

# Effective Workplace Investigations

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# Why Investigate?

- The “Honest Belief” Rule
  - Significant defense
  - Prevents employees (and courts) from second guessing management decisions honestly made in reliance on understood facts, even if that belief is later shown to be misplaced or incorrect.

# Honest Belief Rule

- Variations on a Theme
  - Honest but Foolish Belief (a/k/a the “Bare Honest Belief”)
    - Only question is what actually motivated the employer.
  - Honest and Reasonable Belief
    - While the employer needn’t be correct, it has to have it least made a reasonable decision based on the evidence. Employer must provide plausible explanation for its actions.

# Honest Belief Rule

- Summary Judgment
  - Truth of the conclusions upon which action was taken is often in dispute.
    - “I didn’t actually [break that work rule, harass that person, etc.]”
  - May defend simply by pointing to honest, good faith and subjective evaluation of the facts as the basis for the decision.
    - “Plaintiff may not have committed the violation, but the company honestly believed he/she did.”

# Why Investigate?

- Limit Punitive Damages – *Kolstad's* “Good Faith” Defense
- Affirmative Defense to Hostile Work Environment Harassment by a Non-Supervisor – *Faragher/Ellerth*
  - See *also* EEOC Enforcement Guidance re: Vicarious Liability
- Avoid Liquidated Damages (e.g. ADEA and FLSA)
- Sarbanes-Oxley Act
  - Recently updated Sentencing Guidelines require effective complaint mechanisms for fraud/wrongdoing, follow up, fact finding, and remedial action.

# Why Investigate?

- 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 that 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.

# Stages of an Investigation



# Identify the Investigator

- Option # 1: Inside Personnel
  - Examples: H.R., Legal, Internal Auditors, Security or Compliance Personnel
  - Advantages
    - Cost
    - Speed of Deployment
    - Institutional Knowledge
    - Less Disruption
  - Disadvantages
    - Appearance of Bias or Lack of Independence
    - Speed of Completion (Creep of “Regular Duties”)
    - Inadequate Training
    - Privilege Issues (more on this later...)
    - Civil War
    - Whistleblower Claims?



# Identify the Investigator

- Option # 2: External Personnel
  - Examples: Outside Counsel, Accountants, Consultants, or Security Personnel
  - Advantages
    - Potentially Familiar with the Organization
    - Geographically diverse
    - Speed of Completion
    - Impartiality? (Outside the Organization)
  - Disadvantages
    - Cost
    - Impartiality? (Paid by the Company)

# Identify the Investigator: Skills and Competencies

- Understand the purpose and the issues (practical and legal)
- Formulate appropriate follow-up questions, especially when presented with new facts
- Knowledge of policies, procedures, practices, and corporate culture
- Possess effective interviewing skills given the witnesses to be contacted (i.e. rapport building, press for admissions, understand the interviewee, etc.)

# Identify the Investigator: Skills and Competencies

- Impartial
- Eliminate advocacy
- Notetaking
- Confidentiality
- How are they as a witness?

## Stage 1: Developing a Plan – *Act Promptly!*

- Acknowledge Complaint Promptly (24-48 hours)
- Assess the need for attorney-client privilege
- Define the scope
- Immediate remedial measures
- Identify investigator
- Witness list and documents
- Prepare for interviews
- Communication



## Stage 1: Assess Attorney-Client Privilege – *Maintain or waive privilege*

- Attorney-Client Privilege
  - Does it apply?
  - Do you want it to apply?
  - Can you rely on it?



# Corporate Counsel May Serve Multiple Functions

- Lawyer
- Business/Risk Advisor
- Compliance Officer
- Board Member
- Employee

# Attorney-Client Privilege: The Basics

- The client is the **organization**
- Only **confidential** communications are privileged
- Only communications that provide **legal opinion or advice** are privileged
- The **organization** holds the power to **waive the privilege**

# Attorney-Client Privilege: Legal Advice

***Boca Investering's P'ship v. United States*, 31 F. Supp. 2d 9, 12 (D.D.C. 1998).**

“There is a presumption that a lawyer in the legal department or working for the general counsel is most often giving legal advice, while the opposite presumption applies to a lawyer

. . . who works for the Financial Group or some other seemingly management or business side of the house.”



