

**Compendium: Electronic Recording
of Custodial Interrogations**

INDEX

	<u>Page</u>
Part 1: The Benefits of Statewide Requirements of Electronic Recording of Custodial Interrogations	2
Part 2: States	6
Alabama.....	9
Alaska	9
Arizona.....	13
Arkansas.....	16
California.....	18
Colorado	22
Connecticut.....	24
Delaware.....	28
District of Columbia.....	30
Florida.....	34
Georgia	37
Hawaii	37
Idaho.....	40
Illinois.....	40

Indiana	44
Iowa	45
Kansas	50
Kentucky	50
Louisiana	51
Maine	52
Maryland	55
Massachusetts	57
Michigan	70
Minnesota	73
Mississippi	75
Missouri	76
Montana	77
Nebraska	82
Nevada	84
New Hampshire	86
New Jersey	87
New Mexico	88
New York	89
North Carolina	104
North Dakota	106
Ohio	106
Oklahoma	110
Oregon	112
Pennsylvania	114

Rhode Island.....	117
South Carolina	125
South Dakota	125
Tennessee	125
Texas	127
Utah	133
Vermont	136
Virginia.....	137
Washington.....	138
West Virginia.....	138
Wisconsin	139
Wyoming.....	141
Part 3: Federal Agencies.....	144
Air Force	145
Army and Military Police	146
Defense	148
Homeland Security.....	151
Immigrations and Customs Enforcement.....	151
Secret Service	152
Inspector General	153
Internal Revenue Service.....	159
Justice.....	160
Marine Corps	179
Navy.....	179
Treasury.....	181

Veterans Affairs	184
Part 4: National Organizations	186
American Bar Association	186
American Civil Liberties Union	186
American Federation of Police and Concerned Citizens	187
American Judicature Society	187
American Law Institute	188
American Psychological Association	188
Center For Policy Alternatives	189
Constitution Project	189
Innocence Project	189
International Association of Chiefs of Police	190
Justice Project	195
Major Cities Chiefs Association	195
National Association For the Advancement of Colored People	198
National Association of Criminal Defense Lawyers	198
National Conference of Commissioners on Uniform State Laws	199
National District Attorney's Association	203
National Institute on Military Justice	207
Part 5: Foreign countries	210
Australia	210
Canada	211
England	211
Ireland	212
New Zealand	214

Part 6: Bibliography.....	216
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A Compendium of the Law Relating to Electronic Recording of Custodial Interrogations

This compendium has been assembled in order to summarize in a single document the information my associates and I have collected during the past twelve years relating to law enforcement practices concerning electronic recording of custodial interviews of felony suspects. My thanks to my partner, Andrew W. Vail, my personal assistant, Jo Stafford, and the many Jenner & Block lawyers and paralegals, for the valuable assistance they have given me in the accumulation of the information contained in, and the preparation of this Compendium.

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Part 1: The Benefits of Statewide Requirements of Electronic Recording of Custodial Interrogations

The benefits obtained from recording custodial interviews to all involved in the criminal justice system may be summarized follow:

1. To determine whether or not the defendant was given appropriate explanation of rights required by the *Miranda* case.
2. To determine whether or not the police interrogators used proper procedures and tactics during the interrogation.
3. To determine whether or not statements of the suspect were made freely and voluntarily.
4. To avoid disputes as to what was said and done by the participants in the interview and how the participants conducted themselves.
5. To determine the amount of time involved in the interview.
6. To avoid the necessity for testimony by those involved in the interview – usually the law enforcement officers and the suspects – as to what was said and done during the interview.
7. To save the time of all others potentially involved in determining the facts concerning the interview, namely, supervisory personnel, prosecutors, defense lawyers, jurors, and trial and reviewing court judges.
8. To permit the officers to concentrate on the suspect and their questioning, rather than having to make notes during the interview.
9. To permit the prosecution to make the strongest case in order to convict those guilty of crimes.
10. To permit innocent suspects to establish improper tactics used during interrogations.
11. To protect officers from false claims that they did not give the *Miranda* warnings or used improper tactics.

12. To allow officers who are not in the interrogation room to remotely observe the interrogation in real time and make suggestions to those conducting the interviews.
13. To allow officers later to review recordings to search for clues to guilt or innocence which may have been overlooked during the sessions.
14. For illustrative purposes for use in training new detectives, and continuing education of experienced officers.
15. To instill public confidence in the manner in which law enforcement officers conduct themselves during custodial interviews.
16. To reduce the risk of false confessions and convictions of innocent persons, which result not only in injustice to the wrongly convicted, but also allows guilty persons to remain free.
17. To reduce the risk of civil suits by and damage awards in favor of wrongly convicted persons, which often result in taxpayers bearing the burden of paying the damages.

The benefits to be obtained from having statutes or Supreme Court rules regarding electronic recording of custodial interrogations, applicable uniformly to every department in the state, to avoid a haphazard conglomeration of various local rules:

1. All departments record custodial interrogations of the same classes of felony suspects.
2. All departments use the same means of recording, whether audio, video, or both.
3. Specify locations where recordings must take place.
4. Identify the law enforcement agencies within the state that are covered by the recording requirement.
5. Establish a uniform list of reasons that excuse the recording requirement, and if the case is in court, provide uniform standards as to which party has the burden of proof, and define the applicable burden.

6. Provide the courtroom consequences of unexcused failures to record, e.g., presumed inadmissibility, or a cautionary jury instruction.
7. In states that require dual consent to electronic recordings, determine whether to exempt recordings made pursuant to the statute.
8. Identify the requirements for reproducing and transcribing recordings for defense counsel and the court.
9. Provide provisions relating to custody and time for preservation of recordings.
10. Avoid disparities among various departments in recording practices, that can cause judges, jurors and defense lawyers to challenge testimony of officers to what occurred during unrecorded custodial interrogations, by calling attention to other departments in the state that make an electronic recording under the same circumstances.

To view a specific section of the Compendium, click on the link below to jump to this specific information.

Introduction

Part 1: The Benefits of Statewide Requirements of Electronic
 Recording of Custodial Interrogations

Part 2: States

Part 3: Federal Agencies

Part 4: National Organizations

Part 5: Foreign countries

Part 6: Bibliography

Part 2: States

Since 2003, my associates and I have been studying the practice of state and local law enforcement personnel who use electronic recording devices when interviewing felony suspects who are under arrest in police detention facilities from the *Miranda* warnings to the end of the interviews. In place of standard survey techniques, we make "cold" telephone calls to police and sheriff departments we believe routinely make electronic recordings during custodial interviews; in the course of those calls, we occasionally speak with departments where recording is not customary. We have been aided by a firm that trains federal and state law enforcement personnel in interview techniques, Wicklander-Zulawski & Associates, Inc., of Downers Grove, IL; they distribute a survey to attendees requesting written information about their department's practices.

We have now spoken with and received completed survey forms from over one thousand police and sheriff departments, located in every state and the District of Columbia. We prepare typewritten summaries of all our telephone interviews, and send them to the persons with whom we've spoken for accuracy verification. We have collected written regulations from scores of departments throughout the country, which outline the procedures and methods to be followed when conducting recorded interviews. We seek no information relating to interviews conducted outside official fixed detention facilities, for example, those taking place on the street or in a squad car. We have no litmus paper test as to the felonies which trigger the recording requirement; this varies widely among states that mandate custodial recordings, and among departments that record voluntarily.

We do not list departments that conduct preliminary unrecorded interviews, and then record final statements or confessions. Nor do we include those that use recording on a selective rather than a regular basis.

For most of the states in the following summary, we have listed "Departments we have identified that presently record." These are departments to whom we have spoken, or which have responded to written surveys, that report using electronic recording, audio or video or both, on a customary basis, of custodial interrogations, from the *Miranda* warnings to the end, of persons suspected of committing felonies. We believe there are many other departments that record in these sates. In the states that have statutes or court rules concerning recording that are applicable statewide,

we have not listed individual departments that record custodial interrogations. A list of these states, and citations, as of August 2016 follows.

STATES WHICH RECORD STATEWIDE

<u>State</u>	<u>Year</u>	<u>Source</u>	<u>Coverage</u>
Alaska	1985	Court ruling	All crimes
Minnesota	1994	Court ruling	All crimes
Illinois	2003 2005 2013	Statute Statute Statute	Homicides Vehicular homicides Specified felonies
New Jersey	2005	Court rule	All crimes
Wisconsin	2005 2005	Court ruling Statute	Juveniles – all crimes Felonies
District of Columbia	2006	Statute	Crimes of violence
New Mexico	2006	Statute	Felonies
Maine	2007	Statute	Serious crimes
North Carolina	2007 2011	Statute Statute	Specified felonies Juveniles – all crimes
Maryland	2008	Statute	Specified felonies
Nebraska	2008	Statute	Specified felonies
Indiana	2009	Court rule	Felonies
Missouri	2009 2015	Statutes	Specified felonies
Montana	2009	Statute	All crimes
Oregon	2010	Statute	Specified felonies
Connecticut	2011	Statute	Specified felonies
Arkansas	2012	Court rule	All crimes
Michigan	2012	Statute	Specified felonies
California	2013	Statute	Juveniles – homicides
Rhode Island	2013	Police Accreditation Commission	Capital offense crimes
Hawaii	Various	Department policies	Serious crimes

Vermont	2014	Statute	Homicides, sexual assaults
Utah	2015	Court rule	Felonies
Colorado	2016	Statute	Specified felonies

Citations alphabetical:

Stephan v. State, 711 P.2d 1156 (AK 1985); AR Supreme Court Rule of Criminal Procedure 4.7 (2012); CA Penal Code §859.5 and CA Welfare & Insts. Code §626.8 (2013); CO Rev. Stat., title 16, art. 3, part 6, §16-3-601-03 (2016); CT Gen. Stat. §54-1o (2011); DC Code §5-116.01-03 (2006); HI- verified by the four departments that govern law enforcement in the state; 705 IL Comp. Stat. Ann. §405/5-401.5, 725 ICSA §5/103-2.1 (2003, 2005, 2013); IN Supreme Court Evidence Rule 617 (2009); ME Rev. Stat. Ann., title 25, §2803-B(1)(K) (2007); MD Code Ann., Crim. Proc. §2-402-03 (2008); MI Comp. Laws §763.7-11 (2012); *State v. Scales*, 518 N.W.2d 587 (MN 1994); MO Rev. Stat. ch. 590.700 and 700.1 (2009 and 2015); MT Code Ann. §46-4-406-410 (2009); NE Rev. Stat. Ann. §29-4501-08 (2008); NJ Supreme Court Rule 3:17 (2005); NM Stat. Ann. §29-1-16 (2006); NC Gen. Stat. §15A-211 (2007, 2011); OR Rev. Stat. §133.400 (2010); RI PAC Accreditation Standards Manual, §8.10 (2013); UT Supreme Court Rule 616 (2015); 13 V.S.A. ch. 182, subch. 3, §5581, sec. 4 (2014); *State v. Jerrell*, 699 N.W.2d 110 (WI 2005); WI Stat. §968.073, §972.115 (2005).

Prepared by Thomas P. Sullivan, August, 2016.

Edits, corrections, additions, etc., will be appreciated –
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To view the state map, click [here](#)

State Data Description

Alabama

Alabama has no statute or court rule relating to recording custodial interrogations.

Departments we have identified that presently record:

Baldwin CS
Daphne

Mobile
Mobile CS

Prichard

Alaska

Alaska has a Supreme Court ruling relating to recording custodial interrogations.

Citation: *Stephan v. State*, 711 P.2d 1156 (Alaska (1985)).

General rule: If feasible, all interrogations that occur in a place of detention of persons suspected of committing a felony or misdemeanor, are required by the Due Process Clause of the Alaska Constitution to be electronically recorded. "Before the confession will be admitted, the prosecution must show a knowing and intelligent waiver of the defendant's federal privilege against self incrimination and his right to counsel....To satisfy this due process requirement, the recording must clearly indicate that it recounts the entire interview." (711 P.2d at 1159-60, 1162.)

Circumstances that excuse recording:

"...The failure to electronically record an entire custodial interrogation will, therefore, be considered a violation of the rule, and subject to exclusion, *only if the failure is unexcused*. Acceptable excuses might include an unavoidable power or equipment failure, or a situation where the suspect refused to answer any questions if the conversation is being recorded. We need not anticipate all such possible excuses here, for courts must carefully scrutinize each situation on a case-by-case basis. Any time a full recording is not made, however, the **state** must persuade the trial court, by a preponderance of the evidence, that recording was not feasible

under the circumstances, and in such cases the failure to record should be viewed with distrust.” (711 P.2d at 1162-63, emphasis in original.)

“Despite what we have said thus far, we recognize that nearly every rule must have its exceptions, and that exclusion of a defendant’s statements in certain instances would be wholly unreasonable. A violation of the [recording] rule does not, therefore, require exclusion of the defendant’s statements in all cases. Thus, the holding in this case does not bar the admission of statements taken *before* a violation of the recording rule occurs. Where recording ceases for some impermissible reason, properly recorded statements made prior to the time recording stops may be admitted, even when the failure to record the balance of the interrogation is unexcused, since such prior statements could not be tainted by anything that occurred thereafter. Also, failure to record part of an interrogation does not bar the introduction of a defendant’s recorded statements, *if the unrecorded portion of the interrogation is by all accounts, innocuous*. In such cases, there is no reason to exclude the defendant’s recorded statements, because no claim of material misconduct will be presented. [Citing authority.] For the same reason, a defendant’s unrecorded statement may be admitted if no testimony is presented that the statement is inaccurate or was obtained improperly, apart from a violation of the [recording] rule.” (711 P.2d at 1165, emphasis in original.)

Consequences of unexcused failure to record: “... we adopt a general rule of exclusion. While other remedies may each have their merits, we believe an exclusionary rule will best protect the suspects’ constitutional rights, provide clear direction to law enforcement agencies and lower courts, and preserve the integrity of our justice system...We believe that a strong and certain remedy will have a considerable deterrent effect in future cases. Compliance imposes such minimal costs and burdens on law enforcement that they will have little to gain from noncompliance.” (711 P.2d at 1163.)

Preservation: “...state investigative agencies should have standard procedures for the preservation of evidence obtained during an investigation.” (711 P.2d at 1159 n.10.)

Discussion: Explaining its adoption of an exclusionary remedy for noncompliance, the Alaska Supreme Court said (711 P.2d at 1162-65):

“it is not because a police officer is more dishonest than the rest of us that we...demand an objective recordation of the

critical events. Rather, it is because we are entitled to assume he is no less human – no less inclined to reconstruct and interpret past events in a light most favorable to himself – that we should not permit him to be a ‘judge of his own cause.’” (Quoting Kamisar, *Forward: Brewer v. Williams - - A Hard Look at a Discomfiting Record*, 66 Geo. L.J. 209 (1977- 78)).

“In both of the cases before us, the police were engaged in custodial interrogations of suspects in a place of detention. A working recording device was readily available, but was used to record only part of the questioning. Compliance with the recording rule is not unduly burdensome under these circumstances. Turning the recorder on a few minutes earlier entails minimal cost and effort. In return, less time, money and resources would have been consumed in resolving the disputes that arose over the events that occurred during the interrogations.

“The only real reason advanced by police for their frequent failure to electronically record an entire interrogation is their claim that recordings tend to have a ‘chilling effect’ on a suspect’s willingness to talk. Given the fact that an accused has a constitutional right to remain silent, under both the state and federal constitutions, and that he must be clearly warned of that right prior to any custodial interrogation, this argument is not persuasive.

“Agency policy and operations must change, not simply individual behaviors. Once they are fully aware of the consequences of unexcused violations of the [recording] rule, we are confident that law enforcement agencies will establish effective procedures to implement the rule and provide adequate training for their personnel. Suppression of statements taken in violation of the rule will, therefore, deter continued disregard of its requirements by officers, agencies and courts.

“Another purpose is also served by the rule that we now adopt. The integrity of our judicial system is subject to question whenever a court rules on the admissibility of a questionable confession, based solely on the court’s acceptance of the

testimony of an interested party, whether it be the interrogating officer of the defendant. This is especially true when objective evidence of the circumstances surrounding the confession could have been preserved by the mere flip of a switch. Routine and systematic recording of custodial interrogations will provide such evidence, and avoid any suggestion that the court is biased in favor of either party.

“Most importantly, an exclusionary rule furthers the protection of individual constitutional rights. Strong protection is needed to insure that a suspect’s right to counsel, his privilege against self incrimination, and due process guarantees are protected. A confession is generally such conclusive evidence of guilt that a rule of exclusion is justified, when the state, without excuse, fails to preserve evidence on the interchange leading up to the formal statement. This is especially true when, as in these cases, the defendant may have been deprived of potentially favorable evidence simply because a police officer, in his own discretion, chose to turn the recorder on twenty minutes into the interview rather than at the beginning. Exclusion is warranted under these circumstances because the arbitrary failure to preserve the entire conversation directly affects a defendant’s ability to present his defense at trial or at a suppression hearing. Moreover, the exclusion of the defendant’s statement is the only remedy which will correct the wrong that has been done and ‘place the defendant in the same position he or she would have been in had the evidence been preserved and turned over in time for use at trial.’ [Citing case.]

“Thus, we conclude that exclusion is the appropriate remedy for an unexcused failure to electronically record an interrogation, when such recording is feasible. A general exclusionary rule is the only remedy that provides crystal clarity to law enforcement, preserves judicial integrity, and adequately protects a suspect’s constitutional rights. The necessity for this strong remedy remains, even when we consider society’s interests in crime prevention and the apprehension of criminal offenders. Exclusion of reliable, yet unrecorded, statements will not occur frequently when compliance is widespread.”

Other Alaska cases:

In Bright v. State, 826 P.2d 765, 773-74 (Alaska Ct. App. 1992), the defendant orally confessed during a custodial interrogation, but at trial it was revealed that a portion of the tape was missing, apparently recorded over by mistake; the trial judge found that the officers had acted in good faith. He prohibited the State from introducing testimony during its case in chief of what the defendant said during the entire (partially recorded) interview, and from using what the defendant said during the unrecorded portion for impeachment or in rebuttal. The Court of Appeals affirmed the conviction, finding these sanctions to be adequate, and also observing that the defendant did not claim any specific prejudice from the police failure to preserve the complete recording of his statement. To the same effect, *Bodnar v. Anchorage*, No. A-7763, 2001 WL 1477922 (Alaska Ct. App. Nov. 21, 2001) (tape failed to operate properly).

In *George v. State*, 836 P.2d 960, 962 (Alaska Ct. App. 1992), officer Lower did not make a recording of defendant's custodial interrogation because a functioning tape recorder was not available. The Court of Appeals said:

"This fact excuses non-compliance with the *Stephan* rule. [Citation.] More importantly, *Stephan* does not prohibit admission of a defendant's custodial statement 'if no testimony is presented that the statement is inaccurate or was obtained improperly, apart from violation of the [taping] rule.' [Citation.] On appeal, George does not contend that, apart from Lower's failure to record the interview, there was any impropriety in his interview with Lower. Thus, George's statements to Lower are admissible under *Stephan*."

See also *Butler v. State*, No. A-7376, 2001 Alas. App. Lexis 84, at *12 (Alaska Ct. App. Apr. 25, 2001), in which an earlier recording of a custodial interrogation of Butler was not preserved, the Court of Appeals said, "Butler's failure to allege any inaccuracy in the police investigator's account of the [earlier] interview is fatal to Butler's claim for relief."

Arizona

Arizona has no statute or court rule relating to recording custodial interrogations.

Discussion: In 2000, the Attorney General appointed the State of Arizona Capital Case Commission, consisting of 15 members, charged with reviewing the capital punishment process in Arizona in its entirety to ensure that it works in a fair, timely and orderly manner.

The Commission filed its Final Report in 2001, which included the following with respect to electronic recording of custodial interrogations (§IV, page 22):

“The Commission deliberated regarding the issue of electronic recording of police interrogations. Some states require audio or video recording of interrogations and confessions based on court decision or statute. While there was discussion as to whether the adoption of a recording requirement is best dealt with by voluntary action of law enforcement agencies, the Trial Issues Subcommittee concluded that routine electronic recording of all custodial interrogations and confessions would be a major improvement in criminal procedure and should be encouraged.

“Upon recommendation of the Capital Case Commission, the Attorney General’s Office drafted a protocol that was considered and discussed by the Attorney General’s Law Enforcement Advisory Board, which represents police agencies across Arizona. The Advisory Board agreed to submit the protocol to the Arizona Criminal Justice Commission [ACJC] for consideration. The proposed protocol follows:

‘The Attorney General and the Capital Case Commission strongly recommend that law enforcement officers in Arizona record with audio tape or video tape the process of informing a suspect of his constitutional rights, the waiver of those rights by the suspect, and all questions and answers of that suspect during interrogation whenever feasible.

‘Under the protocol, if the questioning occurs in a place of detention such as a police department, a sheriff’s substation, or jail, the need for audio or video recording of the interrogation is even more pressing. However, even in these circumstances the discretion of the law enforcement officer is employed and recording should take place whenever feasible.’”

We have been informed by the Executive Director of the ACJC that there is no record of the protocol having been submitted by the Advisory Board to the ACJC during the period January 1, 2001 through November 2004.

In 2004, the Attorney General sent a written survey to Arizona law enforcement agencies to determine current procedures with regard to recording suspect interviews. The introduction to the survey quotes the Board's 2002 protocol. Approximately half of Arizona law enforcement departments responded to the survey. 87% reported that all interrogations by detectives were audio recorded, while 10% said that all were not. 71% responded that they had no written rules and procedures regarding taping suspect interviews.

In 2010, the Arizona Justice Project – a volunteer organization devoted to assisting in correcting errors and injustices in the criminal justice system – sent a survey to 40 Arizona law enforcement departments – less than half of the departments in Arizona – requesting information about their practices in recording custodial interrogations. The results of this partial survey were mixed: 38% reported they record all, 40% record more than 75% of the time, and 18% record 50 to 75% of the time.

The Attorney General's staff advises that they believe most law enforcement agencies in Arizona record custodial interrogations as recommended in the Attorney General's draft protocol described above. However, there is no official information available as to the recording practices followed in nearly half of Arizona's departments, and to those that responded to the two surveys, many departments reported that they do not adhere to the draft protocol.

Strong support for Arizona requiring electronic recording of custodial interrogations in serious felony investigations is found in the opinions in the *Debra Jean Milke* case. See *Mroz v. State*, Arizona Court of Appeals, No. 1 CA-SA-14-0108 (Dec. 11, 2014), and *Milke v. Ryan*, 711 F3d 998 (9th Cir. 2013).

In *State v. Jones*, 49 P.3d 273, 279 (Ariz. 2002), the Supreme Court said:

"We are, however, troubled by the fact that this reinitiated conversation was not recorded, while the interrogation that

preceded it and the confession that followed were. The fact that the initial waiver was not taped subjected the state to unnecessary problems because it gives rise to suspicion. It would be a better practice to videotape the entire interrogation process, including advice of rights, waiver of rights, questioning, and confessions. This has been recommended by the Arizona Capital Case Commission and more recently by the Illinois Commission on Capital Punishment.... Recording the entire interrogation process provides the best evidence available and benefits all parties involved because, on the one hand, it protects against the admission of involuntary or invalid confessions, and on the other, it enables law enforcement agencies to establish that their tactics were proper.”

Departments we have identified that presently record:

Apache Junction	Mesa	Sierra Vista
Casa Grande	Oro Valley	Somerton
Chandler	Payson	South Tucson
Coconino CS	Peoria	State Dept of Corrections
El Mirage	Phoenix	Surprise
Flagstaff	Pima CS	Tempe
Gila CS	Pinal CS	Tucson
Gilbert	Prescott	Yavapai CS
Glendale	San Luis	Yuma
Marana	Scottsdale	Yuma CS
Maricopa CS		

Arkansas

Arkansas has a Supreme Court rule relating to recording custodial interrogations.

Citation: Supreme Court Rule of Criminal Procedure 4.7, Recording Custodial Interrogations:

General Rule: “(a) Whenever practical, a custodial interrogation at a police station, or other similar place, should be electronically recorded.”

Recordings may be made by “audiotape or videotape, or digital recording,” and are to be preserved until any related convictions are “final and all direct and post-conviction proceedings are exhausted” or “prosecution for all offenses relating to the statement is barred by law” (c, d).

Circumstances that excuse recording: The lack of a recording shall not be considered in determining the admissibility of a custodial statement in the following circumstances.

(2) (A) a statement made by the accused in open court at his or her trial, before a grand jury, or at a preliminary hearing, (B) a statement made during a custodial interrogation that was not recorded because electronic recording was not practical, (C) 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, (D) a spontaneous statement that is not made in response to a question, (E) a statement made after questioning that is routinely asked during the processing of the arrest of the suspect, (F) a statement made during a custodial interrogation by a suspect who requests, prior to making the statement, to respond to the interrogator’s questions only if an electronic recording is not made of the statement, provided that an electronic recording is made of suspect’s agreeing to respond to the interrogator’s question, only if a recording is not made of the statement, or (G) a statement made during a custodial interrogation that is conducted out-of-state. (3) Nothing in this rule precludes the admission of a statement that is used only for impeachment and not as substantive evidence.

Consequences of unexcused failure to record

“(b) (1) In determining the admissibility of any custodial statement, the court may consider, together with all other relevant evidence and consistent with existing law, whether an electronic recording was made; if not, why not; and whether any recording is substantially accurate and not intentionally altered.

On June 22, 2012, before Rule 4.14 was adopted, the Supreme Court entered a Per Curiam order which recounts, among other things, that the Committee on Criminal Practice had made a proposal to the Court for a recording rule which “does not mandate recording of all custodial

interrogations; rather, it allows the trial court to consider the failure to record in determining the reliability of the statement. We are in agreement with this approach, especially as a starting point. Accordingly we adopt Rule 4.7 as set out [above].”

California

California has a statute relating to recording custodial interrogations of juveniles suspected of murder.

Citation: Cal. Penal Code §859.5 and Cal. Welfare & Insts. Code §626.8 (2013).

General rule: Electronic recording by video shall be made of the entire custodial interrogation of a minor in a fixed place of detention who is suspected or accused of committing murder. The electronic statement recorded as required creates a rebuttable presumption that the statement was given and was accurately recorded, and is otherwise admissible. §859.2(a).

Circumstances that excuse recording: Recording is not required if the prosecution shows by clear and convincing evidence that electronic recording was not feasible owing to exigent circumstances, which shall be recorded in the police report; the person states he will speak only if the interrogation is not recorded, and if feasible that statement shall be recorded; the interrogation took place in another jurisdiction in compliance with the law of that jurisdiction; the interrogation occurs when no law enforcement officer conducting the interrogation has knowledge that the person may have committed murder; an officer reasonably believes the recording will reveal the identity of a confidential informant or jeopardize the safety of the officer, the person being interrogated, or another person; the equipment malfunctioned and timely replacement or repair was not feasible. §859.2(b)(c).

Unrecorded statements may be admitted into evidence if the court finds that the statement is admissible under applicable rules of evidence, and the prosecution proves by clear and convincing evidence that the statement was made voluntarily; and if feasible law enforcement personnel made a contemporaneous recording of the reason for not making a recording of the statements; and if the prosecution shows by clear and convincing evidence that a statutory exception existed. §859.2(d).

Consequences of unexcused failure to record All of the following remedies shall be granted as relief for noncompliance: The unexcused failure to record shall be considered by the court in adjudicating motions to suppress the statement; the failure is admissible in support of claims that the statement was involuntary, or is unreliable; the court shall instruct the jury with an instruction to be developed by the Judicial Council that advises the jury to view with caution the statements made in the interrogation §859(e).

Preservation: The recording shall be maintained until a conviction is final and all direct and habeas corpus appeals are exhausted, or prosecution for the offense is barred by law. §859.5(f). In a juvenile court proceeding, the recording shall be preserved until the person is no longer subject to the jurisdiction of the juvenile court, unless the person is transferred to a court of criminal jurisdiction. §626.8(b) of the Welfare and Institutions Code.

Discussion: The California Commission on the Fair Administration of Justice was formed in 2004 pursuant to a resolution of the state Senate, to study the administration of criminal justice in California, and to make recommendation designed to ensure that the application and administration of criminal justice in California is just, fair and accurate. The members were persons from all sides of the criminal justice system. The Commission held public and private meetings, and rendered a series of interim reports for improvements in the California criminal justice system. The Commission ended its work with a final report in August 2008.

The Commission recommended that a statute be enacted requiring law enforcement agents to record custodial interrogations when interrogating persons suspected of committing serious felonies. The Commission report states:

“There are a number of reasons why the taping of interrogations actually benefits the police departments that require it. First, taping creates an objective, comprehensive record of the interrogation. Second, taping leads to the improved quality of interrogation, with a higher level of scrutiny that will deter police misconduct and improve the quality of interrogation practices. Third, taping provides the police protection against false claims of police misconduct. Finally, with taping, detectives, police managers, prosecutors, defense attorneys and judges are able to more easily detect false

confessions and more easily prevent their admission into evidence.”

Pursuant to the Commission’s recommendation, the Assembly twice passed and sent to the Governor two different bills, one in 2006 and a revised bill in 2007, both requiring that law enforcement officers electronically record custodial interrogations of persons suspected of homicide or violent felonies. The Governor vetoed the 2006 bill (SB171) because it “does not specify what suspected means.”

The Commission then recommended a revised bill which contains a definition of the words “suspected of.” In February 2007, the revised bill was introduced in the Senate as SB 511, which provides that any custodial interrogation that takes place in a fixed place of detention of a person suspected or accused of homicide or a violent felony as defined in the Penal Code “shall be electronically recorded in its entirety.” §2(a). The recording is to be by audio, although videotape is encouraged if the person is suspected or accused of homicide. §2(c)(2). The provision is inapplicable if the person agrees to speak only if not recorded; or if recording was not feasible, for example, recording equipment could not be obtained; the equipment malfunctioned; the equipment was inadvertently operated improperly; the interrogation took place in another jurisdiction in compliance with its law; or exigent circumstances existed which prevented the making of a recording. §§2(a)(2), 2(b)(1)-(7). Provisions are made for preservation of recordings. §2(a)(3). Both the Senate and House passed SB 511, and sent it to the Governor, who vetoed the bill in October 2007. The Governor’s 2007 veto message reads in its entirety:

“I am returning SB 511 without my signature. While reducing the number of false confessions is a laudable goal, I cannot support a measure that would deny law enforcement the flexibility necessary to interrogate suspects in homicide and violent felony cases when the need to do so is not clear. Police interrogations are dynamic processes that require investigators to use acumen, skill and experience to determine which methods of interrogations are best for the situation. This bill would place unnecessary restrictions on police investigators.”

The reason the Governor gave for his veto in 2007 is neither correct nor appropriate. SB 511 would place no restrictions whatever on law enforcement officers conducting custodial interrogations. The bill contains

exceptions that adequately excuse recordings, which have proven acceptable in the other states that have compulsory recording statutes and court rules.

The Governor appears to be saying – although in carefully selected terms but which carry a clear implication and subtext – that some California law enforcement officers may use “methods of interrogation” during custodial interrogations that they do not want disclosed in contemporaneous recordings, and by logical extension in their written reports and courtroom testimony. This basis for rejecting recording legislation sullies the reputations of the many honorable California detectives and their supervisors. They are required to make accurate and complete written reports of what occurs during custodial interviews, and to give honest and complete courtroom testimony. They take a solemn oath to tell the truth, the whole truth, and nothing but the truth as to what was said and done during the closed-door sessions, including candid, unvarnished, accurate descriptions of the “methods of interrogation” they used. Those who file false official reports, or commit perjury, and those who encourage or participate knowingly in these practices, may violate the California Penal Code: §31- aid, abet, advise, encourage or command another’s crime; §118 - perjury; §118.1- false statements in peace officer’s crime reports; §127 - subornation of perjury.

There is another sad side to the Governor’s vetoes. The large number of California police and sheriff departments (some named below) that presently record their custodial interrogations illustrates a widespread recognition on the part of California law enforcement of the value that results from adherence to the practice, with no restrictions placed upon their use of lawful, appropriate interrogation methods.

Departments we have identified that presently record:

Alameda CS	Milpitas	San Jose
Arcadia	Oceanside	San Leandro
Auburn	Orange County	San Luis
Bishop	Fire Authority	Santa Clara
Butte CS	Orange CS	Santa Clara CS
Carlsbad	Placer CS	Santa Cruz
Contra Costa CS	Pleasanton	Stockton

El Cajon	Rocklin	Sunnyvale DPS
El Dorado CS	Roseville	Union City
Escondido	Sacramento	Vallejo
Folsom	Sacramento CS	Ventura CS
Grass Valley	San Bernardino CS	West Sacramento
Hayward	San Diego	Woodland
LaMesa	San Francisco	Yolo CS
Livermore	San Joaquin CS	

Colorado

Colorado has a statute relating to recording custodial interrogations.

Citation: Title 16, Article 3, Parts 6, §16-3-601 (2016)

General rule: An audio-visual recording shall be made of the complete interrogation of persons in custody in a permanent detention facility concerning the investigation of a class 1 or class 2 felony, or a felony sexual assault described in section 18-3-402, 404, 405 or 405.5. §(1)

Definition: “Electronic recording’ means an audio-visual recoding that accurately preserves the statements of all parties to a custodial interrogation. §(6)(c).

Circumstances that excuse recording: The suspect requests that no recording be made, and the request is recorded or in writing; the equipment fails or is unavailable through damage or extraordinary circumstances; exigent circumstances relating to public safety prevent the preservation by electronic recording; or the interrogation occurs outside Colorado. §(2) (a)-(e). Nothing in this section prevents a court from admitting a statement made in a custodial interrogation in a permanent detention facility as rebuttal or impeachment testimony of the defendant. §(3).

Consequences of unexcused failure to record If a recording is not made as required, the court may still admit evidence from the interrogation. If the prosecution fails to establish by a preponderance of the evidence that an exception applies, the court shall provide a cautionary instruction to the jury that the failure to record the interrogation is a violation of the law

enforcement agency's policy and state law, and that the violation may be considered by the jury in determining the weight to be given to any statement of the defendant in violation of this policy in the course of the jury's deliberations. §(4).

Colorado cases:

In *People v. Raibon*, 843 P.2d 46, 49 (Colo. 1992), the Court of Appeals, Division IV, said:

"We recognize that the recording of an interview with either a suspect or a witness, either by audiotape or otherwise, may remove some questions that may later arise with respect to the contents of that interview. For that reason, it may well be better investigative practice to make such a precise record of any interview as the circumstances may permit. We decline, however, to mold our particular view of better practice into a constitutional mandate which would restrict the actions of law enforcement agents in all cases."

Dissenting, Judge Jean E. Dubofsky said (843 P.2d at 52-53):

"In my view, the Due Process Clause of the Colorado Constitution requires that if, as here, a suspect is detained and questioned at a police station or similar detention place, then an electronic recording (or other comparably accurate recording process) of the conversation must be made or else the confession is inadmissible.

"... Even a few hours after hearing a conversation, it is difficult for a person to present precise and accurate testimony about those recent statements. Therefore, testimony about confessions/interrogatories made in court weeks or months afterwards is inevitably incomplete and at least partially inaccurate.

"... The present technology exists to record readily and accurately by both video and sound tapes the statements of witnesses and suspects.

"Furthermore, by confirming the content, legality, and voluntariness of a confession, a recording will, in many cases,

actually aid law enforcement officers. In many situations, a recorded confession and advisement and waiver of constitutional rights will deter a defendant from changing his testimony or making false claims that his constitutional rights were violated. Certainly, such a recording will help the trial and appellate courts determine the truth and thus make more just decisions.

“... Furthermore, the court system is entitled to receive the best evidence available in order to resolve the serious criminal matters which come before it. A logical consequence of these principles is the need for the consistent systematic recording of all interviews conducted by police of a detained suspect.

“Moreover, the concept of Due Process is not static. See *Stephan v. State, supra*. Due Process must change to accommodate ideas of what is necessary to provide fundamental fairness to a criminal defendant. In order to do this, the law must change to keep pace with new scientific and technological developments.”

In *People v. Broder*, 222 P.3d 323 (Colo. 2010). The Supreme Court held that a videotape of an interrogation of a fellow police officer showed that the officer did not make an unambiguous request for a lawyer, therefore the statement he made was admissible in his trial for attempted sexual assault.

Connecticut

Connecticut has a statute relating to recording custodial interrogations.

Citation: Conn. Gen. Stat. §54-1o (2011).

General rule: Custodial interrogations in a place of detention of persons under investigation for or accused of a capital or class A or B felony are to be recorded by an audiovisual recording made by use of an electronic or digital audiovisual device. §10(a)(b).

Circumstances that excuse recording: Electronic recording was not feasible; a voluntary statement that has a bearing on the credibility of the

person; a spontaneous statement not made in response to a question; the person requests prior to making the statement that an electronic recording not be made, and the request is electronically recorded; an interrogation conducted out of state; any other statement that may be admissible under law. The State has the burden of proof by a preponderance of the evidence that an exception is applicable. §10 (e)(f)(g).

Consequences of unexcused failure to record

“If the court finds by a preponderance of the evidence that a person was subjected to a custodial interrogation in violation of this section, then any statements made by the person during or following that non-recorded custodial interrogation, even if otherwise in compliance with this section, are presumed to be inadmissible in any criminal proceeding against the person, except for purposes of impeachment.” §10 (5)(d).

“The presumption of inadmissibility may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances.” §10 (8)(h).

Preservation: Recordings to be preserved until the conviction is final and all direct and habeas corpus appeals are exhausted, or prosecution is barred by law. §10 (c).

Establishment of Standards and Training: The Chief State’s Attorney, in conjunction with the Police Officer Standards and Training Council and a representative of the CT Police Chiefs Association, shall not later than January 1, 2012, establish standards for the equipment to be used, and for the training of law enforcement personnel in the operation of the equipment. §2.

Connecticut cases:

In *State v. James*, 678 A.2d 1338, 1360 (Conn. 1996), the majority, while declining to impose a recording requirement under the state constitution, stated:

“...we agree with the defendant that the recording of confessions and interrogations generally might be a desirable investigative practice, which is to be encouraged...”

Dissenting, Justice Robert I. Berdon wrote (678 A.2d at 1364-65):

“In my view, as a matter of public policy the police should, from the time a citizen is first taken into the police station for investigative purposes, whether voluntarily or involuntarily, electronically record all that transpires with respect to the person as long as he or she is there. Such a procedure would benefit the police by dispelling any claims of coercion with respect to confessions and admissions obtained from the accused. Equally important, the suspect and the public would perceive that justice had been done. Lacking such independent verification, it strains credulity that the defendant would voluntarily go to the police station at 1:30 a.m. at the ‘invitation’ of the police and voluntarily remain there for fourteen hours. We cannot ignore as judges what we know as men and women.”

In *State v. Lockhart*, 4 A.3d 1176, 1205, 1210, 1212, 1219(Conn. 2010), Justice Richard N. Palmer, while concurring that failure to record was not reversible error, wrote:

“I disagree with the majority’s refusal to exercise this court’s inherent supervisory authority over the administration of justice to establish a rule that, whenever reasonably feasible, police station interrogations of suspects shall be recorded electronically. The reasons favoring such a recording requirement are truly compelling, whereas the arguments against it are wholly unpersuasive. Indeed, each and every substantive argument that the state and the majority raise against a recording requirement has been discredited by the experience of those police departments, in this state and across the country, that record interrogations as a matter of policy. Contrary to the majority’s assertion that a rule requiring the recording of interrogations ‘could . . . have negative repercussions for the administration of justice’; footnote 17 of the majority opinion; there is no question that such a rule would promote the fair and impartial administration of justice in this state. Simply put, in this day and age, there is no legitimate justification to refuse to adopt the requirement under this court’s supervisory powers...

“The value in recording interrogations is so obvious as to require little discussion. When a confession is memorialized in such a matter, the fact finder need not rely exclusively, or even primarily, on the recollections and testimony of those present at the interrogation in order to determine precisely what occurred when the confession allegedly was obtained. ...In all cases, a recording of the interrogation provides the fact finder with an objectively accurate picture of what transpired during the questioning, thereby greatly enhancing the fact finder’s ability to evaluate the voluntariness and validity of the confession. For that reason alone, the value of recording interrogations is immeasurable.

“The majority’s first assertion, namely, that the issue presented is not sufficiently serious to warrant this court’s use of its supervisory powers, cannot withstand even the most cursory examination. Indeed, I submit that there are few issues of greater importance to the perceived fairness and integrity of our criminal justice system than the voluntariness and reliability of confessions.

