AMERICAN BAR ASSOCIATION
Criminal Justice Section

Criminal Justice Section Newsletter

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The Spring Meeting Highlights

The 2022 ABA Criminal Justice Section's Spring Meeting took place in Savannah, Georgia on April 7-10, 2022, which featured the Spring Institute with the theme of "Advance or Retreat: Criminal Justice Policy in a Time of Unpredictable Change." The annual gathering also included the CJS awards luncheon, committee and Council meetings.

CLE programs included:

- Well-Being Challenges (and Solutions) for the Criminal Law Professional;
- COVID19: Challenges, Opportunities, and The Courts;
- Prosecution in the Age of Racial Reckoning;
- First But Not the Last (Women in Criminal Justice). [Photo below]

The Midyear Meeting

The Criminal Justice Section's Midyear Meeting took place on Feb. 9-11, 2022 during the American Bar Association's Midyear Meeting. All programs were held virtually and included committee meetings and CLE programs: "The Lawyers' Role in Law Enforcement Assisted Diversion (LEAD) Programs" and "The Rittenhouse Trial: Implicit Bias in Plain View." [Photo below]

Also, criminal justice resolutions passed at the 2022 ABA Midyear Meeting were:

- Res. 700 on risk assessment tools and pretrial release evaluations;
- Res. 609 on expulsion of asylum seekers at the U.S. border;
- Res. 604 on disrupt pathways to homelessness;
- Res. 613 on child dependency/welfare cases;
- Res. 800 on protecting the right to vote in U.S. elections;
- Res. 801 on amending the Electoral Count Act.

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

CJS Award Winners

The Criminal Justice Section congratulates each of the 2021 CJS Award winners:

- Frank Carrington Crime Victim Attorney Award - **Benjamin Crump**;
- Charles R. English Award – **Cynthia Eva Hujar Orr**;
- Livingston Hall Juvenile Justice Award – **Robert W. Mason** (posthumous);
- Curtin-Maleng Minister of Justice Award – **Daniel Satterberg**;
- Raeder-Taslitz Award – **Cynthia E. Jones**;
- Albert Krieger Champion of Liberty Award - **ACLU of New Jersey**.

The awards were presented at the CJS Awards Luncheon during the Spring Meeting in April 8, 2022 in Savannah, Georgia.

While the CJS recently honored 2021 recipients due to a pandemic delay, the CJS is returning to its regular awards schedule and is opening the nominations for the 2022 CJS Awards from May 1 – June 10, 2022. For more information, visit ambar.org/cjsawards.

CJS Chair Wayne McKenzie (far left) with some of the 2021 CJS award winners.

Staff News

Senior Public Relations Specialist **Emily Johnson** has left the CJS. **Hailey Williams** has joined the CJS team as the new Marketing Program Assistant.

Diversity and Inclusion Fellowship Program

The Criminal Justice Section is now accepting applications for its 2022-2024 Diversity and Inclusion Fellowship Program. The Fellowship Program provides opportunities for lawyers from underrepresented backgrounds, including racially and ethnically diverse persons, persons with disabilities, and LGBT+ persons, to actively participate within the Criminal Justice Section and prepare them to take on leadership roles in the Section.

Two fellows will be selected to serve a two-year term, during which time the fellows will sit on the Section's Diversity and Inclusion Committee. Each fellow will be assigned a mentor and undertake a committee project designed to further the goals of the Section, such as organizing a CLE event or publishing an article in one of the Section's publications. Fellows are also expected to attend at least two of the Section's leadership meetings annually: the CJS Fall Institute and at least one of either the ABA Annual Meeting or the CJS Spring Meeting. The Fellowship Program reimburses fellows' travel expenses to leadership meetings up to $2,000 per year.

The Fellowship Program application and additional program details are available online at www.americanbar.org/groups/criminal_justice/committees/diversity.

Member News

On December 31, 2021 with the passing of **Marion Mattingly**, the Juvenile Justice field lost a champion for children. Marion, longtime juvenile justice advocate, did not hesitate to share her passion and knowledge with anyone. She was well connected to legislators, judges, advocates, academics and researchers. The Juvenile Justice Committee many times benefited from those connections as she quite often invited them as guests to the committee meetings and shared tons of research.

In addition to being an active, committed and involved member of both the Juvenile Justice committee and Senior Lawyer Division, Marion was the Washington Editor of the *Juvenile Justice Update* a publication produced by the Civic Research Institute.

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

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The Lawyers' Role in Law Enforcement Assisted Diversion (LEAD) Programs

The CJS Alternatives to Incarceration & Diversion Committee hosted the CLE webinar, "The Lawyers' Role in Law Enforcement Assisted Diversion (LEAD) Programs", during the 2022 ABA Midyear Meeting on Feb. 11, 2022. LEAD is a nationally recognized promising practice in which law enforcement and prosecutors divert people who have unmet behavioral health needs from the formal criminal justice system. LEAD originated in Seattle-King County, WA, in 2011 as a response to reducing racial disparities in drug enforcements caused by War on Drugs initiatives. Designed to think proactively about criminal justice reform and to embed racial equity within its framework, LEAD incorporates a harm-reduction process to respond to low-level drug crime, street-based sex work, and crimes of poverty. Dozens of jurisdictions across the country have replicated LEAD.

