

Chapter 8

Defense Investigation

Part A. General Aspects of Defense Investigation

§ 8.01 INTRODUCTION: SCOPE OF THE CHAPTER

Hang out for long with experienced defense attorneys and you will hear this story about the seventy-year-old indigent drunk-and-disorderly recidivist appearing for arraignment in front of a judge who had sent him to jail half-a-dozen times in the past. “As you know, Sam,” the judge tells him, “if you can’t afford to hire yourself a good defense lawyer, I can assign you one cost-free.” “Thanks,” says Sam, “but if it’s all the same to Your Honor, this time I’d rather you assign me one or two good defense witnesses.”

Believable facts are the fuel that drives criminal defense work. Factual information is always counsel’s most vital resource, not only in litigating the case at trial but in performing every other crucial defense function: – urging the police or prosecutor to drop or reduce charges, negotiating a plea bargain with the prosecutor, advocating a favorable sentencing disposition to a probation officer or a judge.

Investigation is counsel’s principal means for obtaining and vetting the information s/he needs. Although there are other fact-gathering tools – formal discovery proceedings (see Chapter 9); motions practice (see Chapters 7, 16, 22); plea-bargaining discussions (see Chapter 14); informal interchanges with a prosecutor (see § 6.03 *supra*) – they tend to be less reliable and comprehensive than independent defense spadework: meticulously searching the streets, paper and electronic files and records, and the internet.

One key aspect of defense investigation, the interview with the client, is described in Chapter 5. The following aspects of investigation are discussed in the present chapter:

1. Locating and interviewing defense witnesses (see §§ 8.06-8.10 *infra*);
2. Interviewing and taking statements from prosecution witnesses (see §§ 8.11-8.15 *infra*);
3. Observing the scene of the crime and other relevant sites (see § 8.05 *infra*); and
4. Gathering documents and exhibits (see §§ 8.16-8.19 *infra*).

An additional form of investigation – the retention of expert consultants to look into aspects of a case that may have forensic-science angles – is discussed in Chapter 11.

§ 8.02 USING THE DEFENSE THEORY OF THE CASE TO GUIDE THE INVESTIGATION

Chapter 6 describes a process for counsel's developing a defense theory of the case and using it to guide investigation. Because counsel's time and resources are not unlimited, the investigation must be selective – often painfully so. A well-considered theory of the case provides the basis for efficient selectivity and thoughtful assignment of priorities. *See State v. Petric*, 2020 WL 4726485, at *8 (Ala. Crim. App. 2020) (“Defense counsel must, “at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client.”[] This includes investigating all reasonable lines of defense, especially “the defendant’s ‘most important defense.’” Counsel’s “failure to consider alternate defenses constitutes deficient performance when the attorney ‘neither conduct[s] a reasonable investigation nor ma[kes] a showing of strategic reasons for failing to do so.’””).

In most cases, one single issue or a very few issues should stand out as having paramount importance. The prosecution must prove all of the elements of the crime it has charged, but the defense needs to do nothing more than defeat one of those elements. It is seldom profitable to take on more than one or, at most, a couple. The defense should aim at the few weakest points in the prosecution's case or at the few strongest points in the respondent's defense. *See In re Gay*, 8 Cal. 5th 1059, 1083, 457 P.3d 502, 519, 258 Cal. Rptr. 3d 363, 384 (2020) (in a prosecution for the murder of a police officer in which defense counsel's theory of the case was that a codefendant, not the defendant, was the shooter, counsel performed ineffectively in failing to conduct an adequate investigation: “Gay was charged with the murder of a police officer. In such a case, peace officers would have had every incentive to ensure that those responsible were convicted. Exculpatory testimony from a peace officer would have been some of the most persuasive evidence a defense attorney could present. Through discovery, . . . [defense counsel] was aware of evidence that . . . [the co-defendant] freely confessed to the shooting. The professionally appropriate response to this information would have been to contact each peace officer mentioned as having had contact with . . . [the co-defendant] to ask about any confessions they had witnessed or knew of and to solicit evidence that . . . [the co-defendant], alone, killed [the] Officer . . .”).

As Chapter 6 also suggests, however, counsel must avoid premature fixation on his or her initial defense theory. While searching for facts to support that theory, counsel must be alert to those that do not and to facts that suggest a preferable theory. *See State v. Petric*, 2020 WL 4726485, at *8 (Ala. Crim. App. 2020) (““Constitutionally effective counsel must develop trial strategy in the true sense – not what bears a false label of ‘strategy’ – based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation.””). Counsel's best investigative strategy will be to go first to the sources that are most likely to contain information relevant to his or her preliminary, working theory of the case; but in exploring those sources, s/he should collect all other information potentially germane to the case that can be gathered from the same or nearby sources with relatively little additional time and effort. Counsel must constantly re-evaluate the information

s/he has thus far gathered and determine whether to stay on the same track or switch to a new one. By keeping his or her eyes open and plans flexible as s/he excavates the locations of most likely paydirt, s/he may find unexpected nuggets that call for digging in new directions. Counsel must always have priorities but be willing to change them.

§ 8.03 STARTING PROMPTLY AND PRESERVING PERISHABLE EVIDENCE

Counsel's first priority should be to establish a rational order of priorities. To do this, counsel must get a quick picture of the case in broad outline. In addition to interviewing the client to obtain his or her version of events, counsel will need to learn the essence of the prosecution's version. Because the discovery process described in Chapter 9 may take some time to launch, and because most police officers are reluctant to talk with a defense attorney or investigator, the most effective technique for rapidly uncovering the prosecution's basic version of events is usually to go to the police station and obtain a copy of the incident report filled out by the police at the time the complainant first called in about the crime and/or the arrest report filled out when the respondent was apprehended. See § 8.19 *infra*.

A quick start is essential in investigation. *See, e.g., United States v. Scott*, 24 M.J. 186, 192 (U.S. Ct. Military Appeals 1987) (holding trial counsel ineffective for failure to perform a prompt investigation of a potential alibi defense: "A defense counsel has 'the duty . . . to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.' . . . [AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE], The Defense Function, Standard 4-4.1 (2d ed. 1979)." [carried forward as AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE MONITORS AND MONITORING, DEFENSE FUNCTION (4th ed. 2017), Standard 4-4.1(c), *Duty to Investigate and Engage Investigators* ("[d]efense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties"); *Hughes v. Vannoy*, 7 F.4th 380, 388 (5th Cir. 2021) (quoting the extant ABA Standard with approval); *People v. Jones*, 186 Cal. App. 4th 216, 237-38, 111 Cal. Rptr. 3d 745, 761 (2010) (same); *Nelson v. State*, 2021 WL 2982927, at *8-*9 (Md. Ct. Special App. 2021) (same); *State v. Tetu*, 139 Hawai'i 207, 215-16, 386 P.3d 844, 852-53 (2016) ("A review of several jurisdictions' codes and performance standards for defense attorneys indicates that in order to assure competent representation, defense counsel should investigate the crime scene and consider seeking access as early as possible, unless circumstances suggest it would be unnecessary in a given case. The American Bar Association's ABA Standards for Criminal Justice: Prosecution and Defense Function (ABA Standards) states, 'Many important rights of a criminal client can be protected and preserved only by prompt legal action.' *Id.* § 4-3.7(a) (4th ed. 2015). Thus, '[d]efense counsel should promptly seek to obtain and review all information relevant to the criminal matter, including but not limited to requesting materials from the prosecution.' *Id.* § 4-3.7(b). In addition to seeking information from other sources aside from law enforcement, see also *id.* § 4-4.1(c), counsel for a defendant has a specific duty with regard to investigating a case. 'Defense counsel's investigative efforts should

commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter’ *Id.* ¶ The commentary to the ABA Standards emphasizes that ‘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.’ 15 Am. Bar Ass’n, ABA Standards for Criminal Justice: Prosecution Function and Defense Function § 4-4.1 Commentary, at 183 (3d ed. 1993). The commentary further states that if there were eyewitnesses to the alleged crime, then ‘the lawyer needs to know conditions at the scene that may have affected their opportunity as well as their capacity for observation.’ *Id.*”); *Wilson v. Sirmons*, 536 F.3d 1064, 1085 (10th Cir. 2008) (“Under the American Bar Association Guidelines, ‘preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel’s entry into the case.’ ABA Guidelines 11.8.3 (1989). The reason for the ABA’s direction is obvious – there must be sufficient time for interviews, research, and adequate testing before strategic planning can even begin. Additionally, if counsel waits until immediately before trial, it is too late to correct any invalid tests or to pursue leads discovered during the testing process, a requirement for counsel to be effective. . . . The rush to prepare will invariably lead to unnoticed and untapped resources.”); *Bond v. Beard*, 539 F.3d 256, 288-89 (3d Cir. 2008); *In re Gay*, 8 Cal. 5th at 1077-78, 457 P.3d at 516, 258 Cal. Rptr. 3d at 379-80. Physical evidence and human memory deteriorate rapidly. An object of importance may be discarded or carried off by persons unknown. Witnesses may disappear or forget. Particularly in urban areas, individuals are highly mobile. They may go away suddenly and leave no trace. Or if they remain in the area, they may soon blend into the neighborhood, becoming impossible to locate as their principal identifying characteristic – proximity to the offense or arrest – dissolves. If and when they are ever found again, they may be useless as witnesses because they have forgotten crucial details.

It is especially important to move quickly in tracking down and speaking with alibi witnesses. Alibis depend critically upon the witness’s having a detailed recollection of what s/he and the respondent were doing at a precise point in time. Since often those activities will be quite ordinary, such as hanging out on a street corner, even the slightest delay on counsel’s part can cause uncertainties to creep in. After a couple of days, and certainly after a couple of weeks, the witness will no longer be certain whether a street-corner conversation with the respondent took place at, for example, 3 p.m. or 3:10. And the entire alibi could depend on that ten minute difference if the distance between the scene of the crime and the location of the conversation could be traversed in ten minutes. There are certain techniques the defense can use in jogging alibi witnesses’ memories and preserving alibi evidence, see § 33.22 *infra*, but the best technique is to get to the witness while his or her memory is fresh.

Before presenting an alibi theory at trial, defense counsel will have to make a rigorously critical review of the credibility of the testimony supporting that theory. Alibis are often difficult to sell to a judge or jury. See Lisa J. Steele, *Alibi Defenses: Millstone or Key to the Jailhouse Door?*, 45-FEB THE CHAMPION 20 (2021). But counsel should not allow initial skepticism regarding a client’s claim of alibi to dampen or delay thoroughgoing investigation of potential alibi witnesses. See *State v. Syed*, 463 Md. 60, 83, 204 A.3d 139, 152 (2019) (dictum) (“Where a

defendant provides his or her counsel with information about an alibi witness, the attorney has an affirmative duty to make reasonable efforts to investigate the information that was provided.”); *Skakel v. Commissioner of Corrections*, 329 Conn. 1, 35-36, 188 A.3d 1, 23 (2018) (“counsel is obligated to make all reasonable efforts to identify and interview potential alibi witnesses”); *Code v. Montgomery*, 799 F.2d 1481 (11th Cir. 1986) (finding defense counsel ineffective for failing to investigate an alibi defense when the defendant asserted that he had never been in the vicinity of the crime); *Wade v. Armontrout*, 798 F.3d 304 (8th Cir. 1986) (finding that defense counsel performed ineffectively in failing to investigate an alibi defense when the defendant asserted that he was at home with his mother at the time of the crime and that she would testify in his defense); *Stitts v. Wilson*, 713 F.3d 887, 893 (7th Cir. 2013) (“When a defendant’s alibi is that he was at a nightclub at the time of the shooting, where there are presumably many people, we cannot fathom a reason consistent with Supreme Court precedent that would justify a trial counsel’s decision to interview only a single alibi witness without exploring whether there might be others at the venue who could provide credible alibi testimony. There is simply no evidence in the record to suggest that exploring the possibility of other alibi witnesses ‘would have been fruitless’ under these circumstances.”). *See also, e.g., Rivas v. Fischer*, 780 F.3d 529, 531, 532-33, 550 (2d Cir. 2015) (when the chief medical examiner “changed his estimate as to the time of death six years after the fact, seemingly on the basis of no new evidence,” to a time when the defendant “had an incomplete alibi,” “any reasonable attorney . . . [would have] conclude[d] that investigating the basis of [the medical examiner’s] new findings was essential,” and therefore defense counsel’s failure to investigate further violated his “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary”).

