

A crash-course in investigation by Quinn O'Brien

Focusing on Finding Information and Documents &
Interviewing Witnesses

Finding information & documents

- In every case, consider what documents might have been created and who would have created them.
 - What documents do the police create? How can you obtain them? Discovery, Subpoena?
 - What other government agencies might be involved in the investigation, such as the fire dept., the police lab, the medical examiner, buildings dept., etc.;
 - Is there background information about witnesses that you could obtain – prior records, litigation, etc.
 - What agencies might provide you with information/documents about your client? Hospitals, schools, group homes, social service agencies, juvenile defenders? A letter from your client with a release form might be sufficient to obtain the documents, or a phone call to prior counsel might save you some time.

Visiting the scene

- Why visit the scene?
 - Locate witnesses,
 - Understand distances,
 - Understand sightlines,
 - Get a feel for the neighborhood.
 - Cameras? Where are they? Who controls them? How can you obtain the footage? You have to move quickly.
- Remember to take pictures.
- Bring a witness – you can't testify and try the case at the same time.

Interviewing witnesses: friendly and adverse

- Before you interview adverse witnesses, obtain as much information as you can about that witness and what he or she has previously said about the facts;
- Talk to your client. He or she might know a great deal about the witness, for example, prior records, bad acts, litigation, etc.
- Use electronic search engines (discussed in a minute) in addition to what you can obtain through discovery, through your client and your independent investigation.
- Review the documents; and
- Create an interview plan More on how to conduct the interview in a minute.

Physical Evidence

- Defense attorneys do not usually collect physical evidence. We are not first responders and are not invited to the crime scene, but we need to know about the physical evidence and its collection.
- If you are appointed/assigned/retained quickly, can you get to the autopsy in a homicide case and bring your own pathologist?
- Can you see the weapon? Where is it? Who must you contact to have it produced?
- Should you conduct your own tests? For guns, drugs, biology, etc.
- Can you replicate the state's theory? E.g. angles, trajectories, lines of vision?
- Is there evidence to test that the DA hasn't tested? Can you move for testing.
- Can you speak with the technical people at the lab? They should be independent neutral witnesses. Do you want to visit the lab and inspect the testing conditions?

Creating & Using Documentary Physical Evidence

- Maps, diagrams, photos – think about impact and, always, who will introduce the evidence
- Phone records – will the phone company introduce the records? If not, who?
- Medical and mental health records – even if they are certified, you will still need a witness to testify.
- 911 calls.
- Camera footage. Will the state stipulate? Is that the best way of introducing the evidence?
- The court will accept, and permit you to publish to the jury, some evidence without calling witness, e.g. weather, sunset, tides.

Plan for the trial

- How will you introduce the evidence? What witness will testify?
 - How well will the investigator look on the stand? Will the witness create unnecessary problems? E.g. don't put on an investigator with a criminal record.
 - Are there chain of custody issues?
 - Will the DA argue that the evidence looks different/ or has changed?
 - Are there reciprocal discovery issues? E.g. if you do a test, you'll have to turn over the report if you intend to introduce the evidence.

Investigation: The Third Circuit considers defense counsel's responsibility In three recent cases:

Grant v. Lockett, 709 F.3d 244 (3rd Cir. 2013)- duty to investigate

- Granting a habeas petition on IAC, the 3rd Cir. held, “under [*Strickland*](#), ‘counsel **has a duty to make reasonable investigations** or to make a **reasonable decision that makes particular investigations unnecessary.**’ [*Strickland*, 466 U.S. at 691, 104 S.Ct. 2052](#). A key prosecution witness's prior criminal history and resultant parole status clearly constitute important impeachment evidence. It is beyond the range of professionally reasonable judgment to forego investigation of, and impeachment based upon, such evidence absent some apparent strategic reason that might explain or excuse counsel's failure. ‘Thus, viewed objectively, [Grant's] counsel unreasonably failed to introduce such impeachment evidence.’”

Grant v. Lockett, con't.

- And, in the same case, the 3rd Cir. Continued, . . . “Because we conclude that Grant is entitled to federal habeas relief based on trial counsel's failure to investigate Moore's criminal history and parole status, we need not address whether trial counsel's failure to investigate and call Oden and Gee as defense witnesses independently warrants relief.
- Nonetheless, we do note that Oden and Gee's affidavits add to the already significant evidence undermining the verdict against Grant. They also add support to our conclusion that counsel's deficient performance with respect to Moore's parole status prejudiced Grant's defense.”

