AMERICAN BAR ASSOCIATION
Criminal Justice Section

THE AMERICAN BAR ASSOCIATION

# Criminal Justice Section Newsletter

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## Fall Meeting Highlights

The ABA Criminal Justice Section hosted its 9th Annual Fall Institute and Meetings on November 3-6, 2016 in Washington, DC. Robert S. Litt, general counsel for the US Office of the Director of National Intelligence served as the keynote speaker of the Institute. The program started with "White Collar Crime Town Hall: Prosecution Overload and the Realities of Over-Criminalization" on Nov. 3, followed by a full day of complimentary CLE programming on Nov. 4. Various topics explored included "Fee & Fines: The Relationship with Mass Incarceration"; "College Sexual Assault: Protecting the Rights and Interests of the Victim and the Accused"; and "Violence in High Density Communities as a Public Health Issue."


In addition, the Section honored five distinguished legal practitioners during the Second Annual CJS Awards Luncheon. The recipients were as follows: James E. Felman, Kynes, Markman & Felman, Charles R. English Award; Stephanie Richard, Coalition to Abolish Slavery & Trafficking, Frank Carrington Crime Victim Attorney Award; Ebony Howard, Southern Poverty Law Center, Livingston Hall Juvenile Justice Award; Kym Worthy, Wayne County Prosecutor, Norm Maleng Minister of Justice Award; and Angela Davis, American University, Raeder-Taslitz Award. White House Counsel W. Neil Eggleston provided the luncheon remarks.

In addition to the regular convening of the CJS Council, 21 committees met over the course of the conference.

*2016 Norm Maleng Minister of Justice Award Recipient Kym Worthy (center), with Chair Matt Redle and Racial Justice & Diversity Committee Chair Mwanaisha Sims.*

## London White Collar Crime Institute

International criminal law practitioners gathered for the "Fifth London White Collar Crime Institute" on Oct. 10–11, 2016 in London, U.K. Topics of discussion included white-collar crime, including sports and corruption, trafficking and supply chain, combating market misconduct and international enforcement cooperation. The morning plenary included experts such as Mark Steward, director of enforcement and market oversight at the U.K. Financial Conduct Authority; and Andrew Weissmann, chief of the U.S. Department of Justice Criminal Division's Fraud Section. Jonathan Calvert, editor of *The Sunday Times*' Insight investigations Team delivered the luncheon remarks.

# Using the ABA Criminal Justice Standards to Develop Standards for International Tribunals

The Criminal Justice Standards Project, in conjunction with the ABA-ICC Project and the International Criminal Justice Consortium, hosted a town hall discussion on developing criminal justice standards for international tribunals on Sept. 21, 2016 in Washington, DC.


The panel included Alex Whiting, Ambassador David Scheffer, Steve Saltzburg, David Akerson, and Sara Elizabeth Dill. Audience members included lawyers and judges from throughout the world, including those in Washington, D.C. for the International Bar Association's annual meeting.

Following a discussion of the problems plaguing permanent and ad hoc international criminal justice tribunals, and the process of developing criminal justice standards domestically, panelists and audience members brainstormed ideas for the format of standards, as well as focus areas. The project will move forward in a cooperative effort, engaging lawyers, judges, non-governmental organizations, and state actors, to improve the international criminal justice system.

# Media Institute on Legal Affairs

The National Association of Black Journalists and the ABA Criminal Justice Section teamed up to launch the NABJ Media Institute on Legal Affairs on September 24, 2016 at Hogan Lovells LLP in Washington, DC.

The conference theme was "Law and Justice: Issues of Consequence; From Black Lives Matter to Voting Rights." Attendees were able to engage in an open and honest discussion on the state of the Black Lives Matter movement and its meaning in the realm of criminal justice reform. They also heard from Marcus Bullock and Jabriera Handy, who expressed the challenges they faced as youth in the adult criminal justice system. St. Pete's Police Chief Anthony Holloway provided a law enforcement perspective on the use of body cameras, and community policing.

Section leadership, members and committee chairs, including the Hon. Bernice B. Donald, Melba Pearson, April Frasier-Camara, James E. Felman, Police Chief Anthony Holloway, Jenny Roberts and Nicole Austin-Hillery, engaged in dialogue with award-winning NABJ members such as Cherri Gregg, Aaron Morrison, Gary Fields, Melanie Eversley, and Charles Robinson. This dynamic group shared how journalists and criminal justice pracitioners can work together to provide well informed coverage of criminal justice issues.

