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A.5142 **M. of A. Joseph Lentol**
S.110 **Senator Sampson**

AN ACT providing that, as a general rule, an oral or written statement of an accused shall be inadmissible as evidence against such accused unless a recording is made of the interrogation; providing exceptions as to when a statement will be admissible even if the interrogation was not recorded.

THIS LEGISLATION IS APPROVED WITH RECOMMENDATIONS

This report is respectfully submitted by the Committee on Criminal Justice Operations (the "Committee") of the New York City Bar Association. The Association is an organization of nearly 23,000 lawyers and judges dedicated to improving the administration of justice. The members of the Committee on Criminal Justice Operations include prosecutors and criminal defense attorneys who analyze the legal, social and public policy aspects of criminal justice issues facing New Yorkers today.

A.5142/S.110 would require law-enforcement personnel to electronically record custodial interrogations in felony cases This Committee supports a State requirement that custodial interrogations in felony cases be electronically recorded, but recommends that the bill be modified to render the recording requirement and effective date more reasonable.

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.[1] 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.[2] 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.[3]

[1] Thomas P. Sullivan, "Police Experiences with Recording Custodial Interrogation," Northwestern University School of Law, Center on Wrongful Convictions, Number 1 (2004), at 6.
[2] Id. at 12.
[3] Id. at 8.

Recording interrogations often improves the overall quality of investigations.[4] 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."[5]

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.[6] 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.[7]

Rules and Practices in Jurisdictions Outside New York State

According to the *Preliminary Report of the New York State Bar Association's Task Force on Wrongful Convictions (presented January 30, 2009)*:

> At present, 12 states and the District of Columbia require that interrogations be electronically recorded. Eight of those jurisdictions require recording by statute: Illinois, Maine, Nevada, New Mexico, North Carolina, Texas, Wisconsin, and the District of Columbia. Five states require recording by judicial decree: Alaska, Massachusetts, Minnesota, New Hampshire, and New Jersey. These jurisdictions impose different sanctions for noncompliance. Five states impose the penalty of suppression for a willful failure to record (Alaska, Minnesota, and New Hampshire by judicial decree,

[4] Id.
[5] Id. at 6.
[6] Id. at 10.
[7] The Committee, while taking no position on whether inconspicuous recording would be preferable to conspicuous recording, has no reason to conclude that inconspicuously recording interrogations would be objectionable or improper.

> Illinois and Texas by statute). Three states impose the penalty of an adverse jury instruction (Massachusetts by judicial decree, Nevada and Wisconsin by statute). Two states defer to the trial court to impose a penalty, either suppression or adverse inference (New Jersey by judicial decree, North Carolina by statute). Three jurisdictions do not impose any penalty (Maine, New Mexico, and the District of Columbia).
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> Five states require recording for all crimes (Alaska, Massachusetts, Minnesota, New Hampshire, and Texas). Two states require recording for any felony (New Mexico and Wisconsin). Five jurisdictions require recording only for homicides and other serious felonies (Illinois, Maine, Nevada, New Jersey, North Carolina, and District of Columbia).[8]

In addition, the Iowa Supreme Court issued an opinion in a criminal appeal in which it encouraged police to begin videotaping custodial interrogations.[9] Shortly afterward, the Iowa County Attorneys Association wrote to all county attorneys, stating that the Attorney General's office believed that the Supreme Court's opinion "should be read as essentially mandating the practice from this time forward." And, hundreds of law enforcement agencies in all 50 states have, to their credit, voluntarily incorporated electronic recording of custodial interrogations into their regular practices, even though not required by case law or statute.

In promulgating these rules, some jurisdictions (Minnesota, Alaska, New Jersey, Illinois, North Carolina, and Washington, D.C.) have held that the recording requirements are applicable only to custodial interrogations that occur in a place of detention, such as a police station, correctional facility, or other facility ordinarily used to detain criminal suspects. Others (Massachusetts, New Hampshire, New Mexico, Texas, and Wisconsin) have not narrowly defined "custodial interrogation" for purposes of their rules regarding the recording of custodial interrogations.

Recording Custodial Interrogations in New York

In New York, there are currently no citywide or statewide rules or regulations requiring law enforcement officials to record custodial interrogations. Some police departments are, nevertheless, currently experimenting with recording custodial interrogations. They include:

- the Binghamton Police Department
- the Broome County Sheriff's Department
- the Cayuga Heights Police Department
- the Delaware County Sheriff's Department
- the Deposit Police Department
- the Endicott Police Department
- the State Police at Binghamton

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8 *Preliminary Report of the New York State Bar Association's Task Force on Wrongful Convictions ("State Bar Report")* at p. 107 (citations omitted).

9 State v. Hajtic, 724 N.W.2d 449, 454-456 (Iowa 2006).

- the State Police at Ithaca
- the State Police Oneonta
- the State Police at Sidney
- the Tompkins County Sheriff's Department
- the Vestal Police Department[10]

To foster the recording of interrogations, the Division of Criminal Justice Services (DCJS) has instituted the Video Recording of Statements Program, designed to provide law enforcement officials with video recording equipment for the purpose of recording interviews and interrogations of criminal suspects. The localities that qualified for this program were New York City and the seventeen counties that receive "Operation Impact" funding, which are the counties with the highest crime rates in the state. The program requires the District Attorney of each county to work with local law enforcement agencies to select who will use the video equipment and when and how it will be used. To apply for the grant, each District Attorney was required to submit a plan detailing how the equipment would be distributed throughout the county. The program encouraged District Attorneys to seek the maximum coverage for the video equipment in each jurisdiction. It did not impose any requirements as to how and when the video equipment should be used, but only that each District Attorney design a protocol as to how it would be used.

