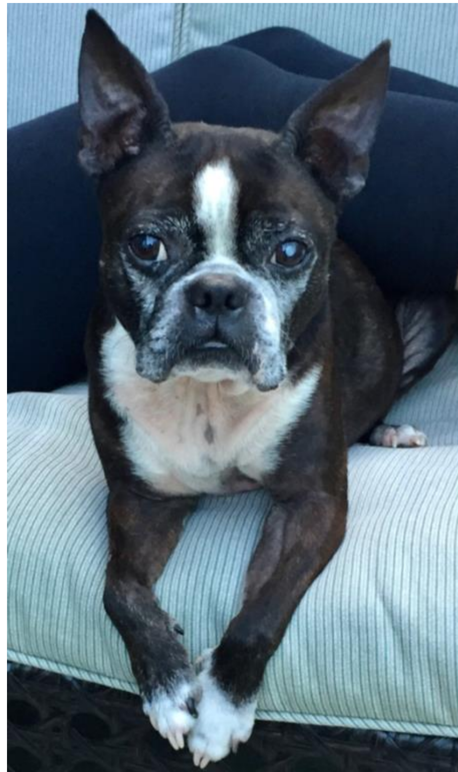
Moving from Criminal to Workplace Investigations



The Old Dog May Have to Learn New Interview Tricks

Bruce Pitt-Payne
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Last year, I made the switch from my Honda Civic to a new CRV. I had always loved driving the smaller, sleeker, faster, sportier, and yes sexier car, but due to an aging back and the need to transport two pups around, I finally bit the bullet and accepted change. When looking around the car lot, I didn't really notice many differences between the two; I mean, an automobile is an automobile, right? Well, that all changed once I got on the road for the test drive. I had to adjust the seat to accommodate the different placement of the steering wheel, and its additional weight affected the acceleration and turning. The CRV also had many different controls, and what appeared to be a more complicated dashboard computer system. The handling was much different, and I wasn't sure of its positioning in the lane. Don't get me wrong, it was the perfect vehicle for me and my back, and the extra room in the back seat would be great for Murphy and Frankie's trips to the doggie park. It was just different, and I would have had to adapt to the variances. I bought it and quickly made the transition by accepting that, although most automobiles were similar in principle, it was I who would have to adjust my sails to fit the winds of change.

When I left a 26-year career in policing and moved into the world of non-criminal, workplace investigations, I believed an "*investigation was an investigation*". I naively thought that I would be able to transfer all my skills and knowledge over to the new situations without having to modify my approach. Much like my experience with the CRV, I soon learned that, although the principles of investigative interviewing for police officers were similar, I would have to adjust my tack due to often subtle differences found within workplace investigations. I didn't find the changes onerous, though, because I had always thought of interviewing as a framework to be modified according to the circumstances and context presented. Had I become entrenched in an inflexible model or protocol, the change would not have been as easy. The hardest part of this opportunity for growth was to recognize the differences, so I could adapt to them. This paper will begin by speaking to the similarities, and will move into the differences along with suggestions for change. The differences will be divided into the following sections: the person being interviewed, the legal considerations, and the interview process.

Common Principles:

Interview Goals

The primary goals of an investigative interview are to find out what happened by obtaining information that is both complete and reliable. The secondary aim is to have the interviewee choose to commit to a version of events; thereby, making it difficult to change stories based on a preference to avoid conviction, as opposed to a desire to tell the truth. Don't fall prey to overcomplicating what should be no more than an overarching principle to guide you through the process.

Interview Objectives

The objectives are a little more complex, as they focus more on the relevancy and detail of the information sought, and are generally broken into topics related to the relevant categories such as the people, locations, actions, conversations, times, and objects. The level of detail required from the interviewee, and the category to be examined, would vary dependent upon the information necessary to prove whether a wrongful action had occurred, and in many criminal cases, whether there had been intent to commit the wrongful act. The action is referred to as the *actus reus*, and the intent the *mens rea*. In many workplace investigations, only the *actus reu*s must be proved. In short, the objectives answer questions about the who, what, where, when, why, and how.

