



Contents

<i>List of Illustrations</i>	xxxiii
<i>Preface</i>	xxxvii
<i>Acknowledgments</i>	xliii

PART 1: Foundations for Interviewing and Investigating	1
Chapter 1: Introduction to Interviewing and Investigating	3
A. Why These Skills Are Important to the Lawyer	3
1. The relationship between law and fact	5
2. Factual analysis	6
a. Comprehension	6
b. Evaluation	7
c. Application	9
3. The role of factual investigation in civil litigation	10
a. By the attorney for the plaintiff	10
b. By the attorney for the defendant	10
4. The role of factual investigation in criminal litigation	11
5. The role of factual investigation in other legal representation	12
B. Other Skills and Areas of Knowledge Related to Interviewing and Investigating	13
1. Substantive law	13
2. Legal research and writing	13
3. Rules of evidence	14
4. The adversarial system and rules of procedure	14
5. Ethics and professional responsibility	14
C. The Lawyer's Use of Paralegals in Interviewing and Investigating	15
1. Lawyers using paralegals	15
2. Definition of a paralegal	16
3. The paralegal as an agent of the attorney	16
a. The actions of the paralegal may be legally binding on the attorney and the client	16
b. The attorney may be liable for damages caused to another by the paralegal	16
c. The attorney may be sanctioned for actions of the paralegal	17
4. Paralegals as licensed private investigators	18
5. What attorneys expect from paralegals	18
a. The willingness to work under the supervision of the attorney	18
b. The initiative to clarify assignments	19
c. Good judgment	19
d. The discipline to keep the supervising attorney well advised	19
e. The ability to work well under pressure	19

f.	Good communication and people skills	19
g.	Objectivity	19
h.	Thoroughness	20
i.	Creativity	20
j.	Sound interviewing and investigating skills	20
	Chapter Summary and Conclusion	21
	Review Questions	21
	<i>Key Words and Phrases to Remember</i>	22
	<i>Learn by Doing</i>	22
	Chapter 2: Ethical and Professional Responsibilities for Legal Professionals Engaged in Interviewing and Investigating	23
A.	Sources of Ethical and Professional Responsibility	24
1.	State statutes which prohibit the unauthorized practice of law (UPL)	24
2.	Mandatory ethical rules governing attorneys	24
3.	Ethical rules promulgated for the paralegal	25
4.	Guidelines for attorneys and paralegals working together in the law office	25
5.	Advisory ethical opinions	25
B.	Consequences of Unethical Conduct	26
1.	To the lawyer	26
a.	The lawyer may be fired by the client	26
b.	The lawyer may be sued by the client damaged by the unethical behavior	26
c.	The lawyer may be sanctioned	27
d.	The lawyer may face criminal prosecution	27
e.	The lawyer's reputation may be damaged	27
2.	To the paralegal	28
a.	The paralegal may lose employment	28
b.	The paralegal may lose certification	28
c.	The paralegal may lose the right to appear before administrative agencies	28
d.	The paralegal may be sued by the client damaged by the unethical action	28
e.	The paralegal may be subject to criminal prosecution	29
f.	The paralegal's reputation may be tarnished	29
C.	Specific Ethical and Professional Concerns for Legal Professionals Engaged in Interviewing and Investigating	29
1.	The unauthorized practice of law	29
a.	Establishing an attorney-client relationship	30
b.	Setting legal fees	30
c.	Giving legal opinions or legal advice	30
d.	Representing a client before a court or tribunal	32
e.	Negotiating a legal matter on behalf of a client	33
f.	Delegable tasks and the attorney's responsibility to avoid an agent's UPL	33
2.	Maintaining client confidences and secrets	34
a.	The attorney-client privilege	34

b.	The broader ethical duty of confidentiality	35
c.	Protecting client information from disclosure	36
3.	Competence	39
a.	Seek good education and training	39
b.	Seek certification	39
c.	Stay informed concerning changes in the law and the profession	39
d.	Stay on the cutting edge of technological advancements	40
e.	Commit yourself to excellence	40
4.	Integrity	40
a.	Truthfulness in dealing with clients, co-workers, and others	41
b.	Fidelity in handling client funds and other property	41
c.	Loyalty	41
5.	Diligence and communication with the client	42
6.	Conflicts of interest	42
a.	Simultaneous representation	43
b.	Representing an interest adverse to a former client	43
(1)	Before accepting representation	44
(2)	After representation has begun	44
(3)	Job changes by a legal professional	44
c.	Personal relationships	45
d.	Recognizing potential conflicts	45
7.	Disclosure of status in verbal and written communications	46
8.	Improper communications	46
9.	Discovery of client misconduct	47
a.	Intent of the client to commit a criminal act	47
b.	Fraudulent claim or malicious harassment	47
c.	Commission of fraud on the court or perjury	47
	Chapter Summary and Conclusion	47
	Review Questions	48
	<i>Key Words and Phrases to Remember</i>	48
	<i>Learn by Doing</i>	49
Chapter 3: The Adversarial System, ADR, and Pre-Filing Investigation		51
A.	The Adversarial System	51
1.	Civil and criminal law	52
2.	The court systems	52
3.	Rules of procedure	53
4.	Rules of evidence	56
5.	Court rules	56
6.	The cause of action	56
a.	In a civil suit	56
b.	In a criminal prosecution	58
7.	Remedies	58
a.	In a civil suit	58
b.	In a criminal prosecution	60
8.	Defenses	60
a.	In a civil suit	60
b.	In a criminal prosecution	61

