



**Post &
Schell** P.C.
ATTORNEYS AT LAW

CONDUCTING EFFECTIVE WORKPLACE INVESTIGATIONS

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Post & Schell Employment & Labor Services

EMPLOYMENT COUNSELING

- HR audits
- Employment agreements
- Handbooks and personnel policies
- Compliance with federal, state and local employment laws
- Wage and hour compliance
- Employee misconduct, theft and discipline
- Hiring, termination, severance and work force reductions
- Union avoidance

EMPLOYMENT LITIGATION

- Defense of harassment and discrimination
- Administrative agency investigations (EEOC, PHRC, DOL, OSHA, NLRB)
- Wage and hour
- Enforcement of restrictive covenants

INVESTIGATIONS

- Discrimination
- Compliance with corporate policies
- Workplace violence
- Employee theft

Roadmap of Presentation

- Legal Reasons for Investigation
- What Events Trigger Investigation
- Who Should Investigate
- Documenting the Complaint
- How to Conduct Investigation
- Investigation Pitfalls



HOW

WHEN

WHY INVESTIGATE?

WHY

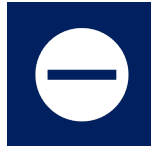
WHAT

WHERE

WHY INVESTIGATE



EMPLOYER RESPONSIBILITIES



RESPONSIBILITY

To maintain an unbiased environment that is free from discrimination and harassment based on race, color, national origin, sex/gender, religion, disability or age



RESPONSIBILITY

To uphold and enforce personnel policies, prevent misconduct, and ensure employee safety



RESPONSIBILITY

To manage, safeguard and use organization assets, charitable contributions, donations, grants, awards and other funds consistent with charitable mission and legal requirements

WHY INVESTIGATE



EMPLOYER LIABILITY

- Employers are vicariously liable for acts of managers and supervisors
- Employers may be held liable for harassment by co-workers
- *Faragher-Ellerth* Defense
 - Employee suffered no adverse employment action
 - Employer exercised reasonable care to prevent/promptly correct harassing behavior
 - Employee failed to take reasonable action, including corrective procedures provided by employer

**HARASSMENT / HOSTILE
WORK ENVIRONMENT**

**NEGLIGENT
RETENTION**

**DISCRIMINATION /
SELECTIVE ENFORCEMENT**

RETALIATION

WHY INVESTIGATE



EMPLOYER LIABILITY

Employer may be subject to liability for harm resulting from employer's negligence in retaining a dangerous employee who the employer "knew or should have known" was dangerous/likely to cause harm to others.

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RETALIATION

WHY INVESTIGATE



EMPLOYER LIABILITY

Investigation of some employee complaints, and not others, can result in claim of discrimination due to disparate treatment of similarly situated employees.

**HARASSMENT / HOSTILE
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RETALIATION

WHY INVESTIGATE



EMPLOYER LIABILITY

- Employment discrimination statutes prohibit retaliation for employees engaged in “protected activity”
- Employee may allege that investigation itself or the manner in which it was conducted is retaliation for engaging in protected activity

**HARASSMENT / HOSTILE
WORK ENVIRONMENT**

**NEGLIGENT
RETENTION**

**DISCRIMINATION /
SELECTIVE ENFORCEMENT**

RETALIATION

HOW

WHEN

WHEN TO INVESTIGATE?

WHY

WHAT

WHERE

WHEN TO INVESTIGATE



Triggers:

- Formal or Informal Complaint
- Exit Interview Feedback
- Lawyer Demand
- EEOC/PHRC/State/Federal Filing
- Anonymous Tip
- 3rd Party Complaint or Investigation
- Other Documents or Conversations

Triggers:

- Annual Audits
- Subpoena
- Search Warrant
- Regulatory Agency Contact
- Other legal implications (harassment, discrimination, retaliation, safety, wage issues, etc.)

May NOT be warranted for “on the spot” resolutions:

- Policy misunderstandings
- Misinformation
- Scheduling/payroll concerns
- Run-of-the-mill disciplinary matters

WHEN TO INVESTIGATE



BIG "I" VS. LITTLE "i"

Nancy informs her supervisor that Joe has been rubbing her shoulders and it's bothering her

I

Jeremy complains about EVERYTHING, this week he is upset because his supervisor is "abusing him"

During her exit interview, Carol states that she is "fed up" with the people she's had to put up with at the Company

i

Joe has just placed his 4th complaint with HR about fellow employee Mark

I

Linda has informed HR that her last paycheck is wrong

i

During his annual review, Pablo says that he is being treated unfairly because he is "different"

I

HOW

WHEN

WHO

WHY

WHAT

WHERE

WHO INVESTIGATES?

