

*Presented by:
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CLI
CONDUCTING LAWFUL INVESTIGATIONS



Presented By

the Learning Group

Littler Mendelson, P.C.



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Agenda

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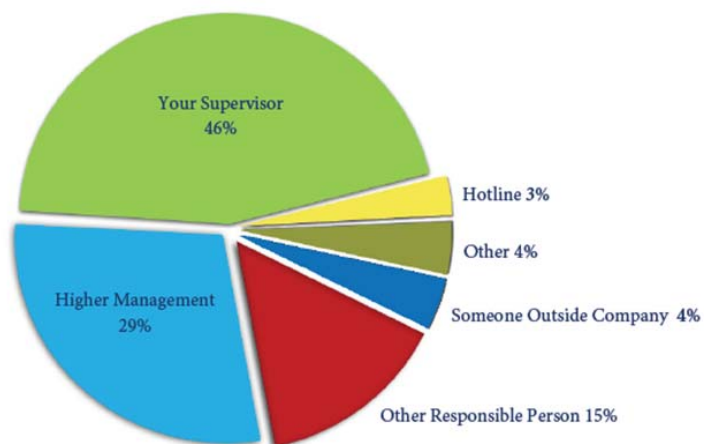
- Legal Trends And The Role Of The Investigator
- Conducting The Investigation
- Interviewing
- Evaluating Evidence & Reaching Conclusions
- Best Practices



Vast Majority of Reports are Made To Managers

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Our Current Climate

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1. Retaliation Claims Skyrocketed

2. Whistleblowers Are Celebrated

3. Dodd Frank Bounty Payment

4. Increased Attention to Corporate Misconduct

World Focus on Corruption

Investigations are Under the Microscope

The Increasing Importance Of Employment Investigations

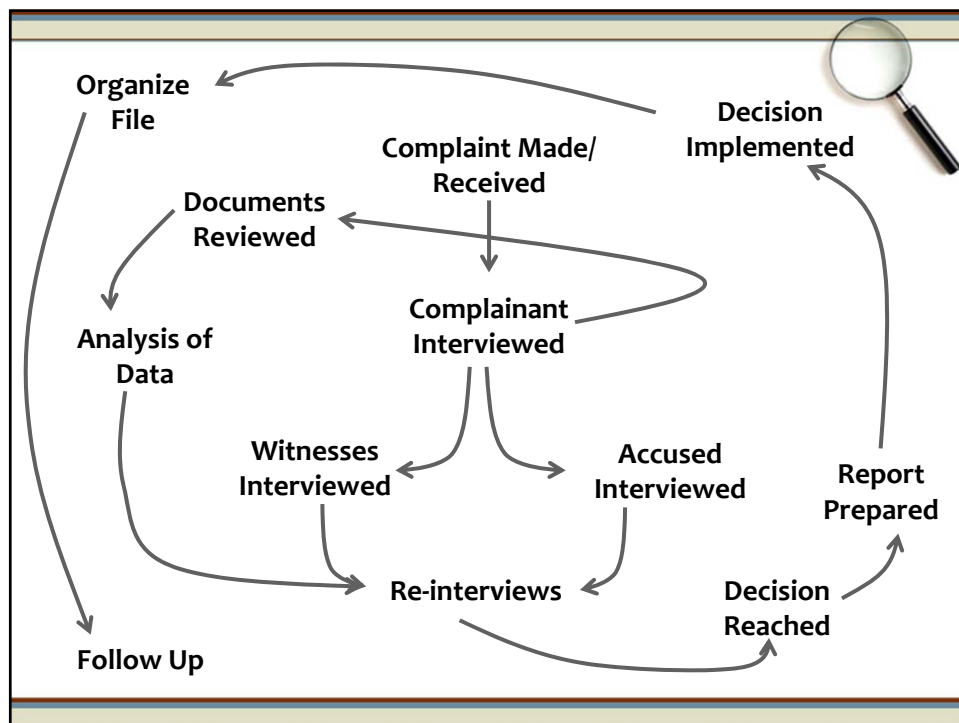
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- Important Link in Ability to Assert Good Faith Defense to Many Claims
- Important Link in Maintaining Employee Confidence and Morale
- Important Link to Sound Management Decisions

