



The American Bar Association

Criminal Justice Section Newsletter

Volume 15, Issue 1 Fall 2006

Hawaii Annual Meeting Highlights

The Criminal Justice Section meeting in Hawaii was a mix of outstanding CLE presentations, rich policy discussions and, yes, some fun in the sun. The Section Council was welcomed to Hawaii by U.S. Attorney for the District of Hawaii Ed Kubo who pointed out Hawaii's unique approach to the crystal methamphetamine problem involving prevention and drug treatment programs.

Mary Beth Buchanan, U.S. Attorney for the Western District of Pennsylvania, spoke about the Justice Department's "Principles of Federal Prosecution of Business Organizations" (widely-known as the "Thompson memo"), thereby setting off a lively discussion about related issues, including attorney-client privilege waivers and corporate responsibility to employers. [See related Practice Tip on page 10.]

As the Justice Department's representative at the meeting, Alice Fisher, Chief U.S. Attorney for the Justice Department's Criminal Division, spoke on the attorney-client privilege and a variety of other policy issues before the Council and the House of Delegates (see page 8).

Race and Racism Committee Chair Kenneth Nunn moderated a panel on "Racial Disparity and Criminal Justice in Hawaii." Kat Brady, Coordinator of the Community Alliance on Prisons, Keleihua Kamau'u, Native Hawaiian activist and ex-offender, Robert Perkinson, Assistant Professor of American Studies at the University of Hawaii, Manoa, and Carrie Ann Shirota, Director of Maui Economic Opportunity Inc.'s BEST

(Being Empowered and Safe Together) Reintegrative Program discussed a number of distinguishing features of the state's criminal justice system. For example, Hawaii sends more of its convicted offenders outside the state for incarceration than any other state. This fact, together with the great distance between prisoners on the mainland and their family members in the islands, means that out of state incarceration poses a particular hardship for Hawaiians.

Military Commissions Program Draws Big Crowd



Neal Sonnett speaks during the CLE presentation on military tribunals, while Colonel Flora Darpino listens.

The Section's Annual Meeting presidential CLE presentation on military tribunals was a huge success, drawing a large crowd of 150 attendees on Thursday morning, August 3, in Honolulu, before most of the Annual Meeting crowd had even arrived. Led by the CJS House of Delegates representatives Steve Saltzburg and Neal Sonnett, the program produced a lively discussion of important issues such as: "Why was there a perceived need for military commissions in the first place and is there a need now?" "Should there be

commissions and should Congress specifically authorize them?" "What have we learned from the proceedings that were conducted—about the role of defense counsel, the role of the presiding judge etc.?" "With four Supreme Court Justices onboard the proposition that conspiracy is not a crime triable by military commissions, what are the options if the administration believes that conspiracy to commit terrorist acts should be a triable offense?" These topics and the proposed legislative response to Hamdan by the National Institute of Military Justice were discussed. This discussion will be available to an even wider audience of Section members in the form of a CLE teleconference, scheduled for Sept. 28, 2006. For a related *ABA Journal* article, see www.abanet.org/journal/daily/am4terror.html

ABA Journal/Doc 8/06m

Inside This Issue:

Policy Update

Practice Tips

Ethics

Legislative Update

Fall Conference Highlights

Section Membership Meets in Hawaii

Chair Michael Pasano convened the Criminal Justice Section membership meeting on Aug. 5 in Hawaii. On motion made and seconded, the revisions to the Section bylaws previously approved by the Section Council and the ABA Board of Governors were approved by the Section membership -- the final step in making them effective. The bylaws changes primarily center around building the new committee structure and officer changes associated therewith.

The Section membership, on motion made and seconded, elected the slate of officers and council members nominated by the Section Nominating Committee. Officers and new Council members serving in 2006-2007 include:

Chair: Robert M.A. Johnson

Chair-Elect: Stephen A. Saltzburg

First Vice-Chair: Anthony

Joseph

Delegates: Stephen A. Saltzburg,

Neal R. Sonnett

Budget Officer: Ronald Goldstock

Five Vice Chairs At Large: Susan Gaertner, Charles J. Hynes, James Cole, Martin Marcus, Gary Walker

Five New Council Members: Stephen Bronis, Cheryl Jacobs, Lt. Colonel Gary Jackson, Mary Boland, and Michael Hamden.

Finally the Council expressed its gratitude for the excellent service provided to Council by outgoing members Barbara Berman, Richard Divine, Edward Siskel, and Andrea Taylor.

SECTION NEWS

Money Laundering Enforcement Conference

The 2006 American Bar Association/American Bankers Association's Money Laundering Enforcement Conference will take place on October 8-10 at the Marriott Wardman Park Hotel, Washington, D.C. Expanding risks, intensified regulatory scrutiny, conflicting guidance on SAR obligations—these are all legal challenges bankers are facing every day. Over 1,000 bankers will assemble to learn ways to address these legal challenges. The conference not only provides instruction from the nation's top AML/BSA experts, it also creates opportunities to network with bankers and lawyers from around the country. Several sessions are geared toward lawyers working in the AML arena. For more information on this and other upcoming events, see www.abanet.org/crimjust.

Securities Fraud Event

National Institute: Securities Fraud took place in Washington, D.C., from September 28 to 29. From Enron to WorldCom to investigations of mutual fund practices and finite reinsurance transactions, securities fraud has dominated the news on the business pages for the past four years. This national institute program provided an in-depth, cutting edge and rewarding educational experience for all practitioners, including prosecutors, regulators, compliance officers, and defense counsel, in this exciting and headline-making field.

CJS Section Calendar of Events

See www.abanet.org/crimjust for a complete calendar.

Oct. 16-17

National Institute on the Foreign Corrupt Practices Act

Washington, DC

Oct. 26-27

23rd Annual National Institute on Criminal Tax Fraud

Washington, DC

Nov. 2-5

Disaster Preparedness and the Criminal Justice System

New Orleans, LA

CJS 2006 Fall Meeting, Council and Committee Meetings

Dec. 7-8

23rd Annual National Institute on Criminal Tax Fraud

San Francisco, CA

Feb. 7-13, 2007

2007 ABA Midyear Meeting

Miami, FL

Criminal Justice Section - InterContinental Hotel (Feb. 9-11)

Feb. 15-16, 2007

11th Annual National Institute on Gaming Law Minefield

Las Vegas, NV

March 1-2, 2007

21st Annual National Institute on White Collar Crime

San Diego, CA

May 10-13, 2007

Criminal Justice Section 2007 Spring Meeting

Grand Hotel, Mackinac Island, MI

May 16, 2007

17th Annual National Institute on Health Care Fraud

New Orleans, LA

Correction

The correct name of the co-author of "How to Establish and Run a Truancy Program" (page 5, Spring 2006) is Jessica Pennington.

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Juvenile Justice Seminar Success

The CJS Juvenile Justice Committee sponsored a CLE program on August 23, *From Truancy to Zero Tolerance: The Changing Border of Education and Juvenile Justice*. The program focused on legal issues associated with truancy and truancy prevention, special education, referrals of students to juvenile courts for school-based misbehavior, education of delinquent youth, and problems delinquent youth have in returning to school after placement. The program was very well received with over 120 attendees, including public defenders, prosecutors, social workers, school personnel, psychologists, and professors.

Section Chair Elect Stephen Saltzburg who attended the seminar and presided over the award program stated, "The Criminal Justice Section Juvenile Justice Committee conference and awards ceremony on August 23 at the Capitol Hilton was a smashing success. To turn out close to 120 participants in DC in August was quite an achievement, but more importantly the substance of the program was engaging and represented differing but dynamic points of view. To have the ABA President as seminar moderator and awards presenter added luster to the occasion. Congratulations to the Juvenile Justice Committee and staff."



