

Witness Interview Memorandum (Workplace Investigation)

A Lexis Practice Advisor® Annotated Form by

Ellen V. Holloman and Jaclyn A. Hall, Cadwalader, Wickersham & Taft LLP



Ellen V. Holloman
Cadwalader, Wickersham & Taft LLP

FORM SUMMARY

This form is a Witness Interview Memorandum (Workplace Investigation) for use by employers and their attorneys to document witness interviews during an internal workplace investigation. This form includes drafting notes, optional clauses, and alternate clauses.

This form is intended for private employers. It is based on federal law and does not address all potential state law distinctions; thus, you should check any relevant state and local laws.

For more information on witness interviews in workplace investigations, see [Interviewing Employees in Workplace Investigations](#) and [Interview Techniques and Questions for Workplace Investigations Checklist](#). For more information on documenting witness interviews, see [Documenting Key Events in Workplace Investigations – Preparing Interview Outlines and Documenting Interviews](#). Also see the practical guidance in the Investigations subtask.

DO NOT DISTRIBUTE, PRIVILEGED AND CONFIDENTIAL, ATTORNEY WORK PRODUCT

Drafting Note to Header

In most cases, the employer will want the details of a witness's interview to remain confidential. If an attorney conducts the interview, the memorandum documenting the interview may be protected by the attorney work product privilege, particularly if the attorney includes in the summary the attorney's mental impressions of the interview. Limit distribution of privileged interview summaries to the investigation team and do not share them with employees. Include this header on all pages of the memorandum. For more information on preserving confidentiality and the attorney-client and work product privileges in investigations, see [Attorney-Client Privilege and Work Product Protection in Workplace Investigations](#), [Attorney-Client Privilege and Work Product Protection during Investigations Checklist](#), and [Confidentiality in Workplace Investigations](#).

In some instances—particularly when interviewing a complainant—the employer may want to use the interview as an opportunity to document the complainant's position and record any admissions that may be helpful for future litigation. In that case, do not use this clause so that you may use the memorandum in litigation.

To: *[In-house counsel / File]*

From: *[Interviewer(s)], [company or law firm]*

Date: *[Date of memorandum]*

Re: *[Witness's full name]* interview on *[date]* concerning *[company name]*'s investigation of *[subject matter]*

1. Investigation Background

[Company name] (the Company) is investigating allegations set forth in a complaint dated *[date]* made to *[name and job title]* asserting *[summary of allegations]* (the Complaint). *[Interviewer(s)]* of *[company or law firm]* is conducting the investigation.

Drafting Note to Section 1., Paragraph 1

If in-house counsel conducts the interview, to help preserve the confidentiality of the memorandum, state in this section that the attorney was acting in his or her legal—not business—capacity and provide supporting facts for this assertion.

This memorandum contains the opinions, mental impressions, and conclusions of *[interviewer(s)]* and has been prepared in anticipation of litigation on this matter.

Drafting Note to Section 1., Paragraph 2

Include this paragraph to protect the privileged nature of the memorandum. If you intend to produce this document in litigation, omit this paragraph. For more information on preserving confidentiality and the attorney-client and work product privileges in investigations, see [Attorney-Client Privilege and Work Product Protection in Workplace Investigations](#), [Attorney-Client Privilege and Work Product Protection during Investigations Checklist](#), and [Confidentiality in Workplace Investigations](#).

2. Witness Biography and Employment History

[Witness's full name] is a *[current/former]* *[title]* at *[company]*. *[Witness]* *[has been / was]* employed by the Company for approximately *[length of time]*.

Drafting Note to Section 2.

Former and third-party witnesses. If the witness is no longer an employee at the company, note his or her current employment, if known, and the approximate date when he or she left the company. If the witness is a third-party witness who the company never employed, note that in this section as well.

Discrimination claims. If the investigation concerns a discrimination or harassment claim based on membership in a protected class (e.g., race, gender, age, or sexual orientation), then it may be appropriate for you to note the witness's membership in that protected class.

3. Statement of Relevance

[Witness] is the person who made the Complaint.

