

The American Bar Association Criminal Justice Section Newsletter

Volume 17, Issue 2 Winter 2009

Ethics - Politics - and Public Corruption **Spring Conference in Birmingham**

On April 3, 2009 in Birmingham, Ala. the Section and the Alabama State Bar Association will address substantive and procedural issues surrounding public corruption during a one-day CLE program titled *Ethics – Politics – and Public Corruption*.



The impact of public corruption extends far beyond the courthouse. The U.S. Government Accountability Office estimates that at least 10 percent of the funding for federal government programs is lost to public corruption and government fraud every year. The U.S. Department of Justice considers the investigation and prosecution of public corruption to be one of its top priorities, with recent investigations having resulted in charges and convictions of federal officials in all branches of government, as well as against numerous state and local officials.

The program – which will consist of four separate panels featuring journalists, judges, prosecutors, defense

counsel and legal scholars – will discuss and provide practical direction of the boundaries between legitimate political activity and corruption. The panelists will also explore the impact of aggressive prosecutions on certain conduct; explore the role of prosecutors, defense lawyers and judges in the trial of public corruption cases; and consider the media’s influence in such cases, and how the players – prosecutors, defense lawyers and judges – can best deal with the media within the bounds of law and ethics.

The event will take place at the Renaissance Ross Bridge Golf Resort & Spa. More information can be found at www.abanet.org/crimjust/calendar (see also page 8-9 of this newsletter).

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Midyear Meeting in Boston

The 2009 ABA Criminal Justice Section Midyear Meeting (Feb. 13-14, Boston Marriott Copley Place) will feature a day to remember for child victim and juvenile justice advocates, the latest updates for white collar crime practitioners in dealing with State Attorneys General investigations, and policy recommendations covering an array of criminal justice issues.

On Feb. 13 the Section will hold a *Day of the Child* two-program event examining the role of the child in the criminal justice system as both the defendant and the victim. *Practical Skills for Attorneys, Judges, Prosecutors, Child Victim Advocates and Defense Attorneys to Better Serve Children* will discuss the role and function of the child victim attorney and how they can serve an important function in the successful case. *A New Paradigm for Juvenile Justice*, moderated by CJS Juvenile Justice Committee co-chair Charles Ogletree, will focus on best practices and winning strategies for juvenile justice reform around the country and will address the importance of involving the private business community, law firms as well as public stakeholders.

The Section’s White Collar Crime Committee Boston Subcommittee will hold a program titled *Handling Investigations By State Attorneys General* on Feb.13. The program will examine how multi-state investigations develop, how these multi-state groups

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Three Questions With...

Charles Ogletree

Considering the New Paradigm for Juvenile Justice

By Christopher Gowen



Professor, can you tell us about the program you are moderating at the ABA Mid year meeting in Boston?

I am delighted to have been appointed to serve as the co-chair of the Juvenile Justice Committee of the Criminal Justice Section of the American Bar Association. Since my early days as a public defender in the District of Columbia, I've always been deeply concerned about the plight of children in our juvenile justice system, and have made it a mission in life to ensure that we find ways to ameliorate the many pains that they suffer daily. This mission of ensuring there is justice in the juvenile justice system will certainly continue in my role as the co-chair of the American Bar Association's Juvenile Justice Committee. We have an ambitious agenda for this year, including a panel discussion at the mid-year meeting in Boston on February 13th, 2009, focused on discovering the new paradigm for juvenile justice. My goal is to look not only at the lessons we can learn from *In re Gault*, but also the lessons from the last 40 or more years of trying to create a sane, fair, and rational juvenile justice system. As we enter into a new era in which we relinquish "failed" policies of the past, we must rigorously re-examine our nation's emphasis on harsh punishment over rehabilitation for juveniles during the past two decades. Research pretty clearly shows us that the "superpredator" never really existed, and that this

Professor Charles Ogletree of Harvard University Law School is the co-chair of the Juvenile Justice Committee of the Criminal Justice Section of the American Bar Association. Christopher Gowen is the senior staff attorney for the ABA Criminal Justice Section.

approach has been counter-productive. It has been particularly harmful for young males of color. I believe it is critically important that we return to an emphasis on rehabilitation and prevention over punishment in our juvenile justice system, and create systems, policies and practices that reflect that emphasis. We hope to have a number of prominent speakers discussing ways that we look at not only the current impact on the juvenile justice system on children, but the collateral consequences that they suffer as a result of their engagement in the system, particularly its negative impact on their prospects for completing high school.

In your opinion what is the most pressing issue regarding juvenile justice today?

Today we face some of the most challenging issues ever on the plight of children. Not only are we looking at the depreciating punitive nature of juvenile justice in America, but we find concern about children who are being held in places like Guantanamo, being prosecuted for crimes for which they may not be guilty. We also have to more aggressively address disproportionate minority confinement (DMC), a phenomenon that is evident in almost every state. This means not only focusing on data and on policy changes, but at looking more closely at how implicit bias is likely affecting decision-making processes of teachers, school administrators, police, judges, probation and parole officers. There is new research on implicit bias that, if we can figure out how to effectively weave it into professional and educational training of law enforcement professionals, may actually begin to remedy some of the root causes of DMC. Finally, as detailed in the report entitled "Leave No More Children Behind Bars" that the Charles Hamilton Houston Institute released last year, the most robust research currently available about youth violence and gang membership very clearly finds that prevention and education are far more effective tools for reducing juvenile delinquency than more prosecutions and stiffer sanctions.¹ We know much more now than we did a decade ago about what programs work, how adolescents think and respond to interventions, and we need to do a more effective job of grounding our policies in this research, which comes from the fields of psychology, sociology, public health,

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education, economics, and criminal justice. It is this wide-ranging set of issues that require urgent attention, and I'm happy to be a part of those who are fighting to promote this justice.

What criminal justice issues do you think President Elect Obama will address in his first term and what role do you envision yourself playing with the Obama administration?

