Foundation, 1200 SW 10th Ave., Topeka, KS 66604



Guest Column

by Kansas Attorney General Derek Schmidt



AG's office places renewed focus on helping victims

Providing services to victims of crime has long been a vital role of the Attorney General's Office. As part of our ongoing efforts to ensure victims receive helpful and timely service, we recently reorganized our office to strengthen our work providing financial help to crime victims in their time of need.

The Crime Victims Compensation Board was established by the legislature in 1978 and assigned to the jurisdiction of the Attorney General in 1989. As Attorney General, I have the honor of appointing the three members of the Board, subject to confirmation by the Kansas Senate. Current members are Suzanne Valdez, Lawrence, chair; Nan Porter, Wichita; and Sheriff Tom Williams, Iola.

The Board is tasked with providing victims of violent crimes with compensation for loss of earnings and out-of-pocket medical expenses as a direct result of the crime. The Board can also award funeral expenses in the event of the death of a victim. Awards are capped at \$25,000 per case. Funding for the crime victims compensation program comes from federal Victims of Crime Act grant funds, a portion of court fines and fees, court-ordered restitution, and fees collected from offenders in prison - not from taxpayers. The compensation program provides nearly \$4 million in support to about 1,000 crime victims each year.

As part of our recent reorganization, I created a new Division of Crime Victims Compensation within the Attorney General's Office. Essentially, the new Division is a talented group of staff who manage the operations of the compensation program.

This reorganization will help ensure that the crime victims compensation program is operated with maximum efficiency and is in a stronger position to support Kansans who are victims of violent crime. It will also ensure that the three members of the Crime Victims Compensation Board can focus on the critical job of evaluating claims for assistance and supporting crime victims rather than on the day-to-day operations of the office.

I have appointed my former Deputy Chief of Staff, Jeff Wagaman, to oversee this Division as its executive director. Jeff and his team look forward to working with prosecutors and victim service organizations across the state to increase the awareness of the crime victims compensation program. It is important that victims of crime in every part of our state know about and have access to these resources.

These awards do make a difference in the lives of real people. For example, in a recent case a 52-year-old female was having dinner at a friend's house when the friend's estranged husband came into the home and threatened to kill everyone. He picked up a baseball bat and began assaulting her. She suffered severe facial and head injuries. The offender was arrested and charged with Attempted Second Degree Murder, Aggravated Battery, and Violation of a Protection Order. While the victim's health insurance covered most of the medical expenses, the Board approved \$2,927 in medical and dental expenses.

The reorganized Division of Crime Victims Compensation is located in Room 612 of the Landon State Office Building, 900 SW Jackson St., Topeka. More information, including an informational brochure that can be distributed to victims, is available on our website at www.ag.ks.gov/dvcv or by calling 1-888-428-8436. 

Information for Victims of Crime



Kansas Crime Victims Compensation Board
120 SW 10th Ave., 2nd Floor
Topeka, Kansas 66612-1597
(785) 296-2359

Crime Victim Information and Referral
1-800-828-9745
8 a.m. - 5 p.m., Monday - Friday

Provided by
**Kansas Attorney General
Derek Schmidt**

www.ag.ks.gov

KCDAA Member Highlight: David Miller

by Amanda G. Voth, Assistant Attorney General

When David Miller received a phone call from a detective 12 hours after being sworn in as Miami County Attorney saying there had been a double shooting, Miller thought the detective was joking. Instead, Miller found himself out in the county after midnight, looking at one dead body on the porch of a house, and another dead man in the yard. The homeowner had shot and killed the two as they tried to break into the house. The cold, midnight incident “gave [Miller] a lot of quick first experiences.” Almost immediately after taking office, Miller was learning how to effectively communicate with law enforcement, families, and the media.

In the last 24 years as Miami County Attorney, Miller seemingly has not slowed down since his first few hours as County Attorney in 1989. Beginning in 1986, Miller served for eight years as Miami County Bar Association treasurer, and then as president from 1995 – 1998. Miller sat on the Board of Directors for the KCDAA from 1994 – 2001, and became president of KCDAA in 2001. Miller and his office were pivotal in bringing Big Brothers Big Sisters to Miami County in 2001. He served as chairman on the board of Big Brothers Big Sisters for three years and served on the board for another seven years. He currently serves on the Kansas Law Enforcement Training Commission Board and the Kansas Prosecutor Ethics and Grievance Committee.



While building relations with local and professional organizations throughout his career as County Attorney, Miller also made substantial changes within his office. Miller doubled the number of assistant prosecutors in his office, from two to four attorneys. He has also doubled the number of his support staff personnel to keep up with both the population increase and the change in crimes. In the early 2000s, Miami County was one of the fastest growing counties in the state of Kansas, and since the 1970s, the county has grown from 20,000 to 30,000 people. Located just south of Johnson County, many people moved to the quieter Miami County. The county’s location, however, has brought interesting issues to Miller. “We seem to have cases where bodies are dropped off in Miami County,” Miller remarks. Miller can think of three

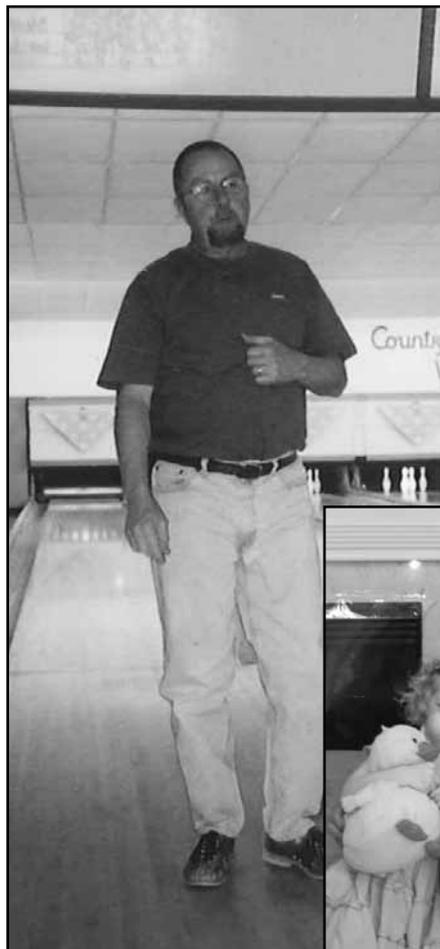


separate instances in the last 24 years where defendants from Johnson County have dropped bodies in Miami County.

