

Chapter 8: Law Office Investigation

Chapter Outline:

- ✓ § 8.1 Just the Facts
- ✓ § 8.2 The Paralegal as Fact Finder
- ✓ § 8.3 Duties of the Paralegal Investigator
- ✓ § 8.4 Law Library Tools for Investigation
- ✓ § 8.5 Skip-Tracing

§ 8.1 JUST THE FACTS

Investigation is about one thing: facts. Identifying facts. Locating witnesses who can verify (or dispute) facts. Corroborating already established facts. As mentioned in the previous chapter, evidence involves the presenting of facts (or at least alleged facts) at trial in support of a client's position. Therefore, identifying persons, places, or things that establish facts becomes the foundation of what will eventually become evidence at trial. This is law office investigation.

Before discussing the role of paralegal as fact-finder and techniques for law office investigation, we must first review several concepts and terms that either affect the process of investigation or may be affected by the results of that investigation. Some of these terms were discussed in *Chapter 4*, but because they have special significance to investigation, they are revisited here in that light.

Admissibility is the criteria that determines if a jury will be allowed to hear evidence. It does not mean believability. The jury is free to believe or not believe the evidence. Concerns about admissibility should not deter the paralegal or investigator from pursuing evidence. Even if a piece of evidence is not admissible at trial, it may open doors to evidence that might be admissible.

The paralegal or investigator often tries to locate and interview witnesses. A *witness* is a person who can provide information about a matter at issue. These are the five types of witnesses:

- *hostile*

A witness with interests opposite to those of your client's

- *skeptical*

A witness who doesn't want to get involved

- *neutral*

A witness who favors neither side, who has no interest in the outcome

- *friendly*

A witness with interests aligned with your client

- *combination*

A mixture of the above types of witnesses

Sometimes a witness or client cannot be found at her last known address. The attorney may ask the investigator to perform a *skip trace*, which means to find a person or persons whose whereabouts are currently not known.

Once a witness has been identified and found, the investigator may interview him. The investigator should keep in mind the question of whether the witness will be considered competent to testify. This does not mean the investigator should refuse to interview the witness, only that he or she should pay attention to the elements of competency. *Competence* is a potential witness's legal capacity to testify.

The elements of competency are:

- 1) *understanding the obligation to tell the truth*
- 2) *the ability to communicate*
- 3) *knowledge about the topic of testimony*

Examination is the questioning of a witness under oath. A witness who lies under oath is committing perjury. Examination may occur in court during a trial or hearing, or it may occur during a deposition. After an interview, the attorney may decide to depose the witness, particularly if the witness' testimony appears to be important to the outcome of the trial.

A *deposition* is the examining of an individual under oath. Usually it is held at a location outside of the courtroom, such as an attorney's office. The person being deposed is called the *deponent* or *witness*.

As mentioned previously, the types of examination (which can occur in court or in a deposition) are:

direct examination

Questioning the witness first. The party who calls the witness to the stand conducts the direct examination.

cross examination

After direct examination, the other party may cross-examine the witness but must limit himself to the topics brought up under the direct questioning.

redirect examination

The party conducting direct examination conducts the redirect examination to clarify matters brought up during cross. The party conducting redirect cannot introduce a new line of questioning.

recross examination

The party conducting cross examination conducts the recross examination, but is limited to matters brought up during redirect.

Why should an investigator care about the various forms of examination? Because identifying a witness for a deposition is great, but it is not the end of the investigator's job. For every critical fact that the witness will testify to, the investigator should ask him or herself: Is there other evidence that can *corroborate* (verify) or *rebut* (disprove) that testimony? A document? A video recording? Even another witness? If the paralegal's attorney is conducting redirect in a deposition, having additional facts (evidence) at her disposal will be a great asset. The paralegal's mindset as an investigator changes.

The witness to be deposed may be issued a *subpoena*. A *subpoena* commands the appearance of a witness at a specific time and place. A witness, especially a business or corporation, may have a *registered agent* or *resident agent* who accepts service on behalf of another. Such service is called *substitute service*.