As President-elect Barack Obama takes office on January 20th, 2009, it provides a propitious opportunity for the Juvenile Justice Committee to urge immediate attention to the Office of Juvenile Justice and Delinquency Prevention, and also to the strengthen the Juvenile Justice and Delinquency Prevention Act of 2002. These are paramount issues that are consistent with President-elect Obama's concerns about children, education, and equal opportunity. It is incumbent upon us to bring to the attention of the highest level in the administration urgent matters concerning DMC, the relationship between educational attainment and juvenile delinquency, the harmful impact of committing youths—particularly non-violent youths—to secure facilities which take them out of their communities and schools, and the cost-effectiveness of investing in education and prevention instead of in more juvenile halls. We need to provide concrete plans for them to address these many matters. I am so pleased to have the honor of serving on this committee, and look forward to working with all of you in the coming days, weeks, and months. Do not hesitate to give me your ideas and challenges for the committee, as we are not only ambitious but eager to change the impressions that the public has of our children, and to give them the opportunity to have a meaningful and productive life.

Endnotes

¹ *No More Children Left Behind Bars*, Charles Hamilton Houston Institute for Race and Justice, March 2008. Available online at: www.charleshamiltonhouston.org/Publications/Item.aspx?id=100012

GREENHALGH STUDENT WRITING COMPETITION

The contest is open to all students who are members of the ABA and who, at the date the entry is submitted, attend and are in good standing at an ABA-accredited law school within the U.S. and its possessions. The topic is any timely and important issue of American criminal constitutional procedure of interest to practitioners of criminal law. Entries must be received no later than April 24, 2009. For more information, see www.abanet.org/crimjust/awards.html or call (312) 988-6047.

Section News



Ed McNally, Senior Counsel, Criminal Division, Department of Justice; Judge Ellen Huvelle of the U.S. District Court in Washington, DC; Bob Litt, ABA Criminal Justice Section Vice Chair; and Chris Conte, Associate Director of the Division of Enforcement for the SEC served as panelist on the **Town Hall Meeting on the State of White Collar Crime** (Oct. 23), which kicked-off the Section's Fall Meeting in Washington, DC, and was moderated by Steve Salky, a partner in the law firm of Zuckerman Spader LLP.



The 2008 Securities Fraud National Institute (Oct. 2-3 in Arlington, Virginia) featured overflow crowds attending panels on the latest developments on issues such as the mortgage meltdown and the False Claims Protection Act.



Former CJS Section Chair Stephen Saltzburg, Supreme Court Justice Anthony Kennedy, Jeremy Travis, President of John Jay College of Criminal Justice, and Margaret Love all took part in a one-day roundtable discussion on Dec. 8 that took a **Second Look at Sentencing Reform**, sponsored by the ABA Commission on Effective Criminal Sanctions.

Juvenile Justice Holds Historic Town Hall Meeting

By Christopher Gowen

On November 6th, the Criminal Justice Section's Juvenile Justice Committee sponsored a Town Hall Meeting at Georgetown Law School. Hosted by the Georgetown University Law Center, the meeting drew over 200 members of the Juvenile Justice Community, making it the best-attended ABA Juvenile Justice Committee event in recent years. Professor Charles Ogletree, long-time friend and advisor to President-Elect Barack Obama and his wife Michelle, moderated the meeting two days after the historic election. Professor Ogletree led a panel discussion that heard representatives from over thirty organizations present proposals on the issues they think the Obama Administration should focus on during its first term.

The Panel included Pennsylvania State Senator Stewart Greenleaf (R), Massachusetts Juvenile Judge Jay Blitzman, Rhode Island Attorney General Patrick Lynch (D), Georgetown Law Professor Kristin Henning, and Washington Post Reporter Chris Jenkins. Special guests at the meeting included staff members from Senator Hillary Clinton's and Senator Jeff Bingaman's office and ABA President Tommy Wells. Former Clinton appointee and Georgetown staff member Shay Bilchik ended the meeting by noting that, "it is obvious that there have been several years of pent up aggression and that the juvenile community appears ready for change."

Christopher Gowen is the senior staff attorney for the ABA Criminal Justice Section and the staff liaison to the Juvenile Justice Committee.

The Road Ahead

Now that the transition is in full force, the question is what, if any, of the proposals put forth at the Town Hall Meeting will the Obama Administration consider. President-Elect Barack Obama earned considerable political capital by his large margin of victory in November. Unfortunately the American economy is in a recession and Americans are facing some of the hardest economic times in our country's history. As our government spends billions of dollars bailing out Wall Street, AIG and the auto companies while trying to provide an economic stimulus package for citizens losing their homes and jobs, the criminal justice system marches on with all of its problems and no cure in site. A widespread fear among the juvenile justice community is that, even if the new Administration agrees in principle with the platforms suggested, it will not be able to recommend or get Congress to appropriate significant funds for juvenile justice. Accordingly, those interested in reforming the juvenile justice system must be ready to introduce economically feasible plans that produce positive reform.

Several speakers at the Town Hall Meeting presented proposals that could produce cost savings while promoting positive reform measures. These included reducing the excessive costs of incarceration, court costs, personnel costs and administrative costs and ways those costs can be reduced with out incurring detrimental burdens to society.

The Gang Task Force of the National Juvenile Justice Delinquency Prevention Coalition noted that, "The United States spends \$65 billion per year on incarceration and now records the highest incarceration rates in the world

with 2.2 million people in prison or jail up 500% from 30 years ago."¹ The Task Force, along with other presenters including Human Rights Watch (HRW), urged Congress and the new Administration not to pass laws that will result in increased incarcerations but have no positive effect on public safety. HRW addressed specific legislation on gangs: "Congress should reject costly and misguided gang legislation that would over federalize state and local crime and subject an increasing number of poor youth to federal prosecution and incarceration."² HRW argued that gang legislation "subjects youth to enhanced penalties for non-violent conduct, strengthens gang affiliations and emphasizes suppression and incarceration over prevention and intervention."³ Further, they noted that sentencing enhancements based on associations, whether a gang, mafia or some other group, do not deter crime any more than the penalty for the underlining crime does. They do however cost the taxpayer millions of dollars a year and serve as an excellent example of legislation that should not be signed by the President elect during hard economic times.

The Economic Policy Institute calculated that "the United States currently spends \$200 million a year on policing, the judiciary and corrections to process and hold inmates,"⁴ a number that EPI points out has grown at a rate "seven times that of the Western industrial average."⁵ This number does not include the costs associated with arresting and prosecuting criminal defendants, which are almost impossible to calculate. In addition to the processing and incarceration costs, taxpayers continue to pay for felons after they have been released because of the collateral consequences of their convictions. EPI notes that convicted felons are completely restricted from



Harvard Law Professor Charles Ogletree leads a discussion on the road ahead for juvenile justice under the new Obama Administration.

certain occupations and even if the law does not restrict them, employers often do. (One survey found that only 13 percent of employers said they would consider hiring an ex-offender).⁶ The Obama Administration would serve the country well by providing government job opportunities for ex-offenders because when citizens are out of work they not only do not contribute to the economy in any way, they become an economic cost through their reliance on social services. The American economy cannot afford to restrict capable citizens from contributing.

