Annual Meeting Highlights

The American Bar Association Criminal Justice Section hosted a wide array of programs and activities during the ABA Annual Meeting on August 10-13 in New York, NY. Programs included Annual Survey of Supreme Court Decisions, The Yates Memo Turn Two -- A Survey of its Impact on Corporate Cooperation; Responding to Cyber Attacks -- Data Sources in Data Breach Investigations; The False Claims Act Post-Escobar; White Collar Enforcement Trends Under the Trump Administration.

The Criminal Justice Section welcomed the Leadership for 2017-2018, under Chair Morris "Sandy" Weinberg, Jr. and thanked outgoing Chair Matt Redle.

The ABA House of Delegates adopted ten new resolutions related to criminal justice: 10B Abolishing Mandatory Minimum Sentences; 10C Protecting the Criminal Justice System by Limiting Immigration Enforcement at Courthouses; 10D Protecting the Office of Global Criminal Justice and U.S. Assistance to Prosecuting Atrocity Crimes; 112A Adoption of Criminal Justice Standards for Dual Jurisdiction Youth; 112B Adoption of Revisions to Criminal Justice Standards for the Prosecution and Defense Functions; 112C Pretrial Release and Cash Bail; 112D Abolition of Cash Bail for Juveniles; 112E Urges Policies Prohibiting the Solitary Confinement of Juveniles; 112F Urges policies allowing individuals to petition to expunge certain criminal justice records that did not result in conviction; 112G Urges policies allowing for the expungement of convictions for actions performed in public spaces associated with homelessness.

CJS in Brazil: Second Global White Collar Crime Institute A Success

The ABA Criminal Justice Section hosted a one and a half day institute in São Paulo, Brazil in June 7-8, 2017, at the Law Offices of Trench Rossi Watanabe. The Section brought the energy and excitement of our previous global white collar crime institute in Shanghai (2015) and created unique opportunities for the participants to network and explore the legal complexities of white collar crime in the growing Latin American legal market.

Immigration Committee Highlights

As one can see from the steady stream of news reports that have been generated in the past several months, immigration enforcement is “front and center” of this Administration’s political agenda. Following a campaign promise to deport millions of immigrants (mostly Mexican and Muslim, it appears), the Department of Justice and the Department of Homeland Security have implemented an aggressive enforcement program that does not stop at the courthouse steps. This is a critical shift in policy that has created quite a reaction within the legal community, the ABA and the country at large.

The CJS Immigration Committee has responded in a number of ways:

- It formally supported the adoption of a resolution proposed by ABA Commission on Immigration and the Massachusetts Bar Association to the ABA House of Delegates, urging the appointment of counsel at public expenses for persons involved in removal proceedings. That resolution was adopted as ABA policy on August 15, 2017 at this year’s Annual Meeting in New York City.

- The committee worked on another resolution, along with the Massachusetts Bar Association and the ABA Commission on Immigration, calling upon Congress to amend Immigration and Nationality Act Section 287 and relevant DHS guidelines, to include federal, state, local and tribal courthouses as “sensitive locations” with restricted immigration enforcement jurisdiction. That resolution was also adopted by the ABA.

- The Spring 2017 issue of the Criminal Justice magazine published an article by outgoing committee co-chair Raul Ayala entitled “Full Frontal Attack on Immigrants – How Will the Bar Respond?”

- The committee will participate in the CJS Immigration Task Force, currently being formed by CJS Chair Sandy Weinberg. This task force will develop policies and written reports addressing the impact of emerging and existing Administration immigration policies upon our entire criminal justice system.
Intern Spotlight: Siri Dasari

This summer, the Section began a formal internship program for college juniors and seniors. This summer’s undergraduate intern, Srinitha Dasari (Tufts University), or “Siri,” worked on multiple projects under the leadership of Lauren King and Patrice Payne, including a juvenile collateral consequences project, reading and responding to prisoner letters, and legal research on drug legalization, public benefits, and education law.

