

The Ethics and Legality of Jury Investigations

Statutes, regulations and case law governing private investigators

by H. Thomas Watson & Lisa Perrochet

“There is no way, except with my unique techniques, that you would know this.”

[“Feds have tapes of Pellicano talking to clients” (Feb. 16, 2006) *Associated Press* www.msnbc.msn.com/id/11399390 [as of Mar. 9, 2006]. (*Associated Press* article quoting the federal indictment papers recounting alleged taped conversations between investigator Anthony Pellicano and the attorney who hired him)].

There has been much press recently regarding unethical and illegal investigations in connection with litigation. One prominent Southern California lawyer has even been indicted for activities in connection with private investigations that he commissioned. However, investigations are a necessary part of litigation, and counsel should be attuned to the laws and regulations that govern such investigations. This article explains some of the statutes, regulations and case law governing private investigators, and focuses on the particular needs for investigating the possibility of juror misconduct.

Private investigators are regulated by the Director of Consumer Affairs under the Private Investigator Act. (Bus. & Prof. Code, §§ 7512 et seq.; Cal. Code Regs., tit. 16, §§ 603 et seq.) Investigators are required to “exercise diligence in ascertaining whether or not the facts and information in the report [submitted to a client] are true and correct” and are forbidden from making “any false report to his or her employer or client for whom information was being obtained.” (Bus. & Prof. Code, § 7539, subs. (b) & (c).) Indeed, investigators may have their license suspended or revoked if they commit any act of dishonesty or fraud, including “making a false statement relating to evidence or information obtained in the course of employment” or “[m]anufactur[ing] evidence.” (Bus. & Prof. Code, § 7561.4.) In addition, during an investigation they are prohibited from “mak[ing] any statement with the intent to give an impression that he or she is connected in any way with the federal government, a state government, or any political subdivision of a state government.” (Bus. & Prof. Code, § 7539, subd. (e).)

Thus, an investigator’s use of misrepresentations during an investigation may result in the loss or suspension of his or her license. For example, in *Taylor v. Bureau of Private Investigators*



(1954) 128 Cal.App.2d 219, a personal injury attorney retained Taylor to investigate an accident for a client who was injured at a filling station operated by Corpe, who was insured by Travelers Insurance Company. Taylor falsely told Corpe that he represented Travelers. During the course of that interview, Taylor secured Corpe’s business card, which he used to falsely represent to an automotive parts company that he was working with Corpe. The Court of Appeal affirmed a judgment denying relief from an administrative order suspending Taylor’s license on grounds of dishonesty.

But positive misrepresentations are not required to support a finding of dishonesty and fraud. In *Wayne v. Bureau of Private Investigators & Adjusters* (1962) 201 Cal.App.2d 427, the Court of Appeal affirmed a judgment denying relief from a suspension order where the investigator accurately identified himself but *failed to disclose* that he had been retained by a party adverse to the party being interviewed. The Court of Appeal held that “the conduct complained of constituted dishonesty and fraud” because the investigator’s engaged in “a studied course deliberately to mislead the unwary and by telling part truths thereby to deceive the interviewees into believing that [the investigator] in some respect represented their agents or principals. [¶] There was the disposition to deceive, betray and mislead the interviewees. In other words, there was a lack of complete integrity.”

Investigators are thus required by law to conduct their investigations honestly, forthrightly, and with complete integrity. Clients who hire investigators are entitled to assume that they will comply with these legal requirements. Although some law firms employ investigators, many firms either retain investigators as independent contractors or recommend that their clients retain a particular investigator directly. As with any other professional, an investigator works as an independent contractor when

he or she “contracts orally or in writing to do a piece of work and renders service according to his or her own methods, subject to control only as to end product or final result.” (Cal. Code Regs., tit. 16, § 604; see *Malloy v. Fong* (1951) 37 Cal.2d 356, 370.) If the investigator’s “own methods” fall short of what the law requires, the attorney or client who hired the investigator should not be vicariously liable for the investigator’s conduct. (See *Privette v. Superior Court* (1993) 5 Cal.4th 689, 693; 38 Cal.Jur.3d (1997) Independent Contractors, § 1, pp. 319-320.)

Investigators are often retained to help determine whether juror misconduct has occurred. Such investigations are necessary because juror misconduct “leads to a presumption that the defendant was prejudiced thereby” (*People v. Nesler* (1997) 16 Cal.4th 561, 578), and because a “biased adjudicator is one of the few ‘structural defects in the constitution of the trial mechanism, which defy analysis by “harmless-error” standards” (In *re Carpenter* (1995) 9 Cal.4th 634, 654). Both criminal and civil litigants are equally entitled to trials free of juror misconduct and bias. (See *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 416 [“civil litigants, like criminal defendants, have a constitutionally protected right to the complete consideration of their case by an impartial panel of jurors”].) For this reason, the Supreme Court has stated that “[n]o principled distinction can be drawn between civil and criminal cases for purposes of the presumption of prejudice arising from juror misconduct.” (*Id.* at p. 417.)

However, there are important differences between investigations of jurors in criminal and civil trials. The identity of jurors in a *civil* trial is public information. (Code Civ. Proc., § 237, subd. (a)(1); *Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258, 263.) On the other hand, information about the identity of jurors in a criminal trial is protected. Such information must be sealed by the court and may be divulged only

upon a petition establishing good cause. (Code Civ. Proc., § 237, subd. (b); Cal. Rules of Court, rule 31.3.) Anyone who knowingly discloses juror identification information in violation of section 237 is guilty of a misdemeanor. (Code Civ. Proc., § 237, subd. (e); Penal Code, § 95.2.)

