



CRIMINAL JUSTICE

The American Bar Association

Criminal Justice Section Newsletter

Volume 16, Issue 1 Fall 2007

Getting the Most Favorable Sentence for Your Client After *Rita v. United States*

PRACTICE TIPS

By David Debold

It has been nearly three years since the Supreme Court held that the Federal Sentencing Guidelines in place since 1987 violated the Sixth Amendment, yet the full ramifications of that decision remain to be seen. The Court's remedy for the constitutional defect – excising parts of the Sentencing Reform Act that make the Guidelines mandatory – has had a modest impact on the number of cases in which a non-Guidelines sentence is imposed. For many defendants, it is as if the Guidelines were still mandatory; but a number others have benefited from this ruling, some in very significant ways.

As the Supreme Court and the lower courts continue to adjust to this new world in which the guidelines are merely advisory and appellate courts review for reasonableness, there are a number of steps practitioners can take to get their clients a sentence that is sufficient, “but not greater than necessary,” to achieve the statutory purposes of sentencing.¹ In *United States v. Booker*,² the Supreme Court held – as most observers

expected it would – that the mandatory Federal Sentencing Guidelines violated the Sixth Amendment, because judges, rather than juries, made the findings necessary to calculate the Guidelines range. In *Booker's* case, for example, it was the judge's finding that the offense involved a certain quantity of drugs that raised the Guidelines range from 210-to-262 months (the penalty authorized by the jury's findings) to that of 360 months-to-life. Though this holding logically followed the Court's decision just seven months earlier in *Blakeley v. Washington*,³ the remedy for the violation caught almost everyone by surprise. Rather than require jury findings for facts that enhance a Guidelines range, a different majority of the Court (the four who dissented from the merits opinion, joined by Justice Ginsburg) held that the remedy was to make the Guidelines advisory, with courts of appeals reviewing sentences for “unreasonableness.”

Although the Court recognized that this remedy could not fully preserve Congress's objective of uniformity in sentencing, the remedy-opinion majority believed that such a fix would nonetheless move sentencing in that direction. But by leaving the fact-finding in the hands of judges, the Court created significant tension between the goal of consistency in sentencing outcomes (e.g., treating like cases alike and allowing for different treatment of cases that are not alike) and the constitutional requirement that juries



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CJS Calendar of Events

Oct. 18
Subpoenaing Sources: Lessons From The Libby Case
New York, NY

Oct. 21-23
ABA/ABA Money Laundering Enforcement Conference,
Washington, DC

Oct. 25-26
National Institute on Securities Fraud, Washington, DC

Nov. 1-4
Criminal Justice Section 2007 Fall Meeting, Washington, DC
Ethics and Professionalism in Plea Negotiations: Best Practices and Worst Pitfalls (CLE, Nov. 2)

Feb. 6-12, 2008
ABA Midyear Meeting,
Los Angeles, CA

April 3-6, 2008
Criminal Justice Section 2008 Spring Meeting, Charleston, SC
Outstanding Direct and Cross Examination (CLE, April 4)

(See the Section website, www.abanet.org/crimjust, for more details.)

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Practice Tips
Ethics
Section News & Events
Policy Update
Legislative Update

Three Questions With... Section Chair Stephen Saltzburg

By Robert Snoddy

How would you convince — and by what means can the Section better serve the interests of — those in the prosecutor and public defender communities to become involved in the Section?

We need to emphasize that all of us who participate in the criminal justice system share a responsibility for making the system fair and equitable and for finding ways both to effectively punish individuals who commit criminal acts and to assist those who have been convicted and served their sentence to become contributing members of their communities. Shared responsibility requires that prosecutors, defenders, judges, law enforcement officers, victims and correctional officials talk to each other and share ideas about how to improve the system. This is not to say that prosecutors cannot learn from and teach other prosecutors or that defense counsel cannot learn and teach other defenders. It is simply a recognition that the best solutions entail buy-in from all segments of the criminal justice community.

The Criminal Justice Section offers the opportunity for a broad-based discussion, a sharing of ideas that provides an unparalleled opportunity for various participants in criminal justice to understand each other, to find ways to work together, to identify those places where the system is broken, and to develop creative ways to fix the problems. Our criminal justice system is rightly evaluated not by the number of convictions or acquittals that lawyers achieve. It is rightly evaluated by the quality of justice it affords to all who are affected by it. The quality is enhanced when the concerns of all participants receive a fair hearing. When our Section engages in serious debate on issues and seeks to find common ground to improve the system, it is inspiring.

My hope is that we can showcase the inspirational engagements and thereby interest as many participants in our justice system as possible to join us.

What are some of the issues you would like to see the Section address that affect not just the criminal justice community, but the American public?

The message that came through loud and clear when the National District Attorneys Association, the National Association of Criminal Defense Lawyers, and the National Association of Legal Aid and Defender Association supported resolutions offered by the Criminal Justice Section and its Commission on Effective Criminal Sanctions was that reducing crime



Stephen Saltzburg, 2007-08 Chair of the ABA Criminal Justice Section and the Section Delegate to the ABA House of Delegates, is a professor of law at the George Washington University Law School.

and the number of victims of crime is a goal widely shared by lawyers and non-lawyers alike.

The American public is familiar with the awful consequences of alcohol and drug addiction, the horror of domestic violence, and with the mental health problems that exist in all our communities. But, the public is not yet adequately informed of the relationship of these social ills to criminal acts. A look at virtually any prison in America reveals that most of the inmates have addiction problems and often mental health problems. The undeniable fact is that we either decide that we are going to try to treat these problems or else we will assure that when inmates are released from prison they are likely to repeat their anti-social, criminal behavior.

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The public debate too often focuses on whether or not we should be tough on crime, when the real question is how to use our resources and talent to break the cycle of recidivism and help individuals deal with the problems that have driven them to commit criminal acts. At long last, with the very important contributions of some innovative prosecutors, the public is focused on the best ways to make communities safer rather than on locking up as many people as possible. The reality, however, is that one highly publicized, horrendous crime can color attitudes towards the entire criminal justice system. Therefore, we must persuade the public that, while there is broad support for locking up sociopaths for very long periods and an understanding that some individuals simply cannot function in a free society, there is a large portion of the prison population that can benefit from treatment and can successfully re-enter society with the proper tools.

The Criminal Justice Section offers the opportunity for a broad-based discussion, a sharing of ideas that provides an unparalleled opportunity for various participants in criminal justice to understand each other, to find ways to work together, to identify those places where the system is broken, and to develop creative ways to fix the problems.

You are a commission member on ABA President Bill Neukom's World Justice Project. How can the Section expand its international reach and expertise, and what are some of the global issues of concern to the criminal justice community?

American lawyers have been among the most parochial lawyers in the world, and this is as true of lawyers who work in criminal justice as it is of lawyers who do any other kind of work. All of us are busy, and we naturally tend to focus on the issues that confront us daily. Rarely do we turn our attention to criminal proceedings in other countries. But, participation in the American Bar Association and in the Criminal Justice Section reminds us that we share a commitment to the rule of law.

Events in Afghanistan, Pakistan, Iraq, the Sudan and elsewhere remind us that the rule of law is non-existent or in great peril in many places. When the rule of law is absent or in jeopardy, anarchy and chaos take hold, and breeding grounds for terrorists and jihadists are created. Like it or not, the presence or absence of the rule of law throughout the world has an impact on the United States and every other nation.

Bill Neukom has recognized this, and has focused the attention of not only the ABA but also every segment of society in many nations on the importance of the rule of law. He is convinced himself, and he makes a convincing case, that the rule of law genuinely affects a nation's prosperity and safety. The World Justice Project will seek, among other things, to create a new index to measure a country's success in adhering to the rule of law. The effort will provide an opportunity for all of us to learn just how true our legal system, including our criminal justice system, is to rule of law principles. The World Justice Project offers every part of the ABA, including the Criminal Justice Section, a chance to learn from representatives of every walk of life throughout the world about why the rule of law matters to them and what we can do to promote it.

For most of my years as a lawyer, the United States has regarded itself as a teacher and promoter of the rule of law. But, in the last few years, many countries have questioned our commitment and adherence to the rule of law. This questioning tells me that the Criminal Justice Section, along with other ABA entities and bar groups nationwide, needs to make sure that we listen to what the world community is saying about our practices and decide whether a change in direction is warranted. We need to pay attention to why we are one of the few countries in the world that have not ratified the Rome Treaty and accepted the International Criminal Court, to calls to close the detention facilities in Guantanamo, and to claims that we have turned our back on a crucial part of the 1949 Geneva conventions. These issues may not be the ones that stare us in the face every day, but they tell us much about who we are and what we stand for. We must make time for them and we will.

