Become AN HR Super Sleuth

What TV crime dramas teach us about investigating employee issues

presented by Sarah Williams
Objective of this session ...

... to provide practical tips and techniques to managers for handling the investigation and resolution of workplace conflicts using examples from popular television crime dramas like Law & Order, The Closer, CSI, etc.

ライブ this symbol and/or Red text are Super Sleuth Tips
All crime dramas start with …

“THE CRIME”

What are the “Crimes” in HR?

- Employee Disputes
- Pay Error
- Adverse Employment Decision
- Sexual Harassment
- Discrimination
- Bullying / Hostile Work Environment
- Theft
- Separation Litigation
- Workplace Injury

... or any issue that requires HR to conduct an investigation to resolve
Elements of the Investigation

**Intake** - learn about issue, incident and/or allegation

**Inquisition** - seek to verify issue, incident and/or allegation

**Interpretation** – determine substance of issue, incident and/or allegation and what remedial or corrective action is necessary

**Illation** – complete remedial and correction action necessary to close the issue, incident and/or allegation
No matter how issue is brought to your attention, your investigation should **start with the “victim”** (the person making the complaint)

**Why?**

- Only the “victim” really knows what happened and why they are upset
- Their complaint guides the investigation
- Importance of impartiality, credibility and integrity in investigation

**The Intake**
Timely response to the victim’s complaint is critical to the integrity of the investigation.

What you do in the first 48 hours after being notified is critical

- Within 2 days of notification, you should have 1) talked to the victim and 2) developed your investigation plan
The goal in talking to the victim is to learn who, what, where, when, why and how ...

**Who**
- Is the complaint about?
- Else was in the vicinity when the issue occurred?
- Else has the victim talked to?
- Else may have been a victim?

**What**
- Happened to the victim?
- Exactly was said?
- Effect has this had on the victim?
- Evidence does the victim have to support this claim?
- Else does the victim know that may be relevant to this claim?

**When**
- Did the issue first happen?
- Did the issue most recently occur?
The Intake continued

The goal in talking to the complainant is to learn who, what, where, why and how ...

Where
  • Did the issue happen?
  • Were the other people in the vicinity when it occurred?

Why
  • Would the perpetrator do this?

How
  • Often did this issue occur?
  • Did the victim react to the issue?
  • Does the victim want to see this resolved?
Intake Interview No-No’s ...

Judgment
• “Why are you just now reporting this?”
  ➢ Tell me about what caused your reporting delay
• “I find that hard to believe“
  ➢ Wow

Leading and Loaded Questions
• “That was offensive, huh?”
  ➢ What was your reaction?
• “Do you think that kind of behavior is appropriate?”

Multiple Choice Questions
• “Were you touched on the leg, on the arm?”
  ➢ Where were you touched?

Bad Body Language
• Any non-verbal behavior that indicates total agreement or disbelief is bad
  ➢ Be compassionate and firm but neutral

Promises You Can’t Keep
• Any guarantees of outcome of the investigation is improper
  ➢ Assure victim you take the claim seriously and will conduct thorough investigation
Also remember ...

**Build Rapport with Victim**
- Ensure victim feels you believe he/she is credible
- Ensure victim feels comfortable speaking to you OR someone else on your team

**Get a Written Statement from Victim**
- Either before or after talking to the victim, ask him/her to write out the issue in his/her own words. Be specific and detailed. Sign and date it.
  - *Important to “lock” in the story*

**Tell Victim What To Expect**
- The length of time it will take to resolve the issue
- What the investigation will entail
- When you will follow up
- How to get in contact with you if he/she has questions or concerns
- Confidentiality
After talking to the victim, take time to review the who, what, where, when, why and how to plan the inquisition ...

Who

• Is the victim? Is the complaint about? Are the potential witnesses?
• Should conduct the investigation?

What

• Other sources can you use to substantiate the claim?
• Questions will you ask the victim? Accused? Witnesses?
• Are the background and histories of the people involved?
  ▪ DOH, position, department, rate of pay, performance, protected class status

When / Where

• Will interviews take place?

How

• Long will it take to resolve the issue?
Your goal is to try to corroborate/substantiate the complaint using independent evidence.

**Why?**

- Importance of impartiality, credibility and integrity in investigation
- Responsibility to ALL parties involved *and* the organization
  - BIG DIFFERENCE between HR and our favorite Crime Drama characters!!
All evidence links the victim, perpetrator and witnesses to the crime.

