

# Conducting Effective Workplace Investigations



Atlanta  
Austin  
Berlin  
Birmingham  
Boston  
Charleston  
Charlotte  
Chicago  
Cleveland  
Columbia  
Dallas  
Denver  
Detroit (Metro)  
Greenville  
Houston  
Indianapolis  
Kansas City  
Las Vegas  
London  
Los Angeles  
Memphis  
Mexico City  
Miami  
Milwaukee  
Minneapolis  
Montréal  
Morristown  
Nashville  
New Orleans  
New York City  
Oklahoma City  
Orange County  
Paris  
Philadelphia  
Phoenix  
Pittsburgh  
Portland (ME)  
Portland (OR)  
Raleigh  
Richmond  
Sacramento  
San Antonio  
San Diego  
San Francisco  
Seattle  
St. Louis  
St. Thomas  
Stamford  
Tampa  
Torrance  
Tucson  
Washington D.C.

Presented by:

**Burton D. Garland, Jr.**

7700 Bonhomme Ave., Suite 650 ♦ St. Louis, MO 63105

(314) 802-3953 ♦ [Burton.Garland@ogletree.com](mailto:Burton.Garland@ogletree.com)

© 2023, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

**Ogletree  
Deakins**

Burton Garland is a Shareholder in Ogletree Deakins' St. Louis Office and has been practicing law for more than 28 years. As a management-side labor and employment lawyer, Mr. Garland:



Provides advice, counseling, and training, on myriad labor & employment law topics and is a nationally recognized speaker on such topics;



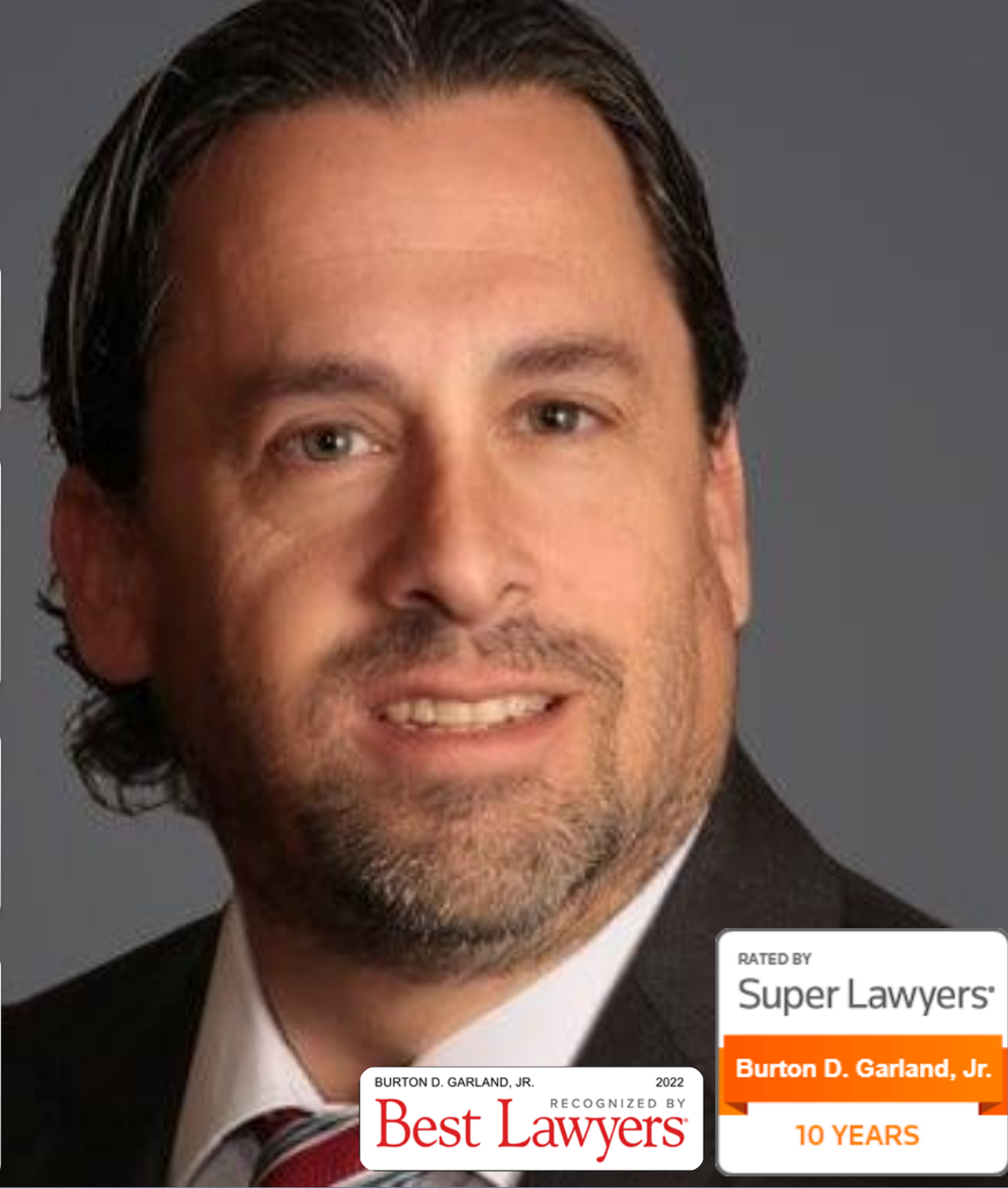
Represents clients before federal and state agencies and courts under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, Fair Labor Standards Act, the Federal False Claims Act, and the various state counterparts to these federal laws;



