



CRIMINAL JUSTICE

The American Bar Association Criminal Justice Section Newsletter

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SPECIAL ISSUE ON DISASTER PREPAREDNESS AND CRIMINAL JUSTICE

PREPARING FOR DISASTERS: AN INTRODUCTION

By Stephen Saltzburg

The November 2006 meeting of the Criminal Justice Section in New Orleans provided Section members and others who attended a special CLE program on disaster preparedness an opportunity to revisit the unanticipated problems caused by Hurricane Katrina, the responses to those problems, and lessons to learn when future disasters strike. A combination of panel discussions and break-out sessions enabled all participants to garner some common knowledge about Katrina and its aftermath, to discuss in smaller groups how to prepare for the future, and to contemplate the unfortunate reality that nature-caused and man-made disasters are an unfortunate but real part of life in every country no matter how technologically or legally advanced.

We experimented in the breakout sessions by having prosecutors, defense counsel, corrections officials, judges and judicial personnel meet in three separate groups. The separation enabled each group to examine how its part of the

criminal justice system responded to Katrina and what plans have been or should be made to deal with the next unanticipated calamity. We have in this issue three presentations that summarize some of the analysis advanced by each group — Joe Whitley writing for prosecutors, Charles Wynder, Jr. for defense counsel, and Jack E. Pool for the judges and judicial personnel. We also have important contributions by Jim Letten, United States Attorney for the Eastern District of Louisiana, who describes the law enforcement response to Katrina, and Lauren Simon and Scott Slonim of the Law Office of the Cook

County Public Defender, who examine the public defender's experience with a tragic fire that struck the high-rise office building housing its office in downtown Chicago.

Each presentation emphasizes that there is no substitute for preparation, preparation, and more preparation. Preparation requires, planning, education, training, and practice. It also requires coordination of federal, state, and local

resources. Prosecutors, defenders and courts now know that they must plan for continuity of operations when disaster strikes. They must have effective communications systems and clear chains of command. They also must backup data so that if one system goes down or is lost, a backup is available. Joe Whitley, Charles Wynder and Jack Pool each demonstrate that these points



"Preparing for a Disaster" plenary session during the Disaster Preparedness conference in New Orleans included (from left): E. Pete Adams, Louisiana District Attorneys Association; Eric Sivula, Louisiana Department of Public Safety and Corrections; Denise LeBoeuf, New Orleans Indigent Defense Board; Catherine Kimball, Associate Justice, Louisiana Supreme Court; and Fran Schmitz, U.S. Department of Justice Counter Terrorism Section.

are equally important for prosecutors, and defenders, and courts. All of the participants in New Orleans emphasized

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Steve Saltzburg is Chair-Elect of the ABA Criminal Justice Section.

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that, in the words of Lauren Simon and Scott Slonim, you must “expect the unexpected.”

Even if you anticipate a potential problem, solving it may not be easy. Katrina taught us that power outages and cell phone tower problems may interfere with the ability of some cell phones and “Blackberries” to communicate. It is necessary, therefore, to think about having access to office cell phones with area codes different from that of the local area or to a phone bank outside the area affected by an emergency. Even if phones work, it is vital for participants in the criminal justice system to know how to reach each other. Readily available lists of phone numbers can be enormously important.

Some events will have a more isolated impact than Katrina but will be potentially devastating for those involved. Planning for these events can be as important as planning for larger disasters. Lauren Simon and Scott Slonim sensitively write about the fire that destroyed the defenders’ building in Chicago, claimed six lives, and injured dozens. They explain that the human costs of the fire might well have been reduced by the evacuation plan in place in the defenders’ office.

The defenders’ experience with a fire was similar in one crucial respect to the judicial experience in Mississippi — i.e., the disruption of the lives of those called upon to deliver legal services. In Chicago, the defender’s office concluded that the traumatic effect of

the fire on lawyers and staff was evident. In Mississippi, judges and staff were scattered by Katrina, communications were unreliable, and the personal losses and stresses for court staff disabled them from fully attending to their duties for an extended period. Both jurisdictions learned that it is important not to ignore the impact of a disruptive event on the lawyers and staff. Jim Letten explains that families may have to separate during a disaster, and families need to have their own disaster-preparedness plan. It is clear, then, that part of careful planning involves recognizing the human costs of disasters and preparing for them as well as for anticipating physical damage to buildings and destruction of equipment and property.

Jim Letten credits the resources of the Department of Justice and the cooperation of other United States Attorneys’ offices for his own office’s ability to fulfill its mission. A comparison of his description with that of Jack Pool’s is a reminder that states may not have the kind of resources that were available to Eastern District of Louisiana. The larger the disaster, the more important it is for governments to pull together and work together. The potential importance of coordination and combining resources is evident in Jim Letten’s description of the joint efforts of the National Guard, Louisiana Department of Corrections, New Orleans police, volunteer police from other jurisdictions, and state and federal prosecutors.

Because the next disaster may be quite different from the last one, emergency legislation may be needed to deal with

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Patrice McFarlane Moves Up Within the ABA

Patrice McFarlane is commended for serving as the Special Editor of this issue of the Newsletter.

The Section of Criminal Justice congratulates Patrice on her promotion and transfer within the ABA to the Individual Rights Section as Assistant Director. The ABA is very lucky to keep Patrice in house. She has done important work for criminal justice over the years and lately worked to support the Women’s and Victims Committee Resolution on Incarcerated Victims of Domestic Violence and prepared a grant proposal on child victims. Patrice worked to improve and expand the Section’s outreach process and database to include state and local bars, criminal justice colleges, U. S. Attorneys, local prosecutors and defense lawyers especially public defenders.

Section Director Jack Hanna states, “I am especially sad that she is leaving because of how willing she has been to tackle new and challenging projects. Not only has she tackled new assignments such as serving as the Special Editor of this issue of the Newsletter, she has also demonstrated tremendous leadership on staff. I am pleased that her qualities have been recognized by others within the ABA and that this tremendous opportunity has come her way.”

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Fall Meeting Brings Players Together for Disaster Preparedness

In February of 2006, then Section Chair-Elect Robert Johnson determined that he wanted to focus on *Disaster Preparedness* as the theme of the ABA Criminal Justice Section Fall meeting. The Section was having a difficult time securing a Washington, D.C. hotel for the fall conference when it occurred to Chair-Elect Johnson that the best place to hold such a meeting would be in New Orleans. The site was selected because participants would learn more about disaster preparedness from the criminal justice system there than anywhere else and because it would be a gesture of support for the city as it continues to recover. It turned out to be an excellent decision as the conference drew close to 150 participants and provided a forum to bring all the players in the criminal justice system together to face the task of rebuilding the system in a unified manner.

The conference, "Disaster Preparedness and the Criminal Justice System," heard first hand from officials and lawyers who were on the ground during and after Hurricane Katrina. The program, held on Nov. 2-3, brought together such notables as Louisiana Attorney General Charles C. Foti Jr.; Justice Catherine D. Kitty Kimball, Louisiana Supreme Court, New Orleans; Marlin N. Gusman, Sheriff, Parish of Orleans; and E. Pete Adams, Executive Director, Louisiana District Attorneys Association.

Nearly a year and a half after the hurricane, the lawyers, prosecutors, judges and police in New Orleans, Mississippi, Alabama and other affected areas, are faced with trying to seek justice in an area where courthouses have been destroyed, evidence has been lost, and lawyers' offices remain closed.



In addition to the plenary sessions, the hands-on conference sessions included break-out sessions for defenders, prosecutors, judges and corrections officials. After the break-out sessions, the various groups came together to report on what had been discussed in the smaller groups. The break-out sessions included such topics as "Criminal Justice Recovery: Lessons Learned" and "Preparing the Criminal Justice System for a Disaster."

Criminal Justice Section Staff Director Jack Hanna reported that the break-out groups were especially beneficial in sharing information and "stressing the critical need for a comprehensive disaster plan," whether it be a natural disaster or man-made while the plenary sessions "brought the entire criminal justice field to the table to try and prepare for the future in a unified way."

