AMERICAN BAR ASSOCIATION
Criminal Justice Section

Criminal Justice Section Newsletter

Volume 32, No. 3: Spring 2024

Spring Meeting Highlights

The 2024 American Bar Association Criminal Justice Section's Spring Meeting featured a new institute: "Unlocking Justice: Navigating the Future of Law with Advances in Forensics, Technology, and Artificial Intelligence," held on April 11-12 in San Diego, California.

The cutting-edge conference delved into the dynamic intersection of law, technology, and forensics.

The conference explored the latest advancements in forensics and information technology, analyzing with practitioners and the private sector how breakthroughs in DNA analysis, fingerprint identification, artificial intelligence and digital forensics are reshaping investigative methodologies. It also explored the ethical as well as the legal considerations of emerging technologies and their impact on legal and business practice, especially Artificial Intelligence (AI) and advances in genealogy.

National White Collar Crime Institute

The 39th National White Collar Crime Institute convened on March 6-8, 2024 in San Francisco, California.

Since its establishment in 1987, the Institute has been attended by leading federal and state judges and prosecutors, law enforcement officials, defense attorneys, corporate in-house counsel, and members of the academic community. The faculty regularly includes some of the top members of the white-collar bar in the United States and abroad.

This year's keynote speakers included U.S. Attorney General Merrick Garland in a "Fireside Chat" and U.S. Deputy Attorney General Lisa Monaco giving the annual E. Lawrence Barcella Memorial Address. In addition, the Attorney General of Switzerland Stefan Blättler and the Director of France's national financial prosecution office, the Parquet National Financier Jean-François Bohnert were featured.

Stay Connected ... With the CJS *via Facebook, Twitter, Instagram, LinkedIn, YouTube ... (hashtag #ABACJS)*

Recent ABA Resolutions on Criminal Justice

The CJS-sponsored resolution on prosecutorial discretion was passed at the 2024 ABA Midyear Meeting in February in Louisville, Kentucky. The Resolution 501 urges governments to affirm the essential role of prosecutorial discretion and to protect prosecutors for removal for partisan reasons.

Other co-sponsored resolutions that passed are: #506 (timely reporting of all deaths and independent investigation into the cause of any death that occurs in a correctional institution or in the custody of law enforcement); #602 (Principles for Juries and Jury Trials).

New Task Forces

Prosecutorial Independence Taskforce

The goal of this task force is to preserve and strengthen prosecutorial independence and enhance the American public's understanding of the prosecutor's critical role in maintaining the integrity of the criminal justice system. Co-Chairs are John Choi, County Attorney, Ramsey County Attorney's Office; Ellen S. Podgor, Professor of Law, Stetson University College of Law; and Ellen Yaroshefsky, Professor of Law, Maurice A Deane School of Law, Hofstra University.

Task Force on Public Defense Independence

The objective of this task force is to protect and strengthen independence and enhance the public's understanding of the critical role public defense independence plays in ensuring a fair and just criminal legal system. It is a project of the American Bar Association Criminal Justice Section (CJS) and Standing Committee on Legal Aid and Indigent Defense (SCLAID), in partnership with the National Association for Public Defense. Co-Chairs are Keisha Hudson, Chief Defender, Defender Association of Philadelphia and Malia Brink, Senior Policy Attorney, Deason Criminal Justice Center, SMU Dedman School of Law.

Upcoming Events

- **Southeastern Regional White Collar Crime Institute**: September 4-7, Braselton, GA
- **ABA/ABA Financial Crimes Enforcement Conference**: October 8-10, Arlington, VA
- **London White Collar Crime Institute**: Oct. 14-15, London, UK
- **17th Annual CJS Fall Institute**: November 14-15, Washington, DC
- **ABA Midyear Meeting**: January 30-February 3, 2025, Phoenix, AZ
- **National Institute on White Collar Crime**: March 4-7, 2025, Miami, FL

View the full calendar at ambar.org/cjsevents.

