CHAPTER SEVEN
Fact Investigation, Witnesses, Expert Assistance
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CHAPTER SEVEN

FACT INVESTIGATION, WITNESSES, EXPERT ASSISTANCE

I. FACT INVESTIGATION AND INTERVIEWING WITNESSES

A. FACT INVESTIGATION[1]

1. Facts Win Cases

Most cases are won by the presentation of evidence, not on legal argument. Facts are counsel's most important asset, whether seeking advantageous terms of bail; urging the prosecutor to drop or reduce charges; negotiating a plea bargain; arguing before a jury; urging a favorable sentencing recommendation to a probation officer; or urging a favorable sentencing disposition to a judge.

2. Counsel Has a Duty to Investigate in Every Case

Counsel has a duty to investigate. 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. ABA Standards for Criminal Justice, Defense Function 4-4.1 (3d ed. 1993), *cited with approval in* Rompilla v. Beard, 125 S.Ct. 2456, 2466, n.6 (2005).

a. Resource Allocation/Planning

Having a theory of the case can help counsel prioritize and make the best use of what may be limited resources. Counsel must not let an initial theory limit the investigation, however.

b. Focus on Likely Avenues but Keep an Open Mind

While reviewing sources that are most likely to contain information relevant to your theory, gather all other information potentially germane to the case that can be gathered with little additional time and effort.

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[1]Based loosely on Anthony Amsterdam's **trial manual 5 for the defense of criminal cases, Volume 1, §§106-119 (1988)**, the American Law Institute. Permission to reprint the same is gratefully acknowledged. All rights are reserved by the American Law Institute. See also, IPDC Performance Guidelines for Criminal Defense Representation, Guidelines 4.1 and 4.3.

c. Constantly Re-evaluate

Be alert to those facts that do not support your theory, and to facts that suggest a preferable theory. Be sure to reconsider as the investigation progresses. Keep your eyes open and plans flexible. Have priorities but be willing to change them.

d. One or Two Issues

Almost always, one issue, or a very few issues, stand out as having paramount importance. The defense needs to destroy only one element of State's case. Aim at the few weakest points in the prosecution's case, or at the few strongest points in the defendant's case.

e. Start Promptly

Speed is essential in investigating criminal cases. Physical facts change. An object of importance may be discarded. Witnesses may disappear or forget. The first things to go after are those that are perishable:

- physical items that are mobile or changeable;
- witnesses who are mobile or indefinitely identified, but related to some specific location at a recent time;
- witnesses whose involvement is such that they may forget if not questioned quickly.

When appropriate, counsel should go to the crime scene immediately and attempt to uncover or preserve any tangible evidence by photograph or otherwise. Once a reasonable effort has been made to find the known perishable items, counsel should evaluate everything he/she has, estimate his/her points of strength, and proceed with further investigation to consolidate them.

f. Prosecution May Have Perishable Evidence

Items may be in the custody of the police or prosecutor. Advise the prosecution and/or the police that you expect them to preserve samples for testing by defense experts. See IPDC Pretrial Manual, Chapter 6.

g. Site Visits/Reenactments

It is usually wise for counsel personally to inspect the site of any important event in the case: the offense, the arrest, and a search and seizure. Counsel will often notice items that would not seem significant to anyone else. For example, at the time of trial, when a prosecution witness testifies about events in detail not previously known to the defense, it may become apparent to counsel who has visited the scene that the witness is mistaken or confused on matters of spatial relations.

While viewing the crime scene, in addition to checking the physical dimensions, spatial relations, viewing obstacles, lighting, etc., counsel should look for surveillance cameras and seek to discover any video or images made at the time of the offense.

PRACTICE POINTER: It may be helpful for counsel to reenact pertinent events (in private and without the knowledge of the prosecutor and police, if possible), such as a search-and-seizure episode in which the client claims the police pushed their way through an apartment door. By playing the role of the 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. Counsel should be sure that the scene has not changed between the time of the critical events and that of counsel's visit.

3. Use of an Investigator

Use an investigator when you need information, whether physical fact gathering, records research, or witness statements. Investigators serve as objective observers of facts. The more factual the report, the more value it has for case preparation. To effectively use an investigator, counsel must explain the case and initial theories of defense fully to investigator. Never assume that an investigator will uncover the information you want until you have worked together on many cases.

