



**Interviewing Complainants, the Accused and Other Witnesses,
and Evaluating Evidence**

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S T I L L M A N . E D U

Witness Interviewing and Evidence Gathering *Bona Fides*

INTRODUCTION

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Labor Litigator Lawyer, Sabin, Bermant and Gould: Labor Mediations, Unemployment and Worker's Compensation Cases.

Chairman of the Rent Leveling Board of Jersey City: Quasi-Judicial Body adjudicating disputes between landlords and tenants.

Goal today is a crash course in gathering and evaluating evidence, particularly testimony, to conduct a reliable, fair and impartial investigation.



Complainant and Witness Interviews



COMPLAINANT
AND WITNESS
INTERVIEWS

INVESTIGATE

- Who? - When?
- What? - How?
- Where?
- Why?



It's an Interview **NOT** an Interrogation

Interviewing and *Interrogation* are Not the Same:

An Investigatory Interview

1. There is an openness to gathering facts without bias.
2. Interviews are used in an investigation to gather information – objective facts.
3. Typically conducted with victims and witnesses.
4. Questions allow the witness to supply the evidence.
5. You ask open-ended and not leading questions. Leading questions can suggest answers the witness does not intend. Thus, you may contaminate the witness (es).
6. The process of inquiring through thorough, patient, unbiased research and inquiry or examination that is fair to all parties.
7. Truth-Telling (*does not mean sharing all information*)

COMPLAINANT
AND WITNESS
INTERVIEWS



It's NOT An Interrogation

Interviewing and *Interrogation* are Not the Same:

An Interrogation

1. There is a presumption of guilt.
2. Not trying to be impartial. (Law and Order example)
3. Designed to elicit incriminating responses that establish a person's guilt (think police or defense or plaintiff attorney).
4. You ask both **open ended** and **leading questions**. (**Famous Amos Cookies**)
5. The process of inquiring to solely garner a confession and/or gain facts to establish guilt.
6. You can lie.

COMPLAINANT AND WITNESS INTERVIEWS



GOALS OF THE INVESTIGATORY INTERVIEW



EVIDENCE GATHERING:
OBTAINING AND
COLLECTING
ACCURATE
INFORMATION
(SIGNIFICANT
EVALUATION
HAPPENS
AFTERWARDS).



ASSESS CREDIBILITY: OF
THE COMPLAINANT
AND OTHER
WITNESSES (ARE
THERE
INCONSISTENCES? IS
THERE A LACK OF
DETAIL TO BASIC
MATTERS?)



JUSTICE: THE IDEA THAT
PEOPLE ARE TO BE TREATED
IMPARTIALLY, FAIRLY,
PROPERLY, AND
REASONABLY, THAT NO
HARM BEFALLS ANOTHER,
AND THAT, WHERE HARM IS
ALLEGED, A REMEDIAL
ACTION IS TAKEN. BOTH
THE ACCUSER AND THE
ACCUSED MUST RECEIVE A
MORALLY RIGHT
CONSEQUENCE MERITED BY
THEIR ACTIONS.



KNOWLEDGE:
EPISTEMOLOGY OF
INTERVIEWING.
NO OPINION
JUSTIFIED TRUE BELIEF

THE PROPER MINDSET FOR
INTERVIEWING WITNESSES AND EVALUATING EVIDENCE
Avoid These at all Cost

Confirmation
Bias

Transference

COMPLAINANT
AND WITNESS INTERVIEWS



MAINTAINING THE PROPER MINDSET FOR INTERVIEWING WITNESSES AND EVALUATING EVIDENCE

“Confirmation bias is a psychological term for the human tendency to only seek out information that supports one position or idea. This causes you to have a bias towards your original position because if you only seek out information that supports one idea, you will only find information that supports that idea.” This is in opposition to doing more research or keeping an open mind to alternative interpretation of the facts. (WebMD. <https://www.webmd.com/balance/what-is-confirmation-bias>.)

Confirmation bias affects how we assimilate, interpret, and recall information. It describes how our perception of things can be tainted by our personal prejudices and assumptions.

CONFIRMATION BIAS



COMPLAINANT
AND WITNESS
INTERVIEWS



VARIOUS TYPES OF CONFIRMATION BIAS



Biased Search

Interview and Evidence
Gathering Stage

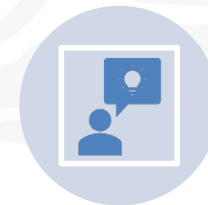


Occurs when you only look for information that supports your preconceived conclusion.