“Of course, recordings do not protect only the accused. ‘[A] recording also protects the public’s interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics. A recording, in many cases, will aid law enforcement efforts, by confirming the content and the voluntariness of a confession, when a defendant changes his testimony or claims falsely that his constitutional rights were violated.’ (*Stephan v. State, supra*, 711 P.2d at 1161; see also *Gasper v. State*, 833 N.E.2d 1036, 1041 (Ind. Ct. App. 2005)).

“... Thus, as one practitioner with particular expertise in the field has explained, ‘[o]f the hundreds of experienced detectives to whom we have spoken who have given custodial recording a fair try, we have yet to speak to one who wants to revert to non-recording. They enthusiastically endorse the practice. The words they use vary, but their reasons are so repetitious they seem rehearsed. Over and over we have been told that recordings protect officers from claims of misconduct, and practically eliminate motions to suppress based on alleged

police use of overbearing, unlawful tactics; remove the need for testimony about what was said and done during interviews; allow officers to concentrate on the suspects' responses without the distraction of note taking; permit fellow officers to view interviews by remote hookup and [to] make suggestions to those conducting the interview; disclose previously overlooked clues and leads during later viewings; protect suspects who are innocent; make strong, often invincible cases against guilty suspects who confess or make guilty admissions by act or conduct; [and] increase guilty pleas...(Thomas Sullivan, *The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish*, 37 Golden Gate U.L.Rev. 175, 178-79 (2006).)

“ . . . Among those who participated in this state's recent recording pilot program, 100 percent reported that the use of recording equipment did not interfere in any way with their questioning of suspects or the outcome of interrogations.

“Finally even if there were some factual or experiential basis for the majority's assertion that a recording requirement might inhibit police with respect to the techniques they use in obtaining confessions, '[t]his is an unacceptable objection. . . . [L]aw enforcement personnel [are expected] to give complete and truthful testimony, including candid descriptions of what occurred during custodial interrogations. Surely [it is] not suggest[ed] [that police] should be free to modify or omit facts when testifying under oath about what happened during unrecorded interviews.'” T. Sullivan, Center on Wrongful Convictions, *supra*, pp. at 22-23.

Delaware

Delaware has no statute or court rule relating to recording custodial interrogations.

In December 2015, the Attorney General of Delaware announced that he has drafted guidelines for video recording of custodial interrogations, from the *Miranda* warnings to the end of the interviews, applicable to all law enforcement agencies in Delaware. He stated, “Increasingly, both at the

federal and state levels, it seems to be recognized as a good practice. Having a recording is always better than not having one.”

The Guidelines state:

“Scope and Effect. This policy establishes the position of the Delaware Department of Justice (DOJ) with respect to the electronic recordation of statements by of individuals in the custody of Delaware law enforcement agencies. DOJ does not have authority to mandate the manner in which statements are recorded by law enforcement agencies, or whether they are recorded. However, DOJ does make discretionary decisions regarding the charging and prosecution of criminal cases, and those decisions are guided by the strength and reliability of the evidence gathered by law enforcement agencies. Adherence to the practices outlined in this policy, which are designed to ensure strong and reliable evidence, will in some instances affect the strength of a case from DOJ’s perspective.

“Recording As Default Option. The custodial interview of an individual in a place of detention with suitable recording equipment should be electronically recorded, subject to the exceptions defined below. No supervisory approval should be required for recording such custodial interviews...

- a. “Electronic recording. When necessary equipment is available, electronic recording should be done through video recording, and wen necessary equipment is available that video should allow a viewer to see both the individual being questioned and the individual(s) asking the questions. When video recording is not available, audio recording may be utilized.
- b. Scope of offenses. If otherwise required by this policy, recording should be done for custodial interrogations relating to all alleged criminal offenses, misdemeanor and felony.
- c. “Scope of recording. Electronic recording should begin as soon as a subject enters the interview room or area and continue until the interview is completed.
- d. “Recording may be overt or covert. Recording may be covert or overt, as covert recording constitutes one-party consent monitoring which is permitted by Delaware state law....”

Circumstances that excuse recording: The draft excepts instances in which the interviewee is willing to give an unrecorded but not a recorded statement; if law enforcement officials are required for immediate public safety reasons a recording need not take place.; a recording is not reasonably practical, for example, owing to equipment malfunction, an unexpected need to move an interview room, or a need for multiple interviews in a limited time period exceeding available recording devices. A DOJ attorney may authorize a non-recorded interview for reasons that do not fall within the prior exceptions when a significant and articulable law enforcement purpose justifies, and the rationale is written

The draft guidelines are under review by police chiefs and police union leaders.

Departments we have identified that presently record:

New Castle City New Castle County Wilmington State Police

District of Columbia

The District of Columbia has a statute relating to recording custodial interrogations.

Citation: D.C. Code §§5-116.01-03 (2006).

General rule: The Metropolitan Police Department (MPD) shall electronically record, in their entirety, and to the greatest extent feasible, custodial interrogations of persons suspected of committing a crime of violence, when the interrogation takes place in MPD interview rooms equipped with electronic recording equipment. Recordings shall commence with the first contact between the suspect and law enforcement personnel once the suspect has been placed within the interview room, and shall include all subsequent contacts between the suspect and law enforcement personnel in the interview room. The recording shall include the giving of any warnings required by law, the response of the suspect, and the consent of the suspect, if any, to the interrogation. §5-116.01(a).

Circumstances that excuse recording: If the suspect announces that he/she will speak with law enforcement personnel only if the interrogation not be further recorded, the remainder of the interrogation need not be recorded.

Law enforcement personnel shall not expressly or implicitly encourage the suspect to give conditional consent in lieu of a completely recorded interrogation. §5-116.01(b)-(c).

Consequences of unexcused failure to record: Any statement of a person accused of a criminal offense in the D.C. Superior Court obtained in violation of §5-116.01 shall be subject to the rebuttable presumption that it is not voluntary. The presumption may be overcome if the prosecution proves by clear and convincing evidence that the statement was voluntarily given. §5-116.03.

Miscellany: The Chief of the MPD may issue a General Order establishing additional procedures, not inconsistent with the statute. §5-116.02.

Preservation: None given.

The District of Columbia Metropolitan Police Department General Order 16, effective February 2006.

Statement of purposes: The purposes of recording custodial interrogation conducted in MPD interview rooms equipped with electronic recording equipment are to create an exact record of what occurred; provide evidence of criminal culpability; document the suspect's physical condition and demeanor; refute allegations of police distortion, coercion, misconduct, or misinterpretations; reduce the time to memorialize the interrogation; reduce the time to litigate suppression motions; enable the interviewer to focus completely on his/her questions and the suspect's answers without the necessity of taking notes; and enable the investigator/detective to more effectively use the information obtained to advance other investigative efforts. §I.

General rule: The MPD policy repeats the D.C. statutory language requiring recording of interrogations of persons suspected of committing crimes of violence, and provides that the policy applies also to "other crimes as listed in this directive." §II. Crimes of violence are listed in §III-2, and additional offenses that require electronic recording are listed in §IV-B,C. Custodial interrogations are to be conducted by detectives/investigators, in an MPD interview room, and shall be video and audio recorded. §IV-E,F,I.

The suspect's consent to recording is not necessary. Interviewers shall not encourage a suspect to request that the recording equipment be turned off. §IV-O. The suspect is to be seated so that his/her face is visible

on camera, and if possible the interviewer's face should also be visible. §V-C-3. Provisions are made for non-English speaking and hearing-impaired suspects and juveniles. §V-D,E. Approval of audio recordings are provided for in §§IV-K-3 and V-H-2.

Circumstances that excuse recording: If the equipment malfunctions or is inadvertently not turned on, or for some other reasons the recording cannot be made, the circumstances shall immediately be reported to the SDD Watch Commander, and documented in WACIIS. Each failure to electronically record a custodial interrogation due to equipment failure shall be explained and documented in a report to the Assistant Chief, Operational Support Command. §IV-L,M.

If the video/audio recording equipment fails to operate properly before, or during, a recorded custodial interrogation, the individual may be transported to the nearest location equipped to handle video/audio recordings. §V-B.

If the subject states that he/she will voluntarily speak with law enforcement personnel only if the custodial interrogation is not electronically recorded, then the recording equipment shall be turned off. The interviewer will record the subject making this request in order to document that the request was made. §IV-O.

Preservation: "The detective who conducted the interview shall retain one copy for the case file, and provide the original and all other copies to a supervisor. The recording(s) shall be considered evidence, and shall be subject to all MPD policies, directives, and regulations pertaining to the storage and handling of evidence as outlined in General Order 601.1...." §V-6.

District of Columbia cases:

In *In re D. W.*, 989 A.2d 196 (D.C. 2010), a 15 year old mildly retarded male was questioned in the Youth Division regarding alleged sexual abuse of an 11 year old female. Following a bench trial and conviction, the D.C. Court of Appeals affirmed, holding that the defendant had knowingly and voluntarily waived his *Miranda* rights. The Court said, "Especially in light of the [trial] court's opportunity to view the video recording, we discern no basis to disturb the court's conclusion that D. W. gave a valid waiver of *Miranda* rights." (989 A.2d at 204.)

In *Napper v. United States*, 22 A.2d 758 (D.C. 2011), during a videotaped recorded interview in a police station, the officers left murder suspect alone in the room, and he made a cell phone call in which he made damaging admissions, while attempting to hide his phone from the video camera. On appeal from a conviction for first degree murder, the D.C. Court of Appeals affirmed, ruling that the suspect-defendant had no expectation of privacy in the interview room, and his secretive behavior evidenced his knowledge that he was being recorded.

Public statement by a veteran detective in the D.C. Metropolitan Police Department, James Trainum:

“I’ve been a police officer for 25 years, and I never understood why someone would admit to a crime she didn’t commit. Until I secured a false confession in a murder case....I used standard interrogation techniques – no screaming or threats, no physical abuse, no 12-hour sessions without food or water.

Many hours later, I left with a solid confession.... At first, the suspect couldn’t tell us anything about the murder, and she professed her innocence. As the interrogation progressed, she became more cooperative, and her confession included many details of the crime....Confident in our evidence and the confession, we charged her with first-degree murder. Then we discovered that the suspect had an ironclad alibi....the case was dismissed, but we all still believed she was involved in the murder. After all, she had confessed....

“...we had videotaped the interrogation in its entirety. Reviewing the tapes many years later, I saw we had fallen into a classic trap. We ignored evidence that our suspect might not have been guilty, and during the interrogation fed her details of the crime that she repeated back to us in her confession. If we hadn’t discovered and verified her alibi – or if we hadn’t recorded the interrogation, she probably would have been convicted of first- degree murder and would be in prison today....

“Videotaping interrogations is proved to decrease wrongful convictions based on false confessions. When the entire interrogation is recorded, attorneys, judges and juries can see

exactly what led to a confession. ...The only police officers I've met who don't embrace recording interrogations are those who have never done it. Too many police officers still wrongly believe that recording interrogations will be logistically difficult and expensive, and that guilty suspects won't confess if they knew they are being recorded." Los Angeles Times, October 28, 2008. See also <http://www.thisamericanlife.org/radio-archives/episode/507/confessions?act=1>

Florida

Florida has no statute or court rule relating to recording custodial interrogations.

Discussion:

In July 2010, the Supreme Court entered an Administrative Order establishing the Florida Innocence Commission "to conduct a comprehensive study of the causes of wrongful convictions and of measures to prevent such convictions." The Commission has held a number of hearings and heard from witnesses.

On June 25, 2012, the Commission filed its Final Report with the Supreme Court. Relating to electronic recording of custodial interrogations, the Report stated:

The Commission voted 12 to 7 "to recommend to the Florida Legislature that a statute under the Florida Evidence Code be enacted making it clear that law enforcement shall record suspect statements during a covered custodial interrogation," and that "there should be an accompanying criminal jury instruction modeled after the New Jersey instruction" (page 38).

Appendices to the Report contain Standards for electronic recording of custodial interrogations (App. J); a letter to the President of the Florida Senate and the Speaker of the House of representatives (App. K); the proposed recording legislation (App. L); and a proposed jury instruction on failure to electronically record suspect statement (App. M), which the committee proposed the court forward to its "Committee on Standard Jury Instructions in Criminal Cases for its review and possible submission to the Court via a petition" (pp. 38-39).

In 2012, the Commission Chair wrote the President of the Senate and Speaker of the House, providing them with the Commission's recommendation, and copies of the proposed statute and jury instruction. The recommended statute provides that interrogations of persons arrested for "covered offenses" that occur in a place of detention must be electronically recorded in their entirety by audio or video, unless the questioning takes place under circumstances in which an electronic recording is impracticable or law enforcement has other good cause. Covered offenses are felonies specified in the bill. Covert recordings may be made. Recordings shall be preserved until all legal proceedings are ended. Failure to record as provided shall be a factor for consideration by the trial court in determining the admissibility of any statement made by the suspect, and by the jury in determining whether the statement was made, and if so what weight if any to give to the statement. In the absence of an electronic recording as required, the court shall provide the jury with a cautionary instruction.

The recommended statute has not been introduced in the Florida legislature.

The recording statute proposed by the Commission was opposed by some representatives of law enforcement. In this respect, it is relevant to contrast the Florida statute relating to the right of law enforcement officers during hearings that could lead to disciplinary action, suspension, demotion, or dismissal (Fla. Stat., §112.532(1)(g)):

"The formal interrogation of a law enforcement officer or correctional officer, including all recess periods, must be recorded on audio tape, or otherwise preserved in a manner to allow a transcript to be prepared, and there shall be no unrecorded questions or statements."

Florida cases:

In *Smith v. State*, 548 So. 2d 673 (Fla. Dist. Ct. App. 1987), the Court summarily affirmed a conviction without opinion. Concurring, Judge Hugh S. Glickstein quoted extensively from the opinion of the Supreme Court of Alaska in *Stephan v. State*, (discussed above) "...in order that we could share it with those reading this opinion – particularly in light of the officer's testimony in this case." The officer's testimony was given in answer to the

question, “And what did Mr. Smith exactly say, as best as you can recall?” The officer responded (548 So.2d at 673):

“Well, as best as I can recall, I can’t recall. I can refer to the police report, and the police report is written in quotes where he said, ‘Sure.’ However, I cannot put myself back at the station that day and remember that he said ‘sure.’”

In *State v. Sawyer*, 561 So. 2d 278, 280 (Fla. Dist. Ct. App. 1990), the Court said:

“In considering the admissibility of Sawyer’s admissions and confessions, the trial court not only had before it numerous witnesses who testified to the circumstances under which the confession was obtained, but the court also reviewed tape recordings of the actual sixteen-hour interrogation session. We wish to commend the Clearwater Police Department in its practice of maintaining a record of interrogations through the use of tape recording and express hope that this policy will continue. We also recommend this practice to all other law enforcement agencies so that challenges to future confessions can be exposed to the light of truth.”

A man and wife were murdered in their home in October 2006 in Masaryktown, Hernando County. During the investigation by the sheriff’s office, two detectives interviewed the 18-year old great nephew of the deceased couple, who was 16 at the time of the killings. A videotape of the interrogation showed the detectives badgering, accusing and threatening, for over 12 hours. The boy was charged with the murders, and jailed for the next 20 days in the department of Juvenile Justice in Ocala. Then a DNA match linked another person to the crime, and the nephew was released; eventually, the murder charges were expunged. After the actual killer was charged and convicted, an Assistant State’s Attorney said, “The bottom line is that the statement [the nephew] gave was not free and voluntary.” <http://www2.tbo.com/news/2011/jul/15/building-a-false-confession-ar-243948/>

Departments we have identified that presently record:

Bradford CS
Broward CS

Hallandale Beach
Hialeah

Orlando
Osceola CS

Cape Coral	Hollywood	Palatka
Carrabelle	Key West	Palm Beach
Clay CS	Kissimmee	Palm Beach CS
Clearwater	Lake Wales	Pembroke Pines
Collier CS	Lee CS	Pensacola
Coral Springs	Leon CS	Pinellas CS
Davie	Manatee CS	Port Orange
Daytona Beach	Margate	St. Lucie CS
Delray Beach	Miami	St. Petersburg
Escambia CS	Miami-Dade County	Sanibel
FL Attorney General,	Midway	Sarasota CS
Tallahassee Div.	Miramar	Seminole CS
FL Highway Patrol	Monroe CS	Sunrise
FL Inspector General (Dept	Monticello	Tallahassee
of Financial Services)	Mount Dora	Valparaiso
Ft. Lauderdale	Naples	Walton CS
Ft. Myers	Okaloosa CS	West Palm Beach
Gainesville	Orange CS	

Georgia

Georgia has no statute or court rule relating to recording custodial interrogations.

Departments we have identified that presently record:

Atlanta	Fulton County	Perry
Centerville	Gwinnett County	Savannah-Chatham
Cobb County	Houston CS	Warner Robins
DeKalb County	Macon	

Hawaii

Hawaii has no statute or court rule relating to recording custodial interrogations. However, for the reasons stated below, we believe Hawaii law enforcement officers record custodial interrogations of persons suspected of serious crimes.

Discussion: Four departments – Hawaii County PD, Honolulu PD, Kauai County PD, and Maui County PD – have jurisdiction over the islands which contain Hawaii’s residents. We have been told by knowledgeable officials of each of these departments that for a number of years each has made it a practice to record custodial interrogations of persons suspected of serious crimes. Honolulu and Maui have written regulations on the subject.

Hawaii cases:

In *State v. Kekona*, 886 P.2d 740, 746 (Haw. 1994), the Supreme Court said:

“Undeniably, recording a custodial interrogation is important in many contexts. A recording would be helpful to both the suspect and the police by obviating the ‘swearing contest’ which too often arises when an accused maintains that she asserted her constitutional right to remain silent or requested an attorney and the police testify to the contrary. A recording would also ‘help to demonstrate the voluntariness of the confession, the context in which a particular statement was made and of course, the actual content of the statement.’ Williams, 522 So.2d at 208. Consequently, although we decline to interpret the due process clause of the Hawai’i Constitution as requiring that all custodial interrogations be recorded, we nevertheless stress the importance of utilizing tape recordings during custodial interrogations when feasible.”

Dissenting, Justice Steven H. Levinson wrote a lengthy opinion explaining why the Court should adopt the rule of the Alaska Supreme Court in *Stephan v. Scales*, 711 P.2d 1156, discussed above. He said (886 P.2d at 747-48, 752):

“... Despite the fact that ‘recording equipment was readily available’ at the La-haina police station on October 31, 1991, majority opinion at 4, Detectives Endo and Blair inexplicably failed to preserve Kekona’s statement to them verbatim. Thus, our ability to determine on review whether the circuit court’s FOFs [Findings of Fact] that ‘[Kekona] . . . never invoked his right to silence’ (FOF No. 6), ‘[n]o coercion, threats . . . , or improper inducements were utilized to elicit [Kekona’s]

statement' (FOF No. 8), and '[Kekona] at no time during the interrogation process . . . invoke[d] his right to terminate questioning' (FOF No. 10) are clearly erroneous has been severely hampered. Or stated more aptly, the informational vacuum created by the lack of a verbatim rendition of Kekona's interrogation substantially diminishes the reliability of an examination of "the entire record and . . . an independent determination of the ultimate issue of voluntariness' based upon . . . 'the totality of the circumstances surrounding [the defendant's] statement.'" [Citing *State v. Kelekolio*, 849 P.2d 58, 69 (Haw. 1993)]

"And yet, had the investigating detectives merely pressed the 'record' button of the 'readily available' recording equipment, the record before us would reflect—to an objective certainty—whether, in the course of questioning, Kekona in fact declared that 'I no like talk' and whether Detective Endo thereafter represented to Kekona 'that he knew various members of Kekona's family well,' majority opinion at 404, 886 P.2d at 741, and that 'if [Kekona] did not talk, [Kekona] would end up like his brother.' *Id.* at 404, 886 P.2d at 741...."

"Although there are undoubtedly cases where the testimony on one side or the other is intentionally false, dishonesty is not our main concern. Human memory is often faulty - people forget specific facts, or reconstruct and interpret past events differently.

"I can think of no possible justification as to why, given the dangers and potential abuses so thoroughly explored in *Stephan*, the police should be permitted to engage in unrecorded custodial interrogations when recording is otherwise feasible. I submit that the majority has been unable to think of any justification either. If I am correct, then there is everything to gain and nothing to lose by adopting the *Stephan* rule prospectively. That is precisely what makes the majority opinion so baffling to me, especially in the face of the majority's acknowledgment of 'the importance of utilizing tape recordings during custodial interrogations when feasible.' Majority opinion at 409, 886 P.2d at 746."

In *State v. Crail*, 35 P.3d 197, 206 (Haw. 2001), the Supreme Court said:

“This court has recognized that ‘having an electronic recording of all custodial interrogations would undoubtedly assist the trier of fact in ascertaining the truth.’ *Kekona*, 77 Haw. at 412, 886 P.2d at 749. Such a recording ‘would be helpful to both the suspect and the police by obviating the “swearing contest” which too often arises.’ (Id. at 409, 886 P.2d at 746.) Thus, in such situations, [a] “recording would also help to demonstrate the voluntariness of the confession, the context in which a particular statement was made and of course, the actual content of the statement.’ (Id.)”

Idaho

Idaho has no statute or court rule relating to recording custodial interrogations.

Departments we have identified that presently record:

Ada CS	Dept Fish & Games	Lincoln CS
Blaine CS	Garden City	Meridian
Boise City	Gooding CS	Nampa
Boise CS	Gooding	Pocatello
Bonneville CS	Hailey	Post Falls
Caldwell	ID Falls	State Dept of Corr.
Canyon CS	Jerome	State Police
Cassia CS	Jerome CS	Twin Falls
Coeur d' Alene	Ketchum	

Illinois

Illinois has three statutes relating to recording custodial interrogations.

Citations:

2003 re homicide suspects: 705 ILCS 405/5-401.5 (juveniles) and 725 ILCS 5/103-2.1 (adults).

2005 re vehicular homicide: 725 ILCS 5/103-2.1(b).

2013 re various felonies: 705 ILCS 401.5(G-5), 40 5/5 (juveniles) and 725 ILCS 103-21(G-5) (adults); predatory criminal assault of a child, and aggravated arson; aggravated kidnapping, aggravated vehicular kidnapping, and home invasion aggravated criminal sexual assault, armed robbery, and aggravated battery based on use of a firearm.

General rule: Custodial interrogations relating to specified felonies conducted at a place of detention shall be electronically recorded by motion picture, audiotape, videotape, or digital recording. §5/103-2.1(a)(b).

Circumstances that excuse recording: Nothing precludes the admission of unrecorded statements taken when electronic recording was not feasible; that constitute a voluntary statement that has a bearing on the credibility of the accused as a witness; if the suspect requests, prior to making the statement, to respond only if an electronic recording is not made, and a recording is made of the request; if the interrogation is conducted outside Illinois; or if the officers were unaware of facts and circumstances that would create probable cause to believe that the accused committed an offense required to be recorded. The state has the burden of proving by a preponderance of the evidence that one of the exceptions is applicable. §5/103-2.1(e).

Consequences of unexcused failure to record: If the court finds by a preponderance of the evidence that the defendant was subjected to a custodial interrogation in violation of §5/103-2.1(b), any statements made by the defendant during or following that interrogation, even if otherwise in compliance with §5/103-2.1, are presumed to be inadmissible in any criminal proceeding against the defendant, except for purposes of impeachment. §5/103- 2.1(b), (d).

The presumption of inadmissibility may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances. §5/103-2.1(f).

Nothing in this section precludes admission of a statement, otherwise inadmissible under this section, that is used for impeachment and not as substantive evidence. §5/103-2.1(e).

Preservation: “Every electronic recording required under this Section 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.” §5/103-2.1(c).

Miscellany: The Illinois Eavesdropping Act was amended to provide that, when questioning suspects under the foregoing provisions, officers do not have to advise suspects that they are being electronically recorded. 720 ILCS §5/14-3(k).

Illinois cases:

In *People v. Quevedo*, 932 N.E.2d 642, 652 (Ill. App. 2010), based upon a videotaped interrogation, the Illinois Appellate Court ruled that the defendant voluntarily waived his right to have an appointed attorney present during the interview. See also, to the same effect, *People v. Polk*, 942 N.E.2d 347 (Ill. App. 2011).

In *People v. Kladis*, 960 N.E.2d 1104, 1110 (Ill. 2011), the Illinois Supreme Court said:

“Since [1974], the use of video recordings as evidence at trial has become a common practice to allow a defendant the opportunity to present an effective defense and to further the truth-seeking process. We recently reaffirmed the general admissibility of such evidence (*People v. Taylor*, 956 N.E.2d 431), and courts across the country are increasingly relying on video recordings to present an objective view of the facts in a case. See, e.g., *Scott v. Harris*, 550 U.S. 372 (2007) (relying on a squad car video recording, Supreme Court reversed lower court’s denial of summary judgment on claim against the officer for the use of excessive force; Court found that a videotape capturing the events in question clearly contradicted the version of the story told by the driver and adopted by the court of appeals, and stated that the court of appeals should have viewed the facts in the light depicted by the videotape); *United*

States v. Prokupek, 632 F.3d 460 (8th Cir. 2011) (reversing the district court's denial of the defendant's motion to suppress on the basis that the officer's testimony at the suppression hearing was clearly contradicted by his contemporaneous statements captured on the squad- car video recording).

People v. Rivera, 962 N.E.2d 53 (Ill. App. 2011), provides an example of an unrecorded written confession taken in 1992, which the reviewing court found to be unreliable and insufficient to provide support for a murder conviction. He has been released after serving 20 years in prison.

People v. Harper, 969 N.E.2d 573 (Ill. App. 2012), the Appellate Court discussed the concluding provision of the Illinois statute, which provides, "The presumption of inadmissibility of a statement made by a suspect at a custodial interrogation at a police station may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances." 725 ILCS 5/103-2.1(f).

Harris v. Thompson, 698 F.3d 609 (7th Cir. 2012). A jury in an Illinois state court convicted Ms. Harris of murdering her four year old son, conviction affirmed, 904 N.E.2d 1077 (Ill. App. 2009), leave to appeal to the IL Supreme Court denied. Harris' federal habeas corpus petition denied by the District Court, 2011 WL 6257143 (N.D. Ill., 2011). The 7th Circuit Court of Appeals reversed and remanded to the state court for a new trial, based upon prejudicial exclusion of a defense eyewitness. As to Harris' videotaped confession, the Court found that "the jury had reasons to question its reliability, too – reasons in line with leading research on false confessions." The Court called attention to the length of the interrogation, "stretching over 27 hours" of "a mother who had just lost her son, she was under stress and stricken with grief," who "did not have an attorney during this questioning," and whose "initial, unwarned confession was inconsistent with the physical evidence...Only in later confessions (and after many more hours of interrogations) did she correct this curious discrepancy" relating to how the child's death occurred. (698 F.3d at 631). The State's Attorney declined to re-prosecute Ms. Harris, and she has been released after serving over seven years in prison.

In *People v. Koh*, No. 09-CR 9151, Circuit Court of Cook County, Criminal, Division (2012), the defendant was charged with first degree murder of his son. The defendant was not proficient in English. During a

lengthy videotaped interrogation, he made statements which the prosecution claimed amounted to a confession. After hearing the testimony of the detective, and viewing the videotape, the jury quickly acquitted the defendant. He was released after serving several years in prison awaiting trial.

People v. Travis, 985 N.E.2d 1019 (Ill. App. Ct. 2013). Following a bench trial, Travis was convicted of first degree murder. On appeal, the Appellate Court reversed and remanded for a new trial, holding that the recorded interview during which Travis confessed was involuntarily given, owing to the absence of a juvenile officer during the questioning of the 15 year old suspect, and the detective's "misleading promises of leniency." (985 N.E.2d at 1034.)

Indiana

Indiana has a Supreme Court rule relating to recording custodial interrogations.

Citation: Indiana Rule of Evidence 617 – Unrecorded Statements During Custodial Interrogation (2009).

Court's finding: The Court stated that it "finds that the interests of justice and sound judicial administration will be served by the adoption of a new Rule of Evidence to require electronic audio-video recordings of customary custodial interrogation of suspects in felony cases as a prerequisite for the admission of evidence of any statements made during such interrogation."

General rule: All custodial interrogations conducted in a place of detention must be electronically recorded when the person being interrogated is charged with specified felonies. Electronic Recording is defined as "an audio-video recording that includes at least not only the visible images of the person being interviewed but also the voices of said person and the interrogating officers." §(a) "The Electronic Recording must be a complete, authentic, accurate, unaltered, and continuous record of a Custodial Interrogation." §(c)

Circumstances that excuse recording: Recording is excused if the suspect agreed to respond only if the interview was not recorded; the officers inadvertently failed to operate the equipment properly; the equipment malfunctioned; the officers reasonably believed the crime under

investigation was not a felony; substantial exigent circumstances existed which prevented or made it not feasible to make a recording. §(a)(1)-(7).

Consequences of unexcused failure to record: “In a felony criminal presentation, evidence of a statement made by a person during a Custodial Interrogation in a Place of Detention shall not be admitted against the person unless an Electronic Recording of the statement was made, preserved, and is available at trial, except upon clear and convincing proof” that an exception is applicable. §(a).

Preservation: None given.

An Indiana case:

The Court of Appeals stated in *Stoker v. State*, 692 N.E.2d 1386, 1390 (Ct. App.1998):

“Nevertheless, although we impose no legal obligation, we discern few instances in which law enforcement officers would be justified in failing to record custodial interrogations in places of detention. Disputes regarding the circumstances of an interrogation would be minimized, in that a tape recording preserves undisturbed that which the mind may forget.”

Iowa

Iowa has no statute or court rule relating to recording of custodial investigations.

Iowa has a Supreme Court ruling advocating recordings of custodial interrogatories.

Citation: *State v. Hajtic*, 724 N.W.2d 449 (Iowa 2006).

Discussion: In the *Hajtic* case, the Supreme Court held that a videotape of the defendant’s custodial interview demonstrated that he voluntarily waived his *Miranda* rights and knowingly confessed to the crime of burglary. The Court added (724 N.W.2d at 454):

“We are aided in our de novo review of this case by a complete videotape and audiotape of the *Miranda* proceedings and the interrogation that followed. The videotape shows the officer with

his side or back to the camera and Hajtic facing the officer and the camera. Hajtic's sister sat about an arms' length to his right. Their mother and Hajtic's six-year-old brother sat behind them in the interrogation room. The officer read out loud a *Miranda* waiver form, and Hajtic read it for himself. Hajtic said he understood his rights and that he had no questions. He signed the waiver form, which stated that he could 'read and understand the English language.' His ability to understand English was confirmed by the videotape of the *Miranda* proceedings and the questioning that followed. He showed no reluctance to ask questions if he did not understand.

"When the officer asked a question confusing to Hajtic, he asked the officer to clarify it, and the officer did so. For the most part, however, the officer's questions were answered responsively and without any reliance for interpretation by his sister. In fact, during the interview, Hajtic appeared almost oblivious to his sister's presence. Judging by Hajtic's actions and responses to the questions, he clearly understood the questions asked.

"This case illustrates the value of electronic recording, particularly videotaping, of custodial interrogations...."

The Court discussed the rulings of the Supreme Courts of Alaska and Minnesota which require electronic recording of custodial interrogations, and the American Bar Association resolution urging "all law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects...or, where videotaping is impractical, to audiotape the entirety of such custodial interrogations," and legislatures and courts to enact laws or rules requiring this practice (ABA Report to the House of Delegates, set forth in Part 4 below). The Court said (724 N.W.2d at 456):

"We believe electronic recording, particularly videotaping, of custodial interrogations should be encouraged, and we take this opportunity to do so. In this case, the videotape of Hajtic's confession and the *Miranda* warnings that preceded it clearly show that he understood the *Miranda* warnings given to him and the questions asked. Further, there is no indication the officer made improper promises or threats...."

In 2007, the Iowa Attorney General wrote in the State Police Association's publication: "Although the court [in *Hajtic*] stated that it is 'encouraging' the practice of electronic recording, the attorney general's office believes that the *Hajtic* decision should be interpreted as essentially requiring this practice." (T. Miller, *Cautions Regarding Custodial Issues*, 39 Iowa Police J. 1, 15 (2007).) The Attorney General's 2007 article about the *Hajtic* case does not have a binding effect on any of the law enforcement agencies in Iowa. He encourages, but does not order, recording of custodial interrogations.

The Iowa Department of Public Safety (DPS) issued a statewide directive, Identifier DOM 23-02-15, to all sworn officers of the State Police, effective January 11, 2007, as a proactive response to *State v. Hajtic*, which provides (General Order 07- 27):

"The purpose of this directive is to establish guidelines and procedures for the electronic recording of custodial interrogations conducted in detention facilities and all [DPS] occupied buildings, including Division of the Iowa State Patrol (ISP) District Offices, and Division of Criminal Investigations (DCI), Division of Narcotics Enforcement (DNE), and Division of State Fire Marshal (SFM) field offices."

"III. Policy. It is the policy of this Department to require the electronic recording of all custodial interrogations conducted by its officers in detention facilities and all [DPS] occupied buildings, when feasible, in order to meet the recommendations set forth by the [Supreme] Court of Iowa. Such electronic recordings facilitate the judicial review process of evaluating the integrity, admissibility and content of conversations between suspects and officers by creating a comprehensive, unbiased and impartial evidentiary record of the interrogation process. This directive does not create statutory or constitutional rights, and the Department does not imply that exclusion of evidence is a remedy for any deviation from the purpose of this document."

"V. Procedure. A. General Requirements.

Officers shall electronically record *in their entirety* custodial interrogations conducted in detention facilities and buildings

occupied by the [DPS]. This includes off- site or other law enforcement agency-controlled buildings or task force offices. Video and audio recording is preferred. Audio-only recording is acceptable when video capabilities are unavailable.” (Emphasis in original.)

In April, 2009, the DPS issued a second General Order Identifier 01-02.06, Order No. 09-44, relating to “Electronic Recording of Custodial Interrogations,” which reiterates that “Officers will video or audio” record custodial interrogations as defined in DOM 23-02.15.” (Part IV.C.g and E.1.4.c.)

Neither the 2007 nor the 2009 General Orders of the Department of Public Safety are directed to or have a binding effect upon local police and sheriff departments.

In 2009, the Iowa State Bar Association (ISBA) held a meeting of stakeholders, including representatives of major law enforcement agencies, at which it was agreed that the ISBA Criminal Law Section Council would survey law enforcement agencies to assess policies, practices, and capabilities related to recording, using the assistance of law students from the University of Iowa. The survey was made of 421 law enforcement agencies. The results, published in December 2011, showed that responses were received from about half (201) of the 421 agencies contacted (using rounded percentages): 50% record all custodial interrogations; 40% do not require that any custodial interrogations be recorded, but instead leave the decision to the discretion of the interrogating officer; and 10% record interrogations of suspects of felonies that are specified by the local department; no information was obtained as to the crimes specified.

In May 2013, the Executive Director of the Iowa County Attorneys Association stated that his organization does not know which departments record and which do not.

The Department of Public Safety, which issued the 2007 and 2009 General Orders, has control over state law enforcement agencies and officers. The DPS orders do not make provisions for consequences if departments either do not adopt the policies, or adopt them in part, or fail to follow whatever policy is adopted. Hence they amount to no more than recommendations, not mandates, thus leaving it to each department within

the Department of Public Safety to determine whether to adopt recording policies, which to adopt, and if adopted the crimes to which the policies will apply.

The DPS does not have control over local police and sheriff departments. The surveys described above reveal that there is no official information as to the practices of over half of Iowa's local departments, and half of those that responded to the most recent survey acknowledged they do not record custodial interrogations as recommended by the Attorney General.

An Iowa case:

State v. Madsen, 813 N.W.2d 714 (Iowa 2012):

"We reiterate our admonition in *Hajtic* encouraging videotaping of custodial interrogations. Since *Hajtic* was decided, 'the use of video recordings as evidence at trial has become a common practice...to further the truth-seeking process.' [citing *People v. Kladis*, 960 N.E.2d 1104, 1110, Ill. App. 2011] (also recognizing that videotape 'objectively document[s] what takes place by capturing the conduct and words of both parties.') We also encourage electronic recording of noncustodial interviews when it is practical to do so."

Departments we have identified that presently record:

Altoona	Des Moines CS	Nevada
Ames	Fayette CS	Orange City
Ankeny	Hancock CS	Parkersburg
Arnolds Park	Iowa City	Polk CS
Benton CS	Iowa DPS	Pottawattamie CS
Bettendorf	Johnson CS	Rock Valley
Burlington	Kossuth CS	Sioux City
Cedar Rapids	Linn CS	Storm Lake
Clarion	Marion	Vinton
Clay CS	Marshalltown	Washington CS
Colfax	Mason City	Waterloo
Council Bluffs	Merrill	Waverly

Davenport
Des Moines

Missouri Valley
Muscatine

West Burlington
Woodbury CS

Kansas

Kansas has no statute or court rule relating to recording custodial interrogations.

In 2016, the Kansas City District Attorneys Association's Best Practices Committee published a draft of a Model Policy on Electronic Recording of Interrogations, which states:

"Law enforcement agencies are encouraged to customize these Protocols to meet their regional needs. This policy is non-binding upon agencies and is meant to serve as a guide in developing a department's individual policy."

The model policy calls for audio visual recording, "when deemed appropriate, in accordance with law and agency policy."

Departments we have identified that presently record:

A.G. Medical Fraud	Newton	Sedgwick CS
Junction City	Olathe	Shawnee CS
Kansas Dept. of Corr.	Ottawa	State Bur. Invtn.
Kansas Univ.	Riley County	Topeka
Lenexa	Saline CS	Wichita
Liberal	Sedgwick	

Kentucky

Kentucky has no statute or court rule relating to recording custodial interrogations.

Departments we have identified that presently record:

Elizabethtown	Louisville	St. Matthews
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Hardin CS
Jeffersontown

Louisville Metro
Oldham CS

Louisiana

Louisiana has no statute or court rule relating to recording custodial interrogations.

The New Orleans Police Department entered into a consent decree to end a lawsuit filed by the United States Department of Justice, which among many other reforms, provides (par. 164):

“All custodial interrogations that take place in a police facility, and all interrogations that involve suspected homicides or sexual assaults, shall be video and audio recorded. All recorded interrogations shall be recorded in their entirety.”

Chapter 25 of the LA Revised Statutes provides: “Rights of Law Enforcement Officers while Under Investigation.

‘§2531. Applicability; minimum standards during investigation; penalties for failure to comply.

* * *

‘B. Whenever a police employee or law enforcement officer is under investigation, the following minimum standards shall apply:

* * *

‘(3) All interrogations of any police employee or law enforcement officer in connection with the investigation shall be recorded in full. The police employee or law enforcement officer shall not be prohibited from obtaining a copy of the recording or transcript of the recording of his statements upon his written request.

* * *

‘(5) No statement made by the police employee or law enforcement officer during the course of an administrative investigation shall be admissible in a criminal proceeding.”

Departments we have identified that presently record:

Lafayette City	Oak Grove	Plaquemines Parish CS
Lake Charles	New Orleans	St. Tammany Parish CS

Maine

Maine has a statute relating to recording custodial interrogations.

Citation: ME Rev. Stat. Ann., title 25, §2803-B(1)(K).

General Rule:

“1. All law enforcement agencies shall adopt written policies regarding procedures to deal with the following ...

“K. Digital, electronic, audio, video or other recording of law enforcement interviews of suspects in serious crimes and the preservation of investigative notes and records in such cases.”

“2. The board [of Trustees of the Maine Criminal Justice Academy] shall establish minimum standards for each law enforcement policy...; policies for the recording and preservation of interviews of suspects in serious crimes under subsection 1, paragraph K, must be established no later than June 1, 2005 ...”

“3. The chief administrative officer of each law enforcement agency shall certify to the board...that the agency has adopted written policies consistent with the minimum standards established by the board pursuant to subsection 2...; certification to the board for the adoption of a policy for the recording and preservation of interviews of suspects in serious crimes under subsection 1, paragraph K, must be made to the board no later than June 1, 2005...The chief administrative officer of each agency must certify to the board...that the agency has provided orientation and training with respect to expanded policies...; certification for orientation and training with respect to policies regarding the recording and

preservation of interviews of suspects in serious crimes under subsection 1, paragraph K must be made to the board no later than January 1, 2006...”

