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Recording the interview: Best practices for compliance professionals, Part 1

by Daniel Coney, CCEP, CFE, CFCS

For decades, federal investigators have withstood cross-examinations in criminal trials in which their testimony about what witnesses and suspects said was based on notes furiously scribbled during interviews. In 2014, that practice gave rise to a defense argument for 2013 Boston Marathon bomber Dzhokhar Tsarnaev asking a federal judge to exclude his statements in a pre-trial motion. Fortunately, that motion was denied, but it illustrates the imprecision on which major prosecutions hinge. Truth be told, we can and should do better. The world is changing and it is unlikely that juries, judges, and other decision-makers are going to trust our word for it when there is readily available technology that can incontrovertibly establish those facts. The best evidence rule will undoubtedly require recorded interviews.

It was therefore much to my surprise when I went to a recent compliance training event that the advice given was to not record interviews. Back in the Fall/Winter 2008/2009 edition of the Journal of Public Inquiry, a now defunct professional journal of the Inspector General community, I wrote a white paper championing the need for recorded interviews.1 Since that time, even the monolith that is the FBI has finally relented. Attorney General Eric Holder said of the Department of Justice’s change of heart, “Creating an electronic record will ensure that we have an objective account of key investigations and interactions with people who are held in federal custody.” Equally important, he said, the new policy will be a “backstop” to ensure that federal investigators have “clear and indisputable records of important statements and confessions made by...
individuals who have been detained.” It cannot be denied that in 2017, an undisputed best practice is to record interviews.

So why is the Compliance profession lagging behind? That perplexing question is why I have updated my original article for a new and improved version aimed at those in the Compliance field. I hope to open a constructive dialogue that challenges the old school convention with the same logic on which I argued almost 10 years ago to change our practice in federal law enforcement. It is said that truth and time walk hand-in-hand; with over 15 years of experience recording interviews now, the propositions advanced in my original paper now are time-tested truths.

In my original article, I surveyed investigative professionals and investigators, primarily in the federal ranks, but also from local and state entities. This was not a scientific or statistically valid survey, but rather an unofficial seeking of experiences and opinions. The population was drawn from the ranks of the Rocky Mountain Inspectors General Council (RMIGC) and my professional contacts, including prosecutors and judges. I also discoursed with legal staff from the Federal Law Enforcement Training Center (FLETC), and researched professional writings. I can now add the sea change that has occurred in federal law enforcement and the experience of hundreds of recorded interviews to the mix.

The drivers for change

The changing face of society must result in compliance professionals adapting to technology changes, as well as changes in the political and social climate in which we operate. Positive steps can now be taken to modernize our approach to capturing the results of our interviews. The body of this article (Parts 1 and 2) assesses 14 common concerns about tape recording interviews. The Department of Justice’s policy is that recording interviews is required in some circumstances, and it is generally understood among prosecutors that recording will be the norm for most interviews in the future. Today, the Compliance profession needs to implement a flexible and realistic best practice of recording interviews, primarily those of subjects.

The Department of Justice’s policy is that recording interviews is required in some circumstances, and it is generally understood among prosecutors that recording will be the norm for most interviews in the future.
The key driver for change is the fact that investigative professionals are not held in high esteem, and their testimony bears no greater influence or credibility than any other witness, and sometimes less. The public and the courts both seem to believe we have a stake in the outcome of the proceedings—a belief perhaps founded, because some law enforcement and Compliance departments rate performance and grant awards based on the outcomes of those proceedings. The respect and presumption of truthfulness once enjoyed by professional investigators simply does not exist in the culture anymore, in part due to the parade of investigative professionals who have been indicted for their own crimes and the rampant corruption of the past (and present) in some departments. Recent in the public’s memory is FBI agent John Connolly, who was convicted of helping the Boston mafia arrange hits. In the OIG community, a SAC for the U.S. Department of Housing and Urban Development was indicted for fraud. From 2002 to early 2012, the Transportation Security Administration reported that Federal Air Marshals were arrested nearly 150 times, many for grievous felonies. The Giglio and Henthorn court decisions reflect the court’s displeasure with law enforcement ethics and their attempt to be sure such ethical concerns are known by defense. Memories of the FBI laboratory failures still linger, and routine news stories about DNA freeing another wrongly convicted person abound.

