


**Council on Licensure,
Enforcement and Regulation**


DENVER
2009 Annual Conference
September 10 - 12

**Compliance and
Discipline**


**Coloring Between the
Lines: Weaving
Together the
Investigation and
Prosecution**

Presenters:

Dean C. Benard, Benard + Associates
Peter J. Osborne, Lenczner Slaght Royce Smith
Griffin LLP

Promoting Regulatory Excellence

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AGENDA

- Part I – Overview of investigator and prosecutor roles
- Part II – Investigative techniques
- Part III – Issues of disclosure
- Part IV – Communication
- Part V – Other issues
- Part VI – Case examples

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PART I – OVERVIEW OF ROLES

The Role of The Investigator:

- Understand the elements of the Complaint/ Issue/ Allegation/ Offence
- Collect all facts, documents, witness information
- Include inculpatory and exculpatory facts
- Organize, synthesize, and present fruits of investigation for prosecution

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PART I – OVERVIEW OF ROLES

Key considerations for the investigator:

- Be impartial (no blinders)
- Be thorough
- Be transparent
- Keep an “audit trail” (record of investigation)
- Assume the investigation will be scrutinized and challenged

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PART I – OVERVIEW OF ROLES

The Role of The Prosecutor:

- Prepare the case for prosecution
 - Review all evidence & discuss case with the investigator
 - Plan evidence presentation & appropriate witnesses
 - Determine how exhibits will be entered (i.e. through which witnesses)


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- Prepare and provide appropriate disclosure
- Consider and plan for potential defense strategies
- Present the admissible evidence fairly and completely for the trier (tribunal or court) to decide the issue.

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As stated by the Supreme Court of Canada:

"It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the [prosecutor] considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings." *R. v. Stinchcombe* [1991] 3 S.C.R. 326, quoting from *Boucher v. The Queen* [1955] S.C.R. 16.

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Part II - INVESTIGATIVE TECHNIQUES

Remember! Whatever you choose to do and how you do it impacts on what the prosecutor will need to work with.


- Interviews
- Evidence collection
- Sourcing information
 - Use of the internet (Google/ Facebook etc.)
 - Databases (government, courts, police etc.)

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- Use of search warrants if available
- Surveillance or undercover operations

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Part II - INVESTIGATIVE TECHNIQUES

Interviews:

- Prepare in advance to cover key facts / issues critical to elements of offence (know what those elements are)
- Consider what might be used as a defense for ones actions and cover those contingencies in your interviews

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- Take a third party (or record) to corroborate/confirm
 - May avoid the need for investigator to testify as to interview
 - Helps to guard against later recantation
 - Discuss with legal counsel how they feel about taped interviews

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Part II - INVESTIGATIVE TECHNIQUES

Consider the following and talk to legal counsel about what applies as well as the potential benefits and pitfalls:


- Is there a duty for the regulated professional to co-operate?
- Can the regulated professional be compelled?
- Can we use the fruits of parallel investigations?
- Can we use admissions made in other proceedings?

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Part II - INVESTIGATIVE TECHNIQUES

Issues of privilege:


- Self incrimination (especially if “accused” can be compelled)
- Attorney / solicitor-client
- Spousal
- Priest / penitent
- Other relationships of confidence

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Part II - INVESTIGATIVE TECHNIQUES

Evidence Collection


How the investigator sources, collects, identifies and secures evidence will have significant consequences or benefits to the prosecution.

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Evidence Collection

Investigators must:

- Identify the source of evidence
- Understand the relevance
- Ensure continuity of evidence through:
 - Continuous chain of possession
 - Preservation / reproduction of perishable originals

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- The ability to demonstrate how evidence was received
- A process that is sufficient to demonstrate evidence has not been altered or tampered with
- Maintain a master index of evidence gathered

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Part II - INVESTIGATIVE TECHNIQUES
Evidence Collection and Analysis

Internet Resources:


- Consider the reliability of the source and verification (e.g. Wikipedia)
- Google / Yahoo etc. searches of all relevant witnesses / players
- Facebook / Twitter searches

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- Internet Archive Wayback sites
- Maintain record of searches


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Part II - INVESTIGATIVE TECHNIQUES
Surveillance and Undercover
Use of these techniques can be very helpful but there may be limitations to consider that are both legal and political. Investigators should consult with legal counsel on the use of these techniques prior to employing them.


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Surveillance and Undercover

- Is it Necessary?
- Cost / benefit analysis
- Ensure admissibility at hearing in your tribunal / jurisdiction
- Consider requirements for disclosure in your tribunal / jurisdiction
- Visual? Audio? – Legal considerations
- “Political” considerations


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Part II - INVESTIGATIVE TECHNIQUES
Search Warrants
Although very effective and helpful if done well, search warrants can be a mine field of potential legal arguments. Investigators need to be extremely careful in how they write the request for a warrant and how they execute a warrant. Discussion with legal counsel can help to avoid potential problems later in a hearing or trial.