General Interview Process

Regardless of the matter under investigation, the flow would remain similar. It would still be a flexible, context-based framework, generally including the following phases (the phases of the PEACE investigative interview framework have been chosen as an example, as they are well-defined, and form an exceptional mnemonic acronym. The names of the phases are less important than the principles behind them):

Planning and Preparation (pre-interview phase)
Engage and Explain (introductory rapport-building and explanatory phase)
Account, clarify, challenge (information-gathering phase)
Close (conclusion phase)
Evaluate (assessment phase)

To satisfy the goals and objectives, these phases (the process) would be founded on scientifically-supported components, such as:

- rapport
- empathy
- an understanding of memory
- an understanding of trauma and its potential affect on memory
- a free-recall account
- productive questioning (a funnel-based, conversational sequence of non-suggestive open, specific [probing] and closed questions) to examine the objectives
- a conversational approach aimed at generating dialogue, even if the information conflicted with the interviewer's beliefs

The process would not include the following obsolete, and often-pseudoscientific components, that could increase the likelihood of generating either a false or unreliable utterance:

- an accusatory or confrontational approach
- detection of deception techniques that rely on observing physiological cues (verbal and non-verbal)
- trickery and deceit, such as the presentation of fabricated evidence, that could have an affect on voluntariness
- minimization or maximization themes
- threats and promises as a *quid pro quo*
- an oppressive atmosphere (anything that could deprive the interviewee of an ability to make a meaningful and effective choice whether to speak, and what to say)

Differences

The people:

Witness: In the workplace, a witness may be naïve to the investigative process in general, causing anxiety from simply being involved. Whereas, many people have watched police procedurals on tv, there haven't been many shows focussed on harassment in the workplace. Workplace witnesses may have fears, either justified or not, about what would take place and how they would be treated. They are unfamiliar with the process and expectations. Additionally, workplace offences, for example sexual harassment, often have a more intricate web of elements, than criminal offences such as theft or assault, leading a witness or victim to either not know,

or misunderstand, whether any wrongdoing had in fact occurred. This could have a deleterious effect on witness confidence, and incentive to assist. It could also mean that the interviewer may have to be sufficiently skilled enough to be able to obtain detailed recall without having to resort to leading questions.

The workplace witness may also feel frustration and fear due to feeling isolated, and trapped in a job she can't walk away from. Although they desperately want the offending behaviour to stop, they may have legitimate fears of retaliation, or have little faith in the process or the investigator. They may have observed the harm caused by past inadequate investigations, and need assurance that the process will be professional, thorough, fair and impartial. For these reasons, a more robust explanatory phase would often be welcomed to demystify the process and build rapport.

The workplace witness may also have knowledge about situations that had occurred over a lengthy period, and happened more than once. For example, the witness may have observed, or been the victim of, harassment that started years before an official complaint had been made, and for which there had been dozens of episodes. This may lead to what is referred to as "*script memory*", where the witness may have difficulty recalling a specific episode, and speak as if many of these episodes had been blurred together. They may telegraph this type of memory by using terms such as, "*usually*" or "*for the most part*", in lieu of a detailed episodic narrative account. For this reason, workplace interviewers would benefit from an understanding of the indications of "*script memory*", as well as how to probe the witness for any episodic memory she may have stored. The educated interviewer would also be less likely to mistake the lack of detail in a *script memory* account for deception, and erroneously attack the witness' credibility or reliability.

Suspect/Respondent:

Aside from the terminology ("*suspect*" is generally used for criminal and "*respondent*" for workplace investigations), there may be other subtle differences in the interview process. At the risk of being overly general, the workplace respondent would not necessarily have the same "*criminal*" mindset as the suspects with whom the police often engage. However, the lack of deviance may be compensated by an accused person who is more intelligent, sophisticated and educated than even the interviewer. This could be accentuated by union representation, and a justifiable expectation to be treated with courtesy and professionalism. Many respondents, either due to a general sense of honesty or because of policy or legislation that compels them to take part in an interview, will often accept your invitation. For that reason, they would essentially be "*yours-to-lose*", meaning that they would stay in the room until you gave them reason to leave. Specifically, inserting an investigative agenda (through accusations,

