
HAMLET'S MIND

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Cadit Quaestio

Question: Why did the chicken cross the road?

Interviewer: Give me five minutes with the chicken and I'll find out.

Before We Get Started.

First: Heads up course announcements: We will be conducting the two-day “**Elicitation Techniques: Tier Alpha**” course in Largo, FL at the Botanical Gardens, March 7-8, 2013. The session will count as sixteen hours CPE Credit. A more formal announcement will be forthcoming in the near future but if you are interested contact me at 828-606-9167 or dwrabon@msn.com

A three-day offering of “**Investigative Discourse Analysis**” will be conducted in Raleigh, NC April 17 – 19, 2013. The session will count as twenty-four hours CPE Credit. Once more, a more formal announcement will be made soon but if you are interested, please contact me via the number or email listed above.

Second: Budgets are tight and travel costs are up. Consequently, if you would like to explore the possibility of having any of the courses listed below conducted in your area in 2013, please contact me. The sessions can be structured toward a specific group or delivered via an open enrollment format. Most recently developed courses are highlighted:

Elicitation Techniques: Tier Alpha (conducted with Van Ritch)

The Narcissist, the Fraud and the Subsequent Interview

Allegations of Workplace Harassment – Interviewing through the Labyrinth

Storytelling, Metaphors and Similes: The Gentle Art of Gaining Compliance

Rapport and the Interview Process

Interviewing for Quality Information

Fraud Related Interviewing

Is That the Truth?

Interviewing from Head to Toe

Interviewer Personality Dynamics

Interviewing Generation ME!

Interviewer Ethics

Persuasive Interviewing

Investigative Discourse Analysis

How to Interview like the Dickens

Finding Shakespeare in the Interview

Huh? Staying Focused during the Interview

Third: Give yourself a gift that keeps on giving: a membership in **The Association of Certified Fraud Examiners**. As I have said before, “It’s your career – manage it well”. From the professional staff, the contacts made in the local chapter, as well as the national conference, the quality training offered and most importantly the esteem with which the “CFE” designation is held makes the ACFE the “B-12” for someone determined to captain their own career. Check it out at ACFE.com

Fourth: This issue contains a challenge that for the winner means \$500 dollars. Are you up for the challenge or are you just gonna sit there on the couch?

Start the New Year off right by winning \$500. All you have to do is solve the following:

emy hmwzuz tme iduffqz mz qjoqxxqzf naaw ymxusmzf eqxr xahq:zmdoueeuey dqhueufqp. uz
rdqcgqzfxk mewqp cgqefuaz zgynqd 96, zmdoueeuefe mzp otuxpdqz ar ftq naaw tq dqhqmxq tq
ue fmxwuzs mnagf tuyeqxr. itmf ue ftq iadp ftmf ymwqe ftmf dqhqxmfuaz?

Hints: M=a, Q=e, Z=n, Chapter one of “Investigative Discourse Analysis 2nd Edition

Note: On the last day of January, all of the correct answers will be placed in my Harley helmet and a name drawn. That name will be the winner. When you submit your answer to dwrabon@msn.com I will acknowledge that I have received it. However, I will not say whether it is right or wrong. The suspense is the fun part, isn’t it? The winner will be announced in the February issue.

I have often been asked why I run these challenges from time to time. It is easy; interviewers are inquisitive, tenacious, think outside of the box and are genetically wired to solve the problem. It is one fun thing to get into the arena with the interviewee. It is infinitely more fun to get into the arena with several thousand interviewers!

In the event there is no winner, I will take the \$500 to my local Harley dealership and purchase a hat and a tee shirt.

Transition – Now to the Point

Interviewing Fundamental:

The Art of Interviewing and Motorcycle Riding

In this issue, we have the fifth in a series of articles relating two topics I enjoy a great deal – interviewing and riding my motorcycle. As we progress, we will continue to explore the broad commonality and application between the two.

