Fall Meeting Highlights

The Criminal Justice Section gathered in Washington D.C., November 2-5, 2017 for the Tenth Annual Fall Institute and CJS Meetings. The conference featured four expert panels addressing hate crime, policy solutions for nonconsensual porn, criminal justice reform in the Trump era and immigration reform.

Keynote speakers included Deputy Attorney General, U.S. Department of Justice, Rod J. Rosenstein and Vanita Gupta, President and CEO of The Leadership Conference on Civil and Human Rights and former chief civil rights prosecutor for the United States.

The Section recognized the recipients of the 2017 Criminal Justice Section Awards during the annual luncheon: Charles R. English Award, Nina Marino; Frank Carrington Crime Victim Attorney Award, Heather Cartwright; Norm Maleng Minister of Justice Award, Richard Schmack and Robert Zauzmer; and Raeder-Taslitz Award, Ellen Podgor.

After the panels and receptions concluded, the Criminal Justice Section Council met to discuss proposed criminal justice reform. The following resolutions will go to the House of Delegates at the Midyear Meeting in Vancouver in February 2018 for vote:

- The Criminal Justice Section urges the Department of Justice to restore prosecutorial discretion in choosing the charges s/he wishes to pursue and reserve mandatory minimum sentencing to only the most serious drug traffickers and prohibit its use to secure plea agreements.
- The Criminal Justice Section proposes legislative bodies and governmental agencies restrict the use of solitary confinement for adults.
- The Criminal Justice Section proposes the Executive Branch rescind its decision to end the Deferred Action for Childhood Arrivals (DACA) program and urges legislation to provide a reasonable pathway to citizenship.
- The Criminal Justice Section proposes to extend *Batson v Kentucky*, to prohibit striking jurors solely based on sexual orientation or gender identity.
- The Criminal Justice Section proposes allowing individuals to challenge their convictions by demonstrating non-DNA forensic evidence that was submitted as proof of guilt to obtain a conviction has now been discredited.
Diversity and Inclusion Fellows

The Section selected an inaugural class for the new Diversity and Inclusion Fellowship Program. The fellowship program provides opportunities for lawyers from under-represented groups such as racial and ethnically diverse lawyers, persons with disabilities, and lesbian, gay, bisexual and transgender persons, to participate in leadership roles within the Criminal Justice Section.

The goal of the program is to increase the number of diverse attorneys within the section and offer an opportunity to develop skills and make professional connections within the criminal justice community. The program ensures appointment to one of the Section’s committees and mentorship for fellows. Additionally, each fellow also assumes responsibility for a committee project designed to further the goals and objectives of the Section.

Our new fellows have each demonstrated a history of commitment to criminal justice, public service, and professional excellence. We are proud to introduce our new fellows:

Andrew Rhoden with Vandeventer Black
Area of Practice: White Collar Crime & Employment Discrimination
American University Washington College of Law

Jamelia Morgan with Abolitionist Law Center
Area of Practice: Prisoners’ Rights; Criminal Law Reform
Yale Law School

Tracie Todd-Coleman with the State of Alabama
Area of Practice: Circuit Court Judge – Criminal Division
Duke University School of Law
The University of Alabama School of Law

Patrice James with Still She Rises
Area of Practice: Criminal Defense
Salmon P. Chase College of Law, Northern Kentucky Univ.

Reyhan Watson with Kramer Levin Naftalis & Frankel LLP
Area of Practice: Litigation
New York University School of Law

Sam Potts with Law offices of Douglas Horngrad
Area of Practice: Criminal Defense
University of San Francisco School of Law

Expungement Panel at the ABA Office

CJS hosted a panel to discuss recently passed policy on expungement of criminal records at the ABA offices on October 24, 2017. The panel was moderated by CJS Staff Attorney Lauren King, and panelists included Jenny Robert, professor at American University Washington College of Law, Jessica Steinberg, professor at the George Washington University School of Law, and Director of GW’s Prisoner & Reentry Clinic, and Swapna Yeluri, Pro Bono Coordinator for the Homeless Persons Representation Project. Panelists discussed the need for more progressive expungement statutes, and the role of expungement in remedying collateral consequences of conviction. Panelists also discussed recently passed CJS policy, and what they would like to see in future ABA policy on the subject.

