The “New” Pretrial Justice Committee

During his 2011 National Symposium on Pretrial Justice, Attorney General Eric Holder noted that, “There are still too many low-risk defendants across America held in expensive jail space simply for the want of the few dollars needed to secure their release, while truly dangerous criminal defendants are all too often quickly released to commit new crimes.” We can do better, but we need the legal community’s active engagement.

For this reason the ABA Criminal Justice Section’s newly rebranded “Pretrial Justice Committee” (formerly the “Committee on Crime Prevention, Pretrial Release, and Police Tactics”) will concentrate specifically on pretrial justice and the current national reform movement by promoting legal and evidence-based pretrial practices. At its first meeting in Washington, D.C., co-chairs Cherise Fanno Burdeen (Executive Director of the Pretrial Justice Institute) and Tim Schnacke (Executive Director of the Center for Legal and Evidence-Based Practices) helped the Committee to agree on an ambitious plan to engage the bar in a variety of pretrial-related educational outreach programs and projects. These will include projects surrounding model laws, court rules, and appellate opinions; all designed to help make the administration of bail more rational, fair, and transparent.

Educational outreach to the bar is especially important because, as Robert Kennedy told the ABA in 1964, solving the problem of an unfair bail system in America requires the “wholehearted involvement of the legal profession—starting with law students and reaching to the topmost ranks of our largest law firms.” Accordingly, both Cherise and Tim have been speaking to law firms and law schools in an attempt to create a core group of attorneys dedicated to what is a monumental national reform movement.

Attorneys and others who are interested in pretrial justice are encouraged to read two new foundational resources written by Tim Schnacke and published by the National Institute of Corrections. The first, Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform, summarizes the: (1) need for pretrial justice; (2) history of bail; (3) legal foundations of the pretrial phase of a criminal case; (4) pretrial research; (5) national pretrial standards; and (6) terms and phrases used in bail.

The second, Money as a Criminal Justice Stakeholder: The Judge’s Decision to Release or Detain a Defendant Pretrial, presents a detailed discussion and analysis of arguably the most important part of the pretrial process—the judge’s release or detention decision—and how America’s overuse of secured money at bail tends to hinder or derail that decision, leading to our current crisis of both unintended detention and release.

In addition, visit www.pretrial.org for a listing of national organizations who are members of the Pretrial Justice Working Group and read policy statements and resolutions supporting this work. ABA’s focus on this issue is in line with a request by Attorney General Eric Holder to make the recommendations of the 2011 National Symposium a reality in jurisdictions across the country.

“Cyber Breaches in Prosecutors’ Offices—What’s Your Action Plan?” panel during the CJS Seventh Annual Fall Institute, October 24, 2014 in Washington, D.C.
Section Highlights


The ABA Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes submitted its final draft proposal to the US Sentencing Commission. The Task Force has identified areas of weakness in the existing Federal Sentencing Guidelines for economic crimes, particularly those involving high loss amounts, and proposed specific changes. The final draft report includes case scenarios and explains how the proposed changes would apply to the sentencing of economic crimes. The report could be found at www.americanbar.org/crimjust

Updates on the Clemency Project

The Clemency Project 2014 (CP 2014) is making significant progress in what is a tremendous and historic undertaking. As of October 31, 2014, 25,426 federal prisoners have submitted applications for consideration of their cases. 4,864 applications are currently under attorney review to ascertain whether they meet the above criteria. There are 5,024 applications with a sentence of less than 10 years, which automatically disqualifies them under the Justice Department’s criteria. Clemency Project will be sending notices soon to these applicants advising that they do not meet the criteria. More than 1,500 attorneys have volunteered to take on cases pro bono via Clemency Project 2014.

The above figures are rolling, as prisoner applications continue to be submitted to the Project and volunteer attorneys continue to sign up to take on cases through the Project. More lawyers are needed to assist in this effort. To read the most recent release from the Project visit: www.americanbar.org/news/abanews/aba-news-archives/2014/10/clemency_project201.html

The Clemency Project is seeking volunteers. CP 2014 was created to assist federal inmates serving sentences for certain non-violent crimes in filing petitions for sentence commutation with the Department of Justice. With nearly 25,000 prisoners who have expressed an interest in sentence commutation more lawyers are needed to assist in this effort. To volunteer for this important project and for more information please visit the Clemency Project 2014 website at www.clemencyproject2014.org, or email the Project at volunteer@clemencyproject2014.org

The American Bar Association Criminal Justice Section is a proud member of Clemency Project 2014, a working group comprised of lawyers and advocates including, the American Civil Liberties Union, Families Against Mandatory Minimums, the National Association of Criminal Defense Lawyers, Federal Public and Community Defenders, and lawyers within those groups.

