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Private Investigation

WHY ATTORNEYS SHOULD USE PRIVATE INVESTIGATORS

"A lawyer without an investigator is like a gun without bullets", Mike McCormick of MCM Investigations, a Los Angeles Investigator.

Why Business Owners & Attorneys Should Utilize Private Investigators

By M. Ettisch-Enchelmaier, B.A.

By using private investigative expert's, business owners and executives can help improve their odds to win a case by collecting any known bits of information about their opponents. If a businessman and his attorney contemplate hiring a private investigator for assistance in their cases, they should also forget such PIs as depicted in fiction or the media.

Often much information is buried in traditional as well as electronic files and in human memory. It must be "unearthed" and presented to the private investigator bestowed with the task to collect or prove the existing data as an independent third party.

In the same way as in many walks of life there are crafty "do-it-yourself" people, even they may need expert help from a certain stage on, let alone a "lay person." And the investigative expert is the PI who should be called in on a case. If an attorney is also involved in the appertaining case, his advice should be sought and be kept informed until the end, since he may need more information than envisaged by the businessman due to the judicial angle of the case.

In recent times more and more attorneys refer an investigation to a Professional Investigator. Criminal and civil attorneys, and especially attorneys specializing in "cyberlaw," i.e. the Internet, have a better insight in this problem and are more ready to use an outside professional PI to improve the possible results they would have obtained through an in house investigator. Attorneys should use PIs as their arms and legs so to speak.

Some reasons as to why attorneys should leave the investigation to PIs, the professional investigators:

- First and foremost, it is not cost effective for attorneys: PIs are much cheaper than attorneys yet get better results.
- Attorneys' knowledge of investigative sources and resources is limited.
- Attorneys are trained to find already existing laws and less in finding persons and facts.
- Their paralegal staff often lack time to execute proper investigation.
- Attorneys may jeopardize their case when being questioned as a witness.

In most instances a businessperson as a client has only a certain amount of dollars to spend on a case, yet his attorney wants as much of the client's dollars he can get. Moreover, no client wants to pay an attorney's higher fees when he can get a PI to do the job for a fee ranging between \$150 to \$200/hour, and a more qualified investigation at that.

It is not cost-effective for an attorney to undertake his own investigation. An attorney's billable time averages in \$250 - \$500/hour or even higher. His time is more profitably spent working on other cases and leaving the low-cost work to the PI, the investigative expert.

In the medical profession, for example, a surgeon comes in on a case only after some other doctors, laboratory and x-ray technicians have diagnosed the problem and submitted their findings to the surgeon. The same applies to any good lawyer. The key to any profitable business is knowing how to get the job done well at the lowest possible cost which often also means to delegate the work to the person who can do it fastest, most thoroughly and accurately.

It is known that some law firms seek to keep every billable hour to themselves by various methods, e.g. doing their own investigation or have their staff do it for them because they firmly believe it to be less expensive employing their staff instead of using an outside PI.

One of the main topics when an attorney discusses a case with a PI is costs, costs, costs. Next is the time element as to how quickly the PI can get the case solved by obtaining the information sought.

Often an attorney will call a PI in on a case at the last moment, needing the results no later than the next morning, having tried already in vain to get the information through his own or his staff's efforts. Attorneys doing the investigations they need themselves or using an "in-house investigator" appear to use resources available on the Internet for free or database services such as "PublicData.com". Rarely do attorneys talk with their peers about databases, timeliness, accuracy, etc. to improve the value and accuracy of the information gathered.

An example as to how databases work: If an investigator does not find the information he searches for (the technical term being "gets a hit") while looking for Bill Smith at 1234 W. Main, Houston, Texas, he does not give up but tries the address at 1234 West Main, Houston, Texas and may be successful in finding the subject. Similarly, he may search for Trinh Thi Doung and may not get a hit, but perhaps is successful with Doung Trinh or Thi Trinh Doung, etc. or Bob Johnson may be found perhaps under Bobbie, Bobby or Robert Johnson [3].

