



**Fisher
Phillips**

Workplace Investigations:

*Spotting Issues on the Horizon and
Rigging Your Vessel for Success*



Megan Janes

Partner

mjanes@fisherphillips.com

954.847.4717

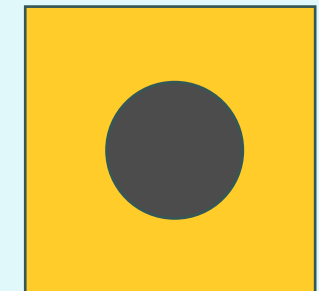
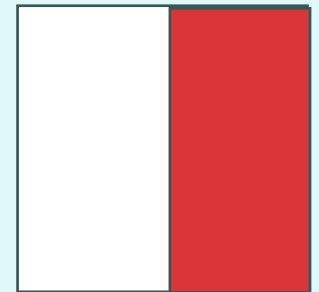
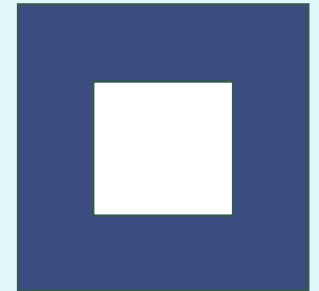
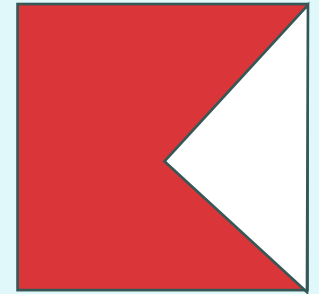


Let's
connect



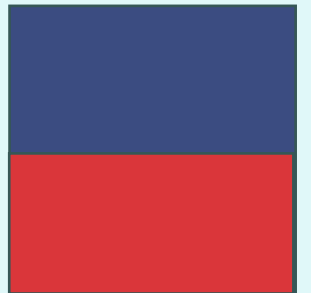
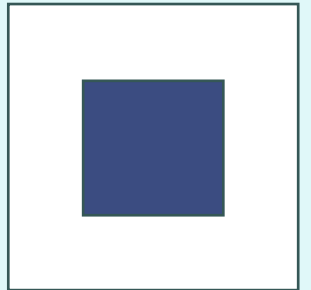
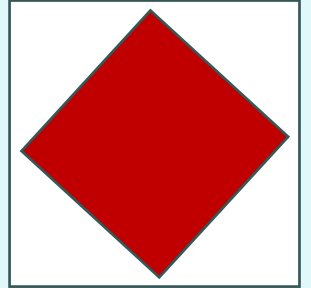
Good Investigations...

- Buoy workplace morale
 - Foster a “speak up” culture without fear of retaliation
- Prevent and deter improper and unsafe conduct
- Show commitment to policies
- Enable consistent enforcement
- Limit legal exposure
 - May avoid lawsuit
 - Help with defense



Bad Investigations...