The Interview Process: The interviewer has to be in the right gear



“One of the most challenging aspects of learning to ride a motorcycle is how to shift gears. The task adds a layer of complexity for those already familiar with how to drive a manual transmission car, and can be especially daunting for new riders who have zero experience with a manual transmission.”

http://motorcycles.about.com/od/motorcyclingbasic1/a/how_to_shift.htm

In the October 2012 issue, we compared the rear break application to the interviewee. In this examination, we address the comparison of the motorcycle gear system to the phases of the interview. Transitions within the interview are a function of the changing interview environment.

Let’s compare this transition using a modification of the observation in the box above: One of the most challenging aspects of learning to conduct a structured interview is how to transition within the changing environment of the interview. The task adds a layer of complexity for those already familiar with how to conduct an interview with a willing interviewee, and can be especially daunting for new interviewers who have zero experience with the interview process.

There is no doubt about it, mastering the process of smoothly changing gears is one of the most challenging aspects regarding learning to ride a motorcycle. The rider must manipulate the clutch with the **left hand**, manage the throttle with the **right hand**, transition to the appropriate gear with the **left foot**. Now add to that, the necessity for the rider to **monitor/control** the direction in which the bike is moving.

Interviewing is not that different in its application: the interviewer must **recognize** the point in the interview wherein a transition must be made, **know** what strategy (gear) which to make the transition into and **possess a functioning ability to apply** the strategy. Lastly, the interview must **monitor/control** the direction in which the interview is moving. As I have noted in the past, “That’s why they call it work!”

As we continue with our analogy, **first gear** is the phatic phase of the interview. These are the initiating components found in social encounters – examples are: introductions, greetings, eye contact, vocal tone and handshake. Each of these communicative devices quickly conveys a wealth of information, creates impressions (that are difficult to change), establish the foundation for building rapport and establishes the criteria for the onset of the interviewing journey.

Have you ever really “seen” yourself in the opening moments of an interview? You should. What is the expression on your face? Does your voice go up or down at the end of the sentence? Do you establish good, comfortable eye contact?

In the **second gear** we transition to any administrative matters that may have to be addressed preliminarily. Once more, are you interacting as one person to another or are you coming across as the automaton, devoid of any vestige of those traits that define us as human, such as we find across the counter at the DMV? Does the interviewee perceive you as talking with them or to them? Is your demeanor that of a parent talking to a child or one adult talking with another?

With the **third gear** we transition into the purpose of the interview itself. Open questions should take precedent. In this phase, the interviewer encourages the interviewee to talk. Herein the evaluation of the interviewee’s verbal, vocal and nonverbal behavior is undertaken. Information provided by the interviewee is linked/compared with the information obtained previous to the interview. The interviewer considers: what is the behavioral base line presented when the interviewee is relating what is known to be true? What topic is on the table at the point the behavioral change occurs?

With the **fourth gear** the interviewer addresses the topics that were in play when the behavioral changes were presented. As the interviewer addresses the topic with amplifying questions the consideration factors are: does the interviewee readily answer the question and if

so, what is related? Does the interviewee display increased evidence of resistance once having been asked the question? Those issues that can be readily resolved are addressed in fourth gear.

In the **fifth gear** those elements that cannot be readily resolved in the fourth gear are addressed. Fifth gear is the *persuasive power* gear. The interviewer in fifth gear uses logic, emotion and character to transition the interviewee from unwilling to willing. Fifth gear is what distinguishes a ride from a trip. With a ride, it's all good – one reaches the destination which in the interviewer's case is to know all. With a trip, one is moving alright but never reaching the predetermined destination.

An interview is also like a motorcycle ride in that the interviewer – like the rider – may find it necessary to down shift gears. For example, topic **A** may be transitioned all the way through fifth gear and reach resolution. However topic **B** may require down shifting perhaps back to third gear or even second gear. In like manner, the same may be true for topics **C** and **D**. The environment of the road can change in a moment. Likewise, the environment of the interview can change quickly. Like the rider, the interviewer must be able to adroitly adjust to the one constant – change. Thus the interviewer either controls the process with the appropriate transitions or is quite literally, taken for a ride.

Advice from an Interviewer

In one sentence you will find an interpersonal communication tip, interviewers know for a certainty, having application to the world at large. The previous issues contain items one through six.