Has extensive experience litigating high stakes matters involving restrictive covenants (non-compete, non-solicit and confidentiality agreements); misappropriation of trade secrets; retaliation; tortious interference; unfair competition; and related claims;



Provides advice and counseling on union avoidance and campaigns, elections, objections to elections, R-Case strategy and litigation, collective bargaining, strikes and injunctions, arbitration, and unfair labor practice charges before the National Labor Relations Board.



RATED BY  
Super Lawyers®

Burton D. Garland, Jr.

10 YEARS

# Agenda

- 1 Why are investigations so important?
- 2 Investigation triggers
- 3 Planning the investigation
- 4 Conducting the interviews
- 5 Preparing the report
- 6 Special investigation issues





# **1. WHY ARE INVESTIGATIONS SO IMPORTANT?**

al·tru·is·tic

/ˌaltro̩ʊˈistik/ 🔊

*adjective*

showing a disinterested and selfless concern for the well-being of others; unselfish.

"it was an entirely altruistic act"

*synonyms:* [unselfish](#), [selfless](#), [compassionate](#), [kind](#), [public-spirited](#); [More](#)

de·fense

/dəˈfens, ˈdēˌfens/ 🔊

*noun*

noun: defence; plural noun: defences; noun: defense; plural noun: defenses; noun: the defense

1. the action of defending from or resisting attack.  
"they relied on missiles for the country's defense"  
*synonyms:* [protection](#), [guarding](#), [security](#), [fortification](#); [More](#)
  - an instance of defending a title or seat in a contest or election.  
"his first title defense against Jones"
  - military measures or resources for protecting a country.  
"the minister of defense"  
*synonyms:* [armaments](#), [weapons](#), [weaponry](#), [arms](#); [More](#)
  - a means of protecting something from attack.  
"education is the best defense against tyranny"
  - fortifications or barriers against attack.  
"coastal defenses"  
*synonyms:* [barricade](#), [fortification](#); [More](#)
  - (in sports) the action or role of defending one's goal against the opposition.  
"we played solid defense"
  - the players in a team who defend the goal.
2. the case presented by or on behalf of the party being accused or sued in a lawsuit.  
*synonyms:* [vindication](#), [explanation](#), [mitigation](#), [justification](#), [rationalization](#), [excuse](#), [alibi](#), [reason](#); [More](#)
3. one or more defendants and the counsel in a trial.  
"the defense requested more time to prepare their case"

TWO CONCEPTS THAT  
ARE NOT MUTUALLY EXCLUSIVE





# **ONE OF THE KEYS TO PREVENTION (& WINNING)**

**...is Found in the Answer to the Following Question**

## **INTERROGATORY NO. 1:**

Please describe, in specific detail, each and every thing defendant did to investigate plaintiff's complaints, including the date defendant started the investigation, why defendant started the investigation, who handled and/or participated in the investigation, to whom defendant spoke with or interviewed during any investigation, the date(s) of such interviews, when the investigation was completed, as well as anything else which was done during this investigation, and identify all individuals who are aware of the events surrounding any investigation and the substance of each person's knowledge.



A dark, monochromatic background featuring legal symbols: a stack of books, a gavel, and a pair of scales. The text is overlaid in the center.

# **LEGAL OBLIGATIONS TO CONDUCT INVESTIGATIONS**



# MILLION DOLLAR QUESTION

What percentage of jurors would try to return a verdict for an employee who is unfairly treated yet no law has been broken?

