A top-down view of a desk with a laptop, glasses, and a pen. The laptop is on the left, the glasses are at the top right, and the pen is on the right side. The background is a light-colored surface.

Work**Smarts** Half-Day Seminar

Workplace Investigations: Keeping your Hands on the Wheel and Your Eyes on the Prize

Stephanie Lovett-Bowman, Partner, Kansas City
Rachael Thomson, Attorney, Houston

Presenters



Stephanie Lovett-Bowman

Partner | Kansas City, MO

816.292.8216 | slovettbodyman@spencerfane.com



Rachael Thomson

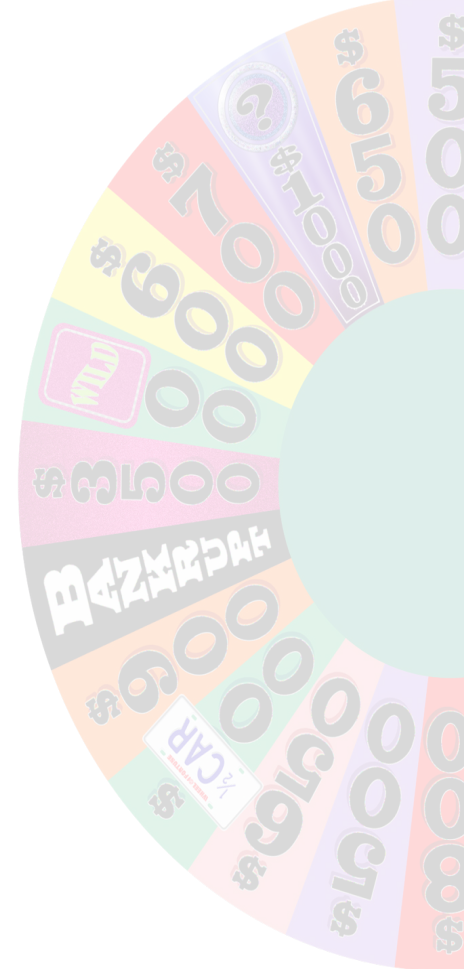
Associate | Houston, TX

713.212.2628 | rthomson@spencerfane.com



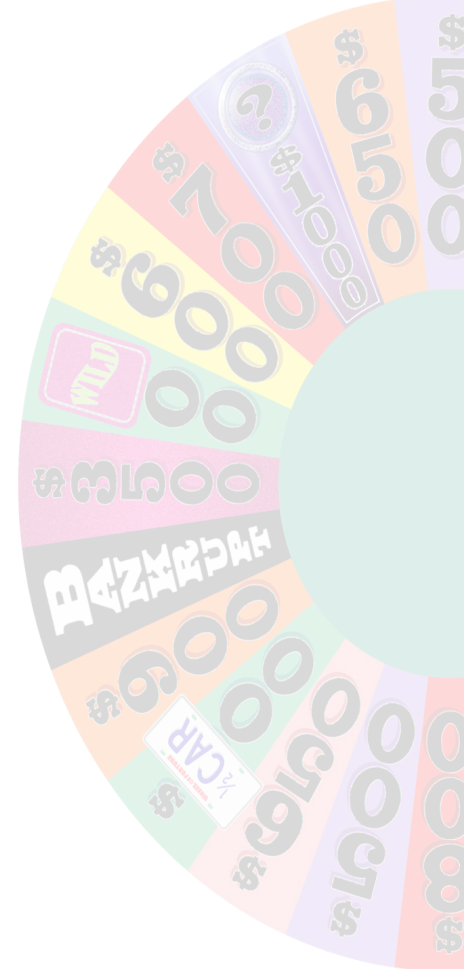
When to Investigate?

- Complaints or concerns of potential violations of company policy
- Law enforcement inquiries
- Lawsuits
- Whistleblower complaints
- Anonymous/Hotline tips
- Exit interviews
- Cease/Desist Letters
- Any other circumstance giving rise to allegations of misconduct



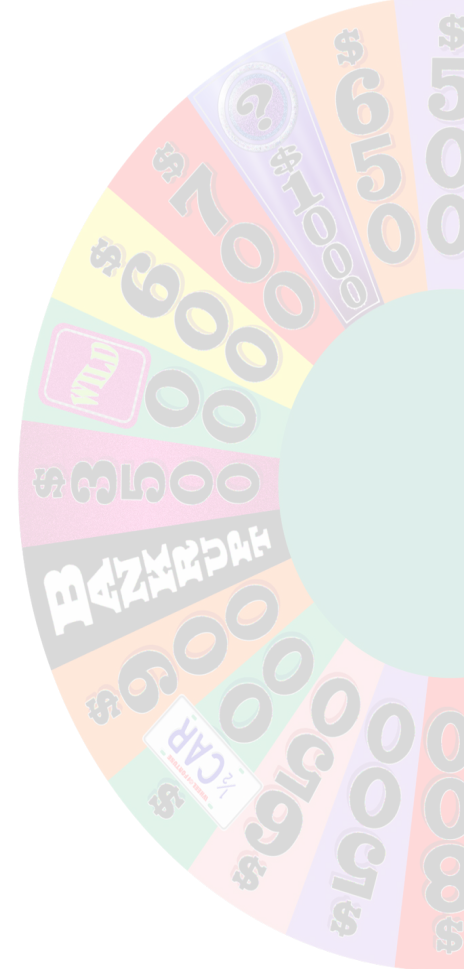
Why Investigate?

