Gesprächsführungstechniken in der Einvernahme

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Abstract: Im Trichtermodell werden Gesprächsführungstechniken in der Einvernahme erkenntnispsychologisch gegliedert. Offene Techniken dienen dem freien Bericht. Später verengt sich die Technik auf W-Fragen. Vorgehalten sollen zuerst innere Widersprüche, danach sollen Fragen im Zusammenhang mit vorhandenen Beweismitteln gestellt werden. Erst zuletzt sollen die ermittelten Beweiselemente tatsächlich offengelegt werden. Der Tatvorwurf muss auf den Punkt gebracht werden. Nach jedem Zugeständnis wird der Trichter der Befragungstechniken beginnend mit dem freien Bericht erneut durchlaufen.

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Forensic interviewing techniques in examination hearings

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I. Basic principles of targeted examination hearing techniques

1. Best forensic interviewing practices as a training objective

One of the most important aims in the training of modern prosecutors[1] is to highlight the best forensic interviewing practices and show how these practices may be applied in day-to-day work. The existence of different legal traditions means that there is no universal philosophy on how examination hearings should be conducted.[2] There are indeed suitable, empirically tested and undisputed forensic interviewing techniques and tactics as well as practical tips. However, this collection of suggestions has thus far lacked a coherent internal structure.[3]

a) Acquiring examination hearing techniques and tactics

In three sequentially progressing chapters, the basic principles underlying examination hearing techniques will be explained from a cognitive-psychological standpoint as well as from the standpoint of the Swiss Criminal Procedure Code (*SR 312.0, CrimPC*). First, an effort should always be made to listen to the persons being questioned. Psychological means should also be used to encourage them to provide a full and detailed account of the events from their own autobiographical memory. The same examination hearing techniques are also ideally suited for gathering testimony from suspects (*referred to in CrimPC as "the accused", see Art. 111 for definition*). Afterwards, modern interrogation techniques can be used, particularly the tactic of conducting statement-consistency checks.[4] If the suspect decides to invoke his/her right to remain silent, then there is no other alternative than to postpone the examination hearing until the suspect shows a willingness to talk.

The forensic interviewing techniques described here cannot be acquired by merely reading an article. Ideally, one should work with videotapes and then later apply the techniques over and over again in practice. Only those who critically analyse themselves and consciously apply these techniques will become a "master". Through role-playing, prosecutors can gain a greater appreciation of what it feels like to be asked to recall every single detail about a given moment in time from memory and then to freely talk about events as they transpired without weighing or censuring one's words. One quickly realises just how unpleasant this role is. People have a hard time remembering things immediately. Often, their minds go blank – just like during an examination – and they forget everything. Then people tend to feel uncomfortable about disclosing details of their private lives or naming specific names – even in role-playing, when such information is irrelevant. It is only by experiencing this first hand that prosecutors can become more patient and tolerant with the persons being questioned and gently guide them as they delve into the recesses of their memory.

b) Are psychological techniques really necessary in examination hearings?

Without the evidence gleaned from the examination hearing with the persons involved in the case, at least half of all serious criminal cases would remain unsolved.[5] An extremely important part of evidence gathering results from social science methodology and should be approached with the same care that forensic experts do when analysing scientific clues. We must not lose sight of the fact that, in most cases, an examination hearing is a one-time, non-repeatable event. Subsequent investigation depends to a very large extent on the outcome of the forensic interview. Metaphorically speaking, the mind of the persons being questioned is also part of the crime scene. For this reason, prosecutors should leave as little of their own (verbal) traces as possible so that the recollections of persons being questioned can be fully used later on in the examination hearing.

For the longest time, prosecutors were convinced that young examiners would eventually gain the required level of competence from their more experienced colleagues. The idea was that experience was enough to replace training and that the corresponding skills could only be acquired in real situations. In principle, this would be both efficient and cost-effective. In the 1980s, however, more and more people,[6] expressed a desire for specific interviewing techniques that were both empirically tested and based on psychological expertise. There were two arguments[7] made against conventional hands-on training and emulation: first, experience does not necessarily equate to skill, which means that the risk of imparting incorrect approaches was high with this form of "training". Second, good examiners are not necessarily good teachers and vice versa.

In all too many examination hearings, the narration of the persons being questioned is brought to a halt too soon; replies are influenced by ill-conceived follow-up questions; and during statement-consistency checks, the results of investigations are disclosed far too early or unnecessarily.[8] Over the past decade, considerable progress has been made in the field of statement analysis, which has led to the identification of the interviewing techniques and conditions that produce the most detailed and least falsified accounts from the persons being questioned.[9]

Good examiners not only have the required legal expertise, they also apply psychological techniques. Legal expertise allows them to decide what they wish to gather information about (substantive law) and how to properly go about doing so (procedural law). Communication psychology skills help them to progress along the right path.

c) Is more information about examination hearing techniques needed?

There are several highly recommended textbooks such as BENDER/NACK/TREUER,[10] MILNE/BULL,[11] HABSCHICK[12] and HERMANUTZ/LITZCKE/KROLL/ADLER[13], which provide very detailed suggestions on how to conduct examination hearings. These textbooks also explain the underlying cognitive-psychological principles. There are also instructions on how to handle specific problem situations (e.g. questioning children,[14] obtaining descriptions of people,[15] etc.) and various personality types, which goes beyond the scope of the present article. Other works, such as WENDLER/HOFFMANN [16], deal with the challenges associated with direct questioning during the main hearing. However, in all of these publications, there is no integrative tactic on how to apply these techniques. Particularly young prosecutors do not know how to structure individual examination hearings and at what point they should apply specific forensic interviewing techniques. In this article, and for the first time, we shall be presenting the known techniques and tips of previous authors in a logical and meaningful structure, which we refer to as the funnel model.

d) Permissible and non-permissible psychological techniques

When we speak of psychological forensic interviewing, we are referring exclusively to scientifically tested, ethically and procedurally sound approaches based on the principle of fairness.

While not prohibited, a comment such as "Your criminal actions are highly reprehensible. How do you see things?" is psychologically awkward and unlikely to produce results. It also makes little sense for the prosecutor to ask the suspect for his/her opinion if the prosecutor's own stance on the matter is clear (e.g. "Your actions were improper. What do you think about it?"). Such comments will produce either an untruthful or aggressive response from the suspect. A statement such as "I've been conducting criminal proceedings for the past twenty years and have never seen the likes of you before" is not conducive to further communication. It does not further the aim of subsequent information gathering nor does it create a favourable climate for discussion.

Some techniques are not permitted. These include exerting excessive psychological pressure on the persons being questioned such as:[17] (constantly) shouting at the suspect during the examination hearing, blinding him/her with light sources, preventing the person from taking breaks during long examination hearings, forcing the suspect to remain standing or in a degrading position for an extended period of time while giving testimony. Continuously hammering the suspect with questions, when he/she has already expressed an unwillingness to make a statement, is also not permitted.

In US films, we often see the three-pronged approach of "false promises", "threats" and "deception" (i.e. misleading information) being used to interrogate the suspect in an effort to break his/her will. A large part of the Reid technique of interrogation, which is widely used in the USA, relies on such tricks.[18] Of course, in Switzerland such interrogation methods are deemed improper and in some cases even punishable under Art. 140 CrimPC. Many errors of justice in the USA (detected through subsequent DNA analysis) were the result of such Interrogation methods.[19]

In this article, we distance ourselves from any and all such pseudo-psychological tricks, which have no place in academic psychology or in the deontology of legal psychology.[20]

It is also important to draw a distinction between threatening a suspect and merely providing information to him/her. A suspect may subjectively perceive the information being given to him/her about the legal or actual situation as a threat. However, this is not the case objectively and therefore providing such information is entirely permissible.

As far as deception is concerned, nuancing is also required: Art. 140 CrimPC does protect a person giving testimony from any errors made by him/her as a result of seriously attempting to deceive the examiner! Examiner conduct that leads a guilty party to make an error is also considered as permissible artfulness. Moreover: the suspect should not be made aware of what the examiner thinks/feels or what conclusions he/she draws from a given reply.

Below is a summary of the fine line between admissible artfulness and inadmissible deception (Table 1).

Table 1

Permissible artfulness	***Non-permissible deception***
Not disclosing the origin of legally obtained evidence	Telling untruths regarding the existence of evidence
Taking advantage of previous errors made	Presenting misleading introductory information regarding the subject of proceedings
Displaying a friendly demeanour	Making threats under false pretences (e.g. threat of coercive detention)
Conveying understanding	Making false claims regarding the legal situation
Tactically planned sequence of statement-consistency checks with presentation of evidence	Making false claims regarding facts surrounding the matter being investigated
Tactically planned withholding of evidence	Giving clearly false information regarding the harshness/lightness of the punishment to be expected

2. Preparing the list of questions and the surroundings

All textbooks agree on the crucial importance of preparing questions for the forensic interview.[21] BENDER/NACK [22] state: "A lack of foresighted planning will invariably lead to failure or can only lead to success through twice the effort." Preparation includes four main areas: (1) Deciding where questioning is to take place, (2) Determining the legal basis, (3) Gathering information about the subject of proceedings and (4) Gathering information about the person being questioned: who do I expect to come in for questioning?

However, good preparation should not result in unnecessary delay in questioning following a recent incident. Memory traces fade with each passing day. Experience has shown that in the days immediately following events, perpetrators of violence and drug addicts are still under emotional effects and are therefore much easier to approach earlier than later.

a) Choice of location and electronics

The choice of location for questioning should ensure that the basic conditions for a serious discussion are met. The location must be conducive to concentration and memory recall; it must be quiet and no telephone calls or other distractions should be permitted. The computer system should also work properly. If it becomes clear that statements made by an information witness (*referred to in CrimPC as "person providing information", see Art. 178 for definition*) may later be used to confirm credibility (e.g. sexual offences, violent crime, or where the individual statement can serve as highly reliable evidence), it is recommended that the first examination hearing be videotaped so that the original sound recording can later be analysed again verbatim.

The examiner should be able to see the entire body of the person being questioned. Moreover, the person should not be given the opportunity to examine documents in the case file (unless this is desired). From the very start, it should be made clear that no (turned-on) cell phones may be taken into the hearing room. In addition to disrupting the hearing, cell phones may be used to record or provide a live video stream of the examination hearing. Has the person called in for questioning brought any personal belongings with him/her? If so, have these belongings checked. This will avoid any unpleasant surprises.

The prosecutor should feel comfortable during the examination hearing. It is the prosecutor who decides how much distance will be maintained between him/her and the person being questioned. If the person being questioned comes too close, then the prosecutor should interrupt the proceedings and politely ask the person to return to his/her seat. Some suspects feel a strong need to move and constantly get up from their seat. In such cases, the prosecutor may tell the person in a friendly, but firm, tone that he/she must remain seated. In extreme cases, the examination hearing must be interrupted.

b) Questioning through an interpreter

Preparations also include hiring and giving instructions to interpreters. In examination hearings with interpreters, it is important to arrange seating in such a way as to ensure eye contact with both the person being questioned and the interpreter. During testimony, the prosecutor must be able to see and observe the person being questioned as opposed to having to look over the person's head while interacting with the interpreter. The prosecutor must speak directly with the person being questioned as if both parties understood each other's language. Working with an interpreter requires mutual discipline and respect. One must not speak too long so as to give the interpreter enough time to convey the message clearly. The best approach is to explain to the interpreter straight away that he/she should not hesitate to ask for clarification at the slightest doubt. A good rule of thumb to check the quality of interpreting is to pay attention to how long the interpreter speaks compared to the original statement or question. If there is a significant difference, then this is a good indication that there is a problem that needs to be clarified. In addition, after a question has been asked, the interpreter and the person being questioned must not be permitted to enter into any form of discussion. If the question has not been understood, then it is up to the prosecutor to reformulate the question. The interpreter must only convey the reformulated question.

