

DRAFT  
FOR DISCUSSION ONLY

# **ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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Draft for March 2009 Committee Meeting

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March 6, 2009

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# **ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT**

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1           **ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT**

2  
3           **SECTION 1. SHORT TITLE.** This Act may be cited as the Electronic Recordation of  
4 Custodial Interrogations Act.

5           **SECTION 2. DEFINITIONS.**

6           (A) “Place of detention” means a jail, police or sheriff’s station, holding cell, correctional  
7 or detention facility, or other fixed location where persons may be questioned in connection with  
8 criminal charges or juvenile delinquency proceedings.

9           (B) “Custodial interrogation” means any questioning or other conduct by a law  
10 enforcement officer that is reasonably likely to elicit incriminating responses and in which a  
11 reasonable person in the subject’s position would consider himself to be in custody, beginning  
12 when a person should have been advised of his Miranda rights and ending when the questioning  
13 has completely finished.

14           (C) “Electronic recording” or “electronically recorded” means an audio or audio and  
15 visual recording that is an authentic, accurate, unaltered record of a custodial interrogation.

16           (D) “Statement” means an oral, written, sign language, or nonverbal communication.

17           (E) “Law enforcement agency” means any governmental entity whose responsibilities  
18 include enforcement of any criminal laws, the investigation of suspected criminal activity, or  
19 both.

20           **SECTION 3. ELECTRONIC RECORDING REQUIREMENTS.**

21           (A)   (1) Absent application of one of the exceptions described in section 3 of this Act,  
22 all statements made by a person during a custodial interrogation conducted at a place of  
23 detention and relating to a felony described in the following sections of the [jurisdiction’s name]

1 [Criminal and Juvenile Codes] shall be electronically recorded in their entirety, from the time  
2 that interrogation of the subject begins, including the Miranda warning and waiver of the subject,  
3 and continues until the time the interrogation ends.: [insert section numbers].

4 (2) [In cities, towns, or villages with a population of over 100,000 residents,] both  
5 audio and visual recordings of statements made by a person during a custodial interrogation  
6 conducted at a place of detention shall be made.

7 (3) [In cities, towns, or villages with a population under 100,000 residents, audio  
8 recording is an acceptable alternative to audio and visual recording.]

9 **Alternative A**

10 (B) If any part of a custodial interrogation takes place outside of a place of detention,  
11 audio recording is an acceptable alternative to audio and visual recording [and shall be done  
12 whenever practicable].

13 **Alternative B**

14 (B) [(1) Law enforcement agencies shall promulgate and enforce regulations  
15 governing the manner in which custodial interrogations are to be taken when they occur outside a  
16 place of detention.

17 (2) Such regulations shall:

18 (a) encourage law enforcement officers to conduct custodial interrogations  
19 only at places of detention absent its being necessary to do otherwise;

20 (b) provide for later electronic recording of the statement; and

21 [(c) further provide that, as soon as practicable, the interrogating officer  
22 shall prepare a detailed written account [as well as an electronically recorded one] justifying the  
23 decision to interrogate outside a place of detention and summarizing the entire custodial

interrogation process.]]

## **End of Alternatives**

(C) (1) Where electronic recording includes video, the camera shall be simultaneously focused upon both the interrogator and the suspect.

(2) The electronic recording must be of sufficient visual quality so that faces, facial expressions, and bodily movements of the suspect and the interrogator(s) are clearly discernible and of sufficient audio clarity so that word content, tone of voice, loudness of speech, identity of the speaker, and all other sounds can readily be identified and understood.

(D) (1) Law enforcement officers conducting a custodial interrogation at a place of detention are not required to inform a subject that a recording is being made of the custodial interrogation.

[(2) Such recordings are exempt from statutory requirements under [insert title and section numbers] that otherwise mandate that a person be informed of, or consent to, his conversations being recorded.]

[(3) Such recordings are further exempt from the public records disclosure laws of this state.]

