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NAGTRI Responds to the COVID-19 Pandemic

On behalf of all of my colleagues at NAAG and NAGTRI, I hope that you are doing well in these challenging times. As we all adjust to a new, but hopefully temporary, normal, I’d like to share how NAGTRI is responding to serve the attorney general community.

First, in response to limitations on group gatherings and the need for social distancing, the NAGTRI Training Committee, in conjunction with NAGTRI leadership, decided to cancel all in-person trainings through July. We plan to reschedule as many of the canceled trainings as possible once restrictions abate.

In the meantime, NAGTRI has shifted its efforts to providing online education as part of the NAGTRI Strategic Plan. Since February 19th, NAGTRI has been offering webinars on issues related to COVID-19 and 20 webinars have been conducted as of publication, on topics including price gouging and scams, continuity of operations, quarantine, open meetings, and courtroom advocacy by phone or video. In April and May, NAGTRI hosted a five-week Wellness Webinar Series, featuring topics such as Better Lawyering Through Mindfulness, Managing Vicarious Trauma and Other Mental Health Issues, and Strategies for Reducing Stress & Anxiety, and launched a multi-week series of 10 minute “daily pause” sessions led by Jeena Cho, who recently joined the NAGTRI Center for Leadership Development as Wellness Consultant. These sessions were designed to offer a brief stop during the workday to practice mindfulness and improve focus.

NAGTRI will soon be launching our new online learning platform, which will include on-demand webinars on a variety of topics, many of which will qualify for CLE. In addition, we are in the process of converting traditional in-person trainings to online trainings. For example, in June, NAGTRI will offer trainings on negotiations and state agencies in an online format.

In this time of crisis, NAGTRI remains focused on its mission of providing high-quality, non-partisan research and training to support state and territory attorneys general and their staff. If you have ideas about how NAGTRI can continue to serve the AG community or want to participate in our efforts in some way, please be in touch.

In the meantime, sending sincere wishes for good health and balance in your lives,

Amy Tenney Curren
“Lawful Investigative Activities,” Pretext, and Rule 8.4(c) of the Colorado Rules of Professional Conduct

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awyers in government practice, from attorney general offices to prosecutors to agency counsel, may have occasion to oversee investigations where deceit or pretext is used. But is advising, supervising, or directing pretextual investigations consistent with a lawyer’s general ethical obligations? Changes to state rules of professional conduct, including a 2017 amendment to Colorado Rule of Professional Conduct 8.4(c), indicate that a lawyer’s oversight is preferable to foregoing law enforcement activities or preventing investigators from receiving guidance from their lawyer-supervisors. But there are important considerations to ensure a lawyer’s oversight complies with local ethics rules. This article addresses Colorado’s rule and provides practical considerations for lawyers to consider in conducting their own such investigations.

A “lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.” This is because “[n]ot every lawyer misstatement poses th[e] risk” of jeopardizing the public’s trust in the integrity and trustworthiness of lawyers. On the contrary, a “commitment to total truthfulness” can actually imperil “attorney involvement in undercover investigations and other strategies used . . . to root out evil or even to save lives.” For this reason, it should “seem obvious that an attorney’s obligation to be truthful does not foreclose her participation in undercover investigations designed to expose wrongdoing.” Thus, a sanction is appropriate only where the deception “reflects adversely on the lawyer’s honesty, trustworthiness, or fitness” to practice law.

The United States Supreme Court has long recognized that deception and pretext are permissible tools of lawful investigations. This is because the Constitution does not protect “a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.” Indeed, given the clandestine nature of criminal activity, “[p]rosecutors and police often need to use deceit to find the truth.” Likewise, a lawyer’s advice, supervision, or direction of a lawful investigative activity can protect an investigation’s target by ensuring the investigation honors the target’s rights.

This is equally true of discrimination testers and for investigations into civil, intellectual property, or consumer-related violations because pretext, deception, and “the use of undercover investigators and discrimination testers is an indispensable means of detecting and proving violations that might otherwise escape discovery or proof.” The Supreme Court has approved of deception and pretext in using housing testers to misrepresent both their identities and purpose to pose as renters or purchasers to gather evidence of and determine whether a landlord or seller is engaging in housing discrimination. Even the Federal Trade Commission tasks investigators to pose as consumers to gather evidence of possible law violations.

Colorado’s Original Rule 8.4(c) and the 2017 Amendment

Before September 2017, Rule 8.4(c) of the Colorado Rules of Professional Conduct (Colo. RPC or Rules) provided that “[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” But in September 2017, the Colorado Supreme Court amended Rule 8.4(c) to add an exception concerning lawful investigatory activities:

It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except

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that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities.\textsuperscript{15}

What prompted this change? The immediate impetus stemmed from an ethics complaint filed by a defense attorney against a district attorney whose office housed (and thereby supervised) an investigative unit that rooted out child predators on the internet—like that defense attorney’s client—by having the investigators present themselves online under fictitious identities.\textsuperscript{16} The district attorney agreed to close the unit, and Colorado’s Office of Attorney Regulation Counsel (OARC) ended the investigation.\textsuperscript{17} But because of OARC’s investigation, the Colorado Attorney General suspended all in-house undercover investigations.\textsuperscript{18} Colorado’s Attorney General then filed an original action in the Colorado Supreme Court seeking injunctive relief to prevent OARC from interpreting Colo. RPC 8.4(c) in a way that would prevent government lawyers from providing advice to lawful undercover investigations or punish them for doing so.\textsuperscript{19} The supreme court denied the petition. Instead, it proposed the above rule change, which it adopted without accompanying comment.\textsuperscript{20}

Colorado is not the only state to allow lawyer oversight in pretextual investigations. Approximately twenty states have adopted similar amendments authorizing and defining deception in pursuit of covert activities. Some states’ rules only authorize lawful investigations involving violations of criminal law or civil or constitutional rights, particularly where the lawyer has a good faith belief that a violation of criminal law or civil or constitutional rights has taken place, is taking place, or will take place in the foreseeable future.\textsuperscript{21} Other states limit deception exceptions to government lawyers.\textsuperscript{22} Finally, several states’ ethics committees have interpreted their rules consistently with Colorado’s amended Rule 8.4(c) but without amending their analogous rules.\textsuperscript{23}

Colorado’s amended Rule 8.4(c) raises a crucial question: What is a lawful investigative activity? This article addresses that question by analyzing cases from around the country that evaluate both civil and criminal investigations, the investigative objective, and any personal involvement by attorneys in the investigations. The article identifies circumstances where the investigative activity overstepped the mark and where investigative situations were ethically acceptable. Finally, it synthesizes common threads to suggest standards for assessing investigative activity. While the following collection of authorities is not exhaustive, they provide guideposts for handling the unique facts of individual investigations. Undertaking any such investigation, however, requires a full reckoning of the facts and law, as well as the lawyer’s professional and ethical obligations.

**Lawful Investigative Activities**

The following cases, largely borne in the civil context of intellectual property, as well as government undercover investigations, demonstrate the types of covert activities that courts have concluded are lawful investigations.

In *Gidatex S.R.L. v. Campaniello Imports, Ltd.*, the plaintiff’s private investigators surreptitiously taped conversations with the defendant’s sales associates.\textsuperscript{24} Although the court determined that the defendant’s sales associates were represented parties under New York’s ethics rule analogous to ABA RPC 4.2 (prohibiting counsel from communicating with an opposing party represented by counsel in the matter, absent exceptions), the court determined that no ethical violation occurred because the investigators “did not interview the sales clerks or trick them into making statements they otherwise would not have made. Rather, the investigators merely recorded the normal business routine . . . .”\textsuperscript{25} More important, the court held that “hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation.”\textsuperscript{26}

Along with *Gidatex*, *Apple Corps Ltd. v. International Collectors Society* is perhaps the most well-known case addressing lawful investigative activities.\textsuperscript{27} In *Apple Corps*, the defendant had been required to stop selling stamps depicting a protected trademark.\textsuperscript{28} The plaintiffs’ lawyers and investigators called the defendant’s sales associates and tried to order those stamps featuring the trademarked image by deceptively presenting themselves as actual customers.\textsuperscript{29} The defendant requested sanctions for this “deceitful” conduct, but the court rejected the request because the misrepresentation went only to identity and was made “solely for evidence-gathering purposes.”\textsuperscript{30} The court highlighted that the “prevailing understanding in the legal profession is that a public or private lawyer’s use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.”\textsuperscript{31}
Similarly, in *Cartier v. Symbolix, Inc.*, a renowned jeweler-watchmaker believed the defendant, an independent jeweler, was violating its trademark by adding diamonds to cheaper Cartier watches and then passing off those watches as expensive original models.\(^{32}\) The plaintiff hired a private investigator and tasked an assistant to accompany the investigator to pretend to buy one of the fake watches.\(^{33}\) The defendant sought an injunction to prevent Cartier from using information discovered in the undercover investigation,\(^{34}\) but, like the courts in *Apple Corps* and *Gidatex*, the court rejected the request, reasoning again that the “prevailing understanding in the legal profession is that a public or private lawyer’s use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.”\(^{35}\)

In *Turfgrass Group, Inc. v. Northeast Louisiana Turf Farms, L.L.C.*, the court likewise upheld the plaintiff’s lawyer’s use of undercover investigators who posed as customers to detect whether the target-defendant was properly selling the product it represented.\(^{36}\) This court, too, repeated that the “prevailing understanding” was that a “public or private lawyer’s use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed.”\(^{37}\)

Finally, in *People v. Morley*, the Colorado Supreme Court upheld the actions of undercover investigators conducting a covert investigation that surreptitiously recorded a lawyer setting up a prostitution ring in Denver.\(^{38}\) The supreme court recognized that while the undercover investigation was “built on deceit,” lawful government activity investigating crime “is not confined to behavior suitable for the drawing room.”\(^{39}\)

**Investigative Activities that are Unlawful or do not Authorize Deception**

On the other hand, where a lawyer’s conduct or the investigation itself so clearly exceeded ethical boundaries, courts have imposed sanctions and deemed the investigation unlawful. In each of these cases, however, the lawyer’s behavior would have fallen outside any investigatory exception authorizing deception, including Colorado’s amended Rule 8.4(c).

Perhaps the most stunning violations occurred in the companion cases of *In re Crossen*\(^{40}\) and *In re Curry*.\(^{41}\) These cases involved facts almost too extreme to be believed. Private attorneys attempted to coerce a judge’s law clerk into implicating the judge in a suspected corruption scandal.\(^{42}\) To coerce the clerk, the attorneys set up an elaborate “sham interview” in which they flew the clerk to Nova Scotia under the pretext of interviewing the clerk for a position as in-house counsel for a fake multinational cooperation.\(^{43}\) They then conducted a second sham interview in New York.\(^{44}\) The *Crossen* court explained that even government attorneys, while permitted to conduct undercover investigations, remained “subject not only to ethical constraints, but also to supervisory oversight” and “stringent constitutional requirements of fair and impartial justice.”\(^{45}\)

The *Curry* court noted that

> [w]ith no motive other than his own financial gain . . . [the lawyer] developed and participated in an elaborate subterfuge whose purpose was to induce or coerce [a] judge’s former law clerk into making statements that the law clerk otherwise would not have made about the judge and her deliberative process . . .

The *Curry* court rejected the argument that lawyers regularly use similar undercover techniques; instead, distinguishing the lawyer’s tactics from lawful ones,
the court ruled that “[the lawyer]’s scheme is different from such investigations not only in degree but in kind.”47 It noted approvingly, however, that discrimination testers or investigators can “pose as members of the public in order to reproduce pre-existing patterns of conduct.”48

Finally, in Leysock v. Forest Laboratories, Inc., the court, applying the governing principles from Curry and Crossen, had little difficulty determining that the subterfuge and “investigation” did not fall within any “investigative exception” to the analogous Massachusetts rule.49 The investigation at issue concerned a fake survey distributed to physicians to gain access to confidential patient treatment files.50 The court recognized the narrow investigative exception articulated in Curry and Crossen, which permitted prosecutors and other government attorneys to conduct undercover criminal investigations—typically requiring “some level of deception or misrepresentation”—and civil attorneys to use investigators to obtain information otherwise normally available to any member of the public “making a similar inquiry.”51 Such civil investigations included using “prospective renters, “consumers,” or “testers” to pose as actual renters or consumers to gather evidence of improper conduct such as housing or product discrimination.52

Turning to the survey materials themselves, the court condemned the deception as “far exceed[ing]” any investigative exception because the surveys were not seeking information otherwise “readily available” to the public who would have been seeking products and services.53 On the contrary, the deception was extraordinarily invasive, intruding upon “one of the most sensitive and private spheres of human conduct, the physician–patient relationship.”54 The court was especially displeased that the lawyers published the survey results.55

**Targets With Retained Counsel in the Matter**

One additional minefield concerns pretextual investigations where the investigative target is represented by counsel in the matter, particularly where litigation already is underway.

