

Just the Facts: Perfecting the Investigation Interview

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BEFORE, DURING AND AFTER THE INTERVIEW

Who are the appropriate witnesses?

- Identify all relevant witnesses
 - First-hand information
 - Observed conduct in question
 - Someone the complaining person spoke to after the alleged incident
 - Someone the subject spoke to about the incident or facts
 - Consider former employees
 - Vendors, faculty, staff, students, others outside of the organization
- Ask the complaining person and subject for suggestions
- Witnesses who can provide relevant information/evidence that will assist the investigator in making their findings

Third Parties

- What do you do if a vendor or CSU business partner is the subject of the investigation?
 - Do you proceed with the investigation?
 - Are you permitted to interview the vendor and other third-party witnesses?
- What if you are precluded from interviewing third-parties, does the investigation still go on?

It's All in the Name

Please do not use:

- Victim
- Accuser
- Accused
- Harasser
- Liar
- Thief
- Pain in the neck
- Please consider using:
 - Complainant, reporting party, complaining party
 - Subject, respondent

Be Prepared!

- Gather documentary and other evidence – remember relevance!
 - Written statements
 - Employee handbooks
 - Written rules, policies that apply to CSU
 - Personnel files
 - Notes
 - Email
 - Diaries
 - Calendars
 - Journals
 - Letters
 - Timesheets
 - Attendance records
 - Videos
 - Photographs
 - Electronic tracking
 - Apps
 - Social media – many caveats! Talk with counsel before proceeding

Create An Interview Outline For Each Witness

- Outline ensures a thorough and consistent line of questioning
- Do not be wedded to your outline – **remember to LISTEN**
- Key words, or brief sentences to keep you focused
- Living documents
 - add to the outline,
 - take questions out of order

Host/Hostess with the Mostess ⇨ Make The Witness Feel Comfortable

- Select a private, non-threatening location
- If appropriate, ask the witness where they would like to meet
- Begin all interviews with appropriate disclosures and admonitions
- Tissues and water are must haves!
- Limit the amount and detail of the information disclosed
- Seating parity
- When conducting virtual interviews:
 - Pay attention to your lighting and make sure your face is well lit, remove glare
 - Proper audio – make sure witnesses can hear you clearly

Opening Act ⇨ Introduction and Standard Admonitions

- Identify yourself and role in company
- General purpose of the interview
- Employer expects cooperation (this is not mandatory and only if appropriate)
- Confidentiality
 - You must get direction from leaders in the DHR/Whistleblower/Equal Opportunity Compliance Services or legal counsel on how to handle confidentiality requests and admonitions
 - State you cannot promise confidentiality but that you expect the witness to do so as it helps maintain the integrity of the investigation
 - Information given on a need-to-know basis only

- Retaliation
 - Protections under the policy
 - Protection under the law for
 - participating in a proceeding outside the workplace, or
 - engaging in protected activity – making a complaint on behalf of oneself or someone else
- Notes
 - Inform witnesses you will be taking notes and that you attempt to be as accurate as possible. You might ask the witness to slow down or ask them to repeat his/her response so you can make sure you get down the substance of the answer.
- Refreshing the witness's memory:
 - They may not remember the answer to a question you ask early on, but as time goes on your questions might refresh their memory. This is common.
 - Ask the witness to let you know at any time during the interview and a reasonable period afterwards if they remember information from an earlier question so you can have accurate notes.

Be an Open Book

- Remember an important part of your role is to listen – have you learned something beyond the initial scope of the investigation?
 - *Example:* You are investigating health and safety violations and a witness casually mentions that someone in the procurement department is bragging about “over ordering supplies and selling them on the side.”
- Remember being efficient is important and some investigations may include the same witnesses

Sneak Preview

- ⇒ How much do you tell the subject?
- ⇒ How much do you tell the witnesses?
- ⇒ Be honest and straightforward
- ⇒ Cautiously provide witness names

CAVEAT: BE AWARE OF SAFETY ISSUES

- ▽ Funnel approach – start broad then narrow down

Be a Reporter ⇒ Listen - Don't Be Wedded to Your Outline

For each allegation, incident, violation, etc. – ask the following:

- Who, what, when, where, how
- Who else was present?
- Who has information about this incident?
- Are there any documents?
- Be cautious about asking “why” – can sound accusatory
- Ask
 - open-ended question to elicit information
- Ask
 - closed-ended questions to confirm

