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TRAINING BULLETIN: LEGAL UPDATE

Miranda *and the Fifth Amendment – Custody and Interrogation*

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In 1966 the Warren Court created the Miranda warning out of nothing, including precedent, as a way of advising suspects of their Fifth Amendment rights (you have the right to remain silent, anything you say can be used against you in court) and Sixth Amendment rights (you have the right to an attorney, and to have him present with you before any questioning). The Miranda warning must be given to a person "in custody" before "interrogation." Four decades and hundreds of cases later, we are still working out the details of this "simple" rule. Here's a quick explanation to refresh and reinforce our knowledge of this topic.

Custody

A person is "in custody" if a reasonable and innocent person in the suspect's position would believe that he or she is not free to leave (*Florida v. Royer* [1983] 460 U.S. 491). It doesn't matter that you, the officer, have personally determined that the suspect is the focus of the investigation and is going to be arrested (*Stansbury v. California* [1994] 511 U.S. 318). It doesn't matter that the suspect personally believes he is going to be arrested (*Yarborough v. Alvarado* [2004] 541 U.S. 652). It is a purely objective, reasonable person test based on the totality of the circumstances.

A formal arrest would be an indication to any reasonable person that he is not free to leave (the handcuffs emphasize that point). The problem area is a de facto arrest, the functional equivalent of a formal arrest, which can occur before anyone quite realizes it. If the circumstances establish a show of authority by the officers which are so coercive or intimidating that a reasonable innocent person would believe that he is not free to leave, that person is "in custody" for purposes of the Miranda warning. (Not to mention the fact that de facto arrests, like formal arrests, are lawful only if you have probable cause to believe that each and every element of a crime was committed and that the suspect committed it.)

Objective circumstances which could establish that a reasonable person would believe that he is not free to leave include:

- the number of officers, especially compared to the number of suspects (*Berkemer v. McCarty* [1984] 468 U.S. 420; *People v. Lopez* [1985] 163 Cal.App. 3d 602)

- a drawn weapon (if the suspect sees it), lights, sirens, etc. (*Stansbury, supra* at p.832)
- the manner of questioning (accusatory or confrontational v. investigative and low-key) (*People v. Boyer* [1989] 48 Cal.3d 247)
- the location of the questioning (the suspect's home v. a public place v. the police station) (*Minnesota v. Murphy* [1984] 465 U.S. 420)
- the length of the detention (this is a significant issue in vehicle stops) (*Hayes v. Florida* [1985] 470 U.S. 811; *People v. Gorrestieta* [1993] 19 Cal.App.4th 1499)
- involuntary transport of the suspect from one place to another (which is why you should always transport the victim to the defendant's location for a showup, not the reverse) (*Dunaway v. New York* [1979] 442 U.S. 200)

A wise officer will always start out with requests, not demands, in order to minimize a show of authority. ("Would you mind stepping over here, sir, away from the other people? It's for your safety and mine.") Paying attention to these details at the time can save you hours of grief later in a motion to suppress.

And then there's always the *Beheler* admonition. Telling the suspect that he is not under arrest and is free to go at any time is a significant indication that the interview is noncustodial (*California v. Beheler* [1983] 463. U.S. 1121). If your investigation allows you the luxury of time, you can make an appointment with suspect to come to the police station, thank him for talking to you, give the *Beheler* admonition, and skip the Miranda warning.

Interrogation

"Interrogation" means questions ("Did you hit her?", or statements ("We know you hit her"), or even gestures (displaying stolen property or contraband to the suspect), that are reasonably likely to lead to an incriminating response (*Rhode Island v. Innis* [1980] 468 U.S. 291). Case law has interpreted this language so broadly that you should assume *anything* you say to a suspect, or to another officer in the suspect's presence, is interrogation unless it clearly falls into one of these exceptions:

- routine identification or booking questions like "What is your full name?" (*Pennsylvania v. Muniz* [1990] 496 U.S. 582)
- neutral questions and remarks unrelated to the crime (small talk) (*People v. Wader* [1993] 5 Cal.4th 610)
- explanatory statements like "Here's what is going to happen next." (*People v. Hayes* [1985] 169 Cal.App.3d 898)
- Responses to questions or statements *volunteered* by the suspect, made spontaneously by the suspect and not in response to something the officer said; the suspect's statements are admissible even if he had already invoked his Miranda rights (*People v. Stephens* [1990] 218 Cal.App.3d 575

Juveniles

Any juvenile who is arrested must be given the Miranda warning within a reasonable amount of time, whether or not the officer intends to interrogate him (W&IC sec. 625). I *know* you know that, but it's always good to be reminded.

"Law and Order"

Doesn't that show just drive you crazy? The officers always give the Miranda warning at the time of the arrest, even though it's clear they won't start interrogation of the suspect until later. The Miranda warning must be given to a person in custody before interrogation. This is *not* the same thing as requiring a Miranda warning contemporaneous with the arrest.

Sixth Amendment Issues

That's for next time.

Please note that this subject matter, the Miranda warning and its strange descendants, is explained in much greater detail in many fine handbooks for officers. I highly recommend California Criminal Investigation, published by the Alameda County District Attorney's Office, updated annually. They can be reached at (510) 272-6222.

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Please consult with your department policy and Legal Counsel in your respective county for precise legal guidance before applying any of the techniques or suggestions in this training bulletin.