



If the incident involves criminal activity;

**STOP!**

Do not take any further action until you have consulted with law enforcement officials.



## LEARNING MODULE C

### *How to Conduct and Interview*

*The following information is graciously provided by the California law firm, Atkinson, Andelson, Loya, Ruud & Romo which represents California's K-12 school districts.*

This Learning Module addresses the gathering of evidence both through interviews and through electronically stored information. You will need to determine, given the facts and circumstances of the particular case, the appropriate sequence of interviews in relation to collecting other evidence.

Here are some suggestions for getting the best results from your interviews with witnesses, complainants (if any), and respondents

#### TIPS FOR GETTING THE MOST RELEVANT EVIDENCE OUT OF AN INTERVIEW

- 1. Have confidence.** You are in a position to make a decision about what happened. Investigators are expected to make determinations, even when it's not obvious what happened. For example, if all you have is a "he said, she said" situation without other witnesses, it is dangerous to just "warn both parties to behave and call it a day." You must thoroughly investigate any corroborating evidence (which might include review of electronically stored information), evaluate the feasibility of each story, evaluate any biases or motives, assess the credibility of the interviewees, and make a good faith decision as to what occurred. Remember, if jury members are required to make decisions based upon limited witness testimony, you can do it, too.
- 2. Be prepared to make credibility determinations.** The Equal Employment Opportunity Commission (EEOC) recommends that an investigator consider several factors when making a credibility determination in a harassment or discrimination matter. These factors include:
  - a. The inherent plausibility of each person's story;
  - b. Corroborating evidence that would tend to support or contradict each person's story;
  - c. Each person's motive to lie; and
  - d. Each person's demeanor, including whether the person appears to be telling the truth when interviewed about the incident.
  - e. An employer may also consider the past record of the person, especially if there is a history of similar behavior in the past or if there have been false allegations in the past.
  - f. None of these factors are determinative, but they may be helpful when assessing the credibility of witnesses.
- 3. Be a good listener.**
  - a. To be a good investigator, you must be a good, neutral listener. Do not interject judgmental comments. For example, avoid comments like:

- i. “Wow, do you ever have a complaint!”
  - ii. “What’s the problem? That’s no big deal.”
  - iii. “Isn’t it kind-of nice he thinks you’re cute?”
- b. A good listener is sensitive to the interviewee and makes him/her feel that what they have to say is important. However, you should not empathize so much that you give the idea that you are on “their side.”
- c. A good listener notices gaps in the interviewee’s story and follows-up with more questions to fill in the gaps. For example, be aware of statements like:
- i. “Before I knew it, he was fondling me.” (Ask the witness to explain exactly what happened right before the touching began. Keep asking until the witness explains all the details.)
  - ii. “Eventually, she told me how she got the money.”
  - iii. “After a while, I knew he was angry.”
  - iv. “Afterwards, I went home.”
  - v. “One thing led to another....”
- d. A good listener recognizes information that should be reported to the employer. For example, relay the following types of information to the employer:
- i. “My lawyer says....” The employer’s lawyer may need to contact the interviewee’s lawyer.
  - ii. “I can’t eat or sleep or get out of bed....” Make sure the employer reminds the interviewee of any Employee Assistance Programs or mental health benefits through their health plan.
  - iii. “I’ve been injured by this....” Notify the employer of any Workers’ Compensation issues.
  - iv. “I’m not the only one that has been harassed by....” Follow-up by finding out who else was allegedly harassed, get the details, and notify the employer if you uncover more complainants.
- e. A good listener notices any new legal theories expressed by the complaint. For example, a complainant may say he has been subjected to general bullying by the supervisor, but during the interview, he may talk about being the “old guy” and how the “young” supervisor gives the younger employees all the good assignments. This could signal an age discrimination complaint.
- 4. Be a Keen Observer.** Make sure you observe the interviewee while he or she is talking. Determining credibility involves listening to what the interviewee says, how he or she says it, and observing what body language, if any, is used while he or she is saying it.
- a. Establish normal behavior patterns for the interviewee. For example, while you are making introductions or chatting about the procedures, observe the normal communication patterns of the witness. Does he or she use a lot of hand movements, grooming movements, fidgeting movements? Does he or she mumble, speak loudly, or speak softly? What kind of eye contact is normal for this person?
  - b. Observe the overall attitude of the witness. Is the witness cooperative, forthcoming, helpful? Is the witness reserved, angry, snappy?
  - c. Watch for expressions of emotion. Does it seem reasonable for the person to express emotion at that

time? Was there a lack of emotion? Was there too much emotion expressed?

