



Interview With a Witness

Tips on conducting an informational conversation to build your case, from whom to talk to and what to ask to how to approach people and why it's so important to listen to what they have to say.

BY FRANK A. KING

Factual information on that new case you just signed up for can come from various places: the pleadings, discovery, documents, reports, photos, and other sources. However, nothing gives you the flavor of the strengths and weaknesses of your case like interviewing the fact witnesses on the ground and finding out what they saw and heard. Initial interviews often reveal facts not always found on paper or in physical evidence. Although these tips are written from the perspective of a civil defense lawyer in a labor and employment practice, many of them can be useful for plaintiffs' practice and other practice areas, as well as for a sole practitioner

or small firm. And these tips obviously are not intended for non-fact witnesses, such as expert, character, or predicate.

- 1. Know Your Case Inside and Out**—Outline the pleadings for all claims and defenses. What elements do you have to defend or prove? Add the pertinent Pattern Jury Charge questions so that you will be able to know which witnesses and what testimony will be important to your case.
- 2. Interview Your Client First**—Obviously, your client is the most important witness to the case and will be

able to identify other witnesses to bolster his or her story. But don't stop there. The most important witness you need to find out about is the one who is most dangerous to your case. This isn't necessarily the opposing party, but other witnesses who may be called by the opposing party. Find out who they are from your client and from the disclosures of the opposing party. Ask your client if they are neutral or adverse, and how receptive they will be to talking to you. Even if they are adverse, it is always worth a phone call to see if they would be willing to talk to you.

- 3. Make a List of Witnesses**—Starting with witnesses identified by your client and the opposing party, rank them in order of importance and create files for each one. Include in the file excerpts from pleadings or discovery where their names are mentioned and all other documents where their names appear, especially if they are the author or recipient of the document. Even if they were only carbon-copied, the witness may have some information. Interviewing the most important one first is one way to rank the importance of other witnesses and may eliminate some from the list.
- 4. Arrange for Face-to-Face Interviews**—In the case of a corporation, agency, or university, all of the witnesses may be located in one place. You may be tempted to have a mass interview to save time. Don't do it. In these public interviews, supervisors or Type A personalities may dominate the conversation and influence what the other witnesses may say. Always have one-on-one interviews.
- 5. Make Your Witness Comfortable**—Most witnesses, especially if it is their first time, will view the interview much like being interrogated by a police detective from a TV show. It is vitally important that you are calm and reassuring, and that the witnesses trust you. Otherwise, they will not be forthcoming and candid with you. Reassure them that everything they say is in the utmost confidence and will not leave the room. Impress upon them the importance of being completely candid, even if it means revealing embarrassing or personal information or saying something negative about a friend, relative, co-worker, or supervisor. Let them know that it is all going to come out eventually. If there is any bad news, or a "smoking gun," you want to hear about it so that you can deal with it now, as opposed to right before trial when it's too late to do any damage control.
- 6. Let the Witness Testify Freely**—Witness interviews are not a test for which witnesses study and then are graded. Handing over a document and asking them about it may refresh their memory, but it is more effective to find out what their strongest memory is by just asking about the incident—what they saw and what they heard. However, if they deny owner-

ship or authorship of an exhibit or document, it will be necessary to show it to them to make sure they can authenticate it. Don't stick too hard to your prepared outline—let the witness do a free-running narrative that will help him or her remember everything clearer. Ask follow-up questions to each statement, especially regarding inconsistent statements by other witnesses or inconsistencies with the documents and exhibits, until the topic reaches a logical end. Then pick up on your outline where you left off. Make sure you cover all issues, claims, and defenses by starting with general questions and boring down to the specific issue until you have exhausted the topic.

- 7. Listen to the Witness**—Make sure you focus your attention on what witnesses are saying and what they are not saying. Don't be so focused on taking notes that you miss out on subtle cues or the context of their statements. If you keep your focus on them, they will realize the importance of their statements and will be more willing to help you. Furthermore, your strict attention to what they are saying helps you assess the quality of their testimony. Finally, never forget to thank them for taking time out of their busy day to assist you and your client.
- 8. Ask for Documents, Emails, Notes, Pictures, etc.**—Many times, even if there is a litigation hold, or a request to produce all documents regarding the lawsuit, witnesses may remember something they may have forgotten about—a calendar, or some phone notes—that they had not produced before. They also may be able to point you toward the source of some other discoverable evidence. Make sure you follow up on those requests.
- 9. Ask Them for Deposition Questions**—One thing I always find useful is to ask the witness, "If you had a chance to ask the opposing party any questions you wanted, what would you ask?" I have been surprised by some of the insightful questions I have gotten and wouldn't have thought of otherwise.

Remember, this is just an initial witness interview. It is not the same as witness preparation for testifying in depositions or at trial. These interviews are for informational purposes at the beginning of the case, not for discussing direct and cross-examinations. Since most cases don't go to trial, that level of thoroughness is not necessary at this point, and you would have a chance to do it again right before trial. **TBJ**



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