

1.12 INTERROGATING SUSPECTS AND ARRESTEES



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I. GENERAL CONSIDERATIONS AND GUIDELINES

Interrogations of persons in police custody must conform to the standards set forth in the *Miranda* decision as well as Due Process. A suspect must "knowingly and intelligently" waive his/her rights to this constitutional protection before the interrogation can begin.

The critical elements to be considered are whether there is a coercive environment and whether the person being questioned is free to leave.

It is important to understand that *Miranda* procedures only apply if both of the following situations are present:

- A person is in police custody or is otherwise deprived of his/her freedom of movement in a significant manner and
- There is police questioning or its functional equivalent, including any words or actions that are reasonably likely to elicit an incriminating response.

A suspect can stop any police questioning at any time by invoking his/her right of silence or by requesting the services of an attorney.

"Spontaneous" statements made to the police before, during or after the arrest by a person in custody are admissible in evidence even though the arrested person was not warned of his/her rights, provided that such statements are voluntary and are not made in response to police questioning or other actions.

I. POLICY

It is the policy of this department that:

- A. Persons in custody shall be given their *Miranda* rights prior to any police interrogation; and
- B. The Due Process rights of persons in custody will be respected.
- C. Electronic audio recording of interrogations shall occur when practical as detailed below.

II. DEFINITIONS

- A. *Custody*: When a person is under arrest, or deprived of his/her freedom in a significant manner.ⁱ
- B. *Electronic Recording*: Means the preservation by digital (digital audio tape, CD and/or DVD non-rewritable discs) means through the use of audio or audio/video recording equipment.
- C. *Interrogation*: Express questioning of a suspect about a crime or suspected crime as well as any words or actions on the part of the police that the officers should know are reasonably likely to elicit an incriminating response.ⁱⁱ
- D. *Place of Detention*: Any police station, state police barracks, prison, jail, house of corrections, or a department of youth services secure facility or facility where persons may be held in detention in relation to a criminal charge(s).
- E. *Other locations*: Any area of jurisdiction where an officer may have a need to interview a witness or suspect. This may include field interviews in public areas; or within academic public, or residential buildings; or in the designated interview rooms or booking rooms controlled by the department.
- F. *Suspect*: A person who has either been charged with a crime or a person for whom there is a reasonable basis to believe that he may in the future be charged with a crime.

Note: Witnesses, victims, and other persons who provide information to a police officer are not considered suspects unless, and until, there develops a reasonable basis to change their status.

III. PROCEDURE [1.2.3(B)]

A. Providing Miranda Warnings

1. If an officer wishes to interview or interrogate a suspect who is in custody or deprived of his/her freedom in a significant way, the officer is obligated to give Miranda warnings prior to such interrogation.
 - a) The Miranda warnings shall be read from a preprinted card or form in a clear and unhurried manner prior to questioning. The suspect should then be asked to sign a waiver form acknowledging that the warnings were given.
 - b) Persons who do not speak English must be given these warnings in a language that they understand.
 - c) Sample Miranda Warning Language:
 - ***You have the right to remain silent.***
 - ***If you choose to speak, anything you say may be used against you in court.***
 - ***You have the right to consult with a lawyer before answering any questions, and you may have him or her with you during questioning.***
 - ***If you cannot afford a lawyer and want one, a lawyer will be provided, at no cost to you, by the Commonwealth.***
 - ***You may answer questions now and waive your right to counsel and your right to remain silent.***
 - ***If you decide to talk to me, you still have the right to stop at any time and for any reason.***
2. The suspect shall then be asked the following questions:
 - a) Do you understand what I have told you?
 - b) Having these rights in mind, do you wish to answer questions now?
3. Persons undergoing the booking process shall be given Miranda warnings as part of the booking procedure. For further information see the department policy on Detainee Processing.
4. If there is any substantial delay between the Miranda warnings and the police questioning, the suspect shall be advised of these rights again before the questioning begins.
5. Whenever an officer has any doubt as to the applicability of the Miranda warnings in any particular case, it is advisable that these

warnings be given to the suspect to avoid any subsequent legal barrier to the admissibility of any statements obtained.

6. If, at any time, a suspect requests to read his/her rights or to be informed of his/her rights, these requests shall be granted.
7. JUVENILES: Before a juvenile between the ages of 7 and 17 is questioned, the Miranda warnings shall be given in the presence of the juvenile and his/her parent, guardian or other interested adult. The adult must acknowledge that [s]he understands the rights and the juvenile must be given the opportunity to have a meaningful consultation with the adult. See department policy on **Handling Juveniles**.