WHO

WHO INVESTIGATES: Internal v. External



CONSIDERATIONS:

- What legal issues are involved?
- Who is being investigated?
- What is being investigated?
 - Misconduct, harassment, discrimination, fraud, violence, threats
- Collateral issues:
 - Security issues - possibility of law enforcement involvement?
 - Risk management –possibility of collateral insurance claim?
 - Audit-Controllershship issues –violations of internal financial controls?
 - Publicity?
 - Experience and qualifications
 - Timing of retention – the earlier the better to maximize benefit
 - Investigator must have full access to all relevant documentation

WHO INVESTIGATES



Supervisor

- Normally biased
- Often a fact witness
- Rarely familiar with policy/personnel issues
- Lack of training and experience
- Communications discoverable

Officer

- Possible bias
- Rarely familiar with policy/personnel issues
- Lack of training and experience
- Communications discoverable
- Risk management

Neutral Manager

- Rarely familiar with policy/personnel issues
- Lack of training and experience
- Communications discoverable

Human Resources

- Possible bias
- Communications discoverable
- Typically, the best choice for internal investigation if uninvolved

In House Counsel

- May not be familiar with employment law
- Familiarity with policies
- Training and experience
- Communications discoverable

Outside Investigator (Non-Lawyer)

- Fair Credit Reporting Act applies
- Increased expense
- Not familiar with company, witnesses, policy
- Communications discoverable

Outside Counsel

- Allows company attorney to maintain privileges and confidentiality
- Less perception of bias
- Expertise (lawyer v. nonlawyer)
- Increased expense
- "qualified" privilege or confidentiality
- If witness, can be disqualified from defending at trial

BUILD A TEAM



Legal Counsel

In House

- Role can be blurred

Special Counsel

Investigator

If investigation results in criminal prosecution and/or civil litigation, will Investigator's findings and conclusions be admissible?

- Only "expert witnesses" may give opinion testimony to help jury determine a "fact in issue"
- Experts must have *scientific, technical or specialized knowledge, skill, experience, training or education*

WHO SHOULD ENGAGE EXPERT?



- If Attorney engages:
 - Communications between attorney and expert are protected from discovery by work product privilege
 - Permits attorney and expert to develop ideas, test theories and explore strategies
 - Protects against disclosure of draft expert reports
- If Company engages:
 - Report and communication process must be agreed upon
 - All communications may be discoverable

HOW

WHEN

WHO

WHAT TO INVESTIGATE?

WHY

WHAT

WHERE

DOCUMENTING COMPLAINT



- Initial complaint often verbal
 - Notes on *all* conversation
- Request complaints in writing
 - Documents scope
 - Consistency in allegation
 - Prevents Complainant from:
 - Changing scope
 - Claiming they included other allegations
- Use Standard Forms
 - General Complaint
 - Harassment and Discrimination
- Ability to Write/Understand English

COMPLAINT FORM



- Reference policy
- Who harassed and discrimination?
- Describe incident
- When? Where? Witnesses?
- Documents? Notes? Videos? Texts?
 - Attach
- Is conduct ongoing?
- How does incident violate Co. policy?
- Response to incident?
- Did you indicate unwelcome?
- Other incidents with others?
- Previously complained about related incidents? To Whom?
- What corrective action are you seeking?
- Discussed with anyone?
- Legal Counsel retained?
- Signature and attestation
 - “I confirm that the foregoing is true and correct. I agree to cooperate with any investigation conducted by the Company into this matter.”
- Date, received by, HR acknowledgement

HOW

WHEN

WHO

WHY

WHAT

HOW TO INVESTIGATE?

