

ON-DEMAND SEMINAR: PRACTICAL AND ETHICAL ISSUES IN MANAGING INTERNAL INVESTIGATIONS

17 March 2017

About this seminar

The prospect of an internal investigation raises many thorny issues. This presentation will canvass some of the potential triggering events, and discuss how to structure an investigation, retain forensic assistance and manage the inevitable ethical issues that will arise.

CPD/CLE

This seminar counts for up to one hour of Substantive Credit under the CPD rules of the Law Society of Upper Canada, up to 1 hour of CPD credit under the rules of the Law Society of British Columbia and up to one hour of CLE credit under the rules of the Barreau du Québec.

Transcript

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Wayne: Good morning everyone. Thank you for coming, battling the construction and making it to our 20th floor. My name is Wayne Warren. I'm the managing partner of the Ottawa office of Gowling WLG. Just a couple of words on our upcoming sessions. For those of you who are chasing professionalism credits we have a half day session coming up on November 22. It's called "Promoting Diversity in Your Organization" facilitated by an expert from Toronto. You will be able to obtain your 3 hours of professionalism should you decide to attend. I've been in one of these sessions previously. We've held them in our firm and it's quite an interactive and a rewarding session. I recommend it to you. For those of you chasing your final substantive credits as we move towards the end of the year we have a "Going International" session December 7. Again half day. 8:00 till noon. Depending on how long you stay you can achieve 4 hours of substantive credit. I hope you'll be able to attend one or both of those.

Moving on to today's presentation, "Practical and Ethical Issues in Managing Internal Investigations", I'd like to welcome our two speakers. Speaking first will be Elisa Scali. Elisa's a partner in our employment and labour law group. She brings over 18 years' experience to her practice. She practices in all aspects of employment law, including workplace investigations, but she drafts the normal documents you'd expect to have an employment lawyer draft; contracts, manuals, confidentiality, non-disclosure, non-compete agreements and when necessary she attends in all levels of Court in Ontario to advocate on behalf of her client.

Our second speaker this morning is Kas Rahman. Kas is a partner of KPMG LLP. He practices primarily out of the KPMG Ottawa office. He is a chartered professional accountant, a chartered accountant, a certified fraud examiner and is certified in financial forensics. He brings over 25 years of experience to us practice and he's been involved in a number of high profile cases. For both public and private sector clients. Please join me in welcoming Elisa and Kas and enjoy the presentation this morning.

Elisa: Good morning everyone. Thank you for coming this morning. I know sometimes it's difficult to get here this early in the morning but we appreciate it. I will be speaking this

morning just generally about investigations that will take place in the work place. Then Kas will be focusing more on a specific type of investigation, a forensic investigation.

Let's talk about what types of events could possibly trigger the need for an investigation. You may have complaints of harassment or discrimination which fall under the Human Rights Code if they're based on a ground prohibited by the Human Rights Code. You may have a complaint of reprisal where someone is saying, "I made a complaint that I was being harassed and now I'm being punished because of that complaint." You would have to investigate that. If you're wanting to terminate someone, or discipline them for misconduct, you often would have to conduct an investigation to be sure that you have enough information upon which to base that discipline. Under the Occupational Health and Safety Act, there's a requirement to keep your workplace safe, to deal with any incidents of violence or harassment, so a complaint could be made under the Occupational Health and Safety Act as well. Harassment complaints would not necessarily be based on a prohibited ground under the Code. It could be just general harassment or bullying incidents, those could require an investigation. If there's an accident in the work place or an occupational illness that needs to be investigated. As well, under work place safety, a work place injury. These are types of events that could trigger a work place investigation.

The next issue you need to deal with is, this is the event, do we actually have to conduct an investigation? I recently read an article as I was preparing for this seminar that scared me a little bit because it was employers are wasting money, or companies are wasting money, on unnecessary investigations. My concern was someone reading that would think, "Why am I wasting all this money? Why am I retaining lawyers? Why am I retaining external investigators to investigate?" It gave the impression that it wasn't necessary. It is necessary. In some instances you actually have a positive obligation to investigate. Under the Human Rights Code you have to investigate if you receive a complaint of discrimination, harassment or reprisal. It could constitute a breach of the Code if you fail to investigate. And if, for example, you don't investigate, you take action, there's a human rights complaint and the human rights complaint is unfounded, so someone alleges harassment but harassment isn't found. But if you fail to investigate you still could be liable for having failed to conduct an investigation at all into the complaint. Under the Occupational Health Safety Act there's been very recent changes. They came into force September 9. Now, this was not an obligation previously, but now you have an obligation to investigate incidents and complaints of work place harassment where appropriate in the circumstances. There's still some flexibility there because you have that discretion if it's appropriate or not. But you really have to examine the situation and determine whether it is appropriate to investigate.

There's also a common law duty that could arise to investigate. If you were planning on terminating someone for cause that could have a pretty significant impact on that person's employment, on their reputation and the Courts are saying you need to be sure. That if you're going to allege that someone did something, that was wrong, that you need to investigate. You cannot simply make an allegation without conducting a proper investigation. If you fail to investigate you could be exposed to damages. This is an example. In the Dunham and County Lennox & Addington case, Dunham was a Salvation Army minister. He was assisting a convicted pedophile that had been released from jail. He was accused of trying to get preferential access to social housing for the pedophile. His employer terminated his employment. No one bothered to interview Dunham to ask him whether he was involved in this. No one advised him of the information or the allegations that were made against him or which his employer was relying on. Ultimately it was found that they were relying on information that was not accurate and that was distorted. Ultimately the employer paid the price because, not only did the employee get a generous notice period, also was awarded \$100,000.00 in punitive damages. The cost for getting it wrong could be quite significant for employers. There's a difference between failing to investigate at all and then failing to conduct a proper investigation. That's an issue as well. You do have a duty, if you're going to investigate, to do it in a manner that's fair and reasonable. This duty exists, whether you're doing the investigation internally, or whether you're hiring a third party to conduct the investigation. The good thing is that the standard is the investigation has to be reasonable. It doesn't have to be perfect. As long as you're taking reasonable actions to conduct a reasonable investigation then you should be okay. You should be meeting the standard.