confrontation, evidence presentation, or challenges) prior to receiving the interviewee's, could lead to an end to the flow of information, or the interview. Another important difference is that, although criminal suspects do face jeopardy, a consequence to being convicted, the workplace respondent may face the spectre of termination of employment. As this could lead to other real consequences, such as loss of property or relationships, this fear may prove to be an impermeable impasse. If you were to get past this barrier, it would likely be due to interviewer preparation and genuine rapport as opposed to preaching or imposing an agenda.

Legal considerations

The legal landscape differs as well, so attention to the following points would be beneficial:

Terminology: Be mindful of the terms used in a workplace environment, as referring to a "*respondent"* as a "*suspect*" could cause irreparable damage to your relationship with the person under investigation, and their labour representative or lawyer. Referring to a "*complainant*" or "*primary witness*" as a "*survivor*" or "*victim*" could also raise a few hackles, as it could be perceived as a bias against the respondent. Words do matter, so familiarity with the proper investigative lexicon is essential to the maintenance of rapport and trust.

Mens rea: As mentioned earlier, many workplace investigations differ from criminal in that they involve "*strict liability*" offences; those that do not require the *mens rea* (intent) to be proved. Harassment is an example, where the action alone would be sufficient to satisfy the commission of the wrongdoing. Often the *mens rea* has been replaced with terms such as, "*a reasonable person ought to have known the comment or action would have been unwelcome*"; thereby, precluding excuses such as, "*I did call her a #$%^, but I was only joking*".

Burden of proof: The vast majority, if not all, workplace investigations are decided using the civil standard of balance-of probabilities. The decision often requires courage and discipline to refrain from "*copping out*" and using the term "*unsubstantiated*", instead of "*founded*" or "*unfounded*". Often, the use of "*unsubstantiated*" is nothing more than a decision not to make a decision, despite having enough evidence and information to do so. That could also be referred to as justice denied.

Credibility assessments: Following the position in the preceding paragraph, a balance-of-probabilities decision may require the results of a credibility assessment of the parties involved. This means that, even if all else were equal, a finding of “*unsubstantiated*” should be the exception and not the norm. The proverbial “*seesaw*” would still tip, as rarely would the two opposing parties be able to have equal credibility. This approach takes courage, but it often differentiates the experienced and knowledgeable investigator from the inexperienced and naïve. Credibility assessments are not just important, they are essential.

Hearsay rules: Whereas hearsay evidence is, short of a few exceptions, not permitted in a criminal investigation, it may be in a workplace matter. A principled approach may lead to its inclusion, depending upon the circumstances. For this reason, it would be wise to, at times, seek legal advice on the matter, rather than lose what may be valuable evidence.

Scope: For workplace investigations, it would not be uncommon to be asked for an investigative report that does not include a decision on whether any wrongdoing occurred. It would be wise for the investigator to understand this at the commencement of the process, as it might lead to a need for reports that are more detailed and nuanced. Not making a decision, does not mean the salient facts should not be reported. It means they should be made abundantly clear, so the actual decision-maker has all that is needed to be fair and accurate.

Custody: Most workplace investigators, or the organizations for whom they work, do not have the lawful authority to detain or arrest anyone. This means that the interviewer should make it clear to the respondent that they are not required to take part in the interview process. Having said that, some organizations have internal policy requiring the respondent to assist the investigation. As this may be confusing to the interviewer and interviewee, ensure the policy is clearly understood to avoid allegations of unlawful confinement. Again, it would be prudent to seek legal advice on this point, rather than relying on assumptions.

Warnings: Although there may not be an obligation to give the respondent the same legal warnings as the police (Constitutional Rights to legal counsel and the choice whether to speak [Miranda warning in the US]), as they are often tied to a detention imposed by the state, there may be legal obligations resulting from internal policy or

collective agreements. It is the professional responsibility of the interviewer to be fluent in these requirements. However, it is equally important to know them well enough to present them in a clear, yet conversational manner, without resorting to a meaningless, recitation from a script. The principles within the warnings may be conveyed without becoming robotic and pedantic. By all means, use a reference guide, but don't feel compelled to read someone to sleep. Rapport is about dialogue, and can be lost by being too officious. Remember, reading from a script or card may have been necessary years ago, but we now have recording devices that liberate us from monotonous routine.

