AMERICAN BAR ASSOCIATION
Criminal Justice Section

Criminal Justice Section Newsletter

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The Fall Institute Highlights

The Criminal Justice Section hosted its annual Fall Institute on November 17-18, 2021 in Washington, DC, resuming in-person conference after convening a virtual meeting in 2020 due to the pandemic. The Section hosted seven plenary and breakout sessions over the course of the Institute covering a range of topics within the theme "Probation & Parole Transformation: Advancing Racial Equity and Enhancing Public Safety." The sessions aimed at developing greater awareness and advocacy to help probation and parole receive the attention necessary for real change.

Committee meetings were hosted virtually and in-person throughout the week. The Institute programming kicked off with the annual White Collar Crime Town Hall which discussed white collar enforcement priorities of the new Biden administration with enforcement heads from the SEC and DOJ.

The programming continued with two plenary sessions "Debunking the Myths of Probation & Parole Supervision" and "Dismantling Post Release Barriers to Successful Reentry." Video recordings of the institute programs will be available on the CJS YouTube Channel (ABA Criminal Justice Section).

The CJS Council also met and reviewed the Diversion Standards, which will have second reading at the Spring Council meeting.

The White Collar Crime National Institute

The 2021 White Collar Crime National Institute marked its 36th year on October 27-29, 2021. The institute returned for in person meetings (with all requisite distancing and precautions) in Miami, Florida, after being presented in 2020 in virtual fashion due to the conronavirus pandemic.

The institute was attended by leading federal and state judges and prosecutors, law enforcement officials, defense attorneys, corporate in-house counsel, and members of the academic community. The faculty included some of the top members of the white collar bar in the United States and abroad.

This year, each panel particularly focused on the impact of COVID-19 on the various substantive areas, including government initiatives and investigations to combat fraud related to the virus and new practices resulting from the virus. In addition, there was a panel on the impact of COVID-19 on the white collar practice, including the conduct of investigations by prosecutors and grand jury, and the handling of motions practice and trials.

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New Fellowship Program

In January 2022, the Legal Education Police Practices Consortium will be launching its inaugural Fellowship program. Member law schools of the Consortium have been invited to identify student Fellows who will be working with the Consortium Director to research their local policing organization and obtain existing policies and procedures which will be uploaded to a public database.

Fellows will conduct a police organizational survey to determine local policing contacts and their chain of command as well as local agencies (to include government and non-governmental agencies, non-profits, civil society organizations, and faith-based institutions) currently working with and/or on policing issues. The Consortium will use this information to advance the adoption of model police practices and initiate other projects designed to support effective policing, promote racial equity in the criminal justice system, and eliminate tactics that are racially motivated or have a disparate impact based on race.

Fellows will be meeting virtually every other week to discuss their progress and to hear from experts currently engaged in policing research and reform efforts. For additional information regarding the Consortium or the Fellowship program, please contact Jessalyn Walker at Jessalyn.Walker@americanbar.org.

A panel from the Fall Institute: (from lett to right) CJS First Vice Chair Tina Luongo, Chair Wayne McKenzie, Chair-Elect Justin Bingham.

Racial Justice and Diversity Committee

The CJS Racial Justice and Diversity Committee will be meeting on the following dates: January 19; March 16; May 18; June 15 (all at 5pm ET) and August 2022 (at the Annual Meeting). Please join these meetings for conversations around the ABA 21 Day Racial Equity Challenge, the Triumph and Tragedy of Engaging in Diversity Equity and Inclusion Work, and other topics of interest.

In the Spring of 2022, the committee will continue these conversations by hearing from Jeffery Robinson, Esq., the renowned founder of The Who We Are Project, a project designed to correct the American narrative on our shared history of anti-Black racism. Mr. Robinson is responsible for the award-winning movie, "Who We Are: A Chronicle of Racism in America," which will be released on January 14, 2022. In Spring 2022, he will engage with the ABA around the critical issues of Race and American History. Please visit thewhoweareproject.org/ for more information on the movie and The Who We Are Project. You can watch the official movie trailer at www.youtube.com/watch?v=IGsGRSgZbXY. For more information, contact Patrice Payne at patrice.payne@americanbar.org.

