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**I N S T I T U T E F O R
C R I M I N A L J U S T I C E
E D U C A T I O N**

January 2012

Intelligence, Informants &
Investigations

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Greetings!

What a great New Year! On New Year's Eve, my alma mater, the Cincinnati Bearcats, knocked off Vandy in the Liberty Bowl; thanks to a 95 yard kickoff return by Ralph Abernathy IV, the grandson of the late Ralph Abernathy Sr. (who was born in Marengo County, Alabama near Linden in 1926.)

Then Auburn defeated Virginia handily, followed by..... Alabama defeating LSU to win the second straight national championship for the state of Alabama.... Well, we'll have to see how that plays out! My daughter, a red-shirt senior at AU can't wait for Monday night!

As we enter another year, it is our goal is to continue providing you with timely information to help you do your job better. As William Faulkner said, "Always dream and shoot higher than you know you can do. Don't bother just to be better than your contemporaries or predecessors. Try to be better than yourself." We hope ICJE can help you do that.

Each month we will provide information on a particular theme, along with our perspective on current events that affect everyone involved in the issues associated with the criminal element in our world.

As always, we welcome your comments and feedback and look forward to a great year.

We start the year with the theme of Intelligence, Informants and Investigations.

Jim Rechel - Newsletter Editor

IAFCI Has New Credit Card Information for Law Enforcement



The International Association of Financial Crimes Investigators (IAFCI) has just created a plastic, credit card sized information resource for law enforcement officers to carry with them that has phone numbers dedicated for law enforcement use only to verify credit card numbers that may be uncovered during traffic stops, investigations or during the execution of searches.

The card includes contact phone numbers for American Express, Discover, MasterCard Worldwide, and Visa International. The cards are available from the Southeastern IAFCI chapter, or by contacting admin@iafci.org.

Entrapment and Driving Under the Influence ?

Two good looking ladies accompanied a man going through a bitter custody/divorce to a bar. (This is not a joke, I promise. No matter what you're thinking!)

They drank, and drank, and then one of the ladies showed him what was under her blouse and asked him to take her on a drive. He was too drunk to drive, but he couldn't resist the implied offer.

Little did he know that the ladies were working for a private eye hired by his ex-wife. As he drove away from the bar, the private eye made a phone call to the local police officer (who was not privy to the plan) to report a drunk driver.



Entrapment?

Only if the women were acting under the direction of the police, and that he wasn't pre-disposed to driving drunk. A hard case to make I would think, until you read the follow-up story.

Read more at [Under the Influence of Sex or Alcohol?](#)

The story continues: [More to the Story](#)

Informants, Entrapment and Jurors

The recent trials involving local bingo operators, operatives and politicians yielded some interesting moments during the trial. One involved a juror who queried the judge about "entrapment".

Read more: [Juror Asks About Entrapment in Alabama Casino Trial](#). With the retrial pending, we'll stay tuned for updates.

So with jurors questioning the concept of entrapment, we thought it was a good time to provide you with a primer on the topic with the article below. It was written by ICJE's own Robert Thetford, Esq.

Entrapment Issues in Handling Informants

Officers can expect entrapment to be raised as a defense in almost any criminal trial in which an informant is used. Even though the issue may never be raised in a particular trial, forewarned is forearmed in this area, and a clear understanding of entrapment from the outset of the relationship may mean the difference between winning and losing a case.

There are really two issues to be covered here: Outrageous Government Conduct and (Technical) Entrapme

Outrageous Government Conduct

Outrageous Government Conduct, although not quite meeting the technical requirements of entrapment itself, will produce a dismissal of the charges or an acquittal with perhaps more adverse consequences to the officer and department. If the defense can show that the police, either through the informant or acting through a conspiracy with the informant, engaged in illegal activity such as illegal wiretapping, assault, extortion or threats to obtain information in the investigation, the criminal case is likely to be dismissed and the officers probably will face disciplinary, civil and possible criminal action.

