

EMPLOYEES BEHAVING BADLY: A 5-POINT PLAN FOR CONDUCTING INVESTIGATIONS AND IMPROVING WORKPLACE RELATIONS

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 **ADDLESHAW
GODDARD**

MORE IMAGINATION **MORE IMPACT**



SPEAKERS



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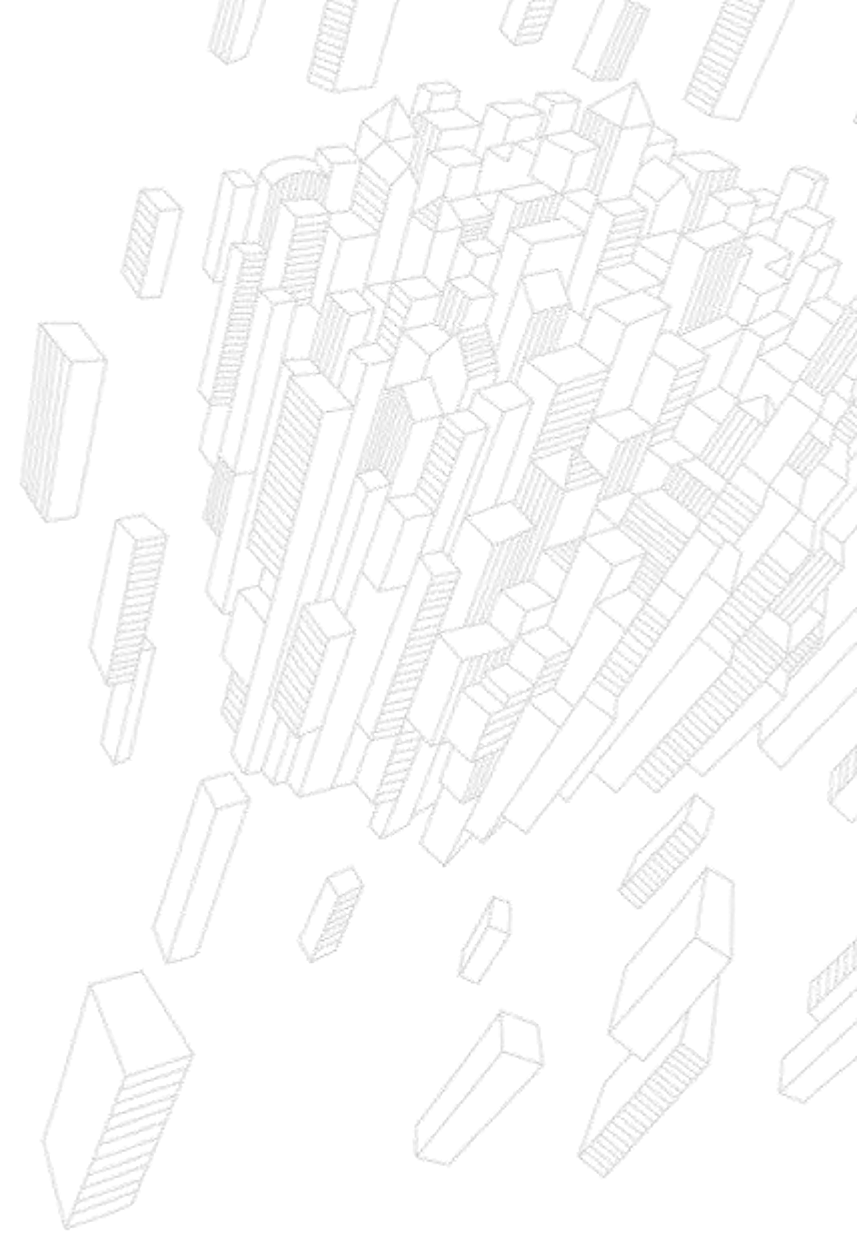


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Partner, Employment

WHAT ARE WE GOING TO COVER?

Why conduct an internal investigation?

- Planning the investigation: scoping and the first 24 hours
- Legal Privilege
- Project delivery: data mining, interviews and expert evidence
- Reporting the outcome of the investigation
- Post investigation actions (e.g. disciplinary, standard of fairness, regulatory referral, criminal proceedings ...)



