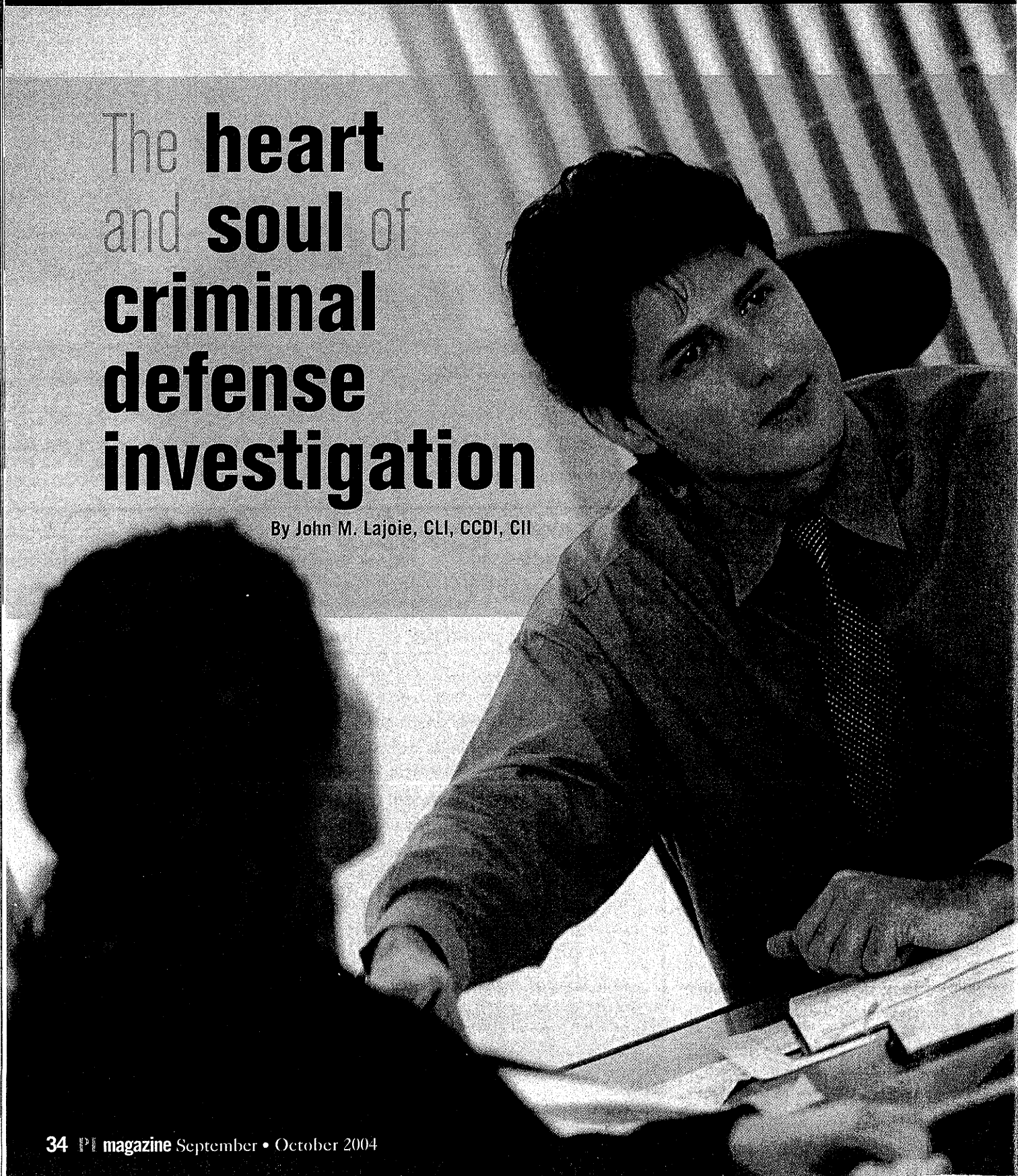


WITNESS INTERVIEWS

The heart
and soul of
**criminal
defense
investigation**

By John M. Lajoie, CLI, CCDI, CII



AND STATEMENTS

Interviewing witnesses and taking their statements are important functions of the criminal defense investigation.

