



## Selecting and Managing Outside Investigators: Nine Tips for Lawyers

by James B. Mintz

Reputational black eyes recently suffered by Hewlett-Packard in connection with clearly inappropriate investigative work performed on its behalf have raised concerns in the corporate and legal communities about the proper use of private investigators.

Since it is often corporate counsel or outside legal counsel who are asked to identify and manage private investigators – and, more particularly, since a reluctance to use investigators could deprive executives, litigators and others of information they need to make sound business decisions and prevail in court – I thought it useful to set down some thoughts for lawyers on best practices in the selection and management of private investigators.

The nine tips that follow are based on my work as a private investigator for law firms, corporations, government agencies, non-profits and other clients over the past three decades.

### Tip #1: Consider going in the front door

First things first: Do you really need a private investigator? Hewlett-Packard might have avoided all the heartache and headlines if it had simply asked all of its board members for their telephone records. These requests would not have been burdensome or invasive -- only a few weeks' records were relevant and only calls to a few reporters' phone numbers mattered. The company could even have assured the directors' privacy by appointing a neutral person of impeccable credentials, such as a former judge, as the custodian of the records.

### Tip #2: Investigate the investigator

If you do need a private investigator, start your search for the right one by asking colleagues whom they have used in the past, and with what result. Ask prospective investigators for references, and call the names provided. Check for past press articles, good and bad, mentioning the investigator. Ask about, and check independently for, any past litigation or licensing/disciplinary matters.

You want to hear not only that the investigator respects the law, but that he/she scrupulously avoids investigative steps that, even if technically legal, might undermine the client's best interests. As a lawyer, you want to hear that the investigator is careful to use methods that will bear scrutiny by judges and juries. And you want to see indications that the investigator's firm has a culture of compliance. For bigger firms, at least, that might mean an ethics statement on the investigator's website and an internal Compliance Plan.

Tip #3: Specialized expertise trumps geography

Investigators, like lawyers, have a variety of specialties, and just as you wouldn't engage a real estate lawyer to file a patent lawsuit, you need an investigator who specializes in the type of fact-gathering you need done.

Take, for example, an assignment from a litigator to an investigator to track down a witness in Cleveland. Years ago, before computerized databases, you needed to query your colleagues along the lines of, "Does anyone know a good investigator in Cleveland?" to get someone to knock on doors there. Now that would be misplaced, since Web-based commercial databases are nationwide, requiring no door-knocking local investigative presence.

By recognizing geography as an often-secondary consideration, you can open your search nationwide for an investigator with the appropriate background, expertise and ethics.

Tip #4: Start with a hypothetical

Many of the best managers of outside investigators begin the first conversation regarding a new assignment with a hypothetical, to determine whether and how the prospective investigator has approached this type of assignment before. The right investigator will be able to tell about successes in similar cases, as well as *how* the results were achieved.

Tip #5: Expect – and want – to hear “No, I can't get that”

In an asset-search case, choose the investigator who says he *can't* find out how much the subject has in his bank account, or to whom he has written checks. (Accessing this information improperly would violate the Gramm-Leach-Bliley Act.) In an assignment to background a litigation opponent, choose the one who tells you she *can't* obtain a comprehensive national “rap sheet” of criminal charges – the likely source of which would be the FBI's eyes-only computer.

These “no” answers should indicate compliance with laws (including the Fair Credit Reporting Act) that, in effect, designate information that can and cannot be obtained legally.

Some years ago, on a panel of private investigators at a litigators' seminar, I was asked by one lawyer-attendee what I would do if asked to obtain personal phone records. I replied that I would decline the request—and that I hoped any other investigator would do likewise. The investigator sitting next to me then said he had a different view, sort-of winked at the inquiring lawyer and said, mock-confidentially, “Let’s talk after the panel.” My competitor may have picked up a client that night, but as confirmed most recently by the situation at H-P, my “no” was the better answer.

Tip #6: Expect and demand methodological clarity

From the very beginning of any investigative project, we advise an approach to client-investigator relations that is the polar opposite of what one lawyer was quoted as telling the *Wall Street Journal* amidst the Hewlett-Packard scandal: “To distance himself from the detectives he hires,” the *Journal* reported, the lawyer “says he won't allow detectives to tell him how they get the information they provide him. ‘I don't want to know that stuff,’ he says, ‘I just want the results.’”

The investigators you retain are your agents, and you can be held responsible for their conduct. So you cannot allow any mystery or misunderstanding, winks or nods, smoke or mirrors – you need those investigators to outline clearly the steps they propose to take on your behalf. “Don’t ask, don’t tell” may or may not be sound military policy, but it’s never sound policy when it comes to investigation management.

