

Criminal Justice Section Newsletter

Volume 32, No. 1: Fall 2023

Annual Meeting Highlights

The ABA Criminal Justice Section's Annual Meeting convened on August 3-5, during the ABA Annual Meeting in Denver, Colorado, with CLE programs, committee and council meetings.

Following CLE programs were presented:

- From Standing Rock to Cop City: Criminal Law's Role in Environmental Justice and Resistance;
- Emerging Trends in Corporate Criminal Enforcement;
- Extending Justice 3: They Don't Look Like Extremists or Terrorists;
- The Ethics of Simultaneous Representation: Navigating Pool Counsel Waters;
- Annual Review of Supreme Court Decisions.

The Curtin-Maleng Minister of Justice Award was presented to Erek Barron, U.S. Attorney for the District of Maryland, Circuit Court for Baltimore City, and Andrew H. Warren, State Attorney, Florida 13th Judicial Circuit, Hillsborough County.



Southeastern WCC Institute

The Ninth Annual Southeastern White Collar Crime Institute took place on September 6-8 at Chateau Élan Winery & Resort, Braselton, Georgia.

Panels presented were:

- The Domestic v. International White Collar Crime Discipline;
- A View from the Bench: Expectations of Judges;
- Cross Border – Export and Sanctions Roundtable;
- Health Care Fraud and Abuse Enforcement in a Granston World;
- A Roundtable Discussion with U.S. Attorneys;
- Environmental Crimes.

Keynote speaker was Lisa Miller, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice.



Resolutions Passed at the Annual Meeting

Following criminal justice resolutions were passed at the 2023 ABA Annual Meeting:

- Resolution 502 -- Adopts the 14 Principles contained in the ABA Criminal Justice Section 2023 Plea Bargain Task Force Report;
- Resolution 503 -- Urges federal, state, local, territorial, and tribal governments to: repeal laws that provide an exception to the prohibition of slavery and involuntary servitude through prison labor, enact legislation that eliminates hard labor as a form of punishment for a crime, and ensure that all prison labor is voluntary, safe, fairly compensated; and amends the *Criminal Justice Standards on Treatment of Prisoners* (3rd Edition, 2011);
- Resolution 504 -- Urges federal, state, local, territorial, and tribal governments to adopt Prosecutor-Initiated Resentencing legislation that permits a court at any time to recall and resentence a person to a lesser sentence upon the recommendation of the prosecutor of the jurisdiction in which the person was sentenced.

New CJS Chair: Tina Luongo

Tina Luongo, the Chair for 2023-2024, is the Chief Attorney of the Criminal Defense Practice of The Legal Aid Society of New York City, and the first gender fluid chair of the Section, which means that Tina does not identify in the male-female gender binary, and uses the pronouns she/her and they/them.



Student Writing Competition Winner

The Greenhalgh Student Writing Competition winner for 2023 is Nina-Simone Edwards, Georgetown University Law Center. Her submission was titled “Security as a Superstition; the Constitution as a Potential Ritual.”

Committee Updates

Young Lawyers/Law Student Development Committee

Young Lawyers and Law Student Development Committees have merged into one committee in 2023-2024. This new structure will facilitate a more focused approach in supporting members exploring or starting a career in criminal justice. Members of this combined committee would benefit from practical career information, publishing and speaking opportunities, networking, public service opportunities, and activities to improve the criminal justice system.

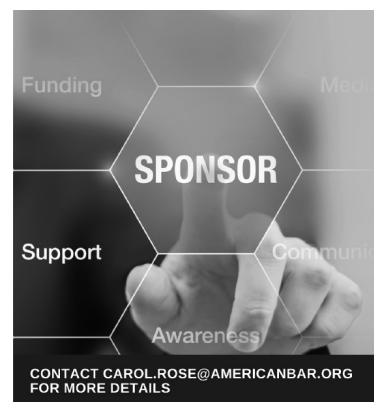
White Collar Crime Committee

White Collar Talks, a podcast series of *JustPod* (CJS podcast) has resumed with new episodes. This podcast features leading white collar practitioners discussing hot topics and emerging trends in government investigations and enforcement.

The White Collar Crime Committee also has published its Summer/Fall 2023 Edition of the *White Collar Crime Committee Newsletter*.

BECOME A SPONSOR

- BUILD LONG-TERM RELATIONSHIPS
- ENHANCE YOUR ORGANIZATION'S EXPOSURE IN THE CRIMINAL LAW FIELD
- CREATE A VALUE INVESTMENT THROUGH CO-BRANDING WITH THE ABA CRIMINAL JUSTICE SECTION
- HIGHLIGHT AND REINFORCE POSITION AS A LEADER IN THE PROFESSION.



CONTACT CAROL.ROSE@AMERICANBAR.ORG FOR MORE DETAILS

The *Criminal Justice Section Newsletter* is published three times a year (Fall, Winter, Spring). 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 2023, American Bar Association.

The American Bar Association
Criminal Justice Section
1050 Connecticut Avenue N.W.
Washington, DC 20036
Phone: (202) 662-1500
Fax: (202) 662-1501
Email: crimjustice@americanbar.org
Web: www.americanbar.org/crimjust

Chair: Tina Luongo
Co-Executive Directors of the Communications Division:
Andrea Alabi, Paula Edgar
Section Director: Kevin Scruggs
Managing Editor: Kyo Suh
Associate Editors:
Patrice Payne, Kristin Smith

Legal Education Police Practices Consortium News

The ABA Legal Education Police Practices Consortium concluded the third fellowship class in April 2023, consisting of 41 students from 28 ABA-accredited law schools in 18 states and the District of Columbia.