Inexperienced interpreters should therefore be instructed to convey messages as literally as possible. In particular, any illogical or contradictory information must be conveyed exactly as it has been given. It is not the task of the interpreter to lend meaning to meaningless replies made by the person being questioned. It is always up to the prosecutor to decide whether to ask for clarification of statements. Moreover, interpreters should also convey swear words, vulgar language and mixture of languages literally (these can be clarified later if necessary). Some interpreters feel reluctant to use vulgar idiomatic expressions relating to sexual acts or scatology. This reluctance can be removed by making them aware of the fact that interpreting is a purely technical undertaking and that the precise use of terms is important. Specific features of language such as dialect, metaphors, proverbs, euphemistic statements or mixture of language must be written down word-for-word and interpreted with an explanation if necessary. Such features are important during plausibility analysis; in some cases, they may even be unique markers.[23]

Good interpreters are able to do more than simply convey statements from one language into another. They are able to clarify specific aspects of their country of origin. It is therefore worth taking the time to talk with interpreters about sociocultural issues in their country of origin. This can provide prosecutors with extremely useful information for their own work.[24]

At the end of the examination hearing, the defence lawyer may want to quickly discuss a matter with the suspect and may need to use the interpreter. This could put the interpreter in an unpleasant position and must therefore be absolutely avoided.

c) Legal basis and facts of the case

The starting point for questioning is always substantive law. The prosecutor must have a clear idea of the alleged criminal offences, along with the associated objective and subjective elements as well as the term pairs commission/omission, qualification/privilege, attempt/completion and the triple combination aiding/abetting/complicity. Finally, the prosecutor needs to gather information about the grounds for justification, the grounds for excluding guilt and other factors that may shed light on guilt/innocence.

Substantive law helps to determine the list of questions to be asked, procedural law dictates the boundaries to be respected, and psychology provides us with the tools for questioning.

In addition, the case file must be carefully studied prior to the examination hearing.[25] The prosecutor should identify the questions that need to be asked on the basis of substantive law and prepare specific questions in advance. The prosecutor must also know the ins and the outs of the subject matter in order to respond spontaneously if necessary. In major cases, it is not possible to always have the entire case file at one's mental fingertips. For this reason, it is recommended that the examination hearing be broken down according to individual themes. Copies should be made of essential documents that the prosecutor wishes to refer to in the examination hearing. All documents that have been presented to persons being questioned during the examination hearing must be precisely indicated in the transcript of that hearing; if necessary, the documents should be included with the transcript after the hearing has come to a close. Familiarity with the crime scene is crucial for a targeted examination hearing. And this means physically going to the location to have a look for oneself rather than merely forming a vague idea in one's mind on the basis of sketches and photos.

When information is available about the person called in for questioning, it is also a good idea to read this information in order to avoid surprises (e.g. the person is not legally entitled to give testimony in the examination hearing, adopts an aggressive demeanour, comes armed, makes threats). Also make sure that you are not being misled by biased second-hand information. The ability and willingness of person being questioned to disclose relevant and precise information is determined primarily by the situation, i.e. regardless of the personality and his/her reputation.[26]

d) Empathy, verbal expressions and communication psychology

Here we support a basic approach of showing empathy: only those who treat people in an open, friendly and fair manner and who show a true willingness to listen can count on receiving relevant information in the examination hearing. This also applies, incidentally, even with difficult, recalcitrant or manipulative persons! Empathy, or the ability to perceive the emotions of others, is understood[27] first of all as an ability to feel the emotional state of others (i.e. concordant empathy). At the same time, empathy is the ability to understand the sensitivities of the person with whom one is interacting or the social environment to which that person belongs (i.e. complementary empathy). The feelings regarding the person being questioned that a prosecutor invariably experiences in each and every interaction should not be suppressed as recommended on occasion in the past. Leading neuroscientists (e.g. LEDOUX[28] and DAMASIO[29]) have shown that a lack of emotions has a serious impact on one's social intelligence and ability to act. The persons taking part in the study were unable to make important decisions or chose completely irrational and dangerous alternatives. A more intelligent approach to feelings is to become aware of them as signals to be reflected upon, without necessarily manifesting them. In order to gain better control over strong feelings, it is recommended that a brief break be called. This will give one the chance to focus entirely on what is happening in one's own body. What bodily sensations accompany the emotion (sweating, restless limbs, a sinking feeling in the pit of one's stomach, hair standing on end, etc.)? This technique comes from psychotherapy and is called "mindfulness". It allows one to make unpleasant feelings more bearable and improves one's self control.[30]

Empathy also includes the ability of the examiner to adapt speech to the level of the person being questioned.[31] For the most part, extremely long sentences will not be understood and strung-out adjectives will only confuse. Many people with only limited schooling are unable to understand sentences longer than a main clause and a subordinate clause. One should also consider that a lower level of intelligence is common; while around 1% of the population in Central Europe suffers from slight mental disability, the percentage is significantly higher

among immigrants from Third World countries, who were undernourished and suffered from intestinal infections as children. People try to hide their handicap and do not speak up when they have not understood. The more socially integrated among this group are generally able to live an independent life and their disability cannot be diagnosed even by clinicians unless specific intelligence tests are given![32] For this reason: better to speak in short, simple sentences and avoid subordinate clauses whenever necessary.

In school, teachers discouraged the repeated use of the same terms for stylistic reasons; however, the transcript of the examination hearing is not intended as a literary work. If, for instance, the weapon used in the crime was a bread knife, then it serves little purpose to refer to it during questioning initially as a bread knife and then later as a kitchen knife, a cutting instrument, a sharp tool, a stiletto or a dangerous weapon.

Finally, a brief statement on jargon: a prosecutor who fails to understand the jargon typically used in certain circles or who attempts to use this jargon in speech runs the risk of not being taken seriously; Knowledge combined with authenticity is the best approach.

In all cases, legalese must be avoided[33] – even when giving legal instructions! Exploring the past is an historical documentation endeavour where the aim is to describe a social reality as precisely as possible and not to immediately give a legal interpretation! In addition, it is important to make sure that the common legal terminology understood by prosecutors does not create unintended associations in the mind of the person being questioned. The following expressions can cause problems:

"The plaintiff alleges …" (the use of "allege" implies that the person is not telling the truth)

"You are said to have stated…" (the use of the indirect form implies doubt)

Likewise, it is better not to address people using their function in the proceedings (e.g. "Suspect, what do you have to say about this?"). One should also not refer to the other persons involved in the proceedings as "witnesses", "victims" or "aggrieved parties". Use their names instead.

It is up to the examiner to adapt the pace of speech to the person being questioned and not vice versa.

Although not sufficiently tested from an empirical standpoint, the communication square developed by SCHULZ VON THUN[34] should also be considered in examination hearing situations. As the name implies, this communication model has four facets:

• *Factual information:* these are facts and objective matters. Here emphasis is placed on the truthfulness, relevance and sufficiency of information.

• *Relationship*: whether we like it or not, when someone speaks to us, our views and opinion(s) regarding him/her are reflected in our formulations, tone of voice and facial expressions; at least with regards to the current topic of discussion.

• *Appeal:* when people address others, they usually try to achieve something, to exert some sort of influence. In other words, they send out an appeal.

• *Self-revelation:* every statement that we make invariably says something about who we are, giving an indication of what goes on in our minds, what we hold dear, what we stand for and how we perceive our role.

e) Avoiding a blurring of roles, maintaining ground rules

How do we know if the person called in for questioning is the one who shows up? When meeting for the first time, have the person present identification.

In order to ensure that all participants will be able to perform the challenging tasks required in the examination hearing, certain ground rules must be adhered to. Occasionally, prosecutors need to explicitly state these ground rules and clearly define roles so as to avoid chaos. The following rules should be explained in a friendly, but firm, manner: it is the public prosecutor

who asks the questions regarding the ongoing investigation, not the person being questioned; in confrontations, only one person speaks at a time; generally speaking, the lawyer is free to ask questions at the end of the examination hearing, but only on matters pertaining to this hearing and without interruption. When these ground rules are broken for the first time, then the parties must be informed of the consequences of breaking them again (e.g. interruption or termination of the examination hearing, penalty fine, bringing in the police to maintain security or moving to another room). Excluding the defence lawyer must be an absolutely exceptional case and in principle always lead to termination of the examination hearing.

Because prosecutors are in such a position of power, they must be able to demonstrate tremendous self-control. If either the prosecutor or the person being questioned begins to lose self-control, then it is better to interrupt the examination hearing.

3. The correct way to give legal instructions

In nearly all cases, the person being questioned experiences the examination hearing as a stressful situation. Anyone who has already been called in for questioning – even as just a witness – can easily understand what it feels like. The person being questioned must therefore be told what is expected of him/her. Uncertainty creates anxiety and uneasiness, particularly among those confronted with such a situation for the first time. Even bad news is often better than no news at all. It is therefore important to break the ice and develop a relationship of trust as soon as the interaction starts.[35]

At the same time, however, criminal procedure law strictly regulates the course of proceedings.[36] Over the past few years, increasingly complex procedural regulations have, in some cases, given rise to extremely detailed legal instructions. Even a legal student called in to testify would be alarmed and would certainly be disinclined to cooperate. And if these legal instructions are read in a bureaucratic tone, it is very likely that defences will be raised and any hope of trust will be lost. If not carefully worded, legal instructions will be received by the listener at the appeal level (under SCHULZ VON THUN)[37]. Prosecutors do indeed want something from people and they want it in a specific form, which they must clearly explain at the very start of the examination hearing. However, things get off to a bad start when the discussion begins with demands, legal instructions and threats of punishment. Even at the self-revelation level, the rattling off of legal instructions can have an undesired effect: the prosecutor is perceived as a heartless bureaucrat, embodying the exact opposite of the fair examiner that lawmakers intended.

Instead, we recommend that the prosecutor ask the person whether he/she is familiar with the interviewing process. This question leads to a more natural transition, which enables legal instructions to be given in a manner more suited to the case and person at hand. Legal instructions are intended to clarify matters, not to intimidate, and should be presented accordingly. From a communication psychology standpoint, the practice in most Cantons of reading out standard legal instructions (and in extreme cases even verbatim extracts of legislation) is unsuitable. Simply going over the main points to be taken into account would be more effective. This would enable legal instructions to be given in a more personalised manner on the basis of the individual person's ability to understand the language and content. It also enables the legal instructions to be received at the factual level. An approach enabling subsequent questions to be asked also prevents the prosecutor from falling into a habit of reading the legal instructions in an impersonal and, for the person being questioned, incomprehensible manner.

