

ACC NCR PRESENTATION

Conducting Internal
Investigations and
Managing Whistleblowers

March 24, 2021

bertram



ACC Association of
Corporate Counsel
— NATIONAL CAPITAL REGION —

YOUR PANEL

Amit Patel, Chief Ethics & Compliance Officer, Johns Hopkins University APL (Moderator)

 Connie N. Bertram, Founder and Partner, Bertram LLP

 Amanda C. Dupree, Associate General Counsel, ePlus

 Virginia Robinson, Deputy General Counsel, DynCorp International

 Andrew Sakallaris, Corporate Counsel, Logistics Management Institute



INTRODUCTION

- Conducting an Effective Investigation: Best Practices
- Retention of Independent Counsel
- Preservation of the Attorney-Client Privilege
- Obligation to Report Up to the Board
- Restricting Communications and Self-Help Discovery
- Reducing the Risk of Whistleblower Retaliation Claims



CONDUCTING EFFECTIVE INVESTIGATIONS

Proper Planning is Half the Battle

- Establish the Protocols in Advance
 - Complaint triage
 - Investigation stakeholders (Control Group)
 - Identification of investigation team
 - Investigation timeline
 - Reports and reporting
- Lessons Learned: Top Three Errors
 - In conducting interviews
 - In communicating with the accused, complainant and witnesses
 - In creating a record of the investigation and results



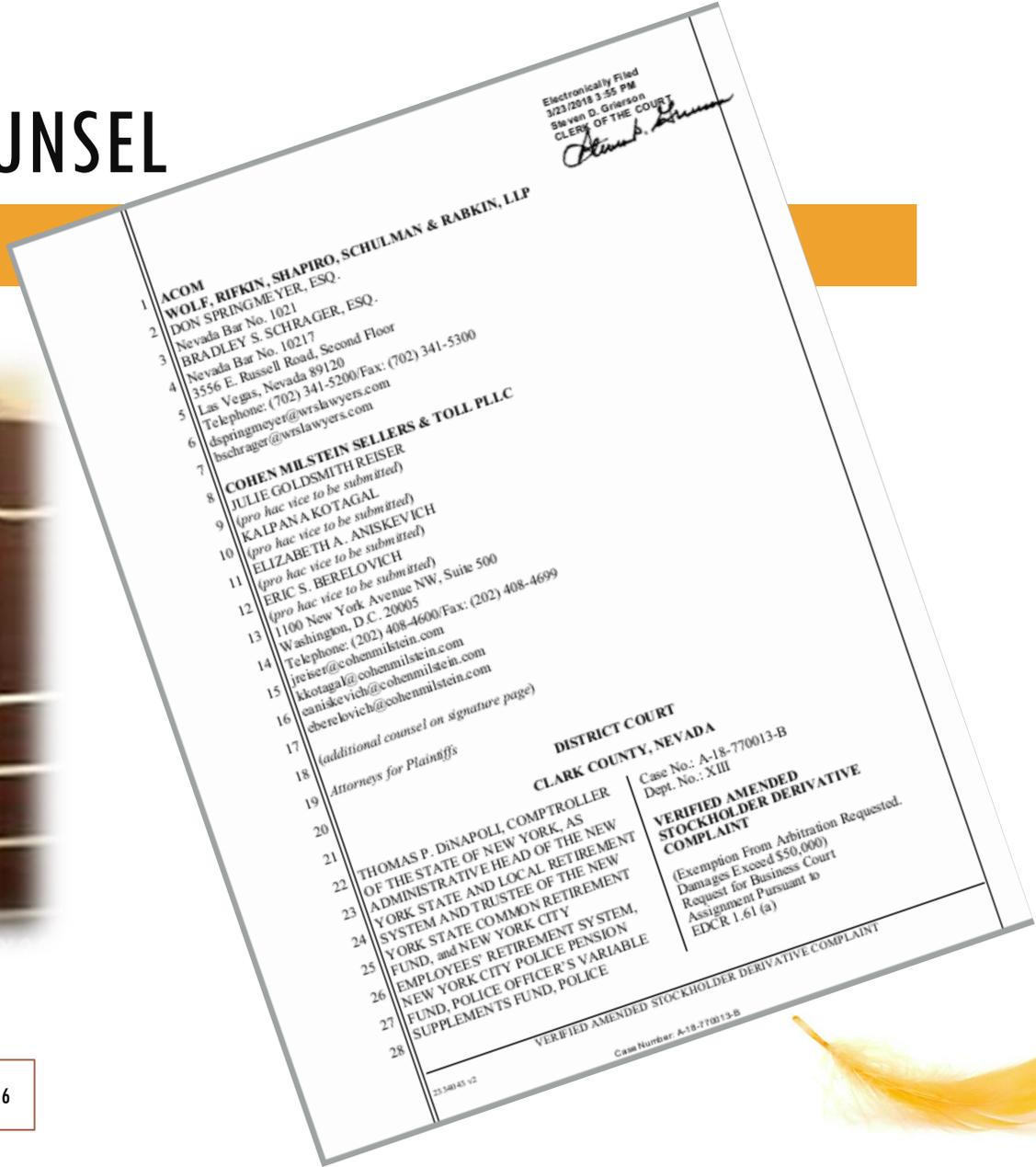
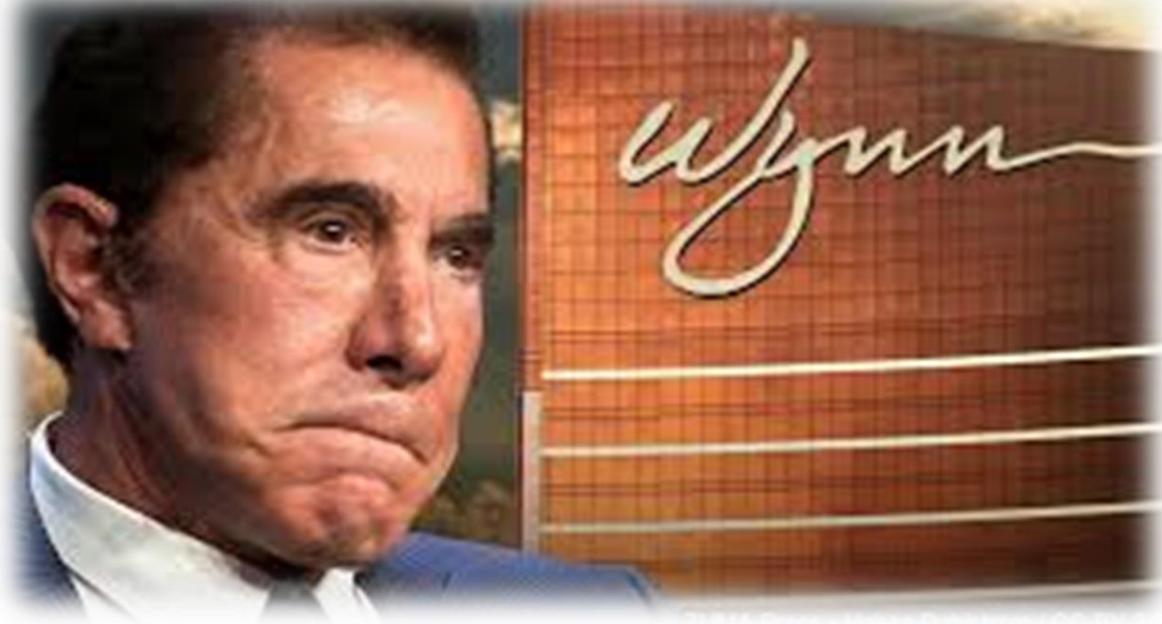
RETENTION OF “INDEPENDENT” COUNSEL

