Midyear Meeting Highlights

The Criminal Justice Section met in Las Vegas for the 2019 ABA Midyear Meeting, January 24 through January 28. The Section hosted CLE program and committee meetings and participated in The ABA House of Delegates sessions.

The Section CLE program featured a panel discussion, “Keeping ICE on Ice.” The panel addressed ICE arrests at courthouses and the threat this poses to criminal justice proceedings. The panel shared perspective from the judiciary, prosecution, defense and academia.

The Women in Criminal Justice Task Force continued their work at the Midyear. The Task Force hosted a number of meetings with women of varying backgrounds and hosted their second listening session in Las Vegas.

The Criminal Justice Section submitted four Resolutions at the Midyear Meeting to the House of Delegates. The House of Delegates adopted the following Criminal Justice Section Resolutions:

109A: Urges rescinding the “Zero Tolerance” and “Operation Streamline” immigration policies and allows for individualized determination on whether to file criminal charges.

109B: Urges legislatures to define criminal arrests, charges and dispositions that are eligible for expungement and set out procedures for individuals to apply for the same.

109C: Urges legislatures to enact legislation to provide all women prisoners with unrestricted access to free toilet paper and a range of free feminine hygiene products.

109D: Urges legislatures to clearly define child torture and make child torture a felony offense and to promote training, for all court and medical personnel in these cases.

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When attending Section events or discussing our initiatives on these platforms, please use the hashtag #ABACJS.
London White Collar Crime Institute

The ABA Criminal Justice Section held its Seventh Annual London White Collar Crime Institute on October 8-9, 2018. The institute was hosted at the London office of Bryan Cave Leighton Paisner LLP with two days of CLE programming and networking receptions.

The panels began with a roundtable discussion with Acting Chief, Fraud Section, U.S. Department of Justice, Sandra Moser and Director, Serious Fraud Office (UK), Lisa Kate Osofsky. They were followed by a panel with general counsel attorneys from various high-profile organizations, who explored the ethical issues of traveling to and from the United States while protecting attorney-client privileged material from U.S. border officials. Other panels compared jurisdictions around the world, extradition policies, cryptocurrencies and blockchain. The main keynote address was delivered by Former Deputy Attorney General, U.S. Department of Justice, Sally Yates.

The second day of programming explored a white collar hypothetical involving a multinational organization going through internal investigations of its employees. The case study was designed to generate various issues and complexities, with a focus on problems that arise where multiple and potentially competing jurisdictions may be interested in the matter.

The Institute had excellent panelists, ranging from positions in international regulatory leadership, general counsel, the judiciary and private practice. International panelists represented the following jurisdictions: Amsterdam, Brazil, Britain, China, Ireland, France and Germany. The Institute also included senior members of the Department of Justice and distinguished members of academia.

Fall Institute and Meetings

The Criminal Justice Section gathered in Washington D.C., November 1-3, 2018 for the Eleventh Annual Fall Institute and Meetings. The conference featured six expert panels addressing plea bargaining, prosecutors as change agents, a review of Guantanamo, re-entry, implicit bias and military justice policies on sexual assault and harassment. Keynote speakers included Honorable Jed S. Rakoff, discussing plea bargaining and immediate past President of the ABA, Hilarie Bass who shared preliminary findings from “Achieving Long-Term Careers for Women in Law.”

Member News

The Criminal Justice Section lost two past chairs recently: Joe Hynes and Ron Smith. Past Chair Charles “Joe” Hynes passed away on January 29, 2019. Joe was the Brooklyn DA from 1990-2013. He was a long time and extremely active member of the Criminal Justice Section and served as Section Chair from 2009 to 2010.

