

But the Detective Promised ...

When It's Best To Remain Silent

By Cassandra Stamm

It's 3:30 a.m. on a Tuesday and your cell phone is ringing. This is certainly not a good sign.

Your longtime client is on the phone, explaining in hurried and hushed tones that he has been at the police station since 10 p.m. and that he might be in a little trouble. But the nice detective with whom he has spent the last six-and-a-half hours has promised that if he just tells him what he knows tonight, he will be treated as a witness instead of a suspect, and he either will not be charged at all or, if he is charged, it will be for a relatively minor offense.

As you are trying to wipe the sleep from your eyes (and re-evaluating your decision to furnish clients with your cell phone number), your client explains that his partner — you remember, the one he was having the bitter and protracted dispute with — has apparently been killed. Even in your compromised state, your mind registers the gravity of the situation.

You are able to gather from your client that though he has been speaking with a detective for a good six-plus hours, he has so far denied knowledge of or involvement in his partner's death. But things get tricky when your client sheepishly explains that those denials may not have been 100 percent true and that, perhaps, he may have been present

when someone else did the deed, and perhaps he may have helped *a little* along the way.

Though he has been reluctant to tell the detective what actually happened, your client is clearly itching to do so now as he is firmly convinced that the detective's promise can be trusted and is in fact his salvation. Your mind fumbles with juristic calculations. Aren't mutual promises sufficient consideration to form a binding contract? But does the detective have authority to make such a promise? Apparent or actual authority? What the heck difference would that make? Aren't involuntary statements inadmissible under the Fifth Amendment? A statement given in reliance on a promise isn't really voluntary, right? And even if it is, wouldn't due process require that the detective's promise be enforced?

If you practice criminal defense, this scenario may be all too familiar and you likely already know how fraught with peril it is. If you do not practice criminal defense, take heed: If your client decides to make a statement based on some promise by a law enforcement officer, he will almost certainly only hurt himself in the long run, perhaps in the *very* long run if he ends up serving a life sentence (or worse) based on his own statements.

So, let us start with the basics: A member of law enforcement has no authority to promise your client that he will not get charged with any crime or that, if he is charged, it will only be with a relatively minor offense. It is perfectly permissible and legal for a law enforcement officer to make such promises (and a host of others) despite this lack of authority. And a statement given in reliance on such a promise *can* be used against the interrogated person in subsequent criminal proceedings.

How can it be that a law enforcement officer is allowed to make promises to a suspect when he knows he does not have the authority to make such promises? Well, the business of law enforcement is difficult and, ultimately, our courts have had little problem with tactics designed to persuade the guilty that a confession is a good idea. Courts have been reluctant to bar the use of these tactics outright because there is an assumption that such promises would not likely cause an innocent person of normal intelligence to admit to a crime he did not commit.

Perhaps some degree of duplicity and pretense is necessary in all interrogations. If an interrogating law enforcement officer was required to be com-

pletely truthful, the interrogation might sound something like this:

I am still investigating this crime and I am not yet satisfied I have enough evidence to put you away for it. It would sure make my job easier if you could just confess because then we could use your own statement to prove your guilt and to get a lengthy prison sentence.

Obviously, such a completely truthful "interrogation" would likely not be very effective.

So, the courts have allowed a fair amount of deception by law enforcement attempting to persuade an otherwise properly treated and Mirandized suspect to confess, including the use of promises that may be unenforceable and for which the officer may have no authority to make in the first place. Although a detective's statement that a suspect will not be charged with a crime may be inherently deceptive, some police deception is permitted.

While it is true that an involuntary statement cannot be used against a confessing suspect, an unenforceable promise made by law enforcement does not

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render a confession involuntary per se. Rather, voluntariness is to be assessed based on the totality of the circumstances, taking such a promise into consideration. The question becomes whether the defendant's will was overborne by the promise. So long as the decision to talk is ultimately a product of the suspect's own balancing of competing considerations, the confession is voluntary.

Theoretically, an unqualified promise not to prosecute might in fact so induce a confession that it could be said to have overcome the confessing person's free will. But if the situation is any more nuanced — for example, if the confessing suspect engaged in a more complicated calculus recognizing that he was trying to get out of trouble, that he was scared and that he could see what the officer was looking for to try to convince the officer he could be useful to the investigation — the statement may be deemed voluntary.

Ultimately, there is at least a slim possibility that a statement made in response to a promise by an interrogating law enforcement officer could be deemed involuntary or to implicate due process concerns, such that the statement could not be used and/or the promise could be enforced. Each case must be evaluated on its own unique facts.

That said, it is very likely that if your client decides to confess to a crime or to duplicity in reliance on a promise from law enforcement, he will be sorely disappointed in the long run. The far better course of action: Exercise that Fifth Amendment right to remain silent for now and, if there are indeed promises to be made and kept, get a prosecutor who has authority to make such promises involved and get them in writing. ■

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