



The Colorado Best Practices Committee  
for Prosecutors  
*Presents*

**Recording of Custodial Interrogations:  
A Report for Law Enforcement**

By Antonia Merzon for the Colorado Best Practices Committee

**Colorado Best Practices Committee**

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## Recording Custodial Interrogations: Executive Summary

Over the past thirty years, the practice of electronically recording custodial interrogations has grown significantly. Custodial interrogations are defined as law enforcement interviews of suspects conducted at police stations or other detention facilities. Suspect interviews of this nature are a key step in most criminal investigations. The ongoing trend toward recording has been spurred both by technological advances that make recording protocols cheaper and easier to implement, as well as a growing recognition that recorded interviews may produce strong evidence and reduce pre-trial disputes, while simultaneously protecting suspects' constitutional rights. After decades of experience across the country, funding for camera equipment and interview rooms remains the most significant obstacle to wider use of this technique.

This memo surveys existing laws in the United States on recording custodial interrogations, as well as the current practice in Colorado. At this time, twenty-one states and the District of Columbia have enacted laws mandating or strongly encouraging the recording of custodial interrogations in at least some criminal cases. Another five states have undertaken successful law enforcement-led initiatives that have expanded the use of recordings statewide. Last year, the United States Department of Justice adopted a policy requiring its law enforcement agencies (such as the FBI and DEA) to record interrogations. Numerous national organizations representing the spectrum of interests in the criminal justice system also have voiced support for implementing recording requirements, noting the benefits to all parties and the court system as a whole. In addition, academic studies have indicated that recording of suspect interviews might especially assist in the investigation of juvenile and mentally disabled suspects, who may be more vulnerable to giving false confessions.

In Colorado, the practice of recording custodial interrogations already has taken hold. The results of a recent survey by the Colorado District Attorney's Council show that at least 102 law enforcement agencies across the state are recording suspect interviews. Of that group, more than half are recording in all criminal cases, with another forty percent recording in all felony or serious felony cases. Virtually all of these agencies reported that they record the entirety of the interview, including the administering of Miranda warnings, thereby documenting the application of suspects' constitutional protections.

Given the widespread implementation of the practice across the state, whether Colorado needs a law mandating the recording of custodial interrogations is an open question. The policies already adopted voluntarily by the Colorado agencies responding to the survey are much broader than many laws in other states currently require. And unlike some other states, in which court holdings or rules have enforced a statewide requirement, the Colorado courts have declined to create such a mandate.

If the Legislature were to take action in this area, it would need to consider several issues in drafting a new law – such as the type of cases for which recording would be required, the procedural remedies if a statement is not recorded, what exceptions to the rule would be recognized, how those exceptional circumstances must be proven, whether audio-only recordings would be sufficient, and whether recorded interrogations should be

available to the public through open records requests. Existing statutes across the country provide some guidance, although the states are not unified, with each jurisdiction embracing its own approaches to these variables. A model statute produced by the Uniform Law Commission would be an instructive starting point, as it reviews and offers answers to many of these policy questions.

Whether legislation is pursued in Colorado, or recording custodial interrogations continues as a law-enforcement-led practice, funding is necessary for future expansion. More than twenty percent of agencies responding to the survey indicated they do not have sufficient space or equipment for recording interrogations, and a similar number said they would record more often if they had improved capabilities. The possibility of linking these funding needs to ongoing legislative and federal interest in providing law enforcement with body-worn cameras might be considered. In addition to funding, policies or rules that encouraged recording interrogations of vulnerable suspects – such as juveniles, the mentally ill or mentally disabled – is a topic that might benefit from statewide leadership.

## Introduction

As law enforcement agencies across the nation work to keep pace with advances in technology, custodial interrogation is one part of the criminal justice process experiencing widespread change. A key investigative stage, “custodial interrogation” refers to the questioning of a suspect held in custody at a police station or other detention facility. Over the past fifty years, the United States Supreme Court has issued a large body of case law, expanded upon by state courts, that provides police officers with detailed guidelines about the rights of suspects during custodial interrogations, as well as permissible interviewing techniques.<sup>1</sup> But for most of our history, the events of an interrogation – the questions asked, the answers given, the demeanor and actions of the participants – could be recounted only through the memory, notes and testimony of the officers and suspects involved.

With the advent of user-friendly, affordable audio and video technology in the 1980s and 1990s, however, the notion of recording custodial interviews began to take hold.<sup>2</sup> The States of Alaska and Minnesota, along with a small number of local jurisdictions around the nation, became early adopters of recording policies, sparking an evolving discussion about the pros and cons of this practice among local, state and federal law enforcement groups, state and local governments, civil liberties organizations and the defense bar.<sup>3</sup>

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<sup>1</sup> See e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (statements made by suspect during custodial interrogation admissible in court only if voluntary and reliable; suspects must be informed of right to consult an attorney and right against self-incrimination, express that he/she understands those rights, and voluntarily waive them); *Berkemer v. McCarty*, 468 U.S. 420 (1984) (procedural safeguards announced in *Miranda* apply to custodial interrogations in connection with crimes of any severity); *New York v. Quarles*, 487 U.S. 649 (1984) (in situations where concern for public safety is paramount, un-Mirandized custodial interrogation acceptable if limited to evolving public safety situation); *Missouri v. Seibert*, 542 U.S. 600 (2004) (unconstitutional to interrogate without reading *Miranda* warnings, then read the warnings and asking suspect to repeat confession); *Berghuis v. Thompkins*, 560 U.S. 370 (2010) (if suspect is aware of right to remain silent but does not specifically invoke or waive the right, subsequent voluntary statements can be used in court and police can continue to question him/her).

<sup>2</sup> Initially, due to cost and limited availability of video cameras, agencies recording custodial interrogations frequently used audio recording devices. When cost and space limitations prohibit the acquisition of video recording equipment, some law enforcement agencies continue to make audio recordings of custodial interrogations.

<sup>3</sup> General pros and cons of recording custodial interrogations are derived from the following sources: **(1)** *Uniform Electronic Recordation of Custodial Interrogations Act*, National Conference of Commissioners on Uniform State Laws (2010); **(2)** Sullivan, T.P. *Police Experiences with Recording Custodial Interrogations*, Northwestern University School of Law Center on Wrongful Convictions (2004); **(3)** Taslitz, A.E., *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, Vol. 7:2 *Northwestern Journal of Law and Social Policy* (2012); **(4)** Collins, J. *Chief's Counsel: Recording Interrogations*, *The Police*

The reasons generally expressed in favor of recording custodial interrogations include:

- *Strong Evidence* – A recording provides clear, precise documentation of a suspect’s admissions, behavior, demeanor, clothing and physical state. Once recorded, criminal defendants cannot easily change their accounts or explanations of criminal events, or dispute admissions made. When suspects make recorded admissions, they do so in their own voices and own words. Also, video recordings allow judges and juries to observe a defendant as he/she looked and behaved close to the time of the crime, rather than when cleaned up for courtroom appearances.
- *Reduced Motions and Pre-Trial Hearings* – Video recordings provide an objective record, removing any issues stemming from conflicting memories or interpretations of what occurred during the interrogation – including whether a defendant waived his/her Miranda rights. Recordings also can debunk the standard defense argument that police officers used improper interrogation methods to obtain statements from suspects. As a result, the number of defense motions to suppress statements and related pre-trial hearings are greatly reduced when interrogations are recorded.
- *Increased Guilty Pleas* – Seeing and hearing a suspect admit to committing a crime is powerful evidence for judges and juries. Many defendants choose to plead guilty once they review this recorded evidence, rather than proceed to trial.
- *Better Interviewing for Law Enforcement* – By recording interrogations, officers are freed from having to take notes while simultaneously pursuing a line of questioning and observing the suspect. Officers, therefore, are better able to focus on and conduct the interview.
- *Catching Missed Evidence* – When interrogations are recorded, law enforcement officers can review them again at a later time. The opportunity to reassess the entire interview can reveal incriminating nuances of a suspect’s statements and actions that were missed as the questioning unfolded.
- *Enhanced Training on Interview Techniques* – Recorded interrogations allow law enforcement officers to evaluate their own performances and be better trained on effective interviewing methods. Officers also can learn, by

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Chief, International Association of Chiefs of Police (June 2014); **(5)** *Interrogations and Confessions: Concepts and Issue Paper and Model Policy*, International Association of Chiefs of Police National Law Enforcement Policy Center (2004); **(6)** *Fact Sheet: False Confessions & Recording of Custodial Interrogations*, The Innocence Project (2015); **(6)** *Irreversible Error: Recommended Reforms for Preventing and Correcting Errors in the Administration of Capital Punishment*, The Constitution Project (2014).

example, how to avoid interrogation pitfalls – such as asking leading questions, talking over the suspect, or contaminating an interview by inadvertently providing a suspect with details of the crime.

