A Compendium of law relating to the electronic recording of custodial interrogations

by THOMAS P. SULLIVAN

"The recording of custodial interrogations is not...a measure intended to 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. In any case, a recording will help trial and appellate courts to ascertain the truth."[1]

On the American Judicature Society website, I have placed a Compendium summarizing my understanding of the current status of the law and practice of state and local governments and federal agencies in making electronic recordings of custodial interrogations of suspects in felony investigations, from the *Miranda* warnings to the end.

The Compendium is divided into the following five parts, described in more detail below:

Part 1 – Why electronic recordings are beneficial for all concerned.

Part 2 – State-by-state analysis.

Part 3 - Federal investigative agencies.

Part 4 - National organization endorsements.

Part 5 – Bibliography.

Our nine year study of custodial recording law and practices

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 suspects under arrest in police detention facilities in felony investigations, from the *Miranda* warnings to the end of the interviews. In place of standard survey techniques, we make personal "cold" telephone calls to police and sheriff departments that we have reason to believe routinely make electronic recordings during custodial interviews, although we often 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. Survey forms are distributed at its training seminars, asking attendees for information relating to their practices and experiences with electronic recordings; the completed surveys are sent to us.

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, and ranging in size from large (over 500 officers), to medium (50 to 500), to small (1 to 50). We have collected written protocols and regulations from scores of departments throughout the country, which outline the procedures and methods to be followed when conducting recorded interviews.

As noted, our aim is to identify departments that, as a matter of policy, electronically record by audio, video, or both, the complete questioning of felony suspects from the *Miranda* warnings to the very end of the interviews. We seek no information relating to interviews conducted outside an official fixed detention facility, for example, those taking place on the street or in a police 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. We do allow for exceptions caused by unanticipated and exigent circumstances, for example, equipment failure, refusal of suspects to be recorded, and the like.

We prepare typewritten summaries of all telephone interviews,

I thank my associates Jennifer T. Beach and Matthew J. Searer, and my personal assistant Jo Stafford, for their valuable assistance in the preparation of this article and the Compendium.

1. *Stephan v. State*, 711 P.2d 1156, 1161 (Alaska 1985).

whether or not the department's practice is to record complete custodial interviews. I then write a personal letter to the person with whom we have spoken or who has completed the survey form, to which is attached our memorandum of the conversation, or the form, with a request for corrections, additions and comments. Complete files are maintained of these letters, memoranda and responses received.

1. Why electronic recordings are beneficial for all concerned.

The responses we have received from the multi-year calls and surveys fall into two repetitious categories: (1) officers from departments that record custodial interviews from *Miranda* to the end, who are virtually unanimous in praise and enthusiasm for the practice of recording, and (2) those from departments that do not routinely record, many of whom voice dire predictions of disasters to ensue if recordings were mandated. Although it may seem an exaggeration, we have yet to encounter a single officer from a recording department who, given the option, would elect to return to making handwritten notes during interviews, followed by typewritten summary reports. Whatever problems have arisen with recordings, we have heard of none deemed sufficiently serious to warrant return to the outmoded "scribble and type" procedure.[2]

In the hundreds of conversations we have had with detectives and supervisors in departments that record, and the survey forms described in Part 2 below, a wide variety of reasons underlay the opinions about the value of recording:

- Our memories and contemporaneous notes are incapable of obtaining as accurate and complete a record of what was said and done on a prior occasion that can match electronic recordings:

"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 the 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.'"[3]

- Recordings enhance detectives' ability to concentrate on the suspect and content of the interview, to later review recordings (especially when recorded by video) in order to observe the suspect's responses and attitudes, to notice missed clues, and indicia of truthfulness and deception. They are also an aide in self-evaluation of interrogation methods and teaching of others.
- Recordings protect detectives against suspects' claims that the *Miranda* warnings were not given, that coercive techniques were used, that they fed incriminating facts for insertion into confessions, that promises of leniency were made, or that other improper techniques were engaged in that might support motions to suppress or arguments that the judge or jury should disregard the confession.
- Recordings often foreclose motions to suppress, and engender pleas of guilty, which in turn save immense amounts of time and expense otherwise required of police, prosecutors, defense lawyers (often public defenders), trial and reviewing court judges, and courtroom personnel.
- Recordings save the time and cost of requiring that the trial and appellate judiciary hear and/or read contesting testimonial versions of what occurred behind closed doors in detention facilities, and make credibility determinations without the aid of easily accessible and usually incontestable evidence of what was said and done.
- Claims for civil damage awards brought by allegedly abused suspects and exonerated defendants are avoided.
- On the flip side of the coin, innocent or mistreated suspects are able to demonstrate if detectives failed to give *Miranda* warnings, engaged in misconduct, supplied details for confessions, or are testifying incompletely or inaccurately about their own and the suspects' statements and actions during the interrogations.
- Errors and exaggerations of the participants are apparent from both oral and video recordings; electronic tapes are not subject to cross examination.
- Overall, recordings provide a substantial measure of assurance that it is the guilty, and not the innocent, who are charged and convicted, thus helping to ensure accuracy in the criminal process, and heightening the confidence of the judiciary, the bar, the media and the public in our system of criminal justice.