4. Providing information about the subject of proceedings

When suspects are called in to give testimony, then the legal requirement to provide him/her with information on the subject of proceedings is handled at the end of the examination hearing. With primary witnesses and information witnesses, however, it is unclear how much the prosecutor should and must reveal about the subject of proceedings. Here, two opposing aspects should be considered. Persons called in for questioning are generally more willing to provide more information when they themselves are given more information. This is because they feel that a greater level of trust is being placed in them. At the same time, however, findings from cognitive psychology research indicate that preliminary information about the state of investigations can influence witness testimony and should therefore be kept to a bare minimum. After receiving extensive preliminary details regarding the subject of proceedings,

people who respect authority may draw their own conclusions as to what they think the prosecutor wishes to hear. Such people will therefore adapt their statements accordingly (i.e. the Pygmalion or Rosenthal effect).[38] In an effort to ingratiate themselves with the prosecutor, they may omit certain details that they presume to disprove (or do indeed disprove) the prosecutor's suspicion. Such behaviour is, of course, absolutely not desired. Therefore, when providing information about the subject of proceedings, prosecutors must carefully weigh these two extremes. As far as legal instructions are concerned, Art. 143 para. 1 CrimPC draws no distinction between suspects, primary witnesses and information witnesses. Finally, legal instructions must be given in a manner that respects the rights of those who will be called in later to give testimony. From this standpoint, it may actually be a better idea to give more information on the subject of proceedings to the suspect than to anyone else called in to testify, so as to avoid bias in testimony.

5. Asking the person questions about himself/herself

Questions asked about the person under Art. 143 para. 1 and 3 CrimPC are intended to enable the prosecutor to gather the necessary information at the factual level. However, these questions are also an important means of facilitating communication between the prosecutor and the person being questioned. The questions should lead to closer contact and encourage compliance, i.e. a willingness to cooperate.

As in any other discussion, the prosecutor in an examination hearing cannot simply get straight down to business. Many people find such approaches irritating. Questions about the person also allow the prosecutor to convey information about himself/herself, namely that he/she is a professional who patiently and carefully listens and respects others. A further advantage of such questions is that it gives the prosecutor the chance to observe how the person being questioned responds to conflict-free topics, where no risk is associated with giving honest answers.[39] This will provide the prosecutor with a baseline behaviour pattern. The prosecutor can then later conduct a credibility analysis by comparing this baseline with testimony regarding the incident.[40]

LÖHNER [41] writes: "The type of relationship between the suspect and the investigator is probably much more important than what is generally assumed in day-to-day practice." The success of the examination hearing depends to a large extent on whether an atmosphere can be created that encourages, or even enables, the person being questioned to give testimony."[42]

6. Choosing techniques according to sub-objectives of examination hearing

Conducting examination hearings is a fine art that cannot be mastered through any single forensic interviewing technique alone. Rather, several different techniques need to be combined. The techniques chosen depend on the sub-objectives of the examination hearing. The sequence of sub-objectives is determined on the basis of epistemological perspectives. Techniques always begin with open-ended questions that gradually become more specific until they reach the point of yes/no questions designed to bring the matter being investigated to a head. The funnel diagram can be used for reference.

a) Epistemological sequencing of examination hearing techniques

1) The first sub-objective is to gather free testimony (open statements) on relevant events. The person being questioned should be asked to spontaneously describe in his/her own words everything that he/she recalls. This approach is also provided for in criminal procedural law: Art. 143 para. 4 CrimPC states that, after legal instructions have been given, the person being questioned shall be asked to comment on the subject of the examination hearing. Free testimony is the foundation upon which facts can be determined.[43] It also the highest value as evidence compared to all other statements because it is the least influenced by questions.

As a rule, an effort should always be made to obtain free testimony, even from suspects. Such testimony can then be used to further clarify or request additional information. This should be done *before* statement-consistency checks are conducted using existing evidence (Art. 143 para. 4 CrimPC applies for all questioning!). This rule is consistent with cognitive psychology in that it allows for optimal gathering of information during the forensic interview. At the same time, it satisfies the criminal law requirement that the suspect be presumed innocent until proven guilty.

2) The second sub-objective of every examination hearing is to repeatedly stimulate recollections so as to enable the person being questioned to enrich free testimony with additional spontaneously recalled details.

3) The third sub-objective is to ask for specific information such as personal descriptions, names, addresses, times/dates and alibis. Art. 143 para. 5 CrimPC states that clearly formulated questions and statement-consistency checks should be used to elaborate on statements and clarify any contradictions. A very common mistake made in examination hearings is to ask for such clarifications too early and to interrupt free testimony (or even bring it to a halt) with such questions.

4) At the very end of an examination hearing, the prosecutor may ask filter questions[44] and present evidence. The presentation of evidence should be planned in such a way as to avoid any suggestive influence over the person being questioned.

b) Sequencing of interrogation techniques

1) If implausible testimony has been given, then interrogation will begin with an initial phase of statement-consistency checks to iron out any discrepancies. Existing evidence must first be tactically arranged in a given order. The sequence in which evidence is presented during statement-consistency checks has an immediate bearing on the amount of information that can be gleaned and whether statements can be used as evidence.

2) When conducting an examination hearing with suspects, a further sub-objective is needed, i.e. to obtain answers to specific questions directly relating to the accusation. It is not enough to merely provide information about the subject of proceedings and the accusation. It is much more important to give the suspect the opportunity to provide an explicit answer to the question: "Did you do it (i.e. the offence)?", giving the person the chance to deny or admit guilt.

3) In the easiest case, this will result in a confession or, in most cases, certain admissions. The suspect admits that he/she was involved to a certain extent in the offence but seeks to minimise his/her involvement or the extent of guilt.

At this point, the proceedings can also go in the exact opposite direction if suspicions against the suspect are allayed. This, of course, is also a partial success in investigations.

4) If the person being questioned admits to objective facts, then this would be the perfect time to obtain a full confession with all of the subjective elements of guilt and exonerating evidence. At this point, the sequence of sub-objectives should be resumed from the start, i.e. on the basis of each admission, the person being questioned must be asked to once again give free testimony, explaining in his/her own words the entire sequence of events as they transpired. The various examination hearing objectives and techniques are illustrated in multiple funnel diagrams.

In a few clear-cut cases, the suspect will deny everything to the very end and the prosecutor must either abandon the proceedings or proceed towards a trial based on circumstantial evidence. In such cases, the credibility of statements and psychological indicators contained in examination hearing transcripts become essential. A survey of judges in three countries[45] showed that many suspects become mired in their own contradictory testimony when their justifications do not match the facts.

c) Funnel diagram used for forensic interviewing techniques

The following diagram shows the relationship between forensic interviewing techniques and the sub-objectives found in all examination hearings. The funnel shows how very open-ended forensic interviewing techniques are used in the beginning and then how these techniques gradually become more targeted. In most cases, examination of witnesses reaches an end after a series of "W" questions or after rudimentary statement-consistency checks. This is not the case with persons who do not provide truthful statements: for such persons, the funnel approach often needs to be repeated several times.

After each and every successful admission, the person being questioned will be asked to once again give free testimony and the funnel process starts again from the beginning.

In social and literary research, the repeated use of a given method to clarify and interpret hidden facts is referred to as the "hermeneutic cycle"[46]. The internal validity is determined on the basis of the internal consistency or coherence of a statement as well as on the basis of real indicators.[47] The external validity, in contrast, refers to the validity of a statement compared to other investigation findings, that is, whether or not the statements match external facts.[48]

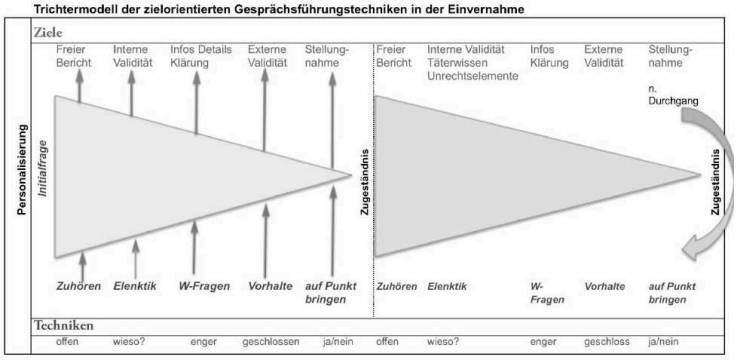

Figure 1

II. Forensic interviewing techniques in examination hearings

Unlike interrogation (i.e. techniques used to check the consistency of testimony), there are internationally recognised best practices that may be used in examination hearings with primary witnesses and information witnesses. These best practices can be found in nearly any textbook on the subject. The first step is always to ask for free testimony and only afterwards to ask suitable questions for greater precision. In Central European legal traditions, it is explicitly stated that even the suspect must first be asked to respond to an initial open-ended question.

1. Gathering free testimony

With many primary witnesses and information witnesses, there are no close ties with the suspect. Therefore, gathering free testimony is uncomplicated because they naturally feel the need to explain what happened. With other persons being questioned, however, the gathering of free testimony can be an obstacle course. A common mistake made by examiners is not to be patient enough to wait and see what comes out of free testimony. Instead, they tend to ask follow-up questions too quickly. This can lead to an unfortunate situation in which the prosecutor speaks too much and through his/her questions reveals more information about the current proceedings than he/she obtains from the person being questioned.

Prosecutors know how difficult it can be to encourage certain people to provide a complete account of events through free testimony. Some persons being questioned say a lot in a spontaneous manner but beat around the bush or have no idea of what might be considered important. Others dwell on emotions and opinions rather than facts. Still others are less talkative by nature and provide only a brief (and unusable) summary of events. Some people will remain completely passive. And finally, some people constantly digress and have a hard time focussing on the question. The above-mentioned difficulties in expression may be due to both emotional and cognitive factors and are often deeply rooted in the person's character. Unfortunately, it means that the person's disruptive behaviour cannot be quickly changed through insistent reminders.

Therefore, patience and empathy as well as respect for others are called for. Of course, prosecutors should not interrupt the recollection process with premature specifying questions. Otherwise, the person being questioned will assume that he/she will be interrupted again later on during questioning and will therefore be less precise in his/her statements. The person

being questioned will wait to be told what is important and what is not. If the examiner is impatient, then the person being questioned will adapt the pace of testimony to the examiner's clearly conveyed time constraints. The person will therefore give shorter and less detailed statements.

"Let's take things back to the beginning, shall we?", i.e. asking for a chronological account of the events, is also not advisable. It is much better to allow the person being questioned to decide what that "beginning" actually is. Doing so offers a fantastic opportunity for analysis and produces important clues as to the credibility of statements, or lack thereof. An additional difficulty arises from the fact that people, in an effort to jog their memories, often refer first to what they have written down[49]. They describe the routine activities of the week in question, mentioning what they did and experienced specifically on the given date. Persons being questioned use this as a sort of crutch to reconstruct their recollections. The prosecutor should wait for the person being questioned to reach the end of his/her free testimony. If by then, the person has not explained exactly what distinguished the given Monday from all other Mondays, then the prosecutor should then start asking "W" questions regarding the the testimony given.

When gathering free testimony, prosecutors should write down verbatim all terms and names of persons spontaneously mentioned by the person being questioned, i.e. "Küde" should be recorded in the transcript as "Küde" and not "Mr Kurt Meier, residing at 8046 Zurich". Likewise, "italo-phone" should be recorded as "italo-phone" and not as "Beretta 92FS". Failing to do so would distance the person being questioned from his/her emotional experience, which would make it much more difficult for that person to recall events from his/her autobiographical memory. Freely chosen terms and names are also interesting from the standpoint of gathering evidence on mental states as well as for credibility analysis. "Italo-phone" is clearly a reference to a weapon commonly used by a specific category of criminals. If the term is not recorded verbatim in the transcript, one might erroneously conclude later that reference was being made to a collector's item. Likewise, the use of the nickname "Küde" might actually be used only by a specific group of people who were involved in the crime.

