Ethical Considerations in Hiring a Forensic Genealogist

by

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I. INTRODUCTION

Professional Genealogy

In recent years genealogy has become a billion dollar business with websites such as Ancestry.com garnering over two million paid subscribers in 2012 alone, leading some experts to suggest that “genealogy ranks second only to gardening as American’s favorite pastime.”¹ The flood of hobbyists and practitioners reflect all levels of expertise from those who dabble casually at the most amateurish level to full-time professionals involved in cutting-edge research techniques.

Organizations such as the Association of Professional Genealogists,² which now consists of over twenty-five hundred members worldwide, and credentialing organizations such as the Board for Certification of Genealogists,³ Council for the Advancement of Forensic Genealogists,⁴ and The International Commission for the Accreditation of Professional Genealogists,⁵ evaluate dozens of applications on an annual basis. Applicants who successfully pass the criteria for professional credentials typically find it takes years of specialized education, as well as professional research and writing to achieve.

“Genealogy is a scholarly discipline… [that] comprises an extensive body of knowledge”⁶ with practitioners schooled in areas as diverse as “anthropology, archaeology, demography, economics, geography, history, law, linguistics, paleography, religion, sociology, and the physical and biological sciences.”⁷ Technologically advanced fields such as genetic genealogy, which includes DNA analysis to resolve unknown parentage,⁸ and forensic document examination are adding new areas to the professional genealogists’ skill set.

² For more information see: www.apgen.org.
³ For more information see: www.bcgcertification.org.
⁴ For more information see: www.forensicgenealogists.org.
⁵ For more information see: www.icapgen.org.
⁷ Id.
⁸ For an excellent introduction to genetic genealogy see CeCe Moore’s website at www.thegeneticgenealogist.com.
Forensic Genealogy

Forensic genealogy may be defined as research of family history with legal implications that usually involves living people. Forensic genealogists are experienced professional genealogists whose research and report writing is specifically geared for legal application in that it is anticipated from inception of the project that it will be used in some sort of court proceeding, often accompanied by the expert testimony of the genealogist. Forensic genealogists have additional educational requirements and training, write reports or affidavits that meet accepted Genealogical Proof Standards, and are prepared to defend their work in courtroom testimony. An important ethical consideration legal practitioners should consider is whether the genealogist they hire is an independent third party with no interest in the outcome of the case. Unlike heir search firms that traditionally charge a contingency fee and therefore have an interest in the outcome, forensic genealogists work under a standard that prohibits contingent, percentage, or outcome based fee agreements.

Most legal practitioners will face the prospect of a case involving forensic genealogy at least once in their careers. Many unique legal, ethical and practical issues arise in these matters that should be dealt with promptly, efficiently, legally and professionally.

Some of the types of forensic cases that the legal community may encounter may be described as follows:

A. **Missing and unknown heir** probate or estate matters.
B. **Real estate title cases** including foreclosures and quiet title cases.
C. **Oil, Gas, and Mineral Right Matters**: In some situations and states, oil, gas & mineral rights will be treated like any other missing and unknown estate heir case, or like any other quiet title action.
D. **Citizenship and Immigration cases**:
   a. Research to help establish U.S. citizenship; and
   b. Research to support dual citizenship in a foreign country such as Italy or Ireland.

This article will emphasize the legal and ethical concerns that face paralegals, lawyers and judges in the areas noted above.

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10 See second bullet under Standards of Practice and Conduct at [www.forensicgenealogists.org/standards](http://www.forensicgenealogists.org/standards). Adherence to these standards is a requirement for membership in the Council for the Advancement of Forensic Genealogy.
II. BACKGROUND

A “missing heir” case arises either (a) when a beneficiary specifically named in a will cannot be located, or (b) when an intestate heir’s existence and possible relationship are known, but the whereabouts of such heir is not known. An “unknown heir” may arise where remaindemen in a will have predeceased the testator or testatrix, but more commonly occur in the case of intestacy. The “unknown heir” cases are more common and cause more difficulty for the estate practitioner and thus receive more attention in case law as well as in this article. Similar legal and ethical issues may arise in real estate title, oil & gas, and mineral rights cases.

