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## Attacks on Employee Interviews

### Part 1: False Confessions

**A**s attorneys have discovered private-sector employee interviewing, there has been an increase in litigation revolving around the interviews conducted with employees. Many of these interviews and the resulting confessions are being challenged on a number of grounds by attorneys eager for a successful lawsuit. Attorneys create arguments using the existing facts available to them, reframing the facts to support their argument. With the media spotlight on false confessions in the public sector, we should expect a continuing attack on employee interviews.

The first course of action is a thorough, careful investigation and preparation for the interview. Then, methodically approaching each interview as though there may be subsequent litigation to make sure that everything is done correctly. Finally, recognizing what areas of the interview are likely to be attacked and why. These preventive actions reduce potential problems should the worst occur and a suit be filed.

Obviously there will be strengths and weaknesses in every case. Obtaining clear direct and circumstantial evidence of an associate's guilt will go a long way toward reducing the potential for litigation. However, even with the strength of the investigation, there is the possibility of a lawsuit.

#### The Frequency of False Confessions

The associate's confession and resulting statement is the heart of the problem for an attorney considering bringing a lawsuit against the company. A well-supported confession, along with the investigative findings, is the cornerstone of the defense to a lawsuit. If he is to prevail, the employee's attorney will have little choice, but to attack the confession's credibility and how it was obtained. Clearly documenting and reporting what occurred during the interview will allow the interviewer to testify accurately to what transpired during the conversation. However, even that may not be enough.

A number of academics are now offering their services as expert witnesses to testify to the coercive effects of the interview and the likelihood of false confessions resulting from the techniques. These expert witnesses generally come from an academic background with no interview or

interrogation experience other than observing video-taped confrontations in the public sector.

One area that is problematic for the expert witness is attempting to quantify the actual frequency of false confessions. The experts have attempted to establish the frequency of false confessions in two ways: (1) through an analysis of known miscarriages of justice and, (2) through research studies.

**Miscarriages of Justice.** The first attempt to estimate the frequency of false confessions is reviewing the known miscarriages of justice using media reports. These miscarriages of justice primarily consist of people falsely confessing, being convicted, and then later being exonerated by DNA

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or other evidence. Unfortunately, there is no central database that collects information on false confessions or criminal justice reports that quantify the numbers of cases of false confessions.

Since 1992, Northwestern University's Innocence Project has helped win exonerations in over 100 cases based on DNA evidence. In twenty-seven of those cases, the defendant had falsely confessed to the crime.

University of California Irvine professor Richard Leo has done a widely cited study of sixty cases of alleged police-induced confessions in which twenty-nine of those confessions were found false and led to the conviction of innocent suspects.

Another frequently cited study was "Miscarriages of Justice in Potentially Capital Cases," which reviewed 350 cases and was published in the *Stanford Law Review* in 1987. Of the 350 cases, only forty-nine involved a confession by the suspect. Included in the forty-nine were clearly coerced confessions, some resulting from beatings, and the voluntary confessions from the mentally ill.

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**Research Studies.** The second method used by academics to establish the frequency of false confessions is through research studies. These studies investigate the ease and frequency that false confessions can be obtained from participants in the study. Unfortunately, it is difficult to recreate the real world mental state in a research subject within the university guidelines of how human subjects must be treated during studies.

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For example, in a study titled “Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication” published in the *Law and Human Behavior* journal in 1991, interrogation transcripts using minimization and exaggeration strategies were read to subjects. The exaggeration strategy used scare tactics, such as the strength of the evidence or the seriousness of the crime, while the minimization offered an excuse or justification for the crime. The study led researchers to conclude that minimization communicated an offer of leniency similar to an explicit promise of leniency. From this they speculated that research subjects have been conditioned to believe that confession is rewarded, therefore they interpreted an interviewer’s use of minimization as a promise of leniency.

In another study, students were told not to hit the ALT key while typing because the computer would crash. Instigating the computer crash, the researchers then falsely accused the participants of causing the crash. The false accusations resulted in 69 percent of the seventy-five students signing a false confession.

Similar studies have replicated these research findings with even higher numbers of false confessions: 72 percent

of 15- to 16-year-olds and 78 percent of 12- to 13-year-olds falsely confessed after being accused.

From this, researchers extrapolate the frequency of the false confession while ignoring the real world knowledge of whether or not the participants actually really knew they had committed the crime. One must wonder what the difference in the false confessions rates in the study would have been if an

innocent person was accused of stealing a \$10,000 deposit from a safe when the individual was certain he had not committed the act.

