The ABA Criminal Justice Section met in Chicago for the ABA Annual Meeting, August 2-5, 2018. The Section hosted CLE panels, council and committee meetings and presented resolutions to the ABA House of Delegates.

The CJS panel, “Opioids in America,” gathered medical, dental and legal professionals to discuss a multidisciplinary approach to the opioid crisis. Another panel, “The Future of Problem Solving Courts,” discussed the struggle to find the balance between treatment and incarceration when managing the opioid crisis.

Chair Dervan joined the CJS Council in 2014. As Co-Executive Director of the CJS Specialized Practice Division, he supervised numerous committees including: Amicus Review, Appellate and Habeas Practice, Cyber-Crime, Global Anti-Corruption, Homeland Security, Terrorism & Treatment of Enemy Combatants, Immigration, and International. Additionally, Prof. Dervan is Chair of the ABA Global White Collar Crime Institute and a member of the International Criminal Justice Standards Task Force.

The Section presented a total of eight CLE sessions, featuring expert discussion of other timely issues such as: cyber breach aftermath, cyber law, trends in white collar crime, FCPA compliance and a review of U.S. Supreme Court decisions on criminal law.

Outgoing, Criminal Justice Chair, Sandy Weinberg, gave his closing statements as Chair and introduced Incoming Chair, Lucian E. Dervan, professor at the Bel-
Southeastern White Collar Crime Institute

The Fifth Annual Southeastern White Collar Crime Institute took place in Braselton, Georgia, September 5-7, 2018. This Institute provides attendees with excellent networking events and panels which address developments and strategies in white collar criminal law.

The faculty was made up of federal and state judges and prosecutors, defense attorneys, corporate in-house counsel, and members of the academic community. Panelists represent jurisdictions and issues specific to both the Southeastern region and the nation.

The Institute provided eight panels covering the following topics: search warrants and taint teams; joint defense agreements after the Yates Memorandum; healthcare enforcement and the False Claims Act; changes in DOJ policy, structure and enforcement priorities; charging decisions and defense strategies; a review of the Supreme Court decisions; jury trials from a judge’s perspective; and ethical guidance in the corporate boardroom.

New CJS Task Forces

Section Chair Lucian Dervan launched new task forces: the Forensics Ethics Task Force to be chaired by former Section Chair Matt Redle; the Women in Criminal Justice Task Force, co-chaired by Carla Laroche and Tina Luongo; and the Marijuana and Federalism Task Force chaired by Sam Kamin. Each initiative is expected to develop policy in its area relying on the expertise of their members and liaisons.

CJS Leaders Attend Global Human Rights Event

In September 14, Section Chair Lucian Dervan and former Section Chair Judge Bernice Donald attended the inaugural Eleanor Roosevelt Prize for Global Human Rights Advancement Dinner, hosted by the ABA Center for Human Rights, at Roosevelt House in New York City.

The event honors individuals or organizations having a global impact in advancing the principles enshrined in the Universal Declaration of Human Rights.

The 2018 Eleanor Roosevelt Prize recipients were: Benjamin B. Ferencz, former Nuremberg War Crimes prosecutor; and Hillary Rodham Clinton, former US Secretary of State (photo below, with Chair Lucian Dervan).
Criminal Justice Section Newsletter

UPCOMING EVENTS

11th CJS Fall Institute and Meetings:
Nov. 1-4, Washington, DC

ABA/ABA Financial Crimes Enforcement Conference:
Dec. 2-4, National Harbor, MD

35th National Institute on Criminal Tax Fraud:
Dec. 12-13, Las Vegas, NV

ABA/CJS Midyear Meeting: Jan 24-27,
Las Vegas, NV

33rd National White Collar Crime Institute:
March 6-8, New Orleans, LA

Spring CLE, Council & Committee Meetings:
April 4-7, Nashville, TN

10th Annual Prescriptions for Criminal Justice Forensics Conference:
May 29-31, New York, NY

Third Global White Collar Crime Institute:
June 28-29, Prague, Czech Republic

ABA/CJS Annual Meeting:
Aug. 8-13, San Francisco, CA

MEMBER NEWS

James Forman Jr. won the Pulitzer Prize in the General Non-fiction category for his book, Locking Up Our Own.

