The American Bar Association Criminal Justice Section hosted its Thirteenth Fall Institute and Meetings on November 16-22, 2020, but like many meetings in 2020, they were converted to virtual meetings due to the COVID-19 pandemic. The Section hosted ten plenary and breakout sessions over the course of the Institute on November 19-20, covering a range of topics within the theme “Advancing 21st Century Criminal Justice – Discovering the Wounds of a Tainted Truth.” The goal of this theme was to discover and heal the wounds of racism and injustice within the criminal legal system.

Committee meetings were hosted virtually beginning on Monday of that week. On Thursday, the CLE programming began with a keynote address from Carlton Waterhouse, J.D., Ph.D. and was followed by breakout sessions addressing race and gender issues in addition to prosecutor reforms, de-incarceration and training the next generation of criminal justice leaders. Thursday concluded with the White Collar Crime Town Hall which discussed DOJ, SEC and CFC enforcement priorities in the coming year.

On Friday, the programming began with Virtual CJS 2020 Awards Luncheon featuring the keynote speech from Senator Cory Booker of New Jersey and recognized the 2020 CJS Award Recipients. A new award category created in 2020 -- the Albert Krieger Champion of Liberty Award -- named after the famed defense lawyer and former CJS chair (2002-2003), was awarded for the first time.

The Friday programming continued with two plenary sessions “Rule of Law: Future of Criminal Justice” and “Confronting Our History: The Role of Race in the Criminal Legal System.” The programming then concluded with a virtual reception. The CJS Council met on November 21-22. The CJS Fall Institute programs can be viewed at the CJS YouTube channel.

2020 CJS Awards Recipients

(Top photo, from left to right)
- Charles R English Award – Judge Ernestine Gray, The Orleans Parish Juvenile Court
- Norm Maleng Minister of Justice Award – Judith Friedman, Counsel, The United States Department of Justice
- Livingston Hall Juvenile Justice Award – Amy E. Breihan, Co-Director, The Roderick & Solange MacArthur Justice Center (Missouri)

(Bottom photo, from left to right)
- Frank Carrington Crime Victim Attorney Award – Margaret Garvin, Executive Director, The National Crime Victim Law Institute
- Raeder Taslitz Award – Professor Maryam Ahranjani, The University of New Mexico School of Law
- Albert J. Krieger Champion of Liberty Award – Neal Sonnett, Former Assistant United States Attorney and Chief of the Criminal Division for the Southern District of Florida

Stay Connected ... With the CJS via Facebook, Twitter, Instagram, LinkedIn, YouTube ... (hashtag #ABACJS)
The Criminal Justice Practice-Ready Clinic

In November 2020, the Section launched the Criminal Justice Practice-Ready Clinic, which was created to provide young lawyers and current law school students with opportunities to learn and strengthen key skills necessary to build successful criminal justice practice. This clinic was designed to respond to the professional development gap caused by employers cancelling internship programs and pausing entry-level hiring due to the impacts of COVID-19.

Clinic participation required attending live and recorded workshops and training sessions essential to practice areas including client services, interviews, legal writing, oral advocacy, fact investigation, developing case strategy, motions practice and more. The Clinic provided training, coaching, and mentoring from criminal justice leaders. Clinic participants also gained access to the Criminal Justice Practice-Ready Career Portal which provided opportunities to search job openings and connect with recruiters.

Clinic participants had the option to choose between two learning tracks: track one geared towards law students and recent graduates with no-to-minimal experience and track two geared towards young lawyers with some post-graduate experience, looking for additional learning opportunities. All participants were required to complete one mentorship session and two work projects in addition to their required and elective course requirements.

The Young Lawyer Committee helped construct the outline and requirements for the Clinic. Members and leaders of the Prosecution Function and Defense Function Committees, in addition to the Racial Justice, Diversity and Inclusion, Corrections, CLE Board, and White Collar Crime Committees, served as coaches and instructors for the sessions.

Committee Updates

The Racial Justice and Diversity Committee, co-chaired by Cherise Fanno Burdeen (Pretrial Justice Institute) and Jamila Hodge (Vera Institute of Justice), has been hard at work this quarter. The Committee hosted two virtual meetings for committee members to review the work plan for this year. This plan focuses on the development and submission of a resolution to the ABA House of Delegates, through the CJ Section. The resolution will significantly update the 2004 resolution (121B) calling for governments to eliminate real and “perceived” racial bias in the criminal legal system. It will also include an acknowledgment of the lack of racial equity centering within the ABA’s CJ Section. In support of this resolution, the committee will be hosting a webinar and submitting a feature to the Criminal Justice magazine.

