

Conducting Effective Workplace Investigations

BY MERIC CRAIG BLOCH

Conducting Effective Workplace Investigations

Companies routinely conduct internal workplace investigations of suspected fraud and misconduct.

In the current economic and legal climate, however, the way potential misconduct is investigated may affect a company's reputation as much as the alleged misconduct.

Workplace investigations try to accomplish many things. Investigations help protect companies against internal and external threats. Investigations also identify areas of unacceptable business risks so that company management can address them. After all, if running a business means taking calculated risks to make a profit, the only way risks can be calculated is to learn as much about them as we can.

An investigation, in simple terms, should tell a complete story about something that happened. The story may be as complex as trying to explain how a dishonest vendor managed to defraud a company of a million dollars in never-delivered products, or as simple as detailing how a drunk executive misbehaved at the company Christmas party.

This guide explains best practices from the perspective of a private-sector for-profit company. Most, but not all, of the concepts in this guide apply equally to academic, unionized, and public-sector workplaces. If you work in one of these settings, consult your manager or legal department before changing any of your current practices to ensure that you remain in compliance with your obligations.

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The Decision to Investigate

When you receive a report of possible misconduct, don't accept the information at face value and start the investigation right away.

First, review the information to determine if an investigation is appropriate. Not every report leads to an investigation. An investigation is appropriate only if the report gives you a reasonable factual basis to believe that misconduct has occurred.

What do we mean by a reasonable factual basis? This standard reflects the value judgment that people are entitled to be free from scrutiny unless some basic threshold is satisfied. A reasonable factual basis means (i) that you reasonably believe a violation of your code of conduct, law or regulation occurred in the workplace, and (ii) you reasonably believe that the named employee committed it.

TALK TO THE REPORTER

Contact the person who made the report (the "reporter"). You want to learn as much as possible from the reporter because this information will help you plan your next steps. Interviewing the reporter is essential whether or not you believe a reasonable factual basis exists because, once again, you should not accept the report at face value. Interviewing the reporter will help establish or disprove a reasonable factual basis.

Once you have learned all you can about the report, you must then make a decision. Based on the information you have gathered so far, do you have a reasonable factual basis? If so, you are ready to begin your investigation. If not, then you must make another decision: are there any additional sources you can check to determine whether the allegation may be true? If so, check with those sources. If not, then sufficient cause may not exist to conduct an investigation at that time.

For more information, see cheat sheet: [8 Tips for Interviewing the Reporter](#)



Investigation Planning

Every investigation requires you to do some thinking and analysis. Ensure a good result by doing as much up-front thinking as possible.

The detail required, and the time consumed, to plan an investigation depends on the complexity of the allegation. Routine investigations usually require minimal time and detail, and a simple outline or summary in a case-management system may be sufficient. More complex investigations need more time and require finely developed planning.

Determine the scope of the investigation by imagining the end of your investigative efforts, and identify and articulate the precise reasons for the investigation. Simply put, what exactly are you trying to learn? Is the allegation related to a company policy only? If so, then the investigation would focus on the relevant facts, comparing that to the specified company policy, and then suggesting remedial action. If the investigation concerns criminal conduct or financial irregularities, then the investigation may also assess possible criminal and civil exposure for the company and the individuals involved.

A proper investigation scope also reinforces the fairness of the process. If the company must later defend a decision based on the investigation – a wrongful termination claim, for example – it will appear unreasonable for an employer to have reached a conclusion based on no evidence or no real investigation at all. Also, it will appear unfair if the company disciplines an employee based on weak evidence when better or stronger evidence is reasonably available but ignored.

DEFINING THE SCOPE

Proper definition of the scope also protects the innocent. A properly conducted investigation will identify any wrongdoers, but that does not mean that other individuals might not be injured as a result of the fact-finding. The importance of defining the scope of an investigation is, in some ways, an effort to protect the innocent, to narrowly define the area to be investigation and to assure that those not involved in a particular act of misconduct are neither implicated by their proximity to the event nor exonerated by omission.

Your scope determination is not engraved in stone. If you change the investigation scope (and the plan), add a note to the file documenting the new objectives and your reasons for changing them. This could help you later on if you are accused of some improper motive for adjusting the investigation.

DEFINING THE STRATEGY >

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DEFINING THE STRATEGY

Once the scope has been determined, you can move to the second part of the plan: the strategy. A proper strategy, regardless of the investigation's complexity, makes the investigation process thorough and professional.

The plan does not need to be formal. You just need to think in advance about how you will approach the investigation:

- What do you already know?
- What do you need to know?
- How will you develop the facts needed to prove or disprove each of the elements of your allegation?
- Who will you ask?
- What documents will you review?
- What questions need to be answered by the investigation?
- What are the standards and elements for which you need facts?