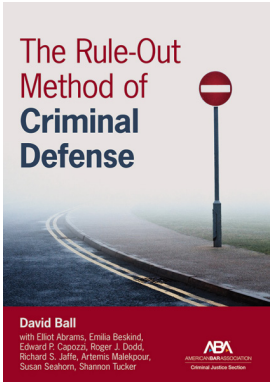
New Book

The Rule-Out Method of Criminal Defense

By David Ball, Elliot Sol Abrams, Emilia Beskind, Edward P Capozzi, Roger James Dodd, et al.

The Rule-Out Method of Criminal Defense brings defense advocacy back to its intended strengths, teaching readers how to find and show plentiful reasonable doubts that counsel most often misses. It also showcases how to avoid common practices that cause most convictions.

View info on CJS books at ambar.org/cjsbooks.



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Criminal Justice Section

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Results of Membership Survey

As a part of the strategic planning process taken on by the CJS Task Force on Strategic Visioning, a full membership survey was taken during the winter of 2024. Here are a few critical takeaways:

The survey confirmed that CJS's membership is *extremely diverse* in practice setting, legal practice area, topical interests, age and career stage, and geography.

- We have Criminal Justice Section members from every state in the United States.
- We're proud to reach 9,000 law students every year, to introduce them to criminal justice career paths and concepts.
- Among our professional members, approximately 35% work in white-collar firms or as corporate in-house counsel; another 35% work in other private defense, including hundreds of solo practitioners around the country; 5% of members are federal or state judges, 5% are academic faculty, 5% are public defenders, and 10% are prosecutors or work for other government entities. The remaining 5% of members represent the military, or other nonprofits, or are retired.

Fifty-three percent of members gave CJS the highest possible overall rating.

Every CJS member benefit received the highest ratings from at least 75 percent of members.

We learned about the several reasons you belong to CJS. …

- Partners from large private firms and corporate in-house counsel members are here to *network with other criminal justice professionals*, especially at our *in-person meetings and institutes*.
- Public defenders, prosecutors, judges, and academics, more than any other group, are here to *contribute to policy reform* above other reasons.
- Members from nearly every practice setting—from white-collar firms to academia—also belong to CJS for its *professional education content*.
- Law students are here for professional *education content* and *to network with criminal justice professionals*.

You also expressed a desire for new and expanded benefits.

- Law students and undergraduates are most interested in *mentorship opportunities*.
- Our professional members are most interested in *more criminal justice news & updates*.

- And everyone wants *more practical skills training* and *more local and regional networking opportunities*.

We learned there are some benefits we don't promote enough.

- Have you perused our list of books? We have published over 60 titles, including our annual State of Criminal Justice collection and ABA Criminal Justice Standards, in a wide array of practice areas including the functions of the defense and prosecutor, juvenile justice, and mental health. They are essential references for your corporate, organizational, or personal library.
- The CLE video library on the ABA website has a host of content created by our section members and experts in our field.

We also gathered a ton of information about your topical areas of interest. We were interested to learn which topics capture many people's attention.

- Over 50% of respondents expressed interest in alternatives to incarceration (69% of respondents),
- Sentencing topics (62%),
- Restorative justice topics (52%),
- Racial justice (55%),
- Rule of law and constitutional issues (62%), and
- Ethics (56%).

A Post-Racial America? Or a Fictitious Ideology

By Theresa Wilson Coney

Notwithstanding the dark picture I have this day presented…I do not despair of this country. There are forces in operation, which must inevitably work the downfall of (inequity)…I, therefore, leave off where I began, with hope. -- Frederick Douglas July 4, 1852

In 2015, my daughter was 14 years old and starting her first year of high school. I was newly married, living in a new state, living a new life, excited about new possibilities. As we drove around, she noticed a stark difference in the paving of the road. "Welcome to Brockton," she said each time we left the smoothly paved roads and largely White population of Holbrock and entered the rocky streets of our mostly minority town. It struck me years later that we were experiencing the evidence of structural racism. "Structural racism refers to "the totality of ways in which societies foster racial discrimination through mutually reinforcing systems."[1] Presumably, these differences in communities were the results of the wealth gap resulting from redlining and other policies that prevented people of color from gaining generational wealth, resulting in less capacity for communities of color to have communal economic supports. Now close to 10 years later, my work has me fully invested in understanding and reevaluating these experiences.