B. Non-Miranda Situations

1. SPONTANEOUS STATEMENTS

- a) Officers may note any spontaneous and volunteered statements. When a suspect or prisoner voluntarily makes a statement, officers do not have to prevent him/her from continuing to talk and the Miranda warnings are not a prerequisite for admissibility of any such statements in evidence at court.
- b) Spontaneous and volunteered statements are statements made by a suspect of his/her own free will and not made in response to police questioning.
- c) A person who voluntarily enters a police station and makes incriminating statements need not be given the Miranda warnings.ⁱⁱⁱ
- d) Spontaneous and volunteered statements may be taken after the suspect is in custody and before, during, or after actual interrogation so long as the statements are clearly voluntary.

2. INVESTIGATORY STOP AND FRISKS: Non-custodial preliminary or investigative questioning need not be preceded by Miranda warnings.^{iv} See department policy on **Stop and Frisk and Threshold Inquiries.**

3. NON-LAW ENFORCEMENT QUESTIONING: Miranda does not apply to statements made in response to questioning by private citizens, unless the private citizen is acting on behalf of the police. For a citizen to constitute an agent of the police, the police must request or encourage the citizen's help.^v Thus, where a fellow prisoner initiates questioning about a crime in hopes of trading information for a lighter sentence, any statements made are admissible if the police neither encouraged nor sought the prisoner's assistance.^{vi}

4. TRAFFIC VIOLATIONS OR TRAFFIC COLLISIONS

- a) A person need not be given Miranda warnings if [s]he has been stopped for violating motor vehicle laws.^{vii}

- b) An officer's request that a motorist perform field sobriety tests does not require that Miranda warnings be given.^{viii}

C. Waiver of Rights

1. VALID WAIVERS

- a) Statements made by an arrestee more than six hours after the arrest (safe harbor period) are inadmissible unless the arrestee has been arraigned or has made a valid written waiver of his/her right to be arraigned without unreasonable delay.^{ix}
- b) If the arrestee is incapacitated due to a self-induced disability (such as the use of drugs or alcohol) the six hour safe harbor period does not begin until the disability terminates.^x
- c) The six hour period is also tolled (i.e., suspended or extended) when interrogation is not possible or must be suspended for reasons not attributable to the police, such as a natural disaster or emergency.^{xi}
- d) The interrogating officers should be certain that the suspect understands the rights which have been read to him/her as the burden will be on the prosecution to prove that the waiver was valid.^{xii}
- e) The waiver must be made voluntarily, knowingly and intelligently to meet the conditions of the Miranda decision.
- f) In determining whether a valid waiver was made, the court examines whether in light of the totality of the circumstances surrounding the making of the waiver, the will of the suspect was overborne such that the statement was not a free and voluntary act. The court considers the circumstances of the interrogation and the individual characteristics and conduct of the suspect, such as the length of time which transpired between the giving of the Miranda warnings and the waiver, the suspect's age, mental capacity and experience.^{xiii}
- g) When the suspect waives his/her rights, the interrogating officers shall obtain a written waiver when possible. A waiver may be made orally or in writing, but a written and properly witnessed waiver is more likely to be upheld in court.
- h) Silence on the part of the suspect does not constitute a valid waiver.^{xiv}
- i) The physical and emotional condition of the person being questioned is an important consideration in determining the validity of a waiver. The police should refrain from questioning if the suspect is clearly not capable of understanding his/her rights.^{xv}

2. COMPETENCY

- a) A suspect must be competent to waive his/her rights prior to police questioning. The question of competency is a question of fact to be determined by the circumstances in each case.
- b) The competency issue is more likely to be raised under the following circumstances:
- c) If the suspect is distraught or very disturbed because of any mental or emotional condition;
- d) If the suspect has been wounded or is the victim of shock or other physical impairment;
- e) If the suspect is so intoxicated or influenced by alcohol or drugs that [s]he cannot think rationally or act sensibly; or
- f) If the suspect's intelligence level is so low, or his/her learning and education are so minimal, that [s]he does not comprehend his/her rights.
- g) In any of the circumstances enumerated above, any waiver obtained will be carefully scrutinized by the court.