What I'd like to do is go through some best practices for conducting successful investigation which will actually ensure that you are fitting within that standard of procedural fairness. What I'd like to review with you is timing, deciding who should do the investigation, collection of the information and the evidence that you're going to rely upon, and preparing the investigation report.

The first, timing. Once you have information about a complaint do not delay. You should act quickly. You shouldn't sit on it. You shouldn't bury your head in the sand. You should deal with it. How quickly do you need to do this. There isn't any set standard or guideline that you have to do it within a specific period of time but the Ministry, however, has given us some guidance from their Code of Procedure. This is a new Code of Procedure that they've published in response to the new Occupation Health and Safety laws which require investigations. This is not mandated. It's simply to give you some guidance. What they're saying is you should be completing your investigations within 90 days unless there's some

extenuating circumstances. There's a lot of witnesses or the witnesses are not available for whatever reason. If you fall into that situation where you can't get your investigation within that period of time then you should be documenting why. If there's a delay you should document it. These witnesses are key witnesses and they're on vacation so this is the reason why we have not been able to move forward within this period of time. I always feel that it's important to communicate it to the complainant and the respondent. They are very anxious about this process so they want to know if it's not happening, why it's not happening. Transparency is important as well.

Who should investigate? There's some instances where the investigator can be an internal employee and there's instances where you want to go outside and hire someone externally, a third party. And that will be decided on a case by case basis. The bottom line is that the investigator should be someone who is going to be fair and impartial. Someone who's qualified and confident to actually conduct the investigation. Depending on the nature of the complaint you may need someone with a specific expertise. You really have to look at the individual case.

If you're going to choose someone internally you have to be careful that you're not choosing someone who could potentially have some bias and not be impartial. There should never be any reporting lines between who is the complainant or respondent and who's conducting the interviews. If we're talking about a very senior executive in the organization, in most instances maybe you do need to go out, to ensure that you're going to have an impartial person investigating. Again, the person should be qualified. If we're talking about something that requires some forensic expertise then you're not going to have someone internally unless you have someone with that expertise available.

And, availability. If you have tight timelines, if you need to do this within 90 days, and the person you would like to conduct the investigation says, "I can't do this for you until 6 months from now." then you have to move on and you have to find someone else. There's going to be someone else out there that's qualified to do it. The timelines are important.

Finally, because this will result in a written report being prepared, upon which the company is going to rely, you want to ensure that whoever is going to be investigating can also prepare a comprehensive and well written thorough report because that is what you're going to be relying on.

Collection of information. First and foremost your information is going to be collected from your witnesses, in most cases. The witnesses are going to be individuals who have information with respect to the matters and issues. It could be their key witness, and obviously the complainant and the respondent, there are eye witnesses. If it's a

harassment complaint, and the harassment took place in the work place with other people present, the people that witnessed it are individuals that you would want to speak to. Obviously coworkers and supervisors. I always ask the complainant and the respondent for a list of people that they feel have information that is relevant and prepare a list based on the names of the individuals that they've given.

Arranging for the interview. Normally you would want to arrange it through the person's manager or human resources. Sometimes these interviews can be quite lengthy. They can take half a day. So that person's going to be away from their desk for that period of time, and the managers should be aware where they are, because they're going to wonder why they're not at their desk. You should be choosing an appropriate time and place. Obviously a time that's convenient for the employee. Doesn't necessarily have to be after working hours. I always prefer to do it during working hours. And in a place that's confidential. You don't want to be doing it in a high traffic area where people are walking back and forth. I always like to do it in a place where there's as little traffic as possible so you maintain as much confidentiality as possible.

Representation. At times you may have witnesses that are very nervous and anxious about the process. They want someone to be present with them. That's a question that you're going to have to ask yourself whether you're okay with that. My view is unless you have a good reason why that person should not have representation you should allow it. Especially if it's legal. If they aren't comfortable with it there really isn't any reason, generally, why they should not be permitted to have someone there as their support.

Recording technique. Everybody differs in terms of how they want to record interviews. You can handwrite everything. You can sit behind a computer and type everything. Or you can actually use a recording device. I often like to use a recording device because it collects everything that was said. Sometimes you don't get everything if you're writing it down. However, if I have a witness that says it makes them really nervous and looking at that recording device makes them apprehensive then I won't do it. I want them to feel comfortable and be able to tell me everything. I don't want them to hold back because they see that recording device in front of them. It really depends on the situation. I don't think you can go in saying, "I'm recording all of these." I think you really have to do it on an individual basis and what works best. I don't like sitting behind a computer though. If I don't use a recording device I'll try to handwrite. The computer creates a barrier between you and the witness and you have to remember, for many witnesses, this is really intimidating so you want to create as much as a rapport with them as possible so they feel comfortable speaking with you. If you have documents that you're going to be referring to, if there's email, if there's some kind of document that you want to ask the witness

questions about, you should have that with you so that they can have the opportunity to read it. They may not know what you're referring to.

When you're conducting the interview obviously you're going to introduce yourself. Explain the reason why you want to speak with them and explain the purpose of the investigation. Most importantly you have to make it very clear that the investigation's confidential. The one thing I always try to avoid is having someone sit with me, speak with me about everything and then go into their work space and start talking to everybody about it. I don't even want them to disclose the fact that there was a complaint. I'm very, very clear to them they are not to mention anything about this investigation. Not there's a complaint generally. Not that they have to attend an interview. The other thing that I do remind them about is reprisal. Again, because it's an intimidating situation. Often they may feel uncomfortable disclosing everything that they should be disclosing so I remind that there's no reprisal. If they say something in the context of the investigation they are not going to be punished for having said something. They can't be punished for giving their testimony. Again, I'll explain the recording method and as I mentioned earlier, if they're uncomfortable with the recording then I assess that and perhaps record information in a different way. Oftentimes I'll warn them, "Look, I may need to speak to you again." If you've got witness number one, by the time you get to witness number 5, witness number 5 might have said something to you which you want to go back to witness number 1 to talk to them about. So you just prepare them and say, "I may need to follow up with you. You may need to come speak to me again." I always provide my contact information because they might think of something that they didn't get a chance to tell me during the interview so I want to invite them to email me or call me with that additional information. Or if they have any questions that come up after the interview.