While this is a rare occurrence, it is not rare for the defense to accuse both prosecutors and the law enforcement officers involved in the investigation of such misconduct. For this reason contact officers should be repeatedly warned by departmental administrators that their actions in handling the informant may be examined at trial. Proof of a proper relationship between the officers and their informants and warnings given to the informants concerning illegal and unethical tactics are essential to the success of future trials. This may not prevent the informant from participating in illegal activity or unethical conduct, but it should give greater protection to both the contact officer and department from liability and should also enhance the possibilities of winning at trial.

Entrapment

Regarding the entrapment issue itself, the defendant who claims to be the victim of entrapment must offer evidence to show that his conduct was induced by law enforcement officers or informants and also that the defendant had no predisposition to commit the offense in the absence of the government inducement or involvement. Therefore, "a valid entrapment defense consists of two elements: government inducement and the defendant's lack of predisposition to commit the crime prior to the inducement."^[1] If a defendant fails to initially show evidence that "governmental conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it," the trial court may properly refuse to accept the defendant's entrapment defense.^[2]

What exactly is government inducement? To establish government inducement, an "element of

persuasion or mild coercion" is necessary.[3] If there is an inducement or promise, it should be shown to be as mild or non-compelling as possible. Any threats or heavily coercive promises or suggestions will automatically show inducement.

Bear in mind that inducement by itself doesn't mean the defendant was entrapped. Upon showing evidence of inducement, the burden then shifts to the prosecution to show beyond a reasonable doubt that the defendant was predisposed to commit the crime. Predisposition has been defined in these terms: "Predisposition is ... the defendant's state of mind and inclinations before his initial exposure to government agents." [4]

One way of proving predisposition is to show that the "defendant responded affirmatively to less than compelling inducement by the government agent." [5] Other evidences of predisposition are prior convictions, similar criminal acts, reputation, conduct during contact with the informant, nature of the crime charged and whether the defendant refused to commit similar acts on other occasions. [6] It then becomes a jury question.

Predisposition, then, means "the defendant's state of mind before his initial exposure to government agents." [7] The prosecution must show that the defendant was predisposed to commit the crime before contact by the informant. The contacts themselves cannot create the predisposition. [8] The problem here in most cases is that the initial contact made between the informant and the defendant is not monitored by officers. Because of this, other indications of predisposition must be sought, such as prior convictions, etc.

It is the investigator's job to anticipate entrapment problems in dealing with informants and to gather evidence of predisposition at the initial stages of the investigation. Doing this just before trial is an invitation to disaster.

Having each conversation between the informant and the subject monitored is clearly important to overcoming an entrapment defense and is often vital to a successful prosecution. Training in the latest consensual monitoring techniques and using good monitoring equipment, including the use of video, has become absolutely necessary to obtaining convictions in a wide variety of cases. In the future this may be necessary for the successful prosecution of almost any case involving informants.

[1] U.S. v. Price, 94-6152 (11th Cir, 1995)

[2] Beason v. State, 27 So.3d 619 (Ala.Crim.App. 2009)

[3] U.S. v. Price, 94-6152 (11th Cir, 1995)

[4] Clay v. State, 95-588 (Ala. Cr. App, 1995)

[5] United States v. Burkley, 591 F.2d 903, 916, (1st Cir. 1978), cert. denied, 440 U.S. 966 (1979).

[6] U.S. v. Dion, 762 F. 2d 674, 687-688 (8th Cir, 1985), reversed on other grounds, 476 U.S. 734 (1986).

[7] U.S. v. Harris, 9 F. 3d 493 (6th Cir. 1993)

[8] U.S. v. Jacobson, 112 S. Ct. 1535, 1541 n.2 (1992)

A Nightmare Informant



Mark Whitacre was approached by the FBI as part of an investigation into price fixing at ADM. While working as an informant, he was also an informant gone wild.

A great site, including his story and and video resources can be found here: [Informant Liability and Second Chances](#).

For more information on Informant Liability, the article below addresses

many of the issues that arose with Mark Whitacre, and those you may confront as well.

Informant Liability Issues - Robert Thetford, J.D.

We see the headlines all too often in newspapers throughout the country, headlines about legal actions against federal or state officers, accusing them of conduct which if true, causes embarrassment to all of us in the profession and in some real sense lessens our ability to do our jobs. Recent headlines like "Grand jury hearing fake-drug lawsuits," and "LA Police in Reign of Terror Against Minorities" along with scores of similar articles have a common thread: the abuse of their position by criminal informants or the misuse of criminal informants or sources by law enforcement personnel, resulting in legal action which almost always proves detrimental to the continued effectiveness of the officers involved.

