Approved on: March 2, 2001
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairperson Michael O'Neal at 3:30 p.m. On February 5, 2001 in Room 313-S of the Capitol.

All members were present except:
Representative Kathe Lloyd - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Judge Marla Luckert, Kansas Judicial Council, Chair Criminal Law Sub-committee
Shane Rolf, Shane's Bailbonds
Gerald Goodell, Kansas Judicial Council
John Peterson, appeared on behalf of Rebecca Wempe, Security Benefit Group
Representative Tom Burroughs
Dr. David Klein, Dean Math & Science & Technology, Kansas City Community College
Nick Tomasic, Wyandotte County District Attorney
Representative Ward Loyd

Hearings on **HB 2083 - arrest of persons released on appearance bonds**, were opened.

Judge Marla Luckert, Kansas Judicial Council, Chair Criminal Law Subcommittee, explained that the proposed bill would give judges discretion as to whether to commit an accused to custody, and would require that the judges discharge the surety. (Attachment 1)

Kansas Bar Association provided written testimony in favor of the proposed bill. (Attachment 2)

Shane Rolf, Shane's Bailbonds, doesn't believe that there are any bondsmen that abuse their authority by collecting premiums and then surrendering their clients back into custody. If the committee is inclined to pass the proposed bill he requested that they define "good cause". (Attachment 3)

Hearings on **HB 2083** were closed.

Hearings on **HB 2082 - a provision incertain documents for a nonprobate transfer is nontestamentary**, were opened.

Gerald Goodell, Kansas Judicial Council, commented that the proposed bill sets out six types of instruments that, if found valid, would not nullify a will. (Attachment 4)

John Peterson, Security Benefit Group, stated that this legislation is important to ensure that benefits are valid and to do so without litigation. (Attachment 5)

Hearings on **HB 2082** were closed.

Hearings on **HB 2194 - admissibility of forensic reports**, were opened.

Representative Tom Burroughs appeared as the sponsor of the proposed bill. He explained that Bethany Medical Center is not providing forensic examinations and that all of their equipment has been moved to Kansas City Community College Forensic Laboratory. This bill would simply add them to the statute so they would be qualified as a Forensic Laboratory to provide evidence in a preliminary examination. (Attachment 6)

Nick Tomasic, Wyandotte County District Attorney, commented that the proposed bill would simply add to the list of those Forensic Laboratories that are certified to provide evidence in trials. (Attachment 7)

Dr. David Klein, Dean Math & Science & Technology, Kansas City Community College, informed the committee that they currently have a PHD Chemists ready to do the work in the forensic lab.

Hearings on **HB 2194** were closed.

Hearings on **HB 2207 - abatement of common nuisances; adding felonies committed by gang members to list of unlawful activities**, were opened.

Representative Ward Loyd appeared as the sponsor of the bill. He stated that this was the same bill as introduced and passed out of the 2000 Judiciary Committee. The purpose of the bill is "gang abatement" through the use of civil injunction. This would make the injunctions easier to use, more efficient and less costly than criminal prosecutions. (Attachment 8)

Hearings on **HB 2207** were closed.

Representative Shriver made the motion to approve the committee minutes from January 10, 16, 17, 22, & 23. Representative Dillmore seconded the motion. The motion carried.

The committee meeting adjourned at 5:30 p.m. The next meeting is scheduled for February 6, 2001.

Judge Marla Luckert

JUDICIAL COUNCIL TESTIMONY
IN SUPPORT OF HOUSE BILL 2083

BEFORE THE
HOUSE JUDICIARY COMMITTEE
February 5, 2001

The Criminal Law Subcommittee of the Judicial Council originated this bill which was approved by the Judicial Council. Members of the Criminal Law Subcommittee include district court judges, prosecutors, defense attorneys, law professors and counsel to law enforcement agencies.

House Bill 2083 amends K.S.A. 22-2809 which relates to the surrender of an obligor by a surety. K.S.A. 22-2809 is a part of the statutory regulation of the pretrial release of persons charged with a crime, including provisions allowing for the release of an arrested person upon the posting of a surety. The surety is often a professional bondsman, but may be any resident of Kansas who has posted a surety on behalf of the accused and met other requirements of the Court. Under K.S.A. 22-2809, a surety is authorized to return the accused to custody for any reason. In fact, the surety is not required to have a reason. The Court is then required to place the accused in custody and to release the surety from any obligation of the bond. The Judge has no discretion.

This provision and the lack of discretion were brought to the committee by a judge and a criminal defense attorney from Douglas County. Each of them had dealt with separate situations in which it was felt that there was no articulated justification for the surrender. Yet, the Judge had no discretion but to place the accused in custody, allow the surety to walk away having the benefits of whatever the surety had been paid, and yet have no obligation in return. The committee unanimously agreed that an amendment was appropriate. Other members told of situations where the application of the mandatory language was unjust. Some recounted situations that were particularly egregious, involving situations where the accused told the judge that the surety had asked the accused to engage in illegal activities and, when the accused had refused, the surety had returned the individual to court. Other cases were less salacious, but still seemed unjust in that the accused had paid the surety, often a considerable amount of money, and the surety was remanding the person to custody for no articulated reason. This allows the surety to benefit financially without any risk in return.

Last session, the Judicial Council proposed an amendment, which became Senate Bill 90, that would have required the release of the surety only if there is good cause for the return of the individual to custody. When this proposal was submitted to this Committee last session, there was concern that the issue might shift to the other end of the spectrum and a surety would not be released from an obligation when the surety had a legitimate concern that a defendant may fail to appear.

To deal with this concern, House Bill 2083 gives the Judge discretion as to whether to commit an accused to custody, but requires that the Judge discharge the surety. This was accomplished by the amendments at lines 21 and 22. In line 21, the word "shall" is deleted. The

words "may, for good cause" allow the Court to exercise discretion in determining whether the accused should be placed in jail. However, the word "shall" is inserted on line 22 so that the Court is required to release the surety from the obligation.

This amendment will not impact the usual conduct of most proceedings. Usually the surety presents good cause for the commitment and the Court will not want to assume a risk and will place the accused in custody.

However, there remained a concern that this proposal did not deal with the situation where the surety had not expressed good cause. Usually, the Court will not be comfortable with a situation in which there is no surety for the appearance of the accused. Yet, after having paid for one surety, an accused may not have the ability to pay another surety. It may be unjust for the accused to have to do so. More importantly, the Court must consider the accused's constitutional right to a bond which is not "excessive." Kansas Constitution, Bill of Rights § 9. Consequently, the Committee felt the language at lines 25 to 28 was necessary. The last sentence was meant as a remedy for the rare situation where the Court felt that the surety was breaching its contract with or obligation to the accused and to the Court and, yet, was benefitting from the bargain to the unjust detriment of the accused. It would be anticipated that the use of the provision would be rare.

The Judicial Council urges your support of House Bill 2083.

KANSAS BAR ASSOCIATION

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LEGISLATIVE TESTIMONY
HOUSE BILL 2083

February 5, 2001

TO: Chairman Mike O'Neal and Members of the House Judiciary Committee

FROM: Paul Davis, KBA Legislative Counsel

The Kansas Bar Association strongly supports enactment of House Bill 2083. As you are aware, this bill is a product of the Kansas Judicial Council. We believe the Judicial Council has brought a very important issue before you today and has crafted a good solution to the bad policy that is currently embodied in K.S.A. 22-2809.

Current law forces a judge to place a person who is charged with a crime in custody subsequent to a pretrial appearance if such action is requested by a surety (a surety is usually a bondsman). We believe this provision allows a surety to exercise unwarranted authority over the court system. This is why we support the change to K.S.A. 22-2809 that the this bill provides so that a judge may properly exercise his or her discretion as to whether a person accused of a crime should be put in custody.

The decision as to whether an individual should be placed in custody during pretrial proceedings should be made by a judge, not a bondsman. The current law allows a surety to place an accused individual in custody for any reason. If the judge does not agree with the surety's decision, the judge has absolutely no recourse. We don't believe this is good policy and therefore request your favorable consideration of House Bill 2083. Thank you!

House Judiciary
2-5-01
Attachment 2

Testimony in opposition to House Bill 2083

My name is Shane Rolf, I am a surety bail bondsman in Johnson County. I have been in business for 15 years. I would like to offer my thoughts in opposition to this bill, which directly affects my business and livelihood.

I understand the goal of this bill, and that goal is admirable: to prevent a bail bondsman from abusing his authority and unjustly enriching himself by collecting premiums, then promptly surrendering the defendants back into custody and keeping the premiums.

This practice is little more than theft. There are, however, other ways to prevent this or respond to this, which would be better or more acceptable than this bill.

1. This is not, in my 15 years of experience, a prevalent problem. Bondsmen who surrender too many of their clients - even for legitimate reasons – soon gain a reputation amongst their target market (incarcerated accused defendants) as someone who will not treat them fairly. As a result, fewer people attempt to retain their services.
2. If a bondsman did surrender a client with no legitimate rationale, that defendant already has a right to sue the bondsman for the return of the premium, in small claims, limited action or, if the premium was large enough, in District Court. This way the party who is damaged needs to actually make a legal claim to that effect, instead of the court simply initiating a claim against the bonding company and then deciding that claim as well.
3. Surety bonding companies are authorized by the administrative judge of each jurisdiction. If the administrative judge begins to see a pattern of this type of behavior, he or she certainly has the authority to punish the bonding company with a suspension or outright disqualification of its authority to post bail in and for the jurisdiction.

