

CHAIR: Stephen Saltzburg
CHAIR-ELECT: Anthony Joseph
DIRECTOR: Jack Hanna

AMERICAN BAR ASSOCIATION

Criminal Justice Section
740 15th Street, NW
Washington, DC 20005-1022
202/662-1500 (Fax:202/662-1501)
crimjustice@abanet.org
www.abanet.org/crimjust

**AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION
POLICY UPDATE**

DECEMBER 2007

Balanced Policy: Uniting Diverse Points of View

The American Bar Association Section of Criminal Justice Council (CJS) is a collegial body that spends most of its meeting time evaluating criminal justice policy. The Section attempts to achieve parity in defense attorney and prosecutor representation to ensure a balanced approach to policy development on its governing body the Council. In discussions members often take counter intuitive policy positions in relation to their current practice setting as a result of high level and open deliberations. The CJS Council is made up of Prosecutors, Defense Attorneys, Judges and Academics. All policy positions of the CJS must be approved by the Council which consists of an approximate equal number of prosecutors and defense attorneys plus judges and academics. Every third year, the Chair of the Section is a Defense Attorney and every third year, the Chair is a Prosecutor. Judges and Academics alternate in the Chair position every third year.

Among the Council's make up are representatives of the following organizations: the United States Department of Justice, The National Association of Criminal Defense Attorneys, the National Association of Attorneys General, the National Legal Aid and Defender Association, the National District Attorneys Association and the Federal Public Defenders Association. Currently the Council has thirteen active prosecutors and six former prosecutors or DOJ staff; fifteen defense attorneys, three academics, a judge, a law student and a government agency attorney who changed jobs after being elected to Council as a prosecutor. Policy generally comes to the Council from CJS Committees including the Prosecution Function and Defense Function Committees where it is debated prior to being sent to Council. You can be assured that policy endorsed by the CJS has been developed and debated from all points of view within the criminal justice arena and as a result reflects the balanced perspective few other entities can provide.

POLICY GOING BEFORE THE HOUSE OF DELEGATES IN FEBRUARY 2008

**ETHICS, GIDEON AND PROFESSIONALISM COMMITTEE
REVISED MODEL RULE 3.8 – PROSECUTORIAL DISCLOSURE OF EVIDENCE**

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

convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction. A complete copy of the recommendation is available at <http://www.abanet.org/crimjust/policy/rule3-8amend.pdf>

Juvenile Justice Committee
Sentence Mitigation for Youthful Offenders

The Juvenile Justice Committee submitted a policy recommendation, which the Section Council passed, that urges all federal, state, local and territorial governments to authorize and implement sentencing laws and rules of procedure that both protect public safety and give mitigating consideration to youthful offenders (i.e., those under 18 at the time of their offense who are subject to adult penalties upon conviction) by recognizing mitigating considerations endorsed by the United States Supreme Court in *Roper v. Simmons*, by authorizing and implementing sentences for youthful offenders that are generally less punitive than comparable sentences for older offenders, and by requiring that such offenders generally be eligible for parole consideration at a reasonable point during their sentences and, if parole is denied, be reconsidered for parole periodically thereafter. A complete copy of the recommendation is available at <http://www.abanet.org/crimjust/policy/juvenilesentencing.pdf>

LEGAL PROBLEMS OF THE ELDERLY COMMITTEE
Vigorous Prosecution of Crimes Against the Elderly

The Section Council passed a recommendation to go to the House of Delegates at the Midyear Meeting in February urging, amongst other things, the following steps be taken by federal, state, local, and territorial governments and their prosecutors to vigorously prosecute cases of elder abuse, neglect, and financial exploitation; (1) creation of special elder abuse units within the prosecutor's office or designate a specially trained prosecutor to handle elder abuse cases; (2) ensure that the victim assistance/services program within the staffing structure of their offices develop policies, procedures and funding for providing specialized victim services to the elder population due to the unique needs of elder abuse victims and the many types of abuse inflicted on them; and (3) update state criminal statutes dealing specifically with the physical abuse, sexual assault, neglect and financial exploitation of elders and the need to take into account the special nature of elder victims and the types of crimes committed against them. A complete copy of the recommendation is available at <http://www.abanet.org/crimjust/policy/crimeselderly.pdf>