Feedback Welcome

Send to
crimjustice@abanet.org

SECTION NEWS

San Francisco Annual Meeting Highlights

Policy adoptions on a variety of issues, high-level policy debates in the Section Council meeting, and strongly attended CLE programs made for an outstanding Criminal Justice Section meeting in San Francisco.

Working with both in-house and outside entities, the Section played a role in the below policies being adopted during deliberations of the ABA House of Delegates:

- Urging federal, state, local and territorial governments to maintain the Medicaid eligibility of otherwise-eligible incarcerated persons and provide continuity of Medicaid eligibility to persons newly-released from custody.
- Urging Congress to override the President's Executive Order of July 20, 2007, which alters the U.S. government's international obligations under the Geneva Conventions of August 12, 1949, regarding the treatment and interrogation of detainees under its authority or control, and to reaffirm those obligations.
- Urging all bar associations and other regulatory bodies to waive dues and CLE requirements for deployed lawyers.
- Encouraging jurisdictions to pass laws that require the provision of evidence-based pre-court diversion and early intervention services for youth who are alleged to have committed status offenses, such as truancy, ungovernability or running away and supports the use of in-home or community-based services as an alternative to secure detention.

– Urging governments, businesses, nongovernmental organizations and other organizations to consider and integrate Rule of Law initiatives with global environmental issues.

– Urging Congress to pass legislation strengthening protections for victims of human trafficking.

– Supporting procedures and standards designed to ensure whenever possible, federal civil cases are not dismissed based solely on the state secrets privilege.

– Adopting principles to govern criminal legal system responses to major disasters that maintain fidelity to the rule of law.

For full copies of the policy reports visit www.abanet.org/leadership/2007/annual/.

The Section Council met Aug. 11-12, to discuss among other things, proposed Prosecutorial Investigation Standards. Election of officers and council members was held immediately following the meeting.

During the discussion of the revised draft of the Prosecution Investigative Standards, the Council asked the Standards Committee to clarify several provisions, including those on private payments to prosecutors, prosecutorial knowledge of informants' identities, and prosecutorial retention of evidence. The second reading will take place at the Fall

Council meeting. If approved at that time, the proposed Standards will be submitted for consideration of the ABA House of Delegates in February 2008.

Bruce Nicholson, ABA Governmental Affairs liaison to the Section, reported on the status of major legislation of interest to the Section such as Prisoner Reentry, Federal Sentencing Guidelines, Indigent Defense Funding, Court Security and Juvenile Justice. (See the legislative update on page 7.)

The Section membership, on motion made and seconded, elected the slate of officers and council members nominated by the Section Nominating Committee. Officers and new Council members serving 2007-08 include:

Chair: Stephen A. Saltzburg
 Chair-Elect: Anthony Joseph
 Delegates: Stephen A. Saltzburg, Neal R. Sonnett
 Budget Officer: Ronald Goldstock
 Five Vice Chairs At Large: James M. Cole, Susan Gaertner, Ernestine Gray, Robert Litt, and Bruce Zagaris
 Five New Council Members: Bruce Brown, Lynn Branham, Christopher Chiles, Cynthia Orr, and Gary Walker

Finally the Council expressed its gratitude for the excellent work and service provided by departing



Former CJS Chair Ron Smith (second from right, with 2006-07 CJS Chair Robert Johnson) was recognized for his years of service working on the Section's Law Student Mock Trial Competition during a joint reception with the Section of Dispute Resolution on Aug. 10 in San Francisco. Also pictured are Stephen Komie (far left) and Albert Krieger (far right).



Eileen Hirsch, Assistant State Public Defender in the Wisconsin State Public Defender's Madison Appellate Office received the Livingston Hall Juvenile Justice Award on Aug. 11 in San Francisco, presented by 2007-08 CJS Chair Stephen Saltzburg.

Money Laundering Enforcement Conference

The 2007 American Bar Association/American Bankers Association's 20th annual Money Laundering Enforcement Conference will take place on Oct. 21-23 at the Marriott Wardman Park Hotel in Washington, D.C.

General sessions and multiple breakout sessions will provide incisive, up-to-date solutions to the challenges faced daily by bankers and lawyers alike. Issues at the conference to be addressed include the latest in assessing, scoring and managing money laundering and terrorist financing risks; the latest SAR trends, with real-life examples and guidance; and the impact of non-traditional government processes.

The conference not only provides instruction from the nation's top AML/BSA experts, it also creates opportunities to network with bankers and lawyers from around the country. For more information on the conference visit www.abanet.org/crimjust/calendar.

members Benton Campbell, Mark DeCaria, Sara Dill, and James Holderman.

The Section sponsored five CLE presentations at the 2007 Annual Meeting, all addressing issues on the forefront of criminal law practice and each well attended.

"Invasion of the Personal Information Snatchers: Pretexting, Caller-ID Spoofing and Beyond" drew more than 225 attendees and featured a panel of Justice Department officials, banking and privacy law experts addressing the ways technology has changed the landscape of personal identity theft and provided an overview of the July 2007 legislative package offered by the Department of Justice on ID theft.

The other CLE programs examined topics such as: a review of constitutional cases, evidentiary issues, and habeas cases that came before the U.S. Supreme Court during the last term; the historical ramification and significance 150 years after the Supreme Court ruling in the Dred Scott Case; a discussion on negotiating points and the law regarding pleas and sentencing; and the Right to Counsel for defendants in juvenile delinquency cases, focusing on the implications of the 1967 Supreme Court decision in *In re Gault*.

The Section recognized two individuals for their outstanding contributions to

criminal law field at the Annual Meeting. Former CJS Chair *Ron Smith* was recognized for his years of service working on the Section's Law Student Mock Trial Competition during a joint reception with the Section of Dispute Resolution on Aug. 10. *Eileen Hirsch*, Assistant State Public Defender in the Wisconsin State Public Defender's Madison Appellate Office received the Livingston Hall Juvenile Justice Award on Aug. 11. Hirsch was recognized for her outstanding appellate advocacy for children's rights and interests, and for her litigation of *In re Jerrell C. J.*, where she persuaded the Wisconsin Supreme Court to adopt an electronic recording requirement for all juvenile interrogations.

Staff Changes

Robert Snoddy is the Section's new Outreach Coordinator, handling all media-related matters, drafting the Section quarterly communiqués to State and Local Bars and other criminal justice organizations and expanding our outreach databases to better convey the Section's work and mission to outside entities. Robert comes to us from within the ABA having served as a public affairs specialist in the Media Relations and Communication Services division.

Shamika Dicks is the new Administrative Assistant to the Standards Project.

New Info on the CJS Web
www.abanet.org/crimjust

Committee Goals, 2007-2008

Highlights and Photos from the 2007 Annual Meeting in SF

Dred Scott! 150 Years Later (multi-media highlight of a CLE program from the SF annual meeting)

Weekly Criminal Justice News Round-Up

White Collar Crime Committee Newsletter (new 9/07 edition)

Criminal Justice Section to Promote Community Awareness on a Plethora of Issues

The Section was the lead entity and drafter of the of the *Mediation in Criminal Matters* proposal which was awarded an \$80,000 grant to study ways to create a pathway for greater utilization of mediation within the criminal justice arena and to train volunteers from State and Local Bar Associations in mediation and model programs.

The project will be governed by an Advisory Committee made up of two representatives and a staff member from a diverse contingency of eight ABA groups: Section of Dispute Resolution; Criminal Justice Section; State and Local Government; Government and Public Sector Lawyer's Division; Judicial Division; Commission on Domestic Violence; Commission on Effective Criminal Sanctions; and Standing Committee on Legal Aid and Indigent Defense.

The ABA groups intend to work collaboratively on the important and needed expansion of dispute resolution methods in the processing as well as resolution of many different criminal or quasi-criminal matters. The proposed project covers the spectrum of criminal practice and procedures. The project will provide methods for increased exposure, experimentation, education and practice of dispute resolution methods by prosecutors, defense counsel and criminal court judges. The project involves documenting current model programs and sharing ideas within the criminal justice system by creating resource manuals and web presentations containing summaries of model programs and best practices and announcing those to the field through the outreach efforts of the collaborating organizations.

The Section cooperated on the *Legal Assistance and Education for LGBT Victims of Domestic Violence* with the ABA Section of Individual Rights and Responsibilities and the ABA Commission on Domestic Violence. The project hopes to develop a core set of resources and trainings for attorneys to: (a) raise awareness within the legal profession about the need for legal services for gay, lesbian, transgender and bi-sexual victims of domestic violence; and (b) train attorneys on the specific legal needs and remedies available to LGBT domestic violence victims.

The Section also has agreed to be a participant on the *National Security Debates Project* with the Standing Committee on National Security, the Public Education Division, the Section of International Law, and the Section of International Rights and Responsibilities.

