

## **Special Issues in Interviewing Witnesses**

Complainants and respondents generally have a strong interest in being involved in an investigation. Whether it is to get their version of events on the record, to respond to allegations, or to correct or clarify information, there is generally a good deal of motivation to respond to an investigator's request for an interview.

Witnesses are a distinctly different matter. Witnesses are brought into investigations because they may have information that will be helpful to an investigator. Many witnesses, however, would prefer not to be involved in what they may perceive as a "war" between parties. Some witnesses have seen or heard things they would prefer not to explain or discuss, but they do not want to be put in a position in which they must lie to their employer. Still others resent being "dragged into" something they view as none of their business or may have concluded is "a bunch of nothing." This poses two dilemmas for an interviewer: (1) securing the cooperation of uncooperative witnesses, and (2) identifying and finding witnesses who have not been identified by others or have not identified themselves.

## **The reluctant or uncooperative witness**

Amelia is an employee in the maintenance department. According to her employer, she is well liked, has had perfect attendance, and has been given recognition for good teamwork. Amelia is the only person who can provide eyewitness testimony to an incident that occurred last week.

It is undisputed that there was a physical altercation between maintenance employees Pat Parker and Roy Melendez in the parking lot outside the main building. Each has presented a different story about what led up to the fight. Although the company has a strict policy against fighting, there is a precedent for relaxing the punishment in cases of clear self-defense. Roy states he was attacked from behind while Pat claims Roy obstructed and verbally provoked him to the point where his pushing Roy out of the way was justified.

Neither individual will concede to any facts alleged by the other. The only thing that both agree on is that Amelia, who was sitting on a bench outside the building waiting to be picked up, heard and saw the entire thing, and she was the one who summoned security when the fight escalated to a brawl.

Amelia is clear that does not want to speak with the investigator. When she is informed that she must cooperate with the investigation, she goes home ill and misses work for three days, the first time she has ever called in sick.

Dealing with a reluctant witness is a delicate balance of observation, analysis, and excellent listening. In anticipation of conducting the witness interview, an investigator will want to recognize and plan for several steps in dealing with reluctance:

- Identify the organizational imperatives for cooperation, such as policies requiring cooperation, and prepare to be sure that these are communicated early and in a non threatening manner.
- Identify any positive feedback provided to the

employee by the organization, such as excellent performance reviews, promotions, recognition or awards, and so forth.

- Prepare to determine completely and fully the nature of the witness' relationship with all primary parties in the investigation. This should include researching current and former organizational relationships as well as any known personal or familial relationships. This should include contacting the primary parties to obtain their description of the relationships.
- Identify the highest priority information that the witness is likely to be able to provide, and prepare to focus on that information should the witness appear likely to terminate the interview.
- Prepare for likely statements of a reluctant witness, such as, "I don't want to get anyone in trouble."

The investigator began the conversation with Amelia by asking questions about her work and history, and noting her accomplishments and successful tenure with the organization. In the course of doing so, the investigator also acknowledged that she was very important to the employer's investigation, and stated that she knew Amelia was aware how important it was to the employer that employees be honest and open with investigators. Aware from prior research that Amelia lived in a nearby community and was a neighbor of Roy Melendez, the investigator acknowledged the challenge of answering questions in such a high stakes investigation, and gave Amelia a chance to discuss her fears and concerns. When Amelia indicated that she did not see anything, the investigator gently reminded her that both Roy Melendez and Pat Parker had indicated they wanted her to tell the truth. As Amelia became emotional, the investigator focused on the simple question as to whether or not Pat and Roy were facing each other or talking to each other before the fight began, rather than on the fight itself. Finally, as Amelia continued to resist, the investigator stated that the sad reality was that Roy and Pat

were both likely to receive discipline or discharge without information that would clarify what happened, and appealed to Amelia's reputation as an honest and forthright person, pointing out that "no one gets in trouble for telling the truth."

The investigator, recognizing that Amelia had up until now, evaded direct questioning, changed questioning strategy. Rather than relying on open-ended questions, she posed a set of "yes and no" hypothetical questions, putting Amelia in a position of either lying or telling the truth with no middle ground. As a result, the investigator affirmed Pat Parker's version of events.

