

# LEADERSHIP CONNECTION

ABA CRIMINAL JUSTICE SECTION

MAY 27, 2011

BRUCE GREEN, CHAIR

[www.americanbar.org/crimjust](http://www.americanbar.org/crimjust)



THE UNIFIED VOICE OF CRIMINAL JUSTICE

## COMMITTEES AT WORK



On Friday, May 27, the **Committee for “Strategies to Save Money, Reform Criminal Justice & Keep the Public Safe”** held a conference call to discuss the following agenda items: a debriefing on the May 6<sup>th</sup> event held in Washington, DC, which launched the successful nationwide project; reports from project’s point persons; identifying steps for developing a follow-up plan in the existing ten states; and identifying implementation strategies for engaging the 40 additional states in the project.

The project is a criminal-justice-reform effort aimed at changing laws and practices on topics including pre-trial release, decriminalization of minor offenses, prisoner re-entry, an increased use of parole and probation, and community corrections in 10 states. The program will operate in California, Delaware, Florida, Georgia, Illinois, Louisiana, Massachusetts, New Jersey, New York, and Vermont. In each state, the ABA has assembled a team of prosecutors, defense lawyers, and allied organizations to push for change.

**The Standards Committee** met May 21-22 to continue its review of proposed revisions to the *Defense Function Standards*. In addition to **Standards Committee Chair Martin Marcus**, attendees included new member **John Cline** and continuing members **Mark Dwyer, Cheryl Jacobs, Peter Pope, Matthew Redle, and Pauline Weaver**. Member **Nancy King** participated by phone. Attending liaisons were **Margaret Love (NLADA), John Hall (NACDL), and Patricia Weiss (DOJ)**.

## PROJECTS AT WORK

The **National Judicial College (NJC)**, in conjunction with the **Center for Research Design and Analysis (CRDA)** at the University of Nevada, Reno, is conducting a study about the use and evolving roles of stenographic court reporters within the judicial branch of government. NJC and the CRDA are seeking input from judges, court managers, defense attorneys, prosecutors, and court reporters. Your welcomed participation in this survey is because of the position you currently hold as an attorney in the court system. Your opinions are extremely important to us, and your responses will represent others who hold a position similar to your own.

**This survey should only take about 10 minutes of your time. Your responses to the survey will be kept strictly confidential.** If you have any questions about the project, please contact **Joseph Sawyer** at

[sawyer@judges.org](mailto:sawyer@judges.org) or 775-784-6747. If you have any **technical** problems with the survey, please call the Center for Research Design and Analysis at 1-800-929-9079 or email [crda@unr.edu](mailto:crda@unr.edu). You may access the survey by clicking on the link below or by cutting and pasting the link into your internet browser.

[http://unrcfr.qualtrics.com/SE/?SID=SV\\_00xGSwquljVEaQA](http://unrcfr.qualtrics.com/SE/?SID=SV_00xGSwquljVEaQA)

*The National Judicial College thanks you in advance for your cooperation. We'd appreciate your opinions by close of business on Friday, June 3rd.*

## **CJS UPCOMING EVENTS**

### **LOUIS STEIN CENTER FOR LAW AND ETHICS FRIDAY, JUNE 3, 2011 Fordham University School of Law McNally Amphitheatre 140 W. 62nd Street, New York City**

The **ABA Criminal Justice Section** and its cosponsors invite you to join us and a distinguished panel of speakers including academics, prosecutors, defense lawyers, judges, scientists and others to discuss forensic evidence, and to examine the myriad issues surrounding forensics. This year's program will open with a retrospective on the late **Margaret Berger's** contribution to forensic science, and look at the forensic landscape two years after the NAS report; cutting edge, social science and forensic issues; emerging issues in DNA; ethical issues in forensic science; and a discussion about electronically stored information in criminal cases. **Click onto [Second Annual Prescription for Criminal Justice Forensic](#) for program information and registration.**



## **CLE LIVE TELECONFERENCE: REGISTER TODAY!**



**THE WHITE COLLAR CRIME COMMITTEE'S  
SECURITIES FRAUD SUBCOMMITTEE PRESENTS  
DOJ, THE SEC AND FINANCIAL FRAUD:  
EMERGING ENFORCEMENT TRENDS**

**JUNE 8, 2011  
NOON TO 1:30 P.M.**

**THE METROPOLITAN CLUB OF WASHINGTON  
1700 H STREET, NW  
WASHINGTON, DC 20006**

**DRESS CODE: JACKET AND TIE FOR MEN AND COMPARABLE ATTIRE FOR WOMEN. PLEASE NOTE CELL PHONES CANNOT BE USED AT THE CLUB.**

Business organizations, directors, CEOs and CFOs have been in the focus of financial fraud cases for years. Following the formation of two government task forces, which include the SEC and DOJ, financial fraud now appears to be a top level priority. Those efforts will be fortified by the Manhattan U.S. Attorney's Office, well known for its zealous insider trading prosecutions, which has made financial fraud a priority. This program will bring together experts from the government and private practice to analyze the impact of these trends. The discussion will focus on key enforcement trends including the liability of directors and officers, the impact of the SEC's strict liability approach to SOX 304 and CEO and CFO liability for the repayment of incentive compensation, and the emerging securities fraud action for holding officers responsible for failure to monitor. For more information or to register, visit online [DOJ, the SEC and Financial Fraud - Emerging Enforcement Trends](#).

