

***Miranda and the Law
The Fifth Amendment***

A Legal Update
Sixth Edition

July, 2020

Table of Contents

Robert C. Phillips
Deputy District Attorney (Ret.)
858-395-0302 (C)
RCPhill101@goldenwest.net

This Outline has been prepared and published for the purpose of aiding law enforcement officers, police and private investigators, law enforcement administrators, prosecutors, the judiciary, other attorneys including but not limited to those engaged in the practice of criminal law, students, and legal educators and scholars of any sort, in accessing, using, and understanding the field of *Fifth Amendment self-incrimination* and *Miranda v. Arizona*. As such, permission is expressly granted by the author to the above listed persons, or anyone else, to use, reproduce, cite, and/or employ in the field of law enforcement, education, or instruction, any or all of this Outline, provided the source is properly and correctly identified, and, more importantly, *except* when done for commercial purposes or for personal profit.

The information provided in this Outline is a summary of various aspects of the *Fifth Amendment's Self-Incrimination* privilege, particularly as they apply under the landmark United States Supreme Court case decision of *Miranda v. Arizona*. In many respects, this Outline represents no more than the author's opinions, interpretation and conclusions concerning the various topics discussed. Readers are advised not to rely upon the information provided in this publication without first researching and verifying the legal rules and issues intended to be used. This Outline is *not* intended to be a substitute for the reader's own professional judgment and legal research. The author expressly declines to accept any legal responsibility or liability for a user's failure to properly research and verify the continued validity, expressed conclusions, or correctness, of any of the cases, rules, conclusions, or opinions contained in this Outline. In other words, your use of this Outline is at your own personal risk.

Comments concerning errors, perceived misinterpretations, and/or other suggestions for correcting, expanding, or improving the information provided in this Outline are respectfully solicited, and should be directed to the author.

Robert C. Phillips
Deputy District Attorney (Retired)
RCPhill101@goldenwest.net
858-395-0302

How To Use This Manual: To locate the law or rule on any particular subject of interest to you, it is suggested that you proceed as follows:

- First note the general description of the subject you are looking for under “*Chapter Summary*,” on page iii, below.
- This will guide you to the correct page of the *Table of Contents* under “*Topics*,” beginning on page iv.
- Under “*Topics*,” which is divided by *Chapter*, you will find a more detailed description of the various legal topics and issues.
- This in turn lists for you the specific page number in the expanded outline where you will find the relevant cases and rules on that topic or issue.

Chapter Summary

	Pg.
<i>Outline</i>	1
<i>Chapter 1: The Fifth Amendment and Miranda</i>	2
<i>Chapter 2: Custody</i>	49
<i>Chapter 3: The Custodial Interrogation</i>	104
<i>Chapter 4: Law Enforcement</i>	129
<i>Chapter 5: Lawful Exceptions to the Miranda Rule</i>	138
<i>Chapter 6: The Admonition</i>	190
<i>Chapter 7: Invocation of Rights</i>	233
<i>Chapter 8: Waiver of Rights</i>	323
<i>Chapter 9: Voluntariness After Waiver</i>	373
<i>Chapter 10: Juveniles & Miranda</i>	412
<i>Chapter 11: Public Employees Subject to Administrative Investigations</i>	435
<i>Chapter 12: Evidentiary, Hearsay, and Confrontation Issues, and a Defendant's Statements</i>	441
<i>Chapter 13: Suppression Issues and Procedures</i>	453

Topics

	Pg.
<i>Outline</i>	1
<i>Chapter 1: The Fifth Amendment and Miranda:</i>	2
The Fifth Amendment:	2
The Fifth Amendment	2
Self-Executing:	2
General Rule	2
Exceptions	2
Question: Why Do People Waive their Rights and Incriminate Themselves?	2
The Need for Interrogations	3
The Limitations:	4
Fifth Amendment Self-Incrimination	4
Fifth and Fourteenth Amendment Due Process	5
The “ <i>Miranda</i> Rule:”	5
Pre- <i>Miranda</i> : History and Development of Pre- <i>Miranda</i> Landmark Cases:	5
Early Common Law	5
Pre- <i>Miranda</i> Landmark Cases	6
Voluntariness Becoming the Issue	7
Applicability of the Fifth Amendment to the States:	9
Rule	9
Federal Principles vs. “Independent State Grounds;” Proposition 8:	9
Substantive Rules	9
Procedural Rules	10

