

CRIMINAL DEFENSE INVESTIGATION



The Component Method of Criminal Defense Investigation and Case Management

A Comprehensive Methodology to Facilitate a Fact Driven Investigation that Encourages a Due Diligence Effort Consistent with the Due Process Model

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TRAINING OBJECTIVES

- Recognize the advantages of professional certification within the discipline of criminal defense.
- Combine discipline specific certifications with comprehensive professional development certification.
- Navigate the complex criminal defense arena.
- Develop legal defense theories based upon facts and evidence.
- Plan and Execute a Comprehensive Investigation.
- Elevate Fundamental Skills and Develop Advanced Skills and Strategies.
- Manage the course of investigation and all facts, data, and evidence recovered.
- Identify, develop, pursue, track and confirm leads.

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.

‘to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.’

Why Should Attorneys and Investigators Use a Methodology?

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 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.

The **NLADA** also states ... *National Legal Aid and Defender Association*

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.

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.
- Aggravating and Mitigating Factors
- Types of Criminal Defenses - Consider the facts recovered and reference them to potential defense theories

The Kovel Privilege – Common law

Texas Rule 503 - Rules of Privilege. (codified)

(1)General Rule. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

WORK PRODUCT

Hickman Vs. Taylor – common law

Texas Rules (codified) - The work-product doctrine protects the ideas and strategic decisions made concerning a case by guarding information revealing the thought process of an attorney, a client, or their agent.

This can include notes, memoranda, letters, e-mails—not just communications.

Protecting work product helps the litigation process by safeguarding an attorney's work in preparing for trial and requiring an opposing party to prepare its own case.

The work-product doctrine is found at Texas Rule of Civil Procedure 192.5 in Texas cases and Federal Rule of Civil Procedure 26(b)(3) in federal cases.

How the Attorney–Client Privilege and Work-Product Doctrine are Different The two protections are different.

First, they serve different purposes. Unlike the attorney–client privilege, the work-product doctrine is not concerned with protecting client's confidential information. Its purpose is to protect the mental processes of the attorney, client, and their representatives, resulting in a safe area to analyze and prepare a case.

The work-product doctrine is also broader. It protects more than just attorney–client communications, extending to notes and other materials prepared for litigation. Unlike the attorney–client privilege, work product can be disclosed to an ally or person with common interest without waiving the protection (though consult with a lawyer before doing so).

UNWRITTEN RULE – BEST PRACTICE

NEVER ACCEPT A CRIMINAL DEFENSE ASSIGNMENT UNLESS AN ATTORNEY AGREES TO PROVIDE YOU WITH THE PROTECTIONS OF AN AGENT OF COUNSEL

FOUR BROAD CATEGORIES OF DEFENSE THEORIES

- ALIBI
- JUSTIFICATIONS
- EXCUSES
- PROCEDURAL DEFENSES

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. A method that promotes due diligence in order to provide due process.

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 while at the same time promoting a methodical and strategic methodology.

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

- 1. Forensic Case Review & Analysis**
- 2. The Defendant Interview**
- 3. Crime Scene Inspection**
- 4. Background Impeachment Investigations**
- 5. Witness Interviews & Statements**
- 6. Reporting & Testifying**

Note – Reports can be generated progressively as the investigation unfolds

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 dependent upon the needs of the case.

Objective & Impartial Investigation

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.

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 case must be evaluated against the investigative functions, priorities, and guidelines: Develop a Plan of Action

Consult and discussion with defense counsel

- Primary nature and complexity of the allegations
- Planned focus and objectives of the investigation
- Possible defense theories and the corresponding elements of proof
- Steps necessary to meet investigative objectives; and
- 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 pursue evidence that is exculpatory and be aware of evidence that is incriminating. The investigator should collect and analyze evidence through a number of techniques, including, but not limited to, interviews of the defendant, witnesses, victims, crime scene inspections, collection & review of records; and the use of computer technology.

COMPONENT ONE – The Forensic Review & Analysis

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

- Don't Drink the Kool-Aide! - Question the Narrative
- Line by Line Analysis - Detect Leads, Inconsistencies and issues
- Beware of the false narrative
- Extract the facts from the narrative
- Independent evaluation allows analysis without the influence of storytelling
- Separate fact from opinion
- Note that the facts will provide a foundation for opinions

Identify Inconsistencies

Assume a Forensic Approach to the analysis of documentary evidence.

