
INTERVIEWING AND TAKING STATEMENTS - APPLICABILITY TO IFA'S

*Research Project for
Emerging Issues /Advanced
Topics Course*

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1.0 INTRODUCTION

1.1 Preface

Investigative and Forensic Accountants (“IFA’s”) have two main goals in any investigation. That is to collect and protect evidence and to locate and protect assets. In performing these tasks, one of the most important aptitudes an IFA requires is interviewing skills. With frauds that occur with little or no audit trail and the increase of computers, interviews can be a key component to narrow down the search for adequate evidence and provide assistance with the location of assets. In many cases, a confession from an accused in the form of a written statement could be the only evidence to support who committed a fraud.

Interviewing and taking statements from witnesses and fraudsters come hand in hand with legal implications and evidence admissibility issues. Proper interviewing and statement taking techniques can make the difference between a successful investigation and a failed one.

1.2 Purpose of Report

This report is intended for novice IFA’s or other fraud examiners to provide some guidelines and techniques with respect to interviews and taking statements. It may also be beneficial as a refresher to more experienced IFA’s.

This report is meant to address the following:

- The purpose and role of the IFA in interviewing and taking statements.
- Techniques for planning and conducting both witness and suspect interviews.
- Statement-taking techniques.
- Verbal and non-verbal red flags of deceit
- Legal issues that may be encountered in interviewing and taking statements.

1.3 Summary of Findings

The role of the IFA is ever increasing with more and more responsibility in fraud investigations. As a result of budget cuts, IFA's are now performing some of the traditional roles filled by the RCMP or investigating police officers. One of these evolving roles is that of interviewing and taking statements during investigations and submitting them as evidence in the court of law.

Interviewing both witnesses and suspects entails a significant amount of preparation and planning from determining the location and set-up of the room to the relevant questions and applicable documentary evidence. To assist with appropriate planning, an interview control and planning tool has been developed and outlined as **Appendix A**.

The IFA needs to develop the right attitude and interview behaviours in order to conduct successful interviews. The IFA should be patient, persistent, friendly, empathetic, open-minded and objective and should not argue, lie or accuse the interviewee. The IFA must be able to direct and control the interview process in a logical manner ensuring who, what, where, why and how are addressed for each issue. In addition, the IFA must be aware of the body language and verbal cues of deceit in order to evaluate the reliability of

responses. Often, the IFA also needs the skills to summarize the interview into a written statement. A reference sheet has been created at **Appendix B** which outlines “Quick Tips for Interviewing” that can be used as a quick review or refresher for overall interview techniques.

Generally when interviewing witnesses, an IFA does not encounter legal issues with respect to the Charter of Rights and Freedoms, nor the admissibility of a statement into evidence. However, when interviewing and taking a statement or confession from a suspect, caution is advised specifically where the police or RCMP have been involved with the investigation. Case law would indicate that if the police have been contacted regarding the case prior to the interview and the accused has knowledge of it, then the IFA could reasonably be viewed as a person of authority acting on behalf of or in consultation with the police. If this occurs, an IFA’s failure to take extra precaution or provide a warning may result in a statement being inadmissible in the court of law. This may lead to the failure of criminal charges and worse yet a disgruntled client.

In order to prevent this outcome, an IFA must be aware of the full situation at hand, including the involvement of the police, if any, the accused’s knowledge of the situation, and if applicable the employers prior discussions with the accused. Where, the police or RCMP have been involved, an IFA should consult with legal counsel.

1.4 Restrictions

Purpose

This report is not meant to be an all inclusive guide to statement taking and interviewing techniques. Rather it is meant to provide the background necessary for an IFA to recognize and be aware of the issues and techniques that need to be considered in performing this phase of an investigation. All investigations and situations are different and must be approached with view of the facts at hand. For purposes of this report most of the references are made to employee fraud. However, the same skills and techniques addressed herein are applicable to many other types of investigations.

The legal issues and case law noted in this report is Canadian. No other countries have been researched. The findings in this report may therefore not be applicable to another Country and may differ substantially.

Specific case law relating to the admissibility of statements taken by forensic accountants was dated May 2000. There may be additional applicable case law that has not been discussed by the writer. Case law is ever changing and a lawyer should be consulted with the specific facts of the situation at hand.

Use

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1.5 Scope of Research

The comments and findings noted in this report have been based on the following types of research materials:

- Journals
- Textbooks
- Presentations
- Training Materials
- Various relevant websites and on-line information
- Statutory Law
- Case law

A complete listing of reference material is contained in the Bibliography, attached at the end of this report.

In addition, assistance was obtained by Mr. Ray Porter of KPMG Forensic. For 24 years Mr. Porter was a member of the Royal Canadian Mounted Police (“RCMP”) as both a criminal fraud investigator and supervisor in the RCMP Commercial Crime, Customs & Excise and Federal Enforcement Sections. Mr. Porter has spent the last six years at national accounting firms investigating and supervising forensic engagements. Mr. Porter’s experience and training has provided him with significant knowledge in the area of taking statements and interviewing techniques.

2.0 PURPOSE OF INTERVIEWS AND TAKING STATEMENTS

In conducting any investigation, the IFA's main role is to locate and protect evidence and assets. Interviewing and taking statements supports this role as it can be used both as a tool for further investigation and as evidence in the court of law.

2.1 Investigative Tool

Interviewing and taking statements can be one of the main forms of collecting evidence and locating assets. In many cases there are no paper trails evident and interviewing potential suspects and witnesses may be the only form of information available to proceed with the investigation. In addition, in many fraud cases where time is of the essence and funds may disappear quickly, interviewing may be one of the IFA's best investigative tools by way of timing and efficiency.

However, one must be careful not to "tip off" the suspect by performing interviews too early in the investigation. This may provide the suspect with the opportunity to quickly remove assets and evidence and make them more difficult to locate, if ever.

2.2 Evidence

Statements can be included directly in the IFA's expert report or submitted as evidence on a stand-alone basis. As previously noted, in the case of a confession, a written statement may be the only evidence available implicating an individual.

Witness statements also provide evidence as to the issue at hand. These statements could be critical where the witness cannot attend trial or changes their story when it comes time to testify. A written statement contradicting their testimony can destroy the witness's credibility.

2.3 Trigger Memory

In some cases witness statements are beneficial to commit a person to their original story. Normally one will remember more details of an event or series of events closer to the date of occurrence. Once time passes, people may not remember as clearly. Therefore a witness statement can serve as a reminder to the witness of the details that took place.

3.0. ROLE OF IFA'S IN INTERVIEWING AND TAKING STATEMENTS

In any investigation, there are at least three parties that could be involved in interviewing and taking statements. In many cases, where an employee fraud has occurred, the employer quickly takes control of the situation, often to their detriment. In other cases the employer will immediately involve the RCMP, the local police fraud squad or a forensic accountant.

3.1 Employer/Victim of Fraud

Many cases are destroyed by the improper handling of interviewing witnesses or suspects by the employer or victim of fraud. Too often IFA's are brought in after an owner or manager has confronted a suspect and terminated them or made arrangements for restitution.

This type of emotionally charged behaviour can result in wrongful dismissal suits, the destruction of evidence, the disappearance of assets and potentially criminal charges laid on the victim themselves. At this point the IFA's role changes to damage control rather than conducting a proper investigation.

If an IFA becomes involved in the matter prior to action by the victim, the IFA should stress the need for a controlled process. All the "what if's" need to be addressed and planned prior to the interview especially where the suspect is the one being interviewed. For example, what should be done if the suspect confesses? Should they be terminated or

suspended? With or without pay? The business owner or manager often does not address these types of issues properly or even consider the repercussions of them.

The IFA also has knowledge and skills required to know what information and evidence is required to achieve a successful investigation. The first interview may be the only opportunity to obtain it and it needs to be done correctly.

