

Paralegal & Investigator Skills Workshop



Interviewing Witnesses

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PARALEGAL & INVESTIGATOR SKILLS WORKSHOP: A Team Approach to Criminal Defense

THE DIFFICULT INTERVIEW: HOW TO GET PAST THE PIT BULL, ON TO THE PORCH, IN THE DOOR AND AT THE TABLE

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PREPARATION . . . THERE IS NO SUBSTITUTE

1. Integrate thoroughly into the case and the defense team.
2. Know the facts cold
 - a. Outline the case
 - b. Create a time-line or chronology
 - c. Create a players list
 - d. Be familiar with the scene and the surrounding neighborhoods
3. Understand where the case stands procedurally. Be clear with counsel on what you can and cannot reveal.
4. Know what representations have been made in court and in the media.
5. Choose your interview targets strategically: Which witnesses first? In what order?
6. Who is this person? Know everything you can about the witness/victim before you hit the porch. The more important the witness, the more thorough your background search should be.
 - a. What is their relationship to the defendant/victim/prosecution?
 - b. Prior statements
 - c. Family relationships
 - d. MySpace, Facebook, Livejournal, Google, Lexis, Choicepoint, news searches, etc.
 - e. Litigation history (defendant/plaintiff, divorce, bankruptcy, criminal)
7. Understand (if possible) the enmities and politics among the players and where the witness is situated.
8. Understand the witness may have criminal or civil exposure and be prepared to address it. Know the possible charges and penalties; know the statute of limitations; know how the witness can get a court appointed attorney.

CREATE FAVORABLE CIRCUMSTANCES

1. Who is this witness most likely to talk to? Become that person.
 - a. What do you wear? Dress up or dress down? Social worker or law enforcement agent.
 - b. What tone are you going to adopt?
 - c. What to bring with you? Briefcase or reporter's notebook in a back pocket?
 - Tape recorder,
 - camera, – Interpreter
 - Dog biscuits
 - Photos, diagrams, discovery, prior statements of the witness? – Other props, such as the attorney

2. When and how is this person most likely to talk to you?
 - a. What time to show up? Know as much about the witness's schedule as possible.
 - b. The ultimate conundrum Do you call first or just show up?
 - c. Can you get an introduction? Would an introduction help?
 - d. Interpreter? Know before you go!

3. Strategy:
 - a. Always be prepared to distance yourself from the client and the attorney if necessary.
 - *I don't know who did what here, I'm just trying to get all the facts so that the attorney can advise his client about whether to plead or not.*
 - *I've never actually met the client, I work for the attorney.*
 - b. Be prepared to make strategic disclosures: You gotta give a little to get a little.
 - *Do you know the current status of this case? – Would you like me to fill you in?*
 - *Do you have any questions that I can answer for you?*
 - c. Use sincerity and sympathy, not strong-arm tactics and discourtesy.

Distinguish yourself from the government at every opportunity.
Key witnesses/victims are often mistreated and always ignored by prosecutors and their agents.

- d. Know the one most important question! This may not always be the obvious one like “Did he do it?” It might rather be clarification of a detail from a description or a question about an event that preceded the actual criminal conduct. This should be agreed upon by the defense team before the investigator ever hits the porch.

HOW TO GET THE 20 MINUTE NON-INTERVIEW

1. You are a salesperson. You must first sell yourself before you can sell reasonable doubt. We do noble and critically important work but witnesses/victims may see our role as perverse. You have to establish your humanity and street credibility with the witness quickly because you may only have ninety seconds.
2. Find some commonality with the witness. Note the personal details of your surroundings and use them to your advantage. Drop to your knees to pet the pooch, check out the photos on the wall. But don't overdo it.
 - *I was in Machu Pichu in 1976, did you hike the trail or take the train? – How do you keep the aphids off of your dahlias?*
 - *My husband has been trying to get me to let him buy a (name of vehicle in driveway)*
3. Stay relaxed and adaptable.
4. Remember all information is good information.
5. Show sympathy for the victim and for the difficult situation the witness is in.
6. Remember that extreme hostility and other adverse responses by witnesses can be used in court to establish bias or an agenda on the part of the witness, so take careful note of it.
7. Be mindful of how your response to a hostile reception might play out if the witness calls the government or later takes the stand for the government, and act accordingly. Be prepared for verbal abuse and take it gracefully. Make sure your behavior in the field does not become the subject of misconduct or witness intimidation claims in court.
8. This may be the only contact the witness/victim has from the defense before testifying. If you are perceived to be making an effort to ameliorate the

psychic or physical damage in the case, a witness who declines an interview may appreciate your effort and return the favor from the stand in the form of mitigated adverse testimony.

