



# Criminal Justice Section Newsletter

Volume 18, Issue 2 Winter 2010

## PRACTICE TIPS

### The Importance of Robust *Upjohn* Warnings after Ruele

By Lee Stein and Elizabeth Kruschek

When a corporation finds itself needing to conduct an internal investigation, it knows that, at some point, it may want to disclose information obtained during the investigation to the government. Such internal investigations—typically conducted by outside counsel retained expressly for the purpose of conducting an investigation that ultimately may be disclosed—invariably involve interviews of employees of the corporation who may have knowledge of the supposed wrongdoing. As practitioners are well aware, these interviews can be subject to a claim of attorney-client privilege on behalf of the employees who are interviewed if appropriate warnings disclaiming an attorney-client relationship—so-called *Upjohn*<sup>1</sup> warnings—are not provided to the interviewed employees.

Any claim of privilege on the part of an employee seriously compromises a corporation's ability to waive the privilege in a subsequent government investigation and to disclose information obtained during the course of the internal investigation. Thus, *Upjohn* warnings—which make clear that the corporation, and only the corporation, holds and can waive the privilege—are critical components of any internal investigation because they ensure that a corporation is in the best position to fully use all information from an internal investigation in any subsequent interactions with government investigators.



Lee Stein is a partner and co-chair of Perkins Coie's Investigations and White Collar Defense group. He regularly conducts internal investigations on behalf of publicly-traded companies. Elizabeth Kruschek is an associate in the group.

A recent Ninth Circuit case, *United States v. Ruele*,<sup>2</sup> illustrates the importance of giving robust *Upjohn* warnings during internal investigations. In that case, Broadcom retained a law firm to investigate its current and past stock option granting practices in anticipation of an SEC inquiry.<sup>3</sup> William Ruele, Broadcom's CFO, was heavily involved in the decision to retain the law firm for the investigation and in the investigation itself; he had substantial knowledge of the underlying facts.<sup>4</sup> Ruele was also well aware that the intent of the investigation was to collect information that would be turned over to Broadcom's external auditors, as well as to governmental investigators, if necessary.<sup>5</sup>

Two civil lawsuits against Broadcom and Ruele personally, among others, which concerned the same subject matter as the internal investigation, followed soon after the firm was retained to conduct the investigation. The firm was already the counsel of record for Broadcom and individual management defendants in one of those suits, which was an existing class action that was amended to include the additional allegations of wrongdoing.<sup>6</sup> After those suits were filed, Ruele was interviewed by outside counsel as part of the internal investigation.<sup>7</sup> Although the lawyers involved claimed that Ruele was given an *Upjohn* warning, both the district court and the Ninth Circuit assumed that no such warning was given because Ruele had no memory of receiving a warning and the attorneys were unable to provide any documentation to the contrary.<sup>8</sup> During the interview, there was no mention of the civil lawsuits or Ruele's personal liability, nor did Ruele seek legal advice about his personal liability.<sup>9</sup> The law firm did, however, briefly represent Ruele individually in the civil suits,

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## Criminal Justice Section Meets in Magic Kingdom for Midyear Gathering

The Criminal Justice Section held its Midyear Meeting on Feb. 5-6, at the Walt Disney World Swan Hotel in Orlando, Fla. On Friday, Feb. 5, the Section presented a CLE program titled “Prosecuting and Defending Immigration-Based Criminal Offenses: What Prosecutors and Defense Attorneys Should Know.” This two-part program – which featured a panel comprised of a US District Judge, Assistant US Attorney, Assistant Federal Defender, and a New York Times immigration reporter – addressed the charging and plea offer decisions made by prosecutors and the due diligence, research, investigation, and advice defense counsel should provide to a client, as well as sentencing determinations made by judges when a non-citizen is facing criminal charges, specifically the immigration-based crimes. This discussion was of great value to both judges and lawyers seeking more detailed information about immigration proceedings and sentencing.

Following the CLE program the Section held its Membership Reception, at which the Frank Carrington Crime Victim Award was presented. The award honors attorneys or legal service providers (including organizations) who have either directly represented specific victims in criminal, juvenile, or appellate courts or worked to promote or implement policies to improve the treatment of crime victims in the criminal justice system. This year’s award went to longtime victims advocate attorney Jay Howell. For almost three decades, Mr. Howell has worked to advance the plight of crime victims both by shaping policy at the local, state and national levels and by standing up and advocating for victims in trial and appellate courts in Florida and across the country. Mr. Howell currently maintains a civil practice in Jacksonville, Fla. specializing in representing crime victims in civil cases, devoting a substantial portion of his practice to pro bono assistance to crime victims as well as training and technical support to non-profits and government agencies in victims’ rights law. More information on Mr. Howell can be found on the Section’s Awards page at [www.abanet.org/crimjust/awards.html](http://www.abanet.org/crimjust/awards.html).

As part of the American Bar Association-wide Midyear Meeting, the Section introduced 10 policy recommendations to the ABA House of Delegates, the policy-making body of the Association, on Monday, Feb. 8. The breakdown of each of the policies can be found in the Policy Update on page 9.

## Seeking Your Input: Brady Best Practices Group Launches Online Survey

The CJS White Collar Crime Committee has developed a “Brady Best Practices” group consisting of public defenders, prosecutors, defense lawyers, judges, ethics officers, and academics to study and survey the Brady and disclosure obligations and practices around the country. The group will explore the different disclosure practices in both state and federal jurisdictions. The goal of the group is to propose a model practice for the identification and production, in a timely manner, of exculpatory materials to defendants in state and federal criminal prosecutions. The first step in this endeavor is the creation of a short on-line survey which seeks information about disclosure policies and practices in state and federal jurisdictions around the country. We hope that you will assist the Section in this very important project by taking the poll, and please feel free to pass along the information about the survey to any colleagues who would find it of interest. The survey can be found at [www.surveymonkey.com/s.aspx?sm=exhlqmTQEvNeQInAqwBi3g\\_3d\\_3d](http://www.surveymonkey.com/s.aspx?sm=exhlqmTQEvNeQInAqwBi3g_3d_3d)

## New Initiative Focuses on Professional Development

“Achieving Excellence” is a new undertaking which involves publishing an ongoing series of short, practical writings that will help people become a better prosecutor or defense lawyer, with an emphasis on (but not limited to) targeting the young lawyer and law student population. The endeavor will serve as both a professional development and membership building tool.

The idea is for the Section to solicit the leadership, members and others to give us short writings that will address how

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**The American Bar Association  
Criminal Justice Section**  
740 15th Street, NW  
Washington, DC, 20005  
Phone: (202) 662-1500  
Fax: (202) 662-1501  
Email: [crimjustice@abanet.org](mailto:crimjustice@abanet.org)  
Web: [www.abanet.org/crimjust](http://www.abanet.org/crimjust)



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prosecutors and defense lawyers can achieve excellence in different aspects of their work.

Below are five questions we would like you to answer – there are no length or style limitations for your response.