Witness interviews should begin as soon as possible after a review of all file and discovery materials. Preparation is the key to a successful witness interview and statement. First, the investigator must identify those who must be interviewed, including:

- The defendant and the victim(s);
- All police personnel involved;
- Medical personnel who responded to the scene or who rendered medical care to anyone involved;
- Family members and friends of the victim(s) and the defendant.
- Anyone else with any knowledge of the incident.

Review and Preparation

Identification of witnesses can be determined from information contained in the discovery materials, news media accounts, reporters' notes, through scene area canvasses, by surveillance at or near the scene at roughly the same time of day the incident occurred, and through interviews with witnesses who have already been identified. A complete list of witnesses should be made containing all their personal and statistical data, their role in the investigation and a brief description of what they did, who they were with, and what they allegedly observed. This list should include time lines. A witness evaluation sheet should be prepared for each and every witness, and should include: social, educational, employment, criminal, medical, driving, and military background information; personal appearance and credibility assessments; and the gist of what they said to the defense investigator.

When reviewing the case file before conducting interviews, keep in mind the legal elements of the charges and the conditions that must be met by the prosecution in order to satisfy those elements. In each and every case, be aware of the legal elements of the theory of defense (i.e., self defense, reasonable

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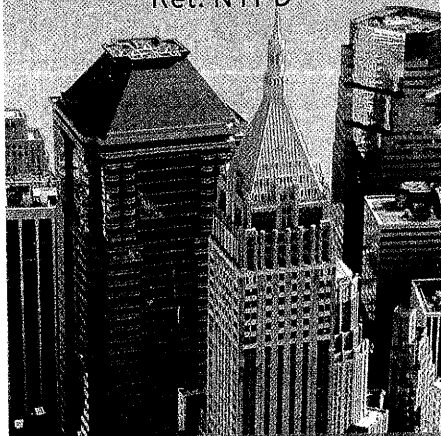
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doubt, mental incompetence, etc.). If the attorney client has not yet determined the theory of the defense, conduct your own legal research, and apply the necessary elements in your field investigation.

Prior Statements

Do not interview a witness who has provided a statement to the police until after their police statement(s) has been obtained, reviewed, compared with other statements, and marked for inconsistencies. The observations of the witness should be compared with information extracted from the discovery materials, scene investigation, and the physical evidence. In some instances, you may not be able to get access to these statements in a timely manner, or there may be other obstacles. In those cases, discuss the matter with defense counsel before making contact with a witness.

Never assume that the information contained in the police department's witness statement is totally accurate, particularly if the statement is not signed. Most often, these statements have been reduced to typewritten, question and answer or narrative form and are usually done by the police investigator. They almost never contain the exact words of the witness and are sometimes highly suggestive. If the adult witness' speech and intelligence patterns are inconsistent with the written version of their statement offered by the police, advise defense counsel accordingly.

Audio or video recorded statements of witnesses by police are not standard practice, but you should check to see if they exist. If so, get a copy of the tape and have it transcribed. View a copy of a video taped statement. These tapes can be valuable in instances when a witness simply signed the statement when it was presented to him. Witnesses, especially eyewitnesses, are often very tired, emotionally and physically drained from the experience, and can't wait to leave the police station after giving a statement.

