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Interviewing Witnesses Early In Discovery Process

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Witness interviewing is playing an increasing role in well-planned litigation. Informal interviews confer several advantages. In-

Litigation

terviews can be undertaken early in discovery in order to narrow a pool of potential witnesses to a few critical deponents.

Interviewing a witness before a deposition can be useful in locking that witness into a story, and more importantly, avoids the problem of witnesses collaborating to recite a sanitized version of events.

As you prepare for such interviews, consider the following issues.

Applicable Privileges

Early on in the investigation, determine who will conduct the interviews and what privileges apply. Investigative reports prepared in anticipation of litigation, including those compiled by agents of the attorney, should have work product protection. However, factual re-

ports may be discoverable by the other side upon a showing of substantial need, or other factors. This is especially true when the interviewer is acting as a neutral third party in the employment arena (a full discussion of which is beyond the scope of this article).

Background Research

When feasible, review relevant news articles or court files before speaking with a critical witness. A prepared interviewer will elicit more information. Even information about topics not essential to the case can open up a conversation. Is the witness the author of a book on Don Delillo's novels? A former pro football referee? Use a person's interests to ease the conversation into an in-depth interview.

Location Of Interview

Most witnesses are best contacted at a place where they feel comfortable and are willing to spend time. Usually, this means conducting the interview at the witness' home or another place of the witness' choosing. If the matter involves an employment issue, and management is cooperating, you may interview the witness at the workplace.

Telephone interviews should be avoided as it is easier for a witness to avoid an interview over the telephone. Moreover, a large portion of communication takes place via non-verbal cues and gestures – you have no way

of evaluating fully a witness you speak with by telephone.

Recording Information

Note-taking is the simplest and least threatening way to record the interview. Take detailed notes. When possible, quote the witness verbatim. Place a check mark in the margin to indicate areas that require further inquiry. At the conclusion of the interview, review your notes and follow-up on the checked areas.

Recording interviews is usually not advisable. Witnesses often become reticent when faced with the prospect of recorded statements, although this may be less true with younger witnesses, who are more comfortable with electronic recording gadgetry.

Of course, always obtain the witness's consent when recording an interview, and have the witness affirm consent as part of the interview. Do not secretly tape record interviews, which may be a violation of wiretapping laws.

Your Demeanor

Before meeting the witness, picture the interview unfolding like a well-directed movie. Approach the witness in a friendly, informed, and sincere manner. Be confident – but not cocky or arrogant – that the person will talk to you. Maintain patience and objectivity throughout, even if the witness becomes verbally abusive.

Although difficult for some

people, allow the witness to talk more than you do. Consider the witness as an expert on the particular matter; let them fill you with their knowledge.

Preparing The Witness

Explain to the witness that you are investigating the facts surrounding a particular matter, and that the interview is a forum to present the interviewee's version of an event. Stress the need for complete and accurate responses.

Make no promises of absolute confidentiality to the witness. Candidly explain the process and purpose of the investigation.

Avoid situating people such that the physical dynamics of the room might give rise to false imprisonment or emotional distress claims.

The Art Of Interviewing

Write a few brief notes in your notebook to remind you of two or three questions you absolutely must ask. Always be prepared to ask the critical questions in case the person declines to be interviewed. Even witnesses who decline will often answer your most critical questions.

You command the interview; therefore, conduct the interview with a firm but respectful touch. Begin with simple, non-threatening, open-ended questions (perhaps based on the background research you completed). Let the person finish before

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you get down to details. Have the witness recite the story chronologically, which is the easiest way for people to process information. You will understand the story better, and be able to spot gaps in the timetable and logic.

Ask how a person has come to learn the information. You need to constantly test credibility, and seek other corroborating sources. Separate personal and hearsay knowledge, and explore the line of hearsay comments until you identify someone with personal knowledge.

When discussing critical information, draw the person through the event slowly. Ask about the sights seen, sounds heard, scents smelled. Who else was present? What was the weather like? What season did the event occur? Review the scene over and over until the witness can see the event occurring.

Think carefully about what you can say to a witness. To get information, you may have to give some information. Do not be needlessly coy about providing background that explains why you are seeking information, especially if the matter is already part of the public record (a court complaint or some other document).

At times, it may be useful to use words that suggest you already know a good part of the information; witnesses may feel more comfortable knowing that they are not the sole source of information.

Asking “why” often opens up witnesses to explain illuminating background that would not have otherwise come out in the interview.

In some cases, simply asking for help has a unique appeal for certain personality types – some people cannot resist the urge to appear expert on a subject.

Sometimes a witness wants to ramble before moving to the critical area of conversation. Let them ramble. As they get comfortable, steer the conversation back to your area of interest.

Do not cross-examine the witness during the initial phase of the interview. While it may be the “the greatest engine of truth ever devised” this engine may propel the interview into a brick wall. Use it sparingly, and at the end of the conversation. Many attorneys are not adept at listening and too often rely on heavy artillery instead of the precise interviewing skills required. Be honest in assessing yourself.

Always inquire about related tangible evidence: documents, videos, tapes, e-mails, computer files, photographs, etc. If you obtained such evidence before the interview, have the witness expand upon the evidence.

Always conclude questioning by asking the witness for names of other sources. Remind the witness that you may follow-up later to clarify any remaining issues.

Observations

Examine the demeanor of the

witness. Although it is useful to note particular behavior such as impatience, lack of eye contact, excessive scratching or perspiration, both truthful and non-truthful witnesses may exhibit certain levels of anger or nervousness. Therefore, examine the broad picture, spotting contradictions in a witness’ verbal and non-verbal postures – evidence of such contradictions should be your cue to test internal contradictions in the story.

In other words, let the witness’ credibility swing on the thread of the witness’ own words. For example, does the witness tell a story that dovetails with that told by other witnesses? Has the witness made prior inconsistent statements? Did the witness change his story when questioned closely? Does the witness offer justifications of behavior or attack other witnesses as unreliable? Constantly test the witness, not just on major issues, but on side issues that the witness does not expect to be examined about.

Thoroughly examine the room where the interview takes place – artwork, décor, furniture, the television channel being watched. All provide potential topics, and also clues about the witness’ background and interests. Look at the magazines on the table; the books in the bookcase. If a witness to a patent dispute over mountain bike design claims to have no such background or interests, why is Mountain Biking magazine on the coffee table?

Untruthful Witnesses

If you strongly suspect a witness is lying – and some will – allow the witness to talk without interruption. Either the person will fail to provide meaningful details or the witness will overcompensate by spitting out excessive verbiage. Note carefully the details and then chip away at the story.

Cross-examining the prevaricating witness is a tactic to be used in small doses, and at the end the interview.

Declarations

If the witness imparts critical information, you may want to memorialize the interview by drafting a declaration. If you fear the witness is particularly skittish, consider drafting a handwritten declaration, and have the witness sign the statement before you depart.

The declaration need not contain all information you have learned, but rather only three to four of the most vital issues.

Have the witness review the declaration, make any necessary changes, and then initial the changes. The declaration should contain wording whereby the declarant swears that the statement has been given with free will and without promise of reward or threat of coercion, that the person has had a chance to read and revise the declaration; and that the declaration is true and accurate statement. **LWUSA**

Questions or comments can be directed to the publisher at: pmartinek@lawyersweekly.com