

DRAFT
FOR DISCUSSION ONLY

UNIFORM ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For March 5 – 6, 2010 Committee Meeting

Without Prefatory Note or Comments

Copyright ©2009
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

February 12, 2010

**DRAFTING COMMITTEE ON A UNIFORM ELECTRONIC RECORDATION OF
CUSTODIAL INTERROGATIONS ACT**

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in drafting this Act consists of the following individuals:

DAVID A. GIBSON, P.O. Box 1767, Brattleboro, VT 05302, *Chair*
RHODA B. BILLINGS, 5525 Williams Rd., Lewisville, NC 27023
W. GRANT CALLOW, 425 G St., Suite 610, Anchorage, AK 99501
W. MICHAEL DUNN, P.O. Box 3701, 1000 Elm St., Manchester, NH 03105
NORMAN L. GREENE, 60 E. 42nd St., 39th Floor, New York, NY 10165-0006
JUSTIN HOUTERMAN, 638 S. Beacon St., 3rd Floor, San Pedro, CA 90731
JOHN L. KELLAM, 30 S. Meridian St., Suite 500, Indianapolis, IN 46204
THEODORE C. KRAMER, 42 Park Place, Brattleboro, VT 05301
STEVEN N. LEITESS, One Corporate Center, 10451 Mill Run Circle, Suite 1000, Baltimore,
MD 21117
GENIE OHRENSCHALL, 1124 S. 15th St., Las Vegas, NV 89104-1740
J. SAMUEL TENENBAUM, 357 East Chicago Ave., Chicago, IL 60611
RUSSELL G. WALKER, P.O. Box 1285, Asheboro, NC 27204
ANDREW TASLITZ, Howard University School of Law, 2900 Van Ness St., NW, Washington,
DC 20008, *Reporter*

EX OFFICIO

ROBERT A. STEIN, University of Minnesota Law School, 229 19th Avenue South,
Minneapolis, MN 55455, *President*
JACK DAVIES, 1201 Yale Place, Unit #2004, Minneapolis, MN 55403-1961, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

PAUL C. GIANNELLI, Case Western Reserve University School of Law, 11075 East Blvd.,
Cleveland, OH 44106, *ABA Advisor*
ANNE SWERN, 350 Jay St., Floor 19, Brooklyn, NY 11201-2904, *ABA Section Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.nccusl.org

**UNIFORM ELECTRONIC RECORDATION OF CUSTODIAL
INTERROGATIONS ACT**

TABLE OF CONTENTS

SECTION 1. SHORT TITLE	1
SECTION 2. DEFINITIONS.....	1
SECTION 3. ELECTRONIC RECORDING REQUIREMENT.....	2
SECTION 4. DISCLOSURE NOT REQUIRED.....	2
SECTION 5. EXCEPTION FOR EXIGENT CIRCUMSTANCES.....	3
SECTION 6. EXCEPTION FOR RESPONSE TO ROUTINE BOOKING QUESTIONING.	3
SECTION 7. EXCEPTION FOR INDIVIDUAL’S REFUSAL TO BE ELECTRONICALLY RECORDED.	3
SECTION 8. EXCEPTION FOR INTERROGATIONS CONDUCTED BY OTHER JURISDICTIONS.	3
SECTION 9. EXCEPTION BASED ON ACTUAL OR REASONABLE BELIEF OF LAW ENFORCEMENT OFFICER.....	4
SECTION 10. EXCEPTION FOR SAFETY OF INDIVIDUAL OR PROTECTION OF IDENTITY.....	4
SECTION 11. EXCEPTION FOR EQUIPMENT MALFUNCTION.	5
SECTION 12. BURDEN OF PERSUASION.	5
SECTION 13. OFFICER’S REPORT.	5
SECTION 14. NOTICE OF INTENT TO INTRODUCE UNRECORDED STATEMENT.....	6
SECTION 15. REMEDIES.....	6
SECTION 16. HANDLING AND PRESERVATION OF ELECTRONIC RECORDING.....	7
SECTION 17. RULES GOVERNING MANNER OF ELECTRONIC RECORDING.....	7
SECTION 18. IMPLEMENTING ADOPTED RULES.....	7
SECTION 19. SELF-AUTHENTICATION.....	8
SECTION 20. NO RIGHT TO ELECTRONIC RECORDING OR TO TRANSCRIPT- PREPARATION CREATED.....	8
SECTION 21. SEVERABILITY.....	8
SECTION 22. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	8
SECTION 23. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.....	8
SECTION 24. REPEALS.	9
SECTION 25. EFFECTIVE DATE.....	9

1 **UNIFORM ELECTRONIC RECORDATION OF CUSTODIAL**
2 **INTERROGATIONS ACT**

3 **SECTION 1. SHORT TITLE.** This Act may be cited as the Uniform Electronic
4 Recordation of Custodial Interrogations Act.

