

THE CRIMINAL DEFENSE INVESTIGATION TRAINING COUNCIL



CRIMINAL DEFENSE INVESTIGATOR TRAINING

BRANDON A. PERRON, CCDI – INSTRUCTOR

Page 1 of 31

www.publicdefenderinvestigator.com

CRIMINAL DEFENSE INVESTIGATION

The Component Method

*"I Hear much of people's calling out to punish the guilty,
but very few are concerned to clear the innocent."* - Daniel Defoe

Why do we investigate on behalf of the defense?

The 6th Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Defending the Constitution

The 6th Amendment

... "to have compulsory process for obtaining witnesses in his favor" ...

The History of Due Process

After the passage of the Fourteenth Amendment in 1868, the Supreme Court dealt with a series of cases regarding the guarantees offered by the Due Process Clause. The first case to evaluate the procedural trial rights of defendants in terms of the Due Process Clause was the 1897 decision in *Hovey v. Elliot*. In *Hovey*, the Supreme Court specifically applied the Due Process Clause to fair trial guarantees, holding that due process "secures an 'inherent right of defense'". This doctrine eventually came to protect the defendant's ability to "present exculpatory evidence and testimony of witnesses". For example, the Court in *Brady v. Maryland* used the Due Process Clause to require the prosecution in criminal proceedings to disclose evidence that is favorable to the defendant prior to a trial.

Why Should Defense Counsel Use Investigators?

THE DUTY TO INVESTIGATE AMERICAN BAR ASSOCIATION STANDARDS

Standard 4-4.1 DUTY TO INVESTIGATE

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions, or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

The Component Method – Criminal Defense Investigation Training Notes

The Importance of Prompt Investigation

Facts form the basis of effective representation. Effective representation consists of much more than the advocate's courtroom function per se. Indeed, adequate investigation may avert the need for courtroom confrontation. Considerable ingenuity may be required to locate persons who observed the criminal act charged or who have information concerning it. After they are located, their cooperation must be secured. It may be necessary to approach a witness several times to raise new questions stemming from facts learned from others.

The lawyer's duty to investigate is not discharged by the accused's admission of guilt to the lawyer or by the accused's stated desire to enter a guilty plea. The accused's belief that he or she is guilty in fact may often not coincide with the elements that must be proved in order to establish guilt in law. In many criminal cases, the real issue is not whether the defendant performed the act in question but whether the defendant had the requisite intent and capacity. The accused may not be aware of the significance of facts relevant to intent in determining criminal responsibility.

The lawyer's duty is to determine, from knowledge of all the facts and applicable law, whether the prosecution can establish guilt in law, not in some moral sense. An accused may feel a sense of guilt, but the accused's subjective or emotional evaluation is not relevant; an essential function of the advocate is to make a detached professional appraisal independent of the client's belief that he or she is or is not guilty.

The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions. Such information may lead the prosecutor to defer or abandon prosecution and will be relevant at trial and at sentencing.

Effective investigation by the lawyer has an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial or to conduct plea discussions effectively. The lawyer needs to know as much as possible about the character and background of witnesses to take advantage of impeachment. If there were eyewitnesses, the lawyer needs to know conditions at the scene that may have affected their opportunity as well as their capacity for observation. The effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; without careful preparation, the lawyer cannot fulfill the advocate's role. Failure to make adequate pretrial investigation and preparation may also be grounds for finding ineffective assistance of counsel.

Standard 4-4.2 ILLEGAL INVESTIGATION

Defense counsel should not knowingly use illegal means to obtain evidence or information or to employ, instruct, or encourage others to do so.

NLADA Guidelines for Criminal Defense Representation

Counsel has a duty to conduct an independent investigation regardless of the accuser's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible. Guideline 4.1

www.nlada.org

The NLADA also states ...

1. Counsel has a duty to investigate a case before recommending that a guilty plea be taken or sought.
2. Counsel may not sit idly by, thinking that investigation would be futile.
3. Investigation is necessary for proper legal advice to the client.
4. Investigators have special training that allows them to do a better job.

Investigator = Truth Seeker

The Criminal Defense Investigator

Certain rules, laws, theories and concepts must be understood by the CDI.

The professional CDI must have a working knowledge of the rules and laws inherent to the discipline of criminal defense.

Expert status must be achieved through training, study, networking and experience.

What the CDI Should Know!

Key Areas of Study **“The Fundamentals”**

- Attorney-Client Privilege – Agent of Counsel protections and concerns.
- Work-Product Doctrine – application and rules.
- Criminal Rules of Procedure – Emphasis upon disclosure rules.
- Rules of Evidence – Definitions & Impeachment.
- The Legal Defenses that are available.
- The Elements of the Crime.
- Due Process – Traffic Stops, Search & Seizure, etc.
- Criminal Investigation Philosophy & Methodology.

Know the game before you play

The Team Dynamic The Boundaries

**An Agent of Counsel
The Kovel Privilege**

United States of America,

vs.

Louis Kovel, Defendant - 1961

'An attorney or counselor at law shall not disclose, or be allowed to disclose, a communication, made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person employed by such attorney or counselor * disclose, or be allowed to disclose, any such communication or advice.'