Applicability to the Military	10
The Post- <i>Miranda</i> Rule	10
History:	11
The <i>Miranda v. Arizona</i> Case	11
Cases Joined with the <i>Miranda</i> Decision	11
Shared Salient Features	12
Inherent Coerciveness of the Custodial Interrogation:	12
Physical Brutality	12
Psychological Effects	13
Inherent Coerciveness	13
<i>Miranda</i> as a Constitutional Principle:	14
<i>Miranda</i> : “Constitutional” or “Prophylactic” Rule?	14
<i>Dickerson v. United States</i> :	16
Rule Prior to <i>Dickerson</i>	16
Facts	16
Result	17
The Ninth Circuit Court of Appeal	17
What does <i>Dickerson</i> mean?	17
<i>Chavez v. Martinez</i>	17
<i>United States v. Patane</i>	18
Fourteenth Amendment “Due Process”	20
<i>Dickerson</i> ’s Effect upon the Legal Exceptions to <i>Miranda</i>	20

Why Prosecutors and Police Officers Should be Concerned; Applicable Professional and Ethical Standards:	21
General Principles:	21
Prosecutors	21
Law Enforcement Officers	21
Courts' Condemnation of Intentional <i>Miranda</i> Violations:	21
The United States Supreme Court	21
The California Supreme Court	22
The Ninth Circuit's Opinion	23
Other Decisions	23
Legal Effects of <i>Dickerson</i>	24
<i>Miranda</i> Violations as a Due Process Issue:	26
Due Process	26
How does <i>Neal</i> square with <i>Chavez</i> ?	26
Totality of the Circumstances	27
Purposes of <i>Miranda</i>	27
Scope of the <i>Miranda</i> Rule:	31
Limited to Governmental Compulsion	31
Asserting the Privilege In Prior Proceedings	32
Documents:	33
Rule	33
Exceptions:	33
Bank Records	33

Corporations	34
Tax Returns	35
Marijuana Entities	35
Passwords to Electronic Devices	36
Use of Biometric Features In Lieu of Passcodes	37
The “Foregone Conclusion” Doctrine	39
Real and Physical Evidence	42
Burden of Proof	42
Limitations on the Need for <i>Miranda</i>	42
Guarding Against a False Confession	44
<i>Miranda</i> Becoming Routine Practice	45
Incompetence of Counsel	46
Prerequisites to a <i>Miranda</i> Admonishment:	46
The Three Legal Prerequisites:	46
Custody	46
Interrogation	46
Law Enforcement	46
Analyzing the Prerequisites	46
Tactical Advice	47
Chapter 2: Custody:	49
The Non-Custodial Interrogation:	49
Rule	49

The Custodial Interrogation:	50
Definition of “Custody:”	50
Rule	50
Test	50
Case Law	51
Objective vs. Subjective Test	52
Age of a Minor	53
The “Focus of Suspicion” Fiction	54
Factors in Determining Custody:	55
Evaluating the Circumstances	55
Totality of the Circumstances	56
The Ninth Circuit Court of Appeal’s Opinion	58
Witness or Suspect	59
The <i>Gladys R.</i> Questionnaire	60
Location as a Factor:	60
The Suspect’s Home or Place of Business	60
In Public	62
In a Police Car	64
In a Police Station	66
Fourth Amendment Custody vs. Fifth Amendment Custody	68
Burden of Proof	69

Detentions:	69
On-The-Scene Investigations; Investigatory vs. Accusatory Questioning	69
Examples Where “Custody” is Lacking:	71
Traffic Stops	71
Traffic Stops to Investigate Criminal Activity	72
Pre-Arrest Phase of a D.U.I. Stop	72
Investigating a traffic collision	72
Investigations of Criminal Activity	73
Drug Investigations	76
Voluntary Responses	76
Curbstone Lineup Detentions	76
Customs Inspections	76
Deportation Interviews	77
Probation Violations	77
Defendant Registering as a Sex Registrant	77
While Transporting to a Police Station	77
Over the Telephone	79
When Already Lawfully Imprisoned	79
Examples Where “Custody” was Found	79
Detentions vs. Arrests:	80
Indicators of an Arrest:	80
At Gunpoint	80
In Handcuffs	80

Putting the Suspect Into a Patrol Car	80
During an Overwhelming, Excessive Show of Force	80
A Non-Consensual Transportation	81
Reversing the Effects	81
Misdemeanor Citations	82
Consensual Encounters	82
Grand Jury Proceedings	83
The “ <i>Beheler</i> Admonishment;” or Taking the “Custody” Out of An Interrogation:	83
The <i>Beheler</i> Interrogation Tactic	83
Effects on the Custody Issue	84
Factors	84
Appellate Authority	85
Exceptions	89
Practice Notes	91
Removing the Indicia of an Arrest	92
<i>Miranda</i> Invocations by the Out-of-Custody Suspect:	93
Issue	93
Rule	93
<i>Miranda</i> and the Jail Inmate:	94
General Rule	94
Recent Trend	94
Factors	96
Examples	97