# Attorney-Client Privilege: Legal Advice

*In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d  
789,  
797 (E.D. La. 2007)

“It is often difficult to apply the attorney-client privilege in the corporate context to communications between in-house corporate counsel and those who personify the corporate entity because modern corporate counsel have become involved in all facets of the enterprises for which they work. . . . ‘As a result, courts require a clear showing that the attorney was acting in his professional legal capacity before cloaking documents in the privilege’s protection.’”

# CHECK-IN POLL

# Loss of the Privilege

- When the communication is not with the client-organization
- When a third party is present
- When the communication is unrelated to a legal opinion or legal advice
- When the person rendering legal advice is not an attorney (or a subordinate acting at the attorney's direction)

# Warnings for the Investigator

- Not all employees may be your “client” for the purpose of the attorney-client privilege
- Investigations motivated by anything other than legal compliance may not be privileged

# Motivations for Investigation

***Duran v. Andrew*, No. 09-730, 2010 WL 1418344, at \*\*10-14  
(D. D.C. April 5, 2010)**

Compelling production of documents when employer's motive in investigation included *business purposes* such as determining whether plaintiff should continue to be employed.

# Motivations for Investigation

***Leazure v. Apria Healthcare, Inc.*, NO. 1:09-cv-224, 2010  
WL 3895727, at \*\*11-12 (E.D. Tenn. Sept. 30, 2010)**

Documents generated by in-house counsel about plaintiff's RIF selection were discoverable; in-house counsel was acting as business advisor and active participant in the RIF decision-making process.

# Warnings for the Investigator

- Not all employees may be your “client” for the purpose of the attorney-client privilege
- Investigations motivated by anything other than legal compliance may not be privileged
- If reasonableness of investigation is raised as a defense, privilege can be waived regarding investigatory materials
  - Investigations undertaken in the ordinary course of business may not qualify as work product either

# Obligations to Third-Parties: Truthfulness

## MRPC 4.1

“In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person.”



# Conflicts of Interest: Dealing with Unrepresented Parties

- **MRPC 4.3:**

- Lawyer shall not state or imply that he/she is disinterested
- Make reasonable efforts to correct misunderstandings about the lawyer's role
- Do not give legal advice, except advice to secure counsel

# Obligations to Third-Parties: Truthfulness

- Application of MRPC 4.1 does not require an affirmative statement
- A lawyer may also violate the rule by:
  - Affirming another person's false statement; or
  - Omission

# Obligations to Third-Parties: Truthfulness

***In re PRB Docket No. 2007-046, 989 A.2d 523, 525-26  
(Vt. 2009)***

Attorney violated Rule 4.1 by failing to correct statement by other attorney to witness that they were not recording their conversation, and in fact assisted in making a false statement by distracting the witness with a statement that they were on speaker phone

# Obligations to Third-Parties: Truthfulness

- Application of MRPC 4.1 does require attorney to know the statement is false
- Innocent misstatements are not covered

# Obligations to Third-Parties: Truthfulness

***In re Disciplinary Action Against Johnson*, 743 N.W.2d  
117, ¶¶ 19-23 (N.D. 2007)**

Whether attorney violated Rule 4.1 by telling witness his claim for deposition costs was prohibited by Fair Debt Collection Practices Act (FDCPA) depended on whether attorney had a good faith belief in the FDCPA's application; because attorney's testimony that he had researched the FDCPA was not credible, discipline for violation of Rule 4.1 was appropriate.

