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# **WITNESS INTERVIEWS**

## **In Criminal Defense Investigations**

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## In Criminal Defense Investigations

The private or defense investigator is the attorney's link to information and evidence relevant to a criminal defense investigation. The investigator is entrusted with a responsibility to seek out those individuals who might have knowledge of a crime and to speak with them. This article does not deal with the content of a witness statement, but emphasizes the methods and goals of a witness interview.

### THE GOAL – TRUTH?

"Truth" is not the goal of a witness interview. "Facts" and "Information" are the objective. Truth is a subjective concept that each individual perceives as being "right" or "undeniable." In the same way that each person believes his political or religious view of life is accurate, so to do individuals involved in a crime believe that their perception is indisputable. Obviously, each fact is information and evidence as understood or recalled by the witness. Unfortunately, we have come to learn that witness identification is frequently faulty. We know that memories change over time. Recollections are skewed by what has been discussed by others. Therefore, we are seeking as much information as possible so that we can eventually link the pieces of this puzzle in such a manner as to better understand the events. Each person has not only their own physical perspective, but their own personal perspective from prejudice. We all comprehend events based upon our backgrounds, likes, dispositions and points of view.

### TIMELINESS

Law enforcement always gets the first bite of the apple. Frequently, they also get the second, third and fourth as well. Independent private or defense investigators do not generally have the pleasure of seeing a crime scene until after the fact. In post conviction cases (PCRA and Habeas) the investigator is sometimes not privy to the documentation, crime scene or evidence until years following the event. Therefore it is even more important for the investigator to have knowledge of what has already been done and by whom. All evidence, reports and test results should be reviewed prior to initiating an investigation. This is a process that may well encompass dozens of file boxes of transcripts. If documentation has not previously been gathered than the investigator should request it. Next the investigator should absorb the information in police reports, autopsy reports, witness interviews and trial transcripts before asking a single question of a single witness.

### THE APPROACH

The investigator should never misrepresent himself or allow the witness to believe that he is a member of law enforcement. Identification should always be shown so that there are no adverse ramifications. Be honest with all witnesses. In other areas of investigation it is sometimes acceptable to use ruses or pretexts. However, in the sphere of criminal investigation it is generally frowned upon. The investigator suffers from both a good and bad image. Many people do not wish to get involved with anyone connected to a crime. However, the mystique of the private investigator, as glorified in mass media, can sometimes be of value. Often, the investigator will get a foot in the door when an attorney will be dismissed outright. Many people are extremely leery of lawyers. Be respectful of your

witness. Talk a bit before getting into the meat of the matter. Allow the witness to recognize that you are another human being doing your job. This is not personal. You are not the advocate, you are the information gatherer. You are not the person who ultimately decides to pursue a suit or bring about a court hearing. You are the individual who will slowly and systematically speak with everyone and anyone who has touched this case. By explaining this you are reassuring the witness who is afraid of being singled out. At the same time you are informing the witness of his or her importance.

The burden falls upon the investigator to do the following:

**1. Understand the nature and details of the charges.**

Read all available information prior to embarking upon an interview. A client interview should pre-date any witness interviews to obtain knowledge about each potential witness. This prepares the investigator and provides needed background. Witnesses have frequently been interviewed by the police and a report of their statement may be available for review. It is strongly suggested that the investigator visit the crime scene before beginning any interviews. Having an image of the location allows the investigator to better understand the answers provided by the witness. Being able to pinpoint the place from which the witness observed activity is essential. It also necessitates communication with the responsible attorney to determine any theories of the case that he/she has considered.

**2. Identify all individuals to be interviewed.**

A cast of characters is suggested which is more than a witness list, but less than an entire transcript. It is an ever changing document that identifies each individual mentioned in any documentation relevant to the crime. It identifies all information known about that person and their relationship to others. With this as a starting point, a witness list can be amassed. Identify the appropriate individuals to interview in an intelligent sequence. Maximum information can thus be gathered before one person "shuts down" other witness's accessibility. When interviewing members of a jury, for example, it should be remembered that often jurors establish bonds during a trial and keep in touch afterwards.

**3. Locate witnesses prior to proceeding to their residence or business.**

Several prominent text books suggest that the investigator should make appointments for the witness to meet at the investigator's office. It is this investigator's opinion that initial interviews should be conducted at the residence of the witness. Being in the comfort of one's own home tends to put the witness at ease. A home visit also provides the investigator with a better knowledge of the socio-economic and physical influences that might impact upon a given statement. The investigator must find the correct witness and his/her physical address. Police reports are an excellent starting point as they frequently include full names, dates of birth and social security numbers of the individuals being questioned.

