Fall Meeting Highlights

During November 7-10, 2019, the ABA Criminal Justice Section hosted its annual Fall Institute, CLE program, committee and Council meetings in Washington, DC. The program kicked off with the White Collar Crime Townhall, “When Cooperation becomes Co-option: The Risk That Companies Under Investigation Become State Actors.”

The Friday programming began with an opening address from the District Attorney of Suffolk County, Boston, MA, Rachael Rollins. Rollins was followed by an interactive plenary session led by the Task Force: Women in Criminal Justice. Breakout sessions addressed criminal justice reform, restorative justice, cannabis legalization and The First Step Act. The keynote address was provided by Judge Richard Mark Gergel, author of “Unexampled Courage: The Blinding of Sgt. Isaac Woodard and the Awakening of President Harry S. Truman and Judge J. Waties Waring.” Gergel described the blinding as a catalyst for the civil rights movement and the overturning of school segregation.

The program concluded with a special youth court reenactment and discussion of youth court diversion programs by the Global Youth Justice.

The highlight of the Institute was the annual CJS Awards Luncheon during which the Section honored the winners of the 2019 CJS Awards:

- Charles R. English Award: Honorable Arthur L. Burnett, Sr.
- Livingston Hall Juvenile Justice Award: Honorable Jay Blitzman
- Frank Carrington Crime Victim Attorney Award: Network for Victim Recovery of DC’s Legal Team
- Norm Maleng Minister of Justice Award: Camelia M. Valdes
- Raeder-Taslitz Award: Professor Joseph L. Hoffman

The Section also recognized the 2019 winner of The Greenhalgh Writing Competition Winner Michael de-Pascale Jr. of Roger Williams University School of Law.
The ABA Criminal Justice Section was founded in 1920 in St. Louis, Missouri and is one of the oldest sections of the American Bar Association. After the founding of the ABA in 1878 and the membership and scope of the ABA continued to grow, the Association recognized the need to have an entity focused on criminal law. The Criminal Justice Section's earliest work examined deficiencies within the law and has contributed to the development of the criminal justice system as we know it today through policy advocacy and the Criminal Justice Standards, originally commissioned in 1964. Those original Standards spanned the entire criminal justice process, including pre-trial release, discovery, jury trials, sentencing, appeals and post-conviction remedies. They also covered topics such as the prosecution and defense functions, the function of the trial judge, fair trials and free press.

The Criminal Justice Section continues to examine the criminal justice system, and with diverse membership including judges, defense attorneys, prosecutors, academics and other criminal justice professionals, seeks to represent the unified voice of criminal justice in its work. The Standards Project has grown, and the Section now has over 40 committees and additional task forces addressing the most pressing criminal justice issues. The Section continues to strive for diversity and inclusion and addressing women's issues in the field of criminal justice.

We have chosen the motto, “Perfecting our Vision in 20/20” for this centennial year. As the motto indicates, we will take the chance to reflect on our history, to learn from our own deficiencies and to move forward with a perfected vision of our priorities and goals for the next 100 years. There will be reflections and projections of our history made available in our publications, at our events and on our website. We invite you to join us in celebrating 100 years of criminal justice progress and ask you to renew your commitment to help us achieve more in the coming 100 years, as there is still much work to be done.

**Diversity and Inclusion Fellows**

The CJS Diversity and Inclusion Fellowship Program provides opportunities for lawyers in under-represented groups such as ethnically diverse lawyers, persons with disabilities, and lesbian, gay, bisexual and transgender persons, to actively participate within the Criminal Justice Section and prepare them to take on leadership roles within the Section.

**2019-2021 Fellows**

Andrea Alabi is Managing Assistant District Attorney for the Gwinnett Judicial Circuit, Lawrenceville, GA, handling all types of cases ranging from nonviolent misdemeanors to the most serious of felonies. While at the District Attorney’s office, Andrea has spoken to hundreds of students and parents about cyber awareness, cyberbullying and preventing domestic violence.

Faraz Mohammadi is Assistant United States Attorney in the Criminal Division of the U.S. Attorney’s Office for the Central District of California.