Gray To Receive Award at the Midyear

Juvenile Justice Committee Co-Chair, Hon. Ernestine Gray, has been selected to receive the Fellows prestigious Outstanding Service Award, which will be presented to her at the Fellows of the American Bar Foundation’s 62nd Annual Awards Reception and Banquet on February 3, 2018 at the Vancouver Club in Vancouver, BC, in conjunction with the ABA Midyear Meeting.
The ABA Criminal Justice Section hosted its Sixth London White Collar Crime Institute on October 9-10, 2017, in London, United Kingdom. The event took place at the London office of Berwin Leighton Paisner LLP.

Opening discussions on the first day were given by David Green CB QC, Director, Serious Fraud Office, London and Trevor N. McFadden, Deputy Assistant Attorney General, U.S. Department of Justice Criminal Division, Washington, DC. Luncheon Keynote Speaker was the Rt. Hon. Sir Tony Baldry, Barrister, Former Conservative MP for North Oxfordshire and Chair of the Church Buildings Council.

Panel topics included: ABA Fair Trial and Public Discourse Standards, White Collar Crime Today: What Are the Investigation & Enforcement Priorities?; The Rise of Health Care Related Legislation & Prosecution on a Global Scale; An International Perspective on Anti-Bribery and Anti-Corruption Measures and Law Enforcement. The program was followed by the official reception hosted by Duff & Phelps Ltd. at The Shard. The second day program focused on a complex hypothetical white collar crime case from investigation to prosecution. A special Women in White Collar Crime Luncheon Program was hosted at K&L Gates.

The institute in 2018 will take place during October 8-9.

**Staff News**

Emily Johnson has joined the CJS staff as the Senior Public Relations Specialist.

Standards Project Director Sara Elizabeth Dill and Staff Attorney Lauren King have left the ABA.

**London White Collar Crime Institute**

**Racial Justice Improvement Project**

The Criminal Justice Section's Racial Justice Improvement Project (RJIP) is beginning its seventh year in its data-driven policy reform efforts which aim to address racial disparity and inefficiencies in criminal justice systems across the nation.

Having completed policy reform efforts in eight distinct jurisdictions, the project has received funding from the Bureau of Justice Assistance, the Public Welfare Foundation and the Kellogg Foundation. The Project has partnered with local criminal justice stakeholders as well as key partnership-organizations including the Pretrial Justice Institute, The Sentencing Project, and The Center for Court Innovation.

The newest Task Force to join the RJIP project is in New Orleans, a group focusing on Juvenile Diversion. On November 6, 2017 the group kicked-off their pilot program with an implicit bias training sponsored by the Criminal Justice Section's Race and Diversity Committee. The Committee's Co Chairs, Mwanaisha Sims, Stan German and Tom Wine presented on key elements of bias-free decision making, and the project's task force facilitator, Ranord Daresburg, moderated the conference. Ashley Nellis from The Sentencing Project discussed racial justice in the juvenile arena and Judge Steven Teske presented on best practices for implementing juvenile justice reform. Judge Earnestine Grey held opening remarks.

The Project plans to launch its pilot juvenile deflection program this month and has already set out a plan to evaluate the pilot for effectiveness. For more information on the RJIP New Orleans Juvenile Project, or to learn more about the other project sites under the Racial Justice Improvement Project, please visit its website at racialjusticeproject.weebly.com.

The New Orleans group kicked-off its pilot program with an implicit bias training.
PRACTICE TIPS

Investigative Social Media Analysis: How to Bridge Information Gaps for Better Outcomes

By Glenn Ware

A large professional services firm was planning an acquisition of a smaller target company that, by all indications, was financially stable and a good strategic fit. However, once analysts began assessing the target CEO’s reputation and behavior in social media, as part of their pre-deal due diligence, they uncovered multiple red flags that could not be dismissed. The CEO had in the past authored discriminatory comments, and had supported discriminatory content by re-tweeting or “liking” such posts made by other people. Upon learning this information, the acquiring company judged this liability to outweigh the potential strategic benefits of the acquisition, and cancelled the deal.