Prison/jail Witnesses	101
The “ <i>Beheler</i> Admonishment” in the Jail Setting:	101
Interrogation Tactic	101
In the Jail Context	102
During Wiretaps:	102
Rule	102
During Telephone Interviews:	102
Rule	102
Cases	103
On Appeal	103
<i>Chapter 3: The Custodial Interrogation:</i>	104
Interrogations:	104
Rule	104
Definition	104
Limitations	105
Interrogation vs. Interview:	106
Use and Purpose	106
The Reid Interrogation Technique:	106
John E. Reid & Associates	106
Under the Reid Technique	107
Further Criticism	108
When Not to Interrogate:	109
Specialization Required	109

Combative Subjects	109
Exception; Juveniles	109
Interrogation vs. Questioning	109
Non-Custodial Conversations	110
The “Functional Equivalent” of an Interrogation:	111
Definition	111
Factors	111
Examples	112
Examples of No Interrogation	112
Functional Equivalent-Related Issues:	114
DUI (or DWI) Cases	114
Consent to Search	115
Gang Affiliation Questions	116
Booking Questions	116
Brief Informational Questions	116
Reverse Lineups	118
Wiretaps	119
During Civil Proceedings	119
Questioning as a Witness	119
Volunteered Statements:	120
Rule	120
Examples	121
After Already Invoking	122

Recording Interrogations:	123
General Rule	123
Other States	124
Murder Suspects, per P.C. § 859.5:	124
Pen. Code § 859.5	124
Case Law	128
Chapter 4: Law Enforcement:	129
Law Enforcement and Agents of Law Enforcement:	129
Rule	129
Who is Law Enforcement or Agents of Law Enforcement?	129
Peace officers	129
Agents of Law Enforcement	129
Probation Officers	131
Parole Officers	132
Private Citizens and other Non-Law Enforcement:	133
Rule	133
Examples of non-law enforcement:	133
A Privately Employed Fire Investigator	133
High School Principal	133
Family Physician	133
Hospital Security Guard	133
News Reporter	133
A Doctor	133

An Emergency Room Physician	133
A Prosecution Psychiatrist	133
Foreign Officials	134
Victim of a Crime	134
Store Security Guards	134
The Defendant's Employer	134
Group Supervisor at Juvenile Hall	134
Social Worker	134
Bounty Hunters	135
An Off-Duty Law Enforcement Officer	135
Parent of the Minor Suspect	135
Foreign Officials	136
Other Instances of Questioning by Non-Law Enforcement	136
While on Supervised Release	136
Indian Tribes	137
Exception: Involuntary Statements	137
<i>Chapter 5: Lawful Exceptions to the Miranda Rule:</i>	138
Exceptions to <i>Miranda</i>	138
Impeachment:	138
Rule	138
The Issue of the Intentional <i>Miranda</i> Violation	139
The Issue of Coercion:	141
Rule	141

What is Coercion?	142
No Coercion	142
Interrogations with Physical, Mental, or Psychological Coercion	143
Intentional Violations with Misleading or Minimal Pressure	144
No Duty of the Court to Instruct	146
The “Widespread Police Departmental Policy and Training” Issue	146
Exceptions to the “Coercion” Rule	148
Fruit of the Poisonous Tree:	149
Rule	149
Examples	150
Exception; Unlawfully Induced Testimony	151
California Rule	151
Other Jurisdictions	152
<i>Dickerson v. United States</i> and the Fruit of the Poisonous Tree Doctrine	152
Statements in Violation of <i>Miranda</i> as Probable Cause in a Search Warrant Affidavit	154
Statements in Violation of <i>Miranda</i> as Probable Cause to Arrest	154
Statements in Violation of <i>Miranda</i> used to Establish Consent to Search	154
Statements in Violation of <i>Miranda</i> used to Revoke Parole or Probation	154
Public Safety Exception:	154
Rule	154
Test	155
Examples:	155
Firearms and Other Weapons	155

Officers' Safety	156
Defendant's Safety	157
Booking Questions	158
Other Instances	158
Before or After an Invocation	159
Exceptions	159
Irrelevancy of The Intent of the Officer	160
Continuing Validity	160
Rescue Doctrine:	160
Rule	160
Test	160
Time Parameters of the Rule	161
Before or After an Invocation	161
Subject Reinitiates Questioning:	162
Rule	162
Limitations	162
Continued Applicability after <i>Dickerson</i>	163
The Need for a New Admonishment and Waiver	163
Scope of the Rule	165
Examples where Reinitiation Upheld	165
Example where Reinitiation Not Upheld	166
Subject Released from Custody:	167
Rule	167

