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Getting them on the team

Overcoming witness objections to testifying through skillful interviewing

Witnesses play an indispensable role in our system of justice. In virtually all litigated matters, civil or criminal, witnesses are called by both sides to testify. A witness provides evidence in the form of declarations, and deposition or trial testimony.

Without witnesses, there would be little, if any, evidence upon which to base a settlement or judgment. The purpose of questioning and cross-examining a witness at deposition or trial is to discover what the witness may have seen or heard regarding the subject of the case. As Daniel I. Small put it in his book, *Preparing Witnesses*, "A witness' goal is not to help anyone else do anything. It is only to be a truthful and efficient witness."

Many witnesses, however, are reluctant to perform this role. People you seek out as witnesses are becoming less likely to cooperate in legal matters. While a witness can be compelled to appear at a deposition or trial through the use of a subpoena, the witness may still remain reluctant to testify. In addition, the power of a civil subpoena is not available during a preliminary investigation where litigation has not yet begun.

But, one might ask, could the reluctance of any witness to cooperate have been avoided during the early stages of investigation? The answer is, in many cases, yes! During the initial interview, there are some things that can be done with a witness, to "get them on the team," so to speak.

Using the interview

There are many reasons a witness may decline to cooperate with an interview. However, among the most commonly encountered statements are the following:

- "I don't know anything. I wouldn't be any help to you on this."

- "That happened so long ago. I can't remember anything about it."
- "I just don't have the time to be involved in this."
- "Oh, no. You're not getting me roped into this. If I talk with you, they'll give me a subpoena to go to court."
- "Look, I don't want to get anybody in trouble. I'm not involved in this."

Each one of the responses above can be successfully refuted, presumably, in a logical appeal to law and the litigation process; however, you may be entirely wrong-headed in your approach. Logic doesn't always cut it in the real world inhabited by witnesses. In order to be as successful as possible in eliciting cooperation for your interviews, you have to be sensitive to the true, underlying reason for the reluctance to cooperate, as opposed to the stated reason.

Reasons for reluctance

Despite appearances, there may be underlying reasons for someone declining to provide an interview. The job of the interviewer is to determine, quickly, whether the stated reason is the real reason.

There are a number of legitimate objections potential witnesses may have to participation as a witness. And, although these reasons are discussed separately, they often work in conjunction with one or more other reasons:

- **Employer blow-back.** People may fear that extensive time spent in interviews and subsequent witness involvement (including testifying at deposition or trial) will cost them too much time away from work and result in employer disapproval, or a loss of income.
- **Embarrassment.** Witnesses may also fear that whatever information they provide to an attorney or an investigator will later be used against them, or twisted in

a court setting. They expect that they will be "on trial," and that they will open themselves up to unwanted exposure.

- **Set role expectations.** Some witnesses believe that they are on "one side" of a lawsuit, and if they have already spoken with the plaintiff's investigators, then it would be improper to speak with the defense investigators or vice versa.

- **Disclosure.** Barriers. Obtaining full disclosure from a witness can be challenging; and often witnesses withhold information because they are not comfortable sharing it with the investigator. For example, perhaps the witness is a family friend or associate of one of the parties, and feels that becoming involved will strain his or her personal relationships.

- **Trauma.** Other witnesses may be reluctant to cooperate because the underlying events were traumatic, and re-living the event will evoke negative feelings and memories.

- **Assumption of irrelevancy.** Some witnesses assume that anything they know, or say, regarding the case would be irrelevant; and therefore, providing the information would be a waste of time.

- **Illness.** Other witnesses claim to be too ill to testify or are suffering under the pressure of worrying about, or caring for, an ill family member.

There are solutions you can find and propose to each of these situations. For example, when appropriate, you can assure the person you wish to interview that his or her statement falls under the blanket of the attorney/client privilege.

You can also emphasize that the time spent, by any one individual witness, is generally not extensive and that the witness is entitled to travel expenses and lost wages for attending a deposition, or appearing at trial. In addition, suggesting

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alternative arrangements for an interview or for deposition testimony, such as video and audio recordings within the home, is an option.

More than anything, however, before the potential objections of a witness are allowed to short-circuit your efforts, you should politely suggest an interview on the spot.

Note: In this connection, you should be prepared with audio-recording equipment, materials to create a signed affidavit/declaration, and, if appropriate for the case strategy, a subpoena for appearance at deposition or trial. However, regarding the issue of recording a witness interview, be aware that California is a two-party consent state, which means that, according to California Penal Code section 632, with the exclusion of law enforcement personnel, it is a crime to record (either through an audio or video recording device) “without the consent of all parties to the conversation” during “confidential communications;” or in other words, when at least one of the parties has a reasonable expectation of privacy regarding the conversation.