# Obligations to Third-Parties: Ethical Dealing

## MRPC 8.4:

“It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

# Conflicts of Interest: Dealing with Unrepresented Parties

# Conflicts of Interest: *Upjohn* Warnings

“In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”—MRPC 1.13(f)



# Conflicts of Interest: *Upjohn* Warnings

## **ABA-Suggested Content:**

- Attorney represents corporation and does not represent the employee personally.
- The purpose of interview is to gather information for the corporation to provide legal advice to the corporation.
- The communications between the attorney and the employee are privileged.
- The employee should not disclose the substance of the interview because it is confidential and disclosure could effectively waive the privilege.
- The privilege belongs solely to the corporation and the corporation may waive the privilege and disclose the communications to third parties.

# Conflicts of Interest: *Upjohn* Warnings

## ***U.S. v. Ruehle*, 583 F.3d 600 (9th Cir. 2009)**

- Counsel interviewed CFO, and company later turned over the interview to the US Attorney
- Dispute over warnings and dual representation
- CFO moved to suppress statement
- In absence of documents memorializing warning, the court referred counsel to disciplinary authorities for failing to obtain a written waiver of the conflict and failing to advise the CFO to get separate counsel

# Practice Tips for Preserving Privilege

- Assume all documents gathered and written will be discoverable
  - Take caution when committing notes and ideas to paper!
- Separate the legal and business advice in the same document by clearly marking—“from a legal perspective” or “from a business standpoint.”
- Be mindful that any privilege attached to legal advice given in a business setting may be jeopardized by third parties.

# Practice Tips for Preserving Privilege

- Provide an “Upjohn Warning”:
  - Counsel represents the company and not the individual employee
  - Discussions may be privileged but the company owns the privilege (not the employee) and may disclose it to others
  - Explain that purpose for the interview is to assist counsel in providing legal advice to the corporation

# Practice Tips

- If it appears that the employee may be a target, company counsel should further state that:
  - There may be conflicting interests between the corporation and the employee and that the employee may face personal liability.
  - The employee should consider exercising the right to retain his/her own legal counsel.
- At a minimum, the interview notes should reflect that the warning was given.

# Practice Tips for Preserving Privilege

- Assertion of privilege must be particularized
- Resist indiscriminate use of privilege label
- Use legal titles in correspondence
- Assume non-lawyers neither understand nor respect the privilege
- Control distribution
- Develop procedures to protect confidentiality

# CHECK-IN POLL

## Stage 1: Developing a Plan

- Acknowledge Complaint Promptly (24-48 hours)
- Assess the need for attorney-client privilege
- Define the scope
- Immediate remedial measures
- Identify investigator
- Witness list and documents
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- Communication





## Stage 1: Define the Scope – *understand the issues.*

- Ensure that the following questions are answered before proceeding with the investigation:
  - Who will be interviewed and what is the likely sequence?
  - What is the subject matter of the investigation?
  - What issues must be covered?
  - Have the employment policy and procedures at issue been reviewed thoroughly?
  - Have relevant documents been requested and reviewed?
  - Are there any potential obstacles to proceeding with the investigation?
  - Is there any documentation or electronic information that should be included in the investigation?
  - When should the investigation be completed?

