



## USING INVESTIGATIVE TECHNIQUES:

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### INTRODUCTION

#### **Expect the Unexpected!**

There may come a day when an event occurs that is unexpected and changes the everyday risk profile that your company faces:

- A workplace violence situation
- A terrorist attack
- A case of identity fraud
- A kidnap & ransom of a top level executive
- A lawsuit is filed
- A search warrant is executed
- A subpoena is served
- A significant transaction is announced
- An anonymous letter is received
- An environmental spill occurs

WITH PRIOR PLANNING AND PREPARATION YOUR ORGANIZATION WILL HAVE THE OPPORTUNITY TO IDENTIFY POTENTIAL PROBLEMS EARLY ON AND RESPOND TO THOSE SITUATIONS AGGRESSIVELY, RESULTING IN RAPID RECOVERY AND A RETURN TO BUSINESS AS USUAL.

This guide is designed to raise basic questions and to discuss some of the key issues that can arise when you are facing a significant event. Let us take a look at the steps you might follow and how you might utilize investigative resources to assist you in the decision making process:

- Will you assess this new risk profile by gathering and analyzing available information?
- Where will the information come from? Who will assess the risk and how?
- Step back and make an initial assessment in order to decide what other resources are needed, if any.
- Seeking outside legal counsel will be an important step.
- Hiring an investigator can assist in gathering the key information, particularly before discovery begins or if discovery is not available.

#### **Risk Management**

Risk management is the art of making decisions with limited information - maximizing the utilization of elements under your control:

- When an unexpected event occurs the first step is to manage the perceived risk and anticipate future developments.

## Using Investigative Techniques

- With an increasingly global economy, business problems, and for that matter, business opportunities are subject to rapidly changing flows of information--which oftentimes are not available through traditional methods and contacts.
- An independent investigation, including risk analysis, is a key source of objective information for decision-making.
- Objective information is best obtained from neutral or independent sources.
- When you are armed with objective information, problems can be resolved; risks mitigated, high-risk transactions can become high margin opportunities.
- It is impossible to know too much when investing capital, time, energy and reputation in resolving a problem or completing a transaction or other strategic move.

**INITIAL STEPS****Issues to Consider**

When an unexpected event occurs, it is important to consider the standard of care that is owed to the shareholders of the company or to other interested parties. A common baseline issue will be: "Who should be contacted?" It may or may not be appropriate to advise senior management or board members. Decide whom to contact only after you have at least a rudimentary understanding of the issues. It is more effective to manage "need to know" issues up-front and conservatively.

The first questions to answer are what are the known facts and what else might be useful to know? Can you immediately confirm the facts, the scope of the problem, or basis for allegations? When a crisis incident occurs, the following four questions will immediately be asked:

- What happened?
- What is being done about it?
- Why did it happen?
- What are we doing to ensure it doesn't happen again?

Other issues to consider immediately are:

- Are there regulatory requirements?
  - SEC issues - including duty to disclose material problems
  - Banking Laws and regulations - Suspicious Activity Reports
  - Foreign Corrupt Practices Act
- Who is potentially liable?
- What is the opponent's agenda?
- Will the media become involved?
- Are there reasons to communicate with company employees or the public? This often depends on the initial answer to the question - Who else knows?

The initial reaction should be to "look before you leap". A few minutes of patient consideration as events begin to unfold can pay dividends.

**Legal Privileges**

Remember to immediately consider and to promptly remind non-lawyer management of the basic legal privileges: Attorney Client Privilege - the basic elements are:

- A communication, between privileged persons, in confidence, in order to obtain legal assistance.
- The privilege applies to corporations.
- Be wary of the crime-fraud exception.

Work Product Doctrine - the basic elements are:

- Documents and tangible things, prepared in anticipation of litigation, by or for another party or for that party's representative.

### **Internal Resources**

To the extent that it is necessary to develop additional information, consider available internal resources first:

- "Need to know" issues clearly apply here.
- Can internal resources be objective?
- Do internal personnel have the experience, know how and resources necessary to assist?
- Consider whether or not to bring in other members of the legal staff, the Corporate Security Department, Human Resources, etc.

### **Assemble the Team**

If necessary, assemble a team of professionals with the required skill sets and resources.

Outside counsel will most often be the first resource to consider, for all the right reasons:

- Problems will raise legal issues in and of themselves.
- The right lawyer is will be equipped and prepared to play a key, if not central role in managing a risky situation.

