

ABA Update On August 2008 Meeting

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NDAA PAST PRESIDENT & LIAISON TO THE AMERICAN BAR ASSOCIATION'S CRIMINAL
JUSTICE SECTION & HOUSE OF DELEGATES

CROSS RACIAL IDENTIFICATION JURY INSTRUCTION RECOMMENDATION

The Criminal Justice Section Council previously voted and recommended to the House of Delegates the adoption of a recommendation on Cross Racial Identification Jury Instruction. NDAA submitted changes to the recommendation to the chair of the council and asked the council to reconsider. I am pleased to report that the chair, and the vast majority of the council, accepted our proposed changes, and voted at the summer meeting to substitute a new amended recommendation that included our changes. It easily passed and was then submitted as the revised recommendation to the House of Delegates.

This revised recommendation was presented and cosponsored by NDAA at the House of Delegates and adopted. NDAA was recognized for its assistance and cooperation in this revised recommendation.

The recommendation reads as follows:

American Bar Association Criminal Justice Section Report to House of Delegates Recommendation

RESOLVED, That the American Bar Association urges federal, state, local, and territorial jurisdictions to recognize that in particular cases cross-racial identification may increase the risk of erroneous conviction.

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, and territorial jurisdictions to seek to assure that, in cases which the trial judge finds a sufficient risk of misidentification based on cross-racial factors, expert testimony that satisfies the applicable rules of evidence is admissible, adequate funding is available to enable both the government and indigent defendants to obtain such testimony, and trial judges have available model jury instructions that inform juries of all of the factors that may enhance or detract from the reliability of an eyewitness identification, one of which may be the cross-racial nature of the identification.

FORMATION OF SPECIAL COMMITTEE ON ATTORNEY MISCONDUCT

The Criminal Justice Section Council is forming a special committee to develop ABA resolutions to address how courts should

respond to perceived attorney misconduct in litigation, with particular attention to courts' findings that a prosecutor engaged in "prosecutorial misconduct." The concern originates out of a perception that courts often make unjustified public findings of "prosecutorial misconduct" in criminal proceedings. Since this perception also includes some findings of "misconduct" during civil litigation as well, members of the litigation section of the ABA have been invited to join the committee.

The obvious concern is that not every lawyer who is engaged in impermissible conduct deserves to be sanctioned for "misconduct" by being identified in a published opinion or otherwise. While at times conduct may violate an established standard, the lawyer did not engage in the conduct with the intent, knowledge, or recklessness that would warrant such a sanction. Attorney "error" or "mistake" may therefore be the fairer characterization of the attorney's conduct.

The thought is that reviewing courts should, when evaluating the trial conduct of prosecutors, distinguish between prosecutorial misconduct and prosecutorial error or mistake. The term "prosecutorial misconduct" would be used for conduct that was known by a prosecutor to be improper and prejudicial but that the prosecutor nevertheless pursued with the intent to affect the outcome of the case. The term "prosecutorial error" would be used for conduct that, even if constituting a ground for reversal, was unintentional, inadvertent, or negligent.

NDAA Board Member Michael Moore, Huron, South Dakota, is co-chair of this ABA special committee, and NDAA Board Members Susan Gaertner, Bob Johnson, Gary Walker, Anne Swern, and former board member Mike McCann will also serve on the committee.

KING COUNTY (SEATTLE, WASHINGTON) BAR ASSOCIATION DRUG POLICY PROJECT (KCBA)

During the Criminal Justice Section Council meeting, representatives of the King County Bar Association made a presentation to the council concerning their Drug Policy Project and the Drug Policy Project Coalition. They indicated that they expected no action at that time; however they indicated that would like the ABA to begin reviewing this issue so perhaps next year they could adopt a resolution in support of their project.

The King County Bar Association is asking various associations and organizations to support and adopt a resolution that

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A less measurable, yet significant benefit of the burglary project is that it allows junior deputy district attorneys to litigate DNA-related motions and to admit DNA evidence at trial. In the past, deputies could only learn about DNA in high-stakes sex assault and homicides cases. With the burglary project, junior deputies can get experience with DNA in relatively lower-stakes cases such as car break-in and car theft cases.

Finally, another real, but hard-to-measure, gain of the burglary project was the improvement in citizens' peace of mind. As all prosecutors know, property crimes generally—and home burglaries in particular—have a deep and long-lasting impact on citizens' feelings of safety and well-being. The reduction in crime occasioned by the burglary project must, therefore, be viewed in the fuller context of its impact on the quality-of-life of citizens in the community.

¹ The other participating sites were Los Angeles, Phoenix, Topeka, and Orange County.

² The term "burglary project" is something of a misnomer in that burglaries were not the only high-volume property crimes tracked in the project. Rather, residential and commercial burglaries, along with car thefts and car break-ins, were studied in the project. However, this phrase serves as a convenient short-hand. Where "burglaries" and "burglary rates" are mentioned in this article, the authors only intend to refer to that specific type of crime.