Parallel investigations: A workplace investigation may occur before, during, or after the investigation by another agency such as the police. This often happens when the workplace is examining an allegation of sexual harassment, that could also satisfy the the elements of criminal sexual assault. Be alive to the similarities and differences related to evidence admissibility, including potential hazards that could be caused by timing issues. A criminal court might rule that certain evidence had been obtained in a manner that, although acceptable to the civil process, would not be admissible in the criminal. Additionally, a criminal court might find that aspects of the workplace interview had interfered with the respondent's ability to subsequently provide a voluntary interview to the police; thereby, rendering it inadmissible. An example is often found when the workplace had used policy to compel the respondent to speak, and the police, not knowing this, did not explain that the police interview was distinct from the workplace investigation, and there was no obligation to speak. The remedy for this issue is found in communication between the investigating bodies. If a workplace investigator believes the investigation might also end up before the police, it would benefit everyone to have a robust discussion.

Lawyer or union reps: In Canada, the criminal courts have distanced themselves from ruling absolutely that a lawyer must be present while an adult suspect is interviewed by the police in a custodial setting. The Court has been more interested in confirming that the suspect had been informed of his Constitutional Rights to counsel, and had been able to implement them before the interview. Generally, the police would not have a lawyer take part in the interview process, after having established that the suspect had spoken to a lawyer, and had understood the advice provided.

In a workplace investigation, the rules may be different, often dependent upon company policy and existing collective bargaining agreements. A respondent may be permitted to have a lawyer, a labour representative, a friend, or a combination of these people present in the interview. It would rarely be time wasted to throughly review company policy; thereby, ensuring this aspect of procedural fairness.

Evidence disclosure: Procedural unfairness may also be alleged when a respondent argues that the investigator had not provided sufficient or adequate information with which to make an informed decision whether to speak. It often revolves around the contention that the respondent had only chosen to talk, because he had not known the risk, or consequence, of doing so. Whereas, there are few absolutes on the information to be provided, the following considerations are important:

- Procedural fairness does not require disclosing the full investigation to the respondent. Often, it would be sufficient to inform the respondent of:
  - the reason for the investigation (the name of the alleged wrongdoing, the policy or act within which it is found, and a definition of the specifically alleged wrongful action);
  - the fact that he is the person being investigated for having committed the wrongdoing;
  - the names of relevant people involved, if they would help the respondent recognize the incident(s) being investigated;
  - relevant locations, dates or times that would help the respondent identify the incident(s) being investigated;
  - any other information that would lead to an understanding of the act or behaviour that was alleged
- Any evidence or information that would not be required to facilitate an informed decision, might be suggestive or leading, and could lead to an inability to properly assess the weight that should be given to the interview. Remember that an interview is not a hearing where the full and frank disclosure of evidence is required in advance. It is an opportunity for the respondent to choose whether to speak

and what to say. Moreover, it would be procedurally unfair to a complainant if she were not to receive full disclosure prior to her interview, when a respondent would get everything. Procedural fairness includes consistency.

- Recent research has suggested that an interview is more productive (generates more information from the respondent) when evidence is strategically presented in a drip-fed manner throughout the interview, as opposed to laying it all on the table at the front end [Early versus Late Disclosure of Evidence: Effects on Verbal Cues to Deception, Confessions, and Lie Catcher's Accuracy, January 2012, Journal of Investigative Psychology and Offender Profiling 9(1) DOI: 10. 1002/hip. 1350, Hartwig, M., et al.]. This insight supports the tactical presentation of information and evidence to generate dialogue and launch conversation later in the process, often in the form of a non-accusatory challenge to inconsistencies, or to ask for an explanation on existing evidence

- Simply "*dumping*" the evidence on a respondent may either overwhelm him, or lead to a perception that there was little benefit to explain anything because the case against him was weak. Conversely, it could make a respondent believe, in cases where the evidence was strong, that choosing to speak would be of little value as the interviewer would certainly have already decided he was guilty. Remember, that the presentation of evidence should be done to motivate the respondent to choose to speak to it. How and when it is presented is crucial to the conversation desired.

