

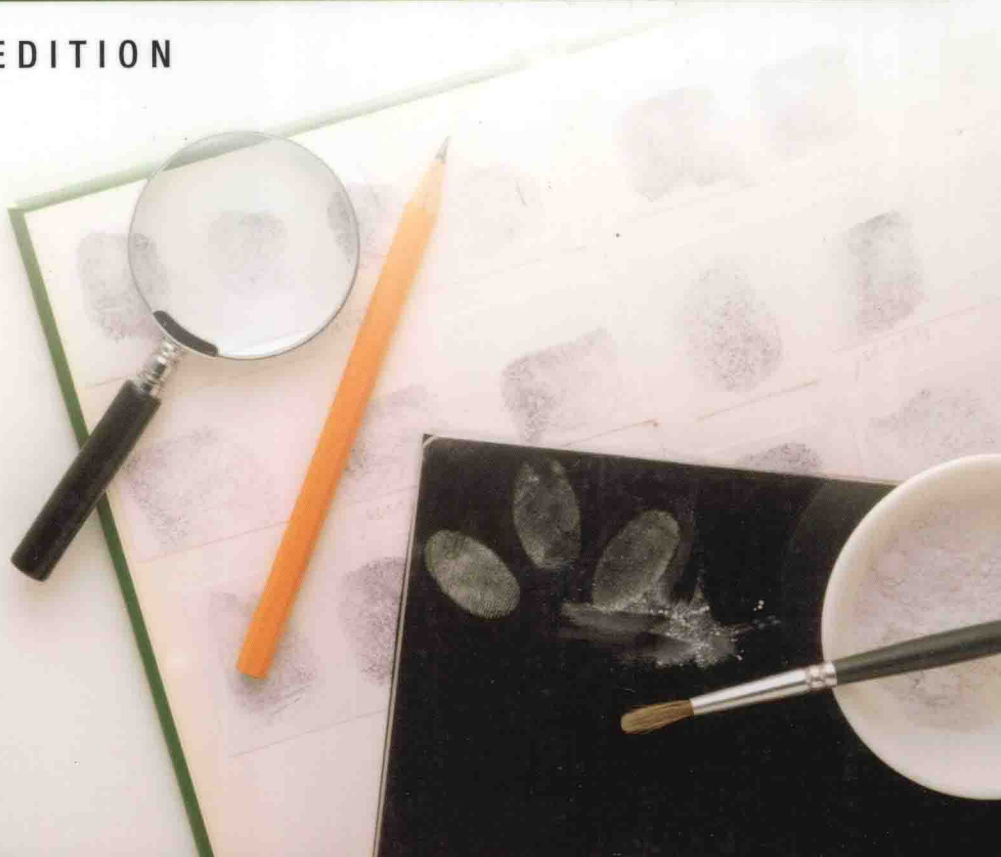
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■ Stephen P. Parsons

INTERVIEWING AND INVESTIGATING

Essential Skills for the Legal Professional

FOURTH EDITION



Wolters Kluwer
Law & Business

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INTERVIEWING **AND** INVESTIGATING

**ESSENTIAL SKILLS FOR THE
LEGAL PROFESSIONAL**

Fourth Edition

STEPHEN P. PARSONS, J.D.



Wolters Kluwer

Law & Business



AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

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P.O. Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-8735-9

Library of Congress Cataloging-in-Publication Data

Parsons, Stephen P., 1949-

Interviewing and investigating : essential skills for the legal professional /
Stephen P. Parsons.—4th ed.
p. cm.

Includes bibliographical references and index.

ISBN 978-0-7355-8735-9 (alk. paper) 1. Interviewing in law practice—United States. 2. Attorney and client—United States. 3. Legal assistants—United States—Handbooks, manuals, etc. 4. Investigations. I. Title.