Public Briefing on Collateral Consequences

On May 19, Staff Attorney Lauren King attended a public briefing at the U.S. Commission on Civil Rights entitled: “Collateral Consequences: The Crossroads of Punishment, Redemption and the Effects on Communities.” This provided an excellent opportunity to network with other policymakers working to reduce the harmful effects of collateral consequences on individuals who are returning home from incarceration. The Commission heard perspectives from diverse stakeholders, including affected individuals, community and advocacy groups, government officials, and academics.

Visit with ICC President

On June 5, 2017, the American Bar Association (ABA) welcomed the President of International Criminal Court (ICC), Judge Silvia Fernández de Gurmendi, to its Washington, DC office to discuss issues of mutual concern in international criminal justice, including the newly launched International Criminal Justice Standards Project. Meeting with her were ABA member and staff leaders, including Matthew Redle, Professor Stephen Saltzburg, Kevin Scruggs, and Sara Elizabeth Dill of the ABA Criminal Justice Section; Judge Bernice Donald and Michael Pates of the ABA Center for Human Rights, which houses the ABA’s ICC Project; ABA Executive Director Jack Rives; and Thomas Susman, Kristi Gaines, and Holly Cook of the ABA Governmental Affairs Office, among other attendees.

Federal Sentencing Seminar

Staff Attorney Lauren King joined Judge Frederick Block and Professor Jenny Roberts for a panel discussion of collateral consequences of conviction at the 26th Annual National Seminar on Federal Sentencing in St. Petersburg, Florida. The panel gave attendees a primer on collateral consequences of conviction, including ABA policy on the topic as well as practical tips on how to make compelling collateral consequence arguments at sentencing. The event was presented by The Tampa Bay Chapter of the Federal Bar Association, The National Association of Criminal Defense Lawyers, The Criminal Law Section of the Federal Bar Association, and The Criminal Justice Section of The American Bar Association.

Standards Director Attends Reception with Peruvian Ambassador

On June 12, 2017, Standards and Policy Director Sara Elizabeth Dill attended a private reception at the residence of Peru’s Ambassador to the United States, Carlos Pareja, in conjunction with days of meetings and trainings with the ABA and a delegation of lawyers and judges from Peru. As Peru continues to improve its criminal justice system, the Ambassador and other expressed their interest in continuing to work with the ABA Criminal Justice System and utilizing the standards and expertise of members.

CJS Participates in IJET Program

In July, CJS Staff Attorney Lauren King gave a presentation on the U.S. criminal justice system to two working groups of international judges from the Kyrgyz Republic and Peru in partnership with the ABA Rule of Law Initiative (ROLI). The judges were participants in the International Justice Sector Education and Training Fellows (IJET) program and their projects focused primarily on improving and reforming their countries’ juvenile justice systems.
All is Not Lost: Practice Tips for Winning the War at Sentencing

By Ellen C. Brotman

As criminal defense lawyers, we want to take every case to trial. But, despite our best efforts, some cases are not trialable. In these cases, sentencing is where the most crucial, creative and effective advocacy can take place. As each client is unique, each sentencing is unique. However, some principles and practice tips apply to all cases.

Sentencing guidelines or statutes describe the guiding principles of sentencing. In federal court, 18 U.S.C. § 3553 (a) requires the imposition of a sentence that “is no greater than necessary” to fulfill the four purposes of sentencing: punishment, deterrence, incapacitation and rehabilitation. However, another section of the sentencing statutes makes clear that, if the first three purposes do not support a sentence of incarceration, rehabilitation by itself cannot because prison is inherently not rehabilitative. See 18 USCS § 3582 (The court, in determining whether to impose a term of imprisonment, … shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.).

Guidelines systems, like the United States Sentencing Guidelines, attempt to identify characteristics of each offense and quantify the punishment of those characteristics. The overarching principle is to punish the “real offense” and not the “charged offense” so that uncharged, but foreseeable conduct that arguably results from, or was intended to result from a crime is included in the calculation of the guidelines score. In white collar cases, the characteristic most heavily weighted is loss amount. The emphasis on loss has led unfair and draconian results. See United States v. Adelson, 441 F. Supp. 2d 506 (S.D.N.Y. July 20, 2006) (Based on loss amount, the guidelines range was 30 years to life; the court imposed a sentence of 42 months and described the guidelines as “patently unreasonable.”). These issues led to the Criminal Justice Section’s formation of the Task Force on the Reform of Federal Sentencing for Economic Crimes. The Task Force, proposed an alternative version of the fraud guideline which can be found at www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.pdf. Since the proposal of this alternative guideline, defense lawyers have been successfully advocating for its use in place of the formal guideline.