Biased Interpretation

Adjudication Stage



Occurs when you interpret evidence and information in a way that supports your opinion or conclusion, despite other alternatives. Biased interpretation maintains stereotypes. Even if a witness or the accused doesn't fit every stereotype of their group, you might remember things about them that support your conclusions about that group.

AVOIDING CONFIRMATION BIAS

Methods

1.

Catch Yourself in the Act: Before you let your mind select a position ask yourself:

Did you replace unknown or incomplete information with a biased opinion?

Have you given serious thought to "I may be wrong"?

2.

Listen to contradictory viewpoints.

Engage with diverse opinions and encourage alternate viewpoints and perspectives of others.

Try to see information beyond your circle of confidence.
What barriers do I have that limit me. How can I get rid of them?

4.

Build and then trust in the integrity of the Judicial Committee or other adjudicatory body as an accountability group. We sometimes cannot see that others see clearly.

3.

Frame the Questions Correctly During Interviews

Ask open ended questions.

Leading questions often align with confirmatory evidence that is compatible with your biased beliefs. :

CONFIRMATION BIAS



MAINTAINING THE PROPER MINDSET FOR INTERVIEWING WITNESSES AND EVALUATING EVIDENCE

Transference is a phenomenon that occurs when people redirect emotions or feelings about one person to an entirely separate individual. This can occur in everyday life.

Healthline.com

<https://www.healthline.com/health/mental-health/transference#different-than-projection>.

Transference is the unconscious transferring of experiences or perceptions from one, interpersonal situation to another (Jones, 2004). Emotions, opinions, and other thoughts are projected onto another being.

A. C. Jones, Transference and Countertransference. Perspectives in Psychiatric Care, 40(1), 13-53, (2004).

Example

A complainant or other witness may view a workplace disagreement and conclude that the supervisor, teacher or staff person was hostile because of being reprimanded previously by that person. Another may believe the employee was being insubordinate because of a prior negative experience with the employee, or a prior positive experience with the supervisor.

Transference



HOW TO INTERVIEW COMPLAINANTS (AND OTHER WITNESSES)



HOW TO INTERVIEW
COMPLAINANTS
(AND OTHER
WITNESSES)



Start with the Proper Mindset

Less is NOT More!!

The more information you gather from witnesses, the more likely you will determine exactly what happened during the incident.

Objectivity in Interviews and Weighing Evidence

*We cannot be confident of **knowing the truth***

Important to maintain a balance between “benefit of the doubt” and “not immediately accepting everything you hear as true or false.” Avoid making assumptions. People lie or are mistaken. Therefore, an objectivity state of mind is crucial when interviewing both **complainants** and the **accused**.

HOW TO INTERVIEW
COMPLAINANTS
(AND OTHER
WITNESSES)



Building Trust

Empathy

Show empathy to the complainant and the accused. Your trustworthiness is the key to your credibility! Many witnesses are concerned about retaliation and the consequences of cooperation. The extent of their cooperation often depends on your professionalism, experience, and trustworthiness. Present yourself accordingly.

Empathy is the ability to understand and share a person's feelings. If you're an empathetic person, you can listen to what someone else has to say without judgment. This ability to connect is not limited by your own experiences. An empathetic person can feel someone else's emotions, regardless of their personal experiences. BetterUp.com

Feeling what someone else feels while maintaining objectivity.

Allows the Interviewer to actively listen to what the complainant or accused has to say.

Not judging. Being objective.

Being aware of nuances and non-verbal cues.

Discovering their perspective.

Acknowledging everyone's feelings.

Building Your Credibility

“Thank you for coming in. This is an unfortunate situation, and we know that you are anxious. We promise to conduct a fair and impartial investigation as quickly and as thoroughly as possible. On our end, we will keep your statements and the details of the investigation confidential. We suggest that you do the same to ensure a fair process.”

HOW TO INTERVIEW COMPLAINANTS (AND OTHER WITNESSES)

*Interacting with the **Complainant***

Stress that you are taking their complaint seriously. Explain the process you will follow. Reassure them that no retaliation will come to them because of filing a complaint. Explain how to report any concerns. “I sense you are hesitant to talk to me. Help me understand why you feel this way.” Be patient and allow the Complainant to share whatever is on his or her mind.

*Interacting with the **Accused***

He or she may be the hardest person with whom you will build trust. Therefore, take the time to explain each step in your process. Assure them that you will conduct a thorough investigation that is fair, and offer them the opportunity to explain the facts.