# Immediate Remedial Measures?

Administrative leave or transfer of the accused

Change work assignments

Remind of non-retaliation policy

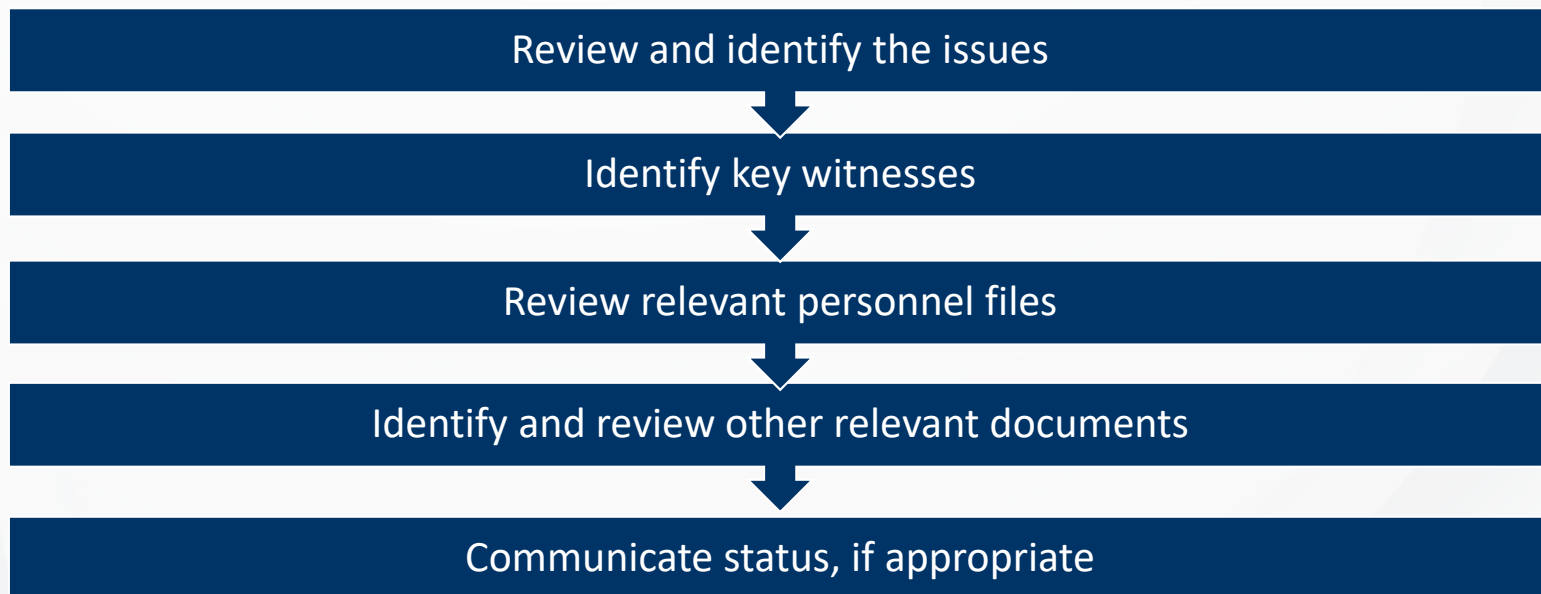
DO NOT adversely affect the complainant

# Stage 1: Handling the C-Suite Investigation

– Be thorough.