- Need objective view of facts
- *Reasonable* investigation can insulate the company from liability
- E.g., sexual harassment – prompt correction is part of the employer's defense



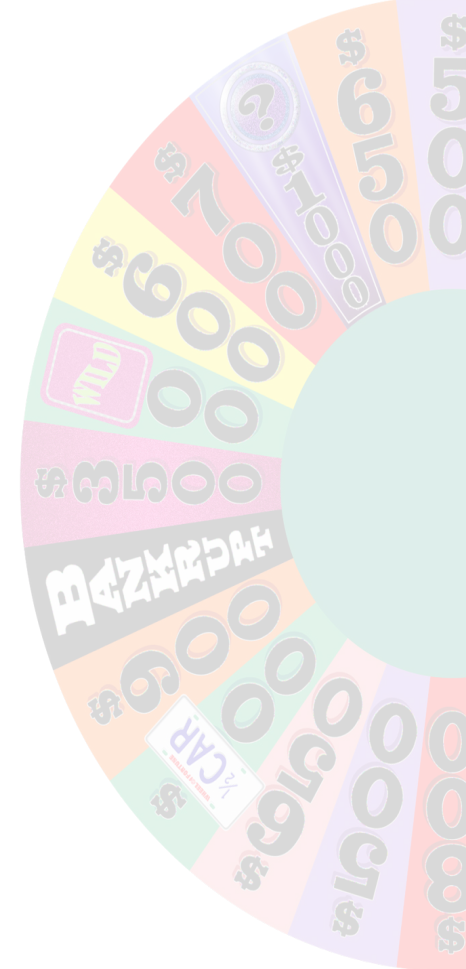
Who Conducts the Investigation?

- Key: Investigator has to be conflict-free
- HR issues – Usually senior manager or HR staff, *unless* dispute involves senior manager
- Issues involving senior managers – Legal counsel or professional investigator



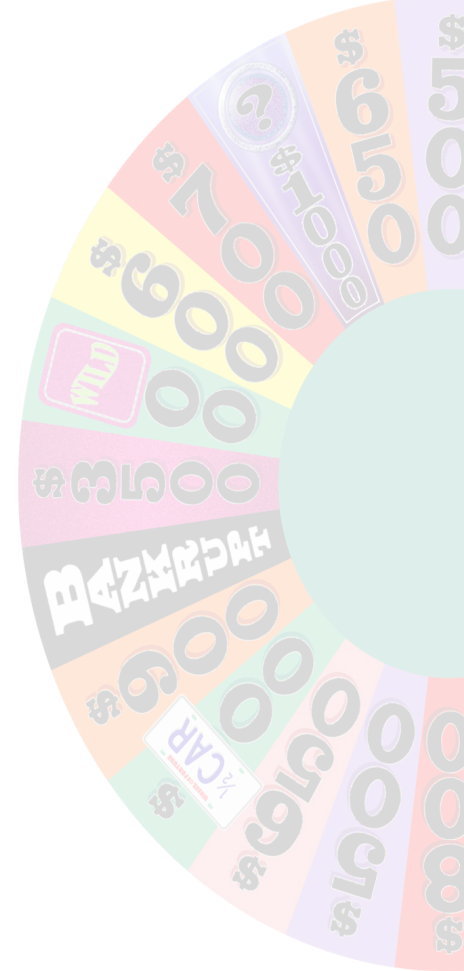
When to Go Outside

- Avoiding a conflict of interest
- When litigation has or is likely to result from the matter under investigation
 - Using outside counsel allows investigation to be conducted under attorney-client privilege
 - For public employers, in most states, any written report is a closed record



What to avoid

- Delays in starting the investigation
- Not recognizing and preserving attorney/client privilege
- Inexperienced investigator



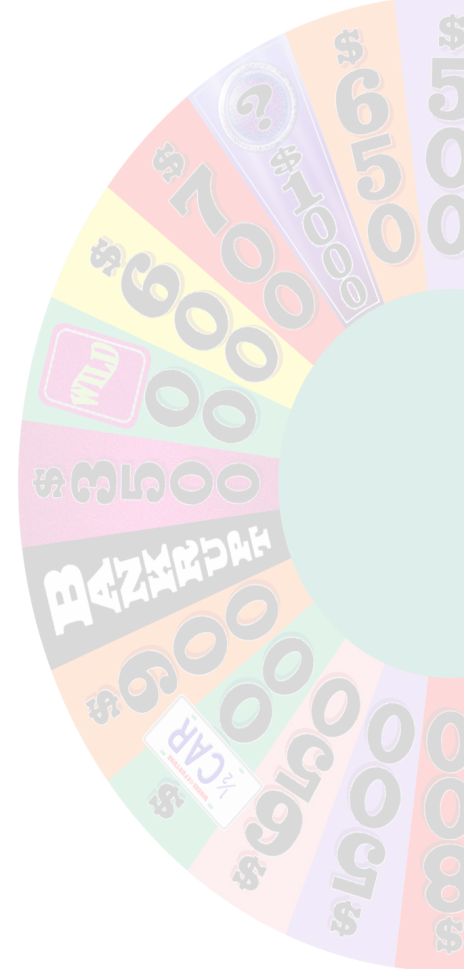




Any guesses?