Disaster preparedness resources compiled by the section may be found on its web site at www.abanet.org/crimjust/calendar/disastermaterials.doc. Such resources include, the disaster Recovery Plan for Law Firms from the ABA Law Practice management Section and hurricane plan from Miami, "After the

Dust Settles," written by Teresa Miranda for the National District Attorney's Association, a link to the U. S. Government avian and pandemic flu information and a disaster recovery plan for courts prepared by the National Association of Court Management.

Criminal Justice Section Homeland Security Committee Co-Chair, Robert Litt states the following, "For me, the conference served as a reminder of how unprepared the various segments of the criminal justice system can be for a major disaster such as a hurricane or pandemic. The need for sample plans, blue prints and check lists is obvious but cookie cutter plans aren't good enough. It is critical that plans be particularized by type of disaster prepared for and by the typography and other aspects of the particular locale. For instance in New Orleans it may be important not to have computer servers, document storage, etc. located in the basement because of the danger of flooding, however if you are in San Francisco they may be better off in the basement because you are preparing for an earthquake. The point is that analysis has to first begin with assessing where the risks are in your particular case. With this issue of the newsletter and with its web page the Criminal Justice Section hopes to provide access to resources to help criminal justice professionals in designing steps for disaster preparation and recovery."

Feedback Welcome
Send to crimjustice@abanet.org

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

A FEW THOUGHTS ON THE ABA CONFERENCE ON DISASTER PREPAREDNESS AND THE CRIMINAL JUSTICE SYSTEM

By Joe Whitley

When Hurricanes Katrina and Rita hit the Gulf Coast in August and September 2005, respectively, it left the criminal justice community in Louisiana and Mississippi in disarray. This past November, I attended a two day program in New Orleans sponsored by the Criminal Justice Section of the ABA. I heard from legal professionals and key members of the criminal justice system from the City of New Orleans and the states of Louisiana and Mississippi on the lessons that they learned from Hurricane Katrina.

From the various presentations and sessions, it was apparent that – for purposes of business continuity in the criminal justice system – planning, education and training were essential to maintaining the viability of the system. In any disaster well trained and prepared lawyers who have developed relationships with other operational decisions-makers can make a real difference in providing real time and accurate legal advice.

This means that, in any jurisdiction, planning needs to be taking place today, before a crisis, to develop a plan of action to respond to a disaster, no matter its form — whether an earthquake, hurricane or terrorist event. As a consequence, defense counsel, prosecutors, judges and correctional officials must develop relationships and

plans to keep the judicial system working in the event of disaster.

Throughout all the panels and sessions in New Orleans, I heard common themes that are relevant to disaster planning in any criminal justice system whether it is at the local, state, or federal level throughout the United States.

Some of these common themes were the following:

- 1) You have to have a plan for continuity of operations. It has to be written down and shared with all employees. The plan must be a real, living document. Something that is just written down and stored on a shelf is worthless.
- 2) Critical pieces of the plan are effective communication systems that need clear and defined chains of command.
- 3) The plan should address basic data protection and redundancy of critical documents and information.

4) The plan needs to address issues associated with the potential absence of large numbers of employees.

5) Finally, the plan should address the reality: in disasters, you can't rely on the government to solve your problems. Assume that you are on your own and be prepared. And think outside the box.

As we look ahead to dealing with the next disaster or crisis that may hit your judicial and legal community, I encourage you to host your own Disaster Preparedness Conference. The dialogue will be a first step to preserving and maintaining our system of justice when disaster threatens it. The ABA Criminal Justice Section is to be commended for setting in motion, with its Fall conference, an effective forum in New Orleans that may very well be the way ahead for preserving our criminal justice system in future disasters.



Joe Whitley is former General Counsel to the U.S. Department of Homeland Security and is Partner of Alston and Bird, Washington, DC.



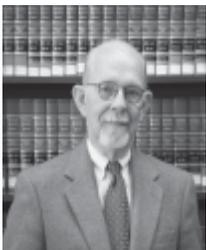
"The Gulf Coast Disaster in Perspective" plenary session included (from left): Richard Stalder, Louisiana Department of Public Safety and Corrections; Burton Guidry, Louisiana Assistant Attorney General; Stephen Saltzburg, Chair-Elect, ABA Criminal Justice Section; and Julie Kilborn, NACDL Katrina Coordinator.

PLANNING FOR THE INEVITABLE

By Jack Pool

In the span of time between September 11, 2001 and the Katrina Hurricane in 2005, all public institutions have gained a new awareness of the impact of natural and manmade emergencies on the necessary governmental functions, including the judicial and criminal justice systems. Prior to Katrina, most emergency planning was focused on traditional first responders—fire and police departments, medical facilities, and utility systems.

On August 29, 2005, the storm came ashore with 140 mile per hour winds and a storm surge of up to 35 feet. Wind gusts of 110 miles per hour were felt 100 miles inland, and the surge was felt in varying degrees six to twelve miles inland. When the skies cleared, Mississippi had 231 dead, 68,729 homes destroyed and 65,237 with major damage and total damages estimated at \$125 billion. Coast roads and bridges were destroyed, and utilities including cellular telephone towers were disabled for days or weeks as far north as the capital in Jackson, over 150 miles north of the Gulf. Mail service was out in some zip codes for months. Louisiana was, of course, hit as hard or harder with the catastrophic near destruction of one of the world's great cities, New Orleans, which is not only the site of the local trial courts, but of the Louisiana Supreme Court and the Fifth Circuit Court of Appeals.



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Court Administrator
of the Mississippi
Supreme Court.*

In the wake of the storm, some Gulf Coast courts were closed for an extended period. In the first days, some jurisdictions found themselves completely without a judicial system. In Jackson, the Supreme Court was closed for eight days due to lack of power, and for weeks communications with the coast was unreliable. Judges and staff were scattered, and courthouses in Bay St. Louis and Pascagoula were heavily damaged. Court staffs were able to move back into the Jackson County Courthouse in November 2006 after working for months in portable buildings and a cavernous civic center. The Hancock County courts continue to operate from portable buildings awaiting repairs to the court house. The courthouse in Biloxi had major roof damage, allowing records to be soaked. The personal losses and stresses for court staff have been such that even those who remained in the area could not fully attend to duties for an extended period.

On August 29, the Mississippi judiciary had no formal emergency preparedness plan. Learning from the experience, even while wrestling with the immediate disaster, the Supreme Court began the creation of a coordinated emergency response initiative for the future under the direction of Chief Justice Jim Smith, and through a committee chaired by Justice George Carlson, Jr. and including Justices James Graves, Jr. and Michael Randolph. In this process, many lessons were learned.

With adequate preparedness, an event may be a problem rather than a disaster. As we go through the process of developing plans, we are learning certain very fundamental truths common to all emergency planning:

1) Emergency response plans must be created locally. Each community will have a different set of resources and responders. In April 2006, the Supreme Court published its Guidelines for Emergency Preparedness Planning, disseminated it to the Mississippi Courts and asked those courts to begin their planning process, to select Emergency Operation Coordinators, and to register the names and contact information for the coordinators with the Administrative Office of Courts in Jackson. See www.mssc.state.ms.us/news/default.asp. An excellent example of a well thought out local plan dealing with issues specific to the particular court is the Jefferson Parish Louisiana Continuity of Operations Plan developed under the direction of Judge Andrea Janzen. See www.jpjc.org/COOP.htm.

2) The two principal goals in any plan are safety of people, including those in custody, and continuity of operations. (Important safety and civil rights issues, including, release, relocation and tracking of those in custody of the state, ranging from neglected children, those awaiting trial, minor offenders to dangerous felons, are beyond the limited scope of this article.)

3) Emergencies should be analyzed as belonging to two sets—those requiring relocation of facilities, staff and those in custody, and those which do not require relocation.

4) Courts often do not get a seat at the table in all community planning. It is common for emergency planners to overlook the judicial system. Alternate facilities should be secured in the overall community planning. Planners must also think about sources for equipment, particularly data processing equipment, which might be borrowed or purchased through special prearrangement.