Notetaking Challenges

- Try and be as accurate as you can – it's rare that an investigator can take down every word
 - Ask the witness to slow down
 - Ask the witness to back-up and provide more details
 - Repeat back what the witness said to make sure you have everything
- Quote often
- Abbreviate when it makes sense and you have noted what your abbreviations stand for
- Include your admonitions in your notes
- Be careful about documenting your observations
 - Avoid
 - making legal conclusions unless required to do so
 - making credibility determinations based on demeanor
 - Examples:
 - Ramon kept crossing and uncrossing his legs when asked about the missing supplies which means he was involved in the wrongdoing.
 - Ava began tapping her pen when asked about the money that was missing from the campus cafeteria safe which implied a guilty conscience.
 - Graham's eyes were blood shot and he smelled of alcohol and was considered drunk.

Tips for Written Statements

Three options

1. The witness reads, dates and signs your notes
2. The employee prepares their own written statement
3. The investigator prepares the written statement using the witness's own words and the witness then reviews, dates and signs
 - Investigator should decide which option works best - be consistent
 - Review the witness's statement for any inconsistencies from what they told you
 - Remember to take into account language and reading proficiency

Be a Director ⇨ Have a Script and be Prepared

- “Why me?”
- “Will I be terminated?”
- “What will happen to [the subject], will they be fired?”
- “I don’t want you to investigate!”
- “I don’t want to talk to you!”
- “I’m not going to participate.”
- “What if everyone gets mad at me for participating?”
- “What happens if I don’t talk to you?”
- “I’m afraid of retaliation.”
- “Everyone will know I made the complaint...I’m not going to talk to you.”
- “Should I get a lawyer?”

Be a Judge ⇨ Remember Your Role and Your Credibility

- Fact finder
- Neutral
- Assess credibility throughout interview
- Pay attention to non-verbal cues
- Do not seek a confession!

Be Aware of Unconscious and Confirmation Bias

Unconscious, nonverbal expressions of implicit bias may favor (or disfavor) certain witnesses during investigations by:

- affecting rapport and information-gathering in cross-cultural/cross-racial interviews if the investigator is unaware of his/her nonverbal cues
- impacting investigator determinations of credibility, once other factors are considered

Investigators should reflect upon their conduct during interviews to ensure they are treating all witnesses alike in terms of sitting distance, eye contact, forward lean and general signs of friendliness. Conscious awareness may increase reliability of credibility determinations. Do not make assumptions – ensure complete understanding of interviewee perspective and gather/review evidence which would support alternative theories. Take time to deliberate and seriously contemplate alternate theories to your own.

Confirmation bias refers to an individual's natural tendency to give more weight to information that tends to confirm his or her preconceived notion (or, conversely, to give less value to information or evidence that contradicts an existing belief).

- For example, a manager who tends to disbelieve employee complaints may tend to collect and analyze evidence supporting that belief.
- Another example of confirmation bias might involve a manager who has been accused of not addressing favoritism complaints in the department. The manager denies the allegations and states the complainant has performance issues. Confirmation bias might come into play if the investigator goes over the complainant's performance evaluations with a fine-tooth comb seeking to find that he or she had performance issues, without looking more deeply into the allegations.
- An investigator may opt not to interview certain individuals identified by the complainant, dismissing these additional witnesses as also having an agenda against the subject of the investigation. Or, the investigation interviews the witnesses and does not find them credible because they support the complainant's version of the facts.

HEARSAY!

Hearsay (please see article provided on this topic)

- Do not ignore hearsay!
- Not always unreliable
- Can lead to relevant evidence
- Ignoring hearsay can put investigator's credibility at risk
- Do not reach a conclusion until the investigation is over

Remember

- Be Patient
- Give witness time to respond
- Don't rush – allow time to think and form answers
- Be respectful of individual styles
- Be aware of diversity issues/cultural differences

Act like Webster ⇨ Get Definitions

Words have different meanings to different people

Examples:

Uncomfortable
Stressed

Drilling Down Techniques

- These tools are particularly helpful when the witness speaks in generalities and lacks specificity with their testimony.

Example: Witness states that her co-worker Howie and his friends have made and submitted fraudulent expense reports by manipulating certain CSU online forms.

