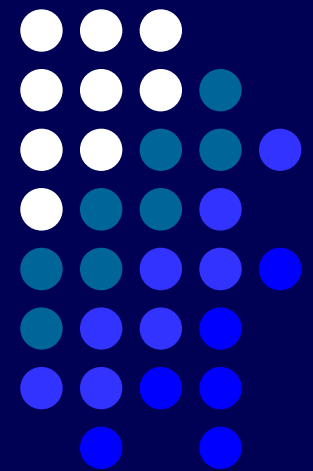
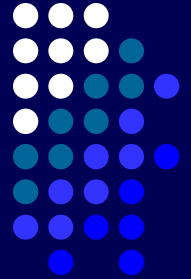


Conducting Defensible Investigations: How Bulletproof is it?

Fran Sepler
Sepler & Associates

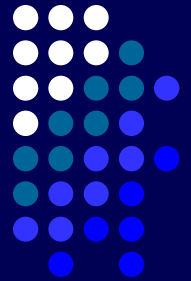


Employment Investigations

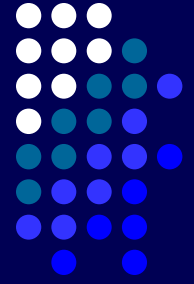


- A little art
- A little science

Key Qualities of an Effective Investigation



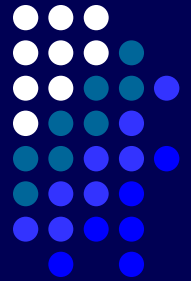
- A competent investigator does everything possible to ensure that the investigation is
 - Neutral
 - Rigorous, and, to the extent possible,
 - Independent.



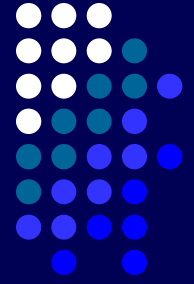
Credible Investigations

- To be credible investigation, an investigative file should tell you a story:
 - That the investigation was conducted to find out “what happened.”
 - that is was conducted in the most professional manner
 - with a reason behind each decision and choice made by the investigator.

A Good investigator will be ready for the bullets



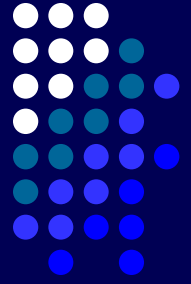
- Effective investigators are always prepared to have their work disassembled, and each choice or decision held up for close scrutiny.
 - A thoughtful investigator should always have a rationale for their choices and decisions.
 - If you are attempting to determine the integrity of an investigation, your fundamental inquiry should be “why?”



Structure

- An investigation should demonstrate
 - Clarity of Scope
 - Thorough gathering and scrutiny of the evidence
 - Thorough and methodologically sound interviews
 - Excellent documentation
 - A sound analysis
 - A credibility assessment
 - Findings based upon all of the above

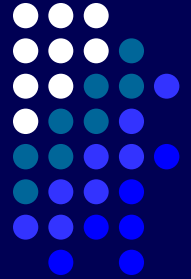
Where Investigations Are Vulnerable (Examples)

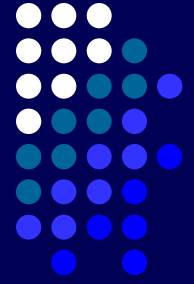


- Scope
- Methodology
- Transparency
- Documentation
- Interviews
- Independence
- Process
- Conflicts of Interest
- Timeliness
- Choice of Investigator

Scope

- Beware of scope creep
- Good planning is essential.