- “What has someone in your office, or opposing counsel, done that really impressed you?”
- “What makes a good mentor or supervisor?”
- “What is something useful that you learned on the job and wish you had previously known?”
- “What tip would you give a young lawyer just starting out about negotiating, handling evidence, dealing with witnesses (or clients), getting clients, responding to discovery, etc.?”
- “What do you wish you had learned in law school that you think future prosecutors or defense lawyers should know?”

The responses will be posted periodically on our website (perhaps with an invitation for readers to comment) and possibly made into a print publication or referred to in our existing publications. Please send your responses to Robert Snoddy at [snoddyr@staff.abanet.org](mailto:snoddyr@staff.abanet.org).

### Section Awarded Grants for Work on Multi-Year Projects

The Criminal Justice Section has had good news on the grant front. First it received word that the Section was selected by the National Institute of Justice to conduct a three-year study of collateral consequences. The Section has assembled a broad coalition of national and local groups and individual experts to meet the challenge of compiling a comprehensive and functional inventory of the collateral consequences of criminal convictions in the laws and practices of federal, state, and territorial jurisdictions. The Section was awarded \$700,000 to fund the project.

The Section was recently informed that it is also the recipient of a grant from the Bureau of Justice Assistance. This project will initiate a “Racial Justice Task Force Pilot Project” that will (1) pilot a Racial Justice Task Force (RJTF) model in four jurisdictions; (2) provide facilitation and informational resources to each pilot jurisdiction; (3) evaluate the RJTF model’s effectiveness in engaging community stakeholders; develop stakeholder consensus regarding the racial justice issues that exist in each jurisdiction; develop a work plan to address a specific racial justice issue(s) in each jurisdiction; develop a sustainable plan for the RJTF beyond the pilot period; and (4) develop written materials and information (articles, reports, tool kits, etc.) to support replication. This Section was awarded \$450,000 for this two-year project.

Both projects build upon the previous work of the CJS especially the Criminal Justice Congress, the Race and Ethnic Diversity Committee, and the work of the Commission on Effective Criminal Sanctions. Staff Attorney Chris Gowen led the effort to draft the proposals.

### Section Fall Meeting A Well Attended Success

The ABA Criminal Justice Section Fall Meeting (Nov. 5-7 in Washington, D.C.) featured a gathering of numerous committees, and a one-day CLE seminar on some of the most pressing criminal justice issues of the day, and a policy-heavy Council meeting.

On Thursday, 16 of the Section’s committees convened and the White Collar Crime Committee held a panel discussion titled “Town Hall Meeting: *Brady* Practices in State and Federal Jurisdictions,” which featured representatives from the bench, Department of Justice, defense bar, and academia debating the emerging issues regarding *Brady*/disclosure obligations and practices in state and federal jurisdictions around the country. That same day the Section held its first-ever Reentry Summit, which brought together a broad range of criminal justice practitioners to discuss the best means for developing reentry programs and what issues and opportunities are involved in undertaking such an endeavor.

On Friday, at the Marvin Center located on the George Washington University campus, the Section presented the “Second Annual Sentencing Advocacy, Practice and Reform Institute with a Special Emphasis on Reentry.” (photo below) This one-day seminar—which brought together a galaxy of experts and authorities—addressed a broad array of sentencing and reentry issues, with a particular emphasis on sentencing practice in white-collar

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## Prosecutors Embrace Public Health Approach to Helping Runaways

By Susan Gaertner

Amie was in deep trouble. The 13-year-old girl already had run away from home several times. Out on the streets, she had been forced into prostitution and gang raped by too many partners to count. As a result, she had contracted chlamydia. She regularly drank alcohol and had tried crystal meth. She seldom made it to school and was estranged from her parents, immigrants from Laos. Her life was in a tailspin, and she sometimes considered suicide. And then one day, a police officer picked her up off the street.

In the past, Amie probably would have been returned home before anyone addressed the underlying reasons for her runaway behavior or the trauma she had experienced. Her family would not have received education or support in caring for their high-risk daughter. Amie would have been petitioned to juvenile court as a runaway and chronic truant. If she already was involved in the court system, a probation violation might have been filed. The troubled girl would have gotten some help, but resources would be limited. Amie wouldn't get the intensive intervention she needed to overcome her complex array of problems.

But something different happened. Instead of being petitioned to juvenile court, Amie was diverted into the Runaway Intervention Project (RIP), a multi-agency program in St. Paul, Minnesota, that utilizes intensive home visiting and case management to help sexually abused or exploited young runaway girls. Now, based on well-documented outcomes of girls in the program, Amie has excellent odds of getting onto a healthy track, almost, statistically, as if she had never been abused.

More than 850 runaway girls have been referred to RIP since its inception as a pilot project 3½ years ago. Amie is a composite of many of them. Sadly, her traumatic experiences are typical of girls served by the program. But fortunately, her prognosis also is similar. After 12 months in RIP, girls show dramatic improvement in healthy sexual behavior, connectedness with family and school, self-esteem, mental health and avoidance of alcohol and drugs, an evaluation found. Remarkably, RIP girls end up



*Susan Gaertner is the Ramsey County Attorney (St. Paul, Minnesota). She has served as a vice chair at large on the Council of the ABA Criminal Justice Section.*

scoring about the same on those protective factors as girls in the general population.

These results have opened the eyes and minds of juvenile justice practitioners in Ramsey County to the rewards of doing business differently. RIP represents an extraordinary departure from a juvenile justice model to a public health model in dealing with runaways. To be sure, prosecutors still address delinquent or dangerous behavior in traditional ways. But with sexually exploited runaways, a lot more energy is being focused on identifying their strengths and building resiliency. It's a different way of protecting public safety – a harm-reduction approach – and it appears to be effective.

The project was undertaken in response to an alarming increase in the number of young runaway girls in St. Paul, particularly in the Hmong community, an immigrant population from Southeast Asia. In 2002 alone, 334 Hmong girls were reported as missing or having run away. Large numbers of them were sexually exploited, including being gang raped and forced into prostitution. In addition to risks for pregnancy and sexually transmitted diseases, these gang-raped and prostituted girls faced a host of mental health issues related to the trauma of the abuse. Many of the girls also were introduced by gang members to hard-core drugs such as meth and cocaine.

A number of agencies tried to assist these girls, but a coordinated response was missing. The turning point came in 2004, when a group of concerned system and community people started to examine how to better help exploited runaway girls. Later that year, those discussions led to the formation of the Hmong Youth Task Force, representing prosecutors, police, schools, public health and community organizations. The task force looked at what wasn't working, gaps in services and ways to make the system work better to help the girls.

Meanwhile, Laurel Edinburgh of Midwest Children's Resource Center (a diagnostic and treatment facility for child abuse victims) examined the cases of 226 girls, ages 10 to 14 years, who had been sexually abused outside their families. What she found was both eye opening and distressing, including the fact that 77 percent of Hmong runaway girls experienced gang rape, prostitution or multiple sexual assaults, compared with 16 percent of other girls evaluated.