The International Committee (Co-Chairs Tyler Hodgson, Bruce Zagaris) has revived its International Committee Newsletter by publishing the Winter 2021 edition, with the focus issue on “Canadian Court Condemns ‘The Penalization of the Simple Act of Making a Refugee Claim’ in America.” Visit www.ambar.org/cjsbooks to view this newsletter.

The Diversity and Inclusion Committee (Co-Chairs Tiffani Collins, Tracey Todd) hosted a webinar on December 10, 2020: “On the Front Lines – How Diversity Dictates Justice.” The Legislative and Policy Committee (Chair Hillel Hoffman) co-hosted a webinar on December 12, 2020: “Red Flag Laws – Protections and Pitfalls.” The videos of these and other recent CJS webinars and past programs are available for viewing at the CJS YouTube Channel (www.youtube.com/user/ABACriminalJustice).

The winner of the 2020 William Greenhalgh Student Writing Competition is Kent Steinberg, University of Virginia School of Law. The deadline for the 2021 competition is July 1.

Nominations for all 2021 CJS Awards are due on May 3, 2021. Visit ambar.org/cjsawards for information on all CJS awards and competitions.
The Criminal Justice Standards Committee (Chair Bruce Green) is meeting virtually one or two times a month to review the draft black letter Diversion Standards.

The Plea Bargaining Task Force (Co-Chairs Russ Covey, Lucian Dervan) met on December 4th and 5th, 2020 and hosted a panel discussion following a screening of “The Vanishing Trial” with FAMM on December 7th.

All CJS Committees and Task Forces are now using the web-based, interactive ABA/CJS CONNECT for committee/task force discussions, replacing email listserves. Members can log onto the CJS Connect on the ABA/CJS website and use the web version to engage in discussions or view documents and resources, or users can continue to send email to a particular committee community using the committee community’s email address. For details, and other committee updates, visit www.americanbar.org/groups/criminal_justice/committees.

Member News

Former CJS Vice Chair-at-Large Kevin Curtin passed away on December 10, 2020. Kevin was also a chair of the Appellate and Habeas Committee and a member of the ABA Presidential Task Force on Building Public Trust in the American Justice System. He was a long time Massachusetts delegate in the ABA House of Delegates, and in 2020 was appointed a position at the ABA Board of Governors. Kevin was instrumental in passing ABA resolutions on safety for international judges, and protection for immigration seekers. In all of his ABA work, he was known for his intelligence, decency, and friendship.

Former CJS Chair Steve Saltzburg is the recipient of the 2021 American Bar Foundation Fellows Outstanding Service Award. ABF gives out the award yearly to individuals who have, in his or her professional career, adhered for more than thirty years to the highest principles and traditions of the legal profession and to the service of the public.

Keramet Reiter has been spearheading an initiative to give inmates access to the University of California system to earn their BA’s.

American Law Institute (ALI) announced that CJS Council Member Lara Bazelon was elected to its membership.

Upcoming CJS Events

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<td>ABA/CJS Annual Meeting</td>
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<td>Sept. 8-10</td>
<td>Southeastern White Collar Crime Institute</td>
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<td>Oct. 11-12</td>
<td>10th Annual London White Collar Crime Institute</td>
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<td>Oct. 27-29</td>
<td>35th National Institute on White Collar Crime</td>
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<td>Nov. 18-21</td>
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For the complete list of CJS events, see www.ambar.org/cjsevents.
Coming Together to End Mass Incarceration and Achieve Racial Justice

By Jeffrey L. Bornstein

With the swearing in of Joe Biden and Kamala Harris as President and Vice-President, we have a chance for renewal of the American spirit, and the opportunity to enact new laws, procedures, processes, and oversight to ensure that there is justice for all. Then President-elect Biden set the tone in his remarks on the police response to the assault on the Capitol on January 6: “No one can tell me that if it had been a group of Black Lives Matter protesting yesterday . . . they would have been treated very, very differently than the mob of thugs that stormed the Capitol. We all know that’s true. And it is unacceptable. Totally unacceptable.”

