CHAPTER 8

LAW OFFICE INVESTIGATION

Chapter Outline

VOLUME 1, CHAPTER 8

Chapter 8 Introduction

THE LAW OFFICE DOOR

A paralegal was investigating a car accident that resulted in a woman's death. The paralegal's attorney represented the woman's estate in a civil action. A 17-year-old girl was believed to have information critical to the case. She had no civil or criminal liability for what happened, but she had information about the defendant's driving history. The paralegal met with the mother of the girl who exclaimed that under no circumstances would she permit the paralegal to interview the daughter. After asking several times very patiently and in several ways, the paralegal had no choice but to assert his client's right to that information. He said to the mother, "You have a choice. You can either allow me to interview your daughter here, with you present in the room, or I can go back to my office and arrange for a subpoena. Your daughter will be picked up by a sheriff's deputy, taken out of school, and brought to our law office. It is your choice. The mother chose to allow the interview.

There is an interesting thing that happens to a lawyer, a paralegal, or an investigator at the front door of a law office. Inside that door, within the confines of the law office, everything is objective. If you find information harmful to your client, it is discussed. If the paralegal finds a case that helps the opposing party, it is brought to the attorney's attention. But once you walk out that front door everything you do is for the benefit of the client. You are the client's advocate seeking information and evidence to which he or she has a right. If someone tries to stop you from getting that evidence, you try again. You look for other strategies. You go around the obstacle. You go over or under the obstacle. But your attitude is that no one will prevent you from obtaining information that your client has a right to see. Don't lie. Don't mislead. Don't intimidate. But persue your client's interests. That attitude is important.

IN THIS CHAPTER . . .

FINDING FACTS

INVESTIGATIVE DUTIES

SKIP TRACING

CHAPTER 8

§ 8.1

Just the Facts

Investigation in a Law Office

THERE FOR THE FINDING

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 factfinder 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.

Even after finding evidence, many questions must be answered before trial. How much weight will a given piece of evidence carry? What is the difference between direct and circumstantial evidence? Which evidence would be admissible? All these questions involve a very important aspect of the law: procedure. Evidence and procedure are close relations.

There are specific procedures for civil cases, criminal cases, and even subject matter cases, such as bankruptcy, domestic relations, and probate. A paralegal with a foundational understanding of evidence, and evidentiary procedure, will be a more valuable employee. Example:

A paralegal was sent to court to obtain a copy of a document from a client file folder. The attorney stressed the fact that he needed it right away.

PROCEED? POSTPONE?

Working Remotely

Even in a post-pandemic environment, much work is likely to remain remote. There are issues to consider if you are continuing to work remotely and need to conduct law office investigation.

Is the investigation really necessary?
Consider whether the investigation can be deprioritized. What is the timeline of litigation? Review any cases that require some form of investigation and within each case prioritize the witness list.

Will postponement increase any risks or compromise the outcome of litigation?
There will be situations where an investigation should not be postponed: for example, the investigation may relate to a matter of critical importance to the business, or its findings may impact on commercial decision making.

Is remote access to materials and individuals possible?
Where materials which are essential to the investigation are not accessible, this may be the deciding factor in postponement. If there are too many important materials or locations not safely accessible, discuss a possible delay with your attorney.

In any of the above questions the answer ultimately lies with the attorney, and the client. Your job is to present the attorney and client with a list of those matters which can be investigated remotely, and which cannot. If the items that cannot be investigated remotely are not critical, the investigation may still be feasible.

Upon arriving at the court file clerk's office, the clerk said the file was not there. According to the log sheet the file had been in the judge's office for a couple of weeks.

The paralegal walked up the stairs to the judge's outer office where he asked the judge's clerk if he could please see the file. The clerk said it was in the judge's chambers and she would not retrieve it. She would not budge. So the paralegal gave the clerk a choice. She could either walk over to get the file and let him make a copy of the document or the paralegal's attorney would file an emergency motion for permission to view the file, to which his client had every right. Then the clerk could explain to the judge why she didn't just walk twenty feet to get the file. The clerk relented.

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 does not 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

INVESTIGATIVE TERMS

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*.

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 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.