Capturing the Witness Statement
By Keith Rohman and Elizabeth Rita

Introduction
Few topics ignite a more spirited debate among workplace investigators than how to capture the witness’s statement. Whether they rely on note taking, audio recording, or drafting witness declarations, investigators feel passionately about the techniques they use. Each approach brings with it advantages and disadvantages that impact the information we obtain, how reliable it is, and how it may be used afterward.

This article will examine the most common techniques investigators use and the factors that argue for or against them. It includes a discussion of brain science research relevant to how we take in, record, and analyze information during an interview. The article will also review the tensions among different approaches and the choices investigators make when they choose one approach or another.

Methodology
We used a variety of resources to explore these issues. We surveyed the 15 members of the AWI Board of Directors to determine their practices. The board is composed of experienced practitioners from different fields, including attorney-investigators, private investigators, and human resources professionals who conduct investigations. We reviewed scientific literature on brain science to find insights into how people capture and process information. Additionally, we obtained information from a useful article in CAOWI Quarterly, “Perspectives on Different Methods of Documenting Witness Interviews.” Finally, the authors’ own experiences provided additional insights.

Our work here does not present a comprehensive survey of practitioners in this field; it instead utilizes the insights and perspectives of the AWI Board of Directors as a core group of highly experienced investigators. The survey respondents mostly requested anonymity so they could be more candid in

1 Of the 15 board members, 11 are attorney-investigators, one of whom is also a private investigator. Two come from a human resources background, one of whom is a private investigator. One, a former member of law enforcement, is an attorney and a private investigator, and one is a private investigator.


3 Both authors have extensive experience conducting and overseeing investigations. Summaries of their professional backgrounds are found at the end of this article.

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their remarks and analysis, so what follows is generally a compilation of the respondents' thoughts and the authors' experiences and observations.

One consideration generally trumps all the issues we discuss below: what the client wants. Internal investigators may be required to follow the standard practices of their organization. Outside investigators may also be asked to adopt an approach consistent with the client's longstanding internal practices. As long as these practices do not interfere with the fact-finding process, the client's preference is an acceptable guide.6

Survey results and analysis
We surveyed AWI directors about how they document witness interviews and what they see as pros and cons of the different approaches. Three assumptions were built into the survey: (1) these are interviews conducted in the course of a workplace investigation; (2) the client had not expressed a preference on how to do this; and (3) the investigator's report could eventually be discoverable in some legal proceeding. We asked survey respondents which of the following approaches they use:

1. Taking handwritten or typewritten notes and later drafting a witness summary as part of a written report to the client
2. Taking handwritten or typewritten notes and, once the questioning is complete, permitting the witness to review the content of the notes in some manner
3. Preparing a declaration for the witness to sign
4. Audio-recording witness interviews
5. Having a second investigator or paralegal in the room to take notes and to act as a witness to what is said

There was no consensus in the survey results. Forty percent of the directors follow approach 1, taking or typing notes and using those notes to prepare a report. Forty percent use approach 2, taking notes and then reviewing them with the witness. Twenty percent prefer approach 4, audio-recording the witness interviews.6

In a group of experienced investigators, we expected there would be a "tried and true" best practice for documenting witness interviews. It became clear as we examined the various methods, however, that there are compelling arguments for and against each of them.

Approach 1: taking notes during the interview and using them to prepare a report.
If there is a "traditional" approach to documenting the witness interview, this option is probably it. The investigator takes handwritten notes, or types notes with a laptop, and then bases his or her report on these notes. Most investigators have used this approach at some point in their practices. Forty percent of the survey's respondents currently use this approach.

The pros. Approach 1 gets the investigation moving forward quickly and effectively. Once the interview is complete, there is no delay in producing documentation—the investigator has the notes and can begin to prepare for the next witness or to draft the report. In contrast to approach 2, in which witnesses review the notes in some way and are given the opportunity to comment on or modify their responses, the investigator relies with confidence on the notes in communicating with the client. A related benefit of approach 1 is that once a witness has spontaneously made a truthful statement or an admission during an interview, the bell has rung; the witness has no opportunity to modify or withdraw it later. Absent are the shifting sands of changing statements that can come from the witness reviewing the notes in approach 2.

Approach 1 has a built-in informality that its practitioners point to as an effective tool for building witness rapport. There is no tape recorder, potential draft declaration, or even review process at the end. While witnesses know they are being interviewed, this is as close to a "normal conversation" as is likely to happen during an investigation. Approach 1 also helps the investigator control the pace of the interview, slowing the witness down if need be. Asking for a moment to catch up with note taking or repeating a question while writing can give the investigator time to thoroughly reflect on an answer before moving on. As discussed in the section on brain science below, the process of note taking provides other benefits in cognitive functioning.

