

## SOME REFLECTIONS ON PRIVATE INVESTIGATION – A VIEW FROM OUTSIDE.

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The perception of judges to the activities and position of private detectives and investigators is obtained by experience at the performance of the judicial office. The activities and methods private investigators apply not only define their position vis-à-vis their clients but also their relations with public authorities in general, and especially with courts. After describing this view I will share with you some ideas on the probative force of the results of the activities of private investigators and on the consequences of legal provisions for their position. Then I will reflect on the common minimum standard presented by IKD, on professional responsibility in context with an ethical code. And finally I will tackle the problem whether private detectives and investigators could act as some kind of assistants to the court.

In the view of judges the activities of private detectives and investigators are manifold and constitute a broad diverseness using many different methods to determine facts in a variety of matters. They may use various types of surveillance or searches to carry out investigations. Private detectives and investigators assist attorneys, businesses, and the public in cases covering legal, financial or personal problems.

They offer many services including executive, corporate, and celebrity protection, and also provide assistance in civil liability and personal injury cases, missing person cases, insurance claims and fraud, child custody, and protection cases. To some extent they are hired to investigate individuals to prove or disprove infidelity. Their duties depend on the need of their clients. Private detectives and investigators are specialized to a certain extent. One of the most important specializations is the activity private detectives generate as legal investigators. These specialize in cases involving the courts, and often are employed by law firms. They frequently assist in preparing criminal defence, locating witnesses, inside common law systems they serve legal documents, and gather and renew evidence. Legal investigators also may collect information on the parties to the litigation, testify in court, and assemble evidence and reports for trials.

Certain European states require private detectives and investigators to be licenced. For such a licensing mostly a given set of qualifications is required, like minimum age, having a combination in police sciences, criminal and other fields of the law, and often prior experience in activities typically for their profession. In addition they mostly pass a criminal history background check and some kind of professional examination. Some investigators receive certification from a professional organization to demonstrate competency in a particular field. To receive such kind of designation, applicants must satisfy experience, educational, and continuing-training requirements, and in some systems must pass written and oral exams, administered by the institution assigning the special designation.

Courts in both criminal and civil cases are confronted with pieces of evidence presented by the parties, which are produced by private investigators. Following the experience of judges this evidence in the majority of cases is presented as a written report. In addition, and most frequently when it appears necessary to give proof on the circumstances established in such a report an oral interrogation would be conducted.

The testimony of private detectives in court has a particular quality. Their position implies to a certain extent conflicting qualities with regard to the probative force of their statements. Private investigators normally are employed by one side of the case, what evidently indicates a close relationship to the party engaging and paying them. But special abilities and skills acquired by professional training and experience imply a considerable benefit for such evidence. Private investigators know and are aware that after taking the observation they could be interrogated on the reproduction of the facts they observed, and that they may appear before a court as a witness. Legal education allows the private detectives to focus already during the observations on those facts, which in the legal respect may really matter for the case and the judgment, and allows them therefore to concentrate on the relevant facts. They imprint the crucial occurrences in their memory, and in this way they are much more capable to reproduce them pursuant to what happened in reality.

This particular situation of a private investigator when testifying as a witness of course is regarded by the court, when considering the testimony and evaluating the reliability and credibility of their statements. The so to speak partiality of such witnesses hired and paid by the party to the procedure, for whom they are testifying, may affect their credibility. As a general rule witnesses nominated by one party of the case often incline to disclose only those facts, which may benefit the side for which they are testifying, and sometimes, what also may happen unknowingly, conceal circumstances which may weaken the litigating position of their client. But on the other hand such a danger is reduced by the legal responsibility of such a witness, who is aware that before the court he only has to state the truth and nothing but the whole truth, and knows that already to conceal intentionally a part of the circumstances, which could be relevant for the assessment of the

facts, in most of the legal systems would constitute a crime. The private investigators certainly are aware of the risks of an incomplete testimony.