Professor Ronald C. Smith of John Marshall Law School was former Section Chair from 2001 to 2002. Ron passed away on October 19, 2018. In 1991, Ron founded the National Criminal Justice Trial Advocacy Competition, co-sponsored by John Marshall Law School and the ABA Criminal Justice Section, which is still running.
Upcoming Events

33rd National White Collar Crime Institute: March 6-8, New Orleans, LA
CJS Spring Program, Council & Committee Meetings: April 4-7, Nashville, TN
29th Annual National Institute on Health Care Fraud: May 8-10, New Orleans, LA
10th Annual Prescriptions for Criminal Justice Forensics Conference: May 29-31, New York, NY
False Claims Act and Qui Tam Trial Institute: June 19-21, New York, NY
Third Global White Collar Crime Institute: June 27-28, Prague, The Czech Republic
ABA/CJS Annual Meeting: Aug. 8-13, San Francisco, CA
Southeastern White Collar Crime Institute: Sept. 4-6, Braselton, GA
CJS Fall Meeting and Program: Nov. 7-9, Washington, DC
ABA/ABA Financial Crimes Enforcement Conference: Dec. 8-10, Washington, DC
For more info on CJS events, visit ambar.org/cjsevents.

Recipients of the 2018 CJS Awards

The 2018 CJS Awards were presented at the Fall Institute, Nov. 2, 2018 in Washington, DC: (From left to right) Chair Lucian E. Dervan, Prof. Paolo Annino (Raeder-Taslitz Award), Matt Redle (Charles R. English Award), Kevin Curtin (Norm Maleng Minister of Justice Award), Rosemary Armstrong (Livingston Hall Juvenile Justice Award), and Charlotte Cluverius with the Navy Victim’s Legal Counsel Program (Frank Carrington Crime Victim Attorney Award).

Second Chances

On Jan. 16, current and past chairs of the CJS with ABA President-Elect Judy Perry Martinez attended the graduation ceremony of the Parelegal Fellowship Program of the DC Mayor’s Office of Returning Citizens Affairs (MORCA), hosted by Mayor Muriel Bowser.

Staff News

Jaime Campbell is the new Senior Meetings Planner. Stacey Brown has retired from the ABA.
FCPA Investigations and “Private” Messaging Apps: What You Need to Know Now

By Eric Matrejek and Dustin Spinks

Most companies already have policies in place to manage the retention of any electronic information considered business records. But there’s one communications channel that’s sometimes overlooked: the growing number of publicly available messaging apps which offer various forms of user confidentiality, such as self-deletion and end-to-end encryption of messages.

Among the reasons for the appeal of these messaging apps are their security, ubiquity and ease of use. While practical for users, they can pose a legal problem for organizations: business communications that occur on such platforms often aren’t known to the organization, retained, or even directly accessible by the organization. They may take place on an employee’s personal device, be inaccessible due to encryption (for instance, WhatsApp, Wire or Signal), disappear automatically by design (for instance Snapchat or Wickr), or exist on a platform that is not even on the company’s radar.

Such “secure messaging” platforms can threaten businesses in two ways: they can be used as vectors for cyber-attacks and other forms of criminal activity; and, because they can effectively erase evidence and are not within the organization’s reach, they could put companies at risk in the event of a regulatory inquiry or investigation.

The DOJ takes note

In November 2017, the US Department of Justice (DOJ) released a new FCPA Corporate Enforcement Policy aimed at providing additional benefits to companies based on their corporate behavior once they learn of misconduct. In order to receive specified credits for cooperation, companies must prohibit “the improper destruction or deletion of business records, including prohibiting employees from using software that generates but does not appropriately retain business records or communications.”

In short: you must maintain an appropriate record, including the provenance, of any and all data that could constitute a business record — and failure to do so can lead to steeper penalties.

With “disappearing” message services such as Wickr, the time you have to store a message is short. With apps that are encrypted end to end, such as WhatsApp, business records could be inaccessible, unless you have the custodian’s cooperation or have implemented a means by which to capture and decrypt them. Whether you have proactively addressed this issue, and whether the apps in question have or have not been formally approved by the organization, may affect the DOJ’s judgment on — as well as potential credits for — cooperation.

This additional guidance should sound the alarm bell for companies about the need to update and enforce their document retention and acceptable-use policies, strengthen their device management posture and cybersecurity hygiene, and be vigilant in tracking their employees’ business communications habits — wherever they may take place.

Cultural resistance to change

The guidance is clear, but top-down execution of a policy of prohibition may not be easy. In some regions, secure messaging services such as WhatsApp are among the most commonly used forms of communication. While the reasons for this may vary — custom, convenience, practical necessity (especially in regions lacking reliable telecommunications), or a desire to shield communications from unwelcome eyes — it is important to not underestimate the cultural challenge in overriding these factors.