9. If the door is being closed, ask your most critical question or consider what provocative comment you can sneak in that might plant a seed. A yes/no question may have the best chance of getting answered. Some questions may have the effect of starting the interview that had already been declined.

a. To the bank teller: *“If the bank robber was holding his wallet in his right hand and took the money from you with his left hand, which hand was holding the gun?”*

b. To the fourteen year old prostitute: *“On your 14th birthday, did your father and sister really get you a cake that said, ‘Happy 19th birthday!’?”*

10. Burn no bridges: If you are perceived as fair and understanding, the witness may relent on the spot or may become open to an interview down the road.

GETTING PAST THE POWER OF THE GOVERNMENT

1. Regardless of what they say, or what the witnesses believe, the government does not own witnesses in criminal cases
2. “I need to talk to my attorney first.” (The prosecutor is not your attorney)
3. If the witness says they have been told not to talk to you, learn the particulars of this for use in court. Find out if they will speak with you if “their” or the government agent is present and set up the appointment. Perhaps even call the agent or officer with the witness right there.
4. Request the same courtesy the witness has afforded the government. It is easiest if everyone has an opportunity to obtain the same information in order to resolve the case quickly and efficiently.
5. If the witness says that they already told it to the cops and it should be in the reports, ask the witness to clarify a specific point in the police report. And hold the document out for the witness to look at.
6. Explain to the witnesses the government’s agenda or theories if you think doing so will resonate and bring the witness around.
7. Likewise, explain the defense team’s agenda or theories – after clearing it with counsel.

THE INTERVIEW

1. Stay relaxed and adaptable because the critical goal is to establish trust.
2. While the witness is on the fence about talking, troll for information without really asking for it.
 - *Has anyone from the government been in touch with you to update you about the case?*
 - *Have you seen your statement in the police report?*
3. If necessary, let the witness know that you are not there to talk them out of their position or to explain away your client's behavior. You are simply there to learn what the witness knows be it good or bad for your client. Let them know it is just as important to get bad news about your client so that you can advise the attorney about the case. Let the person know that believe it or not, there are some times that our clients don't tell us the entire truth.
4. Be professional without seeming to be authoritative and never be intimidating. We are not police officers, we have no power to compel someone to talk other than our appealing personalities and persuasive arguments.
5. Don't be in a hurry to start the interview. Take your time and try to engage the individual. The hard questions can wait until you have laid the groundwork. We rarely cross-examine during an interview.
6. Don't rush to take out the notepad, wait until the witness is comfortable.
7. Once you've established some trust, ask questions then get out of the way and let the witness talk.
8. If it is necessary, or it will further establish trust, tell the witness how their cooperation with you will likely play out.

9. Help the witness to understand their rights and the power that they hold to control their involvement in the criminal justice system.
10. Ask the witness what their concerns are and be ready to address them.
 - *Will I be have to come to court.* – *Will I be subpoenaed?*
 - *What questions will they ask me?* – *How will I get there?*
 - *Who will watch my kids?*
11. Make strategic disclosures to the witness and answer questions honestly if appropriate and you are not breaching any privilege.
 - *It's my belief that Joe was in the back seat, not Frank, is that right?* – *The theory of the gov't case from their papers seems to be that....*
12. Avoid disclosure that can later be construed as contaminating or intimidating the witness. You don't want the witness to tell the jury that it was you who told them where the murder weapon was found.
13. Always leave the witness with your themes ringing in their ears.
14. Give the witness the opportunity to have the last word.
 - *Is there anything you would like to add or change?*
15. Statement Strategies: Discuss with the defense team in advance and agree on strategy. Drafted on the spot? Drafted after consultation with counsel? Handwritten, tape-recorded, laptop w/ portable printer?
16. Sometimes the best result from a difficult interview is to establish a positive relationship with the witness that will allow you to talk to them in the future.