Adding further impetus, in the fall of 2005, the Star Tribune newspaper published a compelling investigative series, exposing the sexual exploitation of young Hmong girls by Hmong gang members. That series, combined with

Edinburgh's research and the work of the Hmong Youth Task Force, created powerful momentum to solve to a very serious community problem.

Funding for that solution – what became the Runaway Intervention Project — came in December 2005, when the Ramsey County Attorney's Office and its partners received a \$200,000 state grant to screen runaway girls. The idea was to create a program with different levels of intervention and service, depending on the needs and risk levels of the children involved. The initiative recognized the need to serve Hmong runaways with carefully targeted, culturally relevant and ongoing care.

RIP was launched in January 2006, a collaborative effort of the County Attorney's Office, Midwest Children's Resource Center, Sexual Offense Services of Ramsey County, Hmong American Partnership (a community-based service agency), the St. Paul School District and the St. Paul Police Department.

Core elements of RIP are a comprehensive initial assessment of physical and mental health, intensive home and school visiting, case management by an advanced nurse practitioner and a therapeutic empowerment group. The program is based, in part, on the Ramsey County Attorney's Truancy Intervention Program, which utilizes progressively targeted interventions to compel students and their parents to address the truancy problem in a positive manner.

Girls are referred to RIP from many directions, including police, schools, Midwest Children's Resource Center, parents, concerned citizens and the Truancy Intervention Program. The County Attorney's Office screens referrals and evaluates risk levels.

If a child is found to be at low risk, a referral is made to Child Protection to determine whether referral to an outside agency or other interventions is appropriate. Moderate risk runaways, those who have not been sexually abused, participate in a 10-week, in-school "Empowerment Group" conducted by Sexual Offense Services. They also are monitored for truancy by the County Attorney's Office and provided services, as needed.

High rate-risk runaways whose whereabouts are known, and who are not in immediate danger, are referred to Midwest Children's Resource Center for comprehensive physical and mental health exams and intensive services, including home and/or school visits for up to one year, individualized case management and family education and weekly therapy groups. Hmong American Partnership works with the girls and their families to repair

communication, support parents and improve their understanding of the girls' needs, with a goal of family reunification.

High-risk runaways whose whereabouts are unknown, or who seem to be in immediate danger, are petitioned to court. Those girls later may be placed on probation with a human services worker and receive intensive RIP services through Midwest Children's Resource Center.

Ongoing evaluation by Dr. Elizabeth Saewyc of the University of British Columbia has determined that RIP is "highly effective for extremely vulnerable runaways" in terms of reduced traumatic responses, reduced risk behaviors, improved health behaviors and self-esteem and reconnection to supportive relationships with family school and other adults. The research shows girls in the program for 6 to 12 months are doing about as well as if they never had been abused. Those who had the lowest connectedness with family and school, the lowest self-esteem and highest levels of distress actually improve the most.

Since RIP's inception, partners in the program have identified an increasing need for services among young women from all race/ethnicity represented in Ramsey County. In 2006, 79 percent of the runaways served by RIP were Hmong girls. In 2008, Hmong teens accounted for 29 percent of those served, with African American girls accounting for 20 percent, white girls 18 percent, multi-racial 15 percent, Latina 14 percent and Native American, 3 percent. RIP is seeking resources to expand services to girls of all race/ethnicity and meet the needs of the vulnerable population of young runaways. Funding from a second state grants expires at the end of 2009, and future funding sources are uncertain.

Partners in the program, however, know the program saves lives, and they are determined to build on its success as a public health model for addressing what often is seen as a juvenile justice issue. "Based upon the best-practices research and our own outcomes, I have come to wholeheartedly believe in the harm-reduction approach," says Kathryn Richtman, who heads the Juvenile Prosecution Unit of the Ramsey County Attorney's Office and co-chairs the ABA's Juvenile Justice Committee. "This method, which focuses far more on building a youth's resiliency than it does on a traditional juvenile justice system response, seems to be more effective in these cases," says Richtman, who helped to spearhead RIP. "It's a different approach to protecting public safety, one that isn't always comfortable or popular. But it seems smarter to me than doing the same things we have been doing for the past decade and expecting a different result."

## Emerging Regulatory and Criminal Enforcement of Credit Default Swaps

By **Pravin B. Rao**

Credit Default Swaps (“CDS”) constitute a multi-trillion dollar segment of the financial services industry that until recently has encountered almost no direct regulation by the U.S. Government. The current financial crisis, however, has resulted in a push by prosecutors, politicians, and regulatory agencies alike for reform of the financial sector and, in particular, the market for over-the-counter (OTC) derivatives. This reinvigorated environment of enforcement is expected to result in more regulatory oversight and increased civil and criminal enforcement actions involving the financial sector. Recent enforcement actions brought by the Securities and Exchange Commission illustrate that the Commission may be attempting to expand its jurisdiction over insider trading involving CDS. This may be a stepping stone to similar actions by criminal law enforcement authorities. For example, the Department of Justice’s Antitrust Division announced in July 2009 that it had begun investigating whether certain providers of CDS trading data engaged in anticompetitive behavior. This raises the possibility that the DOJ will use antitrust laws to bring criminal charges against certain individuals for having unfair access to CDS price information. This article will focus on possible civil and criminal liability for insider trading involving CDS and suggest pre-emptive measures to prepare for such enforcement.

### Background of CDS Regulation

Derivatives are sophisticated financial instruments intended to increase or decrease risk. The market for trading in these products has grown to over \$600 trillion in value. CDS are the most common type of credit derivatives, insurance-like contracts that promise to cover losses on certain securities in the event of a default. Sold by banks, hedge funds, and other financial institutions, CDS typically apply to municipal bonds, corporate debt, and mortgage backed securities. With CDS, the buyer pays a periodic

fee to the seller, who is obligated to make a settlement payment if the specified reference company experiences a specified “Credit Event.” Although the primary function of CDS is to protect investors against losses on bonds or loans, they are more frequently used as a tool to speculate on a company’s ability to repay debt. Such speculation involves investors, hedge funds, and others who buy and sell CDS instruments from the sidelines without having any direct relationship with the underlying investment. While CDS were initially an obscure corner of the credit market, they rapidly grew, from a \$100 billion market in 2000 to a world-wide business that had recently mushroomed to \$62 trillion. Much of this rapid growth occurred during the housing boom when CDS were used to protect against defaults on mortgage-backed securities.