Limitation: The 14-Day Rule	168
Subject Invoked his “Right to Remain Silent” Only:	169
Rule	169
As to a Different Case	169
As to the Same Case:	169
Relevant Cases	170
Factors	171
Limitations	172
An Anticipatory Invocation:	173
Rule	173
Case Law	174
Limitation	175
Counsel is Present:	175
Rule	175
Routine Booking Questions:	176
Rule	176
Case Law	176
Factors	178
Responses to Booking Questions Upheld	179
Limitation; Gang Affiliation	181
Collection of Physical, Verbal (Non-Testimonial) or Visual Evidence Not Prevented by the Fifth Amendment:	184
Rule	184

Examples:	184
Blood Samples	184
Urine Samples	185
Handwriting Exemplars	185
Live Lineups, Wearing Certain Clothing and Repeating Phrases	185
Repeat Words or Phrases	185
Read Aloud from a Wiretap Transcript	185
Trying on Clothing	185
Putting on a Stocking Mask	185
Wear a Fake Goatee	185
Shaving his Beard and/or Mustache	185
Completing a Voice Exemplar	185
Reenacting a Robbery	185
Standing and Giving His Name in Court	185
Giving Consent to Search	185
Tax and Corporate Records	186
Bank Records	186
Hit and Run Statutes	186
Being Required to Incriminate Oneself as a Probation or Parole Condition; Split of Authority	186
Questioning by an Undercover Police Officer or Agent:	187
Rule	187
Limitations:	188
Under the Fifth Amendment	188

Under the Sixth Amendment	188
Chapter 6: The Admonition:	190
<i>Miranda</i> 's Pre-Interrogation Admonition and Waiver Requirement:	190
Rule	190
The Necessity of Custody	190
The Necessity of an Interrogation	190
Exceptions to Necessity of an Admonition	191
Form of the Admonition:	191
Four Distinct Rights	191
No Specific Wording Required	191
Suggested Wording	192
Providing an Attorney	193
Advisements That Have Fallen Short	194
Advisements That Have Been Upheld	196
When Combined with Other Admonishments	198
Discouraging an Invocation	199
Foreign Language Advisements	201
Admonishing From "The Card"	203
Defendant's Awareness of his Rights Prior to Advisal	203
Successive Admonishments:	203
Need to Readmonish in Successive Interrogations	203
Factors	205
Different Crimes	205

Defective Admonishment Following Proper Admonishment	206
Subject Has His Rights in Mind	206
Where Readmonishment Held to be Necessary	208
Questioning by Different Sovereigns	208
Suggested Tactics	208
Relevance of Defendant’s Prior Knowledge:	209
Defendant’s Awareness of the Charges Prior to Advisal	209
Defendant’s Awareness of the Legal or Penal Consequences of the Charges	210
Effects of <i>Miranda</i> Violation on a later valid Admonition and Waiver:	210
Rule	210
The Rule of <i>Elstad</i> Debated	211
The “Two-Step Interrogation” Tactic; the Rule of <i>Missouri v. Seibert</i> :	212
<i>Elstad</i> Limited to its Facts	212
Factors	213
Case Law Where <i>Seibert</i> Held to be Applicable	213
Case Law Where <i>Seibert</i> Held Not to be Applicable	214
Case Law Where a <i>Seibert</i> Issue was Left Undecided	216
Curing a <i>Seibert</i> Violation	216
California’s Former “Presumptive Invalidity” Rule	216
Use of an Undercover Police Agent:	217
Issue	217
Rule	217
Examples	217

Where the Defendant has Already Invoked	224
The Sixth Amendment	229
Pretext Telephone Calls in the <i>Miranda</i> Context:	230
Rule	230
Case Law	230
Chapter 7: Invocation of Rights:	233
Defendant’s Invocation of Rights Under the Fifth Amendment and <i>Miranda</i> :	233
Rights Available to Invoke:	233
Right Not to Incriminate Oneself	233
Right to the Assistance of an Attorney Before and During Questioning	233
Statutory Protections:	233
Evid. Code § 930	233
Evid. Code § 940	233
General Rule	233
The Fifth Amendment Self-Incrimination vs. Fifth Amendment Right to Counsel:	234
The “Fifth Amendment Right to Remain Silent”	234
The “Fifth Amendment Right to Counsel”	234
Legal Effects of Each:	234
Fifth Amendment Right to Remain Silent	234
Fifth Amendment Right to an Attorney	235
Did the Suspect Invoke?	237
Rule	237
Interpreting the Response	237

