WORKPLACE INVESTIGATIONS FROM START TO FINISH

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A Roadmap for Challenging Workplace Investigations

Presenter: Sue Ellen Eisenberg

Sue Ellen Eisenberg & Associates, P.C.

33 Bloomfield Hills Parkway, Suite 145

Bloomfield Hills, MI 48304

248.258.5050 (phone)

248.258.5055 (fax)

Author: Sue Ellen Eisenberg

see@seelawpc.com

A legally compliant investigation must be three things: timely, comprehensive, and objective. An employer's failure to meet any one of these three criteria creates a reason to challenge the investigation. In order to wage a successful challenge, an employee's counsel must be mindful of the following ten guidelines:

1. Contest the Expertise and Neutrality of the Investigator

The first challenge should be against the credibility and/or appropriateness of the investigator selected by the employer. Factors to consider in this challenge include the following:

- *Is the investigator an internal staff member of the employer or an external third-party?* An employer may be compelled to retain an external third-party investigator if an employer's human resources staff is not qualified to conduct an investigation, human resources staff is implicated in the complaint, or the claimant or offender is high profile in the company. Alternatively, an employer may keep the investigation internal, which may pose conflicts if the human resources staff is alleged to have improperly handled previous complaints or failed to use reasonable care in responding to employee concerns. If the employee's complaint involves an owner or high-level executive of the company, counsel should evaluate whether an internal investigator was hesitant to critique and discipline his or her supervisory employees for fear of retaliation.

- *Is there a conflict of interest?* A conflict of interest arises when the employer hires an outside attorney to conduct an investigation and then retains the same attorney to represent the employer in subsequent litigation. In this instance, the attorney is unable to objectively evaluate the sufficiency of his or her own investigation because a critique could result in a malpractice allegation against the attorney. Insist that the employer retain counsel separate from the attorney investigator to defend against any related litigation.

- *Does the investigator understand the employer's industry?* It is critical that the investigator understand the essential functions of the employee's position, the norms in the industry, and any inherent biases that may support the employee's claim. Without this understanding, the investigator may make inaccurate assumptions about reporting structures, workplace relationships, and job responsibilities.

- *Does the investigator have any implicit or real bias?* Conduct reconnaissance to determine whether the investigator has any predispositions that would affect evaluations of liability. For example: obtain the investigator's CV; identify the investigator's primary clients; learn whether the employer has consistently used this investigator to evaluate employee concerns; determine the total number of investigations the investigator has conducted; ask how many of these investigations resulted in a finding of liability and recommendation of remediation; determine whether the investigator has ever provided employment, discrimination, or harassment training; determine whether the investigator has ever been charged with presenting a report that is not fulsome and accurate; search attorney discipline records to determine whether any complaints have been filed and/or validated against the investigator, if an attorney; determine whether the investigator has ever been rejected or accepted as an expert; discover whether the investigator has any licenses; discern whether the investigator has any personal vendettas, gender bias, or other personality preferences. Prepare employee clients for appropriate responses to any of these biases, should they arise during an interview by the investigator. In a deposition or interview of the investigator, exploit any of these biases in order to question the legitimacy and neutrality of the investigation.

2. Critique the Retention Agreement and Assertion of Work Product Privilege

It is imperative to consider *who hired* the investigator. This is of particular importance when evaluating the authenticity of any investigation report and whether the investigator's work product will be privileged.

- *Who retained the investigator?* Request a copy of the retention agreement, which will identify the entity that retained the investigator, the assignment given to the investigator, and the terms and conditions under which the investigator must

operate. For example, the retention agreement may describe whether the investigator will later be retained as counsel, whether the report and notes may be subject to discovery, whether the investigator may be called as a witness, and whether the investigator has discretion regarding which documents to review and witnesses to interview. Also notable is who defined the scope of the investigation. Was it a human resources representative or another employer representative or supervisor? Was management attempting to sway and/or limit the investigation?

- *How was the report finalized?* Determine whether the final report consisted of a verbal or written summary. Although external third-party investigators purport to be "independent" and "neutral," this façade is exposed when: the report is published only to the employer and/or its attorney; the report must be reviewed by the employer's counsel or other representative prior to finalization; or the employer's counsel or other representative has modified or revised the report.

- *Were there any other side-agreements into which the investigator entered?* If the investigator must review confidential or trade secret information during the investigation, has he or she signed a confidentiality agreement with the employer? Has the investigator entered into any agreement with the employer's counsel?

- *Is the investigation report privileged?* If the employer directly hired the investigator, absent any direction from counsel, the investigator's report is not privileged. However, the report will constitute privileged work product if, in anticipation of litigation: (a) the employer hired the investigator at the direction of counsel; (b) the employer's legal counsel retained the investigator; or (c) the investigator is the employer's legal counsel. It is critical that an employee's counsel not enter into side agreements, based on the employer's assertion of privilege, that operate to limit an employee's counsel from sharing documents with his or her client. This creates an inherent conflict of interest.

- *What are implications of an employer's releasing an otherwise privileged report?* If the employer produces a report that is otherwise privileged, then the employer has waived the work product privilege. Thus, the investigator may be deposed even if otherwise retained in a privileged relationship.

3. Identify Serial Offenders

Independent research may be conducted to determine whether the offender has repeatedly violated the law and/or company policy, whether the employer had notice of the continuing unlawful conduct, and whether the employer took appropriate remedial action to prevent the unlawful conduct from continuing.

- *Does the offending party have any past criminal history?* Online resources may reveal a past history of unlawful conduct.

- *Were there any prior charges or complaints filed against the employer?* A search of local state and federal court dockets will reveal whether the employer has defended against other employment complaints. Review the parties named and content of these pleadings to determine whether the same cast of characters are implicated. In addition, if an employee client has previously filed a charge against the employer through the EEOC or local state department of human/civil rights, then the employee may obtain a copy of the charge file the through a Freedom of Information Act Request to the applicable governmental reporting agency. In the request, ask for copies of any and all charges, employer's response to charges, any investigatory notes, appeals, and final reports/recommendations.

- *Do available statistics show a pattern or practice of discrimination?* Identify other employees in the same protected classification as the employee who were treated similarly. Evaluate whether employees outside of the employee's protected classification were consistently treated more favorably. Presenting this data in a visual format can be a powerful and compelling tool to demonstrate the employer's liability through a pattern or practice of discrimination.

4. Deny Multiple Bites of the Apple

According to company policies, and the general nature of investigations, employees have an obligation to cooperate with investigations so that the employer may fully understand the complaint and identify appropriate remedial action. This responsibility to cooperate, however, must be restricted when the employer attempts to conduct multiple investigations for unlawful purposes. When an employer requests that the employee participate in multiple interviews, with the same or different investigators, some key considerations include:

- *Is the employer conducting a fishing expedition?* During an investigation prior to litigation, employers are not entitled to documentation, testimony, recordings, or witness statements, especially privileged work product created in anticipation of litigation. This evidence in support of an employee's claim may be discovered, however, through litigation. Be wary of an employer attempt to use a subsequent investigation as a tool for evaluating its exposure to liability and assessing the employee's damages (*e.g.*, requesting medical documentation, records of the employee's attempts to mitigate damages, figures for the employee's new salary if alternate employment has been obtained). Any repeat investigation should be limited in scope to gathering the facts pertaining to an employee's claim of an unlawful employment action.

- *Was the employer's first investigation flawed? Or did the employer previously fail to take reasonable care to prevent and promptly remediate the unlawful behavior?* Determine and evaluate the methodology and results of any prior investigation. Did the employer discipline the offending party? Was a third-party vendor or company retained to conduct training for the employer? Did the employer delay in taking action, thereby tacitly endorsing the unlawful conduct?

- *Can this subsequent investigation remediate damages already incurred?* If the employer already conducted a flawed investigation and/or failed to take reasonable care to prevent and promptly correct unlawful behavior, identify the resulting damages incurred by the employee. Then ask the employer how this subsequent investigation will mitigate the damages already incurred or expected to incur in the future. If there is no opportunity for an investigation to remediate the employer's past unlawful acts or mitigate future damages, then request clarification regarding the purpose and goals of the subsequent investigation.

