INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
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EMPLOYMENT LAW: WORKPLACE INVESTIGATIONS

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INVESTIGATIONS PROTOCOL

- How many of you have an investigations protocol?
- How many of you have written guidelines?



AGENDA

- Best practices – generally
- Elements of effective investigations
- Planning the investigation
- Conducting interviews
- Report writing
- Packaging the investigation for decision maker
- Training investigators
- Mitigating legal risks

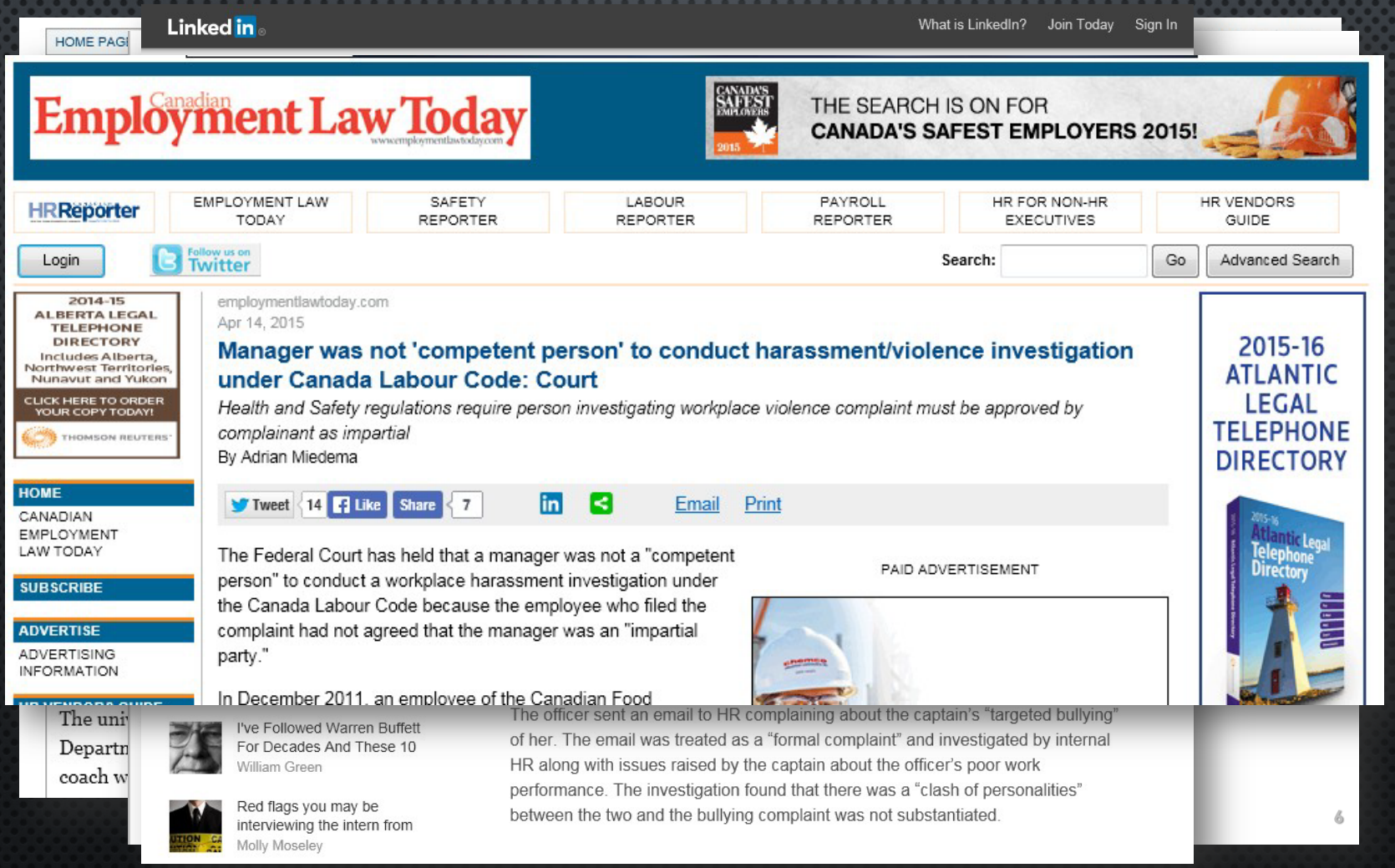


INVESTIGATIONS UNDER THE MICROSCOPE

- What has changed?
- What are the dangers?
- What are the opportunities?