In McClelland v. Blazin’ Wings, Inc., which predated Colorado’s Rule 8.4(c) amendment, the plaintiff’s lawyers hired a private investigator after filing a lawsuit alleging personal injuries following an incident at the defendant’s bar.56 Without disclosing that he worked for plaintiff’s counsel, the investigator surreptitiously interviewed the defendant’s bartender.57 The United States District Court for the District of Colorado found that the “surreptitiously recorded interview . . . occurring on the day this action was commenced” was improper.58 Importantly, the court also found a violation of Colo. RPC 4.2.59

The timing of the investigation troubled the court, as the lawsuit had already been filed.60 What’s more, counsel represented the defendant in the matter.61 Under Colo. RPC 4.2, once a lawyer knows a party is represented by counsel, the lawyer cannot communicate with anyone who has the power to bind the opposing party, either directly or indirectly through another, without that opposing party’s counsel’s consent; this is so regardless of whether the communication involves deception.62

Even under Colorado Rule 8.4(c), as amended, the conduct of plaintiff’s counsel still would have run afoul of Colo. RPC 4.2, because counsel’s investigator contacted someone known to be represented in the matter. However, the plaintiff’s investigator could have used deception to talk to a bystander witness, a person who had no authority to bind the defendant. The investigator also could have proceeded if an exception to Colo. RPC 4.2 had applied.

In Midwest Motor Sports v. Arctic Cat Sales, Inc.,63 the defendant’s lawyer hired an investigator to pose as a customer and secretly record conversations with the plaintiff’s employees to determine that the employees had not suffered a loss of business because of the defendant’s conduct.64 The Eighth Circuit held that where information “could have been obtained properly through the use of formal discovery techniques,” doing so using undercover, pretextual investigation was unlawful.65

Importantly, in Midwest Motor Sports, the investigator was secretly taping employees while trying to induce incriminating statements.66 Indeed, the investigator endeavored to trick the employees to say something they otherwise would not have said.67 Further, as in McClelland, the Midwest Motor Sports court determined that because the investigative target had retained counsel in that matter, the investigation no longer implicated only Rule 8.4(c); instead, Rule 4.2 constrained defense counsel’s ability to conduct a lawful investigative activity.68
Of course, neither McClelland nor Midwest Motor Sports addressed a version of Rule 8.4(c) containing an exception for deceit in lawful investigative activities. Another case, Hill v. Shell Oil Co., confirmed that pretextual investigations are acceptable in the context of having investigators pose as ordinary customers to discover whether the investigative target is discriminating in its selling practices—particularly against minorities or based on immutable characteristics. In Hill, the class action plaintiffs alleged that the defendant oil company and dealerships required African-American customers to prepay for gasoline but allowed Caucasian customers to pump first then pay. Importantly, the defendants alleged violations of Illinois Rules of Professional Conduct 4.2 and 4.3—which the court rejected—and not a violation of Rule 8.4(c). The court determined that although the defendant’s station employees were represented parties under Illinois’s Rule 4.2, it declined to find that any contact with such represented employees constituted a violation, particularly where the investigators-posing-as-customers interacted with the station employees in the course of normal customer business transactions. The court recognized a “discernable continuum” of acceptable conduct. It explained that while investigators “cannot trick protected employees into doing or saying things they otherwise would not do or say” or “interview protected employees or ask them to fill out questionnaires,” they could, as the plaintiff-investigators did here, be “employ[ed as] persons to play the role of customers seeking services on the same basis as the general public.” Investigators even could “videotape protected employees going about their activities” in a normal course of business.

A Lawyer’s Personal Participation Remains Prohibited (in most jurisdictions)

There remains one lingering concern: Can a lawyer be personally involved in a pretextual investigation? The answer, as a general matter, is a firm no. Courts and states’ rules take a dim view of a lawyer’s personal participation. The language of Colorado’s amended Rule 8.4(c) is clear, as is its jurisprudential backdrop: Personal participation is not permitted.

Among the best-known cases involving unethical personal participation in deceptive investigative activities is In re Pautler. In Pautler, a district attorney in Colorado personally presented himself as a public defender to achieve the peaceful surrender of a barricaded axe murder suspect. The Colorado Supreme Court held that “[p]urposeful deception by an attorney licensed in our state is intolerable,” even under those circumstances. It further stated that the then-unamended Rule 8.4(c) was “devoid of any exception” for law enforcement investigations. It rejected Pautler’s proposed “imminent public harm” and “duress and choice of evils” exceptions.

The result in Pautler would not change under Colorado’s amended Rule 8.4(c), first and foremost because of the lawyer’s personal participation. But equally fatal is that there was no lawful investigative activity; rather, Pautler fraudulently impersonated an opposing counsel, thereby lying directly to a suspect and eviscerating that suspect’s trust in subsequent defense counsel (to say nothing of the legal system on the whole). None of these effects is sanctioned by Colorado’s Rule 8.4(c), and the spirit of the Rule does not embrace such collateral damage.

Likewise, in People v. Reichman, the Colorado Supreme Court disapproved of a lawyer’s personal involvement in deceit. But the crux of Reichman is mind-boggling: A district attorney, in attempting to establish a police officer’s undercover identity while investigating drug trafficking, filed fake criminal charges, staged a fictitious arrest, and had the officer appear in court and make false statements to the judge, all without the judge’s knowledge. Yet, the propriety of the undercover investigation itself was never contested.

Finally, two social media-related cases bear mentioning. In Disciplinary Counsel v. Brockler, an assistant district attorney personally created a fake Facebook persona to contact a defense alibi witness to elicit information to refute the defendant’s alibi defense. As in Pautler, the Ohio Supreme Court held that attorneys could not personally participate in covert investigative activities, although it recognized that lawyers could supervise such investigations. Most recently, the Pennsylvania Supreme Court suspended a district attorney for creating a fake Facebook page and urging her office’s attorneys and investigators to use the fake page “to befriend defendants or witnesses if you want to snoop.” Citing Pautler, the court emphasized that lawyers cannot personally participate in covert investigations, and—unlike Colorado—Pennsylvania had no “investigation exception that allows prosecutors to engage in activity prohibited by RPC 8.4(c).”
Considerations for Assessing Investigations

While each investigation requires careful consideration of its own unique circumstances and goals, the above cases provide guidance to attorneys when handling any contemplated investigation. Key takeaways include:

- Personal involvement is prohibited. Colorado’s amended Rule 8.4(c) is clear on this point, as are most other states’ approaches, and case law routinely takes a critical view when lawyers are themselves involved. While some states may authorize it, care should be exercised.

- When assessing the lawfulness of the underlying investigation, whether it is being conducted by a prosecutor or government attorney versus a civil practitioner makes a difference. In civil matters, additional factors may include whether the investigation is simply trying to collect evidence generally available to members of the public; whether the investigation is designed to reproduce a target’s behavior; the investigation’s degree of intrusiveness; and whether other avenues for gathering the evidence exist. Note, however, that Colorado’s amended Rule 8.4(c) does not distinguish between public and private lawyers. Nor do the overwhelming majority of states that permit private civil practitioners to oversee pretextual investigations. Rather, it is in the context of assessing the “lawful investigative activity” that such a distinction can arise.

- A number of lawful investigative activities have received court approval, including undercover police operations, housing and product discrimination testers, and certain intellectual property/trademark infringement investigations. Studying these cases to determine what has gone right (or wrong) can be helpful.

- Investigations designed to re-create situations where a member of the public could pursue a similar inquiry and receive an inappropriate or discriminatory response are more likely to be approved than investigations designed to entrap a target.

- Investigations that perpetrate a fraud on the court are generally unlawful.

- Investigations designed to circumvent proper discovery procedures or to gain access to otherwise confidential or privileged information generally meet with disapproval.

- Pretext or no, a lawyer must comply with Rule 4.2 when the investigative target is represented by counsel in the matter, particularly if a legal proceeding is already underway.

- Many states with similar exceptions consider investigations lawful where the lawyer in good faith believes there is a reasonable possibility that a violation of criminal law or civil or constitutional rights has taken place, is taking place, or will take place in the foreseeable future. Colorado’s Rule 8.4(c), however, does not contain such a qualification.

Conclusion

Court and ethics opinions provide significant guidance on what constitutes unlawful investigative activities, but each lawyer must use his or her own best professional and ethical judgment in determining how to proceed. While the above considerations can assist the analysis, these factors are just a starting point. Ultimately, the responsibility to ensure ethical compliance is the lawyer’s own.
Endnotes

1 See American Bar Association, Standards for Criminal Justice: Prosecutorial Investigations (hereinafter Standards for Criminal Justice) at Standards 26-1.2 and 26-1.3; see also id. at Standard 26-1.3, Commentary to Subdivision 26-1.3(g) (Ethical rules “should not be read to forbid prosecutors from participating in or supervising undercover investigations.”), Comment, Federal Trade Commission, In the Matter of Rules Governing Professional Conduct, Rule 8.4, 2017 WL 4631427 (F.T.C.) (Sept. 5, 2017); see also Minutes of Meeting of Standing Committee on the Rules of Professional Conduct (hereinafter Minutes) at 5 (July 13, 2012), http://www.courts.state.co.us/userfiles/file/7--13-12%20minutes(1).pdf. (recognizing that absent an amendment, to “choose not to know what their investigators are actually doing in the field” government lawyers would “distance[ ] themselves from the actual investigations”).

2 Colo. RPC 8.4, cmt. [2].

3 In re Conduct of Carpenter, 95 P.3d 203, 208 (Ore. 2004).

4 Rebecca Aviel, Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech, 31 Geo. J. LEGAL ETHICS 31, 75 (Winter 2018).

5 Id. at 75-76.

6ABA Standards for Imposing Lawyer Sanctions, Standard 5.1 (amend. Feb. 1992), www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sanction_standards.authcheckdam.pdf; see also In re PRB Docket No. 2007-046, 989 A.2d 523, 528 (Vt. 2009) (recognizing that a broad reading of Model Rule of Professional Conduct Rule 8.4(c) would render Rule 4.1 “entirely superfluous”). Rule 4.1 provides for a lawyer’s responsibility of truthfulness in statements to others. Specifically, in the course of representing a client, a lawyer “shall not” knowingly make a false statement or fail to disclose a material fact when necessary. Of course, as discussed later in the article, Colorado’s amended Rule 8.4(c)—as with almost every other state that has adopted an investigatory exception—still prohibits a lawyer from personally engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. In this respect, the investigatory exception under Colorado’s amended Rule 8.4(c) does not alter the requirements under Rule 4.1.


9 Kevin C. McMunigal, A Discourse of the ABA’s Criminal Justice Standards: Prosecution and Defense Functions: Investigative Deceit, 62 HASTINGS L.J. 1377, 1392 (2011). Defense scholars also recognize that “defense lawyers often face the same barriers to uncovering the truth as police and prosecutors” and “allowing lawyers to supervise undercover investigations is generally a positive one,” in no small part because doing so “not only help[s] uncover the truth, but [is] unlikely . . . to generate a negative public reaction.” Peter A. Joy and Kevin C. McMunigal, Deceit in Defense Investigations, 25 (3) CRIM. JUST. 36, 39 (2010).

10 See Standards for Criminal Justice, supra note 1, Standards 26-1.2, 26-2.2, and 26-2.3 (3d ed. ABA 2014).


14 Colo. RPC 8.4(c) (2016).


17 Coffman v. OARC, at 3.

18 Id. at 3-4; see also Jesse Paul, Colorado AG halts all in-house undercover investigations amid ethics questions about “CHEEZO” unit, The Denver Post, May 12, 2017, available at https://www.denverpost.com/2017/05/12/jeffco-cheezo-unit-ethics-concerns/.