Considerations ...

It only applies to an investigator if an agency relationship exists between the attorney and investigator on behalf of the client, or if an agency relationship exists between the client and the investigator involving the attorney.

1. Elements for Relationship to Exist
2. The principle must manifest that the agent will act for him.
3. The agent must accept the undertaking.
4. The parties must agree that the principle (lawyer) will control the undertaking.
5. Work Product Doctrine

**United States of America, Petitioner Vs.
Monroe Adlman, Respondent - 1995**

The work-product rule shields from disclosure materials prepared "in anticipation of litigation" by a party, or the party's representative, absent a showing of substantial need.

There is no rule that bars application of work product protection to documents created prior to the event giving rise to litigation.

"shall protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

Criminal Rules of Procedure

The CDI has an ethical and professional obligation to be well versed in the Criminal Rules of Procedure. A specialized knowledge must be pursued in respect to reciprocal discovery relative to their operational areas and jurisdictions.

Criminal Defense Investigator

Pursues questions relative to guilt as well as due process issues

Conducts an investigation to uncover Reasonable Doubt.

- Confirm or dismiss an alibi
- Develop alternative suspects
- Credibility of witnesses
- Call upon experts
- Focus on specific issues

What is “Reasonable Doubt”?

The Legal Definition

According to Black’s Law Dictionary –

“Reasonable Doubt refers to the degree of certainty required for a juror to legally find a defendant not guilty.”

According to Dershowitz ...

If the defendant “probably” did it the jury must acquit. “Probably” is not enough to satisfy the burden of “beyond a reasonable doubt. However, it does satisfy the measure of a “preponderance of evidence in a civil case.

Consider the O.J. Simpson case?

THE LAW AND THE TYPES OF DEFENSES TO A CRIMINAL CHARGE

Phased Attack

PHASE 1 - Attacking the premise of the prosecution’s case is an assault upon their burden to prove guilt beyond a reasonable doubt

Expose Inconsistency, Discrepancies, Errors, and Omissions.

PHASE 2 – Deliver new evidence through a variety of sources including testimonial, documentary, and tangibles with the objective of revealing that the Law Enforcement Investigation and prosecution is flawed;

Failed to Pursue All Available Leads.

Failed to Identify and Interview all Potential Witnesses.

The Component Method – Criminal Defense Investigation Training Notes

Phase 2 allows the defense, through investigative efforts, to explain the circumstances surrounding the allegations and tell the whole story.

3 Basic ways to attack! -

Impeach the Government's Case and hold them to the Reasonable Doubt standard.

Present another case via evidence that is contrary to their own.

The Double Attack includes both. It is a "1-2 Punch Combination!"

TYPES OF Criminal Defenses

FOUR BROAD CATEGORIES

- 1) ALIBI
- 2) JUSTIFICATIONS
- 3) EXCUSES
- 4) PROCEDURAL DEFENSES

THE ALIBI

A statement or contention by an individual charged with a crime that he was so distant when the crime was committed, or so engaged in other provable activities, that participation in commission of that crime was impossible.

Based on the premise that the defendant is truly innocent.

JUSTIFICATIONS

A category of legal defenses in which the defendant admits committing the act in question but claims it was necessary in order to avoid some greater evil.

Justifications

Self-defense
Defense of others
Defense of home and property
Necessity
Consent
Resisting Unlawful Arrest

The Component Method – Criminal Defense Investigation Training Notes

In deciding whether a defendant is justified in the use of deadly force, you must judge him by the circumstances by which he was surrounded at the time the force was used.

The danger facing the defendant need not have been actual; however the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through that use of force.

If the defendant who because of threats or prior difficulties with the victim had reasonable grounds to believe that he was in danger of death or great bodily harm at the hands of the victim, then the defendant had a right to arm himself. However, the defendant cannot justify the use of deadly force, if after arming himself renewed his difficulty with the victim.

Look beyond the “snapshot” version of events presented by Law Enforcement and recover all the details surrounding the event.

If the defendant was not engaged in unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force, if he reasonably believed it necessary.

If the victim had a reputation of being a violent and danger person and that his reputation was known by the defendant, the fact may be considered in determining if the actions of the defendant were those of a reasonable person in dealing with an individual of that reputation.

Example

Bill Jones was at the Okeechobee county fair with a few friends. According to witnesses, the victim approached Jones and the two men started to argue. Subsequently, Jones pulled out a handgun and shot the victim. The victim was not armed. The victim died on the scene and Bill Jones was charged with 1st degree murder.

EXCUSES

A category of legal defenses in which the defendant claims that some personal condition or circumstance at the time of the act was such that he or she should not be held accountable under the criminal law.

Excuses

Duress

Age

Mistake

Involuntary Intoxication

Unconsciousness

Provocation

Insanity

Diminished Capacity – Not available in all jurisdictions

PROCEDURAL

A defense which claims that the defendant was in some significant way discriminated against in the justice process or that some important aspect of official procedure was not properly followed in the investigation of the crime charges.