5. Argue that Failure to Follow Protocol Vitiates Neutrality

An investigator's failure to follow the hallmarks of a legally compliant investigation implies that the methodology used was not neutral or objective. If the investigator uses methods that favor the employer, such as delaying the investigation or not conducting a comprehensive review, then the investigation is flawed. Indicia of a biased investigation include:

- *How did the timing or duration of the investigation affect the investigation results and the employee's damages?* The following must be appropriately evaluated: whether the employer delayed the commencement of the investigation; whether the investigation took an excessively long or inadequately short time to complete; and whether the employer failed to conduct any investigation (even if based on the employee's initial representation that he or she didn't want anything done at that time). Determine the effect of this timing and duration on the investigation results. Was evidence lost? Were witnesses unavailable? Were the employee's damages exacerbated?

- *What methodology did the investigator use in his or her investigation?* The purpose defines methodology, so ensure that the two are cohesive. Determine the documents, data, and witnesses to which the investigator was given access. Did the investigator review personnel files, payroll history, prior investigation notes and reports, policies and handbooks, employment agreements, etc.? Was the investigator given full access to resources and witnesses necessary for a comprehensive evaluation? Whom did the investigator interview and how? If there were language barriers, was a skilled interpreter hired? Were interviews conducted by phone or in person? Confirm that the investigator admitted any limitations to his or her evaluation.

- *Assess whether the investigator's notes were properly preserved and/or shared?* Typically, an investigator will take notes summarizing witness interviews and documents reviewed. An investigator may also record interviews with witnesses. Did the investigator preserve these notes and recordings? If not, how did he or she select which ones to retain? Did the investigator share these notes and/or recordings with anyone? If so, for what purpose? Was that purpose proper, such that the integrity and objectiveness of the investigation was preserved?

- *Request a copy of the documentation provided to the investigator to confirm the accuracy of the investigation report.* In some states, employees may obtain a copy of their personnel file as a matter of law. Otherwise, documents may be requested by subpoena or a request for production during litigation. Pertinent documents that should be requested include: personnel files for the employee and offending party; prior complaints by the employee or others against the offending party; any and all agreements between the employee and the employer; invoices for the investigator's services; the investigators' time records, curriculum vitae, and list of prior investigations completed; any document identifying the purpose of the investigation; the investigator's notes and final report, including but not limited to the investigator's outline, methodology plan, chronology, and witness statements. With respect to the investigator's chronology, ask whether it was composed solely by the investigator or if it was derived from a chronology composed by someone else. Did the investigator confirm the accuracy of facts provided to him or her in the chronology written by someone else? How often did the investigator supplement the chronology? Request any supportive documentation supporting the facts contained within the investigator's chronology.

6. Evaluate Whether Witnesses' Comfort was Maintained During Interviews

Aside from documents, witnesses are a key resource for investigators to understand workplace relationships, including culture, personalities, conflicts, and leadership styles. It is essential for a fulsome investigation to include witness interviews that encourage candid, sincere responses. To evaluate whether this was accomplished, consider the following:

- *Were all relevant witnesses interviewed?* Did the investigator speak with all witnesses identified by the employee? If there were witnesses identified but not interviewed, the investigator should explain any inconsistencies. Were the witnesses who were interviewed limited to only current employees? Were former employees interviewed? Former employees should be asked to explain the real reason for the termination of their employment or decision to resign from employment. Often, the stated reason for an employee's departure only scratches the surface of a deeper problem in the workplace.

- *Did the investigator choose an appropriate location for the witness interview?* The location of the interview plays a critical role in establishing a comfort level that facilitates an open and honest discussion with the investigator. The location should be a safe and neutral ground. Examples of improper interview locations include: an employer's worksite, especially when it draws attention to the employee's absence and participation in the investigation; a closed room, when prohibited by applicable cultural norms and/or religious beliefs (*e.g.*, a married Muslim woman may not be alone in a room with a man other than her husband); and phone interview, when a medical condition may improperly influence the investigator's impression of responses (*e.g.*, pauses or stutters may be misinterpreted as based on nervousness or evasiveness instead of understood within the context of an underlying medical condition). If the location selected had a chilling effect on the witnesses interviewed, then the integrity of the investigation has been compromised.

- *Were witnesses provided assurances of protection from retaliation?* In an effort to enhance the witnesses' comfort during interviews, witnesses must be reassured that their participation in the investigation will not result in retaliatory acts by the employer. Additionally, witnesses' fears must be quelled by taking certain protective measures, such as not having an employer representative present during the interviews and being advised of the appropriate person to contact if the witnesses are retaliated against by the employer.

- *Was witness testimony influenced by any coaching in advance of the interview?* The investigator should determine whether the witnesses reviewed any documents or were coached in anticipation of the interview. If so, then were the documents or coaching intended to control the witnesses' testimony to favor one side, to conceal certain relevant information, or exaggerate pertinent facts?

7. Preserve the "Crime" Scene

While an investigation is pending, it is critical to maintain the status quo with respect to limiting the employee's damages and preserving evidence. If an employer is committed to obtaining an objective and effective investigation, it will take necessary measures to protect the Employee and preserve information relevant to the employee's complaint.

- *Has the Employer agreed to limit the employee's damages?* When at all possible, the employee should be given a leave of absence while the investigation is pending. This leave may be classified as a paid or administrative leave, short-term disability leave, an ADA accommodation of leave, or other leave pursuant to the employer's policies and procedures.

- *Has the employer and offending individual preserved evidence?* To protect the employee's interest in obtaining a copy of the information relevant to his or her claims, counsel should send a letter to the employer requesting the preservation of any and all information pertaining to the employee's allegation and the related investigation.

- *Were witnesses instructed not to discuss the investigation?* The employer should take measures to assure that witnesses will provide accurate testimony. This may be accomplished, at least in part, by the employer requesting that the witnesses not encourage other employees to provide exaggerated, inaccurate, or evasive testimony. An employer must not, however, forbid its employees from talking *at all* about the investigation, as such a directive impedes on the employees' rights to engage in protected concerted activity according to Section 7 of the NLRA.

8. Contest the Appropriateness of an Investigator's Assessment of Credibility or Application of the Law

An investigator's primary role is to gather facts from various sources to recreate a picture of the workplace relationships that prompted an employee's complaint. Unlike an attorney's role of evaluating potential liability, assessing witness credibility, and determining potential exposure, an investigator should be tasked with the mission of obtaining the facts from which a legal assessment may be made.

- *Does the report include unfounded assessments of credibility?* Investigators must walk the fine line between questioning the accuracy of information provided (especially when conflicting or contradictory statements have been made) and assessing witness credibility. When an attorney assesses a deponent's credibility, it is usually for the purpose of predicting the impression that the witness will make on a jury and how the presentation will affect potential liability. An investigator does not and should not be involved in gauging credibility. Rather, the focus should be on assessing the reliability of facts presented. If an investigation report includes assessments of credibility, determine whether there is any foundation for the opinion made. Inaccurate and subjective impressions from body language, speech cadence, and appearance should not be taken into consideration when establishing the factual chronology of events.

- *Has the investigator engaged in the unauthorized practice of law by providing legal analysis and recommendations?* If the investigator is not an attorney, a final investigation report should not include a legal analysis applying the law to the facts. Rather, the report should consist of a comprehensive and objective summary of the facts, from which legal counsel may conclude whether remedial action is necessary.

9. Protect the Employee from Retaliatory Adverse Action or Additional Damages Resulting from the Investigation

Despite counsel's best efforts, an investigation may result in the employee incurring additional damages or adverse action. For this reason, it is crucial that the investigation's scope not include inquiries beyond the articulated purpose.