19 See Coffman v. OARC.


21 See, e.g., Alaska RPC 8.4 cmt [4] (allowing lawyers to advise and supervise “lawful covert activity in the investigation of violations of criminal law or civil or constitutional rights” where the lawyer “in good faith believes there is a reasonable possibility that a violation of criminal law or civil or constitutional rights has taken place, is taking place, or will take place in the foreseeable future,” but prohibiting the lawyer from “participat[ing] directly”); Fla. St. Bar R. 4-8.4(c) (providing exception that “it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about
or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule); Iowa RPC 32.8.4(c), cmt. 6 (permitting lawyers to advise clients or to "supervise or participate in lawful covert activity or in the investigation of violations of civil or criminal law or constitutional rights in lawful intelligence-gathering activity" where the lawyer "in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future"); Ohio RPC 8.4(c), cmt. 2A (exception permits lawyer to supervise or advise about "lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law"); Ore. RPC 8.4(b) ("[I]t shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules," and defining "covert activity" as an investigation employing "misrepresentation or other subterfuge" that requires a good faith belief about the existence or imminence of unlawful activity); Wis. SCR 20:4:1(b) and Committee Comment (2007) (authorizing lawyer to advise or supervise others with respect to lawful investigative activities, including where the "conduct involves some form of deception" such as using discrimination testers or undercover detectives investigating theft in the workplace, when the lawyer "in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future," but recognizing that "serious questions arise" if the lawyer personally participates in the deception).

22 See, e.g., Ala. RPC 3.8(2) cmt. (allowing exception for prosecutors to "order, direct, encourage and advise with respect to any lawful governmental action" involving pretext or "the making of false statements," although they may not personally do so); D.C. Bar R. 4.2, cmt. 12 ("This rule is not intended to enlarge or restrict the law enforcement activities . . . authorized and permissible under the Constitution and law of the United States," and stating that the "authorized by law" provision is "intended to permit government conduct that is valid . . . and is meant to accommodate substantive law as it may develop"); Mo. Sup. Ct. RPC 4-8.4(c) and cmt. 3 (providing exception for lawyers employed by criminal law enforcement agency, regulatory agency, or state attorney general to participate in undercover investigation if authorized by law to conduct such investigation); N.C. RPC 8.4, cmt. 1 (rule "does not prohibit lawyer from advising a client or, in the case of a government lawyer, investigatory personnel, of action the client, or such investigatory personnel, is lawfully entitled to take"); Tenn. RPC 8.4(c), cmt. 5 (allowing prosecutors to use or direct investigative agents to use "deceitful" investigative techniques); Wyo. RPC 3.8(b), cmt. 2 (authorizing prosecutors to participate "directly or indirectly in constitutionally permissible investigative actions" and permitting prosecutors to "ethically advise law enforcement" about the "full range of constitutionally permissible investigative actions").

23 See, e.g., Ariz. Ethics Op. 99-11 (Sept. 1999) ("It is many times essential for a lawyer to use 'testers' in order to meet the attorney's responsibilities under the ethical rules," and "when a lawyer directs a tester or investigator to make misrepresentations solely about their identity or purpose in contacting the person or entity who is the subject of investigation" for the purpose of "gathering facts before filing a lawsuit," the lawyer does not violate the Rules.); Va. Legal Ethics Op. 1738 at 10, 12 (Apr. 2000) ("Rule 8.4 does not prohibit a lawyer engaged in a criminal investigation or a housing discrimination investigation from making otherwise lawful misrepresentations necessary to conduct such investigations."); see also Utah Ethics Advisory Op. 02-05, ¶ 10 (Mar. 2002) ("[A] state or federal prosecutor's or other governmental lawyer's otherwise lawful participation in a lawful governmental operation does not violate Rule 8.4(c) based upon any dishonesty, fraud, deceit or misrepresentation required in the successful furtherance of that government operation.").
50    *Id.* at *6-9.
51    *Id.* at *6-8.
52    *Id.* at *6.
53    *Id.* at *8-9.
54    *Id.* at *10.
55    *Id.* at *11.
57    *Id.*
58    *Id.* at 1080.
59    See *id.* at 1077-78.
60    *Id.* at 1075-76.
61    *Id.* at 1077.
62    See Colo. RPC 4.2, “Communication with Person Represented by Counsel,” which provides that “[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”
63    *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693, 695-96 (8th Cir. 2003).
64    *Id.* at 695-96.
65    *Id.* at 699; but see *Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876, 879-80 (N.D. Ill. 2002) (rejecting defendants’ reliance on *Midwest Motor Sports* and its challenge, under Rule 4.2, to evidence obtained by undercover investigators investigating racial discrimination in gasoline sales, specifically whether African-American customers were the only customers required to pre-pay) (citing *Gidatex*, 82 F. Supp. 2d at 125-26).
66    *Midwest Motor Sports*, 347 F.3d at 695, 699. This is one of the many ways *Midwest Motor Sports* is distinguishable from *Gidatex*: in *Gidatex*, the investigators were simply recording the “normal business routine,” 82 F. Supp. 2d at 126, but in *Midwest Motor Sports*, the investigator was secretly taping employees while trying to *induce* incriminating statements, 347 F.3d at 695, 699. Further, in *Midwest Motor Sports*, the surreptitious record itself violated the state’s ethics rules, see 347 F.3d 699—700, but in *Gidatex*, hiring private investigators was an accepted investigative technique, see 82 F. Supp. 2d at 122.
67    *Id.* at 695, 699-700; accord *Curry*, 880 N.E.2d at 392, 404-05.
69    See *id.* at 699; *McClelland*, 675 F. Supp. 2d at 1079-80.
70    *Hill*, 209 F. Supp. 2d at 877.
71    *Id.* at 878-79.
72    *Id.* at 779–80 (applying *Apple Corps*, 15 F. Supp. 2d 456; and *Gidatex*, 82 F. Supp. 2d 119).
73    *Id.* at 779.
74    *Id.* (emphasis added).
75    *Id.*
76    *In re Paulter*, 47 P.3d 1175 (Colo. 2002).
77    *Id.* at 1176--78.
78    *Id.* at 1176.
79    *Id.* at 1179.
80    *Id.* at 1180–81.
81    *Id.* at 1179 & n.4.
82    *Id.* at 1183.
84    *Id.* at 1036.
86    *Id.*
88    *Id.* at 31.
89    See also Colo. Bar Ass’n Comm. on Ethics, Formal Op. 137, Advising, Directing, and Supervising Others in Lawful Investigative Activities That Involve Dishonesty, Fraud, Deceit, or Misrepresentation (May 2019) (addressing amended Colo. RPC 8.4(c), including interaction with other rules of professional conduct and common scenarios).
The Evolving Debate Over Batson’s Procedures for Peremptory Challenges

Two avenues are available to ensure a fair jury pool in both civil and criminal cases: challenges for cause and peremptory challenges. However, when peremptory challenges are “used to express stereotypical judgments about race, gender, religion, or national origin, peremptory challenges betray the jury’s democratic origins and undermine its representative function.” Justice Breyer, among others, has expressed the view that the peremptory challenge system as a whole should be reconsidered because of discrimination in its utilization. This article considers the procedures for obtaining a fair and representative jury, specifically the procedures established in Batson v. Kentucky, and then discusses proposals to strengthen steps one, two, and/or three of those procedures. State-specific solutions, including the Connecticut Supreme Court’s creation of a “Jury Selection Task Force” to consider “measures intended to promote the selection of diverse jury panels” and Washington’s recently-enacted rule regarding implicit and explicit bias are reviewed. Finally, the article discusses whether peremptory challenges should be abolished.

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the community perception of a fair and just jury system, and is simply unrelated to a potential juror’s fitness to be fair and impartial during the trial and deliberations.\textsuperscript{20}

\textbf{The Supreme Court’s Batson Decision}

In \textit{Batson v. Kentucky}, the Supreme Court created a procedure for determining whether peremptory challenges are based upon discrimination. The three-step procedure is:

1. The party opposing the peremptory challenge must make out a \textit{prima facie case of an inference of discrimination};\textsuperscript{21}

2. The party exercising the peremptory challenge must then “come forward with a \textit{neutral explanation}, that need not rise to the level justifying a challenge for cause, related to the particular case to be tried;”\textsuperscript{22} the party opposing has an opportunity to rebut the explanations of the party exercising the challenge;\textsuperscript{23}

3. The court determines \textit{whether purposeful discrimination has been proven} by a preponderance of the evidence by the opposing party.\textsuperscript{24}

A trial judge may consider all relevant factors in determining whether at step 1 there is a \textit{prima facie case} of an inference of discrimination and whether at step 3 there is purposeful discrimination by the party exercising the challenge. Factors the court may consider include:

- \textbf{statistical evidence} about the use of peremptory strikes against the race or gender of prospective jurors as compared to the race and gender of other prospective jurors in the case\textsuperscript{25}

- \textbf{disparate questioning} and investigation of prospective jurors with racial or gender differences

- \textbf{comparative analysis} of the race, ethnicity, and gender of prospective jurors who were struck and the race and gender of prospective jurors who were not struck in the case\textsuperscript{26}

- \textbf{misrepresentations of the record} by a party when defending the strikes during the \textit{Batson} hearing

- \textbf{relevant history in past cases} of use of peremptory strikes by the challenging party

- \textbf{any other relevant circumstances} that bear upon the issue of racial or gender discrimination\textsuperscript{27}

- The constitution forbids striking even a single prospective juror for a discriminatory purpose.\textsuperscript{28}

- As few as one strike against a venire member may constitute a \textit{prima facie} case.\textsuperscript{29}

The party exercising the peremptory challenge may provide a race- or gender-neutral reason for exercising the peremptory challenge.\textsuperscript{30} The reason must give a “clear and reasonably specific explanation of his legitimate reasons for exercising the challenge.”\textsuperscript{31} “Proof that the [challenging party’s] explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.”\textsuperscript{32}

\textbf{Expansion of Batson}

\textit{Batson} concerned a black defendant and the challenge to a black potential juror in a criminal case.\textsuperscript{33} The principle was expanded to include challenges where the defendant and the excluded juror were of different races,\textsuperscript{34} different ethnic groups,\textsuperscript{35} to private litigants in civil cases,\textsuperscript{36} and to peremptory challenges by criminal defendants.\textsuperscript{37} The Court has held that not only did the Equal Protection Clause protect litigants, but it also protected the individual potential juror from being excused because of race or gender.\textsuperscript{38} Some courts have extended \textit{Batson} to challenges based on religious affiliation.\textsuperscript{39} Other courts have extended the principle to sexual orientation.\textsuperscript{40} Although the issue has never been addressed by the United States Supreme Court, the majority of jurisdictions have interpreted \textit{Batson}’s requirement that peremptory challenges cannot be based upon race to include challenges against white potential jurors.\textsuperscript{41}

Notwithstanding this expansion of \textit{Batson}, Justice Breyer has noted “the use of race- and gender-based stereotypes in the jury selection process seems better organized and more systematized than ever before.”\textsuperscript{42}
A Change in Analysis Reversed by Miller-El?

Shortly after the expansion of Batson during the 1991-1994 sessions of the Supreme Court, the question arose as to what type of “race-neutral” explanation was required if the trial court found a prima facie case of an inference of discrimination. Batson itself required that the reason must be “related to the particular case to be tried.” In Hernandez v. New York, the Court addressed an issue of peremptory challenges made against two individuals because they spoke Spanish as well as English. The Court held that a policy of striking jurors because they spoke a different language, “without regard to the particular circumstances of the trial or the individual responses of the juror” may be a pretext for discrimination. After Batson and Hernandez, the test for an appropriate race-neutral peremptory challenge was that the explanation must be (1) related to the case on trial, and (2) related to the individual responses of the jurors.

Unexpectedly, a per curiam opinion in Purkett v. Elem changed these principles. In that case, the prosecution used peremptory challenges against two black men. The prosecution gave as “neutral reasons” that one juror had “long hair” that was “curly, unkempt.” The juror also had a “mustache and a goatee type beard.” The second juror also had a mustache and goatee type beard. One of the two jurors had had a shotgun pointed at his face during a robbery.

The Eighth Circuit reversed the trial court’s finding. The appellate court held that where a challenge was based upon factors which are “facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person’s ability to perform his or her duties as a juror.”

On appeal, the Supreme Court held that during the third step of a Batson analysis, implausible or fantastic reasons may be found to be pretexts for discrimination. However, the Court held that “what it means by a ‘legitimate reason’ is not a reason that makes sense, but a reason that does not deny equal protection.” The Court reasoned because beards and facial hair are not specific to any one race, the peremptory challenges were not discriminatory.

The dissent in Purkett observed that the Court overruled a portion of Batson. The dissent stated: Today, without argument, the Court replaces the Batson standard with the surprising announcement that any neutral explanation, no matter how “implausible or fantastic,” . . . even if it is “silly or superstitious,” . . . is sufficient to rebut a prima facie case of discrimination. A trial court must accept that neutral explanation unless a separate “step three” inquiry leads to the conclusion that the peremptory challenge was racially motivated. The Court does not attempt to explain why a statement
that “the juror had a beard;” or “the juror’s last name began with the letter ‘S’” should satisfy step two, though a statement that “I had a hunch” should not. . . . It is not too much to ask that a prosecutor’s explanation for his strikes be race neutral, reasonably specific, and trial related. Nothing less will serve to rebut the inference of race-based discrimination that arises when the defendant has made out a prima facie case.  

