

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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November 2009 Interim Draft

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November 13, 2009

## **DRAFTING COMMITTEE ON ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT**

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in drafting this Act consists of the following individuals:

DAVID A. GIBSON, P.O. Box 1767, Brattleboro, VT 05302, *Chair*  
RHODA B. BILLINGS, 5525 Williams Rd., Lewisville, NC 27023  
W. GRANT CALLOW, 425 G St., Suite 610, Anchorage, AK 99501  
W. MICHAEL DUNN, P.O. Box 3701, 1000 Elm St., Manchester, NH 03105  
NORMAN L. GREENE, 60 E. 42nd St., 39th Floor, New York, NY 10165-0006  
JUSTIN HOUTERMAN, 638 S. Beacon St., 3<sup>rd</sup> Floor, San Pedro, CA 90731  
JOHN L. KELLAM, 30 S. Meridian St., Suite 500, Indianapolis, IN 46204  
THEODORE C. KRAMER, 42 Park Place, Brattleboro, VT 05301  
STEVEN N. LEITESS, One Corporate Center, 10451 Mill Run Circle, Suite 1000, Baltimore, MD 21117  
GENIE OHRENSCHALL, 1124 S. 15th St., Las Vegas, NV 89104-1740  
J. SAMUEL TENENBAUM, 357 East Chicago Ave., Chicago, IL 60611  
RUSSELL G. WALKER, JR., P.O. Box 1285, Asheboro, NC 27204  
ANDREW TASLITZ, 2900 Van Ness St. NW, Washington, DC 20008, *Reporter*

### **EX OFFICIO**

ROBERT A. STEIN, University of Minnesota Law School, 229 19th Avenue South, Minneapolis, MN 55455, *President*  
JACK DAVIES, 1201 Yale Place, Unit #2004, Minneapolis, MN 55403-1961, *Division Chair*

### **AMERICAN BAR ASSOCIATION ADVISOR**

PAUL C. GIANNELLI, Case Western Reserve University School of Law, 11075 East Blvd., Cleveland, OH 44106, *ABA Advisor*

### **EXECUTIVE DIRECTOR**

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS  
111 N. Wabash Ave., Suite 1010  
Chicago, Illinois 60602  
312/450-6600  
[www.nccusl.org](http://www.nccusl.org)

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1           **ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT**

2  
3                           **[Key: Underlined phrases are new]**

4  
5           **SECTION 1. SHORT TITLE.** This Act may be cited as the Uniform Electronic  
6 Recordation of Custodial Interrogations Act.

7           **SECTION 2. DEFINITIONS.** In this [act]:

8           (1) “Custodial interrogation” means questioning or other conduct by a law enforcement  
9 officer which is reasonably likely to elicit an incriminating response from an individual and  
10 occurs when a reasonable person in the position of the individual would consider that the person  
11 is in custody. The term includes a statement made by the individual in response to the  
12 questioning or conduct, from the time the individual should have been advised of the individual’s  
13 Miranda rights until the questioning or conduct and response terminate.

14           (2) “Electronic recording” means an audio or audio and video recording that accurately  
15 records a custodial interrogation.

16           (3) “Law enforcement agency” means a governmental entity whose responsibilities  
17 include enforcement of criminal laws or the investigation of suspected criminal activity.

18           (4) “Law enforcement officer” means an individual employed by a law enforcement  
19 agency, or someone acting at that individual’s behest, where that individual’s responsibilities  
20 include enforcement of criminal laws or the investigation of suspected criminal activity.

21           (5) “Place of detention” means a fixed location where an individual may be questioned  
22 about a criminal charge or allegation of [insert the state’s term for juvenile delinquency]. The  
23 term includes a jail, police or sheriff’s station, holding cell, and correctional or detention facility.

24           (6) “Statement” means a communication whether it is oral; written, including, but not  
25 limited to, e-mail or other electronically transmitted verbal communications; nonverbal; or in

1 sign language.

2 (7) “Qualified immunity” means immunity from civil suit because of the status of the  
3 entity or individual, as determined by the facts and law applicable to the circumstances of the  
4 case.

