

# CHAPTER 11

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## *Investigation and Interviewing; Directory of Sources*

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\* Research assistance provided by Michelle Dame and Neal Smith

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## § 11.1 INVESTIGATION GENERALLY

The cornerstone of legal representation is the gathering of all facts, which the Supreme Court has unanimously held to be “essential to proper representation”<sup>1</sup> and which is a required under the Supreme Judicial Court’s professional conduct rules.<sup>2</sup> An attorney’s failure to adequately investigate a case violates the client’s Sixth Amendment right to the effective assistance of counsel.<sup>3</sup> Counsel must fully investigate the case regardless of client admissions<sup>4</sup> and before any plea bargain is recommended.<sup>5</sup>

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1. *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981).

2. *See* S.J.C. Rule 3:07, Mass. R. Prof. C. 1.1, 1.2, 1.3. Professional conduct standards also stress the necessity of thorough investigation. ABA Standards Relating to the Administration of Criminal Justice: Prosecution and Defense Function § 4-4.1(a) (3d ed. 1993) (duty to promptly investigate “all avenues leading to facts relevant to the merits . . . and the penalty,” even where client admission of guilt to counsel or client readiness to plead guilty); CPCS Performance Standards and Complaint Procedures Part I, Chapter II (investigation required for preliminary proceedings, including arraignments and bail hearings), Part I, Chapters IVA, C, I (investigation for pretrial preparation, including preparing motions and motion hearings), and Part I, Chapter VIA (trial investigation).

3. *See* *Commonwealth v. Haggerty*, 400 Mass. 437, 439-43 (1987) (ineffective not to obtain medical expert); *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (“counsel has a duty to make reasonable investigations”); *Commonwealth v. Brennick*, 14 Mass. App. Ct. 952, 953 (1982) (rescript) (representation at sentencing by a substitute, ill-prepared attorney was found to constitute ineffective assistance, requiring reversal); *Powell v. Alabama*, 287 U.S. 45, 59-60 (1932) (assistance of counsel required for “vitaly important” phases of consultation, investigation, and preparation); *Commonwealth v. Farley*, 432 Mass. 153, 156-57 (2000) (ineffective assistance of counsel to not develop and investigate evidence that could have supported defendant’s defense); *Commonwealth v. Baker*, 440 Mass. 519, 529 (2003) (duty imposed under State and Federal constitutional law to conduct an independent investigation of facts, including forensic, medical, and scientific evidence on which the Commonwealth is relying); *Commonwealth v. Milton*, 49 Mass. App. Ct. 552, 560-61 (2000) (failure to investigate insanity defense constitutes ineffective assistance of counsel if facts known or accessible to counsel raises a reasonable doubt about defendant’s mental condition) . *But see* *Commonwealth v. Haley*, 413 Mass. 770, 777 (1992) (defendant failed to show prejudice); *Commonwealth v. Gould*, 413 Mass. 707, 711 (1992) (failure to investigate a mental state claim by defense counsel does not constitute ineffective assistance of counsel when there are no facts to support this claim); *Commonwealth v. Messere*, 14 Mass. App. Ct. 1, 11 (1982) (although any counsel who fails to interview a material witness leaves himself open to claim of ineffective assistance, failure here was not ineffective because result of defendant’s lies to counsel); *Commonwealth v. Cepulonis*, 9 Mass. App. Ct. 302, 304-08 (1980) (failure to investigate alibi was harmless error); *Osborne v. Commonwealth*, 378 Mass. 104, 111 (1979) (failure to investigate insanity defense not ineffective unless facts accessible to counsel raise reasonable doubt regarding mental condition); *Commonwealth v. Saferian*, 366 Mass. 89, 97-98 (1974) (lack of investigation and preparation not prejudicial because defendant had two days to consult with counsel during the motion to suppress); *Commonwealth v. Comita*, 441 Mass. 86, 94-95 (2004) (no ineffective assistance of counsel when defendant failed to show that if counsel had filed a motion to suppress that the motion would have been granted).

*See also* *Wagenmann v. Adams*, 829 F.2d 196, 219-23 (1st Cir. 1987) (affirming \$50,000 malpractice award against lawyer who, inter alia, failed to investigate for client facing bail and competency hearing); *Code v. Montgomery*, 799 F.2d 1481, 1484, 1484 (11th Cir. 1986); *Harris v. United States*, 441 A.2d 268, 274 (D.C. 1982) (in both *Code* and *Harris*, the conviction was reversed for failure of counsel to investigate which resulted in prejudice to the defendant); *Eldridge v. Atkins*, 665 F.2d 228, 236 (8th Cir. 1981) (ineffective assistance presumed when counsel failed to interview important eyewitnesses); and other federal cases finding ineffective

Thorough investigation prepares counsel for trial by divulging the Commonwealth's case; by increasing the number of choices available for a defense theory; and, as witness statements are obtained through interviews or evidentiary hearings, by developing contradictions that can be used for impeachment. Thorough investigation is also necessary to maximize the defendant's position in plea bargaining or in the sentencing argument.

Obviously, however, priorities must be set. Generally, these priorities will be a function of (1) relevance to the ever-emerging theory of defense, (2) investigation requested by the defendant,<sup>6</sup> and (3) the comparative fragility of the piece of evidence. Early preservation of evidence is particularly important when witnesses or physical evidence may disappear; when an alibi may depend on drawing the witness's attention to apparently insignificant dates or events; or when a physical injury may fade.

## § 11.2 USING AN INVESTIGATOR

An investigator provides several advantages: unlike the attorney, she may freely testify to her interviews or observations;<sup>7</sup> she may have greater police or community contacts or greater expertise in the subject; and investigation may proceed despite other demands on counsel. There are some countervailing considerations, however. Counsel may lose control of the case if the investigator squanders limited interviewing opportunities or if counsel's reduced immersion in the facts leads him to overlook potentially significant evidence or alternative defense theories. An investigator may not grasp the full legal importance of certain facts. An investigator's reports may be more discoverable than counsel's.<sup>8</sup> Moreover, counsel is ethically liable for the activities of the investigator,<sup>9</sup> and must ensure that the investigator is not corrupt, properly identifies herself to witnesses, etc.

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assistance from failure to interview witnesses, *cited in* Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 665 nn.221, 222.

4. ABA Standards Relating to the Administration of Criminal Justice, Standard 4-4.1(a) (3d ed. 1993).

5. ABA Standards Relating to the Administration of Criminal Justice, Standard 4-6.1(b) (3d ed. 1993). *See also id.* Standard 4-4.1 (duty to promptly investigate). *But see* Wiggins v. Smith, 539 U.S. 510, 521 (2003) (quoting Strickland v. Washington, 566 U.S. 668, 690-91 (1984): "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation").

6. Failure to pursue leads put forward by the defendant is ineffective assistance of counsel. *See* Commonwealth v. Farley, 432 Mass. 153, 156-57 (2000) (ineffective assistance of counsel to not investigate defense raised by defendant); Commonwealth v. Cepulonis, 9 Mass. App. Ct. 302, 305 (1980) (failure to investigate plausible alibi would be ineffective assistance but here harmless).

7. Where counsel will be a witness for his client, he or she is required to withdraw from the case except in narrowly defined circumstances. Mass. R. Prof. C. 3.7; *see also* Super. Ct. R. 12.

8. *See infra* § 16.2C, notes 47-53.

9. In addition to potential criminal liability, it is unprofessional conduct for counsel knowingly to use illegal investigation *or* to employ, instruct, or encourage others to do so. S.J.C. Rule 3:07, Mass. R. Prof. C. 5.3 Responsibilities regarding Nonlawyer Assistants.

To make good use of an investigator, counsel should:

1. Thoroughly interview prospective investigators to ascertain their experience, intelligence, judgment, and cooperativeness;
2. Communicate directly with each investigator and not merely with the chief investigator;
3. Keep the investigator fully informed of the emerging defense theories, including the legal significance of factual possibilities<sup>10</sup> and the explicit purposes of her interview;
4. Prepare written memoranda to the investigator regarding the case, which are privileged;
5. Warn the investigator not to reveal any part of the defense strategy to anyone, emphasizing particularly sensitive secrets;
6. Require the investigator to keep detailed records of information useful for locating a witness should he disappear, as detailed *infra*; and
7. Have the investigator compile thorough logs, reports, and witness statements, unless prosecutorial discovery considerations warrant otherwise.

*Funds for investigation.* If the defendant cannot afford to hire an investigator who is necessary to the defense, she has a constitutional and statutory right to obtain court-ordered funding. This subject is addressed *supra* at § 8.4.B.

## § 11.3 DIRECTORY OF INVESTIGATIVE TOOLS AND SOURCES

### § 11.3A. SOURCES OF INFORMATION GENERALLY

The sources of information are so numerous that a list is by nature limiting, and counsel should be propelled by common sense and curiosity to pursue all leads persistently. In § 11.3B, *infra*, we list particular organizations and agencies that may be helpful in obtaining needed information. In this section, we note the following areas of investigation, which should be borne in mind and exhausted whenever applicable:

1. *Interviews with the defendant*, discussed *infra* at §§ 11.4 and 11.9;
2. *Interviews with all potential witnesses*, friendly or hostile, civilian or police, discussed *infra* at § 11.6. Remember that ambulance drivers, medical personnel, tow truck drivers, neighbors, and news reporters may all be worthwhile sources in particular cases.
3. *Immunizing potential defense witnesses*, discussed *infra* at § 33.7B(3).
4. *Discovery*. Counsel should obtain all evidence in the possession of the prosecutor or police, such as witnesses' statements, police reports, accident reports, physical evidence, grand jury minutes, confessions, etc. This subject is addressed *infra* in ch. 16 (Discovery).
5. *Court papers and records*<sup>11</sup>. The complaint, any search warrants, the defendant's criminal record available from probation, and other court records should be examined for investigative purposes. In particular, an affidavit supporting a warrant and an application for a complaint will usually contain substantial police information,

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10. *E.g.*, an investigator cannot properly elicit information on a search, identification, or self-defense without thorough familiarity with the respective legal doctrines.

11. *See* CPCS Performance Standards and Complaint Procedures Part I, Chapter IID (discussing preliminary discovery issues and prosecution requests for non-testimonial evidence).

including names of witnesses. Where there was a warrant, it may be filed separately from the case, in which case an annotation such as “s.w.” may be marked on the case papers.

6. *Prior testimony of witnesses.*<sup>12</sup> A witness’s testimony may be stenographically or electronically recorded in a codefendant’s trial; in a previous reversed trial of the same case; or in discovery or trial in a related civil case. Where a civil action by the defendant is appropriate and proper, filing suit may have the byproduct of providing additional discovery. Additionally, the investigative potential of the present case should be fully considered: testimony may be taken at a probable-cause hearing, suppression hearing, possibly arraignment, grand jury, and so forth.

7. *Third-party records or documents*, such as telephone, IRS, hotel, school, union, credit, bank, employment, or hospital records; and, as a guide to standard procedures, police manuals or expert treatises. Many of these sources are listed in the Directory constituting § 11.3B, *infra*.

8. *Examine all real evidence.* This includes potential identification evidence at the scene, the arrangement of objects at the scene, photographs or other records of the event, and evidence of physical condition following the incident. However, removing or receiving incriminating evidence may be construed as concealing evidence unless disclosure or other steps are taken, addressed *infra* at § 11.7.

9. *Expert consultation and testing.* It may be necessary to obtain an expert to conduct scientific testing or otherwise reveal whether hidden or esoteric information confirms the defense or prosecution theory. An expert may also be used as a consultant in preparing for cross-examination of the Commonwealth’s witnesses or as a defense witness. Obtaining and using experts is a subject addressed *infra* at ch. 12.

10. *Visit the scene.*<sup>13</sup> Visiting the scene of the crime, search, or arrest, may provide some leads; certainly it will provide a better factual understanding. Attempting to act out the motions of the participants at the scene is an important test of the accuracy of the allegations and may greatly aid any subsequent cross-examination at the trial. It is important to visit the scene under similar conditions, such as at night under a full moon. If testimony about the scene is desired, it will be necessary to bring a third person such as an investigator or photographer.

### § 11.3B DIRECTORY OF ORGANIZATIONS WITH INFORMATION

The following sources may provide records or other information relevant to a particular case. Many of the documentary sources listed can be found at the Boston Public Library,<sup>14</sup> the Kirstein Business Library in Boston,<sup>15</sup> or the State House Library.<sup>16</sup>

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12. See Mass. Guide to Evid. 804(b)(1) Prior Recorded Testimony; Mass. Guide to Evid. 801(d)(1)(A) Prior Inconsistent Statement Made Under Oath or Penalty of Perjury at Certain Proceedings; Commonwealth v. Clemente, 452 Mass. 295, 312-315 (2008) (discussing prior testimony exception to the hearsay rule).

13. See Performance Standards and Complaint Procedures Part I, Chapter IVA (discussing investigation in the pretrial preparation stage).

14. 700 Boylston St., Boston, MA; tel. (617) 536-5400; <http://www.bpl.org/contact/index.htm#visit>; email: ask@bpl.org.

15. 700 Boylston St., Boston, MA; tel. (617) 859-2142; <http://www.cityofboston.gov/news/default.aspx?id=4335> ; email: ask@bpl.org.

16. 24 Beacon St., Boston, MA; tel. (617) 727-2590; <http://www.mass.gov/anf/research-and-tech/oversight-agencies/lib>.

Contents of This Directory

1. Tools for Locating or Researching Persons
  - a. Forwarding Addresses
  - b. Reverse Directories
  - c. Telephone Directories and Directory Assistance; Internet Phonebook Sites
  - d. Town Census
  - e. Department of Motor Vehicles
  - f. Registry of Vital Statistics and Research
  - g. Owner of Property
  - h. Voter Registration
  - i. Locating Prisoners
  - j. Employment Records
  - k. Other Persons Fitting Culprit's Description
2. Tools for Researching Experts or Famous Persons
  - a. Biographical Indexes
  - b. Expert's History and Testimony
  - c. Finding Experts
3. Media
  - a. Television Tapes
  - b. Newspapers and Magazines
4. Prison Records
5. Court Records and Transcripts
6. Police and Fire Department Records
7. Tracing of Guns
8. Medical, Hospital, and Ambulance Records
9. Company Records
  - a. Telephone Company Records
  - b. Credit Rating Companies
10. Weather Reports or Interpretations
11. Other State or Local Government Records
  - a. Maps
  - b. Streetlights and Traffic Lights
  - c. Welfare Department Records
  - d. State Corporations Division
  - e. State Ethics Commission
  - f. State Uniform Commercial Code Office
  - g. State Office of Campaign and Political Finance
  - h. State Charitable Organizations Office
  - i. State Records on the Professions
  - j. City and Town Hall Records
12. Other Federal Government Records
  - a. Social Security Records
  - b. Military Records
  - c. Immigration
13. Other Third-Party Records

*Note regarding compelled production:* Some of the sources listed below will provide information directly to investigators or counsel. Other sources may withhold information unless compelled to produce it — by summons, by court-ordered discovery,

or by a FOIA (Freedom of Information Act) request. *See infra* chs. 13 (summonses) and 16 (discovery).

*Note regarding public records:* In Massachusetts, public records are subject to mandatory public disclosure on request.<sup>17</sup> Public records are broadly defined to include all documentary material or data, regardless of physical form, made or received by an officer or employee of the Commonwealth, unless statutorily exempted.<sup>18</sup> Moreover, there is a presumption that all governmental documents are public records.<sup>19</sup> However, as noted *infra*, the Criminal Offender Record Information Act (CORI) provides that some records relating to a criminal prosecution or disposition are not public records within the act.

## 1. Tools for Locating or Researching Persons

### a. Forwarding Addresses

The post office charges a \$1 fee for recording a customer's forwarding address, which is retained for one year after filing. . To obtain a forwarding address from the post office, send a letter marked "Return Service Requested" to the old address. Instead of forwarding the letter, the post office will return the letter with the forwarding address

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17. G.L. c. 66, § 10(a) (right of access); G.L. c. 4, § 7(26) (definition of public records).

18. G.L. c. 4, § 7(26); Attorney General v. Assistant Comm'r of the Real Property Dep't, 380 Mass. 623, 625 (1980); Attorney General v. Board of Assessors of Woburn, 375 Mass. 430, 431-32 (1978); Cape Cod Times v. Sheriff of Barnstable County, 443 Mass. 587, 591-92 (2005).

G.L. c. 4, § 7(26) contains several exceptions including: (1) investigatory materials the disclosure of which would prejudice effective law enforcement, c. 4, § 7(26)(f); (2) invasion of personal privacy of a specifically named individual, c. 4, § 7(26)(c); and (3) criminal offender record information ("CORI," *see* G.L. c. 6, § 167, 168A.) that may not be disclosed to the general public. These materials may be deleted from the reports, rather than preventing disclosure of the entirety. But analyzing the Act's application to police records, the S.J.C. in *Reinstein v. Police Comm'r*, 378 Mass. 281 (1979), stated:

"There is no blanket exemption provided for records kept by police departments" [citing *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 65 (1976)]. Nor does the statute exempt all investigatory materials; instead it invites case-by-case consideration of whether access "would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest..." That some exempt material may be found in a document or report of an investigatory character does not justify closure as to all of it.

*Reinstein, supra*, 378 Mass. at 289–90. Any portion that is exempt from disclosure must be segregated, with the remainder of the document disclosed. *Reinstein, supra*, 378 Mass. at 294–95. *See also* Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 436 Mass. 378, 383-84 (2002).