Photos: ABA Media Relations/Robert Snoddy

ABA President Karen Mathis moderates the juvenile justice program. Panelists included Barbara Flicker, Susan Gaertner, Robert Schwartz, Kenneth Seeley and Joseph Tulman.

ABA President, Karen Mathis, served as moderator. Youth-at-Risk is among Ms. Mathis's core presidential initiatives for 2006-07. The other panelists included: Barbara Flicker, Legal Consultant, Susan Gaertner, Ramsey County Attorney, Robert Schwartz, Executive Director, Juvenile Law Center, Kenneth Seeley, President, National Center for School Engagement, and Joseph Tulman, Professor, University of District of Columbia, David A. Clarke School of Law.

Education, ABA Section of Individual Rights and Responsibilities, Children & Family Justice Center, Northwestern Univ. School of Law, Council of Juvenile Correctional Administrators, Juvenile Law Center, National Association of Counsel for Children, National Center for Youth Law, National Collaboration for Youth, National Council of Juvenile and Family Court Judges, National Center for Juvenile Justice, National Center for Youth Law National Juvenile Defender Center, and the Office of Juvenile Justice and Delinquency Prevention.

Following the CLE program, ABA President Karen Mathis presented the Livingston Hall Juvenile Justice Award. The award is given each year to recognize lawyers practicing in the juvenile delinquency field who have demonstrated a high degree of skill, commitment and professionalism in representing their young clients. This year's recipients are Patricia Puritz and Martin Guggenheim.

Puritz has over 33 years in the juvenile justice field and currently serves as executive director of the National Juvenile Defender Center in Washington, D.C. Previously, she served as founder and director of the Juvenile Justice Center at the ABA and as adjunct professor at American University. Puritz has her juris doctor from the Antioch School of Law in Washington, D.C., and also attended the Georgetown University Law Center.

Currently a Fiorello LaGuardia professor of clinical law at N.Y.U. Law School, Guggenheim has written extensively, including the 2005 book, "What's Wrong with Children's Rights." He has 35 years in the juvenile justice field and earlier worked in the Juvenile Rights Division of the New York Legal Aid Society and the ACLU Juvenile Rights Project.



Karen Mathis (center) presents this year's Livingston Hall Award to Patricia Puritz and Martin Guggenheim.

Feedback Welcome

Send to crimjustice@abanet.org

Section Committees Reorganized

The committees of the Criminal Justice Section are now rearranged and regrouped into six divisions that are broadly organized based on subject matter and/or function, which has resulted in more than doubling the number of options for members to get involved in committee activities..

Each division is headed by two division executive directors, one of whom also serves as a member of the Council Executive Committee. These divisions do not include the existing Standards Committee, which was originally constituted by the ABA Board of Governors. The Standards Committee will continue to operate as it has in the past, and will keep the Council informed of its work through the Executive Committee's first vice-chair.

The divisions are: Equal Justice Division; Sentencing, Corrections, and Effective Sanctions Division; Specialized Practice Division; Professional Development Division; Communication, Membership, and Services Division; White Collar Crime Division.

A majority of CJS committees have identified their goals for the current year. To access a list of goals submitted by all committees, see Committees portal page at www.abanet.org/crimjust/committees.

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 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.

COMMITTEE NEWS

Juvenile Justice Committee Report

The Juvenile Justice Committee met on August 23, 2006 in Washington, DC. Robert Schwartz is the in-coming committee chair for 2006-07. Bob is a long-time ABA member and youth advocate. He also chaired the Committee from 1992-98.

Outside of ABA activities, Bob is the executive director of the Juvenile Law Center, which he co-founded in 1975. He has represented dependent and delinquent children in Pennsylvania juvenile and appellate courts; brought class-action litigation over institutional conditions and probation functions; testified in Congress; and spoken in over 30 states on matters related to children and the law.

The committee is currently drafting a recommendation and report addressing sentencing of juveniles as adults and plans to present the recommendation to the Criminal Justice Section Council in November. Other possible committee activities for 2006-7 include drafting a new juvenile justice standard, drafting best practices of prosecutors in diverting youth from a court's status offender jurisdiction and best practices for juvenile defense attorneys in preparing their teen clients, after adjudication, and engaging in productive dialogue with judges and probation personnel. Other projects may focus on status offenders, females in the justice system and competency to stand trial.

Many thanks to out-going co-chairs, Professor Vic Streib and Judge Tony Iosco, for their dedication and leadership.

Standards Committee Update

A printed volume of *ABA Standards on Speedy Trial and Timely Resolution of Criminal Cases* is now available. The publication contains both "black letter" Standards and accompanying commentary. Hon. Andrew Sonner of the Maryland Court of Special Appeals (ret.) chaired the Task Force that developed the "black letter" Standards approved by the House of Delegates in August 2004. Reporter Barry Mahoney drafted the commentary, approved by the Standards Committee in April 2006. Order information is available on the Section website (see link above).

The Standards Committee, under the leadership of Irwin Schwartz, expects to conclude its review of draft Standards on Prosecutorial Investigations presented by Task Force Chair Ronald Goldstock and Reporter Steve Solow, in September and to present them to the Council for a first reading in November.

Task Forces revising Standards on the Legal Status of Prisoners and the Prosecution and Defense Function continue to meet. Respective chairs are Margaret Love and Hon. John Tunheim. Respective reporters are Michele Deitch and Rory Little.

A new Task Force on Diversion and Special Courts will begin meeting early in the new Association Year. Hon. Irma Raker will chair the Task Force and Prof. Walter Dickey will serve as reporter. Another new Task Force — on Transaction Surveillance — is currently being appointed.

For latest updates on Criminal Justice Section activities, events and resources, see www.abanet.org/crimjust.

Law School Re-entry Clinics: The Critical Link to Providing Legal Representation Relating to Collateral Consequences

By April Frazier

Many offenders will find that even after their sentence is served, their debt to society is still unpaid. The statute books in every state are filled with laws, commonly referred to as collateral consequences, that disqualify people from jobs, occupational licenses, housing, educational funding, and many social service benefits based on their criminal conviction alone. Many people with criminal convictions, who are often also indigent, are left to fight child custody battles, occupational licensing agencies and housing authorities alone without any legal assistance. Only a few public defender offices provide re-entry legal services, and most civil legal aid offices lack the resources to address these issues. The sad fact is that, without services or support, more than half of those released from prison will find themselves back there within a year.

The Justice Kennedy Commission recommended that law schools establish reentry clinics to assist individuals returning from prison or with criminal convictions regain legal rights and privileges. The Commission on Effective Criminal Sanctions has now urged jurisdictions to authorize and properly fund legal aid services, including law school clinics, to assist offenders with removing or neutralizing the collateral consequences of a criminal record. (The Commission's recent recommendations, which will be considered by the House in February, are available at www.abanet.org/cecs).

Presently, there are only two law schools in the country that offer clinical programs to assist with offender re-entry. New York University ("NYU") launched the first-ever Offender Reentry Clinic in 2002. The clinic was designed to provide direct representation for ex-

offenders and also to expose students in the clinic to a wide range of policy and administrative issues involved in reentry. The University of Maryland Law School also offers a Re-Entry of Ex-Offenders Clinical Program, which provides individual representation to clients seeking expungement of criminal records, partners with the University's social work clinic to assist individuals on the verge of release from correctional facilities, and engages in policy advocacy work on behalf of clients with correctional and law enforcement agencies. These two reentry clinics offer an opportunity for students to engage in a critical examination of important and complex criminal justice issues.

Other law schools, like Howard University School of Law, provide limited re-entry services to their clients though they do not offer a full clinical program specifically focused on offender re-entry. At Howard, law students in the criminal defense clinic are trained to inquire about the client's social service needs and to provide appropriate referrals to address any underlying issues concerning the case. In addition, law students work with the D.C. Public Defender Service to represent clients in parole revocation hearings before the U.S. Parole Commission, which often only involve technical violations. This opportunity offers students a glimpse into some of the challenges faced by their clients upon reentry.