In short, there are already provisions in the law, as it exists now to deal with this issue.

I have not been able to do an exhaustive search of the various state laws in the few days since I first learned of this bill, but I have been able to find a few statutes and cases. It is interesting to note that while some states do have statutory remedies for allowing refunds of bail bond premiums, none that I have found allow the court to reject a surrender for whatever reason. The most they allow is for the court to order a refund for a baseless surrender so that the defendant has the resources to hire another surety. It is absolutely outrageous to require a surety to remain on a bond without its consent subsequent to a surrender. In State of Kansas v. Indemnity Insurance Company, the court held that since the bonding company could surrender the defendant at any time, and for any reason, it wasn't entitled to a great deal of leeway when problems developed. This is the logic that pervades the case precedents relating to surety bail bonds.

Further the bill, as it currently reads, would allow the court to release the defendant back out on the same bond AND require that the surety refund the premium.

It makes absolutely no sense to allow the courts to refuse to accept a surrender. This flies in the face of the law, as it currently exists on every level, both state and federal. It flies in the face of the common law. If we feel that a defendant is no longer a good risk, even if that reason is unreasonable and unfounded, we should be allowed to surrender that individual and absolve ourselves of liability for his continued appearance. Should that result in a refund is another issue.

In short it is a bad idea to change the statutory language from "shall" to "may with good cause"

Refund issues

Essentially, this would put the burden and expense on the bonding company. In the event the judge ordered the surety to refund the bond premium, the bonding company would be forced to hire counsel and appeal the judge's decision. This would obviously cost thousands in an attempt to reclaim an average bond fee of less than $250.00. In every situation the bonding company would be faced with the situation: is this worth appealing? And in almost every instance the answer will be: no, the expense does not justify the reward. Whereas, if the defendant were required to file his own action, such as small claims court, the expense to both parties would be minimal.

There are also due process issues. The bonding company *is* being deprived of property; the statute is not clear what format this action would take. Would it follow standard Chapter 60 procedures with a hearing, discovery, etc? Would the defendant have to make a complaint and/or request for refund or would the judge simply take it upon himself to order some amount of money refunded. And to whom would that money be refunded? I know that I don't keep records of who exactly paid every single premium. But often the defendant doesn't pay the bond premium. Most often it is the co-signer, sometimes it is a third party who is willing to pay the bond premium but is unwilling to assume the potential liability of co-signing. To whom does to court order the bond premium refunded?

And if there is to be a hearing, who is the complainant? The Judge? This establishes a situation wherein judges, on their own motions, are in essence filing lawsuits against bonding companies on behalf of criminal defendants whose cases they are presiding over.

And along this same line, this is a civil issue between parties to a contract (none of whom is the presiding judge), but this statute would apply to bonds posted in municipal courts as well. Obviously, municipal courts do not have the authority to even hear civil cases. They have the authority to levee fines for violations of municipal codes, but that is not the case here. Would those instances need to be forwarded to the District Court level for resolution? And if so, who pays the filing fee, and is it heard in civil or criminal court?

Good Cause

If you choose to proceed with some sort of requirement for refunds in instances wherein no "good cause" existed for the surrender, I would simply ask that you further define "good cause". There are judges who are quite hostile to the bail bond industry and these courts will feel that nothing constitutes good cause for surrender prior to a failure to appear. There will be judges who will order a refund in every single case of surrender prior to failure to appear. All of the other states whose laws have some sort of refund requirement spell out with at least some specificity exactly when a refund might be warranted.

I am including this list of instances wherein a bond surrender prior to failure to appear would be considered to be done with "good cause" and in such instances no refund of bail bond premium would issue:

1. The defendant changes his address or employment without notifying the surety in writing
2. The defendant conceals himself from the surety
3. The defendant leaves the jurisdiction of the court without the written permission of the surety or the court
4. The defendant violates any condition placed upon the bond by the court or by the surety
5. The defendant is arrested for any crime
6. The defendant fails to appear in other court proceedings
7. The indemnitor on the bond attests in writing the desire to be released from the bond
8. The defendant fails to pay any fees due to the surety
9. The defendant or indemnitor provides false information to the surety
10. The defendant commits any act which could reasonably be interpreted as an intent to cause a bond forfeiture
11. The defendant or indemnitor disposes of or attempts to dispose of any property given as collateral to secure the bond
12. The charges in the complaint are altered, amended or enhanced such that the defendant's potential sentence has increased since the initial posting of bail
13. The defendant requests the surrender

This lists encompasses virtually every legitimate reason for surrendering a bail bond prior to a failure to appear. I would ask that if you choose to proceed with this bill that it be modified to include these definitions of "good cause".

Conclusion

The problem this bill proposes to address is relatively rare; there are already current remedies available to address this problem, both legal and market based; the problems created by the broad and somewhat vague language of this bill would dwarf the original issue this bill hoped to address. Given this, I would urge you not to allow this bill to advance further.

JUDICIAL COUNCIL TESTIMONY
ON 2000 HB 2082
FEBRUARY 5, 2001

During the 2000 Legislative session, the House Judiciary Committee requested that the Kansas Judicial Council study 2000 SB 485 concerning nonprobate transfer on death. The study was undertaken by the Judicial Council Probate Law Advisory Committee whose members are: Gerald L. Goodell, Chair, Topeka; Cheryl C. Boushka, Overland Park; Hon. Sam K. Bruner, Olathe; Tim Carmody, Overland Park; Michael L. Clutter, Topeka; Peter A. Cotorceanu, Topeka; Martin B. Dickinson, Jr., Lawrence; Jack R. Euler, Troy; Senator Greta Goodwin, Winfield; Mark Knackendoffel, Manhattan; Justice Edward Larson, Topeka; Philip D. Ridenour, Cimarron; and Willard B. Thompson, Wichita.

SB 485 proposed to enact Section 101 of the Uniform Nonprobate Transfer on Death Act (which is part of the Uniform Probate Code) into Kansas law. The reason for SB 485 is Security Benefit Life Insurance Company's desire to remove any doubt as to the validity of provisions for nonprobate transfers, such as IRA's, tax sheltered annuities, retirement plans and other instruments.

After consideration of SB 485, the Judicial Council Probate Law Advisory Committee supported the purpose of the bill, but was of the opinion the purpose could be accomplished more simply. The Probate Law Advisory Committee noted that while Kansas has adopted a few sections of the Uniform Probate Code, because Kansas is not a Uniform Probate Code state, that provisions of the Code often don't mesh well with Kansas law.

The Probate Law Advisory Committee worked with representatives of Security Benefit to resolve problems in the bill and to meet Security Benefit's needs. As drafted, the bill meets Security Benefit's needs in clearly stating that certain contractual arrangements are nontestamentary in nature. The Probate Law Advisory Committee and the Judicial Council support HB 2082.

Attached is a copy of Section 6-101 of the Uniform Probate Code relating to nonprobate transfers on death and a copy of 2000 SB 485.

PART 1

PROVISIONS RELATING TO EFFECT OF DEATH

Section 6–101. Nonprobate Transfers on Death.

(a) A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary. This subsection includes a written provision that:

(1) money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later;

(2) money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or

(3) any property controlled by or owned by the decedent before death which is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(b) This section does not limit rights of creditors under other laws of this State.

COMMENT

This section is a revised version of former Section 6–201 of the original Uniform Probate Code, which authorized a variety of contractual arrangements that had sometimes been treated as testamentary in prior law. For example, most courts treated as testamentary a provision in a promissory note that if the payee died before making payment, the note should be paid to another named person; or a provision in a land contract that if the seller died before completing payment, the balance should be canceled and the property should belong to the vendee. These provisions often occurred in family arrangements. The result of holding such provisions testamentary was usually to invalidate them because not executed in accordance with the statute of wills. On the other hand, the same courts for years upheld beneficiary designations in life insurance contracts. The drafters of the original Uniform Probate Code declared in the Comment that they were unable to identify policy rea-

sons for continuing to treat these varied arrangements as testamentary. The drafters said that the benign experience with such familiar will substitutes as the revocable inter vivos trust, the multiple-party bank account, and United States government bonds payable on death to named beneficiaries all demonstrated that the evils envisioned if the statute of wills were not rigidly enforced simply do not materialize. The Comment also observed that because these provisions often are part of a business transaction and are evidenced by a writing, the danger of fraud is largely eliminated.

Because the modes of transfer authorized by an instrument under this section are declared to be nontestamentary, the instrument does not have to be executed in compliance with the formalities for wills prescribed under Section 2–502; nor does the instrument have to be probated, nor does the personal representative have any power or duty with respect to the assets.

The sole purpose of this section is to prevent the transfers authorized here from being treated as testamentary. This section does not invalidate other arrangements by negative implication. Thus, this section does not speak to the phenomenon of the oral trust to hold property at death for named persons, an arrangement already generally enforceable under trust law.

The reference to a "marital property agreement" in the introductory portion of subsection (a) of Section 6–101 includes an agreement made during marriage as well as a premarital contract.