The use of the Task Force’s work to help our individual clients points us to practice tip one: you are not alone. Criminal defense lawyers are the best sharers of resources, time and moral support. Here are some ways to capitalize on this wonderful quality of our bar:

- If you are not on a criminal defense listserv – join one and use it for some initial guidance on how others have handled cases that are like yours. Be careful when you discuss your case; do not describe confidential information and be aware if your listserv also includes prosecutors.
- Get to know the federal and local public defenders in your jurisdiction, especially those working on appeals. These lawyers follow developments in real time and are invested in making sure that the criminal defense lawyers throughout their jurisdictions are providing a unified front on cutting-edge arguments.
- Never be shy about asking for help from individual lawyers – in 30 years of practice, whether I knew a lawyer personally or only by reputation, I have never either turned down a request for help or been turned down.

Your requests for assistance will provide you with both research help and anecdotal examples of how lawyers strategically craft winning arguments. This leads me to practice tip two: develop themes and theories that support your requested sentence. These trial techniques work equally well at sentencing and provides a way to organize your advocacy to answer these questions about your case:

- What happened?
- Why did it happen?
- How did your client make amends?
- Can the judge be sure that it will never happen again?

The answers to these questions provide the themes for both your written and your oral advocacy. The first question, what happened, relates to the offense, how was it carried out, and what harm was caused. Your accurate and temperate description of the scope of the offense lends you credibility when you argue the amount of punishment that is required. If the facts of the offense are disputed at sentencing, be careful to double check the accuracy of your version so you do not risk losing credit for accepting responsibility after a guilty plea. Do not rely on your client: trust but verify. (Our clients are often like the “unreliable narrator” you learned about in freshman literature courses.) I have even taken the added step of asking...
the prosecutor to review my written description of the facts prior to filing my sentencing memo to narrow the issues before the hearing.

The second question, why it happened, provides an explanation for the underlying conduct based on the characteristics of the offender. For instance, the theory may be that the client had an addiction that either fueled his need for funds or compromised his judgment. But, how can you prove that this addiction caused your client’s behavior? This is where practice tips three and four come in. **Practice tip three: start planning for sentencing in the beginning of the case, before you even know if you are going to trial or pleading guilty.**

**Practice tip four: learn as much about your client as early as you can.** Early planning for sentencing does not mean that you accept defeat; it means that you are prepared to establish themes for sentencing at trial. For instance, if loss amount will be an issue, lay out your proof at trial. If certain positive qualities of the client’s can be argued as mitigation at sentencing, include character witnesses to those qualities. If you don’t go to trial, your early development of these themes will not be wasted.

To learn as much as you can about the client, try meeting a family member or friend who knows them well soon after the engagement begins. I learned this lesson the hard way in a case I had many years ago: I represented a bank employee who used her position to zero out her credit card debt each month. It wasn’t until I met her teenaged children (months after being appointed) that I learned that my client’s husband was abusive and had an obsessive shopping addiction. These facts were the key to the sentencing: my client left her husband and began to work in a nursing home where she became a valuable employee. Ultimately, the court reduced her sentence of 30 – 37 months to six months home detention and six months community confinement, permitting her to continue working and supporting her children.

The “bank embezzler” case provides a perfect example of how important practice tips three and four are to successfully executing practice tip two. Your themes and theories are only as good as your knowledge of your client’s circumstances and motivations. And this leads me to the next practice tip: **practice tip five: control the character letter process.** To start this process, I give each client a “character letter guide” to copy and distribute to any letter writers. If your client is incarcerated, a family member or investigator may be able to help with this. First, the guide provides the address of the court and instructions about sending the letter to defense counsel, not to the court directly. Then, the guide suggests including the following information:

- That the letter writer is aware of the charges;
- How the letter writer knows the client;
- Any specific information the client has about the theories and themes of the sentencing including what led to the wrongdoing, any restitution or remediation the client has attempted, and the client’s remorse or rehabilitation;
- Any specific acts of kindness, generosity or noteworthy civic accomplishments of the client’s that the letter writer can describe;
- A suggestion that the letter writer not ask for a specific sentence but is free to ask for leniency or even a non-incarceration sentence.

