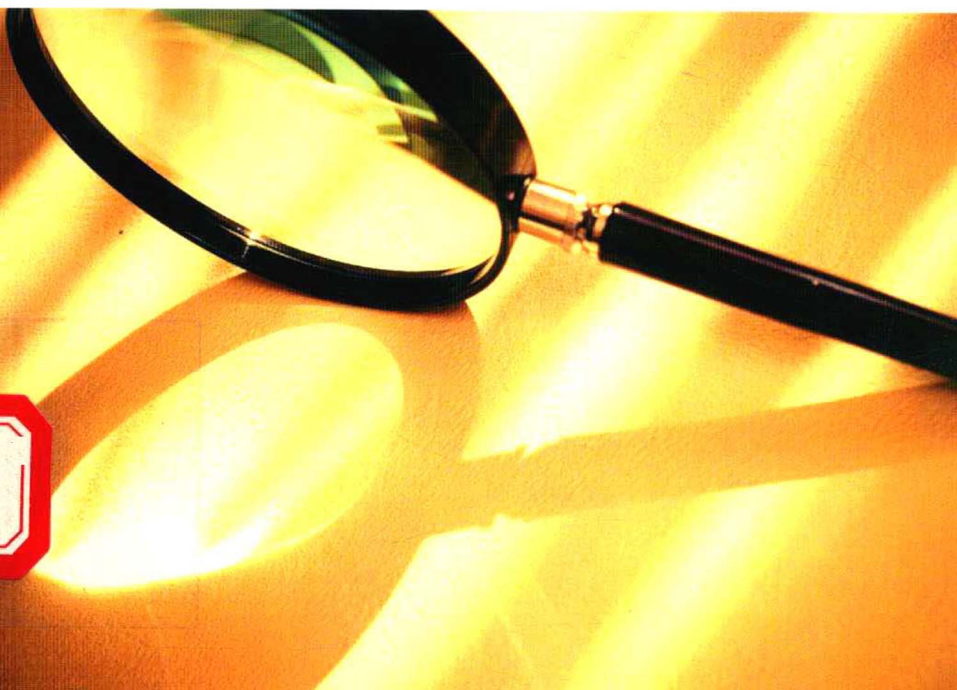


Defense Investigation and Discovery in Criminal Cases

A Systematic Approach to Obtaining
Information and Preparing for Trial

Richard Cline



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Introduction

This book is for you, the criminal defense attorney. It is designed to assist you in the investigation of your case and preparation for trial. It will provide a systematic approach to the investigation of criminal cases that applies universally. We will discuss how to utilize the resources available to you to investigate the defense of your case and suggest approaches that you and your investigator will want to consider for obtaining information outside of the traditional discovery process. We will also discuss how and where to find additional resources that you may not know about or may not routinely consider when representing an indigent defendant.

The book examines the theoretical and jurisprudential concepts that govern a defendant's right to obtain information from the prosecutor necessary to ensure that the defendant receives a fair trial and due process of law. We also examine the opportunities available to the defense to conduct an independent investigation. After you have a thorough and complete understanding of the theoretical construct, the book will provide you with practical, "use it today" motions, pleadings, and legal memoranda to make it easier to get the information you need, when you need it, and while you still have time to use it.

The book uses the federal constitutional rights of due process and a fair trial as the basis for the investigative actions, motions, and legal memoranda contained in the book. Accordingly, the book discusses the discovery rights of the accused in the context of the Fifth and Sixth Amendments to the United States Constitution, the Federal Rules of Criminal Procedure, and the federal cases that interpret and apply those rules. However, because the vast majority of criminal cases are prosecuted in state court, we also identify the majority rule in state courts under state constitutional, statutory and criminal rule jurisprudence and identify any significant minority positions. My objective is to make the book useful to the federal and state practitioner alike.

The book is designed to track the process you will follow as you represent the defendant, starting with the initial interview with the client and ending with the final preparations before trial. We recognize that well over 90 percent of the criminal cases in state and federal court are resolved without

a trial. In our view, your client will get a more favorable result if you follow the systematic approach of case investigation and discovery outlined in this book because you will negotiate the case with a better understanding of the evidence against your client, the law regarding the admissibility of that evidence, and the chances of success at trial. If negotiations break down, you will be better prepared for trial.

This book contains sample documents, motions, and memoranda of law that you can use in your practice today. To obtain the full benefit of the book, we recommend that you first read it from cover to cover so that you will understand the conceptual framework of the investigative and case discovery system. This will also help you identify any minority positions that may prevail in your jurisdiction—and the arguments against them. Once you understand the conceptual framework, you can revisit individual chapters as issues arise in your cases, and you will understand how to adapt the sample documents, motions, or memoranda of law to address specific issues in your case or the law of your jurisdiction.

The book advocates a systematic approach to the investigation and discovery process in criminal defense. The system is applicable to every case, from a simple petty theft to a capital murder charge. The system is comprehensive, so that you are forced to consider every source of information that may assist in the defense of the case. The system is flexible, so that if it becomes apparent that one segment is not applicable to the case at hand, you simply move on to the next segment. The system is targeted, so that your efforts at investigation of the case stay focused on information that is helpful to the defense.

The system is intended to be used in a dynamic process. As you will see, part of the system is the identification of the defense theme and theory of the case. While we talk about identifying *the* defense theme and *the* defense theory of the case, in reality the determination of a theme and theory of the case is a process, not a destination. Throughout your pretrial investigation and discovery process, you will constantly be evaluating the theme and theory of the case, weighing them against the facts you have learned, and adjusting to reconcile the theme and theory of the case with the facts that you expect to be introduced in evidence and accepted by the jury at trial. With those concepts in mind, let us now explore an overview of the systematic investigation and discovery of facts in a criminal case.

CONTENTS

Introduction.....	9
Chapter 1: Integration of Investigation & Discovery into Trial Practice	11
Chapter 2: Constitutional Basis for Defense Discovery.....	35
Chapter 3: Statutory and Rule-Based Discovery.....	63
Chapter 4: Discovering Defense Evidence Independently.....	79
Chapter 5: Ethical Duties Regarding Discovery in Criminal Cases	97
Chapter 6: Motions Practice.....	109
Conclusion	125
Appendices.....	127
Table of Cases Cited.....	181
About the Author	185

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CONTENTS

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