# Stage 1: Witness List and Documents— Be thorough.



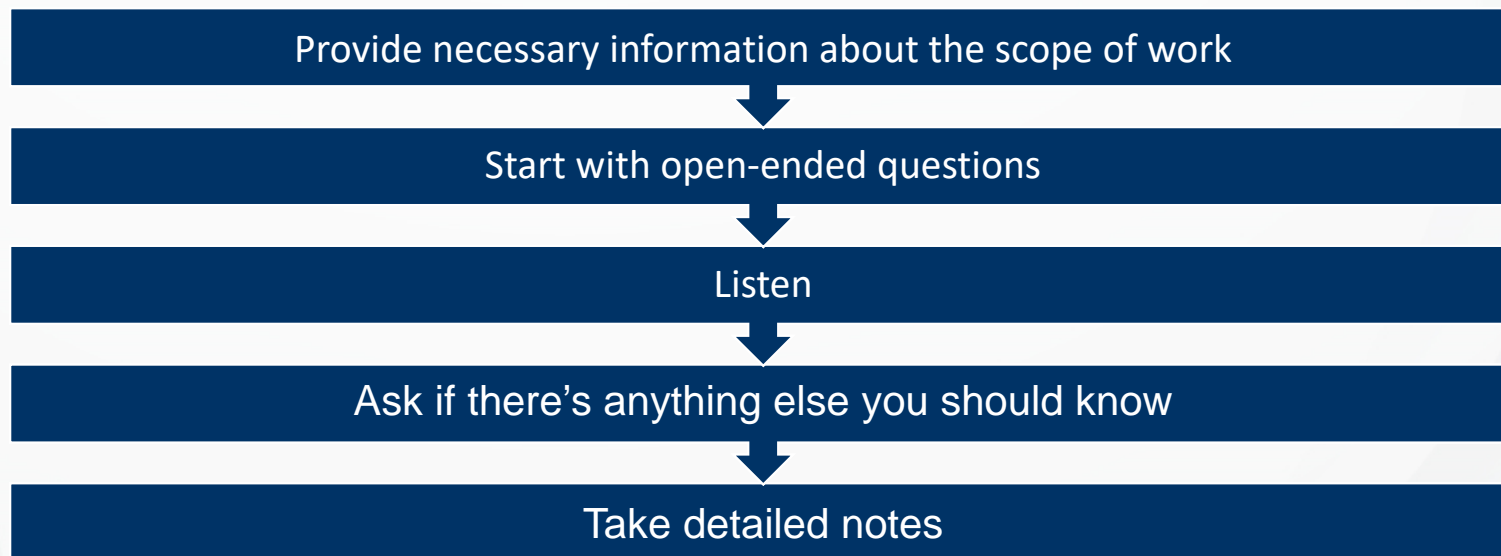
# Stage 2

**Investigation  
& Interviews**

# Stage 2: Interview Best Practices



# Stage 2: Interview Best Practices



## Stage 2: Interviewing the Complainant

Do NOT over-promise

Address confidentiality – No blanket confidentiality

Be empathetic but impartial and objective

Ask about desired outcome

Invite follow up – provide contact information

Remind of non-retaliation policy



## Stage 2: Interviewing the Accused

Address confidentiality

Convey the seriousness of the issue

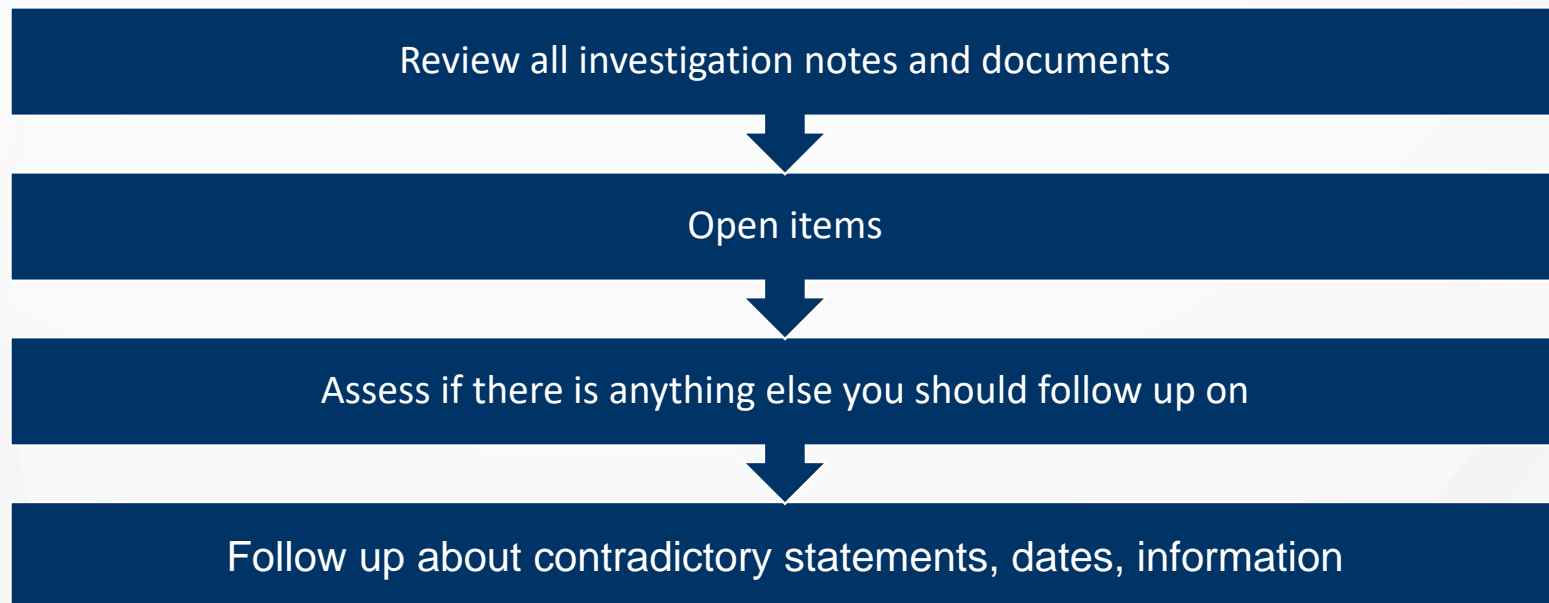
The company requires full and honest cooperation

