



CRIMINAL
JUSTICE

The American Bar Association

Criminal Justice Section Newsletter

Volume 15, Issue 3

Spring 2007

CJS Fall Conference to Focus on the Best and Worst Plea Bargaining Practices

Mark your calendar for the Criminal Justice Section Fall Meeting in Washington, DC that is scheduled for Nov. 2-4, 2007 and will feature a series of substantive committee meetings, the Council meeting and an outstanding CLE presentation scheduled for Nov. 2. The CLE will focus on *Ethics and Professionalism in Plea Bargaining: Best Practices and Worst Pitfalls*, and will bring together prosecutors, defense attorneys, judges, academics and others to examine this oft utilized process that is seldom examined in depth especially from an ethics and professionalism perspective. It will be held at the Marvin Center on the George Washington University Campus.

The Nov. 2 program will feature panel discussions of plea bargaining scenarios that raise ethical and professionalism issues and illuminate the best and worst practices. The conference will begin with a welcome from then Section Chair Stephen Saltzburg and a keynote address by Judah Best. This will be followed by a series of panels that look at different stages of the plea bargaining process.

The first panel will focus on decision making in the plea bargaining process. From the defense side, the panel will identify best ways for defense lawyers to enable clients to make an informed decision whether to enter into plea discussions or accept a plea offer.



Defense lawyers consider how much investigation is needed to give good advice, how best to present advice, and what advice must be said about collateral consequences. Special attention will be given to dealing with impaired clients, with those who claim to be innocent, and with those who might be able to cooperate with the prosecution. From the prosecution side, the panel will discuss how in the initial charging decision the prosecutor should be influenced by the possibility of a plea bargain and the best approaches to take in deciding what plea offer to make. The panel will discuss the policies and structures within a prosecutor's office that are necessary to promote consistent decision making while adequately accounting for relevant individual considerations.

The second panel will examine the actual conduct of plea discussions between the prosecutor and defense attorney and the appropriate judicial role (if any) in the process. Panelists will identify the most effective and ineffective negotiating practices, including the virtues and

liabilities of candor and withholdings. They will suggest how the defense lawyer can provide sufficient information during negotiations while minimizing the risk of hurting the client if a deal falls through. Prosecutors will learn how far they can go in bluffing or merely puffing without crossing an ethical line or undermining their credibility and effectiveness. The panel will update participants concerning recent Supreme Court decisions on the federal sentencing guidelines and how they affect the plea bargaining process.

The third panel will look at the content of plea agreements and debate what terms are fair or unfair. The propriety of asking the defendant to waive procedural rights will be discussed along with the best responses of a defense lawyer when the client is asked to do so. Panelists will consider appropriate conditions of cooperation, conditions regarding the prosecutions sentencing position, and other provisions. They will also discuss the best practices for prosecutors and defense lawyers concerning package pleas. The pitfalls of poor drafting will be highlighted. And the panel will consider the court's role in evaluating the plea agreement?

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SECTION NEWS

**Loyola Wins the Trial Advocacy Competition**

Loyola University New Orleans School of Law won the 17th Annual National Criminal Justice Trial Advocacy Competition, sponsored by the ABA Criminal Justice Section and The John Marshall Law School in Chicago. CJS member Judge (ret.) Sheila Murphy displays the first-place award presented to the Loyola New Orleans' students (L. to R.) Justin Reese, Stephanie L. Cheralla, [Judge Murphy], Leslie Dalton, and Tania Nelson. John Marshall Professor

Ronald C. Smith (Competition Director and 2001-02 Section Chair), and featured commentator Albert J. Krieger (2002-03 Section Chair) are at right. Other jurors not shown were CJS Council member Stephen Komie, and CJS member John Clitheroe of London, UK. Temple University law student Nicole Junior was voted Outstanding Advocate and Best Cross-Examiner in the final round.

**Ray Banoun Wins the Charles English Award**

Ray Banoun was honored at the 21st Annual National Institute on White Collar Crime in San Diego on March 1 for his contribution to the Section and the criminal justice pro-

fession when he was awarded the Charles English Award, which is recognized by many as the Section's highest award for exceptional service.

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Chair (2006-07): Robert M.A. Johnson
 Chair-Elect: Stephen A. Saltzburg
 Director/Editor: Jack Hanna
 Associate Editors: Susan Hillenbrand
 Kristie Kennedy
 Managing Editor: Kyo Suh

**Nominations
for 2007-2008**

The Nominating Committee made the following recommendations: (bios of the nominees can be seen at the Section website)

Chair

Stephen Saltzburg, Automatic

Chair Elect

Anthony Joseph, Automatic

First Vice Chair Nominee

Charles Joseph Hynes

5 Vice Chair at Large Nominees

James Cole
 Susan Gaertner
 Ernestine Gray
 Robert Litt
 Bruce Zagaris

5 Council Seat Nominees

Lynn Branham
 Bruce Brown
 Christopher Chiles
 Cynthia Orr
 Gary Walker

**Young Lawyer Under 36
Council Nominee**

Tanisha Simon

Feedback Welcome

Send to
crimjustice@abanet.org

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Criminal Justice Section**

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CJS Calendar of Events

(See the Section website
for more details)

June 7

**Practical Advice for Corporations
Conducting Internal Investigations
and Responding to Government
Inquiries**, Chicago, IL

June 25-26

**National Institute on Computing
and the Law: From Steps to
Strides into the New Age**,
San Francisco, CA

Aug. 9-14

ABA Annual Meeting,
San Francisco, CA

Criminal Justice Section

Meetings—Hilton Hotel (Aug. 9-12)

Oct. 21-23

**ABA/ABA Money Laundering
Enforcement Conference**,
Washington, DC

Oct. 25-26

**National Institute on Securities
Fraud**, Washington, DC

Nov. 2-4

**Criminal Justice Section 2007
Fall Meeting**, Washington, DC

**Plea Bargaining with Ethics and
Professionalism: A Criminal
Justice Systemic Review of Best
Practices and Worst Pitfalls**
(Nov. 2)

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

CJS Programs and Meetings During the 2007 ABA Annual Meeting

San Francisco, CA, August 10 – 12, 2007

CLE Programs: Moscone Center West
Section Meetings: Hilton Hotel San Francisco
(for updated details, see the Section website)

Friday, August 10

8:30 a.m. – 12:00 Noon: Executive Committee
9:00 a.m. – 12:00 Noon: Victims Committee

9:30 a.m. – 11:30 a.m.: CLE

A Holistic Approach to Serving Unaccompanied Undocumented Youth
*Sponsored by Commission on Homelessness and Poverty,
and Commission on Immigration*

10:00 a.m. – 1:00 p.m.: Corrections Committee

10:30 a.m. – 12:00 Noon: CLE: **Invasion of the Personal Information Snatchers:
Pretexting, Caller-ID Spoofing and Beyond**

10:00 a.m. – 2:00 p.m.: Book Publishing Committee
11:00 a.m. – 2:00 p.m.: Criminal Justice Magazine Editorial Board
12:00 Noon – 2:00 p.m.: Committee Chairs/Directors Luncheon
1:00 p.m. – 3:00 p.m.: Homeland Security Committee

2:00 p.m. – 3:30 p.m.: CLE

Annual Review of Supreme Court Decisions – Criminal Cases

2:00 p.m. – 5:00 p.m.: Defense Function/Services Committee
2:00 p.m. – 5:00 p.m.: Prosecution Function Committee
3:00 p.m. – 5:00 p.m.: Judicial Function Committee
3:00 p.m. – 5:00 p.m.: White Collar Crime Committee
5:30 p.m. – 7:00 p.m.: Welcome Reception