Consider producing a timeline or chronology of events. The chronology should include all the information you know and how you currently know it. The chronology should be constantly updated.

As the investigation proceeds, be flexible to changes in the strategy. Situations change, and you have to be able to adapt. The true nature of the problem under investigation may turn out to be different from what you first thought. Similarly, the witness list should be a “running” list because different or additional witnesses may surface during the investigation. Do not let the investigation plan become so rigid that you can't alter it when necessary.

THE INTERVIEWING PROCESS >

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A successful interview may be measured by the volume of quality information gathered, the ability to move the investigation closer to its conclusion, and whether investigation participants were treated in such a way that they believe the investigation process was fair.

It's important to stay focused on the limited scope of the investigation. Seek interviews with those people who have first-hand knowledge of the situation and do some research and gather documents before you start the actual interviewing.

WHOM TO INTERVIEW

You may think that the more people you speak to, the more complete your investigation will be. Resist this temptation. Instead, determine what information is necessary, and then interview those who possess it.

Since you have already talked to the reporter, there are three more categories of people you need to interview:

- **Information provider:** an individual, often without first-hand knowledge, often with some technical competence, who can explain certain matters that are relevant to the investigation. The accounts payable person who explains how vendor invoices are processed and company checks printed, or the IT person who explains how e-mails are stored on the company's computer servers are good examples. Also, the information provider may be someone who explains the business market, institutional history, or history of conflicts between people involved.
- **Witness:** an individual who has observed some activity that is relevant to the investigation and can, from their own recollection and personal knowledge, give you information regarding their observations. An office co-worker who saw the documents being shredded is a good example.
- **Implicated person:** an individual who, based on the available information, is the target of the investigation.

ORDER OF INTERVIEWS >

Interview the witness with the most expansive knowledge first to begin building the facts.

ORDER OF INTERVIEWS

1. First, interview the witness who has the most expansive knowledge. The witness is your storyteller (also known as the “skeleton”). This witness can give you the details about the people involved – implicated or otherwise – the culture, the personal dynamics, the business relationships, etc. Build your fact-finding using the storyteller as your foundation.
2. Next, interview those who can complete the investigation picture by providing supplemental information (either new details or to corroborate things you have already been told). These people add flesh to the factual skeleton and may corroborate the statements of others. Or the additional testimony may force you to rethink earlier theories.
3. The implicated person is usually interviewed last. This is for practical and procedural reasons. The purpose of interviewing the implicated person is to obtain admissions rather than to obtain primary information. **See Cheat Sheet on Interrogations: Dos and Don'ts.**

BEGINNING THE INTERVIEW

Most witnesses are nervous and understandably apprehensive. The investigative interview is full of stereotypes and misconceptions of questioners giving witnesses the third degree. Unless you neutralize these, you will be at a disadvantage before the first question is asked.

Briefly explain at the start of the interview what is going on and what is expected of the witness. The introduction to the interview is the hardest part because you have to create simultaneously the proper impression, enlist the witness's cooperation and explain the nature of your inquiry. Explain why the witness has been included in the investigation.

