



# Prosecution Function Committee *Newsletter*

Winter 2010 (No. 1)

## CHAIR'S MESSAGE



Charles Joseph Hynes

As Chair of the ABA Criminal Justice Section and a fellow prosecutor, I am particularly pleased to introduce the inaugural issue of the ABA Criminal Justice Section Prosecution Function Committee Newsletter. The ABA Criminal Justice Section is a balanced voice for criminal justice in America and provides a valuable platform for issues

important not only to prosecutors but also to the entire criminal justice system. The ABA Criminal Justice Standards are a significant contribution to the criminal justice field, and those are developed, like most Section projects, with prosecutor involvement and input. Among the most pressing issues on which prosecutors and the criminal justice section leaders have been focusing during my year as Section Chair are the related issues of reentry and collateral consequences. The Criminal Justice Section received good news on the grant front when we were selected by the National Institute of Justice to conduct a three-year study of collateral consequences. The Section has assembled a broad coalition of national and local groups and individual experts to meet the challenge of compiling a comprehensive and functional inventory of the collateral consequences of criminal convictions in the laws and practices of federal, state, and territorial jurisdictions. The Section was awarded \$700,000 to fund the project.

Helping individuals obtain successful reentry into society and overcome collateral consequences is important public safety work for prosecutors. In recent decades, the incarcerated population in the United States has dramatically increased. As of June 2008, more than 1.5 million individuals in this country were in custody in state or federal prisons. That's one in every 196 U.S. residents. Additionally, close to 800 thousand people were being held in local jails, bringing the total number of incarcerated to more than 2.3 million. And as the number of incarcerated has grown, so too has the number of former inmates eventually

released back to their communities – more than 700,000 individuals were released from state and federal prisons in 2007, a 20 percent increase over 2000.

As the stream of the formerly incarcerated swells, communities are struggling to absorb the tide and meet the needs of this population. And the needs are great. Incidence of mental illness is two to four times higher among prisoners than in the general population. Over two-thirds have engaged in substance abuse. About half have not graduated high school. Many were unemployed before incarceration and have checkered employment histories and no job to go to upon their release.

Research tells us that recidivism is high. Three years after release, over two-thirds of these former inmates will have been rearrested and about half will wind up back behind bars. Their criminal activity undermines public safety, and their cycling in and out of prison exacts a huge toll on the individual, his or her family, and the community. The key challenge that must be met is how to ensure that these individuals become law-abiding, healthy members of society, instead of reoffending and recycling through the criminal justice system, leaving victims and destabilized families and communities in their wake.

This American Bar Association Survey on Reentry demonstrates how agencies, both inside and outside the criminal justice system, are rising to that challenge. Almost all the programs described therein were launched in the last decade, and most within the last five years. They evince a nationwide recognition of an urgent and growing demand for effective reentry programs. As these programs become more widely known, it is hoped that they will inspire replication in other jurisdictions. Many programs are now eligible for funding through the Second Chance Act (P.L. 110-199), and monies appropriated for Second Chance Act programs present a wise investment in the country's future. This survey should inspire a commitment, in both public and private sectors, to ensure that effective reentry programs be available to all those leaving prison. Not only public safety, but also the social and fiscal health of our nation, is on the line.

## Seeking Your Input: Brady Best Practices Group Launches On-Line Survey

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

## New Section Initiative Focuses on Professional Development

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

The idea is for the Section to solicit the leadership, members and others to give us short writings that will address how prosecutors and defense lawyers can achieve excellence in different aspects of their work.

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

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

The responses will be posted periodically on our website (perhaps with an invitation for readers to comment) and possibly made into a print publication or referred to in our existing publications.

Please send you responses to Robert Snoddy @ [snoddyr@staff.abanet.org](mailto:snoddyr@staff.abanet.org).

### The ABA Group Membership Program

The American Bar Association is pleased to offer a deep discount to government and legal service organizations that participate in the ABA Group Program.

The Group Program consolidates individual memberships under one group account, and allows each government lawyer to enjoy ABA dues of less than \$100! This Program, designed to increase membership among government and legal service organizations, requires fifty percent of the group to be new to the ABA.

If you are interested in learning more about the ABA Group Program or would like to enroll, please contact Sarah Marcotte at 312.988.5538 or [marcotts@staff.abanet.org](mailto:marcotts@staff.abanet.org).

