AMERICAN BAR ASSOCIATION
Criminal Justice Section

Criminal Justice Section Newsletter

Volume 29, No. 1 Fall 2020

Annual Meeting Highlights

The Criminal Justice Section Council met virtually on August 1-2, 2020. The Council thanked the outgoing Chair **Kim T. Parker** and welcomed the incoming Chair **April Frazier-Camara** of Washington, DC.

Following CJS-sponsored ABA resolutions were passed by the ABA House of Delegates:

- 106A on restorative justice: Urges criminal justice stakeholders to consider using a restorative justice response to crime as one effective alternative, or adjunct to, a criminal adjudicatory process, in appropriate cases;
- 106B on Discovery Standards: Adopts the black letter of the *ABA Standards for Criminal Justice: Discovery, Fourth Edition,* dated August 2020, to supplant the Third Edition (August 1994) of the *ABA Standards for Criminal Justice: Discovery.*

Programs originally planned for the Annual Meeting were converted to webinars:

- Review of the Supreme Court's Term --Criminal Cases;
- The Heightened Risk of Parallel Investigations: What In-House and Outside Counsel Must Know to Navigate Today's Uncertain Terrain.

New Webinars

Due to the COVID-19 lockdown, Criminal Justice Section programs that were scheduled for 2020 were either cancelled or postponed. Some major programs were converted to webinars, and following new webinars were offered.

- *Examination of Witnesses: Trial Tactics for the Novice Attorney*
- *SEC and DOJ Enforcement: What's on the Horizon?*
- *Confronting the Criminalization of Blackness in the Criminal Legal System*
- *Compassionate Release*
- *Does Qualified Immunity trump the Rule of Law?*
- *Current Developments in INTERPOL Red Notice Abuse*
- *Special Q & A: Graduating Into a Recession?*
- *Enhancing Justice: Reducing Bias*
- *The Intersection of the Criminal Justice System and People with Mental Disabilities*

CJS is also hosting monthly virtual meetings to address the most pressing issues in criminal justice, **CJS Hot Topics**. This ongoing series will be hosted on the fourth Wednesday of each month, 3 PM ET. The September 23 meeting discussed the issues of race and policing and threats to the rule of law.

Visit ambar.org/cjsevents for info on upcoming programs/ webinars and video recordings of recent programs.

CJS Chair for 2020-2021:

April Frazier-Camara

April Frazier-Camara is the Director of Defender Legal Services Initiatives at the National Legal Aid & Defender Association (NLADA). During her term, the ABA Criminal Justice Section will confront America's painful history of racism in the criminal legal system, address ways of moving away from silence and toward reconciliation, and advancing racial equity in the criminal legal system.

The CJS Podcast

Season 2 of **The JustPod** has begun, available on iTunes, Spotify and Buzzsprout. Recent episodes include:

- *Juvenile Justice and the Foster Care System*
- *The Power of Restorative Justice.*
- *Trial Tips: Examining a*
- *Law Student Well-Being*
- *Implicit Bias*
- *COVID SCOTUS*
- *COVID and Virtual Court*
- *Prisoners of COVID-*
- *George Floyd and Prosecution of Police*
- *Investigating Child Abuse During COVID*

Member News

Albert Krieger, famed defense lawyer and former CJS Chair (2002-2003), passed away on May 14 in Miami. The Criminal Justice Section has submitted a request for ABA approval to establish an award in his honor intended to recognize defense attorneys, to be named "The Albert Krieger Defense Attorney Award," which would honor those who embody the principles enunciated in the ABA Standards for Criminal Justice, Defense Function.

On Sept. 16, the ABA Tort Trial and Insurance Practice Section honored former CJS Chair **Bernice B. Donald**, circuit judge on the U.S. Court of Appeals for the 6th Circuit, with its inaugural Lifetime Liberty Achievement Award. This award celebrates the lawyers and judges who have spent their career actively promoting diversity and inclusion within the legal profession.

CJS Statement on Racial Equity in the Justice System

The Criminal Justice Section of the American Bar Association stands in solidarity with all who demand an end to racism, inequality and injustice. For more than 400 years African Americans have been victims of violence at the hands of both governmental and private actors and have suffered discrimination in every sphere of American society.

The intolerable killings of George Floyd, and countless others continues this long history of lethal violence against African Americans, and the covid-19 disproportionate impact on African Americans is undeniable evidence that historic discrimination continues to severely impact the African American community. It is long past time that we acknowledge that the continued existence of racial inequalities in the law, the legal profession and the legal system cause unbelievable pain and burden for our clients and colleagues of color.

And it is long past time that we commit to the proposition that we shall and must not be complicit in the structural oppression that plagues not only African Americans, but all Black and Brown and LGBTQI and Gender Non-Conforming people.

