

USE OF EXPERT SERVICES

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CURRENT EXPERT USAGE IN EDNC

Statistics collected by the Defender Services Office demonstrate that CJA attorneys in the EDNC underutilize the expert services that are available to them.

Based on the most recent data that is available, it appears that expert services, (excluding interpreters) were used in 30% of the cases in the EDNC in 2014. That was an increase from 20% in 2013. However, the cost of expert services has declined in the EDNC and it appears that in many cases expert services were used in EDNC to obtain the assistance of a sentencing specialist for Sentencing Guideline issues. While the national average was 15% in 2013 and 14% in 2014, even this number is well below the usage rate by Federal Defender Organizations who rarely, if ever use sentencing guideline experts.

TYPES OF SERVICE PROVIDERS

Service providers for the most part fall into one of two categories: (1) investigative and support services; and (2) scientific and technical experts. Your need for expert services will depend upon the specifics of the case, including the nature of the charges, the complexity of the facts, the volume of discovery (including restrictions on the dissemination of discovery), and the designation of any expert opinions by the government.

¹ This document was originally prepared by Assistant Federal Public Defender Fred Heblich, Western District of Virginia, Charlottesville, VA, for a presentation at the Frank Dunham FPD/CJA conference held in Charlottesville, VA on April 7, 2017. It has been revised and edited by Suzanne Little, Assistant Federal Defender, EDNC, for presentation at the EDNC criminal defense seminar November 2-3, 2017.

SCIENTIFIC OR TECHNICAL EXPERTS

I. MENTAL HEALTH EXPERTS

The most common type of scientific or technical experts used are mental health experts. They are helpful in a number of circumstances, including situations where you want a preliminary evaluation done in order to determine whether there is a good basis for requesting a court-ordered evaluation for:

(1) Competency, to determine whether a defendant is competent to stand trial; [18 USC 4241]

(2) Sanity, to determine whether your client is suffering from a mental disease or defect that would support an insanity defense; [18 USC 4242] or

(3) Post-conviction hospitalization, to determine whether a person convicted of an offense, but not yet sentenced, is in need of custody for care or treatment. [18 USC 4244]

Mental health experts are also useful at the pre-trial, trial, and the sentencing phases of the case. For example:

A. Detention and Pre-Trial Release Conditions

(1) Psycho-sexual evaluation in child pornography cases and failure to register cases to determine whether the defendant creates a risk—often used for bail hearings.

(2) Substance abuse evaluation, for use in determining treatment needs and evidence to argue for pre-trial drug treatment.

B. Trial

To present a defense. The mental health condition of the client contributed to or caused them to engage in the illegal activity. For example, battered woman syndrome as a defense to murder, fraud, assault, etc.

C. Sentencing

Mitigation review of defendant's mental health history prior to sentencing, particularly if PSR contains mental health information.

II. OTHER EXPERTS

Other expert services that may be useful include computer experts (child pornography cases), cell phone and cell tower experts, toxicologists and chemists, pathologists, DNA experts, forensic accountants (economic crime cases), ballistics and firearms experts.

If the government is going to use an expert witness at trial, the government is required by Fed. Rules of Criminal Procedure 16(F) and (G) to disclose the results of any physical or mental examination and any scientific test or experiment, and provide a written summary of any testimony by an expert under FRE 702, 703 or 705. Your own expert can review the government expert's finding and opinions and help you (1) prepare to interview the government's expert, (2) cross-examine the government's expert at trial, and provide evidence to rebut the government's expert.

INVESTIGATION

I. DUTY TO INVESTIGATE

The ABA Standards include a section on investigation and preparation, which is in the "Defense Function" part of the Criminal Justice Section Standards. In February 1991, the ABA House of Delegates approved these "black letter" standards that have been published with commentary in *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed., ©1993 American Bar Association.

Standard 4- 4.1 Duty to Investigate

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

Relying in large part on this standard, the Supreme Court has stated that defense counsel has a constitutional duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). This means, at a minimum, an independent investigation of the facts, and seeking out and interviewing potential witnesses. A defense attorney may not rely solely on information provided by the prosecution, or by the client.

II. WHY USE AN INVESTIGATOR?

Investigators are trained and experienced in ways that a lawyer is not. Many investigators have a law enforcement background that becomes very useful, and some still have contacts from their experience in law enforcement that come in handy. Investigators usually have specialized software that allows them to obtain information (personal, financial, background, etc.) about a person that most people cannot or do not know how to access.

Being your own investigator is fraught with problems.