Drafting Note to Section 3., Paragraph 1

The reasons for selecting a witness to interview include his or her role in the investigation (e.g., complainant, accused, manager, subordinate, co-worker), his or her participation (as a party or witness) in a particular event, or his or her knowledge of a particular system or practice at the company. Use the alternate clauses if the witness is not the complainant.

Alternate Section 3., Paragraph 1:

The Complaint named [witness] as a witness to an incident that allegedly occurred on [date]. Specifically, the Complaint alleges that [describe facts relevant to the witness].

Second Alternate Section 3., Paragraph 1:

[Witness] has knowledge of [company system or practice (e.g., data retention)].

[Interviewer(s)] interviewed [witness] to [short statement explaining why the witness was selected to be interviewed].

4. Interview Preparation

In preparation for the interview, counsel for the Company reviewed the following documents:

- [List of documents]

[Describe other steps taken to prepare for the interview, and, if applicable, identify past interviews that may be related.]

Drafting Note to Section 4.

If you intend to use this document in litigation, omit this section and do not include any attorney work product or mental impressions elsewhere in the memorandum. For more information on preserving confidentiality and the attorney-client and work product privileges in investigations, see [Attorney-Client Privilege and Work Product Protection in Workplace Investigations](#), [Attorney-Client Privilege and Work Product Protection during Investigations Checklist](#), and [Confidentiality in Workplace Investigations](#).

5. Interview Summary

A. Overview

On [date], [interviewer(s)] of [company or law firm] interviewed [witness], a [title] at [company]. [Witness] was interviewed regarding [interview topics]. [Other attendee] attended the interview on behalf of the [company, law firm, and/or witness].

Drafting Note to Section 5.(A.), Paragraph 1

Repeat this last sentence as needed to document all attendees and the party with which they are affiliated.

The interview took place at [location]. It commenced at [time] and concluded at [time].

Drafting Note to Section 5.(A.), Paragraph 2

If you conducted the interview by videoconference, note all locations for all participants. If you conducted the interview by telephone, note that in this section as well.

This interview was recorded by [notetaker, videographer, audio recorder, stenographer, etc.]. [Describe notetaking service and personnel.] This memorandum contains a summary of the interview and is not a verbatim reproduction of the witness's account.

Over the course of the interview, the following topics were discussed:

- [List of topics]

B. Warnings and Instructions

The witness was informed of his or her rights as follows:

I am a [lawyer] for [company / law firm]. I represent only [company], and I do not represent you personally.

Drafting Note to Section 5.(B.), Paragraph 2-5

This paragraph of the memorandum documents the Upjohn warning, which requires attorneys to provide certain information when interviewing employees to maintain the attorney-client privilege with the employer. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981). You should give the Upjohn warning to every witness before interviewing him or her in any internal investigation to which federal attorney-client privilege standards apply. This suggested Upjohn warning script is based on a blueprint provided by the ABA White Collar Crime Committee in 2015. For an alternate Upjohn warning script that includes an employee acknowledgment section, see [Upjohn Warning Script](#).

For more information on Upjohn warnings, see Attorney-Client Privilege and Work Product Protection in Workplace Investigations.

If a non-lawyer conducts the interview, then the warning script above should be adjusted accordingly.

I am conducting this interview to gather facts in order to provide legal advice for [company]. This interview is part of an investigation to determine the facts and circumstances of [alleged event(s)] in order to advise [company] how best to proceed.

Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to [company], not you. That means [company] alone may elect to waive the attorney-client privilege and reveal our discussion to third parties. [Company] alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.

For this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss this discussion.

Optional Section 5.(B.), Paragraph 6:

[Company] appreciates your candid cooperation with this investigation. Retaliation based on your assistance here will not be tolerated. If you believe that you are being retaliated against as a result of your participation in this investigation, you should inform Human Resources immediately.

Do you have any questions?

The witness responded that [he/she] [did / did not] have questions. [Document any questions that he or she asks and your responses to those questions.]

The witness was then asked:

Are you willing to proceed?

The witness responded that [describe the witness's response to the warning]. The witness indicated that [he/she] [was / was not] willing to proceed.