There are roughly 1,000,000 police officers in the United States out of an estimated 312,000,000 United States citizens. Even with the officer to citizen ratio varying from community to community, it appears obvious that informants are an absolute necessity in order for the police to protect society. There are simply not enough officers available to deter and detect criminal activity or to locate and apprehend criminals without assistance from citizens, particularly those associated with illegal activity. This need for extra "eyes and ears" has created a truly unique class of police assistant - the criminal informant.

Basis for Liability

In the recent past, pressure to obtain informants on the federal level began in the training academies and remained constant throughout the careers of the agents. This pressure created an atmosphere in which a steady stream of information became vital to the continued employment of the agent and the temptation existed to "pad" the information just to keep the supervisor happy. Instead of encouraging agents who had demonstrated a knack for developing and managing informants to do so, some federal agencies relentlessly demanded that all agents produce sources, even those employees who were not suited by assignment or temperament to do so. This mindset, which continues somewhat today, has produced some very strange and embarrassing situations.

Most of the situations where informants have committed acts producing injury to third persons have not consistently resulted in liability for the contact officer. There is always the possibility that an officer or agency could be held liable for injury if the informant is shown to be acting within the "scope of employment," especially with the number of lawsuits we have today and if the informant's employment position with the department is unclear (not clearly defined in writing). Another possibility exists with the claim of a constitutional rights violation by an informant acting under the direction of a contact officer, thereby causing a violation of a protected civil right under Title 42, U.S. Code, Section 1983, or even a criminal violation under the federal Criminal Code, Title 18, U.S. Code, Section 241 (conspiracy).

Necessity for Departmental Policy Provisions

Because of the informant's necessary association with the criminal element, the motives, activities and information of the informant are always suspect and are subject to scrutiny even though they are vital to police operations. These same associations cause informants to be the weak link in any police organization, not only because they frequently are able to use the very organization allegedly controlling them for their own purposes, but also because they are occasionally used by unscrupulous officers as cover for conducting illegal operations, sometimes to set up pretext searches and arrests, but often for the personal gain (financial or promotional) of the officers themselves.

The possibility of a runaway informant is truly a nightmare for most contact officers. Even when great pains are taken to validate the informant and ample documentation exists of the validation,

informants often begin to freelance, sometimes engaging in criminal activity themselves or providing false information, a common trait of people who live by their wits. This has destroyed the careers (and often lives) of too many state and federal law enforcement officers. There are few experienced contact officers who do not have at least one horror story regarding their past contact with informants.

Informant Policy Details

To counter the damage that informants can cause to officers and their departments, official policy manuals should contain provisions for informant development as well as for informant management. An effective informant policy provides a comprehensive plan for informant coverage, from initial recruitment to termination of the relationship. The policy will also contain expected conduct for officers in handling informants, including specified prohibited conduct. For example, one typical departmental policy prohibits the following conduct on the part of the officers:

- Socializing with informants and/or their families.
- Becoming romantically involved with informants.
- Buying anything from an informant or selling anything to an informant.
- Borrowing money or receiving gifts from informants.
- Conducting business of any type with informants.
- Contacting informants alone.
- Paying contacts without another officer as a witness.
- Allowing informants to sign anything, such as a receipt for payment, without the entire receipt being completed.

Because officers will never be able to completely control the behavior of their informants, the only possible way to avoid or reduce liability both for the officer and the department is to have a written description of the informant's affiliation, including the following provisions:

- The nature of the department's relationship to the informant.
- The informant is not an employee or agent of the department or contact officer.
- The informant is not required, authorized or encouraged to commit illegal actions.
- The informant agrees to provide all information involving other persons' illegal conduct to the contact officer.

The informant should be required to sign a "contract" with the department setting out the above provisions, including any expectations on the part of the department or the informant, especially where payments and activities are concerned.

Payments to Informants

Payments to informants are particularly dangerous for handling officers and departments, and should always be strictly controlled, with receipts obtained for all monies and expenses obtained. Having a second officer or supervisor witness the payment is one recommended method of insuring some means of control and verification.

