

Gathering Investigation Evidence

Sorting through the Details to Find What's Relevant and Reliable

The two major tasks in the investigative process are gathering evidence from interviews and gathering documents.¹ Interviews are the most sensitive part of the process and need to be understood, planned, and conducted properly with the right questioning process. This type of evidence may provide first-hand knowledge from the people involved or secondary knowledge or hearsay learned from others.

After the interviews, the bulk of the investigative effort will be gathering documents and other physical evidence and reviewing the evidence collected to verify, confirm, or refute statements made by a complainant, witness, or subject. Documentary evidence consists of information, documents, and objects that are used to establish the facts and establish context for the investigation. These include such things as written rules, regulations, laws, policies, or employee manuals.

Documents or physical objects may provide solid factual evidence. A surveillance camera with a date/timer could establish that a person was present at a location. A serial number on a piece of property could establish ownership. Other documents and objects gathered during an investigation may have little value or relevance. The challenge for the investigator is determining which documents and evidence provide value to the investigation in answering questions about the matters under investigation. In short, does this information shed light on the case and add factual understanding to the case? For the purposes of an internal investigation, evidence should be considered relevant if it tends to make a fact more probable.



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AUTHENTICITY, VERACITY, AND RELIABILITY OF EVIDENCE

During any investigation, there is the ongoing process of evaluating and re-evaluating information collected to consider not only relevance and materiality but how reliable it is. If the information comes from a source known to be prejudicial or biased, it affects its veracity. In many cases, the veracity of the information provided

by an individual may come into question when the statements are clearly self-serving. Information that is questionable on its face or that which is contrary to established facts may fall into this category.

Another factor in evaluating evidence is its authenticity. Is it what it purports to be? Is the signature on the document really that of the person whose name it conveys? Did the technician who analyzed an object alleged to be defective really look at the object? Issues of authenticity are generally resolved by the quality (or lack) of chain-of-custody proof, which is ensuring all evidence obtained during an investigation is tracked so that it is never outside of the control of the investigatory or authority responsible for the investigation.

TYPES OF EVIDENCE

There are several types of evidence, and it is important to understand the distinctions. The most important include direct versus circumstantial evidence and fact versus opinion evidence. Evidence, in whatever form, may tend to prove or disprove an allegation either directly or circumstantially. An allegation is proved by direct evidence when the witness has actual or direct knowledge of the fact and proving the allegation does not need to rely on what the witness did not actually observe.

On the other hand, circumstantial evidence is evidence that gives rise to a logical inference that such fact does exist even though the witness did not actually observe or otherwise know about the event. When direct evidence cannot be obtained to establish a fact, the existence of that fact may sometimes be established because reasonable persons are willing to draw inferences from other facts.

Circumstantial evidence leaves room for an alternate explanation of what really happened, which the investigator may need to explore. Witnesses may think they know something directly and present it in that manner, when, in fact, they are really drawing inferences from indirect or

circumstantial evidence. Circumstantial evidence is direct evidence of one or more facts from which other facts may be inferred or established indirectly because there is a logical relationship between them. Direct evidence is direct proof of a fact based on what a witness personally saw, heard, or did. For example, the testimony of a witness who says she saw and heard the supervisor threatening another employee is direct evidence of such a threat.

FACT VERSUS OPINION

Opinions generally are conclusions premised on facts and the interpretation of those facts. The opinion may be accurate, but the person charged with determination of fact cannot be certain without knowing the facts underlying it. Indeed, in some cases, observation of physical details may not always be enough to form a valid opinion.

DOCUMENTS, DATA, AND OTHER PHYSICAL EVIDENCE

Documents are a critical part of an investigation, and in most circumstances documents and physical evidence should be gathered before conducting interviews. They can be instrumental in the interview process for ensuring accurate statements about time, place, policies, and events. They can support complainant and witness information or bring into question the veracity of their statements. Such evidence may help establish timeframes for an event or incident and verify the presence of a party to an incident.

For practical purposes all “documents,” regardless of media format, should be viewed as physical evidence. The most common types of documentary evidence needed in an investigation are the rules that an allegation asserts were violated. This could be a law or regulation but most likely will refer to the policies, procedures, and code of the organization. Other documents include time sheets, attendance

and payroll records, work schedules, audit reports, inventory records, reports, minutes of meetings and email messages.

Documents useful to the investigation may not be limited to the official records of the organization. In some cases, individual managers or supervisors, even employees, may have their own unofficial files or records, such as notes of a meeting or a person's performance on a project. In some cases, documents can be the most important evidence in the case. If the allegations are that an individual falsified a document, then the document is the key to proving the charge. It could be any kind of document, including a voucher, time sheet, injury report, claims submitted to a third party for payment, etc. The same would hold true if the allegation is that someone has been using emails to harass, then the email is the critical evidence.

Another significant source of documentation may come from records of prior reports to the employee hotline or compliance office. The same individual may have been the subject of other complaints and allegations filed by other people. This may suggest a possible pattern of unwanted conduct. Similarly, human resources (HR) may have records of prior complaints, performance reports, adverse actions being taken for misconduct, or other records that may have bearing on the investigation.

ELECTRONIC RECORDS

Business relies heavily on computers and on email and faxes to conduct business; unfortunately, it is also a major problem because users forget that computers have

audit trails and emails and faxes can be read and accessed by others. This kind of information is sought after by federal enforcement agencies. They have found emails to be a treasure trove of information when conducting investigations of wrongdoing. Almost invariably they find information supporting their investigation.

For these reasons, it is advisable to put all employees on notice that business computers and the organization's communication systems are not private and that the organization may access and use this information at its discretion. For those engaged in conducting internal investigations, emails often prove to be an invaluable source of information. In many cases improper use of computers, operating systems, and emails can quickly resolve cases without the need for witness interviews.

MANAGING THE EVIDENCE

Gathering evidence is only part of the investigation. How the evidence gathered is managed is another critical factor. It is advisable to have a case management system that documents how the complaint was handled from receipt to resolution, along with a policy that addresses the creation, distribution, retention, storage, retrieval, and destruction of the records of all investigations. This is to ensure the integrity and confidentiality of the records and easy access if the records are needed in the future. It is also extremely important to control access to the evidence gathered and store it in a limited access secure area.

Endnotes

1. This article draws upon *Conducting Internal Investigations in Health Care Organizations* by Richard P. Kusserow ISBN: 978-1-936230-06-8.

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