Witness Contact

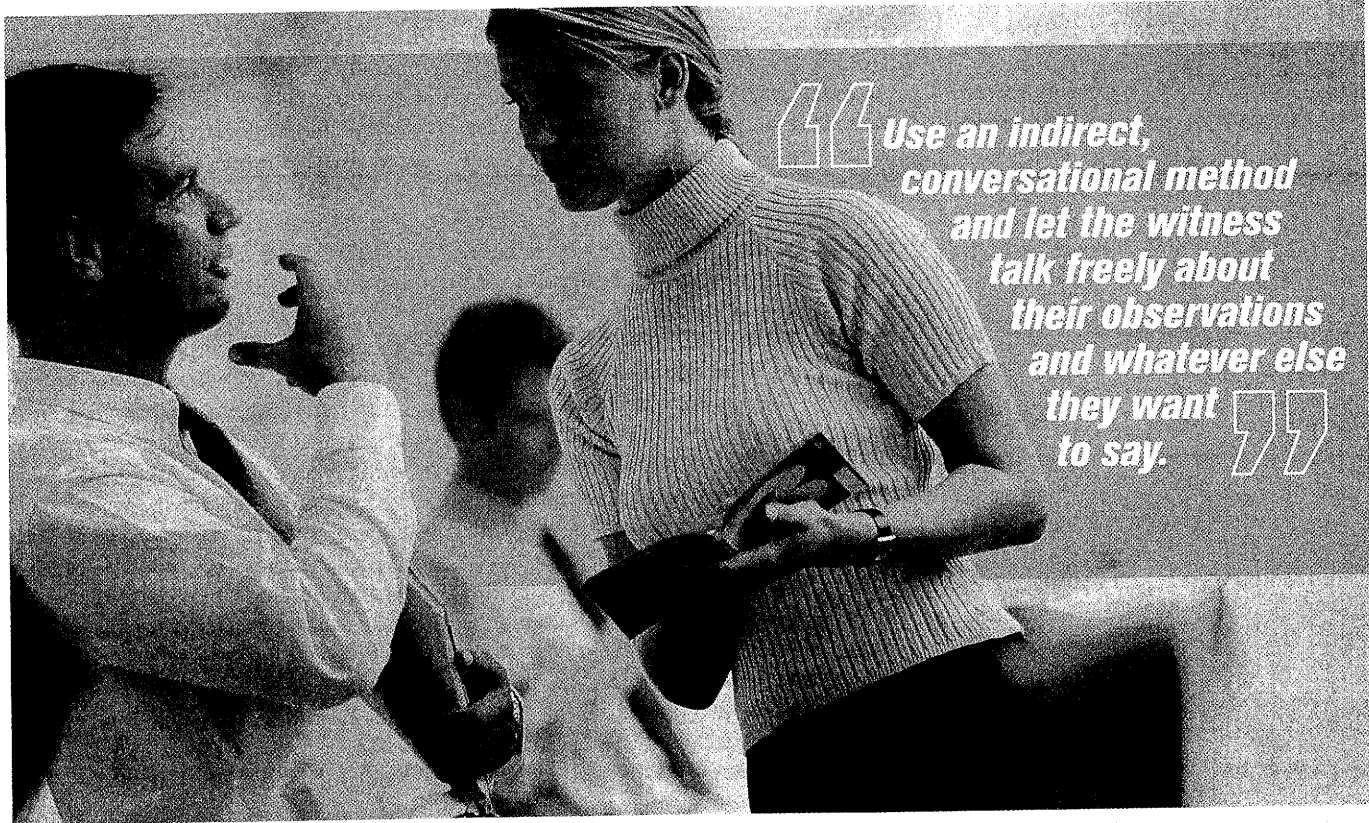
Where the witness is interviewed is critical. The witness should be interviewed out of his or her own environment. The scene of the alleged crime is usually the best location if it is available and provides an environment free from major distractions. If access to the scene is not possible, attempt to bring the witness into a neutral environment. If the witness is reluctant to provide an interview at any location other than their home or workplace, assent to their request. Don't do anything that will agitate the witness and decrease the odds of establishing a friendly rapport. The defense investigator should provide the witness with full identification and a business card.

There are times when it is advisable for a second individual or investigator to be present during the interview and statement. The extra person is necessary with temperamental key witnesses,

The scene of the alleged crime is usually the best location if it is available and provides an environment free from major distractions.



LINE DO NOT CROSS



“Use an indirect, conversational method and let the witness talk freely about their observations and whatever else they want to say.”

minors, the elderly, those who are sick or on medication, and those who are offering death bed declarations and confessions. The second person can corroborate what the witness said and authenticate the statement. Don't "gang up" on the witness. If a witness suddenly confesses to the crime, be aware of his or her constitutional rights. Discuss with your attorney client before confronting potential suspects.