The letter closes with an invitation to the writer to call me directly prior to beginning the writing process. Obviously, this can be labor intensive but it is almost always fruitful. In fact, the letters can be useful in pre-sentencing advocacy with the Probation Department.

We now come to **practice tip six: advocate your position to the probation officer by planting the seeds of your theory and themes during the probation interview and throughout the pre-sentencing process.** In federal sentencing, a probation officer interviews and investigates the client and prepares the Pre-Sentence Report that goes to the Court before sentencing. (The report also goes with the client to prison, if incarceration is imposed.) Of course, you must attend the client’s interview with the Probation Officer. At the interview, take an active role and direct the conversation to the facts that support your sentencing arguments. Provide the Probation Officer with character letters that support your position and suggest that they be quoted in the report, or attached to it. Because Probation Officers are used to getting their information from the government, your efforts to “assist” them is often welcome and successful.

Good character letters can also be the building blocks in your Sentencing Memorandum. Make sure that they are organized as individual exhibits to the Sentencing Memorandum and, if necessary, provide the judge with a Table of Contents for the letters themselves. We now turn to **practice tip seven: prepare a sentencing memorandum in every case.**

In federal court, sentencing memoranda are a central part of sentencing advocacy. (In state court, where they are used less frequently, these memos will stand out more and attract the judge’s notice.) Sentencing memoranda should follow the principles of effective advocacy at trial: tell the story of your client the individual, the human being who has made mistakes but is worthy of redemption and deserving of mercy. Start with an Introduction, analogous to the Summary of Argument
section of an appellate brief. This section has an opening sentence that encapsulates your strongest argument and leads into a paragraph that includes your theory and themes, focusing on the mitigating qualities of the offender. The Introduction itself should be no longer than a page or two, but it should tell the judge everything it needs to know about your argument. As you organize the balance of your memo, think about how you will answer the questions discussed above; quote the character letters freely in support of your arguments.

As defense lawyers, we must also emphasize the policy benefits of alternatives to incarceration; be sure to cite the studies that support non-incarceration alternatives. If your client must face incarceration, remind the judge that the punitive value of each day in prison varies for each individual, e.g., an elderly person suffers more than a younger person; a mother of young children suffers more than a prisoner with no children. See United States v. Redemann, 295 F. Supp. 2d 887, 896 (E.D. Wis. 2003) (“For a defendant who faces more onerous conditions of confinement than the typical defendant, the court can impose a shorter prison sentence and obtain the same punitive effect.”) (Emphasis added).

In your memorandum, remember practice tip eight: preserve your issues, even if they are losers at the appellate level. There is an active and extensive criminal bar working to bring these issues to the Supreme Court and you want to ensure that a good result there benefits your client.

At the sentencing hearing, your client must speak to the court. Therefore, practice tip nine is help your client prepare and rehearse his allocution. As advocates we know that words spoken from the heart can be very convincing, but conviction does not require spontaneity; preparation can avoid unwanted surprises. It is also fine for the client to have a written statement to read. The judge understands that this is a difficult and nerve-wracking moment.

This leaves us at practice tip ten: whatever the result, know that you did your best and you will return to fight another day! As a former partner of mine used to say: “Some days you eat the bear. Some days the bear eats you. The next day, you go back to work.” Right now, in our work defending the Constitutional rights of the disenfranchised, the indigent and the discriminated against, going back to work is more than a job; it is our patriotic duty.

Endnotes

1 As of the writing of this article, Alabama, Arkansas, Delaware, the district of Columbia, Illinois, Kansas, Maryland, Massachusetts, Minnesota, North Carolina, Oregon, Pennsylvania, Utah, Virginia, Washington and the federal system employ sentencing guidelines. See http://sentencing.umn.edu/ for a full discussion of these sentencing guidelines systems. This website is an extremely useful resource and is maintained by the Robina Institute for Criminal Law and Criminal Justice at the University of Minnesota.