19. G.L. c. 66, § 10(c); 950 C.M.R. § 32.08(4) (2003); *Georgiou v. Comm'r of Dept. of Indus. Accidents*, 67 Mass. App. Ct. 428, 431 (2006). A record custodian must demonstrate that an exemption applies in order to withhold disclosure of a document. 950 C.M.R. 32.08(1) (1987); *Coleman v. Boston Redevelopment Authority*, 61 Mass. App. Ct. 239, 243 (2004).



attached.<sup>20</sup> You can also request a forwarding address from the post office by submitting a FOIA request.<sup>21</sup>

**b. Reverse Directories**

Reverse directories list by address or by telephone number. Listings by address are additionally useful because they provide lists of neighbors. Reverse directories are available at the Boston Public Library<sup>22</sup> Humanities Department, the Kirstein Business Library in Boston<sup>23</sup>, the Northeastern University Library<sup>24</sup>, from the publishing companies themselves<sup>25</sup>, and Online.<sup>26</sup>

The Polk Directory contains listings of all adult individuals and business firms within the area, organized by street address, by telephone number, and by name. For each individual, the directory lists spouse's name address; telephone; occupation; employer; and whether householder, renter, retiree, student, or member of the armed services. The street directory lists the occupants, home owners, telephone numbers, types of business or profession, street descriptions, and intersections. The Polk Directory also contains an index to advertisers, a buyers' guide, and a classified business directory.

The Cole Directory includes (1) a street address directory, listing individuals and businesses at each address, and the year first listed; (2) a telephone directory (i.e., listings by telephone number); (3) a "buyer power section," which contains a map showing the area covered, a family wealth rating of each census tract, and a list of streets in each census tract; (4) a census tract marketing section, which contains demographic material for the area, such as median age, percentage of owner-occupied households, median number of children, and median educational level; and (5) an office building directory, listing tenants in principal office buildings.

**c. Telephone Directory and Directory Assistance; Internet Phonebook Sites**

Beyond its obvious uses, an address or town residence may be confirmed using directory assistance even if the telephone number is unlisted, since the operator will distinguish between the absence of an entry and its unlisted status. Old telephone directories are kept by the Boston Public Library in the microtext room. The following are basically computerized phonebooks that may be used to retrieve such information as U.S. mail and E-mail addresses and phone numbers of individuals or companies. These

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<sup>20</sup> More information about return service is available on the post office's website at <http://pe.usps.com/text/qsg300/Q507.htm>.

<sup>21</sup> The post office website explains how to make a FOIA request, [http://about.usps.com/handbooks/as353/as353c4\\_002.htm](http://about.usps.com/handbooks/as353/as353c4_002.htm).

22. *See supra* n. 14.

23. *See supra* n. 15.

24. 380 Huntington Ave., Boston, MA.; tel. (617) 373-2350.

25. The address for Infogroup (publisher of the Polk Directory) is 1020 E 1st Street, Papillion, NE 68046; tel. (402) 836-5290. The address for Cole Information (publisher of the Cole Directory) is 17041 Lakeside Hills Plaza, Ste. 2, Omaha, NE 68130-4677; tel. (800) 283-5895.

<sup>26</sup> The Polk Directory is available at <http://www.polkcitydirectories.com>; the Cole Directory is available at <http://www.coleinformation.com>.

sites also function as reverse directories which can retrieve the names of individuals or companies based on a phone number or address.

<http://www.switchboard.com>  
<http://www.superpages.com>  
<http://www.intelius.com>  
<http://www.whowhere.com>  
<http://www.whitepages.com>

#### ***d. Town Census or “List of Persons”***

Each locality completes a yearly census, listing for each address each occupant, his year of birth, and his occupation. Some towns also include the person’s employer, nationality, party registration, and previous residence. The census is available at the office of the town clerk or registrar, or for many Eastern Massachusetts towns, at the Boston Public Library Government Documents Room.

#### ***e. Registry of Motor Vehicles***

Various records will provide address, date of birth, social security number, insurance company, corrective lens requirement, identity of vehicles registered to subject or spouse, and status of license. See <http://massrmv.com/>.

The Registry provides separate computer printouts of license information (personal information) and vehicle information (description of car, insurance company, registration number, car identification number). Blue binders list by name and provide a street address. They may also be used to sufficiently identify the subject to obtain a computer printout. These binders are based on driver’s license information, which may be years old.

(Additionally, the Registry of Motor Vehicles receives and maintains reports of motor vehicle accidents submitted by the local police department).

These records are available at the Registry of Motor Vehicles, 630 Washington Street, Boston, MA. Some records, such as accident reports and driving records, are available through the Registry of Motor Vehicles website, <http://massrmv.com>.

#### ***f. Registry of Vital Records and Statistics***

The Registry includes birth, death, and marriage certificates and an index of divorces listing county and case number. The research fee is \$9 an hour, and you can request a certified copy of vital records at the registry, on the internet, by phone, by fax, or by mail.<sup>27</sup> The Registry maintains an index of birth, death, and marriage certificates from 1921 and divorces from 1952. The Registry is located at 150 Mt. Vernon Street, Dorchester, MA; tel. (617) 740-2600, and is a department within the Department of Public Health.<sup>28</sup> See <http://www.mass.gov/eohhs/gov/departments/dph/programs/health-stats/vitals/obtaining-certified-copies-of-vital-records.html>; <http://www.mass.gov/eohhs/gov/departments/dph/contact-dph.html>.

Births, deaths, and marriages from 1841-1920 are indexed at the State Archives.<sup>29</sup> The index to the records from 1841-1920 are searchable online at

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<sup>27</sup> <http://www.mass.gov/eohhs/docs/dph/vital-records/service-fee-june-13.pdf>.

28. 250 Washington Street, Boston, MA; tel. (617) 624-6000.

29. 220 Morrissey Boulevard, Boston, MA 02125; tel. (617) 727-2816; <http://www.sec.state.ma.us/arc/arcidx.htm>.

<http://www.sec.state.ma.us/vitalrecordssearch/VitalRecordsSearch.aspx>, but the records themselves can only be obtained at the State Archives. Records prior to 1841 are kept at local town halls, only open to researchers specified hours of the week. See <http://www.sec.state.ma.us/arc/arcgen/genidx.htm>.

***g. Owner of Property***

Owners are listed at the local tax assessor's office, or the County Registry of Deeds. Deeds can be searched Online using the database maintained by the Registry of Deeds Division of the Secretary of State, <http://www.masslandrecords.com>. Users can view and download copies of deeds from the database.

***h. Voter Registration***

The city or town hall of each municipality maintains voting registration lists, often in an "election commission" office. These books list all registered voters, by street address and alphabetically, and the voters party affiliations. Some cities, such as Boston, make voter registration records available Online. Check a city's website to find out whether its records are Online.<sup>30</sup>

***i. Locating Prisoners***

To find someone who may be in a federal prison, provide the name, and date of birth to the Inmate Locator Service.<sup>31</sup> The information can be obtained through the Bureau of Prison's website for prisoners committed since 1982; a letter is required for earlier prisoners.<sup>32</sup> The service will provide the charge on which the sentence is being served, release date, parole date, date of parole hearing, when transfers to other prisons occurred, date of birth, etc. This service is free.

To find someone who may be in state prison, contact the state's department of corrections.<sup>33</sup> The information may also be available through VINE, a service that provides custody information on offenders.<sup>34</sup> All but three states make all or some state custody information available through VINE.

To obtain prison records, *see infra*. §11.3B(4).

***j. Employment Records***

Work records may be a fertile source of information about an individual, including such identifying information as social security number and home address.

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<sup>30</sup> The address and website for every Massachusetts city and town are listed in the Secretary of State's city and town directory, <http://www.sec.state.ma.us/ele/eleclk/clkidx.htm>.

<sup>31</sup> Inmate Locator Service, Federal Bureau of Prisoners, 320 First Street NW, Washington, DC 20534; tel. (202) 307-3198; [http://www.bop.gov/inmate\\_locator](http://www.bop.gov/inmate_locator).

<sup>32</sup> Send requests for information on pre-1982 inmates to Federal Bureau of Prisons Office of Communications and Archives, Attn: Historic Inmate Locator Request, 320 First St., N.W., Washington, DC 20534.

<sup>33</sup> Contact information for the Massachusetts Department of Corrections is available at <http://www.mass.gov/eopss/agencies/doc/>.

<sup>34</sup> <http://www.vinelink.com>.

### ***k. Other Persons Fitting Culprit's Description***

The Boston Police Department and many others maintain a "Computer Video Identification Unit" which can yield suspects based on a submitted description. CPCS has suggested that defense counsel in identification cases consider a "Motion to Compel the

Commonwealth to Provide Exculpatory Evidence,"<sup>35</sup> which would require the police department to run the culprit's description through the computerized database and produce other possible suspects.

## **2. Tools for Researching Experts or Famous Persons**

### ***a. Biographical Indexes***

(1) Biography & Genealogy Master Index.<sup>36</sup> This source provides an index to over seventy biographical dictionaries, both current and historical, including general dictionaries (e.g., *Dictionary of American Biography*, *Who's Who in America*) and specialized dictionaries (e.g., literature: the *Cambridge Guide to Literature in English*, *The International Authors and Writers Who's Who*; art: *Contemporary Artists*, *The Oxford Art Encyclopedia*; music: *Contemporary Musicians*, *The Metropolitan Opera Encyclopedia*; medical: *A.M.A. Directory*, *A.P.A. Directory*; science and technology: *American Men & Women of Science*, *Who's Who in Technology*; and such other subject areas as business, fashion, geography, photography, politics, sports, and theater and film). It is available Online through the Boston Public Library website.<sup>37</sup>

(2) *Who's Who* books, published not only nationally and regionally but in various professions.

(3) Lawyers: Martindale-Hubbell, <http://www.martindale.com>, or Lawyers Diary, <http://www.lawdiary.com>.

(4) Business: Directory of [Corporate] Directors in Boston, Standard and Poor's, Million Dollar Directory, Polkas Bank Directory, and other business directories available at Kirstein Library or Boston Public Library social science reference section or through the Boston Public Library website.

(5) *Medical: Directory of Medical Specialists* (alphabetical national listings, including specialty, education, professional affiliation and societies), *A.M.A. Directory*, *A.P.A. Directory*. Available at the Boston Public Library, Science Department.

### ***b. Experts' History and Testimony***

*Computer indexes* now exist that divulge many of the articles that an expert witness has published,<sup>38</sup> the topic of his or her dissertation (with a hard copy available for

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35. See CPCS Performance Standards and Complaint Procedures Part I, Chapter IVE, [http://www.publiccounsel.net/private\\_counsel\\_manual/CURRENT\\_MANUAL\\_2012/MANUALC hap4CriminalStandards.pdf](http://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2012/MANUALC hap4CriminalStandards.pdf) (providing a list of discovery motions counsel should consider filing).

36. Published by Gale Research Inc..

<sup>37</sup> <http://www.bpl.org/electronic>.

38. This following list is a sampling of the available indexes and databases of published articles:

*General:* Google scholar, General Onefile, Academic Search Premier, JSTOR.

*Biologist:* Medline, ScienceDirect, Biological Abstracts.

*Economist:* EconLit.

order),<sup>39</sup> and whether he or she has testified before Congress.<sup>40</sup> Expert witness interviews are also maintained in databases.<sup>41</sup> Finally, a LEXIS or Westlaw search can determine whether the expert's name appears in any reported case. These types of searches can generally be conducted through a university or public law library if the investigator does not subscribe to the relevant database service.

*Sources for appointed counsel:* For appointed counsel, the Committee for Public Counsel Services Boston office houses a Forensic Experts Project, where names, resumes, and testimony transcripts of forensic experts are collected, including those of experts commonly used by the state.

*Treatises on forensic evidence* are a source of basic information regarding the subject matter of the testimony.<sup>42</sup> Periodicals are also available in this area,<sup>43</sup> including periodicals aimed at prosecutors or police.<sup>44</sup>

### ***c. Finding Experts***

The *Forensic Services Directory* published annually by the National Forensic Center is the most complete and up-to-date sourcebook, listing experts available for forensic consultation by field of expertise.<sup>45</sup> This listing is also available through the Westlaw and LEXIS computer research systems. The National Forensic Center also provides an expert-finding hotline with a toll-free telephone number.<sup>46</sup>

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*Educator:* ERIC.

*Engineer:* Compendex, IEEE Xplore.

*Medicine:* Pubmed, Medline, CINAHL.

*Psychologist:* PsycINFO.

*Sociologist:* SocINDEX, Social Science Abstracts.

39. Most dissertations written in the United States are indexed in Proquest Dissertations & Theses.

40. CIS/Index (Congressional Information Service/Index to Congressional Publications and Public Laws), available through Proquest Congressional.

41. See the list of databases, *supra* note 38.

42. *E.g.*, LYLE, FORENSIC SCIENCE (ABA, 2012); GIANNELLI, IMWINKELRIED, ROTH, AND CAMPBELL, SCIENTIFIC EVIDENCE (LexisNexis, 2012); SAFERSTEIN, FORENSIC SCIENCE HANDBOOK (Prentice Hall, 2002-2010); DONALD SHELTON, FORENSIC SCIENCE IN COURT (Rowman & Littlefield, 2010).

43. *E.g.*, JOURNAL OF FORENSIC SCIENCES, American Academy of Forensic Sciences, 410 North 21st Street, Colorado Springs, CO 80904; tel. (719) 636-1100); SCIENCE AND JUSTICE, Elsevier, <http://www.scienceandjusticejournal.com>.

44. *E.g.*, THE CHAMPION, published by the Massachusetts State Police.

<sup>45</sup> Available in print or Online at <http://national-experts.com/>.

46. National Forensic Center, 17 Temple Terrace, Lawrenceville, NJ 08648; tel. (609) 883-0550, (1-800) 526-5177.

Commercial expert-finding services exist as well, although their focus may be more on lucrative civil litigation.<sup>47</sup> (See also sources for appointed counsel, immediately above.)

### 3. Media

#### a. *Television Tapes*

Television tapes are available from the station itself or from taping services. Most television stations permit the investigator to screen a tape at the station, at no cost, on a timely written request; however, they permit the tape to leave the building only if subpoenaed.

Private taping services include New England Newsclip Agency,<sup>48</sup> which provides typewritten transcripts of newscasts within the last ten days on Boston television; and Critical Mention,<sup>49</sup> which provides digital video recordings and written transcripts of news broadcasts of both local and national stations.

#### b. *Newspapers and Magazines*

Many newspapers and magazines are available on the Internet or in electronic databases, allowing defense counsel to search years of articles in minutes for the name of a witness. Many databases include extensive back issues of newspapers. For instance, Boston Globe articles are available from 1872-present through the Proquest National Newspapers and Proquest Historical Newspapers databases. Comprehensive electronic indexes of newspapers and magazines include the Readers' Guide to Periodical Literature, Infotrac, and NewsBank. Indexes of individual newspapers, such as the New York Times, the Washington Post, and the Los Angeles Times are also available online. Many of these indexes may be accessed through the Boston Public Library and State House Library websites.<sup>50</sup>

*Newspapers and reporter's notes on file:* (1) The Boston Public Library has many newspapers from New England on microfilm and a database of *Globe* and *Herald* obituaries (only obituaries from 1932-1941 and 1953-2010 are in the database; other obituaries are indexed on Microtext card index); (2) the State House Library has newspapers; (3) smaller newspapers have morgue files (envelopes with clippings), and some maintain indexes that may be available at the paper or the local library; (4) newspaper reporters are in fact investigators who should be interviewed when appropriate.

Older newspapers on file: To find out where old issues of particular newspapers may be found, consult: (1) American Newspapers 1821–1936: A Union List of

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47. See, e.g., DJS Associates, 1603 Old York Road, Abington, PA 19001, tel. (215) 659-2010, <http://www.forensicdjs.com/> (can serve Massachusetts); Thomas Reuters Expert Witness Services, 22 Thomson Place, Boston, MA 02210, tel. (978) 631-1708, <http://trepertwitness.com/>.

48. 5 Auburn Street, Framingham, MA 01701; tel. (508) 879-4460.

49. 521 Fifth Avenue, 16th Floor, New York, NY 10175; tel. (212) 398-1141; <http://www.criticalmention.com/>.

<sup>50</sup> Boston Public Library electronic resources, <http://www.bpl.org/electronic>; State Library of Massachusetts electronic journals, <http://rm8bp9xw4t.search.serialssolutions.com/>.

Newspaper Files Available in the U.S. and Canada;<sup>51</sup> and (2) Newspapers in Microform, covering 1948–1972.<sup>52</sup> Both indexes are available at the Boston Public Library.

#### 4. Prison Records

There are two ways to obtain state prison records: (1) by subpoena or (2) by written request accompanied by a consent form signed by the prisoner, which is required for CORI clearance.<sup>53</sup> Either process should be directed to the Legal Department of the Department of Corrections.<sup>54</sup>

#### 5. Court Records and Transcripts

State court criminal records: The Criminal Offender Record Information Act<sup>55</sup> originally exempted most records relating to the prosecution and disposition of criminal cases from the public records disclosure law. However, subsequent amendments to the law permit public access to criminal records of convicted defendants who are in prison, are on probation or parole, or have been recently released (with periods of time varying based on the severity of the crime and length of prison sentence, as specified in the statute). Such records are available from the state Department of Criminal Justice Information Services. By obtaining a docket number with the record, counsel may then inspect all trial records.

CORI had also prevented courts from giving the public access to their indexes of closed criminal cases, so that records could effectively only be obtained with the subject's authorization or a court order. But a federal court has overturned this provision as violative of the First Amendment, requiring that sealing such records be the result of an individualized judicial determination.<sup>56</sup>

Additionally, pursuant to G.L. c. 6, § 172, the public can have access on written request to the convictions of any individual that fits certain categories detailed in the margin. This data can be obtained by an online request to the Department of Criminal Justice Information Services<sup>57</sup>, sending the name and birthdate of the individual (social security number is requested, but not required), with a \$50 fee per request.<sup>58</sup>

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51. Kraus Reprint Corp., NY 1967 (W. Gregory, ed.).

