

COHABITATION INVESTIGATIONS

Family Law Litigation

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THE LEGAL SUPPORT INVESTIGATIVE SERVICE

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I was in a Family Law Litigation course in college when I was given a fact pattern to research and determine whether there was codified law or case law supporting an alimony modification based on reduced need due to cohabitation. Little did I know that I would become an investigator after college and utilize the many legal lessons I learned in my business practice.

Modification of Spousal Support or alimony is a common area of contentious litigation, where investigators are brought in to establish evidence in support of their client's litigated matter.

In Family Law litigation, Cohabitation Investigations can be financially beneficial for the client in the form of reduced or terminated support ... IF the facts and evidence support the client's assertion.

Strangely enough, cohabitation cases have frequently resulted in a disconnect between attorneys and investigators due to poor litigation outcomes, while also futilely expending the client's financial resources. Which raises the question ... why?

In my opinion, the cause of the DISCONNECT lies in a few areas:

- (1) Attorneys may have had a poor prior experience with an investigator, resulting in reduced expectations from the investigation industry.
- (2) Investigators are not trained or experienced in Family Law Litigation and do not quite understand the evidentiary needs to satisfy the burden of proof.
- (3) The client's financial constraints inhibit the investigator's ability to conduct a thorough investigation, resulting in a fragmented / incomplete investigation.
- (4) The client presented an inaccurate representation of alleged "facts", hoping for a financial advantage.

This is where excellence in three areas of a professional investigation is paramount for success.

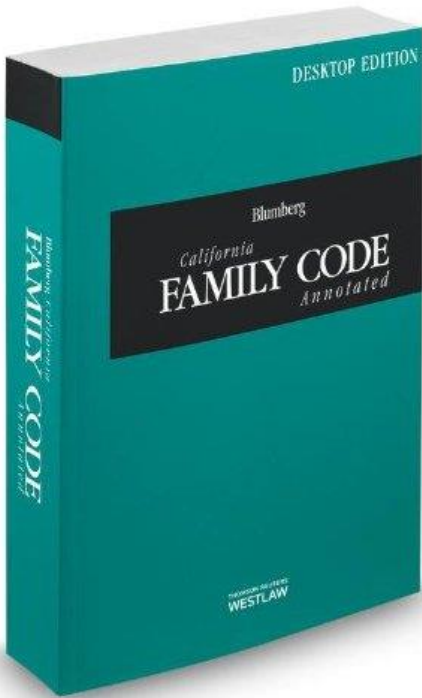
Investigative Expertise - knowledge based on training and experience

Comprehensive Reports – detailed reports that link relevant facts and evidence

Expert Testimony – professionally articulate the facts, supported by evidence.

COHABITATION is defined by Black's Law Dictionary as living together; living together as husband and wife. Cohabitation means having the same habitation, not a sojourn, a habit of visiting or remaining for a time; there must be something more than mere meretricious intercourse.

Cohabitation is far more than just a new partner spending the night with a supported party or vice versa. An investigator needs to understand “cohabitation” in the legal sense in order to focus his/her investigation.



FAMILY CODE § 4323

(a)(1) Except as otherwise agreed to by the parties in writing, there is a rebuttable presumption, affecting the burden of proof, of decreased need for spousal support if the supported party is cohabiting with a nonmarital partner. Upon a determination that circumstances have changed, the court may modify or terminate the spousal support as provided for in Chapter 6 (commencing with Section 3650) of Part 1.

(2) Holding oneself out to be the spouse of the person with whom one is cohabiting is not necessary to constitute cohabitation as the term is used in this subdivision.

(b) The income of a supporting spouse's subsequent spouse or nonmarital partner shall not be considered when determining or modifying spousal support.

(c) Nothing in this section precludes later modification or termination of spousal support on proof of change of circumstances.

More insight into the elements of cohabitation can be found in the appeal, in re Marriage of Lieb, 80 Cal. App. 3d 629 (1978). In Lieb, the courts found that cohabitation existed where the supported party and her partner treated themselves as mutual homemakers, housekeepers, companions, exchanging expensive gifts and taking vacations together, etc.

In the matter of Rheuban v. Rheuban (1987), the supported party (appellant ex-wife), Patricia Rheuban, purchased a home with Gary Gutwirth following her divorce from the respondent. The supporting party (respondent ex-husband), Steven Rheuban, sought a support modification order based on alleged cohabitation and prevailed in family court.

Upon appeal, the appellant stated her purchase of the household with Gutwirth was a business relationship, and that personal living expenses were kept separate. Ironically, the appellant admitted that she shared the same bedroom, the same bed and has had a continuous sexual relationship with Gutwirth. The trial court found that Patricia Rheuban's commitment between herself and Gutwirth was much more substantial than she admitted, and determined that cohabitation did in fact exist.