By confronting a suspect and making some form of agreement, a victim can actually be criminally charged. For example, an employer may call the suspect into their office and say "I know you stole \$80,000 from the company and if you don't pay it back by Monday morning I'm calling the police". This type of bargaining would fall under Section 141 (1) of the Criminal Code of Canada which states:

"Everyone who asks for or obtains or agrees to receive or obtain any valuable consideration for himself or any other person by agreeing to compound or conceal an indictable offence is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

By taking the situation into their own hands, the victim can hinder and even destroy a case decreasing their chances of recovering their assets and perhaps resulting in charges against themselves.

3.2 RCMP/ Police Fraud Squad

At times, victims of fraud will gather what they believe to be appropriate evidence and go directly to the RCMP/Police Fraud Squad (the "authorities") expecting that the fraudster will easily be charged. Without proper knowledge of what is required, the victim usually

provides less than adequate evidence for the authorities to press charges and take the case further.

Today, the RCMP and police simply do not have the budgets to take fraud cases from start to finish. The authorities often require the victim to arrange and pay to have a forensic report prepared by a forensic accountant. This would normally involve interviewing the witnesses and or suspect(s) and taking statements. The traditional role of authorities in these circumstances is in part being transferred to IFA's.

3.3 IFA

These days, in order for a successful investigation, an experienced IFA is frequently required throughout the investigation. This includes the interviewing and statement taking phases of an investigation.

To be handled correctly the individual performing the interviews and taking statements needs to be objective, have good interviewing skills and be aware of the legal implications. The normal business person is usually not equipped with these skills and the authorities often do not have the budget to fulfill this role.

4.0. INTERVIEW PLANNING

Every interviewing situation is different. One may be interviewing a witness or an accused. The interview may be for the purpose of information gathering, assessing whether one has done any wrongdoing or to obtain a confession. Whatever the situation, there are many factors that an IFA must take into account before heading into an interview and preparation is key.

Outlined below are various factors that should be considered in planning interviews. It is not meant to be an all-inclusive list but can be used as a guide. To assist with this process, an interview control and planning guide is included at **Appendix A**.

4.1 Who to Interview

First and foremost the IFA needs to put a list together of who they want to interview. It is important to compile a list of potential interviewees along with their connection to the investigation at hand, the reason as to why they should be interviewed and generally what needs to be accomplished with that interview. In the case of an alleged employee fraud a good starting place would be a review of the organization chart to see what individuals may be of assistance.

Another technique in determining who to interview comes out of a good document control procedure. Document control in general is beyond the scope of this report; however, it will be touched on briefly here. One method for document control is to spreadsheet all documents obtained in a program or even excel. The spreadsheet contains

a section relating to each document that outlines among other information who was involved with the document either by way of being the writer, intended receiver or mentioned in the document. One can easily "filter" the spreadsheet to indicate potential interviewees. In addition, this approach will facilitate in determining which documents are relevant to a specific interview.

In determining the list of interviewee's, it is also important to assess what type of potential interviewee these people will be. Some will be hostile while others will be friendly and cooperative throughout the process. This assessment will impact the many other decisions/considerations (discussed below) that need to be made with respect to planning the interviewing process.

4.2 Obtaining an Interview

There may be many individuals an IFA wants to interview. The initial consideration beyond who the IFA may want to interview is how to get that interview. A potential witness or suspect could always refuse to be interviewed. One issue that needs to be considered is how to approach a person you want to interview - who and how should the initial contact be made. Obviously this depends on the situation but there are some useful guidelines and hints on how to obtain those important interviews.

Scheduling an Interview

Many individuals will refuse an interview when the initial contact is by telephone. Results are much better when individuals are contacted in person. It is much harder to say no to someone's face than it is over the phone. Therefore, for those more difficult to

obtain interviews, where practical, the best technique is to approach the interviewee face to face.

To avoid refusals on the basis that a potential interview does not have any knowledge of the issue at hand or cannot remember, the IFA can ask some general questions to get them talking. The IFA could then respond that this is an area of interest which needs to be reviewed. It will be difficult for the subject to refuse an interview at this point.

Another common refusal is based on the excuse that the subject is too busy to meet. In this case the IFA can try and relieve this issue by promising a short interview and stressing its importance and need for help.

Unscheduled Interview

Another consideration would be whether the interview should be set up at all or should it be a surprise. Where it is likely that one will refuse an interview or bring another individual or counsel with them, the element of surprise and an unscheduled interview may be the best approach. One is normally more willing to be interviewed when surprised because it is human nature not to want to offend someone.

4.3 Type of Interview

An interview can be in person or it could be over the telephone. There are advantages and disadvantages to both.

Telephone Interview

A telephone interview would be convenient when a witness is a long-distance away. However, it is much easier for a witness to lie over the telephone, cut the conversation short or simply hang up. In addition, it is difficult to be sure of the identity of the individual. One also loses the effect of the sure-tale signs of body language. Furthermore, the IFA would be unable to get a signed written statement at the end of the interview or easily discuss documentary evidence.

Person to Person Interview

A person to person interview is generally the method of choice. It allows the IFA to read body language and allows for easy review of documents. In addition, it provides the opportunity to obtain a written statement which could later be used as evidence in court. However, this method of interviewing may be inconvenient and unnecessary where you are not interviewing a key person and significant travel would be involved.

4.4 Timing

Timing relates to both the order of interviewing witnesses, the immediacy required and whether the interview be scheduled or not.

Immediacy of Interview

As previously noted, one of an IFA's main goals is to protect and locate assets. In many situations timing is of the essence. An IFA always needs to consider if locating the assets

hinges on determining where they are immediately before an accused flees with the assets.

One must outweigh the need to perform the interview quickly with that of obtaining the proper amount of documentation and background information in order to carry on a better, more informed interview. Normally the more knowledgeable the IFA is before the interview, the better the results will be as the IFA will be better prepared to ask the best questions.

In addition, interviewing closer to the event in question may result in more information and more accurate information. As time passes witnesses may forget critical events or may not remember critical details.

Order of Interviews

The order the witnesses/accused are interviewed is also of critical importance. Generally interviews should start with the people that are the most peripheral to the investigation. The interviews should then make their way into the most relevant people and eventually the suspect. This way you will learn more about the situation along the way so that you are more knowledgeable about the questions to ask and about the investigation at hand. Ideally you will know everything about the case when the suspect is interviewed. There may be only one chance for an interview and it needs to be done right.

One must take great care to ensure that the accused is not “tipped off” by a friend or colleague that they are being implicated in a fraud. This may result in the disappearance

of the accused, the assets and the destruction of evidence before an IFA has been able to locate it. The order of the interviews must be carefully planned to avoid this situation.

Unscheduled Interview

When dealing with an accused party, it is believed that the element of surprise works best. If you attempt to schedule an interview, the accused is likely to refuse. In addition, the “warning” may lead to the disappearance of the accused and/or assets and evidence potentially destroying the investigation.

It has also been determined that if a dishonest employee is caught off guard with the confrontation of the misdeed, they frequently confess. At this time they may also be cooperative in providing information about the act or sequence of events in the hopes that it will reduce the likelihood of criminal action. The initial surprise will only happen once and the interviewer must ensure they take advantage of it to obtain the key information.

4.5 Location

The interview location has many implications. Holding the interview in a neutral location may allow the accused or witness to speak more freely. Whereas holding the interview in an accused office location may make them feel trapped and threatened. The location may also be construed as one where the IFA would be believed to be a person of authority which could have legal implications on any confessions (See Section 7.0 – Legal Considerations).

Where it is reasonably certain that you are dealing with the guilty party, it is best not to interview at the accused's premises.

One also must consider their personal safety when agreeing to interview someone outside of familiar surroundings. If there are any concerns the interviewer should bring another individual along to assist.