**4. Preparing for the interview.**

The investigator should identify the purpose of the interview and anticipate relevant questions that will help to clarify the crime. Preparation includes having the right instruments with which to take notes and document information. It is suggested that appropriate forms for witness statements or declarations be available in the event that it becomes necessary to memorialize a witnesses words on the spot. Before taping a

conversation with a witness, confirm with the attorney that this is the desired method of documentation. In fact, before putting anything in writing, insure that it will not adversely impact upon the attorney or client's needs.

#### **5. Appearance and personality.**

The investigator would be well advised to understand the individual he/she is to interview. While this is a more relaxed society than one in which many of us were raised, it is still respectful to dress appropriately for the occasion. Therefore, it would be advisable to interview attorneys and business persons while wearing a suit or at least more than casual business clothing. When seeing persons living in rural areas of our country in their own abodes, it would be suggested that neat, clean and casual is more appropriate than dirty jeans and t-shirts. In all cases, the investigator should understand that he is asking someone to confide and trust in him. Warmth and sincerity are more palatable than bullying or demanding. The investigator has no rights in this situation and must rely upon his own "charm" to be invited into the home of the witness.

#### **ULTIMATE USE OF THIS INFORMATION**

The investigator must understand the purpose of each investigative interview. It might be the first of many with this same witness. It could be merely to break the ice and determine the value of the witness for the future. Possibly it is to obtain the names of others who can be of use to this investigation. This might be the one and only time that the investigator has access to a person who has vowed not to cooperate. In all cases it is necessary to obtain information from the witness and about the witness. Even if the only result of an interview is to serve process at a later date for a deposition or court appearance, the interview cannot be conducted without preparation.

#### **SUGGESTED FORMAT AND QUESTIONS**

The classic format for a statement differs from that of an affidavit or declaration. An example of each of these is attached. Even if the discussion is not documented, the investigator should be sure to properly identify the witness for future use.

#### **Obtain at the minimum the following information:**

1. Full name, including nicknames, and alternate identifications.
2. Date of birth and, if possible, Social Security numbers.
3. Current place of business and job held.
4. Contact person if witness is to move or become ill.
5. Personal cell telephone number and, if possible, e-mail address.
6. Make note of the physical description of this witness. It is not out of the question to take a picture of that person with your cell telephone.
7. Family situation in which the witness is living. (Wife and 3 children. Divorced w/ parents.)

### **Allow the witness to tell their own narrative before parsing it for details:**

1. Most people are more than happy to tell a story from their point of view.
2. Once the story is told, go back and confirm the "Who, What, Where, When and How," like a good journalist. Obtain details by going over that which was already outlined by your witness.
3. Ask detailed questions that refer to the description and knowledge of your client.
4. Find out others who might have knowledge of this same crime.
5. Determine if they were interviewed by the police, names of the officers and circumstances of the questioning. Was it recorded? Videotaped? Did they sign anything.
6. Ask specific questions regarding time of day, lighting, visibility, circumstances.
7. Start the day before the event and learn as much as possible about the events preceding the witness's involvement. Establish if the witness was drinking, tired, going to or coming from work, in conversation with others or distracted in any way. Where was the witness coming from and where was he going to when the event happened?
8. Continue to after the event to see who did what once the crime was committed.
9. Provide a blank page for the witness to draw a diagram of the scene and to place himself and others as he recalls the situation.

### **Before leaving, review and confirm the narrative:**

1. Leave no room for misunderstanding.
2. Make sure that all facts are correct.
3. If other witnesses are mentioned attempt to establish a residence or work place for each. Often the interviewee will have addresses or telephone numbers of others at the scene.
4. Determine that the witness understands fully what he has said and your understanding of his words.

### **Leave the door open for additional visits:**

1. This may be the first of many interviews. With familiarity more information can be extracted from the witness. Frequently it is the investigator's job to "babysit" witnesses and maintain contact with them. To this end, make sure that you have shared contact information.
2. Thank the witness for their time and assistance. Shake hands. It may seem like an antiquated habit but it shows respect and sincerity. Even seven year olds deserve a handshake; especially if they have provided valuable information for your client's case.

This may be only the first of many interviews. Frequently it is the investigator's job to "babysit" witnesses and maintain contact with them. To this end, make sure that you have shared contact information. The investigator may have to return and does not want to shut or lock any doors behind him. Thank the witness for their time and assistance. Shake hands. It may seem like an antiquated habit but it shows respect and sincerity. Even seven year olds deserve a handshake; especially if they have provided valuable information for your client's case.