2 In Tapia v. United States, 564 U.S. 319, 332 (2011) the Court held that “(s)ection 3582(a) precludes sentencing courts from imposing or lengthening a prison term to promote an offender’s rehabilitation.” In Tapia, the sentencing judge had imposed a longer prison term to enable the defendant to qualify for drug treatment while in prison.


4 See, e.g., U.S. Sentencing Comm’n, “Alternative Sentencing in the Federal Criminal Justice System,” at 20 (Jan. 2009) (“Effective alternative sanctions are important options for federal, state, and local criminal justice systems. For the appropriate offenders, alternatives to incarceration can provide a substitute for costly incarceration.”)

5 See “The Impact of an Aging Inmate Population on the Federal Bureau of Prisons.” (limited institution staff and inadequate staff training affect the BOP’s ability to address the needs of aging inmates.) This report is available at https://oig.justice.gov/reports/2015/e1505.pdf.

Task Force on College Due Process Rights & Victim Protections

In June 2017, the ABA Criminal Justice Section’s Task Force on College Due Process Rights and Victim Protections issued a groundbreaking, unanimous, bipartisan set of recommendations for how colleges and universities can provide fundamental due process protections for both victims and the accused in disciplinary cases involving college sexual misconduct.

In August 2017, Secretary of Education Betsy DeVos recognized the work of the Task Force in making a policy announcement for how the Department might work to make the disciplinary process more fair for all students. According to Secretary DeVos, “The American Bar Association established a task force comprised of lawyers and advocates from diverse backgrounds and varying perspectives. They found consensus and offered substantive ideas on how we can do better. Schools should find their recommendations useful.”

On September 19, the Due Process Task Force was featured in an exclusive segment on NPR. The Task Force’s work has been featured in numerous press articles and media pieces across the country.

The Task Force is chaired by Andrew S. Boutros, National White Collar Co-Chair at Seyfarth Shaw and member of the Criminal Justice Section Council. It consisted of leaders from across the ABA, the higher education community, and other constituent groups.

A link to the NPR piece is: www.npr.org/2017/09/19/552006625/devos-looks-for-better-way-to-handle-campus-sexual-assault.
Crisis & The Chief Legal Officer: Why In-House Counsel Is Uniquely Positioned To Drive Trust During Crisis

By David Stainback and Marissa Michel

Whatever your professional title — CLO, GC, AGC — the role of in-house counsel has always been a unique one. You stand apart from your corporate counterparts in your responsibility to assess and protect against the critical threats your organization faces, in whatever form they may take. Under the stress of regulatory pressures, geopolitical uncertainty, cyber risks, persistent fraud and economic crime — and the unforgiving glare of 24/7 public scrutiny — the corporate threat landscape has expanded. And with it, so has the role of the Chief Legal Officer. In addition to the traditional task of managing legal risk, senior legal talent are now increasingly involved in the operational details of crisis preparation and response. They have to be. When it comes to protecting the organization, they are on the front lines of both strategy and execution… and everything between.

The critical role of the CLO in times of crisis

A crisis can shake an organization to its core, and shatter the trust it has built with its stakeholders, the public, and even society at large. Many organizations are already familiar with the damage that a crisis can wreak on its operations and reputation: in a recent PwC survey, 65% of business leaders said they’d experienced at least one crisis in the last three years.¹

The list of potential adverse consequences is long: reputational harm, financial loss, fines and penalties, stock-price drops and litigation.

Invariably, in a crisis, issues of responsibilities, roles and processes are put to the test. We have observed that companies whose CLO or GC takes the reins in a major crisis — for example, a highly visible cyber-breach or a significant compliance breakdown — tend to have more successful outcomes. While the depth and breadth of the impact can be extraordinarily challenging, management of the crisis will be even more so.

Fortunately, this plays to the natural strengths of the CLO — and underscores why their role is more critical than ever. Senior legal professionals have the skills, training, temperament and strategic capabilities to lead their companies through the fire. And increasingly, they are being called to do so.