Historically, CDS have not been regulated as insurance, securities or futures. The Commodity Futures Modernization Act of 2000 (CFMA), signed into law on December 21, 2000, also generally excludes CDS from regulation as “futures” under the Commodity Exchange Act. In fact, the CFMA describes CDS as “swap agreements” that are not “securities” for purposes of the Securities Act of 1933 or the Securities Exchange Act of 1934. Although the CFMA provides for CDS to be subject to the anti-fraud and anti-manipulation provisions of the 1933 Act and 1934 Act as “security-based swap agreements,” it prohibits the SEC from taking preventative measures against fraud or manipulation involving CDS. In testimony before the Senate in September 2008, former SEC Chairman Christopher Cox pointed out: “Neither the SEC nor any regulator has authority over the CDS market, even to require minimal disclosure to the market.” Chairman Cox called for giving the SEC the authority to regulate CDS, telling Congress that “the \$58 trillion national market in credit default swaps — double the amount outstanding in 2006 — is regulated by no one.”

### Reinvigorated Regulation and Enforcement

#### Focus on CDS

The days of CDS being unregulated appear to be over, as the reinvigorated enforcement of the financial markets pulls many products onto the Government’s radar. The derivatives markets are heavily blamed for the current financial crisis. Specifically, many believe the lack of transparency found in CDS transactions contributed to the credit crisis in 2008. AIG, which was the country’s biggest insurance company, was bailed out by the Government after it defaulted on \$14 billion worth of CDS.

In response to an outcry for regulating derivatives, the Obama administration recently detailed plans to give the



*Pravin B. Rao is a Litigation partner in the Chicago office of Perkins Coie LLP. Suleen Lee, a Perkins Summer Associate and third-year law student at the University of Illinois College of Law, assisted in preparing this article.*

SEC and the Commodity Futures Trading Commission the authority to police and prevent fraud in the derivatives market, in addition to new record-keeping and reporting requirements for all OTC derivatives. The proposal would require that all standardized OTC derivative transactions be executed in regulated and transparent venues and centrally cleared through exchanges. Furthermore, while trading OTC customized products would still be permissible, regulators would have the authority to collect data on these trades for the first time. Finally, the proposal recommends allowing the CFTC to set position limits on OTC derivatives if they help set market prices. As new regulations are implemented, there will necessarily be more referrals between the regulatory and enforcement arms of the SEC and the CFTC, which, in turn, could lead to more investigations and criminal referrals. Also, as regulators get access to more trading data and can analyze trading patterns, they will have the tools to look for signs of trading that violate insider trading laws.

Recently, Congress has joined the fray by considering steps to curb speculation in the CDS market. The new regulations under consideration could prohibit investors from speculating on a borrower's credit quality, including a ban on so-called "naked" CDS, where a trader does not hold the underlying asset being insured (such as a bond) and a requirement that derivative dealers and investment advisers that manage in excess of \$100 million report their short interests in CDS to the appropriate regulator. As with the Obama Administration's proposal, this derivatives bill is part of a broad overhaul of U.S. financial regulation sought by the White House and Congressional lawmakers. Concerned about increased scrutiny from regulators, Wall Street firms are bracing themselves to be more heavily policed in the future.

### **CDS-Related Enforcement Actions by the SEC and DOJ**

As the increased regulatory scrutiny engenders apprehension on Wall Street, it is only further exacerbated by the SEC and DOJ recently initiating separate investigations into CDS and related markets (and in the SEC's case, already bringing a case).

#### ***A. Civil Liability for Insider Trading of CDS: An Expansion of SEC Jurisdiction?***

Academic and financial experts have repeatedly claimed that insider trading in CDS is rampant. These experts have supported this conclusion by pointing to instances where CDS prices moved before major market announcements, demonstrating that CDS investors obtained information before it was publicly available and consequently traded on it. Although the SEC has been investigating cases of

suspected CDS insider trading since 2007, it has never brought an enforcement action pertaining to CDS until recently.

On May 5, 2009, the SEC brought its first insider trading suit in this area. The SEC charged Jon-Paul Rorech, a Deutsche Bank bond and CDS salesman, with allegedly passing information to hedge-fund money manager Renato Negrin on a bond sale. The SEC complaint alleges that Rorech provided material insider information about the bond offering to his client Negrin, who used this information to buy CDS and sell them a week later after the bond offering was publicly-announced and profited about \$1.2 million. As in traditional insider trading cases, a buyer of CDS may be liable for insider trading if the buyer possesses material non-public information, and uses such information to trade and receive a "windfall."

The vigor with which the SEC has pursued this CDS insider trading case highlights its clear political will to exercise more oversight over these markets that could, in turn, signal a new wave of investigations in this area. As the SEC stated in its press release to the Rorech complaint: "CDS may still be obscure to the average individual investor, but there is nothing obscure about fraudulently trading with an unfair advantage. Although CDS market participants tend to be experienced professionals, there must be a level playing field with even the most sophisticated financial instruments." The SEC does not bring this case without some risk, however. Before reaching the merits of its insider trading allegations, the SEC will likely first need to establish that it has jurisdiction to bring such a suit. Rorech has contested the SEC's jurisdiction, arguing that the underlying Dutch bonds are not subject to regulation in the United States. In response, the SEC has asserted jurisdiction based on the swaps at issue being security-based swaps and the defendants being based in the United States. The Commission's goal to assert jurisdiction over CDS trading, even though they are not publicly-traded securities, could be thwarted if it gets a bad precedent in the Rorech case.

#### ***B. Criminal Liability for Insider Trading of CDS: Taking a New Tack?***

A natural outgrowth of increased SEC insider trading enforcement actions could be parallel criminal proceedings. The most frequently-used criminal statutes to prosecute insider trading— mail fraud, wire fraud, and securities fraud— could just as well be used in CDS insider-trading cases. Since insider trading enforcement has typically fallen under the purview of civil enforcement by the SEC, the DOJ has sparingly exercised its authority to bring parallel criminal proceedings. Nonetheless, CDS insider trading might spur the DOJ to assert itself more in these cases

where both the elevated need for deterrence and high level of culpability associated with these trades (widely held to be the cause of the last year's credit markets' collapse) make it an attractive target for criminal prosecution. The perceived deterrent value of criminal prosecution, in addition to the egregiousness of the story surrounding alleged unlawful CDS trading, could be sufficient for such enforcement. As in other insider trading cases, criminal CDS insider trading will be difficult to prove where prosecutors have to establish willfulness with largely circumstantial evidence. And the intricacies of CDS transactions add another level of complexity, when compared to traditional trading in equities, that makes it difficult to bring criminal cases in this area.

Federal prosecutors, however, are not prone to turn away from pursuing cases in an area because of its complexity. The DOJ may turn to criminal enforcement of CDS through a new angle: antitrust laws. Broadly speaking, antitrust laws are designed to promote fair competition and to protect consumers and businesses from anti-competitive business practices. The harm in antitrust law is done to an entire market, and not a particular business or consumer. Two principal offenses that the DOJ pursues under the Sherman Antitrust Act are "monopolization" and "conspiracy to restrain trade."

