



SEPLER & ASSOCIATES

Step By Step

**Employment Investigations from
Beginning to End**



Why Conduct an Investigation?

- Fairness
- Document/memorialize
- Proactivity
- Clarity
- Shared understanding
- Meet requirements
- Aid decision making
- Support organizational decision making



The Investigative Report Card

✓	Administrative Framework
✓	Adequate Planning
✓	Clarity of Scope
✓	Investigator Expertise and Skill
✓	Neutrality
✓	Flexibility
✓	Credibility Assessment
✓	Findings



The Gold Standard
Consistency and Rationale
This is how we do it.
This is why we do it this way.



Twelve Steps of Investigation

1. Intake
2. Interim Actions
3. Form Your Team
4. Open File
5. Plan
6. Log Evidence
7. Preliminary Interviews
8. Update and Revise Plan
9. Interview Respondent
10. Follow Up Interviews
11. Credibility Assessment
12. Findings/Report



**INTAKE
1**

**INTERIM ACTIONS
2**

Analysis

Informal
Handling

**OPEN FILE
OBSERVE RECORD KEEPING
PROTOCOL
4**

Decision to
Investigate

**IDENTIFY NEED TO KNOW
TEAM
3**

Complainant
Interview if needed

Data Collection and
Recording

**INVESTIGATIVE
PLAN
5,8**

Policy Review

Notices

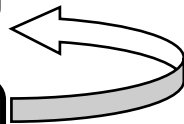
Interim Actions

**GATHER AND LOG
EVIDENCE
6**

**INTERVIEWS
7, 9, 10**

**CREDIBILITY ASSESSMENT
11**

**REPORT FINDINGS
12**





Intake

See “Intake Form”



Taking the Complaint





Intake

- The process of “intake” or, literally, **taking in the complaint** is necessarily and properly decidedly different from investigation, and the quality of the intake will indisputably affect an investigator’s ability to find facts.



What Goes Wrong?

Charges against employers arise out of anger, frustration and distrust in the organization's willingness, interest in, or capability to manage their concerns.

Charges come when complainants believe they have not been listened to, have not been taken seriously, have been unfairly judged, or the organization has not been open and diligent.



Conflating intake and investigation is one of the biggest errors an organization can make.

- the direct questioning and skepticism appropriate in the latter stages of an investigation can crush a complainant's confidence in their employer.



The goal of an intake is to allow a person to be fully heard and their feelings affirmed.



Avoid

- Appearing to blame the complainant
- Asking detailed questions/ interrogating
- Suggesting that false complaints are prohibited
- Making negative statements about other employees



Be Prepared For...

- “I want to tell you, but I don’t want you to do anything about it...”





Intake should involve the following:

- Thank the person for coming forward and being willing to describe their concerns
- Avoid interrupting, expressing doubt or challenging the version provided.
- Listen attentively to what the person has to say
- Be appropriately empathetic, acknowledge the very real feelings being expressed, but don't validate any facts



The Fork In the Road

- If everything the complainant has said is true
 - Would it violate our policy or the law?
 - Would we likely take disciplinary action?



Take Appropriate Interim Actions

Protect People and Property



“Nimble” Policies and Smart Thinking

- Take the least intrusive path to creating a “frozen” scenario
- Take steps to minimize polluting the witness pool
- Stay scrupulously focused on what is needed to capture facts and to be fair



Act Aggressively to Prevent Harm, Reprisal or Recurrence

- Minimize opportunity
- Harden Targets
- Reduce Access
- Issue Clear Instructions



Conducive Environment

- Consider whether removing or separating parties is appropriate. This might include:
 - Offering paid leave to a distressed complainant
 - Placing alleged bad actors on leave
 - Assigning parties to different work areas, or different shifts
 - Instructing parties to minimize contact



Preserve Evidence and Provide Safety



Preserve Evidence/Provide Safe and Stable Work Environment

- If electronic communications are involved, minimize ability of parties to alter those systems
- If there are concerns about physical safety, take steps to ensure proper supervision and security
- Seize and Protect Records and Evidence



Preservation of Documents

- Useful tool
- Not always essential



Create Your Need to Know Panel/Organizational Clearinghouse

Determine who will get
“information as needed.”



Who “Needs to Know?”

- The “need to know” group will include those people who will need to know detailed information about the allegations and the outcome of the investigation. These should include only those people advising you.
- Investigative Coordinator
- In House Counsel
- Sr. Employee Relations Personnel
- Security



Who Gets “Info As Needed?”

- The “information as needed” will include those people making logistical arrangements for you, your key decision makers and anyone who needs to produce data for your investigation. Do not share information with these people any more than is absolutely necessary.
 - Decision makers DO NOT need to know the allegations you are investigating. They merely need to know that you are doing an investigation pursuant to company procedure.



Who DOES NOT need to know?