An all-out prohibition of such platforms may be met with heavy resistance from employees charged with implementing company strategies in the field. Such a prohibition may be ignored, or encourage users to flip channels to a service that’s not even on the company’s radar (a technique often used by criminals), further increasing risk to the company.

Gaining cultural acceptance of the need for compliance when it comes to document retention may require a posture that addresses, rather than limits, the prevalence of these platforms. That could take the form of adding an internal WhatsApp channel to the communication mix, for instance, or providing alternative means for communicating with external parties whose preference is to use prohibited platforms.

And in the case of employees who choose to conduct business on their personal devices, it may be a matter of buying back the devices outright and bringing the platform in-house.

Eric Matrejek is a partner and Dustin Spinks is a director in PwC Forensic Technology.

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.
I’m being investigated and my employees use messaging apps for company business: now what?

Once FCPA-related misconduct has come to light, the DOJ provides guidance when considering leniency to companies based on their behavior both before and after its discovery. Given the challenges these messaging apps present when it comes to supporting a company’s retention strategy, you should focus on the following tenets in order to be considered for a reduction in potential fines:

1. **Judiciousness.** Voluntarily self-disclosing all relevant facts known to the company, including all relevant facts about all individuals involved in the violation of law, “within a reasonably prompt time” after becoming aware of the offense.

2. **Cooperation.** Timely preservation, collection, and disclosure of relevant documents and information relating to their origin.

3. **Remediation.** Appropriate retention of business records, and a policy prohibiting the improper destruction or deletion of business records, including prohibiting employees from using any software “that generates but does not appropriately retain business records or communications.”

When an event occurs, it is imperative that the company heed these tenets and be proactive and transparent in its response. To the extent that communications were happening using non-company approved platforms, a good-faith attempt to identify those instances, preserve the relevant data, report, and remediate will be critical. And, as always with FCPA enforcement, tone at the top and a cooperative stance are generally material factors in outcomes.

Conversely, if the DOJ or SEC finds that the company knew these services were being used on its platform, and did not act to bring them into compliance, the penalties could be significantly higher than they would have otherwise been. If regulators ask for specific records which cannot be produced in a timely manner, they will seek to understand why. These kinds of developments could set in motion a cycle of increased scrutiny. Present or past statements and records could be questioned or cross-checked against material obtained separately (for instance, from whistleblowers). An older investigation could be restarted. And at each stage, credit for cooperation could be reduced.

**Six steps you can take**

Here are six steps you can take now to minimize the risk should a regulatory inquiry or investigation occur in connection with the use of messaging apps:

1. **Have an FCPA compliance policy.** Maintain appropriate written standards for data controls, which clearly define the types of communication software that are permissible to use for business matters. Ensure all employees understand they may only use company-approved communication platforms to preserve information deemed as business records.

2. **Assure compliance with that policy.** Ask employees to acknowledge and provide written consent of the policy. Test, and manage, your mobile devices that they use and the apps that get installed. Monitor compliance with the policy. Deploy technology to ensure that the communications are conducted and retained in compliance with the policy.

3. **Carefully evaluate the benefits and potential costs of BYOD.** Bring Your Own Device (BYOD) policies tend to be popular with both employees (convenience and ease of use) and organizations (efficiencies and cost savings). But considering the potential loss of visibility, control, and cooperation credits (not to mention the cyber risk), some companies are finding that buying dedicated devices for, or from, employees may be a better bargain.

4. **Remind users that unauthorized device and application use has consequences for themselves as well.** By using non-approved devices or apps to conduct business communications, they are putting not only the organization at risk, they are also risking their own personal data. Even supposedly encrypted apps like WhatsApp can be exploited by malicious parties.

5. **In M&A, be mindful about “buying FCPA risk.”** In a cross-border transaction, such as an acquisition, you’re buying more than the company — you’re also buying their existing contacts and local communication protocols. These can expose the entire organization to both compliance and cyber risk.

6. **Get your CISO and Compliance in the same room.** Think holistically about cyber diligence: it’s not a quarterly exercise; it’s something you must do every day. Cybersecurity and electronic record retention practices should be baked in to your training infrastructure from the start.