INVESTIGATIONS GONE BAD



Important Concepts For Investigations – Best Practices Generally

INVESTIGATIONS: THE BALANCE



CONFIDENTIALITY: THE BALANCE



EMPLOYEE RIGHTS

Protect the rights, privacy and reputations of investigation subjects and others, balanced with the need to conduct an effective investigation.



SEE THE BIG PICTURE AND THE DETAILS

- Understand and adhere to scope of investigation
- However, do not ignore issues that may need to be investigated separately
- Avoid re-investigating past complaints brought by the same complainant



ACCEPT AT FACE VALUE



- Investigators may have to assess credibility where evidence or accounts conflict.
- Recognize and suspend any implicit bias you may have.

Be aware of culture

An investigator who does not understand the culture may miss what a witness is trying to convey or might not get the information needed from witnesses.



LOCATE & PRESERVE EVIDENCE



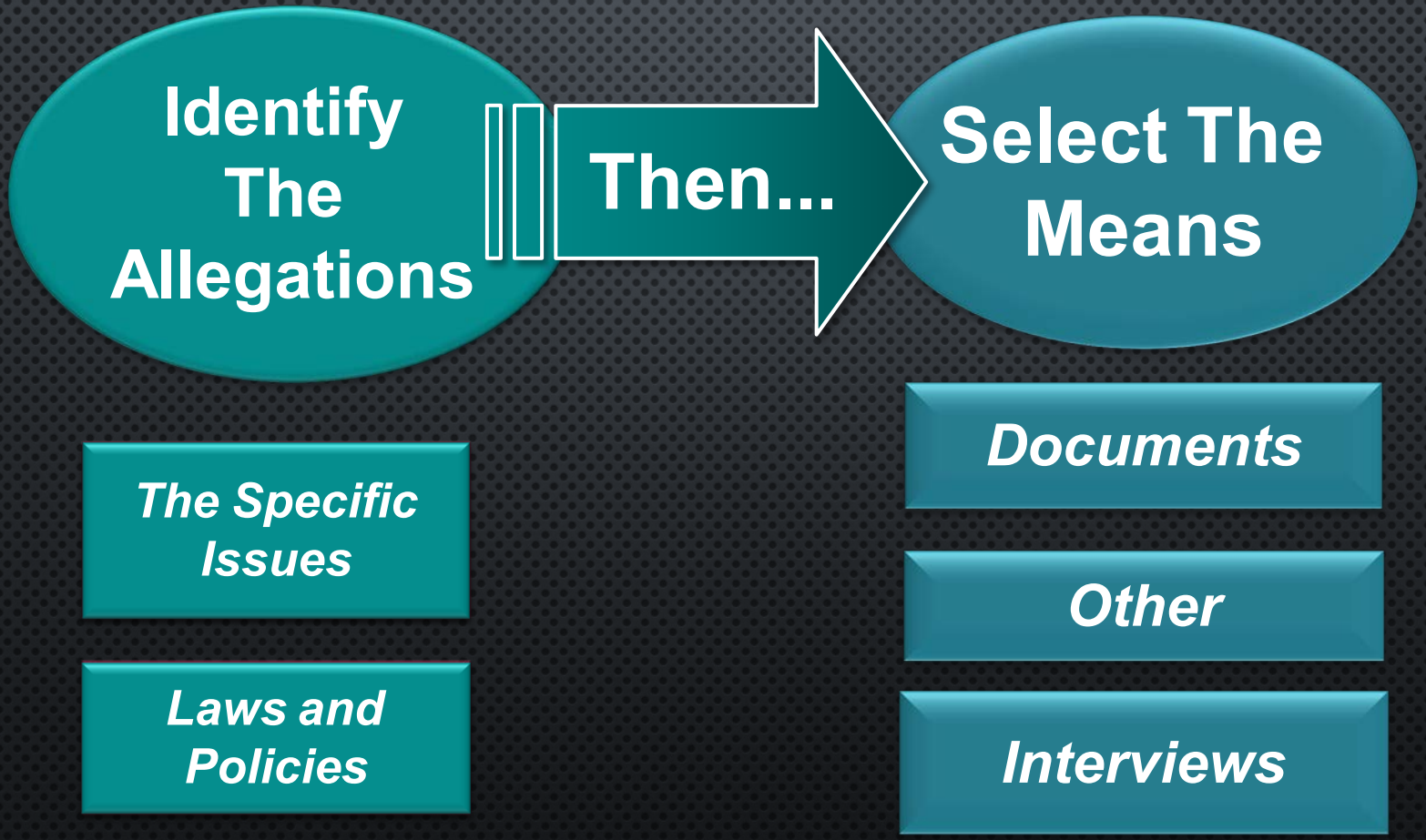
PARTICULARLY IN THE DIGITAL AGE, INEXPERIENCED INVESTIGATORS OR OTHERS IN THE ORGANIZATION CAN INADVERTENTLY FAIL TO SECURE, DESTROY, OR CORRUPT CRITICAL EVIDENCE AND CAN EVEN CREATE NEW BAD EVIDENCE.

