



The American Bar Association

Criminal Justice Section Newsletter

Volume 18, Issue 1 Fall 2009

SEXTING: Balancing the Law and Bad Choices

PRACTICE TIPS

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

Continued on page 12

Inside This Issue:

- Practice Tips
- Three Questions
with Charles Hynes
- Section & Member News
- New Books
- News from the Field
- Ethics

Save the Date:

**Criminal Justice Section
Fall Meeting**

**Washington, DC
Nov. 5-8, 2009**



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.



Past CJS Chair Anthony Joseph hoists the SOC Meritorious Award, presented to the Section during the Annual Meeting for its work on the Mediation in Criminal Matters project. More info on this prestigious honor is on page 5.

Three Questions With ...

Charles "Joe" Hynes

*Kings County (NYC) District Attorney
Chair of the ABA Criminal Justice Section*

By Robert Snoddy
CJS Outreach Coordinator

Q: Attorney General Eric Holder has called for new strategies to fight crime and made clear one of his priorities is not only getting tough on crime, but also getting smart on crime. What are some of the approaches those in the criminal justice community must embark upon to ensure this is realized?

For far too long our Country's strategy to increase public safety has been grounded in a prison based solution. I think most of us in the criminal justice system at both the Federal and local level can agree that in at least four categories of criminal conduct; those guilty of sociopathic violent crime; those whose financial schemes destroy lives; those drug profiteers who flood communities with their packaged poison; and those seemingly incorrigible offenders we must aggressively prosecute and punish through incarceration. And I think there is wide agreement with Attorney Eric Holder's call for the criminal justice system be tough and smart on crime. There is a movement slowly growing at least among local prosecutors to create prevention, intervention and re-entry programs recognizing that perhaps the most efficient and effective way to increase public safety is through recidivism reduction. While a great many local prosecutors have a number of alternatives to prosecution including Secnd Chance and educational initiatives I want to highlight three particularly which have positively affected public safety.

These programs include the kind of initiative which has been successfully accomplished in Drug Courts which have proliferated across America. Drug Courts correctly distinguish between non-addict drug profiteers

who ought to be prosecuted and imprisoned and those who commit non-violent crime to feed their addiction as well as addicts who sell drugs to support their habit. Were it not for the hundreds of Drug Courts taking a smart approach to reducing crime through diversion the prison population in this Country would be overwhelming. In order to offer alternatives to Drug Courts for addicts who are who are not adjusting and those who face long periods of incarcerations for drug sales and other felonies fueled by addiction some jurisdictions like New York State have created a Drug Treatment Alternative to Prison or DTAP, a residential program for hard core addicts. DTAP is employed by more than a third of the 62 District Attorneys in New York State with extraordinary success. And the reason that the other prosecutors in New York State don't have DTAP programs is the State's failure to invest resources in drug treatment. Ironically the resources are scarce in the State because they are used to maintain a vast prison system where many individual prisons have seen inmate populations plummet.



The Attorney General has been given a unique opportunity to make it clear that no society can prison-build its way to public safety without common sense programs designed to reduce recidivism.

Those including Attorney General Holder who wish to learn more about DTAP should review the findings of a five year study by Columbia University's Center for Alcohol and Substance Abuse or CASA. CASA headed by former Cabinet Secretary in the Carter Administration Joseph A. Califano, Jr. provides demonstrable evidence of the success of residential drug treatment, particularly its positive effect on recidivism reduction.

In looking for new strategies for recidivism reduction some local prosecutors who have reviewed the successful results of Drug Courts and DTAP are seeking solutions

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The American Bar Association Criminal Justice Section

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to deal with the hundreds of thousands returning from prison each year and who without any structure other than that meagerly provided by understaffed and overworked parole agencies become sources for increased criminal activity. The movement toward re-entry programs in many communities across America is a good sign but in my view prosecutors who exert enormous influence over the criminal justice system need to get directly involved in re-entry. Some successful prosecutor run re-entry programs can be found in the Office of San Francisco County District Attorney Kamala Harris; in the Office of the Fayette County, Kentucky Commonwealth Attorney Ray Larson and in my Office in Kings County. We recognized that something had to be done about the reality that 6 out of 10 of the formerly incarcerated returning to our communities each year are re-arrested within three years through parole violations or for new crimes and more than half are reincarcerated during the same period. Each jurisdiction takes a someone different approach to re-entry but all three offer programs designed to successfully reduce recidivism. Those including Attorney General Holder who want to learn more about prosecution run re-entry programs can read the findings of Harvard Professor Bruce Western who concluded that our model in Kings County reduced recidivism by more than half.

I fully agree with Attorney General Holder's call to counter balance a tough approach to crime with a smart approach as well. I suggest that Residential Drug Treatment as an alternative to Prison and Prosecution led Re-entry programs are precisely how the Attorney General and others can achieve these goals. The Attorney General has been given a unique opportunity to make it clear that no society can prison-build its way to public safety without common sense programs designed to reduce recidivism. I believe that Eric Holder is a good and decent man committed to carrying out his mission and as Chair of this Section I am committed to do everything I can to assist him.

Q: As Chair, what would you like to see the Section focus on during your term and how will it be accomplished?

Quite obviously given my overarching interest in alternatives to incarceration I would like the Section during my year as Chair to focus on creating a partnership of interest in recidivism reduction among the Prosecutor-Board Members of the National DA's Association who are members of our Section and of our Council; members of the defense Bar active in our Section particularly members of our Council; Judges associated with the Section and

those who are members of the Council; and those in the Academic Community active in our Section and particularly those who are members of our Council.

I would like to build on Steve Saltzburg's extraordinary success with the NDAA when he represented the Commission on Effective Sanctions and was able to persuade the majority of the NDAA Board to Co-sponsor a number of the Commission's resolutions before the ABA's Board of Governor's. It was a proud moment for me and other members of the Section when Mat Heck then President of NDAA (today a member of our Council) moved to support Commission's resolutions before the ABA Board of Governors.

I also look forward to the help available to me on the Council to focus the Section on identifying comprehensive solutions to the nightmare of Domestic Violence and other initiatives designed to promote public safety. I feel blessed that I will have the wisdom and experience of our immediate Past Chair Anthony Joseph, the immeasurable advice and guidance of another former Chair Steve Saltzburg as well as the support of the ubiquitous Ron and Albert team both former Chairs with institutional memories. Robert Johnson and so many other members of our Council including Bruce Green our Chair-elect will I am certain provide great assistance to me during my year as Chair. I look forward to their help throughout the year. And Of course I am also blessed as were AJ and Steve to have Jack Henna as our Executive Director. Of the many Boards and Commissions where I have had the privilege to serve Jack has no equal.

Q: What justification would you offer to someone considering joining the Section?

Frankly this the most difficult question to address. It is difficult for me to understand how anyone with an interest in the criminal justice system would fail to appreciate the countless benefits associated with membership in our Section. Certainly the opportunity to share ideas, posit issues affecting criminal justice and to attempt to find solutions through the dialogue available with exceptional members of our Section who represent the defense Bar, the prosecutors, Judges and Academics should provide clear evidence of the positive benefits available through membership in our Section.

CJS Annual Meeting Featured Topical Criminal Law Programs; Speech by U.S. Attorney General to House of Delegates

The Criminal Justice Section’s 2009 Annual Meeting (July 30-Aug. 2, in Chicago) featured a plethora of programs that addressed issues ranging from the roles and responsibilities lawyers assume when representing juveniles to an in-depth discussion on the factors that contributed to the current financial crisis and what steps both prosecutors and government regulators will take in moving forward with investigations. Overall the Section was involved in more than 25 separate events.