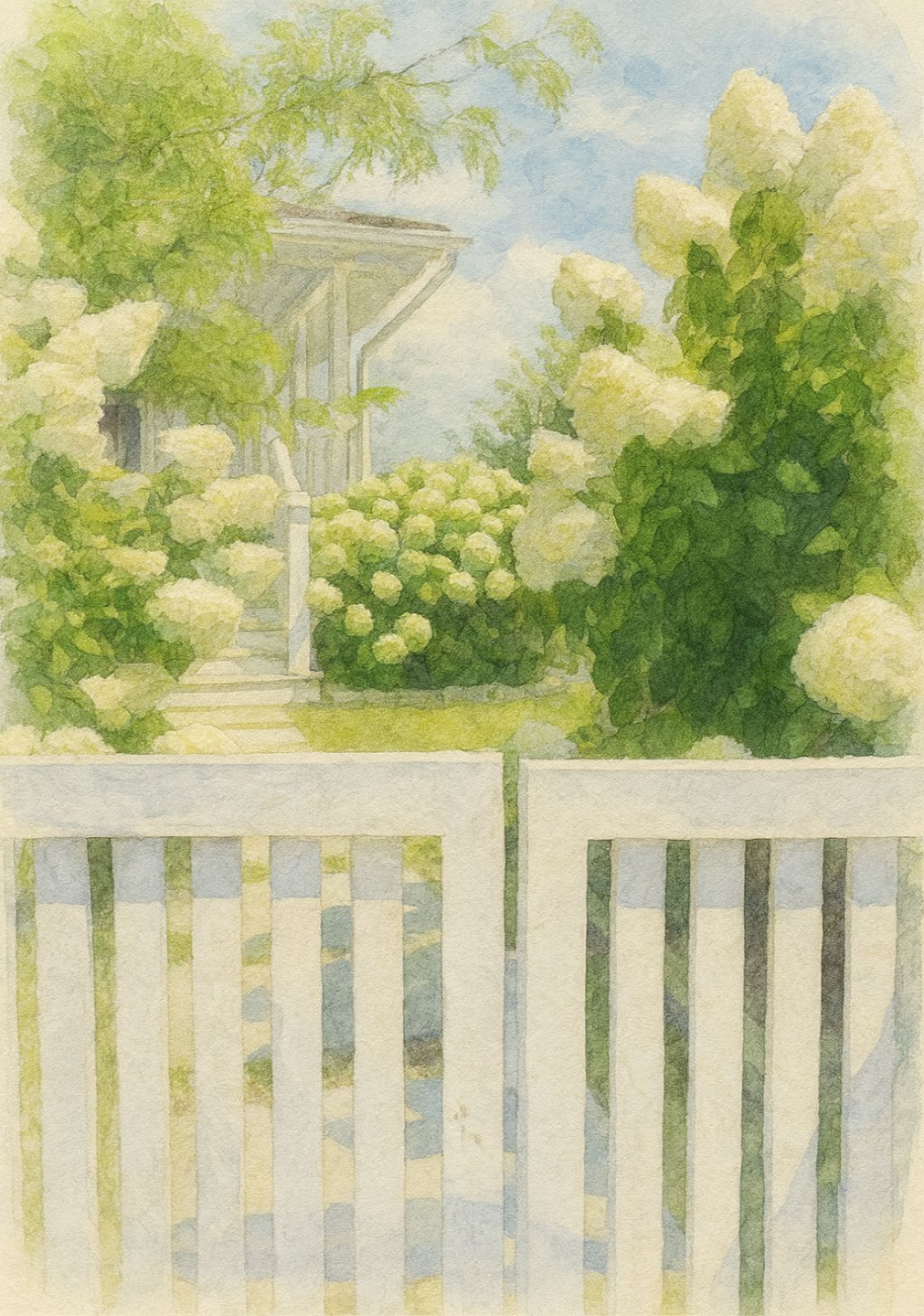
- Allow bad conduct to fester
- Highlight breakdowns in corporate operations
- Increase (or even create) legal exposure
- Enable bias





Agenda

- Planning Investigations
- Witness Interviews
- Investigation Reports
- Common Errors



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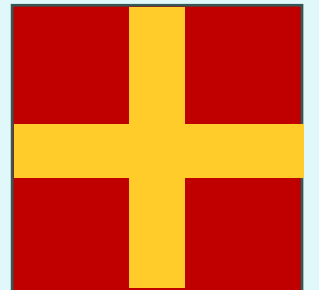
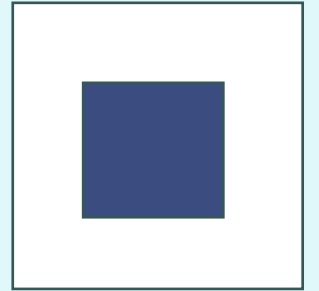
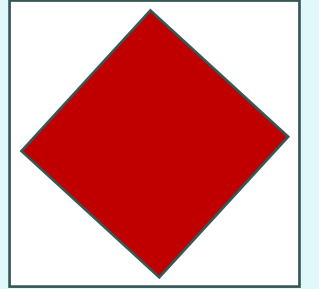
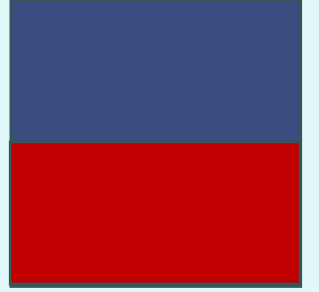
Planning Your Investigation Voyage

