

VIETNAM

Criminal Defense Manual



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Vietnam Hanoi Criminal Defense Training Program Materials



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I. The Importance of Legal Defenders

Legal Defenders protect citizens who are accused of crimes and can not defend themselves. Legal Defenders ensure that all parties participating in the legal process carefully follow the laws that grant rights to all citizens. The Constitution of Vietnam, Article 71, provides that, "The citizen shall enjoy inviolability of the person and the protection of the law with regard to his life, health, honor and dignity." Legal Defenders use the protection of the law in aid of their clients.

I.1 The Duty of Legal Defenders

Legal Defenders have the duty to protect their client's interest within the limits of the law. Legal Defenders use their knowledge of the laws to protect all citizens accused of crimes. The Legal Defender shall never waiver from the protection of their client.

II. Defending a Criminal Case

Every criminal case starts with a charge or an arrest. The legal standards for instigating a case are found in Articles 6, 48, 49 of the Criminal Procedure Code of Vietnam. (The “CPC”) Except in cases when an accused is arrested during the act, a “red-handed offence,” the People’s Prosecutor will charge an individual with a crime. (See, CPC, Articles 33, 34, 35). The accused will then be placed in the custody of the police. Under Articles 11, 48, 49 of the CPC, a detained or charged has the right to defend himself, retain a legal defender or have a legal defender appointed.

Practice Tip No. 1: *The detained or charged person has the right to 1) be informed of the reason of detention or charge, 2) be informed of their rights and obligations, 3) defend himself or retain a legal defender. See, CPC, Articles 48 & 49. The legal requirements that must be met before arrest are found*

III. First Meeting With Your Client

Jail is often the first place that an attorney will meet their client. A person held in jail has many strong emotions. It is important that an attorney, especially an attorney that is appointed, make a confident first impression. A knowledgeable attorney is a confident attorney. Before meeting your client, you must be sure to review the criminal charges, know which laws apply, make copies (if possible) of the legal documents in the case, and be prepared to address bail.

III.1 Suggestions for the First Meeting

Here are some suggestions for when you first meet your client.

- Inform your client that you are there to protect their interests. Remind him that you will work to release him from further incarceration, to avoid a criminal conviction, to protect his or her family and property.

- Inform your client of the criminal procedure that will affect his case. Explain whether bail is available and what is required for bail.
- Inform your client of the criminal charges and the elements of the charges. Make sure that you know each element of the criminal charge or charges and what is necessary to prove those elements.
- Inform your client of potential defenses. Be sure to include legal standards of obtaining evidence and the arrest itself.
- Inform your client that there are four major legal options that must be faced in the future. These options are, 1) trial, 2) no trial by admitting guilt, 3) cooperation and/or negotiations and, 4) dismissal of the charges.
- Inform your client of the sentencing range if they are judged “guilty.” Remember to include both the maximum and minimum sentence as well as sentencing options outside of jail.
- Inform your client of the dangers of speaking with others about their case. Remind your client that what they say to others, including the police, can be repeated against them at trial or at sentencing. Also, it is important that family members are only generally informed of the charges; discussions of specific facts of the charge may cause family members to be used as a witness against the accused.
- Inform your client of the rights and powers that they retain even though they face criminal charges. They have the protection of the Constitution, the Criminal Code and you, their legal defender. They have the right to fight all criminal charges.

<p>Practice Tip No. 2: <i>The legal requirements of arrest and conditions for release on bail are found in the CPC, Articles 79-94. See also, CPC, Articles 126-129.</i></p>

After clearly outlining the above eight points (and any others that you think will be helpful), ask your client if they have any questions. This is your client’s first opportunity to learn the law, criminal procedure and future legal options. Do not expect your client to understand everything that you have just said. You were able to learn in law school. Now, you are the law professor and your client is the law student. Be patient and with a warm heart answer all of your client’s questions.

Once your client is fully informed of the charges, the criminal procedure that applies, the potential sentencing range and defenses to the charges, it is time to ask questions that will aid in their defense. Questions should be asked in a way that is not accusatory. Your questions should give your client the opportunity to give answers that will help their case.

III.2 Client Questions Checklist

The following are some suggested questions.

2a Background Questions:

- 1) When is your birth date?
- 2) Where were you born?
- 3) Where do you currently live?
- 4) How long have you lived there?
- 5) What was your previous address?
- 6) Are you married?
- 7) Who are the members of your family?
- 8) What is your first language?
- 9) What language are you most comfortable speaking?
- 10) Can you read and write?
- 11) Who are the members of your family?
- 12) Where do your family members live?
- 13) Who are your friends?
- 14) Where do you work?
- 15) How long have you worked there?
- 16) What is the name of your boss?
- 17) Who are your friends at work?
- 18) Who would you like to be contacted regarding your arrest?
- 19) Do you have a prior criminal record?
- 20) What finances are available for bail?
- 21) Are there family members or co-workers who will be available to supervise you if you are released on bail?

