With over 140 criminal law practitioners and professionals from the U.S., Europe and Asia gathered in Shanghai, China on November 19-20, 2015, the ABA Criminal Justice Section’s Inaugural Global White Collar Crime Institute in collaboration with the KoGuan Law School of the Shanghai Jiao Tong University, guided by the Legal Daily and the Shanghai Law Society, was highly successful.

Held at the Ritz-Carlton Shanghai Pudong, the goal of the conference was to bring the energy and excitement of the CJS’ previous international white collar crime conferences to Asia and create unique opportunities for the participants to network and explore the legal complexities of white collar crime in the growing Chinese legal market. Conference topics included: “General Counsels’ Roundtable, Enforcers’ Roundtable”; “How to Conduct an International Internal Investigation”; “Examination of Anti-Monopoly & Anti-trust Issues in China & the US”; “Comparative Legal Systems & Special Enforcement Issues in China, the US & Beyond”; “Year in Review -- Lessons Learned from Recent White Collar Crimes Prosecutions in China & the US”; “Trends Regarding Anti-Corruption Enforcement in China & the US”; “Cyber Crime & Virtual Currencies; and Social Responsibility of Corporations.”

Judge Bernice B. Donald, Chair of the ABA Criminal Justice Section opened the program, and was followed by Lucian E. Dervan, chair of the institute and associate professor at Southern Illinois University School of Law. With the assistance of simultaneous interpretation, experts delved into topics ranging from how to conduct an internal investigation; to comparative legal systems and special enforcement issues in China, the U.S. and beyond.

Sung-Hee Suh, U.S. Deputy Assistant Attorney General, delivered keynote remarks on the U.S. Department of Justice’s continued efforts to investigate and prosecute white-collar crime, including the Department-wide enhanced efforts to pursue individual accountability in cases of corporate wrongdoing; the Criminal Division’s continued efforts to provide greater transparency regarding our corporate resolutions, especially in Foreign Corrupt Practices Act cases, in conjunction with the Justice Department’s increased resources devoted to fighting international corruption; and the Criminal Division’s recent retention of an experienced compliance counsel.

National Institute on White Collar Crime To Celebrate 30 Years

The ABA Criminal Justice Section will hold its 30th Annual White Collar Crime Institute in San Diego, CA on March 2-4, 2016. Since its establishment in 1987, the Institute has been attended by leading federal and state judges and prosecutors, law enforcement officials, defense attorneys, corporate in-house counsel and members of the academic community.

The faculty regularly includes some of the top members of the white collar crime field in the United States and abroad. Among the audience are nationally-renowned lawyers, as well as many who are beginning to concentrate in the white collar crime area. Attendees have consistently given the Institute high ratings for the exceptional quality of its publication, the panelists’ presentations, the valuable updates on new developments and strategies, as well as the rare opportunity to meet colleagues in this field, renew acquaintances and exchange ideas.

Substantive topics to be covered in the institute include: Sentencing in white collar cases; Recent developments and new trends in FCPA enforcement; Securities enforcement in 2016 and beyond; Emerging enforcement trends in health care; Increasing enforcement of economic sanctions and export control; National security – cybercrime and economic espionage; Antitrust prosecution trends; Environmental crimes in a world of global markets, climate change and terrorism; Comprehensive tax enforcement – how the government is using its tools; Asset forfeiture and freeze orders; Recent developments in anti-money laundering.

London White Collar Crime Institute

The Criminal Justice Section’s “Fourth Annual London White Collar Crime Institute” was held October 12-13, 2015 at the Law Offices of Berwin Leighton Paisner (Adelaide House) in London, United Kingdom.

Lord Carlile CBE QC, a Member of the House of Lords, served as the keynote speaker at a luncheon held at the historic Fishmonger’s. Lord Carlile served as a Liberal Democrat Member of Parliament from 1983-1997. He was the Independent Reviewer of terrorism legislation between 2001 and 2011, and has a strong interest in cyber-related issues especially regarding National Security.

The conference featured topflight legal practitioners from across the globe tackling such topics as corporate espionage and cybercrimes, tax prosecution and money laundering, extradition as well as public corruption & FCPA Issues. Sessions included a discussion on “Monitors: Ensuring Compliance When You Need It Most!,” with former U.S. Deputy Attorney General James M. Cole, and independent compliance monitor Michael Cherkasky.

The Fifth London White Collar Crime Institute will take place on October 10-11, 2016.

Articles Wanted for the CJS Newsletter

Practice Tips, Project/Committee News ...
Submission Deadline for the Next Issue: April 15, 2016.
For inquiries, contact Kyo Suh, Managing Editor, at kyo.suh@americanbar.org
Eighth Annual Fall Institute

The Section's Eighth Annual Fall Institute “Criminal Justice in the 21st Century: Calibrating the Scales of Justice,” held on October 23, 2015 in Washington, DC, explored a range of topics including surveillance technology and the law, wrongful convictions, the role of judges in criminal justice, and the media’s role in criminal justice policy.

The meeting featured remarks from U.S. Rep. Steve Cohen (D-TN), Judge Bernice B. Donald, CJS Chair, and other members of the Section's leadership brought together a diverse group of expert panelists -- including academics, legislators, prosecutors, defense attorneys and judges -- who delved into a range of topics, including “Hindsight is 20/20: The Prosecutor's Take on Wrongful Convictions and Exonerations”; “Calibrating the Scales of Criminal Justice: The View from the Bench”; “Unreported: The Media’s Role in Fostering Racial Perceptions and What It Means for Criminal Justice Policy.”