KEY ELEMENTS OF EFFECTIVE INVESTIGATIONS

- Defined roles and responsibilities
- Standardized approach with clear procedures
- Documentation
- Notifications
- Case management system
- Risk mitigation
- Metrics
- Reporting
- Avoiding mistakes in investigations protocol

Planning the Investigation

STEPS IN PLANNING



THE FIRST 24 HOURS



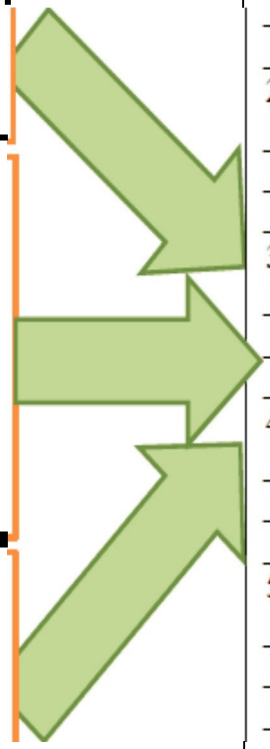
Mistakes in the first 24 hours can cause an investigation to be successfully attacked. Evidence can be lost; poor documentation can send you down the wrong track. In 2022, courts in Canada issued monetary awards for aggravated damages flowing from flawed investigations.

THE FIRST 24 HOURS – PLANNING SHEET

ALLEGATIONS

ISSUES

LAWS & POLICIES



DAY 1

1)

2)

3)

4)

5)

DAY 2

1)

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3)

4)

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DAY 3

,1

,2

,3

,4

,5

ATTORNEY-CLIENT PRIVILEGE ISSUES

- Should the investigation be directed by counsel (either in-house or outside)?
    - This needs to be decided up front
- If it is privileged: all documents should be marked “Privileged and Confidential” and shared only with counsel
- Conversations about the progress of the investigation and/or next steps should be in the presence of, or at the direction of, counsel to maintain privilege
- Written documents should be maintained with the likely prospect that the privilege will ultimately be waived as to the investigation – LEARN GOOD HABITS IN REPORT WRITING



