AMERICAN BAR ASSOCIATION
Criminal Justice Section

Criminal Justice Section Newsletter

Volume 31, No. 2: Winter 2023

Fall Institute Highlights

The Fifteenth Annual CJS Fall Institute convened on November 17-18, 2022, at The Madison Hotel, Washington, DC. The theme for this year's institute was "Criminal Justice Next: Solutions to Move Equity and Fairness Forward." Presentations at the institute aimed to provide solutions to today's issues that incorporate equity and fairness, while not compromising public safety.

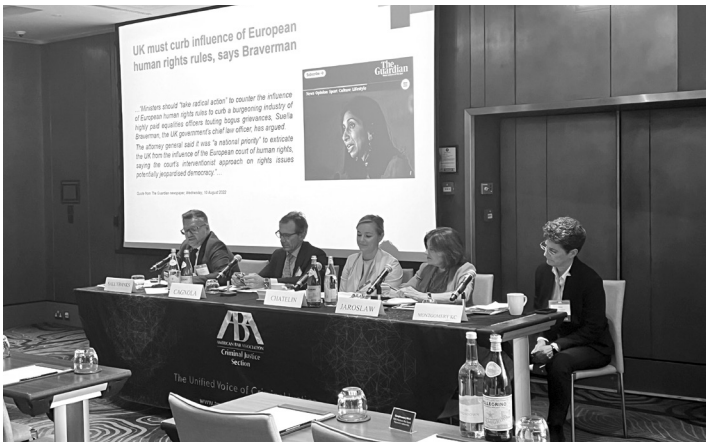
Sessions included:

- Extending Justice: Strategies to Increase Inclusion & Reduce Bias
- Prosecutor-Initiated Resentencing: A New Tool for Expanding Justice
- Public Safety for Tomorrow: the role of mental health clinicians in responding to people in crisis
- Prosecuted Lawyers' Perspectives in White Collar/ Nonviolent Prosecution and Reentry
- From Policy to Practice: The New Diversion Standards and the On-Going Search for Alternatives for Incarceration
- Breaking the Glass Ceiling in White Collar Crime & Punishment: The Rise of Women Offenders

Keynote address at the CJS Awards Luncheon was given by U.S. Associate Attorney General Vanita Gupta, United States Department of Justice, Washington, DC.

London White Collar Crime Institute

The Tenth Annual London White Collar Crime Institute took place on October 10-11, 2022 in London, United Kingdom. For the past ten years, the London WCC Institute has brought topflight legal experts from across the globe to discuss hot button issues of international significance to white collar practitioners including international money laundering and sanctions, cross-border evidentiary concerns, international internal investigations, and more. The closing conference lunch discussed women in the practice issues, hosted by the Women's White Collar Defense Association (WWCDA).



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New Criminal Justice Standards on Diversion

The ABA Criminal Justice Standards on Diversion were approved by the ABA House of Delegates in August 2022. Commentary to the Standards is forthcoming. The Diversion Standards can be viewed at www.americanbar.org/groups/criminal_justice/standards/diversion-standards.

CJS Committees

Committees offer Criminal Justice Section members the best opportunity for direct involvement in Section activities, such as organizing CLE program offerings, developing publications and policy proposals. Committee Missions, Goals for 2022-2023, Activities and Highlights, and Resources can be viewed at www.americanbar.org/groups/criminal_justice/committees.

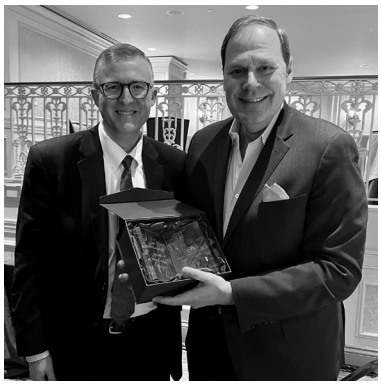
New Podcast Series: White Collar Talks

This is a new series in "JustPod" CJS Podcast, which features leading white collar practitioners discussing hot topics and emerging trends in government investigations and enforcement, hosted by Nina Marino (Co-Chair of CJS CLE Board) and Joe Whitley (Co-Chiar of CJS Homeland Security, Terrorism & Treatment of Enemy Combatants Committee). This series and other episodes of "JustPod" can be heard at www.buzzsprout.com/252350.

The 2023 Greenhalgh Student Writing Competition

The 2023 Competition Topic is "What role do federal Constitution rights, such as the Fourth Amendment, as well as parallel state constitutional protections, play in protecting access to potential evidence?" The competition is open to students who attend and are in good standing at an ABA-accredited law school within the United States and its possessions. The submission deadline is July 1, 2023. Information on the competition can be viewed at www.americanbar.org/groups/criminal_justice/awards/writing_competition.

