UPCOMING CJS FALL PROGRAMS

International White Collar Crime Conference in London

The Criminal Justice Section is hosting the “3rd Annual International White Collar Crime Institute,” October 13-14 at the Law Offices of Berwin Leighton Paisner, in London, United Kingdom. The one and a half day conference will feature topics as corporate espionage and cybercrimes, international money laundering and sanctions, cross-border evidentiary concerns, whistleblowers, deferred prosecution agreements and international internal investigations.

Michael J. Garcia, partner at Kirkland & Ellis LLP in New York City, will provide luncheon remarks. Garcia serves as the Independent Chair of the Investigatory Chamber of the FIFA Ethics Committee. Special focus will be paid to fraud and bribery cases from the perspective of top prosecutors from various countries. View the full program and registration information at www.ambar.org/cjsevents.

CJS Fall Institute in D.C.

Join the ABA Criminal Justice Section for the Seventh Annual CJS Fall Institute on October 23 – 24 in Washington, DC. The program will feature the annual White Collar Crime Town Hall, on October 23 from 2:00 – 5:00 p.m. with a reception to follow at the American Bar Association Offices.

On October 24, attendees will have the option of a half-day or full-day of CLE programming at Law Offices of Hogan Lovells. Topics range from ethics and professionalism to substance abuse in the legal profession. Committee and council meetings will also take place on Oct. 25-26. For more information please visit www.ambar.org/cjsevents.

Felman and Orr Become CJS Chairs


In addition, Felman and Orr will work with ABA President William Hubbard as he seeks to raise awareness of the Section’s criminal justice reform efforts. To read more about Felman and Orr’s initiatives, see www.americanbar.org/crimjust.

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CJS Programs at Boston Annual Meeting

The Criminal Justice Section hosted eight programs during the 2014 ABA Annual Meeting in Boston, August 7–10, including: Peer Justice: Can There Be “Judgment by One’s Own Peers” in the Juvenile Justice System?, Don’t “Play with Your Food”: The New Federal Crackdown on Food Fraud, and Barriers to Reentry: Reconsidering Collateral Consequences. The Section has also partnered with other entities and served as a cosponsor on programs such as a complimentary town hall meeting, “School-to-Prison Pipeline: What Are the Problems? What Are the Solutions?,” hosted by the ABA Council on Racial and Ethnic Diversity in the Educational Pipeline.

ABA President Champions Sentencing Reform

ABA’s new President William C. Hubbard seeks to aid the ABA Criminal Justice Section’s efforts in the areas of sentencing reform and overcriminalization as well as raise awareness of collateral consequences on a national scale. As one of his four initiatives, Hubbard discusses this issue in the video, Consequences of Over-Incarceration; view it at: www.americanbar.org/news/abanews/aba-news-archives/2014/08/aba_president_willia2.html.

Resolutions

During the Annual Meeting, the ABA Criminal Justice Section sponsored Resolution 110A, which was passed as amended, granting successors the right to file a claim that someone who was executed was in fact innocent. The Section also cosponsored Resolution 109, which urges all private and public sector organizations to develop, implement, and maintain an enterprise security program (ESP) in accordance with internationally accepted standards and frameworks. Resolution 109 was revised and adopted.

Awards

Two CJS awards were given at the Annual Meeting. Hon. J. Matthew Martin [above photo on the left, with 2013-2014 Chair Mat Heck, Jr.], associate judge of the Cherokee Court (Ret.), received the Section’s Livingston Hall Juvenile Justice Award, named in honor and in memory of Livingston Hall, a leader in the juvenile justice field and professor emeritus at Harvard Law School.

T. Markus Funk [below photo, far right, with CJS Delegate Neal Sonnett and CJS Director Jane Messmer], cochair of Perkins Coie’s Supply Chain Compliance Practice, was honored with the Frank Carrington Crime Victim Attorney Award, an honor given to attorneys or legal service providers (including organizations) who have directly represented specific victims in criminal, juvenile, or appellate courts or have worked to promote or implement policies to improve the treatment of crime victims in the criminal justice system.
Southeastern White Collar Crime Institute

The CJS Southeastern White Collar Crime Institute was held September 11–12 in Braselton, Georgia, near Atlanta. The program featured expert panelists and speakers who dealt with significant issues such as the effective use of criminal discovery, litigating prosecutorial conduct, FCPA and international bribery crimes, Supreme Court updates and other developments in criminal law, law enforcement initiatives, sentencing issues in economic crimes, and white collar criminal enforcement.

