

# INVESTIGATION TRAINING MANUAL

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This manual was created for investigators as a guide to practice. While it is not a guide for making investigative requests, it is a good start to understanding how to use an investigator and how to work with them.

This guide was created in conjunction with two of my investigators, Peter Lane of the New York Legal Aid Society and Michael Sparks of the Whatcom County Public Defender Office.

# Memos

Memos are an extremely important part of investigative work. They provide official records of what has been done on a case and allow the attorney to stay current with the investigation.

Every time you get a new case from an attorney, make sure they write you an “investigative memo” as shown below. If you don’t ask them for it, they may not give it to you. These memos outline the details of the case, give you the basic facts you need to start your investigation and explain the specific tasks that the attorney wants you to perform.

Sometimes attorneys are just too busy to sit and talk with you about what you’ve done, so it is very important to write a very detailed description of everything you have done on any particular day. Even if you tell the attorney what you’ve done, make sure to write a memo soon afterwards to record the information for the file.

There are three types of memos you can write:

1. **General “what I’ve been up to” memo:**

This kind of memo simply details what you’ve done on a case. It should be informal. This kind of memo can never be introduced in court, though it may be given to a different attorney, so be clear and thorough. You can list a bunch of things in this memo (e.g., went to the DMV, found address x, etc.) but they must all be about the same case.

2. **Statement/interview memo:**

After conducting an interview or taking a statement, you should write an extremely detailed memo describing everything about the interview or statement. You must include everything the person said and did during the interview, as well as when and where the interview took place, how you identified yourself and all details that came out during the interview. If you get a statement, it should also outline exactly what was in the statement.

### 3. Statement/Interview addendum memo:

In addition to the memo on the interview, you should also write a separate memo on some of the specific details about the interview. Reiterate where and when the meeting took place, then detail some specifics about who was there, what the surroundings were like, and what the witnesses reaction to you was, what they were wearing and any comments they may have made that did not make it in the statement.

It is very important that any personal feelings not be included in the memo. If you have things to add, tell them to your attorney face to face, and your attorney will tell you if you should write it in a memo. Do not include things like “the witness seemed to think I was a cop” or “I really thought she was too stupid to understand what I was saying.”

All statements should be typed, and should be given to the attorney directly or left in an obvious spot. Do not just stick the memo in the case file.

# Safety tips

## Plan your trips to avoid problems

- Know where you are going and why well before getting there.
- When in doubt, take a partner.
- Whenever possible, visit during the daytime.
- Visit an address in the daytime before you visit it at night.

## Look the part of a defense investigator

- Dress casually without expensive jewelry or briefcases.
- Only carry your case folder, no briefcases or backpacks.
- Do not carry confidential client information into the field.

## Be aware of your surroundings

- Know where you are.
- Don't look lost, go everywhere with determination.
- If you are lost, ask someone safe (like a store owner).
- Look for safe spots you can go to, like restaurants.
- Don't write memos in the field, only in a safe spot, your car or the bus.

## Pay attention to the people around you

- Take note of drug dealers or other illicit activity and avoid it.
- If people look at you funny, introduce yourself so they don't think you are a cop or are trying to score drugs. Just say hello and say what you are doing there.
- If people wave or beckon you, they may be trying to sell you drugs. Just shake your head and move on.
- Let people know you are a defense investigator, but don't spread you clients name around unnecessarily.
- If you walk into illegal activity, say "sorry" and walk away. If you need to speak to someone engaged in illegal activity, let everyone know who you are, then walk away and wait for them to come to you.
- Do not take photographs of anything without letting people know. If they are in the shot, tell them you do not want a picture of them and tell them they can move out of the shot if they want to.

## **Be respectful**

- NEVER get angry, even if other people are.
- Always use a respectful tone.
- Walk away before things start escalating
- Do not carry a weapon, or act like you have one.

**THE CARDINAL RULE IS:**

**IF YOU ARE UNCOMFORTABLE, LEAVE.**

You can always come back another time and not case is worth your health.

Where there has been a safety issue, report the incident to a supervisor.

# Defense Theories

Defense theories are general strategies which the attorney intends to pursue should the case go to trial. It is good to know what possible defense theories the attorney may pursue, so you can find facts that do (or do not) support their theory.

An attorney may not know what defense theory they initially want to pursue, and even if they do, it may change midway through the case because of the facts you turn up or because of a change in your client's story. This does not mean your client is guilty, just that the attorney has chosen a different way to present your client's story of innocence to the jury.

## Possible Defense Theories

### Self Defense/Defense of another

Where the client should not be found guilty because the action was taken to protect himself or another. Example: A woman takes a gun from a man who is assaulting her and shoots him with it. She is not guilty of assault.

#### *Concentrate on:*

- Prior interactions/aggression between the parties
- Actions directly preceding the attack
- Verbal Threats or physical menacing preceding the attack
- State of mind of the CW and other witnesses
- Exact sequence of events
- Relationship between the persons

### Coercion

A jury may find a person not guilty because they were coerced by another person to commit a crime. The coercer is culpable for the crime. Example: A woman's husband is taken hostage and will only be released if she commits a bank robbery. The woman is not guilty of robbery.