As ABA President Judy Perry Martinez stated, lawyers "have a special responsibility to address" injustices that exist "through laws that unjustly and disproportionately impact people of color." We accept that responsibility as a core element of our mission. We will take immediate steps to ensure that racial equity and inclusion are not only embedded in our organizational values but are embodied in our actions. Accordingly, we will fight to end white supremacy, systemic racism, oppression and inequities in the criminal justice system and in the legal profession; commit ourselves anew to work even more tirelessly for these goals, and call on all members of our Section, the American Bar Association, the legal profession, and concerned individuals to make the same commitment. (July 2020)

The ***Criminal Justice Section Newsletter*** is published three times a year.
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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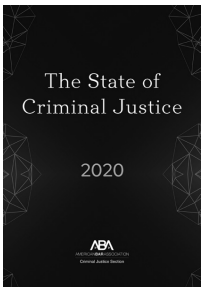
The State of Criminal Justice 2020

Edited by Mark E. Wojcik

Published by the ABA Criminal Justice Section

Reviewed by Elizabeth Kelley



Just as every year we place the latest copy of court rules and the like on our bookshelves (or load on our IPads), so too, we should invest in the ABA Criminal Justice Section's annual edition of *The State of Criminal Justice*.

This work is not a dry recitation consisting of 336 pages of all that happened in the field of criminal justice during the past year. Rather, it is a collection of relatively short chapters about a cross section of topics such as crimmigration (Joshua L. Dratel), implicit bias (Professor SpearIt), juvenile justice (Judge Jay Z. Blitzman), public defense (Malia N. Brink), United States Supreme Court decisions (Professor Rory Little), and the treatment of people with mental disabilities (Deanna Adams).

Because for purposes of this book, the year roughly encompasses June of 2019 to June of 2020, the 2020 edition includes chapters on police involved shootings and the ensuing calls for racial justice (Salma S Safiedine, Hannah Gokaslan, and Ilana Meyer), as well as the challenges to the criminal justice system raised by The Pandemic (Professors David W. Austin and Mark E. Wojcik). Similarly, the chapters are written by a cross section of writers: ABA staff, judges, professors, defense lawyers, and prosecutors. Also included is a list of ABA Resolutions related to criminal justice which were passed during the past year.

A thorough Executive Summary by Professor Mark E. Wojcik of the John Marshall Law School in Chicago and the Editor, begins the book, and entices readers to explore any or all of the chapters. One particularly noteworthy chapter concerns Investigative Genetic Geneology, the recent practice by law enforcement of solving cold cases by family-matching databases. This chapter is written by three California prosecutors: Anne Marie Schubert, Sacramento District Attorney; Cheryl M. Temple, Ventura County Chief Assistant District Attorney; and Gregory Totten, Ventura County District Attorney. The chapter includes a set of best practices which law enforcement can follow in regards to this relatively new tool, and a discussion of the need to balance privacy concerns with public safety. Another noteworthy chapter by Bruce Zagaris, a partner at Berliner Corcoran & Rowe, concerns political asylum and attempts to make sense of this country's ever-changing policies and the resulting court challenges.

The chapter on Capital Punishment written by Ronald J. Tabak, Special Counsel and pro bono coordinator at Skadden, Arps, at 50 pages, is by far the lengthiest. The chapter discusses topics such as the decline of public support for the death penalty; abolition and moratoriums by various states; factually problematic executions, influence of popular culture such as Bryan Stevenson's best-selling book *Just Mercy* on attitudes about the death penalty; factors such as racial disparities, prosecutorial misconduct, junk science, and mental disabilities on the imposition of the death penalty; costs of capital punishment; and ABA initiatives such as amicus briefs and the Death Penalty Representation Project.

The only remotely negative comment I have is that the format isn't particularly inviting. It looks, well, rather like a law book, which it is. The cover is dark and austere. I feel comfortable making this comment because ABA Publishing has made a real effort to design compelling covers for its books, and the Section's *Criminal Justice* magazine has modernized its cover. Moreover, *The State of Criminal Justice* is all text. It could be broken up with some strategic graphs, charts or boxed quotes.

2020 has been a year like no other in US history – economic devastation, political division, racial unrest, and a pandemic which has impacted every facet of our lives. The field of criminal justice has had, nonetheless, some positive developments such as bail reform and the election of progressive prosecutors. All of this foretells that the 2021 edition of *The State of Criminal Justice* will be compelling.

Elizabeth Kelley is a criminal defense lawyer with a nationwide practice focused on representing people with mental disabilities. She is a member of the editorial board of *Criminal Justice* magazine.

Stay Connected ... With the CJS

Via Facebook, Twitter, LinkedIn, YouTube ...

When attending Section events or discussing our initiatives on these platforms, please use the hashtag #ABACJS.