MEMBER NEWS



Criminal Justice Section leader and Maryland Court of Appeals Judge **Irma S. Raker** received the 2007 *Margaret Brent Women Lawyers of Achievement Award* at the ABA Annual Meeting in San Francisco. The award, given by the ABA Commission on Women in the Profession, honors outstanding women lawyers who have achieved professional excellence in their area of specialty and have actively paved the way to success for others.

NEW BOOKS

Street Legal: A Guide to Pre-trial Criminal Procedures for Police, Prosecutors, and Defenders by Ken Wallentine, a 396-page book provides specific guidance on pre-trial criminal procedure of all sorts, and explains in understandable terms “what you can do and what you can’t do” under 4th Amendment search and seizure law. From traffic checkpoints and forceful felony arrest, from Miranda warnings to inmate and cell searches, it’s all covered in this concise reference. Search warrants, electronic surveillance, and use of canine search and seizure are also covered in great detail. To order, see www.abanet.org/crimjust/pubs.

The CJS Standards Committee has produced the Third Edition ***ABA Criminal Justice Standards on Pretrial Release***. This publication contains the “black letter” ABA Criminal Justice Standards on Pretrial Release approved by the House of Delegates in 2002, the history and a discussion of the rationale for each Standard, and updated references to relevant case law, legislation, literature, and research. To order, see www.abanet.org/crimjust/pubs.

The Criminal Justice Section office has produced ***Annual Report, 2006-2007***, with 2006-2007 Chair Robert Johnson’s introduction and a summary of Section highlights in policy development, publishing and technology, continuing legal education, outreach, membership and awards, divisions and committees. The report can be viewed at the CJS website at www.abanet.org/crimjust.

**The 2007 CJS Fall Conference
Washington, DC, November 2, 2007**

**Ethics and Professionalism in Plea Negotiations:
Best Practices and Worst Pitfalls**

**George Washington University Marvin Center
(800 21st St., NW)**



Featuring a series of CLE programs focusing on the often utilized but seldom examined process of plea negotiating, the Council meeting, and various substantive committee meetings the Criminal Justice Section Fall Conference will bring together members of the criminal justice community to discuss issues of critical importance to the field on Nov. 2-4 at the Marvin Center on the George Washington University Campus in Washington, D.C.

Criminal justice experts from the academic, government, public and private sectors will take part in panel discussions that examine issues such as decision making in the plea bargaining process; the actual conduct of plea discussions between the prosecutor and defense attorney and the appropriate judicial role (if any) in the process; and the implementation of plea agreements.

Section Committee and Council meetings will debate and discuss policy issues ranging from prosecutor responsibilities when presented with evidence of convicted defendant innocence to criminal record policy and proposed guidelines governing contacts with employees of a business organization. For a complete listing of CLE programs and more information on the Fall Conference visit www.abanet.org/crimjust

Registration Form:

Ethics and Professionalism in Plea Negotiations: Best Practices and Worst Pitfalls

Advance Registration Deadline: October 19, 2007

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: Members: \$150; Non Members: \$175; Law Students: \$25
(Cancellations must be received by Oct. 5. Cancellations subject to an administrative fee of \$50.)

Name _____ Organization _____

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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.

Multiple Agencies Combat ID Theft

The President's Task Force on Identity Theft, which is chaired by the Attorney General and the Chairman of the Federal Trade Commission and composed of high-level officials from multiple federal agencies, issued a report entitled "Combating Identity Theft: A Strategic Plan" in April. The task force aims to make the federal government's efforts combating identity theft more effective and efficient, particularly in the areas of awareness, prevention, detection, and prosecution. For more information, visit <http://www.idtheft.gov>.

DOJ Targets Fraudulent Medicare Billing

The Department of Justice's Medicare Fraud Strike Force, a collaborative effort of federal, state, and local investigators, is targeting fraudulent billing of the Medicare program by health care companies. This multi-phase enforcement and regulatory project is designed to improve the quality of the health care industry and to reduce the potential for fraud. The strike force uses real-time analysis of Medicare billing data to identify potential fraud cases. The first phase of operations, which began in March in southern Florida, has resulted in 64 arrests and 25 convictions. To date, the strike force has not lost a single count before a jury and has a 100 percent conviction rate. Strike force teams are lead by a federal prosecutor supervised by both the

Criminal Division's Fraud Section and the U.S. Attorney's Office for the Southern District of Florida. For more information visit http://www.usdoj.gov/opa/pr/2007/May/07_ag_339.html

Feds Focus on Software Piracy Groups

Operation Fastlink, a major Department of Justice initiative to combat online software piracy worldwide, has resulted in over 50 convictions to date. This ongoing federal crackdown has involved 12 countries and targets organized piracy groups that are responsible for most of the initial illegal distribution of copyrighted movies, software, games and music on the Internet. For more information visit http://www.usdoj.gov/opa/pr/2004/April/04_crm_263.htm

NACDL Creates Electronic Discovery Task Force

The National Association of Criminal Defense Lawyers' new Task Force on E-Discovery will report on all aspects of the discovery process, including discovery production protocols for the prosecution and reciprocal protocols for the defense, party and non-party responses to subpoenas, fruits of computer and computer network search and access, especially involving encrypted and password-protected data, digital audio and video, and digital imaging of physical documents and the forensic reproduction of computer drives. It will also consider issues related to privilege and privacy, spoliation and disorganization, and the fair allocation of litigation support costs.

Task Force Created to Examine Drug Courts Operations

Another new NACDL project is the Task Force on Problem-Solving Courts, which will undertake a national study of how these courts operate, initially focusing on the increasingly-prevalent drug courts. Problem-solving courts emphasize rehabilitation over punishment and typically eschew the adversarial model in

favor of a "team approach" in which the defendant's recovery from a behavioral problem, such as substance abuse or gambling addiction, is the shared goal of the defense, prosecution, court, and treatment providers. As most practitioners now recognize, these courts offer opportunities to foster rehabilitation and avoid severe penal sanctions, but often require the premature or problematic waiver of fundamental rights. The objective is to identify what works and what does not work, through an array of methodologies including site visits, interviews, surveys, and public hearings. Ultimately the task force plans to develop protocols and recommendations for best practices to insure that the laudable goal of rehabilitation can be achieved within a constitutional framework.

NY State OCA Clips Criminal Report Information

The New York State Office of Court Administration is no longer providing in criminal history reports it sells to the public information about criminal cases where the disposition involves a maximum sentence of 15 days in jail or less. The move – which is the result of a lawsuit involving an 18-year-old who had applied for a job as a cashier with Sears Roebuck and claimed to have been told by Sears that he was rejected because OCA's criminal history report showed he had pleaded guilty a year earlier to disorderly conduct, a violation – was criticized by businesses that conduct background checks but praised by bar groups as needed to prevent harsh consequences for individuals who'd committed minor offenses.

Statewide Public Defender System Gets Boost in South Carolina

The South Carolina General Assembly has created a statewide public defender system for the state's 16 judicial circuits, including the state's 46 counties. The

legislature also appropriated an additional \$7 million in state funds for implementation of the legislation, which will take place over a two year period. Currently the state expends about \$12 million for the current public defender system, and the 39 counties with local public defender offices spend about \$9.4 million. The legislation requires the counties to maintain current levels of funding in dollars for indigent defense. The legislation requires each circuit to establish a juvenile offender division specializing in the criminal defense of juveniles. In addition, it enables the state Commission on Indigent Defense to arrange for systems of appointment of counsel for parents and other parties in child welfare cases in the family courts. The legislation also requires the state Commission to develop performance and caseload standards, serving as a resource center for the circuit defenders, and creates a system of accountability - state and local - which the current system lacks.

NLADA Annual Conference Set for November

The National Legal Aid & Defender Association's 2007 Annual Conference will be held November 7-10, 2007 in Tucson, Arizona. This conference is one of the leading national training events of the year for the civil legal aid, indigent defense and public interest law communities. For more information visit www.nlada.org/Training/Train_Annual/Annual_Home_thirdcol_Overview.