2022 CJS Award Winners



The 2022 recipient of the Raeder-Taslitz Award is Mark E. Wojcik (right on the photo), professor at the University of Illinois Chicago Law School, and editor of *The State of Criminal Justice* (published by the ABA Criminal Justice Section), with CJS Chair Justin Bingham at the 2022 CJS Fall Meeting in DC. The Charles English Award went to Ellen C. Yaroshefsky, professor at the Hofstra University School of Law (to be awarded at the 2023 CJS Spring Meeting). The deadline for the rest of 2022 CJS awards has been extended to Feb. 10, 2023.

Member/Staff News

Maryam Ahranjani, professor at the University of New Mexico School of Law, received the Deborah Rhode Award at the annual conference of the Association of American Law Schools. She currently serves as co-chair of the ABA Criminal Justice Section Women in Criminal Justice Committee and as the Reporter of the ABA Women in Criminal Justice Task Force.

Linda Britton, Director of the Criminal Justice Standards Project, has retired.

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.

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Criminal Justice Section

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Fellowship of the Legal Education Police Practices Consortium

The ABA Legal Education Police Practices Consortium concluded its second class of fellows in November 2022, with 25 student fellows from 20 law schools representing 17 states. Students met weekly via Zoom to hear from a variety of subject matter experts on topics related to policing, public safety, and reform efforts to further inform their own understanding on these issues. In addition, in consultation with a faculty advisor students researched their local policing context to determine if a collaborative relationship would be of interest and value to both their law school and the police department or a legal aid or civil rights organization focused on policing issues.

Outreach was initiated at select schools to local police departments (within the community as well as on campus), however solidifying the parameters of a collaborative relationship between the law school and agency is a complex and time-consuming process. Additional information on the potential and remit of these relationships is anticipated at the end of the spring 2023 semester. In the interim, and 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.

Multiple students investigated the roll-out and possibility of expansion of local co-responder models, which pair a mental health practitioner with a police officer to respond to behavioral and mental health crises. Many of these partnerships have resulted in the development of crisis intervention training (CIT) to further the understanding of officers on how to identify people in crisis and respond in an appropriate manner, with sufficient attention paid to de-escalation. Some students have requested access to this training curriculum to evaluate its content and determine if and how it might be augmented with additional legal precedent or possibly expanded to include student participation.

Other fellows focused on capturing lessons learned on citizen review boards, 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. Throughout this process the students and larger Consortium remain dedicated to researching and addressing issues related to policing and public safety at both the local and national levels through participatory, evidence-based approaches informed by the needs of their communities

Recruitment has begun for the third fellowship class, which will build upon the work of past cohorts and run from January-April 2023. For additional information regarding the fellowship and Consortium, please visit the website at abalegalepoliceconsortium.org or contact the Consortium at LEPPC@americanbar.org.

Upcoming Events

March 1-3:	38th Annual National Institute on White Collar Crime, Miami, FL
March 30-31:	Global White Collar Crime Institute Buenos Aires, Argentina
April 20-23:	CJS Spring Meeting, Memphis, TN
August 2-8 :	ABA/CJS Annual Meeting, Denver, CO
September 6-8:	Southeastern Regional White Collar Crime Institute, Braselton, GA
October 9-10:	London White Collar Crime Institute London, UK
November 2-3:	CJS Fall Institute, Washington, DC

For the complete list of CJS events, see ambar.org/cjsevents.

Plea Bargaining Institute Launched

Criminal justice watchdog Fair Trials has partnered with Belmont University College of Law Professor Lucian E. Dervan (former chair of the ABA Criminal Justice Section) to launch the Plea Bargaining Institute (PBI). Launched in December 2022, PBI is a groundbreaking project that will provide a global intellectual home for academics, policymakers, advocacy organizations and practitioners working in the plea bargaining space. PBI will create an environment for the sharing of knowledge and research and for collaboration related to the reform of global plea bargaining practices.

In the US, 95% or more of criminal cases are resolved through a plea of guilty. When someone pleads guilty they waive their right to a trial, something guaranteed by the U.S. Constitution. While a plea bargain may offer advantages, such as a more lenient sentence, plea bargaining often involves coercive incentives that negatively impacts all defendants' right to trial. Research indicates that these incentives can be so coercive that even innocent defendants plead guilty. For example, 21% of the cases entered into the National Registry of Exonerations in 2021 involved false pleas of guilty. These pressures to plead guilty may include pressure from police and prosecutors, the imposition of much higher sentences for those who exercise their right to proceed to trial, and other systemic problems including lack of access to a lawyer, long pre-trial detention periods and high court costs. Today, coercive plea bargaining is not limited to the United States as countries around the world adopt this system of adjudication.

