



Conducting Investigations

Alaska SHRM

2017 Alaska State Human Resources Conference

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Agenda—10 Most Common Pitfalls Plus More



- Triggers
- Triage
- Planning and assigning
- Conducting interview
- Report writing
- Remediation

Effective Investigations — The Return On Investment

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



Investigations Under the Microscope

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



The Increasing Importance of Employment Investigations

- Recent laws
- Mitigation
- Data Privacy Issues
- Attorney - Client Privilege Issues
- Global Differences



Investigations Gone Bad

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In cooperation with



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Work area

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Workplace investigation gone wrong: Piresferreira v. Bell Mobility

Rubin Thomlinson LLP

Canada

June 30 2009



In a recent decision, *Piresferreira v. Bell Mobility Inc.*, 2008 CanLII 67418 (Ont. S.C.J.), a Court in Ontario highlighted the mistakes that can be made when conducting a workplace investigation and the significant costs that result when things go wrong.

The Abusive Boss

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Effective—and Fair—Investigations

- Beware the risks of acting too quickly:
 - Renault pre-judged three key employees accused of bribery; embarrassment ensued!
 - Investigations must be effective and fair
 - Balance

THE WALL STREET JOURNAL. THEORY & PRACTICE

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THEORY & PRACTICE | MARCH 14, 2011

Firms Revisit Whistleblowing

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By ASHBY JONES And JOANN S. LUBLIN

The messy espionage investigation at Renault SA has become a cautionary tale for U.S. companies under pressure from regulators to aggressively pursue anonymous tips from whistleblowers.



View Full Image

Reuters

Renault dismissed three employees, including Bertrand Rochette, left, amid a corporate-espionage probe.

Among the lessons imparted: Don't rush through internal investigations, and don't be afraid to hire independent lawyers to help.

"Renault is the poster child for why you want to approach these situations with a sense of balance, and not have people rush to judgment," said Robert Fatovic, the chief legal officer at Ryder System Inc., the Miami-based transportation and logistics provider.

The saga concerning the French car maker began last August, when several top Renault managers received an anonymous tip accusing a senior Renault executive of negotiating a bribe.

After a four-month investigation, Renault in January dismissed the executive and two other managers. The employees professed their innocence, but the company's chief executive, Carlos Ghosn, said publicly that the company had evidence against them.

Over the past two months, however, Renault has uncovered no evidence against the trio.

Earlier this month, the company's chief operating officer, Patrick Pélatá, said the company may have been "tricked" into bringing the allegations. On Friday, French police took in for questioning two employees from Renault's security department who were overseeing the auto maker's internal corporate-espionage probe, people familiar with the matter said. Renault is now preparing to exonerate the three managers for lack of evidence.

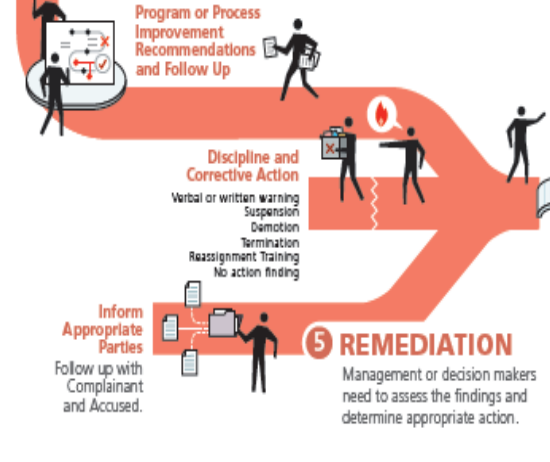
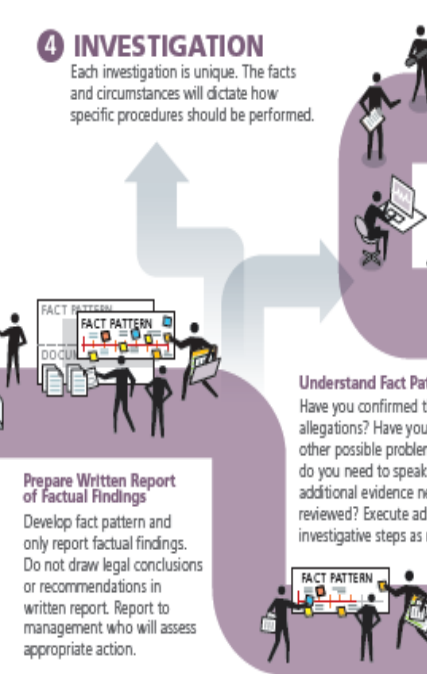
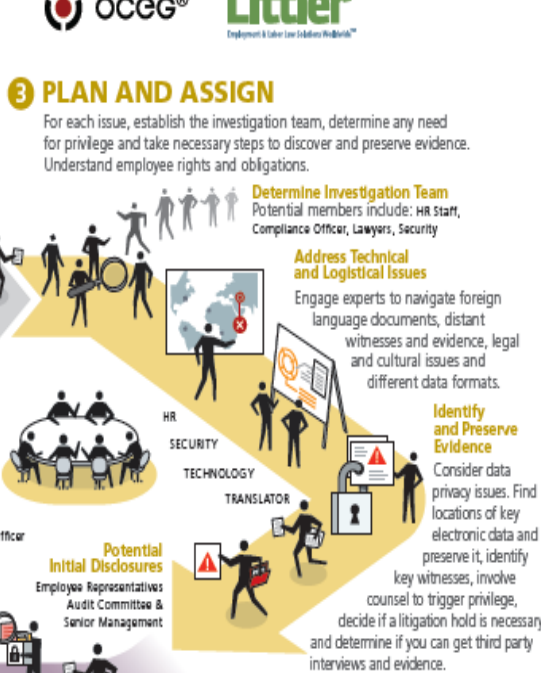
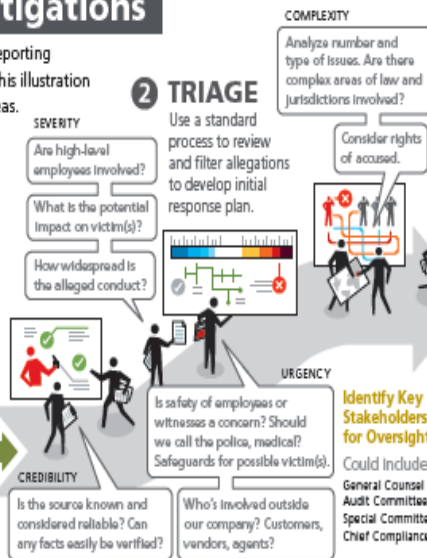
When Will You Conduct An Investigation?