Independent Investigators are particularly useful in situations where information must be developed without the use of formal discovery or in situations where there is a limited ability to compel:

- Even when discovery is available, information gathered by investigators, outside of discovery, can provide a strategic tool by asking and answering questions without formal disclosures to the opponent.
- Investigators can also assist in conducting a parallel investigation alongside ongoing government investigations.

Accounting professionals should be considered when substantial volumes of financial information or other data is involved.

Public relations professionals can provide valuable support in managing publicity risk and disseminating the company's point of view. Note: The more objective information available to the public relations professionals, the more effective they can be, particularly if the news is bad.

## **INTRODUCTION TO INVESTIGATIONS**

### **Information for Decision Making**

Objective information is the material foundation of effective and informed decision making in any legal or commercial endeavor:

- Many decisions are made with only limited objective information. In many settings, even in litigation, the other party is the primary source of information. Investigations can provide information not necessarily available directly from the company's or another party's books and records or employees.
- It is impossible to predict the future, however, understanding past experience is a valuable tool with which to analyze, assess and solve current problems.
- Investigations can strongly complement and support classic discovery by providing lateral information with which to focus discovery. Investigations can also assist in

assessing witnesses and other sources of information outside of discovery.

- Intelligence about your litigation adversary can help you decide whether to fight, and when to consider either negotiating a settlement or pressing an advantage.
- Investigations can assist in answering the classic "What if" questions. In other words, when you have a question or believe more information can help, it is worth considering utilizing investigators.
- There is no substitute for local knowledge. By utilizing personal contacts, subcontractors and "sources", a resourceful investigator can provide an endless variety of useful information.

### **Gather, Assess and Confirm Information**

Investigations are, at their core, simply a basic information gathering mechanism, identifying the location of information and then developing techniques to acquire the facts and additional intelligence.

Investigations are an inherently open ended process. Given the wide variety of variables in a complex business problem, it is difficult to predict at the outset whether the process will progress from A to B or maybe C or D:

- Obtain information from on-line searches and field document reviews to develop a "public record profile".
- Develop additional information from internal and external interviews.
- Confirm, analyze and assess available information.
- Consistency of information in different forms, and from different sources, is important - "The truth cannot be invented".

### **Evidence v. Intelligence**

Investigators will not always be able to provide hard facts in admissible evidentiary form. However, if provided in an appropriate perspective, even soft "intelligence" can be very helpful. Intelligence can also provide adequate basis for proceeding with discovery. A thoughtful coordination of investigative and legal resources can add significant value.

## **INFORMATION GATHERING TECHNIQUES**

### **Gather and Secure Internal Information and Records**

Investigations come in an infinite variety of forms, but most follow a basic pattern. All investigations require an active approach, constantly analyzing and assessing available information and applying appropriate investigative techniques.

It is usually most effective to begin an investigation by debriefing the appropriate company representatives. From an investigator's point of view clients are invariably the best, most rapid and most efficient source of basic information and direction. Clients know their businesses, industry and personnel in greater depth than any professional.

Then cover the basics and "analyze for the obvious" by gathering all available internal information:

- Financial books and records - expense reports, payables, etc.
- Legal Records - Contracts, Compliance Programs
- Human Resources- personnel files, policies, procedures
- Don't forget Electronic Media - Telephone, card keys, servers, PC's, backup tapes, E-mail, voice mail, fax, and copiers.

Be certain to secure records and segregate relevant records promptly. Do not assume that normal records retention procedures apply. Even sophisticated executive may not realize the implications of certain situations, including receipt of subpoenas or service of search warrants.

### **Workplace Searches**

When conducting internal investigations always consider searching employee work areas. In most settings this is perfectly legal. For example, in some states the controlling factors are an employee's personal perception of privacy and/or the company's policies and procedures or employee manual.

### **Public Records**

In the domestic United States enormous quantities of information can be gathered using basic public searches. Thorough public record searching requires a knowledge of both on-line sources and an understanding of where to look and what to ask for, when seeking records in the field.

On-line data bases and The Internet are very powerful, but often incomplete and abstract:

- Older records are often not available on-line - computerized records may exclude key information because of limited number or size of fields - key punch errors create "garbage-in, garbage-out" problems.
- On-line research should be supported by field research, which is often more complete, though much clumsier to collect and analyze.
- Many key filings are still "Off line" - Local Government records, historical, specialized and alternative media, etc.

