



Sub rosa on your side: Working with private investigators

Eventually, we all end up with “another great case ruined by the facts.” Better to learn that early on and stop the bleeding....

BY CLIFF SMOOT

When you need to develop the facts of a case, enlisting the help of a private investigator may be your best first move. This article will acquaint you with some of the best practices for working with private investigators, and share advice from real-world private investigators. For the latter, I interviewed two licensed Bay Area investigators who have a total of 60 years of professional experience investigating civil matters. Given the nature of their work, they asked not to be identified in this article.

“Tony,” age 61, has worked as a solo private investigator for 35 years, and works for plaintiffs and defendants in civil matters.

“Mike,” age 63, has been a private investigator for about 25 years; his firm also works on behalf of both plaintiffs and defendants.

The basics

In civil matters, an investigator completes tasks such as:

- Locating (“skip tracing”), interviewing, taking statements from, and evaluating witnesses;

- Photographing, measuring, and inspecting scenes;

- Securing surveillance videos;
- Surveilling parties and witnesses (aka “*sub rosa*”);

- Finding and capturing social media and other online postings by parties and witnesses;

- Uncovering defendant’s assets;

- Investigating parties’ and witnesses’ criminal history and civil cases (e.g.,

criminal record, child support, civil suits);

“Problem serves,” i.e., where the person to be served is actively avoiding service;

- Conducting public records searches; and

- Locating vehicles and other material evidence.

In California, private investigators must be licensed. (See Cal. Bus. and Prof. Code §§ 7512-7573; Cal. Code Reg. Title 16 Div. 7.) The process for licensing private investigators is controlled by the California Department of Consumer Affairs’ Bureau of Security and Investigative Services. Licensed private investigators must be over age eighteen, undergo criminal background checks, have a certain amount of education or past professional experience (e.g., three years of compensated experience in investigative work), and pass a two-hour multiple-choice examination. (“Private Investigator Fact Sheet,” California Department of Consumer Affairs’ Bureau of Security and Investigative Services, at <http://www.bsis.ca.gov/forms_pubs/pi_fact.shtml> [as of Mar. 14, 2017].) Attorneys that hire an unlicensed investigator could face criminal penalties, including a hefty fine or imprisonment. (Cal. Bus. & Prof. Code § 7523(b).)

Private investigators may not use lies or tricks, even if such conduct amounts to less than criminal conduct. Under the Private Investigators’ Act (PIA), licenses may be denied or revoked if the investigator has been convicted of a crime or committed “any act of dishonesty, fraud or deceit with the intent to substantially benefit

himself or herself, or injure another.” (Cal. Bus. and Prof. Code § 7561.1; see also *Wayne v. Bureau of Private Investigators & Adjusters* (1962) 201 Cal.App.2d 427, p. 437 [holding that a private investigator may not deliberately mislead].)

Additionally, the court may exclude any evidence gathered by an investigator by dishonest or fraudulent means. (See e.g., *Redner v. Workmen’s Compensation Appeals Board* (1971) 5 Cal.3d 83, p. 94 [excluding film procured by private investigator’s “deceitful inducement”].) There is at least one exception to this rule: investigators working on behalf of insurance companies may conduct “pretext interviews...where there is reasonable basis for suspecting criminal activity, fraud, material representation or material nondisclosure in connection with a claim.” (Cal. Ins. Code § 791.03.)

Why hire an investigator?

Why hire a private investigator? For one, consider scalability. As Tony explains, “I call it the ‘oil change’ principle – even though you can do something yourself for cheaper, it’s a royal pain. And it’s much easier to have a pro do it.” For many attorneys, this is reason enough to ask for an investigator’s help.

Second, private investigators can act as independent witnesses. Even if you or your staff are able to go collect the missing evidence, a private investigator will give far more credible testimony as to foundation. Having an attorney or firm member testify about the chain of custody or otherwise laying foundation will not go over well with a jury compared to having a more independent third party do it.



“Attorneys need to avoid situations where they turn themselves into witnesses. If the attorney goes to interview a witness, and the witness ‘goes south’ on the stand, then who are they going to bring in to impeach? Not the attorney! You need an investigator to impeach,” Tony cautioned.