“5. The board shall review annually the minimum standards for each policy to determine whether changes in any of the standards are necessary to incorporate improved procedures identified by critiquing known actual events or by reviewing new law enforcement practices demonstrated to reduce crime, increase officer safety or increase public safety.”

“6. Procedure regarding the preservation of notes, records and recordings...”

“7. A requirement that an officer of the agency record a custodial interrogation when conducted at a place of detention when the interrogation relates to a serious crime.

“8. The requirement to record a custodial interrogation does not apply to [situations set forth in the statute].”

Title 25, §2803C provides that an agency that fails to comply with these provisions –

‘...commits a civil violation for which the State or local government entity whose officer or employee committed the Violation may be adjudged a fine not to exceed \$500.”

In March 2006, the Maine Criminal Justice Authority issued Minimum Standards for “Recording of law enforcement interviews of suspects in serious crimes and the preservation of investigative notes and records in such cases policy.” These standards require each agency to have a written policy to address recording of suspects in serious crimes, and reservation of records, to include at a minimum “a policy statement that recognizes the importance of recording custodial interrogations of persons involved in serious crimes when such interrogations are conducted in a place of detention; definition of recording that encompasses digital, electronic, audio, video or other recording; definitions of custodial interrogations, detention, and serious crimes; provisions regarding preservation of records; “a requirement that an officer of the agency record a custodial interrogation when conducted at a place of detention when the interrogation relates to a serious crime”; and the statutory exemptions.

From time to time, the Maine State Police and the Maine Chiefs of Police Association adopted general orders designed to carry the statutory provisions into effect. On August 18, 2011, the Chiefs of Police Association adopted General Order M-11, which in all material respects is the same as the Criminal Justice Authority Order 1-7 of January 11, 2012, discussed below, except for the provision that “This General Order is for use of the Maine State Police and not for any other agency.”

On January 11, 2012, the Maine Criminal Justice Authority adopted Mandatory Policy Number 1-7, regarding Recording of Suspects in Serious Crimes & the Preservation of Notes & Records. The Mandatory Policy contains the following Advisory:

“This Maine Chiefs of Police Association model policy is a generic policy provided to assist your agency in the development of your own policies. All policies mandated by statute contained herein meet the standards as prescribed by the Board of Trustees of the Maine Criminal Justice Academy. The Chief Law Enforcement Officer is highly encouraged to use and/or modify this model policy in whatever way it would best accomplish the individual mission of the agency.”

The Mandatory Policy provides:

I. Policy. “This agency recognizes the importance of recording custodial interrogations related to serious crimes when they are conducted in a place of detention. A recorded custodial interrogation creates compelling evidence. A recording aids law enforcement efforts by confirming the content and the voluntariness of a confession, particularly when a person changes his testimony or falsely claims that his or her constitutional rights were violated. Confessions are important in that they often lead to convictions in cases that would otherwise be difficult to prosecute. Recording custodial interrogations is an important safeguard, and helps to protect a person’s right to counsel, the right against self-incrimination and, ultimately, the right to a fair trial. Finally, a recording of a custodial interrogation undeniably assists the trier of fact in ascertaining the truth.

“Given that this is a statutorily mandated policy, officers must abide by this agency’s policy as it applies to all standards of the Maine Criminal Justice Academy Board of Trustees.”

II. Purpose. “To establish guidelines and procedures for law enforcement officers (LEO’s) of this agency regarding the recording of certain custodial interrogations of persons and preservation of these recordings and the notes and other records related to the recordings.”

III. Definitions. The Order defines Custodial Interrogation, Recording (“audio, video or other recording”), Place of Detention, and Serious Crimes:

“Serious Crimes: Means Murder, and all Class A, B and C offenses listed in Chapters 9, 11, 12, 13 and 27 of the Maine Criminal Code and the corresponding juvenile offense. Excluded are Class D and E crimes in the applicable chapters that are increased to a felony crime by virtue of 17-A MRSA §1252”

IV. Procedure. “D. Unless exempted by this policy, a recording shall be made of any custodial interrogation conducted by an LEO of this agency at a place of detention when the interrogation relates to any of the serious crimes listed in this policy.”

Section IV E contains provisions for preservation of recordings and notes. Section IV G contains the exemptions to the recording requirement.

The Director of the Maine Criminal Justice Academy wrote in June 2012:

“In Maine, each law enforcement agency must adopt a policy that meets all minimum standards outlined above that are approved by the MCJA Board of Trustees. However, an extremely high percentage of LE agencies adopt the Maine Chiefs Model Policy verbatim because they do not want to reinvent the wheel ‘so to speak.’ A committee made up of chiefs and sheriffs write the model policies which are then reviewed by someone in the AG’s office before final adoption by the Maine Chiefs Board of Directors. Each agency must attest that it has one in place and must send me a copy. Maine LE agencies are 100% compliant.”

Maryland

Maryland has a statute relating to recording custodial interrogations.

Citation: MD. Code Ann., Crim. Proc. §§2- 402-403 (2008).

General rule: “§2-402. *Public policy*. It is the public policy of the State that:

“(1) a law enforcement unit that regularly utilizes one or more interrogation rooms capable of creating audiovisual recordings of custodial interrogations shall make reasonable efforts to create an audiovisual recording of a custodial interrogation of a criminal suspect in connection with a case involving murder, rape, sexual offense in the first degree, or sexual offense in the second degree, whenever possible, and

“(2) a law enforcement unit that does not regularly utilize one or more interrogation rooms capable of creating audiovisual recordings of custodial interrogations shall make reasonable efforts to create an audio recording of a custodial interrogation of a criminal suspect in connection with a case involving murder, rape, sexual offense in the first degree, or sexual offense in the second degree, whenever possible.”

§2-403. “An audio or video recording made by a law enforcement unit of a custodial interrogation of a criminal suspect is exempt from the Maryland Wiretapping and Electronic Surveillance Act.

§2-404. “Report. On or before December 31, 2009, and annually thereafter, the Governor’s Office of Crime Control and Prevention shall report to the House Judiciary Committee and the Senate Judicial Proceedings Committee, in accordance with §2-1246 of the State Government article on the progress of jurisdictions and the Department of State Police in establishing rooms capable of creating audiovisual recordings of custodial interrogations.”

Circumstances that excuse recording: None given.

Consequences for unexcused failure to record: None given.

Preservation: None given.

Discussion: The legislature enacted Section 2, chs. 359 and 360, providing in part that “the Governor’s Office of Crime Control and Prevention

[GOCCP] shall:...(2) develop a program to assist State and local law enforcement agencies in funding the establishment and operation of interrogation rooms capable of creating audiovisual recordings of custodial interrogations; and (3) monitor and report during State meetings on the progress of jurisdictions and the Department of State Police in establishing interrogation rooms capable of creating audiovisual recordings of custodial interrogations.”

The GOCCP has filed annual reports with the legislature each December. The December 2014 report states that of the 131 agencies in the state, 81 agencies have at least one interrogation room containing both audio and video recording capability. Therefore:

*Under §2-402(1), each of those 81 agencies is required whenever possible to make reasonable efforts to create audiovisual recordings of custodial interrogations of criminal suspects in cases involving murder, rape, sexual offense in the first degree, or sexual offense in the second degree.

*Under §2-402(2), each of the other 50 agencies is required whenever possible to make reasonable efforts to create audio recordings of custodial interrogations of criminal suspects in connection with cases involving murder, rape, sexual offense in the first degree, or sexual offense in the second degree.

A Maryland case:

In *Wimbish v. State*, 29 A.3d 635, 646 (Md. Ct. Spec. App.2011), the trial court denied the defendant’s motion to suppress his custodial statements after reviewing a videotape made of the interview. The Court of Special Appeals affirmed, based upon its independent review of the recording, saying: “We agree with the circuit court’s finding that, here, appellant did not make an unequivocal statement expressing a desire to have a lawyer present.”

Massachusetts

Massachusetts has no statute or court rule relating to recording custodial interrogations.

Massachusetts has a Supreme Judicial Court ruling that requires a jury instruction to be given when no recording is made of a confession resulting from an unrecorded custodial interrogation: relates to but does not require custodial recording.

Citation: *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004).

In the *DiGiambattista* case, the Court declined to require law enforcement officials to electronically record custodial interviews under the Court's supervisory powers or the state Constitution, but added, "this court has repeatedly recognized the many benefits that flow from recording of interrogations," and that "we are not, however, satisfied with preservation of the status quo, which amounts only to repeated pronouncements from the court about the potential benefits of recording interrogations." The Court went on to say (813 N.E.2d at 529, 532-35.)

"We believe that a defendant whose interrogation has not been reliably preserved by means of a complete electronic recording should be entitled, on request, to a cautionary instruction concerning the use of such evidence.

"Thus, when the prosecution introduces evidence of a defendant's confession or statement that is the product of a custodial interrogation ... and there is not at least an audio-tape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care. Where voluntariness is a live issue and the humane practice instruction is given [see Mass. Criminal Model Jury Instruction No. 3.560], the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt.

"...the instruction aptly focuses the jury's attention on the fact that the Commonwealth has failed to present them with evidence of the 'totality' of the circumstances, but has instead

presented that with (at best) an abbreviated summary of those circumstances and the interrogating officers' recollections of the highlights of those circumstances. Jurors should use great caution when trying to assess the 'totality of the circumstances' when they have before them only a highly selective sliver of those circumstances, and they may properly decide that, in the absence of that 'totality,' they cannot conclude that the defendant's statement was voluntary.

"...It is of course permissible for the prosecution to address any reasons or justifications that would explain why no recording was made, leaving it to the jury to assess what weight they should give to the lack of a recording. The mere presence of such reasons or justifications, however, does not obviate the need for the cautionary instruction.

"As is all too often the case, the lack of any recording has resulted in the expenditure of significant judicial resources...all in an attempt to reconstruct what transpired during several hours of interrogation conducted [months or years beforehand] and to perform an analysis of the constitutional ramifications of that incomplete reconstruction."

Discussion: In September 2006, the Attorney General and District Attorneys Association issued a Justice Initiative Report, which states in part:

"Law enforcement officers shall, whenever it is practical and with the suspect's knowledge, electronically record all custodial interrogations of suspects and interrogations of suspects conducted in places of detention."

The same month, the Chiefs of Police Association, District Attorneys Association, and State Police distributed to all state law enforcement agencies "*Sample Policy and Procedure*" (No. 2.17), containing the *Report of the Justice Initiative: Recommendations of the MA Attorney General and District Attorneys to Improve the Investigation and Prosecution of cases in the Criminal Justice System*. The Sample Policy and Procedure states in part:

“It is the policy of the [police] department [instituting the policy], to electronically record all custodial interrogations of suspects or interrogations of suspects conducted in places of detention whenever practical.”

In April 2007, an article was published in *Lawyer's Weekly*, entitled *Tale of the Tape: Recorded Interrogations Level the Playing Field, Despite Initial Fears*, by N. Schaffer, which contains the following quotations from several experienced Massachusetts law enforcement personnel and defense lawyers:

Hampden County District Attorney, concerning his adverse reaction to the *DiGiambattista* ruling:

“I felt that to record all the statements would result in a number of defendants refusing to give statements. They might be willing to speak to the police, but they'd be hesitant and reluctant to be recorded. I was wrong.”

Berkshire County District Attorney:

Police departments that were reluctant at first are now pleased that claims of improperly obtained confessions can be proven false by turning on a tape. He says police “have long been annoyed” by claims of misconduct during the interview process. “Having the recorded statement has proved very effective at trial. It eliminates the suggestions that the police aren't telling the truth, that [the defendant] never said it, or that there are other circumstances under which the statement was given. It has made a big difference in our ability to get a number of convictions, because it gives a lot of credibility to the prosecution of the case, and it in the defendant's own words.” He has seen a decrease in motions to suppress being allowed. When recorded evidence results in a motion or verdict for the defense, his department often uses the video as an opportunity “for training.”

General Counsel of the MA Chiefs of Police Association:

“We were worried at the beginning that [suspects] would shut up and not confess if they were being recorded. Before there were a lot of bogus claims. Now, when someone claims that they were surrounded by four officers standing over them and that the door was bolted, you can look at the video and see that

they were being questioned by one person sitting behind a desk.”

Essex County District Attorney:

“[Taping custodial interviews] has shown judges and juries that the police are good at what they do. It has improved the quality of justice.”

On October 1, 2008, the President of the Boston Bar Association (BBA) appointed a Task Force to Prevent Wrongful Convictions, in order to study the problem of wrongful convictions, and to make recommendations to reduce the number of wrongful convictions. The Task Force’s Report includes a chapter on Interviews of Suspects and Witnesses (pages 28-47), which contains the following recommendations:

“1. All law enforcement agencies should video- record the entirety of all custodial interrogations of suspects in serious felony cases commonly prosecuted in Superior Court, unless strong countervailing considerations make such recording impractical or the suspect refuses to be recorded.

“4. The Massachusetts Legislature should be encouraged to create a fund allowing all state and municipal police departments to apply for grants to purchase video equipment.”

In February 2010, the MA District Attorneys issued a *White Paper on Public Safety and Criminal Justice Policy*, which contains the following statement relating to recommendation 1 of the BBA Task Force (pages 6-7):

“Having seen the benefits of the *DiGiambattista* ruling over the last six years, we agree that video recording poses significant benefits to both the accuracy of the investigation and the persuasiveness of the evidence at trial, and accordingly endorse this BBA recommendation.”

At my request, in January 2014, the third vice president of the Chiefs Association distributed a survey to all 360 chiefs statewide, requesting information about their practices and experiences with electronic recording of custodial interrogations in their departments. Of the 100 responses received, almost all responded that they make recordings of custodial

interrogations of felony suspects except those that object, and virtually all reported positive experiences. They were not asked to describe the crimes that trigger recording, the factors that excuse recording, and related matters. No responses were received from the other more than 250 departments.

H 3449, requiring audiovisual recording of custodial interrogations of persons suspected of specified felonies, was introduced in the 2015-16 session of the legislature. A hearing on the bill was held before a Joint Committee in September 2015. The committee has not yet acted on the bill.

We have been advised by a representative of the Chiefs of Police Association that state law enforcement authorities believe the directives have been very effective, and that electronic recording of custodial interviews is widespread throughout the state. However, as noted above, there is no official information available as to the details of the recording practices of the 100 departments that responded to the recent survey, and as to the remaining 250-plus departments, there is no official information whatever as to their compliance with the Supreme Judicial Court's admonition in the *DiGiambattista* case, the Justice Initiative Report, or the Attorney General's recommendations

Massachusetts cases:

In *Commonwealth v. Kee*, 870 N.E.2d 57, 65 n.9 (Mass. 2007), the Court said:

“Commonwealth v. DiGiambattista . . . cited by the defendant in a footnote, is inapposite. There, we held that, where the Commonwealth presents evidence of a defendant's confession without introducing an electronic recording of the interrogation, the defendant is entitled, upon request, to a cautionary instruction. However, while the requirement was created pursuant to our supervisory powers only, that case has its genesis in the constitutional privilege against self-incrimination, see Fifth Amendment to the United States Constitution, and art. 12 of the Massachusetts Declaration of Rights. The considerations relevant to a missing evidence instruction, by contrast, do not implicate the privilege against self-incrimination.”

In *Commonwealth v. Francis*, 891 N.E.2d 717 (Mass. App. 2008), the court said:

“*DiGiambattista* . . . does not require the judge to ‘point out to the jury that the party with the burden of proof has, for whatever reason, decided not to preserve evidence of that interrogation in a more reliable form, and to tell them that they may consider that fact as part of their assessment of the less reliable form of evidence that the Commonwealth has opted to present.’ Defendant’s brief at 29.”

Commonwealth v. Barbosa, 933 N.E.2d 93,117 (Mass. 2010):

“We agree that the judge erred in giving only the second part of the requested instruction. *DiGiambattista* is clear that, where the defendant requests the instruction, the judge must tell the jury both that (1) the State’s highest court prefers that custodial interrogations be tape recorded, whenever practicable, and (2) where there is not at least an audiotape recording of the complete interrogation, the jury should weigh the defendant’s statements with great caution and care. We do not consider the first part of this instruction to be extraneous.”

Commonwealth v. Drummond, 925 N.E.2d 34, 38 (Mass. App. Ct. 2010):

“Particular reasons why an interrogation was not recorded are for the jury to weigh when they consider, after hearing the instruction, evidence of what the Commonwealth contends the defendant said to police. As the court [in *DiGiambattista*] explained, ‘it is of course permissible for the prosecution to address any reasons or justifications that would explain why no recording was made, leaving it to the jury to assess what weight they should give to the lack of a recording. The mere presence of such reasons or justifications, however, does not obviate the need for the cautionary instruction.’ The judge’s limiting language ignored this clear directive and stripped the instruction of at least some of its force. As given, the instruction was incorrect.”

In *Commonwealth v. Troung*, 28 Mass. L. Rep. 223 (2011), the trial judge relied upon audio and video recordings of custodial interviews of a 16 year old girl. The judge found that the interviews were undertaken without affording her an opportunity to consult with her mother, that the girl did not give a valid waiver of her *Miranda* rights, and that her statements to the police officers were not voluntary. The trial judge said:

“When, as here, there exists a combination of trickery and implied promises, together with Nga’s young age, lack of experience and sophistication, her emotional state, as well as the aggressive nature of the interrogation, the totality of the circumstances suggests a situation potentially coercive to the point of making an innocent person confess to a crime. [Citing case.] When such a situation exists, the Commonwealth has failed to meet its burden of establishing beyond a reasonable doubt that Nga’s statement was voluntary and the statement must be suppressed. [Citing *DiGiambattista*.]”

In *Commonwealth v. Hoyt*, 958 N.E.2d 834, 838 (Mass. 2011), during a recorded interview, a rape suspect said, “I’d like an attorney present. I mean I can’t afford one. So I guess I’ll speak to you now. I don’t have an attorney.” The trial court ruled that the suspect’s later incriminating statements were admissible because he had not made an unequivocal invocation of his right to counsel. On appeal from a conviction, the Supreme Judicial Court reversed, based upon a review of the video tape, which the court held established that the defendant did unequivocally request a lawyer, hence his incriminating statements were inadmissible.

In *Commonwealth v. Baye*, 967 N.E.2d 1120 (Mass. 2012), a videotape was made of the lengthy interrogation of an arson suspect. Following indictment, the trial court denied the defendant’s motion to suppress incriminatory statements he had made during the interview. On interlocutory appeal, the Supreme Judicial Court, having analyzed the videotape, reversed the denial of the motion to suppress his statements, saying (p.1135):

“The troopers’ minimization of the defendant’s crimes, their implied assurances of leniency, and their suggestion that such leniency was a ‘now or never’ proposition reinforced their insistence that, in admitting to involvement in the fires, the defendant would not necessarily be admitting to having

committed any serious felonies. These misrepresentations, in combination with the troopers' attempts to persuade the defendant not to obtain the advice of counsel on whether to exercise his right to remain silent, constituted an affirmative interference with the defendant's understanding of his fundamental constitutional rights. On this record, the Commonwealth has not shown beyond a reasonable doubt that the defendant's statements were nevertheless freely and voluntarily made." (967 N.E.2d at 1135.)

Commonwealth v. Brown, 978 N.E.2d 591 (Mass. App. Ct. 2012):

"The *DiGiambattista* case counsels that a defendant who is the subject of an unrecorded police interrogation is entitled, upon request, to a cautionary jury instruction concerning the use of such evidence. The instruction may be given even when the defendant declines to have the statement recorded."

In *Commonwealth v. Clarke*, 969 N.E.2d 749 (Mass. App. Ct. 2012), the court held that the trial court did not violate the defendant's privilege against self incrimination by allowing the state to prove that he refused to submit to have his interview recorded:

"The Supreme Judicial Court has 'expressed a preference' that a defendant's statements during a police interview should be recorded. Where there is no such recording, the defendant is entitled to an instruction informing the jury of the court's preference and cautioning the jury to use great care in weighing such evidence. It is, however, 'permissible for the prosecution to address any reasons or justifications that would explain why no recording was made, leaving it to the jury to assess what weight they should give to the lack of a recording.'"

In *Commonwealth v. Portillo*, 968 N.E.2d 395 (Mass. 2012), the defendant's tape recorded custodial interrogation was conducted entirely in Spanish. The defendant moved to suppress on the ground that he was not given *Miranda* warnings. The prosecutor provided the defense lawyer with a copy of the audiotape, but did not provide a copy of the English language translation which the prosecutor intended to introduce into evidence at the hearing on the motion to suppress. The trial court granted the defendant's motion to suppress the audio recording. The Supreme Judicial Court held:

“Where an audio recording of a defendant’s statements is in the possession or control of the Commonwealth and is audible, the fair administration of justice requires that the Commonwealth prepare a translated transcript of the statements the Commonwealth intends to offer in evidence at trial or any pretrial evidentiary hearing, and provide the transcript to defense counsel, leaving sufficient time to resolve in advance of trial any questions regarding the accuracy or the translation....If the commonwealth chooses not to invest the time, money or effort needed to prepare a translated transcript, it must pay the price of exclusion of the defendant’s recorded statements.” (968 N.E.2d at 402.)

In *Commonwealth v. Bermudez*, 980 N.E.2d 462 (Mass. App. Ct. 2012), two officers questioned a 17 year old male for 70 minutes in a police station interview room that was equipped with video equipment, about his involvement in a shooting. He waived his *Miranda* rights and answered all questions without hesitation. The trial judge ruled the statements inadmissible because the defendant did not knowingly waive his *Miranda* rights. The Appeals Court reversed, based upon the “objective circumstances depicted in the interrogation videotape,” as well as that the defendant was “on the cusp of majority...far removed from the tender years of early adolescence.” (980 N.E.2d at 468.)

In *Commonwealth v. Ashley*, 978 N.E.2d 576 (Mass. App. Ct. 2012), the defendant was convicted of murder, based in part upon a recording of the interview in which the defendant implicated himself in the murder. Following a hearing on defendant’s motion to suppress, the trial judge, after reviewing the recorded interview, admitted part and suppressed part of the recorded interrogation. On appeal, the Appeals Court affirmed, after reviewing holding the defendant knowingly waived his *Miranda* rights, and implicated himself without police misconduct. The Appeals Court also rejected the argument that the videotaping violated the state wiretapping statute, which the Supreme Judicial court did not address in the *DiGiambattista* case. The Appeals Court held that the detectives made it clear that they wanted to know and understand and get “down on paper” the defendant’s version of events, and that he “did not intend to keep his statements private, “recording of the interrogation does not amount to surreptitious eavesdropping; even if...a literal interpretation of the statute

might imply a violation, we do not view the statute as intended to apply in such circumstances as these.” (978 N.E.2d at 587.)

In *Commonwealth v. Rousseau*, 990 N.E.2d 543, 560 (Mass. 2013):

“The defendant contends that the emphasized portion of the above instruction vitiated the *DiGiambattista* instruction by informing the jury that they could consider the fact that the defendant was given the opportunity to have the interrogation recorded, but declined. As an initial matter, we find nothing wrong with the gist of the judge's additional language, which we think ‘hews to the lines laid out in *DiGiambattista*.’ The additional instruction merely alerted the jury to a factor they were entitled to consider in assessing why the conversation was not recorded, while leaving intact the instruction's cautionary force.”

“However, while the use of an additional instruction such as given here is permissible, the use of the term ‘waived’ is problematic.”

The court found that the error was not prejudicial.

Two federal cases:

In *United States v. Younis*, 890 F. Supp. 2d 818 (N.D. Ohio 2012), Senior District Judge James G. Carr granted the defendant's motion to suppress evidence seized during a traffic stop, and ordered further hearings with regard to the defendant's subsequent statements. Judge Carr said:

“As I also expressed at the conclusion of the hearing, I am deeply concerned about the failure of Trooper Stanbaugh to record his interrogation. I neither know of nor can perceive any valid reason for any law enforcement agency or officer, where the means to do so are readily at hand, not to record his or her activities, whether during a traffic stop or in an interrogation room. Officers sworn to uphold not just the laws, but also the Constitutions of the United States and the State of Ohio have the most important of all motives – fidelity to that oath – for recording such encounters.”

During the hearing on the motion to suppress, Judge Carr made the following statement:

“We’re here for one simple reason that I find inexplicable, and that is the failure to use readily available equipment permanently to record each and every important incident in the chain of events that brings us here. I do not understand why the trooper can leave his machine running for however long it took to head down the road to the turn around, apparently three or four minutes, I don’t know, but he couldn’t turn it on at least after he saw the first incident. We wouldn’t be here if he had done so. And I haven’t heard a good reason why he did not do so. And I trust that the government will notify the posts in this region that this federal judge expects better of the people who – whom I and every other citizen of this area are paying to do their job. If nothing else we’ve wasted his time today, time that he could have been spent making the turnpike and I-75 safer for us to travel, for want of four or five minutes of recording. I mean, it was at least, I infer, three hours left on the recording device. He indicated this was his first traffic stop. His time being on duty had been spent conveying an earlier arrestee to and from the Lucas County Jail. There is no excuse for that kind of activity. Likewise, we wouldn’t be here wondering just how well Mr. Younis can or cannot understand English and what was said between Mrs. Younis and her husband in the course of translation if Inspector Stanbaugh had, as apparently many other inspectors state highway patrol and every local agency that I’m aware of, routinely records everything that happens during an interrogation. It is inexplicable. It is inexcusable. It is no way to treat citizens. It is no way to treat a court of law. It is no way to treat the Constitution of the United States. And if it is the ATF policy as it is the FBI policy deliberately not to record its interrogations, then I suggest you talk with the U.S. Attorney’s Office about how I will handle that in the future in any case that goes to a jury in front of me. There is no reason for that practice, none whatsoever. And we would not be here unless that practice had not been involved. I am inclined to find that there’s insufficient evidence in this record to find it more likely than not that those traffic offenses occurred. And if I find that the stop was illegal and everything that happened

thereafter was illegal. I take the record as I find it. And I simply am not persuaded by the existence of a routine practice not to do something that is easy. It's not innovative. The equipment is in those cars, it can be turned on and off. If you're running out of space on the recording chip, you're in the vicinity of a patrol post, go in, download it, clean it up, and record."

In *United States v. Jacques*, 784 F. Supp. 2d 48 (D. Mass. 2011), Jacques was interrogated for 6 1/2 hours in an interview room by an FBI agent and a Massachusetts state trooper, during which Jacques admitted committing an arson. The interview was videotaped. In ruling on Jacques' pretrial motion to suppress, the trial judge found in the government's favor on two contentions:

First, Jacques was not under the influence of narcotics (pp. 53-54):

"On the videotaped interrogation, which includes the time during and subsequent to the signing of the [*Miranda*] waiver, Defendant shows no visible or audible signs of impairment whatsoever. His demeanor and mannerisms appear perfectly normal, and his answers are both cogent and responsive.

"The videotaped interrogation only reinforces Nurse Passa's conclusions. As at the outset of the interrogation when he signed the *Miranda* waiver, Defendant remained cogent and responsive throughout the questioning, up to and including his confession. Defendant's answers were grammatical, pertinent, articulate, and, in some cases, eloquent. Simply put, he did not show any signs of a weakened mental or physical condition that would make him in any way vulnerable to aggressive interrogation."

Second, Jacques was not coerced (pp. 54-56): "...while the questioning was vigorous and persistent, neither Trooper Mazza nor Agent Smythe took any action that could be deemed a constitutionally offensive method of coercion.

"Significantly, though Defendant stated he well knew he had the option, he never once expressed a wish to terminate the interrogation, or even to take a break from it. He never said he was tired or ill. In addition, Defendant requested and was

granted three cigarette/bathroom breaks. Defendant's age (twenty- four years old) and familiarity with the criminal justice system also weighed against a finding of involuntariness.

"...Defendant clearly waived his right to remain silent, both by his conduct and by signing a written statement to that effect. Thus, even if Trooper Mazza's comments could be deemed an implied threat, that threat was directed not at Defendant's invocation of his *Miranda* rights, but at his steadfast refusal to provide honest answers (In Trooper Mazza's eyes) to the investigators' questions."

Departments we have identified that presently record:

Amherst	Easton	Pittsfield
Assumption College	Edgartown	Quinsigamond College
Auburn	Fall River	Revere FD
Ayer	Great Barrington	Sheffield
Barnstable	Holyoke	Somerset
Boston	Hudson	Somerville
Bourne	Lenox	State Police
Brewster	Longmeadow	Tewksbury
Cambridge	Nantucket	Truro
Chatham	North Central	West Brookfield
Dalton	Correctional Inst.	West Tisbury
Darmouth	Northeastern Univ.	Westfield
Dennis	Oak Bluffs	Yarmouth
	Orleans	

Michigan

Michigan has a statute relating to recording custodial interrogations.

Citation: Mich. Comp. Laws §§763.7-11 (2012).

General rule: Audiovisual recordings shall be made of the entire interrogations of arrested persons in custodial detention in a place of detention regarding involvement in the commission of "a felony punishable by imprisonment for life, for life or for any term of years, or for a statutory maximum of 20 years or more, or a violation of section 520d of the

Michigan penal code” relating to criminal sexual conduct in the third degree. §§7(d), 8(2). The statutory requirements take effect in each law enforcement agency within either 60 or 120 days after the agency obtains appropriate audiovisual recording equipment or funds for the equipment. §§8(1), 11(3)(4).

Circumstances that excuse recording: The person objects to recording the interrogation. §8(3). However, “a major felony recording may be made without the consent or knowledge of, or despite the objection of the individual being interrogated.”

Consequences of unexcused failure to record: Failure to record as required “does not prevent any law enforcement official present during the taking of the statement from testifying in court as to the circumstances and content of the individual’s statement if the court determines that the statement is otherwise admissible,” but “the jury shall be instructed that it is the law of this state to record statements of an individual in custodial detention who is under interrogation for a major felony and that the jury may consider the absence of a recording in evaluating the evidence relating to the individual’s statement.” Failure to record does not create a civil cause of action. §§9, 10.

Miscellany: Within 120 days after the effective date of the act, the Commission on Law Enforcement Standards “shall set quality standards for the audiovisual recording of statements,...and for the geographic accessibility of equipment in the state”; and “conduct an assessment of the initial cost necessary for law enforcement agencies to purchase audiovisual recording equipment,” and conduct assessments regarding the costs of purchasing, upgrading, or replacing the equipment every two years.” §11(1) The commission shall annually recommend to the legislature an annual appropriation amount , and the legislature shall annually appropriate funds, in addition to other appropriations provided to the commission, for distribution to agencies throughout the state to allow them to purchase audiovisual recording equipment. §11(2).

Preservation: None given.

A Michigan case:

Chief Justice Marilyn Kelly of the Michigan Supreme Court, dissenting in *State v. Parks*, 797 N.W.2d 136, 137-38 (Mich. 2011):

“Although most courts have concluded that a failure to electronically record police interrogations does not violate their state constitution, many have recognized the benefits of such recordings to all parties. Consequently, many states now require them. A few courts have adopted mandatory recording requirements as part of their supervisory powers. They have held that the proper remedy for a violation of that requirement is suppression at trial of the statement made to the police. Other courts imposing a recording requirement have adopted the remedy of a cautionary jury instruction when that requirement is violated. Still other courts that have not yet adopted a recording rule have directed further study on the merits of adopting such a rule.

“Several state legislatures have passed statutes requiring electronic recording of police interrogations. In Michigan, the House of Representatives passed a bill requiring electronic recording of interrogations in 2010, but the legislative session ended before the Senate took it up. The Michigan Senate unanimously passed a similar bill in April of this year, and the measure is currently pending in the House.

“Given these developments, I would grant defendant’s application for leave to appeal. The issue that defendant presents involves legal principles of major significance to this state’s jurisprudence. The Court should determine whether, in the exercise of its supervisory powers, it should require that all custodial police interrogations in Michigan be electronically recorded. If so, it should determine the appropriate remedy for a violation of that requirement.” (Footnotes omitted.)

A federal case:

In *Giles v. Wolfenbarger*, No. 03-74073, 2006 WL 176426 (E.D.Mich. Jan. 24, 2006), rev’d. and vacated on other grounds, 239 Fed. App.145, 2007 WL 1875080 (6th Cir. 2007), a federal habeas corpus petitioner challenging a state court conviction for murder, Wolfenbarger was questioned in a hospital where he was recovering from surgery for two gunshot wounds. At the evidentiary hearing, the officer testified that in his 14 years in the Homicide Section, neither audio or video recording was done of suspect custodial questionings. District Court Judge Tarnow

stated, “Respondent’s case is weakened by the lack of an audio or video record.” He then quoted with approval from an article written by the author of this Compendium:

“In the past few years, the many benefits of complete audio or video recording of custodial interviews have become increasingly apparent to all parties. For suspects, recordings expose abusive tactics and falsehoods about confessions. For law enforcement officials, recordings spare them from defending unfair charges of using heavy-handed methods or misstating what occurred. Furthermore, prosecutors and defense lawyers no longer engage in courtroom disputes as to what took place: the interviews may contain exculpatory statements favorable to the defense, or admissions which strengthen the prosecution’s case, but in either event, the record is clear and conclusive. Trial judges and reviewing courts no longer have to evaluate conflicting versions of what happened. Unlike the customary interview during which the police make handwritten notes and later prepare a typewritten report, electronic recordings contain a permanent record of the event, leaving no room for dispute as to what officers and suspects said and did.”

Minnesota

Minnesota has a Supreme Court ruling relating to recording custodial interrogations.

Citation: *State v. Scales*, 518 N.W.2d 587 (Minn. 1994).

General rule (518 N.W.2d at 592):

“...in the exercise of our supervisory power to insure the fair administration of justice, we hold that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention.”

Consequences of unexcused failure to record (518 N.W.2d at 592):

“If law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial...suppression will be required of any statements obtained in violation of the recording requirement if the violation is deemed ‘substantial.’ This determination is to be made by the trial court after considering all relevant circumstances bearing on substantiality, including those set forth in §150.3(2) and (3) of the Model Code of Pre-Arrest Procedure. If the court finds a violation not to be substantial, it shall set forth its reason for such finding.”

Preservation: None given.

Minnesota cases:

In 2009, Justice Paul H. Anderson, concurring in *State v. Sanders*, 775 N.W.2d 883, 889-90 (Minn. 2009), wrote:

“...When we adopted the *Scales* rule in 1994, we were only the second state in the nation to adopt this approach. Our decision to adopt the *Scales* rule was greeted with considerable skepticism and dissent. Over the years, the wisdom of our decision has been proven and many law enforcement officials now heartily endorse recorded interrogations as an effective law enforcement tool.

“*Scales* has significantly reduced the number of law enforcement issues confronting the courts. When I first joined our court, we were still dealing with many pre-*Scales* cases challenging *Miranda* warnings given by police officers. It was fairly routine for a defendant to question the propriety of an officer’s *Miranda* warning. The use of *Scales* has revealed, in the vast majority of cases, the competence and general conscientiousness with which police officers in Minnesota advise defendants of their rights under *Miranda*. As a result, in recent years, we have very few valid *Miranda* challenges that have come to our court. This is a good development.

“Further, the use of *Scales* has in many cases eliminated frivolous and unfounded objections by defendants as to the circumstances surrounding their interrogation. While law

enforcement initially feared that by having interrogations recorded it would lose an effective component of its interrogation of defendants, the opposite is true. Not only has *Scales* revealed that in almost all cases law enforcement does a conscientious job when conducting an interrogation, the recorded interrogation frequently turns out to be some of the best evidence against the defendant. In essence, *Scales* has resulted in the best of both worlds. The defendant's rights are protected and law enforcement is more effective."

In *State v. Chavarria-Cruz*, 784 N.W.2d 355 (2010), the defendant was indicted and tried for murder. He argued that his confession should have been suppressed because during his custodial interrogation, which was audio recorded, he invoked his constitutional right to a lawyer. The interrogation was audio taped. The trial court and Court of Appeals rejected the defendant's argument. The Supreme Court wrote that the tape recording revealed the defendant said something that sounded like, "I'm cooperating here. I could just be like, you know, get me a lawyer." The Supreme Court ruled that "Chavarria-Cruz's reference to wanting a lawyer can clearly be heard – a fact that [detective] Hanson himself later conceded upon listening to the tape." The Court concluded that the defendant "expressed himself sufficiently clearly that a reasonable officer would have heard his request for a lawyer," therefore the questioning should have ceased, and since it did not, the courts below erred in denying the motion to suppress the confession, and ordered a new trial. (784 N.W.2d at 365.)

Mississippi

Mississippi has no statute or court ruling relating to recording custodial interrogations.

A Mississippi case.

In *Williams v. State*, 522 So.2d 201, 208 (Miss. 1988), the Court said:

"We accept that whether or not a statement is electronically preserved is important in many contexts. If a recording does exist it will often help to determine the voluntariness of the confession, the context in which a particular statement was made, and of course, the actual content of the statement."

Departments we have identified that presently record:

Biloxi

Gulfport

Jackson CS

Cleveland

Harrison CS

Missouri

Missouri has two statutes relating to recording custodial interrogations.

Citation: Mo. Rev.Stat., ch. 590.700 and 700.1 (2009 and 2015).

General rule: All interrogations of arrested persons, who are not at the scene of the crime, who are suspected of committing or attempting to commit the listed felony offenses shall be recorded when feasible. Recording includes any form of audiotape, videotape, motion picture or digital recording. §2. The recordings may be made with or without knowledge of the suspect. §3. Each law enforcement agency shall adopt a written policy to record custodial interrogations of persons suspected of committing or attempting to commit the listed felony crimes.” §4.

Circumstances that excuse recording: The suspect requests that the interrogation not be recorded; the suspect makes spontaneous statements; the interrogation occurs outside the state; exigent public safety circumstances prevent recording; the recording equipment fails, or is not available at the location where the interrogation takes place. §3.

Consequences of unexcused failure to record: “If a law enforcement agency fails to comply with the provisions of this section, the governor may withhold any state funds appropriated to the noncompliant law enforcement agency if the governor finds the agency did not act in good faith in attempting to comply with the provisions of this section.” §5. “Nothing in this section shall be construed as a ground to exclude evidence, and a violation of this section shall not have impact other than that provided in section 5 of this section. Compliance or noncompliance with this section shall not be admitted as evidence, argued, referenced, considered or questioned during a criminal trial.” §6.

Preservation: None given.

Montana

Montana has a statute relating to recording custodial interrogations.

Citation: Mont. Code Ann. §§406.4 - 406.11 (2009).

General rule: “Except as provided in 46-4-409, all custodial interviews must be electronically recorded. The recording must contain a peace officer advising the person being interviewed of the person’s *Miranda* rights, a recording of the interview, and a conclusion of the interview.” §46-4-408.

The statute contains the following Statement of Purpose:

“The legislature intends to require the electronic recording of custodial interrogations in felony cases based on the finding that properly recorded interrogations (1) provide the best evidence of the communications that occurred during an interrogation; prevent disputes about a peace officer’s conduct or treatment of a suspect during an interrogation; prevent a defendant from lying about the account of events originally provided to law enforcement by the defendant; (4) spare judges and juries the time necessary to assess which account of an interrogation to believe; (5) enhance public confidence in the criminal process; and (6) have been encouraged by the Montana Supreme Court in a written opinion of that court.” §46-4-406.

Definitions. The statute defines the terms “Custodial interrogation,” “Electronic recording” (audio, visual, or audiovisual), “Place of detention,” and “Statement.” §46-4-407.

Circumstances that excuse recording: §46-4-409: A judge shall admit evidence of unrecorded statements if, at hearing, the state proves by a preponderance of the evidence that the statements have been made voluntarily and are reliable; or the person unambiguously declared that he/she would respond only if the statements were not recorded; or the failure to record the interrogation in its entirety was the result of unforeseeable equipment failure, and obtaining replacement equipment was not practicable; or exigent circumstances prevented the making of a recording; or the statements were surreptitiously recorded by or under the direction of law enforcement personnel; or the statement was made during

a custodial interrogation conducted in another state by officers of that state in compliance with the laws of that state.

Consequences of unexcused failure to record: “If the defendant objects to the introduction of evidence under 46-4-408, and the court finds a preponderance of the evidence that the statements are admissible, the judge shall, upon motion of the defendant, provide the jury with a cautionary instruction.” §46-4- 410.

Montana Criminal Jury Instruction 1-119 (2009): Following is the pattern jury instruction to be given when a defendant’s unrecorded statement is introduced into evidence without proof of a statutory excuse:

“A statement made by a Defendant other than at this trial may be an admission or a confession:

“A confession, as applied in criminal law, is a statement by a person made after the offense was committed that he/she committed or participated in the commission of a crime. An admission is a statement made by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his/her guilt. A conviction cannot be based on an admission or confession alone.