In 2024, a prevalent message is that we are living in a post racial America. After all some believe that slavery was abolished, Jim Crow ended, the Civil Rights Movement was a success, the need for diversity in colleges is no longer a compelling state interest. Some believe that affirmative action is not needed to create equity for access and opportunity resulting from the badges and incidents of slavery, when we are now a colorblind society, as the playing field is even, time has run out, and we had a Black president. Yet while in 2015, as we drove that rough road, 5,818 single incident hate crimes based on race, ethnicity, religion, and sexual orientation bias were documented in our nation; the latest statistics show that in 2022, hate crimes in America have almost doubled with 11,634 single bias incidents.[2]

Theresa Wilson Coney is the Racial Equity Training Lead for CPCS, the Public Defender's Office in the Commonwealth of Massachusetts. She is also a Black History Professor.

Was slavery abolished?

In 1865, the Thirteenth Amendment of the US Constitution ended slavery, yet it contained a provision which allowed for the enslavement of individuals to continue for those convicted of crimes. Several states took immediate advantage of these provisions, enacting statutes which were used to subjugate formerly enslaved individuals by arresting them for petty offenses. The prison system then leased these individuals out to work to the very same persons who had formerly enslaved them. Many argue that chattel slavery has been replaced by our prison industrial system. In ABA Resolution 503, "the American Bar Association urges federal, state, local, territorial, and tribal governments to repeal laws that provide an exception to the prohibition of slavery and involuntary servitude through prison labor."[3] This resolution notes that the US Congress "introduced bills to amend the Thirteenth Amendment to the U.S. Constitution to prohibit the use of slavery and involuntary servitude as a punishment for a crime." Id. at 3. Still, the law remains. Given that Black People are incarcerated at a rate six-times higher than that of White People, slavery continues, largely for the same population.[4]

Has Jim Crow ended?

The Jim Crow era was plagued with laws and policies limiting the ability of Blacks in America to enjoy the full rights of their citizenship. One of the main mechanisms through which this was done was by restricting access to the polls and preventing Black people from employing their right to vote. The Brennan Center for Justice's most recent data shows that today there are 322 restrictive bills making it harder for eligible Americans to register, stay on the voter rolls, or cast a ballot in 45 states across the country.[5] A fundamental right to citizenship continues to be impacted across the country, undermining the very democracy that makes America great.

Was the Civil Rights Movement a success?

The Civil Rights movement was a period in American history marked by a progression in the expansion and enforcement of the rights of marginalized people who were denied the opportunity to experience the full benefits of citizenship and economic advancement because of systemic discrimination. Several laws were enacted to ensure the protection of people from discrimination. While the Fifteenth Amendment to the US Constitution extended voting rights to Black men, the Civil Rights Act of 1957 guaranteed those voting rights by allowing federal prosecution of anyone who tried inhibit them. The Civil Rights Act of 1964 promised equal employment for all, limited the use of voter literacy tests, and allowed federal authorities to ensure public facilities were integrated. The Voting Rights Act banned all voter literacy tests. The Fair Housing

Act prevented housing discrimination.[6] While there is an extensive history concerning the efficacy of these protections, in the last few years, the Supreme Court of the United States of America (SCOTUS) has issued several decisions impacting individual rights.

In *Students for Fair Admissions v. President and Fellows of Harvard College*, and its companion case *Students for Fair Admissions v. University of North Carolina*, 600 U.S. 181(2023), SCOTUS held that Harvard and UNC's admissions policies, which relied in part upon race-based affirmative action, violated the Equal Protection Clause of the 14th Amendment. SCOTUS decided that the proffered reasons set forth concerning why their policies were necessary did not constitute a compelling state interest.

Is Diversity a compelling state interest?