- Harassment Claim?
- Suspected Policy Violation?
- Compliance Claim?
- Alleged Fraud?
- Suspected Wrongdoing?



How to Conduct Global HR Investigations

Every organization should have a strong incident management system that includes reporting systems and processes and a response plan to assess, investigate and resolve issues. This illustration can help you implement or refine an investigation process and focus on important areas.



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.
- 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.

**Question:
How Many of You Have A
Written Investigation
Protocol?**





WHISTLE BLOWER



ELECTRONIC DATA



SUPERVISORS



INTERNAL AUDITS



HUMAN RESOURCES



INTERVIEWS



HOTLINES

INTERNAL TRIGGERS

1

INVESTIGATION TRIGGERS

A culture that encourages reporting is essential. Workplace issues can occur in and outside the workplace through social media, by words, pictures and actions.



REGULATORS/
POLICE



THIRD PARTY
COMPLAINTS

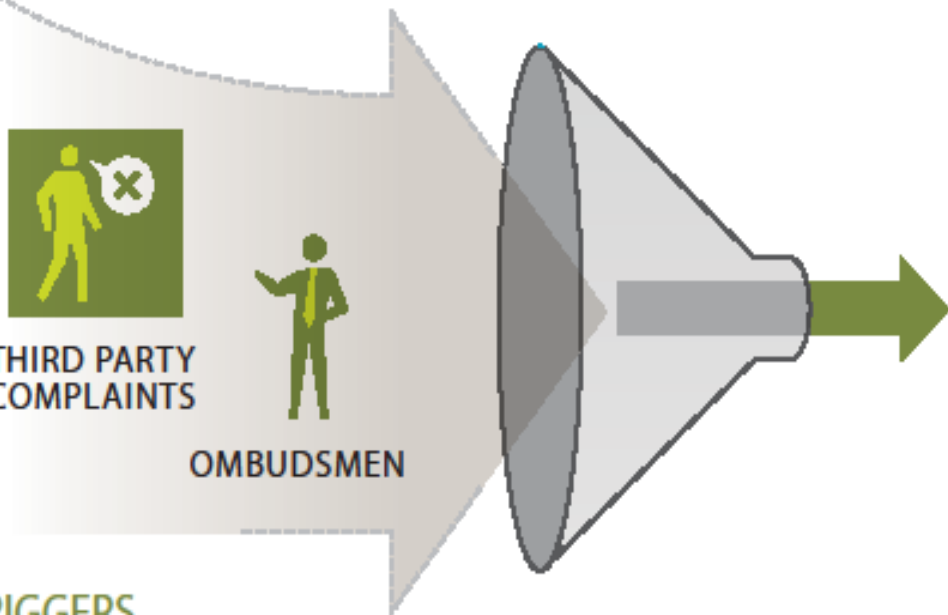


MEDIA



OMBUDSMEN

EXTERNAL TRIGGERS



Most Common Pitfalls Re: Triggers

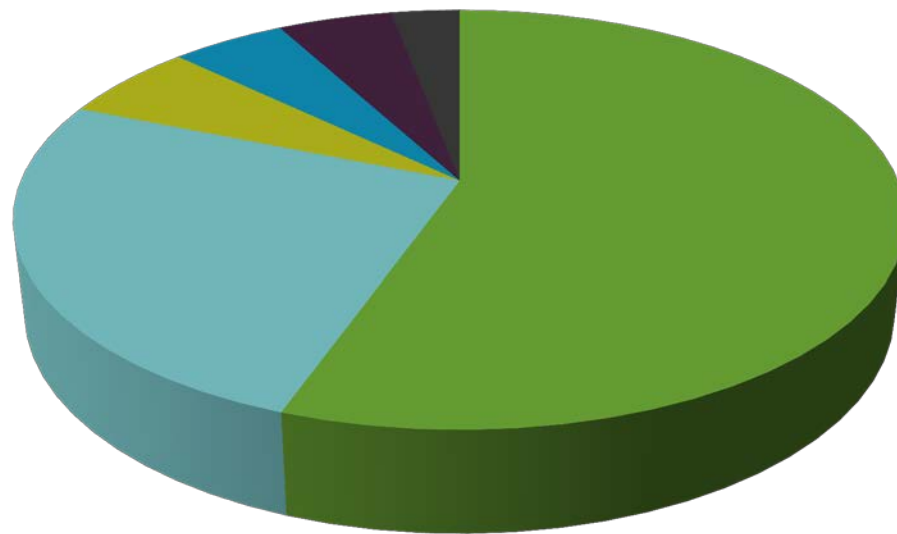
The background features a large teal rectangle on the left containing the text. To the right, there are several overlapping geometric shapes: a light blue cube-like form, a dark green hexagon, and a yellow hexagon. The overall design is modern and uses a color palette of blues, greens, and yellows.

The Triggers—Common Mistakes



- Thinking most complaints go to the hotline—they don't
- 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 complaints against retaliation

Supervisors Receive Majority of 1st Reports



- 56% Your Supervisor
- 26% Higher Management
- 6% Other
- 5% Hotline/Help Line
- 5% Other Responsible Person
- 3% Someone Outside Your Company

2

TRIAGE

Use a standard process to review and filter allegations to develop initial response plan.

SEVERITY

Are high-level employees involved?

What is the potential impact on victim(s)?

How widespread is the alleged conduct?

COMPLEXITY

Analyze number and type of issues. Are there complex areas of law and jurisdictions involved?

Consider rights of accused.

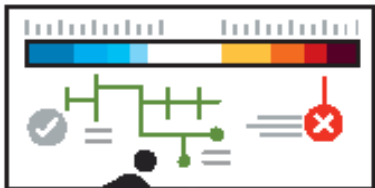
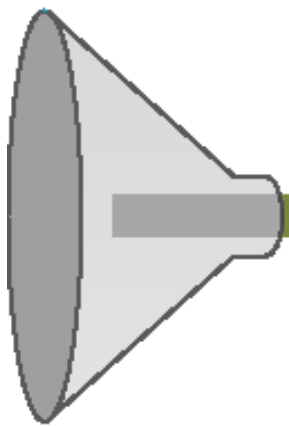
URGENCY

Is safety of employees or witnesses a concern? Should we call the police, medical? Safeguards for possible victim(s)?

CREDIBILITY

Is the source known and considered reliable? Can any facts easily be verified?

Who's involved outside our company? Customers, vendors, agents?



