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Section's Newseum Event Promotes *Padilla* Training



Panelists of *Padilla and Beyond, Scope and Implications of Padilla v. Kentucky*, moderated by Steve Saltzbug, engage in heated discussions: from left to right, Scott Burns, Margaret Love, Jack Chin, Benita Jain, Paul Friedman, Gwendolyn Washington, Bruce Green.



Section Director Jack Hanna explains the special event to the live studio audience at the Newseum.

The March 2010 Supreme Court decision in *Padilla v. Kentucky* requires defense counsel to advise clients if their potential pleas carry a risk of deportation. In response, the ABA Criminal Justice Section sought and on August 9th obtained ABA House of Delegates approval of a resolution urging funding for training public defenders on the nuances of the *Padilla* case. On August 25, 2010 the Section's *Padilla* Task Force led a day-long event at the D.C. Newseum to videotape a package of five complementary but separable training videos to be supplemented with written materials. Together these materials will be used to encourage all players in the system — whether prosecutors, defense lawyers or judges — to become familiar with the deportation consequences explicitly required by *Padilla* as well as other collateral consequences that have potentially significant implications for defendants. The materials are expected to be useful to academics and the general public as well as practitioners.

Morning taping sessions focused on step-by-step advice for prosecutors, judges, and defense counsel in complying with *Padilla*. Advising the defense were Gwendolyn Washington, Civil Legal Services Division of the Public Defender Service for the District of Columbia; McGregor

Smyth, founder and head of the Civil Action Practice at The Bronx Defenders and Reentry Net; and Benita Jain, Co-Director of the Immigrant Defense Project in New York. Scott Burns, Executive Director of the National District Attorneys Association provided advice for the prosecution, and Judge Darrin Gayles, 11th Judicial Circuit Court of Florida, was the advisor for the judiciary.

The featured event, *Padilla and Beyond, Scope and Implications of Padilla v. Kentucky*, took place in the afternoon before a live audience of approximately 100 persons. It was moderated by former Section Chair Prof. Stephen Saltzburg of George Washington University. Joining morning presenters Gwendolyn Washington, Benita Jain, and Scott Burns (all identified above) were Section Chair Prof. Bruce Green of Fordham University; University of Arizona Prof. Jack Chin; D.C. private practitioner Margaret Love; and U.S. District Judge for the District of Columbia Paul Friedman. The panelists discussed the legal and constitutional implications of *Padilla* and the ethical and professional obligations of attorneys. They also touched upon the practical and systemic implications of the case.

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Three Questions With



Bruce Green

Bruce Green, the 2010-2011 Chair of the ABA Criminal Justice Section, is a law professor at the Fordham University School of Law in New York.

1. What are the ABA Standards “Roundtables”?

This is a new project to take place throughout the Fall — something the Criminal Justice Section has never tried before. The background is that for years, one of the Section’s most significant contributions to the field has been to produce the ABA Standards for Criminal Justice. Perhaps the most significant sets of standards have been the Prosecution and Defense Function Standards, which deal with the professional conduct of prosecutors and criminal defense lawyers. They have been cited more than 25 times by the U.S. Supreme Court and over 1,000 times by lower courts. They are now in their Third Edition and they are being revised again.

The Section is working with law schools around the country to organize small-group “roundtable” discussions of the revised Standards while they are still at work in progress. There will be more than a dozen seminar-style discussions this Fall. They will be held at the law schools at American, Boston College, Cardozo, Case, Loyola of Los Angeles, Oklahoma, Pace, Roger Williams, Stetson, University of Texas, Vanderbilt, Washington & Lee, and Wisconsin. And there will be a big public symposium at Hastings, where the reporter to the Standards drafting project, Rory Little, teaches.

The project will bring together local prosecutors, defense lawyers, judges and academics to talk about different aspects of professional conduct in criminal practice — for example, questions about dealing with

the media, relations with opposing counsel, interviewing and preparing witnesses, candor, confidentiality, conflicts of interest, disclosure of evidence, charging discretion — and ask participants to consider, “How should lawyers deal with these problems? Do the Standards give the ideal answers? Do the Standards answer all the questions?”

2. What will come out of this project?

First of all, to set the stage for the discussions, we have asked law professors to write background papers. After the discussions are over, they will turn the papers into articles. The professors will be attending the discussions and can draw on them in their writings. The articles will be published in two Hastings journals — the Hastings Law Journal and the Hastings Constitutional Law Quarterly.

Second, a lawyer at each of the roundtable discussions will serve as “reporter.” They will write summaries of the discussions. We will make the summaries available to the committees working on the Standards and to the Council of the Criminal Justice Section, which will ultimately review and consider whether to approve the new edition. The discussions should help inform the drafting and review processes.

3. What do you hope to accomplish?

The ABA provides a great service in developing standards of practice. I hope these discussions call attention to the Prosecution and Defense Function Standards. Law professors should teach them, and practitioners in the criminal justice field and judges should consult them. The discussions and publications will call attention to this great work.

Moreover, any time the bar brings together prosecutors, defense lawyers, judges and academics to talk together about questions of substance, it is performing a service. There’s so much writing about gaps and divides — between prosecutors and defense lawyers, the bench and bar, the profession and the academy. In its small way, this project breaks down those divisions. That’s

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what the Criminal Justice Section is all about and what makes it different from many other professional organizations in our field — we bring folks together and draw on their perspectives to try to improve working relationships and the criminal justice process generally.

And, of course, it's important to promote both professional and academic understandings of lawyers' professional conduct. That's a core mission of the ABA. We have an impressive collection of law professors who will be thinking deeply, writing background papers and publishing articles about a set of questions of professional conduct including: Stacy Caplow (Brooklyn), Roberta Flowers (Stetson), Bennett Gershman (Pace), Lissa Griffin (Pace), Ben Kempinen (Wisconsin), Cecilia Klingele (Wisconsin), Norman Lefstein (Indiana), Laurie

Levinson (Loyola of Los Angeles), Kevin McMunigal (Case), Daniel Medwed (Utah), James Molterno (Washington & Lee), Jane Moriarty (Akron), Andrew Taslitz (Howard), Rod Uphoff (Missouri), Melanie Wilson (Kansas), and Ellen Yaroshefsky (Cardozo).