Counsel’s other top priorities when starting the investigation should be to locate and preserve contact with items or information sources that are perishable – physical objects that are mobile or changeable; witnesses who are mobile or imprecisely identified but related to some specific location at a recent point in time; witnesses whose involvement is such that they may forget if not questioned quickly. Counsel should move on these items as rapidly as s/he can. This is so not only because of the risk of irreparable losses but also because early investigation makes the most efficient use of counsel’s limited resources: an hour’s search while the track is warm may be worth days later. Once a reasonable effort has been made to find the known perishable items, counsel should evaluate everything s/he has, estimate the points of strength, and proceed with further investigation to consolidate them.

§ 8.04 USE OF AN INVESTIGATOR

Whether counsel should hire an investigator or conduct the investigation personally will depend in part upon the financial resources available to the defense. If the respondent is indigent, counsel can request state funding for investigative services. State statutes and rules commonly provide for such funding. Insofar as they do not, or to the extent that they fall short of providing the amount of funding needed by the defense, counsel can invoke the constitutional doctrines surveyed in § 11.03(a) *infra*, as the basis for requesting adequate investigative support. *See, e.g.,*

State v. Wang, 312 Conn. 222, 245, 92 A.3d 220, 235 (2014); *State v. Second Judicial District Court*, 85 Nev. 241, 453 P.2d 421 (1969); *Staten v. Superior Court*, 2003 WL 21419614 (Cal. App. 2003); *Mason v. Arizona*, 504 F.2d 1345, 1351-52 (9th Cir. 1974) (dictum); and *cf. Hinton v. Alabama*, 571 U.S. 263, 264, 267, 273-74 (2014) (per curiam); *Stubbs v. Thomas*, 590 F. Supp. 94, 99-102 (S.D.N.Y. 1984). Procedures for seeking state funding are discussed in § 11.03(b) *infra*.

An investigator is recommended, when practicable, for several reasons. Money spent to hire an investigator is usually economically spent, since an investigator's time is less costly than counsel's. Counsel does, or will, have other things to do in the case that can be done only by a lawyer, which may occupy counsel at times when investigative needs are critical. A good investigator also has sources of information unavailable to all but the most experienced defense lawyers in a locality – community contacts, official contacts (acquaintances in the police department, prison records department, probation department, and so forth), and contacts with other professional fact gatherers (news reporters, social workers, local politicians and their staffers). An investigator can be called to testify if any conflicts arise between the stories given by witnesses at trial and the stories they previously gave in an investigative interview, whereas judges usually have discretion to refuse to allow a lawyer to take the witness stand in a case in which s/he is appearing as counsel. And, if counsel decides that photographs or recordings are necessary for the defense, a person other than counsel will have to take them and be available to testify to lay a foundation for their admission into evidence, should the prosecutor not stipulate to their authenticity and accuracy.

Intelligent use of an investigator, however, requires thoughtful attention by counsel. *See State v. Petric*, 2020 WL 4726485, at *18 (Ala. Crim. App. 2020) (“[A]lthough lawyers are not prohibited from employing the services of non-lawyer assistants and delegating functions to them, the lawyer is required to supervise the delegated work and retains complete responsibility therefor.’ . . . ‘[A]n attorney must supervise work done by lay personnel and a lawyer stands ultimately responsible for work done by his non-lawyer employees.”). Counsel must explain the case and the initial theories of the defense fully to the investigator at the outset and must inform the investigator periodically of counsel's current thinking in order to avoid squandering defense resources in the collection of useless information. Frequent, regularly scheduled check-ins by phone ordinarily serve this purpose best; most of the time, they can be kept brief.

If counsel is practicing in a jurisdiction that permits the prosecutor to obtain notes of interviews of witnesses who testify at trial for the defense, counsel will need to explain to the investigator the reasons for refraining from taking notes when interviewing defense witnesses and for reporting orally to counsel about the content of the interviews. *See* § 8.10 *infra*.

§ 8.05 THE IMPORTANCE OF PERSONALLY OBSERVING THE SCENE OF THE CRIME AND OTHER RELEVANT SITES

Whether or not counsel uses an investigator, it is usually wise for counsel personally to

inspect the site of any important event in the case: the offense, the arrest, a search and seizure. Although counsel will be principally looking for specific items, s/he will often perceive others that put a whole new complexion on the case – items having a significance that would escape anyone but counsel. Frequently, for example, at the time of trial, when a prosecution witness is testifying about events in detail not previously known to the defense, it becomes apparent to counsel who has been at the scene – and only because s/he has been at the scene – that the witness is mistaken or confused on matters of spatial relations. (A witness who, on direct examination, has carefully drawn a diagram of an unobstructed street corner can be quite visibly flustered by the question on cross-examination whether there is not, in fact, a substantial construction barrier on that corner.) Where necessary, counsel should seek a court order for access to a crime scene that is not otherwise available to counsel. *See, e.g., State in the Interest of A.B.*, 219 N.J. 542, 547, 554, 561, 99 A.3d 782, 785, 789, 793 (2014) (the family court did not “abuse[] its discretion by entering a discovery order allowing the accused, his attorney, and his investigator to inspect and photograph specified areas of the alleged victim’s home for no more than thirty minutes in the presence of a prosecutor’s investigator”; “The right to the effective assistance of counsel in a criminal proceeding includes the right to conduct a reasonable investigation to prepare a defense.”; “a defense attorney’s visit to the scene of the crime is a rather ordinary undertaking, and in some circumstances, such an inspection might constitute a professional obligation. . . . The State generally will have thoroughly investigated a crime scene, securing evidence and taking photographs. Familiarity with a crime scene may be essential for an effective direct or cross-examination of a witness – and even for presenting exculpatory evidence.”; “The [family] court issued the inspection order only after carefully weighing the juvenile’s fair-trial rights and [complainant] N.A.’s privacy interests and imposing reasonable time and manner restrictions.”).

It is also helpful in many cases for counsel to participate in a re-enactment of pertinent events, such as a search-and-seizure episode in which the client claims that the police barged through an apartment doorway without knocking, whereas the police will expectably claim that they knocked and saw illicit activities inside when the door was opened. By playing the role of a police officer in this situation, counsel can become dramatically aware of physical restrictions on the witness’s field of vision that may break the officer’s testimony wide open on a motion to suppress. Of course, counsel should be sure that the scene has not undergone changes between the time of the critical events and that of counsel’s visit. And re-enactments should not be undertaken, if avoidable, in places where the public or the police can watch the replay.

Part B. Locating and Interviewing Defense Witnesses

§ 8.06 THE NEED TO INTERVIEW ANY WITNESSES WHOM THE RESPONDENT WISHES TO CALL

As explained in § 8.02 *supra*, counsel will ordinarily determine the order and scope of the defense investigation, and which witness interviews have priority, in accordance with counsel’s theory of the case. The one exception to this rule is that counsel must talk with any witnesses

whom the client requests be interviewed, however tangential they may appear to counsel. Notwithstanding counsel's belief that these witnesses are unimportant, counsel may be wrong. Moreover, every client is entitled to the small comfort, at least, that his or her lawyer does not disbelieve the client without fair inquiry. *See Lee v. Kink*, 922 F.3d 772, 774 (7th Cir. 2019) (defense counsel's failure to contact potential witnesses after receiving affidavits indicating that they might have exculpatory information would constitute ineffective assistance); *cf. Moore v. Secretary Pennsylvania Department of Corrections*, 640 Fed. Appx. 159, 163 (3d Cir. 2016) ("counsel is deficient where . . . they did not fully investigate a witness that they knew may be exculpatory"); *Cook v. Foster*, 948 F.3d 896 (7th Cir. 2020). Finally, failure to look for witnesses named by the client is, perhaps, the most frequent ground of post-conviction attacks against the competence of trial counsel. *See, e.g., Cannedy v. Adams*, 706 F.3d 1148, 1159-62 (9th Cir. 2013). *See also Mosley v. Butler*, 762 F.3d 579, 587-88 (7th Cir. 2014). Accordingly, counsel should make efforts to find the witnesses and, if the witnesses cannot be located, inform the client of that fact and also make notes of counsel's efforts to find them and of the conversation with the client. If counsel succeeds in finding the witnesses but decides, after talking with them, that they have nothing useful to say or are unconvincing, counsel should discuss these matters with the client and make a file note both of the reasons for counsel's conclusions and of the discussion of them with the client. *See* §§ 2.03, 5.04(e) *supra*.

§ 8.07 LOCATING WITNESSES

Primary sources for identifying and locating witnesses include the respondent, his or her family and friends (and their phones and handhelds), the police, the prosecutor, news media and their reporters, social media, and various websites. If these provide inadequate leads, counsel must resort to visiting the scene as quickly as possible and contacting any person who might be connected with the incident to inquire who knows or saw anything relevant. Counsel should seek out and interview all persons known to have been present at the scene and approximate time of the crime. *See Johnson v. Premo*, 315 Or. App.1, 9, 499 P.3d 814, 819 (2021) ("[a]dequate trial counsel would have recognized the importance in a capital murder case of contacting the people nearby who were likely to have information about the victim, people associated with the residence, and the events of the night in question, when a violent murder occurred in a nearby home in the early morning hours when many residents would likely have been at home"). This aspect of defense investigation is time-consuming and often frustrating. Its importance, however, cannot be emphasized enough.

Counsel should always ask any person interviewed whether other witnesses were present and then get the fullest possible description of them. When identification is by name, the spelling of the name and its phonetic spelling should be taken, if possible. The more kinds of contact information counsel can obtain for each witness – street addresses, phone numbers, e-mail and e-text addresses, website and social media logos – the better. Counsel should ask whether the witness has any aliases or nicknames; where the witness lives or lived; where s/he works or worked; whether s/he is on public assistance and, if so, where s/he collects checks, food stamps, or any other regular source of income; whether s/he belongs to a union or frequents a hiring hall

and, if so, which one; where s/he “hangs out” and with whom; whether s/he has a girlfriend or boyfriend, and where that person lives; whether the witness plays the numbers or gambles in some other manner and where; whether s/he has ever been in prison, been arrested, or been in the military.