The investigator can be called upon to testify if any conflicts arise between the stories given by witnesses at trial and the stories they previously gave to the defense. Also, if counsel decides that photographs are necessary for the defense, the investigator will be available to lay a foundation for their admission into evidence.

a. Selecting Investigator

Hire an investigator who is licensed, bonded, and insured and good in the desired area of expertise. Check references – talk with other attorneys who have worked with the investigator you are thinking of hiring. If testimonial evidence is important in your case, make sure your investigator has experience in skip tracing, interviewing, report preparation, and testimony. If physical evidence needs to be gathered, examined, or reviewed, make sure your investigator is knowledgeable about the forensic sciences.

Make sure your investigator is humble enough to note when they need to enlist the services of consultants, such as a documents examiner, a psychologist, or an accident re-constructionist.

Make sure your investigator is comfortable enough around you that they can make suggestions concerning follow-up interviews or research. An open-minded investigator may present themes you have not thought of and witnesses overlooked (or hidden) by the prosecution.

An attorney and her employees need not be licensed in order to investigate. Ind. Code § 25-30-1-5. Ind. Code § 25-30-1-1 *et seq*. governs licensing of private detectives. A person licensed by another state shall not do business in Indiana until licensed with the board. See Ind. Code § 25-30-1-14.

b. Discovery Issues

You should make sure your investigator knows that they work as your agent, and that all communications with your client are confidential and subject to attorney-client privilege. See, e.g., Brown v. State, 448 N.E.2d 10 (Ind. 1983). This privilege can be waived, however, if your investigator is called to testify at trial. Id.

Caution investigators that their notes, reports, and memoranda may become discoverable by the prosecution in some situations. Verbatim witness statements will likely be subject to discovery, while notes that include mental impressions regarding the interview and the witness may be protected by work-product privilege. See, e.g., United States v. Nobles (1975), 422 U.S. 225, 252-54, 95 S.Ct. 2160, 45 L.Ed.2d 141 (concurring opinion of Justice White). However, like the attorney-client privilege, work product protection can be waived if your investigator testifies at trial.

> United States v. Nobles, 422 U.S. 225, 236-40, 95 S.Ct. 2160 (1975) (requiring disclosure of defense investigator's report before allowing investigator to testify to impeach prosecution witness; no violation of 5th or 6th Amendments or work product rule).

You may choose to have an investigator first report orally to you and then reduce the report to writing with your approval. Or you may prefer to make all the written notes, based upon the investigator's oral report, in order to ensure work product protection.

Whichever means you choose in order to obtain work product protection for your or your investigator's notes of witness interviews, do not undermine your efforts by submitting them for the witness's approval or signature. See Goldberg v. United States, 425 U.S. 94, 105-7, 96 S.Ct. 1338 (1976) (writing by government lawyer relating to witness' testimony signed or adopted by witness not work product).

c. Advisement on Ethical Obligations

The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training. Give investigators and other assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client and should be responsible for their work product. Advise the investigator not to give to state witnesses any suggestion of the defense theory of the case or anticipated defense tactics.

See *Indiana Rules of Professional Conduct*, Rule 5.3 (Responsibilities Regarding Non-Lawyer Assistants).

See Ind. Code § 25-30-1-18 (violation of private investigators professional standards).

Ind. Code § 25-30-1-21 (violations, fines).

B. INTERVIEWING WITNESSES - Practice Tips[2]

NOTE: Ind. Code § 35-40-5-11, regarding defense interviewing of a child less than sixteen (16) years old, who is an alleged victim of "sex offenses," as defined by Ind. Code § 11-8-8-5.2, was repealed in 2020. So, there is no longer a requirement to contact the prosecutor before interviewing a child. But Ind. Code § 35-40-5-11.5, enacted in 2020, specifies that a child victim

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has the right to confer with a representative of the prosecuting attorney's office before being deposed. The statute provides that a defendant may only depose a child victim if the prosecuting attorney agrees to the deposition or if a court authorizes the deposition. The statute also establishes a procedure for a court to use to determine whether to authorize the deposition of a child victim. See Church v. State, 189 N.E.3d 580 (Ind. 2022) (upholding constitutionality of IC 35-40-5-11.5).

