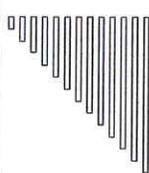


Interviewing Witnesses



Preparing for the Interview



Preparing for the Interview: Read the Discovery

- Police reports usually
 - Incomplete
 - Lack the total perspective
 - Goal is to build a case
 - Read with an eye toward what is not present



Preparing for Witness Interviews

- Know the elements of the offenses charged (get jury instructions?)
- Know the facts of the case cold
 - Outline the case
 - Do a timeline
 - Create a players list
 - Know the scene and surroundings



Preparing for Witness Interviews

- Run backgrounds on witnesses. Who is this person? The more important the witness, the more thorough the background should be.
 - Relationship to defendant/ victim/prosecution
 - Prior statements
 - Family relationships
 - Internet searches
 - Litigation history (defendant/plaintiff, divorce, bankruptcy, criminal)



Preparing for the Interviews

- Establish a goal for the interview
- What do you need from this witness?
 - Lock them into their story?
 - Get more information?
 - Create inconsistencies?
 - Just the facts?
 - Establish an alibi?
 - Attack credibility of another witness?



Using Witnesses for Impeachment

- Bias
- Motive
- Character and reputation
- Prior dishonesty



Preparing for the Interview

- Know the one question you need answered. It might not always be "Did he do it?" It might be clarification or elaboration on some point. Attorney and investigator should agree on this before the investigator ever hits the front porch.



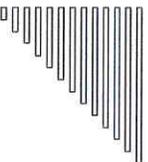
Preparing for the Interview

- Who would this witness be most likely to talk to? Become that person. Dress up or down? Social worker or law enforcement? What tone of language?
- What to bring? Large briefcase or notebook in back pocket?
- When and how is this person most likely to talk to you? Witness's schedule? Call first or just show up? Can you get an introduction? Would it help? Interpreter needed?



Preparing for the Interview

- Decide on statement strategies
 - Drafted on the spot?
 - Drafted after review by counsel?
 - Handwritten
 - Tape recorded
 - Laptop with portable printer?



The First Approach



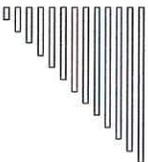
The First Approach

- The art of the interview is developing, in sometimes an amazingly short time, a relationship with a witness in order to achieve the goals of the defense team.
- You have to establish humanity and street credibility quickly
- You have to sell yourself, you have no power to make people talk to you like the police



The First Approach

- Find some commonality with the witness
- Remember all information is good information
- If possible, show sympathy for the victim or for the difficult situation the witness is in
- This may be the only contact the witness has with the defense



Conducting the Interview



The Interview

- Stay relaxed and adaptable because the critical goal is to establish trust
- While the witness is on the fence about talking to you, troll for information without really asking for it
- "Has anyone from the government been in touch with you to update you on the case?"
- "Have you seen your statement in the police report?"



The Interview

- If necessary, let the witness know you are not there to talk them out of their position or to explain away your client's behavior.
- You are simply there to find out what the witness knows, whether it is good or bad for the client.
- Let them know it is just as important to get bad news about the client so you can advise the attorney in the case.



The Interview

- Let them know that our clients can't tell us everything about their own case.
- Don't be in a hurry to start. Take time to try to engage the person.
- Hard questions can wait until the groundwork is laid.
- We rarely cross-examine during an interview



The Interview

- Wait till the witness is comfortable before yanking out the notepad
- Once you've established some trust, ask questions then get out of the way and let the witness talk.
- Ask the witness their concerns and be ready to address them



The Interview

- Never suggest what the witness should say. Do not let anything you do be construed as contaminating the witness.

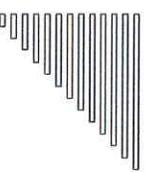
- Take hostility quietly. Never let anything you do be construed as intimidating the witness.



The Interview

- Give the witness the opportunity to have the last word. "Is there anything you would like to add or change?"

