

Criminal Justice Section Newsletter

Volume 28, No. 3 Spring 2020

Midyear Meeting Highlights

The 2020 CJS Midyear Meeting took place in Austin, Texas from Feb. 13-17, 2020 during the ABA Midyear Meeting, and featured the CLE program “To the Border and Back Again” and various CJS committee meetings including the Long Range Planning Committee meeting.

The ABA House of Delegates adopted the following CJS-sponsored resolution on criminal justice policy, and other co-sponsored resolutions (view all at www.americanbar.org/groups/criminal_justice/policy).

Resolution 110 -- Judicial discretion on continued release of defendants between guilty pleas/trials and sentencing:

RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments, and courts and court rule-making entities, to provide courts with discretion to allow defendants to remain on release pending sentencing following a guilty plea or conviction as long as the court finds that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released, such as by amending 18 U.S.C. § 3143 or similar statutes in other jurisdictions.



Chair's Message

Kim T. Parker



This year marks the 100th Anniversary of the Criminal Justice Section. As we entered 2020 we anticipated many challenges, but we had not imagined the crisis that is now upon us. The impact of this pandemic has been difficult for each of you personally and professionally. I have watched and learned as individuals working within the criminal justice systems across this nation have come together to find solutions. The challenges we now face require us to take a hard look at how we conduct ourselves and how we manage criminal justice processes. The decisions and changes we make now will carry us forward into the next 100 years.

Now more than ever, the collaboration of prosecutors, defenders, academics, judges, probation and parole services is necessary. We are in an excellent position to lead the way. We have a long history of collaboration in the Criminal Justice Section. We can serve as the model for the development of policy, procedure and process. I invite each of you to share your visions and innovations for the future of criminal justice. Join us in the critical time as we seek to fulfill our motto, “Perfecting our Vision 2020.”

Spring Programs Cancelled

Due to the outbreak of the COVID-19 Pandemic, CJS programs scheduled for the Spring of 2020 were cancelled or postponed, notably the 2020 CJS Spring Meeting (Kansas City, MO) and the National Institute on White Collar Crime (San Diego, CA). Please monitor Section announcements for information on the conversion of these in-person programs to webinars. The CJS sponsored the webinar “SEC and DOJ Enforcement: What’s on the Horizon?” on April 28. Visit abar.org/cjsevents for the latest updates on cancellations and upcoming webinars and events.

Alternatives to Incarceration and Diversion

The CJS Alternatives to Incarceration and Diversion (ATI) Committee held an in-person meeting on February 14, 2020 at this year's ABA Midyear Meeting in Austin, Texas, with several others participating by conference call. ATI Committee co-chairs Raul Ayala and Brooke D. Hyman presided over an exciting and full agenda.

Professor Mary Ellen Stitt, Ph.D. (2020 Expected, Sociology, University of Texas, Austin) reported on portions of her doctoral research regarding issues affecting diversion and treatment programs in some of Louisiana's criminal courts. Her presentation at the meeting can be summarized by the following introduction to her article, *Adjudication Under Cover: Diversion and Inequality in the Criminal Courts*, to be published in the *American Sociological Review*.

As policymakers face growing pressure to reduce the financial and social costs of incarceration, few reforms have garnered more widespread support than diversion programs designed to provide criminal defendants with mental healthcare in place of punishment. Hundreds of thousands of people now enter court-mandated treatment every year, and advocates and scholars alike have viewed their diversion as an exit from the court system into an environment designed to change defendants rather than to judge them. Drawing on ethnographic fieldwork, interviews, and administrative data, I show that court-mandated treatment operates not as an exit from the court system but as an extension of that system and a site of adjudication in itself. Within that site, defendants are judged not on the basis of law or evidence but on their performance of "compliance," defined in practice as *health, resources, and self-advocacy*. Those who do not meet compliance criteria are systematically sorted out of treatment and returned to court, where they face additional penalties for treatment noncompletion. Ultimately, mental healthcare placed under control of the courts becomes a form of adjudication under cover, both obscuring and intensifying punishment for the poor, racialized, and ill.

