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To Remain Silent

Navigating the minefield of custodial interrogations.

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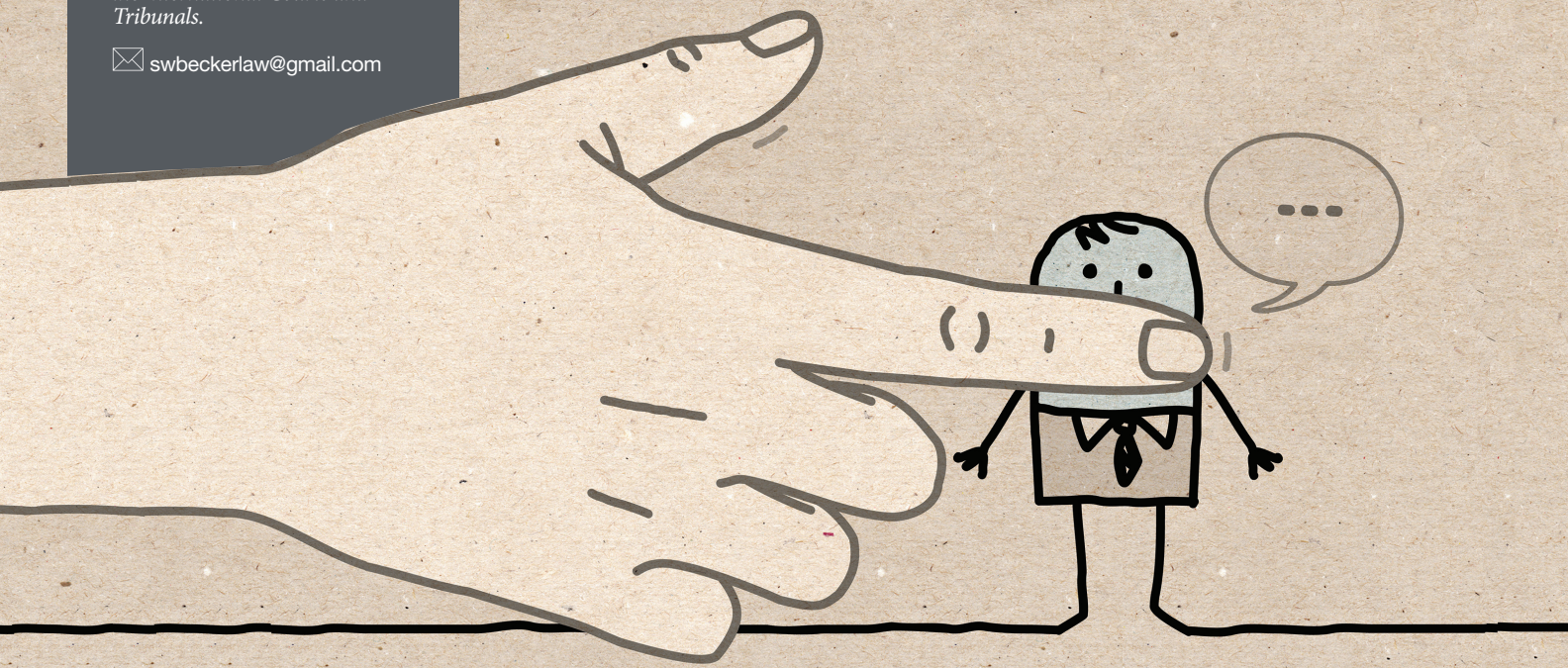
FOR A PROSECUTOR, FEW THINGS RIVAL A DEFENDANT'S CONFESSION TO A CRIME. Although eyewitnesses stumble on the stand and circumstantial evidence withers under defense counsel's scrutiny, a recorded confession is nearly unassailable. Prosecutions thus often hinge on what was said during an interrogation.

Following the chaos of an arrest, the interrogation room is comparatively serene. But the tension is no less. Under pressure to quickly determine the culprit, authorities engage in a cat-and-mouse game with suspects, hoping to pounce before they "lawyer up." This can lead an unscrupulous officer to cut corners. It is especially tempting when a suspect is initially talkative with law enforcement but then seeks a lawyer. Believing to be on the cusp of incriminating information, authorities want the conversation to continue. But state and federal law forbids it. And while a relentless pursuit may pay dividends if a confession is obtained, the victory will prove pyrrhic if the constitutional violation imperils the case.