2b Circumstances of the Arrest:

2b(1) First Contact

- 1) When were you arrested?
- 2) Where were you arrested?

- 3) Who made the arrest?
- 4) Were you informed of the reason(s) for your arrest?
- 5) Did you understand the reasons for your arrest?

2b(2) Warrant or Summons

- 6) Were you shown an arrest warrant or a summons?
- 7) Were you able to read and understand the arrest warrant?
- 8) Were you provided a copy of the summons or warrant?
- 9) Were you informed of your legal rights? (Read CCP, Article 49)

2b(3) Search and Seizure

- 10) Were you stripped searched?
- 11) What was taken from your body?
- 12) What was taken from your clothes?
- 13) Were fluids or hairs taken?
- 14) Was the area or place that you were arrested searched?
- 15) Was your residence searched?
- 16) Was your place of work searched?
- 17) Did you see any evidence being taken by the police or investigators?
- 18) What was taken?
- 19) Were there any witnesses to the search?
- 20) What was the time of day or night when the search occurred?

2b(4) Interrogation

- 21) What was said to you at the time of the arrest?
- 22) What was said to you after your arrest?
- 23) Who spoke with you?
- 24) Who initiated the conversation?
- 25) What were your responses?
- 26) What were your emotions at the time?
- 27) Were your statements recorded?
- 28) Were your statements written down?
- 29) Were you allowed to review and correct your statements?

2b(5) Requests for legal help and family

- 30) Did you ask for a legal defender?
- 31) Did anyone inform you that you could have a legal defender?
- 32) When were you informed that you could have a legal defender?
- 33) Did you ask to see a family member, friend or co-worker?
- 34) Have you seen family, friends, or co-workers since your arrest?

2b(6) Detention

- 35) Describe where you were physically placed after your arrest.
- 36) How many government officials were present at the arrest?
- 37) Was there any coercion before you were interrogated?

- 38) Were you physically threatened at the arrest or later?
- 39) Were you verbally abused or threatened at the arrest or later?
- 40) Did you try to stop the interrogation?
- 41) How did you do to try to stop the interrogation?

2c The Criminal Charges:

- 1) Do you understand the criminal charges?
- 2) Do you understand the legal elements of the charges?
- 3) Is there anyone who would say that they were with them at the time of the crime?
- 4) What part of the charges do you believe are not accurate?

2d Quick Investigation

- 1) Who should you contact?
- 2) Are there witnesses you should talk with?
- 3) Is there evidence that must be secured?

Based on your client's answers, you can give a guarded opinion of options and defense strategies. You should stress that you are giving your opinion without the benefit of any investigation such as viewing the crime scene, speaking with witnesses, or reviewing the evidence on which the prosecutor has based the charges. It is important to stress that your client must be patient to allow you to work for their freedom and protection.

In addition, you should ask your client how they wish to proceed. Do they want a bail hearing? Do they want you to prepare a defense without exploring negotiations with the prosecutor? Are they interested in cooperating with the police? Even though your client may be looking for a quick solution to get out of jail, it is important to remind them that you have just started to work on their case. With additional time you will be able to give them more information about the strongest defense that applies to their case.

After the initial meeting with your client, you should make brief notes of what you discussed. Draft a short outline of the criminal charges, the potential defenses and

areas of investigation that may affect the case. Last, write down all family contacts and who should be contacted, if necessary, to inform them of your client's situation.

III. 3 Bail

The accused has a right to be released from detention until their case is resolved. The conditions of release are dependant on the accused assuring the court that they will not flee the jurisdiction or are a danger to the community. The following are factors that can effect the court's decision to release your client on bail.

3a Bail Considerations

- Location of residence
- Length of time living in the community
- Length of time family has lived in the community
- Reputation in community
- Prior criminal record
- Place of employment
- Length of employment in the community
- Willingness of family members to supervise the accused while on release
- Willingness of co-workers to supervise the accused while on release
- Whether the accused requires special needs.

Practice Tip No. 3: *In most cases, the accused must be released within a few days as a matter of law unless an order is sent to the Procuracy for an extension. See, CPC, Articles 86-93, discussing length of custody and bail.*

IV. Preparation of the Defense

One of the most important and simple tasks of a defense attorney is to fully understand the laws that correspond to the elements of the crime charged. It is important to start a case by writing down each factual assertion that must be proved in order for the government to obtain a conviction. Each element or factual assertion has a defense that

can be applied. It is also true that each charge has a corresponding constitutional section, Criminal Code of Vietnam (CCV) article and a Criminal Code of Procedure article that applies. It is important to know how the law effects the case so all your client's rights are protected.