While the Commission urges law schools to consider implementing comprehensive offender re-entry clinics, similar to NYU and Univ. of Maryland, Howard serves as another model of how law school clinical programs can integrate some aspects of re-entry services without offering a full clinical program. Law school re-entry clinics benefits the public by providing legal services to an indigent

and at risk population, and also sensitizes future attorneys to the social, economic, and political forces that work to their clients' disadvantage, and strengthen their concern for social justice.

The Commission is currently seeking funding to begin a reentry clinic for women with children at a Washington, DC area law school.

Commission on Effective Criminal Sanctions in Discussions with National District Attorneys Association

The Commission on Effective Criminal Sanctions and the CJS has agreed to put a temporary hold on recommendations to the ABA House of Delegates, to allow further discussions with the NDAA about the wording of several of the resolutions. This action was taken after concerns were expressed at the NDAA's Summer Conference in Santa Fe, and with an understanding that the NDAA is genuinely interested in working with the Commission to produce a set of policy recommendations that both organizations can support.

In the coming weeks a subcommittee of the Commission chaired by Brooklyn DA Joe Hynes will be working with a committee appointed by NDAA president Mat Heck, to reach mutually agreeable modifications to the recommendations. Both Mat Heck and Joe Hynes serve on the CJS Council. The Commission will again seek the Section's co-sponsorship at the Council's fall meeting in New Orleans before presentation of the resolutions at the Midwinter meeting in February 2007.

Commission co-chairs Thompson and Saltzburg join with NDAA President Heck in welcoming this unprecedented and historic opportunity for the ABA and NDAA to work together on a set of issues that are critical to the just and efficient functioning of the criminal justice system.

The American Bar Association Criminal Justice Section Presents the 2006 Fall Conference

Disaster Preparedness and the Criminal Justice System

New Orleans November 2-3, 2006

Hotel InterContinental
444 St Charles Avenue



Hotel reservations can be made by calling the Intercontinental New Orleans at 504-525-5566 or 1-800-445-6563. (Single/Double: \$179) Reservations must be made by Wednesday, October 11, 2006 to receive the ABA Criminal Justice Section Room Rate.

Accreditation has been requested from mandatory CLE states.

Among the havoc Hurricane Katrina has inflicted on hundreds of thousands of Gulf Sate residents is the devastating impact it has had on criminal justice professionals. Lawyers, prosecutors, judges, corrections officials, and police are among those who have had to deal with the impact of the storm not only on their personal lives but also on their professional lives. Even today, a full year later, they are struggling to work in a system where courthouses have been destroyed, evidence has been lost, inmates' and defendants' whereabouts are unknown, lawyers' offices have been closed, and crime is on the rise.

It has become abundantly clear that criminal justice systems around the country need to be better prepared to deal with disasters, whether they come in the form of hurricanes, pandemics, earthquakes, industrial accidents, tornadoes, tsunamis, or terrorist attacks. The ABA Criminal Justice Section has designed this conference to help criminal justice professionals learn from the lessons of Katrina about how to do so. A stellar line-up of leading local and national judges, prosecutors, defense attorneys, corrections officials and others will share their insights into Katrina's impact on the criminal justice system and will work with conference participants to identify policies and practices to avoid or minimize similar impacts from future disasters.

For updated information, see www.abanet.org/crimjust.

[Registration Form: Disaster Preparedness and the Criminal Justice System](#)

Advance Registration deadline: October 18th, 2006

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

Program Fee: Members: \$150; Non Members: \$175; Law Students: \$25

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Annual Meeting Held in Hawaii

The 2006 ABA Annual Meeting was held August 3-8, 2006, in Honolulu, HI. The Section Council held its meeting on August 5. Action items approved by the Section include: 1) a proposed resolution on post conviction relief for incarcerated domestic violence victims, 2) Section co-sponsorship of resolution #108A advocating certain principles for homeless courts, 3) Section co-sponsorship of resolution #116 on discretionary review by the Supreme Court of the United States of decisions rendered by the United States Court of Appeals for the Armed Forces that deny petitions for review of court martial convictions or deny extraordinary relief, 4) Section co-sponsorship of resolution #10A on enhancing access to services for at-risk youth, 5) Section co-sponsorship of resolution #120D on inadvertent disclosure of privileged communications, 6) Section co-sponsorship of resolution #120A on expert witness discovery, and 6) Section co-sponsorship of resolution #302B on attorney client privilege. These resolutions are described below. All but the first were subsequently submitted to and approved by the House of Delegates, with or without revision. The approved versions are on our website at www.abanet.org/crimjust/policy.

Post Conviction Relief for Incarcerated Domestic Violence Victims

As approved by Section Council, the resolution on post conviction relief for domestic violence victims who are incarcerated proposes that the American Bar Association urge bar associations and law schools to ensure that persons who are victims of domestic violence are included in the group of individuals targeted by programs that encourage and train lawyers to assist persons in

POLICY UPDATE

applying for pardon, restoration of legal rights and privileges, relief from other collateral sanctions, and reduction of sentence. This resolution also advocates the expansion of, as appropriate, the use of measures such as clemency, parole, and reduction of sentence in cases where incarcerated persons were subjected to domestic violence that played a significant role in their offense but the effect of that domestic violence was not fully litigated at trial or sentencing. Finally, the resolution urges the recognition of the special needs and issues presented by victims of domestic violence in establishing re-entry services for individuals released from jail or prison. It is expected that the Section will submit this resolution for consideration by the House of Delegates at its 2007 mid-year meeting.

Homeless Court

The Section Council voted to co-sponsor the resolution on Homeless Courts which advocates that the American Bar Association adopt principles for Homeless Court programs e.g. prosecutors, defense counsel, and the court should agree on which offenses may be resolved in the Homeless Court program, and approve the criteria for individual participation recognizing that defendant participation in Homeless Court Programs shall be voluntary. The recommendation recognizes that administration of the programs will differ depending on the particular needs, goals and challenges of a jurisdiction. This resolution was approved as revised by the House of Delegates.

U.S. Supreme Court Review of Court-Martial

The Section Council voted to co-sponsor this resolution urging Congress to amend 28 U.S.C. §1259 (3) and (4) to permit discretionary review by the Supreme

Court of the United States of decisions rendered by the United States Court of Appeals for the Armed Forces that deny petitions for review of courts-martial convictions or deny extraordinary relief. In moving adoption by the ABA House of Delegates, Steve Saltzburg delivered an impassioned plea for the rights of military personnel embodied in the resolution “so that they like all U.S. citizens will have the right to appeal their case to the U.S. Supreme Court.” The resolution was approved by the House of Delegates.

Enhancing Access to Services for At-Risk Youth

The Section Council voted to co-sponsor the resolution on enhancing access to services for at-risk youth. This resolution proposes that adequate and appropriate services are made readily available to at-risk youth and their caretakers by ensuring that community health systems serving youth are reinvigorated and significantly expanded, stronger support is given to expanding availability of evidence-based programs for youth and greater investment is made in research to identify additional evidence-based programs worthy of replication and use for at-risk youth and more. This resolution was approved as revised by the House of Delegates.

Inadvertent Disclosure of Privileged Communications

The Section Council voted to co-sponsor the resolution urging federal and state courts to adopt consistent rules to address how the courts and counsel should resolve issues involving claims of inadvertent disclosure of materials protected by the attorney-client privilege or work product doctrine. This resolution was approved by the House of Delegates.

Expert Witness Discovery

The Section Council voted to co-sponsor the resolution urging that federal, state and territorial rules and statutes governing civil procedure be amended or adopted to protect from discovery draft expert reports and communications between an attorney and a testifying expert relating to an expert's report. This report was approved by the House of Delegates.