The Fifth Amendment to the U.S. Constitution prohibits forced confessions. The nucleus of this bulwark against tyranny is the accused's right to counsel, which the U.S. Supreme Court deems "indispensable."[1] Counsel serves to alleviate the coercive pressures that permeate

1. *Miranda v. Arizona*, 384 U.S. 436, 469 (1966).



ISBA RESOURCES >>

- Emily L. Fitch & Brenda M. (Duke) Mathis, *What Did You Say?! The Changing Landscape of Juvenile Custodial Interrogations*, 107 Ill. B.J. 32 (June 2019), law.isba.org/30wapYa.
- Ed Finkel, *Are We Making Murderers? False Confessions and Coercive Interrogation*, 104 Ill. B.J. 22 (Apr. 2016), law.isba.org/3Ti7tKz.
- ISBA, For the Public, *Your Guide to Your Rights if Arrested*, law.isba.org/3wo8ze0.

custody. Yet despite the importance of the right to counsel, what constitutes its proper invocation is elusive. This fact-specific issue thus precludes a rigid approach that frustrates detectives, suspects, and judges alike.

Another challenge for courts is the inherent tension between an accused's fundamental rights and the government's compelling interest in solving crime. Given the gravity of these competing interests, along with the amorphous nature of interrogations, reasonable minds will differ, as a series of recent Illinois Appellate Court reversals reflects. This article identifies the federal and state law principles underlying the admissibility of custodial statements, a new Illinois statute that provides clarity for authorities and suspects, and the latest decisions grappling with this issue. The aim is to assist both sides of the criminal bar in advising their respective clients on the rigors of custodial interrogation.

The prohibition on involuntary statements

Once suspects are taken into custody, which occurs when their freedom is limited to a degree associated with formal arrest, officers must inform them of their right to remain silent and to have counsel before questioning. That is the legacy of *Miranda v. Arizona*, where the U.S. Supreme Court held the Fifth Amendment guarantees suspects' right to silence and counsel during custodial interrogation.[2] Custody and interrogation are a potent duo that "subjugate the individual to the will of his examiner."[3] Similarly, the isolation of custody can make an accused more susceptible to talk. This pressure is so powerful that it causes some "to confess to crimes they never committed."[4]

Thus, if a suspect does not want to talk, there can be no questioning. If a suspect requests counsel, the interrogation cannot begin until counsel arrives. Ignoring these rules will result in any statement obtained after suspects assert their rights to be "the product of compulsion."[5] A conviction founded in whole or in part on an involuntary statement violates due process under the U.S. and Illinois constitutions.[6]

Invoking the right to counsel

Miranda rights are not automatic—the accused must assert them. But not all invocations of counsel are created equal. If a suspect's statement about an attorney is vague such that a reasonable officer would understand only that the suspect might be raising the right to counsel, questioning can proceed. The test is whether the statement conveys "a certain and present desire to consult with counsel."[7] The U.S. Seventh Circuit Court of Appeals has found that desire established by the following verbiage:

- "Can you call my attorney?"[8]
- "I mean, but can I call one now?"[9]

2. *Id.* at 479.
3. *Id.* at 457.
4. *Corley v. United States*, 556 U.S. 303, 321 (2009).
5. *Miranda*, 384 U.S. at 457.
6. *Jackson v. Denno*, 378 U.S. 368, 376 (1964); U.S. Const., amend. XIV; Ill. Const. 1970, art. 1 § 2.
7. *United States v. Hunter*, 708 F.3d 938, 942 (7th Cir. 2013).
8. *Id.* at 943-44.
9. *United States v. Wysinger*, 683 F.3d 784, 790-91 (7th Cir. 2012).

TAKEAWAYS >>

• Relying on an ill-gotten confession will squander significant time and resources while possibly foregoing other evidence and suspects. Moreover, statements extracted through coercion are of questionable validity.

• Effective Jan. 1, 2022, Illinois suspects in custody have the right to communicate with counsel and family members via three phone calls. Diverging with federal requirements, such communications must occur within three hours after arrival at the first place of custody.

• Defense attorneys should continue to advise prospective clients to ask for a lawyer and stay quiet, a right that is as indispensable as it is disregarded. Attorneys also should be familiar with the nuanced differences between admissible statements in federal and state courts.