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*Three Questions With ...*  
**William Sheperd**



*William N. Shepherd is Florida's Statewide Prosecutor. He also serves as the Legal Advisor the Statewide Grand Jury convened by the Florida Supreme Court to study and prosecute criminal gangs throughout Florida. Mr. Shepherd is the Criminal Justice Section's Delegate to the ABA House of Delegates.*

*1. What type of cases is your office handling these days and is there a recurring or developing trend in your community?*

Florida's Office of Statewide Prosecution handles long-term, multi-circuit investigations and prosecutions in state court. We are a part of the Florida Attorney General's Office and, while a separate constitutional entity, serve as that office's criminal prosecution arm. We have eight offices around the state and work a regular docket of wire tap drug trafficking cases, securities fraud, health care fraud, and money laundering cases. We also tackle the problem of grey market pharmaceutical drugs that are bought off the streets from Medicare/Medicaid beneficiaries and then wind their way through the black market and onto pharmacy shelves to pose a risk to patient health. The other side of pharmaceutical crimes is also on our radar - pill mills. Florida is confronting the problem with pill mills that serve no purpose other than supplying narcotic pharmaceuticals to an addict population from Florida and around the country.

In the last three years, we have started a new anti-gang initiative that has resulted in 12 gang RICO cases charging 159 RICO Defendants. Ninety eight of those Defendants have already been convicted and sentenced to a total of 835.38 yrs in the Florida Department of Corrections. RICO let's us give the jury a full picture of the defendants' criminal conduct, allows us to introduce judgements and sentences into evidence to help prove up predicate incidents thus eliminating witness intimidation issues, and, through defendant cooperation, forces the gang to implode upon itself. In conjunction with our own cases, we are also doing gang prosecution training classes around the state so that our efforts can expand beyond our own office.

The good news is not just that we have arrested and successfully prosecuted violent gang members, but we have

also seen a real drop in crime numbers in these hard hit areas. The positive impact on neighborhoods is the real success story from our anti-gang efforts.

Our newest initiative is into the area of public corruption. The Florida Supreme Court has just granted the Governor's Petition to convene a Statewide Grand Jury to investigate and prosecute public corruption throughout our state. A statewide grand jury in Florida, unlike other grand juries around the country, cannot only issue indictments, but can also issue reports that help review and revise existing laws and regulations. The goal is not just to stop individual cases of corruption, but to change the system that fosters and promotes this betrayal of public trust.

*2. How has the financial crisis impacted your office?*

The financial crisis has impacted Statewide Prosecution in two ways: first our budget has been cut to match dwindling state resources, and second, Florida's housing boom of a few years ago has turned into the mortgage fraud echo. While we have routinely handled mortgage fraud cases, we are seeing a dramatic increase in volume.

As foreclosures trigger greater file review by the lenders, they are now discovering the securitized loans were full of fraud. We started our efforts a few years ago with a RICO case in Tampa against an Argent Vice President from New York and now all of our offices have a mortgage fraud cases in their docket. It will be a significant part of what we do for the next few years.

*3. What advice would you give to a law student or young lawyer interested in becoming a prosecutor?*

Do it.... It's a great career - going to work is like going to the movies. Every day is exciting and action packed. I teach as an adjunct and often times students tell me they want to work for the Public Defender to protect the innocent. While I applaud those who seek a career in public service as defenders, I remind them that if you really want to protect the innocent be a prosecutor and don't charge them in the first place.

Those of us who have chosen careers in public service have made early choices about our financial futures. But when I get together with law school classmates, I often see the faint glimmer of the road less traveled. Spending all day in a lavishly paneled office overlooking years of drudgery, pales in comparison to an institutional steel desk at the helm of excitement. Do it right, serve your community, and have a great time at work.

## SEXTING: Balancing the Law and Bad Choices

By Mathias H. Heck, Jr.

Katelyn was 15 years old and in love with her 16 year old boyfriend, Dillon. So, when he asked her to take a naked picture of herself with her cell phone and send it to him, she did. She thought this would be something just the two of them could share and that doing so would show him how much she loved him. But when Dillon broke up with her three weeks later, she started noticing kids at her school giggling behind her back. She soon realized why this was happening when her two best friends came to her and showed her their cell phones, which contained the picture she had sent to Dillon. Her friends told her that the picture had been forwarded to them from their boyfriends and that almost everyone in school had seen the photo or now had it on their phone. For months after that, Katelyn was teased and ridiculed by the other students. She was called printable names like slut, whore, and easy, as well as other names not as printable. Katelyn was devastated. Her grades dropped and she no longer wanted to go to school or socialize with other kids like she used to. Her parents were baffled.

Fourteen year old Heather was dating John, her 16 year old boyfriend. She asked him to take a picture, with her cell phone, of her performing oral sex on him. Heather sent a copy of the picture only to John and he was discrete enough not to share that picture with anyone else, but he did not delete it from his cell phone. John took the cell phone to school and was caught text messaging during class in violation of school policy. The cell phone was confiscated and school personnel believed it to be necessary to look through the phone and found the picture. School authorities decided to report the matter to the police and to contact John's parents. His parents wanted the police to also investigate whether charges should be filed against Heather as the picture was taken at her request with her cell phone.