KF311.P373 2010
340.023'73—dc22

2009050829

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Preface

Approach

One underlying premise to this text is that interviewing and investigating are *skills* to be mastered, rather than a unit of information to be memorized. A second is that interviewing and investigating are *essential* skills for both the lawyer and the paralegal assisting the lawyer, every bit as critical as legal research skills.

Consequently, the approach taken in the text is twofold. First, textual discussion of the subject matter is joined with hands-on learning activities in the Learn by Doing (LBD) exercises. Like any skill, interviewing and investigating can be learned effectively only by practice. Second, varied and realistic legal scenarios are provided in which the student applies the principles studied. With that in mind, the Illustrations, Examples, Hypotheticals, and LBD exercises used throughout the book, as well as the Case Studies provided in Appendix A, present a variety of both civil and criminal and litigation and non-litigation scenarios.

A multi-layered approach is utilized in each chapter of this book. First, numerous brief Examples are sprinkled through the text along with frequent Illustrations. Then lengthier Hypotheticals, typically three to six, are positioned at key points throughout each chapter. The Hypotheticals present a specific factual and legal context, complete with characters, in which the student can see the application—or misapplication—of the concepts being studied. Discussion Questions accompany the Hypotheticals rather than being collected at the end of the chapter so the student, or the class as a whole, can engage in immediate analysis to reinforce the lessons taught by the Hypotheticals.

In most chapters, the Hypotheticals are serial in nature. They follow the exploits of a single new lawyer or paralegal working on a particular case. This allows the students to see how an investigation progresses over time in a real case. It also allows them to see the various types of responsibilities imposed on the lawyer or paralegal involved in investigation. And it allows them to see the consequences of decisions made and actions taken—for good or ill—as a legal matter moves along.

At the end of each chapter, numerous LBDs are presented, designed to be selectively assigned by the instructor. The LBDs require the student to close the book, go out, and engage in some hands-on learning activity related to the subject covered in the chapter. The LBD activities range from having the student determine a state's requirements for becoming a licensed private investigator (LBD 1-2); to interviewing an experienced trial attorney or litigation paralegal concerning the importance of using verbal and nonverbal communication skills to evaluate clients, witnesses, jurors, judges, and opposing counsel (LBD 8-4); locating and evaluating actual experts in various disciplines who live in the student's area (LBD 15-2); touring the local or regional office of a federal or state agency to

learn, among other things, how the agency collects and maintains records and how it handles requests for information (LBD 16-3 and 17-5); and performing a factual investigation of a large local business using the Internet and other resources (LBD 18-4). Although the LBDs are collected at the end of each chapter, references to them are made at relevant points throughout the text.

Additionally, the text provides four detailed Case Studies (Appendix A), complete with characters, designed to be assigned to the students individually or in small groups. The Case Studies present realistic scenarios (a murder case, a personal injury case, a domestic relations case, and a real estate development project) and provide a vehicle for the student to put into practice the skills being learned. As the student moves through the text with an assigned Case Study, the LBDs at the end of chapters are keyed to each of the Case Studies and require the student to identify and evaluate evidentiary questions based on the facts in the case (Chapter 7); prepare a complete investigation plan for the case (Chapter 9); schedule, prepare for, and conduct the interview of a person role-playing as the client in the Case Study (Chapters 10 and 11); schedule, prepare for, and conduct the interview of a person role-playing as a witness in the case (Chapters 12 and 13); prepare investigation reports, authorizations, witness statements, and correspondence related to the case (Chapters 10-13); identify potential witnesses and plan how to locate missing witnesses in the case (Chapter 14); locate and evaluate qualified experts who might be needed in the case (Chapter 15); and determine how they would go about seeking relevant factual information in the case from federal, state, and local government sources and private sources (Chapters 16-18). In short, to learn by doing.