Students met via Zoom weekly, to learn about a variety of themes related to policing, public safety, and professional development from an assortment of external speakers. Presenters hailed from the Center for Problem-Oriented Policing at Arizona State University, the Center for A New American Security Center for Justice Research and Innovation, and the Substance Abuse and Mental Health Services Administration, the International Association of Chiefs of Police, as well as other experts from Consortium-member schools and policing think-and-do tanks.

In addition to the weekly meetings, students were responsible for assessing if and how their law school might collaborate with local police department or civil rights or legal aid organizations working on issues related to policing. Where partnership was pursued, student fellows supported agencies in data collection and analysis, providing legal summaries, aiding the development or revision of legal training material, or delivering public/officer perception surveys.

For schools that opted not to pursue partnerships, students conducted research on a range of themes to identify promising approaches, research gaps, and opportunities for further substantive evaluation related to policing and public safety in their community. Nine fellows participated in the American Society of Evidence-Based Policing Conference held in Las Vegas, NV May 15-17. While there, they were able to network and learn from a variety of legal and criminological experts around emerging and promising evidence related to policing practices.

Fellows as part of their core research have focused on capturing lessons learned on citizen review boards, police transparency and accountability, body worn cameras, or policing policy to elevate them across communities to further promote good and promising approaches or standardization, where appropriate, of policy language. Select schools are considering drafting white papers on their work to further showcase the research to a broader, external audience. Dependent on the research and findings, the Consortium hopes to relay the work of the fellows to propose and advance relevant policy recommendations to the ABA Board of Governors to ensure that the students' work helps to inform real-world reform. Individual law schools might then work with their local departments to determine what implementation of that policy might entail.

The work of the fellows in Spring 2023 will continue to inform future iterations of the fellowship, with the next class set to begin in September 2023.

In addition, in January 2023 Lincoln Memorial University Duncan School of Law in consultation with the Consortium, launched a second iteration of an innovative class entitled Police Law, Policy, & Practices. Taught by Associate Dean of Faculty and Professor of Law Melanie Reid, this course touches on a host of topics related to the evolution and proposed reforms of modern policing, including policing strategies, training, oversight, culture and community engagement. Aside from the formal curriculum, additional learning was achieved through the involvement of active and retired law enforcement from across the country. Through engagement with the Consortium as well as the Criminal Justice Section's Law Enforcement Committee, representatives from a host of different police agencies were sought. Participating on a voluntary basis, officers were involved to support the learning of students as well as hear about their concerns and brainstorm opportunities to strengthen collaboration between communities and police departments. This course, held virtually, emphasized experiential learning through the use of break out groups and class exercises to promote information sharing and partnership between the lawyers of tomorrow and police.

LMU and the Consortium will expand this course in Spring 2024 with the additional involvement of students and faculty from The University of Memphis School of Law, Quinnipiac School of Law, Penn State Dickinson Law, Roger Williams University School of Law and Loyola University College of Law. Representatives from each school will also solicit participation from law enforcement officers in each of their communities.

The Consortium anticipates the publication of a special edition Law of the Police casebook by Rachel Harmon in winter 2023. This publication will be shared with all member schools in the hopes of additional policing content informing the law school experience.

Finally, the Consortium website continues to grow with access to policing data and policies from across our network as well as a database of law of the police scholars. Showcasing the research of students as well as a wealth of other resources related to policing and public safety initiatives underway in member law school communities, the website can be accessed at abalegaledpoliceconsortium.org.

For more information about the Consortium, please contact the Consortium's director Jessalyn Walker at jessalyn.walker@americanbar.org or LEPPC@americanbar.org.

“Tag” Jurisdiction Remains in Flux After Supreme Court’s Certiorari Denial¹

By Andrew S. Boutros, David N. Kelley
and Jay Schleppebach

By necessity, international corporations deal with a complex patchwork of laws and regulations from different jurisdictions all over the world. And anywhere these corporations do business, there is at least some risk that they will be haled into court. Experienced counsel can help determine the extent of that risk so it can be weighed against the potential rewards of operating in any particular jurisdiction. In the United States, that calculus can be tricky given the differing standards for exercising jurisdiction over corporations in different regions of the country, which the United States Supreme Court recently declined to harmonize by denying certiorari in *SEC v. Terraform Labs PTE Ltd.*² This article describes the different standards for what is known as corporate “tag” jurisdiction and offers various pointers to help practitioners better advise their clients on these issues.

“Tag” Jurisdiction Defined

Since 1945, the Supreme Court has held that the Constitution requires courts to have either specific or general personal jurisdiction over a defendant.³ Specific jurisdiction exists only where the events underlying a lawsuit arise out of or relate to the defendant’s contact with the forum state. General jurisdiction, which extends personal jurisdiction to “any and all claims” brought against a defendant,⁴ exists in two circumstances: (1) when the defendant is “essentially at home” in the forum,⁵ or (2) when the defendant is physically present within the relevant court’s territory, “no matter how fleeting his visit.”⁶

Lower courts allowing corporate “tag” jurisdiction anchor their decisions on this second circumstance, holding that the physical presence of a corporate executive within a jurisdiction suffices to bring the corporate entity within the personal jurisdiction of a U.S. court.⁷ Although the Supreme Court affirmed tag jurisdiction for individual defendants in *Burnham v. Superior Court*,⁸ it has not done so in the corporate context.