ANTICIPATE THE UNEXPECTED



- EE refuses to participate
- Recording the interview
- Bringing a friend
- Bringing an attorney
- Raising new claims
- Threatening the investigator
- Interview takes longer
- Employee resources groups/affinity groups behaving like union reps
- Other unexpected things

DRAFT QUESTIONS IN ADVANCE

FORM OF THE QUESTION:

- WHO, WHAT, WHERE, WHEN, WHY, HOW



AVOID:

- "DID YOU DO….."
- "DID YOU DO IT BECAUSE YOU _____"



Conducting the Interview

BEST PRACTICES FOR EFFECTIVE INTERVIEWS



- Instructions to witnesses
- Funneling
- Active listening
- Taking OFF HR hat
- Question, don't interrogate
- Know your documents
- Plan the interview – *don't wing it*
- Ask the hard questions

HAVE STANDARD INTERVIEW INSTRUCTIONS

- Have a script - instructions to witnesses
- Confidentiality
- Retaliation is not allowed
- Data privacy rights
- *Upjohn* protocol
- *Garrity*
- What else?

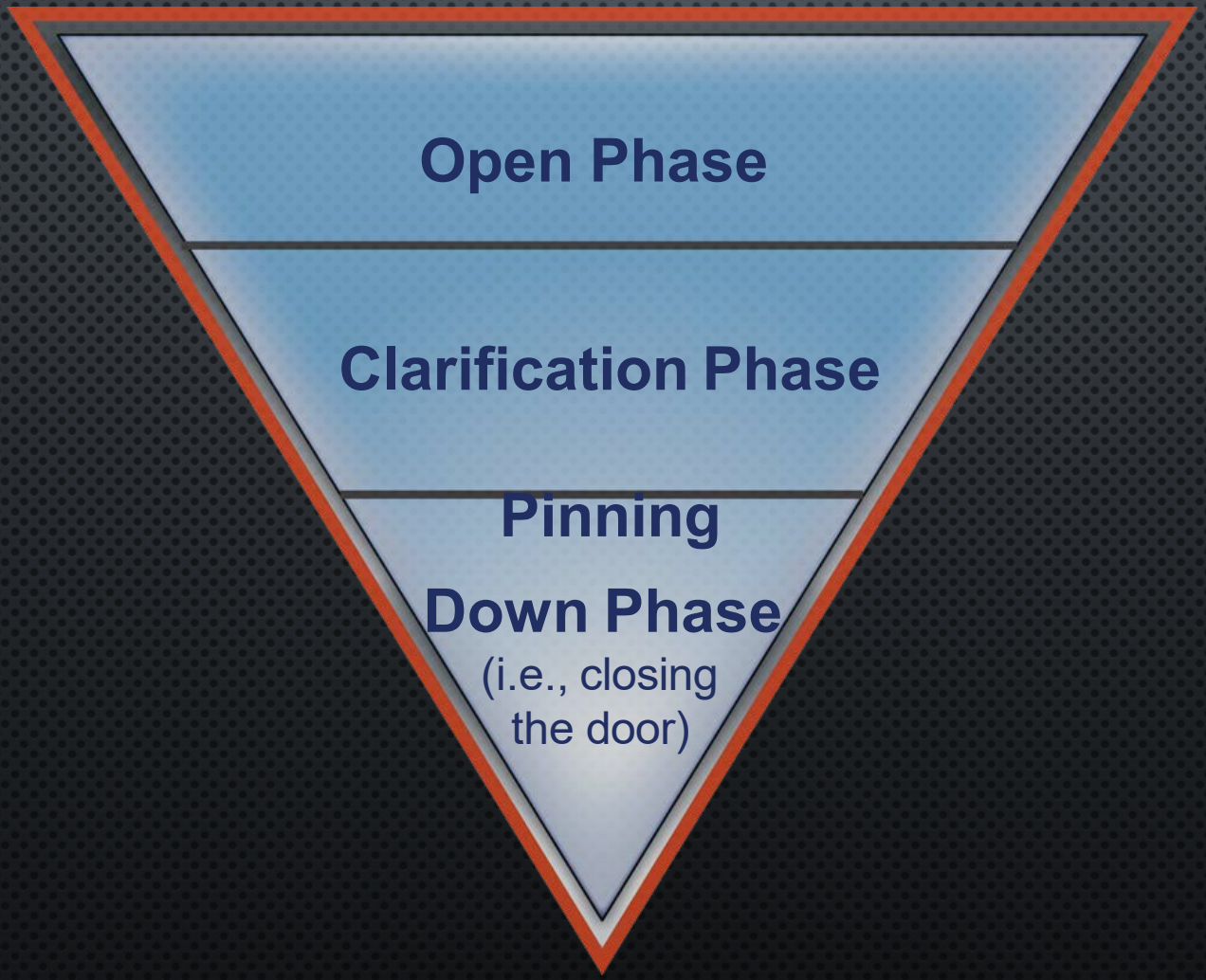


EFFECTIVE INTERVIEW TECHNIQUE

- Funneling
- Active listening
- Closing the door
- Assessing credibility

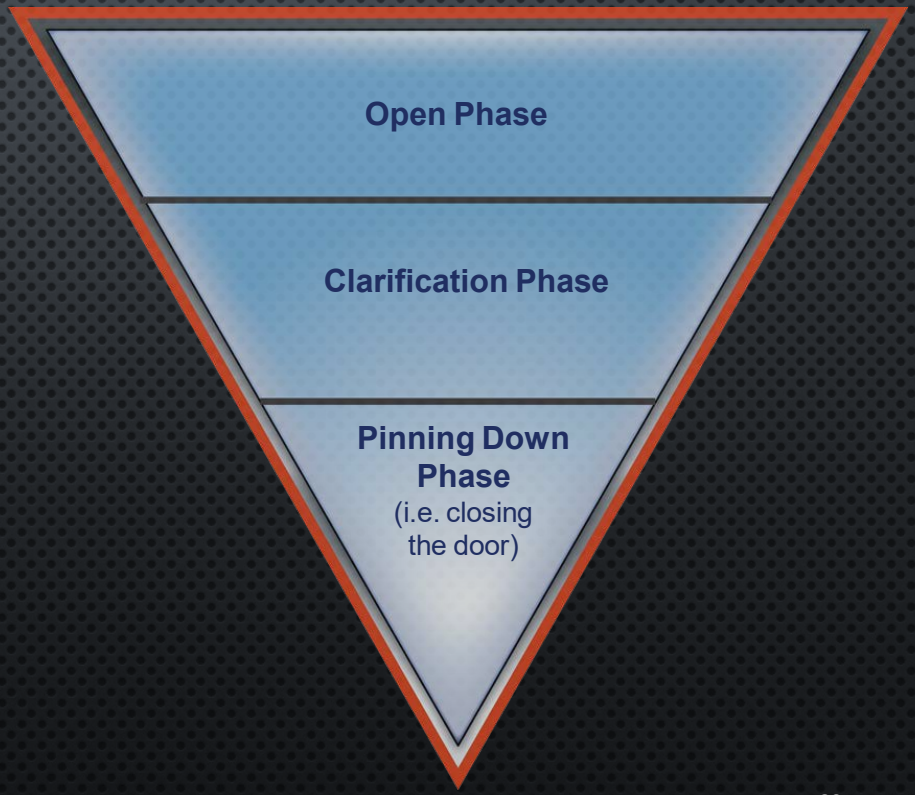


FUNNEL APPROACH (THE PYRAMID)



CLARIFICATION PHASE

- Now get clarification for details
  - Follow-Up
  - Exhaust
  - Fill in



ACTIVE LISTENING



- Listen to the witness
- Don’t be wedded to your outline
- Hearing is different than listening
- Don’t miss obvious or subtle cues
- Take accurate notes
- Power of silence