Another item of committee discussion centered on the review of a proposed survey of ATI Committee members in an effort to increase programmatic activity and membership participation. It is expected that a survey instrument will be sent out by June, 2020 and that the responses will help in formulating resource materials and CLE presentations via webinars or live sessions at any of the Section's events during the ABA Annual Meeting, the Fall Institute, the ABA Midyear Meeting and/or the CJS Spring Meeting. Suggestions were also made for the submission of an article(s) to the *Criminal Justice Magazine* and CJS Newsletter on current issues facing alternatives to incarceration and diversion programming in state and federal courts.

The Committee has also had a leading role in the CJS Task Force on Diversion Standards, which has recently submitted its draft Standards for review by the Standards Committee. It is anticipated that the Standards may be reviewed by the CJS Council at the Annual Meeting with subsequent adoption by the ABA House of Delegates, perhaps at the 2021 Midyear Meeting. For more information on the draft Standards on Diversion, please contact Task Force Chair, Raul Ayala at raul_ayala@fd.org.

Submitted by Raul Ayala, Deputy Federal Public Defender, Collaborative Courts Supervising Attorney, Central District of California and Co-Chair of the CJS Alternatives to Incarceration and Diversion Committee.



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Military Justice Committee

The CJS Military Justice Committee collaborated with the ABA Standing Committee on Armed Forces Law and the Army Court of Criminal Appeals to have a live appellate oral argument on February 13, 2020 at the University of Texas in conjunction with the CJS Midyear Meeting in Austin, Texas. The argument, for the case of *United States v. McPherson*, was well-attended by law students. Additionally, a team of law students submitted an amicus brief on McPherson's behalf, and one law student, Rachel Jensen, presented oral argument following McPherson's military counsel.

The case raised an issue regarding the proper interpretation of the statute of limitations for an offense against a child. McPherson was charged in 2018 with having committed the offense in 2004. The 2005 version of the Manual for Courts-Martial listed the offense as indecent "acts or liberties" with a child, while the 2016 Manual uses the word "conduct" in place of "acts or liberties." The issue arose because of the numerous statutory changes to the military justice system in the past decades.

In 1986, Congress amended Article 43, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 843, to prescribe a 5-year statute of limitations for most offenses under the UCMJ, including appellant's 2004 offenses. In 2003, Congress amended Article 43 to increase the statute of limitations for child abuse offenses to the victim's 25th birthday. The offense of indecent acts or liberties with a child was identified as a child abuse offense. In 2006, Congress again amended Article 43 to change the statute of limitations for child abuse offenses to the life of the child if the charges were received by the convening authority either during the life of the child or within five years after the date on which the offense was committed. Congress did not indicate, however, whether this change to the statute of limitations was meant to apply retroactively.

McPherson argued that Congress's amendments to Article 43 do not retroactively apply to his 2004 conduct because such an application of the law would violate the *Ex Post Facto* prohibition set forth in Article I of the U.S. Constitution. His argument was that the statute of limitations for his conduct expired in 2009, five years after the charged offense.

The government argued that McPherson's offense fell within the definition of child abuse offenses in the amendments to Article 43. Specifically, the government pointed to the fact that the offense of indecent acts or liberties with a child once contained in Article 134 of the USMJ were replaced in 2007 with Article 120 offenses of child rape and aggravated sexual contact with a child. According to the government, although McPherson was charged under Article 134, which was in effect at the time of McPherson's alleged offense, the 2007 amendment established that the same conduct going forward would constitute child rape and sexual abuse of a child under Article 120b, which Congress has defined as child abuse offenses. The government argued Congress clearly indicated its intent to apply the lifetime of the child victim as the proper statute of limitations for child abuse offenses. Therefore, the statute of limitations had not expired when appellant was tried in 2018 for offenses committed in 2004.

Submitted by Amanda Williams, Administrative and Labor Law Attorney, Office of the Staff Judge Advocate, US Army Garrison, Fort Belvoir, Virginia. She is Co-Chair of the CJS Military Justice Committee.