Saturday, August 11

8:30 a.m. – 10:00 a.m.: CLE: **Modern Day Plea Negotiation in Criminal Cases**

8:30 a.m. – 12:00 Noon: Council Meeting
9:00 a.m. – 12:00 Noon: Science & Technology Committee
1:00 p.m. – 3:00 p.m.: Rules of Criminal Procedure Committee

2:00 p.m. – 3:30 p.m.: CLE: **Dred Scott! 150 Years Later**

3:45 p.m. – 5:15 p.m.: CLE: **Back to the Future: Forty Years of In Re Gault**

5:30 p.m. – 6:30 p.m.: **Livingston Hall Award Reception**

Sunday, August 12

8:30 a.m. – 12:00 Noon: Council Meeting
1:30 p.m. – 3:30 p.m.: Juvenile Justice Committee

2:00 p.m. – 3:30 p.m.: CLE: **The Future of Evidence**
Sponsored by the Section of Science & Technology Law

Uniform Law Commissioners Drafting Collateral Consequences Act

By Margaret Love

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has launched a project to draft a Uniform Act on the Collateral Consequences of Criminal Conviction ("the Act"). The project was inspired by the ABA Criminal Justice Section Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons (2003). The chair of the Act's drafting committee is Richard Cassidy, a member of the ABA Board of Governors from Vermont, and the reporter is Professor Jack Chin of the University of Arizona College of Law. Professor Chin also served as the reporter for the ABA Collateral Sanctions Standards. I served as chair of the drafting task force for the ABA Standards, so being associated with the NCCUSL project as ABA liaison is both a privilege and a sort of homecoming. And I am happy to report that the current draft of the Act is faithful to the approach taken in the ABA Standards, both generally and in most of its particulars.

For those unfamiliar with NCCUSL's work, it is an organization comprised of state commissions on uniform laws which are generally established by statute and whose members are usually appointed by the governor. Commissioners (who are all lawyers, may also be judges, legislators, government officials, practitioners or academics) come together as the National Conference for one purpose:

Margaret Love is consulting director of the ABA Commission on Effective Criminal Sanctions.

to draft and propose specific statutes in areas of the law where uniformity between the states is desirable. The Conference was originally established in 1892 upon the recommendation of the ABA, to accomplish legislative drafting projects that the ABA itself was not set up to do. See <http://www.nccusl.org/Update/>.

In many cases a NCCUSL project will be undertaken because of undesirable divergence in state laws. Occasionally, the Commission will respond to a perceived need for guidance in an important emerging area of law. In this case, few states have any comprehensive law at all dealing with the collateral consequences of conviction. So the mission of encouraging uniformity in this case has the added aspect of encouraging jurisdictions to address an unregulated area of growing national concern.

The nature of the concern, as described in the introduction to the current draft of the Act, relates to the growing body of legal consequences of conviction that are administered largely outside of the criminal justice system, as "civil regulation" as opposed to criminal punishment. The introduction points out that "in many instances [they] are what is really at stake, the real point of achieving a conviction." In well over half of all criminal cases, "the real work of the legal system is done not by fine or imprisonment, but by changing the legal status of convicted individuals."

The legal effects the legislature considers important are in the form of collateral sanctions imposed by dozens of statutes. Yet the defendant as well as the court, prosecutors and defense lawyers involved need know

nothing about them. As a recent resolution of the National District Attorney's Association recognizes, "the lack of employment, housing, transportation, medical services and education for ex-offenders creates barriers to successful reintegration and must be addressed as part of the reentry discussion."

Discussion Draft dated March 2007, Introduction at 3-4, http://www.law.upenn.edu/bll/ulc/ucsada/2007march_meetingdraft.htm.

The Act is intended to rationalize and clarify policies and practices relating to the creation and imposition of collateral consequences, as well as their removal. Like the ABA Standards, the Act defines two types of collateral consequences, "collateral sanctions" and "disqualifications." Collateral sanctions are imposed automatically by operation of law upon conviction, and may be created only by formal action of the legislature. Disqualification depends upon the discretionary action by an agency or civil court on grounds related to the conviction. The Act specific provisions address the following issues:

- Collection and dissemination of collateral sanctions and disqualifications arising under the law of a particular jurisdiction, including the means of obtaining relief from them
- Notice of collateral sanctions to defendants at critical points in the criminal justice process: pretrial (so that defendants may base choices upon information received) and when leaving custody (so that defendants may conform their conduct to the law, and learn how to obtain relief)
- The manner in which one jurisdiction should treat convictions that have been reversed, expunged or pardoned,

including convictions from other jurisdictions, for purposes of imposing and removing collateral sanctions

- Limitations on collateral sanctions and disqualifications applicable to employment, educational benefits, housing and licensing

- Certificates of relief from disabilities and of good conduct a to facilitate the reentry and reintegration of convicted individuals whose behavior demonstrates that they are making efforts to conform their conduct to the law, including resident offenders who were convicted in other jurisdictions

- Voting rights restored automatically upon release from incarceration

The drafting committee for the Act has met half a dozen times since June of 2004. An initial draft was presented to the NCCUSL Annual Meeting in the summer of 2006. The Collateral Consequences project is again on the agenda for the 2007 NCCUSL Annual Meeting, looking toward final approval.

Money Laundering CLE Set for Oct. 21-23 in DC

On October 21-23, 2007 the ABA/ABA Money Laundering Enforcement Conference will take place at the Marriott Wardman Park Hotel in Washington, DC.

Council member Bruce Zagaris is one of the principal planners for the event. He states, "It will have many panels customized for lawyers on a wide range of issues, such as responding to criminal and enforcement initiatives, due diligence for financial institutions and law firms (i.e., the gatekeeper problem), and the interaction of tax and money laundering issues. This year's program will be packed full of useful material for lawyers."

Last year's conference drew over 1,200 participants many of the them banking industry representatives. The event provides an excellent networking opportunity for Criminal justice Section members. Check the calendar in the CJS website for more details.

CJS Fall Conference

Continued from Page 1

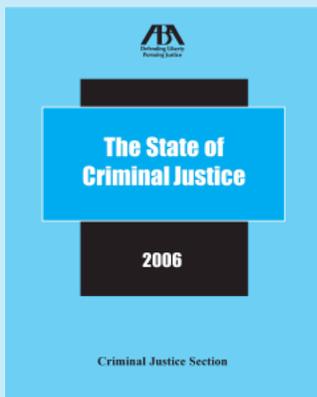
The final panel will look at the implementation of plea agreements. Panelists will identify best practices and worst pitfalls for a defense lawyer seeking to ensure that the client satisfies the terms of the agreement and for a prosecutor seeking to ensure that the state lives up to the agreement. They will discuss how to ascertain whether the prosecution's position at sentencing, or the defendant's allocution or subsequent cooperation, violates the terms of a plea agreement and how best to deal with such violations. Panelists will consider the court's role and the available remedies.

Opportunities will be offered for conference participants to network with others who work in the same setting. The Criminal Justice Section Function Committee Chairs who will be asked to organize dinners on the night before or the night of the conference, including separate dinners for prosecutors and defense lawyers. There will also be separate meetings of the Prosecution Function, Defense Function, Judicial Function and Academic Function Committees. Council and Committee meetings will take place at The George Washington University Law School.

The Section Council meeting will provide the opportunity for attendees to participate in high level debates centered around today's critical issues in criminal justice such as those illuminated by the criminal justice standards. Policy topics to be discussed at council include Prosecutor Responsibility when Confronted with Evidence of Innocence, Health Care for Prisoners and Recently Released Persons, Material Witness, Report on Current Legislation in Congress, and Prosecutorial Investigation Standards. The Section has reserved a room block at the River Inn, 202-337-7600.