7. There are two sides to every story.

Five Mistakes Interviewers Make

Recently I was in San Francisco conducting a class for the ACFE. I began (as I always do) by asking the class individually and collectively what they would most like to take away from our time together. Amid the most applicable requests coming from the floor, one participant stated, "I would like to know the five top mistakes interviewers make." Wow. That was not only a brilliant request for the class itself but also food for thought for the newsletter. In the subsequent issues, I will address each mistake one at a time. That being the case, here we go: Mistake number one:

Failure to plan. Without a doubt this is **the** primary error interviewers make. To make matters worse, the longer the interviewer has been "in the saddle", the less preparation takes place. In debriefing career criminals regarding their tactics, thoughts and behaviors when they are being interviewed, I always explore their preparation undertakings prior to the interview. My inquiry

runs along the line of: “Once you knew you were going to be interviewed, what was going on in your mind?” The answers I have received include:

“Who are they? What have they got? The biggest question to me is . . .”

“Being prepared. Being pre-pared.”

“I had my routines I was going to run down on them.”

“I had my story made up.”

“I had an easy answer.”

The interviewer must consider who the individual is, what information is available, what is wanted from the interview, what the primary interview strategy is to be and what is an alternate strategy? The success or failure of the interview outcome is determined prior to the interviewer walking into the room. As I have often quoted, “Either you have your own plan or you are part of someone else’s plan”.

Observations from the field

It always makes my day to hear from you. It is especially gratifying when you go to the trouble to share an interviewing related observation, technique or experience. I recently received the following:

I’ve read some of your newsletters and found them very informative. I don’t know if you’ve covered the issue of “Stress relief habits v. indicators of deception?” Maybe I missed that newsletter.

Also, other literature on interviewing has skipped this topic. Or at least I haven’t found it.

Regardless, I believe an interviewer can be confused if they misinterpret a stress reliever habit as an indicator of deception. Both are not the same and require a different approach.

What I’m talking about is everybody’s way of dealing with stress, and severe stress. During my interviews I found it can be as mild as a sigh or very pronounced. Once I was interviewing a police officer about corruption in his department and he would cover his face in his hands and say, “ARRRGHHHHH!” It was his way of dealing with the stress of the interview and not an indicator of being deceptive so I scratched off that behavior. After a while, it was irritating, but I realized that he had to do this to cope with my line of questions.

Another time during a proffer interview, in which it was to the subject’s benefit to cooperate, he was subtly rubbing the finger nails of his index and thumb together when I asked him hard and

pointed questions. When he did this, I knew I was going down the right road, but also knew he wasn't lying.

During another proffer, the subject would increasingly say "you know" when I asked about certain topics. It was a verbal way of stress relief.

I don't know if you've ever covered this topic but I look forward to see what you've discovered.

Thanks.

I responded as follows:

Thank you for the follow-up. I really appreciate it and found it most informative. I think the whole dynamic of stress on the detection of deception is one reason why no study on deception has ever been able to replicate itself. No study that I have found ever addresses the subtleties of the verbal, vocal and non-verbal behaviors of the interviewer. For example: the same question or statement (by the interviewer) which in one case the voice goes up at the end of the sentence and in another wherein the voice goes down can have two entirely different emotive outcomes on the part of the interviewee. Additionally the vast majority of studies - especially from academia - are in role play situations having no real stress as a factor. Lastly, what may be a stressor to one individual may be water off a duck's back to another.

This question is why the communication event we call interviewing has held my attention all of these decades. I learn something new every day. I would appreciate your sharing anything you come across that would help to make me a better interviewer and a better interview trainer.

Thank you again for going to the trouble to contact me. All the best, Don

The Elicitation Edge

Beginning with the February 2013 issue there will be an on-going segment titled as above. This portion of the newsletter will address the dynamics of the elicitation process as an additional element within the interviewing process. The information, comments and observations will be most applicable and primarily directed to those completing one or more levels of the Elicitation Techniques taught by my training co-conspirator, Van Ritch and myself

Interviewing related article from a professional in the field

Note: In past issues I have stated my preference and laid out my reasons for recording the interview. One of the most valuable characteristics of an interviewer's mindset is to be open to positions and opinions contrary to their own. Heck, that's what makes it fun and informative. That being said you need to hear what my friend, retired FBI agent Gary Graff has to contribute from the other perspective. I thank Gary from the bottom of my heart for sharing his thoughts with us so that we examine the issue from all sides.