- How to provision
- Charting the course

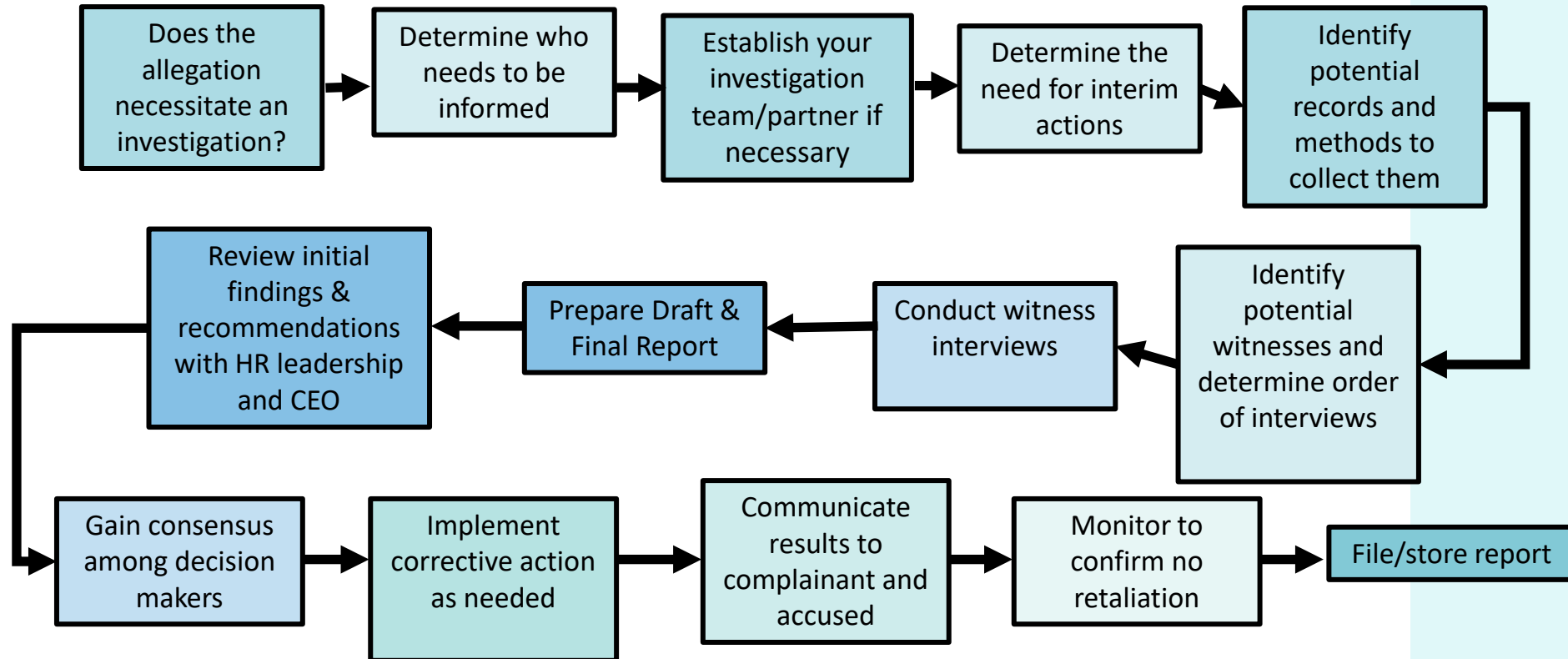
Scenario

Seanna and Davey

- Seanna confidentially tells her supervisor that Davey is encroaching on her personal bubble
- The supervisor, Meredith, tells HR that Seanna has been complaining about Davey but that Seanna does not want anything done about it and Meredith feels it's just a personality issue
- Meredith calls counsel for advice

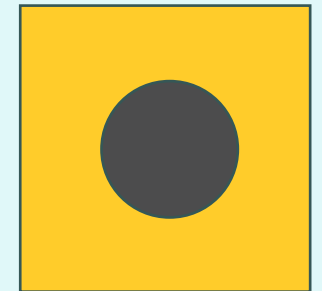
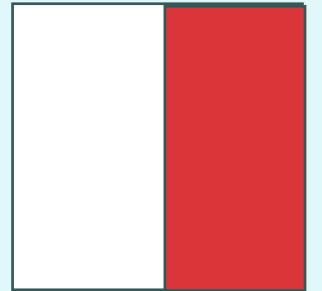
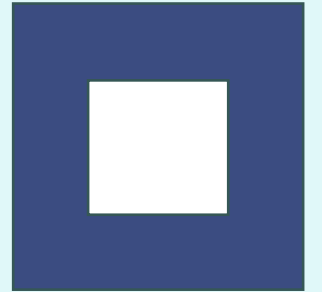
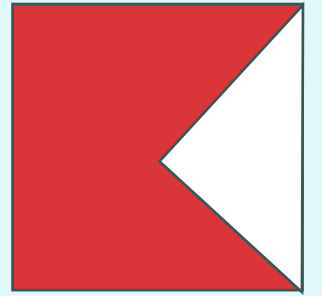