The Investigation Process



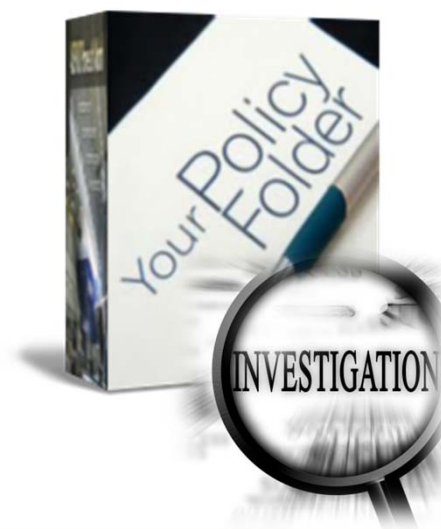


A “Good” Investigation Defined

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- Backed by policy with complaint procedure
- Trained professional to receive complaint
- Timely investigation
- Interview witnesses
- Speak with accused
- Documented interviews
- Documents collected & secured



Why Are We Here?

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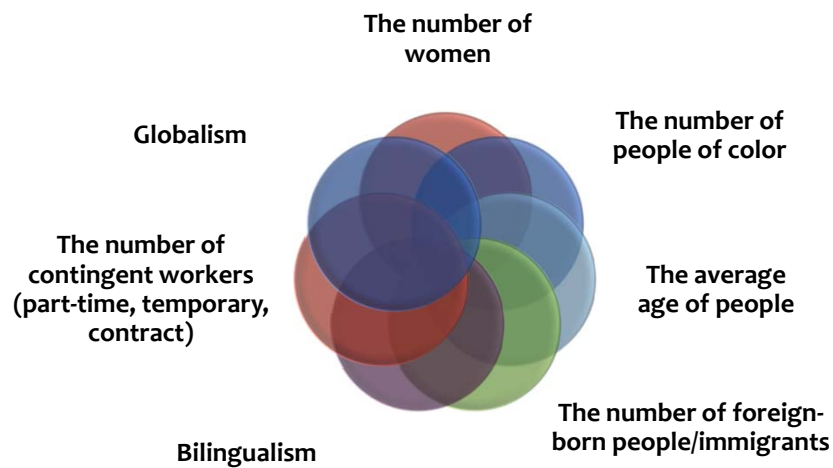
Workplace Dynamics Are Challenging...

Our Evolving Demographics

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Increases in...



Demographic Trends of Interest

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- By year 2050, **more than 50%** of Americans **will be non-Caucasian**
- Minority population is now 104.6 million or **34% of the total population**
- Roughly **1 out of every 9 people** in the United States is the **child of an immigrant**
- There are **54 million differently-abled** individuals in America
- The median tenure of employees between 25-34 **is just 3.2 years**



Explosion of Social Media

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- **Facebook:** 1.71 billion users
- **Twitter:** 320 million
- **Instagram:** 400 million
- **Snapchat:** 100 million
- **YouTube:** Over 1 billion



Statistics of Interest—Religion

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- Religious discrimination claims have doubled in the past **15 years**
- **80%** of Americans belong to various forms of Christianity
- More than half (**56%**) say that religion is “very important” in their lives



Statistics of Interest—LGBTQ

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- 9,000,000 people in the U.S. are considered to be LGBTQ
- Approximately 700,000 adults identify as “transgender”
- 90% of transgendered individuals have encountered some form of employment harassment or discrimination
 - **25% have lost a job because of gender non-conformance**



Qualities of a Good Investigator

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- No biases
- Good listener
- Appropriate investigation
- Attention to detail
- Listen and Think
- Reach reasonable conclusions
- Properly document investigation
- If appropriate, recommend remedy