At the Third Annual International White Collar Crime Institute, October 13-14, 2014 in London, UK, CJS Chairs James E. Felman and Cynthia Orr provided opening remarks and updates on the work of the Section.

The conference touched on hot-button cross-border white collar crime issues including corporate espionage and cybercrimes, international money laundering and sanctions, evidentiary concerns, whistleblowers, collateral consequences, deferred prosecution agreements and international internal investigations.

The Criminal Justice Section Newsletter is published three times a year. Articles and reports reflect the views of the individuals or committees that prepared them and do not necessarily represent the position of the American Bar Association, the Criminal Justice Section, or the editors of the newsletter.

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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 Awards

Stephen A. Saltzburg (second from the left) accepts inaugural Raeder-Taslitz Award, presented by Patricia Sun (far left), Thomas Kelly (far right), and CJS Chairs Cynthia Orr and James Felman.

Saltzburg Receives Inaugural Raeder-Taslitz Award

Professor Stephen A. Saltzburg was honored with the ABA Criminal Justice Section's inaugural Raeder-Taslitz Award at the CJS Leadership and Awards Reception at the Law Offices of Hogan Lovells, Washington, D.C., on October 24, 2014. Saltzburg exemplifies the principles of the award—the ethical and professional conduct; excellence in scholarship, teaching, or community service—and has made a significant contribution to promoting public understanding of criminal justice, justice and fairness in the criminal justice system, or best practices on the part of lawyers and judges.

At the awards reception, the Section also honored Professor Andrew Taslitz with its highest honor, the Charles English Award (posthumously). Taslitz’s wife, Patricia Sun, accepted the award on his behalf.

Boutros Receives Norm Maleng Minster of Justice Award

Andrew S. Boutros, assistant US attorney in Chicago, was honored with the ABA Criminal Justice Section’s Norm Maleng Minster of Justice Award during the National Institute on International Regulation and Compliance: FCPA, Economic Sanctions & Export Control on October 2, 2014 in Washington, D.C. As a federal prosecutor, Boutros has conducted some of the largest and most complex, multidistrict, international fraud investigations and prosecutions of business organizations and corporate executives. As a defense attorney, Boutros led teams of attorneys defending corporations and executives in high-stakes criminal and regulatory probes being investigated by the Fraud Section of the US Department of Justice, the U.S. Attorneys’ Offices, the Securities and Exchange Commission, and other government agencies.

The Norm Maleng Award is bestowed on a prosecutor who embodies the principles enunciated in the ABA Standards for Criminal Justice, Prosecution Function, particularly that “the duty of the prosecutor is to seek justice, not merely to convict.”

Check the ABA Criminal Justice Section Website

www.americanbar.org/crimjust

for

Latest News & Updates
Calendar of Events
New Resources
Project Information
Committee Activities
Cyber-Risk Guidance from the SEC: New Realities for a New Level of Threat

By MacDonnell Ulsch

Cyber-lawlessness: Welcome to the Wild Wild Web

It seems that nearly every day we hear of another successful cyber attack on a highly visible organization. Indeed, data breaches of just about every type are on the rise — in frequency, sophistication, and risk impact. From personal financial and healthcare information to intellectual property and trade secrets, these breaches show no sign of abating.

This new reality of heightened cyber-threats appears to be enabled by several converging factors, both internal and external. In the absence of adequate due diligence and ongoing monitoring, third-party vendors and agents continue to elevate risk. And, while regulation aims to set a standard of mandatory minimums, the gap between that minimum and meaningful risk management can be substantial.

Many companies do not adequately grasp the degree of threat their organizations face. Certain nation-states see cyber-theft and even cyber-sabotage as a beneficial global economic competitive tool. Transnational organized criminals — sometimes in concert with nation-states, sometimes acting alone — continue to score massive attacks against a wide variety of targets.