One AWI director, John Lohse, is a former FBI special agent who now serves as the director of investigations for the Office of Ethics, Compliance, and Audit Services for the University of California. Lohse noted that he was trained in approach 1 at the FBI. He used this approach during his career at the FBI, and when he came to the University of California system, he found this practice used by many of the university's auditors.

6 If the client proposes an interview approach that would significantly interfere with an investigator's fact-finding, the investigator should have a dialogue with the client, explaining the difficulties the client's approach would cause. Hopefully the investigator and the client can reach a mutually agreeable approach; if not, however, the investigator may have to consider withdrawing rather than conducting an investigation with ineffective fact-finding techniques. Attorney investigators must be aware of applicable rules of professional responsibility. See, e.g., Cal. Rules of Prof. Resp. 3-600 (Organization as Client) and 3-700 (Termination of Employment).
5 Whether investigators use a laptop or take handwritten notes is a fascinating—but separate—issue beyond the scope of this article.
6 The survey respondents did not necessarily hold hard and fast to their choices. While the respondents expressed the preferences noted here, many had used other approaches successfully in various environments. Some expressed that their practices had changed and evolved over the years, and they could evolve again.

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The cons. The biggest potential disadvantage of approach 1 presents itself if the interview becomes an issue in subsequent litigation. If the witness changes his or her story and needs to be impeached with the prior statement, approach 1 lacks the punch of other approaches. There is no audio recording, no signed declaration, nor even reviewed notes to use for impeaching the witness at a deposition or trial. Instead the investigator must take the stand to impeach the witness. Those who take this approach note that it has been successfully used for years in civil and criminal cases. As one investigator expressed, “If you are going to rely on me to do the investigation and write the report, you can rely on me to testify effectively about it.” (As we note below under approach 2, the “fix” of having the witness review the interview notes is also imperfect.)

Approach 1 also leaves the investigator vulnerable to the related criticism that he or she missed something, mistreated the witness in some way, or mischaracterized something the witness said. Unlike a recorded interview, of course, there is no formal record of what the interviewer and subject said.

Another concern with approach 1 is the impact an investigator’s biases may have on note taking. Investigators need to be alert to the possibility that they may write down or unduly focus on those facts that accord with their own biases or theory about the case. Is the investigator writing down everything or just those facts that resonate with his or her biases? A related issue is investigator skill and fatigue. This approach requires a relatively high skill at note taking, as well as focus and stamina, as the day stretches into one interview after another.

The bottom line. Approach 1 has a long history; investigators have used this technique for years. Its proponents point to the advantages of the ability to capture what the witness says quickly and accurately and communicate it to the client. While survey respondents acknowledge that this approach may be less effective in later impeaching a witness than other approaches, they note that they have successfully impeached witnesses by testifying from their written reports.

Approach 2: taking or typing notes and reviewing them with the witness, either at the time of the interview or after the investigator has transcribed them.

Approach 2 is similar to approach 1 but adds some level of witness review. Forty percent of the survey respondents use this approach. Some investigators hand their notes to the witness to review after the questioning is over. Others draft their notes later and send them to the witness to review. Still others read the notes to the witness and ask if the witness would like to make any changes.

The pros. Approach 2 has all the advantages of approach 1 in terms of witness rapport and assisting the investigator in controlling the pace of the interview. The main additional advantage is that it mitigates the biggest disadvantage of approach 1 by having the witness review the investigator’s notes and either confirm the content or offer modifications. Another benefit of approach 2 is that it forces the investigator to “review” the data as it is being collected. When investigators review their notes to polish them into a statement for review, they can catch things they might otherwise have missed in preparing for the next witness.

Approach 2 can help build trust and rapport, as witnesses may feel the investigator is treating them fairly by giving them the chance to see what the investigator wrote down. Sometimes witnesses add more details when they have the opportunity to review the notes. If the review process happens immediately after the interview, the witness has less time to “overthink” and possibly change his or her story.

The cons. While approach 2 adds some aspect of witness review to the process, it is also vulnerable to attack. Reading notes to the witness can be challenged as not being as direct as allowing the witness to read the notes. Witnesses can later claim that the reading was inaccurate or that the notes are different from what was read to them. If, as is often the case, the final written report differs from the notes (e.g., the order of statements is changed or comments are paraphrased, both common practices), that can be attacked as well.