Practice Tip No. 4: *The rights and duties of the legal defender include the right to read the case dossier and other papers relating to the case. See, CPC, Article 58.*

Generally, in all cases there are factual assertions by the government that are both good and bad for the defense of your client. "Good facts," are those facts that support the defense of your client. Another way to view "good facts," is to decide if they attack the credibility of any part of the government's charges. On the other hand, "bad facts," are those facts that support the government charges. Since your client has been charged with a crime, and is likely incarcerated, the first impression of the case is that there are many more bad facts than good facts. Do not get discouraged. You are just beginning to formulate a defense.

Make a list of the good and bad facts that you see in the government's charges. Also, note what facts may change and what facts, if they exist, will help or hurt the defense. It is helpful to place the lists side-by-side so that you can compare the two. The list may be daunting, but that is why a legal defender's work is both difficult and rewarding.

Remember, you will be returning to meet with your client to discuss and clarify his case. Showing your client how carefully you prepare a defense will give him confidence in your legal abilities. You will be surprised at how helpful a client can be after their legal defender shows them how to prepare the defense of a criminal charge.

IV.1 What If? Problems that May Occur at this Stage

1. You are denied access to your client:

See, CPC, Article 58, Rights and Duty of Defense Counsel. Defense counsel has the right to meet with their client who is in custody.

2. Your client will not talk with you:

Remember, if your client is in custody he or she will be suspicious of people who visit. Explain to your client that you have either been appointed through CPC, Article 57, or have been hired by family. Carefully explain the criminal procedure of the case and how you can protect their legal rights and assist in their defense. Avoid accusatory questions.

3. The charges are vague:

See, CPC, Article 58, granting the defense counsel the right to view the case dossier.

4. The court prevents you from representing your client:

See, Article 57, granting an accused the right to a defense counsel.

6. Your client was illegally questioned:

Petition the court with special focus on both the factual and legal violations. See, Article 6 of the Constitution prohibiting coercion and CPC, Article 58 of the Criminal Procedure Code allowing for defense counsel to be present at the time of interrogation.

IV.2 Investigation

Both the prosecution and the defense rest on a detailed investigation. As mentioned above, your client is in jail based on some bad facts as reported by the Head of Investigating Body or a police officer.

<p>Practice Tip No. 5: <i>How far does an investigation have to go to find evidence? The law established specific steps that must be followed. See, CPC, Articles 34, 35, 36, set out some of the required duties of the government investigators.</i></p>

The police investigation may be sufficient to charge someone with a crime, but it is not always as detailed as a legal defender requires. This is because crimes are

sometimes charged based on appearances, rather than truth. For example, your client is charged with robbing a Pho restaurant. Your client is arrested because he looks just like the bank robber. He was arrested based on his appearance. The truth was that your client was at work a kilometer away when the bank was robbed. The truth is in the details!

IV.3 Suggestions for Investigation

Here are some suggestions for investigation.

3a Be Quick

- Early investigation is best.
- Delay may cause a loss of physical evidence.
- Witnesses remember best soon after an event has occurred.
- Early discovery of good facts can promote resolution, dismissal of charges, and successful pretrial motions.

3b Easy Sources of Information

- The charging document.
- Law enforcement investigation.
- Client interviews.
- Witnesses.

3c The Crime Scene

- View as soon as possible.
- View at the same time the crime occurred.
- Document the crime scene with sketches, diagrams, photographs, measurements.
- Look for evidence that was not collected.
- Identify witnesses and note where to contact them in the future.
- Look for witnesses who were not interviewed by the police.

3d Witnesses

- If possible, interview the complaining witness.
- Interview eye witnesses.
- Use your personality to overcome a reluctant witness.
- Use the importance of justice to overcome reluctant witnesses.
- Interview witnesses in a safe, comfortable environment.
- Record witnesses background information and current employment.

3e Witness Statements

- Were witness statements tape recorded?
- Were witness statements written as notes by the police?

- Were witness statements written by the witness themselves?
- What was the witness's motive to give a statement?
- Were the statements based on the observations of the witness or what the witness heard?

3f Physical Evidence

- How was the evidence obtained by the police?
- Is evidence fragile or stable?
- What is the chain of custody?
- Has the evidence been tested?

3g Hard or Soft Evidence

- What evidence will not change?
- What evidence can be interpreted differently?

3h Expert Opinion

- What evidence did the expert review?
- What is the area of their expertise?
- How long has he or she worked as an expert?