- *Added Protection for Vulnerable Suspects* – Some studies of custodial interrogation indicate that juveniles, the mentally ill, and individuals with mental disabilities may sometimes falsely confess to crimes because they are especially vulnerable to the influence of authority figures, such as police officers.<sup>4</sup> Recording custodial interrogations of suspects in these groups provides the ability to reexamine their statements and admissions in light of this concern.
- *Added Protection for Suspects Who May Falsely Confess* – By creating a permanent record of custodial interrogations, any future claims by a suspect that he/she falsely confessed to a crime can be objectively evaluated by law enforcement, attorneys and the courts.
- *Video is the Accepted Standard* – Now that making recordings is a routine activity for the average person, courts and juries will expect recordings to be made, especially in the relatively controlled setting of custodial interrogations.

There are, however, logistical and investigative concerns about having law enforcement agencies record custodial interrogations. These issues include:

- *Costs/Lack of Funding* – The technology and facilities needed to record custodial interviews can require significant budget commitments for law enforcement agencies. These costs include the purchase and installation of recording equipment, as well as the purchase of storage equipment or storage services when digital recordings are generated. Over time, depending on the volume of recordings, the maintenance, indexing and storage costs for video and/or digital evidence will likely grow. Funds are needed to meet other long-term requirements as well, such as transcription of recorded statements, officer training, and discovery in criminal cases. Agencies that do not have a suitable physical location for a video-capable interview room also face the costs of renovation or space reallocation.

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<sup>4</sup> Gross, S.R. et al., *Exonerations in the United States, 1989 Through 2012*, Report by the National Registry of Exonerations (2012); Leo, R.A., *False Confessions: Causes, Consequences, and Implications*, *Journal of the American Academy of Psychiatry and the Law* 37:322-43 (2009) (citing several earlier studies); Kassin, S.M., et al., *Police-Induced Confessions: Risk Factors and Recommendations*, *Law & Human Behavior* 34:3-38 (2010).

- *Chilling Effect on Suspects* – The presence of recording devices may cause some suspects to become unwilling to speak to police officers, or less forthcoming in their statements. As a result, important evidence could be lost about the suspect’s guilt or innocence.
- *Juries/Judges Shown Interrogation Techniques* – Recording interrogations will allow juries and judges to scrutinize police interview tactics. Some tactics, while lawful, may be perceived by the layperson as distasteful or negative, with a potentially adverse effect on prosecutions.<sup>5</sup>
- *Implied Distrust* – A requirement to record custodial interrogations may tacitly imply that law enforcement officers are not to be trusted to remember, document and testify honestly about their work.

The perceived benefits and harms of recording custodial interrogations were put to the test by early programs in places like Alaska and Minnesota. After years of experience in these states and other local jurisdictions, it became clear that some of the concerns over recording custodial interrogations were largely unsupported. Law enforcement officers were not encountering a notable chilling effect on confessions, and juries observing police interview tactics were not reacting by acquitting defendants. On the other hand, the number of pre-trial motions and hearings about statements were greatly reduced, and courts found that suspect’s rights were more transparently protected.<sup>6</sup>

In particular, the fear that recording might cause suspects to refuse interviews was abated by two policy decisions. First, officers did not necessarily have to inform suspects that interrogations were being recorded. While the community might learn about the practice as prosecutions using recorded confessions made their way to court, the option remained to covertly record if doing so would improve the chances of conducting an interview.<sup>7</sup> Secondly, if a suspect refused to be recorded, officers were permitted to conduct the interrogation the old-fashioned way, taking notes and making observations.

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<sup>5</sup> See, *Frazier v. Cupp*, 394 U.S. 731 (1969) (police officer’s false statement to Frazier that he had been implicated in the crime by a co-defendant did not render Frazier’s subsequent confession involuntary). Subsequent cases in federal and state courts have defined the types of deceptive tactics that are permissible to obtain a voluntary confession. See also, *People v. Zamora*, 940 P.2d 939 (Colo. App. 1996) (limited use of ruses by police supported by overwhelming weight of legal authority).

<sup>6</sup> See, *Stephan v. State*, 711 P.2d 1156 (Alaska 1985); *State v. Scales*, 518 N.W.2d 587 (Minn. 1994). In *State v. Sanders*, 775 N.W.2d 883 (Minn. 2009), the Supreme Court of Minnesota wrote that, once the *Scales* case mandated recording, state courts had seen very few valid Miranda challenges and the elimination of frivolous defense objections to confessions. The Supreme Court noted, moreover, that recorded interrogations had produced some of the strongest evidence being used to convict defendants.

<sup>7</sup> Circumstances allowing covert recording might differ in states requiring two-party consent. Colorado is a one-party consent state.

In other words, the recording requirement provided leeway for circumstances in which it might limit interrogations of particular suspects.

The experiences of these early adopters, coupled with the availability and rapid spread of digital recording technology in the last decade, has led at least 1,000 law enforcement agencies throughout the United States to resolve the debate in favor of recording custodial interrogations.<sup>8</sup> While the cost of implementing a program is an ongoing obstacle, the trend towards recording is strong. Currently, 21 states and the District of Columbia have laws that in some way require or encourage the recording of custodial interrogations. In eighteen of those states, the laws have been enacted within the past ten years.

During the same period that experience and technology began working in favor of recording custodial interrogations, breakthroughs in DNA testing led to the exoneration of a number of defendants convicted of rape and murder in several states. The ensuing discussion over the reasons for these wrongful convictions reignited interest in recording custodial interrogations. The Innocence Project estimates that approximately 25% of the DNA exoneration cases they investigated also involved some form of false confession by the defendant.<sup>9</sup> In an effort to reduce the number of wrongful convictions, the Innocence Project and other advocacy groups recommend that custodial interrogations always be recorded, in their entirety, to better protect defendants' rights and allow for future review. This practice especially might benefit members of certain groups – juveniles, the mentally ill, and those with mental disabilities – who, studies indicate, may have a greater tendency to falsely confess.<sup>10</sup>

While a desire to protect innocent suspects from wrongful conviction is a goal shared by everyone in the criminal justice system, today's wealth of experience with recording interrogations demonstrates many other tangible benefits for law enforcement. One supervising prosecutor in Minnesota, citing improved statement taking and fewer pre-trial legal disputes, described his state's court-ordered requirement to record interrogations as "the best thing we've ever had rammed down our throats."<sup>11</sup>

Over time, organizations representing diverse interests within the criminal justice system have issued statements in support of recording custodial interrogations. The following are some of the national bodies that have presented these opinions: The American Bar Association, The American Civil Liberties Union, The American Law Institute, The Constitution Project, The Innocence Project, The International Association of Chiefs of Police, The National Association of Criminal Defense Lawyers, The National District Attorney's Association, and the National Conference of Commissioners on Uniform State Laws.

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<sup>8</sup> Sullivan, T.P., *A Compendium of Law Relating to the Electronic Recording of Custodial Interrogations*, 95:5 *Judicature*, American Judicature Society (2012).

<sup>9</sup> *Fact Sheet: False Confessions & Recording of Custodial Interrogations*, The Innocence Project (2015).

<sup>10</sup> See references cited in Footnote 4.

<sup>11</sup> Sullivan, T.P., *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95:3 *Journal of Criminal Law & Criminology*, Northwestern University School of Law (2005).



Given this trend towards recording custodial interrogations and the weakened arguments against the practice (other than funding concerns), this report seeks to examine: (1) how laws and policies on this topic have been implemented across the United States, (2) **how Colorado law enforcement currently is using this policing tool, and the relevant rulings of Colorado courts (see p. 22)**, and (3) what policy and implementation options and opportunities may be available to the Colorado law enforcement community.

## Review of Existing Laws

As of July 2015, twenty-one states and the District of Columbia (D.C.) have laws imposing requirements about recording custodial interrogations.<sup>12</sup> The laws vary greatly in their: (a) source, (b) application, (c) definition of complete recording, (d) exceptions, (e) remedies, (f) preference for audio versus audiovisual recording, and (g) evidence preservation rules. Some laws were imposed by the courts, others by state legislatures. Some are broad in scope, requiring recordings in any criminal case. Others require recording under very limited circumstances. The consequences when police officers fail to record an interrogation range from no sanction at all to the suppression of the defendant's statements as evidence. Most states outline exceptions to their recording requirements, but the exceptions differ state by state.