Treat all witnesses with respect. Inform the witness about the situation at hand but disclose as little information as possible. Never lie to a witness in a criminal defense investigation. If the witness understands that an investigator seeks only the truth, it will be easier to convince the witness to talk. An attempt to influence a witness' statement will damage all concerned, and could lead to criminal charges.

The Interview

The primary purpose of a witness interview is to determine if an individual made pertinent observations of an incident and has relevant, material, and useful information. The secondary purpose flows from the first and that is to obtain a defense witness statement *if and only if* the witness does have relevant,

material, and useful information.

During the interview, the investigator must address five primary concerns, which derive from the five human senses: sight, hearing, smell, taste and touch. Do not take a direct approach at the initial interview. Use an indirect, conversational method and let the witness talk freely about their observations and whatever else they want to say. Listen without interruption. If the witness stops talking for no apparent reason, use encouragement and conversational prompts such as, "Wow, thanks for sharing this information with me, but did the screaming end at that point? What happened next?" The "What happened next?" question is one of the most powerful open-ended questions an investigator can employ to prompt continued conversation. Ask the witness for permission to take notes. More times than not, the witness will allow it.

After the initial conversation has concluded, ask the witness to answer additional questions, to clarify what was said during the indirect interview. Extract specific information about the sequence of events that led to the incident and about the specific facts of the incident itself. This is your golden opportunity to *direct* the interview. Here are essential

directed question categories:

- Where was the witness located and what was he doing prior to the incident and with whom;
- Any alcohol and drug use present;
- The weather and lighting conditions prevalent, and who else was there;
- The physical disparity between the defendant and the victim(s), were there any threats or arguments and when did they occur;
- Was there any physical contact by either person and who initiated the contact, or any aggressive behavior and actions by anyone;
- The positions of the defendant and the victim(s) at all times, especially at the time any physical contact was made, and attempts by anyone to avoid physical battle;
- The movements of all individuals and the time it took to make the movements;
- A description of the scene with reference to possible escape routes, location of structures and objects, obstructed views, and other persons (photographs and diagrams may be used and the witness asked to make notations or references on them);
- Descriptions of any weapons, and the complete circumstances of their use;

- All conversations, especially any statements that were overheard at the scene that could be admissible evidence due to exceptions to the hearsay rule;
- Observations that have significance with respect to conditions warranting the use of force;
- The general reputation and moral character within the community of the defendant, the victim(s), and key witnesses;
- Prior incidents, threats, assaults, criminal acts, and aggressive or passive behavior of the defendant and the victim(s);
- And last but not least, the details and circumstances of how witness statements were taken by police and whether or not they were reviewed, read, and signed by the witness.

Whenever possible, the defense investigator should take detailed notes and not rush the directed interview; it may take hours to complete an interview, so be sure the witness is aware of time

requirements and agreeable to them. If the responses are inconsistent with a statement given to police, question them about it in an inconspicuous manner or, depending upon the established rapport with the witness, challenge them on the discrepancy and ask for an explanation. Try to make these exchanges non-adversarial, avoiding the appearance of an interrogation.

Watch the nonverbal movements of the witness and notice changes in speech patterns. Uncomfortable nonverbal communication, extreme nervousness, sweating, and changing or irritating speech patterns usually means it's time to move on. At this point, the witness may be tired, or may be deceiving the investigator. It may be time to end the interview. Avoid forming an opinion of the witness solely on the basis of nonverbal communication.

Evaluate the witness for bias, prejudice, accuracy of recall, interest or lack of interest, frankness or lack of frankness, and any sympathy or empathy towards the defendant or the

victim. The investigator must assess the conduct, demeanor, attitude, character and appearance of the witness in order to form an impression that will ultimately determine if the witness is favorable or unfavorable to the defense.

