Best practices in preparing for and conducting **virtual interviews**

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Introduction

Due to the restrictions in place as a result of COVID-19, internal investigation teams are adjusting to virtual interviews as the new normal. Based on our experience, we have assembled this guide for in-house and outside counsel who may have to conduct interviews virtually.

Whether your team is trying virtual interviews for the first time or it has long relied on this method of interviewing, this guide sets forth a checklist of considerations on how to prepare for, conduct, and follow up after the virtual interview, all while yielding effective fact-finding and credibility assessments in the virtual setting.

Is a virtual interview a suitable forum?

When considering if a face-to-face interview might be a better option, weigh the potential risks of a virtual interview against the need to perform the interview now. Consider:

- The risk that the interviewee may take notes or photos during the interview without your knowledge.

- The risk that the interview could be recorded, either with or without your knowledge. What if that recorded version is then shown to another interviewee prior to their interview?

- The risk that the documents used in the interview could be captured by screenshots and shared with other interviewees or released to the public.

- The risk that someone may be present for the interview who you do not know about, for example, another interviewee.

- The ability of interviewees to "leave" the interview during difficult questioning.

- Interviews are stressful even under normal circumstances, and it is more difficult to create rapport with the interviewee and put them at ease on a screen. The interviewee will likely not be as forthcoming on video as in person.

- The interviewee may not trust that the interview is confidential or may worry that it is being audio- or video-recorded without their knowledge.

- In some jurisdictions, a virtual interview may be better suited for fact-finding in relation to a civil claim or investigation. It may not be appropriate for a formal interview with an individual suspected of misconduct.

- Most video platforms minimize the video window of participants, particularly during screen share. In a virtual interview, it can be difficult for a person presenting documents and speaking to observe the reaction of the interviewee.

On the other hand, virtual interviews may be the better option when companies do not have the luxury of waiting, such as when companies need to:

- Respond to a government request.

- Self-report potential misconduct, which needs to be done promptly in order to receive full cooperation credit.

- Interview relevant employees who are going to quit, be laid off, or fired.

- Prioritize resources during pandemic disruption.

- Obtain testimony while the events are still fresh in the interviewee's mind.

- Assure employees who have made individual complaints that investigations into reported misconduct are being addressed in a timely fashion.

- Save time and costs involved in traveling to undertake interviews.

Technical preparation for the interview

When selecting the software platform for the interview, we recommend researching the following capabilities and selecting the host based on the appropriate functionalities for the specific purposes of the investigation.

Breakout rooms

- Research whether the platform provides the ability to use breakout rooms, if needed.

- If you want to use breakout rooms, also consider:

    Privacy of the breakout room – find out whether or not anyone on the technical staff is able to hear or see the conversation, which would break privilege.

    Functionality of the breakout room – test the functionality beforehand to confirm that attendees understand how to use the breakout rooms and keep conversations private.

- If you do not want the interviewee to have the ability to discuss anything privately, either select a platform that does not have that capability at all, or work with the provider to turn off that capability prior to the interview.

Chat

- Chat functionality presents considerations similar to breakout rooms. Consider whether attendees should have the ability to chat either with the entire group or privately.

- If the chat function also works as a way to display documents, confirm that the chat is visible to all parties, and research who is able to control or contribute to the chat.