NEW BOOK from the CJS Office

The State of Criminal Justice 2006



Authors from across the criminal justice field provide essays on topics ranging from cybercrime to juvenile justice to DNA. This annual publication examines and reports on the major issues, trends and significant changes in the criminal justice system. As one of the cornerstones of the Section's work, the publication serves as an invaluable resource for policy-makers, academics, and students of the criminal justice system alike. The 2006 volume is considerably expanded from earlier annual volumes and is noted for input and submission of chapters from the Section committees. See www.abanet.org/crimjust for details.

Practice Tips

The McNulty Memorandum, Upjohn Warnings, and a Few Basics When Interviewing Company Employees

By David Z. Seide

It's a common situation. You are counsel to a corporation and are investigating a report of an internal problem. You are about to interview an employee — an employee who must answer your questions or else risk termination. Typically, the interview would be covered by the attorney-client privilege and work product doctrine, but a federal prosecutor may want to hear about the interview too. What do you tell the employee?

First, some background. At the end of last year, the Department of Justice issued somewhat revised principles of federal prosecution of business organizations, the McNulty Memorandum (www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf), to establish new procedural hurdles for federal prosecutors before they can demand that corporations under investigation waive the attorney-client privilege. The Memorandum replaces the government's earlier Thompson Memorandum, from 2003, that required prosecutors to seek waivers of the attorney-client privilege from companies before the prosecutors could reward them with credit for cooperation. The McNulty Memorandum was intended as a response to mounting criticism of the Thompson Memorandum's privilege waiver requirement from across the business and legal communities, as well as from Congress.

Those groups effectively argued that the Thompson Memorandum promoted a “culture of waiver.” In practice, that meant that corporations waived the attorney-client privilege and the results of internal investigations conducted by company lawyers — chronologies of key events, reports summarizing internal investigations, “hot” documents, memoranda of employee interviews and the like — were anxiously turned

over to prosecutors by companies eager to avoid indictment. And that material has since served as the foundation for many a prosecution of company employees.

The Justice Department now claims that the McNulty Memorandum addresses the problem with the Thompson Memorandum, e.g. the culture of waiver (if there ever was such a culture) has disappeared because requests for waiver of the attorney-client privilege are now well-managed by prosecutors and their supervisors. But critics remain skeptical. Most of the defense and business bar continue to believe that companies under investigation still are expected to waive the attorney-client privilege and produce to the government the work product of internal investigations conducted by company counsel.

Because the jury is still out on the issue, company counsel — whether inside or outside the company — investigating reports of possible wrongdoing should continue to assume the worst. In other words, you should still assume that the corporation will decide it is in its best interests to waive the privilege and your work product may one day be turned over to the government. With that operating assumption in mind, here are some basics to use any time an employee is interviewed as part of an internal investigation.

1. *Provide Upjohn Warnings.* In *Upjohn v. United States*, 449 U.S. 383 (1981), the Supreme Court held that the attorney-client privilege applies to communications between company counsel and all company employees, but that, in order for a company to enforce the privilege, company counsel must make clear the nature and purpose of the investigation, whom counsel represents (the company), and who holds the privilege (the company, not the employee). Even though the company may later waive the privilege, counsel still needs to spell out the basics in a few simple steps. Topic sentences should be:

- “Let me tell you what this investigation is about.”
- “I don't represent you; I represent the company.”
- “This interview is covered by the attorney-client privilege; let me explain what that means.”
- “This interview is confidential; let me explain what that means.”
- “The attorney-client privilege belongs to the company, not you; the company may choose to waive the privilege.”

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Practice Tips

EXPERTS AND NOTICE: THE WHEN, THE WHAT, AND THE WHY

By Jon May

If you intend to present an expert witness in a federal criminal case, you may be required to disclose the identity of the expert, his or her qualifications, and a summary of the expert's anticipated testimony in advance of trial. In some cases such disclosure may be so detrimental to the defense that it may be better not to offer the expert's testimony at all. In other instances, the expert's testimony may be so important to the defense, that the possibility of exclusion of this evidence requires the strictest adherence to the rules mandating disclosure. This article is intended to help educate counsel on the requirements of the various rules and suggest those considerations that should affect how counsel can best respond.

In contrast to what is required by the federal rules of civil procedure, see Fed. R. Civ. P. 26(a)(2), neither the government nor the defense in a criminal case is required to disclose the identity of an expert witness or the substance of the witness's testimony prior to trial. Such disclosures arise if, pursuant to Fed. R. Crim. P. 16(a)(1)(G), the defense requests that the government disclose a written summary of the testimony the government intends to introduce pursuant to Fed. R. Evid. 702, 703, or 705. If such a request is made, the reciprocal discovery provision of Fed. R. Crim. P. 16(b)(1)(C) requires that the defense provide the same information in response.

Failure to provide reciprocal discovery can result in the exclusion of the expert. See, *United States v. Nichols*, 169 F.3d 1255, 1267-70 (10th Cir. 1999); *United States v. Dorsey*, 45 F.3d 809, 816 (4th Cir. 1995) cited in Nancy Hollander and Barbara E. Bergman, *Everytrial Criminal Defense Resource Book*, §60:2. While appellate courts

pay lip service to the "least severe sanction necessary" doctrine, courts invariably uphold exclusion of a defense expert as within the discretion of the court and find any error in failing to exclude a government expert to be harmless error. *United States v. Batts*, 171 Fed.Appx. 977, 982 (4th Cir. 2006). Not surprisingly, the sanction of exclusion is far more likely to be directed at a defense expert than a government expert. See e.g. *United States v. Sutbar*, ___ F.3d ___, 2007 WL 731401 (4th Cir. 2007)(upholding trial court's decision not to exclude government expert, claiming that exclusion of testimony is almost never imposed).

In addition, there is one situation where the government can force the defendant to disclose the identity and substance of an expert witness's testimony: a defendant who intends to offer a defense of insanity is required to give notice of that defense pursuant to Fed. R. Crim. P. 12.2(b). In the event such notice is given, the defense must, upon request of the government, provide the government a written summary of the testimony that the defendant intends to offer under Rules 702, 703, and 705. If such a request is made by the government and the defense complies, the defense can also seek to have the government disclose what evidence it intends to offer in rebuttal. Fed. R. Crim. P. (a)(1)(G).

Putting aside for a moment the timing of disclosure, the first question counsel should consider is whether to request disclosure at all. What if your expert has identified some significant flaw in the government's theory of liability? If you feel comfortable that you know what the government's expert is going to say anyway, why telegraph what would otherwise be surprise testimony. Unfortunately, you may only have one or two cases in your entire career where you will have such explosive testimony. In the vast majority of cases you will be far more concerned with finding a way to neutralize the government's expert. The best way of identifying those flaws is by invoking Rule 16 and demanding that the government identify its witness and the substance of the witness's testimony.

Does this mean that you may have to forgo putting on your own witness? Possibly, but that is not necessarily a bad thing. The most persuasive testimony that can be presented on the defendant's behalf comes not from a defense witness (whose credibility and motives are always in doubt) but from a government witness who has been turned. If in fact there is a flaw in the expert's testimony, you should be able to elicit that flaw on cross. Your ability to trap the witness is a function of careful preparation and assistance from your own expert.



Jon May practices law with his wife Carol Cohen in the law firm of May & Cohen P.A. Their firm represents persons and entities accused of federal criminal offenses across the United States. Mr. May is currently co-chair of the ABA CJS Defense Function Committee and is a member of the NACDL White Collar Crime Committee.

While, the purpose of Rule 16(a)(1)(G) is “to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert’s testimony through focused cross-examination,” Fed. R. Crim. P. 16 Advisory Committee Notes to 1993 amendment, the rule does not apply to rebuttal testimony. Thus the government can present an expert on rebuttal without providing any notice to the defense even if this prejudices the defendant’s ability to effectively examine the witness. *United States v. Frazier*, 387 F.3d 1244, 1269 (11th Cir. 2004); *United States v. Silva*, 141 Fed.Appx. 521, 523 (9th Cir.2005) but see *U.S. v. Tin Yat Chin*, 476 F.3d 144, 146 (2d Cir. 2007)(calling failure to provide notice sharp practice but finding no due process violation in facts of the case).