Be impartial and objective – do not accuse

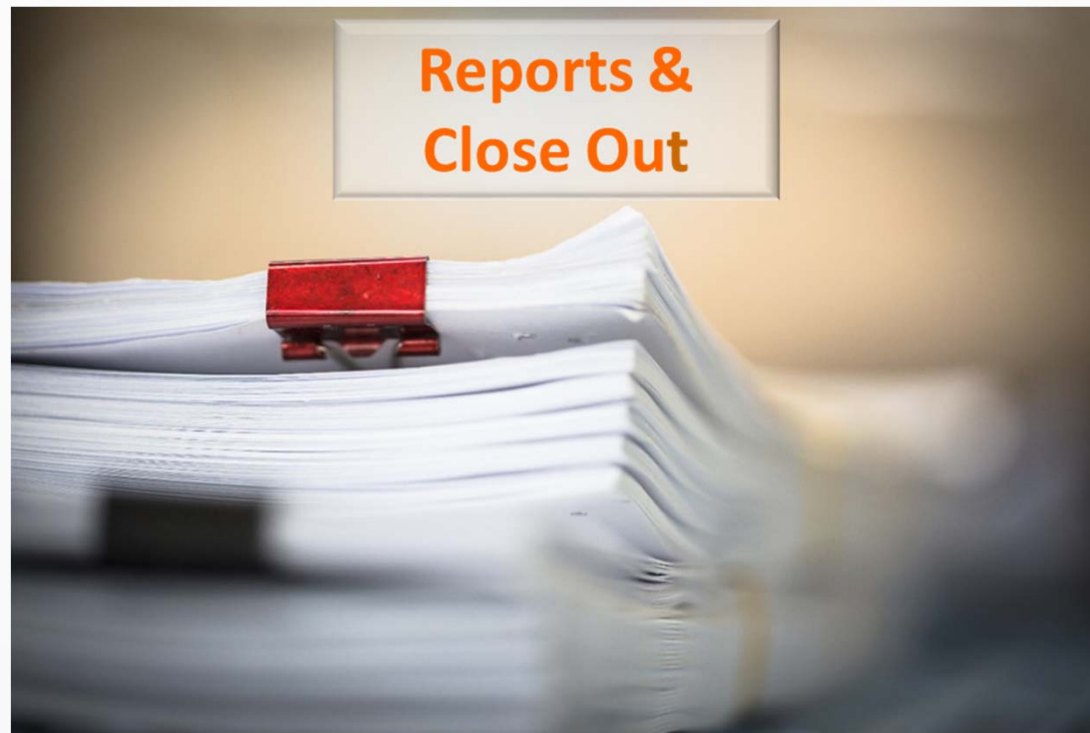
Do not accept blanket denials

Remind of non-retaliation policy

# Stage 2: Follow Up Interviews



# Stage 3



## Stage 3: Analysis of Evidence



## Stage 3: Is a Report Needed?

Employee relation  
problem /  
disagreement



Executive summary, or some  
other less extensive written  
report will normally be  
sufficient

Allegations of possible unlawful  
conduct, policy violations,  
serious unprofessional conduct