ELECTRONIC RECORDING OF INTERROGATIONS

Gary W. Graff

INTRODUCTION

Electronically recording a suspect interview is believed to be, by some law enforcement professionals, the most accurate and efficient method of collecting and preserving confession evidence.¹ In line with this opinion, a number of law enforcement agencies (LEA's) have adopted policies officially mandating this practice. Recording proponents present convincing arguments in its favor, which on the surface, do have merit. In spite of this, twenty-three years of investigative and interviewing experience have convinced this author that the traditional interview method, with officer-generated written notes and reports, often produces better results and better evidence. As LEA's are faced with the decision of whether or not to memorialize subject interviews through recording, they should closely consider a number of factors.

RECORDER ANXIETY

Are suspects less inclined to be truthful and cooperative if they know they are being recorded? Opinions vary, but in conducting over a thousand interviews over the years, I have witnessed many instances where interviewees have clearly displayed their recorder anxiety, either by asking if they were being recorded or by exhibiting nervous, inhibited behaviors. In these instances I informed them that they were not being recorded, and almost without exception, they visibly relaxed and responded more openly. Human nature dictates that when people know they are being recorded, they naturally become more inhibited, more selective with words, more inclined to ask for an attorney, and less likely to communicate openly and honestly about their misdeeds. Admittedly, specialized techniques may be employed by the interrogator to minimize recorder anxiety, but it is often difficult to entirely eliminate the behavior-altering pressure generated under these circumstances.

As one antidote to this recorder-anxiety problem, some suggest covertly recording the interview. Covert recordings of subject interviews may be necessary under certain circumstances, but the short-term gains for doing so may not be worth the long-term losses. From a larger perspective, depending on the type of violation being investigated, many suspect interviews are building blocks for the investigator's future intelligence base. These same individuals are potential sources of information to forward the investigation, expose other criminal activity, or develop future cases. One of the key ingredients to this witness development is the establishment of trust and respect.² Trust is earned by the investigator over time and results from being professional and straightforward, and from treating subjects with respect. Breaking trust through covert recording could unavoidably hinder this important aspect of witness development as, at some point, this deliberate deception is divulged to the subject. In addition, when it became public knowledge that the LEA was secretly recording interviews, it could become more difficult for that agency to obtain the cooperation of other suspects and witnesses.

GETTING IT RIGHT

Some pro-recording advocates raise concerns about relying solely on written reports. They

suggest that human shortcomings, personal biases, and perceptual differences may result in incorrect inferences and conclusions, preventing investigators from accurately reporting the results of unrecorded interviews. In addition, proponents assert that delays in prosecution diminish recollection of specific details not noted in the written record. They suggest that recording the process prevents these problems by permitting later review. These concerns are understandable. However, experienced officers, properly trained in interview technique, have the tools necessary for countering these types of human fallibilities. These tools are developed by examining human variables such as values and culture, and economic circumstances that result in differing viewpoints and perspectives.³ The experienced interviewer knows the importance of spending sufficient time in pre-substance discussion to develop rapport and establish effective communication with the subject.⁴ The interviewer reviews and clarifies important details with the subject, thereby reducing the possibility of personal bias, or cultural and perceptual differences from affecting the accuracy of the report. Important interviews should be conducted by two officers, both of whom carefully review their combined report for accuracy before finalization. Finally, near the conclusion of the interview, officers should go over details again with the subject, and attempt to obtain a signed statement in the subject's own words. These reports and statements may be reviewed months or even years later to refresh memories during trial preparation or plea negotiation.

Admittedly, discrepancies in written reports do occur. Ultimately, mistakes may be resolved through an unpleasant experience on the witness stand. Such experiences help agents become more detailed thorough interviewers and to prepare more accurate reports. Occasionally, suspects may later deny making certain statements included in the report. Positive resolution of conflicting accounts between officer and suspect is aided by having two interviewing officers testify, and/or having the subject's written and signed statement as evidence.