Rule 3.7 prohibits a lawyer from acting as both lawyer and witness unless the testimony (1) relates to an uncontested issue; (2) relates to value of legal services; or (3) disqualification would work a substantial hardship.

Many of you have probably encountered the situation where you interview a witness and then at trial the witness changes his story, making him/her ripe for impeachment. But how do you confront the witness with his prior inconsistent statement without making yourself a witness?

For example, some lawyers think you can proceed in this fashion: On cross-examination ask the witness, "Remember when we talked two weeks ago? Didn't you tell me at that time that the light was *green*?" Better yet, before asking the question, deliberately open your file and remove your notes (or a reasonable facsimile) and look at them first. If the witness admits making the statement, he can go on to explain why he is now making a contradictory statement (e.g., "I've thought more about it"). If he *denies* making the statement, you either have to let it go, or you have to move to withdraw as counsel in order to testify.

The majority of the ethics opinions on this subject appear to condemn asking even the first question, "Didn't you

tell me. . .?," as it is a form of testimony by the lawyer. If this problem arises, you are going to have to move to withdraw in order to testify. If there is a question as to what a lawyer should do, the 4th Circuit Court of Appeals has opined "Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate." *International Woodworkers of Am. v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1272 (4th Cir 1980).

If your investigator interviewed the witness, or was present when the attorney interviewed the witness, the investigator can testify as to the prior inconsistent statement and the attorney does not have to withdraw.

III. USE OF INVESTIGATOR

A. Prepare the Investigator

Give the investigator a copy of the charging documents and discuss in detail the nature of the case. The more information you provide to the investigator, the more investigative information you are likely to receive.

Because many investigators have backgrounds in law enforcement, they may already have some familiarity with substantive law and criminal procedure. Ensure that they are familiar with Federal Court procedures. Provide them with deadlines, time constraints, and any resources available.

Go over the rules. If your discovery is subject to a protective order, make sure your investigator is aware of the order and any limits on use or disclosure of discovery. If your investigator is not aware of your obligation to disclose reverse-Jencks, make sure you explain that so s/he does not go around recording interviews.

To the extent you can, outline for investigator (1) what elements the government has to prove, and (2) what facts the government needs to prove each element. If you have developed a theory of the case, explain that: for example, the defendant sold heroin, but less than the 100 grams charged; or the defendant sold heroin, but that's know what caused the death.

B. The Government's Case

Your investigator should review the discovery materials provided by the government. The investigation should focus on determining the validity and reliability of the government's evidence.

Attacking the integrity of the government's case is a recognized defense strategy. See *Kyles v. Whitney*, 514 419, 437 (1995): [T]he evidence withheld denied the defense the ability to "undermine the ostensible integrity of the [police] investigation" and "lay the foundation for a vigorous argument that the police had been guilty of negligence."

Typical sources of information found in discovery include law enforcement reports, witness interviews, audio and video recordings, criminal histories, physical evidence, visiting crime scenes, laboratory reports, autopsy and medical examiner reports, photographs, etc.

The investigator can follow with his/her own research by:

(a) Interviewing witnesses, researching social media, obtaining telephone records (text messages, cell tower information), interviewing the medical examiner, lab techs.

After reviewing the government's evidence the investigator should make a time-line of events, and a summary of how different persons (defendants, coconspirators, witnesses,

victims, etc.) fit into the time-line. That should be your working narrative of the case.

C. Building Your Own Case

This part of your investigation should fit in with your theory of the case, e.g., mistaken identity, lying witnesses, lack of intent, and so on. Your investigator can help in various ways, such as, locating new witnesses, researching social media, obtaining criminal history and other impeachment information (e.g., mental health, drug treatment) of government witnesses.

D. Working with Defendant

Counsel has an ethical obligation to keep a defendant informed, and as a practical matter, the defendant should be given access to the evidence that is going to be used against him so that he can (1) assist in his defense, and (2) make informed decisions as to whether to plead or go to trial.

Making discovery material accessible to defendants has become increasingly difficult because of the increasing use of protective orders to restrict dissemination of discovery materials. These orders typically contain language that prohibit giving copies of discovery materials to defendants in custody. Read literally, some orders would require counsel to be personally present to review discovery materials with the defendant. However, the orders usually expressly include, or are interpreted to include "agents" of defense counsel, such as investigators and paralegals.

Your investigator, then, can be of great service to you by going to the jail and reviewing discovery materials with the defendant so you do not have to do it. Do not overlook this service when requesting funds for an investigator. If the courts want to impose these onerous restrictions, they should pay for them.