Great emphasis is placed in this text on resources available to the investigator, particularly Internet resources. Appendix E, Resources for the Investigator, provides a rich, diverse source of investigative tools along with information on how to locate and access them. In Appendix E, the student will find online and other resources for locating experts; online resources and an extensive bibliography on alternative dispute resolution; extensive reading lists for developing good communication skills in verbal, nonverbal, and written communication; online sources for accessing information from state and local governments and all three branches of the federal government; written and online resources for utilizing the Freedom of Information and Privacy Acts; citations to the open records acts of all fifty states; people-locating resources, from online people-search services to genealogical resources; extensive lists of records-search companies and online database vendors; and even a comprehensive section on resources for and about private investigators. References to Appendix E are made at relevant places throughout the text and a number of LBDs require the student to utilize the resources found there.

New for the Fourth Edition

For the fourth edition, a Chapter Summary and Conclusion have been added to the end of each chapter, along with a set of Review Questions.

The citations to all Web sites have been updated, and references to many new Web sites and cases have been included. The LBD and Sleuth on the Loose exercises have been updated, new LBDs added, and the Hypotheticals and Examples have been refined to be more effective. For those chapters having more than five LBDs, the additional LBDs are accessible on the Author Updates link to the text web site at http://www.aspenparalegaled.com/books/parsons_investigating/default.asp. All Illustrations have been reviewed and updated. The scope of ethical and professional materials in Chapter 2 has been expanded for both attorneys and paralegals. Important changes in the time deadlines for the federal rules of civil and criminal procedure that went into effect in December 2009 are reflected in Chapters 4 and 5. Significant amendments to the Freedom of Information Act since the last edition are reflected in Chapter 16. Appropriate references to online social networking phenomena including MySpace, Facebook, Friendster, Twitter, blogs, and Flickr have been added in Part 2 of the text, to chapters that cover identifying witnesses, and locating and obtaining information on parties and witnesses as part of an investigation. The discovery of electronically stored information (ESI), added to Chapter 4 in the third edition, has been expanded to reflect the growing body of case law and court rules dealing with issues such as when the litigation hold arises in e-discovery, and the corresponding duty of clients and lawyers to preserve such evidence, spoliation of evidence and undue hardship of production allegations, waiver of privilege charges and the role of clawback agreements, and the need for metadata scrubbing software and inter-office metadata policies. Relevant changes in legislation, including the Consumer Product Safety Act of 2008, the OPEN Government Act of 2007, and President Obama's January 21, 2009 Memorandum on the Freedom of Information Act, are referenced as appropriate.

To keep the dates used in Illustrations, Examples, and Case Studies current, this edition adopts a new, flexible year notation system in which YR00 is always the present year. Previous years are designated as YR-1, YR-2, YR-3, etc. Future years are designated YR+1, YR+2, YR+3, etc. The instructor can choose to have students utilize this year designation system in documents they are assigned to prepare, or have them convert the year designations in the materials to the actual year of use.

Organization of the Book

The text is divided into two parts:

- **Part 1:** Foundations for Interviewing and Investigating (Chapters 1-8)
- **Part 2:** Formulating and Executing a Plan of Investigation (Chapters 9-18)

Part 1 introduces the student to the legal contexts in which interviewing and investigating skills are utilized by attorneys and paralegals assisting them. Based on 30 years of experience as a trial attorney, the author firmly believes that in order to be effective in any type of contested matter both attorneys and paralegals must:

1. understand the critical connection between law and fact;
2. be able to engage in effective factual analysis;
3. have well-developed communication skills;
4. be knowledgeable and *committed* to the highest standards of legal ethics; and
5. be well grounded in the adversarial system, the formal discovery rules in civil and criminal cases, the distinctions between formal and informal investigation, and the basic rules of evidence.

Accordingly, those subjects are covered in Part 1 of the book. They are studied from the viewpoint of the investigating lawyer or paralegal, with emphasis on practical application in real-life scenarios reinforced by the LBD exercises. The Appendices supplement the material covered in Part 1, providing selected Federal Rules of Civil Procedure (Appendix B), Federal Rules of Criminal Procedure (Appendix C), and Federal Rules of Evidence (Appendix D).