Faraz Mohammadi (left) and Andrea Alabi (right)
London White Collar Crime Institute

The Section returned to London to host the Eighth Annual London White Collar Crime Institute during October 14-15, 2019. 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 on enforcement trends with Director, Serious Fraud Office, Lisa Kate Osofsky and U.S. Attorney for the Eastern District of New York, Richard Donoghue. The ‘Navigating Sanctions’ panel included the Director of the U.S. Department of Treasury (OFAC) and the Director, Office of Financial Sanctions Implementation HM Treasury in addition to legal experts in navigating sanctions from the corporate perspective. Other panels compared jurisdictions around the world, sentencing, money laundering enforcement and cyber crisis management.

The second day of programming included the keynote address, delivered by Peter Pope of The Serious Fraud Office – UK. The program then hosted a two-part white collar crime hypothetical exercise examining allegations of bid rigging, inflated invoices, kickbacks and money laundering via cryptocurrencies. The first part focused on the investigation phase, while the second part discussed prosecution and enforcement matters.

The Institute provided excellent panelists, ranging from positions in international regulatory leadership, the Department of Justice, general counsel and private practice. International panelists represented the following jurisdictions: Britain, Canada, Ireland, Italy, Spain, Switzerland and Germany.

ICC Project Side Event at the ICC Assembly of States Parties

ICC Project chair Michael Greco, director Kristin Smith, and several board members attended the International Criminal Court’s (ICC) Assembly of States Parties meeting in The Hague, Dec. 2-7. Mr. Greco submitted a written statement on behalf of the ABA stressing the ABA’s ongoing support for the ICC and the need to protect the independence of the Court’s legal professionals and its casework from political interference.

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Articles Wanted for the CJS Newsletter

Practice Tips, Section/Project News
Submission Deadlines: April 15, Aug. 15, Dec. 15
For inquiries, contact: Kyo Suh, Managing Editor, kyo.suh@americanbar.org
Effective Use of Forensic Accountants in White Collar Crimes

By Paul Peterson

Over the past 30 years, very few career paths in accounting have evolved faster than the role of forensic accountants. In the early days when CPAs first began using the term “forensic accounting,” much of that accounting work was geared toward serving the insurance industry. This accounting specialty was borne out of the need to quantify economic losses for insurance claims as these policies became more complex and complicated. While working with insurance adjusters and claimants continues to be part of the range of services forensic accountants can provide, forensic accounting has evolved and expanded—so much so that bachelor’s degrees in forensic accounting are now offered at many universities.

With the maturing of forensic accounting over the last 3 decades, the skillsets and service offerings have dramatically grown. Today, some of the main clients and supporters of forensic accountants are attorneys, including both external and in-house counsel. And corporations across all industries now rely on forensic accounting. Corporate compliance professionals, investigative units, internal audit departments and in-house and external counsel gain value from forensic accountants’ specialized knowledge, skills and experience, as well as the technology tools they use to detect wrongdoing, uncover facts, and remediate issues to strengthen financial controls and minimize future occurrences of bad acts and crimes.

The following are the key areas where forensic accounting teams can add value during a domestic or international fraud investigation or white collar crime matter.

Books and Records Analysis

The core service offering for a forensic accountant is providing financial analysis from data extracted from a company’s books and records and other data sets related to allegations of wrongdoing. The typical first step a forensic accountant will take is to work with the internal and external attorneys and corporate stakeholders, including IT professionals, to understand where the various data sets reside and determine the best approach to obtain the data and accounting records.

Forensic accountants within large, international public accounting firms have experience working with various accounting systems used around the world, including accounting systems that are in the local language. In order to conduct discreet inquiries and have full access to manipulate and query the accounting data for evidence supporting the allegations or to detect red flags, forensic accounting professionals will typically extract data sets from the local accounting system and set up the data in an independent, standalone environment. The need to understand the company’s debts and credits and accounting records will be determined by the type of fraud allegation; namely, misappropriation of assets, financial statement fraud, or corruption. For instance, if the allegation is related to payments made to specific vendors or coming out of certain expense accounts, the forensic accountant may only need to focus on and query disbursements out of specific expense accounts. Or if financial statement manipulation to increase revenues is alleged, the forensic accountant may have to understand, for example, top-sided or period-end journal entries made to inflate revenues. Top-sided journal entries are adjusting entries typically recorded in the general ledger post-consolidation, but not pushed down to the sub-ledger. In situations where corruption is at the center of the allegations, a broader population of accounting system data should be analyzed. In doing so, the forensic accountant will have visibility across various business cycles to determine how the alleged bribe payments are recorded as government enforcement agencies continue to use laws to penalize companies for improper books and records.

