Chapter 3

Representing Clients Before Initial Hearing; Steps To Take if a Client Is at the Police Station or Is "Wanted" by the Police

Part A. Introduction

§ 3.01 STAGES AT WHICH THE LAWYER MAY ENTER THE CASE

A defense attorney most commonly enters a juvenile delinquency case at the Initial Hearing. If the client is indigent, an attorney is ordinarily appointed by the court at Initial Hearing. If the client's parent can afford to retain counsel, the parent and client most often retain the attorney immediately prior to the Initial Hearing, and the lawyer then enters his or her appearance at the hearing. The role of an attorney at the Initial Hearing and the client's right to counsel at that hearing are discussed in Chapter 4, along with a description of the strategic considerations that should inform counsel's actions in preparing for and conducting the hearing.

Occasionally, however, an attorney enters a case prior to Initial Hearing. The most common scenarios of this type are (i) the attorney receives a phone call from a parent or other relative of the child, stating that the child was just arrested and is presently on the way to the police station or already at the stationhouse; (ii) the attorney is contacted by the child or parent or other relative after arrest, but prior to the probation intake process, and represents the child in the Probation Department's intake process; and (iii) the attorney receives a phone call from a client who is "wanted" by the police for a crime for which s/he has not yet been arrested, for failing to appear for a court hearing, or for escaping from a juvenile detention facility.

This chapter takes up each of these scenarios in turn, describing the steps that counsel must take in each situation to protect his or her client's rights. As a predicate for that discussion, Part B of this chapter presents an overview of the procedures that police departments and probation offices generally follow from the time of arrest until the Initial Hearing.

§ 3.02 GENERAL APPROACH IN ENTERING A CASE: THE NEED TO MOVE QUICKLY

In each of the scenarios examined in this chapter, counsel will need to move quickly. For example, if the client is at the police station, a delay on counsel's part may result in the client's succumbing to police pressure and confessing before counsel can reach the station and avert the confession. In these situations, as in all stages of the case, counsel's preparation and research should be as thorough as practicable. Knowledge of the individual case and client and of the local procedures and functionaries can spell the difference between wise choices of action and foolish ones. But at the outset of a juvenile case particularly, a trade-off does exist between the virtues of time-consuming preparation and the importance of getting started quickly to prevent the client's interests from being irreparably damaged by fast-breaking events that will not wait for counsel to

make a consummately prepared appearance.

Part B. Overview of the Initial Stages of the Juvenile Justice Process

§ 3.03 ARREST

The statutory standards for arresting a child (often termed "taking the child into custody") for a delinquency offense usually parallel the standards for arresting adult criminal defendants. The arrest can be either: (a) pursuant to an arrest warrant (usually called a "custody order") issued by a judge or magistrate on the basis of an affidavit establishing probable cause (often called "reasonable cause" in juvenile statutes) to believe that the child committed a delinquent offense; or (b) without a warrant, on the officer's own determination that s/he possesses facts making out probable cause (or "reasonable cause") to believe that an offense was committed and that this particular juvenile is the perpetrator (or aider and abettor in the perpetration) of the offense. As a practical matter, the courts rarely deal with arrest warrants (or "custody orders") in juvenile cases because the vast majority of juveniles are arrested at or near the scene of a crime shortly after its commission.

The arrest invariably is followed by a "search incident to arrest." See § 23.08 *infra.* Frequently, the police also will conduct an on-the-scene identification procedure, known as a "show-up," in which the respondent is shown to the complainant and any other eyewitnesses for identification. See § 25.03(a) *infra.* Thereafter, the police usually take the alleged delinquent to the police station for "booking," interrogation, and possibly additional identification procedures. See §§ 3.04, 3.05, 3.08, 3.09 *infra.*

§ 3.04 POLICE PRACTICES FOLLOWING ARREST – LOGGING-IN

Following an arrest, an alleged delinquent is generally taken immediately to the police station (or divisional or precinct headquarters) in the precinct in which the arrest took place. The respondent's arrival at the station is ordinarily, but not invariably, noted in a police log for juvenile cases. (This is usually maintained separately from the adult log, in order to conform to local statutory requirements of confidentiality for juveniles.) In some jurisdictions the police treat logging-in as part of the "booking" or "slating" process described in § 3.08 *infra.* The juvenile log normally contains a dozen or so respondents to the page, and it records not merely the name and the time of logging but also the time and the place of arrest, some identifying characteristics of the respondent (such as sex, race, date of birth, and parent's name), and the charge. Some police departments conceive logging-in as a recording routine unrelated to "booking" and maintain two books – the log and the blotter. Under this latter practice all juveniles brought to the station may be logged in on arrival, and those against whom it is decided to lodge charges may later be noted in the arrest book or "blotter." Or children against whom it is clear that charges will be lodged may be noted immediately on the blotter, whereas children brought in "for investigation" or "on suspicion" may be noted in the log (sometimes called the "small book").

In any event, police generally feel no compelling obligation to make an immediate log or blotter entry when there are investigative reasons for not doing so. For example, the police may refrain from logging in a respondent whom they want to interrogate at length, free of any interference from the respondent's relatives or a defense lawyer. Such omissions or delays may violate published police procedures – and may, in some cases in some jurisdictions – violate requirements prescribed by statutes, court rules, or judicial criminal-procedure rulings; but officers dealing with a serious crime or an unappetizing respondent often take these requirements lightly.

In addition to recording the respondent's name in a logbook showing either arrests or arrivals at the station, the police in many jurisdictions also will record the respondent's name and any personal property taken from the respondent in a property log. Unlike property seized as proceeds or evidence of the crime (and held by the police or the prosecution until trial), this personal property can be retrieved at any time by the respondent, his or her parent, or the attorney (with proper authorization). Frequently, this personal property will include clothing, footwear, or other items that counsel will want to retrieve in order to substantiate a defense of misidentification. It may also include cell phones and other electronic appliances that counsel should retrieve promptly, before police investigation or processing of the case alerts officers to the possibility that these gadgets have potential evidentiary value and are subject to seizure and inspection with a search warrant.

§ 3.05 INTERROGATION AND OTHER INVESTIGATIVE PROCEDURES

Whatever the logging-in practice, the police usually subject the respondent to some interrogation subsequent to arrival at the station and prior to the full "booking" process. If the arrest is a misdemeanor or minor felony, the questioning will be conducted by an ordinary patrol officer (usually the arresting officer). In some jurisdictions the booking and questioning of juveniles in minor cases is handled by specially designated "Youth Services Division" police officers. In serious felony cases, particularly if the case has assumed some notoriety, the interrogation will be conducted (either in whole or in part) by detectives of the special squad (whether homicide, sex, robbery, burglary, narcotics, or vice) that investigated the case; in jurisdictions that possess Youth Services Divisions, the youth officer may sit in on the detective's interrogation or may receive the juvenile for booking and further questioning after the detectives have completed their interrogation. If special squads of detectives are involved in the interrogation, frequently the interrogation will be held in the central headquarters of the special squad; after completion of that interrogation, the juvenile may be transported to the precinct of arrest (or, in some jurisdictions, to the headquarters of the Youth Services Division) for booking and possibly further questioning.

Regardless of the nature or title of the interrogating officer, the purposes of the interrogation are always the same: to secure the respondent's admission or confession to the offense for which s/he was arrested, the respondent's implication of other persons involved in the offense, and the respondent's admission or confession of other "uncleared" or "open" offenses

that s/he may have committed. In particular cases, such as those involving the arrest of persons known or believed to be youth-gang members, the police may also seek, through interrogation, to learn general information about recent developments in the neighborhood or the gang or about its members, which information they believe to be useful for intelligence or crime control.

In addition to interrogation a respondent may be subjected to other investigative procedures before or immediately after booking. S/he may be exhibited to witnesses in a lineup or show-up. S/he may be taken to the scene of the crime to "reenact" or demonstrate what happened. S/he may be taken home or elsewhere to assist the police in finding secreted or discarded weapons, loot, contraband, or evidence; and in this connection, s/he may be asked to give consent to warrantless police searches that, without this consent, would require a search warrant. Specimens of the respondent's hair or blood, swabs, washes, or body scrapings may be taken for laboratory analysis. Each of these police actions may develop incriminating evidence. A respondent may have rights not to be subjected to some of these procedures altogether and not to be subjected to others in the absence of his or her attorney. But these rights can be waived – and they often will be waived unless counsel takes adequate steps to insure their protection.

§ 3.06 POLICE NOTIFICATION OF THE RESPONDENT'S PARENT(S)

In virtually all jurisdictions, statutes or police regulations require that the police notify a juvenile's parent that his or her son or daughter was arrested. In some jurisdictions the requirement is a mere formality, and no sanctions attach to the police officers' failure to notify the parent. In some jurisdictions, however, statutes or court decisions specify that the police department's failure to make serious, good faith efforts to notify the parent *and* to arrange the parent's presence during interrogation will invalidate any resulting confessions. See § 24.14 *infra.*

Statutory notification requirements of this sort, which police generally follow, compensate in part for police officers' invariable refusal to grant juveniles any rights of communication after arrest. Theoretically, any arrested person – whether adult or juvenile – has the right under *Miranda v. Arizona,* 384 U.S. 436 (1966), to make contact with the outside world, in order to obtain counsel prior to undergoing interrogation. *Minnick v. Mississippi*, 498 U.S. 146, 152-54 (1990). *Miranda* expressly requires that any in-custody interrogation be preceded by several warnings including the warning that the suspect has the right to the presence of counsel, and, if indigent, the right to court-appointed counsel, during interrogation. *Dickerson v. United States*, 530 U.S. 428, 435 (2000); *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011); *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010) (dictum); see §§ 24.07, 24.09 *infra.* "[A] person taken into custody [must] be advised immediately" of these rights, *Doyle v. Ohio*, 426 U.S. 610, 617 (1976) (dictum); *see, e.g.*, *Stansbury v. California*, 511 U.S. 318 (1994); *Berkemer v. McCarty*, 468 U.S. 420 (1984), and "the police [must] respect the accused's decision to exercise the rights outlined in the warnings." *Moran v. Burbine,* 475 U.S. 412, 420 (1986) (dictum); *see, e.g.*, *Missouri v. Seibert*, 542 U.S. 600, 608, 611-12 (2004) (plurality opinion); *id*. at 620-22 (Justice Kennedy, concurring); *Smith v. Illinois,* 469 U.S. 91 (1984) (per curiam).

As a practical matter, however, police rarely provide criminal defendants with the opportunity to make a phone call prior to interrogation, and it is even rarer that an officer makes that option available to a juvenile respondent. In some cases in which the police have failed to give the respondent an opportunity to contact counsel, it may be possible to argue that any resulting confession or identification testimony must be suppressed under federal or state constitutional doctrines (*see Haynes v. Washington*, 373 U.S. 503 (1963); and see generally Chapters 24-25 *infra*) or under state statutes requiring that the police afford an arrestee an opportunity to make a telephone call to an attorney. *See, e.g.*, *Commonwealth v. Jones*, 362 Mass. 497, 502-04, 287 N.E.2d 599, 603-04 (1972) (explained in *Commonwealth v. Jackson*, 447 Mass. 603, 615, 855 N.E.2d 1097, 1106 (2006)) (intentional police denial of an arrestee's "statutory right to use a telephone" can result in suppression of "an incustody [sic] inculpatory statement or corporeal identification"); *State v. Beaupre*, 123 N.H. 155, 159, 459 A.2d 233, 236 (1983); *and see State v. Hellstern*, 856 N.W.2d 355 (Iowa 2014) (requiring suppression of the results of a breath test to which the defendant submitted after the police had denied him the right to speak privately with counsel by phone); *Copelin v. State*, 659 P.2d 1206 (Alaska 1983) (same); *State v. Matviyenko*, 212 Or. App. 125, 157 P.3d 268 (2007) (same); *State v. Carcieri*, 730 A.2d 11 (R.I. 1999) (the applicable statute "mandates that a police officer not only provide notice of a suspect's right to a confidential telephone call, but also a reasonable opportunity to speak privately with the recipient of the call, if the call was made for the purpose of securing an attorney or bail" (*id*. at 15); remedies for violation of these rights "must be considered on a case-by-case basis" (*id*. at 16), and "if 'the prosecution has improperly obtained incriminating information from the defendant in [violation of his constitutional or statutory rights] * * * the remedy characteristically imposed is . . . to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted.' *United States v. Morrison*, 449 U.S. 361, 365 . . . (1981).'" (730 A.2d at 16.)); *cf*. *State v. McQueen*, 248 N.J. 26, 31, 34, 50, 256 A.3d 966, 969-70, 980 (2021) (construing the state constitution to hold that the police violated the defendant's right to privacy by permitting the defendant, upon arrest and transportation to the police station, "to make a telephone call from one of the stationhouse's landlines" without "tell[ing] him his conversation would be recorded or accessible to law enforcement without his consent or a warrant"; the court accordingly suppresses the resulting recording of the defendant's telephone conversation with his girlfriend in which he gave her instructions for retrieving his handgun; "An arrestee transported to a police station, who is in custody and given the opportunity to make a telephone call, would naturally reach out to a family member or friend (if not an attorney) for advice, support, or comfort. The warrantless and surreptitious monitoring or recording of calls of an arrestee who is presumed innocent does not comport with the values of privacy that are prized in our free society."); *Application of Newbern*, 175 Cal. App. 2d 862, 1 Cal. Rptr. 80 (1959) (vacating a conviction because the police refused to allow the defendant, arrested for public drunkenness, to phone a physician for the purpose of retaining him to administer a blood alcohol test), followed in *In re Newbern*, 55 Cal.2d 508, 513, 360 P.2d 47, 50, 11 Cal. Rptr. 551, 554 (1961) ("[t]he denial of an opportunity to procure a blood test on a charge of intoxication prevents the accused from obtaining evidence necessary to his defense and is a denial of due process of law entitling him to his discharge").

In some States, the juvenile code contains an express guarantee of a juvenile arrestee's right to make a telephone call. *See, e.g.*, CAL. WELF. & INST. CODE § 627(b) (2022); NEB. REV. STAT. § 43-248.01 (2022). In those States that have an adult criminal code provision of this sort but no parallel provision in the juvenile code, the adult criminal statute often will be worded broadly enough to apply to juvenile arrestees as well.