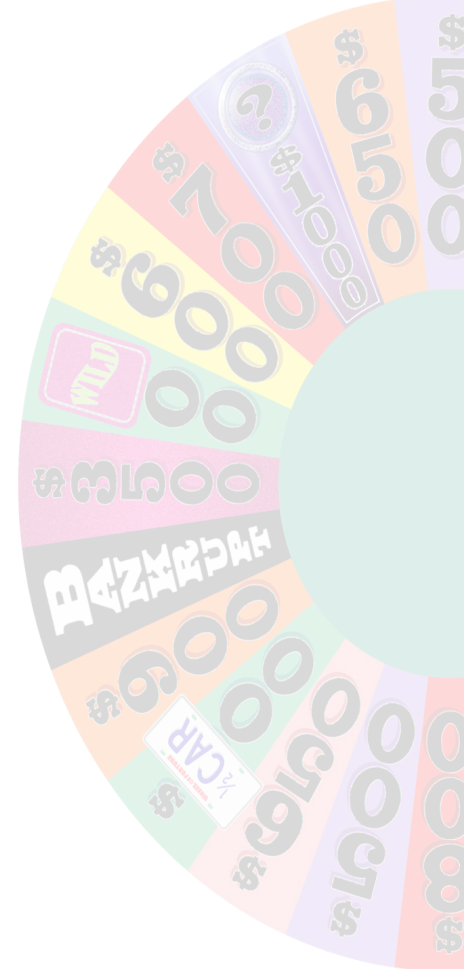
Scope of Investigation

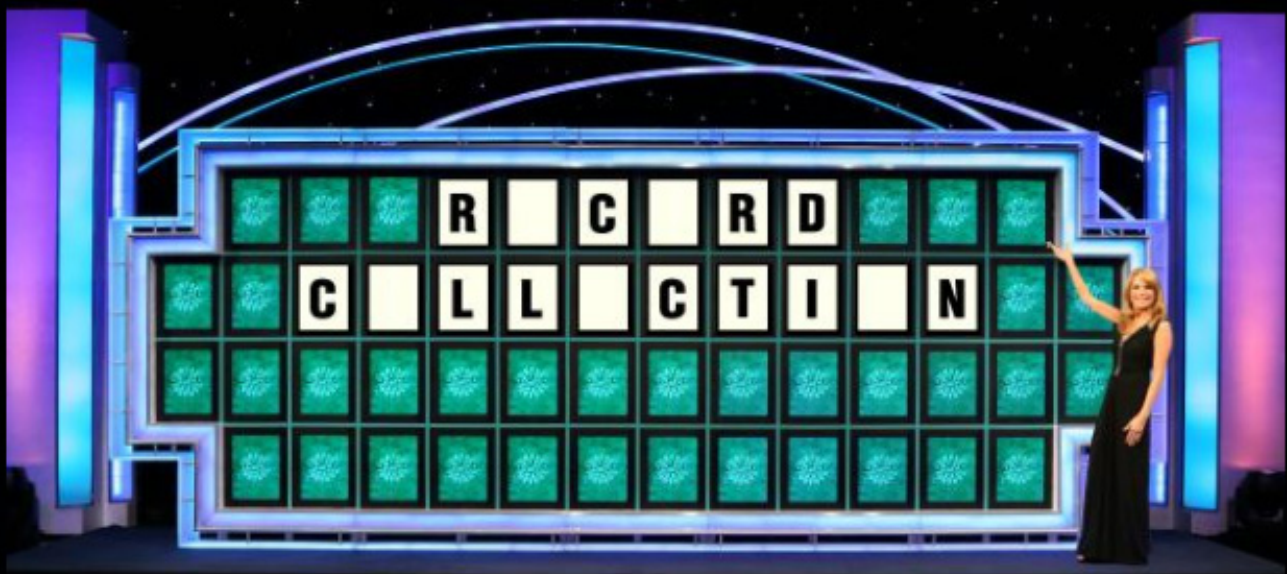
- Review company policy
 - Check for: Timelines, notice rights, outcome rights, procedural requirements outlined in policy
 - Sometimes policy provides standard of evidence
 - Ensures integrity, consistency and efficiency in the investigation process
- If no formal policy, is there an investigation checklist or guideline?