Big Data

These days you cannot go to a fraud or compliance-related conference without being inundated with presentations and marketing materials related to Big Data and data analytics. This is a topic that has significant implications when it comes to investigations of white collar crimes in addition to proactive measures to address fraud risks. Forensic accountants, working with their forensic technology counterparts within their firm, are leading the execution of highly sophisticated tools and processes to normalize, query, and mine the potentially relevant universe of evidence to extract pertinent insights and visually display the most meaningful results showing patterns, relationships, anomalies and connections. Data analyzed are typically not just the accounting records but may also include various internal system data sitting outside the accounting platform as well as external data sets. An important precursor to analyzing the data is confirming the completeness and accuracy of the data set and the quality of the data. If the integrity, quality, and/or completeness and accuracy of the data is determined to be lacking, the results are potentially of zero value and will require a do-over. From my experience from many analyses of data sets, up to fifty percent of the overall time spent by the forensic accounting team may be spent on the initial data integrity verification and data set-up.

Since numbers don’t lie, the forensic analysis of an accounting data set typically proves to be helpful in establishing leads.

Paul Peterson is a Partner in BDO USA, LLP, Forensic Investigation and Litigation Services group.
Whether it’s leads aligned with specific allegations or leads for a proactive fraud detection engagement, the devil is in the accounting details. The leads generated from this analysis allow the forensic accountant to define mission-specific procedures that may take the form of pulling supporting documentation for accounting transactions, interviews, investigative due diligence, or e-discovery, including the review of electronic files, emails, and cell phone data.

**E-discovery and Document Review**

Full-service forensic accounting practices will have some level of e-discovery and document review capabilities. Though the sophistication of these capabilities may vary from firm to firm, it’s always recommended that your forensic accounting team have e-discovery skills and familiarity with the e-discovery tools and techniques needed as well as the capacity to conduct efficient and effective document reviews. An initial step in many forensic investigations is identifying the employees and company files to forensically image. Forensic imaging itself is not a costly endeavor. Once imaged, the forensic accountants and attorneys determine which data sets and files should be processed and hosted for analysis and reviewed while others may be stored for preservation purposes only. The responsive documents and email/text messages identified by the forensic accounting team are usually the most valuable evidence indicating wrongdoing. Overall, forensic accountants play a crucial role during the e-discovery phase of the engagement.

**Investigative Due Diligence**

It is important that your forensic accounting investigation team has experienced members who can perform deep investigative due diligence on the background and history of individuals and entities. The investigated individuals are typically company employees or affiliated with a company vendor or customer involved in the allegations. Investigative due diligence procedures vary depending on the nature of the case, but the forensic accountant investigation team should have the ability to conduct extensive public records research (e.g., court filings, corporation records, etc.) as well as in-country, on-the-ground field inquiries and site visits. When developing investigative due diligence procedures, a little creativity can go a long way in uncovering facts. Value-added findings can be gleaned from properly executed investigative due diligence procedures, some key take-aways are providing insights of related parties of bad actors or from showing behavioral aspects of an individual’s profile that support a history of wrongdoings or lifestyle pressures that may indicate a motive.

**Interviews**

Almost all white collar crimes require some level of informational meetings and interviews of company employees or other key players involved in the allegations. The purpose may be to understand the company’s business and/or accounting processes and internal controls, to corroborate stories or seek an admission of guilt. Traditionally, external counsel will lead such interviews, but the forensic accounting team will play an integral part in either covering the financial reporting and internal control related questions or providing the attorneys with information to use or be mindful of during the interview. Your forensic accountants should be experienced with either conducting interviews or supplementing the investigating attorneys’ interview efforts.