§ 3.07 POLICE EXERCISE OF DISCRETION WHETHER TO CHARGE THE RESPONDENT

State statutes and police regulations generally furnish the police with broad discretion to "divert" juvenile cases from the system by simply dropping the charges with a warning or, in some jurisdictions, by referring the child to a local social services agency or community service program. Statistical studies indicate that substantial numbers of juvenile cases (often as many as 50 per cent of all arrests) are resolved in this manner.

Studies of the nature and effects of this informal diversion process suggest that the primary factors influencing the charging decision include: the seriousness of the offense (note that in many jurisdictions, statutes or police regulations wholly eliminate police discretion to drop charges of certain enumerated felonies); the age of the child (with children of ages 12 and under being diverted on a regular basis); the child's prior record of convictions, charges, and prior contacts with the police; the race, gender, and socio-economic status of the child (with indigent African American and Hispanic males facing the highest likelihood of referral to court); the demeanor of the child (with youths who seem respectful to the officers and fearful of sanctions viewed as "salvageable" and therefore diverted from the system); the comments and attitude of the parents upon being informed of the child's arrest (with the officer assessing whether the parents are likely to appropriately punish the child and control his or her misbehavior in the future); and, finally, the individual officer's personal feelings about the efficacy of the juvenile justice system and the likelihood that a minor offender will derive any benefits from court intervention.

In most jurisdictions, police departments maintain some sort of record of "contacts" with respondents in cases that are subsequently dropped or diverted. These records are consulted when the police wish to determine whether a newly arrested child is truly a first offender and "worthy" of diversion.

Police (or prosecutors later in the pretrial process) may condition their willingness to drop charges upon the respondent's agreement to waive claims of civil liability for illegal arrest, mistreatment following arrest, wrongful prosecution, and so forth, against the officers and governmental agencies involved. Counsel should evaluate the costs and benefits of entering into any such agreement and should be prepared to negotiate for favorable terms. Counsel's leverage in negotiating is enhanced by state and federal rules limiting the conditions that may be exacted as the price for dismissing charges, and limiting officials' power to coerce respondents to accept oppressive conditions. *See, e.g., Marshall v. City of Farmington Hills*, 578 Fed. Appx. 516, 520

(6th Cir. 2014) ("A release-dismissal is enforceable only if a court 'specifically determine[s]' that: (1) it was entered into voluntarily; (2) there is no evidence of prosecutorial misconduct; and (3) enforcing the agreement 'will not adversely affect relevant public interests.'"); *cf. Town of Newton v. Rumery*, 480 U.S. 386, 398 & n.10 (1987).

§ 3.08 BOOKING OR SLATING

Following the period of interrogation and the decision of the police to formally charge the respondent with an offense, the charges are noted in police records. This is the booking or slating process, which involves making a record of the name of the respondent and of some identifying data (usually gender, race, date of birth, address, phone), the time and place of the arrest, and the offenses charged. This information is recorded in summary form on a police blotter and, in more detail, on arrest cards, in arrest reports, in paper or electronic files, in computer data bases, or in more than one of these media.

The booking or slating process may also include the police officer's filling out extensive, specialized printed or electronic forms. The forms commonly include some type of arrest report, calling for the respondent's name, nickname, age, date of birth, identifying characteristics (gender, race, height, weight), address and phone number, parents' addresses and phone numbers, the name and general location of the respondent's school, and the respondent's current grade in school. They often require information concerning the time, date, and location of the offense; the time, date and location of the arrest; whether any other juvenile respondents or adult defendants were arrested for the same offense; whether any force was employed in effecting the arrest; whether the respondent confessed to the offense and possibly also what the respondent said. In addition to these arrest reports, the police frequently prepare a supplement to the original "event" or "incident" or "complaint" report that was filed at the time when the crime was first reported. This supplement usually recounts the details of the arrest, possibly the content of any confessions or admissions, and the results of any identification procedures, and a statement of whether the arrest "closes" the case or whether there are still unarrested perpetrators being sought. Finally, in particular cases, the police may fill out additional forms: for example, firearms cases require special forms listing serial numbers and descriptions of guns and bullets; narcotics cases require detailed information about the nature and weight of the drugs and the property numbers assigned the drugs, as well as a "buy report" by the undercover officer; eyewitness identifications may require special cards or forms listing the description originally given and the words spoken by the witness in identifying or failing to identify the respondent.

The nature of the forms and the precise procedures followed by the police vary greatly among jurisdictions. It is important that counsel become familiar with both the types of forms used and the information contained upon those forms, in order to subpoena documents that can prove invaluable at trial. See §§ 8.16, 8.17, 8.19 *infra.*

§ 3.09 FINGERPRINTING AND PHOTOGRAPHING

Two common components of police booking procedures in adult criminal cases are the fingerprinting and photographing of the defendant, which enable the police to maintain fingerprint records and mug shots for use in later investigations. As a result of the juvenile court's philosophy of confidentiality, statutes in approximately half of the States limit the power of the police to fingerprint or photograph juvenile respondents after arrest. The scope of that limitation varies widely. In some States the police must obtain the consent of a juvenile court judge in order to fingerprint or photograph a juvenile. In other States the police are empowered to fingerprint and photograph juveniles, but only in serious felonies designated in the statute and/or only if the juvenile is above a certain age.

In a few States there are restrictions on police practices of filing and disseminating fingerprint records and mug shots. These statutes generally require that the police keep juvenile fingerprint records and photographs separate from adult records, and withhold the juvenile records from the adult criminal files routinely forwarded to the F.B.I.

In several States the statutes also create mechanisms that attorneys can and should employ to compel destruction of juveniles' fingerprint records and photographs in the event of a favorable disposition of the case or after the juvenile has passed a certain age. See §§ 37.03, 39.08 *infra.*

§ 3.10 POLICE DECISION WHETHER TO DETAIN THE RESPONDENT PENDING ARRAIGNMENT

After deciding to lodge charges against the respondent and after booking (and possibly also fingerprinting and photographing) the respondent, the police decide whether to detain the respondent pending the first court appearance (generally known as the "Initial Hearing") or release the respondent to the custody of his or her parents. If the police opt for detention and court is still in session and the "cut-off time" for bringing the child to court (usually early- to mid- afternoon) has not yet passed, then the detained respondent will be brought to court immediately for arraignment and a judicial determination of the need for pretrial detention. In cases in which the police have decided to detain pending arraignment and the cut-off time has already passed, the police will bring the detained youth to a juvenile detention facility to be held overnight and transported to court in the morning. If the police opt for release, then the juvenile and his or her parents will be given a form (in some jurisdictions, called an "appearance ticket") instructing them to come to court on a specified later date (usually about two weeks later) and to report to Probation Intake.

The ramifications of the police decision to detain or release are substantial. If a child enters court from the cell-block, then judges, prosecutors, and probation officers often apply an unspoken presumption that the detention should continue for the period pending trial. On the other hand, if the child is released and stays out of trouble for the two weeks prior to the first court appearance, there often will be an implicit presumption that the release status should continue. (Indeed, in some jurisdictions, community release cases are arraigned before a

magistrate who does not even have the power to detain the child pending trial.)

State statutes and police regulations generally direct the police to base the detention/release decision on an assessment of the probability of continued criminal conduct and the probability of flight if the child is released. However, in making those assessments, the police usually will consider all of the factors described in § 3.07 *supra* as influencing police discretion on the charging decision. Thus the nature of the offense, the respondent's age, prior record, gender, race, socio-economic status, and demeanor all will inform the police judgment regarding the youth's propensity for future dangerousness or flight and thereby will determine whether the child is detained or released. In some jurisdictions the statutes or police regulations specify that a child shall not be released on charges of certain enumerated felonies.

§ 3.11 ALLEGED DELINQUENTS DETAINED BY THE POLICE PENDING ARRAIGNMENT: TRANSPORTATION TO THE JUVENILE DETENTION FACILITY AND THE *DE NOVO* JUDGMENT ON DETENTION OR RELEASE BY FACILITY STAFF

If the police decide to detain a child in a delinquency case and court has been adjourned for the day (or the cut-off time for bringing children to court has passed), then the police will transport the respondent to a juvenile detention facility where s/he will be held overnight so that s/he can be brought to court in the morning. For children who are arrested on a weekend, the period of pre-court detention may extend up to 72 hours.

In many jurisdictions state statutes empower some official stationed at the detention facility to make a *de novo* decision whether the child should be detained or released into parental custody pending the first court appearance. (That official may be an employee of the juvenile court's probation department or a specifically designated official of the state agency charged with administering the juvenile detention facilities, or a member of the staff of the particular facility.) The governing statute or the applicable agency regulations usually direct that official to base the detention/release determination on a prediction of the child's propensity for future criminal conduct and likelihood of flight. Frequently, agency regulations will amplify this general standard by directing the officials to consider the nature of the present offense and the respondent's prior record. Also, statutes and agency regulations frequently prohibit release in enumerated felony cases.

If the agency official decides to release the child into parental custody, the child and parent are given a form directing them to report to the probation intake office on a subsequent date (usually two weeks later). If the parent refuses to take the child home, then the respondent will be detained overnight and brought to court in the morning. If the parent wishes to accept custody but is unable to arrange transportation from the facility, then, in some jurisdictions the child will be brought home by a facility staff member; in other jurisdictions the parent's inability to arrange transportation results in the child's staying in detention.

In some jurisdictions the official stationed at the detention facility has the additional option of detaining the child overnight in a group home or "shelter house" for alleged delinquent youth. That option may be employed in cases in which the parent refuses to accept custody or in which the nature of the offense or the respondent's prior record warrant a detention option more confining than outright release but less severe than detention in a secure facility.

§ 3.12 THE PROBATION INTAKE PROCESS

Whether a child is detained or released, s/he will go through a probation intake process prior to arraignment. The timing and nature of that process vary slightly, depending on whether the child was detained or released.

In most jurisdictions the probation intake process is designed to serve two functions: (i) to assess whether the "social factors" in the case (that is, the child's age, prior record, parental supervision, school attendance, and attitude) warrant "diversion" of the case – which can mean either outright dismissal of the charges or temporary abatement of any court proceedings and the promise of eventual dismissal after the child has completed some counseling or community service program; and (ii) in the event that the probation office concludes that diversion is inappropriate (or in jurisdictions where the probation office is not the final arbiter of the diversion decision, if the prosecutor's office or judge concludes that diversion is inappropriate), to assess the need for a judicial order of detention of the child pending trial. The probation office's procedures for gathering the information necessary to make these judgments invariably include an interview of the child and his or her parent(s) or guardian, consultation of prior court records concerning the child, and discussions with any present or prior probation officers of the child. The intake process usually also will include telephone conversations with the attendance officer of the child's school and with any mental health professionals who may have been seeing the child.

In detention cases this process usually is relatively truncated, in light of the need to complete the paperwork necessary to send the case into court for arraignment quickly. As soon as the child is brought in from the juvenile detention facility, s/he will be interviewed by an intake probation officer in the cell-block. That same probation officer then will interview the parent, consult prior court records on the child, and make whatever phone calls are feasible. The probation officer then will make a decision on diversion (or, in some jurisdictions, will make a recommendation regarding diversion to the prosecutor's office or the judge). If the case is a detention case, it most likely will not be diverted: whatever aspects of the child's background or the current offense caused the police and the detention facility official to opt for detention usually will also result in the denial of diversion. (In fact, in some jurisdictions the intake probation office follows a policy, whether formal or informal, of automatically rejecting diversion in all detention cases.) Thus the probation officer's primary focus in detention cases usually will be the gathering of sufficient information to make a recommendation to the court regarding the need for pretrial commitment. At arraignment the probation officer will present the recommendation and a summary of the social information underlying that recommendation to the court. See § 4.19 *infra.*

In cases in which the respondent was released by either the police or a detention facility official, the probation intake process will usually take place two to four weeks after arrest. When the respondent and his or her parent appear at the probation office in accordance with their "appearance ticket" (see §§ 3.10, 3.11 *supra*), they will be interviewed by an intake probation officer. Thereafter, the probation officer will check the child's records and will call the child's school, any present or prior probation officers that the child has had, and any mental health personnel who have seen the child. In some jurisdictions the practice is to complete that intake process, determine the propriety of diversion, and, if necessary, send the case into court for arraignment, all on the day of the interview with the respondent. In other jurisdictions the child and parent are instructed to return on another date for the final decision on diversion and, if necessary, for arraignment.

After the probation office has completed its intake process, the intake probation officer will send some type of form to the agency that prosecutes juvenile delinquency cases, informing that agency of the decision regarding diversion (or, in some jurisdictions, making a recommendation regarding the prosecutor's decision on diversion). If the case is not to be diverted, the probation office or the prosecutor's office will prepare a charging document ("petition") and will send the petition and any necessary supporting documents to the court clerk's office. The court clerk's office then prepares the official court file, and when that file is received in the arraignment courtroom, the case is ready for arraignment.

Part C. Representing Juveniles Who Have Just Been Arrested and Are Still at the Stationhouse or Holding Facility: Dealing with the Police and Other Damage Control

§ 3.13 THE TELEPHONE CALL FROM A PARENT OF A CHILD WHO HAS JUST BEEN ARRESTED AND IS STILL AT THE STATIONHOUSE

A late night telephone call from a distressed parent or guardian of a recently arrested juvenile is a common occurrence in the lives of both retained and appointed counsel. The appointed lawyer is usually contacted because s/he already represents the child on some charge and therefore is known to the parent. The retained lawyer may be contacted either because of such an existing relationship with the family or because the parent has obtained the lawyer's name from an acquaintance, a reference, or the phone book. More than any other situation, this scenario requires immediate action on the part of the lawyer. The attorney must move quickly to prevent the respondent from making any incriminating statements to the police. The lawyer's success in that endeavor can literally mean the difference between conviction and acquittal when the case eventually reaches trial.

Because of the need for prompt action, the attorney should keep the phone conversation with the parent or guardian as brief as possible. (The attorney should be sure to explain the need for succinctness, in order to avoid seeming insensitive to the fears and concerns of the parent or guardian.) At this point the only vital information is that which is needed to locate the respondent, gain access to him or her, and establish oneself in the eyes of the police as

respondent's counsel. The attorney should get the following items:

1. The respondent's name (with spelling).

2. The caller's name (with spelling), relationship to the respondent, and telephone number (so the attorney can call back for a follow-up conversation after locating and communicating with the client).