Writing Competition and Awards News

The competition topic for the **William W. Greenhalgh Student Writing Competition** in 2022 is "Technology-enhanced searches": Is the Katz reasonable expectation of privacy test, or the Jones trespass test, better suited to addressing the implications of technological advancements on the right to be free from unreasonable searches guaranteed by the Fourth Amendment? The deadline for submission is July 1, 2022. View details at www.americanbar.org/groups/criminal_justice/awards/writing_competition.

Also, due to continued concerns around the pandemic, the annual **CJS Awards Luncheon** was postponed until the Spring Meeting in 2022.

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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Upcoming Events

37th Annual National Institute on White Collar Crime: San Francisco, CA, March 2-4

CJS Spring Meeting, Savannah, GA: April 7-10

Health Care Fraud Institute, Las Vegas, NV: June 22-24

Gaming Law Institute: Henderson, NV: May 9-20

Health Care Fraud Institute, Las Vegas, NV: June 22-24, 2022

10th Annual London White Collar Crime Institute: London, UK, October

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

Getting a Fair Trial in the Age of COVID

By Paul Speca

The COVID-19 pandemic has had a profound impact on the practice of law, and Judge Barry Kamins, former New York State Supreme Court judge and adjunct professor at Brooklyn School of Law, says perhaps his specialty has been hit the hardest. I talked to Judge Kamins recently about the obstacles the legal profession must address if public trials are to resume in the near future.

"I don't think there is any area of the law that has been affected as much as criminal law has," Kamins said. "When this pandemic hit it turned the world of criminal law upside down."

He said this is because defendants in criminal cases have constitutional rights that defendants in other types of cases don't have: the right of confrontation (to be confronted by witnesses), the right to a public trial and the right to a speedy trial.

When the pandemic began, however, former New York Gov. Andrew Cuomo issued an executive order that suspended some of those rights in his state. The right to appear in court, for example, was relegated to defendants in felony cases having preliminary hearings on computer screens in Zoom meetings. Trials were not taking place, which resulted in a tremendous docket backlog. Grand juries were not being convened, so cases could not be presented to them.

"Right now in New York City there are thousands of cases that normally would have been presented to a grand jury and were not," Kamins said, "and these are just stacked up on calendars in the courts."

Defendants, especially those who have been incarcerated, have their own challenges. During the pandemic their families were not able to visit them, and neither were their lawyers, who had to communicate through video conferences at the jail.

"It's a poor substitute to have to interview your client over a video conference," Kamins said. "Defendants need to be represented adequately by counsel, and there are things that have to be discussed and papers that have to be exchanged."

He said the pandemic has been hard for everyone in the legal system, and he doesn't expect that system to get back on track until sometime next year. Holding trials will be problematic since many potential defendants, witnesses and jury members aren't vaccinated and don't plan to be. Jury boxes that cause people to sit in close proximity might have to be enlarged, as will typically small deliberation rooms.

Other obstacles could also get in the way of a fair trial. For example, witnesses may decline to appear for fear of their safety. And anyone on the witness stand needs to be questioned and cross-examined by both sides. If that person hasn't been vaccinated and needs to wear a mask, the jury can't see his or her facial expressions, which Kamins says is an important part of the way they evaluate the credibility of a witness or defendant. Another issue will be finding suitable jurors, since some people are reluctant to congregate in enclosed spaces.

"You don't want somebody sitting on a jury who is distracted from the issues of the trial and more concerned about issues of his or her own health," he said. "On the other hand, people frequently try to get out of jury duty by coming up with excuses, and you don't want people using that as an excuse to get out of jury service."

"It's going to take some planning by the court to be able to afford defendants the trial they are entitled to," he said, "but the defendants cannot be denied their trials indefinitely."

Kamins says even greater problems could arise in the long term. Defendants have already been waiting 15 months for trials that aren't likely to happen until next year, raising questions of constitutionality. He said it's possible that some serious cases – rapes, murders, burglaries, robberies –- may be dismissed because the court system was not able to provide trials for defendants when they were obligated to do so.

"Looking at two, three or four years from now we may still be litigating a lot of these issues on serious cases that judges had to dismiss because of the length of time somebody was waiting for a trial or because a witness refused to come to court because he or she was concerned about the pandemic," he said.

