

Positioning Your Organization For Effective Internal Investigations

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By Barbara G. Humphrey

1. OBJECTIVES OF INTERNAL INVESTIGATIONS

The increasing frequency with which employment conflicts relate to harassment and bullying is fuelling a growing interest in internal investigation and resolution processes. An appreciation of the objective of an internal investigation process assists in understanding the prerequisites to conducting effective and successful investigations.

The objective of an investigation is to support the determination and resolution of the concerns prompting the investigation. Given that the determinations (*fact finding*) that arise out of an internal investigation are not binding on anyone, the use of the investigation solely to determine the dispute is of a limited value. The objective should be to utilize the findings to successfully pursue a resolution of the issues.

The ability to achieve both a determination and resolution of a complaint is impacted by the following:

1. **Quality of Investigative Initiative**
2. **Credibility of Investigator and Investigation with the Parties (Ability to instil confidence, experience of the investigation, inclusiveness of process, adequacy of reporting, inclusiveness of resolution process)**

The objective of the Investigator should be to ensure that the parties experience an investigative process with the following attributes:

1. Objective.

2. Consultive.
3. Collaborative.
4. Sensitive to and responsive to the parties' legitimate interests (*i.e. confidentiality, due process, non-reprisal*).

There is a significant opportunity to successfully resolve the concerns between the parties through an internal process when the foregoing elements are experienced by the parties.

2. CRITICAL PRE-INVESTIGATION STEPS

A key factor influencing the quality and success of the investigative initiative is the preparation that precedes the interviewing activity pursued with party and non-party interviewees. The following initiatives identified as "*pre-investigation steps*" cumulatively contribute to a successful investigation.

I. Securing an Adequately Particularized Complaint

The securing of adequately particularized allegations is a critical prerequisite to the Investigator's ability to plan and pursue an effective investigation. A useful first step is to require the complainant to provide a particularized summary of all allegations after providing direction on the degree of particularization required to support an effective investigation.

A properly particularized complaint facilitates:

1. Effective identification by the Investigator of relevant interviewees;

2. Supports effective communications with the respondent regarding the complaint;
3. Contributes to the credibility of the process with all parties;
4. Supports the preparation of an effective investigation plan.

II. Timely and Effective Pre-Investigation Communications with the Parties

Parties to investigations are effectively positioned to participate in complaint investigations where they have an understanding of the following matters prior to their interview:

1. The investigation process, timelines, and the merits of the investigation process in terms of a resolution vehicle.
2. The expectations of the parties in the process (*confidentiality, non-reprisal, etc.*).
3. The nature of their involvement in the investigation/resolution process.
4. The parties respective interests and how those interests can be supported through the investigation process.

The foregoing communications are most effectively delivered through pre-investigation contacts by the Investigator with the parties. The foregoing communications can have a significant impact on the quality of an interviewee's participation in an investigation process. Such communications also impact the quality of the investigation and the ability to achieve a resolution through the investigative process.

My practice and recommendation is pre-investigation meetings convened by the Investigator individually with each party. These meetings have the added benefit of enabling the Investigator to commence the

important process of building their credibility with the parties.

The securing and maintaining of the Investigator's credibility with the parties should be an objective throughout the investigative process. There is a direct correlation between the Investigator's ability to establish his/her credibility with the parties and the ability to use investigation results to resolve the concerns prompting the investigative initiative.

3. KEY ELEMENTS IN CONDUCTING AN EFFECTIVE INVESTIGATION

Effective investigations are the product of a collaboration of key elements. My definition of an effective investigation is an investigation where the following is achieved:

1. *All relevant information is available and accessed by the Investigator.*
2. *Support for and confidence in the investigative process is secured and maintained throughout the process.*
3. *The Investigator is positioned to make credible and supportable findings based on the information received through the investigative process.*
4. *The Investigation report instills the level of confidence in all stakeholders.*

There are certain key elements of the investigative process required to support a successful investigation.

KEY ELEMENTS

1. Investigative Plan

An investigative plan contributes to the quality of the investigative activity. A plan supports the objective of securing access to all information relevant to the complaint allegations. A plan also facilitates the organization and writing of effective investigative reports.

An investigation plan should include the following elements:

1. *Identification of all potential interviewees.*
2. *Define the scope of input expected from individual interviewees.*
3. *Careful preparation for each interviewee, based on an evaluation of the scope of relevant input available through the particular interviewee.*
4. *Preparation of effective communications re process to be delivered to non-party interviewees to secure their support for the process and effective participation.*
5. *Identification of all documentation and physical evidence relevant to the complaint allegations.*
6. *Determination of the order for pursuing interview activity.*

The foregoing initiatives should be pursued by the Investigator prior to any interview activity. The plan will evolve and will necessarily be the subject of ongoing adjustments. The investigative plan will provide an invaluable support to pursuing effective investigations.