"A compelling state interest is an element of the strict scrutiny test (for)… judicial review of … constitutional rights... An interest is compelling when it is essential or necessary rather than a matter of choice, preference, or discretion"[7] As Justice Stone's famous footnote four in *United States v. Carolene Products Company* (304 U.S. 144(1938)) indicated, "legislation should be 'subjected to more exacting judicial scrutiny' when it… is 'directed at particular religious, or national, or racial minorities'—'against discrete and insular minorities' that are victims of 'prejudice'"[8] Courts use a higher standard of review when dealing with, among other things, racial minorities. In assessing a compelling state interest, the question becomes whether diversity in the classroom is essential or necessary? Given the state of racial minorities in the country, this question requires an analysis of what diversity in the classroom produces, not just for the institution itself, but in the outcomes for our country, in determining whether the promotion of race-based diversity is merely an admirable goal or compelling.

The Declaration of Independence states, "We hold these truths to be self-evident, that all men are created equal," but several authors didn't actually believe that self-evident truth. We cannot fail to acknowledge the reality that despite their talk of equity, our forefathers, several of whom owned enslaved individuals, believed in the superiority of whiteness. The laws at that time bore out that truth, and today, years later, the impact of that truth is still real. Statistics, at every decision-making point in our criminal legal system, show inequities exist to the determent of people of color.[9] Similar inequities in statistics hold true in housing, employment, healthcare, the wealth-gap and many other areas. Are these badges and incidents of slavery? Is ending inequities in our country essential and necessary? Some cities and states have declared racism an epidemic or note the disparities. These are the truths that are self-evident in virtually every system across our country. There are also statistics that demonstrate the benefits of diversity in education, business, healthcare, employment, and many other areas.[10] Diversity in the workforce progresses from diversity in educational spaces. This foundation helps impact these statistics to create a more equitable society, ending the epidemic of racism, which is not merely a lofty goal, it is essential to thrive, reach our full potential, and provide our citizens with full access to their citizenship. These changes begin with equity in educational spaces.

Do we live under a colorblind constitution?

Plessy v. Ferguson's (163 U.S. 537(1896)) hallmark US Supreme Court decision that ushered in the "separate but equal" doctrine ruled that racial segregation was constitutional. In the great dissent of *Plessy*, Justice John Marshall Harlan declared, "(t)he white race deems itself to be the dominant race in this country. … But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Chief Justice John Roberts championed a color-blind reading of the Constitution in *Harvard* and in *Parents Involved v. Seattle*, (551 U.S. 701 (2007)) arguing against desegregation, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." While Justice Harlan's colorblindness doctrine focuses on the inappropriateness of Whites promoting a dominant race position and using the law as support, Justice Roberts' colorblindness canon discourages the use of the law to address the superiority issue Justice Harlan sought to attend. In Justice Roberts' colorblindness, the caste or the systems which perpetuate inequities, either don't exist or don't matter. Accordingly, we cannot create rules or policies to address or mitigate the impact of these unseen systems. In referencing the separate but equal doctrine established under *Plessy v. Ferguson*, Justice Roberts notes that the "inherent folly…of trying to derive equality from inequality—soon became apparent"[11] The folly of ignoring the caste that exists in our country by ending policies designed to mitigate that reality seems not to be apparent. Justice Roberts' colorblindness hampers our ability to bring light to inequities in the criminal legal field because the idea that we should ignore the tangible impacts of race is the prevailing message from our highest arbiter of the law. In the *SFFA v. UNC's*[12] dissent, Justice Jackson voiced the "let-them-eat-cake obliviousness" principle saying the "majority…announces 'colorblindness for all' by legal fiat. But deeming race irrelevant in law does not make it so in life."

The playing field is even, time has run out…

In the *Dred Scott* decision (60U.S. 393(1857)), Black Americans were told, by virtue of our bondage, that we could never be American, but bondage made us the most American of all.[13] Black Americans and other marginalized citizens force our country to take a hard look at itself, where it has fallen short of the American Dream and compels it to evolve. Civil Rights' Laws were required to ensure the rights of marginalized com-

munities who were not given the opportunity to experience the full meaning of citizenship. Now these laws have been used as a weapon against the very people they were designed to protect. ABA Resolution 107 urges that DEI training be a mandatory component of attorney CLEs.[14] As attorneys, we need to fully understand how inequity impacts us, our institutions, organizations, and clients. Whenever we make a conscious decision that proclaims a colorblind, post racial society and fail to acknowledge that our society is replete with systems which perpetuate inequity, we fail to make America just, we perpetuate harm, and we support systems of inequity. Learning our history and how bias impacts us will help create better informed decisions on important issues.