In trying to locate a witness when only the witness’s name is known, checks should be made of on-line resources, electric and gas companies, voting registrations, tax assessment records, traffic courts, the Department of Motor Vehicles, credit card companies, credit-rating bureaus, hospital and department store billing records, probation and parole departments, the Veteran’s Administration, the Department of Public Welfare, and the Social Security Office. If the neighborhood is known as well, counsel should also check local social work agencies, settlement houses, churches, finance companies, debt-collection agencies, employment agencies, labor union offices and hiring halls, political ward leaders, liquor stores, bars, and the precinct station.

If the crime took place in a public area (on the street or in the lobby or the hallway of a building), it is often productive to go door-to-door to every store front, house, and apartment or room that abuts or overlooks the scene of the crime. This canvassing technique will usually produce witnesses who were in a position to see the crime or events immediately preceding or following it. Counsel also should check whether any CCTV or other electronic surveillance equipment covers the location. If so, counsel should take steps to examine the recordings as soon as possible and, if they look helpful, to obtain copies. Here again, time is of the essence: Many surveillance devices do not retain recordings for more than 24 or 48 hours.

If the scene of the investigation will be a low-income or working class neighborhood, counsel and/or the investigator should dress in casual clothes. Dressing in a suit will make the attorney or investigator look like a plain-clothes police detective or probation officer, thereby ensuring that no one on the street will talk to him or her. It is often very effective to have the respondent or one of his or her adult relatives or friends accompany counsel or the investigator to demonstrate that counsel or the investigator has benign intentions and to introduce counsel or the investigator to contacts on the street.

§ 8.08 KEEPING TRACK OF WITNESSES

Having located and interviewed the defense witnesses, counsel should be sure to gather the information necessary to keep track of the witnesses in the event that they change their address and/or telephone number prior to the trial date. Although counsel may decide provisionally that particular individuals will not be called as witnesses (because their information is not helpful or because their appearances, backgrounds, or uncertainty of recollection leaves them too susceptible to discrediting cross-examination), it is rare that counsel can predict all the future contingencies that may make it necessary to call any individual as a witness after all. It is wise therefore to keep tabs on every witness interviewed who knows anything about the case.

In interviewing the witness, counsel should ask for not only (a) the witness's current contact information – street address, land and cell phone numbers, e-mail and e-text addresses, website and social media logos, place of employment – but also (b) any plans the witness may have to move, and when and where, and (c) in any event, the full range of contact information for other persons through whom s/he can be reached when needed. The rapport-building preliminary conversation described in § 8.09 *infra* lends itself naturally to a discussion of the witness's interests, hobbies, work and leisure activities; if counsel makes notes of these, it may be possible to use the information to track the witness down in the event that s/he changes his or her address and phone number.

§ 8.09 INTERVIEWING DEFENSE WITNESSES

Witness interviews should be conducted in person if at all practicable. *See* Sean O'Brien & Quinn O'Brien, *Put Down the Phone! The Standard for Witness Interviews Is In-Person, Face-to-Face, One-on-One*, 50 HOFSTRA L. REV. 339 (2022).

Counsel (or the defense investigator) should ordinarily begin any interview of a witness by identifying himself or herself as the attorney (or attorney's investigator) for the respondent. Counsel (or the investigator) should show the witness some form of identification.

Then it is usually advisable to engage the witness briefly in some topic of casual conversation to put the witness at ease and establish rapport. The choice of topic will depend upon the witness and upon counsel's (or the investigator's) own style. If the respondent is detained, and the witness is a relative or friend of the respondent's, the witness will usually be eager to hear about the respondent's health and emotional state, and this topic can serve as an effective ice-breaker. If the witness is a stranger to the respondent, counsel will need to come up with some topic that the witness and counsel have in common: photographs, trophies, and posters on the witness's wall may suggest hobbies or interests about which counsel can speak knowledgeably. Of course, if counsel is ignorant of the subject matter or if such casual conversation is not consistent with counsel's personal style, s/he should skip these rapport-building devices. Visibly artificial attempts at striking up a conversation are often worse than jumping immediately into the business at hand.

Frequently, counsel will need to overcome a witness's reluctance to talk. The witness may be unwilling to "get involved" because s/he is queasy about what s/he will have to do as a witness or because s/he is worried about the degree of inconvenience it will entail. Counsel will need to overcome this reticence by an effective pitch of some sort. One argument that sometimes works is to stress the importance of the witness's giving information, since s/he is the only one who has it and the client's liberty is at stake. Counsel can also say that the right thing for the witness to do as [a member of respondent's family] [a friend of the respondent] [a neighbor of the respondent] [a citizen] [*or whatever*], is to step up and tell counsel whatever s/he knows; and that if the witness were, unfortunately, placed in the predicament of counsel's client, s/he would expect others to come forward. If all else fails and counsel believes the witness has important

information, counsel can subpoena the witness and hope that the witness will talk to counsel prior to trial. However, this should not be done – except in an otherwise altogether hopeless case – if the prosecutor is probably unaware of the witness and if there is a substantial chance that the witness’s story will be damning

The basic three-stage interviewing process sketched in § 5.06 *supra* is usually effective in taking a witness’s story. In addition, counsel should ask every witness whether the witness has discussed the case with anyone else, with whom, and what was said. Particular care should be taken to have the witness describe in detail what s/he has told the police and any prosecution agents to whom s/he has spoken, what they said, and what specific questions they asked. The line of questioning pursued by these investigators often gives counsel valuable insights into the opposition’s theory of the case, as well as leads to areas and sources of information that the defense would not otherwise hit upon.

Just as counsel must cross-examine his or her client, when interviewing the client, so s/he must cross-examine other witnesses. This has several purposes: to dig out the truth – and in detail – as an aid to counsel’s further investigation; to evaluate the witness’s potential contribution to the defense if called to testify at a trial; and to educate and prepare the witness for cross-examination by the prosecutor. The latter two purposes can generally be served at a subsequent interview; therefore, unless the first purpose is compelling, counsel may be advised to forego too vigorous cross-examination in an initial witness interview. Counsel stands to gain considerably by being in the witness’s good graces, and it makes no sense to anger the witness unnecessarily by pressing the witness hard before favorable relations are established. If a witness finds it an uncomfortable or unpleasant experience to be interviewed by counsel, the witness will not be readily available for subsequent interviewing and may even shade his or her story so as to discourage counsel from calling him or her at trial. The approach to cross-examining one’s client suggested in § 5.12 *supra* – describing the questioning as a role play or dry run of the cross-examination that the prosecutor might conduct at a trial – is also a useful device for asking other potential defense witnesses the probing questions that are necessary to test the durability of their stories without implying that counsel personally has any doubts about their truthfulness.

If cross-questioning shakes a witness (or may leave the witness feeling shaken) but counsel concludes that the witness’s story is nevertheless sufficiently solid to be potentially useful to the defense, counsel should follow up with some supportive questioning that will assist the witness to regain a warranted measure of confidence and should end by reassuring the witness that the witness is doing just fine. Counsel should never let a witness leave an interview feeling that his or her story has been demolished or disbelieved unless, in fact, counsel is convinced that the story is a fabrication. Minor inconsistencies and errors that counsel realizes are unimportant because they are perfectly natural and will not seriously impair the witness’s credibility may nevertheless cause a legally unsophisticated witness to experience painful self-doubts. Unless those doubts are assuaged by some comfort from counsel at the end of the interview, the witness is likely to dwell on them following the interview, and the witness’s story is likely to become weaker, more hesitant, and more heavily qualified than it needs to be or should be.

§ 8.10 REFRAINING FROM TAKING WRITTEN STATEMENTS OF DEFENSE WITNESSES OR TAKING VERBATIM INTERVIEW NOTES IN JURISDICTIONS WHERE THEY ARE DISCOVERABLE BY THE PROSECUTION

In some jurisdictions, the prosecution can obtain court-ordered discovery of written statements that defense counsel or a defense investigator obtains from defense witnesses and (less frequently) even the attorney's or investigator's notes of oral statements taken from defense witnesses. See §§ 9.11, 27.12(b), 33.03 *infra*. *But see Martin v. Office of Special Counsel, Merit Systems Protection Board*, 819 F.2d 1181, 1187 (D.C. Cir. 1987) (“In *Hickman v. Taylor*, 329 U.S. 497 (1947),] the Supreme Court held that witness statements prepared at the request of an attorney are privileged work product and not subject to discovery unless the discovering party can show the statements are ‘essential’ to her case. . . . The Court also held that attorney *notes* taken during witness interviews are, for all practical purposes, *always* privileged.”). Where such statements and notes are discoverable, they can be used by the prosecutor both to impeach the witnesses’ testimony at trial and more generally to guide prosecution investigation aimed at refuting the defense case. Accordingly, defense attorneys in these jurisdictions should ordinarily refrain (and instruct investigators to refrain) from taking written statements of defense witnesses or taking notes during the interview of a defense witness.

Section 9.13 *infra* suggests that the information given by the witness can usually be preserved (to assist counsel to remember it and possibly for the purpose of refreshing the witness’s recollection later), with minimum risk of prosecutorial discovery, by recording the information in a “strategy memorandum.” Particularly if this is done by counsel rather than by counsel’s investigator, the contents of the memo are likely to be insulated from discovery as “attorney work product.” Whenever counsel conducts an interview personally, s/he should record the information in such a strategy memorandum, interweaving legal theories and strategic considerations with the information obtained from the witness. If a defense investigator conducts the interview, s/he should be instructed to report the content of the interview orally to counsel so that counsel can record the information in a strategy memorandum. The concluding paragraph of § 5.05 *supra* suggests a technique for writing the memo so that counsel can later identify the passages in it that are verbatim transcriptions of the witness’s own words – the passages that are simultaneously most useful for defense trial preparation and most susceptible to prosecutorial discovery – but a judge examining the memo on the prosecutor’s motion will probably not be able to segregate and disclose those passages.

Part C. Interviewing and Taking Statements from Adverse Witnesses

§ 8.11 THE UNIQUE ASPECTS OF INTERVIEWING ADVERSE WITNESSES

Counsel should undertake to identify all potential prosecution witnesses and should interview each of them except in the very rare case in which there are compelling reasons not to. *See, e.g., United States v. Tucker*, 716 F.2d 576 (9th Cir. 1983) (finding defense counsel ineffective for, *inter alia*, failing to interview prosecution witnesses before trial: counsel’s

“ability to cross-examine the government’s witnesses effectively was seriously compromised by his failure to interview them, since he would have little idea as to the specific areas of testimony which could be challenged” (*id.* at 583); “[t]he cases repeatedly stress the importance of interviewing witnesses to the preparation of a defense” (*id.* at 583 n.17); “[e]ffective 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” (*id.* at 583 n.18, quoting Commentary to AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 4-4.1, *Duty to Investigate*); *Larsen v. Adams*, 718 F. Supp. 2d 1201 (C.D. Cal. 2010) (same). Many of the investigative techniques that have been described in connection with defense witnesses will also prove effective in dealing with adverse witnesses. The methods described in § 8.07 *supra* for tracking down witnesses, in § 8.08 for keeping tabs on witnesses, and in § 8.09 for interviewing witnesses will ordinarily be useful, whether the interviewee is a potential defense witness or a potential prosecution witness.

