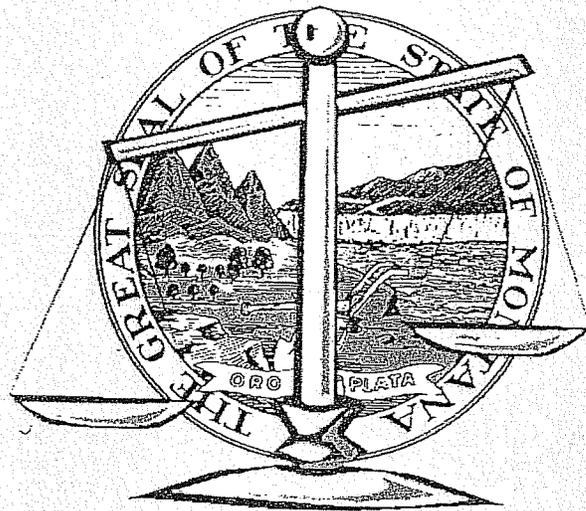


OFFICE OF THE STATE PUBLIC DEFENDER

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Criminal Investigation: Manual of Policies and Procedures



**Office of the State
Public Defender**

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Chief Public Defender

MONTANA OFFICE OF THE STATE PUBLIC DEFENDER:

INVESTIGATION POLICIES AND PROTOCOL

Part 1. Training.

Criminal Investigators will attend all mandatory training including the Annual Training Conference and the Phased Investigator Training Sessions, as identified by the OPD Training Coordinator. In addition, Criminal Investigators will take advantage of other training opportunities that may be available for improving investigative and trial related skills. Criminal Investigators should maintain regular contact with the OPD Training Coordinator in order to identify, and take advantage, of specialized training opportunities outside the regular OPD Training Curriculum.

Part 2. Protocol for organizing an investigation.

In most cases, investigators will not commence investigative tasks on a case until the investigator has received a written request for investigation from the attorney.

Where emergency or other circumstances provide otherwise, the investigator must, as soon as is practicable, prepare a memo for the file documenting the circumstances which led to initiation of investigative activities.

In general, all case investigations will conform to the following procedure:

In general, all case investigations will conform to the following procedure:

1. The case attorney will read the file and develop initial defense strategies or theories and to identify possible investigative needs.
2. Once the attorney has determined that investigation is required, the attorney will prepare an investigative request form and send the form to the investigator.
3. At that point, the investigator should clear the investigative request with the Regional Deputy Public Defender or the Managing Attorney, according to individual regional policy.
4. Once the investigative request has been cleared, the investigator will either pick the case file from the attorney or request that support staff deliver the case file to the investigator, according to individual regional policy.
5. The investigator will then read the case file and making copies of relevant materials for the investigative file.
6. The investigator will then contact the case attorney to discuss case strategy and specific investigative goals, and to share investigative experience and insights with the attorney.
7. It is critical that the investigator and the attorney identify the judicial timeline of the case so that investigative deadlines are recognized and met.
8. Thereafter, the attorney and the investigator will maintain an "open channel of communication" on the case, ensuring that all important investigative developments and findings are appropriately documented.
9. The investigator and the attorney must COMMUNICATE regularly with each other thereafter on regular basis until the case is resolved. This is necessary not only to ensure that deadlines are met but also to prevent unnecessary duplication or waste of investigative resources such as occurs when an attorney neglects to inform the investigator that the client has accepted and signed a plea agreement.
10. Subject to individual regional policies and practices, investigators should regularly attend and participate in attorney staff meetings.
11. Investigators should maintain proficiency with witness locator systems utilized by the OPD.
12. The investigator and the attorneys should treat each other with professional courtesy and respect.

“OPEN FILE POLICY”

OPD investigators must understand the “open file” discovery policy” utilized by the prosecution in the jurisdictions within which the investigator works.

Additionally, OPD investigators must comply with the discovery collection and indexing policy utilized by OPD regions within which the investigator works.

Finally, OPD investigators must ensure that their case files are kept up to date with all discovery and must alert their attorneys whenever they have reason to believe that additional discoverable material exists which has not been provided by law enforcement or the prosecution.

DAILY TIME MANAGEMENT

(a) Make daily “to-do” lists. Incorporate this technique into your daily work practices by making a list of what needs to be accomplished the following day at the end of each day. (Example: The “Task Option” in the *Outlook* program can remind investigators of specific tasks by sending a notice which will appear on the screen on the date and time indicated.)

(b) Combine tasks to minimize time and mileage. Investigators should check daily for upcoming appointment locations and make the effort to perform all duties for a particular area in one block of time. Where two cases require an investigator to be at a local law enforcement agency to view evidence for example, try to coordinate the viewing times for back to back time slots. Keep in mind that, whatever an investigator does, it takes a **conscious effort** to prioritize on a daily basis

(c) Investigators should consider keeping a file for subpoenas or notices to be served or documents at a particular location in their cars. This may prevent having to make multiple trips to the same destination (e.g., police evidence room).

(d) Prepare and keep updated a list of witnesses on each case.

Never order records prior to obtaining authorization for costs. OPD investigators should attempt to establish a relationship with local agencies to be placed on a “no charge list” for costs. This saves money and time. Where requesting records from another jurisdiction, check to determine if OPD has a relationship with the agency from which records are sought. Establishing and maintaining a “no charge” status with agencies should expedite the receipt of the records. To initiate such a relationship, investigators should present a letter signed by their Regional Deputy Public Defender and the investigator requesting this status be instituted.

(e) Track and record time on all work activities

OPD investigators are required to track their time and activities throughout the work day. This should be accomplished by use of the approved time-tracking method in use statewide by OPD at a given time. If there is no specific time-tracking method approved for use by OPD on a statewide basis, investigators should log time in any manner which will permit preservation and review by OPD. When in doubt, investigators should clear their time-tracking method with their Regional Deputy Public Defender or Managing Attorney.

Investigators should track time in one-quarter hour (15 minute) increments unless instructed otherwise by the Chief Public Defender or the appropriate Regional Deputy Public Defender.

INVESTIGATOR EQUIPMENT

OPD Investigators should have, or have immediate access to, the following:

(1) Tape Recorder

Investigators should keep your tape recorder with them at all times, easily accessible. Check for fresh batteries periodically to avoid an important interview being hampered and keep extra batteries at hand.

Investigators should keep a good supply of audiotapes on hand. During the interview intermittently investigators check to see if the tape recorder is indeed recording. This avoids an important interview being rendered useless due to malfunctioning equipment.