Conference in Honor of Andrew Taslitz

In honor of the late Andrew Taslitz, a distinguished scholar, academic, and ABA Criminal Justice Section leader, Howard University School of Law hosted “The Taslitz Galaxy: A Gathering of Scholars at Howard” on September 19 in Washington, D.C. The conference featured over 50 academics, many of whom are CJS members, including professors Stephen Saltzburg, Rory Little, and Bruce Green. Panelists connected a variety of criminal law issues, such as mistaken identification and innocence, criminal procedure, evidence, morality and ethics, empathy, neuroscience, and religion, with Taslitz’s published works.

Staff News

Menelik P. Coates is the new CJS staff attorney. He can be reached at 202-662-1523 or Menelik.Coates@americanbar.org.

CJS Diversity Goal

The ABA Criminal Justice Section values diversity in all aspects of our membership, participation, publications, and programming. The ABA CJS encourages and seeks active involvement of lawyers and associate members of color, women, members with disabilities and LGBT members in ABA CJS’s publications.

UPCOMING EVENTS

ABA/ABA Money Laundering Conference
Nov. 9-11, 2014, National Harbor, MD

Securities Fraud Institute
Nov. 13-14, 2014, New Orleans, LA

Criminal Tax Fraud and Tax Controversy
Dec. 10-12, 2014, Las Vegas, NV

Plan Ahead: Events in 2015

ABA/CJS Midyear Meeting
February 5–7, 2015, Houston, TX

Game Law Minefield Institute
February 12–13, 2015, Las Vegas, NV

National Summit on Collateral Consequences
February 26, 2015, Washington, DC

White Collar Crime National Institute
March 4–6, 2015, New Orleans, LA

CJS Spring Council & Committee Meetings
April 23–26, 2015, St. Petersburg, FL

CJS Spring CLE
May [TBD], San Antonio, TX

Health Care Fraud Institute
May 13–15, 2015, Miami Beach, FL

Forensics Conference
June 5, 2015, New York, NY

ABA/CJS Annual Meeting
July 30–August 4, 2015, Chicago, IL

International White Collar Crime Institute
October 12–13, 2015, London, UK

Global White Collar Crime Institute
November 19–20, 2015, Shanghai, China

For additional information, refer to the CJS calendar at www.ambar.org/cjsevents.
The Newly Published Commentary to the Investigative Function Standards

By Steven Solow

Fifteen years ago, former prosecutor turned law professor, Rory Little, posed the following challenge: because the ABA Prosecution Function Standards had fallen behind the growing role of prosecutors during the investigative phase of cases, an expanded source of guidance for prosecutors was needed. (Little, Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role, 68 Fordham L. Rev. 723 (1999)) Little noted the growing involvement of prosecutors during investigations, the tremendous potential of prosecutors to influence the course of those investigations, and recent criticisms of some prosecutors’ actions in that capacity. Little proposed that it was time to develop greater guidance for prosecutors, and their offices, given the complex demands of this role. The goal of any such guidance would be to help young prosecutors, and their supervisors, strengthen their ability to serve justice in the use of limited law enforcement resources.

Twelve years ago, the ABA took on Professor Little’s challenge, and this July, the ABA published the ABA Standards for Criminal Justice: Prosecutorial Investigations, which now provides detailed commentary for the previously approved black letter standards. The commentary is intended to clarify the meaning and intent of the new standards and to provide procedural recommendations to aid in their use. Finally, the commentary seeks to implement the intended aim of common law—prosecutorial best practices—and in so doing is intended to complement the black letter standards in a way that is both informative and helpful. This article summarizes some key aspects of these standards, with the hope that prosecutors, investigators and others (including law professors), will utilize this resource as a helpful guide.

