Drafting Committee on Electronic Recording of Custodial Interrogations

Report of third committee meeting – Chicago, Illinois – December 4-5, 2009

The following persons attended the meeting:

Commissioners: David A. Gibson, Chair; Grant Callow; Michael Dunn; Norman Greene; Justin Houterman, John Kellam; Ted Kramer; Steven Leitess; Samuel Tenenbaum, and Russell Walker. Also present were Jack Davies, Division Chair; Robert Stein, President; Michael Houghton, Chair of the Executive Committee; John Sebert, Executive Director.

Commissioners absent were Rhoda Billings and Genie Ohrenschall

Reporter: Andrew Taslitz, professor of law, Howard University Law School

Observers present: Paul Giannelli, ABA advisor; Thomas Sullivan of Jenner & Block, Chicago; Anne Swern, Asst. Distrtict Attorney, Kings County, N.Y., and National District Attorneys Association (NDAA); Karen Townsend of American Colloege of Trial Lawyers; Andrew Vail of Jenner & Block

At the meeting we reviewed the current draft of the act, discussed comments from the annual meeting in Santa Fe, reviewed recommendations received from Commissioners Billings and Davies and from Mr. Sebert; and discussed various issues identified by the reporter, members and observers at the meeting, and the chair. A significant consensus was developed on most of the issues. The main issues discussed were as follows:

1. Definitions: A recommendation to add "detainee" as a category was rejected, in that persons can be detained without being subjected to a custodial interrogation as determined by *Miranda* and its progeny.

A recommendation to add a definition of "record," as has been developed by the ULC , was rejected, in that the act itself deals with recordations and the term "record" is a term of art in the field of criminal justice to refer to a person's criminal history. Therefore, the use of the ULC definition of "record" would likely lead to confusion among those who would be referring to this act.

A recommendation to add a definition of "qualified immunity" was rejected, in that the act will not use that term.

Minor changes were made to other definitions.

The committee decided to add the words "under the control of a law enforcement agency" to the definition of "place of detention," so as to make clear the limitation as to where custodial interrogations may be recorded. (Section 2)

2. The committee decided – for enactability reasons – not to require both audio and video recordingsl. Audio recording will be required, and the words "and by video" will appear in brackets. (Section 3)

The committee accepted a recommendation to shift parts of Section 3 as presented at the annual meeting to become a new and separate section 4. The committee also decided to move to Section 3 a portion of old Section 16 (subsection (b)(3)), being the concept regarding the later recording of a custodial interrogation that initially took place away from the place of detention.

3. New Section 4 (old Section 3(c) and (d)) pertains to the lack of a requirement to inform a person that he or she is being recorded. The substance of the prior draft of the act is not changed. A Legislative Note probably will be needed if the recorded interrogation would otherwise be required to be disclosed as a public record. It is believed that most states' public records laws exempt ongoing police investigations from their provisions.

4. No major changes were made to the next three sections as previously drafted. (Old Sections 4, 5 and 6)

5. A recommendation to delete old Section 7, pertaining to interrogations conducted by other jurisdictions, was rejected in order not to create a loophole and thereby permitting the nonrecordation of a custodial interrogation of a person in custody in another jurisdiction, at the suggestion of a law enforcement officer from the jurisdiction where the case will be prosecuted. (New Section 8)

6. The committee accepted a recommendation to divide old Section 8 into two parts, which become new Sections 9 and 10. Section 9 retains the language, with minor changes, found in old Section 8(1) and (2). Section 10 contains the essence of old Section 8(3), but the wording has been rewritten in the hope that it is clearer. These two sections deal with exceptions to the recording requirements.

7. Old Section 9 exception for equipment malfunction) becomes new Section 11. Because of the change described in the first paragraph of number 2 above, subsection (a) will need to be bracketed and subsection (b) will not be bracketed. Minor changes to the wording were made.