1. Dos and Don'ts

a. Do Not Interview Alone

Witness interviews should be conducted either by an investigator or by counsel in the presence of an investigator. Never interview a hostile witness alone. Conduct the interview in presence of another who would make a good and convincing witness.

Use an investigator for your interviewing to avoid having to withdraw as counsel if you become a witness during trial. *ABA Standards*, "The Defense Function," 4th Edition, Standard 4-4.3(f) (2014), provides:

Defense counsel should avoid the prospect of having to testify personally about the content of a witness interview. An interview of routine witnesses (for example, custodians of records) should not require a third-party observer. But when the need for corroboration of an interview is reasonably anticipated, counsel should be accompanied by another trusted and credible person during the interview. Defense counsel should avoid being alone with foreseeably hostile witnesses.

b. Do Not Interview by Phone

Witnesses should not be interviewed on the telephone, nor should the investigator telephone the less friendly witnesses to arrange for interviews. Contacting a potentially hostile witness over the telephone frequently results in no interview. Therefore, the initial contact should be in person, and the investigator should be fully prepared and aware that one interview may be all the witness will allow.

c. Do Interview at Witness's Home

Attempt to contact the witness at home, preferably in the evening. The witness may feel more relaxed and secure and thus freer about giving information. The kitchen is usually the least formal, most supportive environment. Attempt to interview the witness when they are alone, because the presence of other people often inhibits the flow of information, except when interviewing children or the mentally infirm, where the presence of family members or a neutral person is required for obvious reasons.

d. Do Not Misrepresent Status

The witness should never be allowed to believe that the investigator is a government official or has any capacity other than as a defense representative. See *Indiana Rules of Professional Conduct*, Rules 4.3 and 4.4.

e. Not Necessary to Caution Potential Self-Incrimination Problems

ABA Standards, 4th Edition "The Defense Function," Standard 4-4.3(g) (2014) provides:

It is not necessary for defense counsel or defense counsel's agents, when interviewing a witness, to caution the witness concerning possible self-incrimination or a right to independent counsel. Defense counsel should, however, follow applicable ethical rules that address dealing with unrepresented persons. Defense counsel should not discuss or exaggerate the potential criminal liability of a witness with a purpose, or in a manner likely, to intimidate the witness, to intimidate the witness, or to influence the truthfulness or completeness of the witness's testimony, or to change the witness's decision about whether to provide information.

f. Recording

Do not assume the investigator will record the interview, so tell them whether you want it recorded. While the rule of thumb is to record any potentially hostile witness, some investigators tape record everyone. Others do not use recording devices. In Indiana, recordings of conversations with witnesses may be discoverable.

2. Defendant's Right to Interview Any Witness without Consent of State

Witnesses do not belong to any one party to a litigation. Counsel has a right to interview any witness or prospective witness who may have information pertinent to the client's case. Canon 39 of the American Bar Association's *Canons of Professional Ethics* (which remains authoritative because of the omission of the subject from the *Code of Professional Conduct*) makes the point entirely clear: "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."

a. Moral Obligation, Not Legal Obligation

Witnesses (particularly complainants) who have given incriminating information to the police or prosecutor may **think** that they belong to the prosecution. Counsel should explain that this is not so; 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. A witness not under subpoena or court order 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** obligations to tell what they know to the defense, as well as to the police or prosecutor, should be stressed.

b. When Witness Instructed Not to Talk

Instructions by a prosecutor or by the police that witnesses should not talk to the defense (or that they should talk to the defense only with the prosecutor's consent or in the prosecutor's presence) are unprofessional and unconstitutional and violate Rule 3.4(f) of the Rules of Professional Conduct.

Witness should be advised that it is improper and unlawful for a government representative to advise a witness not to speak to the defense or to speak to the defense

only in the prosecutor's presence and should be further advised that the witness has an absolute right to speak to both sides. United States v. Carrigan, 804 F.2d 599, 603 (10th Cir. 1986); United States v. Munsey, 457 F.Supp. 1, 4-5 (E.D. Tenn. 1978); Kines v. Butterworth, 669 F.2d 6, 8-9 (1st Cir. 1981); and State v. Simmons, 57 Wis.2d 285, 203 N.W.2d 887, 892-93 (1973).