Although the number of cases the office files has not increased dramatically over the past couple of decades, the types of crimes have changed. Due to the changes in requirements for law enforcement, he has seen a significant increase in the number of domestic violence cases. One of the accomplishments Miller is most proud of is the change he implemented in handling domestic violence cases. As long as he believes the crime is provable, his office “prosecutes the defendant, whether the victim wants to [proceed] or not.” Miller, too, was on the committee that developed the Domestic Violence Model Policy for Prosecutors handbook. In addition to the increase in domestic violence cases, Miller’s office has also seen an increase in care and treatment cases. With the Osawatomie State Hospital in the county, Miller’s team handles around 250 care and treatment cases yearly.

Amidst all of the changes Miller implemented and saw in the county, much, in contrast, has stayed the same. The physical location of the County Attorney’s office remains on the third floor of the Miami County Courthouse, which was built in 1898. And with this beautiful, old structure, the inhabitants have seemingly stayed the same. “A bat may just come and land in the office, in a courtroom, wherever,” Miller says with a smile.

Miller’s passion for prosecution has also remained



the same over the past 24 years. He decided to go to law school because he wanted to help the community. Miller says he decided to run for county attorney because he always liked the idea of being a prosecutor. He has enjoyed serving as Miami County Attorney, in part, because the size of the county is small enough that he and his staff can look at each case with a personal point of view, with “no cookie-cutter-type prosecution.” They can look at each case to determine what is right for the victim and what is right for the defendant. “One of the great things about being a prosecutor is that we can do what is right; we don’t have a client to please,” said Miller.

As Miller looks toward his retirement in January, he notes he has no regrets about his career as a prosecutor. “I wouldn’t trade it for anything,” Miller says. “I’ve had a great career, and would not have wanted it to go in any other direction.” Miller says he has really enjoyed his experience with KCDA. Being a prosecutor is an “awesome responsibility,” and it can be “very rewarding and satisfying that we are doing something for the community.”

Anniversary

Cowley County Deputy County Attorney **James R. Spring**, celebrated his 30th year anniversary with the office on October 12. Jim was hired as an assistant county attorney in 1982 and has been with the office ever since.



Awards

Since 1998 Sunflower House, a Children's Advocacy Center, has recognized a Child Advocate of the Year. Sunflower House serves both Johnson and Wyandotte Counties and provides Forensic Interviews and Medical Examinations for children who are suspected victims of child abuse (primarily sexual abuse). Sunflower House has strong partnerships with its local Department of Children and Family (DCF) services staff; local law enforcement agencies; local District Attorney and Victim Advocacy offices; local specialized medical providers and local Mental Health providers. Through these multidisciplinary partnerships it is fortunate enough to be able to work with strong advocates for child victims.

Each year Sunflower House hosts a Partner Agency Luncheon, which provides it with an opportunity to thank its excellent partners. Leading up to the luncheon, nominations are sought from all disciplines looking for those partners who have stood out in their advocacy



efforts. Nominations are then presented to the Multidisciplinary Advisory Committee (made up of leaders in each of those disciplines) and the Sunflower House Child Assessment Staff, who select one Child Advocate from each county. Past recipients have included law enforcement personnel, social service staff, mental health providers, and members of the district attorney offices. This year's recipients include: **Jennifer Tatum, former**

Wyandotte County Assistant District Attorney, and Erika Rasmussen, Johnson County Assistant District Attorney.

Their efforts on behalf of abused children exemplify what we all hope to accomplish in helping children heal from their abuse: integrity and grit to get the job done.



Babies

Sedgwick County District Attorney's Office

Chelsea Anderson, attorney in the gang unit, had a son. Jude Sterling Anderson was born June 27 at 6:34 am, 6 lbs. 2 oz., and 18.31 inches long.



Matt Erb, attorney, and wife Tiffany had a baby girl. Evangeline Grace Erb was born June 26, at 8:41 pm, 8 lbs. 13 oz., and was 20 1/2 inches long.



Monika Hoyt, attorney, and

husband Kelly welcomed a baby girl into this world in September.



Lorelei Rose Hoyt was born at 5:29 pm on Sept. 19, and weighed 7 lbs. 8 oz.

Amanda Marino, assistant district attorney, and husband



Andrew, welcomed a new baby girl to their family on July 25.

Rose Marie Marino was 19 inches long and weighed 8 lbs. 3 oz. Big brother Henry and big sister Madeleine are very excited about the new addition.

Wyandotte County District Attorney's Office

Cathy Eaton, assistant district attorney, and her husband David Copeland welcomed twin girls on July 3, 2012. Grayson Ann and Gillian Cassidy joined big brother Isaiah, 12, and big sister Ryley, 3.

Jerome Gorman, Wyandotte County district attorney, is the proud first time grandparent to William Gorman Hunn, born on July 5. William weighed in at 8 lbs. 13 oz. and was 21.5 inches long. Jerry's daughter Emily and husband live in Silver Spring, Maryland.



