



The American Bar Association

# Criminal Justice Section Newsletter

Volume 17, Issue 1 Fall 2008

## Upcoming Conferences in the Fall

### Sentencing Institute

On October 24, 2008, the Section will host a major conference on sentencing and post-sentencing issues, with a particular emphasis on sentencing practice in white-collar cases. The conference will be held at the George Washington University in Washington, D.C. *Sentencing Advocacy, Practice and Reform Institute* features all of the United States Sentencing commissioners and will examine sentencing trends and opportunities for reform in both the federal and state courts. The program begins with a plenary session on the state of the sentencing union, including rates of incarceration, sentencing trends, racial disparity, alternatives to incarceration, and recent federal legislation.

There will be three tracks of instruction, each focused on issues of concern to different segments of the criminal justice community, including white collar crime defense attorneys, prosecutors, academics, public defenders, judges, sentencing consultants, mitigation specialists, corrections personnel, victim advocates, and policy experts. One track will focus on practice and procedure issues of particular concern to criminal defense attorneys in general and white collar practitioners in particular. More details on the Fall Conference and Section Meetings can be found at [www.abanet.org/crimjust/calendar](http://www.abanet.org/crimjust/calendar). See also pages 8-9.

### Money Laundering Conference

The American Bankers Association/American Bar Association annual conference on money laundering compliance is set again for Washington, D.C. for October 19 to 21 and should attract more than 1,000 attendees.



The conference will feature several session topics of keen interest to attorneys including: Anti-Money Laundering and Tax Enforcement; The Gatekeeper Initiative – Time to Pay Attention; Major Enforcement Actions – Key Legislation; Criminal AML Enforcement and its Effect on BSA Regulatory Standards; Mortgage Lending and AML; Large Bank Surveillance Systems – Due Diligence and Fraud Loss Control; Monday Night Networking Reception sponsored by the White Collar Crime Committee of the ABA Criminal Justice Section.

The American Bankers Association and the American Bar Association are proud to bring the most knowledgeable, relevant speakers to the premier AML/BSA event of the year, including James H. Freis Jr., Director of the Financial

Crimes Enforcement Network (FinCEN), who will speak at the Monday luncheon.

Gordon Greenberg of the CJS White Collar Crime Committee states: “Attorneys will gain valuable and up to the minute insight into this practice area along with the opportunity to meet many individuals from the banking world.”

This conference, in its 20<sup>th</sup> year, attracts more than 1,000 of the nation’s leading bank AML/BSA officers, regulatory officials and attorneys and offers many opportunities for attorneys to get to know participants. For more information, see [www.abanet.org/crimjust/calendar](http://www.abanet.org/crimjust/calendar).

#### *Inside This Issue:*

- Interview with New Chair**
- Practice Tips**
- Ethics**
- Legislative Update**
- News from the Field**
- Section News**
- Annual Meeting Highlights**
- Fall Conference**
- Registration**

## Section News

### Three Grants Will Help Expand Section's Reach

The Criminal Justice Section has ambitious plans for 2008-09. Three projects that will play a major role in advancing and expanding the field of criminal law: Improving Cross-Cultural Communication in the Criminal Justice System; Mediation in Criminal Matters; and Child Victims' Rights Project.

The Improving Cross-Cultural Communication in the Criminal Justice System project seeks to increase the effectiveness of cross-cultural communication between major actors in the criminal justice system and members of the communities they represent. The project also will focus on improving the effectiveness of managers within prosecution, defender, and court agencies to identify and address cross-cultural personnel, communication, and management issues, and advance community/public perceptions of and confidence in the criminal justice system, particularly with regard to race and culture.

The Mediation in Criminal Matters initiative will study ways to create a pathway for greater utilization of mediation within the criminal justice arena and train volunteers from State and Local Bar Associations in mediation and model programs. The project will address the important and needed expansion of dispute resolution methods in the processing as well as

resolution of many different criminal or quasi-criminal matters. Additionally, it involves documenting current model programs and sharing ideas within the criminal justice system.

Through the Child Victims' Rights Project, the Criminal Justice Section will seek to develop an awareness of the need for expertise in the enforcement of child victims' rights, with a special focus on child victims of abuse. The project will disseminate knowledge through training and guideline development, and technical assistance to attorneys and guardians *ad litem* nationwide.

### 2008 Annual Meeting Highlights

Policy adoptions on a variety of issues, CLE programs, council and committee meetings, and acknowledging individuals who have made great contributions to the field of criminal law made for an outstanding Criminal Justice Section Annual Meeting in New York City, held August 7-10, during the ABA Annual Meeting proceedings.

**Policy:** Working with both in-house and outside entities, the Section had the following policies adopted during deliberations of the ABA House of Delegates:

- 104A: Recommends that Rule 32 of the Federal Rules of Criminal Procedure be amended by the addition of subsections (c)(3) and (c)(4) that would call for availability of information received from parties and non-parties to

ensure that both the government and the defense have an opportunity to review information to be considered by the sentencing court in determining the appropriate punishment.

- 104B: Urges federal, state, tribal, local, and territorial governments to develop comprehensive plans to ensure that the public is informed about conditions in correctional and detention facilities for adults and juveniles and that there is greater accountability to the public in the operation of those facilities, and adopts the "Key Requirements for the Effective Monitoring of Correctional and Detention Facilities," dated August 2008.

- 104C: Urges federal, state, local and territorial governments to enact effective legislation, policies, and procedures to ban law enforcement's use of racial or ethnic characteristics not justified by specific and articulable facts suggesting that an individual may be engaged in criminal behavior.

- 104D: Urges federal, state, local, and territorial trial judges to give a cross-racial identification jury instruction where appropriate to guard against the enhanced risk of eyewitness misidentification. (For details on these policies, see [www.abanet.org/crimjust/policy](http://www.abanet.org/crimjust/policy).)

**CLE Programs:** In NYC, the Section presented programs focusing on issues involving the following: the most recent research on *Miranda* warnings and waivers, and the latest scientific findings on how *Miranda* is delivered and understood; the use of private

The **CJS Newsletter** is published three times a year. Articles and reports reflect the views of the individuals or committees that prepared them and do not necessarily represent the position of the American Bar Association, the Criminal Justice Section, or the editors of the newsletter. Copyright 2008, American Bar Association.