SFFA v. Harvard did not end affirmative action, but it has had a chilling effect on DEI programs as "30 states have introduced or passed more than 100 bills to… restrict or regulate diversity, equity and inclusion initiatives"[15] These bills restricting access to books, censor discussion, forbid the use of diversity, equity, and inclusion as a concept for schools and employers result in changing the history as it is taught for future generations. It is important to note that other SCOTUS decisions exacerbate marginalization. 484 anti-LGBTIQ+ laws restricting access to books, censoring discussions, preventing gender affirming care, limiting protections for youth and criminalizing supportive parents and medical professionals exist.[16] These laws curtail the full rights and benefits of citizenship. They demonstrate how our Country is repeating some of the same issues that the Civil Rights Movement was designed to redress. With the accompanying rise in bias crimes, the terror that marginalized communities experienced during that Movement continues. Nevertheless, according to Equal Employment Opportunity Commission Chair Charlotte Burrows, it remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.[17] ABA Resolution 512 urges legal employers to continue considering DEI in their workforce. They advise being thoughtful about DEI programs to ensure they focus on redistribution of resources not on the basis of race, but in an effort to redress the inequities inherent in the formation and of such resources, thus making the scales equitable.[18]

After all we had a Black president

As a country, we have moments in time that hold great promise, where we come together as a nation and reckon with ourselves to inspire us to recognize our shortcomings and honor the potential of "All men are created equal." Like the death of the 14-year-old Emit Till, the assassination of President Kennedy, the election of Barak Obama, 911, and the Boston Marathon Bombing, the Murder of George Floyd was one such moment. The horrific scene that played out before us as we watched George Floyd struggle for air sparked a movement. As a nation, we responded. This was a reckoning where a society awakened to racial injustice, and people where inspired to take critical steps to address inequity, trauma, and violence. The movement inspired real hope for change. Now, less than 4 years later, promoting diversity, equity, and inclusion is being outlawed and actions to address inequities are wronged.

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race," ignores the reality that racial discrimination is foundational to "All men" and structurally supported in the systems that perpetuate inequities. Structural bias is real and baked into America. The way to stop discrimination on the basis of race is to see the discrimination on the basis of race. Justice requires that we recognize it and do something about it. Sparked by the death of George Floyd, we recognized in our country a desire to do something different. Do not be swayed by the campaign to halt the thoughtful consideration of inequity. Fighting inequity is the foundation of our country. Recognizing when we get it wrong and doing something about it is what makes America great.

There is a fable attributed to Aesop, a Greek storyteller, about a lion who used to prowl a field where four oxen lived. The lion would attempt to attack the oxen and each time they would unite in their defense, turning their tails inward so the lion met their horns in every direction. In time, the oxen began to disagree, and they allowed their disagreement to overcome their good sense. No longer did they recognize the value of working together because they were too consumed by their differences to make space for each other's perspective. They decided to separate and pasture alone. When the lion attacked, each ox alone could not stand. They all fell. This story is believed to be the original iteration of, "United We Stand," a battle cry used throughout the centuries.

This country's founding was intended to elevate freedoms, celebrate differences, and honor diversity. I invoke that battle cry in the hope that, despite our history, we can live up to these principles and unite or be destroyed by the lion.

Endnotes

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UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

The following articles are reprinted with permission from the *ABA/Bloomberg Law Lawyers' Manual on Professional Conduct.*

Supreme Court Rules for Georgia Man on Double Jeopardy Claim

- **Jury verdicts can't be second-guessed, court says**
- **Justice Alito notes ruling is limited**

The US Supreme Court ruled Georgia can't retry a man who was acquitted by reason of insanity for one charge in the murder of his adoptive mother despite conflicting verdicts on other charges.