5 **SECTION 2. DEFINITIONS.** In this Act:

6 (1) “Custodial interrogation” means questioning or other conduct by a law enforcement
7 officer which is reasonably likely to elicit an incriminating response from an individual and
8 occurs when reasonable individuals in the same circumstances would consider themselves in
9 custody. The term includes a statement made by the individual in response to the questioning or
10 conduct, from the time the individual should have been advised of the individual’s Miranda
11 rights until the questioning or conduct and response terminate.

12 (2) “Electronic recording” means an audio or an audio and video recording that
13 accurately records a custodial interrogation.

14 (3) “Law enforcement agency” means a governmental entity whose responsibilities
15 include enforcement of criminal laws or the investigation of suspected criminal activity.

16 (4) “Law enforcement officer” means an individual employed by a law enforcement
17 agency, or an employee of another governmental agency of this state acting at the officer’s
18 request or direction, where that individual’s responsibilities include enforcement of criminal laws
19 or the investigation of criminal activity.

20 (5) “Place of detention” means a fixed location under the control of a law enforcement
21 agency where an individual may be questioned about a criminal charge or allegation of [insert
22 the state’s term for juvenile delinquency]. The term includes a jail, police or sheriff’s station,
23 holding cell, and correctional or detention facility.

24 (6) “Statement” means a communication whether it is oral; written; or electronic;

1 nonverbal; or in sign language.

2 **SECTION 3. ELECTRONIC RECORDING REQUIREMENT.**

3 (a) Except as otherwise provided in Sections 5 through 11, a custodial interrogation
4 conducted at a place of detention, including administration of any Miranda warnings to, and
5 waiver of Miranda rights by, the individual being questioned, must be electronically recorded in
6 its entirety [by both audio and visual means] if the interrogation relates to a [felony] [crime]
7 [delinquent act] [offense] described in [insert applicable section numbers of the state's criminal
8 and juvenile codes].

9 (b) Law enforcement agencies shall adopt and enforce rules providing that, when a
10 custodial interrogation has not been electronically recorded and occurs outside a place of
11 detention, where feasible:

12 (1) an electronic recording shall be made at a place of detention of a statement
13 from the individual who was interrogated and shall be conducted within a reasonable period of
14 time; and

15 (2) as soon as practicable, a law enforcement officer conducting the interrogation
16 shall prepare a written report explaining the decision to interrogate outside a place of detention
17 and summarizing the custodial interrogation process and the individual's statements made [in
18 the field] [outside a place of detention].

19 **SECTION 4. DISCLOSURE NOT REQUIRED.**

20 (a) A law enforcement officer conducting a custodial interrogation is not required to
21 inform the individual being interrogated that an electronic recording is being made of the
22 interrogation.

23 (b) An electronic recording of a custodial interrogation is exempt from requirements

1 under [cite statute] that an individual be informed of, or consent to, the recording of the
2 individual's conversations.

3 **SECTION 5. EXCEPTION FOR EXIGENT CIRCUMSTANCES.** A custodial
4 interrogation to which Section 3 otherwise would apply need not be electronically recorded if
5 recording is not feasible because of exigent circumstances and a law enforcement officer
6 conducting the interrogation electronically records an explanation of the exigent circumstances
7 before conducting the interrogation, if feasible, or as soon as practicable thereafter.

8 **SECTION 6. EXCEPTION FOR RESPONSE TO ROUTINE BOOKING**
9 **QUESTIONING.** A statement made by an individual need not be electronically recorded if:

- 10 (1) it is a spontaneous statement made outside the course of a custodial interrogation; or
11 (2) the statement is made in response to questioning that is asked routinely during the
12 [booking] [processing of the arrest] of the individual.

13 **SECTION 7. EXCEPTION FOR INDIVIDUAL'S REFUSAL TO BE**
14 **ELECTRONICALLY RECORDED.** A custodial interrogation to which Section 3 otherwise
15 would apply need not be electronically recorded if, before the interrogation, the individual to be
16 interrogated indicates that the individual will participate in the interrogation only if it is not
17 electronically recorded and, if feasible, the agreement to participate without recording is
18 electronically recorded.

