

INVESTIGATION: THE FOUNDATION OF A SUCCESSFUL DEFENSE

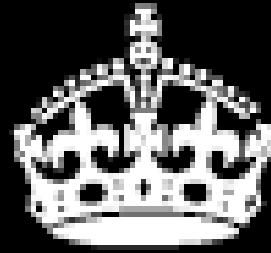


FACTS

The word "FACTS" is rendered in a large, white, serif font with a dark green outline. It is centered within a light green circle. Above and below the word are two horizontal dotted lines, each consisting of ten dots connected by a thin line. The entire graphic is set against a white background, which is framed by a light green border at the top and bottom.

FACTS, FACTS, FACTS

- Facts create theories
- Facts support theories
- Facts limit theories
- Facts extinguish theories
- Investigation is the creation of facts



**KEEP
CALM
AND
TRUST
NO ONE**

CASE ANALYSIS

- In every case...
- Facts Beyond Change
- Theory
- Legal Defense
- Theory + Legal Defense = Defense Theory



THEORY



THEORY

- “Words you hear in your mind as case is prepared”
- Factually driven
- Persuasive
- “I had to protect myself, I had no other choice”
- “They didn’t see what they think they saw”
- “I wasn’t even there, I was x...”
- Unifying focal points for all parts of the case
 - Investigation
 - Motions in Limine
 - Voir Dire
 - Opening
 - Cross etc...

DEFENSES

- Legal reason which allows the jury to reach the outcome you want
- Self-defense
- Fabrication
- Other suspect
- Duress
- Entrapment
- Guilty of Lesser
- Misidentification
- Reasonable doubt (worst one)
- **Theory needs to be tied to a defense**

FACTS BEYOND CHANGE



FACTS BEYOND CHANGE

- Facts that will be believed by the jury fair and accurate
- Photos
- Videos
- Certain documents
- Certain Witnesses
- Facts beyond change can be positive, negative, or neutral
- Do not concede facts beyond change prior to investigation
 - *See State v. ANJ*
- Litigation can change facts beyond change
- Be strategic and what FBC are going to stand
- Your theory and defense has to either be built upon facts beyond change or in harmony with them

THEORY + DEFENSE = DEFENSE THEORY

- Review Discovery
- Client's Version (be willing to offer alternatives)
- Legal Defense
- Emotional component
- Recognize Facts Beyond Change
- Investigate

KNOW THE WHERE

- Go to the scene
- Canvas for witnesses
- Cameras/Surveillance video
- Informs witness interviews

KNOW THE WHO

- Find out as much possible about each witness
- Criminal history
- Include arrest hx (PDRs), protection orders, divorce proceedings, civil proceedings, federal proceedings
- Internet: (youtube, facebook, google, twitter, instagram)
- Consult police policies & procedures manuals
- Writings of the witnesses (e.g. experts)

KNOW THE WHAT

- Subject Matter (you may need to get experts to educate you)
- Challenging cause of death
- Crime scene (drop off, blood spatter)
- Identification Issues

PREPARING FOR THE INTERVIEW

- Have defense theory in mind
- Use what you have learned
 - About the witness
 - The scene
 - The subject matter
 - What you expect the other witnesses to say

- Should you attempt to “trap” the witness?
- Be careful about your language – avoid using pejorative words like defendant, incident, assault that suggest a crime occurred.
- Consider how other witness testimony and physical evidence may confirm or contradict what the witness has to say

INTERVIEWING TECHNIQUES



- Build Rapport
- Be conscious of how you appear
- Tell the witness up front that if they have any questions about your questions, that you will clarify
- End with an affirmation that everything witness said was true, accurate, and complete
- Open-ended questions
- Have a theory in mind (for the case and the witness) but be flexible
- Remember that this is not a cross examination
- At a bare minimum, always cover pre-event, event, post-event, internal and external
- Elimination Clauses (lock them in)

- Ask open-ended questions – this is not cross examination. You want the witness's own words.
- Avoid suggestive questions. Instead of “was it sunny?” try “what was the weather like?” Instead of “was the car green?” try “what color was the car?”
- Avoid “do you recall” questions – it has the subtle effect of suggesting the witness might not recall and tends to give them an out.
- Have the witness define terms. What does “angry” or “emotional” mean to that witness?

