Criminal Law Committee

COMMITTEE UPDATE

1997-1998
No. 1

A PUBLICATION OF THE ABA GENERAL PRACTICE, SOLO AND SMALL FIRM SECTION

Welcome to the 1997-98 Criminal Law Newsletter.

Welcome members, old and new, to the Criminal Law Committee 1997-98. I have the honor of serving as your Chairperson for a second year. This time will permit me to act on some of the suggestions I have received from Committee members over the past year. Specifically, the Newsletter is taking on a new look and will be published three times during the ABA year. As such, YOU have an opportunity and even a responsibility to make the Committee work and work for you.

This edition of the Newsletter includes a great practical guide on joint venturing in criminal defense cases. As workloads increase, so does the need for tools to continue to provide quality services: investigation, briefing, etc. The article touches on the ins and outs of joint venturing and even identifies some of the potential pitfalls of such arrangements. We also have a commentary on a recent United States Supreme Court decision which addresses the ever-embattled exclusionary rule. The exceptions seem to be consuming the rule. Your comments and responses are welcome and will be used in future Newsletter issues.

Please help us make the Newsletter a working tool and forum for Committee members. Your article(s), your views, and your help are crucial to making this year a success. All the best.

— Timothy J. Buckley III

In this issue...

Joint Venturing Criminal Defense Teams

By Robert S. Bennett and Philip H. Hilder

When should David feel secure in defending against Goliath? Upon joint venturing a criminal defense team, of course. Whether a sophisticated white collar prosecution or high profile case, the prosecuting authorities have vast resources at their disposal to present the case. The solo criminal practitioner is at a distinct disadvantage. While some may relish in the underdog mentality, the technical nature or magnitude of the case often requires reinforcements. The joint venture allows solo practitioners to remain at the helm of a larger and more formidable defense team.

The generalist solo practitioner is hard pressed to combat specialized multi-agency governmental task forces. However, parity can be achieved by formulating alliances outside the office to create an ad-hoc defense team. Joint venturing is used to forge relationships in which two or more otherwise unrelated lawyers of law firms can jointly represent a client or groups of clients.

Crafting a criminal defense team with other solo practitioners or another law firm should be done selectively to either supplement a personnel shortage or to fortify expertise. Joint venturing leads to strategic alliances which transcends the standard "referring attorney," or "local attorney" arrangements. These alliances are formed to share cost, skills, knowledge and information.

A joint ventured defense team must be created with necessary sub-specialties to rebut the government's accusations with particularity. For instance, should the evidence include extensive wiretaps, consider adding to your team an attorney familiar with the nuances unique

to tape cases. Defense attorneys, while familiar with criminal procedure, may not be experts in the substantive area of law being prosecuted. Investigations involving anti-trust, securities, customs, tax, environmental, healthcare, ERISA and intellectual property may require additional specialty attorneys.

Parallel proceedings could also require supplementing resources. Parallel proceedings occur when a regulatory agency opens a separate civil or administrative inquiry during a pending criminal investigation. Dual tract investigations are conducted by numerous Federal agencies such as the EPA, FTC, SEC, the Customs Service, the Department of Health and Human Services or any agency that regulates business conduct. The agency may be a state agency. Multiple investigative authorities often have concurrent jurisdiction over certain matters. Accordingly, a case will either be worked independently or in concert. Regardless, the investigation of the same acts or transaction can be investigated simultaneously by various federal and state agencies. This situation requires coordinating responses in multiple investigations so as not to prejudice the other proceedings. This may mean adding an attorney with state or civil expertise to the team.

An incomplete list of examples where joint venturing may be appropriate include:

- Corporations under investigation for federal false claims
- Corporate internal investigations
- Healthcare providers under investigation for fraud or abuse
- Foreign Corrupt Practice Act cases
- Corporations or employees charged with environmental or antitrust offenses
- International investment fraud or money laundering

It is important to create regional efficiencies. Counsel may want to joint venture with a local firm when the case is pending in a different city or state. In addition to providing all the usual advantages of local counsel such as knowledge of local rules, customs, jury attitudes, and judges, joint venturing also saves counsel travel time and expenses.

The development of new technology allows law firms to instantaneously share information and data through special telephone links, an impossibility just a few years ago. Attorneys and staff from different firms can work together concurrently rather than sequentially. The use of computer networks allows this sharing and brings increased power, ability and greater flexibility to the litigation process. The end result is better service to the client. One of the real advantages to strategic alliances is the prospective and experience that each firm brings to a project. The exceptional skills and resources of each firm are employed throughout the project for the client's advantage.