“The circumstances under which the statement was made may be considered in determining its credibility or weight. You are the exclusive judges as to whether an admission or a confession was made by the Defendant, and if so, whether such statement is true in whole or in part. If you should find that any such statement is entirely untrue, you must reject it. If you find it is true in part, you may consider that part which you find to be true.

“Evidence of an unrecorded oral admission or oral confession of the defendant should be viewed with caution.”

Preservation: Preservation is required until defendant has exhausted his/her appeals. Upon motion by the defendant, the court may order that a copy of the electronic recording be preserved for any period beyond the expiration of all appeals. §46-4-411.

Montana cases:

In *State v. Grey*, 907 P.2d 951, 952, 955-96 (Mont. 1995), Grey argued that his videotaped confession, made during a custodial interrogation, should be suppressed because he was not advised of his *Miranda* rights. The officer who questioned Grey testified that he gave Grey the *Miranda* warnings before he took Grey to the interrogation room where the videotape was made; that he “chose not to use a [written] waiver form because he did not want to jeopardize the interrogation”; and that Grey orally waived his rights. The Supreme Court reversed Grey’s conviction because of the police use of deceptive tactics and failure to prove that the *Miranda* warnings were given. The Court said:

“The State simply did not prove by a preponderance of the evidence that Grey voluntarily confessed. It is immeasurably more difficult for the State to sustain its burden to prove the voluntariness of a confession when there is no record of the *Miranda* warnings other than the officer’s testimony that he gave them.

“We do not hold that the police must tape record or create an audio-visual record of *Miranda* warnings and the detainee’s waiver, as Grey urges we should and as some jurisdictions have. See, for example, *Stephan v. State* (Alaska 1985), 711 P.2d 1156 and *State v. Scales* (Minn. 1994), 518 N.W.2d 587. Although that may be the better practice and would help assure that the accused receives a constitutionally adequate *Miranda* warning while, at the same time, enhancing the prosecution’s ability to meet its burden to prove voluntariness, we leave the imposition of any such procedural requirement to the legislature and to individual law enforcement agencies...

“...We do hold that, in the context of a custodial interrogation conducted at the station house or under similarly controlled circumstances, the failure of the police to preserve some tangible record of his or her giving of the *Miranda* warning and the knowing, intelligent waiver by the detainee will be viewed with distrust in the judicial assessment of voluntariness under the totality of circumstances surrounding the confession or admission. That is all the more so where the evidence demonstrates that, as here, the police officer made a conscious

decision not to secure a written waiver or otherwise preserve his giving of the *Miranda* warning and the detainee's waiver on the premise that to do so would alert the accused to exercise his rights and, thus, jeopardize the interrogation."

In *State v. Cassell*, 932 P.2d 478, 482-83 (Mont. 1996), Cassell appealed his conviction on the ground that his tape recorded confession should have been suppressed because (among other reasons) he was not advised of his *Miranda* rights. The officers testified that Cassell was informed of and waived his *Miranda* rights, and that they did not have him sign a written waiver because it was not the common practice in the county to do so, and the tape recording did not reveal the warnings. The majority of the Supreme Court affirmed the trial judge's ruling that Cassell was given and waived his *Miranda* rights, and no impermissible tactics were used.

Justices Terry N. Trieweler and William E. Hunt, Sr. wrote a special concurring opinion, in which they said (932 P.2d at 482- 83):

"In this case, Cassell was interviewed on three separate occasions. Portions of two interviews were recorded, including his incriminating statements. However, for some reason, when he was advised of his rights pursuant to the Fifth Amendment to the United States Constitution during the first interview, and when he was reminded of those rights during the second interview, the recorder had not been turned on. Therefore, there is no record that Cassell was informed of his rights, and there is no record that he waived those rights.

"The investigating officers contend that Cassell was advised of his rights and did waive them, but that that part of the conversation was not recorded because during that time they were establishing rapport with the suspect. Cassell denies that he was given any warning, and denies that he waived his rights. The trial court, and this Court on review, are required to speculate about what actually transpired, based on the relative credibility of the witnesses to the conversation. It is no secret that law enforcement will nearly always win that contest. Therefore, they have no incentive to record that part of the conversation, and it follows, they have little incentive to actually give the required advice.

“On the other hand, assuming the advice was given, that it was understood, and that the rights were waived, why not record the conversation and avoid the inevitable challenge to the admission or confession? That simple practice would have saved time for the prosecuting attorney, the defense attorney, the trial court, and this Court because it would have established with certainty that Cassell’s statement was either voluntary or that it should be suppressed, in compliance with the Constitution, as applied in *Miranda v. Arizona*.

“The excuse given for not recording Cassell’s waiver of his Fifth Amendment rights is equally inadequate. In this case, his interrogators wanted to establish a rapport with him. However, that apparently having been accomplished, nothing prevented them from obtaining an acknowledgment from Cassell, once the recorder had been turned on, that he had been advised of his rights and had waived them. Certainly, that kind of acknowledgment could not have been any more disturbing to him than being asked during a tape recorded interview whether he committed deliberate homicide.

“This is now the second case in which we have dealt with the issue of whether it is necessary to record *Miranda* warnings and Fifth Amendment waivers, where feasible. I would conclude, as the Minnesota Supreme Court did in *State v. Scales* (Minn. 1994), 518 N.W.2d 587, that following two such admonitions, further refusal to record custodial interrogations is unreasonable and should result in suppression of any incriminating statements made during those interrogations....

“When the means is available, as it was in this case, there is no practical justification for the State’s failure to record a custodial interrogation. By its failure to do so, it jeopardizes the prosecution by risking suppression of incriminating statements which have been legally obtained. Just as importantly, it makes any determination that detainees have been illegally questioned virtually impossible. Neither outcome is acceptable when the means to avoid it is readily available.

“Therefore, in the future, I will follow the rule from [*State v.*] *Scales* [Minnesota] and vote to suppress all criminal

admissions made during custodial interrogations when there is neither a written waiver of the detainee's rights, nor an electronic record of the State's advice and the detainee's response, assuming it is feasible to do one or the other."

In *State v. Worrall*, 976 P.2d 968, 978 (Mont. 1999), the Supreme Court made the following observations about the police failure to use easily available electronic recordings to memorialize their contacts with suspects:

"...this problem simply does not have to exist at all. We doubt that there is a police station or sheriff's office in Montana that does not have ...a tape recorder for recording those [custodial statements], and, in many cases, audio-visual recording equipment. Memorializing the reading of an accused's rights, or an accused's confession or, as in the case at bar, a citizen informant's statement in the controlled environment of the station house, absent exigent circumstances, is neither onerous nor a high-tech enterprise. Importantly, doing so avoids the sort of 'who said what to whom' challenges that require trial courts to be arbiters of the credibility disputes that are nearly always resolved against the defendant."

Nebraska

Nebraska has a statute relating to recording custodial interrogations.

Citation: Neb. Rev. Stat. Ann. §§29- 4501-08 (2008).

General rule: Electronic recordings are required of custodial interviews in a place of detention of suspects relating to crimes resulting in death, or felonies involving sexual assault, kidnapping, child abuse or strangulation, and statements regarding the suspect's rights described in section 29-4501 or the waiver of those rights. §4503.

Legislative findings: The legislature finds that electronically recording statements made during custodial interviews is an effective way to document suspects' waivers of rights to remain silent, or requests to have an attorney present or appointed; to reduce speculation as to the content of statements made during custodial interviews; to aid law enforcement in analyzing and reflecting untruthful statements; and to aid the fact finder in determining whether a statement was freely made. §4501.

Definitions: “Custodial interrogations,” “Electronically record” (audio, digital or video recording device) “Place of detention,” and “Reasonable exception.” §4502.

Circumstances that excuse recording: A statement made when it was not practicable to electronically record the statement; recording equipment could not be reasonably obtained; the suspect refused to have the statement electronically recorded; equipment used to electronically record the statement malfunctioned; law enforcement officers reasonably believed that the crime for which the person was taken into custody was not designated in the statute; statements obtained in another state in compliance with the law of that state; and statements obtained by a federal law enforcement officer in compliance with federal law, not in an attempt to circumvent this statute. §§4502(4), 4507.

If a defendant testifies contrary to a statement he/she made during an unrecorded custodial interview, the statement may be used for purpose of impeachment if it is shown that the statement was freely, knowingly, voluntarily and intelligently made. §4505(1).

Consequences of unexcused failure to record: If a law enforcement officer fails to make a recording as required, “such failure shall not bar the use of any evidence derived from such statement if the court determines that the evidence is otherwise admissible.” §4506. Except as otherwise provided in sections 29-4505 to 4507, if a law enforcement officer fails to comply with section 29-4503, a court shall instruct the jury that they may draw an adverse inference for the law enforcement officer’s failure to comply with such section.” §4504. However, “A jury instruction shall not be required if the prosecution proves by a preponderance of the evidence that there is a reasonable exception (sic) for there not being an electronic recording.” §4505(2).

Preservation: None given.

A federal case.

In *United States v. Prokupek*, 632 F.3d 460 (8th Cir. 2011), the defendants were stopped by a Nebraska state trooper, who searched the car and found illegal drugs. In the resulting federal criminal case, the defendants moved to suppress the evidence. The issue turned upon whether the traffic stop was for the driver’s failing to signal his exit from the

interstate (in which case the stop was illegal), or for his failure to signal his turn on to a county road after he left the interstate (in which case the stop was legal). The Court of Appeals for the Eighth Circuit reversed the District Court's denial of the motions to suppress, because a recording device in a camera mounted in the trooper's squad car recorded the trooper saying he stopped the car because of the driver's failure to signal his exit from the freeway. Circuit Judge Raymond W. Gruender wrote for the panel (632 F.3d at 463):

"...In the recording made by the dashboard camera, trooper Estwick can be heard saying to Prokupek...that 'you signaled your turn,' which we are convinced can refer only to the vehicle's turn from the exit ramp on to the county road. This plainly contradicts trooper Estwick's suppression-hearing testimony that Prokupek failed to signal his turn on to the county road.

"...Because Trooper Estwick's testimony at the hearing is so clearly and affirmatively contradicted by his own statement at the time of the events, in the absence of any explanation for this contradiction that is supported by the record, we conclude that Trooper Estwick's after-the-fact testimony at the suppression hearing is 'implausible on its face,' [citing case], and we are left with the 'firm and definite conviction that a mistake has been made,' [citing case]...

"...Therefore, the stop violated the Fourth Amendment, [citing case], and the drugs and drug paraphernalia that eventually were seized are tainted fruit of this violation and must be suppressed, [citing case]."

Nevada

Nevada has no statute or court rule relating to recording custodial interrogations.

The Nevada Advisory Committee on the Administration of Justice, chaired by a state Supreme Court Justice, held a meeting in June 2016. The Chief Deputy Attorney General presented a memorandum to the Committee summarizing the state statutes, court rules and case law on the

electronic recording of custodial interrogations. The memorandum states in part:

“Courts in numerous other states, while declining to mandate the recording of custodial interrogations, have noted the strong policy considerations that favor recording as a standard law enforcement practice. Recording can reduce the time spent in court resolving disputes over whether the defendant properly received *Miranda* warnings, what occurred during an interrogation, and the actual content of a statement.” [Citing cases.]

“Most law enforcement agencies, including those in Nevada, have adopted policies and procedures governing the recording of custodial interrogations, even in the absence of a legal mandate. On May 12, 2014, the U.S. Department of Justice adopted a new policy establishing “a presumption that the custodial statement of an individual in a place of detention with suitable recording equipment, following arrest but prior to initial appearance, will be electronically recorded” (Subject to certain exceptions.”

The presiding Justice of the NV Advisory Committee stated that the newly formed NV Commission on Statewide Rules of Criminal Procedure would add this matter to its agenda. That Commission was created to address a lack of uniformity of criminal procedure rules across the state. The Commission membership is comprised of experienced legal professionals and members of the NV judiciary who are focused on examining key, criminal procedure concerns and making recommendations for improvement on a statewide level.

A Nevada case.

In *Jimenez v. State*, 775 P.2d 694, 696 (Nev. 1989), while ruling that the state constitution did not require electronic recording of custodial interviews, the Supreme Court stated, “...requiring recordings of statements would alleviate the problems of credibility of police officers who claim a defendant made incriminating statements...”

Departments we have identified that presently record:

Boulder City	Henderson	Reno
Carlin	Lander CS	Sparks
Douglas CS	Las Vegas Metro	Washoe CS
Elko	Nevada DPS	Wells
Elko CS	North Las Vegas	Yerington

New Hampshire

New Hampshire has no statute or court rule relating to recording custodial interrogations.

A New Hampshire case.

In *State v. Barnett*, 789 A.2d 629, 632-33 (N.H. 2001), the Supreme Court, using its supervisory powers, ruled:

“In order to admit into evidence the tape recording of an interrogation, which occurs after *Miranda* rights are given, the recording must be complete. The police need not tape the administration of a defendant’s *Miranda* rights or the defendant’s subsequent waiver of those rights. However, immediately following the valid waiver of a defendant’s *Miranda* rights, a tape recorded interrogation will not be admitted into evidence unless the statement is recorded in its entirety. Unlike *Stephan* [Alaska] and *Scales* [Minnesota], failure to record the complete interrogation will not result in the wholesale exclusion of the interrogation. [Citing *Stephan* and *Scales*.] Rather, where the incomplete recording of an interrogation results in the exclusion of the tape recording itself, evidence gathered during the interrogation may still be admitted in alternative forms, subject to the usual rules of evidence.”

Discussion: The net result of the *Barnett* ruling is that if a recording is made of part but not all of a custodial statement, the partial recording is not admissible. However, oral testimony is admissible concerning the entire interview, including testimony concerning the portion that was recorded. Therefore in New Hampshire there is no limitation on the introduction into evidence of oral testimony as to what was said during a custodial interview, The only compulsion on law enforcement to record custodial interviews is

that, if the prosecution wishes to introduce a part of a recorded custodial interview, the entire interview must be recorded.

Departments we have identified that presently record:

Carroll CS	Keene	Plymouth
Concord	Laconia	Portsmouth
Conway	Lebanon	State Police
Enfield	Nashua	Swanzey

New Jersey

New Jersey has a Supreme Court rule relating to recording custodial interrogations.

Citation: New Jersey Supreme Court Rule 3:17 (2005).

General rule: Unless a specified exception is present, all custodial interrogations conducted in a place of detention must be electronically recorded when the person is charged with one of the specified felonies. §(a).

Circumstances that excuse recording: Recording is not required when electronic recording is not feasible; the suspect indicated he/she would participate only if not recorded; and the interrogators have no knowledge that a crime for which a recording is required has been committed. In a pretrial hearing, the State has the burden of proving by a preponderance of the evidence that an exception applies. §(b).

Consequences of unexcused failure to record: “The failure to electronically record a defendant’s custodial interrogation in a place of detention shall be a factor for consideration by the trial court in determining the admissibility of a statement, and by the jury in determining whether the statement was made, and if so, what weight, if any, to give to the statement.” §(d). “In the absence of an electronic recordation required under paragraph (a), the court shall, upon request of the defendant, provide the jury with a cautionary instruction.” §(e).

The jury instructions set forth in an appendix to the rule include the following:

“Our rules require the electronic recording of interrogations by law enforcement officers when a defendant is charged with [insert applicable offenses]. This is done to ensure that you will have before you a complete picture of the circumstances under which an alleged statement of a defendant was given, so that you may determine whether a statement was in fact made and accurately recorded. Where there is failure to electronically record an interrogation, you have not been provided with a complete picture of all the facts surrounding the defendant’s alleged statement and the precise details of that statement. By way of example, you cannot hear the tone or inflection of the defendant’s or interrogator’s voices, or hear first hand the interrogation, both questions and responses, in its entirety. Instead you have been presented with a summary based upon the recollections of law enforcement personnel. Therefore, you should weigh the evidence of the defendant’s alleged statement with great caution and care as you determine whether or not the statement was in fact made and if so whether it was accurately reported by State’s witnesses, and what, if any, weight it should be given in your deliberations. The absence of an electronic recording permits but does not compel you to conclude that the State has failed to prove that a statement was in fact given and if so, accurately reported by State’s witnesses.”

Preservation: None given.

New Mexico

New Mexico has a statute relating to recording custodial interrogations.

Citation: N.M. Stat. Ann. §29-1-16 (2006).

General rule: State and local law enforcement officers conducting custodial interrogations in New Mexico involving persons suspected of committing a felony, when reasonably able to do so, shall record the interrogations in their entirety. If conducted in a police station, interrogations shall be recorded by “audio or visual or both, if available.” §16-A, D.

Circumstances that excuse recording: Officers shall make recordings unless there is “good cause not to electronically record the entire custodial interrogation and [the officer] makes a contemporaneous written or electronic record of the reasons for not doing so.” Examples of good cause are that electronic recording equipment was not reasonably available; the equipment failed and obtaining replacement equipment was not feasible; and the suspect refused to be recorded. Recordings are not required of statements used for impeachment purposes. §16-B,F.

Consequences of unexcused failure to record: “This section shall not be construed to exclude otherwise admissible evidence in any judicial proceeding.” §16-I.

Preservation: None given.

Discussion: There is at present no consequence provided for a law enforcement agency failing to follow the statutory recording statute. I have made a written recommendation to the members of the Supreme Court that they instruct the Court’s pattern jury instruction committee to prepare a jury instruction dealing with the consequences attendant upon a failure to record a custodial interrogation without a statutory excuse for failing to do so.

A New Mexico case:

In *State v. King*, 300 P.3d 732, 763 (N.M. 2013), a defendant indicted for first degree murder, moved to suppress statements he made to police officers during a videotaped interrogation. The trial court granted the motion because the defendant invoked his right to remain silent. Based upon the videotape, the New Mexico Supreme Court affirmed, saying,

“The district court’s grant of King’s motion to suppress is affirmed because King unambiguously invoked his right to remain silent and law enforcement did not scrupulously honor his right to remain silent by immediately ceasing the interrogation.”

New York

New York has no statute or court rule relating to recording custodial interrogations.

A number of different organizations in New York have been involved in the subject of recording custodial interviews, hence the following discussion is presented by organization.

Recommendation of the State Defenders Association in 2003:

“...in order to promote the orderly and fair resolution of criminal prosecutions, supports the passage of a rule of law mandating uninterrupted electronic recording throughout the interrogation process of individuals by law enforcement personnel.”

Recommendation of the committee to review the conviction of Jeffrey Deskovic in 2007:

In 1991, 17 year old Jeffrey Deskovic was convicted by a Westchester County jury for rape and murder. The trial judge, expressing concern as to Deskovic's guilt, imposed the minimum sentence of Deskovic was sentenced to 15 years to life imprisonment. The conviction was affirmed by the New York reviewing courts, and certiorari denied in 2001 by the U. S. Supreme Court.

Years later, a newly elected Westchester District Attorney agreed to test DNA samples from the case against State and federal databases. The test established a match with a man then serving a life sentence for an unrelated murder, who then confessed to the rape and murder for which Deskovic had been convicted. On motion of the District Attorney, the case against Deskovic, then 33 years old, was dismissed on the ground of actual innocence.

The District Attorney appointed a committee to inquire into the circumstances surrounding Deskovic's conviction. The Committee members were two retired state court judges, a former Richmond County District Attorney, and a Supervising Attorney, Criminal Appeals Bureau, The Legal Aid Society of New York City.

The Committee's report was filed in June 2007. The conviction was based upon statements attributed to Deskovic by several police officers, some of which were recorded, but the portions in which the officers testified Deskovic made damaging admissions and his confession were not recorded, with no explanation given for not recording. Thus, the Report states (pages 14-15, 33):

“Deskovic’s January 25th statement was far and away the most important evidence at the trial. Without it, the State had no case against him. He would never have been prosecuted for killing Correa. He would never have been convicted. He would have never have spent a day – let alone 16 years – in prison. Reasonable minds can differ about the credibility of the police explanations for sporadically recording Deskovic’s January 10th statement. No similar controversy exists about the police rationale for failure to record any of the January 25th polygraph examination. The police simply offered none....The unexcused and inexcusable failure to provide jurors with this essential tool looms large in explaining Deskovic’s wrongful conviction....

“The Deskovic case unmistakably demonstrates the desirability of videotaping the entire interrogation of all persons suspected of all persons suspected of involvement in a violent felony.”

Resolution of the State Bar Association House of Delegates in 2009:

“...that the New York State Bar Association urges all law enforcement agencies videotape the entirety of custodial interrogations of crime suspects in the most serious cases at police precincts, courthouses, detention centers, or other buildings where suspects are held for question; and be it

“Further resolved that the [NYSBA] urges the New York State Legislature to enact laws requiring the videotaping of the entirety of custodial interrogations of crime suspects in the most serious cases at police precincts, courthouses, detention centers, or other buildings where suspects are held for questioning, or, where videotaping is impractical, to require the audio taping of the entirety of such custodial interrogations, and to provide appropriate remedies for non-compliance, and to appropriate funds to implement this legislation.”

Report of the NY Bar Association Task Force on Wrongful Convictions 2009:

“custodial interrogations of all felony-level crime suspects should be electronically recorded in their entirety.”

NY Bar Association Committee on Criminal Justice Operations in 2010 announced support of bills introduced in the General Assembly to require recording of custodial interrogations. (A.5213 and S.7877, neither bill passed.)

Actions of the NY State Associations of District Attorneys, Sheriffs, Chiefs of Police and State Police, and NY City Police Department:

At a 2010 press conference, these organizations announced support for “the practice of video recording interrogations of suspects who are in custody in their entirety,” embodied in “*New York State Guidelines for Recording Custodial Interrogations of Suspects*,” described below. The press release identifies 33 counties outside of New York City which have a video program, and six others in process of developing programs. The release also contains the following quotations:

President, State District Attorneys Association:

“The more than 40 counties that have voluntarily adopted the video recording of interrogations demonstrate law enforcement’s commitment to a program that will benefit public safety and safeguard the rights of the accused...The additional funding pledged by DCJS today will be critical in helping us to move forward in recording statements around the state.”

Commissioner, NY City Police Department:

“As technology improved and better equipment became available, it made sense for the department to test video recording of custodial interrogations. Anything that supports the integrity of a criminal confession and ensures justice should be thoroughly evaluated, which is what we intend through this pilot program.”

Acting Commissioner, Department of Criminal Justice Services:

“Governor Paterson’s administration has made a commitment to funding effective, proven programs that reduce crime and enhance the integrity of the criminal justice system. This initiative certainly meets both those aims...it is my hope that [these funds] will help keep the momentum going so that law enforcement can make statewide video recording a reality.”

Acting State Police Superintendent:

“We believe that the videotaping of interrogations, where possible and practical, is an effective law enforcement tool.”

President, Sheriffs’ Association:

“The Sheriffs of New York are pleased to have joined with our partners in law enforcement across this state to develop best practices for video recording of custodial interrogations.”

President, Association of Chiefs of Police:

“Electronic recordings of custodial interrogations enhance the investigative process and assist in the investigation and prosecution of criminal cases. As additional funding and resources become available to assist those agencies who are not already utilizing electronic recordings, the ability to conduct electronic recorded interrogations will expand throughout the state.”

President-Elect, State Bar Association:

“The New York State Bar Association has, for more than five years, urged that custodial interrogations be recorded. It has collaborated with several District Attorneys in granting them funds for a pilot program project. We are pleased that well over half of the state’s District Attorneys and many others in the law enforcement community now believe that this practice promotes justice in the prosecution of criminal cases.”

State Department of Criminal Justice Services, Guidelines for Recording Interrogations of Suspects 2010:

“On a voluntary basis, where resources permit, law enforcement agencies around the State are embracing video recording of interrogations as an enhancement to the criminal justice system. Video recordings of interrogations are currently being conducted in over 30 counties in New York State, with more counties soon to join in. With additional funding and resources, the ability to conduct video recorded interrogations will grow throughout the State.

“Purpose: The purpose of this policy is to establish broad guidelines for the electronic recording of suspects’ statements in custodial interrogations and the associated use, management, storage and retrieval of such recordings. While these guidelines endorse the practice of recording custodial interrogations, they also recognize the dynamics of police work, field operation and suspect encounters. These guidelines provide latitude for officer in conducting interrogations at times that may not lend themselves to the availability or recording equipment.

“Variations by County and Department: ...Police and district attorneys are encouraged to modify these protocols to conform to their specific needs, while being mindful of the intent of the procedures...

“Intent: 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.”

“Electronic Recording: A digital, electronic video or other recording on electronic media. (Definitions §2.)

“Qualifying Offense: (List crimes that the Department requires officers to record, at a minimum, if an interrogation is conducted). (Definitions §8.)

“When to Record: All members of the (name) Department shall, whenever possible and practicable, utilize the electronic recording system located at (location of interview) when conducting a custodial interrogation of someone suspected of a qualifying offense.” General §1.

The suspect need not be informed of the recording. If the suspect inquires, the officer “should answer truthfully and continue the interrogation.” General §3.

“The recording equipment should be turned on prior to the suspect being placed within the interview room and should be turned off only after the suspect has left the room after the interrogation is completed.” Recording the Interrogation §3.

Circumstances that excuse recording: Examples are the equipment malfunctions; equipment is not available; the officer is not aware that a qualifying offense occurred; statements are made during an interrogation conducted at a location not equipped with recording devices, and the reason for using that location is not to subvert the policy; statements made after the suspect has refused to participate in the interrogation if it is recorded – the refusal should be recorded, and the interrogation continued without recording; inadvertent error or oversight occurs that was not the result of intentional conduct of the officer. General, §2. After the interrogation is completed, a written statement may be obtained, and that should be recorded. §6.

Preservation: The recording shall be labeled and copies made according to Department protocols; the original should be appropriately vouchered in accordance with Departmental evidence procedures, and the original retained according to the Department’s retention policy. §§1-4.

Consequences of unexcused failure to record: None given.

Division of Criminal Justice Services (DCJS) Video Recording of Statements Program 2010:

In May 2011, the DCJS announced that “it has invested more than \$2 million in federal Byrne JAG [Justice Assistance Grant] money to assist local law enforcement” to “support video recording of custodial interrogations” because “Recordings capture critical evidence needed in the investigation and prosecution of criminal cases and preserve information used to resolve a person’s claim of innocence.”

The DCJS press release contains statements in support of recording by the DCJS Acting Director (“Video recording custodial interviews allows local law enforcement to preserve evidence, safeguard the rights of the

accused and protect police officers from false claims. I commend police and prosecutors from agencies large and small for embracing this important public safety initiative”); the President of the State Association of District Attorneys (the Association “embraces the video recording of interrogations. These generous grants from DCJS will go a long way in helping to support law enforcements’ efforts to instill and enhance the technology needed to implement the goal of video recording interrogations”); the President of the Chiefs of Police (“Electronic recordings of custodial interrogations enhance the investigative process and assist in the investigation and prosecution of criminal cases” which “not only promotes safe communities but builds the public’s confidence in the criminal justice system as well”); the President of the State Sheriffs Association (“Video recording of custodial interviews creates a permanent record of exactly what occurred, and prevents disputes about officer conduct, the treatment of suspects and statements they made”); and the President of the State Bar Association (“Recording an interrogation on videotape can expose a false confession – or remove doubt about the fairness of the interrogation process. In either case, justice is served”).

The DCJS statement concludes, “With the awarding of these grants, 58 of the state’s 62 counties will have video recording capabilities.”

The DCJS Program directive provides that the Byrne Justice Assistance funds are distributed to the county District Attorneys, who “will work with all law enforcement agencies, as appropriate, to select the agencies who will receive the video recording equipment. Each county should strive for maximum coverage within its jurisdiction. The District Attorney in each county will be responsible for the overall management of the project...Grant funds from this initiative can be used for equipment and installation costs only.”

State Justice Task Force on Criminal Justice Reform, 2009:

In 2009, the Chief Judge of the New York Court of Appeals announced the creation of the Justice Task Force, whose mission is to analyze the causes of wrongful convictions, and to recommend measures to guard against future recurrences. He appointed members from a diverse group of knowledgeable persons, including judges, lawmakers, prosecutors, police officials, scientists, defense lawyers, academics, and others. Among other subjects, the Task Force heard presentations and considered recommendations on recording custodial interrogations.

Task Force Recommendations Regarding Recording of Custodial Interrogations, 2012. The chief points are:

“...unless an exception applies, all custodial interrogations of suspects of qualifying offenses occurring at a place of detention must be recorded...in an appropriate setting suitable for video recording of such interrogations.”

“...the recording requirement apply to interrogations of suspects relating to the investigation of all A-1 non-drug felonies, all violent B felonies...(homicide and related offenses), and all violent B felonies...(sex offenses).”

A list of exceptions is provided, for example, the suspect asks not to be recorded, equipment malfunctions, equipment is unavailable because already in use, etc.

“...the hearing court consider failure to record as a factor in determining the admissibility of the relevant statement at trial.”
If an unrecorded statement is admitted, “a cautionary jury instruction must be given by the trial court.”

“...any legislation requiring the recording of custodial interrogations must be accompanied by a declaration regarding the need for adequate funding.”

In a veiled reference to the Guidelines proposed by state law enforcement agencies, described above, the Task Force wrote:

“...the Task Force ultimately determined that electronic recording of interrogations was simply too critical to identifying false confessions and preventing wrongful convictions to recommend as a voluntary rather than mandatory reform.”

State funding for recording equipment, 2013:

In July 2013, the Governor announced that \$1 million was to be made available to law enforcement agencies to fund the purchase and installation of equipment for video recording of interrogations. The announcement acknowledged the inevitability of variations in the cases in which recordings will be made among the counties:

“In addition to administering the grant funds, district attorneys must partner with police agencies in their counties to develop video recording protocols to detail, among other things, the type of crimes with which an individual is charged that would require the interview to be recorded.”

The funding will be allocated by grants; one of the prerequisites is that the agency provide existing or planned protocols regarding recording of statements; and an example protocol is attached to the grant application. The application instructions make it clear that the protocols are not required or expected to be uniform:

“Each recipient agency will collaborate with the District Attorney’s office to develop and implement a departmental protocol regarding the recording of statements.”

The NY State Assembly:

Bills requiring electronic recording of custodial interrogations have been introduced in various sessions of the General Assembly, but none has passed.

In 2015 a bill mandating statewide recording was passed by the Senate but not the Assembly, and was carried over to the 2016 session.

Discussion: Despite many recommendations for statewide recording of custodial interrogations, the necessary legislation has not been enacted by the General Assembly. Instead, funds have been allocated to various departments, with the understanding that each department may refuse the funding, and if accepted, each may adopt its own unique oral or written rules, thus inviting statewide disparity. No official information as to the recording practices of New York’s departments exists. Disparities in guidelines among departments that record are explicitly invited. No agency is tasked with tracking compliance with regulations or protocols that have been adopted.

New York cases

In *People v. Durant*, No. 166 (Ct. App. 2015), the Court of Appeals held that the trial court is not required to give a cautionary “adverse inference” jury instruction in every case in which the police could have, but failed to, make an electronic recording of a custodial interrogation.

However, in dicta the Court emphasized the value of electronic recordings when the equipment is available (pp. 18-20):

“Finally, while we do not adopt defendant’s proposal to issue a judicial mandate for adverse inference instructions in all cases involving the failure to record interrogations, we recognize the broad consensus that electronic recording of interrogations has tremendous value, and we note the commendable efforts of the bar, the judiciary and the Legislature to address the complexities of this relatively new frontier of the criminal justice system. Certainly, there is widespread agreement that electronic recording of custodial interrogations promotes the fair administration of justice. Because an electronic recording of a custodial interrogation yields a reliable, objective record of the police’s interview with a defendant, the recording ensures that the jury at the defendant’s trial may evaluate every aspect of the defendant’s demeanor, his or her statement and his or her treatment at the hands of the police, thereby enabling the jury to make a fully informed determination of the voluntariness and meaning of the defendant’s statement. Importantly, according to experts and stakeholders in the field of criminal justice, recordings can reveal circumstances that may have prompted suspects to make false confessions, which are a leading cause of wrongful convictions (see New York State Bar Association’s Task Force on Wrongful Convictions, Final Report at 6 [April 2009] [available at <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26663>, last visited 11/4/15]; see also Steven A. Drizin and Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 Drake L Rev 619, 622-624 [2004]).

“Fortunately, in recognition of those widely- acknowledged benefits of recording interrogations and the need for a legal framework governing this area, stakeholders in the criminal justice system and government have come together to begin addressing this critical issue. Many bar groups, district attorneys, defense lawyers, judicial task force members and legislators have already crafted worthy proposals to balance various policy interests and create what, in their judgment, is a

fair, practical and enduring framework for electronic recording of interrogations (see e.g. *New York State Justice Task Force, Recommendations Regarding Electronic Recording of Custodial Interrogations* at 3-4 [2012] [available at <http://www.nyjusticetaskforce.com/ElectronicRecordingOfCustodialInterrogations.pdf>, last visited 11/4/15]; Steven Banks, The Legal Aid Society, *Testimony Before the Council of the City of New York* at 7-10 [Feb 12, 2013] [available at <http://www.legal-aid.org/media/171367/2013.02.12.pdf>, last visited 11/4/15]; District Attorneys Association of the State of New York, *New York State Guidelines for Recording Custodial Interrogations of Suspects* at 1-8 [2010] [available at <http://www.daasny.com/wp-content/uploads/2014/08/Video-Recording-Interrogation-Procedures-Custodial-FINAL-12-8-10.pdf>, last visited 11/4/15). The Legislature is currently considering the enactment of laws based on the important work of those stakeholders (see 2015 NY Senate Bill S2419; 2015 NY Assembly Bill A7063). By drawing policy-based lines that need not follow the open-ended logic of defendant in this case, the Legislature can craft legal principles governing recording and adverse inference charges that realize all of the benefits, and none of the drawbacks, of defendant's proposed judicial rule-making. Consequently, in the absence of existing law compelling a trial court to issue an adverse inference charge in every case in which the police have failed to take available measures to record an interrogation, we leave it to the Legislature to consider whether or not to change the law on this particular issue."

In a concurring opinion, the Chief Judge wrote (pp.1-4):

"I agree with the majority that the trial court did not abuse its discretion as a matter of law by denying defendant's request for an adverse inference instruction based on the failure of the police to electronically record his interrogation. I further agree that there is currently no requirement that such instructions need be given in all cases where a recording was not made. However, I write separately to emphasize that things have changed in many respects since defendant was questioned by the police in 2008. Technology has advanced and significant

resources have been expended to equip law enforcement with the ability to video interrogations in the effort to increase transparency and prevent wrongful convictions. Indeed, the overwhelming national trend is toward requiring video recording of custodial interrogation of suspects, either as a matter of a State's duty of fairness or to protect the rights of defendants. Therefore, going forward, trial courts should give serious consideration as to whether adverse inference charges are indicated and, at least in cases involving serious felonies, it may well be that the grant of a defendant's request and the delivery of the charge is, as a matter of law, the only appropriate course.

"The many benefits of recording custodial interrogations are essentially uncontested. The practice holds significant advantages for the entire criminal justice system. First and foremost, recording interrogations reduces the instances of false confessions and, by extension, wrongful convictions. A video recording of the entire proceeding can also obviate any claim that a suspect's confession has been obtained through improper police tactics. The jury's ability to see exactly what transpired during an interrogation will improve the accuracy of the fact-finding process and facilitate appellate review. The increased transparency will also promote public confidence in the administration of justice. As the majority observes, there is no dispute that the recording of interrogations is the better practice (see majority op. at 2).

"In accordance with the national trend, courts in other states have grappled with the absence of recorded statements and, in the face of legislative inaction, have drawn upon their supervisory authority to fashion remedies. For instance, New Jersey's high court established a committee to study and make recommendations on the electronic recording of interrogations (see *State v Cook*, 179 NJ 533, 847 A2d 530 [2004] and ultimately adopted a rule, generally requiring electronic recording of interrogations that are conducted in police stations or other 'places of detention,' for individuals who are charged with serious felonies (see New Jersey Rules Governing Criminal Practice R 3:17; see also Ind R Evid 617). The failure

to record allows the trial court to consider whether the statement should be admissible and is a factor for the jury to consider in determining whether the statement was actually made and, if so, what weight it should be accorded (rule 3:17 [d]; see also Ark R Crim P 4.7). Where the statement was not recorded, the defendant is entitled to a cautionary instruction upon request (see Rule 3:17 [e]).

“The Massachusetts Supreme Court has similarly determined that a cautionary jury instruction is appropriate at a defendant’s request, where the prosecution introduces evidence of an unrecorded custodial interrogation (see *Commonwealth v DiGiambattista*, 442 Mass 423, 447, 813 NE2d 516, 533 [2004]). The instruction advises the jury ‘that the State’s highest court has expressed a preference that such interrogations be recorded whenever practicable, and caution [s them] that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant’s alleged statement with great caution and care’ (442 Mass at 447-448, 813 NE2d at 533-534).

“Other state high courts have determined, also in the exercise of their supervisory authority, that custodial interrogations must be recorded and that the failure to do so can result in the suppression of the statement at trial (see *State v Scales*, 518 NW2d 587, 592 [Minn 1994]; *In re Jerrell C.J.*, 283 Wis 2d 145, 172, 699 NW2d 110, 123 [2005] [applicable only to juveniles, but the Wisconsin Legislature subsequently enacted separate legislation providing for a jury instruction for felony suspects (Wis Stat Ann §§ 968.073, 972.115)]. Finally, Alaska has held that it is a state due process violation for law enforcers to fail to record a custodial interrogation, where such recording is feasible (see *Stephan v State*, 711 P2d 1156, 1159 [Alaska 1985]).

“Despite the availability of these types of remedies in states as diverse as Alaska and Arkansas, there is currently no such measure in place in New York. However, electronic recording only becomes easier all the time and there is no legitimate argument why this best practice should not become universal in

the interest of a fair and impartial justice system. Looking ahead, then, when a law enforcement agency has the capability, but fails to create a video record of a custodial interrogation, a judicial response will be warranted.”

People v. Thomas, 8 N.E.3d 308 (N.Y. Ct. App. 2014), provides an example of how a videotaped interrogation can lead to a result that would have been unlikely without a recording. The Court of Appeals unanimously ruled that a confession resulting from a 9 ½ hour videotaped statement taken from the father of a deceased four month old baby should have been suppressed, and a new trial held. The Court said (8 N.E.3d at 316-17):

“Defendant’s inculpatory statements were also inadmissible as ‘involuntary made’ within the meaning of CPL [Criminal Procedure Law] 60.45.(2) (i). The various misrepresentations and false assurances used to elicit and shape defendant’s admissions manifestly raised a substantial risk of false incrimination...Every scenario of trauma induced head injury equal to explaining the infant’s symptoms was suggested to defendant by his interrogators. Indeed, there is not a single inculpatory fact in defendant’s confession that was not suggested to him.”

Departments we have identified that presently record:

Binghamton	Glenville	NY State – Oneonta
Brockport	Greece	NY State – Sidney
Broome CS	Greene	Rensselaer
Cayuga Heights	Herkimer	Rochester
Chautauqua	Irondequoit	Rotterdam
Chenango	Jefferson	Schenectady
Clinton	Madison	Sullivan
Columbia	Monroe CS	Tioga
Deposit	Niagara	Tompkins CS
Dryden	Oneida	Troy
Dutchess	Ontario	Ulster
Endicott	Orange	Vestal
Franklin	Otsego	Washington

Fulton
Genesee

NY State – Ithaca

Wyoming

North Carolina

North Carolina has two statutes relating to recording custodial interrogations.

Citation: N.C. Gen. Stat. §15A-211 (2007, 2011).

General rule: The statute enacted in 2007 required recording of custodial interviews of homicide suspects. In 2011, an amendment was enacted expanding the recording requirement to custodial interviews of all interrogations of juveniles, and all suspects in “Class A, B1, or B2 felony, and any Class C felony of rape, sex offense, or assault with a deadly weapon with intent to kill inflicting serious injury.” A law enforcement officer conducting a custodial interrogation at a place of detention of a juvenile, and of persons suspected of committing any of the felonies shall make an electronic recording of the interrogation in its entirety. §§(b), (d). Recordings must begin with the *Miranda* advice of rights, and end when the interview has completely finished, except for brief periods of recess upon request of the suspect or interrogator. The recording may be either video or audio, provided that “A video and audio recording shall be simultaneously produced whenever reasonably feasible, provided that a defendant may not raise this as a grounds for suppression of evidence.” §(c)(1). “If the record is a visual recording, the camera recording the custodial interrogation must be placed so that the camera films both the interrogator and the suspect.” §(c)(2). A statement made by a defendant in the course of a custodial interrogation may be presented as evidence against the defendant if an electronic recording was made of the custodial interrogation in its entirety, and the statement is otherwise admissible. §(e).