- Resist the urge to be too conversational – permit the witness to answer your question. Keep asking your question until you get an answer.
- Use simple language
- Ask one thing per question
- Concrete descriptions of distance (using objects in the room)
- Concrete estimate of time (using watch/timer, etc...)

- Prepare, but be ready to listen
- Determine whether you can make otherwise inadmissible information admissible in the course of the interview
- Use traps/misdirection where appropriate

FROM INTERVIEW TO CROSS

- Defense is Mis-Id. Allegation is that client shot bouncer at a night club.
- Interview:
- Q: Had you ever seen the guy before
- A: No
- Q: Can you describe him?
- Q: Yeah, they both looked, ah, African, African-American, dark skin, dreadlocks, both relatively short and skinny
- Q: Do you have any idea how tall
- A: I'm not sure, I'm not a good estimator of height, but he was not 6 feet.
- Q: Do you remember anything about what he was wearing
- A: Its been a long time, I'm not sure but I think I told the police after I was shot that he was wearing a blue shirt
-

■ Cross :

- Let's talk about what you say the person who shot you looked like
 - -African-American
 - -Dark skinned (I just meant not white)
 - -Dreadlocks
- -Long braided hair (I meant twists)
- -Blue shirt (Had blue in it,)
- -And that is all you remember about what the person who shot you looked like
- Problems: Not enough detail (skin tone, hairstyle, clothes), no elimination clauses, can come back and say he was wearing something else distinguishing

- Q: So the guy who shot you came back, what was he doing
- A: He walked towards us over to a car that was sitting here on the opposite side of the street
- Q: Pretty much right across
- A: Yeah, right across and uh he went and sat on the hood of the car facing us with his legs in the street just facing us with his hand under his pants
- Q: What did you do when you saw him
- A: I just stayed right there, we were just standing there not saying a word
- Q: How long was the guy sitting on the car for
- A: About 2 minutes and then he walked over to me...

- Let's talk about what happened when the guy came back
- -Didn't come right up to you
- -He wasn't on the same side of the street as you
- -He was on the other side of the street
- -You didn't call the police
- -You didn't run

WHAT COULD BE ADDED...

- Time (Do the time trick with them)
- distance (relative to room or objects on the scene),
- how facing,
- how much of face was facing,
- description of car,
- how hand down pants (What think),
- other noises (from club),
- lighting,
- distractions,

- ask for a 2nd description,
- why didn't go get police,
- what did when walking towards,
- how feeling,
- what thinking,
- stress level,
- what focusing on (maybe will say hand in pants)

TRAPS



TRAP EXAMPLE I

- In the course of investigation of a self-defense case you learn decedent (or complainant) has a hx of arrests for violent incidents
- Client doesn't know about it
- Can't find witnesses to support admissibility as character evidence
- When interviewing decedent's close friend and state's main witness attempt to set trap to make admissible

- Lay foundation of how well witness and decedent knew each other
- That knew each other during the time period of arrests
- That lived together/in proximity
- What kind of guy was decedent
- Ask whether decedent in trouble with law
- For what kind of stuff
- Ever anything violent
- Anyone ever claim decedent violent

- Hopefully, witness lies and tries to say that decedent never had any arrests for violent offenses
- Now, you have a chance to argue the arrest records are admissible as evidence of bias

TRAP II

- Your client has claimed the attack on him was racially motivated
- Client made claim during interrogation
- You are interviewing lead detective
- Lead detective reviewed interrogation but did not conduct it
- “Decedent was white, client AA, any reason any part of this incident was racially motivated”
- **Not, “Did you follow up on my client’s claims that the attack was racially motivated?”**