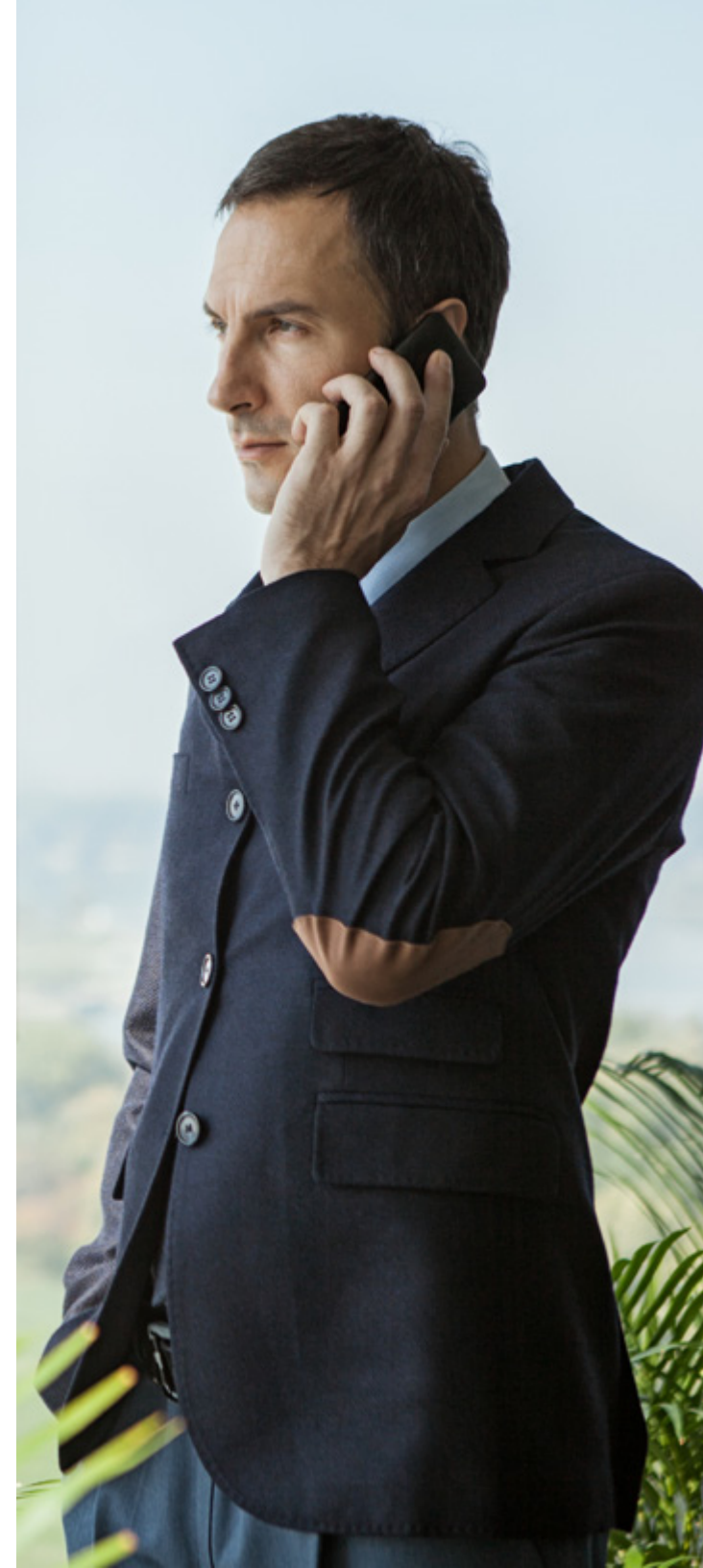
Use a standard set of witness instructions. A standard set of instructions may preempt confusion and possible legal challenges. Be prepared to answer any questions the witness may have about the interview which your instructions may not have covered.

Tell the witness that you will keep any information he provides as confidential as you can. However, never promise secrecy or anonymity. You may have to tell the information to others in order to protect the company, because the company may be legally required to disclose the information.

Giving clear interview instructions not only lays the ground rules. It has a tactical value. It conveys to the witness that, because you set the rules, you are in control of the interview and they are not.

QUESTIONING THE WITNESS

The purpose of the interview is to elicit truthful and relevant information. This is how you build your wall of facts brick by brick. A collegial approach is usually effective because your friendliness will lower their defenses and increase the flow of information. There may come a time when you need to assert the seriousness of your purpose by taking a formal tone with the witness, but this should be the exception. More witness comfort usually yields more witness information.



Remember the 80:20 rule. You are there to acquire knowledge, not disclose it. The witness should be talking 80 percent of the time, and you only approximately 20 percent of the time. Two common interview errors are (i) the interviewer does not allow the witness to tell his own story, and (ii) the interviewer talks too much.

There are no “magic questions” to ask when interviewing someone. But you will never fail if you ask the “who, what, where, when, why and how” questions. Keep the “why” questions until the end as they may be construed as finger-pointing and may discourage the witness from giving full details.

INTERVIEW TIPS

- Ask questions in chronological or other systematic order, not randomly.
- Start with easy questions, such as company work history.
- Ask open-ended questions: Who was there?, What was said?, Why did you do that?.
- Ask straightforward questions in clear language.
- Use silence to elicit more information where appropriate.

CLOSING THE INTERVIEW

Always end the interview on a positive note. Even if disturbing information was elicited, you can at least take an “at least we now know what happened” approach. Use your closing remarks to review key facts elicited during the interview to be certain these points were correctly understood.

At the end of the interview, thank the witness for the information. Give the witness your telephone number – better yet, leave your business card – in case more information comes to light. Keep the door open for future contact if they would like to add or change anything.

If you asked the witness to furnish documents, renew that request and agree to a timeframe. Confirm your request later with an email.

Tell the witness that appropriate management personnel will make any final determination regarding the best way to resolve the issue, but stress that that the witness’s input is valuable and will be considered seriously.

THE PAPER CHASE >

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The Paper Chase

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By contrast, you want to review only the relevant documents. Ask yourself: what documents will help me determine the truth of the allegation?