In a unanimous decision on Wednesday, the court said the Fifth Amendment's Double Jeopardy Clause prevents the state from retrying Damian McElrath for the crime that resulted in the not guilty verdict regardless of any inconsistency with the jury's other verdicts.

McElrath was found not guilty of malice murder by reason of insanity for stabbing Diane McElrath over 50 times in 2012. But he was found guilty, though mentally ill, of felony murder and aggravated assault. The Georgia Supreme Court ruled that wasn't "legally possible," threw out the verdicts, and ordered a new trial.

The district court then rejected McElrath's claim that he can't be prosecuted again for the charge he was acquitted of under the Fifth Amendment's Double Jeopardy Clause, a ruling the state Supreme Court affirmed.

Writing for the majority Justice Ketanji Brown Jackson said the Double Jeopardy Clause prohibits courts from second-guessing why the jury did what it did.

"Once there has been an acquittal, our cases prohibit any speculation about the reasons for a jury's verdict—even when there are specific jury findings that provide a factual basis for such speculation—'because it is impossible for a court to be certain about the ground for the verdict without improperly delving into the jurors' deliberations,'" she wrote, citing the court's 1993 decision in *Smith v. United States*.

Justice Samuel Alito joined the court's opinion but he wrote separately to clarify his understanding of what the court held and note its limits.

He said the state Supreme Court decision had to be reversed because the Constitution doesn't allow for an appellate court to review an acquittal. The situation in McElrath's case, he said, is different from one in which a trial judge refuses to accept inconsistent verdicts and thus sends the jury back to deliberate further.

"Nothing that we say today should be understood to express any view about whether a not-guilty verdict that is inconsistent with a verdict on another count and is not accepted by the trial judge constitutes an 'acquittal' for double jeopardy purposes," he said.

The case is McElrath v. Georgia, U.S., No. 22-721 .

ABA Clarifies Rule on Information Obtained During Public Service

- **Applies to both current, former government workers**
- **Scope includes legislators, public executives**

Attorneys with government jobs can't represent private clients in cases where confidential information learned about an individual through the attorney's public work could disadvantage the individual, the American Bar Association said.

The ABA Formal Opinion 509 clarified the scope of ABA Model Rule of Professional Conduct 1.11(c). The prohibition extends to both current and former government workers, including attorneys who hold part-time public jobs, the ABA said. This is the case even though 1.11(c) was once aimed at regulating the "revolving door" of lawyers moving from government to private practice, the ABA explained.

"We do not perceive any countervailing considerations that would justify exempting current public officers and employees from a disqualification provision designed to prevent that lawyer from misusing confidential government information for a private client," the ABA said.

The rule "applies irrespective of whether lawyers served in a representational capacity when they acquired" the information, the ABA said. Its scope therefore includes legislators and public executives. The ABA cited a 2019 New York State Bar Association ethics committee ruling that applied the rule to a part-time town supervisor who also worked as a private attorney.

The ABA also said it interpreted "private client" to include even public "entities and officials whom the lawyer represents

in private practices, if those clients are not legally entitled to employ the confidential information."

The opinion cited *Gen. Motors Corp. v. City of New York* to support the clarification. In that case, the US Court of Appeals for the Second Circuit in 1974 disqualified a former Justice Department attorney from representing New York in the city's lawsuit against GM because the lawyer had worked on a federal antitrust case against GM.

"[A]s the General Motors case illustrates, there is no less need to protect against the misuse of confidential government information on behalf of a public entity," the ABA said.

ABA Offers Steps to Avoid Conflicts Tied to Prospective Clients

- **Advises on how much information to seek from prospective clients**
- **Conflicts can extend to firm unless 'reasonable' steps are taken**

The American Bar Association has issued new guidance on the steps a lawyer can take to ensure an interview with a prospective client does not prevent their colleagues from potentially representing another party who is adverse to that prospective client.

The ABA Formal Opinion 510 issued by the ABA's standing committee on ethics and professional responsibility, offers further clarity on a rule focused on the conflicts of interest that can arise when an attorney interviews with a potential client relating to a specific matter but is not retained by them. The rule notes that lawyers are barred from representing a party with an adverse claim to that prospective client if that client disclosed information that could be significantly harmful to them in that matter.