Professor Mark Wojcik of The John Marshall Law School, who is also the editor of The State of Criminal Justice, received the Burton Award for Outstanding Contributions to Legal Writing Education, at the Library of Congress.

Nicole Austin Hillery, was sworn in as President of the Washington Bar Association in June 2018.

Judge Langford Morris was selected by the Women Lawyers Association of Michigan for the 2018 Mary S. Coleman Award. She also received an appointment to the ABA Rule of Law Initiative, Africa Council.

CJS Young Lawyers Committee Co-Chair Mike Nguyen was named one of the ABA Young Lawyers Division's “2018 On the Rise - Top 40 Young Lawyers.” This is the third year the YLD has recognized young lawyers “who exemplify a broad range of high achievement, innovation, vision, leadership, and legal and community service.” Mike was one of the 40 honorees this year.

Neal R. Sonnett received a 2018 Solo and Small Firm Lifetime Achievement Award from the ABA Solo, Small Firm and General Practice Division.

Melba Pearson has assumed the role of President of the Gwen S. Cherry Black Women Lawyers Association.

News from the CJS Office

Staff News

Kristin Smith has joined the CJS team as Staff Attorney. Jessica Barnes and Michael Gradess have left the ABA.

New CJS Website

The ABA and Criminal Justice Section are happy to announce the launch of newly redesigned website, americanbar.org. The new mobile-friendly website provides an improved user experience including a new personalized news feed with custom curated content, enhanced search functionality, and a simplified ABA products shopping experience.
Preparing, Responding and Emerging Stronger from Fraud and Economic Crime:
Insights from PwC’s 2018 Global Economic Crime and Fraud Survey

By Chris Rohn, Jerry Dow, Kate Frost

It’s often not until a fraud has erupted into view — in the eyes of the board, the media, or regulators — that a company will turn to external counsel and consultants for independent advice. Yet typically, the underlying business issues that enabled the fraud have been germinating unseen for some time. Had the company been able to catch and address these issues proactively, they might have avoided not only the reputational, financial and regulatory risk they now face — but also the expense of costly investigations and remediation.

The ability to prepare, respond and emerge stronger from fraud and economic crime requires specialized expertise and an understanding of key business issues. Counsel has an important role to play as they help their clients address unique and challenging situations. By understanding the deeper fraud trends and engaging with subject matter experts, counsel can help provide a path to success for their clients. PwC has recently released its biannual Global Economic Crime and Fraud Survey, which explores in depth not only the types and trends of fraud clients face, but also the complex factors driving those frauds — and what organizations can do to mitigate them.

Here are four highlights from the survey that will be of special interest to counsel and their clients.

1. Recognize fraud when you see it

Bribery, corruption, FCPA enforcement and regulatory expectations are up — yet risk assessments are down. The share of US respondents who’d been asked to pay a bribe more than quadrupled since 2016, from 7% to 31%, and the percentage who believed they’d lost an opportunity to a competitor who did pay a bribe nearly quadrupled, from 8% to 29%. Also, more than half of respondents said they expect regulatory changes to have an increased impact on the organization in the coming two years. Despite these trends, only 37% of our US respondents said they’d performed a bribery and corruption risk assessment in the last 24 months; and just half had specific policies that address bribery and corruption.

The takeaway: With FCPA enforcement continuing to grow, and anti-corruption statutes spreading across the globe, counsel needs to be more vigilant than ever in protecting their organizations. If your clients are looking to expand in different areas of the world — be it for supply chain, acquiring subsidiaries, joint ventures, hiring third parties such as agents, or even just locating a server — consider discussing a risk assessment with your clients, as well as evaluating their anti-bribery and anti-corruption policies to ensure they comply with the ever-changing regulatory and enforcement trends in foreign jurisdictions.

Two-thirds of external frauds are committed by “frenemies.” Among global respondents, customers and third parties (so-called “frenemies”) were responsible for 68% of all external frauds.

The takeaway: Our survey shows that one of a company’s biggest fraud blind spots, and biggest threats, is the people it does business with. These are the third parties with whom they have regular, profitable relationships: agents, vendors, shared service providers and customers — in other words, the people and organizations with which they would expect a degree of mutual trust. Counsel can shed light on this often-unseen risk by reinforcing protocols around due diligence, appropriate contracting language and auditing protocols.