## **SECTION 4. EXCEPTIONS.**

(A) The requirement of electronic recording imposed by Section 3 does not apply if:

(i) A statement made during a custodial interrogation is not recorded because exigent circumstances rendered doing so not feasible and an explanation of the exigent circumstances, where feasible, is electronically recorded before conducting the interrogation and, if not feasible, is recorded as soon as practicable thereafter;

(ii) A spontaneous statement is made outside the course of a custodial

1   interrogation;

2                   (iii) A statement is made in response to questioning that is routinely asked during  
3   the routine processing of the arrest of the suspect, also known as during the suspect's "booking";

4                   (iv) A statement is made during a custodial interrogation by a suspect who  
5   indicated, prior to making the statement, that the suspect would participate in the interrogation  
6   only if it were not electronically recorded; provided, however, that the agreement to participate  
7   under that condition is itself electronically recorded;

8                   (v) A statement is made during a custodial interrogation that is conducted out-of-  
9   state in compliance with that state's law and without involvement of or connection to an officer  
10   of this state;

11                  (vi) A statement is made during a custodial interrogation conducted by federal law  
12   enforcement in compliance with federal law and without involvement of or connection to an  
13   officer of this state; [Reporter's note: as an alternative, make exceptions (v) and (vi) into a  
14   separate, and perhaps more detailed, section on interstate solutions?]

15                  (vii) A statement is given at a time when the subject is not a suspect for the crime  
16   to which the statement relates while the subject is being interrogated for a different crime that  
17   does not require electronic recordation;

18                  (viii) The interrogation during which the statement is given occurs at a time when  
19   the interrogators have no knowledge that a crime for which electronic recording is required has  
20   been committed;

21                  (ix) [The officer conducting the interview or the officer's superior reasonably  
22   believed that the making of an electronic recording would jeopardize the safety of any officer,  
23   the suspect being interrogated, or another person, or the identity of a confidential informant, and,

1 if feasible, an explanation for the basis of that belief was electronically recorded at the time of  
2 the interview;]

3 (x) [The statement is offered solely to impeach or rebut the defendant's prior  
4 [trial] testimony, not as substantive evidence.]

5 (B) Where no such exception applies, electronic recording must occur in the manner  
6 described in section 3 of this Act, except that:

7 (i) where audio and video recording are required, audio recording alone is  
8 acceptable where technical problems in video recording occur despite adequate maintenance  
9 efforts on equipment ordinarily sufficient to make a clear and accurate video and audio recording  
10 of the custodial interrogation and where delay to await repair is not feasible.

11 (ii) where either audio and video recording or audio recording alone are required  
12 but no recording occurs, or only a portion of the interrogation is recorded, the complete failure to  
13 record or the partial failure to record are respectively acceptable only if they occur despite  
14 adequate maintenance efforts on equipment ordinarily sufficient to make a clear and accurate  
15 recording of whatever nature is ordinarily required by Section 3 of this Act.

16 (iii) [Whenever an interrogating officer conducts a custodial interrogation [at a  
17 place of detention]:

18 (a) without electronically recording the interrogation, or  
19 (b) only by recording a portion of the interrogation process, or  
20 (c) recording only by means of audio when video is also ordinarily  
21 required, then

22 the officer shall prepare a detailed written report justifying:

23 (a) the decision not to record, or



1 (b) to record only part of the interrogation process, or

2 (c) to record only via audio.

3 The officer shall prepare that report as soon as reasonably practicable after  
4 completing the interrogation and even if the officer has made a contemporaneous electronic  
5 account of the justifications.]

6 (C) [The state shall bear the burden of proving by [a preponderance of the evidence][clear  
7 and convincing evidence] that one of the exceptions is applicable.]

8 (D) (1) If the state intends to rely on any of the exceptions set forth in subsections A  
9 or B of this Section in offering a defendant's statement that does not comply with the electronic  
10 recording requirements set forth in Section 3 of this Act, the State shall furnish a written notice  
11 of that intent.