The term "or other written instrument of a similar nature" in the introductory portion of subsection (a) replaces the former language "or any other written instrument effective as a contract, gift, conveyance or trust" in the original Section 6–201. The Supreme Court of Washington read that language to relieve against the delivery requirement of the law of deeds, a result that was not intended. *Estate of O'Brien v. Woodhouse*, 109 Wash.2d 913, 749 P.2d 154 (1988). The point was correctly decided in *First National Bank in Minot v. Bloom*, 264 N.W.2d 208, 212 (N.D.1978), in which the Supreme Court of North Dakota held that "nothing in [former Section 6–201] of the Uniform Probate Code . . . eliminates the necessity of delivery of a deed to effectuate a conveyance from one living person to another."

Session of 2000

SENATE BILL No. 485

By Committee on Judiciary

1-25

AN ACT concerning nonprobate transfer on death; relating to nontestamentary nature.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary. The provisions of this subsection include a written provision that:

(1) Money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later;

(2) money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or

(3) any property controlled by or owned by the decedent before death which is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(b) The provisions of subsection (a) do not limit rights of creditors under other laws of this state.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

The Security Benefit Group of Companies

Security Benefit Life Insurance Company
Security Benefit Group, Inc.
Security Distributors, Inc.
Security Management Company, LLC

700 SW Harrison St.,
Topeka, Kansas 66636-0001
(785) 431-3000

Date: February 1, 2001

To: Members of the House Judiciary Committee

From: Roger K. Viola
Senior Vice President,
General Counsel and Secretary
Security Benefit Life Insurance Company

Subj: House Bill 2082

Mr. Chairman, members of the Committee, my name is Roger Viola and I am pleased to appear before you today on behalf of the Security Benefit Group of Companies.

Security Benefit Life Insurance Company ("Security Benefit") is a Kansas life insurance company located in Topeka, Kansas with approximately $10 billion in assets under management. Security Benefit offers fixed and variable annuities, money management services, retirement plans and, through its subsidiary broker/dealer, Security Distributors, Inc., a family of mutual funds. Security Benefit also offers individual retirement accounts. Approximately 4,000 Kansas residents invest in Security Benefit's mutual funds through IRAs.

Proposal: Security Benefit Life Insurance Company proposes that the Kansas Legislature enact House Bill 2082, a modified version of Section 101 of the Uniform Nonprobate Transfers on Death Act. This statute would provide that a variety of contractual arrangements, including beneficiary designations in individual retirement accounts, be regarded as nontestamentary in nature.

Background: Nonprobate transfers on death have been challenged as invalid testamentary transfers in states that have not adopted the Nonprobate Transfers on Death Act or similar legislation. See, e.g., E.F. Hutton & Co. v. Wallace, 863 F.2d 472 (6th Cir. 1988) (plaintiff argued that assets of custodial IRA were part of probate estate and did not pass to beneficiary named by the owner-decedent); In re Catanio, 703 A.2d 988, 991 (N.J. Super. Ct. App. Div. 1997) (where trust beneficiary did not acquire any interest in trust property prior to the death of the settlor, the trust was testamentary and invalid if not executed in compliance with the statute of wills); Virgil v. Sandoval, 741 P.2d 836, 838 (N.M. Ct. App. 1987) (plaintiff argued that deed executed by decedent was an attempted testamentary disposition and was invalid because it did not comply with the statutory provisions for the making and execution of a will); Bielat v. Bielat, 721 N.E.2d 28, 31

(Ohio 2000) (wife argued that beneficiary clause in husband's IRA constituted testamentary language and was therefore null and void).

Kansas law on nonprobate transfers has evolved through a series of court decisions and legislative enactments. In 1974, the Kansas Supreme Court held that the transfer of a savings account payable to a third party upon the death of the depositor was testamentary in character, and thus invalid because it was not executed in compliance with the statute of wills. Truax v. Southwestern College, 214 Kan. 873, 883, 522 P.2d 412, 420 (1974). The Kansas Legislature effectively overruled Truax in 1979 when it enacted Kan. Stat. Ann. §§ 9-1215 to -1216, which authorized the transfer of property through payable on death bank accounts without compliance with the statute of wills. In 1987, the Supreme Court held that the payable on death statutes applied to Totten trusts, as well. In re Estate of Morton v. Moore, 241 Kan. 698, 705, 769 P.2d 616, 621 (1987). A Totten trust is created by depositing money into a bank account as "trustee" for a named beneficiary. Id. at 701, 769 P.2d at 618. The beneficiary's right to the trust funds arises upon the depositor's death. Id. Kansas law therefore clearly permits payable on death bank accounts and Totten trusts.

In McCarty v. State Bank of Fredonia, 14 Kan. App. 2d 552, 795 P.2d 940 (1990), the Kansas Court of Appeals held that the beneficiary designation in a custodial IRA was void and invalid. Ralph McCarty named his brother Clarence as the beneficiary of his IRA. Id. at 553, 795 P.2d at 942. After Ralph's death, Ralph's surviving spouse, Mary, sued to have the IRA beneficiary designation declared invalid and to have the assets of the IRA become a part of Ralph's estate. Id. The court rejected Clarence's argument that Ralph's IRA should be treated as a payable on death account or a Totten trust under Kan. Stat. Ann. § 9-1215. Id. at 559, 795 P.2d at 945. Instead, the court treated Ralph's IRA as a revocable inter vivos trust and ordered that the IRA assets be distributed in accordance with Ralph's will, subject to Mary's right to receive one-half of the assets. Id. at 557, 561-62, 795 P.2d at 944, 947.

The Supreme Court later disapproved of the McCarty Court's invalidation of the entire IRA in Taliaferro v. Taliaferro, 252 Kan. 192, 843 P.2d 240 (1992). The Taliaferro Court stated that the portion of Ralph's IRA not subject to Mary's right to elect should have been distributed to Clarence rather than to Ralph's estate. Id. at 204, 843 P.2d at 248. The dicta in Taliaferro, however, was based on the Court's opinion that McCarty improperly expanded the elective share law. Taliaferro did not address the issue of whether an IRA beneficiary designation would be invalid as testamentary in nature.

In 1994, the Kansas Legislature adopted Section 301 of the Uniform Nonprobate Transfers on Death Act, the Uniform Transfer on Death Security Registration Act (Kan. Stat. Ann. §§ 17-49a01 to 49a12). This law allows the owner of a security to register the title in transfer-on-death form. Kansas therefore already permits those nonprobate transfers governed by Section 201 (pay-on-death bank accounts) and Section 301 (transfer-on-death security registrations) of the Uniform Nonprobate Transfers on Death

Act. By enacting a modified version of Section 101, the remaining section of the Act, the Kansas Legislature would remove any doubt as to the validity of provisions for nonprobate transfers contained in other instruments, such as IRAs, tax-sheltered annuity custodial agreements, Section 529 qualified state tuition program accounts, and retirement plans. House Bill 2082 would eliminate litigation like McCarty, and ensure that beneficiary designations are upheld as suggested in Taliaferro.

Note that Security Benefit's proposal would not affect a surviving spouse's right of election. In 1994, the Kansas Legislature adopted the "Redesigned Elective Share" under the Uniform Probate Code. Kan. Stat. Ann. §§ 59-6a201 to -6a217. Under the new law, a surviving spouse is entitled to a specified percentage of the decedent's "augmented estate," which includes nonprobate transfers to others. Had House Bill 2082 been the law at the time of McCarty, the proceeds of the IRA would have been payable to the IRA beneficiary, subject to spousal election, rather than payable to the decedent's estate, subject to spousal election.

Twelve states (Alaska, Arizona, California, Colorado, Kentucky, Michigan, Montana, Nebraska, New Mexico, North Dakota, Texas and Wisconsin) have already adopted Section 101 of the Uniform Nonprobate Transfers on Death Act (or identical provisions found at Section 6-101 of the Uniform Probate Code). Four other states (Idaho, Maine, South Carolina and Utah) have adopted the pre-1989 version of the Act. Four states (Connecticut, Louisiana, Massachusetts and Missouri) have adopted other legislation specifically designating certain nonprobate transfers as nontestamentary.

Impact: By designating certain nonprobate transfer provisions as nontestamentary, House Bill 2082 would ensure that instruments containing such provisions do not need to be executed in compliance with the formalities required for wills and do not need to be probated. Uniform Nonprobate Transfers on Death Act § 101 comment (1991). Adoption of this statute would (i) ensure that the legitimate expectations of contract holders would be satisfied and their beneficiary designations upheld as valid; and (ii) save life insurance companies and other financial institutions from possible litigation regarding the lawful payee of contract proceeds on the death of the contract holder.

STATE OF KANSAS

TOM BURROUGHS
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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
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MEMBER: FEDERAL & STATE AFFAIRS
FISCAL OVERSIGHT
E-GOVERNMENT
JOINT COMMITTEE ON
INFORMATION TECHNOLOGY

February 5, 2001

Chairman O'Neal
Committee Members

Thank you for the opportunity to appear before such an esteemed group of Legislators. My commitment to each of you is that my testimony will be brief.

The contents of HB 2194 were requested by the District Attorney's (D. A's.) office of Kansas City, Kansas/Wyandotte County. As the bill indicates, the D. A's. office has requested that the Kansas City, Kansas Community College Forensic Laboratory and the Kansas City, Missouri Regional Crime Laboratory be included for utilization of forensic examination, analysis, comparison or identification. The Forensic Examiners Findings shall be admissible evidence in a preliminary examination.