*Mathias H. Heck, Jr. is the Prosecuting Attorney for Montgomery County, (Dayton), Ohio, a member of the ABA Criminal Justice Section Council, and is a past president of the National District Attorneys Association.*

Such fact patterns have become very common scenarios over the last year, and the practice seems to have no geographic boundaries. Reports from police and educators are so common that this activity has been given its own name...Sexting. Sexting is the term given to the act of juveniles sharing sexually explicit or nude cell phone photos of themselves or others.

This relatively new practice among our teen population is a widespread problem – one recent study reports that one in five teens say they have sent or posted on-line nude photos of themselves.<sup>1</sup> Twenty-two percent of teen girls report doing this, of which half were aged 13-16. In the same report, 31% report having received a nude or semi-nude photo from someone else. Approximately two-thirds of these photos are to or from a boyfriend or girlfriend. Shockingly, 15% of teens say they have sent nude or semi-nude photos of themselves to someone they only knew online! Nearly four in ten teens admit sending or posting sexually suggestive messages.

Criminal charges have been filed against teens for sexting in Pennsylvania, Ohio, Michigan, Alabama, Wisconsin, Florida, New York, New Jersey, Connecticut, Texas, Utah and other states. The problem that many Prosecutors are encountering with these types of cases is that the juveniles engaged in this conduct are completely unaware that what they are doing is illegal, and in many states could potentially face registration requirements as a sexual offender for committing said acts. In all of the states listed above, prosecutors have charged those sending the photos and those receiving the photos with child pornography offenses, with some juveniles being labeled sexual offenders. Other Prosecutors have treated the problem differently, from misdemeanor charges to refusing to file any charges against the teens involved.

Under Ohio law, which makes no distinction on age of the “offender” or circumstance, sending such erotic photos, of underage minors is typically a felony crime: Pandering Obscenity Involving a Minor, Pandering Sexually Oriented Matter Involving a Minor or Illegal Use of a Minor in Nudity-Oriented Material or Performance. A conviction under one of these felony statutes, which range from a fifth degree felony up to a second degree felony, depending on the circumstances, could also include designation as a Tier I or Tier II sex offender requiring registration for 10 or 20 years.

A unique circumstance that arises in these types of cases is the involvement of the “victim.” While in many situations, the person depicted in a state of nudity, the “victim,” only

intended for the picture to be viewed by a boyfriend or girlfriend, the fact that the picture was transmitted by him or her makes it a crime for which they can also be charged. The victim's charge would be no different than and carry the same penalties as the charge for the person or persons who then forwarded the picture on to his/her friends.

Recognizing the unique characteristics and possible long term effects that could result from the prosecution of cases similar to those outlined at the beginning of this article, I felt we needed to take a realistic and commonsense approach to deal with these cases fairly. I felt the best way was to organize and implement a diversion program for teens accused of sexting.

The act of sexting appears to be, in at least some cases, a result of our teens not understanding appropriate sexual boundaries and not thinking of the consequences of their actions. That is why on March 4, 2009 I, along with the Montgomery County Juvenile Court, announced the implementation of the Prosecutor's Juvenile Diversion Program. Under this program, juveniles in Montgomery County, Ohio who are charged with sexting will be screened by a Diversion Officer of the Montgomery County Prosecutor's Office to determine if diversion from traditional juvenile court proceedings is appropriate. Some of the factors that will be considered when making that determination are: 1) whether the juvenile has any prior sexual offenses, 2) whether any type of force or illicit substances were used to secure the photos, 3) whether the juvenile has been involved in this particular diversionary program previously, or 4) if there is strong opposition by the victim or law enforcement to the juvenile being involved in a diversionary program. If any of the previous factors are present, it is likely that the juvenile will not be eligible for diversion and will be referred for official action. The purpose behind developing this diversion program is to address first time offenders who engage in this behavior, but are unlikely to re-offend after being educated on the legal ramifications and the possible long term effects on the victim.

The core of the Montgomery County Prosecutor's Juvenile Diversion Program focuses on education, but also contains a supervision piece and a community service requirement. If accepted into the diversion program, the juvenile will be under supervision for a minimum of six months, agree to relinquish his or her cell phone for a period of time, perform community service and attend at least four hours of appropriate and specific education. The educational component will focus on the legal ramifications, the effects on the victim, establishing age appropriate sexual boundaries, and responsible use of the internet, cell phones

and other communication devices. If the program is successfully completed, the charges pending against the juvenile will not be filed, or will be dismissed. If it is determined the juvenile does not meet the criteria to be considered for the diversion program, or the juvenile refuses to participate and cooperate, then charges will be filed with the Juvenile Court.