TRAP III

- Your investigator has found multiple Youtube videos of State's witness smoking copious amounts of marijuana (5 bong hits in sequence)
- The witness has acknowledged MJ use
- Question: "How would you describe your marijuana use, light?, moderate?"
- Suggest an answer which potentially makes the bad video admissible

A FINAL WORD ON TRAPS

- Without thorough investigation there can be no trap
- Think about ways to make potentially inadmissible evidence admissible
- You can't force a person into a bad answer, but you can lay the trap

TO RECORD, OR NOT TO RECORD...



TO RECORD

- Think about it first
- Rarely, if ever, for defense witnesses
- Is the state's witness trying to be helpful but doing a bad job (the recanting dv complainant)
- Better for locking witnesses in
- More effective impeachment
- Doesn't create a swearing contest between the witness and the investigator

TO NOT RECORD

- You want to uncover as much information, good or bad, as possible.
- Your interview may be more thorough than the State's.
- Your interview will reveal your defense theory.
- If your interview is more thorough, and uncovers unhelpful information, you may be very glad did not tape the interview.

BUT...

- A state's witness will likely tell the prosecutor bad facts
- Faulty premise that the state will only find out bad facts from our interview
- If a witness says something bad in your interview, they may well say something worse at trial

THE BOTTOM LINE

WHATEVER YOU DO, THINK ABOUT IT, AND
MAKE A MEANINGFUL DECISION

COMMON DIFFICULTIES

- Witness: “I already gave a statement to the police. Do I have to talk to you?”
- Yes.
- What else could you say?
- “You may have witnessed part of what happened, so it is important that we talk to you. It is common that we interview anyone who is identified as a potential witness”
- For the lawyer: See above. And, “we don’t have to talk now, but in the course of this case, we are going to end up having to talk. “
- In other words, yes.

- Witness: “can I tell you something off the record?”
- Response: I will listen to anything you want to tell me.
- I do not have to write/down record this **right now, if you want.**
- Ultimately, however, if pressed, you have to tell them that there is no “off the record”

- **Witness:** Can I see my statement before we talk?
- We are interested in what you remember about what happened. I understand it happened a while ago, but let's talk and see what you remember first
- Consider the plus/minuses to letting the witness see their previous statement

- Witness: “what does (other witness/client) say about all this.’
- “one thing that we never do is tell witnesses what other witnesses are saying. For example, we would not tell another witness what we talked about today. In terms of my client, one of the fundamental ethical rules is that we don’t disclose anything a client says to anyone.”

- What if witness isn't able to deliver a coherent story?
 - Is it helpful if the witness is disorganized and incoherent? Get all the gobbledegook out in the interview.
 - Do you think the witness has helpful information but just has trouble spitting it out? You can attempt to lead the witness to the helpful information and get the witness to agree to what you've said.

- **Witness: I'm not going to talk to you**
 - **Why not? (you might get some good stuff here)**
 - **Would you prefer a deposition?**
 - **Is there some circumstance that would persuade you to discuss this?**

■ Witness implicates himself/admits to crime

- This is fine, as long as you have been clear about who you are. That information is helpful and we do not have a duty to tell the witness to stop talking –we have a duty to try and get as much information as possible from the witness to the extent it is helpful to the client.
- If it helps the client to exclude the witness' testimony, we may consider getting the witness a lawyer.

- **Prosecutor gives the witness legal advice/interferes with the interview**
 - Be clear on the record to the witness that the prosecutor knows they are not the witnesses' attorney and cannot offer legal advice
 - That the question is relevant
 - And explain that witness can either:
 - (1) Answer the question and proceed with the interview
 - (2) Not answer the question, proceed with the interview (if you think that will be useful) but a court may compel the witness to answer the question in a second interview
 - (3) Ask the question – if it isn't answered, terminate the interview and seek a deposition