#### *Concentrate on:*

- Exact relationship between the parties

- Verbal threats or physical menacing before the incident
- State of mind of the client

## **Consent**

The defense is used when your client is not denying an action occurred, but is arguing there was not crime because the action was consensual. Example: A woman goes to the police claiming she has been raped. Although your client admits he had sex with the woman, he says the woman is a prostitute who became enraged when he refused to pay her the agreed upon amount.

### *Concentrate on:*

- Relationship between the parties
- Understanding of the agreement, either implicit or explicit
- Exactly what was agreed to and how it was said
- Any evidence of consent

## **Entrapment**

A person can be found not guilty of a crime because the jury finds the person was led to commit the crime by the police or other law enforcement agency. Example: A man is contacted by the police and asked by the police to find drugs to sell to them, without being contacted by the man first. The man is not guilty of either the sale or the possession of the drugs.

### *Concentrate on:*

- Who said what to whom, and in what order
- Exact terms of the deal
- Who approached whom
- What actually changed hands

## **Insanity**

Where a person is found to be insane, they may not be culpable of a crime. This defense theory may cover either temporary or permanent deficiency. Example: A man becomes enraged to the point of not knowing right from wrong at the sight of his boyfriend taking to another man, and kills him. It may be argued the man is not guilty by reason of temporary insanity.

*Concentrate on:*

- Prior history of mental illness or irrational behavior
- Cause of the incident

**Fabrication**

This theory asserts there was actually no crime, rather than arguing the details of the crime. This defense is used when there is reason to believe the person made the whole thing up, either because of bias, fraud, or to cover up an illegal activity of their own. Example: A man claims he was robbed of \$1500 money his wife gave him to pay his rent. He gives some general description of the person who committed the crime, and the police find your client near the scene without the money. Investigation turns up a drug dealer in the area who says the complainant came to him that day and bought a large quantity of drugs.

*Concentrate on:*

- Prior interactions/aggression between the parties
- Anything that was said prior to the incident
- State of mind of the CW
- Conspiracy/Frame-up/Intentional misidentification

Where the bias comes from the police or other law enforcement agency or a witness, purposeful or not. Example: The police suspect a man of dealing drugs or somehow involved in crime because of the area he hangs out in, his race or the people he associates with. Having seen too many people get off, the police decide to ensure his conviction but testifying they saw him sell drugs to another person who they seized drugs from.

**Innocent presence**

What a client admits they were on the scene, but was not involved in the crime. Example: A man drives up to a 7-11 with some friends, who enter and commit a robbery without the driver's knowledge while he stays in the car. He is not guilty of robbery, even if he drives them away, as he had no knowledge of the crime.

*Concentrate on:*

- Relationship of the parties
- Ability of your client to know what was happening

- Anything that was said before the incident

### **Misidentification**

This is where the defense does not deny the crime took place, but alleges the person arrested was not the person who committed the crime. Example: After a drug sale, an undercover police officer reports the drug dealer as a white woman wearing a green jacket. The team arrests a woman fitting that description, but does not recover any marked money, although they do recover some drugs. The defense would argue the description was too vague and the client was only guilty of the possession offense.

#### *Concentrate on:*

- Ability to Observe
- Conditions of observations
- Identification Procedure
- Suggestive Circumstances around identification
- Time between the incident and identification

# Ethics

You have undertaken a very serious job, one in which people's freedom is at stake. You must always be aware of this, and remember you are a representative of the client and their attorney. Everything you do may be brought under the scrutiny of the court and because of that you must act with the highest ethical standards, the same to which attorneys adhere. Your attorney is ultimately responsible for your conduct, and may be disbarred if you commit a serious ethical violation. If you are instructed by an attorney to do something you believe is unethical, speak with the attorney about it. If after discussing the matters with the attorney and you still have reservations, speak with your supervisor.

It is extremely important you never appear to be acting unethically and that any information you obtain is done in a legal and ethical manner. If you ever have any questions about what is expected of you or what you should do in any situation, even if you are in the field, never hesitate to contact your attorney or your supervisor.

## **Work product**

Investigators are bound to the same rules as their attorneys. This means that when you create a witness statement, it may be discoverable. As a result, it is extremely important you always maintain good and organized files. It is also important to maintain a complete file and not to discard any material until the file has been closed.

It is also important you decide when it is appropriate to take a statement from a witness. As a general rule, no harm can come from taking a statement from a witness for the state, as discovery rules only obligate a party to turn over statements made by their own witnesses.

Statements taken from witnesses who the defense intends to call are discoverable. Before taking a statement from a witness, you must determine whether the attorney will want that statement to be discoverable by the state. Sometimes it is better to refrain from taking an actual statement from a witness and instead merely create a memo regarding the interview.

Most of the work you will do is deemed to be work product. Work product contains the thoughts and impressions of the attorney and is not discoverable.

### **Identification**

Every time you interview a witness, you must identify yourself properly before the interview by telling the witness who you are and who you work for. You must never represent you work for anyone other than your agency.