E. Helping the Cooperating Defendant

Even if your defendant decides to cooperate, that by itself does not mean he will get a substantial assistance motion. The prosecutors and the case agents have their own arbitrary standards in determining who qualifies. But, as a general rule, the more useful the defendant's information, the more likely the 5K or Rule 35. However, even if a defendant provides valuable information, it is not worth much if it is

not used to advance an investigation.

The investigator can help in this regard by following up on the information provided by the defendant to conduct his own investigation to obtain information that can be served up to the government. In other words, doing the government's job for it. This can make the difference between your client getting a 5K or being stuck with a possible mandatory minimum sentence.

F. Case Agent

Your investigator can act as your case agent at trial. Sitting at counsel table, comparing witness testimony with prior statements for impeachment. Prepping and debriefing witnesses. Organizing documents and exhibits.

IV. EFFECTIVE USE OF PARALEGALS

1. Role of Paralegal

Paralegals provide support services, but the nature of the services will vary depending on the needs of the attorney in a particular case and the capabilities of the particular paralegal. Some paralegals are highly skilled and are capable of performing many of the tasks usually done by attorneys, such as legal research, drafting pre-trial motions and briefs, and preparing jury instructions. Some of the paralegal tasks may overlap with those of an investigator and those of a legal secretary. A paralegal can be immensely helpful in case preparation, at trial, and at sentencing.

2. Case Preparation

A. Discovery

The paralegal can review the discovery materials provided by the government and (1) prepare an inventory and index of the materials, and (2) prepare individual summaries of grand jury testimony, witness interviews, police reports, etc. If the paralegal has software, such as CaseMap, the discovery can be entered into that system. Otherwise, the paralegal can organize the discovery manually. Like the investigator, the paralegal can review discovery with a defendant in custody.

B. Investigation

The paralegal can perform some investigative services, such as preliminary interviews with the defendant and family members for bail purposes, and contacts with prospective witnesses and expert service providers. The paralegal can obtain records (employment, health, education, etc.) and can prepare subpoenas for documents and witnesses.

C. Trial Preparation

The paralegal can prepare trial exhibits and assist in the presentation of exhibits at trial. The paralegal can assist with the logistics of getting witnesses to trial and coordinate the appearances of trial witnesses.

D. Trial

The paralegal can assist in jury voir dire and selection—particularly when juror questionnaires are being used—keep files organized, take notes, order trial transcripts, review and summarize transcripts, and prep witnesses. Paralegals can assist in the display of audio, video, and other exhibits using software or other electronic court devices and prepare power points presentations to be used during trial.

Most importantly, paralegals keep track and record exhibits offered, accepted, or excluded at trial.

E. Sentencing

The paralegal is invaluable at the sentencing phase. He or she can obtain necessary records, character letters, assist in preparing any sentencing witnesses, and stay in contact with the clients family. See discussion below under mitigation.

F. Appeal

The paralegal can order transcripts, organize documents, order exhibits, and prepare the joint appendix.

V. NON-CAPITAL MITIGATION

Both the investigator and the paralegal can be useful in collecting and developing non-capital mitigation materials.

It is a mistake to simply rely on the presentence investigation report. For one thing they often contain

mistakes, and for another, despite the protestations of the probation office to the contrary, they are often prejudiced in favor of the government because most probation officers only review the case files of the U.S. Attorney's office to prepare the PSR. This is where they get their information about your client's case, and you have no idea what else they are told.

ABA Standard 4-8.1 requires defense counsel to "seek to verify the information contained in [the presentence report] and should be prepared to supplement or challenge it if necessary."

That means you have to do your own investigation, even if it means duplicating what the probation office has done.

The paralegal can be particularly helpful in obtaining records. If there is a question about a conviction that affects your client's criminal history, or his classification as, e.g., a career offender, you will need to get the underlying documents associated with the conviction. You might also need to obtain records related to employment, education, physical health, mental health, and substance abuse and treatment. As a starting point the client can review the PSR with you and help sort out what is accurate and what needs to be verified.

If there is a large volume of health/mental health information, or if it is particularly complicated, you may want to request the services of a medical person, such as a nurse, to review and summarize the medical records for you. Depending on what you get, you may want to request the services of a physician or psychologist or other expert to confirm or dispute a diagnosis and/or prognosis.

The paralegal or investigator may also assist you by locating and interviewing your client's family members, friends, teachers, coaches, etc., and you may be able to obtain from them things like photographs, certificates, award documents, even report cards, and most importantly character letters because the Judges in the EDNC do not permit live character witness testimony. The paralegal is also better-positioned to develop a friendly relationship and help prepare these persons for appearances at a sentencing hearing.