**Testimonial**
- Verbal recount by a living person
  - Interviews

**Demonstrative**
- Tangible and/or physical
  - Video, Audio, Bodily Injury

**Documentary**
- Anything in written form
  - Time records, Phone records, Social Media messages
  - Notes, Statements
Testimonial Evidence – *Taking Notes*

• Taking notes during interviews is a common practice. It is done with **3 goals** in mind
  - Demonstrate you’re listening to the other person
  - Demonstrate you take the interaction seriously
  - Create reminders for yourself of what was said/done during the conversation

• Do’s and Don’ts
  ✓ Do write what the person is saying
    - *Don’t paraphrase*
  ✓ Do make note of direct and important quotes
    - *Don’t try to write everything down*
  ✓ Don’t include opinions or observations in your notes.
    - *Do note non-verbal changes*
  ✓ Do ask person speaking to slow down and/or repeat themselves
    - *Don’t take so many notes that all visual contact is lost*
Testimonial Evidence – Taking Notes continued

Super Sleuth Note-Taking Tips

- Always record the date, place, setting/surroundings, other people, time start, time finish and any breaks/interruptions
- Consider typing notes on tablet or laptop
- Create your own short-hand
  - Text/IM-speak
  - Skip vowels in words
  - Symbols, abbreviations, acronyms • Keep a key!
- Plain white paper over notebook/pad
  - Put the questions on post-its then tape down later
- Color coding
Testimonial Evidence – *Interviews*

**Miranda Rights**

- Right to remain silent
- Anything say can and will be used against you in court of law
- Right to an attorney
- If you are unable to afford attorney, one will be provided
Testimonial Evidence – *Interviews*

**HR-anda Rights**

- Right to confidentiality. Anything you say will only be shared with those who need to know.
- If something you say is in violation of policy, you will be held accountable and face appropriate discipline, up to and including termination.
- If something you say turns out to be false, fictional or deliberately misleading, you will be held accountable and face appropriate discipline, up to and including termination.
- You have the right to consult an attorney. Your decision to involve outside counsel will not prevent or change our handling of this issue.

*These are NOT for the victim ... yet!*
Testimonial Evidence – *Interviewing “The Perp”*

• Tell the perpetrator the essential information about the allegation
  ❖ **Provide scenarios to refresh their memory but do not lead them.** Let the perpetrator tell his/her version of what happened in their own words
    • “She says you called her a %$#@ on Tuesday in the breakroom”
      ➢ *There was an altercation in the breakroom the other day where some inappropriate language was used. Tell me what you recall*

• Ask the same who, what, where, when, why and how questions as the victim
  • This is especially important if perpetrator completely denies the allegation
    ➢ *Then the focus of the interview shifts to finding out why the victim would fabricate this allegation, what other relevant information the perp has to refute/mitigate the allegation – witnesses, evidence, alibi*
Testimonial Evidence – *Interviewing “The Perp”* continued

- **Do’s and Don’ts**
  - ✓ Do tell the perp all the allegations made against him/her
    - ▪ Don’t try to mislead or shock person into confession
  - ✓ Do make sure the perp knows you have not made up your mind
    - ▪ Don’t let perp believe they are already “convicted”
  - ✓ Do emphasize importance of non-retaliation and confidentiality
    - ▪ Don’t leave the perp with no one to talk to ➔ give them a resource
    - ▪ Don’t let the perp believe retaliation is a one-way street ➔ give them examples of what retaliation is AND what it is not
  - ✓ Do let the perp know how the matter will be handled and resolved
Testimonial Evidence – *Interviewing Witnesses*

• Tell the witness the essential information of the complaint and their involvement. Reassure the witness that they are not a target of the investigation.

  ❖ **Provide scenarios to refresh their memory but do not lead them.** Let the witness tell his/her version of what happened in their own words.

