

*The 25th Annual SC SHRM State Conference  
Charting a Course for HR Success*

# Upping HR's Game in Workplace Investigations

Presented by:

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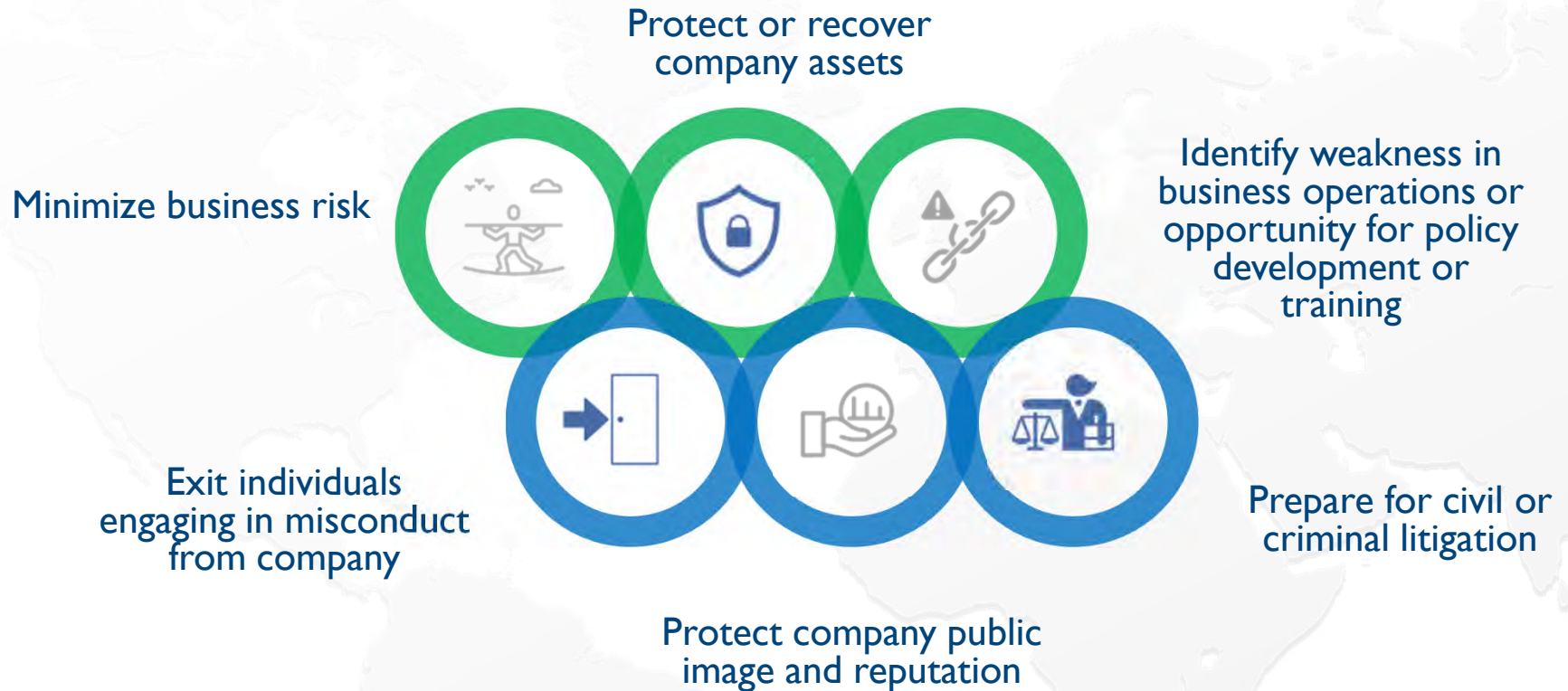
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# Internal Investigations

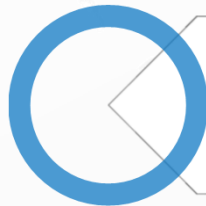
- Government investigations or inquiries
- Whistleblower reports
- General allegations of misconduct (workplace harassment, etc.)
- Internal audit findings
- To gather information in defense of actual or threatened litigation

# Business Goals



# Terminology

 **Report** (instead of claim or complaint)

 **Reporter** (instead of complainant)

 **Subject** (instead of accused)

# Purpose of a Good Investigation



## INTAKE

Understand the report and issues



## PRESERVE INFORMATION/ DOCUMENTATION

Difference between the objective facts and opinions/conclusions



## ACCOMPLISH THE MISSION

To always make a decision. No finding is a decision.



