

# NOPD CONSENT DECREE MONITOR NEW ORLEANS, LOUISIANA



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File Number: 37PA-191555

Deputy Superintendent Danny Murphy  
Compliance Bureau, New Orleans Police Department  
714 Broad Street  
New Orleans, LA 70119

Dear Superintendent Murphy:

This letter constitutes confirmation that the Office of Consent Decree Monitor ("OCDM") has reviewed and provided comments on the revised Chapter 1.9.1 – Miranda Rights. The OCDM has no objection to the policy as revised.

We believe that the revised Chapter 1.9.1 – Miranda Rights, incorporates all requirements of the Consent Decree and sets forth clear and appropriate rules to guide officer conduct. We will continue to assess the adequacy of this policy following its implementation. If we identify any concerns following implementation, we will present those concerns to you and the Department of Justice. Additionally, we note that, pursuant to the Consent Decree, NOPD has agreed to review and revise policies and procedures as necessary upon notice of a significant policy deficiency. We also note NOPD's obligation to review this policy after a year of implementation to ensure it "provides effective direction to NOPD personnel and remains consistent with the Agreement, best practices, and current law." Consent Decree at ¶ 8.

We appreciate your team's effort, cooperation, and responsiveness throughout this process.  
Very truly

Very truly yours,

David L. Douglass  
For SHEPPARD MULLIN RICHTER & HAMPTON LLP\*  
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CC: HONORABLE SUSIE MORGAN (VIA ELECTRONIC MAIL)  
EMILY GUNSTON, DEPARTMENT OF JUSTICE (VIA ELECTRONIC MAIL)



# NEW ORLEANS POLICE DEPARTMENT OPERATIONS MANUAL

## CHAPTER: 1.9.1

### TITLE: MIRANDA RIGHTS

EFFECTIVE:

REVISED:

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#### PURPOSE

This Chapter requires an officer to advise suspects of their constitutional rights at the time of arrest or prior to any custodial interrogation.

#### POLICY STATEMENT

1. The U.S. Constitution and Article 1, section 13 of the Constitution of the State of Louisiana provide protections for the rights of a person accused or detained in connection with the investigation of a crime.
2. Officers shall advise suspects of their **Miranda Rights** at the time of arrest or prior to any custodial interrogation.
3. Suspects may waive their constitutional right to remain silent, but must do so knowingly, voluntarily, and intelligently after their constitutional rights have been read to them and they have indicated understanding.

#### DEFINITIONS

Definitions relevant to this Chapter include:

**Miranda Rights**—The privilege against self-incrimination is guaranteed by the Fifth Amendment to the U.S. Constitution. The Supreme Court, in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), held that the police must inform arrested persons or suspects prior to a custodial interrogation that they need not answer questions and that they may have an attorney present before and during questioning. These requirements are known as the **Miranda Warning**.

**Suspect**— An individual who is reasonably believed to have a connection to criminal activity.

**Testimonial Evidence**—An assertion offered as a proof of the truth of what is being stated. Participating in an identification procedure, giving handwriting or voice exemplars, fingerprints, DNA, hair samples and dental impressions are non-testimonial and therefore not within the **Miranda Rule**. Certain types of non-verbal conduct may be considered testimonial such as nodding up and down or right and left in response to a question and **Miranda** would apply.

**Waiver**—A criminal defendant may waive the right to remain silent and make a statement, but

law enforcement officials must demonstrate to the court that the waiver was the product of a free choice rather than a decision based on intimidation, coercion, or deception. They must also convince the court that the defendant was fully aware of the rights being abandoned and the consequences that would result from the abandonment of those rights. Based on the totality of these circumstances, a court may conclude that the defendant waived his or her **Miranda** rights.

#### **GENERAL INFORMATION ON MIRANDA RIGHTS**

4. The **Miranda Rule** applies only to the use in a criminal proceeding of testimonial evidence that is the product of a police interrogation. For **Miranda** to apply, the following requirements must be met:
  - (a) Evidence must have been gathered.
  - (b) The evidence must be testimonial.
  - (c) The evidence must have been obtained while the suspect was in custody.
  - (d) The evidence must have been the product of interrogation.
  - (e) The interrogation must have been conducted by law enforcement or agents of law enforcement.
5. Silence after advising of **Miranda Rights** is not admissible evidence of guilt and cannot be used to impeach a defendant.
6. **Miranda's** purpose was to protect suspects from the compulsion inherent in a police dominated atmosphere attendant to arrest. Absent a formal statement such as "you are under arrest" the issue becomes whether a reasonable person in the suspect's position would have believed that he/she were free to leave.
7. **Miranda** does not apply to roadside questioning of a stopped motorist or a person briefly detained on the street under a **Terry stop**. Those persons may not be free to leave but the interference in their movement is not considered an actual arrest or its functional equivalent for purposes of **Miranda**.
8. A person who voluntarily comes to a police station or facility for the purpose of questioning is not in custody and therefore not entitled to **Miranda Warnings**. This is true when a suspect is advised by officers that he/she is not under arrest and is free to leave.
9. Interrogation is an express questioning and any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. This can include confronting a suspect with incriminating evidence.
10. The interrogation must be by a known law enforcement officer. An undercover officer does not violate **Miranda** because there is no coercion, no police dominated atmosphere, and the suspect does not know he or she is being questioned by the police.
11. **Miranda** applies to aliens, legal immigrants, and undocumented immigrants as well as U.S. citizens.