The above are just some areas of investigation. More investigation techniques will be discussed in the section covering specific defenses.

IV.4 Investigation of Physical Evidence

An investigator must know what to look for and how to interpret what is found. What may infer guilt to the prosecutor may also be indicative of innocence. Typically, the charging document reflects the prosecution's theory of the case. For a successful prosecution, this theory must not change. The legal defender's task is to analyze the prosecutor's theory for errors, misinterpretations and exaggerations.

"Hard evidence" is evidence that will not change. For example, a gun or stolen goods are both physical objects that may be related to a case and will not change their shape or form. Fingerprints, photos, blood are also examples of hard evidence that will not change.

“Soft evidence” is evidence that can be interpreted and changed over time. Soft evidence usually refers to witness statements since perception and memory can change over time. Witnesses also have different motives to give a statement that reflect on the truth and reliability of the witness themselves. A skilled attorney finds weakness and misconceptions in witness statements.

A skilled attorney can also change “hard evidence” to “soft evidence.” Some physical objects can be changed by perception and interpretation. For example, your client was found with blood on his clothes and charged with stabbing a man with a knife. By testing the blood it was discovered that the blood was not the victim’s blood, but rather from a pig that he had brushed against at the market. Here, the prosecutor’s theory was that victim’s blood was on your client’s clothes. The first impression was that your client was involved in the stabbing because blood was on his clothes. The correct interpretation, however, was that the blood was not the victim’s and your client was innocent.

Perception of physical evidence and interpretation of this evidence is based on what physical evidence is found at the crime scene. Association of an accused with a crime is commonly based on what physical evidence is found at the crime scene and what evidence was near the accused. At the same time, physical evidence can exclude individuals or objects as the above stabbing case has shown.

IV.5 Sources and Examples of Physical Evidence

It is important to think about what types of physical objects lead to association or exclusion of the accused. Some common items are listed below.

Sources of Physical Evidence:

- Clothing
- Footwear
- Tools
- Weapons
- Vehicles
- Storage areas
- Furniture
- Building materials
- Food
- Grass
- Carpet
- The human body

Examples of Physical Evidence:

- Hair
- Clothes fibers
- Cosmetics
- Paint
- Rust and metals
- Tape
- Pottery
- Buttons
- Rope
- Cigarettes
- Matches
- Burned charcoal, wood or paper
- Soil
- Wood splinters
- Plant material
- Glass
- Gunshot residue
- Fingernail scrapings
- Footprints
- Blood
- Blood splatter or patterns
- Wounds

IV.6 Witness Statements

Statements by witnesses are soft evidence. The statements are susceptible to manipulation, change and misconception. Despite the unreliability of statements, witness evidence, especially live witnesses, are relied on as the most significant evidence. What a person says probably leads to more convictions than any other evidence. It has been said that mistaken eyewitness testimony results in more wrongful convictions than any other cause. Therefore, it is vital to know what influences witness testimony.

Eye witness evidence is the result of an event. This is similar to physical evidence that leaves a trace of evidence after the event has occurred. In the case of a witness, the event leaves

a trace in the brain of the eyewitness. This is the witness' memory. Memory evidence, like physical evidence, can be contaminated, manipulated, lost and destroyed.

The accuracy of eyewitness evidence depends on the how an event was viewed. Typically, an eyewitness has not received specialized training in observation; though, common sense tells us that we all have experience in viewing events and describing what we see to family and friends. Common sense also tells us that who a person is and how a person views an event makes a difference in the way the event is retold. How often do we see a husband and wife tell a different story of the same event? It is helpful to take a systematic approach to interpreting eyewitness testimony.

6a Traits of the Witness and of the Crime Scene

Below are some topics to focus on when reviewing eyewitness testimony.

Traits of the Witness	Traits of the Crime Scene
<ul style="list-style-type: none">• Sex• Intelligence• Memory• Education• Work and work history• Language• Speech impediments• Age• Personality• Mental state• Medical state• Alcohol consumption• Eye-sight• Hearing• Relation to the victim• Relation to the accused• Victim or witness• Threatened at the event	<ul style="list-style-type: none">• Lighting• Day or Night• Moonlight• Rain• Fog• Cold• Heat• Number of people• Length of time to view the event• Weapons• Vegetation• Buildings• Cars• Traffic• Angle of the viewing• View from above• View from below• Noise

The above traits will help narrow the defense investigation. The traits will also help the defense attorney discover where a witness testimony is strongest and weakest.

Another area to inquire is how the witness reacted to the prosecutor's investigators. Were they led to their testimony or did they give testimony free from coercion or suggestion? This is especially important to know when a witness makes an identification of your client as the perpetrator of the crime.