The biggest potential problem with approach 2 is that it gives witnesses the chance to disavow uncomfortable statements. During the review process, witnesses may realize they made a damaging admission and backtrack. While investigators who use this method will document such changes, if a change is substantial, the investigator is essentially in the same situation as in approach 1 and may have to testify to impeach the witness. Investigators have to rely on their expertise in neutrality in testifying that their recollection is the accurate and reliable one, and that the witness had a reason to back away from a damaging statement—namely self-interest. This is one reason why some clients may prefer approach 1 to approach 2, which gives witnesses the opportunity to ponder what they said and make changes in an attempt to soften or erase the impact of damaging admissions.

Practical problems also arise with approach 2. It is one thing for an investigator to read notes to a witness after a one-hour interview, but how does one deal with interviews that sometimes stretch to three or four hours or even longer? There can be a significant delay and cost in transcribing the notes from a lengthy interview and, in the back-and-forth with a witness, getting the witness to review and return the notes. In addition, there are confidentiality...
concerns that arise from sharing notes with the witness. If the investigator gives the witness a copy of the interview notes, there is nothing to stop the witness from sending those notes to others. This will compromise the investigation’s confidentiality, and if the witness sends his or her statement to other people on the investigator’s list, this could tantamount to future interviews as well.

Finally, there are potential discovery issues regarding all witness statements, whether a witness reviews and adopts his or her statement or not. The California Supreme Court addressed the discoverability of recorded witness statements during the summer of 2012 in the Coito case. In a unanimous decision, the court held that audio-recorded witness statements taken at the direction of an attorney, in anticipation of litigation, were entitled to work product protection. This decision suggests that in California, a written statement that a witness reviews and adopts may likewise be protected from disclosure by the work product doctrine, so long as all of the requirements for the privilege are met. What happens to this protection, however, when the attorney provides a copy of the statement to the witness and the witness shows his or her statement to others? What if the witness is the complainant or another person who could be adverse in the event of litigation? There is an argument to be made that under some circumstances, a witness’s disclosure of the statement to others (or even the initial disclosure of the statement to the witness) could result in a waiver of the work product protections that might otherwise be available.

The bottom line. As noted above, there are several variations to this approach, but all involve the witness reviewing the investigator’s notes in some way. Compared to approach 1, an equal number of AWI directors use a version of approach 2. Their view is that the advantage of having the witness adopt the investigator’s notes, at least in some form, is worth the potential complications, including the witness changing his or her story at the end of the interview. They note they have found ways to deal with the process of reviewing the notes with the witness in a manner that secures the benefits of this approach while mitigating some of the downsides discussed above.

Approach 3: using interview notes to prepare a declaration or formal witness statement for the witness to sign.

While approach 3 has one important advantage, it appears to have fallen into disuse. Significantly, none of AWI’s directors use this approach for their workplace investigations.

Though approach 3 has the investigator writing notes in the same manner as the first two approaches, it adds an important note of formality. After the interview is complete, the investigator writes a declaration or statement summarizing the witness’s remarks and gives it to the witness to review. The witness can make changes or simply sign it. It is generally signed under penalty of perjury.

Approach 3 is sometimes used for public sector employees, including federal government investigations. AWI founder and past president Amy Oppenheimer recalled using this practice when she started doing investigations under contract with the federal government in the 1980s. In an older version of this process, used by some public and even private sector employers, the witness wrote his or her own statement. While this has the advantage of being literally in the witness’s own words and handwriting, it is our observation that this practice is also no longer widely used.

The pros. Approach 3 has an obvious advantage in terms of impeachment, as the witness generally signs the statement under penalty of perjury. If the witness is given adequate time to review the declaration and is free to make changes, it is difficult for him or her to claim later that the statements are inaccurate. This is a difficult approach to critique from the impeachment perspective. One of the authors spent a long afternoon on the witness stand while opposing counsel (in this case, a deputy district attorney in a criminal case) tried to raise questions about what “legal authority” the investigator had to take a witness statement under penalty of perjury. Not surprisingly, this was not effective in keeping the statement out. No approach is bulletproof, of course, but in terms of impeachment value, approach 3 stands up very well.