III. DUTY TO INVESTIGATE AND REPORT

Pursuant to either legislation, rules of court, or constitutional law, state court decisions have consistently imposed a duty upon personal representatives or their counsel to perform a reasonable investigation for missing and unknown heirs, to provide notice to possible estate heirs before entry of a final decree of distribution, and to report the results of the investigation to the court. Failure to do so may result in (a) an order to return distributed estate funds when additional heirs are discovered, and (b) the possible liability of the personal representative to the heirs where negligence or fraud is involved.

Of course, estate practitioners must fully understand their jurisdictions’ intestate succession laws in order to competently represent an estate that involves unknown heirs. The rules of intestate succession and descent are most easily understood by reference to flow charts.

The issue of missing and unknown heirs often first arises before the court at the call of the account for audit. In contested cases, this will often result in a specially listed hearing to determine the issue of who inherits the estate. However, counsel and their assistants are well-

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13 See, e.g., Pa.O.C. 13.2; Phila. O.C. 13.3.A; and N.J.S.3B:5-5.1.
16 Annotation, Duty and Liability of Executor with Respect To Locating and Noticing Legatees, Devisees, or Heirs, 10 A.L. R.3d 547 § 2 (1966).
18 In other states such as New York, these issues may arise at the outset of probate or administration due to the necessity of giving notice to potential distributees. See, e.g., NY CLS SCPA § 1403. See, also, David N. Adler, “Kinship Proceedings, Proving the Family Tree,” 77 N.Y. St. B.A.J. 42 (2005).
advised to address this issue at the earliest opportunity as it is much easier to find missing or unknown heirs close to the time of death of the decedent rather than years later when heirs may have moved or died.

IV. SELECTION OF HEIR FINDERS

Lawyers and their staff should carefully select a professional to search for missing or unknown heirs with a view to finding an expert who is ethical, experienced, and credentialed (to permit qualification as an expert witness at trial). A private investigator or qualified genealogist may be suitable to find a missing heir. However, locating unknown heirs usually requires the employment of a forensic genealogist. One court stated that an estate heir finder's “business falls somewhere between private detective work and exclusive genealogy.” The courts have acknowledged the use of genealogists for these purposes in a number of instances.

A question exists as to whether or not an heir finder is engaged in the private detective business. A private detective license is required in Pennsylvania where an investigator seeks to determine "(2) The identity ... [or] whereabouts ... of any person ... (4) [t]he whereabouts of missing persons." An exemption applies to licensed attorneys.

In one decision, an heir finder's work was found to constitute private investigative work under that state’s statute and thus the finder's fee contract was held to be unenforceable as contrary to public policy. Other states have found otherwise under their statutes.

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19 Many national, state and local genealogical organizations and societies maintain internet based lists of professional genealogists. E.g., membership lists are maintained by the following organizations: (a) The Association of Professional Genealogists at http://www.apgen.org; (b) The Board for Certification of Genealogists at http://www.bcgcertification.org; (c) The International Commission for the Accreditation of Professional Genealogists at http://www.icagpen.org; and (d) the Council for the Advancement of Forensic Genealogy: http://www.forensicgenealogists.org/MemberRoster.html.


22 P.S. § 12(b) (2 & 4). [See also, 24 Del. C. § 1302; N.J.S.A.45:19-9; and NY CLS Gen Bus §§ 70 & 83.]

23 P.S. § 25; N.J.S.A.45:19-9; and NY CLS Gen Bus § 83.


25 *Estate of Wright*, 90 Cal. App. 4th 228, 108 Cal. Rptr. 2d 572 (2001) (the California licensing act for private investigators included a provision almost identical to that cited above at 22 P.S. § 12(b)(2), but the investigator in that case did not perform the work in California); *Morse v. Illinois Department of Professional Regulation*, 316 Ill. App. 3d at 669, 737 N.E.2d at 682 (the court left the issue for the legislature to resolve).
An heir finder who performs actual legal work without a law license may be found to be engaging in the unauthorized practice of law.26 One local federal bankruptcy court judge stated in dictum that, "The view that finders engage in the practice of law ... is not irrational ..."27