When you're conducting the interview, just some tips in terms of how to conduct it. Ask open questions instead of leading them towards an answer even if you think you know the answer. Listen and let the person tell their story. You will find that oftentimes they like to talk and talk and talk and talk. I had some interviews that I thought would last 2 hours that lasted a day or more because the person had a lot to say. But I let them say it. I would let them tell their story. Confirm your understanding of the answers. This is important because you want to make sure that you understand what they're saying because, again, you're basing your conclusions on the best information that you're gathering. If you don't understand what they're saying, and you record it incorrectly, that's going to, potentially, impact the outcome. Ask questions you think you know the answers to. But don't lead them to the answer. Record your questions and answers. If you're handwriting or typing you should always have the questions and then the answer. If you're only recording the

answers when you go back to read your notes you may forget about the context in which that answer was given. It's always important to have your question connected to your answer.

Summary of interviews. This is not something you are going to do in every instance. Sometimes I will prepare summaries of all my witness statements and have the witness review them and confirm the accuracy of it. If I'm recording it's less likely that I'm going to do that because I have the recording. But in some cases I will do that. It really will depend how many witnesses you have, the timing if it's feasible. It's not going to be feasible in every instance and you may not feel that it's necessary in every instance either. That's really going to be decided on a case by case basis as well.

Something that you don't want to do, again, ask leading questions. You don't want to interrupt them or try to intimidate them. Or do anything that, whether it's intentional or not, could cause them to feel intimidated because, again, this is an intimidating process. You often get witnesses that are scared because they feel like maybe something they say could potentially impact their employment. Don't act surprised or suspicious. Sometimes you think you know the answer or and you give an answer, it's hard to not show a look of surprise or suspicion as though you think they might not be telling you the truth. Always try to avoid that and don't assume you know what the answer will be. Although you may have some information that suggests what the answer will be don't assume that you know it.

I'm just going to review a case with you where an investigator did a lot of these things and it ended up actually harming the employer. In the case of Crompton versus CIBC. A financial advisor was terminated for having funds wire transferred to her personal account by a client in China but then she was transferring the funds to the appropriate place. But the problem was that she was transferring them to her personal account first and that was not acceptable. They ended up terminating her for cause but they did conduct an investigation. In that case the Court basically said the investigator would not let her fully answer the questions. He cut her off. He showed no interest in her explanation. He claimed that he had information that he had not even obtained and he never provided her a reasonable opportunity to explain her conduct. They held that the investigator failed to determine key facts. He did not ascertain whether she knew her conduct was wrong. He jumped to conclusions and made assumptions which resulted in her termination with cause which had a devastating impact on her career. In that case the Court did award aggravated damages against the employer. You do really have to be careful when you're conducting your investigation.

Let's look at what procedural fairness requires and what it doesn't require. What it does

not require is that as an investigator that you interview every single witness that is identified. As I mentioned earlier, I'll ask the complainant and the respondent who should I speak with? Who knows about this incident? But that doesn't mean you have to speak to everyone. You could have a witness that gives you a list of 20 people and some of them, they may know a little bit about it, but it's not really necessary to interview them. You still have the discretion as the investigator to decide who needs to be interviewed and who maybe does not need to be. You don't need to conduct a perfect investigation. As I said, the standard is reasonable in this. It doesn't have to be perfect and the investigator still has a certain amount of discretion over the process. A Courts not going to scrutinize the questions that you actually ask. You still have some discretion there. But the Court will question it if they see some very obvious shortcomings if you didn't ask some questions which obviously needed to be asked.

With respect to the respondent, the question is always, "Does the respondent actually get a copy of the statement? If someone complains, they fill out a formal complaint, are they entitled to see that?" The Courts have basically said, "No. You don't have an obligation to provide the actual statement, however, what your obligation is, is to provide them with enough information about the allegations so they understand what's being claimed against them and they know what their case is that they have to meet, essentially." They have to be able to respond but you don't need to provide the word for word statement.

What does the fairness require? It does require that you interview the complainant and the respondent. Some of you might be saying, "Well, that's obvious." Well, in one case there were several respondents and an investigator choose to interview some of the respondents but decided that two of them he didn't need to speak with. That, the Court said, was inappropriate. Every single respondent should be given an opportunity to respond to the allegations that are being made against them. A respondent has to have an opportunity to fully respond. Similar to in the Crompton case where in that situation it didn't appear as though they gave this employee the full opportunity to respond to the allegations because there were assumptions and conclusions drawn before she even had an opportunity to be spoken to about it.

Gathering real evidence is another part of collecting information. You get your information from your witnesses but then there's documentary evidence that's going to be supportive as well. Physical evidence, documents, if it's a situation of where you think someone is cooking your books, stealing money and you need someone to come in and do a forensic investigation, they get an expert. If it's a technology issue, you have to recover deleted emails because someone's deleted information that you think is important, maybe you need to get a technology expert come in. But don't ignore the documentary evidence. If a

Court knows there was information available and it was ignored that could also be harmful to the investigation.

Preparing the report. You should always think about your audience when you're preparing your report. Who's going to read the report? I always say write as though it's going to be before a Court because it could be. You never know where the complaint is going to go. It could end up in litigation. You may want to just keep that in mind, although I will be talking about privilege at the end of the presentation, you should always keep that in mind. Also, what is the author's expertise and what are they qualified to report on? You always want to ensure that if you're going to report about something, if you're going to draw a conclusion, that you have the appropriate expertise to do that. The written report should always include a summary of the steps that you took in the investigation, how many witnesses you interviewed, when the interviews took place, a summary of the complaint, a summary of the respondent's response, the evidence of the witnesses and then you're findings of fact. You're going to want to summarize then you may have contradicting views. You may find they were one over the other. You will find as a fact that Joe said this even though Mary said something different. Then in order to justify that oftentimes it's based on credibility concerns. If there are credibility concerns and you've assessed credibility, then you should also be including that as part of the report. If you're going to favour Joe's evidence over Mary's you should explain why you're doing that.