10%

51%

35%

68%

68%





## **2. INVESTIGATION TRIGGERS**

# INTERNAL TRIGGERS

Complaints of discrimination or harassment (or retaliation)

Any expression of dissatisfaction with any aspect of the company

Violations of company policy

Safety incident

Theft

Misappropriation of trade secret or confidential information

Fraud/misconduct that arises under Sarbanes-Oxley

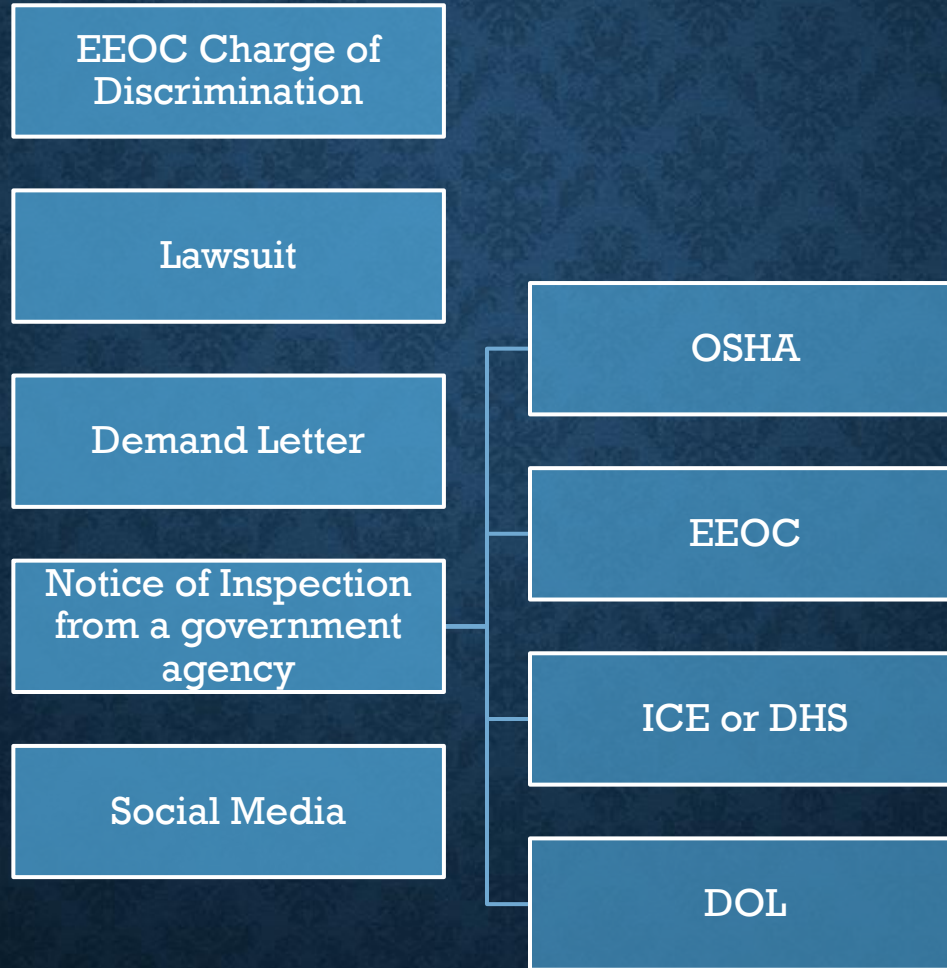
Threats

Substance abuse

- Hotline complaints (even anonymous)
- Injury
- Misuse of company equipment
  - Email
  - Smart phones
- Anonymous complaints
- Alleged unfair treatment
- Complaints about off-work activities
- Productivity/performance issues
- Open Door Policy



# EXTERNAL TRIGGER





## THE COMPLAINT

Rule of  
thumb







## THE “OFF THE RECORD” COMPLAINT

A hand is holding a dark blue rectangular sign with a white border. The sign contains the text '3. PLANNING THE INVESTIGATION' in white, bold, serif capital letters. The background features a large, stylized clock face with black hands and tick marks, and some blue numbers. The overall scene is set against a light gray background.