Of course, a private investigator may still be cross-examined about her methods if it appears that she used undue influence, promised a gift, or other unsavory means to obtain evidence. But if the investigator is good, she will come off as an honest and credible witness, and will get the facts into evidence.

Charm and disarm 'em

Investigators possess a variety of skills, knowledge, and tools that may give them an advantage over the average attorney. For instance, an experienced private investigator will know exactly the right questions to ask of witnesses, will know the right factual issues at stake to identify new defendants, and will have databases and other resources that accelerate the search for information. Investigators also tend to have the social skills to charm and disarm potential witnesses. A good private investigator can make a friendly impression on wary witnesses from all social strata. Similarly, in scenarios where language or cultural differences make it difficult to communicate with the witness, a private investigator may rely on personal experience, his colleagues, or interpreters to bridge the gap.

“I think about the approach,” explains Tony, “Before heading out to meet the witness, I think about what impression I’ll make. I want to be disarming, so I take into account who the witness is, and their background, their station in life. I want to have a friendly demeanor, so I choose my shoes, attire, and approach accordingly.”

Mike explains a different approach: “I never try to dress to fit in. You run

the risk of looking ridiculous if you’re wearing something you’re not used to. I think it’s best to just go, err on the side of being overdressed (a tie and coat or something). . . You’re showing up and telling them you need this info, for a proceeding, and you need credibility since they don’t know who you are.”

The investigator is your “agent,” and all ethical rules apply

Principal-agent principles apply to the attorney-investigator relationship. Generally, an attorney who directs a private investigator is the principal, and the investigator is the agent. (*Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, p. 663 [holding that attorneys may be liable for the conduct of a retained private investigator].) California Rules of Professional Conduct rule 3-110 states that attorneys have a duty to supervise work performed by their non-attorney staff, and this applies to private investigators hired by the attorney. “Attorneys cannot be held responsible for every detail of office operations,” but courts require a reasonable level of supervision over employees and agents. (*Palomo v. State Bar* (1984) 36 Cal.3d 785, p. 79; see also *Zamora v. Clayborn Contracting Grp., Inc.*, (2002) 28 Cal.4th 249, p. 259 [ruling that supervising attorney is responsible for assistant’s typo].)

Along the same lines, an attorney’s agents are bound by the same ethical rules that bind the attorney. (See e.g., ABA Model Rules, Rule 8.4(a), DR 1-102(A)(2) [attorneys may not “circumvent” ethical obligations by delegating tasks to non-attorneys]; see also Rules of Professional Conduct, Rule 2-100 [“a member shall not communicate directly or indirectly ... with a party the member knows to be represented by another lawyer.” (emphasis added)].)

For these reasons, attorneys who hire private investigators to perform *undercover* investigations need to be cautious.

You should be proactively supervising the investigator’s activities with the goal of preventing conduct that a court may construe as an “objectionable or offensive” invasion of privacy. Any such invasions could result in evidence being excluded, or a civil damages claim (or criminal charges) against the investigator, you, and your client.

Does attorney-client privilege attach to investigators?

One issue to consider is whether counsel will be able to discover the documents you share with your private investigator (e.g., emails, reports, photographs, and notes). Attorney-client privilege is unlikely to attach. Under the California Evidence Code, a “client” is someone who “consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity.” (Cal. Evid. Code § 951.) Because a private investigator is not a client, you may have a hard time convincing a judge that this privilege attaches.

What if your client hired an investigator to act as their agent? Or what if an insurance company claims that their investigator’s report is protected by the attorney-client privilege? For this type of issue, consider the Supreme Court of California’s holdings in *People ex rel. Dept. of Public Works v. Donovan* (1962) 57 Cal.2d 346. In that case, the Court considered whether the attorney-client privilege attached to the opinion *and the underlying report* of an appraiser hired by a party. The court ruled that the opinions and the reports were fair game:

Plaintiff further contends that in the instant case there were privileged communications, attorney to expert and expert to attorney, which with other material formed the basis upon which the expert’s opinions were based. Therefore, it is argued, if the expert is now required to reveal these opinions he necessarily would also reveal at the same time the privileged communications. But the attorney-client privilege



is not intended to encompass matters so remote and far removed from the actual communication entitled to protection. Similar arguments could be made in almost any situation where a party employs an expert to investigate and express an opinion on matters specified by the attorney. To thus expand the area of protected material would be directly contrary to the well established policy in favor of strict construction of the privilege in the interest of bringing to light relevant facts.