(2) Street and Phone Directories

Investigators should obtain a city street directory from the local fire department. (Rural fire departments may have a county directory similar to the city directory.) These directories are invaluable as they have directions to all streets within the area for which they pertain. (If such directories are not available, use local phone book's street guides.) As investigators prepare to set out for an investigation in an unfamiliar area, investigators should use a copier to enlarge the area in question and highlight the direction of travel.

Use the Internet sites for maps and phone numbers.

The Polk Company publishes a directory commonly referred to as a "Reverse Directory". This useful resource allows investigators to locate a phone number when only an address is known -- or an address when only a phone number is known. If these directories are not kept current, however, they are not as reliable. Similar resources are available on the Internet.

City maps are great tools to help in finding a location. Investigators should keep a supply of maps handy. Likewise, Google Map and similar Internet programs are a great source for Maps all over the U.S.

(3) Digital Camera

It is imperative to take a supply of floppy disks with the camera. Because certain situations require use of a higher resolution, extra disks may be required with photography tasks.

A 35mm camera, is still a valuable tool, even with the advantage of the digital camera. Investigators must be completely familiar with the operation, accessories available and care of the camera and should always keep a supply of film on hand.

A Polaroid camera, though not preferable to the digital or 35mm because of the quality of picture it takes, can be useful in certain situations. However, the film for this camera is expensive, so use sparingly.

(4) Video cameras and digital video cameras are available through the central office in Butte. Please plan ahead.

(5) Tape Measure

A 100-foot tape measure is useful to have at crime scenes to verify measurements significant to the theory of defense.

(6) Computers, Typewriters, Copy Machines, FAX Machines, Cell Phones, Pagers, etc.

Investigators need to be willing to educate themselves in the use of the machines necessary to perform their duties in a professional manner. This may include taking advantage of seminars or other educational courses offered by OPD or others, or during the annual conference.

(7) Reference Materials and the Reference Library

The Training Coordinator and many OPD offices have an up-to-date directory of expert witnesses. At the completion of a case, investigators working with experts should be sure to fill out an evaluation memo containing positive and negative impressions of the expert. Forward the memo to the Regional Deputy Defender, the managing attorney, or the Training Officer.

As you attend various seminars keep a reference library of the materials which you receive in relation to those topics. If you obtain certain articles involving a particular subject, such as shaken baby syndrome, keep files of these materials categorized by subject.

Keep your reference library current and share the resources. Certain reference materials are in each office and are available for the use of the investigators:

- (i) Physicians Desk Reference (PDR)
 - (ii) DSM-IV (Diagnosis and Statistical Manual of Mental Disorders)
 - (iii) Black's Law Dictionary (aids the investigator in the use of legal terminology)
 - (iv) Montana Criminal Jury Instructions
- (8) Materials for the Interview

Carry blank OPD-Approved release forms (both general and medical) with you to an interview should a witness and/or victim agree to sign one for the use of the defense .

Discuss with your regional deputy defender whether you should carry blank Subpoenas signed by an attorney from your office with you at all times. This can help you to avoid a second trip for service.

If you have a victim who does not wish to prosecute, suggest they go to the District Attorney's Office with their written statement. Another alternative would be for the Attorney to prepare an Affidavit for the victim to sign and submit to the DA.

CROSS REGIONAL INVESTIGATION

(a) Criminal investigators employed by the OPD are assigned to a specific "home region." Within the home region, each investigator is assigned to a principal work site or "home office." Investigators assigned to a given region are responsible for handling all investigative work requests within that region. Investigative work requests within an investigator's "home" region are assigned according to the general protocol discussed above and in compliance with specific procedures set forth by the region's deputy defender.

(b) Criminal investigators employed by the OPD are also expected to perform work for other regions, as needed and in compliance with OPD investigative protocol. If a criminal investigator receives a request for investigative assistance from another region, the investigator will bring the request to the attention of either the OPD Training Coordinator or the investigator's Regional Deputy Public defender .

(c) Requests for cross regional assistance may originate from a variety of sources outside an investigator's home region. All OPD criminal investigators are encouraged to communicate openly with each other regarding matters of investigative expertise, training, and experience. However, no investigator shall undertake to perform work activity for any individual outside of the investigator's home region unless specific appropriate approval has been issued. The Montana Chief Public Defender, the OPD

Training Coordinator, and the home region's Regional Deputy Public Defender are the only individuals authorized to assign investigators to perform out of region work activity. Furthermore, the Montana Chief Public Defender or the OPD Training Coordinator will not issue cross regional assignments unless the home region's regional Deputy Public Defender has been notified.

Part 3. Investigator Ethics.

(1) Criminal investigators must read and comply with relevant portions of the *Montana Rules of Professional Conduct*, which set forth the ethical standards governing the practice of law in Montana. Particular attention is directed to the following rules:

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable effort to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies or ignores the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(2) Criminal investigators must also know and follow Montana rules and procedures pertaining to discovery and disclosure in criminal cases.

(a) The defendant's obligation under this section extends to material and information within the possession or control of the defendant, defense counsel and defense counsel's staff **including investigators**. (46-15-323, MCA)

(b) The defense (which includes investigators working for the defense) must disclose statements which it takes of state witnesses. **See:** *State v. Kills On Top*, 241 Mont. 378, 787 P.2d 336 (1990); *State v Miller*, 231 Mont. 497 (1988).

(c) In Montana, a "statement" is defined as "tapings, transcriptions, writings or other means used to memorialize the witness as to his observation or impression of a situation or event, and which may be used either to refresh the recollection of the witness or to impeach him at trial." *State v. Carkulis*, 229 Mont. 265 (1987).

(3) Criminal investigators must also read and comply with relevant portions of the Standards for Criminal Justice developed by the American Bar Association's Criminal Justice Section. Those standards attempt to further clarify the ethical standards which govern the practice of criminal law. Particular attention is directed to *Chapter 4: The Defense Function, Part 4: Investigation and Preparation*:

Standard 4-4.1 Duty to Investigate

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

(b) Defense counsel should not seek to acquire possession of physical evidence personally or through use of an investigator where defense counsel's sole purpose is to obstruct access to such evidence.

Standard 4-4.2 Illegal Investigation

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

Standard 4-4.6 Physical Evidence

(a) Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (d).

(b) Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in paragraph (c) and (d). In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining to possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.

(c) Defense counsel may receive the item for a reasonable period of time during which defense counsel: (1) intends to return it to the owner; (2) reasonably fears that return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or (5) cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.

(d) If the item received is contraband, i.e., an item possession of which is in and of itself a crime such as narcotics, defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense counsel's judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.