Larry Wojeck of DLA Piper in Chicago addressed a similar issue with respect to juvenile high school dropouts who, he noted, cost Illinois taxpayers \$470 million a year.⁷ Dropouts who re-enroll in high school increase their lifetime earnings by \$355,000 and save Illinois taxpayers \$208,000.⁸ Many juveniles when released from detention are not permitted to go back to their home school and the ones that are allowed to go back to their home school often find themselves far behind academically and socially detached from school. Both scenarios lead juveniles to drop out of high school, costing taxpayers valuable money. A system that allows juveniles to keep up with their home school's curriculum while serving time in detention and, once released, to return to that school

would curb the economic costs society is paying for high school dropouts.

Human Rights Watch also addressed the costs involved in juvenile life sentences without parole. The presenter acknowledged that many times these juveniles have committed heinous crimes but also pointed out the developmental and physiological

differences between a child and an adult and the fact that fifty-nine percent of the juveniles serving life without parole sentences were first-time offenders.⁹ HRW mentioned that the United States is currently the "world's worst human rights violator in terms of sentencing youthful offenders to life without parole"¹⁰ noting "that there are currently 2,484 persons serving a life with out parole sentence for a crime committed when they were under the age of 18."¹¹ HRW has not found one other child in the world serving this sentence.¹² The price of incarceration coupled with the findings of developmental studies about juvenile's impulse control and decision-making skills suggest that the new Administration should consider ending life with out parole sentences for juveniles.

Conclusion

The current political and economic situation provides President-Elect Obama an excellent opportunity to make needed changes in the juvenile justice system. His Reagan-like electoral mandate, together with the public's keen interest in minimizing government expenditures, can be expected to reflect well on juvenile justice reforms that might otherwise be ignored by an indifferent public or opposed as a public safety threat by those who do not understand them. Measures that reduce both the incidence and length of

incarceration for juveniles and that facilitate incarcerated juveniles' reentry into school and the job market can be expected not only to reduce the incidence of crime committed by juveniles (and by the adults they will become), but also reduce the costs that are currently being expended on them.

DVD's of the Town Hall Meeting can be ordered by emailing
Gowenc@staff.abanet.org

Endnotes

¹ See www.abanet.org/crimjust/juvjust/calltoactionmaterials.pdf at Pg 22

² Id at pg. 105

³ Id

⁴ Id at pg 83

⁵ Id

⁶ Id

⁷ Id at pg 3

⁸ Id

⁹ Id at pg 106

¹⁰ Id

¹¹ Id

¹² Id

Midyear Meeting Continued from page 1

are organized and function in individual investigations, how the civil prosecutors in AG offices work with federal and state criminal counterparts, the organizations among attorneys general and staff that support these activities, how these investigations can affect state and federal criminal matters, and how to assist clients in dealing with these inquiries simultaneously.

The Section will be bringing four resolutions to the ABA House of Delegates. They address the Adam Walsh Act; Child Victims; Immigration Raids and Criminal Justice; and Mediation in Criminal Matters. For more information, visit www.abanet.org/crimjust.

Practice Tips

Pre-Sentencing Tips

Little Things that Can Make a Big Difference

By Meredith Auten, Marcos Hasbun and Adrian Mebane,
Co-Chairs of the ABA CJS White Collar Crime Committee's
Young Lawyers Subcommittee

Accompany your client to the interview with the probation officer who will prepare your client's Pre-Sentence Report ("PSR").

Your client's interview with the probation officer who will prepare the PSR is an often underestimated component of the sentencing process. In fact, some defense counsel question whether they should even accompany their client to the interview. Defense counsel should not only accompany their clients to the interview, but should prepare their client in advance of the interview. Having a well-prepared client can have a substantial positive impact on the sentencing outcome. Here's why:

- Judges continue to rely heavily at sentencing on the recommendation of probation officers.
- The probation officer makes a number of critical decisions from whether to apply enhancements to recommendations on disputed issues of fact such as the amount of loss.
- Inaccurate information provided in the PSR can adversely affect the length and location of any period of incarceration.

What you should do before the interview:

- Obtain the documents and forms needed by the probation officer and have your client complete them in advance of the interview.
- Present your view of the case in a letter to the probation officer, including any cases supporting your position - remember, the government often lays out its version of the case and its guidelines calculation, along with victim impact statements, for the probation officer so you want to ensure the officer gets a balanced view.

Meredith Auten is with the Morgan, Lewis & Bockius LLP; Marcos Hasbun is with Zuckerman Spaeder LLP; and Adrian Mebane is with Crowell & Moring LLP.

- Do your homework on your client - gather and provide the probation officer any background information on your client, such as social or family history.
- Provide your client's statement of the offense to the probation officer (your client can do this at the interview, but it is often preferable to set it forth in writing so as not to admit to more serious conduct than charged).
- Prepare your client for the questions and issues that will be addressed at the interview.

What you should do at the interview:

- Ensure your client provides accurate and truthful information.
- Ensure your client is respectful to the probation officer.
- Advance the positions set forth in your letter in person on the offense conduct, your client's role in the offense and any grounds for variance.
- Ask for the dictation date - make sure you get all the information to the probation officer well before that date.

After the interview, follow-up with the probation officer *before* he/she completes the PSR.

Although the sentencing guidelines are now "advisory," the PSR remains a critical component of the sentencing process. Indeed, when crafting a sentence most judges give great weight to the PSR. In light of this, defense counsel should attempt to shape and mold the content of the PSR as much as possible *before* the probation officer begins preparing the PSR.

In one particular case, a prosecutor advised defense counsel that he intended to seek a sophisticated means and abuse of skill enhancement at sentencing. The potential impact on the ultimate sentence if *both* of these enhancements applied was significant because it would have resulted in an advisory guidelines range that included a potential term of imprisonment. By contrast, the possibility of a sentence of probation increased exponentially if only one, but not both, of the enhancements were found to apply.

Instead of waiting for the probation officer to circulate the PSR so that objections could be made, defense

counsel spoke with the probation officer before he started drafting the PSR to explain why neither enhancement applied. Although the probation officer expressed his belief that both enhancements applied, defense counsel nonetheless followed up with a detailed letter re-iterating his position and included legal authority to support that position.