- People making appointments and arranging rooms DO NOT need to know you are conducting an investigation
- Witnesses do not need to know one more detail than necessary.



Open Your Investigative File



File Contents

- Cover sheet/Face Sheet
- Time tracking
- Notes (original and revised)
- Messages, e-mails, relevant calendar entries
- Final Report
- Copies of evidence/exhibits



Planning Your Investigation



Scope

- The investigator should use **consistent** criterion for deciding whether new issues should be added to the current investigation.
 - Is the new issue sufficiently related to the existing issue ?
 - Do the parties essential to resolving or exploring the new issue substantially overlap the existing pool of witnesses? (continued)



Scope

- If the new issues/allegations are true, would they likely change the organization's course of action?
- If the new allegations are found to be untrue, could this substantially affect the assessment of credibility of any party to the current investigation?
- Is the new issue of sufficient scope that it calls for a separate dedication of resources in order to ensure that the central investigation is completed in a timely way?



Using Investigative Questions



Investigative Questions:

- Are separate and distinct from *interview* questions
- Are questions *that will need to be answered in order for the investigation to be completed*
- May include questions about fact, timing, context, history, relationships and organizational climate and culture
- Are dynamic
- Are a TOOL to help investigators maintain focus and efficiency



Create Appropriate Logistical and Communications Support



Logistical and Communications Support

- Determine how to contact and what to say to interviewees
 - Choose a neutral, non-threatening person to arrange logistics
 - Prepare a short script for them
- Understand “need to know”



Scan for and Consider Ramifications of Other Events



Ramifications of Other Events

- Make recommendations or adjustments to minimize the appearance that other events are related:
 - Reduction in force
 - Vacations
 - Plant closings
 - Acquisitions
 - Schedule or management changes



Prepare Appropriate Notices



Gathering and Using Evidence



Evidence is Everywhere

- Electronic footprints
 - Cell phones
 - Pagers
 - Data Cards
 - ATM's
 - Phone chips
 - Voice Mail
 - GPS devices
 - Surveillance Tapes



More creative

- Corporate discounts/id's
- Credit card receipts
- Hotel and travel records
- ATM cameras
- Internet cookies
- “deleted” emails
- Vendors and suppliers



Notes, diaries and calendars

- Obtain immediately for chain of evidence and authenticity purposes
- Make copies and authenticate
- Use distinctive ink



Generate Evidence

- Take photos
- Screen shots
- Video or Audio records
- Printouts



Catalogue Evidence

- Mark every document or object collected



Conduct Preliminary and Follow Up Interviews



Interviewing Essentials



Methodological Decisions

- Specific methodological decisions that are **debatable, but also defensible. You should have an explanation and a record of consistency on the following:**
 - Recording or not recording interviews
 - Interviewing one-on-one vs. two-on-one
 - Reviewing or not reviewing personnel files prior to interviews
 - Informing others about the nature of the allegations
 - Being briefed by a prior/preliminary investigator about the facts and events to date
 - Whether drafts are retained or destroyed



The 5 Stages of Interviewing

1. Opening and Tone Setting
 - ◆ Stage setting
2. Uninterrupted Initial Narrative
 - ◆ Listening
3. Reconstruction
 - ◆ Analysis
4. Deconstruction, or “Push”
 - ◆ Testing and challenging
5. Closing
 - ◆ Recap and continuity





Use a Pre interview Checklist

- Define the process, “rules of the road.”
- Use notices to confirm understandings
- Be prepared for questions such as
 - Should I have an attorney here?
 - What happens if I just say I don’t want to talk to you?
 - Who else will know what I’ve said?



- Be professional, neutral, welcoming, and active
- Respond to challenges or problems with empathy and helpfulness
- Use “small talk” and simple questions to establish comfort
- Provide notices, but avoid droning or being dismissive
- Provide opportunities for witnesses to easily provide information unrelated to specific interview topic
 - “Low hanging fruit”
- Create a pattern of cooperation and agreeability



Ask questions you know the answer to

- How long have you worked at _____ ?
- What is your position, duties?
- Where did you work before?
- Promotions, transfers, why?
- Do you know why you have been asked to participate in this interview?
- Why?