TREATING EMPLOYEES WITH R-E-S-P-E-C-T ♫

- Everyone deserves it
  - We are advocates for the entire organization – management AND employees. Not “us vs. them”
  - So… No walks of shame, security escorts, “misconduct” tags (unless appropriate)
- Disrespect becomes part of every charge or lawsuit – adds fuel to the fire

DURING INVESTIGATIONS: LISTEN FOR OPPORTUNITIES FOR RESPECT

- Filler comments, full of significance
  - "He shouldn't have spoken to me like that"
  - "I told my manager, but she didn't seem to care"
- Apologies can defuse the fire early on
- Convey respect back to them
  - "I hear/understand what you're saying…"
  - "Is there anything else that you think would be important for me to know?"
  - "Is there anything that we can do to support you?"
  - "**Thank you** for your time/candor/feedback"

CLOSING OFF

- Close the door
- Get the final answer
  - Anyone else present?
  - Anyone else know about the details?
- Listen to the witness
- Exhaust the subject
- Recap and ask, “Is there anything else?”



REPORT WRITING



COMMON MISTAKES - REPORT WRITING

- Legal conclusions
- Keeping or not keeping notes
- Written recommendations
- Throwing out reports
- Not filing reports
- Personal opinions and excited utterances (notes in margins)
- No conclusions, just facts
- Timeliness of reporting