The CJS Inaugural Awards Luncheon, held during the Fall Institute, was a complete success. ABA President Paulette Brown provided luncheon keynote remarks. All five Criminal Justice Section Awards were presented to the following recipients: Charles R. English Award -- Ronald Goldstock, Commissioner, Waterfront Commission of New York Harbor, Larchmont, NY; Frank Carrington Crime Victim Attorney Award -- Lenore Anderson, Executive Director, Californians for Safety and Justice, Oakland, CA; Livingston Hall Juvenile Justice Award -- Mark Friedenthal, Assistant Public Defender, Office of the Public Defender, Baltimore MD; Raeder-Taslitz Award -- Professor James Coleman, Duke University School of Law, Durham, NC; Norm Maleng Minister of Justice Award -- Pearl Kim, Assistant District Attorney, Office of the District Attorney, Delaware County, Media, PA.

Spring Meeting to Focus on Neuro-Science and Criminal Justice Reform

The ABA Criminal Justice Section’s Spring Meeting, co-sponsored by the State Bar of New Mexico, will host the CLE program “Neuroscience: Paving the Way for Criminal Justice Reform.” The meeting, including council and committee meetings, will be held April 28-April 30, 2016 in Albuquerque, New Mexico.

New Mexico Supreme Court Justice Charles Daniels will serve as the luncheon keynote speaker. A few months before the conference, Justice Daniels will assume the role of Chief Justice of the New Mexico Supreme Court. Roberta Cooper Ramo, first woman to become President of the American Bar Association, will provide opening remarks.

Key panels will include: “A Neuroscience Primer for the Criminal Justice Practitioner: How neuroscience is paving the way to criminal justice reform”; “Neuroscience and Environmental Factors: Is It Nature or Nurture”; “Neuroscience and Solitary Confinement”; “The Neuroscience of Hate: The Making of Extremist Groups.”

Update on Clemency Project 2014

President Obama granted 95 clemency petitions in mid-December 2015, 27 of which were supported by Clemency Project 2014. This was a historic day, and the CJS is very proud of the progress made thus far. The project seeks to assist prisoners who are serving a sentence that, if imposed today, would be substantially shorter than their original sentence. These individuals are nonviolent offenders with no significant criminal histories who have demonstrated good conduct in prison.

Now that the White House has cemented its commitment to correcting excessive sentences for nonviolent offenders, the project needs CJS members for assistance. 4,864 applications are currently under attorney review to ascertain whether they meet the above criteria, and criminal law practitioners are in the best position to help those selected. The Clemency Project 2014 has now streamlined many of its procedures, making it easier than ever to take a case. Clemency Project staff attorneys have pre-screened cases, including a review of the presentence report, so that cases that appear to meet the criteria can be assigned for review. For more information and to volunteer for Clemency Project 2014, visit www.clemencyproject2014.org.
Criminal Justice Section Newsletter  
Winter 2016

COMMITTEE NEWS

Ethics, Gideon & Professionalism Committee

The Ethics, Gideon & Professionalism Committee (EGPC) is organizing programs at several law schools around the country on ethical issues in representing criminal defendants with mental health problems. The occasion for the discussions is the completion of the revisions to the Criminal Justice Mental Health Standards, which are now before the CJS Council. The revisions were undertaken over the course of several years by the Mental Health Task Force, chaired by Professor Chris Slobogin, and they address a wide range of issues facing criminal defense lawyers, prosecutors, judges and others.

First, the Committee is sponsoring a series of roundtable discussions in early 2016. So far, the Committee has identified three law schools -- George Washington University Law School, New York Law School, and Northwestern Law School -- and it is looking for a fourth (most likely in Georgia) to serve as host. The conversations will be based on a series of hypotheticals designed to raise thorny issues that often arise for criminal defense attorneys who represent mentally ill clients. The point is to generate a lively discussion, generate different ideas about how to handle various ethical dilemmas, and capture the conversation by having a Reporter present to take down what it said and condense it.

Additionally, CJS Council Member Rory Little, a UC Hastings Professor, is organizing a symposium at his law school on the revisions to the Mental Health Standards in cooperation with the EGPC. The UC Hastings Constitutional Law Quarterly has agreed to co-sponsor the symposium and to devote one of its volumes to scholarship arising out of that event. In addition to Professor Little, each host site has a professor who is willing to collaborate with our committee in generating a list of participants for this invitation-only event. All events will take place in the winter and spring of 2016.

(Submitted by Co-Chair Lara Bazelon)

Pretrial Justice Committee

The Pretrial Justice Committee continues to engage lawyers and other stakeholders to raise awareness about the need for pretrial justice reform. The Committee is comprised of co-chairs Cherise Fanno Burdeen, executive director of the Pretrial Justice Institute; Alec Karakatsanis, co-founder of the civil rights legal group Equal Justice Under Law; and David Biggers Jr., executive assistant U.S. Attorney for the Western District of Tennessee. Ms Burdeen and Mr. Karakatsanis have spoken recently with several key groups to highlight the importance of moving from money-based pretrial systems to ones based on risk.

In September, Ms. Burdeen met with students of the Criminal Justice Program of Study, Research & Advocacy (CJP) at Harvard Law School. These students represent the next generation of leading criminal justice attorneys. The newly formed program will focus on criminal justice reform initiatives; the interaction of the media with criminal justice reform; and conversations on race, place, and policing. One of the program’s initial projects will be to work with advocates and policymakers to de-link pretrial release from cash bail.

Committee co-chairs also presented at the Pretrial Racial Justice Initiative’s (PRJI) first annual Roundtable Discussion on Racial and Ethnic Disparities in Bail and Pretrial Detention, in November in Washington, DC. The event included speakers and attendees from the U.S. Department of Justice Civil Rights Division, the NAACP Legal Defense Fund, and the Leadership Conference on Civil and Human Rights, as well as many others from academia and philanthropy. The purpose of PRJI is to form partnerships between civil rights groups and criminal justice reform organizations in order to address pretrial detention practices that have a disparate impact on communities of color and perpetuate mass incarceration.