The materials for all the Section’s programs that took place during the Annual Meeting, as well as audio recordings of selected programs, can be found at www.abanet.org/crimjust/calendar/2009annual.html.

During its Annual Awards Reception on July 31 at the John Marshall Law School the Section honored the following individuals: Susan Gaertner, Ramsey County (MN) district attorney, recipient of the Norm Maleng Minister of Justice Award; Janet Levine, partner in the law firm of Crowell & Morning, recipient of the Charles English Award; and Winston A. Peters, Los Angeles County assistant public defender, recipient of the Livingston Hall Juvenile Justice Award.

U.S. Attorney General Eric Holder gave a keynote address to the ABA House of Delegates outlining his department’s priorities for the nation’s criminal justice system. He discussed issues such as sentencing reform, incarceration guidelines, reentry, health care fraud enforcement, and the need for drastic improvements to the indigent defense System. The audio of his remarks can be found at www.abanet.org/crimjust/annual/annual080309.asx.

Additionally, the ABA House of Delegates approved the lone resolution brought by the Section which supports the enactment of legislation such as S. 714 (111th Congress) which would provide

Section News

for a national study of the state of criminal justice in the United States to consider ways to reduce crime, lower incarceration rates, save taxpayer money, enhance the fairness and accuracy of criminal justice outcomes, and increase public confidence in the administration of the criminal justice system. The entire recommendation and report is available at www.abanet.org/crimjust/policy/am09111b.pdf.

Section Council Approves Diversity Policy

During its meeting in Chicago, the Section Council unanimously approved a diversity policy for the Section brought forth by the Racial & Ethnic Justice & Diversity Committee. Amongst other issues, the policy addresses an action plan including appointments, orientations, mentorship, programming, and outreach. Additionally, the plan places responsibility on the CJS First Vice Chair to serve as the Diversity Director to help the Section implement and comply with the Diversity Plan. The Section would like to thank Erek Barron and Wayne McKenzie, co-chairs of the Racial & Ethnic Justice & Diversity Committee for crafting the policy. To view the entire policy visit www.abanet.org/dch/committee.cfm?com=CR202000.



LEFT: Former CJS White Collar Crime Committee chair Gary Collins presents Janet Levin, executive director of the CJS White Collar Crime Division with the Charles English Award.

RIGHT: U.S. Attorney General Eric Holder shares a laugh with the audience before addressing the ABA House of Delegates. In his speech, the Attorney General outlined his department’s priorities for the nation’s criminal justice system.



Section Project Wins Meritorious Service Award

The *Mediation in Criminal Matters* project received the SOC Meritorious Service Award during the ABA annual meeting in Chicago. The *Mediation in Criminal Matters* project was led by the ABA Criminal Justice Section ADR and Restorative Justice Committee Chaired by Karen Gopee, Marvin Johnson and Kimberlee Kovach. It was funded by the ABA Board of Governors Enterprise fund and participated in by eight other ABA entities including the Section of Dispute Resolution.

The *Mediation in Criminal Matters* project accomplished several major endeavors on behalf of the participating ABA Sections including:

1. Documenting over 130 Current Model Programs Utilizing Pre-Trial Mediation, Restorative Justice, Victim Offender Mediation, and Other Methods of Creative Problem Solving in Criminal Law Settings. The survey of the field is available on the Criminal Justice Section Web site at: <http://meetings.abanet.org/webupload/comupload/CR100000/relatedresources/mediationsurvey.doc>.

2) Piloting a special project on mediation between prosecutor and

public defenders to more quickly process incarcerated individuals unable to make bail in Anoka County, Minnesota.

3) Sponsoring a "Train The Trainers" conference for over thirty professionals from ten different communities that agreed in advance to implement criminal justice mediation programs for other judges, defense lawyers, corrections officials, law school clinical academics and others.

4) Awarding mini-grants to state and local bars, prosecutors offices, courts and community mediation programs to establish pilot programs in mediation in criminal justice.

5) Drafting ABA Policy Encouraging the Use of *Mediation In Criminal Matters* and presenting that policy to the ABA House Of Delegates where it was adopted. .

6) Creating a training DVD in how to set up a mediation in criminal matters program and posting that and related materials on the Criminal Justice Section web site for anyone interested in the project to download.

CJS Staff and Leadership Complete "Race to 11K" Lawyers Membership Drive

Thanks to the CJS leadership, members, staff – and those who took part in the Section's First Annual Membership Telethon Drive – the *Race to 11K Lawyer* exceeded its goal. The campaign sought to bring 11,000 lawyers into the Section by August 31, 2009. As of that date the lawyer member number had reached 11,123. Greater lawyer membership numbers will assist the Section to more effectively as the unified voice in criminal justice matters.

Section Inks Sponsorship Deal with West Publishing

The Criminal Justice Section and West Publishing Corporation have agreed to terms on a one-year sponsorship deal. As part of the agreement, West Publishing will be conducting product demonstrations during the Section's Fall Conference and the National Institute on White Collar Crime (Feb. 24-26, 2010 in Miami, Fla.). If you will be attending either of these events make sure to stop by their Demo Room. More information about West Publishing Corporation can be found at <http://west.thomson.com/>.

RIGHT: U.S. District Judge Paul L. Friedman, Hon. Abner J. Mikva, Chief Judge, U.S. Circuit Court of Appeals D.C. (Retired), Patrick M. Collins, Partner, Perkins Coie LLP, and Chair of the Governor-appointed Illinois Reform Commission, Robert Cary Partner, Williams & Connolly LLP, trial counsel for U.S. Senator Ted Stevens, Edward Genson, former attorney for impeached Illinois Governor Rod Blagojevich, and Hon. Amy St. Eve, U. S. District Court, Northern District of Illinois took part in "Hot Topics and Recent Developments in Public Corruption Investigations & Government Ethics" during the ABA Annual Meeting.



CJS Brings Field Together for First Congress

On May 28-29, 2009, the ABA Criminal Justice Section convened the first Criminal Justice Congress to address complex issues concerning the proper and just operation of the criminal justice system. This was the culmination of years of planning and deliberation by the CJS Executive and Long Range Planning Committees which were working to identify a way to bring the criminal justice field together around critical issues. The CJS hosted the two day meeting of representatives of the National District

The specific issues discussed during this inaugural Congress were (1) re-entry, particularly as it relates to employment; and (2) race, culture, and fairness/integrity in the criminal justice system, with a specific focus on diversity issues and on growing distrust of the criminal justice system that is closely linked with systemic racial disparities.

Drawing on the diverse perspectives of prosecutors, defense lawyers, judges, law enforcement organizations, academic institutions, advocacy organization,

The purpose of this meeting report is to provide a summary of consensus points and other significant points of discussion from participants in the Congress; a list of potential action items suggested by the Congress; and recommendations for moving forward. This report first sets forth overall observations about the Congress before turning to the topics of reentry and racial justice. The report concludes with a set of recommendations for further action by the ABA Criminal Justice Section and the organizations that participated in the 2009 Congress. Consensus points that were affirmed by participants in the Congress in the final discussion session have been specifically noted.

Additional materials that are available upon request from the Criminal Justice Section staff include:

- Detailed discussion notes from each session of the Congress.
- An audio recording of the Congress.
- Briefing materials providing background information on the two major topics of discussion, and the survey information gathered prior to the Congress about needs, opportunities, and existing organizational initiatives.
- A detailed meeting agenda.
- A list of participants in the Congress.

