

Don't Talk to the Police!

This video has probably been posted here a number of times. I think about it often when I watch TV shows such as Dateline NBC, 20/20, The Confession Tapes, and such. The first time I saw this video, I thought it was marginal-to-bad advice.

If you practice criminal law, what do you advise your clients about talking to the police? As I recall, the parents of Jon Benet Ramsey *never* spoke to the police. At the time, I thought they were hiding something. It has been shown that they were not.

Do you have any war stories that you can share?

"Regent Law Professor James Duane gives viewers startling reasons why they should always exercise their 5th Amendment rights when questioned by government officials."

<https://www.youtube.com/watch?v=d-7o9xYp7eE>

And another interesting video:

https://www.youtube.com/watch?v=YWUx3-b0F_Y

While I don't practice criminal law, I wonder what I would advise friend or family if I got a late-night call about an encounter with the police.

No war stories, but I do stress in "know your rights" talks the difference between avoiding arrest, which is nigh impossible, and avoiding conviction. If avoiding conviction is the goal, then silence is golden.

However, wasn't there a SCOTUS case a couple of years ago suggesting one's right to silence only accrues after the gendarmes "read you your rights"?

Robert Link, California

It's always safest to "lawyer up" and, for the most part, police respect that. The vast majority of criminal cases depend in part on something the defendant said to police.

Duke Drouillard, Nebraska

Over at Popehat Ken White has discussed this issue extensively:

<https://www.popehat.com/2014/01/15/the-privilege-to-shut-up/>

Dave Rakowski, Pennsylvania

Great link! Here's a sample, for those who haven't clicked-through yet,

"When you talk to a cop, you are talking to someone who is often privileged to kill you with complete impunity, someone whose claims about what you said during your interaction — however fantastical — will likely be accepted uncritically by the system even if the particular cop is a proven serial liar."

Word.

Robert Link

Not all that impressive, mostly emotive speech. Everyone is privileged to kill with complete impunity, if in self-defense or the defense of others.

Police are often held to a stricter standard. Testimony from any impartial, credible source is likely to carry more weight with the jury than statements made by defendant. Sometimes police serve as that impartial, credible source. Prosecutors are required to provide defense with any information that the police officer is not a credible source. Usually, if an officer makes that list it means the end of their career.

Nonetheless, it is still a bad idea to talk with police without a lawyer.

Duke Drouillard

Although I don't practice in the criminal law area, I have heard that it is preferable to invoke a right to counsel than to invoke the right to remain silent—reason being that the case law suggests that it is easier to waive the right to remain silent than to waive the right to counsel.

Does anyone who practices criminal law have any insight on this?

Brian H. Cole, California

The right to remain silent is passive; you have the right to respond or remain silent every time a question is asked. You don't have to invoke the right to remain silent by saying anything and police are free to continue asking questions. If you invoke the right to counsel, the police must immediately stop all questions; although they might comment on your decision. Police cannot then ask further questions unless defendant initiates further discussion. In formal interrogations, police will generally obtain a written waiver and everything is recorded.

Duke Drouillard

Thanks, Duke.

I think that my understanding came from your distinction that the police can continue asking questions after the right to silence is invoked, but must stop asking questions if the right to counsel is invoked. That right there seems to be grounds to request to speak to an attorney.

Brian H. Cole

I used to practice criminal law, but am now prohibited because of my part time job. While i disagree with Link's Rakowski quote (Most cops are great people and prefer to help than hurt), but i still recommend the "don't talk to cops" video.

It doesn't take but a second to think of any one of a number of folks who were only convicted of lying to police - Martha Stewart, General Flynn add your favorite

بش Contrary to what you see on t.v. refusing to speak with police does not make you guilty. Misstating, trying 2 cover your butt often does!

Randy Birch, attorney and part-time judge in Utah, commenting via cell. Forgive typos

Perhaps I was not clear - I do not agree or like the implication of the Rakowski quote:

I meant to go the other direction - I truly believe MOST cops are great people and prefer to help than hurt; most would not lie about their interaction, much less kill with impunity, etc.

Randy Birch

A bit of housekeeping: I pulled the quote, David Rakowski provided the link from which it came.

It is simply factual that law enforcement field personnel enjoy a presumed immunity not enjoyed by most other walks of life.