3. Authorization from the caller to represent the respondent, at least at this stage.

4. Any information the caller may have about which police station the respondent was taken to. The caller may know precisely, as a result of having received a call from the police notifying him or her of the arrest. If the caller does not know, the attorney should ask: where the arrest was made; whether it was made by uniformed or plainclothes police officers; and whether the officers belonged to a special squad (such as homicide, robbery, burglary, narcotics, vice) or were otherwise identifiable by the caller.

5. The offense for which the respondent was arrested, if the caller knows. The nature of the offense may be important in attempting to locate the respondent, especially if a special squad is involved in the interrogation. Conversely, a lengthy description of the facts of the case not only is unnecessary at this stage but is counterproductive in light of the need for quick action. When, as so frequently happens, the parent launches into an explanation of why the respondent is innocent, the attorney must gently but firmly explain his or her need for acting quickly to find the respondent and should indicate that s/he would like very much to hear what the parent has to say on a later occasion when there is more time. (Such explanations are not only necessary as a matter of common courtesy but also effective lawyering, since good relations with the parent usually are essential to proper handling of the case.)

§ 3.14 LOCATING A CLIENT WHO WAS RECENTLY ARRESTED

The most effective way to locate the respondent is usually a series of trial-and-error telephone calls. The order of the calls depends in part upon the amount of time that has elapsed since the arrest, but the first call should ordinarily go to the desk officer of the police station for the precinct where the arrest occurred, and the second call should go to any officer in that precinct who has been specially designated to conduct the "booking" of all juveniles. In all but serious felony or special-squad cases, these officers are likely to know where the respondent is and what officer is in charge of "booking" and interrogating the respondent. See §§ 3.04, 3.05, 3.08 *supra*.

In serious felony cases and special-squad cases, detectives usually conduct an

interrogation of the respondent prior to turning the respondent over to a uniformed officer or Youth Division officer for booking. See § 3.05 *supra*. As a result, in cases in which the detectives are still in the process of interrogating the respondent, and especially if that interrogation is taking place in a special-squad headquarters in another region, the desk officer and other officers in the precinct stationhouse are unlikely to have any knowledge of the whereabouts of the respondent. Accordingly, if counsel fails to obtain information about the respondent's location from the precinct-station desk or Youth Services officer for that region, calls should next be made to the commanding officer of any detective squads for that precinct and then to the commanding officers of special squads (such as homicide, narcotics, vice) whose headquarters are in other regions. Counsel should also check with the local juvenile detention facility, in the unlikely event that an officer brought the child directly to the facility without first filling out all of the usual paperwork at the police station.

If these phone calls prove fruitless, counsel should call the commanding officer on duty in the arrest precinct, explain that the client has disappeared following an arrest in the commander's precinct, and request that the commander locate the client immediately and inform counsel where s/he is being held. If the commander claims ignorance, counsel should ask for the name and phone number of the highest ranking official of the police department then on duty and should call this official to confront him or her with the client's disappearance and make the same requests. Counsel should next call a member of the prosecutor's staff and object to the incommunicado detention of the respondent. "'Holding incommunicado is objectionable because arbitrary – at the mere will and unregulated pleasure of a police officer,'" *Ashcraft v. Tennessee*, 322 U.S. 143, 152 n.8 (1944); it violates both Due Process (*Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Jauch v. Choctaw County*, 874 F.3d 425 (5th Cir. 2017)) and the Fourth Amendment to the federal Constitution. "[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). All else failing, counsel should call a judge of the court of record of the county and ask to appear before the judge at the earliest possible time to present a petition for a writ of *habeas corpus* directed to the chief of police, the prosecutor, or both, charging them with the illegal custody of the respondent. *See Rasul v. Bush*, 542 U.S. 466, 474 (2004): "'[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.' *INS v. St. Cyr*, 533 U.S. 289, 301, . . . (2001). *See also Brown v. Allen*, 344 U.S. 443, 533, . . . (1953) (Jackson, J., concurring in result) ('The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial')."

§ 3.15 KEEPING RECORDS OF CALLS TO POLICE OFFICERS

It is essential that counsel keep a record of the times at which s/he made telephone calls to locate the respondent and the names (correctly spelled), ranks, and badge numbers of all officers to whom s/he spoke. These may be needed in moving to suppress incriminating statements on the ground of unnecessary police delay in producing the respondent before a judicial officer (see § 24.15 *infra*) or on the theory that such delay was a factor in producing an involuntary statement

(see § 24.04(b) *infra* and particularly *Haynes v. Washington*, 373 U.S. 503 (1963)). In more extreme cases of police delay, the information may be needed for petitions for a writ of *habeas corpus* to free the respondent from police custody.

§ 3.16 CALLS FROM A CLIENT WHO IS IN POLICE CUSTODY

It is the rare case in which counsel will receive a phone call directly from a juvenile client in police custody, since the police invariably violate juvenile respondents' rights to contact an attorney prior to interrogation. See § 3.06 *supra*. When counsel does receive a call directly from the client, counsel should immediately elicit the client's precise whereabouts. The client should be asked to identify his or her location by precinct or headquarters' name and street address or, if these are unknown, by general location and building description. S/he should be asked whether s/he has heard or seen anything suggesting that s/he might be taken by the police to any other location; if so, where and when. As a failsafe, s/he should also be asked the street location where s/he was arrested, the charge, and whatever s/he knows about the identity of the arresting and investigating officers.

Once counsel has completed obtaining this information concerning the client's location, the steps that must be taken are the same as those followed in cases in which the attorney was contacted by the parent or guardian and tracked the respondent down through trial-and-error telephone calls. Those steps are summarized in § 3.17 *infra* and described in greater detail in §§ 3.18-3.25 *infra*.

§ 3.17 OVERVIEW OF THE STEPS TO BE TAKEN AFTER COUNSEL HAS SUCCEEDED IN LOCATING THE RECENTLY ARRESTED CLIENT

After counsel has located the recently arrested client, counsel should take the following steps to safeguard the client's immediate interests and to further the long-range goal of winning the case at trial.

If the client is still in police custody and has not yet been moved to a juvenile detention facility pending arraignment:

1. Gain immediate access to the client by phone in order to relay the information the client needs most urgently. For techniques for persuading police officers to permit counsel to speak with the client by phone, see § 3.18 *infra*.

2. In the phone conversation with the client, counsel should:

    a. Secure the client's permission to represent him or her. See § 3.19(a) *infra*.

    b. Warn the client, in the strongest possible terms, against: making any statements whatsoever to the police; speaking with cellmates or visitors; or

agreeing to searches or other police investigative procedures. See § 3.19(b)-(d) *infra*.

c. Obtain any other information that will be useful in attempting to secure the client's immediate release. See § 3.19(e) *infra*.

d. Instruct the client to tell a police officer, while counsel is still on the phone to hear this said, that the client does not want to talk with the police or prosecuting authorities in counsel's absence but wants to conduct all future communications with the authorities through counsel as his or her attorney.

3. Speak with the investigating officer and the booking officer and:

a. Clearly and firmly declare that, as counsel for the respondent, counsel is informing the police that the respondent is exercising his or her constitutional rights: to refuse to answer questions; to refuse to answer questions without the presence of counsel (an assertion that is separate from and even more important than the invocation of the general right to silence); and to refuse to consent to any searches, identification procedures, or other investigative procedures. See § 3.20 *infra.*

b. In the event that counsel intends to follow the preferred course of action of going personally to the police station, request that the officer not conduct any interrogation, identification procedure, or other investigative procedure with the client until counsel arrives at the station and confers with the client. See § 3.20 *infra.*

c. Obtain other information that will be useful in attempting to secure the client's immediate release or in handling later stages of the case. See § 3.20 *infra.*

4. After speaking with the investigating officer and booking officer, call the respondent's parent/guardian and:

a. Obtain whatever additional information is needed to attempt to secure the respondent's immediate release. See § 3.21 *infra.*

b. Make whatever arrangements are necessary for the parent/guardian to accept custody of the respondent in the event that counsel succeeds in securing the respondent's release. See § 3.21 *infra.*

5. Take whatever steps are necessary to prevent the police from interrogating the

respondent and to attempt to secure the respondent's release:

a. Preferably, counsel should go personally to the police station to prevent interrogation of the client and to attempt to negotiate his or her release into parental custody. See § 3.22 *infra.*

b. If counsel cannot follow the preferred course of going personally to the police station, then counsel should make whatever telephone calls can be made, as the next best alternative for protecting the respondent's rights and interests. See § 3.23 *infra.*

6. If counsel fails to persuade the police to release the respondent, then counsel must speak with any officials at the juvenile detention facility or officials of any other agency who have the power to release the respondent notwithstanding the police decision to detain and attempt to secure the respondent's release. See § 3.24 *infra.*

If, at the time that counsel first locates the client, s/he no longer is in police custody and already has been moved to a juvenile detention facility:

1. Gain access to the client by phone, secure the client's permission to represent him or her, and caution the client against speaking about the facts of the offense with any cellmates or visitors. See § 3.24 *infra.*

2. If any officials at the facility (or other agency) have the power to release the respondent notwithstanding the police decision to detain, then speak with those official[s] and attempt to secure the respondent's release. See § 3.24 *infra*.

§ 3.18 GAINING IMMEDIATE ACCESS TO THE CLIENT: PERSUADING POLICE OFFICERS TO ALLOW COUNSEL TO SPEAK WITH A RECENTLY ARRESTED CLIENT ON THE TELEPHONE

The first step after locating the client should be to talk with the client by phone. See § 3.19 *infra.* Unfortunately, in the vast majority of cases, police officers will be very resistant to the notion of counsel's speaking with the client.

In attempting to cut through police interference, it is usually wise to begin by seeming cooperative and congenial. Most police officers experience a surfeit of angry phone calls from citizens, victims, and lawyers, and they usually react to aggressive calls from defense lawyers truculently. By contrast, a cordial phone conversation that attempts to deal with the officer on a professional-to-professional basis may be disarming and eventually successful. In dealing with the police, it is always useful to anticipate their interests and, if possible, offer counsel's assistance in achieving the officers' goals in exchange for counsel's access to the client. Thus, for example, counsel might say:

> Officer, until I speak with my client, it's my duty, as [his] [her] lawyer, to tell you that [he] [she] does not wish to answer any questions until I get there. Now, if I can have a chance to talk with [him] [her] on the phone right now, so that I can get a better sense of what this case is all about, it may be that I'll end up advising [him] [her] to cooperate with you and possibly to cut a deal. But, I can't make any decision about that, and I certainly can't advise my client about that unless you let me talk with [him] [her] on the phone.

Although it is *very* rare that counsel will ever end up advising the client to cooperate with the police, the fact that that advice is prudent in even a small number of cases means that counsel should not feel reluctant to promise to *consider* advising the client in that manner.

In all such dealings with the police, counsel should take precautions against later being misquoted (for example, by an officer who testifies that s/he questioned the respondent only after both the client and the attorney waived counsel's presence during the interrogation). Counsel should make notes of the conversation immediately and, when time permits, write a memo to the file regarding the content of the conversation.

If an amiable approach fails to shake police refusals to allow counsel to speak with his or her client, more aggressive demands are in order. Insistence that the police respect the client's rights to communication (see § 3.06 *supra*) can be racheted up by threatening to hold the officers legally responsible if they continue to stonewall. Successful civil-rights actions against police for violating the rights of arrestees are not commonplace, but there have been enough of them to make many officers buckle in the face of defense counsel who appear determined to enforce those rights by litigation. *See, e.g.*, *Thompson v. Clark*, 142 S. Ct. 1332 (2022); *Haze v. Harrison*, 961 F.3d 654 (4th Cir. 2020); *Barnett v. MacArthur*, 956 F.3d 1291 (11th Cir. 2020); *Alcocer v. Mills*, 906 F.3d 944 (11th Cir. 2018), and 800 Fed. Appx. 860 (11th Cir. 2020); *Jauch v. Choctaw County*, 874 F.3d 425, 427 (5th Cir. 2017); *Crowe v. County of San Diego,* 608 F.3d 406 (9th Cir. 2010), and cases collected in § 5.09 *infra*; *but see Vega v. Tekoh*, 142 S. Ct. 2095 (2022); *Egbert v. Boule*, 142 S. Ct. 1793 (2022).

If the officer allows counsel to speak to the client, counsel should cover the matters described in § 3.19 *infra*. Counsel should also talk further with the police to try to obtain additional information about the case, provide protections for the client from interrogation and other police investigative procedures, and explore the possibility of the police releasing the client to his or her parent(s) or guardian(s). See § 3.20 *infra*. Thereafter, counsel should go to the police station if at all possible and follow the steps recommended in § 3.22 *infra*. Section 3.23 presents some alternative precautions counsel can take if s/he is unable to go to the police station.

If the officer does not allow counsel to talk with the client on the telephone, counsel should record the officer's name and badge number and the name and phone number of his or her commanding officer and should then give the officer the precautionary instructions itemized in

§ 3.20 subdivision 2(F) *infra*. Counsel should immediately call the commanding officer and attempt to persuade him or her to order the arresting officer to permit counsel to speak with the client on the phone. If the commanding officer proves unbudging, counsel should deliver the same set of precautionary instructions and should inform the commanding officer that counsel is memorializing those requests and the time when counsel gave them to both the arresting officer and the commanding officer. Counsel should then go promptly to the police station where the respondent is being held (see § 3.20 *infra*). Frequently, counsel will obtain better results in person than s/he did on the phone.