New Faces

Ashley Hutton joined the Wyandotte County District Attorney's Office in August 2012. Ashley is from Shawnee, Kan. Ashley is a 2006 graduate of Washburn University and a 2009 graduate of Washburn Law School. Ashley was a law

KCDAA Milestones

clerk for the Shawnee County District Court from 2007-2010. She also worked for Kansas Legal Services, Manhattan office from 2010-2012 doing CINC and domestic cases. Ashley will primarily be doing CINC cases for the Wyandotte County District Attorney's Office.

Katie Means joined the Wyandotte County District Attorney's Office in August 2012. Katie is from Oskaloosa, Kan. and received her law degree from Kansas University. While in law school, Katie participated in several criminal law clinics, received the Jana Mackey Public Interest Fellowship, and earned a Certificate in Advocacy. Katie interned at the Sedgwick County District Attorney's Office and the Wyandotte County District Attorney's Office during her third year. Katie will be handling juvenile offender cases.

Kevin O'Connor began employment with the Criminal Litigation Division of the Kansas Attorney General's Office as the South-Central Regional Prosecutor in October.



Office Moves

Jennifer Tatum has left the Wyandotte County District Attorney's Office to take a position with the United States Attorney's Office as a Special Assistant United States Attorney. Jennifer's caseload will consist of drug and gun cases.



Marriages

Michael Duma, assistant district attorney with the Wyandotte County District Attorney's Office, was married on September 15, 2012 to

Sarah Schrantz in Kansas City, Missouri.

Logan McRae, assistant district attorney with the Wyandotte County District Attorney's Office, married Mark Anderson on November 5, 2011 in Prairie Village, Kan.

Katie Means, assistant district attorney with the Wyandotte County District Attorney's Office, married Travis Devlin on October 20, 2012 in Mission, Kan.



Promotions

Sheryl Lidtke and Ed Brancart, both deputy district attorneys in the Wyandotte County District Attorney's office were promoted to Co-Chief Deputy. Sheryl has been with the office for 23 years. Ed has been a prosecutor for 19 years, eight of them in Wyandotte County.

We want to share your news!



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

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

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

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

Feel free to submit digital photos with your announcement!

Upcoming Deadlines:
Spring 2013: March 15
Summer 2013: June 28

KCDAA Award Winners

The Kansas County and District Attorneys Association (KCDAA) is pleased to announce its 2012 award winners: Trinity Muth – Prosecutor of the Year and Nola Tedesco Foulston – Lifetime Achievement Award. The award winners were honored during the 2012 KCDAA Fall Conference Awards Luncheon on Monday, October 8 at the Sheraton Hotel in Overland Park.

2012 Prosecutor of the Year

Trinity Muth

Senior Assistant District Attorney, Sedgwick County DA's Office

**by Justen P. Phelps, Assistant District Attorney- Gang and Violent Crime Unit
Sedgwick County District Attorney's Office**

This award is presented to a prosecutor for outstanding prosecution of a case or cases throughout the year. The nominee must be a regular member of KCDAA.

Trinity Muth, Senior Assistant District Attorney with the Sedgwick County District Attorney's Office, received the 2012 KCDAA Prosecutor of the Year award for successfully trying several challenging cases over the past year.

Muth handled the prosecution of the individuals responsible for the homicide of Otis Bolden. The two shooters were convicted in separate trials of 1st degree murder, aggravated burglary and aggravated assault and given life sentences. The woman who instigated the shooters and directed them to the victim's apartment where he was shot and killed was convicted at trial of 1st degree murder, aggravated burglary, and aggravated assault. She was also sentenced to life.

Muth handled the prosecution of three individuals who killed a 13-year-old boy on Father's Day. The driver was convicted at trial of 1st degree murder and criminal discharge and given a life sentence. The two shooters were convicted in separate jury trials of 1st degree murder and criminal discharge and each was sentenced to life.

Muth assisted in the prosecution of Charles Williams who had stabbed his teenage stepson to death. The jury found Williams guilty of 2nd degree reckless murder and he was sentenced to 240

months in prison.

Muth took to trial two gang members who fired a total of 14 shots into a vehicle leaving a local night club. Two passengers of the vehicle were seriously wounded, but survived. Both shooters were convicted of multiple counts of attempted 1st degree murder in addition to other counts and received lengthy sentences.

In each of these cases Muth dealt with numerous complex motions and legal issues. There were many difficult or uncooperative witnesses. Muth demonstrated skill and determination in successfully completing such a difficult slate of cases. 🏆



KCDAA Award Winners

2012 Lifetime Achievement Award Nola Tedesco Foulston Sedgwick County District Attorney

by Ann Swegle, Deputy District Attorney
Sedgwick County District Attorney's Office

This award is presented to a regular KCDAA member for his/her longevity as a prosecutor. The nominee must have served no less than 25 years in a prosecutor position, and not previously received this award.

For Nola Tedesco Foulston, professional achievement is not an end in itself. It is a means to other ends – providing her community with the justice that can only be obtained by ethical and effective prosecutorial practices and helping create models of such practices nationwide.

Many of Nola's achievements as a 28-year career prosecutor were discussed in a recent KCDAA Member Highlight in *The Prosecutor* (Spring 2012). And while Nola's achievements as a prosecutor, educator, and administrator par excellence have garnered a wide variety of awards, honors and accolades in her community, state, and nation, it is the results of her work that she sees as the true reward.