No Invocation; Examples	238
Invocation; Examples	241
Problem: Requests to Turn Off the Tape Recorder	243
Talking a Suspect Out of Invoking His Rights	244
Query: Does it Make a Difference?	245
The Current Rule	245
Invocations Upon the Initial (or Prior to) Admonishment of Rights:	246
Rule:	246
Right to Remain Silent	246
Right to the Assistance of Counsel	247
Legally Effective Invocations to Right to Remain Silent	247
Legally Ineffective Equivocal Invocations to Right to Remain Silent	248
Legally Effective Invocations to Right to the Assistance of Counsel	248
Legally Ineffective Equivocal Invocations to Right to the Assistance of Counsel	249
Seeking Clarification of Ambiguous Invocation Made at Initiation of the Interrogation:	252
Rule	252
Ambiguity as a Precedent	253
Invocations After an Initial Waiver and During an Interrogation:	255
Rule	255
Legally Effective Invocations to Right to Remain Silent	256
Legally Ineffective Equivocal Invocations to Right to Remain Silent	257
Legally Effective Invocations to Right to the Assistance of Counsel	258

Legally Ineffective Equivocal Invocations to the Assistance of Counsel	259
No Duty to Seek Clarification of Ambiguous Invocations Made Mid-Interrogation	262
Argument that Ambiguous Invocations are Legally Insufficient Only After an Initial Waiver:	263
Apparent Rule	263
Examples	263
The United States Supreme Court	265
Miscellaneous Invocation Rules:	266
The “Reasonable Officer” Test	266
Anticipatory Invocations	267
Selective Invocations	268
Juveniles:	269
Rule	269
Reinitiation of Interrogation:	270
Reinitiation of an Interrogation by the Police After an Invocation of the Right to Silence:	270
Rule	270
Reinitiation of an Interrogation by Police After a <i>Miranda</i> Invocation of the Right to the Assistance of Counsel:	270
Rule	270
Why a different rule?	272
Different Offense	272
How Long is Forever?	272

Reinitiation of an Interrogation by the Defendant:	274
Rule	274
Limitation:	275
Rule	275
Law Enforcement Encouragement to Reinitiate	276
Decision Clearly and Unequivocally Indicated	279
After Defendant is Arraigned; Sixth Amendment	280
Burden of Proof	280
Defendant’s Invocation as Evidence of Guilt:	281
Rule	281
Case Law	282
<i>Miranda</i> For “Use as a Shield; Not a Sword”	283
On Appeal	285
The Inadmissibility of Words of Invocation:	285
Rule	285
Case Law	286
Defendant’s Invocation as Evidence of Sanity:	287
Rule	287
Exception for Mental Competence Hearing	287
On Appeal	287
Invocation as a Violation of Probation or Parole:	288
Rule	288
Case Law	288

Invocation during Civil Proceedings:	290
Rule	290
Determining Applicability of the Privilege	290
Invocation by a Witness in a Criminal Case:	290
Rule:	290
Evid. Code § 940	290
Evid. Code § 404	291
Case Law	291
Immunity	292
Defense Attorney’s Intervention:	293
Rule	293
Sixth Amendment Right to Counsel	293
Fifth Amendment Implied Right to Counsel	294
Notification to Defense Counsel	294
Defendant’s Refusal To Testify under the Fifth Amendment:	295
Rule	295
Defendant's Refusal to Testify as Evidence of Guilt	295
Testifying Defendant’s Refusal to Submit to Cross-Examination	296
Jury Instructions	297
Comment to the Jury; “ <i>Griffin</i> Error:”	298
Rule	298
Case Law	298
References to Evidence That Only Defendant Could Refute or Contradict	300

Harmless Error	301
Exception: Comments on the Evidence	304
Comments by a Witness	307
When Defendant Does Testify	307
Defendant’s Concurrent Right to Testify:	308
Rule	308
Admonishment by the Court to Self-Represented Defendants:	310
Old Rule	310
New Rule	310
No Privilege to Lie	310
Defendant’s Pre-Trial Silence as Substantive Evidence of Guilt or for Purposes of Impeachment:	311
Rule	311
Issue: Failure to Offer Excuse, Alibi or Defense when Accused of Crime	311
<i>Doyle</i> Error:	311
As Impeachment Evidence:	312
Pre-Arrest Silence, Before a <i>Miranda</i> Admonishment	312
Post-Arrest Silence, but Before a <i>Miranda</i> Admonishment is Given	313
Post-Arrest Silence, After a <i>Miranda</i> Admonishment	313
Post-Arrest Silence, After a <i>Miranda</i> Admonishment, In the Face of an Accusation Made by Non-Law Enforcement	315
Post-Arrest, After Admonishment and Waiver, a Selective Refusal to Answer Questions	316
Impeachment by Cross-Examination or Rebuttal Evidence	317