## GET TO THE TRUTH

Or what we, in good faith, believe is the truth

# Who Should be the Investigator?

## Outside Counsel

- Objectivity
- Substantive knowledge
- Expertise
- Strengthen presumption of attorney-client privilege

## Internal Investigation Team

- Cost containment
- Should be trained
- Should work at direction of in-house counsel



If hiring outside counsel, have a good engagement letter detailing the scope of the investigation

## Attorney-Client Privilege

Protects communications made in confidence for purpose of providing or obtaining legal advice

Does **not** protect business advice or information gathered in the normal course of business

## Work-Product Doctrine

Shields from disclosure materials created or collected by counsel in preparation for litigation

Do not immunize underlying factual information from disclosure

# Tips to Preserve Privilege

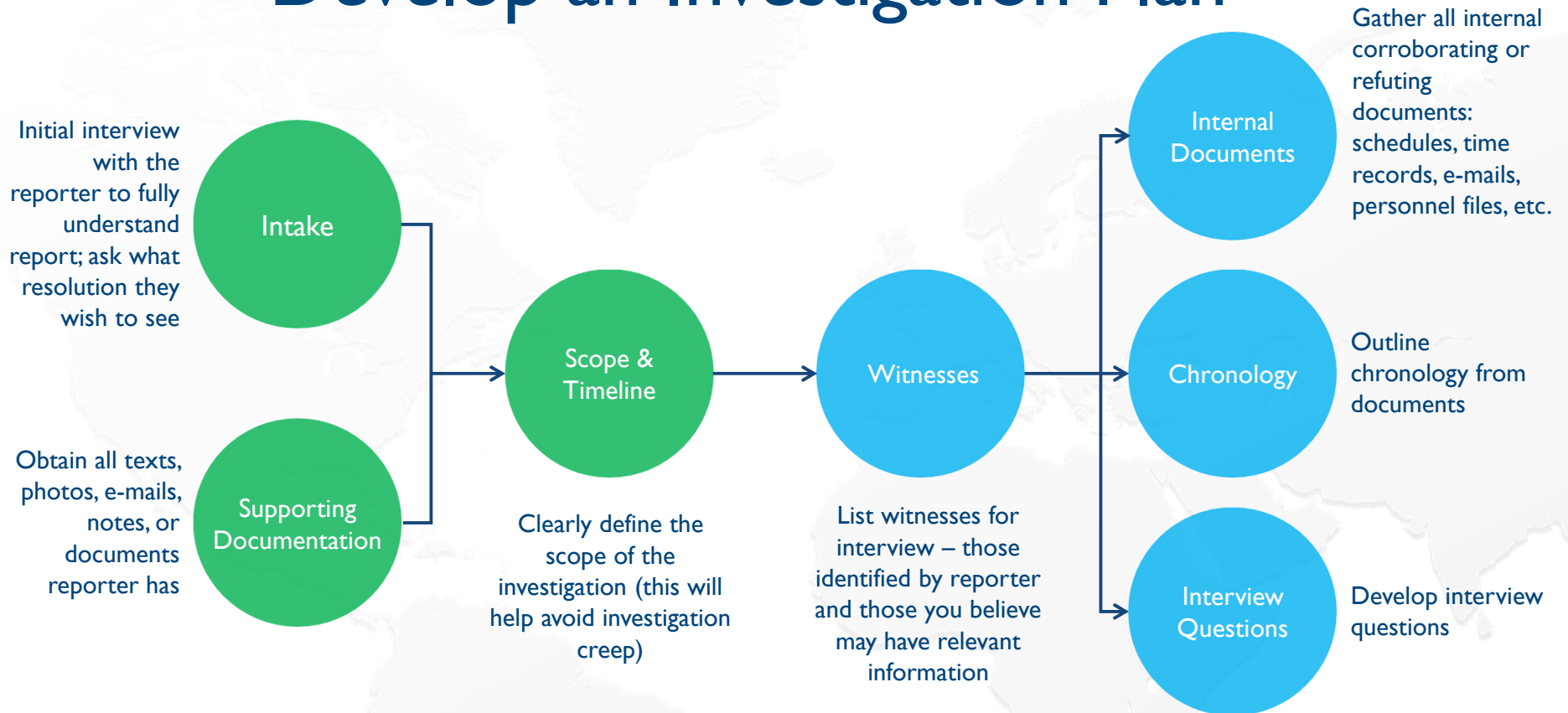
- Document corporate directive to conduct confidential investigation
  - Refer to known litigation or investigation, if applicable
  - Outline purpose to provide legal advice
  - Direct personnel or outside counsel to report to in-house lawyer
  - Advise that investigative material be marked as “privileged and confidential” and “not forward or otherwise disclose”
  - Direct that all materials be delivered to in-house lawyer. No copies retained.



