

The Art of the Witness Interview



Presented by:

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Overview

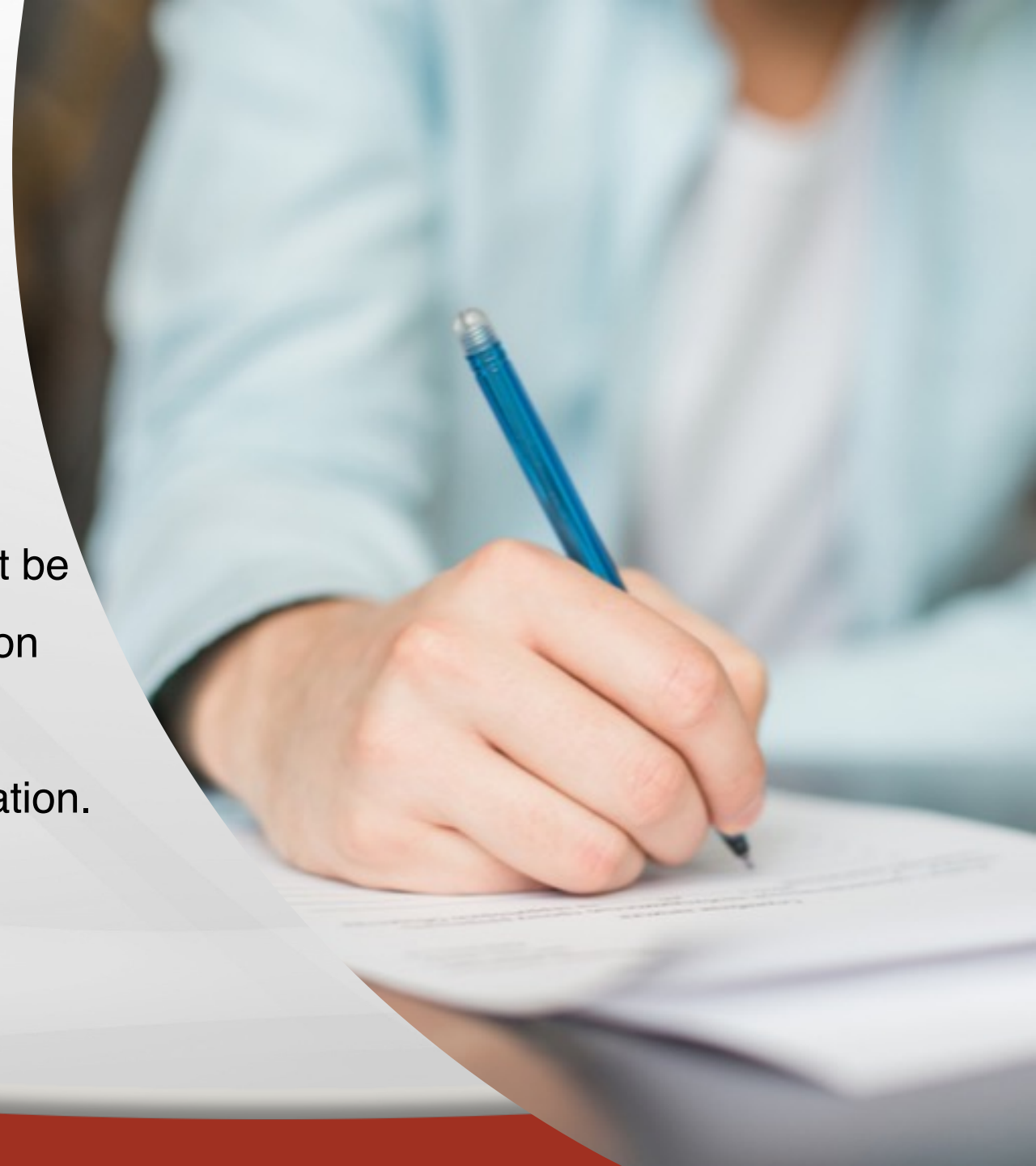
- Planning order of interviews
- Planning order of questions in interviews
- Logistical considerations
- Dealing with difficult witnesses
- Using documents in interviews
- Documentation of interviews – notes and final investigation reports





Initial Considerations/ Reminders

- Consider how to preserve privilege.
- Evaluate what interim emergency steps might be necessary while you conduct your investigation and complete interviews.
- Determine who should complete the investigation.



