Also, if a supervisor failed to honor the request of a bargaining-unit employee to have a union representative present during a disciplinary fact-finding interview, then the information learned would likely not be useful in making a disciplinary decision affecting the employee being interviewed, unless the same information was available from another source.

Information offered under threats by a supervisor or information which was given under duress or as a result of any undue influence by the supervisor is likely to be classified as "tainted" and useless. In effect, if the supervisor failed to follow proper due-process or just-cause guidelines during an investigation, the information learned would likely not have probative value.

"Spontaneous testimony" is evidence offered in very close proximity to the place or time when a misconduct occurred, especially where such testimony was given freely and where circumstances may have prevented a supervisor from giving a warning or informative statement.

Spontaneous testimony is generally afforded a high degree of credibility as it likely was given before sufficient time lapsed to provide opportunity for fabrication or concoction. Such words, in effect, may be in such close proximity to the action in question to be thought of, in effect, as a part of the action itself. Spontaneous testimony may approach the level of best evidence due to its proximity to the event in question. Such testimony is often described as being "in situ" namely, it occurred in the original (same) place and at the same time as the incident or event in question.

On-the-spot unsolicited confession offered by an individual caught in the act of misconduct or wrongdoing, or the first statement of an individual upon awakening in an apparent sleeping-on-the-job incident are examples of "spontaneous testimony".

"Co-worker testimony" is not normally considered best evidence for a number of practical workplace-related reasons. Peer pressure and the generally prevalent feeling of "nobody-likes-a-squealer" play a major role in stifling or suppressing information which might otherwise be available, once it becomes known that a disciplinary investigation is underway.

Arbitrators may not place best evidence status upon co-worker testimony due to the possibility that selfish motives may prompt an employee to testify against a co-worker in order that the employee may obtain seniority-based advantages, overtime advantages, promotional consideration preferential treatment, etc., as a result of a co-worker who is displaced following a disciplinary investigation.

Similarly, co-worker testimony may not have probative value under a defense stemming from a common-law doctrine called the "fellow servant rule." Under that defense, supposedly innovated by the famous lawyer Clarence Darrow ..."When servants are employed and paid by the same master, and their duties are such as to bring them into such relation that negligence of one in doing his work may injure others in performance of his/her work, then they are engaged in the same common business, and are 'fellow servants'." (Black's Law Dictionary, Fifth Edition, 1979, page 555.)

"State-of-Mind evidence" is evidence, usually obtained in the form of a comment from an individuals which indicates what the individual intends to do or intended to do under a set of particular circumstances; for example, "If I am assigned that job, I won't do it. I'll probably get sick or something."

The employee's comment indicates his/her intent, and may be used in the future to explain why the employee did or did not do something.

There is sometimes a tendency to discipline such an employee for an attitude problem in cases such as the one directly above. A more appropriate course of action for the supervisor is to warn such an employee of the consequences if the employee carries out such an act, to discipline the employee following the misconduct, if and when it occurs, and to use the employee's earlier comment as state-of-mind evidence to demonstrate that the employee knew what he/she was doing and that the employee knew it was wrong.

"Off-the-Record Testimony" may occur when supervisors are made aware of possible misconduct of an employee by a co-worker who chooses to remain "off-the-record" or who chooses to "not get involved" in any subsequent investigation or action. Such informant action may create liability for the supervisor if the alleged problem ultimately results in an accident or other mishap. While the supervisor does not want to shut-off such information, some prudent response actions should be followed by the supervisor.

When an employee offers off-the-record information:

1) Thank the employee.
2) Inform the employee that the supervisor will attempt to maintain the comments off-the-record but that a general record of the incident and any follow-up action will be kept.
3) Inform the employee that the supervisor will investigate. Let the employee see the supervisor write down a follow-up reminder note.
4) Keep a record of the general information and the supervisor's follow up action.
5) But be honest and tell the employee that if the matter is serious it may have to be made part of the record.
6) Then, investigate and if at all possible make any decision or take any action based on supervisory sensory facts.
7) Communicate to top-level managers the nature of the off-the-record report and the results of any investigation and any action ultimately taken.
8) Keep a record of the report, the results of the investigation, and any appropriate action taken. (It is not necessary to put specific employee names in the record.)
9) If the employee requests off-the-record for the supervisor to investigate and take action, the supervisor does not owe the employee any formal answer. (Although the supervisor may be obligated to provide such an answer to alleged victims in harassment cases.)
10) If the supervisor does not find any evidence to necessitate corrective action, the supervisor may want to simply conduct a tailgate session to review policies or procedures generally relating to the off-the-record complaint, but without being accusatory in any manner. (Such action will clarify the standards and guidelines and will demonstrate to the informer that the supervisor is, at least, doing something about the alleged problem.)

When an employee offers testimony for the record:

1) If the testimonial solely is critical in making a disciplinary decision, ask the employee to write out and sign it and have a supervisory witness also sign the testimonial or have the employee dictate a statement to be typed and signed by the employee.
2) If the testimonial is to be used in arbitration or prosecution, have the written testimonial notarized.
3) It is critical that the supervisor document critical employee testimonial and the supervisor should document any follow-up investigation made and any action taken.
4) Let the employee see the supervisor write down a note regarding the offered information.
5) Inform top-level managers and, if appropriate, a labor relations representative of the testimony and of any action taken by the supervisor.
6) If action is taken toward an employee solely based upon co-worker testimony, fairness dictates that the employee know the specific nature of the accusations and, at least, the general nature of the source of the complaints.

Off-the-Record Supervisory Comments

Supervisors should not erroneously presume that they enjoy any privilege of anonymity simply because they (the supervisors) make a statement with the qualifier "off-the-record." A supervisor is management's front-line representative when dealing with employees. A supervisor's comments are always "on-the-record" insofar as employees are concerned. A supervisor will not be able to deny having made such a statement, especially under oath and during complaints and appeals and arbitration hearings. Even though an employee may make off-the-record statements,