Few organizations are immune. Virtually any company that possesses intellectual property, sensitive employee or customer data, or other information considered valuable can be a target. Beyond theft, the targeted data can be used to launder money through unregulated money transmitters in various foreign countries — or even used for extortion or scams.

Given the level of lawlessness, many pundits describe today’s cyber attacks as reminiscent of the Wild Wild West. And they may well be right. Today’s Web is a happy hunting ground for parties who are willing to violate virtually any law, statute or ethical edict to penetrate even some of the supposedly best-protected defenses.

Cybersecurity is not just “an IT thing.” It’s also a governance thing. (Just ask the SEC.)

Compounding the problem is the fact that many boards and managements still perceive cybersecurity as essentially “an IT thing.” Not only does this perception increase an organization’s potential exposure to attack, it also widens the communications gap between those charged with protecting the enterprise and those whose obligations are ensuring a return to investors and shareholders, and maintaining strong corporate governance.

But with the kinds of damage being regularly wrought through successful, high-profile cyber-attacks, governance is very much the point. After all, it’s not just businesses and their customers that are on the hook. In an era where digital assets hold an ever greater share of a company’s market value, investors, too, have a vested interest in knowing how — and how well — companies are managing their cyber-operational risks.

Both U.S. states and foreign governments and regulators have responded to this increasingly pressing issue with a variety of data breach laws and/or regulations intended to protect consumer information. The U.S. Securities and Exchange Commission, too, has recently issued updated guidance applicable to SEC registrants.

These guidelines, arguably, represent the next frontier of legal and forensics advice. Not only will they create SEC enforcement risk, they could serve as a useful yardstick for the class action bar in seeking to prove liability. Thus, they constitute a strong signal that companies need to take their cybersecurity efforts seriously.

The regulatory tea leaves suggest that, with the accelerating risk that cyber-threats now pose to shareholders and investors, the SEC will assume more and more prominence in this space. Responding to SEC guidance is therefore gaining board-level traction.

Unfortunately, the task of meaningfully describing in public filings the potential risk — and, in the event of a breach, the potential impact on the securities — is challenging for many registrant boards and executives, even those who have already felt the sting of a cyber-attack.

MacDonnell Ulsch is a Managing Director with PwC.
Cyber-risk guidance: Get ready for the next wave of SEC regulation

The SEC guidance\(^1\) states that “registrants should disclose the risk of cyber incidents if these issues are among the most significant factors that make an investment in the company speculative or risky.” The SEC is prescriptive about what companies should take into consideration when assessing cyber-risk: “In determining whether risk factor disclosure is required, we expect registrants to evaluate their cybersecurity risks and take into account all available relevant information, including prior cyber incidents and the severity and frequency of those incidents.”

The guidance goes on: “As part of this evaluation, registrants should consider the probability of cyber incidents occurring and the quantitative and qualitative magnitude of those risks, including the potential costs and other consequences resulting from misappropriation of assets or sensitive information, corruption of data or operational disruption.”

Beyond disclosure, companies also need to accrue for — and disclose — the costs of a breach in a timely manner. Failure to do so can create significant whistleblower risk, which the SEC’s bounty program exacerbates.

Here are some of the specific factors cited by the SEC, which registrants would be wise to consider in assessing the degree of cyber-risk they face:

- **The adequacy of preventative actions taken to reduce cybersecurity risks, in the context of the company’s industry.** Clients often misjudge adequacy based on the perception that their enterprises are not targeted, and misjudge security requirements based on peer groups.

- **Threatened attacks of which the company is aware, including incidents experienced by the registrant that are individually or, in the aggregate, material.** This raises the issue not only of what attacks the company is aware of, but of what it is doing to identify attacks.

- **Which aspects of business or operations give rise to material cybersecurity risks.** Materiality is not always obvious — especially when considering the compromise of intellectual property, trade secrets and other issues which could possibly imperil the brand and, therefore, its value in the market.

- **The potential costs and consequences of such material risks.** There are many variables here. The loss of personal information in a data breach may involve different costs than, say, the loss of intellectual property and trade secrets.