This group will be writing about some of the most challenging questions in the legal ethics field — these are certainly the questions that professors and students find most interesting to discuss. And we will have a collection of bright and experienced practitioners and judges who will be joining them to discuss these issues at the roundtables. I expect a lot of insight to come out of this. The discussions and writings will provide plenty of fodder for future legal ethics classes and CLE programs and, ideally, help lawyers practice better.

2010 Annual Meeting Activities in San Francisco



Ellen Yaroshefsky of Cardozo Law School moderates "Hot Ethics Issues for Trial Lawyers" session.

The ABA Criminal Justice Section completed a highly successful meeting in San Francisco August 5-8 that included CLE programs, committee meetings, committee chairs trainings, a Council meeting, a membership meeting and election, a membership reception, the Livingston Hall Award presentation, passage of policy at the ABA House of delegates, and more.

CLE: The Section's CLE offerings included "The Vanishing Line Between Criminal and Civil Securities Fraud: Sec V. Goldman Sachs and Other Recent Securities Fraud Actions" organized by the White Collar Crime Committee; the exceptionally well-attended "Hot Ethics Issues for Trial Lawyers," organized by the Ethics Committee featuring Ellen Yaroshefsky of Cardozo Law School; "Putting Power Behind Your Words," organized by the Prosecution Function Committee and featuring Michael Moore, state's attorney for Beadle County, South

Dakota; the "Annual Survey of Supreme Court Decisions," organized by Professor Rory Little of Hastings Law School and Professor Stephen Saltzburg of George Washington University School of Law; "Plain View, Yet Out of Sight: The 9th Circuit Ruling on Electronic Evidence," organized by the White Collar Crime Committee; "Privatization of Punishment," organized by the Juvenile Justice Committee; and "The Shift in Focus to Individuals in FCPA Prosecutions," organized by the White Collar Crime Committee.

Policy Passed at the ABA House: Once again the CJS was prominently featured at the ABA House of Delegates with nine resolutions presented for successful passage and two additional resolutions cosponsored. The resolutions addressed subjects including Attorney Error v. Attorney Misconduct; Transparency at DOJ; Funding for Training in Immigration Consequences for Public Defenders; Forensic Research Improvement; Funding Standards and Accreditation; Homeland Security and Forensic Integration; Death Investigation Accreditation; Nationwide Interoperability; Access to Testing and Experts for Accused. Please check the Section Web site for more information on these resolutions.

Livingston Hall Award: The Criminal Justice Section Livingston Hall award administered by the Juvenile Justice Committee was awarded to Marsha Levick of the Juvenile Law Center. She and a few other law school classmates started the Juvenile Law Center out of a doctor's office in Philadelphia without pay. Today the Juvenile Law Center is one of the nation's most influential and accomplished juvenile law organizations.

Racial Justice Improvement Project

The ABA Criminal Justice Section Racial Justice Improvement Project, funded by the Bureau of Justice Assistance, has finally chosen the projects four jurisdictions that will receive one of four mini-grants to implement a local racial justice improvement task force focused on addressing community problems that contribute to the racially disparate impact of the criminal justice system. The advisory board for this project, comprised of judicial, prosecutorial, defense, and scholarly players in the criminal justice community, met most recently on August 24th to make their final decision on which jurisdictions will be one of the four chosen sites. William Dressel, Robert Johnson, Wayne McKenzie, Lance Ogiste, Joe Cassilly, Judge Marguertie Downing, Edwin Burnette, John Firman, Ronald Hampton, Laura Hankins, Jorge Montes, Ernestine Gray, Nkechi Taifa, Cynthia Orr, Winston Peters, Debra Gammons, and advisory board chair Judge Theodore McKee spent approximately four hours discussing each jurisdiction's application. The results of their deliberation will be released. Those applicants that were not chosen will still be offered a copy of the October 8, 2010 training curriculum and an opportunity for technical assistance in utilizing the curriculum in their local jurisdiction.

In addition, the project staff has commenced planning the project's kick-off training meeting on October 8, 2010. This training meeting will have all of the task force members of each of the awarded sites present and participating. The October 8 meeting will utilize the *Model Curriculum & Instructional Manual* created by the Criminal Justice Section's *Building Community Trust* initiative through funding of the ABA Board of Governors Enterprise Fund. This curriculum is a training tool that increases the effectiveness of cross-cultural communication between primary actors in the criminal justice system and the members of the communities they represent and aids in improving community perceptions of and confidence in the criminal justice system, while reducing the impact of racial disparities in the criminal justice system. Although only parts of this curriculum will be the primary training tool at this project's kick-off meeting, the entire curriculum will be available to all participants to utilize in their home jurisdiction after the meeting.

ABA Criminal Justice Section Website

www.abnet.org/crimjust

Section News & Announcements, Calendar of Events, Policy, Publications, Resources, Practice Tips ...

Building Community Trust

The Criminal Justice Section of the American Bar Association, through the ABA Board of Governors Enterprise Fund, initiated the *Building Community Trust* initiative, in partnership with the ABA Section of Individual Rights and Responsibilities and the ABA Council on Racial and Ethnic Justice. The American Bar Association Criminal Justice Section received an Enterprise Grant to satisfy a number of primary, multi-faceted objectives pertaining to cultural competency and racial disparity. Such objectives included: increasing the effectiveness of cross-cultural communication between primary actors in the criminal justice system and the members of the communities they represent, improving community perceptions of and confidence in the criminal justice system, and providing tools, technical assistance, and support for local criminal justice entities which can be utilized to reduce the impact of racial disparities in the criminal justice system.

In order to successfully achieve these objectives a *Model Curriculum & Instructional Manual* was developed by the Criminal Justice Section Staff and a hired consultant, Catherine Beane. This newly-created curriculum was then tested during two, two-day trainings, and revised based on feedback. The National Judicial College was particularly helpful in improving the curriculum. The curriculum provides leaders of judicial, prosecutorial, and defense agencies with the information, resources, and training tools necessary to support educational efforts in cultural competency.

A subsequent two-day training conference inviting key stakeholders in the criminal justice community was agreed to be the ideal method to distribute the final curriculum and teach individuals from across the nation who were versed in the criminal justice system, how to incorporate and facilitate racial justice issues and bring awareness into practice. A two-day finale conference on June 17th and 18th 2010 was conducted entitled, *Building Community Trust: Improving Cross Cultural Communication in the Criminal Justice System*, Catherine Beane, along with Wayne McKenzie and Edwin Burnette, conducted the training. Forty-two individuals with racial justice expertise from all over the nation attended to initiate further development of the cause. Each attendee was provided with the printed curriculum and designated additional preparatory conference reading materials.

