

The inside track on corporate intelligence

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Neil Barnett of corporate intelligence agency Istok Associates gives some advice to lawyers on what to look for when choosing external investigative resources.

In commercial disputes, corporate intelligence providers are a potentially powerful weapon in the arsenal of law firms. However, the business is by its nature prone to secrecy and obscurity.

Many clients understandably find it difficult to compare and judge quality, fee structures and methods. On top of that, the intersection of legal and investigative work can be fraught, and some providers can generate legal problems, rather than helping to resolve them.

This brief guide aims to help potential clients to select and instruct providers effectively, and to ensure that they stay within the bounds of the law.

Providers

Once the decision has been taken to employ corporate intelligence, the first task is choosing an agency.

Ideally, from the point of view of a commissioner, agencies should be viewed as a smorgasbord and chosen for the task at hand; an outfit that would perform well in a large case on Wall Street might not be so well suited to an investigation in the Bulgarian slag reprocessing business, and vice-versa.

The market is broadly segmented. At the top in terms of profile and size are groups like Kroll and the Control Risks Group. They offer a corporate approach based on subcontracting and a high fee base (often on a daily or hourly rate rather than a project rate) that some clients find familiar and reassuring.

Second, there are investigators who largely or entirely specialise in providing support to law firms. These include Nardello and Proven (closely associated with the corporate intelligence agency G3). In some cases – particularly in large jobs in developed markets – their familiarity with legal practices and evidence can be an asset.

Third, there are niche agencies employing up to 30 or 40 staff. For example Hakluyt, the blue-blooded London firm, has a strong position at the top end of the market, but is not especially oriented towards legal work. There are a number of smaller specialist agencies which offer deep expertise in specific regions, such as the Former Soviet Union or Africa.

While they might not have the same familiarity with legal practices as some of the larger agencies, their knowledge of and access within challenging jurisdictions like the BRICS, Kosovo or Laos can be invaluable on a case-by-case basis.

According to Tamara Makrenko, a partner in West Sands Advisory, an emerging and frontier markets corporate intelligence agency, you should “choose your provider carefully based on what it is you need to get done – a provider who has an excellent reputation for accessing public sources may not be adept at providing deep web searches or conducting investigations using established (and verified) source networks.”

She adds that providers should also “use a phased approach to the project as a way to control expenditure and expectation (in terms of cost and timescale) and provide as much detail regarding the case as possible,”

at least in terms of what it is you want from your corporate intelligence provider.

“By being transparent as to your needs, your provider may identify questions/routes of investigation that should be looked at given their experience with specific jurisdictions that you may not necessarily have been aware of yourself or had otherwise overlooked,” Makrenko further explains.

“Remember that branch offices in sensitive jurisdictions may actually pose more of a detriment than a benefit as it opens cases up to external vulnerabilities.”

How to get the best

If the decision to commission corporate intelligence work has been taken, and the provider selected, it is clearly important to instruct the agency in a way that is likely to get the best results.

Cases that are likely to end up in court are a fertile ground for misunderstandings between corporate intelligence people and lawyers for several reasons. One sticking point is that some lawyers don't always immediately understand the obligation of investigators to protect human sources.

So opening a discussion by asking exactly who an agency will tap is a recipe for getting off on the wrong foot. Corporate intelligence is as much an art as a science and in many cases the sources for a specific job – perhaps people knowledgeable about the shipping business in Vietnam – will not yet exist; the agency will have to develop the sources for that specific case.

They should, however, be willing to give a general outline of sources, without disclosing identities.

Leading on from that, in investigating a corporate dispute for legal purposes it is important to clearly distinguish between finding out what happened and proving what happened.

Both have their place, but must not to be confused – they are like two overlapping circles of a Venn diagram. Often it is very useful to gain a clear understanding of the facts behind a case, even if that understanding is not immediately applicable to court hearings and evidence. That can then be a base for proving what happened.