52. Produced by the Library of Congress Catalogues.

53. G.L. c. 6, § 175. This statute gives any individual the right to inspect and copy any criminal offender record information which refers to him.

54. 50 Maple Street, Milford, MA 01757; tel. (508) 422-3300; <http://www.mass.gov/eopss/agencies/doc/>.

55. G.L. c. 6, § 167 et seq.

56. *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89, 91-99 (D. Mass. 1993). *See also* *Roe v. Attorney General*, 434 Mass. 418, 435-36 (2001) (granting police officers access to these records no matter how old or minimal, or how a person has rehabilitated himself).

57. 200 Arlington Street, Suite 2200, Chelsea, MA; tel. (617) 660-4690; <http://www.mass.gov/eopss/agencies/dcjis>. Online requests are submitted through CORI, <https://icori.chs.state.ma.us/>.

58. Under 803 C.M.R. 2.05, public access includes (1) all unsealed convictions for murder, voluntary manslaughter, and sex offenses; (2) felony convictions punishable by five or more years for which the defendant was released not more than 10 years ago; (3) any other felony

Criminal hearing transcripts or tape recordings: Transcripts of prior hearings or trials are an abundant source of information if they involve the same events or witnesses as the present case. Similarly, an electronic recording of any relevant district court hearing should be obtained. There is a right of public access to cassette copies of any proceeding that was open to the public and has not been sealed or impounded;<sup>59</sup> any person may order such a cassette by submitting the cassette copy order form to the relevant clerk's office. If the proceeding was closed, sealed, or impounded, the tape recording can be obtained only on court order, unless the request is by a party for purposes of appeal.<sup>60</sup>

State probation records: A defendant's record is available to his counsel from the probation officer in the court at which he is appearing. By requesting the client's record, with signed authorization, through the Department of Criminal Justice Information Services,<sup>61</sup> counsel may obtain a certified copy. For a witness's records, a court order is required except for convictions as noted *supra* at note 58.

State court civil cases: There are indexes available for civil cases. Civil cases may contain abundant information in interrogatories if filed, complaints and exhibits, and other documents (all indexed on the docket sheet).

County probate records include wills, divorces, adoptions, guardianships, and name changes. Through wills, the identities of extended family and friends may be obtained.

Federal court: The public has access to both criminal and civil case records and documents electronically through PACER.<sup>62</sup> Federal bankruptcy records contain abundant information on anyone unfortunate enough to have filed for bankruptcy, available at U.S. Bankruptcy Court and through PACER.<sup>63</sup> However, FBI "rap sheets" are not generally available to private parties and are exempt from FOIA disclosure.<sup>64</sup>

## 6. Police and Fire Department Records

Police reports: Documents in the possession of the police may include:<sup>65</sup> (1) an incident report concerning the crime, obtainable for a fee by providing the police

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conviction for which the defendant was released not more than two years ago, and (4) misdemeanor convictions for which the defendant was released not more than one year ago.

59. Dist. Ct. Special R. 211(A)(5)(a); Super. Ct. Standing Order 2-87, ¶ 6.

60. Dist. Ct. Special R. 211(A)(5)(b). However, Super. Ct. Standing Order 2-87, ¶ 7, does not adopt this provision, stating instead that in such cases, the recording "shall be deemed impounded and shall be subject to the provisions of law governing such closed proceedings, as well as to any additional restrictions with regard to its use which may be prescribed by the Justice who presides over the proceeding."

61. *See supra* note 57.

62. Public Access to Court Electronic Records, <http://www.pacer.gov>.

63. John W. McCormack Post Office and Courthouse, 5 Post Office Square, Suite 1150, Boston, MA 02109-3945; tel. (617) 748-5300. Other U.S. Bankruptcy Court locations in Massachusetts are Worcester, Springfield, and Hyannis.

64. Department of Justice v. Reporters Comm., 489 U.S. 749 (1989).

65. *See* CPCS Performance Standards and Complaint Procedures Part I, Chapter IVE, [http://www.publiccounsel.net/private\\_counsel\\_manual/CURRENT\\_MANUAL\\_2012/MANUALC\\_hap4CriminalStandards.pdf](http://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2012/MANUALC_hap4CriminalStandards.pdf).



department with the date, person involved, and where possible, the report number;<sup>66</sup> (2) a motor vehicle accident report, including statements of the participants; this report may be available from the police, or from the Registry of Motor Vehicles, because police departments must report accidents to the registry; (3) statements by individual officers, supplementing the incident report; (4) the defendant's statement; (5) witness statements; (6) identification materials, such as line-up reports, identification photo displays, or identikit pictures; (7) a videotape of a confession or sobriety test; (8) a firearm discharge report; (9) daily logs, required by law and open to public inspection during regular business hours without charge;<sup>67</sup> (10) printouts of 911 calls, containing the time received, who called, and which car was sent; (11) turret tapes (i.e., tapes of 911 calls); (12) printouts of all incidents, arranged by complainant; (13) printouts of all arrests of the past year, arranged by arrestee and cross-referencing the incident report; (14) booking sheets; (15) the booking photograph, which freezes the defendant's appearance and dress at the time of arrest; (16) ambulance reports; (17) a medical examiner's report if there was a death in the case; and (18) mandated reports from health care providers in cases of rape or wound treatment.<sup>68</sup>

In the Boston area, there are also specialized police forces, including the Boston Housing Authority Police,<sup>69</sup> the MBTA Police,<sup>70</sup> and the Boston School Department Safety Services.<sup>71</sup>

Police manuals: Police manuals and periodicals are a helpful source of proper police procedure. These include "Policies and Procedures" by the Municipal Police Institute<sup>72</sup> and a series of training pamphlets published by the International Association of Chiefs of Police, called "Training Keys."<sup>73</sup>

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66. Police departments will delete information concerning the arrestee unless a CORI form, executed by the arrestee, is submitted. Rape reports are difficult to obtain without court process because G.L. c. 41, § 97D, requires that they be treated as confidential, nonpublic records.

In Boston, six copies of each incident report are created, and thus may be obtained from alternative sources: headquarters, the station, the detective, the special unit, and the officer.

67. G.L. c. 41, § 98F. This log is a record, in chronological order, of all responses to valid complaints received, all crimes reported, and the names, addresses, and charges of all arrestees. Under the statute, logs are public records available without charge unless otherwise provided by law. A 1991 amendment extends this requirement to college and university police departments.

68. *See infra* note 82. *See also infra* § 48.1A, regarding mandated reports of child abuse to DCF.

69. Department of Public Safety, One Ashburton Place, Boston, MA: tel. (617) 727-3200.

70. To request an incident report, send a letter to the MBTA Law Department, 10 Park Plaza, Suite 3910, Boston, MA 02116; tel. (617) 222-3200.

71. Located at 213 Townsend Street, Dorchester, MA 02121; tel. (617) 635-8000. To obtain an incident report, counsel should first contact the General Counsel, Boston School Dep't, 26 Court St., Boston, MA 02108; tel. (617) 635-9320.

72. 26 Providence Road, Grafton, MA 01518.

73. This publication also publishes a subject matter index. Issues and the index are available from the IAPC at 515 North Washington Street, Alexandria, VA 22314 and Online at <http://www.theiipc.org>.

Fire Department: Incident reports are available.<sup>74</sup> In Boston arson reports are not voluntarily disclosed, and subpoenas may be challenged by the department on grounds of protecting informants' identities. The Fire Department also keeps ambulance logs.

## 7. Tracing of Guns

To trace a gun, the investigator should supply as much of the following information as possible to the agency: name of requester, with his affiliation, location, and telephone number; gun information, including manufacturer, caliber or gage, barrel length, finish, serial number, country of origin, any other ID marks; and reason for request.

*State records:* The Firearm Records Bureau<sup>75</sup> has records of all guns licensed and registered, or sold, in Massachusetts. It will provide gun license and registration information only to a person who requests it about himself.<sup>76</sup> To get information about a third party, the investigator generally must utilize a subpoena, deposition, or other court process.<sup>77</sup> Additionally, local police provide firearm ID cards to Massachusetts residents.

*Federal records:* The Bureau of Alcohol, Tobacco and Firearms maintains records on all registered guns, as well as the records of gun dealers who have gone out of business. To obtain information, a written request must be sent to the Disclosure Division;<sup>78</sup> a subpoena may be necessary for third-party requests. The FBI's National Criminal Information Center<sup>79</sup> maintains records on guns that were either stolen or lost.

## 8. Medical, Hospital, and Ambulance Records

*Hospital records* may be obtained: (1) by submitting a release signed by the patient and a request specifying the records sought, patient's date of birth, and account number if applicable; or (2) by court order; a summons is insufficient.<sup>80</sup> Counsel should inquire of the hospital whether independent laboratories are used for medical testing, because if so there may be no indication of those tests in the hospital records and the lab will have to be contacted. *Medical records* of doctors, psychologists, or other "health care

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74. In Boston, an incident report may be obtained, for a fee, from the Legal Department of the Boston Fire Department, 115 Southampton Street, Boston, MA; tel. (617) 343-3415.

75. Firearm Records Bureau, 200 Arlington Street, Suite 2200, Chelsea, MA 02150; tel. (617) 660-4780; <http://www.mass.gov/eopss/firearms-reg-and-laws/frb/>.

<sup>76</sup> See G.L. c. 66 s. 10(d) (prohibiting third-party access to firearm records).

77. Such records are to be accompanied by an affidavit certifying the records as true and complete, are delivered to the clerk, and may be inspected prior to the hearing. See G.L. c. 233, § 79.

78. Bureau of Alcohol, Tobacco, Firearms, and Explosives, ATTN: Disclosure Division, 99 New York Avenue, NE, room IE400, Washington, DC 20226; tel. (202) 648-777, (800) 800-3855; fax (202) 648-9619; email: [foiamail@atf.gov](mailto:foiamail@atf.gov).

79. Criminal Justice Information Services (CJIS), Attn: National Crime Information Center, FBI Complex, 1000 Custer Hollow Road, Clarksburg, WV 26306; tel. (304) 625-2000.

80. G.L. c. 111, § 70. See *Lockhart v. Newton-Wellesley Hospital* (Suffolk Sup. Ct. No. 64365) (Order of Tuttle, J., April 27, 1987) (counsel's subpoena not "court order"). In *Commonwealth v. Pellegrini*, 414 Mass. 402, 407-08 (1993), the court rejected a drug defendant's claim that use of her newborn's hospital records, showing presence of drugs, violated her right of privacy.

providers” are also available by right to the patient.<sup>81</sup> Other laws require doctors to submit reports about their examination of a victim to the police and Department of Public Safety.<sup>82</sup>

*Records of examination of deceased:* The Medical Examiner’s report is based on an examination at the time of death; a pathologist will later conduct and record an autopsy.<sup>83</sup>

*Ambulance runs:* The ambulance service submits reports to the police or fire department, which maintains records of all ambulance runs. The Massachusetts Office of Emergency Medical Services maintains a state-wide database of ambulance service reports.<sup>84</sup>

## 9. Company Records

### a. Telephone Company Records

An attorney can obtain information in a customer’s account if he has a signed authorization from him or by subpoena. Such information would include a listing of all outgoing calls. The subpoena should be sent to the phone company’s legal department.<sup>85</sup>

### b. Credit Rating Companies

Disclosure of credit rating reports is governed by law.<sup>86</sup> A credit rating company must furnish its information — including sources and recipients of the information — to the individual who is the subject of the report, or pursuant to subpoena; and may furnish the information to meet a business need, as elaborated in the act.<sup>87</sup> Credit reporting companies are listed in the yellow pages and Online.

## 10. Weather Reports or Interpretations

*Past weather reports and/or interpretations* are available from: (1) the National Weather Service at Logan Airport;<sup>88</sup> (2) the National Climatic Data Center<sup>89</sup>; and (3) the American Meteorological Society<sup>90</sup> (private experts).

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81. G.L. c. 112, § 12CC.

82. *E.g.*, G.L. c. 112, § 12A (where criminal act is believed to be involved, or where gunshot, knife, or certain burn wounds are present); G.L. c. 112, § 12A1/2 (where victim was apparently sexually assaulted).

83. *See generally* G.L. c. 38.

<sup>84</sup> 99 Chauncy Street, 11th Floor, Boston, Massachusetts 02111; tel. (617) 753-7300; <http://www.mass.gov/dph/oems>.

85. *E.g.*, Verizon New England, Legal Department, 185 Franklin Street, Boston, MA 02110.

86. The Fair Credit Reporting Act of 1970 (Pub. L. No. 91-508, Title VI). A copy of this law is available at the FTC website, <http://www.ftc.gov/os/statutes/fcradoc.pdf>.

87. The Fair Credit Reporting Act of 1970 (Pub. L. No. 91-508, Title VI) §§ 604, 609.

88. National Weather Service, 445 Myles Standish Boulevard, Taunton, MA 02780; tel. (508) 828-2672; [www.nws.noaa.gov/box](http://www.nws.noaa.gov/box).

*Sunrise, moonset, etc.:* These times are available from the U.S. Naval Observatory,<sup>91</sup> which provides certified statements for a \$15 fee.

## 11. Other State or Local Government Records

### *a. Maps*

Available in each town; if desired, an attorney may obtain an enlarged section for court.

### *b. Streetlights and Traffic Lights*

Information regarding the lumens put out by particular streetlights, whether they were working, and so on, can be obtained from the Department of Public Works.<sup>92</sup> Information regarding the operation of traffic lights can be obtained from the city's transportation department.<sup>93</sup>

### *c. Welfare Department Records*

Welfare records can be obtained by: (1) a request, with the client's signed release, including the welfare account number, directed to the Department of Transitional Assistance;<sup>94</sup> or (2) by subpoena to the keeper of the records at the same address. The following records may be available: a recipient's confidential records pertaining to public benefits, including the application for welfare benefits, any supporting documents to establish eligibility, and any welfare appeal decisions.

### *d. State Corporations Division*<sup>95</sup>

The Corporations Division of the Secretary of State maintains a searchable database of all corporations and the individuals associated with those corporations.<sup>96</sup> Incorporation papers and annual reports are accessible from each corporation's record. Certified copies of the papers and reports are available for a fee.

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89. Department of Commerce, NOAA Environmental Data Service, National Climatic Data Center (NCDC), 151 Patton Avenue, Suite 120, Federal Building, Asheville, NC 28801-5001; tel. (828) 271-4010; FAX (828) 271-4876.; <http://www.ncdc.noaa.gov>.

90. American Meteorological Society, 45 Beacon Street, Boston, MA 02108; tel. (617) 227-2425; <http://www.ametsec.org>.

91. U.S. Naval Observatory, Astronomical Applications Department, 3450 Massachusetts Avenue, NW, Washington, DC; tel. (202) 762-1617; <http://aa.usno.navy.mil>.

92. In Boston, request the information from the Streetlighting Division of the Department of Public Works, One City Hall Square, Room 714, Boston, MA; tel. (617) 635-4900; <http://www.cityofboston.gov/publicworks/lighting>.

93. In Boston, contact the Boston Transportation Department, One City Hall Plaza, Room 721, Boston, MA 02201; tel. (617) 635-4680; <http://www.cityofboston.com/transportation>.

94. 600 Washington Street, 6th Floor, Boston, MA 02111; tel. (617) 348-8500; <http://www.mass.gov/eohhs/gov/departments/dta>.

95. McCormack Building One Ashburton Place, 17th Floor, Boston, MA 02108; tel. (617) 727-9640; <http://www.sec.state.ma.us/cor/>.

<sup>96</sup> <http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp>.

***e. State Ethics Commission***<sup>97</sup>

The Commission maintains financial disclosure records on elected and some appointed officials. Statements of Financial Interest (SFI) are available to the public for six years after they are submitted. To see an SFI, send a written request to the Commissioner.

***f. State Uniform Commercial Code Office***

This office has records of all loans obtained with personal property as collateral. To access the records, go the searchable database available from the Secretary of State's website.<sup>98</sup>

***g. State Office of Campaign and Political Finance***

The office lists contributions to state, county, district, and governor's council candidates and some municipal election candidates.<sup>99</sup> Other offices list local candidate contributions (city or town clerks) and federal candidate contributions (at state Public Records Division).<sup>100</sup> Federal records are also available on the Federal Election Commission's website.<sup>101</sup>

***h. State Charitable Organizations Office***<sup>102</sup>

Lists of contributors and other financial records concerning charitable organizations are kept in this office. All required records are open to public inspection.<sup>103</sup>

***i. State Records on the Professions***

The state maintains records on various licensed professions such as doctors, real estate agents, and plumbers. Such records can reveal addresses, prior complaints or disciplinary actions, whether and when the person was licensed and so forth. Consult the *Citizen's Guide to State Services*<sup>104</sup> for a listing of these agencies.

***j. City and Town Hall Records***

These records include town census; birth, death, and marriage certificates; tax records on property; business certificates, identifying owners of unincorporated businesses, sometimes also filed by individual or by type of business; streetlight and traffic light records; in some cities, rent control records, and so on.

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97. One Ashburton Place, Room 619, Boston, MA 02108; tel. (617) 371-9500; <http://www.mass.gov/ethics/>.

<sup>98</sup> <http://corp.sec.state.ma.us/uccFiling/uccSearch/Default.aspx>.

99. Massachusetts Campaign and Political Finance Office, One Ashburton Place, Room 411, Boston, MA 02108; tel. (617) 979-8300; <http://www.mass.gov/ocpf>.

100. One Ashburton Place, Room 1719, Boston, MA 02108; tel. (617) 727-2832.

<sup>101</sup> <http://www.fec.gov/disclosure.shtml>.

102. The Non-Profit Organizations/Public Charities Division, Office of the Attorney General, One Ashburton Place, Boston, MA 02108; tel. (617) 727-2920.