If fair trials -- indeed trials at all -- are to begin again, these problems, from courthouse safety to rights guaranteed by the Constitution, must first be solved. How it will all be handled remains a mystery now, but we'll know the answers in the coming months.

Paul Speca is Senior Vice President, Small Law Markets at LexisNexis.

UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

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Missouri Must Rewrite Parole Rules for Young Homicide Convicts

- *Juveniles can't be sentenced to life without parole*
- *State doesn't provide meaningful retroactive review process*

The parole rules that Missouri adopted to comply with the U.S. Supreme Court's holding that juveniles convicted of homicide can't be sentenced to life without parole don't provide a meaningful opportunity for release from prison, the Eighth Circuit said Friday.

The plaintiffs were convicted of homicide when they were juveniles and sentenced to life without parole before the Supreme Court said their sentences were unconstitutional. Because the Supreme Court's decision was made retroactive, Missouri adopted a plan allowing defendants who fit within the holding to apply for parole 25 years after they were sentenced.

The plaintiffs were denied parole under the state's plan and then sued, claiming that they weren't allowed to adequately prepare for their hearings because they couldn't see their parole files. They also said they were only allowed one delegate at their hearing to speak for a limited time about their ability to transition back into their community, while multiple victims and prosecutors could speak on any topic for any length of time.

According to the plaintiffs, they received a "barebones, boilerplate form" without any details saying their requests were denied.

The federal district court ruled for the plaintiffs and adopted a remediation plan that prohibited the state from using any risk assessment to evaluate a parole request unless it specifically incorporated concerns highlighted by the Supreme Court about juvenile offenders.

The plan that Missouri adopted is unconstitutional, the U.S. Court of Appeals for the Eighth Circuit said.

The plan limits the plaintiffs' ability to adequately advocate for their release, it greatly impedes their ability to prepare for a future hearing, and doesn't focus on their rehabilitation efforts and subsequent growth and maturity, the opinion by Judge Jane Kelly said.

Missouri's policies deprive the plaintiffs "of their Eighth Amendment right to a meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation," the court said.

The district court also didn't abuse its discretion by limiting the risk assessment evaluation Missouri can use, the court said. The decision was animated by the Supreme Court's concerns when it ruled that juveniles can't be sentenced to life without parole, it said.

Judge Morris S. Arnold criticized Missouri's plan for not addressing concerns about the defendant's maturity and rehabilitation.

Judge Steven M. Colloton dissented. Missouri was allowed to adopt a plan to consider whether juvenile offenders convicted of murder should be paroled, which it did, he said. "That should be the end of this case," he said.

The case is Brown v. Precythe, 2021 BL 352370, 8th Cir., No. 19-2910, 9/17/21.

Woman Who Says Prosecutor Helped Cover Up Rape Has Suit Blocked

- *5th Cir. says hands tied by Supreme Court precedent on standing*
- *Dissent says woman has 14th Amendment failure-to-protect claim*

A woman alleging she was raped by a relative, an assistant warden at the Louisiana State Penitentiary, doesn't have standing to sue a district attorney who worked with the suspected attacker to help him avoid prosecution, the Fifth Circuit ruled Tuesday.

Priscilla Lefebure alleges that she was sexually assaulted "on multiple occasions" by Barrett Boeker on the grounds of the penitentiary, in a residence provided to the assistant warden by the state. She alleges that Boeker, the husband of her cousin, used his connections with Samuel D. D'Aquilla, the district attorney for Louisiana's 20th Judicial District, to convince authorities not to investigate or prosecute him.

Boeker was arrested on suspicion of second degree rape but never charged. His attorney, who is related to D'Aquilla, is also

alleged to have conspired with law enforcement authorities in the case.

The U.S. District Court for the Middle District of Louisiana partly granted a motion to dismiss by D'Aquilla, while finding that Lefebure had standing to sue. But the U.S. Court of Appeals for the Fifth Circuit reversed, ruling crime victims have no standing to challenge such misconduct if they aren't the ones facing prosecution.

"It is difficult to imagine anyone who deserves justice more than Priscilla Lefebure. But her claim against D'Aquilla runs into a legal obstacle that the panel has no discretion to ignore," the court said in an opinion by Judge James C. Ho.

