

## Wed, 6 Dec - Session 1: 9-11am

### Ann 15 minutes

1. General introduction. Discussion of group session and individual groups.
  - Explanation of case studies in individual groups
  - No lives lost
2. Your role in the system.
  - The adversarial system
  - Example given of monies owed
3. Kinds of evidence.
  - Direct
  - Indirect evidence

### Murray 55 minutes

1. Why an investigate plan?
  - Definition
  - Enables a focused investigation
  - Easier to see where you have gone and where you need to go
  - Ensures all involved are working to the same plan
  - Completeness, every possibility investigated
  - More efficient
  - Lawyers take your work and rely upon it
  - You do everything that is necessary and complete it
  - May only get one chance (one chance to interview or one chance to use or get a document)
  - Very important to plan
  - Working as a group with the plan
  - Record what parts of the plan have been completed
  - Part of the plan is asking the question is there anything missing in this investigation e.g. are you missing an element?
  - Can it be said by you that there is misconduct or there isn't misconduct
  - Open mind
2. General skills
  - Identify and record lines of enquiry that open up
  - Note taking
  - Identify documents, recording receipt and providence
  - Investigation log
  - Techniques of gathering evidence including (in particular) use of notices (e.g. Section 181) and search warrants and interviews
  - This means note taking and entry of dates etc. must be meticulous: e.g. I got this version X on Y date, I got this version Y on Z date; a log of investigation
  - A document log: barcoding; all documents you have are kept in an order that is readily understandable etc.
  - Be aware of the best way to record timing: chronology, timeline, often shows up trends (e.g. on share price documents); very important tool; sets out what you know in an easily consumable form
  - A chronology is a handy way to explain things to other people

- Recording the results
- Timelines, chronologies
- All the above in a useful report
- Investigation does not need to be redone
- Working as a team
- [Mention organisation's relevant guidelines]
- Keep an open mind: this may lead you to a decision as to whether it's illegal behaviour or not (compare a police close minded approach)
- Follow any line of enquiry; ask yourself the question what are our weak points?
- Results of investigation must be able to be replicated: a need to convince or communicate with prosecutors in the court

### 3. The investigative theory

- Best fit with the available evidence
- May be general at first
- All new evidence tested against it
- Evaluating the evidence with an open and critical mind
- Testing, modifying, replacing the investigative theory in the light of evidence
- Enables an investigation plan to be developed; what to do next?
- Point of having it is that it tells you what you do next
- Essentially the outcome of your investigation in one sentence (at any given time)
- Ultimately the theory may be that no misconduct has been committed
- Is a tool to help you focus your investigation
- Example: Share trades equal share washing and this trading looks like insider trading; the two obvious things missing 1. Who? 2. Because?
- It needs to be simple but it is not your ultimate conclusion
- The because? X engaged in share washing to try to artificially maintain share funding as otherwise effective hedge funding
- Need to explain every piece of information (?)
- It is your best fit that you have with the facts at any given moment
- But there must be scope to adjust it
- Capable of changing all the time
- If most of the evidence doesn't fit, the investigative theory may be wrong
- It might be a good thing that as you proceed, you eliminate a theory or particular theories
- Keeping an open mind: always asking the question what is the effect on our investigative theory?
- Example: If someone at a meeting appears to have leaked price sensitive information, it may allow you to focus on your investigation. It doesn't necessarily tell you the order you do it in, but it can tell you what to focus on to enable you to make the decision of what you do next
- At the conclusion of the investigation, your investigative theory may not be the same as the initial one and it might be a negative theory
- Ultimate point is focus