2. Key Elements to Effective Interviewing

A critical aspect of the investigative process will be the interviewing pursued by the Investigator. The interview is the vehicle whereby the Investigator accesses the information required to determine the allegations and issues raised by the complaint. An Investigator's success in terms of accessing all information is impacted by the Investigator's ability to create an environment that empowers and encourages the quality of participation required to secure information. To meet the challenge of encouraging and securing the effective participation, the Investigator is well advised

to attend to the following details in connection with the interview process:

3. Communications with Non-Parties

Prepare and pursue communications with non-parties, party interviewees designed to accomplish the following:

1. *Communicate their value and impact on the process.*
2. *Highlight their self-interest in participating in the process.*
3. *Address and respond to their personal interests (confidentiality, non-reprisal, other interests they may identify).*
4. *Answer any questions they have about the process.*
5. *Provide an understanding of the investigative process and its merits.*
6. *Pursue the investigative activity in circumstances responsive to the non-party interviewee's needs (location, time, duration, etc.).*
7. *Use the investigative plan to ensure that you pursue effective and efficient interviewing of a non-party interviewee.*

4. Interview of Respondent

Effective communications with the respondent to alleged misconduct regarding the investigative process is a key element to a successful investigative initiative. A common preliminary challenge with the respondent can be securing his/her agreement to participate in the investigative process. This challenge can best be managed in the context of the pre-investigation contact with the respondent. The quality of the respondent's participation will be encouraged where the Investigator successfully responds to the following issues with the respondent:

1. *Responds to the respondent's convenience interest in pursuing interviewing.*
2. *Reinforces the merits of the internal investigative process from the respondent's perspective.*
3. *Ensures the respondent is provided with all particularized allegations (to the extent possible) before the interview process to support the respondent's preparation for effective interview participation and due process interests.*
4. *Ensures an interview climate and tone that is neutral, objective and supportive.*
5. *Avoid content or tone that suggests cross-examination of the respondent.*
6. *Provide an environment where the respondent is given the opportunity to provide all input that he/she identifies is important and relevant.*
7. *Emphasize the resolution objective of the investigative process and highlight how the respondent can contribute to that objective.*

The respondent's interview experience can influence the respondent's reception of the report findings at the conclusion of the investigation. The Investigator should direct their efforts to ensuring as supportive an experience as possible for the respondent.

5. Interview of Complainant

A complainant will usually be the most supportive and active participant in the interview process. There are circumstances where, notwithstanding that the complainant triggered the complaint process, he/she may exhibit a significant degree of discomfort with the investigative process and their involvement. In these circumstances, the complainant requires support to support effective participation.

An Investigator has a significant interest in establishing the credibility of the process and the Investigator with the complainant as well as the other parties and non-parties. The complainant's investigative experience can influence the credibility of the investigative initiative and Investigator with the complainant. This experience can impact the complainant's reaction to the report of findings and preparedness to attempt to achieve a resolution through such findings.

In planning and pursuing an effective interview with the complainant, the Investigator should attend to many of the same issues as with the respondent:

1. *Convenience.*
2. *Emphasize merits of process.*
3. *Provide supportive climate.*
4. *Provide supportive tone.*
5. *Encourage and support caucus.*
6. *Allow full opportunity for input.*
7. *Emphasize resolution aspects of process.*

6. Effective Investigation Reports

The quality of the report of findings that is prepared at the conclusion of the investigation is a key element to a successful investigative initiative. The only participant in the investigative process who experiences the entire process is the Investigator. As a result, the only vehicle for providing parties and decision-makers with an understanding of the investigation and investigation results is through the Report and reporting. The objective should be to use the investigation report to guide decision-makers on appropriate decisions and encourage the parties to accept the findings. To accomplish these objectives through the report, the report should reflect the following elements:

- a) Comprehensive

- Communicate to the extent possible the experience of the investigation;
- Contain an overview of the investigative process;
- Clearly particularize the allegations and the issues that were determined;
- Comprehensive (*reflect all relevant evidence received, the Investigator's analysis and conclusions*);
- Clearly reflect all findings and root these finds to the analysis and evidence.

b) Well Organized

Consideration should also be given to the organization of the material in the report. The guiding factor should be the objective of providing the reader, to the extent possible, with a clear and complete experience of the investigation. Remember that prior to the review of the report, a party's experience of the investigation has been limited to their own participation. Decision-makers usually have had no exposure to the investigation. The parties will benefit from the conditioning impact of the report. Such conditioning can support the parties in accepting the findings. A well written report will also support the decision-makers in identifying appropriate remedial initiatives.

c) Tone of Report: Neutral and Objective

It is critical to the credibility of the report with the parties and decision-makers that it be written in a tone and language that is neutral and objective. There will always be stakeholders (*complainant? respondent? someone amongst the decision-makers?*) who will have an interest in resisting the report or its conclusions. This pre-disposition is encouraged and facilitated where a reader can identify value-laden language or superfluous comments in the report.

The importance of the report of findings should not be underestimated. Given the insulation of the parties and decision-makers from the complete investigative process, the report provides the only opportunity to expose these individuals to the experience and results of the investigation. This exposure is essential if the key stakeholders are to have the necessary context to support a resolution through the investigation process.