WHEN A DEFENDANT INVOKES THE RIGHT TO COUNSEL AND IS LATER INTERROGATED WITHOUT COUNSEL, ILLINOIS COURTS EMPLOY A TWO-STEP ANALYSIS TO DETERMINE THE ADMISSIBILITY OF ANY STATEMENTS OBTAINED.

- "I'd rather talk to an attorney first."[10]

In contrast, the following remarks are too ambiguous or equivocal:

- "Maybe I should talk to a lawyer."[11]
- "I think I need a lawyer, I don't know, but I want to cooperate and talk."[12]
- "Am I going to be able to get an attorney?"[13]

Any hesitation or uncertainty will thus hinder later efforts to claim a statement violates *Miranda*. Courts will also treat a limited invocation as such. For example, a defendant refused to sign a written confession until his attorney came but was willing to verbally incriminate himself.[14] The Supreme Court admitted the oral confession because nothing requires authorities "to ignore the tenor or sense of a defendant's response" to *Miranda* warnings.[15] While a written statement would have been barred, it was consistent with the Fifth Amendment for officers to use the opportunity the defendant provided to secure an oral confession. Similarly, declining to answer questions about a certain subject matter, offense, or timeframe will not foreclose all questioning.

Adjudicating the admissibility of custodial statements

Federal and state law vary on the admissibility of custodial statements, so practitioners should be aware of the nuances. An incriminating statement is presumed voluntary under federal law unless connected to coercive police conduct.[16] The standard is less stringent in Illinois, which recognizes that an incriminating statement may be involuntary without police misconduct based only on the defendant's characteristics.[17] This contrast aside, Illinois and federal courts use a totality-of-the-circumstances test in deciding to admit a custodial statement.

As for procedure, Illinois law entitles a defendant alleging a forced confession to an evidentiary hearing. The prosecution must prove by a preponderance of the evidence that the statement was voluntary.[18] When a defendant invokes the right to counsel and is later interrogated without counsel, Illinois courts employ a two-step analysis to determine the admissibility of any statements obtained.[19] First, who initiated the discussion? If police-initiated, the inquiry ends as any statements are barred. If the suspect starts the dialogue, courts will examine the substance—a suspect's comments about routine incidents of the custodial relationship will generally not suffice. The suspect must instead display a willingness for a generalized discussion about the investigation. When this standard is met, the court proceeds to the next step: whether, under the totality of the circumstances, the suspect knowingly and intelligently waived their right to counsel.[20] Courts consider the defendant's age, experience, mental capacity, and physical condition, along with the legality and duration of the detention. Threats or promises by officers are also relevant.[21]

Similarly, the prosecution in federal court must prove by a preponderance of the evidence that the statement was voluntary.[22] Federal courts also examine whether the suspect initiated the discussion and knowingly waived the prior invocation of counsel.[23] In *Edwards v. Arizona*, the U.S. Supreme Court held an invocation of counsel could not be waived because the defendant later responded to police-initiated questions.[24] *Edwards* was reaffirmed in *Maryland v. Shatzner*, where the Court explained that once a suspect declines to undergo questioning without counsel, any subsequent waiver coming at the authorities' behest is presumed involuntary.[25] This presumption ensures the government will not exploit the coercive pressures of custody by repeatedly attempting to question a suspect until they are "badgered into submission."[26]

Such badgering took place in *United States v. Xi*.[27] The defendant asserted her right to counsel twice during the interrogation but questioning persisted. The defendant's statements were barred because the coercion negated the waiver of her prior invocation. Likewise, in *United States v. Hensley*, the agent admitted his continued questioning was designed to erode the defendant's request for counsel.[28] The defendant's subsequent waiver of counsel was involuntary, as it was spurred by the agent's unrelenting tactics.

