

MASSACHUSETTS MAJOR CITY CHIEFS



BEST PRACTICES IN EYEWITNESS IDENTIFICATION AND THE RECORDING OF SUSPECT INTERVIEWS

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Introduction

In December 2009 the Boston Bar Association published Getting it Right, Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts. The report was the result of work performed by a task force of defense attorneys, prosecutors, and police officers that came to strongly support the adoption of reform in four general areas.

Two of the reform categories, eyewitness identification procedures and interviews of suspects and witnesses, are the direct responsibilities of the police. The report concluded by calling upon the legal and law enforcement communities to give recommendations their full support. A copy was sent to every Massachusetts police department.

The Massachusetts Major City Chiefs support the work of the Boston Bar Task Force to Prevent Wrongful Convictions and are committed to the implementation of its recommendations. MMCC, with assistance from the Massachusetts Chiefs of Police Association, has produced this document in order to acknowledge best practices in the areas of eyewitness identification and suspect interrogation. Sample policies on both topics will be provided to police departments with this document.

We recognize that the police are as responsible for protecting the innocent from conviction as we are for identifying the guilty. It is our opinion that Massachusetts police departments should adopt reform procedures and that department policy in these two critical areas should be uniform across the Commonwealth.

Eyewitness Identification

Over the past decade or so, an astonishing number of convicted felons have been exonerated by DNA. At last count, over 250. When those cases were examined, it became evident that about 75% were convicted at least in part on the basis of eyewitness evidence.

Things may actually be worse than they appear. Most defendants exonerated by DNA had been serving time for homicides and sex assaults, crimes that often yield DNA evidence. If over 250 innocent people were serving time for these types of crimes, how many innocents are in prison for crimes like robberies and aggravated assaults, but cannot be exonerated because there is no DNA evidence to prove they did not commit the offense?

Efforts to examine the reliability of eyewitness evidence have been occurring all around us. In 1999, the U.S. Attorney General formed a research group called the Technical Working Group for Eyewitness Evidence. The group's work resulted in the publication Eyewitness Evidence, A Guide for Law Enforcement. The Guide recommended new procedures designed to reduce erroneous identifications, but some departments have been slow to implement them. And twice in 2009, the Supreme

Judicial Court cautioned that it expected Massachusetts police departments to adopt reform procedures, hinting that sanctions may be around the corner if they do not.

In addition to sending innocent people to prison, wrongful convictions leave true perpetrators on the street to continue offending, deny crime victims justice, and erode the public's confidence in law enforcement.

Department Policy

Every police department should have a written policy on eyewitness identification. Policies should be uniform, or at least consistent, statewide.

At a minimum, department policies and procedures should include the following:

1. Before conducting any identification procedure, the police obtain and document as complete a description of the suspect as possible.
2. Formal instructions are given to eyewitnesses prior to all identification procedures. The witness instructions follow the recommendations of the U.S. Department of Justice as contained in the publication Eyewitness Evidence, A Guide for Law Enforcement. Specifically:
 - that the person who committed the crime may or may not be the person who has been stopped (for a show-up) or is in the lineup or photo array;
 - that it is just as important to clear an innocent person from suspicion as to identify a person as the wrongdoer;
 - in the case of a photo array or lineup, that individuals may not appear exactly as they did on the date of the incident because features such as weight, and head and facial hair are subject to change;
 - that regardless of whether or not an identification is made, the investigation will continue; and
 - that the procedure requires the administrator to ask the witness to state, in his or her own words, how certain he or she is of any identification.
3. Patrol officers and detectives carry or have immediate access to cards containing witness instructions for use during show-ups.
4. The department uses witness instruction forms for photo arrays, line-ups and voice identification procedures.
5. Absent compelling countervailing considerations, identification procedures are conducted by "blind" administrators - that is, officers who do not know which of

the individuals in a lineup or photo array is the suspect. Blind administration prevents the officer conducting the lineup from providing even subconscious suggestions that may influence the witness's identification, or indicating to the witness that he or she selected the "correct" photograph.

6. The individuals in the array or lineup are presented to the witness one at a time, rather than simultaneously.
7. At the conclusion of an identification procedure where the witness has made an identification, the officer asks the witness to describe his or her level of certainty about the identification.
8. Officers are required to submit a report on every identification procedure, whether or not a subject is selected, including the instructions given to the witness, the exact words spoken by the eyewitness pertaining to any identification made, and the witness' statement of certainty.
9. The department turns over to the district attorney's office documents containing the instructions given to the witness, as well as the responses of eyewitnesses and their statements of certainty.