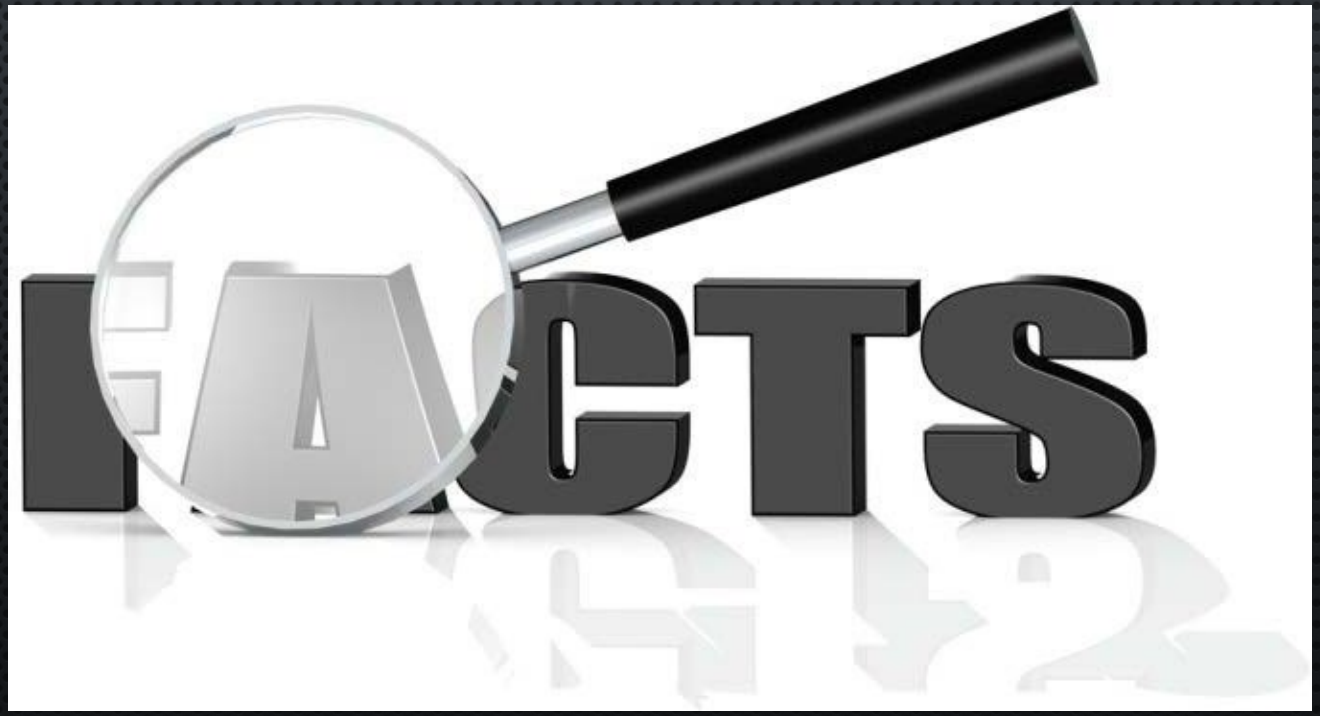
FOLLOW THE REPORT WRITING MAP

- Background
- Other Background
- Nature of Investigation
- Allegations
- Response
- Witness Information
- Findings
- Reasoning
- Recommended Final Steps



Drawing Legal Conclusions

The investigation report should never contain legal conclusions. Remediation decisions will be based on the factual findings.



REACHING A CONCLUSION/DOCUMENTING

- Investigator is not the decision maker
- How does the decision maker make a decision?
- Verify and analyze
- Making credibility determinations
- Remember: making the decision
- Documentation

Packaging the Report and Evidence for The Decision Maker

BEST PRACTICES FOR COMPLEX INVESTIGATIONS:

- Explain how complaint was brought forward and when
- Include a detailed Table of Contents
- None of the items should be labeled “Miscellaneous”
- Include who investigator attempted to interview and outcome
- Document chain of evidence

Best Practices & Common Mistakes

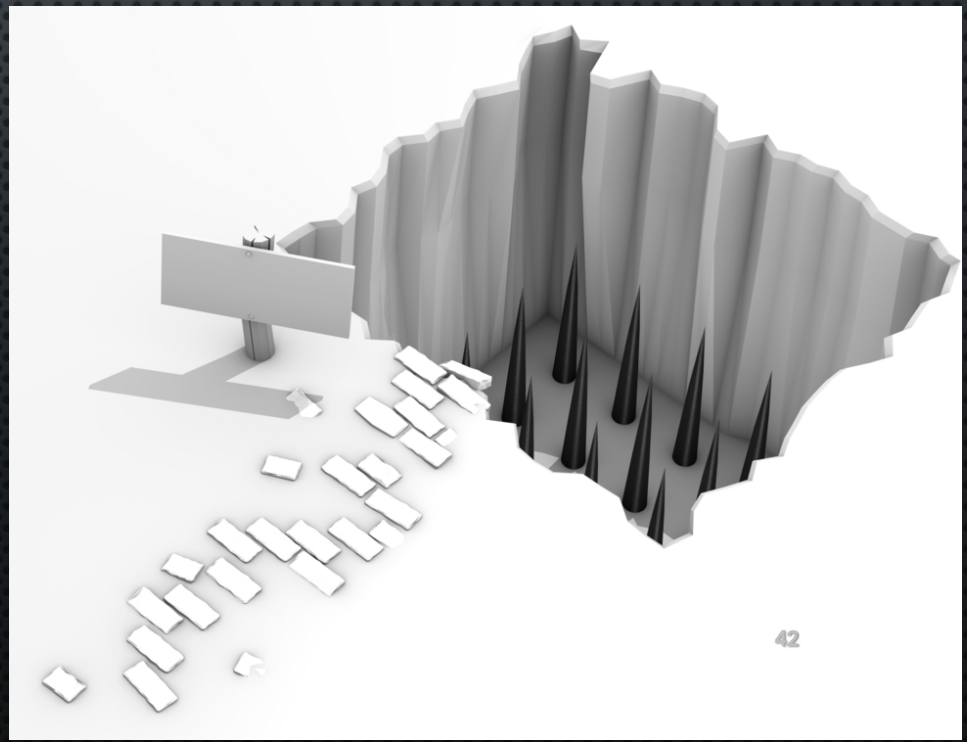
Communicate

Don’t leave the complainant in the dark or they might assume you are doing nothing. Provide updates that you are actively investigating without sharing details.