(Left to right) Associate Judge Lieutenant Colonel Elizabeth Walker, Senior Judge Colonel Jan Aldykiewicz, Funded Legal Education Program University of Texas Law Student Captain Josh Davis, Law Student Rachael Jensen, Law Student Amy Gordon, and Associate Judge Colonel Paul Salussolia.

Visit www.americanbar.org/groups/criminal_justice/committees for updates on other CJS committees.

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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

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

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

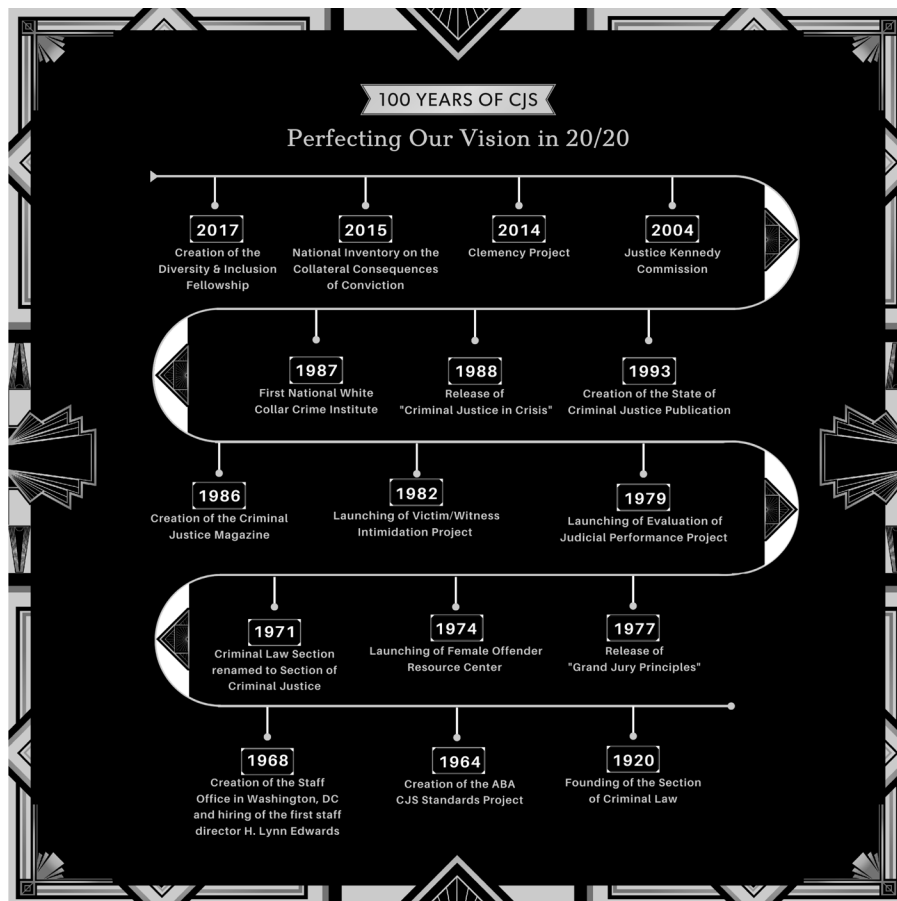
Celebrating 100 Years of the Criminal Justice Section

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.



The Chairs of the 100 Years of the Criminal Justice Section

We recognize our Chairs who have led the ABA Criminal Justice Section over the past 100 years to make the CJS the “Unified Voice of Criminal Justice” that we are today. Take a look at our Chairs since our founding in 1920.

CJS CHAIRS: 1920-PRESENT



2020-2021
April
Fraizer Camara



2019-2020
Kim T. Parker



2018-2019
Lucian E.
Dervan



2017-2018
Morris "Sandy"
Weinberg



2016-2017
Matthew Redle



2015-2016
Hon. Bernice B.
Donald



2014-2015
James Felman



2014-2015
Cynthia Orr



2013-2014
Mathias H.
Heck, Jr.