Procedural Defenses

- Entrapment
- Double Jeopardy
- Selective Prosecution
- Denial of Speedy Trial
- Prosecutorial Misconduct
- Police Fraud

Innovative Defenses

- The Abuse Defense
- Premenstrual Stress Syndrome
- Other Biological Defenses
- Black Rage
- Urban Survival Syndrome

THE INVESTIGATIVE PROCESS - THE METHODOLOGY - Uncovering Reasonable Doubt: The Component Method

An impartial and objective method of uncovering and evaluating all available evidence and facts related to the question of guilt or innocence.

The Component Method combines “old school” investigative techniques with “new school” technologies.

However, “old school” is primary and remains the very foundation of an effective investigation.
The Art of Investigation Vs. the Science of Documentation.

The Component Method adheres to the concept that the investigative process is an art as opposed to a science. Therefore, it demands critical and creative thinking.
Documenting Vs. Investigating

The criminal justice system has altered its general approach.
Documentation has replaced Investigation.

The Component Method – Criminal Defense Investigation Training Notes

The system encourages a facts based recovery process as opposed to a probing investigative inquiry process.

The Component Method is an Investigative Process.

A Management Tool

A case management system, which provides for creative thinking and maximum efficiency.

A Field Guide & Reference Tool

Developed as a basic guide and reference source for the novice and experienced investigator.

A Comprehensive Approach

The Component Method is presented as a case management tool and formula for conducting a successful comprehensive criminal defense investigation.

The Component Method - How does it work?

Each component of the investigative process is designed to uncover leads and develop questions leading to the next component. The subsequent components support efforts to track leads and answer questions developed in previous components.

The Six Components

- 1. Investigative Case Review & Analysis**
- 2. The Defendant Interview**
- 3. Crime Scene Inspection**
- 4. Background Investigations**
- 5. Witness Interviews**
- 6. Report of Investigation & Testifying**

Nothing is carved in stone!

The six components are not “carved in stone”. While engaged in the process – one or more of the components may be revisited dependant upon the needs of the case.

The Edge..... Typically, law enforcement investigation focus upon probable cause as the standard for arrest. However, probable cause falls well short of the standard required for conviction.

The CDI’s standard is “beyond a reasonable doubt”. Therefore, the advantage goes to the CDI.

Objective & Impartial

Remain objective and impartial without forming preconceived opinions. A fact driven investigation dismisses bias and does not allow baseless opinions to navigate the course of the investigation.

Theories should be formed from the facts recovered and evaluated. Theories should not be formed in advance with the investigation focused upon the recovering of facts to support a theory.

The Component Method – Criminal Defense Investigation Training Notes

Guidelines for Effective Investigation

Thoroughness — All investigations must be conducted in a diligent and complete manner, and reasonable steps should be taken to ensure that pertinent issues are sufficiently resolved and to ensure that all appropriate remedies are considered.

Legal Requirements — Investigations should be initiated, conducted, and reported in accordance with (a) all applicable laws, rules, and regulations, agency policies and procedures. Investigations should be conducted with due respect for the rights and privacy of those involved.

Appropriate Techniques — Specific methods and techniques used in each investigation should be appropriate for the circumstances and objectives.

Ethics — At all times, the actions of the investigator and the investigative organization must conform with all applicable standards of ethical conduct.

- Ethics – Legal vs. Ethical vs. Moral
- Conflicts of Interest
- Fairness & Impartiality

Timeliness — All investigations should be conducted and reported in a timely manner. This is especially critical given the impact investigations have on the lives of individuals and activities of organizations. Hence, the effectiveness of an investigator depends, in part, on the promptness of finished work products, such as prepared findings and memorialized witness interviews.

Accurate and Complete Documentation — The investigative report findings and accomplishments must be supported by adequate documentation and maintained in the case file. Documentation of Policies and Procedures—To facilitate due professional care, organizations should establish written investigative policies and procedures via handbook, manual, directives, or similar mechanisms that are revised regularly according to evolving laws, regulations, and executive orders.

Planning & Preparation

Organizational and case-specific priorities must be established and objectives developed to ensure that individual case tasks are performed efficiently and effectively.

Individual Case Planning

Upon receipt, each complaint must be evaluated against the investigative functions, priorities, and guidelines: Develop a Plan of Action

1. Primary nature and complexity of the allegations .
2. Planned focus and objectives of the investigation;
3. Possible violation(s) of law, rule, or regulation and the corresponding elements of proof or standards
4. Steps necessary to meet investigative objectives
5. Resources necessary to meet investigative requirements.

EXECUTING INVESTIGATIONS

Investigations must be conducted in a timely, efficient, thorough, and objective manner. The investigator is a fact-gatherer and should not allow conjecture, unsubstantiated opinion, bias, or personal observations or conclusions to affect work assignments. He or she also has a duty to be receptive to evidence that is exculpatory, as well as incriminating. The investigator should collect and analyze evidence through a number of techniques, including, but not limited to, interviews of complainants, witnesses, victims, and subjects; reviews of records; surveillance and consensual monitoring; undercover operations; and use of computer technology.