What to avoid

- Not framing investigation by allegations
- Parameters too narrow or too broad
- Stopping investigation too early... or over investigating



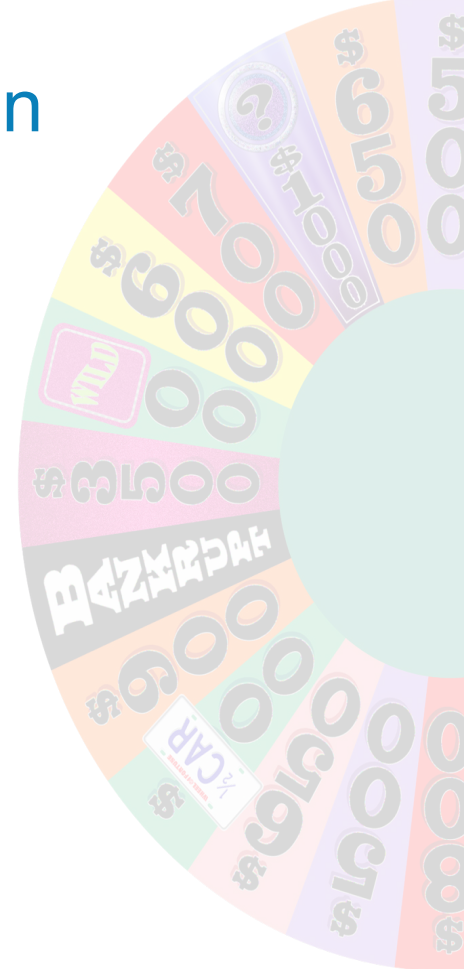




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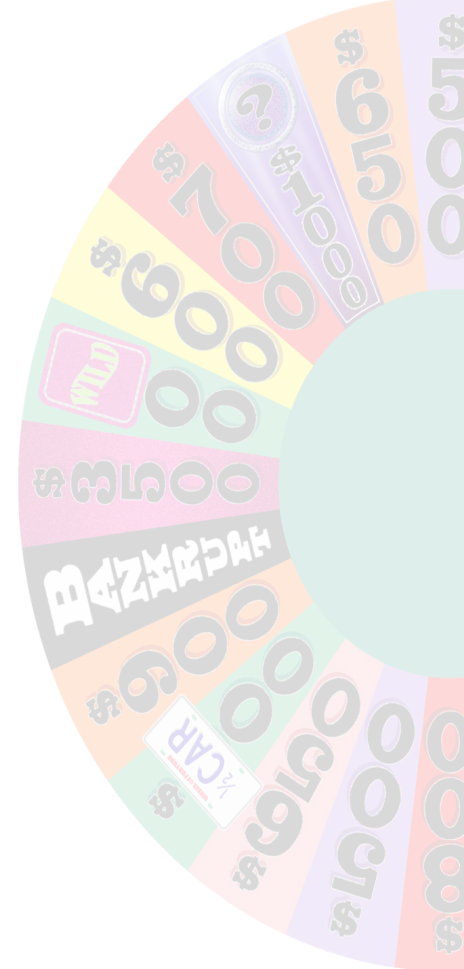
Steps in Investigation – Record Collection

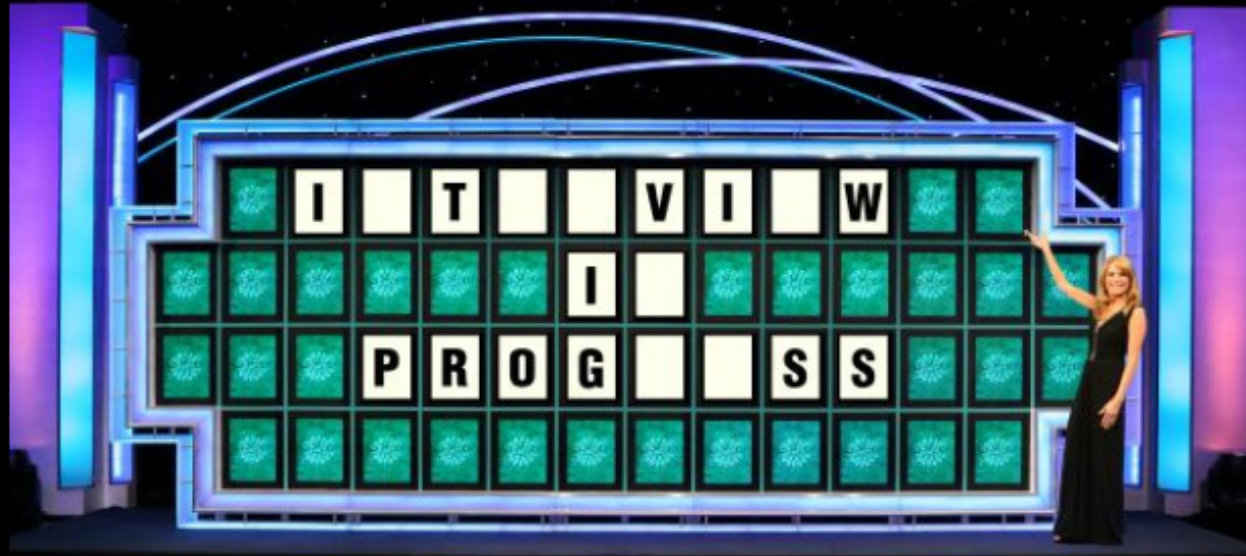
- Think:
 - Who might have relevant written information?
 - What form might that information take? Emails (including personal accounts), texts, social media posts, notes, pictures, recordings, etc.
 - How do I get that information? IT staff, requests from students/staff, searching social media
- Try getting as much as possible before interviews