Summarizing The Investigator's Role

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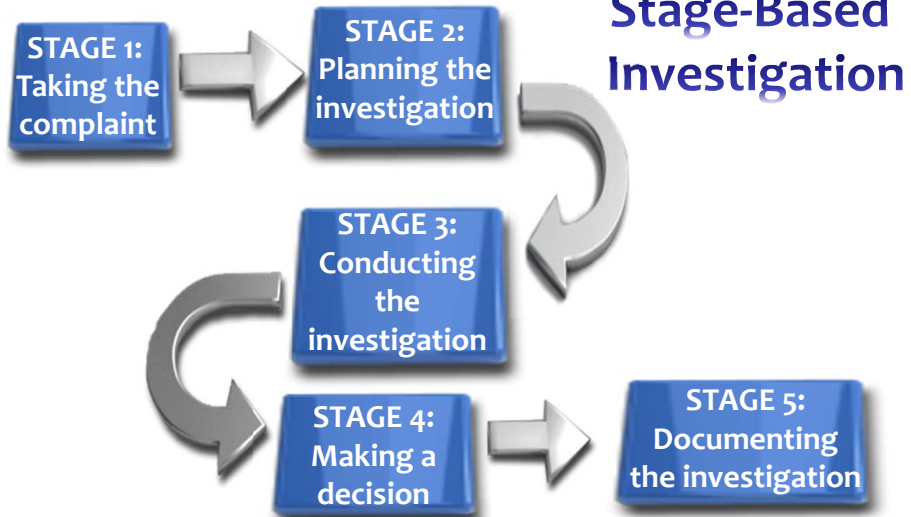
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Investigating In The Workplace

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The Complaint

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Were You Listening?

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- Who made the complaint?
- What department is involved?
- What is the nature of the complaint(s)?
- What do you do next?

Documenting The Allegations

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- **Do**
 - Use objective language
 - Group together logically



- **Don't**
 - Use legal conclusions
 - Put words in the complainant's mouth

Exercise

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Document what is being
alleged.



ALLEGATION

Planning The Investigation



What Do You Investigate?

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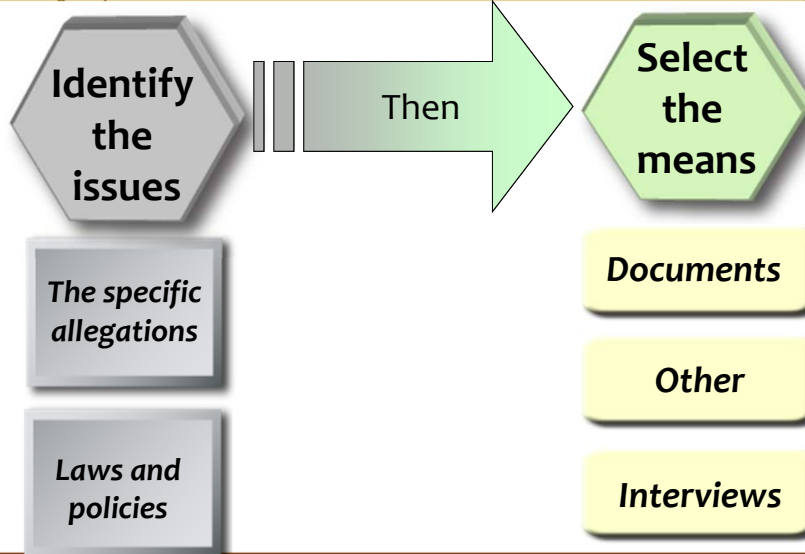
- EEO allegations
- Significant violations of policy
- Possible theft or misuse of assets
- Potential for risk to the company