Finally, Ms. Burdeen and Mr. Karakatsanis were part of a select group invited to participate in A Cycle of Incarceration: Prison, Debt and Bail Practices, co-hosted by the White House and the Department of Justice on December 3, 2015. Speakers included Attorney General Loretta Lynch and other representatives from the AG’s Office; numerous academic and judicial stakeholders; and Michael B. Jordan and David Simon from the television series, The Wire.

The Pretrial Justice Committee continues to engage lawyers and other stakeholders to raise awareness about the need for pretrial justice reform. The Committee is comprised of co-chairs Cherise Fanno Burdeen, executive director of the Pretrial Justice Institute; Alec Karakatsanis, co-founder of the civil rights legal group Equal Justice Under Law; and David Biggers Jr., executive assistant U.S. Attorney for the Western District of Tennessee. Ms Burdeen and Mr. Karakatsanis have spoken recently with several key groups to highlight the importance of moving from money-based pretrial systems to ones based on risk.

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.

(Submitted by Co-Chair Cherise Fanno Burdeen)
Criminal Justice Section Spring Meeting
Co-sponsored by
State Bar of New Mexico
April 28-30, 2016 | Albuquerque, New Mexico

Neuroscience: Paving the Way for Criminal Justice Reform!

Keynote Speakers:
Justice Charles W. Daniels
New Mexico Supreme Court
Roberta Cooper Ramo
President, American Law Institute

Schedule At-A-Glance

Thursday, April 28
- CJS Committee Meetings
- Town Hall: Reversing the School to Prison Pipeline

Friday, April 29
- CLE: Neuroscience: Paving the Way for Criminal Justice Reform!

Saturday, April 30
- CJS Council & Committee Meetings

Topics Include:
- The Neuroscience of Hate
- Neuroscience and Environmental Factors
- Neuroscience and Solitary Confinement

To register visit: http://ambar.org/cjs2016spring
DEVELOPING A WINNING THEME

By Michael D. Dean

Longtime Criminal Justice Section leader Stephen Saltzburg stresses in his co-authored book, *Trying Cases to Win*, that the attorney should stick to one central theme. (Herbert J. Stern and Stephen A. Saltzburg, *Trying Cases to Win: In One Volume*, Chicago: ABA 2013). I couldn’t agree more. For the defense, the “shotgun” approach is weak. It tells the jury that the defendant is perhaps guilty, but the government cannot prove otherwise. For the prosecution, it screams, “I don’t know what really happened.” The concept of a single theme eliminates these perceived weaknesses by communicating to the jury that the attorney is confident that he or she knows what happened and will be able to show it. For these reasons, the attorney cannot truly begin to prepare for trial until that “one central theme” is identified. So, what makes a good “theme?” That is the question this article will answer.

Themes Should be Concise and Memorable

A theme is a concise statement that explains why the represented party should prevail. A good theme is a phrase that is catchy, clever, and memorable. Despite the fact that the theme constitutes only a single sentence of an attorney’s opening and closing arguments—albeit, perhaps an often repeated sentence—it has the potential to harness enormous power over the outcome of the proceedings.

When the Central Ice Cream Company of Chicago sued the McDonald’s Corporation, it retained famed attorney Gerry Spence. Spence was faced with having to prove the existence of an oral contract that the plaintiff claimed was breached when McDonald’s allegedly withdrew from its promise to distribute the plaintiff’s “Triple Ripple” ice cream cone for a period of 20 years. Most would presume that a company as successful and prestigious as McDonald’s would certainly have put such an agreement in writing. Spence’s seven-word-theme, however, turned this presumption to his advantage and painted his client as the hero fighting the villain. “Let’s put honor back in the handshake.” This incredibly concise statement had two main strengths: (1) It was easily memorable; (2) it conveyed a powerful message in approximately ¼ the words used in this sentence. Most importantly, this deceivingly simple statement won the plaintiff a $52M verdict.

One method for ensuring a theme is memorable is to turn it into a “lesson” or a “moral of the story.” Roger Dodd, co-author of possibly the most influential book on cross-examination, devotes a portion of his career travelling the country and giving seminars on his technique. (*See* Larry S. Pozner and Roger Dodd, *Cross-Examination: Science and Technique*, 2d Ed. Charlottesville: LexisNexis 2009). Of course, cross-examination provides a means to advance the advocate’s case using the opponent’s own witnesses. Advancing the case means extracting facts from adverse witnesses that build on the attorney’s chosen theme. Dodd stresses that jury trials should be treated like stories. During his 2013 seminar in Indianapolis, Dodd made his point by displaying a picture from the children’s story *The Hare and the Tortoise*. No words appeared on the screen. However, when the audience—who perhaps had not read the fable in decades—was asked to state the theme, nearly every attorney in the room replied, “Slow and steady wins the race.”

Dodd’s point was made. Simple story themes have the potential to burn images and messages in our minds that last for years—or, in this case, decades. Dodd argued that the “theme” selected by the attorney should be thought of as “the moral of the story,” hence the use of the famous fable. In other words, the facts of the case should be summed up into a simple lesson that makes sense, resonates with the jury, and sounds “right.”

