

## SCCE Internal Investigations Workshop June 17-19, 2019 Orlando, FL



### Gathering Documentary Evidence

Al Gagne, MBA, CCEP

Society of Corporate Compliance and Ethics  
6500 Barrie Road, Suite 250, Minneapolis, MN 55435, United States  
[www.corporatecompliance.org](http://www.corporatecompliance.org) | +1 952 933 4977 or 888 277 4977



1

### Agenda



- Getting your paper (e-document) trail in order
- Utilizing documents for intelligence
- Managing the relevant documents
- External considerations

2

2

## Getting Your Paper Trail in Order

- Allow adequate time to gather documents
- Investigator should have unfettered access to documents
- Consider need to preserve documents (legal hold)
- Identify all the applicable documents needed:
  - Code of Business Conduct
  - Company Policy, Procedures, Work Instructions
  - Employee records
  - Workplace forms and documents (timecards, expense reports,
  - Electronic records and logs
  - E-Mails
  - Internal Memos – formal and informal
  - Voice mail
- Take care not to overdo it, focus on the relevant documents

3

3

## Preserving Documents

- General Counsel should issue a “Document Legal Hold” memorandum given reasonable anticipation of litigation (*Zubulake v. UBS Warburg 2003*).
  - Temporarily suspend document retention and destruction policies and procedures
  - Preserve all documents relevant to the investigation.
- Sarbanes-Oxley makes it a federal crime to knowingly destroy or withhold documents that could interfere with or obstruct an investigation.
- DoJ could argue that the internal investigation is being conducted in contemplation of a subsequent voluntary disclosure to a Government agency.

*VW agrees to plead guilty to obstruction of justice charges and pay \$2.8 billion penalty for mishandling a legal hold (1/11/2017)*

4

4

## Preserving Documents

- Conduct a comprehensive search to locate and gather documents related to the matter under investigation
  - Policies, procedures and work instructions
  - Emails and electronic records
  - Personnel files of subjects or implicated employees
  - Minutes of key management or BoD Meetings
  - Other privileged documents not subject to production
- A thorough collection and preservation of relevant documents can help assure that cooperation will be favorably recognized by government law enforcement officials down the road

5

5

## Gathering E-Documents Can Be Challenging

- Review company electronic media use policy, if applicable
- Will special approvals be required to access E-documents?
- Obtain support from savvy IT professionals and forensic experts
- Consider the need for confidentiality agreements
- Specify the information you seek in support of the investigation
- Use care to protect the privacy of individuals
- Identify all sources of the information obtained in the search
  - Computers and IP addresses
  - Operating systems and applications
  - Catalog all documents retained by the investigation

6

6

## Know Your Documents

- Review relevant documents in light of the alleged misconduct
  - Company rules, processes, procedures, forms
  - Good sources of credible evidence
  - Document process for collecting and reviewing documents
- Documents are often the “smoking gun” when investigating allegations of fraud
- Documents support witness and subject interviews
  - Take time to understand the documents retained
  - Seek help from subject matter experts
- Factor documents into any timelines you may develop
  - Many documents, such as forms and e-documents are the validation of company processes and work instructions – “procedures in motion”

7

7

## Utilizing Documents for Intelligence

- The Investigator becomes the subject matter expert
  - Determines what documents support or disprove the alleged misconduct
- Identify documents needed to support interviews
  - Help interviewees with memory of events and facts
- Documents don't lie; they are what they are.....  
.....even if they have been falsified or prepared to mislead

*“If you want to see the truth, you must be brave enough to look.”*  
Rune Lazuli, Pinterest

8

8

## Managing the Relevant Documents

- Retain authentic documents pertinent to the investigation
  - Avoid marking up original documents
  - Make copies if you need to mark up or highlight relevant information
  - Note location of original document if given a copy for the investigation file
- Consider the need for confidentiality over certain documents
  - Privacy and security concerns
- E-Documents may present challenges as to ownership
- Could you, the investigator, become a witness at some point?