### **3. PLANNING THE INVESTIGATION**







# ELEMENTS OF A “GOOD” INVESTIGATION

- **Each investigation is different**
- **Simplicity and plain common sense**
- **Some key factors:**
  - **Prompt**
  - **Impartial investigator**
  - **Thorough**
  - **Well documented**
  - **Establishes facts, not conclusions**
  - **Confidentiality is protected (to the extent possible, more later)**
  - **Results communicated to complainant and accused**
  - **Effective remedial action**



# A. INITIALLY EVALUATE THE COMPLAINT

## Ask for the complaint in writing

- This will help guide investigation and help pin down the facts early-on (but don't let it delay the investigation)

## Writing promotes accuracy and completeness

- Defends against claims that investigator omitted allegations
- Defends against claims that investigator understated or “shaded” allegations
- Prevents “allegation creep”

The accuser's written statements have been decisive in trials

Does the complaint deserve a full investigation?

This Slide by Unknown Author is licensed under CC BY-NC

Does the complaint merely require employee relations or other limited response?

Of course, the answer is . . .



A Big Cup Of  
"It Depends"



A 3D illustration of a construction site. The word 'PLAN' is rendered in large, dark blue, blocky letters. A crane is positioned to the left, lifting a large block. Three traffic cones are scattered on the ground. The background is a light blue gradient.

# **B. PLANNING THE INVESTIGATION**

# WHO SHOULD CONDUCT THE INVESTIGATION?

- Objectivity and organizational dynamics
- Personal qualities of investigator

WHO



WHAT DO YOU CALL AN  
ALLIGATOR IN A VEST?



AN INVESTIGATOR.

## **SHOULD YOU HIRE AN OUTSIDE INVESTIGATOR?**

Investigators are routinely called to defend  
their investigations in court

Helpful Tips!





1. Every investigation needs a separate file
2. Log all actions
3. Chronology of underlying conduct
4. Witness list
5. Documents relevant to the investigation
6. DO NOT INCLUDE – legally privileged documents containing advice of counsel
7. Documents – Identify and review applicable policies, rules, documents
8. Determine who the witnesses are, and the order in which they will be interviewed
9. Prepare a checklist of questions/topics to ask in the interviews
10. Determine appropriate steps to document and preserve evidence
11. Timeframe and deadlines for the investigation – must be prompt
12. Investigate all material allegations



# INTERIM STEPS

- Place complainant on leave of absence?
  - Paid vs. unpaid
  - Voluntary or involuntary
- Suspension of accused with or without pay
  - Before or after confront accused?
  - Will suspension make things better?
  - Who to consult beforehand? HR? Legal?
- Alerting legal and/or security department





## **4. CONDUCTING THE INTERVIEWS**

The image features two wooden blocks, one with the letter 'N' and one with the letter 'O', positioned to spell out the word 'NO'. The blocks are light-colored with dark letters. Overlaid on the blocks is the text 'SHOULD YOU RECORD THE INTERVIEWS?' in a bold, white, sans-serif font. The background is a solid, light gray.

**SHOULD YOU RECORD  
THE INTERVIEWS?**



**Establish rapport**

**Investigate, don't prosecute**

**Get person to start talking**

**Follow a script, but not verbatim**

**Use chronological order – both ways**

**Avoid compound questions**

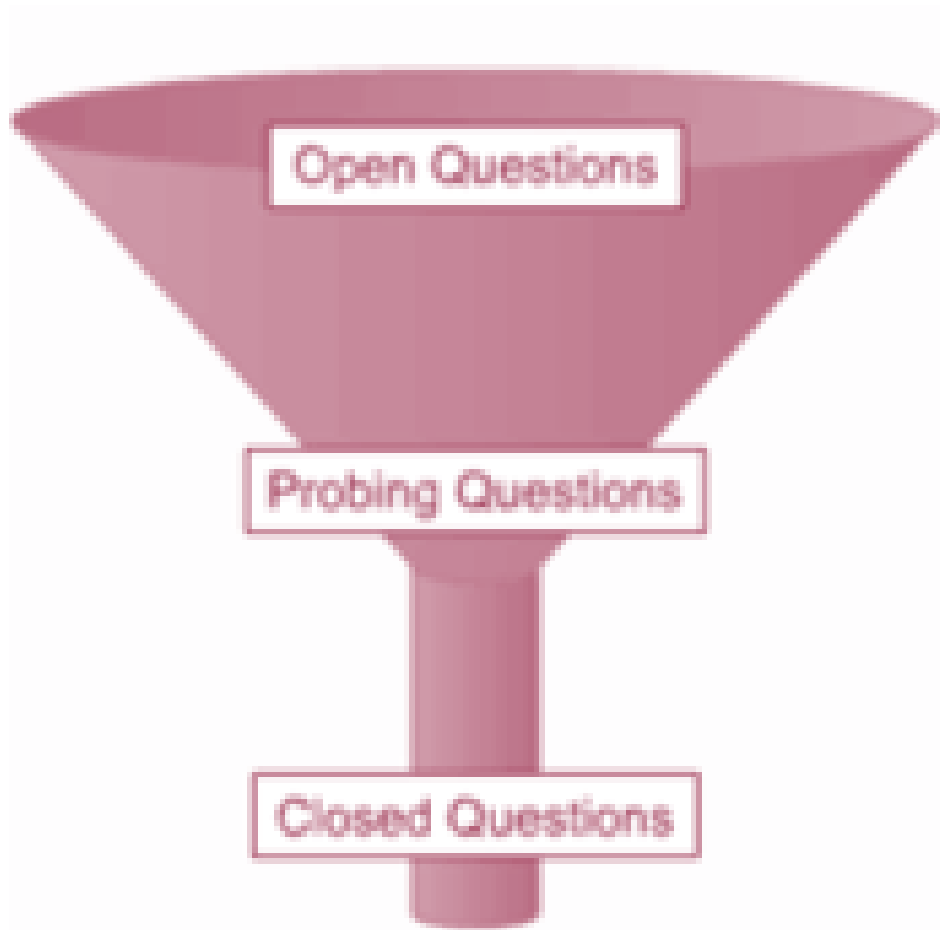
**Easy questions first, hard questions last**