- Sometimes the best result of a difficult interview is to establish a positive relationship that will allow you to talk to them again in the future



Types of Witnesses and the Interview Techniques to Use with Them

 **Characteristics of Friendly Witness**

- Willing to meet with you
- Willing to give time necessary to conduct a thorough interview
- Willing to tell us everything they know

 **Friendly Witness Tips**

Two dangers:

1. Let your guard down and fail to prepare adequately
2. You have misread the witness and, for whatever reason, he/she is not actually friendly

Prepare every interview on the assumption that the witness is potentially hostile or at least neutral

 **Friendly Witness Tips**

- Technique: funnel approach
- After general introductions, elicit a narrative which allows the witness to say in her own words what she knows.
- Rarely interrupt
- Ask open-ended questions which give direction. "Tell me more about..."
"Describe how..."

 **Friendly Witness Tips**

- Only after the witness has completed her story do you follow up with questions to elucidate unclear material or seek additional detail
- Repeat back to the witness what the witness has told you to make sure you understand correctly

 **Friendly Witness Tips**

- They are excellent sources of leads to additional evidence and witnesses so make sure to ask about them

 **Characteristics of Neutral Witnesses**

- Not favorably disposed to either side
- Often reluctant to be involved but not emotionally predisposed to feel threatened or be hostile

 **Neutral Witness Tips**

- Initial goal is to establish rapport and “win them over” so they are at least willing to talk with us
- Need to understand what would motivate this witness to get involved
- This is where neutral witnesses can be more difficult than hostile witnesses. They lack emotional attachment to the case and will perceive involvement as a burden.

 **Neutral Witness Tips**

- Willingness to become involved depends a great deal on what happens between them and the investigator.
- They need us to help them understand how important their information is. They have a small but powerful role to play.

 **Neutral Witness Tips**

- Assure neutral witness that a minimal involvement now will reduce the likelihood of more intrusive involvement later.
- The message should be, “We want to resolve this without people testifying in court if possible, but to do that we have to first know what you have to say about this event.”

 **Neutral Witness Tips**

- They can sometimes be persuaded by an appeal to their sense of justice, but more often they're persuaded by knowing they have a small but important role to play.
- If they say, "I really didn't see much," you respond with, "But what you did see may be crucial to resolving the case."

 **Neutral Witness Tips**

- Technique will depend on whether you can get the witness to move to a friendlier position.
- If they become friendlier, use the funnel technique and ask open-ended questions
- If not, ask close-ended questions
- Try to keep the witness talking as long as possible

 **Characteristics of a Hostile Witness**

- Not as hard to interview as we sometimes anticipate
- People who feel emotionally about an event or person usually need or want to talk deep down
- It's getting through the front door that is difficult
- So expect a great deal of initial resistance
- Once they start talking, the battle is won



Possible goals

- Reduce the emotions involved
- Learn all about the bad facts
- Develop impeachment material
- Soliciting views on potential outcomes such as pleas or sentences



Technique

- Interview technique is the opposite of that for friendly witnesses
- Begin with close-ended questions to get the person used to responding
- Slowly work on opening up the witness by expressing empathy, affirming what she has told us, providing information she wants to know (when possible).



Technique

- If we are successful, we can move from close-ended questions to open-ended questions



Technique

- You must have your most important questions on the tip of your tongue
- Do not get bogged down in *whether* the interview will happen. Go to *what* the interview is about
- In response to "Why should I talk to you?" say "I just want to know about..."
- Make it something the witness is interested in



Technique

- A primary goal is reducing hostility so that by the time the witness testifies the anger or rage is muted.
- This may mean letting the witness rage at us and affirming their anger
- Allowing the witness to share bad facts helps the witness believe we truly want to hear everything and will make the witness more forthcoming



Technique

- If you can get them to answer open-ended questions, go for the details
- Asking for details is the best way to impeach the witness when the details do not match previous testimony, the testimony of others, or the physical evidence

 **Technique**

- If the witness gives you a conflicting detail, confirm it by repeating it to the witness.

- Your main responsibility with a hostile witness is to "first do no harm." DO NOT leave a hostile witness EVEN MORE HOSTILE to your client

 **Technique**

- Remember that extreme hostility and other adverse responses can be used in court to establish bias or an agenda on the part of the witness, so make a careful note of it.

 **Technique**

- Be mindful of how your own response to witness hostility may be used later if the witness calls the government or takes the stand for the government. Take abuse gracefully. Do not let your behavior become the subject of misconduct or intimidation claims.



Technique

- Burn no bridges. If you are perceived as fair and understanding, the relationship with the witness may improve down the road



Technique

- If the door is being closed, ask your most critical question or consider what provocative statement might provoke some interest. Some questions might have the effect of starting the same interview which had already been refused.