> Burst v. State, 499 N.E.2d 1140, 1147 (Ind. Ct. App. 1986) (State actively made informant unavailable to defendant by giving him money "for relocation" and defendant demonstrated materiality of the informant's testimony; conviction reversed);

See also, Indiana Rules of Professional Conduct Rule 3.4(a), Rule 3.4(f), and Trial Rule 37(A).

(1) Prosecutor's Proper Instruction

The commentary to *ABA Standards for Criminal Justice* 3d Ed., Prosecution Function, Standard 3-3.1(d) provides:

> It is proper for a prosecutor to tell a witness that they may contact the prosecutor prior to talking to defense counsel. The prosecutor may also properly request an opportunity to be present at defense counsel's interview of a witness but may not make their presence a condition of holding the interview. It is also proper to caution a witness concerning the need to exercise care in subscribing to a statement prepared by another person.

c. Document Refusals by Witness

If the witness persists in refusing to speak, the investigator should prepare a memorandum of all attempts and the circumstances of the refusal, including the details of any instructions or "hints" the witness may have received from police or government representatives.

d. Ask Prosecutor to Phone Witness

Ask the prosecutor to phone the witnesses immediately and tell them that they are free to talk to the defense. This should be done with defense counsel also on the phone, so that s/he can monitor what the prosecutor says and follow up immediately by arranging an appointment for an interview.

e. Remedies

In Indiana, a defendant may subpoena witnesses who otherwise refuse to cooperate for pretrial discovery depositions. If the prosecutor persists in obstructing defense counsel's access to the witnesses, counsel should move the court for the prosecutor to show cause:

(a) why the charges against the client should not be dismissed with prejudice, on the ground that the prosecutor has unconstitutionally interfered with the preparation of the defense and that there is no way either of knowing how much harm has been done or of setting it right at this stage, or

(b) why all witnesses with whom the prosecutor or any police officer has discussed the

case should not be brought before the court and instructed by the court that they are free to speak to the defense.

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."

3. State Not Entitled to Interview Defendant

The prosecutor is not entitled to interview a defendant represented by counsel. Sixth Amendment, U.S. Constitution.

The Fifth Amendment to the U.S. Constitution provides a privilege against self-incrimination.

Defense counsel should advise every client not to talk to the prosecutor or police without counsel present, whether about the current case or about other matters that have not been charged. See Texas v. Cobb, 121 S.Ct. 1335 (2001) (6th Amendment not violated by police questioning defendant in the absence of counsel about crimes not charged, even though the other crimes may be factually related to crimes already charged).

ABA Standards, the Defense Function, 4th Edition, Standard 4-4.3(g) provides:

It is not necessary for defense counsel or defense counsel's agents, when interviewing a witness, to caution the witness concerning possible self-incrimination or a right to independent counsel. Defense counsel should, however, follow applicable ethical rules that address dealing with unrepresented persons. Defense counsel should not discuss or exaggerate the potential criminal liability of a witness with a purpose, or in a manner likely, to intimidate the witness, to intimidate the witness, or to influence the truthfulness or completeness of the witness's testimony, or to change the witness's decision about whether to provide information.

4. Prosecutorial Misconduct to Warn Defense Witness of Criminal Charges During Interview

Prosecutor may not discourage defense witness from testifying. Regardless of good intentions, prosecutor's warning of criminal charges during personal interview with a prospective defense witness constitutes prosecutorial misconduct, which denies a criminal defendant due process guaranteed by the Fifth and Fourteenth Amendments as well as the Sixth Amendment right to compel witnesses in his favor. Kellems v. State, 651 N.E.2d 326, 329 n.1 (Ind. Ct. App. 1995); Diggs v. State, 531 N.E.2d 461, 464 (Ind. 1988).

Greer v. State, 115 N.E, 3d 1287 (Ind. Ct. App. 2018) (distinguishing Diggs, Court noted prosecutor did not explicitly threaten C.W. with prosecution for perjury and reminded him that he would be in trouble only if he did not tell truth, not if he testified on D's behalf).

