

# The Organization: The Information Before the Litigation

It's been said many times, but bears repeating: Discovery may well be the most important part of litigation.

But sometimes, the beginning of the process is difficult. Interrogatories and other discovery tools and information they provide can be incomplete. In many instances, answers to standard discovery tools raise more questions than answers. Interrogatories and other tools must have some source from which to form a baseline as to the thoroughness of answers.

It is not uncommon for discovery to be responded to in a fashion designed to motivate the opposition to expend valuable resources following up on intimated, but unverifiable sources for convincing, theory-supportive evidence. Accordingly, it is best to determine as much as you can about your potential adversary and the case prior to litigation or notifying same of your intent.

There is the possibility that something will be found in pre-litigation which indicates litigation will be inappropriate, or protracted litigation is not beneficial. It is economically more sound to expend the resources to determine the viability of litigation before filing rather than after. Even though the amount of resources might be substantial, it will always be money well spent and less than what would be required if you delayed this effort subsequent to filing.

The recent litigation involving the tobacco industry as well as General Motors' Oldsmobile sedan fuel tank litigation are classic examples. In product liability litigation, the defect may be known internally and suspected externally. It may be a matter of simply providing the defendant with supportive evidence of the injury and the causative link between the defect and damages, along with applicable law. Further, it is always good to tell the defendant you know what he wishes you didn't know. It is nirvana for the defendant when through a lack of effort, you have not independently discovered this.

However, never fail to fully develop your case with the thought the high-profile defendant will simply settle without your having been able to show the futility of a vigorous, very costly defense effort. It is naive to believe any defendant will settle without being completely convinced you have already thoroughly worked up and preserved provable facts by a preponderance of the evidence. A civil "writ of assistance" might be required. Such a writ is an effective tool which can demonstrate to the defendant the wisdom of resolving the matter as soon as is practicable.

Competitive intelligence information gathering and general tort field investigation, including dumpster diving when accomplished legally and ethically, can be revealing. But these are only a couple of methods of collecting information outside formal discovery. When anticipating litigating with an organization there are several readily accessible open sources of data. The accumulation of all relevant information about an individual or organization can be daunting, and it is always time-consuming when properly, thoroughly, professionally accomplished.

The cost of obtaining this data today will be considered "insignificant," if passage of several bills at the state and federal level is successful. None of the bills, while well intentioned, will accomplish what they are presumably designed to accomplish. The bills, if passed as framed, might be renamed the "Full Employment Act For Investigators and Adjusters." The expense in properly preparing a matter for litigation will increase into the stratosphere. Such an event is clearly, not in the public's interest. There is a far more simple, direct and better solution.

The more knowledge and experience one has, the less time consumed, thus minimizing, by extension, cost. It is

not a task to be attempted at the 11th hour. Attempting to obtain the same data after filing and serving can be in most instances cost prohibitive if not properly, professionally done. Further, no matter how much previously obtained historical data you might have at your fingertips about an individual or organization before filing, you must ask, is it truly complete?

Is there more information needed? The dynamics of an organization today are very fluid. Hence the information obtained in another matter, a few months or years earlier about the same entity you intend to sue may not be as accurate and up to date as will be required. The information from earlier litigation is a good starting point. The effort, depending on your practice, may have to be ongoing and amortized over a number of issues as opposed to a single matter.

Certainly, the deep pocket defendant will be very well advised to pursue these issues in reverse to minimize and probe for potential exposure to inadvertent disclosure by current or former staff. The weak link should be found long before the opposition shows you where it is. Further, you are advised to have a blind effort undertaken to obtain sensitive information by a firm primarily engaged by the usual opposition, filtered through a independent party to avoid future claims of conflict of interest. This will allow you to understand and shore up weaknesses which will or can be located and identified, thereafter taking the necessary remedial precautions to preclude the possibility of such exposure.

It is not necessarily the executive and his knowledge that creates vulnerability to inadvertent and unwanted disclosure of sensitive information. The janitorial service, mail room personnel and their practices can make an organization far more vulnerable than the high level senior executive.

Eric Nalder of the Seattle Times, in a recent article and lecture for the Investigative Reporters and Editors, revealed that there are 6.5 million businesses, 220,000 non-profit organizations and 85,000 state and local governments in the United States alone! Many sound alike and have similar spellings. There are often ad hoc-type organizations within organizations which may or may not be wholly-owned or subsidized by the organization you are anticipating litigating against. Such sub-organizations may not be known to even the designated person most knowledgeable. All things considered, it is not a great mystery why obtaining accurate, up to date, perhaps vital information on an organization can be difficult and costly.

There are several fundamental questions that one attempts to answer when obtaining data about any given organization. Professor Benjamin Gilad, author of the accepted standard of professionalism in competitive intelligence gathering, entitled "Business Blind Spots," points to several areas of corporate vulnerability. This article will touch briefly on only one of the most important areas: The ability to recognize and understand the necessity to develop more than one source for the information obtained.

The manner and method in which business is accomplished today, most information one wants is available in electronic form and it is suggested any of the data recommended be so obtained, along with hard copy for comparison. Frequently, electronic data will be more complete than a hard copy of what is purported to be the same data provided by counsel. The opposite can also be true. Out of an abundance of caution try to obtain your data in all forms of transmission in common usage.

#### WHO ARE THE PEOPLE:

... All groups and organizations larger than individual operations of one, will have payroll lists and internal phone directories. Many directories have residential listings otherwise not obtainable elsewhere for after hours emergencies. It is a good practice to obtain the payroll lists and other similar data as well as internal phone books as many as five years precedent to the event of interest. If the approach is covert, it is not uncommon for several companies to provide complete names and directories in after hours electronic directories. A recording there-

of may prove most beneficial at the end of the litigation when years have passed and people who have relocated need to be located.