Statement of legislative purpose: The purpose of this Article is to require the creation of an electronic record of an entire custodial interrogation in order to eliminate disputes about interrogations, thereby improving prosecution of the guilty, while affording protection to the innocent and increasing court efficiency. §(a).

Circumstances that excuse recording: The statute does not apply to statements made during an interrogation conducted in another state by officers of the other state, or statements obtained by federal law enforcement officers; statements given when the officers are unaware that the person is suspected of homicide; or statements used only for impeachment purposes and not as substantive evidence. §(g).

The state may establish through clear and convincing evidence that an unrecorded statement was both voluntary and reliable, and that law enforcement officers had good cause for failing to electronically record the interrogation in its entirety. Good cause includes, but is not limited to, that the suspect refused to have the interrogation recorded, and the refusal was recorded; or the failure to record an interrogation in its entirety was the result of unforeseeable equipment failure, and obtaining replacement equipment was not feasible. §(e).

Consequences of unexcused failure to record: A failure to record as required by the statute shall be considered by the court in adjudicating motions to suppress a statement of the defendant made during or after a custodial interrogation. The failure to record as required shall be admissible in support of claims that the defendant's statement was involuntary or is unreliable, provided the evidence is otherwise admissible. When evidence of compliance or noncompliance with the statute has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine whether the defendant's statement was voluntary and reliable. §(f).

If the judge finds that the defendant was subjected to a custodial interrogation that was not electronically recorded in its entirety, any statement made by the defendant after the non- electronically recorded custodial interrogation, even if made during an interrogation that is otherwise in compliance with this statute, may be questioned with regard to the voluntariness and reliability of the statement. §(e).

Preservation: "The State shall not destroy or alter any electronic recording of a custodial interrogation of a defendant convicted of any offense related to the interrogation until one year after the completion of all State and federal appeals of the conviction, including the exhaustion of any appeal of any motion for appropriate relief or habeas corpus proceedings. Every electronic recording should be clearly identified and catalogued by law enforcement personnel." §(h).

North Dakota

North Dakota has no statute or court rule relating to recording custodial interrogations.

Discussion: In 2010, the North Dakota Commission on Uniform State Laws recommended introduction in the 2011 legislative session the Uniform Electronic Recording of Custodial Interrogations Act, which was drafted by the National Conference of Commissioners on Uniform State Laws (ULC), and adopted by the ULC in July 2010. The Uniform Act was introduced in 2011 (SB 2125). The Senate and House Judiciary Committees held hearings, during which testimony in support of and opposition to the bill was heard. A statute was enacted providing that “the legislative management shall consider studying the feasibility and desirability of adopting the Uniform Electronic Recording of Custodial Interrogations Act. The legislative management shall report its findings and recommendations, together with any legislation necessary to implement the recommendations, to the sixty-third [2013] legislative assembly.”

The Legislative Management Report, filed in January 2013, states (page 236), “The committee makes no recommendation regarding the adoption of the Uniform Electronic Recording of Custodial Interrogations Act.” No electronic recording bill was introduced in the 2013 or 2015 legislative sessions.

Departments we have identified that presently record:

Bismarck	Grand Forks	ND Highway Patrol
Burleigh CS	Grand Forks CS	Richland CS
Cass CS	Hazen	Valley City
Devils Lake	Jamestown	Ward CS
Dickinson	Minot	West Fargo
Fargo	ND Bureau of C.I.	

Ohio

Ohio has no statute or court rule requiring recording custodial interrogations.

Ohio has a statute that authorizes but does not require recording of custodial interrogations.

Citation: Ohio Rev. Code Ann. §2933.81(B) (2010).

General rule: Statements made by a person suspected of a felony described in the statute during a custodial interview that takes place in a place of detention are presumed voluntary if the statements are electronically recorded by audio or video, from the *Miranda* warnings until the questioning has completely finished. The person who has made a recorded statement has the burden of proving that the statements were not voluntary.

Consequence of unexcused failure to record:

“A failure to electronically record a statement as required by this section shall not provide the basis to exclude or suppress the statement in any criminal proceeding, delinquent child proceeding, or other legal proceeding.” §2933.81(C):

Preservation: §2933.81(C): Required through exhaustion of appeals.

Discussion: The Ohio Supreme Court held (5-2) this statute unconstitutional as applied to juveniles because it impermissibly eliminates the state’s burden of proving voluntariness of custodial statements and places the burden on juvenile defendants to prove that the statements were involuntary. *State v. Barker*, 2016 WL 1697911, April 28, 2016. The Court stated in its Conclusion:

“The statutory presumption of voluntariness created by R.C.2933.81(B) does not affect the analysis of whether a suspect knowingly, intelligently, and voluntarily waived his *Miranda* rights prior to making a statement to police. As applied to juveniles, that presumption is unconstitutional...the burden rested squarely on the state to demonstrate both that Barker knowingly, intelligently, and voluntarily waived his *Miranda* rights and that his statements to the police were voluntary.”

The Supreme Court has not yet ruled on the constitutionality of the statute as applied to adults.

In *United States v. Younis*, 890 F.2d 818 (N.D. Ohio 2012), Senior District Judge James G. Carr said of an Ohio state trooper:

“As I also expressed at the conclusion of the hearing, I am deeply concerned about the failure of Trooper Stanbaugh to record his interrogation. I neither know of nor can perceive any valid reason for any law enforcement agency or officer, where the means to do so are readily at hand, not to record his or her activities, whether during a traffic stop or in an interrogation room. Officers sworn to uphold not just the laws, but also the Constitutions of the United States and the State of Ohio have the most important of all motives – fidelity to that oath – for recording such encounters.”

During the hearing on the motion to suppress, Judge Carr made the following statement:

“We’re here for one simple reason that I find inexplicable, and that is the failure to use readily available equipment permanently to record each and every important incident in the chain of events that brings us here. I do not understand why the trooper can leave his machine running for however long it took to head down the road to the turn around, apparently three or four minutes, I don’t know’ but he couldn’t turn it on at least after he saw the first incident. We wouldn’t be here if he had done so. And I haven’t heard a good reason why he did not do so. And I trust that the government will notify the posts in this region that this federal judge expects better of the people whom I and every other citizen of this area are paying to do their job. If nothing else we’ve wasted his time today, time that he could have been spent making the turnpike and I-75 safer for us to travel, for want of four or five minutes of recording. I mean, it was at least, I infer, three hours left on the recording device. He indicated this was his first traffic stop. His time being on duty had been spent conveying an earlier arrestee to and from the Lucas County Jail. There is no excuse for that kind of activity. Likewise, we wouldn’t be here wondering just how well Mr. Younis can or cannot understand English and what was said between Mrs. Younis and her husband in the course of translation if Inspector Stanbaugh had, as apparently many other inspectors state highway patrol and every local agency

that I'm aware of, routinely records everything that happens during an interrogation. It is inexplicable. It is inexcusable. It is no way to treat citizens. It is no way to treat a court of law. It is no way to treat the Constitution of the United States. And if it is the ATF policy as it is the FBI policy deliberately not to record its interrogations, then I suggest you talk with the U.S. Attorney's Office about how I will handle that in the future in any case that goes to a jury in front of me. There is no reason for that practice, none whatsoever. And we would not be here unless that practice had not been involved. I am inclined to find that there's insufficient evidence in this record to find it more likely than not that those traffic offenses occurred. And if I find that the stop was illegal and everything that happened thereafter was illegal. I take the record as I find it. And I simply am not persuaded by the existence of a routine practice not to do something that is easy. It's not innovative. The equipment is in those cars, it can be turned on and off. If you're running out of space on the recording chip, you're in the vicinity of a patrol post, go in, download it, clean it up, and record."

Departments we have identified that presently record:

Akron	Grove City	State University
Attorney General	Franklin CS	Reynoldsburg
Blanchester	Garfield Heights	Springboro
Bratenahl	Grandview Heights	State Highway Patrol
Cadiz	Hartford	Troy
Cincinnati	Hudson	Upper Arlington
Columbus	Miami CS	Wapakoneta
Darke CS	Millersburg	Warren Cs
Dept. of Natural Resources	OH DPS	Westerville
	OH Pharmacy Board	Westlake
Dublin	Ontario	Worthington
Franklin		

Oklahoma

Oklahoma has no statute or court rule relating to recording custodial interrogations.

Discussion: In 2010, the Board of Governors of the Oklahoma Bar Association established a “Commission dedicated to enhancing the reliability and accuracy of convictions.” The Commission’s report of February 2013 includes the following recommendation:

“The Commission urges the Legislature to enact a video-taping law modeled on laws in force in other states. The legislation should include the following provisions:

“Scope. The legislation should require law enforcement agencies to video-tape the entirety of custodial interrogations conducted at a place of detention in connection with the investigation of any crime which falls under 21 O.S. 13.1D. This proposal seeks to balance the cost of providing equipment to video-record interrogations with the desire to provide justice to individuals suspected of serious, violent felony crimes. Since small law enforcement agencies are unlikely to investigate many murders or sexual assaults, in those rare instances when they do, they can call upon the OSBI [OK State Bureau of Investigation] to appear at the local law enforcement agency with recording equipment to meet the mandate prescribed in the legislative proposal. In this way, the cost burden associated with this proposal will be negligible.

“Rebuttable Presumption of Inadmissibility; Grounds for Rebutting the Presumption of Inadmissibility. The legislation should provide that any confession in a case involving one of the enumerated crimes that is not video-recorded shall be presumed to be inadmissible at trial unless the court finds by a preponderance of the evidence that one of the following conditions justifies the failure of authorities to video-record the confession: a. the suspect requested or demanded (in a video-recorded statement) that the interrogation not be recorded and it was not feasible to nevertheless surreptitiously record the interrogation; b. the law enforcement officer(s) conducting the interrogation reasonably believed that the crime for which the

suspect was taken into custody was not (and was not likely to develop into) a crime for which this statute requires recording; c. the interrogation took place outside the State of Oklahoma in compliance with the laws of the other jurisdiction; d. the interrogation was conducted by a federal law enforcement officer(s) in compliance with the laws of the United States; e. the statement was made before a grand jury; f. the statement was given at a time when the accused was not a suspect for the crime to which that statement relates while the accused was being interrogated for a different crime for which the statute does not require recording; g. the interrogation was conducted by a law enforcement agency with five or fewer peace officers in circumstances where it was not possible for the interrogation to be conducted by the OSBI; h. exigent public safety circumstances prevented recording; i. the confession was contained in a voluntary, spontaneous statement or in response to routine questions that are asked during the processing of the arrest of a suspect; j. the confession occurred in open court; k. the recording equipment unforeseeably failed due to technical malfunction or excusable human error; l. recording equipment was not available for good cause at the location where the interrogation took place; m. other good cause prevented the video-recording of the interrogation that produced the statement in question n. considering the totality of the situation, the statement in question can, by a preponderance of the evidence, be shown to be voluntary and reliable.”

The Oklahoma legislature has not acted on the Commission’s recommendation.

In May 2014, the Oklahoma Municipal Assurance Group (OMAG) recommended that all Oklahoma law enforcement departments “adopt guidelines and procedures for the electronic recording of custodial interrogations and confessions. It based on the model policy developed by the International association of Chiefs of Police (IACP) National Law Enforcement Policy Center.” A model policy was distributed to Oklahoma OMAG insured departments.

Some years ago, a federal District Court judge from Oklahoma wrote me, “I came to the bench three years ago after 29 years in civil practice. I find it ironic that if the cost of repairing a car is at stake in a civil case, the

defendant's account of the matter (i.e., his deposition) is meticulously recorded, but agencies with ample opportunity and resources to do so fail to record statements where liberty or perhaps even life are at stake."

Departments we have identified that presently record:

Moore	Oklahoma City	Tecumseh
Norman	Oklahoma CS	

Oregon

Oregon has a statute relating to recording custodial interrogations.

Citation: OR. Rev. Stat. §133.400 (2010).

General rule: Electronic recordings shall be made of custodial interviews of suspects of aggravated homicides, and offenses requiring imposition of mandatory minimum sentences) or adult prosecution of 15-17 year old offenders. §(1)

Circumstances that excuse recording: Statements made before a grand jury, or made on record in open court, or spontaneously made and not resulting from a custodial interview; statements made during processing in response to a routine question; statements made in another state in compliance with the laws of that state; a custodial interview conducted by a federal law enforcement officer in compliance with federal laws; statements made to a law enforcement agency that employs five or fewer peace officers; custodial interviews in connection with an investigation conducted by a corrections officer, a youth corrections officer, or a staff member of the Oregon State Hospital; a custodial interview for which the state demonstrates good cause for the failure to electronically record the interview. §2. Good cause includes but is not limited to the defendant's refusal or unwillingness to have the interview recorded; the failure to record was the result of equipment failure and a replacement device was not immediately available; the operator believed in good faith that the equipment was recording the interview; electronically recording the interview would jeopardize the safety of a person or the identity of a confidential informant; exigent circumstances prevented recording the interview; the officer conducting the interview reasonably believed at the

time the interview began that it was conducted in connection with a crime not covered by the statute. §7(b).

Consequences of unexcused failure to record:

“If the state offers an unrecorded statement made under the circumstances described in subsection (1) of this section in a criminal proceeding alleging the commission of aggravated murder or a crime listed ORS 137.700 or 137.707 and the state is unable to demonstrate, by a preponderance of the evidence, that an exception described in subsection (2) of this section applies, upon the request of the defendant, the court shall instruct the jury regarding the legal requirement described in subsection (1) of this section and the superior reliability of electronic recordings when compared with testimony about what was said and done.” §3(a). If each of the statements made by the defendant that the state offers into evidence is recorded, the court may not give a cautionary instruction regarding the content of the defendant’s statements. §3(c).

Oregon Uniform Criminal Jury Instruction No. 1007:

“You have heard testimony in this case that [*person making statement*] made a statement to [*name of peace officer*] at [*location*]. The state was legally required to record that statement electronically, but did not. If the state had electronically recorded the statement, you would have been able to hear or see the actual recording of [*person making statement*] making the statement, rather than hear testimony about a witness’s recollection of what occurred.

“An electronic recording of a statement is more reliable evidence of what someone said and how [he / she] said it, than is the testimony of an individual regarding [his / her] recollection of what someone said and how [he / she] said it.

“Even though the statement was not electronically recorded, you may consider the testimony regarding the statement for what you deem it to be worth.”

Preservation: “A law enforcement agency that creates an electronic recording of a custodial interview shall preserve the recording until the

defendant's conviction for the offense is final and all direct, post-conviction relief and habeas corpus appeals are exhausted, or until prosecution of the offense is barred by law.” §4.

Pennsylvania

Pennsylvania has no statute or court rule relating to recording custodial interrogations.

Discussion: In November 2006, the Senate of the General Assembly passed Resolution 381, “to establish an advisory committee to study the underlying causes of wrongful convictions and to make findings and recommendations to reduce the possibility that in the future innocent persons will be wrongfully convicted.” The official name is the PA State Senate Judiciary Committee – Joint State Government Commission to Study Wrongful Convictions, consisting of members of the House and Senate. The resolution directs the Commission “to establish an advisory committee to study the underlying causes of wrongful convictions so that the advisory committee may develop a consensus on recommendations intended to reduce the possibility that in the future persons will be wrongfully convicted in this Commonwealth.”

The Advisory Committee held a number of hearings at which many witnesses testified concerning potential reforms in several areas of criminal practice and procedure, including the electronic recording of custodial interrogations of felony suspects. The Advisory Committee made its report to the full Commission. In September 2011, the Commission delivered to the Senate Judiciary Committee a lengthy, comprehensive report, proposing reforms to the state criminal justice system in eight areas (http://jsq.legis.state.pa.us/publications.cfm?JSPU_PUBLN_ID=212), including the following relating to electronic recording (pages 5 and 127):

“A statute should require custodial interrogations to be electronically recorded with a coextensive wiretap exception for law enforcement.”

The Commission’s discussion of this proposal is contained at pages 83 to 127 of the Report, and a proposed recording statute is contained in Appendix A, pages 169 to 172; the comments of the members who dissented from the recording recommendation appear at pages 310-12.

An Independent Report, prepared by the Law Enforcement and Victim Group Representatives, dated September 2011, expressed opposition to mandating the use of electronic recording without first implementing a pilot project monitored by the PA Commission on Crime and Delinquency.

The General Assembly has not yet acted on the Commission or the Law Enforcement reports.

Philadelphia Police Department. I have been advised that the city police department currently records custodial interrogations of homicide suspects, and has received private grants of \$85,000 for additional video recording equipment, to enable expansion of recording to other crimes. The Philadelphia Police Department has 6,600 sworn officers, and the City has a population of 1,500,000.

Allegheny County. The county includes 166 police agencies, 119 of which are police departments. I have been advised that in 2014, the Allegheny County Chiefs of Police Association, in partnership with the Allegheny County District Attorney's Office, implemented an electronic recording protocol, Electronic Recording of Custodial Interrogation Procedure, which contains the following provisions:

"I. Procedure. The use of electronic recording during custodial interrogations is intended to enhance the investigative process and assist in the prosecution of criminal cases. The recording of custodial interviews will assist the department in demonstrating the interrogation process, preserving the statements of the accused, and defending against claims such as deprivation of the right to counsel and the right against self-incrimination. While serving to enhance public confidence in the integrity of our investigations and prosecutions, this procedure is mindful of these and other benefits of recordings balanced with the overwhelming public procedure demands upon the police in solving crimes.

"II. Wiretap Scope awareness: Acting within the scope of this procedure, consent must be obtained from the subject prior to audio recording, per 18 PA.C.S.A. §5701 et seq. (Wiretapping and Electronic Surveillance Control Act).

“B. Custodial Interrogation. Any interrogation during which (i) a reasonable person in the subject’s position would consider himself or herself to be in custody and (ii) during which questions are asked that are reasonably likely to elicit from the subject a confession, or an acknowledgment that he did not tell the truth in an initial statement.

“D. Electronic Recording...includes motion picture, audiotape, or videotape, or digital recording, or similar capabilities in the making of a record of an interview.

“E. Place of Detention. ...means a building or a police station that is a place of operation for a municipal police department or other law enforcement agency...

“F. Recorded Media. The audio and video signal which are recorded upon a particular medium such as analog recording tape, digital tape, other portable digital storage media and the like.

“G. Members: All sworn police officers.

“J. Serious crime. Includes homicide, sexual assault, aggravated assault, arson, robbery, burglary, and attempt, conspiracy or solicitation to commit the same, whether by an adult or juvenile.

“IV. Procedures. “Procedure for Recording

“A. Members shall make an electronic recording of custodial interrogations at a place of detention when the subject to be interrogated is reasonably suspected of a serious crime.”

In part IV B 1 through 9, exceptions to the recording requirement are set forth.

Section IV 11 provides: “Under current Pennsylvania law, consent must be obtained from the subject prior to audio recording. It is recognized, however, that asking for consent to audio record can have a chilling effect on some suspects that they refuse to continue to give a statement or even talk. Officers must retain the option of obtaining a statement from a suspect **without** audio recording in those exceptional

cases where they reasonably believe and can articulate that asking for consent to audio record would deter a substantive statement. In such cases, when feasible, officers should attempt to obtain consent and audio record a suspect's statement after a substantive interview has been taken place and then adopted by the suspect." (Emphasis in original)

Section IV F 4 provides in part: "The entire custodial interrogation, from the *Miranda* warning to the conclusion of the interrogation, shall be recorded."

Western PA Chiefs Association. This organization, comprised of chief law enforcement officers primarily from 21 counties in the western part of the state, has adopted the Allegheny County's policy on recording.

Departments we have identified that presently record:

Bethlehem	Philadelphia	Tredyffrin Twp.
Bradford Twp.	Pittsburgh	Whitehall

Rhode Island

Rhode Island has no statute or court rule relating to recording.

A model electronic recording policy was promulgated by the Rhode Island Police Accreditation Commission in 2013, which requires that recordings be made of custodial interrogations of persons suspected of capital offenses. The policy has been agreed to by all 43 police departments, and therefore appears to confirm statewide compliance with recording of custodial interrogations of persons suspected of capital felonies.

The chronology is as follows:

June 2011: A statute was enacted establishing a Task Force which, "in consultation with whatever experts it may deem appropriate, shall study and make recommendations concerning the establishment of a statewide law enforcement practice of electronically recording custodial interrogations in their entirety." R.I. Gen. Laws §12-7-22. The Task Force was created "In order to minimize the likelihood of a wrongful conviction caused by a false confession," and to "Further improve the already high quality of criminal

justice in our state.” §(a), (d). The Task Force’s 11 members include several from the State’s law enforcement community, the Public Defender, the Presidents of the Rhode Island Bar Association and Criminal Defense Lawyers Associations, and the Executive Director of the State Commission for Human Rights. §(b). The Task Force was directed to submit its report to various state officials no later than February 1, 2012, with recommendations concerning the investigation and development of policies and procedures for electronically recording custodial interrogations in their entirety. §(e),

February 1, 2012: The Task Force filed its Final Report with the following recommendations (pages 9-19): No later than July 1, 2013, every law enforcement agency should adopt uniform written policies and procedures requiring electronic recording of custodial interrogations in their entirety. The policies should be consistent with (1) the Task Force recommendations, (2) training afforded law enforcement personnel by specified state police agencies, (3) oversight by the Attorney General, (4) standards promulgated by the Accreditation Commission Standards Committee of the Police Chief’s Association, “which will be used to implement a uniform statewide written policy” regarding electronic recordings.” The interrogations should be recorded using audio-visual equipment, but if that is impossible or impractical, by audio recording. If a suspect refuses to be recorded, the refusal be memorialized electronically or in writing, and signed by the officer, suspect, or both. The written policy should provide that the requirement of recording is dispensed with when exigent circumstances are present (examples given). At a minimum, the written policies should require recording during the interrogation of suspects for a crime for which a life sentence is a potential penalty.

May 2013, revised December 2013: As recommended by the Task Force, the Rhode Island Police Accreditation Commission (RIPAC) included in its Accreditation Standards Manual - which contains mandatory requirements for accreditation of state police departments. (Pages 6-8; §8.10, pages 45-46; §9.4, pages 47-48; pages 82-83, and 89-91.) Each department is required to adopt “a written directive that all custodial interrogations in capital cases be electronically recorded in their entirety using audio-visual equipment.” An explanatory paragraph entitled “Guidance” states (page 45): “In addition to guarding against false confessions, the electronic recording of custodial interrogations has many positive benefits for law enforcement in prosecuting the accused. For

example, recordings make law enforcement officers more efficient and effective while questioning suspects, permitting officers conducting interrogations to focus more on a suspect's responses rather than taking written notes of such responses. Recordings also make it unnecessary for 133 officers to struggle to recall details when later writing reports and testifying about what occurred during interrogations. Additionally, recordings offer prosecution and defense attorneys a reliable way of determining whether custodial interrogations were conducted consistent with legal requirements."

October 2013: RIPAC, in cooperation with the Rhode Island Police Chiefs Association, adopted and distributed to the state's 43 police departments (Rhode Island has no sheriffs) an "Electronic Recording of Custodial Interrogations" model policy. The model policy provides:

General rule: Custodial interrogations of persons suspected of committing a capital offense will be recorded by audio and video, or by audio if video recording is impossible or impractical, from the *Miranda* warnings to the end. Capital offenses are the listed 25 crimes which carry a maximum penalty of life in prison. §II, IVA, G1.

Exceptions: Exigent circumstances preclude recording; the suspect refuses to be recorded. §IVF, H.

Consequences of unexcused failure to record: The recording standard is mandatory, therefore failure to adopt or comply with the policy may result in loss of RIPAC accreditation..

Preservation: A copy of each recording will be preserved in accordance with the department's protocols for property and evidence. §VI.

Miscellany: We have been advised by a representative of RIPAC: All 43 Rhode Island police departments have agreed to adopt and comply with the model policy. A police department's failure to adopt or comply with RIPAC's accreditation standards, which includes the model policy, may result in loss of RIPAC accreditation. The Accreditation Standards Manual has a separate section relating to issues that may arise relating to interrogations of juveniles. §9.4.

An earlier Supreme Court ruling. In *State v. Barros*, 24 A.3d 1158 (R.I. 2011), the Supreme Court rejected the argument that the Due Process Clause of the federal or state constitutions require electronic recording of

custodial interrogations; the Court declined to exercise its supervisory authority to mandate a recording requirement.

Concurring, Chief Justice Paul A. Suttell stated (24 A.3d at 1184):

“...[I write] separately to signify my earnest endorsement of Justice Flaherty’s comments concerning the myriad benefits to the criminal justice system resulting from the electronic recording of police interrogations. It is a practice greatly to be encouraged.”

Justice Francis X. Flaherty, dissenting in part and concurring in the result, said:

“The challenge of balancing the rights of defendants, the evidence-collecting responsibilities of law enforcement and prosecutors, and the truth-seeking goals of judges and juries has been a moving target. Since *Brown v. Mississippi*, 297 U.S. 278 (1936) (and without doubt before *Brown*), courts have struggled to maintain an appropriate balance between these interests in myriad contexts. The increased availability and ease of use of advanced technology has altered that balance still more.”

* * *

“It is significant that most courts that have considered the merits of electronic recording have concluded that adopting the practice significantly improves the criminal justice system, and specifically, the ability of judges and juries to get to the truth.... There can be no question that as courts and legislatures engage in the continuing work of providing for a just determination in every criminal proceeding, there has been a concomitant trend to require that the interrogations of suspects be recorded. Indeed, since Alaska’s adoption of the practice a quarter of a century ago, fourteen states and the District of Columbia now require law-enforcement personnel to record some or all custodial interviews. The legislatures and the courts of our sister states that have traveled that path have expressed a preference that confessions be recorded through the development of sundry procedures that encourage or mandate

such recordings. Those preferences have ranged from (1) a statement by the court of its preference for electronic recording of detention-based custodial interrogations, (2) a statute requiring a jury instruction that a jury may presume involuntariness from the absence of a recording, complete or otherwise, (3) a presumption of inadmissibility when the custodial interrogation is not recorded in its entirety, (4) a presumption of admissibility when the custodial interrogation is recorded in full, (5) a jury instruction conveying that a jury should evaluate with particular caution an alleged statement or confession made at a place of detention and derived from an unrecorded interrogation. Significantly, many law enforcement agencies across the country record such interviews as a matter of sound policy and best practice. (Footnotes omitted.)

* * *

“There is no question that there may be a multitude of valid reasons why law enforcement does not record a suspect’s confession. These may range from an experienced interrogator’s judgment that the suspect will not talk if he is being recorded, to the flat refusal of a person being interrogated to give a recorded statement. However, despite such valid potential reasons, it is the fact-finder who carries the burden of adjudging the voluntariness of the statement, and the fact-finder is entitled to the best and highest quality of evidence, or an explanation why it was not presented to it. And it is this Court’s responsibility, under its supervisory authority, to aid the fact-finder in its search for the truth.”

Regarding the so-called “Humane Practice Rule” – requiring the trial judge and the jury to make separate and independent determinations of the voluntariness of the defendant’s custodial statements – Justice Flaherty said (24 A.3d at 1190):

“... the Humane Practice Rule’s dual-tier review of voluntariness is not in and of itself a sufficient prophylactic to the extent that we can confidently ignore the additional protections provided by the widespread availability and ease of use of highly reliable recording technologies.

* * *

“...By encouraging recordings of custodial, detention-centered interrogations, this Court would not undermine the Humane Practice Rule, but would in fact enhance it by providing judges and juries with the most accurate representation of a defendant’s proffered confession.”

A federal case:

United States v. Mason, 497 F. Supp. 2d 328, 335-36 (D.R.I. 2007). District Court Judge William E. Smith was dealing with law enforcement officers from Providence, Rhode Island, but, in denying defendant’s motion to suppress, he sent a message to both federal and state law enforcement personnel (497 F.Supp.2d at 335-36):

“Courts and commentators have consistently struggled to understand the resistance of some in law enforcement to certain practices that offer the possibility of increasing the reliability of evidence in criminal cases. [Citing authorities.]. And, although some states and communities have taken steps to improve these practices, [citing and summarizing from Sullivan article (2004), see Part 5 below], the majority of departments and jurisdictions continue to eschew specific procedures (in reality, reforms) that would help safeguard against the use of unreliable evidence. *Id.*

* * *

“Consider this case as an object lesson on the need for contemporaneous recording of surveillance activities. Here we have an extraordinary set of accusations that are tightly interwoven with indicted allegations against the defendant’s own former counsel and staff. Invocation of the Fifth Amendment as to explosive questions directed at police involvement in the corrupt conspiracy lends oblique but highly inconclusive support for the defendant’s accusations. So there are two possibilities: (1) the defendant has concocted an exceptional weave of the allegations contained in the Cicilline/Torres indictment, his own actual experiences, and some newly-minted fabrications into an alleged scheme worthy

of a crime novel; or (2) the allegations of the defendant are true. At this stage, there has been no concrete evidence to support a finding that the allegations are true; however (and regardless of how insulted Sergeant Partridge may be by the suggestion) the former seems hard to fathom as well. If the Providence Police had followed the best practices associated with undercover investigations, including documenting the undercover surveillance and the controlled buys and recording their initial interview with co-defendant Isom, there would be no question or doubt about the veracity of the affidavit-and possible no suppression motion. [Here is the reference to footnote 8, quoted below.] When defendants face possible sentences of up to mandatory life in prison, one would think that the quality of the police work would be better. It is for this reason that continued indifference (or resistance) by the Providence Police Department to practices aimed at curbing the problems discussed above risks this Court's use of corrective measures.

"These could take the form, for example, of a finding that an officer's testimony be excluded because its reliability, and therefore probative value, is too low compared to its prejudicial effect, see Fed.R.Evid. 403; or in the form of an instruction to the jury, as part of this Court's usual instruction on how to judge witness credibility, that such undocumented evidence may be disregarded or that the jury may consider the lack of contemporaneous notes or other evidence in determining whether the officer's testimony is credible. Where simple and efficient reforms of the investigative and information-gathering stages offer the possibility of increasing the accuracy of criminal convictions, law enforcement agencies should move swiftly toward their implementation. Failure to take action effectively pits these agencies against the truth-seeking process, imperils an already vulnerable criminal justice system and will be met with corrective action by this Court."

In footnote 8, Judge Smith wrote:

"Lurking in the shadows of this case are other disturbing practices. There is not a single contemporaneous incriminating statement by either defendant (Mason or Isom) that is either recorded or in their own hand. Instead, the only direct evidence

linking Mason to the drugs found at 214 Pavilion Avenue (he was not present in the residence immediately before the search) are statements alleged to have been made by Isom during an unrecorded interview in January of 2004 with Partridge. These statements corroborate almost every aspect of the alleged crime but conflict diametrically with Mason's, Mason's father's and Isom's testimony about the use of the 214 Pavilion Avenue residence. In addition, Isom, who on the stand admitted to a number of incriminating actions including drug dealing, testified emphatically that he never made these statements. That perhaps the only direct link between the drugs and Mason could rest on this unrecorded, and disputed, account raises serious concerns....Although at this point the issue is premature, the reliability and propriety of Partridge's witness statement recounting Isom's supposed incriminating statements (and possible other evidence) may at some future point necessitate a more thorough analysis, especially in light of recent empirical research discussing the nature and effect of unrecorded testimony."

Judge Smith wrote an email to the author on January 24, 2009, explaining that the government eventually dismissed the Mason-Isom indictment. He added:

"Over the last several years, since the *Mason* case, I have begun to use a jury instruction that essentially tells the jury that statements from law enforcement officers regarding defendant's statements, which are not recorded when recording equipment is available, must be viewed with particular caution...I have let it be known that in due course I am going to move to a stronger instruction which includes that language that agencies have refused to adopt a policy of recording in spite of strong encouragement by the court to do so...I continue to believe that federal trial judges will have an important role in influencing the DOJ and the agencies to move in the right direction on this issue."

South Carolina

South Carolina has no statute or court rule relating to recording custodial interrogations.

Discussion: Companion recording bills, H.3153 and S.222, were introduced in the 2015-16 legislative session, and were carried over to the 2016 session.

Departments we have identified that presently record:

Aiken CS	Florence CS	Savannah River Site
Aiken DPS	N. Augusta DPS	Law Enf.
City of Charleston	N. Charleston	

South Dakota

South Dakota has no statute or court rule relating to recording custodial interrogations.

Departments we have identified that presently record:

Aberdeen	Lincoln CS	Sioux Falls
Belle Fourche	Minnehaha CS	State Div. Criminal Inv.
Brandon	Mitchell	State Univ.
Brookings	Pierre	Vermillion
Brown CS	Rapid City	Yaukton
Clay CS		

Tennessee

Tennessee has no statute or court rule relating to recording custodial interrogations.

Discussion: In April, 2002, the General Assembly passed a joint resolution directing the Law Enforcement Advisory Council (LEAC) “to study and evaluate all issues relevant to the electronic recording of custodial interrogations of criminal defendants, including current practices and procedures of law enforcement agencies in Tennessee.” (JR 862.)

In 2002, in response to a survey sent by the Comptroller's Office of Research to all Tennessee law enforcement agencies, 43 percent of the 400 which responded report that they electronically record custodial interrogations. L.H. Selva & W.L. Shulman, Legislative Prerogative on Judicial Fiat: Mandating Electronic Recording of Stationhouse Interrogations in Tennessee, 1 Tenn. Journal of Law & Policy, 386, 429 (2014)

In May 2003, LEAC reported on its study and evaluation, including concerns about cost; investigative effectiveness ("...balancing the evidentiary value of the tape against the potential that the equipment would intimidate a defendant and prevent a confession from occurring"); lack of policy and procedure; and creation of statutory right ("As a general rule, the Council feels that the Federal and State constitutions provide sufficient protection of defendants' civil rights, and the creation of additional statutory rights is unnecessary"). The report concluded:

"At present, the point that is clearest to the members of the [LEAC] is that enough concerns have been identified about an absolute requirement to record all custodial interrogations to make immediate action on the point without further review premature. The Council...urges the Committees to delay action on the matter until such time as the pros and cons can be more fully developed..."

A Tennessee case:

In *State v. Godsey*, 60 S.W.3d 759, 772 (2001), the Supreme Court said:

"There can be little doubt that electronically recording custodial interrogations would reduce the amount of time spent in court resolving disputes over what occurred during interrogation. As a result, the judiciary would be relieved of much of the burden of resolving these disputes. In light of the slight inconvenience and expense associated with electronically recording custodial interrogations, sound policy considerations support its adoption as a law enforcement practice. However, '[t]he determination of public policy is primarily a function of the legislature.' [Citing cases]"

Departments we have identified that presently record:

Bell Meade	Franklin	Knoxville
Benton CS	Gallatin	Loudon CS
Blount CS	Goodlettsville	Montgomery CS
Bradley CS	Hamilton CS	Murfreesboro
Brentwood	Hendersonville	Nashville
Bristol	Highway Patrol	Shelby CS
Chattanooga	Knox CS	White CS
Cleveland		

Texas

Texas has no statute or court ruling that requires recording custodial interrogations.

Texas has two statutes that authorize but do not require recording of custodial interrogations. Texas Code of Criminal Procedure, Article 38.22, contains the following provisions:

General rules. Written statements resulting from unrecorded custodial interrogations are admissible in evidence if they are signed by the accused, and the state proves that the defendant received and knowingly, intelligently and voluntarily waived his *Miranda* rights. §2. Oral statements resulting from custodial interrogations are admissible in evidence if an electronic recording is made of the statement, the defendant was given the *Miranda* warnings which he knowingly, intelligently and voluntarily waived, the voices are identified, the recording device was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered. §3(a).

Unrecorded oral statements are admissible if they contain “any statement which contains assertions of fact or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which has states the offense was committed.” §3(c).

Circumstances that excuse recording: “Nothing in this article precludes the admission of a statement made by the accused...of a statement that is the *res gestae* of the arrest or of the offense, or of a statement that does not stem from custodial interrogation, or of a voluntary statement, whether or not the result of custodial interrogation, that has a bearing on the credibility of the accused as a witness, or of any other statement that may be admissible under law.” §5. “Notwithstanding any other provision of this article, a written, oral or sign language statement of an accused made as a result of a custodial interrogation is admissible against the accused in a criminal proceeding in this state if the statement was obtained in another state in compliance with the law of that state or this state, or the statement was obtained by a federal law enforcement officer in this state or another state and was obtained in compliance with the laws of the United States.” §8.

Preservation: “Every electronic recording of any statement made by an accused during a custodial interrogation must be preserved until such time as the defendant’s conviction for any offense relating thereto is final, all direct appeals thereto are exhausted, or the prosecution of such offenses is barred by law.” §3(b).

As to juveniles, the Texas Family Code contains similar provisions relating to recorded and unrecorded oral statements made by juveniles. §51.095.

The Justice Project of Austin, Texas has published an interpretation of the Texas statute:

“Although at first glance it may seem as though the existing Texas statute mandates recorded interrogations, the key to understanding the statute is the phrase ‘statement of an accused made as a *result* of custodial interrogation.’ In other words, the only component of an interrogation that must be recorded in order to be admissible is the final statement, or the confession itself. Even then, only ‘oral or sign language statements’ must be recorded. Signed written statements, which are overwhelmingly relied upon, have no electronic recording requirement whatsoever. While recording of oral confessions is valuable because it presents the jury with the suspect’s final statement, it can be misleading because it does

not show jurors all of the conversation and questions that lead up to that statement . . .” (B)

The Timothy Cole Advisory Panel on Wrongful Convictions

The Panel, named for the first Texan to be posthumously exonerated of a crime through DNA testing, was created in 2009 by the Texas legislature (H.B. 498, 81st Leg.), with directions to advise the Texas Task Force on Indigent Defense in the preparation of a study regarding the causes and prevention of wrongful convictions, including (among others) recording of custodial interrogations. The Committee's report, issued in August 2010, included the following (page 18):

“The State of Texas should adopt a mandatory electronic recording policy, from delivery of *Miranda* warnings to the end, for custodial interrogations in certain felony crimes. The policy should include a list of exceptions to recording and the judicial discretion to issue a jury instruction in the case of an excused failure to record.

Creating a complete, accurate, and reviewable document that captures the entirety of a custodial interrogation will help prevent wrongful convictions. The Panel therefore recommends that electronic recording be made mandatory in Texas for custodial interrogations in cases of murder, capital murder, kidnapping, aggravated kidnapping, continuous sexual abuse of a child, indecency with a child, sexual performance by a child, sexual assault, and aggravated sexual assault.”

The Panel also recommends that exceptions to electronic recording be allowed for good cause, such as equipment malfunction, uncooperative witnesses, spontaneous statements, public safety exigencies, or instances where the investigating officer was unaware that a crime that required recorded interrogations had been committed. This takes into consideration the contingencies that investigating officers may face when dealing with a witness or suspect in the field.

The final recommendation from the Panel is that in instances where the Court determines that unrecorded interrogations are not the result of good faith attempts to record

or that none of the exceptions to recoding apply, the Court may deliver an instruction to the jury that it is the policy of the State of Texas to record interrogations, and they may consider the absence of a recording when evaluating evidence that arose from the interrogation.”

Although the Texas legislature enacted many of the Cole Advisory Panel’s recommendations, it did not enact the foregoing relating to electronic recording of custodial interrogations.

The Timothy Cole Exoneration Review Commission

In 2015, the legislature passed and the Governor signed HB 48, establishing the Timothy Cole Exoneration Review Commission (TCERC), which has 11 members and 4 advisory members representing a cross section of Texas criminal justice experts. The statute provides that the TCERC “may review and examine all cases in this state in which an innocent defendant was convicted and then, on or after January 1, 2010, was exonerated,” in order to, among other things, “suggest ways to prevent future wrongful convictions and improve the reliability of the criminal justice system” (Sec. 8(a)(1); “consider suggestions to correct the identified errors and defects through legislation or procedural changes” (Sec. 8(a)(3); “review and update the research, reports, and recommendations of the Timothy Cole advisory panel...and shall include in its report under Section 9 the degree to which the panel’s recommendations were implemented” (Sec.8(c). The TCERC is to issue a detailed report of its findings or recommended policy changes” not later than December 1, 2016 (Sec. 11). ..Efforts are underway to persuade the TRERC to again recommend that the legislature enact a statute containing a statewide requirement that electronic recordings be made of custodial interrogations of felony suspects as specified in the Advisory Panel’s prior recommendation. The legislature’s next session is in 2017.