The court of appeal determined the present code section requires the court to find the parties were cohabiting, which clearly requires more of an analysis of the living relationships than merely sharing living accommodations. In Rheuban v. Rheuban, the Court of Appeal's concluded: Based upon the evidence and the inferences reasonably drawn therefrom, the trial court found that Appellant and Mr. Gutwirth were cohabiting.

The point of sharing the codified and case law research is so that the investigator understands a cohabitation investigation is far more extensive than being reliant on one piece of evidence.

INVESTIGATION

In cohabitation investigations, rarely will you find a “smoking gun”, in fact, the supported party and new partner will often attempt to conceal the relationship. It's critical for the investigator to exercise due diligence when conducting their cohabitation investigation, proverbially uncovering every stone.

When building a cohabitation investigation, I prefer to look at the compendium of evidence as bricks in a wall, where every single brick is individually important, but none are individually exclusive to the success of the case.



Reliance on one evidentiary item may be easily refuted in court. However, the overwhelming compilation of direct and circumstantial evidence eliminates the opposing party rebuttal of “it was temporary” or an “isolated incident”.

When laying the ground work and planning for your focused investigation, it will initially require considerable communication with the client to determine background facts like habits, patterns, etc about the Supported Party.

COURT DOCUMENTS

Request a copy of the opposing party's Income & Expense Declarations, submitted personal declarations, and/or depositions. Review the declarations, I&E's, etc., and keep critical details in mind when conducting your investigation.

Through the course of the investigation, contradictions and/or undisclosed facts by the Supported Party in their I&E may demonstrate deception or dishonesty in the eyes of the court.

Also, check if the new live-in partner is in the process or has recently divorced as well. If so, pull the docs and review, cross-referencing information that may support your client's case.

DATABASE RESEARCH

Once we have obtained relevant background information from the client, the first step is database research. Always remember, database reports are never considered "conclusive" or definitively accurate ... they are merely an investigative tool. In fact, most database companies attach a caveat to their reports advising that database reports are replete with errors and subject to human error, and must be independently verified. In my reports, I even insert the following caveat.

DATABASE WARNINGS

DATA WARNING: Information contained within this report is derived from public records. Public Records and commercially available data sources may have errors and are not always 100% accurate or complete. Data is sometimes entered poorly, processed incorrectly, and may not be free from defect; it should not be relied upon as definitively accurate. Before relying on any data provided through public records and commercial indices, it should be independently verified.

Moving forward, database research on both the Supported Party (SP) and the 3rd Party is always the first step (I always run 3 different data brokers). It will usually reveal supportive leads in the form of an address history for both the SP and the 3rd Party. There are several things to look for. Did the Supported Party or the 3rd party recently move in with the other, and is it reflected in the report?

If so, it's important to follow up on the last known address of either, demonstrating they vacated their previous address, before moving into their new residence. Additionally, you will want to determine if either person opened a Post Office Box in the area to possibly conceal their current residence. This can be subject to subpoena.

If the database report(s) address history accurately support your client's case, detail this in your report and explain how database companies rely on Credit Header personal identification information (DOB, SSN, etc.), which is collected monthly and provided by the three consumer credit agencies Experian, Equifax, and TransUnion.

On the other hand, the database report may reveal that the supported party or 3rd party actually maintains separate households. It is up to the investigator to determine if this is accurate. If one party does maintain a separate household, the investigator will need to determine if the additional residence is lived in by one of the parties, or is it used by other extended family members, or possibly even used as a rental to generate additional income. This is important to determine early in the case, which could have an impact on whether cohabitation exists and whether the case should continue forward.

A thorough background investigation of the new significant other is important if children are involved. The database research may reveal a history of violence or substance abuse by the new boyfriend / girlfriend, which may have an impact on custody as well.

INTERNET AND SOCIAL MEDIA

Social media can be extremely helpful, depending on the degree of use by the supported party and/or the new significant other. It may reveal intimacy, trips together, shared events, holidays, etc. Additionally, you may want to quickly check the accounts of known mutual friends for related content, such as group gatherings.

Immediately preserve the evidence in the form of print, downloads, and screenshots, then refer to them as attachments in your report(s).

Keep in mind, the date social media images are posted is not necessarily the date they were taken, so further efforts will need to be exercised in determining and cross-referencing evidence so the images serve a relevant evidentiary purpose.

When your attorney subpoenas financial records from the supported party, the credit card transactions may coincide with the social media postings, such as a trip to Hawaii or the purchase of a new item.