- Look for a platform that allows chat specifications per user if you would like to allow some parties to chat but disable the functionality for others, like the interviewee.
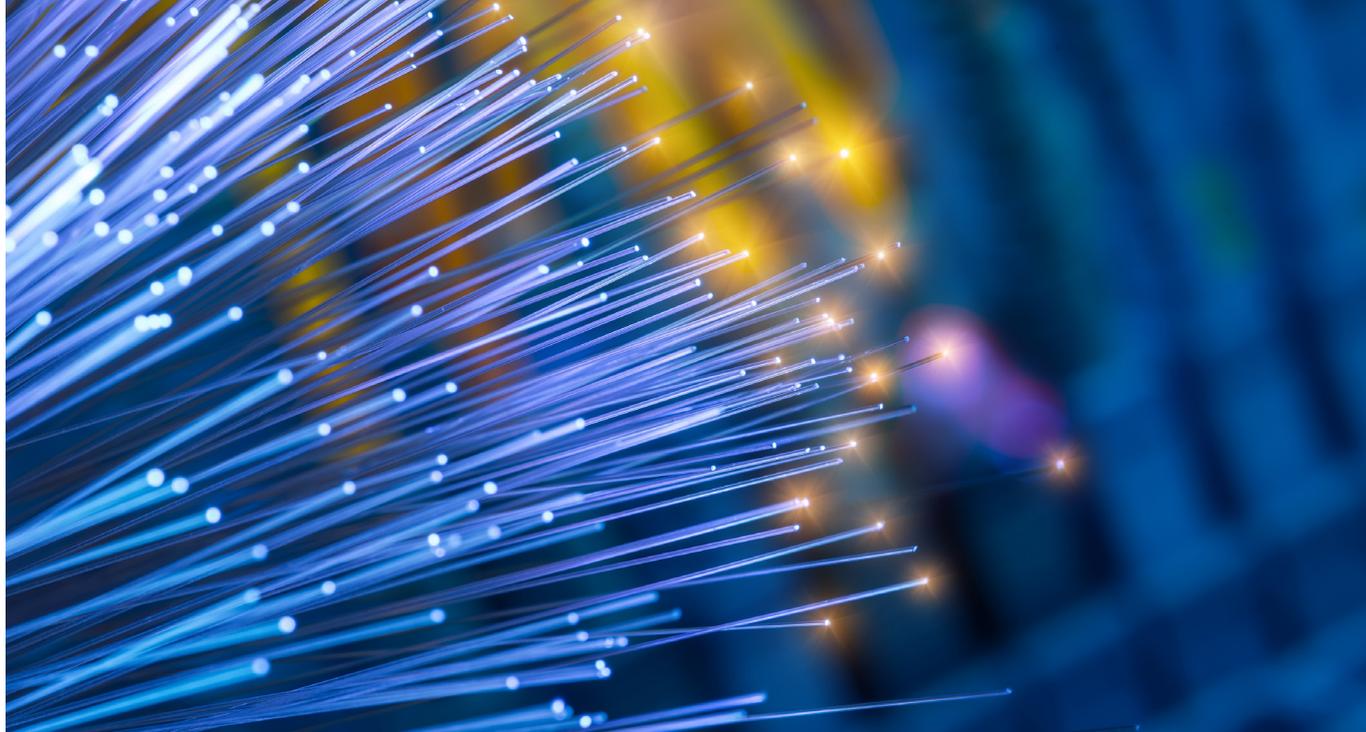
Document exchange

- Videoconference platforms offer numerous ways to share documents during the interview.

    Screen share – The most common form of showing documents is to use screen share. If you are running the screen share and document-sharing process, familiarize yourself beforehand with how to use the functionality. Also research and understand your ability to zoom in, highlight an excerpt, toggle between documents, etc.

    Chat – Some programs allow files to be sent over chat if you prefer this method of document-sharing.

    Technician assisted – Some platforms allow you to email or upload the documents beforehand and have a technician run the document-sharing process. In this circumstance, be sure to practice with the technician beforehand and discuss cues in order to move through files as seamlessly as possible.

Privacy/security

- Encryption – Research the level of encryption and if that level is sustained for the entire videoconference. For example, in some platforms, end-to-end encryption is turned off when breakout rooms are used.

- Secure Link – Research whether the platform can provide a secure link that only allows invited attendees to join the videoconference.

- Password – Research whether the platform allows password-protected entry.

- Waiting room – Research whether the platform uses wait room technology to give the host control over who can gain access.

- Screenshots – Consider attendees' ability to take and save screenshots on the utilized hardware during the interview and how to disable that functionality if needed.

Other capabilities

- Consider what other setup options may be useful during the interview.

    Viewing options: gallery of all attendees, only interviewee, only speaker, etc.

    Attention indicator

    Background noise cancellation

    Disabling of microphones for everyone but the speaker

Security considerations

Data regulations

- Confirm the ability to share cross-border data where applicable.

- For example, if the documents are located only in the European Union but the interviewee is located in the United States, have you confirmed that your ability to use the documents during the interview is not restricted by the General Data Protection Regulation (GDPR)? What if the documents and the interviewer are in China but the interviewee is in England? Would sharing those documents violate the PRC Cybersecurity Law and corresponding data protection rules?