5) Communications may be the biggest problem. In major disasters, cellular phones may not be an adequate fallback because towers may have been destroyed. A limited number of satellite phones should be pre-positioned with those responsible for communications. The public media, who often have more sophisticated assets than local government, can be of major assistance for reaching not only the public but for communicating with scattered staff, especially in the early days of an emergency. However, in a major disaster, the news media should not be relied upon as a sole means of communicating with staff. The media takes a triage approach to disseminating updated information, and whether the courts will be open may be way down the list—if on the list at all. Hard copy lists of emergency contact information for key personnel should be maintained in the possession of those responsible for reestablishing contact and “calling trees” should be established.

6) Courts must identify the minimum essential functions that they perform and the key personnel who will carry out those functions. The focus during the first days should be to reestablish operations and to do what is necessary to have a judicial system for the first thirty or sixty days, and, of course, to preserve information and files which will be necessary to return to full functionality at the end of the initial emergency period.

7) Essential personnel should be required to have family emergency response plans, and other employees should be encouraged to do so. Generally you can expect key personnel to respond to the emergency needs of their employment only after they have made arrangements for the safety of their families.

8) Electronic records must be securely duplicated and stored at sites outside

the locale of the court so that a disaster which hits the court will not simultaneously destroy those back-up materials. Also, care must be taken to safely store program as well as data files. If programs are damaged or inaccessible, the data records may be useless.

9) Payroll and purchasing arrangements must be made before the emergency. This will require joint efforts with the governmental agencies responsible for generating and authorizing the expenditure of public funds. Emergency procedures may require legislation. For payrolls, it is generally found that encouraging or requiring direct deposit will avoid many problems in this area.

10) Courts should have at hand emergency orders which can be entered immediately. These will cover extension or suspensions of filing deadlines, general continuances of cases, and closing of facilities.

11) Emergency response plans should build in processes for regular, formal review. Drills and conferences with the key personnel should be regularly scheduled with new employees made aware of the plan and its requirements as they come aboard.

Fortunately, there are many resources available to courts or other agencies when they begin the planning process. The National Center for State Courts, the ABA, and the courts and administrative office of courts in the states which have adopted plans are most helpful. Florida particularly began recognizing the unique nature of the judiciary’s needs a number of years ago. With their experience from Hurricane Andrew, as well as others, the anthrax scares attendant to 9/11, the pressures on technology and communications surrounding the 2000 presidential elections, they have accumulated invaluable expertise. Mississippi relied heavily on Florida’s resources in adopting its planning guidelines. Although plans must be developed locally, much can be gained by calling on these resources.

The size and extent of emergencies and natural disasters will vary, but their existence is inevitable. When they occur, the people must have real and visible institutions functioning to preserve a civilized society. Otherwise, we walk in the shadow of anarchy. Only with preparation can this threat be avoided.



“Recovering from a Disaster” plenary session included (from left): Phyllis Mann, Defense Attorney, Alexandria; Calvin Johnson, Orleans Parish Criminal District Court, New Orleans; David Gorbaty, Louisiana 4th Circuit Court of Appeals, New Orleans; Cathy Fontenot, Department of Public Safety and Corrections, Baton Rouge; Paul Connick, Jr., District Attorney, 24th Judicial District, Gretna; and James Letten, U.S. Attorney, Eastern District of Louisiana, New Orleans.

Why Disaster Preparedness Cannot Be Put On Hold: The Experience of the Cook County Public Defender's Office

By Lauren Simon and Scott Slonim

Early one autumn evening in the heart of downtown Chicago, just as people were beginning to think about calling it a day, a tragic fire struck a high-rise office building housing the Law Office of the Cook County Public Defender. It began around 5 p.m. on October 17, 2003, in a storage room on the 12th floor of the 35-floor structure that is the headquarters of the nation's second largest public defender office. This blaze would ultimately claim the lives of a half-dozen people, and seriously injure dozens of others.

The fire threatened to prevent the Public Defender's Office from continuing to act as the guardian of liberty for thousands of poor people in Cook County. It was a disaster of unprecedented magnitude for our Office. No member of our staff perished that terrible Friday afternoon, but other offices housed in the same building were not so fortunate. We benefited from emergency training, quick action, and luck.



Lauren Simon is Chief of Staff, Law Office of the Cook County Public Defender and Scott Slonim is Chief, Training Division of the same office.



In the aftermath of the fire, we had some very difficult decisions to make. But we were all of one mind: come Monday morning we would stand ready when the courts opened. Thanks to the yeoman efforts over the weekend of many unsung heroes, our clients were all represented on Monday morning and 150 employees (about 20% of the staff) had workplaces to report to. Still, we were all affected by the experience. When we left the building the night of the fire, we all thought we would be back within a matter of minutes or hours. We were wrong. It would be ten months and two major relocations before we were allowed to return. Of course, our logistical difficulties paled in comparison to the loss of life suffered by other offices that were located in the Cook County Administration Building. The experience was a stark reminder of the value in planning for disaster. If not for an evacuation plan we already had in place, the human cost of that fatal fire could have been higher. We took to heart that it could have happened anywhere, anytime, to anyone, in any organization.

And as we now know, it did. In August 2005, New Orleans' criminal justice system became one of Hurricane Katrina's many victims. That event strengthened our resolve to ensure that all of our "people" are cared for in case of any future disaster. Our "people" include staff, clients, their families, the public and the system we serve. To do this, the Law Office of the Cook County Public Defender operates an internal Continuity of Operations Plan (COOP) Committee, designed to address the proverbial elephant in the room, the threat of disaster. Our committee includes attorneys, investigators and support staff,

representing all levels of the office. Inclusion is crucial. Hearing an active voice from the members of our support staff is critical because when the attorneys leave for court it is members of the support staff who become our presence in the work sites.

We have come to recognize that "disasters" come in many forms, not only fires or hurricanes. They can be large in scope like threats of bioterrorism, chemical emergencies, radiation exposure, mass casualties or contagious outbreaks. But more likely they will occur as smaller events like noxious fumes in a ventilation system, electrical failures, a heart attack in the workplace, an accident, or a collapsing office roof; all of which are capable of disrupting the operations we've carefully designed to provide our clients with the representation they need and deserve.

Additionally, our difficult experience taught us the importance of taking care of ourselves, for that is fundamental to our ability to take care of others whose lives and cases have been entrusted to us. All "COOPs" must contemplate office environments that allow staff to concentrate on clients' needs, instead of their own. To accomplish this, staff members are encouraged to have an emergency plan in place for their own families. It's not always easy to convince people to take seriously the need to plan and practice responses to emergency situations. As elementary as the principle may be, we've all heard the apocryphal tale of lawyers who don't attend to their own wills. And we know that especially in public agencies and small firms, time, money and other resources are at a premium. We recognize that business-continuity planning, while necessary, makes people uncomfortable. We must overcome that discomfort, because the alternative to business-continuity planning is a price to be paid in human

and fiscal terms that is exponentially higher.

Sensitivity to the after-effects of trauma is another essential element we have identified to assure business continuity. Understanding that the people around you cannot escape being affected by what's happened cannot be overemphasized. In our view, there are four phases to preparedness. Phase One is the Prepare/Plan/Drill stage. Expecting the unexpected is our mantra. The details involve making certain that people employed at all levels of the firm participate in the planning; creating backup systems that provide redundancy; practicing; and, strengthening communications, both internally and externally. Phase One must be completed in advance of Phase Two. You cannot plan in the eye of the storm.

Phase Two is Evacuate/Relocate/Shelter In-Place/Survive and kicks in when the disaster hits. Staying calm, remembering the drills so reflexively that you can improvise and adjust to changing circumstances, as needed, are key. Also, during this phase, leadership qualities will emerge from the most unexpected people. People can and will surprise you. And if some people disappoint you with their performance in a crisis, understand that this too is part of the human condition.

When something happens, Phases Three and Four begin in the immediate aftermath of the incident. The third phase involves Assessing Damage. Inventory must be taken of people, places, and things. When we emerged from the fire, Monday's case-files were an immediate concern. Phase Four is Resuming Business. It wasn't our clients' fault there was a fire and we were displaced. Their needs were the same on Monday that they were on Friday. Keeping clients, staff, and the community informed is one of the first

orders of business. You might have to change your business practices in reaction to what has occurred, but you don't change your goals. In fact, you become an agent for change, for the better.