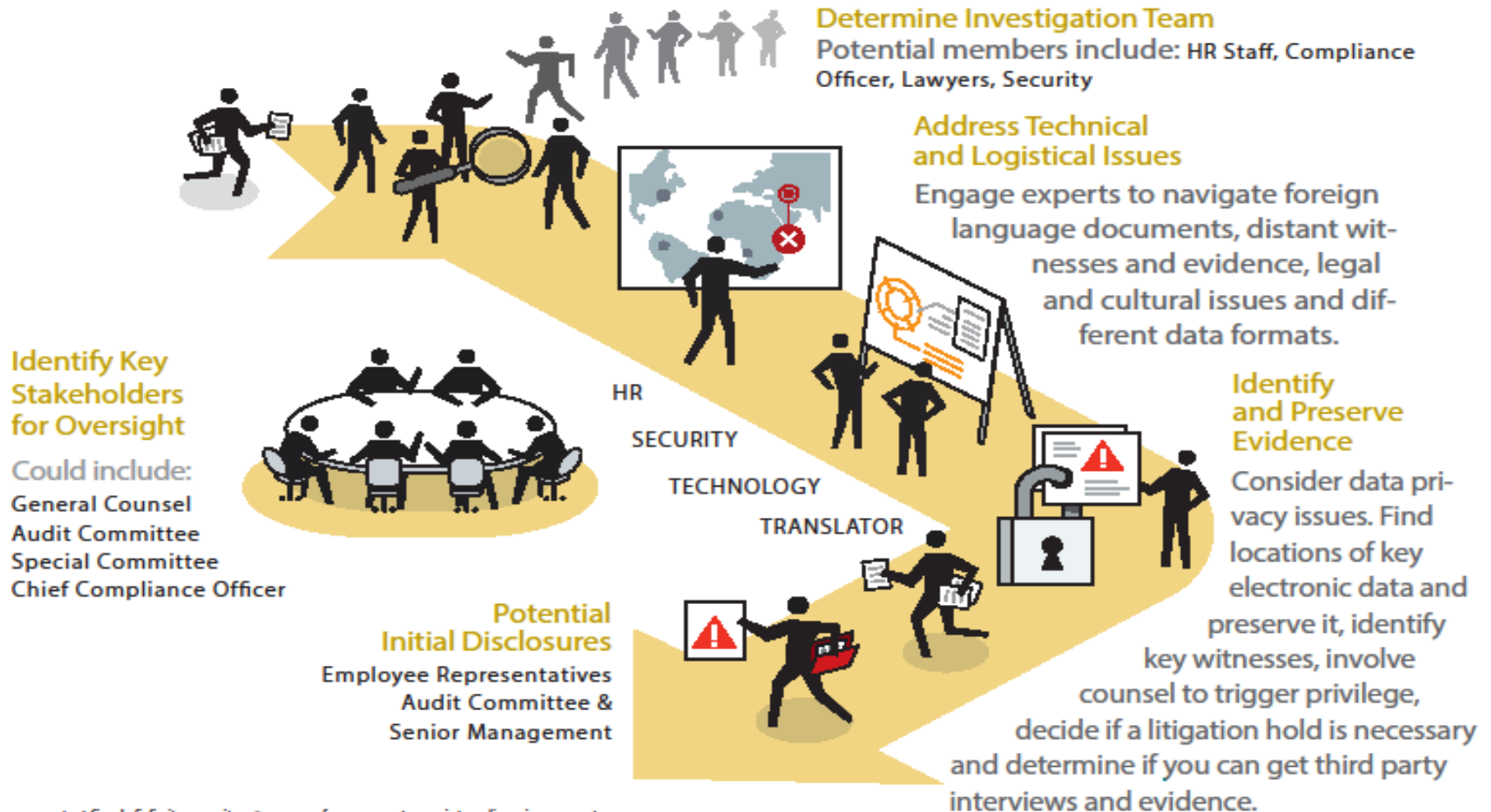
Triage—Common Mistakes

- **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
- **NOT Properly Escalating the complaint Attorney Client Privilege when needed**



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



Does your company conduct training for HR on how to conduct effective and lawful investigations?

- A. Yes
- B. No
- C. Don't know

Planning—Common Mistakes

- All investigations must be conducted promptly—TIMING
- Getting the Right team
- NOT Identifying or Gathering the Right or all the Relevant Evidence, Documents
- Not Preserving the Evidence
- Communication Issues
- Technology Issues
- Data Privacy Issues
- Contractual Rights

