



ADVISING YOUTH OF THEIR *MIRANDA* RIGHTS

A Best Practices Guide and Checklist for SB 395 Consultations

This document provides two SB 395 tools for attorneys:

1. A guide describing best practices, and
2. A two-page checklist which is intended to be a pull-out, quick reference for practitioners (page 6).

I. Introduction

January 1, 2018 marked the effective date of new California law, Senate Bill 395 (SB 395) mandating that, absent a public safety exception, youth 15 and under must consult with counsel prior to a custodial interrogation and before the waiver of any *Miranda* rights.¹ This means that attorneys statewide should be prepared to advise youth of their *Miranda* rights and the consequences of waiver. This guide, written by leading experts on *Miranda* rights and the representation of youth in California, describes the best practices for these consultations.

While any experienced criminal defense attorney knows how to explain to an adult client the rights enunciated in the *Miranda* warnings, effectively doing the same with a child or youth is a different matter. California has long recognized that counsel appointed in delinquency proceedings need specialized skills and in 2015 enacted legislation requiring appointed counsel to have training on how to work with adolescent clients.² Senate Bill 395, too, was enacted with recognition of the neurological and developmental differences between youth and adults. The Senate Bill 395 legislative findings note that youth “have a lesser ability as compared to adults to comprehend the meaning of their rights and the consequences of waiver,” and that “a large body of research has established that adolescent thinking tends to either ignore or discount future outcomes and implications, and disregard long-term consequences of important decisions.”³ Moreover, a high percentage of youth in conflict with the law have cognitive and other disabilities that affect the capacity to comprehend complex legal ideas.

These facts all weigh in favor of providing a careful process ensuring that children and youth understand their rights before being allowed to waive them. The process created by SB 395 will not work, however, if attorneys are not prepared to deal with children and youth. Public defender offices should provide specialized training for their attorneys. Panel attorneys and others tasked with the consultation role should seek training. Toward that end, juvenile law experts created this brief best practice guide and a two-page checklist of best practices for attorneys providing counsel in the SB 395 consultation. It is our hope that these tools will be useful for attorneys across California.

II. *Miranda* Warnings Were Not Created with Youth in Mind

When *Miranda* rights were created in 1966, the wording of the warnings was written with adults in mind.⁴ At that time, people under the age of 18 did not have constitutionally protected due process rights. For more than 50 years, many

¹ See Sen. Bill No. 395 (2017-2018 Reg. Sess.) [creating Welf. & Inst. Code § 625.6.]

² See Assem. Bill No. 703 (2015-2016 Reg. Sess.) at https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB703 [as of Dec. 10, 2017.]

³ Sen. Bill No. 395 (2017-2018 Reg. Sess.) Legislative Findings and Declaration at https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB395 [as of Dec. 10, 2017.]

⁴ At the time *Miranda* was decided children did not have the right against self-incrimination or the right to counsel, those rights were enunciated a year later. (See *In re Gault* (1967) 387 U.S. 1.)

have struggled with communicating the *Miranda warnings* in a way that ensures that youth understand the rights and what it means to waive them.

The problem of understanding begins with the words themselves. Many youth do not understand the words used in advisements. One study examined the language used in 560 different *Miranda* warnings used by law enforcement, and found that the reading comprehension level needed to understand them varied from simple comprehension (i.e. grade level 2.8) to requiring post-graduate education.⁵

In addition, the concept of a “right” is not something easily understood because it requires a certain degree of abstract thought. Some informal surveys suggest that even college students do not understand the term “right” as a protection.⁶ Studies over the years have shown that youth may not be capable of fully understanding *Miranda* rights without assistance.⁷

Research also shows that youth who come in contact with the law tend to have a much higher incidence of cognitive developmental delays, learning disabilities, and mental health problems as compared to peers. Many youth in contact with the police are not performing at their expected grade-level. These factors are likely to affect the pre-interrogation consultations with law enforcement and with counsel. It is critical that attorneys understand these issues and take them into account when providing *Miranda* consultations to youth.

III. The SB 395 Consultation

The best practice is for counsel to meet in person with the youth. An in-person consultation will allow counsel to observe the young person and to more accurately gauge whether he or she is understanding what is being said. It will also make it easier to ensure that the youth’s decision about waiver is made clear to the police.

When an in-person consultation is not feasible, consultations by phone or video conference are permitted under the new law. The topics outlined below assume a telephonic consultation and include some of the issues counsel would need to consider when the consultation is not in person.