**Global Reach**

U.S.-based companies continue to drive growth through international expansions. While venturing into foreign markets provides significant opportunities, companies often underestimate the level of risk it brings. While the degree of risk depends on a variety of factors, such as the countries touched, fraud risk inherently increases with international expansion. As international fraud and compliance matters inevitably arise within multinational corporations, it is important that your forensic accounting firm has in-country resources that are knowledgeable about the local business practices, language, laws, and culture. These local forensic accounting resources are invaluable in distinguishing local customs from anomalous behavior, though both may be illegal or non-compliant with company policies.

**Post-Incident Actions**

At the conclusion of a fraud investigation, companies seek to put in place policies, procedures and internal controls to mitigate the risks that led to the incident in the first place. Your forensic accountant should be well equipped to perform a post-incident root cause analysis and subsequently provide suggestions to strengthen the corporate control environment of the impacted business cycle. A root cause analysis has become routine procedure; U.S. regulators are expecting companies to fully understand how the incident occurred. This analysis will drive remediation steps to prevent the incident from occurring again.

**Conclusion**

In white collar crimes that require independent investigative procedures, companies rely on expert external counsel and skilled forensic accountants. Navigating these matters can be complex and challenging. By partnering with credible forensic accountants and investigators that have experience with 1) performing financial analysis; 2) querying and mining big data; 3) deploying e-discovery tools for electronic file reviews; 4) conducting investigative due diligence; and 5) navigating global matters, backed by boots on the ground, the likelihood of an effective execution and comprehensive conclusion will be greatly increased.
The Mueller Investigation and Beyond


Review by Lucian E. Dervan

On March 22, 2019, Special Counsel Robert Mueller provided Attorney General William Barr with a 448-page report. The report, now commonly referred to as the “Mueller Report,” contained a detailed discussion of the two year investigation into the Russian government’s interference in the 2016 Presidential election, an investigation that included the issuance of 2,800 subpoenas, the interview of approximately 500 witnesses, the testimony of 80 witnesses before the grand jury, the issuance of nearly 50 orders authorizing the use of pen registers, and the obtaining of more than 230 communications records orders through a federal statute. To date, the inquiry has led to the filing of almost 200 criminal counts, seven individuals pleading guilty, one individual convicted at trial, and thirty-seven people and/or entities charged. While much controversy and disagreement remains regarding both the events and process that led to the appointment of Mr. Mueller and the findings and conclusions contained in the report, there can be no dispute that the legal and ethical issues surrounding this historic investigation are fascinating, complex, and worthy of much future study.

The Mueller Investigation and Beyond is the first legal casebook pertaining to the investigation and creates a sophisticated, yet approachable entry point for academics, students, and lay readers to begin examination of the many issues presented by this chapter in our legal history.

One of the many outstanding features of the text is its carefully crafted approach to an overwhelmingly large subject matter. Rather than attempting to address all of the intricacies of an investigation that stretched over several years, the book skillfully selects several of the most pressing issues related to both the process that led up to the investigation and the investigative findings themselves. In just under three hundred pages and eight chapters, the book carries the reader from the constitutional appointment process that resulted in Mr. Mueller becoming Special Counsel to some of the substantive legal issues raised in the final report. Along the way, chapters address issues such as the complexities of parallel investigations, legal ethics, and the attorney-client privilege. What is truly remarkable about this text is its ability to cover so many areas of law in short, succinct chapters that add greatly to the reader’s understanding of what remains, in many ways, current events. As I read the text, I kept a running list of the various areas of law explored. My list included administrative law, constitutional law, criminal law and procedure, national security law, evidence law, legal ethics and professionalism, election law, civil procedure law, executive powers law, and First Amendment law. While I have almost certainly missed many other areas discussed by the authors, this list should give a sense for both the breadth and depth of the pieces and the value that emanates from its contribution to this subject matter.

