

DISCOVERY: Interviewing and Investigation

Instructor's Manual & Test Bank

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Third Edition

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INTRODUCTION

This instructor's manual is designed to assist you in the preparation and teaching of course materials covering interviewing and investigation by paralegals or legal assistants. It is user-friendly with periodic page references to the textbook. I suggest you contact the publisher for a copy of the manual on a disk to facilitate your use of the assignments, test questions, and appendix materials.

If you have any suggestions, ideas, or teaching techniques, as well as supplemental materials that you feel are supportive of the course objectives, I would appreciate your sending them to me or contacting me at Johnson County Community College, 12345 College Boulevard, Overland Park, KS 66210-1299, (913) 469-8500, extension 3359.

I realize that there is considerable diversity in the course structures and curriculum in paralegal or legal assistant educational programs. My suggestions and comments in the manual are only for your consideration in teaching with this textbook, but, you should not rigidly adhere to what I've provided. However, I strongly recommend that you structure your course. In my course, during our first class, we discuss the course objectives thoroughly, and I give my students the opportunity to identify those they consider most important. I have added objectives based upon their input. I also encourage my students to contribute to the course through group and class discussions throughout the semester.

I hope you enjoy teaching this course as much as I do!

Michael A. Pener
Spring 1998

DISCOVERY IN TODAY'S LAW PRACTICE

THE PURPOSE OF DISCOVERY (1)

Many materials for the study of law take the traditional approach of sequentially placing discovery after the pleading stage of litigation but before trial. Today, for practicing lawyers this is outdated, since most legal matters never reach the pleading stage, let alone trial or adjudication. Actually, discovery starts when a lawyer conducts an initial interview of a potential client. As such, discovery should be “deformalized” with emphasis upon informal procedures initially. If the lawyer, working on a contingent fee basis, can quickly settle a personal injury claim without considerable time and effort, then he or she will be successful in the practice of law. Clear-cut discovery objectives such as stated here should be emphasized to the students.

THE NEED FOR DISCOVERY (1)

Since I wrote this chapter, I found out that many insurance companies have gone to “brokered” use of defense law firms for representation. What happens is the broker keeps tabs on the law firms in major metropolitan areas with respect to their effectiveness and then “sells” them to insurance companies. This is a by-product of major changes that have happened to the legal profession. Clients have become cost weary and wary and are turning to alternatives to formal litigation. And even when a suit has been filed, the courts are imposing mediation, arbitration, etc., in lieu of trial on the merits. In addition, the courts are cracking down on procrastinating lawyers known to have conducted “discovery” during trial. Sanctions by statute or court rule are now the norm. This should be thoroughly discussed with specific reference to your state’s statutory and current case law on sanctions against lawyers.

The lawyer can seek some degree of protection against sanctions by conducting an “independent” investigation of the client’s case or matter before any lawsuit is filed. Use applicable case law to support this procedure. Also malpractice insurance carriers are promoting this approach and provide supportive materials and practice tips.

MYTHS AND REALITIES OF THE PRACTICE OF LAW (2)

Just because someone went to law school, he or she doesn’t necessarily possess the practical skills needed to successfully practice law. It’s amazing how most law schools continue to focus on legal theories and avoid practical skills. One thought is that most law professors have never really practiced law and are unable to “teach” practice skills. Of course, so long as this continues, it does support the need of the legal profession for paralegals or legal assistants. At this point in time it would be best to shift the emphasis from the federal court rules and applicable statutes governing the practice of law in the federal courts to state statutes and court rules. Support this by stressing that most lawyers practice within state court systems.

Law as a Business. While the legal profession has been responsible for many great accomplishments and has impacted our society, the bottom line for most lawyers is to make a living practicing law. Salaries for lawyers vary greatly, but all are tied into productivity, and the magic word is “overhead.” Discuss the use of threshold requirements by lawyers and law firms to determine whether a case or matter will be taken. Also, review the movement toward “megafirms” and “boutique” law firms.

Changes in the Legal Profession. Discuss how lawyers in your community have turned to cost-effective measures in their delivery of legal services. Obviously this includes computers and facsimile (fax) machines. Discuss the continued reliance on the use of paralegals or legal assistants. A look into the future might be appropriate here. Divide the class into small groups and let them discuss and report back to the entire class what they believe the delivery of legal services will be like in 10 or 20 years.

STATUTES OF LIMITATION (5)

Docket control and safeguards are absolute requirements for the successful practice of law. Malpractice insurance carriers require lawyers to set out their procedures for such. You should stress to the students the court rules and statutes of your jurisdiction that contain time limitations and standards, particularly statutes of limitations and statutes of repose. The computer has been an extremely useful tool for maintaining control. If free access is available at your institution, a good class exercise would be to have your students access your jurisdiction's court rules, etc., via the Internet.

Inform your students of their important role here and their possible vulnerability to becoming the "sacrificial lamb" in the event there is a time problem, e.g., a brief in support of a motion for summary judgment is filed late. In determining time limits or requirements, the latest version of a statute, court rule, etc., must be examined. Many state bar associations have published CLE books summarizing time limitations and standards for their state. If available, such should be obtained and used, but "time research" should be finalized with a review of the statute books, supplements, and session laws.

Whether or not there is a lawyer-client relationship can be difficult to determine. When consulted by a potential client, the safe approach for a lawyer to take is to make a "record" by use of a "CYA" (cover yourself always) letter. Also, the legal assistant must avoid situations where a potential client calls and starts asking questions before meeting with the lawyer.

STATUTORY PRIVILEGES AND IMMUNITIES (9)

Lawyer-Client Privilege. Your state's statute needs to be examined and discussed with the students. I stress that the client has the privilege. Also, point out that the privilege covers communications with the legal assistant and other employees and agents of the lawyer. This can be crucial where the other side is claiming that an agent was consulted by the client outside of the supervision of the lawyer. Provide your students with a copy of your state's statute. In class, divide them into groups and have them review the statute and identify pertinent provisions, especially those applicable to them.

I review the other statutory privileges with my students and get them into a discussion of possible "new" privileges, such as communications between a parent and child. Also, your state may not have some of the privileges I've listed or may have limitations of such, so you'll have to "localize" your materials for this section.

ETHICAL CONSIDERATIONS AND THE LEGAL ASSISTANT (11)

Go over the sources of ethical standards as outlined in the text. I obtain and emphasize the disciplinary rules of Kansas, the state where my program is located, but I also discuss those of Missouri, since we are quite close to the state line. Disciplinary procedures are thoroughly reviewed. I also provide and discuss with my students copies of the state bar association's guidelines for the use of legal assistants. I define the practice of law. In Kansas the definition is in our cases. In Missouri it is defined by statute.

I cover specific areas where lawyers get into ethical trouble. For example, in Kansas the highest number of complaints concern the following practice areas: divorce and child custody; criminal representation; bankruptcy; fee arrangements, both contingent and per hour; and probate. You should check with your state's disciplinary administrator to see what are the major areas of complaints against lawyers in your state. Or your digest should be consulted for specific cases. Be sure to locate cases that involve legal assistants and situations involving former lawyers being used as legal assistants.

In my lectures on ethics I specifically cover ethical considerations applicable to the legal assistant, including use of business cards, name on letterhead, how he or she is held out to the public, confidentiality, and communications with clients and witnesses. A sensitive area is contact with opposing lawyers. You must thoroughly impress upon your students the many problems they may encounter in their dealings with lawyers. We had an "incident" where opposing counsel refused to allow the other lawyer's legal assistant to be present at the taking of a deposition because the applicable statute specifically said that only the parties, their lawyers, the deponent, and the court reporter may be present. Although lawyers as professional courtesy were allowing legal assistants to be present, the court in this instance strictly construed the statute and sustained the refusal. Fortunately, the legislature amended the statute to include the presence at depositions of the paralegals and legal assistants of the lawyers.

I stress that, except for the unauthorized practice of law by the legal assistant, the lawyer is the one who will be subjected to disciplinary measures for the unethical conduct of the legal assistant. However, there can be disastrous career consequences for the legal assistant.

THE PROFESSIONAL RELATIONSHIP OF THE LAWYER AND LEGAL ASSISTANT (18)

I think it's very important that the students understand the professional relationship of the lawyer and legal assistant. I accomplish this by examining several fundamental aspects.

The Lawyer. I believe I have set out in the textbook good discussion materials, and I am sure that you will be able to elaborate on them with reference to local conditions and your own experiences. I am amazed at how new lawyers in my area still begin their practice of law without practical skills. The "sink or swim" philosophy is still around with many law firms, and it has spilled over into the delegation of tasks to legal assistants. However, thanks to continuing legal education requirements, practicing lawyers must update their practice skills.

It would be wise to explain how the trust account concept works. State supreme courts now routinely audit lawyer trust accounts and require strict compliance with their rules.

A major problem area in the use of legal assistants by lawyers is the giving of instructions. While I've outlined several steps for doing this, you should explore with your students situations where some element is lacking. When it comes to explaining the client's problem, many lawyers will give inadequate background information. Also oral instructions are commonplace. Time deadlines and priorities are very important and adherence will avoid duplication of effort. It's very important that the lawyer and legal assistant be on the same legal terminology "wave length," and the former should not make assumptions about the latter's knowledge and depth of understanding about a practice area and related specific functions. In this regard, I promote both internal and external "networking."

The Legal Assistant. The electronic "revolution" started in the 1960s at the same time the legal assistant profession officially came into being. Today a lawyer simply cannot practice law without all the electronic devices now utilized. These include computers, scanners, fax machines,

cellular telephones, laptop computers, lawyer software, etc. Now the same holds true for legal assistants.

I instruct my students to treat the materials we study in the book as their personal “trade secrets,” which they take with them as they change employment in the legal field or related careers.

ASSIGNMENTS

1. Have the students identify the statutes and disciplinary rules for lawyers in your jurisdiction that correspond to the ethical requirements, limitations, and considerations set out on pages 13 through 17 of the textbook. Emphasize that this should be done with specific references, e.g., MRPC 5.3 for number 2 on page 14, and that there may be duplication.
2. As a major assignment give your students several ethical questions and have each pick one to respond to in the form of an ethical opinion letter. Once a student has selected a question, team him or her with three or four other students who have picked the same question, and meet with each group to discuss the request in greater detail. For the assignment you should provide your students with copies of the disciplinary rules of your state’s supreme court. Also, if available, check out from your local law library and have books on lawyer ethics on reserve at your school’s library. I suggest the following: **Modern Legal Ethics, ABA/BNA Lawyer’s Manual on Professional Conduct**, and the **Law of Lawyering**. And you may want to have them search the Internet for other resources. I instruct my students to prepare outlines of their letters identifying the material facts and questions presented, setting out their opinion with specific references to disciplinary rules, etc., and closing with a conclusion and suggested course of conduct. We then discuss their outlines, and everyone prepares and turns in a letter.
3. Lately, I have been using a more “individualized” ethics assignment where I provide my students with a list of recent disciplinary cases before my supreme court. Each student is assigned one case and prepares a written brief for it. Also each student makes a classroom presentation about his or her assigned case. My state, Kansas, now has free access on the Internet (www.ink.org) to its case law since the fall of 1996, and I encourage my students to find their cases in this manner. For your information, almost all the states are putting their decisions on the Internet. A simple access address is: www.state.abbreviation of state name.us (For Kansas: www.state.ks.us)

TEST QUESTIONS

TRUE/FALSE

Most law schools have extensive coursework covering practical skills, including client interviewing.

(False)

Only the client has the privilege of preventing the lawyer from disclosing confidential communications made to the lawyer by the client during the course of their relationship.

(True)

When a lawyer discovers a conflict of interest after representation has begun, it must be revealed to the client and all other parties affected.

(True)

In most jurisdictions legal assistants are allowed to give out business cards.

(True)

During discovery the two dominant functions performed by the legal assistant are fact gathering and preparation of discovery documents.

(False)

MULTIPLE CHOICE

During discovery, it is the lawyer's responsibility to

- a. ascertain the facts necessary to determine the merit of the client's claim
- b. evaluate the matter for settlement or satisfactory disposition before trial or formal adjudication
- c. preserve testimony and physical evidence for use at trial or formal adjudication
- d. all of the above

(d)

At present, the professional ethics of a legal assistant

- a. are what he or she decides are applicable to him or her
- b. cannot be determined without further research
- c. are governed by the ethical rules of the jurisdiction where the lawyer-employer practices law
- d. are controlled by the ethical guidelines of the National Association of Legal Assistants

(c)

A lawyer may have to terminate representation of a client, if

- a. the client is slow in providing requested information
- b. representation will violate professional rules of conduct or other law
- c. the client is related to the lawyer
- d. none of the above

(b)

With respect to the receipt and disbursement of funds belonging to the client, the lawyer must maintain a

- a. ledger book showing the amount due the client
- b. separate trust account
- c. case file system
- d. journal of contacts

(b)

Functions of a lawyer in our society include

- a. client representation, officer of the court, and public citizen
- b. client representation, officer of the court, and public development
- c. client representation, officer of the court, and private endeavors
- d. officer of the court, public citizen, and support of law schools

(a)

SHORT ANSWER

Identify several of the instructions the lawyer should give the legal assistant when assigning tasks during discovery.

Name the types of discipline that may be imposed upon (name of your state) lawyers for misconduct under the disciplinary rules of the (name of your state) Supreme Court and explain their effect upon a lawyer's ability to practice law. Specifically identify the various persons who can initiate a complaint against a (name of your state) lawyer.

**THE NATURE OF EVIDENCE
AND ITS PLACE IN DISCOVERY**

MATERIAL EVIDENCE (27)

The purpose of this portion of this chapter is to review and summarize the formal rules of evidence. Although your students may have taken a litigation course, you should still cover the “rules” thoroughly, but take a practical approach. Again, use your state and local rules. Remind the students that in seeking evidence that passes the material, relevant, and competent requirements, they should avoid overlooking or discarding evidence that fails to meet these requirements. This type of “evidence” or information may still be significant and can affect resolution of a matter without full-fledged litigation. For example, a potential defendant may have health problems that would be aggravated by prolonged litigation.

TESTIMONY OF WITNESSES (29)

When discussing the four limitations on the testimony of witnesses, you should specify applicable statutes and court rules. An excellent teaching technique is to utilize a recent court decision in your state. Also, with hearsay and its exceptions, recent cases are invaluable as a resource. With respect to public records, I begin stressing the importance of obtaining certified or authenticated copies of public records.

PHYSICAL EVIDENCE (31)

Physical evidence is something presented to a trial jury to get involved in the proceedings, since it can use its physical senses. It’s exciting and allows the jury to participate. However, it is important that you emphasize to your students that jury or judge must be educated about the evidence so that their perception about it is the same as yours. Also, “chain of possession” is very important in this regard, since it bears on the credibility of the lawyer during the course of the trial.

DOCUMENTARY EVIDENCE (32)

As before, you should cite your state’s statutes and court rules for the materials discussed in this section. I discuss the best evidence rule thoroughly and tell my students to follow the office procedures of where they work. Your students may experience some confusion over the difference between a stipulation of the parties and judicial notice. One or two examples may clarify this for them.

ADMINISTRATIVE EVIDENCE (33)

As a society we are moving toward settling disputes outside of the courtroom, and many of the judicial rules of evidence discussed at the beginning of this chapter are being disregarded. For class discussion, obtain the evidential rules of some agency in your state and compare them to your state’s judicial rules. Better yet, get an administrative law judge, mediator, or arbitrator to be a guest speaker.

PLANNING FOR DISCOVERY (34)

At this point I introduce my students to the idea of forming a tactical plan for discovery. I feel this is necessary so they can get used to having an overview of the client's problem or matter, the main objective of the lawyer's representation. In plan development, you need to emphasize flexibility, adaptability, and methodical thinking.

FORMAL DISCOVERY (35)

Whole courses are taught on this subject, and legal assistants are used extensively in this area of the practice of law. Some maintain that we've gone too far in the formal discovery process and have turned law firms into "paper mills." I once reviewed a court file where over 70 pleadings and motions were filed, with the defendant's attorneys copying word for word and serving the interrogatories that the plaintiff's attorneys had served on them. Claims of plagiarism were dismissed by the court. Also, with formal discovery, when used you may be exposing your case to an inexperienced lawyer and provide him or her with information not previously known. Of course, formal discovery will always be necessary when litigation commences, but it should not be used haphazardly.

Your students need to understand that the applicable discovery rules will include local rules and even "bench" rules of a particular judge within a judicial district. Impress upon them that failure to follow applicable rules can be disastrous, especially as to possible malpractice claims.

Pre-Discovery Disclosures. At the federal level and in many states this has been the response to the "paper mill" approach to discovery. The bottom line is that it requires extensive informal discovery before a case is filed.

Interrogatories. Interrogatories are an excellent litigation tool. They're cheap and efficient. In certain areas of the practice of law they are in standardized form. For example, in automobile accident cases, my local court by rule sets out specific interrogatories that may be initially served. I know one very successful attorney who always serves interrogatories with the complaint/petition. Interrogatories are answered under oath, and you should stress the importance of the client fully understanding the questions and his or her responses. (Typically, when deposed, he or she will be questioned thoroughly about the answers by the opposing lawyer.)

Requests of Production, etc. I personally believe this is a very effective formal discovery tool when properly used. However, you can't go on "fishing expeditions." And, in cases involving thousands of documents, such can be overwhelming. Impress upon your students that when in charge of an inspection by the other side, for security purposes they must be present at all times.

Requests of Business Records of a Business not a Party. A most effective means of formal discovery, yet one my students find somewhat "distasteful." I think it's because of the lawyer's ability to obtain the records of a third party who is not directly involved in the litigation. For this reason, I tell my students that as an advocate for my client, I use every legal means at my disposal.

Depositions. Depositions are the mainstay of formal discovery. In complex litigation, computerization by court reporters has turned deposition summarizing into a simple task. Legal assistants are invaluable in the preparation for and taking of a deposition. You need to relate to your students your experiences in taking depositions. Also, emphasize how preparation is essential, including reviewing the case with your client when he or she is the deponent. There are some excellent materials on the deposition process. You may want to invite a lawyer to give a demonstration.

INFORMAL DISCOVERY (45)

It is very important that you properly explain this concept to your students. What needs to be established early in the course is the idea that development of facts will take place initially through informal discovery. Of course there will be exceptions such as the statute of limitations about to run, but for the most part development of the facts will be accomplished through organized, methodical process, as will be discussed in later chapters.

Definition of Fact. You might want to elaborate on what a “fact” is. I find my students like the definition given. At this point in the course, they may not comprehend the terms “direct fact” and “related fact.” I suggest you provide examples. What I try to do is to get my students to avoid a myopic approach to case development and to look beyond the direct facts in a case. There are several reasons for this. First, there may be potential defendants other than the one who was obviously responsible for the client’s problem. Secondly, students, if they want to use investigation skills successfully, must understand that there may not always be one answer to a question or problem. There is a story about an accountant and a lawyer who are asked what does 2 plus 2 equal? The accountant quickly answers “4,” but the lawyer responds with “that depends on how you look at it, since sometimes it may be three and 3/4ths or four and 1/4th.” To support this, look what happened a few years ago with the videotape of the beating of Rodney King by the Los Angeles police officers.

Elements of Informal Discovery. At this point students are introduced to the basic provisions of any informal discovery plan. I explain to my students how important the client is initially to the development of the facts. But without sounding too negative, I discuss how a client may not always disclose all the information at his or her disposal or may present his or her story in its “best light.” Profiles are discussed later in more detail, but be sure to impress upon your students the reality of a case with excellent liability, but worthless because the potential defendant is “judgment-proof.”

Variables. The four variable factors discussed in the textbook might also be called the “four headaches” of the practice of law. External time requirements, especially the applicable statute of limitations, are very dangerous. I know of one personal injury law firm in my area that refuses to take a case with less than 30 days to the expiration of the statute of limitations. Also, internal time limitations can be very hard on a legal assistant. You should advise your students when employed to seek a “time protector” who will shield them from lawyers and legal assistants needing some help with their work. Many firms avoid this problem simply by using the “team” approach. Clients are not accepting case expenses as presented and are requiring specific elaboration and justification.

THE INFORMAL DISCOVERY PLAN (49)

In writing this book, I found that the resources I reviewed always placed the initial development of the discovery plan *after* the interview of the client by the legal assistant. As you can see, I don’t agree with this. Formulation of the informal discovery plan, which should be instigated by the lawyer, should begin no later than right after the initial interview of the client by the lawyer. It will be time wasting for the legal assistant to subsequently do a substantive interview of the client without knowing the direction the case is going. An informal discovery plan solves this problem and give the legal assistant a sense of direction in the tasks to be performed. The textbook gives the students two major approaches to preparing the initial plan. You may want to conduct some classroom exercises to reinforce this concept. Finally, again stress the importance of “flexibility” and “adaptability.” There is no place for rigidity or regimentation when it comes to investigating a client’s case.

ASSIGNMENTS

I have no set assignments for this chapter because the students should be given ample time to work on the ethics assignment given after chapter one. However, if you feel your students need

to develop the ability to “brainstorm,” then I suggest you give them some basic fact situations and have them prepare an informal investigation plan.

TEST QUESTIONS

TRUE/FALSE

Even if evidence is found to have probative value, a court might still exclude it because it would prejudice the jury.

(True)

Judicial notice is the process where a court accepts into evidence all evidence admitted to by the parties.

(False)

The “best evidence” rule with exceptions requires that the original of a document be placed into evidence.

(True)

Evidence that would normally be inadmissible in a court of law may still be admitted in an administrative proceeding.

(True)

Privileged information is discoverable when an adverse party can show undue financial burden.