Part 2 of the book walks the student step by step through an investigation. We begin with how to plan an investigation and how to properly handle documents and physical evidence uncovered in an investigation (Chapter 9). Then we consider how to schedule, prepare for, and conduct a client interview (Chapters 10 and 11), and a fact witness interview (Chapters 12 and 13). Next we learn how to identify potential witnesses and how to locate the missing witness (Chapter 14). Chapter 15 is devoted to the important topic of locating, evaluating, and working with expert witnesses. The text concludes with three chapters devoted to the myriad sources of information available to the investigator, including information available from the federal government (Chapter 16), information available from state and local governments (Chapter 17), and private sources of information (Chapter 18).

Because of its emphasis in Part 1 on the legal context in which the interviewing and investigating is done, including the emphasis on the adversarial system, civil and criminal procedure, formal discovery, and the supporting Appendices and Case Studies, this work can be used as a text for a litigation course as well as an investigation course. The Instructor's Manual provides a sample syllabus and suggested chapter sequencing for teaching the course over one or two academic terms, and for using the text for either a comprehensive litigation course, or a more narrowly focused interviewing/investigation or clinical practice course.

Key Features

Among the many learning tools which distinguish this book are those multi-layered features discussed above:

- Brief Examples
- Illustrations
- Hypotheticals
- Discussion Questions following the Hypotheticals
- Key Words and Phrases
- Learn by Doing exercises
- Sleuth on the Loose

- Case Studies
- Comprehensive glossary

In addition, the text contains occasional Ethical Notes and Career Tips for the student.

The text is designed for use by both law students and paralegal students. Thus the Examples, Hypotheticals, etc. refer interchangeably to lawyers or paralegals. Of course, it should be understood that unless a particular Example or Hypothetical is role-specific, it can and does apply to either category of future legal professional.

The Instructor's Manual for the text contains detailed Character Descriptions for each of the clients and witnesses mentioned in the Case Studies, Instructions for persons role-playing as clients or witnesses, and an Evaluation Form for those persons to complete for each interviewer and return to the instructor. The Instructor's Manual also contains suggested procedures for videotaping and critiquing student interviews, model syllabi, comprehensive examination questions covering all of the chapters with answer keys, and a comprehensive section containing suggested approaches to teaching with the text, including testing and grading, how to use the LBDs in each chapter, how to use Appendix E effectively, and how best to utilize the Hypotheticals, Examples, and Illustrations in each chapter. The complete texts of the Privacy Act and the Freedom of Information Act are also set out in the Instructor's Manual.

Finally, a word about the alliterative and other fictitious names used in the Hypotheticals. These names are not used simply to be clever. The author has developed these materials over fifteen years of teaching an interviewing and investigating course for paralegal students, as well as trial preparation courses for law students, and there are calculated pedagogical goals involved in the name selections. Some Hypotheticals use names keyed to the factual context. For example, in Chapter 6 we learn the importance of knowing the basic rules of evidence by following a dispute between professional golfer, Snap Hook, and his caddy, Teed Off, over an alleged promise to share the winnings in a major golf tournament. In Chapter 7, we review the specific rules of evidence by focusing on a fraud allegation made by Gulli Bull against Smooth Talker. In Chapter 9 we learn how to prepare a plan of investigation by working on an automobile accident case involving Speed Freak and Granny Put-along. And in Chapter 14 we learn how to identify witnesses and locate missing witnesses when Turnme Loose dumps her boyfriend, Getta Life, and then turns up dead.

Other Hypotheticals use names keyed to the lesson to be learned. For example, in Chapter 2 paralegal Sally Oops teaches us the consequences of mishandling client funds, even inadvertently. The experiences of paralegal Ned Newatit demonstrate why new paralegals and the attorneys supervising them need to be familiar with the dangers of unauthorized practice of law (UPL), and why both need to be aware of the danger of disclosing client confidences. In Chapter 8, paralegal Dis Tracted illustrates the perils of not using good communication skills with co-workers. In Chapter 12, Dee Termined demonstrates how to handle the hostile

witness and the skeptical witness. And in Chapters 10-13, Paul Perfect just does a, well, perfect job of preparing for and conducting client and witness interviews.