103. G.L. c. 12, § 8M.

104. Available at Sec't of State's site, <http://www.sec.state.ma.us/cis/ciscig/guide.html>.

## 12. Other Federal Government Records

### *a. Social Security Records*

With signed authorization by the client, the attorney can obtain social security records by calling 1-800-772-1213 and requesting the file be sent to the nearest social security office, or by requesting it of the relevant office.<sup>105</sup> The records may contain such documents as an application for disability benefits, earnings reports, vocational reports, medical reports, and any court reports regarding the case.

### *b. Military Records*

A veteran may obtain his general military records and military medical records by written or Online request to the National Personnel Records Center.<sup>106</sup> Records of veterans whose discharge date is more than 62 years before the date of request are public record, so members of the public may request them. Veterans Administration records may be obtained by sending VA form 70-3288, signed by the veteran, to the VA regional office for the VA medical facility holding the records.

### *c. Immigration*

Naturalization petitions contain the date of entry, witnesses at the naturalization proceeding, country of origin, date of birth, spouse and children, and sometimes a description of the person. The Boston USCIS office<sup>107</sup> and the U.S. District Court<sup>108</sup> maintains the records of aliens naturalized in Boston.

## 13. Other Third-Party Records

Additional third-party records that might be relevant include school records, employment records<sup>109</sup>, union records, business attendance records, social agency or counseling records, credit agency records, IRS records, hotel records, and bank records.

## 14. Background Investigation Internet Sites

The following Internet sites may be used to learn more specific facts about an individual or an organization. The type of information varies from a Social Security Number search to civil and criminal record search. These are all paid services and the fee varies depending on the type of search.

<http://employment.fadv.com><http://lexisnexis.com/backgroundchecks>

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<sup>105</sup> To locate the nearest office, access the Social Security Office Locator at <https://secure.ssa.gov/ICON/main.jsp>.

<sup>106</sup> National Personnel Records Center, Military Personnel Records, 1 Archives Drive, St. Louis, MO 63138; <http://www.archives.gov/veterans>. Standard Form 180 is used to obtain military records. A fire at the records center in 1973 destroyed 16 million military files.

<sup>107</sup> USCIS, John F. Kennedy Federal Building, Government Center Room E-160, Boston, MA 02203; tel. (617) 565-4214.

<sup>108</sup> 1 Courthouse Way, Boston, MA 02210; tel. (617) 748-9152.

<sup>109</sup> See CPCS Performance Standards and Complaint Procedures Part II, Chapter IIB6 (employment records and school records are especially important when representing juveniles)

<http://www.world.std.com/~mmoore>  
<http://www.xukor.com>  
<http://www.integrascan.com>  
<http://www.accu-source.com/>  
<http://www.alphabackgroundchecks.com>

## § 11.4 INTERVIEWING THE DEFENDANT

(See the defendant interview checklist, *infra* § 11.9, and the bail interview checklist, *supra* § 9.10.)

### § 11.4A CONFIDENTIALITY

Confidential communications with the defendant are protected by the attorney-client privilege.<sup>110</sup> Additionally, it is unprofessional conduct to reveal “confidential information,” which is defined by comments to the Massachusetts Rules of Professional Conduct to include, “not merely . . . matters communicated in confidence by the client but also . . . virtually all information relating to the representation, whatever its source.”<sup>111</sup> The attorney must not reveal such information without client consent<sup>112</sup> except “to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or [substantial financial or property injury] or the wrongful execution or incarceration of another,” or “to rectify client fraud in which the lawyer’s services have been used.”<sup>113</sup>

### § 11.4B GOALS

Defendant interviews serve several sometimes conflicting purposes. As with any witness interview, counsel must obtain all facts relevant to the charge, all possible leads, the identities and locations of all known witnesses, and a reading of the defendant’s credibility before a jury. Additionally, however, counsel must obtain a total history of the client, relevant for bail, trial, and sentencing purposes; establish a rapport with the client, specifically eschewing a judgmental attitude; advise the client as to his legal rights and best strategy; and in retained cases, at some point address the issue of fees. The attorney may also wish to enlist the client’s aid in investigation and in introducing counsel to potential defense witnesses.

It is unprofessional conduct for counsel to intimate to the client that he should not be candid in revealing facts with the purpose of affording counsel free reign to take actions that would be precluded by full knowledge.<sup>114</sup>

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110. See Mass. Guide to Evidence § 502 Attorney-Client Privilege; Suffolk County Const. Co., Inc. v. Division of Capital Asset Management, 449 Mass. 444, 448 (2007) (“the attorney-client privilege shields from the view of third parties all confidential communications between a client and its attorney for the purpose of obtaining legal advice”).

111. Mass. R. Prof. C. 1.6, comment [5].

112. Mass. R. Prof. C. 1.6(a).

113. Mass. R. Prof. C. 1.6(b); see also Rule 3.3 and Rule 4.1(b). Rule 1.6(b) also permits disclosure in client/lawyer litigation under certain circumstances.

114. See Mass. R. Prof. C. 3.3(e) & Comments 7-10; ABA Standards for Criminal Justice 4-3.2 Interviewing the Client (3d ed. 1993).

*The initial interview.*<sup>115</sup> During later interviews, counsel will prepare the defendant for testimony from the stand (if any), including a possible simulated cross-examination. In the initial interview, however, it is wise to assure the defendant that you are on his side. Unless asked, avoid talk of plea bargains at this point. Inform the defendant that all conversations are privileged and confidential; advise him not to make any (further) statements to the police (or cellmates) or consent to searches or line-ups, but to tell the police to contact his lawyer; obtain sufficient data to ensure that counsel can easily contact the client; and let the defendant talk freely, returning for elaboration after obtaining an uninfluenced, unexpurgated version of the defendant's total view of the case. Counsel should inquire into any injuries the defendant may have received during the event, arrest, or since so that they may be tended to and documented. If the initial interview is in the jail or the court holding area, it may be wise to concentrate on issues relevant to the bail determination until more time and privacy become available.

## § 11.5 IDENTIFYING, LOCATING, AND RESEARCHING WITNESSES

It is important to obtain as much descriptive and personal information about a witness as possible, both to find and then keep track of the witness: for example, present and past addresses, telephone numbers, present and past employment, identities and addresses of friends and family, union membership, and frequent haunts will all help locate a missing witness.<sup>116</sup> Additionally, counsel should utilize the constitutional confrontation clause right to question a testifying witness as to her present address and the identity of other witnesses.<sup>117</sup>

All information gathered to locate witnesses, whether successful or unsuccessful, should be preserved. The information may be useful if the witness needs to be located later, a missing witness instruction is proposed,<sup>118</sup> or a continuance is sought.

Section 11.3B, *supra*, contains a detailed directory of investigative tools and records. Certain investigative sources are particularly important in locating or identifying witnesses, including police reports, accident reports, the defendant, other witnesses, the media, photographs of the event, post office forwarding address records, the federal prisoner locator service, reverse directories, telephone directories, utility companies, the Department of Motor Vehicles, and city census and tax records. In certain cases, the neighborhood should be canvassed at the time of day when the alleged crime occurred in an effort to identify all potential witnesses. The assistance of the defendant or a member of his family may be helpful.

## § 11.6 INTERVIEWING WITNESSES

(*See also* witness interview checklists, divided by type of case, *infra* at § 11.10.)

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115. *See* CPCS Performance Standards and Complaint Policies Part I, Chapter IIB for a further discussion of the initial interview and how to prepare for the bail hearing.

116. *See* CPCS Performance Standards and Complaint Policies Part I, Chapter IVE for a list of potential discovery motions.

117. *See infra* notes 180, 181, 182.

118. On the subject of adverse inferences drawn from failure to present a favorable witness, *see infra* § 35.3B(5).



## § 11.6A GOALS

Counsel should attempt to find and interview all potential witnesses on either side.<sup>119</sup> It is wise to interview all witnesses as soon as possible — before they disappear, their memories fade, or their attitude or recollection is colored by opposing counsel. Leave each witness your business card and a request that he call you if he remembers anything else about the case.

Interviews seek the following areas of information:

1. Leads for other investigation, such as knowledge of other witnesses, hearsay information about the case, the witness's own opinion or speculation about the case, and so on;
2. All prior witness contacts with the police or D.A., and all statements made by the witness or the officials;
3. All prior contacts with the complainant, another witness, or the defendant, and all statements made;
4. A thorough account of what the witness knows about the case, whether hearsay, seemingly tangential information, or rambling facts. All these facts may be later edited or juxtaposed to provide support for the defense theory;
5. An assessment of credibility as a trial witness;
6. Certain personal information regarding the witness, so that should the witness disappear or become uncooperative, she may be located. Personal information also provides the base from which to investigate a witness's vulnerability to impeachment by bias, criminal record, and so on.

## § 11.6B ETHICAL AND LEGAL ISSUES

If the witness is *represented by counsel* in the matter at issue, any interview concerning the subject matter of the representation must be arranged through that counsel.<sup>120</sup>

When a witness may *incriminate* herself in the course of giving a statement, ABA defense standards state that the lawyer's paramount loyalty to his own client must govern.<sup>121</sup> Therefore, "[i]t is not necessary for defense counsel or defense counsel's investigator ... to caution the witness concerning possible self-incrimination and the need for counsel";<sup>122</sup> In interviewing an unrepresented prosecution witness whose potential testimony might be self-incriminating, counsel may advise the witness to seek counsel in that regard, but it is unprofessional conduct to advise the witness that her testimony might incriminate her.<sup>123</sup>

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119 See CPCS Performance Standards and Complaint Policies Part I, Chapter IIE (noting that counsel should take advantage of interviewing witnesses in court when possible and should have another defense attorney present when interviewing witnesses for the prosecution).

120. Mass. R. Prof. C. 4.2.

121. ABA Standards Relating to the Administration of Criminal Justice: The Defense Function, Commentary to Standard 4-4.3 (3d ed. 1993).

122. ABA Standards Relating to the Administration of Criminal Justice: The Defense Function, Standard 4-4.3(b) (3d ed. 1983).

123. Mass. R. Prof. C. 4.3(b), barring the giving of advice (other than to secure counsel) to someone not represented by counsel whose interests conflict with the client's.

In Massachusetts it is a crime to *tape record or wiretap* a person without the consent of all parties to the conversation or a warrant.<sup>124</sup> Apart from criminal liability, it is professional misconduct to engage in *illegal investigation* or employ or encourage another to do so.<sup>125</sup>

*Interfering with or influencing witnesses:* An attorney is ethically not permitted to compensate a prospective non-expert witness for testimony except for reasonable expenses or loss of time, and in the case of experts and non-experts, to compensate based on the outcome of the case;<sup>126</sup> to advise the witness not to talk with the opposing counsel;<sup>127</sup> or to advise the witness to make herself unavailable as a witness.<sup>128</sup> A growing body of case law holds that the prosecutor may not interfere with defense access to its witnesses.<sup>129</sup> It is a felony to mislead, intimidate, or harass a witness.<sup>130</sup>

Mass. R. Prof. C. 4.3 specifies that a lawyer, when dealing on behalf of a client with a person who is not represented by counsel may not: (1) imply that she is disinterested; or (2) give advice, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client. Indeed, the rule requires that when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer *shall* make reasonable efforts to correct the misunderstanding.

A lawyer also may not use means "that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."<sup>131</sup>

Identifying yourself: In conducting the investigation, counsel or the investigator should ordinarily clearly identify himself as working for the defendant. It is unprofessional conduct to engage in deceit, dishonesty, or misrepresentation.<sup>132</sup> Moreover, later claims by a witness of misidentification may undermine the value of the

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124. G.L. c. 272, § 99(C), D(d). *See also* G.L. c. 272, §99(B)(4) (defining "interception" as "secretly hear[ing] . . . contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication").

125. Mass. R. Prof. C 5.3, Responsibilities for Nonlawyer Assistants.

126. Mass. R. Prof. C. 3.4(g), 3.8. Such conduct may also violate G.L. c. 268, § 3.

127. Mass. R. Prof. C. 3.4(f). However, counsel may inform the witness that she is under no obligation to speak with opposing counsel and may set reasonable conditions for doing so. *See* ABA Standards Relating to the Administration of Criminal Justice: The Defense Function, Commentary to Standard 4-4.3 (3d ed. 1993).

128. Mass. R. Prof. C. 3.4(f). *See* ABA Standards Relating to the Administration of Criminal Justice: The Defense Function, Commentary to Standard 4-4.3 (3d ed. 1993).

129. *See infra* § 11.6D(1).

130. G.L. c. 268, § 13B. *See also* Commonwealth v. Rondeau, 27 Mass. App. Ct. 55, 59-62 (1989); Commonwealth v. Triplett, 426 Mass. 26, 30 (1997) (reversing conviction for common law crime of "obstruction of justice" because it was not enough for Commonwealth to prove that defendant interfered with criminal investigation; to convict defendant of common law obstruction of justice, Commonwealth must prove that defendant knowingly interfered with testimony of witness in judicial proceeding); Commonwealth v. Rivera, 76 Mass. App. Ct. 530, 533 (2010) (the intimidation does not have to actually frighten the witness or make him reluctant to testify).

131. Mass. R. Prof. C. 4.4.

132. Mass. R. Prof. C. 3.3.

evidence obtained and can be avoided by giving the witness a business card, having the witness sign a form following the interview that includes proper identification, or including the interviewer's employer on any witness statement.

On rare occasions "incognito" investigation may be required to uncover the truth.<sup>133</sup> In such a case, the attorney is subject to conflicting obligations of the disciplinary rules, and one should tread with care. However, due process arguably requires that the defendant have the same ability as the government to conduct undercover investigation.

## § 11.6C OBTAINING USABLE WITNESS STATEMENTS

### 1. Lock in the Witness

A witness's statement will be most usable if tape recorded or written, although prosecutorial discovery considerations may sometimes counsel otherwise (*see infra*). If written, it should be signed and dated by the witness, with each page and correction initialed and with a statement included asserting the accuracy and completeness of the statement. Alternatives for a reluctant witness include having the witness inscribe corrections on counsel's notes; initialing pages; or at least oral ratification. If the witness refuses to allow note-taking, the investigator should write a full report with as many quotes as possible immediately afterward.

### 2. Have a Witness Present

If at trial the witness denies making the statement, the attorney is generally not permitted to testify to the contrary without withdrawing as counsel.<sup>134</sup> Therefore it is advisable to have the statement taken by (or in the presence of) a shorthand reporter, an investigator, or other potential witness.<sup>135</sup>

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133. *See* CPCS Performance Standards and Complaint Policies Part I, Chapter IVA (suggesting that counsel consider hiring an investigator to help interview witnesses). Moreover, if the attorney cannot afford an investigator, he may feel it necessary to participate in the ruse himself. However, one must be very careful in any such undertaking. It is unprofessional conduct in the course of representing one's client to knowingly make a false statement of a material fact to a third person, Mass. R. Prof. C. 4.1, or to order or permit an investigator to do so. Mass. R. Prof. C. 5.3.

134. Mass. R. Prof. C. 3.7; Super. Ct. R. 12; *Commonwealth v. White*, 367 Mass. 280, 283-84 (1975); *Commonwealth v. Patterson*, 432 Mass. 767, 777-778 & n. 12 (2000). However, the attorney is permitted to cross-examine the witness as to whether she made the statement. *White*, 367 Mass. at 283-84. *Cf.* *Commonwealth v. Johnson*, 412 Mass. 318, 327 (1992) (prosecutor allowed to use witness's prior inconsistent statement made at an interview with prosecutor, where witness agreed that she had made the statements to him).

135. For this reason, § 4-4.3(e) of the ABA Standards Relating to the Administration of Criminal Justice: The Defense Function (3d ed. 1993) advises that counsel not interview witnesses alone. *See also* CPCS Performance Standards and Complaint Policies Part I, Chapter IIE (suggesting to have another person, such as another defense attorney, present at interviews of the Commonwealth's witnesses).

### 3. Guard Against Compelled Production or Prosecutorial Discovery

A more difficult question is *whether* to memorialize a witness's statement in writing. The advantages — to impeach, to hold the witness to her story, to refresh recollection, or to introduce as a past recollection recorded — are obvious. Generally, taking a thorough statement is good practice.

However, reciprocal discovery may counsel less comprehensive records, at least when interviewing potential defense witnesses. The impact of reciprocal discovery on defense record-keeping is discussed *infra*.<sup>136</sup>

## § 11.6D HOSTILE OR DISINTERESTED WITNESSES

### 1. Access to Commonwealth Witnesses

Although Commonwealth witnesses are not obligated to talk with defense counsel, they are the “property” of neither side, and it is unconstitutional for the Commonwealth to either instruct a witness not to speak or deny the defense counsel access to him.<sup>137</sup> Defense counsel is entitled to talk with obliging Commonwealth witnesses separately and outside the presence of the prosecutor.<sup>138</sup>

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136. *See infra* § 16.2C.