Conclusions. The standard for these investigations is not beyond a reasonable doubt it's on a balance of probabilities. When you're drawing your conclusion, whether harassment took place or there was discrimination, you need to determine based on the evidence, on a balance of probabilities, did this incident actually occur? Your report should include an analysis of how you arrived at the conclusion. You can set out your findings of fact but there should always include the analysis. In one decision a Court did look at the report and said, "If this doesn't even include any real analysis." That's one point that is important to include in your report. Finally, if this is within the scope of the investigators mandate and retainer and expertise, a report may include recommended course of action. If you found that harassment did occur then what would you recommend as the corrective action.

Audience: Sorry to interrupt. If the standard of truth is the balance of probabilities but isn't the case both for eventually will it be the same standard of probabilities?

Elisa: Yes. If you're dealing with something that could be a criminal issue, a criminal conduct, then you might look more towards that beyond a reasonable doubt proof but if you're talking about a harassment claim it would be on a balance of probability.

Circulation of the investigation report. Who are you going to circulate this to? You do not

have to circulate the report to the complainant and respondent. That's not an obligation. You should only circulate the report to the key decision makers. The Occupational Health Safety Act, the new changes, does say that you require to provide the complainant and respondent a summary of the results but that doesn't mean you have to give them the report.

Privilege. Just because you have a lawyer conducting the investigation doesn't mean you automatically have solicitor/client privilege. You have to look at the purpose and the reason for which the report is being prepared. Is it because you want someone to just collect all the facts and give you a conclusion on whether there is harassment or is it really legal advice. You have to look at the scope of your retainer and the mandate and actual functions of the investigator. There was a case where there was a lawyer involved. They were trying to seek solicitor/client privilege over the report and they looked at the retainer agreement and ultimately they held that the main scope retainer was for this lawyer to come in and do a fact finding. It wasn't to provide legal advice with respect to the complaint. You have to be very careful. If you are intending to seek solicitor/client privilege over that report be sure that your retainer and the mandate for the lawyer is very clear.

The other things that you want to think about are what you're circulating and how you're communicating. Copy your counsel. If you copy your counsel you have a better opportunity pulling privilege over that communication and don't forward your communications to third parties. Once you do that you lose your privilege over the document.

A few pitfalls and traps when you're preparing a report or conducting an investigation, hindsight. Hindsight's 20/20. You look at it and go, "How could we have not known that?" But often times hindsight leads to potentially misinterpretation. You're not weighing the evidence objectively because of that hindsight. However, hindsight can be a useful learning tool and you think to yourself, "Okay. That's something we could have prevented. Let's put something in place so we can prevent it."

Bias. Picking an investigator that's impartial is very important. You really have to look at that and I'm going to stress this, especially when it's someone in management, and the investigator might report to that person, you really want to abort a situation like that. Avoid using investigations as a means to build your case. If you have someone come in to complain that there was harassment and you believe that there was, don't use the investigation to try to build the case against the respondent. It is truly a fact finding to confirm whether this actually occurred.

Some other pitfalls, obviously ignoring information that is not convenient for the purposes

of your report. Not considering the reliability of evidence and any kind of mitigating factors. Again, there might be credibility issue, whatnot. Selective referencing of evidence. Again, you prefer this so you're going to pull that out in put in your report but there's other information that you're going to leave out but which could potentially impact the result. Forming opinions and conclusions outside of your expertise. Sharing draft reports prematurely. You should always only disclose your final report or even the draft before the final.

Some recommendations for you. Don't bury your head in the sand if you get a complaint. You really need to address it and not every complaint will require an investigation. That's an assessment that you have to conduct. Don't rush to judgment. Often times you get a complaint and you go, "That happened. I know it happened." But you can't rush to judgment. You have to conduct a fair, reasonable and thorough investigation in many instances to know. I've been in situations where when I get the complaint, it's convincing. Then I speak to the respondent and then I start thinking to myself, "Okay, maybe this isn't as the complainant says it." so you have to conduct that investigation to find that out. Choose the right person to conduct the investigation, someone that's fair, qualified and competent. Ensure you're going to have a well written report that's thorough, sets out an analysis and the facts, again, because if this investigation goes the wrong way because it ends up in discipline and then you have a complaint or a wrongful dismissal claim, or a human rights complaint, that report may become something which is made available to the Court. Finally, don't forget to collect your documentary evidence if it's available. To ensure that the investigation is thorough. Just don't rely on your witnesses. Retain experts, if necessary, to collect the data. We have an expert here who is going to speak to you about very specific investigations that would likely include retaining an expert. I'll hand it over to Kas.

Kas: I'll give you 2 seconds while I get the presentation up here. Everyone awake? Everyone all set? It's early morning. Can you hear me okay in the back? Okay, perfect, perfect. We have quite a few things I want to cover off. Elisa's presentation was fantastic in terms of raising some of the issues with respect to investigations and some of the do's and don'ts. There'll be a little bit of overlap but not a whole lot. My perspective is coming from my experience as a forensic investigator so forensic means different things to different people. For us it's always sort of looking at gathering evidence that could be used in Court, effectively. It could be digital evidence. It could be hard copies. It could be whatever it is to conduct an appropriate and fair investigation.

What I want to cover today in half an hour or so, is a fair amount, is first of all just talk about elements of anti-fraud risk management program. Just really quickly. What we're

dealing with today is the response part of the anti-fraud program. I just want to show you where that fits into dealing with and what I'm going to talk about is the fraud area. Then I'll talk about some of the types of fraud that we see out there. There is basically three big common types. And then a few considerations in relation to investigating or not to investigate. We've already heard from Elisa in terms of some of the obligations upon employers to investigate so I'll just elaborate a little bit on that from a fraud and misconduct prospective. I'll talk a little bit about the impact of fraud and then the response to allegations. That again gets into a bit of the investigation but it will be from a fraud specific perspective.

Whenever we're dealing with anti-fraud programs we always want to make sure we have these three objectives in mind. Prevention, detection and response. We want to cover off all of those three aspects. We're dealing today with the response aspect which is responding to an allegation of impropriety or misconduct of fraud but when you're thinking about where that fits into your overall anti-fraud risk management program, it's one trosh of your whole your anti-fraud program. So I'm always thinking about prevention, detection and response and whenever I coach boards and management and employees on how to put in an effective program, we always talk about these three different areas. Then you can see circling around those three objectives are assessing where you are as an organization. Thinking about where you want to be. Then designing the appropriate controls and frame works to ensure you get to where you want to be. Then implementing those controls and frame works and then constantly evaluating. That's sort of that circle and it's a good picture that shows all the elements that you want to be thinking about.