**Finding "hidden witnesses":** Sometimes it is simple to find witnesses—events happened within sight or earshot of someone, or an individual has volunteered to one of the parties that he or she has knowledge of an event. Sometimes, however, witnesses are not as readily identifiable. For instance, when events take place outside of the organization's physical boundaries, such as conferences or social events, or behind closed doors when it seems as though there would be no witness testimony available. In these circumstances, the investigator should think through the kinds of testimony that might be *available* and *helpful*.

After closing a significant business deal, Fred and Sam, two attorneys, went out together for a celebratory drink. They remained at the hotel bar for approximately one hour before joining the rest of their colleagues for a dinner with the clients. Later, Sam complained that Fred had made sexual advances while they were at the bar, and that while Sam had clearly rejected the advances, Fred played "cat and mouse" with Sam throughout the dinner. Both agree that there was a significant amount of alcohol consumed during the dinner and that the majority of attendees were intoxicated.

This example represents a common dilemma for

investigators attempting to ascertain events while stridently observing the “need to know” standard and also protecting the business interests of parties. The time in the bar involved only the two parties. Those in attendance at the dinner included clients as well as employees, and there is agreement that most would not be able to offer reliable testimony. Given that the parties are attorneys who represent their internal clients, the damage to the party’s professionalism could be substantial if the allegations were revealed. In this case, the investigator could struggle mightily to select one or two witnesses most likely to offer helpful testimony, gingerly avoiding questions sufficiently specific to reveal the complaint but specific enough to determine if the witness observed anything amiss. The likelihood that asking “cagey” questions of those in attendance at the party would generate speculation is high.

The best course in this matter, rather than attempting to surgically extract relevant testimony, might be to consider that at any party, and certainly at any bar, regardless of the state of the intoxication of the attendees, there are servers who are omnipresent, presumably sober, and observant. In this case, the investigator could take photographs of Sam and Fred and present them to the bartender or cocktail server, waiters, or bus people at the bar and party, asking if they recall seeing these individuals and whether they observed or heard conduct or language that made it seem that there was a romantic or sexual interest being expressed. By turning to the servers, the damage to the business deal and relationships is not an issue, and there is far less risk of organizational “leakage” in terms of privacy violations or professional harm.

Similarly, when things occur “behind closed doors,” witnesses can often at least verify the whereabouts of the parties, should that be in dispute. Sometimes, it is a witness’ observation that someone intentionally followed someone into or out of a room that can tip the scale on credibility.

With witnesses, the investigator must be careful to ask only those questions absolutely necessary; this means that

## **The Dynamics of a Harassment Complaint**

A complaint is not a simple thing. By the time an employer has received a complaint of harassment or discrimination, a complex set of interpersonal and intrapsychic processes have coalesced to generate that complaint. In fact, a complaint of discrimination or harassment is the logical endpoint in an often-predictable pattern involving employee perceptions and expectations, employee disengagement, and organizational practices.

Every employer knows that complaints of harassment and discrimination are time-consuming, complex, and often disruptive. They involve tangled webs of complex issues. As a result of dealing with complaints that are messy and generally mired in interpersonal conflict, managers, human resources professionals and attorneys can become cynical about the motive and purpose of a complaint.

The perception of a complaint's validity is more than occasionally shaded by the complainant's prior conduct and performance, or by prior complaints he or she has made. Given a complainant's rocky employment history or turbulent relationships, a complaint may be viewed, on its face, as suspect. As a result of this perception, a paradox ensues; *the manner in which employers respond to complaints can result*

*in escalation, rather than resolution, of the matter.* As an investigator, one cannot be drawn into similar thinking. The human tendency to prejudge is a dangerous one for a fact-finder. The best way to avoid such prejudice is to understand why those things that might appear to make a complaint less credible are in, fact, the things which, if not credibility enhancing, can at least be explained in a manner consistent with truth-telling.

Over nearly 20 years, Sepler & Associates has conducted informal and formal research into the thoughts, feelings, and experiences of individuals from the moment they recognize they have a problem until the time they make a complaint. I have further explored their decision-making once they choose to complain. Although chapter 3 focuses on the perceptions of a complainant, this chapter will discuss the psychological and organizational processes that are underway up until the time a person *becomes* a complainant.

A case to consider:

Barbara Jones is employed by Redword, a Fortune 500 company. She has worked in the finance department for eight years, first in a clerical position and then in professional positions of increasing responsibility to the top nonmanagerial position as senior account representative. She is eligible bonuses and has received modest bonuses each year. She received an achievement award in her third year of employment. Her performance reviews were unremarkable until the prior year, when she received several Ns (needs improvement).