## **Questioning techniques – 10 points**

1. Interview = a conversation with a purpose
  - Remember you are gathering information not telling it
  - Means you are usually asking questions to let the person tell you the story
  - It is not you telling the story
  - Think of a transcript of your interview
2. Record every interview in some way; if it is not recorded it is like the interview 'didn't happen'
3. Preparation before interview
  - Murray has spoken about the investigative plan
  - Speak to you about your planning for the individual interview
  - 3A: Order of interviewees: Before you plan for the individual interview have you thought about the order of interviewees
    - have you planned or thought about who you want first
    - is there an order which will be best
    - If there is one clear PUI do you go straight to that person or before that do you acquire information from other interviews and documents?
  - 3B: Preparation and planning for the individual interview; not just a little bit of thinking; essential thinking before you start
    - Who are you interviewing
    - Why are you interviewing them; what is the purpose
    - How does that fit within the investigative plan
    - What are the topics that you will need to cover
    - What questions will be used to introduce those topics
    - How will you ensure they are covered? Written down
    - What is the structure of your interview? Is that structure recorded/written down before you start
    - How will you deal with new information that comes up unexpectedly?
      - Plan for the likelihood of material that you were not expecting
    - If you have planned the topics and structure of your interview that will make it easier to come to those topics after you have dealt with the unexpected?
    - Completeness –
      - Ensure you have planned all the areas/topics you need to cover
      - Ensure that you actually cover them
      - What will help you do that (a) planning (b) writing down that plan (c) teamwork in the interview
    - Is there any information we do not want to disclose in the individual interview at the relevant stage of the investigation?

- What is the relevant preamble or template for the interview from your Guidelines [insert Organisation's relevant guidelines]
- Conclude – preparation before the interview. Planning everything.

#### 4. Structure of the interview

- [on whiteboard put structure]
- initial impression and initial stages of the interview
  - good impression; personalise; treating interviewee with respect
  - an outline of the process/structure of the interview
  - emphasise importance of truth; ok to say don't know or don't understand
- Getting the story of the witness
  - Open questions – encourage longer answers
    - Tell me
    - Can you explain or describe
    - The Ws
    - Not closed questions
    - Complete story from them; ensure same by asking
    - summarise
  - Uninterrupted
  - Clarifying where appropriate
    - At some stage you will have to intervene and clarify something that has been said
      - Do it efficiently
      - Single question
      - Single proposition
    - After it is clarified move back to open questions to get the story
    - After reached an end point of a version on a particular topic query the use of probing closed questions to end that topic
  - Challenging where appropriate
    - After the open version is given
    - Likely after that version has been summarised and confirmed
    - Put clearly focused challenge
    - 1 proposition per question
    - Firm but respectful
    - Tactical decisions about when to clarify and challenge
      - Based on experience
      - But good rule is it should not be too early
      - Should be well after exhausted the story
        - Use of the closed question
        - Important at this stage
        - Careful that it doesn't give away information that you don't want to give away at that stage of the investigation
- Ending the interview
  - Agreement as to what has just taken place

- Anything else they want to add; have you (the investigator) missed anything
- Do you want to change or add anything?
- Everything true?
  
- Process in the future (possibly)
  
- Evaluation after the interview
  - Review the investigation in light of the interview
  - Does it change the plan?
  - What is the effect of any or new information?
  - Segway back to Murray's point re dynamic investigative plan
  
- End on point 4 structure move to 5; going to speak about some specific questioning techniques

5. Easy to hard

- get the witness to give you the easy stuff first
- i.e. get what the witness is willing to give you without a fight initially
- use that time to build rapport
- after have got what you need you can move onto the harder parts
- Why? Likely to get more information if you start with the easier stuff

An e.g.: whether to and when to confront witness who is lying

- Have you planned it before the interview?
- general rule: open questions initially
- easy questions first
- followed by summary of their or that position
- followed by confronting with the contrary position
- confrontation not angry; firm but respectful;
- getting a clear answer to it

6. General to specific

- open questions to get the version
- closed or specific questions after the full version is taken
- kind of been through that already in structure

7. Don't ask multiple questions:

- 1 question at a time
- 1 proposition per question
- Slow down if necessary

8. Listen to the answers

- Impress on the subject that you are listening
- Builds rapport
- Also allows you to ask questions about their answers
- Also places some pressure on the interviewee

9. 1 asks and other records

- Must occur
- Allows compliance with the interview plan
- If something missed note taker will inform principal questioner
- Note taker can be given opportunity to question

- Allows note taker to ask what has been missed or needs clarification
- Permits time for the principal interviewer to regroup

10. Questioning a third party (or a person who isn't PUI)

- Cooperative witness. Keep it that way
- Be nice. Not aggressive.
- Will get more information that way
- Will more likely stay cooperative
- Segway to other Instructor on Statement Writing