## THE INVESTIGATORS OPINION

Up until this moment the emphasis has been placed on obtaining information from the witness. The Investigator's opinions, comments and conclusions are always of value to any investigation. There are times when an investigator perceives that the witness is lying or protecting someone else. There are features about the witness that may be important to the client's case. The investigator may detect, for example, that the witness has a learning disability or is in excessive fear. That is the type of information that should be communicated to the attorney. Mere reiterating of the words of a witness may not tell the entire story. When such notations become imperative, the investigator should include them in a separate memo to the attorney as this is no longer fact but it is certainly information.

## IN CONCLUSION

There are literally hundreds of volumes of information about taking witness statements. In fact, this article has not delved into the actual wording or phraseology best used. Its goal has been from the beginning; to establish a method of thinking about a witness interview and using the skills of preparation, presentation and personality to insure that the interview process is comfortable and productive. Nothing is as valuable as first person source material. An investigator cannot differentiate between truth and lies without adequate preparation.

Kitty Hailey, CLI is an investigator and writer who has promoted professionalism and ethics in the industry. Her concentration is in the areas of civil rights and criminal investigation. She is the recipient of editor/publisher awards from national and local organizations. Feel free to contact her with any questions: [kitty@kittyhailey.com](mailto:kitty@kittyhailey.com). Visit: [www.kittyhailey.com](http://www.kittyhailey.com).

## **ATTACHMENT #1**

### **DECLARATION vs AFFIDAVIT vs STATEMENT**

These words are similar but not interchangeable in the law. Each has a place in memorializing the words of a witness on paper. None takes the place of a deposition, which is a circumstance under which a sworn witness can be questioned by both the prosecution and the defense in a legal matter. It is important to understand the difference and to obtain clear instructions from the responsible attorney as to his or her requirements under the law.

### **DECLARATION**

Under 28USC§1746 *Unsworn Declarations Under Penalty of Perjury* : “Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or provided by the sworn declaration, verification, certificate, statement, oath or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated....”

To translate simply, A declaration is an opportunity for an individual to sign a statement of his/her understanding or recollection of an event as long as that writing ends with an acknowledgement that “I declare under penalty of perjury under the laws of the United States of American that the foregoing is true and correct.”<sup>i</sup> A declaration is an unsworn statement.

### **AFFIDAVIT**

An affidavit is a statement of an individual which has been sworn and subscribed to by a notary public or other individual so allowed under the rules of court to verify the identity of the individual signing that document. The content of both the declaration and the affidavit might be identical, but the witnessing and authentication by a notary changes its value.

### **STATEMENT**

A witness statement taken by an investigator is “...a formal document containing your own account of the facts relating to issues arising in a dispute. Comments made in the statement should be limited to fact, and comments based on opinion should be kept to a minimum. The purpose of the witness statement is to provide written evidence to support a party’s case that will, if necessary, be used as evidence in court.”<sup>ii</sup>

It is advisable for the investigator to consider becoming licensed as a Notary Public. In criminal cases, especially, it is not always possible to get the witness from the initial revelation stated to an investigator to the point where he or she is willing to recount those words in open court. Fears of reprisal, retribution or even embarrassment have been known to cause hesitance by the time a case actually comes to court. Turning a simple statement into a sworn affidavit might mean the difference in a courts reaction to the relevance of a witness’s word.

**ATTACHMENT #2****CAST OF CHARACTERS**

NAME/IDENTIFIERS	CONTACT	RELEVANCE	SOURCE
ACER, JAMES Dob: 5/5/55 Ss#: 111-11-1111	373 Main Street Oak Hill, MO 37744 555-555-1212	Victim's brother. Rc'vd tele call prior to incident. JA scared	Pol Rept 7/12/02 Discovery package
ASHTON, AMY Dob: ? Ss*: ?	Office of the DA #1 S. Broadway Camden, NJ 08101	Prosecuting attorney at trial	Transcripts/all
BROOM, IVAN Dob: 6/12/57 Ss# 111-22-1111 ID# Z1234	Graterford SCI PO Box 240 Graterford, PA 19771	Client – alleged murderer of JA	CLIENT
BRUESTER, JILL Dob: ? Ss# ?	211 Market Street Magnolia, NJ 08049 Tele: ?	Upstairs neighbor of JA. Called in police report. Heard noises.	Transcript 8/30/03 Pg 123-129 Pol Reprt 7/9/02 Discovery package

Note: This is a living organism that changes as new individuals are identified. It is not necessarily a witness list. Witnesses are persons to be interviewed. A COC is a documentation of all individuals who ever touched a case for the purposes of name recognition. If any individual is to be interviewed it would be necessary to verify each address and update the information.