In addition to these 21 states and D.C., another five states have undertaken initiatives that, while not binding law, have effectively resulted in the widespread implementation of policies requiring the recording of custodial interrogations.<sup>13</sup>

In 2014, after decades of maintaining the position that interrogations are best documented through agent notes and testimony, the United State Department of Justice issued a policy memorandum requiring all agencies under its authority to henceforth video-record custodial interrogations.<sup>14</sup> As a result, the Federal Bureau of Investigation,

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<sup>12</sup> These states are: Alaska (1985), Arkansas (2012), California (2013), Connecticut (2011), District of Columbia (2006), Illinois (2003, 2013), Indiana (2009), Maine (2004), Maryland (2008), Michigan (2012), Minnesota (1994), Missouri (2009), Montana (2009), Nebraska (2008), New Jersey (2005), New Mexico (2006), North Carolina (2007, 2011), Ohio (2010), Oregon (2010), Texas (1989, 2009), Vermont (effective 10/1/2015), Wisconsin (2005). There is a pending statute that would require recording of some custodial interrogations in the State of South Carolina. As of this writing, the South Carolina legislature had not taken final action (Bill No. H.3153, S.0222).

<sup>13</sup> These states are: Iowa (2006), Massachusetts (2004), New York (2010), Rhode Island (2013), and Utah (2007). A 2001 decision of the New Hampshire Supreme Court - *State v. Barnett*, 789 A.2d 629 (2001) - holds that if the prosecution wishes to introduce a recorded custodial interrogation into evidence, the recording must encompass the entire custodial interview. However, the decision does not actually require custodial interrogations to be recorded. Unrecorded statements are still admissible under the usual rules of evidence and relevant laws.

<sup>14</sup> *Policy Concerning Electronic Recording of Statements*, U.S. Department of Justice (2014).

Drug Enforcement Administration, Bureau of Alcohol, Tobacco and Firearms and other DOJ law enforcement agencies are now recording custodial interrogations with limited exceptions. Numerous other federal investigative agencies had already approved this requirement, including all agencies within the Department of Defense.<sup>15</sup>

The following analysis examines the laws and policies on recording custodial interrogations among the states with existing requirements, as well as the policies of the Department of Justice and the approaches recommended by the Uniform Law Commission and the Innocence Project.<sup>16</sup> In addition, a table outlining each state's requirements is attached as an appendix.

A. Source – What branch of government mandated recording?

- *Court Decisions*

Among the states with laws requiring the recording of custodial interrogations, three have had the requirement instituted by the state's highest court. **Alaska** became the first state to have any kind of law on this subject in 1985, when its Supreme Court issued a decision mandating recording for any crime.<sup>17</sup> The Alaska Supreme Court held that the due process clause of the Alaska Constitution required the recording of interrogations to ensure that rights of suspects were maintained. Through subsequent court decisions, the law has been modified to allow for certain exceptions, such as malfunctioning recording equipment or remote agencies without access to recording devices. However, since 1985, the vast majority of custodial interrogations in Alaska have been recorded.

In 1994, the Supreme Court for the State of **Minnesota** issued a similar ruling, although relying on the Court's supervisory power over the state's courts, rather than a due process analysis.<sup>18</sup> Since that time, law enforcement agencies have been required to record all custodial interrogations, with some exceptions developed through subsequent case law.

A 2005 decision by the State of **Wisconsin's** Supreme Court held that all custodial interrogations of juvenile suspects must be recorded.<sup>19</sup> The Court made this ruling using its supervisory authority over the Wisconsin state courts. As described

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<sup>15</sup> *Department of Defense Directive No. 3115,09* (October 2012).

<sup>16</sup> All but a few of the existing laws and policies define the term "custodial interrogation" in language mirroring the holding in *Miranda v. Arizona, supra*, and its progeny. "Custody" is generally described as the circumstances when a reasonable person in the subject's position would consider him/herself to be in custody, starting from the moment a person should have been advised of his/her Miranda rights and ending when the questioning has concluded. "Interrogation" is generally described as questioning by a law enforcement officer that is reasonably likely to elicit an incriminating response from the subject. Some of the laws simply reference the constitutional case law without stating a specific definition.

<sup>17</sup> *Stephan v. State*, 711 P.2d 1156 (Alaska 1985).

<sup>18</sup> *State v. Scales*, 518 N.W.2d 587 (Minn. 1994).

<sup>19</sup> *State v. Jerrell*, 699 N.W.2d 110 (Wis. 2005).

further below, later that year, the Wisconsin legislature passed a law creating similar requirements for the interrogation of adult suspects.

While **Iowa** does not have a case or statute imposing a recording requirement, an Iowa Supreme Court holding in 2006 caused police agencies across the state to mandate recording interrogations. In *State v. Hajtic*, 724 N.W.2d 449 (Iowa 2006), the Court warned it would rule in favor of a requirement in future cases if law enforcement agencies did not take it upon themselves to work out a policy for recording interrogations. In response, the Iowa Department of Public Safety issued statewide directives mandating the recording of interrogations, as well as model policies to be incorporated by agencies across the state. While these directives are not binding, surveys indicate wide compliance by law enforcement in Iowa.<sup>20</sup>

Similarly, in **Massachusetts**, a 2004 decision by the Supreme Court strongly encouraged law enforcement within the state to begin recording custodial interrogations. Moreover, the court ordered that if officers henceforth failed to record, trial courts would issue an instruction to the jury describing the highest court's preference for recording and advising the jury to weigh evidence of an unrecorded statement with great caution. The Supreme Court added that, if a statement is not recorded, the jury also is permitted to conclude that the Commonwealth has failed to prove the voluntariness of the statement beyond a reasonable doubt.<sup>21</sup> Following this ruling, the Massachusetts Chiefs of Police Association, District Attorneys' Association, State Police and Attorney General's Office issued policy statements mandating the recording of custodial interrogations, a policy that largely has been implemented among the state's law enforcement agencies.<sup>22</sup>

#### - *Supreme Court Rules*

Three states have requirements for recording custodial interrogation imposed by their Supreme Courts as rules of evidence. In **Arkansas**, **Indiana** and **New Jersey**, following decisions in relevant cases, the Supreme Courts issued new rules, binding on all courts within the state, requiring that statements taken during custodial interrogation be recorded, and creating remedies when unrecorded statements are offered as evidence.<sup>23</sup> While similar to the court holdings requiring recording in other states, by setting out an evidentiary rule, these states outlined issues related to exceptions and remedies up front, rather than relying on subsequent cases to flesh out the parameters of the new law.

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<sup>20</sup> Sullivan, T.P. *Custodial Interrogation Recording Compendium State-by State* (2014), citing a 2009 survey of law enforcement agencies by the Iowa State Bar Association.

<sup>21</sup> *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004).

<sup>22</sup> *Report of the Justice Initiative: Recommendations of the Massachusetts Attorney General and District Attorneys to Improve the Investigation and Prosecution of Cases in the Criminal Justice System* (Sept 2006).

<sup>23</sup> (1) **Arkansas Rules of Criminal Procedure**, Rule 4.7; (2) **Indiana Rules of Evidence**, Rule 617; (3) **New Jersey Supreme Court Rules**, Rule 3:17.

- Statutes

There are currently sixteen states, plus the **District of Columbia**, with statutes concerning the recording of custodial interrogations. These states are: **California, Connecticut, Illinois, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Texas, Vermont** and **Wisconsin**.<sup>24</sup>

Additionally, a statute in **Rhode Island** (2011) created a task force to study and make recommendations on recording custodial interrogations.<sup>25</sup> In 2012, the task force filed a report recommending that law enforcement agencies record in cases involving crimes for which a life sentence is possible, and asking all agencies to create written policies by 2013. The Rhode Island Police Accreditation Commission then put out a written directive in its standards manual requiring custodial interrogations to be recorded in all capital cases and offering a model policy. Law enforcement agencies within the state must comply with the standards manual in order to be accredited.

