



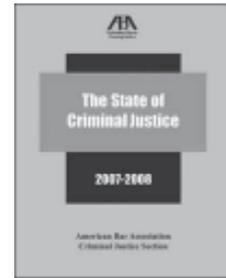
The American Bar Association

# Criminal Justice Section Newsletter

Volume 16, Issue 3 Spring 2008

## New Publication

### *The State of Criminal Justice 2007-2008* Recaps Year Filled with White Collar Crime, Death Penalty and Detainee Cases



State economic struggles, the war on terror and the continuing housing crises are each affecting the state of criminal justice in their own ways, as this year's report from the Criminal Justice Section outlines. *The State of Criminal Justice, 2007-2008* recaps the latest on such areas as white collar crime, national defense and terrorism, capital punishment, indigent defense, corrections and immigration. In addition, the report covers Supreme Court cases relating to criminal justice, as well as federal legislation on the topic. This volume also includes texts and reports of all of the recently adopted official ABA policies that address criminal justice issues.

Defense contractor abuses, the Milberg Weiss securities class action case and a sharp escalation in investigations and settlements under the Foreign Corrupt Practices Act were among the top areas in white collar crime during the past year. The report suggests that such prosecutions will continue but that "companies are becoming increasingly proactive in adopting improved corporate compliance and governance policies in light of the increasing risk presented by the ever-changing global economy and in aggressively ensuring that their employees follow these practices."

As the report indicates, "The Justice Department inspector general's office has reported sharp declines in the number of FBI agents and investigations dedicated to traditional crimes since the terrorists' attacks on Sept. 11, 2001." The year brought much new case law, including that relative to detention of enemy combatants, both in *Al-Marri-v. Wright* and *Bismullah v. Gates*, with respect to the Foreign Intelligence Surveillance Act and national security letters.

*The State of Criminal Justice* also summarizes trends relative to capital punishment, including several state moratoriums and the international trend away from the death penalty. State and local budgets that are being squeezed are leading to a strained judicial system, according to the report: "State and local budget cuts lead to attorney and staff layoffs." Fewer lawyers mean excessive caseloads. Despite challenges, the report offers hope with reform efforts.

As the report outlines, the escalation of the prison population has at least one interesting and somewhat distressing outcome. U.S. Bureau of the Census utilizes a "usual residence rule" in which inmates are counted as residents of the communities where they are confined, rather than where they lived before

being jailed. "Because most prisoners come from urban areas and most prisons are located in rural areas, the 'usual residence rule' has the effect of shifting voting power from cities to rural areas, rewarding prison communities with increased federal aid to the detriment of the communities from which the inmates come – the same communities most in need of help to prevent crime and improve social conditions."

While – or perhaps because of it – Congress has failed to enact comprehensive immigration reform, that issue remains a hot-button one. Inquiring about immigration status of criminal suspects, employment of illegal immigrants and even sanctions against individuals who assist those who are in this nation illegally are among the aspects that are sure to extend into the future.

The 342-page book may be purchased online, see [www.abanet.org/crimjust](http://www.abanet.org/crimjust).

**Inside This Issue:**  
**Practice Tips**  
**Ethics**  
**News from the Field**

## Section / Member News

### Tips for Parents to Protect Kids On-line Well Received

Many parents in the 21st Century encourage their kids to get on-line. But according to the National Center for Missing and Exploited Children, more than 10 percent of youths age 10 to 17 experience a sexual solicitation or approach online. The CJS Cyber Crime Committee is stepping in to help educate parents by releasing the "Top Ten Tips for Parents to Protect Kids from Online Predators." The Tips were developed in conjunction with the National Center for Missing & Exploited Children, and were also turned into an Audio News Release featuring ABA President Bill Neukom that is available on the ABA Web site and was picked-up by 911 radio stations nationwide and reached a listening audience of more than 8.3 million. The Tips themselves are available at [www.abanet.org/crimjust](http://www.abanet.org/crimjust). To listen to the Audio News Release visit <http://www.abavideonews.org/audiovideo.php?id=187>.

### Section Co-sponsors Program Addressing Federal Sentencing Guidelines Issues

The Criminal Justice Section, along with the Federal Bar Association and the United States Sentencing Commission, will co-sponsor the 17th Annual National Seminar on the Federal Sentencing Guidelines, May

21-23, 2008, at the Buena Vista Palace Hotel & Spa in Orlando, Florida. The program features panel addressing issues such as fraud and theft offenses, chapter three adjustments, and crack cocaine and retroactivity. More information can be found on the Commission's website, [www.uscc.gov](http://www.uscc.gov).

### Robert Schwartz's Other Job Receives National Recognition

CJS Juvenile Justice Committee co-chair Robert Schwartz's Juvenile Law Center was recently recognized as one of only eight organizations in six countries to receive the prestigious, international John D. and Catherine T. MacArthur Foundation Award for Creative and Effective Institutions. The award honors non-profit organizations that are highly creative and effective, have made an extraordinary impact in their fields and are helping to address some of the world's most challenging problems. The Center will receive \$500,000 as part of the award. Mr. Schwartz, executive director and co-founder of the Center, was honored to be recognized, and stated it's "the result of having so many wonderful folks, like the Criminal Justice Section, on our side of the fulcrum."

### Member News

Section Officer and Kings County District Attorney **Charles Joseph Hynes** received the Legal Leadership Award at the Brooklyn NAACP's third annual Freedom Fund Reception & Awards Ceremony on April 24, 2008. District Attorney Hynes, along with seven other honorees are being recognized for their active involvement

in the community. Mr. Hynes is being honored for his role in making Brooklyn safe and his fairness to all people in pursuit of justice.

**Terence MacCarthy**, Section Council Member and Executive Director of Federal Defender Program for the Northern District of Illinois, was recently honored by both the National Association of Criminal Defense Lawyers (NACDL) and the Stetson University College of Law. NACDL presented Mr. MacCarthy with its 2008 Champion of Justice, Legal Award. Stetson University College of law made the criminal defense legend the first recipient of its Lifetime Excellence in Advocacy Award, which is given for excellence in all facets of advocacy, from teaching others to representing clients.

### Staff Changes

CJS Staff Attorney **Kristie Kennedy** has accepted a new position with the law firm of Perkins Coie. **Jaime Turner**, Administrative Assistant to the Section, has moved to the ABA Section of Individual Rights and Responsibilities. **Pamela Meredith** has joined the staff as Administrative Assistant.

### Get E-News?

If you are a member of the Criminal Justice Section and have not opted out on receiving emails from the ABA, you receive monthly E-News, with latest updates on Section activities, policies, events and resources. Please contact the Service Center at 800-285-2221 if you do not receive the E-News.