MANAGING INVESTIGATIVE INFORMATION

Investigative data must be stored in a manner that allows effective retrieval, reference, and analysis, while ensuring the protection of sensitive data (i.e., personally identifiable, confidential, proprietary, or privileged information or materials.).

COMPONENT ONE - The Investigative Review & Analysis

Approach documentary evidence from a forensic perspective. Break it Down for simple analysis. The police reports contain testimonial, physical, and tangible evidence reflecting the foundation of the prosecution's case.

Documentary Evidence

Documentary Evidence primarily reflects Testimonial Evidence. However, the original statements have been filtered through two or three sources and interpretations.

A forensic approach is required.

Identify inconsistencies and check facts for veracity ...

Misleading

Appearance

Testimonial Evidence reduced to documentation often enjoys more credibility due to its appearance in a tangible form.

This often results in a free pass through the justice system.

The Component Method – Criminal Defense Investigation Training Notes

Sudden Death?

I attended a gathering of several people for a dinner party at the home of a very compelling Palm Beach socialite. Following the four course meal, we retired to the library for dessert, coffee, and conversation. The topic of discussion turned to the fascinating realm of sudden death. A retired US Army officer with extensive combat experience told the following story:

“A soldier, after a gruesome experience in Afghanistan, returned stateside. He attended church with his wife and fell asleep during the sermon. His sleep was interrupted by a nightmare that had him captured by insurgents who intended to execute him! One of the terrorists approached him intent upon cutting off his head with a large sword. Just as the sword was descending on his unhappy neck his wife lightly touched her husband on the back of the neck with her finger to awaken him. The shock was too great and he fell forward dead!

Identify Inconsistencies

Assume a Forensic Approach to the analysis of documentary evidence.

Consider the source, the creation, and the content to determine the credibility.

A Forensic Approach

Prepare an inventory
of all documents.

Implement an internal
tracking system.

Review the statutory elements of the crime prior to analysis.

Highlight leads and data of specific interest. Utilize multiple colors to code data of interest.

Identify and classify crucial facts – elements of the crime, incriminating, aggravators, exculpatory, mitigators

Classify, cross-reference, and organize data; Time-Line, Alphabetical Listing of all persons, Locations, Issues, and Priority.

Review & Analysis requires more than just merely reading the reports.

Due Process Issues

Verify and Analyze

Compare transcripts to audio/video tapes.

Cross-reference to reports attributing statements to witnesses.

Note omissions, inconsistencies, and discrepancies.

Note use of terms or jargon inconsistent with the nature of the witness.

Information & Lead Tracking

Classify questions and leads uncovered during the course of analysis by cross-referencing the lead with the component that will best answer the question.

A Lead, a Clue, a point of departure

The Component Method is based upon a fundamental principle of investigation.

The development
and pursuit of leads.

Identify, Track, & Pursue Leads

A lead is nothing more than a question that must be answered.

Identify the point of interest.

Form it into a question.

It is now a lead.

How do we track our leads?

We must develop a system to effectively track leads.

This is a fundamental principle that the investigator must accept.

Lead Tracking System

A Progressive Process

Each Component will develop new leads to be answered in subsequent Components.

Therefore, the leads will evolve with the investigation.

What about unanswered leads?

Provides grounds for a continuance.

Justification for additional funds.

Clarifies focus of investigation and needs.

Allows for Transfer to another investigator.

Documents file for Post Conviction Relief and Appellate Review.

Documentation of Leads

The Component Method – Criminal Defense Investigation Training Notes

The defendant's case may not end with the trial process. It is the duty of the investigator to properly note and document all leads that were identified. The defendant should continue to benefit from your insight and knowledge of the case.

Additional Considerations

During the Review & Analysis consider the need for forensic Science and other Experts.

If possible, personally examine physical evidence maintained by law enforcement and compare to the evidence list and facts presented.

Generate Reports Progressively

Reports to be generated.

Inventory of Discovery Report.

Witness Summary Report.

Time-Line of Events Report.

Inconsistencies, Errors, and Omissions Report.

- Remember, the time line will evolve with the investigation.

COMPONENT TWO - The Defendant Interview The Forensic Approach

Interview – Interrogation

Confirm element of confidentiality pursuant to the “Kovel” Privilege.

Communication between a lawyer's client and an investigator who is lawyer's agent is generally protected by the attorney- client privilege.

Innovative Methods?

THE PROCESS

- Professional Introduction
- Aggressively explain the need to be truthful and cooperate with the defense team.

The Component Method – Criminal Defense Investigation Training Notes

- The investigator should take time to ensure that the defendant understands the ramifications of not cooperating.
- Obtain all of the defendant's personal data and background information. Use to document file and measure baseline for Kinesic Interviewing.
- Question the defendant thoroughly focusing upon details. Use the interviewing technique of "visual imagery" and reconstruct the time line.

Why even bother if the defendant confessed?

Confession vs Confession?

S 60.50 Rules of evidence; statements of defendants; corroboration.

A person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed.

Recover the before, during, and after surrounding the events.

Keep the Initiative! Maintain control of the interview at all times! How do you know you lost the initiative? When you are answering questions as opposed to asking them!

Don't become overly aggressive.

The purpose is to ask questions – not answer them.