(*Id.* at p. 356 [citing *Greyhound Corp. v. Sup. Ct.* (1961) 56 Cal.2d 355, p. 397].)

Does attorney work product doctrine apply to an investigator's work?

Another important issue is whether your investigator's work will be protected by the attorney work product doctrine. Generally, California's attorney work product doctrine creates an absolute privilege for any "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." (Cal. Code Civ. Pro. § 2018.030(a).) All other types of attorney work product receive a qualified privilege, and are not discoverable "unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (Cal. Code Civ. Pro. § 2018.030(b).) This is a perennial question in cases where an investigator, working closely with an attorney, identifies witnesses, conducts witness interviews, and records witness statements.

The Supreme Court of California squarely addressed this issue in *Coito v. Superior Court* (2012) 54 Cal.4th 480. Where an attorney conducts and records an interview of a witness, that recording is protected by qualified work product. If the witness's statements are "inextricably intertwined" with the attorney's impressions, then the recording may be granted absolute protection. (*Id.* at p. 495.)

Qualified privilege may also attach when an attorney has created a list of witnesses to interview. (*Id.* at p. 501.) If the list reflects the attorney's assessments of whether the witnesses will be supportive, then the privilege may be absolute.

(*Ibid.*)

Tips from the professionals

According to the interviewed private investigators, here are the best practices for attorneys working with private investigators:

Carefully select your investigator

Attorneys should look to colleagues for referrals to investigators with whom they have experience. Similarly, check any references the investigator gives you. In the absence of colleague referrals, the California Association of Licensed Investigators (CALI) website features a "Find an Investigator" page. (www.calipli.org/find-an-investigator.)

Once you've found a candidate, the next step is to check the investigator's license status, including whether the investigator has a disciplinary record. (See Bureau of Security and Investigative Svcs., www.bsis.ca.gov.) You should also request and check on the candidate's references, and ask the candidate about their insurance coverage (liability and E&O). Mike strongly recommends checking insurance, and explains, "You'll run into a lot of guys who are not carrying insurance. Get a certificate from them before you hire." Finally, as with any expert or consultant, you should perform a conflict check with all the parties and counsel involved.

In any case, your investigator must be credible. In some cases, an investigator will testify as to their method of securing evidence, to lay foundation for the introduction of the evidence itself. In other cases, the investigator will testify as to the evidence itself. Your goal will be to make sure your expert's testimony will be admissible and believable. In this regard,

you will be well served by having selected an investigator who has a good reputation, works on behalf of plaintiffs and defendants, is experienced giving testimony, and has a clean disciplinary record.

Mike says to consider the investigator's communication skills. "If you notice the investigator is having a hard time expressing himself, you can be assured the report will also be lacking." If the investigator does not write or express himself capably, then it virtually does not matter what he finds out, since he will not be able to pass it on. To test the investigator's written communication skills, you can ask for a sample of past work. "This may be a big ask," advises Mike, "but if you can get a redacted sample report, you'll know how clear the investigator's report will be, and the level of detail it will contain."

The investigator's attitude should also be a consideration. Mike, who frequently hires investigators for out-of-state matters, explains "At the first case assignment discussion, when you start hearing from the investigator how difficult the case is going to be, and you hear them setting themselves up for not getting it done, that's a red flag. Whenever I hear that, it usually means I got the wrong guy."

Consider the investigator's "three-legged stool"

When plaintiff's attorneys consider taking on a new client, we often use the "three-legged stool" intake criteria. The case must have (1) legal responsibility, (2) damages, and (3) collectability. If the case is lacking one or more of these "legs," the stool doesn't stand up, and we don't take the case. Likewise, private investigators have their own three-legged stool that makes a good case. Tony explains his: "First, I have to like the attorney and get along with him. Second, the case has to be legit. Third, the attorney has to pay on-time."