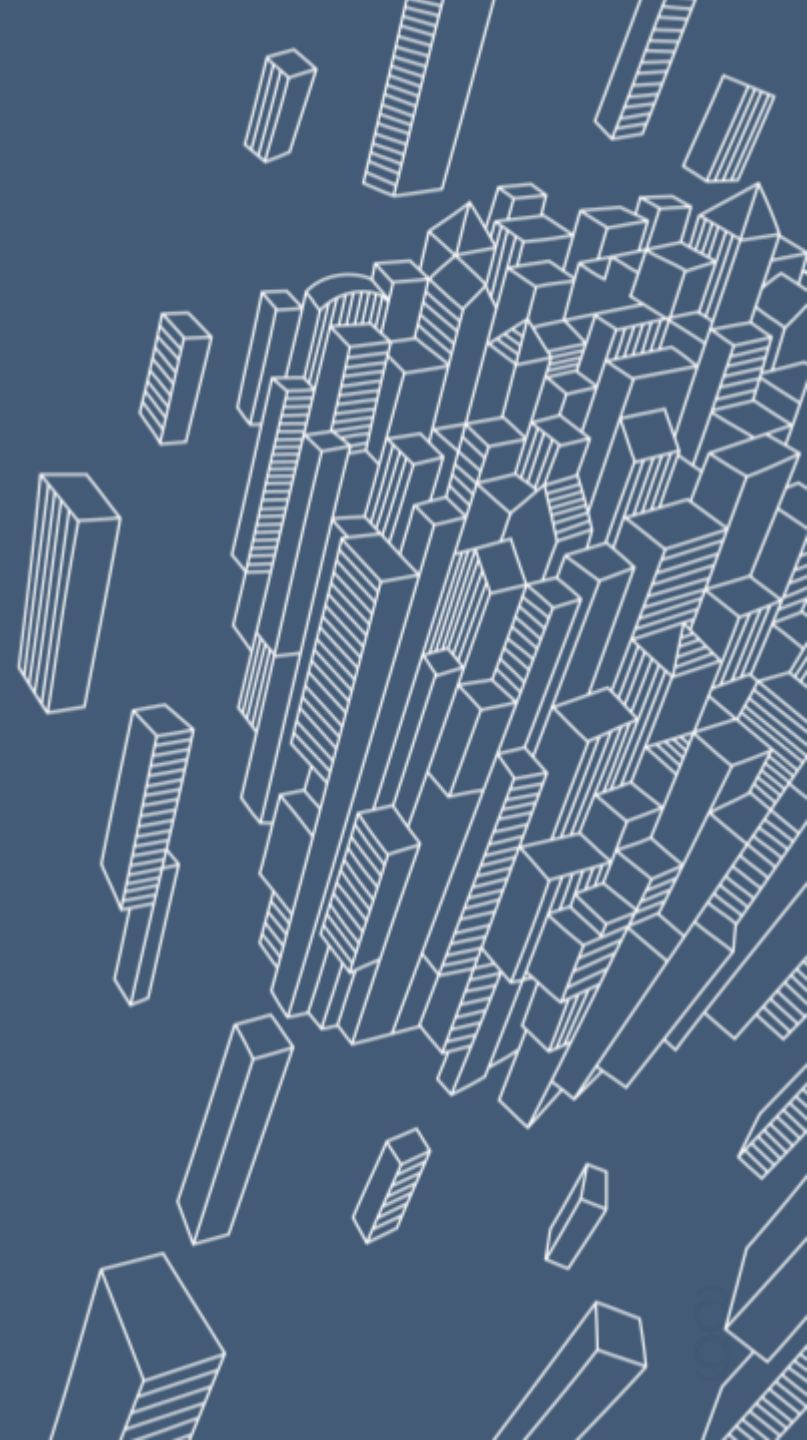
INVESTIGATIONS: INCREASED VOLUME, PROFILE AND COMPLEXITY

More whistleblowing and cultural shift (e.g., #metoo) – greater awareness / publicity

More complex – e.g. increased regulatory overlay / reporting

More use of independent / external investigators

PLANNING AND SCOPING



SCOPING: TERMS OF REFERENCE

Purpose and remit
of investigation

Identifying the allegations

Identifying relevant
internal policies

Standard of proof

Purpose of investigation: “case to
answer” or determine issue

How will findings be presented
and who will they be sent to?

SCOPING

Objective setting

- What are the immediate lines of enquiry?
- What is the overall objective?

Probability / impact assessment

- How serious are the alleged issues?
- What evidence is available?

Resource requirements

- How many people will be needed?
- What skill sets or subject matters experts?



THE FIRST 24 HOURS: TEAM SELECTION



Create an internal executive committee



Establish a working group – likely to include HR, Legal, IT and Risk / Compliance



Consider need for external assistance (e.g. lawyers, accountants, IT forensics)