137. In *Commonwealth v. Balliro*, 349 Mass. 505, 515–18 (1965), the court reversed a conviction where the Commonwealth had denied defense counsel access to three witnesses in its custody, based on violation of the right to present a defense embodied in art. 12 of the Mass. Const. Declaration of Rights. *Accord* *Commonwealth v. Turner*, 37 Mass. App. Ct. 385, 387-91 (1994) (overturning verdict and granting motion for new trial due to prosecutor's threats to two prospective defense witnesses: “You better not show up in court,” “I’ll tear you apart,” and “I’ll end up putting you away too.”); *United States v. Angiulo*, 897 F.2d 1169, 1190-93 (1st Cir. 1990) (discusses due process bar on prosecutor threatening potential defense witness with prosecution, or denying immunity); *Commonwealth v. McMiller*, 29 Mass. App. Ct. 392, 408-09 (1990) (prosecutor threatening potential defense witness with prosecution after promising immunity denies defendant fair trial); *Commonwealth v. Curcio*, 26 Mass. App. Ct. 738, 746–47 (1989) (Commonwealth cannot obstruct access to informer whose identity is known to the defense, and must offer what it knows of location); *United States v. Bailey*, 834 F.2d 218, 223-25 (1st Cir. 1987) (defendant should have been allowed access to jurors when he was accused of corruptly endeavoring to influence a juror); *Commonwealth v. Benoit*, 389 Mass. 411, 426–28 (1983) (error to not allow defense counsel a short recess to interview witness, but harmless because the testimony, if not inculpatory, would have been cumulative of other testimony and not essential); *Kines v. Butterworth*, 669 F.2d 6, 8–9 (1st Cir. 1981) (dictum) (when a witness will not talk to defense counsel due to unjustifiable acts by the prosecution, this is an improper interference with defendant's right of access to witness); *Commonwealth v. St. Pierre*, 377 Mass. 650, 657–61 (1979) (although there was minimal prejudice to the defendant here, there is the possibility that when a prosecutor advises a witness to not speak with defense counsel, or only give hearsay testimony to the grand jury, a dismissal of the indictment, without prejudice, could be the appropriate remedy); *Commonwealth v. Flynn*, 362 Mass. 455, 461 (1972) (defendant failed to show prejudice from prosecutor's attending witness interview conducted by defense counsel); *Commonwealth v. Carita*, 356 Mass. 132, 142–43 (1969) (defendant's right to interview witness is not satisfied when jail officer refused access to witness based on a phone call from someone who said that the witness did not want to talk to defense counsel); *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966) (prosecutor telling defense witnesses not to talk to counsel violated elemental due process); *Commonwealth v. Adkinson*, 442 Mass. 410, 416-17 (2004) (dictum) (both sides should be given access to potential witnesses).

If witnesses will not speak with counsel, it is important to inquire whether they have been instructed by the police or prosecutor not to speak. If so, *Commonwealth v. St. Pierre* prescribed the remedy: the judge should have the witnesses brought to court, instruct them that they may speak to defense counsel, explain to them “in some detail . . . the basis and dimensions of the [*Balliro*] principle,” and provide defense counsel access to them on neutral ground free from prosecutorial influence.<sup>139</sup> As to alternative remedies, *St. Pierre* described the remedy sought by defense counsel in that case — an order that the Commonwealth direct the witnesses to speak to the defense — as the “wrong agent and the wrong message,”<sup>140</sup> but stated that in extreme cases where the Commonwealth has handicapped the defendant’s ability to discover witness testimony, dismissal might be appropriate.<sup>141</sup> Another jurisdiction has ordered a deposition of the witness.<sup>142</sup> If

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*See also* Mass. R. Prof. C. 3.4(f) (unprofessional conduct for counsel to request a person other than the client to not voluntarily give relevant information to another party, unless an exception applies).

The rule should extend beyond the prosecutor to all state officials who interfere with access. *See* *Coppolino v. Helpero*, 266 F. Supp. 930, 934–36 (S.D.N.Y. 1967) (chief medical examiner enjoined from counseling employee not to talk).

138. *Commonwealth v. Flynn*, 362 Mass. 455, 461 (1972) (right to talk outside presence of police and prosecutor); *Commonwealth v. Doherty*, 353 Mass. 197, 211, *cert. denied sub nom. Doherty v. Massachusetts*, 390 U.S. 982 (1967); *Commonwealth v. McMiller*, 29 Mass. App. Ct. 392, 410 (1990) (Brown, J., concurring) (chastising prosecutor for “remain[ing] on the line” when defense counsel spoke with witness); *United States v. Angiulo*, 897 F.2d 1169, 1190-93 (1st Cir. 1990) (discusses due process bar on prosecutor threatening potential defense witness with prosecution, or denying immunity).

*See also* *Salemme v. Ristaino*, 587 F.2d 81, 87 (1st Cir. 1978) (right to interview witnesses); *Dennis v. United States*, 384 U.S. 855, 873 (1966) (restriction on right to interview witnesses only when “clearest and most compelling consideration” requires, e.g., safety).

In *Commonwealth v. Benoit*, 389 Mass. 411, 426–28 (1983), a witness was located only through judicial process. Because the defendant had no access to him before trial, the S.J.C. held that a recess should have been given so that the defendant might interview the witness before offering his testimony but found the error harmless.

139. *Commonwealth v. St. Pierre*, 377 Mass. 650, 657–61 (1979) (officer instructed five corrections officers not to speak to defense) (citing *Commonwealth v. Carita*, 356 Mass. 132 (1969); *Commonwealth v. Balliro*, 349 Mass. 505 (1965); and other cases cited at 658 n.9).

140. *Commonwealth v. St. Pierre*, 377 Mass. 650, 658 (1979). Nevertheless, egregious circumstances might warrant coupling this remedy with the others as a means of undoing prejudicial prosecutorial conduct.

141. *Commonwealth v. St. Pierre*, 377 Mass. 650, 660–61 (1979). The court cited as an example a case in which the Commonwealth intentionally thwarts discovery by violating *Balliro* and also avoiding a probable-cause hearing, using hearsay in the grand jury, and avoiding memorializing in writing its witnesses’ statements. *See also* *Commonwealth v. Turner*, 37 Mass. App. Ct. 385, 387-91 (1994) (overturning verdict and granting motion for new trial due to prosecutor’s threats to two prospective defense witnesses).

Any defense motion on this ground should cite violation of the state and federal constitutions, specifically by abridging the due process right to a fair balance of forces between the accused and the state, the right to counsel, and especially the right to present a defense.

142. *United States v. Carrigan*, 804 F.2d 599, 601-04 (10th Cir. 1986) (deposition was proper remedy for prosecutor’s statements which “strongly implied” witnesses should not talk with defense counsel, and within district court’s inherent power).

unremedied, on appellate review the court will be “wary of concluding too readily that a defendant did not suffer prejudice,” and will assume that the witnesses would have spoken with defense counsel had prosecutorial misconduct not occurred.<sup>143</sup>

Rule 14 requires the Commonwealth as part of automatic discovery to provide the defendant with the name and address (business address in the case of law-enforcement personnel) of each of its potential witnesses.<sup>144</sup>

## 2. Tactics

Obtaining an interview from a hostile or disinterested witness requires both tact and persistence. Generally, contact by a telephone call permits an easy refusal; the better course is to contact the witness personally, at his home in the early evening, when he is most likely to be able to talk.

Because counsel or the investigator must ordinarily identify himself as working for the defendant, some persuasion may be necessary to induce the witness to talk. For some, an appeal to fairness or the stakes may suffice. Others may need to be disabused of the idea that they belong to the prosecution and told they have a right to speak to both sides, perhaps with recourse to the legal instructions noted immediately above. A disinterested witness fearful of involvement may talk to a lawyer who points out “the possibility of dispensing with a subpoenaed court appearance if the witness gives a statement and the prosecutor stipulates to its admission into evidence” or counsel’s interest in “finding out what really happened and whether it is necessary to have a trial.” If the potential witness is favorably inclined toward the defendant, indicate why the defendant’s cause is both important and just.

During an interview with a hostile witness or complainant, it is often best to be nonjudgmental, avoid pointing out inconsistencies, and never cut him off, as you have a better chance of obtaining impeachment material with each succeeding paragraph. Occasionally where a written statement or other record will result, however, counsel should consider steering the witness in a better direction by confronting him with favorable information from an authoritative source, such as a police report. Generally, obtain a complete narration first and then return for elaboration.

It is important to be fully prepared for the interview, since it may be terminated at any time the witness becomes displeased. For the same reason, save the uncomfortable questions for last. Be sure to see any documentation or real evidence in the witness’s possession, to obtain a diagram of the event where relevant, and to ask about any communications with any other persons about the case. When the witness claims ignorance or denies he observed part of the incident, this should be preserved because it will close the door to contrary testimony later. A witness interview checklist can be found *infra* at § 11.10.

When interviewing an unfavorable witness, an investigator or other third party should be present who can testify should the witness change his story<sup>145</sup> and who can

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143. *Commonwealth v. St. Pierre*, 377 Mass. 650, 659 (1979). The court noted the “high value of the *Balliro* principle [and] the obvious difficulty in tracing the effects of a violation” but nevertheless affirmed the conviction. *See also Commonwealth v. Giacobbe*, 54 Mass. App. Ct. 144, 151-52 (2002) (allowing victim-witness advocate, but not victim or defendant, to attend defense counsel interviews with two child witnesses was not prejudicial because the advocate did not overstep her role, disclose the content of the interviews with anyone in the district attorney’s office, and did not interfere with defendant’s access to the witnesses).

144. Rule 14(a)(1)(iv)-(v). *See* CPCS Performance Standards and Complaint Policies Part I, Chapter IVE.

protect counsel from charges of harassment or other unethical behavior. A shorthand reporter can make a verbatim record as well as testify. Additionally, if possible a signed statement should be obtained at the time since a later request may well be refused (*but see infra* § 16.2C, notes 47–53, regarding prosecutorial discovery).

### 3. Interviewing Police Officers

Counsel must ascertain the identities of the arresting officers, all officers investigating the case, and the officer in charge of the case. Police officers are most likely to be found at the station during the beginning and end of their shifts. If an officer refuses to talk with counsel or the investigator, the reasons should be elicited. A police policy or a superior's directive may violate the defendant's access to Commonwealth witnesses as much as an order from the prosecutor because it constitutes state interference with counsel's Sixth Amendment right to gather evidence and due process right to a fair trial.<sup>146</sup>

Initial questions should elicit: (1) whether police claim to have taken the defendant's statement, and its content; (2) the time, place, and manner of arrest; (3) any identification procedures used; (4) any physical evidence in police custody; (5) other police officers involved in the case; (6) witnesses identified and witness statements that exist; (7) the grounds for any search or arrest; (8) the police theory of the case; and (9) whether police will send all police reports and witness statements to counsel.

#### § 11.6E FRIENDLY WITNESSES

Defense witnesses who corroborate any part of the defense case should be interviewed immediately. The interview must ascertain the witness's account, any vulnerabilities, and whether there have been contacts with the police. Preparation for testimony, including a practice cross-examination, may best be delayed until the witness's presence at trial is secure.

Some defense counsel have a summons served at this contact, because it helps ensure presence (or at least a continuance) at trial, enhances the witness's credibility, and provides the witness leave from work and a witness fee.<sup>147</sup>

Memorializing the witness's statement in writing raises issues of prosecutorial discovery or compelled production dealt with *infra* at § 16.2C, notes 47–53.

*Codefendants* should be interviewed, but only with the permission of their attorneys.<sup>148</sup> Of special interest here are whether the codefendant has or may testify for

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145. CPCS Performance Standards and Complaint Policies Part I, Chapter IIE. This avoids the credibility and ethical problems which would arise were defense counsel required to testify to a prior inconsistent statement. *See* Super. Ct. R. 12; and ABA Standards Relating to the Administration of Criminal Justice: The Defense Function § 4-4.3(e) (3d ed. 1993).

146. *Coppolino v. Helpert*, 266 F. Supp. 930, 934–36 (S.D.N.Y. 1967) (chief medical examiner enjoined from counseling employee not to talk). Indeed, AMSTERDAM'S TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES (A.L.I.-A.B.A., 5th ed. 1989) at § 116 argues that because an officer is a state official, he cannot "instruct himself" not to talk with defense counsel.

147. *See infra* ch. 13 (summonsing witnesses).

148. Mass. R. Prof. C. 4.2. It should be noted that, absent a joint-defense agreement, any communications made by a defendant to a co-defendant's attorney would not be privileged, even if at the time of the interview the interests of the two co-defendants seemed to be aligned. *See* Mass. Guide to Evid. § 502(b), Attorney-Client Privilege & commentary; Mass Guide to Evid. §

the Commonwealth, whether the codefendant intends to testify on his own behalf, whether the codefendant has made a confession, and whether the stories “jell.”

## § 11.7 TANGIBLE EVIDENCE/RECEIPT OF INCRIMINATING EVIDENCE

### § 11.7A. PRESERVING TANGIBLE EVIDENCE

Although much of the physical evidence may be in police custody and subject to examination, in many cases defense counsel should attempt to preserve additional evidence by gathering or photographing it as soon as possible. This may entail, for example, going to the scene<sup>149</sup>, having the defendant medically examined, photographing an apartment after a police search, having the defendant or witnesses search for corroborating evidence in their apartments, obtaining taxi fare records, and so on.

### § 11.7B CLIENT’S DELIVERY OF INCRIMINATING EVIDENCE

A special problem arises when counsel discovers or the defendant delivers either evidence that incriminates the client or fruits of the alleged crime. For example, what should the attorney do if a client presents him with the murder weapon or the stolen jewelry? As detailed below, the ethical and legal obligations are so ambiguous that attorney receipt of incriminating evidence poses a real danger, either to the attorney who does not immediately turn it over to the state, or to the client whose attorney does provide it to the prosecutor. For that reason, about the only clear signal emerging from the Rules of Professional Conduct and the case law is that *the attorney should generally refuse receipt of the item and avoid any words that imply that the client should conceal or suppress it.*<sup>150</sup> In no event should the lawyer suggest that the client transfer evidence to him for safekeeping.

However, in some cases the attorney may not be able to avoid taking possession of the object. It may be necessary to move the object in order to submit it to examination, such as ballistics or fingerprint test,<sup>151</sup> or the lawyer may have received the object

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523(b)(1), Waiver of Privilege. For that reason alone, co-defendant’s counsel would be ill-advised to agree to such an interview. Over the course of a criminal case, the respective interests of the co-defendants may well diverge.

149. CPCS Performance Standards and Complaint Policies Part I, Chapter IVA.

150. Mass. Guide to Evid. § 502(d)(1), Attorney-Client Privilege & commentary; Mass. R. Prof. C. 1.2(e), 3.4(a). Such a conversation is not likely within the attorney-client privilege because it advises criminal conduct and thus the attorney could be compelled to testify to it. *See Clark v. State*, 261 S.W.2d 339, 341 (Tex. 1953) (attorney advising client to “get rid of the weapon”); Mass. R. Prof. C. 1.6.

151. There should be an obvious difference between a defense attorney who takes the object to examine it for exculpatory evidence, which may be required by the Sixth Amendment right to counsel, and one who takes it to conceal it. Three cases recognize that such examination might be required. One suggests that after a reasonable period of time, the attorney may return the evidence to its source if done without hindering the prosecution or impairing its availability; otherwise, the attorney should turn it over to the prosecution. *Commonwealth v. Stenhach*, 514 A.2d 114, 123 (Pa. Super. Ct. 1986). Two other cases suggest that the attorney may take the object, withhold it from the prosecution for investigatory purposes for a reasonable period, and then turn it over to the state. *People v. Meredith*, 631 P.2d 46, 53 n.7 (Cal. 1981); *State v. Olwell*, 394 P.2d 681, 684-85 (Wash. 1964).



unwittingly or without an opportunity to decline it. If the attorney does receive evidence, fruits, or instrumentalities from the client, he is subject to conflicting obligations.

The government might argue that any movement (including receipt) of the object should be considered an effort to conceal evidence, potentially criminally punishable as tampering with evidence, obstruction of justice, or accessory after the fact,<sup>152</sup> and some courts have found that the duty not to suppress evidence<sup>153</sup> overrides other ethical obligations.<sup>154</sup> For example, an attorney who transferred a client's sawed-off shotgun and bank robbery proceeds from the client's safe deposit box to his own was suspended from practice for eighteen months.<sup>155</sup> On this view, the attorney who receives incriminating

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152. *See* G.L. c. 268, § 13E(b), Tampering with Record, Document or Other Object for use in an Official Proceeding, which in pertinent part provides: "Whoever alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the record, document or object's integrity or availability for use in an official proceeding, whether or not the proceeding is pending at that time" is guilty of a felony. The statute goes on to provide that "[t]he record, document, or other object need not be admissible in evidence or free of a claim of privilege." *Id.* at § 13E(c). Although the statute has yet to be interpreted by an appellate court, as applied in this context, two things seem clear. First, its reach depends on the intent of the accused – requiring proof of an intent to impair the object's integrity or availability in an official proceeding, whether then pending or not. Second, a claim of privilege will not defeat the statute's application.

Other criminal statutes involving "obstruction of justice" include G.L. c. 268, §§ 13B & 36. For treatment of this issue by other jurisdictions, see *Morrell v. State*, 575 P.2d 1200, 1212 (Alaska 1978) ("taking possession of evidence from a non-client third party and holding the evidence in a place not accessible to investigating authorities would seem to fall within [the crime of concealing evidence]"). However, as Justice Harlan noted in his dissenting opinion in *Miranda v. Arizona*, 384 U.S. 436, 514 (1966), "in fulfilling his professional responsibilities of necessity [the lawyer] may become an obstacle to truthfinding." *See also* *Commonwealth v. Stenhach*, 514 A.2d 114, 123-24 (Pa. Super. Ct. 1986) (while attorney has duty to turn over the object, may not be convicted of obstruction or tampering because state statutes were unconstitutionally overbroad and statutes failed to give adequate notice to attorney which conflicting obligations to follow); *United States v. King*, 402 F.2d 694, 697 (9th Cir. 1968) (no proof beyond a reasonable doubt that counsel's receipt of money he knew to be stolen was an affirmative act of concealment). *See also* *United States v. Cintolo*, 818 F.2d 980, 988-96 (1st Cir. 1987) (attorney guilty of obstruction under federal law, who advised immunized client to take privilege because of corrupt intent).

153. *See supra* ch. 8. *See also* Mass. R. Prof. C. 3.4(a). ATLA Code Rule 3.5 provides that a "lawyer shall not knowingly participate in unlawfully concealing or destroying evidence." However, the Code makes clear in a series of illustrative cases that the attorney's obligation is not *sua sponte* but only to respond to subpoena or court order.