With the loss of forensic services previously provided by Bethany Medical Center, we have identified a new opportunity with the afore-mentioned providers.

I would also request that this occur upon publication in The Register.

I ask for your consideration in this issue and again thank the committee for this opportunity.

I will yield to questions.

Rep. Tom Burroughs
#33

House Judiciary
2-5-01
Attachment 6

Nick Tomasic, Wyandotte County D.A.

HOUSE BILL 2194

House Bill 2194 concerns the admissibility of a report of a Forensic Examiner at the preliminary hearing, without the necessity of the examiner being present. This is not a new bill. The original bill was in 1974, amended in 1982, and again in 1986, 1989, 1996, and 1997.

Prior to 1982, the State would be required to file a motion stating the intent to have the report admitted into evidence without the necessity of calling the examiner. The defense could object and the State would then be required to call the examiner. The 1982 Legislature amended the law to eliminate the motion procedure entirely.

The Legislative notes in 1982 are that the Kansas Bureau of Investigation requested and supported the bill as an economic measure. 95% of the examiners' time was spent traveling throughout the state and only 5% was spent testifying. Turn-around time is of importance. We need to have the evidence examined and a report filed before we can file charges. The K.B.I. labs in Topeka and Great Bend are swamped. The examiner is out of the office testifying; the examinations are not being conducted.

This bill corrects that problem.

The amendments in 1986, 1989, 1996, and 1997 were simply to add additional labs to the bill. There are now 17 labs, including labs in Missouri, Sedgwick County, Overland Park, Shawnee County, Topeka, Wichita and federal government labs. We are asking that two additional labs be included: **Kansas City, Missouri Regional Crime Lab and Kansas City, Kansas Community College Forensic Lab.** We will send evidence to either facility.

Kansas Supreme Court case, *State v. Sherry*, 233 Kan. 920, (1983), upheld the constitutionality of the statute. The Supreme Court stated that if the parties want the examiner personally present, they could use the subpoenas to compel their presence.

We are asking that two more labs be included in the law.

STATE OF KANSAS

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TOPEKA

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TESTIMONY IN SUPPORT OF HB 2207

February 5, 2001

Chairman O'Neal and Committee Members:

I appear today on behalf of the City of Garden City, Kansas, and its residents, in support of favorable consideration of House Bill 2207. By virtue of the timing of the hearing on this bill, and prior scheduling commitments, members of the city staff and the city's governing body were not able to be present to present personal testimony.

House Bill 2207 is identical to a measure (House Bill 2775) that was recommended for passage without amendment by this Committee last year, and then favorably acted upon and passed out of the House of Representatives. We believe that timing did not permit the issue to be scheduled for hearing in the Senate. Thus, the matter is again submitted for consideration.

I provide you with testimony submitted last year on HB 2775 by a representative of the City of Garden City, including a memorandum from the Investigations Division Commander of the Garden City Police Department. There is further submitted an issue paper, "Civil Approaches to Gang Abatement."

House Bill 2775 is modeled after a section of the California Penal Code (Section 186.20–186.28) known popularly as the "California Street Terrorism Enforcement and Prevention Act." The California code provision has been tested in court action, and upheld.

Chairman Mike O'Neal, et al.
House Judiciary Committee
Testimony in Support of HB 2207
by Rep. Ward Loyd
February 5, 2001

A review by Garden City city officials of various intervention strategies designed to abate gang problems indicate two approaches that have been successful in other areas of the country. These primarily involve an anti-nuisance injunctive strategy against gangs or landlords or both, initiated by either the government or citizens. A secondary strategy involves educational efforts involving landlords, citizens, and students. HB 2775 addresses the former, and will be used as a part of the educational efforts.

The concept behind HB 2207 is "gang abatement" through the use of civil injunctions. Injunctions are easier to use, more efficient, and less costly than criminal prosecutions. Injunctions can be tailor-made to attack the specific gang conduct causing a public nuisance, and can target an area or a single locale. Injunctions serve as a vehicle to empower and mobilize neighborhoods, and provide a shelter to those who wish to take their neighborhood's back.

Neighbors must be contacted, and their support and declarations (affidavits) obtained. It is difficult to refute the declarations of residents or business owners who describe how their lives have been disrupted by gun shots, loud and vulgar language, fights or assaults, threats of violence, drinking alcohol in public, drug sales or abuse, and similar items. These declarations can be sealed by the Court and protect the residents from retaliation. All of this engenders cooperation between citizen and police, and build trust through establishment of partnerships.

Civil abatements do not replace criminal prosecutions, they complement them. This bill, if passed, will provide a tool by which to involve neighbors and neighborhoods in the process of community policing.

Thank you.

City of Garden City

LEGISLATIVE TESTIMONY

TO: Chairman O'Neal and Members, House Judiciary Committee

FROM: Jim Kaup, on behalf of the City of Garden City

RE: **HB 2775; Common Nuisances-Felony Activity by Gang Members**

DATE: February 8, 2000

The 2000 State Legislative Policy Statement adopted by the City Commission of Garden City on December 28, 1999 provides:

> "The City supports legislation to amend the common nuisance statute, K.S.A. 22-3901, to add to the list of property declared to be common nuisances property that is used to maintain and carry on gang-related activities."

Like many communities in Kansas and across the nation, Garden City continues to face the problem of youth gangs. In order to deal effectively with this problem, we have engaged in a number of approaches, both proactive and reactive. The City has expanded the scope of its DARE program in the schools to focus even more attention on anti-gang education. In a cooperative program that involves the business community, private citizens, local law enforcement, and other municipal departments, we have significantly reduced the gang graffiti problem in Garden City through an aggressive approach to cleanup and by restricting the sale of spray paint to minors. The special "street gang unit" formed a few years ago in the Garden City Police Department continues to be highly active in identifying and investigating gang members, notifying parents, conducting surveillance, working closely with the schools through their administration and through the school resource officers assigned to them by the department, and arresting gang members on various criminal charges.

CITY ADMINISTRATIVE CENTER
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8-3

As a consequence of all of our efforts, the community has achieved notable success in the reduction of gang activity and the decline in the number of our youth being recruited into local gangs.

However, there is still much that needs to be done in Garden City. Of particular concern to us is what happens to the quality of life in a neighborhood when a particular residence becomes a focal point for gang activity. Such locations become the neighborhood headquarters for vandalism, burglary, drug trafficking, and just plain intimidation. The hard-wording, law-abiding residents of the neighborhood are afraid for their safety, even while on their own property, and those residents fear for the influence this activity may have on small children in the neighborhood. The police respond as aggressively as possible when violations occur, but are often limited in what they can do. The community needs another option to address situations like this.

That is precisely what the City is asking for in House Bill 2775. We seek to expand the range of options available to us to combat gangs in our community, specifically by amending K.S.A. 22-3901 to enable the use of common nuisance statutes against gang activity. This legislation would add specified gang activity to the list of common nuisances. This would give local authorities the ability to file for injunctive and other relief currently provided for under K.S.A. 22-3901 *et seq*. Although new to Kansas, this method has been employed with some success by communities in other states, most notably in Arizona and California where similar laws have survived legal challenges.

It has been our experience in Garden City that complex community problems such as criminal gangs, substance abuse, and other related problems are best addressed on multiple fronts. We view this legislation as assisting us in this regard, by giving us another tool that we can utilize in our efforts to eliminate gang activity and keep the streets safe for our citizens. As such, the City of Garden City would like to convey its strong support for House Bill 2775.

We appreciate the sponsorship of this bill by our Representative, Ward Loyd. The City respectfully requests favorable action on HB 2775 by this Committee.

JMK:ag

Jim\Garden City\Gang Activity-Nuisance Statutes-Legislative Testimony1.wpd

MEMORANDUM

TO: Jim Kaup

FROM: Captain Michael D. Utz, Investigations Division Commander

DATE: February 8, 2000

SUBJECT: Overview of Law Enforcement Response to Gang Activity in Garden City

I am currently assigned as the Investigations Division Commander for the Garden City Police Department and oversee the administrative duties of the Garden City/Finney County Street Gang Unit (SGU). The SGU is comprised of officers and detectives from the Garden City Police Department, the Finney County Sheriff's Office, the Holcomb Police Department and the Kansas Highway Patrol. The SGU also has one prosecutor from the Finney County Attorney's Office assigned to the SGU. The SGU was formed in June of 1996.

Garden City began to notice gang activity in the early 1990's, and as many cities in the Midwest perceived these juveniles as "wanna bee's". As time went by, gang activity within the Midwest grew, and the gang problem in Garden City was no different. Gang members who were committing drive-by shootings, rapes, robberies, burglaries, aggravated assaults and aggravated battery victimized the community of Garden City. In February of 1996, one of the worst case scenarios occurred. Members of a street gang in Garden City murdered a 34-year old family man with four children. Six gang members were ultimately convicted for their role in the murder.