The webinar explored the program model and data highlighting its success in reducing recidivism. It then discussed opportunities to leverage the attorney role to address the whole person and enhance outcomes. Applying a public health framework, LEAD programs allow law enforcement and prosecutors to work closely with participants, referring them to trauma-informed, intensive case-management programs to ensure that all contacts going forward, including new criminal prosecution for other offenses, are coordinated to maximize the opportunity for behavioral change. LEAD further builds on collaborative partnerships by encouraging prosecution and defense to work together to get the courts on board and to be ambassadors to other jurisdictions where participants may have outstanding cases or warrants.

Moderated by Miriam Krinsky, the founder and executive director of Fair and Just Prosecution, the webinar featured speakers from Seattle-King County, WA agencies that are integral to the design, implementation, and success of LEAD.

Complimentary on-demand access to this CLE webinar recording is available on the ABA's Member Benefit Library.

ICC Project Members Discuss War Crimes, Accountability for Ukraine

Members of the International Criminal Court (ICC) Project's board of advisors have been tapped as expert resources (in their personal capacities) for media outlets with questions about the challenges of pursuing justice and accountability for atrocities in Ukraine. They have discussed the practical challenges of investigating crimes like genocide, war crimes and crimes against humanity, legal standards, the International Criminal Court's ongoing investigation in Ukraine, and also current US laws and policies that might restrict US cooperation and information-sharing with the ICC.

Several members have also noted that US domestic laws limit the extent to which the United States can prosecute perpetrators of atrocities that are found in the United States (an issue on which the ABA has adopted several policies, including at the 2021 Annual Meeting).

A few examples:

- The JustPod, S4 Ep7, Prosecuting Russian War Crimes (with David Crane), ABA Criminal Justice Section (Mar. 23, 2022)
- Hearing: Accountability for Russia's War Crimes and Aggression against Ukraine (testimony by David Crane & Dr. Jane Stromseth), Tom Lantos Human Rights Commission (Mar. 8, 2022)
- Interview with Amb. David Scheffer, Why the U.S. Never Joined the War Crimes Court, Here & Now, WBUR (Apr. 18, 2022)
- Interview with Benjamin Ferencz, "I am heartbroken': Last surviving Nuremberg prosecutor on war in Ukraine, Christiane Amanpour for CNN (Apr. 15, 2022)
- Interview with Leila Sadat, Why Genocide is Difficult to Prove Before an International Criminal Court, NPR Morning Edition (Apr. 12, 2022)
- Interview with Amb. Stephen Rapp, Andrea Mitchell Reports MSNBC (Apr. 6, 2022)
- How Would Those Accused of Ukraine War Crimes Be Prosecuted? (quotes by David Crane & Amb. David Scheffer), Frontline PBS (Mar. 25, 2022)
- Christopher "Kip" Hale & Leila Nadya Sadat, How International Justice Can Succeed in Ukraine and Beyond, Just Security (Apr. 14, 2022)

Evaluating Your Expert Witnesses and Witnessing Their Value

By James E. Shaw, Ph.D.

Three friends of mine, all working expert witnesses, called me to recount their experiences with private investigators who interviewed them for prospective cases. One complained that the private investigator "asked me if I could stand up to a *Daubert* Hearing"; another seemed insulted that she was asked what her answer would be if the prosecutor "questioned my *high* expert fees"; and the third groused about being asked by the interviewing P.I. "why I prostituted myself in 'criminal defense alley' "—the throng of law offices that occupied a corridor in and around the county courthouse. They accounted for more than 50% of his revenues the preceding year. All of these colleagues demanded to know (from me) *what was up*! Why were they being grilled like this? Were they viewed as expert witnesses or as suspects? Could P.I.'s even ask such questions? They all claimed this was a "first"; but they suspected it wouldn't be the last time they'd be so queried. I told them that they had the right to remain silent, if they chose, though by taking that tact their *value* in the P.I.'s eyes might cascade like Niagara Falls. What shocked them, however, was my telling them that P.I.'s *could* ask such questions—and that more P.I.'s *should* ask those kinds of questions and many more like them!

Questioning Prospective Witnesses…a Necessity

Questioning your prospective expert witness is vital. If you're running defense for your hiring attorney by only scanning a pile of expert witness resumes, you should probably add a vital component to your examination efforts: Call the experts into your office or at least interview them over the telephone. You and the attorney for whom you work cannot afford to have them "drilled and killed" on the witness stand by a salivating prosecutor or other opposing counsel. Expert witnesses should expect questions about *Daubert* whether or not they are doctors, scientists, engineers, or economists. *Daubert* is the "gatekeeper" standard for testing in court *not* whether there is evidence, but whether that evidence was *gathered properly*.

So, your expert witnesses can bet their next breaths that their testimony about the *method* for gathering evidence will now and forever be deemed light-years more important than whether there *is* evidence. This "method-over-matter" point of view held by courts must be understood by all expert witnesses—regardless of their discipline and expertise—as a signal to *include* the *intellectual* method they utilize to arrive at their expert opinion. And it is their responsibility to be ready to address that. *Daubert*, inside courts, has evolved *away* from being merely THE Supreme Court threshold decision about the scientifics of fingerprinting (*Daubert v. Merrell Dow*) to its present-day "gatekeeper" evidence-controlling purpose: A *Daubert* Hearing alerts the expert witness that his or her *thinking* and *reasoning* about the evidence is critical to analyzing the *method* used for bringing that evidence into court and the light of day in the first place.