Certainly, we all want to keep our teens safe from sexual predators and we will not tolerate child pornography being disseminated in our community. However, in some cases, charging a juvenile with a felony and labeling them a sexual offender when their actions were clearly a result of poor judgment and ignorance of the law seems harsh for first time offenders. It is my belief that this type of activity must be addressed and stopped, and in many cases is best addressed by education and parental involvement.

**Endnotes**

<sup>1</sup> Sex and Tech, Results From A Survey Of Teens And Young Adults, The National Campaign to Prevent Teen And Unplanned Pregnancy, October 2008.

***Transitioning in the Law***



The ABA Criminal Justice Section held a panel discussion on ***Transitioning in the Law*** (January 28, University of Maryland School of Law, Baltimore, MD). The panel served as a resource for law students transitioning to legal careers and attorneys in the legal community transitioning within the legal community.

Panelists were, from left to right, Harry Johnson, Whiteford , Taylor & Preston LLP (former president of Maryland State Bar); Sherri Keene, Assistant Professor, University of Maryland School of Law; Phoebe Haddon, Dean, University of Maryland School of Law; Erek Barron, Kemut & Hunt, PLLC (ABA-CJS Member); Suzette Malveaux, Associate Professor, Catholic University Columbus School of law.

## Criminal Justice Section Resolutions Approved by the ABA House of Delegates in February 2010

### REPORT 102A

#### (Collateral Consequences for Juveniles)

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

### REPORT 102B

#### (Standardized Miranda Warnings for Juveniles)

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

### REPORT 102C

#### (Misdemeanor Prosecutions)

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

### REPORT 102D

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

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

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

RESOLVED, That the American Bar Association urges federal, state, territorial, and local governments to ensure that judicial, administrative, legislative, and executive authorities expand, as appropriate in light of security and

safety concerns, initiatives that facilitate contact and communication between parents in correctional custody and their children in the free community.

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

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

### REPORT 102G

#### (Lawyers and Politics)

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

### REPORT 102I (Prisoner Standards)

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

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

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

*For details on these resolutions, see CJS Policy page at [www.abanet.org/crimjust/policy](http://www.abanet.org/crimjust/policy)*

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

Three Questions With ...  
Michael Moore



Michael Moore is a prosecutor with the Beadle County State's Attorney in Huron, South Dakota. Mr. Moore currently serves as the co-chair of the ABA Criminal Justice Section Prosecution Function Committee and the NDAA State Director for South Dakota.

1. *What type of cases is your office handling these days and is there a recurring or developing trend in your community?*

I am preparing for my first capital trial that is scheduled to begin February 24. This case is not only my first capital trial but the first capital trial that will be held ever in my jurisdiction. In the past year my office has seen an incredible rise in violent crime. In my sixteen years of prosecution I have been involved in five homicide cases, in 2009 we had four homicides and two attempted homicides in addition to numerous aggravated assaults. There are a lot

of different theories on why this is happening but in my two prosecutor office I have been too busy dealing with my case load to get involved in that debate. We are still dealing with our normal case load as well including drugs, DWIs and domestic violence to name a few.

2. *How has the financial crisis impacted your office?*

My jurisdiction is approximately 18,000 people and my office consists of myself, my deputy, two legal assistants and a victim coordinator. My office budget is around \$325,000/year.

My office has seen its budget cut in the last two years. As with most offices the first thing to go is training funds, we have also cut all subscriptions. I am fighting hard to save my victim coordinator.

3. *What advice would you give to a law student or young lawyer interested in becoming a prosecutor?*

My advice to law students who are looking at becoming prosecutors is to intern in their offices either paid intern or for course credit. In my experience most prosecutor offices will hire these people first. Being a prosecutor is a job with many important responsibilities, never take that for granted.

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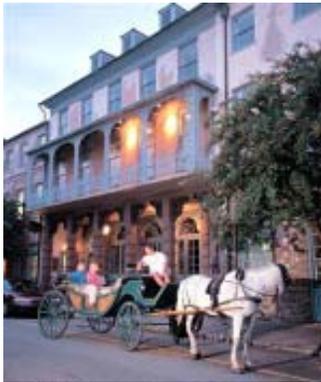
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**UPCOMING EVENTS**



**March 12-14**  
**Health Care Fraud 2010**  
Miami Beach, FL



**April 8-11**  
**Criminal Justice Section  
Spring Meeting**  
Charleston, SC



**June 4**  
**Prescriptions for Criminal Justice  
Forensics**  
New York City



**August 5-7**  
**ABA Annual Meeting**  
San Francisco, CA

*For information on all CJS events,  
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