2012-2013
William Shepherd



2011-2012
Janet Levine



2010-2011
Bruce Green



2009-2010
Charles Joseph
Hynes



2008-2009
Anthony
Joseph



2007-2008
Steve
Saltzburg



2006-2007
Robert
Johnson



2005-2006
Michael
S. Pasano



2004-2005
Catherine
Anderson



2003-2004
Norm Maleng



2002-2003
Albert Krieger



2001-2002
Ronald C. Smith



2000-2001
Ralph C.
Martin II



1999-2000
Bruce Lyons



1998-1999
Myrna S.
Raeder



1997-1998
Ronald G.
Goldstock



1996-1997
William
W. Taylor III



1995-1996
Cara Lee
Neville



1994-1995
E. Michael
McCann



1993-1994
Randolph N.
Stone



1992-1993
Neal R.
Sonnett



1991-1992
Andrew I.
Sonner



1990-1991
Michael L.
Bender



1989-1990
Sheldon
Krantz



1988-1989
Terrance F.
MacCarthy



1987-1988
John M.
Greacen



1986-1987
Norman
Leftstein



1985-1986
Paul B.
Johnson



1984-1985
Paul T.
Smith



1983-1984
Richard H. Kuk



1982-1983
William W.
Greenhalgh



1981-1982
Sylvia Bacon



1980-1981
Herbert S.
Miller



1979-1980
Richie E.
Gerstein



1978-1979
Tom Karas



1977-1978
B.J. George Jr.



1976-1977
Alan Y. Cole



1975-1976
Robert M.
Ervin



1974-1975
Ben R. Miller



1973-1974
Jack G. Day



1972-1973
Keith
Mossman



1971-1972
William Hurt
Erikson



1970-1971
Samuel Dash



1969-1970
H. Eugene
Breitenbach



1968-1969
Louis B.
Nichols



1967-1968
William R.
Walsh



1966-1967
Gerald S.
Levin



1965-1966
James V.
Bennett



1964-1965
Kenneth J.
Hodson



1960-1962
Charles L. Decker



1957-1960
Rufus King



1953-1957
Walter P.
Armstrong



1946-1953
Arthur J.
Freund



1938-1946
James J.
Robinson



1936-1938
Rollin M.
Perkins



1925-1936
Justin Miller



1924-1927
Oscar Hallam



1922-1924
Floyd E.
Thompson



1921-1922
Ira E. Robinson



1920-1921
Roscoe Pound

COVID19 and Jail: A Deadly Duo

By Melba Pearson

Since the beginning of this year, coronavirus, and the resulting illness COVID19, has infected nearly one million people in the United States. More than 50,000 have died as a result. (As of April 2020. Current numbers can be found at the CDC website.) New protocols surrounding social distancing, self-isolation, and quarantine have become the new norm. However, how does this apply in the jail setting -- and what can be done by prosecutors to slow the spread of the virus?

New York learned a painful lesson. On March 18th, the notorious New York jail Rikers Island reported two positive cases of coronavirus; by March 24th it skyrocketed to 52 inmates and 30 guards testing positive for coronavirus. The speed at which the virus does its work is unprecedented. In the jail system, the results are clearly deadly.

Jails are well-known hotbeds of contagion due to the close quarters and the multiple metal surfaces where the virus has been known to live for up to two to three days. The CDC has mandated that individuals maintain six feet of distance from each other. It is impossible to comply with this order in the jail setting when it is full. By continuing to have jails at capacity, it places incarcerated people at risk; but it also places staff and correctional officers at unnecessary risk. Staff members leave the jails daily to return to their families in the community. If they are infected, nothing can be done to stop the spread of the coronavirus. Symptoms may take as long as two weeks to manifest, leaving people to unwittingly spread the virus to others.