PBI will create opportunities for dialogue that will inspire new and innovative research and analysis, empowering those working to reform plea bargaining to more effectively shape laws, change policy, and transform practice in the United States and internationally. PBI will also work to limit the use of coercive plea bargaining and reform the practice as a whole by engaging in training to instigate sustained alternatives.

"I am honored to be partnering with Fair Trials and excited for the launch of the Plea Bargaining Institute," said Professor Dervan. "There is a vital need for an institute that makes important research findings and case developments widely available to those working to reform plea bargaining practices. Simultaneously, there needs to be an organization that creates opportunities for dialogue and collaboration between academics, practitioners and advocacy organizations to assist in identifying new areas for research and inquiry in this field. Today, we launch an institute that will meet these needs and help propel current and future plea bargaining reform efforts."

Professor Dervan continued, "For decades, the plea bargaining system operated in the shadows – not well understood, not well regulated and not regularly subjected to robust challenge through litigation. Fortunately, that has begun to change over the last decade with growing research and advocacy. As research endeavors and reform efforts grow there is a vital need for an entity that can create cohesion and communication between the various groups. PBI will provide a global intellectual home for researchers, practitioners, and policy advocates to share knowledge and promote collaboration."

Rebecca Shaeffer, Legal Director for Fair Trials Americas, said: "Plea Bargaining has come to all but replace criminal trials in the USA, but there is still insufficient knowledge about its impacts on the justice system and the people subject to it. The Plea Bargaining Institute will advance research in this field and provide an empirical and legal basis for the reforms we know the system needs."

To find out more about the PBI, visit pleabargaininginstitute.fairtrials.org.

White Collar Crime 2023

March 1-3, 2023

Hyatt Regency Miami

https://www.americanbar.org/groups/criminal_justice/events_cle/

ABA AMERICAN BAR ASSOCIATION Criminal Justice Section

Enough Is Enough

The Lack of Transparency and Accountability in Federal Prisons

By Jack Donson

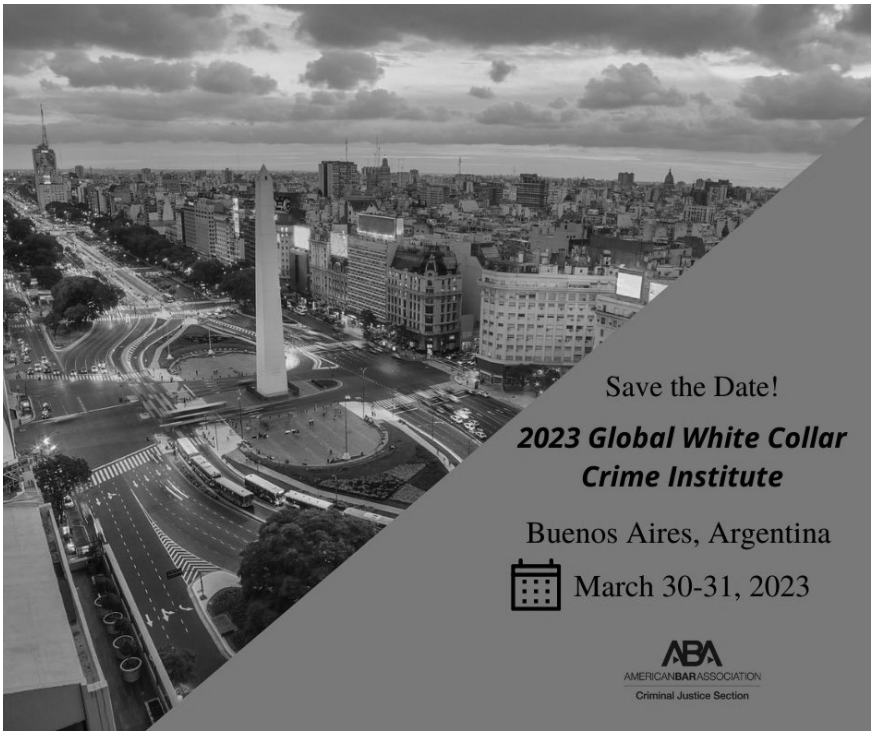
For decades, a lack of transparency and accountability in the federal prison system has allowed even abhorrent conduct to become the norm. Take the Federal Correctional Institution (FCI) for women in Dublin, California, for instance. The Associated Press reported in February on how pervasive sexual assault had become at FCI Dublin -- nicknamed "the rape club" by those held there -- even leading to the arrest of the warden for sexual abuse. Or the U.S. Penitentiary Atlanta, where a congressional investigation substantiated reports by the Atlanta Journal-Constitution of drug trafficking, dozens of incidences of violence, and the most "horrific" conditions reserved for pretrial detainees, i.e., people not convicted of an offense. Decades of lax oversight and accountability enabled coverups of such crimes, abuses, and woefully inadequate physical and mental health care to persist for decades. Much of that came to an end during the COVID-19 pandemic, when calls for a reform reached a fevered pitch.

