

8-1940

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Recommended Citation

Hornaday, William J. (1940) "Some Suggestions on the Investigation of Facts," *Indiana Law Journal*: Vol. 15 : Iss. 6 , Article 2.

Available at: <https://www.repository.law.indiana.edu/ilj/vol15/iss6/2>

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SOME SUGGESTIONS ON THE INVESTIGATION OF FACTS

By WILLIAM J. HORNADAY*

The need for careful and thorough investigation of the facts in civil matters is as great today as it has ever been, and as specialization in some fields of the law progresses, this need is felt more and more. The specialization referred to has seen tremendous growth the past few years in the categories of casualty insurance and tort practices, as the automotive transportation of the country has developed; it includes also commercial and bankruptcy practice, but the scope of this article will be limited to suggestions in the field of tort matters and general rules of investigation which would apply in all fields.

The Federal Bureau of Investigation brought home to the general public and to all law enforcement agencies the drastic necessity of special training in the investigation of the facts in criminal cases, by taking for new personnel attorneys together with a small per-centage of other specialists for certain classes of the Bureau's work, and giving these attorneys and others intensive training in investigative methods and technique.

And yet, in spite of the fact that the factual side of a civil case handled by an attorney may be and often is just as important as the legal questions involved, and frequently require far greater application of effort, time and skill in its proper development, there is not a law school in the country today, so far as this writer is aware, which offers any courses or lectures to its students on methods and technique of investigative work, and the development of the factual evidence in legal matters.

The purpose of this article will be to present to the readers some suggestions which have been given the writer in the FBI

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training school, or which he has found by experience to be of practical aid, and which are just as applicable to investigation of facts in civil cases, usually, as they are in criminal cases. The subject matter of the article doubtlessly will appeal most to the young or beginning attorney, but it is the sincere hope of the writer that should older and experienced attorneys discover herein some new idea that appeals to them they may derive some practical benefit from it.

The cardinal rule of all investigative work has no new note: The job must be done thoroughly. The FBI has gained its laurels not so much by any new, fantastic, scientific hocus-pocus as by just plain hard and *thorough* work. No lead is ever left uncovered, and the reports in each case are scanned over and over again to make certain that no lead has been overlooked.

Probably the second most important rule, one that is self-evident and universally recognized and yet which is too often neglected is to make the investigation just as quickly after the fact has occurred as possible, and get every recollection of everything seen and heard by every witness recorded in a dated writing.

Of course, in those cases in which the facts must be developed through eye-witnesses, the first task is to locate these witnesses. Again the desirability of speedy action is brought home. One handicap experienced in the development of the facts of a case is the reluctance of most disinterested persons to become involved in the troubles of someone else by becoming a possible witness in court; and it is not an unusual experience to find that by getting to a disinterested witness several days after the matter in question has taken place, the witness has had time to think over what it is going to mean to him in hours lost from his own affairs by being a witness in court if he admits that he witnessed the matter, and so he denies having been a witness; whereas, if he had been contacted a few hours after the event, he probably would have more readily admitted seeing or knowing about it.

In this connection, it is well to remember that if a witness is contacted by the investigator who has learned that the wit-

ness actually does or may know something of the matter, or was in a position at the time the event in question occurred which ordinarily would have enabled him to know something about it, and the witness maintains he knows nothing about it, a written signed statement should always be taken from him stating that he knows nothing. If that man later turns up in court as a hostile witness, giving testimony helpful to the opposition, the value of such a written statement for purposes of discrediting the witness or impeaching him is obvious. It frequently is as important to obtain the witness' signature to a statement that he knows nothing as it is to obtain his signature on an otherwise informative statement.

The more quickly the investigator starts to locate his witnesses, the easier his task will be. It is hardly necessary to point out that almost invariably, a more accurate picture of the event will be had if the witnesses are contacted a short time after the event occurs. And, the event being fresher in their minds then, they may give him leads to witnesses unknown to him that they would not recall a few days later. Witnesses should always be asked if they can give the names or identities of other witnesses. If the investigation is permitted to drag out over an extensive period, there is the usual difficulty of locating witnesses who have moved from the addresses which they had at the time of the event, and who must be traced.