³ The National Institute of Justice contracted with the Urban Institute to produce a report on the burglary project as implemented in each of the five project sites. The detailed study produced by the Urban Institute may be viewed at <http://www.ncjrs.gov/pdffiles1/nij/grants/222318.pdf>. Additional detailed information regarding the project may also be found on the Denver District Attorney's Office Web site at http://www.denverda.org/DNA/Denver_DNA_Burglary_Project.htm.

⁴ The profile was also uploaded into the Colorado state database, or "SDIS" (statewide DNA index system) and the local database, or "LDIS."

⁵ This percentage (six percent) is consistent with the four-nine percent range of property crimes studied in Britain in which biological evidence was recovered. Williams, R., *The Management of Crime Scene Examination in Relation to the Investigation of Burglary and Vehicle Crime*, London, Home Office (2004).

⁶ The detective often does not present cases with no active leads to intake deputy district attorneys.

⁷ Chaiken, J.M. and Chaiken, M.R., *Varieties of Criminal Behavior*, Washington, DC: US Department of Justice, National Institute of Justice, 1982 (NCJ 87680):44.

⁸ These costs track those incurred by British law enforcement's property crimes investigations, each of which costs \$470 (adjusted to U.S. dollars from U.K. pounds sterling). Brand, S. and Price, R. *The Economic and Social Costs of Crime*, London; Home Office (2005).

⁹ To arrive at a conservative figure for the cost of prevented property crimes, we used numbers showing the reduction in burglaries, motor vehicle thefts and theft cases in Denver during 2006 and 2007 (available at <http://www.denvergov.org/HomePage/tabid/393800/Default.aspx>) and the corresponding costs from the FBI's 2006 Uniform Crime Report (available at <http://www.fbi.gov/ucr/>).

¹⁰ The relationship between semen recovered from a sexual assault examination kit and the development of a useable DNA profile is, by definition, outside the scope of the burglary grant. The authors do not imply that the statistic of 35 percent is applicable to those facts. Rather, the semen submitted for testing in the burglary grant was of the sort recovered from abandoned condoms left, for instance, in empty warehouses following a burglary or in some other type of uncontrolled environment subject to weather and degradation.

¹¹ In Colorado, the value of items stolen (such as a car or a car stereo) or the value of damage done to property is an element of an offense that must be proven at trial. For example, damage to the entryway of a burglary victim's home can support a class four felony criminal mischief charge if the damage exceeds \$1,000. In contrast, only a class two misdemeanor charge is warranted if the amount of the damage is less than \$500. Section 18-4-501(1).

provides that states should be allowed to adopt and implement legislation governing the production, distribution and use of marijuana; federal law should not impede or preempt the exercise of state authority in this area.

The representatives who spoke at the meeting pointed out that their purpose is not to legalize marijuana or any drug. However, included in their brochure is a statement that reads, "The drug policy project has been promoting a public health approach to the chronic societal problem of substance abuse, stressing the need to shift resources into research, education, prevention and treatment as an alternative to the continued use of criminal sanctions, which has proven to be relatively expensive, ineffective and an inhuman approach to reduce the harms of psychoactive drug use."

It should also be noted that included in their materials is a resolution that was adopted by the Washington State Bar Association Board of Governors, which supports a state's right to govern the medical use of marijuana and the establishment of a special commission to study regulatory options for psychoactive substances in the state of Washington.

The representatives stated that the point they are trying to make is that federal law should be changed so that it does not preempt state laws. They also indicated a desire to present this initiative to NDAA.

POST-CONVICTION RELIEF

A task force is also being appointed to work on post-conviction relief issues. I expect to hear more on that in the future.

PROSECUTION FUNCTION COMMITTEE

The Prosecution Function Committee, a subcommittee of the Criminal Justice Section Council, is considering putting together a project on the subject of witness intimidation. A proposal has been submitted by a Brooklyn law school professor, which is to be considered by the Prosecution Function Committee and the Criminal Justice Section Council. I indicated to the Prosecution Function Committee that this is an area that NDAA and some of its board members have a special interest and concern. I will keep NDAA members advised of further developments.

ABA MODEL RULE 3.8

ABA Model Rule 3.8 was passed and subsequently adopted by the House of Delegates. Subsequently, however, the Department of Justice decided they were not pleased with Rule 3.8, especially paragraphs (g) and (h) as passed, and proposed that Rule 3.8 be modified. Representatives of DOJ met with the chair and several members of the Criminal Justice Section Council after the council meeting to discuss DOJ's proposed modifications. While NDAA objected to ABA Model Rule 3.8 in its entirety, DOJ proposed modification does not completely address NDAA's objections to the rule.