2. Fraud hits the entire organization — so manage it dynamically

The share of serious internal fraud in the US committed by senior management has doubled. Internal fraud holds special legal risks for a company. The more so when it’s committed by the people most able to override internal controls: C-suite and other senior executives. Such crimes carry outsize legal risk — and can easily bleed into the less-manageable domain of reputational risk or crisis. Among US respondents, the percentage of economic crimes committed by this special class jumped from 18% to 36%.

The takeaway: When senior executives are accused of wrongdoing, the legal consequences can affect both the organization and the individual. Our survey indicates that when it comes to so-called “conduct risk,” the direct monetary cost of fraud and its aftermath are frequently dwarfed by secondary costs such as investigations and other interventions. Unlike oper-
When it comes to technology, the proverbial “Goldilocks” sweet spot is extremely difficult to find: the risks are great and the margin of error is small. Counsel can help their clients find that balance, by illuminating the larger reputational, regulatory and/or financial risks around the use (or non-use) of various anti-fraud technologies. Doing so can yield secondary benefits as well: reducing the cost of both customer friction and fraud prevention through efficiencies — and enabling the organization to safely build and sell new products and services on a digital platform.

3. Harness the protective power of technology

Finding the technology sweet spot. When it comes to fraud, technology is a double-edged sword — both a potential protector and a potential threat. While many companies are introducing powerful new fraud-detection tools such as artificial intelligence, machine learning and Big Data, the sophistication of hackers (both individual and nation-states) continues to grow. Over a third of all respondents have been targeted by cyber-attacks, and 41% of executives surveyed said they spent at least twice as much on investigations and related interventions as was lost on cybercrime. And more than a third of respondents said some of their detection technology is yielding false positives, creating the growing challenge of “customer friction” — the irritation of getting too many fraud alerts.

The takeaway: When it comes to technology, the proverbial “Goldilocks” sweet spot is extremely difficult to find: the risks are great and the margin of error is small. Counsel can help their clients find that balance, by illuminating the larger reputational, regulatory and/or financial risks around the use (or non-use) of various anti-fraud technologies. Doing so can yield secondary benefits as well: reducing the cost of both customer friction and fraud prevention through efficiencies — and enabling the organization to safely build and sell new products and services on a digital platform.

4. Invest in people, not just machines

Fraud is at an all-time high — but ethics and compliance programs are lagging. More than half of our US respondents reported serious incidents of fraud or economic crime over the last two years, a far higher share than ever before. Yet the percentage of respondents who indicated they have a formal business ethics and compliance program has actually dropped, from 82% to 77%, since our 2016 survey.

The takeaway: The reported-fraud statistic, while historically high, is only half the story. Our experience shows that the frauds companies don’t catch are the ones that pose the most legal risk — which is why combating it at the source has become a core business issue. Blind spots and silos (e.g., between legal, ethics, compliance, IT and ERM) are endemic across large organizations, and often the source of lapses. Counsel can offer significant value by helping clients address the deeper organizational issues behind such lapses.

Building bridges between legal and business priorities

In addition to navigating the legal landscape, counsel can work with the client and subject matter experts to help map legal issues to relevant business issues and opportunities, adding new areas of value — value which can be communicated above and across the organization, for the benefit of all parties. To effectively combat fraud and manage crises takes training, knowledge and expertise across multiple departments — from the C-suite to legal to finance, IT, tax, sales, procurement, ethics, HR, etc. Building bridges across the organization will help your clients prepare for, and — when necessary — respond to and emerge stronger from unplanned events that may occur as a result of fraud or economic crime.

OUR VISION

The ABA Criminal Justice Section: The Unified Voice of Criminal Justice

The ABA Criminal Justice Section is the premier source of knowledge and insight into the complex issues of criminal justice that face the nation.

By bringing together the perspectives of prosecutors, defense lawyers, judges and scholars, the Section provides valuable and thoughtfully crafted products to its members, to the legal profession overall, and to the nation.