(e) If defense counsel discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c)(1), he or she should do so in the way best designed to protect the client's interests.

(4) Finally, investigators should be aware of the ethical duties of investigation imposed on counsel in capital (death penalty) cases, as set for the in American Bar Association's "*Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.*" Although the specific duties discussed in Guideline 10.7 (below) apply to capital cases, the general principles can and should by extrapolated to noncapital cases.

Guideline 10.7 Investigation

A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.

1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

B. 1. Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.

2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

Part 4. Viewing and Handling Evidence.

ARRANGING THE DATE AND TIME OF VIEWING

(1) Contact the County Attorney or other prosecution representative responsible for coordinating such with the defense.

When coordinating a time and date for viewing evidence, it is best to have a list of evidence numbers of the items to be viewed. Alternatively, indicate "any and all evidence collected pertaining to the case".

The investigator should determine if the case attorney wishes to accompany the investigator to view the evidence and should coordinate timing in order to avoid calendaring conflicts.

The investigator should ask the case attorney if s/he wishes for any experts to accompany the defense team to the viewing and coordinate schedules accordingly.

(2) Equipment necessary for viewing evidence:

Some of the equipment used for the evidence view will be standard equipment used:

writing instruments and paper; cameras; still and video tape measure and or ruler magnifying glass or equivalent; latex gloves

There may be occasion when additional special equipment will be required such as additional light sources, Infra Red or UV (Ultraviolet) magnifying equipment

(3) It is imperative that OPD investigators take property evidence sheets with them to the viewing.

VIEWING PROCESS AND PROCEDURE

(1) Avoid handling physical evidence if at all possible to prevent contamination or manipulation claims by the prosecution or law enforcement. This aspect of evidence viewing should be handled by the coordinating person present.

Before viewing the physical evidence, make certain that clean paper is laid across a table to avoid cross contamination.

If an investigator is left in a position to handle physical evidence s/he should do so with the same procedures used to collect evidence; protecting the integrity of the evidence in the event further forensic analysis is requested. An investigator must wear gloves when handling physical evidence and change gloves often to avoid cross contamination between items.

Investigators should take copious notes of observations made, avoid conversations about specific items of evidence in the presence of the law enforcement or DA representative present. If such conversation can not wait until the completion of the viewing, investigators should step outside of the presence of the representative to avoid the sharing of defense strategy.

Investigators must keep in mind that any information contained on the packaging is every bit as important as the contents. The packaging label is the record of when the item of evidence has been viewed by others and checked in or out of evidence.

Investigators should avoid putting more emphasis on any one item over the others, should make complete observations and should take corresponding notes of all items of evidence. Investigators should remember that they are being observed by law enforcement and/or prosecution representatives during the viewing. At minimum, mental notes are being taken. Be careful not to give away defense strategy during the process.

Investigators should insist that every item be completely emptied of any contents as collected. Many times essential pieces of information and evidence are contained within trash bags etc.. Remember that if law enforcement felt that collection of the evidence was pertinent, the defense should view the contents.

Investigators must ensure that each item of evidence is immediately repackaged and sealed prior to moving on to the next item.

Investigators should set aside ample time to *thoroughly view all of the evidence.*

MEMORIALIZING THE VIEWING

(1) Take a video or photograph of EVERY piece of evidence.

Have the item of evidence photographed at every angle and empty the contents of purses, pockets etc. and photograph as well.

Pay particular attention to bullet holes, blood spatter and that which is not readily observed with the naked eye.

Use the "macro" function on the camera to get close up, detailed photos of minute items of evidence i.e. hair, blood, fibers etc.

When using digital photography do not mix case material on the same disc or CD, make every effort to keep each disc or CD case specific.

Print a copy of the images for the attorneys file and also for the investigators file as soon as possible after the viewing.

(2) Take copious notes and write down observations.

Note time, date, locations and parties present during process.

Note all observations out of the ordinary and be as detailed as possible.

Refer to each item of evidence by the assigned evidence number on the packaging or the property evidence list.

Note any writing on the packaging of the evidence. This is crucial in that it reflects when the evidence has been viewed or checked out for whatever purpose. Cross check the information on the packaging with the discovery to determine if reports of such movement of evidence have been generated and provided to the defense.

Write down a brief description of what the item being viewed is, color, size, distinguishing characteristics etc.

Note any observations made and not referred to in discovery regarding each piece of evidence.

Draft a report of the viewing or at minimum copy notes to the case attorneys.

Encourage a meeting (time permitting) with the defense team attending the viewing to share thoughts, ideas, and strategy as soon after the viewing as possible.

OBSERVATIONS OF FORENSIC ANALYSIS

(1) Make notes of any forensic residue or debris on items of evidence i.e. fingerprint powders, cut out swatches (serology) as well as the following:

Note any tears, cutting or stretching of cloth in items of clothing for comparison with weapons collected.

Notations or marks made on evidence during forensic analysis i.e. circles or arrows drawn, swabs left in firearms.

Note different colors of evidence tape used to seal packaging.

Makes notes of absence of forensic analysis. This requires the investigator to possess knowledge of available forensic testing procedures.

Investigators must NOT discuss their observations while observing evidence.

Part 5. Theory of the Defense.

Early on in a criminal case the theory of defense is determined by the attorney and issues surrounding the defense investigation spring from that theory. It is paramount, therefore, that the investigator become familiar with the theory of defense for the case on which he or she is working. The investigator's interview questions should be based on the theory of defense, the basic strategy of the investigation stems from the theory of defense and the ability of the investigator to conduct a thorough and complete investigation begins with knowledge of the theory of defense.

Investigate Facts Material to this Theory

One false premise exposed by proper investigation will topple the inverted pyramid of the prosecution's case. *American Jury Trials 477, Homicide Section 65. 2*

Be Prepared to alter the theory.

Constantly re-evaluate information and be prepared to decide whether to continue the same line of investigation or to switch to a new one.

SUMMARY

To summarize the foregoing chapter the following offenses are listed with a corresponding "checklist" of possible defenses.