- Prior to the end of the interview, it would be procedurally fair to mention all the remaining evidence, so the respondent could choose to speak to it. Present each piece of evidence individually, and ask the respondent to help you understand its meaning and value. The added benefit of presenting the evidence in this manner, is that, should the respondent choose to speak about it, he would have committed himself to a version from which he would have difficulty straying at a subsequent hearing.

Recording: Whereas, many police agencies have been audio and video recording suspect interviews for decades (in Canada, the Courts often take issue with not video recording), many workplace interviewers persist in handwriting the statement. For reasons ranging from archaic legal advice, to a fear of scaring away the interviewee, the interview process and value is often compromised by an adherence to obsolete methods. Unless you have policy strictly prohibiting the use of electronic recording devices, they should be used. It would be wise; however, to review and reassess that policy as handwritten interviews rarely, if ever, allow an interviewer to achieve the goals and objectives of an investigative interview. If you do use a recording device, unless you are obliged to obtain consent pursuant to legislation or caselaw, ensure that the interviewee clearly understands that he will be recorded.

The interview

As mentioned earlier, the interview process in a workplace situation is often similar to one done by the police. However, the nature and atmosphere of the workplace probe may require some adaptation. Here are a few considerations:

- A respondent or witness may tell you they will only be interviewed if they are not electronically recorded. Be careful not to automatically kowtow to this demand, as it may lead to an inadequate interview, which in turn could have a negative affect on the overall results. Since workplace investigations are adjudicated on a balance-of-probabilities, an investigator shouldn't be overly concerned when an interviewee attempts to interfere with your ability to conduct a fair and thorough investigation. Be prepared to explain the reason you must record the interview, and, rather than lower the interview standard, explain how a civil burden of proof works, and how a choice not to take part in the interview might take away the opportunity to provide meaningful input. Should the interviewee choose to walk away, any diminished credibility due to a lack of information volunteered, would be attributed to the actions and choices of the interviewee, and not the investigator.

- If a witness or respondent wants to speak "*off-the-record*", do not mislead them by agreeing with those terms, unless you agree with them and have the power to fulfill them. Keep in mind that many courts and tribunals often do not consider any utterance to be "*off-the-record*", and may overrule your promise to the interviewee. Additionally, an "*off-the-record*" utterance is of little value to your investigative goals, and could give the interviewee *carte blanche* to intentionally misrepresent information during the interview. Be careful not to use terms such as "*confidential*" unless you thoroughly explain what that means, and be reticent to treat anyone as a *confidential informant*, unless you know the implications of that decision. Other than exceptional circumstances, it would be best practice to inform the interviewee that what they say will be used in the investigation, and may be viewed by people such as lawyers involved in the process.

- To protect the integrity of subsequent interviews, and to prevent toxic gossip or retaliation, it would be wise to ask the interviewee to refrain from discussing the interview with anyone. Some companies have policy that would define post-interview "*gossip*" as a breach of confidentiality, for which a penalty may result. Prior to the interviews, make an effort to familiarize yourself with this policy.

Conclusion

I've spoken with many retired police officers who became workplace investigators, and many, like me, learned that the new role was not exactly the same as the one in which they had learned to conduct interviews. Much of the process has like principles, goals and objectives; however, differences may often be found in the behaviour and expectations of the interviewee; the legal guidelines to which the interviewer should adhere; and the interview process itself. I hope this paper has provided some insight into these important variations to the interview process. I wish the best to all the police officers who choose to adapt to this slightly different investigative genre, and that the transition is fluid and lacks the frustration felt by the old dogs like me.

This paper is dedicated to my old pal Billy, who taught me that everything is the same, until it isn't. I miss you my dear friend.