AFTER THE (NON) INTERVIEW

1. Difficult interviews do not end when you leave the house. If you need a declaration or testimony, prepare the witness during the interview so it is not a surprise two weeks later.
2. Document your contact with the witness in detail.
3. Only make promises to a witness you know you can keep.
 - *I'll call you with the name and number of the prosecutor's witness coordinator so that you can be sure to get your witness fees.*
 - *I promise you the defense attorney will not subpoena you.*
4. Make sure the door is left open for future contact and follow-up questions.
 - *Here are my numbers, please call if you think of anything new or need to speak with me.*
 - *I want to be sure that I am accurate, so is it ok if I call you if I need to clarify something in my notes when I type them up?*
5. Follow Up
 - a. Follow through with any promise you've made. This will distinguish you from the government in a positive way.
 - b. Send them a thank you letter whether they talk to you or not. If they have refused an interview ask them in your thank you letter to please reconsider. Follow up in person or with a phone call after your letter and try it again.
 - c. Call them back two days later, thank them, and ask if they have remembered anything new.

Note: These materials draw from the experience and hard work of many investigators. In particular, we want to thank Eric Mason of the Mason Investigative Group (<http://mason-ig.com>) for contributing the original outline on which this presentation is based.

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A Team Approach to Criminal Defense

INTERVIEWING TECHNIQUES:

FRIENDLY, NEUTRAL AND HOSTILE WITNESSES

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INTRODUCTION

NOTE: Please read this article in conjunction with the very well-written piece entitled, The Difficult Interview: How to Get Past the Pitbull, On to the Porch, In the Door & At the Table, by Madeline Larsen and Doug Cole, included on the CD.

Interviewing witnesses is an art that requires training, practice, and preparation. The “art” is persuading a witness that you want to hear everything s/he knows or thinks about the matter you are investigating.

We rarely have time to think about what it is we do, and what it is that makes us successful (or, less frequently, not so successful). Our strengths lie in being able to relate to people and think on our feet. We can build on those strengths, however, by reflecting on our work and consciously honing our techniques.

In this article, I briefly describe three types of witnesses – friendly, hostile, and neutral – and some of the techniques we can use to get the most out of the interview.

For every interview, nothing substitutes for thorough preparation. Madeline Larsen and Doug Cole have done an excellent job of describing what it means to be thoroughly prepared; I will not repeat that here. Suffice it to say, the Boy Scout motto should be adopted by all.

Adopting a goal or goals for each interview is a critical aid in focusing our efforts. The goal might be as minimal as getting a look at a hostile witness, or confirming a single fact. It might also be as lofty as neutralizing a hostile witness by giving them new information.

On the other hand, the goal should never prevent us from getting more than we expect. Our task is to uncover facts; our joy is in being surprised by the facts.

FRIENDLY WITNESSES

Friendly witnesses, those with a favorable disposition toward our clients, are often (but not always) the easiest to interview. They are generally willing to meet with us and give us the time necessary to conduct a thorough interview. They are generally willing to tell us everything they know.

Two dangers with friendly witnesses occur:

- (1) We let our guard down and do not adequately prepare for the interview;
- (2) We have misread the witness and, for whatever reason, s/he is not actually friendly.

At the outset, therefore, we need to accept that **every** witness is potentially hostile or, at best neutral, and prepare ourselves accordingly.

Assuming a friendly witness, our technique is a funnel approach. After general introductions, we elicit a narrative from the witness that allows her to tell us in her own words what she knows. We rarely, if ever, interrupt the narrative, taking (mental) notes about issues that we want to clarify later. We can assist the narrator by asking open-ended questions, using phrases such as “tell me more about . . .” or “describe how . . .”.

Only after the witness has completed her story do we follow up with questions that will elucidate unclear material or seek additional detail. We might ask the witness to tell the narrative from a different perspective, e.g., chronologically if her rendition was not chronological or from another witness’s perspective if more than one person was present.

Finally, we want to repeat what the witness has told us to make sure that we have understood the witness correctly.

Friendly witnesses are excellent sources of leads to additional witnesses and evidence so we need to be sure we ask about those.

HOSTILE WITNESSES

Hostile witnesses are often not as hard to interview as we anticipate. If we remember that people who feel emotional about an event or person generally want or need to talk, we can use that desire or need to get the person talking. Getting the person to open the door (at least metaphorically) is the most difficult task. Once they have agreed to talk, either explicitly or implicitly, the battle is won.