The result of her work in the Leroy Hendricks case was the civil commitment of Hendricks as a sexual predator and a finding by the United States Supreme Court that Kansas' statutory scheme for the involuntary commitment of such predators was constitutional. The trial of the case revealed Hendricks to be an extreme danger to children and produced some impactful testimony. During the cross-examination of Hendricks, who admitted to molesting children as a stress-buster when he couldn't afford to build model airplanes, Nola asked him if he would guarantee that he would not molest children again. His reply? "The only way to guarantee that is to die."



Nola made a rare second trip to the United States Supreme Court when she assisted in the successful fight to uphold our state's death penalty law against a constitutional challenge in *Kansas v. Marsh*.

During her tenure, Nola has focused on the protection of children and other vulnerable groups. She has devoted many resources to training her staff attorneys in core competencies of prosecutorial practice, highlighting the ethical obligations of prosecutors and their duty to seek justice, not just a conviction.

Whether through her successful prosecutions of offenders (e.g. serial killer Dennis Rader [BTK], child murderer Doyle Lane), beneficial training and mentoring of lawyers, or educating and supporting her community, Nola has achieved a lot. More aptly, she has given a lot, and that is her real lifetime achievement. 🌟

Wrestling with Wright

by Matt Maloney, Senior Assistant District Attorney, Sedgwick County District Attorney's Office

Alternative Means in the Aftermath of State v. Wright

Alternative means has been the focus of many appellate briefs since the Kansas Supreme Court released its opinion in State v. Wright, 290 Kan. 194, 224 P.3d 1159 in February 2010. The term refers to the scenario that exists when a single offense may be committed in more than one way. In such circumstances, the jury should only be instructed on the means supported by the evidence. The stakes are high for prosecutors because if the instructions are not properly tailored, an otherwise valid conviction is likely to be reversed on appeal. This article will summarize the current state of the law and offer suggestions on how to approach the issue at both the trial and appellate levels.

Understanding alternative means is not a simple task, as the concept is often confused with multiple acts. In State v. Timley, 255 Kan. 286, 289-290, 875 P.2d 242 (1994), our Supreme Court, quoting the Washington Supreme Court's opinion in State v. Kitchen, 100 Wash.2d 403, 410-411, 756 P.2d 105 (1988), distinguished the concepts as follows:

“In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to *guilt* for the single crime charged. Unanimity is not required, however, as to the *means* by which the crime was committed so long as substantial evidence supports each alternative means. [Citations omitted.] In reviewing an alternative means case, the court must determine whether a rational trier of fact *could* have found each means of committing the crime proved beyond a reasonable doubt. [Citations omitted.]

“In multiple acts cases, on the other hand, several acts are alleged and any one of them could constitute the crime charged. In these cases, the jury must be unanimous as to which act or incident constitutes the crime. To ensure jury unanimity in multiple acts cases, we require that either the State elect the particular criminal act upon which it will rely for conviction, or that the trial

court instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt. [Citations omitted.]” (Emphasis in Kitchen.)

A crucial part of the Timley opinion was the Supreme Court's pronouncement that in order to protect a defendant's right to a unanimous jury verdict, there must be sufficient evidence to support *each alternative means upon which a jury is instructed*. In State v. Dixon, 279 Kan. 563, 604-606, 112 P.3d 883 (2005), however, the Court adopted a more pragmatic view and, while not overruling Timley, determined that an erroneous burglary instruction was harmless because “there was strong evidence supporting at least one theory of each burglary and no evidence of at least one other theory.”

In Wright, the Court set out to resolve “the tension between Timley and Dixon.” 290 Kan. at 205. While acknowledging the “obvious pragmatic appeal” of Dixon, the Court opted to follow what it deemed the “Timley super-sufficiency condition,” i.e., sufficient evidence to support each means upon which a jury is instructed, concluding that this approach was the “only choice to ensure a criminal defendant's statutory entitlement to jury unanimity,” a reference to K.S.A. 22-3421. 290 Kan. at 205-206.

While Wright addressed the Timley/Dixon tension, it did not explain how to determine whether a statute creates alternative means in the first place. In State v. Brown, ___ Kan. ___, 284 P.3d 977 (2012), the Court took up this challenge and explained that identifying an alternative means statute is more complicated than simply spotting the word “or” within a statutory provision. Rather, the key is legislative intent. The Court wrote: “The listing of alternative distinct, material elements, when incorporated into an elements instruction, creates an alternative means issue demanding super-sufficiency of the evidence. But merely describing a material element or a factual circumstance that would prove the crime does not

create alternative means, even if the description is included in a jury instruction.” 284 P.3d at 988.

The Court noted that the legislature will often signal its intent to state alternative means through structure, separating alternatives into distinct subsections of the same statute. “Regardless of such subsection design, however, a legislature may list additional alternatives or options within one alternative means of committing the crime. But these options within an alternative do not constitute further alternative means themselves if they do not state additional and distinct ways of committing the crimes, that is, if they do not require proof of at least one additional and distinct material element.” 284 P.3d at 990. The Court used the phrase “options within a means” to describe such a scenario, and declared that a super-sufficiency issue will not arise in such circumstances.

Given this still evolving landscape, what measures should prosecutors take to avoid having valid convictions reversed due to alternative means problems? The first step, as the Court indicated in Brown, is to identify whether the criminal statute supporting the charged crime is an alternative means statute. If so, prosecutors must ensure that the trial court tailors the elements jury instruction to include only those means supported by the evidence. In other words, do not simply copy and paste the language from the pattern instruction; instead, carefully review the evidence that was introduced at trial and take the affirmative step of eliminating any means that were not proven. For example, in a rape case in which an able-bodied victim was beaten and raped at gunpoint but never lost consciousness, your instruction should indicate that the victim was overcome by force or fear; it should not, however, include language relating to the victim being unconscious or physically powerless. See K.S.A. 21-5503. This simple step can prevent an otherwise valid conviction from being reversed on alternative means grounds.