Steps In Planning

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Documents

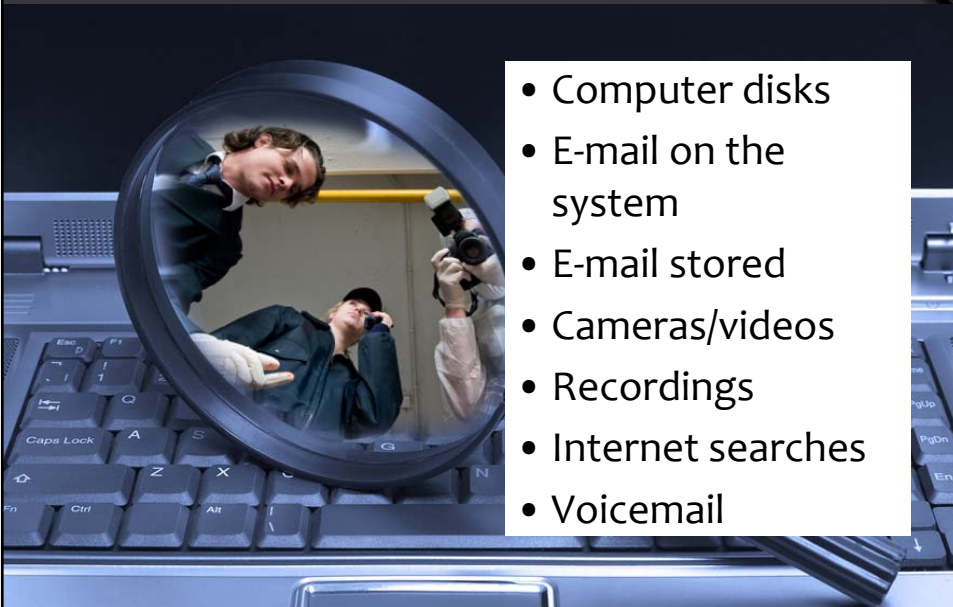
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- Personnel files
- Timecards
- Medical files
- Expense files
- Project files
- Documents in possession of the claimant and witnesses

Electronic Data & Communications



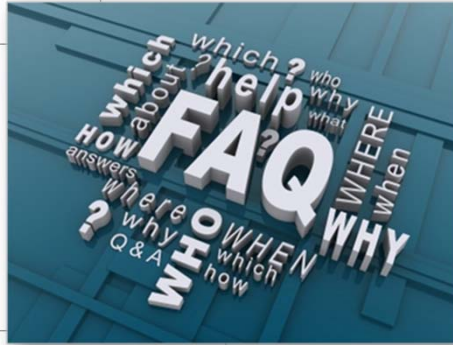
- Computer disks
- E-mail on the system
- E-mail stored
- Cameras/videos
- Recordings
- Internet searches
- Voicemail

Interviews?

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Who to interview?



In what order?

Interviewing The Witnesses



Who?
What?
Where?
When?
Why?
How?

Interviewing Witnesses

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Every interview should review:

- The purpose of interview and witnesses' involvement
- Address confidentiality
- Address nonretaliation
- Ask, "Is there anything else?"



Interviewing: Confidentiality

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- How confidential is an investigation?
- The investigator's privilege
- Attorney-client privilege



Planning For Confidentiality

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- Discuss why interviews or other data must be kept confidential by employer:
 - “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”
- Articulate legitimate reasons to request employee’s confidentiality when appropriate
- Think about the use of notes and memos before you write them

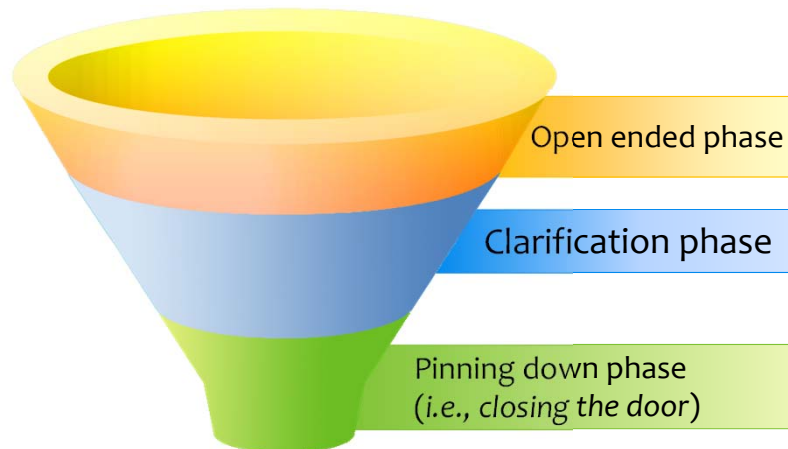


Ask the Right Questions:

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Use “Funneled” Questioning



Open Phase:

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- Open-ended questions
- Aim for all relevant evidence
- Make sure the witness answers the questions fully
- Ask, "Do you remember anything else?"
- Summarize so witness can offer facts that were left out
- Identify other ways to refresh witness' memory
- Encircle knowledge with wrap-up question



Open ended phase

Clarification Phase:

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- Who? What? Where? Why?
- Don't disrupt train of thought
- Use active listening:
 - Don't be wedded to your outline
 - Listen to subtle changes a clarify
- Follow up on cues
 - Watch for eye contact
 - Gestures
 - Body language



Clarification phase

Closing Off:

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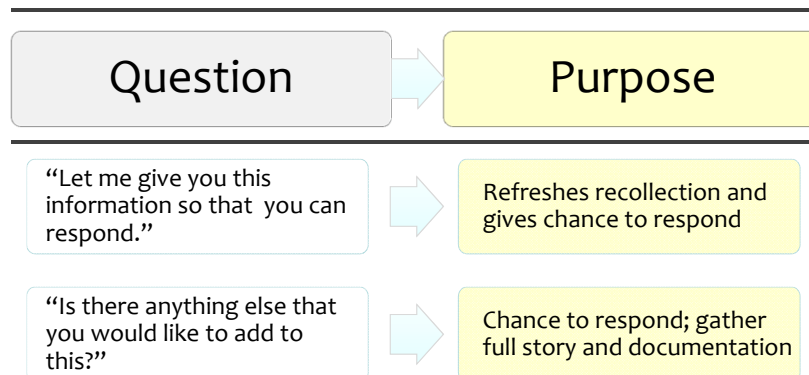
- Close the door
- Get the final answer
- Exhaust the subject
- Recap and ask, “Is there anything else?”



Useful Questions

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Useful Questions

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Question

Purpose

“Whom should we speak with concerning this claim?”

Chance to respond; create witness list

“Is there any other evidence or fact that you believe would help us resolve this?”

Chance to respond; seals off “universe of facts”

Useful Questions

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Question

Purpose

“Here are my card and cell phone numbers. If you have any other information, please call me.”

Chance to respond; catch follow-up issues. Looks good to judge/jury

Interviewing The Complainant

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



Interviewing The Complainant

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



Documenting – Taking Notes



Taking Notes

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Be prepared:

- Written outline of allegations
- Written list of basic questions organized by allegation
- Background about the subject



Outline The Interview

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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 & location of interview]
- [Date & 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]
- [Awareness of facts, documents or persons related to allegations]



Interviews: What To Document

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Do

- Write objectively
- Summarize knowledge
- Give specific responses to key questions and documents
- Use quotes
- Close the funnel
- Use relevant facts regarding credibility



Don't

- Make conclusions as to the facts and credibility
- Use quotes as shorthand
- Stick unwaveringly to script



How To Document

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Bad

- Pat excluded Maria based on her gender

Good

- Maria applied for the upgraded position on (date). Four others applied for that same position (names and genders). Maria was not offered the position (reason, if documented). Maria was informed she had not received the position on (date). On (date), Maria left a voicemail on the company hotline stating the following: “(quote)”

How To Document

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Bad

- Don said Maria was upset by Pat’s rude behavior.