Practice Tip No. 6: *When interrogating a witness, the Investigating Body shall, without any suggestive questions, request them to retell or rewrite what they know of the case. See, CPC Article 135, stating the protocol to follow when interrogating witnesses.*

Identification often comes in three forms: 1) pictures, 2) physical line-up, and single presentations. In the first instance the police show photos of individuals that look

like your client and ask the witness to pick the perpetrator. A physical line-up is when more than one individual is presented to the witness and again the witness is asked to pick the perpetrator. Last, the witness is brought to the accused and asked if he or she is the perpetrator. In each instance the witness is accompanied by an officer for the sole purpose of identifying one (or more) as the guilty party. The inherent problem with each of these forms is that they are suggestive. Eyewitnesses tend to identify the person who most resembles the perpetrator compared to the others in the line up. Again, there are traits to look for to see how the process was suggestive.

6.b Suggestive Traits at a Lineup Identification

- What pre-lineup instructions were given to the witness?
- How similar were the other “suspects” to your client?
- What was the structure of the line-up?
- How much time was spent during the identification process?
- What suggestions or comments were made during the process?
- What post-identification feedback was given to the witness?

While physical traits are important, a witness’ motive to testify is an exciting source of inquiry. Witness credibility can be the difference between believing or not believing a witness. Here, the focus of investigation looks at what a witness will gain or lose by testifying against your client. The opposite perspective is also true for witnesses who are used for the defense: what will the witness gain or lose by testifying for your client? The obvious source of gain is monetary, but there are other sources: love, jealousy, prestige, family position, revenge and more. Remember, nobody wants to be a witness to a crime. Certainly, few people want to testify in court. Discover the motive why a witness is testifying and you might discover the key to your defense.

Practice Point No. 7: *The victim always has a monetary interest in the outcome of a trial. See, CPC Article 99, stating that if the court has pronounced the accused innocent the costs of the trial are charged to the victim.*

IV.7 Statements of the Accused

The most important piece of evidence in any criminal case may be the statements of the accused, your client. Statements of guilt, and statements that tend to show guilt, are generally accepted as the truth. This is especially true when the accused confesses to the crime charged—a confession without additional proof immediately instigates a protocol; see, CPC, Article 102.

If your client is arrested or detained they are required to make a statement concerning the fact that they are suspected of a criminal act. A confession at this stage is should be viewed with caution. As CPC, Article 72, points out, a confession should only be considered as evidence if the confession is consistent with other evidence.

Practice Tip No. 8: *An accused may be interrogated soon after a decision on institution of a case. However, prior to an interrogation the rights provided in CPC, Article 49, must be read and acknowledged. See, CPC, Articles 131, 132.*

This last point, that the accused confession must be consistent with other evidence, is crucial to the defense. Any inconsistency with your client's statement and the other evidence in the case must be carefully reviewed and investigated. Further, an inconsistency may be a sign of coercion and, in some cases, innocence. It is therefore important to recognize what are the traits of a coerced confession, forced confession and false confession.

7a Traits of Coercion, Force and False Statements in Confessions		
Coerced Confession	Forced Confession	False Confession
<ul style="list-style-type: none"> • Pressure • Deception • Persuasion • Custodial • False promises • False facts • Young age • Low self-esteem 	<ul style="list-style-type: none"> • Physical Threats • Emotional Threats • Isolation • Lack of food • Physical Contact • Many interrogators • Length of time • Fear 	<ul style="list-style-type: none"> • Young age • Mental health issues • Linguistic clues • Inaccurate answers • Non-responsive • Contradictory • Exaggerated • Desire to please

The issue of a true or false confession is so important that it is worth repeating and expanding some of the techniques used in obtaining confessions and the responses to these techniques. Remember, techniques and responses may be subtle, mixed and unpredictable. Each case is different as each individual is different. A skilled legal defender looks for subtleties before reaching a conclusion.

7b Why do Suspects Confess?

The below points were developed in response to the question, “Why do suspects confess?”¹

7b(1) Common Personality Traits of the Accused in False Confessions

- A great deal of trust in authority
- Lack of self-confidence
- Susceptible to suggestion

7b(2) Voluntary False Confessions

- Confession is offered without police pressure
- The accused learns about the crime and contacts the police
- Mental health issues: depression, schizophrenia
- The accused has a desire for notoriety

¹ The respected American investigator, Russell Stetler, developed and successfully used these points in the defense of the innocent.