Insider trading of CDS arguably falls under the "conspiracy to restrain trade" category, as set forth in Section 1 of the Sherman Act. ("Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.") To prove such an offense, the DOJ would need to establish "the relevant product and geographic market" in which the conspiracy to restrain trade has been allegedly undertaken. Furthermore, the conspiracy merely needs to be a tacit understanding. While certain kinds of trade restraints are deemed *per se* violations (e.g., price-fixing, bid-rigging, horizontal market allocation), others will be found to violate antitrust laws only if they are proven to be unreasonable. Insider trading of CDS might be classified as a *per se* violation because having access to material non-public information on CDS prices is "unambiguously harmful" activity that does not have any "plausible offsetting benefit to consumers."

The DOJ's recent activity may indicate that it is taking this route with CDS. On July 15, 2009, the DOJ's Antitrust Division notified Markit Group Holdings Ltd. that it would be conducting an inquiry into the CDS market. Markit serves as a collector of pricing information from the largest players in the derivatives industry and passes on

the gathered information to more than 300 financial firms that use the information to determine the prices of similar contracts in their own books. Markit has thus far been cooperating with the DOJ's inquiry, stating that it would "provide any information requested" and strive to "enhance transparency and efficiency in the credit derivatives market." While the scope of the DOJ's inquiry was initially unclear, it now appears that the DOJ is examining whether Markit's shareholders had an advantage as owners and providers of trading data for CDS.

Market participants have also speculated that the DOJ may be requesting information from Markit to gather evidence of possible dealer involvement in manipulating prices. The DOJ later confirmed the investigation, issuing a statement that "[t]he antitrust division is investigating the possibility of anticompetitive practice in the credit derivatives clearing, trading, and information services industries." In addition to Markit, the DOJ is conducting similar inquiries at several banks to determine if there are industry-wide improper practices through which participants receive unfair access to pricing information.

If the DOJ does find particularly egregious antitrust violations, it may also bring criminal charges under the Sherman Act against officers and directors of a corporation in their personal capacity. If convictions are obtained, these individuals face steep fines and possible jail time, in addition to a likely onslaught of civil claims. While the DOJ may have opened an investigation on Markit due to the gravity of the wrongdoing, it also appears to be in part a response to the changing political climate under the Obama administration, which seems determined to hold those involved in CDS schemes criminally accountable for their actions.

#### **Anticipatory Measures for Heightened Scrutiny**

While courts have yet to determine whether the SEC has jurisdiction to bring CDS insider trading cases or whether criminal enforcement actions could also succeed, there is every reason to believe that civil regulators and prosecutors are serious about policing this long unfettered market. Rather than wait for the final word, the better course is for companies to prepare themselves for heightened scrutiny in this area. Companies may be able to reduce the risk of potential civil and criminal prosecutions by following the suggestions set forth below, with the first four recommendations being most relevant to CDS insider trading, while the remaining ones are mainstays of any effective insider trading prevention program:

- Maintain physically and functionally separate departments for trading and lending.

*Continued on page 11*

## Criminal Justice Section Resolutions Going to the ABA House of Delegates in February 2010

Entire text of the resolutions can be found at the ABA Criminal Justice Section's policy page at [www.abanet.org/crimjust/policy](http://www.abanet.org/crimjust/policy)

### REPORT 102A

#### (Collateral Consequences for Juveniles)

RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to increase the opportunities of youth involved with the juvenile or criminal justice systems and to prevent the continuing discrimination against those who have been involved with these systems in the past by limiting the collateral consequences of juvenile arrests, adjudications, and convictions.

### REPORT 102B

#### (Standardized Miranda Warnings for Juveniles)

RESOLVED, That the American Bar Association urges all federal, state, territorial and local legislative bodies and governmental agencies to support the development of simplified *Miranda* warning language for use with juvenile arrestees.

### REPORT 102C

#### (Misdemeanor Prosecutions)

RESOLVED, That the American Bar Association urges local, state, territorial and federal governments to undertake a comprehensive review of the misdemeanor provisions of their criminal laws, and, where appropriate, to allow the imposition of civil fines or nonmonetary civil remedies instead of criminal penalties, including fines and incarceration.

### REPORT 102D

#### (Judicial Role in Avoiding Wrongful Convictions)

RESOLVED, That the American Bar Association urges policy making bodies of federal, state, local and territorial courts to adopt, a procedure whereby a criminal trial court shall conduct at a reasonable time prior to a criminal trial, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under applicable discovery rules, statutes, ethical standards and the federal and state constitutions and to offer the court's assistance in resolving disputes over disclosure obligations.

### REPORT 102E (Impact of Incarceration on Mother/Child Relationship)

RESOLVED, That the American Bar Association urges federal, state, territorial, and local governments to ensure

that judicial, administrative, legislative, and executive authorities expand, as appropriate in light of security and safety concerns, initiatives that facilitate contact and communication between parents in correctional custody and their children in the free community.

### REPORT 102F (Need for Legal Services for Prisoners on Family Law Issues)

RESOLVED, That the American Bar Association urges bars, bar associations, and law schools to consider and expand, as appropriate, initiatives that assist criminal defendants and prisoners in avoiding undue consequences of arrest and conviction on their custodial and parental rights.

### REPORT 102G

#### (Lawyers and Politics)

RESOLVED, that the American Bar Association urges the President and the Attorney General to assure that lawyers in the Department of Justice do not make decisions concerning investigations or proceedings based upon partisan political interests and do not perceive that they will be rewarded for, or punished for not, making a decision based upon partisan political interests.

### REPORT 102H

#### (National Academy of Sciences Report)

RESOLVED, that the American Bar Association urges Congress to enact legislation and authorize and appropriate funds necessary to achieve the nationwide interoperability of the Automated Fingerprint Identification System (AFIS);

*Continued on page 13*



On Nov. 5, 2009 in Washington, DC, the White Collar Crime Committee held a panel discussion titled "Town Hall Meeting: Brady Practices in State and Federal Jurisdictions," which featured representatives from the bench, Department of Justice, defense bar, and academia debating the emerging issues regarding Brady/disclosure obligations and practices in state and federal jurisdictions around the country.

*Stein, continued from page 1*

although the exact date on which the representation began was disputed.<sup>10</sup>

When Broadcom's attorneys disclosed Ruehle's statements in the course of a subsequent government investigation, Ruehle sought to suppress those statements on the grounds of attorney-client privilege.<sup>11</sup> The district court agreed with Ruehle and, in so doing, strongly condemned the law firm's conduct of the internal investigation and went so far as to refer the firm to the State Bar of California for possible disciplinary actions.<sup>12</sup>

The Ninth Circuit, however, reversed.<sup>13</sup> While the Court accepted the district court's finding that an attorney-client relationship existed between Ruehle and the firm hired to conduct the investigation, it held that Ruehle's statements were not privileged because they were not made with the expectation of confidentiality.<sup>14</sup> The Court noted that Ruehle actively participated in the internal investigation and acknowledged repeatedly that the results of the investigation were expected to be disclosed to third parties. Therefore, he could not claim that he reasonably believed any statements made during his interview were confidential.<sup>15</sup> Although this particular case contained unique complicating facts, it illustrates the importance of ensuring that a corporation take every possible step to ensure that it can use or disclose information gained from employees during an internal investigation.