Marissa Michel is Director and US Territory Crisis Leader, PwC Forensic Services and David Stainback is Partner, PwC Forensic Services.

This article appears in conjunction with PwC’s sponsorship of the CJS and neither the CJS nor the ABA recommends or endorses the product or services of PwC.
seat at the table across all four aspects of crisis management.

**Legal/regulatory.** Logically, the GC/CLO will be focused first on dealing with the immediate and follow-on regulatory and litigation issues arising from a crisis, and helping to bring stability to the organization during a murky, complex time. However, the sheer magnitude of the risk — and the fact that in-house counsel is responsible for protecting every aspect and area of the business — has naturally extended its responsibilities into the other three components of crisis management as well.

**Communications.** While in a more narrow situation, the legal instinct might be to focus on playing defense — by determining what information must be put under privilege, what facts could trigger litigation, what communications should be temporarily shut down — the strategic CLO must also play offense. Protecting the enterprise is still job #1, but in the midst of a crisis that job now takes on a wider role. Because in a larger sense, communications — be they outward (PR), inward (employee messaging), or upward (to the Board) — are critical to the outcome.

It is for this reason that the CLO must **drive the narrative** during crisis communication. This requires first, having a command of the facts at a time when information may be scattered and uncertain. It also means coordinating messaging across all three types of communications, while proactively considering the potential downstream risks of each message — even many steps down the line. And of course, when trust is at stake, strategic communications are vital to the task of rebuilding eroded trust with multiple stakeholders.

**Operations.** When it comes to the nuts and bolts of crisis response, the CLO has a critical, minute-to-minute role to play. They need to coordinate multiple work streams and tasks, while also evaluating the strategic impact of heat-of-the-moment decisions on the other moving parts. For example, what would be the legal ramifications of temporarily shutting down an operation that affected a business partner or far-flung subsidiary? When and how would an operational decision trigger the need to assert legal privilege?

The experience of managing a crisis — and the lessons learned on reacting with speed and clarity — have naturally led CLOs to focus on the realm of proactive crisis planning as well, ensuring such plans are both scalable and rigorously tested.

**Ethics.** The ethical component to crisis management is critical because “doing the right thing,” and thinking through ethical obligations when dealing with crisis, are a lynchpin to coming out of one stronger — not only in actual courtrooms but also in the court of public opinion, and in the eyes of the government. Resolving a crisis through an ethical lens also helps promote the core values of the organization, and begins to reinforce once again the organization’s most important intangible asset of all — trust.

**Take your place at the table**

A crisis is a transformational event. That transformation doesn’t have to be negative. In the same survey, 39% of CEOs said that a well-managed response to a recent crisis had a positive contribution on future revenue growth.

So what does this heightened responsibility mean for today’s in-house counsel? It means you have to widen your aperture, mindset and toolkit to incorporate all four components of crisis management across its three stages — preparation, response and recovery.

This naturally brings up several fundamental questions. Do you know what threats may trigger a crisis for your organization? Have you determined whom you can rely on — internally and externally — to support your crisis response efforts? Have you considered your approach to rebuilding trust across many impacted stakeholder groups during a time when trust is rapidly eroding?

While the CEO and Board “own” a crisis, in the sense of ultimate responsibility, increasingly it falls to the CLO to own the process of managing it.

Fortunately, that expanded role plays too many of your natural strengths — proactivity, strategic thinking and a deep-seated sense of ethics. All three are critical to the task of successfully navigating through the heat and fog of a crisis — with the further benefit of helping you take your rightful place at the table of business leadership and crisis management. But act now. Preparation is paramount — and crisis waits for no one.