9.	The burden and degree of proof	61
a.	In a civil suit	61
b.	In a criminal prosecution	61
10.	Means of proof	62
11.	Statutes of limitation and repose	62
B.	Administrative Procedures	64
C.	Alternative Dispute Resolution (ADR)	65
1.	Negotiation	65
2.	Mediation	66
3.	Arbitration	67
D.	Distinguishing Between Formal Discovery and Informal Investigation	68
1.	Formal discovery	68
2.	Informal investigation	68
3.	The advantages of informal investigation	69
a.	Early investigation produces more information	69
b.	Information located early is more reliable	69
c.	Information sought informally is more easily obtained	69
d.	Information sought informally is less expensive	69
e.	No opposing party is present for informal investigation	69
f.	The first side to locate relevant information gains advantages in litigation	69
g.	Prompt investigation enhances settlement prospects	69
E.	Pre-Filing Procedures	70
1.	The mandate for pre-filing investigation	70
2.	Objectives of pre-filing investigation	71
a.	To determine if there are facts sufficient to state one or more causes of action	71
b.	To determine provable damages	72
c.	To determine if there are facts sufficient to assert a valid defense	72
d.	To satisfy special pleading requirements	73
e.	To identify all potential defendants	73
f.	To determine the assets of identified defendants	75
g.	To determine questions of personal jurisdiction	76
h.	To determine questions of subject matter jurisdiction	78
i.	To determine the proper venue for a case	81
j.	To determine questions regarding governmental immunity	82
k.	To accomplish required service of process	83
	Chapter Summary and Conclusion	89
	Review Questions	89
	<i>Key Words and Phrases to Remember</i>	90
	<i>Learn by Doing</i>	91
	Chapter 4: Formal Discovery in Civil Litigation	93
A.	Introduction	93
B.	The Scope and Purposes of Formal Discovery in a Civil Case	94
1.	The relationship between the scope of formal discovery and the rules of evidence	94
2.	Privileged materials not discoverable	95

3.	Discovery of experts	95
4.	Required voluntary disclosures	96
C.	Methods of Formal Discovery in a Civil Case	98
1.	Depositions (FRCP 27 through 32)	98
a.	Why lawyers take depositions	98
b.	Lawyers using paralegals in depositions	99
2.	Interrogatories (FRCP 33)	106
a.	Information to be sought by interrogatories	107
b.	Lawyers using paralegals in discovery by interrogatories	111
3.	Requests for production of documents and things (FRCP 34)	112
a.	Serving document requests and interrogatories together	114
b.	Assisting the client to locate and review documents	115
4.	Requests for physical or mental examination (FRCP 35)	118
5.	Request for admissions (FRCP 36)	118
D.	Drafting Guidelines for Discovery Documents	120
1.	Identify and organize the topics to be addressed	120
2.	Use clear and concise language	120
3.	Be thorough	121
4.	Don't be wordy	121
5.	Use subparts carefully	121
6.	Use definitions	121
7.	Use instructions with caution	123
8.	Avoid abusing discovery	124
9.	Before responding to discovery requests review them carefully for objections	124
10.	In responding to discovery requests, answer only what is fairly asked	124
11.	Comply with all rules of procedure and local rules of court regarding discovery	124
E.	The Order of Discovery	124
1.	Interrogatories and document requests	125
2.	Depositions	125
3.	Requests for physical or mental examination	125
4.	Requests for admissions	125
F.	Discovery of Electronically Stored Information (E-Discovery)	125
1.	The explosion in electronically stored information (ESI)	125
2.	ESI as potentially relevant evidence	127
3.	The litigation hold and dangers of spoliation of evidence	128
4.	Undue hardship and technology assisted review (TAR) in e-discovery	132
5.	ESI production and waiver of attorney-client or work product privileges	134
6.	Other e-discovery amendments to the Federal Rules of Civil Procedure	137
	Chapter Summary and Conclusion	138
	Review Questions	138
	<i>Key Words and Phrases to Remember</i>	139
	<i>Learn by Doing</i>	140

