Informal Discovery Strategies for the Paralegal

By Elizabeth S. Fenton

What is informal discovery? It is factual research obtained without document requests, interrogatories, subpoenas, or depositions. And it can be crucial to developing a case. While the product of informal discovery may not itself be admissible as evidence, it often leads to admissible evidence. As we will discuss for the next forty-five minutes, informal discovery includes client and witness interviews, internet and public records searches, retention of private investigators and/or surveillance, and other methods of getting information. And unlike formal discovery, you can do it any time during the litigation—so get started as soon as possible.

The advantages of informal discovery include:

- You may get more accurate information: witnesses forget, move, or die. Documents are altered. Evidence is lost.
- Information may be easier to get before a lawsuit is filed.
- An interview is cheaper than a deposition, and may help you figure out whether you want a deposition.
- Information=power at the litigation table and at the settlement table.
- You don’t need to let your opposing party know what you are doing.

As we’ll go over, however, you must conduct informal discovery within the bounds of the law and ethical rules.

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B. Interview Client

Sometimes you may conduct an initial interview; sometimes you may be asked to sit in and take notes while an attorney conducts the interview. The initial client interview is an important event in the process of “working up” a case. It is an opportunity to develop rapport and trust with the client, obtain information about the client and the case, and communicate expectations about results, communication and other logistical matters.

Some of the important topics to cover in the initial meeting include:

- Explain the attorney-client privilege and the duty of confidentiality (attorney)¹
- Identify the outcome client seeks
- Discuss fees, budget, payment of bills, handling of expenses such as copy vendors, deposition transcripts, filing fees (attorney)
- Ask about underlying event/events
- Obtain copies of important documents
- Obtain authorizations for medical and/or employment records
- Evaluate client’s demeanor and credibility
- Address stresses/expenses of litigation (attorney)
- Raise other ways of resolving dispute (attorney)

¹ As discussed below, in Section B, “The Role of the Paralegal,” there are certain aspects of the initial client interview that only an attorney can address. These topics are off-limits for paralegals under the suggested guidelines of several leading paralegal organizations.
• Outline possible outcomes and general timeframe (attorney)

In order to prepare for the initial client interview, you should ask the client to bring with him or her all key documents such as contracts, insurance policies, medical bills, and photographs. Depending on the situation, you may wish to ask the client to write a memo summarizing the events, witnesses, and other relevant information, but make sure the client knows not to show it to anyone else (to preserve attorney-client privilege). You may also need to conduct some initial research about the person, company or incident in news sources or public records.

When the client arrives for the interview, do not make him or her wait. Make sure that you have set aside uninterrupted time to conduct the interview, and conduct it, if possible, in a conference room, away from the distractions of computer and telephone. You want the client to have your undivided attention so that you can develop a rapport and trust. Keep in mind that most clients will not feel immediately comfortable discussing sensitive financial, medical or other personal facts. Thus part of your job is to be patient and compassionate, yet not at the expense of getting the information you, and the attorney for whom you work, need to advocate for the client. You should introduce yourself and explain the purpose of the interview. For the most part, let the client do the talking. Ask follow-up questions where necessary, but not at the expense of getting the story. Depending on the nature of the interview, you should ask questions in varied ways: open-ended (to get the narrative), closed-ended (to confirm details), leading (also to confirm information or get client back on track), opinion (to evaluate motivations), and
“pressure” (to probe inconsistencies and see how the client may handle questioning at trial). Listen! Observe! Follow up!

And record! Take good notes. As the client explains what happened, you may find it helpful to create a chronology. If possible, tie the chronology to documents that the client has brought with him or her or documents he or she will deliver to you as soon as practicable. Pinning down dates is crucial to make sure you flag for the attorney any statute of limitations issues. Start a list of follow-up items for you and the client. If you handle a certain kind of case over and over, you might consider creating a questionnaire that covers the basic information. Remember that you will probably need to conduct more than one interview, but get as much information as you can.

The fee and payment terms should be discussed by the attorney in detail. Engagement letters, billing agreements, and contingency agreements should also be finalized by the attorney. Discussion of these issues at the earliest possible stage avoids headaches later. Similarly, the attorney should communicate realistic expectations about the strains, delays, and unpredictability inherent in litigation to the client.