Informants frequently are not working for pay, but are attempting to "work off" their criminal acts. Again, officers must be very careful in not providing immunity for the criminal acts of informants, as this is an area in which the officer has no legal authority; therefore, the matter must be referred to the appropriate prosecuting agency for an immunity determination.

Initializing an Informant Program

Following the rules and employing strict internal controls is only half the battle, however. Officers at all levels of command must be thoroughly trained in the process of opening, handling and paying informants, as well as reporting information in a timely and systematic manner in accord

with existing legal standards. This involves more than the issuance of policy changes and requires the familiarity of policy provisions by a competent training officer and written verification that periodic training has taken place. It should also include both testing and inspection to insure understanding and compliance with the procedures.

The above suggestions may seem to place an undue burden on the already overworked medium to small department. However, if the burden is weighed against the almost certain and ever increasing monetary liability of the officer and department should an adequate policy not be instituted and enforced, the burden is a small price to pay.

The first step is to provide a clear understanding to both management and the first line officer of the need for such a program. A factual review of the recent successful lawsuits against officers across the country in this area along with the disastrous personal and institutional consequences ought to be sufficient to gain the attention of officers at all levels.

This understanding should be followed by a thorough examination of existing departmental procedures for handling informants, including reporting and safeguarding their information as well as any source payment procedures.

Once necessary policy changes have been drafted, a review by the appropriate prosecutorial and legal staff will complete the policy process, to be followed by operational training and implementation of the program. Periodic (documented) evaluations in the legal, compliance and training areas will help to insure validation of the program as planned.

Conclusion

None of these methods will guarantee a trouble free informant relationship, nor will they prevent the inevitable lawsuit, but requiring strict accountability in the handling of informants does provide some measure of protection from the numerous frivolous suits. Documented compliance in the payment for information and expenses will leave an audit trail, insuring protection of the payment process, the officer and the department.

No system can totally prevent lawsuits from occurring or charges from being brought, but with careful preparation, training and documentation, the number of successful suits and charges can be minimized, with the result being a more professional organization, higher morale, and in the final analysis, better service to our community, state and nation.

Informant Program Development & Management

****This class is intended for Law Enforcement Professionals only!****

Location: The Center for Lifelong Learning at The Alabama TechnaCenter (75 TechnaCenter Drive) Montgomery, Alabama

Date: Thursday, January 26th

What could be worse for a law enforcement department than having a poorly planned and managed informant program? That's an easy answer - having no informant program at all. In today's environment of lawsuits and attacks on law enforcement by defense attorneys, are you and your department as prepared for the legal assaults as you could be?

While no training can prevent the inevitable lawsuits, this seminar will provide the tools you need to design, implement and manage an informant program for your department that will help protect your sources, win cases, and defend against legal assaults.

This seminar is sponsored by AUM's Alabama Crime Prevention Clearinghouse & Training

Institute, the Institute for Criminal Justice Education, Inc, Alabama Peace Officers' Association, U.S. Attorney's Office, MDA, and ADECA Law Enforcement Planning/Traffic Safety Division. This training is funded by an ADECA Law Enforcement Planning subgrant #09-DJ-ST-005 awarded to AUM and its Alabama Crime Prevention Clearinghouse.

Included for participants are checklists, forms and policy tips in a comprehensive manual containing all you need to set up and run an effective and legally sound informant program.

Instructors are Dr. Lou Harris, (FBI retired); 25 years investigator and relief supervisor; Chair of the Criminal Justice Department, Faulkner University; certified APOST instructor since 1986; co-author of three books and numerous articles and Robert Thetford, (FBI retired); 25 years, Legal Counsel, FBI; Attorney and former prosecutor; certified APOST instructor since 1984; author/co-author of five books and numerous articles.

For questions or assistance with registration please contact William Ward. Phone: (334) 244-3116 Email: jward15@aum.edu.

Code: 12CP100

Dates: January 26, 2012

Meets: Thursday from 9:00 AM to 4:00 PM, 1 Session

Hours: 6.00

CEUS: 0.60

Fee: \$0.00

Register at: [Informant Development Program - AUM and ICJE](#)

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