



NEW YORK
CITY BAR

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REPORT ON LEGISLATION

**A.4721
S.1267**

**M. of A. Lentol
Senator Perkins**

AN ACT to amend the criminal procedure law, in relation to the electronic recording of interrogations

THIS LEGISLATION IS APPROVED¹

The New York City Bar Association is an organization of nearly 24,000 lawyers and judges dedicated to improving the administration of justice. We support A.4721/S.1267, which would require law-enforcement personnel to electronically record custodial interrogations in felony cases.

Electronic Recording of Custodial Interrogations

Electronic recording of custodial interrogations not only protects the innocent by guarding against false confessions, but increases the likelihood of conviction of guilty persons by developing the strongest and most reliable evidence possible. It aids investigators, prosecutors, judges, and juries by creating a permanent and objective record of a critical phase in the investigation of a crime that can be reviewed for inconsistencies and to evaluate the suspect's demeanor.² Recording entire custodial interrogations significantly reinforces or enhances cases by creating powerful incriminating evidence, which leads to stronger prosecutorial positions in plea bargaining and a higher proportion of guilty pleas and verdicts.³ It has a concomitant effect of reducing the number of motions filed to suppress statements by defendants and the consequent sparing of prosecutors from the need to refute allegations that interrogators engaged in physical abuse, perjury, coercion, or unfair trickery.⁴

¹ Although we approve the bill, we have one recommendation concerning the effective date (currently 90 days after enactment). Depending on when the bill becomes law, police and prosecutorial agencies will likely require much more lead-in time in order to equip their offices and train personnel to comply with the statute. Therefore, we recommend a longer lead-in time than that which is provided in the bill.

² Thomas P. Sullivan, "Police Experiences with Recording Custodial Interrogation," Northwestern University School of Law, Center on Wrongful Convictions, Number 1 (2004), at 6.

³ Id. at 12.

⁴ Id. at 8.

Recording interrogations often improves the overall quality of investigations.⁵ For example, when detectives record interrogations they are able to focus on the suspects rather than taking handwritten notes. Former United States Attorney Thomas P. Sullivan determined in 2004 that, in 238 law enforcement agencies surveyed that recorded custodial interrogations – including those in Chicago, Denver, Washington, D.C., Los Angeles, San Jose, and Prince George's County, Maryland – “[v]irtually every officer ... was enthusiastically in favor of the practice.”⁶

The costs of recording custodial interrogations have proven to be manageable for law enforcement agencies in other jurisdictions. The costs in this jurisdiction would include training of law enforcement personnel, purchase and maintenance of recording equipment, and storage of electronic media. Most of these costs, while not insignificant, are at the front end and diminish once equipment is in place and personnel are trained. Indeed, in many police departments, keeping pace with advances in recording technology has historically posed little difficulty. For example, videotaping sobriety tests of suspected drunk drivers in the field and at station houses is a routine matter for countless police agencies throughout the nation.

Experience has shown that the presence or absence of recording equipment almost never affects suspects’ decisions whether to talk to interrogators.⁷ Should interrogators nevertheless be concerned that suspects, knowing they will be videotaped, will refuse to speak to them, they need not necessarily disclose that an interrogation will be recorded. For example, Wisconsin’s recording statute provides that “[a] law enforcement officer or agent of a law enforcement agency conducting a custodial interrogation is not required to inform the subject of the interrogation that the officer or agent is making an audio or audio and visual recording of the interrogation.” Despite the evidence that suspects are not inhibited from speaking to interrogators by the presence of recording equipment, agencies may prefer the ability to record interrogations inconspicuously.⁸

Current Practice

To date, Connecticut, Illinois, Maine, Maryland, Missouri, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Wisconsin, and the District of Columbia have enacted legislation requiring the recording of custodial interrogations. State supreme courts have taken action in Alaska, Iowa, Massachusetts, Minnesota, New Hampshire and New Jersey. Approximately 840 jurisdictions have voluntarily adopted recording policies.⁹

In December 2010, the NYS Division of Criminal Justice Services issued “New York State Guidelines for Recording Custodial Interrogations of Suspects” which stated that “[v]ideo

⁵ Id.

⁶ Id. at 6.

⁷ Id. at 10.

⁸ While taking no position on whether inconspicuous recording would be preferable to conspicuous recording, we have no reason to conclude that inconspicuously recording interrogations would be objectionable or improper.

⁹ See http://www.innocenceproject.org/Content/False_Confessions_Recording_Of_Custodial_Interrogations.php. (Last visited February 14, 2013).

recordings of interrogations are currently being conducted in over 30 counties in New York State, with more counties soon to join in. . . . It is expected that electronically recording custodial suspect interrogations will enhance the investigative process and assist in the investigation and prosecution of criminal cases. Critical evidence can be captured through the recording of interrogations. The recording will also preserve information needed regarding a person's right to counsel and the right against self-incrimination and it can be used to resolve a person's claim of innocence. Similarly, the electronic recording of custodial interrogations will assist in defending against civil litigation and allegations of officer misconduct."¹⁰

And, in September 2012, New York City Police Commissioner Raymond Kelly reported that the city will begin video recording criminal interrogations. As an expansion of the NYPD's 2010 pilot program, every precinct in the city will now record entire interrogations in murder, assault and sexual assault cases.¹¹

The Proposed Statute

The bill provides that an oral, written or sign language statement of an accused made as a result of a custodial interrogation at a place of detention will be presumed inadmissible as evidence against the accused in any proceeding charging a felony *unless*: (i) an electronic video or audio recording was made of the custodial interrogation in its entirety, including any administration and waiver, or invocation of rights; (ii) the recording is substantially accurate and has not been intentionally altered; and (iii) all voices on the recording are identifiable. The bill provides that, under certain circumstances, the State may rebut this presumption of inadmissibility by clear and convincing evidence. The bill also provides that, based upon a showing of good cause by the State, the court may admit a statement if it believes that suppression of the statement is too harsh a remedy, in which case an appropriate jury instruction may be given.

Nothing in the bill precludes the admission of statements made in open court or before the grand jury, spontaneous statements not in response to interrogation, statements made during routine questioning while processing an arrest, out-of-state statements made during custodial interrogation, statements obtained by federal law enforcement in a federal place of detention, statements given at a time when the interrogators are unaware that a felony has occurred, or statements used for impeachment purposes only.

Conclusion

Although we recommend passage and enactment of the proposed bill, our recommendation encompasses an understanding that adequate funding will be required by and provided to all agencies that would conduct custodial interrogations. While we are confident, based on the experiences of police and prosecutorial agencies that have in recent years begun videotaping custodial interrogations, either as a matter of law or individual policy, that the costs of procuring equipment, training personnel, and storing electronic media will ultimately be

¹⁰ See http://criminaljustice.state.ny.us/pio/press_releases/video-recording-interrogation-procedures.pdf. (Last visited February 14, 2013).

¹¹ See http://www.innocenceproject.org/Content/NYPD_to_Video_Record_Interrogations.php. (Last visited February 14, 2013).

manageable, we are mindful that the costs associated with these matters – especially start-up costs – are not insignificant. There must, therefore, be a funding structure in place adequate to cover these associated costs.

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