Women and men in law enforcement (like my uncle, the CHP competition sharpshooter) are indeed often, perhaps even "mostly" good, kind, honest and true. It is also the case, however, that there is quite a difference in how such folks act while on line at Starbucks and how they act in the field.

Coming back to the original question, should we advise clients to talk, or to not talk, to police? I very much liked the suggestion of invoking right to counsel, and then falling silent. Again, there's not much one can do to avoid arrest if the officers in question have it in their heads that one is guilty. But there is much one can do to avoid giving a prosecutor aid in attaining a conviction.

Who else on the list has done "know your rights" talks? Maybe folks can list the web pages or other public resources on which they rely...

Robert Link

My advice to clients is to not EVER answer law enforcement questions without advice of counsel first.

Mark E. Jakubik

A professor at my law school gave this lecture to law enforcement officials and he had no idea how much attention it would get at the time about why you don't talk to the police no matter how nice they are.

https://www.vice.com/en_us/article/mvkgnp/law-professor-police-interrogation-law-constitution-survival

Sean M. Hobbs, New York

Same professor as the video I posted.

Mike Phillips, North Carolina

Dear Firm:

The case I was thinking of is probably from 2010, *Berghuis v. Thompkins*,
<https://www.supremecourt.gov/opinions/09pdf/08-1470.pdf>

I didn't read the case at the time. What I recall is comments that the ruling arguably muddied the waters in this area. I recall my civil rights oriented pals being less than thrilled with this ruling.

Guess it's time to knuckle down and read it myself now.

Cheers,

Robert Link

Colleagues: I'm working an interesting case right now. Client is a chemist, English is his second language. In US on a green card, can't plea out, need a not guilty. All work reports are mathematical reports, not good at writing English. He was arrested, accusations include domestic battery on a past girlfriend. No rights read at the scene of the arrest. Taken to station. Given a card to sign of Miranda waiver and another spot to sign that he understands the impact of the waiver. Never had any exposure to us legal system or legal system in his home country. He signed the card. Interpreter used thru all court hearings. At police station, he says "when do I get to tell my side of the story." Cop says tell me (this is after signing the card) what happened. He started

to talk, cop said "I can't understand you, here's a pad of paper, go write your story down." He is sent into a room, he took 3 hours to write 3 pages. In there, he admitted that he did it. He apologized. His mental state at the time was that if he cooperated with the police, he would get to go home. I lost on a motion to suppress and have appealed. Case law revolved around several factors, experience with the criminal justice system, the totality of the circumstances. Trial judge's findings were simple "He speaks and understands English." No reference to case law at all.

Any insights?

Joseph G. Bonanno, Massachusetts

I'm only about half-way through *Berghuis v. Thompkins*, but the gist of the majority opinion seems to be that if the accused doesn't use the right magic words then waiver will be implied. The magic words are of the nature, "I unambiguously invoke my right to remain silent. I unambiguously invoke my right to counsel. I unambiguously invoke my right to have counsel present." Invocation of one's rights will not be found by a course of action, say, 150 minutes of silence, but waiver of rights will be found by course of action, speaking after 150 minutes of silence.

Training laypersons to appreciate this kind of word magic is no small task.

Here's a nice pull from the *Berghuis* opinion:

"If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease."

Kennedy was the swing vote on this one, which otherwise split on party lines.

Can't help thinking about the recent "lawyer-dawg" case here, although some have said that one was a tempest-in-a-teapot.

Robert Link

It's usually the nice investigators that do the most damage to my cases.

Clients tend to see nice as equal to being on your side, and open up. More flies with honey than vinegar and whatnot. If q cop is an add, most people get defensive and clam up.

Seth Crosland, Texas

I believe that is the point. Just don't talk. ☹

Randy Birch

The facts of Berghuis suggest that is not enough, unless one has the iron will to truly and literally and completely remain silent. Better to learn the magic words and repeat them when the stars so align. Such is the status of "innocent until proved guilty" in 2017.

Robert Link

Apologies for the after-thought:

In addition to what I posted to the about iron will and magic words, on invoking one's rights interrogation ends. Sitting in silence, if I read Berghuis right, allows the gendarmes to continue their efforts to "wear you down."

