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Attacks on Employee Interviews Part II: Some Considerations

Over the last fifteen years we have observed a change of crimes that are in fashion. There was arson and the creation of arson task forces to combat the problem. Sexual harassment rose to the top as the crime de jour followed by its own flurry of media attention, legislation, and attention from investigators. Then came white collar crime, and the media attention shifted. The newest focus is the false confessor. With the availability of DNA technology, old cases are being reexamined with the disquieting discovery that innocents have been imprisoned. In Illinois alone fifteen people on death row were cleared of their crimes.

In the first part of this series, we discussed critics' comments about false confessions and some of the common denominators among those who falsely confess. The three types of false confessors can generally be broken down into the following.

Voluntary—Those individuals for reasons of their own choose to confess to a crime they did not commit. Their reasons range from delusional, to a need to be punished for some real or fabricated incident, or even to protect another.

Coerced Compliant—These false confessors are very compliant individuals who submit to the interviewer's point-of-view just to remove themselves from the stressful situation of the interview. While this type of false confessor may confess to a crime that he did not commit, the individual is always aware that he is innocent. As a result as soon as the person is removed from the stressful situation, he will generally immediately retract the confession.

Coerced Internalized—These individual typically have a poor memory, perhaps from drug or alcohol use. Because of the gaps in their memory, they accept the interviewer's version of events creating a false memory for themselves of the event. These people come to believe that they in fact committed the crime and may not retract the confession for years, if at all.

There are a variety of common denominators among false confessors. In general, they are younger, less intelligent, or mentally handicapped. In many of the known cases, there were the additional factors of a lengthy interrogation and the use of threats, promises, or other coercive tactics by the interviewers.

We can expect that there will be a trickle-down effect of this attention to employee interviews and the circumstances surrounding them. We should expect that any statement will be challenged since it is the crown jewel of the case. The goal of the attorney is to discredit the way the statement was obtained, tainting one section, thus contaminating the rest.

In one case the authors evaluated a confession from an ex-employee who was suing the organization over her dismissal for theft. In a series of statements, the interviewers built the admission from \$10,000 in merchandise to over \$40,000. How was the \$40,000 figure arrived at? According to the ex-employee's written statement, it was "by my memory." There was little or no substantiation of

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the admitted theft to corroborate the confession. While there was an incriminating video, it did not provide absolute proof of theft, although it certainly did contradict the ex-employee's story. So what we are left with is the fact that the individual was likely a thief, but perhaps not a \$40,000 thief. The failure to corroborate the confession, plus some other problems ended up costing the company several hundred thousand dollars to settle the case.

Consider the following: **A five-year employee admits stealing one hundred dollars a week for the last year. What is his total admission?**

The answer most people give is \$5,200. In fact over 90 percent of the people in our advanced workshops arrived at this answer by multiplying

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\$100 X 52 weeks. The problem with the answer is, “Was the employee really present all 52 weeks?” There may be vacations, illness, or absence for training that would reduce the number of weeks worked significantly. Merely pointing out this inconsistency can damage the credibility of the statement and perhaps taint the validity of other admissions included in the statement.

Consider the following admission: **“Over the last six months I stole \$20 from the register between four and seven times per week.”** What is the total amount stolen?

Over 80 percent of participants attending our advanced workshop used seven times per week to calculate the amount. Development of the admission is one place in the interview that a subject could falsely confess to a larger amount by using the higher amount or frequency to calculate his admission.

In this example the remedy can be as simple as providing a range for the admission, calculating the upper and lower ranges and including them both in the statement. A much better solution would be to calculate an amount using investigative findings to substantiate the number. When this is not practical, using the range solution may be the most conservative and defensible solution.

Change of Perspective

The interviewer should consistently monitor his words to avoid offering a promise to the employee. For example, during the interview the interviewer contrasts two employees who have done something wrong, one who is uncooperative and one who is sorry for his actions.

Which of the following sentences is the best choice to conclude this story? *“Which employee do you feel more comfortable with?”* Or *“Which employee would you want to work with?”*

The safer of the two questions is the first, “Which employee do you feel more comfortable with?” The second question could easily be argued as a promise of continued employment for someone who cooperates. The ambiguity of the word “work” potentially implies that

there is leniency or a reward for cooperation, while how we feel about the person suggests no promise.

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There may be a time in the not to distant future where recording the private sector interview may be the prudent thing to do. Then there will be an opportunity to carefully evaluate the words used by the interviewer. Beginning to monitor word choice now will make for fewer difficulties in the future. Just from the standpoint of monitoring and managing interviewers, recording is a powerful management tool to control a high-liability task.

Threats and Promises

Interviewers will at times say something like, *“We would like to handle this within the company.”* Or *“We don’t want to go to an outside agency.”* In effect, the interviewer is saying talk with me or we will go to the police, an implied threat. There are several problems that could arise as a result of this statement, the first of which is totally unintended.