### 5 **SECTION 3. ELECTRONIC RECORDING REQUIREMENT.**

6 (a) Except as otherwise provided in Sections 4 through 9, a custodial interrogation  
7 conducted at a place of detention, including administration of any Miranda warnings to and  
8 waiver of Miranda rights by the individual being questioned, must be electronically recorded in  
9 its entirety by both audio and visual means if the interrogation relates to a [felony] [crime]  
10 [delinquent act] [offense] described in [insert applicable section numbers of the state’s criminal  
11 and juvenile codes].

12 [(b) A custodial interrogation or part of a custodial interrogation that relates to a [felony]  
13 [crime] [delinquent act] [offense] described in subsection (a) and takes place outside a place of  
14 detention must be electronically recorded.]

15 (c) A law enforcement officer conducting a custodial interrogation is not required to  
16 inform the individual being interrogated that an electronic recording is being made of the  
17 interrogation.

18 (d) An electronic recording of a custodial interrogation is exempt from:

19 (1) requirements under [insert title and section numbers] that otherwise require  
20 that an individual be informed of, or consent to, the recording of the individual’s conversations;  
21 and

22 (2) disclosure under [insert section numbers of the state’s public records  
23 disclosure act].

**SECTION 4. EXCEPTION FOR EXIGENT CIRCUMSTANCES.** A custodial interrogation to which Section 3 applies need not be electronically recorded if recording is not feasible because of exigent circumstances and a law enforcement officer conducting the interrogation electronically records an explanation of the exigent circumstances before conducting the interrogation, if feasible, or as soon as practicable thereafter.

**SECTION 5. EXCEPTION FOR SPONTANEOUS OR ROUTINE STATEMENT.**  
A statement made by an individual need not be electronically recorded if:

- (1) it is a spontaneous statement made outside the course of a custodial interrogation; or
- (2) the statement is made in response to questioning that is asked routinely during the processing of the arrest of the individual.

**SECTION 6. EXCEPTION FOR INDIVIDUAL'S REFUSAL TO BE ELECTRONICALLY RECORDED.** A custodial interrogation to which Section 3 applies need not be electronically recorded if, before the interrogation, the individual to be interrogated indicates that the individual will participate in the interrogation only if it is not electronically recorded and, if feasible, the agreement to participate without recording is electronically recorded.

**SECTION 7. EXCEPTION FOR INTERROGATIONS CONDUCTED BY OTHER JURISDICTIONS.** A custodial interrogation need not be electronically recorded if the interrogation is conducted, not at the direction of a law enforcement officer of this state:

- (1) in another state in compliance with that state's law; or
- (2) by a federal law enforcement agency in compliance with federal law.

**SECTION 8. EXCEPTION BASED ON ACTUAL OR REASONABLE BELIEF OF LAW ENFORCEMENT OFFICER.** A custodial interrogation to which Section 3 applies

1 need not be electronically recorded if:

2 (1) the interrogation occurs when the individual being interrogated is suspected of a  
3 crime for which an electronic recording is not required, but the individual reveals facts giving a  
4 law enforcement officer conducting the interrogation reason to believe that a [felony] [crime]  
5 [offense] has been committed for which Section 3 requires that a custodial interrogation be  
6 recorded; however, if feasible, continued custodial interrogation concerning the [felony] [crime]  
7 [offense] revealed must be electronically recorded;

8 (2) the interrogation occurs when no officer conducting the interrogation has actual  
9 knowledge of facts and circumstances suggesting that a [felony] [crime] [offense] has been  
10 committed for which Section 3 requires that a custodial interrogation be recorded; or

11 (3) the officer conducting the interrogation or the officer's superior reasonably believes  
12 that making an electronic recording will jeopardize the safety of an officer, the individual being  
13 interrogated, or another person, or risk disclosure of the identity of a confidential informant, and,  
14 if feasible, an explanation of the basis of that belief is electronically recorded at the time of the  
15 interrogation.

## 16 **SECTION 9. EXCEPTION FOR EQUIPMENT MALFUNCTION.**

17 (a) If both audio and video recording of a custodial interrogation are required, recording  
18 by audio alone is acceptable if a technical problem in video recording occurs despite reasonable  
19 maintenance efforts on the available recording equipment, and timely repair or replacement is  
20 not feasible.

21 [(b) If both audio and video recording of a custodial interrogation are required, recording  
22 by video alone is acceptable if a technical problem in audio recording occurs despite reasonable

1 maintenance efforts on the available recording equipment, and timely repair or replacement is  
2 not feasible.]