Attorney-Client Privilege

The Section Council discussed provisions from two attorney-client resolutions, one drafted by the New York State Bar Association and the other drafted by the ABA Task Force on Attorney-Client Privilege. The Section Council voted to co-sponsor the resolution drafted by the Task Force and instructed its Delegates to suggest a modification of the resolution to the House of Delegates. This resolution recommended that prosecutors, investigators and enforcement authorities should not, directly or indirectly, demand request or encourage an entity to discipline, sanction or terminate any employee because of that employee's decision to exercise his or her Fifth Amendment right against self-incrimination. It was approved as revised by the House of Delegates.

The resolution (drafted by the New York State Bar Association) on

prosecutors not pressuring an entity to refuse to advance or reimburse the legal fees and expenses of a current or former director, officer, employee or agent of the entity was withdrawn.

Mental Disability and the Death Penalty

At the 2006 spring meeting, the Section Council voted to co-sponsor the resolution urging each jurisdiction that imposes capital punishment to implement specific policies and procedures as it related to mental illness. This resolution was approved by the House of Delegates.

ABA Standards on DNA Evidence

A new set of Criminal Justice Standards on *DNA Evidence* was approved by the ABA House of Delegates. The Standards address collecting, preserving and use of DNA evidence; testing of DNA evidence; pretrial proceedings, trials, and post-conviction issues involving DNA evidence; charging by DNA profile; and DNA databases. Their approval was the culmination of a project that began in the summer of 2003. Judge Martin Marcus of the New York Supreme Court in the Bronx chaired the Task Force that drafted the Standards and Prof. Paul Giannelli of Case Western Reserve Law School served as reporter. The Standards can be found on the Standards website: www.abanet.org/crimjust/standards.

Ethics and Excessive Caseloads for Lawyers Who Represent Indigent Criminal Defendants

Last year, the ABA Criminal Justice Section, the ABA Standing Committee on Legal Aid and Indigent Defense (SCLAID) and the National Legal Aid and Defender Association (NLADA) requested that the ABA Standing Committee on Ethics and Professional Responsibility reconsider its decision not to issue an ethics opinion regarding excessive defender caseloads in criminal cases.

On May 13 of this year, the Ethics committee issued Formal Ethics Opinion 06-441, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation*. This opinion states that all lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant.

Section Web Site Redesigned

The Criminal Justice Section's Web Site (www.abanet.org/crimjust) has been redesigned. The new look is consistent with the ABA-wide design elements and features rearranged portal pages (membership, leadership, law students, calendar, policy, publications, resources, etc.) that have more relevant navigation menus and resources. Committee pages have also been expanded. Feedbacks can be sent to Kyo Suh at suhk@staff.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 [For information on this publication, contact BNA at 1-800-372-1033 or customercare@BNA.com. For a free trial subscription, go to www.bna.com/products/lit/mopc.htm.] The following cases are reported on in greater detail in the publication at Vol. 22, No. 14, July 12, 2006, Vol. 22, No 15, July 26, 2006, Vol. 22, No 16, August 9, 2006.

Appearance of Impropriety Isn't Basis for Disqualifying Prosecutors

On June 26, the Colorado Supreme Court held that changes to a state statute have eliminated the "appearance of impropriety" as a basis for disqualifying prosecutors in criminal cases. A district attorney may be removed only in situations that fit within one of the three grounds listed in the statute. See *People v. N.R.*, Colo., No. 05SA273, 6/26/06. As amended in 2002, Colo. Rev. Stat. § 20-1-107 states that a district attorney may be disqualified in a particular case in three situations only:

- at the request of the district attorney;
- upon a showing that the district attorney has a personal or financial interest; or
- if "special circumstances exist that would render it unlikely that the defendant would receive a fair trial." 22 Law. Man. on Prof. Conduct 330 (July 12, 2006).

Judge Condemns DOJ Policy of Pressuring Companies Not to Pay Employees' Legal Fees

The U.S. District Court for the Southern District of New York held June 26 that the Department of Justice unconstitutionally pressured accounting firm KPMG into limiting payments of legal fees for indicted KPMG officers and employees. See *United States v. Stein*, S.D.N.Y., No. S1 05 0888 (LAK), 6/26/06. 22 Law.

Man. on Prof. Conduct 342 (July 12, 2006).

Grand Jury Targets May Do Privilege Review of Materials Subpoenaed from Third Party

The U.S. Court of Appeals for the Sixth Circuit held on July 13 that when a federal grand jury subpoenas materials from a third party and the targets of the grand jury probe assert that some of the requested materials are privileged, the targets of the investigation whose privilege rights are implicated – not a government "taint team" – have the right to conduct a privilege review of the subpoenaed documents. See *In re Grand Jury Subpoenas* 04-124-03 and 04-124-05, 6th Cir., No. 05-2274/2275, 7/31/06. 22 Law. Man. on Prof. Conduct 351 (July 26, 2006).

Former DOJ Ethics Lawyer Loses Case Challenging Referrals to State Bars

The U.S. District Court for the District of Columbia concluded that the Department of Justice did not violate the law or its own policy when it notified two state bar groups that a former DOJ ethics attorney may have acted unethically when she leaked to a news magazine internal DOJ e-mails relating to the government's high-profile criminal case against "American Taliban" John Walker Lindh. See *Radack v. U.S. Dep't of Justice*, D.D.C., Civ. No. 04-01881 (HHK), 7/17/06. 22 Law. Man. on Prof. Conduct 355 (July 26, 2006).

Agreement with Nonlawyer to Split Fees in Referred Cases Is Illegal

The Wisconsin Court of Appeals, Third District, held that a nonlawyer cannot enforce a lawyer's agreement to pay the nonlawyer a share of fees in referred cases. See *Abbott v. Marker*, Wis. Ct. Appl. 3d Dist., No. 2005AP2853, 7/18/06. 22 Law. Man. on Prof. Conduct 376 (August 9, 2006).

Michigan Reprimands Geoffrey Fieger for Tirades Against Judges

On July 31, a bitterly divided Michigan Supreme court reprimanded outspoken lawyer Geoffrey Fieger for a series of profane epithets he used on a radio show about appellate court judges who overturned a multimillion-dollar verdict he had won. See *Grievance Administrator v. Fieger*, Mich., No. 127547, 7/31/06. 22 Law. Man. on Prof. Conduct 387 (August 9, 2006).

In Switch to Model Rules, Ohio Adopts MJP But Keeps Unique Standards from Prior Code

The Ohio Supreme Court Aug. 1 jettisoned its Model Code-based ethics standards and replaced them with versions of the ABA Model Rules, including the ABA's approach to cross-border practice by lawyers licensed in other states. The new rules go into effect Feb. 1, 2007. 22 Law. Man. on Prof. Conduct 389 (August 9, 2006).

Practice Tips

Protecting Employee Rights Under The Thompson Memorandum

By Jan L. Handzlik

For the second time in a year, the ABA's House of Delegates has gone on record in opposition to certain government practices under the Thompson Memorandum ("Thompson"). Thompson enunciates policies to be carried out by federal prosecutors in considering charges against corporations and other organizations, and in assessing their cooperation with criminal investigations.¹

In August 2005, the House, without dissent, adopted a resolution recommended by the ABA President's Task Force on the Attorney-Client Privilege condemning the government's routine practice of encouraging and in some cases requiring waivers of the privilege and work product protections as a precondition to gaining credit for cooperation.²

The Thompson Memorandum also permits prosecutors to take certain other factors into consideration in making a determination as to whether an organization has fully cooperated with its investigation. The Memorandum states:

[W]hile cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.³



The author, a partner in the Los Angeles office of Howrey LLP, is a former federal prosecutor and past chair of the ABA's White Collar Crime Committee and former member of the CJS Council. He is also a member of the ABA Presidential Task Force on the Attorney-Client Privilege, but wishes to emphasize that the views expressed in this article are his own and not those of the Task Force. He can be reached at HandzlikJ@howrey.com.