When Little wrote his article, he observed that the prosecutorial role had evolved due to the demands of complex cases of various types, from organized and financial crimes, to complex regulatory prosecutions. These cases necessarily put government attorneys into a more active role in the investigative stage. This new level of involvement posed a potential risk to the integrity of criminal investigations as a result of “sweat equity”: prosecutors could find themselves more invested in pursuing cases in which they play an active investigative role. Because the prosecutor is an atypical advocate—operating under a heightened expectation to hold truth, justice, and mercy more sacred than winning—a codification of best practices was seen as a way to help prosecutors mitigate the risks posed by the use of investigative procedures to fairness and equity in the use of scarce enforcement resources, as well as a necessary backstop for the protection of the Constitutional rights always at issue in criminal matters. The new “black letter” standards stand as the ABA’s recognition of best practices for prosecutors involved in criminal investigations, with the aim to maximize the benefits of prosecutorial involvement while directly addressing the challenges posed to prosecutors and their offices by this role.

The Development of the New Standards

The Standards themselves were authored by a task force, created by the Criminal Justice Standards Committee in 2002, and were approved by the ABA House of Delegates in 2008, and as such are ABA policy until and unless any changes are made. (For a useful discussion of this process, See, Martin Marcus, The Making of the ABA Criminal Justice Standards: Forty Years of Excellence, in THE STATE OF CRIMINAL JUSTICE 2009 171 (Myrna Raeder ed., 2009) The black letter standards can be found on the Criminal Justice section of the ABA website.

The task force identified two major areas of concern. The first was whether prosecutors should have any involvement in criminal investigations, and the second was what form an almost entirely new set of standards should take. The task force addressed the first concern by considering concerns from several other participants in the criminal justice process, and found that statutory requirements—for search warrants, electronic surveillance, and related means of investigation—make prosecutorial involvement in the investigative process a necessity. From this, the task force concluded that careful guidance could add substantively to the fair administration of justice. As the Commentary notes:

In the course of writing these Standards, the Task Force found that there was broad consensus among the prosecutorial and defense bars, and among judges, as to what kinds of investigative steps are appropriate in what kinds of cases. In some sense, there is an
unwritten “common law” of prosecutorial good practices, and members of the bar know when a prosecutor violates it. Where it exists, these Standards attempt to reflect that consensus. Where it does not, the Standards are an attempt to forge one.

By considering the first major area of concern, the task force arrived at a solution to the second. The new standards are divided into three sections: general principles, standards for investigative functions of the prosecutor, and the resolution of conflicts and problems. The first part of the new standards also describes their intended scope. They are designed to address and provide guidance for prosecutorial involvement in both criminal investigations and the charging or post-charging stages as they overlap with the investigative stages. The new standards are not intended to be the basis for possible discipline of the lawyers they concern, to make legal claims or create rights, or to modify rules of professional conduct. Moreover, the investigative role of the “prosecutor” is intended to include attorneys outside of a prosecutor’s office who provide legal advice, counsel or support for criminal investigations.

Section I: General Principles to Guide the Prosecutor

The first set of standards affirms general principles designed in accordance with engrained expectations concerning the role of the prosecutor in the investigative stage, and provides guidance concerning the benefits and risks of certain investigative techniques. By outlining these principles, the first section works to emphasize the prosecutor’s role and responsibility in the criminal justice system: to operate as an integral part of an institution that aims to serve justice, and not act as an independent agent. This section addresses the need for prosecutors to be guided by facts and to protect the investigative process from improper influences, while staying mindful of the extensive impact criminal investigations have on all parties involved. Finally, the general principles of the new standards call for supervision, structured oversight and open communication to mitigate risk and encourage compliance.

The Commentary describes these provisions in summary as follows:

… to maintain the legitimacy of the criminal justice system, requires a fact gathering process that is conducted within legal, practical, ethical, and moral constraints. Determining the truth is, by its nature, an imperfect endeavor. In making decisions during an investigation, the prosecutor should be mindful of the risk to the fair administration of justice resulting from a failure to conduct the fact-finding process within these constraints. When premature conclusions as to guilt drive the investigation, the investigation becomes a warped search for facts to support that conclusion. In service of this effort, these Standards support the view that the Constitutional prohibition on selective prosecution based on improper considerations such as race, gender, religion and the like, should be applied by the prosecutor to criminal investigations.