(False)

Compared to other forms of formal discovery, interrogatories are very cost-effective.

(True)

One effective discovery method available to the plaintiff or defendant is to subpoena the business records of a business that is not a party in the lawsuit between them.

(True)

During a deposition, a legal assistant can ask questions of the deponent as long as such is acceptable to the opposing party.

(False)

MULTIPLE CHOICE

A witness who is not an expert may still be allowed to testify as to common, everyday observations including

- a. the results of applications of technical data
- b. speed, weight, height, and width
- c. his or her personal feelings on the merits of the case
- d. a and b

(b)

Exceptions to the hearsay rule include

- a. dying declarations
- b. spontaneous declarations
- c. business entries
- d. all of the above

(d)

One key factor affecting admissibility of tangible evidence is the establishment of

- a. chain of possession
- b. how it was made
- c. its exact dimensions
- d. a and b

(a)

Pre-discovery disclosures do not include

- a. identification of witnesses likely to have discoverable information
- b. confidential communications between the client and lawyer
- c. calculations of damages claimed and supporting documents
- d. production of applicable insurance policies for inspection and copying

(b)

A “fact” includes something that

- a. is an opinion
- b. will happen
- c. has happened
- d. none of the above

(c)

One reason for doing profiles of adverse parties during initial informal discovery is

- a. it's required
- b. to find out if they are without financial resources to satisfy the demands of the client
- c. the client expects fast action
- d. b and c

(b)

When formulating and executing an investigation plan, the legal assistant must consider

- a. professional limitations, costs, and methods
- b. internal and external time, geographies, and costs
- c. internal time, costs, and sources
- d. internal and external time, costs, and methods

(d)

SHORT ANSWER

Identify and briefly explain the three basic requirements that must be satisfied for evidence to be admissible in a judicial proceeding.

LEGAL THEORIES AND FACT ANALYSIS

DISCOVERY PROCESS (57)

This and the next chapter are very crucial to the success of your students when they perform interviewing and investigating functions. We can write about and discuss “fundamental factors” endlessly, but it will all be a wasted effort unless our students understand their practical applications. The development of legal theories is predicated upon the lawyer carrying out one of his or her primary responsibilities: determination of applicable law. While the legal assistant will assist in this task, the lawyer must take the lead in this form of critical thinking.

I candidly discuss with my students the development of my critical thinking skills in law school and update my discussions with information provided me by recent law school graduates. My purpose in doing this is to convince my students that critical thinking is a “learned skill” and that they should not feel intimidated by the lawyer with enhanced skills in this area. Nor should they be amazed by the lawyer who is lacking in these skills.

LEGAL THEORIES (57)

In discussing this topic, you should move from the optimal theory concept of law schools based upon the use of cases to the practical aspects encountered in real life situations. The students must understand that the development of legal theories will often not be “neat and tidy” like the headnotes of a case. Rather, such will be accomplished by hours of effort and analysis. In other words, there is no quick fix! To support this, I draw upon newspaper summaries of cases that have been recently decided in my area or of significance on the national level. Also, I recommend *Court TV* as a resource as well as the *National Law Journal* which can be accessed for this purpose on the Internet (www.nlj.com). We discuss the initial stages of the cases and how the interrelationship of law and facts (legal analysis) produces the legal theories upon which the development of the case proceeds.

Legal Perspective. Fundamental to the above is the lawyer’s legal perspective: how he or she perceives the law to be. You should draw upon your experiences in discussing this. I use as an example a Kansas statute concerning the right of an adopted child to inherit from his or her natural parents. Although the statute severs the rights of the natural parents to inherit from the child, it specifically retains the right of the child to inherit from his or her natural parents. I give my students the fact situation where a grandson, after his father’s death, is adopted by his grandfather and claims two shares of his grandfather’s estate when he dies intestate (his own and that of his deceased father). Invariably, most of my students’ perspective is against the grandson getting two shares, but usually come around as we discuss the purpose of the statute in setting a standard where there is no will.

Next, I discuss with my students how our ability to make judgments and decisions plays a very important role in the legal theories process. I teach the premise that we do learn decision-making skills through our educational process. Again, I stress that getting the right answer initially is not as significant as choosing a course of action.

Legal Research. Before I identify specific legal research techniques, I discuss what I consider are basic concepts. First, as I said, primary responsibility for legal research belongs to the lawyer. Secondly, the actual research, depending upon the staffing of the law office (large firms will have

law students if a law school is located nearby), will often be initially conducted by the legal assistant. Thirdly, no matter who does it, legal research must be done with open-mindedness and common sense. For this reason, I think that many legal assistants will be more thorough in their legal research because of their past experiences. Finally, there must be a specific objective to the legal research or the researcher can spend endless hours looking for something that's been ill-defined.

The legal researcher should take advantage of previous legal research. This can be accomplished by reviewing office files where the lawyer or law firm have set up a legal research file or files containing legal memorandums and briefs. Also, the "territory" should be identified; that is what legal materials are in the office law library and available at the local law and public libraries, as well as through electronic means. And the legal assistant should consult with the lawyer to find out what are his or her favorite legal source-books and materials. To support this I have my students break into discussion groups and identify their favorites and materials they like to use when conducting legal research. Very popular are continuing legal education handbooks (CLEs) and CLE seminar materials as well as specific subject books such as those identified in the textbook. I stress to my students the importance of familiarizing themselves and working with these materials *before* they get too involved with fact development, so they'll know what they need to look for.

In preparing the materials for the specific research techniques set out in the textbook, I used the legal research performance guides that I developed for the paralegal/legal assistant occupations catalog published by the Vocational-Technical Education Consortium of States (V-TECS). (See the Bibliography for more information.) The catalog identifies 69 entry-level tasks and gives an overview of the specific tasks that an entry-level paralegal or legal assistant is expected to perform by lawyers.

Rather than recycle the materials found in the textbook, let me pass on to you some of the pointers my students and I came up with during previous classroom discussions. However, do not take them as limiting your own thoughts on doing legal research and feel free to elaborate.

1. Utilize legal research materials that you find "user-friendly" for yourself. When doing tax law research, I always prefer one tax service over another. It seems to have a better format, and it's easier for me to go from one part to another.
2. Legal encyclopedias are one of the best places to start when you are unfamiliar with the subject matter. I prefer *AmJur* because it references Proof of Facts and Pleading and Practice Forms where I can get specific language for pleadings, etc.
3. Treatises and the state's patterned instructions will give an excellent overview of a specific point of law that must be proved, as well as the supporting factual basis.
4. With computerized access, legal periodical literature is more accessible. My preferences are journals of bar associations and law specialty publications because they seem to present information on a practical level.
5. Always check the statutes! This includes "shepardizing." This means supplements and session laws and checking with the state revisor or legislative service for the current status of a law. There can be overlap, and more than one statute can apply. Annotated statutes can also provide access to case law and other resources.
6. With administrative law, the best approach is to find a resource that combines statutes, regulations, administrative rulings, and case law.

7. Current copies of court rules must be obtained from a publisher or clerk of the appropriate court. Advance sheets and other publications must be checked for changes. My supreme court has all of its rules on the Internet.
8. Being able to utilize case digests efficiently is a must! Case analysis can be a problem, especially when the court's opinion is highly technical or not well written.
9. Depending on how much a legal assistant is used by the lawyer for legal research, the use of citators can quickly become a lost ability. Fortunately, citators like Shepard's do provide instructions in their volumes and pamphlets for their use.

COMPUTERIZED (ELECTRONIC) LEGAL RESEARCH (71)

It's very difficult to give you some broad-based concepts to use when you discuss this topic with your students. This is because there are several unknowns on my part. Are you personally using it? Does your paralegal or legal assistant educational program require such of its students? Does your institution have facilities where it can be done? Nevertheless, let me tell you where I'm coming from. First, I've taken courses on the use of WESTLAW, LEXIS, and LOIS. I presently teach elective legal specialty courses on their use and the use of the Internet. I integrate electronic legal research into this course and all my other courses by way of assignments. And my college's library is very supportive. I believe a paralegal or legal assistant must have these skills in order to do his or her job.

So what should you do? First off, assess what your institution has available to support your teaching the use of electronic legal research.

Next, identify community resources that could help you. Many county law libraries have electronic legal research capabilities and might be willing to assist you. Also, in metropolitan areas the above legal database providers may provide free demonstrations and training programs. Finally, if you lack these skills, you must get training.

One caveat. I have found that my students really like electronic legal research. It's fast and convenient. However, they have their limitations when we attempt electronic legal research first in an area of the law that they are unfamiliar with. So you must impress upon them that they must be well-grounded in a topic before they use electronic legal research resources.

FACT ANALYSIS (71)

The two key words in this discussion are communication and objectivity. The lawyer and legal assistant must communicate to each other all aspects of any fact analysis conducted by each of them. Objectivity is essential and subjective factors must be avoided. When I give my students the situation of the grandson wanting two shares of his grandfather's estate, I purposely make the grandson, our client, out as a greedy, nasty person so that my students can get an idea of what's it like to have a client with the law on his or her side, but whom you'd not like to see prevail.

Definition of Fact Analysis. To support the definition given, I draw upon everyday examples of how we use fact analysis. For example, when I am driving on a thoroughfare and approaching a side street, with an automobile coming up to a yield or stop sign, even though I have the right of way, I analyze the actions of the driver to determine whether he or she is aware of my presence and will yield or stop. This is especially true when the other driver is using a cellular phone or the automobile has darkened side windows and I can't see the driver's face.

You may want to expand as follows upon the factors identified under this topic:

- (1) Final Objective - What will be accomplished by this analysis?
- (2) The Resources Available - You're not going to be able to calculate the stopping distance of an automobile if you don't have the appropriate materials at your disposal.
- (3) The Purpose - In what way will this fact analysis be used?
- (4) Parameters - How far are you supposed to go with the analysis? Are there specific non-subjective limitations, e.g., time and costs?

Analytical Methods. This is hard to teach, and it would be wonderful if all of your students had a logic course as a prerequisite to this one. But such will not be the case. In the textbook, I tried to put inductive and deductive reasoning in concrete terms, and in class I focus on how each of us use these analytical skills daily. For example, when we drive an automobile we use both. But the challenge is getting your students to separate the two.

Analytical Process. The analytical process as discussed in the textbook does help, since it gives the students specific steps to follow. But you need to draw your students into a good discussion of limitations, as well as the significance of their background and knowledge in fact analysis. In a recent movie, a lawyer had a complete memory loss and had to relearn everything. But notably, his basic personality traits were still there. While I accent positive personality traits, I also discuss those that may adversely affect the student's ability to maintain objectivity during fact analysis.

I feel that background and knowledge are very important. Let's face it, if you don't possess the background and experiences, you won't be able to recognize an important piece of information. My students and I do some self-examination and each of us identifies those areas of knowledge and education that we truly enjoy. Then we identify those aspects of each area that we utilize in performing fact analysis. By this approach, each student identifies his or her strengths and weaknesses and will be able to take specific steps in the educational process described on page 74.

Legal Methods. Early in the discovery process, the basic facts pertaining to the client's problem must be established. Everything is predicated on this, and you can't really go forward without the fact elements to support the legal theories that evolve. To do this properly, your students must understand and be able to use the methods described in the textbook. Recording of factual information is absolutely essential, and "memo to file" are words they should live by as well as "CYA" (Cover Yourself Always). Be sure to emphasize that during the discovery process all factual information should be recorded, no matter how trivial or insignificant it may seem at the time it is discovered.

Time Sequencing. I have used this method in cases where many factual events took place. It works well in business, breach of contract and real estate cases. It allows you to establish the facts you have confirmed or verified, and then identify potential facts. It should be done in chart form. There are legal software programs on this, or a spreadsheet could easily be created, unless the lawyer still likes to do this manually.

Story Outline. A story outline is necessary when several people will be working on the client's case. The problem is the story must be updated continuously so there will not be duplication of thinking and effort. As with time sequencing, the story outline should be chronological so that there is a natural flow to the facts of the case.

Cyclical Process. I like this approach because it brings inductive and deductive thinking together. There is a continuous cycle because existing facts must be analyzed (deductive thinking) to identify additional or potential "facts." They are obtained by inductive thinking and

then analyzed. If confirmed or verified, they are added to the existing facts, which will necessarily be changed, causing the process to repeat itself. I emphasize that the process continues until the matter is closed, settled, or goes to trial.

Method Selection. You should explain to your students that fact analysis is a very individual thing; everyone has a favorite approach. This is important because they will find that what we teach them will not necessarily be what the lawyer or law firm does. However, many of my students found that their employers liked their approach and incorporated it into their practice technique in this area.

ASSIGNMENTS

1. One assignment is to have your students do some basic statutory and case digest research to get the “cobwebs” out. I simply go to my state’s statute books or digest and pick out some statutes and digests and frame a question based upon my selections.
2. If you feel your students need reinforcement of their critical thinking skills, I suggest you select some basic fact situations from current decisions of your state supreme court and give them the assignment of doing a fact analysis using inductive and deductive skills.
3. Depending upon your institution’s electronic legal research resources, you may want to give your students some assignments using legal materials CD-ROMs and the Internet. I do the following:
 - a. I get my students on the Internet in our computer lab and give them assignments where they have to research recent case law and “look-up” statutes. Your state bar association will usually contain a digest of recent cases.
 - b. We have the **Index to Legal Periodicals** on CD-ROM in our library. I give my students an assignment where they must find two or three recent articles in the law reviews or bar journals in Kansas.

TEST QUESTIONS

TRUE/FALSE

Although the legal assistant may be called upon to do extensive legal research, the lawyer maintains the primary responsibility for formulation of legal theories applicable to the client’s problem.

(True)

When starting legal research in an unfamiliar area of the law, the legal assistant should first find relevant case law on the Internet.

(False)

Articles in journals of bar associations are usually written by lawyers with considerable practice experience.

(True)

It is not necessary to have the latest version of applicable court rules when conducting the initial research of the client’s problem.

(False)

The two major components of a person’s personality are genetic and natural.

(False)

MULTIPLE CHOICE

Legal analysis consists of

- a. finding applicable case and statutory law
- b. identifying the facts supporting the client's legal position
- c. identifying the central legal theories that support the client's position
- d. applying applicable law to the client's position

(c)

When doing statutory research, the legal assistant should always check the

- a. statute books
- b. annual supplements
- c. session laws
- d. all of the above

(d)

Two very important aspects of fact analysis are communication and

- a. subjectivity
- b. objectivity
- c. issue relationships
- d. none of the above

(b)

Inductive thinking is a method of gathering related information so that a fact-based conclusion can be drawn and

- a. applied to the case circumstances
- b. identified for future use
- c. utilized in final analysis
- d. a and b

(a)

A personality trait supportive of fact analysis is

- a. impatience
- b. inattentiveness
- c. perseverance
- d. lack of curiosity

(c)

SHORT ANSWER

Identify the elements of a case "brief."

Identify the various steps taken in fact analysis through the use of the cyclical process. When does the cycle end?

**IDENTIFICATION OF PARTIES, ENTITIES
AND PROPERTY INTERESTS**

IDENTIFICATION OF PARTIES AND ENTITIES (79)

This chapter demonstrates the importance of looking beyond the “normal” in fact development and rising above our limitations. When you discuss identification of parties and entities, be sure to avoid putting so much emphasis on potential defendants that you are unable to cover identification of the client adequately. I’ll explain this point further when I discuss the client. However, you should stress that a lawsuit cannot be filed until proper identification of a defendant or defendants has been made, especially for service of process requirements. While we now have statutory sanctions in Kansas against lawyers for filing frivolous lawsuits, some time ago our supreme court established a precedent that allows a party, without previous notice, erroneously named as a defendant in a lawsuit to bring a malicious prosecution action against the plaintiff’s attorney [*Nelson v. Miller*, 607 P.2d 438 (1980)]. In this case the court held that it is the responsibility of the plaintiff’s attorney to make a diligent inquiry and investigate the facts of his or her client’s case. With some obvious exceptions, i.e., the potential defendant is aware of the plaintiff’s claim or the statute of limitations is about to run, the potential defendant is entitled to sufficient notice of the plaintiff’s claim.).

Also, before you get into this chapter, review or introduce your students to the concept of subrogation and all of its ramifications. Many states have statutes covering such, particularly as to apportionment of attorney fees. And subrogation’s significance has grown substantially with insurance carriers having such in their policies. A word of caution: I have found many students do not care for subrogation. They think it’s unfair, etc. When you have a student like this, use him or her as a “positive” example of how we must maintain objectivity and avoid prejudices, etc., in representing our client’s cause.

Another good focus point of discussion is comparative negligence and how you can have a “phantom party” at a trial when one of the defendants has settled previously or is an entity that cannot be sued.

Pleading Requirements. You can use Rule 17 here as your guide, but I strongly recommend that you utilize your state’s supreme court rules and/or statutes. Use practice examples or cases to demonstrate to your students the practical aspects of the pleading requirements mentioned in the textbook. I like to point out that a prejudicial error can be disastrous and should be avoided.

Capacity of the Parties. I use the capacity of a corporation to sue and be sued as an example, because Kansas has unusual pleading requirements where a defendant claims the plaintiff corporation lacks capacity because it is not in good standing with the secretary of state. In Kansas, the defendant must plead lack of capacity with specificity in his or her answer. Our statutes will allow the plaintiff corporation to get reinstated while the lawsuit is pending, but I’ve successfully gotten a plaintiff corporation to drop a lawsuit against a client because it would have cost more to get reinstated. Of course, this is a two-edged sword. You may have situations where your corporate client as a defendant is not in good standing, and the plaintiff is suing its stockholders.

Special Situations. Many litigators know absolutely nothing about probate procedures. Perhaps that is why many states allow them to bypass setting up an estate or conservatorship when a lawsuit is filed. However, it may have to be done before settlement, and in some

situations the plaintiff may have to set up an estate for a defendant. I point this out because I want my students to understand that their responsibility to gather factual information can go beyond “normal” situations.

The Client. An ethical situation came up here in Kansas where the attorney hired by the insurance carrier to defend the client in an automobile accident case was concerned about the carrier’s adjuster carrying on direct negotiations with the plaintiff’s attorney after the lawsuit was filed. He was rightly bothered by the fact the adjuster may strike a bargain adverse to his “client.” The ethics opinion said he had a duty to advise the insured of getting independent counsel to protect his interest. Nowadays, identification of the client is a dangerous area in the practice of law. I recall two television lawyer shows that demonstrate this. In one, a husband was suing for the wrongful death of his wife. The case was dismissed during trial when the defendant presented evidence that the dead wife had not obtained a legal divorce from her first husband. In the other one, in a class action, the plaintiff’s lawyers were representing some Central American fruit pickers in a product liability case. Fortunately, before taking a low settlement offer, they discovered that the representative of the class was “in the pocket” of the defendant.

Although important initially, the client profile should be an ongoing process during the course of representation. How far should you go to be sure that there is no conflict? The answer to this question will depend upon recent cases in your jurisdiction. Here in Kansas, we had a case decided by our supreme court that involved a lawyer and legal assistant who were married, but worked for the plaintiff and defendant’s law firm, respectively. The defendant objected to the plaintiff law firm continuing in the case. The supreme court held that when the issue is raised, the burden is upon the one who is suspect to show that there is no problem. I’m sure you can use a similar case in your jurisdiction, and you should also discuss the use of “independent” or “free-lance” legal assistants.

Opposing and Other Parties. Obviously, to have a lawsuit or controversy there must be a defendant or person with interests adverse to those of the client. Legal and statutory relationships are becoming extremely complex. You should be sure that your students understand that all forms of individual and entity identification are checked.

Individuals. I explain the substantive concept of negligent entrustment because I find it is an excellent example of where you can have liability on the part of an individual who did not directly cause the injuries to the client. Again, be prepared for a negative reaction from your students. Procedurally, the status of an individual can affect the course of a case. I expand on the example given of an incompetent individual not having the mental ability to understand service of process.

Legal Relationships. Again, you might want to use current cases in your jurisdiction to demonstrate to your students the importance of legal relationships. In Kansas we now have a number of cases allowing inter-spousal lawsuits. And I know of one matter where a trial court in a divorce action allowed the husband to bring the wife’s father into the case as a defendant. And in another case, our supreme court found the wife responsible for her husband’s hospital bill, although she did not sign it, on the basis of spousal responsibility for necessities.

Another area for discussion could be parental liability for the tortious acts of their minor children. Many states have statutes governing this and it ties into the concept of identifying opposing parties. For a class exercise, have your students locate your state’s statute and case law covering this concept.

Statutory Relationships. I set forth just a few of the statutory relationships I found in the Kansas statutes, and you should review those of your state to expand upon the materials in the text. One highly controversial statutory immunity is the denial of damages for parents of adopted children who were abused while in foster care, against the state and its employees. Also,

while some statutes may deny, others may give additional rights to the plaintiff or impose set or expanded liabilities on the defendant. For example, in Kansas our notary public statutes set the limit of liability at \$7,500 for the negligent acts of a notary public. Also, successful plaintiffs in lawsuits against real estate brokers can assert their claims against a revolving fund administered by the Real Estate Commission where they are unable to collect from the defendant. This now is true for lawyers, and our supreme court has established a similar fund for claims against Kansas lawyers.

Business Entities. Perhaps even more important than knowing how to identify individuals, your students must have a working understanding of business entities in order to perform interviewing and investigative functions. Obviously these few pages only touch upon basics, and you must flesh them out as you feel is necessary. This will depend to a large extent upon the curriculum of your paralegal or legal assistant education program. If a business organizations course is required, then you will not have to do much. If your program is like mine, where such is optional, then you'll have to strike a balance between the students who have taken it and those who have not. In any event, do not get bogged down in providing lots of knowledge, since there are many resources out there that can do that. Rather, you should give your students the ability to inquire about business entities when given such a task by the lawyer. There are now great Internet resources for this subject area. If available to your students, have them locate supportive materials.