Investigation Overview



Pre-Investigation

- Immediate response checklist
- Document the complaint
- Assess the urgency (and safety)
- Identify potential witnesses
- Preserve evidence
- Choose the right investigator
- Consider privilege
- Evaluate interim measures like separating parties, schedule changes, reminders about retaliation
- Assess criminal components
- Identify any union considerations





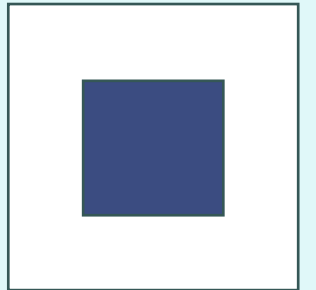
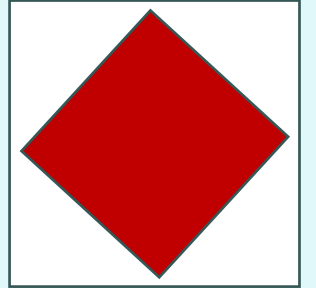
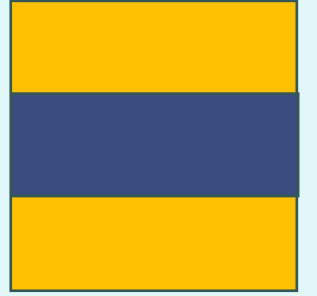
Rough Waters with Witnesses

- Strategize your approach
- Mechanics
- Responding to the unexpected

Interviews

Check the Rigging

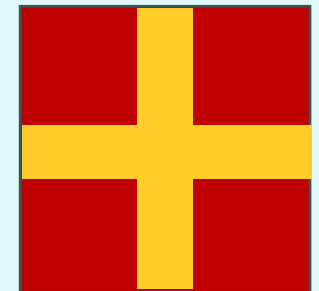
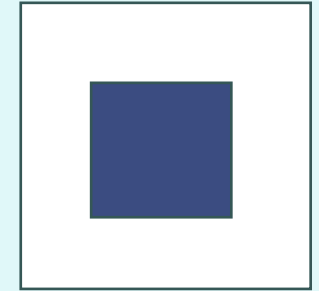
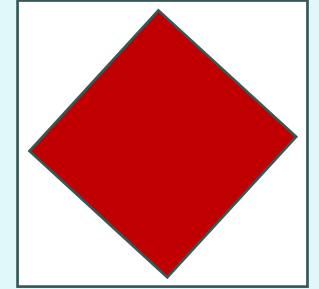
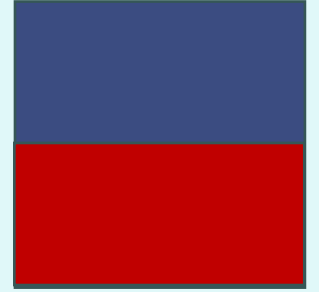
- Set the stage for cooperation
- Prepare to ask the key questions
 - Start broad, then narrow
- Document incidents with dates, witnesses, impact (e.g., how did the actions or omissions affect the employee's work)
 - Timeline
- Script examples for difficult questions



Interviews

Getting Under Way

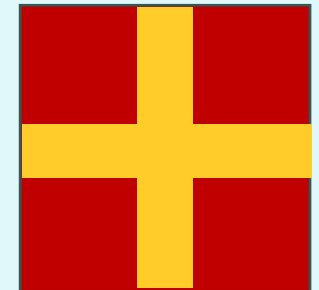
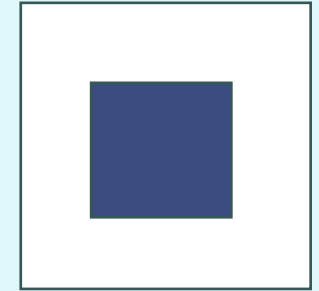
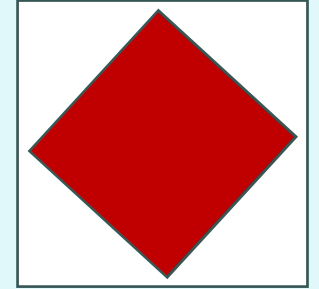
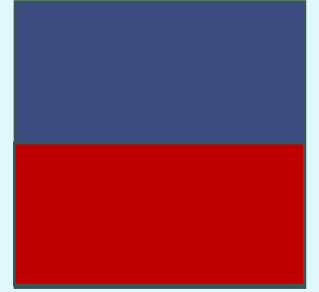
- Explain the process, confidentiality, non-retaliation
- Get detailed accounts of specific incidents
- Ask about dates, times, locations, witnesses
- Inquire about impact on work
- Ask about previous complaints/reports
- Explore whether this is a pattern of behavior
- Document exact quotes when possible
- Do not forget the follow up and catch-all questions