Although an IFA would in many instances have a choice of location, there will be cases where one does not. The interviewer must be flexible and be able to make the best use of what they have at the time. The location may not always be ideal.

4.6 Room Set-up

The set-up of the interview room may also have an impact on how the interviewee feels and responds to questions. If the interviewer is behind a desk in an office as opposed to sitting at a board room table, the interviewee may feel more threatened. It is very important that the interviewee be relaxed. Therefore seating arrangements need to be considered. Often, the interviewer will want the subject to be seated in a chair that does not have wheels. This is a common technique used to prevent the subject from pushing away which becomes an issue where the interview is being tape-recorded.

Equally as important is the personal space of the interviewee. The spacing of chairs should be at the appropriate distance. It should be noted that the comfort level of conversation space is cultural.

It is also important that the interview room be private and the door should be closed. However, it is important for the door to be unlocked and unimpeded. It can not appear that the interviewee is being detained as this has many legal implications and ramifications. If the interviewee has something to say, they will likely not want others to hear. If the interview is in a room at the interviewee's office with co-workers in ear shot they may be unable or unwilling to speak freely.

Other considerations could include the size of the interview room and even the lighting. Any distractions or potential interruptions should be removed from the room such as telephones, books, papers, etc. All attention should be on the interviewer not fiddling with a book left on the table or staring at some interesting artwork.

4.7 People in Attendance

The number of people and who should be in attendance at the interview is also a major consideration.

Number of Interviewees

It appears that most believe that only one witness/accused should be interviewed at a time because one will influence the other. However, an interviewee may request they have counsel present and the IFA must oblige. In this situation, the IFA should try to get co-operation from the lawyer simply to observe the interview as opposed to being an active part of it.

In addition, where an interviewee is a member of a union, they may have a right to a union representative. These third parties often make it more difficult to interview and obtain confessions from individuals. In addition, having a third party involved such as a union representative may result in further legal issues for the IFA. For example, an accused could make an allegation of slander by an IFA in asking various accusatory questions in front of another witness or third party.

Number of Interviewers

The number of interviewers that should be present also seems to be somewhat of an issue. It is possible that more than one could indicate force and the witness/accused could feel threatened which could call into question whether the statement was voluntary (See Section 7.0 – Legal Considerations). However, if there is no record of the interview, another witness attending the interview to contest to what transpired would be beneficial.

There are also situations where for the safety of the interviewer it may be necessary to have two people present. When it is known that the interviewer will be entering a hostile situation, it is suggested that two people attend. This will assist in demonstrating the strength of the interview team.

Conductor of the Interview

The person performing the interview is of relevance as well. For instance a male may feel more comfortable divulging information to another male interviewer as opposed to a female interviewer and vice versa. A younger person may feel more comfortable speaking with a younger person as opposed to someone with “grey hair” that may be

looking down on them with disapproval. Knowing a bit about the potential interviewee may provide an indication as to who would be the best person to do the interviewing (if there is a choice).

4.8 Know the Investigation/Business

In preparing for an interview, one of the most important factors is knowing your investigation. Without adequate knowledge of the case and what you want to gain from each interview, you will be unable to respond appropriately to any questions or recognize when you should be probing further. You may not have the opportunity to go back to the interviewee at a later date to follow-up on questions you "forgot" to ask because you were not sufficiently prepared. In addition, knowledge of the investigation and the business at hand will give you the necessary background to determine who to interview in the first place.

One of the best ways to learn your investigation is to review any documentary evidence provided by your client and obtain any information they may have. It is important not only to learn about the company or situation at hand but about the industry in which the occurrence took place. One should also gain as much information about the interviewee's as possible and their role in the organization or how they fit into the investigation.

This understanding will allow the IFA to form appropriate questions for each interviewee and provide the ability to understand their responses.

4.9 Know Your Purpose and Interviewee

The interview must be planned to suit the individual being interviewed and to obtain the information required. One must always keep in mind the background of the interviewee. The interview questions should be suited to the subject obviously taking into consideration whether they are a witness or suspect.

In order to ensure all relevant questions are addressed they should be pre-planned. A set of questions may be prepared in advance. The IFA also has to be very flexible and be able to recognize when further questions or probing is required. The interviewer cannot be "stuck" to the pre-planned questions. This can be avoided by ensuring the IFA knows in advance the purpose of the interview and what needs to be accomplished. At the same time, the IFA must be able to recognize when the direction changes and head into a different area of questioning.

4.10 Record of Interview

The record of an IFA's interview is critical and can determine the success of an investigation. An IFA must determine how they are going to keep a record of the interview in advance. An IFA may have another person attend the interview and take notes, take notes themselves, tape record the interview for subsequent transcription, write a statement on behalf of the interviewee or have the interviewee write a statement on the major issues surrounding the interview. Whatever the case, the IFA must adequately plan and be flexible with respect to the method of record-keeping that will be maintained. Prior to conducting an interview and depending on the method, the IFA should recheck

the working order of the tape recorder, ensure they have enough tapes (which should all be new), and bring extra batteries, pens and paper.

No matter how the interview is being recorded certain factors about the interview must be noted to ensure proper records. This would include the date and time of interview, the location of the interview, name, addresses and phone number of the interviewee and any other individuals in attendance. A standard form taken into the interview can ensure that you obtain this information. The form will also give the impression to the interviewee that the questions are standard and will give them less concern in responding.

Further details on the techniques of note-taking, tape-recording and statement taking are outlined below under **Section 5**.

4.11 Interview Control and Planning Guide

In many investigations, there are numerous people to interview. In order to maintain control over the logistics it is a good idea to have some form of control sheets and guidance to organize the process. Outlined in **Appendix A** is an example of interview control sheets that can be used to maintain a list of all the interviewees and the order to be interviewed. As well there are sample forms that can be used to control the individual interview information.

For each interviewee a separate control page should be separated by Tabs or binders depending on the size of the engagement. Some witness interviews will have significantly more to it than others. When reviewing documents and evidence prior to the interviews, questions can be added in the correct section so as not to forget to ask that

person. Also in each section, the documents to be addressed with that person can be inserted. Keeping things in order will allow for the most efficient interview and prevent forgetting to ask key questions.

It could also be beneficial to have a separate page kept of all the common questions that you want to address with all interviewees. One should ensure that questions are inserted to flow with theme of that particular interview.

Each specific interviewee control or fact sheet should be completed in as much detail as possible. This will allow for easy review and preparation prior to the interview and will be easily accessible and handy for future reference if it becomes necessary to call on the interviewee again.

These control and planning sheets would be best kept in electronic format so that they can easily be updated and changed as new information is obtained.

5.0. THE INTERVIEW

The interview must be planned to suit the individual being interviewed and to obtain the information required. One must always be conscious of who is being interviewed, the background of the interviewee, the purpose of the interview and the attitude and behaviour displayed by the interviewer. Generally the wording of questions should be short, simple, precise and easily understood but should also be suited to the interviewee.

5.1 IFA Attitude and Behaviours

Throughout the interview the IFA must keep in the back of their mind the attitude and behaviour they are portraying to the interviewee. The way questions are asked and the tone of voice can have significant implications in the responses and overall effectiveness and success of the interview.

The IFA must be polite, friendly, open-minded, sympathetic, patient and confident. The IFA must display good listening skills, facilitate the focus of the interview, be inquisitive, display interest, be a "people" person and be flexible. Behaviours should not demonstrate disapproval, disgust, bias or accusation to name a few. The way an IFA handles themselves in an interview will tend to determine whether the interviewee will be open and honest or will clam up or provide deceitful responses.

The tone of the interview will be set by the interviewer. They should be careful not to speak too quickly as this may make the interviewee uneasy and anxious. The interviewer

should exude a relaxed atmosphere. Although the interview must be relaxed they also must ask questions with confidence and the expectation of an answer. Otherwise they may not receive an answer as the interviewee does not feel a response is expected.