The primary difference in dealing with potential prosecution witnesses is that counsel will usually want to take a written or recorded statement from all such witnesses, or, if the witness refuses to write out or to record a statement, counsel will want to take verbatim notes of what the witness says. Techniques for taking these statements and notes are described in §§ 8.12 - 8.13 *infra*. (Unlike defense-friendly witnesses, potential prosecution witnesses are not likely to be willing to write out a statement in longhand.) There are additional considerations when the adverse witness is a police officer (see § 8.14 *infra*) or a co-respondent or purported co-perpetrator (see § 8.15 *infra*). Finally, there are special steps that counsel will need to take and possibly motions to file when an adverse witness reports that s/he has been instructed by police or prosecutors to refuse to talk with the defense. See § 8.13 *infra*.

§ 8.12 TAKING STATEMENTS FROM ADVERSE WITNESSES

§ 8.12(a) The Reasons for Taking Statements

In interviewing prosecution witnesses, the defense has two central goals: (i) to learn facts about the prosecution’s case that will enable counsel to pinpoint weaknesses and develop rebuttal evidence; and (ii) to elicit statements from the witness, at a time when s/he probably has not yet been coached by the prosecutor (or at least has not been extensively coached), which can be used to impeach the witness at trial.

The best way of nailing down the witness’s statements for use as impeachment material is to record what s/he says in a written document signed by the witness. S/he will have a hard time credibly disowning the making or the details of statements s/he has signed, and an even harder time if s/he has handwritten the statements. Local practice may prescribe a form that gives written statements the effect of sworn affidavits (*see, e.g.*, 28 U.S.C. § 1746); counsel should have this form in an electronic file for instant retrieval when interviewing adverse witnesses, so that it can be inserted into the witnesses’ statements without fanfare or delay which may cause a

witness to think twice about signing anything.

Section § 8.10 *supra* advises counsel ordinarily not to take written statements from potential defense witnesses because they are susceptible to court-ordered discovery by the prosecution. Taking written statements from a prosecution witness usually presents no such risk because most jurisdictions' pretrial discovery rules provide that the prosecutor can obtain statements only of those witnesses whom defense counsel intends to call to testify in the defense case-in-chief at trial. There are a few jurisdictions that extend the prosecution's discovery rights to include statements taken by defense counsel from prosecution witnesses. *See, e.g., Commonwealth v. Durham*, 446 Mass. 212, 843 N.E.2d 1035 (2006). But even in these jurisdictions, it is usually advisable for counsel to take written statements from adverse witnesses because the statement will seldom tell the prosecutor anything that s/he cannot learn directly from the witness, and the impeachment value of a statement made in writing is particularly high.

If counsel is not sure whether a particular individual will turn out to be a likely defense witness or a likely prosecution witness, the safest course of action is to interview the witness initially without taking notes. If it then appears that the witness's story is more damaging than helpful to the defense, counsel can take a written statement.

§ 8.12(b) Arranging To Be Accompanied to Interviews of Adverse Witnesses

Whenever counsel conducts an interview of an adverse witness, counsel will want to bring along an observer (either counsel's investigator or a law partner or some other employee). This "shotgun rider" serves two principal functions. First, s/he will be available to testify concerning what the adverse witness said, should occasion arise for the defense to impeach that witness with a prior inconsistent statement. Second, the "shotgun rider" can protect counsel against possible charges of berating, overbearing, or attempting to corrupt the witness.

§ 8.12(c) Techniques for Taking a Written Statement; Content of the Statement

The preliminary procedures for identifying oneself and attempting to build rapport, described in § 8.09 *supra*, should be used in interviewing potential prosecution witnesses. The identification of counsel (or counsel's investigator) is essential to ward off a witness's claiming at trial that the interviewer misrepresented himself or herself as working for the police or the prosecutor's office. Establishing some degree of rapport – some human connection between interviewer and witness – is important, if at all possible, in order to break through the witness's reluctance to talk with someone "from the other side" and the witness's almost inevitable disinclination to sign a document proffered by a stranger.

Once counsel (or the investigator) has established as much rapport as seems likely on a first contact, s/he should go through the witness's version of the facts once without taking a statement or even mentioning the possibility of a written statement. Having heard the story once through, counsel should then ask the witness to go through the story once more, and while s/he

does so, counsel or the investigator should write up the witness's account in narrative form in a multi-page statement. The three-round format for fact-interviewing, described in § 5.06 *supra*, lends itself nicely to the interviewing of an adverse witness. The first round, in which the witness tells the story in his or her own words, is conducted without anything being written down. The second round, in which counsel goes through the witness's statement in detail, is the stage at which counsel (or the investigator) will simultaneously write down what the witness is saying. And, during the third round, as counsel asks the witness for additional details and clarification, counsel (or the investigator) can make corrections and additions to the written statement.

The statement should begin with a formal heading containing wording such as the following:

This is the statement of [name of witness], date of birth _____, given to [names of counsel or investigator and of any other individual who accompanies the interviewer], on [date and time of statement] at [location where the statement is given, such as "the living room of my apartment, 250 Main Street, apartment 4W"].

I have been told by [name of counsel or investigator] that [he or she] is working for the defense of respondent, [name of respondent], who has been charged with committing an offense on [date of offense] at [location of offense].

The body of the statement should be written in the first person singular, since it will be signed by the witness himself or herself. It should be written in the witness's own vernacular: counsel (or the investigator) should faithfully record any grammatical errors or slang terms rather than damaging the statement's accuracy by correcting the witness's speech.

The statement should be written out in narrative form, in full sentences and paragraphs. Every other line should be skipped so that there is room for corrections by the witness. The pages of the statement should be consecutively numbered so that it will be impossible for the witness to claim later that counsel or the investigator added or deleted pages.

When counsel (or the investigator) has finished writing the statement, s/he should read the statement aloud to the witness, sitting next to him or her and allowing him or her to read along as counsel (or the investigator) reads aloud. The witness should be invited to make any additions, deletions, or corrections that s/he wishes, and every single alteration of this type should be initialed by the witness. As each page is completed, the witness should be asked to initial the bottom of the page.

When the entire statement has been read aloud, the witness should be asked whether s/he has anything to add or correct, and any such additions or corrections should be made. Then counsel (or the investigator) should write a concluding paragraph with wording such as the following:

I have read this [number of pages in the statement]-page statement and have had it read to me by [name of counsel or investigator]. I have also had the opportunity to make all of the additions, deletions, and corrections I desired. To the best of my knowledge, this statement is accurate, correct, and complete.

The witness then should be asked to sign the statement on the line immediately below the concluding paragraph and to record the date of the signature. Procedures for preserving and authenticating hard-copy witness statements are discussed in §§ 8.18 and 10.14(c) *infra*.

§ 8.12(d) Alternatives to a Signed Statement When the Witness Is Unwilling To Sign a Statement; Taking a Recorded Statement

As persuasive as defense counsel or the investigator may be, some witnesses will never consent to sign a statement. However, there are some alternatives to a signed statement that are almost as effective for impeaching a witness at trial who strays from the account s/he gave counsel or the investigator.

Even if the witness is unwilling to sign the statement, s/he may be willing to initial each of the pages of the statement as well as all of the corrections. This initialing is, for counsel's purpose, tantamount to a signature, since it evidences the witness's adoption of the statement. Alternatively, the witness who is unwilling to sign or initial anything may be willing to write out in longhand on the statement any corrections that s/he wishes to make to counsel's (or the investigator's) original written version. This too can later be said persuasively to manifest an implied adoption of the whole document as corrected. Counsel can sometimes trigger written corrections by omitting some insignificant details when s/he (or the investigator) first writes out the statement; then, when reading the statement to the witness, recalling those details orally and asking the witness to pen them in briefly.

If the witness is unwilling to sign, initial, or even hand-correct the statement, counsel nevertheless should review the statement with the witness in its entirety and elicit the witness's oral ratification of its accuracy. If the witness is unwilling to orally ratify the statement, s/he should be asked to orally ratify counsel's (or the investigator's) notes. A casual-sounding question (like "Okay, so [what I've shown you here] *or* [what I've read to you] is what you remember, right?"), followed by an affirmative answer from the witness will suffice for impeachment purposes, allowing the defense investigator (or other shotgun rider) to testify that the witness orally ratified counsel's written statement or notes. *Cf. Goldberg v. United States*, 425 U.S. 94, 105, 107-08 n.12, 110-11 & n.19 (1976).

Electronic recording of an adverse witness's statement is an alternative to be considered. An audio recording is usually less effective for impeachment than a written statement taken as advised in § 8.12(c) because the imprecision of spoken language almost invariably produces a narrative that fails to commit the witness to the kind of specific, unambiguous admissions or assertions that can be nailed down in writing. When an adverse witness refuses to give counsel a

written statement but is willing to make an audio recording, counsel should prepare the witness for the recording by going through the steps set out in the first two paragraphs of § 8.12(c). Until the witness's statement has been rehearsed to counsel's satisfaction in unrecorded form, it is unwise to make a record of it. An unrehearsed recording made by a witness of doubtful allegiance is a formula for disaster. Even after a satisfactory rehearsal, witnesses will often omit or blur important details, and counsel will have to follow up with pinpoint questions before ending the recording. Procedures for preserving the recording and authenticating it at a trial or hearing are discussed in §§ 8.18, 10.13 - 10.14 *infra*. Some jurisdictions have communications-security legislation that counsel will need to consult before opting for electronic recording of witness statements. *See, e.g., McDonough v. Fernandez-Rundle*, 862 F.3d 1314 (11th Cir. 2017).

§ 8.13 OVERCOMING PROSECUTION WITNESSES' UNWILLINGNESS TO TALK WITH AN ADVERSARY; STEPS TO TAKE IF THE WITNESS SAYS THAT S/HE HAS BEEN ADVISED BY THE PROSECUTOR TO REFUSE TO TALK WITH THE DEFENSE

With some prosecution witnesses it will be necessary to overcome not only the natural reluctance to speak with a stranger (see § 8.09 *supra*) and whatever animosity the witness may be feeling toward counsel's client, but also a notion that witnesses are forbidden to speak with "the other side." Counsel will need to explain to these individuals that witnesses do not "belong" to one side or the other; that the witness has as much obligation as a citizen to talk to defense counsel as to the prosecution; and that if the witness does not do so, the trial will be unfair. Of course, an unsubpoenaed witness has no *legal* obligation to talk to either the prosecution or the defense (*e.g., United States v. White*, 454 F.2d 435, 438-39 (7th Cir. 1971)), and counsel must not suggest that s/he has. But the witness's *moral* obligation to tell what s/he knows to the defense, as well as to the police or prosecutor, should be emphasized.