Chair (2008-09): Anthony Joseph  
 Chair-Elect: Charles Hynes  
 Director/Editor: Jack Hanna  
 Associate Editors: Susan Hillenbrand,  
 Robert Snoddy  
 Managing Editor: Kyo Suh

The American Bar Association  
**Criminal Justice Section**  
 740 15th Street, NW  
 Washington, DC, 20005  
 Phone: (202) 662-1500  
 Fax: (202) 662-1501  
 Email: [crimjustice@abanet.org](mailto:crimjustice@abanet.org)  
 Web: [www.abanet.org/crimjust](http://www.abanet.org/crimjust)

contractors in Iraq, Afghanistan, and elsewhere, and the challenges of appropriately applying and enforcing the rule of law in foreign lands to both governmental officers and private entities and individuals; criminal law cases that came before the Supreme Court during the past term; the criminal justice system's treatment of adult and juvenile females who appear as offenders or as domestic violence and child abuse victims; preventing seniors from becoming victims of financial exploitation, and prosecuting such cases in the criminal justice arena; and the way technology has changed how judges handle their courtrooms.

**Awards:** The ABA also recognized three individuals for their outstanding contributions to criminal law field at the Annual Meeting. Charles Joseph Hynes and the King County District Attorney's Office received the prestigious *ABA Dispute Resolution Section Lawyer as Problem Solver Award* for innovative programs in diversion and reentry during a joint reception held by the Criminal Justice Section and the Section of Dispute Resolution. Gary Walker, prosecuting attorney, Marquette, Michigan, was the recipient of *The Criminal Justice Section Minister of Justice Award*; and Michael Pasano, Miami, Florida, former chair of the Section, received

*The Charles R. English Award*. See [www.abanet.org/crimjust](http://www.abanet.org/crimjust) for additional resources from the Annual Meeting.

### *The Race to 10K Lawyers A Success*

Thanks to the CJS leadership, members and the staff, *The Race to 10K Lawyers*, the Section campaign that sought to bring 10,000 lawyers into the Criminal Justice Section by August 31, 2008, has exceeded its goal. On August 31, the lawyer member number reached 10,488. Greater lawyer membership numbers will assist the Section to more effectively serve as the unified voice on criminal justice matters.

### **New Publications and Committee Resources**

*Vouching: A Defense Attorney's Guide to Witness Credibility, Law and Strategy* supplies all one needs to know about this sometimes misunderstood concept. In 15 chapters, one will find the topic of vouching covered from every angle, backed up with relevant case citations whenever applicable. One will discover when it's permissible, and when it's prohibited. For information on this and other books published by the Section, please see [www.abanet.org/crimjust/pubs](http://www.abanet.org/crimjust/pubs).

New resources available online at the Section Web site, [www.abanet.org/crimjust](http://www.abanet.org/crimjust) include: *Criminal Justice Section Annual Report, 2007-2008*; *CJS Leadership Directory, 2008-2009*.

The latest edition of the *WCC Bulletin* – the quarterly on-line publication of the White Collar Crime Committee – was published in August. This edition was the largest ever, and covered such White Collar Crime-related topics as: the two U.S. Supreme Court rulings from the last term that clarified the reach of the Money Laundering statute; the recent developments in mortgage fraud cases; post-*Booker* sentencing strategies in health care fraud cases; and the dangers of providing information to enforcement agencies in civil investigations. The *WCC Bulletin* is available at [www.abanet.org/crimjust/committees](http://www.abanet.org/crimjust/committees)

The inaugural edition of the *Re-Entry and Collateral Consequences Committee Newsletter* was launched in June. It covers several of the most recent, innovative, and important advances in the field of re-entry and collateral consequences such as Brooklyn's ComALERT program, the newly passed Second Chance Act and its implications for nationwide re-entry programs, and Massachusetts' CORI Reform and what it means for those re-entering Massachusetts communities. The Newsletter is available at [www.abanet.org/crimjust/committees](http://www.abanet.org/crimjust/committees)

### **Staff Additions**

Christopher Gowen has joined the CJS staff as the Section staff attorney. He will focus on juvenile justice issues and other important legal concerns for the Section. He practiced for two years as a public defender in Dade County where he represented a number of juveniles.

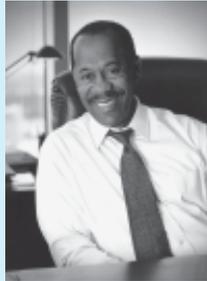


*Outgoing Chair Steve Saltzburg (left) presents The CJS Minister of Justice Award to Gary Walker at the Annual Meeting in NYC on Aug. 8.*

## Three Questions With...

### Section Chair Anthony Joseph

By Robert Snoddy



**With this being an election year, what are some of the issues you would like to see the presidential candidates address that affect the criminal justice system in this country?**

There are several, and hopefully it will become a pertinent topic of discussion on the campaign trail for both candidates. A few issues that come to mind: promoting policies and other initiatives that seek to reduce the ever-growing incarceration rates; embracing the importance of, and encouraging expedited approval by the Senate of the Attorney-Client Privilege Protection Act (S. 3217); addressing racial inequality in the criminal justice system; reforming sentencing for non-violent offenders; and promoting programs designed to reduce recidivism.

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

For starters, I would like to see the Section focus on sentencing issues, particularly with emphasis on fairness, transparency, pretrial diversion, mediation, and other alternatives to incarceration. During the Fall meeting, the Section will sponsor a day-long CLE entitled, *Sentencing Advocacy Practice and Reform Institute*. It will address the full spectrum of sentencing and post-sentencing issues, with particular emphasis on sentencing issues in white-collar cases. The Institute will also address issues such as rates of incarceration, sentencing trends, racial disparity, alternatives to incarceration, and recent federal legislation.

Corruption cases are another area of criminal law we need to address. The DOJ has made corruption a top priority – fourth behind terrorism, espionage, and cyberspace; there have been a number of accusations that certain prosecutions were motivated by politics, and that a number of U.S. Attorneys were removed from office for their failure to promote such prosecutions. There is also a split among the Circuits with respect to what constitutes

corrupt conduct. Corruption cases have changed and continue to appear to embrace concepts that in the past have garnered less attention. The current state has left a lot of uncertainties. During our Spring meeting in April, we will hold a day-long CLE focusing on corruption cases. This symposium will also address how such cases are prosecuted and defended; the Best Practices; and will include discussions addressing relevant policies and reforms.

Finally, policy development is an essential and critical area for the Section. The Criminal Justice System continues to be an inclusive body of prosecutors, defense counsel, judges, academics and other interested parties, in addressing criminal justice issues. I would like to see the Section continue and further advance our prominent role in presenting policy recommendations to the House of Delegates. Our policies have been well defined, well drafted, and impeccably represented by our Delegates. I will encourage our Committees to continue developing pertinent, relevant, and cutting-edge proposals.