Consider potential conflicts in setting up a team

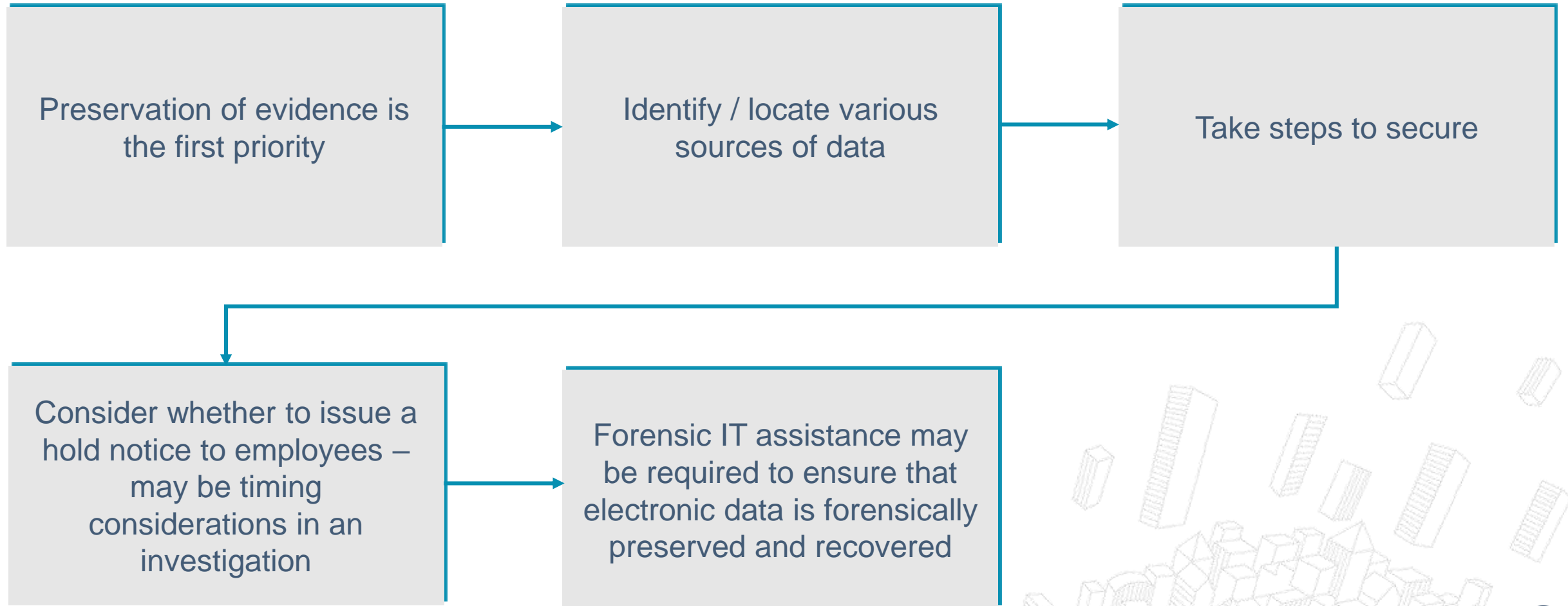


Document the governance and working arrangement for the project teams – include arrangements for the retention of privilege