During the pandemic, several facilities reported an alarmingly rapid spread of the virus, leading to class action litigation challenging how the Bureau of Prisons' (BOP's) was addressing the safety of those incarcerated or employed in federal prisons. That litigation produced damning depositions and expert witness testimony as to the conditions, care, and underreported abuse of prisoners by BOP staff. In October 2022, the Justice Department launched an investigation of the BOP after a federal judge issued a blistering court order saying the agency "*should be deeply ashamed*" for what he called "*its demonstrated contempt for the safety and dignity of the human lives in its care*." While responsibility falls on each director for BOP, the then-retiring director appeared before the U.S. Senate Permanent Subcommittee on Investigations in July 2022 to answer for these revelations. Despite bipartisan criticism, he would not accept responsibility for failing to oversee known problems or institute needed reforms.

To bring needed oversight and accountability to the federal prison system, Senator Jon Ossoff (D-GA) and Representative Lucy McBath (D-GA) each introduced bipartisan bills, the Federal Prison Oversight Act in September 2022. Among other things, the legislation would help ensure ongoing investigation of facilities and create the position of ombudsman to receive relevant complaints from those incarcerated or their family members or representatives.

The ABA has, for decades, produced policy guidance for the treatment of those incarcerated, provide a blueprint for corrections programs, and the ABA supports the creation of ombuds programs help prevent, manage, and resolve systemic problems. In 2008, the ABA also adopted policy resolution 104B, which provides for minimum requirements in oversight and investigation of prisons that track much of the Ossoff/McBath legislation. The time has come for the bench and bar to require more from the federal prison system – to implement the ABA's body of work in this area as BOP works to improve. It is heartening that the Department of Justice has taken the step of naming a new, reform-minded Bureau director from outside the agency's management culture, but if history is a teacher, she will need as much outside support as she can get. It is only by a transparent and accountable prison system that we can be sure incarcerated people are afforded safe environments, humane treatment and the necessary rehabilitation for re-entry. Oversight based in sound practices as outlined in ABA policy will result in safer facilities for prison staff, incarcerated people and increase public safety.

Jack Donson is president and founder of My Federal Prison Consultant.



Surveying the Impact of China's New (and Toothy) Data Privacy Laws on the WeChat Generation of Employees

By T. Markus Funk, Mason Ji, and Huijie Shao

Foreign companies and their lawyers conducting internal investigations in China have long been aware of the challenges of collecting, storing, and reviewing data coming in and out of China.

The country is ramping up investment in technology and data, and passed two data privacy laws in 2021 as part of this effort—the Personal Information Protection Law and the Data Security Law.

This scrutiny presents significant new challenges that foreign companies and their lawyers with Chinese business interests must be aware of. One salient area of risk to monitor is business use of third-party messaging apps like WeChat.

China's New Data Laws

China's recently enacted data laws govern data originating or used inside China. But they also seek to regulate data processing activities taking place outside of China that have the potential to adversely impact its national security, public interest, or the legal interests of any citizen or organization.

The laws establish a regulatory hierarchy for all impacted data. For example, they refer to "important data" that requires elevated protection protocols—i.e., firewalls—localization, and security assessment of cross-border data transfers by data processors, including critical information infrastructure operators.

An additional class of data is highlighted as "national core data," or data that represents a "serious threat" to China's national security. Foreign lawyers conducting investigations in or involving China must keep up to date on what currently falls within the ever-shifting scope of this regulatory hierarchy in their industry and region by consulting—through third parties, as advisable—relevant local governments and regulatory agencies prior to starting their investigations.

Failing to get it right can be costly. Those running afoul of the new data laws should also bear in mind that "violation of the national core data management system or endangering China's national sovereignty, security, and development interests" is punishable by an additional fine of up to 10 million Chinese yuan (approximately $1.56 million), revocation of business licenses, suspension of the business, and, in aggravated cases, criminal liability.