Although in many cases, prosecutors have construed this language broadly, in fact the Memorandum allows consideration of these circumstances only in the case of "culpable" employees and agents. The Memorandum also fails to define such key terms as "culpable," and "misconduct," and does not specify when such determinations should be made. Moreover, Thompson appears to give prosecutors the ability to make culpability and misconduct determinations well in advance of an admission or judicial finding of guilt.

On August 8, 2006, the House criticized the manner in which these provisions have been interpreted and executed by the Department of Justice. Acting on another resolution recommended by the Task Force, the House unanimously condemned practices under Thompson that have the effect of eroding the rights of officers and employees of organizations.⁴

The new resolution adopted by the House states that organizations should not be deemed uncooperative as a result of paying an employee's legal fees, sharing company documents and other historical information relating to the matter under investigation with an employee, or continuing to employ someone who has declined to furnish information to the government, instead asserting Fifth Amendment protections.

The House also addressed the government's frequent practice of denying cooperation credit to organizations that participate in joint defense and information sharing agreements. The ABA resolution condemns the practice of discouraging organizations from entering into or continuing to operate under such information sharing agreements with employees and other represented parties "...with whom the organization believes it has a common interest in defending against the investigation." This qualifying language, not found in other subparts of the resolution, recognizes the need for the existence of a relevant common interest between and among members of a joint defense group.

The provision concerning joint defense agreements was the subject of intense debate during the drafting process. In broad terms, some felt the government had no business in encouraging an organization (or anyone else) to withdraw from a joint defense arrangement or denying cooperation credit to organizations that participated in such agreements. Others felt the government should be able to take an organization's participation in a joint defense agreement into consideration, if a party to the agreement had engaged in unlawful conduct or was

thought by the government to be “culpable,” in the words of the Thompson Memorandum. These differing views and others were reconciled by emphasizing the need for a common interest in defending against the investigation.

Under Thompson, an organization’s participation in a joint defense agreement only becomes an issue if the organization decides to cooperate with the government’s investigation. In seeking credit for its cooperation, an organization can reasonably be expected to assist the investigation, not undermine it. Continuing to participate in a joint defense agreement with a culpable party, under which privileged information concerning the progress of the investigation may be shared, may logically be seen as inconsistent with an obligation to cooperate. More to the point, having made the decision to cooperate, the organization’s interests will diverge from those of other JDA members whom the organization believes to have acted unlawfully in connection with the matter under investigation.⁵

But this determination should be made by the organization, not the government. By emphasizing that the organization’s belief as to a common interest controls, the resolution makes clear that decisions concerning participation in joint defense agreements, as well as those concerning legal fees, the sharing of records and employee discipline, must be left to the organization. Many prosecutors understand Thompson to mean that they have the ability to control these important aspects of an organization’s response to an investigation. By threatening to find an organization uncooperative if, for example, it paid legal fees or shared information with affected employees, and thus encouraging the organization not to do so, the ability to make these decisions was effectively transferred to line prosecutors in the Department of Justice. However, corporations and other organizations, acting on behalf of shareholders and other owners, have traditionally been able to make such decisions concerning employees in a responsible and ethical manner, consistent with principles of good corporate governance and the law, without government interference.

The Task Force report in support of the resolution makes clear that, by encouraging organizations to deprive employees of certain fundamental protections, including the ability to obtain skilled, knowledgeable and independent legal representation, the potential harm to good corporate governance and our adversary system of justice far outweighs any benefit derived by prosecutors

in pursuit of a corporate wrongdoer. Encouraging organizations to make premature culpability determinations, or, worse yet, to simply acquiesce in such decisions made early-on by DOJ line attorneys, severely undermines the relationship of trust and confidence that must exist between organizations and their employees. Effective corporate governance cannot flourish in an atmosphere of suspicion and mistrust. The government’s aggressive application of the Thompson Memorandum may in fact serve to undercut the Memorandum’s stated objectives. By potentially turning corporate counsel into government sleuths and inhibiting dialogue between employees and the organization’s compliance officers, the prevention and detection of improprieties is made more difficult.

Initial DOJ response to the ABA’s policy statements has not been encouraging. Following the passage of the first resolution concerning privilege waivers, the Task Force developed a proposed amendment to the Thompson memorandum to prohibit the practice of encouraging organizations to waive the protections of the attorney-client privilege and work product doctrine to gain cooperation credit. On May 6, 2006, ABA President Michael Greco submitted this proposed amendment to Attorney General Alberto Gonzales.⁶ On July 18, 2006, DOJ rejected the suggestions.⁷

The Thompson Memorandum makes it clear that, in encouraging organizations to undercut the protections to which employees would ordinarily be entitled, the cause of efficiency as well as effective law enforcement is served. As noted in the Task Force Report,

By first encouraging an organization to obtain statements of employees and then requiring or encouraging it to waive attorney-client privilege and work product protections that would ordinarily shield such statements from discovery, the government is benefited, since “[s]uch waivers permit the government to obtain statements of possible witnesses, subjects, and targets without having to negotiate individual cooperation or immunity agreements.”⁸

There is no doubt that the ability to obtain information in this fashion makes the government’s job easier. But convenience to the government should not be allowed to overcome privilege considerations or the rights of employees. Our system of justice depends on the ability of individuals as well as organizations to defend themselves with the help of independent, knowledgeable and effective

Continued on Page 15.

Practice Tips

How Do You Mediate a Criminal Case?

By Jean Whyte

Mediation and other forms of dispute resolution are becoming more commonplace in the criminal sector. The criminal mediation program in Anne Arundel County, Maryland is an internal program of the State Attorney's Office (SAO) consisting of one mediator and one case manager. Since 1983, the program has been assisting the SAO and the citizens it serves to resolve criminal cases prior to trial. The program continues to thrive with an average of 250-400 cases being resolved through mediation each year. Mediation assists the parties, the prosecutor's office, the courts, and the public to save time, money, and frustration. By discussing their interests, concerns, and developing agreements in a confidential setting with the assistance of an impartial mediator regarding their conflict, parties often experience more satisfaction and achieve long-term resolution that avoids escalation and resolves problems.

Selecting criminal cases for mediation

Clearly, not all criminal matters are appropriate for mediation. Although mediated in some victim-offender programs, felony cases or serious misdemeanors rarely lend themselves to mediation. Conversely, minor misdemeanors, particularly involving individuals who have some form of a relationship, often benefit from mediation. Assault, trespassing, malicious destruction of property, harassment, telephone misuse, arson threats, and theft are examples of criminal disputes frequently referred to mediation. Family members, business associates, and neighbors are examples of groups that typically gain more by participating in mediation to address their grievances.

Cases referred to the mediation program originate from several different sources. The majority of cases referred to mediation are carefully investigated by a specific screening unit within the SAO to initially determine whether mediation is a plausible option. If domestic issues are present, the victims' assistance program plays a role in deciding whether a case should proceed to mediation. Prosecutors may refer cases on their docket to mediation. Criminal defense



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attorneys familiar with the program may recommend cases for mediation. Judges may refer parties to mediation when they appear for trial. On occasion, members of the public seek to refer their own dispute to mediation. The mediation program performs the final screening function to assess whether a case is mediation-appropriate. Cases approved by all applicable screeners are then scheduled for mediation. Should the case fail to meet any screener's criteria, the matter is discussed internally and any case ultimately rejected for mediation proceeds to prosecution. Incidents of domestic violence, physical injuries, and the parties' criminal history are examples of factors that influence a decision about whether to mediate a case.

Who participates in a criminal mediation?

The parties named in a criminal complaint and the mediator are the primary participants in the criminal mediation session. The defense attorney's participation in the criminal mediation session is an attorney-client decision. If attorneys do accompany their clients to mediation, they usually assume a more passive role in the mediation process itself as compared to their clients. Prosecutors do not participate in the mediation session. The mediation process is voluntary for the victim and the defendant. Either party may elect to bypass mediation and proceed to prosecution.