Regarding accuracy, advocates point out that recording the interview allows for later observers of the video to personally judge the content for themselves and assess both the credibility of the statement and the suspect's behavior and mannerisms. There are, however, two sides to this coin. First, watching a video recording of an interview is not the same as being there. Voice intonation, expression, and demeanor depicted in a one dimensional video may be quite different from the in-person, in-context experience of the participants. Second, in court proceedings, video recordings are not immune to being second guessed and manipulated by defense attorneys, thereby distorting the statements and intent of both the subject and the interviewer.

In summary, concerns about accuracy with traditional note-taking and report writing can be largely overcome by proper officer training and experience. It is the nature of an investigation to have discrepancies among subject, witness, and agent regarding what took place in an interview. Again, it is ultimately the responsibility of the jury to evaluate the testimony, the corroborating evidence, and the credibility of witnesses.

ADVERSE CONSEQUENCES/LEGAL OBLIGATIONS

Among the negative consequences of recording interviews is the revelation of interrogation technique. Like many LEAs, the FBI requires extensive interview instruction for its agents, and offers additional specialized training throughout agents' careers. Field experience further

develops and fine-tunes interview stratagems. Some of these perfectly legal techniques, if exposed through video recordings, would be unnecessarily compromised and possibly mischaracterized in the court room in attempts to discredit the agent, the LEA, and the investigation.

Another significant issue is that over time, recollections of subjects and witnesses often change. This occurs as questions are asked in greater depth, memories are stimulated, and details of events are further uncovered and reviewed. A complete accounting of events may not be developed until after several interviews over a period of weeks or months. Even the most candid individuals may recall new events or remember details in a different way. If a subject later becomes a witness, truthful and carefully written reports of all interviews will provide the fairest accounting of this logical progression of event recall.

A third consideration involves the process of persuading the suspect/witness to reveal the truth, not only to the interviewer, but also to him or herself. This can be difficult and time consuming, as it may include the suspect's evolution through emotions and various stages of denial, blame, minimization, and ultimately, acceptance. Should the subject be later called to testify as a witness, prosecutors have an ethical and constitutional obligation to provide defense attorneys with information that would reflect negatively on the witness, including conflicting statements.⁵ As opposed to recording these events and opening the process to distortion, an honest, concise, written report describing the subject/witness's evolution throughout the interview process best accomplishes this obligation.

NOTE TAKING - A DISTRACTION?

Some recording advocates feel that taking notes during the interview is distracting and counterproductive to active listening. They propose that recording the process frees the investigator from note taking and allows focus on other revealing behaviors. Additionally, the absence of note-taking promotes a more natural conversation, which may place the subject more at ease. Although these opinions raise valid concerns, they can all be addressed through proper interviewing technique. First, listening effectively while taking notes is a skill developed through practice and experience, and becomes second nature over time. In fact, the very act of note taking forces the officer to mentally analyze and review the information being written, which results in better understanding and clarity. Taking notes also slows the interview process, which promotes deeper reflection and review of key points. Ideally, the interview is conducted by a pair of officers which frees one to assume the role of primary interviewer while the other positions himself outside the focus of the suspect in the secondary role of note-taker.⁶ This facilitates a more natural conversation.

EQUIPMENT AVAILABILITY AND/OR MALFUNCTION

To effectively record an interview, proponents suggest "proper recording equipment, including back-up power supplies, multiple digital or analog recording devices, and several cameras with the capability of capturing a variety of angles".⁷ However, my experience has been that most small police departments and Resident Agency FBI offices can't afford to purchase or maintain such equipment. Many subject interviews are conducted either in a government vehicle, at a

local police station, in a bank officer's office, or at some other expedient location. Many interview opportunities present themselves unexpectedly, and have to be conducted advantageously while the individual is willing to talk. Because circumstances often make it impossible to interview the suspect at an LEA office, the only electronic option may be a simple audio recording, using unsophisticated equipment at an improvised location.