The COVID-19 pandemic, so badly managed by President Trump, has so far killed over 400,000 and sickened more than 25 million Americans. Included are many incarcerated people, who are disproportionately people of color. The violent and unnecessary police killings of black people continue, as do the protests they engender. We may be at a turning point in history due to the confluence of these events. What an amazing opportunity the Biden team has to make 2021 a transformative year for our broken federal criminal justice system.

We have the chance to unite both liberals and conservatives and fix a fundamental problem with our criminal justice system: mass incarceration. It is dangerous, ineffective, and is fundamentally unfair to working people and people of color. Locking up people in cages is a vestige of our nation’s white supremacy roots. So too is its handmaiden, mandatory minimum sentences that eliminate judicial discretion at sentencing that became embedded in the criminal justice system during the Reagan, Bush and Clinton administrations. I was a federal prosecutor in San Francisco during the 90s when much of the stiffer sentences, especially for drug and gun crimes, began. What a blessing it was when Janet Reno loosened the yoke somewhat by allowing us to “do the right thing” in our charging and sentencing decisions. But much more needs to be done now.

Mass incarceration gives little voice to victim advocates because even perpetrators’ real remorse or rehabilitation rarely allows aggrieved people to stop grieving, or feel that justice has been done. Surely retribution which is the real cost of mass incarceration does not relieve their pain. For many, I suspect, it would be better to know that the person convicted, through genuine remorse and effective rehabilitation, has found a way to make amends and re-earn their place in our society.

We know that people of color, especially Black and Brown men, are more likely to be convicted and sentenced to long terms in prison. We need to change our policing practices and everything that follows, including prosecutors’ charging decisions; pretrial detention and legislated sentencing enhancements, especially mandatory minimums. We need to also create real rehabilitation opportunities; and eliminate the permanent underclass that is made up of convicted felons who are released, and denied their fundamental rights as citizens, including denied the right to vote and other indicia of citizenship. In short, we need to find ways to give those who are convicted meaningful opportunities to repay their debts to society.

If the Biden administration wants to hit the ground running on the issue of racial justice, it needs a new federal criminal justice blueprint that starts to identify and then fix the profit driven prison industrial complex that continues to keep people under its collective thumb even after one is released from prison. To start, as the Obama administration did, private companies that operate prisons and detention facilities must be put out of business. We have to take the profit motive out of the equation.

Data needs to be kept on the disparate impact of prosecutorial and detention decisions on people of color. More conviction alternative programs even with respect to drug and gun crimes need to be created. Mandatory minimum sentencing must be abolished. A federal expungement statute needs to be enacted. Effective rehabilitation programs have to be created. And we need to address and correct the racist underbelly of jury selection practices.

None of this is crazy. In fact, it even makes economic sense. It costs us upwards of $80,000 per year to house a person in federal prison. Many are imprisoned for 10, 15, 20 years or more with little good time credits that can be earned and little opportunities or motivations to change one’s life or make amends. And what about the next generation of kids who are raised with a parent in federal or state prison? Does the cycle stop or does it continue to the next generation? The truth is that all too often a parent’s incarceration starts a multi-generational problem particularly with poor and working class families.

If we are serious about ending injustice, especially against black and brown people in our country, and if we believe that Black Lives Matter, or even that all lives matter, then let’s do something constructive together to end the caging of millions of our people. Let’s change our fundamental approach to crime and punishment and truly work towards building a more perfect union with liberty and justice for all.

Jeffrey L. Bornstein is a partner at Rosen, Bien, Galvan & Grunfeld LLP. The views and opinions expressed are those of the author and do not necessarily reflect the official policy or position of any entity.
Lawyers Shouldn’t Respond to Negative Online Reviews, ABA Says

- More attorneys face reviews as online presence grows
- Lawyers risk revealing client confidences when respond

Maintaining client confidentiality is paramount for lawyers contemplating how to respond to negative online reviews and they shouldn’t consider responding, the American Bar Association said in an ethics opinion.

“Lawyers are frequent targets of online criticism and negative reviews,” and they “are left in the quandary of determining whether and how they ethically may respond when the opinions posted are unflattering, and the facts presented are inaccurate or even completely untrue,” the ABA ethics committee opinion said Wednesday.

With more attorneys seeking reviews to build their practices, and also itching to respond to bad ones, some state bars and now the ABA have issued ethics opinions giving lawyers guidance. The danger posed by responding to a client or other review is that a lawyer may reveal client confidences in violation of ABA Model Rule 1.6, the opinion said.

And while there are several exceptions to the rule against revealing client confidences, they don’t apply to responding to online criticism, the opinion said.

ABA Model Rule 1.6(b)(5) says lawyers may reveal information to establish a claim in a controversy with a client; to establish a personal defense in a criminal charge or civil claim; or to respond to allegations in a proceeding concerning the representation of a client.

The only exception that may apply to responding to online criticism is the client controversy one, the opinion said. But because of their “informal nature,” online reviews don’t rise to the level of a controversy, it determined.

And even if they did, they aren’t so serious as to warrant disclosure of client confidences, as state ethics opinions from New York, New Jersey, Missouri, Texas and others have held, the ABA’s opinion said. Lawyers have been disciplined for revealing confidences online, it noted.

The opinion offered some best practices for lawyers facing a bad online review including:

- Asking the website host to remove it;
- Not responding, as a response could draw more attention to it;
- Responding by asking the client to have a private, offline conversation about the post;
- Posting that professional responsibilities don’t allow the lawyer to respond.

The opinion is ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 496, 1/13/21.

Prosecutors Can Advise on Body Cam Video Release in Rhode Island

- Directive requires police to get AG advice about footage requests
- Advice doesn’t violate ethics rules, court ethics panel says

Lawyers with the Rhode Island attorney general’s office can ethically advise law enforcement agencies to release police body camera video in response to public records requests, an ethics opinion said.

Releasing such footage or advising law enforcement to release it doesn’t violate ethics rules on trial publicity or responsibilities of prosecutors, the Rhode Island Supreme Court’s Ethics Advisory Panel said Dec. 15.

A state protocol from last year on reviewing incidents involving the use of deadly force requires law enforcement agencies to consult with the attorney general when they get a public records request for pre-trial release of body-worn camera footage, the opinion said.

If the attorney general’s office says to release the footage, it also has to advise law enforcement to not make public statements that could substantially prejudice a legal proceeding or the public’s perception of an accused, the opinion said.

It noted a New Jersey ruling from 2018 that reached a similar conclusion.

The opinion is R.I. Supreme Court Ethics Advisory Panel, No. 2020-02, 12/15/20.
Diversifying Appellate World Means Starting at the Beginning

- Appellate bar largely white, male
- Group looks for young lawyers, law students to demystify appeals practice

Increasing diversity among appellate lawyers and judges requires building the pipeline during law school, says the head of a new organization aiming to change the face of the appellate bar. The opportunity and information barriers to appellate practice for attorneys of color begin in law school, said Juvaria Khan, a former Patterson Belknap Webb & Taylor associate who founded The Appellate Project.

Because attorneys of color are more likely to be the first in their families to go to law school, there can be a lack of mentors, networks, and even a basic understanding of what an appellate lawyer does, said Khan, who also worked at Muslim Advocates, a national legal advocacy organization. “Law schools tend to assume a lot of knowledge that first-generation law students of color often don’t have,” she said.

Those knowledge barriers can be anything from not understanding the importance of clerkships to a successful appellate career to not knowing which activities students should participate in while still in school—things like moot court, law review, or working as a research assistant, Khan said. “But those choices are rarely explained until it’s too late,” she said.

Appellate Clinic

To change that, the group kicked off its first appellate-focused clinic this year at Howard University. Co-leading the effort is Orrick’s Tiffany R. Wright, who says she sees firsthand “how bad the numbers are” as an attorney of color in appellate practice. There are only a handful of black appellate attorneys in D.C., where she practices, and she is often the only Black woman in the room. “It isn’t just the numbers that are a problem,” Wright said.

Appeals cases, particularly criminal ones, disproportionately affect minority communities. Yet the appellate space is “one of the more elite corners of the law and mostly white males,” Wright said. That affects the quality of the advocacy, too, in that the person arguing the case may not understand the implications for minority communities, Wright said.

The clinic, which includes 10 students, filed its first Supreme Court brief in October in *Jordan v. United States*, a case involving increased sentences for those convicted of firearms offenses. The law at issue in the case, and the criminal justice system in general, disproportionately affects black offenders, the clinic said in its brief. The idea is to give students a taste of what a career in appellate law is like. It involves less of what you see in television courtroom dramas and more research and brief writing.

Mentorship Program

The Appellate Project has also launched a mentorship program to pair law students with appellate practitioners around the U.S.