A. Conflict Policy/Scope of Consultation

Prior to initiating a consultation, the attorney should be familiar with the conflict policy of his or her employer and the scope of representation allowed for these consultations. County public defender offices may vary in the way conflicts are evaluated and when that occurs. Accordingly, some counties may direct attorneys to not discuss any facts of the underlying case during the consultation.

B. Securing a Private Conversation

Youth should have privacy when speaking to counsel, so that the conversation can be confidential. If the consultation is by phone, counsel should first ask the officer for the youth to be placed in a situation that permits a confidential conversation, and then, prior to beginning the conversation, counsel should confirm with the youth that, in fact, he or she is out of hearing range of anyone else.

Counsel should also take a moment to determine whether there are other distractions that could prevent the youth from focusing during the consultation. Asking the youth to describe where he or she is located during the consultation;

⁵ Rogers & Harrison et.al., *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage* (2007) 31 Law Hum. Behav. 177.

⁶ *Id.* at p. 170.

⁷ Ken King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Our Children From Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights* (2006) Wis. L. Rev. 431, 433.

whether a cell phone or landline is being used; and who else is present or near the phone will provide important context.

C. Explaining Counsel's Role

Counsel should take extra care to ensure the young person understands that the attorney is there solely to help the youth, is on the youth's side, and does not work for the police or court. At the start, counsel should also explain that the conversation will be confidential, and that the attorney cannot repeat what is said without the youth's permission.

While the concepts of an attorney and confidentiality are ones that an adult might quickly grasp, the same is not true for many youth. It is a good practice to repeat these and other important things two or three times, using slightly different language, and then stopping to ask questions to ensure the young person understood.

D. Gathering Background Information from the Youth and Assessing the Youth's Abilities

Counsel should obtain information about the youth's education, including grade level and whether the youth is obtaining any special education services. Counsel should ask whether the youth has had previous arrests, including being interrogated previously, or is currently on any type of diversion or juvenile probation. By asking questions in a narrative style and asking the youth to explain things in their own words, counsel will have an opportunity to evaluate whether the youth is functioning close to grade level or not. Asking questions that only require a "yes" or "no" answer is a sure way to miss whether a youth is intellectually delayed.

E. Explaining the *Miranda* Rights

Since the actual text of *Miranda* warnings varies among law enforcement agencies, counsel may want to have the law enforcement agency provide the exact wording of the *Miranda* rights they utilize.

One suggested practice is to repeat the *Miranda* warning to the youth and then ask the youth to explain in his or her own words what it means. First, keep in mind that the concept of "rights" is an abstract one, and there are developmental limitations in understanding abstract concepts. Second, many youth do not know what an attorney is, let alone what an attorney can do to protect a person during an interrogation. Even different words for the same thing, e.g. lawyer, attorney, counsel, representation—might be confusing and leave a young person thinking that each word means something different.

When the youth tells you what he or she thinks a concept means, take care to engage. Do not just say "no, actually, it means..." or "yes that is right," and move on. Instead, discuss the concepts further, enunciating the correct concept, but asking more questions and asking the youth to respond to examples. An engaged discussion will make it easier for you to determine whether the young person really understands the concepts.

The key is to break down each right into very simple terms. When discussing the right to remain silent, your goal is to make sure the youth understands that, no matter what the police may say, a suspect does not have to answer.

It is important to recognize that youth will often say they understand something when they do not. A quintessential adolescent technique to get adults to stop interfering with their lives, many youth have honed the skill of saying what an adult wants to hear. Also, it is very common for youth with disabilities to try to "pass" by acting as though they understand when they do not. Closed questions that require a yes or no answer will mask the lack of understanding. Counsel should think carefully about how to use simple terms, repeat important ideas two or three times, speak slowly, and stop often to ask questions and engage in discussion. The best practice includes having youth explain key concepts in their own words multiple times during the consultation. The consultations will require time and patience. These are the hallmarks of working with youth in a complex legal system.

Simply telling a youth “do not talk” is not a recommended practice. Having a thoughtful conversation with the youth, assisting them in understanding their rights, and answering their questions will enable the youth to better understand the seriousness of their situation and make a good decision about waiving their rights.

F. Understanding the Intersection of *Miranda* and *In re Gladys R.*

The law presumes that youth under the age of 14 lack the capacity to commit crimes.⁸ However, the presumption is rebuttable by clear and convincing evidence, and proving this issue is a part of the prosecutor’s case in chief. One common way capacity evidence is gathered by law enforcement is through a *Gladys R.* questionnaire (in reference to *In re Gladys R.* (1970 1 Cal. 3d 855)). However, because the *Gladys R.* questionnaire may elicit incriminating information, law enforcement cannot ask *Gladys R.* questions prior to a waiver of *Miranda* rights.

This means that when counsel is called to provide a SB 395 consultation with a youth under 14, counsel should explain that if the youth chooses to speak to the police, the police will most likely administer a series of questions regarding whether the youth knew it was wrong to commit the alleged crime, and who taught the youth the difference between right and wrong.

G. Invocation of Rights

If, after the consultation, the youth decides to invoke his or her right to counsel, you should communicate that to the law enforcement officer who initiated the call. When possible, the best practice would be for you to communicate it to law enforcement and then have the youth personally invoke his or her right to counsel while you are present or listening over the phone.

It is important to explain to the youth that youth might be released from custody after the initial invocation and then questioned later. You must ensure that the youth understand that if he or she faces questioning later, the youth should again demand counsel immediately.

It is important for youth to be empowered with knowledge about how to stop an interrogation if the youth chooses to speak to the police after your consultation. Youth should be told that they can change their mind at any point, but when they do not want to speak to the police they must unequivocally ask for counsel. Explain that this means that they cannot casually ask for counsel, or ask the police whether they should obtain an attorney; they must state clearly, “I want an attorney.” Acknowledge that it can be difficult to make that statement to the police, and ask the youth practice invoking the right to counsel during your consultation.

Regardless of whether the youth invokes his or her rights, after your consultation, the youth could be formally arrested and detained. The law requires that juvenile petitions be filed within 48 hours of arrest (not including court holidays or weekends) and that in serious cases the youth may not be brought to court until the day after the petition is filed.⁹ Explain this possibility to youth and make sure they understand that arrest and detention are not linked in any way to whether they invoked their right to counsel.

H. Helping the Youth Understand Police Practices

One of the key reasons youth speak to police is that their age makes them highly deferential to authority and susceptible to pressure. Many police agencies still employ the Reid technique or something very similar for interrogation.¹⁰ These powerful techniques are designed to psychologically impel adults into speaking to the police and confess to crimes. Many youth are under the false impression that if they speak to the police they will go home. Some

⁸ Pen Code § 26.

⁹ Welf. & Inst. Code § 632.

¹⁰ See John E. Reid & Associates, Inc. at <<https://www.reid.com>> [as of Dec. 10, 2017.]

law enforcement officers will suggest leniency, (e.g., “we will talk to the prosecutor about going easy on you if you help by telling us what happened,” or “if you don’t confess, the judge will think you are a cold-blooded killer.”) or use overtly coercive techniques to convince youth not to invoke their rights. Young people may be shocked to know that police are permitted to lie to them about evidence or other information. It is important for counsel to inform the youth of these techniques and how they are used. It is also important for youth to understand that even talking about facts that seem minor or unrelated to the offense can be used against them and may help police prove the case.

I. Explaining the Permanent Consequences of Waiver

Youth need to understand how speaking to the police will affect their case. However, the adolescent brain tends to act more from an emotional rather than rational perspective. The same developmental realities that cause youth to act impulsively in the community, also make it difficult for them to listen to counsel or take the time to understand the ramifications of waiver. In addition, research has demonstrated that youth are prone to choose immediate rewards, and have a difficult time delaying and waiting for a better reward later. This means that those youth who believe they have an alibi, an explanation, or other information to provide law enforcement, might be particularly inclined to risk making a statement to the police. They need to understand how any statements made during interrogation will be used against them later, and that statements made now may make it difficult to defend against charges later. Carefully explain that the youth will always can speak to the police later and explain their side of what happened, but it is often better to do so after an attorney representing them has had access to police reports and other information.

J. Wrapping Up the Consultation

Counsel should end the consultation by asking the youth about what he or she wants to do. Ask the youth why he or she decided to invoke, not invoke, or maintain an undecided stance. If the youth decides to invoke, counsel should inform law enforcement and have the youth personally invoke in counsel’s presence or as counsel listens over the phone. If the youth tells you he or she plans to waive the *Miranda* rights, then ask the youth to explain his or her reasoning. Listen carefully and determine whether the youth’s decision is grounded on a clear understanding of the rights and the ramifications of waiving those rights. If not, then engage in conversation and re-explain the rights and consequences of waiver. If the youth appears to understand the issues, then counsel needs to have the youth practice invocation should the youth wish to end the questioning during the interrogation.

Counsel should record what was said to the youth, by the youth, to the police and by the police in accordance with county policy.

IV. Conclusion

This brief guide is intended to assist attorneys in conducting the consultations mandating by SB 395.

The two-page checklist that follows is a summary of the best practices, and provides possible statements or questions for attorneys conducting the consultations. It is intended to be a stand-alone document for attorneys to use in the field.

Additional training materials will be provided through the Pacific Juvenile Defender Website www.pjdc.org in 2018.



Checklist Best Practices SB 395 Attorney Consultation

In California, every youth age 15 or younger facing custodial interrogation must consult with an attorney before deciding whether to waive *Miranda* rights. The Pacific Juvenile Defender Center has published a memo describing in detail the best practices for attorneys consulting with youth. Below is a summary of best practices for the consultation. Additional protocols may be needed, depending on, for example, whether the attorney is likely to end up representing the youth on the matter, or other considerations. In any case, the attorney should keep careful notes about the interview, what the police officer said, and the youth's responses.

Although possible statements and questions are listed below, this by no means suggests that these are the only things an attorney should say or do. The conversation with the youth should be dynamic, and include many open-ended questions. Perhaps more than with a typical adult, an attorney will need to repeat things several times, use simple language, and be careful about building trust and conveying that he or she is on the youth's side, and not working for the police. If the attorney has not been trained to work with adolescents, he or she should be particularly cautious and aware that many youth in conflict with the law have cognitive disabilities or significant academic deficits and can be adept at hiding that fact. It is important to listen carefully.

I. First interaction with officer

- Get basic info from the officer.
- Set the parameters for your role.

Possible statements or questions:

Thank you, officer. My name is _____, and I am the attorney assigned for this consultation.

What charges are being considered?

Where is the youth now?

What is the youth's full name?

I will be able to be there in person in ____ amount of time. Please do not question him until I arrive; or

I would like to have a confidential conversation over the phone with him. Would you please put him in a situation where s/he can talk to me without being heard by others?

II. Initial conversation with the youth

- Secure privacy for the conversation.
- Make sure youth knows your role.

Possible statements or questions:

(If in person:) Thank you, officer. I would like a private space for this conversation.

(If by phone:) Officer, would you please put the youth in a place where he can speak to me privately, without being overheard by others?

(When on phone with youth:) Hi. I am a lawyer to help you to understand your rights. Our conversation needs to be private. Do you think anyone around you can hear you? Please give the phone back to the officer so I can ask [for him to move away/close the door/etc.]

I am a lawyer/attorney. Do you know what a lawyer is? I am here just for you. I don't work for the police or government. My job is to make sure you understand things.

Everything you say to me is confidential, totally private. That means I cannot tell anyone else what you tell me without your permission.

III. Gauge cognitive ability of youth

- Assess the youth's ability to understand what you are saying by using questions calling for narrative answers throughout your conversation. Ask the youth to explain what you have said in their own words. Listen for clues that the youth has trouble following you, or responds in ways that do not indicate understanding.

Possible statements or questions:

How are you feeling right now?

Are there things that are worrying you?

What did the police tell you about the reason you are in custody?

What does confidential mean to you?

The reason you are talking to me?

Can you tell me what lawyers do?

IV. Explain *Miranda* rights

- Explain the *Miranda* rights and the ramifications of waiving those rights.
- Ensure the youth understands.

Possible statements or questions:

The police officer wants to ask you questions. He wants to ask you questions because he believes you committed a crime.

You do not have to talk to the police. The law says you can be totally silent: this means you don't have to say anything. It also means that if you don't talk right now, later that can't be looked at as a bad thing in court. It cannot be used against you anywhere.

If you do decide to answer questions by the police, they will use what you say against you in court. That means, they will use it to show the judge you committed a crime and should be punished.

You can always make a decision to talk to the police later, after an attorney looks at the police report with you.

You have a right to a free lawyer to help you with this case. That lawyer will help you if you get charged with a crime.

You will not be alone in dealing with this.

Can you tell me in your own words what it means that you do not have to talk to the police? What are your questions about this?

(If the officer told the youth that he or she would be detained if s/he did not give a statement:) *The fact is that if officer has enough proof to keep you, he will probably not let you go home. The police will not let you go home tonight just because you talk to them.*

(If youth decides to not waive rights:) *You need to say to the officer "I do not give up my rights. I do not want to talk. I want an attorney with me if you want to talk with me."*

V. Communicating the decision of the youth

- Ensure the youth's decision is clearly conveyed to the officer.

Possible statements or questions:

If the youth decides to not waive his or her rights, the attorney should either call the officer back in the room if the consultation is in person, or if by phone, tell the youth to ask for the officer to come into the room. The attorney should listen as the youth makes the statement. The attorney should then confirm with the officer.