Simple audio equipment is often used by officers in covert operations. They understand the importance of using back-up recorders. Even under ideal conditions, recordings often contain portions that are either difficult to understand or unintelligible. Ironically, it often seems as if the poorest quality sections of the recording occur during the most critical parts of the conversation. Officers who depend on a recording to memorialize their interview could be headed for a devastating experience if the recording equipment malfunctions. Had no notes been taken, preparing a detailed report would be all but impossible. Furthermore, in ensuing court proceedings, defense attorneys would likely insinuate improprieties regarding reasons for the alleged equipment failure. Again, unless the interview location is properly equipped with high quality audio/video recording devices and back-ups, odds are that technical problems will occur with at least a portion of the recording. Establishing and utilizing these elaborate recording stations, particularly in rural areas, is simply not practical.

SIGNED STATEMENTS

This author is a strong advocate of the signed statement. Through years of study and experience, I have learned effective techniques for obtaining these statements⁸: During the course of an interview, I attempt to build rapport, express empathy, establish trust, and develop the truth, all of which contribute to the suspect's sense of safety with me. Without making promises which would violate the suspect's right to due-process⁹, I subtly present myself as the suspect's advocate with the prosecutor, the ultimate decision-maker regarding criminal charges. I then suggest the preparation of a signed statement in the suspect's own words to inform the prosecutor of the details of the crime, of why it was committed, and of any expressions of remorse.¹⁰ The process of reviewing the suspect's reasons for the crime and presenting them in the statement helps both to solidify trust and to convince the suspect that the interrogator is truly acting in his/her best interest. It also thwarts later attempts by defense attorneys to present other excuses for the suspect's involvement in the crime. As the statement is being written, the interviewer should carefully review with the suspect the wording of each thought, ensuring clarity of intent. The interviewer may serve as scribe for the statement, but the affirmation at the end should be written in the suspect's own hand. The statement should be brief, yet ensure adequate coverage of details, including all essential elements of the crime. This signed statement is powerful evidence at trial and preserves the technique and integrity of the process.

PROSECUTOR PREFERENCE

I am aware of cases lost because a confession was not recorded. Not surprisingly, many prosecutors prefer recorded confessions over written reports, especially if the recording is of high quality and contains consistent, incriminating statements. However, such a recording is normally dependent on ideal interviewing conditions: properly functioning equipment, a suspect un-intimidated by the recording process, consistent recollection, minimal denial, and no

exposure of investigator technique. In this ideal scenario, it would indeed be hard to refute the assertion that a recording represents the best method for memorializing a confession that will be valuable throughout future judicial process. However, the reality is that these ideal circumstances are the exception rather than the rule; problems will occur, and as they do, the value of the results diminishes accordingly. Most would agree that an un-recorded confession is better than no confession at all.

CHALLENGES TO INTERROGATION PROCEDURES

Challenges to suspect interrogation procedures have come from several areas. Several states have passed legislation requiring LEAs to electronically record interrogations.¹¹ In a few instances, courts have made it more difficult for non-recorded confessions to be admitted as evidence, including jury instruction that non-recorded confessions are less reliable evidence. Certainly, judicial climate varies across the country. Requirements to record custodial subject interviews may have been the result of concerns over accuracy, voluntariness, coercive tactics, requests for attorney representation, and proper Miranda administration. Some advocates assert that a recording resolves any ensuing conflicts over these issues. However, properly implemented safeguards and procedures may accomplish the same purpose. For example, subject interviews should be conducted by not one, but two agents, both of whom can then testify to the procedures used and information gained. Additionally, the use of a Miranda Waiver Form, signed by the subject, should be strongly encouraged. Many LEAs require officers to maintain an interview log, noting when certain actions were taken during the interview.¹² The subject's signed statement should include language assuring that proper procedures were used and the suspect's rights were not violated. In my experience, these measures have been sufficient for testifying FBI agents to successfully counter the procedural challenges presented by the defense.

Unfortunately, even rare abuses of interview protocol impact overall officer credibility. Nonetheless, it would still be premature for an agency to succumb to the trend of recording interviews simply because a few courts have raised such concerns. If LEAs implement and supervise policies to ensure an effective, appropriate, and legally uncompromised interview process, they should be able to withstand most court challenges.