By formally unveiling the *Model Curriculum & Instructional Manual* to leaders of criminal justice system agencies, the final conference instructed participants on how to utilize

such essential materials. An interactive session kicked off the beginning of the conference, exploring the language and concept of cultural competency, and the rationale for its application in the criminal justice context. The second day of the conference began with participants taking part in guided discussion, in which they reflected on the opening presentations, evaluated the effectiveness of the training methodology, and identified resources and adaptations that may be needed to effectively present the opening sessions in their home jurisdictions. Participants then engaged in a section-by-section review of the model curriculum, exploring the topics and resources therein. Over lunch, participants brainstormed strategies and opportunities for organizing a cultural competency training event of their own.

At the conclusion of the conference, participants “mapped out” specific steps for organizing a cultural competency training session in their home jurisdictions, and were encouraged to utilize their proposed plan. This call to action was then reiterated through follow-up emails, surveys, and technical assistance offerings by the Criminal Justice Section Staff. Moreover, an offer of on-going technical assistance and support to incorporate their new found knowledge in their local jurisdiction was offered to all participants. Lastly, in order to ensure the success of those wishing to embark on their own teachings, the curriculum became available online along with power point presentation slides and additional reading materials.

Subsequent to the conference numerous comments from the attendees were received by Criminal Justice Section Director Jack Hanna. Such comments included that the conference was intriguing, the presenters were dynamics

and attention-grabbing, that the curriculum along with the slides availability online was easily accessible, that the conference and curriculum fulfilled a pressing need in their local jurisdiction. As depicted in such feedback, the number of trainers with the expertise to deliver cultural competency training and technical assistance to the criminal justice community increased. Additionally, all of the participant will receive updated materials as they become available (including a revised curriculum and accompanying disc) and continued project support upon request.

Finally, and most importantly, the curriculum will outlive the life of the Enterprise Grant. The curriculum has already been utilized in a number of jurisdictions to conduct trainings and will now be utilized to support an even larger project the Criminal Justice Section is embarking upon, entitled the *Racial Justice Improvement Project*. The *Racial Justice Improvement Project* will aid four jurisdictions to develop a Racial Justice Task Force Model to address the racially disparate impact of the local criminal justice system. Parts of the final curriculum will be the primary tool to facilitate training at the project’s kick-off meeting on October 8, 2010.

Overall, the Enterprise Grant allowed the creation of a curriculum that will be utilized throughout the nation. The training conference increased the amount of individual trainers versed in cultural competency issues and provided training to accurately utilize the created curriculum. By providing those within the criminal justice field with the means to spread the curriculum’s teachings, the Enterprise Grant has allowed the lessons of cultural competency and awareness to endure within the criminal justice system for years to come.



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Juvenile Collateral Consequence Project

The Juvenile Collateral Consequence project is the Criminal Justice Section's nationwide study of collateral consequences of juvenile arrest and court involvement in all 50 states. The primary goal of this project is to advise the public and legal community about the collateral consequences of juvenile contacts with the justice system.

The information collected from each state during the first phase of the project has been transformed into "chapters" for an ABA Publication. Each chapter is the basis of the information presented on the website and summarized on the *Think About It!* cards.

We have systematically located and invited the best juvenile defenders, prosecutors, judges, and academics in each state to review the research templates and edit the completed chapters. These methods of securing and implementing review experts have enhanced the legitimacy of the project. As we are nearing the end of this project, all chapters have been submitted by their respective authors and are now being reviewed by their state experts for accuracy.

The project has currently finalized the language and layout for the "*Think About It!*" cards, based on the information and research collected in the course of preparation of each state chapter compilation of collateral consequence. With collaboration and support from state bar associations, it is hoped that copies of the card will be available for youth in every state and distributed by defenders, police and probation officers.

This project has been widely promoted: news of the Criminal Justice Section's work on this topic has been circulated to all relevant juvenile court stakeholders through various means including list serves, publications, and conferences. Most notably, on August 25, 2010 the ABA Criminal Justice Section Padilla Task Force held an event entitled "Padilla and Beyond: *The Criminal Justice Section Symposium,*" at the Newseum in Washington D.C. This event, held before a live studio audience, reserved a segment to remark upon the Juvenile Collateral Consequence project's current progress. Kate Richtman, the Juvenile Committee Chair, debuted the Nevada "*Think About it Card!*" (see the card image on this page). The project's final outputs will debut shortly with the launch of the collateralconsequenceproject.com website and the distribution of the "*Think About It!*" cards which will soon be available nationwide.

THINK ABOUT IT!

A Juvenile Record Can...

PREVENT you from:

- GETTING A JOB
- GETTING ACCEPTED TO COLLEGE OR GRADUATE SCHOOL
- JOINING THE MILITARY
- BECOMING A U.S. CITIZEN

In Nevada the following consequences are **AUTOMATIC**:

CHARGES	CONSEQUENCES
Second violation of possession, distribution, or use of a controlled substance	Loss of public housing
Truancy, graffiti, DUI, drug related charges or possession of a firearm	Suspension or loss of driver's license

You **MAY** be...

- SUSPENDED or EXPELLED from school.
- Required to register as a sex offender.
- EVICTED from public housing.

Your record is **NOT** always private, the following may have access:

- THE GENERAL PUBLIC
- SCHOOL OFFICIALS
- POTENTIAL EMPLOYERS



To Join The ABA call: (800) 285-2221

The front of the Nevada "Think About It" card.

The Adult Collateral Consequences Project Update

The Adult Collateral Consequences Project, funded by the National Institute of Justice, is currently wrapping up the data gathering phase of its research and transitioning into the coding phase of the project. The project ultimately aims to create a database allowing users to determine exactly what consequences follow from particular criminal offenses. The database now holds over 35,000 separate statutes and regulations from nearly every state and territory, with 42 jurisdictions completed. States average approximately 650 statutes relating to collateral consequences. The Adult collateral Consequence team intends to close the gathering phase of the project on September 17th and will develop the coding procedure with experts Jack Chin and Rich Cassidy. During the coding phase the team will classify the gathered consequences and associate them with triggering criminal statutes. The coding phase of the research will begin in early October. For more information, please contact Christopher Gowen at 202-662-1511.