Currently, there are approximately 39-documented criminal street gangs in Garden City. There are at least 375-documented criminal street gang members and at least 75-criminal street gang associates. Over the past three years the SGU has been doing an excellent job identifying gang members, and investigating cases involving gang members are ultimately arrested and prosecuted. Gang members usually do their criminal acts when other gang members accompany them. They also enjoy hanging out at certain locations where they will consume alcohol and drugs, discharge firearms into the air, engage in criminal damage, fighting, etc. Unfortunately, after we arrest them and they bond out, they return back to their hang out. This reduces the quality of life in the neighborhoods that they hang out at, as well as reducing the safety of the young children in the neighborhood. The Garden City Police Department, as well as the SGU have responded to and have successfully cleaned up neighborhoods after having to put special enforcement in the neighborhood for several weeks, if not months.

In the last three years the SGU has done an excellent job combating the criminal street gangs. With the current operation of the SGU, each officer is assigned a task coordinating gang activities with the schools, parole, probation, SRS, other law enforcement agencies, etc. They are also assigned to monitor various gang members and their activities.

The SGU started a responsible retailer program with local retailers that sell spray paint. This program had the retailers voluntarily post signs that sale of spray paint to anyone under 18-years of age was unlawful, and also moved their spray paint displays to the front counters so they may be monitored by store employees. In 1996, there were over 250 reports of graffiti in Garden City, and there were only 25-reports of graffiti last year.

Once the SGU identifies a person as a member of a criminal street gang; an officer serves the parent of the gang member a letter notifying them that their child has been identified as a gang member. The overall consensus from most parents is that they were not aware of their child's activities in a gang.

There is no doubt that law enforcement in Garden City has taken every stride possible to curb activities by the criminal street gang. The SGU has found that any tool available to curb their criminal activities is another step in making our neighborhoods safe. Currently, the neighborhoods and streets are not controlled by any criminal street gang, but the next time they move into a neighborhood it would be advantageous to have additional laws to aid law enforcement in making the neighborhood safe again.

It is unfortunate that the current laws do not permit law enforcement and prosecutors to rid neighborhoods of criminal street gang activity that is disruptive and dangerous to the children in the neighborhood. We can not permit the criminal street gangs to hold our neighborhood hostage where the citizens are too afraid to come out on their front yard.

We would encourage you to support and pass the current bill on before you concerning adding the criminal street gang activities as part of the nuisance statute. We do appreciate your attention to this matter.

Michael D. Utz, Captain
Investigations Division Commander

IMLA ANNUAL CONFERENCE
WORK SESSION VIII

Civil Approaches To Gang Abatement
And Code Enforcement

Gang Abatement In A Community Context

by
Casey Gwinn, City Attorney
Office of the City Attorney
1200 Third Avenue, Suite 1620
San Diego, California 92101

IMLA ANNUAL CONFERENCE
November 16 - 18, 1997

GANG ABATEMENT IN A COMMUNITY CONTEXT

I. INTRODUCTION

Although remedies for public nuisances have been part of equity jurisprudence for centuries, it is only recently that prosecutors have started to use them. Prosecutors have discovered that using equitable remedies they can advance justice and fairness in situations where legal remedies are inadequate. Twenty-first century prosecutors will turn to the historical court of equity to take back houses, streets, neighborhoods and communities from criminal street gangs.

This paper focuses on recent strategies employed in California to fight against gang warfare and discusses case law that upholds those strategies. A review of the latest legal tools shows they are being successfully used to abate gang warfare in communities large and small. The paper encourages prosecutors to plan beyond individual battles and develop comprehensive, community-based partnerships and strategies so that they can ultimately win the war.

A. Definition of Gang Abatement

As used in this paper, "gang abatement" means the use of civil injunctions to prohibit specific gang activities. As with most states, California has a public nuisance statute authorizing municipal lawyers or district attorneys to seek injunctive relief to abate activity that is creating a public nuisance.

B. Civil Injunctions Versus Criminal Prosecution

1. Injunctive Orders are Effective Against Gangs

Why use civil injunctions or "abatements" against gang members who are entrenched in a neighborhood? Because, generally speaking, injunctions are easier to use, more efficient, and less costly than criminally prosecuting criminal street gangs.[1] And where criminal sanctions are effective, injunctions can be used in tandem with traditional prosecution. The time has come for creative solutions. In the preamble to the Street Terrorism Enforcement and Prevention (STEP) Act, the legislature has declared California "is in a state of crisis." Clearly, strategies more effective than traditional criminal prosecution are needed in order to respond to the growth of street gangs.

California has enjoyed some success in the use of injunctions to combat street gangs. In

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[1]Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, Hastings L.J. 1325, 1345-48 (1991).

1992, Burbank reported that within six months of obtaining a gang injunction there was a reduction in the crime rate and dissolution of the gang in the targeted area. In 1993, after the City of San Jose filed its gang injunction case, which reached the Supreme Court in People v. Acuna, 14 Cal. 4th 1090 (1997), there was an 80 percent reduction in drug activity in the targeted area. Given the successes enjoyed in California, the use of gang injunctions has spread to other jurisdictions.

2. Injunctions can be Tailor-made

Injunctions can be tailored-made to attack the specific gang conduct causing a public nuisance. One example is an order enjoining gang members from appearing in public view in a certain area. This provision is appropriate where a gang's threatening presence may seem invincible. The pinpoint sharpness of injunctive relief is backed by the hammer-like effect of contempt orders. If gang members violate the injunction they are subject to sanctions.

3. Constitutional Protections and the Civil Abatement Process

From a prosecutor's viewpoint, the civil abatement process can have several advantages over criminal prosecution. In a court of equity, there is no constitutional right to a jury trial. In the civil abatement process, the burden of proof is a preponderance of evidence, rather than the reasonable doubt standard required in criminal cases. In the case of civil remedies, the Sixth Amendment right to counsel does not apply, although gang members will sometimes request that counsel be appointed for them. These different constitutional standards have engendered debate. Some commentators have called for changes to require those seeking injunctive relief to meet the constitutional standards required for criminal defendants. Clearly, this is an evolving area.

4. Community Empowerment

The gang abatement process can be a foundation for empowering and mobilizing neighborhoods in order to prevent future nuisances. Gang abatements involve contacting neighbors to obtain their support and declarations. The degree of community cooperation and support you receive from the impacted area will affect the long-term success of the abatement. Other important factors include the percentage of home owners in the area and the gang's level of community support. These factors make it imperative to establish and build trusting relationships with residents of the impacted area. Such relationships can then develop into long-lasting partnerships with residents. You can translate such partnerships into success with the abatement process and beyond.

One of the roles of the community prosecutor is to help orchestrate and build the kinds of community support systems necessary to ensure the long-term success of the gang abatement. This process is easier to achieve if your police department has adopted a neighborhood policing philosophy. The San Diego Police Department has seen the fruits of that kind of law enforcement

philosophy. It emphasizes partnerships as the foundation for building community support.

Another means to assist the community restoration process is to have other neighborhood agencies involved in the abatement process. In San Diego, "Safe Streets Now"[2] is such a community organization. It helps residents develop into empowered neighborhood groups that deal with crime and community development issues. The efforts of such a catalyst give rise to Neighborhood Watch groups, community town councils, citizen patrols, and other neighborhood-based groups that foster neighborhood pride and buffer against the return or resurgence of street gangs.

C. Innovative Gang Abatement Strategies in California

Although California did not create gangs, they have become as much a part of the California culture as earthquakes, and they are just as deadly. The state of crisis is apparent every time there is the senseless death of a gang youth or innocent bystander. The literature shows that California prosecutors are adopting new approaches in combating criminal street gangs. Traditionally, prosecutors vigorously prosecute gang members for the crimes they commit. Although this approach is effective against the few who are caught and prosecuted, the problem is that individual prosecutions have failed to retard the growth in gang violence. Where the guilty are prosecuted for crimes, the old gangsters, "O.G.'s," are quickly replaced by a new crop of "gang bangers," and the cycle of violence and death continues.

Although civil gang abatements do not eradicate gang violence, they do disrupt the very nature of the gang activity, enjoining specific gang conduct. A primary objective of gang abatements is to stop gang conduct that causes a public nuisance. Another objective is to disrupt gang activities enough to stop violence *before* someone is killed or injured. In conjunction with criminal prosecution, gang abatements enhance law enforcement's ability to control gang behavior. Proactive gang abatement reduces the gang's collective power, and thus the threat the gang's presence creates.

Civil abatements do not replace criminal prosecutions, they complement them. Gang abatement attacks street gangs where they live, on the streets. Injunctions focus on something criminal prosecutions do not, the gang as an entity, an unincorporated association. One innovative approach to street gangs is taking place in Los Angeles.

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[2]Safe Streets Now is a community-based organization. It promotes community empowerment by assisting residents with crime and community development issues. For example, it brings small claims actions against owners of drug infested properties and helps residents establish citizen patrol groups. The contact person in San Diego is Bob Heider, (619) 399-5408.

Los Angeles District Attorney's Strategy Against Gang Environments (SAGE) Program[3]

The SAGE program is a prototype of the next generation of prosecution efforts against street gangs. SAGE was established by the Los Angeles District Attorney's Office in 1993. It was born of a recognition that individual law enforcement agencies working alone cannot fight gangs as well as they can working together in a multi-jurisdictional, collaborative approach. (One such collaborative approach to prosecuting gangs is Los Angeles's Community Law Enforcement and Recovery (CLEAR)[4] program.) The SAGE program provides Deputy District Attorneys to work in partnership with the community to combat local gang problems.