Reports to be Generated

Defendant Interview Report

Background & History

Details of Arrest, Searches, Line-ups.

Complete details surrounding the incident and allegations in question.

COMPONENT THREE

The Crime Scene Inspection

Compare scene to evidence & testimony.

Identify the location of witnesses at the time of the crime and reference to evidence & testimony.

Lock a witness into specific testimony.

Primary Objectives of Inspection

Compare scene to evidence & testimony.

The Component Method – Criminal Defense Investigation Training Notes

Identify the location of witnesses at the time of the crime and reference to evidence & testimony.

Lock a witness into specific testimony.

Identify Evidence missed or dismissed.

The Correspondence Method in Action

Diagrams, photographs, and video can all be used to test the veracity of evidence.

Does the evidence correspond with the scene?

General Crime Scene Rules

1. Observe – Do not disturb anything at the scene.
2. Record – Take notes, measurements, accomplish photographs and diagrams. - Use Scene To Question Veracity of Testimony
3. Collect – Identify, process, and mark evidence.
4. Preserve – document and preserve observations and evidence uncovered at the scene.

Negative Evidence - Based on the facts, what should be present?

What happens if the CDI Uncovers Material Evidence?

What are the ethical obligations of a criminal defense attorney during the course of a pending criminal matter when the client places upon the attorney's desk or informs the attorney of the location of the instrumentality, fruits, or other physical evidence of the crime?

The criminal defense attorney who takes possession of or is told the location of material evidence of a crime is presented with a complex dilemma that involves the resolution of the often conflicting duties inherent in the adversary system: of seeking the truth and loyalty to the client. Although the case law is limited in this area, the trend clearly seeks to strike a balance between the potentially opposite adversary poles of truth seeking and client loyalty by requiring physical evidence of a crime to be turned over by the attorney to the prosecution within a reasonable time, while broadly construing the attorney-client privilege so as to protect against the compelled disclosure of confidential communications.

Therefore, prior to taking possession of such evidence, the defense attorney should inform the client of the attorney's obligation to turn over the evidence once possession is made and the attorney should seriously question the consequences of his taking possession of the evidence at all.

Best approach, do not collect and advise counsel to contact the prosecution to collect if necessary. Otherwise, document via notes and photography only.

The Component Method – Criminal Defense Investigation Training Notes

Canvass the Crime Scene

Utilize your time at the crime scene to identify and interview potential witnesses.

Basic Scene Diagram

Utilize to orientate counsel and/or witnesses

Google Maps or MapQuest can be used to plan and supplement scene investigation

Google Earth can demonstrate comparisons

Google Maps/Images can be used as the foundation of the diagram. The “Paint” program can be used to add images, text, and other orientation items.

Note: Trespassing sign discrepancy.

Finding the Date of a Google Earth Image: <http://www.labnol.org/internet/find-date-of-satellite-images/2964/>

Finding the capture date of Street View Images

Search for an address in Google Maps and switch to the street view by dragging that street view icon to the map. The image date will be displayed in the status bar again though in this case, Google only reveals the month and year of the picture but not the exact date.

REPORTS to be generated

Crime Scene Examination Report reflecting details of observations.

Note discrepancies and key points relative to testimony and facts.

Diagrams, Photographs, Video.

Canvass of Area Report.

COMPONENT FOUR - The Impeachment background Investigation

Criminal Records

Historically this has been the beginning and end of what is commonly referred to as a background investigation.

A felony conviction is not a definitive reflection of a persons reputation for honesty.
Look at the bigger picture

Focus upon the theme of impeachment evidence. A felony conviction is only part of the equation.

The Component Method – Criminal Defense Investigation Training Notes

Is the witness credible? Should they be believed? If not, why not?

Study your jurisdiction's impeachment rules.

Rules - Impeachment

Who May Impeach?

Florida Evidence Code 90.608 states "Any party, including the party calling the witness, may attack the credibility of a witness by:

Introducing inconsistent statements.

Showing the witness is biased.

Attacking the character of a witness.

Showing a defect of capacity, ability, or opportunity to remember, or recount.

Proof by other witnesses that material facts are not as testified to by the witness being impeached.

90.609 Character of Witness

A party may attack or support the credibility of a witness, including the accused, by evidence in the form of reputation, except that:

The evidence may refer only to character relating to truthfulness.

Evidence of a truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence.

90.610 Conviction of Crimes

A party may attack the credibility of any witness, including the accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement regardless of punishment.

What is the witness' reputation for honesty within the community?

Obtain from records – criminal & civil

Identify & Interview persons who know witness.

Identify community. For example, neighborhood, employers, clubs, bars, hangouts, current and past.

Questions to ask

What is their reputation for honesty?

Follow rumors to source of information.

Use canvassing to facilitate and identify impeachment material.

The Component Method – Criminal Defense Investigation Training Notes

Build a Profile on Each Witness

National Databases

Federal Criminal Records

State Criminal Records

Civil Records – Law Suits

Public Recordings

Impeachment Witnesses

Use a National Database to

Locate witnesses

Identify jurisdictions where the subject has resided in the past.

Develop information leading potential impeachment evidence.