As Substantive Evidence of Guilt:	317
Pre-Arrest and Pre- <i>Miranda</i> Admonishment	317
Post-arrest, Pre-Admonishment	319
Post-Arrest, After Invocation	320
Post-Arrest, After Waiver	321
At Sentencing, When Used in a Subsequent Case as Proof of Defendant’s Prior Conviction	321
<i>Doyle</i> Error on Appeal	321
Chapter 8: Waiver of Rights:	323
Waiver and Expiration of Fifth Amendment Rights:	323
Express (or Implied) Waiver	323
In-Court Waiver:	323
Through Testimony	323
By “Tendering an Issue”	325
Upon a Plea or Verdict of Guilty	327
Expiration:	327
Upon Exhaustion of Appeal	327
Upon Running of the Statute of Limitations	327
Immunity:	327
Rule	327
Penal Code § 1324:	328
Transactional immunity	328
Use Immunity	328
Compelled Use Immunity	329

Standing	329
Case Law	330
Other Statutory Immunity Provisions	330
Induced Waivers:	331
Rule	331
Examples	331
Waiver as a Condition of Probation	333
Express (or Implied) Waivers:	334
Rule	334
Burden of Proof	334
Waiver vs. Invocation of Rights	335
Two Components:	336
Voluntariness	336
Knowing and Intelligent Waiver	337
General Rules	337
Factors	338
Understanding The Rights:	338
Rule	338
Impediments to Understanding the <i>Miranda</i> Rights:	340
Drugs and Alcohol	340
Mental Impediments:	342
General Rules	342
Requirement of Coercive Police Conduct	342

Youth and/or Inexperience	343
Low Intelligence	344
Brain Damage	346
Mental Illness	346
Drug Influence	347
Sleep Deprivation	348
Education	348
Physical Injuries:	348
Gunshot wounds:	348
Statements Admissible	348
Statements Inadmissible	348
Issue Not Decided	349
Other Injuries	350
Language Difficulties	350
Understanding the Subject Matter of the Interrogation	354
Understanding the Charges	354
Expert Testimony	355
Necessity of a Court Hearing	355
Voluntariness Issues:	355
Rule	355
Voluntariness; Before vs. After Waiver	356
Necessity of a Free, Voluntary, and Intelligent Waiver	357
Legal Effect of Pre-Admonishment Discussions	361

Grumbling Waivers:	362
Waiver	362
No Waiver	362
Conditional and Selective Waivers	363
Use of a “False Friend” to Extract a Confession	363
Express v. Implied Waivers:	364
Issue	364
General Rule	365
The Problem	366
Recent Trends	366
Caution Advised	369
On Appeal	370
Conclusion	371
<i>Chapter 9: Voluntariness After Waiver:</i>	373
Coercive Interrogations:	373
Rule	373
Case Law	374
Coercive Psychological Ploys	379
Reasons for Excluding Coerced Confessions	379
Other Products of Coerced Confessions	380
Test	380
Burden of Proof	380
Factors	380

Causation	382
Due Process	383
On Appeal	384
Specific Issues Affecting Voluntariness:	385
General Rule	385
Issues:	385
Administration of Drugs or Use of a “Truth Serum”	385
Alcohol	385
Mental State of the Defendant	385
Threats	386
Threats to Others	388
Offers of Leniency:	389
Rule	389
Impermissible Offers of Leniency	391
Held Not to be an Offer of Leniency	392
Offers of Leniency for the Benefit of a Third Persons	396
Causation Requirement	398
Misrepresentations (Ruse or Subterfuge) Made to the Suspect:	401
General Rule	401
Case Law	401
Rule Criticized	404
Practice Note: The Public Trust	405

Reverse Lineups	405
Religion:	406
Rule	406
Where Use of Religion was Held to be Improper	406
Where Use of Religion was Excused	406
Length of the Interrogation:	407
Rule	407
Where Held Not to be Unduly Coercive	407
Where Held to be Unduly Coercive	408
Violation of the Law Enforcement Agency’s Written Policies	408
Combination of Improper Interrogative Techniques	408
Acceptable Interrogative Techniques:	409
Explanations of the Defendant’s Legal Status	409
Admonishments to Tell the Truth	410
Other Inducements	410
Chapter 10: Juveniles & Miranda:	412
<i>Miranda</i> Protections as They Relate to Juveniles:	412
General Rule	412
Juveniles and False Confessions:	412
The Problem	412
Coercive Interrogative Tactics	415
Coercive Interrogative Tactics Not Found	417
California’s Solution	418