Thus, the names serve not only to catch and hold the *attention* of the student but also to constantly *remind* the student of what the Hypothetical is about and to *reinforce* the concept being taught. Of course, the names might also make the learning experience a little more enjoyable for the students and even for the instructor.

Textbook Resources

The companion website for Stephen P. Parsons's *Interviewing and Investigating: Essential Skills for the Legal Professional*, Fourth edition, at www.aspenparalegaled.com/parsons3 includes additional resources for students and instructors, including:

- Study aids to help students master the key concepts for this course. Visit the site to access interactive StudyMate exercises such as flash cards, matching, fill-in-the-blank, and crosswords. These activities are also available for download to an iPod or other hand-held device.
- Instructor resources to accompany the text.
- Links to helpful websites and updates.

Instructor resources to accompany this text include a comprehensive Instructor's Manual, Test Bank, and PowerPoint slides. All of these materials are available on a CD-ROM or for download from our companion website.

In Appreciation

For this fourth edition the author has again had the good fortune to be ably assisted by a number of people at Aspen Publishers. Special mention among those goes to Elizabeth Kenny for her continuing support of this project. And a very special thanks to the paralegal students at Walters State Community College and the law students at Appalachian School of Law, who are the continuing inspiration for this project and who for years have served as its willing crash dummies. Thanks guys, and bless your hearts.

February 2010

Stephen P. Parsons

Acknowledgments

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Summary of Contents

<i>Contents</i>	<i>xi</i>
<i>List of Illustrations</i>	<i>xxxiii</i>
<i>Preface</i>	<i>xxxvii</i>
<i>Acknowledgments</i>	<i>xlili</i>

PART 1: Foundations for Interviewing and Investigating 1

Chapter 1:	Introduction to Interviewing and Investigating	3
Chapter 2:	Ethical and Professional Responsibilities for Attorneys and Paralegals in Interviewing and Investigating	21
Chapter 3:	The Adversarial System and Pre-filing Investigation	47
Chapter 4:	Formal Discovery in Civil Litigation	77
Chapter 5:	Formal Discovery in Criminal Litigation	119
Chapter 6:	Rules of Evidence for the Investigator—Part 1	151
Chapter 7:	Rules of Evidence for the Investigator—Part 2	169
Chapter 8:	Communication Skills for the Investigator	193

PART 2: Formulating and Executing a Plan of Investigation 217

Chapter 9:	Formulating a Plan of Investigation	219
Chapter 10:	Preparing for a Client Interview	247
Chapter 11:	Conducting a Client Interview	285
Chapter 12:	Preparing for a Witness Interview	313
Chapter 13:	Conducting a Witness Interview	331
Chapter 14:	Identifying and Locating Fact Witnesses	359
Chapter 15:	Working with Expert Witnesses	379
Chapter 16:	Public Sources of Information—Federal	397
Chapter 17:	Public Sources of Information—State and Local	421
Chapter 18:	Private Sources of Information	439
Appendix A:	Case Studies	465
Appendix B:	Federal Rules of Civil Procedure (Selected Rules)	477
Appendix C:	Federal Rules of Criminal Procedure (Selected Rules)	495
Appendix D:	Federal Rules of Evidence (Selected Rules)	507
Appendix E:	Resources for the Investigator	521
<i>Glossary</i>		<i>551</i>
<i>Index</i>		<i>567</i>

Contents

<i>List of Illustrations</i>	xxxiii
<i>Preface</i>	xxvii
<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	4
2. Factual analysis	6
a. Comprehension	6
b. Evaluation	7
c. Application	8
3. The role of factual investigation in civil litigation	9
a. By the attorney for the plaintiff	9
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	11
B. Other Skills and Areas of Knowledge Related to Interviewing and Investigating	12
1. Substantive law	12
2. Legal research and writing	13
3. Rules of evidence	13
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	14
1. Lawyers using paralegals	14
2. Definition of a paralegal	15
3. The paralegal as an agent of the attorney	15
a. The actions of the paralegal may be legally binding on the attorney and the client	15
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	16
4. Paralegals as licensed private investigators	16
5. What attorneys expect from paralegals	16
a. The willingness to work under the supervision of the attorney	16
b. The initiative to clarify assignments	17
c. Good judgment	17
d. The discipline to keep the supervising attorney well advised	17

e.	The ability to work well under pressure	17
f.	Good communication and people skills	17
g.	Objectivity	17
h.	Thoroughness	18
i.	Creativity	18
j.	Sound interviewing and investigating skills	18
	Chapter Summary and Conclusion	19
	Review Questions	19
	<i>Key Words and Phrases to Remember</i>	19
	<i>Learn by Doing</i>	20
	Chapter 2: Ethical and Professional Responsibilities for Attorneys and Paralegals in Interviewing and Investigating	21
A.	Sources of Ethical and Professional Responsibility	22
1.	State statutes which prohibit the unauthorized practice of law (UPL)	22
2.	Mandatory ethical rules governing attorneys	22
3.	Ethical rules promulgated for the paralegal	23
4.	Guidelines for attorneys and paralegals working together in the law office	23
5.	Advisory ethical opinions	23
B.	Consequences of Unethical Conduct	24
1.	To the lawyer	24
a.	The lawyer may be fired by the client	24
b.	The lawyer may be sued by the client damaged by the unethical behavior	24
c.	The lawyer may be sanctioned	24
d.	The lawyer may face criminal prosecution	25
e.	The lawyer's reputation may be damaged	25
2.	To the paralegal	26
a.	The paralegal may lose her job	26
b.	The paralegal may lose her certification	26
c.	The paralegal may lose her right to appear before administrative agencies	26
d.	The paralegal may be sued by the client damaged by the unethical action	26
e.	The paralegal may be subject to criminal prosecution	26
f.	The paralegal's reputation may be tarnished	26
C.	Specific Ethical and Professional Concerns for Legal Professionals Engaged in Interviewing and Investigating	27
1.	The unauthorized practice of law	27
a.	Establishing an attorney-client relationship	27
b.	Setting legal fees	28
c.	Giving legal opinions or legal advice	28
d.	Representing a client before a court or tribunal	30
e.	Negotiating a legal matter on behalf of a client	30
f.	Delegable tasks and the attorney's responsibility to avoid an agent's UPL	30

2. Maintaining client confidences and secrets	31
a. The attorney-client privilege	31
b. The broader ethical duty of confidentiality	32
c. Protecting client information from disclosure	33
3. Competence	35
a. Seek good education and training	35
b. Seek certification	35
c. Stay informed concerning changes in the law and the profession	35
d. Stay on the cutting edge of technological advancements	35
e. Commit yourself to excellence	35
4. Integrity	36
a. Truthfulness in dealing with clients, co-workers, and others	36
b. Fidelity in handling client funds and other property	37
c. Loyalty	37
5. Diligence and communication with the client	37
6. Conflicts of interest	38
a. Simultaneous representation	38
b. Representing an interest adverse to a former client	39
7. Disclosure of status in verbal and written communications	41
8. Improper communications	42
9. Discovery of client misconduct	42
a. Intent of the client to commit a criminal act	42
b. Fraudulent claim or malicious harassment	42
c. Commission of fraud on the court or perjury	43
Chapter Summary and Conclusion	43
Review Questions	43
<i>Key Words and Phrases to Remember</i>	44
<i>Learn by Doing</i>	44
Chapter 3: The Adversarial System and Pre-filing Investigation	47
A. The Adversarial System	47
1. Civil and criminal law	48
2. The court systems	48
3. Rules of procedure	49
4. Rules of evidence	50
5. Court rules	51
6. The cause of action	51
a. In a civil suit	51
b. In a criminal prosecution	53
7. Remedies	53
a. In a civil suit	53
b. In a criminal prosecution	55
8. Defenses	55
a. In a civil suit	55
b. In a criminal prosecution	56

9. The burden and degree of proof	56
a. In a civil suit	56
b. In a criminal prosecution	56
10. Means of proof	56
11. Statutes of limitation and repose	57
12. Administrative procedures	58
13. Alternative dispute resolution (ADR)	59
a. Negotiation	59
b. Mediation	60
c. Arbitration	61
B. Distinguishing Between Formal Discovery and Informal Investigation	61
1. Formal discovery	61
2. Informal investigation	63
3. The advantages of informal investigation	63
a. Early investigation produces more information	63
b. Information located early is more reliable	63
c. Information sought informally is more easily obtained	63
d. Information sought informally is less expensive	63
e. No opposing party is present for informal investigation	64
f. The first side to locate relevant information gains advantages in litigation	64
g. Prompt investigation enhances settlement prospects	64
C. Pre-filing Procedures	65
1. The mandate for pre-filing investigation	65
2. Objectives of pre-filing investigation	65
a. To determine if there are facts sufficient to state one or more causes of action	65
b. To determine provable damages	66
c. To determine if there are facts sufficient to assert a valid defense	67
d. To satisfy special pleading requirements	67
e. To identify all potential defendants	67
f. To determine the assets of identified defendants	70
g. To determine questions of personal jurisdiction	70
h. To determine questions of subject matter jurisdiction	70
i. To determine the proper venue for a case	71
j. To determine questions regarding governmental immunity	72
Chapter Summary and Conclusion	73
Review Questions	73
<i>Key Words and Phrases to Remember</i>	73
<i>Learn by Doing</i>	74
Chapter 4: Formal Discovery in Civil Litigation	77
A. Introduction	77
B. The Scope and Purposes of Formal Discovery in a Civil Case	78
1. The relationship between the scope of formal discovery and the rules of evidence	78

2. Privileged materials not discoverable	79
3. Discovery of experts	79
4. Required voluntary disclosures	80
C. Methods of Formal Discovery in a Civil Case	80
1. Depositions (FRCP 27 through 32)	80
a. Why lawyers take depositions	81
b. Lawyers using assisting legal professionals in depositions	81
2. Interrogatories (FRCP 33)	86
a. Information to be sought by interrogatories	86
b. Lawyers using assisting legal professionals in discovery by interrogatories	92
3. Requests for production of documents and things (FRCP 34)	96
a. Serving document requests and interrogatories together	96
b. Assisting the client to locate and review documents	96
4. Requests for physical or mental examination (FRCP 35)	99
5. Request for admissions (FRCP 36)	100
D. Drafting Guidelines for Discovery Documents	100
1. Identify and organize the topics to be addressed	100
2. Use clear and concise language	101
3. Be thorough	102
4. Don't be wordy	102
5. Use subparts carefully	103
6. Use definitions	103
7. Use instructions with caution	105
8. Avoid abusing discovery	105
9. Before responding to discovery requests review them carefully for objections	105
10. In responding to discovery requests, answer only what is fairly asked	106
11. Comply with all rules of procedure and local rules of court regarding discovery	106
E. The Order of Discovery	106
1. Interrogatories and document requests	106
2. Depositions	106
3. Requests for physical or mental examination	106
4. Requests for admissions	107
F. Discovery of Electronically Stored Information (E-discovery)	107
1. The 2006 E-discovery revisions to the Federal Rules of Civil Procedure	108
2. The "litigation hold" and duty to preserve ESI	109
3. Undue hardship in ESI production	111
4. ESI production and waiver of attorney-client or work product privilege	111
Chapter Summary and Conclusion	114
Review Questions	115
<i>Key Words and Phrases to Remember</i>	115
<i>Learn by Doing</i>	116