19 **SECTION 8. EXCEPTION FOR INTERROGATIONS CONDUCTED BY**
20 **OTHER JURISDICTIONS.** A custodial interrogation to which section 3 otherwise would
21 apply need not be electronically recorded if the interrogation is not conducted at the direction of
22 a law enforcement officer of this state and:

- 23 (1) occurs in another state in compliance with that state's law; or

1 (2) is conducted by a federal law enforcement agency in compliance with federal law.

2 **Note to Committee:** Concerns were raised at the last meeting about how this provision would
3 affect joint federal/state task forces. This provision should be read carefully with that in mind
4 and any thoughts on different language should kindly be directed to your Reporter in advance of
5 the March meeting.

6
7 **SECTION 9. EXCEPTION BASED ON ACTUAL OR REASONABLE BELIEF**
8 **OF LAW ENFORCEMENT OFFICER.**

9 (1) A custodial interrogation to which Section 3 would otherwise apply need not be
10 electronically recorded if the interrogation occurs when no law enforcement officer conducting
11 the interrogation has knowledge of facts and circumstances that would lead a reasonable law
12 enforcement officer to believe that the individual being interrogated may have committed a
13 [felony] [crime] [offense] for which Section 3 requires that a custodial interrogation be recorded.

14 (2) If, in the course of interrogation in section 3(1), the individual reveals facts giving a
15 law enforcement officer conducting the interrogation reason to believe that a [felony] [crime]
16 [offense] has been committed for which Section 3 does require that a custodial interrogation be
17 recorded, if feasible, continued custodial interrogation concerning that [felony] [crime] [offense]
18 revealed must be electronically recorded.

19 **SECTION 10. EXCEPTION FOR SAFETY OF INDIVIDUAL OR PROTECTION**
20 **OF IDENTITY.** A custodial interrogation to which Section 3 otherwise would apply need not
21 be recorded if a law enforcement officer conducting the interrogation or the officer's superior
22 reasonably believes that electronic recordation might disclose the identity of a confidential
23 informant or jeopardize the safety of an officer, the individual being interrogated, or another
24 individual. If feasible and consistent with the safety of the confidential informant, an explanation
25 of the basis for that belief must be electronically recorded at the time of the interrogation. If
26 contemporaneous recording of the basis for the belief is not feasible, the recording must be made

1 as soon as practicable after the interrogation is completed.

2 **SECTION 11. EXCEPTION FOR EQUIPMENT MALFUNCTION.**

3
4 [(a) If both audio and video recordation of a custodial interrogation are otherwise
5 required by Section 3, recordation may be by audio alone if a technical problem in video
6 recordation occurs that prevents video recordation despite reasonable maintenance efforts on the
7 available recording equipment and timely repair or replacement is not feasible.]

8 [(b) If both audio and video recordation of a custodial interrogation are otherwise
9 required by Section 3, recordation may be by video alone if a technical problem in audio
10 recordation occurs that prevents audio recordation despite reasonable maintenance efforts on the
11 available recording equipment and timely repair or replacement is not feasible.]

12 (c) All or part of a custodial interrogation to which Section 3 otherwise would apply need
13 not be recorded to the extent that recordation is not possible because the available electronic
14 recording equipment fails, despite reasonable maintenance efforts on the available recording
15 equipment and timely repair or replacement is not feasible.

16 *Legislative Note: Section (a) is necessary only in jurisdictions that choose to mandate both*
17 *audio and video recording in Section 3. Section (b) is necessary only in jurisdictions that choose*
18 *to mandate both audio and video recording in Section 3.*

19
20 **SECTION 12. BURDEN OF PERSUASION.** If the state relies on an exception in
21 Sections 5 through 11 to justify a failure to make an electronic recording of a custodial
22 interrogation, the state must prove by a preponderance of the evidence that the exception applies.

23 **SECTION 13. OFFICER’S REPORT.**

24
25 (a) When a law enforcement officer conducts a custodial interrogation without complying
26 with Section 3 on the basis that an exception under Sections 5 to 11 applies, the officer shall
27 prepare a report explaining the reasons for the noncompliance.

1 (b) A law enforcement officer shall prepare the report required by subsection (a) as soon
2 as practicable after completing the interrogation, even if the officer has made a contemporaneous
3 electronic recording explaining the reasons for not complying with Section 3.

4 (c) The only sanction that may be imposed on a law enforcement officer for failure to
5 comply with subsection (a) or (b) is administrative discipline.