Consider whether an insider list is required

THE FIRST 24 HOURS: DATA RETENTION AND RECOVERY

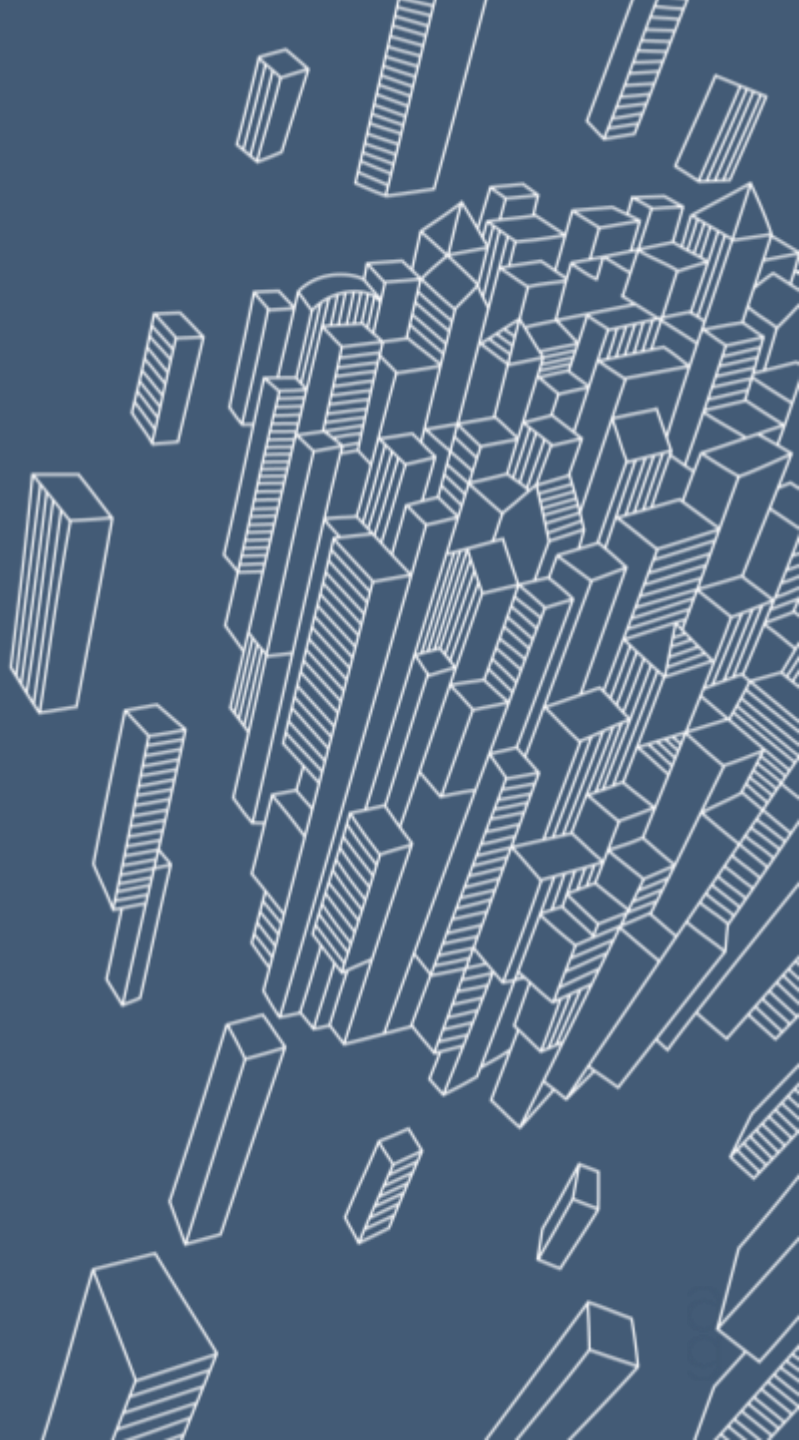


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THE FIRST 24 HOURS: NOTIFICATIONS

- Consider whether any internal communications are necessary
- Is any form of notification or report required?
 - FCA / NCA / Police / Insurers / Lenders / Market Announcements
- PR consultants may be required in cases where likelihood of publicity

LEGAL PRIVILEGE



LEGAL PRIVILEGE

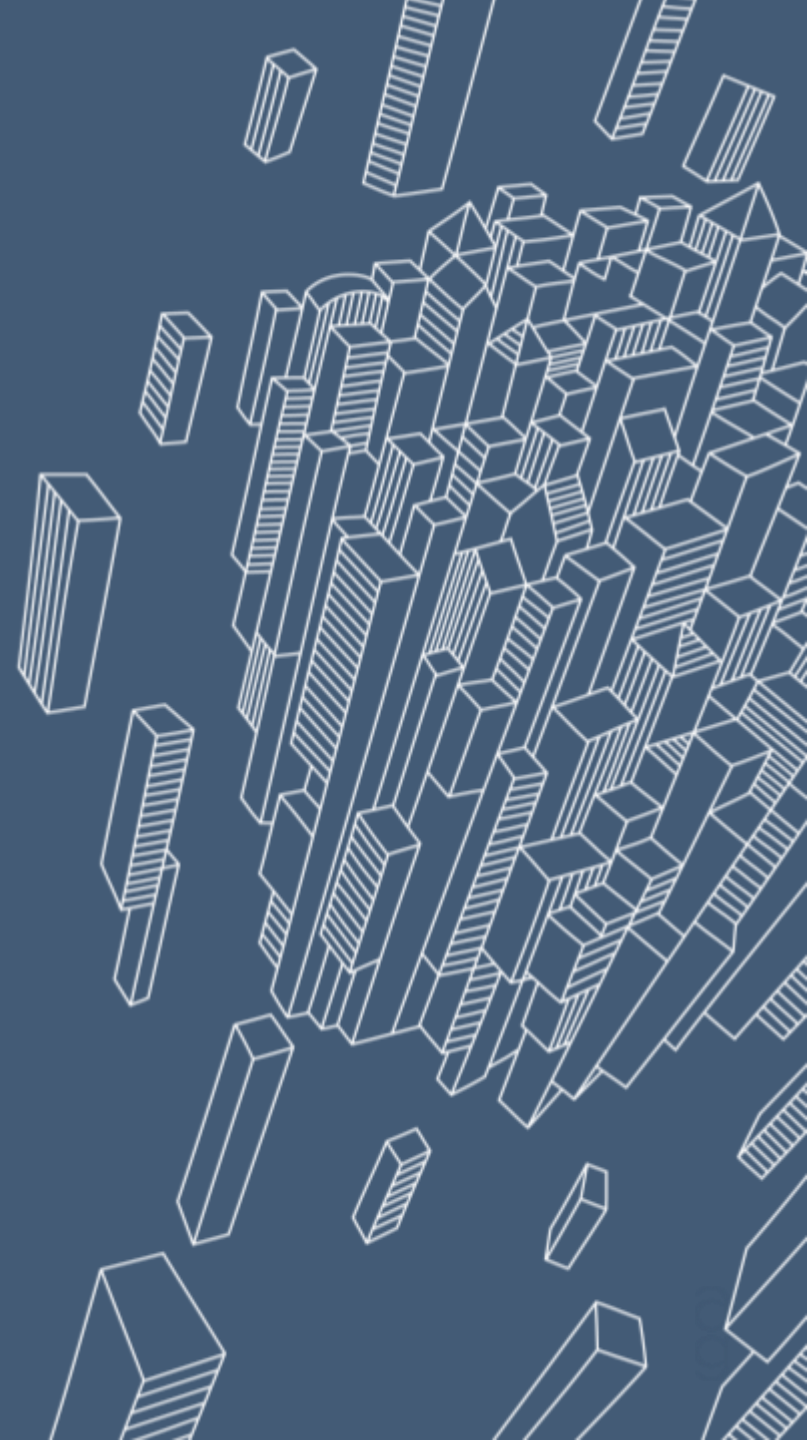
- Why conduct an internal investigation?
- Legal Advice Privilege: communications between lawyers and clients for the dominant purpose of legal advice
- Litigation Privilege (wider): dominant purpose is litigation whether existing or contemplated
- Reasons for wanting privilege:
 - To ascertain legal / regulatory liability
 - To keep control and maximize options
- Reasons for not wanting privilege?