"Supreme Court precedent makes clear that a citizen does not have standing to challenge the policies of the prosecuting authority unless she herself is prosecuted or threatened with prosecution," the court said.

The Fifth Circuit cited Linda R.S. v. Richard D., a 1973 U.S. Supreme Court decision that interpreted the Texas criminal code. The justices found that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."

Chief Judge Priscilla R. Owen joined the opinion.

Judge James E. Graves Jr. dissented. He agreed with the majority's view on standing under the Supreme Court case but said "an individual may nevertheless have standing to pursue an equal protection claim against law enforcement for discriminatory underenforcement of the law."

The case is Lefebure v. D'Aquilla, 5th Cir., No. 19-30702, 10/5/21.

Lawyers Must Address Language Barriers With Clients, ABA Says

- *Lawyers must be able to communicate with clients who don't speak English*
- *If there's trouble communicating, lawyers should get technical or other assistance*

Lawyers must make every effort to effectively communicate with clients with limited English proficiency or who have a hearing or speech impairment, the American Bar Association said.

"Lawyers must communicate with clients in a manner that is reasonably understandable to those clients," an ABA ethics committee opinion said Oct. 6.

Providing competent legal services may mean that an attorney would need to hire outside help to ensure effective communication.

Communication challenges is an issue more lawyers face due to changing population demographics, the opinion said.

Clients must make informed decisions so lawyers must determine whether an interpreter or technology assistance is necessary to satisfy professional obligations once they become aware of a "language access issue," the opinion said.

Any doubt about whether communication is effective should be resolved in favor of getting help, it said.

Interpreters should be impartial and able to explain legal concepts. Any outside service also must comply with ABA model rule 5.3 for nonlawyer assistance, the opinion said.

Services must be "provided in a manner that is compatible with the lawyer's ethical obligations, particularly the Rule 1.6 duty of confidentiality," the opinion said. Attorneys can withdraw representation if services are too expensive.

Competent representation also includes paying "close attention to social and cultural differences that can affect a client's understanding of legal advice," so information isn't lost in translation, the opinion said.

The opinion is ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 500, 10/6/21.

ABA Mulls Changes to Unauthorized Practice, Remote Work Rule

- *Informal announcement made during UPL webinar*
- *Changes to rule could increase access to justice*

The American Bar Association is taking the first steps toward a possible amendment to its unauthorized practice rule, a step that could open up remote work for lawyers on a national scale and improve access to justice efforts.

The ABA Standing Committee on Ethics and Professional Responsibility "is mulling ideas for change and will then seek input from lawyers about what changes they might want to see in Rule 5.5," said attorney Lynda Shely.

Shely, who advises clients on legal ethics from her firm in Scottsdale, Ariz., and chairs the ABA's ethics committee, mentioned the development while moderating a panel on unauthorized practice.

"At this time, the Standing Committee is not making any recommendations for changes—we hope to offer CLE programs and meetings to first gather information," Shely said.

ABA's Model Rule 5.5 on unauthorized practice has been the basis for the standard in most states. It says lawyers admitted in one U.S. jurisdiction and not disbarred or suspended may provide legal services in another jurisdiction only temporarily and with strict conditions. Violators could be subject to discipline although that's believed to be rare.

In an opinion last December, the ABA eased the rule, saying that lawyers can work remotely in jurisdictions where they're not licensed as long as they only engage in law they're authorized to practice.

Several states, including New Jersey earlier this month, have relaxed their remote practice rules since the start of the pandemic, when many lawyers were forced to work at home in states where they weren't licensed. Their guidance mirrors the ABA's newest interpretation of the rule.

But the debate over the rule began before the pandemic, with critics saying it restricts access to justice. The panel debated whether competence, rather than geography, should determine where a lawyer can practice.

Lawyer Doesn't Have to Correct Client Who Lied in Deposition

- *Remaining silent after client's false statement isn't assisting criminal act, Texas Bar says*
- *Texas ethics rules diverge from ABA guidance*

A Texas lawyer whose client lied when questioned by opposing counsel during a deposition isn't ethically obligated to disclose the statement, the state bar said.

A lawyer's silence in the face of cross-examination perjury during a deposition doesn't constitute "assisting" a criminal or fraudulent act, the Texas Bar's professional ethics committee said in a recent opinion.