**What justifications would you offer to someone considering joining the Section?**

Anyone who is interested or involved in Criminal Justice matters should be a member of our Section. The Section offers a multitude of opportunities with more than 34 committees and various Tasks Forces to be involved in the debates and in cutting edge developments. The Section provides a number of ways to stay well informed on the broad range of criminal justice topics. As a member, you receive the Criminal Justice magazine, timely and informative newsletters, and become a part of and contribute to relevant list serves. The Section also presents a wide array of high quality CLE programs. As a member, you will receive discounts on those programs and early notice. The significant professional networking opportunities with some of the finest practitioners in the country, exchanges with prosecutors, defense attorneys, and judges are an immeasurable benefit the Section provides. Joining the Section gives you a tremendous opportunity for knowledge, involvement, and an opportunity to make a difference.

---

*Anthony Joseph, the Chair of the ABA Criminal Justice Section for 2008-2009, is a partner at Maynard Cooper & Gale in Birmingham, Alabama.*

## Practice Tips

By Pravin B. Rao

## Dealing with Parallel Investigations

If responding to a government investigation is not fraught with enough complications, the level of complexity and risk increases significantly when facing parallel investigations. These types of investigations occur when multiple civil regulatory and criminal law enforcement authorities simultaneously initiate proceedings that relate to the same facts or overlapping targets.

This is not a recent development; the government has been able to conduct parallel investigations for some time. In 1970, the Supreme Court approved of parallel investigations in *United States v. Kordell*, stating that “[i]t would stultify enforcement of federal law to require a government agency such as the FDA to invariably choose either to forego recommendation of a criminal prosecution once it seeks civil relief, or to defer criminal proceedings pending the ultimate outcome of a criminal trial.” 397 U.S. 1, 11 (1970). At the same time, the Court acknowledged that due process and “proper standards in the administration of justice” imposed limitations on the conduct of parallel investigations, finding that the government would transgress these limits where it brought a civil action solely to obtain evidence for a criminal prosecution; it failed to advise a defendant in a civil proceeding that it was contemplating a criminal prosecution; a defendant was unrepresented; or there were special circumstances that might suggest the unconstitutionality or impropriety of a criminal prosecution. *Id.* at 11-12.

Some recent district court opinions, however, have placed even greater limitations on parallel investigations. In *United States v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005), a criminal fraud case, the district court for the Northern District of Alabama excluded a defendant’s deposition testimony obtained during a civil investigation by the Securities and Exchange Commission (“SEC”).



Pravin B. Rao is a Litigation partner in the Chicago office of Perkins Coie LLP. His prior experience includes prosecuting criminal cases as an Assistant U.S. Attorney in Chicago and enforcing the Securities laws as a Branch Chief and Senior Attorney with the SEC.

The district court found that the civil and criminal investigations had become impermissibly “commingled” when the Birmingham U.S. Attorneys’ Office (“USAO”) contacted the SEC two days before the defendant’s scheduled SEC deposition and requested that the SEC attorney move the defendant’s deposition from Atlanta to Birmingham (to establish venue for any false statements made during the deposition); avoid certain topics during questioning (in order to conceal the criminal investigation); and assist in examining key witnesses. As a result of this conduct and the failure to inform the defendant of the criminal investigation before he testified, the district court concluded that use of the defendant’s deposition in the criminal case would depart from the proper administration of justice. “To be parallel,” the district court instructed, “by definition, the separate investigations should be like the side-by-side train tracks that never intersect.” *Id.* at 1139. The government did not appeal the decision.

In *United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006), the Oregon district court held that federal prosecutors may not work together with the SEC in a single investigation, building their criminal case while hiding behind the SEC in order to sidestep the defendants’ constitutional rights. Shortly after the SEC initiated its investigation, and following a meeting with SEC officials, the Oregon USAO and the FBI opened a criminal inquiry. Concerned that disclosure of the criminal investigation would halt civil discovery, result in the defendants invoking their constitutional rights and trigger limits imposed by the Federal Rules of Criminal Procedure, the USAO decided to abate its parallel investigation and rely on the SEC to develop evidence for the criminal case. Similar to *Scrushy*, the USAO asked the SEC to move the defendant’s deposition to Oregon to establish venue, instructed the SEC on how to conduct interviews with the defendants in order to create a record for use in a false statements prosecution and took steps to ensure the continued secrecy of the criminal investigation. Finding that “[a] government agency may not develop a criminal investigation under the auspices of a civil investigation,” the district court held that “[t]he strategy to conceal the criminal investigation from defendants constituted an abuse of the investigative process.” *Id.* at 1088-89.

This opinion was reversed, however, when the Ninth Circuit Court of Appeals rejected the contention that parallel investigations may not merge or that a criminal prosecution may not be developed by means of a civil investigation. *United States v. Stringer*, 521 F.3d 1189

(9th Cir. 2008). The court first noted that the SEC started its civil investigation before the criminal investigation began. On that basis, the court concluded that the civil proceeding was not commenced solely as a pretext to obtain evidence for a criminal case. Given the legitimate nature of the civil investigation, and Congress' express authorization of information sharing between the SEC and the Department of Justice to facilitate the prosecution of crimes, the Ninth Circuit found that the cooperation between the agencies was appropriate. Second, the court found that SEC Form 1662, attached to the defendant's subpoenas, stating that any information would be shared with law enforcement agencies where appropriate, provided sufficient notice of the possibility of criminal prosecution. Third, the court explained that "[a] government official must not 'affirmatively mislead' the subject of parallel civil and criminal investigations into believing the investigation is exclusively civil in nature and will not lead to criminal charges." *Stringer*, 521 F.3d at 1198 (internal citation omitted). Barring affirmative representations, however, the government had no legal duty to disclose the existence of the pending criminal investigation.

In sum, following the Ninth Circuit's decision in *Stringer*, while the government may not affirmatively mislead defendants to shield the existence of a criminal investigation, it is under no obligation to inform targets about a criminal investigation as long as the defendants are generally aware of the possibility of prosecution. Moreover, where a genuine civil investigation is initiated prior to a criminal inquiry, federal law enforcement agencies may use and guide the civil proceedings to develop evidence in the criminal case.

