



FLAG ON THE PLAY

Involuntary statement - Case dismissed

PART II of II

Inferred Promise of Leniency

Occurs when the accused could reasonably have inferred a promise going to the punishment for the crime to be confessed (*State v. Munoz, 1998-NMSC-048, ¶ 34*).

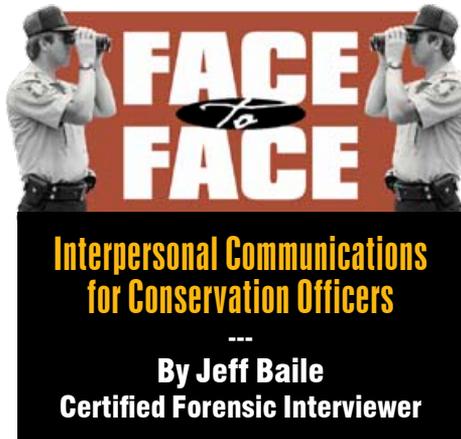
Express Promise of Leniency

An unequivocal guarantee that the defendant would receive leniency if he gave a statement (*State v. Munoz, 1990-NMCA-109, ¶ 13, 111 N.M. 118, 802 P.2d 23*).

AS DISCUSSED in **PART I**, confession cases are initially attacked on Miranda matters. If that doesn't work, the next round is to argue the underlying voluntariness. Of all the reasons we might get an interrogation flag thrown, promising or inferring some sort of benefit in exchange for a confession will draw one faster than any. Promissory penalty flags are probably the easiest for the defense to win and toughest for the state to defend.

Once a promise is mentioned or inferred by the government, defense has free rein to keep that thread running throughout any hearing. We can't take it back; it's out there and they will continually argue it had an on-going effect on their client's decision to confess.

Again, we are reminded that it's us it's not them who create the legal loopholes our suspect escapes through. Courts do permit statements that reduce the moral seriousness such as "you must have been talked into this" or "I'm here to help you get this off your chest." But the use of any type of promise going towards lesser punishment or receiving a benefit is prohibited.



Judges don't like it. Juries don't like it. Prosecutors don't like it. And, honestly, defense attorneys don't like it.

Most of us don't realize that promising leniency or some sort of benefit in any form, in exchange for a confession, is actually a type of plea bargaining. Law enforcement can of course work with the state's attorney after charges are filed, but police cannot unilaterally offer or even insinuate leniency in the field in return for a confession. Even officer discretion, in some cases, can be considered promissory when used as leverage.

For example, stating two tickets will be written if the suspect confesses but he'll get five if he doesn't, is a manner of plea bargaining. No doubt police can choose to write tickets or not write, write a bunch or just a few in any given situation. The situation becomes promissory, though, when the otherwise legally authorized discretion that police have is used as leverage to get a confession.

In my early years I experienced a good number of hearings where the defense raised this issue. For the most part I did prevail but it usually wasn't pretty. Continuing to use this interrogation ploy, I was told, was "bad practice" having long-term negative consequences on my credibility as a witness.

WHAT CAN I SAY?

No instructor can really guide any interrogator (as they never really did for me either) on exactly what to say at any given time. That's because, just like playing lead guitar, interrogations are mostly improv. What we can confidently say, however, is simply – don't promise or infer benefit in exchange for incriminating information. Think of something

South Dakota CO JOSH THOMPSON displays empathy to his defiant suspect Diana Landegent through his palm flash during a practical interrogation class. Most of us don't think to practice our persuasion styles but it's just as important any other endurance training. Notice how he opens and closes the hands as he interrogates, a critical skill any interrogator must develop. He also maintains direct eye contact with her, something Diana says she used to have trouble with.

"It's not as awkward to keep eye contact anymore," Diana says. "Once it got past the weird factor, it wasn't so weird after all. It was a huge advantage to have. I always had a problem of looking away to think and that would cause me to zone them out."

Josh has found that he can tolerate a lot more now from the suspect. "I have learned to sit back and let them fall into their own lies and catch them up in them. Listen to the story. I have also been able to learn and keep a good pause and try to attack the interrogation at the right time with some good one-liners or bypass certain situations I am not there for to keep them on the right track."

"My stamina and confidence has increased drastically," says **Austin Norton** about his interrogation stamina. "The more confessions I obtained on not just small but larger more complex cases have allowed me to become more comfortable with my interview/interrogation routine." Notice once again how the interrogator flashes openness.

AUSTIN'S TIPS:

- Never give up
- Don't tower over the subject
- After I get done with what I have to say, I just like to sit back and be silent. This typically makes the subject uncomfortable. To feel less uncomfortable, they fill the void by talking. Adding a slight smile while being silent kind of puts the icing on the cake.



else to say. To get a more defined view of what might be considered promissory language, ask your prosecutor for some relevant cases. Put them in your squad and review often. Give them a list, as well, of statements routinely used in your interrogations and ask for their candid input. Next, take the same list to a respected defense attorney and have them comment. Between the two, you should have some really good operational definitions of what is allowable or not. The definitions won't be precise but they sure will be a lot narrower. With the addition of the body cams our precise interrogation dialog becomes even more important.