Fables, therefore, may serve as a springboard for ideas when the attorney is looking for the right theme. Aesop has given us many “morals” that are general enough to serve as themes for many types of cases. For example, the prosecution trying a domestic battery case may argue “familiarity breeds contempt,” the moral learned from *The Fox and the Lion*. A defense attorney claiming the defendant acted in self-defense may use the moral, “He who seeks to injure others often injures only himself.” This line, taken from *The Horse and the Stag*, conveys to the jury that the victim’s attempt to assault the defendant simply backfired. A murder case where the defendant kills his spouse’s lover may be summed up by the prosecution with the moral, “Avoid a remedy that is worse than the disease,” taken from *The Hawk, the Kite, and the Pigeon*. Finally, an insanity defense could use the lesson, “No one should be blamed for his infirmities,” taken from *The Old Hound*.

Another useful technique for theme development is to think of the theme as a marketing tagline. Not too long ago, I conducted research online to develop a theme for prosecuting a child rape case. I stumbled upon an online article written by Tampa defense attorney Elliott Wilcox, the author of the weekly “e-zine” *Trial Tips Newsletter*. In the article “Million Dollar Jury Trial Case Themes You Can Steal,” Wilcox argues that movie taglines are good sources for inspiring theme development. (trialtheater.com/general-trial-strategies/million-
dollar-jury-trial-case-themes-you-can-steal, last visited Dec. 14, 2015). Wilcox points out that taglines are used in marketing movies to “resonate with the moviegoer, sticking in his head even after he walks away from the poster, and subtly push him to go see the movie.” In that sense, the purpose of a movie tagline is highly analogous to the purpose of the attorney’s theme. Instead of the “moviegoer,” it is the ladies and gentlemen of the jury we wish to “resonate” with. We also desire our themes to “stick[]” in the jurors’ minds as they enter the deliberation room following closing arguments. Finally, we too want to “push” our target audience. Instead of pushing them to see a movie, we want our theme to “push” the jury to a particular verdict.

Wilcox provides several examples of what he identifies as both “good” and “great” movie themes. Obviously, movie taglines—with few exceptions—should not be used verbatim. However, they serve as an excellent starting point for the attorney’s creative processes. Here are five examples used by Wilcox:

- **Platoon** (1986): “The first casualty of war is innocence.”
- **Chicago** (2002): “If you can’t be famous be infamous.”
- **Rocky** (1976): “His whole life was a million-to-one shot.”
- **Animal House** (1978): “It was the Delta’s against the rules… the rules lost.”
- **Quiz Show** (1994): “Fifty million people watched, but no one saw a thing.”

Notice that these taglines share common threads with both the Spence and fable examples. Again, they are each very brief. Each consists of a single sentence, and each sentence is not more than 10 words. Also, the first two are, in essence, “morsals of the story.” In the movie Platoon, the moral learned is that war destroys innocence. In the movie Chicago, the moral learned is that infamy may achieve an individual’s goals just as much as fame itself (think Lee Harvey Oswald who, before assassinating Kennedy, longed for the spotlight).

**The Theme Must Account for All “Facts”**

So far, this article has focused on what makes a great theme and identified sources to assist in theme development. But, before the attorney is able to construct a one-line, memorable zinger that will resonate with the jurors after they leave the jury box, the attorney needs to identify a winning strategy. After all, the moral “He who seeks to injure others often injures only himself” though powerful, concise, and memorable, is a terrible theme unless the evidence reasonably supports a claim of self-defense. The facts drive the theme, not the other way around.

In *Trying Cases to Win*, Stern and Satzburg point out that a theme must be developed around the “facts” that are either undisputed or, if contested, that the jury is almost certain to accept. A theme that is dependent on a fact or facts that have a high likelihood of being rejected is a disastrous proposition. Thus, before deciding on a theme, the attorney should spend sufficient time in objective contemplation regarding what facts will likely be taken as established. Once these key facts have been identified, the attorney has a toolkit from which to work. The established facts may be thought of as building blocks that can be arranged in a variety of ways to create a final design. That is, the attorney is an architect that must build a structure with a set of finite materials using his or her own creativity. Sometimes the “facts” are such that they are capable of only one reasonable structure. Other times, the attorney will have greater flexibility. Regardless, the final theme must (1) account for all facts that will likely be established; and (2) be a plausible explanation of the evidence.

**Application to a Real-World Example**

The following example, taken from a recent murder trial in the author’s jurisdiction, illustrates one way the points made in the previous sections can be applied. The facts of the case are as follows:

The defendant was out of work and needed a place to stay. He had no money. The victim agreed to provide the defendant shelter in exchange for the defendant’s assistance with some home remodeling. In the days leading up to the killing, various neighbors overheard the victim and defendant arguing. The arguing appeared to be caused by disagreements with how the work on the home should be done.

One day, the defendant entered into the kitchen of the residence where the victim was sitting at a table. The victim had a .40 handgun sitting out where the defendant could see it across the room. The defendant observed the gun a few days before next to a fully loaded magazine (a removable component of the weapon that holds the ammunition). The defendant picked up the gun, pointed it at the victim’s head, and pulled the trigger. The bullet entered the victim’s brain where it shattered into various fragments rendering him bleeding and unconscious.

After the shooting, the defendant fled the scene. He attempted to text his girlfriend to help him leave town. When that failed, the defendant encountered someone he knew on the street. He told the individual (who had criminal history) about the shooting. The individual asked if anybody witnessed the shooting. When the defendant replied negatively, it was suggested that he return to the scene and put the gun in the victim’s hand to...
make it look like a suicide. The defendant took the advice in part; however, instead of putting the gun in the victim’s hand, he wiped his prints off of the weapon with a towel, concealed the weapon in the towel, and then threw the gun into a nearby river. The defendant then went to a neighbor’s house where he got a cup of coffee and sat on the couch watching television while he smoked a couple of cigarettes. The neighbor testified the defendant appeared calm during this time.