9

9

## When the Government Comes Knocking

- Establish policy guidelines and action plan
- Identify who will be the contact point for the company
- Educate key employees on established protocols
- Cooperate carefully with regulators and law enforcement
  - Legal should take the lead to protect the company
    - Non-disclosure agreements
    - Proprietary information concerns
    - Waiver of Attorney-Client Privilege

10

10

## Exercise 1 - Investigation Scenario

You are the Ethics & Compliance Officer for the Super Sauce Co. Inc. You just received a call from the General Counsel of your biggest competitor, Global Sauce International. She told you that her company was recently approached by persons telling them they had in their possession the highly prized trade secret recipe for your company's flagship sauce that generates over a billion dollars in annual revenues. She stated the individuals were asking for \$2 million to provide them with your company's most prized recipe. She also stated that the individuals provided some preliminary documentation with your company's proprietary markings indicating they did in fact have possession of the secret recipe. The General Counsel also assured you that her company has no intention to acquire your company's trade secret as they are committed to competing ethically and legally with all its competitors. She also offered to provide you with the documentation given to her company by the alleged intellectual property thieves with the suggestion that you contact your local FBI Office to see if they would be willing to set up a sting operation in order to arrest and prosecute the persons responsible for the alleged theft of your company's prized trade secret. You know your company has a rigorous process to protect its trade secrets. The recipe in question has been protected for over 70 years and only a few people have access to the secret recipe.

11

11

## Exercise 1 continued - Investigation Scenario

Following a review with your General Counsel and the CEO, you are instructed to contact the local FBI Office for their assistance in prosecuting the alleged theft of your company's intellectual property, specifically the recipe for your company's secret sauce. You are convinced that the only way for that recipe to have gotten into the hands of IP thieves was with the help of a current or former employee who conspired with the alleged IP thieves.

Investigator's Challenge:

- Identify the risks to the company in conducting this investigation with or without the support of law enforcement.
- Identify the documents you want to collect and review.
- Who are the people you want to interview in light of the documentation you collect? Why?
- What are the likely outcomes of the investigation, should you get support from federal law enforcement?

12

12

## Exercise 2 - Investigation Scenario

The E&C Helpline received a call from Cookie Baker, a former company employee, who said she was “wrongly terminated by Human Resources for failing a random mandatory drug screen”. She stated that she tested positive for marijuana, but maintained that she had eaten a brownie given to her by a relative at a weekend party and was not aware it had been laced with marijuana. She argued that her firing was unfair because she did not know there was marijuana in the brownie she ate. She noted that just two months ago another employee who tested positive for using marijuana was not terminated because he claimed he was smoking marijuana at home to ease the pain caused by his terminal cancer. Ms. Baker stated she wanted her job back and was going to appeal her firing to the State Board of Employment Discrimination, if the company refused to allow her to return to her job.

The company has a zero tolerance policy banning the use of alcohol and illegal drugs. The company is a US defense contractor that must randomly test employees who work on Government programs. It is also illegal to possess or use marijuana for medicinal or recreational purposes in the state where the company is located.

13

13

## Exercise 2 continued - Investigation Scenario

A follow up review with Human Resources confirmed the report made by Ms. Baker. The HR Director stated she felt badly for the employee who was using marijuana to ease the pain caused by his cancer, and made the decision together with the employee’s management to reassign the employee to a job where he no longer works on Government contracts. The HR Director also stated she didn’t buy Ms. Baker’s excuse and terminated her based on the company’s zero tolerance policy for employees who test positive for illegal substances. As far as she was concerned the matter was closed.

Investigator’s Challenge:

- What, if any, are the implications for the company?
- What documentation will you need to collect and review?
- Are there people you want to interview in light of the documentation you may collect? Why?
- What are the likely outcomes of your investigation, should you decide to investigate the matter?

14

14

## Session Take-Aways

- Documentation is a key element of a good investigation
- Documentary evidence can fine tune the interview process
- Avoid documentation overload
- Catalog and index all documents retained by the investigation
- Provide support to external investigators and law enforcement

15

15

# Questions?

16

16