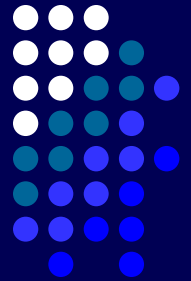




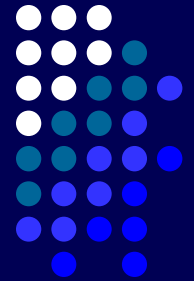
Scope

- Did the investigator use **consistent** criteria for deciding whether new issues should be added to the current investigation.
 - Were add in issues sufficiently related to the originating issue ?
 - Do the parties essential to resolving or exploring the new issue substantially overlap the preexisting pool of witnesses? (continued)

Scope

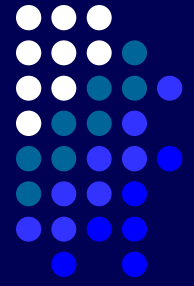


- If the new issues/allegations were true, would they likely change the organization's course of action?
- If the new allegations were found to be untrue, could this have substantially affected the assessment of credibility of any party to the current investigation?
- Was the new issue of sufficient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



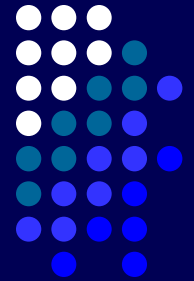
Methodological Decisions

- Specific methodological decisions that are **debatable, but also defensible. You should get 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



Explanation of Process

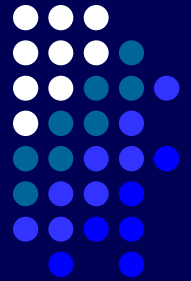
- It is appropriate to suggest that an investigator is not neutral or was in some way unfair if a party who participated in the interview was misinformed or unaware of the actual nature, scope, use and process of the interview.
- If the investigator does not explain the process well, and document doing so, they are justly criticized for leaving the subjects to figure it out.



Explanation of Process

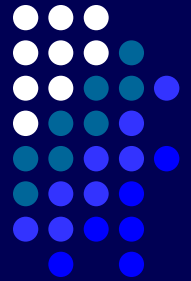
- Competent investigators use a checklist or other method to ensure that they review appropriate warnings, questions, “rules of engagement,” privacy issues, and the role of the investigator.

Pre-Interview Information

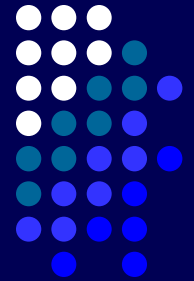


- The purpose of this interview
- Who has retained investigator to conduct this investigation
- Neutral fact finder, no preference or predetermined outcome
- (That I am entitled to union representation)
- Notes will remain in possession unless a court orders otherwise

Pre-Interview Information



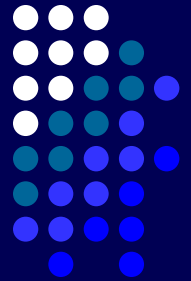
- That investigator will be providing a report to____
- That I am participating voluntarily in this interview
- Information will be shared if necessary
- Should not discuss content of interview with others
- May need to re-contact or re-interview me



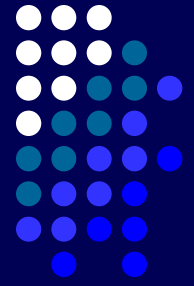
Documentation

- Documentation prepared by the investigator should be even-handed, neutral and complete.
- Subjective impressions do not belong in interview notes, but they are fair game if made separately.
- Credibility notations, if they must be made contemporaneous with an interview, should be made in a separate format.

Documentation

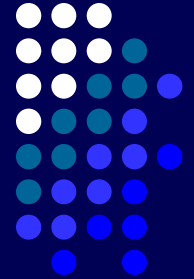


- Notes standard: *Can the interviewer reconstruct what they were told, even after the passage of a considerable amount of time, by what is in the investigative file?*
 - Does the investigator have a consistent standard for his or her notes and apply it to all notes ?
 - Revisions
 - “Clean up”



Documentation

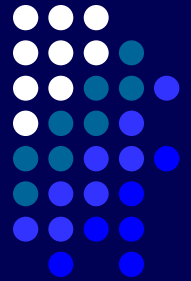
- When preparing photocopies of evidence provided by witnesses, the investigator should
 - Have witnesses verify that the copy is accurate
 - Review documents with the witness and document that the witness agrees the document is accurate.