Privilege

- Assess which jurisdiction's privilege rules apply based on the location of the interviewer, the interviewee, the company, etc.

- Upjohn warnings and other routine admonitions (such as confidentiality and talking about the interview once it is over) should still be given.

- The interviewee should also be informed that having anyone else in the room during the interview could break privilege.

Integrity of interview room

- Set up safeguards to ensure that the interview is not susceptible to spying or monitoring by third parties, which could lead to inadvertent disclosure of privileged communications or other highly damaging consequences (for example, a leak to the media). Prior to the interview:

  Confirm that the link to the videoconference is unique to the participants and cannot be shared or used by others.

  Confirm that there is a waiting room for all participants seeking to join the videoconference and that they can only gain access through the host.

  Confirm that the host has the ability to remove any participants if needed.

  Confirm with all attendees that they are the only ones present in their respective rooms.

  Confirm in advance that "do not disturb" signs have been placed outside of the rooms where participants are attending.

- Limit the participants in the interview room to a minimum, just as you would for an in-person interview. Someone other than the interviewer should be taking notes. It may also be useful to have another attendee observing the reaction of interviewees other than a speaker. If a technical person needs to join the call to fix a technical issue, wait until that person has left to resume the substantive questioning

Other preparation

Setting ground rules for the interview

- Ask interviewees to situate themselves in a private space with no distractions.

- Explain to the interviewee the roles of all participants.

- Explain to the interviewee that they should be alone and not recording any portion of the interview.

- Explain what should happen if the interviewee needs a break.

- Explain what should happen if there is a technical problem.

- Explain how questions are to be posed and answered so that people are not speaking over one another.

- Explain how documents are to be referred to and shared during an interview.

Who should attend?

- Prepare to facilitate independent legal representation, translators, or other participants, if needed.

- Given that the interviewing lawyer will need to focus on establishing rapport, reading the interviewee, and conducting the interview, they should ideally have assistance from another lawyer to:

    Confirm that proper Upjohn warning was given.

    Conduct accurate notetaking.

    Observe and confirm credibility cues from the interviewee.

Satisfying any local law requirements – e.g., employment issues

- Furloughed employees (U.S.)

    They can be interviewed as they are typically bound by contractual obligations to cooperate with internal investigations.

    The company may need to compensate the furloughed employee for time spent (for nonexempt employees) or the full workweek (for exempt employees).

- All employees in any jurisdiction

    Be prepared with contractual language or justification for the employee's cooperation and compensation plan prior to contacting the employee for the interview.

    Consider the local legal employment regime to confirm that a videoconference interview provides sufficient basis to take employment action, if needed.

The day of the interview

Specific adaptations – e.g., questioning techniques

- Anticipate that there may be a lag in audio, video, or both, so you might need to adapt and give additional time during questioning for a complete question and answer.

- iTry to pay closer attention to the interviewee's facial expressions and physical cues as they may be harder to detect via video.

Timing concerns

- In general, the shorter the interview the better.

- Consider time zones and their potential impact on the quality of the interview, start and end times, etc.

How to present documents

- In general regarding documents used for the interview, the fewer the better.

- Pre-mark all documents confidential and/or privileged prior to sharing or using them during the interview.

- Consider redactions to avoid disclosure or distraction of unrelated and unnecessary sections.

- Consider reading relevant excerpts instead of sharing the actual document, if necessary.

How to handle technical problems

- Check with technical support prior to the interview to confirm you know how to reach someone for assistance (phone call, chat function, email, etc.).

- If the interviewee takes a break during a technical interruption, reiterate the interviewee's confidentiality obligations (for example, not texting another interviewee about the interview).

Follow up

Interview notes (where these are being prepared)

- Ensure the interview notes reflect that the interview was conducted virtually and, if applicable, presented limitations regarding evaluating credibility, any technical difficulties, etc.

Follow up with the interviewees and client

- Confirm that interviewees understand their obligations regarding further document retention and availability for additional interviews, if needed.

As virtual interviews become more routine, investigative teams may find that they work well going forward, even after restrictions have eased. For example, virtual interviews are a solution when it is inconvenient to arrange face-to-face interviews in multiple cross-border locations or when there is time sensitivity. We hope this guide serves as a helpful checklist when preparing for virtual interviews.

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