Outline the Investigation

- Summarize the complaint as you know it so far.
 - What are you looking at?
 - Avoid “scope creep”.
- Collect And Review Relevant Materials before you start:
 - Personnel files
 - Previous Complaints
 - Policies
 - Performance records
 - Electronically stored information (e.g., emails, video)
- **BUT DON'T LET PREPARATION/COLLECTION DELAY THE INVESTIGATION.**

Who Should Be Interviewed?

Develop a list of potential witnesses:

- Complainant
- Potential witnesses
- Alleged perpetrator
- Review personnel file of complainant, alleged perpetrator.

Consider Potential Witness Issues:

- Union Issues
- Former employees
- Who needs to be informed in management



Interview Logistics

- In what order should the interviews be conducted?
- Who will attend the interview?
- Where will the interview be conducted?
 - In person or remotely?
 - Consider issues of privacy and safety (for all parties)
- When will the interview be conducted?
 - During or outside of work hours?
- Will the interview be recorded?



Develop Interview Outlines

- Include an opening statement.
- Prepare questions for each witness in advance.
 - Is there anything else I should know?
 - Is there anyone else I should talk to?
- Be prepared for questions interviewees might ask.
- Include a concluding admonition to not interfere or retaliate and to maintain confidentiality.



QUIZ 1: Who should I interview?

Erin Employee approaches Helen HR to say that she found a noose in her locker after she reported Stanley Supervisor's safety violation. Who should I interview?

- A. Erin Employee and Stanley Supervisor
- B. The employees' whose lockers are on either side of Erin Employee's locker
- C. Chelsea Coworker who found a threatening note in her locker the same day
- D. The three employees witnessed on camera hanging out near the locker
- E. Kelly Coworker who Erin Employee identified as a witness



Questions from Witnesses

- Although the interview is for you to gather information, you should anticipate questions from the witness as well.
 - Do I need a lawyer?
 - Who is going to hear what I tell you?
 - Do I really have to answer your questions?
 - Can I go off the record?



Video Interviews

- Useful for providing additional insight to credibility – body language, eye contact, etc.
- Best to confirm before the interview that the witness has technology available to conduct a video interview – a computer is typically preferable to a phone.
- Confirm witness is in a private space and that no others are present.
- Set ground rules regarding recording at outset.



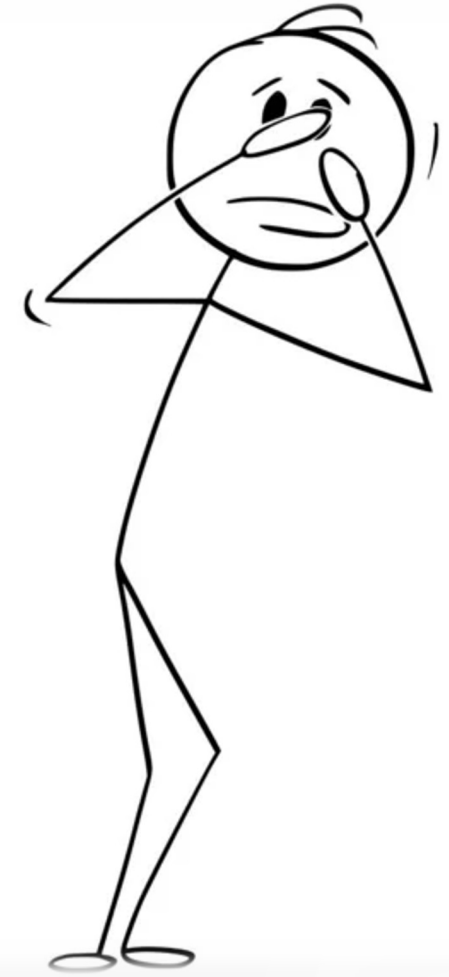
Scenario

- Mary alleges that her supervisor, Tom, has been sexually harassing her and is retaliating against her for taking FMLA leave.
- She states that Tom and two of her colleagues, also in subordinate positions to Tom, have a “boys club” and she fears her colleagues won’t provide information due to their loyalty to Tom.



Interview Scenario – Reluctant Witness

- During your interview of Mary, she tells you another employee, Jim, a member of the “boys club”, witnessed Tom make sexually inappropriate comments.
- You call in Jim to interview him, but he says he “doesn’t want to get involved”.
- What could/should you do?



Dealing with Reluctant Witness

- Start the interview with basic background questions, even if not directly relevant.
- Build a rapport with the witness.
- Use non-leading questions.
- Use silence – people tend to fill the void.
- Empathize.
- Ask why reluctant to get involved.
- Ask if there are documents that might help.
- At end, ask if there are other people who would have more information – a reluctant witness might point you to a useful witness if they think that it could get them off the hook of talking to the lawyer.