Documents often give the clearest record of important events. Most documents are created at a time before the problem was discovered. The facts discussed in the documents are usually accurate at the time they were created because there may have been no need then to falsify or distort them.

Documents also play a supporting role by providing important background information. They help you corroborate facts or substantiate someone's story. They also help you pin down crucial details. Documents establish time frames and identify the people who were involved. Documents also tell you who you need to interview and about what topics.

Witnesses may be reluctant to supply information voluntarily, especially when it may implicate their own actions or the actions of someone they supervise or with whom they work. Similarly, witness recollections of events often fade with time and may be inconsistent with recollections of other witnesses. Documents are essential in the process of refreshing a witness's memory and might also help the investigator reconcile conflicting recollections. Documents can also help determine or assess a person's intent or motive in doing something. Documents often provide the best record of the conduct at issue.

EMAIL RECORDS

Emails are terrific documents for workplace investigations. They give you snippets of the bigger story. And the ease of emails eliminates the time delay that used to allow cooler heads to prevail when sending angry notes. Consequently, an e-mail message may give you valuable insight into the real dynamics that were going on at that moment in time, rather than the cautious recounting of events you might hear in an interview.

PERSONNEL FILE >

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PERSONNEL FILE

As an additional document source, you should review the implicated person's personnel file. The file may reveal other symptoms consistent with the report such as past disciplinary problems or performance issues.

DOCUMENT RETENTION

If a particular document is relevant to your findings, it needs to be retained. The easiest and best way to do this is to upload it electronically into your investigative case management application or similar database.

EVALUATING THE EVIDENCE >

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Evaluating the Evidence

This is the point where you put it all together, find where the truth lies, and determine what really happened.

It is sometimes difficult to know when you are finished investigating. Rarely can every question be answered. But you owe it to the process, the company and your colleagues to get the investigation completed as quickly as possible.

To be fair to employees implicated in your investigation, you have a burden of proof to satisfy. This means that you have an obligation to gather evidence to substantiate each element of the misconduct allegedly committed. Your investigation plan was designed to help you meet that burden.

Once the proof is gathered, it has to be measured against a standard of proof. This is a way of determining whether you have gathered enough proof to determine whether the allegation may be considered substantiated.

PREPONDERANCE OF THE EVIDENCE

The applicable standard of proof is the “preponderance of the evidence.” An allegation is considered proven if, based on the facts learned and the documents reviewed, it is more likely than not – think 51 per cent or more – that the misconduct actually happened. If so, the allegation is considered “proven.” If not, the allegation is considered “unfounded.” The particular nomenclature you use is not important.

The preponderance-of-the-evidence standard is not a criminal-justice standard. The criminal-justice standard, as you likely know, is “beyond a reasonable doubt.” This means that the proof makes it at least 90 per cent certain that the misconduct actually happened. Do not use this standard for your investigations. This would force you, among other things, to spend more resources and time than needed. It will also result in substantiated misconduct going unpunished.

Then, ask yourself another question: are we sure that there is no “tip of the iceberg” concern here? If you are not sure, keep investigating to make sure.

REACH A CONCLUSION >

Resist the temptation to conclude your investigation with an inconclusive finding.

Then, ask yourself: have we gathered enough information to assist management in the post-investigation steps like fixing procedures or resolving a customer problem?

If you can answer “yes” to each of these questions, the fact-finding part of the investigation is done.

REACH A CONCLUSION

There may be times when you feel you cannot make a determination. Some people categorize these results as “inconclusive.” Sometimes, this reflects the limited proof the investigation could gather. In other situations, it reflects poor investigative techniques.

Resist the temptation to conclude your investigation with an inconclusive finding. It is important to the company and the people involved that you reach a conclusion. If you feel you cannot reach a conclusion, review your documents and interview notes (you may need to ask a witness some additional questions). Do whatever you can to meet the burden of proof.

Very few issues in an investigation are black and white, and you will often deal with shades of grey. But you have to reach a conclusion.

DOCUMENTING THE INVESTIGATION >

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Documenting the Investigation

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Of all the documents you created, it is proof-positive that an investigation was conducted. A well-written report, because of its reliance on facts and not speculation, shows both that you have done your job and that you met your responsibilities to the company.

The form of the final report depends on its intended use. There is no one-size-fits-all, and the better reports are tailored to the company's specific goals and needs.

The final report should be explicitly limited by the scope of the investigation. The scope should be clearly specified in the report. The report's recommendations and findings should be limited by that scope as well. This will provide a clear understanding to anyone with whom the report is shared regarding the investigation's limitations.