If, during examination, the witness relates communication with another person, the information may eventually be objected to as *hearsay*.

Do not disregard information because you think it constitutes hearsay. As mentioned earlier, even if a given piece of testimony is determined to be hearsay, it may still be admissible.

The material collected and created during the investigative process is considered *work product*, also called *attorney work product*. Examples would be interview notes, tape recordings, charts, and diagrams. Attorney work product is material prepared in anticipation of litigation for the purpose of that litigation and is not subject to the discovery process. However, once the material is identified as evidence for an upcoming trial, that evidence loses its work product identity and thus becomes discoverable.

§ 8.2 THE PARALEGAL AS FACT FINDER

In a law office, investigation is not usually of the “cloak and dagger” variety seen on TV. Still, it can be a rewarding and important aspect of a paralegal’s career.

Limitations

As a paralegal with investigative duties, you need to be especially careful not to violate laws or rules of ethics. The general rule is that a paralegal acting as an investigator cannot engage in any activity from which an attorney would be prohibited.

For instance, under some circumstances, an attorney must identify himself as an attorney to a potential witness. The paralegal must follow the same guidelines.

Attitude

The key to being a successful investigative paralegal is attitude. When you walk out of the law office door, your attitude should be that nothing is going to keep you from obtaining relevant facts (in a lawful and ethical manner). You become an advocate not only for your client, but for his or her right to effective representation.

When seeking facts of a case, be a crusader for your client’s rights.

§ 8.3 DUTIES OF THE PARALEGAL INVESTIGATOR

The following is an overview of the duties a paralegal might engage in as an investigator:

Identifying Witnesses

The investigator should review any documents, reports, statements, or files, making a list of those who might have information about the matter. Then the investigator should ask two questions:

- *Who is missing from the list?*
- *Are there any unknown witnesses?*

An *unknown witness* is a witness not named, but whose existence is known. An example would be a person in the background of an accident scene photograph. The name is not known, but the person may have been a witness.

Interviewing Witnesses

The goal when interviewing a witness is to pursue the *client's interests*. You are not a neutral party and may not portray yourself as such. The three fundamental considerations when interviewing witnesses are:

Introduction

Make clear to the witness who you are and your position in the firm. Also, be prepared to explain why you have been chosen to conduct the interview.

Preparation of Questions

Preparing a set of anticipated questions for the interview will make the session more productive and professional. Create and keep a form bank of questions. After a couple of years, you will have created a valuable resource.

Location

Choose an appropriate setting for the interview. A law office projects a professional aura. A conference room is appropriate when documents must be reviewed or when multiple witnesses are being questioned.

Interviewing techniques will be discussed in Chapter 9.

Skip-tracing

You may be asked to locate a witness or a client whose whereabouts are unknown. This is called skip-tracing. There are two levels of skip-tracing. The primary level involves searches that can be done from within the office. The secondary level involves searches that include fieldwork.

Accident Scene Photography

A paralegal or investigator may be asked to take photographs of the scene of an accident. The following are a few primary considerations when performing accident scene photography:

Get there quickly

Even if some time has passed since the accident, make it a point to visit the scene as soon as possible. Traffic signs, road deformities and vegetation can change. Take more pictures than you think necessary. As the quote says, "If less is sometimes more, imagine how much more will be!"

Get the big picture

First, take photographs of the overall scene. Don't concentrate on the exact spot of the accident; photograph the approaches from all directions. Your goal should be to anticipate questions the attorney might ask, such as, "Was the street lined with trees?" or "How far ahead can a person see at the curve in the road?" Try to create a record of how the approach to the accident appeared to all parties, including witnesses.

Get the small picture

Try to capture details of the actual scene. Photograph skid marks, oil or gas stains, cracks or bumps in the pavement, scars in the scenery, and traffic signs and signals.

Scale

For close-up pictures of objects, place a ruler near the object to provide accurate scale. If a ruler is not available, a common object, such as a quarter or pencil, will usually suffice.

