UNCOVERING REASONABLE DOUBT: THE COMPONENT METHOD

CRIMINAL DEFENSE INVESTIGATION

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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.

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 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...

Counsel has a duty to investigate a case before recommending that a guilty plea be taken or sought.

Counsel may not sit idly by, thinking that investigation would be futile.

Investigation is necessary for proper legal advice to the client.

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.


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.

Elements for Relationship to Exist

The principle must manifest that the agent will act for him.

The agent must accept the undertaking.

The parties must agree that the principle (lawyer) will control the undertaking.

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."

California Rules: Reciprocal Discovery ...

1054.3. (a) The defendant and his or her attorney shall disclose to the prosecuting attorney:

(1) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons,
including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.

(2) Any real evidence which the defendant intends to offer in evidence at the trial.

Exceptions to the rule...

1054.6. Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product is defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States.

California Work-Product Definition

2018.020. It is the policy of the state to do both of the following:

(a) Preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases.

(b) Prevent attorneys from taking undue advantage of their adversary's industry and efforts.

2018.030. Work Product

(a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.
(b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

A classic example of a writing that is protected by the absolute privilege is a memorandum written by an attorney, after taking a statement from a potential witness, summarizing the attorney’s impressions and conclusions. (See, e.g., People v. Boehm (1969) 270 Cal.App.2d 13, 21.)

Notes made by the interviewing attorney or attorney’s representative usually are treated as work product, entitled to absolute protection, because they reflect the impressions, conclusions or opinions of the interviewer. (See, e.g., Rodriguez v. McDonnell Douglas Corp., supra, 87 Cal.App.3d at p. 648.)

Debra Coito v. The Superior Court of Stanislaus County, # F057690
Judge Kane, California Court of Appeal, Fifth Appellate District – March 5, 2010.

The court considered the question whether the statement of a witness, taken in writing or otherwise recorded verbatim, by an attorney or the attorney’s representative, is entitled to the protection of the California work-product privilege.

The court held that written and recorded witness statements, including not only those produced by the witness and turned over to counsel but also those taken by counsel, are not attorney work product.

What, for example, of the situation in which an attorney sends an investigator to interview all witnesses listed in a police report, and the investigator asks few if any questions while taking the witnesses’ statements? Clearly, these statements would reveal nothing significant about the attorney’s impressions, conclusions, or opinions about the case. Yet the state asks that we treat all witness statements taken by an attorney or the attorney’s representative as work product as a matter of law.

Investigator Access to Inmates

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.

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 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

Investigative Case Review & Analysis

The Defendant Interview

Crime Scene Inspection

Background Investigations

Witness Interviews

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.
A Philosophy & Methodology

The concept of a comprehensive investigation relies upon the investigator assuming the leadership role as the “primary investigator”.

The Primary Investigator

The primary investigator assumes responsibility of the investigation defining its course and plan of action.

The primary investigator is a thinker and evaluates evidence strategically.

Law Enforcement Investigator

Determine a crime has been committed.

Conduct investigation to uncover evidence leading to a suspect.

Identify a suspect based upon the evidence.

Arrest and refer for prosecution.

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 Philosophy
of Investigation
An Impartial & Objective
Advocate of the Truth

Professional Truth Seekers

The philosophy of investigation is to pursue and evaluate all information with rigorous scrutiny, dismissing bias and prejudice of any kind.

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.

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

ALIBI

JUSTIFICATIONS

EXCUSES
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

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.

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 Florida

The devil made me do it?

I only intended to shoot an apple off of his head.

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