What to avoid

- Not being flexible
- Spoliation of documents
- Inadequate doc collection



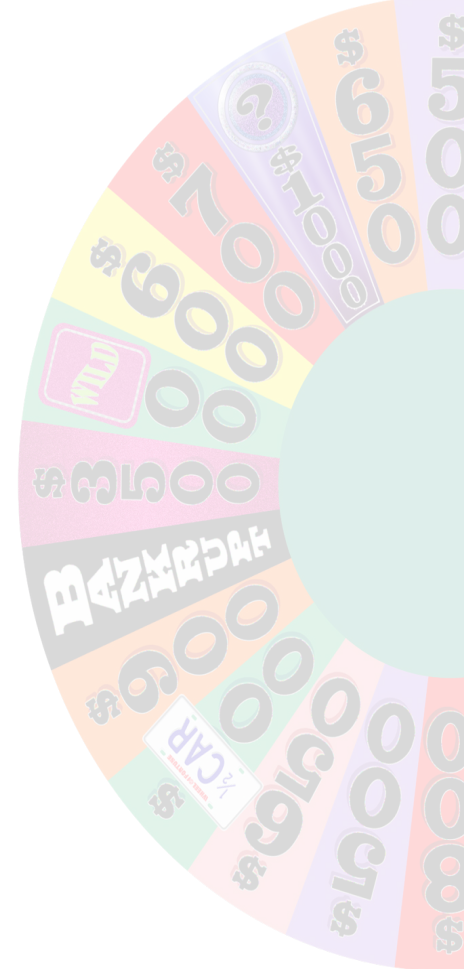




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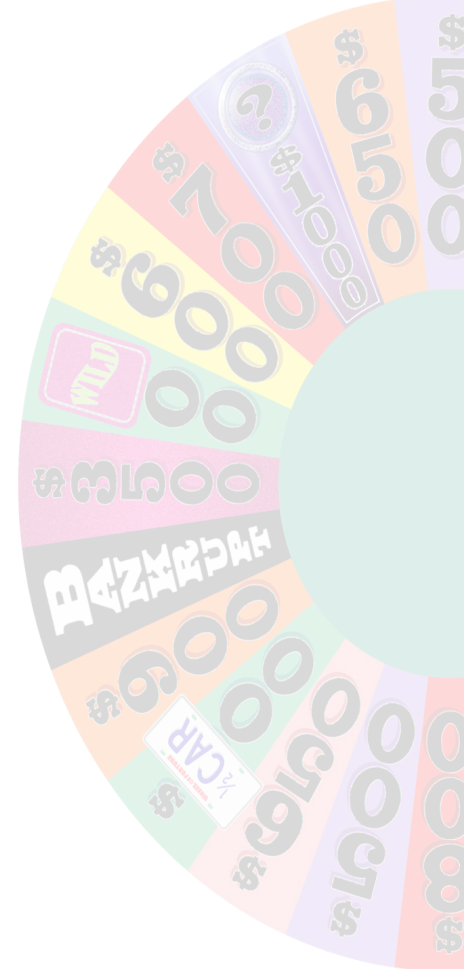
Interviews – Order of Interviews

- Complainant should be interviewed first if possible
- Then, interviews of mere witnesses
- Target
- Go back as needed
- Be thorough



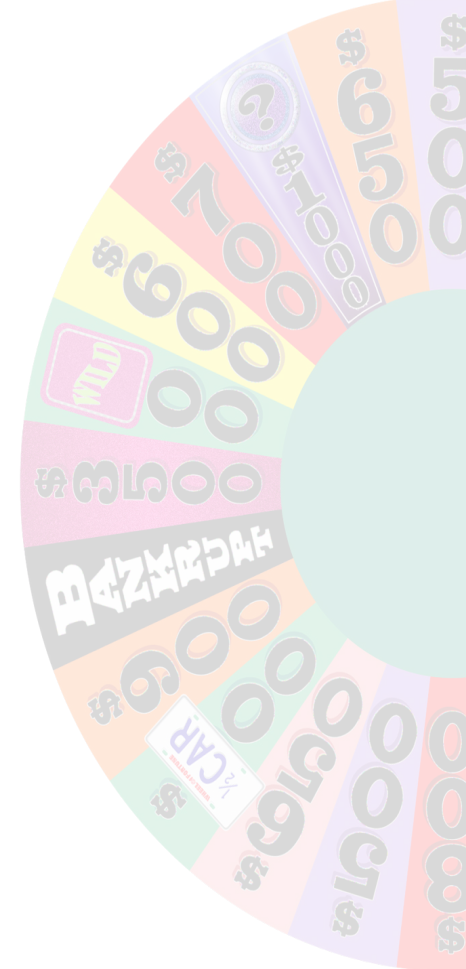
Interviews – Introductory Script

- Make your role clear – gathering info, not an advocate for anyone
- Explain why you are conducting interview – try to be general
- Explain obligation to cooperate