Suppose that a client has a data breach that includes the compromise of financial account information and other personal identifiers. Then consider the client that, as a result of the breach, has lost the R&D details of some great new technology — the next big thing. Then consider that investment partners who also funded the development of the technology. Then, there’s the question of how much revenue the technology was forecasted to deliver over a specified period. And what if the attackers used virtually unbreakable, military-grade encryption, making the technology unavailable to its rightful developers and owners? And what if the attack was launched by a nation-state planning to compete with the client on a global scale, stealing not only its technology but the majority of its market share?

- **To the extent the registrant outsources functions that have material cybersecurity risks, a description of those functions and how the registrant addresses those risks.** This point is particularly important, as third-party vendors are often the entry point in an attack on a registrant.

- **Risks related to cyber-incidents that may remain undetected for an extended period.** Leading breach indicators are sometimes missing for many years (up to six or seven years is not uncommon), making the identification of risk factors a significant challenge for a company.

- **Relevant insurance coverage.** This is a key emerging issue for many clients, who need continuing counsel as threats evolve and as insurance policies adapt to changing conditions.

**Providing the right advice: It’s complicated**

Addressing the many issues in this SEC guidance is easier said than done. Many registrants will need help determining what, how, and when to disclose information regarding the potential for a cyber attack — and how such an attack might impair their operations and valuation. Sophisticated legal and forensics advice is needed to substantively and accurately address pre- and post-breach concerns, including determining materiality.
One useful method for helping registrants assess the legal, regulatory, financial, and reputational risk is to conduct an analysis from a post-breach perspective. This is an opportunity for counsel to assess the client’s disclosure strategy. Simply looking at the registrant’s information security deployment is not sufficient to fully understand its overall risk, and what to disclose, for example, in its 10K filing with the SEC.

But using actual forensic data results, acquired through cyber-breach indicator testing and/or through any registrant’s prior breach data — including data from other companies whose cyber-breaches are part of the public record — can provide a realistic view into the breach and its consequences.

But a word of caution here. Breach cases can be extremely variable; companies report various — but certainly not all — aspects of breaches. While certain general conclusions may be drawn, there are important limitations to what can be learned from the public record. Still, understanding as much as possible about the nature of the threat and the resulting breach is always useful when developing a strategy to manage cyber-risk. From there, you can learn how to manage the breach effectively, and how to report critical elements of it as part of an overall strategy to manage risk.

On the plus side, there is growing interest in the National Institute of Standards and Technology (NIST) Cyber Security Framework, a public-private initiative that will hopefully lead to improved security. The NIST framework will help registrants move in a single direction — a beneficial step as companies prepare to develop plans to mitigate and recover from breaches, and a demonstration of reasonable cyber-risk management.

**Continuous improvement: The next level of compliance**

It’s clear that the Internet, Cloud, mobile, and various other technologies are greasing the wheels for the propagation of cyber-crimes of all kinds. It’s equally clear that security is not likely to outpace the innovation that enables advances in productivity and cost savings — the very virtues that make companies desirable targets. Cyber attacks are not going away.

Viewed in this context, the new SEC guidance on cyber-disclosure is a natural evolutionary step in addressing this systemic risk. Fortunately, there is evidence that registrants are starting to take it seriously.

Still, it is only a step. Compliance alone is not a silver bullet. It should be viewed as the cornerstone of a new framework for managing registrant risk — one that embeds both vigilance and continuous improvement into corporate strategy — in cooperation with regulators and forward-thinking entities such as NIST.

It can be challenging for a public company to incorporate these kinds of evolutionary process improvements into their business strategies while navigating the full range of cyber-risks alone. This is where seasoned attorneys and forensic specialists have a critical role to play. In the matter of the SEC and its registrants v. the cyber-threat, independent, experienced advice can make a significant difference.

**Endnotes**


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**Events for 2015**

ABA/CJS Midyear Meeting: Feb. 5-7, Houston, TX (CJS Hotel: Hyatt Regency)
National Institute on Gaming Law Minefield: Feb. 12-13, Las Vegas, NV
National Summit on Collateral Consequences: Feb. 27, Washington, DC
29th Annual National Institute on White Collar Crime: March 4-6, New Orleans, LA
National Institute on Bitcoin and other Virtual Currencies: April 10, Washington, DC
CJS Spring Council & Committee Meetings: April 23-26, St. Petersburg, FL
CJS Spring CLE: May 15, San Antonio, TX
National Institute on Health Care Fraud: May 13-15, Miami Beach, FL
Prescriptions for Criminal Justice Forensics: June 5, New York, NY
ABA London Sessions: June 15-16, London, UK
ABA/CJS Annual Meeting: July 30-Aug. 4, Chicago, IL
CJS 8th Annual Fall Institute, CJS Council & Committee Meetings: TBD, Washington, DC
CJS Global White Collar Crime Institute: Nov. 19-20, Shanghai, China