When getting into the more sensitive questions, the interviewer must downplay the significance of the questions. Address them as though they were routine. In order to keep the interviewee talking, the IFA should avoid reactions of shock, disgust or disapproval in what they are hearing.

Outlined in **Appendix B**, “Quick Tips on Interviewing” are additional attitudes and behaviours of good interviewers as well as behaviours to avoid.

5.2 Opening the Interview

Introduction

The IFA should normally start the interview with an introduction outlining the reason for the interview making an effort to establish rapport with the subject. Under normal circumstances, the IFA would introduce themselves and the company they work for attempting to be quite informal creating a relaxed atmosphere. It is usually best if the IFA’s title or role at his Company is left out. The title of Vice-President, Forensic Accounting may intimidate the interviewee. At the same time the interviewee should be seated in the appropriate seat (previously planned).

Small talk is necessary in establishing rapport but should be kept to a minimum. The interviewee must “play this by ear” as some individuals will need more assurance and

confidence to feel at ease to carry on with the interview. Planning the interview and knowing the background of the individual will assist in establishing rapport as common ground may be found.

Purpose of Interview

To avoid confusion, the IFA must state the purpose of the interview. It is a good idea in describing the situation to suggest that you need help from the subject. This will make them feel important and more likely to assist. The purpose of the interview should be kept in very general terms and stated in such a fashion that is understandable and easily accepted by the interviewee. It would likely be more acceptable to an interviewee to hear that the IFA is reviewing the purchasing procedures as opposed to performing a forensic audit relating to potential kickbacks. The later, may put the interviewee on the defense and make them less likely to co-operate.

It is also important at this stage to get the interviewee to agree to help. This can be done by simply asking if the interviewee can try to help you out and waiting for a positive response. This will provide some commitment from the subject.

Procedures

The introductory stage should also be used to discuss and explain interview procedures such as how documents reviewed will be handled and the purpose and rules of tape-recording. The IFA should always try to make these procedures appear to be standard.

Prior to starting the interview, if applicable, it is best to suggest that these interviews are always tape-recorded as standard procedure. Reasons should be provided such as the fact that it will speed up the process of the interview and provide protection to both parties. Selling the interviewee on the idea that they will get out of the interview faster and what they say will not be taken out of context because it is being recording can provide the subject with some benefit and acceptance of the method. The rules that assist with recording should also be discussed at this time such as all answers must be verbal and that the interviewee should speak clearly. This prevents the need for explanations during the recording which will disrupt the flow of the interview and result in unnecessary conversation on the tape.

5.3 Conducting the Interview

The Interview questions must be asked in a manner that will lead to the most and best information. This is the stage where the who, what, where, when, why and how of the various matters need to be addressed. With the main purpose of the interview in back of mind and an IFA's knowledge of human behaviour, one can make the most efficient use of an interview. This is where an IFA's knowledge and aptitude of interviewing techniques and interpersonal skills are reflected.

If tape-recording the interview, the tape recorder should be started prior to beginning the process.

Type of Questions

The types of questions asked will depend on the phase and purpose of the interview. Various types of questions should be addressed at specific stages of the interview while others should be avoided altogether. Outlined below are many types of questions and techniques applicable in an interview situation.

Non-sensitive questions. These questions are best asked first to keep the conversation calm, relaxed and prevent the interviewee from feeling threatened. Non-sensitive questions may include asking for a description of the person's job role, etc. These types of questions tend to be informational and fact seeking. Background questions are a good starting point.

Open-ended questions. The best types of questions at the early stage of the interview are open questions – those that cannot be answered with a yes or no. These questions will normally reap the most information. Open-ended questions allow the witness/accused to tell their own story in their own way. However, this may allow the interviewee to go off on tangents. The IFA must be able to control and guide these responses when necessary.

Leading questions. Leading questions are used to confirm known facts. For example one might ask, "When did you first learn about....?". Leading questions, although having an important role should be kept to a minimum as they may cause the witness/accused to feel attacked. In addition, it may lead to credibility issues if the transcription is used in court at a later date. It may appear that you are putting words in the interviewee's mouth.

Complex questions. Complex questions tend to be made up of multiple questions on the same topic addressed as one question. These often lead to confusion with respect to which question the subject is responding and should always be avoided. Questions should always be kept as simple and straightforward as possible to avoid confusion from both parties to the interview.

Clarifying questions. Throughout the interview, the subject may respond in a manner that can be interpreted in various ways or requires further probing. When this occurs, the IFA should ask another question using the subjects wording. For example, "What do you mean by the fact that he has always been dishonest?". These questions are necessary to avoid incorrect interpretations and lead to a more direct response.

Paraphrasing. It is often necessary for the IFA to rephrase a question in their own words what they understand the subject has said. This will prevent misunderstandings in the IFA's interpretation and will normally lead to a yes or no response.

Persisting. In many cases a subject will avoid responding to a question by talking around it or going off topic. It is up to the IFA to keep persisting. This can be achieved by repeating the question a number of times or perhaps by rewording it slightly.

Sensitive questions. As the interview progresses it should move from the general non-sensitive questions to more specific sensitive questions. These questions should be left to the end to avoid the interview ending quickly if the person refuses to respond any further. If after asking sensitive questions (at the end of an interview), this occurs, at least a portion of the interview would have been achieved.

Accusatory questions. Accusatory questions should be avoided. These types of questions will cause the person to feel threatened and cause them to close up. To avoid accusations one can ask questions as if it were a hypothetical situation. An example would be to ask the interviewee "if someone were to steal from the company, how would they go about doing it?".

Dishonesty Assessment

In an attempt to determine if the interviewee is dishonest or guilty in the situation at hand there are many types of "honesty" type questions an IFA can ask. These types of questions are geared at having the individual agree that there are reasonable reasons why one would "steal" from the company. It is more likely that the honest person will disagree with the IFA and suggest that even though an employee is dissatisfied that would not be a reason to steal from the Company. When asking the interviewee what kind of discipline should an employee receive for perpetrating fraud, an honest employee would likely take a harsher route and suggest they be fired and charged. A dishonest employee or fraud perpetrator may suggest that the employee should receive another chance and perhaps there was a good reason why they stole from the company. When an interviewee is asked who they believe would think they have a right to steal from the Company, a dishonest person would be likely to respond that anyone with justification would. An honest person will be more likely to provide employee names.

If a dishonest employee is asked if there would be any reason someone would provide their name as a person that may have perpetrated fraud, they would be likely to provide an

excuse for why someone may mistakenly think that. An honest employee would be more likely to simply say no.

Confession or admission seeking questions are discussed separately under **Section 5.5**.

During an interview, the IFA must also pay attention to and be aware of other verbal and non-verbal cues indicating deceit. These factors are discussed under **Section 6 “Red Flags of Deceit”**.

5.4 Document Control

In many situations, an IFA may be interviewing or questioning a witness or accused with the assistance of various documents. All documents to be discussed with a particular interviewee must be readily available for reference. Proper document control must be adhered to if the results from the interview are to be used as evidence. For example, if the composer of a forged document was the subject of an interview being conducted by an IFA, this document may be shown to an interviewee when asking their knowledge of the document. If the interview was tape-recorded and the witness verified that they had written the document one needs to ensure that the document being submitted to court as evidence is the same as the one discussed in the interview.

A common technique for document control in an interview situation would be to stamp the original document with an identifying number prior to the interview, and take a photocopy of it to the interview. During the tape-recording the document should be identified by its number. As a further precaution, the IFA should have the interviewee

sign the photocopied document to demonstrate that the document is in fact the one that was discussed.

Even if the interview is not being tape-recorded, having the interviewee sign the document is also beneficial for many of the same reasons noted above.

5.5 Confession or Admission Seeking

Admission seeking questions are meant to confirm whether someone is innocent or guilty and obtain a confession admissible in a court of law. It is best to obtain a written statement for the purpose of credibility, although a verbal confession can also be valid.