A right delayed is a right denied

The chief virtue of the right to counsel is that questioning must stop immediately. While this provides a respite for the accused, it is no guarantee that a phone call is imminent. Indeed, suspects may be at the mercy of authorities while idling

10. *United States v. Martin*, 664 F.3d 684, 688-89 (7th Cir. 2011).
11. *Davis v. United States*, 512 U.S. 452, 455 (1994).
12. *United States v. Thousand*, 558 Fed. Appx. 666, 671-72 (7th Cir. 2014).
13. *United States v. Shabaz*, 579 F.3d 815, 818 (7th Cir. 2009).
14. *Connecticut v. Barrett*, 479 U.S. 523 (1987).
15. *Id*. at 528.
16. *Colorado v. Connelly*, 479 U.S. 157 (1986).
17. *People v. Bernasco*, 138 Ill. 2d 349, 368 (1990).
18. *People v. Braggs*, 209 Ill. 2d 492, 505 (2003).
19. *People v. Miller*, 393 Ill. App. 3d 1060, 1064-65 (2d Dist. 2009).
20. *Id*.
21. *People v. Kochevar*, 2020 IL App (3d) 140660-B.
22. *Colorado v. Connelly*, 479 U.S. 157, 167-69 (1986).
23. *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983).
24. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).
25. *Maryland v. Shatzer*, 559 U.S. 98, 104-05 (2010).
26. *Id*.
27. *United States v. Xi*, No. 16-22-5, 2018 U.S. Dist. LEXIS 112429 (E.D. Pa. July 6, 2018).
28. *United States v. Hensley*, No. 2:06-CR-168 PS, 2007 U.S. Dist. LEXIS 10692, *4 (N.D. Ind. Feb. 14, 2007).

in a cell. Logistical issues may preclude an immediate call, but lengthy delays are problematic. When agents stall, they buy critical time. Interactions with authorities during that time can lead a suspect to succumb to the coercive climate. If one must wait multiple hours before being permitted a phone call, the right to counsel is an abstraction. For that reason, lengthy detentions are discouraged. The Supreme Court found that a statement made after 16 hours of "incommunicado detention" was involuntary in *Haynes v. Washington*.[29] Over those 16 hours, the defendant's repeated requests to call his wife and lawyer were denied. An Illinois Appellate Court relied on *Haynes* to find that a suspect's statement following 12 hours in custody was involuntary.[30]

A new Illinois statutory provision goes one step further. Effective Jan. 1, 2022, suspects have the right to communicate with counsel and family members via three phone calls.[31] Diverging with federal requirements, such communications must occur no later than three hours after arrival at the first place of custody. Law enforcement should thus take notice that delaying for more than three hours will violate the statutory protections of access to counsel. The clear standards of this new law will remove some of the ambiguity surrounding the custodial analysis.

Recent Illinois Appellate Court caselaw

The complex interplay of constitutional rights and crime prevention poses significant challenges for courts. Five recent Illinois Appellate Court cases exemplify this point.

An accused's statutory right to make a phone call was addressed in *People v. Salamon*.[32] The defendant invoked his right to counsel before and after being given his *Miranda* rights. While the detectives stopped the interrogation, it was police policy not to permit a call until the booking process finished. After the defendant was left handcuffed in an interrogation room for 24 hours, he initiated contact with police and made an incriminating statement. The First District of the Illinois Appellate Court held the right to make a call was but one factor to consider and that, while the detention was lengthy, the defendant was provided food, drink, bathroom breaks, and contact-lens solution. He was also informed of his *Miranda* rights multiple times and understood them. Based on the totality of the circumstances, the defendant's confession was voluntary.[33] The Illinois Supreme Court affirmed, finding that while the defendant was prevented from exercising his right to counsel and the statement was involuntary, its admission was harmless error.[34] The confession was "cumulative and duplicated other evidence" of the defendant's guilt, most notably his unimpeached confession to a friend that he committed the murder.[35]

An improper interrogation prompted a reversal in *People v. Kadow*.[36] After questioning began, the defendant twice asked, "Can I talk to a lawyer?"[37] The detective responded that he would call the state's attorney's office to see if it "wants you lodged in jail right now, okay? If you don't want to talk to me."[38] Reversing the admission of the defendant's statements, the Fourth District emphasized that the detective initiated the discussion and did so by threatening incarceration for seeking representation.

The Third District considered whether a request for counsel to one officer was imputable to a second officer in *People v. Williams*.[39] During his arrest, the defendant asked the officer for a lawyer. A detective later questioned the defendant at the police station and an incriminating statement was made. The Third District found the trial court committed reversible error in denying the defendant's motion to suppress because the invocation of counsel to the arresting officer was imputable to the detective.