Going further, the researchers postulated on the internalized guilt the subject’s must have felt and the fact that some constructed memories of actions leading to the computer crash. These constructed memories logically helped rationalize their action and allowed them to save face in an awkward situation. This is hardly shocking since the participants had no independent recollections of hitting the ALT key and were attempting to justify and mitigate their actions of unintentionally damaging an expensive system. One again must wonder how often this would occur if the innocents were accused of stealing the \$10,000 deposit that they were certain that did not take.

## Conditions Contributing to False Confessions

There are a number of conditions which seem to be common denominators for false confessions. An examination of the known cases of false confessions has identified five factors that are present either individually or collectively when a false confession is made.

**Length of the Interrogation.** One characteristic often present in false confessions is the length of the confrontation. Unlike the private sector, which most often sets a time limit on the length of an interview, the public sector imposes no such guideline. It is up to the courts looking at the length of the interrogation along with other factors in light of the totality of circumstances, which determines the confessions reliability and voluntariness. It is not unheard of for interrogations in the public sector to last six to twenty hours or more in the most serious of cases.

### Mentally Handicapped Subjects.

Another factor present in a number of false confessions is the mental capacity of the suspect. In many of the known cases of false confessions the suspect was mentally handicapped or mentally ill. The resulting confessions from these people often contradicted the investigative findings and were not supported by corroborating evidence. In some cases the confessions followed the police theory of the case, which was later discovered to conflict with crime-scene evidence. In many of these cases there was no independent evidence that linked the suspect to the case other than the confession. In fact, there was often evidence that was ignored or, worse, withheld that could have exonerated the individual.

### Coercion, Threats, and Promises.

Improper interrogation techniques consisting of physical threats and coercion are also common in false confessions. One has to only look to Iraq to realize the impact these types of actions have on the powerless. Actual physical contact or the threat of harm is obviously a source of leverage that could convince most people to talk or falsely confess. Threats to execute, jail, or remove children from the family also have been found when examining false confessions. Some false confessors, such as Chris Ochoa, accepted a plea of life imprisonment to avoid the death penalty. (See *Practical Aspects of Interview and Interrogation*, chapter 4, for a transcript of his interrogation.)

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efficiency benefits and ensure a richer opportunity for the participant.

Many participants have been eager to share their positive experiences with colleagues, which has resulted in a growing pool of potential rotational auditors.

Other benefits of the program include the following:

- Internal audit resource flexibility
- Mutual learning—Both the internal audit team and the rotational auditor learn from each other
- The rotational auditor leaves the program with a better understanding of internal controls and best practices enabling them to drive improvements in their part of the business
- Networking opportunities
- Internal Audit is demystified—Rotational auditors get to experience the function first hand and share their experiences with others

The rotational auditor program at Limited Brands has been a great way for us to supplement our internal audit resources while we continue to actively recruit solid internal audit talent. We intend to continue to build and grow this program beyond the point at which we reach our current staffing goals.

**At the end of each audit, we provide the rotational auditor with a formal evaluation of their performance on the assignment.**

## 10 Keys to Building a Successful Rotational Auditor Program

1. Firm up your audit work plan as far out as possible.
2. Use enterprise forums to talk about the process and gain senior leadership alignment and sponsorship.
3. Reach out personally to individuals who can provide talented resources.
4. Match skill sets with assignments.
5. Provide up-front materials and meet with the rotational auditors to get them acquainted with
  - The scope of the audit,
  - Their role on the audit,
  - Background that provides context about what is being audited,
  - The detailed written instructions that will guide them through their work, and
  - Expectations of documentation requirements and reporting.
6. Actively supervise and provide support to the rotational auditor throughout the audit.
7. Include the rotational auditor in all team meetings related to the audit.
8. Share the results of the audit with the rotational auditor once the audit is completed and the report is issued.
9. Solicit formal feedback on the experience and continually make adjustments to improve the program.
10. Provide formal feedback about performance to the rotational auditor and his or her supervisor. ■

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**Youthful Suspects.** The younger the subject, the more easily a confession was obtained according to the studies cited above. Combine their relative inexperience with a mental or emotional handicap, and it is no wonder you find these factors in known false confessions. Even lacking mental or emotional handicap, children can be extremely suggestible with a strong desire to please adults, which may lead to false confessions.

### Lack of a Competent Investigation.

In many of the cases the investigators failed to adequately investigate the incident or ignored evidence that would have exonerated the suspect. Ignoring physical and witness evidence, the investigators single mindedly focused on their own theory of the crime and pursued their suspect to the exclusion of others. This occurred to the point that the resulting confession matched their theory of the crime even though it

conflicted with subsequent scientific and witness evidence.

While an interviewer can not necessarily control the age or mental capacity of the subject, he can control the adequacy of the investigation and the treatment of the individual.

In the second part of this series, we will address the specific complaints about interviewer conduct and areas that will be closely examined in the event that the confession is called into question. ■