• Ask the same who, what, where, when, why and how questions as the perp & victim

  ➢ Be prepared for the uncooperative witness

    ❖ **Try to loosen them up with general questions** about job satisfaction, company culture, working relationships then bring it back to issue
    
    ❖ **Reveal what you already know** without compromising integrity
    
    ❖ **Use discipline as an absolute final option**
Testimonial Evidence – *Interviewing Witnesses* continued

• Do’s and Don’ts

  ✓ Do tell the witness the scope of his/her involvement
    ▪ Don’t overstate or understate their importance
  ✓ Do make sure the witness knows they are not in trouble
    ▪ Don’t let witness think not cooperating is an acceptable option
  ✓ Do emphasize importance of non-retaliation and confidentiality
    ▪ Don’t leave the witness with no one to talk to ➔ *give them a resource*
    ▪ Don’t let the witness believe retaliation is a one-way street ➔ *give them examples of what retaliation is AND what it is not*
  ✓ Do let the witness know how the matter will be handled and resolved
Reviewing Demonstrative Evidence

• Video, Audio, Photographs
  ➢ Is the source legitimate?
  ➢ Can a temporal or situational connection be established?
  ➢ Does it support or reject the victim’s story?

• Bodily Injury
  ➢ Is injury consistent with action/activity?
  ➢ Pre-existing condition or other factors?
Creating Demonstrative Evidence

• Video, Audio
  • Audio recordings still more common than video recording of interviews
    + Ensures accurate account of testimonial evidence
    - Makes people nervous and/or inclined to exaggerate
  • Know the laws regarding “secret” recording in your state
    ❖ **Protect your organization with switchboard disclaimer and/or policy**
      ❖ Make sure policy covers the **use of recording devices at work**

• Photographs
  • Commonplace for injuries, property damage
    ❖ Make sure policy covers the **taking of photographs at work**
Creating Demonstrative Evidence continued

• “Crime Scene Re-Enactments”
  • Returning the victim, perp and/or witnesses to the scene in order to demonstrate exactly what happened is a common investigation technique
    – Risks trauma to the victim. Be clear that this is preferred, not required.
    – Risks confidentiality breach. Make sure area is secure.
    – Risks safety. Don’t let a re-enactment result in a new claim.

✓ Can be invaluable tool to give you a clear picture of what happened and reveal possible evidence leads
Reviewing Documentary Evidence

- **Time records, Phone records, Financial records**
  - Search for patterns to corroborate or contradict the claimant’s story
    - Do the dates/times align?
      - **Ask for both parties records**
      - **Ask for printed AND forwarded messages**
    - Is the frequency or scarcity consistent?
    - Are there similar patterns among non-complainants?

- **Social Media, Electronic messages**
  - Examine content to substantiate or refute claimant’s story
    - Are the messages legitimate?
      - **Beware similar user IDs**
    - When were the messages sent?
    - What is the tone and context?
Reviewing Documentary Evidence continued …

• **Statements**
  - Examine content to substantiate or refute claimant’s story
    - Help create timeline?
    - Consistent with information provided in interview?
    - New insights into issue or motive?
  
  ❝Get statements following interviews & review. Don’t be afraid to ask for a revision❯

• **Notes**
  - Any written notes should become apart of the record
    - Stick to the facts. Avoid editorializing
    - Keep notes brief. Write summary statements soon after
    - Importance of quotations
Also remember ....

**Keep Scope Narrow**
- Avoid involving and interviewing unnecessary people
  - This includes written statements. **Gather statements only for key testimony.**

**Control the Integrity of the Investigation**
- Be careful about letting others conduct interviews, gather evidence
- Be mindful of confidentiality and who information is shared with. Address compromises immediately

**Avoid “Wild Goose Chasing”**
- Investigations often reveal other wrongdoings and lesser offenses. Do not let this sidetrack or delay the investigation

**Check in with the Complainant**
- Keep the victim apprised of how things are progressing. Do the same for the perp and key witnesses.
Be prepared....

**To Make Preliminary Recommendations**
- Gathering of evidence usually results in inferences on the resolution of the claim. Be prepared to take action to prevent ongoing issues and/or retaliation.

**To Conduct 2\textsuperscript{nd} Interviews**
- Review of evidence will cause follow-up questions for complainant, perpetrator and witnesses. Be prepared.
  - Organize yourself so only 2\textsuperscript{nd} interview is necessary for each. Going back 3 - 4 or more times compromises the investigation.
Your goal is to interpret the evidence to determine if the claim has been substantiated.

Why?

• Conclude the investigation and report outcome to all parties involved
• Decide on appropriate course of remedial action
Reviewing the Evidence

• Gather up all evidence and organize it in order to create a timeline.

  ➢ This timeline becomes “the record”
    ➢ *Create an “evidence room”* or “murder wall” where all evidence is laid out for the record
    ➢ *Review each piece of evidence one by one.* Take notes to create the record

Once all the evidence is reviewed, write a summary narrative of the evidence → “the record”
Reviewing the Evidence continued ...