But the lawyer can't use the testimony "to advance the client's case in any way," the opinion said.

The scenario presents "very difficult issues" because it requires balancing the competing obligations of candor to the court, the duty to zealously represent a client, and maintaining client confidentiality, the opinion said.

The lawyer was representing the defendant in a case relating to a car crash. The client told the lawyer prior to the deposition that he'd been looking at his phone at the time of the accident but told opposing counsel that he hadn't been, the opinion said.

The duty of candor toward the tribunal hasn't been violated because the lawyer hasn't made a made a false statement, the opinion said.

And the lawyer hasn't used the false deposition testimony, it said. After the client lied, the lawyer didn't question him, and "silence by a lawyer when the client lies on cross-examination should not be deemed to be use of false testimony," the opinion said.

This diverges from the American Bar Association's view that once an attorney discovers a client has lied during a deposition, it's considered assistance if the attorney doesn't disclose the perjury, the opinion said.

The ABA also considers the duty of candor toward the tribunal to apply to depositions, an issue that Texas hasn't yet addressed, the opinion noted.

Even though the lawyer doesn't have to say anything, the lawyer should "urge that the false evidence be corrected or withdrawn," and warn the client of the ramifications of giving false testimony, the opinion said.

The opinion is Prof'l Ethics Comm. for State Bar of Texas, Op. 692, 10/21.

Note: Below are opinion/practice tips-type pieces from Bloomberg Ethics. These columns do not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owner.

Reading Between the Lines of Justice Department Deputy's ABA Speech

Deputy Attorney General Lisa Monaco's recent remarks on Justice Department priorities may be troubling to the business community, but she provided a roadmap that companies can use to avoid DOJ scrutiny and to reach favorable resolutions, Husch Blackwell attorneys Steven E. Holtshouser and Robert L. Peabody explain.

Deputy Attorney General Lisa O. Monaco's recent remarks at the American Bar Association's White Collar Crime National Institute generated much commentary. Her presentation addressed what corporations and their legal counsel can expect from the Department of Justice moving forward and introduced three big action items for the DOJ's enforcement efforts.

First, corporations under investigation that are seeking leniency must disclose all employees and non-privileged information to the government. In Monaco's view, the DOJ is better suited to determine the role of each player involved, rather than trusting the good-faith disclosures of those being investigated.

Second, a company's prior regulatory history will factor in future DOJ charging decisions. This is not a new concept altogether, but the scope would appear to be broader now; Monaco's comments suggests that all prior, DOJ-wide criminal, civil, and regulatory events be considered. A company's prior tax, securities, or environmental infractions—civil or criminal—will now be taken into account in determining outcomes in a Foreign Corrupt Practices Act or other DOJ investigations. Misconduct in one area will impact the outcome of an unrelated investigation. Businesses are advised to consider the impact of civil and regulatory resolutions today on unrelated future criminal investigations.

Third, Monaco gave new life to independent monitors by rescinding prior informal guidance disfavoring their use. Third-party monitors will now serve as DOJ's surrogates and business executives must foot the bill for DOJ's hand-picked watchdogs. Companies looking to avoid criminal sanctions will suffer not only restitution and fines, often subject to multipliers, but also expensive and intrusive monitors.

On a positive note, monitors were mentioned in the context of deferred prosecution and non-prosecution agreements (DPAs/NPAs)—helpful outcomes for any accused entity.

Reading Between the Lines, Probable Impact, To-Do's

We anticipate the enforcement landscape will change based on the approaches outlined by the deputy attorney general. In response, corporations should consider the following items to better manage risks.

1. Invest in Compliance, Remove Bad Actors

DOJ's warning is clear: Failure to hold individuals accountable or to invest in robust compliance will trigger harsh consequences. Companies in high-risk industries or subject to prior DOJ enforcement actions should consider conducting internal investigations to identify responsible individuals and implementing robust, effective compliance programs.

For corporations that have already implemented a culture of compliance, Monaco's remarks might occasion some refinement or tweaking of existing programs and processes; however, corporations that have not made good-faith efforts to improve compliance could be squarely in the government's crosshairs.

The necessary changes are as much cultural as operational, and corporate leaders need to take seriously the extent to which the new enforcement approach examines a corporation's culture of compliance and how that culture is expressed.