4. INVESTIGATIVE CHALLENGES: RECOGNIZING AND MANAGING THESE CHALLENGES

Every investigation poses new challenges for the Investigator to manage. The challenges are frustrating and stressful when they emerge. I will review some of the most frequent and common challenges and highlight tips for successfully managing these challenges.

I. The Uncooperative Respondent

Not surprisingly, a frequent challenge is being confronted with a respondent who starts off with the position that he/she is not prepared to participate in your process. The optimal forum for addressing this challenge is in the initial pre-investigation meeting. Effective communications with the respondent on the following matters will usually encourage their participation in the process:

- Confirm that the investigation will proceed with or without their participation.*
- Educate the respondent on the merits of the internal investigative process in contrast to the external processes that could be pursued if the internal investigation is not pursued or not successful (i.e. highlight the merits of the internal process: efficient, cost effective, greater confidentiality, greater ability to be responsive to a party's needs and interests, supports a

more consultive and collaborative initiative).

- iii) Confirm to the respondent that the findings are not legal determinations and not legally binding. As a result, the process does not prejudice or preclude the opportunity to pursue their issues in other available forums.

The objective should be to move the respondent beyond mere participation to the point of supportive and constructive participation. The provision of an investigative process that is more consultive and responsive to a respondent's interests than what is available through external judicial or quasi-judicial proceedings, will usually encourage active and constructive participation.

II. The "I Don't Want to Get Involved" Non-Party Interviewee

Effective and successful investigations can demand the support and participation of non-party interviewees. It is important to recognize that an Investigator has no authority to compel such participation.

A not uncommon reaction of many potential non-party interviewees is "I don't want to get involved." This challenge can usually be overcome through effective communications with these non-party interviewees.

Communications should include addressing the following matters:

- i) *Clarify the confidentiality aspects of the process and the fact that they are designed to limit the visibility of a non-party interviewee.*
- ii) *Clarify the commitment of the organization to non-reprisal: A commitment that no interviewee's employment relationship, conditions or environment shall be adversely impacted by their participation.*
- iii) *Highlight the non-party interviewee's interest as a stakeholder in the*

investigative process. Highlight for the non-party interviewee the interest they would have as a party if they were a complainant or respondent to a complaint. This pitch has more credibility where the employer has in place published and well communicated workplace harassment and bullying policies that clearly define the expectations and obligations of all constituents of the workplace.

5. MOVING FROM REPORT TO RESOLUTION: DEFINING SUCCESS

I would like to reiterate my definition of a successful investigation. Prerequisites:

1. ***Ability to determine the allegations/issues at the centre of the complaint investigation.***
2. ***Ability to move from determination to resolution (which involves all stakeholders finding a resolution within the context of the internal complaint procedure).***

In my experience many organizations make the mistake of identifying the objective of the investigation only in the context of the first element. They fail to recognize and pursue their interest in part 2, resolution.

The elements critical to the resolution objective are as follows:

I. The Provision of a Highly Inclusive and Collaborative Investigative Process:

How?

1. Appropriate communications with the parties throughout the process:
 - o Pre-interview communications to establish credibility of the process and the Investigator.
 - o Effective input opportunity for participants.

- Full reporting to the parties of the results of the investigation and an opportunity to review the full report.
- Opportunity for input and communications around remediation.

II. Discuss Remedial Issues with Relevant Parties and Seek Their Input Where Appropriate

A common error of employers at the conclusion of an investigation of a complaint is to focus narrowly on the issue of discipline in connection with a respondent to a substantiated complaint and ignore the potential remedial interests of the victim.

Recommendation

The provision of an opportunity for the parties to review the full investigation report can be key to facilitating the parties achieving a resolution within the internal process. It makes sense to discuss remedial issues with the complainant where a complaint is substantiated. This does not mean that complainants will be dictating the remedial measures arising out of a substantiated complaint. However, their input can be appropriate and necessary to successfully respond to their personal remediation interests.

Providing an opportunity to review and discuss remediation issues with the respondent can enhance the opportunity of facilitating a resolution from the respondent's perspective. This review can achieve an educational and conditioning process that moves the

respondent to an appropriate self-interest in resolution. While a respondent to a substantiated complaint may not welcome the organization's thoughts on remediation, if the remedial suggestions are appropriate there is a significant probability that with proper communications, the respondent will recognize a self-interest in supporting a final resolution through the investigation process.

In the context of an unsubstantiated complaint, such conditioning communications and discussions are just as important in terms of pursuing a final resolution.

Summary

In summary, moving from investigative findings to resolution requires an investigative process that recognizes that the parties are important stakeholders in all elements of the process and designs a process to facilitate their effective participation. Effective participation includes the necessity of exposing them to the reporting of findings and in the remediation process.

Support in planning or pursuing internal investigative activity

Barbara Humphrey's services are regularly retained to conduct independent investigation and resolution processes to respond to issues of harassment, bullying, violence and other misconduct in workplaces. Her services are also regularly retained to train internal investigators and provide support to internal investigators in the course of an investigation. To discuss these supports further, Ms. Humphrey can be contacted at:

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