### **Background Research**

When searching for background information, look in the geographic locations the subject has occupied over time. Remember, information ages. Focus on a "material" period, depending on the age and nature of the subject.

Given the incredible variety and number of public and commercial sources of information available, it is important to be flexible in deciding where to look.

Some key records to consider and why:

- Motor Vehicle Department records can reveal key personal and life style issues - DUI's, for instance. The records can also identify vehicular assets.
- Records of criminal convictions are available to the public in local, state and federal courts.
- Litigation histories, also available in local, state and federal courts help identify and illuminate, business style, economic history, and of course, personal and business problems and how they are resolved.
- Family Law actions are often valuable sources of financial information.
- Corporate and partnership records, liens, judgments, etc. provide locations for additional research, potential sources and may identify assets. Business and personal problems may also be disclosed.
- National and local media provide both primary information and access to other leads and sources.
- Internet searches are often free, at least to begin with, but can be incomplete, self-reported or difficult to search efficiently. However, they are continually improving.

## Interviews

In an investigative context, interviews should begin in a non-accusatory manner. In a corporate setting, more information is usually obtained with a soft approach than by "pounding the table":

- One of the key skills an experienced investigator will bring is knowing when to adjust from a soft approach to hard approach in an interview.
- Interviews can be conducted by phone or in person. There are advantages and disadvantages to each approach.
- Interviews of key subjects are normally best conducted in person.
- Whenever possible, ask open ended questions - "Tell me what happened?" not "Why did you steal the plans?"
- Effective interview requires the interviewer to know as much as possible about the situation and interviewee.

## Interviews, Direct and Indirect

Interviews follow two basic approaches, either direct or indirect:

- Direct interviews simply require that a potential interviewee be asked questions about the matter at hand. Most employee interviews are direct. This technique is focused and efficient, but may not be appropriate in all situations, particularly with hostile or potentially hostile parties. Direct interviews can quickly expose the focus of an investigation or specific areas of corporate concern.
- Indirect Interviews avoid some of the risks of direct interviewed by using various types of misdirection to blur the existence, nature and focus of the investigation. Often known as pretexts, sometimes involving more complex "stings", indirect interviews require role-playing on the part of the investigator. Indirect interviews are in most case not used during the course of ongoing litigation. Pretexts may include posing as an investor, competitor, job seeker or whatever role is appropriate for a given situation, without breaking the law.

Pretexts must follow certain basic rules:

- Never impersonate an actual person or entity
- Never, ever, impersonate a government employee or agency

## Identifying Potential Interviewees

Third party interviewees can be identified in a number of ways:

- Internally through client debriefing or through employee interviews
- Externally through public record research
- Source contacts

By utilizing a historical network of contacts and sources, a truly professional investigator will have accumulated valuable in a wide variety of geographic locations, industries and where appropriate, with government agencies. This network will provide both primary contacts and if managed properly secondary and tertiary contacts. "Six degrees of separation " can actually apply.

## Recording Interviews

Interviews should be recorded on paper as they are conducted. In some circumstances it may

be necessary to make notes after the fact, particularly when utilizing pretexts. Note: Tape recorded interviews have less chilling effect than might be expected.

Electronically recording conversations raises a number of legal issues. Jurisdictions tend to fall into two general classes:

- One-party consent - most states and under Federal law
- Multi-party consents - California among others

A basic "bottom line" expectation is that investigations should not create more problems than they solve! Make certain your investigator follows the local rules of engagement in this and in other key areas.

### **Employee Interviews**

Issues to consider include:

- Begin by providing a rational reason for the interview, although it is often not necessary to provide specific information.
- Interviews are best conducted by two person teams. This approach allows for effective note taking, provides solid evidence of what took place and brings a broader perspective and understanding of the facts.
- Interviews can be conducted by lawyers, corporate representatives and by investigative professionals.

Experienced investigative professionals should provide great value in interviews. The ability to obtain information in an informal interview setting is a valuable skill, developed over time.

Consider several basic caveats when conducting employee interviews:

- If a lawyer is present, the employee must be informed that he or she represents the corporation, not the employee and that the interview is privileged.
- Interviewees should always be asked to keep the interview and information exchanged in it confidential.
- Avoid accusations at least until a basic evidentiary floor exists.
- Before taking adverse action against employees, always provide an additional opportunity to explain.
- Lawyers participating in interviews should beware of becoming percipient witnesses.
- Consider gender issues, especially in a hostile interview.
- Ensure you have obtained significant background information regarding the employee prior to the interview.