12 (2) The notice shall state the specific place and time at which the defendant made  
13 the statement and the specific exception or exceptions upon which the state intends to rely.

14 (3) The prosecutor shall, on written demand, furnish the defendant or defendant's  
15 attorney with the name and address of the witnesses upon whom the state plans to rely to  
16 establish one of the exceptions set forth in subsections (A) or (B) of this Section.

17 (4) The trial court shall then hold a hearing to determine whether one of the  
18 exceptions applies.

19 **SECTION 5. REMEDIES.**

20 (A) The failure to electronically record a custodial interrogation in its entirety shall,  
21 absent application of one of the exceptions listed in section 4(A), be a factor for consideration by  
22 the trial court in determining the admissibility of a statement on the grounds that it was not  
23 voluntarily made or that it was not reliable or both.

1 (B) In the event the government offers a statement into evidence that does not comply  
2 with the requirements set forth in section 2 of this [Act] and the prosecutor has not established by  
3 [a preponderance of the evidence][clear and convincing evidence] that an exception listed in  
4 section 4 is applicable, the trial judge shall, upon request of the defendant, provide the jury with  
5 the following cautionary instructions, with changes that are necessary for consistency with the  
6 evidence:

7  
8 State law required that the interview of the defendant by law enforcement  
9 officers which took place on [insert date] at [insert place] was to be electronically  
10 recorded, from beginning to end. The purpose of this requirement is to ensure that  
11 you jurors will have before you a complete, unaltered, and precise record of the  
12 circumstances under which the interview was conducted, and what was said and  
13 done by each of the persons present.

14 In this case, the law enforcement agents did not comply with that law.  
15 They did not make an electronic recording of the interview of the defendant.  
16 [They made an electronic recording that did not include the entire process of  
17 interviewing the defendant, from start to finish.] No justification for not  
18 complying with the statute has been presented to the court. Instead of an  
19 electronic recording, you have been presented with testimony as to what took  
20 place, based upon the recollections of law enforcement personnel [and the  
21 defendant]. [Instead of a complete record of the entire process of interviewing the  
22 defendant, they have left you with only a partial record of events.]

23 Therefore, I must give you the following special instructions about your  
24 consideration of the evidence concerning that interview.

25 Because the interview was not electronically recorded as required by our  
26 law, you have not been provided the most reliable evidence as to what was said  
27 and done by the participants. You cannot hear the exact words used by the  
28 participants, or the tone or inflection of their voices. [Because the interview  
29 process was not electronically recorded in its entirety as required by law, you

1 have not been provided with the most reliable and complete evidence of what was  
2 said and done by the participants].

3 Accordingly, as you go about determining what occurred during the  
4 interview, you should give special attention to whether you are satisfied that what  
5 was said and done has been accurately [and completely] reported by the  
6 participants, including testimony as to statements attributed by law enforcement  
7 witnesses to the defendant. It is for you, the jury, to decide whether the statement  
8 was made and to determine what weight, if any, to give to the statement.  
9

10 (C) [In the absence of electronic recording and of an exception to the electronic recording  
11 mandate for custodial interrogations, the court shall, in an appropriate case, permit expert  
12 testimony at trial concerning the factors that may affect the voluntariness and reliability of a  
13 statement made during a custodial interrogation; the existence of the recording mandate; and  
14 how and why recording can raise the probabilities that a statement is both voluntary and reliable  
15 and can aid a jury in making its independent assessment of those matters.]

16 (D) Any law enforcement agency that has adopted, implemented, and enforced  
17 regulations reasonably designed to ensure compliance with the terms of this Act[, and any law  
18 enforcement officer of such an agency who has complied with those regulations,] shall have a  
19 complete defense to any civil suit for damages allegedly arising from violation of any provision  
20 of this Act. Such regulations shall provide for adequate equipment, training, internal discipline,  
21 and accountability to promote compliance with the provisions of this Act[, including by  
22 specifically addressing the matters identified in section 9 of this Act.]