Of course, these considerations should not paralyze the prosecutor from pursuing an investigation with vigor, while at the same time constantly evaluating and reevaluating conclusions or views as to guilt or innocence of the subjects of the investigation. As an investigation progresses, it will be difficult for all involved, including the prosecutor, to suspend judgments on guilt or innocence. The prosecutor, with the ultimate authority on whether a case will go forward, has a particular obligation to suspend judgment, protect the innocent, avoid missing crucial investigative avenues, and exercise discretion in the use of criminal sanctions for the conduct that is the subject of the investigation.

Section II: Standards for Investigative Functions of the Prosecutor

The second section covers specific investigative functions of the prosecutor—investigative techniques—with the benefits and risks of prosecutorial involvement as the organizing principle. For example, one reported benefit is the legal advice that prosecutors provide to facilitate sound case handling decisions. In this way, involvement of the prosecutor also works to increase the likelihood that the obtained evidence will be both admissible in court and sufficient to acquire and sustain a conviction. The risk presented occurs when a prosecutor fails to maintain the integrity and legitimacy of the criminal justice system. To counter such risk, the standards in this section call for the prosecutor to shepherd limited resources for public prosecution by helping to make prudent decisions concerning their use.
The investigative techniques covered in this section include the use of undercover agents, the handling of informants, subpoenas, electronic surveillance, and other investigative means, in addition to the management of parallel civil and criminal investigations. The use of special prosecutors and special prosecution units are also covered, along with the use of any money, resources and information obtained through non-governmental means. The totality of these techniques are covered in order to advise prosecutors on how to avoid practices that could undermine the integrity of criminal investigative functions. This section concludes by urging the office of the prosecutor to provide the training, guidance, supervision, and means of open communication any organization intending to adhere to these standards should employ.

Section II is arguably the part of the new standards most responsive to Professor Little's challenge, and the commentary quotes his 1995 admonition that new guidance should “compel prosecutors to be explicit and think more broadly in their assumptions, goals and cost assessments. Public prosecutors should, after all, be considering the costs of their actions to all members of the public they serve.” (Little, 69 Ford. L. Rev. at 727).

**Section III: The Role of the Prosecutor to Resolve Conflicts and Problems at Investigative Stage**

The third part of the new standards centers on the prosecutor’s responsibility to address and resolve instances of misconduct on the part of practitioners and participants of the criminal justice system: law enforcement, judicial officers, defense counsel, and any witnesses, jurors, or informants. In addition to preventing illegally obtained evidence from tainting the criminal investigation, prosecutors must also investigate the potentially criminal means by which illegally-obtained evidence is discovered. Cooperation and consultation are the organizing principles of this section, and the standards emphasize that decisions concerning major investigative steps should be made in consultation with and under the direction of appropriate supervisory members of the office of the prosecutor.

The third section of the new standards also speaks to the responsibility of the prosecutor to protect the legitimacy of the criminal justice system by working to maintain the integrity of the investigative process. The standards clearly state the responsibility of the prosecutor to resist efforts to allow personal or partisan influences and political considerations to dictate any decisions connected to a criminal investigation. They also reinforce a long-held policy of the ABA to limit legislative oversight of the criminal justice system. In this, the last section of the new standards highlights prosecutorial responsibility to strive for just rulings independent from political influences, and vindicates citizens' privacy rights that have recently been diminished through the expansion of doctrines such as “inevitable discovery.”

Finally, as the Commentary notes, this section addresses the “significant challenge” when a prosecutor is faced with information about potential misconduct by other participants in a criminal investigation, noting that there “may be a tendency to diminish the significance of, or to demand extraordinary proof about, information concerning potential misconduct as a way to avoid its impact on the matter at hand, and on personal and institutional relationship.” That said, the commentary notes that the Standard seeks to provide both encouragement and a useful standard, to junior and more experienced lawyers, as to when to notify supervisors and seek guidance. Thus when faced with either a “reason to suspect” misconduct, or “reason to believe” that poor staffing or incompetence is evident, further inquiry and consultation is called for.