See www.americanbar.org/crimjust for details.
SPRING CLE
Breaking Developments in Criminal Practice
MAY 15, 2015
San Antonio, Texas

E-Discovery

4th Amendment in the Digital Age

Sentencing & Restitution

Implicit Bias

Networking Reception to Follow
UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

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Attorney-Client Privilege Didn't Cover Surrender Date

An attorney's letter to his client advising her of the date she was required to report to prison or the U.S. Marshals Service to begin serving her sentence didn't disclose confidential information protected by the attorney-client privilege, the U.S. Court of Appeals for the Seventh Circuit held Dec. 2 (United States v. Bey, 2014 BL 338526, 7th Cir., No. 13-2810, 12/2/14).

The client asserted the privilege claim at a bench trial for failing to appear to serve her sentence. The circuit court rejected an argument that the letter's admonition that the client was "supposed to report" to prison or the marshals was tantamount to legal advice about the meaning of the district judge's surrender order. [30 Law. Man. Prof. Conduct 777]

Defense Counsel's Performance Was So Bad That He Can't Practice in Kansas Anymore

Disbarment clearly is warranted for a lawyer whose profound shortcomings as retained defense counsel in a death penalty case were severely prejudicial to his client's interests, the Kansas Supreme Court decided Nov. 14 (In re Hawver, 2014 BL 321677, Kan., No. 111,425, 11/14/14).

Even if the client approved counsel's flawed defense strategy, the lawyer still must be held accountable for abrogating his professional duty to provide competent representation as required by the Kansas Rules of Professional Conduct, the court said in a per curiam opinion. Moreover, neither the lawyer's First Amendment right to express himself nor the client's Sixth Amendment right to counsel of choice protects the lawyer from discipline for his misconduct, it added.

The court stripped Ira D. Hawver of his law license for gravely mishandling the representation of Phillip D. Cheatham Jr., whose convictions and death sentence were ultimately thrown out as a result. See State v. Cheatham, 292 P.3d 318, 29 Law. Man. Prof. Conduct 89 (Kan. 2013).

The court found plenty of support for the hearing panel's finding that Hawver violated his duty of competent representation under Rule 1.1. According to the court, Hawver didn't have the experience necessary to litigate a death penalty case, refused offers of publicly funded help, didn't interview witnesses, failed to check out a potential alibi witness, undertook no penalty-phase investigation and made damaging arguments that painted his client as a killer who should be executed.

In addition, the court said, by violating Rule 1.1 Hawver also breached Rule 1.16(a)(1), which forbids accepting a representation that will violate professional conduct rules, and Rule 8.4(d), which prohibits conduct prejudicial to the justice system. The lawyer also engaged in conduct that reflected adversely on his fitness to practice in violation of Rule 8.4(g) by making damaging arguments to the jury, the court ruled.

Hawver got nowhere with his argument that he was merely carrying out Cheatham's chosen defense strategy—to convince the jury that he was innocent by showing that he was a street-smart criminal who would never have left an eyewitness alive to identify him.

An attorney must undertake a client's objectives competently, the court said. A client's consent to a theory of defense does not immunize counsel from discipline for incompetence in counseling the client and implementing his decisions, the opinion states.

The court also saw no merit in Hawver's argument that he shouldn't be disciplined for judgment calls about his pretrial preparation. "An attorney's decisions regarding the scope of pretrial investigation and preparation must be informed," and strategy decisions are constrained by the duty to provide competent representation, the court said.

The court refused to fault the hearing panel for relying on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. The panel used the guidelines as "merely one touchstone" for assessing the facts rather than treating the guidelines inappropriately as mandatory standards, it said.

Next, the court said that by agreeing to defend Cheatham for a flat fee of $50,000 Hawver violated Rule 1.5(a), which requires a lawyer's fee to be reasonable, and Rule 1.7, which deals with conflicts of interest.