Good

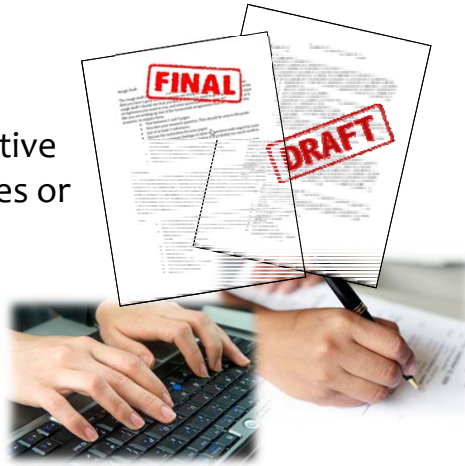
- Don heard Pat tell Maria in a loud voice, “You don’t belong in a man’s job and should be home taking care of your husband and family.”
- “Within a few minutes of hearing this comment, Don saw Maria begin to cry and leave the room.”

A Final Note About Your Notes

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- Drafts & final?
- Handwritten or typed?
- Creating a single, definitive and legible draft of notes or just the draft?
- Name and date!



Arnie







Arnie

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How did Maria do?



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What else do you
want to know?



Interviewing The Accused



Interviewing The Accused

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Two goals:

- Information gathering
- Fair opportunity to respond



Plan For Confidentiality

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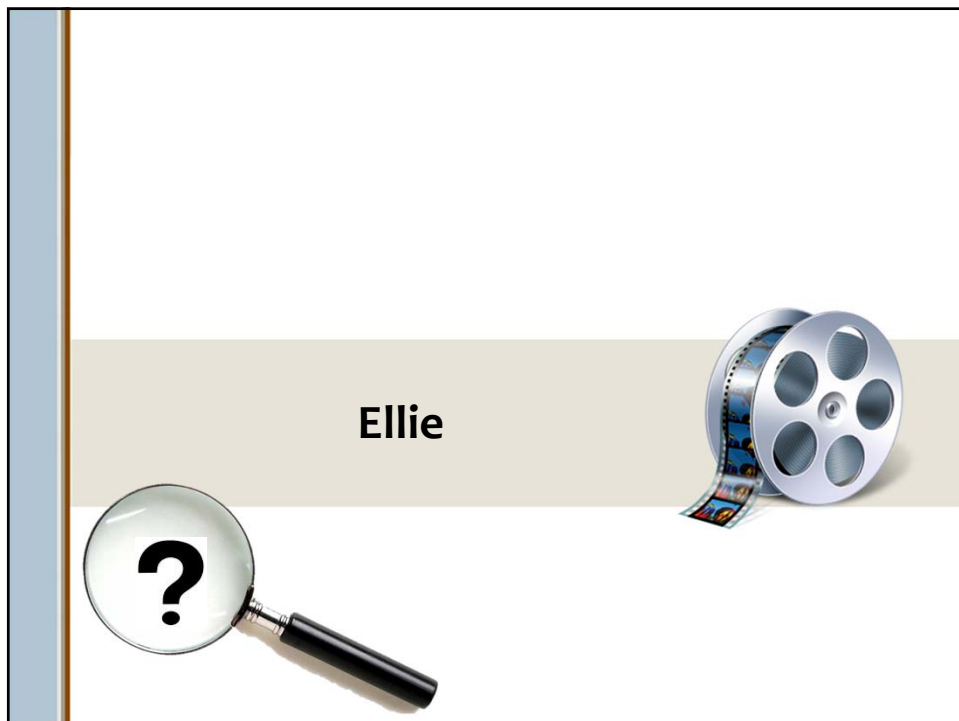
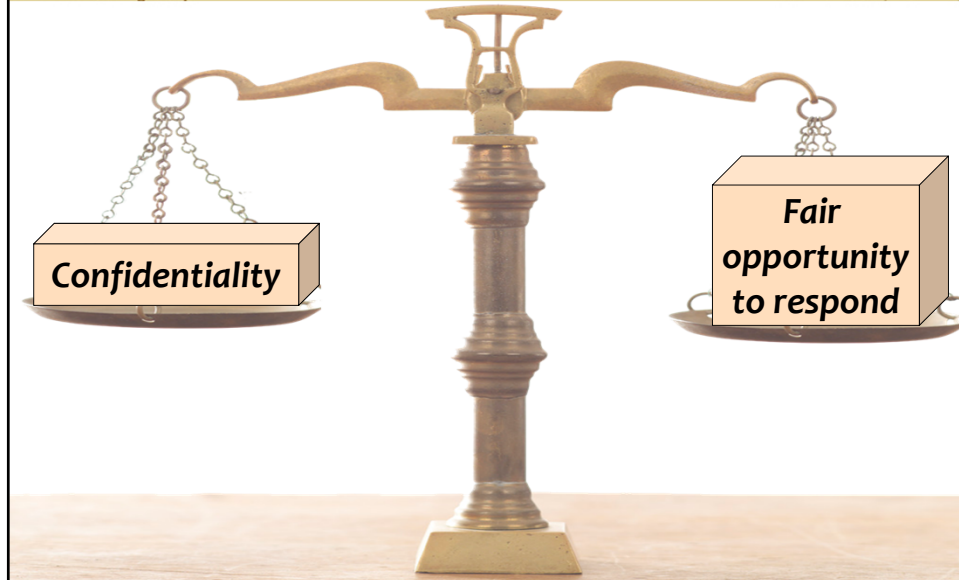
Consider ways to give the targeted employee notice of the claims against him or her without compromising confidentiality