### **Confidentiality**

You may not reveal anything that has been said to you by the attorney or the client to anyone else, including friends and family. In general, anything that is public information, such as the name of the client, what they are charged with and the general circumstances of the crime are all right to share. What is not acceptable to share in most cases is information about your client's potential defense, your client's version of the events, what your client's alibi is any sort of likely outcome of the case or anything the attorney has said or has been communicated from the client. Certain exceptions can be made, but must be cleared with the attorney first.

### **Physical evidence**

Whenever you go in to the field, you should know what sort of physical evidence there might be still out there (including weapons, discarded stolen property) and keep your eyes open for it. Though it is not likely you will find physical evidence in a case, you should know what to do in such a circumstance. In almost every circumstance, you should not touch evidence until you have spoken with the attorney in the case or your supervisor. Do not call the police until you have cleared it with the attorney or your supervisor. Do not assume physical evidence will incriminate your client; it may in fact exonerate him.

### **Legal Advice**

Legal advice is something only lawyers can give out. You are not a lawyer. Don't give out legal advice, even if you know the answer.

Questions you may be asked:

- "I got this subpoena. Do I have to go to court?"

- “Could I get in trouble for telling you I was the one who committed this crime?”
- “Can I just drop the charges?”

The appropriate answer to almost every question is:

- “I’m not a lawyer and I don’t know the answer to this question. Try asking my lawyer. Here is her number. Anyway, you were saying ...”

## **Interviews**

*Age:* There is no specific rule about how old the person has to be to be part of an interview. The important thing to remember is that you do not want the appearance of impropriety in any circumstance. Therefore, if the person is 8 years old, ask the parent before talking to the child. If the person is 12, maybe ask the parent. If the person is 15, don’t worry too much about asking the parent. If the parent of a minor asks to be present at the time of the interview, permit it. If it is a sensitive case in which you think the presence of the parent may influence the interview, ask the parent if you can conduct part of the interview in private. If the parent declines, proceed with the interview.

*Presence of Others:* There are times when you may have to interview a witness in the presence of another witness. This should be avoided whenever possible. Other witnesses may try to bias the story. Ask to interview them separately. If they refuse, at least try to conduct the interviews one at a time. If you refuse, get what you can and note the circumstances of the interview.

If at any time you find yourself about to conduct an interview of a witness in the presence of the client, stop, an interview under those circumstances is as good as no interview at all. Ask the client to leave and continue.

### *Conflict*

You may not interview a co-defendant without the explicit permission of the person’s lawyer. If the person has been charged but has not yet been appointed a lawyer, you may conduct the interview, but be very careful that the person is not simply unaware they are represented by counsel. If you find out during the course of an interview the witness is a co-defendant in your case who is represented by counsel, you must stop the interview. A person who is represented by counsel in another case on different unrelated charges is not a

conflict, although you may want to consider whether you will hurt your client's case when you conduct the interview without notify that person's lawyer beforehand.

A witness with 5<sup>th</sup> amendment issues cannot be interviewed if they are represented. If they are not represented, you may interview them and you have no obligation or authority to inform them of their 5<sup>th</sup> amendment rights.

### *Obstruction of Justice*

The use of any sort of bribe, threat, misrepresentation or harassment is expressly prohibited. No matter how insignificant it may seem, you must avoid the appearance of impropriety.

# Interviewing Witnesses

## 1. Preparing for the interview

The most important thing to remember about interviewing witnesses is that you must be prepared for the interview. Good preparation consists of three stages: reading all of the police reports and government documents, a good client interview and a scene visits. There may be circumstances where all of this is not possible before the interview, but you should always try to do these things.

### *a. Read your materials*

All of the materials you get from the government should be read prior to conducting an interview. If during the course of reading the materials, you discover missing reports, you should also get those from the state. The state is required to provide the defense with all of the police reports, along with names and addresses for the witnesses and every good investigation begins by reading these reports. Remember though, that police reports may be biased. Do not assume that simply because something is written in a report that it is true.

### *b. Talk with the client*

The client is the most important source of information available to the defense and the attorney should conduct a client interview as soon as practicable upon being assigned a case. It may be important for the investigator to attend the interview.

While there are many ways to conduct a client interview, one of the most effective ways is to speak frankly and honestly with your client. Tell your client you cannot investigate the case properly if you do not have as much information as possible about the incident. Some clients may be reluctant to speak with you about an incident, especially if the defense involves identification or some other claim of actual innocence.

Remember not everything the client says will be true. There are many reasons why a client may not tell you the truth. Emphasize with a client why having as much information about the case as possible will help the defense and always be honest and forthright with the client. Do not expect every client will

trust you and be willing to share details of a crime, even where they are truly innocent.

*c. Go to the scene*

As often as you can, you should visit the scene before talking with a witness. Visiting the scene will give you an understanding of the geography of the situation and help you understand the facts of the case better. It also never hurts to have a diagram or have taken pictures. Witnesses are impressed with investigators who have done work prior to the interview and may be more willing to share relevant information with someone they think is working hard on a case.