Chapter 5: Formal Discovery in Criminal Litigation	143
A. The Scope of Formal Discovery in Criminal Litigation	143
B. Means of Formal Discovery Available to the Defense in Criminal Litigation	144
1. Review of the criminal complaint	145
2. The initial appearance or arraignment	148
3. The preliminary hearing	151
a. Frequently, no preliminary hearing is held	152
b. There typically is little time to prepare for the preliminary hearing	152
c. The prosecution need not present its entire case at the preliminary hearing	152
4. The information and the indictment	152
5. The bill of particulars	156
6. Rule 16 discovery	158
a. Statements of the defendant	159
b. The criminal record of the defendant	159
c. Documents, electronically stored information, and things	160
d. Reports of examinations and tests	163
e. Expert witnesses	163
f. Procedure for conducting Rule 16 discovery	164
7. Identity of witnesses	164
8. Statements of witnesses	164
9. Exculpatory material — the <i>Brady</i> doctrine	165
10. Depositions	165
11. Documents, records, and things from non-parties	166
12. Motions as discovery devices	167
a. The motion to dismiss	167
b. The motion to suppress	168
c. The motion <i>in limine</i>	168
13. The Freedom of Information Act and the Privacy Act	168
C. Means of Formal Discovery Available to the Prosecution in Criminal Litigation	169
1. The initial appearance	169
2. The preliminary hearing	169
3. Grand jury testimony	169
4. Rule 16 discovery	169
a. Documents and objects	170
b. Reports of examinations and tests	170
c. Expert witnesses	171
5. Statements of witnesses	171
6. Prior notice of affirmative defenses	171
a. Alibi witnesses	171
b. Insanity defense	171
c. Public authority defense	172
D. The Resolution of Discovery Disputes in Criminal Litigation	172
E. Lawyers Using Paralegals in Formal Criminal Discovery	173
1. Attendance at pretrial proceedings	173

2. Review and analysis of court filings	173
3. Drafting discovery documents and related motions	173
4. Familiarity with discovery procedures	174
5. Familiarity with forms	174
6. Reviewing documents, reports, and summaries	174
7. Assisting the client in responding to discovery requests	174
Chapter Summary and Conclusion	175
Review Questions	176
<i>Key Words and Phrases to Remember</i>	176
<i>Learn by Doing</i>	177
Chapter 6: Rules of Evidence for the Investigator — Part 1	179
A. Introduction to the Rules of Evidence	180
1. What the rules of evidence do	180
2. The burden of proof	180
a. In a civil case	180
b. In a criminal prosecution	181
3. The standard or degree of proof	181
a. In a civil case	181
b. In a criminal prosecution	181
4. Means of proof	182
5. First-hand and second-hand knowledge	182
6. Direct and circumstantial evidence	184
7. Laying the foundation	184
8. Rulings on admissibility and offers of proof	185
B. The Role of the Rules of Evidence in Interviewing and Investigating	186
1. Planning and carrying out effective informal investigations	186
2. Putting discovered information in admissible form	187
3. Drafting formal discovery requests and responses	188
4. Drafting affidavits or declarations for use in pretrial motions	189
5. Planning the evidence to be offered at trial	192
6. Assisting the lawyer at trial	192
C. The Doctrine of Privileges	192
1. Work product and trial preparation materials	193
2. The physician-patient privilege	194
3. The psychotherapist-patient privilege	194
4. The spousal confidential communications privilege	194
5. The spousal testimony privilege	195
6. The privilege against self-incrimination	196
7. Miscellaneous privileges	196
8. Procedural matters relating to privileges	196
Chapter Summary and Conclusion	197
Review Questions	197
<i>Key Words and Phrases to Remember</i>	198
<i>Learn by Doing</i>	198

Chapter 7: Rules of Evidence for the Investigator — Part 2	201
A. Relevance	202
B. Lay Witnesses	203
C. Expert Witnesses	203
D. Examination of Witnesses	205
E. The Rule Against Hearsay	205
1. Hearsay defined	205
a. Is it a statement?	205
b. Is it a statement made out of court?	206
c. Is it a statement offered to prove the truth of the matter asserted?	207
d. Is there a recognized exemption or exception for the statement?	210
2. Admission by party opponent exemption	210
3. Prior inconsistent statement made under oath exemption	211
4. Prior consistent statement offered to rebut charge of recent fabrication exemption	211
5. Prior statement identifying a person perceived earlier exemption	212
6. FRE 803 exceptions to the hearsay rule — availability of declarant immaterial	212
a. Present sense impression (FRE 803(1))	213
b. Excited utterance (FRE 803(2))	213
c. Current state of mind or condition (FRE 803(3))	213
d. Statements made for purposes of medical diagnosis or treatment (FRE 803(4))	214
e. Recorded recollection (FRE 803(5))	215
f. Business records (FRE 803(6) and (7))	215
g. Public records (FRE 803(8) and (10))	216
h. Other FRE 803 exceptions	216
7. FRE 804 exceptions to the hearsay rule — applicable where the declarant is unavailable to testify	217
a. Former sworn testimony (FRE 804(b)(1))	217
b. Statement under belief of imminent death (FRE 804 (b)(2))	218
c. Statement against interest (FRE 804(b)(3))	219
d. Statement offered against or by one who caused or procured declarant's unavailability (FRE 804(a) and (b)(6))	219
8. The residual exception (FRE 807)	220
9. Hearsay and the Confrontation Clause	221
F. Character Evidence	222
1. The criminal accused	223
2. Where character is an essential element of a claim or defense	224
3. Other crimes, wrongs, or acts	225
4. A witness's character for truthfulness	226
5. Character for truthfulness of a witness as evidenced by conviction of a felony or other crime involving dishonesty	226