All the while, the victim was still alive laying on the kitchen floor in a pool of his own blood. When the crime was finally discovered later in the evening, the victim was taken by helicopter to the nearest Level 1 trauma center. He died 2 ½ days later after being taken off life support.

After the shooting was discovered, the defendant cooperated with law enforcement and agreed to be interviewed. He claimed that the shooting was accidental. He stated that the victim was depressed and jokingly told the defendant, “Put me out of my misery.” The defendant claimed that he went along with the joke and intended only to pretend to do what the victim asked. As for pulling the trigger, the defendant acknowledged that the action was “stupid” but that he “just wasn’t thinking” and mistakenly believed that the gun was unloaded and/or on safe. The defendant also acknowledged his actions following the incident. He claimed that what he did looked terrible, but it was only because he was in a state of complete panic and was unable to think clearly.

The facts look bad for the defendant. But, the case still had to be proven beyond a reasonable doubt which meant discrediting the defendant’s account with enough certainty to make the jury feel confident in returning a guilty verdict that would send the defendant away for the rest of his life. The defendant complicated matters by convincing the court to instruct the jury on “reckless” homicide (which carries a sentencing range of only one to six years).

The problem for the prosecution was that the motive for “knowing or intentional” murder was not the strongest. People often disagree about how to do home improvement projects. Moreover, nobody had observed arguing that day, and the victim and defendant had just recently returned to town after running errands together. Thus, there was concern that the jury may believe the defendant’s testimony that it was a “stupid” accident, or at least have a reasonable doubt regarding his veracity.

Under Indiana law, the lesser included offense of “reckless” homicide is only to be considered by the jury if they first find that the State failed to prove “knowing or intentional” murder. To get past this step, the defense argued the affirmative defense of “mistake of fact.” The “mistake” that was claimed was the defendant’s belief that the gun was unloaded and/or on safe. The affirmative defense of “mistake of fact” is codified in the Indiana criminal code. However, the prosecution found that appellate courts had interpreted the defense to have several elements. The first of these elements was that the mistake must be “honest and reasonable.” The court used this case law to issue a jury instruction that broke the defense down into numerical elements.

Based on the “facts” of the case and the law, the following theme was developed: “When someone has to die, the law only forgives reasonable mistakes.” Pointing a gun (even one that has been thoroughly examined) at someone’s head and pulling the trigger is never “reasonable” and the defense was therefore not available. The jury convicted the defendant after only 35 minutes of deliberation.

The example above illustrates the process for selecting a theme.

1. Familiarize yourself with all of the factual materials for the case.
2. If there are any material questions left unanswered after step one, conduct additional discovery until you either (1) answer the question, or (2) determine that the fact(s) you seek cannot be determined.
3. Identify all material facts that are either undisputed or, even if contested, are highly likely to be accepted by the jury as established.
4. As suggested in Trying Cases to Win, write out a list of all material facts on a sheet of paper or on a word processor. These facts should be divided into two columns: (1) those that are favorable to your case and (2) those that are unfavorable.
5. Mentally construct a story of what occurred that accounts for every material fact and that, if proven, demonstrates that you are entitled to a favorable verdict.
6. Apply the techniques outlined at the outset of this article to develop a short, direct, one-sentence theme that summarizes the conclusion that your “story” reaches. It should be easy to remember and convey the “lesson” that justifies a favorable verdict.

In the example of the murder trial, the facts regarding the defendant picking up the gun, pointing it at the victim’s head, and pulling the trigger were undisputed. So were the facts regarding the defendant’s reaction to the shooting. However, the prosecution was uncertain how the jury would treat the defendant’s account that the victim had jokingly told him, “Put me out of my misery.” It was also not sufficiently certain that the jury would accept that an argument had prompted the shooting.
The theme used by the prosecution took account of all of this material and assumed the defendant’s candor with his explanation of what had prompted the shooting. With this story, the theme was developed: “When somebody has to die, the law only forgives reasonable mistakes.” This theme is only 11 words. It emphasized the seriousness of the result—a life was taken. It simplified the point that unreasonableness alone is all that is required to disqualify the defense of “mistake of fact.” Most importantly to the victim’s family, it worked.

Conclusion

The theme is the foundation upon which the entire trial strategy is built. Nevertheless, its importance is often overlooked even by highly experienced attorneys. Taking the time to apply the principles laid out in this article will help the attorney stay focused and organized throughout the trial preparation process. It will also help keep even a complicated case simple to understand. Most importantly, it will help you win.

Saltzburg Testifies in Congress

Stephen A. Saltzburg, ABA Criminal Justice Section delegate and professor at George Washington School of Law, testified on behalf of the American Bar Association before the U.S. Senate Judiciary Committee during a public hearing on the subject of the adequacy of criminal intent standards in federal prosecutions. The hearing was held January 20 in Washington, D.C.

Saltzburg served on a panel with Hon. Edwin Meese III, the 75th U.S. Attorney General and Robert Weissman, President of Public Citizen. Leslie Caldwell, assistant attorney general for the U.S. Department of Justice, Criminal Division also testified.

Call for Nominations

ABA Criminal Justice Section Awards

Deadline: April 8, 2016

Nominations are now being accepted for the following Criminal Justice Section awards:

**Frank Carrington Crime Victim Attorney Award:** Awardees will be attorneys or legal service providers (including organizations) who have either directly represented specific victims in criminal, juvenile, or appellate courts or who have worked to promote or implement policies to improve the treatment of crime victims in the criminal justice system.

**Charles R. English Award:** Judges, prosecutors, the defense bar, academics, and other attorneys who are members of the American Bar Association Criminal Justice Section and have distinguished themselves by their work in the field of criminal justice.