HOW TO INTERVIEW COMPLAINANTS (AND OTHER WITNESSES)



The Interview/Investigation Process

1. **The Complainant/Accuser should be the First and Last Interview:** The first interview extracts details. NO judgments can be made about the complainant's or accuser's sincerity, credibility, or perception at this stage. Never, ever conduct interviews alone!
2. **Be prepared.** Make an outline of the points you want to cover. Don't write out questions. Adjust the interview based on what you learn, and ask useful follow-up questions. The answers will suggest the next questions.
3. **Conduct the Interview in an Appropriate Environment.** Tell the witness how long the interview will take. Conduct the interview in a professional environment.
4. **Listen intently AND Watch the Witness.** Good interviewers rely more on their eyes and ears than their mouth in interviews. Two people are better. One can concentrate on the witness while the other writes. Take your time. Don't interrupt the witnesses' answer.
5. **Ask Open-Ended Questions:** This type of questioning allows you to gather as much information as possible. Avoid asking questions that are designed to suggest an answer (leading questions).

The Interview/Investigation Process

HOW TO INTERVIEW COMPLAINANTS (AND OTHER WITNESSES)



6.

Ask short, simple, concise questions.
Avoid long, unfocused stream of consciousness questions. Ask a series of short, simple questions. Short, clear questions make it easier for the witness to understand the question and for you to evaluate the answer.

7.

Insist on complete, responsive answers.
Did the witness really answer the question? Often witnesses do not. Keep asking until you receive the answer to your question.

8.

Collect everything.
Always get the dates of key events, all the persons present, what was actually said by whom, whether a written record exists, etc.

9.

Press for detail.
Details are crucial. Drill this into your heads. "W-W-W-W-H format:

Who?
What?
Where?
When?
How?

The Interview/Investigation Process

HOW TO INTERVIEW COMPLAINANTS (AND OTHER WITNESSES)

10. Accused Interview: Focus on determining if the accused corroborates or refutes the allegations. You might obtain rebuttal information through the interview, information about possible bias or motive to fabricate, or reasons to explain why the conduct was reasonable or unreasonable under the circumstances.

11. Nature of the Investigation: The accused should be told the nature of the investigation, and the possible ramifications.

12. Neutrality and Fairness Assurance: The investigator should be sensitive to the accused's fear of losing his or her job as well as damage to reputation. Assurances should be made that no conclusions will be reached until the investigation has been concluded, and that it will be conducted as discreetly as possible.



HOW TO INTERVIEW
COMPLAINANTS
(AND OTHER
WITNESSES)



The Interview/Investigation Process...continued

Don't hesitate to ask sensitive questions directly but ask them politely. Fight the fear of embarrassing or upsetting the witness.

Example: Prior Complaints and Other Possible Motivations:

Has the accuser made prior complaints about the accused or anyone else? Has the accuser discussed the allegations with anyone else before the investigation? Does the complainant have any potential bias against the accused. For instance, did he or she recently get passed over for a promotion? Is he upset about his last salary increase? Was she recently transferred? Was there a recent break-up or other personal relationship?

What Other Sensitive Questions Might You Need to Ask?

Don't Contaminate a Witness

An interviewer can contaminate witnesses inadvertently by sharing information learned from prior witnesses. This makes it difficult to separate what that witness observed and perceived first-hand from what she/he learned from the interviewer.

Do not suggest facts or perceptions during interviews!!

Do not reveal any information obtained from other witnesses UNTIL all information has been exhausted from the current witness! The second round of interviews is usually the best time to strategically use information obtained during prior interviews to rebut testimony to gain further clarification, to observe if a witness changes their story materially.

The Interview/Investigation Process...continued

HOW TO INTERVIEW COMPLAINANTS (AND OTHER WITNESSES)



