



A Year in Review

From What Ethics Rules Apply
in Multistate Practice to the
Ethics of Witness Preparation

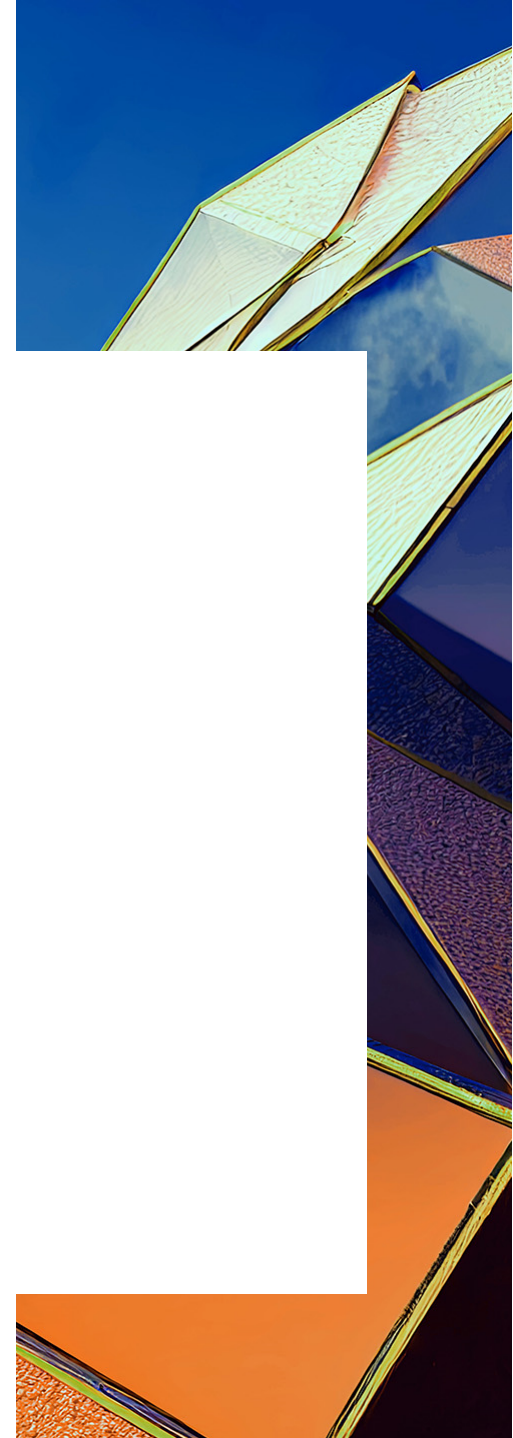
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Presenters



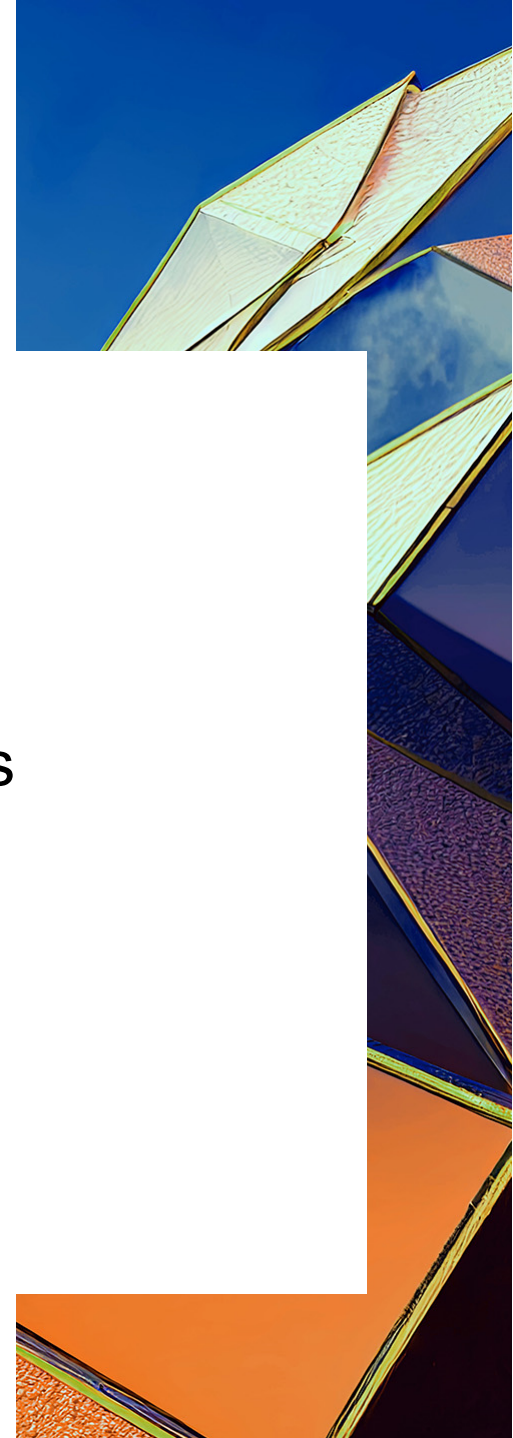
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ABA Formal Opinions in 2023 (even numbers only)