**Norm Maleng Minister of Justice Award:** The selection committee will select a deserving recipient and will ensure that recipients are eventually recognized from all ranks of prosecutors including: (1) federal, state, local, and municipal prosecutors, (2) elected and appointed prosecutors, and (3) those in a large and small office. Selection will be without regard to whether the recipient is head of an office, a supervisor of others, or a member of the ABA.

**Livingston Hall Juvenile Justice Award:** An active member of the bar who devotes a significant portion of his or her legal practice to youth and children, and is making positive contributions to the field both in and outside the courtroom.

**Raeder-Taslitz Award:** Given to a law professor whose excellence in scholarship, teaching or community service 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.

For more information on these awards, please see www.ambar.org/cjsawards.
What’s in Your Yard?
Export Control Reform: What You Need to Know Now

By Jeannette L. Chu

In 2012, PwC published *How High Are Your Walls?*, a look at how the U.S. Export Control Reform initiative (ECR) was shaping up, and what these reforms might augur for affected companies. Three years on, we take a fresh look at the current state of ECR – with a view to offering some suggestions for companies caught in a shifting paradigm.

A unique regulatory ecosystem

When it comes to the transfer of goods, technology, services and information to foreign parties, the United States is unique in the scope, reach and complexity of its regulations.

There are multiple departments responsible for overseeing the movement of a plethora of items across multiple categories and lists. The Department of State administers the International Traffic in Arms Regulations (ITAR), which includes defense articles, technical data, defense services and software enumerated on the U.S. Munitions List (USML). The Department of Commerce administers the Export Administration Regulations (EAR), which includes dual-use and certain military items and technologies called out on the Commerce Control List (CCL). The Department of Treasury’s Office of Foreign Assets Control (OFAC), administers economic embargoes and sanctions.

However, enforcing these regulations and managing the authorization of exports, which include so-called “deemed exports” or technology transfers within the U.S., as well as controls on the export of technical data, software, source code, encryption and other intangible items, can involve a number of additional agencies — including the Defense Technology Security Administration, National Security Administration, Department of Homeland Security, Customs & Border Protection, Federal Bureau of Investigation and the Department of Justice, amongst others.

Many companies have felt constrained in their ability to keep pace with developments in the global security and international marketplaces, and with emerging global geopolitical risks

Export controls, rebooted

ECR aimed to overhaul and streamline the following areas of the export control system, in order to realign export controls with a focus on current threats, and to adapt to the changing economic and technological landscape:

- what the government controls
- how it controls it
- how it manages those controls
- how it enforces controls

The streamlining would be accomplished by establishing:

- a single control list
- administered by a single licensing agency
- using a single IT platform
- backed up by a single enforcement agency.

Export Control Reform’s “four singles” — how do they fare today?

The Obama Administration originally planned to implement the reform in three phases. Phases I&II were to be focused on the reconciliation of diverse definitions, regulations and policies for export controls. They were to be the building blocks for Phase III – the creation of the ‘four singles’.  

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Jeannette L. Chu is Managing Director of 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.*
Getting it wrong: Not an option

While ECR is also meant to simplify compliance responsibilities, the reality is that the rules are more complex than ever to follow — and the consequences of not doing so, more severe. That’s because the government continues to hold companies responsible for ensuring that product classifications are correct and that export transactions take place under the correct agency using the correct form of authorization. As government enforcement activity continues to home in on national security concerns, companies can expect close scrutiny and enforcement actions to continue.

The risks of falling afoul have never been more serious. Heavy fines, expensive investigations, business disruptions, denial of export privileges — even jail time if willful violation is found — can create a nexus of significant problems for companies who violate fast-changing export control laws.

Beyond the high walls: What’s in your yard?

Despite the ambitious goal of a unified entity to manage and regulate all exports in a more simplified, more strategic manner, we’ve found that what really matters to companies stuck in the weeds of the implementation of ECR are two fundamental things:

• Knowing which of their parts, products or services could fall within the current domain of export controls — and in which list, USML or CCL, the parts should now be classified. (Especially important: which items are now required to be moved from one list to another.)

• Knowing precisely how to address and respond to a greatly heightened compliance risk.

Getting down to nuts and bolts

So how — and where — do you start to address compliance in these treacherous waters? Start with asking yourself some practical questions:

• Are you staying on top of the shifting landscape of export compliance reform? The last thing a company should do — despite ECR’s promise of simplification — is to be lulled into a false sense of security and scale back its compliance efforts. Assumptions and wishful thinking around classification or enforcement can trigger unexpected, adverse outcomes.

• Which part belongs where? It has never been more important for companies to know in granular detail what it is that they produce and seek to export, including all components and associated technical data. You also must be clear about the correct classification of every item for export control purposes.

• Do you know their final destination? It’s not sufficient to know which agency has authority over an item at time of sale. You also have to fully understand how such items can be moved around the world. Could one of your components, without your knowledge, be sold down the line to a government end user (even a non-military one)? If so, this could trigger a cascade of new license and enforcement issues.

• Is your export compliance truly end-to-end? Today’s global supply chains — from manufacturing to R&D to shipping — are ever more far-flung, and the global business and regulatory environment is more complex than ever, especially in emerging markets. Compliance does not stop at the water’s edge.

• Are you considering ECR in M&A decisions? When you acquire a company, you are also acquiring any active, retroactive and prospective export control risk exposure. Considering these risks, it stands to reason that export sanctions should be an essential component of pre-transactional due diligence.