- *Is the investigator asking about the employee's poor performance?* An employee's poor performance may constitute a legal basis for the employer's defense that there was a legitimate reason for the employee's termination or other adverse action. The employee's counsel should limit, however, any inquiries pertaining to the employee's performance when that is irrelevant to the investigation's purpose. In limiting such discovery, the investigator is forced to assess whether remedial action is necessary, rather than avoiding such efforts by articulating a legitimate reason for any adverse action. Even if there is a purported legitimate reason, the investigator has an obligation to uncover any facts that may show pretext.

- *Would the requested documents expose the employee to potential liability?* Depending on applicable state law, employees may have a right to record conversations in the workplace. Employee handbooks and policies, however, may prohibit recording conversations in the workplace and provide for termination upon a violation of this policy. In a March 18, 2015 report from the General Counsel for the NLRB,[1] Richard F. Griffin, Jr. stated that an employee's right to engage in protected concerted activity according to Section 7 of the NLRA means that employers' total bans on recordings "are unlawfully overbroad where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time." In addition, an employer's policy prohibiting use of a recording device for the purpose of recoding an employee or operation was found unlawful because "employees would reasonably construe it to preclude, among other things, documentation of unfair labor practices, which is an essential part of the recognized right under Section 7 to utilize the Board's process." The employee's counsel should evaluate applicable employer policies, within the context of federal and state laws, to determine whether recordings made by the employee in the workplace should be produced – or even referenced – during an investigation. If production of or reference to the recording would expose the employee to potential liability or termination, then consider the option of advising the employee to respectfully decline to answer questions about recordings during the investigator's interview. If requested to produce the employee's recordings in response to a subpoena or request to produce, consider whether these recordings constitute privileged work product under Fed. R. Civ. P. 26(b)(3)(A) as having been recorded in anticipation of litigation as opposed to recorded in the ordinary course of business.

[1] http://www.aaup.org/sites/default/files/NLRB%20Handbook%20Guidance.pdf

- *Has the employee incurred additional damages by an unjustified delay of the investigation and/or remedial action?* During an investigation, an employee may require a short-term disability leave or a leave granted in accordance with the Americans with Disabilities Act of 1990, as amended. If a physician has advised that the employee take a medical leave based on medical conditions resulting from workplace relationships, it is advisable that the employee obtain his or her physician's consent to participate in an interview. Participation in a subsequent or unnecessary interview should be avoided when it would cause a set-back or exacerbation of the employee's recovery.

10. Hire an Expert to Critique Inadequacies of Investigation

An expert may be necessary to assist the trier of fact in making a reliable and objective analysis of whether the employer's investigation and response was sufficient. Even before litigation, an expert's critique of an investigation may provide valuable leverage for negotiation.

- *Will the judge or jury need assistance from an expert to understand the inconsistencies and implications of an employer's failure to exercise reasonable care during the investigation?* If the investigation was flawed, based on being untimely, inadequately thorough, or biased, then an expert may be helpful in elucidating these legal insufficiencies.

- *Would an expert's opinion provide insight regarding the reasonableness of the employer's policies, remedial action, or lack thereof?* An expert my provide guidance regarding the sufficiency of the employer's policies and remedial action. Establishing the objective criteria required for legally compliant policies and the minimum standards for assuring a workplace free of discrimination, harassment, and other unlawful acts, will set the stage for an argument articulating the employer's unlawful acts.

[redacted]

ATTORNEY WORK PRODUCT
ATTORNEY-CLIENT PRIVILEGE

Sue Ellen Eisenberg, Esq.
Sue Ellen Eisenberg & Associates, P.C.
33 Bloomfield Hills Pkwy, Ste 145
Bloomfield Hills MI 48304-2645

Re: [redacted]

Dear Sue Ellen:

This is to confirm our agreement to retain you in order to assist us with our representation of [redacted]

As we have discussed, in the course of this investigation, it will be necessary for you to review certain documents which will be transmitted in confidence either by us or our clients including, if necessary, materials we have prepared in anticipation of litigation or in preparation for your impending investigation. [redacted] recognizes and agrees to fully cooperate with Sue Ellen Eisenberg's requests for documents, including potential evidentiary material contained in computer format, as well as production of witnesses, which may include former and current [redacted] employees.

It is understood that we are retaining you as a potential witness in this litigation. Working papers prepared by you relating to this matter belong to this law firm. While actively engaged to assist us with this litigation, you will not accept an engagement with another party if it would impede your ability to assist us under this agreement. Similarly, [redacted] understands its obligation to provide timely access to all witnesses.

We have agreed that your fees will be computed on an hourly basis at the rate of [redacted] per hour with out-of-pocket expenses billed at cost. Invoices will be sent monthly and will be paid within 30 days of receipt. [redacted] agrees that Sue Ellen Eisenberg will bring another attorney with her who will act as a scribe. There will be no costs for this. However, [redacted] understands and agrees that any preparation of notes will be billed at [redacted]

[redacted]

per hour. [redacted] further understands that Sue Ellen Eisenberg may use these notes to prepare a final report which will include witness statements.

[redacted] may terminate the assignment at any time, but agrees to pay for work performed through the date of termination.

Please confirm your acceptance of this agreement by executing a copy of this letter and returning it to me.

[redacted]

[redacted]

Accepted:

Sue Ellen Eisenberg

[redacted]

Matheson & Matheson, P.L.C.
ATTORNEYS AT LAW
15300 North 90th Street
Ste 550
Scottsdale, AZ 85260
(480) 889-8951 (main)
(480) 339-4538 (fax)

Michelle R. Matheson

[Date]

PERSONAL AND CONFIDENTIAL
VIA ELECTRONIC MAIL ONLY

[CLIENT]

Re: ***Retention for Investigative Services***

Dear :

This letter will confirm the terms of my retention to conduct a personnel investigation concerning a sexual harassment and retaliation complaint filed by [Client name] employee [Name of employee] against her supervisor, [Name of Supervisor]. My investigation will consist of reviewing any background documentation relating to the matter, interviewing Ms. X, Mr. Y and any other pertinent witnesses. At the conclusion of the investigation, I will prepare an investigation report summarizing my findings and conclusions. You will be my primary point of contact on this matter.

My hourly rate for investigative services is $250.00. I will send my invoice(s) for services and any out of pocket costs to [Client] upon completion of my investigation. As I have explained, the scope of my retention is limited to conducting an independent internal investigation and preparing a summary of my findings. Although I am an attorney, I am not representing any party associated with this matter, and will not be dispensing legal advice or opinions. As a neutral investigator, you should assume that our communications are not protected by the attorney-client privilege. In addition, the information and documents I obtain or generate as part of my investigation are not privileged.

Please let me know if you have any questions or concerns with the terms of my retention or the services that are provided.

If you are comfortable with the terms of this retention, please sign below and return an executed copy of this letter to me.

Sincerely,

Michelle R. Matheson

MRM:daw

Acknowledgment

I have reviewed this letter and agree, on behalf of XYZ, Inc., to the terms of representation it describes.

XYZ, INC.

BY:_____

Its: Associate General Counsel

Date:_____

CONFIDENTIAL MEMORANDUM

TO: , Director Human Resources

FROM: Michelle Matheson, Matheson & Matheson P.L.C.

SUBJECT: Summary of ABC, Corp. Internal Investigation

DATED: [Date]

OBJECTIVE: Independently investigate the concerns raised by Voice Support Specialist CC about her manager TG in her xxxxxx x, 20xx email to you. Determine whether any violation of applicable law or the Company's Employee Policies and Procedures has occurred.

SCOPE OF INVESTIGATION: Prior to meeting with Ms. C, I reviewed a copy of her personnel file as well as Ms. G's personnel file to determine whether either had received prior discipline during their respective employment with ABC Corp. I also reviewed a number of emails between Ms. G and Ms. C detailing performance related matters, culminating in Ms. C's email in which she seeks a "written record" of issues brought to your attention "including being bullied, retaliated against, hostile work environment and the inappropriate remarks made by my supervisor, TG." I then met with Ms. C on Thursday xxxxxxx, xx, 20 and sought specific examples of these concerns. Due to the nature of the concerns Ms. C shared with me, I determined that it was not necessary to interview other members of the Voice Support Department. Instead, I met with Ms. G to solicit her version of the events and ensure her understanding of the Company's policy prohibiting retaliation against Ms. Cristy for making this complaint. In preparing this report I also consulted a copy of the ABC Corp. Employee Policies and Procedures Handbook dated March 20, 2012.