- (1) Burglary
 - (a) Mistaken identification
 - (b) Circumstances do not show defendant did it
 - (c) Circumstantial evidence consistent with innocence
 - (d) Fingerprints there, but it is a public place
 - (e) Defendant guilty of trespass but not burglary
 - (f) Lack of any element listed in the statute
 - (g) Alibi

- (2) Assault Cases
 - (a) Mistaken identification
 - (b) Lack of any element listed in the statute
 - (c) Self-defense
 - (d) Accident
 - (e) Defendant present, but not a participant
 - (f) Provocation
 - (g) Requisite specific intent absent
 - (h) Defendant guilty only of lesser-included offense

(3) Narcotics

- (a) Lack of any element listed in the statute
- (b) Defendant was not in possession
- (c) Someone else possessed it
- (d) Illegal search and seizure
- (e) It was not prohibited matter
- (f) Defendant present but not possessor
- (g) Defendant knew what was going on but not a participant
- (h) Defendant knew nothing about it - victim of circumstances
- (i) Entrapment
- (j) Frame

(4) Rape

- (a) Mistaken identification
- (b) Consent
- (c) Not sufficient resistance
- (d) She claimed rape because consented and then became afraid she might be pregnant
- (e) She claimed rape because consented and then became afraid of consequences with other boyfriend, friends or family
- (f) No penetration (lesser)
- (g) Lack of any element listed in statute
- (h) Revenge
- (i) Alibi

(5) Robbery

- (a) Lack of any element listed in statute
- (b) Mistaken identification
- (c) It was only a fight, not a robbery
- (d) Defendant was there but not a robber
- (e) Defendant knew it was taking place but not a robber
- (f) Defendant guilty only of simple robbery
- (g) No weapon proven
- (h) Alibi

(6) Theft

- (a) Mistaken identification
- (b) Circumstances do not show defendant did it
- (c) Circumstantial evidence consistent with innocence
- (d) No intent to permanently deprive
- (e) Defendant present, but not thief

- (f) Defendant knew what was happening, but not a thief
- (g) Value less than necessary for felony filing
- (h) Defendant did not know it was stolen when he bought it
- (i) Lack of any element listed in statute

Note: The above is not an exhaustive or exclusive list of possible defense theories but is merely a collection of some of the more obvious theories included as a “starting point” for further exploration and development.

Part 6. Locating witnesses.

GENERAL PRINCIPLES

It is a generally accepted principle that the investigator's search for a witness should begin with establishing the witness's identity. Many people share a common name. Fewer share a common name and a date of birth. An even smaller percentage would share common physical features. Begin the search by establishing the following information as completely as possible about the search subject:

- Full name (correct spelling required)
- Date of Birth
- Last known address
- Social Security Number

This information can often be located in discovery. When searching computerized records for an individual, accurate information is a requirement.

If the potential witness's name is not in discovery or police reports, it is imperative that the investigator determine from the originating source (generally the defendant or others witnesses) the following:

- how they know the witness
- where they know the witness from
- a possible current or former residence
- a physical description
- current or former employment
- other people who might know the witness
- any and all vehicles the witness may own
- if the witness has had any previous law enforcement contacts
- the witness' family members
- where the originating source last saw the witness

Clearly, this is not a comprehensive list of questions to ask the source.

This type of search is most common during assaults in public places, such as bar, where the client or other witnesses can only give a first name, a description, or give vague details regarding others in the area. Start with the people who knew the witness, saw the witness, and have information about the witness.

Investigators should contact each potential lead. Investigators should leave their name and telephone number with every person they contact in case the witness appears. The greater the amount of information an investigator knows about the subject of his search, the more likely his success. Determine if the subject is actively evading authorities (including public defender investigators), missing without intent to evade, or is attempting to maintain a curtain of privacy.

When a search of records fails, locating the subject requires contacting other human sources and an emphasis on inter-personal communication. If the individual has been listed in discovery as a witness by the prosecution, the District Attorney has a duty to disclose the contact information to the defense. If they don't know, or if the witness was developed independently by the Public Defenders Office, then the search will start as indicated above.

While many of the information sources listed are common to other states, the list below was compiled to specifically assist Montana investigators. This information should be accessed through the regional public defender investigator in that jurisdiction to avoid breaching an established protocol.

COMPUTER AND INTERNET SOURCES

Within the last decade, the availability of the internet has vastly improved the amount of information available to defense investigators. Both search engines and specific websites may provide leads or specific addresses and telephone numbers to the witness.

One specific recommendation is made to search the witness's name in a general search engine enclosing the name in quotation marks. This search will then search all available websites by the entire name in exactly that sequence of letters and spaces. For instance, "Jim Waters" will return all websites with exactly this spelling and one space in between the words. Searching by the words Jim Waters (without the quotation marks) will return all websites for "Jim", all websites for "Waters", and all websites with both words together. Other character-based or "boolean" searches can shorten the amount of web page hits to the most relevant.

OPD has reached agreement with Lexis / Accurint permitting our offices to conduct on-line witness tracing searches. Investigators are responsible for understanding and complying with the scope and limitations of the Accurint search agreement. OPD has a limited number of access licenses. Investigators should be familiar with whom to contact in the event a need for a search using the Accurint service needs to be undertaken.

Part 7. Interviewing.

PREPARATION

- (1) *Read the Police Reports.* Investigative reports and interviews are usually incomplete in some way. The function of the police is to build a case against the defendant to secure an arrest. They generally lack the total perspective that leads to alibi witnesses or mitigating circumstances that may suggest doubt about their case. Read the police reports with an eye to what they left out.
- (2) *Obtain Background Information.* Obtain as much information concerning the case, the witnesses, their background and relationships with each other prior to the interview. Understanding witnesses prior to interviewing them will help the investigator establish rapport, control the interview, overcome objections and understand their bias when conducting the interview.
- (3) *Establish A Goal.* With the help of the attorney and through reading the discovery investigators should develop a theory of the defense and then develop goals for each interview as part of the initial preparation.

THEORY OF THE DEFENSE

Understand the theory of the defense and what the elements of the crime are as far as the law is concerned (see chapter on Theory of the Defense).

GOALS OF AN INVESTIGATIVE INTERVIEW

(1) *Impeachment.* Sometimes the issue in a case may not rest on any tangible evidence. Guilt or innocence may rest on the victim's or witness's testimony alone. Impeachment falls roughly into the following categories

Bias- Each individual holds certain values based on their life experience. These values may shade their ability to view, recall and report what they witnessed. Probe with questions their sexual bias, crime victim bias, criminal justice system bias, racial bias, class bias.

Motive hostility or fear. How might the witness become affected by the outcome of the case?

Character. Questions focus on the bias, reputation for truthfulness or untruthfulness.

Prior Dishonest Acts. Questions focus on specific prior acts of dishonesty, false reporting, lies.

Prior convictions. In Montana, evidence of prior criminal convictions is inadmissible in court. (**Rule 609. Impeachment by evidence of conviction of crime.** “For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.”)

Nonetheless, inquiry regarding a witness’s criminal history, to include the fact of prior conviction, is a relevant topic for investigation during pretrial interviews.