LEGAL PRIVILEGE

- SFO v ENRC (2018) CA
 - Overturned narrow approach to Litigation Privilege in internal investigations
 - Narrow definition of “client” from Three Rivers remains
- Identifying “client” group: control distribution
- Labelling emails / documents “confidential & legally privileged”
- Witness statements – legally privileged?
- Secure email address + passwords

PROJECT DELIVERY



ORGANISING INTERVIEWS

Identify potential witnesses / suspects

Establish the order of interviews

Agree the format of interviews:

- Fact finding / inquisitorial?
- Method of recording?
- Provision of legal assistance?

Prepare interview bundles

CONDUCTING INTERVIEWS

Be prepared!

Use appropriately trained interviewers

Tailor approach according to the nature of the interview

- e.g. avoid leading questions on fact-finding interviews

Never give unnecessary or inappropriate assurances

Keep it formal but neutral – even with ‘friendly’ witnesses

Give witnesses time to consider and answer questions – do not harass / bully

Do not feel compelled to stick rigidly to pre-planned questions

Do not express a view or opinion on the witness’ evidence

Recording the interview – form, approval and retention, privilege

TRICKY ISSUES



Anonymity

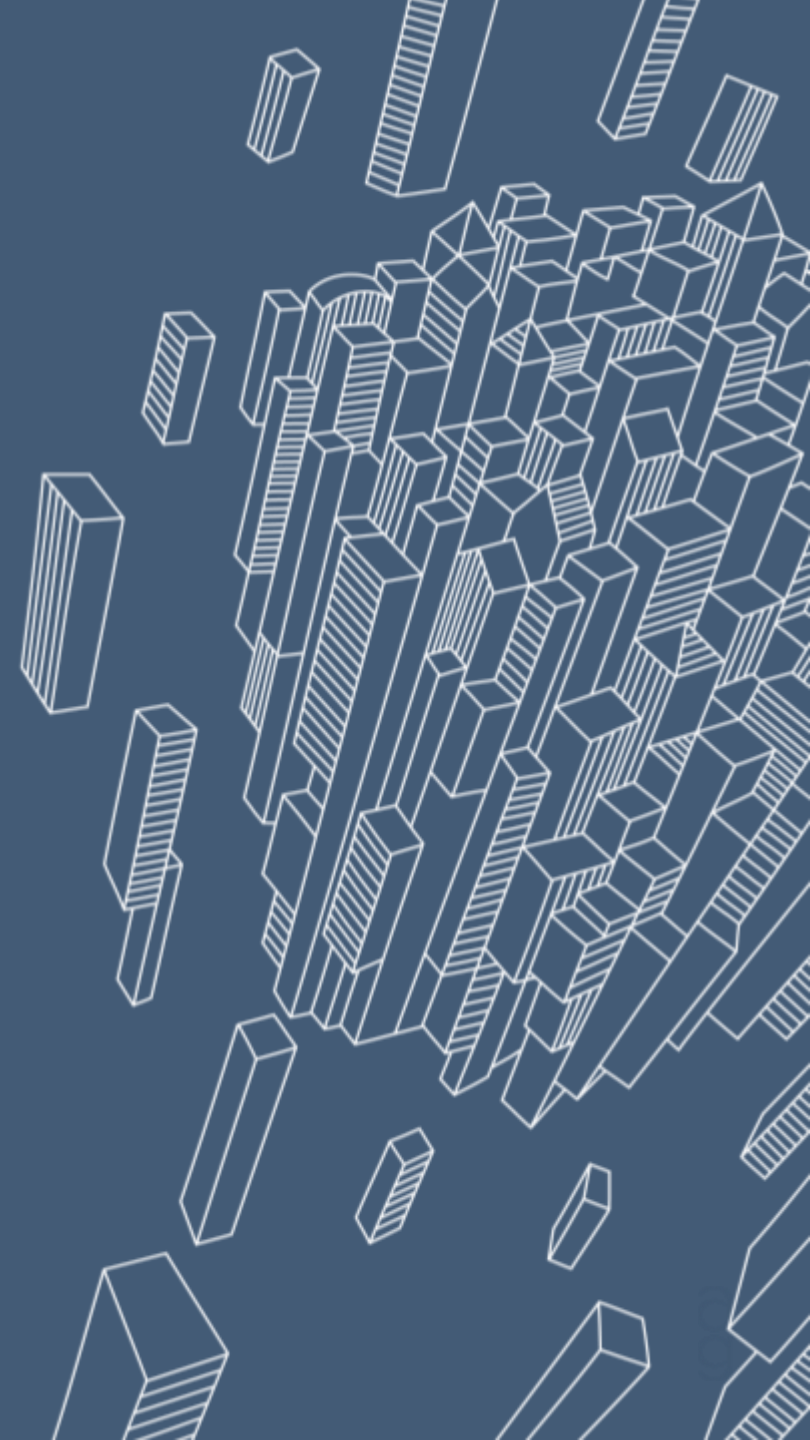


Confidentiality



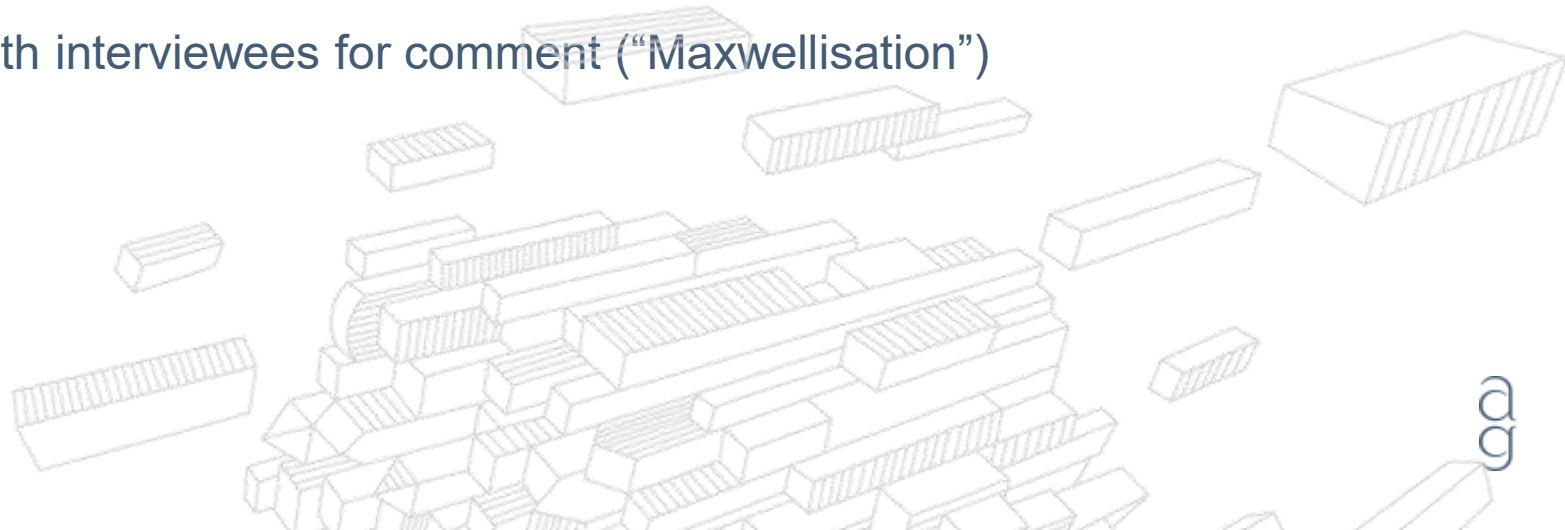
Suspension

OUTCOMES



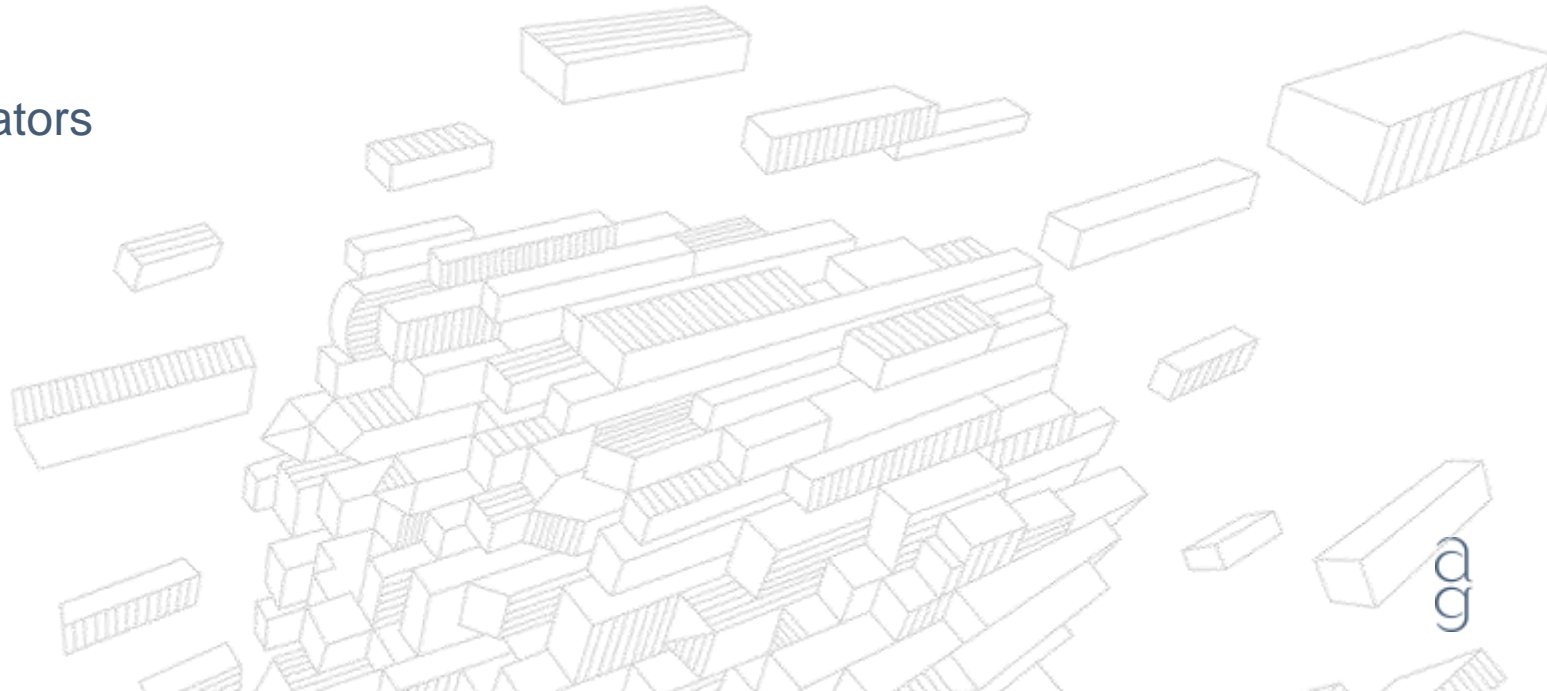
REPORTING

- Disciplined reporting
- Be clear about the findings and recommendations
- Produce provisional report
