

AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
FEBRUARY 8-9, 2010

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association urges federal, state, territorial and local
- 2 legislative bodies and governmental agencies to support the development of simplified *Miranda*
- 3 warning language for use with juvenile arrestees.

REPORT**Overview**

In the landmark case of *Miranda v. Arizona*,¹ the Supreme Court of the United States paved the way for a litany of warnings that are familiar to virtually anyone who watches television or attends the movies. Less familiar—to lawyers and judges, as well as to the public at large—is the fact that the specific wording of these warnings was never prescribed by *Miranda*, and varies widely across jurisdictions.

Miranda never mandated that an arresting officer must state, in the following exact words: “You have the right to remain silent. Every word you say can and will be used against you” Instead, Chief Justice Warren’s majority opinion called for the use of “clear and unequivocal terms” to convey the various components of this warning,² adding that a “fully effective equivalent” to the decision’s sample wording would also suffice.³ The Court later confirmed this distinction by supporting the use of “the now familiar *Miranda* warnings . . . or their equivalent”⁴ and by noting with approval that other courts “have not required a verbatim recital of the words of the *Miranda* opinion.”⁵

The leading scientific authority on the linguistic variability and impact of *Miranda* warnings is forensic psychologist Richard Rogers. In the course of investigations supported by the National Science Foundation (NSF), Professor Rogers and his colleagues conducted a comparison of juvenile and adult *Miranda* warnings and surprisingly found that the juvenile warnings tended to be over 50 words *longer*, ranging from 52 to as many as 526 words, and featuring correspondingly *higher* required reading levels.⁶

Miranda applies to juvenile suspects every bit as much as to adults. In order to determine the knowing, intelligent, and voluntary nature of a juvenile waiver of rights, the federal courts and a majority of state courts again look to the “totality of the circumstances”⁷ in light of such factors as the juvenile’s age, education, and personal background as well as the duration and circumstances of questioning and any allegations of coercion or trickery.⁸ Although the Supreme Court has long instructed the lower courts to consider carefully the impact of age and experience in particular,⁹ it has refrained from stating that the Constitution demands a *per se* rule entitling all children to greater protections, like the presence of a parent or attorney. The government has the burden to prove that *Miranda* rights are voluntarily waived.¹⁰

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² *Id.* at 467-68.

³ *Id.* at 476.

⁴ *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980).

⁵ *California v. Prysock*, 453 U.S. 355, 360 (1981).

⁶ Richard Rogers et al., *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 PSYCHOL. PUB. POL’Y & L. 63 (2008). See also Rachel Kahn, Patricia A. Zapf, & Virginia G. Cooper, *Readability of Miranda Warnings and Waivers: Implications for Evaluating Miranda Comprehension*, 30 LAW & PSYCHOL. REV. 119 (2006); Richard Rogers, *A Little Knowledge is a Dangerous Thing: Emerging Miranda Research and Professional Roles for Psychologists*, 63 AM. PSYCHOL. 776 (2008).

⁷ See *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

⁸ See *West v. United States*, 399 F.2d 467 (5th Cir. 1968).

⁹ See *Haley v. Ohio*, 332 U.S. 596 (1948).

¹⁰ See *Fare*, *supra* note 7, at 724.

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Individual states are free to provide for more safeguards than the constitutional minima established by the Supreme Court; some have chosen to do so, but most have not. About a dozen states have adopted *per se* rules that treat juvenile interrogations differently than those of adults.¹¹ These states have chosen several different types of protection. Some have a mandatory requirement that legal counsel be provided to the juvenile before any waiver is considered valid. Others require that a minor consult with a parent, guardian, or other interested adult before providing any waiver. In Indiana, for example, a juvenile *Miranda* waiver requires the participation of (1) a custodial parent, guardian, custodian, or guardian ad litem with no interests adverse to the child; and (2) meaningful consultation between adult and child, both of whom must join in the waiver.¹² The Indiana Supreme Court determined that a male juvenile's confession to murder and robbery was inadmissible because the adult participating on his behalf, his biological father, was not in this case a "custodial parent."¹³

Juvenile offenders often exhibit limited verbal comprehension as a result of both deficient intelligence and low academic achievement.¹⁴ Data on more than 12,000 detainees of the Texas Youth Commission confirmed that juvenile offenders typically function four years below expected achievement levels, and that nearly half have I.Q. test results below 90 (placing them in the lowest 25 percent).¹⁵ Given these cognitive limitations, juvenile offenders have a particularly pressing need for simple, easily understood *Miranda* warnings.

As noted *supra*, one evaluation of 122 juvenile *Miranda* warnings from across the United States found—most unexpectedly—that juvenile *Miranda* warnings tend to be more than 50 words *longer* than those general warnings intended for all age groups.¹⁶ The range was extraordinary: 52 to 526 words for the warning itself, and 64 to 1,020 words for the total *Miranda* material. Additionally, reading levels for the juvenile *Miranda* warnings were actually slightly *higher* than warnings intended for general use. Most striking in this regard was the *Miranda* prong for free legal services, with such passages typically requiring a tenth grade reading level. Because many adolescent offenders have only rudimentary reading skills, one simple test of their reading capacity would be to ask them to read the *Miranda* warning out loud.

The annual charging of more than 115,000 *pre*-teens with criminal offenses poses an even greater challenge to *Miranda* warning comprehension. Even if one were to assume—and this is most unlikely—that most *pre*-teen offenders possess (1) at least average intelligence; (2) no learning disorders or other impairments; and (3) average academic achievement, these children would still be stymied by the typical reading levels for juvenile warnings on three *Miranda* prongs: the right to an attorney (late eighth grade); continuing rights (late eighth grade), and free legal services (early tenth grade).

¹¹ Kimberly Larson, *Improving the "Kangaroo Courts": A Proposal for Reform in Evaluating Juvenile's Waiver of Miranda*, 48 VILLANOVA L. REV. 629-668 (2003).

¹² Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 WISC. L. REV. 431-477 (2006).

¹³ *Stewart v. State*, 754 N.E.2d 492, 494 (2001).

¹⁴ See Timothy M. Houchin & Joshua C. Jones, *Miranda Waiver in a Juvenile*, 36 J. AM. ACAD. PSYCHIATRY & L. 248 (2008); Allison D. Redlich, *Double Jeopardy in the Interrogation Room for Youths with Mental Illness*, 62 AM. PSYCHOL. 609 (2007).

¹⁵ Texas Youth Commission, *Commitment Profile for New Commitments: Fiscal Years 2002-2006* (2006), available at <http://www.tyc.state.tx.us/research/profile.html>.

¹⁶ Rogers et al., *supra* note 6.

The good news is that simple, easily understood *Miranda* warnings are available for juvenile populations.¹⁷ The same study identified *Miranda* warning components that were relatively brief, requiring less than a fourth grade education. With slight word changes (*e.g.*, “lawyer” rather than “counsel”) and simplified sentence structures, one could easily achieve major improvements in understandability.

Practically speaking, constitutional protections are not “protections” at all if they are routinely ignored. In one preceding study, less than one in seven juvenile suspects asserted their *Miranda* rights. For “younger” juveniles (aged 14 and under), the numbers plummet further. Only one in 13 asserted their rights.¹⁸ These results are consistent with earlier research studies and are clearly linked to immaturity and deficient cognitive abilities. In the *Miranda* decision itself, the Court recognized that the defendants in the greatest need were the least likely to avail themselves of constitutional safeguards: “The defendant who does not ask for counsel is the very defendant who most needs counsel.”¹⁹

Conclusion

There may be those who will construe *Miranda* language reform as an overtly defense-oriented initiative, designed to provide a basis for challenging the validity of an individual defendant’s waiver of rights. On the contrary, we assert that *Miranda* language reform will be at least as useful in supporting the legitimacy of a defendant’s *valid* waiver. There is nothing in this Recommendation that seeks to interfere with the broader interrogative context in which waivers are obtained, and social scientists have not identified any evidence that law enforcement have somehow sought to “hide behind” the complexity, inaccurate translation, or lack of uniformity in current *Miranda* warnings. Clinging to legally and scientifically unsound *Miranda* myths will continue to result in unacceptable consequences: the unwarranted confinement of the innocent, and failure to confine the guilty. Clarifying the language of *Miranda* warnings will go a long way toward eliminating outcomes that frustrate legal practitioners and endanger and infuriate the public at large.

Respectfully submitted,
Charles Joseph Hynes
Chair, Criminal Justice Section
February 2010

¹⁷ See, *e.g.*, *State v. Benoit*, 490 A.2d 295 (N.H. 1985), in which the Supreme Court of New Hampshire adopted specific juvenile *Miranda* warning language with a reading skill requirement at approximately the fourth grade level.

¹⁸ Jodi L. Viljoen, Jessica Klaver, & Ronald Roesch, *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys and Appeals*, 29 LAW & HUM. BEHAV. 253-277 (2005).

¹⁹ *Miranda*, *supra* note 1, at 471.

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GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Criminal Justice Section

Submitted By: Joseph Charles Hynes, Chair

1. Summary of Recommendation(s).
The recommendation urges jurisdictions to develop “Miranda” warnings for juveniles subject to custodial interrogation that facilitate their understanding of the same rights and information that is provided to similarly-situated adults.
2. Approval by Submitting Entity.
The recommendation was approved by the Criminal Justice Section Council on November 7, 2009.
3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?
At the 1999 Annual Meeting, the House of Delegates approved the following resolution:
RESOLVED, That the American Bar Association supports the principle that a person subject to custodial interrogation by law enforcement authorities should be fully advised of:
 1. The person’s right to remain silent;
 2. The fact that anything said during questioning can and may be used against that person in a court of law;
 3. The right to consult with an attorney before and during questioning;
 4. The right to the appointment of a lawyer prior to any questioning, if the person cannot afford a lawyer; and
 5. The right to stop talking at any time during questioning.
4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?
See #3, above. The current proposal seeks to ensure that the previously-adopted principle that persons subject to custodial interrogation should be “fully advised” of relevant rights and information applies to juveniles who may not understand such rights and information unless worded in an age-appropriate way.
5. What urgency exists which requires action at this meeting of the House?
In 2007, over 1.5 million persons under 18 years of age were arrested and it is likely that large numbers of juveniles will continue being arrested in the near future. It is critical for their immediate and long-term futures that these juveniles understand their “Miranda rights” to the fullest extent possible.
6. Status of Legislation. (If applicable.)
Not applicable

7. Cost to the Association. (Both direct and indirect costs.)
None
8. Disclosure of Interest. (If applicable.)
No known conflict of interest.
9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)
Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the February 2010 House of Delegates agenda it is being circulated to the following:
 - Governmental Affairs
 - Standing Committee on Legal Aid and Indigent Defendants
 - Judicial Division
 - Litigation Section
 - Individual Rights and Responsibilities Section
 - Family Law Section
 - Science and Technology Section
 - Standing Committee on Legal Aid & Indigent Defendants
 - Coalition for Justice
 - Council on Mental and Physical Disability Law
 - Council on Ethnic and Racial Justice
 - Commission on Gun Violence
 - Commission on Youth at Risk
 - Coalition for Justice
 - Young Lawyers Division/Children and the Law
 - Commission on Domestic Violence
 - Commission on Homelessness and Poverty
10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

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11. Contact Person. (Who will present the report to the House

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EXECUTIVE SUMMARY

A. Summary of Recommendation.

The recommendation calls for jurisdictions to develop “*Miranda*” warnings in wording that facilitates understanding by juveniles subject to custodial interrogation.

B. Issue Recommendation Addresses.

Juveniles as a class are less intellectually developed than adults. When provided the typical *Miranda* warnings given to adults, many juveniles are unable to understand the rights and information that the warnings are intended to convey. This recommendation addresses the issue by calling for *Miranda* warnings in wording written to be understood by the juveniles.

C. How Proposed Policy Will Address the Issue.

The proposed policy will address the issue by increasing awareness of the difficulty that some juveniles have in comprehending their rights even when read the typical *Miranda* warning and encourage alternative language to be drafted and available when juveniles are subject to interrogation.

D. Minority Views or Opposition.

No opposition to this recommendation is known to exist at this time.