Overall Consensus: “Act Now - Act Together”

The discussion at the 2009 Criminal Justice Congress was rich, thoughtful, and enthusiastic. There was a palpable sense of the importance of coming together, and of the urgency of and opportunity for action by the convened stakeholders to address the issues. Despite the different philosophies and perspectives of those who participated, the Congress was able to identify areas of significant consensus regarding reentry and racial justice challenges facing the criminal justice system, and



CJS Reentry and Collateral Consequences co-chair Lance Ogiste with NOBLE rep. David Owens and National Black Police Assoc. chair John Hayes continue a lively debate from a morning breakout session



CJS Race and Racism co-chair Wayne McKenzie listens intently as Kin E. Ng of the Kings County (NY) D.A.'s Office makes his case.

Attorneys Association, the National Association of Criminal Defense Attorneys, the National Legal Aid and Defender Association, the U S Department of Justice, National Black Police Association, National Judicial College, ABA Judicial Division, Open Society Institute, Federal Public Defenders, Council of State Governments, National Organization of Black Law Enforcement Officers, ABA Governmental Affairs Office and others. The following report was prepared by Catherine Beane facilitator and consultant to the project.

foundations, faith-based communities, and state and federal agencies, the 48 participants in the 2009 Congress utilized a cross-system, problem-solving approach, to identify needs and gaps in the justice system related to re-entry and racial justice, and potential responses to fill them. The specific goals of the Congress were to (1) generate mutual understanding of issues among the diverse participants in the Congress, and (2) identify action-oriented solutions in the areas of policy, training/CLE, publications, and outreach/committee work that would enhance, support, and add value to already-existing initiatives.

potential action items to address those challenges.

Consensus Points:

The following “big picture” consensus points emerged from the Congress and were affirmed by participants in the closing session:

There is value to cross-system convening and problem-solving around systemic issues.

Moreover, the criminal justice system stakeholders represented at the Congress should seek out opportunities for cross-system collaboration.

Additional overarching themes that emerged during discussion include the following:

Participants share a common interest in collaborating across traditional adversarial courtroom roles to meaningfully address long-standing challenges to the proper and just administration of the criminal justice system.

Uniformity of belief and philosophy are not prerequisites for consensus-building about problems and solutions. We may have different motivations, perspectives, and ways in which we would describe the systemic challenges of reentry and

important steps in generating widespread support for serious, systemic responses to the reentry and racial justice issues identified by the Congress.

Reentry Summit Set in Follow up to the Criminal Justice Congress

The CJS will conduct a major follow up event to the “Congress” called the Reentry Summit on November the 5th in Washington, D. C. at One Washington Circle Hotel during the American Bar Association Criminal Justice Section Fall Conference. The ABA Criminal Justice Section has invited prosecutor, judicial, defender, legal services and corrections officials to attend the event. The Summit will consist of a series of presentations of existing exemplary Reentry Programs from the aforementioned professional settings.

The participants will be either be interested in establishing a reentry program or in improving an existing one. The CJS expects over 50 participants and hopes the event serves as a feeder for the National Institute on Sentencing and Reentry the next day.



Bobby Vassar, Majority Chief Counsel, House Crime, Terrorism and Homeland Security Committee; Douglas Burris, Chief U.S. Probation Officer, Eastern Dist. of Missouri; April Frazier, DC Public Defender Office, Community Reentry Program; CJS Prosecution Function co-chair David Barber; and project consultant Catherine Beane participated in a panel discussion on employment-related reentry issues.

Highlighting models of success is an effective means of communicating about systemic issues like reentry.

This includes finding data and examples that explain how a successful model was developed, its strengths and weaknesses, the challenges that were encountered along the way, and how the challenges were overcome.

“Act now. Act together.”

There is a need and opportunity for individual and collaborative organizational action at federal, state, and local levels.

racial justice, yet we can still carve out areas of consensus and collaboration.

The current political and economic climate offers an unprecedented opportunity for strategic leadership to achieve practical, concrete public safety outcomes.

A unified voice and bold leadership from the convened stakeholders regarding the urgency of the issues and the need for solutions/responses are critical if we are to move beyond rhetoric to successfully address these long-standing issues.

Bridging gaps and communicating with others from our fields of practice are

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Check Out the Section Website
www.abanet.org/crimjust

Practice Tips

Pushing the Edge of Insider Trading: The *Cuban* and *Dorozhko* Decisions

By Thomas O. Gorman

Insider trading has long been a priority for Securities and Exchange Commission (“SEC” or “the Commission”) enforcement. Two recent Commission cases suggest the aggressive manner in which the Commission is now policing the markets for insider trading. One is *SEC v. Cuban*, No. 08-2050, Slip op. (N.D. Tex. Jul. 17, 2009) the high profile insider trading case against the owner of the Dallas Mavericks. The other is *SEC v. Dorozhko*, No. 08-0201, 2009 U.S. App. LEXIS 16057 (2nd Cir. July 22, 2009), the so-called “computer hacker” case. Together, these cases suggest that public companies, along with their directors, officers and counsel, would be well advised to carefully review their insider trading procedures, ensuring that they are effective and continuously updated.

Cuban and *Dorozhko* both focus on a key question of whether a fiduciary duty is required under the Supreme Court’s decisions in *Chiarella v. United States*, 445 U.S. 222 (1980) and *United States v. O’Hagan*, 521 U.S. 642 (1987). *Dorozhko* also considers *SEC v. Zandford*, 535 U.S. 813 (2002) for the same proposition. Both decisions answer that question in the negative, but for different reasons.



Mr. Gorman is the Chair of Porter Wright’s SEC Enforcement and Securities Litigation Group, Washington, D.C. He is also Co-Chair of the ABA Criminal Justice Section’s White Collar Crime Securities Fraud Subcommittee.

Cuban: A promise of confidentiality

The facts of *Cuban* are straight forward. Mamma.com, Inc. was planning a private investment in public equity or PIPE offering. At the time, Mr. Cuban was a large shareholder in the company, with a 6.3% stake. As the PIPE offering progressed toward closing, the company contacted Mr. Cuban and asked if he would like to participate. Before extending the invitation, however, the CEO of Mamma.com told Mr. Cuban that he would have to keep the information confidential. Specifically, the complaint alleges that “[t]he CEO prefaced the call by informing Cuban that he had confidential information to convey to him, and Cuban agreed...”¹ Mr. Cuban reacted angrily to the news of the PIPE, stating that he did not like PIPE offerings because they dilute the holdings of existing shareholders. At the conclusion of the conversation, Mr. Cuban stated “Well, now I’m screwed. I can’t sell.” Two internal e-mails at the company note that Mr. Cuban recognized he could not sell his shares until after the announcement of the offering.²

There were two subsequent contacts between Mr. Cuban and the company about the PIPE. In the first, the CEO sent Mr. Cuban an e-mail telling him who to contact in the event he wanted further information about the offering. The second occurred when Mr. Cuban telephoned the sales representative. During the conversation, Mr. Cuban questioned the representative about the pricing for the offering, which he learned was at a discount to market.³

At the conclusion of that telephone call with the company representative on June 28, 2004, Mr. Cuban contacted his broker

and directed him to sell the 600,000 shares of Mamma.com he owned. A small portion of the shares were sold that day and the remainder the next. After the end of trading on June 29, 2004, the company announced the PIPE. Mr. Cuban did not inform the company that he was selling his shares just prior to the announcement. Mr. Cuban avoided a loss of \$750,000 by shelling his shares, according to the SEC.⁴