The solution that has arisen nationwide is to release people in custody. This has taken several forms. It includes releasing people with sixty days or less remaining on their sentence; having a moratorium on cash bail for certain offenses in states where this applies; releasing people who are charged with non-violent offenses and do not pose a risk to the community; and encouraging police departments to utilize citations or arrest warrants in lieu of bringing new people into the jail. Elected prosecutors around the country have been calling for these and other reforms in the wake of the pandemic. As a civil rights attorney and candidate for Miami-Dade State Attorney, I have been calling for the release of nonviolent offenders from jails in Miami, as well as a moratorium on seeking cash bail for non-violent offenders to slow the spread of COVID-19. Groups

such as the Dream Defenders and the American Civil Liberties Union (ACLU) have been calling for release of incarcerated persons as well. Activists have gone as far as filing lawsuits to address the conditions in behind bars -- lack of hand sanitizers, masks, and cleaning products for use by the incarcerated persons as well as the staff.

Several cities have taken the lead on containing the virus by releasing people, including New York, Los Angeles, and Oklahoma. There has been some discussion of release on the federal level as well. US Attorney General William Barr declared that the federal prison system was facing emergency conditions -- resulting in more incarcerated people being released to home confinement. His order gives priority to prisons that have been the hardest hit by COVID19, and to vulnerable people -- those who are elderly, or immunocompromised. Being immunocompromised may include having asthma, cancer, heart or lung disease, or diabetes among other ailments.

While many cities have moved forward with these solutions, push back is not far behind. A prosecutor's job is to maintain the safety of the community while ensuring justice is served. However, some view such releases by its very nature as endangering the community. There have been instances of people being released and reoffending; in one case in New York, a person charged with a parole violation related to a conviction for burglary has been arrested for committing a robbery on an elderly man shortly after his release from custody. These cases should cause concern -- it is critical that before releasing someone, all of the available facts are examined to ensure that the person poses little risk to the community. This includes prior contact with the criminal justice system, types of prior cases if any, nature of the crime itself, and potential risks to victims or witnesses. But there is no crystal ball in life, nor in prosecution. One does the best they can with the facts available. Being charged with a crime should not result in a death sentence without a trial or a jury.

As we move through these times, we must also insist upon transparency in data. The numbers are revealing vast disparities in the death rates of people of color from COVID19 -- possibly due to, among other factors, unequal access to health care, or implicit bias by medical professionals. In the jail and prison system, much like on the outside, testing is not commonplace. The data around how many persons are infected must be revealed regularly, so that those in a position of power can see the full scope of the virus while making policy decisions. For instance, ICE has not revealed its numbers until recently.

Desperate times call for desperate measures. The coronavirus is unprecedented in our lifetime. The virus does not move incrementally; neither should those in power. Decisive action is needed -- lives hang in the balance.

Melba Pearson is a candidate for Miami-Dade State Attorney. She is a civil rights attorney, a former homicide prosecutor in Miami, and Co-Chair of the CJS Prosecution Function Committee.

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UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

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Proposed SCOTUS 'Defender General' Faces Hurdles, Lawyers Say

- Forthcoming article says “defender general” could help criminal defendants
- Lawyers say proposal is well-intentioned but poses dilemmas

A proposal to put advocacy for criminal defendants on more equal footing at the U.S. Supreme Court could move the law in a favorable direction for them, but some lawyers worry it may lead to discarding individual cases for the greater good.

The “Defender General,” professors Daniel Epps and William Ortman explain in an upcoming law review article, would be a “public official charged with representing the collective interests of criminal defendants before the Supreme Court of the United States.”

They say the office would counter the weight of the U.S. solicitor general’s office, which represents the government at the court and is staffed by top lawyers. The office could attract experienced criminal defense attorneys and Supreme Court litigators because of the prestige of Supreme Court practice, the article said.

The solicitor general makes strategic decisions about how and when to weigh in on some of the most pressing issues, seeking to shape the law in a manner favorable to government interests. Defendants are disadvantaged, the argument goes, by not having a parallel force representing theirs.

There is “often a stark contrast in the quality of representation” at the court, Epps and Ortman said. “While the prosecution is typically represented by experienced lawyers working within formal institutional structures designed to maximize Supreme Court expertise and influence, defendants often have lawyers with little or no Supreme Court experience.”