When the probation officer circulated the PSR to the prosecutor and to defense counsel, the PSR made no reference to a sophisticated means enhancement. Once the prosecutor learned this, he decided not to press for the sophisticated means enhancement at sentencing, which he most certainly would have done had it been recommended in the PSR. And all defense counsel know that with some judges it can be exceptionally difficult to argue against application of an enhancement against your client when both the PSR and the prosecutor press for that enhancement. Thus, from a strategic standpoint, it makes more sense to try to keep unfavorable information from being included in the PSR in the first place instead of arguing to a judge why you are right, and both the prosecutor and the PSR are wrong.

Never underestimate the importance of letters of support.

The *Booker* decision has reinvigorated judicial discretion and defense attorneys must utilize every measure to augment their client's prospects for a favorable sentence. In this climate, character letters of support now take on added significance and are an absolute must in providing the Court personal insights that are difficult to glean from the limited perspective afforded in a court appearance. Defense counsel must take the necessary steps to ensure that the letters are drafted properly in order to achieve the desired result.

Here are some ideas you might want to consider when pursuing this endeavor:

- Have your client identify a diverse mix of people, including family, friends, current and past co-workers and the broader community (e.g. neighbors).
- Send a letter to those individuals asking each to express their personal view of the client and to request lenient treatment at sentencing.
- Be sure to explain the current judicial process and the type of letter that would be most helpful to the client. A letter expressing resentment and anger might be improperly attributed to the client at sentencing.

- The letters of support should attempt to persuade a Court that substantial incarceration would serve no useful purpose and if the circumstances call for it, could imperil your client's ability to support and provide for the welfare of his or her family.
- Letter writers should reflect on events and exchanges that reveal the true nature of the client and attempt to concisely capture those thoughts in the letter. In doing so, the writer should briefly describe the nature and duration of the relationship with the client. There is no page limit, but the Court may receive multiple letters, so recommend a page limit of one to three pages.
- Have the letter writers send their drafts to you before sending to the Court so that you will be able to suggest any appropriate revisions.
- Once in final form, assemble all of the letters and provide them to the Court en masse with your other sentencing materials.

Do not underestimate the value of letters of support. It has been our experience that courts and probation officers do read and consider these letters, as they are a vital part of the sentencing process. If the letters are well-drafted and heartfelt, your client may derive a meaningful benefit.

Always confirm whether your client is potentially eligible for the BOP's Residential Drug Abuse Program ("RDAP").

Another avenue to explore with a client is whether he or she would be eligible for the Federal Bureau of Prisons Residential Drug Abuse Treatment Program (RDAP). RDAP is a specialized program that can benefit offenders with substance abuse problems while also offering the added incentive of a potential reduction in their sentences beyond earning good time credit.

The treatment is an intense 500 hour, six to twelve month program and eligible graduates may qualify for an extended halfway house placement and a sentence reduction of up to one year.¹ The program is voluntary and candidates must have a documented substance abuse problem, usually verified by the PSR. Also, the candidate must have 36 months or less remaining on his or her sentence.

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The American Bar Association Criminal Justice Section and
the Alabama State Bar Association Present

ETHICS – POLITICS – AND PUBLIC CORRUPTION

Friday, April 3, 2009

Renaissance Ross Bridge Golf Resort and Spa

Birmingham, Alabama



The impact of public corruption extends far beyond the courthouse. The U.S. Government Accountability Office estimates that at least 10 percent of the funding for federal government programs is lost to public corruption and government fraud every year. The U.S. Department of Justice considers the investigation and prosecution of public corruption to be one of its top priorities, with recent investigations having resulted in charges and convictions of federal officials in all branches of government, as well as against numerous state and local officials.

The program – which will consist of four separate panels featuring journalists, judges, prosecutors, defense counsel and legal scholars – will discuss and provide practical direction of the boundaries between legitimate political activity and corruption and explore the impact of aggressive prosecutions on certain conduct; explore the role of prosecutors, defense lawyers and judges in the trial of public corruption cases; and consider the media's influence in such cases, and how the players — prosecutors, defense lawyers and judges — can best deal with the media within the bounds of law and ethics.

The event will take place at the stunning and majestic Renaissance Ross Bridge Golf Resort & Spa which features a Robert Trent Jones Golf Trail course highlighted by sweeping majestic views of the surrounding foothills as well as a lavish 12,000 square foot European spa, exclusively designed to ensure complete relaxation and tranquility.

Hotel Reservations: The Section is holding a block of sleeping rooms at the Renaissance Ross Bridge Golf Resort & Spa until Wednesday, March 4 at 5:00 p.m. CST. The rate is \$195 single/double. Please call the hotel at 800/593-6419 and refer to the ABA Criminal Justice Section 2009 Spring Meeting to obtain this rate.

**Co-Sponsors: The Alabama State Bar Association, The Mississippi Bar,
Birmingham Bar Association, National District Attorneys Association**

KEY SESSIONS

Substantive Criminal Law and Public Corruption

This panel will identify public officials' conduct that could be targeted by prosecutors and the criminal statutes and legal theories that prosecutors could employ. Panelists will identify the boundaries between legitimate political activity and corruption and how employing aggressive legal theories will chill legitimate conduct.

The Lawyers' Role in the Investigative, Pre-indictment and Pre-trial Stages of a Public Corruption Prosecution

This panel will examine the work of prosecutors and defense lawyers in all stages leading to a trial. The panel will discuss the charging decision, bringing a case in state or federal court, leaving it to state civil agencies (e.g., conflict of interest boards) to address potential wrongdoing and the defense lawyer's role in influencing those decisions? How should defense counsel simultaneously address, and promote, the client's political and penal interests, and how should prosecutors take account of the political implications of an investigation or prosecution?

The Trial of a Public Corruption Case

This panel will look at the role of prosecutors, defense lawyers and judges in the trial of public corruption cases. Among other things, panelists will explore the special strategic and ethical problems in preparing, examining and cross-examining cooperators, defendants and other witnesses in light of the special pressures of high-profile corruption trials, where lawyers and witnesses are under a microscope, testimony has implications for elections and government operations, witnesses are often highly sophisticated, and questions of intent are typically front and center. Practical advice and best practices will be highlighted by the panel.