You cannot ignore the chatter

The ubiquity of user-generated content and the 24/7 media landscape have rewritten the rules for legal counsel and sharply expanded the risk landscape for the companies they serve.

The universe of online content that can be analyzed for risk-relevant information about third-party behavior, associations, networks and reputations is massive. And it’s not just the major social media platforms. The online content universe is constantly evolving and expanding in geographically and culturally diverse ways. Some estimate the number of blog posts to exceed 50 million per month – in over 40 languages.

Growing US-based sites, Chinese-language chat sites, the non-indexed web, comment sections of news sites: the number of online channels where humans interact, do business, and reveal personal details continues to grow. With that growth comes enormous power to influence events and outcomes. Consider the lightning speed at which news and comments on recent scandals have spread across the internet, and the high-profile effect they have had.

Organizations and their counsel would be well advised to stay a few steps ahead of the changing risk landscape. In the era of bring-your-own-device and mobile ubiquity, monitoring just in-house communications – i.e., company-controlled email and instant-messaging protocols – is no longer adequate.

While there are clearly defined lines of legal use of data, one principle remains: Any content that is publicly viewable online and does not require logging in is fair game – be it under the scope of investigations, regulatory compliance, due diligence or litigation.

The takeaway: If you don’t monitor the chatter, you may miss vital early warning signs of a looming crisis; be hamstrung in a litigation; acquire the liabilities of a target company; or become the target yourself of an unexpected regulatory action.

Why social media analysis?

Investigations, disputes, due diligence and regulatory pressures are generally costly, complex, multi-layered affairs that frequently extend beyond jurisdictional and cultural borders. Without adequate visibility into the unseen corners upon which outcomes depend, companies can find themselves at a strategic disadvantage.

To bridge those information gaps, legal professionals are increasingly seeking support from specialists who can help collect and analyze big data (including the sprawling, multilingual universe of user-generated content) using advanced techniques such as network analysis – and turn it into valuable insight on which they can quickly act.

This forensic work requires hewing carefully to bright-line legal and ethical guidelines, however. Here are some of those guidelines:

• Investigators may only gather publicly available information, so that the results of the discovery are fully compliant with the law and respectful of the boundaries of personal privacy.

• “Pretexting” (i.e., presenting oneself as someone else – including through the use of “dummy” social media accounts or “bots” – in order to obtain private information) is unethical and violates user agreements with data providers.

• On the other hand, social media profiles that are freely accessible without logging in, and open to the public, may potentially be used.

• User agreements of social media data providers must be scrupulously followed. Some sites prohibit use of such information in the context of corporate investigations.

Social media analysis in legal practice

Following are some real-world legal contexts in which social media analysis can aid both law firms and in-house counsel.

---

Glenn Ware is a Principal/Practice Group Leader for the Global Anti-Corruption, Intelligence and Threat Practice for PricewaterhouseCoopers LLP. Special thanks to John Byun for his contributions to this piece.

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.
1. Conducting profiles for plaintiffs, defendants or jurors

In preparation for a case or dispute, law firms may need to determine the online and social media footprint or profile of a plaintiff, defendant or potential jurors. They may decide, for example, to develop profiles of counterparties for use in depositions, interviews and trials.

This type of profiling can also help establish jurisdiction. This is accomplished by finding the trail or traces that an entity or individual leaves online. Profiling would encompass not only their social media presence (if publicly available), but also what is being said about them, and on what sites; where the content is geo-located; as well as the frequency and volume of published content.

2. Supporting internal investigations / Fact-finding

An entity and its executives can potentially be held liable for the actions of downstream parties acting on their behalf. Claiming ignorance of criminal or corrupt acts won’t gain the client any traction. Having additional evidence or context in an internal investigation is critical.

In a situation where a client is under investigation, counsel may conduct social media analysis to identify and understand red flags or indications of improper practices. This may help develop evidentiary-quality facts and compelling evidence.

3. Compliance and monitoring of regulatory risk

Data analytics now permeate the toolbox of the US Securities and Exchange Commission, US Department of Justice and other authorities, significantly heightening compliance risks for companies of all sizes.