Admittedly these are rare examples of how easy it is to find a person or skip (a technical term for a person no longer living at the known address having left without supplying a new one). Attorneys simply do not normally understand the whole range of sources and resources of information available. Most attorneys believe it is easy and simple to look something up on the internet, that there is no difference in the method of searching for information than looking up cases and laws. Since their staff are trained for such, they can look up the facts too. Many attorneys forget the analysis to be done on facts developed to get the right facts in an understandable and usable manner by also being able to read between the lines.

In one instance a PI was given a case and he wanted to double check the results, just to be on the safe side. While reviewing the file the PI found that the attorney had sent the in-house paralegal investigator to the courthouse across the street to get some records. The attorney's billing rate was \$250.00 per hour, and it took 2 hours to find the information needed. The PI found the information online in no time at all. Then the PI talked to the paralegal.

It is well known that most of the legal secretaries and paralegals simply do not have enough time left to conduct a thorough investigation besides getting all the typing, briefing, and case preparation work done properly.

However, most attorneys believe that they are the best in asking questions because of their training in direct examinations, cross examinations, re-direct, depositions, interrogatories, etc. and besides, they are so brilliant at case analysis they know they can see the forest for the trees. But while they may be seeing the forest for the trees, a PI is often seeing the mountain from the little rocks and boulders. Here lies the difference between the formal versus the informal interview technique.

When an attorney begins an interview, he acts almost exactly like he does in a deposition. He takes a couple minutes of being very friendly to the interviewee hoping, mostly in vain, to be able to put the interviewee at ease, but then he launches into questions that have been carefully laid out on a yellow pad with a line down the center so that he can write the answers on the other side. No matter what the personality of an attorney is he is still an "attorney" in his way of thinking, demeanor, and body language. The very word "attorney" tends to make people nervous and wary to talk to an attorney.

Furthermore, an attorney does not usually ask questions to find a broad range of facts, but more to find points that would tend to prove each element of his cause of action which he has already outlined in his mind. For example, he may ask a lady whether she saw the red car approach the intersection; whether the car stopped or entered the intersection; and whether she saw the color of the light that the car was supposed to obey. But in most instances, he would not think to ask the lady about any possible eye problems of hers or any eye treatments around the time of the accident, and if she wears glasses and had them on at that significant time. Most attorneys aim at is to get facts to prove their elements, and they do not tend to worry about whether the facts could be tainted by the lady's vision.

It is agreed that the findings at times may weaken a case, but an attorney is better prepared knowing all the facts should the opposition also discover those weaknesses and bring them up in court. On the other hand, there is a good chance that the little-known facts may strengthen the businessman's case in court. Therefore, this chance should not be given away lightly.

Attorneys, even doing informal interviews tend to act formally. They have not been trained to chit-chat and build a rapport with blue collar workers. Furthermore, they cannot utter questions at the (potential) witnesses' level without appearing demeaning. Indeed, PIs frequently experience the results of this attitude.

One of the comments quite often uttered by attorneys is as to why the witness has supplied the PI the information needed and not to the attorney in question. The reason is obvious. A good investigator will put a witness at ease first by coming down to the witness's level by talking with him for 30 minutes or so about something the witness may be interested in. Then when the investigator begins his interview, the witness is relaxed and feeling he is on the same level as the PI. At that point the witness generally tells the PI everything he needs to know.

Some PIs and process servers do not mind that that attorneys first have their "in-house investigators" or paralegal staff attempt to find the information needed. On the contrary the PIs may earn more when an attorney's staff first attempts to find the target. After having dispatched servers to two or three addresses developed by the attorney's in-house investigator, proving to be out of date or completely wrong, the professional process server eventually ends up handling both the locate and the final serve. Furthermore, by the time the PI/process server is bestowed with the task, it becomes a rush case and the attorney, being desperate to get the paper served on time, is ready to pay a much higher fee than usual without much discussion.

Other PIs or process servers do not agree. They prefer to get the cases not meddled with by others. The usual cheap and easy sources have already been contacted and "used" to no avail. They cannot be re-contacted by the professionals who could probably have employed the sources more resourcefully and consequently, most likely more successfully. Therefore, much more difficult, and costly sources and more work and time must be invested to the detriment of the businessman client to find other ways and means to still successfully handle the case.