Articles Wanted for the *CJS Newsletter*

Practice Tips, Section/Project News, Book Reviews
Submission Deadlines: Dec. 15, April 15, Aug. 15
For inquiries, contact: Kyo Suh, Managing Editor,
kyo.suh@americanbar.org

Celebrating 100 Years of the Criminal Justice Section

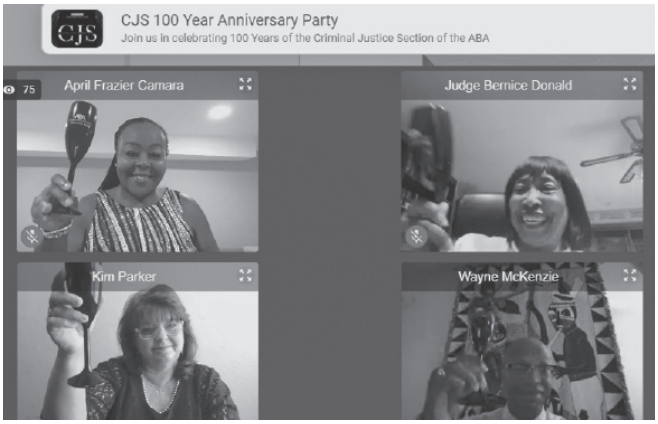
The ABA Criminal Justice Section was founded in 1920 in St. Louis, Missouri and is one of the oldest sections of the American Bar Association. After the founding of the ABA in 1878 and the membership and scope of the ABA continued to grow, the Association recognized the need to have an entity focused on criminal law. The Criminal Justice Section's earliest work examined deficiencies within the law and has contributed to the development of the criminal justice system as we know it today through policy advocacy and the Criminal Justice Standards, originally commissioned in 1964. Those original Standards spanned the entire criminal justice process, including pre-trial release, discovery, jury trials, sentencing, appeals and post-conviction remedies. They also covered topics such as the prosecution and defense functions, the function of the trial judge, fair trials and free press.

The Criminal Justice Section continues to examine the criminal justice system, and with diverse membership including judges, defense attorneys, prosecutors, academics and other criminal justice professionals, seeks to represent the unified voice of criminal justice in its work. The Standards Project has grown, and the Section now has over 40 committees and additional task forces addressing the most pressing criminal justice issues. The Section continues to strive for diversity and inclusion and addressing women's issues in the field of criminal justice.

We have chosen the motto, "Perfecting our Vision in 20/20" for this centennial year. As the motto indicates, we will take the chance to reflect on our history, to learn from our own deficiencies and to move forward with a perfected vision of our priorities and goals for the next 100 years. There will be reflections and projections of our history made available in our publications, at our events and on our website. We invite you to join us in celebrating 100 years of criminal justice progress and ask you to renew your commitment to help us achieve more in the coming 100 years, as there is still much work to be done.

CJS Turns 100!

The ABA Criminal Justice Section celebrated its **100 Year Anniversary** on August 24, 2020. To commemorate the occasion, we posted CJS History on our social media platforms and asked members for feedback on the current state of the Section with the "Criminal Justice Section at 100 Years" survey. Search the hashtag #CJS100 to review the CJS historical posts. Additionally, the Section hosted a special **100 Year Anniversary Virtual Gala** (photos on the right) on Sept. 17 featuring toasts by CJS leadership and a special Town Hall to review our history and discuss what the next 100 years of CJS should look like.



For more information on the Section's history, we invite you to listen to our special "CJS History" series on The JustPod (www.buzzsprout.com/252350). We also invite you to visit our centennial webpage (www.americanbar.org/groups/criminal_justice/events_cle/centennial) with special centennial content including a CJS Historical Video in which members review the history of the Section, our history of diversity and inclusion, women's issues, the history of the CJS Standards Project and more. Cheers to 100 Years of CJS!

Spotting and Stopping COVID-19 Scams and Cybercrime

By Kristin Judge

These days, the COVID-19 pandemic has all of our attention focused on an infectious disease threatening our physical health. However, COVID-19 isn't the only thing threatening our well-being. Cybercriminals use the panic and distraction this pandemic has caused to target innocent people with cybercrime. Cybercrime, fraud, and scams can affect anyone.

Criminals and scammers are all too ready to take advantage of this internet-dependent time to target even more victims. Cybercriminals use a plethora of scams, including COVID-19 related scams, to lure unsuspecting people, knowing that the dire global health situation means almost anyone will pay almost any amount and possibly give out personal information to help the cause.

But there are ways to help defend yourself from ever-present cybercrime with these three golden rules.

Slow it down.
Cybercriminals typically create a sense of urgency to catch people off guard when attempting to scam them. It's important to take your time and ask questions to avoid possibly being rushed into a bad situation. Many scams will ask you to "act fast", but by slowing down and using your better instincts you can avoid scams.

Spot check.
Research and double check the details. Scammers will sometimes pose as trustworthy establishments to make false claims in order to steal funds. By researching the information, you can discover what is true and what is a scam.

Stop! Don't send.
No reputable person or agency will ever demand payment on the spot. When it comes to online payments, it is important to know who you are giving your money to and to always have a written contract for the payment. So if you think the payment feels fishy, it probably is.

Recently, a survey by TransUnion revealed that 22% of Americans have already been targeted by COVID-related fraud. But what typically happens to these cybercrime victims after the crime has occured?

Victims of cybercrime often blame themselves.
Encountering a phishing attempt or clicking a malicious link leaves us feeling responsible — like we should have known better. But the truth is that those who perpetrate crime online are the ones to blame. Emphasizing this point will encourage victims to report, and start their journey to recovery.

Cybercrime victims often choose not to report.
This poses a tremendous challenge for knowing the real scope of the problem. It is important to encourage all to report their experience. Without a criminal report, it can be impossible to prosecute those responsible and more difficult to provide victims with the necessary support.