If children are involved, social media may reveal excessive drinking or violation of court orders.

When submitting printed screenshots of social media or internet posts as evidence, I like to insert the supporting evidence codes for the benefit of the reader.

California Evidence Code 1552

<https://codes.findlaw.com/ca/evidence-code/evid-sect-1552/>

CA Evidence Code 1552(a)

(a) A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information

or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the computer information or computer program that it purports to represent.

California Evidence Code 1553

<https://codes.findlaw.com/ca/evidence-code/evid-sect-1553/>

CA Evidence Code Section 1553(a)

(a) A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent.

UTILITY SEARCHES

Utility searches may be helpful; in my experience, in most cases, the utilities are usually paid by the party the residence is owned, leased or rented by.

MUTUAL FINANCIAL ASSETS & ASSOCIATION

A great form of evidence is searching for the comingling of finances and mutual associations. A couple of years back, I had a case where the Supported Party and the boyfriend purchased a car together, as well as a boat. A DMV search of the license plates revealed that both of their names were listed on the registration and the loans. Additionally, they joined a yachting club together, listing their relationship on the application as “Cohabiting” as opposed to spouse, friends, or roommates.

SURVEILLANCE / DOCUMENTED LIFESTYLE

Surveillance will obviously be the most time-consuming and possibly the most cost-prohibitive, but it can also be the most productive in terms of establishing intimacy, lifestyle, spending habits, etc. Therefore, it’s necessary to have a solid plan and explain the reasoning to the attorney and the client. I advise the attorney and client that it usually takes about 4 weeks to complete a cohabitation investigation. The window can vary depending on the circumstances. If you find evidence that they are not cohabitating, then the case is usually over within the first week. Other times, the case may take a little longer, depending on the circumstances and if there are other factors like custody.

Naturally, you will always use a camcorder and covert camera with Date & Time Stamp capability. With the advances in digital technology, in the form of quality cell phone camera images and apps, I have also incorporated using my cell phone with a free Time Stamp App that superimposes the date & time stamp on the image, and incorporates the location as well, based on cell tower triangulation.

The cell phone app and covert camera are useful for preserving photographic evidence of intimacy, lifestyle, etc., when following the couple in public, to restaurants, bars, events, etc.

Okay, back to surveillance. Even though you will already have most of your background research in hand, the first week is usually the most extensive. The client hopefully provided you with routines or patterns of the Supported Party, and possibly the known employment and habits of the 3rd party. On the other hand, it is not uncommon that the client has no current information about their supported ex or new partner.

The plan in the first week is to quickly develop a lifestyle pattern, since most people are creatures of habit, which will allow the investigator to refine the surveillance to particular days and hours, developing supporting evidence, while being cost-effective.

You cannot, however, selectively pick only specific days to conduct your surveillance and not others (ex, only Saturday and Sunday). Years back, I had a client who wanted to argue cohabitation in court. The problem was that the ex-wife's boyfriend only spent weekend nights at the supported party's residence while maintaining his own separate residence during the work week. This is not cohabitation!

At the beginning of the field investigation, I usually start early Monday morning, until at least one or both parties leave the residence, depending on the known habits and employment facts. I usually follow this with a lengthy afternoon and evening surveillance, documenting when they arrive and then putting them to bed, so to speak (lights out). Chalking the tires can be okay to some extent; however, there is always a chance you may get caught by the parties involved or a neighbor. Additionally, you may be leaving an obvious sign that the tire and street are being marked.

I always return early the following morning, before they awake, to document that the vehicle locations are the same as the night before. It's important to note if there is condensation on the vehicle hood or in the windows. Check to see if the engine hood and brakes are cold or hot. Check the asphalt under the car to see if it's dry, where the rest of the street surface may be damp from overnight dew or a light sprinkle. Does the new partner park in front of the residence or hide their vehicle around the corner? Document when the lights come on inside the residence.

The following is a surveillance scheduling template, sampling every day of the week. Based on a M-F work week, the weekends usually tend to be a little more active surveillance-wise since most people entertain on the weekends.

	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
Week 1	Long Day	Long Day	1600 - 2200	0530 - 0830	1600 - 2200	0600 - xxxx	
Week 2	1600- 2200	0530- 0830		1600 - 2200	0530 - 0830	1600- 2200	0530 - xxxx
Week 3		1600- 2200	0530 - 0830		1600- 2200	0600 - xxxx	1600- 2200
Week 4	0530- 0830		1600- 2200	0530 - 0830		0600 - xxxx	

After the first couple of days of surveillance, the investigator should have established a pattern or routine for the supported party and the new boyfriend / girlfriend. From this point, the investigator can reduce the surveillance to documenting arrival and departure times the following morning. The one exception is to document them in public together to further develop lifestyle and relationship; this usually occurs in the evening and on weekends.

