



Conducting Lawful Investigations

Presented by:
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Today's Speakers



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Agenda



- **Background**
- **Common Mistakes**
 - Triggers
 - Triage
 - Planning and assigning
 - Conducting interviews
 - Report writing
 - Remediation

Effective Investigations—The ROI

- Helps with mitigation with government agencies
- Reduces civil litigation/damages
- Increases morale
- Helps to keep complaints internal
- Helps to create a culture where students and employees feel comfortable bringing complaints or making reports



4

Investigations Under the Microscope

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



5

The Increasing Importance of Effective Investigations

- Constitutional Protections
- Anti-Bullying Trends
- Whistleblower Protections
- Mitigation
- Data Privacy Issues
- Attorney - Client Privilege Issues
- Government Bounties



Trending Now

- Clash Between Free Speech and Safety
- Attacks on Investigations (Investigations of Investigations)
- Duty to Cooperate
- Obstruction of Justice



Investigations Gone Bad



Investigations Protocol

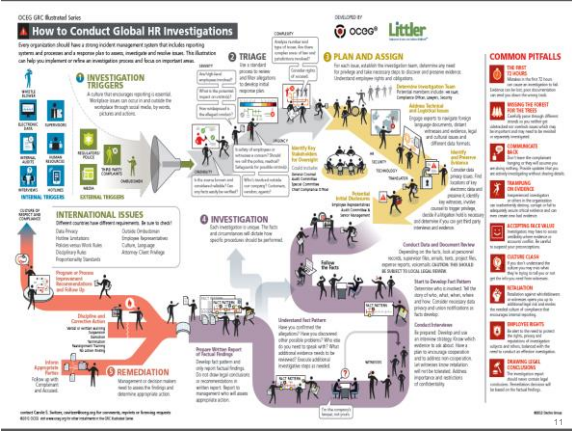
How many of you have an investigations protocol?
 How many of you have written guidelines?

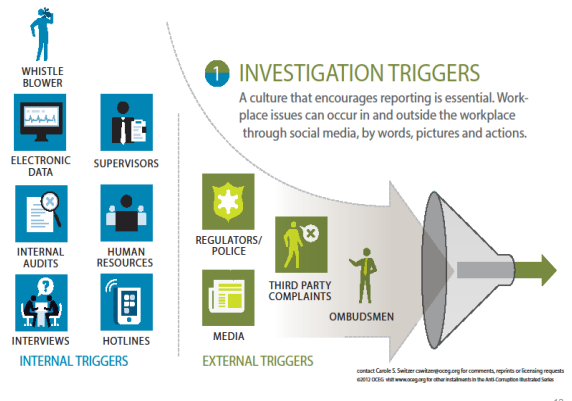


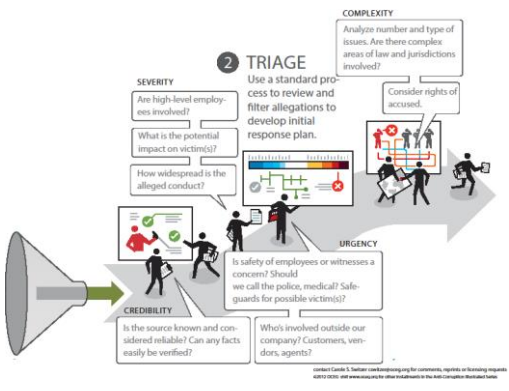
Investigations Protocol – Common Mistakes

- Not having any guidelines
- Having guidelines that you do not follow
- Not having an escalation protocol
- Not having a system of who is doing what
- Not having a process to review and filter the allegations and deciding the best way to proceed
- There is NO ONE SIZE FITS ALL









13



Most Common Pitfalls Triggers and Triage Phases

The Triggers—Common Mistakes



- Thinking most complaints go to the hotline—they don't
- No assessment of potential constitutional protections
- Not training managers
- That there needs to be a formal complaint—its all about notice
- Not keeping the complainant anonymous if it comes in that way
- Protection of Whistleblowers and reporters against retaliation

15

Triage—Common Mistakes

- **Confidentiality:** What steps can be taken now to best limit the universe of people involved to those who need to know?
- **Evidence:** Is there any evidence that needs immediate attention or would otherwise be in danger of spoliation?
 - Do not destroy evidence
 - Do not improperly create evidence
- **Botching attorney client privilege**



16

The Upjohn Warning

I am a lawyer for the University. I represent only the University and I do not represent you personally.

I am conducting this interview to gather facts in order to provide legal advice for the University. This interview is part of an investigation to determine the facts and circumstances of X in order to advise the University on how best to proceed.

Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to the University, not you. That means the University may elect to waive the attorney-client privilege and reveal our discussion to third parties. The University may decide to waive the privilege and disclose this discussion to third parties as federal or state agencies, at its discretion, and without notifying you.

In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the University. You may discuss the facts of what happened but you may not discuss this discussion.

Do you have any questions? Do you understand?

Are you ready to proceed?