The achievement of justice is the abiding purpose of the Section, and makes it the voice of criminal justice.
Increasingly Invasive Technological Searches at Airports

By Martin S. Bloor and Rachel Collins Clarke

Each day, hundreds of thousands of travelers enter the United States at one of its airports. These travelers, including United States citizens and others traveling from countries that are our closest allies, may be subjected to an invasive and warrantless search of their technology as a pre-condition for entrance.

While travelers have grown accustomed to searches of luggage and of themselves, a search of a traveler's smartphone, tablet or laptop by a Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE) agent is potentially far more invasive. For nearly all travelers, these devices contain the details of life – photographs, contacts, emails, text messages and calendars. For business executives, attorneys, doctors and security officials, electronic devices often contain privileged and highly sensitive data.

A pair of Supreme Court decisions provide the legal justification for these warrantless border searches. In the 1975 case of United States v. Martinez-Fuerte, the Supreme Court created a border exception to the Fourth Amendment's warrant requirement. In that case, the Court held that agents may conduct a warrantless search of travelers, their luggage or their vehicles to enforce the country's broad immigration and customs laws.

Ten years later, in United States v. Montoya de Hernandez, the Supreme Court held that agents may stop and search a traveler entering the United States at an international border (including international airports) even if the government has no individualized suspicion of that traveler. As technology has become increasingly ubiquitous, these warrantless searches have evolved into far more invasive investigations into a traveler's entire life. After agents seize and search a traveler’s electronic device, agents may then copy the device's contents and have that copy analyzed by forensic experts off-site.

CBP and ICE agents have been using this authority with increased frequency in recent years. Most recently, in 2017, agents searched the electronic devices of 29,200 passengers arriving on international flights. This was a 59% increase over 2016 when just 18,400 passengers arriving on international flights were searched.

In July 2016, for example, CBP agents working at Los Angeles International Airport detained Maria Abi-Habib as she traveled to the United States from Lebanon. Abi-Habib, who writes for the Wall Street Journal and is a dual citizen of the United States and of Lebanon, refused to turn over her cell phone to the CBP agents who demanded it. She referred the agents to the Journal's lawyers. After a few hours, the agents released Abi-Habib without searching or seizing her devices.

Just a few months later, CBP agents at Vancouver International Airport detained Ed Ou as he tried to board a flight to North Dakota. CBP agents detained Ou, a Canadian photojournalist, for six hours. During his detention, CBP agents seized Ou’s three cell phones. When the agents released Ou and returned his cell phones to him, Ou saw that the tamper tape protecting his SIM cards had been altered, indicating that the agents had temporarily removed Ou’s SIM cards.

While the indignities Abi-Habib and Ou suffered at the hands of the CBP agents are notable, the treatment Sidd Bikkannavar endured is perhaps even more consequential for those concerned about the security of data.

On January 30, 2017, Bikkannavar, a United States born NASA scientist, was flying back to the United States after vacationing in Chile. Bikkannavar arrived at Houston’s George Bush Intercontinental Airport and was detained by CBP officials who seized his phone and demanded that he provide them his passcode to access it. Bikkannavar, an official with NASA's Jet Propulsion Laboratory refused to give agents his passcode because his phone contained highly sensitive NASA information that Bikkannavar was obligated to protect. When Bikkannavar refused to provide this passcode, the CBP agents threatened him with continued detention and seizure of his phone. Bikkannavar turned over the passcode. CBP agents returned thirty minutes later with the phone, but provided no explanation for Bikkannavar's detention or their seizure of his phone.

Bikkannavar's experience is particularly troubling for a number of reasons, including that he is a member of the Global Entry Program and therefore, prior to this experience in Houston, had voluntarily submitted to (and passed) the government’s extensive background check requirements necessary for participation in this program.
Further, Bikkannavar’s work at NASA requires that he be regularly vetted by the federal government. Despite these realities, which should have served assurances as to Bikkannavar’s commitment and loyalty to the United States, CPB agents still detained Bikkannavar, searched – and presumably copied - his highly sensitive data.

These recent events illustrate that CBP agents are increasingly aggressive in their searches of electronic data. In the case of *Alasaad v. Nielsen*, the Electronic Frontier Foundation and the American Civil Liberties Union are suing the United States Department of Homeland Security on behalf of eleven travelers who were ordered to turn over their devices during warrantless searches at the U.S. border.