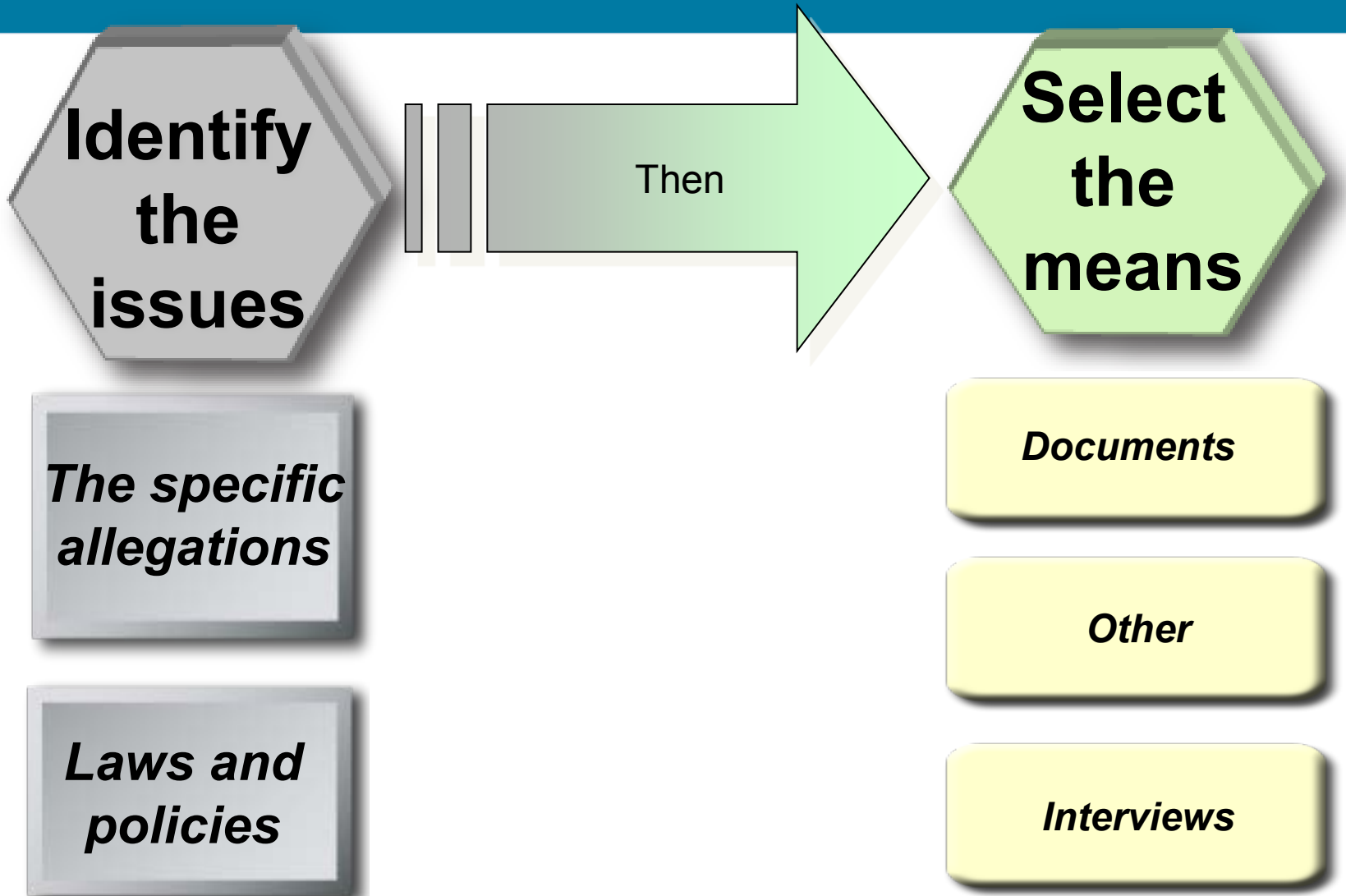


The Role Of An Investigator

- No biases – Impartial fact finder
- Good listener
- Appropriate investigation
 - gather and collect evidence
- Attention to detail
- Protect the record
- Reach reasonable conclusions
- Properly document investigation
- Take out the emotion
- If *appropriate*, recommend remedy



Planning the Investigation: The Steps



Planning the Investigation: Document Review

- Personnel files
- Timecards
- Medical files
- Expense files
- Project files
- Documents in possession of the claimant and witnesses



Planning the Investigation: Electronic Data & Communications



- Computer disks
- E-mail on the system
- E-mail stored
- Cameras/videos
- Recordings
- Internet searches
- Voice mail

Employee Complaint: First Steps

- Get as much detailed information from the complainant as possible
- Listen impartially without committing yourself
- Ask open-ended questions
- Evaluate the complaint from the complainant's perspective



Employee Complaint: First Steps



- Emphasize complaint will be taken seriously
- Advise the complainant appropriately about what you intend to do
- Address confidentiality, non-retaliation, and current job issues
- Ask, “Is there anything else?”