Those conflicts can extend to the lawyer's colleagues, unless the firm takes procedural precautions and if the lawyer takes "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client," according to the rule.

Those "reasonable measures" include lawyers limiting the amount of information sought from prospective clients when determining whether to move forward with the engagement, the ABA said in its Wednesday opinion.

"Those who seek and obtain information without limitations fall short of that standard," the ABA panel said. It added that one way lawyers can avoid crossing this rule's red line is to tell potential clients only to provide info requested.

The ABA's standing committee periodically issues ethics opinions as part of what it says is an effort to "guide lawyers, courts and the public in interpreting and applying" its model professional conduct rules. Many states use the ABA rules as a model for their own guidelines regulating attorney conduct.

This opinion comes as the theme of conflicts becomes even more present inside law firms, many of which are far bigger than they were even a decade ago. Many Big Law firms today utilize "advance conflict-of-interest waivers" that generally allow them to take on cases that might otherwise present a conflict for certain clients.

NY Bar Warns Attorneys of Privacy Risks Posed by AI Tools

- **Task force says bar should educate judges, lawyers on AI**
- **Attorneys should ensure AI tools are secure, used judiciously**

Attorneys who use artificial intelligence should be careful about sharing information and data that could accidentally breach client confidentiality, the New York State Bar Association's AI task force wrote in its report.

The report, approved by the House of Delegates, lays out guidelines for attorneys using AI and recommends the bar focus on education and advocating for comprehensive AI legislation to close gaps in regulating the technology.

AI has broad benefits, including that it can help reduce human errors, increase efficiency, and augment human intelligence, but it also poses data privacy and cybersecurity risks, the report says.

AI has potential to increase access to justice for underserved communities, but the Task Force on Artificial Intelligence warns there are still myriad availability and education gaps that need to be addressed to make sure AI tools can be used by everyone. The task force also warns increased use of AI could further burden an already-overwhelmed court system.

Privacy Risks

Confidentiality concerns arise when information is entered into chatbots and then used to train the AI, the report says. Lawyers should follow the rules of professional conduct and be mindful of a client's privacy when using AI tools and get

client consent before using them. Even with informed consent, attorneys should make sure client information will be protected.

Attorneys also shouldn't rely solely on content generated by AI tools and should make sure any work produced by AI is accurate and complete.

"Further, you should periodically monitor the Tool provider to learn about any changes that might compromise confidential information," the report says.

Using closed AI systems, which aren't accessible to the public but do learn from public data, can also help alleviate client confidentiality and privacy concerns, according to the task force.

Attorneys need to be knowledgeable about the technology they're using or ask for help from lawyers or IT personnel. If that's not an option, "then the attorney should not utilize such technologies until they are competent to do so per the duty of competency," the report says.

"AI can enhance the delivery of legal services," said New York State Bar Association President Richard Lewis. "It obviously has enormous potential because it can already draft documents, conduct research, predict outcomes, and help with case management. However, we have an obligation as attorneys to be aware of the potential consequences from its misuse that can endanger privacy and attorney-client privilege."

Education, Legislation

Laws and regulations have failed to keep pace with AI development, according to the task force. Among other things, the law currently struggles with who should be held liable when AI causes damage or harm. The courts are also grappling with issues involving intellectual property, including disputes over using copyrighted data and information to train AI.

The task force says the bar should prioritize educating judges, lawyers, law students, and regulators on the use of AI and how to apply existing law to regulate it.

"Furthermore, many risks are mitigated through understanding the technology and how AI will utilize data input into the AI system," the report says.

Legislators and regulators should also identify risks associated with AI that aren't addressed by existing law and regulations, and examine how the law can be used to govern AI.

The task force has reviewed but doesn't endorse any specific pending legislation on AI.

Access to Justice

AI can help facilitate greater access to justice, the report says, but attorneys must resist viewing AI tools through a lens of technosolutionism—that is, the belief that it can solve every social, political, and access problem.