2. State-by-state analysis.

Part 2 of the Compendium contains a summary of the law and experiences of each state and the District of Columbia regarding electronic recording of custodial interrogations.

In 2002, only two states, Alaska and Minnesota, required electronic recording of custodial interviews, and this came about as a result of rulings of their state supreme courts. Today, statutory provisions or supreme court rules in the 15 states listed below, and D. C., require recording of custodial interrogations of suspects in specified felony investigations (by statute unless otherwise indicated):

Alaska (Supreme Court ruling)
Connecticut[4]
District of Columbia
Illinois
Indiana (Supreme Court rule)
Maine

2. Published examples of comments received from police and sheriffs are recounted in: *Police Experiences with Recording Custodial Interrogations*, Center on Wrongful Convictions, Northwestern University Law School (2004), available at *http://jenner.com/library/publications/7965; Police Experience with Recording Custodial Interrogations*, 88 Judicature 132 (2004); *The Police Experience: Recording Custodial Interrogations*, 28 Champion 24 (2004); *Recording Custodial Interrogations: The Police Experience*, 52 Fed. Law. 20 (2005); *Electronic Recording of Custodial Interrogations*, XIX The Chief of Police 17 (2005).

3. *Hendricks v. Swenson*, 456 F.2d 503, 507 (8th Cir. 1972).

4. The statute takes effect January 1, 2014.

Maryland
Minnesota (Supreme Court ruling)
Missouri
Montana
Nebraska
New Jersey (Supreme Court rule)
New Mexico
North Carolina
Oregon
Wisconsin

In seven other states the supreme courts and legislatures are actively considering whether to require electronic recordings of custodial interrogations of felony suspects:

• *Arkansas*: A committee formed by the Supreme Court has recommended adoption of a Rule of Criminal Procedure requiring electronically recorded custodial interrogations. The Court requested and received comments, and has taken the matter under advisement.

• *Florida*: A majority of a Supreme Court appointed Innocence Commission took an interim vote in favor of a mandatory recording statute. The Commission's final report is due in June 2012.

• *Michigan, New York, North Dakota, Pennsylvania, South Carolina*: Mandatory recording bills are pending in the legislatures of these states:

— In New York, the Chief Judge of the Court of Appeals in 2009 convened the State Justice Task Force to examine wrongful convictions. It has recently released its support of "legislation requiring recording in certain situations, focusing on serious crimes in which lengthy interrogations which could result in false confessions were more likely to occur."

— In North Dakota, a statute enacted in 2011 directed the legislative management to report to the 2013 legislative assembly on the feasibility and desirability of adopting the model state recording Act approved in 2010 by the National Conference of Commissioners on Uniform State Laws (ULC). Hearings have been held before the Judiciary Committee, but the report has not yet been filed.

— In Pennsylvania, a majority of a Joint State Government Commission Legislative Advisory Committee recently recommended to the legislature and other state officials that a statute be enacted requiring electronic recording of custodial interrogations. This recommendation is pending.

Thus, 22 states and the District of Columbia have adopted or are considering adoption of statutes or court rules requiring law enforcement agencies to record complete custodial interrogations of felony suspects in places of detention. Except for Alaska and Minnesota, this has all occurred within the past decade!

Related observations:

• In Iowa, Massachusetts, New York and Utah, law enforcement agencies have issued bulletins – titled variously as Guidelines/Best Practices/Recommendations - encouraging police and sheriffs statewide to record custodial interrogations of felony suspects.

