

State Bar Volunteers Propel New Legislation on Recording Custodial Interrogations

By Carrie Sharlow

In December 2012, Governor Rick Snyder signed Senate Bill 152 (now Public Act 479) requiring electronic recording of some custodial interrogation sessions. This new law will protect not only the rights of defendants but also the involved law enforcement from false accusations of coercion or constitutional rights violations.

The newly enacted law becomes effective March 28, 2013, and requires “an audio-visual recording of an interrogation of an individual who was in custodial detention in a governmental building regarding a crime that was a major felony”¹ if that location has the appropriate equipment available.

Public Act 479 will apply to:

an interrogation involving questioning in a criminal investigation for a major felony that may elicit a self-incriminating response from an individual and includes a law enforcement official’s words or actions that the official should know are reasonably likely to elicit a self-incriminating response from the individual.²

This new law is the result of more than seven years of work by the State Bar of Michigan, a group of its dedicated committee volunteers, and the lawyer-legislators who serve our state. The history of how SB 152 became law shows how the State Bar can change public policy with the help of its volunteer members.

As Novi Assistant Police Chief and State Bar Custodial Interrogation Recording Task Force member Victor Lauria said at an October 2012 Michigan House of Representatives Judiciary Committee meeting, “We record our children’s dance recitals and baseball games. Why wouldn’t we record an interrogation that might result in a person’s loss of freedom?”³

Work on this legislation began in the spring of 2005 with the State Bar’s Criminal

Custodial Interrogation Recording Task Force Co-Chairs



Valerie R. Newman



Nancy J. Diehl

Jurisprudence & Practice Committee’s concerns “about the wrongful convictions of innocent people, and the amount of time spent at trial and on appeal litigating who said and did what during an interrogation.”⁴ The committee drafted a resolution requiring the recording of custodial interrogations.

The committee, led by Valerie Newman and Martin Krohner, presented this information to the Representative Assembly along with research into others states’ practices. The Assembly unanimously supported “the appointment of a State Bar custodial interrogation recording task force consisting of State Bar members in the criminal defense, prosecution, judicial, and law enforcement communities to develop and promote legislative Court Rule and funding changes that advance the use statewide of audio and video electronic recording of custodial interrogations.”⁵

In the spring of 2006, the State Bar formed the Custodial Interrogation Record-

ing Task Force comprised of defense attorneys, prosecutors, members of the judiciary, and law enforcement officials from around the state.⁶ Co-chaired by Nancy Diehl, past president of the State Bar of Michigan and currently with the Wayne County Prosecutor’s Office, and Valerie Newman from the State Appellate Defender Office, the task force’s goal was to “[m]ake recommendations concerning legislative, court rule, and funding changes that advance the use of audio and video electronic recording of custodial interrogations, and provide support for the adoption and implementation of changes....”⁷ But first it would have to resolve differences and potential conflict between stakeholders.

“The first meeting made it clear that members had very different points of view and were very far apart on what approach the task force should take,” Diehl said. “In fact, when we began to discuss the time required to conduct pilot projects in Michigan, one member resigned.”⁸

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SBM Custodial Interrogation Recording Task Force Members on Record from 2006 through 2011

George Basar	Bradley R. Hall	Jill Leslie Price
Hon. David F. Breck	Donald L. Johnson	Hon. Mark A. Randon
Thomas P. Casselman	Timothy R. Juengel	Thomas M. Robertson
Nancy J. Diehl	Hon. Timothy M. Kenny	James R. Samuels
William Dwyer	Martin P. Krohner	James B. Schlaff
Kim Warren Eddie	Victor Lauria	Ralph C. Simpson
Jeffrey J. Estrella	Donna McKneelen	Stephen M. Taratuta
Alan M. Gershel	Valerie R. Newman	Martin Underhill
Tonya Guy-Willson	Ervin L. Portis	Hon. Christopher P. Yates

Throughout the process, the State Bar worked with key stakeholders, including the Michigan State Police, the Michigan Association of Chiefs of Police, the Criminal Defense Attorneys of Michigan, and the Prosecuting Attorneys Association of Michigan.

Diehl and Newman traveled to the state police chiefs' conference in Grand Rapids to discuss the work of the task force. A survey was also sent to police departments across the state, requesting comments on current policies. At the same time, the task force wrote a Model Policy for Recording Audio/Visual Interrogations, which would eventually become the basis for legislation.