Newsletter Trumpets Los Angeles Anti-Gang Initiative

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) has published "OJJDP News @ a Glance," July/August 2007. The bimonthly online newsletter provides readers with news about OJJDP activities, publications, funding opportunities, and events. The issue's lead article describes the launching of a Los Angeles anti-gang initiative

modeled on OJJDP's Gang Reduction Program. The issue also reports on the upcoming September celebration of National Youth Court Month and OJJDP's 2007 Disproportionate Minority Contact conference, which will be held in Denver, CO, from October 25-27. The newsletter is available at http://www.ncjrs.gov/html/ojjdp/news_at_glance/219271/index.html

New NDAA Publication Examines Prosecutor's Obligations

The National College of District Attorneys recently published the Second Edition of "Doing Justice: A Prosecutor's Guide to Ethics and Civil Liability." The publication – which is an authoritative resource for practical, thorough and accurate information on a prosecutor's ethical and civil liability obligations – addresses such topics as Conflicts of Interest; Safe and Sound Jury Argument; Prosecutorial Liability and Immunity Pitfalls; and Responding to

Charges of Prosecutorial Misconduct. For more information visit http://www.ndaa.org/ncda/ncda_home.php

Workshop to Address Issues Facing Those Working With Female Offenders

The 12th National Workshop on Adult & Juvenile Female Offenders (Oct. 20-24) hosted by Maryland's Department of Public Safety & Correctional Services, the Department of Juvenile Services, and Maryland Criminal Justice Association offers a stimulating and informative conference on the issues that face corrections professionals who work specifically with female offenders. The conference theme: "Transforming Lives, Soaring to New Horizons" will be addressed by five days of presentations, discussions and workshops on key issues related to the management and treatment of this diverse population. For more information visit www.ajfo.org/.

Highlights from CLE Programs at the 2007 Annual Meeting



Invasion of the Personal Information Snatchers: Pretexting, Caller ID Spoofing and Beyond

This session addressed the use of social engineering and new technologies to obtain personal information and recent measures – including new federal legislation – designed to protect against such practices.



Dred Scott! 150 Years Later
Against the backdrop of the 150-year anniversary of the Dred Scott decision, a panel of leading attorneys and legal historians explored the significance and extraordinary role this historic decision has played in our legal system especially in the criminal justice system.

Legislative Update

By Bruce Nicholson

Prisoner Reentry

The Second Chance Act of 2007, bipartisan legislation to help prepare inmates and other ex-offenders to successfully return to their communities, is poised for final passage in both the House and Senate.

The House bill, H.R. 1593, had been scheduled for consideration by the full House of Representatives on May 15, 2007, but was pulled off the floor at the last minute by Democratic leaders. They were concerned that there were not enough votes to ensure its passage under suspension of the rules, where two-thirds of the House (290 members) must vote in favor of a bill to pass it. Since then, there have been ongoing negotiations between House leaders regarding amendments advocated by the Republican leadership that would narrow the scope and authorization funding level of the legislation. The Second Chance Act currently has 92 bipartisan cosponsors.

In earlier action, the House Judiciary Committee approved H.R. 1593 by voice vote following a lengthy markup session on March 28, 2007. The House bill was introduced on March 20, 2007 by Representatives Danny Davis (D-IL) and Chris Cannon (R-UT) and 13 other co-sponsors including House Judiciary Chair John Conyers, Jr. (D-MI) and Rep. Lamar Smith (R-TX), the Ranking Member. The House Judiciary Subcommittee on Crime, Terrorism and Homeland Security held a hearing

on H.R. 1593 on March 20, 2007. The Subcommittee hearing testimony is online at: <http://judiciary.house.gov/oversight.aspx?ID=286>. The Subcommittee cleared H.R. 1593 on March 27, 2007.

The Senate version of the Second Chance Act, S. 1060, has been listed on the Judiciary Committee schedule for markup action in July and may clear the Committee before the August break. Senators Joe Biden (D-DE), Sam Brownback (R-KS), Patrick Leahy (D-VT) and Arlen Specter (R-PA) introduced S.1060 on March 29, 2007. The Second Chance Act currently has 31 bipartisan Senate cosponsors. The Senate bill is nearly identical to its House counterpart.

The bipartisan bill authorizes assistance to states and localities to develop and implement strategic plans for providing and coordinating comprehensive efforts to enable ex-offenders to successfully reenter their communities. Such efforts include access to supports and services such as: family reunification, job training, education, housing, substance abuse and mental health services. The bill also establishes a federal inter-agency task force on offender reentry, provides for research on reentry, and creates a national resource center to collect and disseminate information on best practices in offender reentry. The legislation would provide grants to the states to assist them in reducing crime by improving services and programs for state prisoners reentering communities, reforms to existing barriers in federal law that adversely affect people with both state and federal convictions, and provisions to strengthen federal protections for former prisoners in the areas of employment, housing and voting.

Federal Sentencing Guidelines

The United States Sentencing Commission on May 1, 2007 submitted to Congress its proposed changes in federal sentencing guidelines for 2007. The amendments package included two issues of great concern to the Section and the Association: an amendment to improve crack cocaine sentencing and a policy statement to give sentencing courts guidance on granting release to prisoners for extraordinary and compelling reasons. Margaret Colgate Love testified before the Sentencing Commission on sentence reduction criteria in March 2006. Stephen Saltzburg appeared before the Commission in November 2006 to reiterate our advocacy for adoption of sentence reduction criteria and also urged the Commission to address the disparity in sentencing for crack versus powder cocaine sentences.

Although current law, 18 U.S.C. § 3582(c) (1)(A)(i) gives courts authority, at any time upon motion of the Bureau of Prison (BOP) to reduce a prisoner's sentence to effectuate immediate release if it finds "extraordinary and compelling" reasons to justify the reduction, general policy issued by the Sentencing Commission does not include criteria to be applied or specific examples of what might constitute such reasons. The BOP rarely brings such motions and has done so only in cases of disabling illness or the imminent death of the prisoner. The May sentence reduction recommendation would add several criteria to existing guidelines for sentence reduction for prisoners who are not a danger to the safety of any person or to the community.

The policy statement gives guidance to the courts considering such motions and adds the following criteria for sentence reduction: (i) The defendant

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is suffering from a terminal illness. (ii) The defendant is suffering from a permanent physical or mental condition, or is experiencing deteriorating physical or mental health because of the aging process, that diminishes the ability of the defendant to provide self-care within the correctional facility and for which conventional treatment promises no substantial improvement. (iii) The death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children. (iv) As determined by the director of BOP, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described above.

The Sentencing Commission amendment proposed regarding crack cocaine sentencing would modify the drug quantity thresholds by two levels for sentencing ranges that trigger mandatory minimum penalties. The Commission estimates that 78 percent of crack cocaine offenses will be affected with an average sentence reduction of 16 months. Congress has six months to study the proposed guideline amendments and may reject them. If no action is taken by November 1, the amendments automatically become effective.

The Commission followed its guideline amendment recommendations with the issuance of a new report to Congress on crack cocaine sentencing on May 21. It calls on Congress, as the Commission has several times since 1996, to reduce the "unjustifiably harsher" penalties for crack versus powder cocaine offenses.

Drug Sentencing/Crack-Powder Cocaine

Several bills have been introduced in Congress to address the federal sentencing disparity for crack versus powder cocaine offenses since the May

recommendations and report of the U.S. Sentencing Commission.

On May 14, 2007, Senator Jeff Sessions (R-AL) introduced S.1383, the Drug Sentencing Reform Act of 2007. Senators John Cornyn (R-TX), Mark Pryor (D-AR) and Ken Salazar (D-CO) are cosponsors. The Sessions bill would raise quantities that trigger mandatory minimum sentences for crack cocaine and lower thresholds for powder cocaine offenses to reach a 20:1 ratio and reduce the penalty for simple possession from 5 to 1 year for many crack offenses.

Senators Orrin Hatch (R-UT), Ted Kennedy (D-MA), Dianne Feinstein (D-CA), and Arlen Specter introduced S. 1685, the Fairness in Drug Sentencing Act on June 25, 2007. Their bill would raise quantity thresholds that trigger mandatory minimum sentences for crack cocaine fivefold while leaving powder triggers at current law levels in order to achieve a 20:1 ratio. S.1685 would eliminate mandatory minimum sentences for simple possession.

On June 27, Senator Joe Biden (D-DE) introduced a 1:1 bill, S. 1711, the Drug Sentencing Reform Trafficking Act of 2007. S. 1711 has added Senators John Kerry (D-MA) and Russ Feingold (D-WI) as cosponsors. The Biden bill would raise the crack quantity thresholds by a factor of 100 to eliminate the current 100:1 disparity with powder offense quantities. It would also eliminate the mandatory minimum sentence for simple possession offenses. It would recommend sentence enhancements for offenses that involve dangerous weapons or violence and consideration in determining sentence guidelines of the leadership role of the defendant in criminal drug activity.

In the House, Rep. Charles Rangel (D-NY) introduced H.R. 460, the Crack-Cocaine Equitable Sentencing Act of 2007, legislation to eliminate the disparity

in sentencing policy for crack versus powder offenses on January 12, 2007. H.R. 460 currently has 12 cosponsors and has been jointly referred to the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security and to the House Energy and Commerce Subcommittee on Health.

