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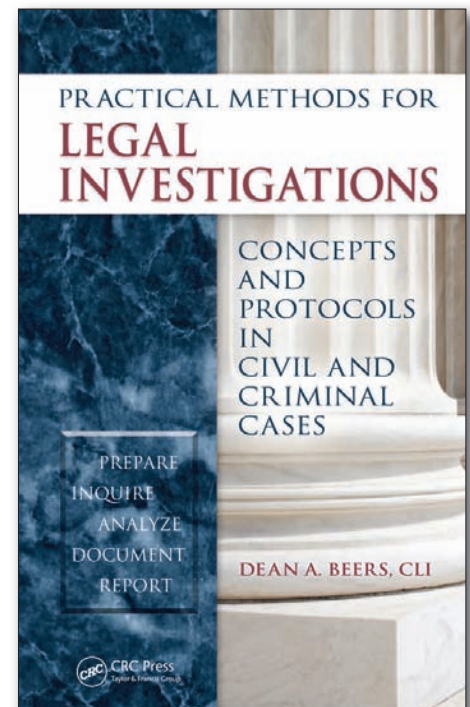
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ANNUAL SURVEILLANCE ISSUE

A Look into the Practical Methods for Legal Investigations

BY **DEAN A. BEERS, CLI, CCDI**

Adapted from Practical Methods for Legal Investigations: Concepts and Protocols in Civil and Criminal Cases, released by CRC Press in February 2011



WHAT IS 'THE PASSIONATE SEARCH FOR THE FACTS'?

As legal investigators, this is the only true function. This includes extenuating, aggravating, mitigating, objective, and subjective information. Anything that supports or refutes any or all of the components of the alleged crime or civil action is what becomes evidence. The passion for this profession will be reflected in the efforts and final report.

Legal investigators have professional obligations to themselves---and all clients---to be:

- Informed, become informed, and to inform
- Unbiased and open minded
- Conscientious of their fiduciary responsibility
- Honest and ethical
- Unrelenting in their search for the facts

OUR INVESTIGATIVE GOALS

As legal investigators we have specific goals in civil and criminal cases. At a minimum we must factually prove or disprove whether the civil allegation(s) did or did not occur (plaintiff or defense). This is accomplished by presenting a factual basis of whether multiple civil allegations are true or false (plaintiff or defense). This supports the 'preponderance' and also begins to define the parameters of comparative or contributory negligence. This also provides a better position for settlement

negotiations. Similarly in criminal defense is to factually prove if criminal charge(s) did not occur. This is also accomplished by presenting with a factual basis at least one of the criminal elements to be false---one element disproven leads to 'reasonable doubt'. This also creates a better position for plea negotiations and sentencing mitigation.

Our most desired goals are to prove or disprove the criminal elements could not occur. By presenting a factual basis that all of the elements are false, absolute innocence is proven. This provides a better chance of complete dismissal or acquittal; similarly, in civil cases, to prove or disprove if the civil allegations could not occur (defense) or did occur (plaintiff). This is also accomplished by presenting a factual basis that all of the allegations are false (defense) or true (plaintiff). This also proves absolute innocence (defense) or responsibility (plaintiff). This provides a better chance of complete dismissal (defense) or no comparative/contributing negligence (plaintiff). These are the legal investigator's goals, but what most often happens:

- Civil – comparative/contributing negligence and settlement
- Criminal – plea negotiation and mitigation

We must be prepared, and prepare the attorney, for all factual possibilities in plea negotiations, or settlement in litigation.

WHAT DOES IT TAKE?

The key elements to successful investigation are:

- Sufficient Time;
- Sufficient Funds and
- Sufficient Resources.

You may have hours or months to prepare and conduct a full investigation, or only key components of the investigation. Focus is placed on the areas that will produce positive results in the time allotted. Working the short-term, but planning for the long-term (things may change – work the present but plan for the future) is part of the investigative tasks.

Limited budgets are expected, especially to start. It is hoped the time to completion is not also limited. Make efficient use of time and resources based upon immediate and necessary goals. Focus on the areas that will produce positive results with the funds allotted. Maintaining a list of potential tasks if additional funding is provided will streamline these processes.

Resources come from a variety of places. Common developed resources include experience, skills, education, colleagues and associations. Do not overlook the client's relatives, friends, neighbors, colleagues. Developing professional and case specific resources can greatly make up for insufficient time and funding. Create, maintain, and share your resources.

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WHAT IS THE LEGAL INVESTIGATOR'S ROLE IN CIVIL AND CRIMINAL LITIGATION?