There are also times when it is not necessary to visit a scene. Like all situations, you must assess where situations where you do not need to visit.

*d. Prepare your investigative plan*

Itemize and prioritize. Decide what needs to be done, what the deadlines are and what takes priority. In general, witnesses are the priority, because the longer you wait to interview them, the more likely it is they will forget important details or be more difficult to locate. Always leave yourself plenty of time to find the witnesses, because they may not be around when you go to trial.

Before you interview a witness, you should have a pretty good understanding of what questions you are going to ask them. Write out your general plan and review it directly before interviewing the witness. Try not to use your list while conducting the interview, but you may want to consult with it before concluding any interview.

## **2. Circumstances of the Interview**

*a. When to conduct an interview*

The ideal time to find and interview a witness varies depending upon the witness. Usually, the best time to find them is the time the incident occurred, though this can be inconvenient if the incident occurred at 2 am. The next best times are generally between 10:00 am and 2:00 pm or between 6:00 pm and 8:00 pm if the person works. Weekends are the best times to find people at home. Avoid going into bad neighborhoods after 3:00 pm, as this seems to be the

beginning of the “activity” in most places. Always go with a partner if you know the area to be bad or if you do not know the area.

*b. Where to conduct an interview*

Interviews should take place in an environment that is likely to put the witness at ease. Often interviews will take place in the person’s home. Although some people will feel protective of their homes, once the interview begins, a witness is more likely to feel comfortable there than any other place. Later interviews can take place at neutral locations or your office, depending upon the relationship you build with the witness. When you are going to someone’s home, it is important to be respectful of their home and also to leave when you do not feel safe.

Interviewing people at their work is difficult, but sometimes necessary. An interview at work can be problematic, because the witness may feel rushed and like they are going to get into trouble with their boss. It is almost always useful to speak to the person’s supervisor to make sure you can speak with them and to avoid any trouble. When showing up to speak to a person at their office, it makes sense to show up at a time when it will not inconvenience the employee or the business (e.g., during the lunch rush hour at a restaurant). If the incident is related to the workplace, it may be the very best place to have the interview and you should work with the employer to make it happen there.

*c. Appointments*

It is rare that you should call a witness before visiting. Exceptions to this rule include when a witness lives in a secured building or when you think the witness will be offended by you showing up.

If you call before visiting, you run the high risk of being declined the opportunity to interview the person in a neutral environment and may have to conduct the interview with the prosecutor present. If you do call to make an appointment and they decline, it is not appropriate to go to the person’s house anyway.

*d. Identification*

It is very important to always identify yourself properly every time you interview a witness. You should always use the same format of identification, so

that if there is any question later about your identity, you can say you always identify yourself in the same way.

You do not have to identify yourself to people you are not interviewing, but make sure not to look elusive about your identity to anyone. If a person is not involved in the case in any way, you have no obligation to identify yourself. You may not misrepresent yourself as an agent of an existing company or the government.

When identifying yourself, you should also leave a business card.

*e. Getting in the door*

There are four types of witnesses you may encounter and a couple of “interested” parties you may interact with. They are as follows

- Friendly witnesses
- Reluctant witnesses
- Hostile witnesses
- Disinterested witnesses

**Friendly witnesses** are obviously what we would like to find everywhere, or what we’d like to make out of all of the other kinds. Friendly witnesses are generally the ones who are in some way connected to our client, and they want to help. Every effort should be made to maintain friendly relations with such a witness; inconvenience them as little as possible and be friendly.

**Reluctant witnesses** are the kind we run into most often. Most complainants are at least reluctant, if not hostile. Reluctant witnesses do not need to remain that way, though, and there are a few methods to getting them to talk to you. If they say “I don’t want to talk to the defense”, your response should be “I am only trying to get the facts of the case; I don’t have much information and am only trying to figure out what happened.” It may also help to remind them that they can talk to whomever they care to, and try using phrases like “I know what his story is, but what is your story?” Try to be empathetic; it never helps to interrogate or intimidate.

**Hostile witnesses** are difficult to deal with. Generally they are characterized by their red faces, loud voice and use of profanities. It is not usually helpful to try and convince them to talk to you, but give it a go anyway. It does not always

help to remind them they can be deposed, but this may be a helpful method of last resort.

If you encounter a **disinterested witness**, it is important to try and get as much out of them as possible. Make them realize the seriousness of the case by explaining potential punishments. If it is a complainant who appears disinterested, find out why.

Sometimes a complaining witness will not want to continue to press charges because their relationship with the client has changed. If this is the case, especially where you do not believe it is the result of witness tampering by your client; get a quick one page statement that says the complainant does not want to continue with the proceedings. Whether or not the complainant wants to drop the charges, you should always get a full statement from them as well.