Ponzi Schemes: Sure to Rise Again

Practical Tips for Attorneys and Investors

By Scott Richter

Within the last two years, Bernie Madoff and Allen Stanford put Ponzi schemes back into the spotlight. But these schemes had never gone away - lesser known Ponzi scheme fraudsters including Tom Petters (Petters Group Worldwide), Lance Poulsen (National Century Financial Enterprises) and Patrick Bennett (Bennett Funding Group) fleeced investors for over \$8 billion within the last two decades. From Charles Ponzi's postage stamp scheme in the early 1900s to the present day, Ponzi schemes have and will continue to flourish as long as investors ignore the warning signs and don't perform the proper due diligence.

Given the recent proliferation of these schemes, trusted legal and financial professionals may now find themselves fielding inquiries from clients about current or potential investments with a greater degree of frequency. Herein are practical tips for attorneys, as well as investors, to assist their clients in identifying potential red flags and thus avoid these fraudulent investment schemes, as well as certain practical considerations for when an investor thinks they might be a victim of a Ponzi scheme.

Identifying a Ponzi Scheme – Key Characteristics

Unreasonable Investment Returns

The Ponzi scheme fraudster must entice prospective investors with favorable returns in order to perpetuate the scheme. These returns need not be off the chart as in the case of Charles Ponzi who offered a 50% return in 45 days or a 100% return in 90 days; they can also be a steady return over time that consistently beats the market as in the case of Madoff, who promised between 10%-12% consistent annual returns. It is also in the fraudster's best interest to avoid liquidating his assets forcing him to find new investors quickly. He may therefore offer higher returns for those who reinvest, thus leaving their principal under his control.



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Red Flags:

- Guaranteed return.
- Above-market return.
- Historical returns defy market trends.
- Higher returns promised for reinvestment.

Reputation and Appearance of Legitimacy

Investors should not assume that the person with whom they will invest their money is trustworthy based solely upon their credentials, background or standing in the investment community:

- Bernie Madoff co-founded the NASDAQ, was Chairman of the NASD, and founded Madoff Investment Securities, at one time one of the largest market makers on Wall Street.
- Lance Poulsen, former CEO of National Century Financial Enterprises, hosted A-list political fundraisers and issued to Wall Street investors billions of dollars of national Century bonds that enjoyed Moody's highest credit rating.
- Tom Petters, once a highly regarded philanthropist, founded Petters Worldwide that operated in four continents and had reported revenues of \$2.3 billion in 2007 before filing for bankruptcy.
- Patrick Bennett of Bennett Funding Group was part of a legitimate family-run business that leased office equipment to governments.

Though solid credentials and reputation may be necessary attributes for any financial services firm or individual to whom an investor will trust their money, that alone is not sufficient to conclude that the investment opportunity is legitimate.

Exclusivity/Target Market

To minimize the chance of his scheme being uncovered, the fraudster will often market the scheme to targeted groups and create exclusivity amongst potential investors with common affiliations, such as the same religious or social group. Some of Madoff's favorite recruiting spots were exclusive country clubs in Florida as well as several Jewish charitable organizations.

Red Flags:

- Investors have to "ask" or "beg" to get in.
- Recruitment or word-of-mouth originates from a common group vs. diverse, unrelated or objective sources.

Avoiding a Ponzi Scheme – Due Diligence Red Flags

First and foremost – *investors should perform due diligence*. The streets are littered with experienced, sophisticated investors who have fallen victim to Ponzi schemes. Had they performed, or been allowed to perform, a few basic due diligence steps, they may have avoided significant personal losses.

Red Flags:

- Complex investment strategies that are “secret”, “proprietary” or otherwise undisclosed.
- If disclosed, the investment strategy cannot be realistically tested or replicated (e.g., had Madoff’s options contracts strategy actually been in place, it would have dwarfed the existing volume of activity in the options market).
- Investment firm refuses or is reluctant to provide prospective investors access to their investment data or company financial data.
- Lack of internal or external financial statements.
- If available, financial statements are unaudited.
- If audited, audit of financial statements performed by unrecognized accounting firm or a firm too small to realistically handle the size of the investment firm.
- Investments are unregistered.
- Sellers are unlicensed.
- Year-to-year historical investment performance too steady and consistent over time and defies any downward trends in the market.
- Offshore presence of key operations, executives, corporate registration, etc., with little or no justification for doing so.
- Lack of physical business address.
- Sense of urgency to invest now.
- Investors are encouraged to continually invest their profits.
- Threat of being rejected as a potential investor for “asking too many questions”.

What to Do in the Event an Investor Thinks They’re a Victim

Should an investor suspect or learn that they’re a victim of a Ponzi scheme, the authorities need not be contacted immediately – though that ultimately may be a necessary course of action. Various regulatory bodies with different agendas can enter the fray when a Ponzi scheme is exposed. The best course of action for an investor who has or thinks they’ve been victimized is to first understand what if any losses they have incurred, and to seek professional financial and/or legal advice to determine the best course of action.

Steps to Consider:

- Compile all financial records, statements, correspondence, record of telephone conversations, etc., related to the investment and the investment company.
- Quantify the loss (if any), i.e., how much money was invested over time including any funds still held by the investment company vs. how much money was withdrawn since inception. This will help determine whether you are a “net winner” or a “net loser” – a concept still being litigated in the Madoff bankruptcy.
- Discuss with a *trusted* financial advisor and/or attorney who has no connection to the investment scheme as a sponsor or a participant.
- In the case of a bankrupt investment scheme, evaluate whether you can demonstrate good faith. Since payments made to earlier investors will likely be deemed by the bankruptcy court to be fraudulent conveyances, an investor must demonstrate that any return of capital and profit was taken both in good faith and “for reasonably equivalent value”. To demonstrate good faith, an investor must show that he or she did not know *and* had no reason to know of the fraudulent scheme.
- Evaluate and quantify any tax losses. Recent Internal Revenue Service guidelines (Revenue Procedures 2009-9 and 2009-20 issued in March 2009) allow for the deductibility of Ponzi scheme losses as *theft losses* when the theft is discovered, as well as allowing the taxpayer to deduct 95% of the amount invested less any actual or expected recovery.
- If the scheme has not already been discovered, consider contacting regulators / authorities. This may include the FBI, DOJ, SEC, CFTC, U.S. Attorney or state Attorney General.

