

MEMORANDUM

TO: Drafting Committee on Electronic Recordation of Custodial Interrogations: Members, Advisors, Observers

FROM: Andrew E. Taslitz, Reporter

DATE: October 7, 2008

RE: *Issues Checklist for First Meeting, October 31, 2008*

This memorandum simply outlines each of the issues for this Committee to resolve before drafting can begin on a proposed uniform statute on electronic recording of custodial interrogations. This memorandum will also briefly list options to consider in resolving some of these issues. A separate *Issues Memorandum* has been distributed analyzing each of these issues, but the current memorandum serves as a helpful checklist and reminder.

Here are the issues and some selected options:

1. Should audio recording, video recording, or both be required?
Options: (a) both are presumptively mandated, but audio alone is acceptable when video is not reasonably available in a particular case;
(b) both are required for large police departments but audio alone is acceptable for smaller ones that cannot afford the video equipment;
(c) either audio or video alone or in combination will do.
2. When should recording be required, for example, should it be mandated only during “custodial interrogations” as defined in *Miranda*, or should it be required whenever any interrogation begins, custodial or not?
3. Where should recording be required, for example, only when the interrogation occurs in a police station? Also in a jail? A prison? Any location whatsoever where interrogation occurs?
4. To what crimes – for example, “serious crimes,” “serious felonies,” particular listed crimes, only homicides, or any crime whatsoever – should the recording mandate apply?
5. What camera angle, if any, should be mandated, for example, a focus on the suspect? The interrogator? Both?
6. What exceptions to the recording mandate, if any – for example, infeasibility, spontaneity, booking, suspect refusal to be taped,

interrogation out of state, interrogation at a time when the interrogatee was not yet a suspect, or interrogation when interrogators had no knowledge that the type of crime for which recording is required was involved – should be recognized?

7. Can recording be done surreptitiously, and thus without the suspect's consent, or must it be done overtly, and if so, does overt recording require the suspect's consent?
8. What remedies, if any, should be imposed for unexcused violations of recording mandates?
Options: (a) a flat exclusionary rule?
(b) a softer exclusionary rule creating an exception to exclusion where the prosecutor proves by some specified standard (for example, preponderance of the evidence or clear and convincing evidence) that, despite the non-recording, the confession is voluntary? Reliable? Both?
(c) a still softer version of the exclusionary rule that considers non-recording but one factor to weigh in determining whether to suppress a confession because it is involuntary or unreliable?
(d) the Constitution Project's version of the exclusionary rule, which mandates exclusion largely when police departments (or precincts, or units) fail to provide the training, equipment, supervision, and discipline necessary to a sound recording program but, when such necessities are in place, excludes only if, under a multi-factor weighing process, the violation is considered so "substantial" in risking conviction of the innocent or endangering constitutional values as to require suppression?
(e) a variant on the Constitution Project's approach in which the exclusionary rule applies *only* where police departments (or precincts or units) or high-level police personnel have either intentionally violated recording mandates or failed to supply interrogators with the necessary training, equipment, supervision, and discipline?
(f) cautionary jury instructions?
(g) expert testimony about the risks of error or involuntariness arising from various interrogation techniques and about the undue weight jurors often give to confessions and the reasons why they do so or such expert testimony in combination with jury instructions but never allowing jury instructions alone?
(h) civil damages remedies, either existing ones or new ones specific to the recording statute?
(i) internal discipline of errant officers?
(j) publicizing violations?
(k) some combination of the above remedies?

9. Should there be special rules for juveniles, for example, requiring the presence of a parent or guardian during the interrogation, or the presence of a lawyer, or mandating a per se exclusionary remedy for juveniles even if some alternative remedy applies to adults?
10. What systems, if any, should be created to monitor police compliance, for example, data collection, clear assignments of supervisory responsibilities, written explanations of deviations from procedures, clear procedures for protecting the chain of custody to protect against tampering, detailed internal compliance regulations, annual or more frequent reports to supervisors and legislators or to the Attorney General, ensuring preservation of notes, addressing the use of interpreters or problems in questioning the deaf?
11. What discovery procedures should be in place, for example, depositions, prosecutor identification and summary of the testimony of witnesses supporting the application of an exception, defense supervised access to original recordings, defense access to copies upon paying a fee?
12. How detailed should a model statute be in prescribing procedures for recording – very detailed? Set out general guidelines for police policies but leave the administrative details to the police so long as they fit within the scope of those general guidelines?