### **3. The Actual interview**

- a. Pre-event
- b. Event
- c. Post-event

When the interview begins, it is often helpful to ask a general question that does not necessarily follow the above chronology, such as “So, tell me what happened?” This will allow the witness to answer the question in a free-form manner, often jumping from topic to topic, skipping sections and leaving out details. This is a useful stage of the interview, because it shows you a general overview of their perception of the events, and it also shows you what sticks out in their mind. It is perfectly all right to let them skip around during this phase of the questioning, but keep in mind you will need to cover the full story in detail next. It is during this initial phase you determine whether a witness is a defense or prosecution witness and whether you will be preparing a complete statement as a result of the interview.

Once you feel you have a general overview and have gotten the witnesses story, return to the complete story and get the details relevant to your defense. If the person is a defense witness remember the statements will be discoverable. You should only take a statement when it is clear the witness understands what their story is and you are sure it will not change. When the witness is a witness for the state, there is no reason to worry about creating statements as they are

not discoverable. Instead, creating statements which can later be used for impeachment is the better practice.

Make sure you also write down as much contact information as you can about the witness, including phone numbers, nicknames, where the person hangs out and with whom. It can be challenging to find a witness when the time for trial comes and the more information you have, the better.

#### **4. Recording the interview**

You should always consider whether you want to tape an interview before you do. Where you have consent from the witness, taping a state's witness is a good practice. It is also good practice to tape the interview, where you believe a defense witness is going to change their story and become a prosecution witness.

Recording an interview is legal as long as both parties consent. When recording an interview, make sure you also put your name and title on the recording, along with the witnesses consent.

#### **5. Diagrams and sketches**

In many cases, it is helpful and often important to have the witness sketch a diagram of the scene. It can also be a nice way to take out your pad and begin to take a statement. Date the diagram and have the witness initial it. Is also useful to have the witness walk through a scene with you, in order to give you distances and perceptions.

It is helpful to test their ability to perceive. The more information you get about a witness, the more prepared you will be.

#### **6. Obtaining a First Person Signed Statement**

If you have been instructed to take a statement from the witness, start after you are completely familiar with the witnesses' story.

There are several ways to make a witness comfortable with your writing out a statement. For example, you can tell them that with a written statement you and the witness can both be sure you have got the story right or that with a written statement your lawyer will know exactly what the witness saw/heard or had happen to them.

Sometimes the best way to get started is to ask for a diagram so you can pull out your legal pad and get the witness comfortable with the idea of writing details down. Let the witness know they can read through the statement when you are done and make any changes. Do not ask the witness if you can write a statement, rather you should gently inform them you are going to write a statement that they can review and affirm.

*a. Content of the statement*

Always begin with the formal heading: “This is the statement of (name, tel#, DOB) given to investigator Travis Stearns in the living room of my home at (address), on (date), at about (time)”.

This information provides a record of when and where the statement was taken, who was present at the interview, as well as showing how you identified yourself. The simplest thing to do is memorize this paragraph so you will always have the information you need.

If it feels awkward to leave the person in silence while you write out this paragraph, leave enough room at the beginning of the statement so you can fill it in at the end of the statement before you read it back to the witness.

Next, start at the beginning and have the witness re-tell what happened. Write the statement in first person singular (e.g., “I saw the man with the mask come around the corner ...”), using the witness’ grammar, slang and unique expressions (E.g., “me and Joe were about to have a fight but then we squashed it). In other words, write the statement just as the witness tells the story. Ask the witness to clarify any words you don’t understand and write down the definition given to you (e.g., “Squashed it” means “We let it go”).

*b. General outline of the Statement*

- 1) Pre-event Issues: What brought the person to the scene, relationship between the various players, etc.?
- 2) The event itself: This will be the largest and most detailed section
- 3) Post event issues: How the police were contacted and who the witness has spoken with, etc.

*c. Post Statement Procedure*

When you have finished writing the entire statement, read the statement aloud to and with the witness. Sit next to the witness and allow the witness to follow what you are reading line by line. All the witness to add, deletes, or corrects anything you have written. You should make the changes and then have the witness initial what you have done once the witness is satisfied. As you read, have the witness initial any additions, deletions or corrections you made while taking the statement. Have the witness initial the bottom of each page in the right hand corner.

If the witness cannot read and asks to have a friend or relative read along, you should comply with the request. Make sure the third party is not a witness to the case. You should also have the third party sign the statement to certify that it was correctly read aloud by you. If you suspect the witness cannot read, you will have to exercise discretion in determining whether a third party should be asked to read along. There should be a third party witness if the witness you are taking the statement from is illiterate.

When you and the witness have finished reading the statement, ask the witness if there is anything else that he would like to add or change. If so, do so. Then add a concluding paragraph which reads: "I have read and have read to me this 14 page statement and attached diagram. I have also had the opportunity to make and initial all of the additions, deletions and corrections I desired. To the best of my knowledge, it is accurate, complete and true." Again, this paragraph is very important to memorize it before you take your first statement. Have the witness sign with his signature beneath the concluding paragraph.

If a written statement is not possible but the witness will talk to you, take detailed notes, have the witness check them, and have the witness initial each page. For example, if you are trying to take a statement from a postal person who is walking on their round and you have to walk and write, take detailed notes and have the witness review them before getting into the mail truck and driving away. Remember that this is not the preferred method for taking a statement.