5. Interviewing Police Officers

Interview the principal police officers involved:

- the detective in charge of the investigation and any officers who spoke to any of the

witnesses whether at the scene or later;

- the arresting officer and his/her partner (regarding statements and condition of defendant, and condition/comments of witnesses);
- any expert witnesses (e.g., handwriting); and other potentially relevant witnesses.

The police officers should be questioned as to:

(a) The facts surrounding the arrest and search of the client and subsequent police procedures.

(b) From the arresting officers the exact location and time of arrest and the manner of effecting the arrest, when the suspect was no longer free to go, and the facts which caused the officer to make the arrest. They should question as to whether the client was interrogated and gave any statements or confessions, what the police told the client concerning the incident, and whether the client was identified in any manner.

(c) Whether the officer has interviewed any witnesses and preserved the notes of those interviews, whether officer has shown any witness photographs and the results of any identification procedures, and whether any tangible evidence was recovered.

(d) The investigator should also ask the names of other officers involved with the case, and any reports which have been filed.

a. When Police Refuse to Cooperate

In Indiana, pretrial discovery depositions are available to the defendant. See IPDC Pretrial Manual, Chapter 6.

6. Questioning Co-Defendants

Before questioning co-defendants, counsel should ascertain whether they are represented by an attorney. If they are, contact each co-defendant's lawyer for permission to interview the lawyer's client. Indiana Rule of Professional Conduct 4.2 provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order.

The interview should thoroughly explore what information the co-defendant has given to the authorities. If a co-defendant admits guilt, counsel should determine whether the co-defendant intends to testify for the prosecution and implicate the defendant. Whether or not the co-defendant admits an intention to testify, counsel should take the co-defendant's story in detail. A co-defendant may turn State's evidence at any time, and their testimony is likely to be decisive at trial. If co-defendant denies guilt, counsel should ascertain what they know about the crime and what their defense is. Counsel should ask the co-defendant's lawyer the same questions. Trial tactics relating to severance and jury trial or waiver may hinge on answers to these inquiries.

II. EXPERT & INVESTIGATIVE ASSISTANCE[3]

A. The Legal Standard

1. Due Process Right to "Basic Tools" of Defense

Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985), is the seminal case establishing the right of an indigent criminal defendant to an expert whose area of expertise is a "significant factor" in the case. The Court reiterated that due process requires that a defendant must have "access to the raw materials integral to the building of an effective defense," and that they must be provided "an adequate opportunity to present their claims fairly within the adversary system," as well as the "basic tools" to do so. Id. at 77. The Court used a basic due process balancing test, weighing: (1) the private interest affected; (2) the governmental interest affected; and (3) the probable value of the assistance sought and the risk of error in the proceedings if the assistance is not provided. The Court held that because Ake's sanity was in issue, he should have been provided an independent defense mental health expert.

2. Defendant Must Demonstrate Reasonable Necessity

Shortly after Ake was decided, the Court held that indigent criminal defendants were not entitled to funds for expert assistance where a sufficiently specific showing of need was not made to the trial court. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985). The trial court had denied the defendant's request for a criminal investigator, a fingerprint expert, and a ballistics expert. The Court wrote that "the requests were accompanied by no showing as to their reasonableness . . . Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision." Id. at 323, n.1. Case law has evolved since Ake and Caldwell, making it clear that the defendant bears the burden of showing both the necessity and the reasonableness of his request for expert assistance, with some degree of specificity.

3. Factors Which Indiana Courts Consider in Determining Reasonable Necessity

In Scott v. State, 593 N.E.2d 198 (1992), authored by Chief Justice Shepard, the Indiana Supreme Court noted that "Indiana's practice of providing indigent criminal defendants with the means to defend themselves long predates such requirements as exist under the federal Constitution." Id. at 199 (citations omitted). The Court pointed out that twenty years before Ake was decided, Indiana Courts were providing defendants whose sanity was in issue with independent defense psychiatrists, in addition to the court's experts required by statute, and that the Ake Court had **cited** Indiana's practice.