Support for Seeking Admission

An IFA must have strong evidence that an individual has performed the dishonest act in question before heading questions in this direction. Evidence by way of the above noted assessment questions; documentary or other evidence may help make that judgment. Once the IFA is convinced within reason that they are dealing with a guilty party, the IFA must determine how best to move forward with questioning.

Known Guilt

A common approach to obtain a confession is to act as though it is known that the interviewee has performed the act at issue. This is sometimes achieved by leaving the room stating that you need to confirm or check something. It is most effective to come back with documentary evidence in hand (if you have it) and put it in front of the accused for their comments. Some suspects will admit to their wrongdoing at this point.

IFA's must have an understanding of human nature when seeking an admission of guilt. It is not human nature to confess unless there is a benefit to confessing. It is up to the interviewer to demonstrate that it would be in their best interest to do so. In addition, it is likely the accused will not admit guilt if the interviewer portrays uncertainty of their guilt. Therefore, the interviewer must address the accused as if they are guilty and act as if it is a known fact.

Rationalizations

To increase the likelihood of obtaining a confession, the interviewer needs to show empathy and understanding to the accused and not condemnation or disgust. They need to provide the accused with some sort of rationalization as to their actions. Knowledge of common rationalizations of fraudsters can assist an IFA. A good interviewer can portray their understanding that the accused was "victimized" by the Company. The interviewer may actually state "you are obviously underpaid and have not been treated fairly by this company". It is best to follow this with a "yes" or "no" question such as "You only did this for these reasons, isn't that right?".

Although the IFA is trying to let the accused "off the hook" morally, they must make sure they do not provide any statements that may appear to let them "off the hook" legally as this may cause admissibility issues at a later date (See Section 7.0 Legal Considerations). An IFA should not downplay the legal side of the dishonest act but perhaps should not even mention it.

Wording

Wording must be carefully chosen and words that are sensitive and accusatory such as fraud, theft or kickback should not be used. Instead of saying "We established that you stole money from the Company", an IFA should say "we established that you wrote yourself a company cheque without permission.

Denials

If the accused denies the accusation, the question should be worded in a manner that suggests that you know they did it and you are just trying to determine why. It is very important that the interviewer not allow the accused to back themselves into a corner of false innocence. Once the accused claims they did not do it (when they did), it is almost impossible to get them to admit they have lied. Therefore the IFA must learn the art of interruption and delay when perceiving the onset of a false denial to prevent its occurrence.

Although the IFA normally prefers this method, there may be times when a false denial would be beneficial. This may be the case where you have definite proof of the fraudulent act and who perpetrated it. The suspects further lies will destroy any credibility they may have had and make the case against them that much stronger.

5.6 Note-Taking

If an IFA or other is taking notes, the detail required will likely depend on who is being interviewed. If the interviewee is a suspect or key witness every attempt should be made

to taking detailed notes. However, if the person is not a key witness or accused they should attempt to write down the important facts, not every detail. Notes from each interview should be recorded separately.

Note-taking can be disruptive to an interview and may cause the interviewee to close up. Therefore it is important to take notes subtly. It is also necessary to conceal the importance of any of the notes taken. If direct quotes are taken, direct quotations must be included in the notes. An IFA must be aware that their notes from particular interviews may be called into court. These notes should be as accurate and clear as possible. Someone unfamiliar with the case should be able to be read and understand it. Personal comments, impressions or opinions should not be included in the notes. These types of notations may show bias if they end up in court which could destroy the IFA's credibility.

It is best to put the notes taken into a typed format for later use as they are easier to read and provide copies to other parties. These notes must be an exact replica of the handwritten notes. No extraneous information such as personal opinions should be included. Any such notations could cause significant issues if discovered in court. It is also critical that the handwritten notes always be kept. The notes may be required at a later date if anything about the interview is called into question.

5.7 Tape-Recording

The preferred method of keeping an interview record by an IFA, would be a tape recording with a transcription. It captures everything (with the exception of body language) and allows the interviewer to focus on the conversation rather than taking

notes. Recording an entire conversation also has the benefit of eliminating any debate of what was said when it comes time to testify in court. It is common for one's story to change over a period of time.

Permission to Tape

Canadian law would suggest that if one person of a conversation is aware of it being tape recorded, the evidence gathered remains admissible in a court of law. However, an IFA resorting to this technique may call into question their ethical behaviour. Under most circumstances an IFA should ask permission to tape an interview. This would alleviate calling into question any legal issues relating to the method of collecting evidence.

Once permission is received to record an interview the witness should be advised of the rules of recording for best results. These rules would include speaking clearly, loudly and only one at a time. In addition the interviewee should be advised that only verbal responses are permitted.

Evidence

After a recorded interview is complete, the IFA must ensure proper control of the tape as it is now considered evidence. A copy of the tape should be used to transcribe the interview. As with other documents, the tape should be properly marked with the date and name of the interviewee and that it is the original. The chain of custody must also be preserved. The IFA should also play the tape and compare it to the transcript to ensure there are no errors.

5.8 Taking Written Statements

A written signed statement is another method of keeping a summary record of an interview. It may be written by the IFA and signed by the witness or accused or written by the accused or witness themselves. A statement is very useful as it can be used for several purposes. It can be used as evidence in the court of law and can be used to corroborate other evidence or it may be the only evidence available. It can also be used to show one has lied and committed perjury in court.

When taken soon after the act at issue, a written statement can be used to “jog” a witnesses’ memory of the event prior to the case reaching trial. In this sense it can commit a witness to their story. As time goes by one tends not to remember details as clearly. In addition, it can prevent someone from changing their story as a result of intimidation or even bribery. A statement can also be used in court when it is known an important witness will be unable to testify in court. In this case the witness should be sworn in by a court reporter.

Statements are admissible in court as long as they meet the rules of evidence i.e. are relevant and have been gathered legally. They are not considered to be hear-say.

A statement is best requested at the end of an interview. Once a witness or accused has provided the information verbally they are much more likely to agree to it in writing. If the statement is requested up-front, it is much more likely that the interviewee will refuse and perhaps withhold information during the interview.

Written by the Interviewer, Signed by the Witness or Accused

If the interviewer is the one writing the statement, they should write it in first person as if the witness or the accused has written it. One trick often used is to incorporate errors in the write-up on purpose so that the witness/accused will correct them. The witness/accused should initial those changes. It will be difficult for the interviewee to later say they did not read it when they have actually made written changes to the statement. Each page should be numbered so that none can be said to have been missing at the time the witness signed it.

Content of a Written Statement

Any written statement should include the following:

- The date, time the interview started and the location the interview took place.
- The identity of the witness/accused with their phone number, address, date of birth, employer and other identifying information possible to obtain such as a social insurance number or drivers license. This information can assist in tracking down this witness/accused again if necessary whether it be 2 months or 2 years from the date of interview.
- The fact that a warning (right to remain silent, right to counsel) was given to the individual, if applicable.
- An initial sentence where the interviewee acknowledges the main reason for the statement.
- The “story” of the statement which should be written in first person and in the words of the witness or accused. For clarity, each topic should be under separate paragraph.

- A concluding remark stating that the witness/accused has read the statement, listing the exact number of pages and that it is true and accurate.
- A signature of the witness/accused, including initials correcting any errors. The signature should be witnessed by the IFA or statement-taker. If the witness/accused does not want to sign the statement, that fact should be noted. Note that if the statement is not signed, it does not make it inadmissible.
- The date and time the statement-taking ended.

An IFA may also want to include where there could be an issue, a declaration by the witness/accused that they can read and understand English.

A separate notebook may be required to take notes that should not be included in the statement such as other IFA's or individuals present and odd body language or other factors noted in the process. One should be cautioned that these separate notes may be called into evidence.