Agency. The legal assistant needs a basic knowledge of agency concepts as provided by the lawyer. If it is not, then instruct your students that they should utilize the legal research materials in Chapter Three. It is important that they understand the nature of the documents and activities that support an agency relationship. But one important point you should make is how an agency relationship, when established, can provide more than one potential defendant. As a teaching example I use the lawyer-client relationship. I point out to my students who is the principal and the agent, and who has the power to determine the outcome.

Employer and Employee. Here, as with agency, several key factors are given the students. You should emphasize Respondeat Superior and the control concept and how they must be established for liability to be imposed on the principal or employer. Also the term "independent contractor" must be defined, since there are situations where liability can be avoided if such a status is proven.

Sole Proprietorship. Because this is the simplest form of doing business, it is the most common. Persons doing business this way are very easy to track because of all the public record contacts they have. Your students need to understand that the individual who owns a sole proprietorship and the latter are one in the same. He or she has complete personal liability for the debts and liabilities of this type of business entity. I suggest you give your students some samples of the various documents associated with a sole proprietor, e.g., UCC-1, fictitious name registration, building permit, and some of the tax forms (Form SS4, Schedule C of Form 1040, and state sales tax application form). Also, this is a good place to give your students an assignment to contact the IRS at 1-800-829-3676 and order Publications 17 and 334 and Package X, assuming they are free of charge. These publications are replete with business and tax-related information for individuals and business entities and reference other sources. Package X contains copies of most frequently used tax forms. This assignment will also serve as a way of introducing your students to the world of bureaucrats.

For identification purposes of a sole proprietorship in preparation for the filing of a lawsuit, you should explain the "doing business as" (d/b/a) designation. A fictitious name registration can be helpful here, but note that businesses don't always comply and file it with the secretary of state.

General Partnership. For liability purposes, general partnerships provide multiple defendants. Some key points to make are the importance of the Uniform Partnership Act, as adopted in your state, and the difficult situation a client can present when there is no written partnership agreement. Also, you need to explain the application of the agency concept whereby each partner is an agent of the partnership. I cover in detail how a partner signs on behalf of a partnership. Again, you should provide your class with some sample agreements.

Limited Partnership. Many states have the Uniform Limited Partnership Act or Revised Uniform Limited Partnership Act, and yours should be identified for the students, particularly those statutes that relate to form of name requirements. Also, for liability purposes, you should explain the importance of verifying whether a person is truly a limited partner and not a disguised general partner who can be personally liable for the debts and liabilities of the limited partnership. The primary source of information of a limited partnership is its certificate filed with the secretary of state or register/recorder of deeds in some states. You should provide one of these to the students as well as a sample limited partnership agreement. While your students are expressing their amazement at the latter's length, you should point out the importance of always working with an executed agreement that has not been disassembled.

Limited Liability Partnership. This form of doing business is becoming very popular with law and other professional firms. Review your state's statutes covering it.

Corporations. Since corporations are statutory creatures, applicable statutes are the key to understanding them. However, since statutory provisions can be complex, you should point out to your students the excellent resources found in the business entities CLE handbook for your state. Also note the *Martindale-Hubbell* digest volume which contains summaries of the statutes of each state. And emphasize the secretary of state's office is always the starting point as to current and past information about a corporation, starting with its charter or articles of incorporation. If your state requires recording of corporate documents in the recorder or register of deeds office or some other way locally, then this should be covered here in detail (recording procedures, costs, access of information, etc.). In this regard, stress how personal liability can occur if statutory and operational requirements are not met.

Important factors concerning corporations are size, regulations of their business purposes, status (parent, subsidiary), type (profit, not for profit, professional) and whether they are publicly traded. All of these factors will affect our ability to gather identifying information about them, particularly determining whether or not a corporate entity has assets in the event of a lawsuit against it. Here I cover the advantage to the shareholders of not being personally liable for the corporation's debts and torts in excess of their investment for its stock. Also, I discuss how this limited liability diminishes considerably when you have a small, privately owned corporation that can't carry on business without personal guarantees of its shareholders.

As with the previously mentioned business entities, you should provide your students with samples of the various corporate documents they will encounter.

Corporate Name. Name similarities can often be misleading, especially if you are trying to prepare for the filing of a lawsuit. This is very important when conducting a UCC search. In the latter case it is wise to check all name forms and variations. In Kansas, our secretary of state and all registers of deeds are protected by statute from liability to the search requestor for their negligence unless it is gross or willful. When a corporation operates in more than one state, it will have to register as a foreign corporation in all of those other than its state of incorporation. Often it will not be able to use its corporate name in another state, because there is similarity to the name of an existing corporation in that state. Hence, it will have to use some other name and will be registered with a "doing business as" (d/b/a) designation. Many states will also require it to register the name as a fictitious name.

Also tell your students that although there are set statutory rules, they should not expect others to play by them. I once had a lawsuit where I wanted to sue a potential defendant that called itself “XYZ Construction Company, Inc.” When I contacted the secretary of state’s office to get the name of the registered agent in Kansas, I found that no such corporation existed. It turned out that I had a sole proprietor who was masquerading as a corporation. In some states that is unlawful, but not in Kansas.

Annual Reports. Annual reports of a corporation are the “mother lode” of information about its operations. In addition to information about its officers, directors, and significant shareholders, they contain annual balance sheets. However, some states now allow corporations by statute to file confidential reports as to financial information, and you will not be able to access these until suit is filed or upon court or administrative order.

Corporate Status. In my area the courts seem to be more open to plaintiffs trying to “pierce the corporate veil,” so I go into the various corporate activities that must be done for the shareholders to avoid personal liability. Also, I touch on the situation where a sole proprietorship or partnership has incorporated but has failed to give proper notice to existing creditors, etc.

Special Corporate Formats. When I discuss professional corporations with my students, I cover the special purpose aspect of a professional corporation and how it is limited in engaging in any other business. Also, it is important that the students understand the incorporating procedures and requirements of regulatory boards.

Liability of Officers and Directors. There can be liability to outsiders. I explain the indemnification concept and how it is advantageous to a plaintiff where it has been put into effect by a defendant’s corporation. Also, a sensitive area is where a lawyer serves as an officer and/or director of a client’s corporation. This can often give rise to a serious conflicts problem.

Limited Liability Company. This is now the “hot” business entity. Just like a corporation, there can be mistakes in its creation or operation that could destroy limited liability. If time permits, get some sample forms and have your students form this entity.

Government Entities. Over the years that I’ve been a lawyer, I’ve seen the supreme courts and legislatures in my area open the courthouse doors to lawsuits against governmental entities that were once shielded by “sovereign immunity.” There is a catch, however. Procedural requirements of statutes allowing such lawsuits must be “followed by the numbers.” This is dangerous for a plaintiff’s lawyer, since you’re talking malpractice if errors are made. So, correct identification of governmental defendants is an absolute necessity. Also, point out to your students that these statutes still provide some immunity in certain instances.

Other Entities. Charitable organizations and private foundations have become institutionalized. While information on a not-for-profit corporation can be obtained from its annual report, a better and more detailed source of information for larger organizations is the IRS. Information on them can be accessed by obtaining from the IRS a copy of their Form 990PF or 990AR.

IDENTIFICATION OF PROPERTY INTERESTS (94)

As with the previous discussion, the substantive depth of your lecture on property interests will depend upon your program’s curriculum. But bear in mind we are more concerned with the practical aspects. Identification of property interests is mostly predicated upon the nature of the

client's problem. For example, a lawyer representing a spouse in a divorce action will want to uncover and verify the property holdings of the other spouse as independently as possible from the information the other spouse must provide. Another case situation where discovery of assets is crucial is where the client is an executor or administrator of an estate and seeks to inventory the assets the decedent owned at date of death. Similarly, a trustee in bankruptcy is interested in the extent and ownership rights of a debtor. And, collection of a judgment will depend upon finding property of the judgment-debtor.

I discuss at length how forms of ownership have changed. For example, stock certificates of publicly traded companies are now merely pieces of paper with CUSIP numbers on them. And bank accounts are now in electronic form evidenced by monthly statements.

Statutory Considerations. Your students must fully understand the underlying importance of applicable state statutes and in some instances, federal law. More and more, legislatures are setting forth specific statutes governing property holdings. And, because of the specificity, it is imperative that all applicable statutes be reviewed prior to or in conjunction with the client's property issue situation. For example, a lawyer dealing with a client situation where medicaid is sought for nursing home care must consider and apply state and federal laws concerning division of assets between the client and his or her spouse.

Real Property. Most likely your program has an introductory law course where basic real property concepts were discussed. However, I find that the students like to review these. I point out to them how many clients will be ignorant of real property concepts, save one: joint ownership. In this regard I like to tell the story of the husband and wife, both with children by prior marriages, who own everything jointly and die in an automobile accident. We focus on the ramifications of who died first and the application of the Uniform Simultaneous Death Act.

Forms of Ownership. Review with your students the basic forms of ownership given in the textbook. I suggest you utilize recent cases in your jurisdiction to illustrate the materials given. For example, the supreme court in Kansas recently held that the balance of funds held in a conservatorship must be returned to the joint tenant of a bank account upon the death of the conservatee. Also, when applicable, be sure to distinguish joint tenancy from tenancy by entireties.

Identifying Documents. Provide your students with some sample real estate documents, including, if available, a closing statement for a real estate transaction. My register of deeds provided me with some deeds and mortgages that were in incorrect form and which she refused to record. Discuss with them how real estate law practice has become somewhat "boilerplate" because of federal standardization of home loans. If possible, have someone from your county recording office be a guest lecturer or better yet take your class there on a field trip. Finally, be sure to stress the significance of a recorded deed or mortgage over one that is not.

Other Interests in Real Property. Here I like to cover mechanic's and materialman's liens in detail because, being statutory, they can be lost if in incorrect form. Also, I discuss judgment liens because of the relation back aspect.

Personal Property. Your students must understand the difference between tangible and intangible personal property. Also be sure to apply ownership concepts discussed previously. Intangible personal property interests are very complex because of new forms they have taken such as annuities, retirement plan benefits, etc. Rights and responsibilities will be spelled out in various documents.

Documents Identifying Ownership Interests. Provide your students with samples of the various personal property documents identified in the textbook. This is very important, since they must have a sense of what they are looking for.

Co-Ownership Interests. We've already discussed this, but you should review how ownership interests are determined by the language used on documents evidencing ownership interests.

Bailments. You can do what you want with this subject. It's not a big practice area except for firms doing insurance subrogation work.

ASSIGNMENTS

1. Have your students contact your secretary of state's office and request filing information, costs, and copies of various forms provided.
2. Have each of your students choose a state statute and turn in a synopsis of it that protects certain individuals or entities from liability for their actions. An example is a "Good Samaritan" statute.
3. Have your students prepare property interests notebooks containing completed sample documents.

TEST QUESTIONS

TRUE/FALSE

Generally, the capacity of a corporation to sue and be sued is determined under the law of the jurisdiction in which it was organized.

(True)

The doctrine of negligent entrustment makes a parent responsible for all negligent acts of his or her minor children.

(False)

With the exception of minors and legally incompetent persons, anyone can be an agent.

(False)

One drawback of a business operated as a sole proprietorship is the unlimited personal liability of its owner for the obligations and torts of the business.

(True)

The owners of a limited liability company are called members.

(True)

A tenancy by entireties is basically a joint tenancy between a husband and wife with limitations on their individual ability to encumber or convey without the consent of the other.

(True)

MULTIPLE CHOICE

Under Respondeat Superior

- a. the employer is not responsible for the negligent acts of the employee
- b. the employee is responsible to the employer

- c. the negligence of an employee occurring during employment is imputed to his or her employer
 - d. an employee cannot be controlled
- (c)**

- A person who contracts with another may not be liable for the latter's negligence if it can be shown that the negligent party was
- a. an employee
 - b. completely under his or her control
 - c. unrelated
 - d. an independent contractor
- (d)**

- Unlike a general partnership, a corporation's shareholders are
- a. personally liable for the obligations of the corporation
 - b. not personally liable for the obligations of the corporation
 - c. responsible for the day-to-day operation of the corporation
 - d. b and c
- (b)**

- Information about any corporation incorporated or authorized to do business in a state can be obtained from that state's
- a. revenue department
 - b. driver's license bureau
 - c. secretary of state
 - d. none of the above
- (c)**

- Basically, under the "sovereign immunity" concept, a governmental entity can maintain immunity from legal actions for its torts unless
- a. it has enacted legislation authorizing such
 - b. six months have passed from the date of liability
 - c. there is no other recourse available to the plaintiff
 - d. it would be unjust to allow it to escape liability
- (a)**

SHORT ANSWER

Define the term "fiduciary" and give two examples of a person acting in a fiduciary capacity.

Identify four of the significant documents pertaining to a corporation.

Identify and explain the functions of the three main types of deeds

COMMUNICATION TECHNIQUES

GENERAL CONCEPTS (101)

Communication is so important in the lawyer-client relationship and the practice of law that the ABA in its Model Rules of Professional Conduct came up with a specific rule:

“RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

As with the lawyer, the legal assistant must have excellent communication skills, but not only with the client, but also when conducting interviews of other persons and during the investigation of a case.

I tell my students that it is not easy to be a good communicator and that there are very few “naturals.” For most of us the art of communicating is a learned skill, which is perfected through practice. Also, I point out that the communication techniques discussed in this chapter have reverse application. For example, during an interview a witness may communicate with certain body language that he or she is defensive and threatened by the legal assistant’s questions about the accident. Yet, at the same time the legal assistants may make the same gesture in response to what the witness says. In other words, communication is a “two-way street.”

Definition of Communication. With this definition I try to simplify the communication process and identify the three basic elements:

1. Transmission
2. Form of message or information
3. Reception

It is impossible to put the quality of a communication into a scale or have some sort of “Communicometer” that we carry around with us. But it is important to each of us to have our own internal mechanism by which we judge others. During the course of a trial, many a lawyer has wondered whether he or she is “getting through to the jury.”

I stress that of the three elements, each of us can “control” the first two through the full utilization of our communication abilities. However, with reception, regardless of all our efforts, the communication can be subjective. For example, President Carter repeatedly warned us of the consequence of our growing dependency on foreign oil, and we turned “a deaf ear.”

Preparation. I explain to my students that I do not expect them to complete an extensive preparation before every communication. In some instances they will, like when they write letters requesting certain information or prepare to interview a client or witness. But at the same time, even with quick communication situations we mentally go through the steps before we communicate. A good example is you’re driving your car and another one is about to cut into

your lane. You communicate by honking your horn, but in these times of “road rage,” you’ll most certainly do a mental evaluation of the situation before you act.

Language. The “language barrier” can have a most adverse effect on the quality of communication. But it is more than someone not being able to understand the language spoken very well. There can be physical and mental limitations. I discuss with my students the use of interpreters for the deaf and foreigners in the courtroom and other legal settings. I have had interpreters come to my class to go over what they do, including the problems they encounter. This problem is becoming more acute, especially with foreigners, and there should be no hesitation on the part of the lawyer to seek the use of an interpreter.

Trauma. Many books and other materials have been written on trauma. Post-traumatic stress syndrome is now legally compensated. Suffice it to say communicating effectively with a traumatized person is one of the most difficult tasks a legal assistant will do. I review with my students situations involving trauma, such as interviewing a client who was severely burned or had a limb amputated and interviewing a person who witnessed a horrendous accident. If conditions are right, I encourage my students to discuss similar situations they have encountered both personally and professionally.

PSYCHOSOCIAL ASPECTS (102)

My students have been very sensitive to the materials discussed under this topic in the textbook. Many of them have had psychology and sociology courses and have read a number of books dealing with interpersonal relationships. They have their own ideas and personal experiences above and beyond what I put into the textbook. You should avoid getting too personal in any examples you use.

Psychological Factors. I found *Born to Win* (footnote 1) an excellent resource and attempted to summarize it on one page. What I do is use it for examples and diagram a few “transactions” on the board to demonstrate to my students how we psychologically communicate to and from our three ego states. Different types of games and scripts are discussed and we try to identify situations where we have encountered these. If you desire more background on this subject area, I suggest you read two books by Eric Berne: *Games People Play* and *What Do You Do After You Say Hello?* I want my students to understand that, notwithstanding the present day desensitization of human emotions, people are psychologically complex.

You should impress upon your students that they will be dealing with individuals with psychological programs. Fortunately, not all will be like the psychotic killers in “Silence of the Lambs.” But they must be able to recognize and deal with psychological problems when they arise in the communication process.

Psychological and Physiological Needs-Maslow’s Hierachy. I’ve used Maslow’s Hierachy in my class for some time. My students like its substantive nature. I also emphasize self-actualization by quoting Maslow: “Even if all these needs...(the lower level needs)...are satisfied, we may still often (if not always), expect that a new discontent and restlessness will soon develop, unless the individual is doing what he is fitted for. A musician must make music, an artist must paint, a poet must write, if he is to be ultimately at peace with himself. What a man can be, he must be. This need we call self-actualization.”

I have incorporated Maslow’s Hierachy into the Written Communications materials by having my students prepare letters in certain client situations using the needs. For example, in the situation where a potential defendant is believed to be terrified of the legal system, e.g., having his or her deposition taken, going to court, anticipating litigation for a long period of time, etc., a notification letter regarding liability would be written in terms of a “threat” to his or her safety

need. Also, please note to your students that Maslow's concepts apply not only to individuals, but to institutions, organizations, and governmental entities. Note how the image of a university can be shattered because of alleged criminal behavior of one of its sports players.

Sociological Factors. In communications, sociological factors have a strong bearing. I put to my class situations involving stereotyping, values, and prejudices. Examples are interviewing a client with multiple tattoos or several pierced earrings on each ear and the face or dealing with someone who uses profanity excessively. I recommend to them the works of Desmond Morris, a renowned social anthropologist, especially *The Naked Ape* and *The Human Zoo*.

We then review the sociological factors under this topic. In discussing **educational background**, I tell the students that they should avoid assuming that a person is knowledgeable or unknowledgeable in the subject matter of the communication because of the amount of or lack of formal education he or she has. This applies nicely to **occupation**, and I cover how people will apply their own occupational patterns and competencies in unfamiliar situations. This is a societal thing, too. For example, in my area a major law firm of around 70 lawyers disintegrated. Although everyone knew they were through, for a month or two they operated on the public pretense of "business as usual."

Social status is also very important in communications. I stress that formal and informal groups that we belong to strongly influence our behavior and decision making. For example, many older people look upon bankruptcy with abhorrence and consider it a form of "social suicide." So a legal assistant interviewing such clients must account for this in all communications with them.

With **gender** there are differences one must take into consideration with respect to communications. If you want to discuss this beyond the textbook materials, I suggest you obtain a copy of the book entitled *That's Not What I Meant* by Deborah Tannen, a linguist who compares and analyzes the communications by and between men and women in various situations. Other excellent books by her are *You Just Don't Understand*, *Women and Men in Conversation*, and *Talking from 9 to 5*.

TYPES OF COMMUNICATION (106)

I tell my students that identification of the three types of communication makes for a good test question. Also, I use myself as an example of active and passive vocabulary. In this manual you've probably noticed a lot of "shoulds" and suggestions that are passive, and I express my reluctance to tell you to teach your class exactly like I do.

Having practiced law for many years, I find it difficult to say that there is only one way to do something. However, there is a dynamism to the active vocabulary; use it when you teach.

Nonverbal Communications. I point out to my students that nonverbal and verbal communications will often be combined. For this reason, advise your students that whenever they get "mixed signals," verbal communications that conflict with nonverbal ones, they must ask, "Are you sure about what you've said?"

Ask that the other person repeat what he or she said. This request gives the person communicating the opportunity to mentally review what was said and to affirm it or change it to coincide with the corresponding nonverbal communication. Note, however, that sometimes the conflict may be caused by other factors. For example, while arms across the chest is considered a defensive gesture, it may also mean that a person is cold.

In preparing the materials on nonverbal communications, I relied upon my own practice experiences and the materials contained in *How to Read a Person Like a Book* (footnote 2). I strongly recommend you obtain a copy and use it to convey your own experiences with nonverbal communications to your students. Some that I concentrate on are:

Appearance and Apparel. Consider beards and mustaches, especially in the law office; hair length on both men and women; clothing in the law office; and a concept I call “synchronized dressing” where people in an office dress alike; does this indicate they think alike? If, so I seek out the office nonconformist at times when I want a different version.

Environment. A legal assistant’s office environment is crucial to a good interview. I recommend to my students that the initial seating arrangement be with the chairs on opposite sides of a desk. This arrangement is more formal. Good technique, if possible, is to remove all files from the desk except the one that is being worked on. We also exchange “stories” about offices we’ve seen.

Facial Expressions. For a more intense discussion of this topic you might want to locate and review a book called *Face Language* by Robert Whiteside. Being able to “read” another person’s facial expressions is invaluable. I make much about the eyes and tell my students they must be able to look at another person’s eyes. One technique for those who are uncomfortable with this is to look at a spot right above and between the eyes.