Robert Link

In light of this discussion, why are the parents of the alleged serial killer in Florida, in potential trouble for not talking to the police?

Sharon K. Campbell, Texas

Is there a duty to report a crime that someone else commits if you know about it? I know nothing about that case...did they try and hide him or something maybe?

Seth Crosland

I'm not familiar with the case and media rarely gets the details correct. I believe most states have a statute which criminalizes "aid and abet" with the same penalty as the

underlying crime. Prosecutor might have grounds to believe they are aiding and abetting a defendant after the commission of a crime. Perfectly reasonable if the facts fit.

Duke Drouillard

I'm sure what Duke meant was, "I have no facts, and therefore no opinion." '-)

Maybe Sharon can be persuaded to start a new subject line and provide some facts to aid informed conversation?

Robert Link

Several points:

First, Florida calls it "accessory", not "aid and abet" but it's the same thing, you're an accessory if you aid or abet.

Second, and possibly relevantly, Florida's accessory statute excludes parents from being charged with accessory after the fact under most circumstances; and that may be relevant to what I discuss below.

Third, what happened, at least according to the news reports, is, that the parents were issued a subpoena; they refused to talk to investigators; State Attorney's office asked that they be held in "indirect criminal contempt"; judge refused when he questioned whether the state was looking to punish them or to compel testimony; the judge did, however, issue an Order to show cause why they should not be held in Civil Contempt (and I'm not going to go into discussion between difference between civil contempt, indirect criminal and direct criminal contempt other than to say that they have different purposes and different remedies and procedures)(but, good for the judge; he's doing what he should do); so, he is going to be holding a hearing to determine if they have any legal basis for failure to comply with the subpoena; there is no statutory "parent child" privilege in Florida; and the reason why parents can't be charged with accessory after the fact being relevant is that they can't claim 5th amendment privilege on that basis; they can't be charged with aiding and abetting the child if he told them something and even if they helped to cover something up.

Ronald Jones, Florida

Excellent analysis Ronald.

Duke Drouillard

I agree. Ronald's analysis explained this quite well and revealed some interesting hidden issues.

Andy Simpson, U.S. Virgin Islands

I do criminal defense work almost exclusively now. I tell anyone who will listen not to talk to the police. The magic words are " Officer I want to cooperate fully with your investigation but first I want to speak to my lawyer"; then shut up. I try to explain that detectives in particular are highly trained in the arts of getting you to say what they want you to say.

Think back to My Cousin Vinny, kid is arrested and told that he killed the clerk, he answers (stunned by the accusation) " I killed the clerk?", the statement is used as an admission. Seems too incredible to be a reflection of reality. It is not. Almost everyone who is arrested says something that will hurt them. People say the strangest things. Nothing worse than arraigning someone on a DWI and you get handed a statement where at the scene client says " I couldn't do these tests sober" That has happened to me a number of times. I have seen parents force their kids to talk to the police and the only evidence against their child is the statement the kid gives the police. The job of the police is to make arrests, not to sort through and find the truth. The ONLY safe course is to not talk to the police, period, end of story.

Graham W. Kistler, New York

You're right. That would have been a much better hashtag. White folks also get murdered by police. I have never seen statistic to know whether the proportion of blacks killed by police is higher per capita than whites killed by police. I can always assume but I've never seen the data.

The "battle" between "all lives matter" v. "black lives matter" really distract from the message of "#StopKillingUs" and helped them get painted, I think unfairly, as anti-white racists.

Gerald Gilliard, Virginia

Years ago I represented a corporate entity that experienced a large-scale execution of a search warrant in which several employees were identified as targets of the investigation. The employees were advised to immediately retain counsel, who in turn advised them not to talk to the government officials. The investigation went on for another

2-1/2 years, but none of the employees ended up being charged. All the targets were well educated individuals, but they had no clue regarding the criminal justice process nor an initial understanding of the risks of speaking with overzealous investigators who felt that were on a crusade.

I have four points to add to the discussion.