In **Utah** in 2008, the Attorney General's Best Practices Committee sent out policy recommendations to the state's law enforcement agencies, with support from leaders of the state's police departments and sheriff's offices, in favor of recording custodial interrogations in violent felony cases. Although not binding upon state law enforcement agencies, a later survey showed at least sixty-percent compliance with the recommendations, although they are not binding and there are no consequences for not recording.<sup>26</sup>

Similarly, in December 2010, the Best Practices Committee of the New York State District Attorneys Association, with input from various law enforcement groups, created guidelines for recording custodial interrogations. The recommended protocols were endorsed by the state associations of Chiefs of Police and Sheriffs, as well as the New York State Police and the New York City Police Department. In conjunction with the publication of these guidelines, the state Division of Criminal Justice Services and the state Bar Association made over three million dollars available to support recording equipment purchases in 59 of the state's 62 counties. In 2013, the Municipal Police

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<sup>24</sup> (1) *California Penal Code*, §859.5; (2) *Connecticut General Statutes*, §54-1; (3) *District of Columbia Code*, §§5-116.01-.03; (4) *Illinois Compiled Statutes*, Chapter 725, §5/103-2.1 (adults) and Chapter 705, §405/5-401.5 (juveniles); (5) *Maine Revised Statutes Ann.*, Title 25, Part 8, Chapter 341, §2803-B; (6) *Maryland Code Ann., Criminal Procedure* §§2-402-404; (7) *Michigan Compiled Laws*, §§763.7-11; (8) *Missouri Revised Statutes*, Chapter 590.700; (9) *Montana Code Ann.*, §§46-4.406-411; (10) *Nebraska Revised Statutes Ann.*, §§29.4501-4508; (11) *New Mexico Statutes Ann.*, §29-1-16; (12) *North Carolina General Statutes*, Article 8, §15A-211; (13) *Ohio Revised Code Ann.*, §2933.81; (14) *Oregon Revised Statutes*, §133.400; (15) *Texas Code of Criminal Procedure Ann.*, Article 38.22 (adults); *Texas Family Code* §51.095 (juveniles); (16) *Vermont Statutes Ann.*, Title 13, Chapter 182, §5585; (17) *Wisconsin Statutes Ann.*, §§968.073 and 972.115.

<sup>25</sup> *Rhode Island General Laws*, §12-7-22.

<sup>26</sup> Sullivan, T.P. *Custodial Interrogation Recording Compendium State-by State* (2014), citing a 2013 survey of law enforcement agencies by the Utah Attorney General's Office.

Training Council (the state's police officer training agency) adopted the guidelines. At this time, approximately 400 agencies have recording facilities in place.<sup>27</sup>

As described further below, these statutes (and statewide policies) take widely varied stances on the recording requirement. At the outset, however, it is worth noting that the approaches taken by six of the states, to either the application or the remedy for non-compliance, have produced very narrow laws.

- In **California**, the recording requirement exists only for juvenile suspects being investigated for homicide.
- In **Maryland**, recording is encouraged, but not required, and there is no remedy or consequence for non-compliance.
- In **Missouri**, the remedy for non-compliance is the governor's prerogative to withhold funds for the relevant law enforcement agency in future budgets.
- In **New Mexico**, recording is encouraged when reasonably feasible, but not required, and there is no remedy or consequence for non-compliance.
- In **Ohio**, a recording requirement is described, but there is no remedy or consequence for non-compliance.
- In **Texas**, there is no requirement that custodial interrogations be recorded. Written statements are equally acceptable forms of statement evidence. If suspect statements are recorded, there is no requirement that the entire interrogation be included in the recording. While suppression or adverse jury instructions are possible remedies for non-compliance with the law, these consequences do not apply to statements containing assertions of facts or circumstances that are found to be true or "conduce to establish guilt of the accused".

#### B. Application – For which crimes is recording mandatory?

There is a wide range among state laws about when to apply the requirement to record custodial interrogations.

Four states require recordings of custodial interrogations in all criminal cases, whether felony or misdemeanor, and whether the suspect is an adult or juvenile. These states are **Alaska**, **Arkansas**, **Minnesota**, and **Montana**.<sup>28</sup> In addition, **Texas**' unusual

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<sup>27</sup> *Press Release: New York State Law Enforcement Agencies Endorse Video Recording of Interrogations, Statewide Guidelines to Ensure Integrity of the Practice*, New York State District Attorneys Association, et al. (December 14, 2010); *Recording of Custodial Interrogations, Model Policy*, State of New York, Division of Criminal Justice Services, Office of Public Safety (2010, revised 2013); Updated information also was provided by the New York State Department of Criminal Justice Services via email.

<sup>28</sup> Following the **Iowa** Supreme Court's decision in *Hajtic*, the Department of Public Safety's directives stated that all custodial interrogations should be recorded. The decision and directives are not binding, and a 2009 survey indicated approximately half the state's law enforcement agencies were recording in all cases, another ten percent were doing so in all felony cases, and the remaining forty percent left the decision to record to individual officers. Similar directives following the *DiGiambattista* case in

law allows for either written statements or recorded oral statements, but recordings can be made of suspects involved in any level of crime.

Two states – **North Carolina** and **Wisconsin** - require recording in cases involving all crimes when the suspect is a juvenile.

Three states direct law enforcement to record in all felony cases. These states are **Indiana**, **New Mexico** and **Wisconsin** (adults).

In eight states and the **District of Columbia**, interrogations are to be recorded for serious crimes or violent crimes. Many of these states list the offenses from their penal or criminal codes for which recording is mandated. These states are **Connecticut**, **Maine**, **Michigan**, **Missouri**, **New Jersey**, **North Carolina** (adults), **Ohio**, and **Oregon**.<sup>29</sup>

Another three states – **Maryland**, **Nebraska** and **Vermont** - require recording for only a short list of serious crimes.

As mentioned above, **Rhode Island** currently mandates recording only in capital cases.

In **California**, custodial interrogations must be recorded only in homicide cases where the suspect is a juvenile.

The **U.S. Department of Justice** policy requires recording for all federal crimes.

#### C. Completeness – How much of a custodial interrogation must be recorded?

Some state laws explicitly set forth what portions of a custodial interrogation must be included in the recording. In fact, fourteen states and the **District of Columbia** specify that the recording must include the entirety of the interview, including the administering of Miranda warnings. Those states are **Alaska**, **California**, **Michigan**, **Minnesota**, **Montana**, **Nebraska**, **New Mexico**, **North Carolina**, **Ohio**, **Oregon**, **Rhode Island**, **Texas**, **Vermont**, and **Wisconsin**.<sup>30</sup>

In the remaining eight states with laws regarding recording interrogations (Arkansas, Connecticut, Illinois, Indiana, Maine, Maryland, Missouri, New Jersey), there are no provisions addressing the portions of the interview that law enforcement officers

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**Massachusetts** recommended recording for all crimes or all serious felonies. No compliance data is available for that state. *See, Custodial Interrogation Recording Compendium State-by State, supra.*

<sup>29</sup> In **Utah**, policy directives from the Attorney General's Office Best Practices Committee recommended recording in all violent felony cases, as defined by Utah law. A later survey reported sixty percent of law enforcement agencies were recording in all felony cases. *See, Custodial Interrogation Recording Compendium State-by State, supra.* In **New York**, the model policy of the state Division of Criminal Justice Services recommends recording for certain felonies, including murder, manslaughter in the first degree, terrorism, racketeering and the most serious kidnapping, arson, conspiracy and sex offenses.

<sup>30</sup> The non-binding state-issued model policy in **New York** also requires recording the entire interview.

must record, and no guidance as to what would constitute a complete recording. Case law in those states may clarify this issue.<sup>31</sup>

The **U.S. Department of Justice** policy states that recordings should include the entirety of the interview, from “as soon as the subject enters the interview area or room and will continue until the interview is completed.”<sup>32</sup>

#### D. Exceptions - When is it permissible not to record?

Most states with statutes or court rulings on the recording of custodial interrogations identify certain circumstances that may constitute an exception to the recording requirement. Some states require law enforcement to prove they acted within an exception according to a specific standard of proof. Eight states allow officers and prosecutors to prove an exception by a preponderance of the evidence.<sup>33</sup> Two states and the **District of Columbia** require proof by clear and convincing evidence.<sup>34</sup> Wisconsin’s statute says an exception may be proven by “good cause.”

In states where a decision by the highest court has created the recording requirement, possible exceptions are generally handled as they arise through appellate cases.<sup>35</sup> Case law developed over the past thirty years in Alaska has carved out various exceptions based upon the good faith of the officers and the potential prejudice to the defendant. Likewise in Minnesota, the Supreme Court has held that the prosecution can prove that a failure to record is not a “substantial violation” of the recording requirement by demonstrating the existence of a number of specific factors.<sup>36</sup> Massachusetts directs the prosecution to present evidence about the failure to record to the jury, and allows the jury to decide how much weight to give the reasons for the exception.<sup>37</sup>

For the many states with legislated recording requirements or court-issued rules of evidence, the statutes set forth a list of exceptions and the legal method by which the prosecution can prove a justified failure to record. The following analysis outlines the approved exceptions listed in statutes across the United States, in order from the most to least utilized. As noted below, a few of these “exceptions” actually refer to scenarios that do not fall under the legal definition of “custodial interrogation”.

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<sup>31</sup> In **Indiana**, the Rule of Evidence on recording interrogations states that the recording must be “complete”, without further definition. Similar language is used in the non-binding directives issued to law enforcement agencies in **Iowa, Massachusetts and Utah**.

<sup>32</sup> *Policy Concerning Electronic Recording of Statements*, U.S. Department of Justice (2014).