Waiver vs. Invocation of Rights:	418
General Rule	418
Factors to Consider	418
Case Law	419
Miscellaneous Issues Unique to Juveniles:	420
Requesting an Adult’s Assistance:	420
Rule	420
The Legal Consequences of a Parent’s Presence:	421
Effect of a Parent’s Presence at an Interrogation	421
Parent as a De Facto Agent of Law Enforcement	422
Conflict of Interest	422
A Parent’s Attempt to Invoke for a Minor	423
Interviewing a Child Victim on a School Campus Without the Parents’ Consent	424
Need for a Clear and Unequivocal Invocation After a Prior Waiver	425
W&I § 707 Fitness Hearings As a Prerequisite to being Tried as an Adult	425
Statutory Protections:	425
W&I Code § 625; Reading A Juvenile His <i>Miranda</i> Rights	425
Minors Age 15 Years and Younger, and Mandatory Attorney Consultations:	427
Welf. & Inst. § 625.6 427	
The Legislature’s Reasoning	429
Case Law	430
Pen. Code § 859.5(a) and Welf. & Inst. Code § 626.8; Recording Requirements	430

Pen. Code § 26; Capacity to Commit a Crime for a Minor Under the Age of 14	430
Custody of a Juvenile:	431
Problem	431
The Juvenile’s Age	431
The <i>Gladys R.</i> Inquiry	431
Use of a <i>Beheler</i> Admonishment	431
Statutory Recording Requirements for Juveniles:	432
P.C. § 859.5(a); Recording Requirements of a Minor’s Interrogation	432
Welf. & Inst. Code § 626.8; Recording Interrogations of Minors	434
<i>Chapter 11: Public Employees Subject to Administrative Investigations:</i>	435
Coerced Statements from Public Employees:	435
Rule	435
Case Law	435
Applicable Statutes:	437
Gov’t. Code § 3253(e)(1): Immunity for a Firefighter	437
Gov’t. Code § 3303(f): Inadmissibility in a Civil Action for a Police Officer	437
Gov’t. Code, § 3304: Forbidding Punitive Action for Police Officers	437
Gov’t. Code § 18676: Immunity for a Witness in a Civil Service Hearing	437
Gov’t. Code § 18677: Immunity from Prosecution	438
Gov’t. Code § 83119: Transactional Immunity for Fair Political Practices Commission Witnesses	438
Corp. Code § 25531(e): Transactional Immunity for Witnesses Before the Corporations Commissioner in a Securities Fraud Investigation	438

P.C. § 1324: Prosecutors’ Request for Judicial Immunity in Felony Cases	438
Examples	438
Exceptions:	439
No Threatened Termination	439
Promises of Immunity	440
<i>Chapter 12: Evidentiary, Hearsay, and Confrontation Issues, and a Defendant’s Statements:</i>	441
On Appeal	441
The “Corpus Delicti” Rule:	441
Prerequisite of a “Prima Facie” Case	441
California Rule	443
Admissibility of Statements After Corpus Delicti Established	445
Not Part of the Corpus Delicti:	445
The Identity of the Offender	445
An H&S § 11379 Enhancement	445
Identity of the Perpetrator, Degree of the Crime, or Penalty Enhancements	446
Admissibility of Uncharged Conduct	446
Extrajudicial Statements that Constitute the Crime Itself	446
A Felony-Based Special Circumstance	446
Examples	446
Court’s Duty to Instruct Jury	447

Evidentiary Uses of Defendant’s Statements:	447
To Prove the Identity of the Defendant as the Perpetrator	447
To Prove the Degree of the Charged Offense	447
To Prove the Degree of a Homicide or Felony Murder	447
To Prove Guilt by Inference	447
To Prove the Elements of a Prior Strike Conviction	448
The Court’s Duty to Instruct	448
Admissibility in Evidence of a Defendant’s Statements:	448
Relevant Definitions:	448
Evid. Code § 140: Evidence	448
Evid. Code § 225: Statement	448
Evid. Code § 250: Writing	449
Statutory Presumptions:	449
Evid. Code § 1552: A Printed Representation of Computer Information or a Computer Program	449
Evid. Code § 1553: A Printed Representation of Images Stored on a Video or Digital Medium	449
Hearsay Issues:	449
The Hearsay Rule:	449
Evid. Code § 1200(a): Hearsay Evidence	449
Evid. Code § 1200(b): Inadmissibility of Hearsay Evidence	449
Relevant Exceptions:	449
Evid. Code § 1220: Party Admission Exception	449
Evid. Code § 1221: Adoptive Admissions	450