Senator Biden enjoys the advantage in the Senate of presiding over the Judiciary Subcommittee on Crime and plans to work on adding Senate Democratic cosponsors in coming weeks before scheduling a hearing in the fall and a markup shortly thereafter.

Gang Prevention

Bipartisan legislation intended to deter gang violence has moved forward in the Senate but no action has yet occurred in the House.

On June 14, 2007, the Senate Judiciary Committee approved a substitute amendment to S. 456, the Gang Abatement and Prevention Act, by a 17-0 bipartisan vote. The substitute version of S. 456 approved by the Committee included new language that tightens the proposed definition of gang membership under the bill and also includes a revised provision requiring that each member of a gang individually commit a gang crime in order to be charged with such a crime, a change sought by several members of the Committee. S. 456 currently has 44 bipartisan cosponsors in the Senate.

Sen. Dianne Feinstein (D-CA) introduced S. 456 on January 31, 2007 in the Senate with bipartisan cosponsors Senators Orrin Hatch (R-UT), Maria Cantwell (D-WA), Jon Kyl (R-AZ), Joe Biden (D-DE), Arlen Specter (R-PA), Chuck Schumer (D-NY) and John Cornyn (R-TX). S.456 is similar to Senate legislation introduced in the past two Congresses, but has been modified to propose new enhanced criminal sentences to replace numerous

mandatory minimum sentences and does not contain any new death penalty provisions as were proposed in predecessor legislation. Sen. Feinstein also dropped proposals from previous bills that would create a presumption in favor of transferring juveniles for trial as adults with regard to a range of gang-related offenses. S. 456 would increase penalties for various street gang-related offenses, expand the scope of predicate crimes for authorization of interception of wire, oral and electronic communications to cover violations relating to criminal street gangs, and authorize the Attorney General to award grants to fund programs to combat gang violence, including \$100 million annually through 2012 for federal, state, and local law enforcement cooperation in "high intensity interstate gang activity" areas, as well as for hiring 94 new assistant U.S. attorneys for assignment to those areas.

Rep. Adam Schiff (D-CA) introduced House companion legislation, H.R.1582 on March 20, 2007, with Rep. Mary Bono (R-CA) as its cosponsor. It currently has 15 House cosponsors. H.R. 1582 was referred to the House Judiciary Committee for further action. Staff with the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security are reportedly working on draft anti-gang legislation that would more broadly support prevention programs than the Senate bill.

Juvenile Justice

Authorization for the federal Juvenile Justice and Delinquency Prevention Act (JJDP), first enacted in 1974 and last reauthorized in 2002, is set to expire on September 30, 2007. Congressional hearings on reauthorization and amendment of JJDP began in July with a broad oversight hearing on July 12, 2007, conducted jointly by the House Judiciary Subcommittee on

Crime, Terrorism, and Homeland Security, and the House Education and Labor Subcommittee on Health Families and Communities. The July 12 hearing testimony is posted online at: <http://judiciary.house.gov/oversight.aspx?ID=350>. Further hearings are expected in September when reauthorizing legislation is likely to be introduced and moved forward by the House Education and Labor Committee. A second House Education subcommittee hearing is planned for mid-September.

The Senate Judiciary Committee held a hearing on the subject of "Mentoring and Community-based Solutions to Youth Violence" on February 19, 2007. The hearing testimony is online at: <http://judiciary.senate.gov/hearing.cfm?id=2553>. The House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing entitled "Making Communities Safer: Youth Violence and Gang Interventions That Work." The House hearing testimony is online at: <http://judiciary.house.gov/oversight.aspx?ID=272>.

Rep. Eddie Bernice Johnson (D-TX) introduced the Youth Crime Deterrence Act, H.R. 1806, on March 29, 2007. The bill would amend the Juvenile Justice and Delinquency Prevention Act (JJDP) of 1974 to restore several of the Act's authorities that were stricken in 2002, such as juvenile mentoring, gang prevention, state challenge grants, and an intervention program for juvenile offender victims of child abuse and neglect. The bill also includes a repeal of the valid court order exemption to the Act's core requirement for deinstitutionalization of status offenders and would amend state plan requirements around youth missing from care and youth reentry and aftercare requirements. H.R. 1806 currently has six cosponsors and has been referred to the House Committee on Education and Labor.

The FY 08 budget recommendations, submitted to Congress on February 5, 2007, for the Department of Justice (DOJ) have called for consolidation of the DOJ administered Office of Juvenile Justice Delinquency Prevention programs, the COPS program and the Violence Against Women Office and for cuts in the combined programs of approximately 50 percent. No FY 08 funding levels were proposed by the Administration for any of the current Juvenile Justice and Delinquency Prevention programs. Instead, the administration has proposed a single, new "Child Safety and Juvenile Justice" block grant that is 25% lower than the total FY 07 funding for the programs eliminated. The House Appropriations Committee approved a draft bill on July 12, 2007, that includes the first increase since 2001 in JJDP programs, recommending that current year funding of \$308.7 million be increased for FY 08 to \$346. The Senate Appropriations approved a recommendation, S. 1745, on June 28, 2007, that would maintain current year funding. Neither the House nor the Senate appropriations measures support the President's proposed new block grant.

Court Security

The House on July 10, 2007, by voice vote, and the Senate on April 19, 2007, by a vote of 97-0, passed companion bills to strengthen security for court officers and enhance safeguards for judges and their families. The House-passed bill, H.R. 660 and Senate-approved bill, S. 378, both titled as the Court Security Improvement Act of 2007, must now be reconciled to resolve minor differences before being submitted to the President for his signature.

House Judiciary Chair John Conyers, Jr. (D-MI), along with Reps. Louis Gohmert (R-TX) and Bobby Scott (D-VA), introduced H.R. 660, on January

24, 2007. The Senate companion bill, S. 378, was also introduced on January 24 by Sen. Patrick Leahy (D-VT). The House twice passed court security legislation in the last Congress, but those bills contained a number of controversial provisions that were unacceptable to the Senate, including proposals to strip federal courts of jurisdiction to review habeas corpus petitions based on claimed sentencing errors or rulings of “harmless error”, new death penalty offenses, and expanded authorization for federal officials to carry concealed firearms. After the November 2006 elections, a version of court security legislation stripped of most of these provisions cleared the Senate just before the 109th Congress adjourned. The new House bill was introduced on a bipartisan basis without unrelated controversial provisions.

H.R. 660 and S. 378 as passed contain redaction authority to protect judges private information, provide increased funding for judicial security programs and create a number of new crimes including a provision regarding “malicious recording of fictitious liens against federal judges and federal law enforcement officers.” The legislation directs the Attorney General to report to the Judiciary Committee on the security of federal prosecutors arising from the prosecution of terrorists, violent street gangs, and drug traffickers among other classes of defendants. The legislation lists a range of security issues to be addressed in the report, including the number and nature of threats and assaults against prosecutors, security measures in place, and training.

The Senate Judiciary Committee held a hearing on S. 378 on February 14, 2007. The testimony is at: judiciary.senate.gov/hearing.cfm?id=2526. The Committee approved S. 660 on March 1, 2007 by voice vote. The Committee report, No. 110-42 at thomas.loc.gov/cgi-bin/

[cpquery/R?cp110:FLD010:@1\(sr042\)](http://cpquery/R?cp110:FLD010:@1(sr042)) was filed on March 29, 2007.

Custodial Interrogation

Representative Keith Ellison (D-MN) recently introduced a bill to require the electronic recording of custodial interrogations in federal criminal cases. H.R. 3027, the Effective Law Enforcement through Transparent Interrogations Act of 2007, was introduced in the House on July 12, 2007, and was referred to the House Judiciary Committee. It would provide that statements made by individuals in an unrecorded custodial interrogation inadmissible against that individual in a prosecution for a federal felony offense except in cases where a court determines that an imminent threat of bodily harm or other exigent circumstances made recording of the interrogation impracticable.

Loan Forgiveness

The House and Senate approved final legislation, H.R. 2669, the College Cost Reduction Act, that contains student loan forgiveness authorization that will provide limited loan forgiveness for prosecutors and public defenders, and other public interest attorneys. President Bush is expected to sign the legislation into law shortly.

In July 2007 both the House and Senate approved by bipartisan votes differing versions of H.R. 2669 (Miller D-CA), the College Cost Reduction Act of 2007, which both include language that would allow certain professions, including “public interest legal services (including prosecutors and public defenders)” to have their qualifying loans repaid following 10 years of service and repayment. The ABA supports both House and Senate versions, but the House language (Section 132), through the work of Rep. Sarbanes (D-MD), would also expressly include non-profit legal advocacy for low-income communities, as well as 501(c) (3) non-profit

organizations, generally. Also under both bills is a provision that recognizes the same class of public interest workers as professions of “national need,” qualifying such persons to receive a one-time award of up to \$5,000 following five years of service.