The ***Criminal Justice Section Newsletter*** is published three times a year.
Articles and reports reflect the views of the individuals or committees that prepared them and do not necessarily represent the position of the American Bar Association, the Criminal Justice Section, or the editors of the newsletter.


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# Highlights of the Academic Committee's Roundtable

By Co-Chairs Steve Morrison, Anna Roberts and Meghan Ryan

The Academics Committee hosted a Work-in-Progress Roundtable as part of the 2016 Criminal Justice Section Fall Institute in Washington, DC. We are grateful to Dan McConkie for his write-up of the keynote speech and an example of one of the drafts discussed at the Roundtable.

Conference participants were favored to hear a keynote address from Gabriel "Jack" Chin, Professor of Law at the University of California--Davis School of Law. Professor Chin spoke about how law professors can be influential outside of the academy. Professor Chin spoke with authority on that subject: his scholarship has been cited by the United States Supreme Court, and in 2003 he successfully lobbied the Ohio legislature to ratify the Fourteenth Amendment, 136 years after the state disapproved it during the ratification process. He said that law professors should be influential, because they perform deep research into important questions. He offered several pieces of advice:

First, law professors should go to conferences to meet people, build relationships, hear new ideas, and present their work. That way, they can get "brutally honest," but very helpful, feedback. They should keep in touch with practitioners in their field and do projects with them. This keeps professors current and grounded in reality.

Second, law professors should spend 5-10% of their time promoting and marketing their ideas. They can disseminate their ideas in many contexts, including CLE events, bar journals, and symposia. They can also get involved in policy making, such as requesting an Advisory Committee rule amendment or seeking for the ABA to draft a resolution. They can seek to have their work included in the Getting Scholarship Into Court Project, which seeks to provide digests of relevant legal scholarship to practitioners.

Third, Professor Chin gave advice about producing good scholarship. He quoted Vik Amar as saying: "Any idea worth publishing is worth re-publishing." Good law review articles have multiple iterations, such as spin-off articles, op-ed pieces, book chapters, and books. He cautioned against writing articles that could be pre-empted by others: "Only write what you alone can write." He strongly recommended that professors seek feedback from people in other fields to read their work "so that we do not appear illiterate." He also said that they could broaden their appeal and increase their credibility by using methods that would seem reasonable to those of different ideological stripes from their own.

Fourth, "If you want to be cited a lot, write a lot." To be published, professors should make sure that they package their articles so that they're attractive to 2L law review editors. He cautioned scholars not to send out pieces that aren't ready yet, as this could be very detrimental to their careers. Professors may write on a wide range of topics but should be sure to have a few core areas of deep expertise.

In addition to Professor Chin's opening remarks at the Roundtable, legal scholars from across the country workshopped their papers on a variety of criminal justice topics. Professor McConkie, for example, presented and workshopped his work in progress titled *Civilizing Criminal Discovery* (not yet submitted for publication). Here is a summary:

Over the last few decades, federal judges throughout the country have begun to remake pretrial criminal discovery in the image of its civil counterpart. They have done so primarily by local rules but also by general and standing orders. I call this the "civilization" of criminal discovery, and it works two major changes in pretrial procedure. First, these rules require the prosecution to produce more discovery along the lines of civil discovery, because they expand the scope of mandatory prosecution discovery under both Criminal Rule 16 and *Brady v. Maryland*; they accelerate the timing of discovery, often by using "criminal initial disclosures"; and they require the parties to work together to arrive at discovery stipulations as to the scope and timing of discovery. Second, these rules transform the role of judges from passive umpires to civil-style managerial judges who monitor the discovery phase of the case through discovery management orders, discovery conferences, and expanded discovery motion procedures.

The implications of these two changes could be profound. Local discovery rules may help re-balance the criminal justice system, which is currently dominated by prosecutors, in favor of defense attorneys and trial judges. In fact, civil-style discovery rules may be particularly useful in the criminal context, because prosecutors already have a somewhat non-adversarial role when it comes to discovery, especially the *Brady* rule, and these local rules taken together force prosecutors to work more closely with the defense and judges in ensuring that the defendants get the discovery they need for a fair trial or plea bargain.

