
Pat Kenney Discusses Private Investigators

Pat Kenney was quoted extensively in an article on Private Investigators in the June 21, 2007 issue of The Buffalo Law Journal.

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The (private) eyes have it
Lawyers outsource legwork to investigators
BY JODI SOKOLOWSKI

Mike Reitano, president of Probe Services Professional Investigations, sits in a surveillance van equipped with a video camera and other gear used in gathering visual evidence.

JIM COURTNEY/BUSINESS FIRSTPrivate investigators are one of many tools in an attorney's toolbox. From performing criminal history checks to securing evidence in workers' compensation cases, private investigators fulfill needs that attorneys just can't feasibly get to — like sitting in a car for hours doing surveillance or obtaining statements from witnesses. Surveillance is expensive, but if you have a case that's worth millions of dollars, you want to verify the veracity of the person before you attempt to settle a case," said Patrick Kenney, managing partner of Kenney Shelton Liptak Nowak. "It's absolutely a cost benefit. However, law firms need to strike a careful balance between not using private investigation services adequately and overusing them in a desperate attempt to get the necessary proof of evidence. "If it's overused, it can be expensive," said Ken Manning, a partner at Phillips Lytle LLP. "If it's not used, you could be missing factual information that could lead to a better outcome." The whole truth Since private eyes may be watching a person's every move, anyone pursuing an injury claim should be aware that a defense attorney might have retained an investigator to gather evidence that would deflate that claim. As defense counsel on a personal injury case, Kenney once hired a private investigator who found the claimant shoveling his driveway, his sidewalk and his neighbor's driveway. "In a personal injury case where somebody says they can't do a particular activity or they can't bend over or use their arm, we'll send a PI out to verify that," Kenney said. "It's very powerful evidence in court." And it works on the converse as well — when there isn't enough evidence to support a claim. When checking out whether there were any witnesses to a car accident, for example, "Sometimes the best information you get is when you find there isn't any information," Manning said. "It's sometimes as valuable as finding someone who did. You go into it with the expectation that you might not find something." Investigators are careful not to let their client's bias influence their work, said Mike Reitano, president of Probe Services Professional Investigations, which has 60 investigators who work across the state and in Pennsylvania and Florida. When investigating a personal injury claim, he said, "You may go out there and find that person is in bad shape. That's OK. We're out there to find the facts. We don't slant anything." "You want to believe your client," he said. "You may want it to be that way for a variety of reasons, but sometimes it isn't the case. Just getting to the truth is what we try to do." President Thomas Thurston said Thurston Investigative Services operates on the same principles. "I won't alter any investigations to show it one way or the other; I go down the middle," said Thurston, a retired FBI special agent who was in the Buffalo office for 32 years. "I would expect all attorneys that work with me would expect that. More than anything else, I rely on my reputation." Scope of services

Sound investigations help defense attorneys to know what they're up against, and may affect their decision whether to accept the case or settle it, Reitano added. While sources say it's primarily defense attorneys who use private investigators in the course of representing clients, plaintiffs' attorneys also retain private eyes to do proactive investigations — when a client company is trying to determine whether an employee is committing fraud, for example. "Obviously there are high-profile cases where a company knows there's a potential for litigation, so they'll do the same thing and take statements of witnesses," Kenney said. Reitano said the vast bulk of Probe Services' work is for plaintiffs' attorneys representing clients following motor vehicle or construction accidents. "That's where the majority of the work is," said Reitano. "This time of year is an extremely busy season. From May to October, that's when we do a lot of surveillance." Thurston, who sees the profession as a "constant chess game," said he answers to the lead attorney on any given case, as that person is the "lead investigator." "I'll do what they want me to do. I look to their instruction as to what they want accomplished," he said. "It's up to me as an investigator to find a unique way to obtain that." Manning, who handles corporate litigation, may also use an investigator to help gain a better understanding of a company or industry when preparing a contract or resolving a dispute. "I might not have enough information, so it's supplemental discovery," he said. "I might want to locate some witnesses who might fill in the gaps." Logistics

Due to logistical and legal issues, private investigators are also crucial for completing tasks that lawyers can't necessarily do. For example, if an attorney were to take statements from non-party witnesses, he or she wouldn't be able to serve as a witness if the statements are challenged during trial. However, a private investigator can overcome that technical challenge. "When it really comes into play is when you do a telephone interview. Then the

investigator can impeach and show inconsistencies in what [the witness] testified. I couldn't do that," Kenney said. "It's also less expensive for a private investigator to obtain a statement rather than an attorney conducting a "full-blown" deposition. Using a private investigator is almost crucial to get a statement since attorneys don't have subpoena powers. And more often than not, witnesses are more likely to spill their guts to a non-attorney. "I find that people don't necessary talk to attorneys as freely as they once did, so it's helpful for someone who doesn't have a law license to talk to someone in the field," Manning said. "It seems like they talk to them more freely." And since private investigations are usually conducted prior to trial, and long before discovery, the attorney can control the pace of the investigation more carefully than the pace of a lawsuit. "The rules of engagement in court have to be respected, but in field investigation, you can control that yourself," Manning said. "I don't know a month that goes by that I don't work with an investigator in some aspect that I'm doing."