3 ([b])[c]) All or part of a custodial interrogation need not be electronically recorded if  
4 recording is not possible because the available electronic recording equipment fails, despite  
5 reasonable maintenance efforts, and timely repair or replacement is not feasible.

6 **SECTION 10. BURDEN OF PERSUASION.** If the [state] [prosecuting attorney]  
7 relies on an exception in Sections 4 through 9 to justify a failure to make an electronic recording  
8 of a custodial interrogation, the [state] [prosecuting attorney] must prove by a preponderance of  
9 the evidence that the exception applies.

10 **SECTION 11. OFFICER'S REPORT.**

11 (a) When a law enforcement officer conducts a custodial interrogation [at a place of  
12 detention] without complying with Section 3, the officer shall prepare a [written report]  
13 [electronic record] explaining the reasons for the decision:

- 14 (1) not to make an electronic recording;  
15 (2) to make an electronic recording only of part of the interrogation;  
16 (3) to make an electronic recording only by audio recording; or  
17 (4) to make an electronic recording only by video recording.

18 (b) A law enforcement officer shall prepare the [report] [record] required by subsection  
19 (a) as soon as practicable after completing the interrogation, even if the officer has made a  
20 contemporaneous electronic recording explaining the reasons for not complying with Section 3.

21 (c) The only sanction that may be imposed on a law enforcement officer for failure to  
22 comply with subsection (a) or (b) is administrative discipline.  
23



1           **SECTION 12. NOTICE OF INTENT TO RELY ON EXCEPTION.**

2           (a) If the [state] [prosecuting attorney] intends to introduce in its case-in-chief a  
3 statement made during a custodial interrogation and to rely on an exception in Sections 4 through  
4 9 to justify a failure to make an electronic recording of the interrogation, the [state] [prosecuting  
5 attorney] shall serve on the defendant written notice of that intent not later than the time  
6 specified by law or rules other than this [act].

7           (b) The notice required by subsection (a) must state the specific place and time at which  
8 the defendant made the statement and identify the exception upon which the state intends to rely.

9           **SECTION 13. REMEDIES.**

10          (a) Unless the [appropriate court] finds that an exception in Sections 4 through 9 applies,  
11 the court shall consider the failure to make an electronic recording of all or part of a custodial  
12 interrogation to which Section 3 applies in determining whether a statement made during the  
13 interrogation is inadmissible because it was not voluntarily made [or was not reliable].

14          (b) Unless the [appropriate court] finds that an exception in Sections 4 through 9 applies,  
15 if the court admits into evidence a statement made during a custodial interrogation that was not  
16 electronically recorded in compliance with Section 3, the court shall, upon request of the  
17 defendant, give appropriate instructions to the jury. Those instructions must, at a minimum,  
18 explain to the jury that the police did not electronically record the entire interrogation process,  
19 though the law required them to do so, and that the jury is therefore deprived of the most reliable  
20 and complete evidence of what was said and done by each of the participants.

21          [(c) Unless the [appropriate court] finds that an exception in Sections 4 through 9  
22 applies, if the court admits into evidence a statement made during a custodial interrogation that  
23 was not electronically recorded in compliance with Section 3, the court, in an appropriate case,

1 shall admit expert testimony about factors that may affect the voluntariness and reliability of a  
2 statement made during a custodial interrogation, if the defendant first offers evidence sufficient  
3 to permit a finding by a preponderance of the evidence of facts relevant to the weight of the  
4 statement the full significance of which may not be readily apparent to a layperson. In deciding  
5 whether to admit expert testimony, the court may consider: the vulnerability to suggestion of the  
6 individual who made the statement; the individual's youth, low intelligence, poor memory, or  
7 mental retardation; use by a law enforcement officer of sleep deprivation, fatigue, or drug or  
8 alcohol withdrawal as an interrogation technique; the failure of the statement to lead to the  
9 discovery of evidence previously unknown to a law enforcement agency or to include unusual  
10 elements of a crime that have not been made public previously or details of the crime not easily  
11 guessed and not made public previously; inconsistency between the statement and the facts of the  
12 crime whether an officer conducting the interrogation educated the individual about the facts of  
13 the crime rather than eliciting them or suggested to the individual that the individual had no  
14 choice except to confess; promises of leniency; and the absence of corroboration of the statement  
15 by objective evidence. The court shall permit appropriate expert testimony offered by the  
16 prosecution to rebut expert testimony introduced by the defendant. Nothing in this subsection  
17 prohibits the court from admitting under law other than this [act] expert testimony about the  
18 voluntariness or reliability of the statement whether the testimony is offered by the defense or the  
19 prosecution.]