INVESTIGATION SUMMARY: In my opinion, the concerns raised by Ms. C were primarily about issues that fall within Ms. G's judgment as a supervisor, not issues governed by the Company's policies against harassment and discrimination in the workplace. For example, Ms. C expressed dissatisfaction that Ms. G had not embraced her suggestion for employee recognition certificates. Likewise she wished to second guess performance directives received from Ms. G. Notably, however, she has not received any negative performance reviews or discipline during her tenure with the Company.

Ms. C did identify a handful of "off-color" stray remarks occurring in her department over a period of several months. Although admittedly none of the comments were specifically directed at her, I did discuss these with Ms. G, who explained that the context provided to me by Ms. C was not entirely accurate. For example, one of the conversations that Ms. C shared with me

allegedly involved a comment by Ms. G about her colonoscopy. Ms. G credibly explained that she has never had this medical procedure and therefore could not have shared any personal experience, although another member in the Department had done so. Even assuming, however, that Ms. C's accounts of these remarks is accurate, the nature and frequency of the comments does not in my opinion rise to a violation of the Company's internal policies.

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ASSOCIATION OF WORKPLACE INVESTIGATORS

Capturing the Witness Statement

By Keith Rohman and Elizabeth Rita

Introduction

Few topics ignite a more spirited debate among workplace investigators than how to capture the witness's statement. Whether they rely on note taking, audio recording, or drafting witness declarations, investigators feel passionately about the techniques they use. Each approach brings with it advantages and disadvantages that impact the information we obtain, how reliable it is, and how it may be used afterward.

This article will examine the most common techniques investigators use and the factors that argue for or against them. It includes a discussion of brain science research relevant to how we take in, record, and analyze information during an interview. The article will also review the tensions among different approaches and the choices investigators make when they choose one approach or another.

Methodology

We used a variety of resources to explore these issues. We surveyed the 15 members of the AWI Board of Directors to determine their practices. The board is composed of experienced practitioners from different fields, including attorney-investigators, private investigators, and human resources professionals who conduct investigations.[1] We reviewed scientific literature on brain science to find insights into how people capture and process information. Additionally, we obtained information from a useful article in *CAOWI Quarterly*, "Perspectives on Different Methods of Documenting Witness Interviews."[2] Finally, the authors' own experiences provided additional insights.[3]

Our work here does not present a comprehensive survey of practitioners in this field; it instead utilizes the insights and perspectives of the AWI Board of Directors as a core group of highly experienced investigators. The survey respondents mostly requested anonymity so they could be more candid in

[1] Of the 15 board members, 11 are attorney-investigators, one of whom is also a private investigator. Two come from a human resources background, one of whom is a private investigator. One, a former member of law enforcement, is an attorney and a private investigator, and one is a private investigator.

[2] Sue Ann Van Dermyden, Debra L. Reilly, Amy Oppenheimer, Rich H. Ramirez, "Perspectives on Different Methods of Documenting Witness Interviews." *CAOWI Quarterly* 2, no. 4 (2011): 9.

[3] Both authors have extensive experience conducting and overseeing investigations. Summaries of their professional backgrounds are found at the end of this article.

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their remarks and analysis, so what follows is generally a compilation of the respondents' thoughts and the authors' experiences and observations.

One consideration generally trumps all the issues we discuss below: *what the client wants*. Internal investigators may be required to follow the standard practices of their organization. Outside investigators may also be asked to adopt an approach consistent with the client's longstanding internal practices. As long as these practices do not interfere with the fact-finding process, the client's preference is an acceptable guide.[4]

Survey results and analysis

We surveyed AWI directors about how they document witness interviews and what they see as pros and cons of the different approaches. Three assumptions were built into the survey: (1) these are interviews conducted in the course of a workplace investigation; (2) the client had not expressed a preference on how to do this; and (3) the investigator's report could eventually be discoverable in some legal proceeding. We asked survey respondents which of the following approaches they use:

1. Taking handwritten or typewritten notes and later drafting a witness summary as part of a written report to the client [5]
2. Taking handwritten or typewritten notes and, once the questioning is complete, permitting the witness to review the content of the notes in some manner
3. Preparing a declaration for the witness to sign
4. Audio-recording witness interviews
5. Having a second investigator or paralegal in the room to take notes and to act as a witness to what is said

There was no consensus in the survey results. Forty percent of the directors follow approach 1, taking or typing notes and using those notes to prepare a report. Forty percent use approach 2, taking notes and then reviewing them with the witness. Twenty percent prefer approach 4, audio-recording the witness interviews.[6]

[4] If the client proposes an interview approach that would significantly interfere with an investigator's fact-finding, the investigator should have a dialogue with the client, explaining the difficulties the client's approach would cause. Hopefully the investigator and the client can reach a mutually agreeable approach; if not, however, the investigator may have to consider withdrawing rather than conducting an investigation with ineffective fact-finding techniques. Attorney investigators must be aware of applicable rules of professional responsibility. *See*, e.g., Cal. Rules of Prof. Resp. 3-600 (Organization as Client) and 3-700 (Termination of Employment).

[5] Whether investigators use a laptop or take handwritten notes is a fascinating—but separate—issue beyond the scope of this article.

[6] The survey respondents did not necessarily hold hard and fast to their choices. While the respondents expressed the preferences noted here, many had used other approaches successfully in various environments. Some expressed that their practices had changed and evolved over the years, and they could evolve again.

In a group of experienced investigators, we expected there would be a "tried and true" best practice for documenting witness interviews. It became clear as we examined the various methods, however, that there are compelling arguments for and against each of them.

Approach 1: taking notes during the interview and using them to prepare a report.

If there is a "traditional" approach to documenting the witness interview, this option is probably it. The investigator takes handwritten notes, or types notes with a laptop, and then bases his or her report on these notes. Most investigators have used this approach at some point in their practices. Forty percent of the survey's respondents currently use this approach.

The pros. Approach 1 gets the investigation moving forward quickly and effectively. Once the interview is complete, there is no delay in producing documentation—the investigator has the notes and can begin to prepare for the next witness or to draft the report. In contrast to approach 2, in which witnesses review the notes in some way and are given the opportunity to comment on or modify their responses, the investigator relies with confidence on the notes in communicating with the client. A related benefit of approach 1 is that once a witness has spontaneously made a truthful statement or an admission during an interview, the bell has been rung; the witness has no opportunity to modify or withdraw it later. Absent are the shifting sands of changing statements that can come from the witness reviewing the notes in approach 2.

Approach 1 has a built-in informality that its practitioners point to as an effective tool for building witness rapport. There is no tape recorder, potential draft declaration, or even review process at the end. While witnesses know they are being interviewed, this is as close to a "normal conversation" as is likely to happen during an investigation. Approach 1 also helps the investigator control the pace of the interview, slowing the witness down if need be. Asking for a moment to catch up with note taking or repeating a question while writing can give the investigator time to thoroughly reflect on an answer before moving on. As discussed in the section on brain science below, the process of note taking provides other benefits in cognitive functioning.

One AWI director, John Lohse, is a former FBI special agent who now serves as the director of investigations for the Office of Ethics, Compliance, and Audit Services for the University of California. Lohse noted that he was trained in approach 1 at the FBI. He used this approach during his career at the FBI, and when he came to the University of California system, he found this practice used by many of the university's auditors.

The cons. The biggest potential disadvantage of approach 1 presents itself if the interview becomes an issue in subsequent litigation. If the witness changes his or her story and needs to be impeached with the prior statement, approach 1 1acks the punch of other approaches. There is no audio recording, no signed declaration, nor even reviewed notes to use for impeaching the witness at a deposition or trial. Instead the investigator must take the stand to impeach the witness. Those who take this approach note that it has been successfully used for years in civil and criminal cases. As one investigator expressed, "If you are going to rely on me to do the investigation and write the report, you can rely on me to testify effectively about it." (As we note below under approach 2, the "fix" of having the witness review the interview notes is also imperfect.)