After its decision in *Purkett*, the Court changed course again, saving the requirement of rational, non-discriminatory reasons for peremptory challenges in *Miller-El v. Cockrell*. At step three, the persuasiveness of the justification by the party exercising the peremptory challenge is the critical question. The persuasiveness of what may be, under *Purkett*, “implausible or fantastic justifications” are examined to determine whether those justifications are pretextual. The credibility of the reason may be measured by the totality of the circumstances including the party’s “demeanor; by how reasonable, or improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.” By mentioning “trial strategy,” the Court re-inserted the requirement that the reasons be related to the case currently at trial. Applying this reasoning, while facial hair may be a non-discriminatory reason under *Purkett*, that a potential juror has facial hair would not be an acceptable reason under *Miller-El*.

**Delay in Addressing Batson Challenges**

In light of the constitutional issues raised by the use of peremptory challenges, commentators have expressed concern over the time between the jury selection in a particular case and the appellate review using the *Batson* standards. A *Batson* objection must be raised in a timely manner. Some courts have held that the objection is only timely raised if it is before the remainder of the venire is excused and the jurors sworn. Whether a timely objection is made is dependent upon the procedures in the particular jurisdiction concerning jury selection.

However, decisions on even timely-raised *Batson* objections can take years to resolve. In *Miller-El v. Cockrell*, the jury selection was in 1986 while the Supreme Court decision was in 2003 – a period of 17 years. In *Flowers v. Mississippi*, the murder was committed in 1996, the Supreme Court decision was in 2019 – a period of 23 years. In *Foster v. Chapman*, which involved a 1986 murder, the Supreme Court’s decision was in 2016 – 30 years later. From a plaintiff’s perspective, attempting to retry a case originally tried over 15 years ago can be an insurmountable obstacle.

**Issues with *Batson* Analysis of Peremptory Challenges and Movement Toward *Batson* Reform**

*Batson* has long been criticized as ineffectual in addressing the discriminatory use of peremptory challenges. However, “given all the problems of *Batson*, it may well be that an adjustment here and there may not be enough.” *Batson* has been seen by many “as so ineffective that alternate approaches to race-neutral jury selection have been proposed, including eliminating peremptory challenges altogether, employing affirmative-action principles into jury selection, imposing specific ethical rules on counsel that afford disciplinary sanctions for purposeful discrimination, and using blind questionnaires and video recording of questioning in voir dire.” Some of the many proposed solutions are discussed below.

**Connecticut’s “Jury Selection Task Force”**

One recent step toward *Batson* reform is illustrated in *State v. Holmes*. In *Holmes*, the Connecticut Supreme Court affirmed the conviction of the defendant over his objections to *Batson* error, finding that the lower courts had correctly applied Connecticut caselaw, which was consistent with federal caselaw. However, the court created a “Jury Selection Task Force” to address issues of disparate impact and implicit bias. The court anticipated that the Task Force members, to be appointed by the Chief Justice, would include a “diverse array of stakeholders from the criminal justice and civil litigation communities.” The specific issue in the case was whether at *Batson* step two, fear or distrust of law enforcement is a race-neutral reason for exercising a peremptory challenge. The Connecticut Supreme Court, examining its prior case law, held that in *Holmes*’ specific case, fear or distrust constituted a race-neutral reason. But the Court, looking forward, created the Task Force to make proposals for meaningful changes relating to discriminatory use of peremptory challenges. The Court sought responses to four issues: 1) proposed changes in the statute concerning the “juror confirmation form and confidential juror questionnaire,” 2) steps to ensure that
venires are drawn from a fair cross-section of the community, representative of its diversity;\textsuperscript{78} 3) model jury instructions on implicit bias;\textsuperscript{79} and 4) proposals for substantive standards to eliminate the purposeful discrimination finding that is now required by \textit{Batson}.\textsuperscript{80} The court concluded, “we ‘hope . . . that our decision sends the clear message that this court is unanimous in its commitment to eradicate racial bias from our jury system, and that we will work with all partners in the justice system to see this through.”\textsuperscript{81}

**Modify Batson To Exclude the First Step**

In a recent California Supreme Court case, \textit{People v. Rhoades}, the defendant complained that the prosecution used peremptory challenges to excuse all black potential jurors from the retrial of a death sentence.\textsuperscript{82} Each potential juror completed a 162-question, 44-page questionnaire.\textsuperscript{83} The defendant made two \textit{Batson} motions: the first after the prosecutor struck three black women, and the second after yet another black woman was struck.\textsuperscript{84} The Court stated the test of a prima facie case was that “the objector must show that it is more likely than not the other party’s peremptory challenges, if unexplained, were based on impermissible group bias.”\textsuperscript{85} The Court found that under the totality test, the evidence offered by the defendant was not sufficient to “give rise to an inference of discrimination.”\textsuperscript{86}

Justice Liu dissented from the majority holding in \textit{Rhoades}.\textsuperscript{87} The Justice criticized the trial and appellate courts for “hypothesizing reasons for the removal of minority jurors.”\textsuperscript{88} The Justice noted that “it has been more than 30 years” since the California Supreme Court had found \textit{Batson} error against the use of a peremptory challenge against a black juror.\textsuperscript{89} The Justice suggested two options to address the discriminatory use of peremptories: first, the courts should not use “hypothesized reasons in first-stage \textit{Batson} analysis,”\textsuperscript{90} and second, to “essentially eliminate \textit{Batson}’s first stage.”\textsuperscript{91} Excluding the first stage would require the party exercising the strike, if an objection is made, to provide “reasonably specific and clear race-neutral explanations for the strike.”\textsuperscript{92} Eliminating the step will unmask intentional and implicit biases by requiring parties to base their challenges in concrete reasons focused on this potential juror’s service in this specific case.\textsuperscript{93} Requiring such an explanation “would serve the important goals of promoting transparency, creating a record for appellate review, and ensuring public confidence in our justice system.”\textsuperscript{94}

**Strengthen Batson’s Second Step Inquiry**

Some courts have required a more stringent inquiry as to the justification for the challenge at the second step. In \textit{Ex Parte Bruner}, the Alabama Supreme Court followed a “quasi-Batson” approach.\textsuperscript{95} When a movant meets the first prong of \textit{Batson}, the challenging party must “articulat[e] a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory.”\textsuperscript{96} Similarly, the Florida Supreme Court has emphasized that, under the second prong of its approach to \textit{Batson}, the prosecution must identify a “clear and reasonably specific” race-neutral explanation that is related to the trial at hand.\textsuperscript{97}
The Washington State Solution: Making Step Three Stronger

Effective in April 2018, the Washington Supreme Court enacted General Rule 37 concerning jury selection in all jury trials in an attempt to eliminate the use of peremptory challenges to exclude potential jurors based on race or ethnicity.99 When the trial court or a party objects to a peremptory challenge by raising the issue of an improper purpose for the exclusion, the Rule provides a procedure for the trial court judge to follow.100 The objector must simply state that the objection is made pursuant to the Rule.101 The challenge must be made before the potential juror is excused.102

Once the objection is made, the party exercising the challenge must state the reasons supporting the challenge.103 The court evaluates the reasons given and determines whether “an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.”104 The rule defines an “objective observer” as someone who is aware of “implicit, institutional, and unconscious biases” that have resulted in unfair exclusion based upon race or ethnicity.105 If the trial judge finds that race or ethnicity was a factor, the challenge is denied.106 The court need not find purposeful discrimination.107

The trial court is directed to consider the totality of circumstances including:

(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it
(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors
(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party
(iv) whether a reason might be disproportionately associated with a race or ethnicity
(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases108

The Washington Supreme Court went further and found certain reasons to be “presumptively invalid.”109 Those reasons include:

(i) having prior contact with law enforcement officers
(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling
(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime
(iv) living in a high-crime neighborhood
(v) having a child outside of marriage
(vi) receiving state benefits
(vii) not being a native English speaker110

Finally, the court set forth conduct that attorneys have used to explain peremptory challenges that are suspect.111 The conduct by the potential juror included things such as being inattentive, failing to make eye contact, attitude, demeanor or providing confused answers.112 The rule requires that the party offering such reasons must give notice so the behavior can be “verified and addressed in a timely manner.”113 The rule mandates that a lack of corroboration “shall invalidate the given reason for the peremptory challenge.”114

The Washington Supreme Court’s decision in State v. Jefferson applied the same reasoning as the Rule.115 The court stated, “Our current Batson standard fails to adequately address the pervasive problem of race discrimination in jury selection... step three of the Batson inquiry must change” to whether “an objective observer could view race as a factor in the use of the peremptory challenge.”116

Washington’s rule change has influenced other courts. The Oregon Court of Appeals has observed that steps can be taken to ensure that jury selection is free from implicit or explicit discrimination,117 and discussed Washington’s recent rule change.118 The Oregon court noted that “Washington’s experience, and whether a similarly concrete set of rules would
improve our handling of peremptory challenges, are questions that may be appropriate for the Council on Court Procedures and the legislature to consider.”

Other Justices of state courts have argued for consideration of the Washington rule.

**Changing Discriminatory Intent to Discriminatory Impact**

One author has suggested that the way to abolish discrimination in peremptory challenges is to change the required finding at step three from one of the challenging party’s intent to the impact of the challenge on the jury’s diversity. Batson “has proven toothless at preventing discriminatory jury strikes because judges routinely accept pretextual race-neutral excuses for them.” The message, this author argues, is that parties “may continue to create all-white juries using peremptory challenges and excuse them with race-neutral pretexts as long as they don’t do it . . . blatantly.”

If her recommendation was adopted, the trial court would look at the makeup of the jury in determining whether discrimination was at play. The author argues that the reality is that white jurors presume that minority defendants are guilty based upon racism. According to this author, “In short, the all-white juries of the slavery system were a mechanism used by whites to uphold the system of slavery.”

**Return to Pre-Batson Examination of Peremptories?**

Curtis Flowers was tried six times for the murder of three white and one black victim. The second, third, and sixth trials were reversed because of racial discrimination in the use of peremptory challenges. In a 2019 decision, the Supreme Court noted that, in the six trials combined, the prosecution used peremptory challenges to excuse 41 of 42 black prospective jurors. The Court found in the sixth trial that the prosecution had struck five of the six black potential jurors, that the prosecution had engaged in “dramatically disparate questioning” based on race, and that at least one potential juror was similarly situated to a white potential juror who was not excused. The totality of those circumstances, the Court held, established clear error by the trial court requiring reversal of Flowers’ conviction and sentence.

In his dissent in Flowers v. Mississippi, Justice Thomas pointed instead to the past. Where the majority found overwhelming racial discrimination, the Justice found that the record of the prosecution’s conduct during jury selection provided no evidence of purposeful discrimination. The Batson rule “was suspect when it was announced, and I am even less confident of it today.” The Justice argued that Flowers did not have standing to assert the excluded juror’s
claim and that he has not demonstrated that the jury that convicted and sentenced him was not impartial. Therefore, the Justice concluded, the defendant suffered no cognizable injury and no relief should have been granted. The historical basis for a peremptory challenge is not the juror’s competence, ability, or fitness but is instead based upon the attorney’s intuitions that a potential juror may be less sympathetic to his case.

Justice Thomas stated that “the entire line of cases following Batson is a misguided effort to remedy a general societal wrong by using the Constitution to regulate the traditionally discretionary exercise of peremptory challenges.” The Justice would return to pre-Batson procedure and “thereby return to litigants one of the most important tools to combat prejudice in their cases.” Peremptory challenges are made with limited knowledge of the potential jurors. Batson, the Justice stated, “rejects the premise that peremptory strikes can be exercised on the basis of generalizations and demands instead an assessment of individual qualifications.” This individual focus is “wholly contrary” to the reasons for peremptory challenges.

Justice Thomas stated that because of Batson and its progeny, “it is impossible to exercise a peremptory strike that cannot be challenged by the opposing party.” The Justice looked back to Strauder v. West Virginia, where the Court found unconstitutional a statute that prohibited blacks from serving on juries. He also cited to Swain v. Alabama, where the Court held that individual peremptory challenges could not give rise to a Constitutional challenge.

Justice Thomas would return to pre-Batson law, freeing peremptory challenges from being attacked based on a single potential juror. By abolishing Batson, he believes, the peremptory challenge would be reinvigorated, which “affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial.”