Ponzi schemes and other types of investor fraud will likely never go away completely; however, a heightened state of investor awareness with regard to any money manager or investment firm will hopefully become the norm. This heightened awareness and concern by investors should establish higher levels of due diligence, and will hopefully cause individuals and companies to seek advice before the fact and prevent these schemes’ continued proliferation.

See “Notable Ponzi Schemes” chart on page 13.

Check [Section Member E-News](#) for latest updates on Criminal Justice Section activities.

FCPA Practitioner Tips for Running a Foreign Language Document Review and Interviews

By *Patrick M. Collins and Caryn Trombino*

With rare exception, a successfully managed, large-scale Foreign Corrupt Practices Act (FCPA) document review is measured by three critical factors: efficiency, accuracy and cost. While accuracy is of paramount importance, particularly in anticipation of potential disclosure to the Department of Justice or the Securities and Exchange Commission, efficiency and cost are often equally significant concerns to in-house counsel. FCPA lawyers who manage and oversee voluminous document reviews on a day-to-day basis must closely monitor the efficiency of the process they have set in place to collect, review, analyze, translate and finalize the documents that will ultimately be used as interview exhibits, in order to ensure that the timeline and budget for the project stays within the bounds of the client's projected estimates.

While any sizable document review presents numerous logistical challenges, reviewing foreign language documents creates layers of unique difficulties, all of which add time and expense. Although it is impossible to predict every complication that will inevitably arise throughout the course of a large-scale FCPA review, this overview of common obstacles and roadblocks is designed to assist FCPA practitioners anticipate the challenges ahead, and to help manage client expectations and budgets without sacrificing the quality of the work product.

Although the document review stage presents various logistical challenges, witness interviews introduce communication difficulties and issues of cultural misunderstanding that can threaten the quality of the fact-finding and the information gathering. Consequently, FCPA lawyers who plan to conduct witness interviews in foreign markets are well-advised to conduct targeted pre-trip research to best prepare themselves and their team for the



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unspoken rules they might encounter during the face-to-face meetings with the key witnesses who are relevant to their investigation.

What follows are some tips highlighting a variety of "lessons learned" by seasoned FCPA lawyers who regularly conduct large-scale foreign language document reviews and witness interviews.¹

1. Invest in a Sophisticated Electronic Review Platform.

Technology is perhaps the FCPA lawyer's best friend and worst enemy. It is technology that results in hundreds of thousands of documents that must be reviewed, with emails, attachments, (and email attachments containing *other* emails and attachments), corrupted files, uploading and downloading processing delays, software incompatibility, etc. However, increasingly sophisticated technology also enables FCPA lawyers to strategically target the critical data through well-crafted search terms and other filtering capabilities.

It must be acknowledged that the cost of using the most technologically-advanced platform can be significant. Because of these costs, it is often tempting for the client or law firm to select a less expensive option. For example, many law firms purchase "in-house" review platforms that are housed on internal servers, and this option has fewer costs than an external web-based platform for which monthly hosting fees must be paid. However, it is best to take a long view when it comes to investing in a review platform, because although it might first appear that the cheapest option will be the most economical, the additional features and capabilities offered by more sophisticated software will reap benefits throughout the entire review process. The below-described inefficiencies and inferior functionality that come with cheaper review platforms will ultimately create delays and other redundancies that, in all likelihood, will far exceed the initial cost of investing in the best review platform to suit the investigation's needs.

Not all review platforms have the ability to process searches in certain foreign characters, which alone might disqualify many of the cheapest options. It is not uncommon for FCPA reviews to include custodians whose data is stored in several different foreign languages. It might not always be possible to anticipate, at the outset, all the languages that may be involved in the document review, so the legal team should actively monitor the review to ensure that any meaningful presence of additional foreign languages is promptly identified and accounted for with necessary search terms.

2. Capitalize on the Technological Features Offered by Review Software.

Perhaps the single greatest technological tool for the legal team is the ability to conduct precise and accurate searches, which will ideally reduce the universe of documents to the most critical subset. Assuming that the majority of the custodians whose data is captured for the review are non-English speakers, it will be essential to conduct searches in both English and the foreign language. In order to conduct precisely targeted searches, it is essential to have Boolean search capabilities so that terms and connectors (e.g. OR, AND, NOT) *and* proximity connectors (i.e. within 5 words of) can be used. Not having the ability to run Boolean searches can add several weeks or months to a review, and most of that additional time will be spent reviewing irrelevant search hits due to the search capability's lack of precision.

Beyond sophisticated searching, which in and of itself is an enormous consideration when selecting the review platform, it is critical to reduce and remove as many duplicates (“de-dupe”), and near-duplicates, from the relevant documents as possible. The concept of de-duping illustrates a common tension that arises between speed and cost. The review team must sacrifice some speed at the front-end of the investigation to effectively de-dupe, in order to save time and money on the back-end when it would be necessary to translate and re-translate the same document (or email chain) over and over again. Certain key or relevant documents might be lengthy and thus extremely expensive to translate, not to mention the additional resources it takes to recreate and translate relevant Excel spreadsheets, PowerPoint presentations, and the like. One helpful shortcut to consider when translating documents is to download the native versions of the files to be translated. This will save the translator the time it might take to recreate the formatting and appearance of the document, and allow him or her to simply re-populate the document with the English translation.

For reasons such as these, the importance of having a sophisticated search and review platform becomes apparent, as more functional software will enable attorneys to weed out and eliminate duplicates, to the extent possible

by meta-data, and software with multiple sorting and search capabilities will enable the results to be filtered back by email subject line, time sent, etc., in such a way that will make the process of spotting and eliminating duplicates more efficient and effective. Software with the capacity to run searches with terms and connectors and proximity restrictions is particularly critical to streamlining the timeline of a review, and a robust metadata search capability will further enhance the legal team's ability to focus the scope of the search results to the most critical subset.

3. Assemble a Review Team with Native Speakers.

Depending on the scope and timeline of the review, it may be necessary to assemble a large team of attorneys who have the foreign-language skills and competencies to handle the project. There are limits to the quality and availability of such attorneys, but to the extent possible, it is advisable to staff the team with native speakers. Native speakers will not only be more capable of understanding idiomatic expressions or slang when reviewing email communications and other types of informal correspondence, but they will also be valuable resources when it comes to developing targeted search terms that will hopefully cull down massive amounts of data to a manageable and relevant core.