8. New Section 12 (old Section 10) (burden of persuasion) evoked an interesting and entertaining conversation among the law school professors and the practitioners as to just what "burden of persuasion" means in this context, when the body of the language of the section uses only the term "preponderance of the evidence." The jury is still "out" on this item.

9. In the next section, the committee decided to accept a recommendation to shorten the section by elimination of the "laundry list" in subsection (a). (Old Section 11)

10. In new Section 14 the committee labored long and hard before deciding to delete the words "case-in-chief" – regarding the notion that the state should give early notice of its intent to rely on one of the exceptions for failing to record a custodial interrogation, whether or not the state intends to use the recorded statement during its presentation of evidence to prove the *corpus delicti* of the crime. (Old Section 12)

11. In the "Remedies" section, now Section 15, the committee agreed to delete the wording of a suggested court instruction to the jury, relegating it to the Comments. This decision required the addition of some language to subsection (b), so as to let a court know that it should give some sort of instruction to the jury if requested to do so by the defendant.

The committee also decided to eliminate subsections (c) and (d), which had been bracketed, and related to the admission of expert testimony on the subject of voluntariness and reliability of a recorded statement. This field is a developing – and highly controversial – one, and not many jurisdictions have had an opportunity to weigh in on it as of yet.

The next subsection, which becomes subsection (c), was reworded so as to eliminate the words "qualified immunity" and merely to state that no civil liability for damages arising from a violation of the act will be incurred by law enforcement agencies that adopt rules reasonably designed to comply with the act and whose officers comply with those rules. The committee also rejected a recommendation to delete original subsection (e), relating to a mandate to law enforcement agencies to include in its rules provisions for the discipline of officers who violated the act. The committee's decision was based primarily on its recollection of the view expressed by police Detective Jim Trainum of the District of Columbia Metropolitan Police Department, who stated that officers needed to be aware of the importance of adhering to that department's policy of recording custodial interrogations. Otherwise, Detective Trainum opined,

officers did and would not record the custodial interrogations. The provision is being moved to new Section 18. (Old Section 13)

12. The committee decided to eliminate old Section 14, which required a state agency to monitor compliance with the act. Elimination of this provision will remove possible "turf wars" in states that adopt the act.

13. What is now Section 16 was amended in a minor respect. (Old Section 15)

14. New Section 17, relating to rules to be adopted by law enforcement agencies regarding this act, has had some wording changes; and, as indicated previously, subsection (b)(3) has been moved to Section 3. The committee also decided to delete the precatory language previously found in subsection (b)(1). (Old Section 16)

15. New Section 18, relating to implementing adopted rules, has had only minor changes in the wording of the section. There has been a recommendation to eliminate the laundry list, setting forth topics which should be addressed by the rules. Some members of the committee expressed an interest in retaining the list, and the topic will be revisited next March. The committee also wanted to include the concept of requiring a provision for the discipline of officers who violate the act, such as existed in old Section 13(e). That provision would become Section 18(b). (Old Section 17)

16. New Section 19, relating to self-authentication has been reworded. The constitutionality of this section has been questioned, in that the defendant's right to confront witnesses against him may extend to pretrial and/or post-trial proceedings. Because of this question, the committee decided to add a provision relating to the severability of any provisions later determined by a court to be unenforceable. (Old Section 18)

17. New Section 20 will have a provision added to it as subsection (b). It will provide that there is no requirement of a transcription of an audio or audio/video recordation. (Old Section 19)

We are hopeful that Taz will be able to furnish us with a revised draft in the not too distant future. I expect that our March meeting will result in a "finished " product for the annual meeting in Chicago.

I continue to be concerned about the lack of participation by various stakeholders. Again, we had no representatives from the National Association of Attorneys General, the International Association of Chiefs of Police; the National Sheriffs Association; the National Criminal Justice Association; the

National Legal Aid Defenders Association; or the Innocence Project – all of whom have been contacted previously.

If it is feasible to have the March meeting in the District of Columbia area, I suspect that some of those organizations would send representatives.

Respectfully submitted,

David A. Gibson

Chair of the Committee