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Federal Defender Newsletter

January 2018

CJA PANEL TRAINING

Sacramento CJA Panel Training will be on **Wednesday, January 17, 2018, 5:30 p.m.** in the jury room in the Fourth Floor of the U.S. District Court, 501 I Street. The presenters are Kathy Brady from the Immigrant Legal Resource Center and José Baez Ricardez from the Sacramento Mexican Consulate. They will address topics of concern for our non-citizen clients, such as the immigration consequences of offenses, eligibility for relief in removal proceedings, how to obtain state relief from prior convictions, and resources available to criminal defense attorneys.

Fresno CJA Panel Training will be on **Tuesday, January 16, 2018 at 5:30 p.m.** in the Fresno federal courthouse Jury Assmehly Room, 2400 Tulare St. Stephanie J. Lacambra, an Electronic Frontier Foundation (EFF) staff attorney, will present on Digital Searches and Compelled Password Disclosure.

CJA Representatives

David Torres of Bakersfield, (661) 326-0857, dtorres@lawtorres.com, is our District CJA Panel Attorneys' Representative handling questions and issues unique to our Panel lawyers. The Sacramento Division's Backup CJA Representative will be announced in our February newsletter.

TOPICS FOR FUTURE TRAINING SESSIONS

Know a good speaker for the Federal Defender's panel training program? Want the office to address a particular legal topic or practice area? Email suggestions to:

Fresno: Peggy Sasso, peggy_sasso@fd.org,
or Karen Mosher, karen_mosher@fd.org.
Sacramento: Lexi Negin, lexi_negin@fd.org.

PODCAST RECOMMENDATION

Ear Hustle: Hosted by San Quentin inmates Earlonne Woods and Antwan Williams and San Francisco artist Nigel Poor, *Ear Hustle* allows San Quentin inmates to produce and tell their personal stories in their own words in prison.

PLEASE NOTE TEMPORARY COURTROOM CHANGE FOR JUDGE SHUBB NEXT MONTH

Starting January 1, 2018 and ending January 19, 2018, Judge Shubb will be holding hearings and trials in Courtroom 1, 16th Floor. Please inform any other interested parties. Thank you.

CJA Online & On Call

Check out www.fd.org for unlimited information to help your federal practice. You can also sign up on the website to receive emails when fd.org is updated. CJA lawyers can log in, and any private defense lawyer can apply for a login from the site itself. Register for trainings at this website as well.

The Federal Defender Training Division also provides a **telephone hotline** with guidance and information for all FDO staff and CJA panel members: 1-800-788-9908.

IMMIGRATION LEGAL SUPPORT

The Defender Services Office (DSO) collaborated with Heartland Alliance's National Immigrant Justice Center (NIJC) to provide training and resources to CJA practitioners (FPD and Panel lawyers) on immigration-related issues. Call NIJC's Defenders Initiative at (312) 660-1610 or e-mail defenders@heartlandalliance.org with questions on potential immigration issues affecting their clients. An NIJC attorney will respond within 24 business hours. Downloadable practice advisories and training materials are also available on NIJC's website: www.immigrantjustice.org.

NINTH CIRCUIT OPINONS

US v. Jones, No. 17-15869 (12-15-17) (Per curiam w/Motz, M. Smith, and Nguyen). The Ninth Circuit holds that Arizona's armed robbery statute, Ariz. Rev. Stat. 13-1904, does not qualify as a crime of violence under ACCA because of the categorical approach. The Ninth Circuit follows US v. Molinar, No. 15-10430 (9th Cir. Nov. 29, 2017), where the panel held that Arizona's armed robbery statute is not a crime of violence under the force clause, but was under the enumerated felonies clause of the *Sentencing Guidelines*.

However, Molinar does not apply to ACCA's enumerated felonies clause. See US v. Dixon, 805 F.3d 1193 (9th Cir. 2015). "Therefore, Arizona armed robbery also does not qualify as a violent felony under ACCA's enumerated felonies clause."

LETTER FROM THE DEFENDER

This end-of-year letter is attached – it is my response to the California State Bar's proposal to re-submit fingerprints for all active licensed State Bar members.

But to end the year, and because I have a weakness for inspirational quotes, I end this challenging calendar year with a quote from Jack Kornfield.

The first of Kornfield's three matters reflects a common sentiment which The Beatles expressed in their last song on *Abbey Road* – The End: the love you take is equal to the love you make. Or in The New Radical's song, You Only Get What You Give.

The second I don't see as being inconsistent with being a criminal defense lawyer or strong advocate for when we see injustice or unfairness. I see it instead as the kind, considered, generous, intelligent manner of interacting with all around us – people, ideas, creatures, our planet, ourselves – to all's mutual benefit.