Abolition of Peremptory Challenges?

In Batson, Justice Marshall in his concurrence wrote:

The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

Justice Marshall noted that the exclusion of jurors based upon race “has become both common and flagrant.” The Justice cited statistics from the mid-1970s: 68.9% of black jurors challenged by federal prosecutors in Louisiana; 82% of black jurors challenged in South Carolina by state prosecutors; 86.7% of black jurors challenged by state prosecutors in Dallas County, Texas. Justice Breyer, in his concurrence in Miller-El v. Dretke, cited more recent statistics. Between 1981 and 1997 prosecutors in Philadelphia struck 51% of black jurors and only 26% of non-black jurors, while defense attorneys struck 26% of black jurors and 54% of non-black jurors. In a county in North Carolina, 71% of black jurors were excused by the prosecution and 81% of white jurors were excused by the defense.

Two states at that time had adopted similar procedures as those required by the Batson holding. The Justice pointed out the shortcomings of the procedure: first, the questioned challenge had to be so flagrant that it established a prima facie case; second, trial courts have a difficult task in assessing motives, and the person exercising the challenge may not even be telling the truth about the motive behind the strike.

The Justice looked at some authors who had suggested that only the prosecutor’s peremptories be eliminated, but that the defendant’s peremptories should be maintained. That solution was not acceptable to Justice Breyer, because a fair criminal justice system requires not only a freedom from bias against the defendant, but also a freedom from bias against the prosecution. The only way to maintain a balance of fairness and to end discrimination is to ban peremptory challenges by all parties.
Since Justice Marshall’s concurrence in *Batson*, others have joined the call to abolish peremptory challenges.\(^{158}\) For example, in *Swain v. Alabama*, Justice Goldberg in dissent stated:

> Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.\(^{159}\)

Iowa Supreme Court Justice David Wiggins in his concurrence in part in *State v. Veal* stated that “the only way to stop the misuse of peremptory challenges is to abolish them.”\(^{160}\) The judge noted that instead of creating a fairer jury the use of peremptory challenges defeated the random draw techniques used to guarantee a representative trial jury.\(^{161}\) “If a person can sit as a juror under the Code and rules, a party should not be able to strike that otherwise qualified juror.”\(^{162}\)

**Conclusion**

Discrimination on the basis of race, ethnicity, and gender continues to be a problem in jury selection of both civil and criminal trials. To overcome that discrimination, suggestions have been made, and some adopted, to strengthen the various steps of *Batson*. Perhaps the most far-reaching change is the state of Washington’s general court Rule, which applies to all trials, civil and criminal. The state has essentially constitutionalized the Rule by holding that application of *Batson* in Washington requires the procedure described in the Rule. That procedure eliminates step one of the *Batson* test, the requirement of a showing of an inference of discrimination. It instead places on the party that is exercising the peremptory challenge the duty of showing that discrimination was not a factor. The Rule also precludes certain justifications and limits other justifications for a peremptory challenge. Another solution, according to Justice Thomas, is to do away with the *Batson* test altogether and return to pre-*Batson* procedures. On the other hand, the solution suggested by Justice Marshall in *Batson* is to eliminate peremptory challenges.

However, there are reasons to retain the peremptory challenge even in the face of persistent discrimination in its use. The use of peremptory challenges does permit a party to de-select those jurors who appear biased toward the opposing party, ultimately resulting in a fairer jury. The peremptory challenge system itself permits the parties to more deeply explore biases of the potential jurors than a system that would permit only challenges for cause. If the trial court judge denies a challenge for cause, a peremptory challenge can be used to excuse a juror that the party believes is biased.

The best solution may well be for courts, by modifying court rules, or legislatures, by amending or enacting statutes, to strengthen the various steps in determining whether there is discrimination in the use of peremptory challenges. The fact that peremptory challenges have been a part of the common law, statutes, and court rules, for over 700 years indicates that they still have a place in ensuring a fair trial for all parties.


Endnotes

2 Id. at 273.
6 See, e.g. California, C.C.P. §§ 225(b), 226; Florida, Fla.R. Civ.P. 1.431(c); Massachusetts R.Civ.P. 47(a); Texas, R.C.P. 504.2(d); Washington, R.C.W.A. §§ 4.4.130, 4.4.170, 4.4.180 (implied bias); 4.4.190 (actual bias).
7 C.C.P. §225(b).
10 22 Okla. Stat. Ann. § 659; 2; see also Cal. C.C.P. § 225(b).
11 The term “peremptory” comes from the Latin word "peremptorius" meaning decisive or final. https://www.etymonline.com/word/peremptory.
12 Frazier v. United States, 335 U.S. 497, 505 (1948).
14 Id. at 213.
15 See An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. at Large 119, Act of Apr. 30, 1790, ch. 9 § 30.
17 See, e.g. United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000) (holding "peremptory challenges are not of federal constitutional dimension.").
18 Batson v. Kentucky, 476 U.S. 79, 85 (1986) (holding equal protection is violated when a black defendant is put on trial before a jury selected by excluding members of the defendant's race).
20 Strauder v. West Virginia, 100 U.S. 303, 304 (1879) (holding unconstitutional a West Virginia statute that denied “colored citizens the right and privilege of participating in the administration of the law as jurors, because of their color”) Batson, 476 U.S. at 100, remanding for a hearing on the basis of the prosecution’s peremptory challenges to all black potential jurors.
21 This step is often stated as “a prima facie case of discrimination,” but Batson itself uses the phrases "an inference of purposeful discrimination," 476 U.S. at 94; "raise an inference," Id. at 96; "an inference of discriminatory purpose," Id. at 97. See also, Flowers, 139 S.Ct. at 2246 (2019); Johnson v. California, 545 U.S. 162, 170, 173 (2005) (“petitioner’s evidence supported an inference of discrimination”); Miller-El v. Cockrell, 537 U.S. 322, 346-47 (2003) (“inference of discrimination”); Hernandez v. New York, 500 U.S. 352, 376, 377 (1991). In Johnson, the Court rejected California’s standard at the first step that it must be shown by a “strong likelihood” and instead held that the first step is satisfied by “producing evidence sufficient to permit the trial judge to draw an inference that discrimination occurred.” 545 U.S. at 170.
22 Batson, 476 U.S. at 97-98.
23 Id. at 98.
24 Id.
25 See, e.g. Ray-Simmons v. State, 132 A.3d 275, 283-84 (Md. App. 2016) (holding that the prosecution’s exercise of five peremptory challenges, all to remove African-American men, satisfied the preliminary burden of producing a prima face case of race and gender discrimination). Compare United States v. Elsparsen, 930 F.2d 1461 (10th Cir. 1991) (“By itself, the number of challenges used against members of a particular race is not sufficient to establish or negate a prima facie case.”) with Jones v. West, 555 F.3d 90, 98 (2nd Cir. 2009) (the record should include “the number of peremptory challenges used against the racial group, the number of peremptory challenges used in total, and the percentage of the venire that belongs to that racial group.”)
26 See, e.g. People v. Hogan, 904 N.E.2d 1144, 1156-57 (Ill. App. 2009) (“An inference of purposeful racial discrimination is raised where the State accepts white jurors having the same characteristics as black venirepersons that were excused for having that characteristic.” The prosecution used the criteria of crime victims.); People v. Bell, 702 N.W.2d 128, 135-36 (Mich. 2005) (peremptory challenge of white males by defendant, the defendant's explanation that “the number of white males on the panel still exceeds the number of the minorities on that panel” insufficient); State v. Hodge, 726 A.2d 531, 542 (Conn. 1999) (“persons with the same or similar characteristics but not the same race or gender as the challenged juror were not struck”).
27 Flowers v. Mississippi, 139 S.Ct. 2228, 2243.
28 Foster v. Chattman, 136 S.Ct. 1737, 1747 (2016); United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994).
30 Batson, 476 U.S. at 97.
31 Id. at 98 n. 20.
33 Batson, 476 U.S. at 83.
See, e.g., United States v. Brown, 352 F.3d 654, 668 (2d Cir. 2003); United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir. 1998) (stating in dicta that it would be “unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, a Muslim, etc. but suggesting it would be proper to strike the potential juror on the basis of certain attitudes that would prevent him from basing his decision on the evidence and instructions); People v. Bryant, 253 Cal. Rptr. 3d 289 (Cal. App. 2019) (holding that while a party may use a peremptory to strike prospective jurors, the party may not use group bias against “members of an identifiable group distinguished on . . . religious . . . grounds.”); Pacchiana v. State, 240 So. 3d 803, 813 (Fla. App. 2018) (“Appellant has a right to a fair and impartial jury panel where the state does not exclude members of a religion in the absence of competent substantial evidence that the potential juror cannot be fair and impartial due to her views related to her members in that religion.”); Oswalt v. State, 19 N.E.3d 241, 246 (Ind. 2014) (peremptory challenges only limited by “the constitutional ban on racial, gender, and religious discrimination.”); State v. Fuller, 862 A.2d 1130, 1143 (N.J. 2004) (“cognizable groups include those defined on the basis of religious principles . . . .”); State v. Purcell, 18 P.3d 113, 122 ¶ 29 (Ariz. App. 2001); State v. Hodge, 726 A.2d 531, 550 (Conn. 1999).

SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471, 479-86 (9th Cir. 2014) (holding “strikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation’s most cherished rites and rituals.”); People v. Garcia, 92 Cal.Rptr.2d 339, 347-48 (Cal. App. 2000); but see United States v. Windsor, 570 U.S. 744, 754 (2013) (holding that whether heightened equal protection scrutiny should apply was still being debated and considered by the lower courts in a “marriage” definition case); United States v. Blaylock, 421 F.3d 758, 769 (8th Cir. 2005) (doubting whether Batson applied to sexual orientation).


Miller-El v. Dretke, 545 U.S. 231, 270 (Breyer, J., concurring).

Batson, 476 U.S. at 98.


Id. at 356 (the prosecutor expressed concern that the jurors would not be able to listen and follow the interpreter).

Id. at 371-72.


Id. at 766.

Id.

Id.

Id.

Id.

Id.

Id.

Elem v. Purkett, 25 F.3d 679 (8th Cir. 1994).

Id. at 683.

Purkett, 514 U.S. at 768.

Id. at 769.

Id.

Id. at 770 (Steven, J., dissenting joined by Breyer, J.).

Id. at 775.


Id. at 338-39.

Id. at 339.

Id.

Batson, 476 U.S. at 99; Ford v. Georgia, 498 U.S. 411, 420 (1991) (holding that a pretrial motion preserved the Batson challenge); United States v. Tomlinson, 746 F.3d 535, 535-36 (6th Cir. 2014) (objection was timely when raised before jury was sworn); McCrory v. Henderson, 82 F.3d 1243 (2nd Cir. 1996) (holding that if the objection is raised during jury selection, the error is remedial); Morning v. Zapata Protein, Inc. 128 F.3d 213, 215 (4th Cir. 1997) ("a prompt objection provides an opportunity for prompt error correction, avoiding costly mistrial and unnecessary reversals"); United States v. Dobyns, 905 F.2d 1192, 1196-97 (8th Cir. 1990) (holding that Batson challenge raised for the first time after trial was untimely in part because only remedy after trial is vacating the conviction); United States v. Forbes, 816 F.2d 1006, 1011 (5th Cir.1987) ("The ‘timely objection’ rule is designed to prevent defendants from ‘sandbagging’ the prosecution by waiting until trial has concluded unsatisfactorily before insisting on an explanation for jury strikes that by then the prosecutor may largely have forgotten.").
finds it objectionable to do so. “

Such information need not be furnished if the prospective juror is not a prerequisite to being qualified for jury service and that in the selection process, that the furnishing of such information race and ethnicity is required only to enforce nondiscrimination informing the prospective juror that the information concerning race, occupation and education and required the questionnaire to

Questionnaires could inquire about a juror’s name, age, race and ethnicity. The provision was amended to provide “that questionnaires need not be furnished if the prospective juror

During jury selection, the Washington State Supreme Court recently announced a modified inquiry. In recognition of the failure of the current framework to effectively combat racial discrimination during jury selection, the Washington State Supreme Court recently announced a modified Batson inquiry. State v. Jefferson, 429 P.3d 467, 469 --70 (Wash. 2018).

Veal, 930 N.W.2d at 361 (Iowa 2019) (J. Appel concurring and dissenting) (giving a historical analysis of discriminatory challenges and how the courts have attempted to stop the discrimination).


221 A.3d 407 (Conn. 2019)

Id. at 412.

Id. at 417.

Id. at 427-428.

Id. at 437.