Before the client leaves, confirm that he or she will (1) provide all documents and physical evidence not already brought to the attorney; (2) maintain all records, especially records of damages, going forward; (3) not discuss the case with others or sign anything without discussing it with the attorney; or (4) sign any required authorizations.

C. Interview Witnesses

Once you have interviewed the client, you should follow up and interview any other witnesses. Before initiating any interviews, make sure you have a grasp of the facts.
and the law applicable to your case. You can generally talk to anyone unless they are an opposing party or a former employee of your opponent. In those cases, you will have to use formal discovery to get the information you need.

When you call to line up an informal interview of a witness, be sure to identify yourself as a paralegal, explain briefly who your client is and what the case is about, tell the potential witness that you understand he or she may have some relevant information, and ask if he or she would be willing to speak with you informally. You may have to utilize your persuasive skills—the witness generally has no obligation to cooperate. In my experience, politeness and gratitude go a long way. Persistence will serve you well. Keep digging.

Ask the witness what happened, see if they know of any other witnesses, probe inconsistencies between the witness’ story and your client’s story (without disclosing those inconsistencies). Use the different kinds of questioning techniques discussed in the previous section. Commit the witness to a story. Find out if the witness knows of any other sources of evidence. Try to figure out if the witness has an ulterior motive. Be respectful, but test the witness’ recall.

Often you may conduct these interviews on the telephone. Other times you may visit the witness’ home or workplace. Be sure to take accurate notes. It may even make sense to audiotape the interview. You will need to be sure you have permission to do so. Your notes or other record of the interview are considered work product and are therefore not generally discoverable. If the interview is helpful to your case, you should discuss with the attorney whether a signed statement from the witness is appropriate. Such
statements, in contrast to notes, may be discoverable. However, such statements may be used at deposition or trial to impeach the witness, so if the witness is reliable and credible, it may be better just to wait until a more formal proceeding to present to witness’ story. If the witness will not be helpful to your case, you should not have the witness execute a written statement. In either case, you will want to prepare a written memorandum summarizing the interview.

D. Use of the Internet

The Internet is a great source of informal discovery. Get information about your opponent, opposing counsel, or the judge from legal and news sources. For a corporate defendant, look at public filings and records. Find expert witnesses; prepare to undercut the opponent’s expert. Find out whether the experts have testified differently in other cases, or whether your opponent is frequently haled into court. Almost anything you can think of, you can find on the Internet twenty-four hours a day, seven days a week, instantly, often at no or minimal cost.

As you approach research on the Internet, keep in mind (1) reliability, (2) cost, and (3) efficiency. Regarding reliability, be aware that information available on the Internet is always changing. As of December 1, 2005, the sites I reference in these written materials were up and running. However, sites on the Internet often change, move or disappear altogether. I make no guarantees that all of the information on these sites is reliable, although I have not provided any links that looked questionable to me. A good rule is to give more credence to information located at .gov or .edu sites than information located at .com, .org or .net sites. Regarding cost, Lexis and Westlaw are
for-fee services, and you should understand your firm’s contract and pricing structure.

When I talk about efficiency, what I mean is the breadth and depth of your searches.

There is no lack of information on the Internet. You may start your research with broad queries and come up empty even though you get a number of “hits.” The thing to remember in using searches and search engines is that search results are listed in a couple of different ways: many search engines report responses based on how many times the term is mentioned on the page, others look at which sites have had the most “hits” or visits by other users.

Just like any other research, Internet research requires a creative approach. It may take several adjustments to your key word search to find what you need. Do your best to keep track of where you have been and what searches you have done. Westlaw does this for you with the ”trail” feature; Lexis does it with the “research history” function. You can also use bookmarks or take notes to keep track of where you’ve been, especially if the site is one you think you might visit relatively frequently. Another way to research efficiently is to utilize the links on the web site you are viewing. Beware, however, of getting off track. There is so much information on the Internet that it’s easy to get sidetracked.

