

ICPAK SEMINAR FORENSIC AUDIT

Legal Issues in Forensic Audit

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Legal Issues In Fraud Examination

A Fraud Examiner may-

- Interview witnesses;
- Collect evidence;
- Collect/Review documents;
- Examine public records;
- Assist Management / Counsel;
- Testify as an expert witness.



Planning for Legal Issues

Part of planning before the engagement.

1. Admissibility Challenges

- Admissibility of Expert Testimony

Qualify by knowledge, skill, experience, training, education.

Expert's specialized knowledge will help jury-Avoid technical jargon as this confuses the court.

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- Admissibility of evidence- Evidence Act Cap 80. Section 5, 10, 16

Sufficient facts and data

Reliable information.

Relevant to the case

Clear, concise presentation

This also applies to electronic evidence, such as C.C.T.V, Audio and Video Recordings.

- Maintain Chain of Custody

Movement of records should be monitored by the Fraud Examiner.

Decision for criminal prosecution, consult with the Attorney.

2. WorkPlace Searches

Reasonable Expectation of Privacy. Kenya Constitution Article 31.

Consider if the employee has exclusive control over the area.

Drawers

File cabinet

Locker

Reasonable Ground For Search

Search must be justified at its inception

- Scope of search must be no broader than necessary to serve the company's legitimate, work-related purposes.

Effective method of eliminating potential problems regarding workplace searches is-

Written policy

- Notify employees that PCs are solely for business purposes

3. Invasion of Privacy

Publicity of private facts

- Publicizes broadly-more than one person
- The facts are private
- Highly offensive to a reasonable person
- In which the speaker does not have a legitimate interest



Email Expectation of Privacy

- Questions remain on e-mail and other electronic communications.

Kenya has laws on electronic evidence

- As with e-mails, the same reasoning should apply to searches of computer hardware and software.
- However, if something placed on a company-wide network, the employee has a lower expectation of privacy.



Right to Financial Privacy

- The Law prohibits disclosure of financial records of a customer to a government authority unless and until the government authority has demonstrated its compliance with the procedures regarding confidentiality.
- Obtaining information from a bank without authority -invasion of privacy.



4. Malicious prosecution, Emotional distress and Wrongful discharge.

- Fraud Examiner institutes criminal or civil action
- Without just cause
- With malice
- Proceeding ends favorably to victim



5. Duress – Bill of Rights- Article 31

- A situation where a person performs an act as a result of violence, threat, or other pressure against the other person. Often claimed by persons after the fact when presenting a defense or to challenge the validity of statements.



6.Privileges And Work Product Protection

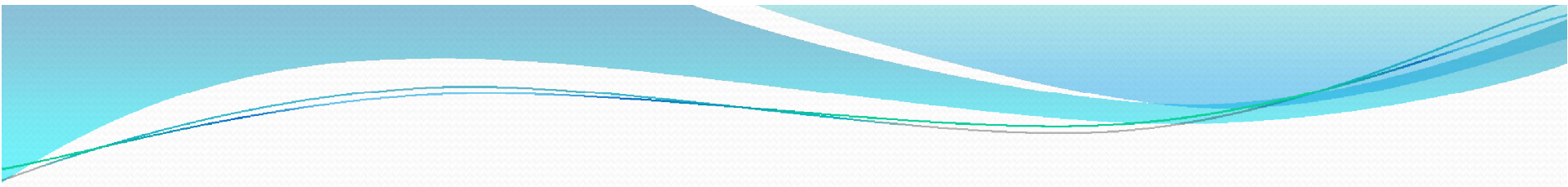
Attorney-Client Privilege

- Made by employees to internal lawyers.
- Made at the direction of corporate superiors in order for the company to obtain legal advice from counsel
- The employees were aware that the communications were being made in order for the company to obtain legal advice .



Communications generally protected under the Attorney-client privileges.

- Concerned matters within the scope of the Employees' corporate duties
- Were confidential when made and were kept confidential by the company?

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- Be careful when sharing information with law enforcement.
 - Fraud Examiner testifies in court as an expert witness and his work may be discoverable by adverse parties.



7.False Imprisonment

False Imprisonment

- The unlawful detention of a person by another for any length of time whereby he is deprived of his personal liberty.
- Force or intentional conduct that causes a person to not be able to exercise his will or go anywhere he might lawfully go.

Examples

- Locking an interview room
- Standing in front of an exit
- Refusing to let the suspect leave the room



How to Mitigate

- Allow witness to sit closest to the door
- No obstructions between witness and door
- Do not lock any door!
- Advise interview that they can take a break or leave the room any time that they want
- Always have at least two interviewers.
- Avoid forcing witness to cooperate
- If witness decides to leave, allow them to leave
- If witness asks to speak to his/her attorney, allow them to do so

Avoid “touching” a witness



8. Defamation

- Libel
 - Written defamation
- Slander
 - Spoken defamation



Legal Elements of Defamation to prove for defamation, the subject must

Prove that the examiner did the following:

- Made an untrue statement of fact
- Published to third parties
- On an unprivileged occasion
- Damaging to the subject's reputation

Case Martha Karua



Mitigating Factor

1. Do not judge

- “No opinion shall be expressed regarding the guilt or innocence of any person or party.”
- Allegations of criminal activity are Defamation Per Se



QUESTIONS AND ANSWERS

THANK YOU