**Conclusion**

Messaging apps are rife with risk. There is little in the ever-changing cultural landscape of that companies can control, especially where there is a compelling need for private communications. While no plan can be foolproof, having a clear, comprehensive, and enforced policy at the corporate level.
My Take

They Are Wise Beyond Their Years: Prosecutors Should Take Cues From Their Juvie Counterparts

By Matthew Bradbury

As a kid, I only knew of Juvie as a faraway place, occupied by movie characters but never by classmates, friends, or anyone I ever came across. As a prosecutor, Juvenile Hall has come to life over the past year. Working here, which means debating whether to send unruly teenagers into ‘The Hall’ every day, has changed my career.

Criminal justice is often referred to as an assembly line, and this often feels true. Arrests, plea deals, sentences, and everything in between happens every day and according to guidelines we follow as gospel. Whether attorneys bargain between 2 and 4 years for a residential burglary or 30 to 60 days for a simple assault, we alter peoples’ lives using basic math and a police report. Once the court system inputs the sentence, we never hear from that individual again – unless and until they re-offend.

Juvenile prosecutions are different, in a good way. These cases offer a chance to actually peek into why people commit crime and why first time offenders become (or avoid becoming) career criminals. By working these cases, prosecutors learn the motivations behind crime and how our justice system can actually work to reduce crime, save money, and protect society. Even after a case resolves, each kid comes back to court via progress reviews for judges and deputy district attorneys to read. Sooner (or later), these juveniles use positive reports to seek a successful termination of probation so they can become adults unencumbered by this system.

People don’t break into nice homes because they want new iPads or flat screen TVs. They break in to steal these items so they can immediately sell them for cash to buy drugs. People don’t hotwire and steal cars because they need a new ride. They take them so they can commit crimes in a vehicle police can’t trace back to them. Young prosecutors learn these lessons quickly, but most of us never get the chance to learn what motivates people to break the law in the first place.

Not every 14 year old who experiments with marijuana and ditches school for the skate park one day becomes a convicted robber, but some certainly do. At the juvenile courthouse, we actually get to see when and why this pipeline forms. Unlike with sentencing of adult cases, we can send that 14 year old to a drug counseling class or ask a probation officer to speak with his parents. We don’t see him one time for a quick plea bargain.

I found this individual case tailoring to be a fresh contrast to the assembly line justice so many commentators have backlashed against in recent years. Growing up, I remember the DARE Program speakers at my elementary school. That program failed because it ignored the obvious truth - young people will experiment with drugs and, occasionally, lose their place on their way to adulthood.

In Juvie, prosecutors learn this. Kids succeed by getting their high school diplomas after years of failing classes and ditching school. Other kids pivot from marijuana to much more dangerous drugs like Methamphetamine. Success isn’t linear for Juvie kids, just like it isn’t linear for adult criminals or anyone, anywhere. The Juvenile Justice System is imperfect and legislators will continue to tinker with it, but it has benefits. Police, prosecutors, and judges actually get to know each defendant, which allows us to craft solution-based sentences instead of simply doling out numbers of days or years of confinement time. This helps kids actually reform and grow. It does the same for us prosecutors.

Politicians and university professors will continue to criticize criminal law, pointing out how the punishment often doesn’t match the crime in America and arguing that we don’t offer solutions when we fight over probation conditions. We should look to the much-maligned juvenile justice system to guide us. If at all possible, local prosecutors should focus more on the name behind the case number and less on the offense itself if we hope to keep that name from coming back over and over again.

We can do this by keeping open files on each criminal defendant instead of starting a brand new file each time that same individual suffers a new arrest. Make notes in that file of his or her results in diversion programs and living status, not just on the number of days of jail he or she has served. As these notes develop, it will be clear that some people need a certain type of help. It will be equally clear that others really do need extended incarceration. Either way, we will know.

Matthew Bradbury is Deputy District Attorney, Orange County District Attorney’s Office, California.
Black Public Defender Association Launched

On November 1, 2018 the Black Public Defender Association (BPDA) was introduced and launched at the National Legal Aid and Defender Association’s (NLADA) annual conference. BPDA is a section of NLADA and is the first national organization dedicated to the advancement, development, and support of Black advocates fighting to both end mass incarceration and reform the systems and policies that have led to the over-representation of Black people in the criminal legal system and in need of access to the civil legal system.