20 (d) A law enforcement agency that has adopted and enforced rules reasonably designed  
21 to ensure compliance with the terms of this [act] and a law enforcement officer of the agency  
22 who has complied with those rules have qualified immunity from any civil suit for damages  
23 allegedly arising from violation of this Act.

(e) A law enforcement agency shall adopt and enforce regulations providing for administrative discipline of a law enforcement officer found by a court or by a supervisory official of the agency to have violated this [act]. [The rules must provide a range of disciplinary sanctions reasonably designed to promote compliance with this [act].]

**[SECTION 14. MONITORING REQUIREMENT.** The [appropriate state agency] shall monitor compliance with the requirement under Section 3 of electronic recording of custodial interrogations].

**SECTION 15. HANDLING AND PRESERVATION OF ELECTRONIC RECORDING.** An electronic recording of a custodial interrogation must be identified, accessed, and preserved in compliance with law other than this [act].

**SECTION 16. RULES GOVERNING MANNER OF ELECTRONIC RECORDING.**

(a) [Law enforcement agencies] [the state agency charged with monitoring law enforcement's compliance with this act] shall adopt and enforce rules governing the manner in which electronic recordings of custodial interrogations are to be made.

(b) The rules adopted under subsection (a) must:

(1) encourage law enforcement officers investigating a [felony] [crime] [offense] designated in Section 3(a) to conduct a custodial interrogation only at a place of detention unless it is necessary to do otherwise;

(2) establish standards for the angle, focus, and field of vision of a camera which reasonably promote accurate recording of a custodial interrogation at a place of detention and reliable assessment of its accuracy and completeness;

(3) provide, when a custodial interrogation occurs outside a place of detention:

1 (A) for electronic recording at a place of detention of a statement from the  
2 individual who was interrogated; and

3 (B) that, as soon as practicable, a law enforcement officer conducting the  
4 interrogation shall prepare a written record explaining the decision to interrogate outside a place  
5 of detention and summarizing the custodial interrogation process.

6 **SECTION 17. IMPLEMENTING RULES.** [A law enforcement agency subject to this  
7 [act]] [the state agency charged with monitoring law enforcement's compliance with this act]  
8 shall adopt and enforce rules that implement this [act]. The rules must provide for:

9 (1) collection and review of electronic recording data or the absence thereof by superiors  
10 within [the agency] [each law enforcement agency];

11 (2) assignment of supervisory responsibilities and a chain of command to promote  
12 internal accountability;

13 (3) a process for explaining procedural deviations and imposing administrative sanctions  
14 for deviations that are not justified;

15 (4) a supervisory system expressly imposing on specific individuals a duty to insure  
16 adequate staffing, education, training, and material resources to implement this [act]; and

17 (5) a process for monitoring the chain of custody of an electronic recording of a custodial  
18 interrogation.

19 **[SECTION 18. SELF-AUTHENTICATION.** In any pretrial or post-trial proceeding,  
20 an electronic recording of a custodial interrogations is self-authenticating if it is accompanied by  
21 a certificate of authenticity by an appropriate law enforcement officer sworn under oath, unless  
22 the defendant offers evidence sufficient to permit a finding that the recording is not authentic.]  
23

1           **SECTION 19. NO RIGHT TO ELECTRONIC RECORDING CREATED.**

2   This [act] does not create a right of an individual being interrogated to require electronic  
3   recording of a custodial interrogation.

4           **SECTION 20. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

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

7           **SECTION 21. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**

8   **NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal  
9   Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq.,  
10   but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or  
11   authorize electronic delivery of any of the notices described in section 103(b) of that act, 15  
12   U.S.C. Section 7003(b).

13          **SECTION 22. REPEALS.** The following are repealed: [insert title and section  
14   numbers].

15          **SECTION 23. EFFECTIVE DATE.** This [act] takes effect on . . . .