Participants can receive 1.25 hours of CLE credit in 60-minute states/1.5 hours of CLE credit in 50-minute states, which have been requested in states accrediting ABA teleconferences and live audio webcasts. States currently not accrediting ABA Teleconferences: DE, IN, KS, OH, PA.

## **TECHNOLOGY...**

### **WHAT'S NEW ON THE CJS WEBSITE:**



This is a **QR (QUICK RESPONSE) BARCODE** for the CJS that will be placed in our marketing materials such as brochures, signs, promotional giveaways, etc. Those with smart phones and appropriate apps can scan this code that will lead them directly to our website or conference schedule.

[CJS Annual Meeting Schedule](#) (Includes an updated version with specific program information) during the ABA Annual Meeting, Aug. 4-7, Toronto, Canada.

Please send your feedback to [kyo.suh@americanbar.org](mailto:kyo.suh@americanbar.org). Be sure to visit the (CJS) on the web at: [www.americanbar.org/crimjust](http://www.americanbar.org/crimjust) and become a CJS Fan on [Facebook](#), [Linked-in](#) and [Twitter](#).

**WEEKLY CRIMINAL JUSTICE NEWS ROUND-UP  
MAY 27, 2011**

## CRIME AND PUNISHMENT PEELS KENNEDY FROM CONSERVATIVES

By [JESS BRAVIN](#)

WALL STREET JOURNAL

MAY 25, 2011

U.S. Supreme Court Justice Anthony Kennedy's majority opinion forcing California to cut its inmate population sharpened his divide with conservative colleagues over what constitutes cruel and unusual punishment.

Backed by the court's four liberals, Justice Kennedy has delivered a series of opinions since 2005 that have abolished the death penalty for minors and for adult criminals who left their victims alive. A Kennedy ruling also required that juvenile offenders be given an opportunity to seek parole unless their crimes included murder. And of Monday, the Reagan appointee wrote the decision prohibiting California from housing inmates in prisons incapable of providing with them essential medical care—even if that requires the release of felons before they complete their sentences.



The prisoner-rights decisions mark a striking contrast to the court's trajectory since the mid-2000s, when President George W. Bush elevated Chief Justice John Roberts and Justice Samuel Alito. Together with them and veteran justices Antonin Scalia and Clarence Thomas, Justice Kennedy has formed a majority to uphold gun rights, permit unfettered corporate and union political spending and undo certain limits on governmental support of religion. But when it comes to the Constitution's Eighth Amendment, which prohibits "cruel and unusual punishments," Justice Kennedy has championed a doctrine that echoes the liberal Warren Court of the 1950s and '60s: that the prohibition be applied, as Chief Justice Earl Warren wrote in 1958, according to "the evolving standards of decency that mark the progress of a maturing society."

"To incarcerate, society takes from prisoners the means to provide for their own needs. A prison's failure to provide sustenance for inmates may actually produce physical torture or a lingering death."  
*Justice Anthony Kennedy.*

The Warren opinion referred to English precedents dating to the Magna Carta and said the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man." Justice Kennedy cited Chief Justice Warren's opinion Monday, then applied it to the California case. "Prisoners retain the essence of human dignity inherent in all persons," Justice Kennedy wrote. More Eighth Amendment cases could reach the high court in coming years.

While the court approved a three-drug recipe for lethal injections in 2008, some suppliers of the narcotics have dropped out of the business and states have substituted other chemicals. That could invite challenges from condemned prisoners alleging that untested formulas would cause unconstitutional levels of pain. And new cases may test the implications of Justice Kennedy's earlier opinions limiting punishments for underage offenders. This month, the Wisconsin Supreme Court found it constitutional to sentence a 14-year-old to life imprisonment with no chance of parole.

Justice Kennedy has looked to social science and modern practices in his earlier decisions outlawing the harshest punishments. "By protecting even those convicted of heinous crimes, the Eighth Amendment

reaffirms the duty of the government to respect the dignity of all persons," he wrote in the 2005 opinion *Roper v. Simmons*, abolishing the death penalty for juveniles. Such positions have put him at odds with Justice Scalia, who misses no opportunity to stress his contempt for Chief Justice Warren's "evolving standards" formula. "I detest that phrase," Justice Scalia said at a law-school forum in 2005, "because I'm afraid that societies don't always mature. Sometimes they rot." In his Monday dissent—joined only by Justice Thomas—Justice Scalia wrote that Justice Kennedy's opinion was unprecedented, even under "our judge-empowering 'evolving-standards of decency' jurisprudence." [I]t would be absurd to suggest—that every single one of those prisoners has personally experienced torture or a lingering death. *Justice Antonin Scalia*

Justice Scalia says he construes constitutional provisions according to their original meaning. Dissenting from Justice Kennedy's *Roper* opinion, Justice Scalia said "cruel and unusual" originally meant that judges could only impose punishments authorized by the legislature, rather than fashion their own.

On Monday, Chief Justice Roberts and Justice Alito filed a separate dissent that avoided mention of the "evolving standards" or "dignity" concepts. Justice Kennedy's opinion included an array of anecdotes regarding prison conditions in California, where "as many as 54 prisoners may share a single toilet" and a psychiatric patient was "held in a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic." Justice Scalia replied that the Constitution doesn't authorize judges to prescribe "rules for the 'decent' running of schools, prisons and other government institutions." He offered his own vivid image, saying that many of those released wouldn't be ill inmates but "fine physical specimens who have developed intimidating muscles pumping iron in the prison gym."

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<http://online.wsj.com/article/SB10001424052702303654804576343720618904448.html?KEYWORDS=Justice+Kennedy>.