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

Identify, Pursue & Track Leads - 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 to be answered or an investigative task to be performed.
- Identify the point of interest.
- Form it into a question or task.
- It is now a lead.
- 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.

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 and apply.

Lead Tracking System

Identify the lead and classify by the Component that will likely develop the lead

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 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.

A Forensic Approach

A step by Step Methodical Process

- Prepare an inventory of all documents.
- Implement an internal tracking system to reference documents and evidence as the investigation progresses.
- Review the statutory elements of the crime prior to analysis.
- Study the charges/statute and clearly understand the elements of the crime.
 - What must the prosecution prove in order to secure a conviction?
- Engage in a comparative study of their case facts. Do they have what they need?

Are the foundational facts of their theory subject to an alternative interpretation?
Subject the Prosecution's Case to Analysis

- Highlight and extract leads and data of specific interest – extract and assign to component.
- Highlight dates, times, and references to times – extract and construct time-line.
- Highlight names – extract and generate cast of characters – name, identifying data, contact information, and details of involvement/potential testimony. Classify them as Prosecution witnesses, law enforcement officers, lab personnel, eye-witnesses, fact witnesses, and sources as well as persons of interest who have were contacted but reflect no information regarding potential testimony.
- Identify, Extract & Classify
- Highlight and extract compelling facts and classify as supporting or in conflict with the elements.
- Highlight and extract compelling facts and classify as incriminating, exculpatory, aggravators, and mitigators.
- Highlight and extract facts & evidence that support or dismiss theories as well as due process issues such as questionable traffic stops and searches.
- Identify Inconsistencies & Discrepancies – Extract and summarize.
- Verify and Analyze Evidence
- 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.
- Identify specific testimonial and physical evidence that may require further analysis.

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 as Information is developed

- Inventory of Discovery Report.
- Witness Summary Report (cast of characters).
- Time-Line of Events Report.
- Fact Classification & Summary Report
- Inconsistencies, Errors, and Omissions Report.

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

COMPONENT TWO – The Defendant Interview

The Forensic Approach

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

The investigator should take time to ensure that the defendant understands the ramifications of not cooperating.

Maintain control of the interview at all times!

Don't become overly aggressive.

The purpose is to ask questions – not answer them.

Document the File and Probe for Facts

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.

DEFENDANT INTERVIEW PLAN

Designed for Optimal Results

1. Introduction

a. Introduce yourself as an investigator retained to assist Defense Counsel and that you are an agent of counsel.

2. Define Purpose of the Interview.

a. Explain the importance of the investigative interview.

3. Explain Attorney-Client Privilege and parameters.

4. Explain the NEED to be truthful and cooperative relative to facts.

5. Recover Background Information and History.

a. Data for file.

b. Mitigation Facts

b. Identify baseline of truthful non-stress communication.

6. Discuss Police Report.

a. Review arrest affidavit or offense report with the defendant.

b. Line by line, ask to the defendant to note discrepancies or conflicts.

7. Ask “What happened”? Have the defendant explain the event in their own words. Provide parameters to keep them on point.

8. Reconstruct the Events leading up to the incident and arrest.

- a. Recover facts using a time-line reconstruction.
- b. Utilize visual imagery to facilitate the memory process.
- c. Walk them through the incident and events focused upon details and facts.

9. Identify eyewitnesses and fact witness.

- a. Seek those who may be able to provide additional information relative to the incident.

Question the defendant thoroughly focusing upon details.

Use the interviewing technique of “visual imagery” and reconstruct the time line. Use to identify the baseline of normal behavior to facilitate Kinesic Interviewing.

Develop the Time-Line

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

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.
- Identify Evidence missed or dismissed.

The Defense Perspective

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

- Observe – Do not disturb anything at the scene.
- Record – Take notes, measurements, accomplish photographs and diagrams.
- Collect – Identify, process, and mark evidence.
- Preserve – document and preserve observations and evidence uncovered at the scene.

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

Canvass the Crime Scene - Utilize your time at the crime scene to identify and interview potential witnesses.

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.

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

Who may impeach?