WeChat Use Is Widespread

Another point of discussion is how employees in China tend to connect. Business communications and the corresponding data in China—unlike, say, in the US or Western Europe—are generally not transmitted through corporate-controlled and regulated environments.

Instead, third-party messaging platforms are the preferred way that China-based employees tend to connect. Foreign lawyers with experience conducting investigations in China likely already understand the ubiquity of WeChat use. And, as a study by Stanford economist Nick Bloom found, work-from-home has significantly increased the use of electronic communication among Chinese workers; a learned habit that persists even when those employees return to work.

It is no overstatement to say that WeChat is used by virtually every Chinese employee in virtually every aspect of their lives, including for hiring transportation, paying for goods and services, and sending business communications.

The ubiquity of WeChat for business activities represents a unique risk factor for companies with offices or relationships in China. Although Chinese companies may have policies and regulations that seek to limit the use of WeChat for company business, in the real world, most employees use WeChat for at least some of their business communications. In short, a more practical approach is required.

Data Security Compliance Implications

The upshot of WeChat's dominance in China is that corralling "business communications" for investigative purposes is exceptionally challenging—especially in light of the stringent requirements of the new data laws. Even companies that spend millions on cutting-edge networks to protect their internal data and comply with the laws cannot overcome the risk that employees will routinely send sensitive, confidential business information over WeChat to their friends or contacts.

As a result, alert investigators should always at the outset examine whether company information was passed to individuals not authorized to view the information via WeChat, and sending such information over WeChat violated company policy or governmental regulation.

These risks are compounded when individuals commonly have multiple WeChat accounts. The good news is that accounts

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Markus Funk is a partner and Mason Ji and Huijie Shao are associates at Perkins Coie. Portions of this article are reprinted with Bloomberg Law's permission.

are linked with individuals' phone numbers or national identification numbers, so lawyers who prepare for employee interviews and conduct investigations should always try to use these identifiers to check whether an individual has multiple WeChat accounts.

Navigating Investigations

Prior to the new data laws, companies and investigating lawyers had leeway to finesse how they obtained WeChat data from a suspected violator. Now, they must obtain written consent before such information can be accessed. Although WeChat messages are generally stored for at least six months by Tencent, the company that owns WeChat, such information is generally only obtainable by the Chinese government upon request.

Chinese authorities, in turn, will likely only allow access to WeChat messages by companies if those messages do not relate to "important data" or "national core data," and the agency or department granting the request will depend on the requesting company's geography and industry in making these decisions. This process will almost always significantly delay any investigation.

UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

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ABA Applies 'No-Contact' Rule to Lawyers Representing Themselves

- **ABA Says rule's language supports pro se lawyer application**
- **Dissenting members point to 'representing' language**

A self-represented attorney may not communicate directly with a represented party about the subject of the representation, the American Bar Association said Wednesday.

Model Rule 4.2 in the ABA Model Rules of Professional Conduct, commonly known as the "no-contact" rule, bars lawyers representing clients in a matter to communicate with another represented person in that case.

That communication rule also applies when a lawyer is self-representing, according to the ABA's Standing Committee on Ethics and Professional Responsibility. The language of the rule supports that conclusion, the committee said in an opinion released Wednesday.

The opinion says the rule is applicable to pro se attorneys because "pro se individuals represent themselves and lawyers are no exception."

"In this context, if direct pro se lawyer-to-represented person communication about the subject of the representation is desired, the pro se lawyer and counsel for the represented person should reach advance agreement on the permissibility and scope of any direct communications," the opinion says.

Committee members Mark Armitage and Robinjit Eagleson dissented from the majority ruling, saying the language of the rule "clearly prohibits" that application to lawyers who represent themselves because it begins with the words, "In representing a client."

Justices to Clarify Privilege of Communications Beyond Legal Advice

The US Supreme Court agreed to consider if the protections under attorney-client privilege sweep broadly enough to include business communications, a tricky issue that lawyers frequently face in the corporate world.

The case involving "dual purpose" communications that the justices agreed to hear Monday aims to clarify tests used by the judiciary to determine whether communications beyond legal advice can be claimed as privileged and withheld from opposing counsel.

The conflict commonly arises in cases involving corporate counsel.

"Given our increasingly complex regulatory landscape, attorneys often wear dual hats, serving as both a lawyer and a trusted business advisor," the San Francisco-based US Court of Appeals for the Ninth Circuit said in a ruling that is now before the justices.

The Ninth Circuit in 2021 said the so-called primary purpose test—looking to the overarching purpose of the communications—was the proper way to determine if dual-purpose communications are protected from being turned over to the other side.