The Fourth Circuit's decision in *In re Grand Jury Subpoena: Under Seal*<sup>16</sup> is just one additional example of the importance of robust *Upjohn* warnings. There, outside counsel was retained by AOL to conduct an internal investigation.<sup>17</sup> Counsel indisputably provided *Upjohn* warnings, but included in those warnings a statement that they "could" represent the employees in addition to the corporation "as long as no conflict appear[ed]."<sup>18</sup> Three former employees subsequently moved to quash grand jury subpoenas for documents related to the investigation on the grounds that an attorney-client relationship was formed based on counsel's statements that they "could" represent the employees.<sup>19</sup> Although the Fourth Circuit affirmed the district court's denial of the motions to quash, it warned that its "opinion should not be read as an implicit acceptance of the watered-down '*Upjohn* warnings' the investigating attorneys gave the appellants," noting that such warnings were "a potential legal and ethical mine field," given the risks inherent in establishing an attorney-client relationship with an employee of the corporation.<sup>20</sup>

Because of the risks involved in inadvertently establishing an attorney-client relationship with an employee of the

corporation during an internal investigation, not to mention the risks inherent in joint representation of a corporation and one of its employees, it is critical that all parties involved in any internal investigation understand the ground rules surrounding the attorney-client privilege from the outset of the investigation.

Here are some tips:

**1. Establish the rules at the beginning of the internal investigation.** Outside counsel should set forth the expectations governing the internal investigation, including the nature of the attorney-client relationship, via letter to the client – the corporation – at the very beginning of the representation. This letter should explain that outside counsel will interview employees during the internal investigation, that all employees will be advised that counsel represents only the corporation and not the individual employees, and that employees will be advised of the legal implications of their communications with counsel.

**2. Provide a robust and complete *Upjohn* warning.** To fully protect the corporation's interests, counsel should avoid the kind of "watered down" *Upjohn* warnings disapproved of by the Fourth Circuit. Incomplete or inadequate warnings frequently result from counsel's concern that a robust warning will frighten employees and discourage candor during the interview. Practitioners should take heart, however, that most employees will cooperate with an investigation regardless of the warnings, and, in any event, it is paramount that counsel protect a corporation's ability to control the privilege. For an example of a thorough *Upjohn* warning, see *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees* (July 17, 2009), published by the ABA WCCC Working Group.

**3. Be consistent in administering *Upjohn* warnings.** Administer the same *Upjohn* warning to each employee at the beginning of the interview. If the *Upjohn* warning is administered orally, have a printed version of the text of the warning with you at every interview so that you can ensure that every employee has received an identical warning. This will also help to avoid any disputes about the content or exact wording of the warning.

**4. Give the interviewee an opportunity to ask questions about the warning.** It will be easier to identify any misunderstandings or potential conflicts if an employee is given an opportunity to clarify any aspects of the warning.

**5. Document all *Upjohn* warnings.** While there is a difference of opinion regarding whether counsel should provide employees with formal written *Upjohn* warnings,

it is clear that counsel should, at a minimum, make some form of contemporaneous record that a warning has been provided. It is ideal if employees sign a document providing the text of the warning and indicating that the employee has read the warning, understands it and is willing to be interviewed. Without documentation, there is a risk of a court finding, as did the Court in *Ruehle*, that no *Upjohn* warning was given at all.

**6. Be especially vigilant about the risks associated with joint representation.** While joint representation of a corporation and one of its employees is possible if there are no conflicts of interest, be aware that joint representation creates additional risks, as should be clear from the *Ruehle* opinion. If it appears at all likely that a conflict of interest may arise, decline the joint representation. If such representation is undertaken, make sure to advise the employee (as well as the corporation) in writing of the terms of the joint representation and to include *Upjohn* warnings in that communication.

*Rao, continued from page 8*

- Establish walls within a firm to prevent the department engaging in credit derivative trading from learning material non-public information from the lending department.
- Appoint a compliance officer who understands the new regulatory landscape and its intersection with CDS.
- Monitor trading activities of employees and look for large spikes in the purchase of credit derivatives in the period before a big corporate announcement is made.
- Abstain from selective disclosures to analysts in financial firms trading in credit derivatives and ensure that every communication is a wide dissemination of information.
- Utilize restricted lists and watch lists for companies that are being insured by CDS.
- Adopt and enforce procedures designed to eliminate insider trading in CDS and programs designed to educate on the potential dangers of insider trading.
- Require officers, directors, and majority shareholders to disclose their holdings on certain events at certain intervals.
- Impose a blackout period where CDS trading is restricted within a certain period of time, such as before corporate announcements or buy backs are made.
- Convey significant insider activity and corporate disclosure in a uniform publicly-accessible means to the public and to the appropriate exchange.

Check Out the Section Website  
[www.abanet.org/crimjust](http://www.abanet.org/crimjust)

Endnotes

1. *Upjohn v. United States*, 449 U.S. 383 (1981).
2. 583 F.3d 600 (9th Cir. 2009).
3. *Id.* at 602-03.
4. *Id.* at 602-04, 609-11.
5. *Id.*
6. *Id.* at 603, n.2.
7. *Id.* at 604.
8. *Id.* at 604 n.3, 605.
9. *Id.* at 604.
10. *Id.* at 605-06, n.4.
11. *Id.* at 605.
12. *Id.* at 606.
13. *Id.* at 613-14.
14. *Id.* at 607, 609.
15. *Id.* at 609-12.
16. 415 F.3d 333 (4th Cir. 2005).
17. *Id.* at 335-36.
18. *Id.* at 336.
19. *Id.* at 337.
20. *Id.* at 339-40.



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### DOJ Announces National Coordinator for Criminal Discovery Initiatives

The Department of Justice has appointed appointment of Andrew Goldsmith as the new national coordinator for its criminal discovery initiatives. The position was established as part of the Department's ongoing efforts, initiated last year at the direction of the Attorney General, to review and improve its criminal discovery and case management policies and procedures. As the national coordinator, Goldsmith will oversee the implementation of a number of initiatives designed to provide prosecutors with the training and resources they need to meet discovery obligations in criminal cases. These efforts include: creating an online directory of resources on discovery issues available to all prosecutors at their desktop; producing a Handbook on Discovery and Case Management similar to the Grand Jury Manual so that prosecutors will have an accessible and comprehensive resource on discovery obligations; implementing a training curriculum and a mandatory training program for paralegals and law enforcement agents; revitalizing the Computer Forensics Working Group to ensure the proper cataloging of electronically stored information recovered as part of federal investigations; and creating a pilot case management project to fully explore the available case management software and possible new practices to better catalogue law enforcement investigative files and to ensure that all the information is transmitted in the most useful way to federal prosecutors. More information is available at [www.usdoj.gov/index.html](http://www.usdoj.gov/index.html).