Although parallel investigations can provide the government with a powerful tool for investigating and prosecuting alleged criminal wrongdoing, they can present significant challenges to companies, their officers, directors, and employees on how to juggle multiple investigations and decide between sometimes inconsistent strategies. Responding to these challenges requires a coordinated legal strategy. Seemingly "routine" inquiries from a civil regulatory agency can lead to criminal investigations. Therefore, if companies or their counsel receive notice of a civil investigation, here are some tips on how to flush out parallel investigations involving other government actors and how best to deal with them:

**1. Assume that a parallel criminal investigation has been initiated and consider confirming the existence of criminal exposure.** Wherever possible, be on the lookout for the warning signs or red flags that a criminal investigation may be initiated or even underway in the background even if the initial inquiry from a civil regulatory agency or self regulatory organization (SRO) is part of a routine examination, inquiry, or standard informational request. These innocuous inquiries may bring to light certain conduct or issues that require the attention of senior management and counsel. Companies should have a standardized protocol on how to deal with these routine inquiries, how the resulting information is communicated within the organization, and the appropriate next steps to take to prepare for the worst case scenario. To mitigate the information imbalance, consider asking the civil authorities directly about the existence of a criminal investigation. However, such inquiries may unnecessarily "stir the pot." Also, the civil authorities may only provide a canned response such as "assume the worst." On the other hand, remaining silent may undermine future efforts to credibly assert that parallel investigations were conducted improperly. Information may be obtained indirectly by delving into the background of the civil agency and its investigators, their prior relationship with criminal authorities, and a history of the criminal referrals they've made. Finally, if a court proceeding has been initiated, the discovery process may be used to obtain information about a criminal investigation.

**2. Understand that parallel does not mean simultaneous.** Counsel should not be lulled into thinking the "parallel" designation means that such investigations always start at the same time and are always simultaneous. Although that is most often the case, a criminal investigation may start much later, especially in light of the recent *Stringer* opinion. The civil investigation or action may end before there is any indication by criminal authorities, through informal requests or subpoenas, that their investigation is active. Keep records collected from the civil investigation accessible until there is confirmation that the criminal portion is over.

**3. Use an internal investigation to determine if the company has any criminal exposure, while being careful of possible employee whistleblowers who may have initiated the inquiry.** A rigorous internal investigation may lessen the chance of government intervention, especially if such investigations can address internal complaints from disgruntled employees or whistleblowers whose broad complaints are many times the catalysts for parallel investigations. During such

internal investigations, though, the company should be careful that efforts to protect the confidentiality of certain business practices are not interpreted as ways to silence whistleblowers.

**4. Understand that information produced to the civil authorities may be used in a criminal prosecution and that even grand jury information may be used in a civil action with court approval.**

The criminal authorities can use information gathered in civil proceedings to pursue their own leads.

Through mechanisms such as “access requests”, criminal law enforcement, whether it be prosecutors or agents, can obtain copies of interview memos, testimony transcripts, and documents generated by the regulatory investigation, or from civil court or administrative proceedings. The SEC even discloses in its Form 1662 that it “makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors.” The prosecutor can also get the court’s permission to allow information obtained during the grand jury process to be shared with civil authorities. The operating assumption should be that the criminal and civil authorities are sharing information and sometimes even coordinating their strategies, especially in formulating their requests for information.

**5. Taking an overly aggressive position in civil litigation could lead to allegations of perjury, false statements or obstruction of justice; consider asserting Fifth Amendment rights rather than providing potentially incriminating statements.** Even where the prosecutor may not have strongest case for proceeding criminally, it may be easier to bring a criminal obstruction or false statement case. As is often said: “It’s not the crime that destroys you, but the cover-up.” Where there is already a parallel proceeding underway, any information provided to civil authorities will receive heightened scrutiny by criminal authorities; in most instances, two sets of eyes will be looking for possible lies upon which to bring a criminal obstruction case. Avoid appearing to interfere with investigations or regulatory requests, and ensure that any production or statement (whether in a formal testimony or informal interview) is consistent, carefully done, and comprehensive. If supplying a statement would lead to incriminating evidence and greater criminal exposure, the best alternative for an individual may be to not provide one at all – instead, assert the Fifth Amendment. Speaking to the government, whether

civil or criminal, can result in a memorialized statement (or even a formal transcript of sworn testimony) which can be used as evidence against the speaker. “Taking Five” for an individual, however, not only may serve as the basis for the civil authority to initiate an action against them, but also may create an adverse inference in a civil proceeding, and even more damaging, may be enough to catch the prosecutor’s interest.

**6. Consider self-disclosure to prosecutors to control the pace of a parallel investigation rather than having the civil authority present the case to the criminal authorities.** The decision to disclose is a complicated one, where the timing and manner of such disclosure, as well as the audience, can influence its effectiveness. The timing is crucial; if it is done too early, the full scope or extent of the issue may not be known and premature criminal interest may frustrate a more measured internal investigation. If disclosure is made, however, efforts to cooperate should be full and complete. Simultaneous disclosure to the civil and criminal authorities may be the best approach and in certain cases (e.g., FCPA-related cases), may be the norm. Recognize that such self-disclosure and subsequent cooperation may precipitate a request for a voluntary waiver of attorney-client privilege. Finally, be aware that voluntary disclosure is a one-way street with the government still maintaining complete control over the process.

**7. Immediately consult outside counsel who have experience with the civil agency (e.g., the SEC’s complex rules), as well as expertise in sophisticated criminal investigations.** Although in-house counsel can be a valuable resource in making the initial assessment of the consequences of a routine inquiry, developing a plan to deal with multiple agencies requires obtaining counsel who are familiar with the particular rules of the specific civil authority and understand the interaction (and limitations of such interaction) between the civil and criminal authorities. Besides the traditional selection criteria for choosing outside counsel, an additional consideration is whether to choose just one counsel to handle the entire matter or different ones for each agency. Either course may work as long as the chosen counsel have the requisite expertise to deal with the agencies in question.

**8. Consider the collateral consequences of dealing with parallel investigations.** As with a one-agency investigation, parallel investigations may still require public disclosure. There is the added element, however, that public disclosure may jeopardize the secret nature of the grand jury investigation.

*Continued on page 16*



*The American Bar Association Criminal Justice Section*

*Presents*

*The 2008 Fall Conference*

---

## **Sentencing Advocacy, Practice and Reform Institute**

---



**October 24, 2008**

**Washington, DC**

**The George Washington  
University**

**The Marvin Center**  
800 21st St. NW  
Washington, DC 20052  
(202) 994-7470

Accreditation has been requested  
from mandatory CLE states.