Hate Crimes

The House of Representatives on May 3, 2007 passed legislation to expand federal hate-crimes law by a 237-180 vote, notwithstanding a White House veto threat issued just before the vote. The House bill, H.R.1592, the Local Law Enforcement Hate Crimes Prevention Act of 2007, was introduced by Representative John Conyers, Jr. (D-MI) on March 20, 2007.

Current federal hate-crimes law applies to the use or threat of force based on race, color, religion or national origin in a way that interferes with the victim’s ability to engage in six specific “federally protected” activities. H.R. 1592 would eliminate the “federally protected activity” requirement and allow federal law enforcement officials to broadly assist state and local officials and to prosecute hate crimes.

Similar legislation was introduced in the Senate April 12, 2007 by Senator Edward Kennedy (D-MA) as S. 1105, the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007. S. 1105 would authorize the Attorney General to provide technical, forensic, prosecutorial or other assistance for any crime of violence under federal law or a felony under state, local or tribal law, that is motivated by prejudice based on the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim or is a state, local, or tribal hate crime law violation. S. 1105 was referred to the Senate Judiciary Committee.

Policy Update

POLICY APPROVED BY THE ABA HOUSE OF DELEGATES IN AUGUST 2007

The ABA Criminal Justice Section endorsed recommendations on Medicaid eligibility for individuals incarcerated and newly-released from custody; adopting principles to govern criminal legal system responses to major disasters that maintain fidelity to the rule of law; calling on all bar associations and other regulatory bodies to waive dues and CLE requirements for deployed lawyers; urging Congress to pass legislation strengthening protections for victims of human trafficking; encourage jurisdictions to pass laws that require the provision of evidence-based pre-court diversion and early intervention services for youth who are alleged to have committed status offenses; integrating Rule of Law initiatives with global environmental issues; supporting procedures and standards designed to ensure whenever possible, federal civil cases are not dismissed based solely on the state secrets privilege; and urging Congress to insure that detainees are treated in accordance of Geneva Convention guidelines.

These were submitted to the House of Delegates for consideration at the annual meeting in San Francisco. All recommendations were approved as official ABA policy. For more information on these and other policies visit the ABA House of Delegates website www.abanet.org/leadership/house/home.html.

Healthcare for Prisoners and Recently Released Persons

As approved by the House of Delegates, the recommendation urges federal, state, local and territorial governments to maintain the Medicaid eligibility of otherwise-eligible incarcerated persons to provide continuity of Medicaid eligibility to persons newly-released from custody, and to suspend, rather than terminate, the Medicaid enrollment of persons who become incarcerated. For a copy of the recommendation and report visit www.abanet.org/leadership/2007/annual/docs/hundredtwentytwo.doc

Preserving The Rule of Law During Calamity

The Section co-sponsored the Section of Litigation's recommendation which includes but are not limited to the following principles designed so that the legal system maintains fidelity to the rule of law even in times of a major disaster: (1) the preservation of the rule of law requires proactive planning, preparation and training before a major disaster strikes; (2) all those involved in the justice system must work to assure the ongoing integrity of the system in times of major disaster; (3) in times of a major disaster the requirements of the Constitution regarding criminal prosecution must be respected; (4) Government assistance mandated by law should be distributed in an expeditious and efficient manner consistent with principles of equal treatment, due process and transparency; and (5) to the extent feasible, attorneys should provide pro bono representation to persons affected by a major disaster who seek either compensation or assistance.

For a copy of the recommendation and report visit www.abanet.org/leadership/2007/annual/docs/hundredthirteen.doc

Bar Dues/CLE Waiver for Deployed Lawyers

The Section co-sponsored a recommendation brought by the Section of Public Contract Law urging all bar associations and other regulatory bodies to adopt a policy that provides for the waiver or suspension of association dues, CLE requirements and other membership obligations for members who are serving in the U.S. Armed Forces and are performing services in a Combat Zone. Under such policy, a waiver or suspension may be requested by the member or by an individual authorized by the member, and membership dues, CLE requirements and other membership obligations will be re-activated upon the member's release from duty in a Combat Zone. Suspension or waiver of one's general membership obligations does not relieve a member of his or her duty to meet the bar's ethical requirements. For a full copy of the recommendation and report visit www.abanet.org/leadership/2007/annual/docs/hundredfifteen.DOC

Protection and Assistance for Victims of Human Trafficking

The Section co-sponsored a recommendation brought by the Task Force on International Rule of Law Symposia that urges Congress to pass legislation that strengthens protection and assistance for victims of trafficking in persons, both citizens and non-citizens, and encourages state, local, territorial, tribal, specialty, and foreign bar associations to engage members of the legal profession in raising awareness of trafficking in persons in their communities and in providing pro bono legal services to victims of trafficking. A complete copy of the recommendation and report is available

See the latest Policy Update at:
www.abanet.org/crimjust/policy

at www.abanet.org/leadership/2007/annual/docs/hundredtenc.doc

Early Intervention Services for Youth at Risk

The Commission on Youth at Risk brought a recommendation urging state, local, territorial, and tribal jurisdictions to pass laws and support policies and programs that divert alleged juvenile status offenders from court jurisdiction that: (1) Mandate the development and implementation of targeted evidence-based programs that provide juvenile, family-focused, and strength-based early intervention and pre-court prevention services and treatment to alleged juvenile status offenders and their families; and (2) Promote the development of gender-responsive programs, treatment, and services for alleged juvenile status offenders. A copy of the recommendation and report is available at www.abanet.org/leadership/2007/annual/docs/hundredfour.doc

Avoiding Dismissal of a Civil Action Based on the State Secrets Privilege

The Section of Individual Rights and Responsibilities brought a recommendation urging Congress to enact legislation governing federal civil cases implicating the state secrets privilege (including cases in which the government is an original party or an intervener) that: (1) Permits the government to plead the privilege in its answer to particular allegations in the complaint without admitting or denying those allegations, and draw no adverse inferences against the government for doing so; (2) Requires the government to provide a full and complete explanation of its privilege claim and to make available for *in camera* review the evidence the government claims is subject to the privilege; (3) Requires a judicial assessment of the legitimacy of the government's privilege claims and deems privileged only evidence

disclosure of which the court finds is reasonably likely to be significantly detrimental or injurious to the national defense or to cause substantial injury to the diplomatic relations of the United States; and (4) Entitles the government to take an expedited interlocutory appeal from a district court decision authorizing the disclosure of evidence subject to a claim under the state secrets privilege, imposing sanctions for nondisclosure of such evidence, or refusing a protective order to prevent disclosure of such evidence. To view the full recommendation and report go to www.abanet.org/leadership/2007/annual/docs/hundredsixteena.doc

Following Geneva Convention Guidelines for Detainee Treatment and Interrogation

The Section co-sponsored a resolution urging Congress to enact legislation that: (1) Supersede the Executive Order of July 20, 2007, which authorizes the Central Intelligence Agency to operate a program of detention and interrogation that is inconsistent with U.S. obligations under Common Article 3 of the Geneva Conventions of August 12, 1949; and (2) Ensure that whenever foreign persons are captured, detained, interned or otherwise held within the custody or under the physical control of the United States, or interrogated in any location by agents of the United States (including private contractors), they are treated in accordance with the minimum protections afforded by Common Article 3 and in a manner fully consistent with the standards of treatment and interrogation techniques contained in FM 2-22.3, the U.S. Army Field Manual on Intelligence Interrogation of September 2006. A copy of the recommendation and report is available at www.abanet.org/leadership/2007/annual/docs/tenb.doc

See **Committee Updates and Resources** at www.abanet.org/crimjust/committees

POLICY IN DEVELOPMENT

Ethics, Gideon and Professionalism Committee

Revised Model Rule 3.8

The Section Council passed a recommendation to go to the House of Delegates at the Midyear Meeting in February advocating that when a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority; and (2) if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that evidence to the defendant unless a court authorizes delay, and undertake further inquiry, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit. The proposed additions to the ABA Model Rules also advocate that when a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction. A complete copy of the recommendation is available at www.abanet.org/crimjust/policy/revised3-8.pdf

White Collar Crime Committee

Guidelines Governing Contact with Employees of a Business Organization

The White Collar Crime Committee submitted policy recommendations to the Section Council at the Annual Meeting on August 9-12, 2007 on proposed guidelines under which the government would contact employees

of a business organization. The draft analyzes whether the unintended effect of the DOJ's privilege waiver and other cooperation policies has been to encourage certain practices that may run afoul of numerous provisions of the Model Rules of Professional Conduct. The report includes proposed guidelines to address the conflicts and ethical issues implicated by the foregoing practices. The Council asked the committee to seek comments from the ABA Task Force on Attorney-Client Privilege. To view a copy of the pre-council meeting draft recommendations go to www.abanet.org/crimjust/policy/contactemployees.pdf

Juvenile Justice Committee

Sentence Mitigation for Youthful Offenders

The Juvenile Justice Committee submitted a policy recommendation to the Section Council urging all federal, state, local and territorial governments to authorize and implement sentencing laws and rules of procedure that both protect public safety and give mitigating consideration to youthful offenders (i.e., those under age eighteen at the time of their offense) by adopting the following principles: 1) authorization and implementation of sentences for youthful offenders should generally be less punitive than comparable sentences for older offenders; 2) authorization and implementation of sentences for offenders under age eighteen at the time of their offense should recognize key mitigating considerations in sentencing youthful offenders, including those found by the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551, 567-570 (2005); and 3) authorization and implementation of sentences for youthful offenders should require that such offenders be eligible for parole consideration at a reasonable point during their sentences and, if parole is denied, be reconsidered for parole periodically thereafter.

