

Investigations in the Workplace

SECOND EDITION



Eugene F. Ferraro, CPP, SPHR



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Disclaimer

While it should be obvious, my lawyers insist that I must emphatically state that neither this work nor the opinions contained herein should be construed as legal advice or relied upon as such. Should such advice be necessary, it is suggested that competent professional assistance be sought. Furthermore, while many of the practices and methodologies that will be presented are considered industry best practices, specific circumstances and fact patterns should drive your process and approach. If you are unsure as to how to properly proceed, stop and seek the advice of a competent professional.

Throughout this work I have attempted to avoid gender stereotyping or the preference of one gender over another. Any appearance of having done so was the product of my writing style and was not intentional. Hopefully my use of both genders does not create a distraction.

The case studies that have been used in this work are based on real investigations conducted by me or my organization. However, in order to protect the reputations of the guilty and the privacy of the innocent I have substantially altered some facts. Any similarity to real situations or real people is unintentional and purely coincidental.

And finally, you will note that I have occasionally referenced a service or product. Neither I nor my organization has been paid nor do we receive any material benefit from such references or endorsements. They have been provided purely for the purpose of assisting you.

To the teachers, professors and instructors who gave of themselves
and whose patience and encouragement inspired me. Without
them, this work would have never been possible, no less
imagined. Thank you one and all. I am forever grateful.

Preface

I have been a corporate investigator for 29 years. For almost three decades I have been dedicated to the investigation of workplace crime and misconduct. This book is my second attempt to share my knowledge and experience regarding this topic with others. As with the first edition of this book, my goal with this work is to provide both the novice and experienced investigator with the most insightful and useful information possible. In the pages that follow, I have revisited many of the topics and strategies covered earlier. Still, I have chosen to challenge conventional thinking and inspire a new approach to workplace investigations. I have arduously resisted ordinary convention and sought new solutions to old problems and challenges. With the assistance of my students and those whom I have worked with and lectured, I have developed and tested new ideas and methods. Many of these have yielded new and more sophisticated approaches and strategies. Where appropriate, I have shared them in this new volume. I think you will find the result both refreshing and very possibly inspiring.

My hope is that, whether you are a professional licensed investigator or someone tasked by your employer to conduct an internal investigation, this work will shine new light on your process and investigation. I also hope this work serves to provide executives, human resource professionals, and the lawyers who represent them new insights into the inner workings of what can become a truly professional workplace investigation.

The reader should know that I am more than a writer, I am a practitioner. The knowledge I offer in this book goes far beyond what is available in the current literature or that which is offered on the seminar circuit. I have drawn upon my years of practical experience and that of my colleagues to craft a work that dispels the myths and troublesome theories promulgated by the uninitiated. My intent is to provide you, the reader, with the backstory behind the methodology, rationale, and subtle practices that have made my workplace investigations soar. But most importantly my intent is as always, to share. I want to give back to my profession and the many in it who came before me. I want to share my experience and knowledge.

I want you to become the best investigator possible. I want to make your learning both rewarding and fun. To that end I have added more stories, more experiences, and many more examples. I have also added more diagrams, checklists, and visuals to help hold your attention and make the content more useful. Additionally, I have added a list of key learning points at the beginning of each chapter. My hope is that this aid will allow the reader to better use their time and more quickly find the information sought. And finally, I have sprinkled small text boxes throughout the book in which I have offered insights to common mistakes.

Common Mistake # 1

Not taking the time to read a common mistake when offered.

You will find that this book is designed for easy reading and use. I have provided an exhaustive table of contents to permit my readers to quickly find the information they seek. I have also provided innumerable references and new and expansive appendixes. These and other features are intended to make this work more valuable to you. It is not intended that the reader read this book from cover to cover. Instead, you may go directly to the section that applies to your specific need or interest. Little should be lost in doing so. To help capture my salient points and simplify the learning process I have also sprinkled the text with brief “Tips” and “Traps.”

Tip: Read my Tips and Traps to get the most out of this book. If you read nothing else, these little gems will help make your workplace investigations sparkle.

Acknowledgments

No work of any importance or value is possible without the help of others. This labor of love has been no exception. One such person is my longtime friend and counselor, Bill C. Berger. Bill is an employment lawyer with the prestigious firm Brownstein Hyatt Farber Schreck in Denver, Colorado. Bill's practice emphasizes the representation of management and employers in labor and employment law matters, including both preventive counseling and litigation. He has represented clients before federal and state courts, administrative agencies, and in arbitration (both industrial-union and private employment) and has experience with every aspect of labor and employment law. His practical and fair-minded approach is matched only by his knowledge of the law and his wacky sense of humor. His rewrite of Chapter 5, "Legal Challenges and Litigation Avoidance," was invaluable.