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**Endnotes**

1. PwC’s CEO Pulse on Crisis. PwC, 2017 (found at: www.pwc.com/gx/en/ceo-agenda/pulse/crisis.html).

2. PwC’s CEO Pulse on Crisis. PwC, 2017 (found at: www.pwc.com/gx/en/ceo-agenda/pulse/crisis.html).
10th Annual
Fall Institute and CJS Council &
Committee Meetings
November 2-5, 2017 | Washington, DC
To register, please visit ambar.org/cjsfall2017

Opening Keynote Speaker
Vanita Gupta
President & CEO, The Leadership
Conference on Civil and Human
Rights

Schedule At-A-Glance
Thursday, November 2
- CJS Committee Meetings
- Academic Roundtable
- White Collar Crime Town Hall: The Politically-Charged
- Welcome Reception
Friday, November 3
- CLE Programs
- CJS Awards Luncheon
- Reception
Saturday, November 4
- CJS Council & Committee Meetings
Sunday, November 5
- CJS Council Meeting

Criminal Justice Section Awards Luncheon

ABA
Criminal Justice Section
1050 Connecticut
Avenue, NW, Suite 400
Washington, DC 20036

Main Tel:
(202) 662-1500
Fax:
(202) 662-1501
Email:
crimjustice@
americanbar.org
Web:
americanbar.org/
crimjust

The Criminal Justice Section Awards Luncheon will be held during the CJS 10th Annual Fall
Institute on Friday, November 3 in Washington, D.C. Five awards will be presented at the
luncheon to the recipients below (in order of appearance):

Charles R. English Award
Nina Marino, Kaplan Marino

Frank Carrington Crime Victim Attorney Award
Heather Cartwright, DOI Office of Justice for Victims of Overseas Terrorism

Norm Maleng Minister of Justice Award
Richard Schmack, former DeKalb County State Attorney
Robert Zauzmer, AUSA, Eastern District of Pennsylvania; Pardon Attorney, Clemency Project

Raeder-Taslitz Award
Ellen Podgor, Stetson University
Confidentiality

NYC Bar Guides Attorneys on U.S. Border E-Device Searches

- NYC bar ethics opinion addresses a lawyer’s duty to protect client confidential information from border agent searches
- Provides proactive measures attorney may take prior to crossing border

Attorneys crossing the U.S. border now have more guidance on how they should protect confidential client information stored on electronic devices from the prying eyes of customs and immigration agents.

A formal opinion issued July 25 by the New York City Bar’s ethics committee identifies some measures attorneys who travel internationally may take to satisfy their ethical obligations, in light of broad powers that U.S. Customs and Border Protection (CBP) agents assert they have to inspect travelers’ electronic devices (N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Op. 2017-5, 7/25/17).

“The Opinion provides helpful guidance to lawyers on an important and timely issue,” Bruce Green, a professor at Fordham law school and chair of the committee that issued the opinion, told Bloomberg BNA. “In this day and age lawyers are constantly in possession of confidential information on their computers and smartphones and have an ethical obligation to reasonably protect this information.”

The ethics opinion appears to be the first to address the topic and comes at a time when there has been uptick in U.S. border electronic devices searches by CBP agents.

There were nearly 15,000 electronic devices searched during the first six months of the CBP’s 2017 fiscal year, compared to only just over 8,000 searches during the previous six months, according to CBP statistics released in April. As the number of searches of electronic devices has increased, many major law firms are reevaluating what policies they should have in place in order to protect confidential information, Steven Puiszis, a Chicago-based partner at Hinshaw & Culbertson LLP, who is his firm’s general counsel for privacy, security & compliance, told Bloomberg BNA.

Increased Concerns

While the percentage of travelers whose electronic devices have been searched remains very small (less one hundredth of one percent), the growing number of searches is prompting some concerns. In January, a U.S.-born NASA engineer made headlines by saying that CBP officers in detained him at a Houston airport until he unlocked his work phone.

The American Bar Association has also raised concerns about the handling of privileged and confidential legal materials during border searches. In May, the ABA sent a letter to the Department of Homeland Security, asking it to revise directives on the standards and procedures that CBP and Immigration and Customs Enforcement agents must follow before the contents of a lawyer’s electronic device can be searched or seized at the border. ABA asserted that DHS’s interpretation of the directives has “resulted in CBP Officers and ICE Special Agents exercising sweeping powers to search electronic devices at the border, with or without reasonable suspicion of any wrongdoing.” ABA urged that DHS revise the directives to state that privileged or confidential electronic documents and files on a device cannot be read, duplicated, seized, or shared unless a subpoena or warrant is first obtained.