Identify potential impeachment witnesses.

Use to test the credibility of potential witnesses.

You never know what you may find.

Access All Sources of Available Information

Federal Criminal Records - Freedom of Information Act:

Wants & Warrants

Federal Bureau of Prisons (www.bop.gov/inmate.html)

U.S. District Courthouses

Federal Agencies

Know Your State's Records Laws

What is available?

Check Other Sources

Federal Agencies – Administrative Actions

Military

State Agencies – Open Records Laws?

Licensing Agencies, etc.

City and Local Agencies

County Government

Friends, Relatives, Neighbors, Associates

Pursue reputation for honesty, violence, and/or past experiences as a witness or a victim in similar cases.

Identify all law enforcement contact in any capacity.

Carefully Review All Records

Remember, documentary evidence can lead to compelling testimonial evidence.

REPORT to be generated.

Reports for each individual witness.

Criminal Records – Certified Copies of Convictions.

Provide a Dossier for each Witness.

COMPONENT FIVE - Witness Interviews and Statements

Understanding Witnesses

Consider the realities of witness observations

Planning is crucial to success!

Plan Witness Interviews

1. Categorize witnesses
 - a. Confirmed
 - b. Unconfirmed

What is the difference?

Confirmed Witnesses have been identified by the prosecution. Their basic testimony is known and can be pursued via deposition.

Unconfirmed Witnesses are merely potential witnesses who have not been interviewed. They are a lead.

Protect Defense Counsel ...

The Investigator should seek to interview unconfirmed witnesses as soon as possible. Never assume witness testimony will be as stated by a third party. Once the witness is listed it is too late. Failure to confirm may provide the prosecution with an additional witness against the defendant.

The Component Method – Criminal Defense Investigation Training Notes

Classify by Expectation

Friends & Family

Cooperation expected

Cooperation level unknown

Preparing for the Interview

Review background information.

Review prior statements.

Prepare question guide in advance.

Review questions and leads.

Conducting the Interview

Attempt to control the environment of the interview as much as possible.

Conducting the Interview

Utilize prepared questions as a guide only.

Securing Witness Cooperation

Secure the “high ground”.

Location, Location, Location!

Their home; time and place convenient for them.

Trojan Horse Approach.

Defenses are down.

Kitchen is best.

Avoid the living room and couch.

Thinks about it? Is your office really designed to facilitate cooperation or designed to intimidate?

Manipulate the seating

Interrogation Perspective

Designed to facilitate cooperation via intimidation and removing the suspect from their comfort zone.

Force mistakes.

Conducting the Interview

Questions should be direct and clear.

Ask what did you see as opposed to “what happened?” What happened tends to allow the witness to draw from all sources of knowledge as opposed to just their own firsthand knowledge.

The Component Method – Criminal Defense Investigation Training Notes

Obtain complete details – utilize the technique of “visual imagery” to reconstruct the actions and observations of witness.

Reconstruct the Time-Line

Use Visual ImageryDo not be afraid to pursue issues and questions as they arise.

Listen & Observe Carefully Listen to the answers, hesitations, verbal cues, and body language indicating confusion and possible deception.

It is the responsibility of the interviewer to recover the data not the responsibility of the witness to provide it.

Remain alert to non-verbal communication

Maintain a Conversational Tone

Avoid leading and loaded questions ...

Be specific and don't allow relative descriptions

Allow them to vent. As long as they are talking you are interviewing

Adjust Note Taking to benefit the interview process and not hinder it.

Document and Preserve!

Obtain complete details – utilize the technique of “visual imagery” to reconstruct the actions and observations of witness.

Documenting the Interview

Sworn recorded statements and written statements vs. a narrative written report?

Policy and preference of counsel?

Separate the process

An Interview is the process of gathering facts and information.

A Statement is a method of documenting facts recovered from an interview.

What are the rules of Reciprocal Discovery? Review the rules

An Interview is the process of gathering facts and information.

The Component Method – Criminal Defense Investigation Training Notes

A Statement is only one method of documenting facts recovered from an interview.

The Do's of Interviewing ...

- 1) Be punctual.
- 2) Conduct the interview with more than one person if possible.
- 3) Establish rapport during initial contact.
- 4) Maintain control in the interview.
- 5) Close on a positive note for future contacts.
- 6) Prepare reports as close as possible to interview.
- 7) Listen to your instincts.
- 8) Consult with counsel.
- 9) Prepare and discuss an interview plan or theme.
- 10) Conduct one interview at a time, unless the situation dictates otherwise.
- 11) Arrange a safe and private interview location.
- 12) Gather and organize pertinent documents before the interview.
- 13) Obtain information concerning the person being interviewed before the interview.
- 14) Exhibit courteous and professional appearance and behavior at all times.

The Don'ts of interviewing

- (1) Conduct interview without a plan of action.
- (2) Fail to discuss the interview with partner.
- (3) Argue with interviewee.
- (4) Lose objectivity during the interview.
- (5) Become judgmental.
- (6) Include personal opinions in notes or written reports.
- (7) Provide promises or assurances.
- (8) Threaten interviewee with disclosure of interview results, discipline, or job security.
- (9) Discuss interviews with anyone outside of the investigation.