Employee Complaint: Asking the Right Questions

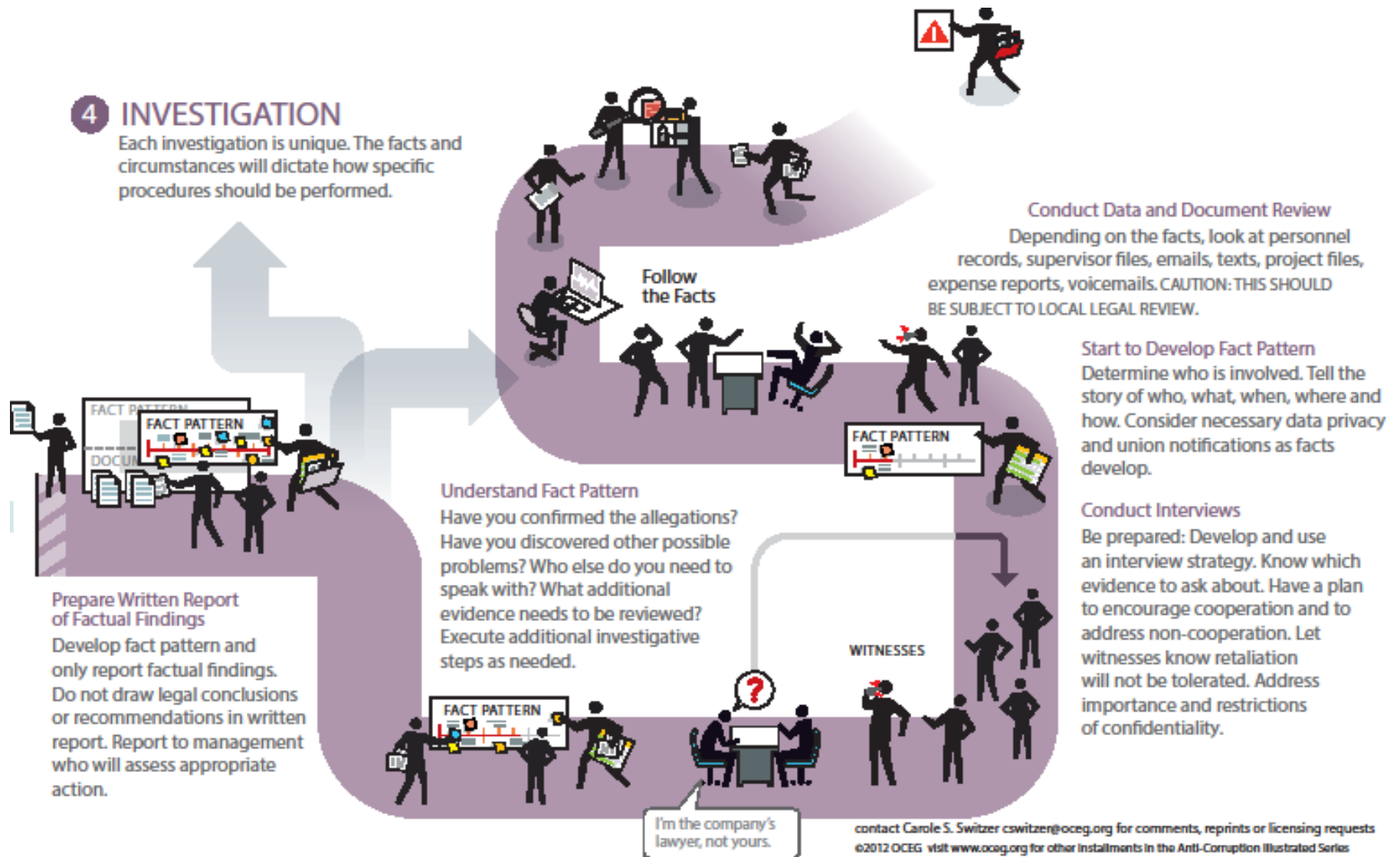


Use “Funneled” Questioning

- Open ended phase
- Clarification phase
- Pinning down phase (i.e., closing the door)

4 INVESTIGATION

Each investigation is unique. The facts and circumstances will dictate how specific procedures should be performed.



Identify Your Witnesses

- Individuals named by complainant
- Individuals named by other witnesses
- Individuals whose names appear in relevant documents
- Complainant's manager/supervisor

Conducting Effective Interviews

• Prepare a list of questions that must be answered -- What they saw, when they saw it, who else was there, why something happened (if known), what happened next, and so on. Be prepared to customize with certain people.

- Interviewee name/title/position
- Date, time and location of interview
- Date and location of incident
- Physical proximity of interviewee to the incident
- Persons Involved in incident
- Background of interviewee with the parties
- Names/relationships of other essential witnesses
- Understanding as to complainant's concerns/allegations
- Awareness of facts, documents or persons related to allegations



The Interview





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 new NLRB cases



Planning For Confidentiality

- Think about the use of notes and memos before you write them.
- Think about ways to give the subject of the investigation notice of the allegations without compromising confidentiality .



Interviewing The Subject of the Investigation

- Two Goals:

- Information gathering



- Fair opportunity to respond



Interviewing the Subject of the Investigation



- Weingarten rights?
- Garrity rights?
- Conduct in private
- Inform employee of allegations
- Ask for response
- Document the interview
- Warn against retaliation

Effective Interview Technique

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



Menendez, March 13, 2013.

- Employee WB successfully sued his employer for releasing his name when he asked to remain anonymous
- Employee recovered \$30,000.
- Lesson learned?