The *Alasaad* plaintiffs are hoping to establish precedent requiring the government to obtain a warrant before searching electronic devices at the border. The ACLU filed the *Alasaad* case on September 13, 2017, in the District of Massachusetts. On May 10, 2018, the District Court denied the Government’s Motion to Dismiss this case. In its opinion, the District Court noted that cell phones contain much more personal information than other possessions the government has traditionally searched at the border. The District Court concluded that where the government goes “beyond the scope of a routine customs search and inspection” in detaining a person, the government must have a reasonable suspicion of certain illegal activity.

The District Court’s opinion in *Alasaad* illustrates that while the border exceptions to the Fourth Amendment are broad, they are not limitless. As the government’s border searches at airports grow increasingly aggressive, legal scrutiny of this practice suggests that the government’s use of these searches may be curtailed.

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**SAVE-THE-DATE**

**Third Global White Collar Crime Institute**

**June 28-29, 2019**

**Prague, Czech Republic**

Hosted at the Prague Marriott Hotel

The ABA Criminal Justice Section will host a one and a half day institute in Prague, Czech Republic in late June 2019.

We intend to bring the energy and excitement of our previous global white-collar crime institutes in Shanghai and São Paulo and create unique opportunities for our participants to network and explore the legal complexities of white collar crime in the growing eastern European legal market.

Visit www.ambar.org/cjsevents for updates.

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The Ninth Annual Prescription for Criminal Justice Forensics Program, May 31- June 1, 2018 in New York City.
**Committee Goals for 2018-2019**

**Academics**

- Continue to prioritize the annual Academics Committee Roundtable. We are particularly interested in building and celebrating a diverse community of legal scholars, and supporting those who are considering entering academia.

- Continue the development and marketing of the Committee’s online directory of committee members and their expertise, and to seek additional ways in which practitioners and academics can network, and connect with others with shared interests.

**Criminal Procedure & Evidence**

- The Committee will continue to monitor and, if appropriate, comment on any developments in terms of expanding criminal pre-trial discovery (especially with emphasis on the new proposed law for enhanced discovery in New York state).

- The Committee will also monitor the actions of the newly enacted State Commission on Prosecutorial Conduct that recently was voted into existence in New York state.

- The Committee will examine the effect and accomplishments of conviction integrity units at prosecutors’ offices.

- The Committee will monitor and, if necessary, comment on any criminal procedure cases before the United States Supreme Court this Term including Gamble v. United States (Double Jeopardy), Garza v. Idaho (Ineffectiveness of Counsel from failure to file a requested appeal), and Timbs v. Indiana ( Incorporation of Eighth Amendment to States).

**Global Anti-Corruption**

- The Committee intends to continue in its highly-acclaimed National Roundtable Series. We expect our series to continually make stops across the country, in cities such as Washington, D.C., Chicago, Houston, San Francisco, and Denver, among others.

- Because our Committee’s work is truly “global” in nature, as we did last year, we intend to go international with our National Roundtable Series. In an augural event, last year, working closely with our Committee members from Pillsbury Winthrop Shaw Pittman LLP, we hosted an overseas Roundtable in Hong Kong. This year, working with Committee Co-Chair, T. Markus Funk and his colleagues from Perkins Coie LLP, we intend to host a Roundtable event in Indonesia.

- Last year, the Committee launched a second high-profile and exciting series: The Foreign Corruption Prosecutor Series. Spearheaded by Co-Chair Mara Senn, the Series welcomed prosecutors from all over the world to present in D.C. on topics of interest to the global anti-corruption community, including topics specific to the host nation where the foreign prosecutor practices law. Speakers included prosecutors from Brazil, the UK, Germany and the Netherlands. We also had a panel with heads of the DOJ and SEC FCPA units and the head of the World Bank Integrity Vice presidency, to discuss how each of those institutions coordinates with foreign prosecutors. Continuing in that work, the Committee intends to continue to host and welcome speakers from across the world, but this year the Committee intends to open up the series to speakers beyond just those serving as prosecutors.

- The Committee intends to continue to run and update the LinkedIn ABA Global Anti-Corruption Group. This LinkedIn page is home to one of the largest anti-corruption groups of its kind, with more than 1,100 diverse members from around the world and an average of 5-10 daily entries.

