



NATIONAL COMMISSION ON FORENSIC SCIENCE

NIST
National Institute of
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Abstract

Proposed Topic

Notification

Sponsoring Subcommittee

Training on Science and the Law

Type of Work Product Proposed

Views Document

Statement of the Issue

Training parties to notify after an irregularity is discovered in the criminal justice process.

Background

The importance of communication when there is a “problem” in the criminal justice system cannot be understated.

A. Types of notification

Notification to a defendant and other interested parties can be separated into two categories: (1) actual notification (“actual notice”) and (2) notification reasonably calculated to reach the party under all circumstances (“constructive notice”).

1. Actual notice

Personal delivery of written notice to every defendant by someone who can answer questions concerning an irregularity would be ideal, but almost impossible. Actual notice can also be achieved by persons who may merely “hand off” a simple, direct letter explaining the irregularity. The latter method, while not as useful as actual notice, is still effective because it can alert a defendant to an irregularity and give contact information for the defendant to obtain assistance in his case. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“Personal service of written notice within the jurisdiction is the classic form of notice always adequate”); BLACK’S LAW DICTIONARY 1227 (10th ed. 2014) (defining actual notice as “[n]otice given directly to, or received personally by, a [person or entity]”).

The two most obvious additional considerations to be taken into account include (1) who delivers the notice and (2) the content of the notice. Those delivering the notification to a defendant about an irregularity will impact how the defendant perceives the irregularity (i.e., whether the irregularity is worth investigating). For example, a prosecutor may not be the ideal person to deliver a notification directly to a defendant because a defendant may not choose to associate with the prosecutor’s office for a variety of reasons, including fear, the passage of time since conviction, and others.

Another major question that remains to be solved is how to fashion notifications, including (1) notifications from agencies or organizations to the “prosecution team” and (2) notifications from the “prosecution team” or another agency or organization to a defendant and/or his counsel.

To whom the notice is directed will largely control the content of the notice because different entities and people will require different types of information. For example, a prosecutor’s office will want to be notified when a conviction stemming from a prosecution from their office is under review. This would allow them to examine the case and reach their own decision on how to move forward with the information because records may need to be retrieved and additional research about the irregularity may be necessary.

A notice to a defense attorney should contain identifying case data so the attorney can find any information or records they still have regarding the case or cases. Further, defendants do not necessarily have a sufficient grasp of legal concepts. Thus, notification to them must be a simple and straightforward, and should not only inform them of a possible irregularity, but give them contact information regarding persons who can help them.

2. Constructive notice and redundancy

However, when it is not possible to notify a defendant through personal service, alternative means must be used to attempt to reach the defendant. This constructive notice standard should be reasonably calculated to reach the defendant. Implementing the standard, however, understates the enormity of the task. *See Mullane*, 339 U.S. at 314–15. In *Mullane*, the United States Supreme Court stated that “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties* of the pendency of the action and afford them an opportunity to present their objections.” *Id.* (emphasis added). Obstacles to notification include death, discharge of their sentence, or an inability to locate them for a variety of reasons. In other words, this class of persons (i.e., that require constructive notice) create unique problems with respect to notification.

The primary problem with constructive notice is that it assumes that the defendant cannot be personally notified. This assumption may be warranted, but once delivery of actual notice has been abandoned in favor of constructive notice, the “notifier” must rely on redundancy to ensure the proper defendant receives the required written notice. The “redundancy” approach must be reasonable in its scope, while increasing the chances that the defendant will receive the notice.

This point is reinforced by the joint white paper on defendant notification that was published by the Texas Forensic Science Commission (“TFSC”) and the Texas Criminal Justice Integrity Unit (TCJIU”) on November 27, 2013.

Redundancy is sometimes provided for by statute. *See, e.g., Mennonite Bd. of Mo. v. Adams*, 462 U.S. 791 (1983). In this case, the United States Supreme Court explained the notice requirements under Indiana state law for the sale of real property when property taxes had been delinquent at least 15 months. *Id.* at 792–93. “Prior to the sale, the county auditor must post notice in the county courthouse and publish notice once each week for three consecutive weeks. The owner of the property is entitled to notice by certified mail to his last known address.” *Id.* at 793 (footnote omitted) (internal citations omitted) (citing Ind. Code §§ 6-1.1-24-3 (1985)); *see* Tex. Tax. Code § 34.01(c), (e)–(f) (requiring that notice for the sale of real property with delinquent property taxes be in accordance with Rule 21a of the Texas Rules of Civil Procedure); Tex. R. Civ. P. 21a. In brief, Rule 21a requires that delivery of service be “by delivering a copy to the party to be served, or the party’s duly authorized agent or

attorney of record” electronically or “in person, mail, by commercial delivery service, by fax, by email, or by such other manner as the court in its discretion may direct.” Tex. R. Civ. P. 21a.

However, these examples are dated and fail to recognize modern methods of communication.

The need for notification could include contacting a single defendant, or a class of defendants, or other parties such as prosecutors, courts, clerks, current or last known defense attorneys, etc. Also, in the case of a larger class of defendants, massive communication may be necessary. The focus of constructive notification is to reach the correct parties so that they can decide if they wish to pursue possible avenues for relief in the face of an irregularity. A cautionary note, however, would be to avoid mass confusion or a flood of filings by people seeking habeas relief when the questioned issues are not relevant to their case or cases (e.g., posting on prison walls).

