

# Trial Practice

by Ralph F. Holmes, Esquire

Editor's Note: *Trial Practice* is a new feature of *Trial Bar News*. Written by Attorney Ralph F. Holmes, of the firm of McLane, Graf, Raulerson and Middleton, it will be a continuing column in *Trial Bar News*. *Trial Practice* will focus on subjects of interest to the trial bar in New Hampshire.

## CASE INVESTIGATION

One of the joys and challenges of trial practice is its diversity, in both subject matter and skills demanded. In this and future columns, I will discuss various facets of this diversity, with an emphasis on practical skills. Because I believe that examples, good and bad, are the best teachers, especially when someone we know is involved, my comments will be illustrated with the retold experiences of other members of our bar. In order for this to work, I need help. If you have a war story with a moral, please give me a call so we can all benefit from its lesson.

A complaint often heard from the grizzled veterans at my firm is that attorneys do not know how to investigate cases any more, and instead, over-rely on formal discovery. Because investigative techniques, unlike the rules of discovery, are not taught in law school, younger attorneys may indeed fail to appreciate the importance of investigation. To the seasoned practitioner, however, it has no equal. Whether inspecting the scene, or interviewing a witness, investigation gives counsel control over information the other side might not have. In some cases, investigation will win the case.

Such was Bruce Felmy's experience. Bruce represented a company in its suit to enforce a noncompete agreement against three former salesmen and their new employer, a competitor. Predecessor counsel had been successful in obtaining a preliminary injunction which, in many such cases, would have effectively concluded the matter. An ex-wife of one of the salesmen, however, came forward and disclosed that the defendants were routinely selling in territories covered by the injunction and were allocating these sales on the company's books to "007," a fictitious salesman. The Plaintiff moved for contempt.

At this point, Bruce took over and depositions were noticed. The

salesmen and the president of their new employer took the position that 007 was Jeffrey Goldberg, a fellow from Vermont, who had been loosely associated with, and was expected to formally join, the company, although his exact whereabouts were not known. This is where the investigation came in. Bruce contacted every Jeffrey Goldberg in Vermont and found the one the defendants had in mind. Mr. Goldberg's story differed from that of the defendants. He said that he had interviewed for a sales job with the defendants months earlier, had had no contact with them since, and expected none in the future, and had taken another job instead.

The setup was perfect. At the hearing, the president of the defendant company enthusiastically committed himself under oath to the Goldberg-007 story. Mr. Goldberg, who until then had been secreted in a conference room, then took the stand and testified that his involvement with the company had been non-existent. The judge interrupted to express his outrage, the hearing quickly closed, and a favorable settlement ensued.

According to James McElhaney, the personal qualities a lawyer needs to be a successful investigator are "curiosity, suspicion, and understanding."<sup>1</sup> "Curiosity" here is simply the desire to learn about all aspects of the case. What Professor McElhaney refers to as "suspicion" would be more aptly called skepticism, namely, a reluctance to accept the face value explanation of things. By "understanding," Professor McElhaney refers to an awareness of the overall factual context of the matter being investigated. If the matter is securities fraud, for example, knowledge of the requirements for 10K and 10Q filings may be important information guiding the attorney in his

<sup>1</sup> J. McElhaney, *McElhaney's Trial Notebook* 14 (1987).



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investigative efforts. To this list of personal qualities, I would add "drive." It is often only through dogged effort that the attorney succeeds as investigator.

Persistence won the day for Blake Sutton when he defended a landlord against a "sick building syndrome" claim brought by a former tenant. The tenant claimed that during the six to eight months he had lived in the house, he developed increasing respiratory difficulties which led to the collapse of a lung and which did not abate until he left the premises on the advice of his physician. His story was corroborated by not only the physician, but also the Plaintiff's live-in girlfriend who claimed that her health as well had suffered during that period. Skeptical, Blake tracked down the Plaintiff's ex-wife to get some background information on him.

The ex-wife, dependent on the Plaintiff for support, refused to talk. Blake instructed his paralegal to keep in regular contact with the ex-wife in the hope that she would change her mind. Finally, after repeated gentle coaxing by the paralegal, the ex-wife relented and revealed that the Plaintiff was a diagnosed hypochondriac who had been previously hospitalized for psychosomatic illness. The Plaintiff's demand dropped from \$75,000 to \$3,000.

Suggested investigative techniques generally are as follows with respect to witness interviews and accident scene investigations:

## WITNESS INTERVIEWS

1. Unless the witness' story trashes your case, get a signed statement, even if the witness says he or she did not see or cannot remember what happened. The statement will help protect you at