V. FEES OF HEIR FINDERS

Traditionally, heir finders, particularly the more unscrupulous ones, attempt to collect contingency fees as high as 50% from beneficiaries or the estates. Legal and ethical issues abound when an estate’s personal representative or law firm retains a forensic genealogist on a contingent fee basis. The business of taking heirship cases on speculation for a percentage of the heir’s share in the estate was aptly described by a relatively recent decision:

The business or profession known as “heir-hunting” or “heir-chasing” has a checkered and interesting history, having long been established on an international and local basis as a lucrative means of livelihood. “Probate searchers” usually operate by investigating probate or surrogate court records to uncover estates of substantial wealth whose probate or administration has been delayed because of inability to contact one or more of the missing heirs. An investigator, usually unknown to the estate, locates the missing heir through cooperation with foreign agents in the same business. The missing person is hastily informed that he has a valid claim as an heir against an unsettled estate. He is promised genealogical charts and other information with which he can establish his heirship if he will assign a portion of his inheritance to the probate researcher.28

Ethical29 and tactical reasons exist to avoid heir finders who insist upon a fee contingent on the

26 Carey v. Thieme, 2 N.J. Super. 458, 466, 64 A.2d 394 (1949) (non-lawyer heir hunter obtained power of attorney from beneficiary; heir-hunting activities are “inimical to the public policy of protecting beneficiaries of estates from imposition of unnecessary expense.”); International Heir Tracers of America, Inc. v. Rinier, 139 N.J. Super. 573, 354 A.2d 683 (1976); In re Butler’s Estate, 29 Ca. 2d 644, 650, 177 P.2d 16, 19, 171 A.L.R. 343 (1947) (heir hunter procured assignments and powers of attorney from beneficiaries that enabled the heir hunter to manage the probate proceedings and hire attorneys); In Re Estate of Rice, Deceased; Columbus Bar Association v. American Archives Association, 30 Unauthorized Prac. News 44 (1964 - 1965).
28 Nelson v. McGoldrick, 127 Wn.2d 124, 129, 896 P.2d 1258, 1260-1261 (1995) (on summary judgment, the Washington Supreme Court remanded the question whether the 50 percent fee agreement was unconscionable).
29 For a case which resulted in an attorney who was retained by an heir finder firm being disbarred for his related conduct, see In the Matter of Weinstein, 4 A.D.3d 29, 772 N.Y.S.2d 275 (Supreme Court of N.Y., App. Div., 1st Dept. 2004). See also, Sullivan v. Committee of Admissions, 395 F.2d 954 (D.C. Ct. App. 1968) (private reprimand of an attorney for representing heir search firm and heirs where champerty, solicitation, and conflict of interest were existed).
value of the estate. Counsel and his or her assistants should also be mindful of the ethical proscription against retaining a witness on a contingent fee or outcome related basis. Most jurisdictions have held that a contract for the payment of a witness, based on the outcome of the case, is void on the grounds that it is contrary to public policy. Witnesses being paid on contingent fee basis may be more tempted to skew the outcome in their favor. In Texas, lawyers are prohibited from offering the testimony of an expert witness, or an entity that employs one, from entering into a contingent fee contract.

Rule 3.04 of the Texas Disciplinary Rules of Professional Conduct states in part:

“A lawyer shall not:
(b)...pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case.”

While an expert witness may receive a reasonable fee for her services in preparing for and testifying at trial, it is considered unethical in virtually every jurisdiction to pay an expert witness a fee contingent on either the content of the expert’s testimony or the outcome of the case. Such fees are prohibited because they create an unacceptable incentive for the expert to tailor the content of her opinion or testimony to the needs or interests of the retaining party. … As a practical matter, a contingent fee would also provide opposing counsel with a means to discredit the expert during cross-examination on her bias.”