# Other Important Initial Tasks

- Review D&O, fiduciary, or EPLI policies for notice requirements
- Determine if litigation hold memorandum should be issued
- Build any necessary consensus
  - IT
  - HR
  - Legal
  - Audit
  - Finance

# Develop an Investigation Plan



# Witness Interview Planning

- Two present? Interviewer and note taker?
- Order of interviews
- Location
- Timing
- Outline
- How will you capture their story?
- What documents are needed for each witness?

# Documenting the Interview

Write down what you want to ask next or follow up items. Toss?

Take down what they say

- Get them to sign
- No hyperbole or conclusions

Prepare interview memo

- Send to witness to review and sign
- No hyperbole or conclusions
- Toss notes?



Do not ask to write their own statement

# Components of an Interview



## Orientation

Establishing rapport, setting tone, what we hope to achieve, how you will preserve - by notes, etc.



## Narration

Get their story in an uninterrupted fashion



## Questioning

Lock down story - question to fill in gaps and resolve ambiguities



## Summarizing

Do we have it right?



## Closure

Leave witness with a sense that they want to continue to cooperate

# Orientation Phase

- Give appropriate disclaimers
  - Purpose of notes – not verbatim transcript
- Build rapport early and keep it
- A relaxed witness is a talkative witness
- Give opportunity to ask questions and express concerns

# Narration Phase

- Let them tell their story at the outset
- Big, broad questions - just nudging them back to the subject matter
- When taking notes, start slow. Don't start taking notes right away (it makes people nervous).
- Who, what, when, where? Anyone present? Anything else?

# Question Phase

- Ask clarifying questions to flesh out their story
- Don't ask leading questions until the very end (and, even then, only when necessary to get clarifying information)
- The goal here is to close off alternative explanations.
  - Getting the story locked down.
- Memory can require some assistance.
  - Documents, etc. - But Be Careful!