There are concerns that an increasing number of courts may require recording subject interviews. Is this indicative of an actual trend or simply a product of overly zealous activist jurisdictions? It should be noted that, barring any violation of constitutionally required procedures, weighing the officer's account of interview statements and resolving any contradictions between officer and subject, has historically been the ultimate function of the jury. In 1995, the 5th Circuit Court of Appeals affirmed the jury's role in a case where one U.S. Customs Agent provided an unrecorded oral Miranda warning, and subsequently obtained an unrecorded confession. The court stated that these facts did not make the confession unreliable as a matter of law. Furthermore, "when the evidentiary value of a confession depends on the credibility of the officer who repeats it, the court correctly allows the jury to make this call."¹³

The U.S. Supreme Court has repeatedly determined non-recorded interrogation procedures to be constitutional. Regarding the waiver of rights portion of the interview, in two separate 1979

cases, the court affirmed previous rulings that the question of whether the accused waived his rights “is not one of form but whether he knowingly and voluntarily waived... Thus, the determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation...”^{14,15} The latter case affirmed the actions of an FBI Agent taking an unrecorded confession after the subject agreed to talk, but refused to sign the Advice of Rights Waiver Form. U.S. Courts of Appeals continue to use the “totality of circumstances” standard and to uphold non-recorded confessions. In 2010, the 11th Circuit ruled in favor of an FBI Agent who obtained an unrecorded confession but did not obtain a signed Advice of Rights Waiver Form. The court indicated that the form was not necessary and that sufficient evidence existed, based primarily on the agent’s credibility, to show that the accused waived his Miranda rights.¹⁶

In 2007, the 9th Circuit Court of Appeals affirmed a lower court decision not to provide the defendant’s proposed jury instruction which stated that the jury should give lesser weight to a federal officer’s testimony about the defendant’s statements because the statements were not recorded. The court continued that “we have never required a trial court to instruct a jury to give unrecorded statements less evidentiary weight.”¹⁷

It appears that there is case law from the U.S. Appellate and Supreme Courts supporting the admissibility of unrecorded confessions.

LEAs can utilize these rulings to justify their interrogation policies to prosecutors, local courts and legislature.

HANDLING CHALLENGES ON THE WITNESS STAND

Challenges to proper non-recorded interview technique are nothing new and can be effectively countered by prosecutors at all levels of the judicial system. Whether in trial or in suppression hearings, addressing the reasons for not recording is best handled on direct examination, where the climate is more conducive to revealing these reasons in full detail. Defense attorneys will often present the question of why the interview wasn’t recorded in such a way that implies a deviance from standard investigative practice or suggests that some impropriety took place. Over the years I have learned an effective response to these challenges: When asked by the defense why I didn’t record an interview, I respond that I have four reasons. Immediately indicating that four reasons exist increases the odds of being given the opportunity to explain all of them. If the defense does not allow coverage of all four, the prosecutor can then follow up and cover the remainder. The following four points are related to the jury:

1. LEA Policy. It is my LEA policy not to record interviews. This statement wards off the defense’s very predictable insinuation that something unusual or abnormal was done by not recording this particular interview with his or her client.

2. Impediment to Truth. It has been my experience that people are often intimidated by a recording device. Its presence inhibits open and honest communication, thus hindering efforts to find the truth. When suspects know they are being recorded, either they have refused entirely to talk, or have tended to withdraw and become selective in their communication. The prosecution

or defense may question that if overt recordings produce anxiety, why not record covertly? The response should include the trust violation issues previously mentioned.

3. *Equipment Malfunction. It is often difficult to obtain a clear recording of the entire interview; there is a chance that at least a portion of it will be unintelligible or lost.*

4. *Best Evidence: I state my belief that the best evidence is a signed statement in the person's own words by the person's own hand and include how and why it is obtained.**

HANDLING ISSUES OF CONFLICTING POLICY

What happens when a suspect interview is anticipated that involves multiple law enforcement agencies with different recording policies? Having worked most cases in coordination with other agencies, I have dealt with numerous conflicts in policy. For law enforcement agencies to work effectively together, it is imperative that each agency adopt a cooperative approach that is receptive and flexible to procedural differences. Any conflicts should be identified and resolved early in the investigation. Often, questions regarding procedure can be answered by determining where the case is most likely to be prosecuted. Jurisdiction, judicial climate of the region, and prosecutor concerns can then be considered to determine which policy is best for effective prosecution. Experience indicates that if federal prosecution is anticipated, state and local agencies should defer to the federal agency's policy, allowing the federal agent to take the lead in the interview and report process. In cases where state prosecution is anticipated, it may be best to follow the local interview policy. I am familiar with cases where both state and federal prosecution was anticipated and the FBI accommodated local wishes to record the process.