Therefore, investigators should ask questions about a witness’s criminal history.

Contradiction/Inconsistent Statements. Inconsistencies in accounts of what occurred happen for a number of reason. One is based on the premise that it is harder to tell the same story consistently when it has been made up and not based on fact. Interviewing a witness to have them repeat their version helps uncover those inconsistencies. Sometimes an alleged victim’s or witness’ statement gets worse over time as they embellish their story. At others times, in the case of the recanting victim, the opposite is true. It is important to document a witness’ or alleged victim’s statement at a point that is most beneficial to the client’s defense i.e. before the alleged victim has been coached, or has become bitter, or when an alleged victim decides to recant.

Incapacity of the Witness. What is the witness’s ability to observe and recall? Question any physical or mental defects such as mental health or physical disabilities and drug or alcohol impairment.

(2) *Just the Facts.* This goal is pretty straightforward: interviewing witnesses merely to find out what they know. Generally, questions are open-ended but the interviewer should be alert to information that may lead them to pursue any of the other goals. Again, be alert for the interaction between people, places and events.

(3) *Establish an Alibi.* Many times a client will provide an alternative version to that of the police reports. In such case, investigators should identify and interview other individuals who can corroborate that alternative version and establish an alibi.

(4) *Get More Information.* Generalized investigation and interview reports result from a lack of total perspective and simple fact gathering. Information may be missing concerning the degree of drunkenness (i.e. the intoxication/impair case), or relationships between people (i.e. self-defense case). The goal here is to secure more details about time, distances, relationships and movements.

EQUIPMENT

Pens, Paper, Batteries and Blank Tapes. Investigators must always carry extra pens, batteries, blank tapes, and blank paper.

Subpoenas and Releases. During the course of an interview an investigator may decide that a subject needs to be subpoenaed although it wasn’t specified in the

investigation request. Investigators should discuss with their regional deputy defender whether to carry blank, signed subpoenas to use if needed. In addition, investigators may encounter a friendly witness willing to cooperate and give consent to certain records of theirs. Having blank releases handy will facilitate that type of situation.

Maps and Diagrams. Maps and diagrams of scenes aid in getting subjects to recall and organize details concerning location. Investigators should bring maps of areas pertaining to the investigation, should go to the scene, and should diagram it. This will assist the investigator in getting oriented to the location and may also help the witness remember certain key facts. Whenever a witness views a map or diagram (or draws one from his/her own memory), the investigator should have the witness initial and date the exhibit to authenticate it.

MAKING CONTACT

(1) *When To Make Contact.* As a general rule, investigators should consider not making appointments to interview people or to subpoena them. Interviews should be spontaneous, without the benefit of the subject having to think about whether they should talk or discuss their answers with anyone else. Not everyone keeps appointments and, for some reason, people find it harder to side step interviews when they are contacted spontaneously and in person instead of by telephone.

Meeting face to face provides the investigator critical insight into what the witness is really like. Seeing what an individual looks like, smells like, lives like – and observing how the individual reacts to certain questions and tones – goes a long way toward helping the investigator and attorney develop a sense of the person's "value" to the defense of the case.

(2) *Identifying Yourself.* No matter what an investigator says, or how an investigator dresses, subjects will often confuse who the defense investigator is and what the defense investigator's role is in the criminal case. As a result, subjects often accuse defense investigators of misrepresenting themselves.

When contacting a witness an OPD investigator MUST:

- (a) Clearly identify himself or herself as "a criminal investigator for the Office of the State Public Defender;"
- (b) Show the witness state identification and a business card;
- (c) State that the investigator is working on behalf of the defendant [by name];
- (d) Answer any questions the witness may have regarding the role of OPD in the criminal case.
- (e) Clearly re-identify himself / herself, on the record, at the beginning of any and all tape-recorded interviews.

(3) *Basic information.* When conducting witness interviews, criminal investigators should always obtain and record the witness's current address, phone number, and employment information.

TAPE RECORDING INTERVIEWS

(1) Tape Recording Interviews.

(a) *When To Tape Record Interviews.* **OPD investigators should not tape record witnesses unless the case attorney has clearly instructed the investigator to do so – or unless the investigator is unable to reach the attorney and, with reference to the following general rules, makes a determination that recording is advisable!**

General Rules Regarding When Tape Recording Might be Advisable:

- (1) When it is likely the subject will recant or change his/her story.
- (2) When the subject is a very important witness to the defense of the case.
- (3) When it is likely the witness will not respond to a subpoena or is likely to flee the jurisdiction.
- (4) When the investigator has grounds to believe that s/he may later be accused of misrepresentation.

CAVEAT: Before recording, always determine whether the witness is favorable to the defense case or not.

(b) *Overcoming Objections to Tape Recording Interviews.* In addition to overcoming objections to being interviewed, an investigator may also encounter objections to tape recording the interview. Whatever the reason, an investigator must determine the basis for the objection and use the appropriate response to overcome it. Here are some arguments for overcoming those objections. Again, in using these arguments, convey the sense that what you are asking for is a routine request.

(1) Not enough time. People who complain they don't have enough time for an interview can be convinced it will take less time to conduct an interview if allowed to tape record it. Suggest that you take very deliberate notes which will take much longer than if allowed to tape record the interview.

(2) Afraid to speak on tape. A lot of people have stage fright and are afraid of tape recorders for that reason. Convey to the subject it is a common fear but most people get over it once they start talking. If they continue to have a problem, put the tape recorder out of sight and connect a microphone to it to lessen their fear.

(3) Don't want to be held to any statements. This is a tough objection to overcome because by tape recording the interview that is exactly what you are attempting to do. Suggest that for everybody's protection, it is better to have the interview on tape so nobody can "put words in their mouths," or misunderstand their words.

(4) Multiple witnesses. Sometimes a case involves a multiple of witnesses. Suggest that because of the large number of witnesses and the importance of the case, it is important that the interview be recorded simply to keep everything straight.

(5) The Assumptive Technique. Sometimes an investigator can use the assumptive technique to gain permission by merely beginning the process by getting the

tape recorder out and ready for the interview without asking. In doing so, convey the sense that it is part of the routine. Begin by telling the subject to provide the correct spelling of their name before beginning the tape. If they haven't objected by then, begin the tape and interview. If they balk at tape recording during that process, revert to an appropriate argument to overcome their objection.

(6) If All Else Fails. If all else fails and they refuse permission to tape record the interview, be nice and go on with the interview by taking notes. Go slow and interrupt to take very deliberate notes. In some instances, the subject will get frustrated with the pace and then consent to tape recording it.