To help determine the parameters of an adequate defense, Scott looked to the ABA Standards for guidance:

In exploring the parameters of the Indiana practice, we begin with reference to general statements about criminal defense. The ABA Standards for Criminal Justice provide: 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

[3]Reprinted, with minor changes, from "Getting Funds for Experts," available on the Practice Guide section of the Council's website.

event of a conviction.

Id. at 199-200, *citing* ABA Standards for Criminal Justice 4-4.1.

Further, Scott, 593 N.E.2d 198 (1992), provided:

Indigent defense plans "should provide investigatory, expert, and other services necessary to quality legal representation. These should include not only effective defense at trial but also those that are required for effective defense participation in every phase of the process."

Id. *citing* ABA Standards for Criminal Justice 5 – 1.4.

The Court noted that the provision of funds to provide indigent defendants with expert services is within the sound discretion of the trial courts and will necessarily be made on a case-by-case basis. However, the Court set out a list of factors which a trial court should consider in determining whether to grant an indigent defendant's request for funds for expert services. They can be summarized as follows:

a. Is the issue within the common knowledge of an average person or is expert opinion necessary?
b. Can counsel perform the service?
c. What is the probability that the expert can show what the defendant desires?
d. How important is the area of expertise to the case (does it address a substantial question or an ancillary one?)
e. How serious is the charge and how severe is the potential penalty?
f. How complex is the case?
g. Is the State hiring an expert?
h. What is the cost of the expert assistance sought?
i. Was the request timely and made in good faith?
j. Will the expert's testimony be admissible at trial?
k. Is there cumulative evidence of the defendant's guilt, reducing the importance of this area of expert inquiry?

In James v. State, 613 N.E.2d 15 (1993), the Court stressed some of these factors, and emphasized yet another – whether the area of expertise involves precise measurements and testing or is subject to dispute. James, a capital murder defendant, had sought funds to hire a blood spatter expert, where the blood spatter pattern around the victim was relevant to whether the killing was intentional. Reversing the trial court's denial of James' request, the Court emphasized four factors: (1) the importance of blood spatter evidence to the case, (2) trial counsel's inability to cross-examine the state's expert without expert assistance of his own, (3) the degree to which blood spatter analysis is subject to interpretation and dispute, and (4) the seriousness of the penalty faced by the defendant.

Shuck v. State, 53 N.E.3d 571 (Ind. Ct. App. 2016) (reversing when nearly every factor favored public reimbursement for investigation expenses and State's argument had terrible public policy implications when revealed during investigation will often be of vital consequence to defendant and attorney when deciding whether to accept plea deal).

PRACTICE POINTER: You should note that the severity of the charges and potential penalty is merely one of many factors to be considered in deciding whether to grant a request for expert assistance. There is a common misperception that experts are "required" in capital cases and "not required" in non-capital cases. In fact, success in obtaining funds for expert services in any case depends on defense counsel's ability to make detailed and persuasive showings on a combination of factors.

4. Standards for appointing interpreter for non-native speaking defendant

Whenever a trial court is put on notice that a defendant has a significant language difficulty, the court shall determine whether an interpreter is needed to protect the defendant's due process rights. Nur v. State, 869 N.E.2d 472 (Ind. Ct. App. 2007).

Trial court is put on notice of potential language barrier when:

a. defendant manifests significant language difficulty or;
b. an interpreter is specifically requested.

The decision as to whether an interpreter is needed is based on:

a. defendant's understanding of spoken and written English; and
b. the complexity of proceedings, issues, and testimony.

See *Getting Funds for Experts* pamphlet and the Council's Casebank at Y.6 for more cases reviewing the denial of funds for experts.

III. APPLICATION PROCESS

A. MAKE A TIMELY REQUEST

One of the factors identified in Scott is whether the request for an expert is timely. In Jackson v. State, 758 N.E.2d 1030, 1034 (Ind. App. 2001), the Court of Appeals questioned whether a request for a DNA expert filed five days before trial was timely. The state's DNA expert's report had been issued only eight days earlier, but trial counsel admitted at the hearing on his funds request that the fact that DNA analysis was being done "did not take me by surprise or unawares in this case." Do not wait until you receive a damaging report from the State's expert to begin seeking your own expert. Begin educating yourself on the field of expertise and developing your request for funds as soon as you learn that a particular type of expertise will be critical to your case. If your initial request is denied, you can renew it later as you develop more support.