CONCLUSION

An in-depth examination of recording subject interviews reveals many problematic issues and unforeseen ramifications. On the surface, it would seem that electronic recordings present the best evidence for future court proceedings. However, the detrimental effects of this practice must be considered. As technology becomes more advanced and accessible, the initial tendency may be to embrace it. Before taking that step, LEA's should carefully consider the consequences.

Endnotes

¹ Boetig, Brian Parse, David M. Vinson, and Brad R. Weidel. "Revealing Incommunicado: Electronic Recording of Police Interrogations". FBI Law Enforcement Bulletin, December 2006: 1-8

² Link, Frederick and Foster, Glen. The Kinesic Interview Technique. Riverdale, CA: Interrotec Associates, 1989, 56-61

³ Vessel, David, J.D. "Conducting Successful Interrogations". FBI Law Enforcement Bulletin, October, 1998, 4-5

⁴ Ibid., 3

⁵ Burke, Timothy T. "Documenting and Reporting a Confession with a Signed Statement". FBI Law Enforcement Bulletin, February, 2001, 20

6. Sandoval, Vincent A., M.A. "Strategies to Avoid Interview Contamination". FBI Law Enforcement Bulletin, October (2003), 3 – 4
7. Supra note 1, 8
8. Supra note 5, 17-22
9. *Miller v Fenton*, 106 S. Ct. 445 (1985).
10. Supra note 5, 20
11. Supra note 1, 4-5
12. Supra note 5, 18

13. *United States v. Flores*, Nos. 93-7388, 93-7662 (1995)
14. *Fare v Michael C*, 442 U.S. 707 (1979)
15. *North Carolina v Butler*, 441 U.S. 369 (1979)
16. *United States v Bernal Benitez*, No. 08-10308. (1/25/2010)
17. *United States v. Walker*, No. 05-10678. (1/12/2007)

**(Note) In instances where a signed statement was not obtained, the testifying officer may want to modify or exclude point #4.*

The author, Gary Graff, retired from the FBI in 2010 after 23 years of service. Opinions expressed in this article are his, and do not represent those of the FBI.

Note: Gary and I both solicit your thoughts, comments and observations.

Book Recommendations

My texts (and no one should ever be without them): The texts I have currently in publication are: *Interviewing and Interrogation*, 2nd edition. *Fraud Related Interviewing*, *Persuasive Interviewing* and *Investigative Discourse Analysis 2nd Edition*. They can be ordered directly from Carolina Academic Press. (919) 489-7486 or online at <http://www.cap-press.com> or www.amazon.com

Below are the texts I have read since the last issue. The fact that they are here indicates my belief that they have information that we, as interviewers can utilize:

Malignant Self Love: Narcissism Revisited. Sam Vaknin, Ph.D, Narcissus Publications;
Narcissism: The Denial of the True Self. Alexander Lowen M.D. Simon & Schuster;
The Narcissism Epidemic. Jean M. Twenge, Ph.D. W. Keith Campbell, Ph.D. Free Press
The Culture of Narcissism: American life in an age of diminishing expectations. Christopher Lasch. W.W. Norton & Company.

Note: Stay tuned as I will soon be announcing courses that will be delivered via webinars, online, blended and one-on-one interview coaching.

Lastly as we close out this year, I want to thank all of you that afforded to me the opportunity to conduct training in your location. I have a special thanks to the ACFE for the years of collaborative undertakings we have shared. I want to thank you – the readership of Hamlet’s Mind – for your interest in the continued professionalism of the interview process and allowing me to drop by six times a year like two old friends catching up. May 2013 prove to be the best year yet for you and yours.

Until the February issue

All the best,

Don Rabon, CFE