Approach 1 also leaves the investigator vulnerable to the related criticism that he or she missed something, mistreated the witness in some way, or mischaracterized something the witness said. Unlike a recorded interview, of course, there is no formal record of what the interviewer and subject said.

Another concern with approach 1 is the impact an investigator's biases may have on note taking. Investigators need to be alert to the possibility that they may write down or unduly focus on those facts that accord with their own biases or theory about the case. Is the investigator writing down everything or just those facts that resonate with his or her biases? A related issue is investigator skill and fatigue. This approach requires a relatively high skill at note taking, as well as focus and stamina, as the day stretches into one interview after another.

The bottom line. Approach 1 has a long history; investigators have used this technique for years. Its proponents point to the advantages of the ability to capture what the witness says quickly and accurately and communicate it to the client. While survey respondents acknowledge that this approach may be less effective in later impeaching a witness than other approaches, they note that they have successfully impeached witnesses by testifying from their written reports.

Approach 2: taking or typing notes and reviewing them with the witness, either at the time of the interview or after the investigator has transcribed them.

Approach 2 is similar to approach 1 but adds some level of witness review. Forty percent of the survey respondents use this approach. Some investigators hand their notes to the witness to review after the questioning is over. Others draft their notes later and send them to the witness to review. Still others read the notes to the witness and ask if the witness would like to make any changes.

The pros. Approach 2 has all the advantages of approach 1 in terms of witness rapport and assisting the investigator in controlling the pace of the interview. The main additional advantage is that it mitigates the biggest disadvantage of approach 1 by having the witness review the investigator's notes and either confirm the content or offer modifications. Another benefit of approach 2 is that it forces the investigator to "review" the data as it is being collected. When investigators review their notes to polish them into a statement for review, they can catch things they might otherwise have missed in preparing for the next witness.

Approach 2 can help build trust and rapport, as witnesses may feel the investigator is treating them fairly by giving them the chance to see what the investigator wrote down. Sometimes witnesses add more details when they have the opportunity to review the notes. If the review process happens immediately after the interview, the witness has less time to "overthink" and possibly change his or her story.

The cons. While approach 2 adds some aspect of witness review to the process, it is also vulnerable to attack. Reading notes to the witness can be challenged as not being as direct as allowing the witness to read the notes. Witnesses can later claim that the reading was inaccurate or that the notes are different from what was read to them. If, as is often the case, the final written report differs from the notes (e.g., the order of statements is changed or comments are paraphrased, both common practices), that can be attacked as well.

The biggest potential problem with approach 2 is that it gives witnesses the chance to disavow uncomfortable statements. During the review process, witnesses may realize they made a damaging admission and backtrack. While investigators who use this method will document such changes, if a change is substantial, the investigator is essentially in the same situation as in approach 1 and may have to testify to impeach the witness. Investigators have to rely on their experience and neutrality in testifying that their recollection is the accurate and reliable one, and that the witness had a reason to back away from a damaging statement—namely self-interest.[7] This is one reason why some clients may prefer approach 1 to approach 2, which gives witnesses the opportunity to ponder what they said and make changes in an attempt to soften or erase the impact of damaging admissions.

Practical problems also arise with approach 2. It is one thing for an investigator to read notes to a witness after a one-hour interview, but how does one deal with interviews that sometimes stretch to three or four hours or even longer? There can be a significant delay and cost in transcribing the notes from a lengthy interview and, in the back-and-forth with a witness, getting the witness to review and return the notes. In addition, there are confidentiality

[7] One of the authors uses this approach. It is her experience that witnesses rarely completely disavow statements once they review the interview notes.

concerns that arise from sharing notes with the witness. If the investigator gives the witness a copy of the interview notes, there is nothing to stop the witness from sending those notes to others. This will compromise the investigation's confidentiality, and if the witness sends his or her statement to other people on the investigator's list, this could taint future interviews as well.

Finally, there are potential discovery issues regarding all witness statements, whether a witness reviews and adopts his or her statement or not. The California Supreme Court addressed the discoverability of recorded witness statements during the summer of 2012 in the *Coito* case.[8] In a unanimous decision, the court held that audio-recorded witness statements taken at the direction of an attorney, in anticipation of litigation, were entitled to work product protection.[9] This decision suggests that in California, a written statement that a witness reviews and adopts may likewise be protected from disclosure by the work product doctrine, so long as all of the requirements for the privilege are met. What happens to this protection, however, when the attorney provides a copy of the statement to the witness and the witness shows his or her statement to others? What if the witness is the complainant or another person who could be adverse in the event of litigation? There is an argument to be made that under some circumstances, a witness's disclosure of the statement to others (or even the initial disclosure of the statement to the witness) could result in a waiver of the work product protections that might otherwise be available.[10]

The bottom line. As noted above, there are several variations to this approach, but all involve the witness reviewing the investigator's notes in some way. Compared to approach 1, an equal number of AWI directors use a version of approach 2. Their view is that the advantage of having the witness adopt the investigator's notes, at least in some form, is worth the potential complications, including the witness changing his or her story at the end of the interview. They note they have found ways to deal with the process of reviewing the notes with the witness in a manner that secures the benefits of this approach while mitigating some of the downsides discussed above.

Approach 3: using interview notes to prepare a declaration or formal witness statement for the witness to sign.

While approach 3 has one important advantage, it appears to have fallen into disuse. Significantly, none of AWI's directors use this approach for their workplace investigations.

Though approach 3 has the investigator writing notes in the same manner as the first two approaches, it adds an important note of formality. After the interview is complete, the investigator writes a declaration or statement summarizing the witness's remarks and gives it to the witness to review. The witness can makes changes or simply sign it. It is generally signed under penalty of perjury.

Approach 3 is sometimes used for public sector employees, including federal government investigations. AWI founder and past president Amy Oppenheimer recalled using this practice when she started doing investigations under contract with the federal government in the 1980s.[11] In an older version of this process, used by some public and even private sector employers, the witness wrote his or her own statement. While this has the advantage of being literally in the witness's own words and handwriting, it is our observation that this practice is also no longer widely used.

The pros. Approach 3 has an obvious advantage in terms of impeachment, as the witness generally signs the statement under penalty of perjury. If the witness is given adequate time to review the declaration and is free to make changes, it is difficult for him or her to claim later that the statements are inaccurate. This is a difficult approach to critique from the impeachment perspective. One of the authors spent a long afternoon on the witness stand while opposing counsel (in this case, a deputy district attorney in a criminal case) tried to raise questions about what "legal authority" the investigator had to take a witness statement under penalty of perjury. Not surprisingly, this was not effective in keeping the statement out. No approach is bulletproof, of course, but in terms of impeachment value, approach 3 stands up very well.

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[8] Coito v. Superior Court, 54 Cal. 4th 480, 278 P.3d 860 (2012).

[9] In California, as in many jurisdictions, the civil work product privilege is codified by statute. California Code of Civil Procedure, section 2018.030. Work product protection can be "absolute" where the "writing…reflects an attorney's impressions, conclusions, opinions or legal research or theories," California Code of Civil Procedure, section 2018.030(a). Such a writing "is not discoverable under any circumstances." *Id.* Work product protection is "qualified" for all other attorney work product, which means that these materials "[are] not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." California Code of Civil Procedure, section 2018.030(b). The statute does not define "work product," and as a result California courts have taken a case-by-case (and sometimes inconsistent) approach to defining this term. Prior to *Coito*, it was unclear in California whether an audio-recorded witness interview was "work product" that could be protected by the work product privilege, or if it was simply evidence that had to be disclosed. The *Coito* decision makes clear that in California a recorded witness interview statement is presumptively protected by at least a qualified work product privilege if it is taken by an attorney (or at an attorney's direction) in anticipation of litigation.

[10] An exhaustive discussion of the work product doctrine and its applicability to witness statements is beyond the scope of this article, and investigators should be familiar with how the courts in their jurisdiction approach these issues.