The Media's Role in Public Corruption cases

This panel will examine the media's role in all aspects of a public corruption case, and how prosecutors, defense lawyers and judges can best deal with the media within the bounds of law and ethics. What are the ethical limits on the attorney's dealings with media and what are the attorneys' obligations to supervise their agents and others in dealing with the media? What are the risks to the defendant in a strategy that involves communications with the media, and to what extent must defense counsel consult with the client about this strategy particularly in light of the risks? What is the potential role of media consultants in advising about, and assisting in, a media strategy, and what are the implications for attorney-client confidentiality and privilege of engaging media consultants?

Registration Form: ETHICS – POLITICS – AND PUBLIC CORRUPTION

Return to: ABA Criminal Justice Section, 740 15th Street NW, Washington, DC 20005 or fax to 202-662-1501.
Contact Carol Rose at 202-662-1519, carolrose@staff.abanet.org Web: www.abanet.org/crimjust

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Cancellations must be received by March 20, 2009. Cancellations subject to an administrative fee of \$50; Registrant substitutions are allowed; Paid "no shows" will receive the materials, minus the CLE certification, and will not receive a refund.

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Practice Tips for the Child's Attorney

By Angela Downes, Vice Chair of the ABA CJS Victims Committee, in coordination with Meg Garvin and Russell Butler, Co-Chairs of the Victims Committee

Understanding the Role of Child's Counsel

The adversarial nature of criminal court often neglects the victim.¹ Fortunately, all states and Congress have passed legislation protecting the rights of the victim in a criminal case.² While these protections are helping ensure all victims are treated with dignity and respect, child victims need added assistance to protect their rights. Research shows that a child-victim can suffer great emotional trauma during criminal proceedings.

One way to respond to the unique needs of child victims is to routinely appoint counsel for a child victim. This counsel can help alleviate fears the child might have about the criminal proceeding; protect the child from improper questioning during discovery or testimony, protect the child from intimidation from the defendant or family members, and work to alleviate the general trauma of the courtroom environment. Not only should appointing counsel for child-victims in criminal courts be more widespread but it can be most effective when it includes clearly defined roles for all so that the child's counsel can best protect the child. What follow are practice tips on the role of the counselor for the child victim and ways that you can effectively work in partnership with the child's attorney.

Distinguishing Between Guardian *Ad Litem*s and Counsel for the Child Victim

Counsel for the child victim can either be appointed by the court as a *guardian ad litem* (GAL) or can be retained to serve as the child's attorney. The child's family has the option of hiring an attorney to represent the child victim, if the parents are acting in the best interests of the child. The main difference between a GAL and a child's attorney lies in their roles and responsibilities. A GAL must represent the child "according to the guardian *ad litem*'s independent assessment of the best interests of the minor."³ According to the ABA Standards of Practice for

Lawyers Who Represent Children in Abuse and Neglect Cases, GALs are appointed "to protect the child's interest without being bound by the child's expressed preferences." These standards require the GAL, regardless of the wishes the child conveys to counsel, to make recommendations to the court that are in his best interests and may not always follow the child's wishes. While many GALs will tell the court the child's wishes, this is not a mandated part of the GALs role.

In contrast, a child's attorney is obligated to represent the child as a client, which requires the attorney to pursue the expressed wishes and views of the child as long as the child is capable of making considered decisions.⁴ The ABA standards stipulate that a child's attorney "owes the same duties of undivided loyalty, confidentiality and competent representation to the child, as is due an adult client."⁵ A critical difference between a child's attorney and a GAL is that an attorney is obligated by lawyer-client privilege, whereas, the GAL must represent the "best interest" of the child.⁶

Practice Tips

1. General rights: Child's counsel, whether they are serving as GAL or attorney for the child, should know general rights and any special rights for all victims in the jurisdiction. (*See, e.g.*, 18 U.S.C. § 3771). Adult victims are sometimes unaware of their rights within the courtroom, so child victims are even less likely to be aware of their rights. Child's counsel can help child victims understand their rights. Under 18 U.S.C. §3771 and many state constitutions, laws and rules, a victim has a number of enumerated rights including to be informed of judicial proceedings, to be present at such proceedings, to be heard at various proceedings including sentencing, to dignity, privacy and respect, and the to restitution. If serving as a GAL, the child's counsel should make a recommendation to the court regarding the child's best interest regarding each of these rights at each stage in the criminal proceeding. If the child's counsel is serving as an attorney, that attorney should, based upon the client's wishes, aggressively advocate for rights at each stage. A federal prosecutor has a legal obligation to inform victims and their parents or legal guardians of the child's rights. This includes a duty to inform the victim of the right to counsel as provided in 18 U.S.C. § 3771(b)(2)(B). Thus, if there is no parent or legal guardian acting in the child's interest, the only way for a prosecutor to comply with the rights of the child victim may be to have counsel appointed on the child's behalf.

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2. Collaboration between attorneys: Child victims often have proceedings occurring in through child welfare, juvenile and criminal courts. Some states attempt to bridge the gap between juvenile and criminal courts by appointing just one attorney to represent the child in both the juvenile and criminal courts. For instance, North Carolina allows the GAL representing the minor in juvenile court to accompany the minor to criminal court if the minor may be called to testify.⁷ If, however, the attorney for the victim in the child welfare case and the attorney for the minor in the criminal case are different individuals they should collaborate on specific case goals and procedures for the victim. Because many criminal cases involving minors may also include child welfare proceedings, the child's counsel may be needed simply to connect the activities and decisions of the two courts. Coordination between the child welfare proceeding and criminal proceedings can avoid repeated questioning of the child and a loss of information. It also promotes shared goals between the juvenile court and the criminal court.⁸

3. Victim impact statement: The child's counsel, whether GAL or child-attorney, should help the child prepare a victim impact statement that makes appropriate recommendations consistent with the rights and interests of the child. Federal law states that the child's counsel should assist the child victim in writing a victim impact statement for the purpose of sentencing.⁹ A GAL or attorney for the child can work with the child, asking age-appropriate questions, to make sure the material presented to the court reflects the rights and interests of the child. Some methods to consider include the child creating a picture or other representation of the impact of the crime on the child or asking the court to allow the child to address the court orally but in a protected environment.

4. Restitution: The GAL or attorney for the child can also file for restitution on behalf of the child. Most states and the federal government have codified a victim's right to restitution, but child victims may have difficulty understanding and exercising a right to restitution. Child's counsel should appropriately act to protect their client's interests in restitution.