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## The Standards

### New Guidance for Prosecutors Who Investigate

Traditionally, police investigate crimes and prosecutors use the fruits of police investigations to prosecute alleged perpetrators. This division of responsibilities continues to work well for most – but not all – investigations. Those relating to organized crime, drug rings, money laundering, cybercrime, terrorism, and other complex, far-reaching, and sophisticated crimes increasingly require prosecutorial involvement. This is because they not only involve more sophisticated investigative techniques but also implicate a wide range of legal rules relating to issues such as search and seizure, right to counsel, investigative grand juries, and immunity.

In February 2008, the ABA House of Delegates approved a new set of ABA Criminal Justice Standards to provide detailed guidance to the prosecutor involved in complicated investigations. The “Prosecutorial Investigation” Standards identify factors for the prosecutor to consider in undertaking, continuing, and terminating an investigation. They address the prosecutor’s proper relationship with victims, potential witnesses, and targets. By identifying “benefits” and “risks,” of various investigative techniques, they help the prosecutor decide whether or not it is appropriate to use confidential informants, subpoenas, search warrants, the investigative grand jury, technologically-assisted physical surveillance, and consensual and non-consensual electronic surveillance.

The Standards emphasize the need of training for line prosecutors, and highlight issues related to special prosecutors, independent counsel, and special prosecution units. They

underscore areas of concern when non-governmental resources or classified information are used. They identify the appropriate prosecutorial role in addressing suspected misconduct of law enforcement, judges, defense counsel, witnesses, informants and jurors. Dealing with illegally-obtained evidence and in responding to political pressures are addressed. Finally, the Standards call for review and oversight of criminal investigations.

The Standards were drafted over a several year period by a Task Force chaired by Ronald Goldstock. Task Force Reporter Steven Solow is currently drafting commentary to accompany the “black letter” Standards. Once approved by the Standards Committee, the commentary will be published along with the “black letter” in a supplement to the third edition “ABA Criminal Justice Standards on the Prosecution Function.”

#### **New Resource from the ABA Commission on Effective Criminal Sanctions:**

#### **Second Chances in the Criminal Justice System: Alternatives to Incarceration and Recovery Strategies**

This compendium of the ABA Commission on Effective Criminal Sanctions and the Justice Kennedy Commission focuses on the fairness and proportionality of punishment and on ways in which criminal offenders may avoid or escape the permanent legal disabilities and stigma of a criminal record. Available from the ABA Web Store at [www.abanet.org/abastore](http://www.abanet.org/abastore).

#### **Feedback Welcome**

Send to  
[crimjustice@abanet.org](mailto:crimjustice@abanet.org)



#### **Judge Wilkins Honored at the Charleston Spring Conference:**

Two prominent SC jurists and longtime friends helped Section Chair Stephen Saltzburg introduce Judge William Wilkins, as he received a lifetime achievement honor from the Criminal Justice Section. Pictured from left to right: 4<sup>th</sup> U.S. Circuit Judge William B. Traxler, Columbia lawyer William C. Hubbard, Judge William Wilkins, and CJS Chair Stephen Saltzburg.

## Charleston Spring Meeting Highlights

### Direct and Cross-Examination CLE

Criminal defense legend Terry MacCarthy, who has overseen the Federal Defender Program in Chicago since 1966, always believed that cross-examination is not an art, but a science that can be taught. “Very few were born with the art of cross-examination,” said MacCarthy, who gave an overview speech on the topic during the *Superior and Direct Cross-Examination* program at the Section’s Spring Meeting. “There was nothing like this when I was coming up. We had no training in trial advocacy.”

The well attended one-day CLE – which took place on April 4, 2008 – featured prominent national and South Carolina prosecutors and defense lawyers demonstrating key trial elements such as how to use direct examination to elicit both direct and circumstantial evidence as well as matters of fact and opinions; the best means for using a witness to lay the foundation for your case and how to dismantle the foundation attempted to be laid by opposing counsel; and how to question the witness’s ability to identify or recollect facts and try to impeach the witness.

The program, which consisted of four demonstrations of direct and cross-examination and each with a follow-up panel discussion, featured hard-hitting prosecutors such as Barney Geise and William Shepherd directing the witness while highly-acclaimed defense lawyers like Albert Krieger, and Charleston’s Dale Cobb and Bart Daniel attempted to discredit the testimony with their own unique cross-examination styles.

Several of the Palmetto State’s legal elite served on the program faculty including former South Carolina Bar president I.S. Leevy Johnson, Judge Allison R. Lee, Judge Clifton Newman, and Judge Matthew Perry.

Of course, this very successful endeavor would not have been possible without the generous support of our outside contributors. The Section would like to thank the law firms of Gedney M. Howe, III, P.A. and Nelson Mullins Riley & Scarborough LLP for serving as program sponsors. Our gratitude also goes out to the Charleston School of Law, the South Carolina Bar, the SC Solicitor’s Association, and the SC Association of Criminal Defense Lawyers for serving as co-sponsors.

The Section would also like to thank Defense Attorneys Bart Daniel, Matt Hubbell and Joe Griffith for hosting a welcoming reception and the Charleston School of Law for hosting a gathering at its facilities following the CLE program.

### Section Bestows Lifetime Achievement Honor on Judge William W. Wilkins

During the Spring Meeting the Section held a luncheon to recognize the extraordinary contributions of South Carolina native Judge William W. Wilkins to law and justice in America by presenting him with a special achievement honor.

For decades, Judge Wilkins has been committed to improving our criminal justice system on the state and federal levels. In the 1970s, when he was serving as the chief prosecuting official for a large judicial circuit in South Carolina, he created the first Child Abuse

Prosecution Unit in the state. He also created the first Pre-Trial Diversion Program, which provided an opportunity for young nonviolent first offenders to avoid a permanent criminal record. Additionally, he established the first Victim/Witness Assistance Unit that worked with victims, their families and witnesses to deal with the complexities of the legal system. All three of these innovative initiatives received national recognition and were used as models for other circuits.

On the federal level, Judge Wilkins served as a district judge, the first chair of the United States Sentencing Commission, chair of the Committee on Criminal Justice of the Judicial Conference, and chief judge of the United States Court of Appeals for the Fourth Circuit.

William C. Hubbard, a partner with the law firm Nelson Mullins Riley & Scarborough LLP in Columbia, has known Judge Wilkins for more than three decades and tried his first case before him. “In my trials and arguments before Judge Wilkins, I always came away thinking how fortunate our nation is to have a judge of such intellect, integrity, fairness and decisiveness,” said Hubbard, who in August will begin a two-year term as chair of the ABA House of Delegates, the second highest elected position in the 413,000-member organization. “He is a giant of the American judiciary, both for his work on the bench and for his leadership in improving our system of justice.”

As the first chair of the United States Sentencing Commission, Judge Wilkins presided over some of the greatest changes in federal sentencing this country has ever seen, helping to address difficult issues requiring a balance of national security and civil liberties concerns.