Engage OSINT (Open Source Intelligence), SOCIN (Social Media Intelligence), and HUMINT (Human Source Intelligence).

Research the Federal Rules and Texas Rules

Federal Rule 607. Impeachment of Witness.

(a) Who May Impeach. The credibility of any witness may be attacked by any party, including the party calling the witness.

(b) Evidence to Impeach. The credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these Rules.

METHODS OF IMPEACHMENT

- (a) His demeanor while testifying and the manner in which he testifies.
- (b) The character of his testimony.
- (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
- (d) The extent of his opportunity to perceive any matter about which he testifies.
- (e) His character for honesty or veracity or their opposites.
- (f) The existence or nonexistence of a bias, interest, or other motive.
- (g) A statement previously made by him that is consistent with his testimony at the hearing.
- (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
- (i) The existence or nonexistence of any fact testified to by him.
- (j) His attitude toward the action in which he testifies or toward the giving of testimony.
- (k) His admission of untruthfulness.

A witness may generally be questioned about criminal convictions only if the convictions are for felonies and the witness has not been pardoned for innocence.

If the witness denies a criminal conviction, it may only be proved by offering a certified record of the conviction.

What about prior bad acts?

Prior bad acts may be acceptable since the credibility of any witness depends upon his or her powers of perception, capacity to remember, ability to communicate accurately and honesty or integrity, it may always be attacked by showing shortcomings in any of those areas.

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.

Build a Profile on Each Witness

National Databases

Federal Criminal Records

State Criminal Records

Civil Records – Law Suits

Public Recordings

Social Media Searches

General Google Search

Other records and sources

All Public Record Sources

Friends, Associates, neighbors, employers

Use a National Database

To locate witnesses

Identify jurisdictions where the subject has resided in the past.

Develop information leading to potential impeachment evidence.

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 – Administrative Actions

Military Records
International Records
State Agencies – Open Records Laws?
Licensing Agencies, etc.
City and Local Agencies
County Government

Identify all law enforcement contact in any capacity

Identify jurisdictions where the subject as resided and worked and contact local law enforcement.

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

Social Media Research

Reports to be generated

Reports for each individual witness.

Criminal Records – Certified Copies of Convictions.

Provide a Dossier for each witness reflecting all data and facts recovered.

COMPONENT FIVE – Witness Interviews and Statements

Understanding Witnesses

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. They are listed within the police reports. In addition, it is expected that they will be listed by the prosecution and will testify to support their case. Their basic testimony is known and dependent upon the jurisdiction may be pursued via deposition.

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

Confirmed Witness Considerations

Keep in mind that defense counsel may specifically request that confirmed witnesses be interviewed. This is especially true when depositions are not allowed via the rules of procedure.

To confirm or challenge their testimony

To identify inconsistencies or changes

To pursue additional information and questions that were not covered by the law enforcement interviews

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.

Importance of Unconfirmed Witnesses

Unconfirmed witness are crucial to developing a defense theory.

The may provide testimony that challenges, contradicts, or provides alternatives to the prosecution's evidence.

Unconfirmed witnesses can fundamentally change the equation of the prosecution's case and demonstrate reasonable doubt.

Classify by Expectation

Unconfirmed

Level 1 - Friends & Family – existing relationship suggests high level of cooperation

Level 2 - Based upon leads cooperation expected

Level 3 - Based upon lack of insight cooperation level is unknown

Preparing for the Interview

Review prior statements subject to analysis in Component 1.
Review background information developed in Component 4.
Review questions and leads generated in prior Components.
Prepare question guide in advance.

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.

Location, Location, Location!

Their home; time and place convenient for them.

Trojan Horse Approach – invited in with the ability to gain control.

Their defenses are lowered when in their own home.

Kitchen is best as it promotes conversation on multiple levels including cultural.

Avoid the living room and couch. It is not an environment that promotes conversation.

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

Ask what did you see as opposed to “what happened?”

Conducting the Interview

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

Reconstruct the Time-Line

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.

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.

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 - The Narrative is too busy but the Bullet Points Invite Review

Narrative Reports VS. Bullet Format Reports

Report Writing Guidelines

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!

Preserve The Record

Benefits of Employing the Component Method

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

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.

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

A SOUND DEFENSE THEORY

The Component Methodology 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.