Gestures and Body Movements. Here I get into the general physical aspects of people such as height and weight and how they affect their gestures and body movements. Also I discuss their effect on perspective. For example, a person who is six feet tall has a different viewpoint than a person five feet tall. Because of height the former will see things of which the latter is unaware. I discuss the concept of “gesture clusters” whereby we communicate through the use of several gestures made at the same time or sequentially. For example, a person who wants to leave a conversation with another may make short steps backwards and hand movements that could be interpreted as a “goodbye” gesture, and repetitively looks at his or her watch. Also we discuss physical positioning and the use of distances between people when communicating.

Before I leave this topic, I have found that many students do not believe in nonverbal communication as fervently as I do. One technique I use to convince them is to show video tapes on this subject area obtained from my college’s library. I couple this with an in-class quiz that requires them to watch the tapes very carefully for the answers.

Verbal Communications. This is the “high -rofile” area of communications, since as a society we have moved from the print-based form of communication to verbal. In discussing the characteristics under this topic, I emphasize the following:

Vocabulary. A legal assistant must be familiar with the “language” of the people with whom he or she is verbally communicating. For example, when interviewing a physician who may be used as an expert witness, the legal assistant must understand the medical terminology used. Insider vocabulary, especially “legalese” in front of a client, needs to be avoided. Mispronounced words give you and others away and may indicate a lack of knowledge about a particular subject.

Voice. Voice quality comes with practice and effort to make one’s voice better. An odd or abrasive voice can really turn people off. I once saw this happen in a jury trial where one lawyer’s voice tone was whiney — he lost the case.

Linguistics. This has been covered somewhat before, but there can be miscommunications between people for the reasons set out in the textbook.

Listening. It is said that a good speaker is really a good listener. Note that we listen at a much higher speed than we talk. An effective listener must also give nonverbal and verbal signals. I have found that my students will signal that they want to ask a question and when they want to take a break.

Verbal and Nonverbal Communication Behavior. Each of us projects our personality to others through verbal and nonverbal methods and indicators. Often we are unaware of this, but we must consciously avoid behaviors that detract from the task. Note the comparison between an assertive and nonassertive person. I know one very successful trial lawyer who, when interviewing witnesses, purposefully acts like he is entitled to a written statement.

One thing I explored with my students is how to tell if a person is lying. Two excellent books on this subject are *Telling Lies* by Paul Ekman, who did an extensive study about this for the CIA, and *Lies! Lies!! Lies!!!* by Charles V. Ford, a psychiatrist. The former contains complete discussions about how to lie and how people “leak” to others that they are lying. The latter identifies two groups of people who are best at telling if another is lying. These are the Secret Service and poker players. I have a speech instructor who is also interested in this subject as a guest speaker. He asks my students to participate in a three-person role-playing exercise. One asks 20 set questions of another, who is instructed to lie during the last 10 questions. The questioner and the third person do not know this. The function of the third person is to observe the behavior of the person answering the questions. It’s an amazing exercise and the class discussion following it supports the findings set out in the above books. Contact me if you’d like more details.

Written Communications. I believe that written communications have made a tremendous comeback in the practice of law because of the facsimile machine and the use of e-mail. This device has revolutionized the litigation process, and the need for competency in writing skills among lawyers and paralegals is back.

Common Characteristics. There are certain rules that must be followed, and I review them with my students. I point out that misspelled words are an absolute “no-no.” An effective example is the resume containing misspelled words. Another example is the elderly client with poor eyesight. For him or her, thanks to computers and printers with a variety of fonts, letters and other documents can be printed out in large type.

Internal Written Communications. I review the simple form of inter-office memorandum provided in the textbook. I explain to my students that it’s important to their careers that they make “tracks” of all they do on a case in the event a problem arises later where someone failed to carry out or follow up on a specific task.

It is very important that you make your students comfortable with writing in a law office. Most of them have never been in a law office and worry that they will make fools of themselves.

Case reports are a very special subject area. The key is objectivity in the main body of a report. This is very hard to do, and in assignments I find my students still make inferences, judgments and slant what they write. While these should be avoided in the body of a report, they are appropriate in the conclusion and are supportive of recommendations.

External Written Communications. As with internal written communications, these external ones have permanency, even more so since the former can be protected from discovery as work product. Of course, external written communications to a client are likewise protected, but there is the loss of control.

All external written communications by a legal assistant must conform to acceptable practices for identification of status in their jurisdiction. Many lawyers are still sensitive to legal assistants engaging in what they consider to be the unauthorized practice of law. You may want to check ethics opinions in your state for more information.

Go over the four functions of external communications thoroughly. Memorializing telephone conversations is very important. If you feel your students are unfamiliar with certified mail, you may want to have them do an exercise covering it. Also some techniques that I pass on include: using numbered paragraphs in letters when I am requesting or providing specific items of information; when requesting information from governmental agencies, giving “answer” space in the left margin of correspondences so the answer can be written there; and providing a stamped, return-address envelope.

Special Communication Areas. It is interesting that there is little formal training offered on the use of telephones and dictating equipment or how to make electronic transmissions. Most law offices take a “sink or swim” approach to them or assume that their personnel, including lawyers, possess such skills.

Use of The Telephone. When I did the research for the *Paralegal/Legal Assistant Occupations Catalog*, I found that the telephone is the piece of equipment most used by legal assistants. In addition to the telephone techniques given in the textbook, I promote discussion among my students to name others they use.

One thing with which they are concerned is getting through to the person wanted after initial contact. Another is how to avoid being put on hold. I like to emphasize preparing an outline before contact. I have even written out whole sentences to be sure I’ve not left anything out. When calling a bureaucracy, I always get a name. Since you can’t make gestures over the telephone, tell your students to try to make verbal gestures during telephone conversations through use of tone, pauses, and fluctuations.

Dictation for Transcription. The person giving dictation and the transcriber must have good rapport. You should tell your students to do everything possible to make it easy to transcribe what they dictate. Note there are now very effective and inexpensive computer software programs that allow direct dictation by microphone into the computer program. They come in regular and specialized packages, including legal software, and contain immense vocabularies and dictionaries, 30,000 and 200,000, respectively. I plan on obtaining these for my students to practice with, since they will be commonplace very shortly.

Electronic Transmissions. This would be a good opportunity to have your students do some research in print media and in your legal community. I stress confidentiality and lack of privacy as two important factors. Surprisingly, many of my students have never sent an e-mail transmission. At my college, the students have e-mail addresses, and I give them an exercise where they must send me an e-mail. It’s very effective and exposes them to a “real world” competency.

ASSIGNMENTS

1. Assignment - Dealing with a bureaucrat

Submit a report in memorandum form in the format found in the textbook about your dealings with a particularly difficult bureaucrat who possessed information that you needed, had to make a decision affecting you, etc. After a brief explanation of the circumstances, focus your memorandum on how you became aware that you were in a difficult situation. Then identify in detail the primary “technique” you used to manipulate the bureaucrat into providing the

information or doing what you wanted. For the purpose of this assignment, a bureaucrat can include persons other than those working for governmental agencies. For example, you may use an admissions clerk at a college, an appointment secretary at a doctor's office, a service manager at an automobile dealership, etc. Conclude the report defining the "technique" similar to the following:

"OLD STUPID ME" - Acting like you don't know that much about the subject matter when you actually know more than the bureaucrat. Usually will be a one-time technique. Its use should possibly be avoided in situations where there will be subsequent contact.

2. Assignment - Evaluation of people

For this assignment list in descending order of importance 10 factors you personally use to evaluate other people. Give a rationale for each one. Include at least one from each of the three communication areas. For example, one factor would be another's eyes. Does he or she avoid eye contact? Does he or she stare inappropriately?

TEST QUESTIONS

TRUE/FALSE

A lawyer and legal assistant should always dress professionally even when environmental conditions would warrant more practical clothing.

(False)

Generally people talk and listen at the same speed.

(False)

A "bureaucrat" may be defined as anyone who possesses necessary information.

(True)

One method to reduce nervousness during a telephone conversation is to make an outline of the conversation before it takes place.

(True)

To save time during dictation, the legal assistant should avoid spelling all proper names and unusual words.

(False)

MULTIPLE CHOICE

When a legal assistant is interviewing a client for the first time, usually the most appropriate seating arrangement is

- a. side by side
- b. chairs on opposite sides of a desk
- c. chairs at a round table
- d. the client's chair on one side of a desk

(b)

During a normal conversation between two people, they will look at each other

- a. 10% to 40% of the time
- b. 30% to 60% of the time
- c. 20% to 80% of the time
- d. 25% to 75% of the time

(b)

When a person listens to you with folded arms, it may indicate that he or she

- a. may feel defensive about what you are saying
- b. believes in what you are saying
- c. may be chilled
- d. a or c

(d)

When what a person is saying does not correspond to his or her facial expressions, gestures, and body movements, it is a good idea to

- a. ask him or her to repeat what was said
- b. immediately break off the conversation
- c. change the subject
- d. start over again

(a)

An assertive person is one who

- a. speaks in monotones
- b. uses fillers such as “well” and “you know”
- c. averts his or her eyes
- d. speaks in concise statements

(d)

MATCHING Match each of the gesture descriptions given below with the statement that best interprets its meaning.

Answers	Gestures	Interpreting Statements
_____ (c)	Steepling of fingers	a. Boredom
_____ (d)	Locked ankles	b. Sincerity
_____ (e)	Throat clearing	c. Confidence
_____ (b)	Open hands	d. Self-Control
_____ (a)	Foot tapping	e. Nervousness

SHORT ANSWER

Identify and explain three of the psychological and physiological needs of people set out in Maslow’s *Hierarchy of Human Needs*.

Identify at least three factors affecting the quality and effectiveness of our voices.

What are some verbal and nonverbal indicators of a non-assertive person?

Identify and explain the functions of an external written communication.

CLIENT COMMUNICATIONS

DEALING WITH CLIENTS (125)

This chapter reviews the communications related to the lawyer's representation of clients. It focuses upon the substantive interview of the client by the legal assistant and post-interview communications. Rather than waiting until my discussion of specific topics, I want to point out to you several activities you should consider in conjunction with this chapter. One that will be of the most interest to your students is having a legal assistant conduct a substantive interview of a "client" (When I do this, I play the part of the client.). Another is to have an insurance defense lawyer speak on his or her firm's procedures in handling cases. And, if time permits, have your students do "role- playing" where some act as clients and are interviewed by the others.

Because of their importance, I reiterate professional and ethical concerns in the lawyer-client relationship. These include competent representation, confidentiality, and avoidance of conflict of interest situations. Also, I review agency principles since they are applicable. Foremost is the client's authority as the principal.

Client's Expectations. It's important that your students fully understand where the client is coming from. Notwithstanding the continual lawyer-bashing, people do see lawyers as powerful and authoritarian persons. Yet they resort to using lawyers only when they must.

The client's viewpoint or perspective is important. The lawyer and legal assistant must understand this and be able to deal with it. To do this, the key is understanding the client's motivation in retaining the lawyer.

Client's Concerns. The lawyer client relationship is very complex. When entering into it, clients have several concerns. Among these is cost. Cost includes expenses and fees. The lawyer must be up-front with the client about cost. Legal ethics now require that contingent fee contracts be in writing. In Kansas our supreme court deems this so important that it requires in its version of MRPC 1.5 that "upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and if there is a recovery, showing the client's share and amount and the method of determination."

The rule goes on to require that the client be advised in the statement of his or her right to have the fee contract reviewed and approved as to a determination of its reasonableness by the appropriate court having jurisdiction over the matter. I think it's important that the legal assistant not handle the making of a fee agreement with the client, unless the lawyer has first discussed the agreement thoroughly with the client and its execution by the client is perfunctory.

Another concern is the "best light" concept discussed in the textbook. This concept is carried to its extreme in the situation where the client withholds critical information from the lawyer. I emphasize the conducting of an independent investigation. Many lawyers now practice "defensive law" whereby they take a retainer to research the law and do a preliminary investigation to determine whether the client's case or matter has merit. Malpractice insurance carriers promote this and other detailed approaches and provide checklists and form letters for their insureds. For complete representation, the lawyer must ascertain exactly how far the client is willing to go, especially if there will be a trial.

Finally, the client must be made aware of the impact the matter, particularly litigation, will have on his or her life. I know one woman whose sex discrimination case took six years!

The Legal Assistant-Client Relationship. To avoid problems later on, mainly as to confidentiality, the lawyer must firmly establish the lawyer-client relationship. Remember this relationship is subjective, based upon whether the “client” thought he or she was represented.

The role of the legal assistant must be established in the manner explained in the textbook. Caution your students that clients will seek what they consider to be the best level of communication. During discovery a primary function of a legal assistant is to be a good communicator, so clients will turn to the legal assistant. Often clients will pressure the legal assistant for his or her “legal opinion” and will want reassurance about their cause. The legal assistant must refuse, but should pass on the client’s questions to the lawyer.

The Lawyer-Client Relationship. Even though the lawyer may at times be nonsupportive of the legal assistant’s role, the legal assistant must avoid saying or doing anything that would weaken or harm the lawyer-client relationship.

Unavailability of the Lawyer. I expand upon the note of caution in this topic by discussing the tendency of clients not only to be literal about communications, but to also seize upon any communications by the lawyer and legal assistant that they consider favorable to their cause. For this reason the legal assistant must avoid making any overly assuring statements about the client’s case.

The Defense Lawyer’s Perspective. In reality most torts are covered by insurance, and consequently defendants are represented by lawyers retained for them by their insurance carriers pursuant to their contracts. The insurance industry through its claims adjusters attempts to settle claims without involving its lawyers. The by-product of this practice is to have the insurance defense lawyer being brought into a case many months after the tort liability arose. Often the defense lawyer will have no knowledge about the case until a lawsuit is filed and the defendant is served.

Bad Faith Liability. During trial of a claim for which there is insurance coverage, insurance cannot be mentioned. Hanging over the insurance carrier is the possibility of extension of its liability beyond the policy limits because it failed to negotiate and settle a claim in good faith. When you discuss this with your students, you should stress the importance of communication with the defendant as to the limitations of his or her insurance policy.

Tunnel Vision. Many defense lawyers and firms have turned to assemblyline production methods in handling cases. The result is repetitive tasks that can cause boredom and procedural errors.

THE SUBSTANTIVE INTERVIEW (130)

There are books and numerous articles written by both lawyers and legal assistants about the interview process. For this reason you should freely supplement the materials found under this topic.

A main concern of my students is how well they will perform when they are given the task of conducting a substantive interview. This is understandable, and I reinforce the skills they have acquired in this and other courses. I assure them that there is no such thing as a perfect client interview and that they should not lose sight of the objective. I emphasize that they should not expect to complete a substantive interview in one meeting.

The Interview Concept. You must impress your students with the responsibility of the interviewer to take charge and control the interview with confidence. If the legal assistant allows the client to take control, then little will be accomplished. Note the two main objectives of the interview: (i) development and evaluation of information, and (ii) imparting information to the client.

Some take the approach that nothing is told the client unless asked. Others go to the other extreme in communicating with the client.

Pre-Interview Planning. I review the steps listed under this topic. I select a recent case and provide my students with its basic facts. Then I discuss how I would prepare for the substantive interview of the client. For review of law I tell them what books I use, but I let them prepare an interview format in discussion groups during class. This also helps them with the interview assignments given at the end of this chapter.

Maximize the Interview. Your students must not forget the primary objective of the substantive interview: obtaining as much factual information as possible about the client's problem. The establishment of rapport or "ice breaking" is essential. When my students have done mock interviews, some were very good at this, and others did poorly. But I found that all understood the importance of not jumping into the body of the interview without first establishing a working relationship.

Your students should understand that structure is essential and that they should, without too much rigidity, follow the interview outline or questionnaire they would prepare prior to the interview.

One other item for discussion with your students is who should be present when you interview the client. Sometimes there will be the situation where you have a relative of the client (mother, father, grandparents, etc.) who is paying the fee and expects to be present at all times with the client. This can't be, for it creates a breach of confidentiality. Tell your students that such situations must be "nipped in the bud" to avoid serious discovery problems later on.

Notetaking. Clients will expect the legal assistant to take notes. Also, nothing should be done that would indicate lack of interest such as drawing lines or doodling.

Questioning. I find that it is effective to look upon the client as another witness and use many of the techniques for interviewing witnesses discussed in the next chapter. However, do not promote the taking of a written statement from the client, since such a document may be accessible by opposing party during formal discovery.

Client Participation. In addition to execution of documents by the client during the interview, the client can actively participate by taking notes about what other information or documents he or she will obtain for the legal assistant.

While I have provided forms of authorization for medical, employment, and educational records, I recommend that you localize these documents. For example, some medical providers will not require the medical authorization to be notarized; yet others will. Some employers and educational institutions will require their authorizations to be executed before a notary public. Note also that many have their own forms and require their use. Obtaining of such forms can be an assignment. (See Assignments for this chapter.)

Fee Agreement. I didn't provide any sample form, since there is considerable variety. However, I suggest you provide your students with at least a contingent fee and a per-hour agreement and discuss their provisions at length. If the Internet is available, have your students locate a fee agreement at one of the websites for legal forms listed in Appendix 2.

Concluding the Interview. The importance of how the substantive interview is ended is often overlooked. Go over the steps listed under this topic in the textbook. I also review the Client Information Sheet and Client Information Letter (Figures 6:6 and 6:7).

POST INTERVIEW COMMUNICATIONS (143)

There are several activities by the legal assistant that occur after the substantive interview. They cannot be delayed. In particular the interview summary and client evaluation affect how the client's case will proceed.

Interview Summary. The summary of the interview should be prepared in objective terms except for the conclusion. Interview notes must not be discarded. The interview summary is considered work product. It is not advisable that the interview summary or the client evaluation, discussed below, be given to the client.

Evaluation of Client. The client evaluation can be one of the most difficult tasks performed by the legal assistant. Lawyers who utilize legal assistants to their fullest rely on them to “give it to them straight”, in other words, to give an opinion whether or not the case should be handled. The legal assistant should not hold back in his or her evaluation. A client is much easier to “fire” before a lawsuit is filed. After filing, withdrawal from representation can only be accomplished with the court's permission.

Post-Interview Communications with the Client. For the most part, contact with the client after the substantive interview will be by telephone, fax, or e-mail, where available. Although not the same as personal face to face communication, the telephone, as previously discussed, is still a very powerful and dominant means of communication.

Periodic contact should be made with the client even when there is nothing happening in his or her case. No matter how hard you try, you will never be able to convince a client that the lawyer handles other matters and cases. Stressing how busy the lawyer is can sometimes make matters worse, because the client will think that the lawyer is not giving his or her case the time and attention it needs. One effective technique is to “copy” the client, with every correspondence sent out on his or her behalf.

Nevertheless, with one of the main complaints against lawyers being their failure to maintain good communications with their clients, the legal assistant must step in and act as a communicator. Tell your students to be sure to keep a log of contact with the client.

The legal assistant should be very careful when communicating confidential or privileged information by telephone, fax, or e-mail. Frankly, I think such should be avoided. I read about where a trial had to be delayed because the plaintiff's law firm mistakenly sent an evaluation of the jury panel by fax to the defendant's lawyers instead of the client.

Medical Information and Records. You may want to go into this subject in more detail. The obtaining of medical records from hospitals and other institutional medical providers has become very systemized and expensive. For this reason, costly bureaucratic mistakes can be made. You should alert your students to be absolutely sure that the records obtained are exactly what was ordered.

Because of their complexity, the “reading” and evaluation of the client's medical records should be done by a person well-qualified for the task. Many large law firms and smaller ones specializing in medical malpractice, product liability, and personal injury cases utilize legal nurse consultants

or have nurses and even doctors on their staff to carry out this function. If time permits, you should consider having the administrator of a medical records department as a guest speaker.

Accident Reports and Other Records. I provide my students with a sample accident report. I review it with them and identify important pieces of information, including telephone numbers of the parties, names of witnesses, weather and road conditions, and if anyone was charged with violation of a criminal law. I point out to them that law enforcement agencies have become very sophisticated in the investigation of accidents and employ other means of recording of information such as tape recordings, video recordings, and photographs. Obtaining these recordings and photographs is discussed more fully in Chapter Eight.

As with medical records, it is always wise to make telephone contact to ascertain the costs of the reports or records.

The Lien Letter and Insurance Notifications. Legal assistant textbooks for litigation may not mention the lawyer's lien letter and insurance notification. You should discuss both of these with your students from the perspective of your jurisdiction. The lien letter found in Figure 6:14 is the form used in those states where the lawyer is required to set out the percentage of recovery he or she will receive. The major drawback of sending the lien letter out right away is that productive contact with the potential defendant will end, because his or her insurance carrier will advise the defendant not to speak to or have contact with anyone about the matter.

The subject of uninsured/underinsured motorist claims is quite extensive in those states that require such coverage. If this is your case, I recommend you go into this with your students. I use this to demonstrate to my students the interplay between the law (in Kansas we have an uninsured/underinsured motorist statute with several court decisions) and its practical applications. Also, as you have probably surmised, this is a "black hole" of legal malpractice claims, usually based upon the lawyer's failure to give proper notification to the client's insurance company of its right to subrogation.

ASSIGNMENTS

Assignment - Obtaining a medical record authorization form

Contact the medical records department of an area hospital and ask that you be sent a copy of its medical records authorization form. Also ascertain copy costs.

Assignment - Uninsured/Underinsured policy provisions

Locate your automobile insurance policy and write a synopsis of its uninsured/underinsured provisions. Also, contact your state's insurance commissioner/director and obtain any available pamphlets or brochures covering this topic.

Assignment - Client interview form/questionnaire

Select a fact situation from the fact situations given below. Using the format in Figure 6:1 in the textbook, prepare a topical list of questions to ask and an itemized list of documents and things to request/obtain at your first client interview. We will discuss the facts further in class during classroom discussions with other students who have selected the same situation.