- When Advisable:
 - C-Suite executive involved
 - Litigation or investigation likely
 - Media Implications
 - Employers that rely on public trust
- Challenges of Independent Counsel
 - Unknown quality/experience
 - Tendency to retain “brand” firm
 - May view situation through their own lens
 - Little control over the record they create
 - Responsible for their statements to and treatment of the complainant and witnesses
 - In-House counsel left “Holding the Bag”



SELECTION OF "INDEPENDENT" COUNSEL

Case Study: Wynn Resorts



PRESERVATION OF ATTORNEY-CLIENT PRIVILEGE

The Scope of the Privilege

- What portion of notes and summaries of interviews can be privileged? What about reports of the investigation?
- How can they be protected in investigations and litigation?
- Considerations:
 - Who drafted the notes or summaries?
 - For what purpose were the notes prepared?
 - To whom will or have they been provided?
 - What do they reflect? Factual statements v. mental impressions and analyses?
 - Will the investigation or investigation results be provided in a government investigation or used in litigation?
 - For what purpose are they sought?



PRESERVATION OF ATTORNEY CLIENT PRIVILEGE

Case Study: “The Washington Football Team”



PRESERVATION OF THE ATTORNEY CLIENT PRIVILEGE

Tips for Preserving the Privilege

- Carefully select and train the investigator(s), even if they are attorneys
- If in-house counsel is conducting the investigation, confirm his or her “protected hat” is on
- Consider dual investigators: one for taking factual notes and the other for recording impressions, questions, follow-up, ideas for investigation
- Or, consider dual notes
- Limit report to facts and factual conclusions and bases for them (no counsel recommendations)
- Can produce a separate memo with thoughts, impressions and recommendations that is protected, if necessary
- Limit distribution of protected materials to Control Group



REPORTING UP TO THE BOARD

Introduction

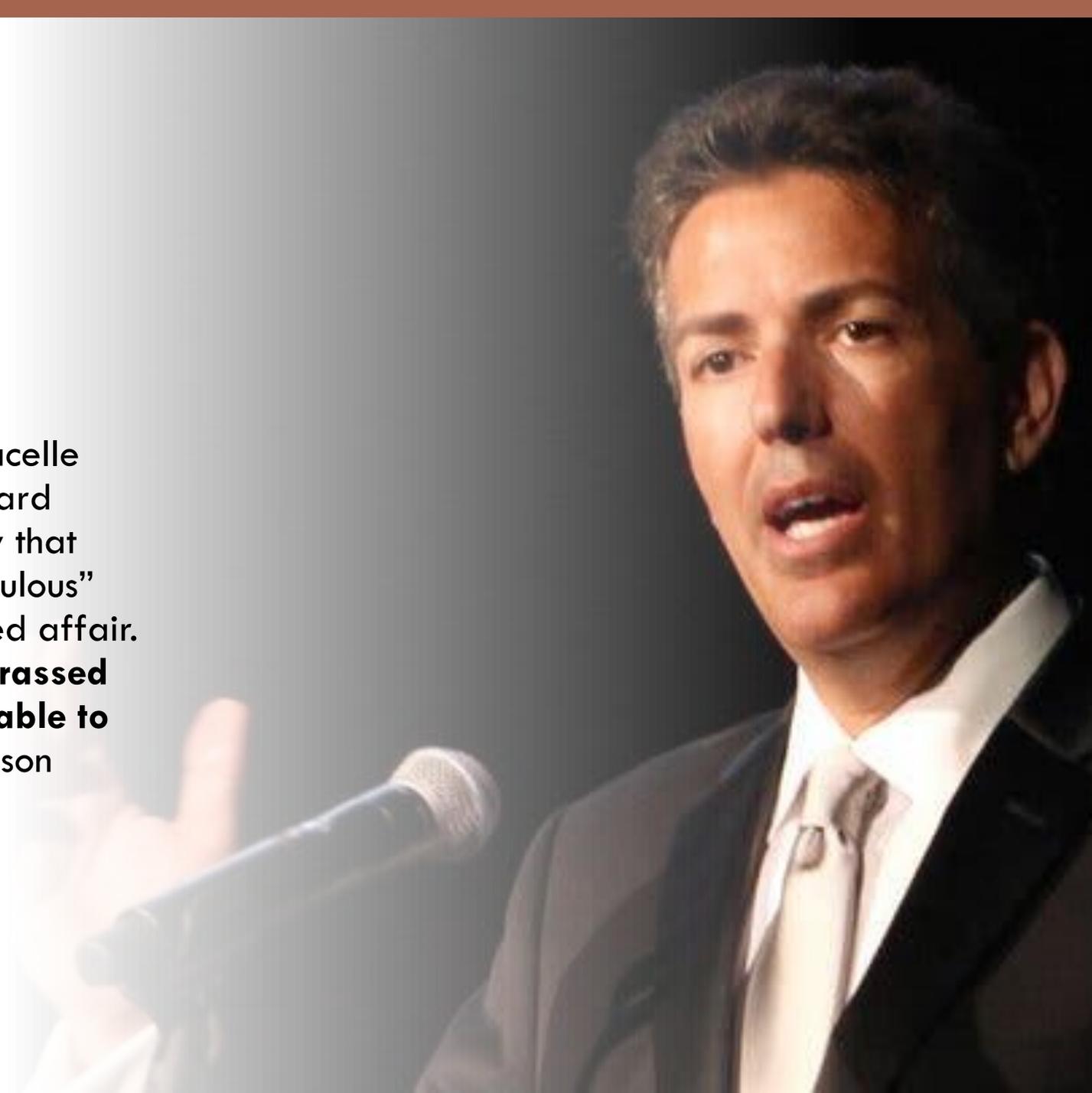
- What triggers the obligation?
- What information should/should not be provided to Boards and committees?
- How can you control confidentiality and privilege?
- How can you control comments and statements by the Board?
- What if the Board retains its own counsel and/or investigator?