A defender general office “staffed with the right personnel, and given time to develop institutional credibility” could “significantly level the playing field,” they said.

Justices Elena Kagan and Sonia Sotomayor have both lamented the quality of criminal defense representation at the court,

and there has been a proposal in Congress for a similar defender program as well.

“I think it’s malpractice for any lawyer who thinks this is my one shot before the Supreme Court and I have to take it,” Sotomayor said of defense attorneys who insist on arguing before the justices after working on cases at earlier stages.

“Every time one of these cases comes to the court where the trial lawyer—and the person may be a terrific trial lawyer—is doing their first Supreme Court argument without thinking about the court, without thinking about the way it operates, rather than giving over one of these cases to an experienced Supreme Court bar member, that’s when I get a little upset,” said Kagan.

The Supreme Court is known for its close-knit bar of highly skilled lawyers, many of whom are repeat players.

Zachary Tripp, a former assistant to the solicitor general now with Weil, Gotshal & Manges, agrees with the premise that there are imbalances between criminal defendants and the government at the Supreme Court, especially when they’re represented by “inexperienced local counsel.” Yet Tripp added that the “inventive” defender general proposal would be difficult to carry out, and even if it were implemented, it wouldn’t match the government’s control over which cases to try to take to the court.

“You can’t stop individual criminal defendants from choosing to appeal in the first place,” he said. “The government, by contrast, can make strategic decisions about whether to appeal at all and thus can decide never to bring a case even to the court of appeals (much less the Supreme Court).” Notably, where a defendant’s interests diverge from the defender general’s views, the proposed office might even file a brief arguing against them.

Sidley Austin’s Jeffrey Green agrees the government has a “structural advantage.” But he said “it’s hard to square the proposal with the Sixth Amendment and the realities of practice at the court where duplication of arguments is highly discouraged.”

The solicitor general’s “biggest advantage is that they get to choose good vehicles to present, but the Defender General couldn’t play that role—if the client wants you to file a non-frivolous petition, you can’t say ‘no,’” said Green, co-chair of the National Association of Criminal Defense Lawyers’ Amicus Committee and co-director of the Northwestern Law Supreme Court Clinic.

Defense lawyer James Felman also agrees there's "asymmetry" in representation. But he worries about individual defendants losing out in the fight to advance collective interests.

"Here's the problem," he said, "every individual defendant is entitled to a lawyer who will zealously represent their interests and their interests alone. And I don't think that could be compromised."

Epps, who clerked at the Supreme Court and teaches law at Washington University in St. Louis, pointed out in an interview with Bloomberg Law that the government also faces instances where it has to consider whether representing individual clients conflicts with institutional interests, like whether to represent an agent sued for rights violations.

"If it turns out that the government wants to pursue an argument that wouldn't be in the interests of that particular client, it can't represent that person, and they have to get private counsel," he said.

Similarly, the defender general's duty would be "to the collective interests of criminal defendants, which is not the same thing as what is in the interests of every single defendant all of the time," he said, noting that defendants would still be represented by their own lawyers if the defender general doesn't side with them in a given case.

"There are many situations," Epps observed, "where what is best for a group is not what is best for every individual member of a group."

Maine Law Firms Can Lend Associates to District Attorney Offices

- Arrangement OK for limited duration, state bar says
- Fills D.A. office needs, associate needs for legal experience

A recent Maine professional ethics opinion lets law firms lend associates to local district attorney offices, subject to certain conditions, in a win-win scenario for firms and the D.A.'s offices.

"If properly executed, the 'lawyers on loan' principle serves as one model to achieve important goals sought by firms and prosecutors' offices alike," the Board of the Overseers of the Bar's Professional Ethics Commission wrote in its March 13 opinion.

District attorney offices throughout the country have limited legal resources while law firm associates often seek more legal

experience. The commission's opinion takes a stab at solving these unfilled needs.