At the appellate level, there are several arguments available to prosecutors. When appropriate, the starting point should be to argue that the statute at issue does not create alternative means. Again, legislative intent should be your guide in making this argument. Brown provides

a useful example. The Supreme Court concluded that the aggravated indecent liberties statute, K.S.A. 21-3504(a) (now found in K.S.A. 21-5506), contains subsections that provide several alternative means; however, the Court found that the language “either the child or the offender, or both,” which is found within multiple subsections of the statute, did *not* create additional alternative means, instead finding that such language identified options within a means. 284 P.3d at 992-993. The Court reached a similar conclusion with respect to the lewd and lascivious behavior statute, K.S.A. 21-3508(a) (now found in K.S.A. 21-5513). 284 P.3d at 993.

Numerous panels of the Court of Appeals have also weighed in on whether specific statutes create alternative means. The fact that different panels have occasionally reached different results when analyzing the same statute illustrates the complexity of identifying alternative means crimes. See e.g., State v. Perkins, 46 Kan. App. 2d 121, 257 P.3d 1283 (2011), and State v. Suter, Unpublished Opinion No. 103,164, filed May 20, 2011 (conflicting opinions regarding whether driving while suspended (K.S.A. 8-262) is an alternative means crime). For both the trial and appellate practitioner, it is important to be diligent in reviewing the caselaw in order to determine whether our appellate courts have addressed the statute(s) you are dealing with in a given case.

If confronted with a statute that truly presents alternative means, you can, of course, argue that there is sufficient evidence to support each means upon which the jury was instructed. This is a fact-dependent argument and should be avoided unless supported by a reasonable review of the evidence.

One argument that has met with success at the Court of Appeals level is based on the invited error doctrine. In State v. Schreiner, 46 Kan. App. 2d 778, 786-792, 264 P.3d 1033 (2011), the court held that when a defendant requests an instruction that includes alternative means of committing an offense, he or she cannot complain on appeal that one or more of the means instructed upon was not supported by the evidence. Several unpublished opinions have reached the same conclusion, though it must be noted that one panel recently

declined to apply the invited error doctrine in such circumstances. See State v. Creason, Unpublished Opinion No. 105,450, filed August 10, 2012. The invited error argument should continue to be advanced by prosecutors; it is likely only a matter of time before the question is resolved by our Supreme Court.

Another option is to argue that Wright is wrong. Admittedly, the Kansas Court of Appeals is bound by Kansas Supreme Court precedent, and the Supreme Court may be reluctant to overturn recent precedent. Nevertheless, there is a valid argument to be made that Wright was wrongly decided in that it is contrary to the longstanding view expressed by the United States Supreme Court in Griffin v. United States, 502 U.S. 46, 59-60, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991). The Griffin court found a controlling difference between a jury having to grapple with a *legally* inadequate theory of conviction, as opposed to a jury confronted with a *factually* inadequate theory of conviction. With respect to the latter, the Griffin court concluded that although it would be “preferable” to remove all factually inadequate theories of conviction from a jury instruction, “[t]he refusal to do so, however, does not provide an independent basis for reversing an otherwise valid conviction.” 502 U.S. at 60. That is to say, Griffin does not require the State to establish “substantial evidence to support each alternative means,” what the Wright court characterized as the “super-sufficiency condition.” 290 Kan. at 203.¹

On a more fundamental level, the problem with Wright, from a prosecutor’s perspective, is that the Court has elected to treat alternative means as a sufficiency of the evidence issue rather than an instructional issue. As prosecutors, we should work to convince the Court to reconsider this assessment.

Footnotes

1. In articulating the “super-sufficiency” condition, the Timley court relied heavily on Kitchen. The Kitchen court, in turn, based its opinion largely on the Washington state constitution. Significantly, Kitchen was a multiple acts case; it did not even involve alternative means. It is fair to argue that Kitchen’s super-sufficiency condition is at odds with Griffin, and that Washington’s state constitution cannot control a defendant’s rights in Kansas.

Indeed, in cases in which there is sufficient and (at times) overwhelming evidence of at least one means of the offense, it is difficult to understand how the matter can be properly characterized as a sufficiency problem. The issue stems not from the evidence, but from the manner in which the jury was instructed. As such, it should be analyzed no differently than any other instructional issue, with the standard of review determined by whether the defendant objected to the instruction below. The Court of Appeals’ willingness to apply invited error is an encouraging sign, as it reflects the fact that the “error” stems from the jury instructions.

Despite the fact that our Supreme Court may be unwilling to reconsider the fundamental holding of Wright, another argument remains that can be advanced in an attempt to avoid reversal. Specifically, prosecutors should argue (if supported by the facts of the case) that reversal is not necessary because the State elected the means of committing the offense at the trial court level. Kansas courts have held in the context of multiple acts cases that when the State makes an election or its functional equivalent, there can be no error with respect to questions of unanimity, as it is generally understood that the jury has limited its considerations with respect to guilt or innocence to the confines of the State’s election. See State v. Dickson, 275 Kan. 683, 69 P.3d 549 (2003) (no multiple acts error because the State made the required election or its functional equivalent); State v. Fulton, 28 Kan. App. 2d 815, 23 P.3d 167 (2001) (same).

If election or its functional equivalent is sufficient to secure jury unanimity in a multiple acts case, a similar election should likewise be sufficient to provide unanimity in an alternative means scenario. Thus, if the State only presented evidence of one means at trial, and the prosecutor solely focused on that means in closing argument, an election argument should be made on appeal. There are multiple pending cases that provide the Supreme Court with the opportunity to address this argument.