Another noteworthy aspect of the book is its approach to each topic. Rather than attempting to analyze each issue in a definitive manner and draw final conclusions for the reader, the text instead seeks to inform the reader regarding the substantive area of law and then present them with primary materials for review and contemplation. For example, in Chapter Seven regarding Obstruction of Justice, Professor Ellen Podgor begins with a general discussion of the meaning of “obstruction of justice” and provides the text of some of the most commonly charged federal obstruction of justice statutes. The chapter then provides select text from several important court opinions regarding obstruction of justice spanning more than two decades, including the highly publicized 2015 case United States v. Barry Bonds. In so doing, the text is able to provide the reader an introduction to the topic that includes both relevant statutory language and interpretive court precedent. The chapter then reproduces excerpts from the Mueller Report’s discussion of the Special Counsel’s obstruction of justice legal framework, thus allowing the reader to compare the earlier statutes and precedents to the interpretations of these offenses made by Mr. Mueller and his team. Finally the chapter ends with further excerpts from the Mueller Report in which the Special Counsel discusses his team’s findings regarding potentially obstructive conduct and the team’s legal analysis and conclusions regarding this conduct.

There is no further review or commentary by the author and the reader, whether a student or otherwise, is not told what to
conclude about the contents of the Mueller Report. Rather, the reader is invited to draw their own conclusions after being presented with background materials regarding the topic and the original text of the Mueller Report. In a time when many books about the Mueller investigation approach the issue from a predetermined perspective, *The Muller Investigation and Beyond* is refreshing in that it seeks to present information to the reader to assist them in drawing informed decisions for themselves. In this way, it is both an excellent text to drive student discussion of these topics in a course and a unique way for lay readers to explore the complexities of this matter through a course of self-study.

While *The Muller Investigation and Beyond*, published by Carolina Academic Press, is marketed to an academic audience for use in class, including as a capstone course for third year law students because of its coverage of so many diverse areas of law, the book also offers more casual readers a manageable window into an investigation that has already secured a place in history and for which discussion and debate will continue for some time. For academics seeking a text to spark discussion in their courses or a casual reader seeking to learn more about some of the major topics raised by Mr. Mueller’s work, this book is a stellar place to start.

### Upcoming CJS Events

- **34th National Institute on White Collar Crime**: March 11-13, San Diego, CA
- **CJS Spring Meeting**: April 23-26, Kansas City, MO
- **11th Annual Prescription for Criminal Justice and Forensic Science Institute**: June 4-5, New York, NY
- **CJS Annual Meeting**: July 30-Aug. 2, Chicago, IL
- **Southeastern White Collar Crime Institute**: Sept. 9 - 11, Braselton, GA
- **CJS Fall Institute**: November 2020, Washington, DC

*View ambar.org/cjsevents for the complete calendar of events.*
UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

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Calif. Judges, Lawyers, Doctors Must Get Implicit Bias Training

- First state-mandated training for all court personnel, doctors
- Education requirements must be met starting in 2023

California lawyers, judges, and doctors would have to take implicit bias training every two years under new laws designed to reduce unconscious biases and internal stereotypes people have about others. The training would focus on the unconscious biases people have based on characteristics in Government Code 11135 – sex; race; color; religion; ancestry; national origin; ethnic group identification; age; mental disability; physical disability; medical condition; genetic information; marital status; or sexual orientation.

“Before implicit bias can be combated, it must be recognized, so the first step to defeating implicit bias is to make a person aware of their biases,” an Assembly committee analysis said. Assembly Bill 242 requires the Judicial Council by Jan. 1, 2021, and the State Bar by Jan. 1, 2022, to develop mandatory training on implicit bias. The bill defines implicit bias as positive or negative associations that affect their beliefs, attitudes, and actions toward other people. Court personnel must complete the course by Jan. 1, 2022. Lawyers would have to meet the requirement after Jan. 31, 2023.

Arizona Can’t Stop Resentencing of Capital Defendant: 9th Cir.

- Divided 9th Cir. panel’s habeas grant stands
- Appellate judges file concuring, dissenting opinions

A man who was convicted of murdering his friend and sentenced to death will get a new sentencing hearing after the full Ninth Circuit declined Arizona’s request that it rehear the appeal. The Dec. 18 ruling lets stand a divided panel’s conclusion that George Kayer received ineffective assistance of counsel at his original sentencing. Kayer’s original attorneys put their investigation of mitigating circumstances on the back burner while they prepared his state court trial for killing Delbert Haas in 1994. The mitigation investigation to prevent the death penalty didn’t start until after Kayer’s conviction, and only weeks before he was sentenced, according to the panel.