17

The Johnnie's Poultry Statement (Bargaining Unit Eligible Employees)

JOHNNIE'S POULTRY STATEMENT

1. My name is [ATTORNEY NAME]. I am an attorney representing [THE UNIVERSITY].
2. I would like to ask you some questions relating to [TOPIC TO BE DISCUSSED].
3. You are not obligated to talk to me. If you talk to me and answer my questions, it will be entirely voluntary on your part. Your job at [THE UNIVERSITY] will in no way be affected by whether you talk to me or do not talk to me. Furthermore, regardless of your decision, there will be no prejudice or benefit to you. You will not be penalized or discriminated against in any way by [THE UNIVERSITY] by reason of any answers you may give me. You also may decide to answer only part of my questions, and you can terminate our discussion at any time you wish. Again, there will be no penalties, retaliation or benefit of any kind based on your decision.
4. If you answer my questions, you should know that I want to know only the exact truth from your answers. Please do not give me an answer you think I would like to hear. Instead tell me the exact truth whether or not you think I would like it.
5. I do not want to know whether you are for the Union or against the Union. I would merely like to know the facts about the events that I have mentioned.

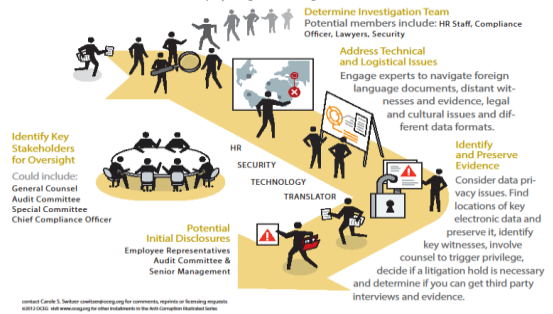
18



Pitfalls of Planning the Investigation

3 PLAN AND ASSIGN

For each issue, establish the Investigation Team, determine any need for privilege and take necessary steps to discover and preserve evidence. Understand employee rights and obligations.



Common Mistake Number One— a Huge Pitfall

Untrained investigator

- Believes a "police-style" approach is appropriate
- Every interview is an interrogation
- Does not know the organization or processes
- Engages in uncontrolled pretexting
- Is not aware of new laws re: restrictions on access to an employee's social media



Planning—Common Mistakes

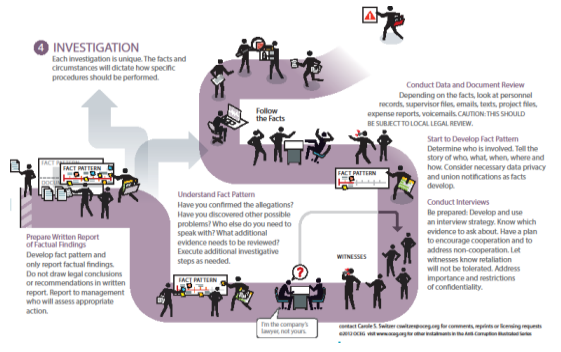
- Not conducted promptly—TIMING
- Not getting the right team
- Not Identifying or gathering the right or all the relevant evidence, documents
- Not preserving the evidence
- Technology issues
- Data privacy issues
- Contractual rights



22



Common Mistakes While Conducting the Investigation



24

Traits of an Effective Investigator



- Impartial fact-finder (no biases)
- Good listener
- Gather and collect evidence
- Attention to detail
- Protect the record
- Properly document investigation
- Fairness
- Take off your HR hat
- Take out the emotion

25

Common Witness Interview Mistakes

- Failure to provide instructions
 - Confidentiality
 - Privilege
 - Purpose
- Data privacy fright
- Not taking off manager hat
- Not listening and watching





Conducting the Interviews

The Interview



How Do You Approach Confidentiality?

- **Require confidentiality in every investigation?**
 - If so, how?
- **Require confidentiality on case by case basis?**
 - What factors are considered?
- **Request confidentiality?**
 - How is this accomplished?



Planning for Confidentiality

- **On a case by case basis, discuss why interviews or other data should be kept confidential**
 - The complaint will be handled confidentially, except:
 - The needs of the employer or the law may require that information be disclosed on a need-to-know basis
 - Be aware of the legal trend that allows employees to talk about terms and conditions of employment



Techniques to Deal with the Obstreperous Witness

- *Self-interest: appeal to the witness's self-interests or ego*
- *Desire to punish: let the witness know that the accused might not get caught if confidentiality is breached*
- *Common interests: loyalty to the organization*



The Reluctant Witness



32

The Blabber Mouth



33

The Uncooperative Witness



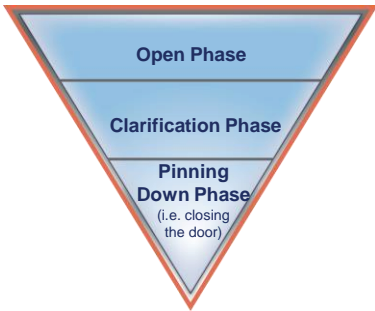
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Effective Interview Technique

- Funneling
- Become a movie camera
- Active listening
- Closing the door
- Assessing credibility



Funnel Approach (The Pyramid)