Victims often don't know how to access tools or resources that will help them recover and reinforce their cybersecurity.
It can be hard to know where to start. Luckily, there are resources to help these innocent victims. For example, Cybercrime Support Network (CSN) works to help victims of cybercrime get back on their feet after a crime has occurred. Through FraudSupport.org, CSN works to curate resources for cybercrime victims so they can be connected with tools to help them in a simple and organized way.

This pandemic poses an immense challenge for all of us. While we know that humans will work together to solve this crisis, we cannot ignore the persistent challenge of fraudsters, scammers, and criminals looking to turn this to their advantage.

Kristin Judge is a member of the CJS Victims Committee and the founder of the nonprofit Cybercrime Support Network, which serves consumers and SMBs impacted by cybercrime.

The Convergency – Where E-Discovery and IT Intersect

By Daniel Gold

Convergency is defined as the act, degree, or a point of converging. For purposes of this article, I look at convergency as converging e-discovery technology with data protection and privacy technology together to create a digital transformation. It is because of the increased data protection threats, the substantial increase in data volumes, the types of data that are being created, and where that data is being created that the convergency of e-discovery and IT is likely the most real and significant digital transformation that we will see in this decade. In-house counsel not only have a very real part to play in this convergency but also have ethical obligations as well.

The State of the Union in Data Protection and Data Privacy

The law firm Baker Hostetler once reported in their *Data Security Incident Response Report*, "no industry is immune." It is why our nation's top intelligence officials reported once that "cyber attacks and digital spying have eclipsed terrorism as the top threat to national security." Recent surveys say that there are more than 4,000 ransomware attacks every day. In 2019, there was a ransomware attack on businesses every 14 seconds in 2019. A whopping 91 percent of cyberattacks all begin with a spear-phishing e-mail, which is commonly used to infect organizations with ransomware. What is worse is that 76 percent of businesses reported being a victim of a phishing attack.

Another survey reports that between 2006 and 2019, there was a 160% increase in data breaches. Last year, there were 230,000 new malware samples produced. There are approximately 25,575 records that are impacted during a data breach. What is worse, it takes up to 197 days for a company to even detect the breach. Other reports show that the most expensive aspect of a data breach -- 43 percent -- is information loss. Putting dollars against all these statistics, the average cost of a data breach in 2019 was $3.92M (up 1.5% from 2018). Companies are spending $2.4M in defensive tactics against malware and web-based attacks. Globally, we are seeing that the overall damage in connection with ransomware attacks is up to $11.5B.

Daniel Gold is the managing director of BDO's Managed Services practice.

Law Firms Are Not Immune to Cyber Criminal Attacks Either

The costs to fight cybercrime are a direct result of the public reporting of cybercrimes on major public and private companies. Yet, until recently, there were not a lot of reports about cyber attacks on law firms in the US. This is of course fascinating as Vincent Polley, a lawyer and co-author of a book for the American Bar Association on cybersecurity, said many law firms were not even aware that they had been hacked. He said a lot of law firm managers were in denial about the potential threat. David Ries, author of *Locked Down: Information Security for Lawyers* puts it, it is because law firms are not obligated, like their corporate clients, to tell the public about breaches. Even though law firms are exempted from the Gramm Leach Bliley Act (N.Y. State Bar Ass'n v. FTC, 276 F. Supp. 2d 110 (D.D.C. 2003)), firms should be "implementing policies regarding administrative, technical and physical security" as criminals "can gain access to client Social Security numbers, sensitive medical information and business trade secrets."

In general, law firms are not employing the same high level of cybersecurity precautions that their corporate clients are doing. Patrick Fallon, Jr., an FBI assistant special agent said that "Law firms are a rich target" because they "don't have the capabilities and the resources to protect themselves. Within their systems are a lot of the sensitive information from the corporations that they represent. And, therefore, it's a vulnerability that the bad guys are trying to exploit and are exploiting."

This is reflected in a stunning report that said 77 percent of law firms do not have cyber insurance; 95 percent of law firms were noncompliant with their own cyber policies; 53 percent do not have a data breach incident response plan in place; and most shocking was that 100 percent of every law firm respondent admitted they were noncompliant with their corporate client's policies.

Since at least 2012 there have been some headlines regarding law firms getting hacked, but it has not really been until recently that there have been repeated headlines. For instance, in May 2014, the Western District of Pennsylvania indicted five Chinese military hackers in a case involving an AmLaw 100 law firm. In April 2016, the now infamous Panama Papers lead was as a direct result of the hack into the law firm Mossack Fonesca. The firm closed its doors stating: "The reputational deterioration, the media campaign, the financial circus and the unusual actions by certain Panamanian authorities, have occasioned an irreversible damage that necessitates the obligatory ceasing of public operations…"

On February 2, 2020, it was reported that "Ransomware Attacks Hit Three Law Firms in Last 24 Hours". Each of these law firms "have been among the companies and organizations targeted by a new round of ransomware attacks. In two of the cases, a portion of the firms' stolen data has already been posted online, including client information."