Attorneys are the presenters of fact. They develop the legal strategy that will put these facts before the trier of fact – judge and jury. The attorney-client depends on the legal investigator's education, training, experience, and perhaps subject matter expertise, to conduct a thorough fact-finding mission. The role of the legal investigator follows five simple investigative protocols, as presented in the book, *Practical Methods for Legal Investigations*:

- Prepare
- Inquire
- Analyze
- Document
- Report

PREPARE

This Prepare Protocol is one of the most important and overlooked. It is here that proper budgeting of time and finances are often not accounted for or provided. Every legal investigator should know the importance of reviewing all discovery and disclosures. This review will detail the elements of the charges or allegations and assist in developing case specific investigative strategy. Another important, but too often disregarded task---usually due to time and finance constraints – is the scene visit. Going to the scene(s) to view the evidence, vehicle or property damage, and premises adds the third dimension and perspective to the two-dimension of the hardcopy discovery and disclosures. Completing these tasks also enhances the interview processes and additional investigative tasks.

Reviewing all available discovery and disclosures includes records (medical, civil, criminal, education, employment, etc.), reports (law enforcement, investigating agencies – OSHA, NTSB, etc.), prior investigations, audio and video of recorded interviews, scene and incident diagrams and photographs, and written statements of the victims and witnesses. Although it is important to not leave any form of record unchecked, these must be prioritized based on importance, legal strategy – and of course time and finances. Even for those items set aside, a review to determine any missing or conflicting information may be helpful.

In addition to the basic core principle of acquiring knowledge---information, facts and evidence--- developing case specific investigative strategy is the second purpose of

this Prepare Protocol. Generally, all incidents are reported in some form (OSHA, NTSB, Risk Management, Road and Bridge, etc.), but not all reported incidents are investigated. From these reports, investigated or not, can be learned:

Who – Additional or expert information sources

What – Evidence or witnesses are time-sensitive

When – As close to the same week day, time of day (including adjusted time changes), environment, and circumstances as the underlying incident. The same season or activities may be necessary (i.e. rafting and river conditions).

Where – The scene, or multiples scenes (such as for a motor vehicle crash and vehicle at the tow yard) are important, as previously discussed.

How – Find witnesses, reports, photographs, experts, etc.

Visiting the scene is part of this Prepare Protocol because it sets the foundation for the core of the investigation – the Inquire Protocol. The scene investigation is more of a combined Prepare and Inquire Protocols, and should be done before interviewing witnesses to become familiar with what they report, and what is in any previously made statements. Do not assume that all evidence has been documented and collected. Compare the scene to the discovery and consider revisiting the scene after interviewing witnesses to confirm their information. Part of the purpose in personally visiting the scene is to create work-product documentation. This would include your own photographs, diagrams and measurements. This best evidence documentation the independent investigation is the best documentation for potential reports and testimony of the findings. The legal investigator may also find contradicting information, such as: measurements, obstructions, clearances and undocumented evidence, etc. These findings may be consistent with, or differ from, those previously reported – document this. It is important to use the perspective of the victims, witnesses, and responding personnel, look for any inconsistencies or discrepancies, as well as contradicting and supporting evidence – including new or previously undiscovered evidence.

One of the core skills is the interview. In this Prepare Protocol for interviews it is

important to determine the goals of the interview, develop witness accounts and unreported information, and secure a supporting or negative statement from the witness. Interviewing is a learned skill. The foundation for the interviews has been previously described. This includes a full case review and scene visit.

INQUIRE

The Inquire Protocol is what most consider the investigative stage. With the Prepare Protocol as the foundation, this Inquire Protocol is the core of these investigative protocols. This is the time to complete background records checks and investigations, contact victims and witnesses, and possible opportunities to expand your investigation.

Part of knowing potential witnesses includes knowing their backgrounds. Time and finance limitations may make this impractical to complete at the onset; however, they should be completed for all witnesses who will be testifying at any deposition, hearing or trial. cursory checks of personal and professional social networking can be revealing, fast and inexpensive. This background information may support or impeach statements made by a witness to either party. Backgrounds, and the course of the interview, may reveal information that could affect what witnesses report (i.e. desire attention, past perjury, related criminal history. Avoid surprises!

Interviews will assist in developing witness accounts and otherwise unreported information, and secure a supporting or negative statement from the witness. Contact and personally interview all victims and witnesses; using telephone interviews only as warranted. If requested, and permitted by regulation and ethics, record all interviews and/or obtain a sworn statement. Core interview questions include asking and determining the who, what, when, where, why and how. During the course of the interview have diagrams or maps ready for each witness. The important questions to ask of each witness, but often are neglected, is if there are any other persons to contact and for the contact information.