5. Testifying in front of the defendant or perpetrator: Providing testimony for the court may be the most traumatic and intimidating experience for a child victim during the criminal proceeding, thus, having independent counsel for the child-victim is particularly important in any crime in which the child victim must

testify in front of the child's alleged perpetrator. Many states have adopted several measures to protect the child witness from the trauma of the courtroom, while still upholding the defendant's right to a fair trial. The child's counsel, with the assistance of therapists and experts, should evaluate and then inform the court of the child's ability to testify in front of the accused and when necessary file a motion to provide the child's testimony by closed-circuit television, recorded deposition, or alternate means. Child's counsel can prepare the child for testimony and take measures to shield the child from intimidation or coercion by the alleged perpetrator before the child goes on the stand. Child's counsel can also petition for a support person to sit with the child during testimony or If the child appears intimidated by the courtroom generally, the child's counsel should file motions for appropriate relief to facilitate testimony (*see* 18 U.S.C. §3509).

6. The child victim and the confrontation clause: Recent developments in the hearsay rules, and the strict enforcement of the Confrontation Clause for defendants makes it more likely that child witnesses will be called to testify. This makes a child victim's need for counsel even more palpable. Counsel can assist their clients in understanding the judicial process in a manner that the child will understand. Perhaps counsel can show the child a courtroom and the consequences and need for testifying truthfully. Adequate preparation may assist in avoiding trauma before, during, and after testimony. When closed-circuit television or video depositions will be used, counsel can familiarize the child with these approaches of in court testimony before they take place.

7. Intrafamilial abuse: The court should always appoint a child counsel in the case of intrafamilial abuse. Many child victimization cases involve intrafamilial conflict. In such cases, the system should handle the case with heightened sensitivity, particularly when there may be a conflict of interest between the child and parents. In addition, the child may be emotionally torn between their desire to punish and their need for emotional support from family.¹⁰ Parents may want the offender to return to the community and may not truthfully represent the interests of the child. Counsel can ascertain the child's rights and interests, rather than the parent's interests, and make the court aware of these. Assume for example that one child sexually assaulted a sibling or one parent assaulted the parent's child; these circumstances may create a conflict and the parent may not act in the interest of the child victim, but in the interest of another family member. For these reasons, the court should

always appoint counsel to represent the minor's interests under these circumstances.¹¹

8. Protective orders: Just as the attorney for the child can file motions for protective orders before and during the trial, so too can the attorney ensure the child is protected after the defendant is sentenced. At the post-trial phase, child's counsel can continue to advocate for their client by seeking no-contact orders and appearances at modification and parole hearings to ensure the child is protected. In some cases such as when children have been victimized in pornographic material, the child may be re-victimized so Child's counsel may need to assist their client in future cases.

Conclusion

The interests of child victims in criminal cases may be ignored unless those persons who have contact with the child victim take appropriate legal actions to protect the child's interests. Child victims will have rights as victims of crime like adult victims, but they may not have the capacity to understand and exercise those rights. Child victims may also have age specific provisions of law to accommodate their status as children. Those involved in child welfare cases, law enforcement personnel, social workers, prosecutors, judges, and others should take appropriate action to facilitate the appointment of GALs or counsel for child victims in criminal proceeding. With appropriate training, attorneys will be able assist child victims in the aftermath of crime.¹²

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Endnotes

¹ "The legislatures who enact laws criminalizing child sex abuse, the police and prosecutors who enforce these laws and society at large have grown increasingly aware of the need to protect children throughout the criminal process. The growing emphasis on child victim rights in this process has led to debate within the legal community regarding how to balance the welfare and rights of the victim with those of the defendant." See generally, Gregory M. Bassi, *Invasive, Inconclusive, and Unnecessary: Precluding the use of Court-ordered Psychological Examination in Child Sexual Abuse Cases*, 102 NW. U. L. REV. 1441, 1442 (Summer 2008). See also Elaine Walton, *The Confrontation Clause and the Child Victim of Sexual Abuse*, Child and Adolescent Social Work Journal (June 1994).

² Information on the victims' rights statutes passed by various jurisdictions can be found at www.ncvli.org.

³ See Mark Hardin, *Guardian ad Litem for Child Victims in Criminal Proceedings*, 251. FAM. L. 687 (1986-87).

⁴ See Hardin, *supra*.

⁵ ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases.

⁶ *US v. Rouse*, 410 F. 3d 1005 (8th Cir. S.D. 2005).

⁷ N.C. Gen. Stat. §7B-601.

⁸ Mark Hardin, *Coordination of Juvenile and Criminal Court Child Abuse and Neglect Proceedings*, 35 U. Louisville J. Fam. L. 239 (1997).

⁹ 18 U.S.C. §3509

¹⁰ *Id.* (See also Debra Whitcomb, *Guradians Ad Litem in the Criminal Courts*, Washington D.C., Nat'l Inst. Justice, 1988).

¹¹ *State v. Freeman*, 203 N.J. Super. 351 (1985).

¹² Special thanks to Melissa Montgomery, a University of Baltimore School of Law (UB) student and summer law intern at the Maryland Crime Victims' Resource Center, Inc. (MCVRC), for her contributions to this article. Ms. Montgomery worked for MCVRC through the University of Baltimore Students in the Public Interest (UBSPI), an organization at UB dedicated to benefiting public interest law throughout the State of Maryland. For more than a decade, UBSPI has assisted law students pursue a career helping the less fortunate and underprivileged obtain equal representation in the justice system. Bridgette Harwood also contributed to this article. Ms. Harwood is a former UBSPI and the current law clerk for MCVRC.

Pre-Sentencing Tips

Continued from page 7

Verify that your client does not fall into one of the categories of inmates who are not eligible for the sentence reduction, such as INS detainees, having a prior conviction of certain violent offenses or having a current offense involving violence or the possession of a dangerous weapon.²

Obviously, defense counsel's primary objective will always be to avoid or reduce a prison sentence and the RDAP program can be a means to ease a client's passage through the prison system.

Endnotes

¹ See 18 USC § 3621 (e)(2).

² The policies and procedures of the RDAP program are set forth in BOP Program Statement 5330.10, Drug Abuse Programs Manual, Inmate, available at www.bop.gov/policy/progstat/5330_010.pdf.