Furthermore, a witness hired on a contingent fee basis would be subject to impeachment on cross-examination due to his or her bias or interest in the outcome of the case. An expert witness “…may be cross-examined as to the amount he expects to receive,” as well as “the

30 In Keen Estate, 56 Pa. D.&C.2d 470 (Phila. O.C. 1972), an heir searcher hired by an executor presumed to be on a contingency fee agreement refused to disclose the name and address of a beneficiary until such beneficiary signed the fee agreement.
31 Pa.R.P.C. 3.4(b); N.J.RPC 3.4(b); and N.Y.RPC 3.4(b).
33 See Opinion No. 553, Professional Ethics Committee for the State Bar of Texas, August, 2004.
method he’ll use to determine the amount he will charge.” An expert witness may also be cross-examined to as to “whether the amount is contingent upon the outcome of the litigation” opening the door for the expert’s financial stake in the outcome to become part of the trier of fact.  

A contingent fee-based finder’s fee has been held to be improper and unenforceable for a variety of reasons, including champerty, bad faith and unconscionability. In 2012, the Office of

38 In McNenar v. New York, Chi. And St. L R.R., 20 F.R.D. 598 (W.D. Pa 1957), the court states:  

Nor is it to be disputed that the court in its discretion may allow counsel to cross-examine an expert witness as to the amount he has received, is to receive, or expects to receive for treatment, examination or testifying, for such information has a possible bearing upon the witness’s impartiality, credibility and interest in the result.

Id. At 600. See West Skokie Drainage Dist. V. Dawson, 243 Ill. 175, 90 N.E. 377 (1909) (in action brought by district to condemn right of way for ditch, attorney should have been permitted on cross-examination to ask engineer about his interest in the result of the suit and if he had not been promised “considerable money” if the proceedings went through); Volpe v. Perruzzi, 122 N.J.L 57, 3 A.2d 893 (1939) (trial court should have permitted following question proffered to doctor on cross-examination: “Does the outcome of this case determine whether or not you get paid?”); Redevelopment Auth v. Asta, 16 Pa Commw. Ct. 576, 329 A.2d 300 (1974) (if the expert witness’s fee is in any way related to the size of the verdict or the number of proprieties involved, then the jury is entitled to consider that relationship in weighing the expert’s testimony); St. Louis & S.F. Ry v. Clifford, 148 S.W. 1163 (Tex. Ct. App. 1912) (Defendant’s counsel attempted to develop proof that doctor had received percentage of recovery in previous case and that he had made some arrangement in the present case. On appeal, court stated the question of whether such inquiry should be permitted was clearly within the rule of Horton and therefore left to the discretion of the trial court); Horton v. Houston & T.C. Ry., 46 Tex. Civ. App. 639, 103 S.W. 467 (1907) (To show interest of physician, counsel asked whether he had testified for plaintiffs in many cases brought by attorneys for plaintiff in present case. Physician admitted testifying in several, but was unable to remember how many. Counsel then named cases, his questions also tending to elicit the fact physician’s fees in names cases were dependent upon recovery of damages. On appeal, such questioning was held to be proper).

Disciplinary Counsel ("ODC") of the Disciplinary Board of the Supreme Court of Pennsylvania, filed a 72-page Petition for Discipline against then state Senator Jeffery E. Piccola, Esquire, alleging numerous ethical violations relating to his representation of an heir-hunting firm and the estate heirs that the heir-hunting firm took on as one-third contingency fee clients. Mr. Piccola agreed to a public reprimand to settle the attorney disciplinary action against him. As stated in the Public Reprimand:

“Your actions have violated the following Rules of Professional Conduct:

1. RPC 1.4(a) - … informed consent …
2. RPC 1.7(a) - … a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. …
3. RPC 1.9(a) – A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent; …”

Genealogists’ fees in these types of cases are subject to the reasonableness standard within the discretion of the probate court. In the absence of a fee agreement, the court may deny a finder's fee on any basis.