“Judge Wilkins represents the best in American justice,” said Stephen Saltzburg, chair of the ABA Criminal Justice Section. “As a distinguished prosecutor, he demonstrated that law enforcement could be fair as well as tough. Throughout his entire career, Judge Wilkins has demonstrated awareness and commitment to the important role that an independent bar and an independent judiciary play in assuring that every man, woman and child in America may demand and receive equal justice under law.”

An audio recording of Judge Wilkins speech is available at [www.abanet.org/crimjust/calendar/wilkins.wma](http://www.abanet.org/crimjust/calendar/wilkins.wma)

### Council Discusses Policy and Covers Criminal Law Landscape

On April 5 the Section Council met to vote and approve section policy to be submitted to the ABA House of Delegates in August, and discuss all matters and endeavors the Section is currently undertaking.

The Council meeting featured a special presentation by Gene Guerrero of the Open Society Institute concerning the recently passed Second Chance Act. Members engaged in policy discussions of Federal Rule 32, cross racial witness misidentification, Racial Profiling, the International Criminal Court, state enforcement of immigration laws, state sovereignty and drug laws, effective prison oversight, Model Rule 1.6, the Upjohn warnings, and differences between prosecutorial misconduct and prosecutorial error.

For a complete list of policy items the Section is taking to House of Delegates, along with all policy currently in development refer to the Section website at [www.abanet.org/crimjust/policy](http://www.abanet.org/crimjust/policy).

## CRIMINAL JUSTICE SECTION 2008 ANNUAL MEETING CLE PROGRAM SCHEDULE

**New York City – Aug. 7-10, 2008**

All CLE Programs will be held at the Sheraton New York  
(For updated details, visit the Section website at [www.abanet.org/crimjust](http://www.abanet.org/crimjust))

### Thursday, Aug. 7

2:00 p.m. – 3:30 p.m.

**Women in Criminal Law and the Criminal Justice Section**

### Friday, Aug. 8

8:30 a.m. – 10:00 a.m.

**It's Time for Justice: How to Handle Financial Exploitation of the Elderly**

*Conference Room K, Executive Conference Center*

2:00 p.m. – 3:30 p.m.

**The Legality and Practicality of Remote Witness Testimony**

*Conference Room K, Executive Conference Center*

3:45 p.m. – 5:15 p.m.

**Annual Survey of Supreme Court Decisions – Criminal Cases**

*Conference Room L, Executive Conference Center*

### Saturday, Aug. 9

2:00 p.m. – 3:30 p.m.

**The Rule of Law and Juvenile Justice**

*Conference Room J, Executive Conference Center*

2:00 p.m. – 3:30 p.m.

**Blackwater and Other Private Contractors: Clearing the Muddy Waters**

*Conference Room K, Executive Conference Center*

### Sunday, Aug. 10

2:00 p.m. – 3:30 p.m.

**Miranda Warnings and Waivers: The Latest Research and Its Practical Applications**

*Conference Room K, Executive Conference Center*

### Upcoming Events *(See [www.abanet.org/crimjust/calendar](http://www.abanet.org/crimjust/calendar) for more info.)*

June 11-13, Washington, DC

**Civil False Claims Act and Qui Tam Enforcement**

June 18-20, Washington, DC

**CyberLaw: Expanding the Horizons**

October 19-21, Washington, DC

**ABA/ABA Money Laundering Enforcement Conference**

**Practice Tips** By Susan Gaertner

## Driving Home Prosecutors' Commitment to Justice

Earlier this year, I was invited to participate in a symposium on "Wrongful Convictions: Causes and Cures," sponsored by Southwestern University Law Review in Los Angeles and co-sponsored by the Criminal Justice Section. As a prosecutor, I was excited about this opportunity to provide balance and perspective on an issue that often seems to put the prosecution on the defensive. The symposium offered a welcome forum for my message – that prosecutors care very deeply about true justice and don't want innocent people in prison any more than defense attorneys do.

I arrived in Los Angeles on a Thursday afternoon, and it quickly became apparent that my message wouldn't be an easy sell. Hakop, my student driver from the law school, set me straight. A bright, engaging member of the Law Review, Hakop told me he loves the law but doesn't want to be a prosecutor because "all they care about is getting convictions regardless of whether a defendant is guilty or not," or words to that effect. As we wended our way through the Los Angeles traffic, I tried to dissuade him of the notion that prosecutors are a bunch of conviction-thirsty zealots, but I had no illusion of changing his mind in the short time available. The best I could do was encourage Hakop to attend the symposium the next morning, particularly our panel on "The Role of the Prosecution and Defense in Causing and Correcting Wrongful Convictions." He assured me he'd try to attend, if for no other reason than it was bound to be more interesting than last year's presentation on asbestos litigation.

I was pleased to spot Hakop in the audience on Friday morning to hear Professor Myrna Raeder's opening remarks on wrongful convictions and our panel discussion. At least he was going to hear more of my thoughts and personal experience on prosecutors' commitment to justice and their efforts to get it right, even after they've gotten it wrong.



*Susan Gaertner is the Ramsey County (Minnesota) Attorney. She serves as a vice chair-at-large on the Criminal Justice Section's Council.*

The symposium came seven years after I started giving serious thought to prosecutors' responsibilities to engage proactively in DNA-based, post-conviction reviews. My interest was sparked in January 2001 by an intriguing round table discussion hosted by then-Attorney General Janet Reno. As co-chair of the DNA subcommittee of the National District Attorneys Association, I had been invited to participate in this discussion of prosecutor approaches to post-conviction DNA testing. It was an eye-opening experience. For the first time, I received detailed information on innovative, prosecution-initiated DNA review projects undertaken by the San Diego County, California, and Travis County, Texas, district attorney offices. At first, I was both fascinated and a bit skeptical. On one hand, I was already a big believer in the power and promise of DNA technology, having been the first prosecutor in Minnesota to present DNA evidence to a jury back in 1989. On the other hand, I wasn't immediately convinced that prosecutors should be at the forefront of such pro-active review efforts. Wasn't it the purview of defense attorneys to initiate post-conviction challenges? After returning to Minnesota, however, I gave it a lot of thought. Upon reflection, it just made sense that we, as prosecutors, should use DNA testing to ensure that justice has been done in every case. Our primary ethical obligation, after all, is to seek justice. It seemed obvious to me that using DNA technology in a proactive way to identify the truly innocent was the right thing to do.

Three months after the round table discussion in Washington, D.C., I initiated a post-conviction DNA review project in my jurisdiction of Ramsey County, Minnesota (St. Paul and surrounding communities). That was the beginning of a long and fascinating road that led in directions I had not imagined. What started as a review of past convictions evolved into three related initiatives aimed at improving the quality of justice in our community of 500,000 people.