[11] Van Dermyden, Reilly, Oppenheimer, and Ramirez, "Perspectives on Different Methods of Documenting Witness Interviews," 9.

Approach 3 has one other advantage: the declaration is not a transcript of the witness's comments, even though the person drafting the declaration makes the initial choices about which statements to include and which statements to leave out. When a witness has rambled all over the landscape, even telling varying versions of events, the declaration freezes their story in one version. The witness gets the chance to review the statement and add to it or remove troubling items. As in drafting contracts, however, there is an advantage to doing the first draft. In this case, that advantage goes to the investigator.

The cons. While the note-taking process here is the same as in the first two approaches, the draft declaration transforms the interview into something more formal. It is a fact of life: people don't like to sign things. And they like it even less in the context of an investigation. Our observation is that witnesses may balk at signing a declaration under penalty of perjury swearing to their testimony.

Other problems with approach 3 include the fact that it is time consuming to draft a formal witness statement, and, if it is of any length, it often cannot be done while the witness waits. In that case, the investigator must either return in person (an added expense for the client) or send the statement to the witness. Sending it to the witness has many problems, not the least of which is the delay or sometimes impossibility of getting it back in an unaltered, signed form. It also allows the witness to circulate it, undercutting the confidentiality of the process.

There is a more subtle problem as well: investigators who draft a declaration at the time they do an interview may not yet know the full extent of the facts in the case. Certain facts that seem irrelevant early in the investigation, and which are left out of the declaration, may become very important later.

Finally, even if a declaration has been directly reviewed and adopted by the witness, if the investigator's notes are later provided in litigation, the declaration could be critiqued to the extent it departs from the rough notes. And, of course, a signed declaration by the witness might be discoverable.

The bottom line. Given the many disadvantages of approach 3, it is not surprising that none of our survey respondents use it. One of the central goals when conducting interviews during workplace investigations is to build rapport with witnesses in order to assist in the fact-finding process. This is always a challenge, and the witnesses' knowledge that they will have to sign something at the end of the interview can make them cautious about what they say, or even unwilling to participate at all.

Approach 4: recording

If there is a second "traditional" approach to documenting the witness interview, it is audio recording. Recording has been used by law enforcement, journalists, and investigators for decades. Advances in digital recording technology have made this approach more accessible, less intrusive, and more accurate than ever before. Twenty percent of our survey respondents use approach 4.

Investigations conducted in police and fire departments use approach 4 almost exclusively.[12] In fact, it is not uncommon in police and fire investigations for three audio recorders to be on the table: the investigator's, the respondent's, and the union representative's. Generally, however, while many public sector employers have adopted recording for all their investigations, private sector employers are much less likely to use audio recording.

The pros. An obvious and enormous advantage to approach 4 is accuracy; assuming the technology works, everything the investigator and witness say is recorded. Recording captures things like pauses, the "hem haw" response, tone of voice, and changes in testimony. Recording can do a nearly perfect job of capturing a witness's shifting story in all its elastic quality without the investigator having to describe what happened.

A recording is excellent documentation that the investigator did nothing improper in the interview and did not mischaracterize anything that the witness said. In fact, some investigators have adopted recording as an interview technique after being accused of having done something improper during a witness interview.

With the recorder running, the investigator can maintain uninterrupted eye contact with the witness, focusing on the questions and answers while maintaining rapport with the witness. The investigator can readily observe changes in demeanor and body language if these are significant. If investigators are not writing notes, they are less likely to provide visible cues to the witness that one statement is more interesting than another.

Modern digital recorders are more accurate and more discrete than ever. Their internal circuitry is designed to focus the recording on voices while minimizing other sounds. They have hours of recording time, so there is no longer any need for that awkward break while the investigator has to flip or change the tapes. And the recorders are *small*, often one inch by five inches.

Recordings are direct evidence, which makes them a fantastic tool if a witness disappears and a great asset for witness impeachment. They can also keep the investigation

[12] Several AWI directors have extensive experience conducting investigations for police and fire departments. In California, these investigations are governed by the Peace Officer Bill of Rights (POBR), Cal. Gov. Code §§ 3300, et seq. and the Firefighter Bill of Rights (FOBR), Cal. Gov. Code §§ 3250, et seq.

moving. There is no delay, as is the case with rough notes, and no declaration needs to be drafted for the witness to review. This approach can also help an investigator avoid battle fatigue. Despite our best efforts, human note taking cannot be 100 percent accurate, and sometimes details will be missed. This simply isn't a problem when interviews are recorded.

The cons. Many investigators feel strongly that recording makes witnesses nervous and can have a chilling effect on rapport and candor. Witnesses who are not used to legal processes can be put off by being recorded. The reluctant sexual harassment complainant who must describe a traumatic, intimate event is the poster child for investigators who don't record. Similarly, these investigators believe respondents may talk more openly without a recorder, perhaps making damaging admissions in what the respondents perceive to be a more informal context.

The particular workplace should also be considered when deciding whether to record interviews. In a government bureaucracy, where recording is common, employees expect to be recorded. Recording may be less accepted, and therefore less effective, in other workplaces, such as interviews of blue-collar employees in a small garment manufacturer.

Approach 4 may result in less-experienced investigators disengaging and not giving the interview their full attention. Some hazards of not paying close attention are discussed in more detail in the section on brain science below, but there are other problems as well. We have reviewed numerous audio recordings and transcripts of workplace investigation interviews; it is not uncommon to hear investigators who, either through inexperience, inattention, or laziness, simply read through their question lists without listening to the witness's answers. And while the recorder is accurate, it also allows witnesses who make damaging admissions to back off from them later in the interview, or seek to dramatically minimize them.

Practical considerations include that transcription takes time and costs money. This means the investigator may not have the notes at hand to prepare for the next interview or to start the report. Some estimate that it takes six hours to transcribe one hour of recording. Without expensive transcripts, recordings are harder for the investigator to search and review than notes when analyzing data and preparing the report.

The bottom line. There is little middle ground in investigators' views of approach 4. Those who use it are convinced it is the most accurate and reliable approach and that it provides an unparalleled level of protection for the investigator. They point to the digital recorders' improvements and assert that five minutes into the interview, most witnesses forget the recorder is running.

Those investigators who don't routinely record (including 80 percent of the AWI directors), assert just as strongly that audio recording is a critical barrier to building witness rapport and getting them to open up truthfully.

Approach 5: using a second investigator or paralegal in attendance to take notes.

The practice of pairing investigators for interviews has a long history in law enforcement, in which almost all investigations are done in pairs. While none of our survey respondents use approach 5, follow-up discussions confirmed that this is driven primarily by budgetary considerations. A budget for two investigators at a time in the workplace environment is rarely available. It is useful nevertheless to examine this approach, which can offer some interesting advantages.

The pros. Approach 5 offers many of the same advantages of the approaches discussed above. There is no device on the table in between the investigator and the witness, yet the investigator still has another set of ears and eyes (and note-taking skills) to double-check the notes. This frees the investigator to pay more attention to eye contact and observing witness demeanor. In terms of impeachment, the investigator has another witness to what was said in the interview, which will bolster the evidence supporting the investigator's documentation.

The cons. As noted above, expense is the main criticism of approach 5. The cost of having two people attend the interviews can be prohibitive. There also may be a qualitative difference in having two interviewers in the room; some feel this by itself may make the witness more nervous. Another issue is having two sets of notes if both investigators take notes. If the two sets of notes conflict or are ambiguous, how does one reconcile the differences?

The bottom line. While approach 5 has some tempting advantages, the cost issue alone makes it impracticable nearly all the time. On the other hand, in some cases—particularly those involving high-profile allegations in which audio recording is not practical—a second person may be the right option. It provides verification of what is said in the room and is a strong hedge against the witness changing his or her story. It gives the investigator an extra set of experienced eyes and ears in the room. Two heads can be better than one in analyzing a shifty witness or catching an important, offhand remark.