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8 Coito v. Superior Court, 54 Cal. 4th 480, 278 P.3d 860 (2012).
9 In California, as in many jurisdictions, the civil work product privilege is codified by statute. California Code of Civil Procedure, section 2018.030. Work product protection can be “absolute” where the “writing…reflects an attorney’s impressions, conclusions, opinions or legal research or theories,” California Code of Civil Procedure, section 2018.030(a). Such a writing “is not discoverable under any circumstances.” Id. Work product protection is “qualified” for all other attorney work product, which means that these materials “[a]re not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party’s claim or defense or will result in an injustice.” California Code of Civil Procedure, section 2018.030(b). The statute does not define “work product,” and as a result California courts have taken a case-by-case (and sometimes inconsistent) approach to defining this term. Prior to Coito, it was unclear in California whether an audio-recorded witness interview was “work product” that could be protected by the work product privilege, or if it was simply evidence that had to be disclosed. The Coito decision makes clear that in California a recorded witness interview statement is presumptively protected by at least a qualified work product privilege if it is taken by an attorney (or at an attorney’s direction) in anticipation of litigation.
10 An exhaustive discussion of the work product doctrine and its applicability to witness statements is beyond the scope of this article, and investigators should be familiar with how the courts in their jurisdiction approach these issues.
Approach 3 has one other advantage: the declaration is not a transcript of the witness’s comments, even though the person drafting the declaration makes the initial choices about which statements to include and which statements to leave out. When a witness has rambled all over the landscape, even telling varying versions of events, the declaration freezes their story in one version. The witness gets the chance to review the statement and add to it or remove troubling items. As in drafting contracts, however, there is an advantage to doing the first draft. In this case, that advantage goes to the investigator.

The cons. While the note-taking process here is the same as in the first two approaches, the draft declaration transforms the interview into something more formal. It is a fact of life: people don’t like to sign things. And they like it even less in the context of an investigation. Our observation is that witnesses may balk at signing a declaration under penalty of perjury swearing to their testimony.

Other problems with approach 3 include the fact that it is time consuming to draft a formal witness statement, and, if it is of any length, it often cannot be done while the witness waits. In that case, the investigator must either return in person (an added expense for the client) or send the statement to the witness. Sending it to the witness has many problems, not the least of which is the delay or sometimes impossibility of getting it back in an unaltered, signed form. It also allows the witness to circulate it, undercutting the confidentiality of the process.

There is a more subtle problem as well: investigators who draft a declaration at the time they do an interview may not yet know the full extent of the facts in the case. Certain facts that seem irrelevant early in the investigation, and which are left out of the declaration, may become very important later.

Finally, even if a declaration has been directly reviewed and adopted by the witness, if the investigator’s notes are later provided in litigation, the declaration could be critiqued to the extent it departs from the rough notes. And, of course, a signed declaration by the witness might be discoverable.

The bottom line. Given the many disadvantages of approach 3, it is not surprising that none of our survey respondents use it. One of the central goals when conducting interviews during workplace investigations is to build rapport with witnesses in order to assist in the fact-finding process. This is always a challenge, and the witnesses’ knowledge that they will have to sign something at the end of the interview can make them cautious about what they say, or even unwilling to participate at all.

Approach 4: recording

If there is a second “traditional” approach to documenting the witness interview, it is audio recording. Recording has been used by law enforcement, journalists, and investigators for decades. Advances in digital recording technology have made this approach more accessible, less intrusive, and more accurate than ever before. Twenty percent of our survey respondents use approach 4.

Investigations conducted in police and fire departments use approach 4 almost exclusively. In fact, it is not uncommon in police and fire investigations for three audio recorders to be on the table: the investigator’s, the respondent’s, and the union representative’s. Generally, however, while many public sector employers have adopted recording for all their investigations, private sector employers are much less likely to use audio recording.

The pros. An obvious and enormous advantage to approach 4 is accuracy; assuming the technology works, everything the investigator and witness say is recorded. Recording captures things like pauses, the “hem haw” response, tone of voice, and changes in testimony. Recording can do a nearly perfect job of capturing a witness’s shifting story in all its elastic quality without the investigator having to describe what happened.

A recording is excellent documentation that the investigator did nothing improper in the interview and did not mischaracterize anything that the witness said. In fact, some investigators have adopted recording as an interview technique after being accused of having done something improper during a witness interview.

With the recorder running, the investigator can maintain uninterrupted eye contact with the witness, focusing on the questions and answers while maintaining rapport with the witness. The investigator can readily observe changes in demeanor and body language if these are significant. If investigators are not writing notes, they are less likely to provide visible cues to the witness that one statement is more interesting than another.

Modern digital recorders are more accurate and more discrete than ever. Their internal circuitry is designed to focus the recording on voices while minimizing other sounds. They have hours of recording time, so there is no longer any need for that awkward break while the investigator has to flip or change the tapes. And the recorders are small, often one inch by five inches.