(c) *Alternatives to Tape Recording Interviews*. In the event the investigator cannot gain permission to tape record an important interview, the investigator should take the following steps to preserve as accurate a record as is possible.

✓Initial the interview notes. The first technique is to take verbatim notes of the important information. At the end, an investigator should summarize notes from the interview with the subject. Have the subject initial each page or the specific section which s/he reviewed signifying that the witness agree with the written note. Change any portion they disagree with and have them initial it.

✓Obtain a signed statement. Always bring along a witness statement form to an interview. In the event the witness does not grant permission to tape record the interview an investigator may still succeed in securing the witness's agreement to hand write a statement. Use this as an alternative to having the subject initial the investigator's own notes.

Remember:

Per §45-8-213, MCA, it is illegal in Montana to "record or cause to be recorded a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation."

Do's and Don'ts

- (1) Get permission. Never tape record an interview without permission.
- (2) Don't rely on gestures. Wait for the subject to verbally acknowledge or answer the questions. Gestures are not captured on tape. If someone gestures as part of their answer the investigator should state for the record what that gesture is and ask the witness to verbally agree with the description.
- (3) Try to eliminate or minimize extraneous noise. Make sure all extraneous noise sources such as radios, televisions and kids are turned off or out of the room. Those noise sources will interfere with the quality of the recording.
- (4) Never record telephone interviews without making sure to get permission from the witness prior to turning the recorder on. Then, reconfirm the permission immediately after turning the recorder on. Make a written note of the fact that the interview is being conducted by telephone and note the locations.

(5) Eliminate or minimize interruptions. Document any interruptions in the taped interview by stating the reason and time that the tape recorder was paused or turned off. When resuming the interview, state the time again and give a brief description of what occurred in the interim. Doing this protects the investigator against any allegations of improprieties while the tape was off and reminds the subject that the interview is being tape recorded.

MULTIPLE WITNESSES

Always interview multiple witnesses separately if possible.

Part 8. Report Writing.

“STATEMENTS” IN MONTANA: THE “CARKULIS RULE”

The Montana Supreme Court has defined a “statement” as “tapings, transcriptions, writings or other means used to memorialize the witness as to his observation or impression of a situation or event, and which may be used either to refresh the recollection of the witness or to impeach him at trial.” *State v. Carkulis*, 229 Mont. 265 (1987)

“Statements” are discoverable and must be disclosed to the prosecution !

REPORTS OF INTERVIEW

Generate a report as soon as possible after an interview. Reports do not get better with age. Details, gestures, specific words and quotations, and facts may be lost as an investigator’s memory of the interview fades.

If the report is longer than one page, number each page sequentially.

An investigator must not quote a witness unless the interview was tape-recorded or the investigator is confident that the interview notes accurately reflect a word-for-word record. An investigator should use quotations when the witness’s exact words establish a significant point of fact.

STATEMENTS WRITTEN BY THE WITNESS

It is often beneficial to have a statement written by the witness. The contents of the statement are informal and do not need to follow any specific format. These hand-written statements are critical in cases where the witness has involvement in the crime, has specific knowledge about the identification of people or evidence, or as the “victim” is recanting a previous version of events.

Although many witnesses are not adept at writing, the investigator should not compose the statement. The written statement should reflect the witness’s level of intelligence and language ability.

A statement written by a witness is not a substitute for the investigator’s Report of Interview. Any statement written by a witness should be accompanied by the investigator’s own report.

A completed statement should fully describe the general facts, what the witness observed, where he was physically located during the time, and his actions.

The witness should initial every page and sign the last page. The witness should read the statement aloud and initial any corrections he makes. The written statement should include a statement to the effect: "The foregoing statement is true and correct to the best of my knowledge." His signature and the date of the statement are the final items at the end.

In its simplest form, a written statement may be an "X" drawn by the witness on a crime scene diagram indicating where he was located.

WITNESS IMPRESSION REPORT

This type of report is separate from the Report of Interview. It contains the investigator's observations and impressions during an interview or made during the course of his investigations. It will include the investigator's impressions and observations of a witness in the following areas:

- (a) Credibility (is he/she lying?)
- (b) Demeanor (hostile? Evasive? Eye contact, body language, choice of speech, surroundings)
- (c) Witness appearance (dress, cleanliness, tattoos)
- (d) Education and background
- (e) His/her relationship to other witnesses, the defendant, or victim
- (f) Prior contact the investigator has had with the witness
- (g) Things other people may have told you about this witness
- (h) Witness possible motives, if any
- (i) What the victim would like to see happen in this case
- (j) The investigator's assessment of whether the witness should testify

The results of any investigation must always be communicated to the attorney. The objective of timely communication is to convey factual information regarding the investigator's inter-personal communications, his observations, or his analysis of evidence. Writing is a demanding task which requires an investigator develop skills which clearly and concisely indicate what he heard, saw, or did regarding a criminal case. The written report may be the only evidence that the investigator performed any work on the case.

Lastly, the written report is an indication of an investigator's intelligence. A report that exhibits poor grammar, incomplete sentences, and misspelled words reflects laziness or an unsophisticated investigator. This not only diminishes the investigator's credibility, it weakens the defense case.

Part 9. Service of Process.

The power to require witnesses to appear and testify on behalf of the defendant is constitutional, statutory and by rule of court. The subpoena, although signed by counsel for either the prosecution or defense, is nonetheless an order of the court, which has the authority and power to enforce its order. It is not a power to be used lightly, belligerently or without due respect for the influence of that power.

Each OPD office must have a basic subpoena template in the computer. Accuracy in preparation is important. Before executing a subpoena investigators must confirm that an actual court date has been set.

SUBPOENA PREPARATION FOR OUT-OF-STATE WITNESSES

Montana is signatory to the interstate compact regarding procedures to be utilized by Montana lawyers in securing out-of-state process. Consult that statute with the case attorney before attempting to serve a subpoena on a witness residing in another jurisdiction.

PROCESS SERVICE

If subpoenas mailed or faxed to a minor, the parent or guardian must also be served. Furthermore, a waiver of service is not valid unless signed by the parent or guardian.

Some agencies, police departments, medical facilities, jails, etc. use a liaison for process service. Learn and follow the rules of the liaison. The court in any given jurisdiction may consider service on the liaison to be equivalent to service upon the person named in the subpoena. Liaisons save time, miles, energy and sometimes create issues which can be exploited by attorneys. Be sure to attach a stamped, self-addressed envelope.