Frequent Mistakes

- Talking too much
- Know what a pregnant pause is, and use it
- Wait before asking the next question. Let the person talk the answer out completely.
- Especially if it's a potential state's witness, do not begin the interview with "I'm here to talk about what you said to the police." Don't lock them into a bad statement and make them defensive. Start somewhere BEFORE that.



Overcoming Objections

- I'll call the prosecutor and get back with you.
- I don't have time, and I don't want to be involved.
- Why should I talk to the defense?
- I'm a prosecution witness.
- I was told not to talk to you.
- I already spoke to police.
- I don't want to have to repeat this in court.
- I don't want to be subpoenaed.



Overcoming Objections

- If the witness says they have been told not to talk with you, ask who told them. Ask if they will sign a statement to that effect. Offer to call that person.
- Explain you only want the same courtesy they gave the government by talking with them. It makes it easiest to resolve matters if everyone has the same access to information.



Overcoming Objections

- If the witness says I already gave a statements to the police, ask them if they have seen it? Show it to them. Ask the witness to clarify a point in the statement. Hold it out for them to see.

 **Overcoming Objections**

- Explain the government's agenda or theories. Do you agree with that?

- Explain defense theory (with permission from attorney first) if that will help.

 **Interviewing Pitfalls**

- Taking notes
- Being somewhere distracting
- Giving blank statement forms to pick up later
- Summarizing interviews in your own words, not those of the witness
- Interviewing witness in the presence of another witness
- Taping without a thorough pre-interview

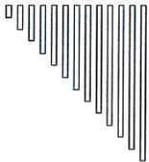
 **Investigator Challenges**

- Making promises
- Threatening a witness with a subpoena
- Unauthorized practice of law
- Letting the witness tell ONLY you
- Revealing confidential information
- Speaking for the client
- Witness want to change story or victim wants to drop charges after talking with you



After the Interview

- Document the contact in full detail
- Leave the door open for future contact
- "Here's my number. Call if you think of anything new or need to talk to me."
- "I want to be sure I'm accurate, so is it OK to call you if I need to clarify something in my notes when I type them up?"
- Follow up with a thank you later



Any Questions?



Interviewing Myths

1 Successful Interviewing Cannot Be Taught

- Reality: Shooting off round after round at a shooting range will not make you a marksman if you never learn the fundamentals of marksmanship.
- Interviewing does have some fundamentals which *CAN* be taught

 **Interviewing Myths**
1 Successful Interviewing Cannot Be Taught

- So the question becomes, is your experience helping to improve your grasp of the fundamentals?
- Some interviewers have 20 years of experience. Other interviewers have one year of experience they have repeated 20 times.

 **Interviewing Myths**
2 Interviews are lists of questions

- Reality: an interview is "a conversation with a purpose."
- You don't win confidence, establish rapport, or discover what makes somebody tick by asking a list of questions

 **Interviewing Myths**
3 Interviewers Stick to the Facts

- Reality: People have positive emotions like duty and honor and they have negative emotions like fear and embarrassment. Acknowledging these emotions is often the key to a successful interview. If the emotions are dealt with, the information will eventually come. If ignored, this will never happen.

 **Interviewing Myths**
4 Listening is natural, not a skill

Reality: Successful active listening is *NOT NATURAL* and actually requires considerable effort.

 **Interviewing Myths**
5 Note-Taking is Paramount

Reality: Note-taking stymies the flow of conversation, inhibits some witnesses, and limits the interviewer's ability to listen and observe. Interviewers can miss important nonverbal behavior and give up on keeping eye contact.

 **Interviewing Myths**
6 Interviewers Need to Dominate the Situation

Reality: True, but how? They dominate with serene confidence, and *SILENCE*. They pause before asking the next question to let the witness say more if she wants to. They remain silent after asking a question and wait for the witness to answer. Whoever speaks first, loses.



Interviewing Myths
6 Interviewers Need to Dominate the Situation

- Reality: These are not interrogations. Police train on interrogation but do not train on active listening.



Interviewing Myths
7 People usually “come clean” when faced with inconsistencies

- Reality: Even the best cross-examinations do not result in people confessing in open court. That’s Perry Mason, not real life. People don’t confess something as a result of questions which show that their position is obviously wrong. They confess because the interviewer has given them good reasons to do so.