The case involves sanctions against an unnamed company and its lawyers who failed to comply with grand jury subpoenas. The parties refused despite rulings that the requested documents weren't protected by attorney-client privilege because the "primary purpose" of the communications was to obtain business, not legal, advice.

Other circuits have used other tests to determine privilege, the company and law firm said in their brief asking for the justices to intervene. They added that "while lawyers frequently must assess privilege issues," appellate courts are limited in their ability to review trial court determinations.

The Supreme Court agreed to hear the case over the objection of the Justice Department, which said the standards governing dual-purpose communications are "well settled" in the lower federal courts.

The case is In re Grand Jury , U.S., No. 21-1397.

Beware of 'Reply All' Responses, Bar Association Warns Lawyers

- **Clarifies Rule 4.2 of the ABA Model Rules**
- **Opinion also outlines certain exceptions**

Lawyers should forward separate electronic communications to their clients without including opposing counsel in order to avoid "reply all" responses, the ABA said in a formal opinion released on Wednesday.

The best practice isn't to copy the client on an email or text to receiving counsel; instead, the lawyer should separately forward any pertinent emails or texts to the client, the ABA said.

The American Bar Association's standing committee on ethics and professional responsibility issued the opinion to clarify the regulations under Rule 4.2 of the ABA Model Rules of Professional Conduct, which limits communications between a lawyer and another party in the litigation.

Lawyers who copy their client on emails sent to opposing counsel create a "group communication" and therefore imply consent to the receiving counsel's "reply all" in response, the committee states in its formal opinion 503.

"We conclude that given the nature of the lawyer-initiated group electronic communication, a sending lawyer impliedly consents to receiving counsel's "reply all" response that includes the sending lawyer's client," the formal opinion says.

"Reply all" has become the default setting in certain email platforms and by copying their client in the communication, the sending lawyer "is essentially inviting a reply all response," the opinion says.

The opinion also outlines certain exceptions to that general rule governing these communications. It says the presumption of implied consent to the "reply all" communications is "not absolute."

One instance in which the implied consent may be overcome is if there is an "express oral or written remark informing receiving counsel that the sending lawyer does not consent," it says.

If the sending lawyer wants to avoid implying consent when copying the client on the electronic communication, they should separately forward the email or text message to the client, the opinion says.

Third Circuit Clarifies 'Anders' Obligation for Criminal Counsel

- **Failure to anticipate pro se arguments not per se problematic**
- **Lawyers aren't expected to be 'clairvoyant,' court says**

The Third Circuit clarified what court-appointed lawyers must do to meet their so-called *Anders* obligation in a Monday opinion, explaining that counsel won't be faulted for failing to anticipate every issue their client might raise in a pro se brief.

The US Court of Appeals for the Third Circuit previously addressed what is expected of counsel when they seek to withdraw under Anders, but the "conscientious examination standard is less than pellucid," Judge Cheryl Ann Krause said.

According to Krause, Third Circuit case law could be misread to fault counsel for failing to anticipate even frivolous arguments.

Counsel's "omission of frivolous issues raised by the defendant has little, if any, relevance where counsel's brief, on its own terms, reflects a conscientious examination of the record and adequately discusses the potentially appealable issues," Klause said.

Failing to anticipate a client's pro se arguments may be relevant, however, insofar as it might illustrate that counsel has failed to raise or address non-frivolous issues or otherwise complete a thorough examination of the potential grounds for appeal, according to the court.

A per se rule that punished counsel for failing to envision every possible argument a client might later raise would "effectively punish such counsel for not being clairvoyant," Klause said.

In cases where counsel have been faulted for failing to anticipate a defendant's pro se arguments, the problem has had more to do with overarching deficiencies in the briefs themselves, according to Klause.

In the cases Klause cited involving attorneys failing to anticipate a defendant's later raised pro se arguments, counsel's briefing was incomplete, incorrect, or otherwise inadequate.

If a court-appointed lawyer representing a defendant in an appeal of a criminal conviction decides their client's appeal is "wholly frivolous," the lawyer can seek permission to withdraw. The lawyer, must, however, file an Anders brief identifying "anything in the record that might arguably support the appeal." The client then has an opportunity to respond.

After "a full examination of all the proceedings," the court makes the ultimate call. If the court agrees there are no non-frivolous arguments, it may grant the lawyer's request to withdraw and dismiss the appeal. If, however, the court finds "any of the legal points arguable on their merits," it must afford the indigent the assistance of counsel to argue the appeal.

In this case, the three additional arguments raised by the defendant, Rasheem Langley, in his pro se brief were "patently frivolous," the court said.