7b(3) Coerced-Complaint False Confessions

- Pressure of the interrogation process
- Confession is provide in exchange for the promise to return home, ending the interview, or, protecting the suspect's family
- Perception of immediate gain outweighs long term consequences
- There is a retraction once the coercion is diminished or gone

7b(4) Coerced-Internalized False Confession

- The belief of guilt without actual memory of the event
- Memory disturbed because of amnesia or other causes.
- Coercive tactics and techniques used to cause self-doubt
- Coercive tactics and techniques used to create a false reality

7b(5) Coercion Interrogation Techniques

- Repeated statements by investigators of your client's guilt
- Repeated reminders of memory problems
- Withholding information that might suggest guilt
- Isolation from family, friends and/or legal defender
- Lengthy interrogation
- Interrogation with emotional intensity
- Statements of scientific evidence without explanation and/or truth
- Creating an atmosphere where the accused may fear denying guilt
- Physical threats
- Physical abuse

7b(6) Linguistic Responses to a Coerced Interrogation

- "I guess I must have . . ."
- "I think I did this next . . ."
- "If what you said is true, then . . ."
- "I just want to get this over with . . ."
- "If I tell you what happened, can I go home?"

Practice Point No. 9: *The legal defender must be involved when the accused is being interrogated. See CPC Articles 131, 132, establishing the rights of the accused and his legal defender during an interrogation*

IV.8 Elements of the Crime

Defenses to criminal charges often appear like flickers of light only to be extinguished by new evidence or a change in circumstances. Similarly, new defenses

can rise like flames and burn so bright that the truth of innocence is obvious to all. In either case, it is important to know the defenses that apply to the most common crimes.

Practice Tip No. 10: *A court must determine whether a criminal act had been committed. See, CPC Article 63, which states what facts are required to be proved in a criminal case. See also, VCC, Article 8, The Definition of a Crime.*

The formulation of a defense begins with the elements of the crime charged. The elements define the crime. If the elements of the crime are proved, the accused will be found guilty. On the other hand, if the elements of the crime are not proved to exist, the accused must be set free. In this way, the elements of a crime are like a three-legged chair; if you take away one leg of the chair, the chair will fall. Like the chair, if you take away one element that defines a criminal charge, the charge must fall.

8a Elements of Common Crimes

Here are the general elements of common crimes along with factors that aggravate or mitigate the crime.

8a(1) Murder:

- A death is confirmed
- Intent to cause the death of a specific person
- Intent to cause serious physical harm and death occurs
- Intent to act in a manner that may cause physical harm or death and death occurs
- An act that shows an extreme indifference to human life
- When unaware of a risk of death, the accused unconsciously causes the death of another

8a(2) Assault:

- Physical injury can be proved
- A threat is believed
- Intent to cause serious physical injury
- Use of a dangerous instrument or weapon

- Intent to cause physical injury
- An act that shows an extreme indifference to human life
- Multiple acts of violence
- A reckless act that causes physical injury
- The victim is placed in fear by an action or an object

8a(3) Theft:

- Property is taken from an owner
- No force or threat was used
- The value of the property taken
- The accused possessed the property

8a(4) Robbery:

- Property is taken from an owner
- There was use of force or threats
- With a weapon
- Without a weapon
- Injury accompanies the act
- The value of the item taken
- The accused possessed the property

8a(5) Crimes Before the Act

- Conduct that is a substantial step in the *attempt* of a crime
- Intent to cause another to engage in a crime by *solicitation*
- To *conspire* with the intent to enter an agreement with one or more persons to commit a crime and one person acts to further the conspiracy.

IV.9 Mental States

After reviewing the elements of a crime, the next step in formulating a defense is to look at the mental state that applies. The mental state of the accused is not always easy to prove. “Who”, it has been said, “really knows what their brother thinks?” Mental state is usually proved by looking at how a person acts and the emotional state that accompanies that action. Typically, an intentional act is punished more severely than a negligent or reckless act.

9a Suggested Mental States

Here are some suggested mental states that apply to common crimes.

9a(1) Intentional

- Clear knowledge
- Certain, firm action
- Socially dangerous acts
- Spoken intent
- Clear indifference to the consequences

9a(2) Negligent

- Should have know of the consequences of the act
- Careless failure to know the consequences
- Indifference to the consequences
- Failure to act to prevent the consequences

9a(3) Reckless

- An action outside of accepted behavior

Practice Tip No. 11: *Memorize the four mental states as defined in the VCC, Articles, 9, 10, 11 and 12: Intentional, Unintentional, Unforeseen, Nonimputability.*

Once finding the mental state(s) that apply to the criminal charges, the legal defender should turn to avoiding a mental state that either increases the likelihood of guilt or punishment if they are found guilty. Avoiding a mental state is harder than showing the existence of a mental state from actions or results. The argument that the act or the result was exaggerated or misinterpreted is always available. In addition to this argument, there are others that try to avoid or replace a criminal mental state with one that under the law is not criminal. Sometimes an expert is necessary.