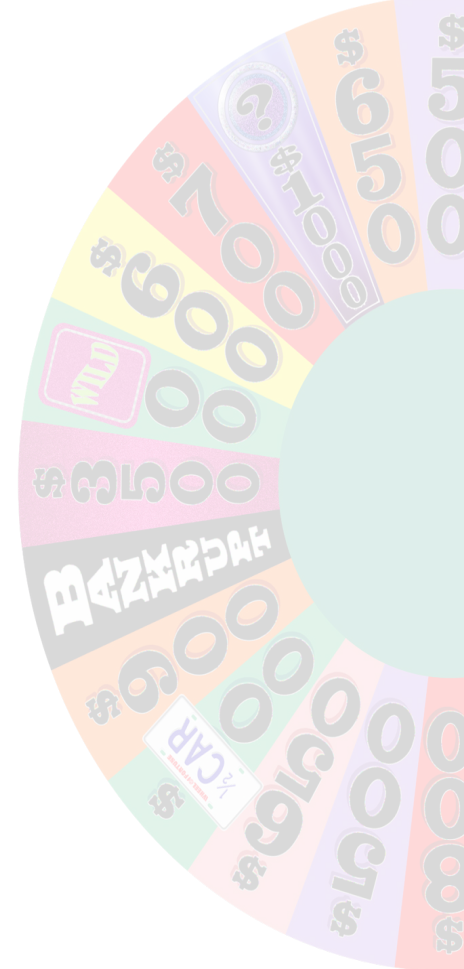
Interviews – Introductory Script

- Do not promise complete confidentiality – someone is going to make a decision based on the investigation
- Require confidentiality and explain why it's needed to protect integrity of investigation
- Reaffirm non-retaliation
- Ask for follow-up if anything else is recalled later



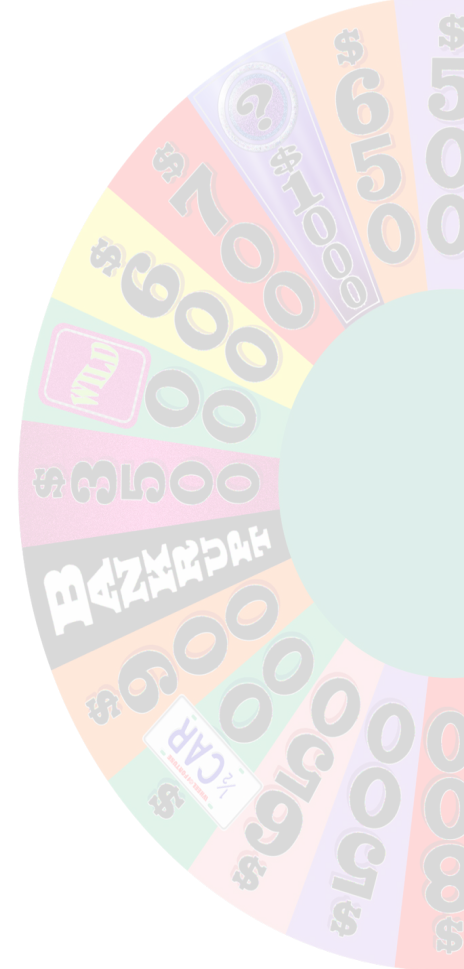
Interviews – Complainant

- Funnel approach – Start broad, then get details
- Discover other witnesses
- Probe motive for complaint
- Advise that he/she will be advised of outcome
- Ask that any perceived retaliation be reported immediately



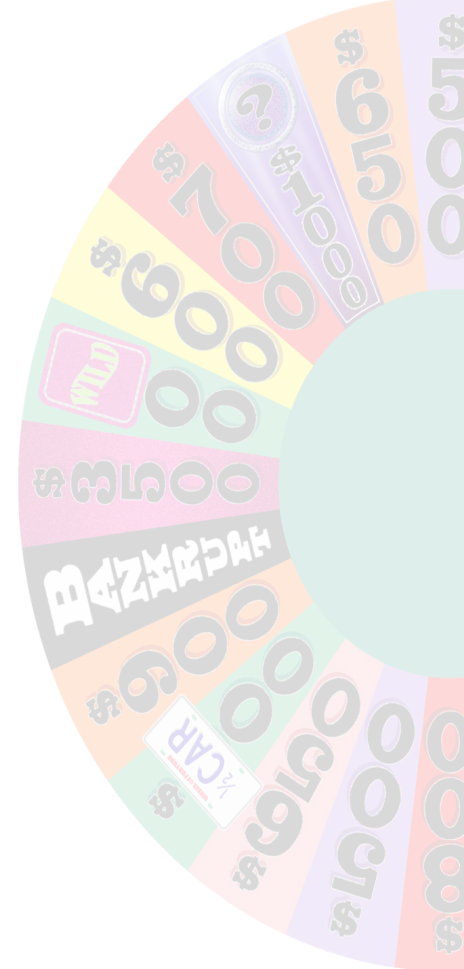
Interviews of Witnesses

- Explain why they are being questioned, in general terms (“I understand you may have information about...”)
- Avoid disclosing the evidence before asking a question – funnel approach
- Ask focused questions about what they saw/heard/know