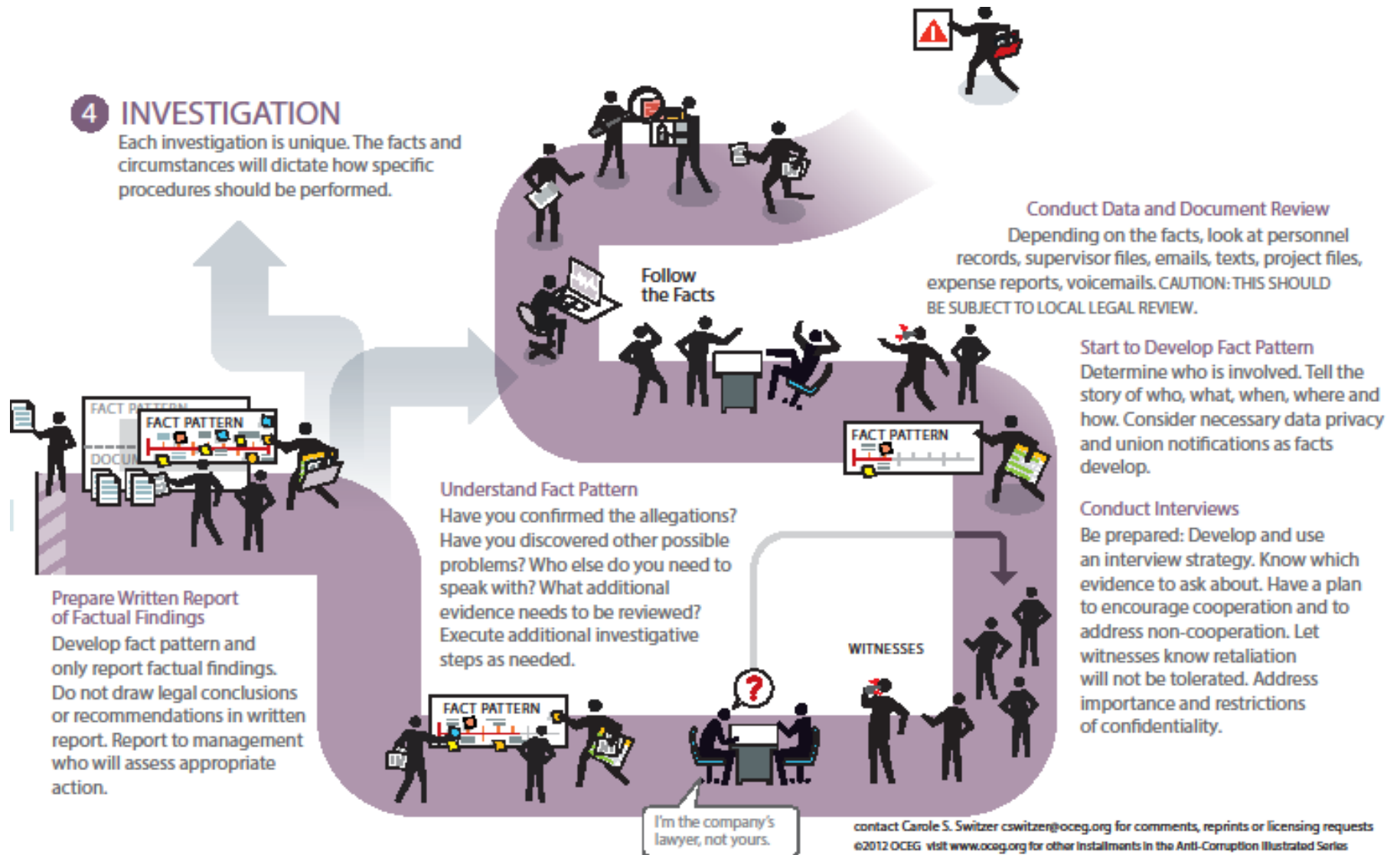
Documenting the Interview

-- Report Writing



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Common Mistakes—Report Writing

- Legal Conclusions
- Keeping or not notes
- Written recommendations
- Throwing out reports
- File systems
- Personal opinions
- Excited utterances (notes in margins)
- Conclusory allegations as findings