When personally serving process on any witness, do so without arguing. Tell the witness the court date, time and courtroom while pointing that information out to the witness on the subpoena.

Investigators are forbidden to accept any materials of any kind from anyone they have served with a subpoena duces tecum. Once the SDT is served, the items must be produced in court.

When subpoenaing a witness who is unknown to the defense, an investigator should obtain appropriate identification from the witness to ensure proper service. If possible, it is helpful to take a mug shot or driver's license photograph. Sometimes the defendant or his family can point out the person you are going to subpoena. But, don't provoke a confrontation.

If the witness refuses to accept the subpoena the investigator may, if appropriate, place the subpoena at the witness's feet and indicate that this constitutes service. (If the wind is blowing, put something on top of the subpoena.) If a witness refuses to open the door to take the subpoena, the investigator should announce his/her identity, make a statement of the date and time the witness is ordered to be in court and put the subpoena inside a screen or tape the subpoena to the door. In either case, prepare a thorough affidavit of service.

The case attorney may want an *ex parte* subpoena duces tecum served for materials that have a confidential component, such as the defendant's medical or mental health records. Follow the directions of the attorney, who may need to ask the court for permission to serve an *ex parte* subpoena.

As a general rule it is a good idea to subpoena experts. Inquire whether the expert will accept re-service by phone.

Part 10. Testifying.

Goals of Investigator testimony:

- (1) Presentation of and Clarification of Defense Case Details
- (2) Impeachment of Prosecution Witnesses
- (3) Introduction of Exculpatory Evidence

GUIDELINES FOR THE INVESTIGATOR WITNESS

- (1) Always Tell the Truth

As a witness in a criminal case it is the Investigator's duty to tell the truth to the best of that person's ability. The investigator's purpose on the witness stand is to provide information concerning the defense of the case; what affect the facts may have on the prosecution or defense is solely the concern of the judge or jury, not the Investigator witness.

- (2) Don't Volunteer Information Not Asked

Confine answers to what is asked. Additional information volunteered by the witness may be inadmissible or irrelevant to the case. If there is information the lawyer wishes to bring out through the investigator witness he or she will ask for it. A prosecutor may discover critical points which can be explored on cross-examination if unnecessary information is divulged.

- (3) Do Not Tell What Other People Said or What You Think Unless You Are Specifically Asked To Do So

In most cases "hearsay" and opinions are improper in Court. Unless the Investigator is specifically asked to tell about a conversation or to give an opinion, assume that every question calls solely for what was actually seen, heard or done by the Investigator. Do not volunteer hearsay or opinions not asked to be given.

- (4) If a Lawyer Starts to Stand Up, Wait for the Objection

If a lawyer for either the defense or the prosecution begins to stand up, he or she probably wishes to object to a particular line of questioning or an answer given by the witness. When it is apparent that an objection is to be made, the Investigator should wait for the judge to rule before beginning or completing an answer to a question.

- (5) Leading Questions Generally Cannot Be Asked On Direct Examination

A leading question is one which contains a suggested answer. For example, "Mrs. Jones told you she lied about the assault, didn't she?" Or, "Isn't it a fact that Mrs. Jones lied about the assault?" Since the lawyer cannot lead the Investigator in direct examination, it is imperative all the facts pertinent to each question must be remembered without the help of the lawyer. Take time and answer each question completely. If asked "Did anything else happen at that time?" or "Was anything else said?" the Investigator can be sure a fact has been omitted which the lawyer wishes to have brought out in the case. Do not quickly answer yes or no, unless sure the answer given previously was complete.

(6) Refer to Documents If Necessary

It is usually more effective to testify completely from memory without looking at anything. If it is necessary to refresh the memory, however, a testifying investigator should ask for a copy of a report or transcript. Keep in mind, however, any documents, reports, notes, etc. brought to the witness stand by the Investigator become accessible as well to the prosecution.

(7) Don't Guess

If the answer is not known to a question, don't guess, just tell the lawyer. If most but not all the details are known in an answer to a question, say so. A testifying investigator should never guess if s/he has no first hand information.

(8) Do Not Assume Long Past Events are Always Dim in Memory

It is the duty of an Investigator to study the case prior to the hearing and have recall of the events from which the questions arise. If, however, an event or detail is not remembered, the investigator should simply say "I don't recall".

(9) Never Get Angry

Some Prosecution attorneys will attempt to get the Investigator angry so they will make a mistake the cross-examiner can then dramatize. It is the duty of the Investigator to present the truth. Becoming irritated with the cross-examiner jeopardizes an investigator's credibility with the court and the jury and may weaken the defense. If a lawyer is trying to anger the witness it is for a purpose. Stay calm and answer the questions. If questions become insulting, the defense attorney may object but it adds credibility if the testifying investigator remains calm and handles every question without help from the attorney. Under re-direct the defense attorney can rehabilitate areas of testimony eroded by the prosecution. Remember, nothing a lawyer says is evidence of anything until it is addressed by a witness.

(10) Be Sure to Understand the Question

If a question is not absolutely understood, ask the examiner to repeat the question or explain what it means. This is especially important if the question is vague or contains value-judgment words.

(11) Beware of Compound Questions

Where several questions are rolled into one, it is usually difficult to answer accurately unless the components are addressed separately. In such a case the Investigator may ask, "That contains several aspects, which I will try to answer one by one." Or, the Investigator may ask the lawyer to break the question down into individual questions.

(12) Beware of Leading Questions Containing Half-Truths

A testifying investigator should be alert to the possibility that a cross-examiner will try to put words into his/her mouth. It is the duty of the testifying investigator to testify to "the truth, the whole truth and nothing but the truth."

(13) Beware Yes or No

If the cross-examiner asks a question which cannot be answered yes or no, the testifying investigator is entitled to tell the attorney it cannot be answered in such a way without the answer being misleading. If the cross-examiner persists, something may be said such as "If it has to be answered 'yes' or 'no' I suppose the answer would be 'no' / 'yes'. It should be explained or it is misleading." The court will not direct the Investigator to answer "Yes" or "No" unless the question permits that kind of answer.

(14) "Isn't it a Fact"

Be careful of questions that start with "Isn't it a fact that..." or "The fact is..., isn't it?" These are usually leading questions containing implications that may only be partly true and require an explanation.

(15) Remain Dignified On the Stand At All Times.

It is the duty of the investigator to remain calm and dignified at all times while testifying on the stand or in the courtroom in general. Be deliberate, do not rush mannerisms and speech. Consider what impression the conduct of the Investigator makes on the Court and the Jury. Never wisecrack in response to a question or attempt to make fun of the cross-examiner. Do not answer a question with another question unless it is to ask the cross-examiner to clarify what is being asked.