Opponents have argued that mass notices will open the “flood gates” of litigation, encouraging every inmate and convicted person to file an application for a writ of habeas corpus to seek relief. First, many inmates and convicted persons cannot afford to hire a postconviction attorney to file an application, if that person is entitled to relief at all. Second, this assumes that all inmates will be affected or be notified in the first place. Third, a person’s right to due process of law should trump judicial economy.

One suggested way to notify a class of defendants regarding a problem affecting more than one case (e.g., major forensic nonconformance discovered years later) could be notifying the Associated Press, Reuters, or other major media outlets with the hope other news agencies would carry the information and that various Internet services would follow suit. Much like vehicle recalls, these various news mediums can help to effectively get essential notices out to people that are unable to be otherwise located for a variety of reasons.

Regardless of the obstacles, federal and state criminal justice systems must rise to the occasion because a defendant’s “need to know” is essential to due process.

B. Notification pretrial, during trial, and post-trial

Brady notifications can be required: (1) pretrial, (2) during trial, or (3) post-trial. *See* Tex. Code Crim. Proc. art. 39.14(h).

What of other stakeholders and their respective responsibilities? Scientists, police, and other participants in the criminal justice system have a need to receive and disseminate notice.

Many organizations have disclosure policies and most consist of notifying the “prosecution team” in some form or fashion. For example, the Texas Department of Public Safety (“DPS”) has had a written disclosure policy since early 2013 for when there is a scientific irregularity in a case and notification becomes necessary. *See* DPS, Laboratory Operations Guide, Quality Action Plan (Mar. 11, 2013), at 1–3. In addition, the suggested protocol of the Texas Forensic Science Commission (“TFSC”) and the TCJIU with respect to forensic nonconformance calls for disclosure the issue to the “TFSC, DPS, and the national accrediting body responsible for the laboratories accreditation,” as well as the relevant law enforcement agency and prosecutors. *See* TFSC and TCJIU, Defendant Notification After Major Forensic Nonconformance, at 7 (Nov. 27, 2013) [hereinafter called Defendant Notification After Forensic Nonconformance].

Although these types of policies can, and have, helped achieve compliance with the spirit of *Brady*, there remains a need to address defendant notification of an irregularity in a comprehensive manner.

1. Post-representation notification

After a defendant's trial is over, and his appeals and postconviction applications for relief are exhausted, many defendants no longer have representation because most are indigent and have no means of hiring an attorney. Fundamental questions are raised, however, by the need to provide notification about an irregularity to defendants, the availability of lawyers to assist them, and the need to direct them to those who can help (e.g., public defenders, innocence projects, and other organizations). The primary classes of convicted people include: (1) people sentenced to death, (2) people currently incarcerated; (3) people released on supervision; and (4) people that have discharged their sentence(s). In fact, the Court of Criminal Appeals handles notification to defendants regarding attorneys available to assist when claims of innocence are received at the Court through inmate mail by sending a letter giving inmates the attorneys contact information.

- *People currently incarcerated*

People that are incarcerated are those with the most immediate need for notification. Based on the cooperative Texas spirit, the State Counsel for Offenders ("SCFO"), which is part of the Texas Department of Criminal Justice ("TDCJ"), has offered to provide constructive notice, if not actual notice, to indigent inmate defendants. The goal of SCFO is "to help indigent offenders with legal problems by providing assistance and attorneys who are independent of the confinement divisions of the TDCJ." State Counsel for Offenders, Mission Statement, available at <http://www.tdcj.state.tx.us/divisions/scfo/>.

- *People released on supervision*

Similar to people that are currently incarcerated, existing infrastructure can be used to facilitate notification to defendants released into society under a form of supervision, including parole or community supervision.

Parole officers, like employees of SFCO, are employees of TDCJ. As employees of TDCJ and having the assigned task of supervising the defendant in question, parole officers are well situated to contact defendants under their supervision. Parole officers should have regular contact with their clients and know pertinent information such as home addresses and phone numbers. Information held by the court and its clerks can also be of assistance.

Probation officers, like parole officers, can use many of the same resources to reach people that should be notified of an irregularity.

- *People that have discharged their sentence(s)*

The most difficult class of defendants to contact may be persons who have discharged their sentences. Notice to this class of people will be more difficult with the passage of time. Former defendants may have moved to unknown parts, lost contact with family or other people familiar with their contact information, and their former attorneys may have lost or destroyed any files or valid contact information, depending on the age of the case.

In such cases, a "wider net" must be cast to reach this segment of affected individuals. And here redundancy is important. Court records, driver's license information, and media assistance may become necessary. And in the event that an interested defendant inquires about a "broadcasted" problem in the system, and the possibility of it having some impact on his case, other measures have already begun to direct them to attorneys or private organizations, such as innocence projects, throughout Texas that may be able to help them. Newspaper announcements, court house postings, current defense attorneys involved in the case, national news media outlets (when the irregularity affects a large

number of cases), electronic news media outlets, government agency press postings, and the use of government resources to identify relevant defendants can all help to locate a defendant and ultimately achieve notification.

Appendix A

TEXAS HAIR MICROSCOPY REVIEW: PROCESS FLOW