**Conclusion**

These new standards, along with the newly published Commentary, provide guidance for both new and more experienced prosecutors to rely upon. At the heart of both the black letter and the Commentary is the principle that the prosecutor is a gatekeeper during the criminal investigative process, and thus serves as perhaps the most critical part of an institution that aims to execute justice. The new standards also encourage supervisory prosecutors to exercise guidance, provide training, and pursue best practices in order to preserve the unique role of participating line prosecutors in investigative decision-making. These new standards—codified in *Prosecutorial Investigations*—aim to normalize those best practices for prosecutorial conduct across jurisdictions, thus encouraging the continued refinement and improvement of the critical role of the public prosecutor during criminal investigations.

The black letter standards can be found on the ABA website: www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Pros_Investigations.authcheckdam.pdf. Revisions, additions, or deletions will be noted on the Criminal Justice section of the ABA website.
Virtual-currency may have the potential to break new ground in the payments industry. Conceptually at least, it promises unparalleled consumer access to a global payment system where participation is restricted only by access to technology, and where low transaction fees provide a potential advantage over established systems.

In practice, however, the virtual-currency market remains fragile — due to an uncertain regulatory environment, evolving perspectives on accounting and tax treatment, spotty merchant acceptance and minimal consumer awareness, among other reasons.

Bitcoin

Introduced as open-source software in 2009, Bitcoin was the first virtual-currency, and — with 13 million coins in circulation and an estimated market value of approximately $7.9 billion — it is currently the market leader. Like other virtual-currencies, it is exchanged on a peer-to-peer network independent of central control.

Bitcoin has captured the imagination of investors, technologists, merchants, entrepreneurs and consumers seeking to harness emerging technologies to create new payment systems. Yet for all its positive attributes, Bitcoin carries a dark side. Its most fundamental innovations — speed, secure transfer and store of value, and limited personal data exposure — have opened up new opportunities for threat actors, from cyberthieves and money launderers to rogue states. Indeed, among virtual-currency’s tech-savvy early adopters are sophisticated financial criminals who view Bitcoin as one method for engaging in illicit transactions.

Whether law enforcement and private industry succeed or fail in creating innovative safeguards to counter these new threats may well determine if virtual-currency will live up to its potential, and survive the long-term tests of legitimacy. This paper provides an introduction to these threats — and comments on the impact this emerging technology may have on existing corporate compliance frameworks designed to detect and mitigate the impact of financial crime.

Virtual-currency financial crimes: An overview

Money Laundering

A recent case illustrates how two of virtual-currency’s greatest strengths — personal data security and network decentralization — can be co-opted to exploit the pseudo-anonymous nature of transactions.

An illegal contraband market known as Silk Road — whose website was accessible only through the anonymizing TOR network — was configured with a payment system that required users to establish a “Silk Road Bitcoin address,” in addition to their own personal virtual-currency address, which would be stored on a virtual-currency “wallet” maintained on servers controlled by Silk Road.

By utilizing “tumbler” technology to process transactions in a way that obscured the personal virtual-currency addresses of its users, Silk Road overrode the transparency otherwise inherent in the Blockchain — the public ledger where all Bitcoin transactions are recorded — and enabled anonymous criminal transactions untraceable to the individual parties’ own unique (pseudo-anonymous) virtual-currency addresses, let alone their physical identity. (On October 1, 2013, the FBI shut down Silk Road and arrested its 29-year-old...
Cybertheft

Another of virtual-currency’s purported strengths that has proved vulnerable is its virtual graphic transferability. Virtual-currency allows parties to conduct near-instantaneous, irreversible transmissions of value over the Internet, without a trusted third-party intermediary. While this has immense positive implications for the future of payment systems, it also carries comparable threat implications for fraud and financial crime.

A good illustration of this threat is the sophisticated cyber-attack that helped to drive Mt. Gox, once the world’s largest virtual-currency exchange, into bankruptcy. Although the extent of the attack is unclear, the initial understanding is that cyber-thieves altered the virtual graphic hashes — the mathematical functions that serve as electronic transaction fingerprints — of Mt. Gox’s transactions, thus tricking its systems into replicating the virtual-currency transfers it made in settlement of customer exchange transactions, and draining its holdings.