In addition, jurors in criminal matters are further protected by Code of Civil Procedure section 206, which requires the judge presiding over *criminal* trials to “inform the jurors that they have an absolute right to discuss or not to discuss the deliberation or verdict with anyone.” Section 206 further provides that, if an allowed discussion with a juror regarding deliberation or verdict occurs more than 24 hours after the verdict, the litigant or his or her attorney or representative must initially “inform the juror of the identity of the case, the party in that case which the person represents, the subject of the interview, the absolute right of the juror to discuss or not discuss the deliberations or verdict in the case with the person, and the juror’s right to review and have a copy of any declaration filed with the court.” The court is authorized to impose monetary sanctions if section 206 is violated.

Penal Code section 95.3 specifically forbids investigators from providing criminal defendants and former defendants with information regarding the identity of jurors without court authorization or juror consent. And Penal code section 95.1 makes it a crime to threaten jurors or the jurors’ families in a *criminal* proceeding, which is punishable by imprisonment in a county jail for up to one year, or by imprisonment in the state prison, or a fine not to exceed \$10,000, or both imprisonment and a fine.

No similar laws protect jurors in civil trials. Indeed, in *Erickson v. Superior Court* (1997) 55 Cal.App.4th 755, the Court of Appeal held that a local rule requiring courts to seal juror identification information in all civil and criminal trials was invalid and unenforceable because it was inconsistent with Code of Civil Procedure section 237, which makes

juror identification information public in civil cases. However, the Supreme Court has also noted “that strong public policies protect discharged jurors from improperly intrusive conduct in all cases . . .” (*In re Hamilton* (1999) 20 Cal.4th 273, 303, fn. 23, emphasis added.) Compliance with the Business and Professions Code statutes governing the conduct of investigators should ensure that this public policy is not thwarted.

There is another important distinction between criminal and civil proceedings concerning how the court determines whether juror misconduct has occurred. If the Court suspects juror misconduct during either a criminal or civil trial, it must investigate. “When a trial Court is put on notice that good cause to discharge a juror may exist, ‘it is the court’s duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error.’” (*People v. Farnam* (2002) 28 Cal.4th 107, 141.) After making reasonable inquiry, the trial court may discharge a juror if the court finds that, due to illness or for “other good cause shown to the Court,” the juror is “unable to perform his or her duty . . .” (Code Civ. Proc., § 233.)

After the jury has been discharged, however, only in criminal matters may the court conduct an evidentiary hearing where jurors testify about the alleged misconduct. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 414-415.) In civil actions, the court must resolve an issue of alleged juror misconduct raised in a motion for new trial solely on affidavits, without the testimony of witnesses. (*Linhart v. Nelson* (1976) 18 Cal.3d 641, 644-645; Code Civ. Proc., § 658.) For this reason, civil litigants often need the services of competent juror investigators who can find the jurors, learn from the jurors what happened during deliberations, and then secure juror affidavits attesting to any misconduct identified during the investigation.

It is helpful to use investigators who specialize in jury investigations because

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they are familiar with the type of conduct that may support an allegation of juror misconduct, and can focus their investigations accordingly. In some cases, such investigations have identified misconduct that was not revealed during counsel's informal post-trial discussions with jurors, and have resulted in new trials being granted.

Jurors occasionally attempt to recant declarations they signed. In those instances, the investigator may need to file a declaration describing in detail his or her investigation procedures and the particular interview(s) being disputed. Following are some of the key features of an investigation that is designed to hold up against challenges to the investigative method:

1. *Before* the investigator speaks to any jurors, he should spend time with counsel to learn about the legal theories in the case, any possible collateral facts that may bear fruit during an investigation, and all juror information gleaned during *voir dire*. For example, an investigator may more carefully question jurors about extraneous "law" creeping into the deliberations if he knows that some of the

jurors had legal training. The investigator also should secure as much public information about the jurors as is readily available in order to facilitate the ensuing investigation.

2. The investigator should present his business card to each juror he contacts, together with the business card of the attorney with whom he is working. By doing this, no juror could later claim they did not understand the investigator's relationship to the litigation.

3. The investigator should explain to jurors that they have the choice whether to speak with him, and he should always honor a juror's decision. The investigator also should allow the jurors to select the time and place for the interviews.

4. The investigator should inform the jurors that he is seeking information about the manner in which the jury reached its verdict. Even when no potential misconduct is identified, information regarding which witnesses or other evidence the jury found to be convincing, and why they returned a particular verdict, is extremely informative and helpful to attorneys and institutional litigants.

5. During the interview, the investigator should take copious contemporaneous notes. After the interview, he should dictate more notes. Then the investigator should prepare written reports for counsel based on all of the notes on each interview. Counsel may then direct the investigator to make further inquiry, or draft a declaration for the juror(s) to sign based on the initial interview.

6. The investigator should present the draft declarations to the jurors for their review and correction. He should explain to each juror that their declaration will be presented to the court in support of a motion for new trial. He also should explain that the juror must sign the declaration under penalty of perjury, and must therefore review it carefully to ensure that it is complete and accurate. The investigator should require the jurors who execute declarations to initial each page of the declaration they sign, and to initial each correction that they make to the draft declaration.

The investigative techniques used by experienced juror investigators have been very successful. Such investigations are perfectly proper, and have been very informative even in cases where a new trial has not been granted. Indeed, they are a necessary part of our system of justice. Without appropriate jury investigations, litigants in both civil and criminal matters may be deprived of their constitutional right to a fair trial. ♣

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