“Again and again, appellate practitioners describe the importance of some mentor or connection who provided guidance and helped them get started,” Khan said. “But that can all be opaque to a first-generation law student,” she said. Khan said she anticipated receiving 30 to 50 applications and wound up getting hundreds.

In the end, the appellate group paired more than 200 law students with mentors, who include high-level government officials, senior partners at big firms, and “some of the most prolific Supreme Court and appellate practitioners throughout the country,” Khan said.

Incubator Program

The next step is a summer fellowship for diverse law students who are underrepresented in the appellate bar, said Timothy K. Lewis, a former federal appeals court judge who sits on the group’s advisory board.

Students participating in what The Appellate Project calls its “incubator program” will be given the opportunity to not only train and network with attorneys and judges in the appellate area, but will receive support and mentorship that extends beyond the summer, The Appellate Project’s website says.

The goal is to introduce the nuance of appellate practice and the players in the field, said Lewis, who was one of three black judges on the Pennsylvania-based U.S. Court of Appeals for the Third Circuit from 1992 to 1999.

It’s “not a lack of desire that these students are underrepresented in the field, but a lack of opportunity,” he said. Lewis said he saw firsthand the lack of diversity among appellate lawyers while sitting on the federal bench. “During my years on the Third Circuit I can count on my hand—less than one hand—the number of black lawyers who argued before me,” Lewis said.

The numbers aren’t much better on the federal bench overall where 23% of the 176 active judges on the U.S. Courts of Appeal are attorneys of color, according to Federal Judicial Center data.
Next Generation

Maggie Jo Buchanan, director of the legal policy program at the Center for American Progress, says diversifying the appellate bar and bench will require a rethinking of who qualifies as an elite lawyer.

Currently, appellate practice typically requires stellar grades from a top law school and a first-rate clerkship, which can land you at a lucrative law firm. But Buchanan said the path to a successful appellate career needs to be broadened to include experiences like public interest law, where women and attorneys of color are represented in higher numbers, Buchanan said.

She pointed to the federal judiciary as an example. Almost 70% of all white men on the appellate bench as of July 2020 spent time in private practice. But less than half of the 12 women of color who sit on the courts followed that path, Buchanan said. Young attorneys of color need to see “people taking paths to the highest level of the profession,” Buchanan said.

Other Efforts

The Appellate Project joins other programs aimed at getting underrepresented groups into the legal career pipeline.

“Just the Beginning” is an organization of judges and attorneys dedicated to helping students of color and from low-income backgrounds get into the legal profession. It sponsors summer judicial internships for law students and runs a clerkship referral program.

Bar associations and other professional groups also have programs focused on helping junior attorneys get opportunities. The Federal Circuit Bar Association sponsors a mock argument series that gives next generation attorneys experience arguing before judges, and encourages attorneys to provide pro bono representation for veterans as a way to get their first oral argument.

ChiPs, an organization focused on advancing women in technology, hosts an annual Next Gen Summit to empower junior to mid-level female attorneys who work in technology, policy, private practice, corporations, or government.

Lawyers Can Work Remotely Where They’re Not Licensed, ABA Says

- Pandemic has forced lawyers home where not licensed
- But can only practice law of jurisdiction where licensed

Lawyers can work remotely in jurisdictions where they’re not licensed as long as they only engage in law they’re authorized to practice, the American Bar Association said in an opinion addressing overnight changes in how attorneys conduct business due to constraints of the pandemic.

The ABA ethics committee opinion released on Wednesday eases Model Rule 5.5 that has long restricted where lawyers can practice. It’s a permanent change and acts as a guidepost to states looking to ease their own unauthorized practice rules amid the pandemic. While it applies to all lawyers, the rule tends to affect those in bigger firms—who are more likely to travel to an office in another state—more than it does solo or small practitioners.

The relative ease with which technology allows attorneys to work remotely has for years been bumping up against potential ethical questions around confidentiality and the unauthorized practice of law as well as the legal profession’s interests in preventing out-of-state lawyers from setting up shop with ease.

But the pandemic has accelerated change as law offices closed or reconfigured their operations and attorneys set up remotely while relying on high-speed internet, video and audio connections to maintain contact with clients, courts, and adversaries.

Model Rule 5.5 has been the basis for the standard in most states. It says lawyers admitted in one U.S. jurisdiction and not disbarred or suspended may provide legal services in another jurisdiction only temporarily and with strict conditions. Violators could be subject to discipline although it’s believed to be rare.