Practical Guidance

The ethics committee’s opinion addresses steps attorneys can take prior to crossing the U.S. border, during border searches, and after a CBP agent reviews confidential information. The opinion provides some practical guidance and highlights an issue that attorneys should be aware of, J. Alexander Lawrence, a New York-based partner at Morrison & Foerster LLP and co-chair of its eDiscovery Task Force, told Bloomberg BNA. Moreover, it will cause lawyers to think twice about whether they are adequately safeguarding their client’s confidential information when arriving at the U.S. border, he added.

Safeguards include avoiding electronic transportation by using blank “burner” phones or laptops, using software to securely delete information, and disconnecting from cloud- and web-based services.

“The New York City Bar’s thoughtful opinion shows just how much advance planning is required to comply with [New York Rules of Professional Conduct],” Roy Simon, a legal ethics advisor to law firms and professor emeritus at Hofstra law, told Bloomberg BNA.

The increasing threats to electronically stored information along with recent changes to ethic rules “should motivate attorneys to take proactive measures to avoid improper dis-
closure, not merely reactive measures when something goes wrong,” and the opinion offers valuable suggestions about how to take those proactive measures, Simon said.

Objecting to a Search

The opinion also says that attorneys must take reasonable measures to prevent disclosure of confidential client information, in the event that a government agent seeks to search an electronic device. Among the actions an attorney can take include informing agents that the device contains privileged information, requesting that such material not be search or copied, and asking to speak to a supervisor, according to the opinion. It also says that lawyers can add “credence to their claim of attorney-client privilege” by carrying proof of bar membership or a business card, at the very least.

No One-Size-Fits-All Approach

The committee notes that there isn’t a “one-size-fits-all” approach to protecting confidential information. Instead, it recommends attorneys consider adopting certain safeguards, and what safeguards an attorney should adopt can vary depending on the sensitivity of the information involved.

This ethics opinion, like others that have addressed protecting client data, recognizes that the more sensitive the information, the less risk a lawyer should take in how the information is handled, Puiszis said. While it provides helpful guidance, there are still a lot of unanswered questions about how attorneys should deal with this issue, he said. For example, the opinion suggests that attorney shouldn’t travel with confidential information unless there is a professional need to do so. However, drawing that distinction may difficult for attorneys who feel they must be accessible to their clients at all times, he said.

The opinion is available at src.bna.com/q8j.

Check the ABA CJS Website

www.americanbar.org/crimjust

for
Latest News & Updates
Project Information
Committee Activities
Publications & Resources
Useful Info Links

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.

CJS Calendar of Events

10th Annual CJS Fall Institute and Council & Committee Meetings: Nov. 2-5, Washington, DC

ABA/ABA Financial Crimes Enforcement Conference: Dec. 3-5, National Harbor, MD

Securities Fraud Institute: Jan 11-12, Hilton Salt Lake City Center, Salt Lake City, UT

2018 ABA Midyear Meeting, Jan. 31- Feb. 6, Vancouver, Canada


2018 CJS Spring Program, Council and Committee Meetings, April 5-8, Tampa Marriott Waterside Hotel & Marina, Tampa, FL

Health Care Fraud Institute: May 2-4, Hotel Nikko, San Francisco, CA

9th Annual Prescription for Criminal Justice Forensics: May 31 - June 1, Fordham University, NY

2018 ABA Annual Meeting: Aug. 2-7, Chicago, IL

7th Annual London White Collar Institute: Oct. 8-9, London, UK

For the complete calendar, see ambar.org/cjsevents.
New Books from the ABA Criminal Justice Section

The State of Criminal Justice 2017

Edited by Mark Wojcik

New edition examines the major issues, trends and significant changes in the criminal justice system.

The Economic Espionage Act: A Practitioner’s Handbook

By Paul F. Enzinna

This handbook is intended as a practical guide for prosecutors, defense lawyers and the U.S. court system for use in economic espionage and trade secret theft cases.

See other CJS books at ambar.org/cjsbooks.