

INVESTIGATION PITFALLS & HOW TO AVOID THEM

Effective Internal Investigations for Compliance
Professionals (A Two-Day Workshop)

Society of Corporate Compliance & Ethics (SCCE)
San Francisco, CA – November 10 – 11, 2011

Latour "LT" Lafferty, J.D., CHC, CCEP
Lt.lafferty@fowlerwhite.com - *The Power of Experience*®



PRIVACY & CONFIDENTIALITY



Privacy & Confidentiality

- Attorney-client privilege
- Joint defense agreements
- Confidentiality agreements
- Employee interviews confidentiality
- News media & public relations
- Federal grand jury investigations/Fed. Rule Crim. Proc. 6(e)



“The most effective way to maintain confidentiality & mitigate adverse consequences of the disclosure of confidential information is to plan your internal investigation from the very beginning with the end in mind.”

- Latour “LT” Lafferty, Esq., CHC, CCEP



REPRESENTED WORKERS



Henri Theodore Young
U.S.P. Alcatraz
AZ-244
(Murder In The First)



INVESTIGATIVE INTERVIEWS

- Types of interviews in an investigation
 - Informational interviews
 - Learn about processes and procedures
 - Build up knowledge to understand what happened and the impact
 - Witness interviews
 - Those with information regarding the event
 - They may or may not ultimately be implicated
 - Subject interviews
 - Those against whom the allegations have been made
- Representation Issues



WEINGARTEN RIGHTS

- In 1975 the US Supreme Court gave unionized employees the right to assistance from union representation during investigative interviews.
- This right is commonly known as Weingarten Rights
- Currently, this right does not attach to non union workers.
 - The NLRB has flip flopped on this over the years



WHEN APPLY?

- Weingarten rights apply when there in an investigatory interview and
 - Management questions an employee to obtain information,
- AND**
- The employee has a ***reasonable belief*** that discipline or other adverse consequence may result from what he/she says



Unionized & Non-Unionized Employees

- Informational interviews
 - No different in treatment of unionized v. non unionized employees
- Witness interviews
 - May be different treatment if become subject
- Subject interviews
 - If the interview in any way can lead to discipline or termination, union members can request that a shop steward or union officer be present
 - Today, non union members do not have that right.



WITNESS INTERVIEWS

- Treatment of unionized v. non unionized employees may be different
 - Could the discussion lead to discipline or termination?
 - If no, rights of unionized and non unionized employees is the same
 - If yes, the rights are different



HOW INVOKED

- When an investigatory interview, where the employee has a reasonable belief that may result in their discipline:
 - The employee must make a clear request for Union representation before or during the interview. The employee can't be punished for making this request.



SUPERVISOR OPTIONS

- After the employee makes the request for a union representative to be present, management has three options;
 1. It can stop questioning until the representative arrives
 2. It can call off the interview or,
 3. It can tell the employee that it will call off the interview unless the employee voluntarily gives up his/her rights to a union representative.



- Has right to participate (not silent witness)
- Be informed of the subject matter of the interview
- Confer with employee before questioning begins
- Speak during the interview
- Seek clarification of questions during interview to achieve understanding
- Advise employee on how to answer a question
- Provide supplement & provide additional information to the supervisor at the end of the questioning.
- But CANNOT instruct employee to not answer/subject to discipline for refusal to answer
- Cannot negotiate the subject matter of interview



- What type of interview is it?
- Employment contract or collective bargaining agreement
- Professional courtesy
- Advance or indemnify legal fees
- Impact on organizational cooperation



PRIVILEGE
 (“The thing you want most.”)



George “Machine Gun” Kelly
U.S.P. Alcatraz – “Public Enemy #1”



THE INVESTIGATIVE RECORD (The Heart of the Matter)

- The investigative record:
 - Tangible:
 - Witness statements & interview reports
 - Documents & exhibits
 - Intangible:
 - Mental impressions – who & what we think is important



WORK PRODUCT PRIVILEGE

- Fed. Rule of Civil Procedure(b)(3)
- Fact v. Opinion
- Elements
- Overcoming the privilege
- Mental impressions



ATTORNEY-CLIENT PRIVILEGE

- Fed. Rule of Evid. 501/Common law
- Rule of Professional conduct
- Elements
- Employee Interviews/Upjohn warnings



OTHER PRIVILEGES

- Self-evaluative privilege
 - Bredice v. Doctor's Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970)
 - Not generally accepted
- State law



OVERCOMING PRIVILEGES

- Waiver
- Crime/Fraud exception
- Federal prosecution policy
- S/H litigation – Garner Rule “good cause”



INTERNATIONAL ISSUES



Roy Gardner
U.S.P. Alcatraz
“King Of The
Escape Artists”
&
“Last Great
American Train
Robber”



LOCATION MATTERS

- Different considerations in different countries
- Review audits and other investigations that have been conducted in that country
- Consult internal/external lawyers to identify any unique guidelines that need to be followed
- Identify employee privacy and other rights in that country
- What are the obligations for notifying the foreign government?
- Be cognizant & respectful of cultural issues

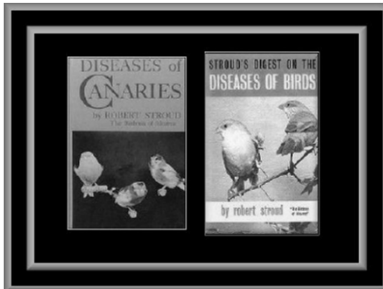
22



Robert “Birdman of Alcatraz” Stroud



Robert “Birdman of Alcatraz” Stroud



**INVESTIGATION PITFALLS
& HOW TO AVOID THEM**

**Effective Internal Investigations for Compliance
Professionals (A Two-Day Workshop)**

Society of Corporate Compliance & Ethics (SCCE)
San Francisco, CA – November 10 – 11, 2011

Latour "LT" Lafferty, J.D., CHC, CCEP
Ltlafferty@fowlerwhite.com - The Power of Experience®