3. ASSESSING COMPETENCY PRIOR TO INTERROGATION

- a) After the Miranda rights have been read and after the suspect has shown an initial willingness to waive those rights, the police may ask the suspect about the following in order to properly assess the suspect's ability to intelligently understand and waive his/her rights:
- b) His/her age;
- c) Whether [s]he is under the influence of any drugs or alcohol;
- d) Whether [s]he is suffering from any mental or emotional problem;
- e) His/her education and learning;
- f) His/her employment;
- g) Whether [s]he has ever been given Miranda warnings previously; and
- h) Whether [s]he understands the words used by the officer in reciting the Miranda warnings or what they mean.

D. Presence of Attorney

1. REQUEST FOR COUNSEL

- a) If a suspect states that [s]he wishes to consult an attorney,
- b) [S]he must not be questioned further by police until [s]he has had an opportunity to consult an attorney. However, if the

suspect initiates statements or conversation, the police may respond to those statements or conversation.

- c) If the suspect initiates statements or conversation, the police may respond to those statements or conversation.
- d) If a suspect has voluntarily waived his/her right to remain silent, [s]he may still invoke this right by refusing to answer any further questions or by requesting an attorney. At this point the police questioning must cease.
- e) A suspect may answer some questions and refuse to answer others. The officer is not required to discontinue questioning unless the suspect indicates that [s]he wishes to remain totally silent to stop the questioning or to consult with a lawyer.

2. REPRESENTATION BY COUNSEL

- a) If the police are aware that the suspect is represented by an attorney, even on other matters, and that the attorney desires to be present with his/her client during any questioning, the police must inform the suspect that his/her attorney wishes to be present during questioning.
- b) Once so informed, the suspect may waive his/her right to have his/her attorney present.

- Summary of **Comm Vs. McNulty, 458 Mass. 305; November, 2010**; Where police did not convey adequately to a criminal defendant, who was in custody, the substance of his attorney's telephone message (i.e., that the attorney wanted to speak with the defendant, and that the attorney would arrive shortly at the police station where the defendant was being held) and advice (i.e., that the defendant should not talk to the police), the defendant's subsequent indication that he would continue to speak to the police did not constitute a knowing or intelligent waiver of his Miranda rights, and as a result, evidence of his statements and his actions in connection with the police interrogation that were made after his attorney tried to contact him should have been suppressed.

- 3. POST ARRAIGNMENT: Once a suspect has been arraigned, the suspect has a right to counsel, regardless of whether or not the suspect is in custody. The suspect shall not be questioned in the absence of counsel unless [s]he specifically waives that right.^{xvi}

E. Setting of the Interrogation

1. GENERALLY

- a) An interrogation is a controlled process, controlled by the officer conducting the interrogation. It should be conducted in a setting that provides a degree of privacy as well as safety and security for the officer and the suspect as well.
- b) All rooms used for conducting interrogations including rooms designated for this purpose shall be inspected for security issues prior to bringing the suspect into the room and conducting the interview. [42.2.10(b)]
- c) This applies to both uniformed and non-uniformed personnel.

2. DESIGNATED INTERVIEW ROOM

The interview room is located on the first floor adjacent to the booking room and is identified by signage.

- a) The interview room should be sparsely furnished with chairs for the officer(s) and suspects, and a small table.
- b) If a telephone is in the room, the ringer should be switched off.
- c) Writing materials, department forms, recording equipment and media will be maintained in the interview room. [42.2.10(e)]
- d) Other items should not be left in the interview room.
- e) Weapons must not be allowed inside of the interview room. [42.2.10(a)]
- f) Persons being interrogated should be pat-frisked for firearms and other weapons prior to being admitted into the interview room.
- g) Police firearms should be secured in a designated location outside of the room.

3. PERSONNEL

- a) Usually, no more than two officers should be present during an interrogation. [42.2.10(c)]
- b) Live audio and video may be made available for other officers to observe a recorded interrogation.
- c) Interrogations should never be conducted by a single officer without a back-up officer readily available in the event that the interviewing officer needs help.

4. MEANS OF SUMMONSING ASSISTANCE [42.2.10(D)]

- a) If two officers are conducting an interrogation, no other backup officers are required. Depending on the suspect, additional backup officer(s) may be advisable.