If a prospective prosecution witness continues to refuse to talk to counsel, counsel should ask whether the prosecutor (or a police officer) has told the witness not to talk to the defense. If the answer is yes or if counsel is not satisfied with the truth of a no answer, counsel should call the prosecutor and ask whether any instructions have been given to any witness. If they have, counsel should point out to the prosecutor that the courts have repeatedly held that such instructions violate an accused's due process right to investigate the case. *See, e.g., Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966); *United States v. Munsey*, 457 F. Supp. 1, 4-5 (E.D. Tenn. 1978); *Davis v. State*, 110 Nev. 1107, 881 P.2d 657 (1994); *State v. Blazas*, 432 N.J. Super. 326, 74 A.3d 991 (2013); *Kines v. Butterworth*, 669 F.2d 6, 8-9 (1st Cir. 1981) (dictum), and cases cited; *State v. Simmons*, 57 Wis. 2d 285, 203 N.W.2d 887, 892-93 (Wis. 1973) (dictum), and cases cited; *see also Soo Park v. Thompson*, 851 F.3d 910 (9th Cir. 2017); *United States v. Gonzales*, 164 F.3d 1285, 1292 (10th Cir. 1999); *United States v. Carrigan*, 804 F.2d 599, 603-04 (10th Cir. 1986); *Johnston v. National Broadcasting Company, Inc.*, 356 F. Supp. 904 (E.D.N.Y. 1973); *Coppolino v. Helpfern*, 266 F. Supp. 930 (S.D.N.Y. 1967); *People v. Eanes*, 43 A.D.2d 744, 350 N.Y.S.2d 718 (N.Y. App. Div., 2d Dep't 1973); *State v. Hofstetter*, 75 Wash. App. 390, 395-403, 878 P.2d 474, 478-82 (1994), and cases cited; *cf. State v. Murtagh*,

169 P.3d 602 (Alaska 2007) (finding that the due process clause of the Alaska Constitution was violated by each of the following provisions of a victim’s rights statute which, in sexual offense cases, (1) required that criminal defense representatives (a) before interviewing a victim, tell the victim that the victim need not talk with the defense representative and that the victim can have a prosecuting attorney present during the interview; (b) before taking an unrecorded statement, obtain written authorization from the victim or witness reciting that s/he is aware that s/he has no legal obligation to talk to the defense representative; (c) before taking an electronically recorded statement, additionally tell the victim or witness that the interview will be electronically recorded and then obtain written authorization from him or her reciting that s/he is aware of the rights not to talk to the defense representative and to have a prosecuting attorney present; and (2) barred defense representatives from contacting a victim or a witness who had informed the defendant or defendant’s counsel in writing that the victim or witness did not wish to be contacted by defense representatives: “Numerous cases hold that a prosecutor may not suggest, directly or indirectly, that witnesses not speak with defense representatives.” *Id.* at 611. “We believe that requiring defense representatives to give unsolicited advice to victims and witnesses that they are not required to talk to the representative and may have a prosecutor present if they do conveys an implied suggestion to prospective interviewees that it would be best if no interview were given. This none-too-subtle warning, in turn, substantially interferes with defense efforts to obtain evidence. The added requirement in sexual offense prosecutions of written consent to an interview serves to strengthen the message of noncooperation.” *Id.* at 612.); *United States v. Ebrahimi*, 137 F. Supp. 3d 886 (E.D. Va. 2015) (“After a significant number of witnesses stated that they either did not wish to speak to the defense or would only speak to the defense in the presence of a government agent, the defense asked the Government whether it had instructed witnesses to only speak to the defense in the presence of a Government agent. The Government acknowledged that it began interviewing potential witnesses in preparation for trial . . . and at these meetings made several ‘requests’ of the witnesses. Specifically, the Government explained that it asked the witnesses to notify the Government if they were contacted by another party and asked to make a statement about the case. The Government also requested that if such a notification took place, the Government would request an agent to be present during the interview to memorialize any statement the witness provided. The Government stresses, and the Court does not doubt, that the Government informed the witnesses that all interviews, including those with the Government, were optional and voluntary.” *Id.* at 887. “[T]he Government’s conduct impermissibly interferes with the right to equal access to witnesses for two reasons. First, such requests necessarily obstruct Defendant’s legitimate need for unhindered access to information in preparation for trial. Second, the Government’s communication with potential witnesses could reasonably have been interpreted by the witnesses as an instruction by the Government or could have otherwise impermissibly influenced the witnesses.” *Id.* at 888. “Accordingly, it is hereby ¶ **ORDERED** that a letter from the judge shall be distributed to potential witnesses with whom the Government has communicated, on Court letterhead, stating that ‘the Court understands that in this case counsel for the Government “requested” that you notify the Government of interview requests by the defense and “requested” that you allow the presence of a Government agent at a defense interview. These requests are not in keeping with the Court’s judgment here that as a witness, you are equally available to lawyers for the defense

and the Government at your own discretion.’ The letter shall further instruct the witnesses, ‘As a witness who may testify in court, you have the option to consent to an interview by counsel for the defendant and counsel for the Government. You have the option to decline such an interview if you are inclined. An interview outside of court is a way the lawyers can learn more about your proposed testimony in preparation for trial. You are not required to notify the Government of contact with defense counsel. You are also not required to have a Government agent present at your interview, if you decide to consent to an interview.’” *Id.* at 889-90.); *United States v. Goldfarb*, 2008 WL 4531694 (D. Ariz. 2008), *as modified on rehearing*, 2009 WL 856326 (D. Ariz. 2009) (in written plea agreements with the defendant’s codefendants, the Government included a provision that “[Cooperating defendant] agrees to notify the United States Attorney’s Office of any contacts with any co-defendants or subjects or targets of the investigation, or their counsel, and agrees to provide prior notice of, and an opportunity for the government to be present at, any interviews between the [cooperating] defendant and any individual not employed by the government regarding any matters related to this case or any other investigation” (*id.* at 1). “For the reasons set forth in *Gregory [supra]*, the Court concludes that [this] paragraph . . . [is “improper and unenforceable” (2009 WL 856326, at *2)]. The prosecutor may not ‘deny[] defense counsel access to the witness except in his presence.’ . . . Such a requirement clearly discourages cooperating defendants from candidly discussing the litigation with co-defendants or their counsel.” 2008 WL 4531694 at *2. “Counsel for the Government shall . . . fax to counsel for all cooperating witnesses a letter which states that (1) . . . [the quoted provisions] of the plea agreements, pursuant to the Court’s order, will not be deemed binding upon the cooperating defendants, (2) the cooperating defendants are free to communicate with or be interviewed by co-defendants or their counsel without counsel for the Government being present, (3) any such communications will not be viewed unfavorably by the Government in evaluating the defendant’s cooperation or in deciding what sentence should be recommended to the Court, and (4) the prosecutor’s letter is being written pursuant to an order of the Court. The letter shall attach a copy of this order. The Court will also continue the trial in this case for one week to enable Defendant to approach cooperating defendants for interviews.” *Id.* at *4.). *See generally* Brad Rubin & Betsy Hutchings, *Blockading Witnesses: Ethical Pitfalls for Prosecutors*, N.Y. LAW J., Dec. 6, 2006, at 4, col. 4. Counsel should add that such instructions clearly violate canons of professional ethics. *See* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4(f) (2022) (except in certain designated special circumstances, “[a] lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party”); AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Canon 39 (1937) (“[a] lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party”); AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE MONITORS AND MONITORING, PROSECUTION FUNCTION (4th ed. 2017), Standard 3-3.4(h), *Relationship With Victims and Witnesses* (“The prosecutor should not discourage or obstruct communication between witnesses and the defense counsel, other than the government’s employees or agents if consistent with applicable ethical rules. The prosecutor should not advise any person, or cause any person to be advised, to decline to provide defense counsel with information which such person has a right to give. The prosecutor may, however, fairly and

accurately advise witnesses as to the likely consequences of their providing information, but only if done in a manner that does not discourage communication.”). *Cf. In re: Eric G. Zahnd*, Mo., No. DHP-17-023, disciplinary panel decision, December 7, 2017, summarized in 86 U.S.L.Week, No. 23, p. 850, *finding of ethical violation approved and reprimand ordered*, *In re: Eric G. Zahnd*, MBE # 47196, Supreme Court of Missouri Case No. SC96939 (May 22, 2018) (finding that a prosecutor violated the rules of professional conduct by issuing a press release naming and castigating individuals who had submitted letters of support at the sentencing of a convicted child abuser: “The threat of a public shaming of a non-suspect, non-criminal citizen should not be a tool of the Prosecutor’s Office, used to force citizens to obey its will.”). Counsel investigating possible violations of a client’s rights in support of a suppression motion (see Chapters 23-25 *infra*) should be alert to the developing doctrine that “the right of access to the courts . . . is . . . denied when law enforcement officers conspire to cover up constitutional violations” (*Jutrowski v. Township of Riverdale*, 904 F.3d 280, 294 (3d Cir. 2018)).

Counsel then should ask the prosecutor to call the witness immediately and tell him or her that s/he can talk to the defense. Counsel should request that the prosecutor’s phone conversation with the witness take place with defense counsel on the phone. If the prosecutor is resistant to this notion, counsel should explain that counsel’s inability to independently verify the prosecutor’s removal of the taint of the earlier instructions will necessitate counsel’s filing a motion for sanctions in order to safeguard the respondent’s constitutional right to unimpeded access to witnesses.

Unless the prosecutor gives complete satisfaction, counsel should file a motion with the court of record having jurisdiction of the case. Depending upon local practice, such a motion may be styled like ordinary motions or in the form of an Order to Show Cause. The motion should seek the following alternative forms of relief: (a) dismissal of the Petition on the ground that the prosecutor’s misconduct has so severely interfered with the preparation of the defense that there is no way either of knowing how much harm has been done or of setting it right at this stage (*see, e.g., United States v. Linder*, 2013 WL 812382 (N.D. Ill. 2013); *Davis v. State, supra*); (b) a court-ordered deposition of each of the witnesses with whom the prosecutor or any police officer has discussed the case, so that counsel can ask the questions that s/he would have asked in an investigative interview if not for the prosecutor’s interference, *see, e.g., United States v. Carrigan*, 804 F.2d 599, 604 (10th Cir. 1986) (upholding a trial court’s order of a deposition: “[a]n order merely to cease . . . [prosecutorial] interference, after the fact, might be insufficient because the witnesses’ free choice might have been already perverted and the witnesses likely to refuse voluntary interviews”); or, at least (c) a hearing in which each of the witnesses who has spoken with the prosecutor or any police officer is brought before the court and instructed by the judge that s/he is free to speak to the defense. *Cf.* the procedure approved in *United States v. Miranda*, 443 F.2d 1351, 1355 n.3, 1356 (9th Cir. 1971); *and see United States v. Vole*, 435 F.2d 774, 778 (7th Cir. 1970): “[w]itnesses are the special property of neither party and in the absence of compelling reasons, the . . . court should facilitate access to them before trial whenever it is requested.”

Of course, counsel may decide that the trouble and friction involved in this procedure are not justified by its likely yield or that at least this course of action should be delayed until counsel sees whether more ordinary discovery procedures (see Chapter 9) reveal what counsel wants.

§ 8.14 INTERVIEWING POLICE OFFICERS

Except in cases in which there are particular reasons to keep a low profile (for example, when counsel's independent researches disclose that the police conducted a slipshod initial investigation and are doing no further investigating, so that counsel prefers to let sleeping dogs lie), counsel should always try to speak with the arresting officer and all officers who participated in the police investigation of the case. Often these attempts will prove fruitless, since many police officers are so distrustful of defense attorneys that they will refuse to talk. However, there are a variety of factors that might motivate a police officer to speak with a defense attorney in a particular case, including: a willingness to give juveniles in general a break or a liking for the particular respondent; qualms about whether the respondent really is guilty; a liking for defense counsel or a desire to match wits with a defense attorney; or a desire to "cut a deal" with the respondent under which the respondent will incriminate other suspects, testify against co-respondents or adult defendants charged in criminal court with the same or connected crimes, "cooperate" by becoming an informer, or "close" unsolved cases by admitting them.