When and where does criminal mediation occur?

Criminal mediation always takes place prior to trial. The SAO sends to the parties and their attorneys, if applicable, a letter and brochure about mediation. The letter requests that recipients contact the mediation program to discuss the option to mediate. When parties contact the program, the case manager or mediator describe the mediation process, field questions, and if the party is agreeable, schedules the mediation session.

Mediation sessions occur at various times throughout the day on all business days. The program identifies a mutually convenient time, date, and location for mediation to occur. Written confirmation notices are sent out to all anticipated attendees. Mediation sessions are held at the

The Maryland Judiciary's Mediation and Conflict Resolution Office (MACRO) offers grants to MD State's Attorneys' Offices to start or expand criminal mediation programs. MACRO was created by and is chaired by the Honorable Robert M. Bell, Chief Judge of Maryland's highest appellate court. According to Chief Judge Bell, "Criminal mediation can often get to the root causes of ongoing conflicts that otherwise reappear before the courts over and over again. In mediation, the participants may find permanent solutions by agreeing to certain forms of relief that the courts are prescribed from providing."

SAO office in a private conference room. When there is delay in scheduling a mediation session, prosecutors and defense attorneys typically jointly consent to a postponement of the trial date to permit more time for mediation to occur. Judges are often willing to grant such a request.

How does the criminal mediation process work?

When a criminal matter is referred to the mediation program, the case manager performs the initial screening function. The mediation program has access to any information compiled by the SAO, including attorney case files, charging documents, screening unit data, prior criminal history records, police reports, and any other pertinent information on file. Related cases and the prior legal history between the parties is examined. The mediation program screens both the victim and defendant within the criminal and civil legal system. The mediator then performs the last internal screening to finally determine if a case is appropriate for mediation. Cases that are rejected for mediation travel the traditional channels to trial.

During the mediation, the mediator welcomes the parties, introduces the mediation process, and addresses any other important items or questions.

After the introduction, the mediator presents the parties with a consent form to review and sign expressing their willingness to participate in mediation. In a confidential setting, each party is then given an opportunity to offer their perspective, share any concerns, and identify their interests or needs with regard to the matter. Important issues are discussed more thoroughly and an option-building phase follows. Parties discuss various options or ideas for how the situation could be resolved. The ideas generated are then evaluated more critically to determine if they are acceptable and realistic solutions. Once the parties have developed and finalized their resolutions, the mediator commits their agreement to writing which both parties sign. If all parties consent, a mediation agreement may include a requirement that counseling or treatment programs be completed by a certain date. The parties receive a copy of their mediation agreement, and the mediator retains the original agreement document. With the exception of the written mediation agreement, all communications associated with the mediation screening, scheduling, and the mediation session are confidential.



Frank R. Weathersbee, State's Attorney for Maryland's Anne Arundel County, oversees a successful criminal mediation program.

What happens after criminal mediation occurs?

Following the mediation session, but prior to the scheduled trial date, the mediator meets with the prosecutor assigned to the case to share the content of the parties' written agreement and provide a recommendation for case disposition. Cases that resolve through mediation may be subject to one of two possible legal case dispositions. A case may receive a nolle prosequi disposition or be placed on an inactive docket. The final decision with regard to case disposition rests with the prosecutor. The prosecutor may file a disposition immediately with the court or close out the matter in person on the trial date. In the latter case, the mediator provides the prosecutor with a folder containing copies of the written mediation agreement for the prosecutor and the court. Under either scenario, parties are usually excused from appearing for court on their trial date.

Why are criminal cases mediated?

Like civil cases, the stakeholders to a criminal matter may all benefit from exposure to mediation. The parties receive a confidential forum to air their grievances, discuss the matter thoroughly, and have a unique opportunity to design their own resolutions. Many parties fear the trial experience and the harsh consequences that may flow from it. Others may feel frustrated or overwhelmed by the complexities of the criminal justice system. Mediation allows parties to steer their own course with respect to their dispute and create win-win outcomes. As with civil cases, criminal mediation frequently saves parties time, money, and aggravation. Mediation may prove advantageous not only to the parties, but also to the prosecutors. Insufficient evidence, unpredictable witnesses, lack of information, risk of disappointing outcomes for victims or any other factor that may render a case difficult to prove at trial may make mediation a more attractive option. In some cases, victims may gain something (perhaps more valuable) through engaging in the mediation process rather than an adversarial judicial proceeding that risks an uncertain result. The judicial system, yet another important stakeholder, is positively affected by criminal mediation. On the trial date, the prosecutor provides the court with a written copy of the parties' mediation agreement. The court places the agreement on the record to conclude the court's review of the matter.

Criminal mediation can save the judicial system considerable time, resources, and expense. Research has shown that individuals who participate in criminal mediation are less likely to re-encounter the criminal justice system.

Practice Tips

Prosecutorial and Defense Discovery

Unexpected courtroom revelations in T.V. dramas not only add to the excitement of the show, but often leave the audience with an unequivocal impression about the guilt or innocence of the defendant and hence the justice of the case. In "real life," however, courtroom surprises rarely advance the cause of justice. The timely opportunity to know about – and, if necessary, to react to or prepare to rebut – certain information in the possession of the "other side" is crucial to our adversarial system of justice.

The following ABA Criminal Justice Standards on Discovery list obligations for both prosecutors and defense attorneys. While there is significant overlap, there are also important differences because of their differing roles. Regardless of their role, practitioners may wish to review both lists from time to time to ensure that they are providing – and receiving – appropriate discovery information and materials. More detailed guidance is contained in additional Discovery Standards available at www.abanet.org/crimjust/standards.

Standard 11-2.1 Prosecutorial disclosure

(a) The prosecution should, within a specified and reasonable time prior to trial, disclose to the defense the following information and material and permit inspection, copying, testing, and photographing of disclosed documents or tangible objects:

- (i) All written and all oral statements of the defendant or of any codefendant that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged, and any documents relating to the acquisition of such statements.
- (ii) The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged. The prosecution should also identify the persons it intends to call as witnesses at trial.
- (iii) The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding or representation between the prosecution and the witness that

constitutes an inducement for the cooperation or testimony of the witness.

(iv) Any reports or written statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons and of scientific tests, experiments or comparisons. With respect to each expert whom the prosecution intends to call as a witness at trial, the prosecutor should also furnish to the defense a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.

(v) Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, which pertain to the case or which were obtained for or belong to the defendant. The prosecution should also identify which of these tangible objects it intends to offer as evidence at trial.

(vi) Any record of prior criminal convictions, pending charges, or probationary status of the defendant or of any codefendant, and insofar as known to the prosecution, any record of convictions, pending charges, or probationary status that may be used to impeachment of any witness to be called by either party at trial.

(vii) Any material, documents, or information relating to lineups, showups, and picture or voice identifications in relation to the case.

(viii) Any material or information within the prosecutor's possession or control which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant.

(b) If the prosecution intends to use character, reputation, or other act of evidence, the prosecution should notify the defense of that intention and of the substance of the evidence to be used.

(c) If the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping) in connection with the investigation or prosecution of the case, the prosecution should inform the defense of that fact.

(d) If any tangible object which the object which the prosecutor intends to offer at trial was obtained through a search and seizure, the prosecution should disclose to the defense any information, documents, or other material relating to the acquisition of such objects.