Additionally, if during the course of the interview, a witness advises that he or she is represented by legal counsel, you must determine whether continuing the interview would be in violation of California Rules of Professional Conduct, rule 2-100. First, confirm that the witness has retained the services of an attorney for your specific matter. In many cases, there is both a civil and criminal aspect, and while he or she may be represented in the one type, often the witness is not being represented in the other. If it is clear that the witness is represented, explain that you understand, and that you will not ask any additional questions relating to the details and facts of the incident in question. You should then ask the witness for the name of the attorney and/or the name of the firm which he or she has retained.

Depending on what information the witness provides, and their role in your matter, you may wish to ask additional questions. For example, let's say that you know your witness is a former employee of the defendant company, and the

witness states that he or she is being represented by the attorneys for the defendant company. It may be beneficial for you to ask questions regarding how the witness came to the decision to retain defendant's counsel and whether he or she independently sought out these attorneys for representation, or if it was defendant's counsel who made the initial contact. According to the California Rules of Professional Conduct, rule 1-400, attorney solicitation of clients is prohibited.

While there are legitimate reasons for some people, under some circumstances, to decline to be interviewed, you must be ready to quickly assess the genuineness of the concerns, based on logic, demeanor and environmental context of the witness's justification. A good interviewer will also strive to conduct the interview immediately or obtain a firm commitment from the witness for a future interview.

So much for the legitimate objections raised by witnesses. But what of the reason behind the reasons? Are there any common factors which underlie many objections to granting an interview? And what do you say to overcome these hurdles?

Motivating a witness to talk

Regardless of what many witnesses may say to send you scampering from their front door, they harbor one instinctive fear that can be summarized in a single phrase: *loss of control*.

Assuming you have not telephoned ahead of time to signal your intention (which is generally not a good idea, for several reasons), approaching a witness for an interview in person is making a request “out of the blue.” In order to put the entire interviewer/ interviewee experience in the proper context, keep in mind that *you are an interruption*. Most of us, like the people we intend to interview, are creatures of habit. Routines are the comforting elements we develop to insert ourselves into the world. The world is understandable and survivable to the extent that we have some control over its uncertainty, and that control is partly expressed through the habitual choices we make, each day.

When you approach a witness without warning, you have interrupted the flow of those comfortable routines. Moreover, your very presence threatens renewed interruptions in the future, in the form of depositions and trial appearances.

Also remember, the justice system is foreign territory to most people, and many fear that, if called in to appear at a deposition, or trial, they will be ridiculed or otherwise mishandled by attorneys. Although your explanation of why you request the participation of the witness is unlikely to bring instant calm, there is still much you can do, on the spot, to nullify or reverse many of the misgivings expressed by witnesses and instead, motivate the witness to talk.

Appearance

First, an interviewer should pay careful attention to his or her appearance and demeanor. This is sometimes overlooked, but is critical. Anyone seeking an interview with a witness is representing one party to a lawsuit or criminal matter. Your physical appearance, dress and demeanor create an instant impression, reflecting a character ranging from professionalism to boorishness.

This is not a physical fitness or fashion advocacy piece; therefore, we will omit specifics. However, be aware that your attire can intimidate a witness, convince him or her that you are trustworthy, or reflect a lack of credibility. So, dress professionally. Also, smiling, and a friendly demeanor can help motivate a witness to talk.

Preparation

You should know as much information as possible about your witness before you stand on his or her doorstep. For example, the interviewer should understand who the witness is, his or her potential role in the case, the events that triggered the filing of the lawsuit, and why the witness is of interest.

Also, basic database research should be conducted on the witness well before the interview, and questions should be written ahead of time, carefully reviewed, and mastered for rapid use (as opposed to rote repetition).

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You should also attempt to determine the witness's schedule; you do not want to approach them as they are walking out the door, late for work. The goal is to get the interview completed on the spot; therefore, you need to make sure the witness is available. Weekday evening hours, between 6:00 p.m. and 9:00 p.m., and weekends often prove to be the "golden hours"; however, there are some witnesses who work nights, and sleep until noon, so determining the appropriate time to knock on the door beforehand is important.

Approach

It is critical to recall what was set forth above: that you represent an interruption. Therefore, directness, brevity and politeness are in order. Apologize briefly but candidly for being the stone thrown into their quiet pool. Briefly state who you are, who you represent, and why you would like to speak with the subject. Remember, you should politely ask the witness for cooperation, rather than demand cooperation. Additionally, a positive attitude may make all the difference.

