

# KLINK & CO., INC.

*A Global Leader in Risk Consulting*

## Communiqué

### LITIGATION SUPPORT – USING NON-TRADITIONAL, INVESTIGATIVE DISCOVERY AS A WEAPON IN YOUR ARSENAL

*The following is a Klink & Co., Inc. Communiqué discussing issues facing attorneys and corporate counsel.*

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**“Keeping the case where you want it”**

#### CASE STUDY

*Klink & Co. was retained by a plaintiff corporation in a patent infringement case. The defendant was seeking to transfer the action for lack of jurisdiction. Discovery had been conducted and the defendant adamantly maintained jurisdiction could not be found, as it had no minimum contacts with the jurisdiction.*

*The action was on the verge of being transferred when our staff uncovered that not only was the defendant doing business in the jurisdiction, but the defendant was sponsoring a sales meeting within the jurisdiction that very morning. Our client kept the case in the jurisdiction where they wanted.*

In theory, discovery in litigation is a wonderful concept. Discovery is designed to initiate cooperation between parties in a legal action, resulting in a free and honest exchange of information.

However, as trial attorneys and corporate counsel, we know that the reality of traditional discovery is much different. Often, the information received from the opposition through interrogatories, requests for production of documents, and depositions can be incomplete, misleading, or occasionally false.

It is the duty of the attorney to legally, ethically, and zealously represent his/her client. Often this means interpreting discovery requests in a hyper-technical manner.

And corporations may not provide their counsel with all materials they are obliged to produce to the opponents in a lawsuit. But the larger and more important question remains –

**How can trial attorneys develop leads and discover the “facts” that are not provided in traditional discovery or when discovery options are limited (arbitration)?**

#### **“Investigative Discovery”**

“Investigative” discovery is an alternative and supplement to traditional discovery. Investigative discovery is not reliant upon the good will and good faith of the other side.

In working with trial counsel, we have found that many damaging facts are uncovered by performing the following methods of “non-traditional” discovery:

- Investigation and profiling of the parties and witnesses;
- Evaluation of the claims and defenses;
- Evaluation of discovery responses.

#### 1. Investigation of the Parties and Witnesses

In pre-filing demands or pleadings, unverified facts are presented regarding claims and defenses, and there is little or no information regarding the people or organizations presenting the facts. Often the identity of the parties, their past conduct, veracity and litigious nature are all unknown.

Investigative discovery is a process to evaluate and establish the litigants’:

- Background;
- Motives;
- Histories;
- Goals; and
- Resources.

An investigation performed by professionals can provide a wealth of information that serves to supplement and

enhance traditional discovery.

**“This party has a history of fraudulent behavior. He duped us before, but not again.”**

#### **CASE STUDY**

*A client brought an action alleging fraud and embezzlement on the part of a former officer, employee and shareholder. Klink & Co. was able to establish:*

- *A pattern of fraudulent behavior that pre-dated employment;*
- *Gross resume fraud; and*
- *Substantial assets in real estate and corporate interests domestically and offshore.*

**Our client received a favorable financial settlement from the former employee.**

With information in hand prior to depositions, trial counsel gains an early advantage in fact gathering and confirming or strengthening a claim. A strategy can be set, traps can be baited, and impeachable evidence can be established.

In other instances, truthful information can be coaxed from a hostile witness or party based on a fear of impeachment. As everyone knows, effective cross-examination is conducted long before counsel steps foot in the courtroom. It is conducted with a thorough evaluation of the witness and his testimony.

## **2. Evaluation of claims and defenses and evaluation of discovery responses.**

Investigative discovery is effective in evaluating the veracity of claims, defenses and discovery responses. Use of these non-traditional techniques can begin as early as the preliminary objection stage of a case when jurisdictional allegations are challenged.

Investigative discovery is also useful when, as is typical, judicial discovery has produced unsatisfactory information.

A thorough review of the pleadings and of an opponent's discovery responses, coupled with the use of independent investigation, is often revealing.

**“We don't blindly accept your version of the truth”**

#### **CASE STUDY**

*A client had us review deposition transcripts and answers to interrogatories relating to a key witness in a large commercial action.*

*After reviewing, investigating, and analyzing the discovery, Klink & Co. was able to verify that certain key statements made regarding the transaction and timing of events were inaccurate.*

*Witnesses were identified who were willing to testify that the key witness for the opposition was either lying or was confused about the crucial facts of the case.*

*Shortly after the depositions were taken of the witnesses, a nominal settlement was reached.*

#### **CONCLUSION**

Investigative discovery is an effective tool for trial counsel and corporate counsel to

uncover and identify facts and witnesses. With specialized information in hand, traditional discovery becomes more effective and allows for the development of a case strategy in the early stages of the case.

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*The Klink & Co., Inc. Communiqué is prepared in summary form and is not to be construed as legal advice or opinion on any specific fact or circumstance.*

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