*Cosponsors:*

**Families Against Mandatory Minimums; National Association of Attorneys General  
National Legal Aid and Defender Association; National District Attorneys Association  
National Association of Criminal Defense Lawyers; The Sentencing Project  
U.S. Sentencing Commission; Vera Institute of Justice  
National Crime Victim Law Institute; National Center for Victims of Crime  
ABA Death Penalty Representation Project; ABA Section of Individual Rights & Responsibilities  
ABA Standing Committee on Legal Aid and Indigent Defendants  
ABA Government & Public Sector Lawyers Division**

*Premier Sponsors:*

**Bryan Cave LLP; Fried Frank Harris Shriver & Jacobson LLP  
Perkins Coie; Skadden, Arps, Slate, Meagher & Flom LLP**

*Contributing Sponsors:* **Carlton Fields; Kynes Markman & Felman**

# Sentencing Advocacy, Practice and Reform Institute

October 24, Washington, DC

## This First-Of-Its-Kind Sentencing Institute Will Feature:

- o A broad array of sentencing and post-sentencing presentations that address the most pressing criminal justice issue of our time;
- o Three tracks of instruction, each focused on issues of concern to different segments of the criminal justice community including prosecutors, public defenders, judges, academics, sentencing consultants, mitigation specialists, corrections personnel, victim advocates, white collar criminal defense attorneys and policy experts;
- o A White Collar Crime Track that will focus on practice and procedure issues of particular concern to criminal defense attorneys in general and white collar practitioners in particular;
- o A Policy Track that will examine sentencing trends and opportunities for reform in both the federal and state courts;
- o A Corrections Track that will focus on conditions of confinement and sentence reduction as well as cutting edge efforts to reduce recidivism;
- o A plenary session on the state of the sentencing union covering rates of incarceration, sentencing trends, racial disparities, alternatives to incarceration and recent federal legislation.

## Registration Form: Sentencing Advocacy, Practice and Reform Institute

**Advance Registration Deadline:** Sept. 24, 2008

**Seating is limited – Register early!**

**Return to:** ABA Criminal Justice Section, 740 15<sup>th</sup> Street NW, Washington, DC 20005 or fax to 202-662-1501.

For more information, contact Carol Rose at 202-662-1519, [carolrose@staff.abanet.org](mailto:carolrose@staff.abanet.org)

**Program Fee:** \$195 for Government & Nonprofit Employees and Academics; \$175 for Section Member Government & Nonprofit Employees and Academics; \$250 for those in Private Practice; \$225 for Section members in Private Practice; \$25 for Law Students. **Amount:** \$\_\_\_\_\_

(Cancellations must be received by Oct. 10, 2008. Cancellations subject to an administrative fee of \$50.)

Name \_\_\_\_\_ Organization \_\_\_\_\_

Address \_\_\_\_\_

City/State/Zip \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_ Email \_\_\_\_\_

**Payment Information:** Make check payable to ABA Criminal Justice Section or fill in the credit card information below:

Master Card  Visa  American Express CARD NO: \_\_\_\_\_ EXPIRATION DATE: \_\_\_\_\_

SIGNATURE: \_\_\_\_\_

## Practice Tips

## Standards

## Judicial Orders: Collecting DNA Samples From Individuals

While DNA evidence can be highly probative in a criminal case, taking a DNA sample from an individual's body can be extremely intrusive to that person's privacy. Judges must weigh these competing interests when deciding how to respond to a request for a search warrant or order for such a sample.

An initial consideration is whether the individual whose DNA is sought has had an opportunity, with counsel, to contest the request. Other relevant issues include the seriousness of the alleged crime and the certainty that it occurred, the likelihood that the sample will help solve the crime, the individual's status as a suspect or non-suspect, and the degree of invasiveness involved in the way the sample would be collected. The DNA Evidence Standards approved by the ABA in August 2006 and published with commentary in 2007 address such issues in Standard 16-2.2. The Standard reads:

**STANDARD 16-2.2**      **JUDICIAL ORDER FOR COLLECTING  
DNA SAMPLES FROM A PERSON**

*(a) A DNA sample should not be collected from the body of a person without that person's consent, unless authorized by a search warrant or by a judicial order as provided in subdivision (b) of this standard.*

*(b) Except in exigent circumstances, a judicial order for collecting a DNA sample from the body of a person should be issued only upon notice and after an opportunity for a hearing at which the person has a right to counsel, including the right to appointed counsel if the person is indigent.*

*(i) If the person from whom the sample is to be collected is suspected of committing a crime, an order should issue only upon an application demonstrating:*

*(A) probable cause that a serious crime has been committed, and*

*(B) if the sample is to be collected from a person is:*

*(1) a sample collected by a physically noninvasive means, reasonable suspicion that the person committed the crime charged; and*

*(2) a sample collected by physically invasive means, probable cause that the person committed the crime charged; and*

*(C) that the sample will assist in determining whether the person committed the crime.*

*(ii) If the person from whom the sample is to be collected is not suspected of committing a crime, an order should issue only upon an application demonstrating:*

*(A) probable cause that a serious crime has been committed; and*

*(B) that a sample is necessary to establish or eliminate that person as a contributor to or source of the DNA evidence or otherwise establishes the profile of a person who may have committed the crime, either because there is reason to believe that the person has contributed to or been the source of the DNA evidence, or for other good cause shown that the sample of that particular person is necessary for that purpose.*

---

For the complete set of the *DNA Evidence Standards* as well as other ABA Criminal Justice Standards, visit the Standards homepage at: [www.abanet.org/crimjust/standards](http://www.abanet.org/crimjust/standards)

### 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.

## Legislative Update

By Bruce Nicholson

*ABA Legislative Counsel*

### Justice Integrity Act/ Racial Disparities

Senator Joseph R. Biden, Jr. (D-DE), Chairman of the Senate Judiciary Subcommittee on Crime and Drugs, along with Senators Arlen Specter (R-PA), Benjamin L. Cardin (D-MD) and John F. Kerry (D-MA), introduced on July 10, 2008, S. 3245, the Justice Integrity Act, legislation designed to increase public confidence in the justice system and address any unwarranted racial and ethnic disparities in the criminal process. A House companion bill was introduced by Representative Steve Cohen (D-TN) on July 16, 2008. The Justice Integrity Act would establish advisory groups in federal districts under the supervision of the United States Attorney General, to study and determine the extent of racial and ethnic disparity in the various stages of the criminal justice system; make public reports on the results of their findings; and make specific recommendations to help to eliminate racial and ethnic discrimination and unjustified racial and ethnic disparities.

The Justice Integrity Act establishes a pilot program within the Justice Department to identify and eliminate unjustified disparities in the administration of justice. The program calls for:

- Ten U.S. Attorneys, designated by the Attorney General, are directed to appoint and chair an advisory group, composed of federal and state prosecutors and defenders, private defense counsel, federal and state judges, correctional officers, victims' rights representatives, civil rights

organizations, business representatives and faith-based organizations engaged in criminal justice work.

- Each advisory group to systematically gather and examine data regarding the criminal process in its district and seek to determine the causes of any racial or ethnic disparity.

- Produce a report on key findings and recommend a plan to reduce any unwarranted racial and ethnic disparities, and thereby increase public confidence in the criminal justice system.

At the end of the pilot program, the Attorney General will produce a comprehensive report to Congress on the results in all ten districts and recommend best-practices going forward.

