

## Evolution of a Valuable Tool for Attorneys: Business Intelligence Practitioners

*By Steven Cash, Day Pitney LLP, and Michael Baker, New York Law Journal*



Although they may not have admitted it, there was a time when lawyers often rubbed elbows with private investigators. PIs still exist, but the profession has greatly evolved since the days of the fabled (and fictional) Phillip Marlowe and Johnny Dollar ("the man with the action-packed expense account—America's fabulous freelance insurance investigator.").<sup>1</sup> PIs, often retained by attorneys, traditionally worked in support of matrimonial and personal injury matters, as well as in defense of criminal matters.

In recent years, the investigative needs of attorneys and their clients have grown larger, more complex and increasingly sophisticated. At the same time, the world has become more interconnected; the globe has shrunk as businesses and governments become increasingly impacted by the actions and directions of others. The need for professional investigation capability, often with an international reach, has been driven in part by the increasing need, often driven by regulation, for businesses to conduct various forms of due diligence. Examples include the need to ensure compliance with the Foreign Corrupt Practices Act and U.K. Bribery Act, or to fulfill duties to shareholders in connection with corporate mergers and acquisitions.

As the need for sophisticated investigatory and information services has grown, the industry serving these needs has changed and grown. While in the past PIs were often former police officers, often working alone or in small firms, today there is a range of larger firms, with a wider array of capabilities. In addition to former police officers, such firms often include staff drawn from the federal (and foreign) intelligence and national security communities with experience in the collection and analysis of intelligence worldwide. The addition of capabilities more traditionally associated with the CIA and the U.K.'s Secret Intelligence Service (SIS, but more commonly known as MI6) reflects the global demand for expanding from traditional investigative services to the higher-end provision of sophisticated competitive and strategic intelligence.

Recently, these classic skills have been augmented by increasing sophistication in the collection and exploitation of "big data" sources and open-source data. Marlowe and Dollar, tough guys who "knew people downtown," have been replaced, or at least supplemented, by highly-skilled intelligence professionals. The shoulder-holster replaced by the laptop and briefcase. Private investigators have been joined by the relatively new profession of "Business Intelligence and Risk Mitigation."

This article underscores some of the practical issues that face attorneys with the need to engage the services of a Business Intelligence (BI) firm.

### Why It Matters

It is well understood that attorneys have ethical duties to their clients to perform, among other things, diligent investigation.<sup>2</sup> This obligation is not only to clients, but in litigation matters, to the court. Law firms are engaging more with BI to facilitate such review and investigation. BI firms

extend the reach and capability of law firms, allowing them to guide clients, ensure regulatory compliance, flag issues and risks, and in the end, support litigation.

In many cases, the information needed is overseas or hidden domestically, often in places not traditionally known to former law enforcement. Getting at such information requires familiarity with a wide array of world-wide fora and a network of people throughout the globe. Sophisticated BI firms can provide such reach. While, depending on the jurisdiction, there may be significant open-source materials and available databases from which to gather information, often the most critical or insightful information during the course of a due diligence investigation or asset tracing comes from human sources. A professional, creative and responsible BI firm will understand the importance of identifying potential human sources and will have the ability to appropriately elicit information of value to the law firm's objectives.

### **What to Expect**

First, most of the leading BI practitioners have professional experience drawn from federal and international service. They speak a distinct language, and their professional ethic is based on that service. Surprisingly, that does not mean they are cowboys. Despite feature films and beach books, the U.S. intelligence community is constrained by a network of law, regulation and oversight, and that regime, although chafing at times, is embraced and accepted by practitioners. All reputable BI firms understand the importance of working within the constraints of the law, no matter to which jurisdiction the investigation leads them. That means that an attorney should not have any cinematic expectation that hiring a BI firm will allow otherwise unlawful activity, or that BI firms expect to be given assignments with a wink and a nod. If you do encounter a firm that shrouds itself in secrecy, or is reluctant to discuss its methodologies, turn and walk the other way.