The mitigation strategy was to show impairment due to mental illness and/or substance abuse, but the evidence was “meager,” according to Judges William A. Fletcher and Michelle T. Friedland, who filed an opinion concurring in the denial of rehearing en banc. Fletcher and Friedland made up the majority of the three-judge panel that ruled in Kayer’s favor on his federal habeas corpus request.

Judge Carlos T. Bea wrote a dissenting opinion, joined by 11 members of the en banc court, all of whom would have granted rehearing. But the court has 29 active members, and the majority declined review. The panel didn’t apply the correct standards under the Antiterrorism and Effective Death Penalty Act, Bea said. “Like clockwork, practically on a yearly basis since the Millennium, we have forced the Supreme Court to correct our inability to apply” those standards, he said.

The Office of the Federal Public Defender represented Kayer. The Arizona attorney general’s office represented the state’s Department of Corrections. The case is Kayer v. Ryan, 2019 BL 483444, 9th Cir. en banc, No. 09-99027, rehearing en banc denied 12/18/19.

Murder Conviction Tossed Over Prosecutor’s Remarks

- Solicitor in South Carolina said defense attorneys manipulated truth
- State’s highest court sees due process violations

A South Carolina man convicted of murder will get a new trial over comments made by the prosecutor over the role of defense attorneys. The South Carolina Supreme Court decided Dec. 4 that the conviction should be tossed as the statements at issue “infected” the defendant’s trial with a level of unfairness that violated his due process rights. At issue were comments made by the assistant solicitor that the job of defense attorneys was to twist the truth and confuse jurors.

Oscar Fortune had been convicted of murder by a jury in 2006 for shooting a man a few years before. Fortune was sentenced to 37 years in prison on that charge. He appealed his conviction due to statements made by the prosecutor during the trial’s closing arguments. The conviction was previously upheld before it made its way to the state’s highest court.

The South Carolina Supreme Court found that the prosecutor
made “several blatantly improper comments” that rendered Fortune’s trial unfair. Statements cited by the court included claims that prosecutors’ jobs were to present the truth, while defense attorneys were to “manipulate” and “shroud” the truth to confuse jurors. “Their job is to do whatever they have to—without regard for the truth” was among the comments highlighted by the court.

Statements such as those “infected Fortune’s trial with such a high degree of unfairness as to make his conviction a denial of due process,” the high court said in tossing the conviction. The case is Fortune v. South Carolina, S.C., No. 27932, 12/4/19

ABA Advises on Ethical Obligations When Attorneys Switch Firms

• Firms, departing lawyers must protect client interests, opinion says

• Advises on “orderly transition” of client matters

Attorneys are more mobile in their careers, and a new American Bar Association advisory opinion addresses obligations when a lawyer switches firms. A departing lawyer and the firm should work together to meet ethical responsibilities to protect client interests during the transition, the Dec. 4 opinion by the ABA’s Standing Committee on Ethics and Professional Responsibility said. The opinion will help inform lawyers and their firms, particularly in Big Law, where it’s become more common over the last decade for attorneys to jump from one firm to another, and to bring their books of business with them.

Ethical obligations include providing the firm with enough notice of the intended departure to notify clients; working together to ensure an “orderly and timely” transition of client files; and returning firm property, it said. Ideally, the firm will have written policies on departures, the opinion said. Ethical obligations include representing a client “diligently,” which means informing the client promptly of a job change, it said. The ABA Model Rules of Professional Conduct say departing lawyers don’t have to wait to inform clients, so long as the the firm is notified at the same time, it said.

Some states, like Florida, address client notification in their model rules, the opinion said. In Florida, an attorney and firm have to try to negotiate a joint client communication before notifying clients. If that fails, the attorney can “unilaterally” reach out to clients. But clients aren’t “property,” the opinion said, so firms and lawyers on the move can’t divide them up. Clients “decide who will represent them going forward when a lawyer changes firm affiliation,” it said.

The firm has a duty under Rule 5.1 to make sure there’s an “orderly transition” of client matters. This includes assessing whether the firm can handle a clients’ work. If the departing lawyer was the only one with the requisite expertise, the firm can’t continue representation, the opinion said. An “orderly transition” also includes making sure client files are up to date and that a departing lawyer respects the duty of confidentiality for clients left behind. This means returning or deleting all confidential information in the lawyer’s possession, the opinion said. A departing lawyer can keep client names and contact information, however, for purposes of conflict checks at the new firm.