Texas cases:

Several cases have held that the statute does not prohibit introduction into evidence of a defendant’s written statement made following and as a result of an unrecorded custodial interview. See, e.g., *Franks v. State*, 712 S.W.2d 858, 860-61 (Tex. Crim. App. 1986); *Rae v. State*, No. 01-98-00283-CR, 2001 WL 125977, at *3 (Tex. App. 2001).

The Texas statute does not require all custodial interrogations of criminal suspects to be electronically recorded from the *Miranda* warnings to the end. Suspects' written statements may be obtained after the *Miranda* warnings are given and waived without electronic recording; the written statements are admissible under Article 38.22 §2. Further, law enforcement officers may, without recording, conduct custodial statements of adults suspects, then electronically record the *Miranda* warnings and waiver, and take a recorded oral statement or confession which is admissible under §3.

The exception contained in §3(c) as to unrecorded oral statements has been expanded by the holding in *Moore v. State*, 999 S.W.2d 385, 400 (Tex. Crim. App. 1999); this provision includes "oral statements asserting facts or circumstances establishing the guilt of the accused if at the time they were made they contained assertions unknown by law enforcement but later corroborated." The court also held that (1) the statement need only circumstantially demonstrate the defendant's guilt, and (2) if this provision is applicable, the defendant's entire unrecorded statement is admissible, not only the portion that was previously unknown.

Ragan v. State, 642 S.W.2d 489, 492 (Tex. Crim. App. 1982):

"Section 3 of Article 38.22 shows a legislative recognition that electronically recorded statements are more trustworthy than unrecorded oral statements." (Citing to footnote 5)

In *Turner v. State*, 252 S.W.3d 571, 583 (Tex. App. 2008), the defendant, charged with aggravated sexual assault, moved to suppress incriminating statements he made on videotape at a police station. The trial judge denied the defense motion to suppress. The reviewing court affirmed, stating: ". . . appellant was not in custody when he made his videotaped statements, appellant's argument regarding his failure to waive his *Miranda* rights is without merit. Assuming, for the purposes of this issue only, appellant was in custody, his argument is still without merit. The record establishes before appellant made his incriminating statements, [detective] Wienel read appellant his *Miranda* rights, and appellant indicated he understood his rights. Appellant then proceeded to answer Wienel's questions. It is undisputed appellant failed to expressly waive his rights; however, we hold appellant implicitly waived his rights."

In *Joseph v. State*, 309 S.W.3d 20 (Tex. Crim. App. 2010), a defendant convicted of murder argued on appeal that, during a custodial interrogation, he did not knowingly and intelligently waive his rights under a provision of the Texas Code of Criminal Procedure. In affirming, the Court of Criminal Appeals recounted in detail that the video showed the defendant was treated properly by the police officers, understood his rights, and freely waived his rights and voluntarily made incriminating statements.

In *Woodall v. State*, 376 S.W.3d 122 (Tex. App. 2012), a defendant convicted of indecency with a child argued on appeal that he was suffering from a mental disorder that prevented him from fully understanding his rights and knowingly and voluntarily waiving them. The Court of Appeals affirmed the trial court's ruling as consistent with the evidence presented relating to the defendant's mental state, the circumstances of his interrogation, and the videotape of the interrogation.

Departments we have identified that presently record:

Abilene	Fort Worth	Parker CS
Alamo Heights	Frisco	Plano
Andrews	George West	Randall CS
Arlington	Georgetown	Richardson
Austin	Granger	Round Rock
Burleson	Harris CS	San Antonio FD
Cedar Hill	Hays CS	San Antonio
Cedar Park	Houston	San Jacinto CS
Cleburne	Hutto	Southlake DPS
Collin CS	Irving	Sugar Land
Corpus Christi	Jim Wells	Taylor
Dallas	Johnson CS	Thrall
Dallas CS	Killeen	Travis CS
Duncanville	Leander	Univ. of Texas
Eagle Lake	Midland	Upton CS
Eustace	Midland CS	Webster
Florence	Murphy	

Utah

Utah has a Supreme Court Rule relating to recording custodial interrogations.

Citation: Utah Supreme Court Rule of Evidence 616 (2015).

General rule: “Except as otherwise provided in subsection (c) of this rule, evidence of a statement made by the defendant during a custodial interrogation in a place of detention shall not be admitted against the defendant in a felony prosecution unless an electronic recording of the statement was made and is available at trial” (§b). “Custodial interrogation” means questioning likely to elicit an incriminating response from a person who is in custody” (§a1). “Electronic recording” means an audio or audio-video recording (§a2). “Place of detention...includes a law enforcement agency station, jail, holding cell, correctional or detention facility, police vehicle or any other stationary or mobile building owned or operated by a law enforcement agency” (§a5).

Circumstances that excuse recording: Statements made prior to January 1, 2016 (§c2); statements made outside Utah conducted by officers of another jurisdiction (§c2); statements offered solely for impeachment purposes (§c3); spontaneous statements made outside of a custodial interrogation or during routine processing or booking (§c4) or before or during a custodial interrogation, if the persons agreed to respond only if no recording was made, provided the agreement is electronically recorded or documented in writing (§c5); the officers in good faith failed to make a recording because they inadvertently failed to operate the recording equipment properly, or without their knowledge the equipment malfunctioned (§c6); the officers reasonable believed the crime under investigation was not a felony under Utah law (§c7); substantial exigent circumstances existed that prevented or rendered unfeasible the making of an electronic recording or prevented its preservation and availability at trial (§c8); or the statement has substantial guarantees of trustworthiness and reliability equivalent to those of an electronic recording, and admitting the statement best serves the purposes of these rules and the interests of justice (§c9). Not later than 30 days before trial, the prosecution must serve notice of intent to offer an unrecorded statement under an exception described in Subsection (c) (4) through (9). (§d1)

Consequences of unexcused failure to record: “Except as otherwise provided in Subsection (c) of this rule, evidence of a statement made by the defendant a custodial interrogation in a place of detention shall not be admitted against the defendant in a felony criminal prosecution unless an electronic recording of the statement was made. This requirement is in addition to, and does not diminish, any other requirement regarding the admissibility of a person’s statements.” (§b).

“If the court admits into evidence a statement made during a custodial interrogation that was not electronically recorded under an exception described in Subsection (c)(4) through (9) of this Rule, the court, upon the request of the defendant, may give cautionary instructions to the jury concerning the unrecorded statement” (§d2).

Utah cases:

State v. Carter, 776 P.2d 886, 891 (Utah 1989):

“While we hold that admission of the confession was not prejudicial error, we do not sanction the particular manner in which it was recorded in this case. In *Bishop*, 735 P.2d 439, 460 (1988), the defendant’s confession, together with statements made by the police officers, was recorded verbatim. This process not only helped insure that the defendant’s confession was not coerced, but also provided both the trial court and this court with the correct tools for effectively and efficiently reviewing the defendant’s contentions, as well as the totality of the circumstances of his confession. Such a process guarantees that constitutional rights are protected and justice is effected. Nevertheless, while the dictation process that occurred in this case could conceivably amount, in other instances, to deprivation of a defendant’s constitutional rights, that was not the case here.”

State v. James, 858 P.2d 1012, 1018 (Utah Ct. App. 1993):

“Although, in accord with other courts, we refrain from requiring recording of interrogations under the Utah Constitution, we note several policy reasons for recording interrogations. These include avoiding unwarranted claims of coercion and avoiding actual coercive tactics by police. In addition, recording an

interrogation may show the ‘voluntariness of the confession, the context in which a particular statement was made, and ... the actual content of the statement.’”

State v. Villarreal, 889 P.2d 419, 426-27 (Utah 1995):

“We have previously addressed the importance of making a contemporaneous record of a defendant’s confession, whether by written or electronic means. See *State v. Carter*, 776 P.2d 886, 891 (Utah 1989). In *Carter*, we criticized the failure of investigating officers to record the defendant’s confession verbatim and endorsed the practice of tape recording confessions, at least when possible. Such practice better ensures that the confession is accurate when presented to the finder of fact and removes some of the errors that naturally occur in the memories of all persons in recalling events, especially precise words. If an officer’s memory of a confession is distorted, inaccurate, or incomplete, whether because of the lapse of time or a variety of psychological factors, the defendant may be forced into the dilemma of having to waive his right not to testify or allowing an erroneous account of the confession to go to the jury. Recording confessions ‘guarantees that constitutional rights are protected and justice is effected.’ *Id.* Thus, electronic or other recording of a confession is a simple and inexpensive means of preserving critical evidence in an accurate form and should be implemented wherever possible.

“Notwithstanding the desirability of recording confessions, it is neither practicable nor possible to require contemporaneous recordings in all instances. When a formal confession is given in a police station, it could, and should, be recorded. But confessions, and admissions short of a confession, can be made anywhere at unexpected times and places where formal recording is impossible. Barring all such evidence would deprive the courts of much evidence that is generally reliable. Thus, we hold that contemporaneous recording of a confession is not mandated by the Utah Constitution.”

Vermont

Vermont has a statute relating to recording custodial interrogations.

Citation: 13 V.S.A., chapter 182, subchapter 3, Law Enforcement Practices, §5581, Sections 4 and 5 (2014)):

General rule: An audio and video recording shall be made of the complete interrogation of persons in custody in a place of detention concerning the investigation of homicide or sexual assault. Law enforcement shall strive to simultaneously record both the interrogator and the person being interrogated. §(a)(b).

Circumstances that excuse recording: Exigent circumstances; the persons' refusal to be recorded; a reasonable belief that the person did not commit a homicide or sexual assault; the safety of the person or protection of his or her identity; equipment malfunction. §(c) (1).

Consequences of unexcused failure to record: If the prosecution does not make a recording as required, the prosecution shall prove by a preponderance of the evidence that one of the exceptions applies. If the prosecution does not meet the burden of proof, the evidence is still admissible, but the court shall provide cautionary instructions to the jury regarding the failure to record the interrogation. (§c)(2).

Preservation: None given.

The Law Enforcement Advisory Board (LEAB) plans for implementation. Effective upon passage, the LEAB shall develop a plan for implementation of the electronic recording act. §5(a)6. The LEAB, in consultation with practitioners and experts in recording interrogations, shall inventory the current recording equipment available in Vermont; develop funding options regarding how to equip adequately law enforcement with necessary recording devices; and develop recommendations for expansion of recording to questioning by a law enforcement officer reasonably likely to elicit an incriminating response from the subject regarding any felony offense. §5(b). On or before October 1, 2014, the LEAB shall submit a written report to the Senate and House Judiciary committees with its recommendations. §5(c).

In January 2015, the LEAB issued its report in response to the legislature (Page 7):

“No. 193. An act relating to law enforcement policies on eyewitness identification and bias-free policing and on recording of custodial interrogations in homicide and sexual assault cases, require that the LEAB develop a plan for the implementation of Sec. 4 of this Act (electronic recording of custodial interrogation) assess the scope and location of current recording inventory in Vermont, develop recommendations on how to adequately equip agencies with recording devices, and provide recommendations on the expansion of recordings for any felony offense....

“Recommendation. The LEAB determined that recording equipment is inexpensive and should be considered essential equipment that is built into an agency’s budget. Given that the Act allows for audio recording alone if ‘...law enforcement does not have the current capacity to create a visual recording...’, an agency should, at a minimum, be audio recording custodial interrogations while building the capacity to add video recording.

“The LEAB further recommends that a best practice would be for an agency to record all custodial interrogations regardless of offense.”

Virginia

Virginia has no statute or court rule relating to recording custodial interrogations.

Departments we have identified that presently record:

Alexandria	Fairfax County	Richmond
Arlington	Loudoun CS	South Boston
Blacksburg	Norfolk	Stafford CS
Campbell CS	Patrick CS	Virginia Beach
Chesterfield County	Radford City	Virginia Tech
Clarke CS		

Washington

Washington has no statute or court rule relating to recording custodial interrogations.

Departments we have identified that presently record:

Adams CS	Grandview PD	Quincy
Arlington	Kennewick	Redmond
Bellevue	Kent City	Snohomish CS
Bellingham	King CS	State Patrol
Bothell	Kirkland	Sunnyside
Buckley	Kittitas CS	Thurston CS
Clark CS	Klickitat CS	Toppenish
Columbia CS	Lewis CS	Univ. WA
Cowlitz CS	Lynden	Walla Walla
Ellensburg	Mercer Island	Washougal
Enumclaw	Mount Vernon	Whatcom CS
Everett	Pierce CS	Yakima CS
Federal Way	Port Angeles	Yakima
Ferndale	Prosser	

West Virginia

West Virginia has no statute or court rule relating to recording custodial interrogations.

A West Virginia case.

In *State v. Kilmer*, 439 S.E.2d 881, 893 (W. Va. 1993), the court said:

“... In refusing to expand the Due Process Clause of the West Virginia Constitution, we reiterate our position espoused in *Nicholson* [174 W.Va. 573, 328 S.E.2d 180 (1985)], that it would be the wiser course for law enforcement officers to record, either by videotape or by electronic recording device, the interrogation of a suspect where feasible and where such equipment is available, since such recording would be

beneficial not only to law enforcement, but to the suspect and the court when determining the admissibility of a confession. However, we decline to establish an absolute rule requiring such recording.”

Accord: *Adkins v. Ballard*, 2014 WL 2404313 (W. Va. 2014).

Departments we have identified that presently record:

Charles Town	Monongalia CS	Morgantown
Clarksburg	Morgan CS	Wheeling
Huntington		

Wisconsin

Wisconsin has both a court ruling and a statute relating to recording custodial interrogations.

Citations: *State v. Jerrell*, 699 N.W.2d 110 (Wis. 2005) (juveniles); Wis. Stat. Ann. §§968.073 & 972.115 (2005) (juveniles and adults).

Statement of policy: It is the policy of this state to make an audio or audio – visual recording of a custodial interrogation of a person suspected of committing a felony, unless a condition specified in the statute applies, or good cause is shown for not making an audio or audio and visual recording of the interrogation. §968.073(2).

General rule: Custodial interrogations regarding felonies shall be electronically recorded by both audio and video. “Custodial interrogation” means an interrogation by a law enforcement officer or an agent of a law enforcement agency of a person suspected of committing a crime from the time the suspect is or should be informed of his or her rights to counsel and to remain silent until the questioning ends, during which the officer or agent asks a question that is reasonably likely to elicit an incriminating response and during which a reasonable person in the suspect's position would believe that he or she is in custody or otherwise deprived of his or her freedom of action in any significant way.” The officer is not required to

obtain the suspect's consent to having a recording made. §972.115(2)(a)-(b).

Circumstances that excuse recording: The conditions which excuse recording include: the suspect refused to respond or cooperate if a recording was made, and the officer made a recording of the suspect's refusal; the officer in good faith failed to make a recording because the equipment did not function; the officer inadvertently failed to operate the equipment properly; without the officer's knowledge, the equipment malfunctioned or stopped operating; exigent public safety circumstances existed that prevented the making of a recording, or rendered making a recording infeasible; the officer conducting or observing the interrogation reasonably believed at the outset that the offense for which the suspect was taken into custody or was being investigated was not a felony. §972.115 (2)(a)(1)-(6).

Consequences of unexcused failure to record: If a statement made by a defendant during a custodial interrogation is admitted into evidence in a felony jury trial, and the court finds that none of the statutory conditions applies that excuse recording, or that no good cause exists for not providing an instruction, "the court shall instruct the jury that it is the policy of this state to make an audio or visual recording of a custodial interrogation of a person suspected of committing a felony, and that the jury may consider the absence of an audio or visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case.." In a felony bench trial, the court may consider the absence of a recording in evaluating the evidence relating to the interrogation and the statement. §972.115 2(a)-(b).

Preservation: None given.

Discussion: As to juveniles, the *Jerrell* case requires recording when the questioning relates to either felonies or misdemeanors. See *State v. Fairconatue*, 773 N.W.2d 226 ¶22 n.6 (Wis. Ct. App. 2009). The statute requires electronic recording of both adults and juveniles when custodial interrogations relate to felonies. Both the *Jerrell* case and the statute require that, to trigger the recording requirement, the person be in custody when the questioning occurs, but neither requires that the person be in a place of detention.

Wyoming

Wyoming has no statute or court rule relating to recording custodial interrogations.

The *Gillette, Wyoming News Record*, April 28, 2010:

“The Campbell County Sheriff’s Office has begun recording interrogations, a move agency officials say was influenced by the outcome of a molestation trial. Video cameras have been installed in the agency’s four interview rooms and a polygraph room...In the past, the Sheriff’s Office has come under fire for not taping interviews. In many cases, there was no video or audio recording of what was said during an interview – a practice defense attorneys often attacked to try to discredit deputies’ testimony. The issue came to the forefront in September 2008 when a Gillette woman was found not guilty of molestation charges after testifying that her confession had been coerced...The verdict forced the Sheriff’s Office to re-examine its policy. After months of internal discussion, officials issued a directive requiring deputies to record every interview when practical,...” It’s kind of a trend in law enforcement,” [a Sheriff’s Department Lt.] said. “It’s what the courts want. It’s what the prosecutors want...In a poll of the state’s 23 sheriff’s offices, The News Record found that Campbell County was the only department that didn’t regularly record what suspects say....Campbell County Sheriff ... hopes the new video system will eliminate any questions jurors have about what was said during an interview. I think they’re a great addition to the department, [the Sheriff] said.”

A Wyoming case.

In *Lara v. State*, 25 P.3d 507, 511 (Wyo. 2001), the Supreme Court said:

“The district court noted that the problems that came up in the suppression hearing, as well as in this appeal, could be avoided if tape recorders were used in interviews. The district court also noted that the county attorney’s office repeatedly had been reminded that it would be a good idea to tape interviews:

‘Instead they want to do it some other way and they expose themselves in every case to the—to the allegations that—that something was left out or misinterpreted or incorrectly emphasized, and they have to end up explaining to me and to the jury why they don’t do it. Their explanations don’t make sense to me, but I don’t—it’s not my prerogative to tell them they have to do that.’

“...we agree with the district court that tape- recorded interviews do leave far fewer loose ends to be tied up and in many, if not most, instances would be a well-advised protocol to follow.”

Departments we have identified that presently record:

Campbell CS
Casper
Cheyenne

Cody
Gillette City
Laramie

Laramie CS
Lovell
Park CS

To view a specific section of the compendium, click on the link below to jump to this specific information.

Introduction

Part 1: The Benefits of Statewide Requirements of Electronic
 Recording of Custodial Interrogations

Part 2: States

Part 3: Federal Agencies

Part 4: National Organizations

Part 5: Foreign countries

Part 6: Bibliography

Part 3: Federal Agencies¹

Air Force

Army and Military Police

Defense

Homeland Security

Immigration and Customs Enforcement

Secret Service

Inspector General

Internal Revenue Service

Justice

Marine Corps

Navy

Treasury

Veterans Affairs

¹ Federal agents are not required to notify or obtain consent from persons who are being recorded. 18 U.S.C. §2511, (2)(c)-(e) (2002).

Air Force

Citation: Instruction 71-118V4 of the Air Force Office of Special Investigations (AFOSI) Manual, General Investigative Methods (AFOSIMAN 71-124), effective October 2009. "This manual provides policy, guidance, and procedures necessary to comply with laws and higher directives, ensure health and safety, standardize investigative operations, and insure investigate sufficiency for general investigative methods common to the [AFOSI]. It pertains to all AFOSI personnel. Compliance is mandatory."

General rule: The Air Force Judge Advocate General's Online News Service, August 26, 2009, states: "AFOSI will begin recording all subject interviews beginning 1 October 2009. The current draft policy requires DVD recording of all subject interviews, with limited exceptions, and the optional recording of witness and victim interviews."

The Department of the Air Force Regulations provide: "Electronically recording interviews refers to both video and audio recording." §4.18. Interview rooms in AFOSI facilities shall be equipped with the capability to electronically record interviews. §4.18.1. "Electronic recording equipment will include audio and video recording capabilities, and this equipment must meet the minimum technical standards contained in paragraph 5.16.9." §4.18.1.1. "Recording equipment should be left on throughout the entire interview session." §4.18.2.4 "While Federal law allows for recording interviews made without the expressed consent of the interviewee, not all states allow for the use of such recordings. Coordinate with the local SJA or, depending on circumstance, with the civilian prosecuting authority to ensure compliance with local laws....at a minimum, signs shall be posted in the waiting areas and outside of interview rooms. Signs will provide sufficient notice of electronic monitoring. The signs should read: All persons are subject to audio or audio and video monitoring while in this facility." §4.18.4.

Circumstances that excuse recording: None given.

Consequences of unexcused failure to record: "If an interviewee requests electronic recording be stopped, agents will comply with the request; however, before stopping the recording, agents will advise the interviewee that recording ensures an objective, true, and accurate record of the interview, and therefore, continuing to record may be to the interviewee's

benefit. If the interviewee still indicates he or she wants the equipment turned off, the recording equipment will be turned off.” §4.18.4.2.

Preservation: “Consistent with existing evidence disposition procedures, the original and all copies of recorded interviews shall be destroyed after the case is adjudicated. Copies of recorded interviews will not be sent to the AFOSI File Repository,” except they may be retained for training purposes. §4.18.8

“Equipment and Interview Room Requirements. AFOSI will use recording equipment that yields high quality visual and audio recordings. The systems shall be closed circuit systems; wireless systems will not be used.” §4.18.9. “Cameras must have a lens size that allows for a clear and undistorted view of the interviewee. The camera will be positioned at an angle that allows for a frontal view of the interviewee. The camera distance and image will allow for easy observation of an interviewee’s facial expressions and body language.” §4.18.9.2.

Army and Military Police

The Code of Federal Regulations governing Military Police Investigation provides (32 C.F.R. §637.21):

“Recording interviews and interrogations. The recording of interviews and interrogations by military police personnel is authorized, provided the interviewee is on notice that the testimony or statement is being recorded. This procedure is a long accepted law enforcement procedure, not precluded by DA policies pertaining to wiretap, investigative monitoring, and eavesdropping activities.”

In an article published in *The Army Lawyer*, DA PAM 27-50- 173, (May 1987), entitled *Will the Suspect Please Speak Into the Microphone?* (pages 46-51), Captains R. Troxell and T. Bailey of the U. S. Army Trial Defense Service, proposed enactment of a rule applicable to military police and the Criminal Investigation Division:

“Many court-martial convictions are based in large part upon confessions or admissions obtained by the military police or the Criminal Investigation Division (CID). These confessions or admissions appear in court, at best, as written statements explained by the recollections of the participants, and at worst, as simply recollections. These recollections often create

inaccurate, incomplete, and conflicting accounts, which in turn lead to disputes regarding rights warnings, waiver, voluntariness, and the contents of the interview. These disputes can, in large part, be eliminated by the objective record of a tape recording of the entire interview, including rights warnings. More importantly, a tape recording will provide the court-martial with a much better opportunity to determine the truth. Consistent with our search for the truth, the following rule is proposed:

Rule. Tape Recording Suspect Interviews.

"(a) All interviews of suspects by members of the military police or the Criminal Investigation Division, including rights advisement and waiver of rights, shall be tape recorded, unless there exist exigent circumstances which would prevent recording. Such recordings will be preserved for trial.

"The proposed rule will aid the courts in accurately determining whether there has been compliance with the warning and waiver requirements of Article 31 and *Miranda v. Arizona*; aid the courts in accurately determining the contents of an admission or confession; save the government time, effort, and expense; allow statements to be redacted prior to trial so as not to prejudice the members; and aid in effective interviewing of suspects.

"The first two advantages are by far the most important. They demonstrate that tape recording creates truth where there was uncertainty by replacing the uncertain medium of biased human perception with the objective record of a tape recorder. All evidence regarding rights warnings, waiver, subsequent invocation or lack thereof, coercion, promises, contents of statements, etc., will be accurately recorded, thus providing a court with a complete record for dispute resolution. Without question, the reliability and credibility of a confession or admission are better judged by listening to a tape than by listening to the recollections of participants. This accuracy is especially important in the case of a suspect interview because an objective electronic recording best protects a suspect's

constitutional and statutory rights. Clearly, a tape recording is a substantial advantage in a court's search for truth.

"Whether or not the failure to record violates constitutional or military due process, requiring suspect interviews to be tape recorded seems consistent with the prevailing notions of fundamental fairness on which the due process clause is based. Therefore, tape recording of suspect interviews should be required.

"The proposed rule is designed to offer the court a complete look at the circumstances and statements made in a suspect interview, the crucial evidence upon which many convictions are based. It is not designed to allow an accused the opportunity to lie on the witness stand. Therefore, consistent with Military Rule of Evidence 304(b)(1), the rule would permit a statement to be used to impeach by contradiction the in-court testimony of the accused and in a later prosecution against the accused for perjury, false swearing, or for making a false official statement.

"With modern technology available to tape record all suspect interviews, there appears no strong argument against, and many for, adoption of a rule requiring such recording...To fail to adopt this rule is to choose uncertainty over certainty, to choose possible injustice over justice. 'For any time an officer unimpeded by an objective record distorts, misinterprets, or overlooks one or more critical events, the temple may fall. For it will be a house built upon sand.'" (Citing Kamisar (1977), see Part 6 below).

Defense

On May 10, 2010, the Deputy Secretary of Defense issued a DTM 09-031 Directive-Type Memorandum entitled "Videotaping or Otherwise Electronically Recording Strategic Intelligence Interrogations of Persons in the Custody of the Department of Defense," applicable to Department of Defense agencies.

General rule: It is DoD policy that, "Subject to the waiver and suspension provisions in Attachment 2 of this DTM, an audio- video recording of each

strategic intelligence interrogation of any person who is in the custody or under the effective control of the Department of Defense or under detention in a DoD facility, conducted at a theater-level facility.” The DTM is to be implemented by the Heads of DoD Components “as soon as possible but not later than 180 days of its issuance.” Attachment 3, par. 3a.

Applicability: Applicable to “OSD [Office of the Secretary of Defense], the Military Departments, the Chairman of the Joints Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the [DoD], the Defense Agencies, the DoD Field Activities, and all other organizational entities within the [DoD]”; to “DoD military personnel, DoD civilian employees, and DoD contractor personnel...who conduct or support strategic intelligence interrogations”; to “Non-DoD personnel who agree, as a condition of permitting them access to conduct strategic intelligence interrogations, to comply with its terms, including other U.S. Government agency personnel, interagency mobile interrogation teams, and foreign government personnel”; and to “DoD and non-DoD law enforcement personnel and counterintelligence personnel who conduct or support strategic intelligence interrogations.”

Circumstances that excuse recording: “...excludes from this requirement members of the Armed Forces engaged in direct combat operations and DoD personnel conducting tactical questioning.” The DTM contains provisions relating to equipment failures, and for waivers and suspensions of the requirement. Attachment 2, pars. f, i and j.

Consequences of unexcused failure to record: None given.

Preservation: Electronic recordings “shall be disposed of only in accordance with a disposition schedule deployed by the USD [Under Secretary of Defense for Intelligence] and approved by the Archivist of the United States. If a recording contains any credible evidence of a suspected or alleged violation of applicable law or policy, it shall be retained as evidence to support any investigation and disciplinary or corrective action.”

Expiration: DTM 09-031 expired effective May 2012, and has not been renewed.

An article by Major Edward W. Berg, Judge Advocate, U.S. Army, *Videotaping Confessions: It's Time*, 207 Military Law Review 253 (2011) (footnotes omitted):

“This article will argue that the Department of Defense (DoD) should adopt a unified policy requiring videotaping custodial interrogations of felony level suspects by the criminal investigative branches of each service, i.e., Criminal Investigative Division (CID) for the Army, Naval Criminal Investigative Service (NCIS) for the Navy and Marine Corps, and Office of Special Investigations (OSI) for the Air Force. This requirement should extend to recording all aspects of the custodial interrogation, including the initial rapport building phase, the rights-warning under Article 31, Uniform Code of Military Justice (UCMJ), and *Miranda v. Arizona*, as well as the entire interview session. Where military exigencies do not permit videotaping, other means of electronic recording should be used. Such a policy should also be coupled with appropriate funding for the required equipment and training.” (Pages 254-55.)

“The evolution in civilian criminal law toward videotaping interrogations supports the proposition that DoD can and should adopt such a policy.” (Page 260.)

“The DoD should adopt a unified policy requiring videotaping custodial interrogations of felony-level crimes by the criminal investigative branches of each service, i.e., CID, NCIS, and OSI. This requirement should extend to recording all aspects of the custodial interrogation, to include the initial rapport building phase, the rights-warning under Article 31, UCMJ, and *Miranda v. Arizona*, as well as the entire interview session. Where military exigencies do not permit videotaping, other means of electronic recording should be used, such as audio recording with a voice-recorder. A policy mandating videotaping should be coupled with the appropriate funding for the required equipment and training.”

“[In addition to the benefits mentioned above], there are additional and more specific benefits to mandated videotaping of custodial interrogations.

“These benefits include efficiency, improving investigative agents’ techniques, enhancing agents’ testimony, and ease of implementation.” (Page 267.)

Homeland Security

Immigrations and Customs Enforcement

In response to my FOIA request, in August 2012 an officer of the U. S. Immigration and Customs Enforcement produced a cover page entitled Department of Homeland Security, U. S. Immigration and Customs Enforcement, Office of Investigations, *Interviewing Techniques Handbook*, OI HB 10-03, April 28, 2010, and pages 30 to 34, which contain the following provisions, among others:

“16.1. *Custodial Interviews*. Electronic recording of custodial (see Section 4.5) interviews may further an investigation and facilitate the successful outcome of a prosecution because they may obviate challenges to the voluntary character of self-incriminating statements. They further establish that the interviewing SA properly advised the individual being interviewed of his or her rights against self-incrimination (Statement of Rights) and that the individual understood such advisement and waived his or her right without coercion or duress. ASAs should be mindful that all such recordings are discoverable. Therefore, electronic recordings of custodial interviews should be controlled, stored, handled, transmitted, distributed, and disposed of in accordance with OI’s policy on evidence handling.

“Confidential consultations between the individual being interviewed and his or her attorney must not be recorded.

“16.1.1 *When Custodial Interviews May Be Recorded*. Electronic recordings of custodial interviews may be used on a case-by-case basis when a determination has been made that special circumstances (see Subsection B below) exist or when otherwise determined to be in the best interest of ICE, subject to authorization of the SAC. SAC’s are authorized to delegate this authority to subordinate officials within their AOR.

“The approving official may authorize the electronic recording of custodial interviews in any of the following instances:

A. The approving official has made a determination that an electronic recording is in the best interest of ICE; and/or

B. The approving official recognizes that one or more of the following special circumstances exist:

- 1) A juvenile (defined in Section 4.14) needs to be interviewed;
- 2) The individual refuses to be interviewed unless the interview is recorded;
- 3) The individual's apparent ability to comprehend is questionable;
- 4) The individual cannot read or write, or his or her knowledge of the language used to conduct the interview may be challenged;
- 5) An investigation has produced limited evidence and the statements by the individual being interviewed are likely to be essential to the prosecution; and/or
- 6) Local U.S. Attorney policies require the electronic recording of interviews.

"Whenever possible, SAs should seek advice from their local OCC prior to conducting an electronic recording of an interview in an investigation that has no involvement by the U.S. Attorney's Office. In cases where the investigation has been assigned an AUSA, SAs should seek advice from the assigned AUSA."

There follow in paragraphs 16.1.2 to through 16.2, and section d of paragraph 16.3, which contain instructions as to the preamble to recordings; handling objections to recordings; and concluding recordings.

Secret Service

In response to my FOIA request, in August 2012 an officer of the Department of Homeland Security, United States Secret Service produced, a document headed United States Secret Service, Directives Division, "Subject: Suspect Interviews and Statements. "This directive is in effect until superseded." The attached two redacted pages contain the following:

"Audio and Video Monitoring Devices.

“Interview rooms equipped with audio and/or video monitoring devices will be posted with warning signs in English, and Spanish if appropriate, advising subjects of the presence of these devices. Subjects who do not speak or understand English must be given this advisory statement in a language understandable by them... Offices needing warning signs or replacement warning signs should contact ISD with their request. Since the intended purpose of these devices is for SAFETY REASONS, no Attorney-client conversations should be monitored....”

“Use of Video Recorded Statements.

“Unless authorized by INV or OPO [Office of Protective Operations] depending on the type of interview, no statements will be recorded using video.”

“Use of Audio Recorded Statements. Audio recorded statements may be taken with a suspect’s permission without prior approval.”

Inspector General

In the publication of the Office of Inspector General, under the subject Frequently Asked Questions About OIG Investigations, it is stated:

“Under the Inspector General Act of 1978, as amended, OIG is authorized to carry out both investigations and audits to ‘promote economy, efficiency, and effectiveness in the administration of, and ... prevent and detect fraud and abuse in ... [the Department’s] programs and operations.’ Through its investigative and audit findings and recommendations, OIG helps protect and strengthen Departmental programs and operations.

“As part of our mission, we conduct investigations that involve employees, management officials, and affected Departmental programs and operations. Investigations are typically administrative in nature, though a small proportion pose criminal implications for employees.

“This set of Frequently Asked Questions (FAQs) is intended to provide Department of Commerce employees and managers with helpful information regarding the nature and scope of OIG investigative activities, as well as their obligations and rights in connection with OIG investigations. In the interest of transparency, we’re providing these FAQs to promote greater understanding of our processes.”

“Q. How is an OIG interview memorialized?

“A. Under Departmental directives DAO 207-10 and DOO 10-13, OIG investigators have authority to take sworn written statements (i.e., affidavits). Additionally, pursuant to OIG policy, investigators may audio or video-record interviews. Recording is to the benefit of all parties, as it ensures a definitive record exists of both what was asked and the information provided in response. Pursuant to the above-referenced directives, employee cooperation extends to participating in audio/video-recorded interviews. As noted above, an employee's management can become involved if the employee declines to participate in a recorded interview.”

The Office of Inspector General (OIG) is a generic term for the oversight division of a state or federal agency, aimed at preventing inefficient or illegal operations within their parent agency. Such offices are attached to many federal executive departments, independent federal agencies, as well as state and local governments. Each office includes an Inspector General and employees charged with identifying, auditing, and investigating fraud, waste, abuse, embezzlement and mismanagement of any kind within the parent agency. In addition to representing departments within the United States Government, some OIG's exist to investigate specific offenses (exp. Small Business Loans Office of Inspector General).

In the United States, the first Office of Inspector General (OIG) was established by act of congress in 1976 under the Department of Health and Human Services to fight waste, fraud and abuse in Medicare, Medicaid and more than 100 other HHS programs. With approximately 1,600 employees, the OIG performs audits, investigations, and evaluations to establish policy recommendations for decision-makers and the public.

There are 73 federal offices of inspectors general, a significant increase since the statutory creation of the initial 12 offices by the Inspector General Act of 1978. The offices employ special agents (criminal investigators, often armed) and auditors. In addition, federal offices of inspectors general employ forensic auditors, or "audigators," evaluators, inspectors, administrative investigators, and a variety of other specialists. Their activities include the detection and prevention of fraud, waste, abuse, and mismanagement of the government programs and operations within their parent organizations. Office investigations may be internal, targeting government employees, or external, targeting grant recipients, contractors, or recipients of the various loans and subsidies offered through the thousands of federal domestic and foreign assistance programs.

Some inspectors general, the heads of the offices, are appointed by the president and confirmed by the senate. For example, both the inspector general of the U.S. Department of Labor and the inspector general of the U.S. Agency for International Development are presidentially appointed. The remaining inspectors general are designated by their respective agency heads, such as the U.S. Postal Service inspector general. Presidentially appointed IGs can only be removed, or terminated, from their positions by the President of the United States, whereas designated inspectors general can be terminated by the agency head. However, in both cases Congress must be notified of the termination, removal, or reassignment.

Presidentially appointed inspectors general

- Agency for International Development
- United States Department of Agriculture
- Central Intelligence Agency
- United States Department of Commerce
- Corporation for National and Community Service
- Office of the Inspector General, Department of Defense
- United States Department of Education
- United States Department of Energy

- Environmental Protection Agency
- Export-Import Bank of the United States
- Federal Deposit Insurance Corporation
- General Services Administration
- United States Department of Health and Human Services
- Department of Homeland Security Office of Inspector General
- United States Department of Housing and Urban Development
- United States Department of the Interior
- United States Department of Justice Office of the Inspector General
- United States Department of Labor
- National Aeronautics and Space Administration
- Nuclear Regulatory Commission
- United States Office of Personnel Management
- Railroad Retirement Board
- Small Business Administration
- Social Security Administration
- United States Department of State — Office of Inspector General (OIG) for the U.S. Department of State and the Broadcasting Board of Governors (BBG)
- Tennessee Valley Authority
- Office of Inspector General for the Department of Transportation
- United States Department of the Treasury

- Treasury Inspector General for Tax Administration of the Department of the Treasury
- United States Department of Veterans Affairs

Designated federal entity inspectors general

- National Railroad Passenger Corporation (Amtrak)
- Appalachian Regional Commission
- Commodity Futures Trading Commission
- Consumer Product Safety Commission
- Corporation for Public Broadcasting
- Denali Commission
- Election Assistance Commission
- Equal Employment Opportunity Commission
- Farm Credit Administration
- Federal Communications Commission
- Federal Election Commission
- Federal Housing Finance Board
- Federal Labor Relations Authority
- Federal Maritime Commission
- Federal Reserve Board
- Federal Trade Commission
- United States International Trade Commission
- Legal Services Corporation
- National Archives and Records Administration

- National Credit Union Administration
- National Endowment for the Arts
- National Endowment for the Humanities
- National Labor Relations Board
- National Science Foundation
- Peace Corps
- Pension Benefit Guaranty Corporation
- Postal Regulatory Commission (formerly Postal Rate Commission)
- United States Postal Service Office of Inspector General
- Securities and Exchange Commission
- Smithsonian Institution

Special inspectors general

- Special Inspector General for Afghanistan Reconstruction - appointed by the president
- Special inspector general for Iraq reconstruction - appointed by the secretary of defense in consultation with the secretary of state
- Special inspector general for the Troubled Asset Relief Program - appointed by the president with Senate confirmation

Legislative agency inspectors general

- Architect of the Capitol
- United States Capitol Police
- Government Accountability Office
- Government Printing Office

- Library of Congress

Internal Revenue Service

On May 15, 2008, the Internal Revenue Service added §9.4.5.8 to the Internal Revenue Manual, under the section entitled “Criminal Investigations”:

“Right to Record Interview.

“1. An interrogation or conference may be recorded only by a stenographer who is an employee of the IRS. This rule may be waived by the special agent’s SSA. At the request of the IRS or witness, which includes a subject, the SSA may authorize the use of a stenographer employed by a US Attorney, a court reporter of the US district court, a reporter licensed or certified by any state as a court reporter or to take depositions for use in a US district court. . . . If no stenographer is readily available, mechanical or electronic recording devices may be used to record statements by advising the witness, in advance, of the use of the device (implied consent). If the witness objects, the interrogator will refrain from mechanically or electronically recording the statement. If the witness elects to mechanically or electronically record the conversation, the IRS will make its own recording.

“2. A witness or subject will be permitted to hire a qualified reporter as described above to be present at his/her expense to transcribe testimony, provided that the IRS can secure a copy of the transcript at its expense or record the testimony using a mechanical or electronic recording device or its own stenographer or reporter. However, the IRS retains the right to refuse to permit verbatim recording by a non-IRS reporter or stenographer on the grounds that disclosure would seriously impair Federal tax administration.”

http://www.irs.gov/irm/part9/irm_09-004-005.html.

Discussion: This provision does not mandate recordings of interrogations, but rather makes them permissible, and it does not provide consequences if an agent fails to record an interview.

Justice

On May 12, 2014, the Director of the Executive Office for United States Attorneys sent a memorandum to all United States Attorneys, all First Assistant U.S. Attorneys, Criminal Chiefs and Appellate Chiefs, "Subject: New Department Policy Concerning Electronic Recording of Statements." The full memorandum states:

"Attached is a Memorandum from the Deputy Attorney General, outlining a new Department of Justice policy with respect to the electronic recording of statements. The policy establishes a presumption in favor of electronically recording custodial interviews, with certain exceptions, and encourages agents and prosecutors to consider taping outside of custodial interrogations. The policy will go into effect on Friday, July 11, 2014. Please distribute the Deputy Attorney General's Memorandum to all prosecutors in your office.