Courts, the report says, would have to spend additional time and resources researching, verifying, and challenging incorrect AI-generated legal opinions, and that could lead to even longer wait times for litigants.

"Coming at a time when many courts are already stretched thin with unacceptably long waiting times in some jurisdictions for a hearing, adding to this strain could lead to more injustice," the task force wrote.

Underserved populations might not have access to computers or the internet and have limited understanding of how to use AI. They might also distrust government institutions, the law, and legal professionals.

AI could potentially "broaden the availability of legal services to the 'haves,' leaving the 'have nots' worse off than they are now," the report says. For example, in a dispute between a landlord and a tenant, the landlord likely could use AI to increase enforcement action against tenants while the tenants might not be able to access AI to respond.

"While many proclaim that AI is the solution to democratization of justice, an equally powerful contingent claim AI may create a 'two-tiered legal system,'" the report says. "Some anticipate that individuals in underserved communities or with limited financial means will be relegated to inferior AI-powered technology."

Plea Deal Expectations Insufficient to Upend 35-Year Sentence

- **Defendant expected sentence to be below guidelines range**
- **Mistaken expectation doesn't make guilty plea involuntary**

A defendant's expectation that he would receive a sentence below the US Sentencing Guidelines' applicable range doesn't justify altering the 35-year sentence he received, the Second Circuit said.

On appeal, Robert Devalle said that the district court violated Rule 11 of the Federal Rules of Criminal Procedure because it didn't ensure that his plea was voluntary and not induced by

a "promise-like" representation that wasn't in his plea agreement. Devalle said that his plea was induced by "his 'belief' or 'expectation' that he would receive a below-Guidelines sentence," the federal appeals court said.

"Delvalle's plea was not rendered involuntary simply because he subjectively expected to receive a lower sentence than he ultimately received," the US Court of Appeals for the Second Circuit said Tuesday in a per curiam opinion. The district court didn't err by accepting Devalle's plea, the court said, because during his colloquy with the magistrate judge, Devalle "explicitly disclaimed having received any promises, apart from those set forth in his plea agreement."

Though Devalle told the magistrate judge he thought he'd get a below-guidelines sentence, he immediately clarified that wasn't a promise, but, rather, a "big maybe" or "possibility."

"[T]he magistrate judge satisfied Rule 11 by making a thorough inquiry into the voluntariness of the plea; confirming with Delvalle that he had not received any promises regarding his sentence, beyond what was laid out in the plea agreement; and making it clear that any sentencing recommendation was not binding on the court," the Second Circuit said, upholding Devalle's plea.

Devalle and his co-defendants were gang members who sold drugs. They murdered Donnell Harris in 2010 for trying to extort money from them. They stabbed Harris with kitchen knives, beat him with pots, tried to drown him in a bathtub, strangled him with an extension cord, dismembered his body, bagged and loaded it into a shopping cart, doused it in lighter fluid, and lit it on fire.

Devalle was charged in 2018 with murder in aid of racketeering activity and murder in connection with a drug crime. But Devalle agreed to plead guilty to one count of conspiracy to distribute and possess with intent to distribute 28 grams or more of crack cocaine.

As part of his agreement, Devalle had to admit to his role in the Harris murder but he wasn't charged for it. The parties stipulated that Devalle's guidelines sentencing range was from 30 to 40 years. The agreement also noted that the prosecution didn't make any promises about the sentence and that the judge would determine the actual length.

Devalle pleaded guilty before a magistrate judge, and in conformity with Federal Rule of Criminal Procedure 11, he was advised him of his rights and consequences of his plea. The judge also confirmed that Devalle's decision to plead guilty wasn't the result of any promises outside the plea agreement and that he wasn't coerced into making the plea.

"[I]t is well settled that a defendant's guilty plea is not involuntary simply because he has a mistaken expectation at the time of entering his plea of what his sentence will be, even if his expectation is based on his lawyer's erroneous prediction about what sentence the court will impose," the Second Circuit said.

The case is *United States v. Devalle*, 2d Cir., No. 22-1539-cr, 3/5/24 .

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