Documentation

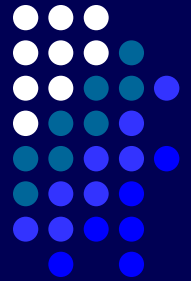
- The investigative file should contain all documentation generated during the investigation, including e-mails, handwritten notes or notations, phone message slips, etc.

Interviews (who, what, when)



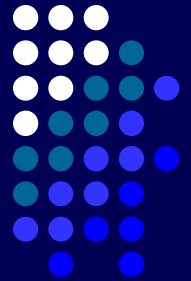
- Did the investigator document:
 - the reason that individuals were NOT interviewed?
 - attempts to reach a witness and the results of those attempts.
- In the case of a witness who may have key information, delaying the findings in an investigation while locating the witness is often appropriate, despite the need for timeliness.

Independent Decision Making

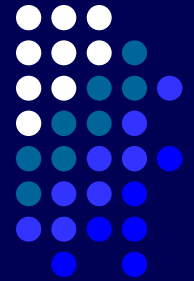


- Operating independently is essential, however:
 - Collaboration in planning the logistics of an investigation is to be expected when an investigator is from outside the organization.
 - Can ask the individual commissioning the investigation to define the scope in a general way
 - It may be prudent to pull all logistics outside of the organizational frame, contacting witnesses outside of the workplace.

Updates

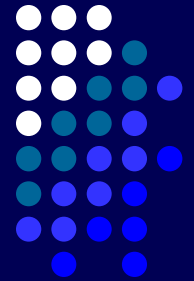


- Agreeing to provide “updates” or “interim reports” is a very dangerous practice and can draw legitimate criticism.
 - Can be viewed as a basis for retaliatory behavior during the course of the investigation.
 - Can result in sharing impressions that will change based upon additional scrutiny of the matter
 - Can undermine confidence in the investigation



The Respondent

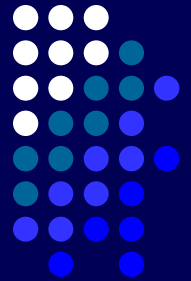
- The respondent should have the opportunity to fully respond to ALL allegations, and be able to identify a reasonable number of witnesses to be interviewed.
- However, the investigator should control when and how this is done.
- A completely responsive interview is insufficient.
 - The respondent must have the opportunity to provide appropriate narrative and to place their own context on events and circumstances that are in question. *Open ended questions are essential*



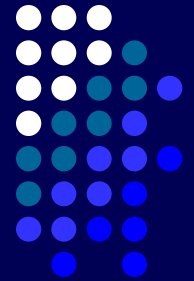
Conflict of Interest

- To the degree that there might be a perception of a vested interest or a relationship that creates a conflict, the investigator should not only be satisfied that it has been fully disclosed and managed, but that there is no substantive basis to the concern.

Conflict of Interest

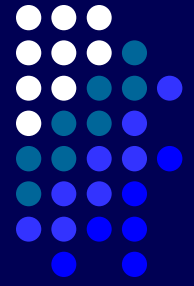


- Prior adverse interactions with counsel for complainants should be disclosed by outside investigators at the time retention is being contemplated.
- Prior engagement by the employer for other purposes should be examined to determine whether any real conflict exists, or whether the appearance of conflict is sufficiently great to warrant retaining a different investigator.



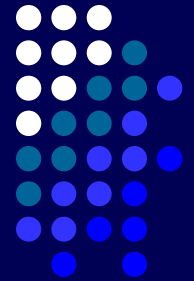
In House HR

- If there is sufficient history between a party and a particular HR professional that a conflict can legitimately be raised, it is in the interest of the company to recuse that HR professional from the investigation.



Evidence

- ALL evidence must be gathered, examined and documented
- The investigator should demonstrate creativity and resourcefulness. Failing to do so warrants scrutiny.
- The investigator should be able to articulate reasons for disregarding or diminishing the value of evidence if that is the case.



Timeliness

- The longer an investigation takes, the more susceptible it is to claims that it is not timely.
 - Few, if any investigations should take more than six weeks absent extraordinary circumstances or missing witnesses

Fran Sepler

Sepler & Associates

www.sepler.com