Another question that our Supreme Court has yet to answer is what the appropriate remedy is when the Court finds that one or more means were not supported by the evidence. The Court seemingly has two options; one would be outright reversal, while

the other would be to reverse and remand the case for a new trial on the means for which there was sufficient evidence. Clearly, the latter is the lesser of two evils from a prosecutor's perspective. Support for such a position can be found in a law review article written by Justice Carol Beier, from which she quoted extensively in Wright. In Justice Beier's article, she explained the remedy for a violation of Timley's super-sufficiency rule:

"In a Timley alternative means case, any reversal would be grounded on a failure of proof, a violation of the super-sufficiency condition. Thus retrial on that theory could not be permitted. It, like retrial on any theory held unsupported by sufficient evidence on appeal, would result in double jeopardy. *The defendant can only be retried on the theory for which evidence was sufficient the first time*, without the pollution of evidence or argument supporting the alternative theory." Beier, *Lurching Toward the Light: Alternative Means and Multiple Acts Law in Kansas*, 44 Washburn L.J. 275, 294 (2005). (Emphasis added.)

Because our Supreme Court adopted Justice Beier's interpretation of the alternative means rule, it is reasonable to argue that the Court also intended to

adopt her interpretation of the remedy for a violation of the rule.

Alternative means is a rapidly evolving and complex area of the law. It is incumbent upon prosecutors to keep up with the numerous appellate opinions addressing the issue. While Benjamin Franklin may not have been thinking of alternative means when he said, "An ounce of prevention is worth a pound of cure," his quotation should remind prosecutors to carefully draft jury instructions and thoughtfully manage their cases from start to finish. ☺

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Securities-Related Prosecution in Kansas: A Primer

By Josh Ney, Special Assistant Attorney General & Prosecuting Attorney, Office of the Kansas Securities Commissioner

Introduction

In an effort to aid district and county attorney offices across the state in identifying and charging securities-related felonies, this article explains the nature and scope of securities fraud and other related criminal prosecution in Kansas. Moreover, the article seeks to explain the unique advantages of prosecuting various types of financial crime under the Kansas Uniform Securities Act versus prosecuting under more general fraud and theft theories. Lastly, this article explains the role of the Office of the Kansas Securities Commissioner (“KSC”) as the principle regulator of Kansas’ securities law in the state and the partnership role the agency can serve in assisting district and county attorneys in their roles as the primary prosecutorial authorities in their jurisdictions.

The Kansas Uniform Securities Act

Since becoming the first state in the nation to adopt wide-ranging securities-related or “blue sky” laws in 1911, Kansas has led the way as an effective and efficient state regulator of securities offerings and capital formation.¹ The Office of the Kansas Securities Commissioner is the executive-branch agency charged with enforcing these laws. Among other duties, the Commissioner enforces three main acts: the Kansas Uniform Securities Act (K.S.A. 17-12a101 et seq.); the Kansas Loan Brokers Act (K.S.A. 50-1001 et seq.); and the Kansas Land Sales Practices Act (K.S.A. 58-3301 et seq.). This article is limited to a discussion of the regulatory structure and criminal provisions of the Kansas Uniform Securities Act.

The Kansas Uniform Securities Act (“Act”), codified in K.S.A. 17-12a101 et seq., provides a comprehensive regulatory scheme of professional registration (i.e. broker-dealers, agents, investment advisers, and investor adviser representatives),

securities offerings registration, compliance exams and audits, and coordination with federal and self-regulatory organization regulators.²

Beyond the Act’s administrative scope, however, lies a very potent criminal code that can be used by Kansas prosecutors, in certain factual circumstances, to enhance the penalties otherwise available under general fraud or theft statutes. The Act’s criminal code is comprised of three main types of violations, all of which are classified as varying severity levels of felonies: 1) securities fraud (K.S.A. 17-12a501 et seq.); 2) securities or professional registration related violations (K.S.A. 17-12a301 et seq.; 17-12a401 et seq.); and 3) administrative rule or order violations (17-12a508(a)(1)). The specific relevance of this discussion for Kansas district and county attorneys is found in the expanded prosecutorial toolset available through the Act. As a result, some of the enhanced statutory penalties for securities-related offenses under the Act will be discussed briefly before considering the specific elements of these crimes.

Enhanced Criminal Penalties for Securities-Related Crimes

K.S.A. 17-12a508 contains the criminal penalties for various offenses under the Act, all of which range between severity level 2 and severity level 7 felonies. There is no crime under the Act that is classified lower (less severe) than a severity level 7 felony. Securities fraud violations (K.S.A. 17-12a501 or -502) are classified according to the resulting financial loss: the top level, a loss of \$1,000,000 or more is a severity level 2, nonperson felony; the middle levels, losses of at least \$250,000, \$100,000, and \$25,000 are severity level 3, 4, and 5 nonperson felonies respectively; and the bottom level, a loss of less than \$25,000, is a severity level 6, nonperson felony. Similarly, registration-related offenses and administrative rule or order violations range between

Footnotes

1. For a thorough history of Kansas securities law, including a narrative of how Kansas became the first state in the nation to adopt comprehensive securities regulation, see Rick Fleming, *100 Years of Securities Law: Examining a Foundation*

Laid in the Kansas Blue Sky, 50 Wash. L.J. 583 (2011).

2. The most established and well known self-regulatory organization in the securities industry is the Financial Industry Regulatory Authority (FINRA).

severity level 5, 6, and 7, nonperson felonies, depending on the amount of financial loss.