During the DNA Project, our first initiative, we systematically examined the cases of current prison inmates whom we had prosecuted for crimes against persons in 1994 or earlier — before present-day DNA testing technology was commonly available and routinely applied in Ramsey County criminal cases. (Starting in 1995, present-day DNA testing technology was commonly available and routinely applied in our cases.) We wanted to determine whether current DNA technology would shed new light on any of the cases.

I was well aware that some people might look askance at this initiative. After all, I had been somewhat of a skeptic myself. The message I tried to send to these prospective critics was that the science of DNA should be applied to past convictions in a fair and systematic manner and not left to the happenstance of a defense attorney taking an interest in a particular case — as sometimes occurs. I also emphasized the power of DNA technology to point us toward the truth in a criminal case — regardless of how much time might elapse between obtaining DNA evidence and reviewing it. Finally, I pointed to the need for the criminal justice system to patch up its image. In preceding years public confidence had been shaken by a series of highly publicized cases where DNA evidence had been used to overturn wrongful convictions. As a prosecutor, I wanted to assure the public that they could have confidence in jury verdicts and that those verdicts would withstand the most rigorous scrutiny. And I wanted them to see that if a mistake had been made, we would own up to it.

As the DNA Project progressed, we identified 116 cases that met the basic criteria for the review. In each case, Assistant County Attorney Jeanne Schleh, assisted by law clerks, examined whether mistaken identity was at least possible, whether current DNA technology could provide exonerating evidence and whether biological evidence from a crime was available to be tested. In the vast majority of cases, DNA testing was not warranted. In many of those instances, the defendant's identity was not in question so DNA testing would serve no purpose. In other cases, evidence other than biological evidence was overwhelmingly strong.

The DNA Project identified three cases where identity was at issue and DNA testing could prove guilt or innocence. In two of those cases, no DNA evidence could be located, and no testing was possible. In the third case, however, the rape victim's underwear was located and submitted for DNA testing by our state forensic crime laboratory. That case involved a woman who was raped while on an early-morning walk in March 1985. David Brian Sutherlin was identified as the assailant when the victim chose him from a photo lineup. The victim was visibly shaken when she saw the photo and said it looked exactly like the attacker. At trial, however, the victim could only say Sutherlin resembled the attacker. Enzymes found on the victim's clothing were consistent with the defendant and 22 percent of the population. A jury convicted Sutherlin of the rape in June 1985. A month later, he was found guilty of two unrelated murders and sentenced to life in prison. Following that, he was sentenced to 43 months on the rape, consecutive to his murder sentences.

In October 2002, in response to our testing request, we received a surprising report from the forensic crime lab. DNA from semen on the rape victim's clothing did not match Sutherlin's DNA profile. This test result, combined with other evidence, clearly established that Sutherlin did not commit the rape. Further, the BCA identified a new suspect in the rape by doing a computer search of its forensic DNA database

Based on the DNA test results, my office initiated legal proceedings to set aside the rape conviction of David Brian Sutherlin. He was still serving the life sentence imposed for the double murder and, fortunately, had not begun to serve the additional 43 months for the rape. To the best of my knowledge, Sutherlin's exoneration was the first in the United States to result from a prosecution-initiated, post-conviction DNA testing program. As for the new suspect in the rape, the statute of limitations had expired on prosecuting the case.

In pursuing a review of past convictions, we had searched for the truth and found it. One man had been wrongfully convicted, and another had escaped justice. It was a sad truth, but I was extremely grateful that DNA technology had provided us with a tool to establish a man's innocence.

As noted, the DNA Project identified two cases where DNA evidence potentially could have been exculpatory, but where no such evidence could be found despite an exhaustive search. Those cases involved the abduction and murder of a 6-year-old girl in 1981 and the rapes of two women in 1986. The evidence likely had been destroyed during routine disposals of old material from the court's evidence vault and police property room.

The realization that DNA evidence apparently had been discarded led us to our second justice initiative — the adoption of a Uniform Evidence Retention Policy.

My office worked closely with law enforcement and our district court to develop the policy, which was adopted in 2004. The policy reflects scientific advances in DNA technology and changes in post-conviction and statute of limitations law in Minnesota. It ensures that biological evidence related to identity is retained whenever appropriate. In homicide and rape cases, for example, evidence must be kept until the defendant has completed his or her sentence.

*Continued on page 14*

**Practice Tips**By *Sylvia Rousseau*

## Lessons from Jena Six: A Broader View of Mediation

### The American High School

Although the Jena Six incident drew national attention marked by indignation and anger, the incident was not a surprise to those of us who are familiar with the challenges many American high schools face. While observers throughout the nation pondered how or why the racial tensions on the campus of the high school escalated to such a high level of violence, as a former high school principal, it became immediately clear to me that this situation resulted from an absence of mediation.

I am not referring to a traditional understanding of mediation that takes place to resolve a conflict between two or more people arising from some specific encounter or difference in opinions. The mediation required to ensure that our schools are safe and nurturing spaces for all students, regardless of their ethnic or racial background, is much more encompassing. The kind of mediation to which I am referring takes place daily as a “way of being” as people strive to create common spaces that reflect the interests, rights, and dignity of every individual who occupies that space. This is a mediation that is never finished. It is always taking place in a process of deepened understandings and greater appreciations for each individual present.

The American high school in many places around the nation is one of the few places where people of different ethnic backgrounds and cultures encounter one another in large numbers on a daily basis. Students are expected to make meaning from their encounters with one another in this space called school, but far too often they are left on their own to negotiate this shared space with little guidance from adults. Adults who have not constructed these meanings in their own lives are unable to guide students.

Although the differences between a high school in California where I spent several years as a principal and Jena High School in Louisiana may be vast, their similarities



*Sylvia Rousseau is Professor of Clinical Education and Urban Scholar in the Rossier School of the University of Southern California. Previously, she was Superintendent of Local District 7 in the Los Angeles Unified School District.*

are striking. Both are located in small towns where people of different races still live in mostly segregated housing patterns, and both are faced with making meaning from diversity.

At the high school where I was principal, more than 35 languages were spoken, matched by at least as many different cultures. When I arrived there I found a circumstance in which White and Asian students graduated and went on to attend prestigious colleges and universities, followed by meaningful careers, while African American and Latino students were too often dropping out or graduating prepared for minimal career options. Students who realized that their options were limited were also angry. School had little meaning for them. When I arrived I learned that fights among ethnic and racial groups were common and the expectation from parents was for me to “clean up the place.”

Upon closer observation, I found a pattern of disparity based in race that was deeply entrenched in the history of the school, yet few people perceived a relationship between the physical violence and the longstanding disparities. This pattern of historical disparity that typifies the American high school permeates the space that students share with little understanding on the part of adults about how to mediate it on their behalf. This wound in relationships that assigns degrees of value to people based on their race, gender or class keeps showing up in our schools where children struggle to find their identities and understand how to construct meaning from the disparities in their relationships. This is a situation that has been thrust upon them, and it is where mediation needs to take place, long before incidents arise and long before students are deeply wounded in their ability to see one another as human beings.