The Circuit Split

The federal circuit courts that have weighed in on the permissibility of corporate “tag” jurisdiction are evenly split, with the

First and Second Circuits allowing the practice while the Fifth and Ninth Circuits disallowing it. The Supreme Court has acknowledged the split, noting that “some courts have sought to revive the tag rule for artificial entities while others argue that doing so would be inconsistent with *International Shoe*.”⁹

Second and First Circuits: “Tag, You’re It”

The Second Circuit explicitly affirmed the usage of tag jurisdiction for artificial entities in 1998. In *First American Corp. v. Price Waterhouse LLP*, that court enforced a subpoena against the British arm of an international accounting firm after a domestic corporation served a partner at the accounting firm during a temporary visit to New York.¹⁰ The court premised its decision on the Supreme Court’s decision in *Burnham* and the partner’s physical presence in New York, reasoning that the British entity knew, or should have known, that it was risking exposure to personal jurisdiction in New York when it chose to send one of its partners there.¹¹ The First Circuit made a statement to similar effect in *Northern Light Technology, Inc. v. Northern Lights Club* in 2001, writing in a footnote that service on a foreign corporation’s president would suffice to confer general jurisdiction over the corporate entity.¹²

Fifth and Ninth Circuits: “Tag, Not It”

In contrast, in its 1992 *Wenche Siemer v. Learjet Acquisition Corp.* decision, the Fifth Circuit rejected corporate “tag” jurisdiction and refused to exercise personal jurisdiction over an out-of-state aviation company based solely on “in state service on a designated corporate agent.”¹³ The court found *Burnham* did not support corporate “tag” jurisdiction, as *Burnham* “did not involve a corporation and it did not decide any jurisdictional issue pertaining to corporations.”¹⁴ The Ninth Circuit similarly rejected of corporate “tag” jurisdiction in *Martinez v. Aero Caribbean*, another suit arising out of an aircraft accident.¹⁵ Although the defendant company had few contacts in the United States, plaintiffs sought personal jurisdiction by serving the company’s vice president of marketing when he attended a short conference in the forum state.¹⁶ The court declined to find personal jurisdiction over the defendant and rejected plaintiffs’ argument that *Burnham* provided an endorsement for corporate tag jurisdiction, stating that “[a]n officer of a corporation is not the corporation, even when the officer acts on the corporation’s behalf.”¹⁷

The Terraform Labs Matter

The *Terraform Labs* controversy afforded the Supreme Court an opportunity to weigh in on this circuit split, but the Court declined to do so. Specifically, *Terraform Labs* arose when the SEC sought to subpoena both Terraform Labs, a Singapore-based company, and its chief executive officer Do Kwon, a resident

Andrew S. Boutros is regional chair, David N. Kelley is past global co-leader, and John R. Schleppebach is counsel in Dechert LLP’s White Collar and Securities Litigation practice. The authors wish to thank Stormie Mauck and Andrew Stahl for their assistance in the preparation of this article.

of South Korea, by serving Kwon during a visit to New York for a blockchain conference.¹⁸ After Terraform and Kwon failed to comply, the SEC sought, and the Southern District of New York granted, judicial enforcement of the subpoenas.¹⁹ Thereafter, Terraform and Kwon appealed to the Second Circuit, which affirmed the subpoenas' validity, and then petitioned the Supreme Court for a writ of certiorari. In their petition to the Court, defendants raised the argument that the Second Circuit unconstitutionally found general personal jurisdiction via corporate "tag" jurisdiction.²⁰ In response, the SEC argued that the Second Circuit's decision was not predicated on corporate "tag" jurisdiction, which is a form of general jurisdiction, but rather on specific jurisdiction.²¹

The Existing Circuit Split Creates Continuing Uncertainty for Corporations and Their Executives Working Across Jurisdictions

With the Supreme Court's denial of certiorari in March 2023, the circuit split on corporate "tag" jurisdiction continues to create uncertainty, especially for international corporations and executives seeking to do business in the United States. Indeed, the current state of the law potentially allows for a corporation to unwittingly subject itself to the jurisdiction of a U.S. court, agency, or department due simply to the travel of a single executive officer to one district versus another.

Practice Pointers

Until the Supreme Court's resolution of the issue, in-house and outside counsel can and should take precautionary measures to avoid inadvertently subjecting their clients to the jurisdiction of the United States. For example:

- Should counsel be aware of, or anticipate, an investigation or litigation in the United States, counsel should be cautious in allowing executives to travel on corporate business or travel to the United States at all.
- Counsel should recognize that differences exist with respect to how certain districts treat corporate jurisdiction; Fifth and Ninth Circuit states like Texas and California are safer for travel than Second and First Circuit localities such as New York and Boston.
- An entity's form and the level of executive involved may also impact the risk of jurisdiction; *First American* (Second Circuit) involved a partner in a partnership and *Northern Light* (First Circuit) involved the president of a corporation.
- International companies with frequent travel to the United States should train their U.S.-bound employees of the risks of traveling to the United States as well as how to prepare for traveling to the United States, including traveling with

corporate laptops and electronic devices.

- As part of that training, traveling employees should be provided with the name and phone number of a U.S. attorney (whether in-house or outside counsel) who they can contact in the event they are confronted with federal agents or other process servers.

