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TRAINING BULLETIN: LEGAL UPDATE

The Miranda Warning and Voluntariness

M. McKay-McCoy, J.D.

Voluntariness Defined

If you give the Miranda warning, the suspect waives his rights, and the suspect makes an admission or confession, you have the best evidence of guilt possible in a criminal case. However, the statement will still be excluded if the judge determines it is involuntary.

Involuntary statements are suppressed for all purposes, including impeachment of the suspect should he take the stand, because they are inherently unreliable, and because their use in court is fundamentally unfair. (*Dickerson v. U.S.* [2000] 530 U.S. 428; *Miller v. Fenton* [1985] 474 U.S. 104) Statements are involuntary only if they are the product of coercive conduct by the police; the suspect's state of mind is relevant only to show his vulnerability to police coercion, if any. (*Colorado v. Connelly* [1986] 479 U.S. 157)

Discredited Tactics

Two formerly used tactics, the "two step" and "going outside Miranda" have met with unequivocal disapproval from the court (and these two tactics were never a good idea in the first place).

One is the "two step", in which the officer interrogates a suspect without a Miranda warning. Then, after a statement is obtained, the officer gives the Miranda warning, obtains a waiver, and asks the suspect to repeat the statement. This was found improper in *Missouri v. Seibert* (2004) 542 U.S. 600.

The other is "going outside Miranda", in which the officer continues to question the suspect after a clear invocation of his rights, on the theory that at least the statement can be used for impeachment if the suspect takes the stand later. A unanimous and seriously unhappy California Supreme Court condemned the practice in *People v. Neal* (2003) 31 Cal.4th 63.

Any statement obtained by either of these tactics should be excluded for all purposes. If it is admitted it will likely be reversed on appeal, so either way, don't go there.

Coercion

Physical coercion is rarely an issue (goodbye and good riddance), but psychological coercion is still very much an issue. The determination of coercion in this context depends on balancing the circumstances of police pressure against the power of resistance of the suspect. (*Dickerson v. U.S.* [2000] 530 U.S. 428) Police conduct or statements which exploit the vulnerability of a suspect are likely to be found coercive.

Circumstances relevant to the suspect include

- Age, especially if the suspect is very young (*Yarborough v. Alvarado* [2004] 541 U.S. 652)
- Mental deficits (*Reck v. Pate* [1961] 367 U.S. 433)
- Religious beliefs (*People v. Kelly* [1990] 51 Cal.3d 931)
- Previous experience with criminal law (*Fare v. Michael C.* [442 U.S. 707)

Circumstances relevant to the interrogation itself include

- Whether or not there is a Miranda waiver (*Berkemer v. McCarty* [1984] 468 U.S. 420)
- The number of officers doing the questioning (fewer is better) (*Spano v. New York* [1959] 360 U.S. 315)
- The length of the interview (frequent breaks are recommended to avoid a defense of mental fatigue) (*People v. Hill* [1992] 3 Cal.4th 959)
- The tone of the interview (keep the interrogation low key and responsive rather than aggressive and hostile) (*People v. Jones* [1998] 17 Cal.4th 279)

Threats and Promises

Statements made by an officer that can be construed as a threat or a promise, whether express or implied, cause the most problems in this area and form the basis of most motions to suppress. It doesn't matter what you *meant*, it matters what you said.

Encouraging the suspect to tell the truth, or pointing out to the suspect a benefit which "flows naturally" from a truthful and honest course of conduct is not coercive (*People v. Holloway* [2004] 33 Cal.4th 96). The problem arises when an officer's statement appears to go beyond that, particularly when it relates to charging, sentencing, punishment, or custody.

The following statements have been found *not* coercive:

- We'll tell the D.A. you were honest with us (*People v. Jones* [1998] 17 Cal.4th 279)
- Help yourself by telling us what really happened (*People v. Hill* [1967]66 Cal.2d 536
- There's no sense in going down as the triggerman in a robbery-murder if it was actually your co-defendant (*People v. Garcia* [1984] 36 Cal.3d 539)
- Stop lying and tell the truth (*In re Joe R.* [1980] 27 Cal.3d 496)

- Right now we're going with the theory that it wasn't an accident, that you killed him so he couldn't identify you (*People v. Thompson* [1990] 50 Cal.3d 134)
- A show of remorse makes things easier (*People v. Anderson* [1980] 101 Cal.App.3d 563)

Compare these with the following statements, which went further towards threatening or promising a specific result, and were found to be coercive:

- First degree murder is a very serious situation (*People v. Lee* [2002] 95 Cal.App.4th 772)
- Tell your side of it, because if you just lie and cover up you won't have a chance at probation (*In re Roger G.* [1975] 53 Cal.App.3d 198
- We're not leaving until you remember what happened (repeated during a lengthy interrogation) (*People v. Azure* [1986] 178 Cal.App.3d 591
- If you tell a lie you'll go to jail, but if you tell the truth you'll get a citation (*In re J. Clyde K.* [1987] 192 Cal.App.3d 459)
- A denial makes things go hard (*People v. Anderson* [1980] 101 Cal.App.3d 563)

The best way to avoid this trap is to stay away from the subject of charging and sentencing entirely. If the suspect raises the issue, respond that it's the DA's decision and you can't make any promises.

Motivating Cause

Ordinarily if coercive tactics are used, they will be regarded as the motivating cause for the statement. However, other factors could work against the causal connection. If there is a significant time lapse between the police conduct and the defendant's statement (*People v. Thompson* [1990] 50 Cal.3d 134), or if the suspect expresses disbelief in the threat or promise (*People v. Coffman* [2004] 34 Cal.4th 1), or if the suspect is just eager to talk (*People v. Mickey* [1991] 54 Cal.3d 612) the statement could be deemed voluntary.

Lies and Deception

Deception is not inherently coercive. As long as the lie is not the type of statement "reasonable likely to procure an untrue statement", it's not coercive (*People v. Farnam* [2002] 28 Cal.4th 107). Telling the suspect, falsely, that the police have physical evidence against him in the form of tire tracks, fingerprints, or positive eyewitness identification have all been found to be not coercive (*People v. Thompson* [1990] 50 Cal.3d 134, *People v. Musselwhite* [1998] 17 Cal.4th 1216, *People v. Parrison* [1982] 137 Cal.App.3d 529). An example of a lie which was found to be coercive can be found in *People v Hogan* (1982) 31 Cal.3d 815, in which an extremely distraught defendant expressed fear that he might be "crazy" and the police exploited that weakness by telling him repeatedly that he was both guilty and crazy and promised psychiatric treatment.

That being said, my own experience with juries, based on talking with jurors after a trial, is that they hate it when an officer lies, about *anything*. This is anecdotal, not scientific or legal, but when a jury finds out an officer lied the officer instantly loses credibility with many jurors. If you must lie during an interrogation, save it as last resort.

Difference of Opinion

Miranda v. Arizona may have been intended as a "simple" rule, but it has proven itself to be a full employment act for lawyers. For every interpretation of "custody", "interrogation" or "voluntariness" there are dozens of cases to choose from over the last four decades, and the end result is that there is no clear rule that everyone agrees on.

Your department's policy, or the particular sourcebook you rely on, may come to a different conclusion than the analysis given above. If so, my advice is to take the most conservative approach possible. When in doubt, give the Miranda warning, get a clear waiver or a clear invocation, and avoid any statement that looks remotely like a promise or a threat.

About the author: Michele McKay McCoy is a veteran prosecutor who now teaches criminal law as an instructor for POST and as adjunct faculty for three colleges and one law school.