### Mediation as a Way of Being

Schools have a responsibility to send a clear message that shared space belongs to everyone with equal rights to learn and thrive. The school’s everyday activities must foster work to protect each person’s right to occupy the shared space. It is important for schools to develop deeper understanding that learning, by its very nature, is a social endeavor. Learning involves ongoing mediation in day-to-day actions and activities intentionally designed to close social and cultural distances between students and teachers and among students. Therefore, the space where this learning takes place has to be mediated by conscious and informed effort.

“All animals are equal but some are more equal than others,” words found in George Orwell’s allegory *Animal*

*Farm*, still characterize the status of students of color on many school campuses. The intense resistance to integration and the persistent achievement gap are the legacies of long-held beliefs that some children are more equal than other children. Schools can only free themselves from this legacy through deliberate and well-thought-out means for mediating a space that is filled with historic and present-day hostilities. This kind of mediation requires adults whose deeply-held beliefs in the dignity of every human being drive them to act daily to ensure a common space where every student's rights are clearly understood and protected. This is the most potent antidote we have to the kind of incident the nation witnessed in Jena.

### **A Humanities Class**

When I assumed the role of principal, parents' mandates to me was "clean up the place" and make it safe for their child. I quickly understood that mandate could not be met with more rules and more punishments. It could only be met by mediating the social and cultural distances that separated the students. One of the first measures I took was to establish a humanities class for ninth grade students. In this class students studied the historical and philosophical underpinnings of non-violence and mediation, and they studied one another's cultures. In order to earn credit for the course, each class was required to identify a need on the campus, submit a proposal to the administration, and then work together to meet that need. This requirement was one way of communicating to students upon arrival to the school the of contributing to a shared space.

### **Mediation: A Way of Being**

The school also created a peer mediation program in which students were trained by people with the best reputations in the area. I, as a principal, participated in the training to send a clear message about the value I placed on mediation. The mediation program became a "way of being" for adults as well as students; therefore adults were also expected to participate in mediation to resolve their conflicts.

Peer mediators represented a broad spectrum of the school population, including formal and informal student leaders. To make mediation as an alternative to fighting, a clear message went forth that to students that they fought and hadn't asked for mediation as an alternative, both persons will be suspended regardless of who hit first. Students came to understand that, if they chose to fight, upon their return from suspension, they would be required to participate in mediation, not led by their peers, but now led by the principal with both sets of their parents present. In these two-hour sessions the principal sat and scripted while the students—one at a time without interruption from the

other student or the parents—were required to provide every detail about the origin of the conflict, their role in the conflict, and the actual fight. As their principal, I pressed for every detail and challenged each inconsistency in their narratives. In the meantime, parents who were quietly listening, gained important insights into their own child's behavior.

As this process unfolded, parents started to abandon anger toward the "other" student that had been shaped by their own child's version of the situation. Parents of both students began to embrace their common humanity by joining one another in requiring both students to accept responsibility for their behavior. The mediation allowed students to reflect on their own behavior as they had to be accountable for every detail. In the process, they came to accept responsibility for their own contribution to the conflict. Students who had protested the unfairness of being suspended when they didn't hit first came to assume responsibility for demeaning and disrespectful behavior that violates the common space of the campus.

### **More Than Mere Apologies**

Students often left these mediations expressing more than formularized apologies to one another. Instead they made commitments to one another about the future. Through their own words expressed the behavior the other party could expect from them. It is also important to note that the consequence of their actions did not end with suspension. As principal, I framed their decision to fight as robbing the school of a common space in which all students had the right to feel safe and respected. Then I offered them the "opportunity" to restore what they had taken away by working together to provide 15 hours of service to the school. The service had to be rendered in a manner that was visible to the entire student body, thereby sending a message to their friends that the conflict was over and their friends' participation in the conflict was not welcome. In this manner, mediation became a "way of being" that each student was responsible for maintaining. The effect in a relatively short time was a dramatic reduction in incidents of violence. New norms were set for our human interactions.

### **Mediated Classrooms**

Closer examination of the disparate academic performance among students, largely along race and ethnic lines, led teachers to meet in small groups to understand the causes for the disparities. As principal, I created small student groups, again representative of the

*Continued on page 14*

## Practice Tips

By David F. Taylor

## Auditors and Internal Investigations

Auditors today routinely request information about internal investigations. Especially where an investigation may relate to a company's financial statements or disclose deficiencies in internal controls, an auditor may be aggressive in demanding information and may refuse to provide an unqualified audit report unless it is satisfied that its questions have been answered. A company or board committee conducting an investigation should consider from the outset how best to manage the relationship with the company's auditor, including whether to disclose any investigative report or other information collected during the investigation.

An auditor may seek information about an internal investigation for many reasons. In the auditor's eyes, information about an internal investigation may be relevant to the auditor's core mission of reporting on the accuracy of a company's financial statements and assessing the adequacy of its internal controls. Section 10A of the Securities Exchange Act of 1934, as amended, specifically requires auditors to look for certain types of illegal acts (those with a "direct and material effect on the determination of financial statement amounts") and to inquire further when they find evidence of illegality. Among other things, an auditor may be required to determine (i) whether it is likely that an illegal act has occurred, (ii) whether the act has an effect on the financial statements of the issuer, including any effect from possible fines, penalties or damages, and (iii) whether management has taken timely and appropriate remedial action. Auditors will often seek information about internal investigations in order to carry out their duties and satisfy their obligations.

As a practical matter, a public company may find it difficult to resist an auditor's requests for information about an internal investigation. However, disclosing



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information about an internal investigation is fraught with risk, especially the risk of waiving the attorney-client and work product privileges. Courts have reached different conclusions regarding whether a company waives otherwise applicable privileges by sharing investigative information with an auditor. Although the cases are sometimes inconsistent, two general observations seem to hold. First, the courts seem to treat the attorney-client privilege and the work product privilege differently in this context. Most courts (but not all) hold that the disclosure of documents to an outside auditor waives the attorney-client privilege. The majority of courts (but not all) have come out the other way with respect to the work product privilege, holding that a disclosure to auditors does not waive the work product privilege. Second, the cases turn on their facts. Courts may look at the purpose of the disclosure, the nature of the relationship between the company and the auditor and other factors in deciding whether a communication with an auditor waives any privilege.