PRESENTATION AND APPEARANCE

(I) Appropriate Attire

An investigator should dress appropriately for court whether testifying or acting as an advisory witness. The judge and jury will most likely see the investigator prior to his or her testimony. Be aware how important first impressions are to the jury and judge. The hair should be worn neatly, women should wear hose. In general, dress should be conservative. If there are still questions as to what style of dress is appropriate, model oneself after the attorney's manner of attire. It is well documented that jurors give more credibility to the testimony of a sharp, well-groomed, and conservatively dressed witness.

(2) Demeanor

Whether on the witness stand, elsewhere in the courtroom or in the hallway, maintain a quiet dignity. Approach the stand when testifying in a business like, serious manner. The testifying investigator should keep his/her head up, eyes forward and directed at the person administering the oath. While testifying, the testifying investigator should make eye contact with the examiner for the question. When answering under direct, a testifying investigator should focus the answers on the jury. When sitting in the witness stand, do not fidget. Sit erect with both feet on the floor. The voice should be well-modulated and the investigator should speak into the microphone. Testify confidently without signs of fear but avoid being overbearing. The extremes of fear and overconfidence are to be avoided. When leaving the witness stand, follow these same guidelines. Do not appear to be victorious or defeated as a result of the testimony just given during any portion of the court proceeding.

Part 11. Demonstrative Evidence.

THE INVESTIGATOR'S ROLE

One of the investigator's more important roles is to assist the attorney in both traditional and computer-aided demonstrative evidence techniques and be prepared to display the piece of demonstrative evidence by using various audio/visual aids available within the Montana Public Defender system. An investigator who can suggest different display options is an invaluable member of the defense team.

DISPLAY TECHNIQUES

(1) CHARTS

A creative investigator/attorney team can devise all manner of charts to describe various kinds of fact patterns. Among subjects often included in charts are chronologies, timelines and inconsistent statements. Charts are most easily created by using tables found in Microsoft Word programs.

Timelines and chronologies can also be created in Word tables, but one of the best programs for creating timelines is **TIME MAP** software. The OPD is currently investigating the viability of this software program for use in some of the larger Montana Public Defender offices. It is easy to use and it creates a visually interesting display of what can often sound like confusing dates and times.

(2) POWER POINT

Power Point is a Microsoft program currently installed on all Montana Public Defender computers. It is best used to tell a story. Attorneys and investigators can display both photos and text on Power Point. It is particularly good for displaying a visual rendering of a client's life story.

For example, a Power Point lifeline can begin with the display of a client's birth certificate, photos of his parents, baby pictures of the client and other photos or documents which chronicle major events or turning points in a client's life.

Power Point projects are generally linear presentations not particularly suited for skipping back and forth through a group of photos or documents. Power Point, therefore, should not generally be used for the simple display of photos and documents. There are safer and easier ways to display photos and documents.

(3) I-VIEW

"I-View" is a photo-viewing program which allows you to view digital or scanned photos in both single and thumbnail versions. The photos or documents can be arranged

in a slide show or selected at random upon the request of the attorney who is addressing the jury.

A word of caution: Be aware that it will often be necessary to "blank" the projector screen between the display of photos selected from thumbnails. The attorney, as the director of the program, will have the discretion to expose the jury to only the photos the attorney wants them to see.

DIGITAL EQUIPMENT

Digital cameras are now available in each Montana Public Defender office. Investigators should be familiar with them and should be using them for creating most of the photos to be used as demonstrative evidence. Digital photos are, of course, the most compatible form of photo for use with computer software programs. Polaroid photos and 35-mm photos can be scanned into the computer, but it is a less efficient way of producing demonstrative evidence.

Digital video cameras, when used in conjunction with Proxima-type projectors, eliminate the need for VCR's, since the digital movie can be played directly from the camera through the Proxima. Supplemental speakers are not necessary, but are highly recommended when using this technique.

Part 12. Sentencing Investigation.

The focus of sentencing investigation is to influence the person or group who will be recommending or deciding the penalty in the case. In non-death penalty cases, this includes the court, the probation department, and the prosecutor. In capital cases, it includes the judge who makes rulings and the jury who decides the penalty.

GENERAL SENTENCING INVESTIGATION

(1) DETERMINE THE TARGET AUDIENCE

(a) Court. The ultimate authority usually rests with the judge in sentencing matters. Obviously, the primary target of the sentencing presentation is to the judge.

(b) Probation. The probation department may have heavy influence on the judge's sentencing decision through their pre-sentence investigation report. Timing is critical here. In order to influence the probation department's report, information beneficial to the client must be presented to the probation department as soon as possible so it can be incorporated in that report.

(c) Prosecutor. Likewise, attempts to persuade the prosecutor should be made prior to walking into the sentencing hearing and before the prosecution has solidified its argument.

(d) Jury. In capital cases aggravating or mitigating factors are determined by the jury that decided the guilt phase of the trial.

(2) SENTENCING ISSUES.

Guilt or innocence is just part of the spectrum of issues the defense team deals with on behalf of its clients. After a guilty verdict has been rendered or the client has accepted a disposition in their case, the issue of what should the penalty be becomes the investigator's focus. Sentencing issues may address multiple areas and can overlap.

(a) Punishment. Focus on cases of like circumstances and range of punishment those defendants received. Focus on to what extent punishment is necessary and whether rehabilitation might be in society's best interest.

(b) Rehabilitation. Focus on propensity for self-improvement, religious or spiritual conversions as potential for rehabilitation. Focus on past positive response to medical or psychiatric treatment. Focus on actual past good conduct while in prison or treatment as an indicator of future behavior.

(c) Deterrence. Focus on whether deterrence is effective in general and specifically in the client's case. Focus on circumstances and context surrounding crime to show other issues are more important such as rehabilitation or restitution.

(d) Victim Concerns and Protection. Focus here on the relationship between client and alleged victim. In the case of a disposition reached prior to trial, sentencing hearings can be a forum to conduct an informal trial and bring out beneficial facts on the client and bring out damaging information on the victim.

(e) Public Concerns and Protection. Focus on client's ability to adjust well in controlled situations with adequate guidance and discipline and that prison is not needed.

(f) Restitution. Focus on the claims of damage or injury and get second opinions and estimates. Carefully investigate inflated damage amount (in restitution cases).

(3) DEVELOPING THEME OR THEORY

Probe the dynamics of the relationships between the witnesses, the victim(s), the defendant, law enforcement, and the prosecution.