If the witness refuses to sign or complete the statement you should also write a memo using the witness' word about why the witness refused to sign or complete the statement.

## 7. Concluding the interview

If a witness asks for a copy of the statement inform the witness that you will convey the request to your attorney. NEVER leave the witness a copy of the statement without first checking with your attorney and do not promise the witness a copy.

Always leave one of your business cards with every witness.

Thank each witness for their time, patience and cooperation and apologize for any inconvenience.

## 8. Special Problems

### a. *Access to witnesses:*

No party controls a witness and cannot block a witness from speaking to you. If a witness indicates that they have been instructed not to speak with you, you should get the precise circumstances surrounding this advice as it may be the basis for an 8.3 motion to dismiss.

Simply because a witness says that they have been instructed to not speak to you does not mean you should not try. You can explain why it is so important to speak to you and why it is better to do it with you rather than at the courthouse with all of the lawyers present. Ultimately, you can explain that a witness can be compelled to be interviewed or deposed and that agreeing to an interview can make their lives easier.

You should report any reluctance or refusal to speak with you to your attorney.

### b. *Self-incrimination by the witness*

The general rule is that without a specific inquiry from a witness, you have no affirmative obligation to advise a witness of potential self-incrimination problems.

You may encounter a witness whose statement might incriminate him or her. Where the possibility of a witness' self-incrimination is apparent prior to the interview, you should discuss the possibility with your lawyer. If the possibility of self-incrimination occurs during the interview, you must remember that your

paramount duty is to your client and you are not required to caution or warn a witness about incriminating themselves.

If during the course of an interview a witness asks if this is going to be used against them, you are obliged to answer truthfully and not mislead the witness. An appropriate response is “I do not know. I do not make those decisions. I am not an attorney.”

A witness who makes a statement that is against their penal interest may later invoke their 5<sup>th</sup> amendment right to remain silent. You may be able to testify as to what they told you under this hearsay exception.

**YOU SHOULD NEVER GIVE LEGAL ADVICE ON ANY MATTER TO A WITNESS BECAUSE YOU ARE NOT A LAWYER**

# Sample Questions

These checklists can be very useful if they are used properly. They contain lists of questions that should often be asked to certain kinds of witnesses in certain kinds of cases. They can be reviewed when you are preparing your own list of questions before interviewing such a witness. They should help you keep from overlooking important issues that should be discussed during the interview process. It should go without saying, however, that many questions on a given list may be irrelevant for the witness that you interview. By the same token, the checklist might ignore some questions that are of crucial importance in your case because of its unique facts. These lists are no substitute for the development of a list of questions that is tailored to your own particular case. The checklists should never be used as forms to be filled out during an interview. Good effective interviewing simply cannot be done solely from a checklist, no matter how complete the list appears.

## 1. Identification Witnesses

The following questions and areas of inquiry are generally important in the interview of a witness who saw all or any portion of any offense taking place. The witness need not be the complaining witness but any witness who was present. Remember that negative responses such as “I don’t know” or “I can’t remember” are important for the lawyer to know about and should be included in your memo and statement. If, for example, a witness says “I don’t know what the man was wearing” write that down before going to the next questions.

### *a. Incident*

- A detailed narrative of what happened; what the witness had been done before; why and with whom.
- When the incident took place.
- Where the incident took place.
- What the witness was paying attention to before the incident and what drew the attention to the incident or the assailants.
- Which one was identified as the defendant and what role the defendant played in the incident?

- How many other people witnessed the incident and any contact information the person may have.
- What exactly occurred (in detail), with a diagram if possible.

*b. Physical capacity of the witness to observe*

- Frightened.
- Tired (how much sleep the witness may have had).
- Preoccupied.
- Age.
- Health (headache, fever, etc.).
- Under medication.
- Alcohol or drugs prior to the incident.
- Eyesight issues.

*c. Physical Conditions for Observations*

- Distance from the witness to the incident.
- Duration of incident (from time first saw the defendant till she or she left), keeping in mind that people have a horrible perspective on time and you should have them describe, with the use of a watch, exactly how much time they mean.
- What the witness focused upon (e.g., weapon).
- Angle of observation (above, below)
- Day/Night
- Lighting Conditions
- Number of lights at the scene
- Exact location and type (Diagram)
- Obstructions
- Shadowing

*d. Description of Perpetrator at the time of the incident*

- Age
- Height
- Build
- Color of skin

- Color of hair
- Color and shape of eyes
- Among of hair, including facial hair
- Nose and mouth description
- Shape of face
- Type of voice
- Hat
- Coat
- Shirt
- Pants
- Shoes
- Other Clothing
- Distinguishing physical features
- Distinguishing clothing

e. *Circumstances surrounding the identification procedure (Photo array)*

- What description of the defendant were you given by the police prior to the array?
- Who gave you the description?
- Did the police take notes while you when you gave your description?
- Were you shown photographs?
- When?
- Where?
- How many?
- By whom?
- Did the witness identify any photos?
- What did the witness say?
- Did you have a degree of certainty, e.g., one to ten?
- How many photos did the witness look at before identifying someone?
- How the photos were presented (array, one at a time, loose)?
- Did the witness identify the defendant?
- Did the witness identify anyone else?
- What were the differences between the person they picked out and the perpetrator?
- What did the police say during the identification process?