One leading case is *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441 (S.D.N.Y. 2004), in which Allegheny sought discovery of two internal Merrill reports about a theft committed by a Merrill energy trader. Merrill claimed that the reports were protected by the work product privilege. Allegheny argued that Merrill had waived the privilege by providing copies of the reports to its auditor. Although the court found merit in both arguments, it held that Merrill had not waived the work product privilege. According to the court, a business and its auditor share an interest in preventing, detecting and rooting out corporate fraud. Merrill provided the report to its auditor so that the auditor could assess the company's internal controls and determine whether the theft had any impact on its financial statements. The court also noted that the auditor was under an ethical and professional obligation to keep the information in the report confidential unless disclosure was required by law or accounting standards. Under those circumstances, the court held that Merrill and its auditor shared a common interest sufficient to preclude a waiver.

Given the uncertainties in the case law and the importance of the facts to the waiver analysis, there is likely to be some risk of a waiver whenever a company discloses investigative information to an auditor. The same factors, however, leave room for companies and their counsel to manage and mitigate

that risk. With that thought in mind, here are some tips for managing communications with auditors when conducting an internal investigation in which the auditors may have an interest.

**1. Carefully evaluate every communication for its impact on privilege.** Counsel conducting an investigation should carefully evaluate every communication with the company's auditor for any impact it might have on the company's privileges, including the risk of a subject matter waiver that exceeds the scope of the specific disclosure to the auditor.

**2. Communicate with the auditor about the scope of the investigation and the procedures used.** Auditors often seek assurances that the investigation is adequate in scope, reasonably thorough and designed to provide reliable findings. A company can often avoid more serious problems by discussing those issues with the auditor at the outset of the investigation. This type of communication may allow counsel to fix problems before they happen without a significant risk of waiver.

**3. Consider both the attorney-client privilege and the work product privilege.** As set forth above, courts are especially likely to find a waiver of the attorney-client privilege. To minimize the risks of a waiver, consider whether information might be protected by both the attorney-client and work product privileges.

**4. To the extent privileged information is disclosed, take steps to support the common interest doctrine.** To the extent the company decides to disclose privileged information to its auditor, take steps to show that the disclosure furthers a common interest shared by the company and the auditor. First, have the auditor agree to keep the information confidential, either by affirming that the information is covered by the auditor's professional obligations or by signing a confidentiality agreement. Second, have the company's audit committee disclose the information. The audit committee typically is responsible for overseeing the audit relationship and most clearly has a common interest with the auditor in ensuring the adequacy of the company's internal controls and the accuracy of its financial statements. Third, understand why the auditor is requesting the information and document the grounds for assertion of any privilege. For example, to the extent the auditor

seeks information to ensure the adequacy of the company's internal controls and the accuracy of its financial statements, create a written record to that effect.

**5. Plan the investigation and the disclosure with the risk of waiver in mind.** Plan the disclosure so as to minimize the damage from any waiver. To the extent consistent with the next practice tip, limit the information consistent with the auditor's stated purpose. Consider also whether the disclosure should be oral or written and, if written, whether to share investigative materials, such as the report, or to create a summary. Likewise, prepare written materials, such as investigative reports and summaries, to mitigate the damage from any waiver. Keep descriptions of findings factual and avoid sensational characterizations or speculation.

**6. Ensure that all information provided is complete and accurate.** Counsel should ensure that all information provided to the auditor is accurate and complete. The auditor may rely on the information provided by the investigation and will likely be evaluating the information to test the credibility of both the company and its counsel. Providing information that is inaccurate or materially incomplete can frustrate the company's goals – and may itself violate federal law.



**CJS Staff Presentation:** On April 22, the Section staff participated in the ABA Brown Bag Series, which offered both the Chicago and Washington offices the opportunity to meet the Section staff and become informed about the Section's activities and programs. The program drew record Brown Bag crowd in DC and via video conferencing in Chicago. From left: Regina Ashmon, Committees Coordinator; Carol Rose, Meetings Coordinator; Shamika Dicks, Assistant to the Standards Project; Susan Hillenbrand, Director of the Standards Project; Jack Hanna, Section Director; Stacey Brown, Membership Coordinator; Robert Snoddy, Outreach Coordinator; Kyo Suh, Technology/Publications Manager.

## 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](mailto:snoddyr@staff.abanet.org).

### New Study Cites Need for Crime Policy Reform

A new report titled “The State of Sentencing in 2007: Developments in Policy and Practice” addresses how decades of “tough on crime” policies have had a dubious impact on the incidence of criminal activity, but the cost of such policies portends societal harms to people and governmental services. The report also highlights a number of important criminal justice policy developments that occurred at the state level during 2007. These include: the creation of oversight committees or task forces to address sentencing laws, prison overcrowding, indigent defense, and/or the provision of reentry services; limitations upon mandatory sentencing enhancement provisions, including substantial reform proposals to mandatory sentencing provisions for drug crimes; and reformed criminal justice policies pertaining to juveniles. For further information, or to obtain a copy of the report, visit the Sentencing Project website: [www.sentencingproject.org](http://www.sentencingproject.org).

### Report Cites How Prison Population Boom is Devastating to Local Communities

According to a new report published by the Justice Policy Institute communities are bearing the cost of a massive explosion in the jail population which has nearly doubled in less than two decades. The research found that jails are now warehousing more

people—who have not been found guilty of any crime—for longer periods of time than ever before. The research shows that in part due to the rising costs of bail, people arrested today are much more likely to serve jail time before trial than they would have been twenty years ago, even though crime rates are nearly at the lowest levels in thirty years. The report, “Jailing Communities: The Impact of Jail Expansion and Effective Public Safety Strategies,” found jail population growth is having serious consequences for communities that are now paying tens of billions yearly to sustain jails. For a complete copy of the report go to [www.justicepolicy.org](http://www.justicepolicy.org)

### Nation’s Chief Public Defenders Call for Caseload and Workload Standards

The American Council of Chief Defenders (ACCD), a section of the National Legal Aid & Defender Association (NLADA), has released a resolution calling for immediate action in the nation’s criminal justice system by setting appropriate caseload and workload standards for attorneys representing individuals who cannot afford to hire counsel in criminal, juvenile and civil commitment matters. The ACCD’s action is in response to caseload crises that are crippling numerous public defense delivery systems throughout the country, making it impossible for them to provide competent services to their clients and undermining the fairness and reliability of many of our nation’s criminal justice systems. In the resolution, the ACCD strongly supports the caseload standards set by the National Advisory Commission (NAC) on Criminal Justice Standards and Goals in Standard 13.12. In reviewing the NAC standards, originally set in 1973, the ACCD found that these “caseload limits reflect the maximum caseload for full-time defense attorneys, practicing with adequate support staff, who are providing representation in

cases of average complexity.” The full resolution and its accompanying report can be found at: [www.nlada.org](http://www.nlada.org)

### NACDL Task Force Holds Hearings on Operations of Specialized Courts

On April 30 and May 1, the National Association of Criminal Defense Lawyers’ Problem-Solving Courts Task Force held public hearings in New York City. NACDL established the Task Force in 2007 to examine the different ways drug courts, mental health courts and other specialized courts are operated around the country. The task force is charged with looking at the role of defense counsel in these courts, the due process and Constitutional rights of defendants in these courts, as well as the courts’ overall effectiveness. Previously, the Task Force conducted initial interviews in San Francisco and held its first hearings in Miami last October and in Tucson, AZ in February. Speakers have included judges, domestic violence and mental health court representatives, and public defenders. In Tucson, representatives from the Pascua Yaqui Tribal Drug Court, including NACDL member and Chief Tribal Public Defender Nick Fontana testified. Also testifying in Tucson was NACDL Board Member and Pima County Public Defender Robert Hooker, who died tragically in a traffic accident Apr. 1, and who will be greatly missed. Another hearing will be held this summer in Milwaukee in conjunction with NACDL’s Annual Meeting.