Under a traditional payment system, such as a credit card or wire transfer, the third-party intermediary charged with processing the transactions would have identified a red flag when it detected identical amounts being transferred multiple times to the same party. The intermediary could have notified the transferor and suspended payments to the transferee (indeed, this is part of the value that intermediaries provide in exchange for their transaction fees). But in the virtual-currency system, if the transferor is tricked, as was Mt. Gox, there is no way to stop or reverse the transfer — and no third party with a vantage point to detect suspicious activity.

Thus virtual-currency’s irreversible transactions and disintermediated network provide threat actors with opportunities for theft not available to them in the traditional financial system.

Tax evasion, terrorist financing and other crimes

As the market for virtual-currency continues to evolve, it is likely that threat actors will seek to leverage this emerging technology to engage in more economic crimes.

Tax evasion may be enabled by the difficulty in identifying parties to a virtual-currency transaction, the borderless nature of virtual-currency wallets, and the multi- and extra-jurisdictional challenges of the Internet. Phishing schemes may benefit from the same themes exploited in the Mt. Gox theft. Bribery, blackmail, ransomware and extortion payments may become easier to mask and harder to prove and trace. Terrorist financing may find new avenues.

Current regulatory and law enforcement responses

The U.S. government has led the way in countering the financial crimes threat presented by virtual-currency. Existing AML regulations governing money transmission, coupled with recent guidance from FinCEN, give the government increasing powers to reduce the impact of money laundering activities that exploit virtual-currency technology. In addition, recent IRS guidance that “convertible virtual currency” is, for U.S. federal income tax purposes, treated as property, rather than foreign currency, shows that U.S. tax authorities are taking seriously the novel tax issues posed by virtual-currency — and can likewise be expected to be serious about mitigating the threat of tax evasion.

In contrast, international attitudes are inconsistent and evolving. Socioeconomic conditions, Internet freedom and penetration, traditional-currency instability and geopolitical risks all play a role in defining the stances of governments around the globe.

Among countries that have not outlawed virtual-currency, the approach remains cautious and somewhat limited. While Australia, the United Kingdom, Canada, Singapore and others have released or are releasing tax guidelines on how to treat virtual-currencies, many others have yet to take action. With only the current global Financial Action Task Force anti-money laundering (AML) standards to guide meaningful discussion on the threat of money laundering, differences in international regulation can potentially be exploited by threat actors seeking to undermine virtual-currency technologies.

Securing virtual-currency technology: Industry opportunities

Priorities are shifting towards an increased emphasis on regulatory compliance for these companies. Various states and the federal government have warmed to virtual currencies and are enhancing their regulatory regimes accordingly. Those that are attempting to ignore the existing regulatory requirements will face challenges in their evolution as the regulators catch up to the sector. Virtual-currency also offers real potential to transform...
the landscape of financial crime investigation and enforcement. The key to unlocking this potential lies in the ability to analyze the public Blockchain ledger.

Crafting a virtual-currency focused AML solution will require. It will require the creation of software, coupled with a toolkit of policies, procedures and internal controls, that can achieve the level of reliability provided by current AML programs at traditional financial institutions — but that interpret and analyze the entirely new forms of data made available by Blockchain. Blockchain analytics, forensic technology, and AML compliance specialists will need to come together to form a solution that aligns with regulatory expectations.

Building new capabilities for the digital era

Unfortunately, a decentralized verification system, akin to the clearing function in today’s payment systems, is not an adequate vehicle for law enforcement or regulators to monitor illicit transfers. Although the Blockchain is open-source, it provides little capability in and of itself to identify suspicious activity — or, ultimately, user identity. Similarly, the public nature of transactions and the ability to mine that activity may prove to be too transparent for legitimate enterprises that do not wish such transactions to be visible.

Industry players — those who hold consumer wallets, convert virtual-currencies for fiat currencies or participate in oversight or operation of the technological protocol — have a critical role to play in ensuring their AML programs are robust. After all, they ultimately hold the data that will be required from an enforcement perspective.