Dorozhko: Tricking a microchip

Dorozhko centers on a claim that the defendant, Oleksandr Dorozhko, a Ukrainian national and resident, traded on inside information in the securities of IMS Health, Inc. According to the SEC, in early October 2007 IMS announced it would release its third-quarter earnings during a conference call after trading on October 17, 2007. The company hired Thomson Financial to provide investor relations and web-hosting services including the release of its online earnings reports.⁵

In the early afternoon of October 17, after several attempts a computer hacker succeeded in breaking into the secure server at Thomson and located the data regarding IMS. Shortly before 3:00 pm that afternoon, the defendant, who had opened, but not used, a brokerage account at Interactive Brokers, purchased over \$41,000 worth of IMS put options set to expire on October 25 and 30, 2007. These purchases represented about 90% of all such purchases.⁶

After the close of the market, IMS announced its EPS were 28% below street expectations. When the market opened the next morning, IMS shares went down 28%. Within six minutes of the market opening, the defendant sold all of his options, realizing a profit of over \$286,000.⁷

The SEC brought a civil injunctive action against Mr. Dorozhko on

October 29, 2007. The district court granted a freeze order over the trading profits. Subsequently, however, the court denied the Commission's request for a preliminary injunction. The court concluded that a breach of a fiduciary duty is a required element under Section 10(b). *SEC v. Dorozhko*, 660 F. Supp. 2d 321 (S.D.N.Y. 2008).⁸

The decisions: No fiduciary duty required

The court granted Mr. Cuban's motion to dismiss. It did not, however, adopt Mr. Cuban's position that there had to be a fiduciary duty or a similar duty as a predicate for Section 10(b) liability under *Chiarella* and *O'Hagan*. Rather, the key question, according to the court, is whether a breach of a legal duty arising by agreement can be the basis for the misappropriation theory and, if so, what are the essential components of the agreement.

In the classical theory of insider trading, a person who fails to disclose material information prior to trading commits fraud only when he or she is under a duty of disclosure. That duty, under the Supreme Court's decision in *Chiarella*, arises from the specific relationship between the parties. Likewise, under the misappropriation theory adopted by the Court in *O'Hagan*, "the essence of the misappropriation theory is the trader's undisclosed use of material, nonpublic information that is the property of the source, in breach of a duty owed to the source to keep the information confidential and not to use it for personal benefit."⁹

Deception under the misappropriation theory stems from the fact that the trader is under a legal duty to refrain from trading on, or otherwise using, the information for personal benefit. If the trader is in a fiduciary relationship, the court held, this obligation arises by operation of law, as *O'Hagan* made clear. Contrary to Mr. Cuban's contention, however, the relationship

between the parties need not be that of a fiduciary. Rather, the duty can also be supplied by an express agreement between the parties. In this regard, the court concluded that "[i]ndeed, the duty that arises by agreement can be seen as conferring a stronger footing for imposing liability for deceptive conduct than does the existence, without more, of a fiduciary or similar relationship of trust and confidence. In the context of an agreement, the misappropriator has committed to refrain from trading on material, nonpublic information. The duty is thus created by conduct that captures the person's obligation with greater acuity than does a duty that flows more generally from the nature of the parties' relationship."¹⁰

In *Cuban*, the SEC's complaint failed to allege an adequate agreement between the parties. While the complaint stated that Mr. Cuban agreed to keep the information confidential, this is not sufficient. Rather, the parties must agree that the information will be kept confidential and that it will not be used for trading purposes. It is the duty from this express agreement which becomes the predicate for the breach and the deception which flows from that breach in an omission case such as this the court held. The fact that Mr. Cuban commented that he was "screwed," while possibly indicating his belief at the time, does not reflect such an agreement.

The Second Circuit reversed and remanded *Dorozhko*. In its opinion, the court rejected the district court's conclusion that *Chiarella* and *O'Hagan* required that there be a fiduciary or similar relationship as a predicate for Section 10(b) liability.

The circuit court concluded that *Chiarella*, *O'Hagan* and *Zandford* do not require a fiduciary duty as an element of every violation of Section 10(b). The theory of fraud in each of these cases was silence or nondisclosure. Thus, while the three

decisions stand for the proposition that nondisclosure in breach of a fiduciary duty meets the Section 10(b) deception requirement, that does not mean that a fiduciary duty is required in every case. To the contrary, where the theory of fraud is based on an affirmative misrepresentation, such a duty is not necessary or required.¹¹

In the circuit court, the SEC argued that the defendant affirmatively misrepresented himself to gain access to inside information which was then used to trade. Specifically, the Commission contended that the fraud consisted of the defendant's alleged computer hacking which involves misrepresentations, not omissions as in *Chiarella* and *O'Hagan*. Thus, the SEC "argues that defendant affirmatively misrepresented himself in order to gain access to material, nonpublic information, which he then used to trade."¹² The misrepresentations occurred because computer hacking "means to trick, circumvent, or bypass computer security in order to gain unauthorized access to computer systems..."¹³ The hacker either uses a false identification to masquerade as another user or exploits a weakness in an electronic code to cause it to malfunction.

The circuit court went on to note that "[a]bsent a controlling precedent that 'deceptive' has a more limited meaning than its ordinary meaning, we see no reason to complicate the enforcement of Section 10(b) by divining new requirements."¹⁴ Since the district court did not determine whether the ordinary meaning of deceptive covers computer hacking as argued by the SEC, the case was remanded for further proceedings.¹⁵

Aggressive enforcement

Dorozhko and *Cuban* are similar in two fundamental ways. First, both cases

[Continued on page 13](#)

The American Bar Association Criminal Justice Section

Presents

The 2009 Fall Conference

**Second Annual Sentencing Advocacy,
Practice and Reform Institute**
With Special Focus on Reentry

November 6, 2009
Washington, DC



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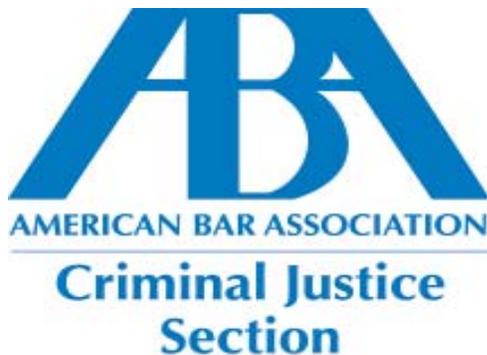
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Section 2009 Fall Conference to Address Sentencing and Reentry Issues

On November 6, 2009 at the Marvin Center located on The George Washington University campus in Washington, D.C. the ABA Criminal Justice Section is proud to present the "Second Annual Sentencing Advocacy, Practice and Reform Institute with a Special Emphasis on Reentry." This one-day seminar will address a broad array of sentencing and reentry issues, with a particular emphasis on sentencing practice in white-collar cases.

The conference will examine sentencing and reentry trends and opportunities for reform at both the federal and state levels. The program will begin with a plenary session on the state of the sentencing union including rates of incarceration, sentencing trends, racial disparity, alternatives to incarceration, and recent federal legislation. There will be two tracks of instruction focused on reentry and two focused

on sentencing, each addressing issues of concern to different segments of the criminal justice community, including probation and parole officials, white collar crime defense attorneys, prosecutors, academics, public defenders, judges, sentencing consultants, mitigation specialists, corrections personnel, victim advocates and policy experts. One track will focus on practice and procedure issues of particular concern to criminal defense attorneys in general and white collar practitioners in particular.

Confirmed speakers include Jeremy Travis, President of the John Jay College of Criminal Justice and the U. S. Sentencing Commission. The complete brochure, which includes registration information, can be found at www.abanet.org/crimjust/calendar.