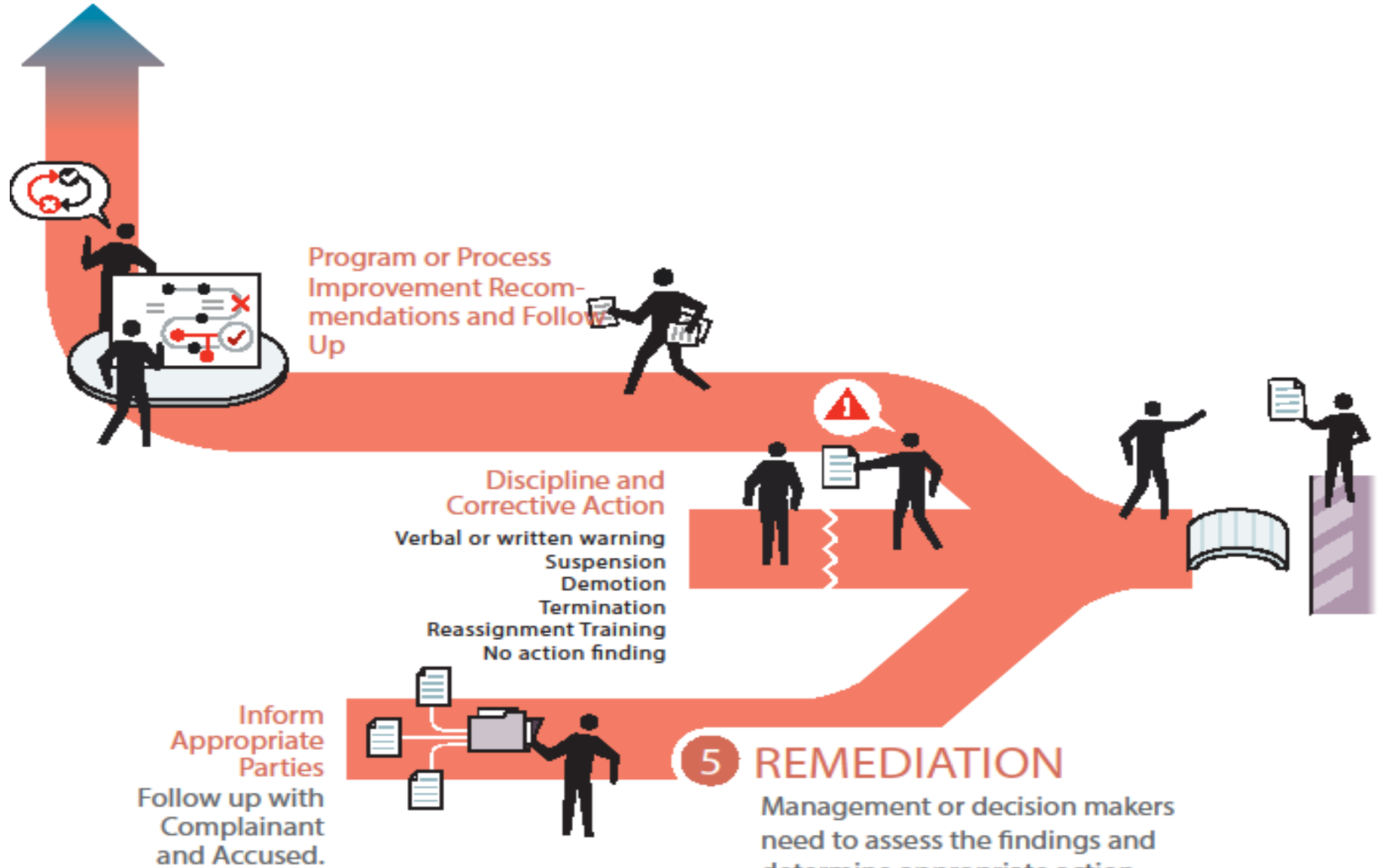


Documentation

- State facts, not conclusions
 - Avoid opinions, rumors, or hearsay
 - Include dates, times, and witnesses as applicable
 - Use quotes properly
- Write clearly so it is easily understood and hard to misconstrue
- No recommendations
- Write for the jury.

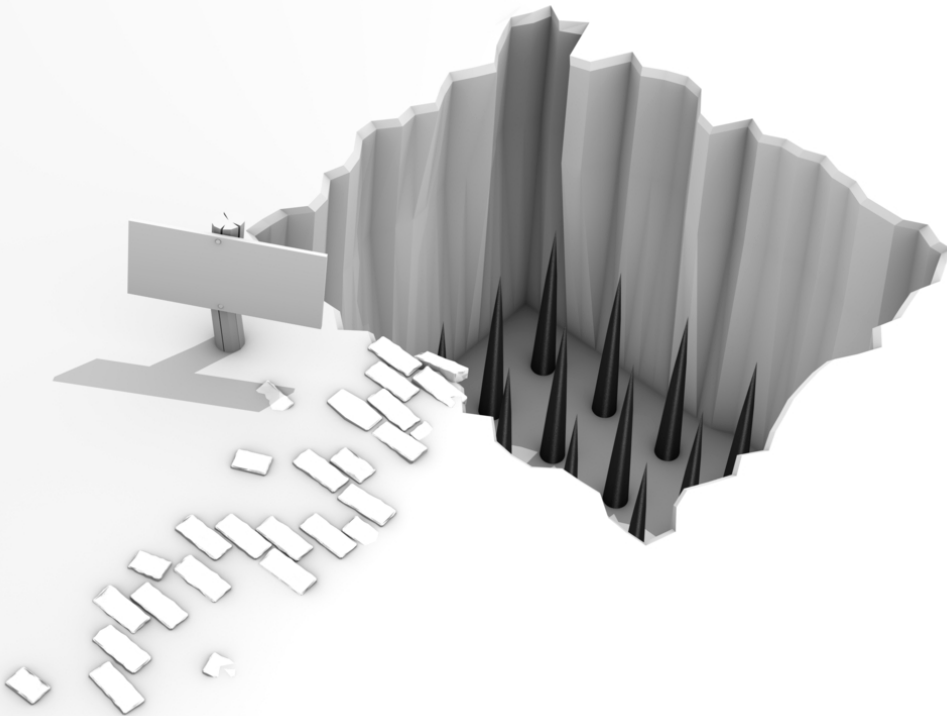


CULTURE OF
RESPECT AND
COMPLIANCE



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 keep them informed of status



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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

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RETALIATION

Retaliation against whistleblowers or witnesses opens you up to additional legal risk and erodes the

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EMPLOYEE RIGHTS

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and others, balanced with the need to conduct an effective investigation.



DRAWING LEGAL CONCLUSIONS

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Drawing Legal Conclusions

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





questions?



thank
you.

Littler
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