23 (E) Each law enforcement agency within this state shall promulgate and enforce  
24 regulations providing for internal discipline of any officer found by a court or by a supervisory  
25 official of that agency to have violated any provision of this Act.[Such regulations shall provide  
26 a range of disciplinary sanctions, including [insert later]. One relevant consideration in

determining the appropriate sanction shall be whether the officer's failure to comply with any provision of this act was done negligently, recklessly, knowingly, or purposely. The regulations may not impose internal discipline for any failure to comply with any provision of this Act that was not at least negligent.]

**SECTION 6. MONITORING REQUIREMENT.** [[Compliance with the electronic recording requirement shall be monitored by the Judicial Council [or analogous [State] law enforcement practice committee]].

**SECTION 7. HANDLING AND PRESERVATION OF ELECTRONIC RECORDINGS.**

(A) Every electronic recording of a custodial interrogation shall be clearly identified and catalogued by law enforcement personnel.

(B) If a criminal or juvenile delinquency proceeding is brought against a person who was the subject of an electronically recorded custodial interrogation, the electronic recording shall be preserved by law enforcement personnel until all appeals, post-conviction, and habeas corpus proceedings are final and concluded, or the time within which such proceedings must be brought has expired.

(C) Upon motion by the defendant, the court may order that a copy of the recording be preserved for any period beyond the expiration of all appeals.

(D) If no criminal or juvenile delinquency proceeding is brought against a person who has been the subject of an electronically recorded custodial interrogation, the related electronic recording shall be preserved by law enforcement personnel until all applicable state and federal statutes of limitations bar prosecution of the person. [Should we provide times for destruction of such recordings?]

1           **SECTION 8. TRAINING.** Each law enforcement agency subject to the provisions of  
2 this Act shall initiate, administer, and conduct training programs for permanent police officers,  
3 part-time police officers, and recruits on the methods and technical aspects of conducting  
4 electronic recordings of custodial interrogations at places of detention consistent with the terms  
5 of this Act and of any internal police regulations on this subject.

6           **[SECTION 9. IMPLEMENTING REGULATIONS OR GENERAL ORDERS.**

7 Each law enforcement agency subject to the provisions of this Act [alternatively, each state  
8 agency charged with statewide and local enforcement of this Act] shall promulgate and enforce a  
9 general order or implementing regulation [consistent with the terms of this Act] [that shall, at a  
10 minimum, include the following matters:

11           (1) mandates for detailed data collection within, and review by superiors within, each law  
12 enforcement agency;

13           (2) clear, specific assignments of supervisory responsibilities to specific individuals and a  
14 clear chain of command to promote internal accountability;

15           (3) a mandated system of explanation for procedural deviations and administrative  
16 sanctions for those that are not justified;

17           (4) a mandated supervisory system expressly imposing on specific individuals a duty of  
18 ensuring adequate manpower, education, and material resources to do the job; and

19           (5) a mandated system for monitoring the chain of custody and responding to prosecutor  
20 and defense counsel evidence and informational requests to ensure responsiveness to the needs  
21 of the judicial branch, and to translate police action into reliable evidence ready for efficient use  
22 by the courts and by lawyers in both trial and pre-trial proceedings.]]

23           **SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

1 applying and construing this uniform act consideration must be given to the need to promote  
2 uniformity of the law with respect to its subject matter among states that enact it.

3       **SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**  
4 **NATIONAL COMMERCE ACT.** This act modifies, limits, and supersedes the federal  
5 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq.,  
6 but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or  
7 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15  
8 U.S.C. Section 7003(b).

9       **SECTION 12. REPEALS.** The following acts and parts of acts are repealed: [insert  
10 title and section numbers].

11       **SECTION 13. EFFECTIVE DATE.** This Act takes effect on [date].