G. Impeaching a Witness by Showing Bias or Interest	227
H. Attacking a Witness's Credibility	
Using Religious Beliefs or Opinions	229
I. Authentication of Documents and Things	229
1. Authenticating physical objects	229
2. Authenticating demonstrative evidence	230
3. Authenticating documents and electronic records	230
4. Authenticating voices	232
J. Best Evidence Rule	233
K. Generally Prohibited Matters	233
1. Subsequent remedial measures	233
2. Settlement discussions and offers	234
3. Paying or offering to pay expenses	234
4. Plea bargain discussions or a guilty plea later withdrawn	235
5. Liability insurance	235
L. Final Considerations Regarding Evidence	236
1. Admissibility for alternative reasons	236
2. Clearing all the hurdles	237
Chapter Summary and Conclusion	237
Review Questions	238
<i>Key Words and Phrases to Remember</i>	238
<i>Learn by Doing</i>	239
Chapter 8: Communication Skills for the Investigator	243
A. The Importance of Communication in the Work of Legal Professionals	244
1. How we all communicate	244
a. Verbal communication	244
b. Written communication	244
c. Nonverbal communication	244
2. The importance of written and verbal communication	244
3. The importance of nonverbal communication	245
B. Verbal Communication — It's More Than the Words	245
1. Tone of voice	245
2. Volume	246
3. Rate of speaking	246
4. Voice inflection	246
5. Enunciation	247
6. Vocabulary	247
7. Grammar	247
8. Slang, colloquialisms, idioms, and accents	248
a. Slang	248
b. Colloquialisms	249
c. Idioms	249
d. Accents	250
C. Nonverbal Communication — Body Language	250
1. Body position	251
2. Facial expressions	252
3. Eye contact	253
4. Nervous signals	253

5. The sounds of silence	254
6. Clothes and environment	254
D. Written (Including Electronic) Communication	255
1. Be aware of grammar	255
2. Use tools for effective writing	256
3. Avoid slang and colloquialisms	256
4. Be precise	256
5. Be thorough but concise	256
6. Avoid repetition	257
7. Be consistent	257
8. Use shorter, simpler, non-technical words	257
9. Use paragraphs	258
10. Use drafts and proof your work	258
11. Protect confidentiality and privilege	258
12. Practice makes perfect – and reading helps too	259
13. Special considerations for electronic communications (netiquette)	259
E. Putting Communication Skills to Work in Interviewing and Investigating	262
1. What are you communicating to others?	262
2. What are others communicating to you?	263
3. Suggestions for phone communications	263
a. Your voice is critical	264
b. Identify yourself properly	264
c. Return calls promptly	264
d. Sound interested – even if you’re not	264
e. Take notes while you talk	264
f. Phone ego – “Please hold for Mr. Big”	264
g. Phone conversations with information sources	264
4. The investigator as a LOVER!	265
a. A Listener	265
b. An Observer	265
c. An Evaluator	265
d. A Reporter	266
Chapter Summary and Conclusion	266
Review Questions	266
<i>Key Words and Phrases to Remember</i>	267
<i>Learn by Doing</i>	267
PART 2: Formulating and Executing a Plan of Investigation	269
Chapter 9: Formulating a Plan of Investigation	271
A. Introduction	272
B. Traits of the Effective Investigator	272
1. The effective investigator is <i>knowledgeable</i>	272
2. The effective investigator is <i>skilled</i>	272
3. The effective investigator is <i>persistent</i>	273
4. The effective investigator is <i>creative</i>	274
5. The effective investigator is <i>perceptive</i>	276
6. The effective investigator is <i>skeptical</i>	277
a. Evaluate the source of information	277