154. *See, e.g., State v. Green*, 493 So. 2d 1178, 1182-85 (La. 1986) (violates professional responsibility for counsel to knowingly take possession of and secret instrumentalities of crime; attorney had obligation to turn over gun given by client, but attorney cannot testify concerning source and gun not admissible until shown to be relevant); *State v. Menard*, 844 So.2d 1117, 1136 (La.App.Ct. 2003) (attorney-client privilege is vitiated if the attorney and the client conspired to secrete relevant evidence); *Morrell v. State*, 575 P.2d 1200, 1210 (Alaska 1978) (criminal defense attorney must turn over real evidence that the attorney gets from his client).

155. *In re Ryder*, 263 F. Supp. 360, 370 (E.D. Va. 1967). *Ryder* took the items at a time when seizure by the FBI appeared to be imminent. *Ryder* was found to have violated Canons 15 (barring attorney from committing crimes or frauds) and 32 (attorney cannot be disloyal to law) of the Canons of Professional Ethics; Canons 5 (use all fair means to present every defense) and 37 (confidences) were found not to sanction the conduct. In disciplining *Ryder*, the court noted that *Ryder*, not the client, took the initiative in transferring possession. The court did not disbar him

physical evidence must inform the court or deliver the evidence to the prosecution,<sup>156</sup> although some courts permit retention by the attorney for a “reasonable period of time” during which the evidence can be examined,<sup>157</sup> and other courts prohibit the prosecution from informing the jury of its source.<sup>158</sup>

But disclosure might be deemed to violate important rights of the client and ethical duties of counsel, including the following:

1. *The professional responsibilities required by the Rules of Professional Conduct.* The attorney may not prejudice the client’s interests, except if required under specified disciplinary provisions,<sup>159</sup> and must not reveal “confidential information” except as required or permitted by the Rules.<sup>160</sup>

2. *The attorney-client privilege.* Although it is a minority view that the privilege protects the object as well as the communication concerning it,<sup>161</sup> because the transfer to the attorney has communicative aspects<sup>162</sup> those aspects should be privileged. For example, several cases that require production insist that its source be concealed from the jury.<sup>163</sup> To the degree that the attorney-client privilege is a necessary element of the right

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because he had consulted in good faith with other attorneys regarding his ethical obligations and intended ultimately to return the money to the bank.

156. *Commonwealth v. Stenhach*, 514 A.2d 114, 119 (Pa. Super. Ct. 1986); *Clutchette v. Rushen*, 770 F.2d 1469, 1472 (9th Cir. 1985); *People v. Meredith*, 631 P.2d 46, 53 (Cal. 1981); *People v. Lee*, 83 Cal. Rptr. 715, 722 (1970); *Morrell v. State*, 575 P.2d 1200, 1210 (Alaska 1978). *Cf. In re Ryder*, 263 F. Supp. 360, 366-67 (E.D.Va. 1967) (attorney violates ethical duty if he actively conceals incriminating evidence); *State v. Olwell*, 394 P.2d 681, 684-85 (Wash. 1964) (affirmative duty after “reasonable time,” although counsel may not be compelled to testify to source of evidence).

157. *Commonwealth v. Stenhach*, 514 A.2d 114, 120 (Pa. Super. Ct. 1986); *People v. Meredith*, 631 P.2d 46, 53 n.7 (Cal. 1981); *State v. Olwell*, 394 P.2d 681, 684-85 (Wash. 1964).

158. *State v. Olwell*, 394 P.2d 681, 685 (Wash. 1964) (prosecution may not inform fact finder of source); *Hayden v. State*, 972 So.2d 525, 549 (Miss. 2007); *Commonwealth v. Stenhach*, 514 A.2d 114, 123 (Pa. Super. Ct. 1986); *Anderson v. State*, 297 So. 2d 871, 873 (Fla. 1974). *See also State v. Green*, 493 So. 2d 1178, 1184-85 (La. 1986) (privilege applies to information regarding source); *Morrell v. State*, 575 P.2d 1200, 1207 (Alaska 1978) (attorney may have either right or duty to remain silent as to source); *State v. Olwell*, 394 P.2d 681, 684-86 (Wash. 1964) (attorney may withhold evidence from prosecution for reasonable period of time and may not be compelled to testify).

159. Mass. R. Prof. C. 1.3 (diligence) requires the attorney to “represent a client zealously within the bounds of law.”

160. *See* Mass. R. Prof. C. 1.6 and discussion *supra* at § 11.4A.

161. *See People v. Belge*, 372 N.Y.S.2d 798, 802-03, *aff’d*, 376 N.Y.S.2d 771 (1975), *aff’d*, 390 N.Y.S.2d 867, 359 N.E.2d 377 (1976) (counsel discovered location of bodies through client communication; attorney-client privilege outweighs statutory obligation to report existence of certain objects). But even if the attorney-client privilege attaches to the object itself, the statute making it a crime to conceal an object with the intent to impair its availability at an official proceeding explicitly provides that, for purposes of the statute, the “object need not be ... free of a claim of privilege.” G.L. c. 268, § 13E(c).

162. The implicit statements made in such a transfer are the same as those discussed in the next paragraph concerning the privilege against self-incrimination.

163. *Anderson v. State*, 297 So. 2d 871, 875 (Fla. 1974); *State v. Olwell*, 394 P.2d 681, 684-85 (Wash. 1964) (privileged communication includes instrumentalities given to attorney;

to effective assistance of counsel or the privilege against self-incrimination, those constitutional rights might also be implicated by requiring disclosure.

3. *The client's privilege against self-incrimination, which only the client may waive.*<sup>164</sup> In Massachusetts it has been held that compelling the *defendant* to produce the murder weapon violated the privilege,<sup>165</sup> relying on Supreme Court precedent that the *act of producing* the object may itself be an incriminating communication — such as a communication that the object exists, is authentic, or is in the possession of the defendant.<sup>166</sup> This protection extends to objects transferred to the attorney: if the attorney received the object from the client in a privileged transaction, and the client would have a

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attorney given knife by client may withhold it for reasonable period of time, after which he should turn it over to prosecution). *Cf. Morrell v. State*, 575 P.2d 1200, 1207 (Alaska 1978) (attorney may have either right or duty to remain silent as to source). *But see* In re January 1976 Grand Jury, 534 F.2d 719, 729-30 (7th Cir. 1976); In re Ryder, 381 F.2d 713, 714 (4th Cir. 1967) (attorney knowingly taking possession and secreting fruits or instrumentalities of crime not within privilege); In re Original Grand Jury Investigation, 733 N.E.2d 1135, 1140 (Ohio 2000) (where attorney gets physical evidence from a third party relating to a possible crime committed by his client, the attorney must hand the evidence over to proper authorities and must comply with any related subpoena).

164. *Compare* State v. Olwell, 394 P.2d 681, 684 (Wash. 1964) (attorney subpoenaed to produce knife given by client may refuse under attorney-client privilege) *with* In re January 1976 Grand Jury, 534 F.2d 719, 728-29 (7th Cir. 1976) (attorney cannot invoke constitutional grounds or attorney-client privilege to avoid obligation under grand jury subpoena to turn over stolen money given him by client).

165. In Commonwealth v. Hughes, 380 Mass. 583, 590–92, *cert. denied*, 449 U.S. 900 (1980), the S.J.C., deciding a contempt appeal, held that under the Fifth Amendment (and noting, but not holding, the same would be so under article 12) compelled production of a gun would itself be testimonial in nature, making an implicit statement about its existence, location, and control by the defendant. “It is extortion of information from the accused himself that offends our sense of justice.” *Hughes, supra*, 380 Mass. at 595.

166. United States v. Doe, 465 U.S. 605, 612-14 (1984) (grand jury subpoena of sole proprietor to produce his business records was unconstitutional because it would compel him to tacitly admit existence, possession, and authenticity of records); United States v. Hubbell, 530 U.S. 27, 45 (2000) (defendant could not be compelled to produce documents without grant of immunity because the act of production, with regards to existence and location of documents, had a testimonial aspect); Fisher v. United States, 425 U.S. 391, 410 (1976) (compliance with subpoena in some circumstances would concede existence of papers demanded, possession or control by taxpayer, and his belief these papers are the ones described in subpoena); *see also* United States v. Ponds, 454 F.3d 313, 324-27 (D.C. Cir. 2006) (production of documents was testimonial because the government failed to show that it already knew of the existence and location of most of the documents subpoenaed). *Cf. Baltimore v. Bouknight*, 493 U.S. 549, 554-56 (1990) (without ruling on its admissibility in a criminal proceeding, court upholds contempt finding on mother suspected of child abuse for not complying with an order to produce the child, since previous juvenile court order gave mother “custodial” obligations to disclose, and production order was part of civil regulatory scheme to protect children, not an effort to impose criminal liability).

This doctrine, developed in 1976, casts some doubt on the reasoning of earlier cases requiring attorney production of incriminating evidence. For example, in *In re Ryder*, 263 F.Supp. 360, 366 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967), the court found that the Fifth Amendment privilege did not apply, stating that “If a document would be subject to an order for production if it were in the hands of a client, it would be equally subject if it is in the hands of an attorney.”

Fifth Amendment privilege, the court will analyze the case as if the client never made the transfer since the attorney-client privilege incorporates the client's Fifth Amendment privilege.<sup>167</sup>

In short, existing authority is so sparse and ambiguous<sup>168</sup> that counsel should avoid receipt of the evidence whenever possible. If he does come into possession of it, obviously he may not alter or destroy it.<sup>169</sup> Although return to its source might arguably be an option if it were clear that the temporary displacement had done nothing to impair the Commonwealth's chances of discovery,<sup>170</sup> under the weight of authority receipt probably invokes an obligation to turn it over to the prosecution or at least inform the court in camera, with safeguards that prevent that production from being used to prove that the client was the source. Such safeguards might be constructed through negotiations with the prosecutor, or court motion, or anonymous production.

*Attorney testimony regarding source of the evidence:* Even those courts that hold that the attorney must turn over incriminating evidence given to him by the client state that the attorney-client privilege protects against attorney testimony regarding its source.<sup>171</sup> Because the privilege belongs to the client, an attorney can neither choose nor be compelled to testify.<sup>172</sup> However, in California a court-created rule holds that if (and only if)<sup>173</sup> the attorney alters or removes the object, the attorney-client privilege is lifted and he may be required to testify to its original location and condition.<sup>174</sup>

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167. *Commonwealth v. Hughes*, 380 Mass. 583, 589 n.7 (1980) (citing *Fisher v. United States*, 425 U.S. 391, 396–405 (1976), which held that an attorney's production of his client's tax records did not violate the client's privilege only because the protected communications were not at issue in the case).

168. *See Commonwealth v. Stenhach*, 514 A.2d 114, 125-27 (Pa. Super. Ct. 1986) (given sparse authority in Pennsylvania, "little or no guidance for an attorney to know when he has crossed the invisible line into an area of criminal behavior," so attorney cannot be convicted of tampering or obstruction).

169. Mass. R. Prof. C. 3.4(a); G.L. c. 168, § 13E.

170. *Commonwealth v. Stenhach*, 514 A.2d 114, 123-24 (Pa. Super. Ct. 1986); *Hitch v. Pima County Superior Court*, 708 P.2d 72, 78 (Ariz., 1985); ABA Ethics Committee of the Criminal Justice Section, *Ethical Standard to Guide [A Lawyer] Who Receives Physical Evidence Implicating His Client in Criminal Conduct*, 29 CRIM. L. REP. 2465–66 (Aug. 26, 1981).

171. *See, e.g., State v. Green*, 493 So. 2d 1178, 1184-85 (La. 1986); *Morrell v. State*, 575 P.2d 1200, 1207 (Alaska 1978) (attorney may have either right or duty to remain silent as to source); *State v. Olwell*, 394 P.2d 681, 684-85 (Wash. 1964) (attorney may withhold evidence from prosecution for reasonable period of time and may not be compelled to testify).

172. *State v. Green*, 493 So. 2d 1178 (La. 1986). *See also* Mass. R. Prof. C. 1.6 (which generally bars disclosure of confidential information).

173. It is clear that where the attorney learns of the existence of incriminating evidence from the client and does not remove it, he is under a duty *not* to reveal the information, and is exempt from statutory requirements of reportage. *People v. Belge*, 372 N.Y.S.2d 798, *aff'd*, 376 N.Y.S.2d 771 (1975), *aff'd*, 390 N.Y.S.2d 867, 359 N.E.2d 377 (1976) (location of bodies). The California exception does not alter this rule.

174. *People v. Meredith*, 631 P.2d 46, 54 (Cal. 1981). *See also* *People v. Nash*, 341 N.W.2d 439, 451-52 (Mich. 1983).

## § 11.7C DISCOVERY OF INCRIMINATING EVIDENCE, OR RECEIPT OF INCRIMINATING EVIDENCE FROM A THIRD PARTY

When the client is not the source of the evidence, either by delivering the object to counsel or by informing counsel of facts that lead the attorney to ultimately discover it,<sup>175</sup> the attorney-client privilege is removed from the scales, but the professional obligation to protect “confidential information” remains.<sup>176</sup> In such a case the weight of authority requires an attorney who has taken possession of the evidence to provide the prosecution with it,<sup>177</sup> and he may also be compelled to testify concerning the third-party source.<sup>178</sup> However, where the attorney does not take possession of the evidence, he cannot be construed as concealing it, and there seems no more reason to expect the attorney to inform the prosecution of that evidence than to expect him to turn over the names of unfavorable witnesses, which would be unconstitutional.<sup>179</sup>

## § 11.8 USING EVIDENTIARY HEARINGS FOR INVESTIGATION

Counsel should always be alert to the investigative and discovery potential of any pretrial hearing. When defense counsel cross-examines a witness on the stand, she has constitutional confrontation rights to elicit the witness’s present address,<sup>180</sup> the identities of witnesses,<sup>181</sup> and all other relevant evidence.<sup>182</sup>

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175. *People v. Belge*, 372 N.Y.S.2d 798, *aff’d*, 376 N.Y.S.2d 771 (1975), *aff’d*, 390 N.Y.S.2d 867; 359 N.E.2d 377 (1976) (location of bodies); *State v. Olwell*, 394 P.2d 681, 683 (Wash. 1964) (“the securing of the knife in this case must have been the direct result of information given to Mr. Olwell by his client at the time they conferred in order to come within the attorney-client privilege”); *People v. Meredith*, 631 P.2d 46, 52 (Cal. 1981) (attorney-client privilege “extends to protect observations made as a consequence of protected communications” citing *West Virginia v. Douglass*, 20 W. Va. 770, 783 (1882)).

176. Mass. R. Prof. C. 1.6.

177. *See, e.g., Morrell v. State*, 575 P.2d 1200, 1207 (Alaska 1978) (“existing authority seems to indicate . . . that a criminal defense attorney has an obligation to turn over to the prosecution physical evidence which comes into his possession, especially where the evidence comes into the attorney’s possession through the acts of a third party who is neither a client of the attorney nor an agent of a client”).

178. *Morrell v. State*, 575 P.2d 1200, 1207–08, 1210 (Alaska 1978); *State v. Olwell*, 394 P.2d 681, 683–84 (Wash. 1964); *People v. Lee*, 83 Cal. Rptr. 715, 723 (1970). *But see* Mass. R. Prof. C. 1.6 comments [5] and [5A].

179. Although an attorney must provide discovery of evidence he intends to use at trial, Mass. R. Crim. P. 14(a)(1)(B), it violates the Fifth Amendment to require him to provide names of witnesses he does not intend to use. *Williams v. Florida*, 399 U.S. 78, 84–85 (1970). *Cf. Clutchette v. Rushen*, 770 F.2d 1469, 1472 (9th Cir. 1985) (communications about where to find receipts were privileged, but once attorney removed receipts from their original location, they were no longer privileged; had attorney left receipts in their place, he could have claimed attorney-client privilege); *People v. Meredith*, 631 P.2d 46, 54 (Cal. 1981) (attorney-client privilege applies to defendant’s disclosures of incriminating evidence as long as counsel does not move the evidence).

180. *Smith v. Illinois*, 390 U.S. 129, 131 (1968). The S.J.C. has held that this is a confrontation right that may be denied only where safety considerations are apparent. *Commonwealth v. Cobb*, 379 Mass. 456, 469–70 (1980), *judgment vacated in part sub nom. Massachusetts v. Hurley*, 449 U.S. 809 (1980), *appeal dismissed sub nom. Commonwealth v. Hurley*, 382 Mass. 690 (1981), *appeal reinstated*, 391 Mass. 76 (1984); *Commonwealth v. Johnson*, 365 Mass. 534, 544–46 (1974); *Commonwealth v. McGrath*, 364 Mass. 243, 250–52 (1973). If the Commonwealth objects, it has the burden of explaining the reasons unless safety

Moreover, in some cases — particularly show-cause hearings, probable-cause hearings, and identification suppression hearings<sup>183</sup> — the relevant issues before the court largely duplicate those relevant to trial. In such hearings, counsel has the opportunity to examine the ultimate trial witnesses on the record, under oath, on issues crucial to the case.

To the degree that discovery and investigation is an ancillary goal, counsel will summons Commonwealth witnesses and documents, present uncalled Commonwealth witnesses at the hearing, use open-ended and extensive questioning, and not object to some inadmissible evidence. (Note also that vigorously cross-examining an adverse witness may only better prepare her for trial and reveal the defense.) Obviously, however, such a strategy should not be used in areas where the pretrial motion would be adversely affected or where the effect might be to preserve the testimony of a witness who might not be available for trial.