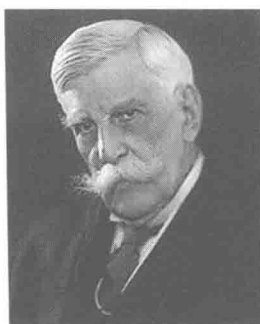
I again thank Professor Norman M. Spain, JD, CPP, and Dr. William C. Butler, PhD. Norman Spain is professor of assets protection and security at the College of Justice and Safety at Eastern Kentucky University. He and Dr. Butler are longtime friends and professional colleagues of the highest order. Norman provided the foundational research for the legal analysis in Chapter 5 as it appeared in the first edition of this book. Dr. Butler generously provided me some of the humorous paradoxes I have incorporated to lighten your reading. He also assisted me with much of the statistics calculations as they appear in Chapter 6, "Applied Strategies," and inspired the short story about Rass at the beginning of the same chapter.

I would also like to thank my staff at Business Controls, Inc. Many of them picked up the slack while I toiled away on my manuscript and neglected them and our business. They include Steve Foster, president and COO; our CFO, Teresa Foster; all of our behavioral sciences division; my professional staff; and last but not least, those in our professional services division. I also wish to thank my editor, Mark Listewnik at CRC Press/Taylor & Francis Group. His uncommon enthusiasm and immense patience are unmatched. Without his persistence and perseverance this book would truly not be possible.

Most importantly I want to thank my loving wife, Shelley. She has sacrificed her time, shared her ideas, and patiently allowed me to quietly work in the peace and tranquility of our mountain home. Whether it was tending to our family affairs or feeding our horses, while I sat and wrote she did her job *and* mine. I love her completely and profoundly.

Introduction

The famous jurist Oliver Wendell Holmes, Jr. thoughtfully mused almost 100 years ago, “We need education [of] the obvious more than the investigation of the obscure.”¹ The son of an accomplished physician, philosopher, and poet, Justice Holmes is considered one of the greatest legal minds in U.S. history. During the end of the nineteenth century he witnessed the birth of the secular progressive movement and the rise of modern science, which helped advance it. Civilization’s infatuation with self-actualization and social experimentation was so obsessive world leaders embraced the metaphysical and even thought they could obsolete war simply by outlawing it. Justice Holmes was more pragmatic. He reasoned that without a fundamental understanding of the *fundamental*, nothing complex was thinkable, no less attainable. And so it is with workplace investigations.



Oliver Wendell Holmes

Successful workplace investigations are complex undertakings. They are time-consuming and fraught with enormous potential for legal liability. When done properly, they combine an intricate mixture of skill, experience, and luck. Those who attempt them without an understanding of their fundamentals are recklessly naive. Workplace investigations can also be expensive. Today’s competitive world requires organizations of all sizes, both public and private, to manage their resources carefully. An improperly conducted workplace investigation can be ruinous and

destroy the careers of everyone involved. Few workplace activities invoke so much risk and at the same time, so much opportunity.

Large or small, organizations of all types routinely conduct internal workplace investigations. Though the objectives, and certainly the scope, of these undertakings have varied widely, their principal purpose has been that of objective *fact-finding*. Thus the fact-finder must be fair, impartial, thorough, and certainly purposeful. Then, to fulfill the varied objectives of the assigned investigation, the effective fact-finder must have a process. That process is called the process of investigation.² Remarkably, however, most fact-finders, regardless of their level of experience, have little or no process. Their approaches are varied, as are their results. Lacking an effective process, fact-finders often spend more time and resources than necessary, produce inconsistent results, and create unnecessary liabilities for those they serve. No investigation, regardless of its objectives or scope, can be successful if not properly engineered and driven by process.

In order for the results of a workplace investigation to be useful, it must have meaningful and well-defined objectives, be properly and lawfully executed, be fair and impartial, and the results accurately documented and communicated. In order for the investigation to be efficient, it must unfold incrementally and progressively in distinct phases. Each progressive phase is engineered to build on the phase that preceded it. Collectively, these phases are called the “seven phases of investigation.” They are

1. Assessment
2. Preparation and planning
3. Information gathering and fact-finding
4. Verification and analysis
5. Decision making
6. Disbursement of disciplinary and/or corrective action
7. Prevention and education

Due to lack of resources and experience, most fact-finders are transfixed on the third phase, that of information gathering and fact-finding. Unwittingly, they conclude their investigation after amassing an impressive collection of related facts, evidence, and information. Though these elements are obviously important, what is overlooked denies a complete result to those to whom they report, and also denies them a thorough understanding of the very matter that precipitated the effort. By imposing processes on otherwise disorganized but seemingly important activities, the fact-finder creates the structure necessary to be uniquely effective. That process allows the fact-finder to transcend the unsophisticated and often tarnished image of corporate gumshoe, and elevates him to the professional standing of corporate investigator, or better yet, professional investigator.