INVESTIGATION REPORT TIPS

- Keep the report simple and factual.
- Use the first person singular when referring to yourself.
- For clarity, use as few pronouns as possible.
- Do not include your opinions. The report should not state, for example, that "John Smith appeared uninterested." Rather, it should state that "John Smith continually looked around the room and requested that questions be repeated to him two or three times before he would answer."
- Avoid inflammatory or judgmental words.
- Reach a conclusion. Assess the credibility of the witnesses. Examine the objective facts and consider motivations. State each of these factors clearly and explicitly.

MORE INVESTIGATION REPORT TIPS >

The final report must stand on its own without relying on a reader's background knowledge.

- Describe any documents that are part of the findings.
- Avoid terms like “supposedly” and “presumably.” This injects you and your perspectives into the investigation.
- Use direct quotes whenever possible.
- Refer to relevant company policies, practices and written procedures. This places the factual context within the operations of the business.
- Do not make legal conclusions about any perceived law violations, breaches of contract, or potential corporate liability.
- Specify any contradictions that surfaced and indicate whether you were able to resolve any conflicts in testimony or documents.
- If an acknowledgement, admission or confession is made, be specific as to exactly what was admitted and use quotes.
- Define all technical terms, jargon and acronyms.

The final report must stand on its own without relying on a reader’s background knowledge or the incorporation by reference of another document. The ultimate test of a good final report is simply this: if the reader of the report has a question, the report is deficient.

NEXT >

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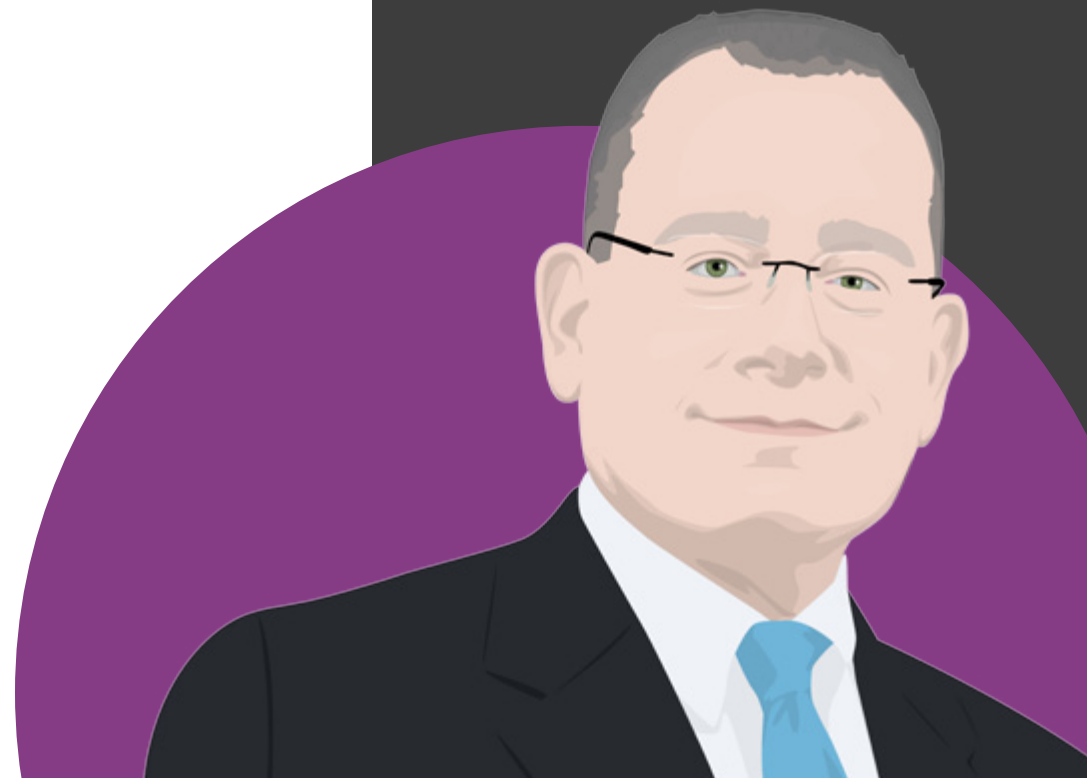
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Meric Craig Bloch is the Principal of Winter Compliance LLC, a consulting practice helping organizations create effective internal investigations programs through investigation process design, investigator training, and investigations management. He has designed, implemented and managed the workplace-investigations processes for multinational Fortune 500 companies, trained thousands of HR and compliance professionals to conduct investigations and has conducted more than 400 internal investigations of fraud and serious workplace misconduct in the US and internationally.

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