Drafting Note to Section 5.(B.), Paragraph 10

You should encourage the witness to respond verbally that he or she understands the warnings and agrees to proceed before asking any further questions.

C. [Subheading for each event and/or subject discussed]

Drafting Note to Section 5.(C.), Heading

Include each specific allegation that you discussed with the witness. You should note the witness's response to questions about relevant events even if the witness responded that he or she was not there, did not recall the event, or did not know anything about it.

Witness stated that *[insert summary of the event or subject as described by the witness]*.

Drafting Note to Section 5.(C.), Paragraph 1

Include a complete, accurate, and objective description of all relevant facts (even unfavorable ones), including dates, times, statements, and names of other witnesses. Do not merely repeat the witness's statements verbatim—that's the role stenographer, recording device, or notetaker. This section should be a concise, organized, and reader-friendly description and assessment of the interview. However, be sure to retain the raw notes to refer back to if necessary.

First Optional Section 5.(C.), Paragraph 2:

When asked about [question], [witness] explained that [statement].

Second Optional Section 5.(C.), Paragraph 2:

[Interviewer] showed [witness] [document]. [Witness] stated that (s)he (recognized / did not recognize) the [document]. [Insert summary of discussion about the document].

Drafting Note to Section 5.

In general, witness interview summaries are privileged and confidential and contain the attorney's work product (i.e., mental impressions and advice). To maintain that privilege, include the attorneys' opinions, mental impressions, and conclusions throughout the interview summary. For more information on preserving confidentiality and the attorney-client and work product privileges in investigations, see [Attorney-Client Privilege and Work Product Protection in Workplace Investigations](#), [Attorney-Client Privilege and Work Product Protection during Investigations Checklist](#), and [Confidentiality in Workplace Investigations](#).

However, if you are preparing a witness interview summary that you intend to be admissible in litigation, consider writing the interview summary section in the style of a declaration, with an emphasis on documenting alleged facts and reproducing the interviewee's phrasing. In such cases, you may give the complainant-interviewee the opportunity to review the summary after the interview and ask him or her to sign it to verify that it is complete and accurate.

6. Conclusions

[Insert conclusions and recommendations for the company].

Based on this interview, the following people should be considered for additional interviews:

- *[List of potential interviewees]*

In addition, *[list of past interviewees]* should be contacted for follow-up regarding *[relevant event(s) or subject(s)]*.

[Witness] mentioned *[potential document(s)]*. Copies of the *[document(s)]* should be located and reviewed.

Drafting Note to Section 6.

In addition to follow-up interviews and documents, you may also include in this section a description of any issues concerning the interview unrelated to the factual matters you discussed, such as conversations with the witness that took place before or after the interview, descriptions of the witness's demeanor and credibility, and any other mental impressions about the witness. You should also include recommendations for the company, such as any corrective actions it should take against the interviewee. If you intend to use this document in litigation, omit this section and do not include any attorney work product or mental impressions elsewhere in the memorandum. For more information on preserving confidentiality and the attorney-client and work product privileges in investigations, see [Attorney-Client Privilege and Work Product Protection in Workplace Investigations](#), [Attorney-Client Privilege and Work Product Protection during Investigations Checklist](#), and [Confidentiality in Workplace Investigations](#).

Drafting Note to Enclosures

Attach a copy of the following documents to the interview memorandum, where applicable:

- Any documents provided by the interviewer to the witness for discussion during the interview.
- Any documents provided by the witness to the interviewer during or after the interview.
- Key documents reviewed in preparation for the interview, which are listed in Section 4., above (unless you intend to use this document in litigation)
- Any relevant contracts or agreements signed by the witness, such as his or her employment contract or signature page from the company's employee handbook.

Ellen V. Holloman, Cadwalader, Wickersham & Taft LLP

Ellen represents financial institutions, corporations and individuals in regulatory enforcement proceedings, corporate internal investigations and related civil litigation. She also frequently handles litigation for bankruptcy and restructuring matters, and has experience in representing clients in contract disputes and employment-related claims, including for enforcement of non-compete and confidentiality agreements. She has first and second chair trial experience, has argued motions in federal and state court, and has participated in over one hundred depositions.

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