General Sites:

www.jenkinslaw.org: Jenkins Law Library maintains this site, which contains Jenkins’ catalog as well as a research guide, “Gathering Information on People Using the Internet.”

www.virtualchase.com: This site is a service of Ballard Spahr Andrews & Ingersoll, LLP. It contains articles and advice regarding the accuracy and reliability of Internet research, as well as links to factual research sites.

www.reporter.umd.edu: “A Journalist’s Guide to the Internet”. This well-organized site contains links to newspapers, courts, maps, state and federal government resources, and statistical and political information.

www.lii.org: Librarian’s Index to the Internet. This site contains links to general information about a wide array of topics, including business, law, education, health, news and reference materials.

**Research on Individuals and Companies:**

www.knowx.com: This site provides, for a fee, background checks on individuals, businesses, and assets.

www.infospace.com: Nationwide telephone and address information.

www.bigbook.com: Site is supported by Verizon and contains telephone and address information for businesses.

Public records of all kinds are available at state and local web sites. Corporate information, licensing information for professionals, the existence of liens or judgments against a party are all located on such sites.

**Research on Expert Witnesses:**
www.expertpages.com: Free, searchable site for experts in a number of areas including medical, business, insurance, environmental and construction.

**Research on Opposing Counsel:**

www.lawyers.com: A service of Lexis. The lawyer locator gives you background information, contact information, and firm information on co-counsel or opposing counsel.


www.martindale.com: This online version of the Martindale-Hubbell Legal Directory has profiles and biographical information on lawyers throughout the country. It is searchable by name, location, firm, and law school.

**Lexis/Westlaw:**

Both Lexis (www.lexis.com) and Westlaw (www.westlaw.com) maintain public records databases, company information, and news libraries. Make sure you understand the pricing structure before you use these services. They can save you a great deal of time and effort once you know how to use them properly. You can search whether your expert has testified in other cases, or look at whether your opposing party is a frequent litigant. You can search real estate and judgment records. You can also track down witnesses’ addresses.

**A. Surveillance**

You may be asked to line up a private investigator or maybe even to conduct some informal surveillance on your own. Check with others in your firm about private
investigators whom they have used in the past. It is important to get someone reputable and ethical, who is cost-effective, responds to phone calls in a timely manner, and will be credible on the witness stand. Look on the internet, in the yellow pages and in Martindale-Hubbell. Interview the private investigator if your firm does not have a track record with him or her. Ask for references. Think about whether it makes sense to use someone local or national.

Private investigators can be used, among other things, to locate witnesses, perform surveillance, obtain information about assets, civil and criminal court actions, marital history, professional licenses, credit information, and motor vehicle records.

If you are asked to watch a place of business or a potential witness or opposing party, be sure you get clear instructions and are not placed in any danger. You can obtain much valuable information about a business by watching the comings and goings (is the business really failing because of your client’s alleged breach of contract?). Likewise, we have all heard of individuals who exaggerate health problems; surveillance may produce essential information about the truth of the situation.

**B. The Role of the Paralegal**

The Pennsylvania statute concerning the unauthorized practice of law is located at 42 P.S. § 2524. The key thing is that paralegals cannot perform work that involves the exercise of legal judgment, although the statute does not specify what that is.

More specifically, I have provided some excerpts from the ethical guidelines and canons of (1) National Association of Legal Assistants (www.nala.org) and (2) the National Federation of Paralegal Associations (www.paralegals.org). Although these are
not necessarily “binding,” they are practical and common sense. I also identify the “take-away” for the purposes of conducting informal discovery. As you conduct the informal discovery we’ve discussed, be mindful of these precepts as well as of any instructions the attorney gives you.

1. NALA Code of Ethics and Professional Responsibility

Canon 1.
A legal assistant must not perform any of the duties that attorneys only may perform nor take any actions that attorneys may not take.

For the purposes of today, it is important to remember you cannot do something that the attorney could not do him- or herself; as a result, if an attorney is precluded from directly contacting an opposing party who is represented by counsel, so is the paralegal working with him or her.

Canon 3.
A legal assistant must not: . . . (b) establish attorney-client relationships, set fees, give legal opinions or advice or represent a client before a court or agency unless so authorized by that court or agency . . . .