5.9 Closing the Interview

Closing

In closing the interview, the IFA should clarify and confirm the most important points to ensure they were understood properly. These questions should be asked in the form that requires yes or no responses only. In addition, the IFA should allow the interviewee to provide any other comments with respect to the issue at hand or if they know anyone else or have any documents that would be helpful in the situation. The interviewee can also be asked hypothetically how they would proceed with the situation if they were you.

If the IFA has had difficulty with an interviewee or has been seeking a confession, it is important that the IFA ask if they have been treated fairly during the interview as if it were a standard question. This can help ascertain in court whether the interviewee has been providing information voluntarily.

The IFA must also ascertain the necessity for confidentiality and whether a commitment from the individual not to discuss the matter with anyone could be obtained. Again, this comes into play where a fraud perpetrator may be tipped off and further evidence or assets may disappear.

The IFA should always try to leave the interview with open doors. They should provide their phone number and request the individual call if they have anything else to add that they recall at a later date. An IFA may also want to suggest that you may need to call them if further questions arise.

6.0. RED FLAGS OF DECEIT

In the course of interviewing and taking statements an IFA must be aware and take into account red flags which would suggest the individual at hand is being dishonest or has knowledge of certain facts not provided. Interviewing skills include the ability to read the verbal and non-verbal cues of body language including tone of voice during an interview. Without these skills, the investigator may rely on false information and make incorrect conclusions.

Reviewing statements requires a different type of non-verbal analysis of what an individual is "saying" to determine one's honesty after completion of an interview. Two common statement analysis techniques used are the Criteria-Based Statement Analysis and the Scientific Content Analysis Technique ("SCAN"). The technique most applicable to an IFA would be a general Criteria-Based approach. Although these approaches are meant to analyze the written statement, many of the noted red flags may be applicable during the actual interview.

6.1 Body Language

There are many body language actions that potentially demonstrate one's feelings or deceitfulness. A good IFA must be able to read these signs to get the most out of interviews and understand where the individual's issues appear to be. Body language can be broken down into many different categories as outlined below. One must use caution as these signs are not applicable to all individuals or all situations. Where a subject is

familiar with body language “give aways”, they may be able to avoid many of the indicators of deceit.

Eyes

It is believed that eye contact is the most obvious indicator of whether one wants to communicate. When eye contact is avoided it is often because the interviewee wants to avoid communication and relieve stress by looking away. It is difficult to look someone in the eye when lying. Looking away can also demonstrate a lack of confidence in the person and what they are saying.

In addition, pupils tend to contract and eyes narrow when a person is shocked or frightened. Nervousness can also be indicated through blinking or fluttering eyes.

Voice

Tone, loudness and quality of speech may give an indication of the truthfulness of the interviewee. One must be aware of what one is saying in view of how they are saying it and beware of what may appear conflicting. When someone is upset their voice tends to become higher pitched. Therefore a difference in voice tones can indicate sensitive areas.

Mouth/Throat

Those that are under stress and high emotion have a dry mouth and tend to clear their throat frequently. Movements to prevent speaking such as covering their mouth, biting their lip or chewing on objects are normally stress related. Breathing also becomes more

rapid when someone is nervous. Smirking as opposed to a full smile is also an indication of deception.

Face/Neck

Someone lying is more likely to touch their neck, nose, eyes or ears. It is also believed that a neck scratcher is speaking words that are inconsistent with the feelings or what they believe to be the truth.

A red or pale face as well as perspiration and a quicker heart beat may indicate stress.

Movement

People that are under stress and restless often move around in various ways such as shifting in their chairs, acting fidgety or shaking their leg. The stress caused by lying tends to create subconscious reactions in the feet and legs which are difficult to control. Therefore these movements are a good indicator of how the interviewee is feeling.

It is also quite common for someone in defense to cross their arms across the body or cross their legs in an attempt to reduce or relieve stress.

The reaction of the interviewee to documentary evidence of wrongdoing is usually viewed quite casually by a guilty party and then pushed away. If the topic of conversation becomes uncomfortable to the interviewee they may, if space is there, back up a little bit, showing their desire "to get away".

Overall Attitude

Overall someone who is being dishonest in the interview will react defensively, be tense and impatient. They also tend to be very polite and friendly to the point that they are “overdoing” it.

Silence

Guilty people when accused of the act performed are normally silent or provide a very weak dispute perhaps in the form of a mumble. Another response would be silence on the direct question talking around it instead. Perhaps giving a reason as to why they could not have performed the dishonest act. On the other hand, an accused innocent will likely react angrily and in shock. They will outright deny the accusation.

6.2 Criteria-Based Statement Analysis

This technique of searching for deceit is based on analyzing the language chosen by an individual whether it be the tense or the use of a pronoun. The IFA’s ability to review statements after the fact can be as important as obtaining them in the first place. If an individual has not told the truth, it is important that the IFA realize the implications on the information provided and the need to dig further or obtain corroborative information through other sources.

The Canadian Edition of the Fraud Examiners Manual (1998) published by the Association of Certified Fraud Examiners outlines numerous red flags that could be

inherent in a witness or fraudsters statement. Many of these indicators of deceit are discussed below.

Past or Present Tense

Whether one uses the past tense or present tense, may indicate their knowledge of an event. For example, if one knew that money was missing from the company at hand, an individual with knowledge of this fact would refer to the money in the past tense. This would indicate their knowledge that the money was gone. Another individual without this knowledge may refer to it in the present tense.

Pronouns – I versus We

Normally an honest interviewee will refer to themselves as “I” while a dishonest interviewee is more apt to use the pronoun “we”. The use of “we” is used by a guilty individual in an attempt to remove themselves from the scene of the crime. It is an attempt to make it appear as though the individual had nothing to do with the situation. The use of the word “we” can also indicate that the individual has a relationship with someone else involved in the matter. This may indicate that there are other individuals involved in the fraudulent activity.

Possessive Shift

A guilty individual trying to remove themselves from the blame will also shift from using “my” to “the” when referring to the situation at hand. This may be an indicator that the individual is not being truthful. For example, a bookkeeper could refer to the cheque

book they are responsible for as “my cheque book” but then when referring to it after some unauthorized cheques were cashed as “the cheque book”. This type of change in language normally indicates an attempt of the fraudster to disassociate themselves from this bad cheque book.

Verb Tense

The tense of a verb may indicate whether an individual is actually remembering a situation or is “making it up”. If one is actually recalling something in the past, their tense should also be past. If one is being untruthful, the verb tense of the story tends to change when the individual switches from recalling to making up the event.

Volume of Information

A truthful witness will normally provide an equal volume of information in recounting prior to an incident, the incident itself and subsequent the incident. An untruthful witness will tend to reduce the volume of information provided surrounding certain timeframes. An IFA can quickly determine where an individual has not told the truth or has omitted part of their story by simply noting the imbalance in the volume of information.

Lack of Details

A dishonest person will tend to omit certain detail or be very vague in recounting an event in an attempt to remove themselves or avoid the situation. An honest person will tend to provide much more detail.

In addition, a truthful person will tend to discuss unusual details that are not necessary to the story but are nonetheless believable. Details that involve their normally daily lives will be included in the story. A deceptive interviewee will be focusing on lying and therefore will not focus on these other details.

Chronological Order

Normally when one recalls a situation it will not be remembered in perfect chronological order. Rather it will normally be remembered as a complete situation. Therefore an IFA should note a situation where an individual recounts the perfect chronological order of a situation. This may indicate that the story has been planned prior to the statement or interview. When asked to repeat the story in reverse order, someone that has made it up will find it almost impossible to do so.

Emotions

An honest person will tend to state their feelings surrounding an event or with respect to the people involved. A dishonest person tends not to discuss their own emotions.

Conversations Recounted

When an honest interviewee is recalling a conversation, they have a tendency to refer to it as an animated dialogue. A dishonest interviewee will likely not re-perform the conversation as it is too difficult to come up with a believable conversation on the spot.