Determine if reports and discovery are accurate. Having specific clips and quotes from statements may refresh their memory, enlighten them to how their

information relates to the events, and show them that you are professional and prepared. The interview should be more of a 'conversation'. Follow where the witness takes the conversation, while maintaining control of the interview.

The investigative process is dynamic. It changes with new information from all the various sources and inquiries. Within your given parameters and priorities, follow the process...expand your investigation! This is accomplished with canvassing the neighborhoods and businesses for witnesses, mapping and obtaining data for security/surveillance cameras, obtaining weather reports and warnings, road conditions, and history of incident area. These important steps will aid in confirming what is in the reviewed reports and what witnesses report. Check the unusual---quiet neighbor, urgent care clinics, food banks, homeless shelters, and delivery drivers.

Often the attorney-client will have limited knowledge and resources that are important to legal investigators. For this reason, it is important to make recommendations and requests for additional information (i.e. EMS logs, 911 calls) that may have been overlooked. This information may not be included in discovery, and may have details and other persons to contact, as well as may confirm or dispute other reports and statements. This is an important investigative step to find all of the case facts. Every report or memo submitted will likely provide an opportunity to make recommendations and requests for additional information. Not only is this beneficial to the case at hand, it also conveys integrity, experience and skills – professionalism – to the client.

ANALYZE

It is important to organize your investigation into assignments and stages. These might include immediate, interim, and long term assignments. Examples of these specific assignments will include evidence and discovery to review, incident scene to investigate and document, and key witnesses to interview. These are the core investigative skill sets. After completing each Protocol of assignments, analyze the case and progress to determine any new or different courses of action. This may have you return to the Prepare Protocol, the Inquire Protocol, or move forward to case conclusion. This

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process of assignment analysis will continue until disposition or completion.

DOCUMENT

In reviewing of discovery and disclosures we see the course of the official investigation. Similarly, the legal investigator should follow a protocol and methodology that includes record keeping and tracking. This includes having evidence logs, photograph logs, diagram details, witness information, and time lines as needed. Keep

continuous case progression information in a summary. As the case nears possible settlement, disposition, negotiations, or trial – the attorney will want a concise summary of the case reports. This will allow you to (almost) effortlessly present this information to the attorney.

REPORT

The most important document the legal investigator produces is their written report. Herein, 'report' refers to any written

“Legal Investigators are Fact Finders”

communication to the client. This report may be shared with clients, attorneys, insurance companies, judges, juries and even law enforcement. Just as the legal investigator reviews dozens of reports, so too will those same parties review the legal investigator's report. It must not only be concise and factual, but also be free of errors that may diminish the perceptual quality of the report and work-product of the legal investigator. Reports may also include confidential memos. Prior to drafting any reports, it is important to determine from the client what is expected. This is particularly important to discovery and disclosure sensitive issues. It is also important to agree with the client on intervals of any reports.

In each report detail specific assignment progress and case status. This would include the status of any ongoing, suspended, or changed assignments. New findings, conflicting findings, mitigating and aggravating information are important to convey. Include the who, what, when, where, and how of each assignment and how they interconnect – from other parties to information, facts and evidence.

WHAT DOES ALL THIS DO?

Legal Investigation, in both civil and criminal matters, is simply a progression from information and leads to the next assignment. It should flow naturally, but be flexible based upon the needs of the case, progress of the case, and developed information.

Legal investigators are fact finders, for better or for worse for the client. As such, legal investigators have a duty to the attorney-client to present a complete picture so that they may better assist the attorney in advocating for their client. **PI**



Dean A. Beers, CLI, CCDI is an expert in death investigation and personal injury causation. He is the only Certified Legal Investigator (CLI) in northern Colorado, and is also certified in Medicolegal

Death Investigations, specializing in consultations and investigations of all civil personal injury, negligence and death matters, as well as felony criminal defense. He has authored three books and operates his firm with his wife Karen S. Beers, BSW, CCDI.

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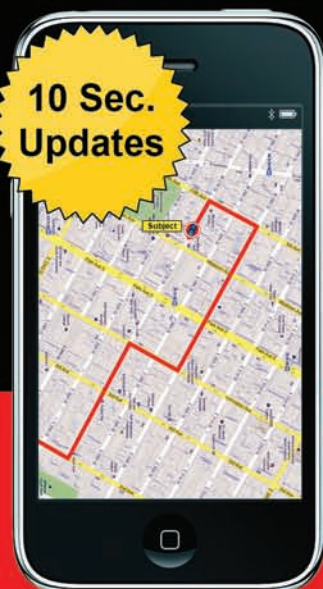


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