(Note: I group students who have picked the same fact situation together, but never in groups of more than four people. I let each group discuss its fact situation. Next, I meet with each group as the lawyer in each fact situation to answer questions and to give direction as to what its members are doing. I also explain to my students that I do not expect them to provide answers

to the questions for the client. However, if your class size is small, I suggest you consider playing the part of the client and have each group interview you. If your institution has a drama department, consider asking if their students could play the client "parts." If either is done, then you can easily expand the assignment to include the preparing of an interview summary, client evaluation, and/or informal discovery plan.

Please note that the following fact situations were for the most part based upon actual cases.

Personal Negligence

Our client, a police investigator, responded to a report of an injured dog in front of a local convenience store. The dog had been hit by a vehicle, but appeared to be calm. Our client placed the dog in his vehicle, drove the dog to a veterinary clinic, and carried it into the examination room. As our client lifted the dog onto the examination table, one of the dog's legs caught on the table, and the dog, reacting to pain from its injuries, bit our client's nose, almost severing it from his face.

Employment Accident

Our client works in an office building in Corporate Woods. During her lunch break she went to the Overland Park Trail to walk. While she was walking she was struck by a bicyclist and injured.

Premises Accident

Our client stayed at a local motel. After she settled into her room, she decided to go to the restaurant to get something to eat. She went down a staircase, slipped on dog fecal matter on the staircase and fell, suffering serious personal injuries.

Product Liability

Our clients' 17-year-old daughter is dead. She was in very good health until about 3 months ago. Sometime prior to that time she started getting a tan by tanning machine. Her parents believe she went to one or more tanning salons several times a week.

Professional Malpractice

As a result of carbon monoxide poisoning, our client's minor son is mentally incompetent. He was discovered in an automobile located in the family garage. The garage doors were closed and the automobile's engine was running. After his discovery, he was taken out to the yard and administered oxygen. He was taken to a nearby hospital by ambulance. At the hospital oxygen was administered according to emergency room procedures. He was transferred to another hospital, which had intensive care facilities and special equipment for the treatment of such cases. However, he remained in the second hospital's emergency room for some time, was not given special treatment, and less oxygen was administered to him. He was taken to the hospital's pediatric ward. During his stay in the hospital he was not given special treatment for carbon monoxide poisoning, but was instead treated for aspiration pneumonia. He suffers from brain damage and is now totally and permanently disabled.

Criminal Defense Investigation

In this situation our client was arrested by the police for having a substantial quantity of cocaine on the front seat of an automobile he was driving. At the time of arrest, the car had heavily tinted glass windows all around. The arresting officer was wearing sunglasses that become darker

in sunlight. Our client confessed, and his confession was videotaped. Our client also suffers from severe manic depression and is taking medication for it.

TEST QUESTIONS

TRUE/FALSE

Generally, it is best for a lawyer to delay discussing the fee arrangement with his or her client until after settlement of the client's claim.

(False)

Sometimes a client will give the lawyer and legal assistant only factual information favorable to his or her case and avoid disclosing detrimental information.

(True)

An example of "bad faith liability" is the failure of a plaintiff's lawyer to provide a potential defendant with a lien letter.

(False)

The main objective of a substantive interview of a client is to come up with facts supportive of the legal basis of the client's claim.

(False)

Generally at the conclusion of the client interview it is a good idea for the legal assistant to prepare and have the client sign a written statement.

(False)

By use of a lien letter, the lawyer protects his or her interest in the claims of the client against another person.

(True)

MULTIPLE CHOICE

Clients should expect lawyers to

- a. represent them competently and diligently
- b. keep all their communications confidential
- c. avoid situations where there may be a conflict of interest
- d. all of the above

(d)

When a client during an interview asks the legal assistant a question about the application of the law to his or her case or about its progress, the legal assistant

- a. can offer his or her comments
- b. must answer this and other "lawyer" questions
- c. must refer the client's questions to the lawyer
- d. must immediately end the interview

(c)

When conducting a substantive interview with a client, the legal assistant's questions should promote

- a. better relations with the lawyer
- b. narrative responses
- c. defensive answers
- d. trust

(b)

One of the main complaints by clients against lawyers is

- a. their failure to communicate
- b. their personal appearance
- c. their failure to ask questions
- d. none of the above

(a)

The legal assistant cannot always rely on accident reports to be

- a. available
- b. detailed
- c. accurate
- d. b and c

(d)

Typically hospital medical records will contain

- a. patient histories
- b. nurses' notes
- c. a and b
- d. none of the above

(c)

SHORT ANSWER

Identify and briefly explain the pre-interview steps the legal assistant should take for maximum effectiveness during the interview.

Identify the various steps a legal assistant should take at the conclusion of a substantive interview of a client.

INVESTIGATING THE CASE: WITNESSES

INTRODUCTION TO INVESTIGATION TECHNIQUES (157)

As you may have noticed, beginning with the last chapter there has been an increase in applications of the textbook's materials to practice situations. With this chapter and the next, the investigation of the client's case or matter moves into two major areas: witnesses and evidence.

As a part of the informal investigation plan, witnesses are unique because we need them for case development. They will supply corroborative testimony, and through them we will want to confirm the client's story.

Before I get into this chapter, I define the term "witness" to include not only experts and nonexperts who have personal knowledge of the direct facts of the client's case, but also anyone who has knowledge of factual information that may have a bearing on the client's case.

Timeliness. Ask any successful personal injury lawyer what is a key ingredient to investigation, and you'll be told that "time is of the essence." One said that the first person to visit a witness gains an advantage. All is not lost if the insurance adjuster for a potential defendant has already contacted the client. In some states, including Kansas, there are statutory time limitations on the ability of persons with adverse interests to contact an injured person in a hospital to negotiate and/or obtain a release of liability or a written statement.

It's a proven fact that a witness's memory will fade; all the more reason to contact witnesses as soon as possible. Of course, tell your students that there will be situations where the accident or event happened months before, and timeliness may not be as acute. But even then, delay can be detrimental. For example, a witness moves to another part of the country and his or her location cannot be ascertained.

Assumptions. Without detracting from objectivity in dealing with witnesses, I stress the use of the assumption that there are witnesses to the client's case. However, I make the point that you cannot assume that a witness will discuss the case with you or that you can trust that what you are told is correct.

I emphasize verifying everything a witness tells you. In some witness situations this will be obvious, such as where the witness is the client's parent and is very sympathetic.

Perseverance and Diligence. Your students must understand that finding witnesses and interviewing them can at times be a very difficult task. Because of all the law enforcement movies and television shows, the students may have an unrealistic expectation of the cooperativeness of witnesses. In reality, people don't want to get involved. They don't have the time or inclination when such involvement will impinge on their lifestyles. It is a very unusual situation where witnesses voluntarily come forth.

Tell your students that when the lawyer gives them the assignment to go and interview a witness, the lawyer will expect them to come back with something concrete. Nowadays, I believe that legal assistants do have an advantage over lawyers in performing this task. People don't like

lawyers, and they are fearful of them. As a communicator, the legal assistant in contact with witnesses can promote understanding and allay fears.

Case Management. As discussed previously, you have to make tracks, especially where witnesses are involved. Duplication of contact activities with witnesses must be avoided. It will drive them away. Before contact is made with any witness, a separate file should be set up for the witness. This may entail some duplication of documents, but it will mean that the questions posed under this topic will be answered affirmatively.

Preliminary Investigation. Excessive case costs can detract from an effective investigation. I go over the various in-office techniques listed in the textbook and give reasons for them. For example, number 3, getting directions, is very important. Nothing will turn a witness off more than being kept waiting.

Sometimes adhering to the “rules “ can be counterproductive. As to number 6, I caution my students about using impersonal form letters to solicit information from a large group of people who may have knowledge about the client’s case.

There may be a situation where you will want to avoid using standard procedures like making appointments or telephone inquiries. The profile on a witness may be such that the best approach would be to drop in unexpectedly.

Use of a Professional Investigator. Private investigators are like any other service; you have to know what you are getting. Qualifications must be checked. Control of activities by the lawyer directly or through the legal assistant is a must. Sometimes an investigator can get carried away and subject the lawyer to liability for tortious acts.

The use of independent or free-lance legal assistants as investigators has grown considerably in the last several years. You should address how an outside investigator informs a witness of the lawyer’s representation of the client. I once had a guest speaker tell my class that he never said anything about this and would purposely avoid any questions about who he was working for. Watch out for people like this. New Jersey lawyers tried unsuccessfully to get their supreme court to find that the activities, including investigation, of independent or free-lance legal assistants constituted the unauthorized practice of law. This is still a very sensitive issue, and you should localize it.

In my state the supreme court strictly limited the use of a disbarred or suspended lawyer as a legal assistant or investigator and specifically barred any contact by him or her with the employing lawyer’s client.

IDENTIFYING AND LOCATING WITNESSES (160)

My students are amazed at the materials under this topic. Many of them do not like to accept the idea that there is much publicly accessible information concerning their personal lives.

I promote checking out known witnesses. For example, I once had a case where I interviewed the other side’s star eye-witness, who saw the accident from his front yard where he was raking leaves. A check of his driver’s license revealed that he was required to wear glasses when driving. As a wearer of glasses who does not like to wear them unless I have to, it was easy to deduce that he didn’t have his on at the time of the accident, and I got him to admit this to me.

Stress to your students the importance of asking every witness, including hostile ones, to identify other witnesses. People will not necessarily volunteer this information.

Identification Techniques. In preparing the materials for this section, I examined a number of books and articles, including those written for criminal investigations, and found all of the techniques mentioned in one place or another. There was not much explanation.

Tell your students that once you've used any of the identification techniques, you have had the experience that you can draw upon in subsequent cases. Be sure to stress that for this reason they should set up their own personal investigation techniques file for future reference.

When the techniques listed below are used, the legal assistant will naturally be asked why he or she is seeking the information. I tell my students that they should identify themselves as the legal assistant for the lawyer or law firm and say that they are investigating the accident or matter involving the client. If they are pressed for a further explanation, most people will be satisfied with the response that the paralegal is trying to find out exactly what happened.

Neighborhood Canvass. When canvassing in automobile accident cases, it is a good to ask if similar accidents have occurred. When applicable, the functioning of traffic signal devices should be checked out. I know of a case where a legal assistant actually went to the accident scene with a sign and was able to locate witnesses to the accident.

Emergency Personnel. In urban areas we have become very sophisticated with our emergency procedures. A recording is made of all 911 calls, and telephone equipment allows emergency personnel to locate exactly from where the call is coming. (This information could lead to a possible witness; one who calls but won't give his or her name.) Written reports are filed, and in some instances there will be photographs and video recordings available. "Field notes" should be requested. If they are not supplied, you should request that they be retained.

Invite a police officer as a guest speaker to explain how an accident is investigated. You might want to have an EMT person to explain accident scene procedures.

News Media. I personally witnessed a police shoot-out with a bank robber at a busy suburban intersection. The robber was killed. I was unable to stop, but I later contacted the main local newspaper to see if it was aware of what happened. A reporter interviewed me, and I and some other witnesses were quoted in a news article published the next day. Subsequently, I was contacted by an "action reporter" for one of our television stations, who requested that I give a taped interview on whether I thought unnecessary force was used that jeopardized the lives of innocent bystanders. I declined, but another person did it. In a follow-up investigation I was interviewed by the police, who got my name from the newspaper article.

For convenience, some major law firms will keep copies of newspapers in their offices for several months after publication date. Also, before I leave this, I want to point out that your students should be advised not to discuss the case with media people, even "off the record." This is only for the lawyer, with the full knowledge and consent of the client.

Advertisement. A drawback of an advertisement is cost. You want to place the ad in a newspaper or on television or radio where it will be seen or heard by unknown witnesses.

In the pedestrian/automobile accident case in this and the last chapter, a good place for an advertisement would be in the student newspaper or radio station of the university.

Public Records. Public records are discussed in greater detail in Chapter Nine, but, if it is accessible in your state, you might want to "walk" you students through obtaining the name of the owner of a motor vehicle from the VIN number (left corner of the dashboard) or license plate number.

City Directories. Surprisingly, some of your students will not have ever used a Polk or Cole directory. For this reason, it is wise to give an in-class demonstration. Point out that these are private publications, and their information may not always be accurate or up to date.

Note that many public libraries keep old directories. I had one case where I did research in some that were 15 years old.

Internet Resources. Internet search engines provide free access to names, addresses, and telephone numbers of individuals and businesses. Many also provide locator maps. Some fee-based services maintain complete credit reports.

Locating Techniques. Once a name is known, the locating of a witness moves to a different level of operation. Because we are mobile society, there still may be difficulty in locating a witness's whereabouts. The more information you have about a person, the better the chances of finding him or her.

Also, although a person's Social Security number is not supposed to be used for private purposes, in reality it is a major locating tool. Whenever legally possible, the SSN should be ascertained and used.

Telephone Book. I once invited a private investigator, a former police officer, to speak to my class about his locating techniques. He told the story about how he was brought in on a case where all avenues of locating a witness had been exhausted. He took the name, looked it up in the telephone book, called the number listed, and talked to the witness!

Whenever I call relatives, employers, and friends, I try to explain why I am calling, especially to unrelated persons, and I usually obtain some forwarding information. Also, this would be a good place to discuss the contact and disclosure limitations of the Fair Debt Collection Act.

Tax Assessor and Property Records. You should explain the function of such records, but I would wait to discuss them thoroughly when you cover Chapter Nine. With nationwide databases, it is now possible to access computer property records located in another state.

Voter Registration Records. I'm sure these vary from state to state. In Kansas, unless he or she has put a block on this information, I can obtain not only what is set out in the textbook, but also a person's party affiliation and Social Security number.

Court Records. Court records are the ultimate public record. Some like divorce and bankruptcy court records, overwhelm you with information. In Kansas, our Supreme Court support form that is filed initially has a place for Social Security numbers. I recommend you go over a sample form in class.

Again, some of your students will be sensitive to this, especially those who have had court experiences as plaintiffs or defendants. You might want to go into the area of sealed court records. Check your state's statutes and rules on this.

Driver's License Records. With the states now required to give their residents the option to limit access to information, this locating method may not be that productive. This is discussed in more detail in Chapter Nine.

United States Postal Service. Postal regulations have made it impossible to directly obtain a person's change-of-address information unless litigation against him or her is involved. However, you may still be able to use the method set out in the textbook.

Employment Sources. Some of these sources are discussed in greater detail in Chapter Nine but, again, you should give the students one or two examples. I use myself and tell them how they can contact the Clerk of the Kansas Supreme Court to get information about me. Things have tightened up considerably as to getting information from a previous employer, but you should tell your students that they should still ask.

Social Security Administration (SSA). Supposedly there are private companies that claim they have “legally” obtained information on individuals by Social Security number. Tell your students to be very leery of such operations. Granted, the way Social Security numbers are used commercially makes such information easy to assemble.

If you have a Social Security number, or even a name, an alternate method for contacting a witness or locating a person is explained in the textbook. I used this procedure in an estate where we needed to locate an heir. We had the Social Security number, but knew nothing of where he was. Following is the form of letter I sent.

Date

John Doe

Social Security Number: _____

Dear Mr. Doe:

I am the attorney for the Estate of Ralph Doe, deceased, presently being administered in the Probate Court of _____ County, (Name of State), Estate No. _____. As an heir of the decedent you are entitled to share in the estate. However, we have been unable to locate you to give you notice of the proceedings as required by law and are utilizing the services of the Social Security Administration to contact you. Please contact me upon the receipt of this letter.

Sincerely,

Locating Companies. Some situations may require the services of a locating company. Some of these companies run very sophisticated operations. One I’m aware of maintains a national death index on its computers which instantly tells if the person is deceased.

If the paralegal has never used a locating company before, I suggest you tell your students to start with a local outfit with good recommendations from lawyers and legal assistants who have used its services.

WITNESS INTERVIEWING (166)

I’m sure you will want to supplement this section of the textbook with your own materials. As you are aware, having all the witnesses interviewed and their stories clarified early on can set the stage for settlement without having to proceed to litigation. All witnesses must be contacted even though they may already be in the “camp” of the other side.

Tell your students that this is an area where they will experience rejection, but they must carry out this function to its fullest. I read once that we’re lucky if 50% of the people we meet like us, so we shouldn’t get upset when someone does not respond to our personalities.

Contact with Witnesses. As discussed before, explaining the purpose of the contact works well for me, and I emphasize this approach. I don’t believe in any type of subterfuge; it will haunt you later on.

Special Considerations. I stress the serious ethical problem that can arise if contact with a witness is continued after the legal assistant finds out the witness is represented by a lawyer. This, however, can be a “fuzzy” area. What if the witness says the defendant’s lawyer is the witness’s lawyer? Also, is it necessary to ask if the witness has legal counsel? The safest approach is to terminate contact, prepare a memorandum, and immediately report the situation to the lawyer. Check the ethical opinions in your state to see if any have been rendered on this subject area.

Another thing to consider is the situation of a witness you believe may “skip” out on you. In such instances, you should try to get the name, address, and telephone number of a relative and the witness’s Social Security number.

Special Problems. Whenever possible, potential problems should be realized before they happen.

Chain of Command. This is another fuzzy area. The consequences of not following the chain of command can be devastating, e.g., exclusion of testimony or denial of discovery. You should check your jurisdiction’s case law on this.

Children and the Aged. Generally, very young children should be interviewed with a parent or legal guardian present. An obvious exception would be where the interview revolves around the parent’s behavior towards the child.

When you interview children in their teens, most likely you will be able to set up an interview without a parent or legal guardian present as long as such have knowledge and consent.

Your students should be aware that other people may suffer from infirmities that can affect their qualifications as witnesses. Also they should be given special consideration depending upon individual needs. For example, one may be hard of hearing or have failing eyesight.

Illiterate Persons. Note the method given in the textbook for telling if someone knows how to read. Someone can be functionally illiterate and have a very limited vocabulary.

Perception and Memory. Point out that memory deteriorates with time and that it can be strongly affected by suggestion. This is why being the first person to interview a witness is so important.

Personality Clash or Lack of Rapport. I believe that most people want to be liked, but there will be instances where there is no “chemistry” between the legal assistant and the witness. Your students must maintain their objectivity in such situations and not take them personally.

Preparing for the Interview. I tell my students that forms and checklists are good to prepare because they give tangible support during the interview. However, I caution the students not to overdo forms and checklists and to avoid allowing them to hamper the interview process. In other words, prepare, but be flexible.

Conducting the Interview. Unlike contacts with the client, the legal assistant will not be able to repeatedly contact a witness for information without becoming a nuisance. So, the legal assistant must give his or her best shot at the interview.

When a witness is uncooperative, tell your students to try everything else before bringing out the “big gun,” the threat of being subpoenaed for a deposition. (A savvy witness knows that depositions are expensive and that you may be bluffing.) One technique I tell my students to use is to tell the witness that if he or she won’t talk to me, this will have to be reported to the

lawyer. Of course, the lawyer should be made out to be a nasty person who doesn't take no for an answer. And most people already have this image of lawyers.

Interview Format. I tell my students to avoid jumping too soon into the substantive part of the interview. The witness will give you signals when he or she is ready for that. The legal assistant should try to get the witness to tell a story without too much interruption, except for completeness and clarification.

Not all interviews will result in the taking of a statement. For example, one trial lawyer I know interviews adverse witnesses, but never takes their written statements. He maintains that such statements solidify their memories.

Form of Questions. Yes and no questions are boring. Questions should be in a form that allows the witness to talk freely. By use of properly framed questions, the legal assistant conveys to the witness that he or she is knowledgeable in the subject matter of the interview.

Interview Summary and Witness Evaluation. Many think that if a statement is taken from a witness that a summary is unnecessary. This is incorrect. Remember we discussed the setting up of a witness file for each witness. Cases can go on for years, and we must have a "handle" on each person involved in them. The summary and evaluation provides the legal assistant with the opportunity to give his or her input into the case.

WITNESS STATEMENTS (177)

As previously discussed, statements should not be taken from adverse witnesses. Also, it may be superfluous to take statements from favorable witnesses on close or friendly terms with the client. Such may be useful where the case is one that will most likely be settled and the insurance adjuster or other side is unaware of the relationship.

When it is determined that a witness's statement will be taken, a good approach is for the legal assistant to act as if he or she is entitled to the statement.

Purpose of Statements. Note the main purpose of statements given in the textbook. Your students must understand that statements are normally inadmissible as evidence, but do have certain uses at trial as set out in the textbook. I like statements to be taken by the legal assistant rather than the lawyer, because it will look better to a jury if it becomes necessary for there to be testimony in support of impeachment of a witness during trial.

Forms of Statements. My students always get nervous with the witness statement at the end of this chapter. They don't want to make mistakes and want to submit it in correct form. I repeatedly tell them that substance is what counts, but this is a difficult hurdle to get them over.

Signed Statement. Signed statements are still significant, although we have advanced considerably with respect to electronic means of recording information. There is something personal and formal about a person signing his or her name to a document. Be sure your students understand that the legal assistant, not the witness, writes out the statement (Note: There are now laptop or portable computers with printout capabilities, and these could be used provided the format used for hand-written statements is modified to their use.).

I suggest you go over the written statement in the textbook. A typical practice is to type a statement after it is signed to make it easier to read. Also point out to your students that while the statement given in the textbook is in optimum form, in reality written statements are usually taken hurriedly and may not be so neat. Make sure your students understand the concept of making mistakes (at least one on each page).

Sometimes the legal assistant will work up a statement and then the witness refuses to sign it because of the statement at the end. Tell your students that they have to try to get a signature.