Registration Form: **Second Annual Sentencing Advocacy, Practice and Reform Institute**

Seating is limited – Register early!

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: \$195 for Government & Nonprofit Employees and Academics; \$175 for Section Member Government & Nonprofit Employees and Academics; \$250 for those in Private Practice; \$225 for Section members in Private Practice; \$25 for Law Students (Cancellations must be received by Oct. 9, 2009. Cancellations subject to an administrative fee of \$50.)

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Practice Tips: Heck

Continued from page 1

Heather as the picture was taken at her request with her cell phone.

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.¹ 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 affects 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 affects 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

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

Practice Tips: Gorman

Continued from page 9

read *Chiarella* and *O'Hagan* as not requiring a breach of fiduciary duty. In a silence case, *Cuban* holds that an agreement incorporating certain features may supply the necessary relation between the parties, the breach of which results in Section 10(b) deception. In a misrepresentation case, *Dorozhko* raises the question of whether computer hacking is a

misrepresentation that constitutes Section 10(b) deception, a question the district court will analyze on remand.

Second, both illustrate the aggressive posture of SEC enforcement in this area. *Cuban* pushes the edge regarding the kind of relationship required. In bringing the *Cuban* case, the Commission was not attempting to allege a fiduciary duty or anything similar to such a duty. Rather, the predicate for the complaint is the fact that the information is material, non-public and there is a request that it be confidential. Starting with the *Chiarella-O'Hagan* duty, *Cuban* reflects the SEC pushing the edge of the required legal obligation far down the road toward a parity of information theory. That theory of course has long been rejected. *See, e.g., Chiarella*, 445 U.S. at 233 ("neither the Congress nor the Commission ever has adopted a parity-of-information rule."). Viewed in this context however, *Cuban* represents an aggressive effort to police insider trading which, according to the court here, went over the line in this instance. Whether that line will hold remains to be seen.

Dorozhko pushes the limits of the misappropriation theory from the other direction. In this case, the Commission pushed the edge regarding what constitutes a misrepresentation. Theorizing that an electronic break-in which tricks a computer chip to circumvent a security device is clearly a novel theory of misrepresentation. Whether this push of the limits will prove to be over the line as in *Cuban* will have to await the decision of the district court on remand.

A note of caution

The aggressive posture of SEC enforcement in these two cases cannot be doubted regardless of the ultimate outcome of each. It should serve as a caution to all issuers about the handling of material non-public information. Issuers and their directors, officers and

counsel should take care that they have adequate procedures for handling such information which go beyond window dressing and are properly policed for effectiveness. *See also, In the Matter of Merrill Lynch, Pierce, Fenner, & Smith Inc.*, Exchange Act Release No. 59555, Admin. Proc. File No. 3-13407 (Mar. 11, 2009), available at www.sec.gov/litigation/admin/2009/34-59555.pdf (firm sanctioned for having inadequate procedures for material non-public information).

Finally, *Cuban* counsels that before material non-public information is furnished to others, steps should be taken to make sure that there is an appropriate agreement in place to ensure to prevent the misuse of the information. *Cf.* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The Retirement Systems of Alabama, Exchange Act Release No. 57446 (March 6, 2008), available at www.sec.gov/litigation/investreport/34-57446.htm (settling insider trading case and issuing report of investigation where appropriate procedures adopted). Taking these steps can help avoid trading in the past of SEC enforcement.

Endnotes

¹ *SEC v. Cuban*, No. 08-9050 (N.D. Tex. filed Nov. 17, 2008) ("Compl.") at ¶ 14.

² *Id.*

³ Compl., ¶ 17. These details undoubtedly confirmed Mr. Cuban's concerns about the offering — it would dilute his holdings and the value of his shares.

⁴ Compl., ¶ 24.

⁵ *Dorozhko* at *2-3.

⁶ *Id.* at *3.

⁷ *Id.* at *4.

⁸ *Id.* at *5-6.

⁹ *SEC v. Cuban*, Slip op. at 16.

¹⁰ *Id.* at 20.

¹¹ *Dorozhko* at *16.

¹² *Id.* at *19.

¹³ *Id.* at *23.

¹⁴ *Id.* at *19.

¹⁵ *Id.* at *24-25.

Policy Update

During the 2009 Annual Meeting, the ABA House of Delegates approved the lone resolution brought by the Section which supports the enactment of legislation such as S. 714 (111th Congress) which would provide for a national study of the state of criminal justice in the United States to consider ways to reduce crime, lower incarceration rates, save taxpayer money, enhance the fairness and accuracy of criminal justice outcomes, and increase public confidence in the administration of the criminal justice system. The entire recommendation and report is available at http://www.abanet.org/leadership/2009/annual/daily_journal/One_Hundred_Eleven_B.doc.

Policy in Development

All of the below will be voted on by CJS Council during its Fall Meeting on Saturday, Nov. 7 in Washington, D.C.

ABA Parenting Initiative – The Women in Criminal Justice Committee has developed a policy which, amongst other things, urges states, territories, and the federal government 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.

Misdemeanor Prosecutions – The Defense Function Committee has drafted a resolution which amongst other things, urges local, state, and federal governments to re-characterize certain misdemeanors that pose little or no threat to public safety, and to implement a system of civil fines and

remedies as an alternative to the criminal sanctions previously in place; and to enact laws and policies allowing prosecutors to have discretion to dismiss or divert to community-based treatment programs non violent misdemeanors not covered by this resolution as they deem appropriate.

Standardized Miranda Warnings – The Science and Technology Committee is working on a policy which urges all federal, state, territorial and local legislative bodies and governmental agencies to support the scientifically informed development of culturally and developmentally accessible wording for standardized *Miranda* warnings.

Collateral Consequences for Juveniles – The Juvenile Justice Committee has developed a policy which amongst other things, urges federal, state, territorial and local governments to increase the opportunities of youth involved with the juvenile or criminal justice systems and prevent the continuing discrimination against those who have been involved with the criminal justice system in the past by limiting the collateral consequences of juvenile arrests, adjudications, or convictions.

Attorney Error v. Attorney Misconduct – The Special Committee on Attorney Misconduct has re-worked a previously submitted draft resolution which urges trial and appellate courts to distinguish between lawyer “error” and lawyer “misconduct” when describing a lawyer’s action, and to recognize that use of the term “misconduct” to describe a lawyer’s action that would more accurately be characterized as “error” may result in unfairly damaging a lawyer’s reputation and impairing a lawyer’s professional advancement.

Vienna Convention Task Force – Developed by the ABA Section of Litigation, this resolution calls upon the United States and upon state and

territorial governments to work to ensure that the fundamental protections of Article 36 to the Vienna Convention on Consular Relations (“Article 36”) are extended fully and without obstacle to foreign nationals within the United States borders; and that the fundamental protections of Article 36 are extended fully and without obstacle to United States citizens in foreign countries.

Opposing Lawyer Regulation Under Consumer Financial Protection Agency Act – Drafted by the ABA Task Force on Financial Markets Regulatory Reform, this resolution recommends that lawyers engaged in the practice of law should not be covered by the definition of “financial institutions” and that the legal services provided by those lawyers should not be covered by the definition of “financial activities” or “financial products or services,” or other similar terms, when those terms are used to establish the regulatory jurisdiction of any federal financial regulatory agency.