If the client has the financial resources, I will sometimes conduct a 2:00 am spot check, documenting the vehicles in the middle of the night.

Things to note every day:

- (1) Document all vehicles and license plates at the residence.
- (2) Document vehicle locations.
- (3) Habits of neighbors, possibly interacting with both parties.
- (4) Mailman & delivery services,
- (5) Days for trash truck pick-up, who brings trash receptacles to the street
- (6) The clothing of the supported party and 3rd Party. Does the person staying overnight wear the same clothing the next day when they leave, or do they maintain a change of clothing at the residence?

- (7) Walking pets, together or does one walk the other's pet?
- (8) Engaged in what could be perceived as familial activities.
- (9) Does the 3rd party drop-off and / or pick-up support the party's kids at school
- (10) Any signs of intimacy
- (11) Access to the residence; use of keys and garage remotes
- (12) Does the 3rd party intentionally park their vehicle away from the residence in an effort to deceive the client?
- (13) Do they share household chores like taking out trash, mowing the yard, etc.?
- (14) Do they share buying groceries?
- (15) Were they wearing different clothes from the night before?

TRASH CHECKS

Trash checks can be extremely useful in the form of evidence and leads for the attorney to subpoena. Searches can reveal junk mail to the address with either or both parties' names, possible bank accounts, printed communications, etc. Depending on the circumstances, I sometimes save trash checks for the end of the investigation, just in case I am caught by the subjects of investigation or the neighbors.

In *California v. Greenwood* (1988) 486 U.S. 35, trash receptacles located at the street-side curb were considered discarded or abandoned.

Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, to children, scavengers, snoops, and other members of the public. See Krivda, supra, at 367, 486 P.2d, at 1269. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so.

OTHER CONSIDERATIONS

While the case in point is cohabitation, the real underlying issue is the reduced need for financial support. Does the former spouse live a lifestyle consistent with his/her personal declaration, I&E's, etc., or is he/she living beyond their means and concealing relevant facts from the court?

Aside from establishing cohabitation, the attentive investigator needs to be mindful of:

- (1) Custody, if a factor
- (2) Spending habits which may be revealed in surveillance and trash checks.
- (2) Unreported income in the form of cash jobs or personal cash based business
- (3) Possible routine gifted income by family
- (4) Is the supported ex-spouse employable?
- (5) If claiming injury or disability, is lifestyle consistent with claim of injury?
- (6) Does the new partner drop off or pick up the client's children at school or events?
- (7) Does the new partner's actions or lifestyle endanger the children?

INTERVIEWING WITNESSES

Most neighbors will have knowledge of the relationship and cohabitation, but are not willing to cooperate since they do not want to get involved, considering they have to live next to the supported party. You also take a chance of tipping off the supported party, which will almost assuredly result in their change of lifestyle. As a result of being tipped off, it is not uncommon for the new boyfriend or girlfriend to move in with family, friends, or lease an Airbnb to give the court the impression they maintain a separate residence.

Information gleaned from children by their parents can be a great source of information, but always try to follow up and independently verify their comments. If possible, it's helpful to get the supporting facts verified and keep the children out of court.

DEPOSITION SUBPOENA

As you near the end of the case, the attorney will usually subpoena the new partner who may be living at the supported party's address. If the new partner's previous address was a rental, the investigator may want to confirm with the owner or rental company that the person no longer lives there.

Once it's established that the new partner has vacated the rental, proceed to the local United States Postal Center with the deposition subpoena to determine if the new partner submitted a Mail Forwarding Address form.

Each post office creates its own process or response policy; however, regardless if you receive the document immediately or returned in the mail, it will have the postal date stamp and the completed FOR POST OFFICE USE ONLY section completed, possibly confirming the supported party's address. This completed form may also be used as supporting evidence.