A team of ABA CJS volunteers, ABA staff and staff with The Sentencing Project worked with Senator Biden's staff over a period of several months to draft the Justice Integrity Act. Numerous law enforcement and civil rights organizations have expressed their support for Sen. Biden's legislation.

### Juvenile Justice Reauthorization

On July 31, 2008, the Senate Judiciary Committee on July 31, 2008 approved S. 3155, legislation to reauthorize the federal Juvenile Justice and Delinquency Prevention Act (JJJPA), following adoption of key ABA-supported amendments regarding "status offenders" and mental health needs of youth.

The Committee approved an amendment offered by Senator Ben Cardin (D-MD) by an 11-7 vote to change longstanding federal policy toward status offenders, youth who have been found to be truant, have run away from home, or violated curfew or liquor ordinances. The amendment provides for a phase-out

over three years of the Valid Court Order (VCO) exception to the 1974 Act's core requirement that states deinstitutionalize status offenders. The VCO exception was added to the Act in 1980 to give states additional time to develop alternative community resources to jail and secured detention for non-criminal youth offenders. S. 3155 as originally introduced would have stiffened due process protections for youth subject to VCO proceedings but would have continued authorization for states accepting JJJPA grant funding to continue confinement of status offenders in youth detention facilities. States which are unable to end use of VCO confinement in three years may apply for an addition 1-2 year exemption.

The Committee also approved an amendment offered by Senator Dianne Feinstein (D-CA) by an 18-1 vote to authorize grant funds for states to provide mental health screening and assistance and drug abuse treatment. States that apply for the grants would be required to screen juveniles shortly after arriving at a detention facility for mental health or drug abuse issues and provide treatment for those found to be suffering from such problems.

As introduced, S. 3155 would strengthen the JJJPA in a number of important respects, including its Core Requirements to:

- Strengthen the Disproportionate Minority Contact (DMC) requirement. Research has documented that youth of color are disproportionately over-represented and subject to more punitive sanctions at all levels of the juvenile justice system. S. 3155 directs states and localities to plan and implement data-driven approaches to ensure fairness and to reduce racial and ethnic disparities, to set measurable objectives for DMC reduction, and to publicly report on progress.

- Improve the Jail Removal and Sight and Sound core requirements. Research shows that youth confined in adult jails and lock-ups face increased recidivism and high risks of assault and suicide. S. 3155 extends the jail removal and sight and sound core requirements to keep youth awaiting trial in criminal court out of adult lock-ups under certain circumstances. While our ultimate goal is to completely remove these youth from adult facilities, S. 3155 takes a good step in this direction.

- Allow States to continue to place youth convicted in adult courts in juvenile facilities without jeopardizing federal funding. S. 3155 would permit many States to continue allowing youth convicted in adult court to serve their sentence in juvenile facilities until they reach the extended juvenile jurisdiction age. Under current law, States can be penalized for utilizing these more appropriate and humane placements for youth.

Overall juvenile justice system improvements in S. 3155 include provisions to:

- Improve conditions of confinement in juvenile facilities: S.3155 calls for the Administrator of the Office of Juvenile Justice and Delinquency Prevention (OJJDP) to report annually on state data regarding the uses of isolation and restraints in juvenile detention and corrections facilities, and encourages training of facility staff to eliminate dangerous practices. S. 3155 also requires states to develop policies, procedures and training on effective behavior management designed to eliminate use of dangerous practices, unreasonable restraints and isolation.

- Provide comprehensive services and supports for youth: S. 3155 promotes alternatives to detention, improves assessments and treatments for

mental health and substance abuse, enhances child welfare and juvenile justice integration, supports effective assistance of counsel, and improves case management and transitional care for youth upon re-entry.

- Create incentive grants: S. 3155 expands evidence based and promising intervention and prevention programs by creating incentive grants. The Senate bill could be further strengthened by an amendment to ensure that programs funded by these grants show evidence-based or promising outcomes of effectiveness.

- Expand the role of OJJDP: S. 3155 provides guidance about specific research, technical assistance and training efforts to be conducted in a manner that benefits States and communities, nationwide.

- Set higher authorization levels for Title II and Title V: S. 3155 provides States with additional resources to achieve and sustain compliance with the core requirements of the JJDP and take meaningful steps to improve juvenile justice systems and prevent delinquency and violence.

The JJDP was first enacted in 1974 and was last reauthorized in 2002. Its current statutory authority expired on September 30, 2007. Congressional hearings on reauthorization and amendment of JJDP began in July with a broad oversight hearing on July 12, 2007, conducted jointly by the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, and the House Education and Labor Subcommittee on Healthy Families and Communities. The July 12 hearing testimony is posted online at: [judiciary.house.gov/oversight.aspx?ID=350](http://judiciary.house.gov/oversight.aspx?ID=350). The House Education and Labor Committee held a second hearing on September 18, 2007. It is posted at: [edlabor.house.gov/](http://edlabor.house.gov/)

[hearings/hfc091807.shtml](http://hearings/hfc091807.shtml). The Senate Judiciary Committee held a hearing on reauthorization of JJDP on December 5, 2007. It is posted at: [judiciary.senate.gov/hearing.cfm?id=3043](http://judiciary.senate.gov/hearing.cfm?id=3043). Reauthorizing legislation has been in the drafting stage for months and is likely to be introduced in April or May and moved forward by the respective House and Senate Committees before the August recess.

The ABA supports reauthorization of JJDP, including the state mandates. The mandates are: (1) deinstitutionalization of status offenders; (2) sight and sound separation of juveniles from adult offenders; (3) removal of juveniles from adult jails and lock-ups; and (4) reduction of disproportionate minority contact with the justice system. The ABA also opposes trying juveniles younger than 15 as adults and believes that juvenile court judges should decide after a hearing whether a waiver of juvenile court jurisdiction is appropriate in a particular case. ABA juvenile justice policy is based upon the IJA/ABA Juvenile Justice Standards, which were developed over many years through the contributions of judges, prosecutors, defenders and other juvenile justice professionals and also is based on specific JJDP policy recommendations adopted in February 1992, August 1995 and August 2007.

### Loan Forgiveness

On July 31, 2008, both the House and Senate approved H. Rept. 110-803, the Conference Report to H.R. 4137, the Higher Education Opportunity Act. The House voted 380-49 and the Senate voted 83-8 for final passage. The legislation incorporates respective House and Senate legislation, H.R. 4137, the College Opportunity and Affordability Act, introduced by Representative George Miller (D-CA),

as well as S. 1642, the Higher Education Authorization Act, introduced by Senators Ted Kennedy (D-MA) and Michael Enzi (R-WY).