b.	Test information for internal consistency	278
c.	Look for gaps in information	278
d.	Compare new information to information already gathered	278
e.	Seek corroborating information	278
f.	Seek explanations and details	278
g.	Seek leads to more information	278
7.	The effective investigator is <i>flexible</i>	278
C.	The Importance of Having a Plan of Investigation	279
D.	Formulating a Plan of Investigation	280
1.	Start with what you already know	280
2.	Identify the specific goals of your investigation	281
a.	Consider the law of the case	281
b.	Write down the ultimate goals of the investigation	283
3.	Brainstorm for specifics	283
4.	Identify all possible sources of information	284
5.	Organize your plan into a logical format and chart it	284
a.	The chronological to-do list format	286
b.	The topical format	286
c.	The sources format	287
d.	The cause of action format	287
E.	Limitations on a Plan of Investigation	288
1.	The amount of work actually required	289
2.	The cost of the work to be done	289
3.	The value of the case	289
4.	The resources of the client	290
5.	The resources of the law office	290
6.	Client authorization	290
F.	Flexibility of a Plan of Investigation	290
G.	The Handling of Documents and Physical Evidence During an Investigation	291
1.	Distinguishing between documentary and physical evidence	291
2.	Creating demonstrative evidence	291
3.	The role of the rules of evidence in handling documents and things	292
4.	Procedures for handling documents and things in your custody	294
a.	Label the evidence	294
b.	Secure the evidence	294
c.	Keep an evidence log	294
5.	Procedures for documents and things not in your custody	295
H.	The Importance of Diligence and Thoroughness in Executing a Plan of Investigation	296
1.	Diligence	296
2.	Thoroughness	296
	Chapter Summary and Conclusion	297
	Review Questions	297
	<i>Key Words and Phrases to Remember</i>	298
	<i>Learn by Doing</i>	298

Chapter 10: Preparing for a Client Interview	301
A. Introduction to Interviewing	301
1. Persons to interview	301
a. Clients	302
b. Fact witnesses	302
c. Other information sources	302
2. Different methods and locations for interviews	302
B. Reasons for Conducting Client Interviews	303
1. The initial client interview	303
2. Subsequent information-gathering interviews	303
3. The update or status report interview	303
C. Goals of the Initial Client Interview	303
D. Scheduling the Initial Client Interview	304
1. Check all participants' schedules before you call	304
2. Have several dates and times in mind before you call	304
3. Allow for plenty of time	304
4. Make sure the interview room is available	305
5. Consider what the client needs to bring	305
6. Identify yourself when you call	305
7. Cover all necessary details in the scheduling call	305
8. Take comprehensive notes during the scheduling call	305
9. Things to do following the scheduling call	305
E. Preparing for the Initial Client Interview	307
1. Prepare forms	307
a. Records authorizations	307
b. Fee agreements	310
2. Prepare your questions	313
a. Review your notes	315
b. Consider what you know so far of the legal question involved	315
c. Consider special needs of the client	316
d. Brainstorm a list of topics to be covered	316
e. Organize the topics in a logical fashion	316
f. Prepare specific questions within each topic	318
g. Consider the phrasing of questions	322
h. Put questions in a format consistent with any checklist or intake sheet being used	324
i. Put questions in a format conducive to taking good notes during the interview	324
j. Be flexible—always expect to ask other questions in the interview	324
k. Have the supervising attorney review questions and forms	325
3. Using a checklist or intake sheet	325
4. Prepare the physical environment where the interview is to take place	327
5. Give thought to any special needs of the client	327
6. Plan the seating arrangement	327
a. In an office with a desk	328

b.	At a rectangular conference table	328
c.	At a rounded conference table	331
d.	Other considerations in seating	331
7.	Preserve confidentiality and avoid interruptions during the interview	334
8.	Be physically and mentally prepared for the interview	334
a.	Get enough rest the night before the interview	334
b.	Leave your personal life outside the interview room	334
	Chapter Summary and Conclusion	335
	Review Questions	336
	<i>Key Words and Phrases to Remember</i>	336
	<i>Learn by Doing</i>	337
	Chapter 11: Conducting a Client Interview	339
A.	Introduction	339
B.	Ten Things to Remember Throughout the Client Interview	340
1.	Be friendly but professional	340
2.	Avoid legal or technical jargon except as necessary	340
3.	Be cognizant of the dangers of the unauthorized practice of law	340
4.	Take good notes	341
5.	Engage in active listening	341
6.	Evaluate the demeanor and behavior of the client	341
7.	The client will not know what to tell you—you have to ask	341
8.	Remember the commandments	341
a.	Assume nothing	342
b.	Verify everything	342
9.	Keep an emotional distance between yourself and the client	342
10.	Overcome <i>internal</i> obstacles to effective interviewing	342
a.	Concentrating too intently on your next question	342
b.	Concentrating too hard on taking good notes	342
c.	Being a slave to the prepared list of questions	343
d.	Letting your own biases affect you	343
C.	The Order and Manner of Conducting a Client Interview	343
1.	Greeting the client	343
2.	Beginning the interview	345
a.	If appropriate, express empathy toward the client	345
b.	Explain the absence of the supervising attorney	345
c.	Explain your role as a paralegal or associate attorney	345
d.	Explain the attorney-client privilege	346
e.	Briefly review the goals to be accomplished in the interview	346
f.	Explain that you will be taking notes during the interview	346
g.	Ask if the client has any questions	346
h.	Obtain biographical information for the file	346
3.	Conducting the substantive portion of the interview	347
a.	Briefly review any documents the client brought	347