- Care with language / phraseology – Who will see the report?
- Consider who needs to see the drafts – Do not risk losing privilege
- Consider the format of the report – Executive Summary / Principal Conclusions?
- May be appropriate to share extracts with interviewees for comment (“Maxwellisation”)
- Sharing the report – limited waiver

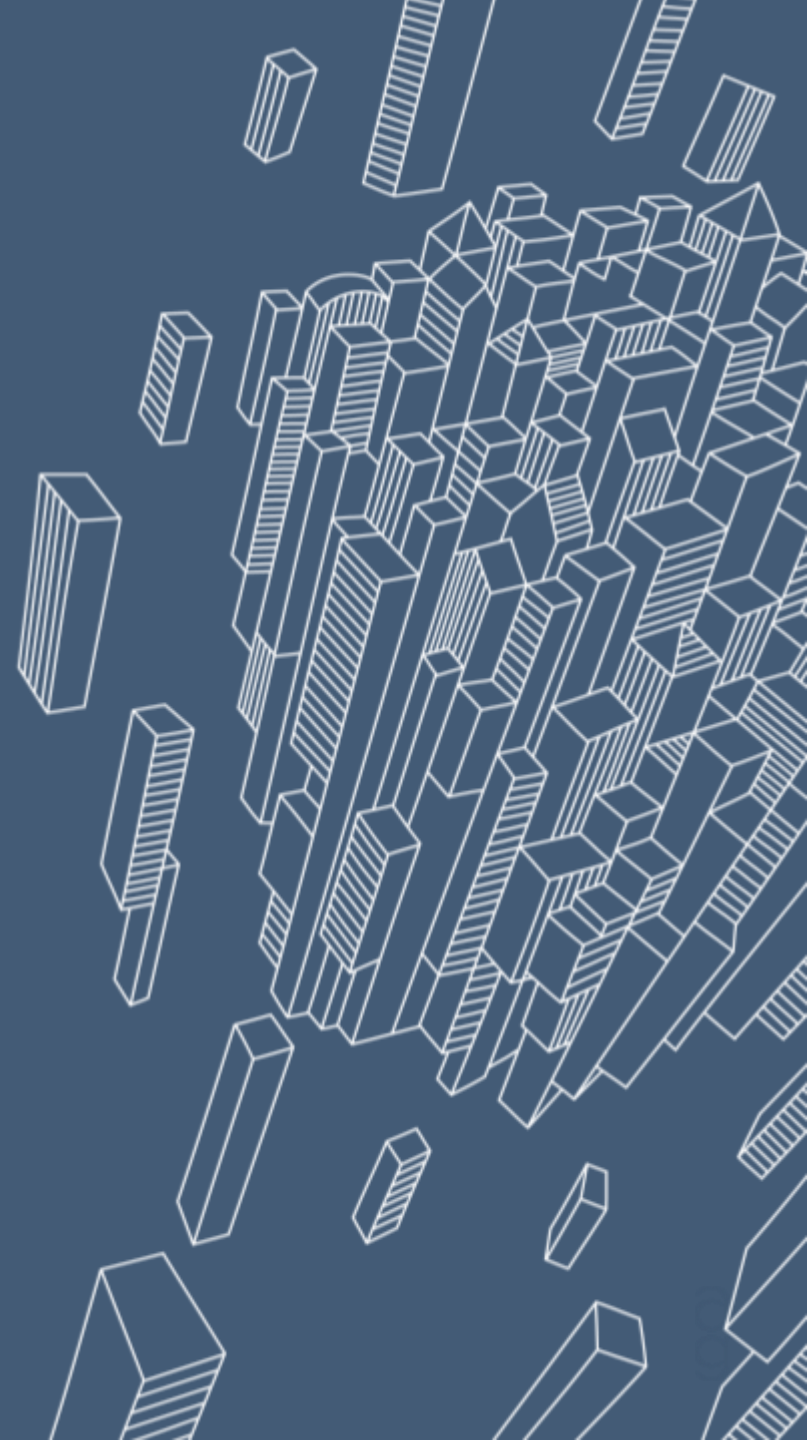


EMPLOYMENT AND REGULATORY TENSIONS

- “Fitness / propriety” – regulatory creep?
- Compliance will be involved and may have their own view of severity of conduct
- Decision-maker may have the benefit of advice, but it should **not** be a joint or collaborative decision
- Decision should not be pre-judged
- Attempts to avoid disciplinary findings
- Obligations to supply information to regulators