- Why create “the record”
  - **Time saver**. Makes it easier to determine what happened in a claim when have to refer back to it.
  - **Historical summary**. Provides simple, central reference point → **create catalog**
  - **Maintain confidentiality**. Outlines the complaint, investigation and resolution without naming names.
Reviewing the Evidence continued ...

• What’s in “the record”
  ❖ **Summary of the complaint and victim’s statement.**
  ❖ **Summary of the investigation.** List synopsis of each and what it proved/refuted → **Number evidence as exhibits**
  ❖ **Summary of resolution.** Summary of remedial action and notifications to key parties.
Once you have the record, you have to review it and determine what it all means and what action has to be taken.

Was the victim’s claim substantiated?

• The evidence gathered will either support, refute or negate the original allegation
  - Support = able to substantiate and/or corroborate a significant portion of the original allegation
  - Refute = unable to substantiate and/or corroborate a significant portion of the original allegation
  - Negate = discover issue that is altogether different from original allegation
**The Interpretation** continued

- **Supported** means the perpetrator confessed and/or the evidence corroborates the victims version of events

- **Refuted** means the perpetrator recalls a different version of events and the evidence supports both the victim and the perpetrator

- **Negated** means the perpetrator recalls a different version of events and the evidence supports the perpetrator or neither version
Deciding the Remedial Action

To determine what is needed, review the who, what, where, when, how and why again

**Who**
- Violated a law or policy? ⇣This could be anyone!

**What**
- Law or Policy was violated?

**When/Where**
- Did the violation occur? ⇣This could be multiple infractions

**How**
- Law or Policy was violated?
- Severe is the violation

**Why**
- Law or Policy was violated? ⇣Be mindful of mitigating factors
Deciding the Remedial Action continued ...

Examine all the violations against the 5Ps

- Postulates (Laws): What Federal and/or State guidelines say about this?
- Policy: What does our Company policy and standards of conduct say?
- Procedure: What is our Company procedure for this?
  - What was proper thing to do?
- Practice: What is our Company practice for this?
  - What do people normally do?
- Precedent: What has our Company done previously?
  - Who else has done the same thing? What happened to them?
<table>
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<th>Termination</th>
<th>Demotion or suspension with retraining</th>
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<td>Counsel</td>
<td>Counsel with retraining</td>
<td>Counsel with suspension and retraining</td>
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Remember ...

**Consult Other Decision Makers**

- Discuss and reach agreement on the course of action with other decision-makers
  - What needs to happen and when
  - Who needs to deliver and return documentation
  - Play the “Honor” game
Your goal is to carry out and collect related documentation for your remedial action.

**Why?**
- The investigation isn’t truly complete until all remedial action is carried out and completely documented.
Create a To-Do list based on the decisions made during Interpretation Counsel

• Who writes it? Who delivers it?
  - **HR should review any written warnings before delivered**
  - **Be prepared for “refused to sign”. Handle like an uncooperative witness**

Suspension

• How long will it last? When does it start and end? Paid or unpaid?
  - **Beware non-punitive suspensions**

Re-Training or Probationary Periods

• What will be reviewed during re-training? By whom? When? How documented?
• How long will probation last?
  - **What does success look like? What happens if it doesn’t work?**
Create a To-Do list based on the decisions made during Interpretation

**Termination**

- When will it happen? Who will be present?
- Is the person eligible for rehire?
- How will benefits and entitlements be handled?
- When will the person’s final paycheck be? What about bonus?
  - Consider if severance & separation agreement is needed?
  - Consider security issues?
Elements of Counseling

- Summary of Complaint
- Summary of Investigation, including any Counter-Claim
- Explanation of violation(s)
- Outline of the expected behavior
- Summary of the Remedial Action
- Space for comments

❖ Try to be as brief as possible
Remember ...

Always formally counsel and document

- If HR is involved, at least a written warning is necessary

Be prepared for additional statements

- Contentious termination may result in harsh words/actions. Be sure to add this to the file

Send Close-Out Notices

- Formally let victim, perpetrator, key witnesses and personnel know the issue has been resolved
In closing ...

- Remember the 4 I’s of the Investigation
- Communicate consistently with victim and other key parties
- Have a plan for how to handle the investigation
- Be mindful of how much time it takes to resolve the issue
- Never lose sight of your central issue
- Always close matter completely