Possible goals with hostile witnesses include (1) reducing the emotions; (2) learning all the bad facts; (3) developing impeachment material; and (4) soliciting their views about potential outcomes for plea and sentence negotiations.

The interview technique for hostile witnesses is generally the reverse of that with friendly witnesses. We begin with close-ended questions meant to get the person simply responding to our questions, then we slowly work on opening up the witness through expressing empathy, affirming what she has told us, and providing information that she wants to know. If we are successful, we can move the interview from close-ended questions to open-ended questions, which will elicit a lot more information.

With the hostile witness, we must have our questions at the tip of our tongue. We want to avoid getting bogged down in a discussion about **whether** the interview will happen to **what** the interview is about. Thus, in response to the question, "Why should I talk to you?", we want to say, "I just want to know [a specific fact]." The fact might or might not be of interest to us, but it should definitely be of interest to the witness.

A primary goal with a hostile witness (particularly a victim) is to reduce the hostility so that, by the time the witness testifies in front of a jury, the anger and rage is muted. Often, that means we must allow the witness to rage at us, and we must affirm their emotions. By absorbing the anger ourselves, we deflect it from our client. It is difficult to empathize with the witness while maintaining our emotional distance but it is an extremely effective technique.

Another important goal is to elicit **all** of the bad information so the attorney and client will not be surprised at trial or sentencing. If the witness believes we truly want to hear everything, she is more likely to be forthcoming. Thus, we do not dispute what the witness tells us; we accept and affirm it by repeating what they said.

Importantly, we want to elicit enough detail from the witness that she can be impeached if her version of events does not comport with the physical evidence or the testimony of others. When the witness gives us information that conflicts with other evidence, we want to repeat what the witness just said. This solidifies the fact and reduces the chance the witness will later disavow having said it to us.

Finally, if we are successful in moving a hostile witness to a more neutral or friendly position, we might want to give the witness information that conflicts with her version of events. For example, we might tell an eyewitness that something she thinks she saw is actually a physical impossibility. This is a risky technique and must be used only with the advice and consent of the attorney on the case. It can, however, move an eyewitness from a highly confident position to a less confident one, creating reasonable doubt for the jury.

Although hostile witnesses can be tricky to interview, they are often the most rewarding. Our first responsibility with them is to “do no harm.” If we remain friendly and professional even in the face of verbal abuse, we’re likely to be rewarded.

NEUTRAL WITNESSES

Neutral witnesses are those who are not favorably disposed to either side. They are often reluctant to be involved but are not emotionally disposed to be “hostile.” The initial goal with neutral witnesses is to establish a rapport and “win them over” so they are at least willing to talk with us. We need to understand what will motivate the witness to get involved.

In many respects, neutral witnesses are harder than hostile witnesses because they lack an emotional attachment to the case or client. Their willingness to become involved depends on building an emotional attachment to the investigator. Thus, we must use our persuasive talent to make them feel important and liked – to charm them into talking with us.

One successful technique is to assure neutral witnesses that a minimal involvement now will reduce the likelihood of a more intrusive involvement later. This should be done in a friendly manner, not in a belligerent tone. The message should be, “We want to resolve this without further litigation if at all possible but that requires us knowing what you have to say about this event,” rather than, “You can talk to me now or you can be subpoenaed to testify in court.”

Neutral witnesses can sometimes be persuaded by a plea to their sense of justice but, more often, they’re persuaded by thinking that they have minimal but powerful role to play. In response to an assertion that “I really didn’t see much,” we might answer, “But the little you did see may be crucial to resolving the case.”

The questioning technique you adopt with a neutral witness will depend on whether or not you are able to move a her to a friendlier position. If you’re successful, you engage in open-ended questioning; if you’re not, you ask close-ended questions.

Try to keep the witness talking as long as possible to ensure you have mined all of the information she is capable of providing.

CONCLUSION

The art of the interview is developing, in sometimes an amazingly short time, a relationship with a witness in order to achieve the goals that you and the attorney set for the interview. You will know you've succeeded if, at the end of the interview, the answer to your question, "May I call you again if I have more questions," is a resounding "yes."