How detailed must the notice be? That is unclear. One court has held that at a minimum, the disclosure should include:

- (1) Any reports and analyses that the expert has prepared, concerning the facts of the case;
- (2) Copies or a specification of all documents, writings and other information reviewed by the expert or on which the expert’s opinions are based, in sufficient detail so that the opinion rendered can be tested against that upon which it is based;
- (3) The expert’s work papers; and
- (4) The expert’s curriculum vitae or professional resume.

United States v. Reliant Energy Services, Inc. ___F.Supp. 2d.____, 2007 WL 640839 (N.D.Cal. 2007).

The bottom line is that defense counsel is faced with a major strategic decision. Is it more important to destroy the government’s expert, or is it more important to prevent the government from learning the substance of your expert’s testimony? In making that determination, you will need to consider some of the following factors:

- (1) the likelihood that the government will offer expert testimony;
- (2) the likelihood that you will learn something you don’t know about the

government’s case through any disclosures the government will have to make if you invoke Rule 16;

- (3) how important is the expert to the government’s case;
- (4) the likelihood that disclosure of the government’s expert and the substance of his testimony will help you to neutralize the expert’s testimony.
- (5) how likely is it that you will put on your expert;
- (6) how significant is the expert’s testimony to your case; and
- (7) will disclosure of a summary of the expert’s opinion and reasoning
 - (a) make the exclusion of the expert more likely under a Daubert challenge.
 - (b) reveal a critical aspect of the defense that you wish to keep concealed?

There is no deadline in the rules for the defense to request disclosure from the government, however, courts usually set a set a date for a response after a request is made. As discussed above, the failure of a party to comply with the court’s scheduling order may or may not lead to exclusion of expert testimony, depending upon whether the expert is offered by the defense or the government.

If you decide not to request disclosure of the government’s expert in advance of trial, have a *Daubert* motion ready to file when the government calls its witness. Because Fed.R.Evid. 702 independently requires the court to determine the relevance and reliability of all expert testimony, you may get much of the discovery you need, and—if you’re lucky—the court grants an evidentiary hearing, a crack at examining the witness before the witness testifies before the jury. But be prepared to go through the same process when you call your expert in the defense case.

Finally, don’t hesitate to educate your client on these issues. Some clients believe that, in order to win at trial, the defense must affirmatively present testimony to counter the government’s proof. Such clients will try to pressure counsel to offer expert testimony when the safer and more effective means of demonstrating the client’s innocence is through effective cross-examination. Some times you have to take risks. Sometimes it’s better not to. Having to make those judgments is why you get the big bucks.

Practice Tips

The Fear is Half the Fun:

What I've Learned From the Masters About Running a Great Small Firm Criminal Practice

By Solomon L. Wisenberg

- 1. Everything You Do Is Marketing.** How you answer the phone, how your web site looks, how your shoes are shined. Everything you do from the moment you and your support staff arrive at work is a marketing statement, whether you like it or not. I learned these and other invaluable truths from Harry Beckwith's three great books—*Selling the Invisible*, *The Invisible Touch*, and *What Clients Love*. Great legal work is not enough. Your attitude, your office and your entire presentation must reflect and express your substantive excellence.
- 2. Remember the Intangibles.** When Kirk Gibson won the Most Valuable Player award in 1988, he thanked the sports writers for considering the intangibles. Gibson did not have the highest batting average, the most home runs, or the most runs batted in. What he had was the indomitable spirit and toughness that sparked his team to a pennant victory. Much of your success as a small firm criminal practitioner depends on your own consideration of the intangibles. Do you return client phone calls in a timely and courteous manner? Are you authentic with your clients? Do you take the time to explain pertinent legal concepts to them? If you forget these intangibles you will lose your clients—and the loss will be deserved. The intangibles must be remembered in dealing with prosecutors as well. Do you interact with prosecutors in a civil, professional manner? Do you treat them with respect? Do you show them, through your confident attitude and knowledge of the case, that you are a formidable adversary?



Solomon L. Wisenberg is a partner in Wisenberg & Wisenberg PLLC located in Washington, DC. The firm focuses on federal white-collar investigations and trials, federal sentencing matters and federal criminal appeals. Mr. Wisenberg chairs the ABA CJS Criminal Practice Management/Solo and Small Firm Committee.

- 3. Stay Forever Young.** Many years ago I saw Doc Severinsen interviewed by Tom Snyder on The Tomorrow Show. In marveling at some of his own creative exploits as a 12-year-old trumpet prodigy, Severinsen remarked: "I hadn't been taught yet what I couldn't do." That comment has always stayed with me. In your legal work and your marketing work, don't let people tell you what you cannot do. Lawyers are a remarkably lock-step, timid bunch when it comes to advertising and marketing. Don't be afraid to try new and cutting-edge approaches, as long they meet ethical norms. When considering your legal strategies and arguments, don't be afraid to return to first principles. After all, first principles got us *Crawford v. Washington* and *United States v. Booker*.
- 4. The Leapfrog Theory.** In the 1970s, Robert J. Ringer wrote the business classic, *Winning Through Intimidation*. In the book, Ringer introduced the Leapfrog Theory, which holds that you have the right to leapfrog over your competition and proclaim yourself as one of the leaders in your profession. Of course, you have to have the goods to back it up. But if you do, there is no need for you to toil away for years in some grueling apprenticeship. This is more true than ever in today's high-tech world, where your small criminal law firm can take advantage of cutting-edge technology to let the rest of the world know how great you truly are.
- 5. Show Up.** Woody Allen once said that 90% of success in life is showing up. When you are asked to give a speech at your local Rotary Club, show up. When they invite you onto a panel at the state bar group's lunch, show up. When the television station calls because they need your expertise, show up. You never know who is listening. You never know what might happen.
- 6. Always Do What You Are Afraid To Do.** I read this in an essay by Ralph Waldo Emerson. It has become a byword of my professional life. Stonewall Jackson put it another way: "Never take counsel of your fears." You can't run a small or solo criminal law firm without guts. Sure, it's scary to take that first step and open a new practice, to pay for an excellent website, to manage your cash flow properly. Plenty of friends, many of them well-meaning, will tell you that it can't be done—that you are crazy to try. It is so easy to listen to the naysayers. Don't do it. Of course, you must plan, and be realistic. But the professional, emotional and financial rewards of a successful small practice are enormous. The fear is half the fun.

Practice Tips

Increasing the Odds for the Supreme Court to Grant Certiorari

By Cynthia Hujar Orr

1. No other authority reviews the Supreme Court

Counsel should keep in mind that the Supreme Court's decisions are not reviewed by any other authority. Thus, it is unlike any other court. It frequently decides issues that were not preserved or were not raised. Less frequently, it decides cases that reached the Court out of time.

And unlike other courts it decides cases based on a large variety of persuasive sources. Most recently, it raised controversy by deciding that juveniles should not be executed by relying in part upon international standards of decency. History, legislation, practices in other jurisdictions, legal scholarship, statistics, studies, developments in technology and science and many other matters influence the Court's decisions.

2. Write to survive the screening process

However, it is of foremost importance that counsel seeking a grant of certiorari prepare a thorough petition and seek support for the grant of certiorari from appropriate amici. Remember, that petitions are subject to a screening process. Supreme Court Law clerks are given the work by all but one Justice to review the writs of certiorari and recommend whether each petition should be granted or denied.

Since more than 7,000 petitions are filed each year, most of the Justices divide their initial review among the clerks each week on a random basis. The clerks then prepare memos which recommend denial or grant of certiorari.