Recordings are direct evidence, which makes them a fantastic tool if a witness disappears and a great asset for witness impeachment. They can also keep the investigation

12 Several AWI directors have extensive experience conducting investigations for police and fire departments. In California, these investigations are governed by the Peace Officer Bill of Rights (POBR), Cal. Gov. Code §§ 3300, et seq, and the Firefighter Bill of Rights (FOBR), Cal. Gov. Code §§ 3250, et seq.
moving. There is no delay, as is the case with rough notes, and no declaration needs to be drafted for the witness to review. This approach can also help an investigator avoid battle fatigue. Despite our best efforts, human note taking cannot be 100 percent accurate, and sometimes details will be missed. This simply isn’t a problem when interviews are recorded.

The cons. Many investigators feel strongly that recording makes witnesses nervous and can have a chilling effect on rapport and candor. Witnesses who are not used to legal processes can be put off by being recorded. The reluctant sexual harassment complainant who must describe a traumatic, intimate event is the poster child for investigators who don’t record. Similarly, these investigators believe respondents may talk more openly without a recorder, perhaps making damaging admissions in what the respondents perceive to be a more informal context.

The particular workplace should also be considered when deciding whether to record interviews. In a government bureaucracy, where recording is common, employees expect to be recorded. Recording may be less accepted, and therefore less effective, in other workplaces, such as interviews of blue-collar employees in a small garment manufacturer.

Approach 4 may result in less-experienced investigators disengaging and not giving the interview their full attention. Some hazards of not paying close attention are discussed in more detail in the section on brain science below, but there are other problems as well. We have reviewed numerous audio recordings and transcripts of workplace investigation interviews; it is not uncommon to hear investigators who, either through inexperience, inattention, or laziness, simply read through their question lists without listening to the witness’s answers. And while the recorder is accurate, it also allows witnesses who make damaging admissions to back off from them later in the interview, or seek to dramatically minimize them.

Practical considerations include that transcription takes time and costs money. This means the investigator may not have the notes at hand to prepare for the next interview or to start the report. Some estimate that it takes six hours to transcribe one hour of recording. Without expensive transcripts, recordings are harder for the investigator to search and review than notes when analyzing data and preparing the report.

The bottom line. There is little middle ground in investigators’ views of approach 4. Those who use it are convinced it is the most accurate and reliable approach and that it provides an unparalleled level of protection for the investigator. They point to the digital recorders’ improvements and assert that five minutes into the interview, most witnesses forget the recorder is running.

Those investigators who don’t routinely record (including 80 percent of the AWI directors), assert just as strongly that audio recording is a critical barrier to building witness rapport and getting them to open up truthfully.

Approach 5: using a second investigator or paralegal in attendance to take notes. The practice of pairing investigators for interviews has a long history in law enforcement, in which almost all investigations are done in pairs. While none of our survey respondents use approach 5, follow-up discussions confirmed that this is driven primarily by budgetary considerations. A budget for two investigators at a time in the workplace environment is rarely available. It is useful nevertheless to examine this approach, which can offer some interesting advantages.

The pros. Approach 5 offers many of the same advantages of the approaches discussed above. There is no device on the table in between the investigator and the witness, yet the investigator still has another set of ears and eyes (and note-taking skills) to double-check the notes. This frees the investigator to pay more attention to eye contact and observing witness demeanor. In terms of impeachment, the investigator has another witness to what was said in the interview, which will bolster the evidence supporting the investigator’s documentation.

The cons. As noted above, expense is the main criticism of approach 5. The cost of having two people attend the interviews can be prohibitive. There also may be a qualitative difference in having two interviewers in the room; some feel this by itself may make the witness more nervous. Another issue is having two sets of notes if both investigators take notes. If the two sets of notes conflict or are ambiguous, how does one reconcile the differences?

The bottom line. While approach 5 has some tempting advantages, the cost issue alone makes it impracticable nearly all the time. On the other hand, in some cases—particularly those involving high-profile allegations in which audio recording is not practical—a second person may be the right option. It provides verification of what is said in the room and is a strong hedge against the witness changing his or her story. It gives the investigator an extra set of experienced eyes and ears in the room. Two heads can be better than one in analyzing a shifty witness or catching an important, offhand remark.