**Avoid legal-ese or jargon**

**If rumor or conjecture, label as such**

**Use quotations**

**Don't be afraid to slow down the witness**



# QUESTIONING 101

Develop the facts through the  
FUNNEL TECHNIQUE





**HOW?**

**WHY?**

**WHAT?**

**WHO?**

**WHEN?**

**WHERE?**

# PREPARE ROUGH OUTLINE/ CHECKLIST FOR THE INTERVIEW

- Each situation demands different questions, each problem is rarely the same.
- Question each witness about what they saw, when they saw it, where the incident occurred, who was there, why something happened (if known), what happened next, and so on.
- The investigator must be alert, flexible and open to explore new questions on the spot to follow up on information given by the witness(es).



The image features two Oreo cookies against a dark, textured background. The cookies are positioned diagonally, with one slightly behind and to the right of the other. They are dark brown with a white filling. The top surface of each cookie has a distinct embossed pattern, including a central circular logo and a scalloped outer edge. The lighting is soft, highlighting the texture of the cookies and the background.

Interviewing

There is a beginning, middle, & an end!

## Purpose

- You are a fact finder, state your role
- Advise that the purpose of the meeting is to find out what has occurred

## Cooperation

- Emphasize the Company requires cooperation, answering questions honestly and fully

## No Retaliation

- Advise interviewee that the Company's policy and some laws do not allow retaliation for making a complaint. If interviewee believes he/she has been subject to retaliation, they need to immediately tell you.

Explain the reason  
for the interview  
(alleged act)

Confidentiality  
(do not guarantee)

## The Beginning





Review facts/notes

Are there any documents, e-mails, etc. that you think I should review?

- Why are those items important or relevant (if not obvious)

Who do you know of who might have relevant information?

- Who are they and what information do you think they have?

Have we discussed what you know about this matter complaint/your response?

Would you like to change or correct anything that you have told me?

Is there anything else you would like to add?

The Middle



Advise possibility of follow-up interview and avenues to relay additional information

- If you remember anything else/different, let me know immediately

Reinforce no retaliation and avenues to report retaliation

Acknowledge and thank the witness for his/her participation

Leave the door open for follow-up communications

Note the length of the interview, including when interview began and ended

Note where the interview took place and all present; include your name as the author of the notes

- Jane Smith's Interview of John Doe, 1pm on 2/12/18; HR Conference room; Jane Doe present

The End





# reCORD

Observations: \_\_\_\_\_.

A woman with dark hair pulled back, wearing a grey and white plaid blazer over a light-colored button-down shirt, is seated and looking towards a man. The man, seen from the side and back, has dark hair and is wearing a light blue button-down shirt. They appear to be in an office setting with a white wall and a desk in the background. The entire image has a dark blue overlay.