Though these precautions can hardly assure an international corporation that it will not be summoned into an American courtroom during executive travel into the United States, they can help reduce the likelihood of corporate tag jurisdiction and also inject a bit more predictability into the risk assessment process.

Endnotes

1. Order Denying Certiorari, *Terraform Labs Pte. Ltd. v. SEC*, No. 22-332, Dkt. # 14 (March 20, 2023); this article is adapted from Andrew Boutros et al., "Tag, You're It": U.S. Supreme Court Denies Certiorari on Corporate Tag Jurisdiction Appeal (April 5, 2023).

2. No. 22-368, 2022 WL 2066414 (2d Cir. June 8, 2022).

3. See *International Shoe v. Washington*, 326 U.S. 310 (1945); see also *McGee v. International Life Insurance*, 355 U.S. 220 (1957) (holding that general jurisdiction is unnecessary when a state has specific jurisdiction over a defendant).

4. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

5. *Id.*

6. *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990) (plurality opinion).

7. See, e.g., *First American Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20–21 (2d Cir. 1998); *Northern Light Technology, Inc. v. Northern Lights Club*, 236 F.3d 57, 63 n.10 (1st Cir. 2001).

8. 495 U.S. at 610.

9. *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1038 n.4 (2021) (Gorsuch, J., concurring) (citations omitted).

10. 154 F.3d 16 (2d Cir. 1998).

11. *Id.* at 20–21.

12. 236 F.3d 57, 63 n.10 (1st Cir. 2001).

13. 966 F.2d 179, 180 (5th Cir. 1992).

14. *Id.*

15. 764 F.3d 1062 (9th Cir. 2014).

16. *Id.* at 1064–65.

17. *Id.* at 1068 (citations omitted).

18. *Terraform Labs*, 2022 WL 2066414, at *1.

19. *Id.* According to Law360, which covered the Supreme Court's denial of Terraform's certiorari's petition, a Terraform spokesperson told Law360 "that the company handed over the requested documents after the lower court ordered them to do so in March 2022 while maintaining its objections to the subpoenas." Jessica Corso, *Justices Won't Hear Terraform Appeal Over SEC Subpoenas*, Law360 (March 20, 2023).

20. Pet. for Cert., *Terraform Labs Pte. Ltd. v. SEC*, No. 22-332, Dkt. # 3 (Oct. 6, 2022).

21. Brief in Opp., *Terraform Labs Pte. Ltd. v. SEC*, No. 22-332, Dkt. # 11 (Feb. 2, 2023).

We Too Will Sue! -- America's Grieving Parents Sue Schools as Suicides of Bullied Teen Daughters Skyrocket

By James E. Shaw

I was looking for a parking spot at the Civil Court when my phone's "silent" mode began buzzing. The caller was an attorney whose clients were parents of a female high student who had committed suicide. She had been incessantly tormented not only at school but also via TikTok, Meta, Instagram, and on the Internet by other students. The attorney told me, "I need you on this tragic case. My clients' daughter committed suicide after countless and repeated bullying victimized her on the campus, in her classes, in the cafeteria, and on the Internet. With your background as Director of Child Welfare and Attendance in a public school district with some thirty one schools, you know the drill: misguided students can stalk, prey, and kill."

After surveying recent years, The Centers for Disease Control and Prevention report that sexual violence, suicidal thoughts, suicidal behavior and other mental health woes affected many teens regardless of race or ethnicity; but girls and LGBTQ youth fared the worst. More than 17,000 U.S. high school students were surveyed in class in the fall of 2021. In 30 years of collecting similar data, "we've never seen these kinds of devastating, consistent findings," said Kathleen Ethier, director of CDC's adolescent and school health division. "There's no question young people are telling us they are in crisis. The data really call on us to act."

But are schools fully and completely responsive to the "crisis" daily experienced by America's teenagers? The nation's schools are the epitomes of *education*. Yet, do they convene students in "responsibility assemblies" and frankly discuss the facts published by the Centers for Disease Control and Prevention? Are schools alert about and aware of cell phone usage and how a frightening number of their own students misuse cell phone, as a matter of social power honed by "normal" skill and harassment via Meta, TikTok, Instagram, other social media and the Internet? Are school principals, teachers and counselors alerted to and focused on the rise, on their campuses, of bullying, name-calling, jeering, verbal threats and other inhumane acts by students against students? Are schools regularly calling

parents and requesting Parent-Teacher-Student Conferences due to mounting and increasingly gross misbehaviors threatening their own children?

What the CDC Informs Us About Bullying

Bullying is unwanted, aggressive behavior among school-aged children that involves a real or perceived power imbalance. The behavior is repeated, or has the potential to be repeated, over time. Bullying includes actions such as making threats, spreading rumors, attacking someone physically or verbally, and excluding someone from a group on purpose. Bullying can occur in-person or through technology.

Bullying has serious and lasting negative effects on the mental health and overall well-being of youth involved in bullying in *any* way, including: those who bully others, youth who are bullied, as well as those youth who both bully others and are bullied by others, sometimes referred to as "bully-victims." Victims of bullying are not happy campers, and school teachers, counselors, secretaries, vice principals, and principals need to watch and monitor the social interactions and behaviors of victims of bullying. Said another way, professional school staff need to leave their offices periodically and walk about and survey the campus, from which they earn their livelihood, to find out for themselves what is going on among the children they are to protect and for whom they stand "in loco parentis" (in place of the parents) for six to eight hours every day of the week.