Memos usually contain the following information:

- (a) a statement as to whether it is a writ of certiorari case or an appeal;



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- (b) Identification of the Judge who wrote the opinion of the court below, and identifying any judge who may have written a concurring or dissenting opinion;
- (c) an outline of the facts and the lower court holdings;
- (d) Identification of the questions presented for review and the contentions of the parties with respect to why the case should or should not be given plenary review; and
- (e) the law clerk's conclusions and recommendation as to whether the petition should be granted or denied.

Stern, Gressman, Schapiro, Geller, *Supreme Court Practice*, pages 39-40 (eighth ed. 2002).

These memos are circulated, commented upon by the other clerks and provided to the Justices with the pending petitions. In some cases, the Justice will rely on the memo without reading the petition. However, it is the conference of the Justices and the favorable vote of four which secures a grant of certiorari. The clerks' memos are simply tools used to aid the Court.

Moreover, as Justice Harlan once noted, "the question of whether a case is 'certworthy' is more a matter of 'feel' than of precisely ascertainable rules." That kind of "feel" is something that no law clerk can address in a certiorari memo; nor can a clerk's memo hide, let alone dictate, a particular Justice's "feel" that a given case comes within the Justice's own agenda or that of the Court. Nor is a law clerk's recommendation capable of overriding, or even influencing, the Justices' joint consideration of the case on the "discussed list."

A case on that list means that the "certworthiness" of the case will be discussed by all nine justices in their weekly conference from which the law clerks are excluded. The relative few certiorari petitions that are granted owe their success not to a blind following of law clerk recommendations but to the favorable vote of at least four justices following a conference discussion among all nine Justices. Stern, Gressman, Schapiro, Geller, *Supreme Court Practice*, pages 39-40 (eighth ed. 2002).

It should be noted that while clerks are particularly sensitive to recommending the grant of certiorari, the decision whether to grant certiorari is made by the Justices in a conference which the clerks do not attend.

3. Starting with the basics.

The Court's certiorari jurisdiction is not employed to simply review the position of the defeated party in the Courts of Appeals. As you well know, the Court exercises discretion with respect to writs of certiorari. Therefore the Court's jurisdiction has been fashioned to address matters of far-reaching importance, beyond the particular facts and parties involved in a case. Certiorari will be granted to cases presenting important federal principles or questions that will affect a great many people and courts across the country. About 3% of petitions for writ of certiorari are granted.

Rule 10 of the Supreme Court Rules sets out the general rule for the grant of certiorari.

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that the Court considers: (a) a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with the decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals; (c) a state court or United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for writ of certiorari is rarely¹ granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

4. Where to look for guidance.

A. What the Court says

Counsel should review the reasons that the Supreme Court granted certiorari in cases surrounding the area of law with respect to which his or her petition seeks review. Where the Court has engaged in dicta which the federal Courts of Appeals and state courts have applied with variations, this presents a cert-worthy area. Where federal statutes leave terms undefined, certiorari may be granted to supply the definition or declare the statute vague.

B. When inferior courts fail to follow guidance

It is safe to say that where the Courts of Appeals or state courts of last resort refused to follow or fail to follow Supreme Court precedent, certiorari is likely. This is considered the strongest area in which certiorari may be merited.

C. Splits among the high courts

Another area offering a good chance for the grant of certiorari is where the federal Courts of Appeals or state high courts reach differing results regarding the same federal question. This area is traditionally referred to as a split. A split may exist within a circuit court of appeals. However, a split within a circuit is not considered sufficient reason for the grant of certiorari alone. While it is attractive, it is not a sure thing. The issue must also be of sufficient importance. In addition, the Supreme Court will often allow the lower courts to "percolate" such questions and resolve the conflict themselves in "the laboratory" of their future opinions.

5. Decided issues

In recent years, the Court is more likely to grant cert. in order to reexamine Supreme Court precedent. While traditionally certiorari is granted regarding points reserved or left undecided in previous Supreme Court cases, where a question concerns prior decisions of the Supreme Court which are inconsistent or cannot be reconciled, or where the decision is based on a Supreme Court opinion that needs clarification, the Court will also grant cert.

6. What are important constitutional issues?

In order to increase the chance that your case is granted certiorari it is important to argue not only that your case presents an important federal question, but also that the question has broad implications beyond the parties involved in the case. Whether yours is a case that involves

American foreign policy, or involves disparate application of the same federal statute in different jurisdictions, it is imperative that you described the pressing and broad implications of the court's failure to decide the issue.

Of course, there are certain areas where certiorari is likely to be granted. For example, some fact bound cases involving the 1st Amendment are frequently granted review. Another area where the Supreme Court frequently grants Certiorari is in cases involving the extent to which the government may become involved in personal and family decisions. Of the criminal cases granted certiorari each year, many involve statutory interpretation or application of the death penalty. And the Court will be certain to act in areas where Congress has recently acted or may act such as with regard to the sentencing guidelines or amendments to the habeas statutes. Finally, the Court traditionally becomes involved in areas where it is setting the benchmark for constitutional rights.

I will close by telling the story of a federal public defender, Jack Carter, who had the nerve to question the application of the commerce clause in the context of federal gun in school zone cases. Decades of litigation before had resulted in seemingly limitless extension of the commerce clause and, with it, federal jurisdiction. This did not seem right to Jack Carter. And he was right. In *U.S. v. Lopez* the Court struck down the gun in school zone statute because the law did not require a sufficient federal nexus, an effect on commerce.

It is never too soon to start framing your issue for certiorari. Think about these practical tips in each case at the trial level and onward as you preserve error and develop the facts in support of your claim. Soon you will be in the unenviable position of appearing before our highest Court.

Endnotes

¹ This is the reference to the rare case of national importance in which the Court will grant certiorari to correct perceived error. A good example is *Bush v. Gore*, 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996).

Interviewing Company Employees

Continued from Page 6

2. *Discuss the Possibility of Waiver.* Given the continuing uncertainty over the benefits of waiving the privilege, it remains good practice to explain in more detail that the company may elect — at its discretion and its discretion alone — to turn over the statements made in the interview to the government.

3. *Make a Clean Record.* Because of the potential import of these issues, it also makes sense to have an unambiguous record memorializing your statements and the employee's understanding of them. Since the record may one day be seen by third parties, it also makes sense, if possible, to distinguish between pure facts, mental impressions, and legal advice — although such distinctions are far easier to describe abstractly than to apply in real life.

4. *Be empathetic.* Let's not kid ourselves — these can be exceedingly difficult issues. The company seeks to learn the true facts, so that it can make reasonable judgments, and report wrongdoing, if wrongdoing has actually occurred, in order to demonstrate its cooperation. For the employee who may have possible exposure, difficult choices also await, among them: decline to be interviewed and face termination; agree to be interviewed, make incriminating statements, and risk prosecution; or agree to be interviewed, make false exculpatory statements, and still risk prosecution. The McNulty Memorandum does nothing to make any of this easier, for you or your client.

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.

COMMITTEE REPORTS

Equal Justice Division

Juvenile Justice

During the past several months, the Juvenile Justice Committee drafted a policy recommendation and report addressing the sentencing of juveniles as adults. Other policy projects underway include girls in the justice system and a new Standards volume to address the borders of juvenile justice and other child-serving systems (education, child welfare, mental health).

The committee also continues to educate its members with updates on federal and state legislation and model programs. At the committee's meeting on April 21, a presentation on the status of federal legislation of interest was given by two Hill staffers from the U.S. Senate Judiciary Committee. Additionally, Vinny Schiraldi, Director, and Marc Schindler, Chief of Staff, of the Department of Youth Rehabilitation Services in D.C. gave a report about juvenile justice reforms in the District.

On August 11, during the ABA Annual Meeting, the committee will sponsor a CLE program, *Back to the Future: Forty Years of In Re Gault*. Following the program, ABA President Karen Mathis will present the Livingston Hall Juvenile Justice Award.