Only much later in the examination hearing (namely during “W” questions) should individual language codes be clarified.

a) Why is free testimony important?

There is international consensus, regardless of the legal tradition, regarding the critical importance of free testimony. This is stressed by numerous authors of textbooks on examination hearing techniques[50] as well as in the findings of hundreds of scientific studies on perception psychology and memory psychology.[51] Free testimony normally contains a greater proportion of correct and detailed information than any other elicited responses. It is the most valuable portion of the entire testimony. With each question and each statement-consistency check, the likelihood of suggestively influencing testimony increases (as HUSSELS[52] has extensively shown), thereby partially or completely invalidating many replies as evidence.

Moreover, it is much more difficult to elaborate a coherent web of lies with narration than with responses to very specific questions. The cognitive overload of lying makes it almost impossible to not become trapped in contradictory statements.[53] Liars have to keep in mind both the actual and imagined experiences and how they relate to the timeframe under investigation as well as the facts that they are officially supposed to be aware and unaware of.

The suspect finds it nearly impossible to retract his/her own unsolicited statements regarding circumstances surrounding the crime. The following Example 1 illustrates the value of free testimony and shows how to start it in many cases.

Example 1: Disappearance of a young girl (cited from SAPIR*)*[54]

A young girl, 7-year-old Colleen, went missing in a small neighbourhood on Sunday afternoon. At around 8.00 p.m., the child's body was found outside the neighbourhood. She had been sexually abused and murdered. All of the neighbours were questioned and a 15-year-old boy gave the following testimony to police officers (Susan was Colleen's mother; Jim and Kim were the neighbours' children): "I saw the children playing hide-and-seek and they asked me if I would join them. I said, "Sure, why not?"

and we played for around ten minutes. Then two of the young girls left to eat dinner and Jim and another girl returned to their apartment. Colleen headed off towards the school, saying that she would meet up with a friend of hers. I went back home. When I arrived home, I watched the Super Bowl match on T.V. and then heard how Susan called out for Colleen. So, I walked outside and asked Susan if something was wrong. She told me that Colleen had disappeared and so I helped her to look. Then the police came and I went down to the stream where Kim had said that Colleen sometimes plays. However, she wasn't there and when we got back, we heard that her body had been found."

Free testimony can be analysed using suitable methods.[55] In the example above, the testimony seems harmless at first glance, and yet it reveals a discrepancy that gives the perpetrator away: in a small neighbourhood, mothers often call out to their children to return home. At the time discussed in his testimony, no one – apart from the perpetrator – could have even suspected that something bad had happened nor would it have occurred to anyone to go outside to ask if something was amiss. Through his own testimony, the teenager unwittingly revealed that he had known before anyone else that something terrible had happened to Colleen. During the statement-consistency check phase, he eventually confessed to having committed the crime.

A credibility analysis using methods recognised in Switzerland and Germany[56] also relies on gathering as much free testimony as possible. The Federal Supreme Court (FSC)[57] states the following: "When assessing the truthfulness of witness testimony, the Statement Analysis method developed by UNDEUTSCH should be used to draw a qualitative distinction between true and false narrations." However, the 19 features of narrations based on real experiences (referred to as reality indicators) are only apparent with properly transcribed free testimony (e.g. unordered flowing narration, abundance of specific details, spontaneous improvements to one's own testimony, etc.).

b) Producing good transcripts of examination hearings

From the previous paragraphs, the importance of producing good transcripts of examination hearings should be clear. From a scientific standpoint, it is absolutely essential that free testimony be taken down verbatim or recorded electronically.[58] Only in this manner can this testimony be truly analysed and fully assessed as evidence of the person's mental state. If we consider the mind of the person being questioned as part of the crime scene, then the transcript is the equivalent of taking photographs and gathering clues at the crime scene in forensics. For this reason, preparing the transcript is not an ancillary or trivial task. Anyone responsible for preparing transcripts must undergo special training and be able to type without having to look at the keyboard in order to keep up with verbal statements.

c) Formulating the first question for free testimony

Being called in for questioning by the authorities is an extremely uncommon situation for most people. What people are asked to do – namely to give a complete account down to the smallest details, without holding anything back, of everything that one experienced and did (both relevant or irrelevant) – goes against common day-to-day practices. Normally, people find it impolite to speak for too long without giving others the opportunity to speak. For this reason, the person giving testimony often responds to the first question by merely giving a brief summary instead of relating everything in detail.

An initial question is asked to elicit free testimony. This question is formulated in a way that is suited to both the case and person at hand. More specifically, the initial question is associated with a request. For the most part, persons being questioned have no idea what is expected of them.[59] The examiner must first explain things to them and this is done by asking the initial question, which in the simplest case would be formulated thus:

"Primary witnesses and information witnesses are the eyes and ears of the justice system. Think back to when the incident occurred and try to remember exactly what you experienced, perceived and did. Tell us everything as if you had recorded everything on film, without trying to distinguish between what is important and what isn't. Take your time and try to relate everything you remember as clearly as possible. Sometimes a bit of patience is needed to recall individual memories, but this is completely normal."

In order to ensure that this message comes across, the examiner should speak slowly and deliberately. If done properly, this should also create a more relaxed atmosphere in the room.

Depending on the case, the person being questioned may be asked to do the following:

• To report everything that they can remember;

• Not to add anything other than what they remember (no filling in of gaps, no logical suppositions);

• To also report details, which at first glance seem trivial, incomplete or illogical;

• Not to analyse their perceptions after the fact;

• To draw a distinction between hearsay and what they experienced directly;

• To state when there are any uncertainties or questions associated with their recollections.

In some cases, prosecutors must specifically make sure that the initial question enables the person to recall the incident as vividly as possible. Therefore, the persons being questioned may be asked to reconstruct the scene in detail. This allows them to focus on their senses, both one-by-one and collectively. Some senses will be more stimulated than others but the main objective is to help the person to remember what happened. Some may feel that the sense of hearing is not very important – and that would be a serious mistake!

Example 2 (Homicide at a bar)

In a case involving a homicide at a bar, the person being questioned was asked to do the following: "Think back to the place where the shooting occurred, i.e. at the bar entrance. Picture the room in your mind. Try to remember where you were standing. Tell me everything that you could see from this vantage point. Can you still remember what you heard right before the shooting started? Were there any noises that seemed out of place? Can you remember any other people in the room? Were there any noises that you noticed at the time? Were there any special movements? Try to remember as much about the events surrounding the shooting as you can for the record and do not leave anything out that you can remember."

It is worth repeating that these questions should not be answered immediately but are mainly intended to help the person being questioned to relive the events as vividly as possible so as to provide their own account of what happened. The idea of having the person being questioned relive the experience comes from the cognitive interview technique proposed by GEISELMAN and FISHER.[60] Nevertheless, it is important to keep in mind the fact that such processes also have a suggestive impact.

In some cases, the initial question should be broken down into several parts.

Example 3: Questions regarding a missing person

In this case, the police investigator is trying to gather information about a missing person. The first part of the initial question: "Tell me everything you know about the person's disappearance, what you heard and saw." The second part: "Tell me in detail, where and when you last had contact with the person and what each individual person involved did and said on this occasion." The third part of the initial question will then begin if there is suspicion that a criminal act has taken place. The person will be asked to give an alibi for the time period when the disappearance occurred: "Please describe in detail where you were between time x and time y and tell me what you did and experienced in detail." Note: specifying questions should only be asked after free testimony regarding the alibi has been given, e.g. "Did anyone see you? Do you have any proof (ticket, parking receipt, record of credit card charges, etc.) to substantiate your statements?" When asking about the person's alibi, it is crucial not to interrupt the flow of statements. In free testimony, the above-mentioned analytical method[61] can be used to assess word frequency per period of time, which provides indications of omissions or gaps.

Depending on the person, case and location, the person being questioned may be asked – after giving his/her version of the events – to draw a sketch of the location described. In a recent study, LEINS et al.[62] found that false alibis could be detected from sketches since

spatial visualisation would be lacking.

Art. 6 and Art. 139 CrimPC require criminal justice authorities to use all suitable, and legally admissible, evidence based on the latest scientific findings and experience to uncover the truth. In addition, new approaches may be tested whenever existing approaches have been unsuccessful.

d) Supporting narration to further enrich free testimony

Very often, narration comes to an end too early or leads to irrelevant statements. Many people react to the request for free testimony by first taking the defensive: "I can't remember anything in particular, I didn't notice anything." If the prosecutor persists in a friendly manner, most people will make an effort to remember something. Fragments of the picture will gradually emerge, which through questioning can then be put together like a puzzle to gain a clearer idea of the events that transpired. The examiner should therefore not be discouraged when the person being questioned initially claims to remember nothing at all. Not everything stored in memory can be retrieved at a moment's notice.

When the person being questioned puts up resistance, the aim should be to gradually help him/her to return to the matter at hand. The techniques particularly suited for this purpose are intended to create an atmosphere that enables the prosecutor to listen carefully and maintain the flow of testimony. The idea is to steer the discussion towards relevant topics without influencing the recollections of the person being questioned.63

Patience, patience and even more patience. Listening includes all prosecutor interactions aimed at encouraging the person being questioned to continuously elaborate on statements made during testimony. The person being questioned should feel greater interest in remembering, should feel positive about self-portrayal, should overcome any shyness about conveying information and should be willing to provide explanations where needed.64 With patience, we mean showing empathy and giving the person being questioned the time to focus on the incident and remember relevant details. Examiners who allow their minds to wander and only feign patience will not achieve the desired result; facial expressions will invariably reveal one's inner indifference.

The most important verbalisation technique is to maintain moments of silence. Unlike in day-to-day conversation, the prosecutor must not immediately begin speaking at the end of the last sentence spoken by the person giving testimony. Long pauses (e.g. half a minute and in rare cases even several minutes) are entirely suited and have a greater impact than immediate follow-up questions. By maintaining these pauses, the prosecutor retains control over the examination hearing. Under no circumstances should prosecutors break the silence before the persons giving testimony. In some cases, the moment of silence is intended to give the person being questioned the opportunity to remember. Experience has shown that very passive persons with limited attention spans can only be prompted to speak freely when prosecutors wait for them to add information to their statements. Prosecutors who cannot stand silences, run the risk of losing control over the discussion. In this undesirable state of affairs, the person being questioned takes complete control over the situation, saying as little as possible. This pushes the prosecutor into a corner, forcing him/her to formulate increasingly longer questions, thereby unnecessarily divulging considerable information about the state of investigations without obtaining any relevant new information from the person being questioned (i.e. the person manages to side-step questions that were actually quite simple and clear).

In order to revive an ebbing flow of testimony, the prosecutor can use prompting questions, that contain no information but encourage the person to resume free testimony,65 namely:

• "And then?"

• (…)

• "What happened afterwards?"

• (…)

• "Well?" (if there are signs of hesitation)

• (…)

• "What else?"

• (…)

• "Is there anything else that comes to mind?" (after a moment of silence and right before free testimony is about to end)

• (…)

• "Would you like to add anything else?"

In addition, the flow of testimony can be sustained through non-verbal cues (e.g. nodding one's head or slowly closing the eyelids) as well as through therapeutic sounds ("mhm", "aha" …) and statements to give emphasis ("Really?", "Unbelievable!", "No?!"). The prosecutor may, for example, respond to a meaningless reply by waiting a few seconds and then making a meaningful "uh-huh" sound. This signal tells the person being questioned that the prosecutor expects to hear more and is not going to settle for short answers or digressions.