Following the hearing, counsel should order the tape recording for trial preparation and impeachment purposes.<sup>184</sup> If the defendant is indigent, counsel may seek court funds to have a transcript prepared.<sup>185</sup>

## § 11.9 DEFENDANT INTERVIEW CHECKLISTS<sup>186</sup>

(See also *supra* § 11.4 (interviewing the defendant) and § 9.10 (checklist of interview questions relevant to bail).)

Where appropriate, counsel should also obtain in the initial interview: (1) the client's signed release giving counsel the right to inspect his hospital, prison, and juvenile court records; and (2) a signed retainer and fee agreement.

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concerns are apparent from the charge and circumstances. McGrath, 364 Mass. at 251–52; Cobb, 379 Mass. at 469-70; Commonwealth v. Francis, 432 Mass. 353, 357-58 (2000); Commonwealth v. Holliday, 450 Mass. 794, 803 (2008). If cross-examination to elicit the present address is denied, private disclosures to defense counsel may be proper. McGrath, 364 Mass. at 252 n.5.

181. Commonwealth v. Johnson, 365 Mass. 534, 544-45 (1974).

182. Commonwealth v. Johnson, 365 Mass. 534, 543–46 (1974). *Johnson* provides strong authority that wide-ranging cross-examination is guaranteed under article 12 of the Declaration of Rights of the Massachusetts Constitution and the Sixth Amendment of the U.S. Constitution, stating that such concerns as embarrassment or safety cannot justify proscribing cross-examination, with two exceptions: safety considerations may provide a bar to (1) disclosure of an informant's identity when it would not affect the fairness of the trial, and (2) disclosure of a witness's present address where the court finds an actual danger and considers alternatives to full nondisclosure. See Commonwealth v. Dias, 451 Mass. 463, 469-470 (2008) (upholding trial judge's order requiring Commonwealth to disclose the identity of informant based on defendant's showing that the informant's identity "would be relevant and helpful to the defense").

183. See discussion of strategic considerations *supra* at §§ 2.2 (probable-cause hearings) and 4.2B (show cause hearings), and *infra* at § 18.15A (identification hearings).

184. CPCS Performance Standards and Complaint Policies Part I, Chapter IIIB(7).

185. See *infra* ch. 29.

186. This checklist is adapted from § 90 of A. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES, copyright 1989 by the American Law Institute. Reprinted with the permission of the American Law Institute — American Bar Association Committee on Continuing Professional Education.

**§ 11.9A CLIENT HISTORY**

- 1. Name (make the client spell even common names)
- 2. All aliases
- 3. Address
- 4. Phone (or phone at which he can be reached and name of person there)
- 5. Date of birth
- 6. Place of birth
- 7. Place of residence at time of arrest
- 8. Prior places of residence (from latest to earliest)

Residence	From (date)	To (date)
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- 9. Education (include all schools attended)

Name of school and location	Highest grade completed	Date last attended
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- 10. Armed forces

- Branch of service
- Date of beginning of active duty
- Date of discharge
- Type of discharge
- Rank at time of discharge
- Any honors or medals
- Combat service
- Time overseas (place and dates)
- Any court martial charges
- Charge
- Finding
  - Date of finding
  - Sentence

- 11. Present employment (separate notation for each employer, if more than one)

- Name of employer
- Address
- Type of business

Client's immediate supervisor  
Client's job designation  
Pay (starting) (present)  
Employed since (date)  
Indicate season if seasonal

12. Presently unemployed?

Since (date)  
Receiving unemployment compensation? Amount  
Other means of support

13. Prior employment (all employers, from latest to earliest)

Name of employer  
Address  
Type of business  
Client's immediate supervisor  
Client's job designation  
Client's type of work  
Pay (starting) (at termination)  
Employed from (date) to (date)  
Indicate season if seasonal  
Reason for leaving

14. Social security number

15. Marital status

Single  
 Divorced  
 Married ceremonial  common law

16. Wife

Name  
Address  
Phone  
Employed  
Type of work  
Employer's name  
Employer's address

17. Children

Name Age



Name                      Age

18. Client's father, mother, and siblings — for each, list

Name

Living [    ]                      Deceased [    ]

Address

Phone

Type of work

19. By whom was client raised? Indicate if parents were separated during childhood. If client was raised by persons other than a parent, get data for those persons as for parents, *supra*.

20. Does client use narcotics?

Type(s)

Since (date)

Present frequency of use

Has client received treatment for a narcotics problem or participated in any form of detoxification program? Describe.

21. Does client use alcohol?

Volume of use

If heavy drinker, since (date)

Has client received treatment for an alcohol problem or participated in any form of detoxification program? Describe.

22. Physical and mental condition

Present physical disabilities

Present physical illness

Presently under medical care

Doctor's name

Address

Phone

Serious physical injuries (and all head injuries)

Type

Cause

Date

If hospitalized, name, address, and city of hospital, and dates of hospitalization

Has client ever been in a mental hospital or institution (name and address of hospital)?

Has client ever been treated by a psychiatrist (name, address, and telephone

number of psychiatrist)?

Has client ever undergone psychiatric or psychological evaluation (circumstances; names and addresses of evaluators)?

23. Prior criminal record (all arrests, from latest to earliest, *including pending charges, including juvenile arrests*, and in all jurisdictions)

Date of arrest

Jurisdiction (city and state)

Charges(s)

Disposition if not by court

Plea (guilty or not guilty; if guilty, of what charges)

Trial by judge or jury

Name of judge

Court disposition (guilty or not guilty; if guilty, of what charges)

Sentence

Date sentence handed down

Time served

Institution                      Prison number

Dates on probation or parole      from              to

Name of probation or parole officer

Rearrest for probation or parole violation

    Date of rearrest

    Violation charged

    Disposition

Name of attorney

Address of attorney

24. Was client on probation or parole at the time of this arrest?

    Probation or parole

    On which of the above prior charges (indicate by number)?

25. Was client under any pending charges at the time of this arrest?

    (Indicate by number which of the above prior charges was pending.)

26. Was client wanted for arrest on other charges in any jurisdiction at the time of this arrest?

    Jurisdiction

    Charge(s)

    How does client know he is wanted?

    Name of law enforcement agency involved, if known

Name of officers involved, if known

27. Present custodial status

Jail (name and address)

Prison (name and address)

Prison number

Bail

Where posted

When posted

Amount

Form (cash, property, professional surety)

If bonding company, name

Who paid for the bail?

**§ 11.9B CLIENT'S VERSION OF THE EVENTS AT ISSUE**

1. Ask the client to tell everything he knows about the present charge, in chronological order: what he did, why he did it, where and when it occurred, what happened to him, and who was involved. *See* witness interview checklists regarding particular cases, *infra* § 11.10.

2. If the client denies involvement, where was the client? What was he doing at the time? How does he remember the exact time and place? *See* alibi checklist, *infra* § 11.10A.

3. Witnesses (indicate if immediate contact is advised for any reason, and in each case get name, alias, nicknames, address, where the witness works, hangs out, etc.):

Witnesses to the alleged event (including the complainant and persons who may be prosecution witnesses):

Alibi witnesses

Character witnesses

4. Are there any codefendants?

Name(s)

If in custody, where?

If at liberty, get identifying information, including alias, nicknames, address, where the witness works, hangs out, etc.

**§ 11.9C ARREST**

1. Who, what, why, when, where, and how?

2. Who was with client when he was arrested? Were they arrested? (For each witness, get name, alias, nicknames, address, where the witness works, hangs out, etc.)
3. Was client drunk when arrested or had he taken alcohol recently?
4. Was client under the influence of narcotics or had he taken narcotics recently?
5. Was client ill when arrested?
6. Was client struck or roughly handled in arrest or thereafter? (Describe injuries.)
7. Date and time of arrest
8. Exact location of arrest
9. Names of arresting officers
10. Did they have a warrant?
11. What did they say the charge was?
12. All conversation and statements. What questions did police ask the client? What did the client tell them?
13. Did police at time of arrest or any other time take property from the client's home, person, place of work, automobile, place where the client was, home or place of any other person?

Kind of property

Did police have a search warrant?

Describe circumstances under which property was taken.

(For each witness, get name, alias, nicknames, address, where the witness works, hangs out, etc.)

#### **§ 11.9D FOLLOWING ARREST**

1. Every location to which client was taken by police
2. Exact times of confinement in each place
3. Number of officers present in each place (get names, ranks, and descriptions of each officer significantly involved in investigation)

#### ***Interrogation***

4. Where did it take place?
5. When and how long?
6. Interrogating officers
7. Other persons present
8. Was a lie detector test given?
9. What specific questions did the officers ask? (This is often a good means of learning something about the prosecution's case.)
10. Did the police confront the client with any evidence against him?
11. Did the police tell the client that any person had incriminated him or that any

codefendant had confessed?

12. Did any codefendant confess or incriminate the defendant in his presence?

13. Did client tell the police anything?

What, in detail?

Did client make a written statement?

Was his oral statement taken down?

Did he sign anything?

Were there any recording devices around?

Other circumstances at the time of the client's statement, in detail

14. Was the client previously warned:

That he had a right to remain silent?

That anything he said could be used against him?

That he had a right to a lawyer before making a statement?

That if he could not afford a lawyer, one would be appointed for him before making a statement?

What did the client say to these warnings?

### ***Examination***

15. Was the client given any physical examination; was a blood sample taken; was hair taken or combed; was a narcotics or alcohol test administered or body inspection of any sort made; was the client examined by a doctor or psychiatrist?

16. Where?

17. When?

18. Describe the examination, test, or inspection.

19. Name all persons present.

20. Did anyone say anything about what the examination, test, or inspection showed?

21. Was the client asked for permission to make the examination, test, or inspection?

22. Was he told that he had a right to refuse or to have an attorney present?

### ***Identification procedures***

23. Was the client exhibited in a lineup or brought before any person for identification?

24. Where?

25. When?

26. Describe the situation.

27. All persons present (including police, identifying witnesses, other persons in lineup, codefendants)

28. What did the police say to the identifying witness?

29. What did the identifying witness say?

30. Was the client asked to say anything?
31. Was the client asked for permission to put him in the lineup or to exhibit him for identification?
32. Was he told that he had a right to refuse or to have an attorney present?
33. Was he asked to do anything (move, speak, walk around)?
34. Was he told that he had a right not to do these things?
35. What did he say or do?
36. Was the client asked to reenact anything?

***Consent to search***

37. Was the client asked to give his permission to the search of any place or thing?
38. Where?
39. When?
40. By whom was the request made?
41. All persons present
42. For what place or thing was permission to search requested?
43. What was the search supposed to be looking for?
44. What was said to the client by the person requesting permission?
45. Was the client told that he had the right to refuse permission?
46. Was anything said about a search warrant; what, specifically?

**§ 11.9E PRIOR JUDICIAL PROCEEDINGS IN THE CASE**

1. Has the client appeared in court?
2. When?
3. What court?
4. Nature of proceedings?
5. Who was present (names or descriptions of judge, prosecutor, police)?
6. Were charges read or shown to the client? What were they?
7. Was the defendant asked to plead? What did he plead?
8. Who testified?
9. What did they testify?
10. Did the client testify? What did he testify?
11. Was he represented by a lawyer? (Give name or description of lawyer, and circumstances of representation; did the attorney give client his card, and does client still have it?)
12. What else happened?
13. Was client given a slip of paper or a form of any sort? If so, where is it? (Counsel

wants to lay his hands on this form as soon as he can get it from the client or his family, since it usually will state the charges and next court appearance date more accurately than the client can remember and will contain the court's case number.)

## § 11.10 WITNESS INTERVIEW CHECKLISTS <sup>187</sup>

The following questions include only some aspects of certain offenses and are not designed to replace the specific, detailed questioning of witnesses necessary to elicit the unique facts of a particular case.

(See also *supra* § 11.6A (checklist of areas common to all types of cases), § 11.6B (ethical and legal considerations in witness interviews), § 11.6C (obtaining usable statements), § 11.6D (interviewing disinterested or hostile witnesses), § 11.6D(3) (checklist of areas for police interviews), and § 11.6E (interviewing friendly witnesses).)

### § 11.10A ALIBI WITNESS

1. Was the defendant with you on (date)?
2. How do you recall that specific day?
3. How do you recall that specific time?
4. When did the defendant arrive?
5. When did you first see the defendant?
6. Where did you first see him at that time (address, exact place, etc.)?
7. Was the defendant alone or with someone else? Who? Where do they live?
8. Did anyone else see you and the defendant together? Who? Where do they live?
9. How long was defendant with you?
10. How do you know it was this long?
11. What exactly did defendant do/say/etc.? (Be as specific and detailed as possible.)
12. Did defendant ever leave your presence during this period of time?  
When?  
To go where?  
How many times?  
How long was defendant gone each time?  
When did defendant return?
13. When did defendant finally leave?
14. How do you know?
15. Who, if anyone, left with the defendant?

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187. This checklist is a revised version of a checklist included in the CRIMINAL PRACTICE INSTITUTE TRIAL MANUAL published by the D.C. Public Defender Service and the Young Lawyers Section of the D.C. Bar Association. The author gratefully acknowledges the CPI for its permission to utilize and adapt the checklist.

16. Where did defendant go?
17. How do you know?
18. How did the defendant act during the period of time he was with you? (Be as specific as possible.)
  - Intoxicated?
  - Drugged?
  - Nervous?
  - Excited?
  - Calm?
  - Normal?
  - Angry?
  - Happy?
  - Sad?
19. What is your relationship with the defendant?
  - Close friend?
  - Casual friend?
  - Know to speak to?
  - Relative by blood?
  - Relative by marriage?
  - Employer?
20. How long have you known the defendant?
21. When was the last time you saw the defendant before [the date in question]?
22. Where? What was the defendant doing, etc.?
23. Have you seen the defendant since [the date in question]?
24. Where? What was the defendant doing?
25. Are you aware that the defendant is charged with [offense]?
26. How did you learn this?
27. What exactly do you know about the offense?
28. Have you ever talked with police about the offense? (If yes, details as to when, where, what said, etc.)
29. Have you ever talked about the offense with the defendant? (If yes, give details.)
30. Have you ever spoken to anyone else about the offense? (If yes, details as to when, what said, by whom, etc.)
31. Have you testified before the grand jury about this case?
32. Have you spoken to anyone else about the offense? (If yes, details as to whom, what said, by whom, etc.)



33. Did you ever discuss the case with the police or the assistant district attorney? (If yes, details as to when, what said, etc.)
34. Have you ever been convicted of an offense? (When, where, what disposition?)
35. Where do you now live? Phone number? Length of time?
36. Where did you live before that? Length of time?
37. Where do you work? (If unemployed, how long?)
38. What is your position?
39. How long have you been employed there?
40. Where did you work before that? Position?

### **§ 11.10B IDENTIFICATION CASE**

(See also *infra* ch. 18 (identification cases))

#### ***1. Questions About the Event Itself***

1. Give a detailed narrative of what happened during the event.
2. Where was the witness coming from, what was he doing prior to the incident, and where was he going?
3. Whom was he with?
4. What was he paying attention to just before he noticed the assailant for the first time?
5. From which direction did the assailant approach (front, rear, side, don't know)?
6. What was the exact location of the confrontation? (Elicit in both words and diagram if possible.)
7. Exactly what happened? Was there more than one person involved? What were the exact and relative roles of the persons involved?
8. Determine which assailant, if there is more than one, is supposed to be the defendant. Then find out where he was at all times, in absolute terms and in relation to the other assailants and witness.
9. Which assailant if any made contact with the witness?
10. When did the witness first notice the assailants? (How far away were they? What drew his attention to him or them?)
11. Was anything taken from the witness? What was done with it after it was taken?
12. Where or in which direction did the assailant flee? For how long after the incident did the witness have him in sight?

#### ***2. Opportunity to Observe***

What was the witness's state of mind?

1. What had the witness been doing prior to the incident?

2. Had the witness been drinking prior to the incident? Had he been using any drugs?
3. Where was the witness going at the time of the incident?
4. How much sleep had the witness had the night before?
5. Was he tired? Preoccupied?
6. Was he frightened?
7. Was he focusing on a weapon during the incident or on another individual?

What were the physical conditions of observation?

(All questions should treat the incident as a series of parts. For example, the witness may not have had a good opportunity to observe, or may have been focusing on one particular item or person during some of the segments.)

1. What was the distance between the witness and the assailant when he first noticed him?
2. What were the distances between the two of them during the different phases of the incident?
3. How long did the incident take? (*Note: Time is very important. Most witnesses will say that an event took minutes when it actually was seconds. If you can help the witness realize how long a minute is, his estimate of the period of observation may be reduced considerably.*)
4. What was the angle of observation between the witness and the assailant?
5. What is the witness's hearing like? His vision?
6. What were the weather conditions like (sunny, rainy, overcast, stars out)?
7. What were the lighting conditions? Get streetlights, houselights, car lights, anything available. Was any of the lighting filtered or obstructed? Get exact locations of the lights. Find out if street lights were high or low intensity. Were there any lights available that were not turned on?
8. Were there any physical barriers or obstructions between the witness and the assailant, such as cars, trees, other witnesses?

### ***3. Reporting the Incident***

To the police

1. How was the incident reported to the police? (Calling? Flagger down a car?)
2. Who reported the incident to the police?
3. How soon after the event was it reported?
4. With whom was the incident discussed?
5. What was said by all parties during the reporting of the event?

6. What was the initial description the witness gave to the police?
7. Did the witness forget to tell the police anything that he is now telling you?
8. Did the police read back to the witness what they had written down? Did the witness change anything or adopt it?
9. Did the witness make a written statement?
10. Was the witness under the influence of any drugs or alcohol when speaking with the police?
11. Has the witness spoken with anyone else about the incident?
12. Were there other witnesses who talked to the police?
13. Were there other witnesses who did not talk to the police?