Time of day

If possible, take pictures at approximately the same time of day as the accident occurred. If the accident was at night, take both day and night pictures. If weather may have been a factor, revisit the scene at some point under similar weather conditions.

Obtaining Documents

If an attorney requests a document, the paralegal or investigator must find a legal and ethical way to obtain it. The most common documents needed are the following:

Court Documents

Most documents filed in court are public record. The major exceptions are records relating to juveniles and some family court records. If a record is not sealed, you should be able to gain access. If the action has been closed for more than a year, the court clerk has probably sent the file to the court archives. Access should still be possible. Be respectful to the clerks, but remember that your client has a right to those documents.

Medical Records

If you need documents from a doctor or hospital, the best way is to obtain a written authorization or release from the subject of the records, usually your client. Make sure that the release specifies the entire file including notes and diagnoses. Hospitals often provide only summaries and may attempt to sanitize a file by removing physician and medical personnel notes. Insist on the complete file. If the entire file is not provided, it is possible to subpoena the entire file by using a *subpoena duces tecum* addressed to the hospital custodian of records. If the hospital does not release the entire record according to the subpoena, the attorney may then file a *motion to show cause* or a *motion for contempt citation*.

Taking Statements

Witness statements serve two purposes. First, they provide information that can be used in the pretrial process to promote settlement. Second, they lock the witness into the scope and substance of the testimony they will provide at trial. There are two kinds of witness statements: formal and informal.

formal witness statements

Formal statements are generally typed, and are often notarized. They are prepared after at least an initial interview, if not multiple interviews.

informal witness statements

Informal statements are usually handwritten, the result of unexpected information or a surprise during the interview. The statement commits the witness to the surprising or important information.

Unless the attorney instructs otherwise, only take statements that benefit your client's position. If you put an adversarial statement in writing, you simply lock the witness into the damaging information and may force yourself to provide damaging discovery to the opposing party.

Title Searches

The method used to search land titles varies from state to state, and sometimes even county to county. The county recorder maintains records of titles to property. Check with the recorder's office for specific steps to take in that jurisdiction. Here are some typical steps:

Go to the county assessor

Use the known address in question to look up the assessor's parcel number. Most documents, such as an appraisal, will have the assessor's parcel number, as well as the legal description needed to check the recorder's office for encumbrances. Example of an assessor's parcel number: **190-04-612-068**.

Go to the county recorder

Use the legal description to check the recorder's records, determining whether there are any liens and/or encumbrances. An example of a legal description would be **LOT 237 BLOCK 9 BEACH FRONT HOMES**.

Internet Searches

The Internet offers three levels of search potential.

General Information Search

There are many effective general information search engines online, including:

www.google.com

www.bing.com

www.ask.com

However, for serious online queries consider the meta-search engine *Copernic Agent*. This search engine differs from most in that not only does it search multiple online search engines at the click of a button, more importantly *Copernic Agent* saves the search results on your computer's hard drive so you can return to the search at any time. For a serious online investigator, this feature is priceless.

There are three versions of *Copernic Agent*. Two that you must pay for and one free version. It is recommended that you download the free version. It is one of those rarities: Something free that is also incredibly useful. It is not a “trial” version. It is fully functioning. Simply visit the Web site www.agent.copernic.com and choose the free download.

Legal Site Search

If the goal is to locate a site for specific information from a legal source (such as a court, agency, or government office), the most effective method is to use a general search engine and conduct the following search: *law legal (your county) (your state) information*.

Legal Authority Search

The general research site www.megalaw.com has excellent statutory, court rule, and administrative regulation links. www.westlaw.com and www.lexis.com are high-end, fee-based sites. www.versuslaw.com and www.loislaw.com are low-cost, fee-based sites that have grown in popularity. They are not as expensive as *Westlaw* or *Lexis*, but they also do not provide as much material. However, these sites are the first real competition to the more expensive sites.