- As part of its ongoing efforts to support and help collaborate on the important work being done by the CJS and other ABA Sections, the Committee will continue to collaborate closely with, among others, the International Section and its Anti-Corruption Committee as well as other constituents.

Goals and activities of additional committees can be found at the CJS Committees portal web page: www.americanbar.org/groups/criminal_justice/committees.html
**Legislative & Policy**

The Committee will continue its analysis of Bail Reform legislation. At the 2018 CJS Spring Meeting, the Committee focused on Bail Reform legislation in New Jersey and Connecticut. At present California has just passed comprehensive Bail Reform legislation and it is anticipated that such legislation will be re-introduced in New York State in the 2019 Legislative Session. The Committee will conduct an analysis of these new legislative measures as well as practices in other States.

**Parole & Probation**

- Explore alternatives to traditional probation and parole practices as they relate to the incarceration of individuals for noncompliance and assess how current practices regarding terms, conditions, and fees, impact low-income offenders.
- Document nationwide best practices regarding the alternative disposition of marijuana cases and how these practices impact criminal justice resources, reoffending, and the safety of communities.
- Explore the multi-jurisdictional use of personal recognizance bonds and release conditions as a form of “pretrial probation” and assess the related effects on offenders, the community, and criminal justice practitioners.
- Explore the relationship and applicability of restorative justice principals to probation and parole.

**Pretrial Justice**

- Continue work on the Prosecutor Pre-Trial Manual with the Prosecutor Function Committee and Harvard Law School.
- Participate in the Uniform Law Commission drafting process for the Alternatives to Bail Project.
- Collaborate with the Alternatives to Incarceration/Diersion Committee & Law Enforcement Committee on a CLE panel focused on Law Enforcement Led Diversion.
- Collaborate with Prosecution Function, Defense Function and Science, Technology & Forensics Committees on a possible resolution focused on best practices for the use of risk tools, algorithms and artificial intelligence in the criminal justice system.

**Prosecution Function**

- Provide advice and partnership, with an eye to the prosecution point of view, in the area of criminal justice reform. This includes resolutions, providing speakers for panels, and other types of collaboration.
- Continue to develop and promote CLE programs needed in the area of prosecution
- Complete a publication regarding Prosecutor Discretion
- Promote “Implicit Bias Training for Prosecutors Toolkit” to ensure prosecutors are receiving this important training
- Participate in the drafting of a Pre-Trial Manual for Prosecutor Offices
- Lead an update of the Victim Rights Guidelines through a Standards Task Force
- Draft resolutions relevant to the area of prosecution
- Continue to be involved in the Annual Prescription for Criminal Justice Forensics Seminar held in June each year.

**Victims**

- Create a coalition of leaders from crime victims organizations to voice where we can improve the criminal justice system for victims, and to work to implement those changes.
- Work in conjunction with the potential taskforce on victim’s rights to update standards.
- Sponsor resolutions and chapters that highlight gaps in the criminal justice system that create injustice for victims and work to resolve them.

**Women in White Collar Subcommittee**

The mission of the Women in White Collar Subcommittee is to be the national representative of female professionals (including private and public defense attorneys, prosecutors, judges, and related professionals) who focus their practices in the area of white collar criminal, civil, administrative, and regulatory law. The Subcommittee will principally seek to advance gender diversity in white collar representation through promoting thought leadership, educational opportunities, and positive publicity to encourage a focus at the national level on the professional excellence and accomplishments of women in the white collar field.
UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

The following articles are reprinted with permission from ABA/BNA Lawyers’ Manual on Professional Conduct, Vol. 34. Copyright 2018 by the American Bar Association/the Bureau of National Affairs, Inc. For information about the ABA/BNA Lawyers’ Manual on Professional Conduct, including a free trial subscription, visit the publication’s Web site at www.bna.com/products/lit/mopc.htm

Advertising and Solicitation

Nonprofit Law Firm Can’t Solicit Modest-Income Clients

• Rules against direct solicitation for pecuniary gain apply to nonprofit law firm looking to serve self-represented litigants

• Even modest gain at below-market rates still triggers direct solicitation rule

A nonprofit law firm that charges “below-market flat-rate fees” can’t directly solicit self-represented litigants who are unable to afford an attorney, a Texas bar’s ethics committee said in an August opinion. The opinion centered on a law firm organized as a 501(c)(3) public charity nonprofit that tries to help “clients who earn too much to qualify for free/pro bono legal services, but also earn too little to afford a traditional private attorney.” The firm can’t directly solicit self-represented, or pro se, litigants, because this would violate the rule on direct solicitation of clients for pecuniary gain, the committee said.