Standards Committee
Prosecutorial Investigative Standards

The Section Council has approved proposed Criminal Justice Standards on Prosecutorial Investigations and will present them to the House of Delegates in February. The Standards address issues likely to arise when prosecutors become involved in the investigatory stage of the criminal justice process. These include working with law enforcement agencies; contacts with victims, potential witnesses, opposing counsel and the public; decisions to initiate or continue investigations; using undercover agents and confidential informants; employing subpoenas, search warrants, the grand jury, and surveillance techniques; use of non-governmental resources; and responding to suspected misconduct by judges, defense counsel, witnesses, informants, or jurors. The need for oversight of investigations by government agencies and officials is also addressed. By sensitizing prosecutors to the issues and potential pitfalls of various aspects of investigations, the proposed Standards are expected to guide them through their decision making. A complete copy of the proposed Standards is available at <http://www.abanet.org/crimjust/policy/prosecutorialinv.pdf>

Encouraging Identity Theft Pro Bono Programs

The Section is co-sponsoring the Section of Administrative Law & Regulatory Practice's recommendation urging national, federal, state, and local bar associations, in cooperation with state and local pro bono, lawyer referral, and legal aid programs, to establish programs for representation of victims of identity theft who need assistance in recovering from its effects. The recommendation also addresses the fact that victims of identity theft often suffer significant financial and non-financial harms, including harm to credit standing and reputation, but lack the practical and legal knowledge necessary to recover from identity theft, such as dealing with

creditors and law enforcement authorities, correcting business and public records, and otherwise restoring their reputations. To view the recommendation and report go to <http://www.abanet.org/crimjust/policy/identitytheft.pdf>

Model Rule on Conditional Admission to Practice Law

The Section is co-sponsoring a recommendation of the Commission on Lawyer Assistance Programs which calls for the adoption of the Model Rule on Conditional Admission to Practice Law. The resolution, which encourages law students to seek early treatment for substance abuse and/or mental health disorders without fear that professional help would prevent them from obtaining a license to practice law – states that an applicant who currently satisfies all essential eligibility requirements for admission to practice law, including fitness requirements, and who possesses the requisite good moral character required for admission, may be conditionally admitted to the practice of law if the applicant demonstrates recent rehabilitation from dependency or successful treatment for mental or other illness, or from any other condition the court deems appropriate, that has resulted in conduct or behavior that would otherwise have rendered the applicant currently unfit to practice law. To view the recommendation and report go to <http://www.abanet.org/crimjust/policy/conditionaladmission.pdf>

Providing Legal Services to Veterans to Assist in Obtaining Benefits

The Section is co-sponsoring a recommendation of the Section of Litigation that urges Congress to enact legislation, like the Veterans Advocacy Act of 2007, which promotes the provision of legal services to veterans and members of the Armed Forces to assist them in obtaining the full range of health care, benefits and services to which they are lawfully entitled. This policy is consistent with the ABA's general policy of supporting legal assistance for military personnel, as well as consistent with the ABA's general support of the independence of advocacy and access to legal system. A copy of the recommendation and report is available at http://www.abanet.org/leadership/2008/midyear/sum_of_rec_docs/hundredeight_108_FINAL.doc

Establishing Fee Levels for Immigration and Naturalization Benefits

The Section is co-sponsoring the Commission on Immigration's recommendation that supports fee levels for immigration and naturalization benefits that are not so burdensome as to deter eligible applicants from filing. The recommendation further supports: (a) a clearly-defined fee waiver policy and procedures that ensure that waivers are reasonably available to eligible applicants who demonstrate an inability to pay the fees associated with their applications; (b) no fees for applications for humanitarian forms of immigration relief and associated benefits; and (c) appropriation of federal funds for U.S. Citizenship and Immigration Services activities, including application processing when necessary to avoid prohibitively high immigration fees, and for applications for humanitarian forms of immigration relief and associated benefits, and to cover costs that are not directly related to application processing but that benefit the general public such as national security and anti-fraud efforts. To view the recommendation and report go to <http://www.abanet.org/crimjust/policy/feelevels.pdf>

Updating and Improving Immigration Detention Standards

The Section is co-sponsoring the Commission on Immigration's recommendation that supports the issuance of federal regulations that codify the Department of Homeland Security (DHS) Immigration and Customs Enforcement (ICE) National Detention Standards, and supports improvement, periodic review, and increased oversight of detention standards implementation in order to ensure that detained noncitizens and their families are treated humanely and have meaningful access to counsel and to the legal process. The recommendation supports enforcing the detention standards at all facilities where noncitizens are detained for immigration purposes. Further, the recommendation urges that the least restrictive detention setting be used for individuals and families in immigration detention, and that immigration detainees not be housed with criminal inmates. To view a full copy of the recommendation and report go to http://www.abanet.org/leadership/2008/midyear/sum_of_rec_docs/hundredelevenb_111B_FINAL.doc