"The combination of the flat-fee agreement, Cheatham's inability to pay, and Hawver's need to devote his time to fee-generating matters supports the panel's conclusion that Hawver's personal interests created a conflict of interest, causing him to materially limit Cheatham's representation," the court stated.

Under the circumstances, the court said, Hawver had a financial disincentive to devote the necessary time and resources to Cheatham's case. He knew he was unlikely to be paid if Cheatham was convicted and spent only 60 hours preparing for the trial, it said.

As for Hawver's constitutional challenges to discipline, the court held that "the First Amendment provides no protection for
Hawver's misconduct in the Cheatham case.” None of the conduct at issue is protected speech, it ruled.

The court noted that many of Hawver's lapses, such as his failure to file an alibi notice, were nonexpressive conduct that does not implicate the First Amendment. But he cannot claim First Amendment protection even for deficiencies that involved expressive conduct, such as his damaging arguments to the jury, it said.

“A lawyer who undertakes a duty to act only in the client’s best interests possesses no First Amendment interest in such in-court speech,” the opinion states.

In any event, the court said, the state’s significant interest in imposing discipline for a lawyer’s incompetence justifies restriction of the lawyer’s First Amendment rights.

The court also spurned Hawver’s attempt to raise Cheatham's Sixth Amendment right to counsel of choice as a barrier to discipline. “Cheatham's decision to have Hawver represent him does not insulate Hawver from discipline resulting from the course of that representation; nor is discipline an infringement on Cheatham's Sixth Amendment rights,” the court stated. “A criminal defendant’s choice of counsel is properly constrained by regulations governing the practice of law,” it added.

Ordering Hawver’s disbarment, the court cited the record in which the lawyer agreed to diversion for violating Rule 1.1; his refusal to accept publicly financed resources to aid in his client’s defense; and his “inexplicable incompetence” in handling both the guilt and penalty phases of the trial. In addition, it said, Hawver’s misconduct actually injured Cheatham by depriving him of effective assistance of counsel. [30 Law. Man. Prof. Conduct 759]

Court Kills D.A.’s Interrogation Program
But Avoids Addressing Ethics Implications

New York’s highest court Oct. 28 said a county district attorney's office must stop using a “preamble” that encourages suspects to talk before they receive their Miranda warnings (People v. Dunbar, 2014 BL 302664, N.Y., No. 169, 10/28/14).

Judge Susan Phillips Read said for a 6-1 majority that the preamble used by the Queens County District Attorney’s Office undercut all the warnings incorporated in the Miranda litany and therefore denied suspects an effective explanation of their constitutional rights.

Ethics Rules Not Mentioned
The court didn’t address an argument, raised in an amicus curiae brief filed by the Legal Ethics Bureau of New York University’s law school, that prosecutors may have acted unethically by participating in these prearraignment interviews. The prosecutors risked violating the rules protecting the administration of justice and prohibiting contacts with represented parties, the brief said.

It pointed out that New York Rules of Professional Conduct 4.3, 4.1 and 8.4(c) protect unrepresented persons from misrepresentation, deceit and overreaching by prosecutors during custodial interrogations, and that Rules 5.3(b) and 8.4(a) make prosecutors responsible for the conduct of the detectives assisting them and acting on their behalf.


The judge had found that the preamble program violated Rule 8.4(c) because it falsely implied that the interview was designed to assist the suspect and misled detainees into thinking they would forever surrender the chance to bring exculpatory evidence to the prosecutor’s attention if they invoked their rights.

In the present case, a joint amicus brief prepared by the American Civil Liberties Union and the New York Civil Liberties Union contended that the Queens County program has played “fast and loose” with the right to counsel and the right to a prompt court appearance by deliberately delaying arraignment to enable law enforcement to gather additional evidence before a defense lawyer enters the case.

Make Your Case
The controversial “prearraignment interview program” was instituted in 2007 by the Queens County D.A.’s Office and has come under heavy criticism from the defense bar and civil liberties groups.

Under the initiative, every suspect who doesn’t already have a lawyer is taken before arraignment to an interview room and told he will have just one chance to tell his side of the story and have the police investigate potential defenses.

After receiving that warning, the suspects in the two cases here were given Miranda warnings and then asked whether they would be willing to answer a few questions. Both defendants made statements that they later sought to suppress.