Practice Tip No. 12: *The mental state of both the accused and of witnesses may be subject to the examination of an expert. See, CPC Article 155, stating that an examination is compulsory if the accused may not understand the circumstances of the charge or trial, and if the witness or victim may not be able to understand and testify truthfully.*

The most extreme mental state is insanity. There are, of course, degrees of insanity as well as moments of insanity. The timing of the change in mental state (from sane to insane) will affect the defense. Sanity may be lost before or at the time of the criminal act. Sanity may also be lost after the criminal act and sometimes not until the accused is incarcerated. Declaring someone insane is a difficult task. However, in the most serious cases with the most damaging evidence, finding the accused insane may be the only way to explain the actions and avoid the most extreme punishment.

The age of the accused is a source to look at when discussing mental states. Under the Vietnam Criminal Code, Articles 57 to 60, there are three ages that a legal defender must be aware of; under 14 years of age, between 14 and 16 years of age, and over 16 years. Depending on the age of the accused they may or may not be subject to criminal responsibility. In addition, the young age of an accused also affects their potential sentence.

IV.10 Recognized Defenses to Common Crimes

Recognized defenses are those that are recognized as legal defenses to the criminal charge. Like all defenses, they must be based on factual evidence and supported by skilled legal argument. The benefit of these defenses is that they are written into law and thus must be recognized by the court. If the legal defender can satisfy the elements of the defense, the accused will be freed.

There are generally two areas of defenses. First, Justification Defenses. These defenses are used when the accused admits to the criminal act. Second, Affirmative

Defenses. These defenses are used when the accused does not admit to the criminal act.

In both defenses, the legal defender must argue the defense on behalf of the accused.

Practice Tip No. 13: *Justification Defenses are found in the VCC at Articles 13 & 14.*

As you can see from the below list, a Justification Defense requires the legal defender to present evidence to the court. Not to be overlooked is the statement of the accused. The legal defender, witnesses, and the accused must all have a coherent and compelling story to tell for a successful defense. Remember, the accused will be admitting to a criminal act! Here are some ideas that support a Justification Defense.

10a Justification Defenses

- **10a(1) Ignorance:** the accused was unaware that he was committing a criminal act.
- **10a(2) Mistake:** the act was made by mistake and without criminal intent
- **10a(3) Entrapment:** the accused was coerced into committing a criminal act. Further, it was an action that had not been done in the past.
- **10a(4) Consent:** the act was authorized by an owner or supervisor. This is usually used when the criminal charge is theft.
- **10a(5) Necessity:** the action was made to protect a valid interest.
- **10a(6) Self-defense:** the act was done in response to a threat and for protection. The defensive act must be contemporaneous with the threat. The threat must be commonly recognized threat.
- **10a(7) The Defense of Another:** the act was done in response to a threat and for protection.
- **10a(8) The defense of property:** the act was done to protect a home or business.

An Affirmative Defense requires additional efforts since the accused is arguing that, despite the prosecutor's case, he did not do the crime. And in some cases the accused will argue that he was not at the crime scene. Again, the legal defender, witnesses, and the accused must all have a coherent and compelling story to tell for a successful defense. One must remember that these defenses argue that the prosecutor and his investigators are completely mistaken! Here are some ideas that support an Affirmative Defense.

10b Affirmative Defenses

- **10b(1) Alibi:** the accused was not at the crime scene. This defense requires witnesses or some other type of documentation.
- **10b(2) Mistaken identity:** the witnesses have identified the wrong man. Investigation, witness cooperation and skilled questioning are needed to show that there was human error.
- **10b(3) Misinterpretation of the evidence:** some facts are not always accurate. Testing of materials and forensic training are helpful to show that first impressions are not always correct.
- **10b(4) Insanity:** An expert is need to testify that the accused was not sane –he was someone else-- at the time of the criminal act

10c Battered Woman Defense

A Battered Woman Defense should be raised if a woman is repeatedly subjected to any forceful physical and/or psychological assault over a period of time. Generally, a battered woman must have been assaulted more than one time and remained in the relationship. The defense should be used when a woman –it can also be a man— uses

physical force to prevent future abuse. In this case, the act may not easily fit into the definition of self-defense.

10c(1) Stages of Abuse: Many experts recognize three stages of an abusive relationship:

1. a tension building stage of minor threats and physical abuse;
2. the actual battering stage; and
3. a period of forgiveness that can include love and affection.

Relationships are complicated. There are many practical issues, emotional issues and psychological issues that put strain on a relationship. For example, financial concerns, the absence of love, resentment, are just some things that can strain a relationship.