The echoing (or keyword), mirroring and paraphrasing techniques described below were developed by CARL ROGERS66 for psychotherapy and medical discussions. Collectively, they are referred to as *active listening*.

An extremely important instrument used in psychological forensic interviewing is the echoing technique, also referred to as the keyword technique. First, the examiner echoes the words that have been emphasised by the person being questioned. This is achieved by placing (verbal or facial) emphasis on the emotional charge given to individual terms. This prompts the person to elaborate further.

Example 4: Using the echo technique to decode terms

Suspect in narcotics case:	"I said straight away that I didn't what that junk in my car."
Examiner (echo):	"That junk?!"

By using the keyword "junk", the suspect is encouraged to name the drugs specifically. This would be more difficult if the examiner were to ask a question such as: "What drugs were you referring to in particular when you said 'that junk'?" Whenever possible, decoding should always be done by the person being questioned. Otherwise, he/she can always argue that the decoded term ("drug" in example 4 above) did not come from him/her but rather from the examiner.

The greatest benefit to be derived from echoing emphasis is that nothing is reinterpreted, only a signal is sent regarding the point in the statement that the examiner wishes to focus more closely on.

It is also possible to echo synonyms. This is merely the repetition of the strongly stressed word in a meaningful form, which conveys a feeling that the listener is emotionally involved but doesn't judge.

Example 5: Echoing synonyms

Person being questioned:	"There were at least 12 guys who came at us out of nowhere."
Examiner (Echo):	"That's a lot of people."

Even if such echoes do not lead to further elaboration of a given statement, at least they convey to the person being questioned that the examiner is listening carefully to what is being said. People tend to speak more freely with those who listen. Another mirroring technique, which is another form of active listening, consists of repeating the entire assertion using different words. The mirroring technique also allows the examiner to verify that he/she has properly understood what was said. At the same time, the aim is to convey to the person

being questioned that he/she is being carefully listened to and not judged. Both sides neutralise their emotions and build an atmosphere of trust. The direct mirroring of key aspects of a statement also have the effect of allowing the person being questioned to focus more closely on relevant aspects and get less side-tracked. According to the above-mentioned theory,[67] four parts of any given statement (made by the person being questioned) can be mirrored.

Example 6: Clarifying statements

Person being questioned:	"I am not saying anything more!"
Examiner: (at the factual level)	"You have no more information to add?"
Examiner: (at the relationship level)	"You mean, That's as far as we go?»
Examiner: (at the appeal level)	"You mean, I should back off!?"
Examiner: (at the self-revelation level)	"You are perfectly free to remain silent!»

In terms of content, this allows the examiner to determine whether he/she has correctly understood the person and if not, to find out what is wrong. The questions based on the four-corner theory also serve to clear the interpersonal atmosphere.

By using these subtle techniques, which are not discernible to the untrained eye, the person being questioned is given the opportunity to use neutral language forms to express his/her fears, expectations, experiences, anguish, knowledge and recollections without the corresponding emotional load. The benefits of this are: the person being questioned volunteers more information; there is less emotional impact associated with testimony, and hence, an easing of tensions. This will enable an authentic relationship to be established enabling the person being questioned to behave normally during testimony.

If the person being questioned continues to deliver only a summary account of events despite careful interviewing and use of the above-mentioned techniques, then it is possible to shift the focus to events that transpired after the crime occurred: "Let's go back to the period between a and b, tell me what happened in detail."

e) Bringing more talkative persons back to relevant topics

Echoing and mirroring techniques are particularly suited for keeping testimony focused on relevant topics. However, when people constantly beat around the bush, prosecutors should not frequently call them to order and return to the main line of questioning. This will be perceived as an affront, which can make them less willing to comply. A much better idea is to continue to show interest in what the people are saying but to use echoing and mirroring to gradually steer testimony back towards relevant subjects.

Another way of bringing the focus of testimony back to relevant subjects is to express a polite criticism. Instead of saying "Please return to the topic at hand.", the examiner may say: "I see that you are more interested in talking about your leisure activities. As a private individual, this would also interest me. However, as an examiner, I need to clarify this incident. We were talking about point z, what happened next?"

f) Handling less talkative persons

Under Art. 178 let. a CrimPC (see also Art. 180 para. 2 CrimPC) certain primary witnesses and information witnesses are required to give testimony; they are required to reply completely and truthfully (Art. 163 para. 2 CrimPC). Exceptions to this obligation can be found in Art. 168 ff. CrimPC. Some primary witnesses and information witnesses may attempt to discharge themselves of this unpleasant obligation by adopting a taciturn approach and feigning memory gaps. Of course, the handling of such cases is clear from a legal standpoint, but what psychological approach can be used to deal with unmotivated people?

And what about the right of the suspect to remain silent? Is the prosecutor required to leave him/her alone and not ask any more questions or pursue statement-consistency checks? The Swiss Federal Supreme Court (FSC) has a clear stance on the matter:[68] "The suspect is free to decide whether and how much testimony to give before an investigating judge. If he/she invokes the right to remain silent, this does not mean that the investigating judge must immediately terminate the examination hearing. Instead, an attempt should be made to encourage the suspect to change his/her mind – either fully or partially – and to give

testimony at least on individual aspects of the case. The prerequisite is only that the investigating judge must not exert any direct or indirect pressure [...] so as to avoid influencing the suspect's decision. In the current case, the investigating judge limits himself/herself to reading the individual questions and then stating for the record that the suspect does not wish to make any statements. In this manner, no unauthorised pressure is exerted."
There are several ways to encourage unmotivated persons to talk. An attempt can be made to probe their inner sensitivities (e.g. "Are you undecided?") or to obtain clarification (e.g. "You look like you are worried about something in particular." or "You seem surprised."). Such observations should be made when an uncomfortable silence settles in the room, i.e. something clearly unusual is going on that latently disturbs.

Another option is to address the person's non-verbal behaviour directly without giving any second meanings or interpretations to this behaviour:

• "You are looking at the ceiling..."

• "You smile as you say this ..."

• "You said that so softly ..."

• "You shrug your shoulders ..."

Such interventions also serve the purpose of recording the non-verbal behaviour in the official transcript while also prompting the person being questioned to take a stance.

In order to improve compliance from unmotivated persons who have invoked their right to remain silent, an advanced forensic interviewing technique can be used, the *motivational interview* (MI), which was developed by MILLER and ROLLNICK.[69] This technique is considered to be a fair approach from a criminal procedure standpoint (i.e. no prohibited attempt is made to exert "massive control over the person's mental state."). The technique offers the person being questioned the freedom to decide whether or not to make any further statements. It is used solely and exclusively for the purpose of broadening the range of possible decisions of the person being questioned and to provide him/her with information regarding the investigation. It should take into account both the ambivalence of the suspect as well as any anxiety felt by witnesses who may also have been threatened. If the person being questioned is hesitant, then the prosecutor may guide the person to reach a decision (his/her own, of course) by asking him/her to explain the reasons for hesitation. In a second phase, both weights should then be placed on the scale. In other words, instead of pushing for a statement, the prosecutor may say:

"I see that you are pondering the situation, weighing the pros and cons of giving testimony. Let's consider both variants, shall we?"

Over the course of this discussion, the person being questioned is encouraged to explicitly state the reasons for his/her hesitation and in so doing provides the examiner with relevant information. The first step is to echo the reasons mentioned and then attempt to minimise these concerns by providing useful information. For example:

• "You are afraid that the suspect will want to seek revenge?"

• "You are afraid that your words will be twisted because this happened to you in a previous case, am I right?"

Witnesses who are afraid because they have been threatened should be reassured by pointing out that threats against witnesses are statistically common but rarely, if ever, acted upon. If the examiner feels that it is very unlikely that the threat will ever be carried out, then he/she may argue the following:

Example 7: Witness anxiety

Person being questioned:	"You have no idea who you are dealing with. I do not want to risk my life. Besides, I don't even remember that much."
Examiner:	"Now that your statement has been recorded in the official transcript, the perpetrator can no longer act on his/her threats with impunity. Any violence will only expose him/her to an even greater extent and result in further investigations. It is true, however, that accessories to a crime who hold back information pose a latent threat to the perpetrator and there is indeed a risk of reprisals."

If the examiner instead concludes that there is a real risk that the threat will be acted upon, then he/she must either take protective measures under Art. 149 ff. CrimPC or, if no suitable protective measures can be taken, then the witness may refuse to testify.[70]

Foreign suspects in a case should be provided with information regarding the legality of proceedings in Central European countries. They should also be informed that voluntary confession reduces penalties and the risk of collusion, and hence the reason for detention.[71] In some cases, the defence lawyer can also be asked to confirm the accuracy of what the examiner has said.

With the *motivational interview* there is, of course, no guarantee that the person being questioned will make any further statements. However, if they do, then it is with their informed consent. That said, the amount of time invested in this technique is relatively high.

A related approach is the positive mirror: i.e. showing a non-directive, activated, constructive side of a given situation.

Example 8: Positive mirroring

Person being questioned:	"This will expose me to greater risk."
Examiner:	"But then there is the potential reward!"

Example 9: Clarifying ambivalence

Person being questioned:	"Then I will have to go back to working hard!"
Examiner:	"But you will also start earning a regular income."

By appealing to the person's system of values, the listener is left with the impression that his/her conscious or unconscious principles and even his/her guiding values have been recognised or at least that an effort has been made to recognise them. Empathic understanding makes it considerably easier for the suspect to experience a positive climate for interaction and discussion.

Example 10: Mirroring the person's system of values

Person being questioned:	"I can't give up hard drugs."
Examiner:	"And yet, you do not want to put your health at risk."

g) Handling experienced suspects

Suspects who have experience with criminal proceedings are the most difficult to approach. Such people will detect the sequencing of techniques described above and will be considerably less inclined to talk, unless hard evidence is presented to them. However, one can and should resume attempts to elicit free testimony if, after the first statement-consistency checks, the person shows a willingness to talk. The starting point in such cases is the same as with persons who have less experience with criminal proceedings.

Example 11: Handling suspected false alibis

Examination of a suspect arrested at the border when drugs were found in his car:

Examiner:	"Today 300 g of cocaine were found in your car. What do you have to say about this?"
Suspect:	"Well, you see, it's like this. I picked up a hitchhiker who later got out of the car before we reached the border. I was then stopped at customs. I have no idea where the cocaine came from. Not from me, that's for sure."
Examiner:	"Alright. We'll need to explore this further then. Why don't you start by telling me about your whole day in detail, from the moment you woke up until now. What did you do, experience, observe and speak to others about?"

If the statement made by the suspect in Example 11 is intended to mislead investigators, then this harmless request for free testimony regarding the suspect's activities during the period in question will put the suspect in a bind. This is because he will need to pretend, in his own words, that he is actually innocent and is willing to help the prosecutor find the mysterious hitchhiker. He will then need to create a false alibi, which is not at all easy.

The funnel is therefore not merely a working instrument to be used at the beginning of the examination hearing, rather it should be used each and every time the person shows a willingness to give relevant testimony.

2. Asking good questions for greater precision

The types of questions mentioned here and their sequencing also meet international consensus on both sides of the Atlantic.[72] Divergent opinions (which are occasionally expressed at police conference presentations) are only heard from countries controlled by dictatorships, where the willingness to confess is encouraged through beatings and other similarly unpleasant means.