• Are you focused on voluntary reporting and remediation? The government provides incentives for disclosing breaches and in some cases disclosure of certain fact pat-
terns may be required even if an actual export or violation has not occurred. If you should have a compliance breakdown, the enforcement outcome can be influenced by the effectiveness of the systems and processes you had in place — and by voluntary efforts to report and remediate. In most cases, companies facing penalties will also be required to invest in new, robust compliance measures.

Why the grass in your “yard” will be greener

Complying meticulously with export controls is not just a doom-and-gloom affair. There’s a supreme silver lining for companies that take the time to do it right. Beyond avoiding export enforcement headaches, having an effective trade compliance program can also help you:

- **Achieve synergies** with your other internal controls and compliance programs — from quality assurance, logistics and protecting intellectual property, to Foreign Corrupt Practices Act (FCPA), conflict minerals, Anti-Money Laundering (AML) and “know your customer” measures.

- **Enable complicated transactions** — including proper classification, management and timing of licenses — and mitigate costly business delays and other issues. Good trade compliance is embedded, and works hand in hand, with business units, in real time.

- **Make the case to the C-Suite** that compliance should be part and parcel of business strategy — rather than a defensive cost center. Properly utilized, compliance dollars create value for the enterprise.

The bottom line: When the rules are this complex and mutable — and the risks this high — clarity is everything. It is in your very best interest to have clarity around what’s in your “yard”.

The ABA Center for Professional Development recognized Ray Banoun (second from the left, with DC Operations Director Holly Cook and CJS staff), the founder and chair of the National Institute on White Collar Crime, with the Stellar Speaker Award during its Partner Appreciation Award on Nov. 30, 2015, at the ABA Offices in DC. Also, the ABA Criminal Justice Section earned the ABA Center for Professional Development Member Value Award for providing most CLE programs.

Video Highlights of CJS Activities

The Section added new videos to the CJS Voices playlist on YouTube. Newly added Section members include: Keely Rankin, lawyer at Davis, Wright, Tremaine in Seattle; Judith Friedman, senior trial attorney of the U.S. Department of Justice Office of International Affairs in the Criminal Division; Tiffani Smith, a public defender in Atlanta, GA; Sidney Butcher, lawyer at Whiting, Taylor and Preston in Baltimore; Pauline Weaver of the Law Offices of Pauline Weaver; Nina Marino white-collar crime defense attorney of Kaplin, Marino LLP in Beverly Hills; and Michael Dean, chief deputy prosecutor for Union County, IN.

The CJS Awards video playlist contains video highlights of award ceremonies, including the Inaugural Awards Luncheon held during the Eighth Annual Fall Institute on October 23, 2015 in Washington, DC.

Over the past year, the Section has also increased its efforts to engage with Section membership through consistent coverage of panel discussions at CJS meetings and conferences. Visit our channel and subscribe for new posts, available at the CJS website, www.americanbar.org/crimjust.

Staff News

**Kevin Scruggs** is the new Staff Director (the Section is looking for a new Standards Project Director).

**Lauren Beebe** is the new Staff Attorney.

**Rafiat Adetona** is the new Marketing Program Assistant.

_CJS staff contact information can be found at www.americanbar.org/crimjust._
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<th>Phone Number 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlanta</td>
<td>Robert Gallagher</td>
<td>(678) 419 4314</td>
<td></td>
</tr>
<tr>
<td>Boston</td>
<td>Chris Barry</td>
<td>(617) 530 6304</td>
<td></td>
</tr>
<tr>
<td>Boston</td>
<td>Erik Skramstad</td>
<td>(617) 530 6156</td>
<td></td>
</tr>
<tr>
<td>Chicago</td>
<td>Ryan Murphy</td>
<td>(312) 298 3109</td>
<td></td>
</tr>
<tr>
<td>Dallas</td>
<td>Charles Reddin</td>
<td>(214) 754 5173</td>
<td></td>
</tr>
<tr>
<td>Houston</td>
<td>Brian Wycliff</td>
<td>(713) 356 5499</td>
<td></td>
</tr>
<tr>
<td>Los Angeles</td>
<td>Owen Murray</td>
<td>(213) 356 6097</td>
<td></td>
</tr>
<tr>
<td>Miami</td>
<td>Mona Clayton</td>
<td>(305) 347 3510</td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>Charles Hacker</td>
<td>(646) 471 8580</td>
<td></td>
</tr>
<tr>
<td>Philadelphia</td>
<td>Mark Gerber</td>
<td>(267) 330 1888</td>
<td></td>
</tr>
<tr>
<td>San Francisco</td>
<td>James Meehan</td>
<td>(415) 498 6531</td>
<td></td>
</tr>
<tr>
<td>Washington DC</td>
<td>Jim Thomas</td>
<td>(703) 918 3050</td>
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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.

The National Association of Attorneys General will also host its Winter Meeting on Feb. 22-24 in Washington, D.C. U.S. Attorney General Loretta Lynch will speak to NAAG for the first time. DC Police Chief Cathy Lanier will be the opening speaker, discussing 21st Century policing, which is this year’s NAAG presidential initiative theme. The traditional U.S. Supreme Court Perspectives luncheon is confirmed with former U.S. solicitors general and legal scholars Theodore Olson and Walter Dellinger offering their insights. The annual NAAG Supreme Court Reception will take place Tuesday night, when Associate Justice Samuel Alito is scheduled to briefly talk with the attorneys general in a closed session. For more information visit: www.naag.org.

NACDL’s 2016 Midwinter Meeting & Seminar will be held in Austin, TX, February 17-20, 2016. Whether it is insanity, incompetence, or impairment; mental health issues affect bail decisions, sentencing, and the chance of winning at trial. Understanding the current science and being able to use it can be the key to successful representation of a client. This program will cover various aspects of mental health issues. Beginning with an in-depth review of the law from diminished capacity to insanity and mental retardation, you will learn about pharmacology, picking the best jury and getting them to care about your client, how to effectively cross-examine a variety of experts, and mitigation at sentencing. For more information visit: www.nacdl.org.