<sup>33</sup> The eight states are Alaska, Connecticut, Illinois, Montana, Nebraska, New Jersey, Oregon and Vermont.

<sup>34</sup> The two states are Indiana and North Carolina.

<sup>35</sup> In Iowa, where the law enforcement community has imposed recording requirements on itself, after the state Supreme Court indicated it was on the verge of mandating the practice, the standard for exceptions is not specified and seems to be handled on a case-by-case basis.

<sup>36</sup> *See, State v. Scales, supra* at 592, stating the factors as contained in the Model Code of Pre-Arrestment Procedure.

<sup>37</sup> *See, Commonwealth v. DiGiambattista, supra*.

- **Statements made during custodial interrogation by a suspect who requests not to be recorded.**
  - This exception is listed in the statutes/rules of fifteen states and D.C., as well as in the policy of the U.S. Department of Justice.<sup>38</sup>
  - In nine states and D.C., law enforcement officers must record or document the suspect asking that his/her interview not be further recorded for this exception to apply.<sup>39</sup>
  
- **Statements made during a custodial interrogation conducted in another state or by federal law enforcement officers.**
  - This exception is included in the statutes/rules of 14 states.<sup>40</sup>
  - Some states add that, for the exception to apply, the interrogation must be conducted according to the laws of the other state. A few states also specify that this exception will apply only if law enforcement officers of that other state conduct the interrogation.
  
- **Spontaneous statements not made in response to a question.**
  - This exception is listed in the statutes of 12 states.<sup>41</sup>
  - Spontaneous statements of this nature are not considered the product of “interrogation” under the law and, barring unusual circumstances, would be admissible in court as voluntary admissions.<sup>42</sup>

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<sup>38</sup> The fifteen states that list this exception are Arkansas, California, Connecticut, Illinois, Indiana, Maine, Michigan, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Vermont and Wisconsin. In addition, the Rhode Island Police Accreditation Commission policy, the New York model policy, and Utah Best Practices directive recognize this exception.

<sup>39</sup> The ten states with this requirement are Arkansas, California (if feasible), Connecticut, Illinois, Indiana, Michigan, New Jersey, North Carolina and Wisconsin. The New York model policy and Utah Best Practices directive also contain this provision.

<sup>40</sup> The fourteen states that list this exception are Arkansas, California, Connecticut, Illinois, Indiana, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Oregon, Texas and Vermont. The New York model policy also contains this exception.

<sup>41</sup> The twelve states listing this exception are Arkansas, Connecticut, Illinois, Indiana, Maine, Missouri, Montana, New Jersey, New Mexico, North Carolina, Oregon and Wisconsin. In addition, the New York model policy contains this exception.

<sup>42</sup> *See, Miranda, supra.*



- **Statements made in response to questions routinely asked during the arrest processing of a suspect.**
  - This exception is listed in the statutes of 12 states.<sup>43</sup>
  - Questioning for the purpose of processing an arrest is not considered “interrogation” under the law, as the questions asked are not reasonably likely to elicit an incriminating response.<sup>44</sup>
  
- **Voluntary statements, whether or not the result of custodial interrogation, that have a bearing on the credibility of a person as a witness.**
  - Four states include the use of unrecorded statements for impeachment purposes as an exception to the recording requirement.<sup>45</sup>
  - Seven additional states have distinct sections in their statutes/rules asserting the admissibility of unrecorded statements that bear on the credibility of the accused as a witness, or to prove perjury charges against the accused.<sup>46</sup>
  
- **Statements not recorded due to a malfunction of the recording equipment or inadvertent failure by an officer/agent to properly operate the equipment.**
  - Ten states and the U.S. Department of Justice list this exception.<sup>47</sup>
  - Some statutes/rules add that police agencies would have to demonstrate the equipment was otherwise properly maintained, and that repair or replacement of the damaged equipment prior to continuing the interrogation was not possible.
  
- **Statements made in cases where the officer/agent reasonably believed the offense under investigation was not an offense that required recording under the statute.**
  - Nine states use this exception.<sup>48</sup>
  - This exception is needed only in states with statutes listing specific crimes that trigger the custodial interrogation requirement.

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<sup>43</sup> The twelve states listing this exception are Arkansas, California, Connecticut, Illinois, Indiana, Maine, Missouri, Montana, New Jersey, North Carolina, Oregon and Wisconsin. In addition, the New York model policy contains this exception.

<sup>44</sup> See *Miranda, supra*; *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

<sup>45</sup> The four states are Arkansas, Connecticut, Illinois and Texas.

<sup>46</sup> The seven states are Arkansas, Connecticut, Illinois, Nebraska, New Mexico, North Carolina and Texas.

<sup>47</sup> The ten states are California, Indiana, Maine, Missouri, Montana, Nebraska, New Mexico, North Carolina, Vermont and Wisconsin. The New York model policy and Utah Best Practices directive also recognize this exception.

<sup>48</sup> The nine states are California, Illinois, Indiana, Maine, Nebraska, New Jersey, North Carolina, Vermont and Wisconsin. The New York model policy and Utah Best Practices directive also recognize this exception.

- **Statements made in situations where recording was not feasible/practical (for example, no recording equipment was reasonably available).**
  - Eight states and the U.S. Department of Justice include this exception.<sup>49</sup>
- **Statements made by a suspect in open court, at his/her trial, before a grand jury or during a preliminary hearing.**
  - Seven states list exception in their laws.<sup>50</sup>
  - Questions asked by prosecutors, defense attorneys or judges in these post-charging, court-related settings are not considered “custodial interrogation” under the law.
- **Statements made during exigent circumstances that make recording unfeasible.**
  - Six states use this exception.<sup>51</sup>
  - While not explicitly stated, it seems this exception contemplates the type of “public safety” scenarios during which un-Mirandized custodial interrogation is permitted under *New York v. Quarles*, 487 U.S. 649 (1984).
- **Statements that would be otherwise admissible under the law.**
  - Two states’ statutes list this exception.<sup>52</sup> In addition, Alaska’s Supreme Court decision mandating recording includes similar language.
  - A general catchall, this exception seems to allow unrecorded statements if they are otherwise legally admissible. The expressed legislative intent for this phrase, as well as subsequent judicial construction, may result in a more narrow exception.
- **Statements not recorded because the officer reasonably believes recording the interrogation would disclose the identity of a confidential informant, or would jeopardize the safety of an officer, the person being interrogated or another individual.**
  - Two states have this exception.<sup>53</sup>

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<sup>49</sup> The eight states are Arkansas, Connecticut, Illinois, Maine, Missouri, Nebraska, New Jersey and New Mexico. The New York model policy and Utah Best Practices directive also recognize this exception.

<sup>50</sup> The seven states are Arkansas, Connecticut, Illinois, New Mexico, North Carolina, Oregon and Texas.

<sup>51</sup> The six states are California, Indiana, Missouri, Montana, Vermont and Wisconsin. The Rhode Island Police Accreditation Commission policy and Utah Best Practices directive also recognize this exception.

<sup>52</sup> The two states are Connecticut and Illinois.

<sup>53</sup> The two states are California and Vermont.

- **Statements made during custodial interrogation conducted by a law enforcement agency with five or fewer officers.**
  - Oregon is the only state to set forth this exception, although the issue of whether small agencies, with limited budgets and resources, can comply with recording requirements exists in most states.
  
- **Statements made during surreptitious recording by or under the direction of law enforcement.**
  - Montana is the only state that includes this exception.
  - While the wording is not especially clear, it seems to protect the admissibility of undercover recordings that, logically, would not include the administering of Miranda warnings.
  
- **Statements that contain assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as finding secreted or stolen property or instrument with which an offense was committed.**
  - Texas is the only state to set forth this exception.
  - Texas also allows written statements in lieu of recorded statements. By including this exception when recordings are made, the Texas law seems to create a broad loophole to admit unrecorded statements if “truthful” and helpful in establishing a suspect’s guilt.

E. Remedies – What are the consequences for a failure to record?

Among the 21 states with recording laws, as well as the District of Columbia, there is a wide range of remedies available to the courts in cases involving law enforcement’s failure to record custodial interrogations. Some states also provide for more than one remedy.

The States of **Alaska, Indiana** and **Minnesota** are at one end of the spectrum. Their Supreme Court holdings state that failure to record will result in outright suppression or exclusion of the statement evidence. These states do, however, allow law enforcement to prove that the failure to record was due to certain exceptional circumstances. It is noteworthy that the recording laws in these states were the product of decisions by their respective Supreme Courts.