If the officer refuses to speak with counsel, counsel should ask why. If the officer indicates that s/he has been instructed not to talk by the prosecutor or by a superior officer or that s/he is following a departmental policy, counsel should file the type of motion described in § 8.13 *supra*, challenging the prosecutor's or police department's interference with the respondent's due process right to investigate the case. Even if the officer's refusal to talk is not the product of prosecutorial or departmental interference and is merely an individual choice, counsel nevertheless may want to seek a judicial order compelling him or her to tell counsel what s/he knows, on the theory that police officers are not mere private witnesses but are state officials with criminal law enforcement duties and due process obligations, *Curran v. Delaware*, 259 F.2d 707 (3d Cir. 1958), and hence may no more instruct themselves than they may instruct one another to refuse information to the defense. *Cf. Coppolino v. Helpern*, 266 F. Supp. 930 (S.D.N.Y. 1967).

Even when counsel succeeds in getting a police officer to talk, it is unlikely that counsel will persuade the officer to sign a written statement or even to permit counsel to write out a statement. However, as long as counsel conducts the interview with an investigator or other employee of counsel's present, that individual can serve as an impeachment witness if, at trial, the officer denies the information s/he related to counsel. See § 8.12(b) *supra*. Some officers may also be willing to ratify counsel's notes orally if counsel reads them aloud and asks "have I got that right?" See § 8.12(d) *supra*.

If counsel succeeds in getting an officer to talk, it is usually advisable to see the officer again on other occasions and conduct as many follow-up conversations about the case as time

permits. Inevitably, the officer will feel progressively more comfortable with counsel and will increasingly reveal information about the case. In addition, the more frequent the conversations between an officer and counsel, the more difficult it is for the officer to recall what s/he has said to counsel and the more cautious s/he will be at trial to refrain from embroidering the facts.

If an officer expresses a desire to “cut a deal” with the respondent, counsel should ordinarily deflect any discussions of the actual deal by explaining that counsel first needs to hear everything the officer can tell counsel about the case so that counsel can advise the client whether a deal would be worthwhile. Counsel should almost never make any actual agreements with the police. If the client is going to enter into an agreement, that agreement should be made with the prosecutor, since it is only the prosecutor who has the power to drop or reduce charges, and the police officers’ promises are not necessarily binding upon the prosecutor.

The one exception to this general rule is the situation in which the police are willing to bargain away charges that the prosecutor does not yet know about and the police are willing to include in the bargain a commitment to withhold all information about the charges from the prosecutor. If the officer can be trusted (a fact which counsel will need to verify by speaking with other members of the local defense bar who have dealt with the officer in the past), then it may well be wise to take the risk of making an agreement directly with the officer in order to prevent the prosecutor and the court from ever learning of the charge.

§ 8.15 INTERVIEWING CO-RESPONDENTS AND ADULT DEFENDANTS CHARGED WITH THE SAME OR CONNECTED CRIMES

It is essential that counsel speak to any juveniles who are jointly charged with the respondent as co-respondents, any juveniles who are charged separately (in juvenile or adult court) with the same or connected crimes, and any adult defendants charged in criminal court with the same or connected crimes. Although their version of the events may parallel and support the client’s, it is equally likely that any such co-respondents and defendants have turned state’s evidence, or may do so in the future, and will end up testifying for the prosecution against the client. In addition, even when co-respondents or adult defendants don’t turn state’s evidence, they may present a defense at trial that denies their own guilt by placing all of the blame on the respondent.

Before questioning co-respondents or adult defendants, counsel should ascertain whether they are represented by an attorney. If they are, a local rule or ethics opinion may require that counsel obtain consent from that attorney before interviewing his or her client. Even in jurisdictions that have no such rule, counsel should ordinarily follow this procedure as a matter of professional courtesy.

An interview with a co-respondent or adult defendant should cover everything s/he knows about the criminal episode and charges and should get a detailed account of everything s/he has said or given to the authorities. Counsel should ask whether s/he has been approached about

possibly testifying for the prosecution, and, if so, what s/he has discussed with whom and when. Counsel should take a written statement from each co-respondent and adult defendant if s/he will give it. If not, counsel should attempt to get his or her oral confirmation of the accuracy of counsel's write-up or notes of what the co-respondent or adult defendant has said. If s/he later testifies against the respondent, s/he can be impeached with a written statement or counsel's memorialization of what s/he said orally. See § 31.11 *infra*. If s/he does not testify, and if counsel wishes to call him or her as a defense witness but is stymied by a claim of the Fifth Amendment privilege, a written or memorialized oral statement may be admissible as an admission against penal interest, provided that counsel has followed the procedures required by local rules or caselaw for taking a statement against penal interest. (These usually include the requirement that the witness know at the time of the statement that it is against his or her penal interest. Accordingly, counsel or the investigator may need to advise the witness of that fact just before finalizing the statement.)

Part D. Gathering Police Reports, Other Documents, and Physical Evidence That May Be Needed as Defense Exhibits at a Motions Hearing or at Trial

§ 8.16 THE NEED TO GATHER THE MATERIALS, AND THE TIMETABLE

Counsel's prospects of prevailing at an evidentiary motions hearing or at trial will usually depend upon the thoroughness with which s/he has sought out and obtained police reports, other pertinent documents, electronically stored materials, and physical evidence relevant to the case. Police reports containing witnesses' prior statements are often the only way of learning what the prosecution witnesses will say at trial (since many will refuse to talk to counsel), so as to plan an effective cross-examination. These police reports are also indispensable for impeachment purposes. Official documents such as hospital records, Weather Bureau records, and the medical examiner's report in a homicide case are similarly invaluable in planning the defense theory of the case and in cross-examining prosecution witnesses whose stories are at odds with the official reports. Social media communications data – posts, comments, messages, bulletin boards, photos, logs and subscriber information stored by providers such as Facebook, Twitter, and Instagram – can provide crucial information: leads to locating witnesses; materials usable to refresh the recollections of the respondent and potential defense witnesses; materials usable for impeachment of complainants and alleged crime victims, co-respondents who may flip, and other possible prosecution witnesses; similar materials in the accounts of the respondent and potential defense witnesses that counsel needs to know about because they may be available to the prosecutor as substantive evidence or for impeachment. Counsel is advised to track down these materials early in the defense-investigative process: they provide a relatively easy and inexpensive means of information gathering; they can open avenues, guide directions, and establish priorities for follow-up investigation that involves more difficult and expensive methods; and they are susceptible to being deleted at any time at an originator's instance. After they have been taken offline, they may still be reachable by defense subpoenas *duces tecum* directed to the social media service provider (*see Facebook, Inc. v. Superior Court*, 4 Cal. 5th 1245, 417 P.3d 725, 233 Cal. Rptr. 3d 77 (2018); *Facebook, Inc. v. Superior Court*, 10 Cal. 5th

329, 471 P.3d 383, 267 Cal. Rptr. 3d 267 (2020)), and counsel may want to seek such subpoenas as his or her investigation progresses. But getting hold of the social media communications data before they are deleted is a major trouble-saver. Conversely, if there are materials open for public viewing in the social-media accounts of the respondent, the respondent's family, or potential defense witnesses, counsel wants to learn about them early. They may include unflattering items that can be used by the prosecution for impeachment or that may be seized upon by news reporters and go viral, poisoning the atmosphere and making it difficult for the respondent to get a fair trial. Counsel will want to consider whether matters of this sort should be promptly deleted. Deletion may be ill-advised when the prosecutor is one who, in a case of the present kind, can be expected to conduct a comprehensive background investigation of electronic resources: if s/he is assiduous enough to obtain the deleted posting, s/he can do even more with the fact of deletion – as an indication that the respondent or witness is attempting to conceal embarrassing information – than s/he could have done with the contents of the posting itself. But in the case of prosecutors whose research is less thorough-going, deletion can put potentially damaging appearances completely out of play.

Counsel will need to begin gathering the documents and other materials as quickly as possible. Certain real evidence such as objects dropped at the scene of the crime – or the layout of the crime scene as it was at the time of the crime – is highly perishable and will disappear if counsel does not retrieve it or photograph it quickly. Even less obviously perishable objects may be lost through delay: In some jurisdictions, recordings of police radio communications are routinely erased after a certain number of months and the tapes re-used by the police department; private CCTV recordings tend to be destroyed by recycling much sooner, often after only after 24 or 48 hours. Finally, many documents (like police reports, hospital records, school reports, and even court transcripts) may take weeks to acquire; the acquisition process must be started early so that it can be completed in time for trial.

§ 8.17 METHODS FOR GATHERING THE MATERIALS

Some of the materials that counsel will wish to gather are public documents, available for the asking. For example, in many jurisdictions, the initial police report (usually called a “complaint report” or “incident report”) is a public document that can be obtained by simply going to the police station in the precinct in which the crime occurred and paying a nominal fee for the photocopying of the document.

Most of the documents and exhibits that counsel will wish to gather, however, will need to be subpoenaed. The constitutional and statutory law governing subpoena practice are described in §§ 10.04-10.05 *infra*; the procedures for obtaining subpoenas, in § 10.04 *infra*; and the procedures for serving and enforcing them, in §§ 10.06-10.07 *infra*.

Subpoenas for documents, called subpoenas *duces tecum*, are addressed to the custodian of records of whatever agency or entity is in possession of the documents, directing the custodian to appear in court with the original documents on the date of the motions hearing or trial. These

subpoenas are ordinarily required to specify with considerable particularity the documents or records sought. In theory the subpoenas *duces tecum* are not to be employed for discovery but only to procure evidentiary matter for use at trial. As a practical matter, however, counsel can often persuade the custodian to permit counsel to inspect the subpoenaed document prior to the beginning of the court proceedings, or counsel may persuade the judge to order the custodian to show counsel the document before court, during preliminary proceedings, or during a recess, in the interest of saving time at trial. In federal practice, numerous cases recognize that the district courts have discretion to order that documents covered by a subpoena *duces tecum* be produced before trial (*see United States v. Sellers*, 275 F.R.D. 620, 623 (D. Nev. 2011), and cases cited), upon a showing that: “(1) the documents are evidentiary and relevant; ¶ (2) . . . they are not otherwise procurable by the defendant reasonably in advance of trial by exercise of due diligence; ¶ (3) . . . the defendant cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial; ¶ [and] (4) . . . the application is made in good faith and is not intended as a general fishing expedition.” *United States v. Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952), *cited with approval in United States v. Nixon*, 418 U.S. 683, 702 (1974).

Physical objects and artifacts (including recordings) that are in the possession of law enforcement agencies or officers, government officials, or third parties can also be reached by subpoenas *duces tecum*. If counsel wishes to inspect them or to have them tested by defense experts before trial, a motion for production and inspection should be made. See § 9.07(c) *infra*.

§ 8.18 PRESERVING REAL EVIDENCE

When counsel obtains a physical object that has evidentiary value in the case, counsel will need to take certain steps to preserve it in its original form and to guard against allegations at trial that the object has been altered.

The object should be retained in the custody of some credible person (an investigator or counsel’s administrative assistant will do) under lock and key. The custodian should bag the object and tag it with the name and number of the case to which it relates, and the date and time when the custodian received it and locked it down. S/he can then be called at trial to identify it and to testify that there has been no change in its condition since the time it was first received. Defense lawyers who maintain a strict, routine procedure of this sort for handling evidence will usually find that their reputation for doing so – or a pretrial representation to the prosecutor of counsel’s proposed chain-of-custody testimony in the case at hand – will elicit a prosecution stipulation of authenticity and unchanged condition, rendering unnecessary any actual in-court appearance of defense chain-of-custody witnesses.