SAGE Deputy District Attorneys (DDAs) come from the District Attorney's Hardcore Gang Division to work in Los Angeles County communities. The SAGE DDA obtains restraining orders and injunctions to combat gang violence. The pilot program was in Norwalk in 1993 and was effective in combating local gang problems. Housed in the city or unincorporated area where they work, the SAGE DDA develops knowledge and expertise about local gangs and works with local law enforcement agencies, such as the police and probation departments. They also work with the community, including schools, churches, politicians, businesses, civic leaders, and community-based organizations.

SAGE DDAs have used civil injunctions against gangs, and have used the threat of injunctions to help arrange a gang truce. Although SAGE is an abatement program, it is flexible enough to be involved in other creative solutions to the gang problem. They have helped to develop a special education program for "at risk youth" as part of their outreach effort.

The SAGE program has three objectives: (1) to create an atmosphere that leads to cooperative conduct between community residents and law enforcement; (2) to identify gang members who are problems; and (3) to stop targeted criminal street gang members from committing acts that degrade the quality of life in the community.[5]

SAGE DDAs work with local law enforcement gang experts, patrol officers, and probation officers to tailor injunctions specific enough to address local gang problems. Once

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[3]Gil Garcetti, SAGE Strategy Against Gang Environments, A Handbook for Community Prosecution, June 1996.

[4]CLEAR is a collaboration of law enforcement agencies, all working together as a team to address one community's problem with a specific gang. CLEAR is designed to draw on the resources of all team agencies to apply a flexible and coordinated response to gang crime. CLEAR's mandate is simple - to address the problems caused by one criminal street gang's activities by rapidly deploying coordinated community-based law enforcement strategies.

[5]Gil Garcetti, *SAGE Strategy Against Gang Environments*, A Handbook for Community Prosecution, June 1996 at 1.

injunctions are obtained, SAGE DDAs work to ensure police and probation officers have copies of the order so they can identify and document violations. The SAGE DDA uses a computerized gang tracking system containing gang probation conditions. This allows them to accurately monitor and effectively account for probation violations. SAGE's multi-jurisdictional approach, coupled with a commitment to community partnership makes SAGE one of the most innovative responses to the gang problem.

D. Criteria to Consider in Identifying a Gang for Abatement

Prosecutors should consider whether a gang (1) is creating a public nuisance, (2) is limited to a specific geographic area or property, and (3) is an unincorporated association banding together for the primary purpose of engaging in criminal activity. Sometimes the public nuisance is not sufficiently well documented. In that case, you will need to develop an enforcement strategic plan to establish the public nuisance. Document gang member arrests, field interrogations (FIs), calls for service (CFS), and gather declarations from citizens. Review local ordinances and state statutes to determine whether all available tools are being used to document the nuisance activity. In California, for example, there is a statute prohibiting "loitering for drug activity" that has proved to be a useful tool.

Your jurisdiction's first gang abatement case will not only be a learning experience for the prosecutor but also an opportunity to educate the bench about the merits of gang abatement. Unfortunately, not all courts have embraced the use of civil injunctions to address the street gang problem. In cities like Oakland and Westminster, California, some courts have been unwilling to issue preliminary injunctions against gang conduct prohibited by criminal statutes. These courts have held that there is an "adequate remedy at law." Several courts have found some injunctive provisions to be overbroad and vague. These cases serve to remind prosecutors that injunctive provisions must be narrowly tailored so as not to infringe "intimate" or "expressive" First Amendment associational rights. Injunctions may "burden no more speech than necessary to serve" an important governmental interest. Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984), Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994).

II. STATUTORY BASIS FOR GANG ABATEMENTS IN CALIFORNIA AND OTHER ENFORCEMENT OPTIONS

A. Public Nuisance Statutes

California's Street Terrorism Enforcement and Prevention Act authorizes the use of injunctive relief to abate disruptive gang activity, but most gang abatements in California are based on public nuisance statutes. The nuisance statutes are preferred for their simplicity and adaptability.

California Code of Civil Procedure section 731 authorizes the city attorney or district attorney to bring civil actions to abate public nuisances. California Civil Code section 3479

defines a "nuisance" as anything that is "injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any . . . public park, square, street or highway." California Civil Code section 3480 defines a public nuisance as "[a nuisance] which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." California Civil Code section 3491 prescribes three remedies: indictment or information, a civil action, or abatement. These public nuisance statutes are designed to protect against injuries to *community rights*. Acuna 14 Cal. 4th at 1104.

1. Unreasonable and Substantial Interference Requirement

The interference with the community's quality of life must be both *substantial and unreasonable*. Acuna, 14 Cal. at 1105. "Substantial interference" is established by proof of significant harm. Significant harm is "a real and appreciable invasion of plaintiffs interest" that is "definitely offensive, seriously annoying or intolerable." Id. "Unreasonableness" is based on a comparative standard: whether the interference is actionable is determined by comparing the social utility of an activity to the gravity of the harm it inflicts looking at the situation as a whole. Id. Both standards are objective ones.

2. Establishing a Gang Abatement Action

a. Citizen Declarations

Gang abatement actions must overcome two evidentiary hurdles. The first is to establish that a public nuisance exists. The second is to prove that gang members are creating and maintaining the public nuisance. Both hurdles may be overcome using citizen and police declarations that document the activities and identify the individuals creating the nuisance.

Citizen declarations can establish the existence of a public nuisance - the *unreasonable and substantial interference* with their community rights. Such declarations carry great weight with the courts. It is difficult to refute the declarations of residents or business owners who describe how their lives have been disrupted by gun shots, loud and vulgar language, fights or assaults, threats of violence against adults and children, trespassing, littering, drinking alcohol in public, drug sales and abuse.

In some areas gangs are more aggressive in using intimidation and violence against residents. The greatest violence involves drug trafficking and deadly turf battles between rival gangs. Gang members use threats and acts of violence to prevent interference from neighbors. The legitimate fear of street terrorists complicates the task of obtaining citizen declarations and engaging citizens in the efforts to reclaim their neighborhood. One tactic to help protect residents is to ensure that their declarations are sealed by the court. Courts are likely to grant such requests when the city can show that complaining residents have been threatened. Another means to

reduce fear is to use gang abatement as part of a *comprehensive* effort to restore the community. Such an effort could involve redistribution of available resources: an increased law enforcement presence, recreational and community development, and code enforcement. When gang abatement is viewed as a first step, residents are more willing to take a personal risk and participate.

If citizens are willing to participate, their declarations can be instrumental in identifying gang members. Often residents have lived in their neighborhoods for a long time. They have watched neighborhood kids grow up to be gang members. Without knowing gang members' names, residents may be able to identify gang members' families, friends, or other associations.

In some cases, for various reasons, some residents may object to gang abatement efforts. Residents have been known to work against abatement efforts by denying the need for an injunction or by encouraging neighbors not to support it. It takes a broad base of community to support to counteract such opposition.

b. Police Declarations

If the citizen declarations are the heart of the case, then the patrol officer and gang detective declarations are the soul. Police declarations document the crimes and nuisance activities of the gang members and establish their gang affiliation. The lead gang detective needs the expertise on street gangs to testify about (1) an individual's identity as a member of the subject street gang, and (2) the crimes and disorderly conduct of the named gang members that establish the criminal nature of the street gang.[6]

The California courts have held that the question of whether a "criminal street gang" exists is a proper subject for expert opinion. In re Nathaniel C., 228 Cal. App. 3d 990, 1004-1005 (1991). Courts have also upheld expert witness testimony concerning such areas as gang psychology and sociology, including the social customs and methods of particular gangs. People v. Gamez, 235 Cal. App. 3d 957, 966 (1991)(overruled on other grounds by 14 Cal. 4th at 605).

An officer's expert opinion is required in order to establish (1) an individual's membership in a gang and (2) the gang's primary activities. An officer cannot establish these facts by relying simply on nonspecific hearsay and vague arrest information. To lay the foundation for an officer's testimony as an expert, the officer must have the appropriate background and training, personal knowledge and experience with the *subject* criminal street gang, information from the investigative files and police reports, and personal observations or reports of the observations of investigating officers. Id at 966-968.

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[6]Penal Code section 186.22(a) defines street gang member as "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct . . . ."

California Penal Code section 186.22(f) defines "criminal street gang." An expert's opinion can establish that a particular gang is in fact a criminal street gang. California Penal Code section 186.22 (e)[7] sets out what constitutes a "pattern of criminal activity." Proving such a pattern requires time-consuming investigative work to show that certain kinds of crimes were committed within a certain time by two or more individuals. It must be shown that in committing the crimes, the individuals' actions were "gang-related."[8]

Selecting which gang members to name in a complaint, either as individual gang members or, under California Code of Civil Procedure section 369.5, as members of an unincorporated association 369.5, should be a collaborative decision. In order to choose the most active and dangerous gang members and to establish the necessary nexus between the gang members and the nuisance activity, it is important to hear from the police, probation department, residents and other affected members of the community. In Acuna, the court found a sufficient nexus when (1) documented gang members were (2) present in the targeted area. The nexus is even stronger where, rather than being based on mere "presence," the nexus is based on an arrest. It is important to be able to defend the criteria by which you decide that some gang members will be named as defendants and others will not be named.