A time saving point which is often overlooked is to make an appointment in advance with any businessman during business hours—and to preserve any friendliness such a witness may feel toward the investigator or the latter's client, it should not be overlooked that keeping the appointment is usually a necessity.

For a successful interview with witnesses, always observe all courtesies. Never get in an argument with a witness. Even where the witness is patently hostile, control the temper—the investigator's only business with the witness at the moment is to learn what that witness knows, and to get this knowledge recorded in writing, signed by him as a correct and true statement of the facts. These ends will never be gained by arguing, being "hard-boiled" or discourteous.

The initial approach to the witness usually is most effective if it is completely casual. Inform him that there are a few questions which the interviewer would like to ask concerning the case; be careful never to mention the words "statement" or "written statement." These usually have the effect with a majority of witnesses of making them cautious or of forgetting completely all they may have known.

It may be well to spend some time discussing the weather or some other neutral subject; the passing and lighting of cigarettes or cigars is frequently an excellent means of lightening tension, bringing relaxation or a weakening of barriers and defenses. There is rarely any cause for not being entirely frank as to the party represented by the investigator; in fact, most circumstances demand the utmost frankness on this point from the attorney in civil practice.

Tablets, paper, pen or pencil should not be brought out while the first questioning proceeds; avoid giving the witness any reason to suspect that what he is saying is going to be written down. Paper should be left in a brief case, or, if a tablet is carried, if small enough it should be left in a pocket, or else placed on the floor or a table as if it is not going to be touched again.

Go over the entire subject matter with the witness verbally, if he talks readily. Try to bring out a chronological story; this saves much confusion. Lay witnesses who have had past court experience, or who have had some bad advice from neighbors, sometimes make a flat initial announcement that they do not intend to say a word until they are on the stand in court, or, on some other excuse, will refuse to discuss the matter in hand. Don't accept this as final. A dodge which frequently works is to appear to accept such a pronouncement as the last word in the matter, but then start in passing the time of day on some trivial subject, finally working the conversation around to the matter in hand, asking a few innocent appearing or immaterial questions on it, and then begin asking more pertinent questions. Usually, by being persistent in a manner along this line, everything the witness knows can be dragged out of him.

Another advantage of a rapid investigation as soon as possible after the matter comes to hand is the opportunity the investigator frequently has to interview the opposing party ethically before the latter has retained counsel, which, if skilfully done, usually will result in obtaining a written statement.

Persuading recalcitrant witnesses to talk is always a test of the ingenuity and resourcefulness of the investigator; no set rules can be laid down, of course, as no two cases are alike; and yet as a general rule, the above procedure generally will work pretty well. It is necessary always to remember not to be too easily discouraged.

After the matter in question has been gone over thoroughly once verbally with the witness, writing materials should then be produced. It frequently is found to be effective to remark to the witness something about as follows: "Well, I guess I'd better make a memorandum of what you have told me." If the witness seems perturbed at this, it may be well to point that when you have made a written memorandum of the conversation at that time when the witness himself can determine its accuracy, there is then no danger that in the future you will misquote him. Going over the whole ground covered initially verbally, then, the information given by the witness is written down in the form of a statement, using the pronoun "I" for the witness as if he were writing it himself. Repeating the whole matter this way very frequently brings to the witness' memory some particular which he did not recall in going over the matter the first time.

As to the form of the written statement, there are a few good general rules that can be followed. First, it is well to have a heading consisting of the address of the place where the interview takes place, and the date of the interview. A good form for this is to write both in the upper right corner of the first page the same as if beginning a letter on a blank page. The opening sentence of the body of the statement should name the witness and the person taking the statement, with a reference to whom the latter represents; this will prevent the witness or opposing counsel from ever claiming the

statement was obtained by false representations. A good form may be as follows: "I, John Jones, make the following statement to Howard Smith, who has advised me that he is an attorney, representing Mary Doe." If it happens to be a criminal matter, and the interviewer is a prosecuting attorney or investigator of a law enforcement office, it is well to add immediately following this a statement that the witness has been advised of his constitutional rights and makes the statement voluntarily.