#### **MIRANDA WARNING / ADVISEMENT OF RIGHTS**

12. The approved advisement of rights for the New Orleans Police Department is as follows:
  - (a) You have been arrested or detained in connection with the investigation or commission of a crime, more specifically – (state the crime for which the person is

- under investigation).
- (b) You have the right to remain silent.
  - (c) Anything you say can be used against you in a court of law.
  - (d) You have the right to an attorney.
  - (e) If you cannot afford an attorney, one will be appointed for you, prior to and during any questioning, if you wish.
  - (f) You can decide, at any time, to exercise these rights and not answer any questions or make any statements.
13. After a suspect has been advised of his/her **Miranda Rights**, the following additional questions or advisements must be made before questioning may begin pursuant to a valid waiver of rights:
- (a) Do you understand each of these rights I have explained to you?
  - (b) Having these rights in mind, do you wish to talk to me/us now?

### SECURING A WAIVER OF MIRANDA RIGHTS

14. If the suspect does not fully understand his/her rights as outlined, he/she **cannot be questioned**. If at any time during the questioning the suspect expressly invokes a right, asks not to be questioned further, or indicates in any manner that he/she does not wish to be questioned, then the questioning **must cease**. For a waiver to be valid the prosecution must prove that the suspect had a basic understanding of his/her rights. The focus of the analysis is directly on the personal characteristics of the suspect. If the suspect was under the influence of alcohol or other drugs, or suffered from an emotional or mental condition that substantially impaired the suspect's capacity to make rational decisions, the courts may well decide that the suspect did not understand his/her rights.
15. An invocation of rights must be clear and unequivocal. Any ambiguity or equivocation will be ineffective. If the suspect's assertion is ambiguous, the interrogating officers are permitted to ask questions to clarify the suspect's intentions, although they are not required to.
16. The use of **NOPD Form 153 – Rights of an Arrestee or Suspect** and the audio/video recording of the interview or interrogation is the preferred documentation for showing the arrestee or suspect was advised of his/her rights and granted a valid waiver of rights.
17. If the arrestee chooses to waive his/her rights and make an oral or written statement, the investigating officer should complete an **NOPD Form 153 – Rights of an Arrestee or Suspect** and allow the arrestee to sign it. If the suspect has been advised of his/her rights and indicated he/she wishes to make a statement or answer questions but declined or refused to sign the form after indicating he/she has understood the rights, he/she may still be questioned. The form shall be attached to the Incident Report.

### ADDITIONAL WARNING TO A JUVENILE

18. If you are under the age of 17, anything you say can be used against you in a juvenile court prosecution for a juvenile offense and can also be used against you in an adult court criminal prosecution if you are to be tried as an adult.
19. The juvenile suspect who is being interviewed or interrogated must be allowed to engage in a meaningful consultation with an attorney or an informed parent, guardian, or other adult interested in his or her welfare before the juvenile can legally waive the right to counsel and the privilege against self-incrimination.

20. A juvenile who is being questioned as a witness or as a suspect must have a parent, legal guardian or child advocate present to witness the interview or interrogation. They need not be present in the room during the interview or interrogation but they must be able to witness (see and hear) the entire session. The entire interview or interrogation, including the **Miranda Rights** admonition, must be video and audio recorded in an approved NOPD interview / interrogation room. The name of the parent, legal guardian or child advocate shall be stated on the recording and included in the investigative report.

#### **ADDITIONAL WARNING FOR THE DEAF**

21. If you are deaf or profoundly hard of hearing, the New Orleans Police Department has the obligation to offer you an interpreter without cost and will defer interrogation pending the appearance of that interpreter.
22. Once the suspect who has been identified as deaf or profoundly hard of hearing has been identified, the **NOPD Form 153 – Rights of an Arrestee or Suspect** shall be provided to the suspect to read. Further communications AND the advisement of **Miranda Warnings** shall be given using an interpreter. The fact the person is deaf or profoundly hard of hearing, the interpreter's name and an affirmative statement that the **Miranda Warning** was provided by the interpreter shall be noted on **Form 153** and in the police report.