WHERE

DEFINE SCOPE OF INVESTIGATION



- Effective investigation process
 - Prompt, thorough and impartial
- Define Scope of Investigation
 - What triggered investigation?
 - Who, what, when and where is incident?
 - What areas of Company may be impacted by investigation?
- Scope may be adjusted during investigation
 - *Example:* Investigation of harassment complaint against one person leads to investigation of entire department
 - *Example:* Investigation of harassment complaint reveals Complainant's performance deficiencies
 - *Example:* Investigation of wage issue reveals large scale problem

INTERIM MEASURES



- **Triage**

- How to continue operations?
- Advise management?
- Assess inside vs. outside resources
- Change/restrict access to information? (IT)

- **Notify Appropriate Insurance Carrier**

- Costs of certain investigations may be covered

- **Personnel**

- Place alleged wrongdoer on suspension immediately?
 - Ends contact, preserves integrity of investigation
 - Consider position, access to evidence, influence over witnesses, ability to harm Company or influence results, conspirators, confidentiality
- Interim actions to protect Complainant?
 - Can be discriminatory without consent– e.g. moving the Complainant

WRITTEN INTERNAL HOLDS



- Notice to employees of obligation to preserve evidence/ suspend routine document destruction practices (i.e. electronic back-up systems)

- What must be preserved:
 - Paper documents (stored in central filing, offices, home)
 - Electronic data (office/home computers, work/personal email, databases, servers/networks/cloud/text messages, social media)
 - Telephone records, text messages
 - Security records (e.g. entry and exits records, video footage, signing in/out computer systems, printing records on copy/printers)

- Legal duty to preserve data in native format for criminal/civil reasons
 - Need for forensic help

DOCUMENT REVIEW



- Company policies, SOPs, rules
- Complainant's personnel file
- Alleged Wrongdoer's personnel file
- Previous complaints about or involving either Complainant or Alleged Wrongdoer
- Internal correspondence, emails, targeted email searches, texts
- Video, audio or voicemail
- Manager or supervisor notes
- Employment contracts and collective bargaining agreements
- Outside documents filed with agencies
- Other relevant documents: timecards, expense reports, receipts

BUILD A TIMELINE



- Begin preparing based on complaint and written documents
- Amend throughout course of investigation
- Important to support conclusions, assist in credibility determinations
- Retain and identify supporting materials (or absence of existence of materials)



NOTICE TO PARTIES



INTERVIEW LIST



- Sequencing
 - Complainant first
 - Alleged Wrongdoer – second or last?
 - Witnesses back-to-back, or time interval
- Which Witnesses?
 - Identified by Complainant
 - Identified Alleged Wrongdoer
 - Identified by other witnesses
 - Individuals likely to be witnesses (co-workers who work in same area)
- Managers and supervisors
- External witnesses
 - Former employees?
 - Other fact witnesses- customers, vendors, etc.

INTERVIEW PREPARATION



- Method of interviews
 - Remote or in-person
- Who present?
 - Other Company witness
 - Attorneys of Complainant, Alleged Wrongdoer
- Notetaking/Recording
 - Notetaking, preserving notes
 - Note taker
 - Recording
 - Legality, permission
 - Pros/Cons
- Determine order of interviews



CONTENT OF INTERVIEW



- Prepare Introduction and Instructions
 - Role of investigator (internal, external, decisionmaker)
 - Explain why person is being interviewed
 - Instruct witness to maintain confidentiality in order to protect integrity of investigation – others will be interviewed
 - Employer cannot promise confidentiality because conducting other interviews
 - Confirm prohibition on retaliation for participating in investigation
 - Rules of interview
 - No recording, follow up info

- Prepare Interview Outline
 - Topics and questions to ask of witness
 - Documents to show witness, questions related to documents
 - Timeline of events

CONDUCTING INTERVIEW



- Do NOT sit behind computer
- Open with Introduction and Instructions
- Build rapport where possible, role is not to judge
- Ask about allegations
 - Key topics to cover
 - Start with open-ended questions
 - Narrow questions to specific allegations made in complaint
 - Confirm details: what occurred, when, where, who was present
 - Confirm whether information first-hand and, if not, who has first-hand knowledge
 - Ask follow-up questions to clarify
 - Follow leads, ask questions about new facts and information provided by witness
 - Save unfriendly or embarrassing questions until the end
 - Ask if witness is aware of anything you haven't asked about
 - Has witness discussed with anyone else
- Witness call backs or reach outs