Gregg v. Rockview SCI, 596 Fed. Appx. 72 (2014) – duty to investigate

- The Third Circuit held counsel ineffective because he failed:

“to conduct a reasonable investigation into the identity of Ms. Jones, one of two alibi witnesses identified by Gregg before trial. In fact, the record reflects that counsel conducted no investigation at all. Despite receiving an investigator's note indicating that Gregg claimed to be with his friend Jones and an individual named “Weezy” at the apartment of Jones's mother on the night of the shooting, counsel never asked Gregg or Jones who “Weezy” was or how to contact her. Counsel only came to learn that “Weezy” was the nickname of Ms. Fitzgerald, Jones's girlfriend, when Gregg took the stand at trial and identified her by her given name. Counsel's inaction falls well short of the reasonable investigation that *Strickland* requires.”

Gregg v. Rockview SCI, continued – duty to use subpoena power.

- Failure to use a subpoena to bring the witness into court is IAC:
- “As we have previously noted, defense counsel can compel a witness to appear at trial and testify through the use of a trial subpoena. See [Grant, 709 F.3d at 239 n. 10](#). To provide competent assistance under the circumstances of this case, counsel should have employed such a measure, at a minimum, to ensure the attendance of the defense's key witness. Counsel has offered no principled or strategic reason for his failure to do so here, instead asserting that it is not generally his office's practice to subpoena a witness who appears willing to testify. This rationale is insufficient to justify counsel's failure.”

Moore v. Beard, 42 F. Supp. 3d 624 (2014)- duty to investigate

- Defense failure to call alibi witness.
- “It is patently unreasonable for defense counsel to fail to introduce evidence that contradicts a key prosecution witness's testimony.
- Attorney Yeager's concession that the defense failed to properly and thoroughly interview Jones—a potentially critical exculpatory witness who would have squarely contradicted testimony of the key Commonwealth witness—establishes that counsel's decision not to call Jones is not the kind of strategic choice entitled to *Strickland* deference.
- The court therefore concludes that, in light of all the circumstances, counsel's failure to call Jones was so egregious that it falls ‘outside the wide range of professionally competent assistance’ and is therefore deemed deficient. [*Strickland*, 466 U.S. at 689–90, 104 S.Ct. 2052.](#)” (other internal citations omitted.)
- Defendant likely innocent. Habeas granted 30 years after conviction.

Moore v. Beard con't.

- Failure to use impeachment material on cross-examination: “Attorney Yeager concedes that he knows of no strategic reason for the failure to fully explore Scott's state and federal plea agreements—and his potential motivation to testify in a manner favorable to the prosecution—during cross-examination.
- Quite frankly, the court is also unable to conjure any reasonable justification for the failure of defense counsel to introduce this important impeachment evidence. Accordingly, defense counsel's omission is so egregious as to fall ‘outside the wide range of professionally competent assistance’ and is therefore deemed deficient. [Strickland, 466 U.S. at 689–90, 104 S.Ct. 2052.](#)”

Electronic Searches: The Google

- Google is only as smart as you are – don't be THAT guy.
- Google cannot search the content or databases of each site.
- It is free: multiple searches are a MUST: use quotes, use the minus sign (-) to exclude a term, use an asterisk (*) for unknown terms, do a reverse image search...
- Don't forget about the image search, the maps, etc...

The Google logo is displayed in its characteristic multi-colored font, with each letter in a different color: G (blue), o (red), o (yellow), g (blue), l (green), e (red).

google is s|

google is skynet

google is slow

google is scary

google is spying

FACEBOOK

Lesson 1:

ETHICS

DO NOT 'FRIEND' WITNESSES;

DO NOT COMMENT, LIKE, OR OTHERWISE ALTER A WITNESS'S PAGE;

DO GET YOUR CLIENT'S PASSWORD AND HAVE A LOOK AROUND;

DO FIND A SYMPATHETIC CONNECTION;

MAYBE SEND A MESSAGE FROM YOUR OWN ACCOUNT

Prisons

- <https://www.vinelink.com/vinelink/initMap.do> VINELINK – prison info aggregator
- <http://www.bop.gov/iloc2/LocateInmate.jsp> BOP - federal inmates
- <http://offender.tdcj.state.tx.us/OffenderSearch/> Texas

Government Documents Online

County Governments

- Property records
- Recorder of deeds
- Tax information
- Marriage Licenses
- Zoning information
- Voter registration
- Criminal history

State Governments

- DMV information
- Professional Licensing
- Campaign contributions
- Dep't of Natural Resources
- Highway Patrol information
- Voter records
- Business registration and information

Be creative! This is more than just a 'locate' exercise!

NICAR Net Tour

- <http://www.ire.org/resourcecenter/nettour/index.html>
- Here you'll find tips on how to use the Freedom of Information Act, how to find public documents using the internet and lots of other helpful links.

HINT: Journalists don't get subpoena power. We have much to learn from them, Grasshoppah.