Brain science
For better or worse, neuroscientists do not appear to have directly studied investigators conducting interviews. There is, however, research in neuroscience and related fields that examines behaviors and actions related to the interview process, and this provides insight into our work as investigators.
Hearing versus listening—mastodons and Freddy Mercury. For investigators conducting interviews, hearing—and the ability to listen—is essential. But on a day-to-day basis, we don’t spend a lot of time thinking about our hearing; in fact, we tend to understate it in comparison with the other senses, particularly sight. For our cavemen ancestors, however, hearing was their essential early-warning system. Humans can hear far beyond the perimeter of what we can see or smell, and this holds true even while we are asleep. In fact, our ears and brains “hear” ten times faster than we “see” and ten times faster than we can form a conscious thought.13

How do our brains translate this rapid-fire sensory data into meaning or action, turning “hearing” into “listening”? The answer is, it’s complicated! (What did you expect? This is brain science.) There are two different types of attention in play, having totally different functions and using very different parts of our brains.

The first kind of attention is stimulus driven—think of a prehistoric mastodon crashing into our caveman ancestors’ camp at three o’clock in the morning. This activates the classic “startle reaction,” our simplest and most primitive form of attention. The ear sends the crash sound straight to the brain stem, and from there it is converted into a body-wide defensive response in less than 1/10 of a second.14 It bypasses those parts of the brain that would “think” about what is happening. Eyes immediately close (protecting the eyes); necks hunch (protecting the essential brain area); hearts accelerate; eyes widen to see what’s happening. All of these actions happen instantly and without conscious thought.

The second kind of attention occurs when we focus our minds on something, activating higher brain pathways. A mother, for example, can hear her child call out for her in a crowded airport terminal, or one can distinguish a snippet of “Bohemian Rhapsody”—a favorite song from college days—coming from the window of a passing car. When this happens, the signal is directed to the dorsal cerebral cortex, the part of our brains responsible for computation, sequencing relationships between data, and other analytic functions.15 The brain focuses on what we are trying to hear, relates it to other memories, and tunes out distracting sights and sounds.

This more conscious form of listening is more taxing on our brains, with more pathways fired up and more areas of the brain engaged. Neuroscientists tell us that when this happens, we are better able to store (or “encode”) data into memories. The harder our brains are working, and the more areas of the brain we use, the better we are able to store the data we gather. As discussed below under note taking, the view of these authors is that while storing what we learn while interviewing is only one part of our job as investigators, the more engaged our brain is during those interviews, the more effective we are as interviewers—at least to a point.

Investigators and multitasking. When conducting interviews, investigators must listen to the witness, take notes, refer to the outline, analyze the data coming in, compare it with data the investigator already has gathered, follow up when the witness raises attention to new areas, try to capture verbatim answers, and watch for shifts in witness demeanor, all while working to keep rapport with the witness. This rapid switching from activity to activity taxes our ability to organize our thoughts and impacts our capacity to learn.16 While there might be scholarly debate over whether investigators’ activities during interviews technically constitute “multitasking,” in its colloquial sense, the term fits.17

Many investigators, particularly those with many years of experience, are confident that they can manage all these tasks with a high level of certainty that they have recorded everything they need. Neuroscientists, however, raise questions about this. As one psychology professor put it, “Heavy multi-taskers are often extremely confident in their abilities. But there’s evidence that those people are actually worse at multi-tasking” than those who are less confident.18 Multitaskers also generally perform worse on cognitive and memory tasks than people focusing on single tasks.

One of the problems with switching from task to task is that it slows down “working memory,” the short-term memory that allows us to hold information in our brains and manipulate it—that, in short, allows us to think.19


—Here is one example of the definition of multitasking from a scholarly work: “Multi-tasking involves concurrent performance of two or more functionally independent tasks with each of the tasks having unique goals involving distinct stimuli (or stimulus attributes), mental transformation, and response outputs.” David M. Sanbonmatsu, David L. Strayer, Nathan Medeiros-Ward, Jason M. Watson, “Who Multi-Tasks and Why? Multi-Tasking Ability, Perceived Multi-Tasking Ability, Impulsivity, and Sensation Seeking,” PLoS One 8, no. 1:e54402, doi:10.1371/journal.pone.0054402. A comprehensive review of the subject is (way) beyond the scope of this article.


14 These areas of the brain are the temporoparietal and inferior frontal cortex regions, mostly located in the right hemisphere of the brain. Id.
15 Id. See also Grégoire Borst, William L. Thompson, Stephen M. Kosslyn, “Understanding the Dorsal and Ventral Systems of the Human Cerebral Cortex, Beyond Dichotomies,” American Psychologist 66 (October 2011): 624.
Our store of working memory is limited. A frequently-cited Harvard study from 1956 found that most people’s working-memory capacity is limited to about seven units.\textsuperscript{20} In other words, ask most people to repeat a sequence of numbers, or sing a line of music, and their limit is going to be roughly seven numbers or notes.