Contradictions and Corrections

Obviously an IFA should note any contradictions in the story that logically do not make sense. It is normally an indication that one is being untruthful. An honest subject will correct themselves when they realize they have made an error in the story. A dishonest person will be too preoccupied with the appearance of honesty that they will not want to go back and change their story.

Memory and Doubt

A truthful interviewee will normally admit to the fact they cannot recall every detail of the incident. An untruthful individual will not admit a lack of memory. They do not want to appear that they are lying and believe that not recalling something destroys credibility.

In addition, a truthful individual will admit doubt in their story and that they are not absolutely 100% certain of the details provided. A dishonest interviewee will normally not provide any doubt in their story.

6.3 Scientific Content Analysis Technique (SCAN)

Like the Criteria-Based Technique, SCAN is based on flagging language used in a written statement to indicate where an individual may have been deceitful. It does not claim the ability to detect out right lies. Rather it points to red flags that may indicate one has been deceitful. The difference with this technique is that for the approach to work the statement has to be a "pure version statement". A pure version statement is normally

referred to as one that is made directly by the witness or accused without the assistance of another person and prior to any discussion taking place regarding the incident at hand.

The SCAN technique is meant to be scientific in that every statement is analyzed in the same fashion. The analysis is based on what the person says and not what is already known and not the body language in an interview. It is a structured review of the statement.

The results of the SCAN technique seem to be controversial and perhaps not necessarily applicable to IFA's. One of the main issues would be that once an IFA is involved it is unlikely that a pure version statement could be obtained. It would be likely that any witness or potential interviewee may already have discussed the situation with someone else. In addition, this technique may not allow the IFA to obtain the best information. As previously discussed you do not want to back anyone into a corner. It is possible that an accused may take an initial position of lying prior to any discussion of your knowledge of the facts. Once the accused has chosen one story it will be very difficult to get them to change it which will be counterproductive to the IFA's role.

7.0. LEGAL CONSIDERATIONS

In performing interviews and taking statements, IFA's need to be aware of the legal implications that can affect the evidence they are obtaining. A case can be destroyed as a result of inadmissible evidence. Questions arise as to whether the IFA needs to comply with the Canadian Charter of Rights and Freedoms or provide a warning to individuals of their right to remain silent or right to retain counsel prior to interviewing and taking statements.

Below are some legal issues that should be considered by an IFA. These issues are addressed to provide the IFA with the background necessary to know when to seek legal counsel. The IFA should also be aware that there are special rules in place when dealing with a young offender (age 12 to 18) that have not been addressed. A specific case is discussed to outline various potential pitfalls an IFA can encounter in taking statements and attempting to submit them as evidence in the court of law.

7.1 Evidence Admissibility Rules

Prior to looking at the admissibility of Statements, one must look to the general rules of admissible evidence. For evidence to be admissible in the court of law it needs to be:

1. Competent – sufficient, reliable and relevant.
2. Relevant – have a legitimate ability to establish a fact.
3. Material – must be important, rather than repetitive or remote.
4. Gathered Lawfully.

An IFA, must be certain that these rules have been met. Generally the issue that would come into play in the submission of a statement would be whether it was taken legally. To determine if a statement has been legally taken, the Canadian Charter of Rights and Freedoms and the Confession Rules must be reviewed.

7.2 Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms (the “CCRF”) sets out the fundamental rights of individuals. Although the CCRF does not apply to private individuals or sectors, there are certain sections that can affect the work of an IFA. The IFA’s work may be affected by the CCRF when performing a fraud examination that could result in criminal charges. Under these circumstances the IFA should ensure that their investigation meets the rights guaranteed under the CCRF.

Section 24 – Fundamental Rights and Evidence

Section 24 of the CCRF sets out the following:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstance.

24. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be

excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The portion of this section that could affect an IFA's work is section 24(2) whereby an individual could make an application under the Charter to exclude evidence. The common test that is applied in determining whether evidence should be excluded is whether the use of the evidence obtained against the CCRF's "would bring the administration of justice into disrepute".

If an IFA has gathered evidence in a case that has gone to criminal trial that is in violation of the CCRF then it is possible the evidence may be inadmissible in court. Under the CCRF the burden is on the accused to demonstrate on a balance of probabilities that their constitutional rights were a violated. If this is achieved, the evidence may still be admissible. The CCRF only permits exclusion of evidence if it "would bring the administration of justice into disrepute".

Section 7 – The Right to Remain Silent

The right for an individual to remain silent applies when an individual is detained and is covered under section 7 of the CCRF which reads as follows:

7. *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

The Canadian Edition of the Fraud Examiner's Manual (1998) published by the Association of Certified Fraud Examiners made the conclusion based on the case of R. v. Hebert (1990), that

"..... a fraud examiner or investigator does not have to inform a suspect or interviewee of his or her right to remain silent if the suspect is not being detained by law enforcement authorities" (p. 2.309)

However, if an IFA could be considered to be an agent of the state the issue still remains. To determine if an IFA or other fraud examiner could be considered an agent of the state, the relationship between the authorities and the investigator must be reviewed. It seems clear that if an IFA has not dealt with police authorities in the matter then, the standard right to remain silent would not be applicable. However, where the ongoing investigation involved discussions between the IFA and police prior to interviewing the individual, the IFA may be viewed as an agent of the state and evidence admissibility issues may arise (See **Section 7.3**). The prior police involvement triggers the suspect's constitutional rights.

In any investigation, where the RCMP or police are involved prior to the suspect interview, an IFA should consult with legal counsel on how best to handle the situation. This is pertinent to protect the evidence and ensure (or at least increase the probability) of its admissibility in the court of law.

In addition, it should be noted that being detained does not have to result from a physical restraint. Being detained could result from a psychological restraint. It would appear that an IFA could be construed as holding a psychological restraint over an accused.

Section 10 – The Right to Retain Counsel

Upon being detained or arrested, the suspect has the right to be informed of his right to retain counsel. Section 10 (b) of the CCRF protects this right and is stated as follows:

“Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.”

Based on the discussion under **Section 7.3 - “Admissibility of Statements”**, where an IFA would not be considered to be a “person in authority”, they do not have an obligation to inform the interviewee of their right to have legal counsel present. If an IFA is deemed to be a “person in authority”, then the courts would review the situation to determine if the suspect was being detained. It would not normally be the case that an IFA has detained a suspect, and therefore would not be required to provide this warning. However, if the interviewee wants their lawyer present, an IFA cannot refuse this right.

7.3 Admissibility of Statements

To determine the admissibility of a statement, courts initially look to who the person was that took the statement. Rules of admissibility come into effect if the statement was taken by a person in authority or was acting as an agent of a person in authority. If the statement was taken by a person in authority, it is further scrutinized to ensure the statement was taken freely and voluntarily. This is often referred to as the “confession rules”.

Person in Authority

The RCMP (2000) training materials entitled "Statements – Statement Admissibility" define a person in authority as follows:

"Anyone engaged in the arrest, detention, examination or prosecution of the accused, and who is perceived by the accused as having authority or control over him (her)." Generally it includes the "police, Crown attorneys, court officials, jail guards, matrons and probation officers, teachers and parents (young offenders), and social workers." (p. 2 of 13)

The interpretation of who represents a person of authority can be quite wide. If it is determined that the person that took the statement is not a person of authority the statement can be admitted into court as evidence without the same scrutiny. Otherwise, a detailed review of the procedures followed in taking the statement is performed.

Depending on the circumstances, an IFA can be considered to be a person of authority. Such may be the case if they had been retained or referred to the matter by the RCMP or police fraud squad. This was the ruling made in the case R v. Reid (D.L.) (2000) which is discussed later in this report.