Politics and the Department of Justice – The Ethics, Gideon and Professionalism Committee is working on a resolution which urges the President and the Attorney General to assure that improper political considerations do not affect decisions to appoint, promote, assign and terminate United States Attorneys and other political appointees in the Department of Justice; and urges state, local and territorial prosecutors to assure that improper political considerations do not affect decisions to appoint, promote, assign and terminate political appointees in their offices.

For more information on the above policies and all matters relating to Criminal Justice Section policies please visit <http://www.abanet.org/crimjust/policy/>.

UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

The ABA/BNA Lawyers' Manual on Professional Conduct, a multivolume reference and notification service, is available by subscription through the ABA Web Store at www.abanet.org/abastore or by contacting BNA at 1-800-372-1033 or customercare@BNA.com. For a free trial subscription go to www.bna.com/products/lit/mopc.htm.

Prosecutor Has Duty to Disclose Evidence and Information Favorable to the Defense

On Aug. 20, 2009 the American Bar Association Standing Committee on Ethics and Professional Responsibility released an ethics opinion which concluded that prosecutors face a stronger duty to disclose information that might help defendants fight criminal charges under ABA Model Rules of Professional Conduct than they do under the U.S. Constitution. But they are not obliged to search for information favorable to the defense. The disclosure requirement is grounded in a prosecutor's role as "a minister of justice, and not simply that of an advocate," carrying "specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons," said the committee. ABA ethical standards have recognized a prosecutorial duty to not suppress facts that could establish innocence since 1908, more than 50 years before the Supreme Court of the United States ruled in *Brady v. Maryland* that the Constitution's Due Process Clause extends the disclosure obligation beyond federal prosecutors to include state court prosecutors, noted the committee. The committee said ethics

Rule 3.8(d) requires prosecutors to share even information that they do not deem credible, while the Constitution only requires them to reveal "material" information, or evidence or material they view as likely to lead to acquittal. The opinion also restates the responsibility of managerial and supervisory lawyers in prosecutor offices to assure subordinate lawyers comply with all their ethical responsibilities, including disclosure of information favorable to defendants. The opinion, Formal Opinion 09-454, is available from the ABA Center for Professional Responsibility at <http://www.abanet.org/cpr>.

Wisconsin Adopts a Version of ABA Model Rules 3.8(g) & (h)

Wisconsin recently became the first state to adopt ethics rules based on ABA Model Rules of Professional Conduct 3.8(g) & (h). The Criminal Justice Section was the principal sponsor of these rules, which address prosecutors' post-conviction duties upon learning of new evidence of innocence. Interestingly, the Wisconsin District Attorneys Association was the entity that moved to adopt the provisions, and every entity that made a submission, including several representing law enforcement, supported the ABA Model Rules or some variant on them. Wisconsin's modifications to the ABA Model Rule are slight and do not significantly weaken it. The Wisconsin court order announcing the adoption of the rules is available at www.wicourts.gov/sc/scord/DisplayDocument.htm?Content=html&seqNo=36849.

Hiring of Criminal Defendant's Ex-Attorney Won't Always Disqualify Prosecutor's Office

The Utah Supreme Court ruled that when a prosecutor's office employs a lawyer

who previously represented a defendant in connection with the matter for which he is on trial, it creates a rebuttable presumption that the entire office is in possession of confidential defense information. (*State v. McClellan*, Utah, No. 20080350, 7/31/09). The burden is on the prosecutor's office to show that it created an ethics screen that prevented any transfer of information about the defendant from his former defense counsel to his new colleagues, the court made clear in an opinion by Justice Michael J. Wilkins. Carl McClellan had an attorney, Phil Hadfield, who appeared with McClellan at his preliminary hearing and arraignment on a rape charge. Three days before trial, Hadfield announced that he had taken a job with the county attorney's office that was prosecuting McClellan. New defense counsel was appointed. After he was convicted, McClellan argued that his replacement counsel provided ineffective assistance in failing to seek disqualification of the entire county attorney's office after Hadfield went to work there. He urged the adoption of a per se rule of disqualification when former defense counsel moves on to work for the prosecutor. Courts in other jurisdictions that have looked at this issue disagree on whether per se disqualification is the only way to protect defendants' rights. Most of them have rejected a blanket rule and decided to focus instead on whether former defense counsel was isolated from the defendant's prosecution. The Utah Supreme Court joined the majority of other courts and declined to require the automatic disqualification of an entire prosecutor's office in this situation. Instead, it held that the presence of former defense counsel in the prosecutor's office raises a presumption that the whole office has been tainted with confidential defense information. That presumption can be rebutted, the court said, if the prosecutor's office demonstrates that

it has in place effective screening procedures and shows that those procedures have been used to sequester former defense counsel from the prosecution of his ex-client. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.25, page 467 (Sept. 2, 2009)

Demanding Cash to Forgo Baseless Lawsuit Violates New Hampshire Extortion Statute

A lawyer committed theft by extortion when he extracted \$500 from a hair salon by threatening to bring a baseless lawsuit against it for alleged discriminatory pricing unless the company changed its policies and paid him \$1,000, the New Hampshire Supreme Court decided August 5 (*State v. Hynes*, N.H., No. 2008-371, 8/5/09). In an opinion by Justice Gary E. Hicks, the court concluded the threatened lawsuit was groundless since the lawyer lacked standing to sue, in that he had no client and did not personally patronize the salon. The court rejected the argument that the lawyer, who sent similar letters to other salons in the state, had standing to proceed based on his status as a private party with an altruistic interest in ending discriminatory practices. Daniel Hynes sent a cease and desist letter to Claudia's Signature Salon notifying the owner that the company policy of charging women \$25 for haircuts, but only charging \$18 for men and \$12 for children, constituted unlawful gender and age discrimination and was an unfair trade practice in violation of certain New Hampshire statutes. Hynes said he would forgo litigation if the company ceased its unlawful practices and paid him \$1,000. The shop owner's husband called Hynes and offered to settle the matter for \$500; Hynes accepted. At the ensuing settlement meeting, Hynes admitted that he did not represent a client and that he had never patronized the salon

himself. He said that he had just searched the internet for salons with discriminatory pricing schemes. He said he was currently negotiating with other attorneys in response to similar letters he had sent out to other businesses. An undercover agent with the state attorney general's office attended the settlement meeting; Hynes was arrested immediately after he took possession of the \$500. Hynes was convicted of theft by extortion, and the supreme court affirmed the conviction. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.25, page 438 (Aug. 19, 2009)

Offer to Keep Quiet About Illegal Conduct In Return for Benefit Harmed Justice System

The Nebraska Supreme Court July 31 suspended a lawyer from the practice of law for 120 days for offering to stay quiet about what he believed to be illegal conduct by a prosecutor in return for the dismissal of charges against the lawyer's client (*State ex rel. Counsel for Discipline v. Koenig*, Neb., No. S-08-128, 7/31/09). Finding that the lawyer's threat exceeded the bounds of proper plea negotiations, the court concluded that his behavior prejudiced the administration of justice and implied that he could improperly influence a public official. The court also concluded, however, that the lawyer did not violate the ethics rule that makes it professional misconduct to commit a crime that reflects adversely on a lawyer's fitness to

practice law. The lawyer had never been charged or convicted of any crime in connection with the threat, the per curiam opinion pointed out. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.25, page 452 (Aug. 19, 2009)

