

Austin Area Chapter Association of Certified Fraud Examiners

Update of Chapter Activities

Fall Seminar - We've got a great seminar coming up for you on Wednesday, December 7th, from 8am to 4:30pm. Register online at our chapter website <http://www.austinacfe.com/>. Be sure not to miss this opportunity to pick up 8 hours of CPE credit. One of the seminar speakers, Mr. Joe Collins, requested that we review the video at the following link prior to his presentation <http://www.bloomberg.com/video/81729932/>.

Scholarship Award - Our fall scholarship winner is Ms. Shelby Kiser, a business major enrolled at Tulane University.

Community Services Project - As a reminder, part of our mission as a Chapter of the ACFE is to provide community service. This year the Chapter has a Community Service Committee and one of first projects is to accept donations for victims of the Bastrop fires. We are asking for additional help from our members. You may donate by cash, on the website by pay pal or send a check to the Chapter at the mailing address. Make the checks to the Austin Area Chapter of ACFE. Our Treasurer will send a check in the name of the Chapter after the fall seminar. Thank you for your consideration for this worthy cause.

Chapter Membership - Our Chapter continues to grow and currently has 84 paid chapter members,76 of whom are CFE's, for the 2012 fiscal year. If you are not yet a Chapter Member please contact our Chapter Treasurer, Mr. David Heater or fill out the membership application on the Chapter's website <http://www.austinacfe.com/>.

Chapter Meeting Schedule

Time: 8:00 a.m. to 4:30 p.m.

Location: Catfish Parlour
4705 E Ben White Blvd

Cost: Seminar Fee: Members (\$125.00)
Non-members (\$175.00)

Date: December 7, 2011

See flyer for details at
<http://www.austinacfe.com/docs/fallseminar2011.pdf>

register on line: www.austinacfe.com
or

call 512-923-8656

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October What You Missed

By Mike Garner, CFE, CIA

If you were not able to attend the November 7, 2011 Chapter meeting you missed the second part of a presentation on “Ethical and Legal Considerations for Fraud Examiners” presented by the Chapter’s Vice President Mr. Andy Prough and Chapter Member Dr. Cecily Raiborn, McCoy Endowed Chair in Accounting, Texas State University, San Marcos.

Mr. Prough provided a brief review of last month’s part one presentation including the basic elements of ethics (decision-making, right and wrong – moral principles, and concern with values), the teaching of values, choosing wisely, directing our actions, the eight elements of the ACFE’s professional code of ethics, and the general topic of conflict of interest. Dr. Raiborn then provided a presentation on “Whistle Blowing” and Mr. Prough closed with presentations on “Privacy and Privilege” and “Good Faith and Fair Dealing.”

Part One Overview -. Mr. Prough provided an overview of Part One including the three elements that are traditionally mentioned in the definition of ethics including reflective choice (decision-making), standards of right and wrong (moral principles), and concern with values (the “greatest good”); and the purpose of ethics which is to direct our actions to better conform to a written code of ethics such as the Certified Fraud Examiners Code of Professional Ethics. Mr. Prough also discussed conflicts of interest and the example case study presented by Mr. Dan Hargrove at the October 2011 Chapter Meeting.

Whistleblowing – Dr. Raiborn started her presentation on Whistleblowing by giving the simple definition that it is tattling and the whistleblower is a tattletale. A more formal definition is calling attention to wrongdoing that is occurring within an organization. A more detailed definition is the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.

The primary methods used to blow the whistle include: reporting wrongdoing or a violation of the law to the proper authorities; refusing to participate in workplace wrongdoing; testifying in a legal proceeding; and leaking evidence of wrongdoing to the media. Section 8 of Sarbanes-Oxley (SOX) provides certain protections for whistleblowers. Prohibits discharging or discriminating against an employee who assists in an investigation against the company or files or participates in a process relating to fraud against shareholders.

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Section 806 of SOX indicates that the whistleblower must file a complaint within 90 days of the alleged retaliation; being late by 1 day precludes the Department of Labor (DOL) from awarding any relief and deprives federal district courts of jurisdiction.

The organization can still avoid Sec. 806 liability by demonstrating that the same action would have been taken in the absence of the protected activity.

The whistleblower protection act of 1989 provides protection for federal government whistleblowers. Employees must prove that the whistleblowing was a factor in the personnel action taken and includes: that harassment and threats can constitute a prohibited personnel practice "triggering" protection of the Act; protects employees who refuse orders that require a violation of the law (prior law required employees to follow orders and protest after the fact); requires that employees who prevail at the initial hearing be returned to the job (or at least the payroll) during the appeal process; and gives employees who win their cases preference in transfers to new jobs.

Dr. Raiborn briefly discussed the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010). In accordance with this Act the Securities and Exchange Commission (SEC) is required to pay a reward for original information that result in monetary sanctions over \$1 Million.

In regards to the Certified Public Accountants (CPA) responsibilities related to whistleblowing Rule 501.75: states that except with the client's permission, a CPA cannot voluntarily disclose information communicated to him/her by the client relating to, and in connection with, professional accounting services... However, if you work for a company that has a whistleblowing program, the CPA has the authority to blow the whistle.