- b) A backup officer shall be located in the immediate vicinity of the interrogation, within audible distance, for the duration of the interrogation, in the event that the interviewing officer(s) summons assistance.
 - c) Live audio and video may be made available for other officers to observe a recorded interrogation for the safety of the officer(s) conducting the interrogation.^{xvii}
 - d) For information on recording interviews and interrogations, see the department policy on ***Electronic Recording Interrogations***.
5. BREAKS: If an interview or interrogations is of long duration, officer(s) must make arrangements for access to restrooms, water, and provide for comfort breaks while continuing to provide for the security and safety of all parties involved. [42.2.10(f)]

F. Documenting Suspect Statements and Confessions

1. RECORDING REQUIREMENTS

- a) In *Commonwealth v. DiGiambattista*, 442 Mass. 423 (2004), the Supreme Judicial Court held that if the prosecution introduces a confession or statement that the police obtained during an interrogation of a defendant who was either in “custody” or at a “place of detention”, and the police did not electronically record the statement, the defendant is entitled to a cautionary jury instruction. Upon the defendant’s request, the judge must instruct the jury that “the State’s highest court has expressed a preference that such interrogations be recorded whenever practicable and....that, in light of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant’s alleged statement with great caution and care.” This jury instruction is required regardless of the reason that the police did not record the interrogation.

2. RECORDING INTERROGATIONS

- a) Officers shall video and or audio record all suspect interrogations whenever possible.
 - b) Before recording an interrogation, the suspect shall be notified that the conversation will be recorded.^{xviii} When practical, interviews and interrogations conducted in other locations shall be recorded in the same manner. While recognizing that routine field interviews can transition quickly, reasonable efforts should be made to record such interactions when it is safe to do so and suitable equipment is available.
- 1.2.3 a

- c) **Applicability:** These guidelines require Southborough Police sworn personnel to record three types of interrogations, whenever it is practical:
- 1) Custodial interrogations of suspects, and
 - 2) Interrogations of suspects occurring at places of detention.
 - 3) Interviews with suspects at other locations, when it is likely to be of substantive value to an investigation which may result in criminal charges against one or more people.
- d) **Wiretap Violations:** The Massachusetts's wiretap statute, MGL C 272, S. 99, generally prohibits anyone from secretly recording another person's oral statements. Accordingly, unless one of the narrow exceptions in the wiretap statute applies, officers who electronically record an interview or interrogation must do either of the following:
- 1) Notify a suspect that his/her statements are being recorded
 - 2) Conduct the interrogation in such a way that it is obvious to the suspect that his statements are being recorded.
- *Once the suspect knows, or reasonably should know, that they are being recorded, officers may record without asking for or receiving explicit consent to do so.
- c) **Creating a Clear and Complete Record:** To the extent it be practical, officers should record the entire interview or interrogation. To assist in the creation of the record, officers should do the following:
- 1) Start the recording device.
 - 2) Inform the other party that they are being recorded.
 - 3) State the date, time, location, and names of the persons present. If the recording device indicates a date or time on the recording, verify that they are correct.
 - 4) State the full name of the parties.
 - 5) Execute appropriate departmental forms including, but not limited to, Miranda warning and waiver, and waiver of prompt arraignment (if applicable).
 - 6) If the officer must suspend the recording for any reason, they should record the reason for stopping (i.e., taking a break or a malfunction), the time the recording device is turned off, the time it is turned back on, and what transpired while the recording device was turned off.

7) If the officer uses or refers to documents or other items during the interrogation, they should describe those documents or items on the record, referring to property numbers, if assigned.

8) Conclude the recording by stating the date and time the interrogation is completed.

- e) For further information see department policy on ***Electronic Recording of Interrogations***.

3. SUSPECT REFUSAL TO BE RECORDED

- a) In the event that a suspect refuses to be recorded, see the procedures set forth in the department policy on ***Electronic Recording of Interrogations***.
- b) The officer shall document the fact into his/her report.
- c) If the suspect submits a written statement the suspect should be asked to include a statement regarding his/her wishes not to be recorded.

4. NOTE TAKING

- a) Notes should be taken in a manner that does not interrupt the interviewing process. Some interviewees are reluctant to talk if they notice that the officer is taking down every word they say.
- b) Brief notes can be made without deterring or distracting the interviewee. However, if a statement appears highly informative due to its nature and content, a verbatim account should be made.

5. WRITTEN STATEMENT OR CONFESSION

- a) Obtain a written statement from the witness/victim, if appropriate.
- b) The statement may be written on a "Statement" form, or on blank paper. If the statement form is used, have the writer fill in the blank spaces. If using blank paper, ask the writer to provide the necessary information:
- c) Identification of the writer
- d) Writers address
- e) Date and time that the written statement was undertaken.

- f) Location of the statement.
- g) The suspect should recount the incident in his/her own words.
- h) The suspect should review the statement; correct any errors, sign, and date the statement.
- i) The interrogating officer(s) shall sign and date the statement or confession.
- j) If the person giving the statement cannot write the statement due to injury, illiteracy, or other reason, the statement may be dictated and written, word for word, by a companion, or by a police officer.

6. TRANSCRIBED STATEMENT

- a) TYPES OF TRANSCRIBED STATEMENTS
- b) An oral statement transcribed from a recorded interview is preferred.
- c) A statement may also be transcribed by writing down the suspects words as the statement is being dictated.

WRITTEN STATEMENTS OR CONFESSIONS AS EVIDENCE

- a) The transcribed statement shall be reviewed by the person who gave the statement, any errors or omissions corrected, and then signed by that person.
- b) The interrogating officer(s) shall sign and date all written statements and confessions.

G. Conducting the Interview or Interrogation

1. BEGINNING THE INTERVIEW

- a. At the beginning of the recorded interview, verbally record the following:
 - 1) The name(s) of officers present during the interview.
 - 2) Date and time of the interview.
 - 3) The location of the interview.
 - 4) The name of the witness being interviewed.
- b. If the interview is not being recorded, the information shall be recorded in writing.

2. CONDUCTING THE INTERVIEW

- a. Ask the person being interviewed to fully describe the incident.
- b. Ask specific questions to clarify the statement or to fill in any omissions or unknowns.

c. Note:

- 1) any relationship or connection the suspect might have with the victim, other perpetrator or the property or premises involved in the crime;
 - 2) the overall credibility of the witness/victim;
 - 3) his/her opportunity to make observations; and his/her ability to recall details as opposed to general impressions, etc.
3. OBSERVATIONS: Observe and note any emotional outbursts, inflections of the voice and nervous reactions which may indicate areas requiring further probing or clarification.
4. TERMINATING THE INTERVIEW: Interviews should be ended in a courteous manner.
5. DOCUMENTING THE INTERVIEW
- a) The circumstances surrounding the conduct of interrogations and recording of confessions shall be fully documented. This includes:
 - b) Location, date, time of day and duration of interview;
 - c) Identities of officers or others present;
 - d) Miranda warnings given, suspect responses and waivers provided, if any; and
 - e) The nature and duration of breaks in questioning to provide the suspect food, drink, use of the restroom, or for other purposes.

ⁱ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966)

ⁱⁱ *Com. v. Morse*, 427 Mass. 117, 691 N.E.2d 566 (1998)

ⁱⁱⁱ *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711 (1977)

^{iv} See, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966); *Com. v. Podlaski*, 377 Mass. 339, 398 N.E.2d 1379 (1979)

^v *Massiah v. U.S.*, 377 U.S. 201, 84 S.Ct. 1199 (1964)

^{vi} *Com v. Gajka*, 425 Mass. 751, 682 N.E.2d 1345 (1997)

^{vii} *Berkemere v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138 (1984)

^{viii} *Com. v. Wholley*, 429 Mass. 1010, 709 N.E.2d 1117 (1999); See also, *Vanhouton v. Com.*, 424 Mass. 327, 676 N.E.2d 460 (1999)

^{ix} *Com. v. Rosario*, 422 Mass. 28, 661 N.E.2d 71 (1996)

^x *Com. v. Rosario*, 422 Mass. 28, 661 N.E.2d 71 (1996)

^{xi} *Com. v. Rosario*, 422 Mass. 28, 661 N.E.2d 71 (1996)

^{xii} *Com. v. Nom*, 426 Mass. 152, 686 N.E.2d 1017 (1997)

^{xiii} *Com. v. Nom*, 426 Mass. 152, 686 N.E.2d 1017 (1997); *Com. v. Hooks*, 38 Mass. App. Ct. 301, 647 N.E.2d 440 (1995)

^{xiv} *Com. v. Roy*, 2 Mass. App. 14, 307 N.E.2d 851 (1974)

^{xv} *Com. v. Hosey*, 368 Mass. 571, 334 N.E.2d 44 (1975)

^{xvi} *Massiah v. U.S.*, 377 U.S. 201, 84 S.Ct. 1199 (1964)

^{xvii} M.G.L. c. 272, s. 99(D)(e)

^{xviii} M.G.L. c. 272, s. 99