This is a busy slide but it sort of shows that when you're dealing with a fraud prevention and anti-fraud program you want to have elements under each of these objectives. You can clearly see that prevention, there's a number of items detection and I'm going to talk mostly about response today. Under prevention fraud risk assessments is a big one. It's only one part though and there's a number of other elements there. I won't be spending a whole lot of time on any of these elements except for the response side of things.

Just want to quickly talk about the different types of allegations. In my experience the investigations I've done, I've done a few harassment ones but not very many of those, because typically you don't bring the accountant in to deal with those issues. You tend to bring in people that have, as Elisa mentioned, people that have experience in conducting interviews and being able to gather facts. I think we're very consistent in that regard that you want to find the person who has the reasonable expertise in the area of the issue that you're dealing with. But when we're dealing with fraud these are some of the main types of fraud. There's three real main types and all the surveys that have been conducted over

the years all sort of point to these three major types. Asset misappropriation, corruption and financial statement manipulation.

When you think of asset misappropriation most people think about computers or laptops or physical assets. Asset misappropriation deals with any time you're moving any kind of asset from an organization, out of the organization, to an individual for personal gain of some sort. Typically it's for personal gain. People don't tend to do this for fun although there are certain criminals who would do things like this for fun but typically it's for personal gain. When I think about asset misappropriation, I've listed just a couple of those examples, expense report fraud is certainly one because it's cash. Cash is the easiest asset to move out of an organization. Expense report and credit card type of abuses, fictitious vendors. Very easy to set up fictitious vendors. If I have control of setting up vendors in my system and then I can also be involved in paying, making the payments, very easy to move money from my organization to this fake vendor that's not actually supplying anything to my organization, out of the organization. So that's a very, very typical one. Payroll frauds another and I have a session that I do that just deals with all the different types of fraud situations and how to combat them. It's my fraud 101 course which is not how to commit them but how to combat them.

Corruption is certainly a big issue and we hear about it constantly in the news these days. It's been around forever but corruption we've heard a lot about recently in the last few years. Certainly in Quebec with the Charbonneau Commission. There's a whole bunch of corruption, globally, in terms of legislation like the anti-bribery and corruption legislation, the FCPA in the US, and the CFPOA in Canada, and the UK Bribery Act, all deal with foreign corruption. But corruption deals with bribes, kickbacks, conflict of interest, so I always think of procurement. Whenever we're purchasing in procurement that's where corruption happens. Those types of investigations you often get. I just got a call on Friday on a situation where someone felt that the procurement process was not fair and they were unduly, or unfairly, treated in the procurement process. Our role is to investigate what happened. There are allegations that there were some bribes paid to get a contract and that kind of thing. Those types of investigations are very tricky because the evidence, where do you find the evidence for that stuff, right? I'll talk a little bit about that shortly. That's certainly a big one.

Financial statement manipulation is primarily where financial information is made public or there's incentives within your organization to create financial information that may be misleading because it helps you get a bonus or helps you reach a certain target. For large public companies, of course, that can certainly be adjusting earnings for a quarter to have made certain targets. Your share price stays at a certain level. There's a lot of that as

well but mostly for publicly traded companies is where you see financial statement manipulation. The big cases of Enron, WorldCom and Nortel, those are some very obvious examples. There's lots of others as well that are not as public.

To investigate or not. Elisa talked already about the obligation under certain acts and codes. Certainly you want to look at whether or not there is a breach of a law of a regulation or policy. Once you've decided that you're going to investigate, or you're thinking about it, you want to understand what the impact might be. If it's a very minimal impact maybe you're not going to be inclined to do an investigation. The financial loss in a fraud or misconduct situation can be one aspect. But often it's the reputational issue for most organizations. Certainly in Ottawa, there's lots of not for profits and national organizations, and certainly the government. The reputation is the bigger issue. If you have even a small fraud in an organization and you collect funds from donations, primarily, or contributions of some sort, if it gets out that there was a fraud and it wasn't appropriately dealt with, you may have an impact on your future ability to generate donations and revenue because the trust is gone. You can't stop the fraud from happening but what you can do, and we'll talk about that shortly, is how you deal with the investigation. Did you have a protocol in place to deal with the investigation and a communication protocol to properly deal with the public. Really good example, just thinking off the top of my head, CRA had an issue a few years ago. Probably about a year and half ago now. It was a cyber-attack. A bunch of the information was breached. CRA, in this case, had a very, very strong investigation protocol. They knew right away that, okay, we've got a big problem here. Someone's hacked into all this information that could affect any Canadian in the country. How do we deal with this? They were right on top of it. They made a public announcement that this is what happened. We're investigating. We don't know the extent of the issue but we'll keep you informed and they did. They shut down the website. They closed off all access. They did an investigation. They figured out what happened and they communicated. I think that went a long way in their response to maintaining public trust. If they had botched that communication, even if they were doing all the right things on the investigation side, if they botched the communication at the element of it, that could have had significant repercussions in terms of the reputation and the confidence Canadians have in the CRA. That was just an example, a highly public one, of responding and the reputational risk that can ensue if you don't respond appropriately.

The other impact that people don't often think about is the organizational tone and the morale. How many, and I'm not going to pick on anyone so don't worry, but how many of you have been in an organization where there's been some kind of misappropriation of funds or allegations of fraud or misconduct? Maybe by a show of hands. So, there's a few

and I'm sure there's more. All the studies say there is over 50% of companies have had some kind of fraud or misconduct issue in the prior couple of years. It's going to happen at some point. It's just a matter of how you deal with it. But often if you're in that situation you're in a situation of crisis, first of all, and often there's a real morale issue within the organization. I'm sitting in my cubicle and the person next to me has committed a fraud. This has been my best friend, or best work colleague, for many, many years and now I find out this has been going on. That they've been stealing from the company over years and years and years. It really affects the morale of the organization. But the important thing for the organization is to be able to deal with those types of situations in a very measured and appropriate manner that will set the tone from the organization that this type of thing will not be tolerated. One of the slides I talked about earlier was the whole anti-fraud program. One of the pieces is governance and tone from the top. So investigate, if appropriate, and then also disciplinary action and remediation. If those things are not in place it can really affect how people feel coming to work. They don't necessarily feel that some transgression is going to happen, that it will be dealt with appropriately, and that can allow for more of that to happen in an organization so I'd love to talk more about that but I can't at this time.

