

Project: *Corporate Counsel – Legal Service Providers*

Selecting The Right Business Investigator Is Important – But Using Them Effectively Is Crucial

By Christopher T. Marquet



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It doesn't take a rocket scientist to understand that you wouldn't ask a carpenter to repair an electric circuit or expect an electrician to rebuild a roof.

The same holds true for asking counsel to conduct in-depth investigations for internal misconduct or litigation purposes. Just as specialists like skilled carpenters and electricians cannot be expected to be experts at repairing anything that's broken, many counsel, though they have legal skill and experience, should not be counted upon to serve as their clients' business investigators.

With an unprecedented surge of scandal underscoring today's less-secure economic climate, and with senior executives and board members now being held more accountable for their companies' conduct, cursory investigations that once began and ended over a simple review of public records, have become virtually useless. More important, their superficiality has recently resulted in some highly publicized, embarrassing and very costly business blunders, further heightening the value of expert investigative consultants.

Good investigators can't replace lawyers, but their intelligence-gathering skills – which provide timely and accurate information in this fast-paced, competitive environment – can significantly strengthen counsel's ability to reduce risk and make more informed strategic and operating decisions.

Most lawyers seeking professional investigators get referrals from other attorneys. It is important to make sure the investigative firm is locally licensed, holds appropriate insurance and has a reputation for legal and ethical behavior, responsiveness and open communication. Excellent references are

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essential, and a face-to-face never hurts – in fact, it often serves as a good barometer of how comfortable and collaborative the professional relationship will be.

Still, getting the right expert for the job is just the beginning. The trick is in understanding precisely what investigators can provide for counsel and how they can be utilized effectively. It is no accident that the premier business investigative consulting firms often include former top law enforcement officials recruited from the prosecutorial ranks, the C.I.A., F.B.I., D.E.A. and police departments, as well as forensic accountants, attorneys and former journalists known for their thoroughness and tenacity.

Reputable investigative consulting firms offer counsel versatility. Their staffs are trained to conduct in-depth interviews, gather facts, calculate financial damages and collect cyber evidence – suitable for presentation in court – digging deep and wide to unearth the underpinnings of business transactions, disputes over intellectual property and financial obligations, and cases entailing fraud and theft or employee misconduct.

To pierce the corporate veil, business investigators reach well beyond a review of easily accessed public records, and are especially adept at identifying, locating and evaluating potential witnesses. In addition to interviewing industry and confidential

sources, they conduct intensive background checks, which include complex asset searches and looking for long-buried criminal records, past co-conspirators in fraud cases and evidence of problems such as substance abuse, gambling and personal financial difficulties. They also check out disparities between lifestyle and salaries, which can sometimes bear clues to true corporate structures and entity relationships.

When confronted by lawyers, witnesses may instinctively clam up. But effective investigative consultants know how to prevent that from happening. They often conduct a thorough background search and develop a script with counsel's approval before contacting the subject. Sensitivity to the impact of cultural differences can also be critical in conducting interviews. Investigators must study the foreign business customs and mores, arming themselves with information that will not offend, but rather put the subject at ease. And, whenever possible, they avoid impersonal telephone interviews, preferring face-to-face meetings to establish more collaborative and cooperative relationships.

Utilizing computer, behavioral and accounting forensics, skilled investigators can provide corporate counsel with litigation intelligence and support by determining defensible valuation of potential damages and serving as specialized valuers for intellectual property disputes. By delving into an adversary's litigation history and strategy, investigators also supply counsel with invaluable information to assess the strength of the opposition's case. They can also determine the adversary's financial ability to sustain litigation, evaluate how important the case is to them and ascertain whether they will be able to satisfy judgments.

What's more, resourceful investigators, skilled in computer forensics, are experts at gathering and evaluating cyber evidence. By targeting key word searches on imaged hard drives – including slack space – they often recreate key email histories, determining whether evidence has been deleted, hidden or otherwise altered and ensuring that it will be presented properly for

admission in court.

Some success stories:

- When damaging rumors about a Fortune 100 conglomerate appeared on the Internet, the firm's stock dropped precipitously. Since the rumors were exaggerations of confidential information, corporate counsel recruited professional investigators to find the source, who turned out to be a disgruntled former employee. The lawyers then filed various actions, blocking the offender from further Internet postings that alleged securities violations.

- On behalf of its client, a major Texas-based law firm engaged an investigative consultant to search of hidden assets of the principals of a company that had bilked its overseas client of more than \$10 million. The investigators not only identified significant recoverable assets, but also provided general litigation support and assisted with assembling a proof of loss for the client's claim.

In addition to understanding how to utilize investigative consultants, corporate counsel also must understand how to manage relationships with them. Regular and open communication is the foundation of the relationship. To start with, be sure your investigator has no conflicts of interest. Prepare and execute an engagement letter or agreement for each assignment – a measure that will establish the work-product privilege, as well as clarify such deliverables as verbal and written reports. Equally important is a comprehensive discussion of case strategy and operating methodology in advance, clearly setting forth the investigative activities and establishing a budget as well as a timeline. Find out how much reliance they place on subcontractors as these are resources not directly under your control. Determine what quality and ethical assurances are in place with subcontractors.

Last, but certainly far from least, when dealing with investigative consultants, corporate counsel should be wary of the "wink and nod." Those are best left to magicians, who are experts at pulling rabbits out of hats, not at conducting appropriate and ethical business investigations.