- Op. 508 – The Ethics of Witness Preparation
- Op. 506 – Responsibilities Regarding Non-Lawyer Assistants
- Op. 504 – Choice of Law



Case Law

1. *In re Grand Jury*, No. 21-1397, 23 F.4th 1088 (9th Cir. 2021) but the US Supreme Court dismissed it after argument in 143 S.Ct. 543 (2023)
2. *SuperCooler Technologies, Inc. v. The Coca Cola Company*, Case No. 6:23-cv-137-CEM-RMW, ___ F.Supp. 3d ___ 2023 WL 5284850 (M.D. Fla. 2023)

ABA Opinion 508 – Witness Preparation

- “An essential tactical component of lawyer’s advocacy”
- A failure to adequately prepare a witness “would in many situations be classified as an ethical violation”

ABA Opinion 508 – Witness Preparation

What is OK?

- Explain that telling the truth can include a truthful answer of “I don’t recall”
- Explain case strategy and procedure, including the nature of the testimonial process or the purpose of the deposition
- Suggest proper attire and appropriate demeanor and decorum
- Provide context for the witness’s testimony
- Inquire into the witness’s probable testimony and recollection

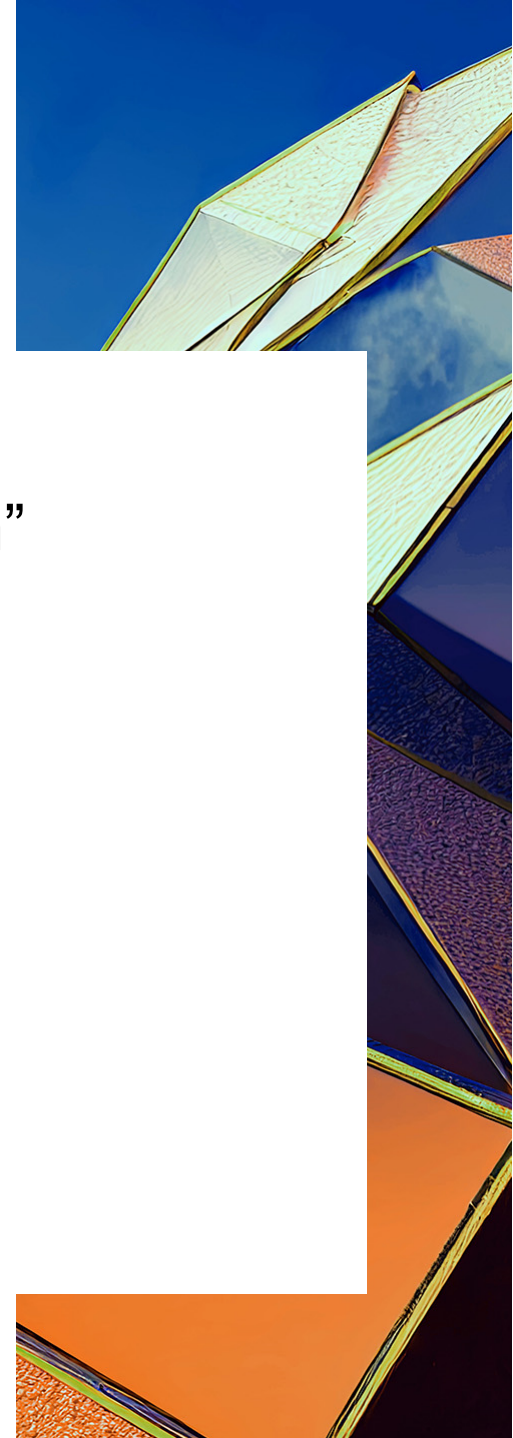
ABA Opinion 508 – Witness Preparation

What is OK?