Some of the other things to consider with investigating is there any potential for recovery. What's your objective here? If your objective is to recover some money is there a potential to get some money back? If an employee has stolen from you is there an opportunity to get some money back? There's a couple of ways to do that. One is directly through the individual, through civil proceedings, and of course you would have counsel help you with that with figuring out what the obligations are and starting a claim. But then you've also the insurance aspect. A lot of organizations have what they call employee fidelity bond or crime insurance. In a number of cases I've done in the last 6 months the insurance has varied from a very small amount to nothing to very significant amounts of coverage. The coverage is not that expensive but it really protects the organization from financial loss because then you have to come up, do an investigation, figure out what happened, report appropriately, a fact finding report and then submit an insurance claim. In most cases the insurance companies, if it's an appropriate report, a well done report and all the steps Elisa's talked about in terms of fairness and everything else and a fact finding non-opinion based report, you'll get your money back from the insurance company, or at least up to your limits. That's one way of recovering assets. But you have to understand if that's your objective and if it is then you'll investigate for sure.

Sometimes you get allegations and you're not sure, "Okay, well, it doesn't sound that big so maybe we won't investigate." But maybe it's just a symptom of something much larger.

If you don't investigate to a certain degree you might not know what that larger item is. The tip of the iceberg item is important to think about and start the investigation. Ask some questions as appropriate, as Elisa talked about, understanding who you want to talk to get some good information to be able to assess whether or not you want to continue with an investigation. Obviously you want to get input from your counsel. Certainly we never get involved, or typically don't get involved, unless we're working through counsel. It's a whole discussion around privilege but that way when we do the investigation, the work is done through privilege, and then counsel can provide legal advice in relation to the information that we provide in terms of the investigation. It's actually a really good tag team in a lot of cases where you get the legal advice so the information is protected and the investigation is done together. That happens quite often. Elisa mentioned resources available to investigate. You're an organization. You're a small organization, let's say, and an issue like this comes up like fraud, it throws your organization into crisis mode. You're dealing with all those issues around how much is it, is it going to affect our reputation, who knows, who doesn't know, what's the impact? You're in crisis. You want to investigate and you decide to do so but do you have the resources to do it? By resources do you have qualified resources can do a proper investigation that will serve your purposes. Whether it's to recover, whether it's just to contain, whether it's for disciplinary action, whatever it might be, you got to see whether you have the resources. If you don't then you have to think about what's my plan? Is there someone I can call in, a third party, that can help? Who's my legal counsel? Who else can help on this type of situation? The availability of resources is a consideration. But if it's certainly an issue and you need to investigate but you don't have the resources you have to think about what's your plan B.

I've already talked about some of these items. The reputational issues, financial impact is often not as great as their reputational issues, I've already talked about each of these points. I'm just going to move to my next slide. Another way to think about the impact of fraud is sort of a nice little box diagram, you've seen many of these types of diagrams depicting lots of different things, but I like to have the potential for materiality and that could be reputational impact, it could be financial loss, up here, and on the bottom is sort of looking at the individual in the organization. What's the scope and breadth of that particular individual? If they're senior management you'd say certainly that they have a high degree of breadth and scope. Anything that they have done, if there's an allegation against a senior management person, it's going to be in the black area and you're going to certainly want to investigate. Anything in the gray area you'd also want to be considering investigation and then thinking about whether it's an internal investigation versus an external. If it's a senior management person it's pretty tough to find someone internally to actually do the investigation because how do you know who's implicated? If it's senior

management are there others in senior management? Then you might be thinking about board involvement, special committee of the board to be involved, and perhaps hiring some kind of third party. If it's a smaller scale situation then perhaps you can get someone within the organization that's going to be independent and impartial and they can do the investigation internally. But it just depends on the scope and the impact. That's just a nice little chart to depict that.

Getting back to the response. Some of the things to think about. One of the things is that I just mentioned is organizations, as I talked about when you're dealing with your anti-fraud program, often think of just certain elements. One of the elements you want to think about in your response is an investigation protocol. What do you do when something happens? Because there's always going to be a situation at some point where you're going to be hit with an allegation of something. If you're management, what do I do? And if you haven't got a protocol in place you're going to be in crisis and your eyes are going to go off the business and go into dealing with this crisis situation. It's a bit of crisis management but having a protocol in place as to your response is critical to ensuring the least disruption and an effective investigation. One of the suggestions is a special committee. It could be a special committee, a management committee, depending on the level. It could be a special committee of the board, that's another way. I've seen it quite often when it involves more senior people. Just depends on the nature of the allegation. But having a special committee of the board, the important thing is to be somewhat independent within the organization. Elisa mentioned that as well. That you've got to be careful who knows and who conducts the investigation. Often having a committee is a good way to oversee the investigation. People that you'd want on the committee, you'd certainly want someone from HR, unless they're implicated. You'd certainly want someone from in house counsel, if you have in house counsel, and if not you'd want external counsel to advise certainly on the legal matters, for sure. Then you have to think about, okay where is the situation occurring? Who else do I want on my committee? It might be someone from the audit committee, from a board member, it might be someone in senior management that understands operations that is clearly not implicated or could not be implicated. But you have to think about who's on that committee.

Then you want to think about the objectives of the investigation. What are you trying to achieve here now? It depends on what the violation is. In dealing with fraud situations, or alleged fraud, you want to think about, okay, do I want to recover funds? Do I want to just discipline? Do I want to terminate? What are your objectives? That will drive how you respond and the evidence that you gather. As Elisa mentioned, a lot of internal investigations, the standard of evidence can differ from if you're going into a criminal

matter and I think that question was raised earlier. With fraud situations, or alleged fraud, you may be in the criminal realm. Then you're having to gather evidence from that perspective and that's different. The way you gather it and how you gather it becomes very, very important. That's where Elisa was talking about is do the people who are conducting the investigations understand the difference, understand the objectives and are they gathering the information appropriately so it won't be tainted when you go to testify in Court in relation to the report. That's a little bit on the objectives in the investigation.