The opinion was prompted by a question to the committee about whether this scenario was feasible. The committee acknowledged that this type of arrangement does happen at some Maine law firms and that the associate does the work of a "typical" assistant district attorney, prosecuting criminal and civil infraction matters for a "short period of time" during which the firm pays the associate's salary.

A big obstacle to this type of arrangement are conflict of interest analyses. A "robust conflict of interest analysis" is needed for a transition from private practice to government work and again when the lawyer returns to private practice, the opinion said.

Ethical rules concerning conflicts of interest involving current and former clients, as well as special conflicts of interest of former and current government employees all come into play, the opinion said. Written, informed consent is needed from the district attorney or attorney general for an associate to participate in a matter in which they participated personally or substantially while in private practice, it said.

And the loaned associate can't conduct a case against any person whom they or their firm represents or previously represented as a client, the opinion said.

The associate's firm also has to be mindful during the associate's absence, it said. The law firm can't knowingly represent a client if the "loaned" associate would be prohibited from doing so because of duties to current or former clients unless that affected client gives informed consent, the opinion said. Once the associate returns to the firm, there are additional ethical obligations to be conscious of, it said.

The associate can't represent a person the associate once prosecuted in a subsequent civil action against the government concerning the same transaction or in any matter where the lawyer was so involved that "the subsequent representation can justly be regarded as changing sides," it said.

Furthermore, the associate needs written, informed consent from the D.A.'s office to represent a client in connection with a matter in which the associate participated "personally and substantially," the opinion said.

As a final note, the opinion pointed out that it's the responsibility of a law firm's leaders to make sure the firm has policies in place that provide "reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."

Judges Must Weigh Inability to Pay Bail, Fees, ABA Says

- American Bar Association opinion says judges ethically obliged to do so
- Criminal, civil litigants shouldn't be jailed if they can't pay debts, it says

Some judges are repeatedly falling short of their ethical duty to inquire about the ability of criminal defendants and civil litigants to pay legal debts, including bail, fees and fines, before jailing them for non-payment or threatening to do so as an inducement to pay, the American Bar Association said.

An opinion released on Tuesday by the group's Standing Committee on Ethics and Professional Responsibility described the problem as a "serious breach" of a judge's duty "to comply with the law" that could merit discipline for violating the Model Code of Judicial Conduct. "The duty to inquire is foundational not just to the constitutional rights of litigants but to the integrity of the judicial process and public confidence in it," the opinion said.

And it disproportionately affects low-income litigants, because better off ones can "simply pay to avoid incarceration," it said.

The criminal justice system has grappled for decades with how to address inequalities in the system that sends disproportionately more low-income, minority defendants to jail.

A judge who doesn't look into a person's ability to pay a debt, whether civil or criminal, violates the model code's mandate to comply with the law and accord every person in a legal proceeding the right to be heard, the opinion said.

There are a number of reasons why, over the past few decades, there's been an increase in costs, it explained.

Courts across the country have faced "severe" budget crises, resulting in higher legal fines and fees, there's been a growth of misdemeanor enforcement and an expansion of "a movement to require criminal defendants to pay restitution and other costs of administering the criminal justice system," the opinion said.

But bail requirements and collection methods can compromise the model code's dictates that judge act with fairness and impartiality, it said.

A Justice Department investigation following the fatal police shooting of Michael Brown in 2014 in Ferguson, Mo., raised the issue of court debt collection practices there to help boost municipal finances, a practice that it found singled out blacks

and violated Fourth Amendment guarantees, the opinion said in citing what it called an egregious example.

And a Missouri judge, for example, was suspended for personally administering a law "library fund" from charges assessed in guilty pleas where money was spent on law books, wages, court furnishings, and court maintenance, the opinion said.

Despite these "vigorous collection policies," the National Center for State Courts Handbook says that incarceration for failure to pay legal financial obligations should be "a last resort," the committee said.

Judges should use "objective financial data" like income and net assets as well as financial obligations to determine an ability to pay and adopt policies and procedures to help, it said.

The Conference of State Court Administrators and the National Center for State Courts have guidance on how to design and implement these procedures, the committee said.