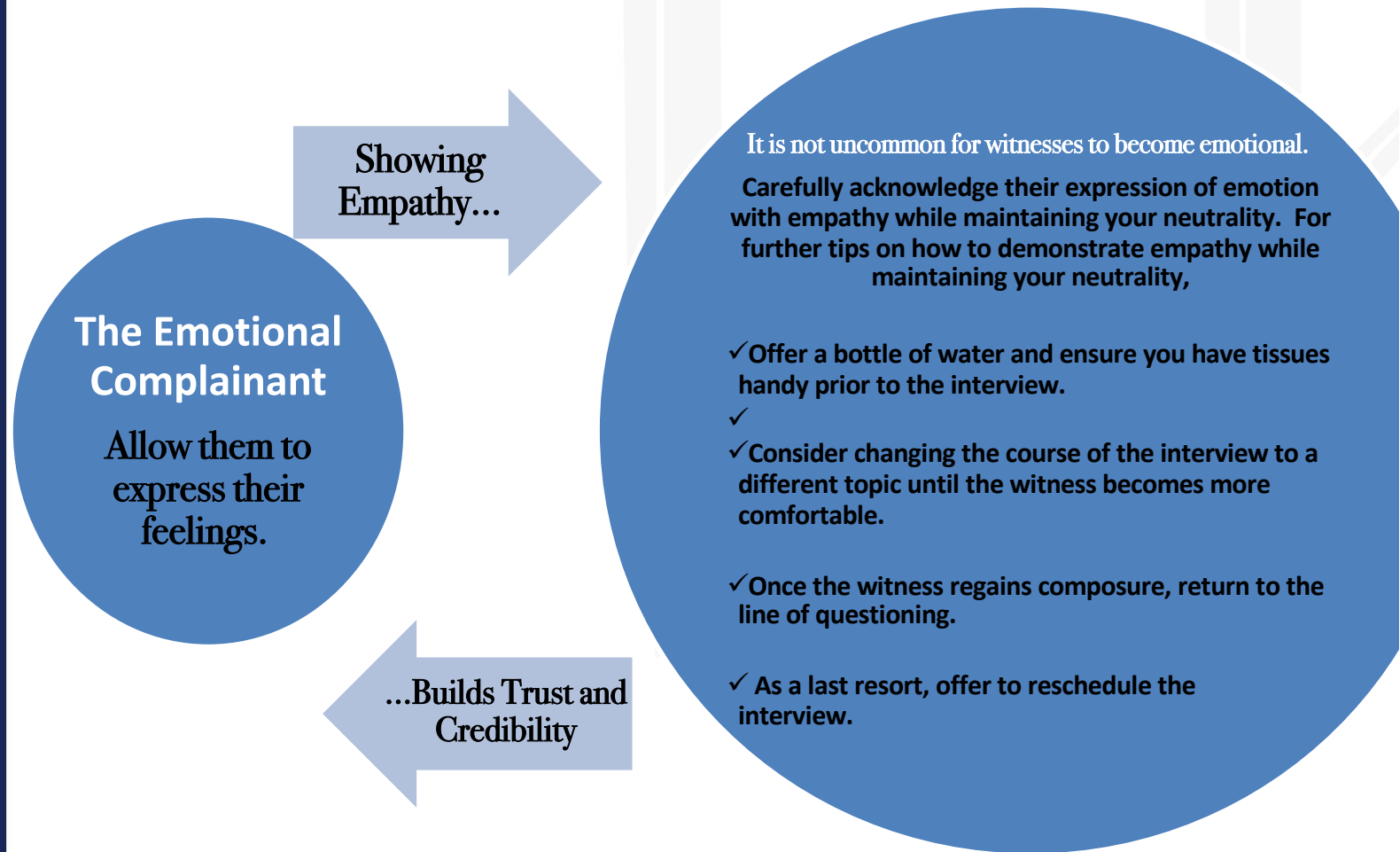
The Reluctant Complainant

- A Complainant may be reluctant to talk with an investigator for many reasons.
- They fear retaliation by the Accused or do not wish to see the Accused “get in trouble.”
- Faced with the reality that an informal complaint would result in a formal investigation Complainants hesitate to cooperate.
- May be reluctant to share information.
- Be patient and allow the Complainant to share whatever is on his or her mind. This approach may cause the Complainant to reveal what they are experiencing.
- Thereafter, their answers may lead to additional questions that ultimately get to the heart of their complaint.

HOW TO INTERVIEW COMPLAINANTS (AND OTHER WITNESSES)



The Interview/Investigation Process...continued



EVALUATING EVIDENCE



4 Types of Evidence in General

1. Real Evidence

- Physical evidence: pictures of injuries, guns, knives, blood samples, etc.

2. Testimony Evidence (statements)

- Including writings such as emails and letters, casual statements made by witnesses to friends, co-workers, strangers, family members, by which the witness provides facts.

3. Demonstrative Evidence

- Diagrams, pictures of where things occurred.

4. Documentary Evidence

- Letters either in hard or soft copies.

GATHERING EVIDENCE: 4 TYPES

The Adjudicatory Group Start with the Proper Mindset

EVALUATING EVIDENCE

The Judiciary Committee and other adjudicatory groups should strive to help each other be better thinkers, to be more open-minded, and help each other evaluate their own thoughts before fixating on a specific opinion.