National Institute on White Collar Crime:
March 2-4, San Diego, CA
(The 30th Anniversary Event)

Digital Currency and Blockchain Technology
National Institute: April 1, Washington, DC

Internal Corporate Investigations and Forum for In-House Counsel: April 27-29, Washington, DC

CJS Spring Meeting: April 28-30, Albuquerque, NM
CLE Program on April 29: Neuroscience: Paving the Way for Criminal Justice Reform

National Institute on Health Care Fraud: May 11-13, Indian Wells, CA

Seventh Annual Prescriptions for Criminal Justice Forensics: June 3, New York, NY

Civil False Claims Act and Qui Tam Enforcement:
June 18-20, Washington, DC

ABA Annual Meeting: August 4-9, San Francisco, CA
(CJS Programs & Meetings)

Southeastern White Collar Crime Institute:
Sept. 8-9, Braselton, GA (near Atlanta)

Fifth Annual London White Collar Crime Institute:
Oct. 10-11, London, UK

CJS Fall Institute & Meetings:
Nov. 3-5, Washington, DC

For the full listing, see www.ambar.org/cjsevents.

Check the ABA CJS Website
www.americanbar.org/crimjust

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Social Media

Lawyers’ Intensive Social Media Investigations Carry Risks

Lawyers who investigate jurors and opposing parties online may cross the ethical line if they engage in “repetitive viewing of an individual's social media profile” with knowledge that “the other person would receive notice each time the lawyer viewed the profile,” the Colorado bar's ethics committee has cautioned (Colo. Bar Ass'n Ethics Comm., Op. 127, 9/15).

The opinion addresses a range of “ethical issues that arise when lawyers, either directly or indirectly, use social media to obtain information [about] witnesses, jurors, opposing parties, opposing counsel, and judges.”

While the committee borrowed from the analysis of eight other bar panels in reaching most of its conclusions, its observations about “repetitive viewing” of jurors’ and other trial participants’ social media profiles are noteworthy because that issue has not received much attention in the other opinions.

Your Profile Has Been Viewed

Bar groups are divided on the question of whether lawyers violate ethics rules when they view the public profiles of jurors, judges or represented persons on social media platforms—such as LinkedIn—that automatically alert users to the fact that their profiles have been viewed.

Some ethics committees have said such notifications may constitute “communications,” and that passive browsing may thus violate state variants of ABA Model Rule 3.5(b) (ex parte contacts with judges and jurors), Model Rule 4.2 (communications with represented persons) and Model Rule 4.3 (communications with unrepresented persons).

The Colorado panel disagreed with those opinions, rejecting the view “that it is proper for a lawyer to view a juror’s social media profile only so long as the juror remains unaware that such investigation is occurring.”

Passive review of a social media profile is not “communicating” merely because “a technical feature” of the service alerts users to hits on their profiles, the committee said, adopting the reasoning in ABA Formal Ethics Op. 466, 30 Law. Man. Prof. Conduct 292 (2014).

Harassment?

But the Colorado committee went on to discuss a tangential concern that the ABA opinion only hinted at: that “a lawyer might take improper advantage of the fact that a particular individual will receive automatic notification that the lawyer or someone on the lawyer's behalf viewed the individual's social media profile.”

That scenario, the committee said, could implicate Colorado Rule of Professional Conduct 4.4(a), which provides that in representing a client a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person.

“[R]epetitive viewing of an individual's social media profile could potentially violate Colo. RPC 4.4(a) if the lawyer knew the other person would receive notice each time the lawyer viewed the profile, the lawyer had no other legitimate purpose for the repetitive viewing, and the repetitive viewing rose to the level of harassment or intimidation,” the committee said.

However, it added, “To constitute a violation of the Rules, this would have to be an extreme situation, and it would be an exception to the general opinion expressed herein.”

New York Panels Agree

A review of authority by Bloomberg BNA indicates that only two ethics panels have expressly disagreed with the ABA's view that “passive” browsing of a social media profile doesn't amount to contact or communication even when the account holder receives notice of the activity.


Shortly after the ABA issued its opinion, three members of the New York State Bar Association's Social Media Committee wrote a public letter detailing their concerns.

Continued on page 16
about “passive review” of jurors’ social media profiles.

“In this age of limited digital privacy, we believe that social media interactions between jurors and lawyers should not occur and the ABA opinion does not sufficiently seek to ensure that this prohibition does not occur,” the New York bar letter stated. “Receiving multiple notifications indicating that individuals from a law firm or investigative agency are poring over one’s social media profile surely would be disconcerting to most jurors, at best, and could result in a mistrial.”

Additional Guidance

The Colorado panel’s other conclusions didn’t depart significantly from those of other ethics committees that have opined on this topic. The committee said that lawyers

• may always view the “public” social media profiles of judges, jurors, represented persons or unrepresented persons;

• may request permission to view an unrepresented person’s “restricted” social media profile—but only after the lawyer identifies himself as a lawyer and discloses the “general nature” of the matter for which he has been retained;

• who know an individual is represented must obtain the consent of that person’s attorney before requesting access to the individual’s restricted profile;

• may never request permission to view the restricted profiles of judges presiding over cases in which the lawyer is involved;

• may never request access to the restricted profiles of prospective or sitting jurors;

• “must never use any form of deception” to gain access to restricted profiles; and

• cannot delegate investigative tasks to avoid prohibitions on their own use of social media.