No company wants to be blindsided by a regulatory action – from fines and investigations to outright sanctions or criminal penalties. At the same time, regulatory bodies across the globe have begun to coordinate law firms’ activities by imposing action against such threats.

With their assistance, law firms are helping their clients stay one or more steps ahead – monitoring media coverage, commentary, social media and analysis to stay abreast of key events and issues, enabling swift reposition of resources for possible looming threats or regulatory action.

4. Guarding against fraud

Legal talent is frequently called upon to provide investigation support and complex transactional due diligence. This could be in the context of monitoring far-flung third parties who may be engaging in asset misappropriation, or corrupt activities that could potentially trigger enforcement actions; in guarding against cyber-breaches; or in forestalling intellectual property theft. In these and other cases, social network analysis can be indispensable in putting the pieces of a fraud puzzle together. The ability to decode patterns — mapping out who is communicating with whom, when and where; detecting sudden bursts of communication among certain parties; and triangulating against events — is an essential tool.

5. Guarding against reputational and other risks

Misinformation, loss of control of content, unverified claims, potentially damaging information (whether accurate or inaccurate) released on line, threat actors on social media – all can fatally damage an organization’s reputation. Here again, a sophisticated social media analysis can help preclude or defend against such threats.

When a company is going through a crisis, they need to know as precisely as possible the immediate risk scenarios they face, be they external, internal or regulatory. For many organizations, that vigilance does not extend beyond consumer-grade, English-language-only news alerts. In such a context, being able to run social media analysis in multiple languages, across the internet and extending to the non-indexed web, can make every difference in the outcome.

6. Other litigation/legal support services

The value of advanced analytical tools also extends to these legal areas:

- Forensic technology. Detecting, preserving, and analyzing online media (including social media) evidence in a forensically sound manner.
- Non-indexed web capabilities. Utilizing non-indexed web capabilities in order to identify the source of a data compromise or intellectual property theft.
- Asset tracing. Identifying assets in order to facilitate support for judgments, liens and receiverships.
- Witness due diligence and identification. Identifying and locating fact sources and witnesses – and legally vetting the online activities of potential expert witnesses.

Seeing around digital corners

Legal and business strategy has always entailed understanding and gaming risk to win better outcomes. Today’s social media ecosystem has created a degree of complexity that has forced – and continues to force – executives and their counsel to try to see around corners that are often barely perceptible. In this new landscape, the process of connecting massively dispersed pieces of information to create a clear and succinct picture is increasingly falling to the hands of trained investigators and experienced risk analysts.

With their assistance, law firms are helping their clients stay one or more steps ahead – monitoring media coverage, commentary, social media and analysis to stay abreast of key events and issues, enabling swift reposition of resources for possible looming threats or regulatory action.
Federal Collateral Consequences For Offenders That Impede Educational Attainment

By Leeana Skuby

Occasional series highlighting research writings of CJS interns.

After a person is adjudicated guilty, they must deal with the direct and indirect consequences. Indirect consequences of a guilty conviction, also known as collateral consequences, may include but are not limited to: loss of voting rights, employment discrimination, denial of public housing, and ineligibility for federal student financial aid. Collateral consequences inhibit people’s ability to acclimate to life as a returning citizen, which increases the likelihood of recidivism. Collateral consequences are particularly burdensome for persons seeking to pursue higher education, a choice that would substantially decrease their likelihood of recidivism. This article explores federal collateral consequences for offenders that directly impede their educational attainment.

The Federal government imposes collateral consequences for persons convicted of drug related offenses, which limits their ability to pursue higher education. Based on Section 438 of the Higher Education Act Amendments of 1998, students convicted for possessing or selling illegal drugs while receiving financial aid may be denied additional federal financial aid in the form of grants, loans, and/or work study programs for at least one year. The ineligibility period is longer if the conviction is for a second or third offense. Students are required to disclose any drug convictions that occurred after their 18th birthday or that were adjudicated in adult court and while they were receiving federal financial aid. If a person is convicted after submitting the Free Application for Federal Student Aid (FAFSA), they will lose funds not yet dispersed. A person may be able to reduce their ineligibility period by completing a drug rehabilitation program that meets certain criteria including the administration of two unannounced drug tests; however, such test are often expensive and may require costly travel. Barriers to program completion decrease the likelihood students will be able to regain their financial aid eligibility in a timely manner.