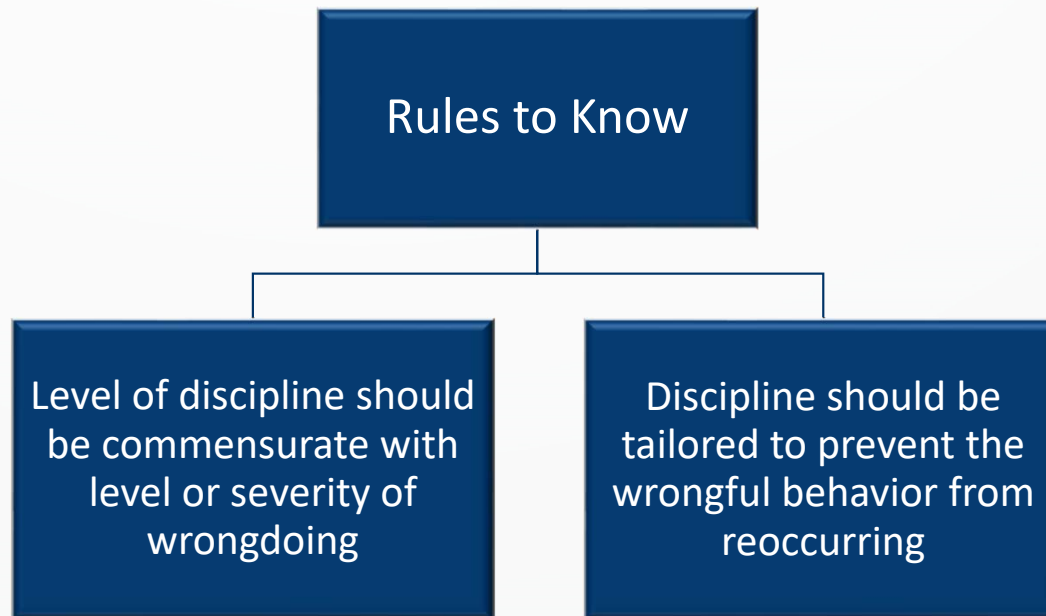


Detailed, well-written report is  
necessary (particularly if remedial  
measures/discipline will be  
imposed)

# Documenting the Results of the Investigation

- The report should:
  - recite the complaint, the chronology of the investigation,
  - a summary of the factual evidence, and
  - a discussion of credibility issues, where necessary or appropriate.
- Avoid stating legal conclusions. Avoid using terms like “unlawful.” Conclusions should be presented utilizing terms such as “inappropriate” or “unprofessional.”
  - Present results in the context of whether the complaint and conduct was unsubstantiated, substantiated or violated company policies or standards of conduct.
- Do not include any references to privileged communications or recommendations as to disciplinary action. Determinations as to disciplinary actions are the responsibility of management.

## Stage 3: Assessing Remedial Measures – Role of Management and/or Office of General Counsel



## Stage 3: Recordkeeping & Close Out

Failure to provide information about the investigation to complainant and accused.

**M I S T A K E S**

**NOTE: Keep all documents relevant to the investigation in a separate confidential file**



## Stage 3: Communicating the Results of the Investigation

- **Meeting with the complainant:**
  - Inform the complainant of the conclusion reached (i.e., the complaint was found to have merit, the complainant was found to be without merit, or no conclusion could be reached as to the merits of the complaint).
  - Ordinarily, the complainant should not be informed about the specifics of any disciplinary or personnel actions taken as a result of the investigation.
  - Instruct the complainant to immediately report recurring or continuing issues and retaliation.
- **Meeting with the accused:**
  - When meeting with the accused, the company's representative should emphasize the prohibition against retaliation. Where the complaint was found to have merit, the accused should be informed of disciplinary action that is being imposed. Where the accused is not terminated, documentation should be given to the accused and placed in his/her file reflecting the disciplinary action taken and a warning notice concerning any recurrence.
- **Memorialize the meeting in writing.**

# Thank you!

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