CHILD VICTIM RIGHTS

The American Bar Association's Criminal Justice Section took a special interest in child victims this year. One indication of this was the development of an ABA policy resolution that will be considered by the ABA House of Delegates at its February 2009 Midyear Meeting. The Section's goal was to address the concerns and needs of young children who have to appear in court. Providing testimony on the witness stand as well as dealing with the many procedural complexities in a criminal case can be very confusing and frightening to child victims. Justice requires that, to the extent possible, judges and prosecutors advise victims of their rights and confirm that the victims have understood the rights.

In addition to drafting and introducing policy, the Section has developed a Child Victims "List of Rights" for courts to provide to child victims and their guardians:

- 1. You have the right to know what is happening in the court case that came about from the report you made.** If you do not understand something that is being said to you, you may ask the judge or the prosecutor to explain it to you. They are not your lawyer but if you have a lawyer, you can also ask your lawyer. If there is a victims' help line, you may call it.
- 2. You have the right to be in court whenever the judge and the prosecutor are there to discuss the case, before a trial starts.** If the case goes to trial, you have the right to be present for the trial unless the judge decides that it would be unfair for you, as a witness, to hear other witnesses. Since the trial will be recorded, when it is over you have the right to hear a recording or read a transcript of everything that was said during the trial.
- 3. You have the right to request to speak to the judge anytime the judge makes a major decision in the case.**
- 4. If you lost money or something valuable was stolen from you or damaged as a result of the crime, you have the right to ask the court to make the defendant pay you back for what you have lost.**
- 5. If your property was stolen and has been recovered you have a right to get your property back as soon as possible.**
- 6. If you are scared or feel threatened, you have the right to ask the judge to provide reasonable protection before, during, and after the trial.**
- 7. There are services and people you can talk to outside of the courtroom about what you are feeling.** If you would like to do this, you may ask the clerk, the prosecutor, or the judge to recommend a service or person with experience talking to other children who have been crime victims.
- 8. If you would like to talk to someone privately without your parents or legal guardian knowing, you may ask the judge to appoint a guardian or an attorney to represent you.**
- 9. You have the right to ask the judge to allow your parents, your guardian, or another adult whom you trust to be present with you during your testimony.**
- 10. Whether or not there is a trial, you have a right to know if the defendant is sent to jail or prison and, if so, when the defendant is expected to be released.** You also have a right to know if the defendant asks the court to reconsider the case.

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News from the Field

News from the Field provides updates on activities – ranging from upcoming programs and publications to actions taken on all levels and branches of government – that affect the criminal justice community. If you would like to submit something for consideration, contact Robert Snoddy at snoddyr@staff.abanet.org.

NAAG Issues Top 10 List of Consumer Complaints

The National Association of Attorneys General (NAAG) has released its Top 10 Consumer Complaints List for 2007. This national list of consumer complaints is a compilation of reports provided by offices of the Attorneys General and is tallied by NAAG's Consumer Protection Project. Debt Collection, Auto Sales, and Home Repair/Construction were the top three complaint areas. These annual findings are based on a non-scientific survey of the top complaints from across the country and provide a snapshot of trends and enforcement activities occurring by the states' chief legal officers. Attorneys General are a leading consumer protection force in the nation and can be found in the forefront of defending senior citizens from telephone and mail fraud and home repair fraud, protecting consumers from fraudulent practices as the practitioners migrate from the "bricks-and-mortar" to the "online" world. For more information – including the rest of the Top 10 list – visit www.naag.org/naag-issues-national-top-10-list-of-consumer-complaints.php.

NLADA Joins with ABA, LSC, and Pro Bono Net to Create Disaster Aid Website

The National Legal Aid and Defender Association, in partnership with the American Bar Association (ABA), Legal Services Corporation (LSC) and Pro Bono Net, has developed a new

Internet resource for individuals and communities seeking civil legal advice in times of disaster. The National Disaster Legal Aid Web site, www.disasterlegallaid.com, is a resource and information center for individuals, attorneys, aid organizations and volunteers working to disentangle the numerous legal woes faced by communities in the wake of disastrous events. Resource links to agencies and organizations providing legal aid assistance. The site includes information such as the basic legal aid actions individuals can take to improve their situation; guidelines for keeping and managing important and vital documents together and in secure of a location as possible; information on what individuals legal rights are following a disaster; a guide and links for individuals looking to volunteer legal aid or legal aid support; and links to agencies handling additional aspects of disaster relief.

NDAJ to Hold 36th National Conference on Juvenile Justice

The National District Attorneys Association is teaming up with the National Council of Juvenile and Family Court Judges to sponsor the 36th National Conference on Juvenile Justice. The conference offers juvenile justice professionals a national perspective on the issues they face in their day-to-day efforts to make a difference in the lives of children and families. The sessions at the conferences will highlight effective practice and programs, offer tips and tools, provide an opportunity for networking, and inspire and invigorate participants. With breakout sessions on a wide variety of topics, from truancy and safe schools, to gangs, to family violence, to child abuse and neglect, to juvenile sex offenders, to substance abuse, there is sure to be something for everyone. For more information on the conference, which takes place March 11-14 in Orlando, Fla., visit www.ndaa.org/education/ndaa/juvenile_justice_conf_march_2009.html

Brennan Center Report Shows People Are Often Wrongly Denied Counsel

The Brennan Center for Justice at New York University School of Law presents information about best practices for determining financial eligibility for free counsel. The report gathers, in one place, existing standards and procedures, relevant judicial precedent, and the specific views of many defenders in communities around the country. The report also exposes the lack of state and local court standards for determining who is eligible for court-appointed defense counsel and concludes that many jurisdictions use flawed screening processes to separate those who can afford counsel from those who cannot. The report, titled, "*Eligible for Justice: Guidelines for Appointing Defense Counsel*," is available on-line at www.brennancenter.org/content/resource/eligible_for_justice/.

DOJ Issues 2008 Performance and Accountability Report

The Department of Justice has issued its Performance and Accountability Report (PAR) for fiscal year (FY) 2008, which provides financial and performance information, enabling the President, Congress, and the American public to assess the annual performance of the Department of Justice. The report is prepared under the direction of the Department's Chief Financial Officer. The report includes the Department's financial statements for FY 2008 and for the preceding fiscal year (FY 2007) and reports on all accounts and associated activities of each office, bureau, and activity of the Department. The report is available at: www.usdoj.gov/ag/annualreports/pr2008/TableofContents.htm.