### **Third-Party Interviews**

Third party interviews often require approaches similar to employee interviews. However, access to, control of and the motivations of non-employees tend to be radically different than employees. When conducting non-employee interviews:

- Do not rely on the ability to re-interview; make certain your investigator is well prepared and has thorough knowledge of the investigation.
- It is often appropriate to conduct third party interviews on an unscheduled basis. Arriving at an interviewee's home on surprise basis can be very effective.
- Third party interviews are much more likely to compromise confidentiality.

### **Hands-on Techniques**

There are additional "hands-on" investigative techniques to consider:

Organizations and individuals continue to discard key information, at work and at home. In almost every jurisdiction it is legal and permissible to gather information from discarded trash. However, it is important that counsel knows the technique is being used and that all the appropriate local rules of engagement are being followed. Typically:

- Avoid trespassing on a subject's property
- Wait until material has been discarded to the curb, or better still has been merged with other discards.

No discussion of investigations is complete without raising the issue of surveillance. Surveillance can be a powerful, albeit an indirect and speculative tool.

- Surveillance can be very costly; however, it may produce significant results and save numerous hours of research.
- Surveillance is most effective when used to support the ongoing investigation. An effective surveillance team can often develop valuable intelligence to support or redirect the investigation.
- Consider the existence of local "anti-stalking" laws.

### **Risks, Regulation, Buyer Beware!**

Finally, there are investigative techniques to be very wary of. The information market place is a very open environment. It is possible to buy any class information, if you are willing to pay the price and take the risk. If information seems too good to be true, be careful.

Beware the "nod and the wink". Be very sure you really understand what is being obtained on your behalf and how it is being acquired. A legitimate investigator will be happy to explain where information comes from and how it is obtained.

Regulation is changing rapidly and in recent years has run far ahead of the market, particularly the Internet. Internet based information providers may appear to be legitimate sources of many classes of government, personal and financial information. In today's environment they may represent a particularly serious risk - don't make things worse!

### **THE INVESTIGATIVE PLAN**

The key elements of an Investigative Plan are as follows:

#### **Investigative Goal**

It is imperative that both client and investigator agree upon and define the primary goals of the investigation. Good sense also suggests that, in most circumstances, the investigator should understand the underlying reasons for and purpose of the Investigation.

#### **Investigative Method**

Every investigative plan amounts to a "battle plan", and will often change based on actual results in the field. However, the expected investigative approach should be discussed and defined at the beginning of the investigation and should include the following minimum elements:

- Timing and nature of client debriefing?

## Using Investigative Techniques

- What internal records will be required, and when?
- What public records will be searched?
- Whether information and/or documents will be obtained from on-line sources or from the field?
- When interviews will be initiated? It is important to consider whether it is imperative to begin interviews immediately or whether it is appropriate to gather baseline information before proceeding - "more haste less speed".
- What internal interviews are expected and what are the ground rules, disclosure, location etc.?
- If external interviews are anticipated when will they be initiated?
- Will the investigator have carte blanche or look for specific guidance from counsel?

**Reporting**

When will information be delivered, to whom and in what manner? Written reports are useful, but there are many situations where it may be appropriate to delay or avoid written reports all together.

- Material information should be delivered immediately. Otherwise, a reporting schedule should be agreed upon for all communications.
- Beware legal privilege issues when reports are delivered directly to the client without benefit of counsel's presence. A basic rule of thumb: address all written materials to counsel.
- An investigator should be expected to provide information in an appropriate perspective, particularly with regard to who provided information, when and why. Beware of vagueness and references to generic sources.

**Staffing**

It is important to define, within the vagaries of the assignment, specifically who is going to perform the work; avoid "bait and switch". Will subcontractors be utilized?

**Timing**

Within reasonable limits, it is possible to define, up front, how long each phase of an investigation will take. Be flexible, particularly considering both "human element" and "battle plan" issues.

**Cost**

Pricing depends on several separate elements:

- The nature of the task at hand, and the experience levels of the professional staff involved.
- Whether the plan calls for a rational linear plan or an aggressive, time sensitive, "shotgun" approach.
- The number of actual jurisdictions in which the investigation is to be conducted. Each additional location adds incremental cost. International locations can be particularly costly.
- Case specific issues can affect cost. To search "John Smith" in Los Angeles is considerably more time consuming than "Stephen Vale" or "Ernest Brod".