POST INVESTIGATION ACTIONS



DISCIPLINARY PROCEEDINGS

- Standard of fairness
 - Disciplinary = impact on long term career prospects
 - Dismissal = loss of approved status (regulated profession)
 - Implications for standard disciplinary process:
 - Right to legal representation? (*R (on the application of G) v Governors of X School* [2011])
 - Investigator must be even-handed (*Salford Royal NHS Trust v. Roldan* [2010])
- Parallel criminal proceedings

OTHER POST INVESTIGATION ACTIONS



Workplace
relationships



Mediation



Implementing
recommendations



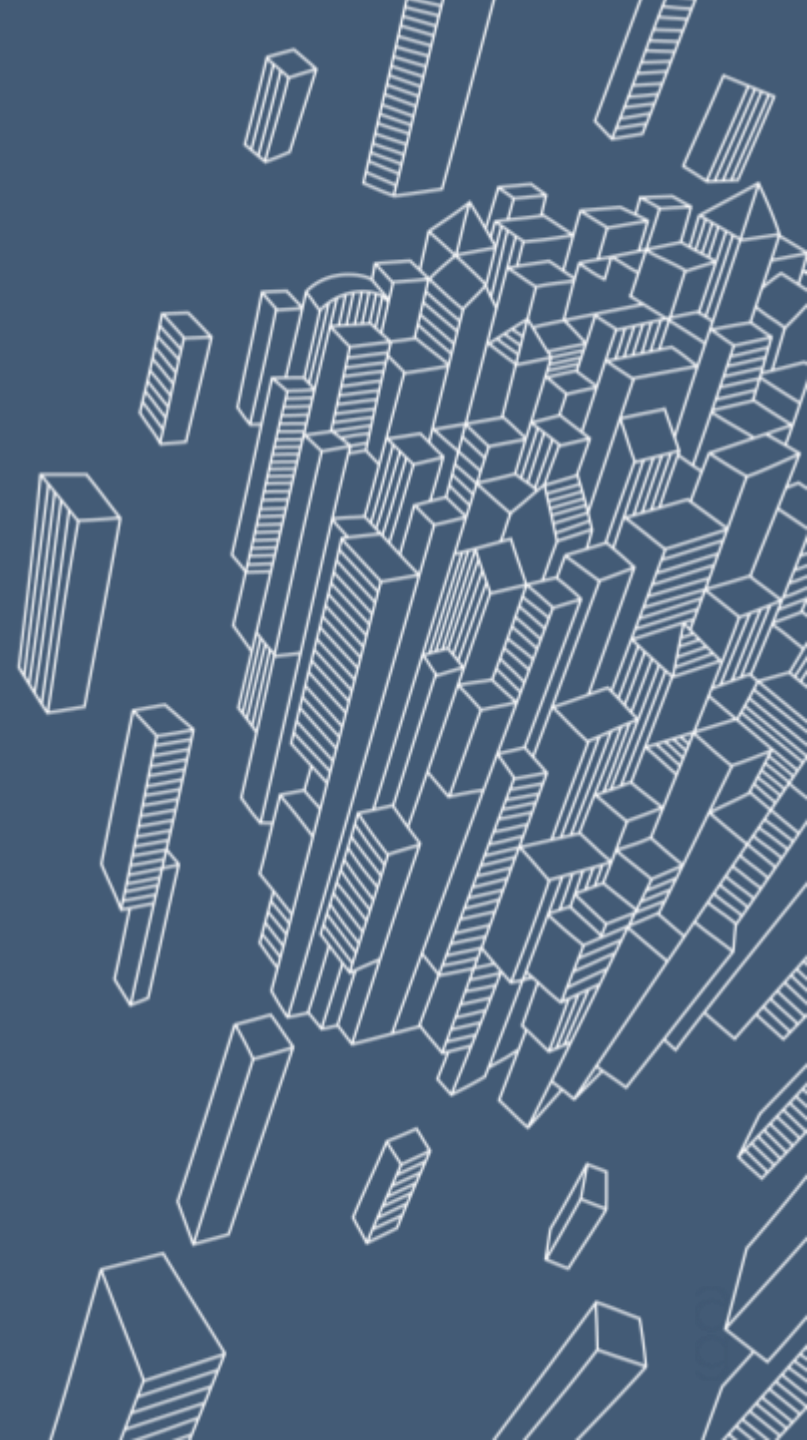
Media /
Comms strategy



NDAs

- Law Society
Practice Note

QUESTIONS AND FOLLOW UP



MORE IMAGINATION MORE IMPACT

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