Moreover, K.S.A. 17-12a508(a)(5) provides that “[a]ny violation of [the professional registration, securities-offerings registration, or securities fraud statutes] resulting in a loss of \$25,000 or more *shall be presumed imprisonment*” (emphasis added). In other words, *all* securities-related crimes resulting in a loss more than \$25,000 constitute presumptive imprisonment crimes regardless of the defendant’s criminal history score, and even fraud resulting in the loss of just one dollar (\$1), *when connected with the offer, sale, or purchase of a security*, is classified as a severity level 6, nonperson felony, constituting a presumptive imprisonment crime for criminal history scores of A-G.

What Is a Security?

The three securities-related criminal offenses discussed below have one common element: the presence of a legally recognized security. The statutory definition of “security” in the Act is located in K.S.A. 17-12a102(28), and contains a long list of financial instruments and interests considered legally recognized “securities.” This statutory definition largely mirrors the definition for a “security” under the federal Securities Exchange Act of 1934, which the Kansas Supreme Court referenced when holding that “the Kansas [Uniform Securities] Act should be developed by court decisions which are firmly grounded on prior state decisions and upon decisions of the federal courts, and the courts of our sister states.”³

In addition to the more formal types of “securities” such as stocks, bonds, and stock options, the most common types of securities found in criminal investment fraud schemes are “notes” and “investment contracts.” The commonly recognized test for determining whether a “note” is considered a legal security was established by the U.S. Supreme Court in *Reves v. Ernst & Young*, 494 U.S. 56, 62 (1990). In essence, the *Reves* test requires that courts conduct a “family resemblance” test beginning with the presumption that all “notes” are securities.⁴ This presumption may be rebutted if an instrument bears a strong “resemblance,” after an examination based on four stated factors, to “one of a judicially

crafted list of categories of instruments that are not securities” or if an issuer “convinces the court to add a new instrument to the list.”⁵

The foremost definition of an “investment contract” was established by the U.S. Supreme Court in *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946). In *Howey*, the Supreme Court found that an investment contract exists when a person: 1) invests money, 2) in a common enterprise, 3) with the expectation of profit, 4) from the efforts of others.⁶ This test was adopted by the Kansas Legislature in K.S.A. 17-12a102(28)(D), which states that an “investment contract” is an “an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor.”

Three Types of Securities-Related Offenses

1. Securities Fraud

The first, and most common, category of securities-related criminal offenses in Kansas is securities fraud. K.S.A. 17-12a501 provides:

It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly: (1) To employ a device, scheme, or artifice to defraud; (2) to make an untrue statement of a material fact, or omit to state a material fact necessary in order to make a statement made, in the light of the circumstances under which it is made, not misleading; or (3) to engage in an act, practice, or course of business that operates as a fraud or deceit upon another person.

In other words, the Kansas Securities Act calls for specific, enhanced penalties for *general fraud* (whether conducted by device, scheme, or artifice; via omission or misrepresentation of material fact; or by a defrauding act, practice, or course of business) when that fraud is *connected with the offer, sale, or*

3. *State ex rel. Owens v. Colby*, 231 Kan. 498, 501 (1982).

4. *See Reves v. Ernst & Young*, 494 U.S. 56, 63-64 (1990).

5. *See id.*

6. *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946).

purchase of a security.

Securities fraud is perhaps the most broad-ranging type of securities-related criminal offense in Kansas and may be among the types of financial crimes most commonly seen by district and county attorneys' offices in the state. When reviewing or investigating financial crimes or general fraud, Kansas prosecutors and law enforcement should stay alert to corresponding securities or investment-related activity within such schemes, due to the enhanced penalties available if one additional element ("in connection with the offer, sale, or purchase of a security") is present in the fact pattern.

2. Registration Offenses

The second category of securities-related criminal offenses in Kansas is professional or securities-offering registration offenses. K.S.A. 17-12a301 et seq. establishes the general registration requirements and procedures for all securities offerings in the state. The system is designed to provide a notice-based and merit-based system for reviewing securities offerings in Kansas. Similarly, 17-12a401 et seq. establishes the general registration requirements and procedures for securities professionals and firms (i.e. broker-dealers, agents, investment advisers, and investment adviser representatives) doing business in Kansas. Registration under the Act is a primary function of the KSC, so enforcement of these provisions is not directly connected to the day-to-day functions of district and county attorneys. Nevertheless, Kansas prosecutors should note these registration offenses as potential parallel charges in securities-related criminal activity.

3. Violation of Administrative Rules or Orders

The third and final category of securities-related criminal offense in Kansas is intentional violation of administrative rules or orders issued by the KSC. K.S.A. 17-12a508(a)(1) provides that "a conviction for an intentional violation of the Kansas uniform securities act, *or a rule adopted or order issued under this act* [exceptions omitted] . . . is a severity level 7, nonperson felony" (emphasis added). Additionally, under K.S.A. 17-12a508(a)(4),

violation of certain cease and desist orders issued under the Act is a severity level 5, nonperson felony. Although the KSC office is in the best position to police this type of violation on a day-to-day basis, Kansas prosecutors and law enforcement, when reviewing or investigating investment-related financial crime in the state, should coordinate with the KSC to determine whether the defendant is a repeat offender subject to prior adverse administrative action or has intentionally violated KSC rules or regulations. This determination could reveal additional felony charges applicable in the case.

Conclusion: The Role of the KSC in Criminal Prosecutions

K.S.A. 17-12a508(c) establishes that the primary prosecutorial authorities for securities-related criminal offenses in Kansas are local district and county attorneys. The KSC does not have independent prosecutorial authority to bring criminal actions in state district court, so the decision to charge and prosecute securities-related offenses is solely at the discretion of the local district and county attorneys. However, the KSC has specialized prosecutors, legal staff, and other resources available to independently litigate or co-chair securities-related prosecutions under special assistant attorney designation if authorized by the local authority, and the agency has had a long and successful history of coordinating and working with local prosecutors to litigate securities-related offenses. In addition to utilizing this brief survey of securities-related prosecution in Kansas, Kansas prosecutors are encouraged to use the KSC as a resource when investigating and prosecuting financial crimes in the state. 