Lexis and Westlaw

- People Finders
 - Public records search and locator
- Bankruptcy findings
- ABA disciplinary findings
- NEWSPAPERS
 - Don't limit newspaper searches to Lexis/Westlaw

Are these the droids you're looking for?



Databases are only as reliable as the humans who enter the data.

Almost Ready to Knock on Doors!



← There they are!



The Old Jedi Mind Trick:
"You didn't see what you just saw"
—Obi Wan Kenobi

Jedi Mind Tricks 101

Approaching and Interviewing
witnesses

Quinn O'Brien

ABA Guidelines, Rules 3.7 and 4.1 – 4.4

What this means to you in an investigative context:

1. Lawyers cannot testify for their clients – so you need a witness.
2. You cannot lie about who you are, what you are doing, or who you represent
3. If a person is represented by counsel **IN THE MATTER YOU ARE INVESTIGATING**, you must obtain permission from counsel to proceed with the interview.

*****NEVER FORGET ABOUT ATTORNEY/CLIENT PRIVILEGE!*****

Have you collected and read lots and lots of documents? Do you know where your witnesses live? Do you have a PLAN?

- Work from the outside-in; don't go for the Big Fish on the first trip
- Who are you going to see first? Why?
- What are you going to take with you?
- Have you role-played and discussed approaches with your peers?
- WHO are you going to chose to do the interview?

Barriers to Disclosure:

Things to consider before your interview
the witness may be dissuaded from speaking
because of the following factors, among others:

- Shame, embarrassment, humiliation
- Fear of Consequences
- Lack of understanding
- Culture, race, class
- Hostility to your cause or client

How will you encourage the witness to speak with you?

No phone interviews*.

*Ever. No exceptions. Always in person.

Make a good entrance!

- Identify yourself clearly and confidently
 - “I’m Millard Farmer and I represent Billy Bert.”
- Have a good handshake—firm and warm
- Get your foot in the door
- **NO MORE THAN TWO INTERVIEWERS AT A TIME!!**

Getting started

- Don't debate whether the interview will take place.
 - Why does this upset you?
 - How were you hurt?
 - Help me understand...
- Be low key, but persistent.
 - “I need your help to learn about...”
 - “I'm here to find out...”
 - “What do you know about...”
- **NEVER ASK PERMISSION!**
 - Can we talk? NOPE.
 - Do you have time? NOPE.

Taming your own nervousness

- Emotions are reflected and amplified;
 - your tension makes the witness tense;
 - Your ease puts the witness at ease
- Practice on check-out clerks
- “Interview” strangers in elevators
- A good interview is a conversation
- It’s your job to knock on that door! It’s not only legal, it’s your duty!

Rapport Building Tips

- Pet the dog
- Drink the coffee
- Find something to like
- Linger in the comfort zone
- Don't be phony!
 - Self-disclose, but not too much

Rapport killers

- No Tape recorders!
- Choose the right time for making notes
 - During interview risks rapport
 - Ask permission when the time is right
 - Know when to put the pencil down
- Don't script your questions
- Two's company, three is a crowd
- Escape distractions! (TV's, crowds, etc.)

NO GUNS!

DO NOT SCRIPT YOUR QUESTIONS!

Sorry for yelling, but this is important.

Have a plan

Plan lead in sentences, think about transitions

But don't script your questions.

Tame Your Inner Lawyer

- This is not a Direct
- This is not a Cross
- This is not an interrogation
- This is not a race
- This is not confirming what you found in the discovery

This is a conversation. Expect the unexpected. Be in the moment. Follow-up.

How to have a good conversation

Ask OPEN-ENDED questions that will yield narrative answers:

-Why?

-How?

-Can you give me an example?

-What do you mean by...?

Used closed-ended questions sparingly to focus the conversation or confirm a detail.

Not so good questions

- Super complicated questions – think compound, complex sentences and talking too much.
- Closed-ended questions yield a yes-or-no answer; Use these sparingly to focus the conversation if you must, but try to avoid them.
(Too many closed-ended questions can start to seem accusatory or hostile.)

Third Grade English Lesson:

If you begin a sentence with a Helping Verb, you will be asking a closed-ended question.

Don't be Anne Curry. Listen!

- The more you talk, the less you hear
- Silence is golden; wait for an answer!
- Don't interrupt the witness!
- Be patient!
- Don't rush the response!
- Don't finish the witness' sentences!
- Don't make speeches!
- Don't offer multiple-choice answers!

Listen!



Jedi Mind Trick =

SILENCE

Think Like an Investigator

- Look for Brady material/violations
- You don't know what you don't know
- Read the social cues
- Look for leads: more people? Supporting/corroborating documents?



Leave the door open...

- A good interview leaves the door open to return
 - “I will be back if I have more questions for you...”

The End

It was not THE ending. There are neither beginnings or endings to the turning of the Wheel of Time. But it was an ending...