Losing financial aid due to a drug conviction for even a single year substantially increases the likelihood that students will not complete their higher education program. A study by the Education Advisory Board found that losing $1,500-$2,000 in student aid increases the likelihood that a student will drop out by three percent. As the amount of financial aid lost increases, the likelihood of dropping out also increases. Students who lose more than $10,000 in financial aid are 20 percent more likely to drop out of college than students whose financial aid does not change. Loss of financial aid is most harmful for students from lower and middle class families that have less means to finance a college education without assistance. This collateral consequence is less of a barrier for students from a higher socioeconomic status because their family is more likely to be able to subsidize higher education costs.

The financial aid restriction is a collateral consequence that can affect persons convicted of any crime. A question about criminal background makes the financial aid process susceptible to “application attrition.” Application attrition refers to the phenomenon in which persons with felony convictions fail to complete college applications due to a question about criminal background. A study of State University of New York System applicants found that nearly two of every three applicants who disclose a felony conviction during the application process never complete their application. Application attrition is a larger barrier to persons with a criminal background than the selection process conducted by admissions offices. For every one applicant denied admission due to a felony conviction, 15 applicants with a criminal record are not admitted because of application attrition. The Department of Education has not released data about FAFSA application attrition. However, it is reasonable to assume that FAFSA suffers from a similar level of application attrition. The rate may even be higher for FAFSA because applicants are required to complete additional forms if convicted of a drug-related offense while receiving financial aid. These forms can be confusing and burdensome for students without family members or school support staff to assist them with the paperwork.

Outside of the traditional higher education setting, persons with criminal convictions face collateral consequences that limit their educational attainment. Persons who are incarcerated are ineligible for certain types of financial aid during incarceration, which can prevent them enrolling in higher education programs offered within their institution. Any person incarcerated in a correctional or juvenile justice facility is ineligible for federal student loans during their time of incarceration. Adults who are incarcerated in a state or federal institution are also ineligible for federal Pell Grants, some of the most common need-based federal grants for low-income students. The Second Chance Pell Grant program began in 2015 to provide access to Pell Grants for some offenders; it remains to be seen whether this program will be expanded. As more correctional institutions partner with higher education institutions, it becomes increasingly important that people have access to the

Leeana Skuby, an intern from the George Washington University, was recently chosen for the prestigious Teach for America program, and will be teaching high school in Detroit, Michigan starting in the fall of 2018.

Continued on page 10.
Responding to Prison Letters
By Amanda Kerbel

On the first day of my CJS internship at the ABA, I sat in Staff Attorney Lauren King’s office listening to the rundown of intern responsibilities. The other intern and I would attend and take notes at criminal justice reform meetings, collect information about the collateral consequences that juveniles face after being arrested, and the task I found the most fulfilling, responding to letters from prisoners.

Prisoners write to the ABA from federal and state prisons, jails, and even immigration detention centers. Between myself and the other CJS intern, we replied to hundreds of prisoner letters in our three months at the ABA. We responded to the letters by explaining how to file grievances against public defenders or private attorneys, by sharing the pro bono programs that operate in their areas, and most difficult but also most important, by providing these inmates with ABA policy and codified law that they request or that their letters indicate they need.

Of the letters I read, though, the hardest moment I had was when I came across a letter that clearly did not belong in my stack of ones from prisoners. I read a teenage girl’s horrific account of being smuggled into the United States from Mexico by her sister. Since then, she had been repeatedly raped by the sister’s boyfriend until ending up away from him at the detention center she was writing from. Due to a mental disability, so much of her letter was spelled incorrectly that I had trouble deciphering what she was trying to say.

I took the letter to Lauren and we discussed the possibilities. Although it did not seem that the woman was asking or looking for something in particular, we couldn’t just disregard her plea for help. We discussed the merits of taking the letter to the Commission on Immigration or the Commission on Disability Rights. Ultimately, Lauren suggested I take the letter to the ABA Commission on Immigration, and so we went over to Robert Lang, ABA staff attorney with the Commission.