It is what I have been calling for years the "slippery slope of corporate data." If you think about it, the security of data diminishes from the time it goes from the company, who likely has an incredibly secure infrastructure and security controls, business continuity policies, incident breach response policies, data breach policies, compliance policies, etc., to their law firms' clients, and then to a service provider.

A Lawyer's Ethical Obligation

In the words of Alan Promer, partner & chair of the technology committee at Hangley Aronchick Segal Pudlin & Schiller, "A smart lawyer is only going to engage in the things they're knowledgeable about … I don't know many lawyers who speak fluent cybersecurity."

The Rules of Professional Responsibility, Rule 1.1. The Rule states, "A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation" (emphasis added).

Comment 8 of Rule 1.1 states, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject" (emphasis added). Lawyers must be much more vigilant in understanding the risks associated with data security to properly protect our own data and our client's data.

Taking it another step further, from a law firm perspective, Rule 1.6(c), Confidentiality of Information, requires us to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." In other words, if we are going to be competent under 1.1, we must therefore, under this rule ensure we are not doing certain things that will jeopardize client data and that we are doing the right things that will keep the client's data safe. Under Comment 17, it says that a "lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Comment 19 drives this point home best; it states that when "transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."

Applying these Rules, there have been several national and state level ethics opinions validating that an attorney has an ethical responsibility to understand data privacy and data protection. The ABA Ethics Committee handed down Formal Opinion 483 on October 17, 2018 and stated that "data breaches and cyber threats involving or targeting lawyers and law firms are a major professional responsibility and liability threat facing the legal profession. As custodians of highly sensitive information, law firms are inviting targets for hackers."

In ABA Ethics Committee Formal Opinion 477, "A lawyer should understand how their firm's electronic communications are created, where client data resides, and what avenues exist to access that information. Understanding these processes will assist a lawyer in managing the risk of inadvertent or unauthorized disclosure of client-related information."

In order to appropriately supervise, lawyers must understand what they need to know to know if those they are supervising are doing it correctly. Under ABA Rules of Professional Responsibility, Rule 5.3(b) Responsibilities Regarding Nonlawyer Assistance, states that "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."

In fact, applying this Rule, Formal Opinion 477 noted above, the Committee noted that "ABA Formal Opinion 08-451 … identified several issues a lawyer should consider when selecting the outsource vendor, to meet the lawyer's due diligence and duty of supervision … Such factors may include … vendor's security policies and protocols…" In other words, there is a very direct and real ethical obligation to ensure that each of the noted resources above are performing their role appropriately to satisfy Rule 1.6(c).

The Convergence to E-Discovery

Notwithstanding all these ethical obligations, a survey by ALAS (Attorneys' Liability Assurance Society) Loss Prevention Journal, Summer 2018 stated that only "35 percent of firms had standardized procedures to assess vendor".

Vendors, just like corporations and law firms are hacked as well. In fact, on October 17, 2019, the headline on Law Sites

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UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

Judges, DAs Question California Proposal on Bias and Juries

- *Bill latest legislation aimed at implicit race, gender bias in courts*
- *Legislation heads to Senate for debate this summer*

Prosecutors and judges are resisting a proposal working its way through the California Legislature to require transparency around juror strikes in the nation's largest state justice system, favoring a court-driven approach to address concerns of racial, gender, and other bias. "Almost without exception, trial judges have problems with that bill," Judge Steve White, president of the Alliance of California Judges, said in an interview. "The concern is not its objective, which we share. It's the mechanism by which they seek to achieve that objective."

Opponents call premature the measure that has cleared the Assembly and is set for consideration in the Senate on July 28. They say there already are checks in place for judges, and that the plan as proposed would add work to an already over-taxed justice system without improving juror quality. Proponents say the effort in the Democratically controlled Legislature would provide a fuller picture of peremptory strikes when they happen. But judges and prosecutors also prefer to see how a newly formed California Supreme Court task force tackles questions of unconscious bias and discrimination in jury selection. A particular concern, according to one study, is the removal of prospective Black jurors.

Other states have acted or are considering similar approaches. These efforts come amid heightened racial awareness nationally after George Floyd's death while in the custody of Minneapolis police launched ongoing protests over injustice and inequality. The scrutiny includes public debate about how bias influences and can infect decisions in the criminal justice system.

Not Just Race

Assembly Bill 3070 would require the party challenging a prospective juror from serving to state the reasons why. The court is required to determine whether "an objective observer, aware of unconscious biases, would view race, ethnicity, gender, and other specified characteristics as a factor in the use of the challenge," an Assembly floor analysis said.

California Assembly member and bill author Shirley Weber (D) said she began working on the measure five or six years ago, and the prospects are good under Gov. Gavin Newsom (D), who she said has "the same kind of passion for social justice." Weber, whose husband was a judge, dismissed judicial and prosecutor opposition.

"None of these folks want to change. All of them believe they have changed and if the system has any flaws it's not enough to produce dramatic changes," Weber said in an interview. Judges are already required to rule on whether a peremptory challenge is discriminatory, said Matthew Clair, Stanford University assistant professor in sociology and law whose research includes law and society, race and ethnicity, cultural sociology, and criminal justice. "If anything, this legislation would provide judges greater leeway to make a more holistic determination about whether a lawyer struck a juror on the basis of race, gender, or sexual orientation," Clair said.