There are, of course, certain risks when a project is divided among firms. For example, one firm's attorney may prepare the jury charge leaving out key language. If uncorrected, the consequences could be disastrous to the entire project. Releasing control of part of a case may be anathema to some trial attorneys. It certainly suggests the need to build trust among those involved in strategic alliances.

Once it is decided that a joint venture is appropriate, the agreement with the other firm or lawyer should be reduced to writing. A joint venture is equal to going into business with the other entity. Joint venturers should confront and resolve potential problems early. The process of formulating the written agreement will surface problematic issues that are best resolved at the onset.

The entire exercise of joint venturing is to combine forces which gives the defense the expertise and strength to become on par with the government. Nonetheless, the purpose of the joint venturing is to share, albeit not necessarily equally, the work. Most cases will not dictate the precise definition of the type of work that each attorney/firm will perform. However, it may be preferable to have the ultimate responsibility for making key strategic decisions, such as signing work, tracking work assignments, informing the client of the status, rest with one attorney. A sole attorney should be

in charge rather then having no captain. It may be appropriate to delineate from the beginning the various assignments:

- Assigning the pre-trial motions, research and writing
- Dividing the responsibilities for fact and expert witnesses
- Assign one entity to be responsible for the evidence
- Assign lead trial counsel

When various assignments are being made, the joint venturers should accept tasks that are in line with their strength and expertise in order to maximize the joint venture. The below sample joint venture agreement is illustrative only and should be modified to fit your particular situation.

Phillip H. Hilder, a partner at Bennett Krenek & Hilder, L.L.P. is the former Attorney in Charge of the United States Department of Justice, Organized Crime Strike Force, Houston Field Office and former Assistant United States Attorney. Mr. Hilder handles white collar criminal defense matters, grand jury investigations, antitrust and internal compliance programs.

Robert S. Bennett is a partner at Bennett Krenek & Hilder, L.L.P. and former Assistant United States Attorney. Mr. Bennett handles complex civil matters involving personal injury, toxic tort, employment discrimination, antitrust and federal investigations.]

Recent United States Supreme Court Decision Further Limits Exclusionary Rule

The United States Supreme Court has recently crafted a bright line rule with regard to the search of passengers in a lawfully stopped vehicle. In Maryland v. Wilson, 65 LW 4124 (2/19/97), the U.S. Supreme Court held the Fourth Amendment permits police officers, as a matter of course, to order passengers in a lawfully stopped car to exit the vehicle. The Wilson decision has expanded the capability of police officers to search and detain not only those who have been stopped for cause, but those to whom no probable cause has attached. In Wilson, the defendant was a passenger in a rental car stopped by an officer for speeding and driving without a regular license plate. The officer ordered the defendant to exit the vehicle and, as he exited, a quantity of crack cocaine fell to the ground. Consistent with case law from the past twenty years, the state appellate court ruled the holding of Pennsylvania v. Mimms, 434 U.S. 106 (1977), in which officers were permitted to order a lawfully stopped driver to exit a vehicle, did not apply to passengers; thus, the cocaine should be suppressed.

In a 7-2 majority opinion, Chief Justice Rehnquist weighed the state's "legitimate and weighty" interest in preserving officers' safety against the "de minimis" infringement on liberty occasioned by ordering an already stopped driver and/or passenger to exit his or her vehicle. Although the Court conceeded a passenger has a stronger claim of liberty than a driver because there is no probable cause to believe the passenger has committed even a minor traffic crime, as a practical matter, ordering a passenger out of the vehicle provides a decrease in risk of possible harm to the officer by a mere "change of location." The Court analogized its holding to its ruling in Michigan v. Summers, 452 U.S. 692 (1981) which allows officers to temporarily detain the occupants of premises that are being searched for contraband by a warrant. Both situations, the Court held, require police to "routinely exercise unquestioned command of the situation."

In dissent, Justice Stevens argued the majority based their theories of the risk to officer safety on insufficient statistical evidence. The evidence was insufficient as to the number of attacks on police officers from drivers versus passengers or whether those attacks came from inside or outside the car. Therefore, applying Mimms to passengers was not a guarantee that attacks on police officers would be minimized. Justice Kennedy joined in Justice Stevens' dissent and expressed concern about the potential for subjective application of the majority's decision.

The Wilson decision has a far reaching impact. The police can now demand the high school girl passenger on a date during which her boyfriend is stopped for a broken tail light to exit the car with her hands up. The octogenarian passenger and her husband