

What May Be Missing from the *Miranda* Warning in Your Next Case

By John J. Brunetti

The 2010 United States Supreme Court decision in *Florida v. Powell*¹ is a reminder that adequate *Miranda* warnings must include an advisement that the suspect has a right to invoke the rights to silence and counsel, not only at the outset of the interrogation, but also during the interrogation. As the Supreme Court held in *Miranda* itself: “An individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today.”² Since the warnings in *Florida v. Powell*³ concluded with “you have the right to use any of these rights at any time you want during this interview,” the Court found them to be adequate because they “reasonably conveyed Powell’s right to have an attorney present, not only at the outset of interrogation, but at all times.”⁴ The absence of the word “during” by no means renders warnings fatally defective. To the contrary, case law shows that phrases such as “at any time” are adequate substitutes. What is key is that the warnings make clear that both the right to silence and the right to counsel, including free counsel, may be invoked at any time⁵ during the interrogation.

Not surprisingly, the Court of Appeals has left “no doubt that the [Miranda] right to counsel extends to representation during any interrogation by the police and that the defendant is entitled to advice to such effect.”⁶ Moreover, the Court has held warnings fatally defective due to their failure to include an advisement to the suspect that he “was entitled to the assistance of counsel during his questioning by the officer, an aspect of the warnings to which [the suspect] concededly was entitled.”⁷ Naturally, Appellate Division decisions echo these pronouncements,⁸ as does the C.J.I.2nd instruction on voluntariness.⁹ However, the *Miranda* warning published by the New York State Division of Criminal Justice Services (DCJS) does not.

The D.C.J.S. *Miranda* protocol is comprised of a five-part rights advisement and two questions designed to extract an express waiver of those rights. It reads as follows:

DCJS Form 3652-September 2002

1. You have a right to remain silent **and refuse to answer any questions.**
2. Anything you do say **may** be used against you in a court of law.
3. As we discuss this matter you **have a right to stop answering** my questions at **any time** that you desire.

4. You have a right to a lawyer **before speaking to me**, to remain silent until you can talk to a lawyer, and to have that lawyer present when you are being questioned.
5. If you desire a lawyer but you cannot afford one, one will be provided to you **before questioning** without cost to you.
 1. Do you understand each of these rights I have explained to you?
 2. Now that I have advised you of your rights are you willing to answer my questions?

Examination of the highlighted words exposes how the right to silence advisement satisfies *Miranda*’s requirement that the suspect be advised of the right to remain silent during the interrogation, while the counsel advisement does not. Not only does the right to counsel advisement fail to inform the suspect that he has the right to request a lawyer at any time during the interrogation, but it expressly limits the defendant’s right to counsel to the outset of the interrogation, with the words, “You have a right to a lawyer **before speaking to me**, to remain silent until you can talk to a lawyer, and to have that lawyer present when you are being questioned.” The advisement compounds the error by adding “If you desire a lawyer but you cannot afford one, one will be provided to you **before questioning** without cost to you.”

The deficiency in the DCJS charge should be corrected. Until it is, defense attorneys should not hesitate to raise the issue if the circumstances warrant.

Endnotes

1. __ U.S. __, 130 S. Ct. 1195, 1205 (2010).
2. *Miranda v. Arizona*, 384 U.S. at 471-72.
3. __ U.S. __, 130 S. Ct. 1195, 1205 (2010). The warnings in *Powell* read: “You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any question. You have the right to use any of these rights at any time you want during this interview.”
4. *Id.* at 1205.
5. See, e.g. *People v. Bartlett*, 191 A.D.2d 574, 595 N.Y.S.2d 89 (2d Dep’t 1993), *lv. den.*, 81 N.Y.2d 1010, 600 N.Y.S.2d 198 (1993) (warnings adequate where they included “you have the right to talk to a

lawyer before answering any questions or to have a lawyer present at any time"); *People v. Congilaro*, 60 A.D.2d 442, 400 N.Y.S.2d 409 (4th Dep't 1977) (wrap-up advisement that informed the suspect of "the right to an attorney at any time while in custody" was sufficient to satisfy *Miranda's* dictate that the suspect "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation."); *People v. Bowers*, 45 A.D.2d 241, 357 N.Y.S.2d 563 (4th Dep't 1974) ("[T]he warnings which police gave to defendant were inadequate, for they failed to advise him that he was entitled to have his attorney present during the time when the police were questioning the defendant and that he was entitled to stop talking at any time in the course of making a statement.").

6. *People v. Tutt*, 38 N.Y. 2d 1011, 1013, 384 N.Y.S.2d 444 (1976) ("[There is] no doubt that the right to counsel extends to representation during any interrogation by the police and that the defendant is entitled to advice to such effect.").
7. See *People v. Hutchinson*, 59 N.Y.2d 923, 466 N.Y.S.2d 294 (1983), where the Court found the warnings fatally defective due to the officer's failure to advise suspect that he "was entitled to the assistance of counsel during his questioning by the officer, an aspect of the warnings to which appellant concededly was entitled." The Record on Appeal in *Hutchinson* reveals that the warnings were: "You have the right to remain silent until you have consulted with an attorney. Anything you do say might and will be used against you in a court of law. You have the right to remain silent until you have consulted with one" [Rec. on App., Transcript of Suppression Hearing, p. 6]. Noticeably absent is an advisement of the right to counsel free of charge, yet the Court of Appeals apparently ignored that additional flaw in the warnings.
8. See, e.g. *People v. Bracero*, 117 A.D.2d 740, 498 N.Y.S.2d 467 (2d Dep't 1986) ("Since the defendant was never explicitly advised, after being arrested, that he had the right to consult with counsel prior to and during the course of police questioning, the hearing

court properly granted his motion to suppress oral statements made to the police."); *People v. DiLucca*, 133 A.D.2d 779, 520 N.Y.S.2d 171 (2d Dep't 1987) ("As the People concede, the *Miranda* warnings administered to the defendant by Officer Simon were insufficient because the defendant was not advised that he had the right to consult with an attorney prior to and during the course of any police questioning"); *People v. Betancourt*, 153 A.D.2d 750, 545 N.Y.S.2d 207 (2d Dep't 1989) *lv. den.*, 75 N.Y.2d 767, 551 N.Y.S.2d 910 (1989) ("The arresting officer's failure to have advised the defendant that he was entitled to the assistance of counsel during the course of questioning by the officer, an aspect of the warnings to which he was clearly entitled, required suppression of the subsequently elicited statements"); *People v. Gomez*, 192 A.D.2d 549, 596 N.Y.S.2d 439 (2d Dep't), *lv. den.*, 82 N.Y.2d 806, 604 N.Y.S.2d 942 (1993) (Court found that the detective's failure "to advise the defendant that he had the right to have counsel present during the interrogation" was a fatal defect).

9. C.J.I.2d Voluntariness: While there are no particular words that the police [or assistant district attorney] are required to use in advising a defendant, in sum and substance, the defendant must be advised: 1. That he/she has the right to remain silent; 2. That anything he/she says may be used against him/her in a court of law; 3. That he/she has the right to consult with a lawyer before answering any questions; and the right to the presence of a lawyer during any questioning; and 4. That if he/she cannot afford a lawyer, one will be provided for him/her prior to any questioning if he/she so desires.

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