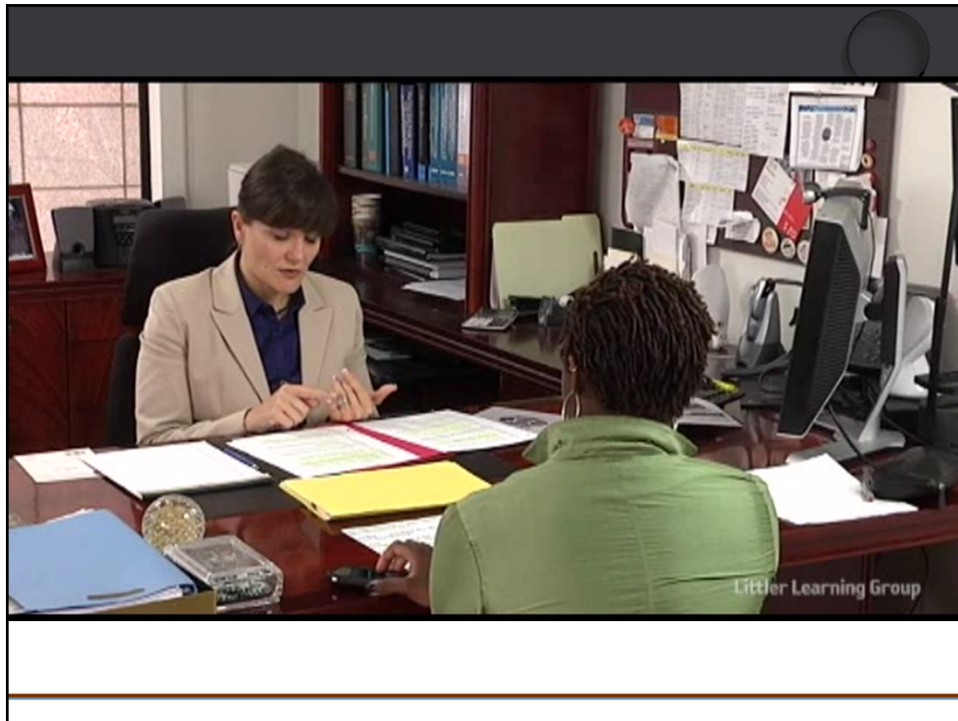


Confidentiality: The Balance

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Ellie

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How did Maria do?



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Special Issues

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- Employee representation
- Uncooperative employees
- Uncooperative witnesses
- Post interview follow-up

How Would You Respond?

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**Employee says...“I
want my attorney
here!”**



How Would You Respond?