The Committee will host another Roundtable at the 2017 Criminal Justice Section Fall Institute. The Institute is scheduled for November 2–5 in Washington D.C.

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# Regulators Are Using Analytics: Here's Why You Should, Too

By Sanjay Subramanian

The massive increases in both data storage and processing power — and the dispersion of communications channels — have changed the rules for businesses and regulators alike. Once the sole province of the largest organizations, data analytics now permeate the toolbox of the Securities and Exchange Commission (SEC), the Department of Justice (DOJ) and other authorities, significantly heightening compliance risks for companies of all sizes.

In addition to advanced technology, regulators have another advantage: the Dodd-Frank whistleblower provisions, which give individuals who have witnessed corruption or other form of fraud a powerful economic incentive to report it directly to the government — as opposed to using internal hotlines.

**Pick up the whispers before they become a shout (or a whistle)**

Whether an allegation bubbles up on social media or via whistleblower, we now do business in an environment where reputational and other damage can spread uncontrolled, and at lightning speed. It's critical that companies and their counsel stay one step ahead of the risk. While there's no such thing as a foolproof early-warning system, sophisticated organizations are now leveraging technology to listen for the "whispers" that can foretell a problem — and rectifying them before they become an enforcement matter.

Before a fraud comes to light, an employee, third party or customer is likely to voice concern (or ill intent) through some form of digital communication. Usually this early noise appears in unstructured form, some of it internal and some external — text messages, emails, telephone logs, chat room feedback, comment pages, social media posts, direct messages and the like.

These are the kinds of digital patterns that social network analysis and other advanced data techniques are able to identify, parse and analyze. What's new is that regulators are now using many of those same tools. They are examining external data such as consumer complaints — or metrics such as foreclosure rates, for example — and using them as a basis for enforcement action.

Sanjay Subramanian is Principal, PwC.



**"If you'd searched for it, you could have found it"**

If the SEC or DOJ picks up potentially incriminating digital crumbs before the organization does, it can legitimately ask why the company itself did not catch them in time and take action. And if they engage in an investigation, they will request records of such communications and transactions, which companies must rapidly produce. Loss of credibility can add to complications in an enforcement situation. At a time when many companies are using similar data analytical technologies for market research and product testing — but not applying them to compliance — arguments of insufficient availability of data can fall on deaf ears.

The key is to know where to look. Increasingly, evidence of fraudulent activity or bad conduct is found *outside* of traditional controlled enclaves such as company databases — emails, transfers of funds and the like — and instead in open-source forums such as various social media sites and comment pages: places where customers, employees or suppliers are much more likely to communicate. (If two employees decide to collude to commit fraud, for example, it's more likely they will exchange instant messages than emails on the company server.) A short text message may be a precursor to an incriminating phone call, whose metadata could later serve as evidence. It is only via more advanced forensic techniques that such "hot spots" can come to light.

The takeaway for companies and their counsel is clear: it is now necessary to expand the horizon of their compliance and fraud risk assessments — from traditional internal controls and metrics to the new channels where chatter is happening (and which regulators, in many cases, are watching). Despite a natural inclination to keep the focus — and potential reporting responsibility — on internal matters, it is vital to understand that in many cases the risks have already left the building.

**It's not about technology, it's about regulator expectations**

While technology clearly has a part to play, it's important to remember that tools such as data analytics are only a means of ensuring compliance — and that the focus should in all cases be on meeting regulator expectations, or mounting a credible defense. There is no law requiring companies to spend a fortune on advanced new technology. The guiding principles of compliance remain the same: understanding your business, understanding your regulators' priorities, knowing how to find the markers for fraud — and then targeting your analytical horsepower on high-priority risks.

Looked at through a forensic lens, it's easy to see how social network analysis, for example, can be helpful in putting the pieces of a fraud puzzle together. The ability to decode pat-

terns — mapping out who is communicating with whom, when and where; detecting sudden bursts of communication among certain parties; and triangulating against events — is an essential tool.