Statements

Based upon the results of the interview and the evaluation and impression of the witness, you may or may not decide to take a formal signed, handwritten statement or recorded interview statement. Whichever method is employed, be sure the statement includes all personal, statistical, occupational and employment data, and, if the witness is a police officer or an expert, include their qualifications. The decision to take a statement should be based on whether or not the witness is able to provide relevant, material, and useful information and facts about the incident before, while, or after it occurred. If so, take the statement. If not, make detailed notes for your file. If the witness refuses to consent to an interview or to

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give a statement, for whatever reason, it should be noted and the attorney-client should be informed. If a suspected witness alleges to know nothing about the incident, the defense investigator should obtain a "negative" statement. Get the witness to attest that he or she knows nothing about the incident. If after the interview, the witness refuses to provide a statement, don't force the issue. If appropriate, explain how the new statement will give the witness the opportunity to correct inaccuracies or mistakes in any statement he or she may have previously given to police or other investigators.

When dealing with a favorable witness, include in the statement the strong, supportive factual observations, particularly those that support or satisfy the defense strategy. In regards to an unfavorable witness, emphasize the exaggerations of the observations so that, in the end, the exaggerations have damaged the witness' credibility.

All handwritten statements should be completely reviewed, read, and, if necessary, corrected by the witness. The witness should initial every correction, sign every page, and affix their signature and the date, time and location of where the statement was taken at the end of the statement, below a sentence preferably written by the witness that says he or she has read the entire statement and attests or swears that it is true and correct. The investigator should keep the original statement to avoid chain of custody issues.

If the defense investigator uses the recorded interview (RI) statement method, it should be done in a strict direct and formatted manner. The RI should be constructed as follows:

- Introduction;
- Time and location;
- Persons present during RI;
- Permission to record;
- Identification of the witness;
- Facts of the incident and the witness's observations and activities;
- Follow up questions;
- Re-assertion of recording permission;
- A "true and correct" paragraph;
- Announce recording's conclusion with ending time.

The original tapes are evidence. They should be labeled and kept in

a safe location. The tape should be transcribed and the transcription should be reviewed by the investigator. In some cases, the attorney-client will ask that the witness sign the transcription. At the review, both the investigator and the witness should initial each page and any corrections made by the witness. Both should sign the statement, under a paragraph testifying to the accuracy, truth, and "free will" of the statements given under the pains and penalties of perjury. The original recorded interview tape is kept by the defense investigator to maintain the chain of custody.

Although there may be admissibility issues from state to state, the recorded statement method is the most effective manner in which to take a formal statement. A recorded statement usually includes much more detail in a shorter period of time and is less likely to be challenged because the words are the "voice" of the witness. The attorney-client can listen to the tape to get an idea of how the witness would sound in court. Recorded interviews over the phone are not recommended, but must sometimes be taken for a variety of reasons, most notably distance. Under no circumstances should a defense investigator record a witness in person or over the phone without establishing proper permission in accordance with prevailing federal and state law.

Technology and Statements

Digital audio and video recorded statements are recommended only under certain conditions. Use of digital audio recorders is suspect at this time, although with new technologies to authenticate the statement and prevent tampering, there is hope for future forensic uses. Video statements are not recommended except in the case of confessions or retractions. Before employing video recording, the investigator should consult with defense counsel.

Email communications are not a reliable method of statement taking. Once again, distance may dictate the use of email, but it should be followed up with a personal interview and statement. Watch out for the witness who is local but hides behind a flurry of emails to communicate and is reluctant to meet with an investigator.

[continue on page 69]

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Witness Interviews and Statements *[continued from page 39]*

Conclusion

The art of the interview and securing a factual statement is the heart and soul of not only criminal defense investigation but civil investigation as well. Legal investigators should not be intimidated by the process and we should always seek to improve our skills in this most critical aspect of successful investigation. Your livelihood depends on mastering the art of the interview.

Your client expects it. And what is most important, especially in criminal defense investigation, the defendant's life may depend on it.

John Lajoie (www.privateinvestigator.com) is president of Lajoie Investigations in West Boylston, MA. He is actively involved in the training and certification of investigators.

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