

DEFENCE COUNSEL AT POLICE QUESTIONING: PROTOCOL

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Introduction

This protocol aims to indicate the guiding principles upon which the defence lawyer should substantively base his (or her) role during (police) questioning. The protocol states that the defence lawyer should be given the opportunity to actively fulfil his role during (police) questioning, if he deems it necessary in the interests of his client. The checklist, which is appended, is just a practical tool. The intention is not to create new (disciplinary) standards - or to rack up existing (disciplinary) standards.

1. The client's interests are determinative for the way in which the defence lawyer substantively fulfils his work before and during (police) questioning.

Explanation:

This rule brings rule 5 of the Rules of Conduct 1992 to mind.

Various interests play a role of importance during the police questioning phase. The interests of arriving at the truth may conflict with suspect's legitimate interests. Interests of victims, family, witnesses, etc. may influence the way in which the investigation is organised. The defence lawyer should not ignore these interests, nonetheless he should always realise that he only has to represent one interest and that is the interest of his client (the suspect).

This rule is primarily targeted at the defence lawyer, but it also implies that the other participants in the proceedings, such as the judiciary and police, must also be conscious of the special role that the defence lawyer plays as legal assistance provider (proceedings monitor, representative, confidential counsellor and adviser of his client).

2. The defence lawyer adequately informs his client about the course of the criminal proceedings and about his rights and entitlements.
3. The defence lawyer advises his client on exercising his rights and the entitlements vested with the defence. In addition, he advises his client on the course of action to be adopted during the proceedings.

Explanation:

The suspect must be informed correctly and fully, so that a proper assessment can be made with an eye on the course of action to be adopted during the proceedings. This is especially important during the police questioning phase. As the suspect must make important decisions that (can) determine the course of the criminal proceedings (and the outcome of the case), such as:

- (not) accepting legal assistance prior to questioning and/or legal assistance during questioning;
- remaining silent or speaking;
- informing the police about certain information or not;
- (not) cooperating in certain investigations;
- (not) accepting another manner of settlement;
- etc.

The defence lawyer can use the checklist appended to this protocol for the purpose of informing and advising his client.

4. The defence lawyer must perform his duties expertly, diligently and to the best of his ability before and during the (police) questioning. He must act professionally at all times.

Explanation:

One expects the defence lawyer, who provides the legal assistance before and/or during the police questioning, to do all that possible to represent the interests of his client. In addition, he must conduct himself in such a way that the trust in the legal profession and his own professional conduct is not damaged (cf. rule 1 of the Rules of Conduct 1992). For example, this means that he must in principle treat the other participants in the proceedings properly. This also means that he must respect that the interviewing official holds the presiding role during questioning. For that matter, this does not mean that the defence lawyer must refrain from intervening, making comments, making requests, etc., at the moment that he sees a reason to do so. The defence lawyer must do his best to provide his client with legal assistance of the highest quality in every regard.

5. A defence lawyer who provides a client with legal assistance prior to questioning that will occur at a police station must ensure that his client does not have to wait for his legal assistance for an unnecessarily long period of time.

Explanation:

It is in the interests of a suspect, who is awaiting questioning at a police station, to receive legal assistance as quickly as possible. At this stage, a delay is usually not in the client's interests. In most cases, it is also in the interests of the police that the defence lawyer does not delay in providing the suspect with legal assistance prior to questioning, as a delay by the defence lawyer means that the questioning of the suspect cannot (in principle) begin.

Setting a 'rigid' term is not desirable. A defence lawyer in a hearing or meeting will probably require slightly more time to get to the police station than a colleague who can come immediately. A preferred lawyer who has to travel a long way will also often require somewhat more time. It is obvious that the defence lawyer should not let his client wait for his legal assistance for an unnecessarily long period of time, as the questioning cannot in principle begin until the suspect, who requested legal assistance prior to questioning, has been seen by a/his defence lawyer. The defence lawyer is bound by a best-efforts obligation to attend as quickly as possible (after being called).

6. If the defence lawyer discovers a conflict of interests or when there is another reason why he cannot defend a certain suspect, he must ensure that a replacement defence lawyer is alerted immediately.

Explanation:

It will at all times remain the responsibility of the defence lawyer – thus also in the phase in which the legal assistance prior to questioning is provided and when the (police) questioning occurs – to determine whether there are any conflicts of interest (cf. rule 7 of the Rules of Conduct 1992). Conflicting interests must not be confused with interests of the investigation. It sometimes occurs that the police takes the view that the defence lawyer is not allowed to visit and provide legal assistance to different suspects in the same case. However, this is not a 'hard' rule. The defence lawyer need only comply if the public prosecutor (or the examining magistrate) has instituted so-called restrictive measures in the interests of the investigation (during the time that these restrictive measures stand).

Because the client's interests must come first in all cases, it is up to the defence lawyer, who is unable – for whatever reason – to provide legal assistance, to organise a replacement

defence lawyer in accordance with the relevant duty lawyer rules applicable in the jurisdiction of a Court of Appeal.