The matter of identifying good questions in examination hearings has already been addressed by HUSSELS.[73] Briefly summarised, the idea is not to expose the person being questioned to cognitive overload so as to avoid dimming his/her recollections.[74]. Negatively formulated questions ("Can't you remember anything else?") and more indirect constructions ("Could you possibly say something about this?") would also be considered bad since they provide the person being questioned with an easy way of evading the question.

What criteria do good questions meet? Good questions are clear and unambiguous; they relate to only one point; they must be understood by the person to whom the question is addressed; they are not intended for self-portrayal but rather require a specific reply and serve a specific purpose that was carefully considered during the planning phase of investigations (i.e. and hence are determined by substantive law considerations).

A good question is therefore a *"W" question*. It relates to only one point or event and there is little need for polite formulations.

Only at the end should *filter questions* be asked. Filter questions are defined as multiple-choice questions, which bring the full range of possible replies down to a limited number. Such questions must always include a more open-ended option such as: "...or was there something else (or another person)?"

A selection of police photographs should also only be shown at the end of questioning and must be well prepared. Identification based only on photos of a suspect – without including a selection of photos of persons who resemble that suspect – is worthless. No matter how often this warning is repeated, the same mistake continues to be made over and over again. It is important to present a selection of photos to the person being questioned so that he/she is free to state whom he/she recognises, i.e. who number X is.

III. Interrogation techniques

In this third and final chapter of our article, we shall be discussing interrogation techniques. In Central European legal traditions, the term “interrogation” has nothing to do with intimidation of a person by the examiner. Instead, the purpose of interrogation is to clarify discrepancies, to perform statement-consistency checks using evidence as well as to hear the suspect’s stance regarding the accusations levelled against him/her. If pressure is exerted on the suspect during interrogation, then it is only because of the situation and the fact that the suspect has attempted to deceive the prosecutor on relevant matters, not because the prosecutor has resorted to irrelevant tricks. Tactically well-structured statement-consistency checks should not create any anxiety in the hearts and minds of innocent people. However, guilty parties should be made very much aware of the inconsistencies that exist between the evidence presented and the statements made.

1. Statement-consistency checks using evidence

a) Definition of statement-consistency check

A statement-consistency check is defined as a sort of accusation. In most cases, the person being questioned is first presented with a fact, which is always linked to a question, e.g.

• “What do you have to say about this?”

• “What can you say about this?”

• “Is this true?”

• “Did you explain it like this to the police?”

In other cases, statement-consistency checks are merely critical questions that make a latent accusation (i.e. only visible to someone familiar with the case file). In such cases, the hidden accusation is not immediately detected from the questions being asked. The person being questioned only perceives the statement-consistency checks as indications that some inconsistencies exist in testimony.

It is important to ensure that *statement-consistency checks* are formulated in a way that can be clearly understood. Often there is the risk that too much information is presented all at once in the statement-consistency check. For this reason, after each statement-consistency check, the person being questioned should be asked a series of specifying or control questions. This is done to determine which part of the statement-consistency check the person has responded to. Complex statement-consistency checks relating to statements made by other persons who gave testimony or to investigative findings must therefore be broken down and presented in chunks.

b) Planning the sequence in which evidence should be presented

As a rule, prosecutors must always take time to think about the sequence in which they wish to present existing evidence for subsequent statement-consistency checks. An alternative tactic is to present a large amount of evidence all at once, which can give the suspect a feeling of being surrounded: the suspect is made acutely aware of the fact that his/her lies no longer hold water. While quite efficient, this second tactic is also far riskier.

c) Deciding the sequence of statement-consistency checks during questioning

The sequencing of statement-consistency checks must be planned strategically. Under no circumstances should prosecutors shoot in the dark. Instead, they should carry out consistency checks tactically, using the following three-step approach.

1) First step: according to WALDER/HANSJAKOB,[75] the sequencing of statement-consistency checks should be planned in such a way as to first draw attention to internal inconsistencies in an individual person's testimony. At this stage, the statement-consistency checks focus only on the internal validity[76] of statements made by an individual. The primary aim is to

eliminate or clarify any misunderstandings that may arise for any number of reasons, including the stress frequently associated with questioning. Discrepancies and misunderstandings may also arise because the examiner and the person being questioned use entirely different language codes. The following diagram shows the problem along with an approach to solving it:

The sender-receiver model in communication psychology was derived from radio technology. It shows just how complex a simple exchange of words can be and how much room for misinterpretation exists. The original question: was the door closed?[77]

Original question: was the door closed?

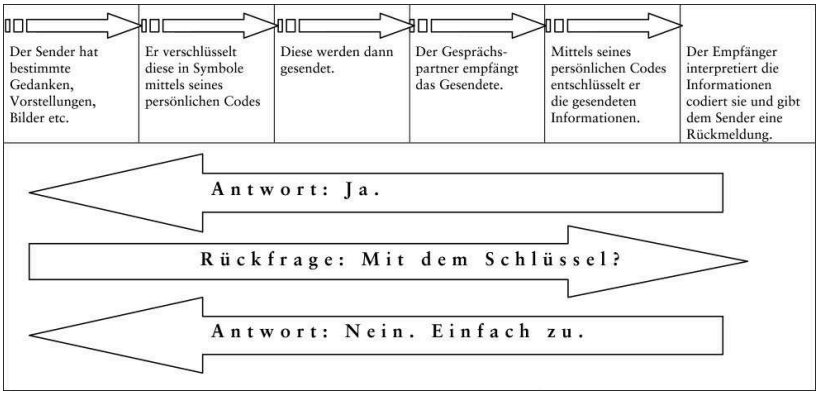

Figure 2

It only becomes clear that the sender and recipient have given a different meaning to "closed" when a follow-up question is asked for confirmation.

It is also possible that the person being questioned did not understand the question because he/she did not hear it properly or that he/she placed the question in a different context. Finally, the question/reply may not have been properly conveyed by the interpreter.

Statement-consistency checks of internal validity also serve the purpose of documenting any untrue statements at least twice, thereby ensuring that no subsequent claims can be made later on that the question/statement was misunderstood. Questions may be formulated thus:

• "What I don't understand is ..."

• "Here I see a contradiction ..."

• "In order to clarify this point, I need to know a bit more about ..."

• "Otherwise your statement could be misconstrued..."

• "Is what you have described even physically possible?"[78]

2) Second step: here, the prosecutor seeks to corroborate statements on the basis of existing evidence. If, for example, telecommunication records exist, then questions may be asked about any telephone calls placed during the corresponding period, i.e. when the calls were placed, to whom, and what was discussed. This tactic was tested by HARTWIG et al.[79] and resulted in a significantly higher rate of detection of dissimulation attempts and lies than direct statement-consistency checks where evidence was presented without asking such questions (85.4% trained versus 56.1% untrained police cadets discovered the untrue statements made by their colleagues in the experiment).

Randall Jones 3.8.13 19:10

Kommentar:

The sender has specific thoughts, notions and images in mind.

He encodes these in symbols using his personal code

This message is then transmitted.

The receiver receives the message.

Using his own personal code, he decodes the message.

The receiver interprets the information, encodes it and gives the sender a reply.

Answer: Yes.

Follow-up question: locked?

Answer: No, just closed.

3) Third step: according to WALDER/HANSJAKOB,[80] this step begins only after questions relating to existing evidence have remained unanswered. The aim at this point is to determine the external validity of statements.[81] Based on the results of the previously described tactical sequencing of checks, the prosecutor directly asks the suspect what he/she has to say about the evidence presented. Depending on the person's reaction – admission or no reaction – he/she will be asked to once again give free testimony or will be asked to respond to additional statement-consistency checks. Experience has shown that hard-nosed repeat offenders require hard evidence before they are willing to make any admissions. Nevertheless, these suspects very often tend to make one illogical statement after another, which prosecutors may freely record in the transcript.

The precise sequencing of statement-consistency checks on the basis of existing evidence must also be carefully planned in advance. Any objects (weapons, narcotics, sketches of the crime scene, photos) that lead to the perpetrator should be presented to suspects before they are told what others have said about the incident. The descriptions and justifications surrounding such objects may provide important clues regarding subjective elements of the offence (e.g. knowledge that only the perpetrator could have). However, these statements only serve as evidence if the same information has not already been recorded elsewhere in a previous transcript.

In major cases, the same person may make several statements (some contradictory) regarding on the same subject. During statement-consistency checks, the person being questioned must be confronted with the multiple versions so that light can be shed on the issue. Thought should be given here to which sections of the transcript should be dealt with first and which ones later in the interrogation: if the aim is to test the credibility (or lack thereof) of a given series of statements, the sequence should go from the least specific to the most specific and from the least credible to the most credible statements.

The three-step approach offers various benefits over tactically unplanned statement-consistency checks. First of all, if the statements made are true, there is no need for subsequent statement-consistency checks. The prosecutor also does not need to disclose any unnecessary information about the investigation (which might later reach other ears). Secondly, the interrogated person does not become angry or alarmed by any misunderstandings or clarified inconsistencies. Finally, with this approach, suspects who have created a web of lies will become increasingly caught up in the strands of their own testimony.[82] Sometimes, they realise themselves when their concoctions no longer make any sense.

As we can clearly see, modern forensic interrogation tactics are based on the principles of fairness and a presumption of innocence even though they were originally devised for the purpose of gathering facts in an optimal manner.

2. Making a direct accusation of involvement in the offence

At this point, the examination hearing techniques have narrowed the discussion to yes-no questions, which allow the prosecutor to confirm or ease suspicions. The questions are used to determine whether a given person was at a given place at a given time, whether this person had already had contact with a specified individual, whether he/she owns a firearm, whether the signature is his/hers, etc.

a) Formulating the accusation using neutral words

Finally, the accusation should be formulated as a question (and not merely presented as information on the subject of proceedings) so that the suspect may explicitly take a stance on the accusation. This recommendation, which incidentally comes from the English-speaking world,[83] is also entirely compatible with our approach of ensuring fair proceedings. Innocent parties will refute the accusation directly, quickly and very assertively whereas guilty parties will have to think longer about it and will attempt verbal pirouettes. Examples include such things as a blanket denial (the sentence: "I am innocent"), attempting to twist statements, blaming others or arguing over semantics rather than addressing the subject at hand.[84]

In order to bring matters to a head, the prosecutor should use vocabulary that does not cause the suspect to feel alarm as objective elements of the offence are presented. Certain terms will automatically send warning signals, causing the suspect to raise his/her guard. Such terms include "abuse", "victim", "crime scene", "threaten", "motive," "assault", "violence" and other terms regularly splashed across news headlines. Instead, the suspect should be asked a simple question without any hint of judgement. Here are a few examples:

• "Did you make any specific preparations to act on your ideas?" (not: "Did you make any specific preparations to commit such a deed?");

• "Did you have anything to do with your wife's death?" (not: "Did you kill your wife?") – why the more euphemistic formulation? In therapy sessions with persons convicted of murder or manslaughter, we often find that the person convicted believes deep down inside that the action was legitimate, e.g. as punishment, as redemption, as an emotional response to provocation;

• "Did you light anything up at that moment in time?" (not: "Did you start the fire?") – the fire may have been the result of negligence, and therefore not intentional;

• "Did you have sex with your wife even against her will?" (not: "Did you rape your wife?") – some perpetrators of domestic violence are convinced that they have the right to sleep with their wife at any time, regardless of what their wife thinks;

• "What were your reasons for acting in this manner?" or "Why did you do this?" (not: "what was your motive for acting in this manner?") – the word "motive" has a direct negative connotation in ordinary speech and tends to exclude the possibility of any reasonable justification or attenuating circumstances.

b) Adapting to specific thought and speech patterns of the person being questioned

How should one level an accusation against suspects who come from criminal subcultures? Such perpetrators often speak as though their actions were justified and in some cases their reasoning takes on grotesque proportions. Often perpetrators and repeat offenders suffering from personality disorders have very distorted views of social reality. This symptom is referred to as "cognitive distortion". In such cases, dissocial perpetrators create their own inner picture of social reality over a period of several years, enabling them to satisfy their needs and optimally exonerate themselves of guilt. This is a type of defence mechanism. In other words, they hold delusions and convictions that (when taken in isolation) are not necessarily manifestations of serious psychopathology or a psychotic episode. Rather, the persons in question are very much aware of the fact that they have done something wrong, which is why they have taken steps to hide their actions. They simply do not want to admit their guilt.[85] In order to alleviate these feelings of guilt, they talk with people who think like they do, who share their immoral views.