As I began to mention the letter to him, he automatically asked me a name. I was confused but then turned over the letter to look at the return address.

Out of all the people who work at the ABA in the Immigration and Disability Commissions, Robert was the first person Lauren and I consulted, and he also happened to be the one person at the ABA with whom this woman had been in contact. He shared their correspondence with us and pointed to a place in the letter that I didn’t understand originally. After his direction to it, though, I realized that the letter had been sent to him all along and simply was sorted with the wrong mail.

Robert told us the work he had been doing to help this woman, how they talk so often she knows about his family, and also that he is so involved with her case that she has his personal number and she often just calls him to chat. After my initial shock and sorrow when I first read the letter, I was so glad to know there was a person who not only was assisting her, but also who genuinely cared.

Out of the hundreds of prisoner letters that I read while interning for CJS, this is the one that upset me the most. However, out of these hundreds of letters, this was the one that was both most fulfilling for me as well as made me realize how important and impactful our responses are for the prisoners who we correspond with.

A month after my internship ended, I can still say I think about this project every day, and I am sure I will continue to do so for a very long time.

Amanda Kerbel, an intern from the George Washington University, is a dual degree student obtaining her masters in criminology.
Solo Lawyer Can’t Use Translated Version of Surname as Firm Name

- Name of solo’s firm can’t have a different name than lawyer’s legal surname on the roll of attorneys, even if firm name is a reasonable English translation of lawyer’s surname
- Use of English translation would be misleading even if it’s juxtaposed next to lawyer’s real surname

It is unethical for a solo lawyer to use an anglicized version of his real surname in the name of his law firm, according to a Nov. 8 opinion from the New York state bar’s ethics committee.

An English translation of the lawyer’s surname is more likely to mislead the public than other more minor name alterations, such as simply translating a lawyer’s first name to English or dropping a lawyer’s first name and using initials to identify the lawyer, the committee found (New York State Bar Ass’n Comm. on Prof’l Ethics, Op. 1138, 11/8/17). Although the committee didn’t mention it, some research indicates that job applicants with foreign names get fewer job interviews in English-speaking countries than people with English-sounding names.

The committee said the inquiring lawyer believed his legal surname, under which he’s admitted to practice, looks and sounds strange to the English-speaking public that he wants to attract as clients. The lawyer wanted to adopt an English language translation of his surname as the name of his firm, while also giving his real name as a lawyer with the firm. The committee gave the following hypothetical example. If the inquirer’s name on the official roll of attorneys is Yohan Schmidt, and the English translation of that name is John Smith, the firm would be identified as “The Smith Law Office with Attorney Yohan Schmidt.”

Virginia Prosecutors Get Lashing from Fourth Circuit

- Prosecutors withheld evidence of defendant’s innocence, including information on different suspect
- State took stances ‘plainly contrary to their obligations under the Constitution,’ appeals court says

Withholding evidence about a murder defendant’s innocence violated his due process rights and earned Virginia prosecutors a verbal takedown by a federal appeals court. “We have repeatedly rebuked the commonwealth’s attorney and his deputies and assistants for failing to adhere to their obligations” under the Constitution, Circuit Judge James A. Wynn wrote for the U.S. Court of Appeals for the Fourth Circuit Nov. 16 (Juniper v. Zook, 2017 BL 412748, 4th Cir., No. 13-7, 11/16/17). “We find it troubling that, notwithstanding these rebukes, officials in the Commonwealth’s Attorney’s office continue to stake out positions plainly contrary” to those obligations, he said. The comments came in a footnote to a Fourth Circuit ruling that found lower courts had erred in denying Anthony Bernard Juniper’s contention that prosecutors didn’t disclose evidence of his innocence.

The U.S. Supreme Court ruled in Brady v. Maryland that prosecutors must disclose evidence that would prove a defendant’s
innocence or help that person discredit the state’s theory of the case.