§ 3.19 THE TELEPHONE CONVERSATION WITH THE CLIENT WHO IS PRESENTLY IN THE CUSTODY OF THE POLICE

§ 3.19(a) Preliminary Matters To Discuss with the Client

If the attorney succeeds in persuading the police to permit him or her to speak with the client on the phone, the first thing to do is to obtain an explicit statement by the client that s/he wants counsel to represent him or her. If counsel was initially contacted by a caller on behalf of the client, counsel should explain that the caller asked counsel to represent the client and to give whatever help counsel can provide. Counsel should ask the client whether s/he wants counsel to represent him or her and explain that counsel is willing to represent the client for the time being, at least until there is time to get together and talk about whether the client wants counsel to continue on the case. Assuming the client is willing to be represented by counsel, counsel should obtain an explicit statement to that effect from the client and then should tell the client that counsel is now formally the client's lawyer. In the event that counsel is able to follow the preferred course of personally traveling to the police station, counsel should also tell the client that s/he will be coming down to see the client immediately (or as soon as counsel judges that s/he can get there), giving a specific time estimate.

The other preliminary matter to which counsel should attend in the phone conversation with the client is to ensure that the remainder of the conversation will be private. Counsel should ask the client where the telephone the client is using is located (detectives' room? pay telephone in the corridor?) and whether any officer is listening to the call. (The client should be instructed to answer this last question "yes" or "no" without indicating that the subject of the conversation is the risk of eavesdropping.) The client also should be asked whether any other individuals, such as nonpolice employees of the stationhouse or persons arrested with the client, are within earshot. If there is a possibility that any police officer or other individual may be eavesdropping on the conversation, counsel should warn the client to use "yes" and "no" answers whenever possible. In serious felony cases, particularly those with some notoriety or those involving gang activity or major drug rings, counsel also must be alert to the possibility of wiretapping of the police phone or of police officers listening on an extension phone and must modify his or her own end of the phone conversation accordingly. Surreptitious eavesdropping on attorney-client conversations is impermissible (*see*, *e.g.*, *Matter of Neary*, 84 N.E.3d 1194 (Ind. 2017)) but it does happen and is difficult to prove, so counsel is wise to avoid touching on any subjects that may reveal

incriminating information or potential defense activity.

§ 3.19(b) Advising the Client: Protecting the Client from Interrogation

The first and most emphatic advice that the attorney should give in a telephone conversation with a client who is presently in custody is:

> Say nothing to the police. Tell them nothing at all. Do not answer any questions from the police until you and I have had a chance to talk privately.
>
> If the police try to question you or to talk to you at all – about *anything* – tell them your lawyer told you not to talk. If they say anything about having evidence against you or if they tell you what the evidence is or if they bring in someone else who says something against you, then they are just trying to get you to talk. Don't fall for it. If they promise to drop the charges after you confess or if they threaten to stick you with more charges if you don't talk, they're just trying to trick you. Don't fall for any of their tricks. Whatever they say, tell them your lawyer told you not to talk.
>
> Sometimes, the police tell arrested kids that their lawyers don't know anything and that only the police know what's good for the kid. That's just another police trick. They're trying to get you to say something so that they can get the judge to lock you up for a long time.
>
> So, make sure you don't say anything to them. Just keep saying that your lawyer told you not to talk.

This phraseology is preferable to any of the other standard formulations used by lawyers in advising their clients not to confess. Telling the client not to say "anything" is better than telling him or her not to "make a statement," since many clients believe that a "statement" means a written, signed confession. It is also better than advising the client not to make any written or oral confessions, since often clients will not understand that "confessions" include what they believe to be exculpatory statements (for example: "I didn't break into the house, I just stood outside as a lookout"). Advising the client to say explicitly "My lawyer told me not to say anything" is better than advising the client to remain silent, because it is more concrete and therefore easier for the client to understand; it gives the client *something* to say instead of having to suffer the discomfort of standing mute in the face of questions or accusations, and so may be easier for the client to do; and it avoids the risk that the client's total silence may later be used against him or her as a "tacit admission." See § 24.24 *infra*.

The advice not to talk to the police should be given in *all* cases. Concededly, there is sometimes a possibility that wholehearted cooperation on the client's part might result in the police exercising their discretion to drop the charges or at least to release the client pending arraignment. See §§ 3.07, 3.10 *supra.* However, the possibility of obtaining those benefits is

usually so slim and the consequences of confession so devastating in the long run that a cost-benefit analysis has to result in advising the client not to talk. In the few cases in which the client's alibi or explanation is so foolproof that it would have persuaded the police to drop the charges, that same result can usually be achieved through negotiations with the prosecutor involving none of the risks that talking to the police entails. Similarly, in the few cases in which cooperation would have resulted in a police decision to release the respondent, that same result can usually be achieved without a confession by persuading a detention facility official or probation officer to exercise his or her discretion to release the respondent. See § 3.24 *infra.* Finally, counsel can minimize even the comparatively negligible risk of adverse consequences flowing from a lack of cooperation with the authorities by telling the client to explain that s/he is refusing to speak with the police solely because of counsel's advice. By placing the onus on the attorney, the client can obtain whatever benefits might accrue from appearing to be a cooperative child (see §§ 3.07, 3.10 *supra*) while avoiding the overwhelmingly detrimental consequences of a confession.

§ 3.19(c) Cautioning the Client Against Speaking with Cellmates or Visitors

In addition to telling the client not to speak with the police, counsel should caution the client against speaking with cellmates, co-respondents, and adult co-defendants. Cellmates may be snitches, and co-respondents and adult co-defendants may become turncoats. Counsel should be aware that this is a lesson that most juveniles find hard to accept. Lacking the adult criminal defendant's experience with cellmates or co-defendants who "turned," juveniles tend to trust naively the loyalty of their friends and peers. For this reason, counsel should stress the importance of not talking with cellmates, co-respondents, and adult co-defendants and may wish to mention that a large number of people who get busted end up snitching in order to save their own skins.

Counsel should also warn the client about the possibility that the police will eavesdrop on any visits or telephone conversations that s/he may have with family or friends while at the police station. To minimize this danger, it is wise to advise the client (i) to make and receive no visits or phone calls except from counsel or from close family members who need to be reassured that the client is all right, and (ii) during any family calls and visits, to say nothing unnecessary and certainly nothing about the client's actions or whereabouts before s/he was arrested or anything else that might have any connection with the case.

§ 3.19(d) Other Advice To Give the Client: Protections Against Lineups, Show-ups, and Other Police Investigative Procedures

Once counsel has fully warned the client against speaking with the police (§ 3.19(b) *supra*) and against speaking with cellmates, co-respondents, adult co-defendants, and visitors (§ 3.19(c) *supra*), counsel will have established the most urgently needed protections of the client's interests. There is additional advice that counsel can give regarding other police investigative procedures, but this should be given if, and only if, counsel believes that the

youthful client is capable of assimilating the lengthy discourse involved and will not suffer such information overload that s/he ends up forgetting some of counsel's critical advice about talking to no one. That judgment by counsel needs to be based on the child's age, emotional state, and degree of physical exhaustion. Throughout the phone conversation, counsel should periodically ask the client questions that will force the client to repeat back the advice that counsel has just given (for example: "Okay, now what are you going to say when the police say that if you tell them what happened, they'll drop the charges and you can go home?"). Such questions will not only serve as a mechanism for double-checking the client's comprehension of the previously given advice, but they will also enable the attorney to gauge whether the client's current attention span warrants venturing into the realm of useful-but-not-indispensable additional advice.

If the client seems reasonably alert, counsel should next advise him or her how to deal with lineups and other identification procedures that may occur while s/he is at the police station. It is presently unclear to what extent the police can lawfully compel an unwilling accused to submit to identification confrontations in the absence of counsel. See § 25.06 *infra.* The client should accordingly be advised to object to any lineup, show-up, or confrontation for identification purposes that is held in counsel's absence, and to tell the police, if they say anything about showing the client to any witness for possible identification, that the client wants to have his or her lawyer present and that s/he is asking the police either to phone the lawyer (giving them the lawyer's number) or to let the client phone the lawyer, so that the lawyer can come down to the station and represent the client during any identification procedure. The client should also be instructed that in the event that the police do display the client to any person for identification, the client should not speak any words or answer any questions – including his or her name – during the procedure. S/he should not, however, physically resist being exhibited; and if the police insist on going ahead with the exhibition after s/he has told them that s/he objects to it, the client should follow whatever orders the police may give with regard to the client's going up onto a lineup stage or stepping forward or walking about or speaking words that everyone in the lineup is asked to speak. S/he should never attempt to hide his or her face or to make faces. These tactics, or a failure to obey instructions to step forward or to walk about or to say words that other persons in the lineup speak, will only focus attention on him or her and thereby increase the chances of being identified as the perpetrator; they may also be used against the client as evidence of guilt; and physical resistance to the officers may result in a beating or the lodging of assault-upon-an-officer charges or both. If the police tell the client that s/he is being taken to a lineup or identification room, s/he should orally object to the absence of counsel but should not sit down or physically refuse to go, since this action may result in the witnesses being brought back to view the client in the cell – a far more suggestive form of confrontation than the lineup itself. If the police tell the client that s/he is being taken anywhere to be shown to witnesses, s/he should insist, *first*, that s/he be given a chance to phone his or her lawyer and to have the lawyer present and, *second*, that s/he not be shown to witnesses except in a lineup with other people who resemble the client. Once in a lineup or identification confrontation, s/he should observe and remember everything about it that s/he can, particularly (a) how many other persons were in the lineup, how they were dressed, and what they looked like (getting their names, if possible without attracting attention to the client or afterwards if the client sees these

persons again while s/he is in custody); (b) how many witnesses were asked for identifications, what they said, what the officers said to them, their names, and what they looked like; (c) how many police officers were present and their names, badge numbers, and descriptions; and (d) the time and place of the lineup. The client should not attempt to take notes during the lineup or in any place where s/he may be observed by the witnesses to the lineup, but when s/he returns to the cell, s/he should request paper and a pen from the guards and immediately write down everything that s/he can remember.

The client should also be instructed that if anyone asks for permission to go to the client's house or to any other place in order to search for evidence or weapons or pieces of clothing or anything else, s/he should say, "My lawyer told me to say, 'No,'" whether or not s/he thinks that the things the police are looking for will be found or that the search will prove the client innocent. S/he should be instructed to give the same answer if the police ask the client to lead them to any place or thing or to act out or demonstrate any action; and to object to being taken from the cell area for any reason, saying that s/he wants to stay there and wait for an attorney who is coming. S/he should be instructed not to sign any forms or papers and not to write down anything for the police. Again, the proper answer is "My lawyer told me to say 'No' until s/he gets here." The client should be instructed that if anyone attempts to inspect or examine his or her body, to take swabs or washes or scrapings from it, to cut nails or take hair samples, the client should tell them "My attorney said to wait until s/he gets here"; but if they go ahead anyway, the client should not try to fight them off.

§ 3.19(e) Eliciting Information from the Client That Will Be Useful in Attempting To Secure the Client's Release

In the relatively rare situation in which the attorney was initially contacted by the client directly rather than by a parent or other relative on the youth's behalf (see § 3.16 *supra*), it is essential that the attorney elicit from the client his or her parent's (or guardian's or close relative's) name and phone number. In addition, since this is the only situation in which the attorney will not already know the client's current location (since it is the only situation in which the attorney did not track down the client before talking to him or her), the attorney must elicit from the client his or her current location by precinct or headquarters' name and street address or, if these are unknown, by general location and building description.

Whether it was the client who called, or the more common situation of the attorney reaching the client, counsel should ask the client precisely where *within* the building s/he is. This information will be important later when the attorney goes to the station, in order to deal with desk officers who profess ignorance of the client's being in the station. Counsel should also ask the client whether s/he has heard or seen anything suggesting that s/he might be taken by the police to any other location; if so, where and when.

Counsel should ask the following questions to elicit information that will be useful in attempting to secure the client's release:

1. Counsel should ask the client what the police have said that the client is being charged with. Counsel should be sure to ask: "Is that all of the charges that they have told you?" Counsel also should inquire whether the police said anything about possibly adding any other charges or about the client's being involved in any other criminal matters, and specifically what. In asking these questions, counsel must, of course, refrain from eliciting any statements that could be overheard by police regarding the client's version of the present offense or any other offenses with which s/he may be charged. The discussion should be limited to the charges the police are contemplating and should not get into the facts underlying any of those charges. Since many juvenile clients are eager to tell their version of the facts and will doubt counsel's competency or loyalty if s/he refuses to allow the client to relate the facts, counsel must explain the need for confidentiality at this point and reassure the client that there will be time later to discuss the facts in a private setting, free of the risk of police eavesdropping.

2. If the client's age and the nature of the charges make waiver to adult court a realistic possibility under local statutes, counsel should ask the client whether the police have said anything about seeking waiver to adult court. This will enable counsel to start preparing immediately for a major battle on the issue of waiver. See Chapter 13.

3. If, as in most jurisdictions, local statutes permit the police to release the child into the custody of his or her parents, counsel should ask the client whether the police have said anything about the possibility of the client's being released to his or her parents.

4. If counsel is practicing in one of the relatively few jurisdictions that permit bail in juvenile cases, then counsel should ask the client whether s/he has been told (and, if not, ask the client to ask the police now) whether bail has been set for the client and at what amount. Counsel also should ask the client who should be called (parent, grandparent, other relative, or friend) to put up bail money or to pay the bond premium.

In addition to these questions, which provide information necessary for attempting to secure the client's release, counsel should also inquire into the client's immediate medical needs. Counsel should ask the client whether s/he is hurt or injured or needs any sort of medical attention. Counsel also should ask the client whether the police are mistreating the client in any way.

§ 3.19(f) Concluding the Telephone Conversation with the Client in Police Custody

Counsel should keep in mind that most juveniles have had very little experience with the criminal justice system, and they are likely to be frightened both by their current incarceration

and by the unknowns of what will happen in court (and what will happen when they have to face their undoubtedly enraged parents). Counsel should try to reduce the client's anxiety by letting the client know when counsel will be back in touch with the client and what counsel will be doing to try to secure the client's release:

1. If counsel intends to adopt the preferred course of action of going to the police station, counsel should tell that to the client, and give the client a reasonable time estimate of how long it will take for counsel to get to the station. Counsel should tell the client not to worry if the client is moved before counsel arrives, since counsel will try to track the client down and visit the client wherever s/he has been taken. Counsel should add, however, that there is a possibility that the police will not allow counsel to see the client and that if the client does not see counsel, it is because of police interference and not through any lack of effort on counsel's part.

2. If counsel is not going to go to the station or if counsel is not planning to leave for the station immediately, counsel should give the client a telephone number at which counsel can be reached.

