



Report on Public Policy Position

Name of Committee:

Criminal Jurisprudence and Practice Committee

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Other:

Proposed Legislation on Custodial Interrogations.

Date position was adopted:

3/17/05

Process used to take the ideological position:

Committee discussion

Number of members in the decision-making body:

14

Number who voted in favor and opposed to the position:

Position:

The Committee supports the enactment of an act relating to criminal procedure, to require electronic recording of custodial interrogations or questioning.

The text (may be provided by hyperlink) of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report:

For an Act relating to criminal procedure, to require electronic recording of custodial interrogations or questioning:

Section 1: Preamble: (1) The Legislature finds that audio and video electronic records are the most effective way for the prosecution to meet its burden of demonstrating a free, knowing, and intelligent waiver of a person's right to remain silent, to refuse to answer questions, to refuse to respond during a custodial interrogation, to have an attorney present during such questioning, and to have an attorney provided to such person if he or she cannot afford an attorney, as provided by the Constitution of the United States and the Constitution of Michigan.

Providing a precise record of the circumstances of an interrogation and any waiver of constitutional rights will reduce speculation and claims that may arise as to the content or context of the interrogation. Such a complete and accurate record of the interrogation furthers justice as it aids law enforcement officers, judges, and juries, in assessing the truthfulness of a confession.

Section 2: Requirements: (2) All custodial interrogations or questioning, including interrogation and questioning about rights described in section (1), shall be electronically recorded. Except as provided in section (3), if a law enforcement officer, or an individual working with such law enforcement, fails to comply with this subsection, any statements or confession a person makes in response to such custodial interrogation shall be presumed inadmissible at a criminal proceeding against such person.

Section 3: Exceptions: (3) Any admission or statement by an accused person which is not electronically recorded shall be presumed inadmissible unless: (a) the prosecution proves, by the preponderance of the evidence, that there is a reasonable excuse for there not being an electronic recording; (b) it is used for the purpose of impeachment against an accused person who testifies contrary to his or her unrecorded admission or statement, provided that admission or statement is not involuntary; or (c) the court is satisfied that there are exceptional circumstances which, in the interest of justice, justify the admission of the evidence.

Section 4: Definitions: (4) (A) In this Act, “custodial interrogation” means any interrogation during which (i) a reasonable person in the subject’s position would consider himself or herself to be in custody and (ii) a question is asked that is reasonably likely to elicit an incriminating response. A custodial interrogation is not limited to one which takes place at a police station or a place of detention, but rather in those circumstances above in (i) and (ii) and as explained in *Miranda v Arizona*.¹

(4)(B) Reasonable excuse includes circumstance where; (i) the admission or statement was made when it was not practicable to electronically record the admission or statement; (ii) the equipment necessary for electronically recording the interrogation could not be obtained while the accused person was under reasonable detention; (iii) the accused person refused to speak if the interrogation or questioning was electronically recorded, or (iv) the equipment used to electronically record the interrogation malfunctioned.

RECOMMEND STATE BAR ACTION ON THIS ISSUE:

Arguments for the position:

Introduction:

There are three states that require the electronic recording of suspect interrogations: Alaska, Illinois, and Minnesota. Illinois has passed legislation mandating the electronic recording of homicide interrogations. In Alaska and Minnesota, police interrogations are electronically recorded pursuant to court rules.

The Illinois Law:

The Illinois law requires police departments to electronically record custodial interrogations² that are conducted in a place of detention.³ The requirement is limited to homicides. The failure to comply with this requirement results in a presumption of inadmissibility and suppression of any admissions or confession made under those circumstances. The inadmissibility presumption is subject to exceptions, including: (i) when the electronic recording of the interrogation is not feasible, (ii) where a voluntary statement is made that has bearing on the credibility of the accused or suspect as a witness, whether or not the statement was made in a

² A custodial interrogation means any interrogation during which (i) a reasonable person in the subjects position would consider himself or herself to be in custody and (ii) during which a question is asked that is reasonably likely to elicit an incriminating response.

³ A Place of detention is a police station, or place owned or operated by law enforcement at which persons are or may be held in connection with criminal charges against that person.

custodial interrogation, (iii) a spontaneous statement that is not made in response to a question, (iv) a statement made in response to a question that is routinely asked during the processing of the arrest of the suspect, (v) a statement made by a suspect who requests that the custodial interrogation not be recorded, (vi) a statement made during an out-of-state custodial interrogation, (vii) a statement given at a time when the interrogators are unaware that a death has in fact occurred, or (viii) any other statement that may be admissible under law.

The presumption of inadmissibility of a statement can be overcome by a preponderance of evidence that the statement is voluntarily given and is reliable, using the totality of the circumstances test.

Case Law in Minnesota and Alaska

In 1985, Alaska became the first state to mandate the electronic recording of all custodial interrogations pursuant to court rules. In *Stephan v. State of Alaska*, 711 P.2d 1156 (1985), the defendants challenged the admissibility of their confessions which were taken in violation of a state judicial rule requiring such recording. Both defendants moved at trial to suppress their confessions, alleging police misconduct. The court evaluated the credibility of the defendants and police officers and found the confession to be admissible. The appeals court acknowledged failure of the interrogators to record the interrogations, but declined to adopt an exclusionary rule for the confessions based on that violation. The court affirmed the trial court conviction.