In this environment, we have seen more and more courts and prosecutors preferring evidence that does not rely on the testimony of investigative professionals. Because of cost restraints, decisions on which cases to pursue are based in part on the level of litigation the prosecutor will face, particularly suppression hearings where witness or defendant statements are at issue. Effective law enforcement, and by extension compliance efforts, is not simply about proving facts; sophisticated professionals actively seek to eliminate or at least mitigate possible defenses before ever bringing the case to prosecution.

When it comes to interviewing, instead of asking the question, “Why should we tape?” the better question is, “Why aren’t we taping?” Are there legitimate grounds for not taping interviews, or only taping in limited circumstances? Why would we not want to be as transparent about our practices as possible? If our interest is conveying facts as truthfully as possible, why would we not resort to the best evidence we could possibly obtain? If our expert Don Rabon pointed out, “Now, often, the defense has only to raise the specter of the possibility that inappropriate steps were taken within the ‘communication event.’” One Special Agent in Charge (SAC) I spoke with said his agency went to tape recording interviews following a case where the jury refused to believe a confession, because the perception was law enforcement was hiding something by not taping the interview.

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interest is in protecting people’s rights, why aren’t we bending over backwards to ensure what they say is not taken out of context? I would submit that there was historically no precedent for law enforcement recording, and thus a resistance from some in law enforcement to something “new.” The reason why this was so is two-fold: In the past, (1) the technology was not acceptable, and (2) the costs for an adequate ability to record were infeasible. Because those two questions were answered in the negative, there was never a need to ask further questions. However, today’s technology and cost feasibility is well within any organization’s reach. Furthermore, the culture and accountability of the times we live in mandates we progress to a point where we at least ask the more in-depth questions about why we do not take advantage of the cost-effective technology that now exists.

One argument is that having a recording device in the room puts people on the defensive and may make them more likely to refuse an interview. Essentially, the best argument presented was one of history—an “if it ain’t broke don’t fix it” concept in which the overriding theme is that, over the many years they have done investigations and secured convictions, they had never needed to use recordings. This is an obviously flawed argument—the dinosaurs did not adapt to their environment and perished. Although the past informs the present and is the basis for setting precedent, it should not make us so inflexible that we do not take advantage of new and better ways to accomplish the mission before us. It seems this is an emotional response that appeals to our sense of tradition more than anything else, while holding little logic.

Restricting the ability to “get the interview”
One argument is that having a recording device in the room puts people on the defensive and may make them more likely to refuse an interview. I have found no empirical studies on this topic, but my personal experience has found no resistance at all, particularly when it is explained in the context that the recording is intended to protect them from misquoting their statements. In fact, it is apparent the interviewee forgets entirely about the recorder as the interview progresses. It also allows a more natural “conversation” to take place, with the interviewer not necessarily having to take copious notes to capture everything said in an interview.

Arguments for and against audio recording interviews
Reasonable evidence needs to exist to support the need for change. In the case of recording interviews, I would submit to you that support is overwhelmingly in favor of change. We’ll spend the balance of this issue’s article, and the next issue, outlining the arguments I’ve encountered over the years.

Historical argument
In my survey, of the relatively few in law enforcement who opposed the idea of tape recording interviews, the arguments were remarkably consistent and one-dimensional.
never materialized. Investigative professionals adapted quite well and, today, few would argue that Miranda amounts to much more than a slight bump in the road. One SAC commented that his OIG recorded about 65% of their interviews in the previous year (representing 450—500 interviews), and had only one lawyer refuse to consent. My experience of probably 200+ recorded interviews is I have yet to have one person decline, and that included having the interviewees sign a notice form. Other SACs who regularly record interviews reported no problems stemming from refusals to consent; thus, it appears this is not a material problem. On the rare occurrence when someone does not consent to a recording, the interview can still take place, memorializing the fact that a recording opportunity was offered and declined, which still has the effect of protecting the appearance of propriety before a jury or decision maker.

**Integrity and ethics**

By necessity, Compliance as a profession (and compliance professionals individually) must be one in which we are above reproach. Even the appearance of impropriety or underhandedness reflects poorly on all of us. Failure or refusal to record interviews only fuels conspiracy theories and fears.