Interviews

Opening of Each Interview

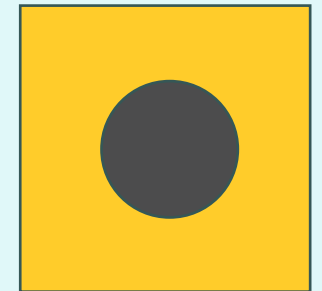
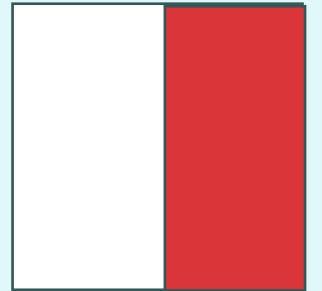
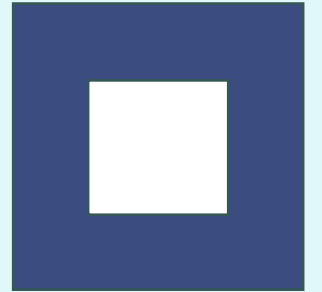
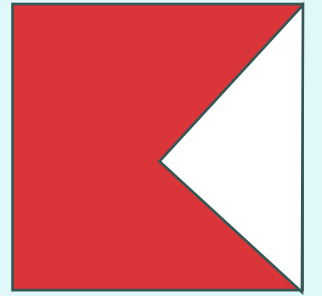
- Describe the purpose of the meeting
- Explain expectation of cooperation and truthfulness
- Discuss confidentiality
- Confirm that retaliation is prohibited



Interviews

Dealing with rough waters

- Identify all relevant witnesses
- Reluctant witnesses
- “I don’t remember”



Union Considerations

Investigations fundamentally the same

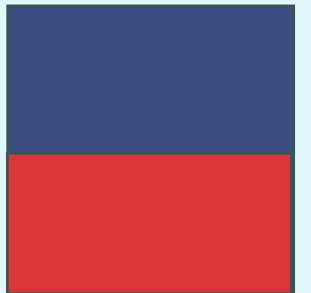
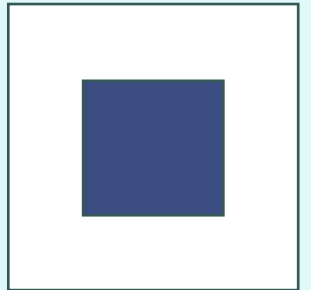
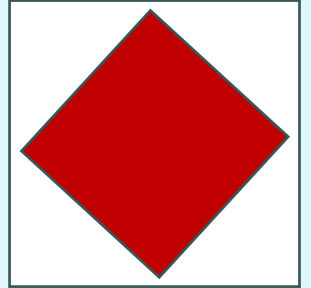
- CBA requirements
- Communications with Union
- Decisions regarding corrective action

Weingarten Rights

- Right for representative to be present – not to obstruct (CBA may impose additional requirements)
- Currently only applies to union employees

Section 7 Rights

- Protected concerted activity
- Protects union and non-union employees

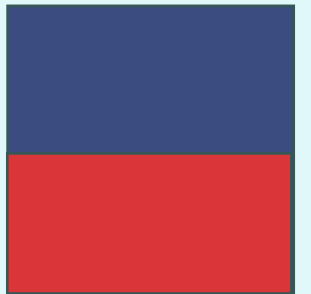
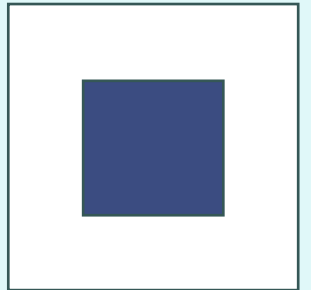
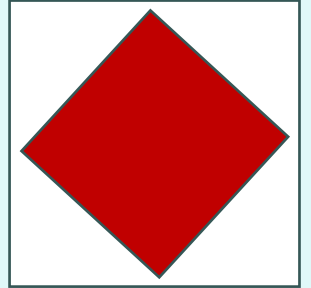