One approach is to change the statement at the end to: "I have read this statement and it is accurate, but I will not sign it." Believe it or not, many will sign such a statement when requested to do so. Finally, I tell my students that they should avoid giving the witness a copy of the statement. If pressed, they should say that they'll get it to the witness.

Court Reporter Statement. Review with your students the situations where a court reporter statement may need to be utilized. I like to emphasize the use of a court reporter when a potential defendant has a municipal court setting or trial. He may make a statement against his or her interest during the proceedings and when memorialized in this fashion, the statement can be used. The legal assistant should ask the lawyer to contact the judge's office beforehand to obtain permission.

In some situations, the testimony of a witness may need to be memorialized, as explained in the textbook. When discussing this, I give my students a copy of the applicable state statute or court rule.

Recorded Statements. I point out to my students that while recorded statements are now very easy to obtain, they should always take notes while the statement is being recorded. My students and I discuss "stage fright" in detail, because it does happen to all of us.

Telephone Statements. I have no problem with this form of statement taking, but I'm partial to the old-fashioned handwritten statement. What bothers me is this: With a telephone statement the interviewer is a part of the content and this could affect perception by someone listening to it.

A volatile discussion topic is the recording of a telephone conversation by one party without the other's knowledge. Our ethics advisory opinion committee of the Kansas Bar Association issued an opinion saying that it was legal, but expressed concern over possible ethical ramifications. I can see situations where this may be necessary, such as dealing with an unrepresented, violent spouse of a divorce client. The legal assistant should be instructed to never do it without the express consent of the lawyer.

Video Statements. Video camcorders are now a "tool of the trade" for lawyers and legal assistants involved in investigation. They have evolved to the point where they are very user-friendly and unobtrusive.

The Negative Statement. The negative statement is a very effective method of pinning a hostile, unresponsive witness or non-witness down to a "know-nothing" position that will not be supportive in the event he or she subsequently becomes a witness for the opposing party. When such a statement is prepared, the legal assistant should not go into detail about its purpose.

EXPERT WITNESSES (187)

Pre-representation consultation with an expert is becoming more common because of the increased willingness of the courts to impose sanctions on the plaintiff's lawyer for inadequate case preparation. A problem with such an approach is this: If the consulted expert makes an unfavorable determination, then it is subject to formal discovery if a lawsuit is filed anyway. This may be why many lawyers and law firms usually have an expert in their pocket, so to speak. This is a person whose professional inclination is usually favorable to the legal position taken by the lawyer or law firm that uses his or her services.

There is nothing wrong with this approach, and it probably does reduce frivolous litigation. However, at the same time, it tends to institutionalize the litigation process. Many judges are dissatisfied with the increased use of experts and the concomitant rise in litigation costs. Nevertheless, the use of experts is not going to diminish, and the legal assistant must understand what an expert is, how to find one, and how to effectively interact with an expert on a professional level.

I review the uses of an expert during discovery. It's very important that the lawyer and legal assistant be educated about the subject matter of the client's case.

Definition of an Expert. Review with your students the definition of an expert given in the textbook. Point out to them that the definition is not limited to professional occupations but also includes trades and persons with specialized knowledge. You should refer to your state's statutes and/or court rules covering experts and their giving testimony.

The parameters listed were developed from a review of the *Lawyers Desk Reference (LDR)* by Harry M. Philo. I take this book to class and review it with my students. Recommend to your library that it be purchased.

Tell your students that there cannot be delay. I know of a matter where there was delay by one party in contacting the inventor of a testing device, and unfortunately the other side got to him first and retained him as an expert witness.

Locating Experts. In locating an expert, there are several factors to consider beyond basic qualifications. Some experts may be vulnerable to attack at trial because they make their living by being an expert and do not actively practice their field. For this reason, some lawyers will seek out a person as an expert who heavily practices his or her profession. Unfortunately, the services of these people are hard to obtain, unless the subject matter of the case is one about which they feel very strongly.

I review with my students the various resources for locating experts listed in the textbook. They can be found in various professional journals and magazines, through locator services, and by use of the Internet.

Contact with Experts. Use of an expert is serious business. A good expert can make or break a case. The lawyer and legal assistant must be able to deal effectively with a person they consider using as an expert. If available, previous courtroom testimony of the expert in similar cases should be obtained. And this should be considered when evaluating an expert witness the other side is using.

Contact Methods. There must be flexibility in contact methods. Due to the personality of the expert, sometimes it is best for the lawyer to make initial contact.

Interview Questionnaire. When assigned the task of meeting a potential expert, the legal assistant must get basic information from him or her.

Evaluation. This can be a most difficult task for the legal assistant. However, there are several crucial factors to consider.

First of all, if the matter goes to trial, what kind of impression will the expert make on the jury? Will he or she fit the "mold" that the jurors have stereotyped for the expert's profession or area of expertise? Next, will the expert be able to effectively communicate with and "educate" the jury? And of course, what is the cost of the expert's services?

ASSIGNMENTS

Assignment - Taking a witness statement

Using the format in the textbook, take a written statement of a witness to an actual automobile accident, other type of accident, incident, or occurrence of which the witness has personal knowledge. For this assignment, a participant is considered a witness, and there is no time limitation on when the accident, etc., occurred. It is suggested that one avoid an incident that happened over a year ago. You may change names, locations, etc., to maintain confidentiality. *(Do not submit a typed statement—the statement must be in your handwriting, except for signature and initials by witness.)*

Assignment - Statutory review

Locate the applicable statute in your state regarding experts and their testimony. Identify the statute by number and write a short statement outlining the qualifications of an expert listed under the statute.

TEST QUESTIONS

TRUE/FALSE

All witnesses contacted by the legal assistant, including those hostile to the client's case should be asked to identify other persons who may be witnesses or who possess information.

(True)

The Social Security Administration will disclose a person's mailing address if it can be shown that an inquiry about him or her is for good reason.

(False)

Generally, when minor witnesses are young children, the legal assistant should interview them without their parents present.

(False)

When a statement is taken from the witness, it is not necessary to prepare a summary of the interview with the witness.

(False)

One purpose of a statement is to record a witness's recollection of the facts so it can be used later to refresh his or her memory.

(True)

When a legal assistant takes a telephone statement, he or she must make a "beep" sound every 21 seconds to comply with FCC regulations.

(False)

One reason for obtaining the services of an expert at the beginning of discovery is to have him or her assist in determining whether the client's case is viable.

(True)

MULTIPLE CHOICE

Although there are many factors affecting the conduct of an investigation, one important for success is

- a. location of the parties
- b. inconvenience to the legal assistant
- c. the ages of the witnesses
- d. timeliness of the investigation

(d)

Although a good research tool in identifying potential witnesses, one drawback of a city directory is

- a. the information provided may not be current
- b. it does not give telephone numbers
- c. it is difficult to use
- d. it is unavailable at public libraries

(a)

During an interview if a person is discovered to be represented by a lawyer in connection with the investigation, the legal assistant

- a. can continue the interview process
- b. must immediately terminate the interview and report the situation to the supervising lawyer
- c. can complete only the line of questioning he or she started
- d. must inform the person that he or she has the right to terminate or continue the interview

(b)

When a legal assistant writes out a witness statement, it is a good practice to

- a. ignore essential information
- b. make a recording without the witness's knowledge
- c. avoid reviewing it with the witness
- d. make errors and have the witness initial the corrections

(d)

Although a recorded statement may be more complete than a written statement, the latter may be preferable because

- a. a recorded statement will contain both favorable and unfavorable information
- b. many witnesses will become nervous when recorded
- c. a and b
- d. none of the above

(c)

A negative statement is one where

- a. it is adverse to the client's interest
- b. the witness states he or she doesn't know anything at all about the client's case
- c. it is full of negative feelings
- d. the legal assistant reports to the lawyer that he or she could not find any pertinent information

(b)

An expert may be defined as a person who possesses

- a. extraordinary abilities in the courtroom
- b. practical knowledge above that of members of his or her profession or trade
- c. knowledge, skill, experience, training, or education to give an opinion
- d. sufficient information about a subject to give an opinion

(c)

SHORT ANSWER

Besides the neighborhood canvass, identify four other identification techniques that can be used to identify unknown witness or obtain additional information about known witnesses.

Identify some of the motivating factors that compel witnesses to provide information.

Identify and discuss two sources that can be used to locate expert witnesses.

**INVESTIGATING THE CASE:
DOCUMENTARY AND PHYSICAL EVIDENCE**

GENERAL CONCEPTS (193)

The use of documentary and physical evidence in trials has exploded. In many cases, trial exhibits number in the hundreds, and even the thousands. The preparation of exhibits for trial has turned into a multimillion dollar business. Courtrooms are being “wired” and trials have become multimedia presentations. All of this has enhanced the legal assistant’s role in the gathering of evidence. But what is used at trial of a case, if necessary, has its roots in the basics of evidence gathering.

Form of Evidence. Because of electronic media, the form of evidence has been expanded to include almost any type of “intangible” information as long as it can be reproduced. I review applicable statutes and court rules and discuss with my students how the courts are handling these new forms of evidence. In this regard you might want to contact the clerk of your state’s supreme court or the National Center for State Courts (www.ncsc.dni.us), 300 Newport Avenue, Williamsburg, VA 23187, (804) 253-2000.

Preservation of Evidence. Premature repair or destruction of physical evidence can be devastating to a client’s case. Your students must understand the importance of taking immediate steps after the occurrence of an accident, etc., to save anything that could have evidentiary value. Self-reliance is the key here. You cannot expect the potential defendant to keep evidence, especially physical evidence without some threat or punishment for failure to do so. Where there is a problem, the legal assistant should immediately inform the lawyer so that a court order of preservation can be obtained.

The basic rules in the textbook should be reviewed. I focus on avoiding placing any marks on original documents or physical items unless agreed to by all the parties for inventory purposes. I caution my students on disassembling documents for copying. In other words, they should leave the staples in when copying documents.

Control and Retrieval. Depending upon the nature of the client’s case, this can be a very simple or complex thing. You should discuss how “originals” of documents are handled by lawyers and law firms in your area. Procedures in court for marking and identifying should be explained. In my area, in cases with innumerable documents, many law firms take control of the documents to maintain organization.

Physical objects can pose a problem depending upon their size. After the Hyatt Hotel tragedy in Kansas City, the potential defendants were eager to dispose of the debris, including the fallen skywalks as soon as possible, but this action was delayed by court order. In that matter, there were so many documents that a storage facility with shared costs was set up by all the parties to control access in an orderly fashion.

Storage. I review the “chain of custody” concept and how its importance has evolved from criminal to civil matters. Storage of documents in the custody of the parties or their lawyers will affect access during formal discovery. In the movie *Class Action*, the lawyers for the defendant

supposedly “buried” a key document amid boxes of many documents, making it virtually impossible for the plaintiff’s lawyer to locate it.

Tell your students that the sample storage log in Figure 8:1 is used in cases where there is not a great deal of documentary and physical evidence. In complex litigation cases, control, retrieval, and storage logs will be computerized.

Case or Direct Evidence. When the term “fact” was defined previously in Chapter Two, we introduced the concept of direct and related facts to the students. We focused on documentary and physical evidence specifically identified with the client’s case. You must clarify this with your students.

The basic premise is that the initial concern in a case is to gather all direct evidence as soon and as completely possible. A proper analysis cannot be made of the client’s injuries, if there are incomplete medical records. I know this sounds simplistic, but I have seen lawyers and legal assistants hastily investigate and gather case or direct evidence, proceed with the filing of a lawsuit, and then come up short during formal discovery or at trial.

With my students I review all of the items of direct documentary or physical evidence that would be of importance in a particular case. When time permits, we break into discussion groups and go over the fact situations given in the Client Interview Form/Questionnaire Assignment in Chapter Six. If you do not have the class time to do this, then I suggest you use the basic automobile personal injury case situation.

Sources. When the legal assistant has developed a working knowledge of a particular practice area, the sources of evidence will be obvious. For example, in automobile accident cases, obtaining the accident report is a routine matter.

Source Identification. With my students I take the approach that there has to be someone at a source of information who knows what’s going on, and he or she will be of the most assistance. Also, this goes hand-in-hand with the investigative reporting “paper trail” concept — you must follow it to the end.

You must be frank with your students as to the lawyer’s position with respect to reviewing the investigative work of the legal assistant. The lawyer functions as a critic or reviewer and will question whether the legal assistant has exhausted identification of all sources. For this reason the legal assistant must be “tough-skinned” and not take any criticism personally. Remember no one trains lawyers to be managers.

INVESTIGATIVE PROCEDURES (200)

By this time applicable legal theories applicable to the client’s case or matter should have been identified by the lawyer or by the legal assistant when this task has been assigned. While many methods of investigation have become routine, even in those instances there must be room for flexibility. For examples of standardized procedures, you might use *LDR* or *Causes of Action*.

I emphasize looking beyond the obvious situation. This is quite effective when seeking potential defendants.

Identification Techniques - Case Parameters. Cases have their own personalities that reflect our attitudes as a society, both nationally and locally. These attitudes are reflected in how we decide the merit of a case and what needs to be done in it. For example, in my judicial district with conservative juries, plaintiffs’ lawyers consider a medical malpractice case to be one of the

most difficult areas of success. Yet, in a neighboring district — probably because of better jury awards there — such is not the case (assuming there is merit to the plaintiff’s claim).

Identification Techniques - Knowledge Parameters. When you discuss the ways of improving identification skills, please add demonstrations, visual recreations, computer models, videos of similar methods, techniques, and procedures. You must impress your students that they will be called upon to be “pathfinders of knowledge.”

For example, I had one student who worked at a major defense firm and went from knowing absolutely nothing about the construction of automobile and truck wheels and tires to being the firm’s “in-house expert” on this subject. The firm was engaged in defense work all over the country on behalf of the client, which was defending itself in multiple lawsuits over rim failure of tires that it manufactured.

Procurement. Methods of obtaining and the relevancy of documentary and physical evidence will be grounded in applicable statutes and court rules. There are also practical considerations. As mentioned in the textbook, you cannot easily bring an automobile into the courtroom. Of course, its presence will be substituted through the use of photographs, but their admissibility is based upon certain statutes and rules of the court.

General Procurement Techniques - Documents. I believe there is an ebb and flow to the effectiveness of the procurement techniques discussed in the textbook, often dictated by current needs and limitations. For this reason I recommend to my students that they should account for this in their use of any one method at a particular time.

1. **Telephone Requests.** This is a good example of the above. Access to personnel of public agencies and court support systems is becoming more and more restricted. In my jurisdiction, the district court clerk’s office shuts its telephones off at 4:00 p.m., even though its staff works until 5:00 p.m. Telephone requests can be untimely. You cannot expect a request to a state agency on a Friday before a Monday holiday to be fulfilled in a timely manner.

And, although touted as cost-effective compared to written correspondence, the use of the telephone can be expensive when used in dealing with unfamiliar sources. I recommend to my students that they obtain a copy of the telephone book of their state’s capital city to alleviate this problem.

2. **Mailed Requests.** I stress to my students use of the preprinted forms of the agency or person to whom the request is made.
3. **The Facsimile Machine.** The use of the fax machine has increased and is an indispensable business practice. Controls should be in place to maintain confidentiality. Many state agencies allow requests by fax and will accept payment via charge card or will allow the lawyer or law firm to set up a prepayment account.
4. **The Modem and Computer.** Use of the modem in accessing public documents is now so commonplace that new computers have it built in.
5. **Personal Contact.** This is the old standby of obtaining documents. Caution your students that they should not hesitate to use it (locally, of course) if they determine that they are not dealing with competent people. Although later we will discuss in more detail the obtaining of certified copies, you might want to bring it up briefly with your students at this time.

6. **Document Search Services.** My program now has an elective course called Computer Assisted Legal Research, which has a component on the use of nonlegal databases. However, because of its limited access (class sizes are small), I obtained a free demonstration disk from Prentice Hall and either use it in class or give my students an assignment to use it in my college's computer lab.

Considering the ease with which documents can be forged, it is well worth the minor expense for the lawyer to obtain his or her own certified copies of all certified documents provided to him or her by the client, particularly when the client is new.

Finally, you should emphasize to your students the importance of making sure that when they obtain documents from third parties that each one is specifically identified in any receipt they sign and that each is physically accounted for, page by page.

General Procurement Techniques - Physical Objects. Jurors like physical objects. They are tangible. However, they are perishable or subject to deterioration. Thus, it is imperative that they be obtained as soon as possible and preserved as admissible evidence in the event there will be a trial.

Where physical evidence relates to an accident or event, it must not remain in the hands of the client. This is particularly true in product liability cases.

1. **Demonstrative Evidence.**

- a. **Photographs.** The use of photographs in the courtroom is a common trial technique. Although photographs can be taken by the legal assistant as long as the rule governing admissibility is complied with, when photographs will be an essential part of the evidence it is better to use a professional photographer. A professional photographer who has extensive experience with lawyers would be a good guest speaker.
- b. **Diagrams, Drawings and Sketches.** Trials have become a form of entertainment through the use of demonstrative evidence. We do tend to judge the weight of evidence by the quality of the graphics presented in court. The latest "show" is computer simulations or reconstructions using the technology seen in movies.
- c. **Video and Audio Taping.** Video productions are not cheap. You might contact a local production company to obtain current production information to pass on to your students.

2. **Collection of Physical Evidence.** Advise your students that it's very important that standard procedures be used so that there will not be any question as to admissibility.

Investigative Tools. Electronic devices have made many standard "tools" obsolete. These include laser measuring devices and satellite-guided position locators.

Use of an Investigator. Many lawyers and law firms have an in-house investigator. Others will turn to an outside investigator to procure evidence as the need arises.

Surveillance by an Investigator. You should tell your students that when such is employed that there be specific instructions and continued monitoring of the activities of the investigator. A private investigator from your community would be a good guest speaker.

Analysis. Document analysis for computerized litigation support systems has become very important in lawsuits involving thousand of documents. Since many of my students have worked for law firms employing such techniques, I rely on them to “educate” the rest of the class on what methods are used. If such persons are not available to you, then I suggest that you bring in a guest speaker on this subject.

Evidentiary Analysis. Evidentiary analysis goes farther than the use of an accounting. With it the legal assistant uses the techniques discussed earlier in the textbook.

Technical Analysis. Technical analysis is the use of an expert or technician to conduct testing services with respect to documentary and physical evidence. To give my students an idea of what is done, I have had guest speakers engaged in such work. An excellent field trip would be to go to a testing laboratory.

Accident Reconstruction. Accident reconstruction is an attempt to come up with a plausible explanation of how an accident occurred. It is done extensively in vehicular accidents where the goal is to reach conclusions about the times, speeds and distances involved. Reconstruction activities, however, are only as good as the supporting evidence upon which they are based.

ASSIGNMENTS

ASSIGNMENT - USE OF PRENTICE HALL DEMONSTRATION DISK

Go to the computer lab and check out the Prentice Hall OnLine Public Information Services Demonstration Disk. Follow the instructions given on the disk folder. Once the demonstration is activated, follow the Personal Name Search for Henry Garick and do the following: Obtain the corporate number of Grocery Mart, Inc., and the date of its incorporation.

TEST QUESTIONS

TRUE/FALSE

Documents may be marked on for identification purposes as long as they are “cleaned up” before their use as evidence.

(False)

An example of case or direct evidence is the employment records of the client.

(True)

An example of “active” physical evidence is the speedometer of a vehicle “frozen” at the speed it was traveling at the time of an accident.

(True)

In some cases involving technical matters, the client may be a good information resource.

(True)

MULTIPLE CHOICE

When seeking case or direct evidence, the legal assistant should identify its source and

- a. a competent person there to help in accessing it
- b. deal only with the person responsible for it
- c. hire a private investigator to obtain it
- d. wait to obtain it until after formal discovery is started

(a)

In situations where alterations to an official public document may have been made, the legal assistant

- a. should immediately turn it over to a forensic expert
- b. should obtain a certified copy directly from the issuing governmental entity
- c. ascertain how the alterations were made
- d. should disregard the alterations if they were made

(b)

When a technical analysis will involve destructive testing, it should be

- a. done without the knowledge of other interested parties
- b. accomplished by complete destruction of the object
- c. accompanied by notice and involvement of other interested parties
- d. none of the above

(c)

SHORT ANSWER

Identify and briefly discuss three procurement methods used to obtain documents.

What are some of the questions that should be asked when doing an accounting of a document?

**INVESTIGATING THE CASE:
PUBLIC AND PRIVATE RECORDS**

PUBLIC RECORDS (213)

In the development of case or direct evidence, the legal assistant must identify and access public records at all levels of government. In many instances, the sought records will be about the parties, witnesses, and subject matter of the case. You should spend some time discussing the definition of public records set out at the beginning of this chapter.

You should spend some time discussing the term “record” under the Privacy Act of 1974 as it pertains to those items of information that the federal government has concerning an individual.

Without confusing your students, obtain and review with them your state’s statute or statutes which defines “record.” Be sure to maintain the separation between federal and state records.

I’ve mentioned this earlier, but some of your students will get “touchy” with the materials in this chapter as they realize the extent of information about them that, notwithstanding the provisions of the Privacy Act, is completely accessible by others. This is mainly true at the state and local governmental levels.

Although the next chapter covers public information about the activities of government in more detail, I still like to introduce this concept at this time to distinguish the two types of public records.

Identification of Records. Normally the legal assistant will not be called upon by the lawyer to do an extensive record search about or on behalf of a client. But there may be instances where a complete background check will be appropriate. While a private investigator will probably be retained for such situations, the legal assistant still needs to know what a background check entails.