To the prosecutor and/or court

1. Has the witness been to the grand jury? Did he testify or did he meet only with a prosecutor?
2. What was the witness's testimony?
3. Did the prosecutor take notes of the meeting?
4. Who else has met with the prosecutor?
5. Is there anything the witness told the grand jury or the prosecutor that he has not told you?
6. Is there anything the witness told you that he forgot to tell the grand jury or the prosecutor?

#### ***4. Description of the Assailant***

1. Age?
2. Height (relative to witness or another object)?
3. Weight?
4. Skin color and complexion?
5. Nose (shape)?
6. Mouth (shape, especially lips)?
7. Teeth?
8. Eyes (color, shape, and positioning)?
9. Shape of face (broad, narrow, type of forehead, etc.)?
10. Glasses?
11. Facial hair (type, style, color, amount)?
12. Hair (style, amount, color)?
13. Clothing description (style, color, distinguishing features)?  
Coat? Hat? Pants? Shirt? Shoes? Any other articles?

14. Any distinguishing or unusual feature of the assailant?
15. Was the assailant carrying any object? (Get full descriptions of any weapons: include style, type, color, size, where the item came from.)
16. Was there anything distinctive about the assailant's voice, the way he walked, or any unusual mannerisms?
17. Does the description that the witness gave to you differ in any way from that he gave to the police? Did he add anything or leave anything out?

#### ***5. Evaluation of the Witness***

1. Has he ever been a victim of a crime before?
2. Has he ever been a witness to a crime before?
3. How articulate is the witness?
4. How certain or sure does the witness appear to be?
5. How anxious is the witness to pursue this case?

#### ***6. Identification Procedures Generally***

1. How was the identification made? (Show-up, photo array, lineup, caught on the scene, second sighting?)
2. What was said to the witness by the police before the identification? Did the witness overhear anything being said?
3. What was said by the police during the identification?
4. What was said by the witness in making the identification? (Exact words if possible.)
5. What was said by the police after the identification?
6. Did the police write down what the witness said?
7. Were there any other witnesses around during the identification? How close were they to this witness?
8. Did this witness hear what any other witness said about an identification?
9. Were any other identifications made?
10. Were there any times when the witness was asked to identify someone and was unable to make an identification? Get full details.
11. What did this witness base his identification on? (Clothes, face, relative size, body build?)
12. How soon after the incident was the identification made?
13. Did the person whom the witness identified appear to be different in any way from the assailant? (Was there different facial hair? Different clothes?)
14. If there was more than one culprit, how were they identified? If at a show-up or lineup, were they brought out together? If in photos, were their pictures in the same array?
15. How certain is the witness of this identification? Also find out if the police

asked this question and what the witness's response was.

16. Is the witness more certain now than at the time of the original identification? Have there been multiple identifications that now make the person more certain?

17. If there is more than one person, is the witness more certain of one than the other?

### **7. *Show-Up Identification***

1. Was the witness taken to the assailant, or was the assailant transported to the witness?

2. Was the show-up at the scene of the crime or at another location?

3. Where was the witness at the time of the identification? (Actual position on a diagram or in detailed words, and relative to the assailant.) Could the assailant see or hear the witness?

4. What was said by the police and by the witness before, during, and after the identification?

5. What description had the witness given to the police? What description did the police have from other witnesses?

6. Were police around the suspect when he was brought? Was he handcuffed? Was he in a scout car?

7. Who else was present? Could other witnesses hear what this witness said? Could this witness hear what other witnesses said?

8. Did the suspect have to do anything during the show-up (e.g., say anything, put on or take off an article of clothing)?

9. Find out the exact location of the show-up to determine lighting, possible witnesses, etc.

10. *Note:* Be sure to ask the questions listed *supra* in § 11.10B(6) (Identification Procedures Generally).

### **8. *“Second” Sighting***

1. Did the witness ever see the suspect again on the street? (When? Where? Be exact.)

2. What did the witness do after seeing the suspect again?

3. Was anyone else present?

4. What was he paying attention to just before seeing the person again?

5. What were the circumstances of the “second” sighting?

6. What was the lighting?

7. Was anything said to or by the suspect?

8. Question the witness about his ability and opportunity to observe at the “second” sighting.

9. Question the witness about reporting the incident to police.

## **9. Photo Identification**

1. Was this the first identification?
2. Were there any identifications or failures to identify at the scene?
3. Where were the photos shown?
4. How were the pictures shown (loose, in a book, in sets, computer, etc.)?
5. Did the police say anything to the witness about the pictures that were being shown (e.g., that the pictures were all of known rapists; that they suspected someone in the pictures or book, etc.)?
6. How did the police handle the pictures? Did they let the witness look through the pictures on his own; did they sit there with him; did they show the witness the pictures one at a time? How did they lay the pictures out and in what order?
7. How many pictures were there?
8. Were all the pictures the same? Same size, same color?
9. What did the police say before, while, and after showing the pictures?
10. What exactly did the witness do? Did he look through all of them and then pick out one? Did he stop at one picture and make an identification? After identifying one picture, did the witness go through the pictures again or finish going through them? Did the witness ever turn the pictures over to the back?
11. Was the witness aware of any dates on the pictures?
12. Did the witness write anything on the picture after the identification?
13. Was more than one picture picked?
14. How sure is the witness that the identification is accurate?
15. Did the picture differ in any way with the witness's memory of the assailant?
16. Did the police write anything down at any time?
17. Where in the stack or in the book was the person whom the witness identified?
18. What drew the witness to the picture that he identified?
19. How long did the showing take? Who else was present? If there were other witnesses present, did they view the photos together or separately?
20. What other identifications were made at that time or any other time?
21. *Note:* Be sure to ask the questions listed *supra* in § 11.10B(6) (Identification Procedures Generally).

## **10. Lineup Identification**

1. Did the witness identify anyone at the lineup?
2. How did the witness get to the lineup? (Picked up by the police, with other witnesses, etc.?)
3. What was the witness told before going to the lineup or observing the lineup?
4. Did the witness ask the police any questions?

5. Did the witness talk to other witnesses while waiting outside the lineup room?
6. How many people were in the lineup room?
7. In what position in the lineup was the suspect standing?
8. Was there anyone else in the lineup who resembled the person whom he identified?
9. Did the witness ask anyone in the line to do anything, say something, turn a particular way?
10. Did the witness look down the line and then identify someone or did he just center on one person?
11. What did the witness tell the police? What exactly did the witness say in making the identification? Did he express doubt or certainty to the police?
12. On what basis was the identification made? (Face, clothes, relative body build?)
13. Was there anything different about the person whom he identified than he remembered?
14. How sure is the witness of the identification today?
15. Did the witness identify the suspect in the presence of other witnesses?
16. What did the witness say to other witnesses, or what did the witnesses say to him?
17. Had the witness ever made another identification in this case? When and how? (Get full details.)
18. Had the witness been shown any pictures at any time? (When, how many, by whom, what other witnesses, what was said?)
19. *Note:* Be sure to ask the questions listed *supra* in § 11.10B(6) (Identification Procedures Generally).

## **§ 11.10C SELF-DEFENSE**

### ***1. Evidence of Victim's Aggressive or Bad Character***

1. Was victim a violent, aggressive person? Always getting into fights, arguments, altercations with people? Threatening people? (Specify details as to when, where, with whom, persons present, outcome, etc.)
2. Did the victim associate with people with a reputation for assaultive behavior toward others? If so, who were these other people and where do they live?
3. Have you ever known the victim to carry any type of weapon?
4. What kind of weapon?
5. Did the victim always carry it? Frequently? Occasionally? Who would know the victim carried a weapon?
6. Has the victim ever used a weapon on anyone other than the defendant? (If yes, specify details as to when, where, on whom, injuries, persons present, outcome, etc.)

7. Do you know of the above from personal observation or from what others have told you? (If others, specify details as to whom, when, where, etc.)
8. Was the victim violent or aggressive when sober, or violent only when intoxicated or drinking?
9. Was the victim known to drink to excess? Use narcotics?
10. Was the victim ever charged, arrested, or tried for any crime, especially including assaultive behavior against anyone? (If so, details as to when, where, date, result.)

**2. Defendant's Knowledge of Victim's Violent, Aggressive, or Bad Character**

1. Determine whether the defendant was aware of any of the above ten factors pertaining to the victim. If so, specify details as to how he knew, who told him, when he became aware, etc.
2. Had the victim ever made threats against defendant in the past?
  - To the defendant personally? (Specify details as to where, when, who present, etc.)
  - To other people concerning the defendant? (Specify details as to when, where, who present, etc.)
  - Did the defendant know of these threats against him by the victim? (Specify details as to who told him, when, where, reaction.)
  - Was the defendant ever present when the victim made threats to others?
3. Did the defendant know of the victim's reputation for carrying a weapon?
  - From personal observation? (Specify details as to when, where, who present, etc.)
  - From other people? (Specify details as to when, where, who told him, etc.)

**3. Prior Relationship Between Defendant and Victim**

1. Have the defendant and victim had any difficulty with each other in the past?
  - When? (Day and time)
  - Where? (Precise place)
  - Who else was present? (Full names, addresses, telephone numbers)
  - Cause of dispute or altercation?
  - Who spoke first and what exactly was said?
  - Any challenges or threats made? By whom? What was said and what was the response?
  - Who committed first act? What was it? Response? Did the defendant attempt to withdraw?
  - Were any weapons involved? What type? Who had them? How were they used?
  - Was anyone injured, and if so, how?



Why did the defendant do what he did?

2. Did you ever tell the police and/or prosecutor any of the above? If so, what and when? What was the response?

*Note:* The above questions do not attempt to explore the details of the altercation giving rise to the instant offense. This area must, of course, be covered in great detail. Specific questions are suggested in the checklist immediately following.

## **§ 11.10D CRIMES AGAINST PERSONS**

### ***1. Where***

1. Where did the offense take place (address)?
2. Where at this address was the exact location of the offense?
3. Where exactly were the participants standing when the altercation began?
4. Where exactly were the participants immediately prior to the blow being struck?
5. Where exactly were the participants at the time of the fatal blow?
6. Detail exactly where the interviewee was during all of the above.
7. Detail exactly where all other witnesses were during all of the above.
8. If a homicide case, where at this address was the exact place of death?

### ***2. When***

1. When did the altercation begin?
2. When did the defendant arrive on the scene?
3. When did the victim arrive on the scene?
4. When did the witness-interviewee arrive on the scene?
5. When did the other witnesses arrive on the scene?
6. When was the offense reported?
7. In a homicide case, when was the fatal blow struck?
8. In a homicide case, when did the victim die?

### ***3. What***

1. What was the cause of the altercation?
2. What exactly took place during the course of the altercation?
  - Who spoke first and what was said? Done?
  - Any challenge or threats made? What? By whom? Response?
  - Who committed the first overt physical act?
  - What was it?
  - What was the response?
  - Did the defendant attempt to withdraw or did he “wade” in?

Did the victim retreat?

3. Were any weapons involved?

Who had them?

Where were they?

What type of weapon?

Who used them?

Was the weapon used by the defendant visible to the victim?

Was the weapon used by the victim visible to the defendant?

Were any weapons recovered by the police on or near the victim? By anyone? Turned over to the police?

Did the police recover a weapon from the defendant?

4. What, in your opinion, caused defendant to do what he did?

5. In a homicide case, what, if anything did the defendant say or do immediately after inflicting the fatal blow?

6. In a homicide case, what, if anything, did the victim say or do immediately after receiving the fatal blow?

7. Did the victim say anything to the police after the fatal blow was struck? What? Where? When?

8. Did victim say anything to anyone else after fatal blow? What? When? Where?

9. What, if anything, did the witness being interviewed tell the police? The prosecutor?

When?

Where?

To whom?

Sign statement?

Testify at grand jury or any court appearance?

10. What did other witnesses tell the police? The prosecutor? When? Where?

11. What did the witness-interviewee do during the entire incident?

12. What did the other witnesses do during the entire incident?

#### **4. How**

1. How did [defendant/victim/witness] arrive and leave?

2. How long did the entire incident last?

3. How were the weapons used, by all parties?

4. How were the injuries inflicted on the victim and/or defendant?

Where?

How severe?

How many?

Where was the person treated?

How did person get there?

5. How many times, if any, did the defendant tell the victim to leave him alone? What was said? Did the victim hear it?

6. How far from the victim was the defendant when the incident began?

7. How far from the victim was the defendant immediately prior to the fatal blow being struck?

8. How many times did the victim tell the defendant to leave him alone? What was said? Did the defendant hear it?

9. How far from the victim and defendant was the witness during all of the above?

10. How many people participated in the altercation? Who? What did they do?

## **§ 11.10E CRIMES AGAINST PROPERTY**

### ***1. Where***

1. Where did offense take place (address)?
2. Where specifically did entry into the premises occur at this address?
3. Where did the taking occur at this address?
4. Where was the burglar during the entire incident?
5. Where were any witnesses during the course of the incident?
6. Where were any occupants during the incident?
7. What locations did the police dust for fingerprints?
8. What items did the police dust for fingerprints?
9. Where on the premises or items were prints lifted?

### ***2. When***

1. When did the offense occur?
2. When did the burglar first arrive? Leave?
3. When was the offense discovered? By whom?
4. When was the offense reported? By whom?
5. When was the property recovered?
6. When was the property in question purchased? Where? Price paid? Receipt in existence? Estimate of value at time of taking? Basis of estimate?

### ***3. What***

1. What exactly occurred during the entire incident?

2. What exactly was said by the burglar during the entire incident?
3. What exactly was said by each of the witnesses during entire incident?
4. What property was taken?
  - Complete detailed description
  - Unusual characteristics
  - How was the item identified?
5. What tools were used to gain entrance? How used? Marks left on premises? Any tools recovered?
6. What weapon, if any, was used by burglar? Describe the weapon and its use.
7. What items, if any, were left at the premises that belonged to burglar? Where are these items now?
8. What information was reported to the police?
9. What information was reported to the insurance company? When? Where? What company? Result?

**4. How**

1. How did the burglar arrive? Depart? (mode of transportation)
2. How did the burglar gain entrance to the premises where property was? How did the burglar depart house? (Detail each.)
  - Breaking?
  - Jimmying?
  - Picking locks?
  - Slipping locks?
  - Unlocked entrance?
  - Let in by occupant?
3. How was property removed from the premises?
4. How was property recovered?

**5. Who**

Answers to questions contained in the identification checklist, section 11.10B should be obtained, if applicable.

**§ 11.10F UNAUTHORIZED USE OF MOTOR VEHICLE**

**1. Where**

1. Where was the car taken? Address? Exact location at this address?
2. Where was the car's driver? Address?
3. Where was the car recovered? Address? Exact location at this address?

**2. When**

1. When was the car taken? Date? Time? Basis of knowledge?
2. When was the car discovered missing? Date? Time? Basis of knowledge?
3. When was the car reported missing? Date? Time?
4. For how long was the car driven after the theft?
5. When was the car recovered? Date? Time?
6. When was the defendant arrested? Date? Time? Statements? Others with defendant? Who was driving? Where in the car was the defendant?

### **3. What**

1. What kind of car?  
Make; model; year; color; license plate number; manufacturer's number; mileage at time of taking; recovery; condition at time of taking and recovery
2. What items, if any, were removed from the vehicle by the unauthorized user?
3. What items, if any, belonging to the user were left in vehicle?
4. What portion of the vehicle was dusted for prints?
5. From what portion of the vehicle were prints lifted?
6. What prior relationship, if any, existed between the owner and the defendant?
7. What police officers were involved in the case?

### **4. How**

1. How was the car taken?  
Keys in car?  
Car jumped?  
Another key used?  
Ignition locked/unlocked?  
Windows/door jimmyed/broken?  
Slashed top?  
Tools used? Describe how.  
Permission to drive given to anyone?
2. How did the participants arrive on scene? Depart?

### **5. Who**

1. Who witnessed the removal? Recovery? (Details, names, addresses, and what seen)
2. Who was in the car at the time of recovery? (Details, names, addresses, positions in car)
3. Who reported vehicle stolen?

4. Who else participated in the removal of the vehicle? Use of vehicle?

## **§ 11.10G FALSE PRETENSES, FORGERY, AND UTTERING**

### **1. Where**

1. Where did the offense take place (address)?
2. Where did the exchange occur at this address?
3. Where was the defendant during the entire time at this address?
4. Where were all witnesses located during the entire incident?

### **2. When**

1. When did the offense occur? Time? Date?
2. When did the forger/utterer first arrive?
3. When did the forger/utterer leave?
4. When was the offense reported?
5. When was the property recovered?

### **3. What**

1. What exactly occurred during the entire incident?
2. What was said by forger/utterer during the entire incident?
3. What was said by all witnesses to the incident?
4. What type of identification did the forger/utterer use?
5. What type of instrument was used by the forger/utterer (check, credit card, etc.)?
6. What property and/or money did the forger/utterer get?
  - Complete detailed description
  - When purchased
  - Value (at time of purchase and at time of taking)
  - How is item identified?
  - Any unusual characteristics?
  - Condition at time of purchase and time of recovery?
7. What names were on the instrument?
  - Payee?
  - Maker?
  - Endorser?
8. What exactly did forger/utterer write?
  - When?
  - Where?

In whose presence?

**4. Who**

1. Who else was with the forger/utterer? (Detail everything they said and did during the incident.)
2. Who reported the incident?
3. Who responded? Detail everything that transpired thereafter.

**5. Photograph**

Was a photograph of the forger/utterer taken when he passed the instrument? If so, where was camera, where was the forger/utterer at the time of the picture, and where is the picture now?

**6. Handwriting Analysis**

(Generally applicable if interviewing the arresting or investigating officer.) Probe all the details surrounding the taking of a hand-writing sample from the defendant: when, where, who was present, what was written, what was said by all, waiver first obtained, etc.