It is recommended that the policy also include procedures for voice identification.

Training

Every police department should provide the training listed below to its sworn personnel.

1. All patrol officers and supervisors should receive training about eyewitness identification procedures to include managing witnesses, show-up procedures, blind administration and photo arrays.
2. All detectives should receive advanced training in eyewitness identification to include recognition memory, cognitive interview techniques, variables affecting eyewitness recall, procedures for show-ups, photo arrays, line-ups and voice identification procedures, and issues related to composites and sketches.
3. Roll call training on eyewitness identification should be provided to all sworn personnel at least annually.

Recording Interrogations

While 75% of convictions overturned by DNA involve erroneous eyewitness identification, an astounding 20% of the convicted defendants falsely confessed. In fact, some defendants who were mistakenly identified by an eyewitness later confessed. Were it not for the advent of DNA, few people would have believed that these prisoners

could actually be innocent. And yet the science cannot be denied; these people confessed to crimes they did not commit.

In most cases, it appears that detectives did nothing illegal or improper when they interrogated their suspects. In fact, the Boston Bar report states that “even the best intentioned detectives, employing entirely lawful and appropriate interview methods, can conduct interviews which inadvertently generate false confessions.” It is this very sentiment that supports the notion that police interrogations should be recorded.

Among the advantages of recording interrogations are:

- Jurors will not be left to wonder whether the police abused or coerced the suspect;
- Officers will not be expected to recall on the witness stand the words spoken by the defendant during an interrogation;
- The recorded statement will provide more compelling evidence than the officer testifying to what the suspect said;
- Interrogations will generate fewer suppression hearings; and
- The SJC’s 2004 decision in *Commonwealth v. DiGiambattista* provides for a cautionary jury instruction in cases where the police neglect to record an interrogation.

Department Policy

Every police department should have a written policy on the interrogation of suspects. Policies should be uniform, or at least consistent, statewide. Department policy and procedures should include the following:

1. At the very outset of a custodial interrogation, or the interview of a suspect at a police station or other place of detention, the officer informs the subject that the conversation is being recorded. It should be noted that the subject need not consent to the recording, only that the recording not be “secret” within the context of M.G.L. Chapter 272 § 99.
2. Patrol officers who are not equipped with pocket recorders are encouraged to conduct interrogations in felony cases back at a police station where they can be recorded.
3. If the subject interrupts the interview and refuses to speak while being recorded, the recording device should be shut off. However, the recording of the conversation to that point should be preserved as evidence. (Some departments have suspects sign a refusal form when they decline to be recorded.)

4. All police reports concerning interrogations address whether the interrogation was recorded and how the recording was stored or processed.
5. The department turns over to the district attorney's office in a timely manner all police reports concerning interrogations, and all such reports contain details about the collection, storage and retention of electronic evidence.

The Boston Bar report urges police departments to, where practicable, video record interviews with victims and witness in serious felony cases. This particular recommendation is not universally accepted, and some district attorneys' offices disagree with it. Departments are encouraged to consider it as an option, and to discuss the issue with their district attorney.

Equipment

Police departments should ensure that their officers, particularly detectives, have at their disposal equipment and facilities that facilitate the recording of interrogations.

1. All police buildings where suspects might be interrogated should have at least one room set up with audio and video recording equipment.
 - It is permissible, if not preferred, that the cameras and microphones are hidden from view so that their presence does not deter a suspect from talking and so the equipment cannot be used as a weapon against the interviewing officers.
 - Recording equipment should be positioned so that microphones pick up both sides of the interrogation and the camera captures the suspect and both officers in the same frame.
 - The equipment used for the recording of interrogations should be digital, with files saved to a server that is backed up after each interrogation, or with a system for saving every interrogation to two separate media.
2. Pocket recorders should be issued to all detectives along with a directive that recorded statements be electronically saved immediately following the interview.

Training

As recommended by the Boston Bar report, police departments should provide training to their officers, especially detectives, about the existence of false confessions and their causes. Detectives should be taught to whenever possible validate confessions by asking the suspect about unpublicized details that only the offender could know.