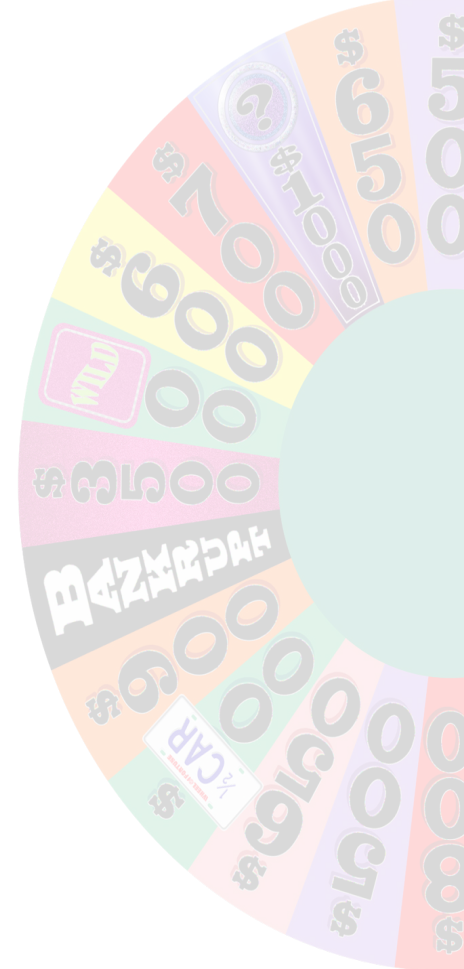
Interviews – Target

- Generally describe the complaint
- Use the funnel approach
- Probe motives for complaint
- Ask if anything to add
- Admonish not to retaliate



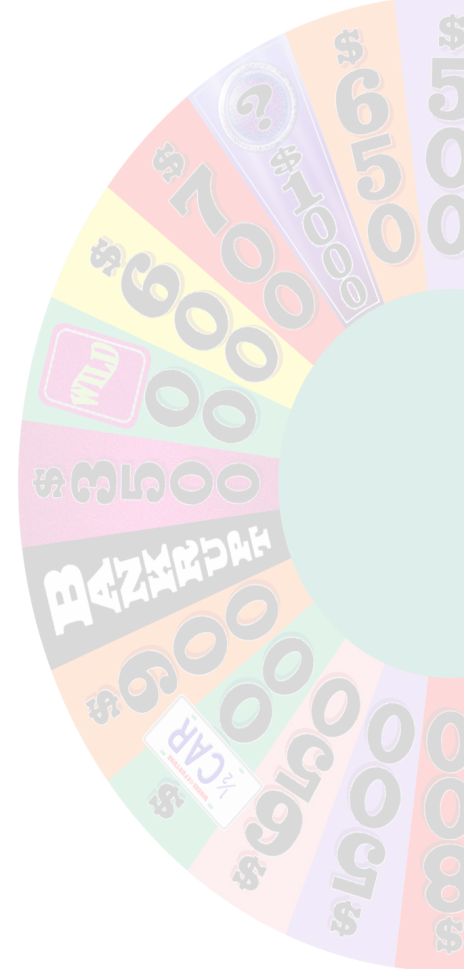
Interview Considerations

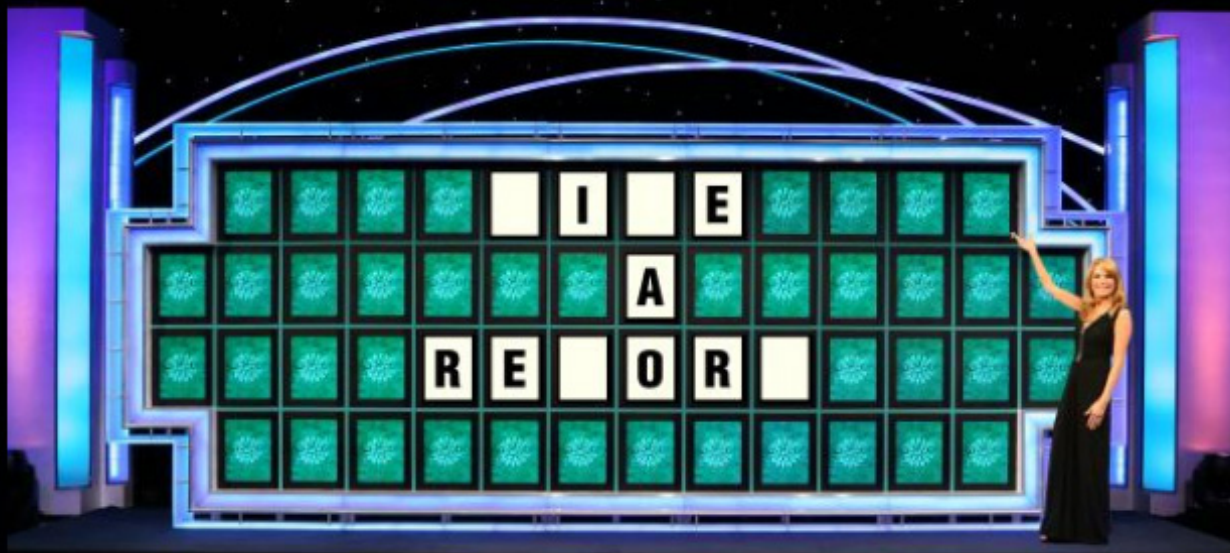
- Record? Yes, if matter is serious (but only you record) or if lots of interviews
- Third parties present?
 - Union rep? Probably
 - Attorney? No right to counsel
 - Other persons, e.g., friends, co-workers? No