Under the Texas Disciplinary Rules of Professional Conduct 7.03, lawyers can’t directly solicit clients “when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.” Seeking even a “modest pecuniary gain,” even on a “reduced fee, below-market, or flat-rate fee basis” violates that rule, the committee said. And the pro se litigants the firm sought to target aren’t members of the charitable organization to which the firm belongs. So the charitable status of the firm isn’t relevant, the committee said.

Pro se parties make up an ever-larger share of the nation’s litigants. A 2015 study by the National Center for State Courts found that 76 percent of cases involved at least one pro se party.

Lawyer Can’t Talk to Experts Just So Adversary Can’t Use Them

• Lawyer can’t delay or burden opposing parties by limiting their access to experts

• So a lawyer can’t try to create disqualifying conflict with an expert he has no intention of using, Texas bar panel says

A lawyer can’t hire or share confidential information with an expert just to keep her from working for an opponent, a Texas bar’s ethics committee said in an August opinion.

A lawyer was engaged in litigation where only a handful of highly specialized experts could testify. He asked if he could try to create a conflict that would disqualify an expert from working for the opponent by hiring the expert or sharing confidential information. The lawyer can’t, the committee said, if there is no “substantial purpose” other than to create a conflict. If the lawyer retains or simply shares confidential information with a prospective expert, she may then be disqualified from assisting or testifying for an opponent.

The Texas Disciplinary Rules of Professional Conduct 4.04(a) provides that “a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.” If a lawyer has no “substantial purpose” other than “delay or burden the opposing party by impeding the opposing party’s access to a limited pool of potential experts,” then hiring or sharing confidential information with a prospective expert violates Rule 4.04(a), the committee said. But a rule violation isn’t dependent upon whether the expert is eventually disqualified, the committee said.

The committee said a lawyer also could violate Rule 4.01 if he makes a false statement in speaking with the expert about hiring her when he has “no intention of using that expert.” And Rule 8.04(a)(3) could be violated if the lawyer makes any misrepresentations or is deceitful in trying to disqualify the expert.

Articles Wanted for the CJS Newsletter

Practice Tips, Project News ...

For inquiries, contact Kyo Suh, Managing Editor, at kyo.suh@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.
11th Annual

CJS Fall Institute
Council & Committee Meetings

November 1-4, 2018
Washington, DC

Keynote Speaker

The Honorable Jed S. Rakoff
United States District Court
S.D.N.Y.

CLE Topics:

◊ A Fresh Look at Plea Bargaining in our Criminal Justice System

◊ Prosecutors as Agents of Change

◊ GITMO Twelve Years Later

◊ Re-Entry and Innovation

◊ What Civilians Can Learn from the Military Experience with Sexual Assault & Harassment

◊ Enhancing Justice: Reducing Implicit Bias in the Criminal Justice System

Register at www.ambar.org/cjsfall2018
Recent Books

The State of Criminal Justice 2018

This annual publication, edited by Prof. Mark Wojcik of The John Marshall Law School, examines and reports on the major issues, trends and significant changes in the criminal justice system. The 2018 volume contains chapters focusing on specific aspects of the criminal justice field, with summaries of all of the adopted official ABA policies passed in 2017-2018 that address criminal justice issues.

Criminal Procedure in Practice, Fifth Edition

By Melanie Wilson, Paul Marcus, Jack B Zimmermann

This comprehensive guide will assist anyone involved in the criminal justice system and will serve as an especially valuable guide for new prosecutors or defense attorneys entering the field. The text gives a broad overview of criminal procedure from investigation all the way through post-conviction reviews. The authors discuss complex topics such as standing, fruit of the poisonous tree, car stops, the privilege against self-incrimination, eyewitness identification, habeas corpus, and double jeopardy in both the civilian and military settings.