### Statement or Narrative Statement writing

1. Definition: what they are simply put:
  - Organised Statement (story) of the witness in their own words
  - Will come back to this
2. More comfortable environment for the witness
  - Why that is better?
3. You are encouraged to take a narrative statements from witnesses when:
  - certain of their status as a witness without any suspicion
  - they are cooperative
  - their evidence is a purely factual account of events unlikely to be disputed
  - they appear credible and are unlikely to lie to or mislead the investigators
4. Another practical benefit of narrative statements is that we can ensure that the presentation of the evidence in the statements is suitable for use in the court.
  - [insert C (points on taking voluntary statements) & D (written template for same) from the Guidelines document]
5. Taking narrative statements can ensure that their evidence is
  - Relevant
  - logical and
  - In chronological or other logical order
6. Statements in narrative form - it is their story.
  - Their words a statement in the witness' own words where the witness gives evidence in a continuous manner
  - Logical sequence rather than through a series of questions and answers.
  - A formal, question and answer format may be confrontational and make some witnesses uncomfortable, which may affect their willingness to cooperate.
  - On the other hand, having informal discussions with the witnesses at a time and place convenient to them and then taking a narrative statement summarising their evidence may help to reduce the witnesses' concerns that they are being questioned
7. In order to take a narrative statement you will need to:
  - explain purpose of the interview;
  - the matter being investigated;
  - Ask the witness what they know about the matter, e.g. the related events, the people involved and the relevant records.
  - You will then prepare a narrative statement summarising the information provided by the witness uses the witness's own words.
  - Draft statement should then be given to the witness for their comment.
  - When you are happy the witness is happy so its contents are agreed, you should have the witness sign the statement in front of you or a colleague.

- DoJ and external counsel advising the SFC prefer narrative statements

- What we say should be consistent with the SFC Interviewing Guidelines (or other relevant guidelines for other organisations).
- Narrative Statements are dealt with at paragraphs 47-50 of those Guidelines.

## Friday, Session 7

### (9-10am) Review of Investigative Methods

The importance of these things (and any others) that have popped up in the sessions so far.

1. Meticulous Note/Record Keeping
  - a. Generally
  - b. Small irrelevant bit of info later becomes crucial
2. Timeline
3. Chronology
4. Relationship diagram
5. Lines of enquiry
6. Document log
7. Investigative theory – stop and analyse
8. Open mind

End: Relate these back to the exercises they've been involved in.

### (10-10.30am) Structure of the Interview

1. Importance of preparation generally
  - a. Generally
  - b. Investigative Plan: guides the questions
  - c. Effectiveness of plan depends on the detail
  - d. If topics are really broad – may not get to the point you need to
    - i. E.g. tell us about the takeover? What would be the sub-topics
2. Theory
  - More control
  - What Topics or areas
  - What sub-topics or issues within area
  - What questions
3. Structure:
  - Background/specific
  - Topics of the interview: e.g. initial negotiations for purchase of shares, who involved...
  - [use whiteboard dot points]
4. Enquiring Questions
  - a. Defining them
  - b. Factual matters

c. As against belief or opinions

5. Focus

- a. [Bad demonstration: open questions and no control]
- b. Good demonstrations
  - Point: principally more control
  - W's etc. equals enquiring questions
  - Actual demonstration
  - Debrief of the good demonstration

6. Headline

- a. Focusing the interviewee on the topic and then asking open questions

7. Detail

8. Listening to the answer

- a. Plan to come back to material

9. [further demo?: good/bad interviews]

## **Cooperative and uncooperative witnesses (10.30-11.30am)**

### **Morning Tea (11-11.15am)**

## **PUIs, difficult lawyers and ending the interview (11.15-12.30pm)**

- [remember the 10 points]
- Now 11-15.

### 11. Cooperative witnesses (including innocent third party witnesses)

- Theory
  - Use the cooperation to your advantage
  - Allow the witness to tell you their story
  - No need to compel is there?
  - Use a narrative statement (as discussed previously)
  - Getting the best out of them
  - Maintain structure
  - Order of things
  - Headlining
  - Focussing attention of interviewee
  - Still open questions
- Demonstration [using factual examples from case studies we are using]:
  - easy to hard
  - general to specific
  - listening to the answer