### New SEC Initiative Encourages Individuals and Companies to Cooperate in Investigations

The Securities and Exchange Commission recently announced a series of measures to further strengthen its enforcement program by encouraging greater cooperation from individuals and companies in the agency's investigations and enforcement actions. The new initiative establishes incentives for individuals and companies to fully and truthfully cooperate and assist with SEC investigations and enforcement actions, and provides new tools to help investigators develop first-hand evidence to build the strongest possible cases. The cooperation initiative is expected to result in invaluable and early assistance in identifying the scope, participants, victims and ill-gotten gains associated with fraudulent schemes. Greater detail on these new measures can be found at [www.sec.gov/news/press/2010/2010-6.htm](http://www.sec.gov/news/press/2010/2010-6.htm).

### Study Chronicles Children's Exposure to Violence

The Department of Justice Office of Juvenile Justice and Delinquency Prevention recently released the *National Survey of Children's Exposure to Violence*, the most comprehensive survey to date of children's exposure to violence in the United States. The survey was conducted between January and May 2008, and surveyed more than 4,500 children or their parents or adult caregivers regarding their past-year and lifetime exposure to violence. The survey asked screening questions about 48 types of victimization in the following categories: conventional crime; child maltreatment; peer and sibling victimization; sexual victimization; witnessing and indirect victimization; school violence and threat; and Internet violence and victimization. More detailed information on the report is available at [ojjdp.ncjrs.gov/publications/PubAbstract.asp?pubi=249751](http://ojjdp.ncjrs.gov/publications/PubAbstract.asp?pubi=249751).

### NACDL to hold Spring and Sentencing Meetings

The National Association of Criminal Defense Lawyers has two upcoming meetings of great importance to the criminal justice community. They will hold their Spring Meeting from April 28-May 1, 2010 in Memphis – titled “Rock & Roll Defenses: Singing the Tune of Victory in Street Crime Cases” – which will address a wide-ranging variety of issues and litigation techniques for attacking police practices in the cases that arise from the all too pervasive police-citizen encounter, the auto stop— from drunk driving to drugs to felony possession. From May 12-14, 2010 in St. Petersburg, Fla. they will hold the “Nineteenth Annual Seminar on the Federal Sentencing Guidelines”, presented in conjunction with the ABA Criminal Justice Section and the Federal Bar Association. More information on both programs can be found at [www.nacdl.org/meetings](http://www.nacdl.org/meetings).

### New Publication Addresses Corrections Reform

The Pew Center on the States, Public Safety Performance Project recently released “*Right-Sizing Prisons: Business Leaders Make the Case For Corrections Reform*”. The publication interviews business leaders from five states who are advocating for public safety policies that control correction cost, keep communities safe and ensure states have the workforce they need in a thriving economy. The full report is available at [www.pewcenteronthestates.org/uploadedFiles/Business%20Leaders\\_QA\\_Brief\\_web.pdf](http://www.pewcenteronthestates.org/uploadedFiles/Business%20Leaders_QA_Brief_web.pdf).

*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](mailto:snoddyr@staff.abanet.org).

**Section News**, continued from page 3

cases. Panels included updates on sentencing case law and legislation in the post-*Booker* era; reports on effective reentry programs; the evolution of policies on collateral consequences; the effects of judicial discretion on white-collar sentencing and loss calculation; effective plea negotiation and sentencing advocacy; alternatives to incarceration; and employment barriers to successful reentry. There were two tracks of instruction focused on reentry and two that focused on sentencing, each addressing issues of concern to different segments of the criminal justice community, including probation and parole officials, white-collar crime defense attorneys, prosecutors, academics, public defenders, judges, sentencing consultants, mitigation specialists, corrections personnel, victim advocates and policy experts. The entire membership of the U.S. Sentencing Commission provided a report and update on the commission's activities over the past year and its agenda for the upcoming term.

## Staff News

### Christopher Gowen Finally an Honest Man

Senior Staff Attorney Christopher Gowen married his Hillary campaign sweetheart,Carolynn McDonald, on November 14<sup>th</sup> in the Bahamas.

### Pam Meredith Climbs the CJS Ladder

Congratulations to Pamela Meredith on her promotion to Section Administrator. As Section Administrator, her responsibilities will include budget oversight and management of office operations including the overall administrative needs of the Section.

### Get E-News?

If you are a member of the Criminal Justice Section and have not opted out on receiving emails from the ABA, you receive monthly Section E-News, with latest updates on Section activities, policies, events and resources. Please contact the Service Center at 800-285-2221 if you do not receive the E-News.

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adopt the fifteen recommendations made by the 2008 National Academy of Sciences report *Ballistic Imaging* for improving the effectiveness of the National Integrated Ballistic Information Network (NIBIN) through operational and technological improvements; develop and implement training for law enforcement officers and evidence collection units in optimizing the effectiveness of NIBIN; and facilitate the development and implementation of a systems interoperability strategy for current and future forensic database systems.

### REPORT 102I (Prisoner Standards)

RESOLVED, That the American Bar Association adopts the black letter of the *ABA Criminal Justice Standards on the Treatment of Prisoners* dated February 2010 to supplant the *ABA Criminal Justice Standards on the Legal Status of Prisoners*; and that Standards 7-10.2 and Standards 7-10.5 through 7-10.9 of the *ABA Criminal Justice Mental Health Standards* are supplanted by Standard 23-6.15 of the Standards on the *Treatment of Prisoners*.

### REPORT 102J (John R. Justice Prosecutors and Defenders Incentive Act of 2008)

RESOLVED, That the American Bar Association urges Congress to ensure that funding for the John R. Justice Prosecutors and Defenders Incentive Act of 2008 (Section 951 of PL 110-315) is expanded beyond its original authorization of \$25 million to cover the actual national need; and that the American Bar Association urges Congress to lift the proposed expiration of the John R. Justice Prosecutors and Defenders Incentive Act of 2008.



Frank C. Razzano, Stephen J. Obie, Adam G. Safwat, Cheryl Evans, Laura Joseph, and Thomas O. Gorman took part in "Enforcement Trends in Securities & Commodities Actions 2010" on Jan. 13, 2010 at the Law Office of Pepper Hamilton LLP in Washington, D.C.

## 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](http://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](mailto:customercare@BNA.com). For a free trial subscription go to [www.bna.com/products/lit/mopc.htm](http://www.bna.com/products/lit/mopc.htm).

### DOJ Issues Discovery Guidance for Federal Prosecutors

On Jan. 4, 2010 the Department of Justice released three memos – including a detailed guidance memo for all federal prosecutors – which layout the steps the department has taken to ensure that prosecutors hand over evidence that could help indicted defendants prove their innocence, or help the defense impeach the government's witnesses at trial. In a letter regarding the new directives, it states "The guidance is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department's pursuit of justice. The guidance is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits." In addition to the policy guidance, the Justice Department is planning to create an online directory of resources pertaining to discovery issues, a handbook on discovery and case management, and a mandatory training program for law enforcement agents. More information on the memos is available at <http://www.justice.gov/dag/discovery-guidance.html>.

