

## Potential Civil Liability for Coercive Interrogations

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Few interrogators think about the possibility of civil liability when going about their work. The focus of their activity is rightly about the admissibility in a criminal trial or disciplinary proceeding of any confession or incriminating statements they may obtain from a subject. This means adherence to the often-complex rules of Fifth and Sixth Amendment rights of suspects or those subject to administrative discipline.

Understandably overlooked is the possibility of civil litigation over the techniques employed to obtain statements. Recent cases illustrate this issue in the context of civil rights actions. They point out that while the potential for civil liability exists, the courts have placed the standard for plaintiffs in civil rights cases at a high level. Basically, the courts have held that unless improper interrogation conduct is “shocking to the conscience,” liability will not result under the federal civil rights act, 42 U.S.C. § 1983. This is a fact-driven inquiry in each case.

For example, in *Tinker v. Beasley*, 429 F.3d 1324 (11th Cir. 2005), an arrestee brought an action against police officers, alleging that their questioning of her concerning a murder violated her substantive due process rights and constituted the Alabama tort of outrage.

The court held that the interrogating officers’ conduct in falsely informing a suspect that his lawyer no longer represented him did not shock the conscience so as to violate the suspect’s substantive due process rights. It also held that the officer’s conduct, though generally reprehensible, was not sufficiently outrageous to meet Alabama’s standards for the tort of outrage.

Although the court in *Tinker* found no basis for civil liability, it noted, “In the context of involuntary confessions, the Supreme Court has observed that ‘certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.’ [ *Miller v. Fenton*, 474 U.S. 104, 109, 106 S.Ct. 445, 449, 88 L.Ed.2d 405 (1985)].”

The United States Supreme Court more explicitly identified the constitutional issue in *Chavez v. Martinez*, confirming that, under some circumstances, coercive interrogation alone may violate a suspect’s right to substantive due process, even when no self-incriminating statement is used against the person interrogated. [ *See* 538 U.S. 760, 780, 123 S.Ct. 1994, 2008, 155 L.Ed.2d 984 (2003)]. Such a violation will be recognized, however, only where the specific conduct alleged rises to a level of coercive interrogation that “shocks the conscience.” [ *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 1717, 140 L.Ed.2d 1043 (1998)].

The Supreme Court originally found a conscience-shocking violation of substantive due process where police directed an emergency room doctor to extract against a suspect’s will his stomach contents, which included heroin-filled capsules. [ *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 188 (1952)].

On the other hand, in *Moran v. Burbine*, the Supreme Court found that failure of police to inform a murder suspect of telephone calls from an attorney, who had been contacted by his sister, before continuing an interrogation, did not undermine the validity of the suspect’s waiver of his *Miranda* rights or shock the conscience when that suspect had never asked for an attorney, was unaware that his sister had called one, and had not been formally charged. 475 U.S. 412, 415, 428, 432-33, 106 S.Ct. 1135, 1138, 1145, 1147, 89 L.Ed.2d 410 (1986). The Court in *Moran* concluded: “We do not question that on facts more egregious than those presented here police deception might rise to a level of a due process violation.” [ *Id.* at 432, 106 S.Ct. at 1147].

See also in a recent criminal law case, *State v. Phillips*, No. 48A08 (N.C. 2011), <http://caselaw.findlaw.com/nc-supreme-court/1571796.html>, where while a defendant was being questioned by the police after waiving his *Miranda* rights a public defender arrived at the police station and asked to speak to him. Defendant had not asked for an attorney and did not know the

attorney. The police did not tell defendant about the attorney and continued to take a confession. The court held no violation of the defendant's right to counsel occurred. Additionally, a state statute provided for the provision of a public defender as soon as possible for capital defendants, such as defendant. The court said the statute also did not require the police to tell the defendant about the attorney's visit or provide access to the attorney if the defendant had waived his right to counsel after being Mirandized. Since there was no constitutional violation in *Phillips*, as in *Moran v. Burbine*, there could be no civil liability under § 1983. But see, *Aleman v. Village of Hanover Park*, No. 10-3423 (7th Cir. 2011), <http://caselaw.findlaw.com/us-7th-circuit/1586667.html>, where the court held that when a criminal suspect twice called his attorney on the telephone during police interrogation this was an unambiguous invocation of his right to counsel and continued questioning by the police was a violation of *Miranda* and would be the basis for a civil rights action against the police under 42 U.S.C. § 1983 brought after criminal charges were dropped.

In *McConkie v. Nichols*, 392 F.Supp.2d 1 (D.Me. 2005), after a reversal of his conviction for unlawful sexual contact with a minor and acquittal upon retrial, the former defendant brought a civil rights action against a police detective, alleging that the detective's lies during interrogation had induced the inmate's false confession.

The court held that evidence that the detective may have misled the suspect, during an allegedly coercive interrogation, by telling him that his statements would remain confidential, that the charges were not serious, and that they would lead to little or no consequences, did not "shock the conscience," as a basis for a substantive due process claim under the federal civil rights act.

#### **Practice Pointers:**

The United States Supreme Court has in the past permitted a degree of deception in interrogation cases so long as such techniques do not overbear the will of the suspect and result in an involuntary confession.

To avoid the result of suppression and the possibility of subsequent civil litigation (which itself is costly even if the plaintiff does not prevail), a few common-sense rules should be followed:

- **Misrepresentations to a suspect may be permissible but should not involve untrue statements relating to the constitutional right to counsel and the privilege against self-incrimination.**

- **The use in an interrogation of manufactured (false) physical evidence, such as a purported but fabricated written statement of a witness incriminating the defendant, or a fabricated DNA lab report, should be avoided, in part because it may find its way into the judicial process and thus involve the court in a falsehood (judicial integrity doctrine requires suppression of confession).**

- **Physically abusive or coercive actions by the police (as opposed to psychological ploys) will come close to, or establish, the "shocks the conscience" test in civil litigation as well as leading to a finding of involuntariness in criminal proceedings.**

- **Violations of *Miranda*, in cases where criminal charges are not pressed or are dismissed, can be the basis of a civil rights action under 42 U.S.C. § 1983.**

It would be desirable if a single rule could be devised to govern the admissibility of evidence in the criminal context and a defense to all civil litigation. Unfortunately these cases are always fact-bound. Seasoned and well-trained interrogators know where the line between acceptable and unacceptable conduct lies. A review of decided cases is the best approach to training in this area, but as to the officer actively involved in the heat of an interrogation, who is trying to avoid potential problems, one is reminded of the words of Supreme Court Justice Potter Stewart on the definition of obscenity under the First Amendment, "... I know it when I see it."

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## Coercive interrogations: cases cited – with hyperlinks to the decision

1. [Aleman v. Village of Hanover Park](#), #10-3523, 2011 U.S. App. Lexis 2324 (7th Cir. 2011).
2. [Chavez v. Martinez](#), #01-1444, 538 U.S. 760 (2003).
3. [McConkie v. Nichols](#), Civ.#04-91, 392 F.Supp.2d 1 (D. Me. 2005).
4. [Miller v. Fenton](#), #84-5786, 474 U.S. 104 (1985).
5. [Moran v. Burbine](#), #84-1485, 475 U.S. 412 (1986).
6. [Rochin v. California](#), #83, 342 U.S. 165 (1952).
7. [Sacramento, County of v. Lewis](#), #96-1337, 523 U.S. 833 (1998).
8. [State v. Phillips](#), #48A08, 365 N.C. 103, 711 S.E.2d 122 (N.C. 2011).
9. [Tinker v. Beasley](#), #04-14597, 429 F.3d 1324 (11th Cir. 2005).