- Why did you identify the person that you did?
- What did the photos look like (Black and white, color, full body, face, etc.)?
- Prior identification of the witness?
- Who was present during the process (Police, prosecutor, other witnesses)?
- What did you base your identification upon (clothing, body type, face)?
- If other witnesses were present, did they view the photos at the same time?

*f. On scene identification*

- Was the defendant brought back to the scene
- Where did the show up happen exactly?
- How long after the incident?
- What was said by the police prior to the identification?
- Who else was present?
- How many subjects were brought by the police to be identified?
- What was the basis of the identification (clothing, body type, face, etc.)?
- How far away was the defendant when the identification took place?
- Did the defendant say anything to the witness during the identification or to others?
- What was the emotional state of the witness?
- Was the person identified in handcuffs?
- Was anyone with the defendant other than the police?
- Were any other non-police witnesses present?

*g. Line-Up identification*

- When?
- Where?
- How many people in the line up?
- Which position was the defendant in?
- Did the witness identify defendant in the presence of other witnesses?
- Was the witness shown photos before the lineup (When, how many, by whom)?
- Were other witnesses shown photos too?
- Was anything said?
- Why did the witness pick out the defendant?

- Was there anything similar to the other persons in the line up to the defendant?
- See above questions as well.

*h. Other identifications*

- Has the witness ever identified someone else?
- Did the witness fail to identify anyone?
- Has the witness ever seen the defendant before?

**2. Crimes against persons**

The following areas should be probed when interviewing witnesses in a case where the charges involve assaultive behavior.

*a. Where*

- Where did the offense take place?
- Where at the address was the exact place?
- Where were the witnesses standing when the incident started?
- Where did the person fall when the blow occurred?
- Where were the witnesses interviewed?
- Where did the person die?

*b. When*

- When did it begin?
- When did the defendant arrive?
- When did the victim arrive?
- When did the witness arrive?
- When did other witnesses arrive?
- When did the assault occur?
- When was it reported?

*c. What*

- What was the cause of the altercation?

- What exactly took place and what was said and done by the defendant and victim before and during the altercation?
- Who spoke first and what was said?
- Who did something first and what was it?
- Any challenges or threats? By whom and what was the response?
- Who committed the first physical act?
- What was it?
- Was it on purpose?
- Did the defendant attempt to withdraw or did the defendant engage?
- Did the victim retreat?
- Were weapons involved?
- Who had them?
- What were they?
- Who used them?
- Was the weapon visible to the defendant?
- Was the weapon visible to the victim?
- Were the weapons recovered by the police?
- Why did the defendant do what he did?
- What did the defendant say after the incident?
- Did the victim say anything after the incident?
- What did the witness say to the police?
- Did the victim speak to the police or emergency workers after the incident?

*d. How*

- How did the (defendant) (victim) (witness) arrive and leave?
- How long did the entire incident last?
- How were the weapons used?
- By the defendant?
- By the victim?
- By anyone else?
- How were the injuries inflicted on the victim (defendant)?
- Where?
- How severe?
- How many?

- Where was the person treated?
- How did the person get there?
- How many times did the defendant tell the victim to leave him alone?  
What was said? Did the victim hear it?
- How far from the victim was the defendant when the incident began?
- How far from the victim was the defendant immediately prior to the fatal blow being struck?
- How many times did the victim tell the defendant to leave him alone?  
What was said? Did the defendant hear it?
- How far from the victim and defendant was the witness when the incident occurred?
- How many people participated in the altercation? Who? What did they do?

*e. Who*

- Answer to the questions in the identification section should be obtained

*f. Self defense*

In most crimes against persons, the prior relationship between the defendant and victim is relevant. Be sure to refer to self-defense question to probe:

- Evidence of the victim's violent or aggressive character.
- Defendant's knowledge of the victim's violent or aggressive character.
- Specific prior instances of difficulty between the defendant and victim.

### **3. Self Defense Questions**

The following questions should be considered during interviews of ALL WITNESSES where the defense may be self-defense. You must attempt to elicit specific instances, not just general feelings ("he's the bad guy").

*a. Evidence to show the victim's aggressive or "bad" character and propensity towards violence*

- Was the victim an aggressive person (specific incidents, including fights with other people, arguments and threats made)?

- Did the victim associate with people with a reputation for aggressive behavior?
- Have you ever seen the victim carry a weapon?
- How frequently did the victim carry a weapon?
- Has the victim ever used a weapon on anyone other than the defendant?
- Was the victim more aggressive when intoxicated or high?
- Did the victim drink or use drugs to excess?
- Do you know of specific incidents where the victim was arrested for violent behavior?

*b. Defendant's knowledge of the victim's violent, aggressive or "bad" character*

- Determine whether the defendant was aware of any of the above behavior.
- Had the victim made threats to the defendant prior to the incident? To the defendant personally? To others?
- Did the defendant know of the threats?