## **A. INTERVIEWING THE COMPLAINANT**



# INTERVIEWING THE COMPLAINANT



# **INTERVIEWING THE COMPLAINANT**

**Interview as soon as practicable**

**Decide how you want to handle situation if Complainant asks to have an attorney present during the interview.**

**At the interview, cover Standardized Beginning of Interview**

**Ask prepared questions**

**Ask him/her to confirm the accuracy of the interview**

**Is there anything else I should know?**

**Ask what outcome he/she would like from the process**

**Try to get it in the Complainant's own writing**

**Remember the special questions and the essential closing questions:**

- **What is it that you think should be done?**
- **Is there anything you need for us to do right now?**
- **"Is there anything else I should know?"**





# THIRD PARTIES

## B. INTERVIEWING THIRD-PARTY WITNESSES

- **Avoid wild goose chase**
- **Only disclose facts they need to know**
- **Determine relationship, if any, to complainant or accused**
- **Get signature on written summary**
- **Explain generally what is being investigated, seriousness of matter.**
- **Explain the allegations (only as needed); you may choose to keep the complainant's name confidential.**
- **Determine whether to provide witness with factual background**
- **Don't share what other witnesses have said unless necessary.**
- **Do not discuss your opinions and conclusions with witnesses**
- **NEVER conduct witness interviews in groups**

# C. INTERVIEWING THE ACCUSED

Opportunity to provide their side of the story

Convey seriousness of the matter

Pin down the accused's story

- Names, dates, witnesses, locations, times, probe motives, details, details, details...

Don't accept blanket denial

- Is there a reason he/she would make this up?

Be careful not to give appearance of a predisposition

Probe motive

ACCUSED



## D. CONCLUDING ALL INTERVIEWS



HAVE YOU TOLD US  
EVERYTHING YOU  
KNOW ABOUT  
\_\_\_\_\_?



IS THERE ANYTHING  
THAT I DIDN'T ASK  
YOU ABOUT THAT  
YOU THINK IS  
IMPORTANT?



IS THERE ANYTHING  
ELSE YOU WANT TO  
TELL ME?