Feedback Welcome

Send to
crimjustice@abanet.org

UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

The following cases are reported on in greater detail in the *ABA/BNA Lawyers' Manual on Professional Conduct*, a multivolume reference and notification service that reports on issues relating to ethics and professionalism for lawyers. The publication may be obtained by contacting BNA at 1-800-372-1033 or customer@BNA.com. For a free trial subscription go to www.bna.com/products/lit/mopc.htm.

Malpractice Action Does Not Accrue Until Client Obtains Post-Conviction Relief

The limitation period on a criminal defense client's malpractice claim does not begin to run until the client is exonerated through some form of post-conviction relief, the New Jersey Supreme Court announced Nov. 26 (*McKnight v. Office of the Public Defender*, N.J., No. A-109, 11/26/08). In a per curiam opinion, the court said it was persuaded by the argument that a criminal defendant has not suffered an actionable injury until he has obtained post-conviction relief such as dismissal of the charges, acquittal on retrial, or conviction of a lesser-included offense. As a matter of fairness, the court added, defense lawyers who could face a future malpractice lawsuit deserve to receive notice as soon as practicable that they may be sued following the client's pursuit of post-conviction relief. To that end, the court asked its Criminal Practice Committee to draft an appropriate rule requiring that a copy of any PCR petition alleging ineffective assistance of counsel be forwarded to the attorney whose performance has been questioned. For greater detail see: Volume 24 Law. Man. Prof. Conduct, page 637 (Dec. 12, 2008).

In-House Consultation on Ethics Issues Doesn't Create Per Se Conflict of Interest

A lawyer's consultation with his law firm's in-house ethics counsel about the lawyer's conduct in representing a client does not create a conflict of interest between the firm and the client unless the principal goal of the

consultation is to protect the lawyer or firm from the consequences of the lawyer's misbehavior, the ABA's ethics committee declared in an opinion. Addressing questions of ethics that arise when a lawyer consults with someone else in the same firm about the professional implications of the lawyer's conduct, the committee also advised that: the client's consent is not required before a consultation, nor is the firm necessarily obligated to inform the client of the consultation afterward; ethics counsel may have to disclose a consulting lawyer's misconduct to higher authority within the firm unless she reasonably believes the situation can be corrected without harm to the firm through counseling or other means; ethics counsel may reveal the misconduct to others outside the firm if the partners or other management authority in the firm fail to take appropriate corrective action in regard to clearly illegal conduct that could significantly harm the firm; and reporting the lawyer's misconduct to disciplinary counsel will not be required if the information relates to a client's representation, but the ethics counsel should seek appropriate client consent to report where disclosure is not likely to harm the client. For greater detail see: Volume 24 Law. Man. Prof. Conduct, page 616 (Nov. 26, 2008).

Second Circuit Clarifies Test For 'At Issue' Privilege Waiver

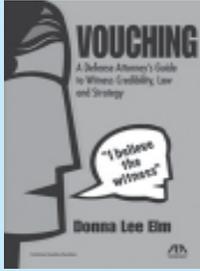
To establish that an opponent has waived the attorney-client privilege by placing its counsel's advice at issue, a litigant must establish that the opponent is asserting its actual reliance on such advice as a claim or defense, the U.S.

Court of Appeals for the Second Circuit made clear Oct. 14 (*In re Erie County (Pritchard v. Erie County)*, 2d Cir., No. 07-5702-op, 10/14/08). In this class action under 42 U.S.C. §1983, the plaintiffs contend that detainees at jails in Erie County, N.Y., were subjected to invasive strip searches, without regard to individualized suspicion or the nature of the alleged crime, in violation of the Fourth Amendment. The plaintiffs have been trying to force the defendants to produce 10 e-mails exchanged between county officials and a government lawyer about the legality of the strip-search policy. In a previous decision, the Second Circuit held that the e-mails were shielded by the attorney-client privilege even though the lawyer's advice extended to policy recommendations. For greater detail see: Volume 24 Law. Man. Prof. Conduct, page 556 (Oct. 29, 2008).

Client Who Asks for File May Be Charged Fee for Retrieving E-Documents

A lawyer's clients have a presumptive right of full access to e-mails and other electronic documents in the lawyer's possession, but clients who request copies of those documents generally may be charged a reasonable fee for gathering and producing them, the New York City bar association's ethics committee has advised (New York City Bar Ass'n Comm. on Professional and Judicial Ethics, Formal Op. 2008-1, 7/08). It is prudent for a lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and memorialize their understanding in a retention letter, the opinion advises. The opinion addresses some of the ethical issues implicated by the growing reliance on e-mails and other electronic documents in law practice. For greater detail see: Volume 24 Law. Man. Prof. Conduct, page 517 (Oct. 1, 2008).

NEW BOOKS



Vouching: A Defense Attorney's Guide to Witness Credibility, Law and Strategy

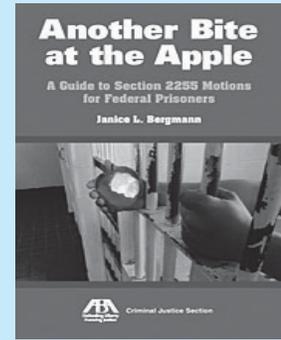
In 15 chapters, the topic of vouching is covered from every angle, backed up with relevant case citations whenever applicable. You'll discover when it's permissible, and when it's prohibited. You'll get a cleared picture of where the illusive grey areas lie, and learn to recognize when it's been crossed. If you are a trial lawyer, prosecution or defense, you need this book to help establish your expertise in the sometimes confusing area of vouching. (250 pages)

Another Bite at the Apple: A Guide to Section 2255 Motions for Federal Prisoners

This is the first book of its kind to focus on the special procedures and concerns that arise when a prisoner moves to Avacate, set aside, or correct a federal conviction or sentence under Section 2255.

This book is especially important now as Section 2255 proceedings have become significantly more complex with the enactment of the Antiterrorism and Effective Death Penalty Act, and federal courts continue to struggle with the interpretation of the AEDPA's provisions.

This book examines the various legal and practical questions that may be



encountered in section 2255 proceedings, including those posed by the AEDPA. This book is an essential resource for anyone wanting an introductory education about section 2255, or experienced practitioner looking for an in-depth analysis. This important book is the perfect handbook for the in the litigation of noncapital section 2255 proceedings. (327 pages)

For a listing of other Criminal Justice Section publications, see www.abanet.org/crimjust/pubs.

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