

Investigation Interviews: How to Get Critical Evidence From Your Witnesses

Allison West, Esq., SPHR, SHRM-SCP



INVESTIGATION GOALS

🏆 Is everyone safe?

🏆 Did someone violate a company policy?

NOT YOUR GOALS

- ☠ Tricking or badgering a witness for a confession
 - ☠ Embarrassing a witness
 - ☠ Coercing a witness to tell you what *you* want to hear
 - ☠ Counting how many times you say “AHA! I caught you in a lie”

Take it seriously

- Be familiar with and follow EEOC guidance how to conduct investigations
- Cotran
 - **Important case!**
 - **Good faith investigation**
- Lay out the allegations so the alleged wrongdoer has every opportunity to respond

IT'S ALL IN THE NAME

⊗ Please do not use:

⊗ Victim

⊗ Accuser

⊗ Accused

⊗ Harasser

⊗ Liar

⊗ Thief

⊗ Pain in the neck

BE AN EAGLE SCOUT: BE PREPARED

- Written statements
- Employee handbooks
- Personnel files
- Notes
- Email
- Diaries
- Complaints
- Journals
- Letters
- Timesheets
- Receipts
- Attendance records
- Surveillance videos
- Calendars

BE PREPARED

- ☐ Create an outline
 - ☐ brief
 - ☐ key words
- ☐ Tag documents, interview notes or other evidence
- ☐ Remember to listen!

BE PREPARED

- ☐ Chronology of events
- ☐ Cast of characters
- ☐ Investigation Log
- ☐ Keep track of all major events/contacts during investigation
- ☐ Record efforts to contact witnesses and/or obtain documents, reasons for delays, other issues that arise

HOST/HOESSE

WITH THE MOSTESS

- ↪ Make the witness feel comfortable
- ↪ Interview location
 - ↪ private and non-threatening
 - ↪ HR office is not always the best location
 - ↪ be mindful of wage and hour issues!
 - ↪ ask the witness
- ↪ Seating parity
- ↪ Tissues and water!

OPENING ACT

- Set the tone for the meeting
- Introduction and standard admonitions
 - identify yourself and role in the company
 - general purpose of the interview
 - limit amount of detail/info disclosed

OPENING ACT

- Introduction and Standard Admonitions
 - no retaliation
- Employer expects cooperation
- Thank the witness for showing up
- But what about confidentiality???

The NLRB Confidentiality Dilemma

- Not a total ban
- Burden lies with employer to show confidentiality restrictions would be necessary for **any one** of the following reasons:
 - To protect a witness
 - To prevent the destruction of evidence
 - To preserve testimony and thwart fabricated testimony
 - To prevent a cover up
- Unfortunately, the Board offered no guidance about the kind of proof that might be required for an employer to demonstrate a confidentiality requirement is lawful.

SNEAK PREVIEW

- ☹️ How much do you tell the alleged wrongdoer?
 - ☹️ be honest and straightforward
 - ☹️ cautiously provide witness names
 - ☹️ **CAVEAT: BE AWARE OF SAFETY ISSUES**

SNEAK PREVIEW

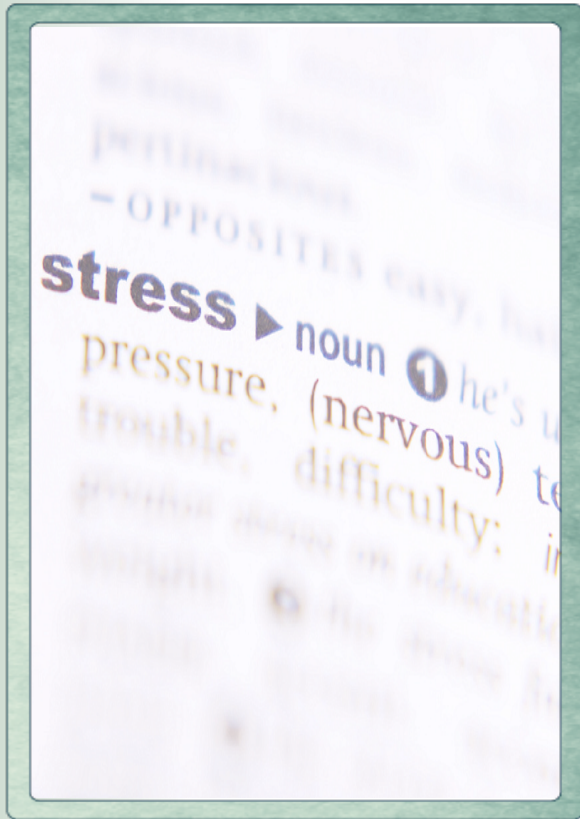
- How much do you tell the witness?
- Inverted triangle approach
 - Start with broad questions then narrow down

BE A REPORTER

- ✍ *Listen – don't be wedded to your outline*
- ✍ Who, what, when, where, how
 - ✍ Sparingly use “why”
 - ✍ Who else has information?
 - ✍ Are there any documents?
- ✍ Ask:
 - ✍ open-ended question to elicit information
 - ✍ closed-ended questions to confirm



ACT LIKE WEBSTER



- Get definitions
 - words have different
 - meanings to different people
- Examples:
 - uncomfortable
 - stress

BE A DIRECTOR

➤ Prepare scripts:

➤ “why me?”

➤ “will I be terminated?”






➤ “I don’t want to talk to you”

➤ “what will happen to the alleged wrongdoer?”

➤ anticipate questions



BE A JUDGE

-  Remember your role and credibility
 -  fact finder
 -  neutral
-  ***Fagedabout*** HEARSAY!
-  Do not reach a conclusion until the investigation is *over*

BE A JUDGE

- Do not seek a confession
- Assess credibility throughout interview
 - remember non-verbal
- Conflicting information
 - give complainant and alleged wrongdoer opportunity to rebut or add information

BE A JUDGE

- ✓ Be patient
- ✓ Give witness time to respond
- ✓ Be respectful of individual styles
- ✓ Be aware of diversity / cultural issues

Be a Judge, not judgmental

- Use the word “alleged” throughout the investigation
- If you do not – you lose your independence and your credibility
- Do not go in with the attitude “they must have done it”

EXHIBIT A


Documents

 Authentication

 Go through entire document with the witness – don't make assumptions

 Have witness id people, places, things in photos

 Id all evidence to easily track it in your notes

 E.g., For the first document you present to witness Barbara Walters – at the bottom right of the document write BW1 and continue in sequence for all documents

DRILLING DOWN

- ✘ Get details
- ✘ Techniques:
 - ✘ drawings
 - ✘ measurements
 - ✘ location
 - ✘ distance
 - ✘ demonstrating conduct

BE A MAGICIAN

- 👁 Use a variety of questioning techniques
 - 👁 summarize
 - 👁 ask questions out of order
 - 👁 repeat a question later in the interview
 - 👁 ask a question you already know the answer to
- 👁 “I’ m struggling”

KISS YOUR QUESTIONS

- 👍 Keep your questions
 - 👍 simple
 - 👍 slow
 - 👍 Short
- 👍 Improves your note-taking

KISS YOUR QUESTIONS





- ⊗ Avoid questions that are . . .
 - ⊗ Accusatory
 - ⊗ Loaded
 - ⊗ Leading
 - ⊗ Compound
 - ⊗ Long and winding
 - ⊗ Sound like Sgt. Joe Friday

LAND THE PLANE

- Ultimately ask a direct or leading question
 - Use when struggling to get an answer
 - Pay attention to non-verbal cues
 - Handling conflicting information

THE SYBIL EFFECT

Reluctant or Nervous Witness

-  Gently probe concerns
-  Emphasize retaliation prohibition
-  Make sure the location is comfortable
-  Don't make promises just to get the witness to talk

THE SYBIL EFFECT

 Overly helpful / talkative / inquisitive witness

 Stay in the driver's seat

 It's ok to interrupt

 Scripts:




 "I am sure you can appreciate I need to stay focused with my line of questioning"

 "I understand you are curious about the details, but right now I need to ask some questions"

 Don't make promises just to get the witness to talk

THE SYBIL EFFECT

Hostile Witness

-  Respond quietly and calmly - ask about the hostility
-  Address concerns, fears or other issues
-  Document all comments and behaviors

Don't

-  threaten, coerce or intimidate
-  make promises of benefits based on cooperation
-  play games – if appropriate, give information

DIFFERENT HEIGHTS

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

CLOSE THE CIRCLES

- o ***Remember to do a follow-up interview when necessary***
 - o Are there any responses that are unclear?
 - o Are there issues in conflict that require further fact-finding?
 - o Do you need clarification?
 - o Do you need to confirm or figure out credibility?
 - o Was witness given every opportunity to answer all questions?

CLOSE THE CIRCLES

- o Are you making assumptions about facts without getting confirmation, corroboration or clarification?
- o Did you learn new facts after the witness's interview that might change some responses?
- o Have you been fair and unbiased?
- o Have you been put on notice about other potential wrongdoing?

Keep Your Skills Sharp/Up-to-date

- Association of Workplace Investigators
 - www.aowi.org
 - Guiding Principles – write to me to get a copy!

Thank you!

Connect with me!

LinkedIn: [linkedin.com/in/allisonwestesqsphr](https://www.linkedin.com/in/allisonwestesqsphr)

Twitter: twitter.com/AllisonWestEsq

Blog: feeds.feedburner.com/AllisonWest

446 Old County Road #100-328
Pacifica, CA 94044
650-557-1400
866-551-1400
awest@employmentpractices.net