Dr. James E. Shaw is a member of the Panel of Experts of the Los Angeles Superior Court, Foltz Criminal Justice Center.

What, Who…Daubert and Me?

Don't let your prospective expert witnesses cop out by telling you, "*Daubert* doesn't apply to me. I'm *not* a medical doctor/engineer/scientist/economist." *Daubert*, if nothing else, scrutinizes for due diligence in the evidentiary thinking processes of *non-scientific* pre-testimony expert witnesses. *Daubert* can either seat expert witnesses or strike them and send them packing. You can even advise prospective experts on some of the *Daubert*-type questions opposing counsel might ask them, to try to disqualify them: *The theory or technique you've described, has it been tested and validated?* This kind of question goes to the issue of how established, experienced, and even respected your expert witness is. Your attorney is paying him or her for their *expert* opinion; opposing counsel is not paying them a dime. Therefore, the big, imaginary "zero" opposing counsel sees on the expert's forehead represents a target at which to aim and fire the toughest questions.

The responses your expert gives should be precise, non-argumentative, and without any arrogance or aggrandizement. He or she should sound as though they are well-experienced and, as appropriate, cite other sources in their profession who validate their opinion. *What about peer review? Has your theory or technique been peer-reviewed and published?* This question goes to whether and how your expert is perceived and regarded by his or her peers in their field of expertise: Is he or she known or unknown? Highly-regarded or an "also-ran"? Credible or discredited? Peer reviews are considered the litmus test. Your expert should frankly—without boasting—define and describe those of his or her theories that have been peer-reviewed and published. *What is the potential or previously documented rate of error of the method used?* This question goes to the reliability of your expert's theory. It is important to remember that a high error rate does not always mean the theory is unreliable; it merely means that the rate of error is something to factor in, not disregard. A significant error rate does not render invalid your expert's theory. By the same token, if your expert's theories or techniques are controversial, that is not necessarily a negative against your expert. Controversy is active and ongoing debate; it doesn't mean your expert's work and reputation are tarnished. Since opposing counsels often look for opportunities to do a

verbal "Assault-and-Daubert," you can tailor-make your own questions to acquaint your expert with and prepare him or her for *Daubert* issues.

Questions Are Critical—They Aren't Criticism

Expert witnesses should not be put off or feel insulted about any questions the P.I. asks them. P.I.'s can make their interviewees feel more comfortable about answering their "twenty questions" by advising them that "I have to ask you several questions along the way. Better I do it before the prosecutor does; that way you *and* the attorney I work for can look good in court." Or, "I hope you won't be insulted, but the more questions you answer for me, the more *qualified* my attorney can make you look in court." Or, "Prosecutors regularly dispute the qualifications of the expert witness. The *Daubert* Hearing gives them an additional tool to not only dispute but also to try to *disqualify* you. And we wouldn't want that to happen, would we?" With this in mind, expert witnesses should also expect to be asked questions about their "high" hourly fees. A private investigator friend of mine recalls a prosecutor grandstanding before the jury by haranguing the expert witness about his fees. He ended by telling the expert that his boss, the district attorney, "pays me only a fraction of what you make per hour." To which the expert witness replied: "Well, the district attorney certainly knows your worth far better than I do." The courtroom, including the judge and jury, erupted in laughter; the prosecutor, though, seemed not to be amused.

Human nature is often unpredictable, and just because an expert's good-natured humor may incite laughter from a judge and jury, does not mean that the expert is *favorably* regarded at all. An embarrassed and insulted opposing counsel can often very skillfully turn a moment of levity against the expert. Indeed, the judge, while laughing and seeking to mollify opposing counsel's bruised ego, might even discredit and dismiss the expert as off-base and impolite. That well-aimed response might—in jury deliberations—even be regarded as impertinent and rude. The jury might be ashamed of its spontaneous outburst of laughter and, with stony faces, try to rectify their "sin" by regarding the expert with mistrust… as somebody given to self-aggrandizing and discourteous responses. It is better that opposing counsel expose his or her own feelings of annoyance about your expert's so-called "high fees" and be the spectacle in their own circus of critical questions. Your expert need not be caught up in this game. You might wish to repeatedly and diplomatically advise the expert to tell the truth, to act naturally, not to exhibit arrogance or ridicule, not to joke, and certainly not to argue with opposing counsel. In this context, "Sharp tongues sometimes cut their own throats" is a maxim that describes what could happen to *either* an expert witness or the opposing counsel. A backlash *could* hurt the expert more than it hurts opposing counsel.

It's Preparation…Not Ping-Ponging With the Prosecution

Rather than risk your expert's trying to match wits, in the foregoing manner, with the prosecutor, I recommend that the expert be prepared to reveal to you *why* their hourly fees are the way they are. There are at least nine reasons your expert witnesses might find valuable support for questioned fees: (1) years of experience in the field; (2) court certification your expert has; (3) membership on any court's Panel of Experts; (4) rank and tenure in your expert's professional discipline, such as college and university teaching; (5) books, papers, or journal articles your expert has published; (6) the number of cases in which your expert has provided expert testimony; (7) your expert's membership and rank (such as president) in professional associations; (8) your expert's participation and presentation at professional conferences, particularly those where continuing education credits (e.g., CLE) are awarded to their audiences of licensed professionals; and (9) your expert's media profile: how often he or she has appeared on television or radio providing their opinions on national topics. Juries can often follow a logical trail and understand why a judge allows expert witnesses into the court to opine about cases. In other words, juries are not usually put off by carefully-explained and well-reasoned justifications the expert makes for his or her fees. The expert witness should never be gulled by the prosecutor's comparison of his or her own salary with that of the expert. Tell your experts to treat their fees as a kind of evidence and to speak about them openly and frankly. Rather than be or feel vilified by the prosecutor, your experts can show themselves as *vital* to the case *because* of their fees.