REPORTING UP TO THE BOARD

The Humane Society

Explaining the board's decision to retain Mr. Pacelle after an hours-long telephone meeting, one board member, Erika Brunson, 83, said in an interview that she was aware only of what she called a "ridiculous" old accusation against him regarding an alleged affair. **"Which red-blooded male hasn't sexually harassed somebody?"** she added. **"Women should be able to take care of themselves."** On Friday, Ms. Brunson resigned from the board.



LIMITATIONS ON COMMUNICATIONS AND SELF-HELP DISCOVERY

Introduction

- Does Protected Activity include self-help and informal discovery by the complainant and witnesses, including:
 - Taking, downloading, and uploading documents and data?
 - Asking a co-worker to obtain information or data?
 - Taping conversations in the workplace?
- When and how can an employer control or discipline an employees' conduct and what impact can it have on litigation? How can you navigate a termination?
- What if the government is conducting an investigation or the complainant provides the information or data to the government?
- What if the information is used by the complainant or witness for other purposes?



LIMITATIONS ON COMMUNICATIONS AND SELF-HELP DISCOVERY

JDS Uniphase Corp. v. Jennings, 473 F. Supp. 2d 697, 702-03 (E.D. Va. 2007)

The Court noted that “endorsing such theft would effectively invalidate most confidentiality agreements” and cause litigation to “blossom like weeds in spring . . .



LIMITATIONS ON COMMUNICATIONS AND SELF-HELP DISCOVERY

Glynn v. Impact Science & Tech., 804 F. Supp. 2d 391 (D. Md. 2011)



- Imposed \$20,000 sanction on plaintiff and counsel for obtaining information from former co-worker after the plaintiff was terminated and trying to conceal the documents through the assertion of privilege
- Granted summary judgment in favor of IST on counterclaim for breach of confidentiality and non-compete provisions of employment contract by removing trade secrets, colluding with current employee and selling module designs to competitor



REDUCING THE RISK OF WHISTLEBLOWER CLAIMS

Important to Understand the Motivations of Your Whistleblower

- “Private Attorney General”: Raising concerns about potential violations in good faith
- Confused Do-Gooder: Acting in good faith based on misperceptions
- Disgruntled Poor Performer: Seizing on concerns (real, perceived or concocted) to gain protection from termination
- Revenge: Making allegations to get back at a colleague
- Opportunistic Complainant: Looking for an opportunity to raise concerns and cash out
- “The Best Defense is a Good Offense”: Divert attention from his or her own misconduct



REDUCING THE RISK OF WHISTLEBLOWER CLAIMS

How to Handle the Complainant, Given These Motivations

- Conducting Pre-Investigation by In-House Counsel Prior to Selection/Involvement of Outside Counsel
- Selecting an Appropriate Liaison for the Complainant and Accused
- Conducting an Investigation That Is Not Perceived as Retaliatory
- Communicating Complainant About the Investigation and Its Results
- Handling the Complainant's Ongoing Employment
- Terminating Based on Investigation Misconduct or a False Complaint
- Counterclaiming Against the Complainant



REDUCING THE RISK OF WHISTLEBLOWER CLAIMS

Day v. Staples, Inc., 555 F.3d 42 (1st Cir. 2009)

[Day v. Staples, Inc.](#)

United States Court of Appeals for the First Circuit

February 9, 2009, Decided

No. 08-1689

Reporter

555 F.3d 42 *; 2009 U.S. App. LEXIS 2266 **; 92 Empl. Prac. Dec. (CCH) P43,462; Fed. Sec. L. Rep. (CCH) P95,062; 2009 OSHD (CCH) P32,985

KEVIN M. DAY, Plaintiff, Appellant, v.
STAPLES, INC., Defendant, Appellee.

Opinion by: LYNCH



KEY DECISIONS TO REMEMBER

- **Glynn v. Impact Science & Tech., Inc.**, 804 F. Supp. 2d 391 (D. Md. 2011) (rejecting claim that counterclaims brought by employer in FCA whistleblower action were retaliatory), aff'd, 710 F.3d 209 (4th Cir. 2013)
- **Hosch v. BAE Sys. Info. Solutions, Inc.**, 2014 U.S. Dist. LEXIS (E.D. Va. Jan. 22, 2014) (granting sanctions for theft and spoliation to conceal evidence of fraudulent conduct by employee)
- **Zulfer v. Playboy Enters.**, Case No. CV-12-08263 (C.D. Cal.) (jury awarded \$6 million to former accounting executive in SOX whistleblower action who was terminated after she refused to pay executive bonuses)
- **Noble v. US Foods, Inc.**, 2015 U.S. Dist. LEXIS 133638 (N.D. Ill. 2015) (confirming arbitration award finding that former executives engaged in an “illegal caper” to bring down CEO through various self-help activities and anonymous letter to Board alleging ethics violations)