GO OVER YOUR  
NOTES, CONFIRM  
AND CLARIFY DETAILS

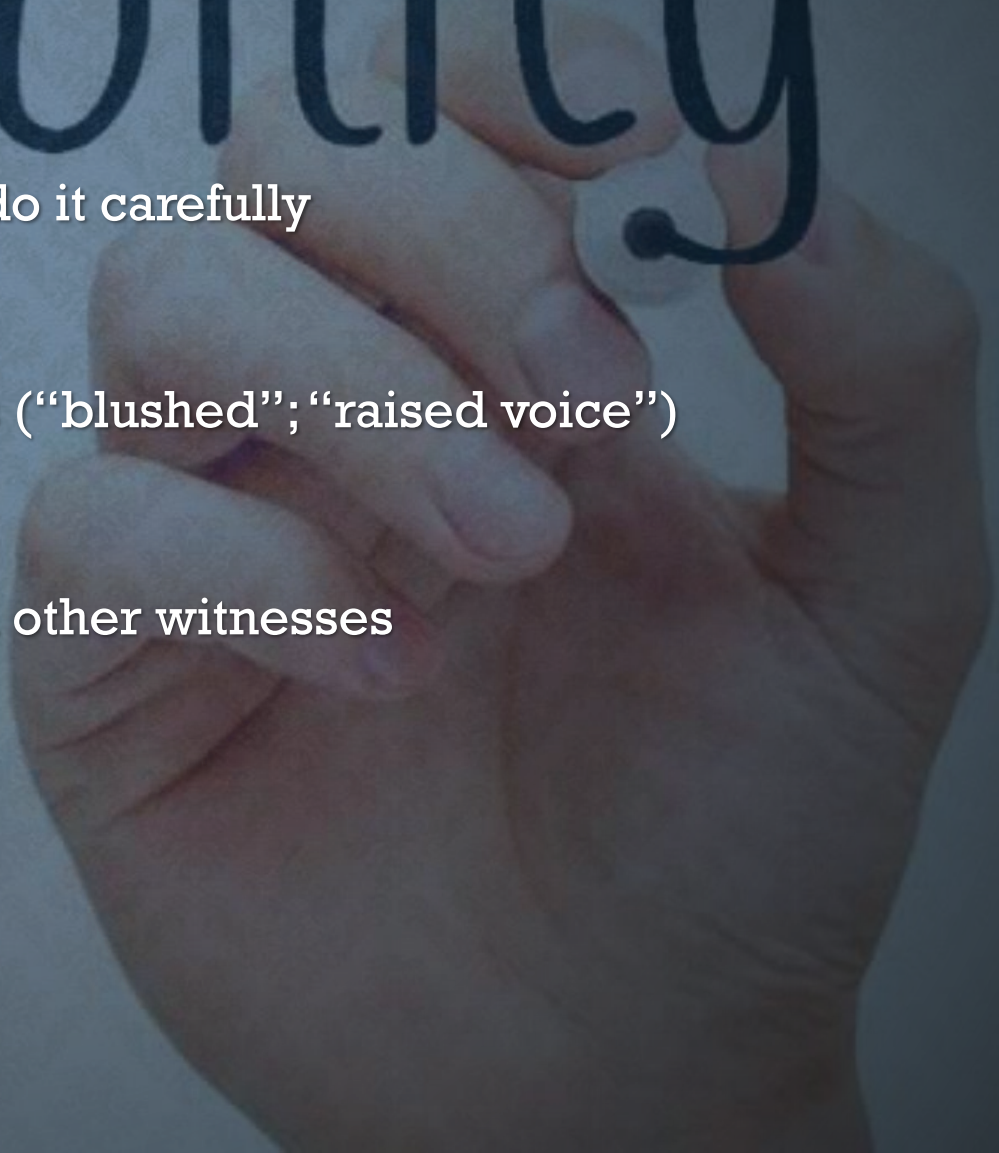


PROVIDE YOUR  
CONTACT  
INFORMATION AND  
REQUEST TO BE  
CONTACTED IF THE  
WITNESS REMEMBERS  
ANY ADDITIONAL  
INFORMATION



PREPARE THE  
INTERVIEW SUMMARY  
ASAP

# Credibility

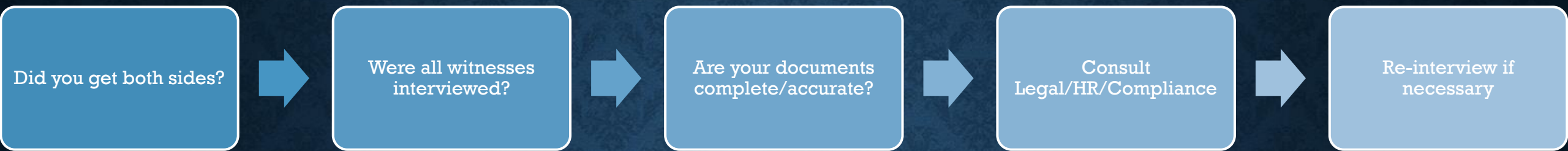
A close-up, slightly blurred image of a hand holding a pen, positioned as if writing the word 'Credibility' on a whiteboard. The hand is in the lower right foreground, and the pen is pointing towards the end of the word. The background is a light blue-grey gradient.

- Don't be afraid to evaluate credibility, but do it carefully
- Plausibility—does the story make sense?
- Demeanor – record objective observations (“blushed”; “raised voice”)
- Motivations
- Corroboration—compare to documents and other witnesses
- Record—any history of untruthfulness?



# THE “HE SAID/SHE SAID” DILEMMA

- Demeanor
- Consistency of Story/Logic
- Corroborating Evidence
- Circumstantial Evidence
- Inability to substantiate the allegations made by complainant.



WRAP  
IT UP





## 5. PREPARING THE REPORT

WITNESSES INTERVIEWED:


DOCUMENTATION: (Documentation which supports the findings of investigation, and/ or that show diligence)

E-mails	
IM screenshot	
Resume	

Management Notified:

Involved / Aware Parties:

ALLEGATIONS:

Hotline Complaint Report # : [Indicate if allegation is substantiated or unsubstantiated]

1.

2.

3.

COMPANY LOGO

Name:	Status : Closed
Hotline Report Number:	Findings: Confirmed/Not Confirmed
Source: Hotline	Date of Complaint:
Allegation Category:	Investigation Opened: [Date]
Complainant: Anonymous	Investigation Closed: [Date]
Complainant Initial Contact: [Date]	Complainant Contact Information: N/A - Anonymous

CASE SUMMARY: Caller alleges that. |

On [Date], [Name of Individual] assigned [Name of Individual] to investigate.

INDIVIDUALS CONCERNED: (individuals who directly or indirectly have an impact on the findings of the investigation)


INVESTIGATION:

[Date] [Name of Person Interviewed] [Summary of Interview]

Repeat for each person interviewed

Additional Notes and Observations

MANAGEMENT ACTIONS: (If appropriate list actions taken to remediate)

1.

2.

3.

4.