An integral part of our Continuity of Operations planning process has been delineating our role that we as defenders play in the criminal justice system. For our purposes, we have divided our COOP planning into five areas: Client Rights, Client Welfare, Staff Welfare, Operations and Leadership. Each is equally important. Preparing to protect our clients' rights in the event of a disaster means that our effort to uphold constitutional guarantees starts with monitoring the custodial status of each client, their liberty interest and speedy-trial rights. Losing track of clients was a sad feature of what plagued New Orleans during and after Katrina. Clients' welfare must be addressed as well, given our unique position in the legal community. Knowing not only the physical location, but also the treatment of clients, is essential. Reuniting clients and families, protecting confidentiality and providing continuity of service must be part of the plan.

Preparation in lieu of panic is an important component of Staff Welfare. Employees need to feel safe and secure in the workplace. This invokes a host of considerations ranging from ensuring timely payroll, to incorporating a mental-health component in the COOP. With respect to Operations, controlling case management is a starting point. Assessing

availability of personnel for that function, and others, is clearly a managerial challenge in times of crisis. Preserving case-file accessibility was one of our initial concerns in the wake of the fire, as a necessary predicate to ensuring that witnesses weren't lost. Having backup systems of critical information, off-site, is a point of emphasis; whether it's to deal with a post-event relocation, or a systemic movement as seen in post-Katrina New Orleans.

The role of Leadership cannot be overstated. It's up to criminal justice system leaders to set the tone for their organizations, in this realm as well as in others. That starts with creating a culture where planning and practicing for emergencies is valued. Leaders have to triage the needs of their clients, their staff, and the system. They must participate in groups that coordinate resolution of issues surrounding the criminal justice system, and they must engage advocates from outside their own organizations.

When all is said and done, every organization has a mission. To survive an emergency with your mission intact, and operational, takes foresight. We got out because we took disaster preparedness seriously. We were able to maintain uninterrupted client representation through careful planning. We learned from our own experiences, and those of others. We recommend that you do the same.

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Systems & Leadership: The Route to Defender Disaster Preparedness

By Charles Wynder, Jr.

Successful disaster preparedness for public defender offices is dependent on the ability of leaders of public defender offices and the defense bar to develop effective administrative and management systems. The creation and implementation of effective systems prior to a disaster not only allows offices to better weather the storm caused by disasters but also to better rebound following a disaster. A well funded and effective system is better able to withstand the pressure of an unexpected disaster or emergency than a poorly funded system with few systems and structures. Defender leaders and their partners should strive to build public defense systems that are able to deliver “effective, efficient, high quality, ethical, conflict free representation to accused persons who cannot afford to hire an attorney.”¹

The main goal following a disaster should be establishing effective coverage in courts and quickly making the office operational so that attorneys can zealously and effectively represent clients. This requires assessing the indigent defense system prior to a disaster and understanding the interrelatedness of the component parts of the criminal defense delivery system, the criminal justice system, and the overall justice system. A review and



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Association.*

evaluation of the justice system prior to a disaster allows defender leaders to work with prosecutors, judges, court personnel, corrections offices, law enforcement, and the larger community to plan, implement, and execute necessary disaster preparedness plans. A systems view of indigent defense disaster preparedness deemphasizes individual events and mistakes. It moves us away from looking at individual personalities and offices. Systems thinking forces us to understand the underlying structures that shape behavior and create conditions that impact the outcome of events.²

The lessons learned during the ABA Disaster Preparedness Conference highlighted the importance of systems thinking and the development of strong systems. Panelists and participants agreed that recent disasters such as Hurricanes Rita and Katrina illustrate the importance of having structures and systems; developing and maintaining effective communications; creatively engaging in advocacy strategies; exercising collaborative leadership with other partners.

Structures & Systems

“When placed in the same system, people, however different, tend to produce similar results.” Structures making up complex systems directly influence the way people react to conditions and events. This underscores the importance of understanding that systems create their own behavior.³

Defender leaders should build offices that have sufficient structures that communicate and reinforce clear lines of authority and decision making. Disasters and emergencies place stress on offices

and systems that exacerbate the effect of inefficient office organization. Panelists suggested that the creation of a clear chain of command and lines of authority make communication easier during a disaster. Defender leaders should also review their technology and develop backup systems. Offices should conduct technology audits and prepare a list of hardware and software requirements of the office. Staying current with state of the art mechanisms and protocols for backing up data and information from computers and computer networks is critical to disaster preparedness. It is critical that defender offices communicate with other partners in the justice system to develop effective technology backup procedures. Some panelists pointed out that off site locations for storing back-up data are not sufficient to secure information. Regional disasters such as Hurricanes Katrina and Rita illustrate the importance of having out of state or extra-regional off site back up locations.

Offices should have hard copies of critical information as well as back up copies stored at off site locations. Several defender leaders discussed the fact that disasters often disable technology. Having hard copies of important information such as personnel rosters, bar and bench leaders, and client lists can make the difference in operating when power outages prevent use of technology.

Effective Communications

Defender leaders should create multiple platforms for receiving, sharing and distributing information. You cannot be overly reliant on one communication mechanism. Remember that power outages and cell phone tower problems may temporarily impact the effectiveness of Blackberries and other smart cell phones. Having access to some office cell phones with area codes different from that of the local area can

facilitate communication when cell phone with local cell area codes becomes inoperable. Some leaders suggested that offices should require staff to create personal web based email accounts that enable staff to access email from the office leadership from any remote location that has internet access. Other leaders pointed out that creating newsletters, blogs, and other communication tools allows staff to remain connected and informed during a disaster. Several participants noted the importance of having personal contact information of leaders of other parts of the justice system. Chief defenders should have personal contact information for judges, clerks, and prosecutors, sheriffs, and police chiefs. Having this information makes it easier to communicate when disaster creates additional confusion due to dislocation and other factors.

Developing Effective Advocacy Strategies

Developing and executing an aggressive habeas and motions practice is an important aspect of protecting the clients' rights during and following a disaster. In addition to engaging in an aggressive habeas practice, the Federal Public Defender in New Orleans worked with colleagues to challenge the jury composition following the disaster to ensure that clients were not negatively impacted by the change in racial balance following the hurricanes. They challenged the government's request to change the locations of trials into other venues. They filed motions to enable them to photographically document the damage and destruction of the evidence room. This allowed them to effectively challenge the admission and weight given to evidence at trial. Conference participants encouraged colleagues to use post disaster motions practice to advance systemic reforms

that reach beyond the immediate advocacy concerns of clients. Participants also stressed the value of engaging in dialogue with judges, prosecutors, clerks and corrections officials on issues of concern prior to a disaster. The pre-Katrina work and advocacy of the Juvenile Justice Project of Louisiana helped lawyers work with corrections official and judges during the period immediately following the disaster. Other participants pushed for challenging common practices before a disaster. Challenging the dependence on bond by advocating alternatives to pre-trial detention is helpful to defenders and their clients in a post disaster environment. Effective use of pre-trial services is helpful to the interests of clients, defenders, prosecutors, and judges.

Exercise Exemplary Leadership

Disaster preparedness and post disaster challenges require defender leaders to exercise exemplary leadership. Participants discussed the fact that disasters forced them to realize the value of leadership and leadership development. Strong and effective leadership at the chief and middle manager levels enable offices to be responsive and resilient during the stress of disasters and emergencies. Internal leadership is enhanced and leveraged when defender leaders participate in collaborations with other partners of the criminal justice system. Defender leaders stressed the value of partnering with professional and bar associations.

Others praised partnerships with volunteer lawyers and students in the period following Hurricanes Katrina and Rita. Law students are playing a critical role in documenting conditions that are helpful to advocacy efforts of lawyers. Disaster preparedness and post disaster challenges require leaders to develop clear goals; create a shared vision; effectively communicate; and partner with others. These skills can be developed through training and technical assistance. Defender leaders should invest in leadership development to enhance the individual and their office's collective effectiveness.

