

Investigations: Will They Ever Be the Same Again? The View of the Horizon from In-House

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The COVID-19 crisis has forced businesses to adapt to new challenges with an obvious and direct impact on how investigations are conducted.

For some organisations who have conducted remote investigations, the impact of COVID-19 has brought minimal disruption to their ability to conduct internal investigations in an effective manner.

For others, less familiar with conducting investigations remotely, it has presented new challenges and an opportunity to consider how their existing approach to investigations may need to be adapted. Whilst it may be possible for some organisations to delay conducting investigations until lockdown ends, there are risks associated with delaying matters indefinitely.

WHAT ARE SOME KEY FACTORS FOR CONSIDERATION WHEN CONDUCTING REMOTE INVESTIGATIONS?

1. **Planning and Timelines** – Preparation for a remote investigation is paramount and there are various issues and challenges to consider when preparing the timeline of an investigation. These may include issues relating to data collation, the use of new and unfamiliar technology, working across multiple jurisdictions and time zones, identifying and complying with local laws and regulations, and rapport building with interviewees that an interviewer is unable to meet in person.

COVID-19 has also brought new challenges owing to budgetary constraints, the furloughing of staff, and the impact of lockdown and social distancing. All of these factors must be considered by investigators well ahead of time to ensure an effective, timely, and cost efficient investigatory process.

In many cases it will be possible to conduct the investigation remotely, however, in some jurisdictions, the diversity of language and culture means that interviews should be carried out in person and in certain jurisdictions it would be considered disrespectful to ask someone to be interviewed via video. Therefore careful consideration as to the structuring of the investigation and factoring in all relevant considerations will be of critical consideration at an early stage in the investigation.

2. **Policies and Training** – Businesses may need to reconsider their internal policies and processes to ensure that they incorporate necessary guidance relating to conducting investigations remotely and the specific unique considerations of this type of investigatory process.

Just as policies may need updating, investigators unfamiliar with conducting remote investigations, may also require additional training and/or support to ensure that they are able to conduct an effective investigatory process remotely. This may include specific technology training relating to: undertaking document collation securely from multiple platforms and on a remote basis; the use of technology for document sharing during remote interviews whilst also maintaining confidentiality; and guidance regarding human behaviours to enhance interaction with the interviewee during a remote interview.

3. **Data Collation** - For investigations it is becoming essential that you can access all relevant devices on which work is being carried out. Many organisations have multiple data sources across multiple jurisdictions which may present challenges when seeking to collate materials remotely.

Notwithstanding data storage and transfer policies, many employees working from home have had little choice but to use personal devices and, therefore, this poses problems where organisations rely on people working from the office. Policies are unlikely to have caught up and even where they have, they are hard to police. As such, consideration should be given at an early stage to ensure that all material is collected from all relevant devices in a forensically sound manner before interrogation. If it is not possible to collect that data centrally/internally, this poses problems for the integrity of the investigatory process.

4. **Use of Technology** – The use of technology can also be intimidating for some people. Investigators should consider potential technological issues which could impact the way that the investigation is conducted, especially in terms of time allocation and data collection.

Technology for secure document sharing exists. The sophistication of such technology is such that it can prevent downloads, add security watermarks, and prevent screenshots. Technology also provides a real time audit of who has accessed documents and when such access has taken place. Translation and interpretation can also be built in securely. If the security risk is even higher, counter-surveillance technology can detect recording devices, but this can be expensive.

The use of analytics and Artificial Intelligence (AI) can also help investigators when interpreting, assessing, and/or evaluating data remotely. Although this technology has been used before, COVID-19 crisis has enhanced its functionalities, rendering data analytics and AI an important tool for remote investigations.

5. **The Interview** – Just as conducting interviews remotely may be a new experience for an interviewer, it is also an unfamiliar environment for an interviewee who may already be nervous about being interviewed, let alone being interviewed remotely. It is therefore beneficial to spend time anticipating the specific needs and circumstances of the interviewee - they may be in lockdown, self-isolating owing to health issues, and/or have concerns about their job security. Similarly there may be specific logistical needs – the interviewee may need to have a translator and/or to view translations of key documents; specific technology may be needed to support the interview and to allow for document sharing; there may even be concerns about the adequacy of the wi-fi connection.

Fundamental difficulties may arise where there are added complexities, as evident during COVID-19. Therefore identifying a time to contact an interviewee prior to the interview taking place may be helpful in presenting an opportunity to discuss some of these issues; to determine logistical arrangements in advance; to address any specific concerns of the interviewee and to familiarise all parties with relevant technology to be used in the interview; and finally, to build rapport and trust prior to the interview taking place which will be key to ensuring an effective and open investigation.

6. **The Interviewee** – Conducting an investigation remotely can pose challenges in maintaining the appropriate legal or human resources support for the interviewee. Whilst these safeguards can be put in place remotely, investigators should be mindful to ensuring that the interviewee receives adequate support.

Engagement with interviewees should not be underestimated and investigators must remember to be empathetic to the circumstances of the interviewee, and to prioritise and concentrate on building a rapport with the interviewee. Introducing common subjects and general topics of discussion before starting the interview can help interviewees to open up and ease tension.

7. **The Interviewer** – Interviewers should also reflect on their own position in the interview and be conscious of their own body language and narrative, and adapt this accordingly to ensure that they can best develop a rapport with the interviewee. They should also become alert to changes in demeanour of the interviewee, recognising shifts in body language and vocal tonal changes to assist in their assessment of an interviewee's credibility.

Organisations that were already investigating remotely pre COVID-19 will continue to do so and many others have been forced to adapt quickly to employ remote workflows. It is, however, clear that whilst a number of new issues and challenges must be considered and overcome, the realisation is that remote investigations are not only possible, but in many respects are becoming the new default position for investigatory practice.

ABOUT US

Fulcrum Chambers Ltd has wide-ranging experience in conducting remote investigations, in addition to acting as the trusted advisers to many corporates and other organisations in related areas across all major continents. We have been involved in, and continue to be involved in, the most significant and high-profile international corporate criminal investigations and prosecutions.

TLS empowers legal professionals to leverage AI, data analytics and language technology across a broad spectrum of investigations. Our experts – forensic experts, data scientists and former litigators- have supported legal professionals across a broad range of industries and jurisdictions.