2. Prosecution of Individuals Will Increase

Monaco's remarks made clear that the criminal prosecution of individuals within businesses who commit criminal acts or reap the rewards of the acts remains a high priority.

3. DOJ Will Rely Heavily on Data Analytics

What data shows about trends of behavior should be a significant concern for companies, whether under investigation or not, because data can be manipulated in unforeseen ways, analytical methodologies can be flawed, and wrong conclusions can be drawn. Businesses operating in high-risk industries need to know what their own data shows and how it might be mined by DOJ.

4. Experienced Guidance is Key

Outside counsel is a cost center for businesses, but the direction DOJ is heading makes obtaining advice and counsel from experienced former prosecutors a wise investment, akin to the investments corporations make in cybersecurity or marketing. Among the risks faced by corporations, those presented by regulatory noncompliance can be costly, both in terms of the balance sheet as well as reputation.

Additional Areas of Concern

Monaco's far-reaching remarks touched on a range of issues, some operationally driven and others merely signaling a departmental change in posture. Among the latter, she exhorted DOJ line prosecutors to invest resources in cases that could be lost at trial, suggesting a courageous new approach at DOJ.

Of note, she reminded prosecutors of the minimum required to "commence a case" under the Principles of Federal Prosecution (PFP). Monaco's encouragement to "be bold" and not deterred by the "fear of losing" may be more aimed at corporations than her DOJ colleagues, because AUSAs are already cognizant of the minimum charging/evidentiary requirements and don't want to lose.

While Monaco's remarks concerning "edge cases" likely won't occasion a lot of concern, the DOJ's stated intention to embed FBI agents within its Fraud Section (and potentially other investigative sections) should be a concern. While seemingly efficient, housing prosecutors and agents together could pressure agents and AUSAs to prematurely produce indictments and civil complaints. AUSAs generally act as independent evaluators of the strength and credibility of evidence and the meth-

ods used to gather evidence.

Despite good intentions, without those checks—and when AUSAs and agents see themselves as collaborators—there is an added risk of regulatory overreach.

The Ahmaud Arbery Case: Lessons to Prevent Prosecutor Conflicts

The indictment of a former Brunswick County, Ga., district attorney for alleged misconduct in connection with the delayed prosecution of three men charged with killing Ahmaud Arbery holds lessons for prosecutors everywhere, say Alissa Marque Heydari, deputy director of the Institute for Innovation in Prosecution, and Ronald Wright, Wake Forest University School of Law professor. Prosecutorial conflicts of interest must be addressed with procedural reforms and enhanced training, they say.

The killing of Ahmaud Arbery in Brunswick, Ga., last year sparked conversations nationwide about the prevalence of racism in law enforcement and the dangers of citizen's arrest laws. But the recent indictment of Brunswick Judicial Circuit District Attorney Jackie Johnson, who initially handled the Arbery case, brought to the forefront an equally problematic aspect of our criminal system—conflicts of interest for prosecutors.

Johnson is accused on charges of violating her oath of office and obstructing police. One of Arbery's alleged murderers reportedly worked for Johnson's office as an investigator until 2019, and left a voice mail asking her for advice after the shooting of the young Black male jogger**.** Although it is too early to determine the strength of the criminal case, it is clear that the indictment relates to a personal relationship between Johnson and one of the accused murderers.

The conflict of interest at play in this case—in which the prosecutor personally knows the accused— is more likely to exist in a smaller jurisdiction. However, conflicts of interest can threaten the integrity of prosecutors' offices of all sizes.

How Conflicts Arise

A frequent source of conflicts of interests is the prosecutor-police relationship. When police are accused of misconduct, the collaborative relationship between police and prosecutors can make it difficult for prosecutors to evaluate such cases in an objective way. When a prosecutor works with the same group of police officers on a regular basis—whether by official policy or informal practice—it can lead to friendly relationships that blind the prosecutor to mistakes or misconduct by the police.

For example, many midsize and large prosecutors' offices—and their local police departments—have specialized units that focus on one category of crime, such as drug cases or sex crimes. Attorneys in these units often develop close relationships with the small group of police officers who exclusively investigate these cases.