**Reverse-engineer fraud: Define the red flags and incentives, then go look for them**

One way to catch criminals is to think like one — to reverse-engineer the crime. What sorts of fraud are most likely in your industry and theater of operations? What internal pressures in your organization might be driving fraud or regulatory infractions? And how, in a sea of unstructured data, would such fraud manifest? How would you look for those telltale patterns? Then seek to validate and refine your statistical hypotheses.

**Compliance in the Era of Analytics: 9 Principles to Remember**

1. Don't get caught flat-footed. If fraud is occurring in your company, you want to be the first to know. Regulators are already leveraging data analytics, and whistleblowers have an incentive to report incidents before you may be aware of them. Today, a lack of information is no excuse.

2. Look inside. Ensure your risk management, compliance controls and information governance are up to date.

3. Look outside. What are the latest regulatory, industry and fraud trends? Be sure to monitor external sources for red flags (customers, suppliers, social media).

4. Forensics first. The "noise" you need to hear is out there now. Whether your focus is compliance and early detection — or responding to a regulator — stay focused on uncovering and piecing together evidence. Listen for and analyze both structured/internal and unstructured/open-source data to pick up warning signs.

5. Technology second. Focus on the analytical tools you need, not the bells and whistles; start with what you have now, and keep the focus on investigative power.

6. Reverse-engineer fraud. Think like a criminal — then determine how the fraudulent act would manifest in the data. Then test and refine your model.

7. Risk-test internal initiatives. Keep in mind how pressures and incentives can drive employees to commit fraud. Add a control environment or targeted fraud system whenever you introduce a new internal incentive system.

8. War-game an investigation. Today, when issues arise, the damage can spread in all directions — and at the speed of light. It makes sense to practice an investigation in the business area that is most risk-prone. How quickly can you mobilize a team, analyze the data, get the information you need? When should counsel get involved?

9. Move quickly. In an actual crisis, it's a race against the clock to respond to regulators, your stakeholders and the press. Preserve your reputation (and your credibility): bring in your analytical firepower swiftly — and map out your investigation and the flow of events using both structured and unstructured data.

Also keep in mind the potential negative consequences arising from in-house incentive programs. Fraud practitioners understand the convergence of factors — including both internal pressures and opportunity — that can lead to aberrant activity. Creating customized checks and balances in tandem with such incentive programs, and tracking for potential red flags, is a vital practice for keeping fraud eruptions in check.

Consider for example a consumer bank where a scandal involving customer deception is brewing beneath the surface. If the bank detected a sudden uptick in products sold around a cluster of the population, but didn't see a corresponding cluster of customer activity around those products, this could be an indication of a fraudulent pattern. The bank could then triangulate with internal initiatives, such as sales targets and incentives, uncover a potentially deeper problem, and fix it before it erupted into an enforcement and reputational issue.

**Why timing is critical, and preparation is key**

Compliance today is a constant race against time. There are three reasons for this:

- If you detect malfeasance somewhere across your business ecosystem, it is advantageous to redress and/or report it to a regulator before a whistleblower does. And whistleblower incentives can be powerful.

- If your first exposure to a problem area is an enforcement action, how quickly you respond to a government request — for example, for extracts from your database — is critical. In a DOJ or SEC investigation, the analysis of your data will begin quickly. Ideally, the company should cooperate in launching a credible internal investigation as well.

- In today's 24/7 information ecosystem, brand damage through social media and news reporting can be near-instantaneous. You have to be able to get the facts, and get a clear and credible message out to manage the crisis, even faster.

Many companies today will test their preparedness by "war-gaming" an investigation — to simulate and practice a response. Focus on whatever part of your business would be more likely to have an issue arise, and gauge your ability to respond with speed and accuracy. How quickly can you mobilize a team? Analyze the data and get the critical information out? Deduce what happened, and how? At what point should the legal department be notified?

Above all, it is wise not to overlook how critical data analytics has become to compliance. The good news is that you can start with the tools you already have, and add only as needed — guided by the fundamental principles of risk management, compliance and good forensic practice. Investigative brainpower will always be more important than processing power.