Id. at 437, Conn. Gen. Stat. § 51-232(c). In 1996, the juror questionnaire provision was amended to provide “that questionnaires could inquire about a juror’s name, age, race and ethnicity, occupation and education and required the questionnaire to inform the prospective juror that the information concerning race and ethnicity is required only to enforce nondiscrimination in the selection process, that the furnishing of such information need not be furnished if the prospective juror finds it objectionable to do so.” Id.

Holmes at 437.

Id.

Id.
adopts GR 37 into our Batson framework, which is unnecessary and inappropriate.” Id. at 482, ¶ 73.
118 Id.
119 Id.
120 See, e.g. State v. Veal, 930 N.W.2d 319, 358 (Iowa 2019) (J. Appel concurring in part and dissenting in part).
122 Id. at 95.
123 Id. at 98.
124 Id. at 104.
125 Id. at 100.
126 Flowers v. Mississippi, 139 S.Ct. 2228, 2234 (2019)
127 Id. at 2235.
128 Id.
129 Id.
130 Id.
131 Id.
132 Id. at 2252-74.
133 Id. at 2255.
134 Id. at 2269.
135 Id. at 2270.
136 Id.
137 Id. at 2272.
139 Id.
140 Id. at 2272.
141 Id. at 2273.
142 Id.
143 Id.
144 100 U.S. 303, 308-09 (1880).
146 Flowers at 2272 citing Swain, 380 U.S. at 212.
147 Batson, 476 U.S. at 102-03.
148 Id. at 103.
149 Id. at 103-04.
151 Id.
152 Id. at 268-69.
153 Batson, 476 U.S. at 105.
154 Id. at 105-06.
155 Id. at 107.
156 Id.
157 Id. at 107-08.
159 Swain v. Alabama, 380 U.S. 203, 244 (1965) (J. Goldberg, dissenting).
160 State v. Veal, 930 N.W.2d 319, 340 (Iowa 2019), see also Minetos v. City University of New York, 925 F.Supp. 177, 183, 185 (S.D.N.Y.1996) (stating that “all peremptory challenges should now be banned as an unnecessary waste of time and an obvious corruption of the judicial process” and holding that “peremptory challenges per se violate equal protection”); Alen v. State, 596 So.2d 1083, 1086 (Fla. Dist. Ct. App. 1992) (Hubbart, J., concurring) (“Rather than engage in a prolonged case-by-case stranguation of the peremptory challenge over a period of many years which in the end will effectively eviscerate the peremptory challenge or, at best, result in a convoluted and unpredictable system of jury selection enormously difficult to administer—I think the time has come, as Mr. Justice Marshall has urged, to abolish the peremptory challenge as inherently discriminatory”); People v. Hernandez, 552 N.E.2d 621, 625 (1990)(Titone, J., concurring) (“I suspect that rather than developing a complex set of judicially imposed limitations and standards, the most constructive course would be for the Legislature to take a hard look at the existing peremptory system with a view toward determining whether it is still viable”), aff’d 500 U.S. 352 (1991)
161 Veal, 930 N.W.2d at 340-41.
162 Id.
All rise.

This past November, the Ohio Attorney General’s Office hosted its seventh annual Mock Trial Competition. Each year since 2013, the office has invited students at the nine law schools within Ohio to participate in the program, which centers on a public service-related case.

The Mock Trial Competition is designed to be mutually beneficial, providing the attorney general a way to promote careers in public service to future Ohio lawyers and affording law students an opportunity to learn directly from practicing attorneys and enhance their trial skills.

It also allows for an organic flow of ideas that not only challenges the students but also provokes thought among the legal professionals from my office who volunteer to coach and prepare the participating student teams. Professional development, after all, hardly ends in law school.

About 50 students typically take part in the daylong competition, spending their fall semester preparing for trial, which takes place in Columbus, Ohio. Many of the law schools give academic credit for participation.

The team coaches receive the case specifics in late August, and the coaches then work through law school faculty to recruit teams of second- and third-year law students. Once teams are finalized in September, the students and their coaches begin the prep work, developing persuasive and powerful case themes and practicing both the plaintiff’s and defendant’s sides of the case.

Students also serve as their team’s witnesses during trial, giving them a taste of the witness experience as well. Witness preparation is crucial, as it can make or break a team's performance and enables the students to thoroughly familiarize themselves with the patterns and evidence in the case.

The 2019 case scenario came from the Tennessee Attorney General’s Office, which collaborated with the National Attorneys General Training & Research Institute to develop a 42 U.S.C. Section 1983 case. Specifically, the plaintiff was a young motorcyclist who maintained that his constitutional rights had been violated by a state trooper’s alleged unlawful arrest and use of excessive force.

During the competition, each team presents both the plaintiff’s and defendant’s cases in a timed environment to a panel of three judges consisting of practicing trial lawyers and current and former judges. Teams are encouraged to use state-of-the-art courtroom technology, further preparing them for life as a trial lawyer. At the end of each round, the panel offers immediate feedback.

The day ends with an awards ceremony, at which the top three placing teams are recognized, along with the best attorney and witness performances for each trial. Year after year, judges and coaches walk away impressed with the teams’ level of preparation.

Mock trials, we have learned, can help separate the wheat from the chaff, which is why the annual competition has become such an effective recruiting tool for the Ohio Attorney General’s Office. Last year alone, we hired three participants in the 2018 competition – all three of whom are now thriving as assistant attorneys general.

Our experience with the competition speaks for itself in that it inevitably introduces us to some bright, passionate young minds – lawyers-to-be who embrace the notion of working for justice on behalf of the people of Ohio.

And the professional fulfillment that comes from ‘doing big good,’ they soon discover, is tough to beat.

If you’re interested in learning more about the Ohio Attorney General’s Mock Trial Competition, visit OAG-MockTrialCompetition@ohioattorneygeneral.gov.
JEANETTE MANNING, DIRECTOR OF THE NAGTRI CENTER FOR INTERNATIONAL PARTNERSHIPS AND STRATEGIC COLLABORATION

Without dispute, the world is increasingly shrinking due to globalization in its many forms. This phenomenon is no different in its effect on the legal community. Important issues affecting attorneys general—and the legal arena at large—surrounding cybercrime, consumer protection, disaster preparedness, hate crimes, drug and human trafficking, and the opioid crisis all have ties to well-funded and connected international criminal networks thanks to the internet and easy cross-border access. In light of this ever-evolving atmosphere, it is essential for organizations such as the National Association of Attorneys General (NAAG) to have a voice, through its members and their staff, on international matters and decisions shaping rule of law and justice sector reform. What occurs globally directly affects the attorneys general and their constituents collectively on a national level and individually within their respective states.

Given the dynamic role that attorneys general now play, with increased visibility and credibility on all fronts, their expertise, experience as chief legal officers of their states, and principled and steady judgment carries substantial weight in international settings concerning legal advocacy. It is to follow up on this international standing that NAAG, through its research and training arm, NAGTRI, sought to solidify its standing internationally and continue building relationships to benefit the attorney general community. Accordingly, in January 2019, NAGTRI officially launched its Center for International Partnerships and Strategic Collaboration (CIPS-C). This article describes the first year of operations for the Center.

CIPS-C was created to serve as the central location for streamlining all NAAG and NAGTRI international and domestic relationship-building and partnership efforts. I serve as director of the Center, and my colleague, Gina Cabrejo, serves as criminal justice instructor for Latin American programs.

NAAG and NAGTRI routinely work to build relationships and create opportunities for the attorney general community that help them to achieve their goals and serve as reliable global stewards. We have engaged in relationship-building work for years through hosting international delegations and fellows, supporting attorneys general serving as dignitaries in delegations abroad, using attorneys general and their staff to provide training to prosecutors, judges, defense attorneys, and civilian government officials within and outside the U.S., and providing evaluative assistance on justice sector reform projects, to name just a few of our efforts. These activities foster a learning environment for all involved and provide openings for improved cultural and legal understanding and support, which is indispensable in addressing worldwide problems that directly reach our shores. CIPS-C serves as NAAG’s and NAGTRI’s conduit to bridge gaps and address pressing demands affecting our world. CIPS-C’s mission is to focus on growing our international presence, building strategic partnerships in the global sphere, and providing training, technical, and research assistance to domestic and international attorneys, prosecutors, and other government representatives to promote security and enhance capacity.

Since its inception last year, CIPS-C has sought to initiate projects to assist, educate, and create opportunities for the attorney general community domestically and internationally. To date, CIPS-C has been successful in expanding its presence, establishing important relationships, and introducing entities to our Center. To introduce CIPS-C further to our readers, I will discuss the initial programming the Center has offered since it launched and note where it seeks to go in the immediate future.
Human Trafficking

Human trafficking is a global crime recognizing no borders and affecting every country in the world in myriad ways. Given the transient, global nature of this crime, both the human trafficking portfolio falls under CIPS-C’s purview. This centralization allows for coordinated efforts to strategize productively in and outside of the U.S., elevate the reach and content of human trafficking issues, and connect necessary partners with ease. CIPS-C has actively focused its attention on human trafficking since its official January 2019 launch in Carolina, Puerto Rico, where it held an international human trafficking conference in partnership with the International Association of Prosecutors (IAP) (see below). Since then (and including the Puerto Rico event), CIPS-C has made human trafficking a central priority in its work and efforts to expand its reach in a domestic and global setting. All programming since the Puerto Rico summit and conference has been designed to build upon the discussion and issues raised there, and to continue providing educational resources and information. CIPS-C continues to explore ways to heighten awareness on issues surrounding human trafficking and welcomes input from members and their offices on how it can assist offices.

Included below are some activities NAGTRI has engaged in to educate and capitalize on moments that bring together critical stakeholders to address this scourge:

**NAGTRI Human Trafficking Summit**

NAGTRI worked in conjunction with Utah Attorney General Sean Reyes and Massachusetts Attorney General Maura Healey, who jointly led NAAG’s Human Trafficking Committee, to plan the NAGTRI Human Trafficking Summit. The Summit was held in Carolina, Puerto Rico, for two days in January 2019. Attendees at the Summit included only U.S.-based prosecutors and assistant attorneys general from state attorney general offices, law enforcement officials, local prosecutors, and practitioners from non-governmental organizations. The Summit provided a forum for practitioners to focus on legal issues and challenges that primarily affect lawyers tasked with handling human trafficking cases in their respective jurisdictions and also provided them an opportunity to interact with critical stakeholders to coordinate efforts on this metastasizing crime. They were able to focus on innovative and trending investigative, prosecutorial, technological, and victim-focused strategies.

**NAGTRI and IAP Global Conference on Human Trafficking: Working Collaboratively to Conduct Effective Prosecutions and Restore Victims**

Immediately following the domestic summit, NAGTRI, along with the IAP, hosted a first-ever international conference bringing together domestic and international prosecutors, assistant attorneys general, law enforcement officials, and victim-service providers from around the globe to collaborate and learn from one another. The international conference was held in Carolina, Puerto Rico, for two days in January 2019. More than 100 people from over 22 countries from every region of the globe, including Africa, Asia, Europe, the Middle East, and North, Central and South America participated in the conference. Participants were able to develop important relationships and gather professional contacts. Practical tips and best strategies were shared to enable governments to investigate and prosecute human trafficking cases effectively while simultaneously ensuring victims are identified and protected using a victim-centered or trauma-informed approach. Two instantaneous benefits occurred during the conference involving immediate assistance to a U.S. state and another country. Information was shared on two pending cases: one involving determination of the physical location of an interested party and the other involving identification of a point of contact within a country far from the U.S. where a state attorney general office sought to make inroads on a matter. Neither of these successes would have been possible had this forum not occurred.
**NAGTRI Mobile Human Trafficking Training**

NAGTRI hosted a mobile training at the Kansas Attorney General’s Office in May 2019 that brought together assistant attorneys general, victim-service providers, and law enforcement officials to discuss human trafficking investigative and prosecutorial techniques. Participants were trained over the course of two days with opportunities to practice and discuss elements of human trafficking investigations and prosecutions using hypothetical case studies.

**Interviewing Victims of Human Trafficking**

NAGTRI, in partnership with AEquitas, hosted a webinar in April 2019 that focused exclusively on special considerations related to interviewing human trafficking victims. The webinar discussed how to recognize the signs and symptoms of trauma, conduct thoughtful and effective interviews, and implement trauma-informed strategies to secure victims’ safety and participation in the process.