Evid. Code § 1222: Authorized Admissions	450
Evid. Code § 1223: Admissions of a Coconspirator	450
Evid. Code § 1291: Former Testimony	451
Evid. Code § 771: Past Recollection Refreshed	451
Evid. Code § 1230: Declaration Against Penal Interest	451
Evid. Code § 1237: Past Recollection Recorded	451
Admissibility of Defendant’s Oral Declarations	451
Federal Extradition Proceedings:	452
Admissibility of Third Party Hearsay Statements Obtained by Torture	452
<i>Chapter 13: Suppression Issues and Procedures:</i>	453
<i>Miranda</i> Violations:	453
Summary	453
Results	453
Procedural Issues:	454
Federal Standards to be Used	454
California Rules: In Limine Motions Heard by the Trial Court	454
Statutory “Motion to Suppress Evidence” for Fourth Amendment Issues Only	455
Federal Court Rules:	455
18 U.S.C. § 3501: Hearing Out of the Jury’s Presence	455
Retroactivity	455
Procedure on Appeal	456

Standing:	456
Rules:	456
Another Person’s <i>Miranda</i> Violation	456
Products of Another’s <i>Miranda</i> Violation	457
A Third Person’s Involuntary, Coerced Statements	457
Products of Another’s Coerced Statements	457
Corporations	458
Suppression Issues:	458
Suppressed Statements:	458
Statements Subject to Suppression:	458
Complete Confessions	458
Admissions	458
Inculpatory Statements	458
Exculpatory Statements	458
Knowing and Intelligent Waiver as a Prerequisite to Admissibility	458
<i>Miranda</i> Violations: Statements Inadmissible in the People’s Case-in-Chief:	459
Rule	459
Exception: Statements Offered for Purposes of Impeachment	459
Exception #1 to Impeachment Exception: Involuntary or Coerced Statements	459
Exception #2 to Impeachment Exception: Defendant’s Illegally Obtained Statements Offered to Impeach a Defense Witness	459
Exception #3 to Impeachment Exception: Defendant’s Illegally Induced Testimony	460

Fruit of the Poisonous Tree Doctrine:	461
Rule	461
Statements in Violation of <i>Miranda</i> as Probable Cause in a Search Warrant Affidavit	461
Statements in Violation of <i>Miranda</i> as Probable Cause to Arrest	461
Statements in Violation of <i>Miranda</i> used to Establish Consent to Search	462
Statements in Violation of <i>Miranda</i> Used to Violate Parole or Probation	462
Statements Obtained as the Product of an Illegal Detention or Arrest:	462
Rule	462
Effect of Intervening Factors:	463
Attenuation of the Taint	463
Causal Chain of Events	463
The Public Safety Exception	464
Effect of an Intervening <i>Miranda</i> Admonishment	464
Statements Obtained as the Product of an Illegal Search:	465
Rule	465
Exceptions to the Non-Admissibility of Statements or Evidence Seized as a Product of a Fourth Amendment (Detention, Arrest, or Search) Violation:	465
As Impeachment Evidence	465
Where the Taint is Purged	466
Where Law Enforcement's Illegal Act is Not Exploited	466
A Knock and Notice Violation	467
Products of a Breach of a Statutory Privilege:	468
General Rule	468

Exception	468
Other Suppression Issues:	468
Statements Made to Third Persons and/or at Prior Hearings, Used for Impeachment:	468
Statements Made to Psychotherapists	469
Statements Made to a Probation Officer	470
Other Hearings	470
During Plea Negotiations	472
Statements Admissible at Other Hearings:	473
Civil Proceedings	473
Where Sanity is at Issue	474
Deportation Hearings	475
Parole Revocation Hearings	476
Probation Revocation Hearings	476
Mental Competence Jury Trial, per P.C. § 1368	477
Mentally Retarded Determinations, per W&I § 6500.1	477
State Bar Proceedings	477
Mentally Disordered Offender Hearings	477
The Lanterman-Petris-Short Act, per W&I §§ 5000-5550	478
Writ of Habeas Corpus Hearings	478
Foreign Criminal Proceedings	478
Interrogations by Foreign Officials	478

Right Against Self-Incrimination at Sanity Commitment Extension Hearings, per P.C. § 1026.5(a) and W&I §§ 1800 to 1803:	479
Sanity Commitment Extension Hearings	479
Sexually Violent Predator Hearings	480
Mentally Disordered Offender Hearings	481
Military Investigations and Hearings	481
Statements Taken During a Delay in Arraignment:	482
California Rule (P.C. §§ 821, 825)	482
Federal Rule (18 U.S.C. § 3501(c)):	483
The <i>McNabb-Mallory</i> Rule	483
18 U.S.C. § 3501(c); Safe Harbor Act	484
Exceptions	484
Other Case Law Applying the Rule	486
Statements Obtained from a Foreign National; The Vienna Convention & P.C. § 834c(a)(1):	487
Vienna Convention on Consular Relations	487
Advisal of Rights Made to Arrestee/Detainee	487
Standing	489
Automatic Notice to Foreign Country	489
Sanctions for Violations	489
Polygraph Tests and Results:	493
Rule	493
Sixth Amendment Right to Counsel:	494
The Sixth Amendment	494