AMERICAN BAR ASSOCIATION
Criminal Justice Section

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## Second Global White Collar Crime Institute

## June 7-8, 2017

## São Paulo, Brazil

*Hosted at the Law Offices of Trench, Rossi e Watanabe Advogados*

***Bem-vindo a São Paulo! (Welcome to São Paulo!)***

The ABA Criminal Justice Section will host a one and a half day institute in São Paulo, Brazil in June 2017. We intend to bring the energy and excitement of our previous global white collar crime institute in Shanghai and create unique opportunities for our participants to network and explore the legal complexities of white collar crime in the growing Latin American legal market.

Panel topics will include: A Prosecutor's View of Global White Collar Crime from Investigation to Sentencing, Navigating Cross Border Government Investigations and Prosecutions, Trends Regarding Global Anti-Corruption Enforcement, A View of Global White Collar Crime From the Bench, Preparing for the Globalization of Corporate Internal Investigations, and Navigating Global Compliance Trends and Global Enforcement Priorities.

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## UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS



### *Confidentiality*

## OK to Store Client Data in 'Cloud,' Illinois Bar Panel Says

• Illinois bar panel says it's okay to store client files in cloud if vendors are investigated and monitored

• Joins at least 23 other state bar panels to give lawyers a green light to use cloud computing

A lawyer may use cloud-based services to store client files so long as the lawyer "takes reasonable measures to ensure that the client information remains confidential and is protected from breaches," the Illinois bar's ethics committee advised in a recent opinion (Ill. State Bar Ass'n Comm. on Prof'l Ethics, Op. 16-06, 10/16).

Bar panels in at least 24 states have addressed whether lawyers may store client files on remote servers that are operated or maintained by third-party vendors. Like every other panel to consider the question, the Illinois committee said doing so "is not, in and of itself, a violation" of the ethics rule governing client confidentiality "provided that the lawyer employs, supervises and oversees the outside provider."

"Lawyers must [e]nsure that the provider reasonably safeguards client information and, at the same time, allows the attorney access to the data," the committee said.

**Due Diligence in Selecting Provider**

"Because technology changes so rapidly, we decline to provide specific requirements for lawyers when choosing and utilizing an outside provider for cloud-based services," the committee said.

Nevertheless, the committee did stress the importance of conducting "a due diligence investigation when selecting a provider," and it followed the lead of other ethics panels by identifying a number of best practices lawyers may employ when choosing a vendor. The opinion lists seven such practices:

1. Reviewing cloud computing industry standards and gaining familiarity with appropriate safeguards;

2. Investigating whether the provider has implemented reasonable security precautions to protect client data from inadvertent disclosures, including but not limited to the use of firewalls, password protections, and encryption;

3. Researching the provider's reputation and history;

4. Asking whether the provider has experienced any security breaches, and if so, investigating those breaches;

5. Requiring that a provider agree to abide by the lawyer's duties of confidentiality and immediately notify the lawyer of any breaches or outside requests for client information;

6. Requiring that all data is appropriately backed up completely under the lawyer's control so that the lawyer will have a method for retrieval of the data; and

7. Requiring provisions for the reasonable retrieval of information if the agreement is terminated or the provider goes out of business.

**Monitor Existing Practices**

The committee said exercising due diligence "at the time of entering into an agreement" with a cloud-storage provider will not "be adequate to avoid an ethical violation if a breach of confidentiality should occur through a failure of the provider or through the action of hackers."

"We do not believe that the lawyer's obligations end when the lawyer selects a reputable provider," the committee said. "Pursuant to [Illinois Rules of Professional Conduct] 1.6 and 5.3, a lawyer has ongoing obligations to protect the confidentiality of client information and data and to supervise non-lawyers," the committee noted. Moreover, it said, "Future advances in technology may make a lawyer's current reasonable protective measures obsolete." For that reason, a lawyer "must conduct periodic reviews and regularly monitor existing practices to determine if the client information is adequately secured and protected," the committee said.

Full text at www.isba.org/sites/default/files/ethicsopinions/16-06.pdf.

**CJS Diversity Goal**

The ABA Criminal Justice Section values diversity in all aspects of our membership, participation, publications, and programming. The ABA CJS encourages and seeks active involvement of lawyers and associate members of color, women, members with disabilities and LGBT members in ABA CJS's publications.