Honestly assessing and evaluating the capabilities and performance of the indigent defense system, criminal justice system, and overall justice system prior to a disaster is a major step in disaster preparedness. Lessons learned during the assessment enable defender leaders to effectively employ systemic approaches to planning, implementing and effectively executing disaster plans.

Endnotes

¹ See The American Bar Association's "Ten Principles of a Public Defense Delivery System", and the Compendium of Standards for Indigent Defense Systems www.ojp.usdoj.gov/indigentdefense/compendium

² Peter. Senge, *The Fifth Discipline* (New York: Doubleday Currency 1990, 2006), 40, 42-43

³ P. Senge, *The Fifth Discipline*, 40, 42-43

Section Web Site Redesigned

The Criminal Justice Section's Web Site (www.abanet.org/crimjust) has been redesigned. The new look is consistent with the ABA-wide design elements and features rearranged portal pages (membership, leadership, law students, calendar, policy, publications, resources, etc.) that have more relevant navigation menus and resources. Committee pages have also been expanded. Feedback can be sent to crimjust@abanet.org.

FUNCTIONING, ADAPTING, AND MAINTAINING MISSION PRIORITIES IN THE WAKE OF A DISASTER: A FEDERAL PROSECUTOR'S PERSPECTIVE

By Jim Letten

This is an excerpt from a longer article, available at the CJS website, www.abanet.org/crimjust/newsletter.html

... One of our first orders of business was to swiftly locate and ensure the safety of all of our office employees, many of whom had evacuated to various locations within the United States. This was done under the tremendous guidance of our First Assistant United States Attorney Jan Maselli Mann, who, with a number of our key top support staff (some of whom had actually lost their own homes in New Orleans) gathered in Baton Rouge and worked virtually around-the-clock toward this end.

The results of those combined efforts were extraordinary. Within a matter of days, we had located and were providing housing, assistance, and work space for many of our employees who were arriving in Baton Rouge and who were now operating out of the Middle District U.S. Attorney's Office. The remainder were being assumed into various components of the U. S. Department of Justice, and in eight United States Attorney's Offices in districts around the United States. In fact, many Assistant U.S. Attorneys, because of the precipitous arrival of some 250,000 additional inhabitants in

Baton Rouge and the attendant scarcity of living and office space, continued to operate in those offices, and to actively serve the citizens of the United States by supporting the missions of those offices and ours wherever necessary.

Cellular telephones, compliments of DEA, were issued to our staffers and subscribed to area codes outside those adversely affected by the storm, thus providing us with critical mobile communications. GETS (Government Emergency Telecommunications Service) allowed us to punch through otherwise impenetrable hard-wire telephone traffic to conduct essential business in the area and throughout the United States. Backup servers were established with new e-mail accounts as a result of around-the-clock efforts by EOUSA and other elements of the Department of Justice.

As the first few days passed, housing for our employees returning to Baton Rouge eager to support our mission, along with office space from the Middle District and schools for dislocated families, was miraculously being located and provided by a partnership between our own staff, the U.S. Attorney's Office for the Middle District, and EOUSA Operations Branch.

Meanwhile, the United States Marshals Service maintained their headquarters in the flooded city, within the United States District Courthouse, protecting the (fortunately undamaged) buildings of the U.S. District Court, United States Attorney's Office, United States Fifth Circuit Court of Appeals, and other federal assets, along with Federal Protective Service Officers.

In the field, DEA, FBI, and ATF special agents supported by dedicated staffs, continued to protect infrastructure and support critical search and rescue efforts in the first few days immediately following the storm, while supporting New Orleans Police Department and other local agencies in reestablishing law and order in a flooded city which was experiencing an undeniable increase in looting, occasional sniping and other lawless acts by a relatively small number of individuals attempting to exploit the situation there.

In fact, although nearly the entire city was destroyed by flooding beginning on Monday, August 29th, by the following Friday morning, September 2nd, the State Attorney General and Secretary of Department of Corrections, recognizing the complete absence of any prison or holding facilities in the City of New Orleans or its environs (the closest being St. Gabriel State Correctional Facility outside Baton Rouge, 75 miles away), secured the local Amtrak/Greyhound Station in downtown New Orleans, instantly converting it to a makeshift processing/temporary/detention/holding/transshipment facility which provided the badly-needed facility for arrestees to be processed by local police as well as federal agents. Without the establishment of this facility (which we announced in a nationally-televised press conference), officers and agents would have no place to book, process, incarcerate, and transport individuals arrested for serious criminal offenses. This, then, was an early groundbreaking and critical watershed for all of us in transitioning from the reestablishment of civil order to active criminal justice functions in the heart of the destroyed city.

Without electricity available locally, however, other innovations were needed and obtained. While Amtrak pressed into service a diesel locomotive



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as a generator to light the facility and allow it to maintain functions around the clock, we were able to secure not only federal agents, but also National Guard Units to provide perimeter security for it and its inhabitants. Importantly, the facility was manned around the clock by Louisiana Department of Corrections personnel, augmented by New Orleans Police and volunteers from other police departments outside the State of Louisiana who were arriving daily as volunteers to help establish and maintain order in and around the city.

One of the key elements was the ability to make intelligent, on-the-spot legal decisions regarding appropriate charges against individuals arrested for various offenses. To that end, a mobile and committed cadre of volunteer Assistant United States Attorneys from Dave Dugas' Middle District and my office thereafter served in 24-hour shifts in the

converted station, often eating MREs, rations, and sleeping on mats on the concrete floor. Initially also, prosecutors from the State Attorney General's Office worked side-by-side with our federal prosecutors, in order to determine

whether individuals arrested for offenses in the city should be booked with state or federal offenses. It worked. . . .

[For full article, see www.abanet.org/crimjust/newsletter.html]

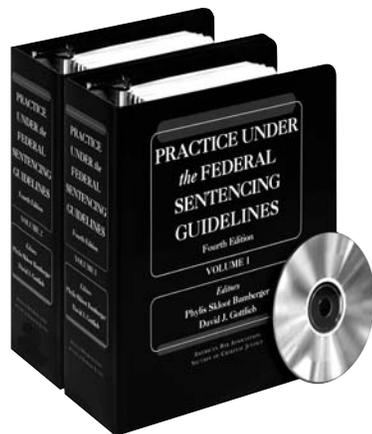
Commission on Effective Criminal Sanctions

After an inspirational speech by Justice Anthony M. Kennedy in 2003, then-ABA President Dennis W. Archer created the ABA Justice Kennedy Commission chaired by Steve Saltzburg, then-Vice Chair of our Section. The Report of the Commission was so well received that the Commission on Effective Criminal Sanctions was created and received grant funding to continue the work initiated by the Kennedy Commission. Steve Saltzburg and James Thompson co-chair a distinguished group of commissioners, with Margaret Love serving as Consulting Director to the

project, which is staffed by Project Coordinator April Frazier. While the Commission has developed important positions on criminal justice issues for the House of Delegates to consider, its work to reach out to the broader criminal justice community has been remarkable. Reasonably described as a "historic" moment, the Commission has the support of the National District Attorneys Association on four of the six resolutions and support of the National Legal Aid and Defenders Association on all six.

Practice Under the Federal Sentencing Guidelines, Fourth Edition

Edited by Phylis Skloot Bamberger and David J. Gottlieb



Looseleaf, 2 volumes with CD-ROM,
Supplemented twice annually,
ISBN: 0735516065, \$470

Master the Federal Sentencing Guidelines with this step-by-step guide that will help you achieve the best outcome for your client facing sentencing. Written by an expert group of practitioners, it covers everything you need to know about the Guidelines and their application and provides you with fast answers, efficient research and successful strategies for sentencing hearings.

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A new chapter by Professor Douglas Berman and David Johnson discusses *United States v. Booker* and its aftermath and examines the past, present and future of the Guidelines.

UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

The following article is reprinted with permission from *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol. 22 p. 587 (November 29, 2006). Copyright 2006 by the American Bar Association/The Bureau of National Affairs, Inc.. For information about the *ABA/BNA Lawyers' Manual on Professional Conduct*, including a free trial subscription, visit the publication's Web site at www.bna.com/products/lit/mopc.htm. In this issue, we focus on disaster and displacement practice for attorneys.

ABA Committee Proposes Model Court Rule Easing Practice Limits During Major Disasters

Out-of-state lawyers would find it easier to provide pro bono services in states ravaged by natural or man-made disasters under a model standard being advanced by the ABA's Standing Committee on Client Protection. The proposed Model Court Rule on Provision of Legal Services Following Determination of Major Disaster, co-sponsored by the National Organization of Bar Counsel, also would allow lawyers whose practices have been disrupted by such a calamity to cross into states where they are not licensed and continue what is left of their practice on a temporary basis. The committee said it will submit its recommendation to the ABA House of Delegates for consideration at the bar group's midyear meeting in February 2007.

Displaced Lawyers. It wasn't long after Hurricanes Katrina and Rita ripped through the Gulf Coast in 2005 that neighboring jurisdictions began waiving their unauthorized practice rules to allow displaced lawyers to carry on their law practice in their adopted state for a while without having to obtain a license there. See 21 Law. Man. Prof. Conduct 483. Moreover, some affected states, to encourage out-of-state lawyers to come volunteer their

services, suspended licensing rules for those willing to do pro bono work. See 21 Law. Man. Prof. Conduct 533.

The ABA Task Force on Hurricane Katrina encouraged these reforms and subsequently approached the ABA Coordinating Council for the Center of Professional Responsibility to help draft a model rule on the subject. The Standing Committee on Client Protection took up the matter and on Nov. 8 approved its proposed model court rule.

According to the committee report, it elected to address the matter as a model court rule instead of addressing the subject in ABA Model Rule of Professional Conduct 5.5, on multi-jurisdictional practice, because the issue is essentially an administrative and operational concern for each state's highest court instead of an ethics matter. The committee recommendation does, however, include a proposal to add a new Comment [15] to Rule 5.5 that will cross-reference the new court rule.

Four Horsemen. Lawyers whose practices are disrupted by a major disaster would be authorized under paragraph (c) of the proposed rule to provide legal services on a temporary basis in a nay other jurisdiction that has adopted the model court rule. The rule makes clear, however, that the lawyer may not use this authorization as a vehicle for setting up a new practice. It

specifies that any legal service offered from the sister state must "arise out of and be reasonably related" to the lawyer's practice in the affected jurisdiction.

Paragraph (b) of the rule of allows lawyers in good standing in another jurisdiction to provide pro bono legal services to residents in the affected region. The services must be offered through an established not-for-profit organization, and must be supervised by a lawyer licensed in the affected jurisdiction, the rule states.

The rule leaves it to the affected state's highest court to decide what type of catastrophe constitutes a "major disaster" sufficient to trigger the rule and how long the waiver from licensing requirements should last. The court is also left to decide whether the waiver applies to lawyers throughout the jurisdiction or just one particular region.

Although the proposed rule does not define "major disaster," the comment explains that "[a] major disaster includes, for example, a hurricane, earthquake, flood, wildfire, tornado, public health emergency or an event caused by terrorists or act of war."

Court Appearances. Paragraph (f) reminds lawyers who take advantage of the rule that they agree to submit to the host state's disciplinary authority as provided in Model Rule 8.5, and that they must file a registration statement within 30 days from when they start practicing within the state.

The rule does not give attorneys the right to make court appearances in the host state unless counsel is granted pro hac vice admission or the state's high court decides to grant "blanket permission" to pro bono lawyers coming into the state to help.

POLICY UPDATE

Section Approved Policy

The recommendations on the Prison Litigation Reform Act, Effective Criminal Sanctions, the Model Court Rule, the Right to Exclude Guns from Private Property, and the Fed.R.Crim P. 29 described below, were submitted to the House of Delegates for consideration at the midyear meeting in Miami, FL. Please visit our website at www.abanet.org/crimjust/policy for more information.

Prison Litigation Reform Act

As approved by Section Council, the resolution on the PLRA seeks to ensure that prisoners are afforded meaningful access to the judicial process. It also calls upon Congress to repeal or amend specified provisions of the PLRA as follows: 1) Repeal the requirement that prisoners suffer a physical injury in order to recover for mental or emotional injuries caused by their subjection to cruel and unusual punishment or other illegal conduct; 2) Amend the requirement for exhaustion of administrative remedies to require that a prisoner who has not exhausted administrative remedies at the time a lawsuit is filed be permitted to pursue the claim through an administrative-remedy process, with the lawsuit stayed for up to 90 days pending the administrative processing of the claim; 3) Repeal the restrictions on the equitable authority of federal courts in conditions-of-confinement cases; 4) Amend the PLRA to allow prisoners who prevail on civil rights claims to recover attorney's fees on the same basis as the general public in civil rights cases; 5) Repeal the provisions extending the PLRA to juveniles confined in juvenile detention and correctional facilities; and 6) Repeal the filing fee provisions that apply

only to prisoners. The resolution also urges Congress to hold hearings to determine if any other provisions of the PLRA should be modified and to determine what other steps the federal government may take to foster the just resolution of prisoner grievances in the nation's prisons, jails, and juvenile detention and correctional facilities.

Commission on Effective Criminal Sanctions

The Commission on Effective Criminal Sanctions submitted six recommendations (co-sponsored by the Section) to the House of Delegates at its midyear meeting. The recommendations address: 1) alternatives to incarceration and conviction; 2) improvements in parole and probation supervision; 3) employment and licensure of convicted persons; 4) access to and use of criminal records for non-law enforcement purposes; 5) representation relating to collateral consequences; and 6) training in the exercise of discretion.

Model Court Rule on Provision of Legal Services Following Determination of Major Disaster

The ABA Standing Committee on Client Protection recommends the ABA adopt the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster ("the Model Court Rule"). The Model Court Rule allows out-of-state lawyers to provide pro bono legal services in a jurisdiction that has been devastated by a major disaster and in which they are not otherwise authorized to practice law. The Section Council voted to co-sponsor this recommendation.

Right to Exclude Guns from Private Property

The Special Committee on Gun Violence recommends the ABA support the traditional property rights of private employers and other private property owners to exclude from the workplace and other private property, persons in

possession of firearms or other weapons and opposes federal, state, territorial and local legislation that abrogates those rights. The Section Council voted to co-sponsor this recommendation.

Opposition to the Proposed Changes to Fed.R.Crim P. 29

Amendments have been proposed to the Federal Rules of Criminal Procedure that the Defense Function Committee believes will have a dramatic and detrimental impact upon criminal justice. Briefly, proposed Rule 29 would allow the government to seek appellate review of a pre-verdict judgment of acquittal. (The full text of the proposed changes and the report of the Advisory Committee on the Federal Rules of Criminal Procedure is available at www.uscourts.gov/rules/newrules1.html). The Section Council voted to submit a report and recommendation to the ABA House of Delegates opposing the proposed changes to Rule 29.

Pending Policy or Section Actions

Attorney-Client Privilege

The Section Council voted to work with the ABA Task Force on Attorney-Client Privilege and the Coalition to Preserve the Attorney-Client Privilege (which includes the U.S. Chamber of Commerce, the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, the ACLU, and other influential business and legal groups) to modify DOJ's position on attorney-client privilege waiver. These groups worked closely with Sen. Specter's staff to craft the legislation he introduced in early December 2006 that would reverse the privilege waiver and employee rights

provisions in the Justice Department's Thompson Memorandum as well as all other similar federal agency policies. Just before the bill was introduced, Sen. Specter decided to remove the limited waiver provision at the request of the ACLU. In response to the concerns raised by the ABA and the coalition and the introduction Senator Specter's bill, Deputy Attorney General Paul McNulty issued revisions to the Thompson Memorandum on December 12, 2006, that require high-level Department approval before prosecutors can demand waiver, but which fail to end the practice entirely. Please visit www.abanet.org/buslaw/attorneyclient/home.shtml for more on the Task Force

Ethics, Gideon and Professionalism Committee Considers New York State Bar Rule of Conduct on Prosecutorial Conduct

The Ethics, Gideon and Professionalism Committee has drafted a resolution it will be asking the Section to submit to the House of Delegates in February. The draft resolution calls for a prosecutor who comes to know of new and material evidence that suggests a likelihood that a convicted defendant did not commit the offense for which the defendant was convicted, to: 1) disclose that evidence to the convicted defendant and any appropriate court or authority; and 2) undertake such further inquiry or investigation as may be necessary to determine whether the conviction is wrongful. The proposed additions to ABA Model Rules also advocate that when a prosecutor comes to know of clear and convincing evidence establishing that a conviction was wrongful, the prosecutor shall take appropriate steps to remedy the wrongful conviction.