Military Justice

The Military Justice Committee reviewed proposals to:

- (1) amend the Rules For Courts-Martial to eliminate the fact finder's ability to reconsider findings of not guilty while retaining the ability to reconsider findings of guilty; and
- (2) amend Article 27, UCMJ to: grant service secretaries the authority to promulgate rules of professional responsibility; to require such rules to be based on the ABA Rules; to have

such rules preempt conflicting state bar rules; and to codify, via statute (Article 27), the federal preemption.

The committee voted not to support the proposals. With respect to the first proposal, the committee believes the current rules pertaining to reconsideration are fair in that they offer the greatest protection to the accused (less votes needed to reconsider finding of guilty but more votes needed to reconsider findings of not guilty) while preserving the trier-of-fact's ability to render its "true verdict." With respect to the second proposal, the committee believes such an amendment would be unnecessary in that the service TJAGs already have the authority to promulgate rules of professional responsibility, to require to require service rules to be based on the ABA rules may diminish each service TJAG's responsibility to maintain professional supervision and discipline over individuals practicing in his/her service, and federal preemption would be at odds with the current federal (military and non-military) practice.

Problems of the Elderly

The committee is redrafting the policy positions on the prosecution of elder abuse, neglect, and financial exploitation of the National District Attorneys Association together with the positions presented in the APRI Reports into an ABA format for the adoption by the House of Delegates at the earliest possible time. Once that approval is accomplished, the committee will seek adoption by the Uniform Commission of State Laws.

Race and Racism in the Criminal Justice System

The committee has convened meetings in New Orleans and Miami. The initial meetings focused on establishing committee goals on strategies to address racial disparity in the criminal justice system. To that end, extensive discussions were had regarding the feasibility of using

two Maryland jurisdictions as pilot sites for establishing Racial Justice Task Forces. Additionally, we will evaluate the newly released suggested guidelines for Federal Prosecutors to Reduce Racial Disparity in Sentencing prepared by the Brennan Center in collaboration with NILE, with a view towards obtaining ABA support in favor of the guidelines, including having the guidelines considered by the Standards Committee. We will further seek ways to support the work of the Vera Institute's Prosecution and Racial Justice Program, an innovated effort aimed at creating data collection and management tools for prosecutors to address bias in the exercise of prosecutorial discretion.

Victims

First, in January 2007, the Committee, working closely with the rest of the Criminal Justice Section, reviewed the proposed amendments to the Federal Rules of Criminal Procedure to determine their impact on the rights of victims. This review revealed that the proposed amendments to FRCP 17 did not comport with existing ABA policy. As a result, Robert Johnson submitted a letter to the Committee on Rules of Practice and Procedure urging the Committee to adopt changes to Rule 17 that would be in conformance with ABA policy, which supports greater protection for the privacy interests of victims. Next, in March 2007, co-chairs Russell Butler and Meg Garvin had the opportunity to present at the Equal Justice Conference in Denver, Colorado. The presentation addressed the critical need for attorneys provide *pro bono* representation to crime victims. Finally, the Committee is proposing to the Section Council the creation of the *Frank Carrington Victim Attorney Award*.

Two ongoing projects have remained a focus for the Committee. The Victims of Crime Act (VOCA) funding is again being threatened by

congressional and presidential maneuvering. The Committee is once again working to ensure not only that funding for crime victims funds not be diminished, but in fact that the cap on VOCA funding be lifted to ensure proper services to victims nationwide, as well as to ensure victims can obtain those rights provided by law. The Committee is also continuing to review the "ABA Guidelines for Fair Treatment of Crime Victims and Witnesses" in order to recommend revisions to the now 24 year old document to ensure it once again can provide guidance on victims issues the criminal justice system.

Women in Criminal Justice

This committee is relatively new. The motivation for starting a new committee arose in part from our deep frustration with the large numbers of battered women serving long sentences, in large part due to ineffective assistance of counsel, and then with little or no recourse, depending on state laws and availability of appellate counsel. The committee drafted resolutions with a supporting report and helped to marshal through what ultimately became ABA Resolutions.

We are currently planning ways to implement these resolutions. We are studying what can be done with state and local bar associations and law schools to raise consciousness about these issues. The Committee is considering what legislation we can propose and what other steps states, territories and the federal government can take. We are collecting models that might be useful. Finally, we are investigating what current re-entry services exist and what proposals we can offer for expanding them to better serve battered women being released.

Correction and Sentencing Division

Corrections

The committee has been hard at work on two exciting efforts. Under the

leadership of Ceceilia Klingele and with advice from William Rold, Michael Hamden and Tammy Seltzer a work group has written a report on the need for federal reimbursement of local prison and jail medical costs for the care of incarcerated persons. At the May meeting the committee will review the report and its accompanying draft resolution which, if endorsed by the full committee will be forwarded to the Criminal Justice Section for consideration.

Another work group under the leadership of Lynn Branham has just commenced work on an effort to develop a report and draft standards for the best means of effectuating public oversight of local prisons and jails. The workgroup hopes to have something for the committee to consider at the summer meeting in time to pass along for consideration by the House of Delegates next winter.

Re-Entry and Collateral Consequences

The Committee has undertaken several initiatives during the last 6 months. On January 12, we co-sponsored the Massachusetts Public Policy Forum: Building Consensus Around Successful Reentry at Suffolk Law School. We are currently planning a forum in NYC to discuss collateral consequences of criminal convictions. One of the foremost collateral consequences often discussed is the issue of loss of voting rights. By drafting an op-ed, the committee Chairs worked with the ABA to raise this issue in Kentucky and to foster discussion in the press regarding legislative changes.

We updated and greatly expanded our website to include practical tips on understanding collateral consequences and to enable attorneys to locate reentry programs.

Sentencing

On the state side, Vice-Chair Carl Reynolds has been extremely active in studying and reporting on state sentencing policies and constitutional issues. In addition, he has been in contact with CJS Chair Bob Johnson about taking up the mantle of "training in the exercise of discretion" as recommended by the Commission on Effective Criminal Sanctions. We are working with Doug Dretke, the former head of prisons in Texas, who now runs the Correctional Management Institute at Sam Houston State University, and working toward a November sentencing conference for judges in Texas, in conjunction with the state's community corrections department.

On the federal side, we have made our top priority addressing the unfair disparity between sentences for crack and powder cocaine. We are cautiously hopeful that action will be taken this week by the United States Sentencing Commission on this important issue. Assuming the Commission takes action, we will be ready to take an active role in the debate of that action that is sure to follow in the Congress. Otherwise, we have been largely on the sidelines as we await the Supreme Court's decisions in *Claiborne* and *Rita*. The holdings in those cases could result in fundamental changes in federal sentencing. At the same time, we are monitoring legislative efforts in the aftermath of *Booker*, but those efforts are for the most part on hold pending the Supreme Court's anticipated rulings.

Specialized Practice Division

Cybercrime

The Cybercrime Committee has actively supported the Criminal Justice Section's efforts on the ABA's National Institute on Computing and the Law. It will be on June 24-25 in San Francisco.

The Cybercrime Committee also developed a "Top 10" list for ways to avoid identity theft, which ABA President Karen Mathis turned into an audio press release to promote "The State of Criminal Justice."

Homeland Security

The Committee held its first meeting in connection with the CLE program in New Orleans in Nov. 2006 during the Disaster Preparedness conference. The presentations were powerful and provided a useful framework for examining whether local criminal justice systems are ready to deal with another large-scale emergency in the future.

Several steps were taken to build on the program and disseminate the lessons learned. The Section posted on the website a variety of resources from the sessions. A special issue of the section newsletter on Disaster Preparedness and Criminal Justice was published in January. And Mary Boland wrote an article entitled "Will Your Criminal Justice System Function in the Next Emergency?" It was published in the May issue of the Criminal Justice magazine.