b.	Obtain a broad overview of the client's story	347
c.	Fill in gaps in the information given	348
d.	Ask for definitions of unfamiliar words and phrases	348
e.	Ask for details	348
f.	Ask for leads to witnesses and documents	349
g.	If helpful, have the client draw a sketch or diagram	349
h.	Establish an accurate chronology of events	350
i.	Clarify errors, inconsistencies, or vagueness in the client's story	351
j.	Verify all information given as best you can	352
k.	Seek corroborating information	354
l.	Get the particulars on persons and documents or records mentioned	354
m.	Review documents closely and copy or arrange to keep them	354
n.	Determine what the client wants	355
o.	Check off the topics on your question list as you go	355
4.	Dealing with special problem clients	355
a.	The reluctant client	355
b.	The highly emotional client	356
c.	The self-important or condescending client	356
d.	The obviously lying client	357
5.	Concluding the client interview	357
6.	The role of the assisting paralegal when the supervising attorney conducts the interview	358
7.	Following the interview	359
a.	If needed, do another conflict of interest check	359
b.	Prepare an interview summary	359
c.	Prepare a follow-up letter to the client	359
D.	Subsequent Client Interviews and Contacts	363
	Chapter Summary and Conclusion	364
	Review Questions	365
	<i>Key Words and Phrases to Remember</i>	365
	<i>Learn by Doing</i>	366
	Chapter 12: Preparing for a Witness Interview	367
A.	Introduction	367
B.	Goals of the Witness Interview	367
C.	Kinds of Witnesses	368
1.	The friendly witness	368
2.	The hostile witness	368
a.	Be friendly and patient with the witness	369
b.	Try to get the witness to like you	369
c.	Use the witness's natural instinct to help	369
d.	Use subpoena power as a motivator — if you must	369
3.	The neutral or disinterested witness	370
4.	The skeptical witness	371
5.	The nosey witness	372
6.	The busy witness	372
7.	The too-helpful witness	372

8. The show-off witness	373
9. The big-ego witness	373
10. The condescending witness	373
11. Special problem witnesses	374
a. Language barriers	374
b. Physical barriers	374
c. Mental barriers	374
d. The Romeo (or Juliet!)	375
e. The witness for sale	375
D. Scheduling and Preparing for the Witness Interview	376
1. Scheduling the witness interview	377
2. Preparing for the witness interview	377
3. Special considerations in scheduling and preparing for a witness interview	378
a. Contacting a witness represented by counsel	378
b. Preserving client confidences and secrets	378
c. Don't use tricks	378
d. The location of the witness interview — the field interview	379
e. Telephone interviews and sound or video recording interviews	381
f. Planning multiple witness interviews	381
Chapter Summary and Conclusion	382
Review Questions	382
<i>Key Words and Phrases to Remember</i>	382
<i>Learn by Doing</i>	383
Chapter 13: Conducting a Witness Interview	385
A. Introduction	385
B. Things to Remember Throughout the Witness Interview	386
1. Observe and evaluate the witness's environment	386
2. Overcome <i>external</i> obstacles to active listening and observing	388
3. Avoid disclosing confidential or privileged information	388
C. The Order and Manner of Conducting a Witness Interview	389
1. Beginning the interview	389
a. Greet the witness	389
b. Express appreciation for the witness's cooperation	390
c. Disclose your status as a paralegal	390
d. Briefly state the purpose of your interview	390
e. Obtain background information on the witness	390
2. Conducting the substantive portion of the witness interview	390
a. Briefly review any documents the witness has made available	390
b. Obtain a narrative summary of what the witness knows	391
c. Fill in gaps in the story	391
d. Ask the witness to define unfamiliar terms or concepts	391
e. Ask for details	391
f. Seek leads to other witnesses and documents	391
g. If helpful, have the witness draw a sketch or diagram	392