The rule is meant to protect the public from incompetent practitioners, the ABA said. But its “purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed,” the opinion said.

Being invisible means they don’t provide an address in the local jurisdiction or offer legal services there, the opinion said. As long as a lawyer isn’t violating any local unauthorized practice rules by working remotely, there shouldn’t be ethical concerns on the topic, the ABA said.

Several jurisdictions, including the District of Columbia and Florida have eased restrictions around lawyers working where they’re not barred, or licensed, since the onset of the pandemic.

Minnesota, North Carolina, Arizona, Maine, Utah, and New Hampshire already allowed lawyers to practice within their borders if they’re licensed elsewhere as long that they disclose that they’re not licensed to practice in that state.
Criminal Justice Section Newsletter
Winter 2021

Criminal Sentence Stands Despite Co-Defendant’s Erring Lawyer

- Defendant’s lawyer explained wired plea, co-defendant’s didn’t
- Ineffective assistance gets co-defendant original plea offer

A criminal defendant’s sentence can’t be reduced based on the ineffective legal assistance his co-defendant received, even though he got a longer sentence at trial after his co-defendant turned down a generous wired plea deal that wasn’t explained to him, the D.C. Circuit said Tuesday. Only the co-defendant is entitled to the original plea offer because of his lawyer’s ineffectiveness, the U.S. Court of Appeals for the D.C. Circuit said.

Melvin Knight and Aaron Thorpe were arrested for armed robbery and kidnapping. They were offered a wired agreement, which required them to both accept the deal, that would have put them in prison for two to six years. Knight’s lawyer never explained the deal to him and told him he’d have to spend 10 years in prison.

Thorpe’s lawyer explained the offer to him and he wanted to accept it. Because Knight refused the offer, the pair went to trial and were convicted. Knight was sentenced to 22 years in prison and Thorpe got 25 years.

Knight’s lawyer was ineffective, the court here said in an opinion by Judge Judith W. Rogers. The contemporaneous evidence and Knight’s testimony at an evidentiary hearing also sufficed to establish a reasonable probability he would have accepted the offer but for counsel’s ineffective assistance, it said. The remedy for Knight is that he be offered the original plea deal, the court said.

Thorpe argued that but for the ineffective assistance of Knight’s lawyer he would have accepted the deal and should receive the offer again, too. But his lawyer provided him effective assistance during the negotiations, the court said.

Although Thorpe was willing to accept the agreement and his ability to do so was thwarted by the ineffective assistance of Knight’s lawyer, his Sixth Amendment rights weren’t violated, the court said.

The D.C. Circuit had no power to order a remedy for Knight. But it suggested that the government had “the discretion to ameliorate any injustice that would result from permitting the inadequately counseled defendant to accept the original plea offer but not the co-defendant’s who counsel’s performance was adequate.”

Judge Robert L. Wilkins joined the opinion. He was randomly chosen to replace Judge Steven F. Williams, who was on the panel but died before the decision was handed down.

Dissenting Judge Gregory G. Katsas said that Knight never showed that he was prejudiced by his counsel’s ineffective assistance. Evidence showed that he rejected the plea offer for other reasons, he said.


Avoid Losing Control of a Remote Witness: Some Suggestions

Virtual trials shift more control to witnesses than typical, in-person trials, which could affect the outcome, say Eckert Seamans attorneys Daniel B. McLane and Michael P. Pest. Drawing from their recent experience in a virtual trial in a federal district court, they suggest a pretrial order or stipulated protocol for remote witnesses to govern their appearance, conduct, and contact with interested parties. (This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.)

We recently completed a virtual bench trial in the U.S. District Court for the Western District of Pennsylvania that was necessitated by the continuing impact of Covid-19.

While the parties quickly agreed with the court to proceed remotely in order to keep the previously scheduled trial date, minimal consideration was given at the time to the procedures that would govern the appearance and conduct of the remote witnesses during the trial.

While no issues arose during our case, the experience revealed certain potential challenges associated with controlling witness conduct and attorney-client interactions in a virtual environment that simply are not present in the actual courtroom. Given the near certainty that virtual trials will continue into 2021, we offer suggestions for establishing procedures to prevent any such issues from occurring.