- Identify other testimony that is expected to be presented and explore the witness's version of events in light of that testimony
- Review documents or physical evidence with the witness, including using documents to refresh a witness's recollection of the facts
- Identify lines of questioning and potential cross-examination
- Suggest choice of words that might be employed to make the witness's meaning clear
- Tell the witness to testify only about what they know or remember and not to guess or speculate
- Familiarize the witness with the idea of focusing or answering the question (*i.e.*, not volunteering information)

Where is the Line?

- “Unethically interfering with the integrity of the justice system”
- “Unethically obstructing another party’s access to evidence”



ABA Opinion 508 – Witness Preparation

What is impermissible “coaching,” “woodshedding,” “sandpapering”?

- Start with Model Rule 3.4(b):
A lawyer shall not
(b) falsify evidence, counsel or assist a witness to testify falsely. . .
- Can’t encourage a witness to present fabricated testimony



ABA Opinion 508 – Witness Preparation

What's impermissible?

Instigating a witness to lie can occur in ways beyond an outright instruction to fabricate testimony

- Can't "tell a witness to 'downplay' the number of times a witness and a lawyer met to prepare for trial"
- Can't "encourage a client to misrepresent a location of a slip and fall accident to have a viable claim"
- Can't "program a witness's testimony"

ABA Opinion 504 – Choice of Law for Ethics Rules



- Clarifies ABA Model Rule 8.5 Disciplinary Authority; Choice of Law
- Clarifies which Ethics Rules apply
- Clarifies what should happen if conduct violates the Rules of Professional Conduct in one jurisdiction but is permissible in another

Under ABA Model Rule 8.5

- A lawyer is subject to discipline in every jurisdiction in which the lawyer is licensed
- A lawyer is subject to discipline in every jurisdiction in which the lawyer offers services
- A lawyer may be subject to discipline in more than one jurisdiction for the same conduct

Choice of Law Under ABA Model Rule 8.5/Op. 504

- Different analysis for litigation and non-litigation matters
- For litigation, its “the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal apply otherwise”
- For all other conduct (transactional work, “conduct in anticipation of litigation not yet filed”), a lawyer must comply with the ethics rules of the jurisdiction where the lawyer’s conduct occurs or, if different, where the predominant effect of the lawyer’s conduct occurs

ABA Opinion 504 – Choice of Law for Ethics Rules

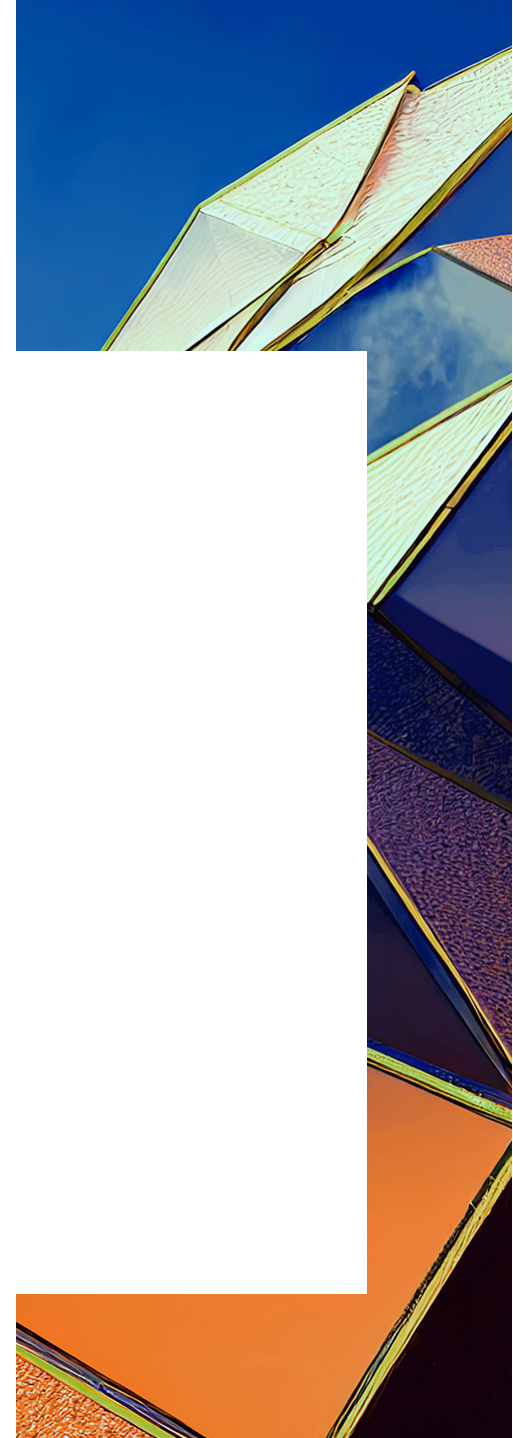
Factors for determining where predominant effect of a lawyer's conduct occur:

- The client's location, residence and/or principal place of business;
- Where the transaction may occur;
- Which jurisdiction's substantive law applies to the transaction;
- The location of the lawyer's principal office;
- Where the lawyer is admitted;
- The location of the opposing party and other relevant third parties (residence and/or principal place of business); and
- The jurisdiction with the greatest interest in the lawyer's conduct.

ABA Opinion 504 – Choice of Law for Ethics Rules

Safe Harbor

- A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.



No Guidance from the U.S. Supreme Court on Dual Purpose Communications

- When legal advice is mixed with business advice, it jeopardizes the confidentiality of communication between lawyers and clients.
- Is a dual purpose communication is protected by the attorney-client privilege?



No Guidance from the U.S. Supreme Court on Dual Purpose Communications

- The Supreme Court was set to decide whether a communication involving both legal and non-legal advice from a law firm specializing in international tax is protected by the attorney-client privilege when obtaining or providing legal advice was one of the significant purposes behind the communication.
- But, after oral argument, the U.S. Supreme Court dismissed *In re Grand Jury*, No. 21-1397 without clarifying whether a dual purpose communication is protected by the attorney-client privilege
- So, where does that leave us?

No Guidance from the U.S. Supreme Court on Dual Purpose Communications

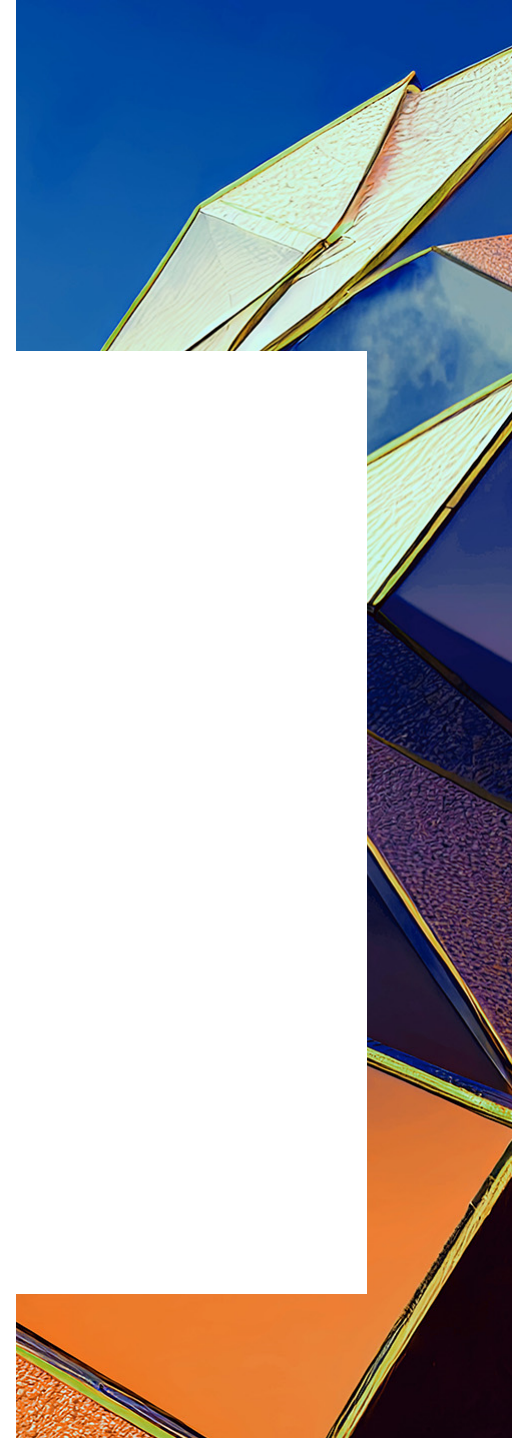
There is a split in the Circuit Courts on the proper test to use:

- The primary purpose test: whether the primary purpose of the communication related is to legal advice or business advice.

In re Grand Jury, Docket #21-1397, 13 F.4th 710 (9th Cir. 2021)

- Significant purpose test: whether obtaining or providing legal advice is a primary purpose of the communication (not necessarily **the** primary purpose).