Cyber assessments, required to assess vulnerabilities in data flows within an organization, will need to absorb the fundamentals of this new technology — particularly in the new realm of multi-signature (or “multi-sig”) capabilities — to provide the C-Suite the comfort that the payment system can be integrated safely into existing e-commerce platforms.

The road ahead

For the time being, virtual-currency remains mostly on the fringe for both law-abiding citizens and financial criminals. Banks and credit cards will remain the payment system of choice for consumers, and cash will remain a primary medium of exchange for criminals. Still, the industry continues to move forward. New York State’s recent issuance of a proposed regulatory framework for licensing virtual-currency exchanges, and the first moves of large corporations towards accepting virtual-currencies as payment are only the most recent developments in virtual-currency’s slow but steady move toward mainstream use and acceptance.

As the industry continues to develop, the challenge of mitigating the threats posed by financial criminals will become more visible. And the ability to get ahead of these threats will likely be a defining attribute of tomorrow’s market leaders.

If the innovative technologists that give life to the virtual-currency ecosystem can converge their efforts with those of traditional financial crime specialists, virtual-currency may one day live up to its promise — while becoming even more resistant to crime than traditional financial systems. But if this convergence doesn’t occur, the virtual-currency industry could be doomed to indefinite marginalization.

Endnotes

1 https://Blockchain.info/charts.
**Trial Conduct:**

**Lawyers May View Jurors' Social Media, But Mustn't Try to Access Nonpublic Material**

Lawyers conducting jury research before and during trial may look at any electronic social media information about jurors that is available without an access request, even if the website will automatically notify the juror about the lawyer's visit, the ABA's ethics committee advised April 24 (ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 466, 4/24/14).

The opinion makes clear that lawyers may not use social media to communicate with jurors and may not, either personally or through another, request access to a juror's electronic social media. But unlike some opinions from other bar groups, it concludes that no improper contact with jurors occurs merely because a particular social media network lets members know when other members view their information.

Lawyers must notify the court, the committee also advised, if they learn from social media or otherwise that a juror is engaging in fraudulent or criminal conduct, including criminal contempt of the court's instructions.

**Look but Don’t Touch**

The committee noted that many Internet blogs and websites containing social media information are publicly accessible to anyone. Other social media sites such as Facebook, LinkedIn and Twitter allow subscribers to select their own privacy settings, and a person who wants access to someone's protected information must send a request asking that person for permission.

The opinion applies the Model Rules of Professional Conduct—particularly Model Rule 3.5(b), which forbids lawyers to communicate with a potential juror leading up to trial or any juror during trial unless authorized to do so by law or court order.

Just as a lawyer may drive down the street where a juror lives to glean publicly available information, a lawyer does not violate Rule 3.5(b) by quietly viewing a juror's social media information that can be accessed without any request and without the juror's awareness, the committee concluded.

“The mere act of observing that which is open to the public would not constitute a communicative act that violates Rule 3.5(b),” the committee stated, citing ethics opinions from three bar associations in New York and bar groups in Kentucky, New Hampshire, Oregon and San Diego.

On the other hand, it offends Rule 3.5(b) for a lawyer to send an access request to a juror, the committee said, drawing on ethics opinions from Connecticut, Missouri, New York and Oregon, and disagreeing with opinions from the New Hampshire and Philadelphia bars.

Such a request, the committee said, is a communication asking a juror for nonpublic information, much like driving down a juror's street, stopping the car, getting out and asking the juror for permission to look around inside the juror's house.

Lawyers may not get someone else to make this request, it added, because Model Rule 8.4(a) prohibits a lawyer from using another person to do what the lawyer is forbidden to do directly.

**Who’s Poking Around?**

The opinion notes that some social media networks have a feature that allows subscribers to identify which members of the network have viewed their information. Typically, the committee said, this notice is generated by the network and is based on the profile of the fellow member.

A lawyer does not “communicate” with a juror in violation of Rule 3.5(b) when the lawyer passively views the juror's posts or other data through a shared social media platform that enables the juror to learn the lawyer's identity, the committee said.