This also applies to written statements and reports produced by a private investigator in order to be presented in a case. Reports of private detectives are considered by the court generally in the same way like any other documentary evidence, which is submitted to the court by the parties, although some procedural codes refer explicitly to such kind of evidence. But unlike oral testimony those written reports contain a higher probability that an essential circumstance would be concealed for reasons just explained, as this may happen with an oral testimony. The report of a private investigator shares the same kind of problems which may affect the presentation of a written expertise presented by one party. On this account judges would mostly prefer to have private investigators appearing before the court to testify orally on decisive facts, rather than to only have read out a written report produced by them.

This situation generally occurs, no matter whether a legal system regulates the position and structure of private investigators' profession. European procedural systems in general don't provide more credibility or persuasive power to particular kinds of evidence. All these legal systems are governed more or less by the principles of free consideration of credibility and reliability of a piece of evidence by the court, including evidence of all kind, may it be the testimony of a witness, a document, the statement of an expert or evidence by inspection. It is exclusively the court who evaluates freely, whether it would be satisfied by the evidence or not.

But in fact particular pieces of evidence have higher chances to be regarded as more convincingly than others, if one only takes into consideration the various kinds of documents which are presented to the court, ranging from a simple piece of paper with a handwritten statement by any person, to an official instrument certified, for instance, by a public notary or an official authority.

However, consistent regulations providing for the situation of private investigators and structuring the profession altogether have at least indirectly an impact on the position of private investigators vis-à-vis any public authority. A severe legal procedure for admission to the profession, with strong criteria on training and personal propriety, outwardly indicates that members of this profession are persons, who not only dispose about the necessary personal skills for their activities, but also possess integrity. This can result in a sound reputation of the profession, what of course has a consequence for credibility and liability of their members. The fact that private detectives normally are paid by the party for whom they are acting therefore takes a back seat in this respect.

Following these considerations, and my personal experience also on a European level, I would plead for strong legal rules providing for the profession of private detectives and investigators. Those legal rules at least should cover personal and professional requirements for the performance and the scope of the profession, for training standards, provisions on incompatibility, and on responsibilities vis-à-vis the client and the legal system, in particular with respect to secrecy and the fundamental right to protection of personal data. These provisions should guarantee personal integrity and propriety in order that clients and public authorities confronted with the activities of private detectives and investigators would be certain that in any respective case an upright person was performing the function properly, and that the assumption always is pleading for the reliability of what was produced.

In considering the situation within the European Union it could be advantageous to attain among the member states at least a harmonization of basic provisions. A common minimum standard would of course serve to achieve the desired goal. For many years I acted for the European and International Association of Judges, and dealing considerably with the compilation of basic principles and provisions, which lastly are applicable for all members of an international organization. In such situations one is confronted with the need to satisfy various demands. In this respect each organization of a similar composition must cope with its own challenges. But to achieve an agreement about a common standard within the international organization of a given profession this only is the first step. Even in establishing common principles one should take into account the following step, consisting in advocating for the rules firstly before the authorities of the own national legal system, and then of the European Community.

In reflecting on the present draft on a common minimum standard I must ask for your appreciation. My view of course is a perception from outside, and may be influenced to a certain extent by the experience judges are making in this regard. The paper I received on this seems to me a suitable endeavor to define the most basic principles, which could be or already may be agreed by all members of IKD. The presented scheme of options is an efficient structure to complete it according to the principles labeled there.

I think that option one of this paper dealing with personal requirements by mentioning only a minimum age and a sound mind seems to be somewhat undercharged. This possibly could be backed up to some extent. For me personally the minimum age of only eighteen years seems somewhat too young. I believe that the profession of a private detective and investigator bears considerable accountability, what requires a well founded character and a mature personality, and I worry that the age of eighteen years would not always guarantee this, keeping in mind first of all the desired reputation of the profession. I don't know whether this collides with already existing age limits in some systems, but I would determine a minimum age of at least twenty-four years as adequate. Physical and mental qualification for the aspired occupation could be another personal requirement. I would recommend emphasizing also the physical qualifications, because these at least are necessary to conduct all kinds of surveillances the clients want the private investigator to perform, and to reproduce the observations in a way required to be used as evidence.