The timing for final action in California is unclear, but there are developments elsewhere. A Connecticut Supreme Court-convened task force held its inaugural meeting July 14 to review what changes in law and practice may be needed to address implicit bias in jury selection. And a rule in Washington state, which California used in drafting its proposed law, gives judges more authority to prevent challenges "disproportionately" aimed at ethnicity.

Batson in Focus

A focus in the California effort is the U.S. Supreme Court's ruling nearly 35 years ago in *Batson v. Kentucky* . That decision outlawed the use of peremptory strikes on racial grounds and allowed judges to consider only purposeful discrimination in the use of those challenges. It later extended *Batson* to strikes based on ethnicity or gender. California's Supreme Court has an "abysmal" record in *Batson* cases, said Elisabeth Semel, director of the University of California Berkeley Law's clinical programs who helped write the legislative proposal.

A UC Berkeley Law death penalty clinic study of 670 appealed cases involving *Batson* claims where defense counsel objected to peremptory strikes used by prosecutors concluded that "California has a serious Batson problem and lacks an effective judicial mechanism (or the judicial will) to address it."

Objections to Bill

The Association of Deputy District Attorneys criticized the UC Berkeley report as misleading by only examining trials in which there was an accusation a juror was excluded for a discriminatory reason. "To extrapolate those results, as the authors have done, to all California prosecutors, where there is an accusation in less than 1% of trials and a finding of misconduct by the courts in what equates to .0162% of those cases, is statistically dishonest," wrote Michele Hanisee, president of the Association of Los Angeles Deputy District Attorneys. The group is the collective bargaining agent representing nearly 1,000 deputy district attorneys who work for L.A. County.

The Alliance of California Judges says A.B. 3070 isn't the answer. "It won't solve the problem and to just to make the jury selection process three times longer and ten times more difficult is not the solution. If you really care about solving the problem, eliminate peremptory challenges," White said. Even public defenders who support the legislation acknowledge the position judges are put in when evaluating challenges. Judges, a substantial portion of whom come from DAs offices, must take a "radical step" to even demand justifications, said AJ Kutchins, supervising deputy in the Office of State Public Defender, who argues A.B. 3070 will help jurists.

Task Force Competition

Legislation opponents want A.B. 3070 to take a back seat to a California Supreme Court jury selection working group that on July 6 was finally named six months after the chief justice announced its formation. The group includes judges, defense counsel, and prosecutors who will spend 12 to 15 months studying possible alternatives to a purposeful discrimination standard, unconscious bias, and new training or guidance.

Lawyer Ineffective for Not Bringing Up New Confrontation Ruling

- *Supreme Court handed down opinion while criminal appeal pending*
- *Lawyer refused to make argument based on new precedent*

A lawyer provided ineffective assistance to a man convicted of sexual assault when she decided to forgo using a U.S. Supreme Court opinion about confronting witnesses that was handed down while her client's appeal was pending, the Seventh Circuit said. "An attorney exercising reasonable professional judgment would have recognized that the confrontation claim was clearly stronger than the claims Attorney Hackbarth raised," the court said, referring to attorney Lynn Hackbarth.

Antonio Ramirez was convicted of sexually assaulting his eight-year-old stepdaughter. During trial, her statements and those of her younger brother were admitted into evidence through law enforcement officers and medical professionals. At the time, a defendant had no confrontation clause right to cross-examine unavailable witnesses or other declarants if their statements were deemed adequately reliable, Judge Joel M. Flaum said for the U.S. Court of Appeals for the Seventh Circuit. While Rameriz's conviction was pending before the appeals court, however, the Supreme Court handed down *Crawford v. Washington*_, which held that a defendant is entitled to cross-examine declarants if their statements are testimonial.

Rameriz asked his appellate counsel, Hackbarth, to make a *Crawford* claim, but she opted to pursue other defenses such as an ineffective trial counsel claim related to his prior attorney, violation of his right to a speedy trial, and sentencing-related claims. Rameriz's confrontation argument was clearly stronger, the Seventh Circuit said here. His trial counsel made confrontation objections, and Hackbarth could have made strong arguments that Wisconsin courts should grant relief on the merits, it said. The omission was prejudicial to Rameriz and the state must either release him within 90 days or grant him a new appeal, the appeals court said. The case is *Ramirez v. Tegels* , 2020 BL 231752, 7th Cir., No. 19-3120, 6/23/20.

ABA Says Lawyers Have to Ask Clients If They Think There's Fraud

- *If facts show "high probability" of client fraud, lawyers must inquire*
- *Failure to ask clients about conduct is punishable, ABA opinion says*

Attorneys must make a reasonable attempt to get more information if facts show a "high probability" that a prospective client wants to use their services to further illegal conduct, an American Bar Association opinion said. The legal profession has become "increasingly alert" to the possibility that clients might try to hire a lawyer for a matter that on its face appears legitimate but that "further inquiry would reveal to be criminal or fraudulent," the opinion by the ABA's ethics committee said.

"Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings" aims to illustrate when an attorney might have to delve deeper into a client's situation before accepting or proceeding farther with representation. Suspected money laundering or terrorism are examples of what might trigger such inquiry.

ABA Model Rule 1.2(d) prohibits a lawyer from advising or assisting a client in conduct the lawyer "knows" is criminal or fraudulent. The opinion specifically examines what attorneys have to do to satisfy the "knowing" standard. The standard requiring further inquiry singles out a "high probability" of potential illegal conduct. And the failure to take further steps to get more information amounts to "willful blindness" that is sanctionable under the actual knowledge standard of the rule, the opinion said. The ABA cited a 2018 New York City Bar Association ethics opinion holding that lawyers have to inquire further if retained for a transaction "that appears to the lawyer to be suspicious." And the circumstances dictate what is suspicious, it said.

The opinion provided hypothetical circumstances when further inquiry may be necessary. In one, a potential client tells a lawyer he is an agent for an anonymous government official from a "high risk" jurisdiction who wants to buy an expensive property in the U.S. that would be owned through corporations but is vague about the source of the funds. In this scenario, "the combination of risk factors known to the lawyer creates a high probability that the client is engaged in criminal or fraudulent activity," and requires additional inquiries, the opinion said.

Criminal cases treat deliberate ignorance or willful blindness as equivalent to actual knowledge, the ABA opinion noted. Lawyers can face criminal charges or civil liability for avoiding knowledge that a client is using the lawyer's services to further a fraud, it said. Furthermore, Rule 8.4 prohibits committing a criminal act and engaging in fraud.

Even if an initial inquiry doesn't establish "knowledge," other professional conduct rules may require the lawyer to dig deeper, the opinion said. For example, the duties of competence, diligence, and communication might require a lawyer to delve more into the identity of the client or the nature of the matter, especially if "such matters are frequently associated with criminal or fraudulent activity," it said. It might even be necessary under the rules to then persuade the client not to pursue conduct that could lead to criminal liability or liability for fraud, the opinion said. And when a client refuses to provide additional information, the lawyer has to explain that it's necessary for the representation and must withdraw if the client doesn't agree, it said.

Lawyers also can't agree to an unreasonable limitation on the representation such as excluding an inquiry into the legality of a transaction, the opinion noted. Scope limitations to keep costs in check, for example, are allowed with informed consent, it said. "Ascertaining whether a client seeks to use the lawyer's services for prohibited ends can be delicate" but it must be done, the opinion said. The opinion is is ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 491, 4/29/20.

Washington Not Liable for Some Problems in Public Defense System

- *State insulated by statute from local-level deficiencies*
- *May be liable for maintaining structurally deficient system*

Washington's statutorily implemented public defender system insulates the state from liability for deficiencies at the local level, but it may still be liable for maintaining a system that denies indigents their constitutional right to counsel, the Washington Supreme Court said. A class of juvenile plaintiffs sued the state, claiming it allowed the Grays Harbor County Juvenile Court to provide incompetent counsel. They claimed the state maintained the system in violation of their constitutional rights, and the state law.

Washington plainly has a constitutional duty to provide indigent public defense services, the court said in an opinion by Chief Justice Debra L. Stephens. But the state has delegated the duty to enforce that right to local governments, hasn't reserved any oversight, and given the localities taxing authority to pay for the service, it said. Although the state is responsible to enact a statutory scheme under which local governments can adequately fund and administer an indigent public defense, "it is not directly answerable for aggregated claims of ineffective assistance," the court said. Instead, the plaintiffs "must show that the current statutory scheme systemically fails to provide local governments, across Washington, with the authority and means necessary to furnish constitutionally adequate indigent public defense service," the court said.

The plaintiffs' claims premised on the state's knowledge of Gray Harbor County's failure to provide constitutionally adequate indigent juvenile public defense services must be dismissed, the court said. But their claims premised on alleged systemic, structural deficiencies in the state system may proceed, it said. The case is *Davison v. Washington* , 2020 BL 235441, Wash., No. 96766-1, 6/25/20.

ABA President and Members Respond to US Sanctions Against the International Criminal Court

ABA President Trish Refo issued a statement on Sept. 17 "condemn[ing] the imposition of punitive travel and economic sanctions against the International Criminal Court prosecutor and another senior ICC staff member." President Refo urged the US administration to reverse its September 2 decision to designate two individuals as "Specially Designated Nationals," which made effective a sanctions regime proposed earlier this summer in Executive Order 13928 intended to impact the International Criminal Court (ICC) Prosecutor's pursuit of certain investigations, including an investigation into alleged crimes committed in Afghanistan.

President Refo noted that the sanctions "could have severe consequences not only for ICC officials and staff, but also for the diverse groups of victims and legal professionals who contribute to the court's work," calling the sanctioning of legal professionals in this way "an act of intimidation and attack on the rule of law."

The statement follows a June statement by ABA Past President Judy Perry Martinez and policy passed by the ABA House of Delegates in August (sponsored by CHR and supported by CJS) affirming the need to protect the Court's independence and condemning threats and sanctions by any government against the International Criminal Court and its staff. Many members of the International Criminal Court Project's board of advisors wrote opinion pieces and analyses on these actions and their impact on US foreign policy and global accountability for atrocity crimes. In addition to the ABA, other bar associations, countries, and civil society organizations have issued statements against the Executive Order and sanctions.