In an effort to show the real-time value of interrogation recording, the State Bar created a pilot program to install audio-visual equipment at police departments in Ann Arbor, Charlotte, Grand Ledge, Pittsfield Township, and Ypsilanti and sheriffs' departments in Eaton and Jackson counties. The equipment was paid for with funds from a Michigan State Bar Foundation grant and the Criminal Law Section.

University of Michigan Professors Sam Gross and Pheobe Ellsworth, U-M doctoral candidate Katherine Knight, and Michigan State University Professor Barbara O'Brien volunteered to research the pilot program's findings for a final policy report on audiovisual recording of custodial interrogations.

As the pilot program progressed, proposed legislation was being fine-tuned for consideration by the state legislature. Of course, the best people to introduce and support the legislation were attorneys serving in the legislature.

The State Bar of Michigan Governmental Relations Division began the long process of

lobbying for bill sponsorship and passage. SB 152 was the third attempt in as many legislative sessions. Previous versions of the bill were introduced by two Democratic lawyer-legislators from Detroit—Rep. Steve Tobocman in 2009 and Rep. Rashida Tlaib, Tobocman's successor, in 2010. Tlaib's bill passed the Michigan House with near unanimous support, but the Senate failed to act on the legislation before its session ended.

At the start of the new session in 2011, Sen. Tonya Schuitmaker (R–Lawton), another lawyer-legislator who has also served on the Representative Assembly, introduced SB 152; Tlaib introduced an identical bill in the House the same month.

SB 152 moved quickly through the Senate and earned unanimous approval in April. The bill languished in the House for more than a year. The Bar continued pushing for passage, with Diehl, Newman, and Lauria making frequent visits to Lansing for committee testimony. At the start of a contentious and historic lame-duck period in December, SB 152 passed out of the House Judiciary Committee under the leadership of lawyer-legislator and Speaker Pro Tempore John Walsh and went to the House floor, where it passed unanimously.

With the legislation enacted into law, the Michigan Commission on Law Enforcement Standards (MCOLES) will set “quality standards for the audiovisual recording of state-ments”⁹ and assess the cost of equipment with funding coming from the legislature.

“MCOLES, in keeping with the timelines of the statute, has begun a needs analysis by surveying agencies throughout the state,” said David Harvey, the commission's executive director. “Additionally, we are pre-

paring the specifications and costs for the equipment. Staff is also developing the process by which the funds, when appropriated, will be distributed.”¹⁰

Former State Bar president Frank H. Boos has said, “Any worthwhile achievement in the field of judicial administration is generally the result of a continuous pressure exerted over a considerable period of time.”¹¹ Public Act 479 is no exception. When judges, prosecutors, defense attorneys, and law enforcement agencies come together with the goal of lasting change to the state's judicial system, Michigan takes notice. ■



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FOOTNOTES

1. House Legislative Analysis, SB 152, November 25, 2012, available at <<http://www.legislature.mi.gov/documents/2011-2012/billanalysis/House/pdf/2011-HLA-0152-4ECF59B9.pdf>>. All websites cited in this article were accessed February 25, 2013.
2. *Id.*
3. Victor Lauria, Custodial Interrogation Recording Task Force member, Remarks at the Michigan House of Representatives Judiciary Committee meeting (October 17, 2012).
4. Press Release, State Bar of Michigan, *New Custodial Interrogation Recording Task Force Formed* (May 16, 2006), available at <http://www.michbar.org/news/releases/archives06/interrogation_taskforce.cfm>.
5. State Bar of Michigan Representative Assembly, Summary of Proceedings (September 22, 2005) <<http://www.michbar.org/generalinfo/pdfs/9-22-05summary.pdf>>.
6. See <<http://www.michbar.org/generalinfo/pdfs/9-22Custodial2.pdf>>.
7. State Bar of Michigan, *Custodial Interrogation Recording Task Force* <<http://www.michbar.org/generalinfo/custodialinterrogation.cfm>>.
8. E-mail from Nancy Diehl, co-chair, Custodial Interrogation Recording Task Force, to author (February 3, 2013) (on file with author).
9. House Legislative Analysis, SB 152, October 15, 2012, available at <<http://www.legislature.mi.gov/documents/2011-2012/billanalysis/House/pdf/2011-HLA-0152-5.pdf>>.
10. E-mail from David Harvey, executive director, Michigan Commission on Law Enforcement Standards, to author (February 5, 2013) (on file with author).
11. State Bar of Michigan, *Presidential Visions* (State Bar of Michigan, 2010).