Because modern document reviews involve massive amounts of email correspondence, it is important to craft search terms that capture informal usage or slang terms for certain concepts, such as “kickbacks” and “bribes.” Native speakers will be the best resource when developing these search words and phrases, and they should be consulted throughout the drafting process. For languages such as Chinese, consider which regional dialects will likely be used in the materials being reviewed, and try to include at least one or two reviewers who are conversant in that specific dialect.

Some litigation support vendors will offer their language experts to help legal teams develop and refine search terms. Depending on the cost of this additional service, it may be worth considering their input, but it is not advisable to hand over the reins entirely. Unlike an internal team of reviewers, the linguists offered by external vendors will not have the benefit of the legal and factual briefing that covers the background and context of the investigation. And, as explored further below, the accuracy of language translation depends very heavily upon context.

It is worth noting that it has become increasingly common for review platforms to offer a software-based foreign language translation feature. While there are varying degrees

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of accuracy with such programs (certain languages, such as Spanish, tend to produce more reliable results than others, such as Thai), as machine translation becomes more refined, such a feature will better enable first-level review to be conducted by lawyers who may not have the ability to read the relevant foreign language.

As an alternative, one option that law firms and companies may increasingly utilize is the outsourcing of first-level document review to attorneys in countries outside the US, such as India.² Not only do outsourcing firms offer legal services at rates far below that which would be charged in the US, but outsourcing may enable FCPA lawyers to directly supervise a team of native attorneys in the relevant country itself, thus ensuring that the team is comprised of reviewers who can most accurately comprehend the meaning of the documents and communications identified in the investigation.

4. Account for the Extraordinary Expense of Language Translation.

The language translation stage of a document review introduces a potential hornet's nest of complications, many of which are simply unavoidable. Perhaps the most frustrating aspect of language translation is its subjectivity. Simply determining whether an email is instructing its recipients to "destroy," or "delete," or "remove," or "edit" something can depend entirely on who is asked, and yet the meaning of that single term may influence the course of the investigation.

As many FCPA practitioners are well aware, there is a robust industry of professional translation agencies that offer the services of certified linguists. This can be an attractive option, as the agencies have extensive networks of linguists whose skills have been tested and verified, and who can collectively produce polished translations on an expedited basis, if necessary. Additionally, utilizing the services of a translation agency provides an additional measure of independence to a review, which can also be an important consideration to the client. There are two major downsides to this option. First, professional language translation is extremely expensive, and a project ordered on a "rush" basis often multiplies the cost. Second, many agencies send out the translation projects to multiple linguists, who may be sitting anywhere around the world, and in most cases the legal team conducting the review has no interaction with these translators whatsoever. These linguists have not been briefed regarding the context of the communication within the larger investigation, and they may be unfamiliar with certain industry-specific terms or terms of art. As a result, it is

not uncommon to receive professional translations that grossly misinterpret key phrases in the email.

As one alternative to professional translation agencies, FCPA lawyers may want to consider assembling their own team of certified linguists who work directly with the legal team overseeing the review. There are several major advantages to this option. First, the translators have the benefit of having been briefed about the background and context of the overall investigation and the nature of the communications. Because context can so dramatically affect the accuracy of language translation, an internally-supervised team of certified linguists will likely produce translations that capture nuance and meaning that might otherwise be missed or mistranslated. Furthermore, the linguists on an internal team have the advantage of consulting with one another to discuss and debate the best translation, as well as the benefit of experience, as they will undoubtedly read multiple communications from the same custodians, and in this way become more familiar with the phrasing and shared meaning. In contrast, linguists retained by translation firms are often sitting alone, in various locations around the world, and seldom (if ever) work in teams. An internal team is also more likely to recognize duplicates and continuations of similar email chains, and will not needlessly spend time and resources working on a document that has already been translated. Lastly, the cost of hiring an internal team of linguists will often be a fraction of what a professional translation firm would charge for the resulting work product.

Whatever method is selected, it is imperative to weed out and eliminate any duplicative or non-responsive documents prior to moving on to the translation stage, to the best of one's ability. The cost and time that must be allocated to translation is considerable, and it is a waste of resources to send documents out for translation that could easily have been eliminated had they been looked at and considered more closely at the outset.

5. Anticipate the Potential Impact of Cultural Differences and Business Etiquette Norms.

In absence of the elusive "smoking gun" document or communication that captures the issue, the success of an investigation will often hinge on witness interviews. A cooperative witness or whistleblower can dramatically improve the review team's ability to gather facts and evidence, so it is important to approach the interviews with sensitivity towards the cultural differences that could potentially derail a face-to-face meeting.

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Undoubtedly, the majority of interview preparation should focus on familiarizing oneself with the key interview exhibits; however, it is a good idea to spend some time reviewing local customs and business etiquette prior to walking into the first meeting.³ For example, a common misstep for many US lawyers can be attempted use of humor to break the tension of an uncomfortable moment. The use of humor or sarcasm at a business meeting in a foreign culture can often backfire and set a negative tone for the remainder of the meeting. It is important to keep in mind that a comment that would likely generate a laugh from the average American might deeply offend the witness with whom the attorney was hoping to establish an atmosphere of trust.

While many FCPA lawyers consider face-to-face interviews to be an invaluable opportunity to assess witness credibility, a lawyer's ability to read a witness's body language can depend largely on one's level of familiarity with local norms. For example, in certain Asian and African countries, it is considered impolite to make direct eye contact, whereas an American might interpret a witness's failure to make eye contact as shifty or indicative of guilt. Other non-verbal misunderstandings can impede communication, such as nodding head movement that signifies agreement to an American, but may indicate disagreement in countries such as Greece or India. In a similar way, the attorneys leading the interviews should also be aware of the manner in which questions are phrased. In cultures where conduct is strictly guided by conscious efforts to avoid "losing face," a witness might refuse or hesitate to answer a "Yes or No" question posed by an attorney, out of concern that a response in the negative might embarrass the questioner and thus cause him or her to lose face. While the questioner might interpret the witness's body language or reluctance to answer to be indicative of evasiveness, the behavior might instead be motivated by these invisible social constraints.