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**Employee says...“I
refuse to be
interviewed unless
I can bring my
coworker, Berta,
into the interview
with me.”**



When Push Comes To Shove

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**Employee Has A Duty to Cooperate
"An employee shall substantially comply
with all the directions of his employer
concerning the service on which he is
engaged, except where such obedience is
impossible or unlawful, or would impose
new and unreasonable burdens upon the
employee."**

Rules For Handling A Personal Accusation

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- Don't be defensive – nobody is perfect
- Listen
- Stay calm
- Remain focused on the investigation
- Do you have a conflict?



Post-Interview

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- Record employee's reactions
- Document that the interview occurred, including employee's signature where appropriate
- Maintain documentation control
- Distribute notes & documents to Investigation file



Follow-Up

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- Do new facts or allegations require follow-up interviews?
- Any new places to look for documents or other evidence?
- Are there new or omitted questions?



Ted







Ted

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 How did Maria do? 

Documents

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- What documents do you want to see and secure?
- Do these documents require more follow up?

Connect The Best Evidence Possible

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- Seek written documents such as reports, memos, notes, and letters
- Meeting agendas
- E-mail and voicemail
- Photos and videos
- Calendars



Reaching And Documenting Findings



How Do You Make A Decision?

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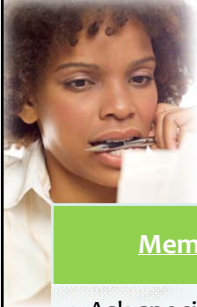


Credibility of
witnesses

Making Credibility Determinations

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Memory

- Ask specific questions to assess the witness' memory

Veracity

- Does the person look like he or she is telling the truth?
- What is his or her demeanor like?

Corroboration/Lack Of Corroboration

- Did you ask open-ended questions to find out if any corroboration exists?

Making Credibility Determinations

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Bias

- What else is going on in the workplace?
- Are there feuds, hate relationships or sour grapes?

Consistency of Account

- Does his or her story remain the same over time with totally different people?

Making Credibility Determinations

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Check your decision-making process

- Watch for:
 - Preference to confirm your previous views
 - Preference for people you like or who are influential to you
 - Preference based on results you like
- Reason vs. Emotion

Making Credibility Determinations

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- Do not document credibility conclusions
 - “Mary’s lying” or “Mary’s biased...”
- Instead, present facts (i.e., “Mary gave inconsistent information as follows ... ” or “Mary and Carl both admitted to having a relationship outside the office...”)



Final Documentation: An Overview



Objectives

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- Address all allegations raised
- Identify and review the policies, procedures, business practices, law, regulations, and ethics standards that pertain to the allegations
- Make a record of your reasoning and steps taken
- Avoid unnecessarily controversial comments



Documentation Basics

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State facts, not conclusions of law

- Avoid opinions, rumors, or hearsay
- Give concrete examples when possible to document the incorrect behavior or performance
- Include dates, times, and witnesses as applicable

Write for posterity (or the jury)



Documentation Basics

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- Write simple clear statements
- Avoid unnecessary adjectives
- Avoid unnecessary characterizations
- Proofread carefully and edit
- Recheck details for accuracy



What Not To Include!

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- Subjective information
 - Back up with specifics
- Personal opinions
- Legal conclusions
- Hearsay, gossip, rumors
- Information about a medical condition
- EEO status
- References to prior irrelevant matters or unrelated history



About Your Notes

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Consider preparing individual documents recapping the information provided by each of the parties and/or witnesses.

- Where practical to do so, ask each individual to review the information s/he provided for changes and then have the document signed or initialed by the individual.



Best Practices



Recommended Final Steps



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- If appropriate, recommend discipline
- Discipline the right people
- Address any control issues or other corrective action
- Document what has been done



Best Practices – Remedial Action

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Duty:

To take immediate corrective action by doing whatever is needed to end the workplace misconduct and to prevent it from recurring. The corrective action should reflect the severity of the conduct.

Assessing Solutions

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If appropriate, assess solutions or corrective action

- Did conduct violate policy?
- Severity or repeated nature of violation?
- Past practice?



Recommended Final Steps

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- Follow up with witnesses as appropriate
- Implement any decisions
- Follow up with complainant in reasonable time



Thank You

Question & Answer



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