Stage 2: Uninterrupted Initial Narrative



UIN

- Unravel and re-organize thoughts of interviewee
- Generate recollection and clarity of detail
- Create a dynamic of speaking and listening
- Assure that mega-messages of the speaker are fully understood
- Create a shared reality by:
 - Seeing the arc of the narrative
 - Identifying, but reserving questions about gaps and subtleties





Stage 3: Reconstruction

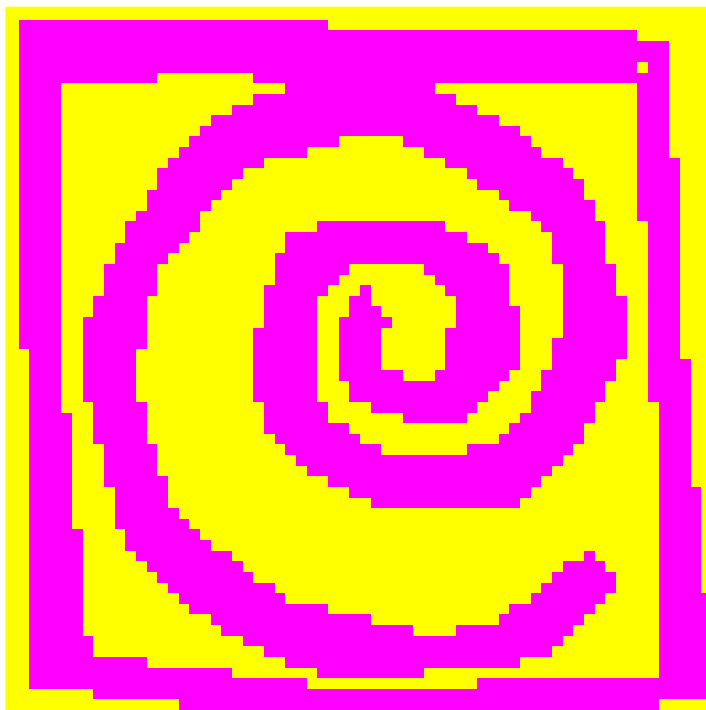
- Obtain more detailed information
- Create a cooperative situation
- Construct a chronology of events
- Less emotional, more analytical
- Facts, facts, facts.





Stage 4: Deconstruction/Push

- Create opportunities to test interviewee's credibility
- Obtain response/reaction to outside evidence or statements of others
- Use inconsistencies to challenge veracity of statements
- Move from self-advocacy to truth telling, if applicable.





Stage 5: Closing

- Confirm the accuracy of the information gathered
- Provide a buffer to allow the interviewee to re-engage
- Ensure that appropriate expectations have been managed



Steps for Closing an Interview

- Recap all that has been said in the interview
- Make certain that the interviewee is informed of expectations and policies regarding their interview and the information gathered.
- Thank the interviewee



Avoid making promises or appearing to make commitments:

- Consider the “crystal ball” or “magic wand” question



Continue to Update and Revise your Plan

What questions have you
answered? Who do you add to
your witness list?



Note Taking

- Your notes must be:
 - Contemporaneous
 - Objective records of statements
 - Clear enough to you to be able to interpret them later
 - Consistent from individual to individual in detail



Note Taking Advice

- Take minimal notes during the uninterrupted initial narrative, focusing on the “high level.”
- After the uninterrupted initial narrative, recap and review your notes, using structure such as seriousness, chronology or vividness.
- Never put your opinion in the body of your notes.



Note Taking Advice

- Keep credibility notes separate.
- Put observations in parentheses (crying).
- Review and refine your notes immediately following each interview.
- If you use a PC, back up frequently.
- Practice, practice, practice.



Assessing Credibility Concluding the Investigation



Credibility Assessment Relies on:

- Analysis
- Observation
- Response to Deconstruction Techniques
- Corroborative Evidence or Testimony



Analytical Factors

- Motive for untruthfulness
- Unrelated lack of truthfulness
- “Game playing” with context
- Ease and Effort of Response
- Reliability
- Historical context
- History of behavior or claims (past pattern and practice)
- Behavior in “like” situations
- Consistency in sequence and content
- Affective dissonance



Interviewer Observations

Conduct **may** suggest credibility or lack of credibility when variance from baseline exists

Always baseline during your rapport building stage



Corroboration

- Did someone see/hear what happened?
- Did someone see/hear about it?
- Did subject tell someone about it?
- Did subject write it down?
- Is there independent evidence?



History and Patterns of Behavior

- Past conduct is generally, but not always an indicator of future conduct
- History of similar events adds credibility to alleged current event
- History of false complaints compromises the credibility of a current complainer
- History of untruthfulness should be considered



Internal Consistency of Information Provided

- Does it hold together?
- Does it match tone, belief systems, boundary structure with the rest of the information?
- Has the information stayed stable despite multiple methods of inquiry



Report Formatting

Outline Recommendations

- I. Intent
- II. Methodology
- III. Executive Summary (optional)
- IV. Summary of Claims and Statements
- V. Credibility Assessment
- VI. Findings



Findings

- Statements of Fact (i.e. what happened)
- Statements regarding degree of evidence to support or not support facts
- Statements as to why allegations or facts asserted during the course of an investigation were not found to be supported by evidence or were false.
- No legal conclusions



Do You Make Recommendations?

- Not if you are a fact finder
- Not if you aren't sure they will be accepted
- Instead, make yourself available to consult
- Let the decision maker decide
- Can inform about past practice



You are responsible for the effort

Not for the outcome



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