Even youth who have *observed but not participated in bullying* behavior report significantly more feelings of helplessness and less sense of connectedness and support from responsible adults (parents/schools) than youth who are not victims of bullying and have not witnessed bullying behavior.

Negative outcomes of bullying (for youth who bully others, youth who are bullied, and youth who both are bullied and bully others) may include: depression, anxiety, involvement in interpersonal violence or sexual violence, substance abuse, poor social functioning, and poor school performance, including lower grade point averages, standardized test scores, and poor attendance.

Youth who report having frequently bullied others and youth who report being frequently bullied themselves are at increased risk for suicide-related behavior, the final feelings of being demeaned and trashed.

Youth who report *both* bullying others and being bullied (bully-victims) have the highest risk for suicide-related behavior of any groups that report involvement in bullying.

James E. Shaw, Ph.D., is certified national court expert and author of best-selling book, Jack & Jill, Why They Kill: Saving Our Children, Saving Ourselves.

What the CDC Informs Us About Suicide

- Suicide-related behaviors include the following:
 - Suicide:* Death caused by self-directed injurious behavior with any intent to die.
 - Suicide attempt:* A non-fatal self-directed potentially injurious behavior with any intent to die as a result of the behavior. A suicide attempt may or may not result in injury.
 - Suicidal ideation:* Thinking about, considering, or planning for suicide.
- Suicide-related behavior is complicated and rarely the result of a single source of trauma or stress.
- People who engage in suicide-related behavior often experience overwhelming feelings of helplessness and hopelessness.
- *Any* involvement with bullying behavior is one stressor which may significantly contribute to feelings of helplessness and hopelessness that raise the risk of suicide.
- Youth who are at increased risk for suicide-related behavior are dealing with a complex interaction of multiple relationship (peer, family, or romantic), mental health, and school stressors.

What We Know about Bullying *and* Suicide Together

- We know that bullying behavior and suicide-related behavior are closely related. This means youth who report any involvement with bullying behavior are more likely to report high levels of suicide-related behavior than youth who do not report any involvement with bullying behavior.
- We know enough about the relationship between bullying and suicide-related behavior to make evidence-based recommendations to improve prevention.

Statistics & Citations

These statistics and their accompanying citations (Meier Foundation as of June 2021) are provided to students, parents, educators, and other professionals in order to spread highly reputable information and sources for issues regarding bullying and cyberbullying. The Megan Meier Foundation should not be held accountable for the accuracy of these statistics.

Bullying

- Nearly 2 out of 3 teens have witnessed bullying at school, and 1/2 have experienced it first-hand (Patchin & Hindu-

ja, 2020)

- 2 in 3 students are willing to step in to defend, support, or assist those being bullied at school and online when they see it (Patchin & Hinduja, 2020)
- Barriers to helping when tweens witness bullying at school or online included being afraid of making things worse, not knowing what to do or say, not knowing how to report it online, being afraid others kids will make fun of them, being afraid to get hurt, and not knowing who to tell (Patchin & Hinduja, 2020)
- 13% of students (9-12 years old) reported experiencing bullying at school and online (Patchin & Hinduja, 2020)
- Bullying and Cyberbullying is the 2nd (62%) biggest child health concern among parents (C.S. Mott Children's Hospital National Poll on Children's Health, 2020)
- More than 8 in 10 LGBTQ students experienced harassment or assault at school (GLSEN: Gay Lesbian, Straight, Education Network 2020)
- Students who experience bullying are at increased risk for depression, anxiety, sleep difficulties, lower academic achievement, and dropping out of school. (Centers for Disease Control [CDC], 2019)
- Students who are both targets of bullying and engage in bullying behavior are at greater risk for both mental health and behavior problems than students who only bully or are only bullied. (CDC, 2019)
- 20% (1 out of every 5) middle and high school students report being bullied each year (National Center for Educational Statistics [NCES], 2019)
- Bullied students indicate that bullying has a negative effect on how they feel about themselves (27%), their relationships with friends and family (19%), their school work (19%), and physical health (14%) (NCES, 2019)
- 41% of students who reported being bullied at school indicated that they think the bullying would happen again. (NCES, 2019)
- According to the National Center for Educational Statistics (2019), of students who reported being bullied: 13% were made fun of, called names, or insulted; 13% were the subject of rumors; 5% were pushed, shoved, tripped, or spit on; and 5% were excluded from activities on purpose.
- A slightly higher portion of students who identify as fe-

male than as male report being bullied at school (24% vs. 17%) (NCES: National Center for Educational Statistics, 2019)

- According to the National Center for Education Statistics bullied students reported that bullying occurred in the following places:
 - The hallway or stairwell at school (43%);
 - Inside the classroom (42%)
 - In the cafeteria (27%)
 - Outside on school grounds (22%)
 - Online or by text (15%)
 - In the bathroom or locker room (12%)
 - On the school bus (8%)
- In 2019, over half (52.3%) of students said they had been bullied at school in the past 30 days, compared to 38.6% in 2016 (a 35% increase) (Hinduja and Patchin 2019).
- 46% of bullied students report notifying an adult at school about the incident (NCES, 2019)