Frank and Direct Answers Are Best

It is highly doubtful that a prosecutor would insinuate that an expert witness "prostitutes" himself or herself in certain financially-lucrative environs around the court. Most fish find their water in the ocean. Too, any number of expert witnesses might find prospective cases among a virtual "sea" of law offices around the courthouse. It's only practical and makes good business sense to market themselves in and among such a constellation or cluster of law firms. What the P.I. means by the "prostitute" question (if he or she even chooses to use *that* word at all—however, one P.I. did when querying me!) is whether the expert witness shows a dominant *bias*—for either prosecution or defense—in the *kinds* of cases taken in, say, the past year. Again, it's better that your prospective expert answer the question head-on and directly.

By stating the obvious—that most *private* law firms house only *defense* counsels—your expert can show he or she is merely answering legally-constituted calls for defense expert testimony support and not turning away prosecutors' requests to provide expertise on cases. To be sure, prosecutors use expert witnesses. However, the number of cases for which they bring an expert into court is but a fraction of the frequency with

which defense attorneys need and use experts. Even in those cases where the defendant has been pronounced by the court as "indigent" (impoverished and unable to pay) he or she is still the client of a defense attorney who thus may need an expert witness. There's also the fact that prosecutors select their expert witnesses from the court's approved Panel of Experts. If your expert witness is *not* on the panel, that may not be his or her fault. Thus, their answer to an inquiring prosecutor, regarding the percentage of prosecution and defense cases on which they've worked, can reasonably be: "I would probably work more prosecution cases if I were on the court's Panel of Experts, but I am not; and thus far I've not been chosen by the district attorney to participate on a case."

If your expert has completed the application process to be on the panel, he or she should certainly state that; that fact is good public relations. The prosecutor knows that an expert's *not* being on the court's Panel of Experts may have little or nothing to do with the expertise and qualifications of the expert. Often, the court's panel is full and there simply is no room for another expert. Frequently, not all of the judges, or any single one of them, who comprise the team that chooses expert witnesses for the Panel of Experts, hears cases for which a given expert's *rare* experience and expertise are needed. The court's "problem" here is, of course, known by the prosecutor, and is not something to be held against the expert. Your expert is not responsible for any past or present circumstances inherent in the court. Again, if your expert witness has made application to the court, to be on its Panel of Experts, he or she should so state. That revelation can clear the air and deflect any "end run" the prosecutor might try to make in the effort to disqualify your expert.

Who Can Pre-qualify Your Experts Better Than You?

Both P.I.'s and expert witnesses provide a huge and valuable service to the attorneys who employ them. And every P.I. and attorney I've worked for has been highly appreciative. Expert witnesses should regard questions from P.I.'s as appropriate and necessary safeguards to protect the legal rights and interests of the client and fulfill the case objectives of the hiring attorney. As a Private Investigator, you know which way the winds inside the court blow (or are likely to) better than any roomful of expert witnesses. Take time to ask your prospective expert witness the hard questions, and to pose the tough issues. If possible, meet and confer with him or her personally. Go over their resume and interview them about the information it contains. Ask them to tell you about their four cases ("your top four") that are unique and unlike any others on which they've worked; then ask them to define what makes these four cases stand apart from the rest. Show them a calendar, and ask them about their availability for trial as you highlight the anticipated trial dates. Determine whether they might have schedule conflicts.

Taking Time to Talk Now Increases Value Later

By taking the time to have at least a one-hour "sit down" discussion with any prospective expert, you can *pre-qualify* him or her for your attorney. Your prospective expert's opinion is the purpose for which he or she might be hired, and it ought to be the rock-solid foundation upon which their role and reputation are established and respected by the court. Therefore, your reviewing and clarifying the opinions to which they will be testifying to, is key critical. It will do you both good to hear, in their own words, what opinions they hold about the case and what they will likely say in court. Equally important, their going over with you the facts and assumptions that frame the bases of their opinions is a practical step; it is the productive equivalent of a baseball player's doing warm-up calisthenics and taking batting practice. One can never review one's facts and assumptions too much or too often; such review prevents one from being caught off guard on in "the blind" by opposing counsel's peppering questions.

You will need to hear and your prospective expert needs to say how, that is, in *what way* they derived their opinion: What methodology did they employ? This tracking the trail from beginning to end sets up a logical step-wise chronology that can be as impressive as it can be instructive. In my own experience, prosecutors have sometimes been left astonished and speechless before admitting, "No further questions, your honor," to the judge, after I have carefully laid out the methodology that framed and informed my professional opinion. You will certainly want to ask your expert *when* his or her opinion was formed. You can stress the importance of their addressing the *timing* of the formulation of their opinion, as the opposing counsel will seek to find some kind of fault with the timing—holding it up to be premature or incomplete, and the resultant opinion as inaccurate.