Years of psychotherapy are needed in order to transform these illusions and defence mechanisms into a more realistic perception of the facts. Prosecutors wishing to shed light on a given case are therefore left with no other alternative than to adjust to the psychosocial perceptions of the persons giving testimony.

In order to encourage such suspects to give testimony, prosecutors may have to resort (albeit in a reasoned manner) to the terminology used within the paedosexual scene, the financial underworld, the drug scene, by hooligans, human smugglers, political or religious extremists, fellow convicts, etc. For example, a prosecutor could approach a suspected paedosexual teacher by asking whether he/she had a "special relationship" with the child; whether he/she could "speak about love"; whether he/she was "affectionate"; whether he/she had "helped the child to develop sexual behaviour", etc. If family members of the victim are to be present during questioning, then this special choice of words must be explained ahead of time through their legal representative.

Nevertheless, the expressions used by the person being questioned ("helping the child to develop sexual behaviour", etc.) must be decoded at some point. The prosecutor must eventually determine exactly what actions the person being questioned refers to when using these expressions. This does not necessarily have to be ascertained through questioning of the suspect. Questioning of the victims may shed light on the matter, since the encoded language is often also used in their presence.

c) Applying criminal law hermeneutics

Last but not least, it is important to use carefully chosen vocabulary for the purposes of criminal law hermeneutics. Certain imprecise words and nuanced meaning prevent subsequent evidence gathering that would enable subjective guilt to be determined. Prosecutors must keep in mind that the subjective elements of the offence can only be determined with the knowledge and willingness of the perpetrator. In the case of threats or preparatory action, a question that is often asked but is less than ideal is: "How would you specifically go about doing this?" The use of the conditional tense "would" has no value in a court of law, since it falls within the context of pure fantasy, which is not punishable. Therefore, a question that is much better suited to evidence gathering is: "Do you want to act on this?", and if so, "How then?".

3. Dealing with implausible allegations

A study by KUNZ and HAAS [86] found that suspects who are adamant in their denials are more likely to be released than those who confess (to the given life circumstances). However, in the cases in question, the prosecutor's evidence had been on thin ice anyway.

a) Allowing lies to accumulate

It is important to understand that even a denial of guilt can lead to admission of relevant facts.

Example 12: He who excuses himself also accuses himself

> When ex-offender Mike A. (43) testified in court in a murder case involving a call girl, he denied his involvement on several occasions. He claimed that the prosecution did not have its facts straight. Not all of his replies were conclusive. And then he stated with utter conviction: "I did not have sex with anyone. I can't imagine how the DNA (author's note: here, he is referring to the DNA of the victim) could still be on me after I took that shower."[87]

One strategy that can be used with a suspect who refutes accusations is to first ask him/her for clarification. Here, it is important to be convincingly insistent with these questions, i.e. while the examiner should indeed be open to other hypotheses on the inside, he/she should not show this on the outside:

• What happened next? Tell me!"

• So it (= the alleged act ...) didn't happen. Tell me what really happened."

This gives the suspect another opportunity to present his/her own version and perception of events if desired (there is, of course, no obligation to do so). The procedure is therefore fair since even an innocent person − for reasons entirely unrelated to case at hand − may have deliberately chosen to make a false statement.

Some prosecutors get upset when they are lied to and react angrily. Nevertheless, untrue accounts very often contain bits of valuable information. The cognitive burden of dishonesty is considerably greater than what is felt by merely being honest. In essence, as the liars continue talking, they often dig their own graves. Indeed, he who excuses himself also accuses himself. VILLERBU,[88] WALDER/HANSJAKOB[89] and WALTERS [90] therefore recommend that prosecutors simply keep a record of all fabrications, alibis and even fully implausible versions of the events.

It is better not to confront the suspect right away. This includes not immediately drawing attention to any contradictions in testimony. The examiner should merely mirror the improbable portion of the statement (= "iP") without comment and use the affirmative form: "You said "iP", right?" Some suspects will respond with an attempt to embellish their testimony, which leads to further inconsistencies.

If findings from another investigation cast very serious doubts on the statement or if the suspect compromises his/her credibility by presenting x different versions of the same story, then it is also possible to express oneself non-verbally, with a surprised face, wait a bit to let the expression sink in, say "Really?" followed by a brief period of silence, or to state "Before you said something entirely different..." When facts show that the person giving testimony is blatantly lying, then patience is still called for. The examiner can merely make a brief non-verbal question mark to express his/her scepticism.

These tactics offer the advantage of enabling lies to be recorded in the transcript as such; the suspect is no longer able to argue later on that there was a misunderstanding. The more detailed the untruthful story is, the better. It offers more points to dig into. Examiners should therefore allow the lie to become deeper and more intricate and to write everything down precisely in the transcript. At the same time, these tactics give the person the chance to rectify statements if – for reasons unrelated to the incident – the person has not been entirely upfront with investigators.

b) Talented manipulators

No all liars are as easy to catch as Mike A. above. Particularly gifted manipulators use their own tricks, which need to be exposed.

First of all, they love to hide behind omissions, which can be detected in their use of language: they use the passive tense and avoid using the word "I". This tactic can very easily be handled using "W" questions.

The second manoeuvre is to make an introductory statement that encloses another statement and then to refer only to the introductory statement.

Example 13: Bill Clinton's trick

In a well-known public TV interview Bill Clinton stated: "But I want to say one thing and I will say it again: I did not have sexual relations with that woman, Miss Lewinsky." This statement was true in every sense because it only refers to what Clinton wanted to say. Later - when he was called in to testify under oath in court - he referred once again to his enclosing statement in response to the question regarding whether he had had sex with his trainee: "I already clearly stated in the hearing before the Senate and on TV that I did not have any sexual relations with Ms Lewinsky." Once again, he made a true statement, but one that does not answer the question, i.e. is irrelevant.

Such evasive manoeuvres can be easily handled by rewording the question thus: "Allow me to reformulate the question: Did you touch Monica Lewinsky's pubic area?" and then: "Did Ms Lewinsky touch your pubic area?" And then: "What part of the pubic area exactly?"

If the person persists with these introductory enclosing statements or other evasive manoeuvres, you may state: "You have not answered the question regarding sexual intercourse between you and the witness and have therefore also not denied that sexual intercourse took place."

Another idea developed by a practitioner by the name of MORGAN consists in asking the person being questioned to comment on a sketch (e.g. of the crime scene).[91] GORDON/FLEISHER[92] postulate that such a sketch can stimulate a person's recollections, which should lead to further details (if the person was truly there) or a series of even more convoluted false statements or justifications (if the person wasn't there). The use of sketches also reveals information that only the perpetrator could know.

Here again we see the scientific importance of producing good transcripts of examination hearings, since only a verbatim transcript allows the prosecutor to prove that intentional omissions have been made and allows him/her to detect twists in testimony.

c) Socratic dialogue and elenctics

Some suspects present various, more or less plausible explanations and versions of how events transpired. When such intelligent excuses are proffered, the maieutic method can be applied. Maieutics is based on the idea that one must approach the truth in the same way that a midwife approaches the delivery process. By having the person answer a series of intelligently proposed questions, the truth will eventually come out. An understanding of elenctics (i.e. instilling in the person an awareness of guilt and a subsequent need for forgiveness) is also important.[93] The idea is therefore to begin with the critical analysis method developed by Socrates and then to follow up with elenctics.

The repeated use of "W" questions after each subsequent clarification, i.e. an effort to understand the reasons, is of crucial importance for elenctics. We want to gain a clearer idea of why the alleged actions occurred.

If the prosecutor's aim is to merely fill in gaps in knowledge, then a person telling the truth will have no problem answering the various questions. However, if the person has lied or attempted to cover something up, then the harmless question of "why" will very often take testimony into the realm of Absurdistan. Moreover, the prosecutor must always consider how a person would normally respond when giving an entirely accurate account of the events.

d) Interrogation tactics to be used with accomplices

When interrogating accomplices, a ping-pong tactic should be used. While this technique comes from the American school,[94] we can present it here because it is considered procedurally fair under Swiss standards. The tactic consists of completely normal statement-consistency checks: minor bits of information − that the prosecutor has gleaned from the testimony of alleged accomplices − are presented to the suspect. This should produce an emotional effect, namely anger at the realisation that one of the accomplices has disclosed information. This, in turn, should also create a desire to get even. These emotions lead to new justifications, which should reveal even more information. Each and every new clue is then presented in ping-pong fashion.

In the interpretation of Art. 147 CrimPC (Rights to Participate in the Taking of Evidence), there is currently debate as to when, for example, accomplices and their legal representatives should be present at the examination hearing of a given suspect. In its judgment dated 10 October 2012[95], the Federal Supreme Court (FSC) ruled that, in principle, accomplices are also entitled to be present at the suspect's examination hearing.[96] The FSC nevertheless stipulates that if the given suspect will be asked questions that relate personally to an accomplice who has not yet testified and who has not yet had the chance to refute/confirm allegations in statement-consistency checks, then that accomplice may not be present at the examination hearing. No such restriction applies, however, if the accomplice concerned has already given relevant testimony. It must be assumed, therefore, that the right of accomplices to be present during the suspect's examination hearing must be honoured at an early stage of investigations, which naturally makes prosecution of gang leaders and primary suspects in a criminal investigation much more difficult. Indeed, accomplices can be effectively intimidated to avoid giving any further testimony and this can expose them to disproportionately harsh sentencing. In addition, the order in which suspects (and accomplices) are called in for questioning becomes extremely important. Each of the defence lawyers involved will use all of the resources at their disposal to ensure that their respective clients are interviewed last, since each statement made by accomplices allows the defence lawyer to bolster the defence strategy for his/her client.

The "Prisoner's Dilemma" theory holds that all accomplices will attempt to reduce their sentence by invoking their right to remain silent. However, the social reality among accomplices is entirely different.[97] Most do not share the same extent of involvement in the crime perpetrated. Some are merely followers and play a passive role, others may have been intimidated and even forced to take part in gang activities.[98] Such followers therefore have every interest in clarifying the offence and admitting their part in it. Not only will they be able to reduce their sentence, they will have a chance to break free from the clutches of the gang.

e) Easing shame, helping to save face

What prevents certain people from telling the truth after they have become trapped in their own lies? Actually, it is not a fear of punishment that drives them but rather a feeling of shame at their own moral and intellectual failure when their lie is uncovered. A practical psychological approach can help to lower this secondary obstacle. Standard sentences can be used to make it easier for the suspect to admit the truth:

• "OK, you are perfectly entitled to try to work your way out of this mess, but..."