Committee Updates

Input on Policy Needed

The ABA Criminal Justice Section is the preeminent voice on national criminal justice issues. Policy is developed through committees as they take up emerging criminal justice issues and propose policy to the Council. The Council then proposes policy to the ABA House of Delegates.

In order to stay current on new concepts and developments in criminal justice, we must hear from you. If you encounter an issue you believe has system-wide significance, advise a committee chair of the issue. Section committees, their chairs and email addresses may be found at www.abanet.org/crimjust/committees. Select a committee, then click on chair(s) name in "Message from the Chair(s)" box to send email directly to chair(s).

New Committees

The committees of the Criminal Justice Section have been rearranged and regrouped into six divisions that are broadly organized based on subject matter and/or function, which has resulted in more than doubling the number of options for members to get involved in committee activities. New committees are: Military Justice, Problems of the Elderly, Alternative Dispute Resolution and Restorative Justice, Diversion, Re-Entry and Collateral Consequences, Appellate and Habeas, Cyber Crime, Ethics/Gideon and Professionalism, Judicial Function, Law School and Academic Outreach.

For details on these and other Section committees, see www.abanet.org/crimjust/committees. Members can join committees online via this site.

Reentry Committee Conference

The CJS Reentry Committee cosponsored a state conference in Boston on Friday January, 12 at the Suffolk University School of Law on "Building Consensus Around Successful Reentry. Reentry Committee Chairs Mike Festa, Lance O'Giste and Lisa Smith were present along with close to 120 participants. CJS Council member and CESC Commission member Charles Joseph Hynes and CJS Corrections Committee Co-Chair Marty Horn were featured speakers at the day long seminar that focused on CORI, Corrections and Community Continuum of Care. See Related Resources & Events in the Reentry Committee page at www.abanet.org/crimjust/committees.

CJS Section Calendar of Events

For details on these and other upcoming events, see the Section calendar at www.abanet.org/crimjust/calendar.

March 1-2

21st Annual National Institute on White Collar Crime
San Diego, CA

May 10-13

Criminal Justice Section 2007 Spring Meeting (CJS Business Meetings), Grand Hotel, Mackinac Island, MI

May 16

17th Annual National Institute on Health Care Fraud
New Orleans, LA

Aug. 9-14

ABA Annual Meeting
San Francisco, CA
Criminal Justice Section –
Hilton Hotel (Aug. 9-12)

White Collar Crime Committee Mid Atlantic Region Event a Success

On November 15, 2006 a roundtable discussion took place regarding Health Care Fraud Enforcement: Insiders Predict the Future. The panelists were James Sheehan, AUSA for the Eastern District of Pennsylvania, Kevin F. Brady, Esquire and Senior Vice President and Chief Counsel for Wyeth Pharmaceuticals, and Lee Dobkin, Deputy General Counsel for the University of Pennsylvania and Chief Counsel at the University of Pennsylvania Health System, along with a cadre of defense lawyers in a discussion of viewpoints regarding hot button issues facing the healthcare industry today. The event was attended by over 60 attorneys in the private defense bar industry and AUSA's, and was well received.

White Collar Crime National Institute

The 2007 White Collar Crime National Institute will be meeting for the 21st consecutive year on March 1-2, but for the first time in San Diego. This year's event will feature Attorney General Alberto R. Gonzales as the keynote speaker.

Over 1,000 practitioners attended last year's annual gathering of the national white collar bar. The faculty includes some of the leading white collar lawyers in the United States. This year's keynote panels will continue to focus on the role of ethics and corporate compliance in today's business environment. Each year the Institute brings together judges, federal, state and local prosecutors, other law enforcement officials, defense attorneys, corporate in-house counsel, and members of the academic community. Among the audience are experienced litigators as well as attorneys who are beginning to concentrate in the white collar area. Attendees have consistently given the Institute high ratings for the exceptional quality of the Institute's publication, its valuable updates on new developments and strategies, as well as the rare opportunity to meet colleagues in this field, renew acquaintances and exchange ideas.

CJS members get \$125 discount on the program tuition. See www.abanet.org/crimjust/calendar.



Saltzburg, continued from page 2.

immediate problems. One example is the amendment of 27 U.S.C. 141 in response to Katrina, providing for the venue of federal criminal proceedings in other districts upon a judicial determination of unavailability due to emergency conditions. Once in place, such legislation may be of assistance in future disasters, but additional legislation may be necessary when a new problem arises.

Looking back, we know that there was much planning that should have been, but was not done, before Katrina. We also know that the plans that were in place — at the federal level especially — were critical to maintaining law and order and pursuing justice in the face of an enormous catastrophe just as the plans in place in the defenders' office in Chicago helped to minimize the human costs of fire.

The challenge to the criminal justice system of Katrina, the Chicago fire and every disaster is obvious. The system can only function as intended if all participants are able to do their respective jobs. Police and law enforcement must be able to do their jobs and ensure the safety of the community. Prosecutors must be able to bring appropriate charges against law-breakers. Defense counsel must be available to defend those accused. And courts must be open so that the rights of those arrested or accused can be protected. This requires each segment of the criminal justice system to be prepared, to have a plan, and to work together in an all out effort to preserve the rule of law in time of crisis. That is our challenge. We are committed to meeting it.

Practice Tip

Whose Case Is This Anyway?

According to Standard 5-5.1 of the ABA *Providing Defense Services Standards*, "(c)ounsel should be provided in all proceedings for offenses punishable by death or incarceration ...". The Standard's underlying assumption is that defendants will benefit from the assistance of attorneys who are learned and experienced in matters of law. But where does "assistance of counsel" give way to the defendant's own decisions about the case? And what if the defendant doesn't want any assistance at all?

In addition to knowing how to provide effective representation for their clients, defense attorneys should be aware of when to step back. And judges should bear in mind the conditions that should be met before they allow defendants to proceed *pro se*. Various volumes of the ABA Criminal Justice Standards address these issues.

The *Defense Function Standards* provide guidance on the types of decisions to be made by the attorney and the types to be made by the accused. Prerequisites for valid waivers of counsel are set out in the *Providing Defense Services Standards*. If the defendant is permitted to proceed to trial without an attorney, the *Special Functions of the Trial Judge Standards* recommend the judge consider appointing standby counsel to assist the defendant when called upon or when the defendant's behavior precludes *pro se* representation. The *Defense Function Standards* also address obligations of standby counsel.

Defense Function Standard 4-5.2: Control and Direction of the Case

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- (i) what pleas to enter;
- (ii) whether to accept a plea agreement;
- (iii) whether to waive jury trial;
- (iv) whether to testify in his or her own behalf; and
- (v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

Providing Defense Function Standard 5-8.2: In-court waiver

(a) The accused's failure to request counsel or an announced intention to plead guilty should not of itself be construed to constitute a waiver of counsel in court. An accused should not

be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed before a judge and a thorough inquiry into the accused's comprehension of the offer and capacity to make the choice intelligently and understandingly has been made. No waiver of counsel should occur unless the accused understands the right and knowingly and intelligently relinquishes it. No waiver should be found to have been made where it appears that the accused is unable to make an intelligent and understanding choice because of mental condition, age, education, experience, the nature or complexity of the case, or other factors. A waiver of counsel should not be accepted unless it is in writing and of record.