h.	Establish the chronology of events known to the witness	392
i.	Clarify errors, inconsistencies, or vague points	392
j.	Attempt to verify information provided by the witness	392
k.	Ask about corroborating sources	392
l.	Ask about smart phone recordings and social media	392
m.	Get the particulars on all persons and documents mentioned	392
n.	Make copies of documents produced or arrange to keep them	393
o.	Ask the witness to tell you anything else they remember	393
p.	Ask about other interviews or statements given	393
q.	Make sure you have covered everything	393
3.	Impeaching a witness	393
a.	Inconsistencies or contradictions in the statement	394
b.	Unreliability of the witness's information	394
c.	Bias of the witness	394
d.	Interest of the witness in the outcome of the case	395
e.	History of the witness affecting credibility	396
4.	Concluding the witness interview	396
5.	The interview summary	396
D.	Audio or Video Recording the Interview	397
1.	Obtain the prior consent of the supervising attorney	397
2.	Consider using a court reporter	399
3.	Obtain the witness's consent <i>before</i> electronically recording	400
4.	Repeat and record the statement of consent	400
5.	Identify yourself and your position in the recording	400
6.	State the date and time the interview begins	400
7.	Identify all persons present	400
8.	Handling interruptions in the interview	401
9.	Avoid "talking over"	402
10.	How to conclude the electronically recorded interview	402
11.	Transcribe the recording or prepare a summary	403
12.	If appropriate, provide the witness a transcript or digital copy of the interview	403
13.	Preserve the recorded interview	403
E.	The Voice-Only Interview	404
1.	Speak and listen carefully	404
2.	Ensure privacy and preserve confidentiality	404
3.	Using documents or things in a voice-only interview	404
4.	Recording the voice-only interview	405
F.	The Written Witness Statement	405
1.	The format of a witness statement	406
2.	How attorneys use witness statements	406
3.	Preparing the written witness statement	406
a.	It should identify the witness by name and state the date of the interview	406
b.	It should be written in the witness's own words	407
c.	It should state the total number of pages it contains	407
d.	The pages of the statement should be numbered	407

e.	Every page should be signed or initialed by the witness	407
f.	It should be read and corrected by the witness before it is signed	407
g.	It should be signed by the witness	410
	Chapter Summary and Conclusion	411
	Review Questions	411
	<i>Key Words and Phrases to Remember</i>	412
	<i>Learn by Doing</i>	412
	Chapter 14: Identifying and Locating Fact Witnesses	415
A.	Introduction	415
B.	Identifying Fact Witnesses	415
1.	People sources	416
a.	The client	416
b.	Other witnesses	416
c.	The investigating officer(s)	416
d.	Ambulance, rescue squad, and emergency room personnel	417
e.	Video cameras in private or public areas	417
f.	Canvassing the scene or neighborhood	417
g.	The neighborhood regulars	418
h.	The reporting media	418
i.	Solicitations in traditional and social media	418
2.	Document and records sources	421
a.	Medical records	421
b.	Employment records	422
c.	Educational records	422
d.	Personal correspondence and journaling	422
e.	Online correspondence and social networking data	422
f.	Business records	424
g.	Personal credit, utility, and financial records	424
h.	Public records—local, state, and federal	425
C.	Locating Missing Witnesses	425
1.	Let's play <i>This Is Your Life</i>	425
2.	Sources of information for locating the missing witness	427
a.	People sources	427
b.	Organizational sources	428
c.	Documentary sources	428
d.	Social networking and people search websites	431
e.	People search database vendors	432
f.	Determining if someone has died	432
g.	Locating former employees	432
h.	Locating current or former members of the military	432
i.	Locating current or former prison inmates	433
j.	Tracing companies	433
k.	Genealogical and genetic testing services	433
	Chapter Summary and Conclusion	434
	Review Questions	434
	<i>Key Words and Phrases to Remember</i>	434
	<i>Learn by Doing</i>	435

Chapter 15: Working with Expert Witnesses	437
A. Who Experts Are and Why Attorneys Use Them	437
1. The definition of an expert and the admissibility of expert testimony	437
2. Distinguishing consulting experts from testifying experts	439
3. How attorneys use experts	440
B. Locating Qualified Expert Witnesses	442
1. Attorneys or paralegals in the office	442
2. Other attorneys or paralegals in the community	442
3. Attorneys or paralegals in other parts of the country	442
4. Lawyer organizations	442
5. Referral companies	443
6. Directories	443
7. Professional, technical, and trade organizations	443
8. Private businesses	443
9. Colleges and universities	443
10. Government agencies	444
11. Literature in the field of expertise	444
12. Other experts	444
13. The Expert's Webpage	444
C. Evaluating the Expert	445
1. Why we evaluate experts	445
2. The expert's resume	445
3. How to evaluate an expert	445
a. Look for education, training, and work experience	445
b. Look at the specific area of expertise	445
c. Verify information on the resume	445
d. Check the expert's online presence	447
e. Review the expert's publications	448
f. Review publications on which the expert bases an opinion	448
g. Locate and review prior testimony by the expert	448
h. Ask for references	449
i. Interview the expert	449
D. Working Successfully with Expert Witnesses	450
1. Obtain the expert's fee schedule early	450
2. Be sure the expert does not have a conflict of interest	451
3. Become familiar with technical terms and concepts in the expert's field	451
4. Do not identify the expert in discovery until the decision has been made to use the expert for testimony	452
5. Do not supply the expert with privileged materials	452
6. Always communicate a neutral picture of the case to the expert	453
7. Provide materials requested by the expert promptly	454
8. Keep a record of all materials sent to or received from the expert	454
9. Do not allow the expert to put preliminary opinions in writing	455