INVESTIGATION FORM



# DOCUMENTATION

- **Maintain accurate records of information received from complaining employee, witnesses and alleged wrongdoer**
- **Take your time**
- **Document each interview and, when appropriate, have the interviewee sign a statement**
- **Separate notes for each interview**
- **Separately record observations and evaluation of credibility. Caution: may be discoverable**
- **Tell accused of each allegation**
- **Ask the tough questions, but save embarrassing and unfriendly questions for the end to avoid witness becoming defensive and less open**
- **Be patient, allow responses.**
- **Write key statements literally in quotes**



# DOCUMENTATION

A close-up, slightly blurred image of a hand holding a fountain pen, writing on a document. The pen is silver and black, and the hand is positioned over a document with some faint, illegible text. The background is dark and out of focus.

- **Effective note taking includes:**
  - Preparer's names, date/time of interview, all present
  - Close to verbatim/use quotes
  - Identify those present, date, time, location
  - Record Qs & As
  - Review and affirmation of information
  - Based on fact – not opinion or speculation
  - Reference specific issues, policies
  - Include dates, times, chronology of events
  - Statements are critical





# INVESTIGATION REPORT

- Should be prepared by the interviewer
- Establish a chronology of the investigation
- Summarize investigation procedure
- Accurately describe the complaint/issues
- Accurately summarize interviews
- Summarize facts and whether they were corroborated



# INVESTIGATION REPORT

- Make a Determination
  - Did the alleged inappropriate conduct occur?
    - Yes
    - Maybe - some evidence, may be conflicting
    - No
  - DO NOT make legal conclusions, such as
    - Discrimination, harassment, retaliation
  - USE terms such as
    - Inappropriate, unprofessional, or a policy violation
- Document action taken
  - Termination, write-ups, no action...



# CLOSING OUT THE FILE

- Contact the Law Department with determination and report
- Close out letter to the Complainant
  - Confirm no retaliation
  - Remind of the open-door policy
- Close out letter to the Accused
- Take appropriate remedial or disciplinary actions
- Consider possible follow-up and monitor future conduct
- Remember retaliation perception risks





## **6. SPECIAL INVESTIGATION ISSUES**



Negligent investigations

Negligent hiring, retention or supervision

Privacy concerns – to what extent?

Discrimination claims

False imprisonment

Infliction of emotional distress

Defamation

Malicious prosecution

## **POSSIBLE LEGAL ISSUES**

# OTHER INVESTIGATION ISSUES

- What do you do when the witness wants to tape record or video record the interview?
- What do you do when an employee says he wants his lawyer to be present during the interview?
- What do you do when the complaining employee alleges she is so distressed that she is unable to come to work and participate in an interview?





# OTHER INVESTIGATION ISSUES

- How do you deal with co-employees who say they do not want to participate when approached about giving an interview?
- Is the use of a polygraph examination ever appropriate or helpful (especially in situations when an employee accused of misconduct volunteers to take one)?



# OTHER INVESTIGATION ISSUES

- The Complainant says, “I need to tell you about something that John did, but I don’t want him to get in trouble, so don’t say anything.”
- The Complainant says, “I will get fired for saying something, so just deal with this and don’t tell anyone I told you about it.”
- Witness: “I don’t want to talk to you until I talk to my lawyer.”
- Witenesse’s family member calls and says this is too stressful on my parent and s/he is concerned about losing his/her job.





# OTHER INVESTIGATION ISSUES

## Other Investigation Issues: Minors

Interviewing as  
complainant,  
witness, or  
respondent

Requesting  
confidentiality

Signing legal or  
other documents

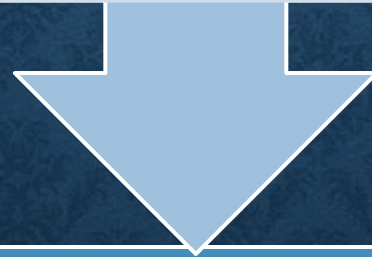
Parental  
involvement

when is it  
required?

Upon request

When violates  
more than policy  
or relates to  
health issues, i.e.  
criminal law,  
WC, drug testing

When authorities  
are involved



Not needed for routine disciplinary  
actions or terminations

# INTERVIEW DON'TS:

- ❌ Do not suggest answers or interrupt
- ❌ Do not act partial to one side
- ❌ Do not mistreat interviewee
- ❌ Do not make accusations or threats
- ❌ Do not allow distractions
- ❌ Do not assume information is true simply because it is corroborated by another person
- ❌ Do not make promises, obligations or private deals
- ❌ Do not tape record (unless expressly approved by an attorney)





**WHAT IF ONE CLAIM REVEALS VARIOUS  
OTHER CLAIMS?**

**ONE  
THING  
LEADS TO  
ANOTHER**



Questions?