3. Whether counsel intends to go to the police station or not, counsel should tell the client that:

    a. Counsel will call the client's parents immediately to reassure them that the client is all right, to arrange for their presence in court so as to increase the client's chances of being released in court, and to enlist the parents' aid in trying to secure an even earlier release of the client;

    b. Counsel will also take whatever other steps might help in attempting to secure the client's immediate release, including talking with the police and any probation officers and/or agency officials who might have some power over the client's current detention;

    c. If the client is not released, then the client will be taken to court, and the judge will decide whether to release the client; counsel will be in court with the client, and counsel will try to convince the judge in court to release the client [adding when appropriate: and counsel feels confident that the judge will release the client to the custody of his or her parent(s)].

Before ending the conversation, counsel should instruct the client to get the attention of a police officer and tell the officer, while counsel listens on the phone, that the client does not wish to talk further with the police in the absence of counsel and that the client wants all further dealings with the police to be conducted by counsel on the client's behalf. Once the client has made a statement of this sort, with counsel in a position to testify that s/he heard it made, the client has obtained the fullest possible protection against police interrogation while in custody,

short of counsel's physical presence. For, under the rule of *Edwards v. Arizona,* 451 U.S. 477 (1981), the police may not thereafter question the client, even with full *Miranda* warnings and waivers, "unless the [client] . . . himself [or herself] initiates further communication, exchanges or conversations with the police." *Id.* at 485; *see also Minnick v. Mississippi*, 498 U.S. 146, 150-56 (1990)*; Smith v. Illinois,* 469 U.S. 91, 95 (1984) (per curiam); *Shea v. Louisiana,* 470 U.S. 51, 54-55 (1985); *Montejo v. Louisiana*, 556 U.S. 778, 794-95 (2009) (dictum). The procedure advised in this paragraph is important; without it, counsel's own admonitions to the police not to interrogate the client may be ignored, and any promises made by the police that they will not interrogate the client, may be broken. *See Moran v. Burbine,* 475 U.S. 412 (1986). *But cf. People v. Grice*, 100 N.Y.2d 318, 321-22, 324, 794 N.E.2d 9, 10-12, 13, 763 N.Y.S.2d 227, 229-30, 232 (2003) (state constitutional right to counsel attaches, and "interrogation is prohibited unless the right is waived in the presence of counsel," if an attorney or "the attorney's professional associate" informs the police "'of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant'").

§ 3.20 TELEPHONE CONVERSATIONS WITH THE POLICE ON BEHALF OF A CLIENT WHO IS PRESENTLY IN POLICE CUSTODY

In dealing with the police on behalf of a recently arrested client who is still in police custody, counsel should pursue three major goals: (i) to prevent the police from interrogating the client or conducting other investigative procedures; (ii) to secure the immediate release of the client; and (iii) to obtain as much information as possible about the facts of the offense for which the client has been arrested. The prevention of interrogation should be counsel's primary objective, since a confession will severely limit counsel's chances of winning the case at trial and preventing long-term incarceration. However, in structuring conversations with the police, the topic of interrogation should normally be left for last, since counsel's efforts to prevent interrogation will be seen by the police as marking the beginning of an adversarial relationship between them and counsel; from that point onward, counsel can expect that the officer(s) will cease being cooperative and providing information.

Thus counsel should ordinarily structure conversations with the police in the following manner:

1. Ask to speak to whatever officer happens to be with the client at the moment, whether that is the investigating officer, the booking officer, a detective, or a special Youth Services Division officer. (This will be the officer most likely to be on the verge of – or in the course of – interrogating the client. Imminent interrogation should be the attorney's immediate concern; later phone calls or a trip to the police station can deal with officers who might be planning to interrogate the client later on; as for interrogations that have already taken place, there is very little counsel can do about those until the time comes to start preparing motions to suppress.)

2. In the conversation with the officer, counsel should:

A. Begin by explaining that counsel is an attorney and has been asked by the respondent's parent or guardian or other close relative to represent the client and is, in fact, now representing the client.

B. "Confide" in the officer that counsel has no information about the case whatsoever, and therefore would appreciate some idea of why the client was arrested. (As a practical matter, this approach is much more likely to elicit information about the case than an aggressive demand for information or a series of lawyer-like questions.) Follow up with questions about the facts of the crime and the grounds for the arrest as the officer sees them (couching the questions, to the extent plausible, as requests for clarification of things that the officer has already said). In the course of any ensuing conversation about the arrest, counsel should ask the officer what specific charges are now placed against the client (being sure to ask "Is that all the charges?"); whether other charges are being considered; and if so, what they are. (Although the police have discretion to drop charges and divert the respondent from the juvenile justice system (see § 3.07 *supra*), there is not much point in counsel trying to persuade the police to drop the charges: the police tend to view the arrest and charging decisions as their prerogative and generally resent attorney attempts to influence the diversion decision; counsel's only real hope for shaping the police decision regarding diversion is through advice to the parent. See § 3.21 *infra.*)

C. Attempt to find out whether the police might be willing to release the respondent to his or her parent(s) pending arraignment. This should be a preliminary broaching of the subject of release, to be followed up by additional negotiations after counsel has spoken with the client's parent(s) further and obtained social information that can be used in attempting to persuade the police to release the client. (The additional negotiations preferably will take place at the police station when counsel goes there; but, if counsel is not able to go to the station, those negotiations should be conducted in a follow-up phone call to the police. See §§ 3.22, 3.23 *infra.*)

D. If counsel is practicing in a jurisdiction that permits bail in juvenile cases, ask the officer whether bail has been set for the client; if so, how much; if not, whether stationhouse bail is ordinarily fixed for charges such as those against the client and how much; and, if the officer has indicated a possibility that additional charges may be placed against the client, what the bail on those charges will be.

E. Ask the officer where the client is now, including the precise location within the building; whether there are any plans to move the client elsewhere and, if so, where and when; whether the officer will be handling all of the remaining booking of the client or whether that will be handled by other officers, and who.

F. Having obtained all possible information concerning the charges, facts of the offense, and possibilities for release, deliver the following instructions, advice, and requests regarding police interrogation and other investigative procedures:

(i) Tell the officer that counsel is requesting the officer not to interrogate the client or to ask the client any questions; tell the officer that counsel has instructed the client to say nothing, to answer no questions, and to waive no rights; tell the officer that, as attorney for the respondent, counsel is informing the officer that the client is hereby asserting his or her right to refuse to answer questions and his or her right to refuse to answer questions without the presence of counsel; if counsel intends to go to the police station, add that counsel is requesting that no interrogation take place until counsel arrives at the station (expressing the hope that counsel will be able to cooperate with the officer as soon as s/he arrives but saying that s/he must really ask the officer not to deal any further with the client at this time, until counsel has had a chance to confer with the client and to find out what the matter is all about).

(ii) Tell the officer not to ask for the client's consent to conduct any search or investigation; tell the officer that counsel has instructed the client to give no consents; and tell the officer that counsel, on behalf of the client, is informing the officer that the respondent refuses to consent to any searches or other investigations.

(iii) Tell the officer not to place the client in a lineup or exhibit the client for identification or make any physical or mental examination, body inspection, or test of any sort on the client in the absence of counsel; tell the officer that counsel has instructed the client to give no consents and to participate in no investigative procedures in the absence of counsel; state that, as counsel for the respondent, counsel is asserting the respondent's right to have counsel present during any identification or other investigative procedure.

(iv) Say to the officer that counsel is formally requesting that the officer relay the foregoing instructions and requests for the handling of the respondent to any other officers who may become involved in the booking or interrogation of the respondent or who may come into contact with the respondent while s/he is at the police station.

G. Conclude the phone conversation with the officer as follows:

(i) If the client has indicated that s/he needs medical treatment, tell the officer to take the client to the hospital (see § 5.09 *infra*), and then ask what hospital the client will be taken to [adding, if appropriate, that counsel will meet them at the hospital].

(ii) If counsel intends to go to the police station, tell the officer that counsel will be at the station as soon as s/he possibly can, and request that the officer not move the client from the station for any purpose (except for medical treatment if the client has indicated that s/he needs medical treatment).

(iii) Take the officer's name (with spelling), rank, and badge number, and ask the officer where s/he will be and how counsel can contact him or her during the next few hours.

3. Having completed the phone conversation with the officer who currently has custody of the client, counsel then should repeat that conversation: (A) with any officers that the first officer indicated would later be involved in the booking of the respondent or investigation of the case; and (B) with any officers – such as the precinct's Youth Services Division Officer – who will likely take part in the booking or investigation or in interrogating the respondent, notwithstanding the first officer's failure to mention them.

§ 3.21 FOLLOW-UP CONVERSATION WITH THE PARENT OR GUARDIAN OF THE CLIENT

After counsel has finished talking with the police on the phone, counsel will need to call the parent or guardian of the client. (If it was the parent or guardian who initially contacted counsel, this will, of course, be a follow-up call; if counsel was initially contacted by the client himself or herself or by some other concerned relative or friend, counsel will need to make contact with the parent or guardian for the first time.)

The first and most important topic to discuss with the parent/guardian is the subject of the client's release. If the police expressed to counsel their willingness to release the client to

parental custody, then counsel should determine whether the parent/guardian is willing to accept custody of the child pending arraignment. If the parent/guardian is unwilling to accept custody either because of frustration with the child or a notion that a "taste of jail" will teach the child a needed lesson, then counsel should educate the parent/guardian regarding certain realities of the juvenile court system: that, frequently, children who are detained prior to arraignment will be ordered detained for the much longer period pending trial, notwithstanding the parent/guardian's desire at that point to take the child home; and that the ensuing pretrial detention could have devastating effects upon both the chances of winning at trial and the chances of preventing a subsequent sentence of incarceration. In addition, if counsel has knowledge of any harsh conditions or inadequate services at the local juvenile detention facility (and particularly if counsel has knowledge of recurring physical and sexual assaults upon inmates by other inmates), counsel has a legal obligation to the juvenile client and a moral obligation to the parent/guardian to let the parent/guardian know that the facility is not the ideal rehabilitative facility the parent/guardian may be envisioning.

Assuming that the parent/guardian is (or becomes) willing to accept custody of the child and assuming that the police already have expressed their willingness to release the child to parental custody, counsel then must make the necessary arrangements for the parent/guardian to go to the police station and pick up the child. Preferably, counsel will arrange to meet the parent/guardian at the station, so that counsel can facilitate the release process and also so that counsel can prevent both the child and the parent/guardian from making any damaging statements to the police. If counsel is unable to go to the station, counsel will need to instruct the parent/guardian which station to go to and which officer(s) to see, and counsel should caution the parent/guardian against saying anything (or allowing the child to say anything) to the police about the crime for which the child was arrested. See § 3.19(b) *supra.* Finally, counsel will need to discuss the subject of transportation: counsel should assist the parent/guardian in finding out the right route (by car or mass transit) to the police station; or if the parent/guardian is totally unable to arrange transportation and if counsel is driving to the station, counsel should consider offering to give the parent/guardian a lift to the station.

If the police did not indicate a willingness, or if they expressed an outright unwillingness, to release the respondent, then counsel will need to take the following steps to try to secure the respondent's release: (i) ask the parent/guardian whether the police have already called to notify him or her of the child's arrest; if the police have not yet called, then advise the parent/guardian that s/he can improve the client's chances for release by being as cooperative as possible with the police (without making any damaging statements or giving consent to interrogation or searches or other investigative procedures) and by letting the police know that the parent/guardian intends to take steps to discipline the child even if the child is released by the police (without describing such severe disciplinary measures that the child will end up being removed from the home because of police allegations of child abuse); (ii) advise the parent/guardian, whether or not the police have already called him or her, to be cooperative and express appropriate disciplinary intentions in the event that the parent/guardian is called by any police officers who may be reconsidering the issue of detention as a result of counsel's efforts or by any probation officers or

detention facility officials who may be making a *de novo* judgment regarding the need for detention pending arraignment; (iii) counsel should then elicit from the parent/guardian social information about the child that counsel can use in attempting to persuade the police to release the child: information about the child's behavior at home, school attendance, conduct in school, school grades, part-time and summertime employment experiences, prior record of convictions and arrests, whether the child is presently on probation and the probation officer's name and phone number, and other information bearing on the likelihood that the parent/guardian can control the child and that the child will stay out of trouble if s/he is released to the parent; (iv) under this scenario, when the police have not yet indicated any willingness or have expressed an unwillingness to release the respondent, there is no reason to send the parent/guardian to the police station unless counsel can change the police officers' minds; thus counsel should simply obtain a phone number at which the parent/guardian can be reached during the next several hours in the event that counsel can persuade the police to release the client into parental custody.

If counsel is practicing in a jurisdiction that permits bail in juvenile cases, counsel also will need to ask the parent/guardian whether s/he can and will pay the bond premium or put up sufficient assets to cover any bail that is realistically likely to be set and, if not, whether there are any other relatives or friends who can provide all or part of the bail money. If the parent/guardian can put up the bail money, then counsel should arrange to have the parent/guardian meet counsel at the police station or court where bail will be posted (or at a bail bonder's office) at a designated time. If counsel is unable to go to the police station or bail bonder's office to personally oversee the payment of the bond, then counsel will need to give the parent/guardian detailed instructions on how to contact the bail bonder (giving a group of names of bail bonders from which the parent/guardian can choose) and how to navigate through the bail bond payment process.

After fully covering the topic of potential release of the client, counsel should elicit from the parent/guardian any information that the police may have given him or her regarding the facts of the offense, the charges that the police intend to lodge against the client, and whether the police intend to seek waiver to adult court. This information may prove useful in immediate discussions with the police (see §§ 3.22, 3.23 *infra*); on the other hand, there is still a premium on time and if the parent/guardian embarks on a lengthy discourse, it may be necessary to curtail the conversation tactfully. See § 3.13 *supra.*

§ 3.22 COUNSEL'S ACTIVITIES ON THE CLIENT'S BEHALF AT THE POLICE STATION

After speaking by telephone with the client (if possible), the police, and the parent/guardian, counsel should go as quickly as possible to the police station. The following discussion canvasses the matters that counsel should attend to at the police station. If counsel is unable to go to the station personally or to send someone (like a law partner or law clerk), then counsel should make the additional phone calls described in § 3.23 *infra*.