The four pillars of BPDA are: (1) Lead, (2) Support, (3) Inspire, and (4) Train. Members will be provided with skills-based advocacy trainings and leadership development. The association will also develop a pipeline that prepares racial & social justice minded students to enter legal and non-legal offices that are committed to defending and strengthening communities. BPDA will also become a national voice and supporter of the movement to eradicate racial disparities within the criminal legal system.

BPDA’s membership is open to attorneys and non-attorneys that are committed to improving the quality of representation provided to low-income communities across the United States. To join BPDA you must be a member of NLADA. During the inaugural year of BPDA, NLADA has waived the individual membership fee so applicants will only be required to pay BPDA’s $50.00 Section dues. For more questions about BPDA, contact aprilfcamara@gmail.com.

Event at the ICC Assembly of States Parties

In cooperation with the International Federation for Human Rights (FIDH), the ABA's ICC Project and Criminal Justice Section held a side event during the 17th Session of the Assembly of States Parties of the International Criminal Court in The Hague, The Netherlands on Dec. 6, 2018. Convening a group of distinguished experts with experience in US policy-making, human rights investigation and international criminal accountability advocacy, the discussion centered on challenges and opportunities for increased accountability presented by the International Criminal Court’s recent preliminary examinations and investigations.
College Due Process Rights and Victim Protections Task Force

By Andrew S. Boutros, Chair and Tamara Rice Lave, Reporter

In 2016, the ABA Criminal Justice Section constituted the College Due Process Rights and Victim Protections Task Force with one overarching goal: to provide a framework that would allow colleges and universities to fairly adjudicate sexual misconduct cases in a manner that respects the rights of both victims and the accused.

The Task Force brought together diverse stakeholders from all across the higher education and legal community. They included representatives of victims of sexual misconduct and those accused, university leaders, national experts, and leaders from not-for-profit organizations on both sides. The Task Force also had two voting members who were originally liaisons from the ABA Commission on Domestic and Sexual Violence and the ABA Section of Civil Rights and Social Justice.

The Task Force worked diligently and expeditiously, and in June 2017, it issued unanimous, bipartisan Recommendations for colleges and universities handling reports of sexual misconduct. The final product did not represent the views of just one person or even a group of people but the views of the collective whole, and it was the product of extensive discussion and compromise. Various stakeholders agreed to bend on certain provisions in order to obtain other provisions of importance to them and in order to reach unanimity. On May 6, the ABA Criminal Justice Section Council voted unanimously to endorse these Recommendations for publication.

The Recommendations have proved to be enormously influential. On September 22, 2017, the Department of Education, Office of Civil Rights (OCR) rescinded the 2011 Dear Colleague Letter, which had been criticized for not providing sufficient procedural protections for accused students. In November 2018, OCR issued a new set of proposed regulations, which relied heavily upon the ABA CJS Recommendations.

In addition, in 2018, California Governor Jerry Brown constituted a working group to make recommendations concerning how best to address allegations of student sexual misconduct on college and university campuses in California. On November 14, 2018, the California working group adopted many of the Task Force’s Recommendations (either wholly or partially). The Task Force’s groundbreaking work is demonstrative proof that when different stakeholders come together in good faith and with an open mind to find agreement on issues of public importance, the whole truly can be greater than the sum of its parts.

Academic Committee’s Roundtable

By Co-Chairs I. India Thusi and Anna Roberts

The Academics Committee hosted its annual Works-in-Progress Roundtable as part of the 2018 Criminal Justice Section Fall Institute in Washington, D.C. on November 1, 2018.

Conference participants heard a keynote address from Cynthia Lee, Charles Kennedy Poe Research Professor of Law at George Washington Law School. Professor Lee provided guidance on how law professors can be productive scholars. Professor Lee spoke with authority on that subject. She has published numerous articles, including Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society in the North Carolina Law Review and Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines in the UCLA Law Review, amongst many others. She is also the author or editor of four books.