WITNESS CREDIBILITY



- Demeanor - note it for report
- Cooperation
- Consider age, impairments, intelligence of witness
- Overpreparation of witness (coached)
- Memory - interview methodology
 - Funnel method of interviews (go back and unpack)
- Opportunity to observe vents
- Ability to remember
 - Possible corruption of memory
- Conflicting narratives
 - Corroboration
 - He said/she said
- Motive to tell truth
- Collect information, documents immediately

INVESTIGATOR PARAMETERS



- Scope of investigator rule
 - Fact finder only
 - Fact finder and makes conclusions
 - Fact finder, conclusions, decisionmaker
- Do not fill in gaps, gaps may remain
 - Timeline critical to identify gaps
 - Note in report



THE INVESTIGATION REPORT



- Full Report or Executive Report
- Elements:
 - Complaint
 - Identify Complainant and date of complaint
 - Summarize complaint and include copy of complaint form
 - Include information about supplemental complaints or additions to original complaint (including date)
 - Applicable Policies
 - Identify policies implicated by complaint and facts uncovered in investigation and attach copies
 - Documents Reviewed
 - List documents reviewed and attach copies

THE INVESTIGATION REPORT



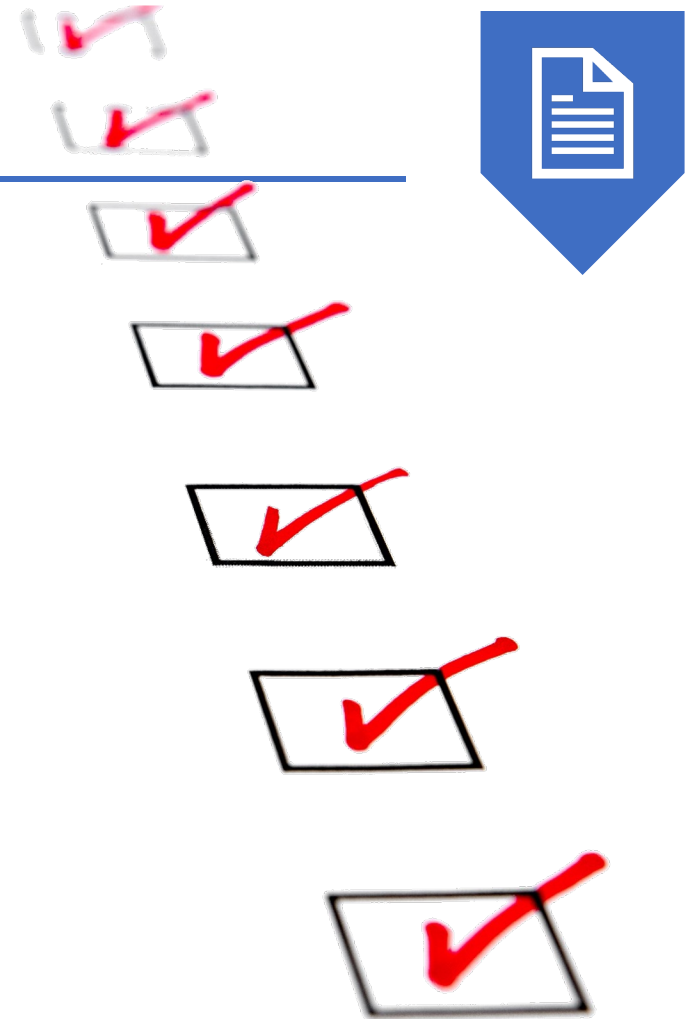
- Summary of Interviews
 - Document individuals interviewed
 - Date, time, place of interview, who present
 - Position, seniority with company
 - Use specific language where possible with quotes on key facts
- Retention of Original Interview Notes
- Findings and Conclusions
 - Set forth findings concerning facts alleged by Complaint
 - Identify whether policy violation occurred (probable cause)
 - Identify other issues stemming from investigation which require follow-up action

CORRECTIVE ACTION



NOTIFICATION OF OUTCOME

- Communication process
 - Alleged wrongdoer
 - Complainant
 - Management
 - Other witnesses
- Copy of report
- Letter documentation disciplinary action
- Follow up with Complainant/Witnesses- 2 weeks, 30 days



WHERE DO CHALLENGES ARISE?