## Tweeting, Blogging Lawyers Warned About Positional Conflicts

• Two simultaneously issued DC ethics opinions add to growing body of bar ethical guidance on social media

• First addresses social media for personal and marketing purposes; second addresses social media in legal representation

• Novel guidance on dangers of creating "positional" conflicts when blogging about legal developments

Lawyers who blog or tweet about legal developments should be cautious "when stating positions on issues" because "those stated positions could be adverse to an interest of a client, thus inadvertently creating a conflict," the District of Columbia bar's ethics committee advised in November. The guidance came in one of two simultaneously issued opinions that discuss a host of ethical issues involving lawyers' use of social media (D.C. Bar Legal Ethics Comm., Ops. 370 and 371, 11/16).

The opinions—which respectively address the use of social media for "marketing and personal" purposes and "in the subtantive practice of law"—cover a range of topics that have drawn attention from bar panels across the nation.

Ethics opinions on attorneys' social media usage have piled up in recent years, and the D.C. committee borrowed from the analyses of at least 19 other bar panels on a number of issues—including whether lawyers have an ethical duty to monitor a client's social media postings, or to investigate the online activities of adversaries, jurors and judges.

But the D.C. panel also highlighted a few risks that were not emphasized in prior ethics opinions. One apparently novel warning was on the risks of creating so-called "positional" conflicts when blogging or tweeting about legal developments. These are conflicts that can arise when a lawyer advances one position but needs to argue the opposite on a client's behalf. The D.C. opinions also appear to be the first bar advisories to warn lawyers about the practical dangers of allowing social networking websites like LinkedIn to access their e-mail contact lists.

**Transactional and Regulatory Practice**

Most ethics opinions on attorney social media usage have focused on risks unique to litigators, who increasingly must wrestle with what one bar panel recently described as "the growing volume of litigation regarding social media discovery." New York County Ethics Op. 745, 29 Law. Man. Prof. Conduct 438 (2013).

The D.C. panel addressed a number of litigation-related issues, urging lawyers to expressly include social media evidence in discovery requests and to not overlook such evidence in discovery responses. But the panel also acknowledged "potential issues in transactional and regulatory practices, which are infrequently discussed," said Jan L. Jacobowitz, who teaches legal ethics at the University of Miami School of Law.

The panel said social media evidence may be relevant to a "broad array of transactional and advisory practices, including regulatory work." Transactional lawyers should "includ[e] social media in due diligence requests" and review "client social media for their consistency with representations, warranties, covenants, conditions, restrictions, and other terms or proposed terms of agreements," the panel said. That could be important "because inconsistency could create rights or remedies for counterparties," the panel said.

And regulatory lawyers may have to advise clients on "whether social media postings or use violate statutory or rule-based limits on public statements or marketing," which several federal and state agencies have promulgated, the panel noted. "Communications about initial public offerings pose regulatory risk, and those risks apply fully to issuer social media," the panel said, citing Securities and Exchange Commission rules. And "[i]nadequately disclosed interactive internet downloads may constitute unfair or deceptive acts or practices," the panel said, citing Federal Trade Commission guidelines.

**Blogging Dangerously**

The panel warned that lawyers who blog or tweet about legal developments may run into ethical problems if they state positions on legal issues that conflict with positions they have advanced, or may be called on to advance, on a client's behalf.

The committee said lawyers who engage in online musings of this sort may inadvertently create a positional conflict under D.C. Rule of Professional Conduct 1.7(b)(4). That rule says a lawyer may not represent a client in a matter if "the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by ... the lawyer's own financial, property or personal interests."

The committee didn't devote any more attention to the risks of creating positional conflicts through online commentary, but a few legal ethics scholars and professional responsibility lawyers have discussed this issue in law review articles and CLE presentations.

University of Tennessee law professor Judy M. Cornett has said the "definition of positional conflicts is limited to positions taken 'in different tribunals,'" and thus "would seem to be inapplicable to positions taken" on legal blogs ("blawgs") or social media sites.

"However, it is conceivable that positions taken by a blawger may create a conflict if she subsequently takes a position contrary to her previously stated position," Cornett wrote in *The*

*Ethics of Blawging: A Genre Analysis*, 41 Loy. U. Chi. L. J. 221, 259 (2009). Accordingly, Cornett said, "If a blawger whose reputation is entwined with her blawg needs to take a contrary position in order to advance a client's interests, she may be 'materially limited' from doing so because of that reputational interest."