If the physical condition of any object is important and is subject to change, counsel should have the custodian inspect the object, photograph it, and make a written, signed description of its relevant characteristics at the time of its receipt. One copy of the photograph and of the description should be retained with the object, additional copies in counsel’s case file.

At trial, counsel will either have to get an authenticity-and-unchanged-condition stipulation from the prosecutor or present witnesses who trace the chain of custody of the object between the time and place of its acquisition by counsel (or counsel's investigator) and the time and place of its deposit in counsel's locked evidence facility. These witnesses will have to identify the object in the courtroom as the one they handled; they will have to recount when, where, how, and from whom they received it, and when, where and how they subsequently deposited it in the secure facility or turned it over to the next person in the chain *en route* to the facility; and they will have to attest that the object was not altered while in their possession. For this reason, counsel should, if possible, have the object picked up in the first instance by counsel's investigator or administrative assistant rather than by counsel personally, since it is undesirable – and, in some courts, forbidden – for counsel to testify. The fewer people who handle the object on its way to the secure facility, the better. In most cases, counsel will also have to present the same kind of chain-of-custody testimony covering the period between the object's connection to relevant events (the crime scene, or whatever episode the object is offered to document) and the object's acquisition by counsel. It is wise to have written, signed statements made by all witnesses who will be called to provide this testimony. These statements, too, should be duplicated, and copies kept both with the object in lock-down and in counsel's file.

If counsel wishes to have tests made of the object or to show it to anyone, counsel should have the custodian deliver the object manually to the tester or person in question, and the custodian should then recover it manually when the test or inspection has been completed. The custodian should make notes of the date, time, place, and recipient of delivery and a similarly detailed record of the object's return, all to be locked in with the object. This simplifies problems of proving the identity of the object and the lack of change in its condition at the time of trial. If the object is to be left with the tester or person, even briefly, s/he should be instructed (1) not to allow it out of his or her possession until it is recovered by the custodian; (2) to keep it in a secure place, under lock-down, whenever s/he is not actually working with it; and (3) that s/he will very likely be required to testify in court (a) that s/he complied with the preceding two instructions, and (b) that s/he did nothing to impair the object's probative value while handling it. When an object is to be tested, counsel should also instruct the tester to bag-and-tag it or to make some mark on the object that, while not affecting its probative quality, will allow the tester to identify it at trial as the same object that s/he tested. The expert's written report to counsel should describe the object and indicate what tag or mark the expert made.

§ 8.19 TYPES OF MATERIALS TO GATHER OR GENERATE

There are as many sources of information as there are different factual situations. Among the most useful to keep in mind are:

Police Reports and Related Materials

Complaint Reports

The complaint report (sometimes called “event report” or “incident report”) is filled out by an investigating officer when the complainant first reports the crime. This document usually contains: identifying information about the complainant (name, address, phone number); a record of the time and location of the crime; the complainant’s description of the crime; the complainant’s or eyewitnesses’ descriptions of the perpetrator(s); and a list of any injuries suffered by the complainant. The complaint report is extremely useful at suppression hearings and at trial. The complainant’s account of the events can be used to impeach the complainant if s/he diverges from this account in his or her testimony. The description of the perpetrator’s appearance and attire is usually the only written record of the complainant’s and eyewitnesses’ descriptions prior to their observing the respondent in a show-up or lineup, and it can be used to impeach these witnesses if they subsequently mold their descriptions of the perpetrator to fit the respondent. Often the description of the injuries suffered by the complainant will contain the name of the hospital that treated those injuries, thereby identifying the hospital to which counsel should direct a subpoena for the complainant’s medical records.

Arrest Reports

The arrest report is filled out by the officer who arrested (or assisted in the arrest of) the respondent. This document will identify the respondent by name and physical description (including supposed ethnicity and sometimes apparel) and may also contain some information about the respondent’s background (including supposed gang affiliation). The report will be useful in suppression hearings because it often lists: incriminating statements allegedly made by the respondent; property allegedly seized from the respondent; the precise time of arrest (which serves as a baseline for calculating the length of any interrogations before, during, and after the booking process); and the respondent’s height and weight at the time of arrest (useful if the respondent has grown by the time of the suppression hearing and the defense needs to show that the respondent’s height and build at the time of the offense did not match descriptions of the perpetrator). If arrest reports in the jurisdiction also contain a factual account of the offense, then counsel should obtain the arrest reports for all juvenile co-respondents and adult co-perpetrators who were arrested, since the accounts in those reports will often be inconsistent with the accounts in the respondent’s arrest report, and such inconsistencies can be used to impeach the witnesses who gave the accounts to the officers, the officers who prepared the reports, or both.

Recordings of 911 Telephone Calls and Police Radio Communications

If a crime is reported by an emergency phone call to the police (usually called a “911 call”), many police departments record and temporarily store the recording of the telephone conversation between the caller and the police operator. Similarly, if the investigating officers engage in radio communications with the police dispatcher or with each other during the investigation of a case, many jurisdictions record and store recordings of the transmissions. These various recordings can be crucial, since they may contain descriptions of the perpetrator given by the complainant prior to viewing the respondent in a show-up or lineup, or they may demonstrate a sequence of events at odds with the complainant’s or police officers’ versions of

the crime or the police investigation, or both. In many jurisdictions these recordings are routinely erased after a designated period of time (in some jurisdictions, three months) and the tapes re-used; accordingly, defense counsel must subpoena them immediately after starting work on the case. *Cf. Freeman v. State*, 121 So.3d 888, 895-97 (Miss. 2013).

Arrest Photographs

When arrest photographs were taken, these will often be relevant and should be subpoenaed. When length of hair or facial hair is relevant to the description of the perpetrator, a mug shot will often be the best available evidence of the respondent's appearance at the time of the offense. In some jurisdictions the police take full-color photographs; if the respondent was arrested shortly after the offense, these will show the clothing s/he was wearing and can be used at a suppression hearing (to demonstrate inconsistencies with the complainant's description of the perpetrator – and thereby that the police lacked probable cause to arrest – or that the identification procedures were unreliable) and at trial (to argue that discrepancies between the appearance of the perpetrator and the appearance of the respondent on the day of the offense raise a reasonable doubt).

Eyewitness Identification Reports and Recordings

In some jurisdictions the police prepare special forms whenever an identification procedure is employed, to record the result of the procedure and the precise words used by the eyewitness in identifying (or failing to identify) the respondent. These forms are obviously important in connection with any identification suppression claim and also can be used to impeach the witness at trial if s/he claims a greater degree of certainty or a different basis for recognizing the respondent than is reflected in the witness's words at the time of the pretrial identification. It is increasingly common for police and prosecutors to video-record lineup proceedings (see § 25.03.2 *infra*) routinely. Show-ups (see § 25.03.1 *infra*) are less commonly recorded as a matter of routine but may be captured on police body vidcams. Counsel should subpoena these recordings or move for their disclosure in formal discovery after first requesting them from the prosecutor (see § 18.3 *infra*). If the prosecutor stonewalls and declines to acknowledge whether or not such recordings exist, counsel should include in the battery of defense discovery motions a set of interrogatories asking whether or not recordings of this sort were made.

Forms and Reports for Confessions; Recordings of Police and Prosecutors' Interrogations and Interviews and of Statements Made by the Defendant, Any Alleged Accomplices, and Witnesses

If the respondent gave a written statement, it will often be handwritten onto a police form which contains not only the content of the statement but the date and time when it was completed and signed by the respondent, and sometimes also the date and time of the beginning of the interrogation session that produced the statement. The form may also indicate the names and badge numbers of the officers who took the statement. This form – or whatever paper or

electronic document the police use to record the statement if not a standard form – is ordinarily invaluable in providing information that counsel needs in order to calculate the duration and circumstances of interrogation as the basis for a suppression motion (see Chapters 22 and 24 *infra*) or for arguing at trial that the statement was made under conditions that render it unreliable. However, counsel should be aware that the times noted on a respondent’s written statement may not be accurate: unscrupulous police officers may jiggle them to improve the prosecution case. Some police departments video-record or audio-record statements made by suspects and all or parts of the preceding interrogation (see § 26.14 *infra*) and/or interviews of potential witnesses; prosecutors and their investigators may do so as well. Counsel must obtain these recordings by subpoena or discovery (see the preceding paragraph); but, once again, s/he will want to be alert to the possibility that the police have been self-servingly selective in recording only portions of their interchanges with the respondent, other suspects, or witnesses, or that they have doctored the recording *ex post*. If a respondent’s incriminating statement was oral and was never put into writing, there will often be notes about its making and contents in the arrest report or in supplementary investigation reports.

Additional Police Reports That Must Be Filled Out When the Crime Is of a Certain Type

Depending upon the nature of the case, any one or more of the following reports may also exist. These reports frequently contain a factual narrative of the crime that will prove useful at a suppression hearing or trial.

1. In drug possession or sale cases there will frequently be a “buy report” describing the transaction in detail if it was conducted by an undercover officer. There will always be a chemist’s report documenting the nature and weight of the drug and possibly containing a police officer’s description of the circumstances under which the drug came into the officer’s possession.
2. In cases in which the police recover a firearm, there will usually be a weapons report describing the gun and its serial number and also describing any slugs and shell casings that were recovered. There will also usually be a ballistics report describing the results of a test-firing of the gun, reporting whether the gun is operable, and possibly also reporting the results of any tests to match the gun with expended bullets recovered in connection with this case or other cases.
3. In cases in which scientific evidence of the perpetrator’s identity was recovered from the scene of the crime or the putative crime weapon – fingerprints, footprints, body fluids, hairs, clothing or fabric fragments, and so forth – there will usually be (a) reports by evidence technicians describing their collection of the evidence and (b) reports by the relevant police or lab experts describing the degree to which the recovered materials match the respondent’s prints, secretions, hair, clothing, or whatever.

4. In cases of sex offenses there will usually be (a) reports of a physical examination of the complainant, describing physiological indications of forcible intercourse and noting the blood type and/or DNA of any foreign body fluids found on the complainant or the complainant's clothes, or at the scene of the offense, and (b) serology or DNA reports detailing test procedures used to identify the individual who is the source of these body fluids.
5. If the crime involved a shooting and the respondent is arrested shortly after the commission of the crime, there may be a report of an examination of the respondent's body or clothing to determine whether s/he recently fired a gun (a "gunshot residue" or "GSR" test).
6. If a complainant was injured, some jurisdictions require that the police fill out a specialized report describing the nature and extent of the injury and of any treatment administered before the complainant was turned over to hospital or other medical personnel.
7. In homicide cases there will usually be an autopsy report available from the medical examiner's or coroner's office.

Property Reports

These are of two kinds: (a) In many jurisdictions the investigating officers are required to fill out property reports whenever any tangible evidence is recovered from the suspect or from the scene of a crime. If the crime was a serious felony, some police departments dispatch a special "crime scene squad" which will produce its own reports on property recovered from the scene. (b) Whenever a respondent is incarcerated, personal property in his or her possession that is *not* viewed by the police as having evidentiary value is vouchered and stored in the lockup. Listed items on the voucher may have relevance for defense purposes overlooked by the officers.

Police Photographs and Diagrams

The police may have photographs and diagrams of the crime scene and possibly also a police artist's sketch or composite of the suspect. These materials are usually available to the defense only through the discovery procedures described in Chapter 9.