The Committee is preparing a report and recommendations for the Council on the material witness statute.

Immigration

In its second year, the Immigration Committee continues to grow and actively support the Criminal Justice Section. The Committee successfully sponsored a CLE at the ABA Midyear Meeting in Miami. Committee Co-Chairs Bob McWhirter and Sara Elizabeth Dill presented a program on the representation of non-citizens in criminal proceedings.

Professional Development Division

CLE Board

The CLE Board of the Criminal Justice Section is a relatively new committee for the Criminal Justice Section. The CLE Board's primary responsibilities will be to take a major role in coordinating the section's Annual Fall meeting, to work closely with section committees on the mid-year and annual meetings and other CLE events, and to oversee and support the CLE-related work of the section. The CLE Board will hold its first meeting on June 4.

Criminal Procedures, Evidence and Police Practices

At the request of Section Chair Robert Johnson, the Committee will study legal issues raised by the use of private security to perform policing functions. The issue has become more important as private security forces have proliferated.

The Committee continues to monitor progress on proposed Federal Rule of evidence 502, dealing with waiver of the attorney-client privilege. A large number of practitioners and scholars commented on the Evidence Advisory Committee's proposal during the comment period, which ended in February.

Innocence Sub-Committee

The Subcommittee's publication *Achieving Justice: Freeing the Innocent, Convicting the Guilty* has sold approximately 400 copies to date, which essentially covers the cost of publication for the entire 1000 copies that were printed. These sales indicate the national interest in finding solutions to wrongful convictions and highlights the leadership role of the CJS in developing ABA policies on these issues. Individual members of the Subcommittee have remained active in discussing ABA policies at the conferences they attend.

Defense Function

The Committee will be preparing a recommendation to the Criminal Justice

Council, Prosecution Function Committee, the White Collar Crime Committee and the President's Task Force on the Attorney-Client Privilege recommending that the ABA promote the passage of the Attorney-Client Privilege Protection Act pending in Congress.

The Committee prepared comments to proposed rules 29 and 17. Its comments regarding rule 29 were ultimately adopted by the CJS Council and presented to The Advisory Committee on the Federal Rules of Criminal Procedure on behalf of the ABA.

The committee has also submitted practice tips for inclusion in the Criminal Justice Section's newsletter.

Brice L. Aikens and Robert Buschel presented a successful proposal for the ABA 2007 annual meeting: "Modern-Day Plea Negotiations in Criminal Cases." Cynthia Orr assisted Barry Boss in outlining a telephonic CLE conference concerning the Rita and Claiborne cases.

Committee chairs have been conducting an analysis of tribal Justice issues for consideration by the defense function committee. We were alarmed to learn that *Gideon v. Wainwright*, 372US 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), is not deemed to apply on Indian reservations. In addition, there have been recent efforts made to encourage the creation of death penalty offenses on Indian reservations.

The Committee is also preparing proposed ethical standards for defense counsel conducting internal investigations regarding alleged corporate misconduct.

In addition to seeking information concerning appropriate standards for habeas corpus and appellate practice,

the defense function services committee had a conference call concerning the proposed Investigative Standards for prosecutors. The committee will be providing comments to the Standards Committee.

The committee will continue to pursue a recommendation for post-conviction relief measures allowing defendants a process to review their wrongful convictions in appropriate cases.

The committee also continues to participate in and coordinate efforts with NACL and the Heritage Foundation concerning reform of the federal criminal code.

Ethics, Gideon and Professionalism

This newly-formed Committee held its first meeting on January 5 in D.C., coinciding with the annual meeting of the AALS. Members agreed to help develop the committee's website and to contribute to various CLE programs and publications. Since that time, the Committee circulated a Report and Recommendation to amend Rule 3.8 of the ABA Model Rules of Professional Conduct to include two provisions that would address prosecutors' post-conviction obligations upon learning of material evidence of innocence. The committee co-chairs have also been working with Section chair-elect Steve Saltzburg and a planning committee to organize the Section's November 2 program in Washington, D.C. on ethics and professionalism issues in plea bargaining.

Judicial Function

Committee members will be participating and providing a judicial perspective on issues addressed at the CJS program on plea bargaining on November 2, 2007 in Washington, D.C.

Past Chairs Function

Calls and letters have gone out to former chairs. There will be a committee meeting at the annual meeting in San Francisco to discuss the committee's agenda. Plans include a former chairs CLE panel at upcoming section meetings.

Prosecution Function

The Prosecution Function Committee is participating in the CLE program on Plea Bargaining to be presented at the Fall meeting. The committee is also reviewing and preparing comments on the "Investigation Standards for Prosecutors," and the proposed resolution concerning Sentence Mitigation for Youthful Offenders.

Science and Technology

The Committee for Science and Technology is organizing the ABA's first National Institute on Computing and the Law, entitled "Steps to Strides into the New Age." The institute will take place at the Nikko Hotel in San Francisco on June 25-26th. More information is available on the sections' website at www.abanet.org/crimjust.

Communication, Membership and Services Division

Book Publishing

The Book Committee has the following projects in development: *Citizenship Flowchart*; *4th Amendment Handbook* (3rd ed.) and *4th Amendment Reference Card*; *The Street Cop's Guide*; *Money Laundering*; *Asset Forfeiture* (2d ed); *Section 2255 Motions by Federal Prisoners*; *Collateral Consequences*; *Federal Conspiracy*; *Deciphering Medical Records and Lab Reports*; *The Criminal Amendments*.

ABA Publishing is continuing to market *The Criminal Lawyer's Guide to Immigration Law, Second Edition* and *Leapholes* (the young adult law-related novel by established best-selling author James Grippando) as well as the other Section's other current titles.

Criminal Justice Magazine Editorial Board

The editorial board met at the ABA Headquarters in Washington, D.C., on March 30. In addition to the ongoing pursuit of authors and articles, the board continues its work on a variety of magazine topics, such as: the design and implementation of a new readership survey; the creation of a new readership subcommittee; design revisions to the magazine; devising a method of assessing the impact of the articles and columns published in the magazine; identifying new sources for commercial advertisements for the magazine; and an attempt to run several articles and/or columns on "Careers in Criminal Justice," to create interest in a new ABA book proposal on that same topic.

Criminal Practice Management/Solo & Small Firm

The chair prepared a Practice Tip for the Section newsletter.

Legislative and Policy

Participated in conference call training facilitated by Steve Saltzburg and Lynn Branham on Policy Development within the CJS of the ABA.

Identified that the committee may be able to track issues currently of interest to State Legislatures through the Council of State Governments and National Conference of State Legislatures. It was suggested that we attempt a pilot program with 5-7 State Bar Associations to try to insure that as issues arise in state legislatures those bodies become aware of ABA/CJS Policy provisions relevant to those issues.

White Collar Crime Division

White Collar Crime

This past quarter was highlighted by the 21st Annual National Institute on White Collar Crime which was held March 1-

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Legislative Update

By Bruce Nicholson

Prisoner Reentry

Bipartisan legislation to help prepare inmates and other ex-offenders to successfully return to their communities moved forward in the House and Senate in late March. The House Judiciary Committee on March 28, 2007 approved H.R. 1593, the Second Chance Act of 2007, by voice vote to conclude a markup session lasting five hours. H.R. 1593, was introduced in the House of Representatives 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: judiciary.house.gov/oversight.aspx?ID=286. The Subcommittee cleared H.R. 1593 on March 27, 2007.