Most employees who have stolen have two primary fears—termination and embarrassment. With the realization, *“Oh, my gosh, I could get arrested, too!”* what the unwitting interviewer has done is now raised another hurdle—the fear of arrest—which to this point may not have even been on the subject’s radar screen. The by-product of this is an increase in resistance by the subject who now has an additional hurdle to be satisfied. Second, the timid soul may be coerced

into a confession to avoid an arrest even though he is innocent.

An alternative to this is less threatening and direct. A statement such as *“We want the people who make the decision to have full understanding of why this happened.”* Or *“We don’t want to make this a serious issue”* affords the interviewer the ability to be less threatening and direct while still

talking about “another’s” decision making.

Some threats can be very direct and clearly avoided. In a previous job one of our staff members dealt with a case after taking over a district investigator position. In reviewing the restitution file he noticed that a woman had not made several recent payments. When he contacted her, she said that she was thinking of retaining a lawyer because she had been railroaded into making her statement. Returning after the birth of her first baby, she was confronted by the previous investigator with the results of his investigation. He said to her, *“You admit to everything in these exception reports, or I will have your baby taken away.”* In fact in her statement she did just that, admitting to everything in the exception report.

While she had stolen from the company, she was certainly not responsible for all the shortages in the report, many of which were paperwork or pricing errors. But imagine the impact this statement had on the new mother the very first time away from her first child. A new interview and new statement and restitution agreement avoided a lawsuit and corrected an injustice.

Lying

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While the courts have upheld the right of an interviewer to lie during an interview, it may be problematic to do so. “We have you on video tape going into that room.” Or “Is there any reason that you can think of that there would be a video of you going into that room?”

One concern expressed by the critics is the interviewer’s use of lies during the interview. There is the potential for an individual who has no independent recollection of an event may admit in the face of evidence indicating his involvement. This is not true when an individual clearly knows what he has or has not done.

Remember the Kassin study cited in Part I where people falsely confessed to hitting the ALT key on the keyboard causing the computer to crash? Inadvertently striking the ALT key on either side of the space bar was certainly possible and the presentation of fictitious evidence proving it caused false confessions. However, with the

exception of certain types of development, in most cases there is clear knowledge of what one has done or not done.

From an interviewer’s point-of-view there are other problems. First, if the lie assumed incorrect information, the subject may quickly detect the deception and distrust any further statements made by the interviewer.

Second, the statement may indicate to the subject what the interviewer knows or suspects, thus allowing the subject to determine what he might successfully conceal or continue to deny. Effectively the statement is an offer of information to the subject from which he can gather intelligence. If the statement was true and not a lie, the interviewer has now given up information that could be used to substantiate any subsequent admissions.

Third, the subject may demand to see the proof and the interviewer’s failure to produce it indicates that the case may not be as strong as alleged by the interviewer. This may simply increase

rather than decrease the resistance of the subject.

The second question, “Is there any reason that you can think of that there would be a video of you going into that room?” affords the interviewer an opportunity to back out of the situation if confronted by the subject for proof. He could respond to the subject, “We have not reviewed all the tapes in the building so if there was a reason that there was one of you going into that room, I thought we could discuss it now.” Backing out without the loss of credibility allows the interviewer to continue with the encounter.

In the third part of this series, we will consider several other commonly used statements and their potential impact in an interview. This will lead to a discussion of ethical considerations in interviewing and the treatment of the subject. ■

Risk Management Issues

Defamation of character is an inherent risk of the loss prevention function. It cannot be eliminated. Therefore, it must be managed. The risk must be identified and assessed, and appropriate risk management measures should be implemented to minimize the number of claims and to position the merchant to successfully defend against such claims.

Identification and Assessment.

LP-related defamation might occur in the investigative fact-finding process, in the detention process, in the internal and external reporting process, and the employment reference process. However, the possibility of a claim is not necessarily the same as the probability of a claim. Solid risk reduction measures can significantly reduce the probability of a claim against a merchant.

Risk Reduction Measures. Three traditional measures merchants may take to manage defamation liability are to adopt appropriate policies and procedures, to properly train employees, and to audit employee compliance.

First, policies and procedures are the foundation of any risk management program. Here, these directives might address:

- Preferred locations of employee interrogations and customer detentions,
- Distribution of internal oral and written reports,
- Communications with outside authorities,
- Confidentiality statements and reminders for employees questioned during investigations,
- Guidelines for employee briefings, and
- Procedures for employment references.

For example, merchants might minimize employment defamation risks by adopting policies that prohibit any references other than dates of employment and positions held, or permit references only after employees have signed waivers and hold-harmless clauses.

Second, staff members need to know the details of each policy and procedure, the reasoning and necessity of adherence, and the risk of corporate and

personal liability for violation. Training is essential and should be documented, tracked, and ongoing.

Third, audits need to be conducted to measure employee knowledge and compliance with existing requirements. For example, when conducting routine store audits, LP and/or human resource staff might quiz store managers on the policy regarding employment references. Case files might also be audited to measure compliance with the distribution, storage, and destruction of records policy. Auditors might also periodically call stores for employee references to determine if unauthorized references are being provided.

Fourth, authority for implementation and enforcement of these risk management measures must be clearly delineated. The designated manager should also serve as an advisor to resolve any questions from the field. ■