6. Carefully Weigh the Costs and Benefits of Interview Timing.

Many factors must be considered when determining the appropriate time to conduct interviews, particularly when witnesses are based in a foreign market. As clients are well aware, the arrival of an investigative team of US compliance attorneys in a foreign market is not an event that goes unnoticed by employees of the company. Once witness interviews begin, the legal team should anticipate that employees may share information regarding the content of their interviews, creating the opportunity for witnesses to compare notes and "get their stories straight" before meeting with the legal team. Consequently, if a

legal team conducts witness interviews early in the process, and prior to the conclusion of the document review, the confidentiality of the review may risk compromise, and future witnesses may be "coached" or otherwise tipped-off concerning the nature of the investigation. Furthermore, without the full universe of relevant documents that might pertain to those witnesses, the lawyers conducting the interviews will be unable to challenge certain explanations or claims that might easily be refuted by an email or document that is later discovered by the review team.

In addition to the diminished quality of fact-finding that might result from premature witness interviews, the legal team should also consider the considerable costs that are incurred when the investigative team travels to the relevant market to conduct interviews. Whenever possible, the interview process should be designed to cover all the necessary issues and witnesses during one trip, rather than multiple rounds of interviews over a prolonged period of time. Travel expenses can quickly add up to a costly sum that will impact the case budget markedly.

Nevertheless, depending on the severity of the underlying allegations, the potential involvement of foreign government investigators, or the possibility of an intentional destruction of evidence, it may be necessary for the legal team to conduct witness interviews prior to the conclusion of the document review stage. For these reasons, the circumstances of each case must be carefully considered when deciding the appropriate time to conduct witness interviews.

7. Build Cushion into the Projected Timeline to Accommodate Unexpected Delays and Complications.

Due to the many additional considerations already outlined above, it is without question that a foreign-language document review will require more time and resources than an English language review. Because of this, it is important to properly manage the client's expectations, both in terms of budget and timeline. Beyond just the time necessary for language translation, tasks that require little second thought in an English-language review might create substantial delays when dealing with a foreign-language review. For example, certain software programs might produce distorted characters when printed out

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directly from the system. It can take hours or days for engineers to correct these problems, and to the extent they can be anticipated and addressed prior to “crunch time,” the legal team should try to do so through trial runs early in the review.

Always easier said than done, lawyers who specialize in FCPA investigations must learn to expect the unexpected. Due to the often urgent nature of many FCPA allegations, in-house counsel are typically under considerable pressure to move investigations forward as quickly as possible. Nevertheless, external law firms are retained in order to ensure that the investigation is handled properly, and it may be a strategic disadvantage to move forward with

witness interviews prior to the completion of the document review stage.

Footnotes

- ¹ Although not addressed herein, one critical step that must be taken prior to data collection is a review of the privacy and data protection laws of the applicable countries.
- ² Heather Timmons, *Outsourcing to India Draws Western Lawyers*, The New York Times, August 5, 2010, at B1.
- ³ Native speaker reviewers can offer valuable cultural insight that should be considered prior to witness interviews. Additionally, there are several helpful online sources available as well, including <http://www.cyborlink.com>.

Notable Ponzi Schemes (continued from page 8)

	Charles Ponzi	Patrick Bennett	Lance Poulsen	Tom Petters	Bernie Madoff
Pedigree	None	CFO Bennett Funding Group	Founder / CEO National Century Financial	Founder / CEO Petters Worldwide	Former NASDAQ Chairman
Date Exposed	1920	1996	2002	2008	2008
Duration of Scheme (Years)	2	6	3	13	18
Size	\$7 million	\$1.5 billion	\$3 billion	\$3.65 billion	\$65 billion
Investor Profile	Anyone	Sophisticated	Sophisticated	Sophisticated	Sophisticated
Promised Invest. Return	50% in 45 days 100% in 90 days	7.5% annually	AAA-Rated Bond Rates	11% annually	10% annually
Jail Sentence in Years	12	30	30	50	150

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UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

The *ABA/BNA Lawyers' Manual on Professional Conduct*, a multivolume reference and notification service, is available by subscription through the ABA Web Store at www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=2170002MOPC or by contacting BNA at 1-800-372-1033 or customercare@BNA.com. For a free trial subscription go to www.bna.com/products/lit/mopc.htm.

Dishonest Attorney Suffering Post-9/11 Distress Lacked Venal Intent to Convert Funds

A lawyer suffering from post-9/11 trauma did not have the requisite “venal intent” to support a finding that he intentionally misappropriated funds from his trust account, the New York Supreme Court, Appellate Division, First Department, ruled July 27 (*In re Salo*, N.Y. App. Div. 1st Dep’t, No. M5962, 7/27/10).

In a per curiam opinion, the court pointed out that mental health experts for both sides agreed that the lawyer’s post-traumatic stress disorder interfered with his ability to reconcile his trust accounts and that any conversion of funds was inadvertent.

The court also ruled, however, that there was sufficient evidence to justify imposing a one-year suspension based on proven charges that the lawyer commingled funds, misdirected client money, and committed other accounting infractions when handling and dispensing the money.

Fund ‘Cushion’: Frederick W. Salo won a \$198,000 settlement in a personal injury matter and paid the client and himself out of the escrow account in which the funds had been deposited. Initially, Salo kept \$40,000 in the account to cover a lien claimed by an insurer. Before the lien was resolved, Salo withdrew most of the \$40,000 for his personal use. When the insurer’s successor in interest took action to enforce the lien, Salo deposited his personal funds back into the account. Salo was ultimately charged with violating five sections of New York’s former Code of Professional Responsibility: DR 9-102(A) (misappropriation and commingling of client funds); DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit, or misrepresentation); DR 9-102(B)(2) (identification of bank account); DR 9-102(E) (authorized signatures), and DR 1-102(A)(7) (conduct adversely reflecting on lawyer’s fitness).

Although Salo admitted that he did a poor job of managing client funds, he argued that he lacked the requisite venal intent to support a misappropriation charge. He contended that the misuse in part stemmed from his practice of keeping a “cushion” of earned legal fees in his escrow account to pay personal expenses, and from his extreme anxiety triggered by a history of childhood abuse and by the events of Sept. 11, 2001, which made him confused and disorganized.

Dire Condition: Salo had an office near the World Trade Center at 100 Church St. at the time of the terrorist attacks. Although he wasn’t in the office at the time of the attacks, it severely disrupted his law practice and, according to expert testimony, likely interfered with his ability to focus on reconciling his attorney trust bank account. The disciplinary committee’s expert agreed that Salo suffered the “dire psychological condition” described by his expert. Nonetheless, the disciplinary committee argued against mitigation, pointing out that Salo had enough wherewithal to competently run his law practice.