Also, an approach that clearly identifies the interviewer, and his or her client, is not only vital to obtaining the cooperation of the witness, but is also required by law. Misrepresentation of which party you, or your legal staff/investigator, are working for when contacting a witness can result in devastating consequences, including professional disciplinary action.

California Business & Professions Code sections 7512 through 7573, also known as the Private Investigator's Act (PIA), is just one set of such provisions which prohibits "any act in the course of the licensee's business constituting dishonesty or fraud," which includes misrepresentation, and has been known to result in the suspension or revocation of the investigator's license.

Despite the fact that some witnesses may not wish to provide information to a particular "side" of a dispute, do not fail to disclose your representation. Instead, be honest and transparent regarding your involvement in the matter, and use the following interviewing techniques to gain your witness's cooperation.

Gaining cooperation

There are several techniques that you can utilize to obtain cooperation from a witness, and while some or none of these techniques may work on a particular subject, they are basic interpersonal skills that are valuable during any kind of social interaction.

Empathy

You can create an instant bond by attempting to enter the perspective from which you, and your request, are likely being viewed.

For example, let the witness know that you understand he or she is being caught off guard, and that you only desire a few moments of his or her time; however, if it is obvious that you have arrived at an inconvenient time, offer to return later that same day. Also, as you are intending to ask the witness numerous questions, from which you will hopefully obtain the information you seek, offer to answer any questions the witness may have, providing him or her with an opportunity to regain the feeling of control.

You can also utilize empathy by demonstrating that you are actively listening to the witness's concerns and statements, and that you are not passing judgment. David A. Binder and Paul Bergman, in their book *Fact Investigation*, explain that this approach allows the witness to express his or her feelings, which, although not relevant to the case, as you only want the facts, encourages disclosure and allows the witness to tell a more complete story (*Id.* at 231-232).

Recognize the witness's rights

Witnesses do have rights, and by explicitly acknowledging these rights, you may be able to gain their cooperation.

For example, inform the witness that he or she is not required to speak with a private investigator or legal staff member. This should defuse the objection. If the witness remains reluctant, you may be able to motivate him or her by providing more information about the case, and explaining how critical the witness is to learning all of the facts. This will further identify the reasons you are hoping to speak with the witness and will also make

the witness feel important and special, which they are, to the case.

Reassurance and praise

Reassurance can also make a witness more inclined to cooperate. When appropriate, you can reassure the witness that most cases never make it to trial but are settled outside the courtroom, that you are not interested in exploring what the witness does not recall but only what he or she does recall, and that (in many cases) multiple depositions are held on the same day with many deponents, some lasting only several minutes.

You can also reassure a witness that, in many respects, attorneys desire to keep costs at a minimum which might involve asking only a few questions, and that, although not entirely predictable or under your control, providing a written, signed declaration, or recorded interview (under penalty of perjury), *might* avoid the need for a deposition or trial appearance. You can also inform the witness that cooperative witnesses usually have much more control over the legal process (such as depositions noticed at their convenience, and the use of on-call agreements). Also, if appropriate, you can gently remind a witness that if he or she chooses not to speak with you, there is the possibility of a subpoena being issued to compel the witness's testimony.

In addition, you should praise and thank the witness throughout the interview for his or her cooperation. Sincere recognition and praise will sometimes motivate the witness to continue the interview and continue to want to be of assistance in the future.

Listen with care

When conducting any interview, it is important to know what questions you absolutely must get responses to, and what issues you cannot leave unaddressed. However, some investigators and attorneys become so infatuated with their astonishing ability to craft clever questions that they end up not listening to the answers. Ask those critical questions, and then listen carefully to the witness's response. If possible, use that response as the springboard for the next question, and the start of a conversation. Don't be

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slavishly committed to asking all of the questions you've written in the order you wrote them, or so intent on taking notes that you forget you are involved in a social exchange with another person.

Remember to practice active listening. Throughout the interview you should be responding to the witness, not with additional questions or a gaze locked downward at your notepad, but with thoughtful comments demonstrating that you are paying attention; that what they are saying is important. Just by saying "mm-hmmm" or "I see," the witness will know you are listening. Also, respond to a witness's feelings, not just the facts, such as by rephrasing what a witness has said, and including the emotion: "It makes you sad when you think about..."