Your thorough and intensive interviews and evaluations of expert witnesses can result in your attorney's being able to *witness their value* in court.

For Privilege to Attach to Dual-Purpose Messages, the "Primary Purpose" of the Attorney Communications Must be Legal (Rather than Business) in Nature[1]

By Andrew S. Boutros and Jay Schleppenbach

During white collar criminal investigations, issues sometimes arise as to the scope of the attorney-client privilege. In particular, in-house attorneys for companies may sometimes wear multiple hats as trusted business advisors as well as legal experts, which can lead to confusion about whether their communications contain privileged legal advice.[2] After all, not every communication involving an attorney is privileged, but only those that are made confidentially for the purpose of seeking legal advice.[3] Where communications involving an attorney have a "dual purpose," one that is legal in nature and one that is not, such as seeking business or tax advice, courts have applied different tests to determine whether the privilege applies.[4] With a recent Ninth Circuit decision, however, several circuits have now signed on to a test that asks whether the "primary" or "predominant" purpose of the communication was to seek or provide legal advice. Thus, to protect the privilege in connection with white collar criminal investigations, practitioners should advise their clients to document in writing the legal purposes of their communications.

The Ninth Circuit Decision

The Ninth Circuit's September 2021 decision in *In re Grand Jury* resolved a split among district courts on the questions of how the application of the attorney-client privilege should be decided with regard to attorney communications with a dual purpose.[5] A grand jury had subpoenaed the communications at issue in the case from an unidentified company and law firm, each of which withheld a variety of documents claiming attorney-client privilege and/or work product protection.[6] The government moved to compel production and the district court granted the motion, holding that certain documents were not privileged because their "primary purpose" was seeking tax rather than legal advice.[7] The company and law firm continued to withhold the documents, were held in contempt, and appealed, arguing that the district court should have applied a different test for privilege.[8] Specifically, the appellants argued that the court should have borrowed the test from the attorney work product context for when dual-purpose communications are protected.[9] That test, sometimes referred to as the "because of" test, protects such documents "when it can be fairly said that the document was created because of anticipated litigation and would not have been created in substantially similar form but for the prospect of that litigation."[10]

In a unanimous decision, the Ninth Circuit affirmed the district court and rejected the appellants' suggested test, noting that the attorney client privilege and the work product protection "are animated by different policy goals" and thus it "makes sense to have different tests for the two."[11] Although privilege is focused on protecting full and frank communication between lawyers and clients, the work product protection is centered on protecting the adversarial process by allowing lawyers to develop litigation strategy without fear of intrusion by their adversaries.[12] Thus, the appellate court concluded that applying the "because of" test in the different context of privilege would not make sense and could even "create perverse incentives for companies to add layers of lawyers to every business decision in hopes of insulating themselves from scrutiny in any future litigation."[13] In the court's view, the "primary purpose" test properly captured when attorney-client privilege should apply to dual-purpose communications between attorneys and clients.[14]

Growing Consensus

The Ninth Circuit's endorsement of the "primary purpose" test brought it in line with similar tests applied by some of the other federal circuit courts. The Second Circuit and the Sixth Circuit consider whether the "predominant purpose of the communication is to render or solicit legal advice,"[15] while the Fifth Circuit asks if the communication was "for the primary purpose of securing either a legal opinion or legal services, or assistance in some legal proceeding."[16] Similarly, some federal district courts within other circuits have also applied an equivalent test. For instance, the Southern District of Florida has stated that "the privilege applies only if the primary or predominant purpose of the attorney-client consultations is to seek legal advice or assistance."[17] The District of New Jersey posited that "[i]f the primary purpose of a communication is to solicit or render advice on non-legal matters, the communication is not within the scope of the attorney-client privilege."[18] The Eastern District of Pennsylvania has also applied a "primary purpose" test to in-house counsel.[19]

The D.C. Circuit's approach is similar but applies the privilege slightly more broadly, asking "was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?"[20] That federal appellate court opined that "trying to find the one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task" because, often, it is "not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B."[21]

Andrew S. Boutros is Regional Chair of Dechert LLP's White Collar practice in Chicago and Washington, D.C. John R. ("Jay") Schleppenbach is Counsel in Dechert LLP's White Collar practice in Chicago.

The appellants in *In re Grand Jury* actually asked the Ninth Circuit to follow this slightly broader approach from the D.C. Circuit, but the court declined to decide the issue, concluding that it would not make a difference on the facts of the case.[22]

Tips to Protect the Privilege

The most obvious effect of the Ninth Circuit's opinion is to resolve a split within the district courts of the circuit, some of which had adopted the broader "because of" test for privilege—a test that has now been rejected in that circuit.[23] But it may also impact the way other courts nationwide consider privilege issues when communications have a dual purpose by adding to the growing circuit consensus that a "primary" or "predominant" purpose test is appropriate. Thus, although attorneys—particularly those who work in house—may never be able to fully separate their dual roles as business and legal advisors, they would do well to take steps to emphasize their legal role when they wish to claim privilege, such as:

- Adding a header to the top of a communication or email subject line, with the notation "FOR PURPOSES OF LEGAL ADVICE."
- Advising businesspeople to clearly state when they are seeking "the legal perspective."
- Retaining outside counsel or appointing in-house counsel early in an internal investigation to help make clear that it is being conducted for the purpose of obtaining legal advice and not just to make business decisions.
- Just as outside counsel would do with an engagement letter, in-house counsel should create contemporaneous documentation of an internal investigation stressing its scope and purpose to obtain legal advice.
- Limiting email lists to only those employees necessary to the legal advice aspect of a communication.
- Clearly defining in writing the roles of attorneys and other employees on a project, especially if an investigation is being handled by in-house counsel.
- Creating (or updating) company policies to clearly state when counsel (especially in-house counsel) will be consulted for business versus legal advice.