• The Vermont General Assembly enacted a statute in 2010 providing that, after July 1, 2012, the Assembly intends law enforcement agencies to make an audio or video recording of custodial interrogations of felony suspects. The statute directed the state law enforcement advisory board to submit an implementing proposal. The board has proposed that "recording of custodial interrogations whenever practicable is a best practice that should be adopted by Vermont law enforcement agencies." The General Assembly has not taken further action.

• In Rhode Island, a Task Force formed by the legislature recently submitted its final report recommending that every law enforcement agency adopt uniform written policies and procedures requiring electronic recording of custodial interrogations in their entirety. The legislature has not taken further action.

While guidelines are steps in the right direction, they should be recognized for what they are - recommendations, which may or may not be adopted by individual law enforcement departments. They lack the force of law, and contain no sanctions for failures to comply. The members of the New York Task Force, mentioned above, focused on the critical distinction between suggested "best practices" and mandatory legislation, when they "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."

• Relevant statutory provisions in Ohio and Texas, and court rulings in New Hampshire and Texas, lack meaningful recording requirements, or sanctions for failure to record.

In Part 2 of the Compendium, there are quotations from a number of state reviewing courts which, while not requiring that recordings be made, have written opinions favoring the practice. Also provided is information from our telephone inquiries and the survey forms, identifying departments in each state which, while not required to do so by statute or court ruling, voluntarily make complete electronic recordings of custodial interrogations. Hundreds of detectives and supervisors from these departments make recordings without legislative or judicial compulsion, for the simple reason that the practice has proven to be of great benefit to the accomplishment of their mission to enforce the law in a fair and lawful manner.[5]

3. Federal investigative agencies.

Use of recording devices has been mandated or authorized for investigators in various federal agencies, for example, the Air Force, Army, and Navy, and has been endorsed by the Federal Commission on Military Justice. However, based upon a number of discredited reasons,[6] one of which is of doubtful ethical propriety and legality,[7] the Department

5. In states that now require statewide recordings, many departments were already recording before the statewide mandates took effect. Those departments are not listed in Part 2.

6. *See* T. Sullivan, *Recording Federal Custodial Interviews*, 45 American Criminal Law Review 1297, 1315-35 (2008).

7. Id. at 1324-27.

of Justice remains opposed.[8] There are many other federal agencies with investigative arms, about which I have no information at this time.

4. Nationwide organization endorsements.

Part 4 contains a list of the major law enforcement, bar associations, and other national organizations devoted to law enforcement, which endorse recording custodial interrogations. For example, the International Association of Chiefs of Police, the American Federation of Police and Concerned Citizens, the National District Attorneys Association (NDAA), and the American Bar Association, all advocate recording.[9] Also listed are national organizations devoted to law, order and the rule of law, including the American Judicature Society, the American Law Institute, the American Civil Liberties Union, the Center for Policy Alternatives, the Constitution, Innocence, and Justice Projects, and the National Association of Criminal Defense Lawyers. Quotations from some of these organizations' publications are included.

Special note should be taken of the Uniform Electronic Recordation of Custodial Interrogations Act (UERCIA), mentioned above, and adopted in July 2010 by the National Conference of Commissioners on Uniform State Laws (ULC). The ULC is a non-profit, state supported organization, established 120 years ago, with members from every state, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. Its mission is to develop and provide state legislatures non-partisan, well-conceived and well-drafted legislation in order to bring clarity and stability to critical areas of state statutory law. After more than two years of discussion and consultation in open meetings with public and private stakeholders, and after many drafting sessions, the ULC approved and recommended the UERCIA for enactment in all states. It is a comprehensive, balanced statute which is available online.[10]

5. Bibliography.

Enumerated in Part 5 are articles and books, including those by leading authorities on criminal law and criminology, expanding on the benefits of recording to law enforcement, suspects and the community. ★

Since it is my intention to make ongoing revisions, readers are requested to contact me with corrections or supplements to the information contained in the Compendium.

THOMAS P. SULLIVAN
is a partner at Jenner & Block in Chicago. (tsullivan@jenner.com)

8. The DOJ investigative agencies include the Federal Bureau of Investigation, the Drug Enforcement Agency, and the Bureau of Alcohol, Tobacco, Firearms & Explosives.

9. The NDAA supports recording, but opposes mandatory legislation.

10. Available at http://www.law.upenn.edu/bll/archives/ulc/erci/2010final.htm.The proposed statutes pending in New York, North Dakota, Pennsylvania and South Carolina are based in whole or in part on the ULC model recording Act.