The Council suggested that the recommendation be amended with the following changes: a) 18 years old versus 16 as the age for criminal court jurisdiction; b) the harms caused by violent crimes and the impact on victims should be included in the report; and c) an additional principle should be created regarding states carving out exceptions, along with added dialogue that addresses mandatory minimums. The committee passed a motion to support the resolution as amended with Council concerns and will send back to the Council in November at the Fall Meeting and bring before the ABA House of Delegates in February. To view a copy of the pre-council meeting draft recommendations go to www.abanet.org/crimjust/policy/sentencemitigation.pdf

Standards Committee

Prosecutorial Investigation Standards

In August, the Section Council continued its first reading of proposed Criminal Justice Standards on Prosecutorial Investigations that began at the May Council meeting. The second reading of these Standards is expected to take place in November and, if approved at that time, they will be presented to the ABA House of Delegates in February, 2008. As requested at the May meeting, the Standards Committee had drafted and circulated to the Council and Committee chairs and co-chairs a proposed Preamble explaining the scope of the Standards. In part, it reads: "These Standards are intended as a guide to professional conduct and performance for a prosecutor actively engaged in the conduct of a criminal investigation or performing a legally mandated investigative responsibility, e.g., serving as legal advisor to an investigative grand jury or as an applicant for a warrant to intercept communications. These Standards may not be applicable to a prosecutor serving in a minor supporting

role to an investigation undertaken and directed by law enforcement agents." To view the proposed preamble to the Standards go to www.abanet.org/crimjust/policy/prosecutorialinvestigations.pdf

Improving Procedural Fairness in the Federal Sentencing Process

The Section supports the recent recommendation of the Sentencing Initiative of the Constitution Project regarding improving procedural fairness in the federal sentencing process. Specifically, the Section endorses the proposed amendments to Rule 32 of the Federal Rules of Criminal Procedure set forth in the Constitution Project Report which calls for: (1) any party wishing to submit information to the probation officer in connection with a pre-sentence investigation shall, absent good cause, provide that information to the opposing party at the same time it is submitted to the probation officer; and (2) where information provided by a non-party has been used in the preparation of the pre-sentence report or otherwise submitted by the probation officer to the court, the probation officer shall, on request of any party, make such information available to the parties for inspection, copying, or photographing, or, if the information was provided to the probation officer in oral form, the probation officer shall provide a written summary of the information to the parties. A copy of the recommendation and report is available at www.abanet.org/crimjust/policy/proceduralfairness.pdf

Continued on the back cover

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

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make the factual findings that determine the maximum sentence a judge may lawfully impose.

In June 2007 the Supreme Court took a small step toward clearing up the uncertainty over the amount of weight judges should now give to the Guidelines. In its 8-1 decision in *Rita v. United States*,⁴ the Court affirmed the ability of appellate courts to use a “presumption of reasonableness” when the sentences under review were imposed within the applicable range under the Guidelines. *Rita* rejected arguments that such a presumption gives too much weight to the now-advisory Guidelines.

In the October 2007 term, the Court will begin to explore reasonableness review for sentences that fall *outside* of the Guidelines range. In *Gall v. United States*, argued October 3, 2007, the issue is whether extraordinary circumstances are required for a sentence that varies to an extraordinary extent from the Guidelines range. Eight circuits have adopted some version of this so-called proportionality principle. In *Kimbrough v. United States*, also argued October 3, the Court will examine the extent to which judges may rely on policy grounds to impose sentences outside the Guidelines range. In *Kimbrough*, the Fourth Circuit reversed a sentence outside the Guidelines in a crack case where the judge relied in part on criticisms by the Sentencing Commission itself and others of the so-called 100:1 ratio between crack and powder cocaine (in which the same penalty applies to a quantity of crack and 100 times that same quantity of powder cocaine).⁵

As the Court sets out to provide more direction on the role the Guidelines can and should play in the post-*Booker* era, there are certain things practitioners need

to know in order to represent their clients effectively:

1. The Guidelines remain an important part of the sentencing process.

For better or for worse, district judges still routinely begin the sentencing process by calculating the applicable Guidelines range. The *Rita* opinion recognizes this framework of calculating the Guideline range first, then determining whether there are grounds for a departure from that range (under the familiar pre-*Booker* “heartland” analysis created by statute and implemented in Chapter 5K of the Guidelines). Only after those steps are completed does the judge turn to whether there are reasons to impose a non-Guidelines sentence.

As a result, practitioners must be familiar with the Guidelines Manual, amendments to the Manual, and circuit court case law interpreting its various provisions. Especially with the appellate presumption of reasonableness for within-Guidelines sentences, it is difficult to understate the importance of having the district judge calculate the correct Guideline range at the start of the sentencing process. If counsel fails to object to the judge’s calculation of a range that is too high, it will be nearly impossible to convince the court of appeals that a sentence within that range is unreasonable. If the judge misapplies the Guidelines in the other direction over the government’s objection, the government will be able to seek reversal and remand without the court of appeals even getting to the issue whether the final outcome was reasonable.

2. The Guidelines are not presumptively reasonable at the district court level.

It is important to remember *Rita*’s directive that the presumption of reasonableness for a within-Guidelines sentence applies only at the appellate level, not in the district court.⁶ Although that distinction sounds counter-intuitive, it is

entirely consistent with the Court’s reason for endorsing the appellate-level presumption. The Court explained that the presumption derives from the fact that a sentencing judge has *independently* reached a result – after applying the relevant sentencing factors to the individual defendant – that accords with the Commission’s view of the appropriate application of sentencing considerations in the mine run of cases.⁷ Put differently, the judge’s decision, at the retail level, to impose a Guidelines sentence corroborates the soundness of the Commission’s selection of that sentencing range at the wholesale level. If a district judge arrives at a Guidelines sentence by presuming the reasonableness of such a sentence, the independent corroboration is lost.

If the government argues that the district judge should impose a sentence within the Guidelines because such a sentence is presumed to be reasonable, counsel should therefore respond that applying such a presumption – and requiring the defendant to overcome it in order to receive a non-Guidelines sentence – would be reversible error.

3. Sentences outside the applicable Guidelines range are not presumptively unreasonable.

The Court in *Rita* only needed to decide how to review a within-Guidelines sentence. Nonetheless, the Court also made some important statements about the appropriate standard of review for sentences outside the Guidelines. In particular, the Court stated that while courts of appeals may adopt a presumption of reasonableness for Guidelines sentences, this does not mean they may adopt a presumption of *unreasonableness* for sentences that are *outside* of the Guidelines.⁸ Moreover, a majority of the Justices, through separate concurring and dissenting opinions, emphasized that the deference given to within-Guidelines sentences also extends to non-Guidelines

sentences. For example, Justice Stevens, in a concurring opinion joined by Justice Ginsburg, sought to dispel the notion that the rebuttability of the presumption of reasonableness for within-Guidelines sentences “is more theoretical than real.”

Our decision today makes clear, however, that the rebuttability of the presumption is real. It should also be clear that appellate courts must review sentences individually and deferentially whether they are inside the Guidelines range (and thus potentially subject to a formal “presumption” of reasonableness) or outside that range. Given the clarity of our holding, I trust that those judges who had treated the Guidelines as virtually mandatory during the post-Booker interregnum will now recognize that the Guidelines are truly advisory.⁹

Because Justice Scalia (in a concurring opinion joined by Justice Thomas) and Justice Souter (in dissent) made separate cases for reasonableness review that is even less stringent than the approach taken by Justice Stevens, there is reason for optimism that a majority of the current Court will be deferential to district judges regardless of whether they impose sentences within or outside the Guidelines.