POLICY IN DEVELOPMENT

WHITE COLLAR CRIME COMMITTEE

Guidelines Governing Contact with Employees of a Business Organization

The White Collar Crime Committee submitted policy recommendations to the Section Council at the Annual Meeting on August 9-12, 2007 on proposed guidelines under which the government would contact employees of a business organization. The draft analyzes whether the unintended effect of the DOJ's privilege waiver and other cooperation policies has been to encourage certain practices that may run afoul of numerous provisions of the Model Rules of Professional Conduct. The report includes proposed guidelines to address the conflicts and ethical issues implicated by the foregoing practices. The Council asked the committee to seek comments from the ABA Task Force on Attorney-Client Privilege.

Corrections Committee

Guidelines for Effective Prison Oversight

The Corrections Committee's Subcommittee on Effective Prison Oversight has drafted a resolution that calls for federal, state, local, and territorial governments to take certain prescribed steps 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. The resolution also urges federal and state governments to establish public entities that are independent of any correctional agency to regularly monitor and report publicly on the conditions in all prisons, jails, and other adult and juvenile correctional and detention facilities operating within their jurisdiction.

Commission on Effective Criminal Sanctions

Limiting Access to Criminal History Information

In May 2007, the Commission began work on a policy recommendation on access to criminal history information. Based on testimony from employers, criminal background screeners, persons with criminal records, media attorneys and civil legal aid attorneys during our Spring Conference, the Commission is considering whether there are any circumstances under which records should be closed or sealed from general public access, and whether credit reporting agencies and others should be prohibited from disclosing records. The Commission is seeking to balance the values of open access and individual privacy that underlie criminal records policy, and the important public safety goals of successful offender reentry and reintegration. The Commission has not yet formally presented any recommendation to the ABA House of Delegates, in light of concerns expressed by the press and business community. The Commission is also considering alternative approaches to neutralizing the effect of a criminal record for employment and other purposes. For more information visit the Commission's website at www.abanet.org/dch/committee.cfm?com=CR209800.

Criminal Procedure, Evidence and Police Practices Committee

Updating Current ABA Policy on Racial Profiling

The Criminal Procedure, Evidence and Police Practices Committee has drafted a resolution calling for the updating and strengthening of the current ABA policy on racial profiling by law enforcement agencies. The Committee proposal requires police departments to have a written policy banning racial profiling and focuses not only on training all line personnel but to institute operational supervision to ensure compliance with the policies and training. Unlike the ABA resolutions, the Committee proposal recommends not only analysis of the data, but publication of the data as well. The Committee's recommendation would provide funds – via legislation at the state or federal level – available to implement the policies, especially for training of officers.

Improving Procedural Fairness in the Federal Sentencing Process

The Section Council heard the recent recommendation of the Sentencing Initiative of the Constitution Project regarding improving procedural fairness in the federal sentencing process. Specifically, the Council focused on the proposed amendments to Rule 32 of the Federal Rules of Criminal Procedure set forth in the Constitution Project Report which calls for: (1) any party wishing to submit information to the probation officer in connection with a pre-sentence investigation shall, absent good cause, provide that information to the opposing party at the same time it is submitted to the probation officer; and (2) where information provided by a non-party has been used in the preparation of the pre-sentence report or otherwise submitted by the probation officer to the court, the probation officer shall, on request of any party, make such information available to the parties for inspection, copying, or photographing, or, if the information was provided to the probation officer in oral form, the probation officer shall provide a written summary of the information to the parties. The Council did not vote to endorse the recommendation, but will revisit it at its next meeting.

Standards Committee

On November 17, the Standards Committee began a formal review of a revised version of the current *ABA Criminal Justice Standards on the Legal Status of Prisoners*. The Committee expects to present recommended Standards to the Section Council for the first of two readings in the fall of 2008.

Standards Task Forces are drafting proposed revisions to the *ABA Criminal Justice Standards on the Prosecution and Defense Function* and developing new Standards addressing transaction surveillance and diversion and special courts.

A publication on *ABA Criminal Justice Standards on DNA Evidence* is expected to be available by mid-December. It will contain the "black letter" Standards approved by the ABA House of Delegates in August 2006 together with extensive commentary approved by the Standards Committee in July 2007.

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