§ 3.22(a) Gaining Access to the Client

Upon arriving at the police station, counsel should show the desk officer some identification (like a Bar I.D. card) or other document confirming that counsel is an attorney. S/he should say that s/he is representing the respondent (or has been asked to represent the respondent) and that s/he wishes to see the respondent immediately. If a delay of more than a few minutes occurs, s/he should repeat this request and ask, alternatively, to see the commanding officer. If the commanding officer proves obstructive, counsel may be able to obtain assistance from the prosecutor's office. In some urban areas, a deputy prosecutor is assigned to be on call for after-hours emergencies and can be reached through the prosecutor's office switchboard. In extreme situations, counsel should call a judge of the local court of record and arrange to present a prompt petition for a writ of *habeas corpus* directed to the chief of police, the prosecutor, or both. Again, in some areas, there is an emergency judge available for after-hours crises. If the desk officer or the commanding officer tells counsel that s/he can see the client but only after the completion of interrogation (or lineup procedures, or other investigative procedures, or booking), counsel obviously should insist that the procedures stop until counsel has had a chance to confer with the client.

§ 3.22(b) Matters to Cover in the Interview with the Client

Once counsel reaches the client, s/he should request the use of a room in which the two can consult privately. As soon as counsel and the client are out of earshot of the police and other persons, counsel should immediately instruct the client that:

(a) s/he should respond to any questions from the police or anyone else by saying "my lawyer told me not to talk";

(b) s/he should respond to any requests for permission to search for evidence or weapons or anything else by saying "my lawyer told me to say, 'No'";

(c) s/he should not sign or write any papers for the police or anyone else;

(d) s/he should not agree to leave the cell area or go with the police to any other place except to court or to a detention facility (but s/he should not forcibly resist a police officer's attempt to take him or her to another location); and

(e) if the police say that they intend to exhibit the client to any witnesses or subject him or her to any sort of bodily or mental examination, s/he should ask to phone counsel so that s/he can confer with counsel and have counsel present during the proceeding, and she should say that s/he does not want the exhibition or examination to be held in the absence of counsel.

It is a wise practice for counsel to make and carry a supply of "rights cards" or forms that s/he can give to clients in custody for their use in preserving their rights during police investigation. Such a card may read, for example:

> My lawyer has instructed me not to talk to anyone about my case or anything else and not to answer questions or reply to accusations. On advice of counsel and on the grounds of my rights under the Fifth and Sixth Amendments, I shall talk to no one in the absence of counsel. I shall not give any consents or make any waivers of my legal rights. Any requests for information or for consent to conduct searches or seizures or investigations affecting my person, papers, property, or effects should be addressed to my lawyer, whose name, address, and phone number are _____. I want all communications with the authorities henceforth to be made only through my lawyer. I request that my lawyer be notified and allowed to be present if any identification confrontations, tests, examinations, or investigations of any sort are conducted in my case, and I do not consent to any such confrontations, tests, examinations, or investigations.

The client should be instructed to show this card to any officer or other person who asks the client questions, accuses the client of anything, talks to the client in any way about the case, or starts to examine or exhibit the client while in custody. Cards of this sort serve four important purposes. First, they enable the client to assert his or her rights even if s/he is unable to remember what they are or what to say in order to claim them. Many clients who are simply given the oral advice suggested above will forget most of it. Second, they allow the client to make an *express* claim of his or her rights. In some situations, the mere silence of the client may not be sufficient to protect the client's interests fully. See §§ 24.10, 24.24, 33.06(I) *infra*. Also, as a practical matter, it may be difficult for the client psychologically to maintain silence in situations that seem to call for some response; the response of flashing the card gives the client something to *do* to relieve this tension. Third, the card makes it easier for the defense to prove in court that the client claimed his or her rights and waived none of them. Any lawyer who has seen a police witness flash a "*Miranda* card" in the courtroom appreciates the probative force of a written record in the inevitable disputes about what was said between officers and arrestee behind the closed doors of a stationhouse. Defense counsel should attempt to give the client something of an even break in this swearing contest. Fourth, the card gives the client a sense of reassurance in his or her capacity to handle the often frightening experience of confronting police investigators in confinement, and it also gives the client an added ground for confidence in counsel's professional ability and concern.

Once these crucial cautionary instructions have been given, counsel can move on and ask the client for information about the client's background (home life, school, employment, and after-school activities) that counsel can use in trying to persuade the police to release the client. Thereafter, to the extent that time permits, counsel can question the client about the information that counsel will need at the Initial Hearing (see § 4.07 *infra*) and about the facts of the offense (see § 5.06 *infra*).

§ 3.22(c) Discussions with the Police

After the interview with the client has been completed, there are several matters that counsel will need to discuss with the police. The first matter that should be covered (before the conversation with the police takes a confrontational turn, leading to the drawing of battle lines) is the subject of the client's release to parental custody. Counsel should ask whether the police intend to release the client; if the police have decided against release or have not yet reached a decision, then counsel should use the positive social information that counsel elicited from the parent/guardian (§ 3.21 *supra*) and from the client interview to try to persuade the police to release the client; in making these arguments, counsel should emphasize that s/he is primarily trying to provide additional information to assist the police and is not trying to infringe upon police prerogatives. In jurisdictions that permit bail in juvenile cases, counsel also should discuss the availability (and applicable amount) of "stationhouse bail" – that is, bail set by the police, usually according to a prescribed schedule.

After the subject of the client's release has been resolved, counsel should ask the investigating officer whether the client has made any written or oral statements. If s/he has, counsel should request to see them or, in the case of oral statements, to be told of their contents immediately. Counsel should ask whether the client has been exhibited to any possible witnesses for identification purposes and whether any tests or examinations have been conducted on the client. If so, counsel should ask the nature of the identification proceedings or tests, who conducted them, what results they produced, and the names of all persons present during the identification or testing procedures. Counsel should ask whether any future identification or testing procedures are anticipated, what procedures and when; and s/he should ask and arrange to be present when they are conducted. Counsel should tell the investigating officer that s/he has instructed the client not to talk to anyone and not to give any consents or waivers in counsel's absence; and s/he should ask the officer not to question or talk with the client unless counsel is present and not to take any consents or waivers from the client without counsel's prior approval. Before leaving a client in custody, counsel should have the client inform an officer, in counsel's presence, that the client does not wish thereafter to talk or deal with the police or prosecuting authorities without counsel but wants to communicate with them only through counsel. See § 3.19(f) *supra.* Counsel should give the officer counsel's professional card and should also give one to the desk officer on the way out.

§ 3.22(d) Actions for Counsel to Take in Identification or Examination Procedures

Counsel who obtains permission to attend identification or examination procedures should ordinarily act as unobtrusively as possible. S/he should not attempt to interfere with them in any way or to play any part in them while any potential identifying witness is present. Prior to the exhibition of the client and *out of sight and earshot of any potential identifying witness*, counsel should (a) inform the police that s/he objects to the identification proceeding altogether, if she does (for example, if s/he contends that the client has been illegally arrested or is being illegally detained, see § 25.07 *infra*), and (b) object to any feature of the proposed exhibition

procedure that she believes will impair its reliability (see §§ 25.02-25.04 *infra*). Counsel should couple the latter objection with affirmative suggestions for modification of the procedure only if s/he is reasonably confident that (i) the police will adopt those suggestions and (ii) the result will be that the client is not identified. (If the client *is* identified through a procedure endorsed by counsel, counsel's role in shaping the proceeding can only hamstring subsequent defense challenges to the propriety or reliability of the identification; if the police reject counsel's suggestions, a prosecutor will later be able to contend that those suggestions limit the aspects of the identification proceeding about which the defense can complain in a suppression motion.) During the proceeding itself – while potential identifying witnesses are present – counsel's role is strictly that of an observer. S/he should watch and take notes on everything that happens, be sure to get the names of all persons present, and ask questions both before and afterwards about anything s/he does not understand.

Before the proceeding begins, counsel should ask whether it will involve the respondent's performing any kind of action – for example, speaking (to provide a voice exemplar) or turning or walking about on a lineup stage. If so, counsel should request the opportunity to confer privately with the respondent in advance of the exhibition procedures, so that s/he will not have to interrupt them for the purpose of giving the respondent advice. Counsel may or may not have suggestions to offer the client about how s/he should behave in performing the actions s/he will be called upon to take. But even if counsel does not, it is ordinarily helpful for counsel to forewarn the client specifically what those actions will be, because foreknowledge may reduce the danger that the client will exhibit guilty-looking signals as a result of nervousness or surprise.

At a lineup or show-up, counsel should ask to speak to the possible identifying witnesses *before* the respondent is exhibited to them. It will be the rare case in which the police will permit such interviews. But at the earliest time when counsel can obtain access to the witnesses, counsel should ask them (i) to think back to their original observation of the person whom they saw in connection with the offense and to describe that person as s/he then appeared; (ii) to describe the circumstances under which they observed that person; (iii) how sure they are that they could recognize the person if they saw the person again; (iv) by what characteristics they could recognize the person; (v) what descriptions of the person they gave to the police prior to the present identification proceeding; (vi) whether they have been asked by the police to attempt to identify any persons other than those exhibited in the current proceeding, either in the flesh or by photograph or video, and whether they made any identifications on these occasions; and (vii) what they were told by the officers who brought them or asked them to come to the station today. When there is more than one identifying witness, counsel should, if possible, speak separately with each. Interviewing identifying witnesses as a group will result in the loss of important information unique to each of them and will probably cause them to homogenize their impressions, to the client's ultimate detriment.

Whenever counsel is permitted to attend a show-up, counsel should object to the show-up procedure and request that the police conduct a lineup instead. Counsel should point out the

likelihood that any show-up results will be suppressed in court because there are no exigencies requiring a show-up instead of a lineup. See § 25.03(a) *infra.*

Counsel should urge the officers conducting the lineup to follow procedures which assure against unreliable identifications. In localities where statutes, court rules or law-enforcement guidelines prescribe protective practices (such as those modeled by the Louisiana statute summarized in § 25.03 *infra*), counsel should insist that they be followed. Elsewhere, s/he should try to persuade the officers to adopt as many of these "best practices" (LA. CODE CRIM. PRO. art. 251 (A)) as s/he can. At the least, s/he should attempt to ensure that any lineup is composed of at least six persons who resemble the respondent in general characteristics – age, skin color, height, weight, body type, hair style, clothing, and accessories; and counsel should ask that all subjects be exhibited in street clothes, not jail garb or, in the case of police officer "fillers" in the line, articles of clothing that are identifiable as parts of a police uniform. If more than one witness is to view the lineup, the witnesses should not be present during one another's viewings; the positions of all subjects in the lineup should be changed between witnesses; and the witnesses should not be assembled where they can talk together either before or after the conclusion of the proceedings. At the lineup, counsel should record the names, descriptions, and means of later contacting all witnesses who are present to view the lineup (whether or not they attempt to make any identifications), what is said to them, and what they say. Counsel should also record the names, descriptions, and contact information for all persons in the lineup array. Counsel should record the manner in which the lineup is conducted, including distances, lighting, any directions to the subjects to walk, motion, or speak; what they do; and when in the course of these proceedings any identification is made. S/he should also note the names, ranks, and badge numbers of all officers present and of those who brought witnesses to the lineup. Similar interviews, observations, and notes should be made at show-ups.

Police detectives and officers usually record their own observations of lineups and show-ups in handwritten notes and typed reports. It is commonplace for the array of persons on a lineup stage to be photographed in a composite still, and in some jurisdictions the entire lineup proceeding is videotaped by the police. Counsel should note whether any of these records are being made, so that s/he can later subpoena them or request their production through pretrial discovery proceedings. See §§ 8.17, 8.19 *infra.*

In the case of other testing procedures, counsel should record the names of all technicians and officers present and the means of contacting them and should ask them to describe for counsel what procedures, materials, substances, chemicals, and so forth, they are using, as they proceed. If possible, counsel should get them to describe, *before* any testing is done, what indicators or results they believe will demonstrate positive and negative findings. Counsel should also ask them whether their testing procedures will affect the substances being tested and, if so, request that they leave a sufficient amount of the substances untouched for subsequent defense testing. Any refusals of the technicians or officers to cooperate in these regards or to explain what they are doing should be noted.

§ 3.23 ACTIONS THAT CAN BE TAKEN TO PROTECT THE CLIENT'S RIGHTS IN LIEU OF A TRIP TO THE POLICE STATION

There is no fully adequate substitute for a trip by counsel to the police station. However, if for some reason counsel cannot go to the station, there are phone calls s/he can make that will further some of the same objectives.

After speaking with the client by telephone (§ 3.19 *supra*), having a preliminary phone conversation with the police officer(s) (§ 3.20 *supra*), and speaking by phone with the parent/guardian of the client (§ 3.21 *supra*), attorneys who cannot go to the stationhouse should phone the police again, ask for the officer who is currently responsible for handling the client's case, and:

1. Discuss the possibility of the respondent's release to parental custody, using the social information elicited from the client and the parent/guardian to try to persuade the officer to agree to release (and couching all arguments in terms of providing the officer with additional information, so as not to seem to be attempting to encroach upon police prerogatives).

2. In jurisdictions that permit bail for juveniles, elicit all information necessary for obtaining stationhouse bail. See § 3.20(2)(D) *supra.*

3. Reiterate and reinforce all advice, instructions, and requests that counsel gave in the earlier phone conversation with this officer or other officers regarding police interrogation of the client, identification procedures, and other investigative procedures. See § 3.20(2)(F) *supra.*

If counsel was able to persuade the police to release the client to parental custody (or, in jurisdictions permitting bail for juveniles, if counsel was able to arrange the setting of stationhouse bail), then counsel should call back the parent/guardian and arrange for the parent/guardian to secure the client's release. This will require detailed instructions to the parent/guardian regarding the place to go (police station, detention facility, bail bonder's office), the individuals to speak with, and the procedures to follow. The parent/guardian also must be cautioned against making any statements to the police and should be urged to restrain the client from making any statements to the police.