"This policy resulted from the collaborative and lengthy efforts of a working group comprised of several United States Attorneys and representatives from the Office of the Deputy Attorney General, EOUSA, the Criminal Division, and the National Security Division, as well as the General Counsel, or their representatives, from the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Drug Enforcement Administration, and the United States Marshals Service.

"Earlier today during a conference call with all United States Attorneys, the Deputy Attorney General discussed the background of the policy and explained its basic terms. The policy will be the subject of training provided by the Office of Legal Education, including 2014 LearnDOJ training videos."

The Subject of the memorandum is "Policy Concerning Electronic Recording of Statements." The memorandum is in full as follows:

"This policy establishes a presumption that the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and the United States Marshals Service

(USMS) will electronically record statements made by individuals in their custody in the circumstances set forth below.

“This policy also encourages agents and prosecutors to consider electronic recording in investigative or other circumstances where the presumption does not apply. The policy encourages agents and prosecutors to consult with each other in such circumstances

“This policy is solely for internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights or benefits, substantive or procedural, enforceable at law or in equity in any matter, civil or criminal, by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person, nor does it place any limitation on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

“I. Presumption of Recording. There is a presumption that the custodial statement of an individual in a place of detention with suitable recording equipment, following arrest but prior to initial appearance, will be electronically recorded, subject to the exceptions defined below. Such custodial interviews will be recorded without the need for supervisory approval.

“a. Electronic recording. This policy strongly encourages the use of video recording to satisfy the presumption. When video recording equipment considered suitable under agency policy is not available, audio recording may be utilized.

“b. Custodial interviews. The presumption applies only to interviews of persons in FBI, DEA, ATF or USMS custody.

Interviews in non-custodial settings are excluded from the presumption.

“c. Place of detention. A place of detention is any structure where persons are held in connection with federal criminal charges where those persons can be interviewed. This includes not only federal facilities, but also any state, local, or tribal law enforcement facility, office, correctional or detention facility, jail,

police or sheriff's station, holding cell, or other structure used for such purpose. Recording under this policy is not required while a person is waiting for transportation, or is en route, to a place of detention.

"d. Suitable recording equipment. The presumption is limited to a place of detention that has suitable recording equipment. With respect to a place of detention owned or controlled by FBI, DEA, ATF, or USMS, suitable recording equipment means:

- (i) an electronic recording device deemed suitable by the agency for the recording of interviews that,
- (ii) is reasonably designed to capture electronically the entirety of the interview. Each agency will draft its own policy governing placement, maintenance and upkeep of such equipment, as well as requirements for preservation and transfer of recorded content. With respect to an interview by FBI, DEA, ATF, or USMS in a place of detention they do not own or control, but which has recording equipment, FBI, DEA, ATF, or USMS will each determine on a case by case basis whether that recording equipment meets or is equivalent to that agency's own requirements or is otherwise suitable for use in recording interviews for purposes of this policy.

"e. Timing. The presumption applies to persons in custody in a place of detention with suitable recording equipment following arrest but who have not yet made an initial appearance before a judicial officer under Federal Rule of Criminal Procedure 5.

"f. Scope of offenses. The presumption applies to interviews in connection with all federal crimes.

"g. Scope of recording. Electronic recording will begin as soon as the subject enters the interview area or room and will continue until the interview is completed.

"h. Recording may be overt or covert. Recording under this policy may be covert or overt. Covert recording constitutes consensual monitoring, which is allowed by federal law. See 18 U.S.C. § 2511(2)(c). Covert recording in fulfilling the

requirement of this policy may be carried out without constraint by the procedures and approval requirements prescribed by other Department policies for consensual monitoring.

“II. Exceptions to the Presumption. A decision not to record any interview that would otherwise presumptively be recorded under this policy must be documented by the agent as soon as practicable. Such documentation shall be made available to the United States Attorney and should be reviewed in connection with a periodic assessment of this policy by the United States Attorney and the Special Agent in Charge or their designees.

“a. Refusal by interviewee. If the interviewee is informed that the interview will be recorded and indicates that he or she is willing to give a statement but only if it is not electronically recorded, then a recording need not take place.

“b. Public Safety and National Security Exception. Recording is not prohibited in any of the circumstances covered by this exception and the decision whether or not to record should wherever possible be the subject of consultation between the agent and the prosecutor. There is no presumption of electronic recording where questioning is done for the purpose of gathering public safety information under *New York v. Quarles*. The presumption of recording likewise does not apply to those limited circumstances where questioning is undertaken to gather national security-related intelligence or questioning concerning intelligence, sources, or methods, the public disclosure of which would cause damage to national security.

“c. Recording is not reasonably practicable. Circumstances may prevent, or render not reasonably practicable, the electronic recording of an interview that would otherwise be presumptively recorded. Such circumstances may include equipment malfunction, an unexpected need to move the interview, or a need for multiple interviews in a limited timeframe exceeding the available number of recording devices.

“d. Residual exception. The presumption in favor of recording may be overcome where the Special Agent in Charge and the

United States Attorney, or their designees, agree that a significant and articulable law enforcement purpose requires setting it aside. This exception is to be used sparingly.

“III. Extraterritoriality. The presumption does not apply outside of the United States. However, recording may be appropriate outside the United States where it is not otherwise precluded or made infeasible by law, regulation, treaty, policy, or practical concerns such as the suitability of recording equipment. The decision whether to record an interview - whether the subject is in foreign custody, U.S. custody, or not in custody - outside the United States should be the subject of consultation between the agent and the prosecutor, in addition to other applicable requirements and authorities.

“IV. Administrative Issues.

“a. Training. Field offices of each agency shall, in connection with the implementation of this policy, collaborate with the local U.S. Attorney's Office to provide district-wide joint training for agents and prosecutors on best practices associated with electronic recording of interviews.

“b. Assignment of responsibilities. The investigative agencies will bear the cost of acquiring and maintaining, in places of detention they control where custodial interviews occur, recording equipment in sufficient numbers to meet expected needs for the recording of such interviews. Agencies will pay for electronic copies of recordings for distribution pre-indictment. Post-indictment, the United States Attorneys' offices will pay for transcripts of recordings, as necessary.

“V. Effective Date. This policy shall take effect on July 11, 2014.”

Announcing the new policy, Attorney General Eric Holder released a video message containing the following statement:

“Every day, in big cities and small towns across the country, hardworking prosecutors, agents, and investigators perform exceptional work in order to combat violent crime and other

threats to the public. They approach this high-stakes work with the utmost integrity and dedication.

“The professionalism of our personnel gives us the confidence to be as transparent as possible about how we perform our work. We at the Department of Justice are committed to ensuring accountability and promoting public confidence in the institutions and processes that guide our law enforcement efforts. Doing so not only strengthens the rule of law; it also enhances public safety – by building trust and fostering community engagement.

“That’s why we are announcing a new step to raise our already high standards of accountability. The Department of Justice is instituting a sweeping new policy pertaining to interviews of individuals in law enforcement custody. This new policy, which will take effect on July 11th, [2014] creates a presumption that statements made by individuals in federal custody, after they have been arrested but before their initial appearance, will be electronically recorded. The policy applies in a place of detention that has suitable recording equipment, and it encourages video recording whenever possible and audio recording when video is unavailable. The policy also encourages agents and prosecutors to consider electronic recording in investigative or other circumstances not covered by the presumption.

“This presumption in favor of recording applies to statements made by individuals in the custody of the FBI, the DEA, the ATF, and the United States Marshals Service. It allows for certain exceptions—such as when the interviewee requests that the recording not occur or when recording is not practicable.

“Creating an electronic record will ensure that we have an objective account of key investigations and interactions with people who are held in federal custody. It will allow us to document that detained individuals are afforded their constitutionally-protected rights. And it will also provide federal law enforcement officials with a backstop, so that they have clear and indisputable records of important statements and confessions made by individuals who have been detained.

“This policy will not – in any way – compromise our ability to hold accountable those who break the law. Nor will it impair our national security efforts. On the contrary: it will reduce uncertainty in even the most sensitive cases, prevent unnecessary disputes, and improve our ability to see that justice can be served.

“Federal agents and prosecutors throughout the nation are firmly committed to due process in their rigorous and evenhanded enforcement of the law. This new recording policy not only reaffirms our steadfast commitment to these ideals – it will provide verifiable evidence that our words are matched by our deeds. And it will help to strengthen the robust and fair system of justice upon which all Americans depend – and which every American deserves.”

Criticisms of the previous DOJ-FBI non-recording policy.

A substantial number of knowledgeable commentators, including federal and state court judges, have lodged severe criticisms of the previous FBI policy that discouraged - indeed, virtually eliminated - recording of custodial interviews. The following examples are arranged chronologically.

United States v. Azure, No. CR-99-30077, 1999 WL 33218402, at *1-2 (D.S.D. 1999). Federal Magistrate Judge Mark Moreno and District Court Judge Charles B. Kornmann both denied the defendant’s motion to suppress a statement taken by an FBI agent. However, in his opinion, Judge Kornmann wrote:

“The Court has conducted a *de novo* review of the motion to suppress a statement (Doc. 25), the report and recommendations from Judge Moreno (Doc. 43), to transcripts (Docs. 33 and 42), and the exhibits (Doc. 39).

“This is another all too familiar case in which the F.B.I. agent testifies to one version of what was said and when it was said and the defendant testifies to an opposite version or versions. Despite numerous polite suggestions to the F.B.I., they continue to refuse to tape record or video tape interviews. This results, as it has in this case, in the use, or more correctly, the

abuse of judicial time, both from the U.S. Magistrate Judge and from the U.S. District Court, which should not occur. Private investigators routinely tape interviews and statements. All South Dakota Highway Patrol officers have tape recorders in their vehicles and tape all interviews conducted in a patrol vehicle. The taping is done by the Highway Patrol Officer without the suspect even being aware that the interview is being taped. Psychologists interviewing children in suspected child abuse cases are told by their professional societies to video tape all such interviews to ensure as far as possible that no suggestive or leading questions are being asked of the child. All jails in larger towns and cities in South Dakota video tape people arrested and brought to the jail. There is no good reason why F.B.I. agents should not follow the same careful practices unless the interview is being conducted under circumstances where it is impossible to tape or record the interview. These disputes and motions to suppress would rarely arise, given careful practices by F.B.I. agents. The present practice of the F.B.I. enables the agent to take notes and then type a Form 302, a summary of the interview, written entirely by the agent. The agent chooses, in some cases, the proper adjectives. The F.B.I. agent knows in advance of his or her plans to interview a criminal suspect and thus has full opportunity to prepare for the interview. The prosecutor then questions the defendant at trial by showing the defendant a copy of the 302, a document that is unsigned by the defendant and not written by the defendant. The prosecutor then attempts to show that the 302 is equivalent to a statement given by the defendant. It is not equivalent, of course. Both Chief Judge Piersol and this Court have repeatedly expressed our displeasure with F.B.I. tactics as to not taping or otherwise recording statements. Chief Judge Piersol has even spoken with F.B.I. Director Freeh about the problem and the Director was unaware of any such F.B.I. 'policy.' The argument that too much secretarial time would be required to type the transcript is a specious argument. First, there is no need to ever type anything in the case of a video tape since the tape is simply preserved until the case is concluded. It can then be used again. Second, there is no need to type or transcribe an electronic tape unless the same is possibly needed at a hearing or at trial. The tape could simply

be played to the judge or to the jury or both without typing anything. Tapes cost very little, given all the money spent on law enforcement activities by the federal government. In addition, justice requires the practice whenever possible and cost should not determine the measure of justice and fair treatment of all persons accused of a crime.

“In all future cases in the Northern and Central Divisions of the District of South Dakota in which statements taken after November 1, 1999, are not tape or video recorded and there is no good reason why the taping or recording was not done and there is disagreement over what was said, this Court intends to advise juries of exactly what is set forth in this Order and explain to the jury that F.B.I. agents continue to refuse to follow the suggestions of Judge Piersol and the presiding judge in the Northern and Central Divisions of the District of South Dakota and why, in the option of the court, they refuse to follow such suggestions. The prosecutor will also not be allowed to question defendants about the 302's in the absence of a cautionary instruction and explanation by the Court to the jury. Fair warning has now been provided and it is expected that the United States Attorney will communicate all of this to the Federal Bureau of Investigation so they can decide what to do in the future.”

Footnote 3 is as follows:

“This writer feels there is little doubt that accurate, contemporaneous recording of custodial statements would facilitate the truth-seeking aims of the justice system, and it would also facilitate review on appeal. Given the inexpensive means readily available for making written, audio, and video recordings, the failure to use such devices may raise some interesting issues. Absent a proven violation of rights in this case, however, it is not a matter within our power to pass upon.”

An article co-authored by a Special Agent, published in 2006 in an FBI publication, outlined the advantages of recording custodial interrogations: B. Boetig, et al., *Revealing Incommunicado: Electronic*

Recording of Police Interrogations, pp. 1-8, FBI Law Enforcement Bulletin (Dec. 2006):

“Testimony regarding what transpired inside the interrogation room can become tainted if only the participants witnessed what occurred. Conflicting statements by the police and defendant regarding the presentation and waiver of *Miranda* warnings, requests for an attorney, the use of coercive tactics, and the mere presence of a confession expose the spectrum of issues that can arise.

* * *

“Many law enforcement agencies and courts have recognized and accepted electronic recording as a just and viable manner to collect and preserve confession evidence, the single most valuable tool in securing a conviction in a criminal case.

* * *

“...As the most accurate and efficient method of collecting and preserving confession evidence, the benefits of recording to the criminal justice system and community are unequivocal.”

Following a 2006 trial in a Chicago federal District Court, in which defense lawyers dissected agents’ reports of unrecorded interviews of the defendants, an FBI agent is reported to have said (Chicago Sun-Times, July 17, 2006):

“I think we are going to see more interviews recorded at the FBI. If a person hears that tape, it’s going to be hard to argue with that tape.”

Transcript from *United States v. Cook*, 3:10-CR-522, N. D. Ohio, (Sept. 8, 2011):

Judge James G. Carr: “Twice in my career I’m faced with the fact that had the Bureau recorded the conversation, we wouldn’t be here. I find it a shabby and unjustified practice. Recording is ubiquitous. They videotape with TPD.

Assistant U.S. Attorney: "You're preaching to the choir. But, that having been said, this is a procedural thing that the government -- when I say the government, I mean my office has no control over.

Judge Carr: "I understand that. Somebody has to tell the Bureau, enough is enough. This kid is looking at 15 years, if I understand correctly. A 20 year old eagle scout. I don't know whether he's telling the truth. But I think this matters... I'm sitting here listening to that kid and wondering, you know, maybe he's telling the truth. Implausible as it seems, incredible as it is; nonetheless, we wouldn't be here... It's not necessary for us and the jurors and everybody else to take the time and money when the Bureau, as far as I'm concerned, has absolutely no reason not to do it. It gives the Bureau an edge. These guys come in here with their badge, their experience, their professional demeanor in testifying, and it's impossible not to believe them. It's impossible. It really is.

Assistant: "So you're doing this in order to get them to change their policies?

Judge Carr: "No, I'm doing it because it's fundamentally unfair. It is fundamentally unfair. They do it deliberately because they know it gives them an edge. And that's not right. It's not the way the government should function. It recorded ...hundreds of hours of [name] ... the plant in the terrorism case. Hundreds of hours. Peep hole cameras, gym bags; they can do it. There's no excuse not to. Highway patrol does it. I'd be willing to bet every major police department in this state does it. There's no excuse. I'm yelling at you, I'm sorry, but I'm really upset. This is 15 years of the kid's life. He may deserve it. The stuff we saw yesterday is appalling. He deserves a stiff sentence if he did it. And we could know one way or another what the truth was about what happened in that closed interrogation room. I don't like thinking that an FBI agent might lie, but there's a sure and certain way I would know whether that's true or not. This case wouldn't be here. If they had a recording, [defense lawyer] would have pled, or you wouldn't have indicted. End of discussion.

“...And we all know and the last five years have shown us there are plenty of false confessions. People who are totally innocent. Has it happened in this case? Who knows. That’s for the jury to decide. But I am sick and tired of the Bureau coming in here and taking that edge. It’s a violation of fundamental due process as far as I’m concerned.

“ ... I paused for a moment and said, you may step down. At that moment I thought about saying, well, agent, you didn’t record it, did you? No. Why not? Bureau policy. Does the Lima P D record? Does the Allen County sheriff? Do you know whether the Toledo police department records? The Ohio state patrol when they have a traffic stop?

“I’m going to be very candid. Agent [name], I know it’s not your job to change policy. But as [the Assistants] probably told you, I am deeply disturbed that the FBI continues its incomprehensible policy of not recording interviews. We spent this week for one reason and one reason only in this case, because the Bureau does not record interviews. Shame on the Bureau. It makes no sense. It gives the Bureau an unfair advantage. You come in here in your coat and tie and say I’m from the FBI and I do not lie, and everybody believes it. You already come in with an overwhelming advantage because of the Bureau you work for and the esteem and respect in which we all hold it, myself included. I’ve worked with your agents for more than 30 years. And quite candidly, rarely, if ever, have I had a question about their veracity. But it enhances the advantage you already have and the government already has not to record interviews. They tape record, they videotape them across the street, across the mall in Toledo police department. You have an undercover operation, you wire the informant for every single drug transaction. Why do you do it? Best possible record. That’s why. But you get in an interrogation room with nobody else except a 20 year old defendant, and you -- your Bureau sees fit at that moment, the most crucial moment of any investigation, not to record what he says and what you say. You collectively incorporated. And that’s shameful. It’s intolerable in any society under any government that values the rights of its citizens to a fair trial. I know my saying this is out of role and

perhaps out of place. I know that there is nothing you can do about it. But quite simply, somebody has to tell the Bureau, there's at least one federal judge in whose estimation the FBI diminishes when it comes in the courtroom and it says, we didn't record the statement. I was tempted to ask the simple question, what would have been the indisputable proof of what was said in that room? And you would have had to answer, a recording. I was that close to doing it. But I decided not to put my thumb on the scales. I'm not so sure next time it happens I will be quite so discreet. This young man is looking at 15 years in prison if he gets convicted. If he did what he did, it's appalling. It's insufferable. He deserves to go to prison. But he also deserves the fairest possible trial our government can give him. And every time the FBI does not show up with a recording device, it cheats that suspect and ultimately that defendant. It's not playing fair. I expect more from our government law enforcement agents. You send in an undercover agents, peephole cameras, you wire rooms, you record by law every conversation that's heard on a Title 3. But it comes to the occasion when most cases are determined, namely when you sit down in a closed interview room with a suspect. That is the most crucial moment of almost every case in an investigation, the one-on-one interrogation. And you take advantage of that by not recording it. Shame on the Bureau, and tell them I said so. Tell them they can do better. We deserve better. I've said enough.

"...I will not tolerate the fundamental unfairness of what the FBI does day in and day out, trial in and trial out, interrogation in and interrogation and interrogation after another. It is unpardonable. In this courtroom in front of this judge it is unacceptable. And it will not happen again or if it does I will give a strongly worded instruction. I will exercise my right to question the agent. And I will also exercise my right to comment on the evidence. Enough said."

Dueling recorded confessions show FBI agents induced a false confession.

In 2011, two children were found murdered in their home on an Indian Reservation in Spirit Lake, North Dakota. This was a federal crime. FBI

agents suspected the children's father, whom they interviewed. After lengthy sessions, the father insisted he couldn't recall committing the murders, but he finally confessed. Subsequently, DNA was discovered which matched a male baby-sitter; the same agents interviewed him, and he too confessed, but unlike the father, he provided details of the crime previously unknown to the agents. The interrogations took place in a local police station in North Dakota in a room equipped with recording equipment; both interviews were videotaped. At the 2013 federal court trial of the sitter, the defense lawyer played the father's taped confession, and argued he was the killer, while the Assistant United States Attorney argued the father's confession to the FBI agents was false. The jury convicted the sitter. After the jury convicted, the United States Attorney stated that he favored electronic recording of all custodial interrogations.

The tape made of the father's "confession" illustrate how law enforcement agents – including federal agents – may inadvertently suggest to those they interrogate how crimes occurred, and pressure suspects for admissions of guilt. Without the videotapes that graphically revealed the exact evolution of the two interrogations – which agents' brief written reports customarily do not – the father rather than the sitter may have been convicted of killing his children, and a serious injustice perpetrated. *Criticisms of the Drug Enforcement Agency previous non- recording policy*

United States v. Plummer, 118 F. Supp. 2d 945 (N.D. Iowa 2000). The defendant was interviewed by state officers and DEA agents. Chief District Court Judge Mark W. Bennett granted the defendant's motion to suppress his statement on the basis that the defendant made "an unequivocal decision to invoke his right to remain silent." (118 F. Supp. 2d at 953). In a footnote, he wrote (F. Supp. 2d at 951, n.6):

"The court again notes that this factual conflict, indeed the entirety of Plummer's motion, could have been easily resolved if the officers had videotaped or otherwise recorded their interaction with defendant Plummer."

In the body of his opinion, Judge Bennett wrote (118 F. Supp. 2d at 946-47):

"This motion to suppress reminds the court of one of Akira Kurosawa's classic films, RASHOMON, where the director takes an apparently simple story and complicates it by filtering it

through the perceptions of four different witnesses. Here, four state law enforcement officers working with the Tri-State Drug Task Force testified to four slightly altered versions of the events surrounding the defendant's being informed of his constitutional rights as required by *Miranda v. Arizona*...while the defendant provided the court with a contrasting account. Resolution of this factual conflict, indeed the entirety of the motion to suppress, would be unnecessary if the officers had videotaped or otherwise recorded their interaction with the defendant. The interview room where the questioning took place had videotaping capability. Their failure to videotape the events surrounding the interrogation of the defendant was done pursuant to an edict of the United States Drug Enforcement Agency which proscribes its officers from recording the questioning of suspects.

"The continued failure of federal law enforcement agencies to adopt a policy of videotaping or otherwise recording interviews leads invariably to the proliferation of motions such as the one currently pending before the court. The court, therefore, is considering adopting policies similar to those implemented by Judge Kornmann in *Azure*.

"The room has no two-way mirror but does have the capacity for audio and video monitoring. The room also has videotaping capabilities but no videotaping occurred here pursuant to the United States Drug Enforcement Agency's ('DEA') policy of not recording or videotaping interrogations." (Footnote 2)

Footnote 2. "Officer Cheshier testified at the evidentiary hearing that it was his understanding that the reason underlying the DEA's policy for not videotaping interrogations was to preserve uniformity in the evidence of all interrogations. As explained by Officer Cheshier, the DEA believes that because not all questioning that occurs in the field can be recorded or videotaped then no interrogations should be videotaped. This explanation is at least suspicious and at worst ludicrous. The court notes that Iowa State Troopers have videotape recorders in their patrol cars and the capacity to make audio recordings of conversations that occur in those patrol cars. Moreover, small audio tape recorders have been widely available for a great many years and small hand held videotape recorders are now available. Indeed, State law enforcement officers have previously

testified before this court about their ability to record statements. There is simply no good reason why DEA agents could not make audio or video recordings of virtually all interrogations that occur. Even if occasionally a law enforcement officer in the field were unable to record his or her questioning of a suspect because of environmental factors or mechanical malfunctions, this does not support the officer's failure to record statements under the conditions which existed here. Indeed, Officer Fellin actually used the audio video monitor in the interview room here to watch portions of the interrogation but simply elected not to use it to record the interrogation. Thus, left with no rational explanation for the DEA's policy against videotaping or recording on interrogations, the court is left with the inescapable conclusion that DEA's offered reason for not videotaping or recording statements is totally pretextual."

United States v. Thornton, 177 F. Supp. 2d 625 (E.D. Mich. 2001). The defendant was interviewed by DEA agents, and signed a written confession. District Court Judge Arthur J. Tarnow granted the defendant's motion to suppress both her oral and written statements, saying (177 F. Supp. 2d at 627-28):

"The court finds, after considering all of the circumstances surrounding the confession, that Ms. Thornton's confession was involuntary and must be suppressed.

"The Court notes that neither the interrogation nor confession were audio or video taped. While electronic recording is not a constitutional requirement, there is a 'heavy burden' on the government to show a suspect's waiver of rights was knowing and intelligent. *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). To that end, several jurisdictions in the United States have instituted mandatory taping of confessions, waivers of *Miranda* rights, and interrogations, such as Alaska and Minnesota, while many more tape voluntarily. It certainly harms the prosecution in a close case when the court cannot evaluate the actual confession. The Court recommends that the DEA electronically record future interrogations and confessions so a reviewing court can full evaluate whether a confession violates Fifth or Fourteenth Amendment."

United States v. Mansker, 240 F. Supp. 2d 902, 910-11 (N.D. Iowa 2003). Chief Judge Bennett upheld a jury verdict of guilty, but in the course

of his opinion he referred again to the DEA policy of not recording custodial interviews:

“Nevertheless, the court is troubled by the agents’ practice of destroying their notes after typewritten summaries have been prepared because it is a subversion of the truth-finding process, which this court refuses to sanction as a tolerable practice. This court criticized a parallel law enforcement practice in *United States v. Plummer*, 118 F. Supp. 2d 945 (N.D. Iowa 2000). In *Plummer*, the issue before the court on a motion to suppress revolved around whether and how a defendant was *Mirandized*. Had the interrogation been videotaped, resolution of the factual dispute would have been unnecessary. But, an edict of the United States Drug Enforcement Agency proscribed its officers from recording the questioning of suspects. *Id.* at 947. In *Plummer*, the court cautioned that, if law enforcement officers refused to adopt a policy of videotaping or otherwise recording interviews, it would likely adopt Judge Kornmann’s approach in the District of South Dakota:...

“When questioned, neither the case agent nor the prosecutor could articulate any legitimate justification for destroying handwritten notes after they had been reduced to a finalized report. Because there is no legitimate reason for destroying rough notes and because of the danger their destruction poses to the integrity of the criminal justice system, the court is seriously contemplating entering an administrative order that no federal law enforcement officer or state officer working with the Task Force in the Northern District of Iowa, absent a satisfactory explanation for the destruction of their rough notes, will be allowed to testify if the officer destroyed his or her notes after preparing a finalized report.”

United States v. Lewis, 355 F. Supp. 2d 870, 871-73 (E.D. Mich. 2005), involved a defendant who was questioned at the local DEA headquarters. The defendant’s oral statement to the agents was summarized on DEA Form 6 Report of Investigation. In his opinion granting the defendant’s motion to suppress the statement, District Judge Avern Cohn said:

“While video equipment and audio cassette equipment was available at the DEA headquarters, as a matter of policy interviews such as those which occurred on June 5, 2003 are not recorded. The Assistant United States Attorney prosecuting the case advised the Court:

‘DEA policy does not prohibit the recording of statements. Rather, the policy requires the recording of statements if the agents request that the interview be recorded and the defendant consents to the video or audio recording. While the recording of interviews would certainly make for less litigation over suppression issues, the government continues to believe that case law does not require suppression simply because the agents chose not to record the interview.’

“The notion of recording interrogations is not new, nor is it uncommon. Indeed, less than a decade after *Miranda* the American Law Institute proposed recording of interrogations as a way to eliminate disputes over statements made during interrogations. American Law Inst., *A Model Code of Pre-Arraignment Procedures* §130.4(3) (1975).

“. . . Additionally, the American Bar Association unanimously accepted a regulation in early 2004 that urges law enforcement agencies across the country to videotape interrogations. *Id.* at 640. On a global scale, Great Britain, Canada, and Australia all require either audio or video recordings of interrogations. Daniel Donovan & John Rhodes, *Comes a Time: The Case for Recording Interrogations*, 61 Mont. L.Rev. 223, 231 (2000). If law enforcement officers in Australia fail to comply with the requirement, the jury will receive an instruction suggesting any police testimony about a confession may be unreliable. *Id.*

“Affording the Court the benefit of watching or listening to a videotaped or audiotaped statement is invaluable; indeed, a tape-recorded interrogation allows the Court to more accurately assess whether a statement was given knowingly, voluntarily, and intelligently. One legal commentator has noted that ‘some of the most detailed assessments of voluntariness have come in cases of recorded interrogations, which permit judges to

parse implicit promises and threats made to obtain an admission.'

One of the reasons Judge Cohn gave for his ruling was that (355 F. Supp. 2d at 873):

"the interviews were not memorialized by video or audio recording, notwithstanding that equipment to do so was available, and notwithstanding the fact that one of the officers had previously been involved in an interview situation where the failure to record was criticized, see *United States v. Thornton*, 177 F. Supp. 2d 625, 628 (E.D.Mich. 2001)."

Commentary re past DOJ non-recording policy:

The DOJ policy which discouraged agents from recording their custodial interrogations is difficult to square with the truism contained in Senior District Judge Robert Van Pelt's opinion in *Hendricks v. Swenson*, 456 F.2d 503 (8th Cir. 1972). That case involved a defendant who was convicted in state court, who argued that his constitutional rights were violated by the local law enforcement officials by video recording his confession. Judge Van Pelt observed (506-07):

"...a video tape is protection for the accused. If he is hesitant, uncertain, or faltering, such facts will appear. If he has been worn out by interrogation, physically abused, or in other respects is acting involuntarily, the tape will corroborate him in ways a typewritten statement would not. Instead of denying a defendant his rights, we believe it is a modern technique to protect a defendant's rights."

* * *

"We must recognize that the capacity of persons to observe, remember and relate varies as does their ability and desire to relate truly. For jurors to see as well as hear the events surrounding an alleged confession or incriminating statement is a forward step in the search for truth. And after all, the end for which we strive in all trials is 'that the truth may be ascertained and the proceedings justly determined.'"

It is also difficult to reconcile the previous DOJ policy which discouraged agents from recording their custodial interrogations, with the awards made by the Department's Office of Justice Programs, Bureau of Justice Assistance, to eight state agencies (CA, CT, LA, MS, MO, NM, NC, TX) for the purchase of video recording equipment to support their recording of custodial interrogations; and to the injunction imposed by the federal court in Detroit at the urging of DOJ lawyers, requiring Detroit police to record custodial interrogations of persons suspected of serious felonies. *Harlin v. City of Detroit*, No. 04 70922, Dkt. 110 (E.D. Mich. Jun. 22, 2006).

Marine Corps

Citation: Marine Corps Inspector General Program, Investigations Guide, August 2009.

“Section 6-2, Categories of Evidence. 4. Oral Statements.

“a. Testimony. (1) Testimony is defined as a sworn and recorded oral statement...Testimony is the primary means of gathering evidence in investigations, and IGs may use it in inquiries....(2) Verbatim testimony may not always be practical. If assets or time are limited, take sworn and recorded testimony and initially prepare a summary in Memorandum for Record (MFR) format. ...Keep in mind that the purpose for recording is to make an accurate record of the interview. For accuracy, you may record interviews even if you do not intend to prepare a verbatim transcript. When in doubt, record!”

Navy

Citation: U.S. Naval Criminal Investigations Manual, Dec. 2008, Chapter 36-11.

General rule: “The recording of interrogations by overt video or audio means within the confines of an NCIS [Naval Criminal Investigations Service] facility having the technical capabilities for such recordings shall be accomplished in all investigations involving crimes of violence...” §36-11.1.

“...It is envisioned that all NCIS components will eventually become technically capable to record interrogations, consistent with the guidance provided below” §36-11.2.

“The entire sessions, except for when a person is conferring with their lawyer or with a chaplain, shall be recorded from the time the person being interrogated enters the room until the time he/she departs, to include the statement taking process” §36-11.3e.

“Agents should consider use of this investigative tool in all investigations.” §36-11.10.

Signs shall be posted at each entrance to rooms used for interrogations. “Room subject to audio/video recording at all times,” translated in foreign countries into the native language §36-11.3a.

Circumstances that excuse recording: “A decision not to record may be made by the SAC [Special Agent-in-Charge], or the supervisory designee, when circumstances of investigative environment dictate that recording would be counterproductive or otherwise impede the interrogation” §36-11-1. If the decision not to record interrogations relating to crimes of violence, the rationale for that decision and the identity of the supervisor who made the decision shall be annotated in the case agent report. “If the person interrogated objects to being recorded, the recording equipment shall be immediately turned off and remain off throughout the interrogation and statement taking process” §36-11-3c. Polygraph examinations are exempted from the recording requirement §36- 11.7.

Miscellany: Factors for consideration by SACs when considering whether to record interrogations are listed in Appendix (3), including “Whether the subject’s own words and appearance (in video recordings) would help rebut any doubt about the voluntariness of the statement raised by a person’s age, mental state, educational level or understanding of the English language; or is otherwise expected to be an issue at trial, such as to rebut an insanity defense; or perhaps be of value to behavior analysis” §4; “The preference of the Military Trial Counsel, the Attorney’s Office, or federal District Court regarding recorded statements” §5; and “Local laws and practice – particularly in task force investigations where state prosecution is possible” §6. If the decision is made not to record interrogations relating to crimes of violence, the rationale for that decision (e.g., the office interview

room was not equipped for recording) and the identity of the supervisor making that decision shall be annotated in the CAR [Case Action Report].” §36-11.4. In joint investigations with another agency that has primary jurisdiction, the other agency’s policy prevails §36-11.9.

Consequences unexcused failure to record: None given.

Preservation: “The master recording shall be maintained as evidence until the case is fully adjudicated including the appeals process. A ROI shall reflect where the recording was placed into evidence, to include the date and evidence log number. A log shall be established to document any reproductions or copies of recordings. The log shall be maintained in the case file and shall reflect the name of the requestor, the date copies were made, and to whom the copies were provided. A copy of the recording shall not be submitted as part of the closed file.” §36-11.5

Treasury

The Guidelines issued by the Treasury Inspector General for tax Investigations (TIGTA) provide in part:

210.1 Overview.

This section contains the following information regarding investigative interviews conducted by TIGTA-Office of Investigations (OI):

* * *

210.19 Custodial Interviews.

If a subject is in custody or is deprived of his/her freedom of action in any significant way, advise the subject of his/her *Miranda* rights.

* * *

Obtain a written waiver if the subject elects to waive the right to counsel and the right to remain silent.

* * *

210.19.1 Recording Custodial Interviews. This policy establishes a presumption that the custodial statement of an individual in a place of detention with suitable recording equipment, following arrest but prior to

initial appearance, will be electronically recorded, subject to the limited exceptions described in Section 210.19.1.3 below.

210.19.1.1 Requirements. The policy to record in-custody statements applies when the following factors exist:

- **Custody, Timing, and Jurisdiction.** This policy applies to the subjects of TIGTA investigations, after their arrest for a Federal crime, but prior to their initial court appearance before a judicial officer under Federal Rule of Criminal Procedure 5. Interviews in non-custodial settings are excluded from this policy.
- **Place of Detention.** The policy applies when the subject is held in a place of detention. A place of detention is any structure where persons are held in connection with Federal criminal charges and can be interviewed. A place of detention includes any TIGTA office, other Federal facilities, and any State, local, or tribal law enforcement facility, office, correctional or detention facility, jail, police or sheriff's station, holding cell, or other structure used for such purpose.

Recording under this policy is not required while a person is waiting for transportation, or is en route, to a place of detention. However, no supervisory approval is needed if an agent deems it prudent or necessary to record a post-arrest custodial interview while awaiting transportation or en route to a place of detention.

- **Suitable Recording Equipment.** This policy applies when the place of detention or the agent has suitable recording equipment.

There is no requirement that interviews not meeting the above criteria be recorded; however, agents are encouraged to consider electronic recording in other interviews, in accordance with TIGTA policy and consultation with a prosecutor.

210.19.1.2 Procedures for Recording Custodial Interviews. Recording under this policy may be covert or overt. Covert recording constitutes consensual monitoring, which is allowed by Federal law. See 18 U.S.C.

2511(2)(c) The decision to covertly record the interview should be discussed with the SA's supervisor and the prosecutor, prior to arrest.

The electronic recording must begin as soon as the subject enters the interview area and will continue until the interview is completed. When overtly recording, the special agent will start the recording with a preamble that provides the date, time, and participants, as well as a reading (or re-reading if previously read) of the interviewee's *Miranda* rights, followed by the interviewee's acknowledgment and waiver of these rights as is practical. In instances where the recording is conducted covertly, the preamble will be recorded outside the presence of the interviewee and as contemporaneously with the start of the interview as is practical. The covert recording should also address the interviewee's *Miranda* rights in the same manner as is described above for overt recordings. Ensure bargaining unit employee subjects are also notified of their right to union representation via IRS Form 8111.

The electronic recording of the interview may be audio only, or both audio and video, if available.

The recordings of custodial subject interviews per this policy will be treated as evidence. The first download of the recording from the digital recording device will be directly to an individual digital media storage device (e.g., DVD-R, CD-ROM). This original copy will be considered "best evidence" and will be preserved as evidence in accordance with Section 190.3.

210.19.1.3 Exceptions to Mandatory Recording of Post-Arrest Custodial Interviews. A decision not to record an interview that would otherwise presumptively be recorded under this policy must be documented by the agent on a separate document (e.g., letterhead memorandum) and made available to, or provided to, the United States Attorney's Office. Exceptions to the presumption of recording are:

- Refusal by the interviewee. If the interviewee is informed that the interview will be recorded and indicates that he or she is willing to give a statement but only if it is not electronically recorded, then a recording need not take place. Additionally, if the interviewee asks to stop a recording that has already been started but agrees to continue the interview, the agent may cease recording while continuing the interview.

- Public Safety and National Security Exception. There is no presumption of electronic recording where questioning is done for the purpose of gathering public safety information under *New York v. Quarles*. The presumption of recording likewise does not apply to those limited circumstances where questioning is undertaken to gather national security-related intelligence or questioning concerning intelligence, sources, or methods, the public disclosure of which would cause damage to national security.
- Recording is not reasonably practicable. Circumstances may prevent, or render impracticable, the recording of an interview, such as equipment malfunction, an unexpected need to move the interview, or too many interviews to record with available equipment in a limited timeframe.
- Residual exception. The Special Agent in Charge and the United States Attorney, or their designees, agree that a significant and articulable law enforcement purpose (e.g., avoiding disclosure of a sensitive law enforcement technique) requires the interview not be recorded.

Veterans Affairs

The VA Resource Guidebook (July 2004) contains the following under §2,5,3, Witness Interview Process:

“Introduction – The interview process is the most integral part of an administrative investigation. The ultimate goal is to discover what really happened....

“Recording and Transcribing Testimony – VA policy requires that ‘complete testimony be transcribed, reviewed and corrected. This required (sic) that testimony be taped (sic) recorded, or a court reporter be retained. Witnesses are not allowed to tape record proceedings. They will have an opportunity to have copy of their transcript at the conclusion of the proceeding.”

To view a specific section of the compendium, click on the link below to jump to this specific information.

Introduction

Part 1: The Benefits of Statewide Requirements of Electronic
 Recording of Custodial Interrogations

Part 2: States

Part 3: Federal Agencies

Part 4: National Organizations

Part 5: Foreign countries

Part 6: Bibliography

Part 4: National Organizations

The following national organizations, listed alphabetically, have taken formal positions regarding the practice of electronic recording of custodial interrogations.

American Bar Association	International Association of Chiefs of Police
American Civil Liberties Union	Justice Project
American Federation of Police and Concerned Citizens	Major Cities Chiefs Association
American Judicature Society	National Association for the Advancement of Colored People
American Law Institute	National Association of Criminal Defense Lawyers
American Psychological Association	National Conference of Commissioners on Uniform State Laws
Center For Policy Alternatives Constitution Project	National District Attorney's Association
Innocence Project	National Institute of Military Justice

American Bar Association

In February 2004, the House of Delegates approved a resolution urging "all law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at places where suspects are held for questioning, or, where videotaping is impractical, to audiotape the entirety of such custodial interrogations." The House of Delegates also urged "legislatures and/or courts to enact laws or rules of procedure" to the same effect. ABA Resolution 8A - *Videotaping Custodial Interrogations*.

American Civil Liberties Union

Members of the ACLU work "in courts, legislatures and communities to defend and preserve the individual right and liberties that the Constitution and laws of the United States guarantee everyone in this country."

In May 2008, the Director and Legislative Counsel of the ACLU sent a memorandum to members of the United States House of Representatives urging them “to support the video recording amendment” to the defense authorization bill, which “would make an important – and extraordinarily practical - change to Defense Department interrogation practices by requiring the recording and retention of videos of strategic interrogations of persons under the custody or control of the Defense Department.”