Professor Lee offered several pieces of advice. First, law professors should read extensively and consider this reading as part and parcel of the writing process. Reading law review articles, cases, and popular media articles sparks ideas for new projects and ensures that scholars remain current in their areas of expertise. Second, Professor Lee emphasized the importance of keeping a record of ideas that come to mind for future reference. This “ideas folder” can be a source for future inspiration. Third, Professor Lee emphasized the importance of sharing work with others in the field. Feedback allows scholars to refine their scholarship, make an iffy first draft into a real contribution to the criminal justice field, obtain feedback from practitioners on the ground, and share work with mentors and peers early in the writing process. Conferences are a great place to get feedback because they present an opportunity to publicize your work, and they all set a fixed deadline, encouraging productivity.

In addition to Professor Lee’s opening remarks at the Roundtable, legal scholars from across the country workshopped their papers on a variety of criminal justice topics. Papers examined the following: the underlying rationales for criminalization and punishment and new approaches to punishment theory and criminal convictions; the practice of sentencing and the nature of punishment; criminal law practices at the pre-trial and investigations stage; how police do their jobs, the bases upon which police should be guided in their jobs, and how technology should impact police practices; and comparative and interdisciplinary approaches to criminalization and policing.

The Committee will host another Roundtable at the 2019 Criminal Justice Section Fall Institute. The Institute is scheduled for November 2019 in Washington D.C.
Women in Criminal Justice Task Force

The Women in Criminal Justice Task Force was formally launched at the 2018 Fall Institute. This Task Force will address the unique concerns and challenges faced by women in the criminal justice community. The Task Force is led by co-chairs, Tina Luongo and Carla Laroche, and consists of attorneys of diverse backgrounds and perspective. The Task Force held its first listening session at the Fall Institute and will host its second at the Midyear Meeting in January 2019. The Task Force also looks forward to a special Women in Criminal Justice program on April 4th, 2019 during the Spring Meeting in Nashville, Tennessee, and intend to organize other regional events throughout the year.

Carla Laroche is a visiting clinical professor at the Florida State University College of Law Public Interest Law Center. She directs the Gender and Family Justice Clinic, which focuses on the collateral consequences of incarceration on women and families. Prior to FSU, she was a criminal justice reform law fellow at the Southern Poverty Law Center in Florida. Previously, she was a pro bono fellow at Hunton Andrews Kurth LLP and served as federal law clerk for the Honorable Donald M. Middlebrooks in the Southern District of Florida.

A first-generation Haitian-American, Professor Laroche earned her JD from Columbia Law School; Master’s in Public Policy from Harvard Kennedy School; and A.B. in History, with a certificate in Women and Gender Studies, from Princeton University. She received the National Bar Association’s 40 Under 40, the Excellence in Activism, and the Young Lawyers Division’s Humanitarian Awards. She was also named an American Bar Association On the Rise – Top 40 Young Lawyer and co-chairs the ABA Criminal Justice Section Women in Criminal Justice Task Force.

Justine M. Luongo, known as Tina to all, is the Attorney-in-Charge of the Criminal Defense Practice of The Legal Aid Society. As the Chief Defender, Tina is responsible for leading a passionate and dedicated staff of over 1,100 responsible for representing more than 200,000 people in their trial, post-conviction and parole matters. In addition, Tina oversees two law reforms units that are involved in class action litigation and legislative advocacy that have forced critical reforms in the criminal justice system. During her time in this role, The Legal Aid Society opened the first-ever defense focused Digital Forensic Unit, launched both the Cop Accountability and Decarceration Projects and increased the capacity of every trial office to provide the highest quality representation to clients. She is dedicated to increasing the diversity of the public defense workforce and is integrally involved in The Legal Aid Society’s diversity initiative. She has been an active voice in the movement to foster best practices in public defense and continues to be involved in the dialogue about how public defenders can create systemic change, as well as be zealous advocates for their clients.

After graduating from Brooklyn Law School, Tina began her Legal Aid career in September 2002 as a staff attorney in the New York County trial office of the Criminal Defense Practice. In 2007, she was promoted to Supervising Attorney in the same office where she continued to directly represent clients, as well as train and manage her team of attorneys, paralegals and investigators. In May 2011, Tina was hired as the Deputy Attorney-in-Charge of the Criminal Defense Practice. Prior to joining the Legal Aid Society, Tina served as the Vice President of Operations, for a national gang intervention and prevention nonprofit organization known as the Council for Unity.