#### **ADDITIONAL REQUIREMENTS FOR LIMITED ENGLISH PROFICIENCY (see Chapter 55.4 – Limited English Proficiency)**

23. A person who does not speak English as his/her primary language and has a limited ability to read, write, speak, or understand English is considered as having **Limited English Proficiency (LEP)**. LEP individuals may be competent in certain types of communication (e.g. - speaking or understanding), but still be LEP for other purposes (e.g. reading or writing). Similarly, LEP designations are context-specific: an individual may possess sufficient English language skills to function in one setting, but these skills may be insufficient in other situations.
24. Similarly, a person's **Primary Language** is an individual's native tongue or the language in which an individual most effectively communicates. NOPD personnel should avoid assumptions about an individual's primary language. Members of the Department should make every effort to ascertain an individual's primary language to ensure effective communication.
25. Once the LEP person's primary language has been ascertained, further communications AND the advisement of **Miranda Warnings** shall be given using an interpreter. The language identified, the interpreter's name and an affirmative statement that the **Miranda Warning** was provided in that language shall be noted on **Form 153** and in the police report.
26. A failure to protect the rights of LEP individuals during arrests and interrogations presents risks to the integrity of the investigation. NOPD members must recognize that miscommunication during interrogations may have a substantial impact on the evidence presented in any related criminal prosecution. A qualified interpreter shall be used for any interrogation or taking of a formal statement when the suspect's or witness's legal rights could be adversely impacted.

#### **NON-CUSTODIAL QUESTIONING**

27. Officers may question persons during general on-the-scene investigations as to acts surrounding a crime.

**VOLUNTEERED OR SPONTANEOUS STATEMENTS (RES GESTAE)**

27. Volunteered and spontaneous statements are not barred from use in an investigation or subsequent criminal prosecution and no **Miranda Warnings** need be given preceding them. However, any questioning initiated by the police officer thereafter, in clarification or amplification of the volunteered or spontaneous statement must be preceded by a **Miranda Warning**.

**INTERROGATION AFTER THE SUSPECT HAS REQUESTED A LAWYER OR INVOKES RIGHT TO REMAIN SILENT**

28. When a suspect invokes his/her right to silence, all interrogation shall cease immediately. The suspect may not again be interrogated about the crime for which he/she is charged, other crimes, or by other officers (from this or other agencies) unless:
- (a) The officers wait a significant amount of time to re-approach the suspect; and
  - (b) Miranda Rights are re-administered and a waiver obtained before any questioning may take place. Officers shall also document the significant amount of time that lapsed between the initial invocation of right to silence and the subsequent re-administration of Miranda Rights and waiver.
29. When a suspect invokes his/her right to counsel, all interrogation shall cease immediately. The suspect may not again be interrogated about the crime for which he/she is charged, other crimes, or by other officers (from this or other agencies) unless:
- (a) The suspect has requested an attorney and the attorney is present at the questioning; or
  - (a) The suspect initiates new contact with the police. In this latter case, Miranda Rights must again be administered and a waiver obtained before any questioning may take place. Officers shall also document and, if possible, obtain written verification that the suspect initiated the communication.
30. Unless the suspect personally initiates further communications, exchanges, or conversations with an officer and clearly indicates that he/she wishes to voluntarily provide a statement and/or answer questions, the officer(s) shall re-advise the suspect of his/her **Miranda Rights**, clearly and concisely indicate on any audio or video recording that the suspect initiated the action and has done so voluntarily after again being advised of all applicable rights as outlined in this Chapter. The **Miranda Rights** advisement, the waiver of rights and a statement by the suspect that he/she initiated the communication shall be clearly stated, in its entirety, on the video / audio recording as the subsequent statement and/or answers to questioning.

**EXCEPTIONS TO MIRANDA RULE**

31. There is a public safety exception to the **MIRANDA RULE**. It applies when circumstances present a clear and present danger to the public's safety and the officers have reason to believe that the suspect has information that can end the emergency.
32. Investigators should be aware of the **Massiah Doctrine**. This doctrine prohibits the admission of a confession obtained in violation of the defendant's Sixth Amendment right to counsel. Specifically, the **Massiah Doctrine** or rule applies to the use of testimonial evidence in criminal proceedings deliberately elicited by the police from a defendant **after formal charges have been filed**. Although similar in effect to **Miranda**, the **Massiah Doctrine** has different requirements. The events that trigger the Sixth Amendment safeguards under **Massiah** are:

- (a) The commencement of adversarial criminal proceedings, and
  - (b) Deliberate elicitation of information from the defendant by governmental agents.
33. Investigators shall not conduct interrogations in violation of the **Massiah Doctrine**.