

Use of Private Investigators - Getting the Goods Without Getting in Trouble

July 27, 2011

In Summary Newsletter - Summer 2011

By utilizing private investigators (P.I.), insurers, employers and many other litigants who have been sued, believe a suit will soon be filed against them or are considering filing suit themselves, find them to be an invaluable resource. From shooting holes in a plaintiff's personal injury case where he or she has claimed injuries or damages to determining whether filing suit will be a worthwhile undertaking, private investigators regularly provide significant value to litigants.

However, a significant aspect of the benefits gained from private investigators is the possession of knowledge and information that the opposition does not know you possess until you determine the most beneficial moment and method for you to disclose it. Fortunately, Michigan Law's Private Investigator Privilege provides statutory protection for information litigants obtain via private investigators in most cases.

Origin of the Privilege – MCL §338.840

Except as required by law, neither any licensee (P.I.) nor any employee, principal or manager of a licensee can disclose "any information acquired during employment by the client" to anyone other than the client. Further, "any communications, oral or written, furnished by a professional or client to a licensee, or any information secured in connection with an assignment for a client, is considered privileged with the same authority and dignity as are other privileged communications . . ."

Michigan's State and Federal Courts Interpret the Privilege Broadly

While taking slightly different analytical approaches, Michigan's state and federal courts have consistently upheld the P.I. privilege. Michigan's state courts have repeatedly ruled that the breadth of the P.I. privilege is consistent with that of the attorney-client privilege, and finding that **all information obtained by a P.I. on behalf of his client** (*In re Investigation of Death of White*, 250 Mich. App. 39; 662 NW2d 69 (2003) and even **the identity of a P.I.'s client** (*Ravary v Reed*, 163 Mich. App. 447 (1987) are within the scope of the privilege's protection.

Similarly, Michigan's federal courts have held that "[t]he questions asked by the investigators and the responses the witnesses elicited are intertwined with the mental impressions, conclusions, opinions or legal theories of the defendants' attorneys," and, therefore, they are protected from

discovery by the attorney work product doctrine. See *Miller Oil Company v Smith Industries*, 1990 WL 446502 (W.D. Mich 1990) (unpublished) and *In re Grand Jury Subpoena dated Nov. 8, 1979*, 622 F2d 933 (6th Cir 1980).

Liability to Litigants for Acts by their Private Investigators

“Usual and ordinary” agency principles apply when courts analyze whether a litigant should be held liable for any allegedly wrongful acts committed by their investigators. If the (investigator) servant is acting within the scope of his employment when he commits the wrong, then the master (party) is liable. If the servant (investigator) is acting beyond the scope of his employment when he commits the wrong, the master (party) is not liable. See *Renda v International Union et al.*, 366 Mich. 58; 114 NW2d 343 (1962).

Lawyer Liability/Accountability for Actions by Private Investigators

Pursuant to Michigan's ethical rules and opinions applicable to lawyers, a lawyer may not “employ, retain or have an association with a non-lawyer/investigator” for the purpose of communicating with a represented party. However, a lawyer does not violate ethics rules if she or he merely “acquiesces” in investigative activities lawfully engaged in by an investigator who isn't retained or employed by the lawyer and does not undertake activities at the direction of the lawyer.

One example of this rule or standard as applied by the State Bar of Michigan is:

An insurance company retains outside counsel to defend workers' compensation claims. The insurance company has its in-house investigative unit investigate the veracity of the claimants' allegations, especially those relating to their alleged physical limitations. Outside counsel becomes aware of these investigations and that they often involve the investigators using pretexts to induce the unwary claimants to do things that contradict their assertion as to the limitations caused by their alleged injuries – like lift heavy objects and assists in strenuous tasks. The acts of the investigators are not imputed to the lawyers for purposes of the ethics rules, and the investigators are not subject to the ethics rules applicable to lawyers.

Penalties for Improper Use or Control of Private Investigators

The U.S. District Court for the Western District of Michigan addressed this issue in *Upjohn v Aetna*, 191 US Dist Lexis GG2; 1991 WL 490026 (WD MI 1991). In this case, Aetna's lawyers hired investigators to interview former Upjohn employees in an attempt to obtain information about environmental damages that were the subject of the pending litigation. The reviewing federal magistrate found that the investigators failed to determine whether the former employees were represented by counsel, failed to clearly identify themselves as working for lawyers for Aetna in the litigation against Upjohn, and failed to state the purpose of the interviews. The court determined:

- It was not permissible for the lawyers to accomplish the deception they were not allowed to use themselves via the use of investigators; and
- the evidence obtained through the interviews had to be excluded.

It is notable that exclusion of beneficial or even essential evidence may not be the only sanction suffered by litigants or attorneys when they are held accountable for improper conduct by investigators, and licensing sanctions, monetary fines or even dismissals of claims or defenses may result.

Preserving and Best Utilizing the Privilege

The privilege is applicable when the private investigator used is a *duly licensed* investigator. Therefore, it is important that litigants obtain the pertinent information regarding an investigator (or his or her agency's) license status before retaining the investigator and should keep this information on file should it be needed to defend the privilege.

Further, litigants and their attorneys should take care not to indicate that their basis for a claim or defense is "information (or evidence) obtained via a private investigation," or the court might rule that the privilege doesn't apply to such information or evidence.

Finally, the privilege does *not* provide litigants an opportunity to "sandbag" or withhold evidence for a strategic advantage that results in *prejudice* to the opposition. Therefore, make sure that any evidence obtained from a private investigator, and which litigants intend to use to support their positions, is disclosed timely in accordance with the court's applicable orders in each case to avoid losing the opportunity to use it.

Value Proposition

Possession of superior information and the ability to use it to your advantage is a valuable tool. Use of a P.I. is often an efficient method by which to obtain such information, and following the measures outlined above will preserve the privileged status of the investigator-client relationship, as well as the information obtained through it.

The Bulletin Newsletter is distributed by the firm of Plunkett Cooney. Any questions or comments concerning the matters reported may be addressed to the firm's Labor & Employment Law Practice Group Leader or any other members of the practice group. The brevity of this newsletter prevents comprehensive treatment of all legal issues, and the information contained herein should not be taken as legal advice. Advice for specific matters should be sought directly from legal counsel.

Copyright© 2011. All rights reserved PLUNKETT COONEY, P.C.