The legislation includes, among it broad provisions, authorization for four new loan forgiveness programs for public service lawyers:

- The John R. Justice Prosecutors and Defenders Incentive Act, championed by Senators Dick Durbin (D-IL) and Arlen Specter and Representatives David Scott (D-GA), Bobby Scott (D-VA) and Ted Poe (R-TX). This program provides up to \$10,000 per year in loan forgiveness in exchange for a one-time renewable 3-year commitment. The program is authorized for five years and directs the Inspector General to report to Congress in the third year on its progress and effect.

- The Legal Assistance Loan Repayment Program, which was added to the act as an amendment sponsored by Senators Tom Harkin (D-IA) and Ben Cardin (D-MD). The program provides up to \$6,000 per year in loan forgiveness, in exchange for renewable 3-year commitments, up to a maximum of \$40,000 in loan forgiveness. It includes lawyers employed full-time in legal aid provision as well as lawyers working with persons with disabilities. The program gives priority to those with past full-time legal assistance experience and less than three years service in their current office. It will be administered by the Department of Education.

- The Loan Forgiveness for Service in Areas of National Need provides a modest loan forgiveness benefit of up to \$2,000 per year for up to five years for persons who work in qualifying jobs listed under the program, including those who work in "public interest legal services."

- The Perkins Loan Cancellation for Public Service program will cancel a

percentage of outstanding Perkins loan balances for those in identified public service jobs, a list that now includes federal and local defenders. The schedule of cancellation provides 100% loan forgiveness after five years of employed service.

On September 27, 2007, the President signed into law P.L. 110-84, the College Cost Reduction Act, which includes an ABA-advocated loan forgiveness program for public service. Under the program, which became effective October 1, 2007, borrowers may repay their qualifying federal student loans as an affordable percentage of their income, and after 120 payments (10 years), any remaining balance is forgiven by the government. Among the class of professions and employment sectors covered, the Act includes "public interest law services (including prosecutors and public defenders and legal advocacy in low-income communities at a non-profit)." In addition, persons working in "government," "military," and at 501(c)(3) organizations are also included. The program became effective October, 1, 2007 for some borrowers, does not require a separate appropriations bill, and critical dates over the next two years will progressively expand opportunities for additional persons to enroll.

#### **Drug Sentencing Reform/Crack-Powder Cocaine**

*For complete legislative updates, see [www.abanet.org/crimjust](http://www.abanet.org/crimjust)*

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

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

## Upcoming Events Calendar

October 2-3, Arlington, VA  
[National Institute on Securities Fraud](#)

October 16, Houston, TX  
[National Institute on Foreign Corrupt Practices Act](#)

October 19-21, Washington, DC  
[ABA/ABA Money Laundering Enforcement Conference](#)

October 24, Washington, DC  
[Sentencing Advocacy, Practice and Reform Institute](#)

October 23-26, Washington, DC  
[CJS Fall Meetings](#)

December 4-5, San Francisco, CA  
[National Institute on Criminal Tax Fraud](#)

December 5, Gulfport, FL  
[Providing People with Disabilities and the Elderly Equal Access to Justice](#)

Feb. 11-17, 2009, Boston, MA  
[ABA Midyear Meeting](#)

Feb. 13-14, 2009, Boston, MA  
[CJS Midyear Meetings](#)

March 4-6, 2009, San Francisco, CA  
[White Collar Crime Institute](#)

See [www.abanet.org/crimjust/calendar](http://www.abanet.org/crimjust/calendar) for a complete listing.

### **Criminal Justice Section Committee Resources**

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

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

## News from the Field

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

### NLADA Report Critical of Current Funding Structure for Public Defense in Michigan

A recent study by the National Legal Aid & Defenders Association ranks Michigan 44th in the nation for public defense spending, at only \$7.35 per capita. The report, titled “A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis” also found that residents are routinely tried in district courts without access to any legal counsel whatsoever, calling into question the reliability of Michigan’s criminal justice system. The findings are based on a year-long study of 10 counties chosen by a Michigan-based advisory group consisting of representatives from a number of state and county legal offices and groups, including the State Court Administrator’s Office, the Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan, as well as the state Supreme Court and trial-level judges. NLADA, in partnership with the Michigan State Bar Association, conducted the study at the request of state lawmakers. A full copy of the report is available at [www.mynlada.org/michigan/michigan\\_report.pdf](http://www.mynlada.org/michigan/michigan_report.pdf).

### NACDL Elects New Leadership

During its recent Annual Meeting, the National Association of Criminal Defense Lawyers elected new officers and Board of Directors. ABA

Criminal Justice Section Council member Cynthia Hujar Orr was sworn in as Second Vice President. John Wesley Hall, a Little Rock, Ark., criminal defense attorney, was appointed the Association’s 50<sup>th</sup> president. For more information on the rest of the elections results go to [www.nacd1.org/public.nsf/newsreleases/2008mn17?OpenDocument](http://www.nacd1.org/public.nsf/newsreleases/2008mn17?OpenDocument).

### DOJ to Give \$17 Million in Grant Funds for Project Safe Neighborhoods

The Department of Justice intends to award more than \$17 million to combat gangs and gun crime around the country through locally organized Project Safe Neighborhoods (PSN) task forces. The funds will be distributed to each of the country’s 94 judicial districts. The U.S. Attorneys in each of those districts, working with local law enforcement and other officials, tailor their PSN strategy to fit the unique crime problem in that district. The PSN task forces are a cooperative effort between federal, state and local law enforcement agencies and prosecutors, along with research and media outreach partners, as well as community leaders. More information is available at [www.psn.gov](http://www.psn.gov).

### National Institute of Justice Publication Covers Array of Criminal Law Topics

The latest issue of the National Institute of Justice Journal features articles covering such topics as internationalizing criminal justice research; a case study of the 2005 London train bombings; the latest software programs used for processing DNA samples; and in-depth look at terrorist behavior. A copy of the Journal is available at [www.ojp.usdoj.gov/nij/journals/260/welcome.htm](http://www.ojp.usdoj.gov/nij/journals/260/welcome.htm).

### National Association of Attorneys General Elects New President

The National Association of Attorneys General (NAAG) unanimously elected Rhode Island Attorney General Patrick Lynch as its 101st President, earning him a place in history as the Association’s first President hailing from the nation’s smallest state.

Lynch announced that his presidential initiative, *The Year of the Child*, will focus on propelling protections for young people, with a particular concentration on increasing safeguards in relation to technology. NAAG also elected Nebraska Attorney General Jon Bruning as President-Elect; North Carolina Attorney General Roy Cooper as Vice President; and Idaho Attorney General Lawrence Wasden as Immediate Past President for the 2008-2009 term. Elections were held June 16-20 during NAAG’s 2008 Summer Meeting. More information is available at [www.naag.org](http://www.naag.org).