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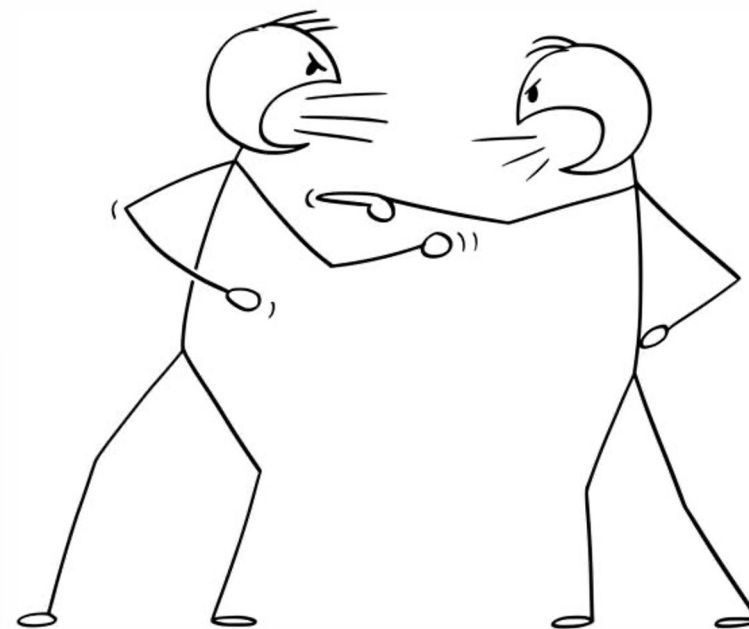
Listen to silence. It has so much to say.

RUMI

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Interview Scenario – Combative Witness

- When you begin interviewing the accused, Tom, he becomes angry – demanding to know immediately what is going on and why he was called in for an interview.
- Tom says he's not going to talk to you at all until he knows whether he has been accused of something and, if so, what
- How should you respond?



Dealing with Combative Witness

- Remain calm and in control.
 - Never let a witness take control of the interview.
- Safety first.
- Explain that an investigation is a process, and provide some general information if necessary.



Dealing with Combative Witness, continued

- Begin with open-ended questions, but be prepared to confront a combative witness with contrary evidence if the witness does lie.
- If a witness refuses to answer questions, remind the witness of the duty to cooperate.
- Use suggestions we discussed relating to uncooperative witness (appeal to need for cooperation, use silence).
- If witness invokes 5th Amendment, remind witness that the company is not a government body, this is not a criminal proceeding, and the company will continue the investigation and make a decision without input from witness, if necessary.

Interview Scenario – Forgetful Witness

- When you interviewed Mary, the complainant, she told you Ronda was present on a few different occasions when Tom referred to Mary as honey, hugged her, and stated he wished his wife looked and acted like Mary.
- When you interview Ronda, she states she can't recall any incidents between Mary and Tom that she perceived to be inappropriate for the workplace.
- What questions should you ask next?



Dealing with Forgetful Witness

- Ask Ronda questions to help recreate the situation when certain events may have occurred, but which don't suggest an answer.
- Return to the same question more than once – in different ways.
- Ask whether Ronda has spoken with others about the incidents in question.
- Probe about the existence of any other evidence (texts, emails, notes, etc.)
- Try a little silence.

Interview Scenario – Chatty Witness

- In her interview, Mary mentioned that another colleague, Cathy, also witnessed Tom hug Mary.
- When you interview Cathy, she begins telling you about another supervisor, Jenny, who has close relationships with her subordinates Joe and Harry.
- Cathy also tells you that she heard that Mary and Tom went to a bar together.
- How do you respond to this information?





Dealing with Chatty Witness

- Don't let the witness hijack the interview.
- Refocus the witness on Mary's allegations against Tom.
- If Cathy does offer information that indicates others may have engaged in inappropriate workplace conduct, be prepared to take notes and consider strategy for another start another investigation.
- Question Cathy about the source of her information – be sure the witness has personal knowledge of the information the witness is volunteering.

Scenario – Contradictions in Witness Stories

- During your interview of the complainant, Mary, she tells you a Supervisor, Melissa, told her that Tom had said to her (Melissa) that he thought Mary was taking off too much time to care for her sick husband.
- You interview Melissa and she states that she never said anything like that to Mary because Tom never said anything like that.
- What should you do to follow-up with Mary and Melissa about this inconsistency?