Practice Tips, Continued from Page 7

Blog read: "Ransomware Attack Reportedly Hits Practice Management Company, Locking Lawyers Out of their Case Files." Here, the case management software company TrialWorks was reportedly hit by a ransomware attack. As a result, the hackers shut down its platform "for at least four days and locking some lawyers out of their case files."

More recently, an e-discovery provider was also hit by ransomware. This story reads a bit like Peter Elkind's 3-part series in Fortune magazine's story on the Sony hack from a few years ago. The key takeaway and (one of many) lessons learned is the critical importance of security questionnaires and the appropriate level of compliance around the same.

Under the Model Rule 5.3, lawyers have a duty to ensure their providers have the right processes and controls in place so that the provider is doing everything it when it hosts data from corporations and law firms to prevent their private data centers from being hacked by cybercriminals phishing attempts.

The same Model Rules noted above (1.1, 1.6, and 5.3) can be applied to every e-discovery matter as well. Without knowing whether a data map has been created, without really knowing who is creating the data, where the data is being created, and on what app, there is also no true way for an attorney under Federal Rules of Civil Procedure 16(b)(3)(B)(iii) to state for purposes of a Scheduling Order what ESI is relevant and therefore should be preserved. There is also no tangible way under FRCP 26(f)(3)(C) to state with utmost certainty for purposes of the Discovery Plan what the attorney's view is on discovery or what data must be appropriately preserved. Likewise, it follows that under FRCP 26(a)(1) and (b)(1), Initial Disclosures, that an attorney may not be able to fully disclose data they are seeking that is "proportional" to the needs of the case by understanding burdens associated with preserving evidence if there is not an actual understanding of client data. If the attorney has been able to get past R. 26 Initial Disclosures without really knowing the data landscape, getting past Rule 26(f) Meet and Confer may not be as easy.

It stands to reason that without knowledge of the same, it is exceedingly difficult to have a meritorious conversation. Plus, how many times have attorneys not asked for the right form(s) of production under Rule 34(b) or don't ask for a R. 502(d) Clawback Provision, which is an agreement outlining procedure to be followed to protect against inadvertent waiver of privilege or work product protection due to inadvertent production of documents or data.

Retired Judge Waxse from Kansas once said at the 2014 Association of Certified E-Discovery Conference that he believes it is "now legal malpractice to litigation in federal court without having a [Federal Rules of Evidence] 502(d) order in place … So those of you who are not doing it, just remember that."

It should also be noted what Magistrate Judge Wayne Brazil once said:

"… a lawyer who is not prepared for a Rule 16 conference runs a substantial risk that a better-prepared opponent will persuade the judge to enter orders that put the unprepared lawyer at a severe procedural disadvantage." 3 Moore's Federal Practice - Civil § 16.05 (2020)

In summary, to paraphrase author Abby Buchanan Longstreet's 1886 book, "Remy St. Remy, or, The Boy in Blue", to argue about e-discovery without the appropriate knowledge is like having "a battle of wits" with someone who is "unarmed".

Conclusion

There are a lot of questions lawyers should be asking vendors to understand whether they can securely and defensibly handle your eDiscovery. To start, it is helpful to download the EDRM (E-Discovery Reference Model) organization's model Security Audit Questionnaire. This tool was designed to "evaluate the security capabilities of cloud providers and third parties offering electronic discovery or managed services. The tool is also useful as a self-checklist for organizations testing the security capabilities of their own in-house systems."

Knowing whether your organization (both law firms and companies) have the appropriate plans and policies that govern data and risk is a good start. Knowing whether there is a commitment to ongoing training of data breach and security awareness, commitment and investment to data security and privacy, cyber-risk insurance coverage, and a schedule for assessments and audits is both useful and beneficial.

There is good news on the horizon. According to ILTA's (International Legal Technology Association) 2019 Technology Survey, 68% of 537 large and small law that they were conducting phishing tests, up from 38% in 2016 and 72% firms adopting two-factor authentication for external access, up 23 percentage points.

The real digital transformation is truly an opportunity for companies, outside firms, and trusted service providers to come together to perform what I like to call "The Three C's": Convergence, Competency, and Collaboration. The convergence is what happens when IT, litigation support, and attorneys from all three entities work together. Attaining the appropriate level of knowledge for lawyers to understand their data ensures competency compliance. When that goes right, the level of collaboration between law firm, legal department, service provider and opposing counsel becomes a smoother process.

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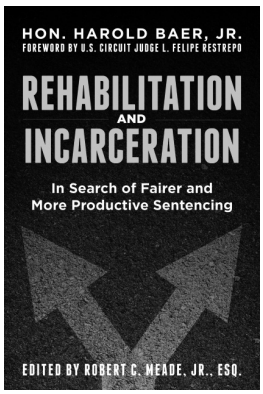

Street Legal: A Guide to Pre-trial Criminal Procedure for Police, Prosecutors, and Defenders, Second Edition

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