§ 3.24 ACTING ON BEHALF OF CLIENTS WHO HAVE BEEN MOVED FROM THE POLICE STATION TO A JUVENILE DETENTION FACILITY PENDING INITIAL HEARING

Counsel will need to deal with detention facility officials in either of two situations: (i) when, upon first receiving the phone call regarding a newly arrested client and tracking down the client's current whereabouts, counsel discovers that the client has already been moved from the

police station to a juvenile detention facility pending arraignment; or (ii) when counsel got to the client or the police prior to any such movement of the client, but counsel was unable to sway the police from their decision to detain the client in the detention facility pending Initial Hearing. The measures that must be employed to protect the client's interests in these two situations are essentially identical, with one exception: In the first situation, when counsel is establishing contact with the client for the first time, counsel will need to go through the usual preliminary steps of first speaking with the client by phone (and covering all of the matters described in § 3.19(a)-(c) and (e)-(f) *supra*) and speaking with the parent/guardian about his or her willingness to accept custody of the client and about the client's prior behavior and prior record (§ 3.21 *supra*). Once counsel has completed these telephone conversations, s/he will be ready to attempt to persuade the detention facility officials to release the client to his or her parent/guardian.

In many jurisdictions an official stationed at the detention facility – a probation officer, social services agency employee, or member of the staff of the facility – has the power to make a *de novo* decision about whether children received at the facility should be detained or released into parental custody pending Initial Hearing. The governing statute or the applicable agency regulations usually direct this official to base the detention/release determination on a prediction of the child's propensity for future violence and likelihood of flight. Frequently, statutes or agency regulations prohibit the agency from releasing respondents charged with enumerated serious felonies.

Counsel's goal obviously is to persuade the official to release the respondent to parental custody. The ammunition for counsel's arguments should be the social information that counsel elicited during the interview of the client and during the phone conversation with the client's parent/guardian. The factors to emphasize should be: the young age of the respondent; his or her lack of any prior record (or, as appropriate: lack of prior convictions, although s/he may have been arrested before; lack of many prior convictions or arrests; lack of convictions for serious felony offenses; lack of convictions for serious felony offenses involving violence; or lack of serious, violent offenses in the recent past); the child's good behavior at home, as reported by the parent/guardian; the child's good school attendance record, good conduct in school, and good school grades; any summertime or part-time employment experiences showing the respondent's reliability or industriousness; and the comparatively minor nature of the present offense (or, as appropriate: the lack of violence even though the offense was serious; the lack of any concrete police evidence linking this respondent to the offense; and any other factors making it plausible that the respondent actually is innocent and falsely arrested).

If it is simply impossible for counsel to go to the detention facility, then these arguments will need to be made over the phone to the appropriate official. However, counsel's chances of securing the client's release will be vastly improved by a personal trip to the detention facility. Facility officials are not used to seeing attorneys (especially late at night), and they will often respond to an attorney's appearance by treating the case as an exceptional situation that warrants something other than routine rubberstamping of the police officers' decision to detain the child.

If the respondent is currently (or was previously) on probation or parole (in many jurisdictions, called "aftercare") and if the respondent has a good relationship with his or her current or former probation or parole officer, counsel should telephone the officer and enlist his or her aid in lobbying the facility official to release the respondent. Frequently, an agency official will respond far more favorably to a fellow worker than to a defense attorney, in part because of the inevitable institutional loyalty to others in the same line of work (even when they are from another division of the same agency or another agency) and in part because s/he will view the worker as being less partisan than a defense attorney. If it is after work hours and if the probation or parole officer's home number is not listed in the phone book, counsel can try asking the respondent's parent or guardian, since some officers give out their home numbers to respondents' parents in case problems crop up after hours. If counsel is unable to learn the officer's home number and if counsel is confident that the officer will give a good report, counsel can ask the agency official to call the officer at home; frequently these officials have listings of the home numbers of their colleagues.

If counsel succeeds in persuading the detention facility official to release the respondent into parental custody, then counsel usually will need to call the parent/guardian and arrange his or her picking the client up from the facility. In some jurisdictions, if the parent/guardian is unable to arrange transportation, the facility will arrange to bring the child home. Facilities that lack provisions for transportation may, depending upon local regulations and custom, permit the attorney to take the child home if the parent/guardian is unable to come to the facility to pick up the child.

Finally, in jurisdictions that permit bail in juvenile cases, if the attorney has not as yet arranged bail, the detention facility official's decision to deny release will necessitate the arranging of bail. Procedures for securing the client's release on bail are discussed in § 4.27 *infra.*

§ 3.25 FINAL STEPS TO TAKE ON BEHALF OF THE NEWLY ARRESTED CLIENT IN CUSTODY PENDING ARRAIGNMENT

If counsel has taken all the steps described in §§ 3.20 and 3.22 or 3.23 *supra* for dealing with the police and in § 3.24 *supra* for dealing with detention facility officials and has nevertheless been unable to secure the release of the respondent pending Initial Hearing, counsel has done everything possible to try to bring about release. Counsel now will need to take steps to prepare for Initial Hearing. Since the respondent is detained, that hearing will take place at the earliest possible opportunity: later the same day if court has not yet been adjourned for the day and the "cut-off time" for bringing children to court has not yet passed; the following morning (or, if into a weekend, the following Monday morning) after court has adjourned or the cut-off time has passed. Counsel will need to speak with the parent/guardian promptly to: (i) arrange that the parent/guardian attend the hearing, since the judge probably will not release the child if the parent/guardian does not appear; (ii) ensure that the parent/guardian will be willing to accept custody of the child during the pretrial period if the judge orders release; and (iii) coach the

parent/guardian on the need for relating positive information about the client to the probation officer in the upcoming probation intake interview. See § 3.27 *infra.* Counsel should take advantage of any remaining time to gather whatever additional information about the child will help to construct persuasive arguments for pretrial release. See § 4.09 *infra.*

If the client was released by the police or by a detention facility official, then counsel will have considerably more time to prepare for Initial Hearing. In most jurisdictions children who are released by the police or a detention facility are not required to report to court for at least two weeks. (Upon being released, the child and his or her parent or guardian are given a document instructing them to report to court (or the probation office) on a certain date.) Counsel thus will usually have a period of at least two weeks to consult with the client and his or her parent/guardian regarding the probation intake interview and the Initial Hearing and to do any other necessary preparation for the hearing and the arguments on pretrial detention.

Part D. Entering the Case at the Probation Intake Stage: Representing Children Who Were Released After Arrest and Have Not Yet Gone Through Probation Intake

§ 3.26 OVERVIEW OF THE ROLE THAT THE ATTORNEY POTENTIALLY CAN PLAY IN THE PROBATION INTAKE PROCESS

In most jurisdictions the probation intake process is designed to provide social information for a probation officer's determinations (i) whether to "divert" the case out of the juvenile justice system (or in some jurisdictions whether to recommend that the prosecuting agency divert the case); and (ii) if the case is not diverted, whether to recommend pretrial detention or release of the child at Initial Hearing. See § 3.12 *supra.* The probation intake process generally consists of a probation officer's interview with the child and with the parent, consultation of prior court records on the child, discussion with any other probation officers who have previously supervised or are currently supervising the child on probation, telephone calls to check on the child's attendance and behavior in school, and possibly also telephone calls to the supervisors of the child in any part-time or summertime jobs and to mental health professionals who may have seen the child previously.

The most common situation in which defense counsel confronts the probation intake process is when s/he has been retained by a parent/guardian whose child was released immediately after arrest and who was directed to appear in court (or in the probation office) for a probation intake interview prior to Initial Hearing. Court-appointed counsel may deal with the probation intake process if a former or current client is rearrested and contacts the attorney for advice prior to probation intake on the new case. Attorneys who enter the case at or after the Initial Hearing usually will not encounter probation intake issues, since the process already will have been completed by that time.

The role that the attorney can play in influencing the probation intake process ordinarily is a very limited one. The attorney usually will not be permitted to attend the probation officer's

interview with either the child or the parent/guardian. Also, most probation officers will be at least somewhat resistant to attempts by attorneys to advocate to them what their decisions should be. There are, however, two ways in which the attorney can indirectly influence the outcome of the probation intake process: (i) by counseling the child and parent/guardian how to deal with the probation officer and what information to provide during the intake interviews (see § 3.27 *infra*); and (ii) by gathering positive social information about the child and relaying that information to the intake probation officer (see § 3.28 *infra*).

§ 3.27 COUNSELING THE CHILD AND PARENT/GUARDIAN TO PREPARE THEM FOR THE PROBATION INTAKE INTERVIEWS

The first and most important task in preparing a child and parent/guardian for the probation intake process is to let them know that any information they give to the probation officer will probably be relayed to the judge. Many probation officers begin a probation intake interview by assuring the child and parent/guardian that anything they tell the probation officer will be kept confidential. Although that statement may be technically accurate in that juvenile probation files are not available to the general public, it is incumbent upon defense counsel to ensure that the child and parent/guardian do not suffer from the misconception that the probation officer will keep secret everything s/he is told. Counsel should inform the child and parent/guardian that any social information disclosed to the probation officer may be relayed to the judge at the Initial Hearing and, if the child is convicted, may find its way into the presentence report. Thus any unfavorable social information related to the probation officer may impair the child's chances of pretrial release at Initial Hearing and, if the child is convicted, may hurt the child's chances of receiving a favorable sentence. By educating the child and parent/guardian in this manner, counsel can ensure that any decision by the child or parent/guardian to disclose negative social information is based on an informed judgment and not on a misimpression of absolute confidentiality. Simultaneously, counsel should encourage the child and parent/guardian to relate to the probation officer any positive social information about the child's school performance, employment experiences, and other activities. However, counsel should warn the child and parent/guardian that any information they give the probation officer may be verified through telephone calls to schools, prior employers, and so forth; thus the child and parent/guardian should be careful not to succumb to the natural temptation to exaggerate the child's good points and accomplishments.

How the child and parent/guardian behave during the probation intake interviews is often as important as what they say. In deciding whether to exercise discretion in favor of diverting a case or recommending pretrial release, many probation officers will be affected by such intangible factors as the attitude and demeanor of the child and parent/guardian, the degree of respect that the child seems to accord to both the parent/guardian and the probation officer, and the degree of emotional support that the parent/guardian seems to be providing to the child. In order to advise the child on these matters in a way that will make sense to the child and will simultaneously not be demeaning, the attorney might consider using the analogy of a job interview: The child should be advised to dress up as if s/he were trying to get a good job, should

look the probation officer in the eye while talking to him or her, and should act respectfully both towards the probation officer and towards his or her parent or guardian. In advising the parent/guardian, counsel should just be straightforward about the power that the probation officer wields and the degree of impact that these probation intake interviews can have on the child's case and freedom.

§ 3.28 THE ATTORNEY'S OPPORTUNITIES FOR DIRECT INVOLVEMENT IN THE PROBATION INTAKE PROCESS

Since most probation officers will resist and resent any attempts by the attorney to play the role of advocate in the diversion or pretrial detention decisions of the probation office, the attorney usually can achieve the best results by assuming the seemingly neutral role of information-provider: relaying to the probation officer positive social information about the child that the probation officer might not have obtained otherwise. Most probation officers are heavily burdened with high caseloads and have too little time to attend to each case. As a result, probation officers will make only the most urgently needed phone calls on each case and often will fail to uncover available mitigating facts. Thus, in a relatively common example, the probation officer may call the attendance officer of the child's school and be told that the child was marked absent for most of the year; the child tells the attorney, and the attorney verifies by obtaining the school records, that the child actually attended each day, but simply skipped homeroom period and thus was marked absent when attendance was called. In some cases, the attorney might learn that the child is indeed skipping school but that the attendance problems are caused by the child's frustration and humiliation at being unable to keep up with the class as a result of undiagnosed or inadequately remedied learning disabilities. When facts of this sort are relayed to the probation officer, they will often bring about the desired result far better than counsel's arguments.

Thus when an attorney enters a case during the probation intake stage, s/he should promptly interview the child and parent/guardian, elicit all possible positive social information about the child, and obtain the written releases of information from parent/guardian and child necessary for counsel's examination of school records and other agency records concerning the child. See § 5.11 *infra.* The attorney then should take whatever steps are necessary to obtain third-party verification of the positive social information. That verification should preferably be in written form, since documents will be more persuasive than the attorney's affirmation that s/he received verification in a phone conversation. Thus the attorney might obtain copies of school records and arrange to have letters written by teachers, former summertime employers, coaches, after-school activity program supervisors, priests or ministers, and even neighbors. The key is to think creatively both in exploring the question of the child's positive traits with the parent/guardian and child and in gathering supporting documents. For example, the best supporting document might be a photograph of the child's trophies for sports accomplishments or a piece of pottery that the child made in an after-school program that s/he regularly attends. Any such mitigating evidence can be passed on to the probation officer either by the attorney or by the parent/guardian in the interview with the probation officer. Of course, the goal of

obtaining written or tangible evidence of the child's positive traits must be given up if there is no time for it; in such cases, phone conversations with teachers or other relevant individuals will have to suffice. Once the attorney has located and spoken with such supportive individuals, s/he can recount the phone conversation to the probation officer and possibly urge the probation officer to call that individual.

The limited role of the attorney that has been described here can be expanded when an attorney has developed a good reputation within the probation office and has developed a good prior relationship with the particular probation officer who is handling the case. A probation officer who has come to know and trust a certain attorney will often be much less resistant to overt arguments by the attorney directed to swaying the probation office's decisions. For this reason attorneys can significantly increase their effectiveness by taking the time to get to know probation officers.

After the probation office has completed its intake process, either the case will be diverted or the paperwork on the case will be sent to the prosecutor's office for preparation of the charging document. If the case is going forward (and will be "papered" or "petitioned" by the prosecutor's office), then counsel's next step must be to prepare for arraignment. See Chapter 4.

Part E. The "Wanted" Client: Representing Children Who Have Not Yet Been Arrested But Who Are Being Sought by the Police

§ 3.29 THE INITIAL PHONE CALL FROM THE "WANTED" CLIENT OR FROM SOMEONE CONCERNED ABOUT THE CLIENT

An attorney may receive a call from a client who is "wanted" by the authorities in either of two basic situations: when a potential client contacts the attorney for the first time because of his or her suspicions (or knowledge) that s/he is being sought by the police; or when an already-existing client suspects (or knows) that s/he is being sought by the police for crimes other than the one(s) on which s/he is already being represented by the attorney. If the attorney is contacted by the client himself or herself (rather than by a parent or other relative or friend on behalf of the client), the contact is usually in the form of a phone call: Few clients trust an unknown (or even partially known) attorney enough to appear in the attorney's office and face what the client believes to be a significant risk of betrayal to authorities.