**PRACTICAL ISSUES****Plan Ahead**

Plan ahead, if you can. Expedited searches cost more and deliver less. In order to respond very rapidly an investigator must utilize an inefficient "shotgun" approach as opposed to a

slower, linear approach. Rules of thumb:

- Two-four weeks for a "linear" investigation -allowing facts to develop rationally leading from one issue to the next.
- Two-four days for a "shotgun" investigation - moving rapidly ahead without taking time to develop issues.
- International investigations invariably take longer especially depending on the particular locale.

### **Communications**

Try to share information, goals and concerns with your investigator; perspective helps. Maximizing initial information results in more effective, efficient and speedy investigations. If you have chosen your investigator wisely, confidentiality should be eminently manageable.

### **Expectations**

It is very important to be realistic about your expectations and to carefully balance the costs, risks and rewards for an investigation. Given the extensive variable inherent in even a modest investigation, it is important that client, counsel and investigator be realistic - it is far too easy to over promise at the inception of an investigation, just as it is far too easy to make unreasonable demands in the heat of the moment.

### **Structured Approach**

Most complex investigations call for a structured or phased approach. By dividing the project into rational steps it is possible to meet two goals:

- Provide a "self financing" basis for additional phases.
- Allow for a natural strategic ramp-up of investigative efforts - it is almost always imperative to build a basic understanding of a particular situation or subject before proceeding with an intensive or aggressive investigative effort.

The investigative marginal utility is very steep. Thus, as potential risks increase, it is possible to expend exponentially more time, energy and money investigating even a single individual.

### **Patience**

Investigations invariably involve patience, even when simply collecting documents in the field. The primary reason for this is the unavoidable "human element". This is particularly true when attempting to conduct interviews or contact sources. If "time is of the essence", key witnesses invariably choose to go on vacation or be otherwise occupied. Bottom Line: Planning pays dividends.

### **Subcontractors**

Almost all investigators will utilize subcontractors, from time to time. Given the importance of local knowledge your investigator's ability to bring in key subcontractors brings important value. No single organization can maintain, in-house, the infinite skill sets, both geographic and functional, required to succeed in complex investigations.

### **Sourcing**

Information must always be viewed in the perspective of the source, from which it comes:

- Always consider identifying at least one objective source or reference for all material issues - do not rely on the subject alone.
- Legitimate businesses or individuals have no reason to be defensive about their backgrounds. Be very thoughtful about why a negative reaction occurs when basic

questions are asked.

- Interviews with individuals who have been associated or worked with the subject are often the best sources of information.
- Live source information must always be viewed in perspective.
- Consider all other sources related to the subject's specific history - "an unasked question can never be answered".
- Even negative results are helpful? "Information must exist to be discovered"

### **Confidentiality**

The trade-off balance between keeping the existence of the investigation confidential and gathering material information cannot be avoided. If an investigation must be conducted in a totally covert manner, searches will be limited to available public record information. Results may well be limited.

### **Disclosure**

Sometimes it may be necessary to disclose the existence of an investigation to a subject or the subject learns of inquiries during the course of the investigation. Disclosure versus confidentiality is a question of balance:

- Disclosure sometimes provides the opportunity to gather information from the subject.
- Disclosure often precludes the effective use of pretext and misdirection.

## **LICENSING AND OTHER ADMINISTRATIVE MATTERS**

Be sure to utilize licensed Private Investigators. Almost every state requires licenses for individuals gathering information for sale to others, particularly if it is obtained by interview or surveillance. There are often civil and criminal penalties for violating Investigative Licensing Laws.

In addition inquire if your investigator:

- Carries adequate insurance
- Provides employee training
- Screens subcontractors for appropriate licenses, bonds, etc.

## **CONCLUSION**

It is impossible to know too much when investing time, energy and resources to resolve a problem. Make certain that you, your organization and your team of professionals have access to the material objective information required for effective decision making.

Don't forget the clichés:

- "Look before you leap"
- "Knowledge is power"
- "The unasked question cannot be answered"
- "Information must exist to be discovered"
- "The truth cannot be invented"
- "Knock on doors"
- "On the record don't ask a question if you don't already know the answer"