Instead, the opinion states, it is the social media service that communicates with the juror about the lawyer's viewing, akin to a situation where a neighbor recognizes a lawyer's car driving down the juror's street and tells the juror about it. Two bar associations in New York have staked out different positions on this issue, the committee acknowledged.

The opinion recommends, however, that lawyers familiarize themselves with these automatic subscriber-notification features by reviewing the terms of use for social media networks they use in their law practice rather than routinely clicking their agreement to those conditions. Comment [8] to Model Rule 1.1 highlights the importance
of staying current with technology, the committee observed.

In addition, it said, lawyers must make sure their viewing of jurors’ social media information is purposeful and not crafted to embarrass, delay or burden jurors or the proceeding, which would violate Model Rule 4.4(a).

**Seeing Jurors Blab About Trial**

The opinion points out that through viewing jurors’ posts and other social media information, a lawyer may become aware of a juror’s criminal or fraudulent conduct related to the trial.

In that event, the committee advised, Model Rule 3.3(b) requires the lawyer to take reasonable remedial measures, including notifying the court if necessary. This affirmative duty applies, it said, when a juror's Internet postings about the case violate court instructions and rise to the level of criminal contempt under applicable law.

The committee found indications in the drafting history of Rule 3.3(b) that the authors intended to require disclosure of “improper” conduct by jurors, not just criminal or fraudulent jury behavior. However, the wording of Model Rule 3.3(b) as adopted does not demand disclosure when a juror's actions violate court instructions but are not criminally contemptuous, such as innocuous postings about the quality of food served at lunch, the committee said.

**New Books**

*Immigration Relief: Legal Assistance for Noncitizen Crime Victims* by Elizabeth Anne Campbell, Rachel DeLia Settlage, and Veronica Thronson is an essential resource that synthesizes, explains, and guides the reader through all of the crucial components of this area of the law. Its careful organization, thorough explanations, and clear presentation demystify the daunting array of immigration statutes, cases, regulations, practice manuals, and policy memoranda that govern the adjudication of applications for immigration relief for immigrant victims of crime.

*Criminal Procedure in Practice, Fourth Edition*, by Jack B Zimmermann, Melanie Wilson, and Paul Marcus provides practical guidance for attorneys during each stage of a criminal case, from the police investigation immediately following the crime to postconviction reviews.

Information on books published by the CJS can be viewed at www.ambar.org/cjsbooks.

**News from the Field**

**NACDL (National Association of Criminal Defense Lawyers)** will host its 5th Annual Sex Crimes Conference, “Zealous Advocacy in Sexual Assault & Child Victims Cases” at Planet Hollywood Hotel & Casino in Las Vegas, November 20-21, 2014. Attend this one-of-a-kind NACDL seminar and leave with a better understanding of sex crimes cases in order to effectively represent your clients before, during, and after trial. For more information visit: www.nacdl.org/SexAssault/.

NACDL will also host its 35th Annual Advanced Criminal Law Seminar, January 11-16, 2015 at the St. Regis Resort in Aspen, CO. Presented in cooperation with NACDL and Victor Sherman, there is nothing else like this weeklong networking and CLE event for the criminal defense bar. For more information please visit: www.nacdl.org/Aspen/.

**NDAA (National District Attorneys Association)** will host “Unsafe Havens I: Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation” on November 17-21, 2014 in Dulles, VA. Unsafe Havens I offers training for prosecutors handling technology-facilitated crimes against children. Utilizing a mixture of lectures, case studies and small group discussions, prosecutors will gain in depth understanding of the technology and best practices for building strong cases. This training is designed to follow the trajectory of a typical case from initiation of investigation, pretrial considerations, case presentation, to appellate considerations. In addition, experts will present on: medically proving age of children in exploitation cases, psychological issues regarding offender behavior, computer forensics, emerging technologies, human trafficking, cognitive development of children, and compliant teenage victims. Space is limited to 60 prosecutors. Applications must be in by 30 September 2014. Acceptance letters will go out on 3 October 2014. Any questions should be directed to Jason Allen (jallen@ndaa.org or 703-549-9222).

**Articles Wanted for the CJS Newsletter**

*Practice Tips, Project/Committee News ...*

Submission Deadline for the Next Issue: Dec. 15, 2014

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