36

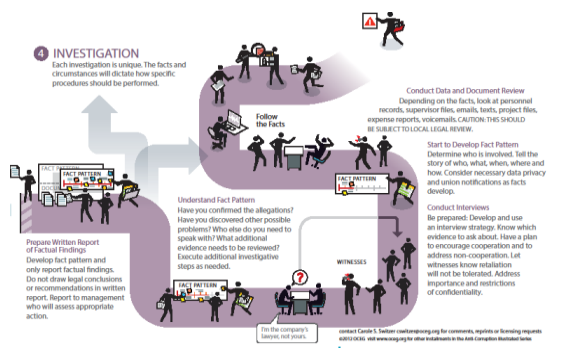
Active Listening



- 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



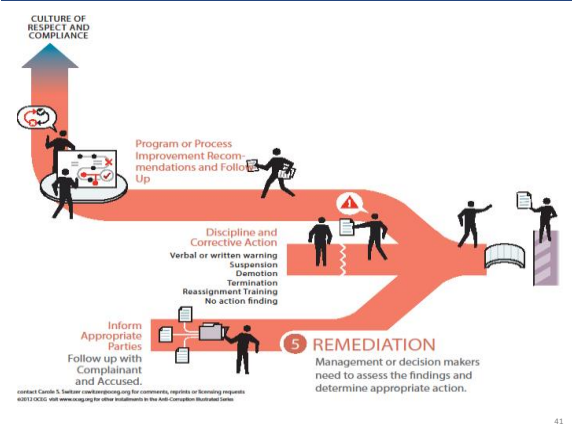
Documenting the Interview – Report Writing



Common Mistakes—Report Writing

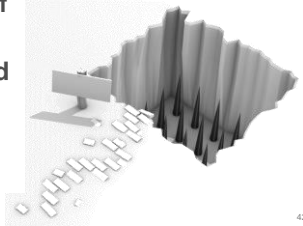
- Legal conclusions
- Premature conclusions
- Sloppy note-taking
- Written recommendations
- Personal opinions
- Excited utterances (notes in margins)





Common Mistakes—Remediation

- Often overlooked and under appreciated
- Perceived lack of authority
- Band-Aid applied when a suture is needed



COMMON PITFALLS



THE FIRST 72 HOURS
Mistakes in the first 72 hours can cause an investigation to fail. Evidence can be lost; poor documentation can send you down the wrong track.



MISSING THE FOREST FOR THE TREES
Carefully parse through different strands so you neither get sidetracked nor overlook issues which may be important and may need to be revisited or separately investigated.



COMMUNICATE BACK
Don't leave the complainant hanging or they will assume you are doing nothing. Provide updates that you are actively investigating without sharing details.



TRAMPLING ON EVIDENCE
Inexperienced investigators or others in the organization can inadvertently destroy, corrupt or fail to adequately secure critical evidence and can even create new bad evidence.

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ACCEPTING FACE VALUE
Investigators may have to assess credibility where evidence or accounts conflict. Be careful to suspend your preconceptions.



CULTURE CLASH
If you don't understand the culture you may miss what they're trying to tell you or not get the info you need from witnesses.



RETALIATION
Retaliation against whistleblowers or witnesses opens you up to additional legal risk and erodes the needed culture of compliance that encourages internal reporting.



EMPLOYEE RIGHTS
Be alert to the need to protect the rights, privacy and reputations of investigation subjects and others, balanced with the need to conduct an effective investigation.



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

43

The First 72 Hours

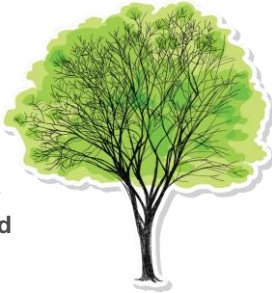


• Mistakes in the first 72 hours can cause an investigation to fail. Evidence can be lost; poor documentation can send you down the wrong track.

44

Missing the Forest for the Trees

• Carefully parse through different strands so you neither get sidetracked nor overlook issues which may be important and may need to be revisited or separately investigated.



45

Communicate Back

- Don't leave the reporter hanging or they will assume you are doing nothing. Provide updates that you are actively investigating without sharing details



46

Trampling on Evidence

- Inexperienced investigators or others in the organization can inadvertently destroy, corrupt or fail to adequately secure critical evidence and can even create new bad evidence.



47

Accepting at Face Value

- Investigators may have to assess credibility where evidence or accounts conflict.
- Be careful to suspend your preconceptions.



48

Culture Clash

- If you don't understand the culture you may miss what they're trying to tell you or not get the info you need from witnesses.



Retaliation

- Retaliation against whistleblowers or witnesses opens you up to additional legal risk and erodes the needed culture of compliance that encourages internal reporting



Employee Rights

- Be alert to the need to protect the rights, privacy and reputations of investigation subjects and others, balanced with the need to conduct an effective investigation.



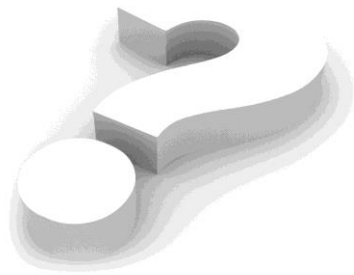
Drawing Legal Conclusions

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



52

Questions?



53

Thank You!

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