The rights of the accused has been discussed earlier a little bit but whenever I'm involved in an investigation I always think of the person who is being accused of the wrong doing. I always take their position. I'm going to be them. What would I say to these allegations? Always think of the rhetoric. If there's an issue of cash moving out of the company. Have I thought about if the person paid it back, he or she? Often you say, "I'm just going to get the information to show that the money came out." But if the person paid it back and fully intended and had some kind of side agreement, yeah, probably not the right thing to do but they paid it back and you never even asked that question. The last think that you want is for that to come out when you're in Court and you've got your nice case done, and that goes to the whole idea fair, reasonable, impartial investigation, and thinking of the rights of the accused is really thinking about, from my perspective, is thinking about what would they say and make sure I have a case for them as well, so that's fair and balanced. All too often you see one sided biased investigations and that doesn't serve anybody's purpose.

Some of the other considerations. If this individual has financial capability within the organization, thinking about do you withdraw those. What do you do with the individual? Are the allegations such that you want to think about perhaps a temporary leave? With pay or without pay? Those are things obviously you have to talk to your counsel about as to what would be the best approach. But sometimes having someone, "Look there's an allegation against you. We're going to conduct a fair reasonable approach to this and do an investigation. While we're doing this we're going to have you not come in and we're going to suspend your authorities so your access to servers and all that kind of stuff will be suspended until we complete the investigation." That's something you have to get legal advice on, of course, but that's something we see quite often. That allows the investigation to actually be conducted in a way that there's no risk of data or information that's critical to leave the organization. That's the same with withdrawal of physical and electronic access rights.

I'll just jump to securing assets. I always think about if you know that there is an allegation here, at some point you're going to have to say, "Did money dissipate from the organization? Did it go to financial gain?" That's when you're getting into, "Okay, how do

we make sure we have some claim and stake to some of the assets that belong to the company but they're now in somebody's else's name?" That's further down the investigation but there may be some assets that are available right now, just computers and that kind of thing, that the individual has access to that you want to secure up front.

That goes to securing evidence including electronic. In the old days you'd go into an investigation, you'd get boxes of information, you'd do interview and interviews have always been critical to any investigation, but you get boxes. For the last many years, as you all know, information is electronic. Any investigation has to think about where am I going to get my best evidence. It's going to be through interviews and it's going to be through all of the electronic information. When you're thinking about you're investigation, where is the evidence? The evidence is on the computers, for sure. On the servers, on the back ups, on the laptops, on the personal devices of the individuals. That's where you're going to get all of your evidence. Up front, when there's an allegation, before you advise the individual you want to think about how am I going to secure this so this evidence doesn't get shredded. The old days of shredding paper, there isn't paper anymore, really. It's all electronic. It's about, "Okay, how are we going to preserve the electronic environment?" I'll get to that in a second. Often I see companies that tell me about the incident that's happened and they start looking at the computer, and I'll talk about in a second, but you don't want touch the computer. You just want to protect it so no one can use it and protect the information, I'll get to that in a second.

I mentioned retention of specialized professionals, whether you need them or not. You have to decide depending on the impact of the case but legal, for sure, forensic accounting folks, depending on the nature of the issue, potentially. Insurance considerations, I've mentioned that already. So think about that. Look at your policy. Make sure you have coverage, or if you don't have coverage, think about whether you think you might want coverage. That's sort of a good segue to reporting the matter to the police. If it's a fraud situation, an allegation of fraud, sometimes there is an obligation in the insurance policies actually to call the police and have a police report. It may not amount to anything but often, as a condition of your insurance policy to get any kind of recovery, you have to make a police report. But that's also something to think about. Whether or not this is something that you want to pursue criminally. Oftentimes with allegations of fraud organizations don't want this out there so they'll do an investigation, find out what happened, do the disciplinary proceeding, whatever it might be. It might be termination, whatever it might be with cause or without cause. That's it. It gets swept over. What happens is, some of these individuals will move on to the next organization and do exactly the same thing. If there is no criminal record, any kind of conviction with respect to what

happened, there's no criminal record on the individuals background. They can almost be free to go ahead and move to another organization. I've seen this a number of times where a person will go from one organization. I do the investigation there and 5 years later I go to another organization, same individual, and you see the same pattern of behaviour. One of the reasons was because background checks may have not been done as robust as they should've been, and the second would be that even if they did a background check, they wouldn't find any criminal wrongdoing. Wouldn't have any knowledge.

Another point in terms of consideration is that communication strategy I talked about. Very, very important to mitigate the damage to your reputation that could occur when something like this happens. Establishing a communications strategy is very important. You want to have that up front, have that as part of your protocol so when it happens it's not a big crisis. You know what you're going to do.

Some of the things not to do when there's allegations or suspicions of fraud, you don't want to dismiss them, of course. You don't want to dismiss the suspicions or the red flags that come up. You don't want to make any accusations before investigating, of course. That's not fair, balanced and reasonable. You don't want to have the suspect have access to records that might be important. You have to figure out how you're going to do with that, with counsel, how you're going to do that and that could go back to the suspension or the leave with pay or without pay. One important aspect is searching a suspect's computer. Often I hear, "Yup. We've got the computer. We found all this great stuff on the computer so, clearly, he did it or she did it." That's the last thing you want to hear as an investigator because know the information is all tainted. Now you know maybe you've got some good information, but it's going to be hard to allow that information to be used in a Court, if you're going to need it in a Court. There's a whole bunch of stuff regarding technical stuff, metadata and everything else that gets changed and you can't prove the evidentiary value of that information. What we always recommend is, "Look. If you think there's information on the computer just preserve it. Put that computer in a locked room. Don't let anybody touch it." Then what you do is you just get imaged. Forensically imaged. There's lots of ways of to it but there's certain techniques that are approved by the Courts and certain software that are approved by the Courts, in terms of forensic images, and that's very important to do if you're going to want to preserve that information. The first thing is put away, lock it up. That's the laptop. There's other devices like PDA's, your iPhones and Blackberry's, there's all that to think about as well and see if you can gather those and make sure you have them and then preserve those as well, if you're able to. Again, that goes down to the company policy, what you're able to do. Is it company

versus privately owned. There's issues of privacy that we can't get into today but something to certainly consider.