It is usually helpful in the next paragraph to record some facts concerning the witness himself, such as: "I live at 506 North Robertson Avenue, Ft. Sill, Indiana, with my wife and two children. I am 38 years of age and for the past four years have been manager of Lipscombs Department Store." Then begin and carry through a complete statement of what the witness saw, heard or knows about the matter, arranged in chronological order.

In closing the statement, a recitation that the witness has read the statement, consisting of a certain number of pages, and has signed same to certify to its truth and accuracy, makes a good and valuable final paragraph. If the witness might be considered hostile, this closing paragraph should go further, stating that the witness has signed the statement at its end, and has initialed the other pages; and the witness should be persuaded to place his initials on each page other than the last one. This on the ground that his initialing the pages will be proof in the future that those are the pages he has read. The interviewer is then also protected against any claims of the witness or opposing counsel that there has been substitution of pages in the statement. It still occurs occasionally that a witness may be interviewed who does not know how to or is physically unable to write his name or initials. After having such witness make his mark at the end, if an ink stamp pad or other means is available, it is a good step to have the witness place his right index or other finger print on the margin of each of the pages.

Of course, the witness probably will be more at ease if he is not made aware that a formal written statement of this

kind is being drawn up while the actual questioning and writing is taking place. When the statement is finished, hand it to the witness, ask him to read it carefully, and if he finds errors, point them out so that they can be corrected. Add casually that when he is through reading the statement, you want him to sign it. Don't ask him if he will sign it; the odds are in favor of his refusing to do so. But if approached in a manner along the lines suggested, it is rare that any witness raises an objection to signing the statement. If he does object, suggest that that question can be discussed later, but in the meantime, ask the witness to go ahead and read the statement and advise if it is correct. This is important. If the witness reads the statement and advises the interviewer it is correct, that written statement, after being properly identified by the interviewer on the stand, can be used almost as well for impeachment purposes as a signed one. But again, don't give up on the point of the signing of the statement too easily.

If corrections are made in the statement, some investigators are careful to re-write the whole page, so that no question of alteration of the page can be raised in court if delineations or insertions are noted; however, if time is short, have the witness place his initials right beside the lines marked out or changed, or, if there is space, write in the margin something to the effect: "These corrections noted; made at my request," draw an arrow from this to the corrections, and have the witness sign this notation. It may be well to state at the close of the statement, instead; "I am adding that the corrections which appear at line 12 of page 2 and lines 15 to 17 of page 5 were made at my request."

It is submitted that written statements should be taken from every witness concerned with the matter being investigated. Some attorneys question the value of such procedure, but the psychological effect on hostile witnesses from whom written statements have been taken, while those witnesses are on the stand in court, alone has sufficient value to make the careful taking of written statements worth while. Those witnesses certainly are careful of their remarks on the stand.

In addition, the greater certainty with which the attorney can prepare himself for trial when he can review the written statements of every witness has real value. The attorney then knows to a far greater certainty what each witness can be expected to testify to than if he tries to rely on his memory of what the witness has said in some past verbal interview, or on some sketchy notes. They also give the attorney a feeling of confidence, because if the witness unexpectedly turns hostile, or changes his story, or otherwise tries tricky actions on the stand, the best means that could be had is then at the attorney's hand with which to destroy that witness.

If two or more investigators are together interviewing a witness, it is well to remember that better and faster results are obtained, as a general rule, if each investigator does his complete questioning without interruption by the others, each taking the witness in his turn. Sometimes one questioner will be carefully building up a certain line of questions to a definite goal only to have it upset and spoiled by an interruption by another who mistakenly thinks he is helping the first one. It is not an uncommon experience, especially in criminal law enforcement work, to see two or more interviewers firing away questions at a witness, interrupting each other, and causing utter confusion, when, if each would take his turn, far more satisfactory results would be obtained.

In closing, it is readily admitted that in reading these suggestions, many of them may appear trite; and yet it is astounding to observe in the field how many of them are overlooked or ignored completely by attorneys and others doing investigative work, and almost always to their own damage. The writer wonders if it might not be valuable to have a column or page in the *Law Journal* devoted two or three times a year to tips or suggestions in investigative work submitted by attorneys?