10. Be familiar with all rules of evidence and procedure that apply to the expert	455
Chapter Summary and Conclusion	455
Review Questions	456
<i>Key Words and Phrases to Remember</i>	456
<i>Learn by Doing</i>	456
Chapter 16: Public Sources of Information — Federal	459
A. Introduction	459
B. Public Records in General	460
C. The Importance of Knowing How Government Works	460
D. Structure of the Federal Government	461
E. Determining What a Federal Agency or Department Does and the Records It Maintains	461
1. Experienced people in the office	461
2. Government publications	463
3. Data.Gov and agency websites	463
4. State and local bar directories and handbooks	465
5. The phone book	465
6. Publications	465
7. Enabling statutes and regulations	465
F. How to Access Information from the Federal Government	467
1. The judicial branch — court records	467
a. Kinds of information available in federal court records	467
b. How to conduct searches in federal court records	467
c. Computerized resources for searching federal court records	468
2. The legislative branch — Congress	469
a. Congress online	470
b. Accessing Congress through database vendors	470
3. The executive branch	470
a. Executive orders	470
b. Obtaining information from the White House	471
c. Obtaining information from executive agencies	471
Chapter Summary and Conclusion	479
Review Questions	480
<i>Key Words and Phrases to Remember</i>	480
<i>Learn by Doing</i>	481
Chapter 17: Public Sources of Information — State and Local	483
A. The Structure of State and Local Governments	483
B. Records Maintained by State Governments	484
1. Vital statistics	485
2. Motor vehicle and driving records	486
3. Corporate and other business records as public records	486
4. Licensing and registration records	487
5. Regulatory commission records	487
6. Tax and revenue records	488
7. Securities filings	488

8. Social service agencies records	488
9. Workers' compensation records	488
10. Law enforcement records	488
C. Records Maintained by Local Governments	490
1. Records of civil and criminal cases in court clerk's offices	490
2. Law enforcement records	491
3. Permits and licenses	492
4. Real property transfer records in register/recorder of deeds office	492
5. Tax records in assessor's offices	493
6. Probate court records	493
7. Vital statistics	493
8. Voting records in election commission offices	493
9. Public utilities records	493
10. Public school records	493
11. The public library	494
D. State Public Records Acts and Other Statutes and Rules Controlling Accessibility	496
1. What is an accessible "public record" under a state PRA?	496
2. Who can access a public record using a state PRA?	499
3. Procedure for accessing public records under a state PRA	499
E. Other Sources for Accessing State and Local Government Records	502
1. State and local government sponsored "open data" sites	502
2. Non-governmental websites	503
3. Online database vendors	503
4. Public records search companies	505
Chapter Summary and Conclusion	505
Review Questions	506
<i>Key Words and Phrases to Remember</i>	506
<i>Learn by Doing</i>	507
Chapter 18: Private Sources of Information	509
A. An Overview of Private Sources of Information	509
B. Accessing Private Sources of Information	512
1. Medical records	512
a. Obtaining medical records by written patient authorization	512
b. Drafting the medical records authorization	513
c. Using the medical records authorization	513
d. Special medical records authorizations	515
e. Obtaining medical records by court order	515
f. Obtaining medical records by Rule 45 subpoena	516
2. Employment records	517
3. Educational records	518
4. Other sources of academic information	519
5. Address and phone records	519
a. Finding address and phone numbers	519
b. Accessing unlisted phone numbers	520
c. Phone call records and wiretapping	520

6. Credit records on individuals	520
7. Credit information on businesses	522
8. Bank account, credit card, and general financial information on individuals	523
9. Financial and general business data on corporations and other businesses	524
10. Online database vendors	525
11. Background check companies	527
12. Private investigative firms	528
a. Locating a reliable private investigator	529
b. Working effectively with a private investigator	529
C. Personal Surveillance	530
Chapter Summary and Conclusion	531
Review Questions	532
<i>Key Words and Phrases to Remember</i>	532
<i>Learn by Doing</i>	533
Appendix: Case Studies	535
Case Study No. 1: The Rowdy Outlaw Case	537
Case Study No. 2: The Red Dog Saloon Case	540
Case Study No. 3: The Vidalia Unyon Case	542
Case Study No. 4: The Rocky Road Project	545
<i>Glossary</i>	547
<i>Table of Cases</i>	569
<i>Index</i>	571