Remote Testimony Shifts More Control to the Witness

It is universally recognized that the credibility of a trial witness is as important as the weight of the evidence in the record for the jury or judge to evaluate. When a witness appears remotely, the in-person opportunity to evaluate the witness’ demeanor, gestures, and other conduct that may assist the fact finder in making a credibility determination is substantially altered.
This problem is compounded by the fact that, generally, witnesses testifying remotely are free to appear via a laptop, tablet, cell phone, or other device of their choice. This gives witnesses a greater degree of control over what may be viewed by the attorneys, judge and jury than in a typical courtroom setting. This shift in control can have significant implications for the outcome of a trial if not properly managed by counsel and the court.

Virtual trials are more susceptible to improper witness and attorney interaction than typical, in-person trials. For instance, a virtual trial environment hinders counsel’s ability to identify, monitor, and control what notes or other materials are within the reach and/or view of a remote witness, and/or whether a witness is receiving emails, text messages, or other communications from an attorney or a party during an examination that would never occur in an actual courtroom.

A Proposed Protocol for Virtual Trials

Accordingly, counsel preparing for a virtual trial should consider entering into a pretrial order or stipulated protocol for the court’s approval that addresses some or all of the following points:

- The parties should agree that all witnesses appearing remotely will be viewable at a camera angle that allows all counsel and the court to have a reasonable view of the witness’ location and, if practical, to observe more than just the witness’ face.

- The parties should commit to conducting a pretrial test of the Zoom (or other) platform to ensure that the witnesses will have a sufficient internet connection during the trial, and to minimize any technical issues.

- The pretrial order should require all remote witnesses to certify that they are alone in the location in which they are testifying, or identify all individuals present during an examination.

- Counsel should agree that all witnesses shall not have available for access— and/or review off screen— any documents or other materials beyond the relevant trial exhibits, pleadings and/or transcripts, if applicable. The pretrial order should address a practical share platform for exhibits and/or the preparation of a joint exhibit binder to provide to remote witnesses.

- The parties and/or the court should consider requiring each witness to certify under oath that he or she has not been provided or accessed information (hard copy or electronic) that cannot be observed to assist in providing testimony during an examination.

- Witnesses should certify under oath that they have not received communications during an examination by an attorney or any other interested party via email, text message, or other electronic means. Indeed, to the extent practicable, the parties should agree in a pretrial order that all remote witnesses shall not have active devices such as cell phones, laptops, or smart watches in the room during an examination.

- Consistent with the standard practice of advance disclosure of witness lineups, counsel should also agree to disclose whether they intend to conduct an examination of a witness remotely, or if the attorney will be in the same room with the witness during the examination and thus present during opposing counsel’s cross-examination.

While the remote examination of a trial witness is inherently more challenging in many respects than an in-person examination, a well-crafted pretrial order can be an effective tool in minimizing the issues that can arise in virtual proceedings.

Trump Administration Sued Over International Criminal Court Sanctions

Former South Africa Ambassador Patrick Gaspard, president of Open Society Foundations, examines the first lawsuit filed against the U.S. government over the Trump administration’s executive order authorizing travel and economic sanctions on persons working with the International Criminal Court. (This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.)

On Sept. 2, the Trump administration sanctioned two officials of the International Criminal Court (ICC), a tribunal dedicated to seeking justice for victims of heinous crimes, simply for doing their jobs.

Since it was established in 2002, the court has investigated and prosecuted cases of child soldiers in Uganda and the Democratic Republic of the Congo, the destruction of cultural property, sexual abuse, and gender violence.

The Open Society Justice Initiative is fighting back, filing a lawsuit in the Southern District of New York. The suit challenges a June executive order sanctioning senior ICC officials, including Fatou Bensouda, the court’s chief prosecutor. The executive order appears to be retaliation for the ICC’s investigation of alleged wrongdoing by U.S. personnel in Afghanistan.

Constitution, Due Process Challenges

The lawsuit, filed with four law professors, argues that by penalizing and possibly criminalizing our work in support of in-
ternational justice, the Trump administration has violated the U.S. Constitution’s First Amendment as well as due process rights. The lawsuit also seeks to stop the U.S. government from enforcing the executive order.

The executive order is not only unconstitutional; it’s a perverse betrayal of U.S. values. In America, we have long pursued liberty and justice at home and abroad.

The U.S. helped build the ICC, a vital part of the international rules-based order, a multilateral institution established to investigate and prosecute perpetrators of horrific acts including genocide, war crimes, and crimes against humanity.