*Resources at the CJS Website*  
([www.abanet.org/crimjust](http://www.abanet.org/crimjust))

Policy Bulletin  
Legislative Update  
Supreme Court Cases  
Criminal Justice News Round-up

## Criminal Justice Section Rolls-Out New Membership Growth Initiative

The Criminal Justice Section recently embarked on a new campaign, *The Race to 10K*, which seeks to bring 10,000 lawyers into the Criminal Justice Section by August 31, 2008. Attorney and law student membership has been growing at a fast pace during the last two and a half years moving the Section toward record membership numbers in both categories. As recently as May 2005, the Criminal Justice Section had 6,241 attorneys. The current attorney membership stands at 8,659 and we believe that by the end of this fiscal year we can bring that number to 10,000 lawyer members.

This Section-wide endeavor will require the help of every council

member, every committee chair and every member of the Criminal Justice Section to reach out to criminal defense lawyers, prosecutors, judges, and academics inside and outside the ABA and ask them to join our dynamic section. The Criminal Justice Section seeks to be the unified voice for criminal justice in America. Greater lawyer membership numbers for the ABA Criminal Justice Section needs will assist the Section to more effectively serve as the unified voice on criminal justice matters.

How can members help? Criminal Justice Section members can utilize and adapt letters found on our website to send to their colleagues and associates that are not members of the ABA Criminal Justice Section and ask

them to join us. One letter is for individuals who are not members of the ABA and one letter is for individuals who are members of the ABA, but not of the Criminal Justice Section. The letters should be sent on June 1, 2008 or after because after June 1, new ABA members receive membership during the remaining months of this fiscal year ending in August and all of the next year beginning in September.

More information on *The Race to 10K* – including invite letters tailored for both non-ABA and ABA members asking them to join the Section – can be found on the Section’s website, [www.abanet.org/crimjust](http://www.abanet.org/crimjust).

## Section Collaborates With NDAA for Timely Elder Abuse Policy

Historically elder abuse – albeit physical or financial – was treated as a family matter. In many instances the victims were not able or willing to testify against loved ones, making such cases difficult to prosecute.

Sensing a need for immediate action on this issue the Criminal Justice Section – spearheaded by the Problems of the Elderly Committee – teamed with the National District Attorneys Association to develop a resolution calling for vigorous prosecution of crimes against the elderly.

The resolution, modeled after policy previously passed by the NDAA, became official ABA policy after it was unanimously approved by the ABA House of Delegates at the 2008 Midyear Meeting. It calls for special

elder abuse units to be established within prosecutors’ offices, supports the formation of a National Center for the Prosecution of Elder Abuse, Neglect, and Exploitation and recommends a multidisciplinary team approach to prosecuting elder abuse cases including individuals and agencies from the medical and financial fields, public health, service providers and law enforcement.

Recent measures taken on the state and local level make clear that support for vigorous prosecution is on the rise: California passed legislation requiring banks and credit unions to report suspected elder financial abuse to the authorities; South Carolina recently formed a task force that will address financial exploitation of the elderly; a bill was just introduced in the Michigan Senate designed to guard seniors from

predators by increasing penalties and giving additional tools for prosecutors; and Minneapolis-St. Paul police are seeking to launch a new unit that solely investigates elder abuse, after nearly 800 cases were reported last year.

“This resolution will do much to promote the safety of seniors. Congressman Jesse Jackson, Jr. just secured a grant for the Illinois Criminal Justice Information Authority to convene a group to pilot such a multidisciplinary approach for cases of serious crimes against seniors as envisioned by this resolution,” said Lori G. Levin, co-chair of the Criminal Justice Section’s Problems of the Elderly committee and executive director of the Illinois Criminal Justice Information Authority. “The multidisciplinary approach will ensure services for seniors while maintaining the integrity of investigations and allow for the more effective prosecution of offenders.”

### Gaertner

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The purpose of the policy is to ensure that evidence is handled in a way that protects the public safety and the rights of the accused. We can't really imagine what DNA forensics will be able to accomplish in the future. The Evidence Retention Policy ensures that DNA evidence will be available for testing as the technology evolves in the years ahead.

The DNA Project also underscored the troubling issue of incorrect eyewitness identifications. David Brian Sutherlin had been convicted primarily on the basis of a faulty eyewitness identification. That fact – combined with similar wrongful convictions around the country and mounting research on best practices in identification procedures – prompted our third justice initiative – the adoption of new photo lineup guidelines.

The most widely used photo identification procedure, both in Ramsey County and nationwide, has been the simultaneous display of several photos – often by an investigator with knowledge of the case. In 2005, my office initiated a pilot project with law enforcement agencies to conduct sequential photo lineups using independent administrators. With this method, the lineup is administered by someone who does not know who the suspect is, displays photos one at a time to the witness (rather than all at once) and, if the witness identifies a suspect, asks the witness how certain he or she is of the identification. An assessment of our pilot project showed positive results, and the new protocol utilizing sequential photo lineups was implemented countywide in 2006.

In my view – one widely shared in my profession – prosecutors should be judged as much for their commitment to justice as for their record of convictions. Our three initiatives have had a common purpose – to improve the quality of justice in our jurisdiction and to assure the public that, though the system is fallible, we are working very hard to get it right.

Hakop, my student driver, heard much of this message during the panel discussion at Southwestern University. I am hopeful the dialogue, at a minimum, challenged his image of prosecutors as justice-blind, conviction-happy fanatics and, in my fondest wish, may even have opened his mind to a prosecution career. It's great work for people who care about justice.

### Rousseau

*Continued from page 9*

full spectrum of students. I met with the students in two-week intervals for a full semester around one question: What do you consider to be a positive teacher-student relationship that enables you to learn? When I started posting the students' responses to this question on large placards during faculty meetings, teachers were so impressed by that they began to invite students into their small group discussions. They became genuinely interested in how students felt in their classes. The teachers came to recognize the power of mediating the space they shared with students in their classrooms. They began to invite mediators to broker conversations between themselves and their students to improve the learning culture in the classroom. These deepened understandings about one another's roles in the classroom resulted in fewer referrals to the dean for discipline. I am convinced it was one of the causes for improved academic performance among all students, particularly students of color.