Like most effective processes, the fact-finder's effort should also produce measurable results. While the output is often measured by the fact-finder's customer* in terms of the actionable evidence he accumulates, the first and most immediate ought to be return on investment, or ROI. The properly engineered and executed investigation will often produce tangible, measurable results such as the recovery of stolen property or money, the termination of dishonest employees or vendors, and of course, successful prosecution. Also possible are civil recovery, restitution, damage awards, and successful insurance claims.

The process, however, goes beyond this and can even be engineered to allow the employer to recover the actual cost of the investigation from the transgressor. Unique also is the process's suitability to generate statistical results the fact-finder can use over time to measure effectiveness and ROI. Without process and structure, the fact-finder has no means to measure results and show value to the customer.

The fact-finder must also think in terms of process in order to be consistently successful. Long gone are the days when anyone could conduct a workplace investigation. Sloppy techniques, careless fact gathering, and bending the law are no longer permissible in our litigious society. Neither the public nor our courts will tolerate the practices that just several years ago were considered "industry standards." Today you cannot get away with unethical or sloppy investigations, and if you try, you will land yourself and your customer on the wrong end of a lawsuit.

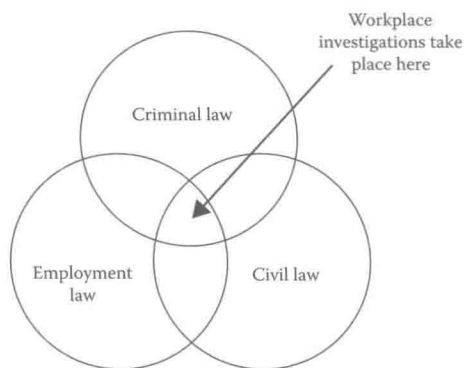
The last and possibly the least-considered benefit of using an investigative process is scalability. Without the means to consistently duplicate processes, one is unable to reliably predict outcomes. This concept of repetitive processes and predictable outcomes is fundamental to scaling every industrial activity. Modern manufacturing, distributing, franchising, and even marketing largely depend on this concept. Any large-scale business activity employs processes that are scalable. In fact, it was the use of scalable processes that allowed these activities to become as large as they are. It is impossible to think of any large enterprise that was not scaled. And because organizations and the people who run them depend so much on predictable outcomes, it is abundantly obvious that one's investigations should employ replicable processes to achieve them.

Take for example my organization, Business Controls, Inc., of which I am the chief executive officer (CEO). By means of trial and error, we have learned that the most productive investigators we produce are not those who come to us with investigative or law enforcement experience. While these qualifications are required of their investigators by some organizations, we have found the best investigators are the product of the processes they use, not the amount or type of experience they

* The reader will note that I will use the word *customer* frequently. When doing so, I am referring to the person or persons to whom the fact-finder reports. When the fact-finder is in-house, that entity is typically his employer. It may also be a particular individual or group within the organization serving as the decision maker(s). For fact-finders who are not employees of the customer, this entity is then likely to be their paying client.

possess. We have consistently found that intelligent and disciplined professionals of any stripe, when given good processes and proper supervision, become good investigators. What's more, they do not have the need to unlearn bad habits or old-school methods. Using the modern methods and processes described in this book, my new investigators hit the ground running. As such, we easily scale our business as need demands it.

But workplace investigations are more than just processes. They typically involve the convergence of many disciplines and an assortment of uncommon skills. More often than not, the investigator must have a comprehensive understanding of criminal, civil, and employment law. They also require a considerable investment of time, money, and patience by the employer. Then finally, to ensure success, the process must be highly structured and flawlessly executed. Even the most sophisticated organization can find the task consistently challenging.



Therein is the opportunity. Every organization, public or private, eventually finds itself in need of an internal investigation, be it the suspicious disappearance of tangible or intangible assets, the questionable ethical practices of an employee, or a troubling allegation of sexual harassment. Sooner or later, every organization is confronted with the need to gather evidence, interview suspects, and uncover the truth. With the ability to muster the necessary resources, deploy skilled fact-finders, and adhere to a disciplined process, any organization can conduct a successful workplace investigation. For the organization this outcome is manifold. For in addition to the above factors, workplace investigations are fraught with liability. Workplace investigations of even the simplest variety are not for the fainthearted. By definition they involve the investigation of people who have a relationship with the organization. Most often those people are employees. They are insiders. They are people whom the organization employs or with whom they do business. As such, they have special rights and expectations and very often they carry a sense of entitlement and inflated importance.