7. The defence lawyer provides legal assistance during the questioning and ensures that the questioning is performed fairly.

Explanation:

With this rule it is emphasized that the defence lawyer who is admitted to the police questioning is the legal assistance provider.

Because arriving at the truth is paramount during the (police) questioning, the defence lawyer will, in principle, act with some reserve (but not passively). If necessary, the defence lawyer should conduct an active defence in the interests of the suspect. This means that he should sit next to his client in the questioning room and that he is obliged to intervene when the suspect is questioned in a manner that is in conflict with the ban on pressure or when such a situation threatens to occur. Furthermore, the defence lawyer is obliged to intervene when he sees good reason to do so.

He can advise his client during the questioning if needed. He is obliged to ask the interrogator(s) to pause the questioning so that he may hold a private consultation with his client, or to take a break ('time out'), whenever he considers this necessary. Furthermore, he is obliged to ask questions or make comments whenever he deems it necessary in his client's interests.

(Needless to say) the defence lawyer will not make excessive or unreasonable use of the instruments made available to him as a legal assistance provider during the questioning.

In particular, the defence lawyer ensures that the right to not incriminate oneself and the freedom of choice of the suspect to make statements, answer questions or remain silent are respected. He monitors how his client is treated during the questioning. He monitors whether the procedural rules are observed and whether the questioning proceeds correctly in other respects. If necessary, he must report any irregularity he observes. For example, he may suggest that the interviewing official formulates a question differently and/or he may advise his client to refrain from answering.

8. The defence lawyer ensures that the official report on the interview that is drafted is a correct record of the questioning.

Explanation:

In the explanation of this standard of conduct, the client's interests are also guiding for the defence lawyer. Monitoring the correct content of the official report that is made of the questioning of the suspect is an important task of the defence lawyer. Since the official report can play an important role at a later moment in the proceedings, for example, when answering the evidentiary question. It is therefore of great importance that the suspect's statement is reported correctly. This applies to incriminating parts of the statement, but, of course, also to parts of the statement that are/can be exculpatory for the suspect. Bearing this in mind, the defence lawyer must run through the draft official report with his client, and he must ensure that any necessary improvements, additions and/or changes are made to the text.

Moreover, it is important that all the information that relates to the (formal) course of the proceedings during the questioning is recorded properly. For example, it concerns the times of questioning, names of persons present, and the caution, but also, for example, the remarks that were made by the defence lawyer during the questioning and with reference to the report of the interview.

POLICE INTERROGATION CHECKLIST / STANDARD FORM

Client's details

Name:
First names:
Sex: male/female
Nationality:
Minor: yes/no
Date of birth:
Place of birth:
Address:

Telephone number:
CSN:

Spoken language:
Interpreter required: yes/no

Health:
Doctor required: yes/no
Psychiatrist required: yes/no

Case details

Public prosecutor's office no.:
Suspicion: art.:
District:
Client's place of residence:

Public Prosecutor:
Telephone number:

Police contact person:
Telephone number:

Date and time of arrest:
Date and time of end of examination:
Date and time of detention:

Waiver of right to legal assistance prior to questioning: yes/no
Waiver of right to legal assistance during questioning: yes/no

Statement of rights conferred: yes/no

Consultation

Date and time of report:

Visit:

yes/no

Starting time of consultation visit:

Duration of consultation visit:

Notifications:

- the role of the defence lawyer (including client confidentiality)
- the right to legal representation (+ legal aid)
- the right to information regarding the charges
- the right to interpretation and translation
- the right to remain silent
- the right to access case documents
- the right to inform consular authorities and one person
- the right to receive urgent medical attention
- the number of hours or days that the suspect may be detained before he must appear before a judicial authority
- information on the possibilities of fighting the lawfulness of the arrest, obtaining a review of the detention or requesting one's release

- (a waiver of) the right to legal assistance during police questioning
- the right to express himself in the language of his choice
- the course of the procedure regarding the deprivation of liberty
- the course of the procedure during questioning
- the function of the questioning and the importance of making a 'good' statement
- the importance of reading through the statement carefully
- the opportunity to make remarks with reference to the official report on the questioning and the importance of recording these remarks
- the importance of auditively or audiovisually recording the interview

Other topics of conversation

- the suspicion
- the adopted course of action during the proceedings
- the need for investigation (witnesses, experts, etc.)
- financial aspects (assignment, payment, hourly rate, advance payment, etc.)
- contacts with third parties (restrictions)
- co-suspects (conflicting interests)
- monitoring (telephone) calls
- unrestricted communication with the defence lawyer
- health
- (relevant) personal circumstances.
- any personality assessment
- probation investigation
- the possibility of another method of settlement (HALT, conditional dismissal, out-of-court settlement offered by the Public Prosecution Service, etc.) and accelerated proceedings

Notes of the conversation: