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In Case of Confession

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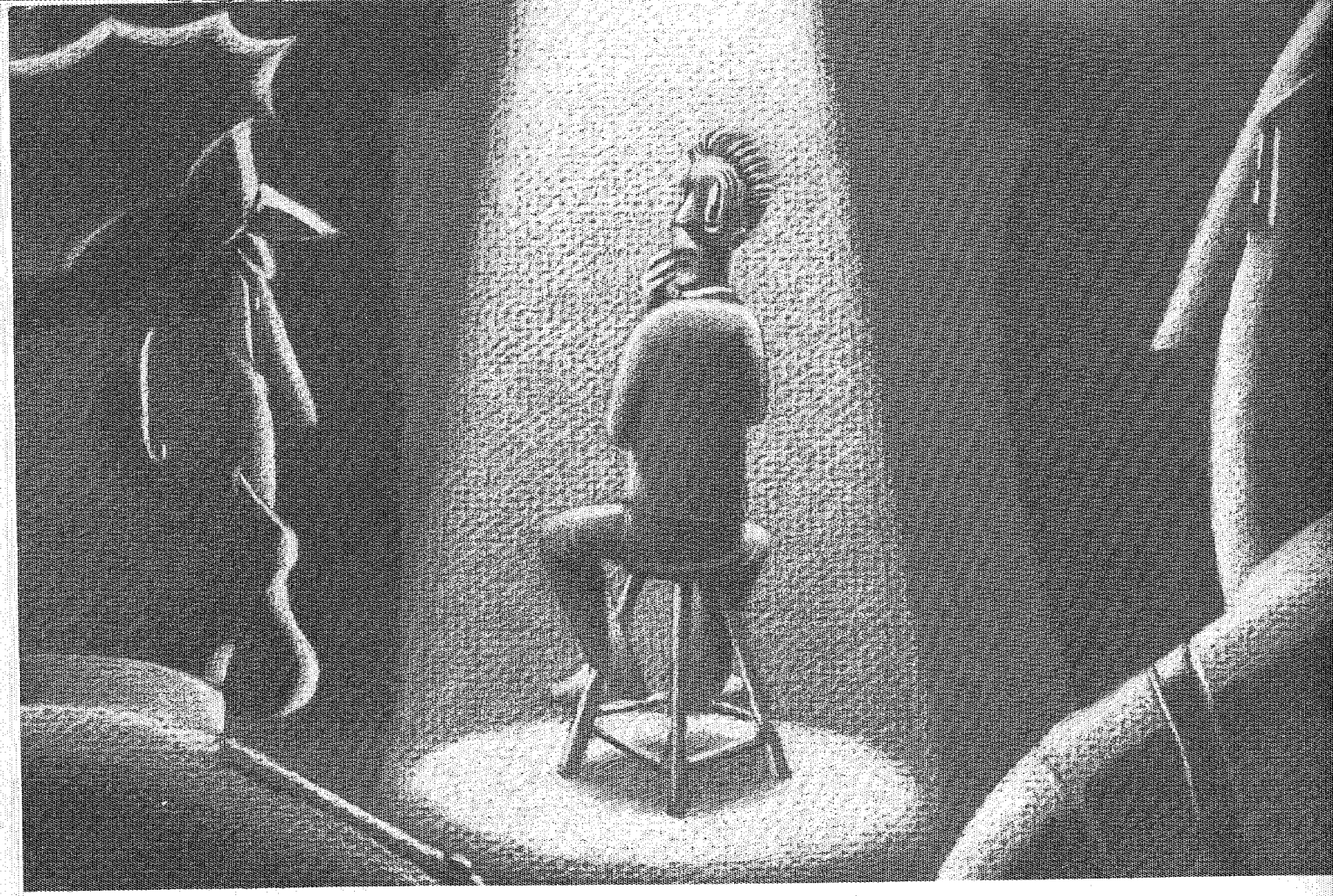


In Case of Confession

You may convince a jury that your client was virtually tortured to confess, and the jury might hate the police and wish to have them indicted by the end of the trial, but if the jury believes the confession is reliable, that it is true, they will convict.

by Andrea D. Lyon and Michael J. Morrissey

One of the most difficult aspects of trying cases, especially homicides, is developing a method of defense to a client's "confession."[1] Clients make statements for a variety of reasons, ranging from physical coercion to guilty conscience. Our job as defense attorneys is to put the interrogation sessions under a microscope and prove to the jury that these interrogation sessions and ensuing statements do not prove guilt.

The purpose of this article is to discuss contesting the confession at trial. You must show the jury both that the confession is the product of coercion *and* that the truth and the accuracy of the confession are highly suspect.

It's important that coercion, as well as lack of truth and accuracy, be highlighted for the jury. You may convince a jury that your client was virtually tortured to confess, and the jury might hate the police and wish to have them indicted by the end of the trial, but if the jury believes the confession is reliable, that it is true, they will convict.

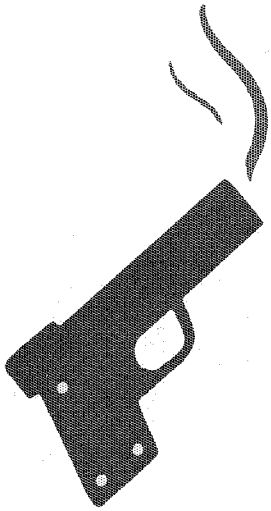
Threshold Choices

You need to consider two important strategy issues before trial. The first issue is whether to contest the confession at all. If it is possible to build a theory of defense consistent with the client's statement, your chances are better than they are taking on the police in a confrontation.

Convincing a jury that the cops are lying is tough work. Whenever you receive a copy of a statement your client supposedly made, go through it very carefully to see if there is a foundation upon which to build a defense. For example:

> *Your client was a back seat passenger in a car. He and three buddies were going to have a fight with a rival gang. When they get to the scene, one of his buddies rolls down the window, pulls out a gun and shoots and kills a rival gang member, and then the driver speeds away. Your client says he didn't have a gun and he didn't know any of his friends did.*

That's his statement to the cops. He tells you that the cops choked the statement out of him, that he has his girlfriend as an alibi, and that he wasn't involved at all. What should you do?



Your client says he didn't have a gun and he didn't know any of his friends did.

That's his statement to the cops.

The statement may prove up accountability for murder on a law school exam, but most jurors have never been to law school, and might not convict here, since your client wasn't the actual shooter. If the defendant looks young and his appearance is halfway decent, you might get an acquittal. On the other hand, if your client testifies vaguely about police coercion and his girl friend makes a poor alibi witness, the jury will probably convict. If you can reconcile your client's statement with a viable theory of defense, you will have a better chance of winning than if you confront the police outright.

The second threshold issue is when—not whether—to file a motion to suppress the statement. We all know that judges don't grant these motions, especially where a serious prosecution hinges on the admission of the confession. An evidentiary motion to suppress the statement, however, is an excellent opportunity to find out pre-trial how the police and prosecution explain their protracted interrogation involving several officers.

A pre-trial evidentiary hearing also gives you an opportunity to see the number of officers involved and get a feel for how they respond to direct and cross examination. After the hearing, you will be better able to develop a strategy as to which specific officers are responsible for the coerced, untrue confession.

Coercion

Physical Coercion

There are basically two broad categories of coercion: physical and psychological. Physical coercion can be divided into two types: That which shows and that which doesn't. The easier of the two to deal with is, obviously, the type that shows.

When there are physical injuries, it is easier than under any other circumstances to get a jury to believe your client was coerced. But the importance of investigation and preservation of evidence cannot be stressed enough. You want *photographs* of the injuries—not just descriptions. You need hospital records, "before-and after" witnesses, every possible preservation of the look and feel of the injuries, not just the fact that they existed.

At the hearing on the motion to suppress, you will hear the police explanation of the injuries; this will tell you how to meet it at trial. For instance, in one case a client was arrested in a stolen 1966 Cadillac some seven months after a homicide. After he was arrested, he somehow floated to a Violent Crimes holding area (no one would admit taking him there); twelve hours later he was returned to the general lockup, having signed a nineteen page court-reported confession to the murder. As soon as he got back to the lockup, he told the lockup keeper he had been beaten and forced to confess. Sure enough, he had *truncheon* marks on his back

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and chest. The police explanation at the motion hearing? "Well, when he was arrested in the stolen car, he drove 40 m.p.h. down a "T" alley, jumped a curb and hit a tree."

Result on Motion to Suppress? Denied.

At trial, though, evidence was presented that proved: (1) no damage to the car and (2) no damage to the tree. Result? Cops caught in an absolute lie.

What about the physical coercion that doesn't show? For instance, in Chicago, there is a practice of opening a phone book, placing it on a suspect's head, and pounding.[2] Frightening, painful, and leaves no bruises. Even though you may not be able actually to document physical coercion, at trial you need to demonstrate the relative difference in power between your client and the police (this applies also to psychological coercion, as well. *See infra*). For instance: How many police officers questioned your client? What are their relative sizes? Very important (for *any* demonstration of coercion) is the relative helplessness or vulnerability of your client. Does he have a low I.Q.? Is this a first arrest? Was be drunk or high? Does he have a physical problem (such as asthma or gout) that would make him even more vulnerable?

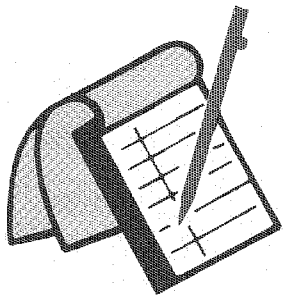
It is also important to explain through cross examination the biases of the police officer. He has as much to lose as your client. If he coerced a confession, he and/or his partner can lose his job; he can lose his case (and maybe a raise or a promotion); he could even be indicted. Because of the need to protect himself and the need to close the case, the officer was careful how he beat your client.

Psychological Coercion

This is the more common form of coercion and, as stated before, many of the methods of coercion overlap. Remember, these are all methods of interrogation—methods that are taught and, more important, written about. In the *Miranda* decision, the United States Supreme Court referred to the book (now in its third edition) that most police departments use to teach interrogation. It is by Inbau, Reid, and Buckley, and called *Criminal Interrogation and Confessions*. You can't *believe* what they have written down.[3] It is, essentially, a guide to coercing a confession. Oh, the authors offer admonishments such as "Don't use this method unless you've got a guilty suspect." But they also make such recommendations as: "When interrogating a suspect, don't write anything down at first. This is a grim reminder the suspect is incriminating himself." The book is a goldmine of information.

The basis for all coercion, especially psychological coercion, is fear. This fear must be demonstrated, shown, and illuminated to your jury in words, action, and emotional tone.

One of the psychological methods of coercion is the use of threats. For instance, a client was driven to the scene of the crime at two in the morning right past the Chicago River. The police stopped on its banks and inquired of the client if he thought anyone would notice an African-American (not the word they used) floating handcuffed in the Chicago River at two in the morning. The client thought not, and promptly confessed.



Police interrogators are taught:

"When interrogating a suspect, don't write anything down at first. This is a grim reminder the suspect is incriminating himself."

When questioning the police about things such as this, take your time and recreate the atmosphere of fear your client felt. Of course, the police will deny making the threat, but, because of your (denied) motion to suppress, you will have a transcript that proves they did drive by the Chicago River at two in the morning.

What you want to do in cross examination is to get the admission from the officer that he had been trained in interrogation techniques, then name and define those that apply to your case.

Some of the common techniques of psychological coercion include:

Isolation. This does not mean (necessarily) leaving your client alone, but that he felt alone, cut off, and helpless. We have all had the experience of feeling alone in a crowd.

Playing one suspect off against another. This is where the officer tells A that B is squealing on A and vice versa. It's a very effective coercion technique, but difficult to sell to a jury.

"Nice guy/mean guy." It's a mystery why this still works, but it does. If this was the technique used, which one of the partners of the interrogation team do you think the prosecution will call to the stand? The officer who looks like (and probably was) an altar boy. You must, therefore, subpoena *every* officer who participated in the interrogation of your client. If the prosecution doesn't call the Incredible Hulk (Altar Boy's partner), then *you* do.

Trips during interrogation. As stated before, many techniques are used in conjunction with others, as in the threat described earlier.

Use of time. Many interrogations take hours, even days, until the suspect is sufficiently softened up to say the "right" things. In one case, the suspect was questioned over a 36-hour period. Stated that baldly, it doesn't sound that bad. But in cross examination, the officer was asked if 36 hours translated to 2, 160 minutes. He agreed. Then the court clerk was handed a stop watch and asked to call out when one minute had passed. The cross examiner stood silent during that very *long* 60 seconds of silence. The next question was: "So there were 2,159 more of those until you get the "confession" correct?"

Number of officers. Watch for and illustrate the "tag team" approach—relays of fresh officers who wear down the suspect.

Deprivation of such things as sleep; food; contact with the outside world. (Notice how the suspect always gets his cheeseburger *after* the confession?) Relatively minor things can be powerfully coercive: Do the interrogators withhold cigarettes from a smoker, but smoke themselves during interrogation sessions?

There are many techniques of interrogation. Into your cross and its preparation you must factor in who your client is and his/her particular vulnerabilities.

Truth and Accuracy

Bringing out the coercive nature of interrogation sessions, proving that the police are thugs, proving that the police are brutal, and showing that the police violated all kinds of rules, regulations, and Constitutional Rights is not enough. Ultimately, you must also prove to the jury that the truth and accuracy of the statement are highly suspect and, therefore, your client must be acquitted.

Truth and accuracy are two different issues. *Accuracy* is whether the words of the alleged confession are the *words* of the defendant. *Truth* is whether the words of the defendant explain acts that the defendant actually committed.

Accuracy

Typically, after a person is arrested, the police question the person more than once, over a time span that might be a few hours or a few days. During the course of the trial, all of these sessions are played back for the jury. There might be a number of different types of statements produced by these interrogation sessions:

- Oral statements to cops not recorded in reports.
- Oral statements summarized in reports typed up after the interrogation session is over.
- Oral statements summarized by notes taken by cops during the sessions.
- Written statements prepared by law enforcement and signed by a suspect.
- Court reporter statements typed and signed by a suspect.

With any statement you're going to challenge, you have to focus the attention of the jury on the accuracy of that statement. Are the words used by the police in court the same the words spoken by the defendant?[1] To challenge a confession's accuracy, you must show the jury that there is substantial doubt as to what exactly the defendant said. How you do this obviously depends on the type of statement you're dealing with.

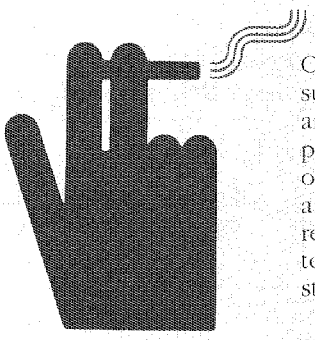
For oral statements not recorded in any reports, the points you make in cross examination and in closing argument should include:

(1) That the statement was taken several months before it was testified to in court;

(2) That the officer has spoken to many people on lots of cases since then (probably hundreds of other interviews)

(3) That the cop knows the exact words of a suspect are very important;

(4) That the officer is trained to write reports that include the information important in the case; and



Do the interrogators withhold cigarettes from a smoker, but smoke themselves during interrogation sessions?

(5) That the officer failed to do so here.

Oral statements not recorded in any reports are so suspect that you can aggressively and persuasively argue to the jury that the cop is lying outright. Emphasize during cross examination and closing all of the other ways the exact words of the police and the suspect could have been preserved: tape recording; giving the defendant a pen and paper to write out his own statement; court reported statement; even video tape.

Oral statements made by a suspect that are summarized in notes or reports. Again, you should emphasize during cross examination and closing all of the other ways the exact words of the police and the suspect could have been preserved. The argument to the jury is that the cops failed to follow the better procedures, because an *accurate* record of the interview session could hurt the prosecution's case, would prove the coercive nature of the session, and/or would prove the defendant said he was innocent. The prosecution is asking the jury to convict the defendant based on his own words, but the prosecution has failed to preserve those words accurately for the jury. You want the jurors to ask themselves: "Why?"

Whenever you are dealing with an oral statement, keep in mind two concepts: time and language. Frequently, a cop will get on the stand and say that he talked to your client for one hour, yet will summarize that one-hour conversation by a report or notes that take ten minutes to recite on the stand. Obviously, a lot more was said during that hour that what is testified to in court. None of the cop's questions and none of the suspect's answers will be accurately recorded. Bring that out.

When cops write police reports, they invariably shift into a type of language unique to their trade in police reports. Cops write summaries like this: "Suspect stated that he exited the vehicle, pulled for his weapon and caused it to discharge at the victim."

We read reports like that all the time.

Then, when the cop prepares for court, he memorizes the report(s) and repeats it the same way on the witness stand. He *must*—because he *can't* remember; he must rely on his report. This highlights the fact that it's the cop's words and not your client's. Bring that out.

Written statements. When the defendant has signed a written statement, it becomes tougher to contest the accuracy of the statement. But even with written statements there are points to make.

A common practice now in Chicago is for a prosecutor to go to the police station and interview a suspect. After the interview, the prosecutor writes up a statement in her own handwriting and tries to get the suspect to sign it. The argument to the jury on these types of statements is that the prosecutor wrote up the statement herself because the prosecutor wanted her own words to be on the paper—not the suspect's words. If the prose-

continued on page 50

In Case of Confession
(cont. from page 11)

cutor wanted to take a fair and accurate statement from the suspect, the prosecutor would have given the suspect the paper and pen and had the suspect write out his own statement.

Court-reported statements. Do not concede that the statement is accurate and fair. Every court-reported statement we have seen has come about after one or more previous interrogation sessions were held before the court reporter was brought into the room. It is only after the client has been "softened up" that the cops and the prosecutors feel that it's safe to record the statement. Only after that do they bring in the court reporter. (Or the tape recorder or video equipment, on the rare occasion they do this).

Also, you will never see a court-reported statement in which the suspect is allowed to give a narrative account of what happened. The prosecutor or the cops go through the statement with the suspect in a question-and-answer format. There are two very important things to look for in these question-and-answer statements:

First, the type of questioning. Are the questions open-ended questions that allow the suspect to answer freely, or are the questions leading questions, posed by the prosecution to suggest an answer? If the questions are leading, their suggestive nature to the jury. Like a statement written by a prosecutor in his own handwriting, a statement comprising leading questions is *not* a statement containing the words *of the suspect;* a statement comprising answers to leading questions is a statement of *the cop or prosecutor.*

Since you will be asking leading questions yourself, it is important to differentiate what you're doing (which is good) from what the prosecutor did (which was bad). For example:

Q: [To the prosecutor who took the statement]: Now you know what a "leading question" is, correct?
A: [Yes.]
Q: Like what I'm doing now, correct?
A: [Yes.]
Q: But when you questioned my client, he had no one there to object if an improper question was asked, did he?
A: [No.]
Q: Like Ms. Prosecutor here will do if I ask something she thinks is improper, correct?
A: [Yes.]
Q: Similarly, there was no judge to protect my client from improper questions, was there?
A: [No.]

Thus, you show how different your leading questions are from those asked by the prosecutor in the interrogation.

Second, what information was sought by the questions? As stated before, we have never seen a case where a cop or prosecutor walked directly into an interview session with a court reporter. The court reporter comes into the room only after one or more unrecorded sessions. Once the recorder is present, the questions become selective; the interrogators will never ask a question likely to provide information favorable to the defense. For example: During the prosecutor's first conversation with the defendant, the defendant tells the prosecutor that the deceased had made threats to him several previous times. He also says he had seen the deceased with a gun in the past. On the night of the occurrence, he and the deceased got into an argument in the pool hall. The defendant says the deceased reached for his pocket; the defendant says he thought the deceased was going to shoot him. The defendant says he pulled out his own gun and shot the deceased.

When the court reporter gets brought in, will the prosecutor ask about the prior threats, knowing the deceased had carried a gun, or how the defendant felt when the deceased reached into his pocket? Chances are, she won't. The questions (and answers) will probably be:

Q: Did you and the deceased argue?
A: [Yes.]
Q: Were you carrying a gun?
A: [Yes.]
Q: Did you see the deceased with a weapon?
A: [No.]
Q: Did you shoot and kill the deceased?

And so forth. But if you can prove the content of the suspect's statement(s) made *before* the court reporter was brought in (through prosecutor's notes or another witness), you can make the prosecutor look outright unethical. But even if you cannot prove the first conversation, it's obvious, by the types of questions in the reported statement, that the suspect was never able to provide this information—*because he was never asked for it.*

In a question-and-answer reported statement, your argument to the jury is that the accuracy of the statement is dictated by the types of questions posed by the prosecution. If the questions are leading questions, of if the questions fail to go into facts potentially favorable to the defense, then the statement is not fair and not accurate.

Truth

Do the defendant's words explain acts that the defendant actually committed?

How do you contest the truth of a statement? In other words, how do you convince the jury that the words spoken by your client do not prove he committed the crime?

When contesting the truth of a statement, there are two basic strategies. Where the facts of the defendant's statement are not consistent with the trial evidence, your argument is that the defendant's statement is obviously not true. However, if the facts of the defendant's statement are consistent with the trial evidence, your strategy is that these consistent facts were known to the police before the defendant was interrogated, through coercion and intimidation, the police have coached the defendant into reciting a statement of facts they already knew.

Statement Not Consistent With Evidence. Someone once said that trial work is 10% inspiration and 90% preparation. This is particularly true when you are trying to prove to the jury that your client's statement is not consistent with the trial evidence.

In preparing your case, you must go over your client's statement detail by detail and compare the facts in your client's statement against the prosecution's evidence and evidence that you discover through your own investigation. Go out to the crime scene. Does it look like the description in the statement? Don't rely on the witness interviews in the police reports. Go out and talk to those people yourself, to see how *they* describe what happened. Carefully investigate the physical and scientific evidence in the case—when a defendant's statement is not consistent with known physical or scientific evidence, the impact on the jury is very significant.

For example: A client was charged with bludgeoning two old men to death with a blunt object. The pictures of the scene portrayed blood all over the place. The defendant's statement was that he was striking both men at close range with the blunt object. The defendant was arrested a short time after the occurrence, wearing an old dirty pair of pants and an old dirty shirt. The crime lab tests showed only a very small area of blood on his pants and the lab was unable to determine the age of the stain.

The argument to the jury was that the client's statement was obviously false. If the statement were true, the defendant would have had blood all over his clothes.

In murder cases, check the autopsy report closely, to see if the findings of the pathologist match the description given in the statement.

In gun cases, check for evidence of close range firing, size and shape of entrance wounds, and/or path(s) of the bullet(s).

Here is another example: The defendant's statement was that first he struck the victim in the face with the butt of the gun, and then he shot him. The autopsy report indicated that the man had been shot, but there was absolutely no injury around the man's face or head. Conclusion: The statement is obviously false.

Statement *Is* Consistent With Evidence. What if you investigate the case and the statement matches up with the evidence? Don't give up. Just shift over to the second strategy. Your argument now is that the statement and the trial evidence match up because the police know all the facts before they interrogated the defendant. The cops pumped the facts into the defendant and then coerced and coached the statement out of him.

How do you present the argument to the jury? You prove to the jury that the facts of the defendant's statement were known to the cops *before* the statement was given; you bring this out through the cross examination of the cops or prosecutor who took the statement:

Q: Mr. Detective, in the written statement, my client said the shooting took place at 5th and Wisconsin. Mr. Detective, before you even arrested my client, you know that the shooting took place at 5th and Wisconsin, is that right?
A: [Yes.]
Q: In this statement, my client said he shot the man twice. Didn't you know the man was shot twice before you interrogated my client?
A: [Yes.]

And so on, highlighting for the jury *each fact* in the statement that was known to the police before the interrogation began.

As a tactic for this strategy, you might want to blow up the statement on poster boards and show the jury exactly what was said by the defendant and to get the cop to admit that he knew the facts point by point before the interrogation of the defendant began. And in closing argument, you might want to give copies of the written statement to each of the jurors and go through, line by line, each of the facts in the statement known by the cops prior to their interrogation of your client. (These two techniques, blowing up the statement on posters and giving copies of the statement to the jurors, can be used not only in cases where you are showing that the facts stated were known to the police before interrogation, but really in *any* case where you are attacking the truth and accuracy of a written statement.) By blowing up the statement and/or giving a copy to each juror, you aggressively challenge the statement; the points you make will be stronger in the jurors' minds.

Worst Case Scenario

In conclusion, there is one more type of statement case we all get one time or another.

Your client voluntarily walks into the police station. A cop gives him a sandwich and a cup of coffee. After twenty minutes with the officer, he gives a written statement fifty pages long. The statement describes the crime top to bottom. The statement is in the same "street talk" language your client uses. All of the facts in the statement match up with the facts of the case, and some are facts only the perpetrator could know.

The defendant signs the statement on each page and says at the end of the statement that he's been "treated like a prince" by the cops.

What do you do in cases like this?

We don't know for sure, but we're working now on an article about insanity defenses. ■

Notes

1. Some practitioners maintain that it is an error to use the word "confession," preferring the term "statement." The most important thing is, if you *do* use the word "confession" in court, make sure to put it in quotation marks with your voice.

2. A.K.A. "Reach Out and Touch Someone."

3. Some of the more interesting highlights are detailed in Snook, Book Review, The Champion, Dec. 1986, at 40 (reviewing F. Inbau, J. Reid & J. Buckley, *Criminal Interrogation and Confessions* (3d ed. 1986)).

4. This particular attack, of course, does not apply to tape recorded or video recorded statements.

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