Developing the Case - Dr. Raiborn discussed the steps in developing a whistleblower case. Ascertain the facts of the case as presented by the whistleblower including: what occurred; who was involved; how did it violate the law, regulations, rules and/or procedures; and what, if any, negatives exist about yourself or your involvement in the fraud. Then determine the relevant regulator (U.S. Attorney, state attorney general, SEC, or IRS Whistleblower Office) with which to file.

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Before you file find credible supporting evidence to support the claim including knowing the location and form of documents, records, files, e-mail, and computer software and being able to explain how documents relate to one another. Gather the names and contact information of anyone with knowledge of the fraud or who can support the claims made. Estimate the amount of money the government stands to recover. In developing a case it is important to remember that facts that have already been publicly disclosed generally cannot be used to build a whistleblower claim; a whistleblower case can take months or years to develop; patience and discretion are essential; and the confidentiality of the whistleblower is a top priority.

Privacy and Privilege Issues – Mr. Prough then discussed privacy and privilege issues for fraud examiners. Disclosures between insurance companies and information disclosures to law enforcement by the fraud examiner are often privileged. Fraud examiners have broad protection when disclosing fraud examinations to proper parties such as governmental entities and law enforcement if the nature of the communication is to support a fraud investigation or to mitigate losses from fraud. Do not communicate the disclosure to inappropriate parties or abuse the privilege in order to communicate information that is not meant to advance the purpose of the fraud examination. The CFE can forfeit their protection if they help a company gain a competitive business advantage by exposing a person as being under investigation or exposing a facility as being under investigation.

Example Case – Mr. Prough provided a real world example of leaking sensitive information to the wrong parties. In the IRS investigation of BALCO steroids lab (Barry Bonds and others were caught up in the investigation) from 2003 to the present grand jury information was leaked to the press. The longest jail sentence to come from the investigation was for the leaker. Troy Ellerman who admitted leaking the confidential grand-jury testimony of Barry Bonds and other athletes was sentenced on July 12, 2007 to two and a half years in prison, by far the harshest penalty to result from the IRS's steroids investigation. He admitted he wanted to smear the names of several baseball players because he thought prosecutors "weren't going far enough." He was ultimately exposed as the illegal leaker by a former business partner after they had a falling out.

Good faith and Fair Dealing Issues – Fraud examiners have a general duty of fair dealing and good faith when disclosing information related to a fraud examination. Mr. Prough then discussed *Amica Mutual Insurance v. Schettler* (Utah App. 1989), where the judge held that simple cooperation with law enforcement could not be the basis for a bad faith claim.

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In 1981, Carl Schettler owned a Dodge vehicle, which was damaged in an auto accident. Mr. Schettler took the car to a repair shop, and was paid in full directly for the repairs by Amica Mutual Insurance. However, he did not tender the insurance money to the repair shop, and instead removed his car from the repair shop without paying his bill. The repair shop repossessed Mr. Schettler's Dodge and Mr. Schettler reported the car stolen to the Sheriff. At the same time, Mr. Schettler submitted a claim to Amica Insurance for the loss of his "stolen" vehicle, and received a check for \$6,925. Unfortunately for Mr. Schettler, the Detective Mortensen at the Sheriff's office stayed on the case, and he soon "found" Mr. Schettler's "stolen" vehicle – being prepared for auction by the repair shop.

Malicious Prosecution Claims – Mr. Prough examined a number of malicious prosecution claims most without merit but were filed and considered by the court. He then presented the Bear Stearns Malicious Prosecution claim and focused on some of the merits of this claim. Two Bear Stearns executives, Ralph Cioffi and Matthew Tannin, who ran hedge funds that collapsed after betting heavily on the shaky subprime mortgage market were acquitted of lying to investors. This was considered a defeat in the government's bid to punish fraud exposed by the financial crisis and no further criminal cases were pursued in the subprime mortgage market.

During the monthlong trial, prosecutors relied on a series of e-mails they alleged revealed behind-the-scenes alarm at the hedge funds as investments in complex, high-risk securities tied to the subprime market began to slide. On an e-mail that Tannin wrote to Cioffi in April 2007 indicated that the subprime market looks pretty ugly. If Bear's internal reports were accurate, Tannin suggested, "I think we should close the funds now," and "the entire subprime market is toast."

The situation became so dire that Cioffi pulled \$2 million of his own cash from the fund, but the pair still told investors that they should stay in and that the outlook was good, prosecutors said. He also was accused of hiding news that one worried investor had decided to pull out \$57 million from the funds. Based on a credit analysis, "there's no basis for thinking this is one big disaster," Cioffi told investors in a recorded conference call with investors that was played for jurors.

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Jurors indicated that the evidence was flimsy and contradictory and some suggested the pair were being blamed for market forces beyond their control. The defendants' lawyers indicated that this should have been named "Operation Malicious Prosecution" and that very likely they wouldn't have faced criminal charges if Bear Stearns hadn't collapsed.

Fall 2011 Scholarship Winner



Shelby Kiser
Business Major
Tulane University