There is nothing we do in our interviews that should not be open to the utmost public scrutiny. After all, we are usually talking about depriving a person of their livelihood, their liberty, seizing their assets, and other serious intrusions. We are not the KGB, nor the Gestapo—we proudly steward the public trust. Remember the first principle of the Compliance profession is an obligation to contribute to the public good. As such, establishing and following a best practice of routinely recording interviews of suspects and key witnesses puts us under the microscope as much as the person interviewed. It “equals the scales” so to speak, and it disables defense attorneys from being able to make inane arguments that impugn our integrity. At the same time, it instills an element of professionalism and self-policing. The dashboard cameras in patrol cars have been a boon to demonstrate how professionally an officer acted, or in cases when an officer abused his authority, it had the effect of being able to weed out those officers. Although embarrassing, it is much better to remove from service those who cannot handle the position.

**Operational security**

A concern for some involves giving away techniques or strategies employed by a professional investigator. Although important, it is rather the plan for implementing law enforcement tactics in any given situation that is critical, not the elements of the tactics themselves, which are more “like plays in professional football—everyone pretty much has access to the same game plans and plays. It isn’t so much who has the most plays as who can best execute the plays that they all have.”

The real point of public distrust in law enforcement, and therefore jury bias, is that law enforcement is by nature very secretive of...
what they do and how they do it. We cannot expect jurors to trust our testimony if they do not understand how we go about obtaining confessions any more than we can expect them to trust physical evidence if they don’t understand how it was collected at a scene.

Some people point to particular tactics the public may see as distasteful, such as excessive use of profanity when dealing with certain segments of society. This perhaps is an issue for certain law enforcement agencies in some contexts, but for the vast majority of law enforcement, and particularly the Inspector General and Compliance community, there is no excuse for the unprofessionalism of profane, abusive, or out-of-control speech. The public can see such speech as intimidating and coercive because it is, and we should not be lowering our standards to allow such conduct.

If we cannot support a practice when exposed to the light of day, then it should not be a practice in our repertoire at all, despite the results we may sometimes achieve. The means and ends must both be pure in our profession. Our customer is really the jury, whether that be an actual jury, a decision-making judge, a tribunal, or an administrative board that makes final decisions. We need to be accountable and transparent to our customer, so they can be comfortable with the facts presented to them. Every reasonable effort should be employed to make the facts speak for themselves—and tape recordings do that in a literal way.

Interviewing is one of the integral components of the job, and enhancing that skill is possible through using mistakes to train others to avoid future mistakes.

Interviewing is one of the integral components of the job, and enhancing that skill is possible through using mistakes to train others to avoid future mistakes. One SAC in my survey population stated it has “made my investigators better interviewers—no one wants to go into an interview unprepared, and then sound foolish on the tape. An agent will only do that once.”

Interviewing is one of the integral components of the job, and enhancing that skill is possible through using mistakes to train others to avoid future mistakes. On the same token, particularly good interviews can be used as training aids for new investigators or those in need of remedial skill building in the area of interviewing. Furthermore, from a supervisory standpoint, supervisors are able to much more effectively monitor individual performance and deal with allegations if they can review the interview.

Yet another issue that is more fundamental to this argument is the ethical basis for why we would not want a mistake exposed in the first place. This is the assumption underlying the argument: We don’t want to have a recording in case there are mistakes. This presupposes first that we will make mistakes, and second that we
don’t want those mistakes exposed. This is fundamentally unethical, and from Watergate to Martha Stewart, is the basis from which worse lapses in judgment occur. Where we make mistakes, we ought to own up to them, regardless of the consequences. We must not also assume that all mistakes are fatal; judges and juries do not expect human beings to be perfect, and minor lapses should not be expected to result in exclusion of the statement. *

Part 2 of this article will appear in the June issue of Compliance and Ethics Professional.

The opinions in this article are the author’s and do not necessarily represent the position of any government agency.

3. Dan Rabon: “Should We Record the Interview?” Fraud Magazine, published by The Association of Certified Fraud Examiners, September/October 2006, page 54-55 (Emphasis in original)
9. Ibid, Ref #3, pg. 54

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