What to avoid

- Overly aggressive interview tactics
- Jumping to conclusions
- Overpromising
- Not following-up



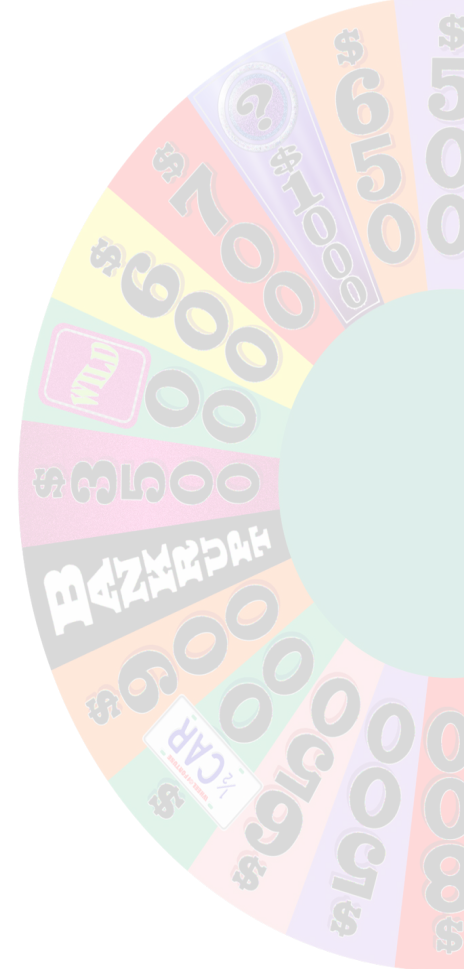




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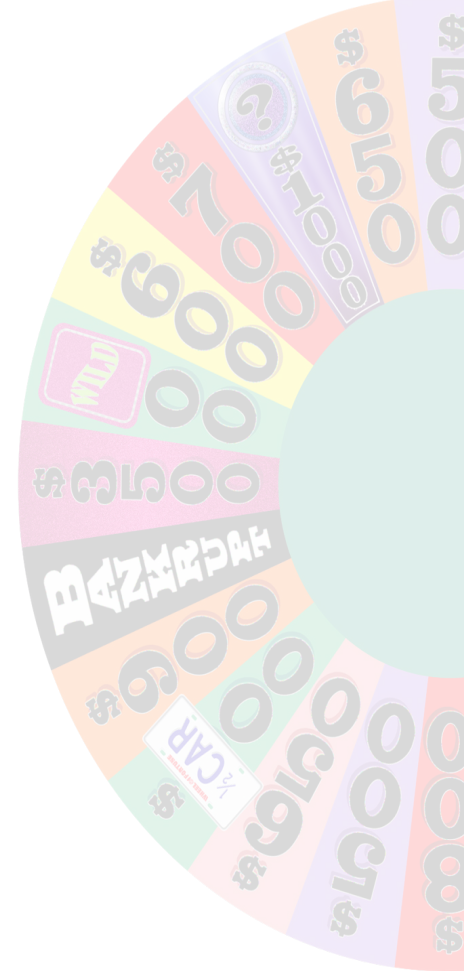
Reporting on Investigation

- Sometimes, written report is required under policy or law
- Written report may be discoverable unless prepared by attorney
- Consult with legal counsel on whether to create written report, if litigation is possible
- Written report can be helpful to show that action was taken and matter taken seriously



What to avoid

- Mistakes in the final report
- Inadvertent disclosure





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Top Tips

Top Tips

- Outline topics of investigation before beginning
- Confirm allegations with complainant
- Avoid over disclosure to participants
- Document efforts to contact witnesses and obtain records
- Follow policy timelines and standards of evidence
- Reach thoughtful conclusions
- Be flexible!

Thank You!



Stephanie Lovett-Bowman

Partner | Kansas City, MO

816.292.8216 | slovettbowman@spencerfane.com



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