What this tells investigators is that it is important to guard against overconfidence and recognize that the human brain is balancing multiple functions when the investigator is listening to what is being said, planning ahead to the next set of questions, and trying to write down a verbatim record of the conversation. Being conscious of our limitations is the first step. If possible, the investigator should take steps to screen out distractions and lower the payload on their working memory. For example, try to have an interview space that isn’t noisy and where neither the witness nor the interviewer can look out a window. While not fully analogous to an investigator taking notes while conducting an interview, the research presents intriguing insights. The findings that note taking requires more brain activity and aids memory tracks with the anecdotal observations of our survey respondents, who described the note-taking process as helping them process information and remain focused during an interview.

**Your brain on Jane Austen.** Inevitably, concentration levels fluctuate in human interactions, including while conducting interviews. It turns out there is a big difference in what our brains do when we concentrate closely versus when we use our senses in a more superficial way.

We came across an interesting multidisciplinary study that used Jane Austen’s work to study this phenomenon. Researchers from Michigan State University and Stanford University examined the difference between the brains of “studiers” and information “browsers”—in other words, between those reading closely versus those reading with less attention.\textsuperscript{24} Natalie Phillips, the literary scholar who led the study, had the subjects read Jane Austen’s *Mansfield Park* while lying in a magnetic resonance imaging machine. Sometimes they were asked to read the chapter as if they were reading for pleasure. Other times they were asked to study the text intently, as if they were college professors or graduate students preparing a comprehensive literary analysis. Phillips expected to find only subtle differences because everyone was doing the same function—reading—and the only differences should have appeared in the parts of the brain related to attention.\textsuperscript{25}

Note taking and the brain’s ability to store information. Most neuroscientists believe that taking notes helps the brain store information more deeply because note taking requires more brain activity.\textsuperscript{22} The physical action of note taking activates areas in the brain involved in listening, cognitive processing, muscle commands, and data recording. These studies conclude that the more pathways we involve, the more associations our brains make and the more deeply our brains store the information.\textsuperscript{25}

The empirical research we reviewed focused primarily on memory and retention, often observing college students taking notes in lecture situations. While not fully analogous to an investigator taking notes while conducting an interview, the research presents intriguing insights. The findings that note taking requires more brain activity and aids memory tracks with the anecdotal observations of our survey respondents, who described the note-taking process as helping them process information and remain focused during an interview.

\textsuperscript{20} George Armitage Miller, “The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information,” *Psychological Bulletin* 63 (1956): 81.


In a neuroscientific “plot twist,” Phillips found big differences instead. For the “studiers,” the attention-controlling executive function part of the brain was not the only part that reacted. Brain areas that controlled physical movement and the sensation of touch were fired up as well. “What’s been taking us by surprise...is how much the whole brain—global activations across a number of different regions—seems to be transforming and shifting” when reading more closely.26 The brains of the “studiers” acted as if they were actually there in Mansfield Park, running around and feeling the spring breeze in their hair.

Lessons for investigators. What does this mean for investigators? Neuroscience confirms our intuitive sense that the closer attention we pay, the better the result because we are literally using more of our brains. If we listen closely to what we are hearing and apply it to new facts in real time, we can work more effectively and compensate for the inherent multitasking challenges we face.

While brain science doesn’t support one interview approach over the others, it does point to several factors that investigators should keep in mind. Multitasking is an inherent reality in the interview process, and investigators should be cognizant of their human limitations as they attempt to balance the many tasks necessary to accomplish effective interviews. There is a big difference between simply hearing and listening intently to what is being said. When one focuses closely on what is being said, more of the brain is engaged and one is better able to process and presumably retain what has been heard.

Critical factors to consider
There was no consensus in our sample as to which of the five approaches discussed in this article is best, and we do not recommend one approach over the others. Among our survey respondents, 80 percent eschew audio-recording interviews, and this group is evenly divided on whether they review their notes with the witness. Even the two authors of this article use different approaches; while neither routinely audio-records, one reviews the notes with the witness while the other does not.

Agreement does exist, however, about what factors investigators should consider and balance in deciding which approach to take.

Consistency of approach. Whatever the investigator chooses to do, he or she should use the same approach consistently. The investigator’s best defense if challenged about the approach will be the ability to clearly articulate a longstanding practice and the reasons for it. The one exception is when the client’s organization has an established approach it wishes the investigator to adopt, provided it does not interfere with fact-finding.