Whether or not they are facing litigation following students' gross physical injuries from bullying, and suicide victimization from bullying, schools *must* develop educational programs to teach students how to confront bullies, respond to gross and threatening put-downs by taking an alternate route by launching their own *positive* Internet, Instagram, and Meta posts; or distract their friends with real-world social-growth activities so they don't get consumed and transformed into bullies online. Being sued (litigation) by mourning and grief-stricken parents is a little late for schools to suddenly and frantically decide that it is time for various and sundry campus interactions to block, stop, and stay bullying; and emergency agenda items must be frantically added to the next School Board meeting. After all, if one student is not safe on a campus, then no child is safe on that campus. True education and intellectual growth cannot occur on a campus growing with bullies who engage in 24-hour, round-the-clock continuation of their behavior by prowling the Internet for the right place to drop their poison against a campus victim they have continuously assaulted repeatedly on campus. For them the Internet is a theater and they are the executive producers of their tirades, slurs, name-calling, scarcely-veiled references against a certain student, against whom they unleash their vitriolic hatred.

School teachers, counselors and principals ought to pose questions in regular staff meetings: "Does a cyberbully have plenty of places to hide?" What can, or should, we do if a Twitter, Instagram, TikTok, or Meta profile, blazing with the name of our school, pops up this year and spreads ugly and anonymous rumors? What can we do to *block* anonymous bullying, false stories, name-calling, racist terms, dehumanizing rumors, and abusive sex talk? When can we do it and why must we move quickly and continuously? A good first step is to recognize that bullies are grossly unhappy beings who feel unwanted

and unloved, whether admired on campus or blossoming on the Internet or social media platforms, with lies, racial slurs, homophobic tirades, horrid physical descriptions of students hated, and open threats. Bullies transfer their self-hatred onto others by inventing lies, hoisting exaggerations, torpedoing threats, nasty name-calling, and aggravated verbal assaults against race and ethnicity and gender preference.

Further elements that schools *must* take a dramatic leadership role in, are: (1) What daily programs *against* bullying, name-calling, and sexual aggression does the school have in place? (2) What *online education* programs does the school utilize; (3) What "behavioral contracts" does the school mandate its students *and* parents sign?; (4) What mandatory in-class education *and* assemblies-in-education does the school have its students attend and write essays and reports about? (5) What *for parents only* anti-bullying regular programs does the school have in place? (6) What press and media communications does the school take advantage of to alert, teach, and warn students about the horrid subjects of bullying, gender preference harassment, and sexual aggression? (7) For its professional staff *and* students, does the school partner with other schools in conducting "best practices" current, legal, regular, and necessary anti-bullying programs?; (8) Does the school partner with the local law enforcement agency to hire SROs (Security Resource Officers) to train and educate students on the law-breaking aspects of bullying, name-calling, threatening, and personal injury?

Returning to the behavioral contract cited above (#3): Schools who do not have students read and sign Behavioral Contracts need to do -- immediately. It is important that students promise their behavior, both verbally and in writing. Special assemblies during which students are educated on the mandatory instructions to sign, observe, adhere to and heed behavioral contracts—indeed, the multiple commandments of anti-bullying behavior—are vital in re-modeling a campus that addresses students' needs; protects students from marauding bullies; and goes so far as to learn how students manage their time at home and what drives them to Instagram, TikTok, Meta, and the Internet. Adolescents will engage in behaviors out of sight and out of range; three such social platforms are listed above. School staffs need to realize every school in America is encircled by a new and growing generation. Their social mores, folkways, judgments and desires are remote and alienated from the schools' adults responsible for overseeing and ensuring their education, emotional security and physical safety.

Schools need to frequently consult with their campus safety and personal injury insurance providers on education, welfare and safety programs that, when practiced, increase student and staff awareness, reduce the insurance premiums *and*, hopefully, the number of lawsuits. Schools need to remember that *correct verbal and physical behavior* is a daily necessity! Schools need to have regular (1) In-Main-Office; (2) Classroom; and (3) Assembly sessions on name-calling, bullying, sexual aggression; racial

slurs; and verbal threats. Written reports, regularly produced and published for faculty and teachers could protect schools against lawsuits. Reaching out to other schools, who have successfully conducted such behavioral correction programs can also go a long way toward thwarting litigation. Parents seldom sue schools if their sons or daughters fail to graduate. Similarly, parents may possibly decide *not* to sue a school district if the schools have been developing, conducting and maintaining daily programs stipulating correct, ethical and healthy social behaviors, no name-calling, no ethnic, cultural or social class ridicules, and no bullying on or away from campus, e.g., on the Internet.

School Districts' Board of Education must mandate each school in its jurisdiction *order* every teacher not to bully; *not* call students out of their names; not laugh at embarrassing pranks that other students pull on a non-suspecting student; and teachers should interrupt, as necessary, the expected exam or lecture and, instead, preach to, and teach, the students about bullying, name-calling, racial terms, and sexual harassment. Since schools districts must carry insurance, they must also take advantage of safe schools educational programs their insurance provider conducts. Such involvement might possibly reduce the size and number of lawsuits. School districts can certainly request their insurance providers' assistance with creating, coordinating and conducting personal injury education and prevention programs for campus use and student assemblies. As a country-and-western singer once said, "Liability can become cryability."



Award Ceremony at the Annual Meeting

At the 2023 Annual Meeting in Denver, the CJS Curtin-Maleng Minister of Justice Award was presented to Andrew H. Warren, State Attorney, Florida 13th Judicial Circuit, Hillsborough County (co-recipient Erek Barron, U.S. Attorney for the District of Maryland, Circuit Court for Baltimore City, could not attend).