Sometimes counsel may receive a call or visit from the parent or guardian, another family member, or a friend of a potentially "wanted" client, acting at the client's instance or because the caller is independently worried about the prospect of an arrest. If this person appears to be genuinely concerned with protecting the client and promoting the client's best interests, counsel should have him or her put counsel directly in touch with the client, and counsel should then proceed as described in the following paragraphs and sections through § 3.33. If the person appears to be motivated by his or her own interests without regard to the client's, and especially if such an individual is not the client's parent or guardian, counsel will ordinarily want to decline

any involvement in the matter. Representation of anyone in this situation is all too likely to embroil counsel in ethical and personal conflicts s/he would be wise to avoid.

In all dealings with "wanted" clients, the attorney must be sensitive to the paranoia that develops when an individual leads the life of a fugitive. In the beginning of any phone conversation with a "wanted" client, counsel should explain that the attorney-client privilege covers anything that the client may say about his or her situation and current whereabouts. It is clear under the code of ethics that such conversations do, indeed, fall within the attorney-client privilege. If any attorney labors under the delusion that lawyers are obliged to surrender their clients or facilitate their clients' arrests by telling the authorities where the client can be found, ethical considerations militate that that attorney either refuse to speak with the "wanted" client at all or, at the very least, begin the conversation by warning the client that the attorney may relay to the police any or all of the information that the client divulges. If an attorney, albeit aware of the attorney-client shield, nevertheless feels personally uncomfortable with knowing the client's location, that attorney certainly has the prerogative of asking the client not to reveal his or her whereabouts to the attorney. (Indeed, that type of request may have the fringe benefit of noticeably reducing the client's suspicions about the attorney.)

In any event, after settling the issue of attorney-client privilege, counsel should elicit precisely why the client believes that s/he is wanted by the authorities. A client ordinarily becomes aware that s/he is wanted for arrest because of police efforts to locate the client, because of news reports, or because s/he learns of the arrest of companions. S/he may be wrong in believing that s/he is wanted, and counsel acting on behalf of a supposedly wanted client should be careful when making inquiries of the authorities not to give them any ideas or information that they do not already have. Before calling them, the attorney should question the client thoroughly about why the client believes that s/he is wanted, in order to assure that his or her belief is well-founded. If its source is a family member or acquaintance whom the client trusts but whose information seems to counsel to be vague or dubious, counsel is advised to speak to that source directly before making any contact with law enforcement.

The preliminary interview should also cover: (i) what the client knows about the nature of the charges; (ii) what the client knows about the events underlying the charges; (iii) the client's assessment of whether s/he appears to be in danger of immediate arrest before counsel can discuss with the authorities the possibility of a voluntary surrender; (iv) information that the attorney will need in order to make a strategic judgment and advise the client about the likelihood of release in the event that the client does surrender to the authorities (including information concerning the prior criminal record of the client; the willingness of the client's parent/guardian or other relatives to accept custody of the client pending trial; the client's record of school attendance; and, in jurisdictions that permit bail in juvenile cases, the sources and amount of the client's resources for making bail); and (v) depending upon the degree of trust that has been established between attorney and client thus far and depending upon the client's assessment of the imminence of arrest, the attorney may wish to begin a conversation about the advisability of a voluntary surrender if the client should indeed turn out to be wanted by the

police (see § 3.31 *infra*). If the attorney does not broach the final subject – the advisability of surrender – in this preliminary interview, counsel should at the very least note that s/he will suggest some advice on that issue after ascertaining the client's actual status as well as other pertinent information. Finally, the attorney should obtain the client's permission to contact the authorities on his or her behalf and, without revealing the client's whereabouts, inquire whether s/he is actually wanted and whether the police would be willing to enter into any agreements regarding the client's release in the event of surrender.

§ 3.30 MAKING INQUIRIES OF THE POLICE AND PROSECUTOR

After obtaining the client's permission to contact the authorities, counsel needs to consider how much information can be revealed to them without suggesting that the client feels or is guilty of some offense and ought to be wanted by the police if s/he is not already. Forearmed with a plausible, nonincriminating reason for the inquiry, counsel should phone the police officer who would logically handle the client's arrest (either those officers who are said to be looking for the client or the desk officer or Youth Services Division officer for the district of the client's residence, or a "warrants squad" officer if the department has a separate section responsible for serving arrest warrants and if a warrant may have been issued) or the prosecutor's office (if, in this locality, the prosecutor's office customarily gets involved in prearrest investigations and charging decisions) or, in some jurisdictions, the division of the court clerk's office that is responsible for maintaining records of all judicially approved arrest warrants or "custody orders." Counsel should identify himself or herself as an attorney, say that s/he has been informed that the police may be looking for the client, and ask whether this is so. If it is, s/he should ask whether an arrest warrant for the client has been issued and what the charges are. In jurisdictions that permit bail in juvenile cases, counsel should also ask whether the warrant specifies a bail figure; if it does not, counsel should ask whether the police are authorized to release a juvenile arrestee on his or her own recognizance or to the custody of his or her parent or guardian, or to set bail on the charges for which the client is sought and what the amount of any bail required will be.

Particularly in cases in which the police are seeking the client for a warrantless arrest, the precinct desk officer may have little information to give counsel and may refer counsel to the investigating officers. In any event, on the basis of the information counsel receives from the desk officer (or prosecutor or court clerk), counsel should consider whether s/he wants to speak directly with the investigating officers in order to ask them about the nature of the charges, the circumstances of the supposed offense or offenses, and the likelihood of police release after arrest (or, in some jurisdictions, the likelihood of the police setting stationhouse bail). This will depend on whether counsel believes that s/he can get more information than s/he will be giving out in such a conversation. It also will depend on counsel's assessment of the likelihood that an offer to arrange the surrender of the wanted client can be used as leverage to bargain for concessions from the police on the issue of postarrest release of the client. Thus, for example, counsel should attempt to extract a commitment from the police that they will exercise their discretion to release the child pending arraignment if s/he surrenders. See § 3.10 *supra*. Even in jurisdictions where the police are barred by statute or police regulations from releasing juveniles

charged with certain enumerated felonies, the officers can nevertheless opt for release by redefining the crime for purposes of arrest as a less serious offense – unless, of course, the arrest was pursuant to a warrant specifying one of the enumerated felonies. In jurisdictions that permit bail in juvenile cases, counsel can bargain for stationhouse bail as the *quid pro quo* for surrender. Although the police may have (or may claim that they have) little discretion in setting the amount of bail because it is fixed by a bail schedule, they sometimes do possess some *de jure* discretion in regard to stationhouse bail, and they – or the prosecutor – can always exercise *de facto* discretion either by (i) changing the offense charged (unless a warrant has been issued) in order to change the applicable bail schedule figure or (ii) agreeing to go jointly with counsel to a magistrate or judge (who is not bound by the bail schedule) and to recommend that bail be set in an amount different from the bail-schedule figure.

In some cases, the police will refuse to make any concessions on release or bail in return for the client's surrender, because they feel that they do not have discretion to make them, because they are confident that they can soon and easily arrest the client anyway, or because they want to have the client detained following his or her apprehension in order to further their in-custody investigations or to keep the client "off the street." If the police stonewall, counsel should phone the prosecutor's office and attempt to negotiate a surrender and the setting of reasonable release terms (or, in some jurisdictions, setting of manageable bail) directly with a prosecuting attorney. If the prosecutor is willing, the arrest of the respondent can take place in the courthouse itself, and then the arresting officer can take the respondent directly to the court detention area to await the prosecutor's completion of the charging documents preliminary to the client's immediate release. If the prosecutor is unwilling, counsel often can arrange with a courtroom clerk and intake probation officer to have the case called so that the client can surrender in open court.

Even though these alternative procedures for arranging surrender are available, counsel should begin by attempting to negotiate with the police. Generally, police officers are more interested than prosecutors in "closing" open police cases by arrest, since the officers will thereby generate self-serving statistics. Accordingly, police officers have the greatest incentive to agree to bargains proposed by defense counsel, such as the trade-off of surrender for postarrest release.

§ 3.31 THE FOLLOW-UP CONVERSATION WITH THE CLIENT: COUNSELING THE CLIENT ON THE ADVISABILITY OF SURRENDER

After talking with the authorities, counsel will want to confer again with the client, to discuss the client's feelings about surrendering and to advise the client concerning the wisdom of that course in general as well as the specifics of any agreements that counsel thinks s/he can negotiate with the authorities and the mechanics of surrender if one is arranged. There are several potential benefits to surrendering: (i) The most significant from the client's perspective will be the possibility of postarrest release by the police, pursuant to any agreements that counsel can negotiate; (ii) a less immediate but equally tangible benefit will be the enhanced likelihood of release at arraignment, since counsel will be able to argue to the judge that the client's decision

to surrender voluntarily demonstrates both that flight is unlikely and that the respondent is a responsible individual; (iii) by surrendering at a prearranged time with counsel present, the client can avoid the embarrassment and inconvenience of being dragged out of his or her home or school by the police and can preclude the risk of physical injury from a violent confrontation with the arresting officer; (iv) by surrendering in the presence of counsel, the client ensures that there will be no postarrest custodial interrogation.

The alternative course of not surrendering and of attempting to evade the police entails significant risks (of inconvenience, embarrassment, possible physical injury, and greater likelihood of detention) and usually provides very little benefit. Although the client may buy a little time "on the street," the police, at least in serious cases, are usually fairly prompt in executing arrest warrants. Moreover, the police usually have little trouble in finding fugitive juveniles: Since children are generally dependent upon their parents or other relatives for shelter and food, most juveniles tend to "hide" in their own homes or the homes of close relatives, where they are readily found by the police. There is one exceptional situation in which a client's successful evasion of the police will produce a distinct benefit. In many jurisdictions there is a maximum age (usually 18 or 21) beyond which a child cannot be incarcerated in a juvenile placement facility. *See, e.g.,* N.Y. FAM. CT. ACT § 355.3(6) (2022). In these jurisdictions a child who commits a crime that is not subject to "waiver" or transfer to adult court (see Chapter 13) and who eludes capture until s/he has passed the maximum age for commitment to a juvenile facility has gained absolute immunity from imprisonment. Moreover, s/he probably will not be prosecuted for the crime: A prosecutor is unlikely to incur the expense of prosecution solely to put a conviction on the child's record when that conviction can thereafter be sealed or expunged (see § 39.08 *infra*).

Counsel will need to advise the client concerning all of these factors so that the client can make an informed decision whether to surrender. Although counsel can (and often should) advise the client to surrender, the final decision of course must be left to the client.

§ 3.32 ARRANGING THE SURRENDER

If the client decides to surrender, then the attorney can finalize the negotiations with the police and arrange the mechanics of the surrender. Counsel should insist upon securing assurances from the police that the client will not be interrogated, exhibited to witnesses for identification, or subjected to searches or examinations while in custody prior to being released. A time and place for surrender should be agreed upon, and counsel should accompany the client to assure that the arrangements which s/he has made with the police or prosecutor are carried out. Before the surrender, counsel should make a detailed file memorandum recording the agreed-upon surrender terms, identifying the officer or official with whom they were arranged, and noting the time and manner (*e.g.*, a phone conversation between specified phone numbers) in which the officer or official agreed to the terms.

In jurisdictions that permit bail for juveniles, arrangements should also be made in

advance, either with a professional bail bonder or by getting the requisite cash, securities, or property deed in hand, to have the necessary security for posting bail available at the time of surrender.

An attorney seeking to avoid harmful publicity arising from the surrender of a client of notoriety should consider picking a time and place inconvenient or inaccessible to the media. Once reporters have obtained facts about a case or photographs of the respondent, it is virtually impossible to restrain their subsequent dissemination, notwithstanding its prejudicial impact on the respondent and his or her ability to get a fair trial. *See Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979). Conversely, if there are strategic reasons for memorializing the client's arrest (such as concern that arresting officers may mistreat the client), the surrender should be made in open court or in some location, such as the courthouse steps (*compare Glik v. Cunnliffe*, 655 F.3d 78 (1st Cir. 2011), *and ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), *with Enoch v. Hamilton County Sheriff's Office*, 818 Fed. Appx. 398 (6th Cir. 2020)) where counsel can videorecord it. *See Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 817 (1st Cir. 2020) (affirming "the District Court's . . . ruling that . . . [a Massachusetts statute] violates the First Amendment by prohibiting the secret, nonconsensual audio recording of police officers discharging their official duties in public spaces").

§ 3.33 THE SURRENDER AND SUBSEQUENT ASPECTS OF THE CASE

If in the course of the actual surrender of the client, a police officer begins to renege on his or her agreements with counsel, the attorney should inform the officer that unless s/he adheres to the agreed-upon surrender terms, counsel will inform the local defense bar that that particular officer cannot be trusted in negotiations on surrender or any other matters. Since many officers are very concerned with closing cases and amassing arrest statistics, the threat to their credibility as honest traders may cause (or at least encourage) the officer to adhere to the original terms of the agreement. Should the officer persist in violating the terms of a surrender agreement, counsel should make a file memorandum detailing the incident, for potential use in (a) seeking immediate corrective action from superior officers, a prosecutor, or a judge (in a *habeas corpus* or injunctive proceeding) and (b) later litigating motions to suppress any evidence obtained by the police during the client's detention (see Chapters 23-25 *infra*).

Once the surrender has been accomplished, counsel then will need to take all the steps that normally must be followed at that particular postarrest stage of a juvenile case. If release of the client was not part of the agreement with the police, counsel will need to try to persuade detention facility officials to release the client to parental custody. See § 3.24 *supra*. If release was part of the agreement and the client in fact was released, then counsel will need to deal with the probation intake process. See §§ 3.26-3.28 *supra*. Then, once the case reaches court, counsel will need to handle the Initial Hearing, a topic that is taken up in the next chapter.