§ 8.4 LAW LIBRARY TOOLS FOR INVESTIGATION

Investigation is generally about finding facts. *Legal research* is generally about finding law. However, an investigating paralegal may want to use the following research tools found in the law library (or corresponding online research sites) during the preparation for an interview or when drafting deposition questions.

Form Books

Form books can help the paralegal create documents and checklists and provide other pretrial assistance. There are dozens of form books. Each library decides which ones it wants to carry, so you must be flexible. For investigation, *Am. Jur. Proof of Facts* is an excellent research tool.

If time permits, attempt to research your matter using form books in the law library. If you locate relevant examples of interrogatories, examination questions or other materials, you can modify them for use in developing interview questions.

Martindale-Hubbell Law Directory

This set of books has three main functions.

1. *State-by-State Attorney Listings*

Attorneys who subscribe to *Martindale-Hubbell* are listed with phone, address, fax, areas of specialties, undergraduate and law school degrees, and foreign languages spoken at the firm.

2. *Digest of State Laws*

In a separate set of volumes, *Martindale-Hubbell* provides an abbreviated synopsis of the legal system and general laws of each state.

3. *Digest of Foreign Laws*

In a separate set of volumes, *Martindale-Hubbell* provides an abbreviated synopsis of the legal system and laws of most foreign countries.

The state and foreign law digests may be helpful to an investigator working outside his or her normal jurisdiction. *Martindale-Hubbell* may be found online at www.martindale.com.

§ 8.5 SKIP-TRACING

Skip-tracing is the attempt to locate someone who is not at his last known home or business location. A skip can involve:

- *Someone avoiding a criminal charge*
- *Someone avoiding a civil lawsuit*
- *Someone avoiding a financial obligation*
- *A person who is not avoiding detection, but is being sought for informative purposes, such as notification of a death in the family, an inheritance, adoption information, etc.*
- *A witness to an event that is now the focus of a legal action*

Signs of a Skip

An investigator may suspect the person she seeks is avoiding detection if she encounters:

- *Several dead-ends*
- *Addresses of relatives or friends*
- *Several different addresses*

Skip Patterns and Similarities

There are some patterns that an investigator should be aware of.

Is the skip intentional?

Keep in mind that some skips are unintentional. The individual may simply have moved.

Is it a financial skip or a criminal skip?

If the skip is criminal, concentrate on local venues, such as family and friends. A criminal skip will rely on a close circle of support.

If your search is initially unsuccessful, you may need to broaden your criteria.

- *It sometimes helps to look for indications of the skip in the past instead of the present.*
- *Review pleadings and documents filed in court for overlooked sources, including court actions other than the current litigation.*
- *Look for served subpoenas or summons for other addresses. The person who served the summons may have information.*
- *Search for known relatives and acquaintances of the skip, in the hopes that they will lead you to the subject.*

Sources for Skip Tracing

Following are some starting points for skip tracing.

Initial Sources (In-office):

- Information (411)*
- Telephone book*
- Present and past employers*
- Family and friends*
- Utility companies (usually confidential)*
- Internet sources, including general and location-specific searches*

Field Sources (Out-of-office):

- Court files to check subpoenas for addresses
- Reverse and Cole Directories
(These are books that provide an address based on phone numbers, as well as other information.)
- Neighbors
- Post Office forwarding addresses
- Vehicle registration and title
- Marriage records
- Divorce records
- Incorporation records (Secretary of State's office)
- Bankruptcy records
- Co-signers on loans
- Insurance agents
- Cemetery records
- Reviewing information for overlooked sources

CHAPTER 8 WRAP-UP

WHAT YOU SHOULD KNOW...

After reading this chapter you should know the following:

- A paralegal's role as investigator
- A paralegal's limitations in law office investigation
- How investigation leads to the identification of evidence
- Skip-tracing as an investigatory device
- Techniques related to skip-tracing

ASSIGNMENTS

There are no assignments for this chapter.

WEB STUFF

For more information, articles, and links to additional resources visit:

www.essentialskillsforparalegals.com/vol1chapter8