The final matter is for most of us the most challenging – letting things go. It could be modifying an expectation, a dream denied, a person through lost love or death, a motion or appeal, cause or election you thought was won.

In the end these things matter most: How well did you love? How fully did you live? How deeply did you let go?"

Happy New Year, all. May your next year be better than your last.

~ Heather Williams



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December 26, 2017

California State Bar
Proposed Rules Committee

RE: Proposed Rule responding to California Business & Professions Code § 6054 (as amended by Senate Bill 36) and October 10, 2017 California Supreme Court letter

Dear Ladies and Gentlemen:

Our California State Bar proposes re-fingerprinting its active licensed attorneys. Our State Bar's Proposed Rule responds to the California Senate's passage of Senate Bill 36 amending Cal. B&P Code § 6054, creating a subparagraph (b) authorizing, but not requiring active licensed attorney fingerprinting: "**may** require **a** member to submit or resubmit fingerprints to the [California] Department of Justice [DOJ]." Our California Supreme Court then directed the State Bar to require State Bar applicants and active members submit fingerprints as a "critical component of public protection and strengthen(ing) the State Bar's discipline system."

Requirement for active licensed California lawyers to resubmit fingerprints is **form over substance** and a substantively meaningless, time-consuming and expensive action. I am disappointed in myself for not knowing before about the Senate's proposal and the California Supreme Court's consideration before this boulder started rolling downhill. The proposed costs (an average \$82 paid by each lawyer, not including the independent actual fingerprinting costs) go to the State Bar to staff and orchestrate submitting the prints to California DOJ, who also will also receive a portion of the expected \$15,500,000 (\$15.5 million) for generating criminal record results.

My objections to the Proposed Rule as written, beyond my objections to it at all, are:

1. In all paragraphs, I suggest injecting "California" before "Department of Justice." Otherwise, the Rule could be interpreted and used to turn over a lawyer's fingerprints to the U.S. Department of Justice.

This addition accurately reflects the legislative intent of using "State and local law enforcement" to "cooperate with and give reasonable assistance and information" to the State Bar.

2. In paragraph 1,

- insert “establishing the identity of and” between “the purpose” and “of obtaining” to accurately reflect the purposes specified in Section 6054;
 - delete “state and federal level” and replace with “California and other states” to repeat how Section 6054 limits the searches;
 - delete “and arrests” and replace with “subsequent to giving the fingerprints.”
3. In paragraph 3, to accurately reflect Section 6054’s language:
- insert between “of providing” and “criminal” the word “identity and;”
 - Delete “history” and replace with “conviction;”
 - Delete the comma between “of” and “State Bar;”
 - Insert a comma between “encoding” and “shall;”
 - In the 2nd paragraph, remove “FBI” as Section 6054 focuses only on “State and local law enforcement” to assist the State Bar.
4. Add language:
- “Except as limited below, the California Department of Justice shall retain fingerprints submitted under this Rule for the limited purpose of providing the State Bar notification of subsequent criminal arrest(s).”
This reflects the new Section 6054(b)’s language (end of paragraph).
 - requiring the State Bar to then specify with the agency running a State Bar applicant’s or active licensed lawyer’s fingerprints to limit the search to “the identity of the applicant and in order to determine whether the applicant or member has a record of criminal conviction in this state or in other states,” as Section 6054 requires, **but**:
 - not to search or provide the State Bar with any information about arrests before the fingerprints were submitted or any federal convictions;
 - not allow the submitted fingerprints to be compared with unknown prints discovered or analyzed in connection with any criminal investigation; **and**
 - not provide the submitted fingerprints to any other local, county, state, or federal law enforcement or agency.This is to specifically exclude the submitted fingerprints from being included as part of any general database or for any use not authorized by Section 6054.
 - “As Section 6054(b) requires, the State Bar shall notify the California Department of Justice about individuals who are no longer members and applicants who are denied admission to the State Bar within 30 days of any change in status of a member or denial of admission.”

My objections to this entire active licensed attorney re-fingerprinting, supporting its form-over-substance, are six-fold:

1. Statutes and rules in place currently – requiring California prosecutors to report lawyer arrests, California court clerks and convicted lawyers to report convictions, as well as most other state bar professional conduct rules requiring lawyers to report another lawyer’s professional misconduct – are working, or, if they are not working, should be removed;
 2. Of the more than 250,000 active California licensed lawyers, according to the November 9, 2017 *Daily Journal* article about this Proposed Rule,¹ 32 lawyers over 3 years had someone report their felony conviction – 0.000128% of all California bar licensed lawyers;
 3. Fingerprint comparisons are fallible;
 4. People maintain some privacy interest in their own fingerprints;
 5. Not every criminal conviction translates into professional misconduct or a likelihood of malpractice or ineffective assistance of counsel; and
 6. Using even a portion of the money generated by this Proposed Rule (\$15.5 million) for legal aid programs would provide greater access to justice for more of the public than the number of individuals affected by lawyers with a criminal conviction.
1. Multiple levels of reporting lawyer arrests and convictions exist:
 - Lawyers must report to the State Bar their own felony and some misdemeanor convictions.
 - California licensed prosecutors must report when a lawyer has been criminally charged.
 - California court clerks must report attorney convictions within 48 hours.
 - Most other state bars which follow the American Bar Association’s *Model Rules of Professional Conduct* must report to the appropriate state bar when “another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer.” That misconduct the ABA also defines as committing “a criminal act” adversely reflecting on the lawyer’s honesty, trustworthiness, or fitness, or conduct involving dishonesty, fraud, deceit, or misrepresentation.

The *Daily Journal* article notes a majority of lawyers who failed to self-report were convicted in the 32 convictions reported (presumably by court clerks) over 3 years. And, where the prosecutors reported an attorney charged with a felony, “less than half” those lawyers self-reported. Sounds like the court clerk and prosecutor reporting requirements are working.

¹ Lyle Moran, Convicted lawyers urged to tell – State Bar president asks attorneys not to wait to be found out, *Daily Journal* (11/9/2017), p.1.

2. As of December 2017, the California State Bar licenses more than 250,000 attorneys.² Compare this with the 32 lawyers over the past 3 years whose convictions were reported (0.000128% of all California bar licensed lawyers), versus the 29 of those who failed to self-report (an even more miniscule percentage of the total California State Bar licensed lawyers). The State Bar investigates approximately 16,000 complaints of attorney misconduct annually - 32 reported with felony convictions over 3 years equals an average of 11 California Bar licensed lawyers per year sustaining felony convictions or 0.000687% of all attorney misconduct investigations.³ All active California licensed lawyers spending \$15.5 million to identify the infinitesimal number of lawyers fingerprinting intends to discover is outrageously disproportionate to the alleged public benefit.
3. Fingerprint comparisons are fallible. Remember Brandon Mayfield? He is the Oregon lawyer who spent 17 days in custody after three FBI experts concluded his fingerprint matched a latent print on a plastic bag, evidence associated with the 2004 Madrid subway bombing. In fact, Simon Cole, a criminologist at the University of California – Irvine, in 2005 cited studies where the fingerprint comparison error rate may be as much as 2.5%.⁴ This means, when comparing 250,000 active licensed lawyer prints, there could be over 6,000 lawyers seeing error results.
4. Courts have found people have no reasonable Fourth Amendment privacy expectation with their fingerprints. However, even given we will be required to submit our fingerprints to keep our licenses to practice law, we will have no control over how law enforcement uses our prints once they have them **unless our State Bar limits how California DOJ uses them or with whom they share them, limits them to only the California Senate's contemplated goals.** I am embarrassed our State Bar and I (by not being better informed these proposals were in the works) have not done more to protect and stand up for each California active licensed lawyers right to some fingerprint privacy. What a shame that those who fight so strenuously fight to protect the public's and private citizens' privacy rights do not have their own precious guarded.

I say this as a person who willingly and with much forethought provided my own fingerprints to federal law enforcement to be a federal public defender.

² <http://www.calbar.ca.gov/About-Us/Our-Mission>.

³ <http://www.calbar.ca.gov/About-Us/Our-Mission>

⁴ Simon Cole, More Thank Zero: Accounting for Error in Latent Print Examination, 95:3 *Journal of Criminal Law & Criminology* 985, 1027 (Spring 2005).
<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=https://www.bing.com/&httpsredir=1&article=7201&context=jclc>

5. Not every criminal conviction automatically translates to a lawyer needing discipline (as distinguished from needing help), committing malpractice, or being ineffective assistance of counsel. For instance, a driving under the influence conviction may not translate to the lawyer being under the influence when with clients or engaged in work for clients.
6. There are so many more cost effective and meaningful ways to assist and protect more people and the public with \$15.5 million (plus its own excess funds) the State Bar expects re-fingerprinting to cost. It could increase access to justice funding and expand by 50% its over \$30 million annual distributions in grants to legal aid organizations.⁵ With investigating approximately 16,000 complaints of attorney misconduct annually, even a portion of the equivalent money could be used in those investigations, rather trying to catch the 29 attorneys in three years (0.000116% of the over 250,000 California Bar licensed lawyers) who failed to report their own criminal convictions.⁶

Again, the Senate's amendment to Section 6054 is form-over-substance and our State Bar seems to have done little to protect its members' interests and rights.

Most concerned,



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⁵ <http://www.calbar.ca.gov/About-Us/Our-Mission>

⁶ <http://www.calbar.ca.gov/About-Us/Our-Mission>