Communicate with your investigator about scope and budget

“My biggest piece of advice is for people to develop rapport with an investigator, get to know them, let them get to know you, and let them know how you’d like to proceed,” says Tony. In this regard, you should memorialize in detailed writing the scope, objective, and parameters of the investigator’s assignment, including the tactics by which the investigator will carry out the assignment. Mike has wise advice: “Make it clear whether you want an informal interview and report, a taped statement, or a written statement. Be sure to tell them if all you really want is a statement and a report, affirmatively add not to tape it. Discovery laws mean that if you tape something, that almost always becomes discoverable.”

In addition, you and the investigator should create and memorialize a budget. Tell the investigator whether the case deserves a few hours, or if it is a “no stone left unturned” kind of case. “The sky is the limit,” explains Tony, “I could spend the rest of my career on any *one* of my cases, knocking on doors and making calls.”

Attorneys should check in at various stages of the investigation to discuss what leads remain and how many hours the investigator has spent to date. “We establish ‘milestones,’ where we check in at an agreed-upon dollar interval. At the check-in, the client can authorize more work, or pull the plug,” says Mike. Later, review the investigator’s invoices to make sure it all makes sense. “My goal is to be trustworthy, efficient, and reputable,” says Tony, “and I want attorneys to see that in my billing hours.”

Once the investigator begins work on the case, you and the investigator should be in regular communication about the investigator’s progress and results. “If you’re not hearing updates from an investigator about a plan or ideas, then that’s probably an investigator

who needs more supervision,” says Mike. You may want to fix an update schedule, with the additional understanding that the investigator will contact the attorney if any significant developments occur (e.g., major changes to the budget, schedule, or case theory).

Set up your investigator for success

If you’re hiring an investigator, look for efficiency. Before dispatching the investigator into the field, consider whether you have enough information, or if you can make the investigator’s job easier. This will save time and money for you and your client. Consider if you need to send the investigator in to preserve evidence that is likely to disappear, or if you will be better off waiting for reports and other vital information to arrive before dispatching your investigator. You may consider asking your client to collect information and make calls in order to “open doors” for your investigator.

Give your investigator all the background facts, and share your case theories with your investigator. Mike recommends that you give “more background than they need.” From the start, this information will allow the investigator to suggest more avenues of investigation. Later, if the investigator finds a knowledgeable witness, the investigator will need full background so as not to miss opportunities. Having the complete background and case theory will help the investigator “get the most out of witnesses.”

Along the same lines, do not give your investigator unreliable information. Tony recounted a story in which an attorney dispatched him to an address in Los Angeles to interview a witness named Mike Smith. Tony arrived at the witness’s door, only to find out it was the wrong Mike Smith. It turned out that the attorney had used Google to “find” the address. Tony recalls, “This was a huge waste of money. When the attorney’s intent was to save himself a few bucks, he

ended up with a \$300 invoice for a ‘blank run’ to Clayton.”

Temper your expectations

Do not expect the impossible. Your investigator will be one of the first people to give you feedback on whether your case is viable, and can give you a valuable reality check on your case theory. Give some consideration to your investigator’s opinion.

Not all cases are winners. “None of the attorneys want to be associated with ridiculous cases,” says Mike, “You go before the same judges and opposing attorneys every time, and you don’t want to bring in crazy cases.”

Tony recounts a trip-and-fall investigation in which he discovered that the object that caused the plaintiff’s injuries “had nothing to do with the defendant.” Tony relayed this information to the directing attorney, but the attorney insisted that Tony try to find a way to connect the defendant to the trip-and-fall incident. “He wouldn’t take ‘no’ for an answer,” recalls Tony, “until he finally got defended!”

Since then, Tony has learned to recognize when an attorney is ignoring warning signs. Although some plaintiffs’ stories seem compelling, “you’re still penned in by the facts,” counsels Tony. “I admire the attorneys who know when to call it a day, and just tell me, ‘well, another great case ruined by the facts.’”



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