These considerations significantly add to the complexity of the fact-finding process and the manner in which the subject may respond to the investigation's findings and management's corrective actions. Regardless, the path is filled with legal obstacles and challenges. For the unknowledgeable and unprepared employer it is a virtual legal minefield. On the other hand, the totality of these complexities gives the properly prepared and equipped employer a decisive competitive advantage. The employer that is able to efficiently bring an end to a workplace substance abuse problem, catch thieving employees in the act, or obtain restitution from a dishonest vendor, without litigation or a public relations debacle, has a significant competitive advantage over the employer that cannot.

Several years ago, the human resource director of a substantial clothing distribution operation called and indicated he needed my immediate assistance. Having provided him assistance in the past, I was eager to help. He told me that one of the firm's female executive assistants had received at least a dozen greeting cards from what appeared to be a disturbed anonymous admirer. All but two of the cards had been received via U.S. mail. The two that had not had been left at her desk. All of the cards were similarly themed and appeared to be part of a single set. Most disturbing, however, was that the handwritten messages in each of the successive cards were increasingly disorganized and bizarre. The most recent message was outright threatening. My client asked that I help him identify the writer and deal with him. We quickly discussed the investigation's objectives, a timeline, and several other administrative details, and then I went to work.

Given the facts I've just shared and several others I quickly uncovered, I determined the writer was most likely a current male employee. What's more, given that some of the cards were hand delivered to the woman's desk, the writer also had access to the executive office area. With the use of simple forensics and some basic timeline analysis, I was able to reduce the list of possible suspects (also called the pool of suspects) to a mere three people. After more interviewing and a little more digging, I identified the likely perpetrator: the corporate IT (information technology) manager. I arranged to interview him and in less than thirty minutes he quickly confessed. He also revealed that he sabotaged a number of electronic management systems that if left uncorrected would eventually cause significant financial and inventory distortions. The revelation was shocking and my client quickly took corrective action. My client also now wanted the manager put behind bars. I agreed to look into the possibility of prosecution and in the meantime the manager was placed on administrative leave, pending the determination of his fate.

Exercising its prerogative to search offices, desks, and workstations, while strictly following policy, my client authorized the systematic search of the manager's computer. The effort revealed that in addition to having spent a great deal of his time downloading pornography, the employee had also sent a huge number of

inappropriate email messages to several current and former female employees—a matter that had never been revealed by any of the recipients.

My client concluded he had enough evidence and terminated the manager. The former employee immediately hired an attorney and through her, threatened to sue. It became quickly apparent that the attorney had not been provided the entire story. However, after several telephone conversations between the attorney and my client's employment law attorney, the whole matter dissolved and the former employee was never heard from again.

As promised, I did contact the local police to discuss the case. Although the matter involved the possible violation of both federal and state law, law enforcement was not interested. Not only had some of the offenses occurred in several different jurisdictions (the cards were postmarked in one jurisdiction and received in another), none of offenses involved a violent act, and no one had suffered a monetary loss. In other words, the case involved too much work and not enough return on investment. Regardless, from the perspective of the employer, the case was a smashing success. Let's quantify the result:

- The anonymous “admirer” was identified and stopped, thus terminating a disturbing and potentially dangerous progression. The recipient and those who knew about the cards enjoyed great relief and satisfaction and were able to return to their respective jobs without the distraction.
- A previously unidentified problem (the electronic distribution of pornography and inappropriate messages) was identified and corrected.
- Operational and financial management mechanisms that had been sabotaged were identified and could now be repaired.
- The perpetrator was swiftly separated from the organization without incident, litigation, or any public discourse or adverse publicity.
- The perpetrator received no unemployment insurance benefits and was never heard from again.

Additionally, the entire matter was handled quickly and economically. The lack of prosecution was not a failure. Had the district attorney taken the case, my client would have had to spend more time and money. Because the standard of proof for criminal prosecution (beyond a reasonable doubt) is so much higher than that of a workplace action (good faith investigation and reasonable conclusion), more time and money are always necessary to achieve it. In many instances the return on investment of employee prosecution just isn't there.

Without adequate process the success of the above investigation would not have been possible, nor would most workplace investigations. This book describes that process. Soon you will learn about this powerful mechanism and how it will allow you to engineer the most successful workplace investigations possible. Let's get to work.

Endnotes

1. Oliver Wendell Holmes, Jr. (March 8, 1841–March 6, 1935) served as an associate justice of the Supreme Court of the United States from 1902 to 1932. Noted for his long service, his concise and pithy opinions, and his deference to the decisions of elected legislatures, he is one of the most widely cited United States Supreme Court justices in history, particularly for his “clear and present danger” majority opinion in the 1919 case of *Schenck v. United States*. http://en.wikipedia.org/wiki/Oliver_Wendell_Holmes_Jr (accessed March 8, 2011).
2. The term “process of investigation” is the registered trademark of the author. Its use for any purpose is strictly prohibited without prior written permission.