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Search Warrants

- Must be carefully written to show
 - Grounds for why the items being searched for are relevant to the investigation
 - Grounds that items sought are in the location you want to search
- Strict compliance with terms / requirements specified in the warrant
- Process of execution is defensible

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- Will forced entry be used?
- Accuracy of Index of seized items
- Continuity of possession / retention
- Returns on warrants are completed

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Part III – ISSUES OF DISCLOSURE

The Supreme Court of Canada Has Said...

"the fruits of the investigation which are in the possession of the [prosecutor] are not the property of the [prosecutor] for use in securing a conviction but the property of the public to be used to ensure that justice is done"


"It is difficult to justify the position which clings to the notion that the [prosecutor] has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour ... are overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this Court in the future but is not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the fundamental difference in the respective roles of the prosecution and the defence."

(R. v. Stinchcombe, Supreme Court of Canada supra)

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Part III – ISSUES OF DISCLOSURE

- Timely and complete
- Trend in Canada towards ever-widening scope
- Disclosure must be foremost in the mind of investigator from outset of investigation
- Contemporaneous records (notes) should be created with a view to ultimate disclosure
 - Content
 - Format


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Part III – ISSUES OF DISCLOSURE

Investigators need to remember that other than a few exceptions everything they write and record will be disclosed and seen by the defense. To avoid allegation of bias investigators need to keep the following in mind when writing reports and taking notes:


DO

- Be complete
- Be accurate
- Be impartial

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DON'T


- Be subjective or include editorial comments
- Become part of the story and therefore a witness compellable by the defense.

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Part III – ISSUES OF DISCLOSURE


Are there any exceptions to disclosure?

- Expert reports obtained by the prosecution but which will not be relied upon?
- Legal advice obtained by the investigator and/or prosecutor

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Part V - OTHER ISSUES

- Sharing of information with
 - Other regulators
 - Other jurisdictions
 - Police or other law enforcement agencies
- Avoiding Allegations of Bias
- Avoiding Allegations of Delay

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Part VI - Case Examples (1)

- Investigator submits a report but then comes across additional information
- Investigator writes a new report and submits it advising the old report should be discarded
- Old report is not discarded and then must be disclosed by prosecutor
- Defense counsel questions why there are two reports that are different
- Comments?


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Part VI - Case Examples (2)

- Investigator gathers documents as part of an investigation
- Many of the documents are not dated and after the investigator gets them the order of the documents is altered as they are examined
- Prosecutor wants to know what order they were in when obtained


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- Investigator can't answer the question
- How serious is this problem?


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Part VI - Case Examples (3)

- Investigator is looking into a case and is advised during the investigation that someone else has alleged similar conduct against the same subject but doesn't want to complain
- No formal investigation on second issue but investigator interviews that person, obtains records related to that person and questions the subject about that person

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- Information from second allegation is provided in the report of the first allegation. No conclusions are made by the investigator as to the significance of this additional information.
- Defense counsel alleges bias on the part of the investigator
- Did the investigator do the right thing?

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Part VI - Case Examples (4)

- Original complaint or allegation was made five years ago
- Witness statements are stale
- New statements / refresher statements are obtained, but they differ from original statements or facts in original statements can no longer be recalled. How serious a problem is this?

OR


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- What if the delay occurs between the bringing of charges / allegations and the hearing. Is the analysis any different?

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**PART VI CASE EXAMPLES (5)
– TIME PERMITTING**

- Other issues of Disclosure
- Information obtained but not going to be relied upon – legal advice / expert reports / surveillance
- Investigator’s rough notes i.e. witness summaries have all been produced and were made from notes. Must notes be produced?

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- Witness interviews were recorded. Summaries prepared from recordings were produced. Recordings were subsequently lost. Does this fact need to be disclosed?

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Speaker Contact Information

Dean Benard
Benard + Associates
410 Conestogo Road
Suite 205
Waterloo, Ontario N1R 7L7
Canada
Tel: 1(888)733-2226
Fax: (519)880-0722
Email: dbenard@benardinc.com
Website: www.benardinc.com



Peter J. Osborne
Lenczner Slaght Royce Smith
Griffin LLP Barristers
130 Adelaide Street, Suite 2600
Toronto, Ontario M5H 3P5
Canada
Tel: (416)865-3094
Fax: (416)865-3974
Email: posborne@litigate.com
Website: www.litigate.com