**Convicted of Murder**

Juniper was convicted of murdering his on-again-off-again girlfriend, her two children, and her brother in 2004. Although he claimed innocence, two people testified under the promise of immunity for their drug crimes that they saw him in her home with the murder weapon in his hands. But prosecutors failed to give Juniper evidence that a downstairs neighbor told police she was outside when she heard gunshots and saw a man run out of the victims’ apartment.

Her report on the time of gunshots, getaway vehicle, and suspect description all contradicted the witnesses at trial and the prosecution’s theory of the case. The neighbor also did not identify Juniper in a photo array provided to her. Those details significantly undermined the reliability of the jury’s conviction, the appeals court said in the lapse it called a “classic Brady evidence” case.

“Without question, the perpetrator of the Stephens’s murders committed a heinous crime and should be vigorously pursued and prosecuted,” Wynn wrote. “However, the prosecution’s pursuit of justice must keep faith with the principles of due process that separate societies that adhere to the rule of law from those that do not.”

**Lawyer Suspended for One-Sided Farmland-for-Fee Deal**

A lawyer who convinced a client facing drug charges to transfer ownership of land worth $135,000 as payment for representing her in a case that ultimately required just 40 hours of work was indefinitely suspended by the Ohio Supreme Court Nov. 29.

The decision highlights the risks of accepting property in lieu of money when negotiating fee arrangements with prospective clients who are land-rich, cash-poor, and in dire straits (Disciplinary Counsel v. Bucio, 2017 BL 425430, Ohio, No. 2017-0800, 11/29/17).

The respondent, Christopher R. Bucio, was charged with violating Ohio’s version of Model Rule 1.8(a), which requires lawyers to make a series of disclosures before entering into a business transaction with a client.

Ethics rules don’t forbid lawyers from accepting property in lieu of cash. But the per curiam order adds to a long line of cases in which courts have found that such arrangements typically constitute business transactions with clients—and are therefore subject to the exacting requirements of Rule 1.8(a).

The disciplinary proceeding was triggered by a bitter dispute that spanned seven years and also generated a malpractice lawsuit and criminal charges against Bucio. Bucio escaped liability in the malpractice action, which was dismissed on statute of limitations grounds—but was convicted of a fourth-degree felony, “unauthorized use of property,” Ohio Rev. Code § 2913.04(A), in the parallel criminal case. The ruling here saddled Bucio with yet another sanction: an indefinite suspension from practice, coupled with a prohibition on petitioning for reinstatement until he completes a “five-year community-control sanction” imposed as part of his criminal sentence.

**Ohio’s Short SOL for Legal Malpractice**

Bucio’s ability to defeat the parallel malpractice case that his client filed was attributable, in part, to the fact that Ohio has one of the shortest statutes of limitations for legal malpractice claims.

In 2015, the Primerus Defense Institute published A Survey of the Law of Legal Malpractice, highlighting state-by-state variations in the treatment of professional negligence claims against attorneys. That compendium indicates that Ohio is just one of a handful of states where legal malpractice claims must be filed within one year after the cause of action accrues. Other states with one-year limitations periods include California, Kentucky, Louisiana, and Tennessee.

**Land-for-Fee**

Bucio’s travails were tied to a fee arrangement he worked out in 2010 with Linda Heuker, who needed a lawyer after authorities discovered a marijuana-growing operation in her basement. When Bucio visited Heuker in jail, she told him she didn’t have enough cash to cover his fee but would be willing to sell a 22-acre parcel of farmland to pay for the representation. Bucio then “suggested that she transfer the property to him” and said that “he would take care of the details,” the court said.

The retainer the parties executed, which was detailed in an opinion dismissing Heuker’s parallel legal malpractice suit, made it clear that Bucio was acquiring full title to the land, which his law firm ultimately sold for $135,000—a sum that far exceeded the $9,000 that Bucio conceded he would have been paid if Heuker had paid him on an hourly basis.

Heuker believed she “was putting my land up for like a lien … it would pay for my legal fees, and whatever was left I would get back.” Bucio pointed to the clear language in the retainer in defending himself against the grievance, but his clever draftsmanship didn’t insulate him from disciplinary liability.

The Ohio Supreme Court, applying a fairly well-settled princi-
ple, deemed the land-for-fee arrangement a business transaction with a client and concluded that Bucio failed to comply with an ethics rules that requires lawyers to make a series of disclosures before entering into such transactions.