Many women in a battered relationship find that they cannot leave the relationship for reasons that range from dependency on their spouse for food and shelter, to psychological dependence based on their depression and their inability to change their circumstances.

The above scenario also applies to children who are physically and/or psychologically abused over time. Unfortunately, it is common that the cycle of abuse continues through generations. If an adult was abused or in an abusive family as a child they often continue the abuse as an adult.

10c(2) Signs of Abuse: Here are some traits to look for in order to support this defense.

- Bruising (old and new injuries)Injuries in time intervals (consistent with an abuse cycle)
- Signs of broken items or replacement items in the home
- Witnesses testifying to seeing injuries or hearing loud arguing
- Reasons for a strain on the relationship
- A history of abuse in the family of the assailant

V. Motions to Aid the Defense

Motions are formal requests submitted to the court. A well written motion is both a request and informative. Based on law and fact, motions are constructed carefully so that they reflect both the applicable law and your intellect. In other words, motions should be, first, a reflection of the laws that apply to your client's case, and second, a reflection of your skills as a legal defender. The motion should be clear and precise for the relief requested.

Be warned, not all requests made by motion will be granted. Do not be discouraged. A motion preserves the issue for appeal to a higher court. Disagreements in the legal arena are not unusual. What is important is dedication and hard work for the purpose of upholding the law and the protection of your client's rights.

V.1 Topics for Effective Motions: Below are some topics for fast, effective motions in a criminal case.

1a Dismissal of the charging document

- Defects in the charge
- The charge is not a crime
- The law has changed
- The conduct is protected by other laws
- There was no criminal offense
- The act was not a crime
- The accused was under the age to bear criminal responsibility
- The time limit for prosecution has expired
- The accused was previously granted amnesty

<p>Practice Tip No. 14: <i>Arguing that the charging document is insufficient or unlawful strikes at the heart of the prosecutor's case. Asking that the charges to be dismissed based on a flawed charge is bold, but it is supported by the law. See, CPC, Article 107</i></p>

1b Access to your client

- A first visit
- Regular visits
- Private visits
- Ability to review documents
- Expert examination of your client

1c Detention

- Detention exceeds the legal limit
- There is no risk of flight
- There is no risk to the community
- Family and/or business associates are ready to supervise
- Client is employed
- Client requires medical care
- Client is responsible for the care of children or elderly
- Client is either too young or too old to be safely detained

Practice Tip No. 15: *The legal limits to detain suspects are very specific. See, CPC, Article 120, stating the detention limits in different cases.*

1d Access to evidence

- Statements
- Expert opinions
- Physical evidence
- The crime scene
- Photos, videos, recordings
- Diagrams
- Witness contact information
- Employment records of police officers

Practice Tip No. 16: *A fair investigation and a fair trial are fixed in the Constitution. To protect legal rights, a fair trial and the search for truth, the legal defender should be able to view all the same discovery as the prosecution. See, CPC, Articles 74-76, establishing a protocol to use when handling material evidence.*

1e Suppression of evidence

- Violations of protocol
- The warrant failed to include the proper information
- Boundaries of the search exceeded the limits of the warrant
- Timing of the search exceeded the limits of the warrant
- Search was done without witnesses
- Coercion, threats or torture were used during the search

Practice Tip No. 17: *Evidence obtained through a search, with or without a warrant, is always controversial. It is important that a search falls within the limits of the warrant or investigation; otherwise innocent citizens would be subject to random searches and seizures. The law protects innocent citizens. See, CPC, Articles 149, establishing limits to an investigatory search.*

Practice Tip No. 18: *The Constitution bars the use of coercion and physical abuse against its citizens. See, CPC, Article 71, “It is strictly forbidden to use all forms of harassment and coercion, torture, violation of his honor and dignity, against a citizen.”*

1f Suppression of identification

- Suggestive identification
- Improper identification
- No out-of-court identification
- No opportunity to cross-examine the witness

Practice Tip No. 19: *Witness identification of your client in the courtroom is compelling theater. To protect the truth finding process, be sure that the witness has made a reliable identification before coming to court. It is simple to pick out where the accused sits in court. It is more difficult to make an identification in a fair setting.*

1g Suppression of client’s statement

- Mental health issues of the accused
- Voluntary false confession
- Verbally coerced false confession
- Physically coerced false confession
- Confession made without witnesses
- Confession made without a legal defender present

1h Suppression of witness statement

- Unreliable witnesses
- Mental issues
- No first-hand observation
- Hearsay

1i Motion to continue trial

- Require additional time to meet with client
- Require additional time to prepare a defense
- Witness or expert unavailable
- Test results are not completed
- Client is mentally incompetent