Police body camera and vehicle camera recordings

In many localities police officers wear body vidcams and/or police vehicles are equipped with vidcams. In some localities the officers are required to keep their vidcams running while they are engaged in arrests, car chases and other interactions with civilians. The recordings made by these vidcams are an invaluable source in any case in which the legality of police activity may be made the basis for a suppression motion (see Chapters 24-27 *infra*) or in which police officers

may be called by the prosecution to testify to observations which support the prosecution's version of events that constitute elements of a criminal offense (see § 37.7 *infra*). Counsel can seek the recordings through informal and formal discovery proceedings (see the paragraph in this section titled *Eyewitness Identification Reports and Recordings*; and see Chapter 9 *infra*) or by subpoena (see § 8.17 *supra*).

Supplemental Investigation Reports

In addition to the complaint report and the arrest report, one or more supplemental investigation reports may be written up by the detectives or other officers who are interviewing potential witnesses, conducting searches for physical evidence, and/or seeking various sorts of incriminating information. In heavy felony cases, a series of supplementary reports (sometimes called "evidence supplements") will often track the progressive stages of an extended evidence-gathering process.

Police Regulations and Policy Statements

In many localities the police department has regulations or policy statements governing procedures for making arrests and *Terry* stops, conducting on-the-street pat-downs, taking confessions, and conducting identification viewings. Copies of these regulations and policy statements should be obtained, either informally from the police department or via subpoena. An officer's violation of his or her own department's internal regulations can be a weighty factor in a judge's determination of the validity of the police actions that produced evidence against counsel's client.

Reports and Other Materials Generated by the Booking Process

Various reports and materials are generated during the booking process described in §§ 3.04 and 3.08. Those most often useful at a suppression hearing or at trial include:

1. Arrest photographs of the respondent;
2. Notations on the police blotter indicating the time when the respondent was received at the police station (often useful at a hearing on a motion to suppress incriminating statements, as a means for establishing the length of interrogation);
3. Notations in the property book at the precinct station showing
 - (A) property that was seized from the respondent as evidence and
 - (B) other personal property that was in the respondent's possession at the time of arrest;

4. Reports by the juvenile division of the police department regarding their processing and possibly also interrogation of the respondent; and
5. Reports by the detention facility at which the respondent was placed pending Initial Hearing, regarding staff processing and possibly also interrogation of the respondent.

Transcripts and Other Court Documents

Transcripts

As suggested in § 4.31(d), (e) *supra*, if a probable-cause hearing was held in the case, counsel should obtain a copy of the transcript. Frequently, that transcript will prove useful in impeaching the police officers and other witnesses who testified.

If a separate probable-cause hearing was held for a juvenile co-respondent or if a preliminary hearing was held in the case of an adult co-perpetrator, transcripts of those hearings should also be obtained.

Search Warrants and Arrest Warrants and their Supporting Affidavits

If a search was conducted by the police pursuant to a search warrant or if the respondent was arrested pursuant to an arrest warrant, counsel should obtain the warrant and any affidavits the police filed in order to obtain the warrant(s). These items will usually be turned over by the prosecutor in informal discovery, see Chapter 9. Alternatively, counsel can obtain them from the office of the clerk of the court that issued the warrant. In addition to their obvious utility in litigating suppression motions, they ordinarily contain informational details that can be used at trial to undermine the prosecution's latter-day version of the criminal episode or the prosecution's retrospectively embroidered testimony identifying the respondent as a perpetrator.

Gerstein Proffers

In some jurisdictions there is a practice of placing a written "*Gerstein* proffer" (see § 4.28(a) *supra*) in the court files of detained adult defendants and juvenile respondents, showing probable cause to believe that the individual committed the crime charged. Such documents, usually prepared by the police officers on the case, will be useful in impeaching those officers and possibly also the civilian witnesses who provided the facts that the officers incorporated in the *Gerstein* proffer.

Psychological Evaluations

Particularly in cases in which counsel is seeking to show that the respondent was mentally, educationally, or emotionally impaired in ways that adversely affected his or her capacity to make a valid waiver of *Miranda* rights, confess voluntarily, give competent consent

to a search, or form the *mens rea* of a particular crime, counsel will need a relatively contemporaneous psychological evaluation of the respondent. Counsel may be able to save the time and expense of obtaining a new evaluation if the respondent has been the subject of prior delinquency, PINS, or neglect proceedings. Frequently, the court files, probation files, or other agency files for those proceedings will contain a psychological evaluation of the respondent that is sufficiently recent to serve counsel's purposes.

Other Exhibits and Materials To Gather

Photographs

Although police photographs of the crime scene are often available through discovery, see Chapter 9, these will seldom be adequate to fulfill all defense needs, and counsel will have to commission the taking of additional photographs. Defense photographs should be taken from several angles and at several distances, so that all spatial relations involved are fully depicted. Counsel should remember that photographs are not admissible until a foundation has been laid by a person who testifies that they are an accurate reproduction of the scene that s/he observed. A photographer should therefore be selected who will be available at the time of the trial and who will make a good and personable witness. S/he should be informed that s/he will be asked at trial, as a basis for testifying that the photographs are accurate, whether s/he has a present recollection of the scene that s/he photographed. Counsel should ordinarily obtain:

1. Photographs of the scene of the crime (to show matters that are not apparent in the police photographs, such as the absence of street lights, in support of a contention that the scene was too dark for the complainant and eyewitnesses to get a good look at the perpetrator; or the presence of CCTV cameras in cases where the police appear to be claiming that no electronic surveillance records exist).
2. In cases involving motions to suppress tangible evidence, photographs of the scene of a challenged arrest or *Terry* stop (to help illustrate the precise course of events) or of the scene of a challenged search (to show, for example, that items which the police will testify were in "plain view" could not in fact have been seen from the officers' vantage point).
3. In cases involving a motion to suppress identification testimony or a misidentification defense at trial, photographs of the scene of a show-up identification (to illustrate, for example, how far the witness actually stood from the respondent during the show-up, or the dim lighting in the location where the show-up took place at the relevant time of day).
4. In cases in which the respondent was injured, and that injury is relevant to the theory of the defense (for example, as evidence of physical abuse by the police in a hearing on a motion to suppress a confession or as evidence of an assault by the

complainant in a self-defense case), photographs of the respondent's injuries. These should be taken as quickly as possible before the bruises fade or the injuries heal.

5. In cases in which the respondent's facial appearance, hair length, height, or build at the time of the incident will be relevant to an identification suppression motion, motion to suppress tangible evidence (to show lack of probable cause to arrest), or misidentification defense at trial, photographs of the respondent. These should be taken as soon as possible after counsel enters the case because the physiognomy of a juvenile can change markedly within a relatively short period of time, and, if it does not, the prosecution will doubtless argue that it did. When taking photographs for the purpose of depicting the respondent's height, the respondent should be photographed next to a measuring stick or next to an adult who is the same size, is a personable witness, and can testify to his or her exact height at the suppression hearing or trial.

Diagrams and Maps

Diagrams of the scene of the crime, the scene of the arrest, or the scene of a search will frequently prove useful in suppression hearings and at trial. In jurisdictions that have or can arrange the technology in the courtroom for projecting computerized images onto a screen for the factfinder, such diagrams can be prepared in digital form. Otherwise, diagrams can be displayed on poster board or on large sheets of graph paper. Diagrams and maps should be drawn to scale whenever possible. In some cities it may be possible to obtain a large area map from the city planner's office. Street maps available online will suffice only if the characteristics of an area covering several square blocks is in issue and if precise measurements are unimportant. When a crime site is indoors and precise measurements *are* important, the architect's plans for the building may be available from the office of the building owner, construction company, or a government agency responsible for approving construction plans or conducting periodic inspections.

Records of Lighting and Weather Conditions

In hearings on identification suppression motions and in presenting a defense of misidentification at trial, it will frequently be important to show that an eyewitness's or complainant's ability to observe was limited because of poor lighting or weather conditions. Records showing weather conditions and the time of sunrise and sunset can usually be obtained from the United States Weather Bureau.

School Records of the Respondent

Whenever a juvenile case involves a confession, the respondent's school records should be obtained as quickly as possible. Frequently, these records will demonstrate the existence of a

learning disability, a language problem, or reading or comprehension deficits that will strongly support a claim that the respondent lacked ability to understand and competently waive *Miranda* rights. If the records suggest significant impairment, counsel should interview the respondent's school teachers (and, if possible, the teacher or psychologist who prepared the records) to determine whether these witnesses will suffice to substantiate the defense claim. If not, then counsel should consider the possibility of hiring a psychologist to examine the respondent for the specific purpose of determining his or her ability to understand and competently waive *Miranda* rights. See § 24.10(b) *infra*.

Medical Records of the Respondent

If a motion to suppress a respondent's incriminating statements involves a claim that the respondent was physically abused by the police, or that the respondent was ill or suffering some physical injury at the time of the statement, it will be essential to obtain hospital and other medical records pertaining to any examination or treatment that the respondent received more or less contemporaneously with the statement. Similarly, in assault prosecutions in which counsel is considering a self-defense theory, hospital and medical records bearing on any injuries the respondent received at the time of the episode underlying the charge are invaluable.

Medical Records of the Complainant

If one of the offenses charged is an assault or battery count that depends upon the prosecution's proving a certain kind or degree of injury, the medical records of the complainant will provide crucial information. Even when the nature of the complainant's injuries is not technically an element of the charge, his or her medical records may be useful to show that s/he is exaggerating the harm or the suffering s/he claims to have experienced, and counsel can then argue that the rest of the complainant's testimony is no more credible than his or her inflated account of injuries. Also, medical records frequently record the complainant's version of how s/he was injured, and this account may be useful in impeaching a complainant who testifies at a trial or motions hearing.

Records To Support an Alibi Defense

Various kinds of records can support an alibi defense. Depending upon the facts, counsel may find it useful to obtain: time-clock entries to demonstrate that the respondent was at school or at an after-school job or a community center at the time of the crime; electronic records corroborating that the respondent's subway-fare card or bus pass or some other sort of transportation card or pass was used at a particular location at a particular time; phone or social-media records or electronic surveillance recordings placing the respondent elsewhere than at the crime scene at a relevant time; and network or local TV station logs documenting that the television program which the respondent claims s/he was watching (and the precise activity s/he describes seeing on the show) was, in fact, being aired at the time s/he says s/he viewed them.

News Media Files and Photographs

If the crime involved a certain amount of notoriety, it may have been reported in the local newspapers or “hot” media. If so, the news items may quote statements by the complainant or other witnesses that will be useful in impeaching them. In addition, newspapers may possess still photographs and TV stations may possess footage of relevant scenes, events, or people.

Other Possible Sources of Video Recordings of the Crime or Arrest or Other Relevant Events

Video footage of a crime or an arrest or some other episode relevant to a criminal case may be obtainable from a wide array of other sources than the news media. There are often CCTV cameras recording events inside and directly outside stores, malls, places of entertainment, parking garages, apartment houses and private homes, public housing projects, police stations, hospitals, other public buildings, parks, playgrounds and street areas. Counsel will need to move quickly to find and view any such recording and to have it copied if it appears useful, because many private and public establishments obliterate their recordings (by destroying them or by re-using the storage material) after a relatively short period of time. Videos recorded by passersby on their cellphones may be posted on YouTube, Facebook, or some other social media site, and searchable through the site. Witnesses to an event may have recorded some or all of the event on their cellphones; whenever counsel interviews a witness, counsel should ask whether the witness made such a recording and still has it.