In re Kellogg Brown & Root, 756 F.3d 754 (D.C. Cir. 2014)



Dual Purpose Communication – Practical Tips

- Analyze whether the communication is likely to be protected by privilege before documenting a potentially non-privileged communication
- Draft the communication to demonstrate that its purpose is to provide legal advice
 - Discuss legal requirements and legal issues
 - State: “this information is provided for the purpose of rendering legal advice”
 - Restrict the distribution of the communication
 - Identify the author by name with legal title

Dual Purpose Communication – Practical Tips

- Don't provide both legal advice and business advice in the same document. Discuss business concerns in a separate document (which will likely have a broader distribution list)
- Train your client (management and those who write to you for legal advice) on the privilege what falls within the attorney-client privilege
- Suggest that your client write “Request for Legal Advice” in the communication to you and limit the distribution to lawyers

Advance Waiver of Conflicts of Interest

SuperCooler Technologies v. Coca Cola (M.D. Fla)

- Coca Cola moved to disqualify Paul Hastings LLP, which represented Coca Cola on international human rights issues related to its supply agreements in Africa and later also represented SuperCooler Technologies in its lawsuit against Coca Cola.
- Paul Hastings relied on the advance waiver in its engagement letter.
- The client argued no waiver of conflict of interest.
- The client also argued its Outside Counsel Guidelines superseded the engagement letter.

Advance Waiver of Conflicts of Interest

There was a conflict of interest under Rule 1.7, which provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Advance Waiver of Conflicts of Interest

Despite a direct adversity conflict of interest, Paul Hastings was permitted to proceed with the representation by satisfying Rule 1.7(b)'s four requirements:

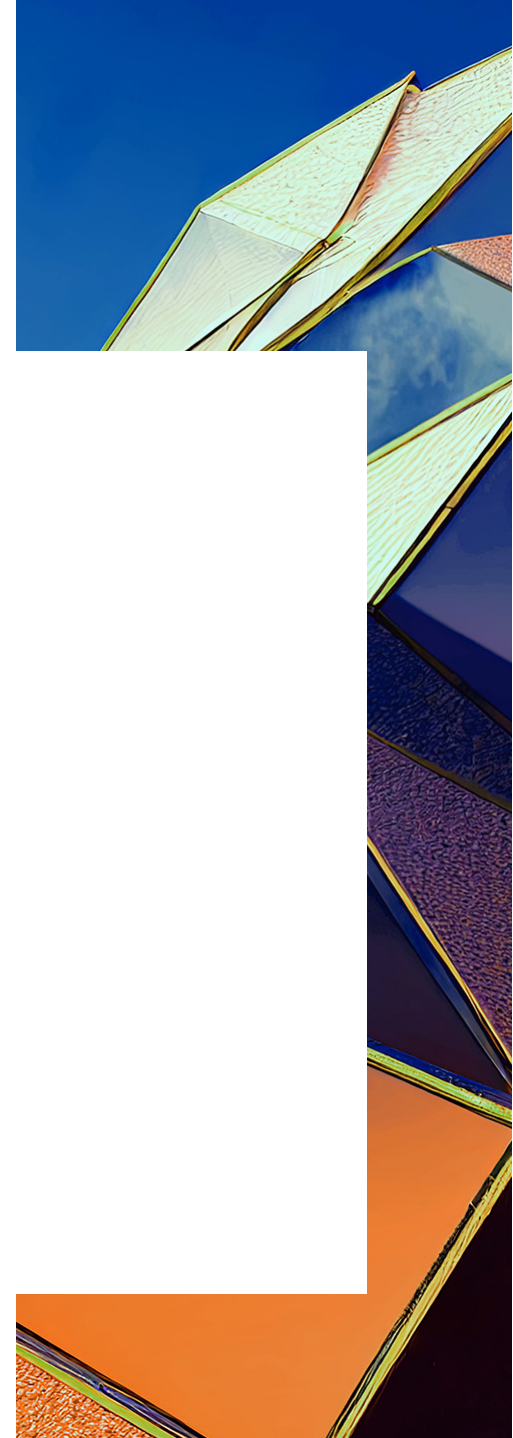
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

Advance Waiver of Conflicts of Interest

- The client argued the engagement letter was superseded by its Outside Counsel Guidelines
- The court held that the Outside Counsel Guidelines did not vitiate the advance waiver
- Although the Outside Counsel Guidelines said client did not grant advance waivers of conflicts, the client knowingly executed a waiver of future conflicts

Thank You

- Questions?



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