Regarding the required propriety one should consider that the criminal history background not only should be limited to a certain number of less serious offences, which may not constitute a handicap for the occupation but due to the fact that the ambition of the profession is just to get a maximum respect and reputation, it seems more advisable to demand a criminal record, which is completely clean, as it mostly is required for security personnel employed by the public authorities. Integrity furthermore is not only limited to not showing a criminal record, it covers more qualities, for instance, in a commercial respect not having been bankrupt or any other insolvency during a certain period before the admission to the profession. Integrity also means to be respectable and trustworthy. These qualities are closely linked to an effective code of ethics, to which I will make a brief remark later on.

In looking on the different systems among Europe the establishment of a common standard on training and experience may be a rather delicate matter, and I almost don't dare to reflect on this. The subjects to be instructed might be comparable to those required for the education of police agents, or other public security services. The study of criminal and civil law, including substance and procedure, is of major importance. I will limit my remarks on this. The important subjects for the big variety of methods exercised in the practical use of the profession belong to your own expertise. Only just a word on the duration of the training period: It applies generally that a profound and widespread education always takes its time, and as better the education for the function is, as higher will be the reputation and prestige the profession attains from this.

This also applies to the examinations to be taken at the end of the training period. Severe tests should prove the competence of the candidate, and verify that the applicant disposes the required qualities to perform the function properly. The examination board consigned to approve the tests should be composed of persons of high professionalism and integrity. It should be an examination regarded as serious, and not one about which the rumor says that everybody would pass it. The exams could prove personal skills like ingenuity, persistence, and assertiveness. A candidate must not be afraid of confrontation, and should communicate well. Good interviewing and interrogation skills also are important. Because the courts often are the ultimate judge of a properly conducted investigation, the investigator must be able to present the facts in a manner that each court either consisting of professional judges or of a jury will believe. All professions bearing high responsibility include in their professional exams the proof of personal characteristics, which are essential for the performance of the activities. Such qualities are not easy to test. It needs examiners of high personal qualities and broad professional experience, who enjoy high confidence among their peers, to check these capacities.

So far I repeatedly emphasized that private detectives and investigators need high reliability and credibility not only in the relationship with their clients but particularly when they appear before courts and other public authorities. This requires of course special responsibility, and that the profession carries additional moral responsibilities to those held by other people in general. This is because these professionals are capable of making and acting on an informed decision in situations that the general public cannot, because they have not received the same training, and lack of the same experience. This additional knowledge also comes with a particular authority. The clients place trust in the professional on the basis that the service provided will benefit them. It would be quite possible for the professional to use his authority to exploit the client. Therefore questions arise as to the ethical limits of the professional's responsibility.

Most professions have internally enforced codes of practice that members of the profession must follow, to prevent client disappointment, and first of all to preserve the integrity, and credit of the profession. Ethical codes, often combined with disciplinary responsibility allow drawing a standard of conduct, and ensuring that individual practitioners meet these standards, by disciplining them from a professional body if they do not practice accordingly. This allows the professionals, who act with conscience to practice in the knowledge that they will not be undermined commercially by those, who have less ethical concern. This also maintains the public's confidence in the profession, meaning that the public will continue to seek their services.

In the context of a code adopted by a profession, an ethical code may be styled as a code of professional responsibility, which may dispense with difficult issues of what behavior would be regarded as ethically. Some codes of ethics are promulgated by the agency responsible for licensing the profession. Violation of these codes may be subject to administrative sanctions, as e.g. loss of the licence, or even civil or penal remedies. Other codes are enforced by the organization that promulgated them. Violation of such codes usually is limited to loss of membership in the respective organization. Other codes are merely advisory, and there are no prescribed sanctions for violation or even procedures for determining whether a violation even occurred.

In general ethical codes are formal statements of the organization's values on certain ethical and social issues. Some only set out general principles about the profession's belief on matters such as quality, employees and the treatment of clients. Others set out procedures to be followed in specific situations like conflict of interests, and establish procedures to determine whether a violation of the code of ethics occurred, and if so what sanctions should be imposed.

The effectiveness of such ethical codes depends on the extent to which the competent organs are supported for imposing sanctions or rewards. Violation of private organization's codes usually subject the violator to organizational sanctions, what in the ultimate context can mean expulsion from the organization.