Investigative work should proceed in phases, with each phase controlled by a detailed to-do list, budget, timeframe and prohibitions that you have reviewed and approved. This can be done orally and/or in writing. In any case, the investigative team should explain in detail, and to your satisfaction, what they are about to do, not just nod their assent to your directions and concerns.

This to-do list approach doesn’t preclude the investigators’ use of, for example, confidential sources. Even if the lawyer-client decides he/she doesn’t need to know the sources’ names, the lawyer-client should have a chance to approve or veto those approaches beforehand. Don’t let your investigators use “confidential sources” as a cloak of invisibility and unaccountability masking whatever it is they are doing.

As the work proceeds and the time comes for your investigators to present their findings, there should be no mystery about where each and every piece of information came from. This expectation of transparency would have well-served, for example, the lawyers now defending themselves in the press for using Hollywood private investigator Anthony Pellicano, who stands accused of obtaining information on litigation opponents through wiretapping and other illegal means.

Tip #7: Make your prohibitions crystal clear

Some lawyers we know who are experienced at managing investigators stress specific investigative do's and don'ts in their briefings and engagement letters – a practice we've seen more often in the wake of the Pellicano case – and investigators can expect more of the same post-Hewlett-Packard.

Use of subcontractors may be a good example. In the H-P situation, it appears that some of the most clearly inappropriate activities were done by an extended chain of subcontractor investigators whom H-P may or may not have known about or approved. You can insist on knowing about – and approving or rejecting the selection of – any subcontractors your investigator wants to hire.

Tip #8: Rehearse beforehand any outreach to witnesses or others

Another way in which lawyer-clients can manage their outside investigators is by thinking through whom the investigators may interview, how they will introduce themselves and their inquiry, and what they are prohibited from discussing.

We suggest, as a best practice, that investigators prepare a list of proposed interviewees (whom to approach) and an interview template (how to approach); and that no outreach occur until the lawyer-client has approved both. The templates, tantamount to a script, should outline the approach to be used, starting with, “Hello, my name [investigator] is \_\_\_\_ and I'm calling from \_\_\_\_ on behalf of \_\_\_\_.”

Insisting that interviews be rehearsed and approved is sound investigative management. Even if they do not engage in outright falsehood in identifying themselves, investigators must choose among a myriad of ways to describe themselves, their client, the context for the inquiry, etc. – and lawyer-clients, in our view, should supervise, edit and approve these choices.

By the way, not every investigative situation calls for the investigator to identify him/herself as such. For example, in the tome *Business and Commercial Litigation in Federal Courts* (West Group & ABA, 1998), there's a chapter entitled “Investigations of the Case” that advises: “[A]n attorney seeking to obtain a court order authorizing the seizure of bootleg video tapes or other pirated merchandise might want to identify the persons responsible for producing and manufacturing the fake goods after locating the places of sales and distribution. In these circumstances, counsel might well consider retaining an investigative team with demonstrated experience conducting surveillances and other covert field operations, such as stings.”

Interview templates are a particularly important control mechanism when the interviews to be conducted are with former employees of a litigation opponent. These interviews are the subject of specific ethics rules and court decisions in various jurisdictions, and they must be done with an understanding of what is required in a particular situation.

Tip #9: Demonstrate the lawyer-investigator team's commitment to accuracy

Judges, juries, third parties and even opponents should be able to rely on investigators and the lawyers who manage them to be responsible about the accuracy of the information they bring forward. Investigators should be used as fact-gatherers, not advocates for the client's position. From the beginning, lawyers' assignments to investigators should be worded carefully as digging for facts, whatever those facts turn out to be. And success should not be defined as achieving a particular factual result, no matter how close that result is to the client's heart.

To-do lists, for example, should rely on words like *whether*, as in "Determine whether Vendor X has undisclosed ties to Executive Y." Interview templates should document that witnesses are being asked for nothing but the truth, letting the chips fall where they may.

One last point about accuracy: We think interviews should be taken by skilled note-takers, and almost never by tape recorder. Even if witnesses consent to have a tape recorder on the table during an interview, we find it often severely limits what they are willing to say. And investigators' covert tape recording – even if permitted by federal law, state law and legal-ethics guidelines – may be viewed unfavorably by jurors and others.

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The work that top investigative services firms do for their clients is important and valuable. It can, must and will continue. But in too many instances, and for far too long, some investigators have been presenting their work as a mysterious, "black box" process – and their clients have sometimes been too willing to accept it. If the recent, high-profile difficulties of H-P prove anything, it's that investigative services must be carried out according to an appropriate and approved set of ground rules, within the law, and with a high degree of transparency and accountability.