Dealing with Contradictions in Witness Stories

- Take it head on, ask witnesses to explain inconsistencies.
- Ask each witness why the other might disagree.
- Ask about specific facts and how each witness would characterize what happened and why.

QUIZ 2: How Handle this Witness?

During your interview of Mary, she told you that Tom hugged her at the holiday party, the summer picnic, and after the team had exceeded quarterly goals. Jim corroborated Mary's version of events with respect to the picnic and the quarterly goals day.

During your interview of Tom, you ask him whether he has ever hugged Mary. Tom says he can't remember ever hugging Mary.

Which of these questions is appropriate to ask next?

- A. Who else was present when you learned the team had exceeded quarterly goals?
- B. Did your team attend the summer picnic? Mary, Jim, Tyler, Marco, Cathy, and Ronda?
- C. Jim already told me that he saw you hug Mary at the summer picnic – why would he lie?
- D. You do know that lying in an investigation can lead to termination, right?



Using Documents in Interviews

- When to use:
 - Refresh recollection of witnesses
 - Confront untruthful witnesses
 - Explore contradictory testimony
- Best practices:
 - Document must have a connection to a witness – personal knowledge
 - Present to witness during interview, not before
 - Ask witnesses for any other relevant documents in their possession



Note on Privilege for HR

- To preserve privilege, have HR contact legal and ask for advice.
- Legal should then direct that HR (or other appropriate personnel) conduct an investigation into the alleged misconduct.
- Don't just copy counsel on everything - that won't create the privilege.
- Do not assume that the investigation is privileged – take notes and draft the report as if they will be seen in court.
 - Underlying facts are not protected.
 - Don't memorialize conversations with legal in your notes.



Note on Privilege

“The Legal Department is directing your team to investigate recent allegations of XXX made by Y, to determine whether those allegations have any merit. The investigation is being requested by the Legal Department in anticipation of litigation, and the Legal Department will provide direction and guidance as to the appropriate steps in the investigation. Because the investigation is being conducted at the direction of the Legal Department, your investigation and communications with the Legal Department are privileged and confidential. To ensure this privilege is maintained, you and you team should not discuss the investigation or legal advice with anyone other than the Legal Department or counsel that the Legal Department may later retain. Further, all documents you create as part of the investigation (including interview notes), should be marked on each page “Privileged and Confidential: Prepared at the Direction of Counsel.” The Legal Department is available anytime to answer your questions and provide further guidance during the investigation. Please contact me with questions or if you need assistance.”

Note on Privilege for In-House Counsel

- Investigation notes are not privileged.
- Do not put legal recommendations in the same document as your factual summary of the investigation.
- Mental impressions of counsel are likely privileged.
- Document that you gave privilege warning to witnesses at the outset of interviews.



Confidentiality of Investigation – NLRB Considerations

- ***Banner Estrella Medical Center*** (2015): Required employers to determine, on a case-by-case basis, whether imposing confidentiality during any particular workplace investigation improperly infringed on employee rights under the NLRA to discuss terms and conditions of employment.
- ***Apogee Retail LLC*** (2019): NLRB switches course, and says so long as employer confidentiality rules apply only during the course of the investigation, the employer need not engage in the particularized balancing of interests and confidentiality policies are permissible.
- Current NLRB General Counsel has encouraged the Board to abandon the ***Apogee Retail*** framework and return to the ***Banner Estrella*** framework.
- Stay tuned!

Documenting an Interview – Best Practices

- Take detailed and accurate notes
- Include date, time, place, and attendees of interview
- Include all names and titles that come up
- Include warnings given to witness
- Accurate record of what witness said
- Preferably typed – if in handwriting, type up notes after (with date of memorandum in addition to date of interview)
- Only include facts, no legal conclusions





Creating A Written Report

- Who is your audience?
- What Makes a Good Report? “The 3 C’s”
 - **Clear**
 - Language
 - Logic
 - **Complete**
 - Documents all aspects of investigation
 - Addresses/resolves all issues
 - **Concise**
 - Direct, succinct
 - In “plain English” and easy to read



Report – Best Practices

- **What to include in your report?**
 - Investigators
 - Start/end date of investigation
 - Summary of allegations
 - Summary of scope of investigation
 - List of witnesses interviewed
 - List of documents reviewed
 - Findings of fact – no legal conclusions, unless the document is privileged
 - Recommendations



Thank You



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