And doubts about an ability to pay should be resolved against incarceration if the person doesn't pose a safety threat, it said.

By adopting "carefully prescribed procedures to prevent incarceration where a litigant lacks the resources to pay legal financial obligations or private civil debts," courts help "protect the integrity, fairness, and impartiality of the judicial process," it concluded.

Pennsylvania Bar Issues First Opinion on Remote Work Amid Crisis

- Lawyers must be technologically competent, bar says
- Oregon and Michigan have issued ethical guidelines

Client data confidentiality is paramount while lawyers and law office staffers work remotely during the coronavirus pandemic, the Pennsylvania Bar Association said in an opinion written to address ethical concerns voiced by lawyers ordered to close their offices.

The opinion is the first of its kind to be released by a state bar, although others including Michigan and Oregon have issued ethical guidelines for attorneys. "The COVID-19 pandemic has caused unprecedented disruption for attorneys and law firms, and has renewed the focus on what constitutes competent legal representation during a time when attorneys do not have access to their physical offices," the bar's legal ethics committee said April 10.

The committee pointed out that while the issue of remote work isn't new, and past ethics opinions have addressed related topics like technological competence, many attorneys and staff weren't prepared to work from a home office once the state's stay-at-home order went into effect, prompting the opinion.

The duties of competence and confidentiality are the major ones implicated by working from home, it said.

In order to protect computer systems and paper files, lawyers have to be competent in the "benefits and risks of technology," the committee said. Some "reasonable precautions" for lawyers and staff to take to protect confidentiality under professional ethics rules include:

- Requiring the encryption or use of other security to assure that information sent by electronic mail are protected from unauthorized disclosure;
- Using firewalls, anti-virus and anti-malware software to prevent the loss or corruption of data;
- Requiring the use of a Virtual Private Network or similar connection to access a firm's data; and
- Requiring the use of two-factor authentication or similar safeguards.

Many attorneys might also have paper files at home and so should make sure they aren't accessible by anyone not authorized to see them, it said. Confidentiality also extends to conversations, the committee said. Attorneys need to be careful during phone or online conferences about being overheard, particularly by smart devices like Amazon's Alexa and Google's voice assistants, which "may listen to conversations and record

them," it said. However, not all information requires the same level of protection, the committee said.

An ABA opinion on securing communication of protected client information advocates a "fact-specific approach to business security obligations," it said. This takes into account what type of information is being communicated—highly sensitive, insignificant—and what reasonable efforts lawyers can take to protect it.

The committee also provided general suggestions for lawyers on how to meet their ethical obligation of competence while maintaining confidentiality. They should consider:

- Avoid using free Wi-Fi;
- Use Virtual Private Networks;
- Use multi-factor authentication to prove their identity;
- Employ strong passwords to prevent hacking;
- Back up remotely stored data; and
- Have a secure home office through the use of firewalls, up-to-date software, and antivirus software.

"Although the pandemic created an unprecedented situation, the guidance provided applies equally to attorneys or persons performing client legal work on behalf of attorneys when the work is performed at home or at other locations outside of outside of their physical offices, including when performed at virtual law offices," the committee concluded.

The opinion is Penn. Bar Ass'n Committee on Legal Ethics & Prof'l Responsibility, Formal Op. 2020-300, 4/10/20.

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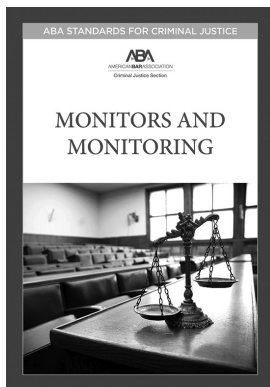
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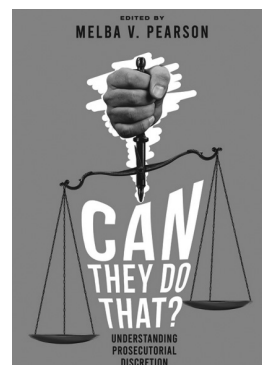
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