Standard 11-2.2 Defense disclosure

(a) The defense should, within a specified and reasonable time prior to trial, disclose to the prosecution the following information and material and permit inspection, copying, testing, and photographing of disclosed documents and tangible objects:

- (i) The names and addresses of all witnesses (other than the defendant) whom the defense intends to call at trial, together with all written statements of any such witness that are within the possession or control of the defense and that relate to the subject matter of the testimony of the witness. Disclosure of the identity and statements of a person who will be called for the sole purpose of impeaching a prosecution witness should not be required until after the prosecution witness has testified at trial.
- (ii) Any reports or written statements made in connection with the case by experts whom the defense intends to call at trial, including the results of physical or mental examinations and of scientific tests, experiments, or comparisons that the defendant intends to offer as evidence at trial. For each such expert witness, the defense should also furnish to the prosecution a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.
- (iii) Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, which the defense intends to introduce as evidence at trial.
- (b) If the defense intends to use character, reputation, or other act evidence not relating to the defendant, the defense should notify the prosecution of that intention and of the substance of the evidence to be used.
- (c) If the defense intends to rely upon a defense of alibi or insanity, the defense should notify the prosecution of that intent and of the names of the witnesses who may be called in support of that defense.

Handzlik, *Continued from Page 11*

legal assistance. To the extent practices and procedures under the Thompson Memorandum have undercut these objectives, such practices should be ended.

Endnotes

¹ Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys on *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), available at www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

² These and other useful materials on the topic of privilege waiver are posted on the Task Force's Website, which is located at www.abanet.org/buslaw/attorneyclient/.

³ Memorandum from Larry D. Thompson, *supra* note 6, at 7-8.

⁴ See www.abanet.org/buslaw/attorneyclient/.

⁵ Outside the context of government criminal or enforcement investigations in which an organization may seek credit for cooperation, an organization may continue to have certain common interests with culpable current or former employees under some limited circumstances. For example, if an organization and a culpable individual continue to be obligated to defend against parallel civil, administrative or debarment proceedings, they may continue to have limited common interests in the defense of those proceedings, even if the organization has resolved the criminal investigation through a cooperation agreement. The Task Force did not explore these issues.

⁶ Available at www.abanet.org/poladv/acprivgonz5206.pdf.

⁷ Available at www.abanet.org/buslaw/attorneyclient/.

⁸ Memorandum from Larry D. Thompson, *supra* note 6, at 7, quoted in the Task Force Report, at p. 5. Available at www.abanet.org/buslaw/attorneyclient/.

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PEOPLE

CJS Chair **Bob Johnson** sent this report from his recent trip to Sacramento:

California faces extraordinary challenges with its criminal justice system. It has roughly 170,000 people in prison, more than any other state, and the number continues to grow well beyond capacity. The Federal Court has taken jurisdiction over aspects of the system. The recidivism rate in California is very high. The state is struggling with how to deal with these issues.

After preparing for and meeting with the Little Hoover Commission, a bipartisan independent state body that promotes efficiency and effectiveness in state programs, it appeared to me that the state legislators and officials understand the problem. There has been exceptional work performed to analyze the issues and come up with solutions. What is missing, and not just in California, is the will to effect meaningful change that would reduce cost while improving public safety.

Jim Cole, Council Executive Committee member, has been appointed as the Independent Consultant for AIG in its settlement with the SEC and the State of New York. This follows on his appointment as the Independent Consultant for a prior settlement that AIG entered into with the SEC and Justice Department in 2004. The two projects involve a review of AIG's compliance programs, including measures to ensure that its financial reporting is accurate, and an examination of certain transactions over a five year period to determine whether any of the transactions were used by AIG's customers to achieve

an improper financial reporting or accounting result.

Myrna Raeder, Co-Chair of the Ad Hoc Innocence Committee and former Section Chair, has been appointed to the ABA Youth-at-Risk Commission by ABA President Karen Mathis.

Chicago Mayor Richard M. Daley has appointed **Lori G. Levin** to serve on his Domestic Violence Advocacy Coordinating Council. Ms. Levin is Executive Director of the Illinois Criminal Justice Information Authority.

Neal Sonnett received the Selig I. Goldin Memorial Award on June 23 during the the Florida Bar's Annual Convention in Boca Raton. "Neal's efforts in fighting against abuses in the criminal justice system have gone far beyond simply bar association and congressional activity," Miguel de la O wrote in his nomination letter detailing his former law partner's impressive career.

Criminal Justice Diversion Committee Co-Chair Hon. **Mathew D'Emic** was the subject of a *Wall Street Journal* article on Brooklyn's Mental Health Courts. According to the WSJ, "Brooklyn's mental-health program has become a model for localities trying to deal with a seemingly intractable problem: the increasing number of mentally ill people filling the nation's prisons... {Mental Health Courts} are designed to allow the mentally ill to avoid prison time, provided they adhere to extensive treatment plans set up and monitored by the new courts."

Michael S. Hamden (ABA Liaison to the American Correctional Association Commission Accreditation for Corrections) and **William J. Rold**, ABA Liaison to the National

Commission Correctional Health Care) served on the Institute of Medicine's Committee on Ethical Considerations for Revisions to DHHS Regulations for Protection of Prisoners Involved In Research. The Committee was created in response to a request from the U.S. Department of Health and Human Services for a review of ethical considerations in research involving prisoners as a basis for updating DHHS regulations to protect prisoners as research subjects. The report recommends expanding the population of prisoners covered by rigorous ethical rules and by recommending additional safeguards. It also acknowledges that research involving prisoners may be critical to improve the health of prisoners and the conditions in which they live, but that it should only be conducted if it offers a distinctly favorable benefit-to-risk ratio, not because prisoners are a convenient source of subjects. The full text of the report is available at <http://www.nap.edu>.

Congratulations to **Jan Handzlik**, former Council Member, and wife, Jennifer. On July 3, Jennifer gave birth to twins, a boy and a girl. Jake was 4 pounds, eight ounces and Maggie was 3 pounds, 12 ounces.

Section Vice Chair at Large **Susan Gaertner** of St. Paul, MN, successfully completed her first triathlon on August 12—enduring a 1 mile swim, a 21 mile bike ride, and a six mile run. Says Susan: "I achieved my primary objective: I didn't drown."

Hoai Hong has joined the CJS staff as the assistant to the director and can be reached at hongh@staff.abanet.org, 202-662-1520.

LEGISLATIVE UPDATE

By Bruce Nicholson

Sex Offender Registry/ Omnibus Crime Legislation

Before adjourning for the August recess, the Senate on July 20 and the House on July 25 passed the Adam Walsh Child Protection and Safety Act of 2006 (originally titled the Children's Safety and Violent Crime Reduction Act of 2006.) President Bush signed the bill into law – Public Law No. 109-248 – in a ceremony at the White House on July 27, marking the 25th anniversary of the abduction and then murder of Adam Walsh, son of John Walsh, host of the television show “America’s Most Wanted.” Mr. Walsh’s advocacy was a significant factor in bringing enactment of the new law.

The Adam Walsh Act is a comprehensive new child protection law. The Act creates a national, public sex offender registry. It also requires states to maintain offender registries accessible to the public on the Internet, to use and maintain uniform information about sex offenders and directs the Justice Department to maintain a national database and makes failure to register a felony.

The Act creates, among other things, new state and federal registration and community notification requirements, as well as new federal criminal penalties, for sex offenders. It also provides new resources for law enforcement including: authorizing the U.S. Marshals to go after absconded sex offenders; 20 new Internet Crimes Against Children Task Forces; 200 new federal prosecutors for prosecuting child sex offenses; and 45 new computer

forensic scientists dedicated to investigating crimes involving the sexual exploitation of children and related offense.

Sex offenders are required to provide DNA samples and are subject to more frequent in-person verification of information they provide regarding their residences and workplaces. If their workplace and residence differ, they must register in each jurisdiction.

Also under the Act, a minimum 10-year sentence is set for anyone convicted of causing serious bodily injury to a child or using a weapon to attack a child, and a 30-year minimum applies to people convicted of having sex with a child under 12 or sexually assaulting a child between 12 and 16.

The Act makes changes in the way law enforcement handles missing child reports. Reports must be entered into the FBI’s National Crime Information Center within 2 hours. It also prohibits the removal of a missing child report when the child turns age 18 before being recovered.