Confession Rules

In Canada, confessions made by an accused to a person in authority outside of court are only admitted as evidence if the statement was made freely and voluntarily. If this can not be shown, then the accused statement will be inadmissible. The burden of proof

remains with the prosecution to demonstrate beyond a reasonable doubt that the confession was made voluntarily. If not, the statement will be excluded from evidence.

However, it should be noted that a statement can be considered to be made freely and voluntarily even if it has been obtained through deception. This would be the case where an under cover officer obtained a statement.

For a statement to be made freely, it has to be made without inducements or threats. The RCMP (2000) training materials entitled "Statements – Statement Admissibility" explain an inducement as:

"The inducement must be from someone whom the accused believes is in a position to follow through, such as a person in authority. One form of inducement has been deemed to not affect the admissibility of statements is spiritual inducement. This is the only inducement accepted by the courts from persons in authority."

"Inducements which would affect admissibility include the obvious ones such as violence, or threats of violence..... promises or threats to any person relating to charges or reduction in charges, length of sentences and intimidation could be construed as inducements." (p. 3 of 13)

What is considered as an inducement continues to expand. Therefore an IFA must be very conscious in conducting interviews to prevent making any promises or providing inducements. However, an IFA need not be concerned about providing a pop or coffee to an accused in the process of taking their statement.

7.4 Case Law – An Example

In the case of *R. v. Reid* (D.L.) (2000), the Court provides some guidance on what may cause an accused persons statement taken by an IFA to be inadmissible as evidence in court. This case has been used as an example as it appears to be a situation that may result from a typical fraud investigation scenario.

Case Facts

The facts of the case were generally as follows:

- An accountant noted irregularities at Atlantic Fundraising Association (the “Company”).
- The employer at the Company went to the police to request an investigation.
- The police would not proceed with an investigation until a forensic audit was performed.
- The Company retained KPMG Investigation & Security Inc. (“KPMG ISI”) to perform the forensic audit.
- The accused was interviewed by Oake and Norman of KPMG ISI regarding the issues at hand.
- A jury trial was held on May 5, 2000 of the accused on fraud charges.

Ruling – Inadmissible Statements

The judge decided that Mr. Oake and Mr. Norman were “persons of authority when they obtained the statements from the accused”. The judge also decided that “the Crown had not proven the voluntariness of the statements beyond a reasonable doubt” (paragraph 31). The judge therefore ruled that the statements were inadmissible.

Knowledge of the Accused

In coming to his decision, the judge took into consideration the accused's knowledge prior to the interview by Oake and Norman of the following:

- One of the accused's fellow employees had been terminated.
- The accused's manager and his wife had left the company upon finding out of the irregularities.
- There were suspicions of funds misappropriation.
- The Company had gone to the police regarding the financial irregularities and provided employee information.
- The Company had retained KPMG ISI.

The judge also took into consideration facts that were unknown to the accused as follows:

- The relevant police had a new policy where they did not undertake forensic audits themselves and could not lay charges unless a forensic audit was undertaken.

Prior to the interview, the accused was informed by Oake and/or Norman of the following:

- They were acting for the accused's employer.
- They were employed by KPMG ISI by way of providing a business card to the accused.

In addition, the accused's manager had commented in front of her and other employees that there was a need for the employees to cooperate with KPMG ISI.

Inferences

Based on the above-noted facts, the judge determined that the accused could have reasonably made the following inferences as a result of the knowledge she had prior to the interview:

- The information gathered in the interview would be provided to her employer, the Company and eventually to the police.
- The information would be used to determine if she should be prosecuted.
- The accused's job would be in jeopardy if she did not cooperate with KPMG ISI.

Detained

In determining whether the accused was detained (paragraph 11), the judge considered that KPMG ISI did not inform the accused that she had to or did not have to answer their questions. In addition, she was not told whether she could leave or not leave the room without answering their questions. The door was not impeded or locked. Therefore, the judge found that the accused was not detained when being interviewed.

Person in Authority

In determining that Oake and Norman were person's in authority, it was accepted that "whether a person was a person in authority depended on the extent to which the accused believed the person could influence or control the proceedings against him or her" (paragraph 15). With this statement accepted, if the accused knows of a relationship of agency or close collaboration between the person taking the statement and the police, then

the statement taker could be considered to be a person in authority. In the case at hand, the judge determined that the accused could have reasonably believed that her interview by KPMG ISI would affect the decision of whether charges would be laid.

Voluntary Confession

Once it is determined that the statement taker's were persons of authority the next step is that the Crown must prove beyond a reasonable doubt that the statement was voluntary. In the case at hand, the judge determined that the statement was not voluntary beyond a reasonable doubt because if the accused did not cooperate with KPMG ISI it threatened the accused's employment. In addition, the accused reasonably believed that she would be viewed favourably if she cooperated with KPMG ISI based on her employer's comments.

7.5 Accusing the Innocent

Although an IFA may be certain that they have all the evidence in place that provides reasonable assurance that an individual has acted dishonestly prior to seeking an admission, sometimes they may be incorrect. In this situation, an IFA may outwardly accuse an innocent party. The question then arises as to the legal implication. The individual may allege slander, etc.

Generally if there were reasonable circumstances to believe that the individual was guilty, the accusation was done in a reasonable manner and the accusations made were in privacy there should be no legal repercussions. Therefore, prior to an IFA seeking admissions or written statements, one must have reasonable belief of the interviewee's guilt.

8.0. CONCLUSION

The role of the IFA or fraud examiner in any forensic investigation is ever expanding. Today, IFA's are becoming involved in more than just the "number crunching" of the investigation. Due to government budget cuts and an increase in fraud awareness, IFA's are now taking on a good deal of the interviewing and statement taking roles traditionally filled by the RCMP or police fraud squad. As a result it is critical that IFA's be trained and experienced in interview and statement-taking techniques as well as the legal implications that go along with it.

Interview techniques require more than just knowing what questions to ask, it represents an entire skill set. To achieve a successful interview, the IFA needs to be properly prepared with respect to both information requirements and atmosphere of the interview room, have significant knowledge of the case at hand, the right mindset of attitude and behaviour and be attuned to verbal and non-verbal cues of deceit. The interview room should normally be in a neutral location, have no distractions and be private but prevent the feeling of being detained or threatened. The IFA must be able to establish rapport with the subject, be friendly, polite, objective, open-minded, empathetic and accepting. They should maintain self-control and not react excessively to responses or show disgust or disapproval. A good interviewer will balance the right type of questions between non-sensitive, open-ended, leading, sensitive and clarifying in order to obtain the best information possible. At the same time the IFA needs to assess the honesty of the subject through assessment questions, verbal cues of dishonesty such as the use of past tense, possessive shift, lack of details and contradictions as well as non verbal cues. The IFA should be attentive to body language demonstrating stress and dishonesty such as the lack of eye contact, leg shaking, arm crossing, lip biting and neck scratching.

The result of an interview may be in the form of notes, tape-recording or a statement. In order for these to be admissible as evidence in the court of law, the IFA must follow the rules of evidence. An IFA must therefore be aware of statement-taking techniques as well as the laws that affect admissibility. Generally the Charter of Rights and Freedoms and admissibility rules are not a significant concern when interviewing a witness. However, when an IFA is dealing with a suspect, they must be familiar with the Charter of Rights and Freedoms and related Confession Rules. It is not uncommon for an IFA to be considered a person of authority, especially where the police are involved in the investigation. In these situations, the IFA must take extra precaution to ensure that the individual's rights are met in order to avoid any question of statements admissibility. If it is perceived that there have been any inducements or threats then the statement will not be voluntary and will be inadmissible.

A successful IFA must be skilled in interview techniques as well as be aware of the legal implications. The outcome of the entire process will make the difference between a successful and unsuccessful investigation. In order to assist in the process, included as **Appendix A** is an Interview Control and Planning Guide and as **Appendix B** is an outline of Quick Tips for Interviewing.