At the next level of stringency, four states (**Connecticut, Illinois, Montana** and **Texas**), as well as the **District of Columbia**, describe their remedy for failure to record as a “rebuttable presumption of inadmissibility”. In doing so, they seem to indicate that the presumptive remedy is suppression, but courts will be willing to have this presumption rebutted by a provable exception listed within the recording statute. As described above, each state requires exceptions to be proven by a specific standard of proof – either by preponderance of the evidence, or by clear and convincing evidence.

A few states – **Arkansas, California, New Jersey** and **North Carolina** - call for a more flexible remedy if a statement is not recorded and does not fall under a listed exception. In these states, courts “shall consider” a failure to record when determining a

statement's admissibility, but there is no presumption of inadmissibility. California, New Jersey and North Carolina combine this approach with a mandatory instruction cautioning the jury, should the unrecorded statement be allowed into evidence.

In fact, a total of nine states indicate that at least one remedy for failure to record will be an instruction to the jury that unrecorded statements introduced into evidence should be viewed with caution, and the jury may consider the absence of recording in evaluating the statements and related evidence. These states are **California, Michigan, Montana, Nebraska, New Jersey, North Carolina, Oregon, Vermont** and **Wisconsin**. Also, **Texas'** law says a jury instruction may be given if the issue of the unrecorded statement's voluntariness is raised by the defense. All of these states allow exceptions to the recording requirement to be proved by their specified standard of proof.

Three states contemplate fiscal consequences and/or administrative sanctions as the remedy for failure to comply with recording requirements. In **Maine**, law enforcement agencies can be fined up to \$500 for non-compliance with recording laws, and face possible accreditation review. In **Missouri**, the statute indicates that the governor may withhold state funds that would otherwise be appropriated to a non-compliant agency. In **Rhode Island**, law enforcement agencies risk losing accreditation if they do not comply with the policies on recording interrogation promulgated by the Rhode Island Police Accreditation Commission (pursuant to recommendations from the state's statutorily created task force on this subject).

Three states with recording laws have no remedy at all as to evidence obtained through unrecorded custodial interrogation, or law enforcement agencies acting in defiance of policies about recording. These states are **Maryland, New Mexico** and **Ohio**.

The policy memorandum issued by the **U.S. Department of Justice** mandating recording does not set forth remedies for non-compliance. Presumably, however, the same remedies available within the Department and federal courts for all agency policies are available.

#### F. Video versus Audio – How must recordings be made?

In looking at the existing laws and policies concerning the "recording" of custodial interrogations, there is some disparity about the acceptable technical format for making a legally valid recording. Approximately half of the laws approve of any type of recording, with no preference for video over audio, or for any particular form of media. The other half use differing approaches, with a few states requiring very specific formats. Below is a breakdown of the term "electronic recording" within existing laws on recording custodial interrogation.

*Definitions of “electronic recording” among the 21 states (plus the District of Columbia) with existing laws on custodial interrogation, as well as the four additional states with statewide law enforcement initiatives, and the U.S. Department of Justice:*<sup>54</sup>

- A motion picture, audiotape, videotape or digital recording
  - Eleven states use this definition, or something very close to it.<sup>55</sup>
  - This is the broadest definition, allowing for any format and expressing no preference for any particular form of recording. Most of the states with laws issued by their high courts construe “electronic recording” in these broad terms.
- An audio, video or audiovisual recording (if available/feasible)
  - Two states – North Carolina and Montana – use this definition.
  - This broad definition expresses some preference for audiovisual recording, but other recording formats are equally acceptable.
- An audiovisual recording, or just audio if an agency does not have current capacity for visual recording
  - Three states – Maryland, Iowa and Vermont – use a version of this definition.
  - This approach also indicates a preference for audiovisual recording, but openly recognizes that resource issues may render audio recording the only possible option for some agencies. Maryland describes the difference in terms of agencies with properly equipped “interrogation rooms” versus those without such rooms.
- An audio or audiovisual recording, but audiovisual is recommended and agencies are encouraged to capture the suspect’s face during the recording
  - Utah’s Best Practices policy statement includes this policy
- An audiovisual recording (strongly encouraged); if audiovisual is not feasible, then audio recording is acceptable
  - The U.S. Department of Justice uses this guidance in its policy. Rhode Island’s definition is similar, stating that recordings should be audiovisual unless it is unfeasible to do so.

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<sup>54</sup> The laws in two states – New Jersey and Oregon – do not define the term “electronic recording”.

<sup>55</sup> The eight states are Alaska, Arkansas, Illinois, Massachusetts, Maine, Minnesota, Missouri, Nebraska, New Mexico, Texas and Wisconsin.

- An audiovisual recording
  - Three states – California, Connecticut and Ohio – use this general definition.
  - These states require recording with both audio and video capacity, but do not dictate the recording technology that must be used. These states also do not authorize audio recording as an alternative.
- An audiovisual recording, if an agency has recording equipment that is operational or accessible
  - Two jurisdictions – the District of Columbia and Michigan – use this definition. The law in D.C. focuses on the existence of equipped interview rooms.
  - This definition does not mention audio recording as an alternative.
- An audiovisual recording that includes visible images, the voice of the person being interviewed and the voices of interrogating officers
  - Indiana uses this definition – the most specific of all the laws.<sup>56</sup>
  - Audio recording is not offered as an alternative.

It should be noted that the variances in the definition of “electronic recording” may correlate with the age of the laws. The technological options for recording interviews twenty or more years ago were far more limited than the methods available today. Indeed, recent technological developments may change the options for recording custodial interrogations yet again. As described above, many statutes indicate a preference for video recordings, but recognize that some agencies may not have the proper rooms and cameras to conduct video interrogations. With the surge in police use of body-worn camera, however, the need for “interrogation rooms” with pre-installed camera equipment may become obsolete. Beyond their use in the field, body-worn cameras may allow officers to conduct recorded custodial interviews in a detention facility without the need for additional equipment.

#### G. Preservation – For how long must recordings be kept?

The need to preserve recorded custodial interrogations as evidence is directly addressed in the laws of eleven states. In those states, law enforcement is directed to maintain recordings until a suspect’s acquittal, conviction (and exhaustion of all post-conviction relief), or until a statute of limitations bars prosecution. The states with these

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<sup>56</sup> The New York model policy also contains a very specific definition of “electronic recording”. The definition references specific analog and digital forms of electronic media. While not clearly allowing audio-only recordings, one form of media included in the policy’s approved list is “MP3 player”, a device that typically records and plays audio files.

provisions are **Alaska, Arkansas, California, Connecticut, Illinois, Maine, Montana, North Carolina, Ohio, Oregon and Texas.**<sup>57</sup>

The remaining states with recording laws do not mention preservation of the recordings. It is possible that in these states, the recordings fall under existing general rules covering the preservation of evidence.<sup>58</sup>

Interestingly, four statutes specify that recordings of custodial interrogations will not be subject to open records requests from the public, at least while the case is pending. These states are **Connecticut, Illinois, Michigan and Wisconsin.**

#### H. The Uniform Electronic Recording of Custodial Interrogations Act

In 2010, the National Conference of Commissioners on Uniform State Laws – also known as the Uniform Law Commission (ULC) - approved and recommended the enactment of the *Uniform Electronic Recording of Custodial Interrogations Act* (UEROICA). As stated in the act, the goal of the ULC is to provide states with “non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.”<sup>59</sup>

In drafting the UEROICA, the ULC surveyed existing laws on recording custodial interrogations throughout the United States, as well as policies voluntarily-imposed by law enforcement entities. The Commission then drafted a model statute, explaining in detail their reasoning for choosing certain policy options over others for each statutory component. Some sections of the UEROICA list options from which a state can choose when creating legal parameters for recording interrogations, in order to shape the statute to the needs and policy inclinations prevalent in a particular state.

The UEROICA is a very useful starting point for any state considering legislation on this topic. It provides a clear, efficient statutory format and addresses every pertinent factor. The act begins with general definitions of basic terms, such as “custodial interrogation”, “electronic recording”, “law enforcement agency” and “place of detention”. It then provides sections for stating the recording requirement, notice and consent to record, exceptions to the requirement, the burden of persuasion for proving an exception, procedural remedies for failure to record, and preservation of recordings. The model also includes language on providing prosecutorial notice of intent to use a recording, the self-authentication of recordings, and limited civil liability for law enforcement agencies if the statute is violated.

The UEROICA takes a broad view of what constitutes an “electronic recording,” defining it as either an audio recording or an audiovisual recording. The drafting, however, leaves open the option of limiting the format to audiovisual recording only. As

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<sup>57</sup> The New York model policy directs officers to preserve recordings in accordance with other evidence storage procedures.

<sup>58</sup> Rhode Island’s policy on recording interrogations, as set forth by the Rhode Island Police Accreditation Commission, directs that recordings be preserved in accordance with the rules governing other forms of evidence.