Investigation Reports

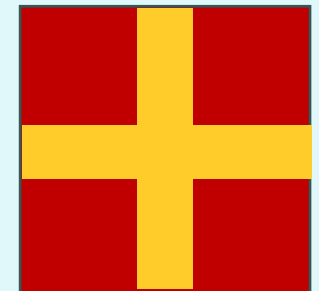
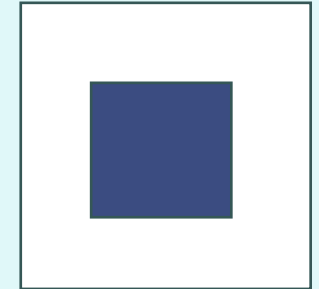
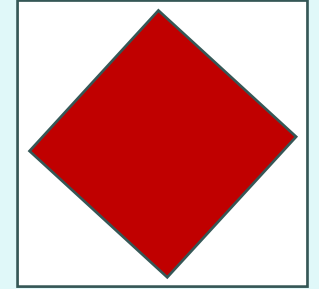
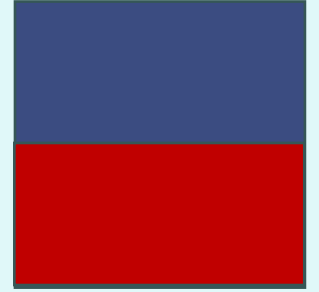
Scenario

- Seanna's version does not line up exactly with the text messages she provided
- The texts are inconclusive
- Davey denies key issues
- Davey got a new phone recently and does not have any of the texts
- The other witnesses did not see or hear anything
- Meredith says it is she said, he said



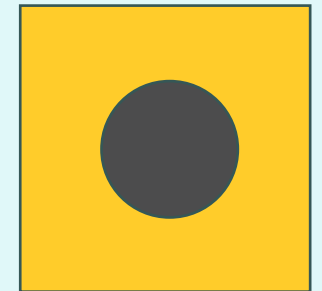
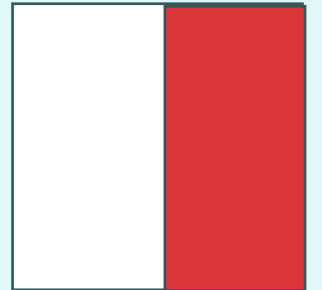
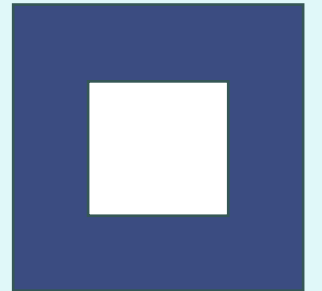
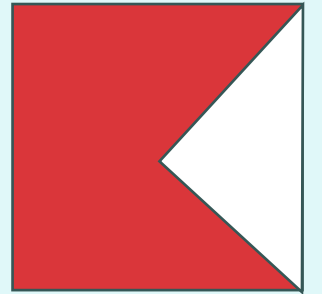
Make a Decision

- Determine credibility when stories conflict
- Proportional discipline decisions
- Consistent treatment for similar violations
- Internal policy and practices
- Document your reasoning, not just the conclusion



Elements of the Report

- Succinctly and accurately summarizes the allegations
- Makes credibility assessments
 - Common sense
 - Demeanor
 - Forthcoming or evasive
 - Corroborative or contradictory evidence
 - Past record of honesty or dishonesty
- Recaps interviews and evidence
- Substantiated or Unsubstantiated
- Recommendation on corrective action

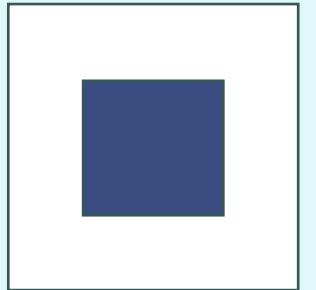
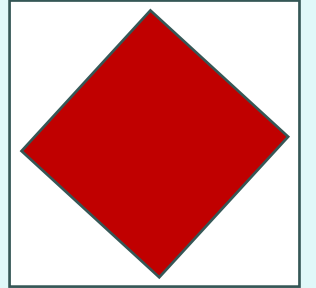
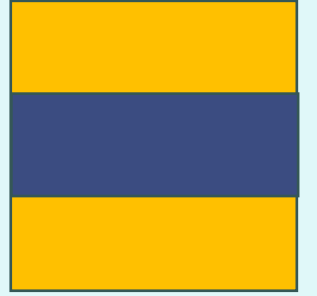