#### **Students Working for Racial Harmony**

The school provided opportunities for students to be trained by the National Council for Community and Justice (NCCJ) in principles contributing to racial harmony. In a short time following this experience, students began to initiate two-day overnight racial harmony days. They selected the teachers they wished to work with them in these events that engaged up to 100 students at a time to mediate their tensions and confront their misperceptions about one another. Again, these and many other activities led by teachers, students and parents were processes for mediating the space of school to become a place that respected the dignity of all students and adults.

Mediation as an ongoing "way of being" faces numerous challenges, but failure to engage in it leads to unfortunate incidents like the one in Jena. Although I am no longer a principal, the students I meet from time to time in various circumstances state to me, without prompting, the value they place on the experiences they had in learning to mediate human space. They attest to the value of this experience in their adult lives, in their families and in the work place. This notion of mediation may have been the missing element in the Jena Six incident. Let us hope that schools across America will learn that the effects of this kind of mediation are long lasting and valuable, not only to the high school campus, but to our society at large. We are a nation in need of mediating our shared space as a "way of being" in honor of one another's humanity.

## 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](mailto:customercare@BNA.com). For a free trial subscription go to [www.bna.com/products/lit/mopc.htm](http://www.bna.com/products/lit/mopc.htm).

### NY County Bar Goes Against ABA Stance on Metadata Usage

The New York County Lawyers' Association Committee on Professional Ethics – in a rebuff to the American Bar Association's stance on the issue that lawyers are forbidden to exploit secrets lurking in metadata embedded in electronic documents received from opposing counsel or adverse parties – concluded that a lawyer generally may not explore or use metadata in electronic documents received from opposing counsel unless the lawyers had some sort of understanding to the contrary. The committee instructed that while a lawyer who is sending electronic documents to opposing counsel should scrub them to guard against an inadvertent breach of client confidentiality, the receiving lawyer may not ethically take advantage of the sender's breach of care by intentionally searching for metadata. The committee made clear the opinion does not address the obligations regarding metadata in documents produced in discovery. See New York County Lawyers' Association Committee on Professional Ethics, Op. 738, 3/24/08. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.24, No. 8, p. 192 (April 16, 2008)

### If Your Client Obtains Opponent's Damaging Attorney/Client E-Mails, Action Must be Taken

The Philadelphia Bar Association Ethics Committee recommended that when an attorney learns that their client has gained access to potentially damaging e-mails between the client's litigation opponent and the opponent's lawyer they must do more than simply refuse to discuss the e-mails with the client. The opinion suggests that before deciding how to proceed, the attorney should find out from the client exactly how they became privy to the e-mails, and evaluate whether the client faces potential civil or criminal liability. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol. 24, No. 7, p.165 (April 2, 2008)

### In-House Lawyers Based Out of State May Advise Employer About Virginia Law

In-house counsel who are licensed and based outside of Virginia may advise their employers about Virginia law without running afoul of the rules barring the unauthorized practice of law, even if they give that advice to a branch office located within Virginia, ruled the State Bar Standing Committee on Unauthorized Practice of Law. The committee also indicated that out-of-state lawyers are not subject to Virginia's corporate counsel registration rule so long as Virginia is not their "base for employment". For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.24, No. 7, p. 166-167 (April 2, 2008)

### Georgia Raises the Bar for Ability to Hand-Out Contempt of Court Charges

Tossing out its "clear and present danger" test for gauging whether an attorney may be convicted of criminal contempt based statements made in a courtroom, the Georgia Supreme Court adopted a two-part standard requiring proof that counsel's speech and conduct actually interfered with or posed an imminent threat to the administration of justice and that the lawyer should have known that the behavior "exceeded the outmost bounds of permissible advocacy". Applying this new test, the court reversed the conviction and 30-day jail sentence of a criminal defense attorney who had been cited for inappropriate facial expressions, disrespectful tone of voice, and intemperate statements impugning the impartiality of the trial judge. See *In re Jefferson*, Ga., No. S07G1208 2/25/08. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.24, No. 5, p. 105-106 (March 5, 2008)

### Double Jeopardy Clause Doesn't Rule Out Multiple Charges Against Disbarred Lawyer

The Tennessee Court of Criminal Appeals ruled that a disbarred lawyer who was convicted of contempt for continuing to practice law after he lost his license cannot use the double jeopardy clause to avoid further prosecution for impersonating a licensed professional and theft. In its ruling the court explained that although the criminal charges stemmed from the same incidents in which the defendant deceptively held himself out as a licensed lawyer, each one requires proof of distinct elements, is driven by different public policy concerns, and

For the latest updates on Criminal Justice Section activities, events and resources, see the Section website at [www.abanet.org/crimjust](http://www.abanet.org/crimjust)

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## Ethics

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involves different victims and somewhat different acts. See *State v. Thompson*, Tenn. Crim. App., No. W2007-00976-CCA-R9-CD, 2/13/08. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.24, No. 5, p. 108-109 (March 5, 2008)

### There Will be No Disqualifying Credit for Defendant Because They Plot to Kill Prosecutor

A criminal defendant cannot create a disqualifying conflict of interest for a prosecutor or their office by threatening to have them murdered. Citing decisions from other states as support, the New Mexico Court of Appeals held that a criminal defendant's attempt to arrange a hit on a prosecutor who was handling a sex crimes case against him does not

mandate the disqualification of that prosecutor, her supervisor who has taken over the case, or the district attorney's office itself. See *State v. Robinson*, N.M. Ct. App., No. 26,594, 1/28/08. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol. 24, No. 4, p. 80-81 (Feb. 20, 2008)

### Penn. Bar Ethics Committee Says Lawyers Must Decide on Using Hidden Metadata

The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility advised that each lawyer must make an individual decision whether to use "metadata" hidden in electronic files received from opposing counsel, based on the lawyer's own judgment and the particular factual situation. According to the opinion, the decision of how and whether a lawyer may use the information contained in the metadata will depend upon many factors,

including: the judgment of the lawyer; the particular facts of the situation; the lawyer's view of his obligations to the client under Rule 1.4 (diligence); and how and from whom the information was received. See Pennsylvania Bar Ass'n Comm. On Legal Ethics and Professional Responsibility, Formal Op. 2007-500. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.24, No. 3, p. 59 (Feb. 6, 2008)

### Criminal Justice Section Committee Resources

[www.abanet.org/crimjust/committees](http://www.abanet.org/crimjust/committees)

Check each Committee Web Pages for recent committee news, updates and resources.

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