The Postal Service suggests the following format (letterhead optional) be used in conjunction with regulations at 39 CFR 265.6(d)(4)(ii) by persons empowered by law to serve legal process when requesting change of address or boxholder information:

Postmaster _____	Date _____
City, State, ZIP Code _____	
REQUEST FOR CHANGE OF ADDRESS OR BOXHOLDER INFORMATION NEEDED FOR SERVICE OF LEGAL PROCESS	
Please furnish the new address or the name and street address (if a boxholder) for the following: Name: _____ Address: _____	
Note: The name and last known address are required for change of address information. The name, if known, and post office box address are required for boxholder information. The following information is provided in accordance with 39 CFR 265.6(d)(4)(ii). There is no fee for providing boxholder information. The fee for providing change of address information is waived in accordance with 39 CFR 265.6(d)(1) and corresponding <i>Administrative Support Manual</i> 352.44a.	
1. Capacity of requester (e.g., process server, attorney, party representing self): _____	
2. Statute or regulation that empowers me to serve process (not required when requester is an attorney or a party acting pro se—except a corporation acting pro se must cite statute): _____	
3. The names of all known parties to the litigation: _____	
4. The court in which the case has been or will be heard: _____	
5. The docket or other identifying number if one has been issued: _____	
6. The capacity in which this individual is to be served (e.g., defendant or witness): _____	
WARNING	
THE SUBMISSION OF FALSE INFORMATION EITHER (1) TO OBTAIN AND USE CHANGE OF ADDRESS INFORMATION OR BOXHOLDER INFORMATION FOR ANY PURPOSE OTHER THAN THE SERVICE OF LEGAL PROCESS IN CONNECTION WITH ACTUAL OR PROSPECTIVE LITIGATION OR (2) TO AVOID PAYMENT OF THE FEE FOR CHANGE OF ADDRESS INFORMATION COULD RESULT IN CRIMINAL PENALTIES INCLUDING A FINE OF UP TO \$10,000 OR IMPRISONMENT OF NOT MORE THAN 5 YEARS, OR BOTH (TITLE 18 U.S.C. SECTION 1001).	
I certify that the above information is true and that the address information is needed and will be used solely for service of legal process in conjunction with actual or prospective litigation.	
Signature _____	Address _____
Printed Name _____	City, State, ZIP Code _____
FOR POST OFFICE USE ONLY	
_____ No change of address order on file.	POSTMARK
_____ Moved, left no forwarding address.	
_____ No such address.	
NEW ADDRESS OR BOXHOLDER'S NAME AND STREET ADDRESS _____ _____ _____	

INVESTIGATIVE REPORT

You should always assume the report will be presented as evidence and viewed by opposing party, as well as the judge or commissioner therefore, take your time to present the detailed facts in an honest, logical manner ... void of personal opinion.

Investigative reports and corresponding evidence can be voluminous in cohabitation matters. I prefer to write my reports, as I have this article, in plain English without cop jargon; written clear and concise, presenting the facts in chronological order. It should read almost like a story.

I also prefer to write the report in 3rd person by surname (Investigator Alexander) and not "The Investigator", to reduce reader confusion since there may be multiple investigators working the case.

Video and photographic evidence are obviously critical. However, unlike Insurance Defense and Workman's Compensation, I have not shown video evidence in over 24 years of going to Family Court. The judge wants to keep the case moving quickly, where usually photographic evidence or video capture stills will suffice. I have found the judge is usually looking at the photo evidence while I testify.

CONCLUSION

In closing, this article does not include all investigative possibilities or avenues since every case is unique. It is intended to demonstrate the depth and complexity of cohabitation cases. Your investigation requires planning, common sense and foresight.

Always advise your attorney of any potential leads established through the course of the investigation that may require a subpoena (loan docs, work and school records, etc.). Or issues that may require a response from the supported party via special interrogatories, in deposition, etc.

Since a thorough investigation does take time, it is important to keep the attorney routinely updated on the case, usually via email with a few supporting photos. This is protected under the Work Product Doctrine.

It's good business to keep the client updated as well, just remember there is no confidentiality with the courts between the client and the investigator. The opposing counsel can compel any and all communications, photos, videos, reports, etc, shared with the client.

I hope this article has provided a little insight into the planning and conduct of cohabitation investigations. Additionally, the investigator will be able to explain the process and reasoning with the attorney and client.

R.A.

ABOUT THE AUTHOR

Randall Alexander has been a Legal Investigator and California state licensed investigator since 1999, specializing in Civil Litigation Support and Family Law Litigation. Randall served several years in multiple capacities with the California Association of Licensed Investigators, where he was specifically recognized for “Exceptional Service” to the association and its members.

In 2008, Randall was recognized as a Subject Matter Expert by the Bureau of Security and Investigative Services, a division of the California Department of Consumer Affairs. He has testified in civil and criminal matters in both state and federal courts, as well as a state administrative hearing.

Randall earned his Associate of Arts in Paralegal Studies from the Southern California College of Business and Law; an American Bar Association approved program where he completed coursework in: Advanced Legal Research, Torts & Personal Injury, Civil Litigation, Business Law Contracts, Criminal Law, Family Law Litigation, Legal Procedures, and Advanced Legal Writing. Additionally, Randall completed undergraduate coursework in Administration of Justice.