Common Errors

Navigation Mistakes

- Delayed investigations
- Improper order of witnesses
- Recordings of interviews
- Improper use of leading questions
- Failure to conduct follow-up interviews (where necessary)
- Privilege issues

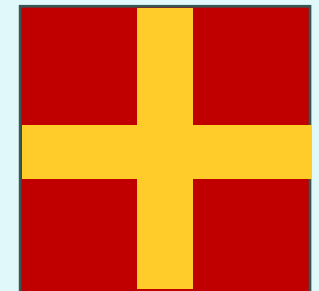
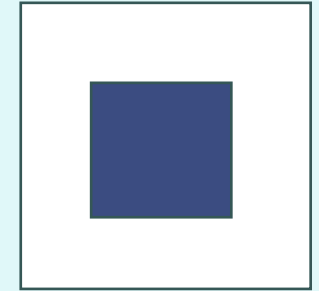
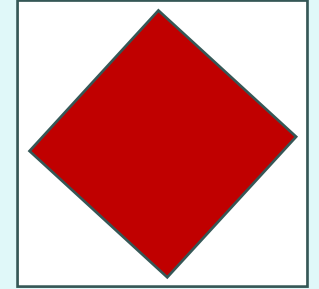
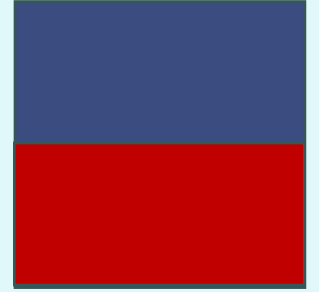