*c. Prior relationship*

- Have the victim and defendant had difficulty in the past?

#### **4. Crimes Against Property: Theft and Burglary**

*a. Where*

- Where did the incident take place?
- Where was the entry?
- Where was the taking?
- Where was the defendant during the incident?
- Where were the witnesses during the incident?
- Where were any other persons?
- Did the police dust for fingerprints?
- Who was on the property prior to the dusting for fingerprints?
- What property was removed?

*b. When*

- When did this occur?
- When did the defendant first arrive?
- Who else was present?
- When was the theft discovered? By whom?
- When was it reported? By whom?
- When was the property recovered? By whom?
- When was the property purchased? Where? Price paid? Receipt existence? What was the value? How did you come to that figure?

*c. What*

- What exactly happened?
- What exactly was said by the defendant?
- What exactly was said by others?
- What was taken? Did it have any unusual characteristics?
- How were the items identified?
- How were the items identified?
- What tools were used to gain entrance? How were they used? Any marks? Any tools recovered?
- What weapon, if any, was used by the defendant or any other person involved in the incident? Was it recovered?
- What items were left at the scene by the defendant?
- What was reported to the police?
- What information was reported to the insurance company?

*d. How*

- How did the defendant arrive and depart (transportation)?
- How did the defendant enter the house? How did he leave?
- Did he make any demands of persons in the house?
- How was the property removed?
- How was it recovered?

*e. Who*

- Answer questions contained in the identification of witness section

## 5. Crimes against property: Forgery

### *a. Where*

- Where did the offense take place?
- Where did the exchange occur at this address?
- Where was the witness during the entire time at this address?
- Where was the defendant during the incident?

### *b. When*

- When did the offense occur?
- When did the defendant first arrive?
- When did the defendant leave?
- When was the offense reported?
- When was the property recovered?

### *c. What*

- What exactly occurred?
- Was exactly was said by the defendant during the incident?
- What exactly was said by each witness during the incident?
- What type of identification did the defendant use?
- What type of instrument did the defendant use (check, credit card, debit card)?
- What property or money did the defendant get? Value?
- How is the item identified? Unusual characteristics? Condition or property at time of purchase?
- What names were on the instrument? Payee? Maker?
- Who else was present?
- Was there a dispute? What was its cause?

### *d. Who*

- Who was with the defendant?
- Who reported the incident?

- Who responded (FBI, State police)?

*e. Photograph*

- Is there any photographic evidence or video taken of the instrument being passed?

## **6. Taking a Motor Vehicle**

*a. Where*

- Where was the car taken?
- Where was the car driver?
- Where was the car recovered?

*b. When*

- When was the car taken? How do you know?
- When was it discovered missing? How do you know this?
- When the car was reported missing?
- When was the car driven after the theft?
- When was the defendant arrested? When were others arrested?

*c. What*

- What kind of car?
- Make?
- Model?
- Year?
- Color?
- License Plate?
- Mileage?
- Condition at time of taking and recovering?
- Where any items removed during the taking?
- Were any items left behind by the thief?
- Was the car dusted for fingerprints?

- Was there a prior relationship between the owner of the vehicle and the defendant?
- Had the defendant ever taken the car with the permission of the owner before?
- What officers were involved?

*d. How*

- Keys in the car?
- Car jumped?
- Another key used?
- Ignition locked/unlocked?
- Windows/door jimmied?
- Slashed top?
- Tools used?
- Permission for anyone to drive car?
- How did participants arrive at the scene?
- How did the participants depart?

*e. Who*

- Who saw the car being taken?
- Who was in the car when it was taken?
- Who reported the vehicle stolen?
- Who else participated in the taking of the vehicle?
- See also questions from the identification section

## **7. Alibi Witnesses**

- Was the defendant with you on (you may need to refresh the witnesses recollection, which is completely proper)?

*a. Time together*

- How do you recall that day?
- How do you recall that time?
- When did the defendant arrive?

- When did you first see him?
- Where did you first see him?
- Was the defendant alone or with others?
- Did anyone else see you with the defendant?
- How long were you with the defendant?
- How do you know how long you were with the defendant?
- Did the defendant ever leave your presence when you were together?
- How many times?
- When?
- When did he return?
- When did the defendant finally leave?
- How do you now?

*b. Defendant's behavior/relationship to witness*

- How did the defendant act when you were together (Intoxicated, drugged, nervous, excited, calm, normal, angry, happy, and sad)?
- What is your relationship with the defendant (close friends, casual friends, know to speak to, relative by blood, relative by marriage, employer)
- How long have you known the defendant?
- When did you last see the defendant?
- How many times have you seen the defendant since the incident?
- Do you know what the defendant is charged with?
- How did you learn this?
- What do you know of the offense?
- Have you ever talked with eh defendant about the incident?
- Have you ever talked with the police about the incident? Did you give them the alibi information?
- Have you spoken to anyone else about the incident?
- Have you ever been convicted of a crime?
- Where do you live and what is your contact information?
- Where do you work? How long have you been employed