After allowing his lawyer, Olubukola O. Adetula, to withdraw, the court dismissed the appeal. Judges Stephanos Bibas and Marjorie O. Rendell joined the decision. The case is US v. Langley, 3d Cir., No. 21-2114, 11/7/22 .

International Criminal Law Practice Project Holds Side Event at International Criminal Court Assembly of States Parties

The ABA Criminal Justice Section's International Criminal Law Practice Project (part of the joint CJS-Center for Human Rights Atrocity Crimes Initiative) held its first public event on Dec. 9th, 2022 in The Hague, the Netherlands on the margins of the International Criminal Court's (ICC) Assembly of States Parties, co-sponsored by Switzerland and Ecuador. The side event on "Judicial Selection, Evaluation, and Trial Management in International Criminal Tribunals" featured several ICL Practice Project Steering Committee members (Amb. Stephen Rapp, Judge Shireen Fisher, Angela Mudukuti) as well as other experts.

Amb. Stephen Rapp introduced the topic and project, highlighting the project's intent to propose best practices or standards, as well as ideas that can be implemented to positively impact criminal justice practice at tribunals adjudicating atrocity crimes. Moderator Angela Mudukuti situated the event among current discussions in the field and at the Assembly in particular, discussing ICL judges' unique responsibility and opportunity to shape ICL institutions and substantive law. She noted that political motivations and vote trading, which have allegedly been part of some past judicial nomination processes, can negatively impact gender and geographical diversity and unfortunately shift focus from candidates' merit to the resources and political influence of supporting countries.

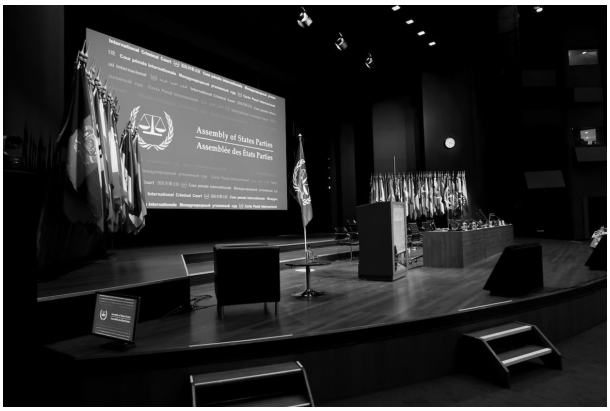
Judge Guénaël Mettraux (Judge, Kosovo Specialist Chambers) spoke from his professional experience about the unique skills and challenges necessary for effective judicial practice in ICL. Judges need to be able to apply the law with integrity to the process, maintain independence from outside stakeholders and even their own personal career goals, have the ability to manage information and evidence on a massive scale unique to international contexts, have the willingness to learn and adapt to new systems, and resist simply applying their home legal system (civil or common law). In explanation, Judge Mettraux quoted the late Judge Patricia Wald: *"Of course we need a mix, but you wouldn't put a judge who has never been in court in charge of a big conspiracy case…. you wouldn't take a professor of anatomy and put him into an operating theatre and say, 'Now perform this brain surgery.'"* He also suggested that countries take seriously recommendations of the Assembly's Advisory Committee on the Nomination of Judges and consider a more demanding selection process, such as including peer reviews.

Judge Shireen Fisher (Judge, Residual Special Court for Sierra Leone) previewed a forthcoming proposal from the ICL Practice Project, suggesting that the international community create a pre-election certification curriculum that would allow candidates for ICL judicial positions to learn crucial skills and competencies before their election or appointment. This program could for example focus on managing complex trials, and understanding the hybrid, combined system of international criminal law. Such a process would require investment from the international community, but would have many benefits, including could give less prominent candidates an opportunity to demonstrate their qualifications and a path to judicial positions (whether they ultimately ended up in national or international institutions), provide judges an opportunity to discover what they "didn't know they didn't know" before responsibilities start. Strengthening the preparedness and quality of judges will ultimately advance the credibility and legitimacy of international criminal law and its institutions.

Filippo Musca (Director General, Siracusa International Institute for Criminal Justice and Human Rights) discussed the Siracusa Institute's work building and supporting the national-level capacity of various legal actors, including judges, to address international crimes. He noted that these programs also have benefits for the larger field of international criminal law and institutions like the ICC, as they spur more sustained, less *ad hoc* action on complementarity, and provide pathways to advise on reconciling national frameworks with ICL institutions.