### California Bar Approves Second Round of Updates to Professional Conduct Rules

On Jan. 9, 2010 the California State Bar's board of governors approved nearly a dozen new or amended professional conduct rules, in yet another step on the road toward updating the state's standards governing lawyer behavior. The latest set of standards addresses several topics that proved particularly controversial: what safeguards apply when fee agreements are modified; the circumstances in which lawyers must report other lawyers' misconduct; whether advance payments of fees must be deposited in client trust accounts; and whether there should be a near-total ban on sexual relations with clients.

The newly approved rules also address other aspects of safekeeping client property, as well as lawyer-client business transactions, aggregate settlements, fee payments from third parties, trial publicity, lawyers as witnesses, membership in

legal services organizations, and participation in law reform activities. None of the rules approved by the board will go into effect, however, unless they are also accepted by the California Supreme Court. The second set of rules is available at [bog.calbar.org/docs/agendaItem/Public/agendaitem1000005784.pdf](http://bog.calbar.org/docs/agendaItem/Public/agendaitem1000005784.pdf).

### Proposed Changes to Texas Rules Add Plenty of Updates, but Omit MJP, Screening

Proposed amendments to the Texas rules governing lawyer conduct that the state supreme court has circulated for comment address a wide range of topics, including additional guidance on the subject of representing multiple clients in a single matter. The proposals do not include a screening provision to prevent imputed disqualification, however, and the subject of multijurisdictional practice has not yet been addressed. Untouched in this round of amendments are the rules on advertising and solicitation, which Texas amended in 2004 when new standards on referral fees were put into place.

The proposals reflect a highly selective approach toward incorporating language from changes the ABA made to the Model Rules of Professional Conduct in the past seven years. While some aspects of the revamped ABA models are embraced in the Texas proposals—such as the requirement in several rules that a client's consent to a conflict of interest be confirmed in writing—the state rule changes would go their own way in most respects. The proposals also include a standard on representing clients with diminished capacity (Rule 1.14), which essentially follows the ABA model, as well as a new standard (Rule 1.17) on obligations to prospective clients, which departs from the ABA model in several key ways. For more information visit [www.texasbar.com/Template.cfm?Section=Past\\_Issues&Template=/ContentManagement/ContentDisplay.cfm&ContentID=25685](http://www.texasbar.com/Template.cfm?Section=Past_Issues&Template=/ContentManagement/ContentDisplay.cfm&ContentID=25685).

### Screen in Two-Prosecutor Office Is Effective

The Michigan Court of Appeals decided a two-prosecutor office succeeded in effectively screening an incoming lawyer who, just before joining the office, had been representing a criminal defendant being prosecuted by the office, (*People v. Davenport*, Mich. Ct. App., No. 271366, 11/3/09). In an initial appeal after being convicted, the defendant convinced the court of appeals that his replacement counsel provided ineffective assistance by failing to raise the issue of his former counsel's move to the prosecutor's office. The court held that once a defendant has shown that a member of the prosecutor's office formerly represented him in the same or a related matter, a presumption arises that members of the

prosecutor's office have conferred about the case. In a per curiam opinion, the court found it abundantly clear that, even though the prosecutor's office maintained no written procedures about how to handle potential conflicts or the defendant's file in particular, both prosecutors and all staff members were informed and understood that the incoming lawyer was to have no contact with the defendant's file and that he would not participate in any discussion, interviews, or meetings about the case. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.25, page 688 (Dec. 9, 2009)

### False Denial of Secret Tape-Recording Didn't Violate General Rule on Deceit

The Vermont Supreme Court decided the ethics rule that forbids conduct involving fraud, dishonesty, deceit, or misrepresentation reaches only conduct that calls into question an attorney's fitness to practice law, (*In re PRB Docket No. 2007-046*, Vt., No. 2008-214, 11/25/09). The case involved two criminal defense lawyers who misled a potential witness about whether they were recording a telephone conversation. The lawyers, partners in a law practice, represented a client accused of second-degree murder. Just before the trial was to begin, a jailhouse tipster contacted them, claiming to have evidence implicating someone else as the murderer. The lawyers arranged to interview the witness by telephone and to record the call. They stipulated that during the call, the witness asked if they were recording the interview. One of the lawyers said "No," and the other tried to distract the witness by saying, "She's on speaker phone, so I can hear you."

The witness later filed complaints against both lawyers with the Office of Disciplinary Counsel. The hearing panel concluded that the lawyers violated Rule 4.1, which provides that in the course of representing a client "a lawyer shall not knowingly make a false statement of material fact or law to a third person." For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.25, page 691 (Dec. 9, 2009)

### Prosecutor Can't Try Case Against Familial Accuser

The Indiana Supreme Court decided the appearance of impropriety prevents a special prosecutor from handling a case against a defendant who in another matter testified against the prosecutor's brother-in-law, (*State ex rel. Kirtz v. Delaware Circuit Court No. 5*, Ind., No. 18S00-0909-OR-411, 11/13/09). Ind. Code Ann. §33-39-1-6(b)(3) authorizes the appointment of a special prosecutor when the court finds that such appointment is necessary to avoid an appearance of impropriety. The defendant in this case has been accused of a drug offense, and the local prosecutor's office requested the appointment of a special

prosecutor on account of the defendant's relationship with the office involving his work as an informer and cooperating witness. The problem was that the attorney appointed to serve as the special prosecutor is the brother-in-law of a man against whom the defendant had testified in an unrelated matter. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.25, page 645 (Nov. 25, 2009)

### Phone Sex With Client Calls for Public Admonishment of Lawyer

The Ohio Supreme Court publicly reprimanded a lawyer for engaging in "sexual activity" with her incarcerated client, based on evidence that she had a series of steamy telephone conversations with him while he was incarcerated (*Cincinnati Bar Ass'n v. Schmalz*, Ohio, No. 2009-0661, 8/25/09). Although the behavior violated Ohio's rule against engaging in "sexual activity" with a client, the court said, this particular activity fell "at the end of the spectrum representing the least egregious cases of sexual misconduct" and thus warranted no more than a reprimand. In so ruling, the court said there was no indication that the misconduct caused the lawyer to deliver subpar legal services. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.25, page 498 (Sept. 16, 2009)



On Jan. 14, 2010 in Birmingham, Alabama, over 100 participants attended the "Negotiation for Criminal Justice Practitioners," sponsored by the Alabama Center For Dispute Resolution, the Alabama State Bar and funded by a grant from the ABA Enterprise Fund with technical support from the ABA Criminal Justice Section.

**Feedback Welcome**  
Send to  
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## UPCOMING EVENTS

**April 8-11**

**Criminal Justice Section  
Spring Meeting**

Charleston, SC



**June 4**

**Prescriptions for Criminal  
Justice Forensics**

New York City



**Aug. 5-7**

**ABA/CJS  
Annual Meeting**

San Francisco, CA



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