B. REQUEST AN *EX PARTE* HEARING

Before you make your request for funds, you should move for permission to file your request under seal and have it heard *ex parte*.

For clients charged with a capital offense, Criminal Rule 24 specifically authorizes *ex parte* applications for funds in capital cases.

If you represent a non-capitally charged client, there is no principled reason for denying you an *ex parte* hearing on your funds requests when they are specifically authorized in capital cases. At one time, the Indiana Supreme Court had suggested that *ex parte* funds hearings might be

improper and might violate the judicial canons, see Newhart v. State, 669 N.E.2d 953 (Ind. 1996), but the Court has since held that trial courts may, in their discretion, grant them, Stevens v. State, 770 N.E.2d 739, 759 (Ind. 2002), *vacated in part on other grounds by* Stevens v. McBride, 489 F.3d 883 (7th Cir. 2007). And as mentioned above, the Court amended CR 24 to specifically authorize them in capital cases. Ind. R. Crim. P. 24(C)(2). Still, a number of trial courts have balked at granting ex parte hearings.

The Indiana Court of Appeals has upheld a challenge to such a denial on equal protection grounds. See Beauchamp v. State, 788 N.E.2d 881, 886-88 (Ind. Ct. App. 2003). But the Court's analysis focused on the requirement of making a specific showing, rather than the need to make it in open court and found a rational basis for this requirement. Beauchamp's actual claim was that the denial of an *ex parte* hearing put him in the position of having to "reveal defense theories, trial strategies, investigations, and possibly inculpatory evidence in an open hearing subject to prosecutorial cross-examination and objection," id. at 886, and that a non-indigent defendant who did not have to make this showing in open court would be protected from their disclosure under Trial Rule 26. It is worth noting that although the Court found no equal protection in forcing Beauchamp to make these disclosures in open court, it found that the State's use at trial of an expert that Beauchamp had consulted early in his trial preparation violated at least "the spirit and intent behind T.R. 26(B)(4)(b), inasmuch as a party should certainly be protected when obtaining expert advice he requires in order to properly evaluate and present his case without fear that every consultation will be discoverable." Id. at 892. It is difficult to square this holding with the Court's holding that Beauchamp was not entitled to protection from disclosure of the experts he sought to consult with by means of an *ex parte* hearing on his request for funds to hire them.

This holding and language from Beauchamp was later cited by the 7th Circuit Court of Appeals in Stevens v. McBride, 489 F.3d 883 (7th Cir. 2007), which reversed a death sentence after finding trial counsel ineffective for putting on a mental health expert who had written a very damaging report. On post-conviction review, the Indiana Supreme Court had found it was not deficient performance in light of the trial court's order requiring disclosure of all expert witness reports. Stevens v. State, 770 N.E.2d 739, 748, n.4 (Ind. 2002) (Court also found that the trial court was within its discretion to deny an *ex parte* hearing on trial counsel's request for funds to hire the expert), *vacated in part on other grounds by* Stevens v. McBride, 489 F.3d 883 (7th Cir. 2007) The 7th Circuit, however, reasoned that trial counsel could have designated the expert as a consulting rather than an expert witness, and thus protected the expert and his report from disclosure under T.R. 26(4)(b)(4). McBride, 489 F.3d at 896-97.

It is crucial that you: (1) seek an *ex parte* hearing on your request for funds to hire experts, (2) not designate them as witnesses until you are certain that they will be helpful, and (3) **cite** T.R. 26(B)(4)(b) and these cases citing it in support of your doing so.

SAMPLE MOTION: A sample motion for *ex parte* hearing on funds application is available in the *Motions* manual and the *Motions* section of the Council's website, as well as in the Council's publication, *Getting Funds for Experts*, available in the *Expert* section of the Council's website.

You should also provide the court with an order to distribute to all court personnel explaining how your requests and the court's orders on those requests are to be treated in order to maintain confidentiality. A sample order is available with the sample motion from the sources mentioned above.

C. DEMONSTRATING REASONABLE NECESSITY

When you draft your motion for funds, to be filed under seal, consider every factor listed in Scott and James, and be as specific as possible. If possible, ask the expert you are seeking funds for to preliminarily review the State's charging information, appropriate witness statements, physical evidence, and test results, or tell her hypothetically about your case. Ask her to provide an affidavit in support of your motion.