COMMON MISTAKES—REMEDIATION

- Not following up
- Not taking appropriate remedial measures



COMMON MISTAKES—FINAL STEPS

- NOT following your policies
- NOT holding employees accountable
- NOT following up with witnesses as appropriate
- NOT following up with complainant and keeping them informed of status



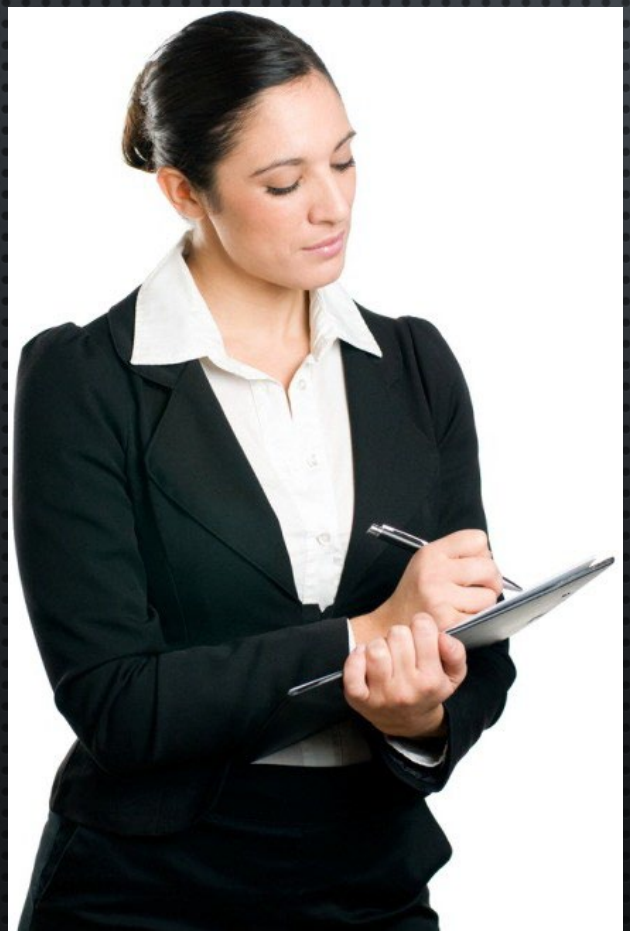
Training Investigators

TRAINING

- Does your governmental entity conduct training for HR on how to conduct effective and lawful investigations?
- Who should be trained and how often?
- What is the most effective way to train investigators?



BEST PRACTICE TIPS FOR TRAINING AN INVESTIGATOR



- Impartial fact-finder (no biases)
- Good listener and follow up
- Gather and collect evidence - do a deep dive and go beyond the workplace when needed and appropriate
- Attention to detail
- Protect the record
- Properly document investigation
- Fairness and respect
- Take off your HR hat
- Take out the emotion
- Avoid prejudging the situation and keep an open mind

Mitigating Legal Risks

TRIAGE AND ESCALATION ISSUES



- What are the challenges?
- What are best practices?

PROTECTION OF THE WHISTLEBLOWER - RETALIATION ISSUES



- What are the challenges?
- How do you reduce the risk of retaliation?
- What should the investigator be doing and saying?

RETALIATION

Retaliation against witnesses or whistleblowers exposes organizations to additional legal risk and erodes the necessary culture of compliance that encourages internal reporting.



TYPES OF ADVERSE EMPLOYMENT ACTION



- Promotions
- Discipline, Demotions
- Transfers
- Assignments, Training
- Invitations to meetings
- Terminations, Layoffs



QUESTIONS?





THANK YOU FOR ATTENDING THIS SESSION!

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