**'Public Relations Issue,' Not 'Hard Conflict.'**

Jacobowitz told Bloomberg BNA that "an attorney expressing his views online regarding particular case decisions or current events is more likely to create a public relations issue than a hard conflict under the rules." "In other words, it is not inconceivable that a lawyer might lose a client or fail to attract a certain client, if that lawyer has a significant social media presence in which he is outspoken on issues that are contrary to a client's business interests," said Jacobowitz, who is co-authoring a book on attorney social media usage with John G. Browning of Passman & Jones P.C. in Dallas.

**Firm-Wide Social Media Policies**

New York attorney Ronald C. Minkoff has advised law firms to adopt a "social media policy" with a provision that takes positional conflicts into account. Minkoff, who heads the professional responsibility group at Frankfurt Kurnit Klein + Selz P.C., has provided CLE participants with a sample social media policy that includes the following language:

Avoid business conflicts**.** Please exercise discretion when opining about court decisions, regulatory changes, or other developments that affect our clients' businesses, or that may be inconsistent with positions that the firm has taken on behalf of its clients.

**LinkedIn Lesson**

Bar panels have issued conflicting opinions on whether lawyers violate ethics rules that prohibit communications with jurors and judges when they browse profiles those individuals maintain on LinkedIn, which automatically alerts users that their profiles have been viewed. See Colorado Ethics Op. 127, 31 Law. Man. Prof. Conduct 698 (2015).

LinkedIn has also been the subject of opinions that deal with prohibited claims of expertise. See, e.g., New York County Ethics Op. 748, 31 Law. Man. Prof. Conduct 156 (2015).

The D.C. panel addressed those topics but also highlighted another—LinkedIn's "Imported Contacts" feature—that hasn't received attention in past opinions. That feature enables LinkedIn to gain access to a user's e-mail address book so that it can connect existing members and send messages that ask nonmembers to join the site and connect with an existing member.

The committee said this could be problematic for lawyers because their contact lists "frequently include clients, opposing counsel, judges and others whom it may be impermissible, inappropriate or potentially embarrassing to have as a connection on a social networking site." "The connection services provided by many social networks can be a good marketing and networking tool, but for attorneys, these connection services could potentially identify clients or divulge other information that a lawyer might not want an adversary or a member of the judiciary to see or information that the lawyer is obligated to protect from disclosure," the panel said.

Lawyers should thus exercise "great caution" when asked to grant a social media site access to their e-mail contacts, the committee said. The committee's ethics counsel, Hope C. Todd, told Bloomberg BNA that this "prudential guidance" was a "practical tip that came from understanding how the social networks access personal information and send emails 'on your behalf.'"

**Social Media Checklist**

The committee also offered guidance on several topics that have been covered in prior ethics opinions. Among other things, it said:

- the duty of confidentiality may require a lawyer to seek "explicit informed client consent" before blogging about a case, and to share drafts of any proposed blog posts with the client;

- the so-called "self-defense" exception to the duty of confidentiality "does not provide complete safe harbor for the disclosure of client confidences in response to a negative internet review";

- using "a prominent disclaimer" may help avoid the inadvertent formation of attorney-client relationships when discussing legal issues with internet users;

- the duty of competent representation may require lawyers to review client social media posts to ensure they are consistent with a client's "claims, defenses, pleadings, filings or litigation/regulatory positions";

- lawyers "may need to include social media in advice and instructions to clients about litigation holds, document preservation, and document collection";

- lawyers may need to advise clients on whether "obstruction statutes, spoliation law and procedural rules" in a given jurisdiction permit them to "modify their social media presence once litigation or regulatory proceedings are anticipated"; and

- the duty of competent representation "may require investigation of potentially relevant social media postings" of adverse parties, opposing counsel, jurors and judicial or administrative "decision-makers."

The ethics opinions can be found at www.dcbar.org/bar-resources/legal-ethics/opinions/.