**Client Protective Rule**

“Before entering into the transaction, Bucio failed to comply with the professional-conduct rule designed to protect a client against his or her attorney’s potential overreaching when the attorney enters into a business transaction with the client,” the court said, referencing Ohio’s version of Model Rule 1.8(a). “For example, Bucio failed to fully disclose in writing the terms on which he was acquiring an interest in Heuker’s property, he failed to advise her of the desirability of seeking independent legal counsel before entering into the transaction or give her a reasonable opportunity to seek such advice, and he failed to obtain her informed consent to the essential terms of the transaction and his role in it,” the court said.

**Dodging Calls**

After the representation, Heuker repeatedly attempted to contact Bucio to inquire about the remaining proceeds from the sale that she believed she was entitled to, the court said. But Bucio dodged Heuker’s phone calls and “cancelled appointments that she had made with his staff,” the court said. By doing so, Bucio violated Rule 1.4(a)(3), which requires lawyers to keep clients apprised about the status of a matter.

**‘Clearly Excessive Fee’**

When Heuker finally connected with Bucio, the lawyer “informed [her] of his position that she was not entitled to any portion of the farmland’s sale proceeds because he had accepted the land as a flat fee for representing her in the criminal case.”

“Bucio later acknowledged, however, that he spent only about 40 hours working on Heuker’s case and that if he had charged his hourly rate of $225, he would have received $9,000 for the representation,” the court said. After making that concession Bucio agreed to stipulate that he “collected a clearly excessive fee” in violation of Rule 1.5(a), the court said.

**Restitution and Mitigation**

Bucio ultimately agreed to pay Heuker $97,767 in restitution, according to the opinion. That decision—along with other mitigating factors, such as the fact that Bucio suffered other penalties in his criminal case—weighed “against the presumptive sanction of disbarment,” the court said.

resources to finance their education and prepare themselves for success as returning citizens.

The American Bar Association has passed resolutions which favor reducing collateral consequences to educational attainment. In 2017, the ABA passed a resolution urging Congress to repeal the restriction on federal student aid for persons convicted of a drug offense. Bills to repeal the restriction have been introduced in the current United States Senate and House of Representatives; neither bill has made recent progress. It may be worthwhile for the Criminal Justice Section to explore collateral consequences for higher education at the state rather than federal level. All states and the District of Columbia offer some form of student aid and prison education programs. For many states, the FAFSA-determined expected family contribution decides eligibility for need-based aid. States may unintentionally disqualify persons for student aid due to this reliance on the FAFSA. This issue has been largely unexplored by the ABA. Additionally, states have separate policies which determine collateral consequences for higher education. The Section could produce a report highlighting states that have expanded access to higher education for persons who are incarcerated or have a criminal background as an example for other states to follow.

**Endnotes**


2 Ibid.


5 Ibid.


CALENDAR OF CJS EVENTS

CJS Midyear Programs During the 2018 ABA Midyear Meeting: Feb. 2-3, Vancouver, Canada

32nd White Collar Crime National Institute: Feb. 28 - March 2, San Diego, CA

21st National Institute on the Gaming Law Minefield: March 7-9, Las Vegas, NV

2018 CJS Spring Program and Meetings: April 5-8, Tampa, FL

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

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

CJS Annual Meeting & Programs During the 2018 ABA Annual Meeting: Aug. 2-5, Chicago, IL

Southeastern White Collar Crime Institute: Sept. 6-7, Braselton, GA

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

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

For a complete listing of CJS events, see www.ambar.org/cjsevents.
ABA Criminal Justice Section ... The Unified Voice of Criminal Justice

Recent CJS Books

• The ABA Compliance Officer’s Deskbook
• The Economic Espionage Act: A Practitioner’s Handbook
• Insider Trading
• The State of Criminal Justice 2017

For a complete listing of CJS books, see www.ambar.org/cjsbooks.

Check the ABA CJS Website

www.americanbar.org/crimjust

for

• Latest Section News & Updates
• Upcoming Events & Programs
• Project Information
• Committee Activities
• Publications & Resources
• Useful Info Links