During a transition, a law firm also has responsibilities. Although it’s O.K. for firms to have employment agreements requiring attorneys to provide reasonable notice of a job change, Rule 5.6(a) says the agreements can’t be used to “coerce or punish a lawyer for electing to leave the firm,” the opinion said. Firms also can’t refuse departing lawyers access to “adequate firm resources needed to competently represent the client” during the transition period, it said. These can include assistance of support staff and access to email and files. The opinion is ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 489, 12/4/19.

Divided SCOTUS Skeptical of Driver’s Fourth Amendment Claim

• Supreme Court argument in Kansas case on how much information police need to pull drivers over

• Government warns of public safety implications, while defense, others raise social justice, privacy concerns

U.S. Supreme Court justices were skeptical of a Kansas man’s argument that police violated the Fourth Amendment when they pulled him over, in a case that government officials warn has big public safety implications, while defense and other advocacy groups raise social justice and privacy concerns.

At oral argument on Nov. 4, a minority of the high court pressed the state on its “common sense” assumption that it was reasonable to pull over a car whose registered owner’s license was revoked, without the officer doing anything more, like trying to verify the driver’s identity first. But without a definitive answer from the driver Charles Glover’s lawyer, veteran Supreme Court advocate Sarah Harrington, as to what more exactly is required of law enforcement in these situations, he could be out of luck. Chief Justice John Roberts, in particular, seemed exasperated during a lively exchange with Harrington of Goldstein & Russell, PC.

Still, key justices like Neil Gorsuch asked tough questions of both sides, and how the high court ultimately decides the case
could depend on how broadly or narrowly the justices rule—that is, as Justice Samuel Alito put it during the argument, whether they issue “a trivial decision or a revolutionary decision.” Whether trivial, revolutionary, or something in between, a decision is expected by late June.

**Totality of the Circumstance**

The dispute stems from a 2016 traffic stop, where a Kansas officer pulled over the pickup truck that Glover was driving. The officer said he stopped the truck because, when he ran the license plate, he saw that its registered owner—Glover—had his driver’s license revoked. But the officer didn’t have more information than that before pulling over the truck. He didn’t try to confirm Glover’s identity first. Charged with driving as a habitual violator, Glover challenged the stop on Fourth Amendment grounds.

The state’s top court ruled for Glover, finding the officer’s assumption that Glover was driving “was only a hunch and was unsupported by a particularized and objective belief.” Kansas officials appealed, backed by the Trump administration. Out of the gate at the argument, some of the justices focused on the slim factual record in the case. The officer didn’t testify at a suppression hearing. There was just a stipulation that the officer assumed Glover was driving.

Nonetheless, Kansas solicitor general Toby Crouse and assistant to the U.S. solicitor general Michael Huston stressed what they characterized as the common sense nature of their position. But Gorsuch pressed Crouse on that point, saying “you’re asking us to make an inference about facts when there are no facts in the record at all, zero.”

Crouse said the court should look to the totality of the circumstances, but Justice Sonia Sotomayor retorted that “there’s only one totality.” Likewise, Justice Ruth Bader Ginsburg said “it’s one circumstance, the registered owner’s driver’s license has been suspended, period.” The government has “offered literally no way for this Court to assess whether that is, in fact, a reasonable assumption, whether it is, in fact, based on common sense,” Harrington argued.

**Numbers, Revolution**

But some justices pushed back on what they saw as assumptions in Harrington’s argument, and, in questions to both sides, multiple justices wondered how percentages and statistics should play into the Fourth Amendment equation.

“Do you think it’s totally random who the driver is? In other words, it’s registered to Fred Jones, but it could be anybody in the world?” Roberts asked Harrington at the beginning of an exchange that enlivened the usually even-keeled chief. He’d go on to say that “reasonable suspicion does not have to be based on statistics, it does not have to be based on specialized experience.” It can be based on common sense, he said.