The Proposed Statute

The bill provides that an oral or written statement of an accused made as a result of a custodial interrogation at a police station or other 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; (ii) prior to the custodial interrogation the accused received and waived his Miranda rights; (iii) the recording is accurate and has not been altered; and (iv) all voices on the recording are identifiable.

"Place of detention" is defined as "a facility under the control of a law enforcement agency." "Custodial interrogation" is defined as "any interrogation during which the person being interrogated is not free to leave." Any electronic recording under the act must be preserved until such time as "the defendant's conviction for any offense relating to the statement is final and all direct and habeas corpus appeals are exhausted, or the prosecution of such offenses is barred by law."

Subsection 4 provides that nothing in the statute shall preclude the admission of: (a) a statement by a defendant made before a grand jury, at a preliminary hearing, or in open court at a trial; (b) a statement made prior to the accused being taken into custody; (c) a statement made during a custodial interrogation that was not recorded because video or audio recording was not feasible; (d) a voluntary statement, whether or not the result of a custodial interrogation, that has a bearing on the credibility of the accused as a witness; (e) a statement made under exigent circumstances; (f) a spontaneous statement not made in response to a question; (g) a statement made after questioning that is routinely asked during arrest processing; (h) a statement made during a custodial interrogation by a suspect who agrees, prior to making the statement, to

[10] As of January 2009, 26 of 62 New York counties have voluntarily adopted some form of recording. *State Bar Report* at p.108.

respond to the interrogator's questions only if a recording is not made, provided that a recording is made of such agreement; (i) a statement made during custodial interrogation that is conducted out-of-state; or (j) a statement made by a suspect who is being interrogated simultaneously with other suspects concerning the same offense, but only to the extent no recording equipment is available because it is being used to interrogate the other suspects.

Subsection 5 provides that the people shall bear the burden of proving, by a preponderance of the evidence, that one of the exceptions in subsection 4 is applicable.

Finally, the bill provides that the act shall take effect on the first of November next succeeding the date on which it becomes law.

Recommendations

The Committee recommends modifications to the proposed statute.

First, the sanction of a preclusion provided for in subsection 2 of the proposed statute may be unduly harsh in some circumstances. An adverse inference charge against the People should also be available as a sanction. For example, where a post-breach interrogation is clearly attenuated, or where the breach proves to be innocuous, a lesser sanction, similar to the jury instruction required by Commonwealth v. DiGiambattista, 442 Mass. at 447-448, 813 N.E.2d at 533-534 should be available as an alternative to preclusion. The bill should allow for that circumstance.

Second, subsections 2's reference to a *presumption* of inadmissibility unless certain conditions are met is problematic. If one of the conditions in subsections 2(a-e) is not met – *e.g.*, all voices on the recording are not identifiable - does that mean the statement is actually inadmissible so that the judge *must* preclude it? Or, is the statement only presumed inadmissible, meaning that the judge can consider whether the presumption has been overcome in some fashion? Left unstated is how the presumption might be overcome and which party carries the burden of proof on that issue. (By contrast, the bill makes clear that it is the people's burden to prove that one of the subsection 4 exceptions applies.)

Third, subsection 3's reference to "all direct and habeas corpus appeals" should be amended to refer to "all direct appeals and federal habeas corpus proceedings."

Fourth, subsection 4(c) provides for an exception where recording is not "feasible", but no exception where the failure to record is due to equipment failure. We recommend that change. Also, subsection 4(i) provides for an exception for out-of-state interrogations but not for interrogations by federal authorities (as appears in A.5213). Finally, subsection 4(d) appears to contain a typo in that it refers to a custodial interrogation that "was a bearing" as opposed to "has a bearing."

Fifth, conforming amendments to Criminal Procedure Law article 710 will be required to effectuate the procedure to be followed when a defendant wishes to allege a violation of the proposed statute.

Sixth, depending on when the bill becomes law, police and prosecutorial agencies will likely require much more lead-in time that that which is provided for in Section 2 of the proposed statute. It will take time to equip their offices and train personnel to comply with the statute. A longer lead-in time is more realistic.

Conclusion

The American Bar Association in 2004 unanimously adopted a resolution urging legislatures or courts to enact rules requiring the videotaping of custodial interrogations in their entirety at places where suspects are held for questioning.[11] The Committee is also unanimously in favor of electronically recording, with video and audio equipment, custodial interrogations in their entirety in all felony cases. We recommend passage and enactment of a statute similar to the proposed bill, but with amendments and additions as noted above.

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 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.

Committee on Criminal Justice Operations
Association of the Bar of the City Of New York
Chair Robert Dean

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[11] A.B.A. and N.Y. County Lawyer's Ass'n, Criminal Justice Sections, Report to the House of Delegates (Feb. 2004), available at http://www.abanet.org/leadership/2004/recommendations/8a.pdf.