The pressures of interrogation and confinement subverted the defendant's waiver of counsel in *People v. LaRosa*.[40] The defendant twice requested counsel, yet the detective continued questioning. After being isolated in the interrogation room, the defendant eventually made incriminating statements. The Third District reversed the admission of the statements because the detectives "used the compelling pressures of interrogation to undermine defendant's will to resist and to compel him to speak."[41]

Finally, the First District found a *Miranda* violation when officers ignored an unambiguous request for counsel in *People v. Coleman*.[42] The defendant's inquiries of "Can I call my lawyer?" and "Or call my momma and then call my lawyer" were satisfactory invocations of *Miranda*. However, the detective proceeded with more questions, including, "So you don't want to talk to us anymore?" This prompted a colloquy in which an incriminating statement was subsequently made. In engaging with the detective,

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29. *Haynes v. Washington*, 373 U.S. 503, 514 (1963).
30. *People v. Sanchez*, 2018 IL App (1st) 143899.
31. 725 ILCS 5/103-3.
32. *People v. Salamon*, 2019 IL App (1st) 160986-U, *affirmed People v. Salamon*, 2022 IL 125722.
33. *Id.* ¶ 62.
34. *People v. Salamon*, 2022 IL 125722, ¶¶ 102, 119-21.
35. *Id.* ¶¶ 126-27.
36. *People v. Kadow*, 2021 IL App (4th) 190103.
37. *Id.* ¶ 25.
38. *Id.*
39. *People v. Williams*, 2021 IL App (3d) 180282.
40. *People v. LaRosa*, 2021 IL App (3d) 190288-U.
41. *Id.* ¶ 45.
42. *People v. Coleman*, 2021 IL App (1st) 172416.

the defendant did not "undo" his prior invocations of counsel. The First District thus reversed the trial court's admission of the confession.[43]

How to approach a custodial interrogation

The recent Illinois Appellate Court decisions capture the consequences of interrogation missteps. They also provide valuable lessons for law enforcement. Relying on an ill-gotten confession will squander significant time and resources while possibly foregoing other evidence and suspects. Moreover, statements extracted through coercion are of questionable validity. *Kadow*, *LaRosa*, and *Coleman* reflect why officers must stop questioning after an unequivocal request for a lawyer. And while questions designed to provoke an incriminating response are a nonstarter, even innocuous remarks should be avoided as a court might construe them as a ruse to restart the dialogue. Further, *Kadow* rejects the use of threats or promises that are premised on access to an attorney. When cooperation with law enforcement is the basis for contacting counsel, any statements are, by definition, forced. Despite these constraints, an interrogation does not exist in a vacuum, and it is permissible for officers to explore a suspect's answer if it is a less-than-clear expression of a desire for counsel.

As for timing, allowing a request for a lawyer to languish can undermine even the most hardened criminal's resolve. This strategy thus often bears fruit for law enforcement. But using extended-incommunicado detention and deprivation of counsel is illegal. Illinois law now mandates phone calls within three hours. Laboring under such limits will make it more difficult for authorities. But this is the price for keeping the government honest and avoiding the tyranny of forced confessions.

For the criminal defense bar, the advice to dispense is practical but powerful: Ask for an attorney and stay quiet. A familiar adage, it is often disregarded. An accused must be resolute in demonstrating a present desire to consult with counsel and not condition the request with "I probably should," "I think," or "maybe." Any equivocation or ambiguity can expose the accused to additional questions. A suspect should also avoid limiting the invocation to specific offenses, subject matters, or time periods as questions outside those parameters can continue. Such questions in turn might be the catalyst to converse further. Finally, even when a suspect properly asserts *Miranda*, authorities can use isolation to prompt a statement.[44] Interrogation is desolate by design and being warned of such conditions can help an accused through the crucible of custody.

Conclusion

The legal landscape on custodial interrogation is thorny. Ultimately, clarity from both sides is paramount. The accused who is ambiguous or less than resolute risks the admission of their confession. The detective who lumbers onward with questions despite a request for counsel risks the suppression of a confession. Accordingly, the best practice is to simply follow the law. IBJ

43. *Id*. ¶ 109.
44. This tactic was used in *People v. Salamon*, 2022 IL 125722, ¶¶ 102, 119-21 and *People v. Mandoline*, 2017 IL App (2d) 150511, ¶¶ 104-06.