VI. REAL ESTATE AND QUIET TITLE ACTIONS

Just as in missing and unknown heir cases, due diligence is required to locate missing and unknown owners or their heirs relating to quiet title actions. This is so that proper notice of the action may be given to interested parties as required by due process of law.

In Texas, a suit to quiet title or remove a cloud on title can be brought under a number of circumstances in which heirs of the original parties must be contacted to clear title. “Texas case

(heirship search and investigative, including attorney services, in exchange for a 40% interest in the heirs distributive share, held not to be champertous; strong dissent).

44 Estate of Hodge, 22 Pa.D.&C. 4th 458, 15 Fid. Rep. 2d 1 (Chester Co. O.C. 1994) (heir locator company took the case on speculation without entering into a contract with the estate or heirs).
law defines the term *cloud on title* as an encumbrance apparently valid but in fact invalid. *Heath v. First Nat’l Bank*, 32 S.W. 778. When an instrument, valid on its face, purports to convey an interest in property but is for some reason ineffective, a suit to remove the cloud on title is appropriate. *DRG Financial Corp. v. Wade*, 577 S.W. 2d 349.\(^{47}\)

In circumstances such as perfecting adverse possession claims or when title has passed informally by intestacy for several generations, title issues may not have been recognized until the *de facto* owner attempts to convey title to a third party. Similarly, a trespass-to-try title suit “is a statutory action authorized by Chapter 22 of the Texas Property Code” in which the plaintiff seeks both title and possession of real estate.\(^{48}\) In both situations, a forensic genealogist may be required to locate distant heirs.

**VII. OIL & GAS RIGHTS**

Oil and gas rights are determined by state law except in those cases where the federal government owns the mineral rights. In some states, such as Oklahoma and Louisiana, “the landowner does not [own] the oil and gas under his land until produced; until then he owns only the exclusive right to develop and produce that oil.”\(^{49}\) In Louisiana, which follows Napoleonic law, severed mineral rights revert back to the landowner after ten years of non-use. In Texas mineral rights can be severed in perpetuity or subject to term of years if so stated in the conveyance.\(^{50}\)

In Texas, it has long been settled law that a landowner owns the oil and gas in place beneath his land,\(^{51}\) and they are conveyed with the surface estate unless severed by grant or reservation in a deed.\(^{52}\) Once severed from the surface estate, the mineral estate develops a separate chain-of-title and each fractional interest must be followed from grantor to grantee in the same manner as the surface estate.

Determination of mineral title is typically researched by landmen\(^{53}\) employed by land and mineral companies or oil and gas companies. While certified or registered landmen may be very experienced at running mineral title they are rarely trained genealogists and when dealing with


\(^{48}\) Id.


\(^{50}\) Id.

\(^{51}\) *Oil & Gas Exploration and Surface Ownership*, Texas Railroad Commission, (http://www.rrc.state.tx.us/media/7124/surfaceownerinfo.pdf ; accessed 19 July 2014.)

\(^{52}\) Stephens County v. Mid-Kansas Oil & Gas Co., 254 S.W. 290 (Tex. 1923); *Texas Co. v. Daugherty*, 176 S.W. 717, 720 (Tex. 1915).

\(^{53}\) For more information see the American Association of Professional Landmen at www.landman.org.
intestate estates the legal practitioner should be wary of relying entirely on an unsourced and undocumented family tree. It is standard practice for a forensic genealogist to submit a formal source-cited report containing supporting documents such as birth, death and marriage certificates to their clients. Landmen rarely do so, neither are they typically expected to provide such a report. Proper due diligence dictates that attorneys and their staff ensure mineral ownership passing through probate or by intestacy be properly documented and retained in company files to ensure all heirs have been found and leased.