The principal opposition at both the Subcommittee and full Committee markups was mounted by Rep. Louis Gohmert (R-TX), who introduced 11 amendments to narrow the scope of programs authorized under the bill. Several of Rep. Gohmert's amendments sought to make eligible faith-based organizations that discriminate in hiring practices for grants to conduct programs to ease the re-entry of former prisoners into society. All were withdrawn or defeated. The Judiciary Committee also rejected by a 16-20 vote an amendment offered by

Rep. Steve Chabot (R-OH) to adopt his bill, H.R. 845, the Criminal Restitution Improvement Act of 2007, making restitution mandatory to victims for all federal crimes. With full committee support, H.R. 1593 is likely to be considered on the House suspension calendar in the near future.

In the Senate, Senators Joe Biden (D-DE), Sam Brownback (R-KS), Patrick Leahy (D-VT) and Arlen Specter (R-PA) introduced S.1060, the Second Chance Act of 2007, on March 29, 2007. 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.

Court Security

House Judiciary Chair John Conyers, Jr. (D-MI), along with Reps. Louis Gohmert (R-TX) and Bobby Scott (D-VA), introduced the Court Security Improvement Act of 2007, H.R. 660, on

January 24, 2007. A 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 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 has been introduced on a bipartisan basis without these provisions.

H.R. 660, as introduced, contains redaction authority to protect judges private information, provides increased funding for judicial security programs and it creates a number of new crimes including a provision regarding "malicious recording of fictitious liens against federal judges and federal law enforcement officers. H.R. 660 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 bill 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. H.R. 660 was referred to the House Judiciary Committee.

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

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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://thomas.loc.gov/cgi-bin/cpquery/R?cp110:FLD010:@1(sr042)), was filed on March 29, 2007, and the bill was placed on the Senate Legislative Calendar for future floor consideration that same day.

Gang Prevention

On January 31, 2007, Sen. Dianne Feinstein (D-CA) introduced anti-gang legislation 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, the Gang Abatement and Prevention Act of 2007, 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. S. 456 currently has 20 Senate cosponsors and has been referred to the Senate Judiciary Committee.

Rep. Adam Schiff (D-CA) introduced House companion legislation, H.R.1582 on March 20, 2007, with Rep. Mary Bono (R-CA) as its sole cosponsor.

H.R. 1582 was referred to the House Judiciary Committee for further action.

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. The ABA is monitoring this legislation.

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: 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: judiciary.house.gov/oversight.aspx?ID=272.

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. It is unlikely that this proposal will receive serious consideration by Congressional appropriators who begin work in earnest on next year's appropriations in mid-March. Instead, there is a strong consensus and likelihood that House and Senate Appropriations Committees will approve increased funding for the principal federal juvenile justice programs.

The critical federal role of the JJDP is threatened by efforts to make sweeping

changes to the Act, including the elimination of the Act's four core mandates to the states, the abolition of the Justice Department's Office of Juvenile Justice and Delinquency Prevention (OJJDP) and a concentration on "get tough" program grants to the states. OJJDP funding, in the current year set at \$700 million, would be eliminated under President Bush's budget recommendation for Fiscal Year 2008. Supporters of a strong federal partnership role with the states are pushing to restore severe funding cuts made over the past several years and to strengthen the core requirements of JJDP.

Youth Crime Deterrence Act

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 two cosponsors and has been referred to the House Committee on Education and Labor.

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

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. This excellent 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.

Lawyer Cannot Advocate Against Clients Frivolous Motion

A criminal defense attorney who believes his client's requested motion is frivolous may not reveal privileged communication and may not advocate against the clients position. The California Court of Appeals, Fourth Circuit ruled that the client was denied effective assistance of counsel when his own lawyer advocated against his client's interests. See *In re Prescott*, Cal. Ct. App. 4th Dist., No. D047936, 4/3/07. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol. 23, No. 8, p. 193 (April 18, 2007).

Attorney's Silence Is Not Golden

Having missed the trial the defendant was picked up in time for the sentencing hearing at which his attorney stated that the client did not recognize the validity of the if the trial or the authority of the court to proceed with sentencing then fell silent and advised the client to do so as well. U. S. Court of Appeals for the Seventh Circuit held a criminal defendant was deprived of his constitutional right to effective assistance of counsel when his attorney stood mute at sentencing in a misguided effort to keep his client out of more trouble for failing to appear at trial. See *Miller v. Martin*, 7th Cir., No. 05-3978, 3/15/07. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol. 23, No. 8, p. 194 (April 18, 2007).

Jenkins and Gilcrest Firm Not Prosecuted, but...

The IRS has announced a settlement with Jenkins and Gilcrest law firm in which the firm agreed to a fine of \$76 million stemming from its development and marketing of abusive and fraudulent tax shelters. The firm is expected to disappear almost immediately. The IRS news release is available at http://www.irs.gov/pub/irs/news/jenkins_gilcrest_np_pr.pdf. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol. 23, No. 7, p. 178 (April 4, 2007).

Lawyer Malpractice Claim Must Come From Client Not His Bill Payer

An attorney hired and paid by an individual to represent his stepson in a criminal matter cannot be held liable in malpractice to the fee-payer for allegedly botching the stepson's case. Malpractice claims require proof of an attorney-client relationship, and mere payment of a lawyer's bill does not even establish an agency relationship much less an attorney client relationship. See *Fox v. White*, Mo. Ct. App. W. Dist., No. WD66701, 1/23/07. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol. 23, No. 3, p. 53 (February 7, 2007).

Actual Innocence Applies to Lesser Crime

A defendant who was allowed to withdraw his guilty plea to felony vandalism and replace it with a guilty plea to a lesser included misdemeanor may not pursue a claim of malpractice against his attorney who negotiated the original plea without first proving that he was actually innocent of both the felony and the lesser included offense. See *Sangha v. La Barbera*, Cal. Ct. App. 4th Dist., No G035195, 12/26/06. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct* Vol. 23, No. 3, p. 60 (February 7, 2007).

Policy Update

The Section website is updated with new policy information on a quarterly basis. See www.abanet.org/crimjust/policy for the latest update.

Committee Reports
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2. This year, a record number of more than 1300 practitioners gathered in San Diego to benefit from the expertise and insights of a unique blend of judges, federal, state and local prosecutors, other law enforcement officials, defense attorneys, corporate in-house counsel, and members of the academic community. Our nation's highest ranking federal law enforcement official, Attorney General Alberto Gonzales delivered the keynote at the Institute's luncheon during which he addressed the priorities of the Department of Justice.

Our Institute, founded by former Committee Co-chair and National Institute Program Chair, Ray Banoun, stands alone as the preeminent gathering of criminal justice practitioners in the country. Ray's vision and foresight were honored at the

conference when he was awarded the Charles English Award.

Criminal Justice Standards

When most crimes were street crimes, the roles of police and prosecutors were generally clear and quite distinct — police investigated and prosecutors prosecuted. However, as crime has become more complex and the legal rules governing its investigation have become more intricate, prosecutors have become more involved in the investigatory stage. Recognizing this, in the summer of 2002, the Criminal Justice Section's Standards Committee commissioned a Task Force to draft Standards for prosecutors involved in complex investigations.

On April 10, the Standards Committee sent the Section Council and other interested parties a comprehensive set of proposed Standards on Prosecutorial Investigations. This is scheduled for a first

reading at the May 12-13 Council meeting on Mackinac Island.

The proposed Standards will supplement the current Prosecution Function Standards that deal with the issue in much less detail. Among the topics addressed are undercover agents, confidential informants, subpoenas, search warrants, and surveillance techniques. They also provide guidance in investigating suspected illegal behavior of other prosecutors, judges, defense counsel, witnesses, informants, and jurors.

Standards Committee Chair Irwin Schwartz oversaw the Standards Committee review of the proposal. The Task Force that drafted it was chaired by Ronald Goldstock. Steven Solow was the Task Force reporter. For a copy of the proposal or for further information about it, contact Standards Project Director Susan Hillenbrand at hillenbrands@staff.abanet.org.

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