The draft of the IKD Code of Ethics is following almost literally the Association of British Investigators Code of Ethics. This code is typically for one promulgated by an organization of the profession. In describing the responsibilities the code is characterized by a broad usage of general clauses and uncertain legal and ethical concepts like it mostly happens when only general principles are set out. Such concepts, like the phrases "highest moral principles", "legality", "morality", "professional ethics", but also "interest of the client" or "highest standard of proficiency" must always be construed according to the concepts of the environment and the social and professional context in which the person, subject to such a code, is acting. I understand this code as a definition of general principles, on which the IKD members could agree. But provisions of such a kind always are difficult to apply in practice. Similar ethical codes are coping with these difficulties supplementing each single article of the general rules by comments. These comments explain the substance and the intended purpose of the respective provisions by describing wherefore they stand, and giving examples for instance what conduct would bring reproach upon the profession.

Ethical codes only giving general rules on how the members of the organization should behave, and what they should respect are somewhat incomplete like substantial provisions of criminal law without providing for their enforcement. In case ethical rules lack a procedure enforcing them they will remain solely as a call or appeal, and they will not have a major impact. A certain danger could arise that they would only be obeyed by the willing members of the profession. Therefore, it is highly recommendable to fortify them by providing additionally for an enforcing procedure including a body, which will apply the ethical standards and sanction infringements of the rules. Problems appearing for national associations in this context are resolved mainly by enacting such supranational ethical codes like some kind of directive for the national members, which will obligate them to promulgate their own national codes accordingly, and strengthen them by establishing a body, which would sanction infringements.

Finally I will briefly tackle the problem whether private detectives and investigators could act in assistance to the courts. According to my view they can never do this in cases where they are engaged by a party to the proceedings. Assistants of the court would require a similar impartiality as it is for instance with court surveyors or expert witnesses, who are not nominated by a party but appointed by the court itself. Being hired by one side evidently deprives the concerned person of impartiality. But acting in a case independently and not engaged by a party involved opens possibilities to provide the court with special expertise. It depends on the legal system, to what extent they for instance can act as expert witnesses. Some legal systems establish official registers, in which practitioners with paramount expertise in particular areas are enlisted after proving their expertise e. g. by passing a special examination, and then generally being sworn on impartiality, neutrality and objectiveness. Those expert witnesses then are selected by the court out of such a register, and appointed for acting in the particular case. They are giving opinions on the question of facts according to their specialized knowledge. It is not exceptional that private investigators are included in such registers. In other legal systems the court appoints an expert witness according to its belief about the specialized knowledge of a practitioner to answer factual questions what the court has to resolve. Generally I don't see any obstacle to appoint private investigators when they range among the best available experts to answer special questions in cases, when they have or had no relationship to the parties and did no investigation in the particular case before.

But another case is the use of private investigators during the course of a preliminary inquiry of the court. In the majority of European legal systems such pre-trial investigations in criminal cases are conducted by public prosecutors or attorneys. For the actual investigative activities the prosecutors use the assistance of police agents, may it be agents of a special court police acting for the judiciary, like in some way in France, or special trained agents of particular criminal police departments, like for instance in Germany. These agents in fact are civil servants paid by the state, and subject to special legal provisions and a particular discipline. They perform their office under the control of public authorities. It would be very difficult for private investigators to compete with public authorities of that kind, who in addition dispose of a legitimate use of physical force, which auxiliary means are never available for private investigation. Altogether I see only limited possibilities for private investigators as official assistants to the courts.

Anyhow, the challenges for private detectives and investigators are increasing, and their activities become important more and more. Significant tasks are sourced out from the responsibilities of public authorities, like corporate and personal protection, supervision of companies and residential areas, protection of persons and assets, investigation for insurance and bank companies. As from now this could mark a part of the future development of the activities of private detectives and investigators. Against the background of the high significance of the protection of personal data, which in all EU member states lead to the supervision of data detection and processing even of the authorities of police and military intelligence by independent legal commissioners and controllers, classical surveillance and investigation activity by private detectives in any way becomes increasingly complex. Therefore also representatives of the judicial power are very interested in your debate on problems concerning your profession.