### 12. Uncooperative witnesses

- Theory:
  - Types: aggressive, evasive & lying
  - Answer: persistent politeness; gentle reminders of powers
- 12A: Resistance or a failure to cooperate should be anticipated
  - It should be prepared for
  - If it is not it can lead an investigator to become anxious or panicked;
    - And as a result lead an investigator to repeat topics unnecessarily in an interview or prematurely end an interview
    - Other?
  - Practice different ways of dealing with such witnesses
  - Resistance or a failure to cooperate may come from a witness:
    - knowing they are guilty but
    - it may arise from innocent explanations: pressure, anxiety, fear, embarrassment and concern about implicating others
  - Think about what is the likely reason for the failure to cooperate; try to address it by balancing firmness and listening
  - Showing empathy for the witness, a non-judgmental attitude and a conversational style can be useful techniques
  - Not bound to accept the first or subsequent answer of the witness
  - Use your knowledge to your advantage

- Of your powers
  - Of the case
- If witness not answering questions you can still ask questions
  - There will be a point where there is no utility in continuing to do so
- Other?

#### 12B putting accusations or the contrary position

- be clear on what that position is
  - is it a fact from another witness
  - is it a prior version of the witness
- put it clearly and accurately
- it can be confronting the witness with
  - Information you have which is contrary to their position
  - Information you have which has not been covered by them (if it is appropriate to do so)
  - Inconsistent information they have given you

#### 12C using information (including provided by others)

- if not clear already – when will specific information be used
- in every interview
- Decision not disclose at all?
- Decision to disclose at a particular time in the investigation
- Decision to disclose by confrontational questions in an interview after the open version has been given?

- General demonstration (Murray being difficult)

### 13. Person under investigation (PUI)

- Theory

- Generally: right to some form of privilege or the like
- [check relevant guideline]
- s187 SFO an interviewee has the right to claim privilege against self-incrimination
- if an answer to a question would tend to incriminate a person and they claim privilege not admissible in evidence against **that person**
- In order to prosecute a case we should usually be able to prove a suspected offence with evidence independent of that PUI.
- Decision to compel or seek a voluntary statement?
- Sometimes obviously will need to compel
- If compelled may not be able to use that information against the PUI in a criminal case
- should consider instead conducting voluntary cautioned interviews
  - During a voluntary cautioned interview, a person has the right to silence and need not say anything. However, anything they do say may be used in evidence in criminal proceedings against them.
  - Before interviewing them, you must caution them about this. A benefit is the use of admissions

- Demonstration: (Murray and Scott)

- General to specific
- Easy to hard
- Use of documents in investigation ( preparation for presentation of the document, allow the witness to absorb it, use it well, single document, planning, IDing them)
- Using information provided by others (use Murray's incremental questioning approach)

#### 14. Dealing with difficult lawyers

- Insert
  - Be firm but respectful
  - Know your power
  - Be persistent
  - Plan for the difficult lawyer; Practice for the difficult lawyer
  - Record every exchange
  - Other?
- Demonstration: (Murray and I)

#### 15. Ending the interview

- Our experience in the sessions
- Plan/think about how you will end the interviews

## **Friday, Session 8**

### **2-2.30pm Nature of Evidence in Chief and Cross-Examination**

(Remember: Participants will give evidence and be cross-examined on the narrative witness statement prepared during the Investigation exercise – in the next session)

- Role of investigation
- Cycle of evidence
  - Types of evidence: direct, indirect, circumstantial & expert
  - Kinds of evidence: witness, maps, things, summaries etc.
- EIC:
  - witnesses story, own words, in order, determined by questioner (parallel with investigator)
  - (type of question) using enquiring questions
  - even though know the answers
- XX
  - To obtain info from the witness you need for your case
  - To cast a different light on their evidence
  - To cast doubt on reliability (cf dishonesty)
  - To accredit
  - (type of question) using leading propositions

End: Segway to them having a go in the next session

### **2.30-3pm Issues for Investigators in giving evidence**

- Supporting what you say
- Why you did or did not follow a line of enquiry
- Documents – use of them
- What power – for what purpose?
- Precision

## **Friday, Session 9 (4.15-5pm)**

### **Narrative Statements**

- Revisit quickly key points of a narrative statement
- Demonstration (using whiteboard)
  - One instructor interviews another (in role play)
  - Another instructor takes conference notes
  - Fourth instructor turned the conference notes into a narrative statement (of the EIC)
- Emphasis:
  - witnesses story in the witnesses own words
  - investigator condenses and orders the information in a sensible way (using chronological form and headings)

### **Concluding remarks at end of the Workshop**

**End.**