Keys to Successful Interviewing

Remain conversational in tone and avoid becoming aggressive.

If you don't have a personality – get one!

Reports

Generate a separate report for each witness.

Write in third person.

Use bullet formats to communicate facts and deliver key points.

Avoid sole narratives if possible but a hybrid of key points and narrative works well.

COMPONENT 6 - The Report of Investigation

The written report of investigation is the foundation of every legal action.

A weak foundation will reveal a weak case.

Therefore, it should be clear, concise, and accurate, ensuring evidence is being communicated effectively.

An investigation is a puzzle. The facts are pieces that must be organized and put together to form an image of the truth.

Avoid “Story Telling”

Story telling encourages and facilitates embellishment, exaggeration, and distortion of the facts. The investigator should be focused upon a historically accurate reporting of an event as opposed to a “Hollywood” version.

Allow for Easy Access to Facts

A fact driven investigation should produce a Fact Driven Report!

Consider the three phase process of selecting, organizing and interpreting information.

Use it to organize the facts that demand emphasis. Draw readers to the facts and encourage universal interpretation.

The written report should be more than an information report but in fact a “tool” that counsel can use throughout the process.

Proper Formatting

“Just the Facts”

Narrative Reports vs. Bullet Format Reports

Bullets to communicate specific key point facts and narratives to communicate the story that drives the perspective of the defendant, victim, witnesses and the defense theory.

The Component Method – Criminal Defense Investigation Training Notes

Organizations should determine the most appropriate report mechanism (verbal or written) and format, on the basis of the circumstances of the issue(s) involved. In pursuing this standard, the following guidelines should be considered:

In any report, the facts should be set forth to facilitate reader comprehension. This should include a clear and concise statement of the facts and applicable law, rule, or regulation that was allegedly violated or that formed the basis for an investigation.

The principles of good report writing should be followed. A quality report will be logically organized, accurate, complete, concise, impartial, and clear and should be issued in a timely manner. Reports should contain exculpatory evidence and relevant mitigating information when discovered during any administrative investigation. Exculpatory evidence in a criminal or civil investigation must be brought to the attention of the assigned prosecutor.

Evidence outlined in a report should be supported by documentation in the investigative case file. 5. In some cases, it may be appropriate to note specific allegations that were not investigated to ensure that decision makers can take further action as they deem appropriate.

The outcome or accomplishment (fines, savings, recoveries, indictments, convictions, suspensions and debarments, or management recommendations, etc.) should be documented in the file.

Systemic weaknesses or management problems disclosed in an investigation should be reported to agency officials as soon as practicable.

SAMPLE - REPORT OF INVESTIGATION Work-Product

TO: [NAME] Perry Mason, [TITLE] Assistant Public Defender
FROM: [NAME] Alan Pinkerton, [TITLE] Investigator
RE: [SUBJECT LINE] State of Colorado Vs. John Doe
DATE: [REPORT DATE] MAY 23, 2014

I. Information

[The information section should generally be about two paragraphs. It should state very succinctly why the investigation was conducted.]

II. Executive Summary

[For a simple investigation, the executive summary should be no more than four or five paragraphs. For a more complex case, the summary may reach a page in length.]

In this section, you should also summarize what actions you performed during the investigation, such as reviewing documents, interviewing witnesses, conducting analyses or tests, etc.
At the end of this section, you should summarize the outcome of the investigation.

The Component Method – Criminal Defense Investigation Training Notes

Refer to Text Book for additional example ...

Add sections to accommodate new data.

Stick to the facts that can be verified and corroborated

Do not express opinions within the report – if comments are necessary provide a comments section or generate a memorandum.

Review for accuracy!

Utilize Professional Language:

Avoid “lingo”

Utilize language that will clearly reflect the official nature of the investigation without using “law enforcement lingo”.

Observed	Examined
Revealed	Related
Determined	Stated
Supported	Recorded
Uncovered	Corroborated
Documented	Confirmed
Dismissed	Denied

Words to Avoid

(1) "totalizing" words such as always, never, everyone, all, every, everywhere, totally, absolutely, and so on. These words are hard to defend, because your readers tend to be good at finding exceptions.

(2) "conversational" words and phrases such as you know, I feel that, I'm trying to, what's up with, and so on. This guideline includes almost all slang and almost all contractions.

(3) "judgmental" words such as stupid, dumb, awful, terrible, great, amazing, and so on, unless you explicitly defend your judgment. Some demeaning words such as dumb can almost always be specified better by using a less demeaning, more precise word.

(4) socially or culturally "unacceptable" words. In some settings, calling an adult female a "girl" is appropriate, but in other settings it is inappropriate. Context often makes all the difference.

(5) Recognize that your words can have ideological meanings that please or anger your readers.

Write in third person to achieve clarity.

Write in a manner that will effectively communicate facts objectively.

The Component Method – Criminal Defense Investigation Training Notes

Allow the facts and evidence to tell the story.