A less obvious potential conflict with the police arises when officers bring cases directly to prosecutors with whom they already have a relationship. Doing so avoids the formal intake process, where a randomly assigned prosecutor receives the case and may be more likely to spot police errors.

Although most officers engage in this practice because they prefer to work with a specific prosecutor with whom they have a positive working relationship, and not for a particularly unethical reason, this informal practice heightens the potential for prosecutorial bias.

Prosecutor elections present another potential source of conflicts of interest. District attorney candidates must solicit donations, and that leads to conflicts when donors become involved in criminal matters.

For example, last December, the incoming district attorney in Bibb County, Ga., came under fire for accepting campaign contributions from those indicted in a racketeering and illegal gambling case. A recent study of campaign contributions to prosecutors revealed the role money plays in district attorney races, and the resulting potential for conflicts of interest.

Mitigating Prosecutorial Conflicts of Interest

Despite many sources of potential conflicts, there is little guidance to help prosecutors navigate these ethical quandaries. The American Bar Association's Model Rules of Professional Conduct establish specialized rules for prosecutors, but none specifically relate to conflicts of interest with police or donors. Nor has the U.S. Supreme Court addressed how prosecutors should handle these issues.

Several solutions can mitigate the harms of such conflicts, across offices of all sizes. To start, state legislatures can remove the authority of local district attorneys to investigate and prosecute officer-involved fatalities. Last year, New York State lawmakers permanently established a unit within the state attorney general's office to investigate police-involved deaths.

But prosecutors do not have to wait for lawmakers to act. Instead, they can implement internal mechanisms to mitigate the risks and harms of conflicts of interest.

First, larger offices should create committees to advise prosecutors regarding conflicts. Although assigning the task of evaluating conflicts to several attorneys may not be an

option for smaller offices, those with fewer attorneys on staff can designate one attorney as the local expert on ethics and conflicts for other prosecutors in the office.

Second, all prosecutors should undergo training that illustrates the array of conflicts of interest attorneys may encounter so that they carefully scrutinize their own cases. Without such training, individual prosecutors are more likely to miss a potential conflict of interest and fail to address the issue with the appropriate person, whether it be a senior prosecutor in a small office or a conflicts committee in a larger office.

Third, prosecutors' offices should not permit attorneys to accept cases directly from the police, rather than the formal intake process. At a minimum, offices that tolerate such a practice should require the line prosecutor to note in the file the way the case arrived, and inform a supervisor, so that the case receives heightened scrutiny.

Fourth, prosecutors must proactively track police misconduct to identify patterns of wrongdoing before an officer's negligence or criminal behavior puts the prosecutor's office in a conflicted situation.

Finally, candidates for district attorney must scrutinize who is donating to their campaigns, and decline or return contributions from those who present an immediate conflict of interest (such as police unions, police chiefs, sheriffs, defense attorneys, or those under investigation by the office).

In the wake of a grand jury's decision to indict the prosecutor who originally handled the Ahmaud Arbery case, prosecutors should review their procedures to prevent conflicts of interest. By supporting legislation and creating internal processes to address these issues, prosecutors can create an office culture that ensures fair prosecutions.

Oxford High Shooting: A Watershed Moment for Prosecuting Parents?

The fact that prosecutors in Michigan are charging the parents of the 15-year-old accused of shooting four students should be "a thunderous wake-up call" to all parents that they could be held civilly and criminally liable for their children's actions, writes Dmitriy Shakhnevich, criminal law attorney and John Jay College adjunct professor.

On Nov. 30, Oxford Township, Mich., was the site of the latest and unfortunately, familiar, deadly school shooting.

Fifteen-year-old high school sophomore Ethan Crumbley opened fire at Oxford High School. This act of horrific violence led to the deaths of four students, and severely injured seven others. Crumbley was charged as an adult with four counts of murder, as well as a terrorism charge. He faces life in prison upon conviction.

But instead of the usual thoughts and prayers, hand wringing, and inaction, prosecutors assigned to the case took a drastic, and somewhat innovative, step. They charged the parents of the shooter, James and Jennifer Crumbley, with involuntary manslaughter, putting the entire country on notice that we all can be part of the cure to our gun violence epidemic and could be held responsible if we don't act.