Hold each other accountable to make it difficult to drift to confirmation bias.

Have an openness to listen to diverse perspectives.

Create a safe space so that a member may admit that he or she was wrong (we all are at some point).

Reward and reinforce honesty.



EVALUATING
EVIDENCE
TESTIMONY



Witness Credibility
The Truth? A Lie? Mistaken?

Evaluators of Facts

- As evaluators the facts, you determine the truthfulness and accuracy of the testimony of each witness.
- You must decide whether a witness told the truth, was accurate, testified falsely or was mistaken.
- If you find that any witness has intentionally testified falsely as to a material fact (e.g., not simply the time of day or date), consider disregarding witness's entire testimony.
- You may disregard so much of it as you find was untruthful and accept so much of it as you find to have been truthful and accurate.

EVALUATING EVIDENCE

WITNESS CREDIBILITY

RELEVANCE

WEIGHT



Some of the factors that you may wish to consider in evaluating the testimony of a witness.

- Did the witness see or hear the events about which he or she testified?
- Could the witness recall the events accurately?
- Was the testimony of the witness plausible and likely to be true, or was it implausible and not likely to be true?
- Was the witness' testimony **consistent** or **inconsistent** with other testimony or evidence in the case?
- Did the **manner** in which the witness testified reflect upon the truthfulness of that witness's testimony?
- Did the witness have a **conscious bias**, **hostility** or some other attitude that affected the truthfulness of the witness's testimony?
- Did the witness show a bias that the witness may have even unknowingly acquired from stereotypes, gossip, and attitudes about a person or groups of people? Did that bias impact that witness's ability to be truthful and accurate.
- Was the witness coerced or encouraged to lie?

IN GENERAL



Some of the factors that you may wish to consider in evaluating the testimony of a witness...

1. You may consider whether a witness had, or did not have, a motive to lie.
2. If a witness had a motive to lie, you may consider whether and to what extent, if any, that motive affected the truthfulness of that witness's testimony.
3. If a witness did not have a motive to lie, you may consider that as well in evaluating the witness's truthfulness.
4. You may consider whether a witness hopes for or expects to receive a benefit for testifying ("Let's get rid of that lady").
5. You may consider whether a witness has any interest in the outcome of the case, or instead, whether the witness has no such interest.

Examples?

MOTIVE AND BENEFIT



Some of the factors that you may wish to consider in evaluating the testimony of a witness

1. Consider whether a witness's testimony is consistent with the testimony of other witnesses or with other evidence in the case.
2. If there were inconsistencies by or among witnesses, you may consider whether they were significant inconsistencies related to important facts, or instead were the kind of minor inconsistencies that one might expect from multiple witnesses.
3. You may consider whether a witness has engaged in prior conduct of falsehood and if so, whether and to what extent it affects your evaluation of the truthfulness of that witness's testimony. You consider whether a witness's criminal conviction or conduct has affected the truthfulness of the witness's testimony. Does the witness have a reputation for honesty, or the contrary?

**CONSISTENCIES AND
INCONSISTENCIES &
PRIOR CONDUCT**



Several factors affect the weight of evidence – its reliability and persuasive power

Witness Credibility and Reliability = Weight afforded to the evidence
(Its reliability and persuasive power).

Source of Evidence: Refers to the basis for a witness's knowledge: Does the witness know for a fact, or is the testimony what the witness overheard from the street committee, or what the witness supposes or thinks might have happened? *Direct personal knowledge* is weightier than information overheard from another, or through supposition.

Direct Evidence: As the name implies, it is evidence that tends to prove a fact directly. It is the strongest method of proof, – for example, a statement from an eyewitness, the confirmed email or text message in a sexual harassment allegation.

Corroboration: Look for evidence that *corroborates* the statements of an important witness. If a witness claims that he/she was harassed, or did not harass, ask for copies of any documentary or electronic evidence or physical evidence to corroborate testimony (texts voice recordings).

WEIGHT OF THE EVIDENCE



QUESTIONS?

SOURCES

1. “The Basics of Evidence for Fraud and Corruption Investigators” <HTTPS://GUIDE.IACRC.ORG/>
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3. “CREDIBILITY OF WITNESSES.” NY COURTS.GOV
4. Healthline.com <https://www.healthline.com/health/mental-health/transference#different-than-projection>.
5. A. C. Jones, Transference and Countertransference. Perspectives in Psychiatric Care, 40(1), 13-53, (2004).
5. BetterUp.com