In *Stephan*, the Alaska supreme court reversed the court of appeals decision and remanded the case for a new trial where the unrecorded statements were inadmissible. The court found that a fear of chilling suspect's statements with the presence of recording equipment and the burden recording placed on police were far outweighed by the judicial interest in determining admissibility of confessions on the basis of objective evidence rather than the testimony of interested parties with human limitations. The court explained that failure to record violated the due process rights of defendants under the Alaska Constitution. The due process rights implicated were the right to counsel, the right against self incrimination, and a right to a fair trial. The court went on to clarify that a failure to electronically record without an appropriate excuse violates the court rule and is properly remedied by an exclusionary rule suppressing the statements.

In Minnesota, the supreme court considered the same issue in *State of Minnesota v. Scales*, 518 N.W.2d 587 (1994). The defendant's conviction was affirmed, on the ground that substantial evidence existed against him even without his confession, but the court exercised its supervisory powers and mandated a recording requirement for all custodial interrogations. The rationale for this requirement, as in Alaska, was the due process rights of the defendant. This court also found the proper remedy for a violation of the rule to be suppression of the unrecorded statements.

Both the Alaska and Minnesota judicial rules contain exceptions for situations where electronic recording is not feasible, but the state then has the requirement of proving the confession was both knowing and voluntary.

Benefits of Electronic Recording:

At first glance, the requirement for the electronic recording of custodial interrogations seems primarily designed to protect the rights of defendants. In fact it would protect against infringement of constitutional rights and police coercion by allowing the factfinder to observe the interrogation.

The benefits to the prosecution, police departments, and judicial efficiency and accuracy, however, would actually outweigh those to the defendants. Claims of violations to constitutional rights at custodial interrogations are frequent. Defendants also often claim police conduct from coercion to outright brutality.

Video or audio recording of an entire custodial interrogation and not just the confession or statement virtually eliminates such controversies and credibility issues.

Judicial Accuracy:

Moreover, there are well publicized incidents of individuals who confessed and were later found innocent. It was the repeated exoneration of death row inmates who had confessed in Illinois which prompted Illinois Governor George Ryan to commute the sentences of all the death row inmates in Illinois to life and to institute a moratorium on the death penalty.

The jury can also get a more accurate picture of the defendant. They can see how he or she looked at the time of the arrest and observe the defendant's demeanor.

Concerns from Police Groups:

From an officer's viewpoint, there is still cause for concern and resistance to electronic recording of custodial interrogations. Initial resistance in many states centers on a concern that confessions would be inadmissible because the officers would be unable to comply with the law. Other resistance focuses on the concern that juries would not understand interrogation styles that are constitutionally permissible – such as telling a suspect that his fingerprints were found at the scene, or holding a suspect for up to forty-eight hours without a determination of probable cause. These concerns focus primarily on the availability of resources to electronically record statements at all times and places and a fear of burdensome restrictions on police practices. These concerns can be alleviated by the exceptions crafted into the proposed legislation and the ability of the prosecutor to request judicial instruction on permissible interrogation practices.

Legal Scholar Approval:

There is support in the legal community for requiring custodial interrogations to be electronically recorded. It is viewed as a natural outgrowth of due process law and a prophylactic requirement, akin to Miranda statements, that provides constitutional protection in an area where fact finding is constrained by considerable limitations.⁴

Anecdotes:

The following anecdotes sum up the case in favor of the electronic recording of custodial interrogations. First, the recording need not be obvious or known to the defendant and such concealment can reveal clues about the crime. For example, the chief prosecutor for Minneapolis, Amy Klobuchar, relates a story where the suspect did not know he was being videotaped. One of his primary defenses was that he was blind and could not have committed the crime. On the videotape, however, the defendant was seen reading a newspaper after the officers left the room. In another Minnesota case, after the detectives left the room the defendant looked down and said to himself, “s***, I’ve got blood on my shoes.” The blood turned out to be the victim’s blood.⁵

Arguments against the position (if any):

See above.

⁴ See, E.g., Donovan & Rhodes, Comes a time: The case for recording interrogations, 61 Mont L Rev 223 (2000).

⁵ Post, Leonard. “Illinois to tape police questioning” The National Law Journal, Monday August 4, 2003.

If the State Bar currently has a position on this subject matter, state the position, and an analysis of whether the recommended position and the current State Bar position are in conflict.

To date, the State Bar does not have a position on this matter.

Fiscal implications of the recommended policy to the State Bar of Michigan:

None stated.

This position falls within the following Keller-permissible category:

The regulation and discipline of attorneys

✓ The improvement of the functioning of the courts

The availability of legal services to society

The regulation of attorney trust accounts

The regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.

Keller- permissible explanation:

Not provided.