Barbara works in a group of eight employees—two male and six female—all of whom have been with the company five years or more. They report to James Alton, a career manager with Redword, who has supervised this group for 15 years. James is caucasian. Barbara and two of her colleagues are African American. One colleague is an Asian immigrant. The rest are Caucasian.

Barbara has filed a complaint of harassment and discrimination with Redword's human resources department.

She claims that there has been inappropriate (racially and sexually charged) humor used by her coworkers and between James and her coworkers—both male and female—for six years.

A recent selection of her coworker, Monica Sands, to attend a conference was based on James's preference for white employees; Barbara and one other African American employee were denied the opportunity to attend despite submitting requests to attend for three and two years, respectively.

James is harsher with Barbara and other African American employees in regard to errors and is more rigid in applying rules and regulations with African American employees than with the other employees. This has become worse during the past year, when James began documenting even her most minor infractions while ignoring the same infractions in others. James has asked Barbara inappropriate questions about her personal life, including asking about her dating life and evening activities.

While the investigation is ongoing, James has already contacted the investigator to ensure that she is apprised of the following:

- Barbara has recently been placed on a performance improvement plan (PIP) due to declining productivity and a lack of apparent willingness to make needed improvements. PIP employees are not eligible for out-of-state travel.
- Barbara has been written up for attendance issues three times in the past two years, and has been coached informally about disappearing from her work area. She has also been spoken to about time wasting and professionalism.
- Barbara was the subject of an informal complaint by two coworkers last year for being disruptive, and for excessive nonwork discussion. No record was made of the complaint and no action was taken. Instead, the coworkers rearranged their cubicles to minimize disruptions.

- Barbara has, until recently, been very open and forthcoming about her personal life. In fact, she has directed several coworkers and James himself to a blog she writes about her dating experiences, which includes some suggestive content.

Since Barbara filed the complaint last week, two coworkers have commented on feeling uncomfortable with her, since she stares at them and makes hostile faces.

This case has several elements that point to some typical patterns and underlying dynamics of harassment cases:

- Reporting takes a long time (six years in this case).
- The complainant's own conduct or reaction to prior conduct makes claims of unwelcomeness suspect (in this case, the complainant discusses her dating life, suggesting that she may signal that she welcomes the very personal discussions about which she complains).
- Possible inappropriate conduct. (Is she writing the blog on work time? Is her discussing the blog with coworkers appropriate?)
- Performance and attitude issues (performance improvement, subject of prior complaints, and coaching regarding her own conduct).
- Relationship issues (coworkers have complained about her, and current issues with staring or making faces).

Since an investigator will encounter one or more of these dynamics when investigating harassment, discrimination, and other complaints, there are several key concepts and models that will be helpful to review in order to best deconstruct those dynamics when investigating complaints.

**Declining immunity:** Both the complainant-to-be and the ultimate respondents play a role in the extraordinary length of time it can take for someone to complain about

workplace misconduct. The combination of habit and tolerance create a lethal incubation period that makes these cases particularly difficult to understand when conducting an investigation.

*Declining immunity* is a term that describes the human propensity to feel more and more troubled by conduct over time, despite the fact that the conduct has remained generally consistent. A simple way to explore this is by examining a typical marital situation *and* reacting to a spouse's or partner's habit:

You are in love. Your heart flutters each time you think of your companion. You have a sense of wonder and excitement in your life, and you can barely concentrate on worldly matters as you delight in the new and wonderful relationship that is unfolding. The target of your affection is terrific. Everything about this person fascinates and attracts you—from his or her smile, to the way this person speaks, to his or her little eccentricities. You even think that funny way he or she sniffs when reading is adorable. Almost puppy-like, you think, how earnest this person is when reading, that he or she doesn't hear these little snorts. It is really adorable.

Some time has passed now. The early stage of infatuation has become a less cataclysmic affection as you have settled into a more committed relationship. Yes, this person is still "the one," but real life has set in and occasionally small challenges arise. During this time, you realize that when you both sit together reading, as you so enjoy doing, the unconscious sniffing of your partner has become a bit distracting. It is such a small thing but probably worth nipping in the bud. "Darling," you say, "I love you so....but there is a tiny little problem I'd like to address with you." In the most loving and supportive way, you tell your beloved the sniffing distracts you, and you ask him or her to try to be more aware of it. Distressed at your distressed, your partner apologizes and readily agrees, and for a period, your shared reading time is blissfully silent.