1. Speaking without counsel under these circumstances would have been potentially disastrous given the nature of some of the investigators assigned to the matter.
2. Counsel for corporate entities may generally tell employees that they do not have to talk to government officials, but if they instruct the employees to invoke their right to remain silent then they can be charged with obstruction of justice. If you ever are in the situation of having to advise a corporate entity, be aware of where the line lies.
3. A good thing to inform employees is that nothing they say is going to make the investigation go away anytime soon and that it is in their interest to have counsel. If the information they have is exculpatory, then their counsel can present it in the best light a week or two later.

Likewise, if they have information that might inculcate them, they likely won't be able to retract it if they speak with the government.

4. Never trade a difficult-to-prove misdemeanor for an open-and-shut felony (e.g., false statement or obstruction of justice).

Bert Krages, Oregon

I have never been involved in a criminal appeal where anything the defendant said to the police helped. I have been in several where it hurt. My friends who try criminal cases say they have the same experience defending at the trial level.

Wendy Lascher, California

I represent a lot of youth in dependency cases where the child is removed due to safety concerns, neglect, etc.

Had two kiddos removed from father in case where father's girlfriends baby was essentially neglected and died. Worse photos I have ever gotten in discovery in a civil case.

Kiddos cooperated with police because dad was a monster...I advised not to...folks really do think they are helping when they 'assist' the policeeventually police turned to blaming the children of the father for the death and the investigation went that way.

No amount of 'cooperation' is going to fix the situation and bring the baby back to life. I agree that police are not there to figure it out like Colombo.

P. Jayson Thibodaux, Washington

I wrote an article titled "After the Search Warrant or Grand Jury

Subpoena: Tips on Advising Your Business Client" that was published in The Practical Lawyer in 1997 reprinted in 2000 in a book called "ALI-ABA's Practice Checklist Manual on Advising Business Clients II." I can't find a copy of the printed article but here are a couple of relevant portions from the manuscript:

It is common during the execution of a search warrant for agents to attempt to interview employees. The client representative should object to such interviews unless the search warrant authorizes the seizure of conversations. Once again, if the agents

refuse to abide by the request then the client should not interfere with the agents. Employees will probably want to know if they are required to submit to interviews. The answer is no they are not but the client will be exposed to obstruction of justice charges if employees are ordered not to talk. Therefore, the client should inform the employees that they are not legally required to talk with government agents but are free to do so if they desire. In many instances, it may be feasible to send employees home until the search is over.

To learn that one is a target or subject of a criminal investigation is a trying experience for most people. Persons in such situations may be unable to sleep or concentrate. This can impair their ability to make rational decisions. Given the human tendency to want to make something bad go away as soon as possible, individuals under severe stress can make irrational decisions. It is a good idea to have the company retain counsel for individuals that are likely targets or subjects of the investigation. Experienced counsel can advise these persons and reduce the possibility that irrational decisions will worsen the exposure to liability for all parties. Furthermore, separate representation reduces the barriers that ethical considerations can place on the attorney representing the business entity. Similarly, the parties can preserve some confidentiality by entering into a joint defense agreement.

Bert Krages

What Andy and Duke said. Thanks, Ron, truly, for shedding light!

Robert Link

You may not be a suspect today but you may be tomorrow, especially if you say anything.

Invoke your right against self-incrimination and your right to have an attorney present.

Jordan Rosenberg, California

This is sometimes an issue in "protection from abuse" cases when a victim, including parents, after realizing that a criminal conviction may impede the ability of the defendant to get employment, will later refuse to testify.

Bob Gasparro, Pennsylvania

A suspect for a series of killings in Florida has been apprehended. The police have been trying to question his parents and they have refused. They were subpoenaed by the police. They appeared but refused to answer questions. Now they have a hearing in January as to why they should not be held in contempt of court. All I know is what I read in the news and I have not seen anything about them being suspected of aiding their son.

Wondering why it is a problem for them to refuse to answer questions?

Sharon K. Campbell

The right to remain silent is generally considered a right of the accused; an extension of the fifth amendment. There is no corresponding right for witnesses called under subpoena power of the court to present themselves for questioning. Consider reporters who have been jailed for contempt of court because they refused to reveal a source. Additionally, there is no privilege similar to spousal privilege for parents that excuses them from testifying against a child.

Duke Drouillard

Well they can plead the 5th if answering questions would put them under criminal liability.. such as for aiding and abetting

Erin M. Schmidt, Ohio