Second, BI tasks are, almost by definition, complex, and necessitate well-crafted "requirements," the term of art used to describe how a client "tasks" a BI firm with work. The requirements process is how a need for information is articulated so both the client and BI firm know what is wanted, whether it can be done, and how much it is likely to cost. A good BI firm will work closely with a client to help craft and then execute such requirements. Attorneys are particularly good at such an exercise, as their craft (gathering, analyzing and presenting facts) is a close cousin to the BI trade. This process of fully articulating the client's objectives, requirements (a term of art in the intelligence world, describing a client's informational needs) and expectations with the BI firm prior to engaging is critically important. Failure to properly brief and task the BI firm, and then to work closely with the firm as it progresses through the investigation, can lead to a variety of unhappy results.

Third, attorneys retaining a BI firm should expect an honest answer to the fundamental question of "can this be done?" The best BI firms are immensely capable, and have a remarkable range of collection and analytic capabilities. But even the best cannot accomplish the impossible, and an attorney engaging a BI firm for a client should expect to be told "no" frequently—after all, a BI firm is retained when the question to be answered (the "requirement") cannot be answered by all of the other more traditional means. Reputable firms in the BI space understand that their reputations, and future possible employment, depend on their ability to properly manage expectations of clients and to consistently produce quality results. A BI firm that says "yes" to every request or task, simply to get the work in the door, will have nowhere to hide when the results fail to match the promises.

## What to Watch Out For

**Maintaining the privilege.** In many cases, any privilege associated with BI communications is because it is considered an agent of the attorney. This agency exception stems from *United States v. Kovel*, in which the U.S. Court of Appeals for the Second Circuit applied the attorney-client privilege to communications among a lawyer, a client and an accountant employed by the lawyer.<sup>3</sup> The court reasoned that attorneys often have to seek help from other professionals in order to advise clients, and concluded that communications with third-party agents should be protected when they are needed to accomplish the attorney's work.<sup>4</sup> After *Kovel*, the law has taken an expansive view of this agency theory and extends the attorney-client privilege to anyone retained by an attorney to assist that attorney in the rendering of professional legal services.<sup>5</sup> The question of privilege and establishment of reporting lines among lawyer, client and BI firm, should obviously be discussed and determined prior to the engagement. Clear reporting lines, like specific and well-briefed requirements, help set the stage for a successful overall result.

## Agency Issues

It is critical for attorneys to appreciate that the actions of the BI firm could be imputed to them, and even on to their client. The simple rule is that an attorney generally cannot take action through the BI firm that would be prohibited if it were done by the attorney. This seems obvious, but as noted above, many seem to believe that they can insulate themselves from liability by "winking" at their investigator. You may be able to get away with it, but a reputable BI firm will not take tasking in that manner, and a reputable BI firm will have no trouble discussing how they do their business or answering questions about their collection methods.

One of the key questions that an attorney employing a BI firm should ask is "to what degree do you (the BI firm) outsource or subcontract your collection or investigative efforts?" If they state that they do subcontract, dig further. The attorney should ask, if they rely on outside providers, in what regions or areas they typically outsource and how do they monitor or control the activities or behavior of their subcontractors. The goal of a BI firm should be to minimize risk, maximize the opportunities for success and improve transparency. The more attorneys ask, and understand, about how their chosen BI firm works, and the more communication with the BI firm at the outset and throughout a project, the more likely the attorney and the client will achieve the desired outcome.

In short, 21st century business intelligence practitioners provide a valuable tool to attorneys. But it is a tool that requires care and knowledge to be best used. Johnny Dollar, Philip Marlowe and their fellow "private dicks" would be amazed, but, one would hope, appreciative of what can be done. No fedora required.

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[1] N.Y. GEN. BUS. LAW, Art. 7 defines "Private investigator," and sets forth New York's licensing scheme. For more information on Johnny Dollar, see <http://www.yourstrulyjohnnydollar.com/>.

[2] See *Chandler v. Norwest Bank Minn., Nat'l Ass'n*, 137 F.3d 1053, 1057 (8th Cir. 1998) (imposing sanctions when attorney failed to conduct a reasonable inquiry, despite a reasonable belief that the allegations were based in fact).

[3] *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

[4] *Id.* at 922.

[5] See also *United States v. McPartlin*, 595 F.2d 1321, 1335-36 (7th Cir. 1979) (holding that client statements made to a private investigator employed by an attorney are privileged).

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