It is perfectly appropriate for lawyers to wear multiple hats, but ensuring that the legal hat is discernably the (or a) "primary" purpose of the communication may make the difference between producing a communication in litigation or withholding it as privileged.

Endnotes

1. This article is adapted from Andrew Boutros & Jay Schleppenbach, *Special In-House Counsel Alert: Ninth Circuit Adopts "Primary Purpose" Test for Dual Purpose Communications Seeking Attorney-Client Protection* (Sept. 23, 2021).

2. Doug Gallagher & Manasi Raveendran, "Attorney-Client Privilege for In-House Counsel," *ABA Landslide* (Nov./Dec. 2017).

3. Restatement (Third) of the Law Governing Lawyers § 72 cmt. c (2000).

4. *Compare Alomari v. Ohio Dep't of Pub. Safety*, 626 F. App'x 558, 570 (6th Cir. 2015) (holding that attorney-client privilege should apply when the "predominant purpose of the communication is to render or solicit legal advice") *with In re CV Therapeutics, Inc. Sec's Litig.*, No. C-03-3709, 2006 WL 1699536, at *3 (N.D. Cal. June 16, 2006) (holding that attorney-client privilege should apply to all documents created "because of" anticipated litigation).

5. 23 F.4th 1088 (9th Cir. 2022) (amending Sept. 13, 2021 decision).

6. *Id.* at 1090.

7. *Id.*

8. *Id.* at 1091.

9. *Id.* at 1091-92.

10. *Id.* at 1092 (*quoting In re Grand Jury Subpoena (Mark Torf/Torf Env't Mgmt.)*, 357 F.3d 900, 908 (9th Cir. 2004)).

11. *Id.* at 1093.

12. *Id.*

13. *Id.* at 1093-94.

14. *Id.* at 1094.

15. *In re County of Erie*, 473 F.3d 413, 420 (2d Cir. 2007); *see also Alomari v. Ohio Dep't of Pub. Safety*, 626 F. App'x 558, 570 (6th Cir. 2015) ("When a communication involves both legal and non-legal matters, we consider whether the predominant purpose of the communication is to render or solicit legal advice.")

16. *United States v. Robinson*, 121 F.3d 971, 974 (5th Cir. 1997).

17. *Preferred Care Partners Hldg. Corp. v. Humana, Inc.,* 258 F.R.D. 684, 689 (S.D. Fla. 2009).

18. *Claude P. Bamberger Int'l, Inc. v. Rohm & Haas Co.,* No. 96-cv-1041, 1997 WL 33762249 (D.N.J. Dec. 29, 1997).

19. *Kramer v. Raymond Corp.*, No. 90-5926, 1992 WL 122856 (E.D. Pa. May 29, 1992).

20. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014) (emphases added).

21. *Id.* at 759 (emphases added).

22. *In re Grand Jury*, 23 F.4th at 1094-95.

23. *See, e.g., In re CV Therapeutics, Inc. Sec's Litig.*, No. C-03-3709, 2006 WL 1699536, at *3 (N.D. Cal. June 16, 2006) ("the Ninth Circuit has recently suggested that the primary purpose test may have been replaced or refined by the 'because of' standard"); *Visa U.S.A., Inc. v. First Data Corp.*, No. 02–1786, 2004 WL 1878209, *4 (N.D. Cal. Aug. 23, 2004) (applying the "because of" test in the privilege context).

UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

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New York Bar Outlines Attorney's Duty to Protect Smartphone Data

- Lawyer's contacts might include criminal representations
- Human must not review confidential information

An attorney who stores the confidential identity of their clients on a smartphone must not consent to share contact information with an app unless that information won't be shared with any human, the New York State Bar Association said.A lawyer's contacts might include criminal representations, and an attorney is required to "make reasonable efforts" to prevent disclosure of confidential client information under Rule 1.6(c) of the New York Rules of Professional Conduct, the New York Bar said in an ethics opinion dated April 8.

"Insofar as clients' names constitute confidential information, a lawyer must make reasonable efforts to prevent the unauthorized access of others to those names, whether stored as a paper copy in a filing cabinet, on a smartphone, or in any other electronic or paper form," the ethics opinion says.

The New York bar further explains that, before an attorney grants access to their contacts, the lawyer must "determine whether any contact" is confidential within the meaning of Rule 1.6(a). If there is confidential information on the smartphone, the lawyer must determine if a human being will view the data and if it will be sold without the client's consent, according to the ethics opinion.

American Bar Association Clarifies Rules on Legal Solicitation

- Solicitation rule was amended in 2018
- Prohibitions can apply to lawyers' employees

Lawyers who know of specific unethical conduct by employees, and either directed the conduct, ratified it, or failed to take reasonable remedial measures after the fact, violate the ABA Model Rules of Professional Conduct, the ABA said in a formal opinion released Wednesday.