No request by a client or necessary search of a public record pertaining to the client’s case or matter should be taken lightly. If the lawyer or law firm is negligent in performing this type of function, there can be liability.

Identification of Record Sources. What I do here is use myself as an example. I have my students identify several aspects about me such as my marital status, employer, ownership of property, military status, education and voting information. We then identify specific sources of public records about me. Then as we go through this chapter, I point out where and how we’d access the information about me. This works well because it allows me to explain how important it is to be specific as to time and place.

Once we’ve done this, I move the discussion into the federal records area. Most people will not have many records about them in the hands of federal agencies. In my case I was in the military, so we use that as an example. We examine the *United States Government Manual* in class to determine how we’d obtain my military records. I use this opportunity to explain the manual and how it can be obtained.

Next we move to the state level and discuss the obvious record source, which is my law license. Unfortunately Kansas has no government manual or official handbook that we can examine, but

since I am also licensed to practice law in Missouri, we refer to its “bluebook” of state agencies which is similar to the *United States Government Manual*. Fortunately, the Internet has lessened the task of identifying the appropriate state agencies, since all the states now have websites with links to various state agencies.

Finally, for the local level, we cover my ownership records at the county land records office, which in Kansas is called the register of deeds. Inform your students that the digest volume of *Martindale-Hubbell* is a good source for identifying state and local offices. The Internet is helpful here, but it is not as complete. Point out there is no uniformity from state to state and locally as to what records may be available. For example, in large metropolitan areas the central city often has birth and death records which will also be found at the state department of vital records. However, smaller towns and communities will not normally keep such records.

Access Requirements and Limitations - State and Local Records. In one form or another all states and the District of Columbia have open records acts which basically require the state and its subdivisions to have its records open for inspection and copying by the public. In certain instances the statutes place no access restrictions whatsoever on the records. Real estate records are a good example, as are UCC filings at the state and local level.

The statutes seem to become restrictive, however, as you move into the area of records that are more personal, such as birth and death records. In the case of the latter, many states will release a death certificate for good reason shown. I once had a case where I had to show to the probate court that the decedent and her spouse were divorced before her death or that he predeceased her. With regard to the latter, I was able to contact several state departments of vital records requesting a search for his death certificate, using as a reason the requirement of showing it to the probate court.

Since each state has its own open records act, you must review the highlights of yours with your students. When I cover the Kansas Open Records Act, I like to point out the provision that allows for the payment of the reasonable attorney’s fees of the agency if you lose, or yours by the agency if you win, when you take it to court to get its records. Each state’s statutes will contain specific exceptions similar to those set out in the textbook. You should review those of your state.

To avoid court costs, state and local agencies will often seek the opinion of the state’s attorney general as to whether or not their records can be released. You should review with your students how your attorney general’s opinions can be obtained.

Access Methods - State and Local Records. I tried to be “generic” in the five access concepts or techniques listed in the textbook. You should, of course, add your own thoughts and experiences. Because I feel that being able to access records is such an essential skill, I strongly recommend to my students that they treat it as an asset to be treasured. Tell your students that they will have to use just about all of their communications skills discussed in Chapter Five.

More and more state and local governmental agencies are turning to computer and electronic storage of information. In my area, one local court system has had a system in place for several years that allows direct external access by modem to the court’s docket. With the development of the Internet, this is now done by accessing its home page. With this and where electronic access is internal (by terminal at the clerk’s office), the legal assistant must understand procedures for it, so as to work independently. If you have external access you might want to set up a classroom demonstration, or make up an assignment utilizing external access.

Access Requirements and Limitations - Federal Records. An interesting aspect of the Privacy Act is that it identifies some of the records that an individual has the right to access about him or herself. At the same time it prevents access to those records by others.

Besides reviewing the types of records listed, you should discuss the exemptions. Note that a federal agency must tell you if it has a file on you, whether or not you desire access.

Access Methods - Federal Records. Accessing records with some federal agencies, such as the IRS, can be relatively simple. With others there will be nothing but difficulty. In the federal bureaucracy, each has its own way of doing things. There are some approaches the legal assistant can take, however, to make a request move along.

First, where it is unclear what records of a client with an agency need to be accessed, the agency in question should be contacted by telephone or in person to get particulars about its requirements. One very strong reason for doing this is to keep costs down. The bureaucracy moves slowly, and you cannot give it an opportunity to move slowly with you.

Once certain records are targeted, a request letter should be prepared and sent, preferably by certified mail. Note the requirement of signature by the requesting party or by his or her agent with written authorization, which may, depending on the agency's requirements, need to be notarized. It is crucial that this be done correctly. For example, a name variation will probably result in the request being returned, unless the client executes an affidavit explaining why his or her name is different.

Finally, tell your students that if they have situations where they are at a loss as to what agency to contact, they should contact a Federal Information Center by telephone using the number given in their local telephone book "blue pages."

SELECTED SOURCES OF PUBLIC RECORDS (222)

The nature of the case will affect what public records are accessed. For example in a real estate dispute, all records at the county land office pertaining to the real estate in question must be accessed, as well as local and federal court records, but you would not be concerned normally with Social Security earnings records or employment records.

Federal Agencies. You might want to expand upon the agencies listed in the textbook by referencing the *United States Government Manual* and *Information U.S.A.* When discussing the IRS, note that forms can be ordered by calling: (800) 829-3676. If your institution has Internet access for its students, then plan a class exercise or assignment where your students have to get information about the IRS from its homepage (www.irs.ustreas.gov). All of the United States District Courts are now on the Pacer external access system, and I give my students a demonstration of its use. Also our U.S. Bankruptcy Court has a Voice Case Information System (VCIS), and I use it for an assignment.

State Agencies. States are attempting to promote uniformity of their recordkeeping methods. The Internet has pushed this along. There is, however, some uniformity with certain agencies in all the states. For example, vital records agencies and secretary of state offices, by the nature of their records maintain them in similar fashion. UCC documents and search practices are fairly standardized. Licensing agencies take similar approaches.

You should, however, still identify key state agencies and discuss them as sources of public records. I want to mention here, too, that records at some state agencies of persons other than the client can be accessed. For example, in Kansas I can check with the workers' compensation commission for information about previous claims by an individual. This is done as a matter of

course by workers' compensation defense lawyers. In the same vein, the driving record of a potential defendant can be obtained from my state department of motor vehicles, unless he or she has placed a restriction on such access.

Local Entities and Agencies. Since they will be dealing with them extensively, I recommend that you provide your students with samples of local records. It is important that they be prepared to "dig a little deeper" when they seek local records. It's been my experience that sometimes you have to pry them from the "bureaucratic clutches" of their custodian.

You will run across bureaucrats who will volunteer nothing. Tell your students that in such situations they must persevere and turn to the statutes and regulations to make things happen.

Before we leave public records that are directly related to the client's case, I want to point out that I didn't cover the statutory procedures with respect to appeals to the court systems when an agency refuses to provide the requested public records. You may want to go into detail about this, especially if you are teaching in a state capital or near Washington, DC.

I do review thoroughly the terms "certified," "attested," and "authenticated" as they pertain to public records. After I define these terms, I discuss the Uniform Enforcement of Foreign Judgments Act, which allows you to enforce a judgment obtained in one state in another. An authenticated copy of the judgment is required.

PRIVATE RECORDS (229)

Your discussion of private records must be separate from public records, and you should avoid an overlap. Emphasize the distinction. Review the definition in the textbook, but tell your students to avoid being too rigid in their thinking, lest they overlook some key information. For example, we tend to think that employment records are inaccessible unless they pertain to our client. But where a person is an employee of a public entity at the state and local level, it may be possible to access his or her earnings and length of employment records without that person being the client.

Before I discuss the various types of private records, I discuss with my students the procedures for obtaining a certification or verification from the custodian of such records that he or she has provided true and correct copies of the records. As you know, courts will accept such records in this form into evidence, unless the other party submits good and compelling reasons not to.

Employment Records. Many clients are unaware that their employers maintain a file on them and that they have the right of access to the documents it contains. Accessing the employment records of a client will be case-driven. In many instances, access will not be adversarial, but to obtain employment information as it affects a claim of a client against another party.

Business Records. Access to business records without subpoena will be predicated upon statutory rights. For example, under the corporation code of most states, a stockholder or director of a corporation has the right to inspect its books and records.

Health Records. Accessing of a client's health records has already been discussed, but you might want to discuss all the various records that fall under this category.

Financial Records. I review how you obtain copies of a client's checks from a bank. I will call a couple of banks to find out what this service costs. I discuss the Fair Credit Reporting Act provisions that give a person the right of access to his or her credit file.

Denial of Access. Normally, holders of records pertaining to a client will be cooperative in allowing access. But they may get touchy if they feel that they may be subject to liability. Lawyers cannot automatically include such persons in a lawsuit for discovery purposes only. Rather, the better approach is to do a business records subpoena, as set out in Figure 9:7. I suggest you review your state's statutes and court rules covering this procedure.

ASSIGNMENTS

Assignment - Preparation of Privacy Act Request Letter

Using the *United States Government Manual* to identify its mailing address, prepare for yourself a Privacy Act Request Letter to a federal agency.

Assignment - Preparation of Request for Earnings and Benefit Estimate Statement

Obtain a Social Security Administration Request for Earnings and Benefit Estimate Statement form. This can be done by calling or by downloading the form off the Internet (www.ssa.gov). Complete the form for the following individual: Cecilia Rinkwaiter, a single woman, born August 26, 1962, last year's earnings: \$28,541 and expects to earn \$33,822 this year, plans to retire at age 62, telephone number is (913) 555-1212, expects future average yearly earnings of \$48,000, lives at 121 S. 119th Street, Overland Park, KS 66210.

TEST QUESTIONS

TRUE/FALSE

Public records are those that a public agency is required by law to keep and make available without any limitations other than those designed to maintain privacy and confidentiality.

(True)

The *United States Government Manual* provides comprehensive information on the branches of the federal and state governments.

(False)

When seeking to access records of a client under the Privacy Act, the best approach is to avoid any informal contact with governmental agencies possessing the records until after they are sent the formal request letter.

(False)

A secretary of state's office is the primary source for information about corporate and limited partnership filings pertaining to the creation and termination of these entities.

(True)

Copies of clients' cancelled checks can be obtained from financial institutions cheaply.

(False)

MULTIPLE CHOICE

Which of the following would constitute a limitation on a legal assistant's being able to access state records?

- records constituting the work product of an attorney
- library patron and circulation records pertaining to identifiable individuals
- records that are privileged under rules of evidence
- all of the above

(d)

The Privacy Act requires federal agencies to inform requesting persons

- a. whether or not the agency holds information on file about them
- b. about their functions
- c. about all information about them in private hands
- d. a and c

(a)

Access to birth and death records held by a state vital records agency

- a. is open without any limitations
- b. is on a first-come, first-served basis
- c. is often severely limited
- d. cannot be done until a person dies

(c)

When a legal assistant is sent by the lawyer to obtain a copy of the minutes of a meeting of an administrative board or commission, he or she should always

- a. call and let them know when he or she is coming
- b. inquire about and obtain a copy of a tape recording of the meeting, if available
- c. demand to meet with the head of the board or commission
- d. try to confuse its staff so as to obtain confidential information

(b)

Private records include

- a. employment, business, health, and financial records
- b. school, business, health, and financial records
- c. employment, military, health, and financial records
- d. none of the above

(a)

SHORT ANSWER

Identify some of the exemptions to the Privacy Act that allow a federal agency to deny access to its system of records.

Define "private records" and name the four major categories of private records.

SOURCES OF INFORMATION

GENERAL CONCEPTS (235)

This chapter mainly covers the search for information related to the client's case. The information will not be case or direct evidence as previously discussed, but is of a kind that helps in the "education" of the lawyer and legal assistant, assists in the development of case or direct evidence, and may become case or direct evidence.

Many of your students will tell you that this is their favorite chapter of the textbook. Their reason is it gives them a working understanding of information research; something we do not normally teach people during their years of required education.

Feel free to give your students other illustrative examples. I use a nail gun case where the jury came up with a several-million-dollar verdict.

I found out about a case involving the auto-ignition of heat transfer oil in a heat transfer chamber; the jury returned a \$17.6-million verdict for the plaintiffs. I don't know about you, but I don't know anything about heat transfer oil. Neither did the plaintiffs' lawyer, but his legal assistant found out in a very lucrative way.

In conjunction with this, be sure that your students understand that just because someone is a lawyer, he or she is no more competent than the legal assistant to do informational research. I pump mine up by telling them that by the time they finish with this chapter, if they are already working in law offices, the lawyers will be hounding them to do this kind of research.

Factors. Do not fail to go over each of the factors listed. Each of them is important to successful research. Also, here you must make your students understand that while it is important to have knowledge about a particular subject, knowing where and how to find out about it is just as acute.

Information Exists. I think it is a form of "positive thinking" to make the assumption that information exists until you verify that it does not. This technique is used in statutory research, where you assume that there is a statute covering the subject matter of the client's case.

Access Limitations. You should add physical access limitations. Also, I expand on the lack of knowledge or technical understanding as mentioned in the textbook.

Focus. Working from general concepts to specifics is simple enough to state, but you'll find that your students try for the "fast track" to get the right answer.

Case Parameters. In addition to the textbook discussion, you might want to cover the situation where the case is "new" to the practice of law. For example, a "new" tort is tortious interference with an expected inheritance, which is being recognized in more and more states. With this tort the beneficiaries under a will or heirs file suit against other parties who deprive them of their inheritance from a decedent.

Duplication and Overlap. What I mean here is duplication of sources and information as well as the resultant duplication of time and effort. Source and information overlap can be a problem,

as choosing the wrong source first can be time-wasting as well as frustrating. Tell your students to look for systems and methods to reduce duplication and overlap.

Erroneous, Incomplete, or Obsolete Information. This is a favorite area of mine. Information once thought to be correct and valid can subsequently found to be wrong and vice versa. Just think, the frontal lobotomy was once touted as the ultimate cure for persons with acute behavioral problems. You can find old books and medical articles supporting and explaining the benefits of its use. You should discuss electronic information storage systems and their weaknesses. I know this sounds basic, but I tell my students to check the copyright date, especially for print materials. Internet resources should be checked for their latest updating date. Evaluation techniques should be utilized for both resources.

Language and Terminology. Knowing the terminology and slang used with respect to information is a must. I remember, when personal computers were coming into their own, how seminar companies were teaching computer terminology courses to computer illiterate people without even having a computer present! How smug we were toward those who didn't know what a CPU was!

Informal Discovery. I tell my students that this ties into educating themselves. In many instances, use of library reference materials and books on specialized subject areas will be of great benefit. I recommend to my students that if they feel they are not mechanically inclined, to get books like *The Way Things Work* by David Macaulay.

Formal Discovery. During formal discovery, the lawyer must present the image that he or she is quite knowledgeable in the subject area of the client's case. If the other side has the slightest indication that this is not so, it can severely affect settlement values or trial. The image is demonstrated through intelligent questions during deposition, well-written interrogatories, and sharply drawn motions for production.

Judicial Notice. I recall discussing with a lawyer the experience and background limitations of a particular judge and how he would have to be educated in the legal theories and factual basis of the lawsuit before him. An excellent way to accomplish this task is the use of judicial notice or stipulations, where the judge encourages their use.

Certified/Authenticated Copies. I'm not trying to be repetitious here, but you must drill this into your students. When they obtain information, for example, from a governmental agency, certification will save time and expense.

GOVERNMENT SOURCES (240)

Remind your students we are not now covering case or direct evidence, but information that may or may not have a bearing on the client's case. I tell my students that this is factual information that was produced regardless of what happened between my client and opposing party. For example, in the automobile/pedestrian case used in previous chapters, the time sequencing of a city's pedestrian walk signal would be such information.

As you are aware, governmental sources move slowly, so tell your students that all will be lost if they wait too long in dealing with them. Also, because of internal accountability, their employers are sensitive to their public image. For this reason tell your students to get the name of any individual with whom they are dealing. (This is good for name-dropping.)

Federal Sources. With federal information sources you'd think you get the benefit of having nationwide resources at your disposal. However, this may not be the case, since many agencies operate somewhat independently on a regionalized basis.

There is a difference between the career bureaucrat and the appointee, and your students must be able to distinguish between them.

Source Identification. Except for depository libraries, I've already mentioned the materials discussed here for source identification. If you are fortunate to teach at an institution that is a depository library, then you should consider having one of your librarians as a guest speaker or tour guide at the library to discuss this concept.

National Archives. When scheduling permits, I take my students to the Kansas City Branch of National Archives and Records Administration. If you do not have this luxury, I suggest you contact the branch nearest to you and request accessing information for your students. The archives employees take their jobs seriously and are very security-minded when it comes to their records.

The Freedom of Information Act (FOIA). I point out that FOIA does not apply to information maintained by the legislative and judicial branches of the federal government. You may want to discuss the nine exemptions in detail here, rather than wait till after you cover the request.

The FOIA Request. The FOIA request letter has some similarities to the Privacy Act Request. For example, the request should be as specific as possible without limiting the parameters of the search. There are differences of which you should make your students aware.

First a FOIA request does not require the signature or authorization of a client, since you are not asking the agency for records pertaining directly to him or her. Next, federal agencies must respond to all requests for information within 10 working days, as explained in the textbook. Federal agencies strictly apply the Privacy Act to FOIA requests and a requester should be prepared to receive incomplete information.

Publications/Internet Resources. I don't think I can add much to what's in the textbook other than the suggestion that you obtain some samples of source-books for your students. But if you take a library tour, as suggested later on, this can be covered then. And, you should review the various publications listed in the textbook. I pass around the Consumer's Resource Handbook and encourage my students to obtain a copy (it's free).

Now many agencies are publishing information about themselves directly on the Internet. Downloading can be a practical problem, especially when the information is a 200-page manual. It might be better to create Internet "Bookmarks" for future research and reference.

Selected Departments, Agencies, and Commissions. I got this list from the *United States Government Manual* table of contents. I select out for discussion what I consider some of the more important.

State Government Sources. The type of information that is obtainable from state government sources depends a lot upon a particular state's approach to public access to its records. Some states have set up computer databases containing agency information with complete free public access by modem or through the Internet. In others, like Kansas, much is free, but access fees are charged for certain information.

Source Identification. I want to mention again the telephone book for a state's capital city. Note also many state agencies have toll-free telephone numbers and information centers, like on the federal level. In my state, I can call the governor's office toll-free for assistance.

Accessing. Point out to your students that there may be other statutes and regulations applicable to accessing a state agency's records besides the state's open records act.

Publications. Many states, have a governmental printing office. They will have a state newspaper to which the lawyer or law firm can subscribe. Whenever I deal with a particular state agency I always get its forms, pamphlets, etc., which sometimes are free or carry a nominal costs. For example, here in Kansas, the Workers' Compensation Commission, sells a pamphlet containing the statutes, regulations, and information about its operations.

Selected Departments and Agencies. I'll leave it to your discretion how much time you want to spend on your state's agencies. I always try to discuss the office of the secretary of state as well as, the department of revenue, the department of motor vehicles, and the department of transportation. With the latter, I point out their system of photographing every so many feet all of the state's highways, including intersections and how their photographs are available to the public. Such can be invaluable in an automobile accident case at an intersection that has been materially changed since the date of accident.

Local Government Sources. This is the front line of information gathering, since many legal-based activities such as zoning happened here.

Source Materials. It would be best if you localize your materials here. I tell my student that for municipalities, the city clerk's office is a good place to start in your information search. This is especially true in small towns. Clerks can also be helpful in gathering case or direct evidence.

Many local governmental entities have turned to the use of tape recordings to make a record of their meetings and activities.

Accessing. Accessing of local information sources and records can be very difficult, since there is so much public contact. Employees of local government sources will sometimes take it upon themselves to be the "keepers of the flame" without having a clear understanding of the ability and right of the public to access.

OTHER SOURCES (255)

Business Sources. The legal assistant will be called upon to find out information about a business and its operations. You should distinguish for your students the differences between a publicly-held corporation and a small, privately-owned corporation or business. Some of the business sources listed in the textbook are devoted exclusively to the former, while others make no such distinction.

Since the sources listed will usually be found in public libraries, you could save your discussion until later. I like to specifically cover *Thomas' Register of American Manufacturers*, in both print and electronic form, with my students since they have to use it for the research assignment at the end of this chapter.

Local Sources. Many large communities now have business directories that list locally owned and operated companies.

Institutions and Organizations. Again, you might want to wait to discuss the publications listed in the textbook until you get to Libraries. Note, however, there is a unique information source through the IRS with respect to charitable organizations and foundations that are required to file forms 990-PF and 990 AR, both of which are accessible by the public.

Individuals. Information about individuals can be accessed in many instances through organizations, associations, and professional listings. For lawyers, the prominent one is the *Martindale-Hubbell Law Directory*. If you are a lawyer, you might want to use yourself as an example here. If you are not, then use the name of a well-known lawyer in your area. In addition to regular listings, the directory has listings with complete biographical sketches for each lawyer listed. See Appendix 2 for Internet resources on lawyers.

Information Specialist. This has become big business. It can also be very expensive. If such a person is to be utilized, the factors listed in the textbook must be considered. Also, if large costs are estimated, then the client's written permission must be obtained. Many large corporations are using in-house information specialists.

LIBRARIES (259)

Perhaps the most important source of information is the library. The term library has taken on new meaning in the electronic age. Look at all the different types of libraries listed in the textbook. If your students as legal assistants do not know how to use the basic public library collection, then they will be lost when called upon to do research in specialized libraries, and lawyers will do just that.