• "You may have thought at the start of questioning that you would be better off denying everything. Now, things seem to be getting increasingly difficult..."

• "It is possible that (without thinking things through) you said something at the start of this hearing that was not exactly true. Now you find that you can't take your words back even though you would actually like to?"

• "I think we've gotten off to a bad start. Let's try again from the start. Where were you on..."

Other suspects, however, do not feel ashamed at all. Quite the opposite, they are proud of their craftiness. Such persons generally respond rather well to good-natured statement-consistency checks that reveal their attempts to deceive.

Therefore, the idea is to perceive emotions and adopt a stance that can allow the person to come to your side.

4. First admissions

The personal insight resulting from a willingness to confess is not important solely because it makes judicial assessment easier; it is also a vital step in the social reintegration process, which under Swiss criminal law is a primary objective.

a) Confirming admissions

When the suspect concedes: "OK, I really messed up", this is an initial indication that he/she has gained personal insight and the prosecutor should therefore adopt a more benevolent stance. After all, taking this step was certainly not easy. When the suspect feels the inner need to talk, then this is the moment to listen without interruption. Nevertheless, the prosecutor should not entertain any delusions that this initial step is already the decisive step. Very often, the suspect will give an entirely different version of the events, i.e. one that matches the evidence presented during statement-consistency checks. While the new version is still far from being an effective confession, it is nonetheless a step in the right direction.

Let's assume that the suspect says: "OK, it's true, I fired the gun." Can the prosecutor now close the examination hearing? No, because the suspect has only made an admission regarding objective facts of the case. He/she has not yet said anything about the subjective aspects, which are required in order to correctly ascertain which offence objectively applies: murder, wilful homicide, manslaughter, contract killing, or involuntary manslaughter.

Some suspects will attempt to use minor admissions as a means of cutting short a broader (and possibly more revealing) discussion. This may take the form of a statement such as “I have already admitted this, can I go now?” Here, the answer must be “No.” At this stage, the person being questioned must now be asked to once again give free testimony to clarify the main points of what happened: Who did what, where, when, how and why? This takes us right back to the start of our funnel, this time focussing on the person's own account of the incident, using his/her own words.

b) Gathering information that only the perpetrator(s) could know

In major cases, admissions must be corroborated with information that only the perpetrator could know. This is done so as to ensure that the suspect cannot retract his/her statements later on. If the suspect does not naturally volunteer this information, then the prosecutor may express relative scepticism: “How do I know that this time you are really telling me the truth?” or “Is that really true?” Of course, questioning the suspect to obtain information that only the perpetrator could know requires a very good understanding of the case at hand. The prosecutor and the suspect have now reached a delicate point in the examination hearing. If testimony is interrupted here, then the suspect may be less willing to talk at the next examination hearing.

Until these details can be clarified, the accusation will remain on shaky ground.

5. Confession as a basis for social reintegration

For certain offences, a complete confession is not always needed to prove guilt. However, over the course of the criminal investigation, thought should be given to the social reintegration process and how confession can be a first step towards true openness and emotional involvement on the part of the suspect. Confessions secured under fair conditions should mature into personal insight. The objective of punishment is to ensure that the person concerned gains a deeper understanding of democratic rights and obligations, feels more empathy towards others and develops greater self-control.

a) Perception of confession in western culture

If one adopts a purely materialistic-rational view of the world around us, then in all cases a confession would be deemed counter-productive since it results in punishment or, at the very least, a loss of face. Seen from this angle, it is remarkable to see just how many suspects actually do break down and confess. In a study conducted by KUNZ/HAAS[99] over 60% of all suspects fully or at least partly confessed before the court.

Confession as a means of enlightening the soul is deeply rooted in western psychology and can be traced back to the Bible. In Psalms 15, David[100] writes:

1 Lord, who may abide in Your tabernacle? Who may dwell in Your holy hill?

2 He who walks uprightly, and works righteousness, and speaks the truth in his heart.

Since few people always only behave uprightly and righteously, one might wonder how anyone can overcome past misdeeds when the past can no longer be undone. Coming to terms with the past and changing one’s personality are only possible if one first confesses, and does so from the heart, i.e. from inside and not merely under the influence of external pressures. Lawmakers have taken this old principle into account by providing for up to a one-third reduction in sentencing under the condition that the confession is made without awareness of the specific evidence gathered against the suspect. This is because a confession given under such circumstances is a manifestation of an inner change of heart, not simply a self-serving attempt on the part of the suspect to avoid punishment now that the evidence has been laid out in the open.[101]

b) Intrinsic motivations for confession

Apparently, there are strong motivations for someone to confess in court despite the clear disadvantages of doing so. With an understanding of these motivations, prosecutors are able to reach the suspect at an even deeper level in examination hearings, provided a relationship of trust can be built.

Offenders know that their criminal acts will invariably expose them to hatred and rejection from fellow human beings. An important motivation for confession is therefore the desire to be loved and accepted regardless of the (repeated) mistakes made. A second motivation has to do with the person's view on life. Many perpetrators are willing to put their whole life at stake in exchange for short-lived moments of triumph and consumption resulting from the criminal act. A third motivation could be referred to as a willingness to give up feelings of grandeur

and arrogance that are often found among perpetrators. Those who place themselves above others find it easier to justify their own injustices. However, this arrogance comes at a high price, namely social isolation. A fourth motivation for confession is to explain one's motivations: who I am I really, what drives me to expose myself to prosecution? Awareness of such behaviour patterns can make it easier to influence the social reintegration process.

This brief summary of confession motivations incidentally comes from the plume of early Christian theologian AURELIUS AUGUSTINUS,[102] who wrote his autobiographical work "Confessions" around 400 A.D.. The psychological principles of confession outlined in this work are still valid today. Prisoners undergoing therapy also spontaneously mentioned these motivations, which further highlights the relevance of these principles. Perceptions on confession can easily be applied to examination hearings to encourage confession. A follow-up to the question "How could you have reached such a point (of committing the crime)?" could elicit more detailed information, depending on the case and the suspect's own testimony:

"A confession could also be a great relief – particularly in one's dealings with others."

"It must be a very lonely life when one has so much to hide ..."

If diminished criminal responsibility is suspected (but only if there are clear indications), then certain questions can be asked to determine whether a psychiatric examination is needed:

"Can you still remember what event triggered your reaction, making you behave in a way that was no longer 'yourself'?"

"For a brief moment of satisfaction you put your entire future at stake. Don't you want to know more about this, what drove you to act or not to act in such moments?"

With repeat offenders, additional questions need to be clarified such as why, despite previous second chances and punishments, they committed the crime again. Prosecutors should also find out whether there was any increase in the severity and frequency of crimes over time.[103]

c) Extrinsic and irrational motivations for confession

In addition to the intrinsic motivations, there are also purely material (extrinsic) and irrational motivations for confession.

Purely material and reasonably valid motivations for confessing to a crime include a desire to improve one's living conditions, since prison would be a preferable option to deportation and/or living in the streets in wintertime.

Politically motivated perpetrators (provided that they are not mentally disturbed) wish to draw public attention to ideas that are not endorsed by the majority of the population. Their motives for committing the crime are therefore associated with the need to gain publicity.

Caught in a grey area between rationality and pathology, repeat offenders experience what is known as the “revolving door” effect. Having spent their entire lives in institutions, they commit crimes out in the open (often attempting to escape from prison shortly before the scheduled date of their release), knowing fully well that they will find themselves once again behind bars. They do this because they find it hard to cope with life outside of prison. On the one hand, this behaviour could be viewed as symptomatic but on the other, there may very well be a realistic self-evaluation behind their actions.

Last but not least, it should be mentioned to the suspect that only confession enables attenuating circumstances (e.g. motives or way in which the crime was committed) to be taken into account in court proceedings. Without a confession, the viewpoint of the perpetrator does not exist and cannot be used to obtain milder sentencing.

Even admission of irrational motives can sometimes be a means of getting closer to the examiner. Irrational – though not necessarily pathological[104] – reasons for making a confession also include a desire to get even and to make trouble for accomplices, regardless of the personal consequences that this may bring upon oneself. Some juvenile delinquents confess in order to lash out at family members. They seek notoriety in an attempt to tarnish the family's reputation. In such cases, the young people feel a need to reveal skeletons in the family closet or to publically shame a domineering father.

Another reason for confessing one's guilt can be a desire for glory, which was already understood back in ancient times. In the year 356 B.C., Herostratus set fire to the Temple of Artemis in Ephesus (one of the Seven Wonders of the World) in a bid to become the greatest criminal in history. Likewise, there have been countless false confessions made by people claiming to have killed Olaf Palme and John F. Kennedy. The quest for glory can also be seen among querulants, who repeatedly pursue legal actions on manifestly unfounded grounds. In such cases, the confession comes in the form of a complaint: "I did it because of someone else's actions..."

Finally, there are those who suffer from mental illness, dementia or disability. Such people are entirely incapable of recognising that they have done anything wrong. Likewise, people who are mentally ill frequently make false confessions. In such cases, the delusional statements can easily be recognised, even by those who lack formal training in psychiatry.

6. Closing the examination hearing

a) After obtaining a confession

In order to shed light on indications of guilt, the prosecutor is once again required to establish a relationship of trust. A question such as: "How could you have reached such a point?" can be used to channel the discussion back to the suspect. This question helps to reveal the subjective elements of the offence as well as any situative factors that may have had an influence.

b) Closing without haste

The examination hearing – after the transcript has been read and signed – should not be brought to a close too hastily. It is not rare for people to suddenly give relevant information at the last minute as soon as the pressure of the official situation is relieved. This additional information should also be recorded in the transcript of the examination hearing. Or course, the prosecutor should not waste the opportunity to give the person a small note with a telephone number to contact[105] should he/she think of anything else.

A final comment regarding how to handle more emotionally charged examination hearings with the suspect: one must never end a hearing with the suspect on an emotional peak if there is a risk that he/she will commit suicide. At the end of the examination hearing, the prosecutor can bring up harmless and general topics and attempt – particularly in the case of serious offences where the suspect risks spending years in prison – to give the person prospects. The aim is not to minimise the seriousness of the offence but rather to show that there are always possibilities, no matter how bad the situation becomes.

IV. Conclusion

A good understanding of cognitive psychology enables examination hearings to be planned in such a way as to ensure that a maximum amount of new information is obtained with a minimum disclosure of investigative findings. Examination hearing techniques are structured in the funnel diagram in such a way as to ensure that free testimony is gathered at the very beginning of the examination hearing. Then, with each new admission, the person being questioned is asked to once again give free testimony. Free testimony is essential because it delivers the greatest amount of valuable information. A person can be encouraged to give free testimony in a number of ways: by explaining to him/her that it takes time to retrieve all of one's recollections from memory; by allowing moments of silence; and by giving brief verbal and nonverbal cues to confirm and encourage. Only after free testimony has been given should more precise questions (i.e. “W” questions, filter questions) be asked.

Interrogation techniques, in contrast, are based on a three-step approach aimed at verifying both the internal and external validity of testimony. The suspect is first asked questions to clarify any implausible statements that he/she has made. Then, the suspect is asked questions relating to matters for which the prosecutor already has evidence. And finally, the prosecutor shows this evidence in a given sequence and asks specific yes-no questions to bring the accusation to a head. With each new admission, the hermeneutic questioning cycle starts once again at the open end of the funnel diagram.