<sup>59</sup> *Uniform Electronic Recordation of Custodial Interrogations Act* [UEROICA], National Conference of Commissioners on Uniform State Laws (2010).

to completeness, the model act requires the entirety of the interview to be recorded, including the administering of Miranda warnings. It also asks that officers write a report to document instances in which required recording is not conducted, and affirms that recording would not apply to statements made during non-interrogation scenarios - such as a suspect's spontaneous statements or statements in response to arrest processing questions.

In terms of application, the UEROICA leaves it to the individual states to decide which crimes would trigger the recording requirement. The language allows states to choose all crimes, all felonies, all delinquent acts, or a specific list of offenses defined by statutory section/code.

The model also lists six exceptions to the recording requirement, and requires the prosecution to prove an exception by a preponderance of the evidence standard. The included exceptions are: (1) exigent circumstances, (2) a suspect's refusal to be recorded, (3) interrogations conducted in another jurisdiction, (4) an officer's belief that recording was not required for the crime under investigation, (5) jeopardy to the safety of another individual, such as a confidential informant, and (6) equipment malfunction. In the ULC's commentary, they note that the preponderance of the evidence standard was chosen so as not to put "undue burden on the prosecution," and also for the sake of consistency with "much of the law of constitutional criminal procedure."<sup>60</sup>

The UEROICA does not endorse an exclusionary rule or a presumption of inadmissibility as the proper remedy for failure to comply with the statute's recording requirements. Instead, the model act states that the court will consider the failure to record as a factor in determining the admissibility of the statement, including whether it was made voluntarily. If the court admits the statement, the court will give the jury a cautionary instruction at the request of the defense.

In a lengthy discussion, the ULC Commentary explains that it chose this approach as a fusion of the remedies employed in Illinois and New Jersey. On the one hand, by instructing the court to consider recording as one of several factors to be evaluated as to a statement's admissibility, the law would allow unrecorded statements into evidence "if the reliability concerns arising from the recording's absence are allayed by other evidence." If the statement is admitted however, the jury will be instructed as to the lack of compliance with the recording requirement. The instruction is included to create a deterrent effect on law enforcement and to improve jury fact-finding. The ULC points out that such cautionary instructions are "a modest and traditional judicial remedy."<sup>61</sup>

In sum, the UEROICA takes a moderate approach to crafting a model statute that would satisfy the concerns of both law enforcement and civil rights organizations focused on preventing false confessions. As such, it offers a highly instructive framework for future statutory efforts in the area of recording custodial interrogations.

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<sup>60</sup> UEROICA, Commentary to Section 11, "Burden of Persuasion".

<sup>61</sup> UEROICA, Commentary to Section 13, "Procedural Remedies".



## I. The Innocence Project's Model Legislation

The Innocence Project [IP] has created a model statute entitled “An Act Directing the Electronic Recording of Custodial Interrogations,” in an effort to persuade state legislatures to enforce the organization’s preferred regulations on this topic.<sup>62</sup> The IP model includes similar definitions to those used in most existing statutes, although it states that all recordings should be audiovisual unless made outside a place of detention, in which case recordings could be audio only. In taking this approach, the IP model differs from all existing laws and other models. Current requirements do not require recording of custodial interrogations occurring outside of a “place of detention”, likely because of the lack of recording equipment outside of detention facilities. The IP model thus imposes additional duties on law enforcement to record custodial interrogations in the field. It also requires that the camera simultaneously record both the suspect and the interrogating officer.<sup>63</sup>

The IP proposal allows each state to designate the crimes to which the recording requirement would apply. The model also dictates a strict exclusionary rule as the remedy for a failure to record and exceptions to the requirement are quite limited. Possible exceptions include: (1) statements made in response to routine arrest processing (not interrogation under the law), (2) suspects who refuse to be recorded, but such refusal only qualifies if the suspect consulted with an attorney, (3) interrogations conducted in another jurisdiction, and (4) exigent circumstances. These exceptions apply only when the statements are otherwise found to be voluntary, reliable and admissible, and the officer made a contemporaneous audiovisual recording describing the reason the interrogations was not recorded, and the prosecution can prove the grounds for the exception by clear and convincing evidence.

In addition, the IP model would require a state’s judicial and law enforcement authorities to monitor agencies’ compliance with the recording law. The proposed statute lists several categories to be monitored and enforced by various state authorities. The proposal also includes preservation requirements for the recordings.

The Innocence Project model legislation incorporates the most restrictive components of existing laws, while adding more conditions and pre-requisites. It is, therefore, unlikely to garner wide adoption, even from those states and law enforcement agencies interested in pursuing a policy requiring the recording of custodial interrogations.

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<sup>62</sup> Innocence Project, [www.innocenceproject.org](http://www.innocenceproject.org), updated December 2014.

<sup>63</sup> Indiana is the only state to currently incorporate this requirement into its law. The idea for mandating a specific camera angle during recording in order to capture both the suspect and questioner likely is derived from articles published over the past thirty years by G. Daniel Lassiter, a psychology professor at Ohio University. Over the course of many studies, Lassiter explored whether the camera angle used in a custodial interrogation setting affected the viewer’s bias for or against a suspect. His studies indicate that focusing the camera solely on the interrogator is the position least likely to influence the viewer. Such positioning is unlikely to be used by law enforcement agencies, however, as viewing the suspect is critical to future evaluation of the statement by the courts.

## Colorado Status Report

In Colorado, there is no statute or state court decision that currently mandates the recording of custodial interrogations by law enforcement. In fact, as discussed further below, the Colorado courts have contributed little in the way of holdings or commentary on the subject. Nonetheless, numerous local law enforcement agencies have voluntarily created policies requiring such recording during suspect interviews. This section examines the practice of recording interrogations in Colorado, as well as the existing guidance from the State's courts.

### Recording Custodial Interrogations in Colorado

In April 2015, the Colorado District Attorneys' Council sent a survey to over 250 law enforcement agencies across the state, asking about their practices on recording custodial interrogations. Of the 108 agencies that responded, 45% reported they already have written policies on the subject. The responding agencies also helped provide information about the following survey questions.

- *Are law enforcement agencies in Colorado currently recording custodial interrogations?*
  - Yes. 102 of the 108 responding agencies electronically record custodial interrogations in at least some cases.<sup>64</sup>
  - Agencies with as few as one officer or more than 500 officers are among those recording interrogations.
  - Four of the six agencies that do not record employ three or fewer officers.
  
- *Do the recordings include the entirety of the interrogation, including the administering of Miranda warnings?*
  - 93% of the agencies that record said their policy is to record the entire interview, including the administering of Miranda warnings.
  - 7 % of the agencies that record indicated their policies did not require Miranda warnings to be recorded.
  - 99% of the agencies require the recordings to include all questions and answers asked and given during the interview.

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<sup>64</sup> One agency that has not yet responded to the survey is the Denver Police Department, the largest police force in the state. The Denver P.D. has been recording custodial interrogations pursuant to a written policy for over 25 years. Sullivan, T.P. *Police Experiences with Recording Custodial Interrogations*, Northwestern University School of Law Center on Wrongful Convictions (2004).

- *Are the recordings in audio or audiovisual format?*
  - 86% are recording in both video and audio.
  - 14% are recording in audio only.
  
- *For what types of crimes are suspect interviews being recorded?*
  - 55% of agencies that record do so for all crimes.
  - 16% of agencies that record do so in all felony investigations.
  - 23% of agencies are recording for all investigations of homicide, sexual assault and other serious felonies.
  - Other agencies opt to record based on the nature of the case and the decisions of the officer/supervisor.
  - Eleven of the agencies that do not record for all crimes, require interviews to be recorded any time the suspect is a juvenile.
  
- *How many custodial interrogations are Colorado agencies conducting per year (recorded and unrecorded)?*
  - 29% of respondents said fewer than 20 interrogations
  - 26% of respondents said between 20 and 50 interrogations
  - 19% of respondents said between 50 and 100 interrogations
  - 9 % of respondents said between 100 to 200 interrogations
  - 13% of respondents said between 200 to 500 interrogations
  - 4 agencies (4 %) reported conducting over 500 interrogations per year
  
- *Do Colorado law enforcement agencies have the necessary rooms and equipment to record interrogations?*
  - 78% of the responding agencies said they have adequate rooms and equipment.
  - 22% of the responding agencies said they do not.
  - Of the agencies that do not have adequate rooms or equipment, more than half utilize the recording facilities of a nearby larger police department or their local Sheriff's Office when needed.
  - 23% of responding agencies would record more frequently if they had funds to purchase equipment or could improve/acquire appropriate space.