### CATO Publication Examines Several Trends Underway in Federal Criminal Law

A new report issued by the CATO Institute titled *Deputizing Company Counsel as Agents of the Federal Government* calls on policymakers to reexamine the manner in which corporations and other organizations that are suspected of wrongdoing are investigated. The report discusses, how in the aftermath of the Enron scandal, laws like Sarbanes-Oxley, combined with recent changes to the Federal Sentencing Guidelines, have substantially increased the penalties on companies and individuals for white-collar offenses. To purchase a copy of the report go to [www.cato.org/pub\\_display.php?pub\\_id=9534](http://www.cato.org/pub_display.php?pub_id=9534).

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

## UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

The following cases are reported on in greater detail in the *ABA/BNA Lawyers' Manual on Professional Conduct*, a multivolume reference and notification service that reports on issues relating to ethics and professionalism for lawyers. The publication may be obtained by contacting BNA at 1-800-372-1033 or [customer care@BNA.com](mailto:customer care@BNA.com). For a free trial subscription go to [www.bna.com/products/lit/mopc.htm](http://www.bna.com/products/lit/mopc.htm).

### ABA Warns Against Disclosure Provisions in Proposed Federal Contracting Rule

On June 20, the American Bar Association expressed strong opposition to two key provisions in a controversial proposed Federal Acquisition Regulation (FAR) rule that would require federal contractors to disclose to the government when they have "reasonable grounds to believe" that a violation of federal criminal law or the False Claims Act has occurred in connection with a contract. The ABA noted that its concerns regarding the FAR rule are similar to those regarding the "more explicit" waiver policies adopted by the Department of Justice – most recently, in the 2006 McNulty Memorandum – under which the ABA said that DOJ attorneys pressure companies to waive those protections in exchange for receiving "cooperation credit" during investigations. The ABA letter and the association's recommended changes to the proposed FAR rule are posted at [www.abanet.org/poladv/priorities/privilegewaiver/2008jun20\\_farcase\\_gsaltr.pdf](http://www.abanet.org/poladv/priorities/privilegewaiver/2008jun20_farcase_gsaltr.pdf).

### Disclosure, Consent Are Needed When Firm Represents Client Before Judge Who is Client

The American Bar Association's Ethics Committee advised in an opinion released in May that lawyers in the

same firm may not represent both a judge and a litigant in an unrelated proceeding before that judge unless the lawyers reasonably believe that they can effectively represent each client and both clients provide written consent. Much of the opinion hinges on the judge's own responsibilities under the Model Code of Judicial Conduct. If the judge refuses to comply with these obligations, the committee said, withdrawal from one or possibly both representations is the only option for the lawyers. For more information on this opinion visit the ABA Center for Professional Responsibility at [www.abanet.org/cpr](http://www.abanet.org/cpr).

### Two-Part Test Governs Accused's Right Not to be Prosecuted by Former Counsel

The Texas Court of Criminal Appeals ruled a criminal defendant's due process rights were not violated when she was prosecuted and cross-examined with generally known information by a district attorney who, while in private practice, had defended her on the same type of charge. The court ruled that adverse information that the prosecutor may have learned in the prior representation, such as details about the defendant's drug and alcohol use, was not confidential because the same information was available in public records and was aired by relatives who testified on the defendant's behalf. The court suggested, however, that to avoid professional impropriety or the appearance of impropriety, prosecutors may wish to step down voluntarily from handling a case against a former client. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.24, No. 14, p. 348 (July 9, 2008).

### Unless Lawyer is Alerted to Sender's Mistake, Search for Metadata is Allowed

The Colorado Bar Association's Ethics Committee concluded that ethics rules permit a lawyer to search for and review metadata embedded in an electronic document received from opposing counsel or a third party unless the lawyer was notified before reviewing the document that confidential information was inadvertently transmitted. While recognizing that much hidden information in electronic documents is insignificant, the committee said that the burden of protecting sensitive metadata rests with lawyers who send electronic documents, not with those who receive them. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol. 24, No. 12, p.286 (June 11, 2008).

### Utah Lawyers Who Ghostwrite Pleadings Have No Ethical Mandate to Notify Court

The Utah State Bar Ethics Committee advised that unless some source of authority outside the professional conduct rules expressly provides otherwise, a Utah lawyer may provide legal assistance to pro se litigants and help them prepare filings without notifying the court of the lawyer's participation or making sure that the litigants do so. The opinion makes clear that undertaking to provide limited legal help does not generally alter any other aspect of an attorney's professional responsibilities to the client. Rather than addressing a particular scenario, the opinion broadly discusses the topic of limited representation of pro se litigants "behind the scenes". For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol. 24, No. 11, p.265 (May 28, 2008).

## Practice Tips

*Continued from page 7*

If a company is cooperating with the government, the better course is to inform the government of any future disclosure, walking the line between disclosure obligations and cooperation. Finally, resolving parallel proceedings successfully may still leave the company exposed to private litigation that can use prior admissions in guilty pleas from criminal cases. Protecting attorney-client privilege may be difficult if details of an internal investigation have been provided to the government as part of self-disclosure and cooperation. Accordingly, any such reporting should try to minimize the risk of waiving privilege.

The government's ability to engage in parallel investigations can seem to be an insurmountable obstacle for individuals and companies alike. By

being proactive, maintaining vigilance, gathering as much information as possible during the process, and relying on the expertise of counsel with relevant experience, a more even playing field is possible.

### Member News

## Neal Sonnett Receives the John H. Pickering Award

Section officer and former chair of the Criminal Justice Section Neal R. Sonnett received the 2008 John H. Pickering Award of Achievement at a dinner held in his honor at the New York Athletic Club during the 2008 ABA Annual Meeting in New York City.

A former Assistant U.S. Attorney and Chief of the Criminal Division of the Southern District of Florida, Mr. Sonnett is the Managing Partner of his Miami-

based law firm. He has received the Florida Bar Foundation Medal of Honor in 1989, the ABA Criminal Justice Section's Charles R. English Award in 2001, and several other prestigious acknowledgements for his contributions to the legal profession.

He also chairs a nonprofit agency dedicated to the rehabilitation of ex-offenders; and serves as the ABA's Observer for the Military Commission trials in Guantanamo; as Chair of the ABA Task Force on Domestic Surveillance in the Fight Against Terrorism; and as a Member of the ABA Task Force on Treatment of Enemy Combatants.

### Feedback Welcome

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

Nonprofit Org.  
U.S. Postage  
PAID  
Merrifield, VA  
Permit 6418



American Bar Association  
Criminal Justice Section  
740 15th Street, NW  
Washington, DC 20005-1022