(b) If an accused in a proceeding involving the possibility of incarceration has not seen a lawyer and indicates an intention to waive the assistance of counsel, a lawyer should be provided before any in-court waiver is accepted. No waiver should be accepted unless the accused has at least once conferred with a lawyer. If a waiver is accepted, the offer should be renewed at each subsequent stage of the proceedings at which the accused appears without counsel.

Special Functions of the Trial Judge Standard 6-3.7: Standby counsel for pro se defendant

(a) When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon. Standby counsel should always be appointed in capital cases and in cases when the maximum penalty is

life without the possibility of parole. Standby counsel should ordinarily be appointed in trials expected to be long or complicated or in which there are multiple defendants, and in any case in which a severe sentence might be imposed.

(b) The trial judge should clearly notify both the defendant and standby counsel of their respective roles and duties.

(c) When standby counsel is appointed to provide assistance to the pro se accused only when requested, the trial judge should ensure that counsel not actively participate in the conduct of the defense unless requested by the accused or directed to do so by the court. When standby counsel is appointed to actively assist the pro se accused, the trial judge should ensure that the accused is permitted to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.

**Special Functions of the Trial Judge Standard 6-3.9:
Misconduct of pro se defendant**

If a defendant who is permitted to proceed without the assistance of counsel engages in conduct which is so disruptive, including disobeying or failing to respond to judicial orders or rulings, that the trial cannot proceed in an orderly manner, the court should, after appropriate warnings, revoke the permission and require representation by counsel. If standby counsel has previously been appointed, the counsel should be asked to represent the defendant. When appropriate, the trial should be recessed to allow counsel to make the necessary preparations to go forward with the trial

**Defense Function Standard 4-3.9:
Obligations of hybrid and standby counsel**

(a) Defense counsel whose duty is to actively assist a pro se accused should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.

(b) Defense counsel whose duty is to assist a pro se accused only when the accused requests assistance may bring to the attention of the accused matters beneficial to him or her, but should not actively participate in the conduct of the defense unless requested by the accused or insofar as directed to do so by the court.

* * *

All ABA Criminal Justice Standards are available online at: www.abanet.org/crimjust/standards.

**Nominations for Awards
Due April 10**

The Section is soliciting nominations for the following three awards.

Charles R. English Award: This award recognizes a Criminal Justice Section member who has: (1) provided exceptional service to the Criminal Justice Section (2) exercised exemplary ethical and professional conduct, (3) engaged in activities that have increased the stature and professionalism of lawyers practicing in the criminal justice system, and (4) enhanced the relationship between prosecutors and the defense bar by promoting professional and bar association endeavors that advance fairness and justice over parochial defense and prosecution views.

Minister of Justice Award: Nominees for this award must be prosecutors. They may practice at the federal, state, local or municipal level, and they may be elected or appointed. The nominee selected will be distinguished in his or her work in the field of criminal justice, and will exemplify the principles that: (1) the prosecutor's obligation is to protect the innocent as well as to convict the guilty and (2) the prosecutor must guard the rights of the accused as well as enforce the rights of the public.

Livingston Hall Award: The 22nd Annual Livingston Hall Juvenile Justice award recognizes lawyers practicing in the juvenile justice field who have demonstrated a high degree of skill, commitment, and professionalism in representing their young clients.

For more information on these awards, please call the Section office at 202-662-1500 or see www.abanet.org/crimjust/awards.doc. Please note the deadline for submitting nominations for these awards is April 10, 2007.

New Audio Resource

The Criminal Justice Section Council meeting in New Orleans was enlivened by a discussion of "The Ethics of Disclosure after Brady: From the Prosecutor-Defense and Judge's Perspective," a panel discussion moderated by Prof. Stephen Saltzburg and participated in by Judge James Holderman, Vincent Aprile II, and Benton Campbell. The audio of this ethics discussion is available on the Ethics Committee page under "Resources." See www.abanet.org/crimjust/committees.

PEOPLE



Norman Maleng (left) and CJS Chair Robert Johnson.

During the CJS Council Meeting in New Orleans on November 3, 2006, the **Minister of Justice Award** was presented to **Norman Maleng**, King County Prosecuting Attorney, Seattle, Washington. Mr. Maleng has served as King County Prosecutor since 1978. In that capacity, he has embodied the principle enunciated in the *ABA Criminal Justice Standards on the Prosecution Function* that “(t)he duty of the prosecutor is to seek justice, not merely to convict.” His impact on the justice system has been statewide and beyond, with involvement in victims rights, laws involving the civil commitment of sex offenders, and a Juvenile Justice Act that provides an improved framework to intervene in the life of a troubled youth.

During the Fellows of the American Bar Foundation’s annual awards banquet during the ABA Midyear Meeting on Feb. 10, 2007, CJS Council Member **Neal Sonnett** received the Outstanding Service Award and CJS Past Chair **Cara Lee Neville** was honored with the Outstanding State Chair Award.

CJS Staff Changes

There have been several changes to the Section staff. Carol Rose has been promoted to CLE and Meetings Coordinator. Stacey Brown has been promoted to Membership Coordinator. Regina Ashmon,



Kristin Traicoff (right) with CJS Chair Robert Johnson.

Also at the New Orleans meeting, **Kristin Traicoff**, a student at the University of California, Berkeley Law School, received the winning prize (\$2,000 cash prize) of the **William W. Greenhalgh Student Writing Competition**, which is held in honor of late Georgetown law professor William W. Greenhalgh, a distinguished scholar of Fourth Amendment constitutional law. Her paper, “Closing Two Doors with One Hand,” focuses on the relationship between plain error review and review for prejudice in *habeas* proceedings. Her essay was published in the winter 2007 issue of *Criminal Justice Magazine* and is also available at www.abanet.org/crimjust.

formerly a staff of the ABA Administrative Law and Regulatory Practice Section, is the new Committee Coordinator and Jamie Turner is the new Administrative Assistant to the Director.

CJ Section’s First Vice Chair **Anthony A. Joseph** was elected President of the Birmingham Bar Association for 2007. Mr. Joseph is a shareholder in the Birmingham law firm of Maynard, Cooper & Gale, P.C. where he focuses largely on white collar criminal defense.

170 CJS members are listed in **The Best Lawyers in America® 2007**, which includes listings for over 28,000 lawyers in 80 specialties, in all 50 states and the District of Columbia. *The Best Lawyers in America®* is published by Woodward/White, Inc., Aiken, South Carolina and can be ordered directly from the publisher (803-648-0300, www.bestlawyers.com). The following CJS Council members are listed:

Stephen J. Bronis, Miami, FL
James M. Cole, Washington, DC
Anthony A. Joseph, Birmingham, AL
Albert J. Krieger, Miami, FL
Robert S. Litt, Washington, DC
Michael S. Pasano, Miami, FL
Neal R. Sonnett, Miami, FL

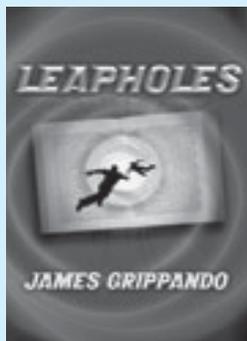
For a complete list of CJS members on this list, see the CJS website at www.abanet.org/crimjust.

Hoai Hong is now the Administrative Assistant to the Standards Project. Patrice McFarlane will be transferring to the ABA Individual Rights Section as Assistant Director.

Recent Resources on CJS Web Site (www.abanet.org/crimjust)

- Resources on Katrina Response and Disaster Preparedness
- At Risk Youth Project Resources
- ABA Criminal Justice Standards on DNA Evidence
- Victims in the U.S. Criminal Justice System
- Legislative Update
- Recent Supreme Court Cases on Criminal Justice
- CLE Materials

NEW BOOKS



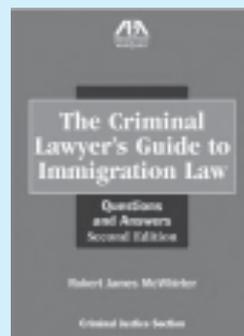
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For information on other books published by the Criminal Justice Section, see <http://www.abanet.org/crimjust/pubs>.

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