**5. Ask Good Questions.** It may take some practice, but asking good questions leads to receiving clear information.

a. Avoid leading questions. For example:

- i. “Now, it’s my understanding you told her you didn’t like that, isn’t that right?” (Instead ask, “What did you do next?” “Did you say anything?” Et cetera.)
- ii. “Isn’t it true you knew about the complaint procedures?” (Instead ask, “Who did you tell?” “Did you file a complaint?” “Are you aware of any complaint procedures?” If so, “Which ones?” Et cetera.)
- iii. “You were upset, weren’t you?” (Instead ask, “How did you feel?” “Why did you feel that way?” Et cetera.)
- iv. “I’m sure you told your boss about it, right? (Instead ask, “Who did you tell?” “Did you tell anyone else in the workplace?” “Did you tell a supervisor?” If not, “Why not?”)

b. Avoid compound questions. For example:

- i. “What time did you get there and who did you see?”
- ii. “What did she say and what did you say?”

c. Avoid beginning a question with “Do you recall...” This type of question lets people off the hook too easily. A lazy, non-interested person responds, “No.” A person trying to avoid involvement says, “No.” This type of question makes it easier for a deceptive person to lie. For example, instead of asking, “Do you recall seeing the man hit the locker?” ask, “What did you see next?” Then, “Did you see the man hit the locker?”

d. If someone responds to a question with “I don’t remember” or “I don’t recall”, ask follow-up questions to ascertain if it could have happened, but they just don’t remember. Or, do they not remember the incident because it did not happen. (People tend to interchange these concepts when they say, “I don’t remember.”)

e. Allow for silence after you ask your question. Many people are uncomfortable with silence, so some investigators want to chatter during the silence by asking the question again or adding clarifications to the question. If the witness takes a long time responding, the interviewer should remain silent, observe the witness, and make note of the late response.

f. Don’t be afraid to ask your question again if the person fails to answer it. For example, you may ask, “What time was it when you received the phone call?” and the person responds that she couldn’t believe how late she was at work that night because she never works that late. Ask again, “What time was it when you received the phone call?”

g. Ask follow-up questions about other evidence. If the person says he doesn’t remember what time it was when the call came in, ask him if he told anyone when the call came in, if he kept a log of long distance calls, if his time sheet would note the time, if he kept a personal diary, if he had phone bills that would show the time of the call. You can also ask him questions to try to refresh his memory: Was it dark outside? Was it before or after dinner? Etc.

h. Ask enough questions that you can visualize the incident from start to finish with all the available details. For example, if a complainant says the respondent touched her buttocks, ask for more details: “Where on the butt - the top, middle, side, bottom? The left, right or center? Was it a pat, slap, caress,

grab, pinch, poke, brush-up? What hand did the respondent use? Was the hand open, closed, back of hand or front of hand? Which way was respondent's body facing?

## 6. Ask for a Demonstration.

- a. Have the witness demonstrate the behavior on himself or a willing support person. Take detailed notes and observe the person's ability to recall details. For example, if a witness says the supervisor screamed at him, ask him to demonstrate how loud it was.
- b. If feasible, have the witness show you to the scene of the event. If that's not possible, have the witness draw and label a diagram of the location. Observe the witness's level of detail. Ask the witness to sign and date the diagram.

## 7. Take thorough notes.

- a. This benefits the investigator because:
  - i. Notes keep a contemporaneous record of the evidence gathered.
  - ii. Notes demonstrate thoroughness of the investigation.
  - iii. Notes demonstrate neutrality of the investigator.
  - iv. Notes support the investigator's findings.
- b. But it is risky to investigator because:
  - i. Notes demonstrate failures in the investigation.
- c. Thorough notes should include the gist of the question asked, the content of the verbal response from the witness, and notation of any credibility issues such as paralinguistic or non-verbal behaviors.
- d. Consider using a form of short hand or typing your interviews so that you can take down a lot of information. Shortly after the interview, go back over your notes and fill-in any short-hand or gaps in your notes, if needed.
- e. Query: Should you take a written statement from the interviewee?
  - i. Legal minds differ regarding the benefits and risks of taking a written statement from all investigation participants.
- f. Query: Should you tape record the interview?
  - i. Legal minds differ regarding the benefits and risks of taking a written statement from all investigation participants.

## INTERVIEW THE COMPLAINANT AND WITNESSES

- 1. Interview the complainant:** In most investigations, you begin gathering evidence by interviewing the complainant first, instead of starting with the respondent or witnesses.
- 2. Interview witnesses:** Even though the complainant may have submitted a lengthy, written complaint, you must interview him or her to get all relevant details, to examine credibility, and to confirm there are no more allegations.
- 3. Who can be present during the interview with the complainant?**

- a. Can you interview the complainant alone?
  - i. Benefits for investigator include the opportunity to build rapport and ability to observe more natural behaviors.
  - ii. Risks to investigator include potential allegations of wrongdoing against the investigator.
- b. Do you allow the complainant to bring an attorney, union representative, spouse/partner, parent/guardian, and/or other support person?
  - i. Typically, a complainant does not have a right to bring an attorney or union representative to an investigation interview. However, most employers or administrators allow a non-disruptive support person to be present, especially if there are claims of sexual misconduct.
  - ii. Benefits for investigator
  - iii. Risks to investigator
- c. Remember your goal is to gather information from the complainant, not the support person.
- d. If a support person is too disruptive, set ground rules and consequences for not following rules.