6 **SECTION 14. NOTICE OF INTENT TO INTRODUCE UNRECORDED**

7 **STATEMENT.** If the state intends to introduce in its case-in-chief a statement made during a
8 custodial interrogation that does not comply with Section 3, the state shall serve on the defendant
9 written notice of that intent and of any exception upon which the state intends to rely not later
10 than the time specified by [insert citation to appropriate law or rules of procedure].

11 **SECTION 15. REMEDIES.**

12
13 (a) Unless the appropriate court finds that an exception in Sections 5 through 11 applies,
14 the court shall consider the failure to make an electronic recording of all or part of a custodial
15 interrogation to which Section 3 applies [as a factor] in determining whether a statement made
16 during that interrogation is inadmissible because it was not voluntarily made [or was not
17 reliable].

18 (b) If the court admits into evidence a statement made during a custodial interrogation
19 that was not electronically recorded in compliance with Section 3, the court shall, upon request
20 of the defendant, give appropriate cautionary instructions to the jury.

21 (c) A law enforcement agency [in this state] that has adopted and enforced rules
22 reasonably designed to ensure compliance with the terms of this Act and a law enforcement
23 officer of the agency who has complied with those rules are not subject to civil liability for
24 damages arising from violation of this Act.

1 **SECTION 16. HANDLING AND PRESERVATION OF ELECTRONIC**

2 **RECORDING.** An electronic recording of a custodial interrogation must be identified,
3 accessed, and preserved in compliance with law of this state other than this Act.

4 **SECTION 17. RULES GOVERNING MANNER OF ELECTRONIC**

5 **RECORDING.**

6 (a) Each law enforcement agency in this state shall adopt and enforce rules governing the
7 manner in which electronic recordings of custodial interrogations are to be made.

8 [(b) The rules adopted under subsection (a) must at a minimum establish standards for the
9 angle, focus, and field of vision of a camera which reasonably promote accurate recording of a
10 custodial interrogation at a place of detention and reliable assessment of its accuracy and
11 completeness.]

12 *Legislative Note: Subsection (b) is necessary only in a jurisdiction that requires both audio and*
13 *video recording under subsection (a).*

14 **SECTION 18. IMPLEMENTING ADOPTED RULES.**

15 (a) Reasonable rules shall address [at least] the following topics:

16 (1) the collection and review of electronic recording data or the absence thereof
17 by superiors within law enforcement agency;

18 (2) the assignment of supervisory responsibilities and a chain of command to
19 promote internal accountability;

20 (3) a process for explaining procedural deviations and imposing administrative
21 sanctions for deviations that are not justified;

22 (4) a supervisory system expressly imposing on specific individuals a duty to
23 ensure adequate staffing, education, training, and material resources to implement this Act; and

24 (5) a process for monitoring the chain of custody of an electronic recording of a
25
26

1 custodial interrogation.

2 (b) a law enforcement agency shall adopt and enforce regulations providing for
3 administrative discipline of a law enforcement officer found by a court or a supervisory official
4 of the agency to have violated the terms of this Act. [The rules must provide a range of
5 disciplinary sanctions reasonably designed to promote compliance with this Act.]

6 **SECTION 19. SELF-AUTHENTICATION.** Unless the defendant introduces
7 evidence sufficient to support a finding that the recording is not authentic, in any pretrial or post-
8 trial proceeding an electronic recording of a custodial interrogations is self-authenticating if it is
9 accompanied by a certificate of authenticity by an appropriate law enforcement officer sworn
10 under oath.

11 **SECTION 20. NO RIGHT TO ELECTRONIC RECORDING OR TO**
12 **TRANSCRIPT-PREPARATION CREATED.**

13 (a) This Act does not create a right of an individual being interrogated to require
14 electronic recording of a custodial interrogation.

15 (b) This Act does not require preparation of a transcript of an electronic recording of a
16 custodial interrogation.

17 **SECTION 21. SEVERABILITY.** If any provision of this Act is declared invalid under
18 this state's or the federal constitution, the rest of this Act's provisions shall remain in effect.

19 **SECTION 22. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
20 applying and construing this uniform act, consideration must be given to the need to promote
21 uniformity of the law with respect to its subject matter among states that enact it.

22 **SECTION 23. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
23 **NATIONAL COMMERCE ACT.** This Act modifies, limits, and supersedes the federal

1 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq.,
2 but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
3 authorize electronic delivery of any of the notices described in section 103(b) of that act, 15
4 U.S.C. Section 7003(b).

5 **SECTION 24. REPEALS.** The following are repealed: [insert title and section
6 numbers].

7 **SECTION 25. EFFECTIVE DATE.** This [act] takes effect on