PRACTICING INTERROGATIONS

Practice: n

- repeated exercise in or performance of an activity or skill so as to acquire or maintain proficiency in it*
- the actual application or use of an idea, belief, or method as opposed to theories about such application or use*

When we run out of steam in a foot chase, the suspect usually gets away. And failure to keep up during the interrogation has the exact same effect. This lack of endurance – the inability to spontaneously improvise when the interrogation gets tough – is one of the uppermost reasons interrogations fail.

To be a long-time successful career

interrogator is always having the perseverance to outlast the suspect. There should never be a time when the government terminates the interrogation first. The only reason the suspect will leave the room is when you have a confession or Miranda is invoked – this is what we shoot for.

One way to work on your interrogation energy is attending practical (scenario-based) interrogation classes with instructor and class feedback. In addition to invigorating endurance, having your interrogation style critiqued is extremely eye-opening. Others see and hear things we are not aware. Another great way is practicing with a co-worker

HERE'S THE STEEPLE

Forming the hands in a steeple announces extreme confidence in what is being said as **CO Eric Voigt** shows. Attorneys do this a lot in front of juries to boost their arguments. Transitioning from steeping to a palm flash during your interrogation also nonverbally communicates you are empathetic to their situation and thoughtfully thinking about what they are saying.



a few times a month. This is a lot of fun and the scenarios are created quite easily.

Decide who will play which role and then fashion a relevant situation using an existing crime. When assuming the suspect role, make sure to give the interrogator a hard time as we want them to cogitate and think on their feet just like in real interrogations. Continue the simulation for as long as you can making it as realistic as possible, then switch roles. Even if the sessions only last five minutes, you will find the experiences stick.

If you're heading into a likely interrogation in the field, another way would be to practice out loud in the squad continuously until you pull into the drive. You'll be adapting on the fly, but rehearsing just before the interrogation begins will cause things to pop into your mind quickly. Just like taking one last look at your notes before midterms.

Zach Thomsen, stationed in Phillip South Dakota, says one of the biggest things he's learned from interrogation practice is to slow down. "Slow down and let the subject speak, don't interrupt them, play the pause and make sure, when I feel the point hits, to tell them what I think happened. Also a person does not want to give too much information right away in an interrogation. Hold known facts back and use as ammo during the further part of the interrogation, if known facts are available."

Every time we practice the process of interrogation, the procedure embeds in our brains just a little deeper. It is through this repetition that our deter-

mination and endurance flourishes. We develop the keen ability to keep on talking through those really tough moments and find ourselves "never giving up" as Officer Norton has found.

FRUSTRATION AGGRESSION MANAGEMENT

Definition: *The state that emerges when circumstances interfere with a goal response.*

In our case, the goal is confession and the circumstance is the inability to think up more to say (lack of interrogation stamina) in the face of incessant denials.

Multiple rejections from the suspect can lead to a state of mind called Frustration Aggression which often leads to muted anger. This anger, in turn, can cause the interrogator to react emotionally not tactically. Studies in anger management show this mind set is tough to manage in the heat of the moment. And this is often the flashpoint where police opt to use non-permissive language.

Having an on-going interrogation practice commitment in your toolbox helps tremendously with managing frustration aggression. Any kind of rehearsing, no matter how long the practice sessions lasts, creates degrees of "procedural memory." This kind of unconscious memory development has a strong tendency to pre-determine how we respond in all kinds of sticky situations. When the interrogator bumps up against an intense suspect, it is this training we want to tap. Tact, stamina and professionalism not anger, frustration or strong-arming.

This is important theory going to the very heart of interrogator conduct. For reviews read:

- (1) *Frustration-Aggression Hypothesis: Examination and Reformulation* by Leonard Berkowitz, *Psychological Bulletin* 1989, Vol. 106, No. 1, 59-73.
- (2) Barker, R., Dembo, T. and Lewin, K. (1941) *Frustration and aggression: An experiment with young children*, *University of Iowa Studies in Child Welfare*, 18, 1-314.

IT IS NOT ILLEGAL to interrogate, it is illegal to illegally interrogate. Any confession that lacks integrity – one that smacks of government overreach or unprofessionalism – will draw a flag every time. It's the kind of game cheating the defense is mandated to look for and act on; even when they know their client is factually guilty. They are obsessively committed to getting their client off the same hook that we are obsessively trying to put them on. That's their oath. It's what they're paid to do.

Any of them will admit, however, the one thing that presents them their biggest challenge is the confession. Remember that a suppression hearing is a defense motion; they must convince the court it was tainted. Legally, a confession is assumed true and lawfully taken. Unless we inadvertently help the defense with their arguments by creating interrogation loopholes, they typically will have a tough time convincing the judge.

If we can learn to pay extraordinary close attention to Miranda situations, use clever forward thinking, never run out of things to say, and scrutinize our language, we can avoid most interrogation flags. 🧠

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WANTED:

I am compiling research on False Confession for an upcoming article. If you have experienced a genuine false confession and would like to contribute your story please email me.