Like other global organizations Trump has disparaged and defunded, the ICC relies on diplomacy and cooperation to carry out its investigations, efforts the U.S. and its allies have championed since Nuremberg.

**U.S. Has Supported ICC**

While not a member of the ICC, the U.S. has supported the court’s efforts toward accountability for atrocities in some of the very places Trump has most disparaged, including Sudan, Libya, and Uganda.

Furthermore, the ICC is a court of last resort, which means that it generally steps in only when a country doesn’t deploy its domestic justice system to investigate and prosecute serious crimes.

After more than 10 years of examination, the ICC’s Appeals Chamber authorized Bensouda to open an investigation into crimes allegedly committed in Afghanistan since 2003, including crimes allegedly committed by the Taliban, Afghan security forces, and, possibly, U.S. personnel.

But the threat the Trump administration perceives the ICC to present to the U.S. is a straw man, a pretext for the self-absorbed isolationism in which this administration traffics.

Sanctions at their best are a tool for accountability. The U.S. has long used economic sanctions to combat genuine threats—terrorists, rogue regimes, and drug cartels—not renowned prosecutors.

By misusing these powerful tools for purposes for which they were never intended, Trump’s executive order undermines the value of sanctions when they are next needed, and diminishes Washington’s status as a global leader.

**International Response**

The global response to the sanctions was swift and strong, a chorus of condemnation from United Nations officials, the European Union, and staunch U.S. allies like Canada and Ireland. German Foreign Minister Heiko Maas said the executive order was a “serious mistake.”

French Foreign Minister Jean-Yves Le Drian called the sanctions “a grave attack against the court and beyond that a questioning of multilateralism and the independence of the judiciary,” and appealed for the U.S. to withdraw the measures.

No wonder America’s image in the world has plunged through the floorboards since Trump took office, dropping, according to the Pew Research Center, to the lowest level recorded since the organization began polling on the matter nearly 20 years ago.

The Open Society Foundations shares the deep concern of the international community, and is confronting this with the tools still at our disposal: the rule of law, the U.S. Constitution, and the project of international justice, to which the individuals sanctioned under this order have dedicated their careers.

While legal victory is not certain—courts traditionally grant broad discretion to the president to issue executive orders—such orders have to respect the Constitution. And this particular order stomps on constitutionally protected speech. Challenging this order is a job for the courts, and we are optimistic that a court will rein in this administration.

We will keep going to the courts to insist on protection of the values that truly make America great. Defending the constitutional right to speak out in support of a just world, where seeking accountability for atrocities is rewarded, not punished, is a protection not only for our own democracy, but for those beyond our borders who seek the same.

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**Articles Wanted for The CJS Newsletter**

*Practice Tips, Section/Committee News, Book Reviews*

Submission Deadlines: April 15, Aug. 15, Dec. 15.

For inquiries, contact: Kyo Suh, Managing Editor, kyo.suh@americanbar.org
Street Legal: A Guide to Pre-trial Criminal Procedure for Police, Prosecutors, and Defenders, Second Edition
By Ken Wallentine
This practical, comprehensive guide on criminal procedure is a must-read for police investigators, defense attorneys and prosecutors, and any lawyer who needs a quick reference and reliable answer to a pre-trial criminal procedure question.

Rehabilitation and Incarceration: In Search of Fairer and More Productive Sentencing
By Harold Baer Jr
Author explains the crisis of mass incarceration in the US, how it came about, and the pressing need and means to reduce prison populations and recidivism; promote rehabilitation and re-entry into society; and protect public safety.

The State of Criminal Justice 2020
Edited by Mark Wojcik
This annual publication examines and reports on the major issues, trends and significant changes in the criminal justice system in a given year.

Can They Do That? Understanding Prosecutorial Discretion
Edited by Melba Pearson
This book explores prosecutorial discretion from varying viewpoints – theory, practice, and from individuals who wish to change the status quo. It is a must have for criminal lawyers, law students and prosecutors' offices as a training tool.

The Privilege of Silence: Fifth Amendment Protections Against Self-Incrimination, Third Edition
By Steven Salky
This guide is designed as a basic research tool to aid practicing lawyers in thinking about and applying the Fifth Amendment privilege in various contexts and proceedings.

ABA Standards for Criminal Justice Monitors and Monitoring
By Criminal Justice Standards Committee
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