HOW

WHEN

WHY

WHAT

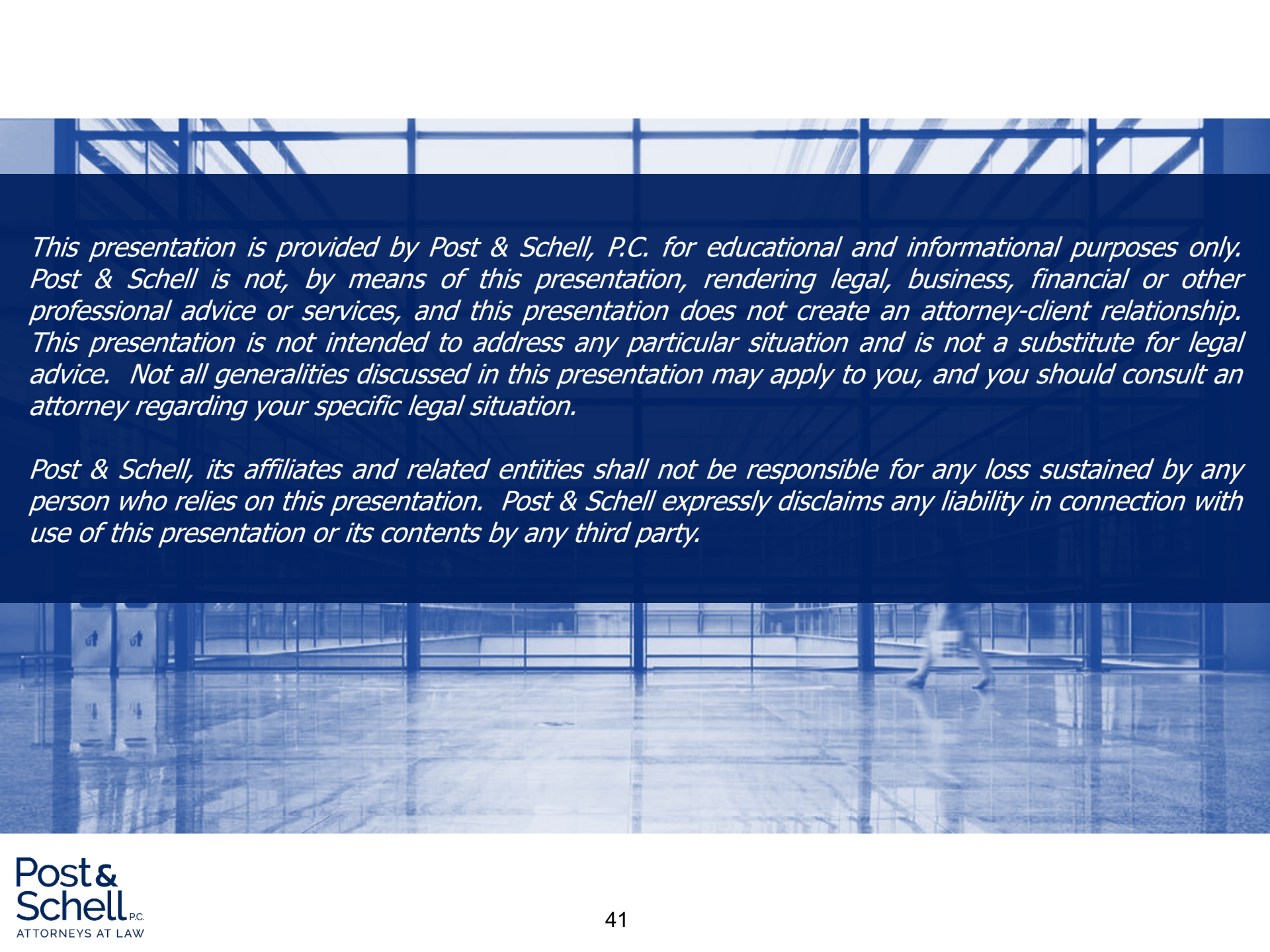
WHERE

WHERE DO CHALLENGES ARISE?



COMMON MISTAKES IN INVESTIGATIONS

- Untrained investigators
- Bias
- Jumping to conclusions
- Promising confidentiality
- Failing to promptly conduct the investigation
- Failing to properly document the investigation
- Bad report writing
- Lack of diligence, thoroughness
- Failing to talk to accused before reaching conclusion
- Failing to reach conclusion/implement corrective action
- Failing to follow up once concluded to assure no retaliation



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