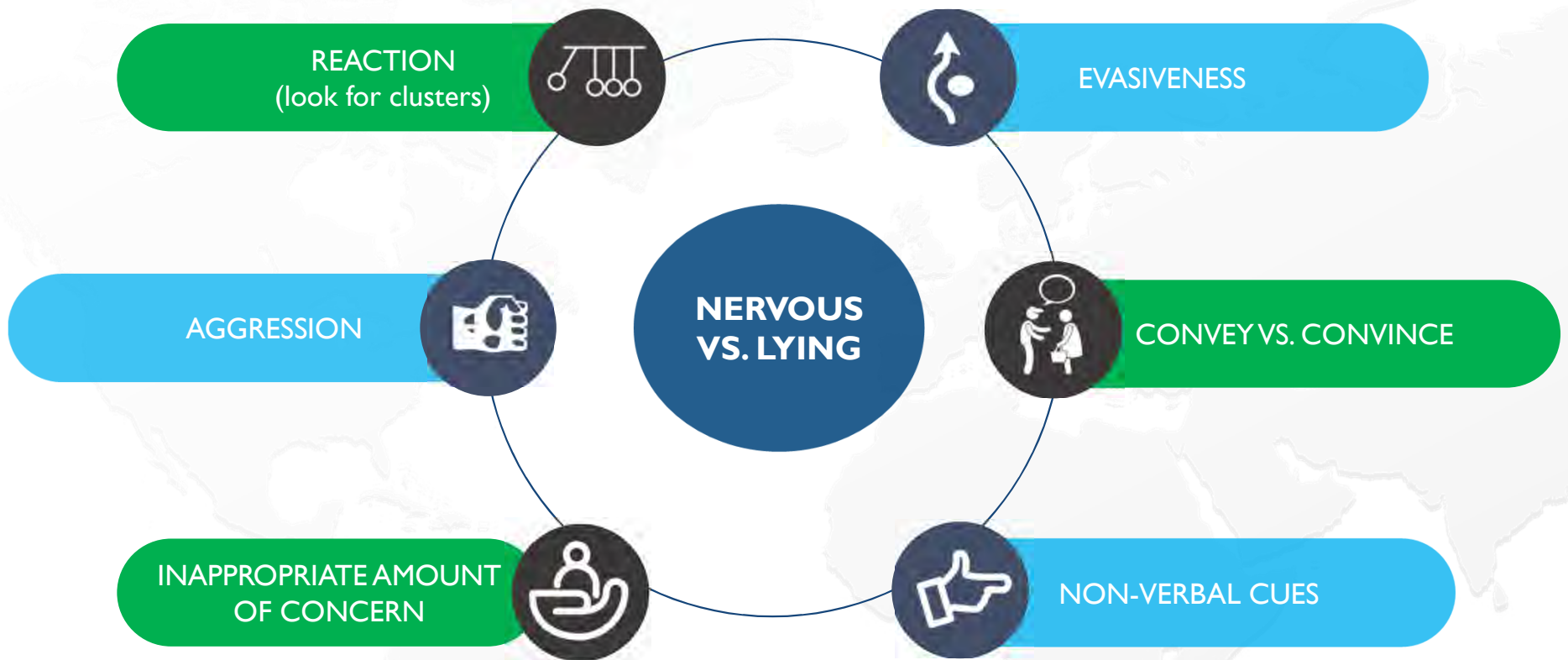
# The Difficult Question

- Precision is key
- Listening very carefully to their response is very important
  - Watch a yes no question being answered with a complete sentence, or coupled with convincing statements
  - Watch for indignation (and stay calm)
  - Don't let them rephrase the question
  - Watch for the hypothetical response
  - Watch for evasive responses

# Tools of the Interviewer

- Silence
- Body language - What signs do we look for? Does it mean they are lying?
- Tone - If a witness becomes hostile or adamant, what does that mean?
- Eye Contact - What does the science say about eye contact?
- Micro-expressions - Emotional responses of less than  $\frac{1}{2}$  a second tell you more than their facial expressions held for longer than  $\frac{1}{2}$  a second.
- Show them documents, or don't? If so, “funnel” – seek witness's understanding of issues, then present documents

# Credibility Keys



# Be Prepared for Twists



## UNCOOPERATIVE WITNESS

Try to gain cooperation through rapport, but may need to explain could lead to termination of employment



## REQUEST FOR LAWYER OR WITNESS

Not required to grant, and generally not advisable



## REQUEST TO RECORD

Deny and explain reason

## GET TO THE TRUTH

Or what we, in good faith, believe is the truth

# What About Non-Employee Witnesses?

- Independent Investigator?
- Vendor/Third Party/Former Employee
- Confidentiality Issues
- Privilege Issues

# Closing an Interview

## SUMMARIZE

### DOCUMENTATION

- › Did we cover everything?
- › Anything to add?
- › Sign off on notes

### NEXT STEPS

- › Contact information
- › Leave the door open for questions or concerns
- › Time table

## POLICY REMINDERS

### NO RETALIATION

- › Explain meaning
- › Review how to report

### CONFIDENTIALITY

- › Explain importance
- › Obtain commitment
- › If applicable, what if governmental agency contacts?

# Report of the Investigation

- Whether to prepare or not?
- If so:
  - Chronology of facts, witnesses interviewed, and documents gathered
  - Credibility assessments
  - Conclusion based on facts
  - Avoid legal conclusions unless sure protected by privilege

# Post Investigation

- Feedback to reporter
- Implementing actions:
  - Prompt
  - Appropriate: employee discipline/termination; policy/procedure development revision; enhancing controls; training
- Legal obligations/duty to report



Questions?



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