Lawyer Disbarred for Not Reporting Cash Payments

The Washington Supreme Court disbarred a criminal defense lawyer who, while defending an alleged foot soldier in a major drug ring, accepted two paper bags containing \$20,000 in cash as his fee and later pleaded guilty to willfully violating federal cash reporting laws (*In re Vanderveen*, Wash., No. 200,569-1, 7/16/09). In an 8-1 decision, the court stressed that the lawyer not only knowingly flouted his obligation to report the cash payments to the Internal Revenue Service but also took deliberate steps to hide the transactions by hiding the cash in a safe in his house. According to the court, attorney James White asked A. Mark Vanderveen to represent Wesley Cornett, a low-level figure in a federal drug prosecution. White represented one of the major players in the ring. Vanderveen agreed to represent Cornett and told the client at their first meeting that Cornett's "friends or associates" would pay his legal fees. Vanderveen then received from White \$20,000 in two cash installments. One paper bag with \$10,000 was left in the



William Baker of Latham & Watkins; Joseph Decilveo of Huron Consulting Group; Robert Burson, Associate Director, SEC's Chicago Regional Office; Gary Collins, Managing Director, GE Financial Services; Christine Franklin of Franklin Law; and Ed van Liere of Simmons & Simmons participated in the ABA Annual Meeting program "Investigations in a Time of Financial Meltdown: What is the New Normal."

municipal court chambers, where both White and Vanderveen sat as pro tempore judges. Several weeks later at a bank parking lot, White handed Vanderveen the remaining \$10,000. White told Vanderveen that the money came from “people” Cornett worked with. Although Vanderveen ordinarily deposited cash fees in the bank the same day he received them, and entered the payments in his QuickBooks accounting system, he did not do so in this instance. Instead, the court said, Vanderveen hid the cash in a safe located at his residence. For greater detail, see *ABA/BNA Lawyers’ Manual on Professional Conduct*, Vol.25, page 415 (Aug. 5, 2009)

Scope of Defense Lawyer’s Ethical Duty Doesn’t Extend to Defying Judge’s Orders

A litigator has no right, much less any professional obligation, to flout the directives of a judge who the lawyer believes is trampling on a criminal defense client’s constitutional rights, ruled the U.S. Court of Appeals for the Sixth Circuit. (*United States v. Moncier*, 6th Cir., No. 07-6053, 7/8/09). Declaring that an attorney’s duty is not to defy a judge’s orders but to obey them, the court found that a lawyer engaged in criminal contempt when he obstructed a judge’s questioning of his client. But because the conduct leading to the contempt charges involved disrespect toward the judge, the court added, the charges should have been heard by a different judge, thus entitling the attorney to a new trial. In a brief, unpublished opinion issued the same day, the court affirmed a district court order suspending the lawyer from practice before the district court for seven years based on the lawyer’s contemptuous conduct (*In re Moncier*, 6th Cir., No. 08-5645, unpublished opinion 7/8/09). For greater detail, see *ABA/BNA Lawyers’ Manual on Professional Conduct*, Vol.25, page 383 (July 22, 2009)

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Defendant Must Show Harm to Obtain Retrial After Defect Is Found in Prosecutor’s License

The Minnesota Supreme Court declared convictions obtained by a prosecutor who was not properly licensed will be reversed only if the defendant can establish prejudice. (*State v. Graham*, Minn., No. A07-1759, 4/23/09). In an opinion by Justice Paul H. Anderson, the court rejected the argument that prosecution by an attorney not validly authorized to practice results in an inherently flawed trial that should warrant an automatic right to a retrial. Although there is authority to that effect in Illinois, the court distinguished the two states’ laws in ruling that Minnesota requires the defendant to demonstrate that the prosecutor’s license status actually affected the trial to the defendant’s detriment. Alonzo Jerome Graham was convicted of first-degree murder. Just before sentencing in this case, the county attorney’s office learned that the law license of the lead prosecutor at trial had been restricted for more than 20 years because she had failed to fulfill her continuing legal education requirements. On appeal, Graham emphasized that state law provides criminal penalties for the unauthorized practice of law. He urged the court to follow the approach of other courts and void his conviction. For greater detail, see *ABA/BNA Lawyers’ Manual on Professional Conduct*, Vol.25, page 243 (May 13, 2009)

Lawyers Can’t Be Compelled to Tell Grand Jury About Client’s Threats to Harm Third Parties

Threatening messages that a client left on his attorney’s answering machine are protected by the attorney-client privilege, thus preventing the attorney from being compelled to testify about them before a grand jury, the Massachusetts Supreme Judicial Court decided. (*In re Grand Jury Investigation*, Mass., No. SJC-10173, 3/23/09). The court rejected the argument that a client’s menacing statements to a lawyer are not made for the purpose of obtaining legal assistance and thus fall

outside the protection of the privilege. Forced disclosure of these communications would discourage lawyers from exercising the discretion afforded by the ethics rule on lawyer-client confidentiality to disclose the threats in order to prevent harm, Justice Francis X. Spina pointed out. As an initial matter, the court made clear that the lawyer’s disclosure of the threats was ethically proper under Rule 1.6(b), which allows but does not require an attorney to disclose information about a client to prevent a crime that the lawyer reasonably believes is likely to result in substantial bodily harm or death. But the ethical permissibility of such a disclosure does not resolve the distinct issue of whether a lawyer who discloses threats can be compelled to testify before a grand jury, the court observed. For greater detail, see *ABA/BNA Lawyers’ Manual on Professional Conduct*, Vol.25, page 157 (April 1, 2009)

Defense Lawyer Didn’t Contravene Rules By Using Ruse to Get Dirt on Complainant

The Wisconsin Supreme Court ruled that a criminal defense attorney did not violate ethics rules against false statements or deception by having an investigator use false pretenses to obtain potentially damaging evidence from a client’s alleged victim. (*Office of Lawyer Regulation v. Hurley*, Wis., No. 2007AP478-D, 2/11/09). The court emphasized the referee’s findings that investigative deceit of this type is considered acceptable by many members of the Wisconsin bar and that prosecutors have traditionally been allowed to use sting operations to garner evidence. There is no compelling reason for saying that prosecutors may do this while defense attorneys may not, the court indicated in its unsigned order. For greater detail, see *ABA/BNA Lawyers’ Manual on Professional Conduct*, Vol.25, page 115 (March 4, 2009)

Member News

Please Refer to Her as “Madam President”

Criminal Justice Section Council member Cynthia Hujar Orr was elected president of the National Association of Criminal Defense Lawyers during its 51st Annual Meeting in Boston on Aug. 8. Orr has served on the NACDL’s Executive Committee, previously holding the offices of President-Elect, First Vice President, Second Vice President, Secretary, and Treasurer, and as a member of the Board of Directors. She has chaired NACDL’s Membership, Internet,

Public Affairs, Death Penalty, and History Committees. She was also a member of the Amicus Curiae and Lawyers Assistance Strike Force Committees. The entire ABA Criminal Justice Section offers its congratulations to Ms. Orr for this achievement.

Neal Sonnett to Receive Legal Legend Honor

Neal Sonnett, the former CJS Section chair and current Section liaison to the ABA Board of Governors will receive the 2009 Legal Legends Award from the Historical Museum of Southern Florida’s 11th Judicial Circuit. The award, to be presented on Nov. 5, is given to those that have made substantial contributions

to the legal system in South Florida for 25 years or more.

Susan Gaertner Throws Her Hat in the Ring for Gubernatorial Post

Former CJS Council member and Ramsey County (MN) district attorney Susan Gaertner is making a strong push for governor of Minnesota. According to her campaign website, she believes her great state needs a fresh start and is running for governor because “our next governor should rightly prioritize the values of justice and fairness that I have worked to uphold as a prosecutor.” For more information on her campaign visit <http://www.susangaertner.com/>.