Brain science

For better or worse, neuroscientists do not appear to have directly studied investigators conducting interviews. There is, however, research in neuroscience and related fields that examines behaviors and actions related to the interview process, and this provides insight into our work as investigators.

Hearing versus listening—mastodons and Freddy Mercury. For investigators conducting interviews, hearing—and the ability to listen—is essential. But on a day-to-day basis, we don't spend a lot of time thinking about our hearing; in fact, we tend to underrate it in comparison with the other senses, particularly sight. For our cavemen ancestors, however, hearing was their essential early-warning system. Humans can hear far beyond the perimeter of what we can see or smell, and this holds true even while we are asleep. In fact, our ears and brains "hear" ten times faster than we "see" and ten times faster than we can form a conscious thought.[13]

How do our brains translate this rapid-fire sensory data into meaning or action, turning "hearing" into "listening"? The answer is, it's complicated! (What did you expect? This is brain science.) There are two different types of attention in play, having totally different functions and using very different parts of our brains.

The first kind of attention is stimulus driven—think of a prehistoric mastodon crashing into our caveman ancestors' camp at three o'clock in the morning. This activates the classic "startle reaction," our simplest and most primitive form of attention. The ear sends the crash sound straight to the brain stem, and from there it is converted into a body-wide defensive response in less than 1/10 of a second.[14] It bypasses those parts of the brain that would "think" about what is happening. Eyes immediately close (protecting the eyes); necks hunch (protecting the essential brain stem area); hearts accelerate; eyes widen to see what's happening. All of these actions happen instantly and without conscious thought.

The second kind of attention occurs when we focus our minds on something, activating higher brain pathways. A mother, for example, can hear her child call out for her in a crowded airport terminal, or one can distinguish a snippet of "Bohemian Rhapsody"—a favorite song from college days—coming from the window of a passing car. When this happens, the signal is directed to the dorsal cerebral cortex, the part of our brains responsible for computation, sequencing relationships between data, and other analytic functions.[15] The brain focuses on what we are trying to hear, relates it to other memories, and tunes out distracting sights and sounds.

This more conscious form of listening is more taxing on our brains, with more pathways fired up and more areas of the brain engaged. Neuroscientists tell us that when this happens, we are better able to store (or "encode") data into memories. The harder our brains are working, and the more areas of the brain we use, the better we are able to store the data we gather. As discussed below under note taking, the view of these authors is that while storing what we learn while interviewing is only one part of our job as investigators, the more engaged our brain is during those interviews, the more effective we are as interviewers—at least to a point.

Investigators and multitasking. When conducting interviews, investigators must listen to the witness, take notes, refer to the outline, analyze the data coming in, compare it with data the investigator already has gathered, follow up when the witness raises attention to new areas, try to capture verbatim answers, and watch for shifts in witness demeanor, all while working to keep rapport with the witness. This rapid switching from activity to activity taxes our ability to organize our thoughts and impacts our capacity to learn.[16] While there might be scholarly debate over whether investigators' activities during interviews technically constitute "multitasking," in its colloquial sense, the term fits.[17]

Many investigators, particularly those with many years of experience, are confident that they can manage all these tasks with a high level of certainty that they have recorded everything they need. Neuroscientists, however, raise questions about this. As one psychology professor put it, "Heavy multi-taskers are often extremely confident in their abilities. But there's evidence that those people are actually worse at multi-tasking" than those who are less confident.[18] Multitaskers also generally perform worse on cognitive and memory tasks than people focusing on single tasks.

One of the problems with switching from task to task is that it slows down "working memory," the short-term memory that allows us to hold information in our brains and manipulate it—that, in short, allows us to think.[19]

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[13] Seth S. Horowitz, op-ed, "The Science and Art of Listening," *New York Times*, November 11, 2012, at SR 10.

[14] These areas of the brain are the temporoparietal and inferior frontal cortex regions, mostly located in the right hemisphere of the brain. *Id.*

[15] *Id. See also* Grégoire Borst, William L. Thompson, Stephen M. Kosslyn, "Understanding the Dorsal and Ventral Systems of the Human Cerebral Cortex, Beyond Dichotomies," *American Psychologist* 66 (October 2011): 624.

[16] William R. Klemm, "Will Multitasking Make You a Scatterbrain?," *Psychology Today*, June 25, 2010, *http://www.psychologytoday.com/blog/memory-medic/201006/will-multi-tasking-make-you-scatterbrain* (last visited June 6, 2013).

[17] Here is one example of the definition of multitasking from a scholarly work: "Multi-tasking involves concurrent performance of two or more functionally independent tasks with each of the tasks having unique goals involving distinct stimuli (or stimulus attributes), mental transformation, and response outputs." David M. Sanbonmatsu, David L. Strayer, Nathan Medeiros-Ward, Jason M. Watson, "Who Multi-Tasks and Why? Multi-Tasking Ability, Perceived Multi-Tasking Ability, Impulsivity, and Sensation Seeking," *PLoS One* 8, no. 1:e54402, doi:10.1371/journal.pone.0054402. A comprehensive review of the subject is (way) beyond the scope of this article.

[18] David Glenn, "Divided Attention," *The Chronicle of Higher Education, The Chronicle Review*, February 28, 2010, *http://chronicle.com/article/Scholars-Turn-Their-Attention/63746/* (last visited June 6, 2013), *quoting* Clifford I. Nass, professor of psychology at Stanford University.

[19] Meredith Melnick, "Can You Multitask? It'll Get Tougher with Age," *Time*, April 12, 2011, *http://healthland.time.com/2011/04/12/can-you-multitask-itll-get-tougher-with-age/* (last visited June 6, 2013).

Our store of working memory is limited. A frequently-cited Harvard study from 1956 found that most people's working-memory capacity is limited to about seven units.[20] In other words, ask most people to repeat a sequence of numbers, or sing a line of music, and their limit is going to be roughly seven numbers or notes.

What this tells investigators is that it is important to guard against overconfidence and recognize that the human brain is balancing multiple functions when the investigator is listening to what is being said, planning ahead to the next set of questions, and trying to write down a verbatim record of the conversation. Being conscious of our limitations is the first step. If possible, the investigator should take steps to screen out distractions and lower the payload on their working memory. For example, try to have an interview space that isn't noisy and where neither the witness nor the interviewer can look out a window with lots of distracting activity. Both the witness and the interviewer should turn off their cell phones during the interview to avoid additional distractions. The investigator can also streamline questions and monitor fatigue and concentration levels to ensure maximum attention to the task at hand.

One interesting study found that there is another way to deal with the cognitive overload of multitasking—typing instead of writing.[21] This study found that typing notes reduced the multitasking demand because it can be so much faster than writing notes by hand. This study found that the average typist could produce 33 words per minute but could produce only 19 words per minute by hand.

Note taking and the brain's ability to store information. Most neuroscientists believe that taking notes helps the brain store information more deeply because note taking requires more brain activity.[22] The physical action of note taking activates areas in the brain involved in listening, cognitive processing, muscle commands, and data recording. These studies conclude that the more pathways we involve, the more associations our brains make and the more deeply our brains store the information.[23]

The empirical research we reviewed focused primarily on memory and retention, often observing college students taking notes in lecture situations. While not fully analogous to an investigator taking notes while conducting an interview, the research presents intriguing insights. The findings that note taking requires more brain activity and aids memory tracks with the anecdotal observations of our survey respondents, who described the note-taking process as helping them process information and remain focused during an interview.

Your brain on Jane Austen. Inevitably, concentration levels fluctuate in human interactions, including while conducting interviews. It turns out there is a big difference in what our brains do when we concentrate closely versus when we use our senses in a more superficial way.

We came across an interesting multidisciplinary study that used Jane Austen's work to study this phenomenon. Researchers from Michigan State University and Stanford University examined the difference between the brains of information "studiers" and information "browsers"—in other words, between those reading closely versus those reading with less attention.[24] Natalie Phillips, the literary scholar who led the study, had the subjects read Jane Austen's *Mansfield Park* while lying in a magnetic resonance imaging machine. Sometimes they were asked to read the chapter as if they were reading for pleasure. Other times they were asked to study the text intently, as if they were college professors or graduate students preparing a comprehensive literary analysis. Phillips expected to find only subtle differences because everyone was doing the same function—reading—and the only differences should have appeared in the parts of the brain related to attention.[25]

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[20] George Armitage Miller, "The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information," *Psychological Bulletin* 63 (1956): 81.