As both lawyers and investigators are aware, the facts behind an apparently routine case are often completely unexpected, bizarre or downright Gothic. Determining those facts at an early stage without the pressure on sources of witness statements can be very useful indeed.

One example is a commercial dispute between a multinational construction firm and its local partner in Kazakhstan. The local partner and his associates seemed hell bent on pursuing and deepening a conflict with the multinational that had little or no upside for them, and could only result in a Pyrrhic victory.

An initial background investigation into the local partner and his associates revealed that they were strongly committed to a fundamentalist Christian sect based in the US and had sought out and pursued a number of other bitter commercial disputes for no apparent gain.

While their motives were hard to comprehend, the intelligence allowed the client and their legal team an insight into the irrational nature of their adversaries, and to shape their strategy accordingly.

There are private investigators who speculatively call likely sources by phone and try to get information out of them for court use. In a case where the stakes are high, this is unlikely to be of much use and may indeed be counterproductive.

Serious use of human sources requires a gentle and patient approach, in the first stages making it clear that there is complete anonymity and that if there were ever to be any witness statements or affidavits, then that is

some way down the line. It is, in other words, a process of seduction, and any provider who appears to favour a bureaucratic approach should be treated with caution.

According to Makarenko, when commissioning corporate investigators “first ensure that thorough access to public records is obtained and results appropriately analysed.

Second, be aware that when dealing with emerging/frontier markets, there will likely be a need to go beyond public record and open source research; but in going down the human source route, ensure that your commercial intelligence provider is willing to provide you with a general idea of the background of the sources used/whether and how they have been verified/and how they have triangulated any sensitive findings to distinguish between sheer rumour and probable accuracy.

Third, expect a clear and concise structure of reporting that gives you findings that are contextualised both to the jurisdiction from which they have been obtained, and to the exact problem that is being addressed.”

Staying clean

In the wake of the News International ‘phone hacking scandal, the importance of investigators staying within the law can hardly be overstated; investigators should limit rather than create legal risk, and overstepping the mark can have lethal consequences for the client’s interests and reputation.

The fact that the News of the World to its great cost employed grubby raincoat gumshoes does not mean that larger and more corporate outfits are above such methods in commercial dispute cases.

In recent years perhaps the most notorious such case occurred as part of the Alfa Group-IPOC battle over ownership of the Russian telecoms company Megafon.

In 2005, employees of Diligence, a US investigation company, approached an employee of KPMG in Bermuda, falsely claiming to work for Britain’s Secret Intelligence Service, otherwise known as MI6.

They persuaded the employee to hand over audit details for IPOC, Alfa Group’s Bermuda-registered adversary; Diligence had been instructed by Barbour Griffith & Rogers, the Washington lobbying firm. The stakes were high, but this was a spectacular own goal.

More recently, the battle over the hedge fund Ikos (in parallel with the divorce of its founders) degenerated into farce when investigators resorted to breaking and entering, bugging, planting a GPS tracking device on a car and sending in what the Mail on Sunday described as “a glamorous undercover agent.”

Aside from the reputational and potentially criminal repercussions, such revelations can plainly have a catastrophic effect on a client’s case in court.

While it is of course not advisable to instruct corporate investigators to use such means, it is also important to remember that they need to be unambiguously instructed not to break the law or otherwise act unethically, even if on their own initiative.

An associated issue is the FCPA and the UK Bribery Act, although this is perhaps of less significance than some clients imagine. The truth is that very few agencies pay sources (as opposed to consultants or associates) for information.

Competent corporate intelligence operators often come from a state intelligence or journalistic background, and are adept at developing and managing sources in a way that does not involve payments. (Indeed, paying sources sets up all of the wrong sorts of incentives to fabricate reams of lurid information.)

So while the question of payments – especially to public officials – is a real one, it is probably far less

prevalent than might be supposed.

In conclusion, corporate intelligence agencies can provide priceless intelligence to elucidate a case and sometimes evidence and witness statements too. But in order to get the best, agencies need to be carefully selected on a case-by-case basis, briefed and managed.

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