3. Limitations of Gang Injunctions Under *Acuna*

a. Constitutional Challenge - *Right of Association*

Gang injunctions based on public nuisance statutes have been attacked on several constitutional grounds. Recently, in Acuna for example, the defendants attacked a provision of an injunction granted the City of San Jose that enjoined 38 defendants from "*Standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant herein, or with any other known 'VST'. . . member . . . .*" Reversing the court of appeal, the California Supreme Court held that the street gang's conduct did not qualify as protected "expressive"or "intimate" association. The court found that based on its activities within a specified four-square-block area "the gang is not an association of individuals formed '*for the purpose* of engaging in protected speech or religious activities.' " Id. at 1110–1111 (quoting Board of Dirs.Of Rotary Int'l v. Rotary Club, 481 U.S. 537, 544, (1987) italics added).

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[7]Penal Code § 186.22(e) "[P]attern of criminal gang activity" means the commission of, attempted commission of, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons.

[8]"Gang-related" crimes are "felon[ies] committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, . . ." Penal Code section 186.22(b)(1).

While acknowledging that the gang may exercise some discrimination in selecting its members, the court found that the gang did not possess the characteristics of an "intimate" association worthy of constitutional protection. Quoting Roberts v. United States Jaycees, 468 U.S. 609, 620, the court held that

> Such affiliations . . .'involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things . . . they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.

See id. at 1110.

While the Acuna court upheld the provision affecting the gang members' rights of association, the court held that such provisions must be narrowly tailored. Provisions affecting constitutionally protected rights must be framed in the narrowest terms "that will accomplish the pin-pointed objective of the injunction." Id. at 1127 (Kennard, J., consenting and dissenting). In Acuna, restrictions on association pertained to a four-square-block area called Rocksprings.

b. Constitutional challenge - *Overbreadth*

Overbreadth was a second ground on which the court of appeal had invalidated the restriction on association in Acuna. The California Supreme Court was concerned about the "inhibitory effect a contested statute may exert on the freedom of those who, although possibly subject to its reach, are *not* before the court." Id at 1113. The court found, however, that the constitutional challenge lacked merit because "*no one*, apart from the defendants themselves, is or can be subject to the prophylactic relief granted by the trial court." Id. Drawing a distinction between a statute and the provisions of an injunction directed toward "identifiable parties and to specific circumstances," the court found that there was no unrepresented class of individuals whose conduct might be affected by the provision.

Again, to avoid overbreadth, injunctive provisions need to be narrowly tailored to protect the defendants' associational rights. In enjoining defendants, the trial court must ensure that the injunction "burden no more of defendants' speech than necessary to serve the significant governmental interest at stake." Id. at 1115 (quoting Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994)).

c. Constitutional Challenge - *Void-For Vagueness*

In Acuna the court of appeal sustained vagueness challenges to two injunctive provisions. In analyzing the void-for-vagueness claims, the California Supreme Court used two principles as

"reliable guides." The first principle is the need for a "contextual application" in evaluating vagueness claims. The second constitutional principle is the concept of "reasonable specificity." "Reasonable specificity" allows courts to uphold language against vagueness challenges "if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain . . . ." Id. at 1118 (quoting In re Marriage of Walton, 28 Cal. App. 3d 108, 116)

As to the provision enjoining the defendants from associating with any other named defendant or "any other known" gang member, the court imposed a *knowledge* requirement as a limiting construction. Before the City of San Jose could prevail in a contempt action against defendants who associate with "any other known" gang member, the City would have to show that the defendants knew of the associate's gang membership. Id.

Another provision of the injunction enjoined the defendants from "*confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to 'Rocksprings,' . . . known to have complained about gang activity.* . . ." Id. at 1030. The California Supreme Court reversed the court of appeal and again imposed a knowledge requirement.

Defendants also challenged as vague, the failure to adequately define "confront," "annoy," "provoke," "challenge," and "harass." Relying on the holding in Madsen, 512 at U.S. 753 where the United States Supreme Court had upheld similar words against vagueness challenges, the California Supreme Court found no reason to find the words constitutionally infirm." The court took into account the context and objective of the injunction. After reviewing citizens' declarations that described the threats, intimidation, and harassment residents faced at the hands of the gang members in Rocksprings, the court found that the declarations clearly provided a contextual application sufficient to defeat a vagueness claim. Although the City of San Jose ultimately prevailed, the potential for constitutional challenges points up the need to narrowly tailor the provisions in injunctions.

B. California's Drug Abatement Statute as a Gang Abatement Tool

Where drug trafficking by gangs can be linked to specific properties, approaches such as that of the California Drug Abatement statute should not be overlooked Although the organizational structure of the typical gang is not particularly suited to the drug trafficking business, individual gang members, gang cliques, and a few gangs in certain geographical areas have made drug trafficking a primary activity.[9] Where gang members are involved in drug

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[9]James C. Howell, Ph.D., Youth Gangs in The United States: An Overview, National Youth Gang Center, December 1996 at 18.

trafficking, civil remedies designed to abate public nuisances can be effective in combating both gangs and drugs.[10]

The California Drug Abatement statute (California Health and Safety Code sections 11570–11587) authorizes the city attorney, district attorney or citizen to "maintain an action to abate and prevent the nuisance and perpetually to enjoin the person conducting or maintaining it, and the owner, lessee, or agent of the building or place, in or upon which the nuisance exists, from directly or indirectly maintaining or permitting the nuisance." Health and Safety Code section 11571. Under this statute, as in the general public nuisance statute, the plaintiff must establish the existence of the public nuisance and show that gang members are responsible for causing and maintaining it.

Drug Abatement actions in San Diego have two objectives: (1) to stop the narcotic activity occurring on private property—residential or commercial; and (2) to ensure the rehabilitation of the property consistent with minimum code enforcement standards, including housing, fire, health and other local and state code regulations. This approach is based on the "Broken Windows" theory, which observes that "serious street crime flourishes in areas in which disorderly behavior goes unchecked."[11] One broken window, caused by gangs or otherwise, that goes unattended invites more deterioration. At its extreme, social disorder becomes rampant. A drug house left unattended can send a whole neighborhood spiraling down out of control. A dual focus on drug abatement and code enforcement in a community context is the focus of San Diego's Drug Abatement Response Team (DART).[12]

1. Persons To Be Enjoined

California's drug abatement statute authorizes injunctive relief against one or all of the following individuals who maintain a public nuisance on their property: (1) the person conducting or maintaining the nuisance, (2) the owner, (3) the lessee, or (4) the agent of the building or place with a public nuisance caused by drug activity. In most California jurisdictions, cities file only

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[10]California Health and Safety Code section 11570 Nuisance

Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance, precursor, or analog specified in this division, and every building or place wherein or upon which those acts take place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

[11]James Q. Wilson and George L. Kelling, Broken Windows, The Atlantic Monthly, March 1982, at 34.

[12]DART is San Diego's multi-jurisdictional drug enforcement effort. DART's core members are a city prosecutor, narcotics officer, and building inspector.

against the property owner, but other parties responsible for the narcotics activity may also be named as defendants.

There are several reasons why drug abatement actions usually focus on property owners. First, the law holds property owners responsible for public nuisances on their property. Leslie Salt Co. v. San Francisco Bay Conservation, etc. Com., 153 Cal. App. 3d 605, 622. Second, and equally important, only the property owner can take the necessary action to abate the nuisance, e.g., instituting evictions, hiring a property manager, installing better lighting. As abatements are proceeding against property owners, criminal prosecution can proceed against the persons using and selling drugs on the property.

In San Diego, we have not made gang members parties to our abatement actions against property owners. We have, however, obtained TROs, Preliminary, and Permanent Injunctions against *individual gang members*, enjoining them from being within a specific radius of the subject property. Often stay-away orders are necessary against gang members who are members of the property owner's family. In such cases, property owners may be unable or unwilling to keep their gang banger family member off the property.

2. Injunctive Provisions Against Gang Members

When filing a drug abatement action, tie gang members into the process by preparing a list of documented gang members interviewed by police or arrested on the subject property. The names of potential gang members are gathered by reviewing arrest reports, crime reports, and incident reports pertaining to the property. The names are then reviewed by a gang detective who identifies documented gang members. Non-gang members who are arrested for narcotics violations on the property are also put on the stay-away list.

The court then enjoins the named individuals (gang members and narcotics offenders) from being on, or within a certain radius (e.g., 300 feet) of, the property. When the subject property is close to another location involved in a gang's drug trafficking, e.g, an intersection, both locations are specified in the stay-away order. These stay-away provisions include a map detailing the area from which gang members are restricted.

3. Citizen and Police Declarations

As in gang abatements based on the general public nuisance statutes, the drug abatement statute requires police and citizen declarations. The one difference is that in the case of the drug abatement statute, the gang expert documents that the gang is dealing drugs on a particular property. As always, the gang expert must establish the foundation for the expert's beliefs. Like the police declarations, the citizens' declarations must substantiate the existence of a public nuisance based on drug activities. Citizen declarations should also describe the impact of the drug activities on the peaceful and quiet enjoyment of their property.

4. Additional Evidence

When gang members live at or frequent a property, usually they "claim" the property with graffiti. Pictures depicting gang graffiti can establish a gang's association with a property. In a recent case, a gang painted an entire house their gang color. A picture of it made a convincing exhibit. Surveillance videos are also useful to show the court the kind of activity you are trying to enjoin, and that residents are forced to live with. Surveillance photos are easiest to obtain when gang members are associated with a specific property, rather than with a large area such as a park.