Judge Benes Aldana (President, National Judicial College) de-

scribed the national-level experience of the National Judicial College's Academy course, which seeks to help judicial candidates in the United States learn about judicial practice and responsibilities, such as maintaining impartiality, and to improve their chances of appointment or election. He noted that their courses have increased diversity among judicial candidates in the United States, and include a scholarship program which contributes towards that goal.



21st Session of the International Criminal Court's Assembly of States Parties

During discussion, audience members noted the need for judicial training programs to consider ways to ensure they are still accessible by individuals from countries with less resources, such as through scholarships or other means. Several members also suggested the need to consider how to address language differences and potential bias in evaluating judicial candidates, in order to increase geographical representation and other forms of diversity in ICL institutions. The use of "List B" judges under Rome Stature Art. 36(3)(b)(ii) was also discussed, with some participants suggesting that given the evolving nature of ICL, candidates of academic background have something to contribute to judicial practice, but those skills are less useful on a daily basis than practical, trial management skills.

The International Criminal Law Practice Project plans to release publications on several aspects of judicial practice and other topics in 2023. Read more about the project at: https://www.americanbar.org/groups/human_rights/preventing-atrocities/international-criminal-law-practice-project.

Articles Wanted for *The CJS Newsletter*

Practice Tips, Section/Committee News, Book Reviews
Submission Deadlines: April 15, Aug. 15, Dec. 15

For inquiries, contact: Kyo Suh, Managing Editor,
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Congress Closes Loophole in US Criminal Jurisdiction Over War Crimes Committed Abroad

In late December 0f 2022, Congress passed the Justice for Victims of War Crimes Act (signed into law in January 2023). The act amends Title 18 to include federal jurisdiction over war crimes committed abroad when the perpetrator is present in the United States, regardless of the nationality of the perpetrator or victim. Prior to this legislation, US federal criminal law only covered war crimes committed by or against US nationals or members of the armed forces (US federal criminal law contains also provisions on torture and genocide), which as noted by many members of congress in press releases and discussions about the bill, would not cover most war crimes committed in places like Ukraine should perpetrators later be found in the United States. The United States has prosecuted several individuals under US jurisdiction for torture committed abroad, but has never used the war crimes provision to prosecute an individual in the United States. Given the limitations in federal criminal law, federal authorities often use immigration violations to prosecute individuals for lying about their involvement in human rights violations and atrocities when entering the United States, which may result in conviction or their removal from the United States, but do not address the gravity of the underlying, substantive atrocities they are accused of committing. The Justice for Victims of War Crimes Act also eliminated the statute of limitations for most war crimes, which was previously limited to five years for war crimes not resulting in death.

The Working Group on Crimes Against Humanity (part of the Atrocity Crimes Initiative) has been working to address jurisdictional gaps and other discrepancies in US law over atrocity crimes, and engaged in advocacy discussions about the Justice for Victims of War Crimes Act and related issues. Following a hearing in September 2022, ABA President Enix-Ross submitted a statement highlighting ABA policy and support for several opportunities for Congress to strengthen US law on war crimes and crimes against humanity. Working Group Chair Amb. David Scheffer was also quoted in a *New York Times* article about the legislation. With the Justice for Victims of War Crimes Act passed, the Working Group will continue working to advance consideration of a crimes against humanity statute.

ABA President's September 2022 Statement to the Senate Judiciary Committee: www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-statement-senate-judiciary-committee-hearing.pdf.

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Recommended Book

Extending Justice: Strategies to Increase Inclusion and Reduce Bias

Edited by: Bernice B. Donald, Sarah E. Redfield

Carolina Academic Press (cap-press.com/books), 2022

The first book in this series, *Enhancing Justice: Reducing Bias*, was written to increase awareness of implicit bias and serve as a benchbook for judges. This book goes the next step to be useful to a wider audience with virtually every chapter offering thoughtful context and practical strategies for interrupting unintentional bias. Edited by two proven leaders in the field, with twenty-six chapters written by fifty diverse authors, the voices in the book combine to provide wide-ranging and user-friendly science and tools.

Perspective comes from authors who are diverse in gender, gender orientation, race and ethnicity, age, ability, education, and profession. Fields covered are also diverse, including law, health, education, artificial intelligence, nonprofits, education, the military, and disability. Thought-provoking essays and interviews on healthcare, extremism, courage, and the silencing and invisibility of the Native American community further enrich the work. The chapters are written to stand alone but build on each other for a strong collective whole. Readers will find the book useful in their own disciplines and beyond. Teachers, students, judges, and professionals in all fields can use this work for inspiration and reference as they apply its strategies and thinking to enhance their accomplishments in achieving diversity, equity, and inclusion, individually and systemically.