Justice Stephen Breyer similarly seemed to struggle with Glover’s position. Justice Samuel Alito, who usually sides with the government in criminal cases, told Harrington that she’s proposing “either a trivial decision or a revolutionary decision.” He said it’s a “trivial decision” if all that’s lacking in this case is a statement from the officer, “I’ve been trained that, blah, blah, blah.” But it’s a “revolutionary decision if in every case involving reasonable suspicion there has to be a statistical showing or an examination of all the things that you think are necessary here.”

Harrington said all she’s asking for is “that the ordinary Fourth Amendment contextual analysis be required in every case. It doesn’t require statistics in every case. It doesn’t require any magic words. It just requires something to support the reasonableness of an assumption.” Fourth Amendment experts anticipated ahead of the argument that the statistical aspect could come into play, thus making the case a potentially significant one if the court says something about how to gauge probabilities in the search and seizure context.

Broadly, the case is “about whether police officers can pull people over based on general probability rather than the officers’ personal observations,” said Matthew Tokson, law professor at the University of Utah. Given that the reasonable suspicion standard is “such a nebulous, low” one, “it is always potentially helpful to receive further guidance from the high court—including how we ought to think of percentage possibilities,” said Stephen E. Henderson of the University of Oklahoma College of Law.

**Safe Streets, Privacy**

Over a dozen states have lined up to support Kansas, claiming that “the ability of state officers to keep their streets safe” is at stake. “Studies show that despite having their license suspended, many drivers continue to drive their vehicles,” state officials say. “Because unlicensed drivers account for a disproportionate share of fatal motor vehicle accidents, such stops are often the sole, indispensable means available to officers to police against this important public safety hazard.”

An array of outside groups have lined up to support Glover, observing that license suspensions “are concentrated in poor communities and disproportionately in communities of color.” Because there are fewer vehicles per household in those communities, drivers are more likely to borrow vehicles from friends or family. Such communities are also subject to in-
A federal court improperly allowed a prosecutors’ office to review law firm emails seized in the investigation of one of the firm’s lawyers, the Fourth Circuit ruled Oct. 31. And the district court abused its discretion when it refused to order a stop to the review, the panel said.

The magistrate judge who set up the “filter team” and the procedures for its privilege review “failed to recognize and consider the significant problems with that delegation, which left the government’s fox in charge of guarding the Law Firm's henhouse,” Judge Robert B. King said. The magistrate judge's actions and the district court’s ruling were riddled with errors, the court said.

Federal authorities investigating drug dealers came to investigate their lawyer, who then became the client of the Baltimore lawyer at the heart of this case, according to the appeals court. That attorney is identified as Lawyer A. The individuals’ and firm’s names are under seal.

An Internal Revenue Service agent applied for a warrant to search Lawyer A's office, and prosecutors proposed the filter team in an or ex parte proceeding in the U.S. District Court for the District of Maryland. The magistrate judge set up a protocol for the team—which consisted of lawyers at the U.S. Attorney’s Office in a different division, Greenbelt, from the Baltimore office handling the case—as well as non-lawyers, including paralegals and IRS agents.

Among the items seized was Lawyer A’s email inbox, containing about 37,000 emails, according to the court. Only 62 referred to Client A. Client A and the law firm both sought injunctions, which the court denied.

The U.S. Court of Appeals for the Fourth Circuit chastised the magistrate judge’s creation of the team and the court’s approval of it. The magistrate judge “inappropriately assigned judicial functions to the executive branch,” the ex parte proceedings prior to the search were improper, and the use of the team “contravenes foundational principles that protect attorney-client relationships,” the panel said. “Federal agents and prosecutors rummaging through law firm materials that are protected by attorney-client privilege and the work-product doctrine is at odds with the appearance of justice,” it said.

Chief Judge Roger L. Gregory and Judge Allison Jones Rushing also served on the panel. Kramon & Graham represented the law firm. The Department of Justice represented the U.S. The case is In re: Search Warrant Issued June 13, 2019, 4th Cir., No. 19-1730, 10/31/19.

Death Row Inmate Gets Hearing on Ineffective Assistance Claim

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 an 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.

The Federal Public Defender’s Office represented Williams. The Nevada Attorney General’s Office represented the state. The case is In re: Search Warrant Issued June 13, 2019, 4th Cir., No. 19-1730, 10/31/19.
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