Witnesses are likely to be motivated to continue speaking when they feel they are similarly situated with the interviewer. If you have a story or an experience that is relevant, let the witness know. The common situation will create a stronger bond, and confirm that you are listening and caring about what the witness is saying.

Triangulate

There also exists a trinity of motivations, in your interview arsenal, to which you can appeal: emotion, reason, and morality.

By emotion, we mean an appeal to how your witness is made to *feel* about the case you are working on. In the case of a tragic automobile accident, for example, if you represent the plaintiff, emphasize how life-altering the accident has proven to be for your client. Be as specific as possible (or as allowed without violating client confidentiality) regarding the physical, emotional, and financial damages that have been inflicted. Let's take, for example, one of the questions/responses we raised at the outset: "Look, I don't want to get anybody in trouble. I'm not involved in this..." You might then respond, "Mr. (or Ms.) 'Smith,' unfortunately, several people are already in trouble because of [the event] and you and I have nothing to do with it. In fact, Ms. 'Jones' is in a great deal of trouble. Her 31-year-old husband is dead, leaving her with three young children, no life

insurance, and a heart full of grief that may never go away."

The appeal to reason may be the most clear-cut tool you can employ. This approach involves unpacking a witness' response for logic and responding accordingly. For example, take the statement, "I just don't have the time to be involved in this."

You may want to respond, "Really? Would you have ten minutes right now? That's all I'm asking for. I'm trying to clarify, in my own mind, what happened and I think you could help me do that."

Appealing to morality will almost always come down to invoking the Golden Rule, "Do unto others as you would have them do unto you." The appeal to morality says, "Mr. (or Ms.) 'Smith,' I know how you feel. However, what I sometimes do is put myself in Ms. 'Jones' shoes. How would I feel if it was my wife? How would I face such a loss? What would I do if it were my three children who need to be fed, clothed, sent to college, and have some sort of a life ahead of them? When I ask myself these questions, I know that I would do everything I could to see that justice is done in this case." People feel good about themselves when they believe that they are doing the right thing.

Documenting the interview

Using the above techniques, you can successfully gain a witness's cooperation; however, it is equally important that you are prepared to successfully document the interview.

Mentioned briefly before was the recommendation to bring audio-recording equipment, and materials to create a signed affidavit/declaration, when appropriate. During interviews where these means of documenting the witness's statements are utilized, it is also recommended that you have extra batteries for your portable audio recorder, which has also been tested in advance to ensure proper functioning, and a portable laptop computer, in case it is preferred that the affidavit/declaration drafted be in a type-written format, as opposed to hand written.

Printing of the document can be done via a portable printer, a nearby business location with printing services (such as FedEx Kinkos), and even the witness's home or work printer, when you've been very successful in obtaining his or her cooperation.

The decision to use the above "formal" documentation methods will also depend on the value of the witness's statements. As you cannot control what a witness might say during a recorded interview, it is advisable to always conduct a pre-interview.

A pre-interview is conducted after a witness has expressed his or her willingness to participate in the interview, and is an opportunity where you can begin to discuss the details of the case, asking variations of the most important questions you have prepared in advance, which will determine whether or not the facts and opinions of the witness make him or her the quintessential smoking gun witness to your case. A pre-interview should not be recorded, and is a time when you can ascertain if a witness is going to provide good evidence, that you would want to preserve in such a permanent and official manner. The pre-interview also allows you the chance to resolve any damaging, erroneous assumptions or recollections that the witness may have, for which you can provide facts to disprove.

Regardless of whether you decide to record a witness interview, or obtain a signed statement, you should always take good hand-written notes, which may be the best, and most protected way, to document an interview, according to a recent opinion of the court regarding the sharing of this type of evidence as it relates to the protection of the California work-product privilege.

According to the Fifth Appellate District's interpretation in *Coito v. Superior Court* (2010) 182 Cal.App.4th 758, regarding attorney work product, the general opinion regarding what the courts currently deem discoverable includes witness statements, reports, declarations, and audio and video recordings, which fall under the categorization

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of being “non-derivative” evidence. However, in regards to notes produced by the attorney, or the attorney’s agent, such as an investigator, the court did not address this product type along with the above discoverable evidence.

Conclusions

There are as many objections to cooperating with an investigation as there are reluctant witnesses. Far from considering the reluctant witness as an adversary, the proper approach is always to recognize that the witness is an individual deserving your respect, concern, and individual attention. Each witness

comes with a unique world view, a distinct psychological profile, and a singular sociological background. An interviewer’s responsibility is to develop the skills necessary to identify and overcome the true, underlying objections to providing testimony on behalf of the client.

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