According to the court, a prosecutor attended both interviews. Reading from the script, the detectives warned the defendants that this was their last opportunity to tell their story to the prosecutors and steer the investigation into looking into possible alibi evidence. This preamble was “at best confusing and at worst misleading,” the court said.

Continued on page 11
Know where it’s going before it gets there.

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U.S. Department of Justice (DOJ) continues to provide grant opportunities to conduct research, to support law enforcement activities in state and local jurisdictions, to provide training and technical assistance, and to implement programs that improve the criminal justice system. To learn more about DOJ grant funding opportunities, visit www.justice.gov/business.

Association of Prosecuting Attorneys (APA) will continue its Final Friday webinar series on January 30th, 2015 starting at 3:00pm EST. This webinar – Ethics: Maintaining the Integrity of the Profession – will be presented by Chief of the Community Prosecution Division, Michelle Waymire, from the Marion County Prosecutors Office. APA hosts a webinar training course every last Friday of every month. There is no cost to view the webinar. Also, CLE will be provided, subject to review by the Virginia Bar. Registration can be accessed through their Events & Training section on our website, www.APAInc.org.

The Association of Prosecuting Attorneys will also host its Innovations in Criminal Justice Summit III. Prosecutors and their criminal justice colleagues accept the challenge to acquire groundbreaking and cost effective programs that exhibit assurance in lessening and preventing crime, delivering improved alternatives to incarceration, and discovering effective options to better utilize the given resources for an improved security of the public.

Pending approval by the U.S. Department of Justice’s Bureau of Justice Assistance, APA anticipates hosting this summit on the west coast in the spring of 2015. To view their two prior Innovative Summit materials or review the prior 20 Innovative programs, please visit their Programs section on their website at www.APAInc.org.

NACDL’s 2015 Midwinter Meeting & Seminar will be held at the Royal Sonesta Hotel in New Orleans, LA, February 18-21, 2015. Attendees will learn enhance their cross-examination techniques and receive tips from an expert faculty of seasoned practitioners. Engage in various seminars and programs on how to set up your cross-examination, how to convey a story through cross, and offer specific sessions on cross-examining some of the most challenging of witnesses -- kids, experts and cops. For information visit: www.nacdl.org/LegalEducation.aspx?id=20165&libID=20135

The National Attorneys General Training & Research Institute (NAGTRI) of the National Association of Attorneys General (NAAG) is conducting a tuition-free, one and one-half day training for prosecutors and investigators on Human Trafficking. The training will be limited to prosecutors and investigators. This is a mobile training. NAGTRI provides a number of different training platforms for the benefit of Attorney General offices. During a mobile training, NAGTRI brings in a national faculty to provide staff training. Visit: www.naag.org/human-trafficking-for-state-prosecutors-pago-pago-am-samoa.php. For more information, contact Judy McKee, NAGTRI Deputy Director, (202) 326-6044.

National District Attorneys Association (NDAA) will host the 2015 Successful Trial Strategies Course, January 26–30, 2015 in Tampa, Florida. This course is designed to provide up-to-the-minute instruction on trial advocacy skills, trial preparation, and other methodologies that will assist the busy prosecutor in improving their skills inside the courtroom. Designed to go beyond the basics of trial advocacy, this course will benefit both new prosecutors and experienced litigators. Attendees will have an opportunity to learn from seasoned prosecutor faculty members, as well as their colleagues from across the country. Open to lawyers in local, state, federal and military government attorneys’ offices, paralegals who work in these offices and law enforcement officers who are involved in case preparation with a prosecutor’s office. For more information, contact course director Brent Berkley at bberkley@ndaa.org

Ethics, continued from page 9

The defendants were in essence told they would forfeit a valuable opportunity to speak with an assistant district attorney, to have their cases investigated or to assert alibi defenses if they kept their mouths shut or insisted on talking to a lawyer, it said.

In dissent, Judge Robert S. Smith argued there is nothing improper in exploiting “the natural impulse of any guilty defendant to think that he can talk his way out of trouble, by persuading police or prosecutors either that he is innocent or that he deserves leniency.” On the other hand, this preamble can be a good thing for those who are unjustly detained, Smith added.

“It is usually in the interest of an innocent person to give investigators the true facts as soon as possible, before the evidentiary trail has grown cold and before an alibi can be tainted by the suspicion of contrivance,” he said.

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