The other thing that I'll just mention, I want to make sure you leave with is, often companies, because there's so much data that we're backing up on a regular basis. The data is back up on tapes, typically. Tapes are expensive, backup tapes. What companies typically do is they'll have a 3 month rotation, or a 5 month, or 1 month, whatever it is. After 3 months tape number 1 will go back into rotation, will wipe out what we had on it but we'll use to back up the current stuff. Which is fine for most organizations in terms of back up because a lot of the information is just the same information, you're just going over it. What happens though is, that you've got a situation or allegation and you're dealing with investigation, when that 3 month tape gets backed up, if there were things that were on there that are incriminating, or could be important information on the investigation, there are about to get written over. One of the first things to think about is where is all of my data? If it's on backups let's understand our back up policy and let's not overwrite backup tapes until the investigations done. If you do that you're losing valuable information. You can recover stuff from laptops, on the hard drive, you can recover certain information as long as you don't tamper with it. We have our technical expert in the room so he's probably going to correct me on a few things but that's okay. With servers, that's a big one, is understanding the environment and making sure that you're not losing information that are on backup tapes.

Some of these other things are quite obvious. You don't want to be starting to rummage through a suspect's office and just sort of look for stuff. You want to make sure you've got a good protocol in place. Understand what you're doing. What is the purpose of the investigation and what are you looking for. That's going to be defense's supportable down the road. Always thinking, like Elisa said, what you're going to do in your investigation internally. Think about it as you're going to Court with this. All of your actions including rummaging through a suspects office will subject to some kind of scrutiny. If you have a protocol, I was looking for this information, I knew it was there. I'm the employer. This is all company information, you've got a defense. But if you just start flipping through stuff because you're excited and you think, "I'm going to find this and I'm going to fire this guy. I didn't like him anyway." then that's probably not a good defense in Court. You don't want to tamper with documentation, I've mentioned. You don't want to interview or confront a suspect without proper consideration of all the alternatives. Who else do you need to talk to? What other information do you need before you start confronting someone with allegations? The other thing I see often is making a deal with the suspect without consulting with counsel. You make a deal everything's off. You're done. Usually if a

suspect is making a deal with you it's because it's a much bigger issue and, "I'll take it. I'll sign off. I'll pay back." Often I say, "Yeah, you know what? We did the investigation, a partial one, we found \$10,000.00. Wasn't much. They agreed to pay it back so I think we're good." Well, if they agreed to pay all \$10,000.00 back you can bet there's a lot more there that they haven't told you about. They're thrilled that this deal's been cut. Now you've also compromised a lot of your rights. I'll leave it to legal counsel to give you what that is but it totally compromises your ability to do anything further if you cut a deal with the suspect.

Those are all my comments. I think I'm just over 9:00 there. I apologize for that. Any questions at all?

Audience: Hey Kas. In your experience, given the different test on the civil/criminal side, when police are engaged, what percentage actually lead to successful charges?

Kas: That's a fantastic question. In the cases I've been involved with, and through 25 years in Ottawa doing cases in this area, very, very, very few. I can think of maybe two cases that have actually gone, when you hand it over to the police with a bow tied around it, here's everything you need. The reason is resources. The police don't have the resources to investigate. They've got violent crimes. They've got drug issues. They're dealing with some big stuff. They're not dealing with white collar crime. If you don't have a case together, forget it, they're not going to look at it. There's no resources. If you do have a case there's a chance. Great point. You might give it to them. It's reported so you might meet your insurance requirements but you're likely not going to get a conviction. Unless it's a massive case. There's a few big ones that sometimes they'll jump on. But again, big cases they don't have the resources to handle either. Even those big cases, high profile, you might not get a conviction. Thank you. Yes?

Audience: ...

Kas: Fantastic point. Thank you. That's great. Yes?

Audience: Referring to police ... I think the resources ... these cases always have to go through ...

Kas: You can certainly proceed in terms of investigating and trying to effect civil recoveries. As soon as you want to move to a criminal conviction or charge then you have to involve law enforcement. Absolutely. You can certainly do the investigation but the objective in the end would not be for charges to be laid because only law enforcement can lay charges. Good question. Thank you.

Elisa: I just have one comment that I want to make before anyone else leaves. In terms of the work place investigations I want to mention one thing. You should always look at your policy. If your policy provides anything that is more onerous than I mentioned today, for example, I said that you don't have to provide the investigation report to the respondent or the complainant, but if your policy actually requires you to do that, then you have to make sure you comply with your policy. Go back, look at your policies. I didn't want to mislead anyone, you know, do something that is contrary to your policy which might be more onerous than the standards that we talked about today.

Kas: That's great. Thank you. I'm just cognizant of time too but I'm happy to stick around as well.

Audience: In the global context corruption is, depending on which country you were dealing with, some countries ... normal way of doing business. Canada we have more stricter corruption issues. What do you advise Canadian businesses that are now going into the international market to do business?

Kas: That's a fantastic question. It is a huge, huge topic area, anti-bribery and corruption. There is legislation in Canada called the CFPOA and there's legislation in the US so it's a multi-faceted question but you actually have to really be careful. Understand what country you're operating in. Understand how it works and if corruption is rampant in a country there is certainly some real repercussions for Canadian companies. If there operating through the US there's also ramifications, huge penalties for engaging in corrupt activities. If corruption is part of how business is done there's a whole host of different types of payments that some are acceptable and some are not. Some are that's how you do business. Those are facilitation payments but there's other payments that are not acceptable and they're basically offside of the rules. There's a whole discussion on that but we would certainly advise understand where you're operating. Understand how business is conducted. Make sure you know what your people on the ground are doing because the impacts can be huge to the Canadian companies, such that they could be debarred from government contracts. Debarred from world contracts and not be able to continue operating. I've seen that happen. It's a big topic, for sure, absolutely. I'm happy to chat with you offline.

Thank you so much everyone.

pleased to discuss resolutions to specific legal concerns you may have.

Host(s)

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