Therefore, with respect to the initial client interview, you can assist the attorney but you cannot commit the attorney to the case, be involved in the setting or negotiation of fees, or give legal advice.

Canon 5.
A legal assistant must disclose his or her status as a legal assistant at the outset of any professional relationship with a client, attorney, a court or administrative agency or personnel thereof, or a member of the general public. . . .
Whenever you are dealing with the client, locating and talking with potential witness, or otherwise conducting background factual research, you should always identify yourself as a paralegal. This holds true for all correspondence as well.

Canon 7.
A legal assistant must protect the confidences of a client and must not violate any rule or statute now in effect or hereafter enacted controlling the doctrine of privileged communications between a client and an attorney.

As you conduct informal discovery, be aware of any confidential information of the client that should not be disclosed.

2. National Federation of Paralegal Associations, Inc. Guidelines

EC-1.2(b) A paralegal shall not communicate, or cause another to communicate, with a party the paralegal knows to be represented by a lawyer in a pending matter without the prior consent of the lawyer representing such other party.

Again, in the course of informal discovery, it is crucial to remember that you cannot communicate directly with someone whom you know to be represented by counsel. Generally, this rule only concerns opposing parties, but in larger litigation it could include co-defendants as well.

EC-1.3(b) A paralegal shall avoid impropriety and the appearance of impropriety and shall not engage in any conduct that would adversely affect his/her fitness to practice. Such conduct may include, but is not limited to: violence, dishonesty, interference with the administration of justice, and/or abuse of a professional position or public office.

This precept seems pretty obvious. Stick to it.

1.5 A PARALEGAL SHALL PRESERVE ALL CONFIDENTIAL INFORMATION PROVIDED BY THE CLIENT OR ACQUIRED FROM OTHER SOURCES BEFORE, DURING, AND AFTER THE COURSE OF THE PROFESSIONAL RELATIONSHIP.
Ethical Considerations

EC-1.5(a) A paralegal shall be aware of and abide by all legal authority governing confidential information in the jurisdiction in which the paralegal practices.

EC-1.5(b) A paralegal shall not use confidential information to the disadvantage of the client.

EC-1.5(c) A paralegal shall not use confidential information to the advantage of the paralegal or of a third person.

EC-1.5(d) A paralegal may reveal confidential information only after full disclosure and with the client's written consent; or, when required by law or court order; or, when necessary to prevent the client from committing an act that could result in death or serious bodily harm.

EC-1.5(e) A paralegal shall keep those individuals responsible for the legal representation of a client fully informed of any confidential information the paralegal may have pertaining to that client.

EC-1.5(f) A paralegal shall not engage in any indiscreet communications concerning clients.

Do not misuse or disclose confidential information you gain about a client in a case. If you have a question about what’s confidential and what is not, talk to the attorney. Always err on the side of not disclosing even non-confidential information other than what you absolutely must.

1.6 A PARALEGAL SHALL AVOID CONFLICTS OF INTEREST AND SHALL DISCLOSE ANY POSSIBLE CONFLICT TO THE EMPLOYER OR CLIENT, AS WELL AS TO THE PROSPECTIVE EMPLOYERS OR CLIENTS.

Ethical Considerations

EC-1.6(a) A paralegal shall act within the bounds of the law, solely for the benefit of the client, and shall be free of compromising influences and loyalties. Neither the paralegal's personal or business interest, nor those of other clients or third persons, should compromise the paralegal's professional judgment and loyalty to the client.

...
EC-1.6(c)  A paralegal shall avoid conflicts of interest that may arise from family relationships and from personal and business interests.

EC-1.6(e)  A paralegal shall reveal sufficient non-confidential information about a client or former client to reasonably ascertain if an actual or potential conflict of interest exists.

EC-1.6(f)  A paralegal shall not participate in or conduct work on any matter where a conflict of interest has been identified.

Develop a system with the attorney to ensure that you do not have any conflicts of interest. If you know one of the witnesses to a case, be sure to let the attorney know as soon as possible.

1.7  A PARALEGAL'S TITLE SHALL BE FULLY DISCLOSED.

Always explain who you are when dealing with clients, witnesses, third parties, and court personnel.