**Sexual Cyber Predators: Understanding Sextortion and Holding Offenders Accountable**

NAGTRI, in conjunction with the U.S. Department of Justice Criminal Division, agreed to host a two-part webinar series on sextortion and sexual cyber predatory activities. The webinars offered an introduction to sextortion and its many forms and discussed current trends, special circumstances in identifying and working with vulnerable populations, investigating and making charging decisions, mental health considerations, common defenses, and case study review.

**Buenos Aires IAP Annual Conference, Special Interest Group Session: Trafficking in Persons Platform (TIPP), Fighting Human Trafficking Through Global Cooperative Efforts**

One of the primary goals of the January 2019 NAGTRI and IAP Global Conference on Human Trafficking was to ensure sustained conversation and coordinated efforts following the successful event. Accordingly, CIPS-C has worked directly with attorney general offices to maintain communication among the states and has continued working with Manon Lapointe from the Public Prosecution Service of Canada and the IAP to host a special session on human trafficking at the IAP annual conference and general meeting. Over 500 people attended the IAP Conference in Buenos Aires where the general theme focused on promoting global collaborative efforts across different legal systems. The Trafficking in Persons Platform (TIPP) session brought together a representative from the United Nations Office on Drugs and Crime in the Human Trafficking and Migrant Smuggling Section, the Director of Public Prosecutions of Uganda, and a federal prosecutor from Buenos Aires. The session was extremely well attended, indicating how relevant and important this topic is globally and to those in attendance. The presenters discussed the best ways to collaborate and the current trends and prosecutorial challenges to investigate and prosecute human trafficking cases while continuing to balance and respect victims’ needs.
International Fellows Program

NAGTRI’s international presence has grown through the years in part because of programming such as the annual International Fellows Program (IFP). The IFP brings together senior government attorneys to learn about a topic of mutual legal interest while meeting with high-ranking government officials and experts in the field, which culminates in delivering oral presentations before an esteemed panel and written papers offering collaborative approaches and recommendations on how prosecutors can best tackle challenging legal issues. 2019 marked NAGTRI’s ninth year hosting this unique program. With each program NAGTRI attempts to strategize on trending topics that affect attorneys in the U.S. and abroad. We have focused on topics such as rule of law, anti-corruption, trafficking in persons and goods, cybercrime, and innovative prosecutorial techniques.

The June 2019 program, held in Washington, D.C. and New York, analyzed an innovative topic and welcomed new staff to the program. Cybercrime is one of the fastest growing worldwide crimes measuring an estimated annual economic global loss of $600 billion, accounting for .08% of the world’s GDP. For this significant reason, focusing on cybercrime as the IFP theme was quite timely, and the program helped participants to consider anew its impact in the era of social media. Worldwide social media use has changed the environment in which government attorneys must consider how to combat, prosecute, and deter cybercrime. This year’s IFP class consisted of 20 highly qualified attorneys from Australia, Brazil, Canada, Dominican Republic, Germany, Ghana, Hungary, Israel, Moldova, South Korea, Switzerland, Taiwan, Uganda and the United Kingdom. U.S. participants were from Illinois, Louisiana, New Jersey, New York, Ohio, and Utah.

Participants heard from experts in the federal, private, and non-governmental sectors to help them prepare presentations and propose effective methodologies and recommendations to combat cybercrime in four areas: global cooperative efforts to prevent cybercrime; overcoming hurdles to secure evidence from social media companies; protecting the public and vulnerable populations from fraudulent uses and scams on social media; and corporate and government responsibility and accountability to protect data and assist law enforcement. The Fellows’ final papers and additional information about them, their respective roles, and office were included in the previous issue of the NAGTRI Journal.

Our successful IF Program requires a team effort from initial selection of candidates to final program execution. NAGTRI staff work to prepare for this program for nearly a year. The staff who work on this program are committed to excellence and global stewardship, extremely interested in international issues as it affects the world and the United States, and dedicated to bringing people together to collectively work on some of the world’s most challenging problems. This year, NAGTRI officially welcomed to the program Blake Bee, Director of the NAGTRI Center for Leadership Development. Although Blake is not new to NAGTRI, he first participated in the IFP as an observer in 2018 and decided to join the team and work on all facets of the program this past year and going forward. During his tenure with NAAG, Blake Bee helped to create the Prosecutors Consumer Protection Network (PCPN) at the annual IAP meeting in Johannesburg, South Africa in 2018. He also lectured on consumer protection law to government officials at the Public Ministry of the State of São Paulo and the annual conference of the National Association of Consumer Protection Prosecutors in Brazil.

In addition to new staff joining the program, special thanks are due to all NAAG attorney general members and their staff and NAGTRI staff who helped to make this program a success. NAGTRI owes a very special thanks to Attorneys General William Tong (CT), Kathleen Jennings (DE), and Gurbir S. Grewal (NJ) for their time, dedication, and attention while serving as distinguished panel members and offering insightful ideas and critiques to participants on their oral presentations. We also are sincerely grateful to Attorney General Latisha “Tish” James (NY) for her kindness in welcoming and hosting the NAAG staff and Fellows. NAGTRI staff members Molly Flanagan and Zoe Reinstein work tirelessly and effectively to make this program a success.

Unfortunately, the 2020 International Fellows program has been cancelled as a result of the COVID-19 pandemic. NAGTRI intends to reschedule the program to June 2021 focusing on prosecutorial strategies to combat domestic and sexual violence.
Siracusa International Institute for Criminal Justice and Human Rights

As the world continually shrinks as a result of borderless criminal activity, its manifestation, networks, and impact, attorneys within the attorney general community must develop relationships beyond those within their immediate offices and states. In fact, these relationships must extend globally, because many state offices already experience challenges with cases involving foreign nationals within their respective jurisdictions who either have committed crimes or are victims of crime, as well as entities or organizations with amorphous business records or inconsistent state presence. To minimize this conundrum, the Siracusa International Institute for Criminal Justice and Human Rights in Siracusa, Italy, offers a two-week course where junior attorneys from around the world gather to develop relationships, learn about international law, and how to apply it directly to cases.

CIPS-C recognizes the impossibility of effectively combatting crime without increased communication and improved collaboration. Siloed operations were once the norm, but this manner of handling cases is now ineffective and unsuccessful. Even in instances where attorney general staff have limited jurisdiction or are otherwise restricted in their legal authority regarding cases with tangential international elements, the established international relationships that they create through the Siracusa program facilitate better case management. NAGTRI has therefore offered scholarship opportunities to junior attorneys in attorney general offices who have been recognized as leaders in their office and who may work on matters that have an international reach. Each one-week scholarship provides an opportunity to better equip recipients to handle complex cases should special international components arise and to help their peers upon returning home. Moreover, they connect with diverse prosecuting attorneys throughout the globe, resulting in improved communication and interpersonal relationships that are key elements in obtaining case assistance and information.

This past year, NAGTRI provided scholarships to attorneys in the District of Columbia, Kentucky, and Nevada attorney general offices. The three attorneys participated in the first week of the course, where they met attorneys from around the globe, developed relationships, and learned about laws and cases involving international human rights, international treaties, human trafficking, environmental matters, government transparency, terrorism, cybercrime, wildlife trafficking, and international war tribunals.

Future Goals and Immediate Plans

Even though CIPS-C has officially been in existence for only fifteen months, the Center has been active in disseminating information and growing NAGTRI’s presence with more requests for assistance domestically and abroad. CIPS-C has identified various priorities for the immediate future in its quest to be good global partners and citizens through support from the attorney general community and will extend its efforts to find opportunities that ultimately will benefit the attorney general community. These will include using our best efforts to build domestic and international partnerships, enter into memoranda of understanding, identify and apply for funding opportunities, meet with and host delegations and serve as delegates, conduct training and offer similar assistance abroad pursuant to our existing memorandum of understanding with the U.S. Department of State, and streamline procedures and ensure continuity on our grant projects and domestic collaborative projects.

CIPS-C has also begun planning another international human trafficking conference that will be hosted in conjunction with the International Association of Prosecutors in Miami, Florida, in March 2021.

CIPS-C has received much positive feedback on how these opportunities have increased morale and given attorneys opportunities they otherwise would not have had to learn just as much as—if not more than—their colleagues abroad to whom they offer training. CIPS-C looks forward to establishing relationships, meeting with interested parties, and continuing important work that helps the attorneys general and their staff meet their offices’ and constituents’ needs in areas involving globalization.

Endnotes

This is another in our series reporting on recent decisions from across the country affecting the powers and duties of state and territory attorneys general.

ALABAMA

Attorney General is Not Proper Defendant in Federal Civil Rights Case

The city of Birmingham adopted an ordinance raising the minimum wage for workers in the city. The ordinance was enforceable through a lawsuit by an affected employee who was not receiving an appropriate wage. The Alabama legislature passed a statute (Act. No. 2016-18) that preempted all local ordinances by voiding any local law that required employers to pay wages higher than state or federal law mandates. Two African-American employees sued several state officials, including the attorney general, alleging that Act 2016-18 violated the Equal Protection clause. The court of appeals addressed the question of whether the plaintiffs had Article III standing to sue the attorney general.

During the time that Act 2016-18 was being considered by the legislature, the Birmingham City Council passed an ordinance that would have raised the minimum wage in the city by 39 percent immediately, rather than over a two-year period, as had previously been contemplated. Businesses in Birmingham expressed great concern, and the attorney general issued a press release that stated that under Alabama law, the ordinance could not take effect immediately. The press release concluded, “The Alabama Legislature is currently addressing this issue and I expect it will be resolved shortly without adversely affecting the citizens of Birmingham.”

Plaintiffs’ complaint alleges that Act 2016-18 violated the Equal Protection clause because, among other reasons, the act “perpetuates Alabama’s de jure policy of white supremacy, in particular its suppression of local black majorities through imposition of white control by state government.” Plaintiffs sought a declaratory judgment that the Act violates the Equal Protection Clause, an injunction directing the attorney general to notify the public that the Act is unconstitutional, and an injunction ordering the Birmingham city council to enforce the city’s minimum wage law.

The district court dismissed all the claims. A panel of the Eleventh Circuit reversed only the dismissal of the claim against the attorney general, because his broad authority to interpret and enforce a state statute gave an Article III connection to the plaintiffs’ injuries. The panel also held that the attorney general had a sufficient connection to the enforcement of the Act to make him a proper defendant under *Ex parte Young*, and that the plaintiffs had alleged sufficient discriminatory intent to state a plausible claim.

The Eleventh Circuit, sitting *en banc*, first outlined the requirements for standing. First, the plaintiff must have suffered an injury in fact. Second, there must be a causal connection between the injury and the challenged action of the defendant—it must be “traceable” to the defendant’s conduct. Third, it must be likely that a favorable judgment will redress the injury. The court found that the injury in fact requirement was satisfied in this case, but that the other two parts of the test were not.

Turning to the question of traceability, the court read the plaintiffs’ complaint to assert two theories about the attorney general’s conduct. First, in what the court called the *ex ante* claim, the plaintiffs’ alleged that the attorney general “refused to perform his statutory duty to inform the Legislature and the Governor of Act 2016-18’s unconstitutionality” and in fact issued a press release that implied that Birmingham employers would not have to comply with the minimum wage ordinance. Second, in what the court called the *ex post* claim, the plaintiffs argued that because the attorney general is either actually enforcing or threatening to enforce the law, the city of Birmingham is not implementing the ordinance.
With respect to the *ex ante* claims, the court disagreed that the attorney general implied that employers would not have to comply with the ordinance. The court noted that the attorney general twice said that employers would have a reasonable time to comply. Nor did the court agree that the attorney general’s press release stated his expectation that the state legislature would invalidate the ordinance. More important, the court held that the attorney general had no affirmative legal duty to inform the governor and legislature of the Act’s unconstitutionality. The court dismissed plaintiffs’ arguments that statutes requiring the attorney general to give his opinion, when asked to do so by certain state officials, were applicable here. No appropriate official had asked the attorney general for his opinion here. A statute that provided that the attorney general “may” examine statutes for clarity and constitutional validity only authorized such examination and did not require it.

Turning to the *ex post* theory, the court concluded that there is no threat of enforcement by the attorney general because the Act has no enforcement mechanism, and merely declares the city ordinance void. The Act would serve as a defense to an action by an employee against her employer but would not be “enforced” by any party.

The court next addressed the third prong of the standing test: redressability. This prong requires that a decision in the plaintiffs’ favor significantly increase the likelihood that plaintiffs would obtain direct redress for their injury, and that the redress come from the effect on the defendant of the court’s judgment. In this case, plaintiffs are seeking a higher wage from their employers, who are not parties to the suit, so the court concluded that they could not obtain direct redress. With regard to indirect redress, the court noted that a new mayor and city council had been elected since the original ordinance was enacted, and the city had not committed to enforcing the ordinance if the court ordered the attorney general to declare it unconstitutional. The court also noted that Birmingham employers would likely continue to refuse to pay significantly higher wages for as long as possible. Thus, the likelihood of plaintiffs’ obtaining a higher wage would not be significantly increased by the relief they are seeking from the attorney general. *Lewis v. Governor of Alabama*, No. 17-11009 (11th Cir. Dec. 13, 2019).