Witness comfort level. Witness rapport is important in all workplace investigations, and there are inevitable tensions between building witness rapport and issues such as the ability to impeach a witness later if necessary. While those who audio-record assert that the presence of a recorder does not inhibit witness disclosure, this is not the view of the majority of investigators who responded to our survey. Most of these investigators regard audio-recording (and drafting declarations) as key barriers to disclosure.

Future impeachment. It is an unfortunate fact that witnesses will sometimes disavow what they said in their interview. Investigators who audio-record point to this issue as a key argument in favor of that approach. Those who use approach 1 point to its longstanding use and practice in effectively impeaching testimony, while those who use approach 2 “split the baby” by using some aspects of witness adoption while keeping the relative informality of the note-taking process.

Cost and time. Some approaches are more labor intensive than others, and this can cost a client more money. Transcribing audio recordings can be expensive. Similarly, having a second person along as an investigator can dramatically increase costs. A related issue is the time it takes for an investigator to complete an investigation. Employers are required by law to conduct prompt investigations, and some approaches can eat up valuable time. If the investigator has to draft his or her notes and then send them to the witness, days or even weeks can be lost.

Confidentiality. Confidentiality concerns can arise if witnesses circulate their declarations or the investigator’s rough notes to their coworkers and others, despite the investigator asking them not to do so. Disclosing statements can not only pose problems in preserving the confidentiality of the process but can potentially taint the data that the investigator gathers later. Under some circumstances, there is a risk that providing a witness with his or her statement could lead to a waiver of the work product protection the statement might otherwise have.

Investigator issues. In this category, the issues are as varied as the investigators who do the work. Investigator fatigue can be an issue when doing multiple interviews in one sitting. Some approaches require more investigative expertise than others. It may be easier for some investigators to pay attention if they have to take detailed notes, or easier for others if they are freed from having to do that.

Conclusion
With all the different factors to balance and consider, the absence of one clearly defined approach is not surprising. This area of practice, like others in workplace investiga-
tion, is evolving, and a similar survey taken five years ago or five years from now could very well produce different results. Even the individual investigators with whom we spoke said they are constantly evaluating their approaches and modifying them as circumstances and the law change.

Each of these approaches has advantages and disadvantages, but the investigator must make a choice. The best starting point for this decision is awareness of the common practices in the field and the issues that need to be balanced as we conduct investigations.

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Applying the California Supreme Court “Mixed Motive” Analysis in Workplace Discrimination Investigations

By Jennifer Doughty and Alexander Sperry

Introduction

Let’s say you are charged with investigating a claim of discrimination. The complainant alleges he was demoted because of his age, 66. You obtain evidence that demonstrates the manager had legitimate reasons for the demotion, and that the employer had in fact demoted two other employees, both of whom were in their 30s. But, being the thorough investigator that you are, you also uncover evidence that the manager repeatedly made jokes about the complainant, referring to him as a “dinosaur,” an “old fart,” and otherwise commenting on his outdated computer skills. What now?

Enter the “mixed motive” analysis. In a mixed motive discrimination case, an employer has both lawful and unlawful reasons for terminating an employee. A recent decision by the California Supreme Court in Harris v. City of Santa Monica set forth the standard for determining liability in “mixed motive” cases which involve both legitimate and discriminatory reasons.1 In Harris, the court held that if an employee can show that discrimination was a substantial factor motivating his or her termination, the employer can still demonstrate that legitimate nondiscriminatory reasons would have led it to make the same decision. If it does, the employee cannot recover damages or be reinstated to their job. However, in such situations the employee may still be entitled to injunctive and declaratory relief to stop any discriminatory practice, in addition to recovering attorneys’ fees and costs. The standard is distinguishable from the three-stage burden-shifting analysis utilized in discrimination cases that do not involve mixed motives.2

The supreme court’s decision in Harris provides helpful guidance for workplace investigators analyzing mixed motive facts in discrimination investigations. This article provides a brief overview of the facts of the case, the supreme court’s decision, and what the decision means for workplace investigators.

To understand how this applies to workplace investigations, let’s first look at the facts of Wynona Harris’s case.

The facts

Wynona Harris worked as a probationary bus driver for Santa Monica’s city-owned transit system. During her training and probationary period, Harris was involved in two preventable, noninjury accidents. Harris also had two late arrivals, or “miss-outs,” where she did not notify her supervisor in a timely manner.

1 Harris v. City of Santa Monica, 56 Cal. 4th 203 (Cal. 2013)