4. Rita gives counsel the chance to make many arguments that were unavailable under mandatory Guidelines.

In the portion of its opinion examining the adequacy of a judge’s statement of reasons for imposing a particular sentence, the Court in *Rita* noted that the following arguments for a non-Guidelines sentence are now available under an advisory Guidelines regime: “contest[ing] the Guidelines generally”

by arguing, for example that “the Guidelines reflect an unsound judgment”; and arguing that “the Guidelines sentence itself fails properly to reflect § 3553(a) considerations” or that “the case warrants a different sentence regardless.”¹⁰

Significantly, in the government’s merits brief in *Gall* it emphasized the power of judges “to vary” from the Guidelines range “based solely on policy disagreements with the Guidelines[.]”¹¹ The government needed to make this argument; a contrary rule allowing significant upward variances only when justified by *factual* circumstances would violate the Sixth Amendment requirement that juries make the findings that authorize a greater sentence. Defense counsel should not pass up the opportunity to argue that the Guidelines applied in a particular case are grounded in faulty policy judgments.

A final new argument to consider is an as-applied Sixth Amendment challenge to a sentence within the Guidelines range. This argument will be available where the Guidelines range based on judicial findings is significantly higher than the range available based solely on facts found by the jury or admitted by the defendant. For example, suppose the jury convicts the defendant of one or more counts of mail fraud. The judge finds that the loss exceeded \$20 million.

Under USSG § 2B1.1, this factor alone takes the defendant from a base offense level of 7 to an adjusted offense level of 29. Under the Sentencing Table at Chapter 5 of the Manual, this means the difference between a range of 0-to-6 months and a range of 87-to-108 months. Because a sentence anywhere near 87 months would be unreasonable unless supported by factual findings beyond those made by the jury, a sentence within that higher range would violate the Sixth Amendment.

The upcoming decisions in *Gall* and *Kimbrough* should provide greater guidance to practitioners and the lower courts on the ability to tailor sentences to the unique circumstances of each case. In the meantime, counsel should take full advantage of the tools already available in the post-*Booker* era.

Endnotes

¹ 18 U.S.C. § 3553(a).

² 543 U.S. 220 (2005).

³ 542 U.S. 296 (2004).

⁴ 127 S. Ct. 2456 (2001).

⁵ The briefs filed by the parties and *amici* in *Gall* and *Kimrough* can be found at <http://ussc.blogspot.com/>. Look for postings made in July, August and September 2007.

⁶ 127 S. Ct. at 2465.

⁷ *Id.*

⁸ 127 S. Ct. at 2467.

⁹ 127 S. Ct. at 2474 (Stevens, J., concurring).

¹⁰ 127 S. Ct. at 2465 & 2468.

¹¹ Government’s Brief in *Gall* at 36.

Practice Under the Federal Sentencing Guidelines

An important part of counsel’s effective representation of federal criminal defendants is a good understanding of the Sentencing Guidelines provisions applicable to a case, the case law interpreting those provisions, and the tools available for seeking a below-Guidelines sentence. The ABA publishes an excellent resource, updated annually in the fall, entitled “Practice Under the Federal Sentencing Guidelines.” This two volume treatise covers every step of the sentencing process with valuable tips for both new and experienced practitioners. Mr. Debold served as editor of the treatise’s supplements for 2008. The CJS website at www.abanet.org/crimjust will feature information on the book as it becomes available.

Update on Attorney Professionalism and Ethics

The following cases are reported on in greater detail in the *ABA/BNA Lawyers' Manual on Professional Conduct*, a multivolume reference and notification service that reports on issues relating to ethics and professionalism for lawyers. The publication may be obtained 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.

Lawyers Can't Charge Clients for Withdrawing Representation

The North Carolina Bar's ethics committee advised that in most situations, a lawyer may not charge a client for preparing and presenting a motion to withdraw representation. The committee decided fees may be charged for this only if the withdrawal advances the client's objectives for the representation – aside from replacing the lawyer – or if the court approves payment sought by a court-appointed lawyer. It makes no difference, the panel said, whether it is the client or the lawyer who first concludes that their relationship must end. Even when the difficulty of determining who is at fault is not a consideration, the lawyer simply may not shift the cost to the client, the committee declared, reiterating that attorneys are required by professional conduct rules and court rules to obtain permission from the court to withdraw. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.23, No. 17, p. 430 (Aug. 22, 2007).

No Sanctions Against Lawyers for Copying Notes Left in Post-Trial Jury Room

The U.S. Court of Appeals for the Fourth Circuit decided in an unpublished opinion that lawyer's post-trial copying of notes left by jurors on a flip chart in the jury room was not sanctionable under the court's inherent power or the

federal statute on vexatious attorney conduct. The court found that the conduct in question did not invade the jury's deliberations or evince bad faith. The jurors' notes were left in plain view, and the lawyers went into the jury room only because the courtroom clerk improperly enlisted their help in removing exhibits, it pointed out. See *Thomas v. Shatz*, 4th Cir., No. 06-1175, 8/7/07 unpublished. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.23, No. 17, p. 426 (Aug. 22, 2007).

Self-Defending Lawyers Can't Get Fees from Frivolous Lawsuit

A lawyer who defended himself in a lawsuit that was found to be frivolous may not be awarded attorneys' fees under California's statutory version of Rule 11. Additionally, since the lawyer did not have an attorney-client relationship with anyone and did not incur any obligation to pay fees, he is not entitled to a fee award as a sanction. See *Musaelian v. Adams*, Cal. Ct. App. 1st Dist., No. A112906, 7/25/07. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.23, No. 16, p. 399 (Aug. 8, 2007).

You Can't (well, at least not solicit to) Take Them With You...

Before actually leaving one firm to join another, a departing lawyer may provide current clients with factual information relevant to their choice of counsel but should not actively solicit clients to follow the lawyer to the new firm. The opinion, issued in a joint opinion by the ethics committees of the Pennsylvania and Philadelphia bar associations, replaces earlier guidance on professional obligations when a lawyer changes firms, and emphasizes that when a lawyer leaves a firm both the departing lawyer and the

firm have obligations to protect clients' and to honor clients' right to choose their counsel. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.23, No. 15, p. 384 (July 25, 2007).

Common Interest Doctrine Protects Information Between Accountants and Clients' Attorneys

The shared interest between an accounting firm and a law firm that advised clients on tax shelters protects a memorandum from the accounting firm's in-house lawyer to its outside counsel that also ended up in the law firm's possession despite the fact that the firm did not represent the accounting firm, the U.S. Court of Appeals for the Seventh Circuit holds. In the court's third ruling growing out of the IRS's effort to enforce administrative summonses against accounting firm BDO Seidman LLP, Judge Kenneth F. Ripple said that the common interest doctrine preserves the attorney-client privilege for the document at issue, even though it came into the possession of a third party. See *United States v. BDO Seidman LLP*, 7th Cir., No. 05-3260, 7/2/07. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.23, No. 14, p. 342 (July 11, 2007).

Get E-News?

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Policy Update

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Legal Problems of the Elderly Committee

Vigorous Prosecution of Crimes Against the Elderly

At the Fall Meeting on November 2-4, the Legal Problems of the Elderly Committee plans to submit policy recommendations to the Section Council urging the following steps be taken by federal, state, local, and territorial governments and their prosecutors to vigorously prosecute cases of elder abuse, neglect, and financial exploitation; (1) creation of special elder abuse units within the prosecutor's office or designate a specially trained prosecutor to handle elder abuse cases; (2) ensure that the victim assistance/services program within the staffing structure of their offices develop policies, procedures

and funding for providing specialized victim services to the elder population due to the unique needs of elder abuse victims and the many types of abuse inflicted on them; and (3) update state criminal statutes dealing specifically with the physical abuse, sexual assault, neglect and financial exploitation of elders and the need to take into account the special nature of elder victims and the types of crimes committed against them.

Commission on Effective Criminal Sanctions

Limiting Access to Criminal History Information

In May 2007, the Commission began work on a policy recommendation on access to criminal history information. Based on testimony from employers, criminal background screeners, persons with criminal records, media attorneys and civil legal aid attorneys during its Spring Conference, the Commission is

considering whether there are any circumstances under which records should be closed or sealed from general public access, and whether credit reporting agencies and others should be prohibited from disclosing records.

The Commission is seeking to balance the values of open access and individual privacy that underlie criminal records policy, and the important public safety goals of successful offender reentry and reintegration. The Commission has not yet formally presented any recommendation to the ABA House of Delegates, in light of concerns expressed by the press and business community. For more information visit the Commission's website at www.abanet.org/cecs

For a summary of additional policy issues the Section of Criminal Justice is developing visit the Section's policy page at www.abanet.org/crimjust/policy

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