## NEWS FROM THE FIELD

**NACDL's Midwinter Meeting & Seminar**: "The Voo-Doo of Voir Dire" (March 1–4, 2017 at The Royal Sonesta Hotel in New Orleans) program focuses on the principles of effective voir dire, and will carry 12 CLE credit hours. (www.nacdl.org/LegalEducation.aspx?id=19610)

**Cato's "Policing in America" Report**: Following its December 7, 2016 conference on the state of policing in America, the Cato Institute has released its annual report entitled "Policing in America," a national public opinion survey. This report, authored by Emily Ekins, a research fellow at the Cato Institute, explores topics such as use of force, perceptions of fairness, police misconduct, and attitudes towards the police. The report can be downloaded from cato.org.

**Coalition for Public Safety Event**: The Coalition for Public Safety will hold its monthly criminal justice event on January 27, 2017 in Washington, DC. CJS attorneys Sara Elizabeth Dill and Lauren Beebe King will give a presentation on CJS Standards to continue making the standards more accessible to criminal justice policy makers and stakeholders.

**NAAG Winter Meeting**: The National Association of Attorneys General will host its Winter Meeting on Feb. 27-March 1, 2017 in Washington, DC. Officials from the new Trump administration will be invited to speak about common issues and potential partnerships. NAAG will also host its Supreme Court luncheon during the meeting to discuss upcoming cases. (www.naag.org/meetings-trainings/annual-meetings/2017-naag-winter-meeting.php)

**NDAA's Capital Conference**: The National District Attorneys Association will host its Capital Conference on Jan. 31 – Feb. 1, 2017 at the Westin Washington, DC City Center. Attendees will have the opportunity to hear speakers on a variety of topics, including representatives on priorities for the new Administration, as well as meet members of congress and state delegations. (www.ciclt.net/sn/events/e_signup.aspx?ClientCode=ndaajustice&E_ID=500039&RegType=ATT)

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Useful Info Links

## CALENDAR OF EVENTS

CJS Midyear Meetings at ABA Midyear Meeting:
Feb. 3-4, Miami, FL

Ethics and Equal Access to Justice in All Languages -- Title VI and Consideration of Title II:
Feb. 22, Webinar

White Collar Crime National Institute:
March 8-10, Miami Beach, FL

Global Investigations and Compliance: From Regulatory Trends to Leveraging Innovation and Technology:
April 5, Hong Kong

Blockchain Technology and Digital Currency National Institute: April 10, New York, NY

CJS Spring Meeting and Program:
May 4-7, Jackson Hole, WY

27th Annual National Institute on Health Care Fraud:
May 17-19, Ft. Lauderdale, FL

8th Annual Prescription for Criminal Justice Forensics: June 2, New York, NY

Second Global White Collar Crime Institute:
June 7-8, São Paulo, Brazil

Third False Claims Act Trial Institute:
June 14-16, Washington, DC

CJS Annual Meetings at the ABA Annual Meeting:
Aug. 10-13, New York, NY

4th Annual Southeastern White Collar Crime Institute: Sept. 7-8, Braselton, GA (near Atlanta)

6th Annual London White Collar Crime Institute:
Oct. 9-10, London, UK

10th Annual CJS Fall Institute and Council & Committee Meetings: Nov. 2-5, Washington, DC

ABA/ABA Money Laundering Enforcement Conference: Dec. 3-5, National Harbor, MD

*For updates, visit ambar.org/cjsevents.*

**The American Bar Association**
**Criminal Justice Section**
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# ABA Criminal Justice Section Newsletter

*New Book*

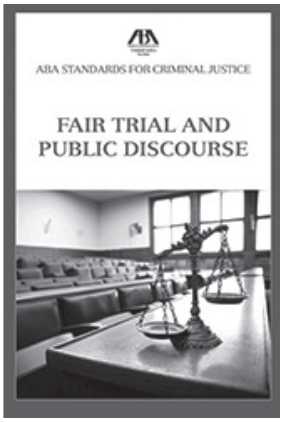
## ABA Standards for Criminal Justice: Fair Trial and Public Discourse

The Criminal Justice Standards for Fair Trial and Public Discourse are now available for purchase in print and e-book format.

The task force was chaired by Ronald Goldstock, and the reporter was Jessica Roth.

This is the first volume of the standards to be available as an e-book, including a cover redesign by CJS staff member Rabiah Burks.

The book is available on the ABA Website Store at shop.americanbar.org.




**Articles Wanted for the *CJS Newsletter***

Practice Tips, Project/Committee News ...
Submission Deadline for the Next Issue: April 15, 2017.

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