About the Author

Josh Ney is a Special Assistant Attorney General and prosecuting attorney at the Office of the Kansas Securities Commissioner. Prior to joining the KSC, Josh was First Assistant County Attorney in the Jefferson County Attorney's Office. Josh lives in rural Jefferson County with his wife and four children.

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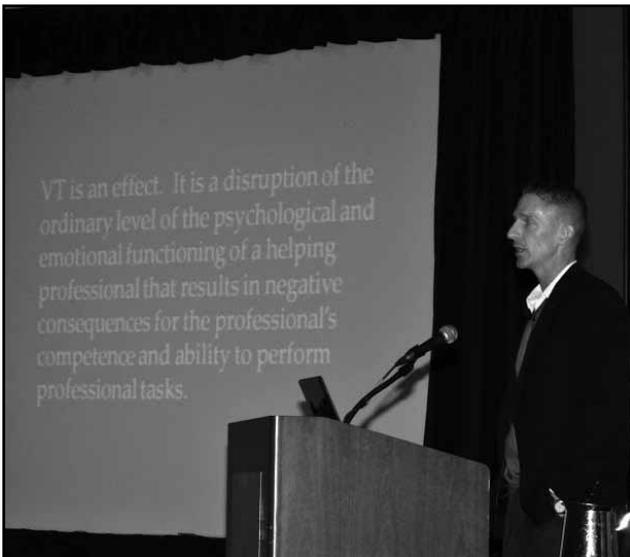
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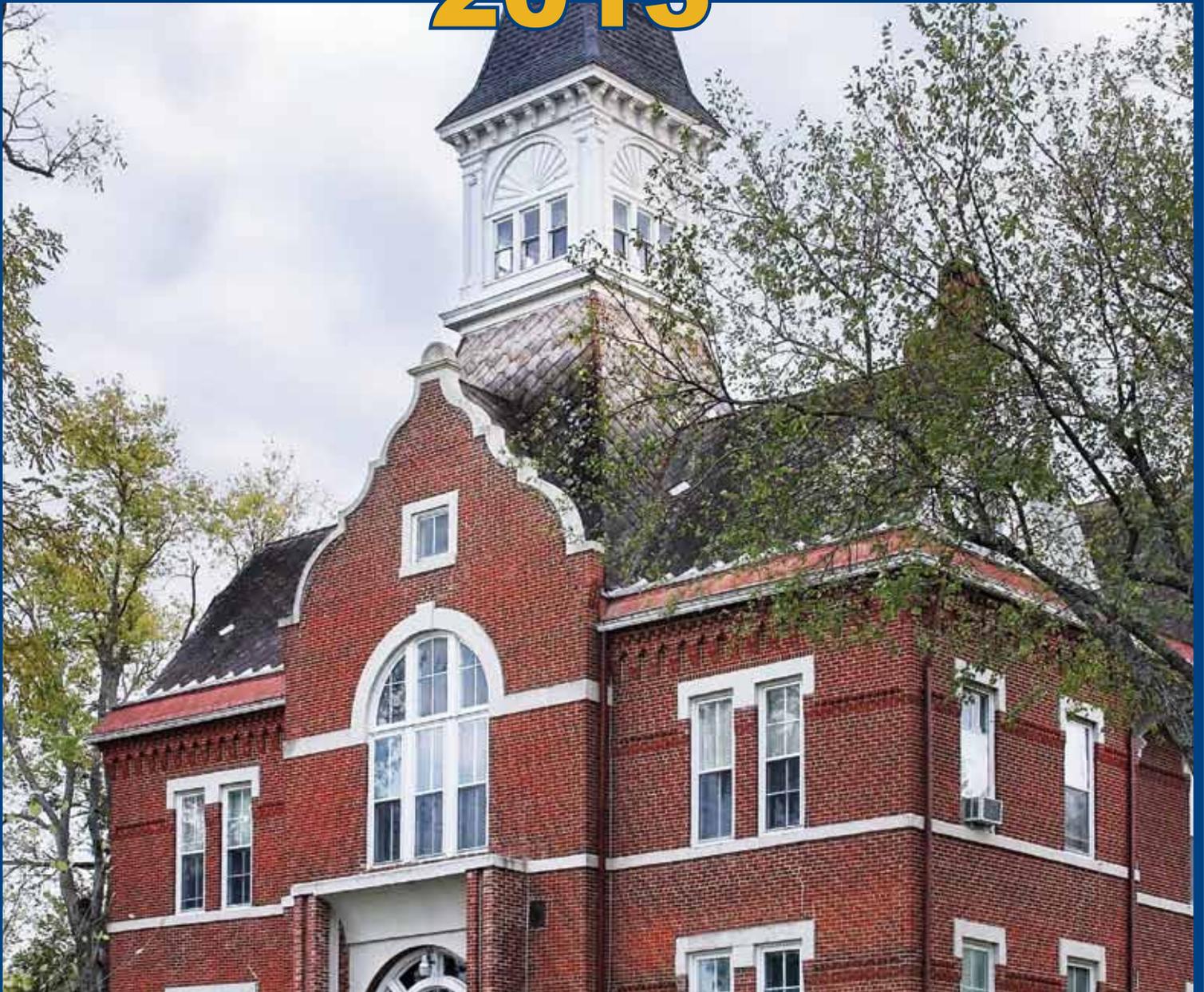
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