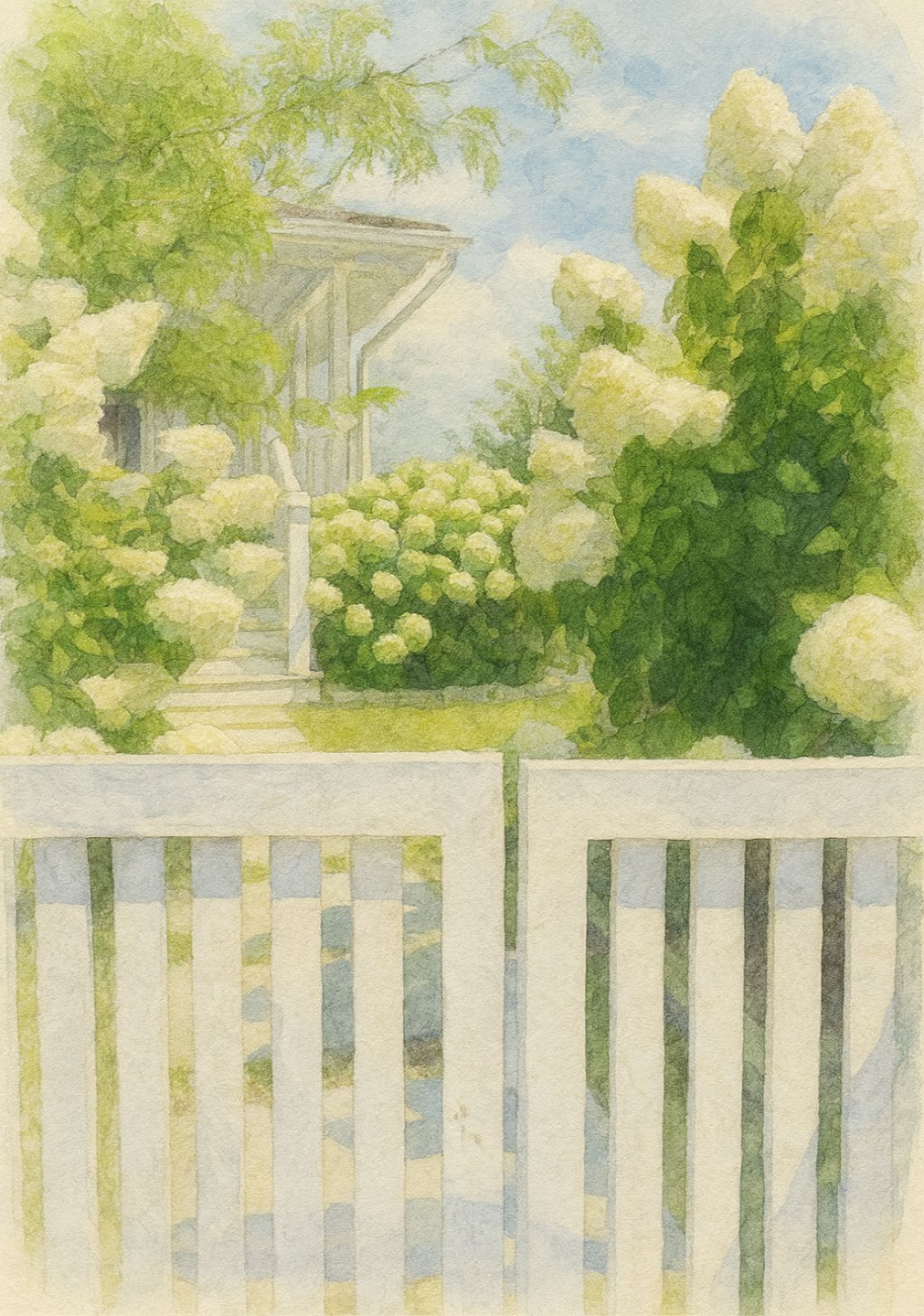
Privilege

- Attorney investigator is not enough
- Do not want fact-finder to also give the decision-maker legal advice
- Witness interview notes often not privileged
- Written record and future privilege logs
- Inadvertent waiver issues
- Considerations with subsequent representation
- Local law nuances

Log Mistakes

- Opinions vs. facts
- Insufficient detail about decision-making process
- Missing follow-up documentation
- Insufficient notes
 - Editorialized
 - Non-specific
- Poor organization
- Confusing timeline
- Not referencing evidence collected
- Obtaining written statements from witnesses in lieu of interviews
- Not preserving evidence – e.g. Slack, editable cloud docs



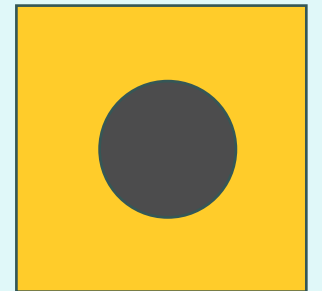
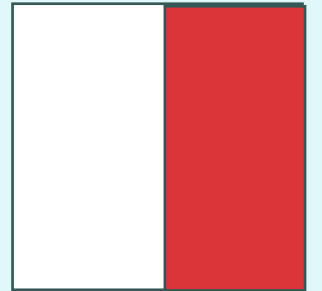
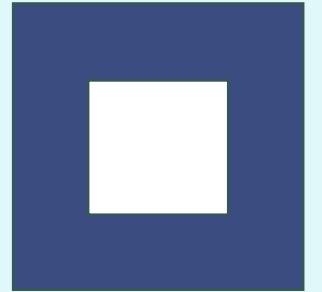
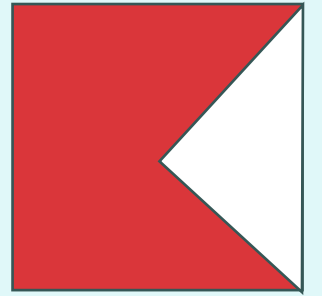


Timing is Important

Action	Timing	Rationale
Initial Response	24-48 hours	Demonstrates prompt action
Start Investigation	Within 1 week	Prevents reckless indifference allegation
Complete Investigation	2-4 weeks	Balances thoroughness with promptness
First Follow-Up	30 days post-completion	Shows ongoing monitoring

Berthing Mistakes

- Failing to lower the boom (take corrective action)
- Taking corrective action, but not monitoring the situation
- Poor documentation of ongoing compliance efforts
- Failing to inform complainant and wrongdoer that investigation is closed
- Not checking in/confirming no retaliation
- Improper storage of investigation file





Takeaways

1. Fairly and promptly find out what happened
2. Consider the significant legal exposure if company has knowledge and does not conduct a proper investigation – includes the supervisor's knowledge
3. Ensure counsel and key leaders are properly notified and maintain strict confidentiality
4. Stick to structure for opening statements
5. Assess credibility and reach a conclusion
6. Decide on appropriate corrective action (and implement)
7. Sufficient investigation reports

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Megan Janes

Partner

mjanes@fisherphillips.com

954.847.4717

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