Furthermore, an improperly handled investigation, such as an ill searched address, can put an attorney in jeopardy and cause a client to lose his case. About a decade ago a PI had a summons to serve for an attorney on a Janice Williams (an assumed name) in the framework of an accident case. The PI went to the address the attorney's in-house investigator had developed and found an individual with the same last name. The PI told Mr. Williams that he had a summons to serve on the latter's wife Janice. Mr. Williams stated that he was not married let alone to a Janice, nor did he know anything whatsoever of the accident from which that suit had arisen. Trusting his professional instincts that the individual was honest, the PI left with an apology.

The next day the PI contacted the attorney and informed him about the incorrect address. The attorney checked with his secretary who had located the address and she could not understand what the problem was, maintaining that the address was the only one she could find with the name "Williams" in that area. The PI made the attorney aware that his office had almost forced an uninvolved party to defend themselves in a lawsuit. It is well known how that would impact on the plaintiff's attorney. It was the last skip or search the secretary ever was asked to do and the PI gained a new client.

Another reason why an attorney should not undertake an investigation himself is not to conflict himself out of the case when he becomes a fact witness. He may also lose his work product and attorney/client privilege when he must testify as a fact witness since this is very detrimental to his client. By not undertaking the investigations himself the attorney avoids the awkward situation that if he interviews the witness and the witness later recants, whom should he call to the stand to impeach the witness?

Many attorneys do not place much importance on knowing a PI's credentials or history of success and sources, nor do they care whether the PI they use crosses the thin line of legality. They just want "information." They do not realize that with this attitude they can jeopardize their case, even wind up in court along with the investigator who oversteps the boundaries of appropriate behavior. Fearing just that is the greatest worry for some lawyers according to Brian Rishwain, a partner in the Los Angeles law firm of Neville, Johnson & Rishwain.

One of Mr. Rishwain's clients sued the opposing counsel and their investigators for invasion of privacy, claiming that the investigators had already done so by misrepresenting their identity to secure information about a real estate dispute. A California appellate court ruled that indeed there was an invasion of privacy. The investigators were also sued on the grounds that a private investigator is effectively an agent of a lawyer and his client. To avoid those problems, Katsh does not leave anything to chance when he hires an investigator.

Duli and Brown describe in detail what a businessman or his attorney should consider and do before hiring a PI to check his integrity and competence. Katsh also acts along the maxim that a lawyer involved must maintain complete and utter control over everything that the PI or his company do. Dailey and Moro go even further by regarding recommendations from other attorneys using a PI to be of great importance, while they rate the word of mouth as being by far the best recommendation. Not only is a PI's integrity of great importance, but also his competence and availability of sources to get a job done. To ensure the quality of the investigation most of the investigators Moro uses are former law enforcement officers, who have formal training and are already familiar with the rules of evidence.

According to the author of this article, former law enforcement agents/officers may be the just the right investigators for the jobs Moro has to offer, but like in other professions there are PIs specializing in one field of activities while others specialize in other fields, e.g. a top surveillance specialist may have no knowledge in how to trace a person online. Just as a medical or legal general practitioner does in directing his patients or clients to specialists when the case is beyond his scope, the same is true with an ethical and seasoned PI. When he sees that an investigation is beyond his skills after having learned what is needed or in a later stage of the investigation, he will refer the case to the PI specialist, having secured his client's agreement first.

The supervision of a PI by the lawyer in question is also crucial, especially since the PI is a vital part of the legal team. If the attorney representing the businessman has the full supervision of the case, he can also warn the PI of any legal snares thus ensuring that the PI's findings will be valid and not jeopardize the case.

In recent times there is a trend revealing companies or universities, insurers or others needing an investigation done calling upon a law firm to do the investigations instead of turning to a professional investigator directly to get better results with many insightful notes and at a much lesser price. However, this trend probably originates from the wish to be legally on the safe side at any cost.

If you'd like to discuss further how our firm can help you with your investigative needs, contact Lee Walters at 719-208-4088 or via email at rlwalters@excaliburlegalsupport.com.