The Attorney General of Massachusetts opened an investigation of Facebook’s policies and protections with respect to user data, under G.L. c. 93A, which prohibits “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce” within Massachusetts. Section 6(1) of the statute provides “whenever . . . [the Attorney General] believes a person has engaged in or is engaging in any method, act or practice declared to be unlawful by this chapter, [he or she] may conduct an investigation to ascertain whether in fact such person has engaged in or is engaging in such method, act or practice.”

The Attorney General issued three civil investigative demands (CIDs) during her investigation. Facebook, which had retained a law firm to undertake an internal investigation, declined to provide, on work product and attorney-client privilege grounds, certain information generated in the course of its investigation about the specific apps, groups of apps, and app developers that Facebook claims to have flagged as potentially problematic.
The court first addressed the work product doctrine as interpreted by Massachusetts courts, and determined that the sole issue in this case is whether Facebook's documents were “prepared in anticipation of litigation or for trial.” The attorney general argued that Facebook’s motive for identifying apps who may have misused consumer data was to repair and enhance its public reputation after widespread criticism of its practices. The attorney general also argued that the investigation was not a new process established because of the prospect of litigation, but was a continuation of Facebook’s regular business practices, which it describes as engaging in “regular and proactive monitoring of apps” and investigating “for potential app violations.” The court agreed with the attorney general, concluding “The record shows that Facebook, as part of its normal business operations, has been engaged in a continuous review of Platform apps for possible violations of its Policies since 2012, and that the [investigation] is just another iteration of that program.”

Even if the material at issue had been prepared in anticipation of litigation, the court held that it would not be protected by the work product doctrine because that doctrine can be overcome if the party seeking the information has a substantial need for it and cannot obtain it through other means. That is the case here. “Only Facebook knows the identity of these apps and developers, and there is no other way for the Attorney General to obtain this information on her own.”

Turning to the attorney-client privilege claims, the court held that the identity of specific apps and developers that have been flagged by Facebook may be a fact underlying attorney-client communications, but the fact itself is not protected, and the fact cannot be protected simply by sharing it with attorneys. Citing a recent Massachusetts case, the court held that Facebook cannot “rely on an internal investigation to assert the propriety of its actions to third parties and simultaneously expect to be able to block third parties from testing whether its representations about the internal investigation are accurate.”

**PENNSYLVANIA**

**Attorney General’s Role in Use of Forfeited Assets**

A district attorney in Lancaster County, Pennsylvania (Stedman) filed an original action in Commonwealth Court (the statewide appellate court) against the county commissioners alleging that they were attempting to inhibit the use of funds exclusively committed to his control through forfeiture. He also named the Pennsylvania Attorney General as an Indispensable/Non-Adverse party. Original actions may be filed in Commonwealth Court only against certain parties, including “(1) against the Commonwealth government, including any officer thereof, acting in his official capacity. . . .”

Stedman alleged that he had sole control over the funds from forfeitures subject to two layers of oversight: the state controller, who must perform an audit of all funds used by the district attorney; and the attorney general, who reviews the controller’s audit and who also, pursuant to the statute, adopted reporting procedures and guidelines for district attorneys. Using forfeited funds, Stedman had leased a car for the use of his office, after obtaining a certification from the controller authorizing the lease. The commissioners insisted that the lease should have been authorized by them as a county contract. Stedman argued that they had no authority over forfeiture funds, and that their investigation is an unlawful audit that usurps the attorney general’s authority. He sought a declaratory judgment that only the controller or attorney general can audit or investigate his use of forfeited funds.

The commissioners argued that the court lacked subject matter jurisdiction because the county and its commissioners are not “the Commonwealth government or officers thereof,” and the attorney general is not an indispensable party because Stedman is not seeking relief against the attorney general. Stedman argued that his requested declaration will have an impact on the statutory role of the attorney general under the Forfeiture Act.
The Commonwealth Court agreed that the county government was not included in the statutory definition of “the Commonwealth government or officers thereof.” The court noted that past decisions have held that “the mere naming of the Commonwealth or its officers . . . does not conclusively establish this court’s jurisdiction . . . joinder of such parties when they are only tangentially involved is improper.” Instead, whether a party is indispensable involves “whether justice can be accomplished in the absence of the party.”

In this case, the attorney general has a “general duty to uphold the laws of this Commonwealth” but this is not enough to make him a proper respondent. “[I]n order to bring suit against the attorney general, the attorney general must be the official who is charged with the enforcement and administration of [the statute at issue].” The role of the attorney general must be “more than ‘minimal’ or merely ‘ministerial’ in nature.” The Forfeiture Act provides that the county (through one of its officials) must “create an annual audit of all forfeited property and proceeds” which is submitted to the attorney general. Because the county, not the attorney general, is creating the audit, the court did not find any power in the attorney general to conduct an audit of the forfeited assets. The attorney general is “merely the recipient” of the audit from the county and does not have any oversight responsibility in connection with the county audit.

The court concluded that the legal dispute was localized and the attorney general “is only tangentially involved in the dispute, possessing no power or duty to enforce or administer the statutory provisions that . . . are at issue.” Stedman v. Lancaster Cty. Bd. of Commissioners, 2019 Commw. LEXIS 1040 (Pa. Commw. Ct., Nov. 20, 2019).

**MICHIGAN**

**Attorney General Opinion and Standing of Legislature**

A Michigan statute, 2018 PA 608, amended the Michigan election law with respect to petitions, limiting the total number of signatures from any congressional district that could be counted for validity. The statute also added a requirement that paid petition circulators file an affidavit with the Secretary of State disclosing their paid status and that forms include a check-box in which the circulator indicates that they are paid. The secretary of state asked the attorney general for an opinion on the constitutionality, under the state constitution, of these provisions.

The attorney general issued an opinion that the limitation on signatures based on geography violated the petition and amendment provisions of the state constitution, neither of which limit the number of signatures that can be gathered from one geographic region. She also opined that the requirement for circulators to reveal on the petition that they were paid did not further any government interest and could expose circulators to harassment, which was also unconstitutional.

The following day, the League of Women Voters and others filed a complaint against the secretary of state for declaratory and injunctive relief, seeking a declaration that the provisions were unconstitutional and enjoining the secretary of state from enforcing them. Shortly thereafter, both houses of the Michigan legislature filed a complaint challenging the attorney general’s opinion and seeking declarations that 2018 PA 608 is constitutional and must be enforced. The lower court determined that the legislature did not have standing to sue because it had not demonstrated “a particularized injury that would be detrimentally
affected in a manner different from the citizenry at large,” but it treated the legislature’s briefs as amicus submissions. The court then granted summary judgement to the League of Women Voters on their constitutional claims. The legislature appealed.

The appellate court first noted that even though the lower court held the legislature did not have standing, its arguments were considered by the lower court. The appellate court agreed that the legislature did not have standing to seek a declaratory judgment in this case. The statute that authorizes declaratory judgments requires an actual case and controversy. Michigan courts have interpreted this provision to require that the judgment is necessary to “guide a plaintiff’s future conduct in order to preserve the plaintiff’s legal rights.” No matter how the court decides this case, the legislature will still have the authority to enact laws. The court reviewed past Michigan precedent involving claims by individual legislators and held that the legislature was suing to reverse actions by a member of the executive branch. The court held that prior Michigan caselaw “stands for the proposition that courts should not confer standing in matters that have the real possibility of infringing upon the separation of powers.” The court concluded that the statute was not enacted to benefit the legislature, and the legislature “does not have a special interest in voter-initiated petitions that differs from the citizenry at large.”

Finally, turning to the legislature’s argument that if the lower court opinion is upheld, the result will be “a single member of the executive branch being able to exercise unchecked veto power over a bill that has already been passed and enacted into law.” The appellate court noted that the lower court had analyzed the attorney general’s legal conclusions, the appellate court had also done so, and it was likely that the state supreme court would also do so. “In light of that review process, it cannot be concluded that the Attorney General has “unchecked veto power” over PA 608.”


NEW YORK

Attorney General’s Authority to Prosecute Law Enforcement Officer-Involved Deaths

The governor of New York issued an Executive Order appointing the attorney general as special prosecutor in matters where the death of an unarmed civilian was caused by a law enforcement officer or in “instances where, in the [attorney general’s] opinion, there is a significant question as to whether the civilian was armed and dangerous at the time of his or her death.” A civilian was killed by a police officer in Troy, New York, and the local district attorney informed the attorney general that the Executive Order did not apply because the civilian’s use of his vehicle made him an armed civilian. The district attorney convened a grand jury which found that the officer’s use of force was justified.

Concerns were raised about the civilian’s death, and the governor issued another Executive Order, authorizing the attorney general to investigate and prosecute “any and all unlawful acts or omissions or alleged unlawful acts or omissions by any person arising out of, relating to, or in any way connected” with the death of the civilian and the subsequent investigation, including the grand jury presentation. The attorney general empaneled a grand jury to investigate alleged misconduct. That grand jury charged the district attorney with two counts of official misconduct and one count of perjury. The district attorney moved to dismiss the indictment on the grounds that the attorney general lacked jurisdiction to prosecute the perjury count, and the lower court agreed. The attorney general appealed.
The appellate court reversed. New York’s Executive Law §63(13) provides that the attorney general shall prosecute any person for perjury committed during the course of any investigation conducted by the attorney general “pursuant to statute.” The district attorney argued that the governor’s executive orders were not “statutes” within the meaning of Executive Law §63, and the attorney general argued that another provision of the law, Exec. Law §63(2), gives the attorney general authority “whenever required by the governor” to “appear before the grand jury . . . for the purpose of managing and conducting . . . criminal actions or proceedings . . . .” The district court interpreted this law to allow the attorney general to prosecute perjury only in cases where a statute gives the attorney general authority to investigate.

The appellate court interpreted Executive Law 63 to permit and require the governor to define, through the Executive Order, the scope of the attorney general’s authority, but the investigation is “still conducted pursuant to that statute, albeit within a scope defined by the executive order.” The statute “gives the [attorney general] power, but only when the governor “requires[s]” [the attorney general] to act. . . . Relatedly, the governor would have no authority to give powers to the attorney general—through an executive order or otherwise—without the legislature having granted the governor the ability.” The court concluded that the attorney general’s perjury claim should not be dismissed. People v. Abelove, 2019 N.Y. App. Div. Lexis 8499 (N.Y. App. Div. Nov. 21, 2019).

CALIFORNIA

Attorney General’s Role in Quo Warranto Proceedings

The attorney general’s role in quo warranto proceedings in California was explained by a state appellate court. The case involved the mayor of a town who wanted to continue to serve as a board member of a water replenishment district. California statutes prohibit the holding of multiple public offices where there is a possibility of a significant clash of duties or loyalties between them.

A quo warranto action, codified in California’s Code of Civil Procedure, allows an action to be brought “by the attorney general, in the name of the people of this state, upon his own information, or upon complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office . . . .” Although the attorney general is named in the statute, “usually the action is filed and prosecuted by a private party who has obtained the consent of the attorney general.” The attorney general’s “gatekeeping” function protects public officers from frivolous lawsuits. The procedures by which the attorney general can authorize another to bring a quo warranto action are in the California Code of Regulations, and provide, “the attorney general may at all times, at any and every stage of the said proceeding, withdraw, discontinue or dismiss” the case or may assume the management of the case at any time.

The defendant argued that the attorney general could not authorize the district attorney to sue because the attorney general is not a “private party” eligible to serve as a relator. The court noted past attorney general opinions have not interpreted the law’s language to exclude public officers as relators and cited a long line of cases in which public entities have brought quo warranto actions with the attorney general’s permission. The court held that the attorney general had properly deputized the district attorney in this case.

The defendant also argued that because he had been reelected to both offices ten months after the initial suit was filed, the district attorney needed to apply again to the attorney general for permission to file a quo warranto action. The court held, “There is no need to seek authority from the attorney general to maintain an already-filed quo warranto lawsuit because the attorney general at any time may assume control of the prosecution of the action or dismiss it.” The court concluded that the defendant could not legally serve in both offices. People ex rel. Lacey v. Robles, 2020 Cal. App. Lexis 73 (Cal. Ct. App. 2d Dist., Jan. 29, 2020).
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