Among the things you will want to include in your motion are the following:

1. Facts

a. Facts about the case which make an expert necessary

You will need to have thorough knowledge of the State's case, of the particular fact(s) you hope to dispute with expert assistance, and of the area of expertise, in order to make an adequate showing. Your expert can assist you with this.

Based upon the State's discovery, tell the court what the State's case will be against your client, what evidence the State will likely put on and what it will tend to show, what facts you intend to dispute and what you have discovered that makes you believe that there is room to dispute them, what sort of inquiry your expert will help you undertake, and what facts make it likely that your requested expert will be able to assist you in challenging the State's case in this particular area, either by putting on your own evidence or preparing for effective cross-examination, or both.

If you are seeking an expert in an area in which you expect the State to call one or more expert witnesses, tell the court what facts lead you to believe or confirm this, the importance of the particular factual issue and area of expertise to the State's case, and what facts about the area of expertise make it subject to question and/or interpretation. If there are specific aspects of the State's expert's credentials or background, or of the particular testing performed, that raise questions, tell the court these facts, and tell the court as specifically as possible how your expert will help you pursue those questions. Ask your proposed expert for help with this.

If you are seeking an expert to help establish an affirmative defense, or to dispute a factual issue, tell the court what facts make you believe that such a defense or challenge would be appropriate, how critical it is to your case (or how critical the challenged fact is to the State's case), and what facts make you believe that your requested expert will be able to assist you. For example, if your client has given a statement or confession and you have reason to believe that it was coerced, tell the court what other evidence the State has against your client, what his statement consists of, how important it is to the State's case, what facts make you believe that it might be coerced (i.e., facts that render your client particularly suggestible, facts about the interrogation that suggest coercion, physical evidence that does not match your client's confession, etc.).

b. Facts that Make Your Expert Reasonable, as Well as Necessary

(1) Tell the court the fees and anticipated total costs of your expert. If possible, demonstrate to the court the reasonableness of these fees based on comparison to other fees in the area.

(2) Tell the court the qualifications of your expert, including any specialized training or expertise that is particularly relevant to the facts of your case.

(3) Tell the court exactly what you anticipate that your expert will do, including any testing or evaluation of evidence, and how you plan to use the expert's assistance.

2. Legal Grounds

a. Legal Relevance and Admissibility

Where necessary, provide legal authority and argument regarding the relevance, materiality, and admissibility of your expert's proposed testimony. See, e.g., Miller v. State, 770 N.E.2d 763 (Ind. 2002) (defendant's expert opinion testimony regarding effects of police interrogation upon mentally retarded individuals is admissible at retrial of this case to assist jury in determining his statement's weight and credibility).

b. Constitutional Rights

Tell the Court each of your client's constitutional rights that will be abridged by denial of the expert assistance you seek, and how. Include each of the following that apply, as well as any others which you determine will be affected.

(1) The right to confront the State's witnesses. (U.S. Const., 6th Amend.; Ind. Const., Art. 1, § 13)

(2) The right to effective assistance of counsel. (U.S. Const., 6th & 14th Amend.; Ind. Const., Art. 1, § 13)

(3) The right to present a defense. (U.S. Const., 6th Amend.; Ind. Const., Art. 1, §§ 12, 13)

(4) The right to call witnesses on his own behalf (compulsory process). (U.S. Const., 6th Amend.; Ind. Const., Art. 1, § 13)

(5) The due process right to a fair trial. (U.S. Const., 5th & 14th Amend.; Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985); Ind. Const., Art. 1, §§ 12, 13)

(6) The equal protection of the laws. (U.S. Const., 14th Amend.; Ind. Const., Art. 1, § 23)

(7) The protection against cruel and unusual or disproportionate punishments. (U.S. Const., 8th & 14th Amend.; Ind. Const., Art. 1, § 16)

SAMPLE MOTION: A sample motion for *ex parte* hearing on funds application is available in the *Motions* section of IPDC's website, as well as in the IPDC publication, *Getting Funds for Experts*, available in the Practice Guide section of the website.