

The Defense Duty to Investigate and Coping with Prosecutorial Intimidation

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From time to time prosecutors overstep their bounds and accuse defense lawyers of improper conduct just because defense counsel has conducted an investigation and interviewed prosecution witnesses. This can arise in any type of criminal proceeding but is most likely to occur in domestic violence, sexual assault and other cases in which a citizen is a victim of a violent offense.

Defense counsel has a right and a duty under the Sixth Amendment, "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *State v. Thiel*, 2003 WI 111, para. 40, quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984). One of defense counsel's investigative failures in *Thiel*, a sexual exploitation by therapist case in which the supreme court ordered a new trial on the ground of ineffective assistance of counsel, was the fact that he made no effort to speak with the complainant. *Thiel*, 2003 WI 111, para. 28.

The Wisconsin Supreme Court has held that "an accused's counsel has the right to interview prosecution witnesses before trial." *State v. Simmons*, 57 Wis. 2d 285, 292, (1973), citing *State v. Watkins*, 40 Wis. 2d 298 (1968). *Simmons* agreed that federal cases support the proposition that it is a "denial of due process for a prosecutor to instruct government witnesses not to talk to defense attorneys unless the prosecutor is present." *Simmons*, 57 Wis. 2d at 292. The *Simmons* court expressly adopted an ABA standard that it is "unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give the defense information which he has a right to give." *Id.*

While prosecutors have no affirmative legal duty to encourage state witnesses to cooperate with the defense, see *State v. Eugenio*, 219 Wis. 2d 391, 416 (1998), they remain under the *Simmons* obligation not to discourage witnesses from cooperating with the defense. *Eugenio*, 219 Wis. 2d at 416. Essentially, a prosecutor can present a state witness with three options under *Eugenio*: meet with the defense investigator; meet with the defense investigator in the presence of someone from the prosecutor's office; or decline to meet with anyone from the defense. *Id.* at 416 n.8. But a prosecutor may not attempt to thwart a defense interview of a complainant or any other state witness or advise a prosecution witness not to meet with defense counsel, and certainly may not retaliate against defense counsel or the defendant for defense counsel's effort, successful or otherwise, to interview a complainant.