For example, I know of a small plaintiffs' law firm (8 lawyers, 4 legal assistants) that handles medical malpractice claims. None of the lawyers but each of the legal assistants has his or her own access permit, costing \$300, to a local university medical school library.

Unfortunately, many of your students may not admit their lack of library skills. This lack of an important competency is recognized by a number of colleges and universities that require their students to take a library research course. Others require incoming students to go through an orientation of the library. With this in mind do not be tempted to teach a library course when you cover these textbook materials. Rather, take your students to your school's library or if none, to a public library, and arrange for a librarian to discuss how they would utilize the resource materials related to the assignments at the end of this chapter.

Identification. I do, however, point out to my students that they should inventory the library resources in their area, including special or unique features they have. For example, my local public library at its central and other branches has an internal computer linked catalog of its entire collection. It can also be accessed by computer via modem. And, its resources are on the Internet.

Another important feature is interlibrary loans which eliminate inordinate travel to get books.

Finally, you should explain to your students, if they don't know already, that librarians in providing assistance can either be extremely helpful or useless. They must be able to recognize the personality type with which they are dealing. I once attended a seminar on the relationships between librarians, faculty, and administrators in colleges and universities and was told that many librarians do indeed have passive personalities and lack interpersonal skills in dealing with library patrons. I point all this out with my students only to emphasize that they must achieve self-reliance when utilizing a library.

Reference Materials. I tie the different reference materials listed into the library research assignments at the end of this chapter. Review the works listed under Library Research.

Periodicals and Newspapers. When I take my students to the library, I have the librarian give a demonstration on how to use InfoTrac II and microfilm and microfiche readers. And these resources are made a part of the research assignments.

DATABASES (264)

The textbook materials only touch upon the highlights of this area of information research. Go over the advantages and disadvantages thoroughly. Many fee-based databases, such as Medline, are now free through the Internet. No matter the cost arrangement, I advise my students to do a “hard copy” search first. This helps them become familiar with the materials and shortens online time considerably.

THE INTERNET (267)

I advise my students to take an Internet training course. Many have taken my Paralegal Program’s course entitled Computer-Assisted Legal Research, which covers use of the Internet, LOIS, and LEXIS-NEXIS. If your students have Internet access, then you should encourage them to create their own Internet directory similar to Appendix 2 of the text.

ASSIGNMENTS

Assignment - Freedom of Information Request

Utilizing the United States Government Manual and/or the Internet, identify a federal government agency and review its Freedom of Information request procedures. Then prepare a request letter to it in the format found in Figure 10:3.

Assignment - Library/Internet Research

For this assignment you need to supply the information requested for the following case situation. All information needed can be found in the reference section of our library. However, you may utilize public libraries so long as you are able to ascertain the information requested. For **each identified item** of information you are expected to provide **answers with pertinent detailed information** including **names, addresses, telephone numbers, publication titles, dates, page numbers, etc.** Review the client’s problem given below and the factual information needs. Identify each item of information needed and turn in a list as part of your responses. Correct citation form, especially for publications, is expected.

CASE SITUATION: PRODUCT LIABILITY

The Client’s Problem:

Our client is a 29-year-old man. He was doing some work in his woodworking shop at home when a small piece of wood flew up from his power saw and struck his safety glasses. The piece of wood went through the safety glass and into his left eye, and he has lost his vision in that eye permanently.

Factual Information Needs:

This is a most unusual case. We have lots of medical documentation and have gathered facts relating to the incident. But, there is other information that is necessary for the development of our case. First, let’s find out about safety glasses in general. When and where were they invented? These were made of clear polycarbonate. What’s that? I don’t know if there is any kind of patent on them, but if there were, from what government agency would we get a copy of the patent application?

It might be a good idea to contact a research organization in the area of ophthalmology, particularly as to injuries to the eye. And see if you can come up with the name and information on a national ophthalmological association.

The manufacturer of the safety glasses is Rally Products, Inc. (Note this manufacturer's name was used only for the purpose of this assignment, and this assignment is not meant to reflect in any way upon the quality of its product.) Get details on it, including the city and county where it's located. Also, obtain information on a lawyer or law firm in the county seat or a major city in the county that handles product liability cases. And see if you can locate a local manufacturer in our area that we could contact to "educate" ourselves. I understand that the manufacturer may get bought out by Nortek, Inc., which is listed on one of the national stock exchanges. Please check it out. Get its trading symbol as well as its home office address and telephone number. Also, I believe there is some sort of product safety commission, and it may have information relating to eye injuries from consumer products. Does it have any hotline, toll-free number, we could call for quick answers and information?

Using InfoTrac II, see if there are any recent articles on safety glasses and provide me with a printout of it. Check our library's computer index to see what is the *latest* book available within its system on diseases and injuries to the eye. Verify whether there are any more current books.

One other item that I'd appreciate your doing while you are in the library for this is to get me some information on a prescription drug called Duricef. I want to know if there may be material side-effects from its use.

Normally, in gathering factual information, one of the most difficult tasks is finding sources. However, in cooperation with our reference librarians and to lessen confusion in the library, the following information is provided for the above assignment:

1. *Encyclopedia of Associations*
2. *Facts on File*
3. *United States Government Manual*
4. *Physicians' Desk Reference (PDR)*
5. *PDR for Non-Prescription Drugs*
6. *Encyclopedia Britannica*
7. *Thomas' Register*
8. *Standard & Poor's Stock Reports*
9. *Books in Print*
10. *Directory in Print*
11. *Research Centers Directory*
12. *Lawyers Desk Reference, Vols. I & II*
13. *Standard & Poor's Corporation Records*
14. *Information U.S.A.*
15. *The World Book Encyclopedia*
16. *Encyclopedia of Chemistry*
17. *Martindale-Hubbell*
18. *Rand McNally Road Atlas*
19. *Chemical Dictionary*

(Note: The information needed will not necessarily be found in all of the above sources and could possibly be found in similar reference books)

ANSWERS

The number following each answer refers to numbers used above.

Invention of safety glasses, 6, Vol. 10, p. 296
Clear polycarbonate, 19, p. 461
Patent information, 3, p. 148
Ophthalmological research organization, 11, Vol. 1, p. 376
National ophthalmological association, 1, Vol. 1, Part 2, p. 1499
Manufacturer of safety glasses, 7, 81st Ed., Vol. 18, p. 2532 (1991)
Law firm in county seat or major city, 17, Vol. 8, p. 317B (1991)
Local Manufacturer (see local business directory or Thomas' Register)
Consumer Product Safety Commission Hotline, 14, p. 63 (1986)
Recent magazine article (use InfoTrac II)
Latest book available (use library catalog)
More current books (use 9)
Duricef, 4, p. 1406 (1992)

Several of the above answers can be found using the Internet. You may use it, if you wish.

(This assignment should be changed with each new class of students or at least once a year. I have changed it to include a ping-pong ball exploding, with the fragments hitting a person in the eye, the swallowing of a safety pin (remember those?) by a toddler; a house fire caused by too much electrical current; and a small fire extinguisher going off and spraying on a small child. If you'd like copies of my materials, please contact me. Remember, the important thing is that your students use the reference books and become comfortable with using library reference materials.)

TEST QUESTIONS

TRUE/FALSE

In an automobile case, a court will usually take judicial notice of the time of sunrise/sunset.

(True)

Properly authenticated copies of records of federal agencies can be admitted into evidence in place of the originals.

(True)

With specified exemptions, under the Freedom of Information Act (FOIA) a legal assistant can obtain information maintained by federal administrative agencies as well as by the legislative and judicial branches of the federal government.

(False)

Whenever possible Internet resources should be used instead of print-based media.

(False)

MULTIPLE CHOICE

With the information explosion, while legal assistants need to be knowledgeable about factual information, it is just as important that they

- avoid embarrassing the lawyer
- seek to be "all knowing"
- have the ability to access sources of information
- a and b

(c)

When utilizing printed materials, the legal assistant should

- a. ascertain the date of publication
- b. mark the pages for easier access later on
- c. remove pertinent pages
- d. hide them to limit access by others

(a)

Although federal government publications can be obtained from the Superintendent of Documents, a legal assistant may access them locally at

- a. a freedom of information center
- b. an American Cultural Exchange Center
- c. a public library designated as a Depository Library
- d. the offices of the Resolution Trust Corporation

(c)

How long do federal agencies have to respond to a request for information under FOIA?

- a. 5 working days from the date of the receipt of the request
- b. 10 working days from the date of the receipt of the request
- c. 10 calendar days from the date of the request
- d. 14 days from the date of the request or 10 working days from the date of the receipt of the request, whichever is later

(b)

Which of the following is not a federal department, agency or commission?

- a. Department of Commerce
- b. Environmental Protection Agency
- c. State Department of Revenue
- d. National Highway Traffic Safety Administration

(c)

When an information specialist is utilized, a factor to consider in his or her selection is

- a. credentials, qualifications, experience, and references
- b. database experience if the search will be conducted with computer databases
- c. time and costs
- d. all of the above

(d)

SHORT ANSWER

Identify some of the libraries available for informational research.

Identify the search techniques that the legal assistant should follow to conduct a database search.

**SERVICE OF SUMMONS AND
COMPLAINT AND SUBPOENAS**

Before I get into a discussion of the materials in the last chapter, I ask my students to take out the course syllabus (Appendix A), and we review the objectives, except for those pertaining to this chapter, to see if we have covered them as we planned.

Before we do this chapter, I like to schedule as a guest speaker a private investigator or free-lance legal assistant who has had experience in serving summons and complaint as well as subpoenas. As an alternative, I will use a sheriff's deputy from the civil process desk or a public sector investigator.

I send the speaker a copy of the course syllabus beforehand, and we discuss with specificity what they should cover in the presentation to my students. I do this because I have had some guest speakers in the past stray from the subject area.

**SERVICE OF SUMMONS AND COMPLAINT -
FEDERAL DISTRICT COURTS (269)**

Before I get into the materials on the federal district courts, I cover some general areas and make reference to the state court systems. Students should be more familiar with their state court systems than that of the federal and I like to reinforce that initially by telling mine to get all applicable statutes and court rules and make sure they're current.

Filing of the Lawsuit

Because this step is the formalization of the adversarial relationship between the plaintiff and defendant, we place great emphasis on its being done correctly. For example, the courts through statutes and court rules require uniformity. In Kansas they specify the size of paper, pleading format - including spacing - and they require each pleading to be signed by the lawyer. I had a student who worked in the court clerk's office, and she told the class how it refuses to file an unsigned pleading.

Our statutes require each lawyer to be current on his or her county law library dues before a pleading will be accepted.

For some time the responsibility for the preparation of service forms has been placed on the lawyers in my state. In my urban court area, the clerk's office has assisted lawyers on this by preparing model forms. These can also be obtained on disk. Some local courts have all of their rules and forms available through the Internet. I use this as an assignment from time to time.

One other related thing before we move onto the federal courts; current cost requirements must be ascertained and in what form they will be accepted. By the latter I mean cash, check, or credit card. This is equally important where there will be out-of-state service.

The federal district courts require all lawsuits, when filed, to be accompanied by a cover sheet, see Figure 11:1A. You should review the cover sheet with your students and here stress the importance of obtaining local federal district court rules. Lawyers must be sworn in before a federal district court before they can practice before it. Nowadays this is automatic with the

passing of the bar examination. The clerk of the federal district court administers the oath at the same time it is done by the clerk of the state supreme court.

Issuance of Summons. I have nothing to add here except to make sure that the forms used are current.

Service of the Summons and Complaint (Process). Since service in civil cases in the federal district courts is no longer done by the U.S. Marshal, federal statutes provide for this to be done by private means. See Figure 11:3. Even with the federal district courts, this is “localized” in that some do not even require a special appointment. Tell your students to check with the clerk’s office for exact information.

Service by Mail (Notice and Acknowledgment). Many lawyers don’t bother with private personal process service. Instead they do service by mail by following the procedures outlined in the textbook. Point out to your students that the federal rules do not require the mailing to be other than first-class. However, they may use certified mail when they want proof of service that the defendant did not respond.

Personal Service Requirements. It is very important that you cover each of the requirements listed in the textbook. Note that personal service in the federal district court is predicated upon statutes of the state where they sit, so you will have to get into state statutes on this at this time. Avoid doing too much about your state’s process requirements.

SERVICE OF SUMMONS AND COMPLAINT - STATE COURTS (280)

You must “localize” your materials here. To do this for Kansas, I have obtained copies of law reviews and bar journal articles on our service of process statutes and procedures to supplement the procedures set out in the textbook. I check with the people at the sheriff’s office for their comments.

Methods of Service of Process. You should take the materials under this topic and restructure them as necessary to conform to your state’s requirements. Assuming you have service by certified mail, I suggest that you walk your students through the preparation of certified mail forms.

Personal Service Requirements. Again “localize” the textbook materials.

Long-Arm Statutes. It would be great to have about a week to discuss long-arm statutes, but this subject should have been covered in your program’s litigation course. Whether it was covered or not, I suggest you pass on to your students information on the CT Corporation System, 1633 Broadway, New York, NY 10019; (800) 624-0909. They have an excellent free pamphlet on this subject as well as other areas of the law for which they provide support services. Other companies that specialize in this area can be found on the Internet. I go over the minimum contacts listed in the textbook.

Immunities and Exemptions from Service. Review your statutes on this. I give examples of fraudulent service.

Basic “Mechanics” of Service of Process. I give my students practical pointers to avoid problems. Service by certified mail should become routine to them, especially when they do lawsuits in great numbers, e.g., collections. A trap for the unwary is out-of-state service. The out-of-state sheriff’s office must be contacted beforehand to find out about specific costs and form of payment.

When the legal assistant functions as a process server, he or she should know the “rules.” I review specific techniques to accomplish service without problems. In a case decided by the Kansas Supreme Court, the clerk of the trial court in preparing the summons made an address error, and there was a delay in service so that it was beyond the statutory 90-day requirement. The problem was that the statute of limitations had run. Fortunately for the plaintiff, the court said the plaintiff should not be deprived of the right to adjudication by a delay that was the fault of the clerk’s office and not the plaintiff.

This case brings to mind what I discussed at the beginning of this manual: You don’t need the case cluttered up with collateral issues.

SERVICE OF SUBPOENAS (292)

Review the two main area of subpoenas.

Federal District Courts. As you can see, my discussion revolves around Rule 45, FRCP. Note to your students that the lawyer can sign the subpoena on his or her own. Also, go over the procedures and service requirements, particularly those for distance and payment of fees.

State Courts. Review your state’s statutes and rules. I stress the importance of the legal assistant as a server and trial coordinator. I tell my students that friendly subpoenas for trial should always be issued and served. These formalize the relationship with friendly witnesses and give credence to their missing time at their place of employment when they are called upon to testify.

ASSIGNMENTS

Since this chapter ends the course, I don’t particularly give my students any assignments related to its materials. However, if you desire to do some, then I suggest the following: an assignment where they prepare a summons for service by mail; an assignment where they prepare a letter regarding access to box holder information as per Figure 11:10; and a subpoena for attendance at trial as a witness.

TEST QUESTIONS

TRUE/FALSE

Failure of the plaintiff’s lawyer to sign a complaint or petition may result in the clerk of the court refusing to accept it for filing.

(True)

When service is made upon a defendant by certified mail, it is best that the postal certification number be typed on all documents sent to the defendant.

(True)

When service will be made by an out-of-state sheriff, it’s a good idea to contact his or her office beforehand with respect to fees to avoid unnecessary delay.

(True)

In serving a summons and complaint, the legal assistant must touch the defendant with the papers if he or she refuses to take them.

(False)

A “friendly” subpoena is where the plaintiff gives a subpoena to the defendant before the start of the trial in a friendly manner.

(False)

MULTIPLE CHOICE

Under our state’s statutes a return of personal service of a summons must be made within how many days?

- a. ____
- b. ____
- c. ____
- d. ____

(Ascertain your state’s time requirements and fill in the blanks)

In the federal district courts a person must be at least how old to be a private process server?

- a. 16
- b. 18
- c. 20
- d. 21

(b)

Which of the following would be a questionable service of process?

- a. upon the president of a corporation
- b. upon an eight-year-old child for her mother
- c. upon the spouse of the defendant at their place of residence
- d. a and c

(b)

In some states a person is immune from service of process if he or she is

- a. coming and going from a state to testify at a trial
- b. gainfully employed
- c. without visible means of support
- d. none of the above

(a)

A subpoena for the taking of a deposition will not be effective unless it is personally served upon the deponent

- a. within five days of its issuance
- b. at his or her place of residence
- c. along with the required witness and mileage fees
- d. not less than two days before the date set for taking his or her deposition

(c)

SHORT ANSWER

Identify at least four of the minimum contacts necessary to justify personal jurisdiction under long-arm statutes.

Identify the persons on whom personal service can be made on behalf of a defendant corporation.

SAMPLE COURSE SYLLABUS

Name Of Educational Institution

Course Syllabus (Name of Program)

Name of Course (Interviewing and Investigation)

Course Number: _____

Time of Course Offering (Semester, Quarter, Etc.)

Instructor Information

Name: _____

Telephone: _____

Office: _____

Office Hours: _____

Course Information

Credit Hours: 3

Prerequisite(S):

Prerequisite Or Corequisite:

Required Text(S)

Pener, Michael A. *Discovery: Interviewing and Investigation*, Third Edition. Dallas, TX: Pearson Publications Company, 1998.

Supplemental Materials:

Supplies:

Fees:

Caveats: Success in this course is very dependent upon the student attending all class sessions, due to the specialized nature of the course. If a session is missed, the student should contact the instructor to discuss the missed session and obtain handout materials.

Course Description:

Upon successful completion of this course, the student should be able to explain ethical rules and standards governing the legal profession, interview clients and witnesses, and perform factual investigation pursuant to legal proceedings. The emphasis will be on the development of interviewing and investigating skills.

Course Objectives:

Upon successful completion of this course, the student should be able to:

1. Explain the difference between authorized and unauthorized practice of law.
2. Identify situations involving the unauthorized practice of law.

3. Discuss the principles of the American Bar Association Model Rules of Professional Conduct as adopted by the state supreme court and explain their applicability to paralegal activities.
4. Determine whether there has been a violation of the Model Rules of Professional Conduct.
5. Explain the procedures for disbarment and other forms of discipline of an attorney by the state supreme court.
6. Explain the applicability of standards and guidelines of other professional organizations regarding paralegal activities.
7. Identify and analyze situations posing special ethical considerations for paralegals.
8. Identify and explain forms of evidence.
9. Identify formal discovery tools.
10. Explain informal discovery.
11. Develop an informal discovery plan.
12. Conduct legal analysis and research.
13. Conduct fact analysis.
14. Identify parties, entities, and property interests.
15. Explain the various means of communication by persons, including verbal, nonverbal, and written.
16. Explain and conduct communications with and on behalf of clients.
17. Perform various tasks related to witnesses, including their identification and location, interviewing and statement taking.
18. Explain the utilization of expert witnesses.
19. Identify and procure various forms of documentary and physical evidence.
20. Identify and access public records.
21. Explain the Privacy Act.
22. Identify and access private records.
23. Identify and access sources of information, including government sources, business sources, libraries, and databases.
24. Identify requirements for the service of summons and complaints, and subpoenas in the federal and state courts.
25. Serve summons, complaints, and subpoenas.

Course Requirements

1. Tests: Three examinations. Test will consist of true/false, multiple choice, and short answer questions. Tests will be returned for review one week after given.
2. Ethics applications: After studying legal ethics, the student will be given an assignment applying legal ethics.
3. Investigation assignments consisting of the preparation of an investigation plan and client interview outline, and the taking of a witness statement.
4. Fact research assignment consisting of the use of resource materials and involving analysis of factual information.
5. All students must take tests and turn in assignments at the time they are scheduled. Late assignments will not be accepted without good cause. In the event of illness or emergency on a test date, the instructor must be notified prior to or immediately after the class session. Make-up tests will be given provided proper notification has been given to the instructor. All make-up tests must be taken prior to return of the tests to the class for review.
6. Americans with Disabilities Act (ADA) disclosures. (Check with your institution for exact language)

Evaluation

Three examinations:

- 50.0% of grade Ethics assignment
- 10.0% of grade Investigation assignments
- 25.0% of grade Fact research assignment
- 15.0% of grade

Total: 100.0%

Grading Scale:

- 90 - 100% A
- 80 - 89% B
- 70 - 79% C
- 60 - 69% D
- Below 60% F

TENTATIVE COURSE SCHEDULE

The following course schedule will be followed as much as possible. Deviations will be announced in class. You will receive confirmation of a test date at least one week in advance. Tests include lecture materials. All reading references are to the required course textbook.

Lecture

Week Subject, Reading Assignments, And Test Dates

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|---|--------------------------------------------------------------------------------|
| 1 | Orientation to course: review of syllabus and text; explanation of assignments |
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2	Discovery in law practice: Chapter One
3	Evidence-its relationship to discovery: Chapter Two
4	Legal theories & fact analysis: Chapter Three
5	Identification of parties and entities: Chapter Four
6	Identification of property interests; Chapter Four continued
7	TEST #1-Communication techniques: Chapter Five
8	Communication techniques: Chapter Five continued
9	Client communications Chapter Six
10	Case investigation-witnesses: Chapter Seven
11	Chapter Seven, continued; Case investigation-documentary & physical evidence: Chapter Eight
12	Chapter Eight, continued
13	TEST #2-Public & private records: Chapter Nine
14	Sources of information: Chapter Ten
15	Chapter Ten, continued; Guest speaker on investigation
16	Service of summons, complaint & subpoenas: Chapter Eleven
Final Week	TEST #3