In the compromise legislation as finally accepted by the House and Senate, juveniles are included on the national sex offender registry – but only, as Sen. Patrick Leahy (D-VT) explained on the Senate floor, “the most egregious juvenile offenders.” The Act exempts from the registry most sexual offenses committed by juveniles, requiring registry listing only of juveniles convicted of a criminal sex offense committed at age 14 or older “comparable to or more severe than aggravated sexual abuse...or an attempt or conspiracy to commit such an offense.”

The legislation also retains the House-passed provision requiring the Secretary of Health and Human Services to create a national registry of substantiated cases of child abuse and neglect. When fully

implemented over time, the registry is intended to enable child protective service agencies to identify an adult perpetrator’s past child maltreatment offenses in other states, without having to check all individual state child protective service central registries.

The Adam Walsh Act does not contain provisions previously passed by the House of Representatives to restrict federal court jurisdiction to review habeas corpus petitions and the broad House-passed anti-gang and court securities titles.

Final passage followed lengthy House-Senate negotiations after Senate passage on May 4, 2006 of S.1086, the Sex Offender Registration and Notification Act, by unanimous consent. Introduced on May 19, 2005 by Senator Orrin Hatch (R-UT), S.1086 was approved in substitute form by the Senate Judiciary Committee on October 20, 2005.

The House of Representatives earlier passed a package of three anti-crime bills it had passed individually in 2005, including sex offender registry legislation, on March 8th by voice vote. H.R.4472 was introduced on December 8, 2005, by Representative James Sensenbrenner, Jr. (R-WI) with the hope of quick action before Congress adjourned for the holidays. It also contained a proposed restriction on federal habeas corpus jurisdiction to review claims regarding a sentence if a state court found any constitutional error that occurred to be “harmless” or “not prejudicial.” No similar provision was taken up in Senate legislation, and is not part of the new Act.

Prisoner Reentry

On July 26, 2006, the House Judiciary Committee approved H.R.1704, the Second Chance Act (SCA), legislation aimed at helping to ensure that that ex-

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offenders successfully re-enter society. The Committee approved the bill by voice vote, sending the bill to the House floor for consideration, following a lengthy mark-up session. During its consideration, the Committee accepted a substitute amendment offered by the Crime Subcommittee Chair Howard Coble (R-NC). The Coble substitute provides for drug treatment programs, family-based treatment resources, and an elderly non-violent offender pilot program. Also accepted were amendments offered by Ranking Member John Conyers (D-MI), Rep. Bobby Scott (D-VA), and Rep. Louie Gohmert (R-TX), which added, respectively, re-entry courts, resources for electronic monitoring of parolees, and continuity of medical care for mentally ill and chronically ill offenders. Committee members rejected several amendments proposed by Rep. Gohmert to add faith-based language to the bill.

The SCA legislation was the subject of negotiation with House and Senate leaders since its approval by the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security on February 15, 2006 by voice vote. H.R.1704 is a bipartisan bill sponsored by Rep. Chris Cannon (R-UT) that currently has 108 House cosponsors. It would authorize new Department of Justice grants to programs that provide newly released prisoners with housing, drug treatment, counseling, job training and literacy and education services. The Subcommittee markup was preceded by a hearing held on March 8, 2006. The hearing record is posted on the Subcommittee website at: <http://judiciary.house.gov/hearings.aspx?ID=130>

The Senate companion bill, S.1934, was introduced on October 27, 2005 by Senate Judiciary Committee Chair Arlen Specter (R-PA) and currently has 24 cosponsors. Several Senators have

proposed changes in recent weeks to the Senate bill, and it is not clear at present when the Judiciary Committee will proceed with action on the bill this year.

Federal Restitution Procedure

Legislation to amend federal law to make restitution mandatory for federal crimes, to simplify and streamline restitution procedures, and to improve restitution enforcement was introduced in the House of Representative on June 22, 2006, following a hearing by the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security on June 13 on the bill as then in draft form. In addition to mandating restitution for federal crimes, it would provide that terms for supervised release or probation be extended as long as a defendant's restitution obligation remains unpaid. Testimony from the June 13 hearing is posted at: <http://judiciary.house.gov/hearings.aspx?ID=148>

H.R.5673, the Criminal Justice Restitution Improvement Act of 2006, was introduced by Representatives Steve Chabot (R-OH), Phil Gingrey (R-GA), Louie Gohmert (R-TX), Dan Lundgren (R-CA) and Ted Poe (R-TX). No comparable bill has yet been introduced in the Senate.

Death Penalty Reform Act

Legislation introduced in March 2006 to amend procedures in federal death penalty cases has been stalled – at least temporarily – by politics between the executive branch and Congress that date from the May 20, 2006 FBI search of the congressional office of Representative William D. Jefferson (D-LA). Several legislative issues being pushed by the Department of Justice were subsequently pulled off the schedule for the House Judiciary Committee after the raid and the timing for further action in the House presently remains unclear.

The House Judiciary Subcommittee on Crime, Terrorism and Homeland Security held a hearing on March 30, 2006 on H.R.5040, the Death Penalty Reform Act of 2006, a bill introduced in the House of Representatives the previous day by Rep. Louie Gohmert (R-TX). H.R.5040 would amend federal law to make a number of changes in death penalty procedure. Specifically, it would amend U.S. law dating to 1790 regarding the required appointment of two “learned counsel” at the time of indictment for a capital offense. H.R.5040 would authorize delaying the appointment of capital-qualified counsel until the U.S. Attorney General approves prosecutor decisions to seek the death penalty, a process now reportedly averaging 23 months after indictment. The bill also proposes new mental retardation procedures and a new statutory definition of mental retardation. H.R.5040 would change current federal law that now provides for a pretrial judicial determination and replace it with a proposed procedure that delays the jury's mental retardation verdict until after the presentation of all evidence including aggravation evidence has been presented.

The proposed new definition of mental retardation would purportedly codify factors set out in *Atkins v. Virginia*, 536 U.S. 304 (2002), in which the Supreme Court held that execution of mentally retarded offenders violates the Eighth Amendment. The proposed definition was criticized as unduly restrictive at a March 30, 2006 hearing. H.R.5040 also includes a new proposed requirement that the capital defendant personally sign and serve notice before trial of all mitigation factors upon which he will rely at sentencing. Lastly, the bill would add several new statutory aggravating factors making crimes eligible for the death penalty.

CLE AD (from the Word file)

Red Hook Community Justice Center Wins Institutional Problem Solver Award

Judge Alex M. Calabrese was recognized at the ABA Annual Meeting for his work as Acting Supreme Court Justice of the State of New York and the Presiding Judge of the Red Hook Community Justice Center, which is one of the most comprehensive community courts in the United States. The award was presented by the ABA Section of Dispute Resolution and is given to recognize attorneys and legal institutions that solve problems in unique and creative ways.

Judge Calabrese solves problems in the courtroom by combining the power of the court with drug and alcohol treatment, mental health counseling or youth counseling with a goal towards getting the defendant “back on track.” Additional services at the Justice Center include job training and placement, individual,

youth and family counseling, high school equivalency classes, a Youth



Judge Alex M. Calabrese

Court, child care and a community health clinic. There are over 120 people in treatment at the Justice Center on a regular basis. On successful completion of services, the Kings County District Attorney will frequently dismiss the charges against the defendant.

Judge Calabrese solves problems in the community by regularly attending community meetings – from police precinct council to Tenant and Advisory Committee meetings. This attendance creates a circle of accountability, making the police, the prosecutor and the judge accountable to the community to solve community issues.

Finally, Judge Calabrese and Team Red Hook connects the Justice Center with the community by ensuring that tenants in public housing can obtain repairs, sponsoring a little league with over 150 male and female youths, by organizing park events which include movies in the park and providing gifts to needy families over the holidays, among numerous other services.

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