... To keep cost down it is best to be sure the material has some differentiation in the personal identifying information of those listed such as middle name or initial. This is especially true in instances wherein names might be of foreign extraction or common to the involved nation or heritage. Understand that foreign workers frequently Americanize their names. It is recommended your search for the subject be conducted using both versions.

... Newsletters and articles written for wide internal and, in some cases, external distribution can be helpful in explaining an organization's current position from what it may have been years earlier. If the newsletter is distributed externally, there must be a mailing list which might be available through the vendor, should the organization use an outside mailing source. Additional information contained in the newsletter might be obscure references to consultants used at one time by the organization or prior suppliers as well as vendors.

... Consider the type of business in which the organization is involved and what type of professional associations in which employees are or may have been members. Usually, such organizations publish rosters, newsletters, hold conventions and trade shows wherein speeches are made, followed by question and answer periods, usually recorded and held in the archives of the group.

... One must understand that individuals are not the only entities that can form, attend, support and participate in a professional association. The organization itself can and does participate as well. The organization subject to your inquiry may have discussed your area of interest and provided a knowledgeable former representative to present it's views and then current official position at the annual convention or trade show.

... Lawsuits by former employees and even innocuous small claims actions may contain more names that may prove helpful. Depositions having been noticed or taken in prior litigation is an essential element for comprehensive organizational structure and name identification of those in authority as well as support positions during a given timeframe.

... A call to the former prosecuting attorney or claimant may prove to be of interest. Such litigation research will sometimes reveal actions involving whistle-blowing. In those instances wherein the whistle-blower has been promised confidentiality, try contacting the involved regulatory agency and asking them to forward a letter from you to the whistle-blower asking same to contact you directly.

... A determination of what federal, state, county and city licensing bureaus which might have authority over the organization you are researching will assist in identifying others within the organization not otherwise readily identifiable. Usually, current and former employee names will be shown along with small biographical information and perhaps historical complaints and disciplinary action.

... There are few organizations of any size that are not in some manner contracted or attempting to contract with a governmental entity. Those contracts are, for the most part, public and will reveal a number of names that are or were key participants within the organization at the time of the contract. A Freedom of Information request might be required, but the time and effort is well worthwhile and will be apparent once the information is received.

... A check of federal bankruptcy records is a potential invaluable source of information regarding former or current employees and former suppliers, vendors who might have detailed knowledge about the organization. UCC filings and follow-up can be most helpful in estimating true assets and net worth during a specific timeframe, which may or may not be consistent with published materials. If it's a non-profit group, then a review of the

annual 990 is an absolute must.

... The local library, many of which are now on-line, will have available old newspapers, as well as old copies of city directories, which will list the place of employment of local residents during specified time periods.

... Determine if the local press has ever done a investigative or puff piece on the involved organization. If yes, contact the reporter(s) whose notes or recall might prove more informative than the edited or published article. You might ask for, but might not get, names along with attribution for off the record, deep background only information discussed with the reporter.

... There are unions which also publish in-depth analysis of organizations in preparation for contract negotiations for internal distribution on many organizations. Companies have former lawyers, who might be helpful. (Not all communications are confidential and absolutely privileged notwithstanding the myth and perception.) There are also former accountants, advertising agencies and public relation firms, which in turn, also have current and former employees that may have been involved with the organization and who you might ultimately wish to depose.

... A review of the Better Business Bureau will have a registry of people with complaints against the organization. Perhaps an electronic review of letters to the editor of the local newspaper will provide additional names of people within any organization as well as other information that may prove helpful. Depending on the importance of the matter, an international literature search, by name of author, known and suspected subject material or item can be most beneficial. Remember, what is no longer being done in the United States, may continue to be done off shore.

... Determine the local eateries and lounges within a given radius (easily accomplished with today's technology and search engines) of the involved organization where employees might or are known to visit, as well as the nearby health club where conversations of interest might have been overheard.

... A tour of the company offices or organization's facilities may prove beneficial in collection of additional names on desk name plates, the in and out boards, individual office doors, the telephone message box at reception desk, employee-of-the-month plaques and awards, usually with a photo. Automobiles in and around the known public parking zone of the entity in question should be noted for later reference. An international or national print media search will reveal yet additional names and recorded positions publicly taken by organizations which may warrant follow-up.

... If this effort is pre-litigation and evaluative, then there is no exparte consideration. Then an interview with actual people involved with the organization will reveal names of current and former staff, suppliers and vendors of the organization in which you are interested. Additional areas of inquiry can be developed with the simple retort to an important or curious comment by a current or former employee of an organization is "How do you know that?" "What else/who else?" and "Are you absolutely certain about that?" Many former employees will have memorable photographs they have archived which will provide an important visual of certain people and events.

If the matter being handled is substantive, then the preceding effort might well be warranted. If not substantive, then the preceding effort will be pared back. Technology today allows for legitimate time-saving short cuts to benchmark launch points to far more comprehensive and reliable proactive field effort.

There is no substitute for comprehensive field research. Reliance on the electronic systems will only lull the unsuspecting and inexperienced into a false sense of security about the completeness of the information. This must always be balanced by cost and effect analysis against the resolution value of the matter at hand.

Finally, time and space has permitted but a limited overview of the many areas of inquiry one can undertake legally and ethically to obtain open source data to learn about the people of the organization. This paper is meant as a primer of only a few of those methods. It is hoped you will find this helpful in your endeavors.