American Federation of Police and Concerned Citizens

This is a national organization, founded in 1966, among other purposes, to assist family members and children of officers killed in the line of duty, and promotes the training of police reserves. In November 2011, the Executive Director wrote to the author on behalf of the national President:

“Over the years we have been instrumental in promoting not only safety in law enforcement but also advocating for the wellness and welfare of departments and their individual officers. We believe that the use of recording devices during interrogation and during other crucial times of an investigation provides a great measure of safety to the interrogating officers and to the departments as well, especially when trying to meet certain legal guidelines and stave off potential litigation. Therefore we endorse your writings pertaining to the promotion of recording devices to be utilized whenever possible.”

American Judicature Society

The Society is an independent, non-partisan, membership organization working nationally to protect the integrity of the American justice system. A 2006 editorial in the Society’s publication, entitled *Systemic flaws on our criminal justice system*, states (89 Judicature 244 at 246):

“*Confessions*. DNA exonerations have shown what many are not willing to believe: that even in the *Miranda* era, some confessions are still coerced, and some are simply false, due to police manipulation of suspects who are misled into confessing to crimes they did not commit. To avoid over-reaching and impermissible psychological ploys, all station house

interrogation could be videotaped from start to finish (not just the formal statement of the suspect).”

American Law Institute

The Institute is an independent organization producing scholarly work to clarify, modernize, and otherwise improve the law. In 1975, the Institute adopted its Model Code of Pre- Arraignment Procedure §130.4 (3) (c) (1975), which provides that law enforcement agencies should make a sound recording of “any questioning of the arrested person and any statement he makes in response thereto.” The purpose is “to aid the resolution of factual disputes which may subsequently arise concerning what happened to an arrested person in custody. Such a provision is central to the Code’s attempt to provide clear and enforceable rules governing the period between arrest and judicial appearance” (Note, page 39).

American Psychological Association

In August 2014, the APA Council of Representatives adopted the following Resolution on Interrogations of Criminal Suspects (retrieved from <http://www.apa.org/about/policy/interrogations.asps>) [site unavailable] (redacted):

“Whereas videotaping of interrogations in their entirety provides an objective and accurate audio-visual record of the interrogation, provides a vehicle by which to resolve disputes about the source of non-public details in a suspect’s confession, and has the potential to deter interrogators from using inappropriate tactics and deter defense attorneys from making frivolous claims of police coercion...

“Whereas, as a scientific and educational organization, the American Psychological Association’s mission is in part to promote the application of sound research findings to advance the public welfare;

“Therefore, be it resolved that the American Psychological association recommends that all custodial interrogations of felony suspects be video recorded in their entirety and with a ‘neutral’ camera angle that focuses on the suspect and the interrogator.”

Center For Policy Alternatives

The Center is an independent, nonpartisan, nonprofit organization working to strengthen the capacity of state legislators to lead and achieve progressive change. In 2005, the Center recommended that states enact The Electronic Recording of Interrogations Act, which requires that any custodial interrogation conducted by police must be electronically recorded in its entirety.

Constitution Project

Founded in 1996, the Project enlists experts and practitioners from across the political spectrum in order to promote and safeguard the Constitution, America's founding charter, reform the nation's broken criminal justice system, and strengthen the rule of law through scholarship, consensus policy reforms, and public education. Its report, *Mandatory Justice: The Death Penalty Revisited* (2005), contains the following recommendation (No. 23, p. xx; see also pp.75 -84,131-133):

“Custodial interrogations of a suspect in a homicide case should be videotaped or digitally recorded whenever practicable. Recordings should include the entire custodial interrogation process. Where videotaping or digital video recording is impracticable, an alternative uniform method, such as audiotaping, should be established. Where no recording is practicable, any statements made by the homicide suspect should later be repeated to the suspect and his or her comments recorded. Only a substantial violation of these rules requires suppression at trial of a resulting statement.”

Innocence Project

The Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system to prevent future injustice. In 2011, the Project published its model state statute, an Act Directing the Electronic Recording of Custodial Interrogations. In an accompanying statement, the Project wrote, “Mandating the recordation of custodial interrogations has long been identified as a reform that shields the innocent from wrongful convictions by creating a record of the questioning that yields a confession.” The Project also recounted benefits that the practice offers

law enforcement: capturing details that may be lost if unrecorded which aids better investigations; creating a record of the suspect's statements, making it difficult for him/her to change the account; permitting officers to concentrate on the interview without the distraction of note taking; providing a record of how the officer acted and treated the suspect during the interview; protecting officers from false claims of coercion; enhancing public confidence in law enforcement; and reducing citizen complaints against the police.

International Association of Chiefs of Police

The IACP is the world's oldest and largest nonprofit membership organization of police executives, with over 20,000 members in over 100 different countries.

2006. In 2006, the IACP issued its Model Policy on Electronic Recording of Interrogations and Confessions.

Policy. "It is the policy of this law enforcement agency to electronically record specific custodial interrogations and confessions in order to provide an evidentiary record of statements made by suspects of major crimes. Such electronic recordings can help protect both the suspect(s) and interviewing officers against potential assertions of police coercion or related interrogation misconduct, and may increase the likelihood of successful prosecution." §II.

General Rule: "Officers shall electronically record interrogations conducted in a place of detention involving major crimes as defined by this department." §IV.A.1.

"Interrogations and confessions shall be recorded in their entirety starting with the interrogator's entrance into the interview room and concluding upon departure of the interrogator and suspect." §IV.B.4.

Circumstances that excuse recording: If electronic recordings cannot be conducted due to equipment failure, lack of suspect cooperation, or for other reasons deemed pertinent to successful interrogation by the case manager, the basis for such occurrences shall be documented. This includes but is not limited to spontaneous declarations or other statements not elicited by the police questioning. §IV.A.4.

Preservation: All recordings shall be governed by this department's policy and procedures for the handling and preservation of evidence. Recordings shall be retained by the department in secure storage for a period of time as defined by state law or the office of the prosecutor. §IV11-12.

2007. In February 2007, the IACP National Law Enforcement Policy Center issued a Concepts and Issues Paper, to accompany the Model Policy. Included in this document are the following:

I. INTRODUCTION. B. Background

“Video technology has become widely accepted among law enforcement agencies and today is used routinely for a variety of purposes. These include, among other adaptations, documentation of crime scenes, recording victim and witness statements, sobriety tests, traffic stops, surveillance, accident scenes, and crime scenes.

“Electronic recording—defined in the model policy as the use of any audio or video recording whether using magnetic tape, digital means, or other recording media—of interrogations and confessions is also now used by a substantial number of law enforcement agencies in both large and small jurisdictions.”

II. PROCEDURES. A. General Requirements.

“The intent of the model policy is that *custodial* interrogations be recorded at a place of detention; detention meaning, for example, a police station, jail, or holding facility where electronic recording capabilities are present. Once an individual has been arrested and given *Miranda* rights a custodial interrogation takes place by ‘words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.’ This would not include simple fact finding interviews that are conducted at police stations when an individual is not the focus of suspicion, is not in custody, and officers are not attempting to elicit incriminating responses.”

Full Interrogations versus recaps.

“All things considered, full recording of interrogation sessions and confessions are generally preferable. This is the only positive means by which police can demonstrate that interrogations were conducted properly and confessions elicited legally.

“Electronic Recordings and Quality of Interrogations. There is little conclusive evidence to show that the use of recordings has any significant effect on the willingness of suspects to talk. While some are willing to talk or even play to the camera, others are reluctant. But the majority of agencies that use recordings have found that they were able to get more incriminating information from suspects who were recorded than they were in traditional interrogations.

“Possibly of more interest to investigators who routinely conduct interrogations are study findings that recordings do not noticeably inhibit the interrogation practices of officers over the long run.

“Once investigators became accustomed to working in front of the camera, they typically reverted to traditional tactics. The use of profanity and street language by interrogators, for example, was a matter that caused initial concern. But, interrogators found that ‘as long as they [were] following up on the suspect’s choice of words to communicate clearly rather than gratuitously or in an intimidating manner, it [did] not seem to bother judges or juries.’

“Finally, in terms of the quality of confessions, the survey of agencies using recordings confirmed that defense attorneys lodged fewer allegations of coercion or intimidation after the agencies began to record. Administrations of *Miranda* warnings on camera are a primary reason for this, as well as the straight-forward record of the interrogation or confession or both provided by the recording.

“Prosecutor’s Views. Prosecutors surveyed indicate that the use of videotape has little or no bearing on their decision to charge suspects. But they almost unanimously agree that recordings help them assess the strengths and weaknesses of

the state's case and help them prepare for trial. Recordings, they say, provide the details of the interrogation (such as the sophistication of the suspect, how he answers questions, body language and intonation) that are not possible to capture on audiotape alone or through transcripts but are important to case preparation.

“Electronic recordings can also be of value to prosecutors in negotiating acceptable pleas. If the recording shows a particularly strong case for the state, a plea bargain would normally favor the prosecution. On the other hand, should there be weaknesses with the case that are revealed on the tape, a reasonable plea bargain may be struck that averts more serious prosecutorial dilemmas should the case proceed to trial.”

2012. In May, 2012, the IACP adopted a Model Policy (reevaluated May 2013) on “Interviewing and Interrogating Juveniles,” that is, persons under 18 years of age. The Procedures section includes the following:

“4. Where possible, audiotape and videotape the interview.”

2013. In April 2013, the IACP National Law Enforcement Policy Center issued a Concepts and Issues Paper, relating to juvenile interviews, which includes the following:

“B. Recording Interviews and Interrogations

Recording a child's statement benefits everybody – whether that child is a victim, witness, or suspect. Almost every child victim interview protocol requires that the interview be recorded. The model policy makes this recommendation whenever circumstances and equipment availability permit. It is easy to understand why this is recommended; when a questioning session is recorded from start to finish, officers have a complete record that allows attorneys, courts, and other law enforcement personnel to objectively review the entire statement. The recording also makes it unnecessary for officers to take notes during questioning, and allows them to focus exclusively on the interview. The recording protects officers from false claims of coercion, leading to fewer pre-trial suppression motions, more guilty pleas, and less time spent in court defending themselves

on the witness stand. Finally, recordings can help guard against the false confessions previously mentioned. With a video- and audiotape recording, officers and others can review the interrogation for any signs of statements made or actions taken by police that could have resulted in a false confession. The statement can also be reviewed repeatedly where verification of facts made by the juvenile need to be made.

“Experience over time has shown that the most common law enforcement objection to recording – that it would deter suspects from speaking freely – is unfounded. In fact, law enforcement agencies that have instituted mandatory recording of custodial interrogations have overwhelmingly come to embrace the practice. Therefore, the recorder should be turned on the moment an officer begins talking to any child victim, witness, or suspect and should not be turned off until the last question is answered.”

2014. In April 2014, the IACP adopted a Model Policy on Body- Worn Cameras (BWC), which states in part:

“II. POLICY.

It is the policy of this department that officers shall activate the BWC when such use is appropriate to the proper performance of his or her official duties, where the recordings are consistent with this policy and law. This policy does not govern the use of surreptitious recording devices used in undercover operations.”

The Procedures section states, “Officers shall activate the BWC to record all contacts with citizens in the performance of official duties.”

The same month, the IACP National Law Enforcement Policy Center issued a Concepts and Issues Paper relating to BWCs, which includes the following:

“I. B. Background

Video recorders and digital cameras have been useful tools in the law enforcement profession for some years. Advances in technology have improved camera equipment and enhanced the development of the body- worn camera (BWC). While

many police agencies have taken advantage of these advancements even more have overlooked or are unaware of their usefulness, or have chosen not to deploy them.”

“C. Uses for Body-Worn Cameras.

“Throughout the United States, courts are backlogged with cases waiting to be heard and officers who are spending time in court that could be used more productively in enforcement activities. The availability of audio and/or video recorded evidence increases the ability of prosecutors to obtain guilty verdicts more easily and quickly at trial or to more effectively plea-bargain cases, avoiding lengthy trial proceedings. In jurisdictions that employ audio and visual evidence, officers normally submit their recordings along with a written report, which is later reviewed by the prosecuting attorney. When the accused and his or her attorney are confronted with this evidence, guilty pleas are more often obtained without the need for a trial or the pressure to accept a plea to lesser charges. This substantially reduces the amount of time an officer must spend in court and utilizes prosecutorial and judicial resources more efficiently.”

Justice Project

The Justice Project consists of two non-partisan organizations dedicated to combating injustice and to creating a more humane and just world. In 2007, the Project issued *Electronic Recording of Custodial Interrogations, A Policy Review*, which includes a summary of the benefits to be obtained by both law enforcement and suspects from recording custodial interviews, and detriments resulting from failure to record (pages 2-7, 15-21). A Model Bill for Electronic Recording of Custodial Interrogations is included (pages 22-23).

Major Cities Chiefs Association

In June 2015, the members of the MCPA adopted the following Policy Statement entitled Improving Policing to Ensuring Accuracy in Arrests and Convictions (redacted, footnotes omitted):

“Preface

“To date, 329 innocent people in prison have been exonerated by DNA evidence. In almost half of these cases, the DNA evidence that exonerated the innocent also identified 141 true perpetrators, many of whom had gone on to commit additional crimes, including more than 70 rapes and 30 murders, and countless other violent felonies, while someone else served time in prison for their crimes.

“Wrongful convictions cause tremendous harm, not just to the innocent and their families, but also to crime victims and the general public, and they have a profound negative impact on public safety, public trust in policing, and police legitimacy. When the wrong person - an innocent person - is convicted and imprisoned, the actual perpetrator remains free and a continued threat to the public. In addition, prosecution and imprisonment of the wrong person wastes precious police and other criminal justice resources and robs citizens of their faith in law enforcement and our criminal justice system. The public needs to believe that law enforcement agencies and individual officers are willing to take whatever steps necessary to ensure public safety and the reliability of arrests and convictions of fellow citizens.

“Simple improvements to policing and police investigations can significantly reduce the chance of false arrests and wrongful convictions. As such, the Major Cities Chiefs Association adopts the following policy statements and urges law enforcement agencies to adopt best practices to ensure the accuracy of investigations and prevent wrongful convictions.

Policy Positions

* * *

“Improving Interrogation Evidence:

“False confessions are a serious problem and have occurred in nearly a quarter of the 329 wrongful convictions proven by DNA evidence. Electronically recording custodial interrogations removes serious questions about the circumstances of such

'confessions' by preserving the truest account of the interrogation, improving the quality and reliability of the interrogation evidence, and thus reducing the possibility of false arrest and wrongful conviction.

"By recording the interrogation, disputes about the circumstances of the interrogation and conduct of investigators will be grounded in evidence available to all parties, protecting both the innocent and the investigators. Moreover, investigators will not have to focus upon writing up a meticulous account of the statements provided by the suspect and may instead focus attention on small details, such as subtle changes in the narrative, which might otherwise have been missed. Finally, having a record of good interrogation techniques can also provide a valuable training tool for police departments, particularly as cases with distinctive characteristics come to light.

"Mandatory electronic recording of interrogations is now embraced by an estimated 1,000 law enforcement agencies across the country. Twenty-one states and the District of Columbia require recording by law or court action in serious cases, and many others have voluntarily implemented recording as a best practice, including large metropolitan cities, such as Philadelphia, Boston, San Diego, San Francisco, Denver, Portland, and Austin. In 2004, Former U.S. Attorney Thomas P. Sullivan published a report detailing police experiences with the recording of custodial interrogations. Researchers interviewed 238 law enforcement agencies that implemented mandatory recording of interrogations and concluded, 'virtually every officer with whom we spoke, having given custodial recordings a try, was enthusiastically in favor of the practice.'

"Based on the findings from this research and on practitioner experience, the Major Cities Chiefs Association recommends that all law enforcement agencies implement the mandatory recording of custodial interrogations to increase the quality and accuracy of interrogation evidence."

National Association For the Advancement of Colored People

In 2014, the NAACP adopted the following resolution (redacted):

“Whereas, wrongful convictions have a disastrous and rippling effect on families and communities; and

“Whereas, a number of factors lead to wrongful convictions, including eyewitness misidentification, false or coerced confessions, and lack of access to DNA testing; and

“Whereas, the 316 individuals that have been exonerated by DNA evidence have erroneously spent an average of 13 years behind bars, with 18 of those individuals sentenced to death;

“Whereas, false confessions contributed to more than 25% of the 316 wrongful convictions in the United States overturned by post-conviction DNA evidence; and

“Whereas mandated electronic recording of the entire interrogation process – which has already been adopted by 23 states – protects against false and coerced confessions by ensuring integrity in the interrogation process, and reliable record of what transpired during the course of an interrogation;...

“Therefore...Be it further resolved that the NAACP advocate for states to electronically record all interrogations in felony cases in their entirety.”

National Association of Criminal Defense Lawyers

The NACDL is a nationwide organization of lawyers who specialize in the defense of person accused of violations of state and federal criminal laws. In 2002, the Board of Directors adopted a resolution supporting “the videotaping of law enforcement interrogations from beginning to end and calls upon Congress and state legislatures to pass legislation mandating this practice.”

National Conference of Commissioners on Uniform State Laws

The Conference, commonly known as the Uniform Law Commission (ULC), established over 115 years ago, is a state- supported organization which provides non-partisan, well- conceived and well-drafted legislation, in order to bring clarity and stability to critical areas of state statutory law. Commissioners are lawyers appointed by state governments, the District of Columbia, Puerto Rico and the U. S. Virgin Islands, to research, draft and promote enactment of uniform state laws where uniformity among the states is desirable and practical. The Commissioners donate thousands of hours every year as a public service, and receive no salary or compensation for their work.

In July 2010, the ULC approved and recommended for enactment in all states the Uniform Electronic Recordation of Custodial Interrogations Act, which is a comprehensive uniform state statute on electronic recording of custodial interrogations. The Prefatory Note explains the need for a uniform state law on the subject of recording custodial interviews in felony investigations, as well as the benefits to be derived from the practice of making electronic recordings of interviews from beginning to end (pages 6-11). Three broad types of justifications have been offered for electronic recording of interrogations: promoting truth- finding, promoting efficiency, and protecting constitutional values. See generally LEO, *supra*, at 296- 305 (elaborating on the justifications noted here). The list below summarizes the major ways in which electronic recording furthers these goals.

A. Promoting Truth-Finding. Truth-finding is promoted in seven ways:

1. Reducing Lying: Neither defendants nor police are likely to lie about what happened when a tape recording can expose the truth.
2. Compensating for Bad Witness Memories: Witness memories are notoriously unreliable. Video and audio recording, especially when both sorts of recording are combined, potentially offer a complete, verbatim, contemporaneous record of events, significantly compensating for otherwise weak witness memories.
3. Deterring Risky Interrogation Methods: “Risky” interrogation techniques are those reasonably likely to elicit false

confessions. Police are less likely to use such techniques when they are open for public scrutiny. Clearly, harsh techniques that police understand will elicit public and professional disapproval, even if only rarely used today, are ones that are most likely to disappear initially. But more subtle techniques creating undue dangers of false confessions of which the police may indeed be unaware will, over time, fade away if exposed to the light of judicial, scientific, and police administrator criticism—criticism that electronic recording of events facilitates. Electronic recording thus most helps precisely the vast bulk of interrogators, who are hardworking, highly professional officers, to improve the quality of their interrogations and the accuracy of any resulting statements still further.

4. **Police Culture:** Taping enables supervisors to review, monitor, and give feedback on detectives' interrogation techniques. Over time, resulting efforts to educate the police in the use of proper techniques, combined with ready accountability for errors, can help to create a culture valuing truth over conviction. Police tunnel vision about alternative suspects and insistence on collecting whatever evidence they can to convict their initial suspect (the "confirmation bias") have been shown to be major contributors to wrongful convictions. Tunnel vision and confirmation bias are not the result of police bad faith. To the contrary, these cognitive patterns are common to all humans but can be amplified by stress, time pressure, and institutional cultures that encourage zealous pursuit of even the loftiest of goals – factors often present in law enforcement organizations. Moreover, these cognitive processes work largely at a subconscious level, thus requiring procedural safeguards and internal organizational cultures that act as counterweights. A more balanced police culture of getting it right rather than just getting it done would be an enormously good thing.
5. **Filtering Weak Cases:** By permitting police and prosecutors to review tapes in a search for tainted confessions, prosecutions undertaken with an undue risk of convicting the innocent can be nipped in the bud—before too much damage is done—because the tapes can reveal the presence of risky interrogation techniques that may ensnare the innocent.

6. Factfinder Assessments: Judges and juries will find it easier more accurately to assess credibility and determine whether a particular confession is involuntary or untrue if these factfinders are aided by recording, which reveals subtleties of tone of voice, body language, and technique that testimony alone cannot capture.
7. Improving Detective Focus: A detective who has no need to take notes is better able to focus his attention, including his choice of questions, on the interviewee if machines do the job of recording. Such focus might also improve the skill with which detectives can seek to discover truth by improving interrogation-technique quality.

There are also essential economic efficiency benefits to recording.

B. Promoting Efficiency. Efficiency is promoted in these four ways:

1. Reduced Number of Suppression Motions: Because the facts will be little disputed, the chance of frivolous suppression motions being filed declines, and those that do occur can be more speedily dispatched, perhaps not requiring many, or even any, police witnesses at suppression hearings.
2. Improved Police Investigations: The ability of police teams to review recordings can draw greater attention to fine details that might escape notice and enable more fully-informed feedback from other officers. Police can thus more effectively evaluate the truthfulness of the suspect's statement and move on to consider alternative perpetrators, where appropriate.
3. Improved Prosecutor Review and Case Processing: For guilty defendants, an electronic record enhances prosecutor bargaining power, more readily resulting in plea agreements. Prosecutors can more thoroughly prepare their cases, both because of the information on the tape and because of more available preparation time resulting from the decline in frivolous pretrial motions.
4. Hung Juries Are Less Likely: For guilty defendants who insist on trials, a tape makes the likelihood of a relatively speedy conviction by a jury higher, while reducing the chances that

they will hang. The contrary outcome—repeated jury trials in the hope of finally getting a conviction—is extraordinarily expensive. But, as I now explain, videotaping not only saves money while protecting the innocent but also enhances respect for constitutional rights.

C. Protecting Constitutional Values. Constitutional values are protected in six primary ways:

1. Suppression Motion Accuracy: Valid claims of *Miranda*, Sixth Amendment right to counsel, and Due Process voluntariness violations will be more readily proven, creating a disincentive for future violations, when such violations, should they occur, are recorded.
2. Brady Obligations: *Brady v. Maryland*, 373 U.S. 83 (1963), requires prosecutors to produce to the defense before trial all material exculpatory evidence. Some commentators argue that Brady does more than this: it implies an affirmative duty to preserve such evidence. Electronic recordings further this preservation obligation.
3. Police Training: Recordings make it easier for superiors to train police in how to comply with constitutional mandates.
4. Restraining Unwarranted State Power: Recordings make it easier for the press, the judiciary, prosecutors, independent watchdog groups, and police administrators to identify and correct the exercise of power by law enforcement.
5. Race: Racial and other bias can play subtle but powerful roles in altering who the police question and how they do so. Electronic recordings make it easier to identify such biases and to help officers avoid them in the future, difficult tasks without recordings precisely because such biases are often unconscious, thus operating outside police awareness.
6. Legitimacy: Recordings can help to improve public confidence in the fairness and professionalism of policing. By ending the secrecy surrounding interrogations, unwarranted suspicions can be put to rest, warranted ones acted upon. Enhanced legitimacy is a good in itself in a democracy, but it has also

been proven to reduce crime and enhance citizen cooperation in solving it.

A detailed explanation accompanies each section of the ULC uniform statute (pages 12-53).

The ULC uniform statute has been used as the basis for bills introduced in and enacted by several state legislatures. The effort to obtain passage of the ULC statute will continue in coming years in states that do not yet have mandatory recording legislation or court rules.

National District Attorney's Association

The NDAA is the oldest and largest professional organization representing criminal prosecutors in the world. NDAA serves as a nationwide, interdisciplinary resource center for training, research, technical assistance, and publications reflecting the highest standards and cutting-edge practices of the prosecutorial profession.

In 2004, the NDAA Board of Directors adopted a Policy on Electronic Recording of Statements. The policy states:

The National District Attorneys Association opposes the exclusion of otherwise truthful and reliable statements by suspects and witnesses simply because the statement was not electronically recorded.

“America’s prosecutors encourage police agencies to record statements by suspects and witnesses but recognize that there are circumstances in which the statements are not or could not be recorded. In a truth- based justice system we should always want juries to have as much truthful information as possible. The use of juries as the trusted finders of fact in criminal trials throughout the courts of the United States provides the best assurance that true and correct verdicts will be found. Every concern raised by proponents of mandatory electronically recorded statements is properly resolved by motions to suppress, jury trials, or appellate action. Virtually every jurisdiction in the United States requires prosecutors not only to prove the accuracy of a confession, but also to prove that it was freely, voluntarily, and knowingly given. Exclusion of reliable evidence harms the truth seeking process and increases the risk of miscarriages of justice.”

In 2009, the NDAA also endorsed a series of proposals contained in a document entitled “Expanding Electronic Recording of Statements by Law Enforcement: An Incentive-Based Approach,” which was submitted to the Uniform Law Commissioners. The first paragraph of the Executive Summary states (page i):

“The benefits of electronic recording of statements obtained by law enforcement officers through custodial interviews have been widely recognized by various commentators and courts. Electronic recording provides an objective record of what happened during the interview. By preserving the actual words as they were spoken during police/suspect encounters, electronic recording can reveal the content and context of the statements, demonstrate police compliance with *Miranda*, assist courts in determining the voluntariness of a statement, and disproving unfounded defense claims that coercion, duress, entrapment or other types of misconduct occurred.”

The Summary continues by pointing out various costs associated with electronic recording, in particular for equipment, and clerical and record keeping support. The Summary continues (page i):

“The biggest cost from recording, however, would come if rule makers were to put in place some sort of ‘exclusionary rule’ that would bar prosecutors from presenting reliable but unrecorded statements from defendants. Such an exclusionary rule would obviously provide an incentive to law enforcement agencies to adopt electronic recording, but at the excessive cost of depriving juries of extremely important information about the guilt of a suspect. Moreover, because of these potential costs, a rulemaker considering mandating electronic recording might be required to keep the mandate narrow (by, for example, limiting the recording requirement to custodial interviews for a few serious crimes conducted at police stations).

“Rather than pursuing this ‘stick’ approach to encouraging electronic record, a far better idea would be to use a ‘carrot’ or incentive. Law enforcement and prosecuting agencies should be provided an incentive to use electronic recording. In particular, given the objective record that recording provides of what happened during a custodial interview, the recording

should be automatically admissible in evidence without the need to call the police officer who made the recording in all proceedings – with the exception of a trial, where the defendant has a constitutional right to confront the witnesses against him. Accordingly, if a police officer certifies under penalty of perjury that the recording is accurate, then the recording should be admissible at pre-trial and post-trial hearings unless the defendant can make a substantial preliminary showing that there is some reason to disbelieve the officer. Such an approach would provide substantial incentives to law enforcement agencies to record custodial interrogations, by allowing agencies to avoid the need to send officers to testify at preliminary hearings recording the statements that they have obtained.”

In the next section of the document, the benefits of electronic recordings of custodial interviews are expanded upon (page 1):

“The benefits of electronic recording of custodial interviews have been widely discussed in the literature and need only be briefly reviewed here. In particular, recording of interviews of a suspect provides an objective record of what has happened during police interrogations, eliminating ‘swearing contests’ about who said what to whom. For example, by demonstrating exactly what happened during questioning, claims by suspects that they have been mistreated to extract a confession are often effectively rebutted by a recording.

“Recording has other benefits for police officers. By maintaining a recording of what is happening during questioning, the recording permits the interrogating officer to focus on questioning the suspect rather than writing notes. The recording also eliminates the need for a detailed report from officer about precisely what was said during the interview. The officer is also free to go back to review the recording to see whether any details about the investigation might have been overlooked. Later hearings about the interrogation are also simplified, as the recording usually eliminates debate about what happened during the recorded interview.

“Defendants and the courts also benefit from recorded statements. Because the officer is aware that an objective record is being made of the interview, there is a clear disincentive for the officer to use improper questioning techniques. Also, in highly unusual cases where a mentally disabled suspect has ‘confessed’ to a crime that he did not commit, the recording will provide an opportunity for a reviewing court to identify the problem. More generally, recorded statements provide clear evidence to judges and juries of what was said during an interview – including the demeanor and physical appearance of those involved.”

The document goes on to recount that proponents of recording have proposed the imposition of sanctions in the event a recording should have been but was not made, namely:

“...suppression of the statement from the defendant that law enforcement agent has obtained, regardless of how reliable the statement may be and how important it is to obtaining the conviction of a guilty criminal. In other cases, the sanction may be a jury instruction, cautioning the jury that it should not readily credit the law enforcement officer’s testimony about the circumstances surrounding the interrogation.”

Then follows an explanation as to why it is unwise to mandate electronic recording of custodial interviews, and why a “carrot” rather than a “stick” approach ought to be used. Instead of sanctioning an unexcused failure to record (the “stick”), there should be no requirement imposed that recordings must be made (pages 3-6). Instead, provisions should be to reward law enforcement agencies for making electronic recordings – “the ‘carrot’ of giving a presumption of admissibility to any recorded custodial interview in a pre-trial or post-trial proceeding” (page 6). A proposed model statute is included, which embodies the “carrot” approach (pages 6-8), followed by an analysis of the proposed statute (pages 8-16). The Conclusion states:

“Recording of custodial interviews by law enforcement officers is desirable objective to encourage. At the same time, however, that objective is better accomplished by providing incentives to law enforcement agents to record such interviews, rather than drawing up a set of rules to punish them for failing to do so by

excluding reliable confessions. A proposed model statute creating a presumption of admissibility for recorded statements effectively accomplishes this goal.”

The NDAA Executive Director has said of electronic recordings, “It’s more compelling, powerful evidence.” B. Warren, *Scripps Howard News*, Jan. 13, 2012.

Discussion: The fundamental problem with the NDAA proposal has been explained in the Commentaries to the Guidelines and Best Practices Statements in Part 2. They lack the force of law, contain no requirement that they either be adopted or followed, and provide no sanction for non-compliance. While better than nothing, they are in no way the equivalent of a statewide statutory mandate that contains some provision for enforcement by, for example, a presumption of inadmissibility or a cautionary jury instruction.

The so-called “carrot” suggested by the NDAA is of little or no real value to prosecutors. In the usual pretrial hearing, the admissibility of the recordings are usually stipulated, thus rendering testimony by a participating officer unnecessary. As the NDAA acknowledges, in trials in criminal cases, consistent with the constitutional right to confront government witnesses – contained in the Sixth Amendment to the federal Constitution, and virtually all state constitutions – there is serious doubt that a statute may authorize introduction of a tape recording without presenting a witness who has personal knowledge of the circumstances under which the recording was made. In any event, the calling of an officer to testify to the foundation for a recording is routine, and normally takes but a few minutes.

National Institute on Military Justice

The National Institute of Military Justice (NIMJ) is a District of Columbia non-profit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ is not a government agency.

In October 2009, the Commission released a report containing recommendations “to advance principles of justice, equity, and fairness in American military justice.” http://www.wcl.american.edu/nimi/cox_

commission.cfm. The report includes the following recommendation (pp. 3, 12):

“Require military law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at law enforcement offices, detention centers, or other places where suspects are held for questioning, or, where videotaping is not practicable, to audiotape the entirety of such custodial interrogations.”

To view a specific section of the compendium, click on the link below to jump to this specific information.

Introduction

Part 1: The Benefits of Statewide Requirements of Electronic
 Recording of Custodial Interrogations

Part 2: States

Part 3: Federal Agencies

Part 4: National Organizations

Part 5: Foreign countries

Part 6: Bibliography

Part 5: Foreign countries

Australia

Canada

England

Ireland

New Zealand

Australia

Since about 1990, in all jurisdictions in Australia, for a defendant's custodial confession or admission to be legally admissible it must be electronically recorded by audio or audiovideo.

General rule: The South Australian provisions apply in relation to the investigation of "indictable offenses." Summary Offenses Act of 1953 §74D ("SOA"). In the Northern Territory, the recording requirement applies to offenses for which the maximum penalty is imprisonment in excess of two years. Police Administration Act of 1978, Division 6A §139(c) ("PAA").

Circumstances that excuse recording: If it is not reasonably practicable to record the interview on videotape, but it is reasonably practicable to record the interview on audiotape, an audiotape recording of the interview must be made. SOA §74D(1)(b). If it is "neither reasonably practicable to record the interview on videotape nor reasonably practicable to record the interview on audiotape (i) a written record of the interview must be made at the time of the interview or as soon as practicable after the interview; and (ii) as soon as practicable after the interview, the record must be read aloud to the suspect and the reading must be recorded on videotape." §74D(1)(b)(c). "In deciding whether it is reasonably practicable to make a videotape or audiotape recording of an interview, the following matters must be considered: (a) the availability of recording equipment within the period for which it would be lawful to detain the person being interviewed; (b) mechanical failure of recording equipment; (c) a refusal of the interviewee to allow the interview to be recorded on videotape or audiotape; (d) any other relevant matter." §74D(3).

Consequences of unexcused failure to record. In South Australia, unexcused failure to record results in inadmissibility of the "evidence of an interview," unless "the court is satisfied that the interests of justice require the admission of the evidence despite the investigating officer's non-compliance." SOA §74E. In the Northern Territory, "A court may admit evidence . . . even if the requirements of [the recording statute] have not been complied with, or there is insufficient evidence of compliance with

those requirements, if, having regard to the nature of and the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, the court is satisfied that, in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice.” PAA §143.

Preservation: None given.

Miscellany: In South Australia, “[a] suspect must be provided, on request and on payment of the fee fixed by regulation, with (a) an audiotape of the soundtrack of a videotape recording of an interview with the suspect under this Part; or (b) a copy of an audiotape recording of an interview with the suspect under this Part.” SOA §74D(6). In the Northern Territory, “[t]he investigating member must (1) inform the person that the person is entitled to a copy of the electronic recording on request; (2) issue a certificate the recording has not been altered after being made and that the prescribed requirements in relation to the method of making the recording have been met; and (3) cause a copy of the audio or video recording to be made available to the person or the person’s legal representative, without charge, within 7 days after request. PAA §142(a).

Canada

The Supreme Court has held that contemporaneous recordings of custodial police interrogations are not required. *R. v. Oickle*, 2 S.C.R. 3, 2000 SCC 38. The British Columbia Court of Appeal has observed that making contemporaneous recordings of custodial interrogations is highly desirable, and is a practice that has been both recommended and encouraged by courts and commissions of inquiry. *R. v. Richards*, 87 B.C.A.C. 21 (1997). Failure to record electronically a formal police interview, when there is no good reason not to, may raise suspicions and present obstacles to the Crown in its efforts to prove beyond a reasonable doubt that a statement given to a person in authority was voluntary. *R. v. Ducharme*, 2004 MBCA 29, 182 C.C.C. (3d) 243; *R. v. Groat*, 2006 BCCA 27.

England

Recording of custodial interrogations is mandated by the Police and Criminal Evidence Act 1984 (PACE), Code E, Code of Practice on Audio Recording Interviews with Suspects.

General rule: “[A]udio recording shall be used at police stations for any interview” (a) with a person cautioned “in respect of any indictable offence, including an offence triable either way,” “(b) which takes place as a result of an interviewer exceptionally putting further questions to a suspect about an offence described in paragraph 3.1(a) after they have been charged with, or told they may be prosecuted for, that offence,” “(c) when an interviewer wants to tell a person, after they have been charged with, or informed they may be prosecuted for, an offence described in paragraph 3.1(a), about any written statement or interview with another person.” §3.1. The Terrorism Act 2000 provides for the audio recording of interviews of persons suspected to be terrorists. §3.2.

Circumstances that excuse recording: “The custody officer may authorise the interviewer not to audio record the interview when it is: (a) not reasonably practicable because of equipment failure or the unavailability of a suitable interview room or recording equipment and the authorising officer considers, on reasonable grounds, that the interview should not be delayed; or (b) clear from the outset there will not be a prosecution.” §3.3.

Consequences of unexcused failure to record: None given.

Preservation: “The officer in charge of each police station at which interviews with suspects are recorded shall make arrangements for master recordings to be kept securely and their movements accounted for on the same basis as material which may be used for evidential purposes, in accordance with force standing orders.” §6.1. “Interview record files are stored in read only format on non-removable storage devices, for example, hard disk drives, to ensure their integrity. The recordings are first saved locally to a secure non-removable device before being transferred to the remote network device. If for any reason the network connection fails, the recording remains on the local device and will be transferred when the network connections are restored.” §7.16.

Miscellany: “At the conclusion of the interview, the suspect shall be offered the opportunity to clarify anything he or she has said and asked if there is anything they want to add.” §7.12.

Ireland

Ireland has regulations promulgated in 1997 by the Minister for Justice relating to electronic recording of custodial interrogations - S.I. No.

74/1997 - adopted under the authority of the Criminal Justice Act of 1984, §27.

General rule: Electronic recordings are required to be made of interviews conducted by officers in Garda Siochana (the police force for Ireland) stations that have recording equipment provided and installed for the purpose of recording interviews of persons detained under (1) Section 30 of the Offences Against the State Act of 1939, (2) Section 4 of the Criminal Justice Act of 1984, (3) Section 2 of the Criminal Justice (Drug Trafficking) Act of 1996, as modified by Section 4(3). §§2-3.

Section 30 of the Offences Against the State Act of 1939 covers “an offence under any section or sub-section” of the Act, including usurpation of functions of the government; obstruction of the government; obstruction of the President; interference with military or other employees of the State; printing of prohibited documents; possession of treasonable documents; conducting unauthorized military exercises; forming, promoting, or maintaining any secret society in the army or the police; and administering unlawful oaths. Section 4 of the Criminal Justice Act of 1984 covers “any offence for which a person of full age and capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of five years or by a more severe penalty and to an attempt to commit any such offence.” Section 2 of the Criminal Justice (Drug Trafficking) Act of 1996 covers “drug trafficking” offenses.

Before the interview is commenced, the officer in charge shall inform orally and in ordinary language the person to be interviewed that the interview may be electronically recorded, and that the person is entitled to receive a notice as to what is to happen to the tapes of the interview. §5. At the conclusion of the interview, the officer shall enquire of the person interviewed if there is anything further he/she wishes to say or clarify; and read back any notes and memoranda taken in the interview and enquire if the person wishes to make any alterations or additions. §12.

Circumstances that excuse recording: If the equipment is unavailable due to a functional fault; the equipment is already in use and the officer considers on reasonable grounds that the interview should not be delayed until the fault is rectified or the equipment becomes available; where otherwise the electronic recording of the interview is not practicable. §4. The recording may be interrupted where a person objects to the electronic recording of the interview. §7.

Consequences of unexcused failure to record. None given.

Preservation: As soon as practicable after the interview is concluded, the interviewing officer shall give the sealed master tape to the officer in charge, who shall make a record of the date of the interview, the date the tape was received, and the identification number of the tape. §13.

Miscellany: Upon receipt of a written request, a working copy of the tape shall be provided to the person interviewed or his legal representative, unless the District Superintendant believes on reasonable grounds that to do so would prejudice an ongoing investigation or endanger the safety, security and well being of another person. § 16.

New Zealand

The Ministry of Justice recommends that any statement made by a person in custody or in respect of whom there is sufficient evidence to charge should be recorded by video, unless that is impractical, or the person declines to be recorded by video. Where the statement is not recorded by video, it should be recorded permanently on audio tape or in writing. The person making the statement should be given an opportunity to review the tape or written statement, or to have the written statement read to him/her, and given an opportunity to correct any errors or add anything further, and to approve the statement. See Ministry of Justice, *Interrogation and Custody Rules*, available at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/international-human-rights-instruments/international-human-rights-instruments-1/convention-against-torture/united-nations-convention-against-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment-new-zealand-periodic-report-6/article-11/17-interrogation-and-custody-rules>.

To view a specific section of the compendium, click on the link below to jump to this specific information.

Introduction

Part 1: The Benefits of Statewide Requirements of Electronic
 Recording of Custodial Interrogations

Part 2: States

Part 3: Federal Agencies

Part 4: National Organizations

Part 5: Foreign countries

Part 6: Bibliography

Part 6: Bibliography

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