Throughout her careers at both organizations, Tina has focused on improving the lives of those marginalized by race, sexual orientation, gender identity and socio-economic status. She is driven to provide a voice for those silenced and to help empower others to create change.

She is an Special Advisor to the ABA Criminal Justice Section Council, President of the Chief Defender Association of the State of New York, a member of the NLADA Defender Council and a member of various coalition that are working toward reform of the criminal legal system.

CJS Committees are grouped in the following Divisions:

- EQUAL JUSTICE
- COMMUNICATIONS, MEMBERSHIP
- CORRECTIONS AND SENTENCING
- PROFESSIONAL DEVELOPMENT
- SPECIALIZED PRACTICE
- WHITE COLLAR CRIME

See the list of CJS Committees at ambar.org/cjscommittees.
Death Row Inmate Gets Hearing on Ineffective Assistance Claim

• Counsel didn’t adequately investigate, present mitigating factors
• Failure to do so likely prejudiced mitigation case

An inmate who has been on death row for 35 years is entitled to a hearing on his ineffective assistance of counsel claim, the U.S. Court of Appeals for the Ninth Circuit said Nov. 9. Cary Williams’s trial counsel should have done a more thorough job investigating his childhood and whether brain damage factored into his killing of a pregnant woman who caught him burglarizing her home, the opinion by Judge Paul J. Watford said.

Because the case received extensive coverage in the press, Williams pleaded guilty to the crime, and the penalty phase was tried by a three-judge panel. His trial attorney, Shelly O’Neill, presented evidence showing that Williams was generally considered a “good guy,” but nothing extensive about his childhood. While O’Neill spent some time investigating Williams’s childhood, it wasn’t enough, the court appeals court said. If she had looked deeper, she would have discovered Williams’s mother died while he was young, that he and his sisters bounced from family to family and were subject to severe beatings and sexual abuse, and that he started using drugs at a early age to escape his problems, it said.

O’Neill also failed to uncover evidence that Williams may have brain damage, the court said. “It is beyond debate that evidence of brain damage can be powerful mitigating evidence,” it said. Because O’Neill’s representation prejudiced Williams, he is entitled to a hearing on his ineffective assistance claim, the court said. Judges Marsha S. Berzon and John B. Owens joined the opinion.


State Facing Federal Grand Jury Subpoena Can Claim Privilege

• State may claim attorney-client privilege
• Circuits split on whether privilege is categorically unavailable to states

There is no categorical rule preventing states facing a federal grand jury subpoena from invoking attorney-client privilege, the U.S. Court of Appeals for the First Circuit said. There is a circuit split on the issue. The Seventh, Eighth, and D.C. Circuits say there is a categorical bar, while the Second Circuit says there isn’t, the Nov. 21 opinion by Judge William J. Kayatta Jr. said. A federal grand jury subpoenaed records from the Rhode Island Department of Education and Training. The district court said, as a categorical matter, the attorney-client privilege doesn’t shield communications between state lawyers and state officials from a federal grand jury.

The U.S. argued that a state government lawyer shouldn’t be able to assert the privilege because his ultimate duty is to the public, the government entity need not fear prosecution, and the privilege is overborne by the public interest in transparent government. But the public nature of the state entity can’t by itself make the privilege inapplicable, the court said. A federal grand jury subpoena shouldn’t overrule a state’s decision on how to operate its own government “when there is no claim of wrongdoing by state officials,” the court said. When a grand jury is investigating potential crime within the state government, however, those arguments have more force, it said.

Because the U.S. didn’t suggest the subpoena here was targeted at wrongdoing by state officials, the court refused to decide what type of showing is required to avoid the claim of privilege. Instead, it simply rejected the categorical rule. Chief Judge Jeffrey R. Howard and Judge David J. Barron joined the opinion.

The Rhode Island Attorney General’s Office represented the state. The U.S. Attorney’s Office represented the U.S. The case is In re Grand Jury Subpoena, 2018 BL 430212, 1st Cir., No. 18-1464, 11/21/18.

Justices Uneasy With Lawyers Preventing Clients’ Appeals

• High court argument on ineffective assistance, appeal notices
• Justices sympathize with defendants whose lawyers ignore their wishes

A criminal defendant who wants to appeal despite signing an
appeal waiver is trying to have his cake and eat it too, Idaho’s deputy attorney general argued at the U.S. Supreme Court Oct. 30. But several justices, including Brett Kavanaugh, didn’t seem to eat up the government’s argument. Instead, the court on the whole appeared to have more of an appetite for the points raised by Gilberto Garza Jr.’s lawyer, Amir H. Ali of the MacArthur Justice Center in Washington. Just because defendants sign appeal waivers doesn’t mean there’s nothing to appeal, Ali noted. That includes challenges to the voluntariness of the plea itself.

Because Garza’s trial lawyer effectively deprived him of an appeal altogether by not filing a notice of appeal—even though Garza asked him to—the lawyer was automatically ineffective, Ali argued. A lawyer in this situation “has no place telling that defendant that he would prefer to just substitute his own view that the defendant go off, cede defeat, and go to prison,” he proclaimed. The state, supported by the Trump administration, argued against a bright line rule, insisting on case-by-case determinations. A decision in the case is expected by late June.

Garza pleaded guilty to drug and no contest to assault charges in Idaho state court in 2015. He signed appeal waivers as part of the deal. But he still asked his lawyer to appeal. The lawyer declined, citing the waiver. Garza says that amounts to ineffective assistance of counsel. His case calls on prior ineffective assistance opinions written by the retired—and recently lauded—Justice Sandra Day O’Connor.

Generally speaking, defendants claiming ineffective assistance need to show two things: The lawyer performed deficiently and the defendant was prejudiced by it. That standard is well-known to criminal practitioners, and comes from O’Connor’s landmark 1984 opinion in Strickland v. Washington. That’s the standard the government says should apply here.

But the court has carved out exceptions to the Strickland rule in some scenarios where prejudice is presumed, meaning defendants don’t need to prove that second part of the ineffective assistance test. Garza’s case falls under the exception, he argues, citing a more recent O’Connor opinion, Roe v. Flores-Ortega. If a lawyer’s error deprives a defendant of an appeal altogether, then the lawyer is presumed ineffective, she wrote in that 2000 case.

His claim also relies on last term’s death penalty decision in McCoy v. Louisiana. A trial lawyer couldn’t concede the defendant’s involvement in a murder, even if the goal was to ultimately spare the defendant from execution, the high court held in McCoy.

Ali sought to incorporate the autonomy point during the argument. Garza’s was violated by his lawyer’s refusal to abide by his wishes, he said. But autonomy “runs both ways,” Justice Neil M. Gorsuch retorted. A defendant who signs an appeal waiver has expressed his autonomy that way, he said.

Yet Gorsuch took an even more skeptical approach to the government’s argument. Responding to Idaho lead deputy attorney general Kenneth K. Jorgensen, Gorsuch said the state’s stance runs counter to what Gorsuch called the “normal division of labor” between clients and lawyers. “Don’t clients generally specify the end, I wish to appeal, and leave it to the lawyer to determine the means?” Gorsuch asked. He brought up the same point to assistant to the U.S. solicitor general Alon Kedem when it was his turn at the lectern.

But the justices were most critical of Jorgensen’s argument out of the three. They pushed back on his claim that the fact of a waiver resolves the issue against the defendant. A waiver addresses many but not all issues, Chief Justice John G. Roberts Jr. observed. The court also more broadly examined the implications for the criminal justice system of rulings for both sides.

Jorgensen said most defendants who waive appeal won’t be successful in appealing other issues. But to use that premise to argue that prejudice shouldn’t be presumed here is “disheartening,” Justice Stephen G. Breyer said. Breyer said he would find it hard to write an opinion “which said the reason you don’t get exactly the same right is because you have fewer likely grounds for appeal.”

Kavanaugh noted that prejudice is already presumed in most jurisdictions. “I haven’t seen much evidence of practical problems from the presumption,” he said to Jorgensen. The newest Trump appointee later brought up the same point to Kedem. “Does the federal government think that the experience of those circuits that have applied a presumption of prejudice has shown a problem?” Kavanaugh asked. Kedem replied that it doesn’t get exactly the same right is because you have fewer likely grounds for appeal.”

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