[21] Ian Schoen, "Effects of Method and Context of Note-taking on Memory: Handwriting versus Typing in Lecture and Textbook-Reading Contexts" (2012). Pitzer Senior Theses. Paper 20. *http://scholarship.claremont.edu/pitzer_theses/20* (last visited July 16, 2013).

[22] There are many studies on the impacts of note taking on the storage/encoding of information and on our ability to recall it later. *See*, e.g., George A. Miller, "The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information," *Psychology Review* 63 (1956): 81; Giles O. Einstein, Joy Morris, and Susan Smith, "Note-taking, Individual Differences, and Memory for Lecture Information," *Journal of Educational Psychology* 77 (1985): 522; Kenneth A. Kiewra, "A Review of Note-Taking: The Encoding-Storage Paradigm and Beyond," *Educational Psychology Review* 1 (1989): 147.

[23] A few studies are at odds with this conclusion, finding that the multitasking required to listen and take notes results in "cognitive overload," so that we do not remember things as well. *See*, e.g., Linda K. Cook and Richard E. Mayer, "Reading Strategies Training for Meaningful Learning from Prose," in *Cognitive Strategy Research Springer Series in Cognitive Development*, ed. Michael Pressley and Joe R. Levin (New York, NY: Springer, 1983), 87; Neil W. Mulligan, "Perceptual Interference at Encoding Enhances Item-Specific Encoding and Disrupts Relational Encoding: Evidence from Multiple Recall Tests," *Memory & Cognition* 28 (2000): 539.

[24] Natalie M. Phillips: Leisure vs. 'Close Reading,' Michigan State University College of Arts and Letters, *http://www.cal.msu.edu/natalie-m-phillips/* (last visited July 16, 2013); Corrie Goldman, "This is your brain on Jane Austen, and Stanford researchers are taking notes," Stanford Report, September 7, 2012, *http://news.stanford.edu/news/2012/september/austen-reading-fmri-090712.html* (last visited July 16, 2013).

[25] Helen Thompson and Shankar Vedantam, "A Lively Mind: Your Brain on Jane Austen," Shots - Health News from NPR (blog), National Public Radio, October 2, 2012, *http://www.npr.org/blogs/health/2012/10/09/162401053/a-lively-mind-your-brain-on-jane-austen* (last visited June 6, 2013).

In a neuroscientific "plot twist," Phillips found big differences instead. For the "studiers," the attention-controlling executive function part of the brain was not the only part that reacted. Brain areas that controlled physical movement and the sensation of touch were fired up as well. "What's been taking us by surprise…is how much the whole brain—global activations across a number of different regions—seems to be transforming and shifting" when reading more closely.[26] The brains of the "studiers" acted as if they were actually there in Mansfield Park, running around and feeling the spring breeze in their hair.

Lessons for investigators. What does this mean for investigators? Neuroscience confirms our intuitive sense that the closer attention we pay, the better the result because we are literally using more of our brains. If we listen closely to what we are hearing and apply it to new facts in real time, we can work more effectively and compensate for the inherent multitasking challenges we face.

While brain science doesn't support one interview approach over the others, it does point to several factors that investigators should keep in mind. Multitasking is an inherent reality in the interview process, and investigators should be cognizant of their human limitations as they attempt to balance the many tasks necessary to accomplish effective interviews. There is a big difference between simply hearing and listening intently to what is being said. When one focuses closely on what is being said, more of the brain is engaged and one is better able to process and presumably retain what has been heard.

Critical factors to consider

There was no consensus in our sample as to which of the five approaches discussed in this article is best, and we do not recommend one approach over the others. Among our survey respondents, 80 percent eschew audio-recording interviews, and this group is evenly divided on whether they review their notes with the witness. Even the two authors of this article use different approaches; while neither routinely audio-records, one reviews the notes with the witness while the other does not.

Agreement does exist, however, about what factors investigators should consider and balance in deciding which approach to take.

Consistency of approach. Whatever the investigator chooses to do, he or she should use the same approach consistently. The investigator's best defense if challenged about the approach will be the ability to clearly articulate a longstanding practice and the reasons for it. The one exception is when the client's organization has an established approach it wishes the investigator to adopt, provided it does not interfere with fact-finding.

Witness comfort level. Witness rapport is important in all workplace investigations, and there are inevitable tensions between building witness rapport and issues such as the ability to impeach a witness later if necessary. While those who audio-record assert that the presence of a recorder does not inhibit witness disclosure, this is not the view of the majority of investigators who responded to our survey. Most of these investigators regard audio-recording (and drafting declarations) as key barriers to disclosure.

Future impeachment. It is an unfortunate fact that witnesses will sometimes disavow what they said in their interview. Investigators who audio-record point to this issue as a key argument in favor of that approach. Those who use approach 1 point to its longstanding use and practice in effectively impeaching testimony, while those who use approach 2 "split the baby" by using some aspects of witness adoption while keeping the relative informality of the note-taking process.

Cost and time. Some approaches are more labor intensive than others, and this can cost a client more money. Transcribing audio recordings can be expensive. Similarly, having a second person along as an investigator can dramatically increase costs. A related issue is the time it takes for an investigator to complete an investigation. Employers are required by law to conduct prompt investigations, and some approaches can eat up valuable time. If the investigator has to draft his or her notes and then send them to the witness, days or even weeks can be lost.

Confidentiality. Confidentiality concerns can arise if witnesses circulate their declarations or the investigator's rough notes to their coworkers and others, despite the investigator asking them not to do so. Disclosing statements can not only pose problems in preserving the confidentiality of the process but can potentially taint the data that the investigator gathers later. Under some circumstances, there is a risk that providing a witness with his or her statement could lead to a waiver of the work product protection the statement might otherwise have.

Investigator issues. In this category, the issues are as varied as the investigators who do the work. Investigator fatigue can be an issue when doing multiple interviews in one sitting. Some approaches require more investigative expertise than others. It may be easier for some investigators to pay attention if they have to take detailed notes, or easier for others if they are freed from having to do that.

Conclusion

With all the different factors to balance and consider, the absence of one clearly defined approach is not surprising. This area of practice, like others in workplace investiga-

[26] *Id.*

tion, is evolving, and a similar survey taken five years ago or five years from now could very well produce different results. Even the individual investigators with whom we spoke said they are constantly evaluating their approaches and modifying them as circumstances and the law change.

Each of these approaches has advantages and disadvantages, but the investigator must make a choice. The best starting point for this decision is awareness of the common practices in the field and the issues that need to be balanced as we conduct investigations.

Keith Rohman is president of Public Interest Investigations, Inc. For the past 30 years, he has trained and overseen dozens of investigators. He was a member of the Los Angeles County Sheriff's Equity Oversight Panel, which oversaw investigations by the Sheriff's Internal Affairs Bureau. He was the Executive Director of the Los Angeles City Office of Discrimination Investigation, overseeing more than 300 workplace investigations. He was one of the principal investigators assisting the court-appointed monitor in the groundbreaking Denny's Restaurant discrimination cases, and has worked on litigation related to the Abu Ghraib prison, shootings by Blackwater in Iraq and rape in the U.S. military. Mr. Rohman may be reached at rohman@piila.com.

Elizabeth Rita is founder of and senior investigator for Work Place Intelligence, LLC. She has more than 20 years of experience as an employment lawyer and workplace investigator. She has conducted hundreds of investigations for cities, fire protection districts, the federal government, multinational corporations, and other organizations in the United States and Canada. She has trained attorneys and human resources professionals in how to conduct investigations and has written and spoken on this topic for a broad range of audiences over the years. Ms. Rita may be reached at erita.ihi@gmail.com.