The referee found that although post-traumatic stress disorder played a substantial role in bringing about the misconduct, Salo knew that he was using third-party funds to pay for personal expenses. Citing the extremely unusual mitigating circumstances of Salo’s psychological condition, the referee rebuffed the disciplinary committee’s request that Salo be disbarred or suspended for at least three years, and recommended instead a one-year suspension. The hearing panel adopted the referee’s recommendations.

No Financial Motive: The appellate court agreed that Salo misappropriated funds and committed accounting irregularities, but said there was insufficient evidence that he did so out of dishonesty, fraud, deceit, or misrepresentation. According to the court, “it cannot be ignored that the mental health experts for both sides were in agreement that [Salvo] invaded the [insurer’s] lien funds inadvertently, without specifically intending to misappropriate third-party funds, as the direct result of the PTSD from which he suffered at the time.” The court noted that both experts felt that Salo’s psychological disorder caused him to stop opening mail, including bank statements, and to lose track of the fact that the balance remaining in his trust account was subject to an insurer’s lien. It also found significant the fact that Salvo apparently had no financial motive to convert third-party funds, since it was uncontroverted that he had sufficient funds of his own to meet his personal expenses. It further noted that no other

instances of conversion were alleged and that neither the client nor the insurer were harmed.

Nevertheless, the court imposed a one-year suspension, noting that even nonvenal misappropriation of funds calls for suspension for a substantial period of time. Chief Counsel Alan W. Friedberg, New York, represented the Departmental Disciplinary Committee for the First Judicial Department. Salo was represented by Michael S. Ross, The Law Offices of Michael S. Ross, New York.

For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.26, page 504 (Aug. 18, 2010).

Criminal Conduct Disbarment Ordered for Lawyer on Death Row

Disbarment is the proper sanction for a lawyer who was sentenced to death after he was convicted of murdering five people and seriously wounding a sixth, the Pennsylvania Supreme Court ruled July 30 in a per curiam decision (*Office of Disciplinary Counsel v. Baumhammers*, Pa., 598 Disciplinary Docket No. 3, 7/30/10).

According to the court's disciplinary board, Richard Scott Baumhammers killed five people and seriously wounded another with a .357-caliber magnum revolver. It recommended disbarment, commenting that the board had never faced anything like this before. "The gravity and magnitude of his crimes far exceed that which this Board has dealt with in the past," it said.

The board noted that it had recommended disbarment once for a lawyer who murdered his girlfriend, commenting that the lawyer's repudiation of society's rules resulted in a forfeiture of his right to practice law. The board concluded, and the court evidently agreed, that the lawyer's conduct here was "so reprehensible and outside the norms of societal convention that the only appropriate discipline is disbarment."

For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.26, page 505 (Aug. 18, 2010).

CJS Committee E-Newsletters

- Juvenile Justice
- Prosecution Function
- Re-Entry & Collateral Consequences
- White Collar Crime

See at www.abanet.org/crimjust/committees

Padila Event (continued from page 1)

Another panel discussion to be included in the video training package focused on two ongoing Criminal Justice Section projects compiling not only deportation consequences but all collateral consequences of criminal convictions in each of the 50 states – one project relating to adults and the other to juveniles. The panel was moderated by April Frazier, Community Reentry Coordinator for the D.C. Public Defender Service. The panelists were: Prof. Timothy Hedeem at Kennesaw State University; Richard Cassidy, private practitioner in Burlington, Vermont; Kate Richtman, head of the Juvenile Prosecution Section in the Minnesota Ramsey County prosecutor's office; and McGregor Smyth (above).

In addition to thanking the moderators and panelists for making the program such a success, Chair Bruce Green acknowledged the significant contributions of the Criminal Justice Section staff, especially Director Jack Hanna, Chris Gowen, and Salma Safiendine. The Section thanks the Open Society Institute for its generous support of the program.

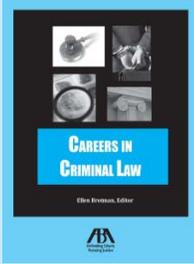
STAFF NEWS

Robert Snoddy, Outreach Coordinator, has moved on to a new position. His absence will be missed by those who had the opportunity to work with him, and will be felt throughout the Section. Membership Coordinator **Stacey Brown** has been promoted to Membership Marketing Associate and Committees Coordinator **Regina Ashmon** has been promoted to Committee Specialist.



On Aug. 10th the Criminal Justice Section held its annual Intern Mock Trial. Staff Counsel Christopher Gowen presided as judge, with interns Julie Steinberg, Caleb Skeath, Ashley Southerland, Stacey Sklaver, Caitlin Huggins, and Jake Kartchner acting as prosecutors and defenders. CJS staff Michael Gradess played the defendant. Other staff played key witnesses, including Susan Hillenbrand and Salma Safiendine.

New Books



Careers in Criminal Law

Edited by Ellen Brotman, this book features firsthand descriptions of a wide variety of career options available to lawyers and law students interested in the criminal law field. The book includes articles by 35 authors whose careers present an

impressive array of choices beyond stereotypical defense and prosecution. There are articles by a mitigation expert, victim advocate, and post-imprisonment reentry specialist. Despite the diversity of career paths these authors have taken, they all have one important thing in common—a passion and commitment to what they do.

The Fourth Amendment Handbook, Third Edition

This book is the definitive guide to understanding Fourth Amendment case law. With summaries of all Supreme Court Fourth Amendment decisions through 2009, the book is an excellent reference on the evolving history of the Fourth Amendment. This newly updated and revised chronological survey serves as a starting

point for research, a quick means of review, or a checklist in court. The handbook is an invaluable resource for any lawyer presented with an issue involving search and seizure.

Warning the Witness: A Guide to Internal Investigations and the Attorney-Client Privilege

This guidebook by Gary Collins and David Seide covers the practical issues of attorney-client privilege in internal investigations. Any attorney who conducts an interview in an internal investigation faces a unique set of challenges, not least of which is the tension between representation of the corporate client and fair treatment of the corporate constituent. The book offers a recommended best practices section that contains sample witness warnings; guidelines for corporate counsel who seeks to interview a constituent; supplemental oral warnings; and a list of topical issues and questions likely to arise in an internal investigation.

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