5. Benefits of a Gang/Drug Abatement Injunction

The drug abatement statute is effective in abating narcotics activities by gang members on specific properties. Drug abatement, however, is not without its challenges. Usually by the time the court order is issued, police and gang detectives are unable to find gang members at the property for service of process. The necessity of serving TROs and injunctions on *each named defendant* affords officers probable cause to contact and search gang members for weapons before serving them. The process of explaining the order, the map's perimeters, and the consequences for disobeying the order diminishes the gang's sense of authority over the property and the area.

Involving citizens as part of the abatement process creates an opportunity to mobilize citizen participation in community efforts. When gang activities that involve drugs are associated with one or two properties in particular, the drug abatement is more effective in addressing the problem than the general nuisance statute. When gangs in isolated areas are abated, neighborhood recovery may be quicker and easier. Service of process is simplified in drug abatement proceedings. Because gang members are not named parties, they do not have to be served with summons, complaints and other pleadings. But they are still bound by the court's stay-away order.

6. Limitations of Gang/Drug Abatement Injunctions

Drug abatement does not attack the criminal street gang itself. It excludes named gang members from areas within a specified radius of particular properties. However, it is a valuable tool when gang problems are in small, isolated areas.

C. Gang Abatement in San Diego - A Case Study

In San Diego, the general nuisance statute was effective in abating a nuisance at a residence used by gang members as a hang out. The drug abatement statute was not warranted because of the absence of documented narcotics activity on the property. Neighborhood residents, especially the main complainant who lived directly across the street from the hang out, were forced to suffer numerous indignities. They witnessed drug trafficking and abuse, drinking in public, large groups loitering on both sides of the street, loud and vulgar language, fights in the street, and shootouts in broad daylight. The access to their residences was blocked by incessant

traffic. And they had to endure threats and constant intimidation. Even the police were apprehensive about contacting individuals in front of the property, unless they had sufficient backup.

The City's strategy was to force the property owner to take affirmative steps to stop the gang's public nuisance activities. Citizens' declarations established that gang nuisance activity had been associated with the property for two years. Gang members used the house for parties on an almost daily basis. The property owner claimed to be afraid to evict the gang members.

One neighbor consistently complained. Research revealed an almost total absence of any enforcement history concerning the property. No arrests had been made; there was not so much as a field interview. To find out whether the complainant's claims were legitimate, the prosecutor decided to call a community meeting to discuss the property. The complainant provided the names and addresses of forty neighbors. The complainant went door-to-door encouraging them to attend. The meeting was held at a library away from the property in order to ensure the residents' anonymity and safety.

About thirty residents attended the meeting. Asked about problem locations in their neighborhood, approximately three-quarters of the group identified the gang hang-out as the major problem in the area. Two subsequent meetings were held to gather more information and build a relationship with the residents. Besides the community prosecutor, neighborhood policing officers, city council representatives, and representatives of neighborhood agencies attended. At the third meeting, a resident was elected to chair the group and to schedule additional meetings to monitor the gang abatement process.

Nine citizens' declarations were obtained from residents who either lived on the street or had personal knowledge of incidents involving gang members at the targeted house. Three police declarations were used in the abatement action, including one from a gang detective. The gang detective's declaration established the gang affiliation of the people hanging out at the property.

Six weeks after the last community meeting, a complaint was filed and a preliminary injunction was issued ordering the defendants—the property owners, not the gang members—to abate the public nuisance on their property. The defendants served an eviction notice on the family living on the property. Within sixty days of serving the injunction, the nuisance was abated.

Having reclaimed their street from "hoodlums," the neighborhood residents, with the assistance of an existing town council organization, formed their own town council association and continue to meet to discuss neighborhood issues.

III. REFORMING THE PROPERTY

Once a civil injunction has successfully abated gang activity on a commercial or residential property, the next step is to rehabilitate the property. Drug abatements can do more than stop narcotics activity. They are a means to ensure that code violations are corrected and that the property is rehabilitated. As a result, a crucial member of San Diego's DART team is the code enforcement inspector. At the initial stage of the process when a potential drug abatement case is identified, a housing inspector, accompanied by a DART police officer, conducts both an exterior and interior inspection of the property, noting all code violations.

The property owner is given notice of the violations and is told to correct them. If any violations remain when the injunction is granted, the property owner is *ordered* to correct them. If the property is a hotel, a multi-unit apartment complex, or commercial building, the injunction has special provisions. The owner may be required to (1) employ a 24-hour on-site security guard, (2) contract with a property management company, (3) provide adequate lighting, (4) adequately screen tenants, and (5) attend a landlord training class.[13]

In the case of a single-family home, a rehabilitated house free of trash, graffiti, and other code violations restores a sense of pride to the neighborhood. It sends a message that this is a community where crime will not be tolerated and residents may feel safe. The neighborhood is now more attractive to future businesses and residents.

Environmental Factors in Preventing Crime

A. Proactive Code Enforcement

Today, more than ever, law enforcement and community groups recognize that a crucial weapon in fighting and preventing crime in neighborhoods is a proactive code enforcement program. Vacant or dilapidated buildings, trash, abandoned cars, substandard housing, graffiti and blight serve as an open invitation for vandals, prostitutes, gang members, drug users, and other criminals to commit crime. On the other hand, aggressive enforcement of housing, building, zoning, fire, litter, and health and safety regulations, sends the message that law enforcement and the community care, and that crime and neglected properties will not be tolerated.

If residences are left vacant and unsecured, gang members are attracted to them. In San Diego, the owner of a vacant and unsecured building receives a Notice of Abatement from City code compliance inspectors, and is required to board and secure the property in ten days.[14] If the

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[13]The San Diego Police Department conducts an ongoing landlord training class designed to teach property owners to properly screen tenants and implement proactive security measures.

[14]Depending on the complexity of the case and property ownership, the inspector could also refer the case to the City Attorney to obtain a civil abatement order.

owner fails to take action, the City may abate the structure and assess the abatement costs as a lien against the property. In the case of a structurally unsafe or dangerous building, the City may require demolition of the property.

Even a boarded and secured property can attract gangs. In 1992, the San Diego City Attorney's Office and the City Manager's Office formed a strong partnership with the real estate industry, the Apartment Owners Association, banks, and the community to aggressively confront the problem of vacant properties throughout San Diego. One result was new legislation. San Diego's Vacant Properties Ordinance assesses the owner of a vacant and boarded structure a $250 fine per quarter, not to exceed $1000 per year for leaving the property in a boarded state over ninety days, unless they take certain action. The owner must (1) file a statement of intent explaining what they intend to do with the property, and (2) actively rehabilitate, lease, rent, or sell the property. The City Council funded a "Vacant Properties Coordinator" who identifies vacant properties throughout the City and facilitates rehabilitation. The Coordinator contacts owners to determine why the property is vacant, provides access to grants, involves non-profit agencies in rehabilitation efforts, conducts first-time home owner fairs in the community, and maintains a partnership with the banking and real estate industries.[15]

Because crime, including gang activity, is less likely to occur in neighborhoods where properties are maintained free of blight, it is imperative for municipalities to have a vigorous, proactive code enforcement program. An effective program involves the prosecutor, police, code enforcement inspectors, elected officials, and the community. Although the size and budget of the municipality dictate what code enforcement services can be provided, no matter what the size of the municipality, volunteers are crucial to a successful code enforcement program.

Since 1987, San Diego has provided training to thirty volunteer groups citywide. The groups identify neighborhood issues, prioritize violations, and attempt to obtain voluntary compliance without referring the case to City staff. Before initiating enforcement activities, volunteers must participate in training concerning communication skills, information on resources, and how to identify violations. Volunteers send letters to violators requesting voluntary compliance. If property owners do not comply, the case is referred to City code enforcement inspectors for enforcement action. Volunteer groups meet with City code enforcement staff each month. The meetings allow each volunteer group to turn over priority cases and ask questions about specific ordinances. Code enforcement staff report back to volunteers on cases referred for enforcement action.

Since 1984, San Diego has been fortunate enough to be able to dedicate prosecutors full-time to code enforcement in a specialized Code Enforcement Unit (CEU). In recent years, San Diego's code enforcement program has become increasingly more proactive . This past year city code inspectors and the police department created project teams to aggressively address problem

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[15]The City of San Diego recently received an award from the American Planning Association for its innovative Vacant Properties Program.

properties known to the police and the community. Police officers are becoming better able to identify code violations, and code enforcement efforts complement community policing.

CONCLUSION

Gangs, and the violence and drug trafficking associated with them, pose a serious threat to our communities. It will take our most thoughtful and creative approaches to meet this threat. Traditional criminal prosecution has not been sufficient. More is needed. Civil gang abatement, coupled with traditional prosecution, will more effectively address the destructive impact of gangs on our communities. We need programs like SAGE and others that combine criminal and civil enforcement. If, in addition to such programs, we build partnerships in our communities, we can hope not only to wage war on gangs, but ultimately to enjoy success.

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National District Attorney's Association
American Prosecutor's Research Institute 1995
Community Prosecution: A Guide for Prosecutors

California District Attorney's Association
1994 Gang Resource Guide
Appendix M
Misdemeanors, Civil Abatements and Gangs
"What is a Civil Gang Abatement?"

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