The ABA's standing committee on ethics and professional responsibility issued the opinion to clarify the scope of multiple rules related to solicitation, including parts of Rule 5.3, Rule 7.3, and Rule 8.4 that were amended in 2018. The opinion examines various solicitation scenarios that may involve employees and agents of lawyers, and it provides guidance for attorneys in deciding what activities are permissible.

Despite amendments to the solicitation rules in 2018, ambiguity remained over lawyers' ethical responsibilities for their actions and for the action of others who engage in live, person-to-person solicitation with certain individuals, the opinion said.The prohibition against live person-to-person solicitations extends to actions by those "employed by, retained by, or associated with the lawyer under certain circumstances," the opinion said.

A lawyer with supervisory responsibility over nonlawyer employees must discuss ethical rules with them to ensure they understand the limitations on their conduct. Supervisory lawyers must explain the requirements of Rule 7.3 to refrain from improper solicitation on behalf of the lawyer, the opinion said. These lawyers have a duty to supervise and must train all persons employed, retained, or associated with them to ensure compliance with the rules.

The opinion looks at four hypothetical solicitation scenarios in light of the 2018 amendments and provides guidance on what is permissible for attorneys. For example, a lawyer who rewards a paralegal who brought in new business by handing out their law firm's business cards to injured people while working as a paramedic violates the rules.

Google Location Data Tempts Police While Privacy Advocates Worry

- Mobile phone user movements may reveal criminal suspects
- Searching company records raises legal questions

Location tracking data from Alphabet Inc. is a tempting way for law enforcement to seek out suspects in the vicinity of a crime, but a first-of-its-kind legal ruling could put a stop to police efforts to use it. These so-called geofence warrants allow law enforcement to scour a crime scene for potential suspects, rather than acting on a hunch about a specific suspect and asking a judge for a warrant to search their home or belongings.

Geofence warrants rely on Google's extensive records showing where a user's mobile phone is located at a given time, offering a novel way to identify criminal suspects who might not otherwise be found. But allowing police to scrutinize movements by a

pool of phones near a crime reveals other people's whereabouts as part of the hunt for a suspect, posing a privacy concern.

"The places we go tell a lot about our lives," said Hayley Tsukayama, a legislative activist for the nonprofit Electronic Frontier Foundation. "Having that information analyzed without cause, for most people swept up in these warrants, that's a huge privacy violation."

Bank Robbery Tests Law

Using a geofence warrant to find a bank robbery suspect violates the Fourth Amendment's protections against unreasonable searches because police sifted through other people's location histories in the process, without establishing legal justification for searching them alongside the suspect, a federal judge in Virginia decided in early March.

The judge still let evidence drawn from the location data search stand in this case, the first where a criminal defendant challenged the use of a such evidence in his indictment. This part of the ruling relied on what's known as the "good faith" exception to the Fourth Amendment's warrant requirement, meaning law enforcement officers acted on what they thought was a valid warrant at the time.

A lawyer for Okello Chatrie, the man accused of robbing a bank near Richmond, Va., declined to comment on whether he would appeal the ruling.

The robbery ruling in the U.S. District Court for the Eastern District of Virginia could have implications for police departments as they increasingly seek to search Google's location data, with many privacy advocates hoping that judges in other courts will follow its lead to deny issuing geofence warrants going forward. The decision from U.S. District Judge Hannah Lauck also raises questions about whether legislatures should step in to set parameters around how, or even whether, law enforcement should use these warrants.

Future Warrants

Lawmakers in New York have proposed a bill to block police efforts to tap into Google's trove of location information. The bill's backers include the Surveillance Technology Oversight Project, a New York-based privacy advocacy group.

The project's founder and executive director Albert Fox Cahn said he's hopeful that the legislation, first introduced in 2020, will move forward and become a model for other states, now that the judge in the robbery case deemed this kind of location history search unconstitutional. It remains to be seen if other judges will agree with Lauck's reasoning, which hinged on the privacy impact for other people who unknowingly appear in the search for a suspect. The judge's ruling found that police didn't show what's known as probable cause to search these other people.

"Even if this opinion does become effectively the law of the land if other courts follow suit, there would still be some room for police to meet the standards of probable cause to use this investigatory tactic," said Jane Bambauer, a law professor at the University of Arizona who studies the social costs and benefits of big data. Geofence warrants "would be more limited" as a law enforcement tool, she added.

Decisions on whether to grant the warrants going forward could depend on the crime being investigated, Bambauer said. For a series of seemingly linked crimes, comparing phone location histories could reveal a suspect present across events.

A federal judge in Illinois granted law enforcement access to Google location data for an investigation into 10 fires in the Chicago area in 2019 that were believed to be connected. The judge decided that the request was narrow enough that it wouldn't infringe on Fourth Amendment rights.

Rising Requests

State and local law enforcement are increasingly turning to Google data in search of suspects for robberies or other crimes, according to a report from the tech giant. In the bank robbery case, Google submitted a legal brief urging the Virginia court to rule that law enforcement must obtain a warrant supported by probable cause to gain access to the company's location history records.

"We are reviewing the court's decision," a Google spokesperson said of the Chatrie case. "We vigorously protect the privacy of our users, including by pushing back on overly broad requests, while supporting the important work of law enforcement."