- Measurements
- Drawings
- Amounts
- Location
- Distance
- Demonstrating conduct

Focus Your Questions

- Simple – don't overload the questions with facts
- Slow down
- Short
- Ask questions geared to develop relevant facts
- Seek to understand motivations, agenda, viewpoints
- Remember your goals: gather information to make a finding, not to say "gotcha!"

Be a Magician ⇨ Use a Variety of Questioning Techniques

- Summarize
- Ask questions out of order
- Repeat a question later in the interview
- Ask a question you already know the answer to
- I'm struggling
- Summarize and ask, "Did I get that right?"

Questions to Avoid

- **Accusatory**
 - Isn't it true that...
- **Loaded**
 - When was the last time you improperly filled out your expense reports?
- **Leading**
 - Did you see Bob change Form 453A four times?
- **Compound**
 - Q: So, on Monday you saw Bob and Sue together and then you saw them on Thursday laughing together, right?
 - A: Yes.
- **Long and winding**
 - Avoid sounding like an interrogator

Land the Plane ⇒ Ultimately Ask a Direct or Leading Question

- Use this technique when you are struggling to get an answer from the witness
- Pay attention to non-verbal cues
- Handling conflicting information

The Sybil Effect ⇒ Dealing with Different Personality Types

- **Reluctant**
 - Gently find out why
 - Make certain they understand “no retaliation”
 - Don’t make promises just to get the witness to talk
 - *Example:* “We really need your help. Nothing will happen to you as a result of this investigation.”
- **Overly Helpful / Overly Talkative / Overly Inquisitive**
 - Always maintain control of the investigation
 - Keep focused on the questions you need to ask; don’t be afraid to steer the interview the way you need it to go
 - Discourage other witnesses from conducting their own investigation
 - It’s ok to interrupt the witness to ask clarifying questions to make sure you understand the point they are trying to make
- **Very Nervous**
 - Ask their reasons and to explain their feelings
 - Don’t make promises just to get the witness to talk or to make them feel less nervous
 - Make sure the witness is comfortable with the location

- **Hostile**

- Respond quietly and calmly
- Don't
 - argue; allow person to vent
 - threaten, coerce, or intimidate
 - make promises of benefits based on cooperation
 - mirror the witness
- Document the situation
- Consider telling the witness s/he can leave at any time, but remind them you will reach a conclusion with or without their testimony

Differing Heights

- Dealing with witnesses at different levels of hierarchy
- The goal remains the same
- Don't be intimidated
- Don't just take what management says at face value – respectfully question and focus on your goal – has a policy been violated
- Push management the same way you would push a lower-level employee

Close the Fact Circles

- Remember to do a follow-up interview when necessary
- Are there any responses that are unclear?
- Are there issues in conflict that require further fact-finding?
- Do you need clarification?
- Do you need to confirm or figure out credibility?
- Was witness given every opportunity to answer all questions?
- Are you making assumptions about facts without getting confirmation, corroboration or clarification?
- Did you learn new facts after the witness's interview that might change some responses?
- Have you been fair and unbiased?
- Have you been put on notice about other potential wrongdoing?

- Conflicting information
 - Critical to procedural fairness is the need to give the parties an opportunity to respond to conflicting information

Before You End the Interview

- Did you get what you wanted or anticipated? (One interview may not be enough)
- Did you gather enough information to effectively assess credibility?
- Ask the key last question:
 - _____

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Allison West has a straightforward approach to employment practices: *be proactive*. In 2000, after practicing law at a San Francisco labor and employment boutique, she started Employment Practices Specialists where she uses her employment law background, coupled with her sound knowledge of human resource practices, to help employers with educating their workforce, minimizing legal risk and creating a culture of respect and productivity.

Known for her dynamic presentation style, Allison is a frequent top rated-speaker on employment law and human resources topics at national and local human resources, diversity and industry conferences. Regarded as a national expert in her field, she has appeared on NPR and CBS This Morning discussing workplace harassment issues.

Allison specializes in delivering and customizing interactive management training on topics such as harassment, discrimination and retaliation prevention, performance management and other HR related topics. Also, she conducts workplace investigations and delivers training to HR and other professionals on how to effectively conduct investigations. Allison also concentrates her practice on coaching executives and managers who have engaged in misconduct, human resources consulting and serving as an expert witness.

Allison is a member of the State Bar of California, holds a SHRM-SCP certification, and the AWI-CH certificate, and is a member and former board member of the Association of Workplace Investigators.

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