As the results of this survey demonstrate, law enforcement agencies of all sizes are recording custodial interrogations across the State of Colorado. More than half do so in every case. Significantly, many agencies expressed interest in recording more interrogations, but lack necessary equipment or space. Although many agencies did not

reply to the survey, the experiences of the more than 100 responding agencies already recording custodial interviews suggest that the practice has taken hold among local law enforcement.<sup>65</sup>

### Judicial Action on the Recording of Custodial Interrogations

Unlike other states, the courts in Colorado have refrained from leading the local policy dialogue on recording custodial interrogations. In fact, even when given the opportunity to create a holding that would mandate recording, as occurred in Alaska and Minnesota, the courts have refused to do so. Under the courts' current interpretation of the Colorado Constitution, recording custodial interrogations is simply not required. The courts have, however, expressed positive views of the practice and a willingness to encourage its expansion.

The case law on this topic begins with *People v. Raibon*, 843 P.2d 46, 49 (Colo. Ct. App. 1992). The defendant in that case, citing the law in Alaska, asked the Court of Appeals to find that suspects have a due process right to have their interrogations recorded. The Court declined to do so, stating that Article II, Section 25 of the Colorado Constitution guarantees no such due process protection when it comes to recording custodial interviews. The Court went on to say:

“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.”

Since the decision in *Raibon* over twenty years ago, the judicial posture on this topic has not changed. In *People v. Johnson*, 987 P.2d 855, 860 (Colo. 1998), the Court of Appeals again rejected the argument for a constitutional right to have interrogations recorded. And in *People v. Casias*, 59 P.3d 853, 857 (Colo. 2002), the Colorado Supreme Court affirmed this position, citing *Raibon* and *Johnson*, by stating that police officers have no duty to record interviews with suspects under established law.

The *Casias* case involved a custodial interrogation during which the recording equipment malfunctioned, rendering the videotape unintelligible. In rejecting the defendant's argument that the equipment failure constituted destruction of evidence, the Supreme Court provided rare commentary on the subject of recording custodial interrogations. The Court stated:

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<sup>65</sup> It is unknown whether this high percentage is a reflection of the agencies that chose to respond to the survey. In other words, agencies that are not recording custodial interrogations may have been less likely to respond.

“Furthermore, as a matter of policy, sanctions are not appropriate because we want to encourage, not discourage, the police from recording their interviews with suspects. We emphasize that recording interviews is good investigative practice and we do not wish to place police officers in fear that a failed attempt to record will lead to the suppression of valuable evidence.”

While no other cases address arguments for a court-ordered requirement to record interrogations, the Colorado judicial system has evaluated hundreds of cases in which recorded interrogations were introduced as evidence, indicating that the practice of recording suspect interviews has become routine in many jurisdictions. Moreover, several appellate cases have dealt with evidentiary issues arising from these recordings, creating a small body of case law on various technical and legal concerns.<sup>66</sup>

Given the courts’ historical reluctance to mandate recording, it is unlikely that a judicially imposed rule or law will occur in Colorado in the near future. Instead, having voiced support for the practice, the courts seem to prefer to allow recorded custodial interrogations to take their place among many other forms of evidence evolving from developments in technology.

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<sup>66</sup> See e.g., *People v. Broder*, 222 P.3d 323 (2010) (Court assesses recording’s lack of audibility in determining if defendant invoked his right to counsel); *People v. Wood*, 135 P.3d 744 (Colo. 2006) (Court reviews recording of interrogation in detail to determine whether defendant’s rights were violated).

## Outlook for the Future

As can be seen from the evaluation of laws across the country, and from the current situation in Colorado, a law enforcement trend towards recording custodial interrogations is evident. The arguments in favor of recording have been supported by practical experience in the field. In studies and anecdotally, officers, prosecutors, defense attorneys and judges report that recording custodial interviews allows for objective and thorough documentation of suspect statements, fewer motions and hearings regarding the protection of suspects' rights, better interviewing methods for officers, and the capacity for subsequent review of suspect statements to the benefit of all parties in the criminal justice process. Many of the concerns about recording have been alleviated by laws and policies that permit unrecorded statements to be taken in appropriate circumstances.

But while the trend may exist, there is little consistency in its application. Laws have been crafted in half the states, but they are products of different governmental branches and proscribe highly varied rules for law enforcement agencies. Where some states require recording in all cases and exclude statements from criminal trials if recording procedures are not followed (such as Alaska and Minnesota), others offer only mild encouragement to record interrogations and impose no consequences if recordings are not made (such as Maryland and New Mexico).

### *- Judicial or legislative action in Colorado?*

In Colorado, there is no state law regarding recording interrogations. The comprehensive laws in Alaska and Minnesota resulted from rulings by their Supreme Courts that either due process required interrogations to be recorded, or that recording should be compulsory under the Court's supervisory authority. But the Supreme Court in Colorado has determined that the due process clause of the Colorado Constitution should not be similarly interpreted, and has not otherwise exercised its supervisory powers. Instead, the Court has stated plainly that law enforcement officers in Colorado do not have a duty to record custodial interrogations. Unless a dramatic change in reasoning comes about, the courts will not be the source of any law that mandates recording in this state.

If a shift were to be made, therefore, it would be developed in the Legislature. Any proposed statute would have a number of factors to address, all of which involve considerable issues to debate. In what types of cases will recordings be required? Will recordings have to be audiovisual, or is audio alone sufficient? Will there be exceptions to the recording requirement and, if so, by what standard of proof will the prosecution have to prove an exception occurred? What remedy will be enforced as a consequence of law enforcement's failure to record? Will recordings of interrogations be available to the public pursuant to open records requests? And, perhaps most significantly, who will pay for the equipment and space needed by many agencies in order to comply with such a law? Assistance in resolving these questions might be found in the ULC's model statute on recording, as well as recently drafted statutes from other states, such as Vermont and Montana.

*- Is there a need for legislation in Colorado?*

The ultimate question, however, is whether any legislative action is really needed in Colorado. Of the 108 agencies responding to a recent survey on the subject, 94% are already recording custodial interrogations. More than half of those agencies are doing so in all criminal cases, with another forty percent doing so in all felony or serious felony cases. The self-imposed practice among Colorado agencies is much broader than the statutory requirements of most states that have legislated on this topic. And while the survey does not tell us about every agency in the state, it is undoubtedly a strong indicator that widespread recording is already occurring in Colorado, and that the state's law enforcement community is open to incorporating this investigative tool.

Certain concerns about recording custodial interrogations might best be tackled on a statewide level. For example, special recording or review procedures might be established to provide enhanced protections for juveniles and suspects with mental health vulnerabilities. The routine recording of Miranda warnings would be a prudent policy for all law enforcement agencies to follow. Preservation of interrogation recordings until all stages of appellate litigation are concluded should be ensured, as with other evidence in criminal cases. Rules about open records' requests and recorded interrogations might be useful, especially as body-worn camera recordings have taken on prominent public interest.

But given the state of affairs in Colorado, there may be options other than legislation to provide statewide guidance on recording interrogations. Policy statements and/or regulations could be issued by the Department of Public Safety, the County Sheriffs of Colorado and the Colorado Association of Police Chiefs, directing compliance by their associated agencies. Such statements could be written and coordinated with recommendations from the Colorado Best Practices for Prosecutors Committee, providing corresponding information to the state's District Attorneys' Offices. Statewide training could be offered through these organizations, as well as the Colorado Police Officer Standards and Training Board. This type of self-imposed law enforcement policy regulation on recording custodial interrogations has been used in other states, such as Iowa and Utah. And in Maine and Rhode Island, which also have turned to law enforcement to lead the policy implementation, the recording requirements have been incorporated into those states' accreditation systems, creating direct consequences for non-compliance.

While legislation might help provide funding to law enforcement agencies in support of expanded recording policies, other methods of meeting these costs are potentially available. In particular, the need for camera equipment might be linked to the growing federal and state interest in providing body-worn cameras to law enforcement agencies. In fact, with the assistance of body-worn camera providers, agencies might consider whether body-worn cameras could also be used to record custodial interrogations. By placing the camera on a stand or wall attachment, these devices might take the place of traditional video cameras in a custodial interview setting.

## *Conclusions*

In sum, the recording of custodial interrogations is a practice that has taken hold across the nation and the State of Colorado. Improvements in technology have made recording simpler and less expensive. Decades of experience in states that first adopted recording requirements have demonstrated the general benefits, and found answers to the principal concerns. At this time, law enforcement agencies throughout Colorado are regularly recording custodial interrogations, providing evidence routinely used by prosecutors in criminal trials. Whether statewide action is needed to standardize or expand the use of recording is an open question. But if action is taken, whether by the Legislature or under law enforcement leadership, the laws and models from numerous states, agencies and organizations, from around the country and here at home, will provide Colorado's criminal justice community with an instructive head start.

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