Google's data is more precise than other location information that's collected when a mobile phone pings nearby cell towers. The U.S. Supreme Court ruled in 2018 in *Carpenter v. United States* that a warrant is required for law enforcement officials to access cell tower location history.

Geofence warrants could work their way up to the nation's top court next, if more criminal suspects challenge their use, according to John Seiver, of counsel at Davis Wright Tremaine LLP. "If you're a criminal, this is a good hint to them," Seiver said. "Either don't take your phone with you or turn it off."

An International Guide to Corporate Internal Investigations

By Mark Beardsworth, Patrick Hanes, Ibtissem Lassoued, Saverio Lembo, and Frances McLeod

Published by the American Bar Association Criminal Justice Section, 2021

Reviewed by Lucian E. Dervan

Just over ten years ago, the ABA Criminal Justice Section launched conferences in Frankfurt and London focused on the evolving field of international white collar crime. At the time, international corporate internal investigations were already an important part of the global white collar landscape, but few events offered participants a focused examination of some of the most complex and evolving issues in this field. These initial conferences explored some of the pressing challenges faced by counsel as they began to engage in cross-border inquiries, including questions about privilege, data privacy, state secrets, blocking statutes, and labor laws.

Ten years later, the field of cross-border investigations has matured and the Criminal Justice Section has expanded its conferences to Shanghai, Sao Paulo, Prague, Amsterdam, and Paris, but the myriad of questions surrounding how to conduct international investigations and the various pitfalls and perils that might await those engaged in this practice persist. Into this space now steps a well-researched and detailed book examining key questions related to international corporate internal investigations in a host of jurisdictions around the world.

An International Guide to Corporate Internal Investigations, published in 2021 by the ABA Criminal Justice Section, is a collection of chapters focusing on core questions related to cross-border inquiries in different jurisdictions around the world. Each chapter is written by authors with deep experience in the location and who are able to capture the significant and subtle differences of each country. In total, over forty practitioners from eleven jurisdictions contributed to the work and chapters cover countries in North and South America, Europe, Asia, and the Middle East. The approach of selecting authors for each jurisdiction with intimate on-the-ground knowledge of the location adds great strength to the book's content as the writers are able to address legal, regulatory, and structural differences, along with important cultural distinctions.

For example, in their chapter on the United Arab Emirates, Ibtissem Lassoued and Benjamin Jones of Al Tamimi & Company note the importance of investigators understanding the unique structure of the country's federal system, which is made up of seven Emirates and includes over forty commercial free-zones. Later in the chapter, the authors also note the ways in which cultural and religious considerations are vital when conducting employee interviews in the UAE. Not only do these types of insights add to readers' knowledge about particular countries, they also help practitioners identify broader issues for consideration in whatever country their investigation may travel.

Within each chapter, a number of important issues related to cross-border investigations are addressed, along with additional unique information relevant to each jurisdiction. This structure allows readers to compare and contrast approaches to commonly encountered issues around the world, while also benefiting from additional particularized information. As detailed in the foreword by former Deputy Attorney General Sally Yates, now with King & Spalding LLP, each chapter considers issues surrounding privilege, language considerations, labor and employment laws, and document collection, review, and production. As an example of the combination of these general areas of inquiry with more specialized considerations, Saverio Lembo and Pascal Hachem of Bar & Jarrer, AG discuss the above general issues in their chapter on Switzerland, but also provide the reader detailed information regarding Swiss blocking statutes and their impact on investigations. This material leaves the reader with a deeper understanding of comparative international investigations law, along with additional information of significance in particular locations.

Finally, in addition to offering practitioners operating around the world invaluable information regarding the particular jurisdictions discussed, the book also provides the reader with broad insights regarding cross-border inquiries more generally. In his introduction, editor and author Mark Beardsworth of Cadwalader Wickersham & Taft LLP offers several important themes and learnings, such as noting the role of planning, structure, and management, the evolving use of technology, and the importance of counsel's independence. He goes on to synthesize the book's material into nine key best practices for internal investigators, which cover a myriad of topics including the importance of clearly identifying the client and considerations related to self-disclosure. This complimentary generalized discussion of investigations practice allows the reader to leave with tools for use and consideration in the many additional countries not specifically addressed in the book where cross-border investigations may occur in today's global enforcement environment.

At a recent ABA Criminal Justice Section conference, Mark Beardsworth made note that the last decade has seen the creation of an international investigations bar. This book is a testament to that fact and is an excellent resource for those in this field as they navigate the pitfalls and perils that await those who are ill prepared for the diverse regulatory, legal, and cultural considerations presented by the growth of cross-border investigations.

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Upcoming Events

June 10:	Paris White Collar Crime Institute, Paris, France
June 22-24:	Health Care Fraud Institute, Las Vegas, NV
Aug. 4-9:	ABA Annual Meeting, Chicago, IL
Sept. 7-9 :	Southeastern White Collar Crime Institute, Braselton, GA
Oct. 10-11:	10th Annual London White Collar Crime Institute, London, UK
Nov. 17-20:	CJS Fall Institute/Meeting, Washington, DC
Dec. 5-7:	ABA/ABA Financial Crimes Enforcement Conference, National Harbor, MD

For the complete list of CJS events, see ambar.org/cjsevents.

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