With him are, from left, chair-elect Sidney Butcher, incoming chair Tina Luongo, outgoing chair Justin Bingham, and former chair Morris "Sandy" Weinberg.

Upcoming Events

- **CJS Fall Institute:** Nov. 2-4, Washington, DC
- **ABA/ABA Financial Crimes Enforcement Conference:** Nov. 25-30, National Harbor, MD
- **ABA/CJS Midyear Meeting:** Jan. 31- Feb. 5, 2024, Louisville, KY
- **National White Collar Crime Institute:** March 6-8, San Francisco, CA (2024 WCC Institute Scholarship is available --submission deadline is Dec. 18, 2023.)
- **CJS Spring Meeting:** April 10-14, San Diego, CA
- **National Institute on Health Care Fraud:** April 30-May 2, Chicago, IL
- **ABA/CJS Annual Meeting:** July 31 - Aug. 6, Chicago, IL

View complete calendar at ambar.org/cjsevents.

Articles Wanted for *The CJS Newsletter*

Practice Tips, Section/Committee News, Book Reviews

Submission Deadlines: Dec. 15, April 15, Aug. 15

For inquiries, contact: Kyo Suh, Managing Editor,
kyo.suh@americanbar.org

UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

The following articles are reprinted with permission from the *ABA/Bloomberg Law Lawyers' Manual on Professional Conduct*. (Copyright 2023 by the ABA/the Bloomberg Law)

ABA Tightens Restrictions on Advance Fees for Legal Services

- *ABA formal opinion provides guidance on advance fees and use*
- *Advances must be held in separate account and must be refundable*

Advance fees paid to attorneys for future legal services must be placed into a trust account until the money is earned or returned to a client, the American Bar Association said June 7. The ABA released a formal opinion providing guidance on the proper handling of advance fees under the Model Rules of Professional Conduct. The opinion clarifies the proper methods for handling fees, including when to treat them as earned.

Advances are fees paid by clients to attorneys for legal services to be done in the future. This differs from a retainer, which is a fee paid by a client to an attorney to contractually keep the attorney on call to handle the client's legal matters. Attorneys must hold advances in an account separate from their own, according to the ABA opinion.

Client trust accounts have been getting closer attention, thanks in part to the high-profile criminal prosecution of Thomas V. Girardi. The disbarred California attorney is accused misappropriating millions in client settlement money and other funds. The ABA said in the new opinion that advance fees placed in a trust account can be disbursed to an attorney when they are earned or expenses are incurred, in accordance with ABA Model Rule 1.15(a). The rule works in concert with Model Rule 1.16(d), which requires lawyers to refund any advances or expenses not earned or incurred when the representation is terminated.

The ABA also discouraged the practice of declaring advance fees as nonrefundable. Labels such as "nonrefundable retainers," "nonrefundable fee," or "earned on receipt" in a fee agreement violate Model Rule 1.5, which outlines that attorneys can't ask or collect unreasonable fees from clients.

"An advance fee paid by a client to a lawyer for legal services to be provided in the future cannot be nonrefundable. Any unearned portion must be returned to the client," the ABA said in the document. The ABA recommends that attorneys use plain language when drafting a fee agreement, using the word

"advance" instead of "retainer" and explain how the money will be held, used, and the cases where it will be refunded. Lawyers should also include language towards how advances will be handled when the representation is terminated.

ABA Outlines Nonlawyer Responsibilities On Client Intake

- *Lawyers can use nonlawyers to work with prospective clients*
- *Nonlawyers must be trained, supervised to follow ABA rules*

Lawyers can employ nonlawyer professionals to work with prospective clients on certain tasks, but those lawyers must ensure that they have met their obligations for management and supervision of them, the American Bar Association said June 7.

The ABA issued a formal opinion on the best practices for lawyers to integrate nonlawyer assistants to handle some intake tasks with potential clients while adhering to the ABA Model Rules of Professional Conduct.

When trained, supervised nonlawyer assistants can assist with gathering initial information about the legal matter when engaging with prospective clients, the ABA said. The nonlawyers can also help with initial conflict checks, determining if the legal matter falls under the lawyer's practice, and answering general questions about fee agreements and the scope of representation.

Lawyers must ensure that their assistants don't engage in the unauthorized practice of law when engaging with these clients, as defined by state laws and rules, and lawyers must step in to answer questions around fee negotiations and interpretation of engagement agreements, the ABA said in Formal Opinion 506.

Under ABA Model Rule 5.3, partners and managers of law firms must ensure that the firm has policies to ensure that the nonlawyer's conduct is compatible with the lawyer's professional obligations. Lawyers who directly supervise nonlawyer assistants must also make "reasonable efforts" to ensure that the assistant's conduct is compatible with the professional obligations of the lawyer.

"A lawyer's delegation of prospective client intake tasks to a nonlawyer or the lawyer's use of technology to assist with the initial intake of clients provides significant benefits and increased efficiency to lawyers," the ABA said in the opinion, adding that legal service organizations and mass tort and class action practices have successfully utilized nonlawyers for intake tasks.

What Are the Biggest Concerns Confronting the US Criminal Justice System?

By Haala Humayun

Haala Humayun is a human rights activist and lawyer at HAPS Law Chamber in Islamabad, Pakistan.

The United States criminal justice system is facing a multitude of challenges and issues that are hindering its effectiveness and fairness. In recent years, there has been an increasing awareness about these issues and a growing demand for reform. This article will discuss some of the major current issues facing the US criminal justice system, including mass incarceration, racial disparities, inadequate funding, and the war on drugs.

One of the most significant issues facing the criminal justice system in the United States is mass incarceration. The US has the highest incarceration rate in the world, with approximately 2.2 million people currently behind bars. This has led to overcrowding in prisons and increased costs for taxpayers. The focus on punishment and the “tough-on-crime” approach has contributed to this problem, as individuals convicted of nonviolent offenses are often given lengthy sentences without consideration of alternatives such as rehabilitation or community service.

Additionally, racial disparities are a pervasive issue within the US criminal justice system. African Americans and Hispanics make up a disproportionately large percentage of the incarcerated population. For example, African Americans are imprisoned at more than five times the rate of white Americans. These disparities are not solely the result of differences in criminal behavior but also reflect biases in arrests, charging decisions, and sentencing practices. Systemic bias, including racial profiling and implicit bias, perpetuates these disparities and create a sense of injustice and mistrust within marginalized communities.

Inadequate funding is another critical issue that impacts the functioning of the criminal justice system. Several areas of the system, such as public defenders’ offices and rehabilitation programs, are significantly underfunded. As a result, defendants who cannot afford proper legal representation may be denied their right to a fair trial. Similarly, the lack of funding for rehabilitation services perpetuates a cycle of repeat offenses as individuals released from prison struggle to reintegrate into society without the necessary support or treatment. Moreover, underfunding also affects the conditions of the correctional facilities, which can lead to a violation of inmates’ rights and pose challenges for inmate rehabilitation.

The war on drugs is also a major issue within the US criminal justice system. The focus on punitive measures rather than addressing underlying causes has led to the over criminalization of drug offenses. Nonviolent drug offenses account for a significant portion of the incarcerated population, with drug-related offenses representing the leading offense category for federal prisoners. This approach has disproportionately affected minority communities, exacerbating the racial disparities mentioned earlier. It has also diverted significant resources from prevention, treatment, and harm-reduction programs, which could address drug addiction as a public health issue rather than a criminal one.

Another critical issue is the use of solitary confinement. Solitary confinement is the practice of isolating prisoners in small cells for 22 to 24 hours a day, often for extended periods. It has been linked to severe mental health issues, such as depression, anxiety, hallucinations, and even suicide. Despite these negative consequences, solitary confinement continues to be over-used in the US criminal justice system, including for juveniles and individuals with mental illnesses. This practice not only violates basic human rights but also fails to promote rehabilitation and reintegration, often resulting in worsened behavior and mental health outcomes.

Furthermore, there is a lack of focus on rehabilitation and re-entry programs within the criminal justice system. Instead of prioritizing the treatment and support of individuals who have committed offenses, the system often emphasizes punishment and incarceration. This approach disregards the potential for rehabilitation and ignores the fact that most individuals will eventually be released from prison. The absence of comprehensive reentry programs results in a high recidivism rate, further burdening the system and society.

The use of technology presents yet another issue for the US criminal justice system. While technological advancements can have beneficial applications in solving crimes, there are concerns about privacy, data security, and potential bias within emerging technologies. Predictive policing algorithms, for example, may perpetuate biased practices if they are based on historical data that reflects underlying biases in arrest or charging decisions. Additionally, the use of facial recognition technology has raised concerns about racial bias and the potential for false identifications.

These are just a few of the major issues that the US criminal justice system faces today. Their impact is far-reaching, affecting individuals’ lives, communities, and society as a whole. Recognizing these issues is a crucial first step towards developing comprehensive and evidence-based reforms that aim to create a more equitable, efficient, and effective criminal justice system.



**The American Bar Association
Criminal Justice Section**
1050 Connecticut Avenue N.W.
Washington, DC 20036

RETURN SERVICE REQUESTED

Nonprofit Org.
U.S. Postage
PAID
Manassas, VA
Permit #314

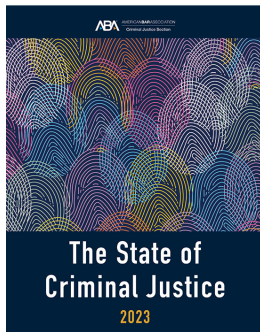
ABA Criminal Justice Section ... The Unified Voice of Criminal Justice

New Books

The State of Criminal Justice 2023

Edited by Elizabeth Kelley

This publication examines and reports on the major issues, trends and significant changes in the criminal justice system. The 2023 edition contains chapters focusing on specific aspects of the criminal justice field, with summaries of all of the adopted official ABA policies passed in 2022-2023 that address criminal justice issues.

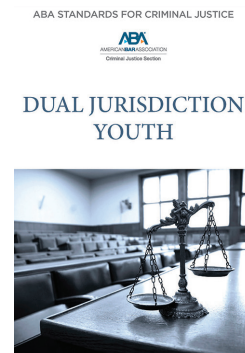


ABA Standards for Criminal Justice

Dual Jurisdiction Youth, Fourth Edition

By Criminal Justice Standards Committee

Part of the ABA Standards on Criminal Justice, this is the development of ABA-enacted Standards and commentary on Dual Jurisdiction Youth, defined as youth who are involved in multiple legal systems.



For more info on CJS books, see ambar.org/cjsbooks.