VIII. DORMANT MINERAL RIGHTS

State laws vary widely in their treatment of dormant mineral interests. In Louisiana, a separate mineral estate has never been recognized under the law. “The [Louisiana] supreme court has consistently held that any attempt to create such a ‘mineral estate’ will result only in the creation of a servitude, subject to ten-year prescription” which terminates with non-use of the right.

Conversely in other states such as Texas, rights to mineral interests never expire, and are treated as real estate and subject to the statute of frauds in regard to conveyancing and recordation requirements. They can be severed from the surface estate and may be conveyed separately via a deed during life, or pass under a will, or through intestacy. Because many people in Texas die without a will, their mineral interests often pass through multiple generations of intestacy before an oil and gas company may be interested in leasing those rights. This creates an opportunity for forensic genealogists to assist landmen in determining ownership of mineral rights.

The 1986 Uniform Dormant Mineral Interest Act was drafted to "provide a means for termination of dormant mineral interests that impair marketability of real property." Connecticut adopted the UDMI Act while ten other states adopted variations of that Act.

In Pennsylvania, anyone with an interest in oil and gas rights in land may petition the court to declare a trust in favor of missing or unknown owners of oil and gas but diligent efforts must be used to locate them. The state's court rules (and in some cases, local rules) provide guidance as to the minimum requirements of due process.

54 Frost-Johnson Lumber Company v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922); Wemple v. Nabors Oil Company, 154 La. 483, 97 So. 666 (1923); Lee v. Giauque, 154 La. 491, 97 So. 669 (1923).
See also Art. 789, La. Civil Code of 1870: “A right to servitude is extinguished by the nonusage of the same during ten years.” Art. 3546, La. Civil Code of 1870: “The rights of usufruct, use and habitation and servitudes are lost by non-use for ten years.”


56 Oil & Gas Exploration and Surface Ownership, Texas Railroad Commission,

57 Dormant Oil and Gas Act, 58 P.S. Section 701.1 et seq.

58 Pa.R.C.P. Rule 430.
IX. IMMIGRATION AND CITIZENSHIP CASES

U.S. Citizenship and Immigration Services “USCIS” is the federal government agency which
determines those aliens who may immigrate to the United States.59 One of the most common
ways in which people immigrate to the US is by proving relationship to a US citizen or holder of
permanent resident status (commonly referred to as a “green card”). Permanent residents may
file an I-130 Petition for Alien Relative, for spouse or unmarried children, while US citizens may
file the form for the same, and to also include married children. USCIS rules can be complex for
children of American citizens born abroad or American citizens domiciled abroad. The
assistance of a forensic genealogist is often helpful in acquiring the proper documents and
translations.

In other situations such as when an immigrant decedent has no apparent heirs in the US, the
forensic genealogist can file form G-639 under the Freedom of Information Act (FOIA) to
request access to alien files. These files will typically contain the names of parents or other
relatives who stayed in the home country allowing research to continue abroad in the search for
relatives.60

Another instance in which an independent report prepared by a forensic genealogist might be
needed are in those situations where a US citizen is attempting to gain dual citizenship in another
country. Ireland and Italy both have procedures in place that allow American born descendants to
obtain citizenship – sometimes with an accompanying right to work in the foreign country
without a work visa.

X. CONCLUSION

There are many situations in which legal practitioners should consider hiring a forensic
genealogist in preference to the limited work a private detective or family genealogist would be
able to provide. Attorneys and their staff should keep in mind that engaging anyone on a
contingency basis, such as an heir search firm who may be needed to testify later will expose that
witness to the possibility being impeached in most jurisdictions. Attorneys and their staff would
be well advised to verify the genealogist’s credentials, ask for a sample forensic report, obtain a
contract based on an hourly rate, and verify whether the genealogist is able and willing to testify
in court if it should be needed.

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59 See www.uscis.gov
60 Michael S. Ramage, “Use of Form G-639 to Obtain USCIS Alien Files,” Forensic Genealogy
News 3 (CAFG: August 2013): 8.