#### **4. Give introductory comments to complainant**

- a. Confirm receipt of memo from management.
- b. Give copy of any pertinent policies or confirm receipt of policies.
- c. Ask if any questions about the memo or other policies and procedures.
- d. Explain the documentation process, if any.
- e. Offer assurances that the employer will take the complaint seriously.
- f. Notify complainant that he or she will receive the results of the investigation.
- g. Engage in other conversation to get to know the complainant before asking difficult questions.

#### **5. Gather the facts from the complainant**

- a. Ask the complainant to explain exactly what happened. Ask clarifying Who, What, When, Where, Why and How questions for each allegation.
  - i. If the complainant uses words like “harassment”, “hostile environment”, or “discrimination”, ask questions to establish whether the complainant is in a protected category, perceived to be in a protected category, associated with others in a protected category.
  - ii. If the complainant is not in a protected status, then the complaint probably involves unprofessional conduct or inappropriate behavior.
- b. If there is more than one allegation, it is often easier to ask the complainant to start from the beginning and go through each allegation in chronological order.
- c. Ask the complainant how the alleged conduct made him or her feel. Ask enough questions that you can determine if the complainant actually felt bad and if a reasonable person (of the same gender as the complainant) would find the conduct to be offensive. This is especially important in sexual harassment investigations.

- d. Ask the complainant if the alleged conduct affected the work environment. Ask enough questions that you can determine if the complainant's work environment was actually negatively affected and if it is objectively reasonable that the person was negatively affected.
- e. Ask the complainant about other eye-witnesses or other corroborating witnesses.
- f. Ask the complainant about what remedy they hope to receive. Caveat: It is not up to the complainant to determine what disciplinary action to take, but he or she may have an opinion as to what would be an appropriate remedy.
- g. After you have discussed all the allegations, ask the complainant if there is "Anything else?" Ask this question over and over until the complainant confirms that there is nothing else to report.

## **6. How do you deal with a reluctant complainant?**

- a. Try to ascertain why the complainant is reluctant: Afraid of retaliation? Afraid of losing friends? Afraid of the impact on the respondent? Afraid of not being believed? Afraid the complaint is silly? Afraid of revealing their own bad behavior? Afraid of getting caught giving a false allegation?
- b. In general, the employer has a duty to investigate once put on notice of a potential problem. This is especially true for civil rights violations. For example, sometimes an alleged victim of sexual harassment states that she does not want the employer to pursue the complaint, but that she just wanted to "vent" or talk about it. The employer must explain to the complainant that the employer has a duty to investigate under the law.

## **INTERVIEW THE WITNESSES**

*NOTE: In some situations, the investigator may interview the respondent next and then go back and interview all of the relevant witnesses. There are risks and benefits to this approach depending on the facts of each investigation.*

### **1. Determine which witnesses to interview first.**

- a. Interview the eye-witnesses and corroborating witnesses first because you want to talk to them while their memories are fresh. The character witnesses can wait until the end.
- b. Interview the witness with the most information first. Then, interview other witnesses.
- c. Other factors, including availability.

### **2. Who can be present with the witness?**

- a. Can you interview a witness alone?
  - i. Benefits for investigator include the opportunity to build rapport and ability to observe more natural behaviors.
  - ii. Risks to investigator include potential allegations of wrongdoing against the investigator.
- b. Do you allow the witness to bring an attorney, union representative, spouse/partner, parent/guardian, and/or other support person?
  - i. Typically a witness does not have a right to bring an attorney or union representative in an investigation interview. The employer or administrator may allow it.
  - ii. Benefits

iii. Risks

- c. Remember your goal is to gather information from the witness, not the support person.
- d. If a support person is too disruptive, set ground rules and consequences for not following rules.

**2. Give introductory comments to witness**

- a. Confirm receipt of memo from management.
- b. Ask if any questions about the memo or other procedures.
- c. Explain the documentation process, if any.
- d. Explain that the witness will not receive the results of the investigation due to confidentiality rules.
- e. Engage in other conversation to get to know the witness.

**4. Gather the facts from the witness**

- a. Eye-witnesses: Ask them to explain in detail what they observed. Ask Who, What, When, Where, Why, and How questions about each allegation that they were a witness to. No need to ask questions about other allegations if it is certain they were not present.
- b. Corroborating witnesses: Ask them to explain in detail what the complainant or respondent told them and how the complainant acted.
- c. Character witnesses: Ask questions to ascertain the credibility of the person they are vouching for.
- d. Ask for any relevant documents or other evidence. (For example, ask for copies of any relevant e-mails.)
- e. Avoid fishing expeditions with witnesses, especially if they have a reputation for gossip!

**5. How do you deal with a reluctant witness?**

- a. Avoid asking witnesses to participate, because most will say something like, "No, thank you." Instead, offer different times or locations for the interview, so they can choose what fit their schedule.
- b. Explain to the witness that their employer (or the school) needs to know what they witnessed.
- c. Explain the importance of witnesses in our system of justice.
- d. Explain the civic duty involved with providing relevant evidence.
- e. Reassure the witness of the employer's stand against retaliation.
- f. Reassure the witness that others are also participating in the investigation. (But do not give out names of other witnesses.)