A Tribute to Betty Harth

By Robert Horowitz

Director of ABA Professional Services Division - DC

On July 15, the Criminal Justice Section lost a financial guru, historian, mentor and friend — Betty Harth. Her passing was quick and unexpected, and gave none of us a chance to say good-bye and to thank her for all she did for us over her 34 year career at the ABA and Section of Criminal Justice. After the fact and in print – thank you Betty.

Thank you for being such a careful steward of our resources. Throughout her tenure Betty looked after the section’s finances like she would her own household budget. Where a savings could be found without sacrificing quality, Betty found it. Where resources were needed to shore up an activity, Betty looked under every rock. When the ABA changed its financial accounting, revised budget policies, or imposed new deadlines Betty adapted, learned, and never missed a target. Less known to those in the section Betty also had broader ABA duties, as associate director for the Professional Services Division (PSD) in DC, which houses all DC based sections and many of its committees and commissions. Though to lesser intensity, what Betty did for the section she did for so many other entities. And in doing so, fairness was her hallmark. If we were asked to reduce budgets, without fail Betty helped us to do so in a way that was fair, even if painful, to all of the PSD entities. While Criminal Justice was her home,

she played no favorites, and in doing so enhanced our reputation within the ABA management — they quickly learned that if it came from Betty it was right!

Thank you, Betty, for being a mentor. As new section staffers and directors of other PSD entities came and went, Betty was there to teach them the ropes of the ABA, especially all things budget. Confused by our investment policies, ask Betty. Don’t know how to set up a budget in our on line systems, go to Betty. Need help in interpreting ABA financial policy,.....

Thank you Betty, for being a historian to the Section. Did you wonder why the section decided to produce a glossy magazine – don’t worry, Betty would remember. Who was Livingston Hall and why does the Section name its juvenile justice award after him – Betty knew.

And finally Betty, thank you for being our friend. Truth be told Betty could be ornery at times... but under it all was a heart of gold. On her passing I was struck by the emails I received from staff who commented on her many acts of kindness and support. This was especially true for newer staff feeling their way through the ABA and in need of a friendly hand. This was a side of Betty often overlooked but deeply appreciated, and dearly missed.

For all of this we thank Betty, whose professional life was dedicated to the section, and the section was and is much better off for having known her.

News from the Field

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

DOJ: Violent Crime Rate Held Steady in 2008

According to an annual Justice Department survey, the rate of violent crime in the United States remained virtually unchanged from 2007 to 2008 while the rate of property crime dropped slightly. The National Crime Victimization Survey collects information on nonfatal crimes, reported and not reported to the police, against persons age 12 or older from a nationally representative sample of U.S. households. The rate for the past two years is the lowest since 1973, the first year such data were collected. The report includes data on violent crimes (rape/sexual assault, robbery, aggravated assault and simple assault), property crimes (burglary, motor vehicle theft and property theft), and personal theft (pocket picking and purse snatching), and the characteristics of victims of these crimes. A copy of the full report can be found at www.ojp.usdoj.gov/bjs/abstract/cv08.htm.

National Academy of Sciences Report Questions Crime Lab Evidence Reliability

A report issued by the National Academy of Sciences says that, with the notable exception of DNA evidence, many forensic methods have never been shown to consistently and reliably connect crime scene evidence to a specific individual or source. *Strengthening Forensic Science in the United States: A Path Forward*, is the result of a two-year study, also calls for a complete overhaul of

the nation's criminal lab system and states scientific verification is lacking in many courtroom claims about fingerprints, bite marks and other evidence. A full copy of the report is available at www.nap.edu/catalog.php?record_id=12589#description.

NACDL Advanced Criminal Law Seminar Celebrates the Big 3-0 in Colorado

The National Association of Criminal Defense Lawyers will hold its 30th Annual Advanced Criminal Law Seminar from Jan. 10-15, 2010 in Aspen, Colo. NACDL proudly conducts this unique seminar complemented with an unparalleled faculty that will enlighten and inspire all who attend. This 2010 program will provide you with the chance to hear from the past year's most publicized and well-known defense attorneys and discuss the latest issues confronting defense attorneys today on various interactive panels. Included in this year's impressive faculty are some of the most noted defense attorneys, prosecutors, government officials, and judges in the country. For more information visit <http://www.nacdl.org/>.

NAAG Elects New Leadership

The National Association of Attorneys General unanimously elected Nebraska Attorney General Jon Bruning as its 102nd President in June during its 2009 Summer Meeting. Bruning announced that his presidential initiative, *Virtual World – Real Crime*, strives to shield children from sexual predators and protect consumers and businesses from fraud. NAAG also elected North Carolina Attorney General Roy Cooper President-Elect, Washington Attorney General Rob McKenna as Vice President, and Rhode Island Attorney General Patrick Lynch became

Immediate Past President for the 2009-2010 term. More information is available at www.naag.org.

NLADA to Hold Annual Conference in Denver

The National Legal Aid & Defender Association will hold its 2009 Annual Conference from Nov. 18-21 in Denver. The Conference is a leading national training event for the civil legal aid, indigent defense and public interest law communities. The goal of the conference is to offer advocates the latest knowledge and professional skills to enable them to creatively and effectively meet the legal needs of low-income people. The conference also provides equal justice advocates with opportunities to meet and exchange ideas with colleagues from across the country and to fulfill continuing legal education requirements. This year's conference will focus particular attention on developing strategies where civil legal services and defenders can join together to make equal justice a reality in this nation. More information is available at <http://www.nlada.org/>.

MEMBER NEWS

Chicago Legal Groups Toast Mr. MacCarthy

On Sept. 10, the Chicago Bar Association and the Chicago Bar Foundation honored former CJS chair and current Council member Terence F. MacCarthy at the Tenth Annual Justice John Paul Stevens Award Luncheon. The event celebrates Illinois lawyers who demonstrated extraordinary integrity and service to the community throughout their careers.

Economic Recovery Resources Portal

(from the American Bar Association)
<http://new.abanet.org/economicrecovery>

NEW BOOKS

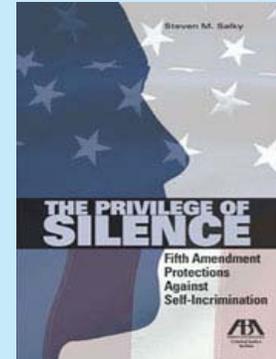
Trial Tactics, Second Edition

A compilation of high-profile criminal cases, practice tips, legal analyses, and cautions that prepares defense counsel, prosecutors and judges to do outstanding work at trial and assists them in ensuring that justice is done each day in every court throughout the land. The text provides excellent statutory, case law, and inside advice by George Washington Univ. Professor of Law Stephen Saltzburg. The 54-chapter book is broken down in seven parts: Basic Principles; Examination of Witnesses; Lay and Expert Opinion; Hearsay, Confrontation and Compulsory Process; Character Evidence; Summaries and Exhibits, and; Opening and Closing Arguments. Additional chapters are included in this second edition.

The Privilege of Silence: Fifth Amendment Protections Against Self-Incrimination.

The United States Constitution provides that “no person shall be compelled in any criminal case to be a witness against himself.” While this portion of the Fifth Amendment contains only 15 words, its application can be deceptively complex. Using the Fifth Amendment right against self-incrimination is dependent on the factual setting in which the privilege is asserted, with the values served often balanced against the competing interests at stake. This book explains the contours of the Fifth Amendment privilege against self-incrimination in practice, providing a guide for both the civil litigator who may encounter it infrequently, as well as the criminal lawyer who seeks to advance his or her client’s

interests through the use of the Fifth Amendment.



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