The Charges

In the U.S., criminal conduct is typically not charged against a passive wrongdoer unless prosecutors can make out a legal theory based upon either solicitation, conspiracy, or aiding and abetting.

In other words, the passive wrongdoer, in this case Ethan Crumbley's parents, must have taken affirmative steps in agreeing with the active wrongdoer or assisting the active wrongdoer. Once again, the passive wrongdoer must have been aware

of the criminal conduct that would take place, or at least know that the criminal conduct was foreseeable.

The charges against James and Jennifer Crumbley stem from the allegation that, for Christmas, they bought their son the weapon used in the commission of this offense. Beyond that, on the morning of the shooting, the Crumbleys were called into the school after it was discovered that Ethan had constructed drawings, in which he noted, in sum and substance, that he had thoughts of shooting a gun.

After being informed of this, text messages revealed a message sent by Jennifer Crumbley to her son, in which she had, in sum and substance, told her son that she is not upset with him, and simply told him not to get caught in the future. No further actions were taken by the Crumbleys to help their son or ascertain his mental state.

On Dec. 3, prosecutor Karen McDonald announced that the Crumbleys would be charged with four counts of involuntary manslaughter. Essentially, the charges seek to hold the Crumbleys accountable for their failure to take preventive measures to ensure their son was not a danger to others.

In order to convict the Crumbleys, prosecutors will have to show that the Crumbleys created a set of circumstances in which the risk of death was very high.

Certainly, from the facts that we have at our disposal, it is difficult to tell whether those elements can be satisfied. In the coming weeks and months, evidence will likely come out as to the relationship between the Crumbleys and their son, whether any prior risks were known to them, and whether they acted properly in disregarding the apparent warnings at the school prior to the shooting.

Each involuntary manslaughter count carries up to 15 years in state prison.

Civil Liability

In addition to criminal charges, we will likely see a set of civil suits arise from the shooting. In fact, a $100 million suit has already been filed against the school district.

Any lawyer who takes on tort cases like this will tell you that the most important portion of a personal injury case is whether there is a defendant who is not "judgment proof," meaning they possess the resources or insurance to pay a court judgment against them.

Unlike in a criminal case, recovery in a civil suit carries a far less serious burden of proof. The standard of proof would be proof "by preponderance of the evidence," rather than "beyond a reasonable doubt."

Beyond that, the filing party in such a case would simply have to prove negligence on the part of the Crumbleys—that they breached a duty of care by acting as they did. That is far less difficult than the involuntary manslaughter standard described above. So, it may well be easier to successfully win a civil suit against the Crumbleys than it will be to send them to jail.

Whether they have resources to pay if they lose any of these possible cases remains to be seen. But it should be a thunderous wake-up call to all parents and perhaps even friends that they, too, could be held responsible if a loved one commits a crime they knew could happen and didn't try to stop.

The Implications

The dramatic nature of charging parents for the conduct of their children cannot be understated. If bad parenting was chargeable as a criminal offense, then the entire criminal justice system would be turned upside down.

However, this case is not about mere bad parenting, it is about the steps that the parents should have taken to prevent such a tragic event.

In this situation, you have parents who purchased a weapon for their child, then may have disregarded somewhat explicit warnings that the child may use the weapon in a dangerous way, and expressly seem to have laughed off the severity of these possible events. Under these very specific circumstances, it is possible that this will be a watershed moment for prosecutions involving acts of violence by children.

However, it is unlikely that these charges will be the norm for school shootings going forward. Charges such as these will only be limited to instances where there is a very direct connection between the parents' conduct and a violent result brought about by a child.

This case does not necessarily mean that parents who buy guns for their children will now be charged with homicide offenses, but hopefully it will make them think more responsibly when they do.

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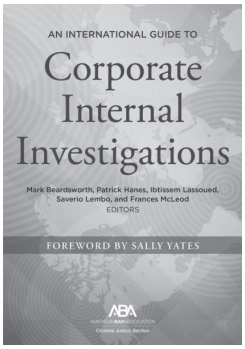

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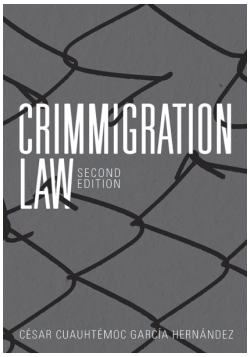

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