Avoid References to the First Person (unless it is your affidavit)

I think that
I believe that
I feel that
In my opinion
It is my belief that
It is my opinion that

Use of "I think" or "in my opinion" could make you sound less confident, as if you are suggesting to readers that these are only your ideas and that readers do not need to believe them. If your purpose is to report information objectively you should sound as confident and as well informed as possible.

"We" "Us" "My"

To some extent, avoiding the first-person ("I," "me," "we," "us," "my") has become a convention of formal writing, and using the first-person tends to add an informal tone to your reporting. Also, though, the first-person phrases referenced are "wordy" they add nothing that is not already implied. Readers will assume that the "beliefs" expressed in your report are your personal beliefs, so why do you need to tell readers this information? The information reported should be factual and corroborated as opposed to unsupported opinions.

Avoid Wordy Expressions

"Wordiness," or unnecessary words, is usually caused by the use of common expressions. They are so common that we can make a list of them.

In parentheses next to each wordy expression is the more concise way to convey the same idea. Notice that there is no difference in meaning between the wordy expression and the more concise one.

tall in height (tall)
blue in color (blue)
small in size (small)
short in length (short)
in a hasty manner (hastily)
this is a subject that (this subject)
the reason why is that (because)
the question as to whether (whether)
be under the impression that (believe, think)
given the fact that (because)
each and every one (every one)
put forth an effort (try)
empty void (void)
past experiences (experiences)

The Component Method – Criminal Defense Investigation Training Notes

whole entire (whole or entire)

due to the fact that (because)

because of the fact that (because)

at this point in time (now)

at that point in time (then)

he is a man who (he)

in today's world (today)

this day and age (today)

has the ability (can)

in order to (to)

during the same time that (when)

during the time that (while)

until such time as (until)

in spite of the fact that (although)

by means of (by)

be of the opinion that (think)

disappear from view (disappear)

Why should you avoid "wordy" expressions?

Such expressions are either redundant (as in "blue in color" or "empty void") or are a "wordy" way of expressing a simple idea (as when someone uses "at this point in time" to express the idea of "now").

Other wordy expressions are just plain unnecessary, such as "in this world." When you use wordy expressions, readers have to dig through the verbiage to get to your point.

Don't be misled by the frequent use of these expressions by politicians and other manipulators of language. Wordy expressions are an easy way to sound intelligent to the uninformed, but an informed listener or reader can see right through these empty phrases.

By the way, "the fact that" is the most commonly used wordy expression: you should always try to eliminate the expression from your writing.

Avoid the Use of Clichés

pride and joy / between a rock and a hard place / every cloud has a silver lining / under the weather / last but not least / hustle and bustle / better late than never / at a loss for words / easier said than done / sad but true / green with envy / free as a bird / like there's no tomorrow / tried and true / pretty as a picture / without a doubt / when all is said and done / through rose colored glasses / raining cats and dogs / as cold as ice / winds of change / as busy as a bee / as quiet as a mouse / worlds apart / time flies / going nowhere fast / slowly but surely / as sly as a fox / a needle in a haystack / one in a million / fading fast / in the long run / going to the dogs / sick as a dog / dog eat dog world / a diamond in the rough / running in circles / as smooth as glass / all that glitters is not gold / in broad daylight / out of the blue / the point of no return / to cry like a baby / hope against hope / any port in a storm / too close for comfort / without a care in the world / under the gun / laughing her head off / strutting his stuff / a face

The Component Method – Criminal Defense Investigation Training Notes

in the crowd / more trouble than it's worth / to stick like glue / too close to call / down to the wire / can't win for losing / time will tell / outside looking in / in the nick of time / spinning one's wheels
Clichés are common and that's exactly the reason you should avoid them!

Writers often mistakenly think that clichés are effective ways to make their writing sound more "literary," more creative, or more original.

They are worn-out expressions that have lost their vitality from overuse and they are one sign of weak writing.

Preserve The Record

Avoid comprehensive summaries.

Write in third person to achieve clarity.

Write in a manner that will maintain work-product status.

Paraphrase and avoid excessive quotes.

Benefits of Employing the Component Method

The Component Method is more than a simplified and comprehensive approach to the discipline of criminal defense investigation.

Verbal Reports

Preservation of the record is crucial and necessary to protect due process.

What if counsel states "do not send me written reports". What does the CDI do?

Secure instruction and direction from a supervisor.

Write report but don't send it to counsel. File for reference.

Work-Product Notes option.

Preserve the Record

Managing a heavy case load.

Utilizing the component method will allow the investigator to manage cases more effectively. The Component Method may be applied comprehensively or as individual components.

Allows for Efficiency & Creativity

It provides case managers and independent field investigators with a case management and lead tracking system.

The Component Method – Criminal Defense Investigation Training Notes

A system designed to provide guidance while also allowing independence and creative thinking.

A SOUND DEFENSE THEORY

The “primary investigator” can provide defense counsel with the opportunity to develop a defense based upon facts and not abstract theory. Upon reviewing the evidence, defense counsel may request additional investigation based upon initial findings, recommendations, or supplemental discovery.

THE BEST OF THE BEST!

The Criminal Defense Investigator maintains a role within the justice system as an impartial and objective advocate of the truth!

“MANDAMUS VERITAS”