

UNIFORM ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS ACT - BACKGROUND MEMORANDUM

Section 1 of 2011 Senate Bill No. 2125 (attached as [Appendix A](#)) directs the Legislative Management to study the feasibility and desirability of adopting the Uniform Electronic Recording of Custodial Interrogations Act. In 2010 the National Conference of Commissioners on Uniform State Laws (National Conference) approved and recommended the uniform Act for enactment in all states. This uniform Act addresses issues that accompany interrogations conducted by law enforcement officials. The uniform Act, which requires law enforcement to electronically record custodial interrogations, is intended to promote truth finding and judicial efficiency and to further protect the rights of law enforcement and those under investigation. The uniform Act, which has been endorsed by the American Bar Association, has been introduced in Tennessee but has not been adopted in any state or territory.

UNIFORM ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS ACT (2010) SUMMARY

According to the National Conference, in the past decade numerous cases of wrongful convictions have garnered the attention of the media, prosecutors, defense counsel, legislators, and law reformers. While much of this attention is focused on the faulty use of DNA evidence, wrongful convictions are prevalent in many cases in which DNA evidence is never available. The National Conference indicates that one important contributing factor to a large percentage of the mistakes made in many criminal cases is the admissibility at trial of a false confession.

In its summary of the Uniform Electronic Recording of Custodial Interrogations Act, the National Conference notes that false confessions may occur no matter how well-meaning the interrogating officer or how strong his or her belief in the suspect's guilt. Conflicting testimony sometimes results in judges or jurors believing the wrong tale, other times allowing for frivolous suppression motions wasting the court's time, and impugning careful, professional, and honest police officers. The resulting wrongful conviction or acquittal means not only that an innocent person may be sent to prison or jail but also that the guilty offender may go free, perhaps to offend again.

The summary indicates that the National Conference's primary justification for its recommendation of the uniform Act is to promote truth finding. The summary indicates that truth finding is promoted in seven ways:

1. Reduce lying. Neither an alleged offender nor police are likely to lie about what happened when a recording can expose the truth;

2. Compensate for bad witness memories;
3. Deter risky interrogation methods. Police are less likely to use risky interrogation techniques that could possibly elicit a false confession when the method is open for public scrutiny;
4. Police culture. Recording enables supervisors to review, monitor, and give constructive feedback on detectives' interrogation techniques;
5. Filter weak cases. Police and prosecutors are able to review recordings in detail before prosecution of the alleged offender is undertaken to reduce the risk of convicting an innocent person;
6. Factfinder assessment. Judges and juries can easily and more accurately assess credibility and determine whether a particular confession is voluntary or untrue; and
7. Improve detective focus.

The National Conference also indicated that as a result of the impact of flawed confessions on the integrity of the criminal justice system, legislators, courts, and police departments have begun requiring recordation of interrogations. Several states have mandated that interrogations be recorded through statutory changes. Others have imposed conditions for recordation through court rule. Even absent statutory or judicial-imposed mandates, a significant number of police departments have voluntarily adopted policies requiring interrogations to be recorded under a variety of circumstances on the theory that recordation both protects the officers involved and improves the factfinding process.

According to the National Conference, there are wide variations among the state provisions and the voluntarily adopted programs mandating electronic recordation of custodial interrogations. Some approaches promise to be more effective in protecting the innocent, convicting the guilty, minimizing coercion, and avoiding frivolous suppression motions than others. The National Conference indicated that the Uniform Electronic Recording of Custodial Interrogations Act resolves the differences found around the nation and helps improve the fairness and professionalism associated with electronic recordings.

The uniform Act mandates the electronic recording of the entire custodial interrogation process by law enforcement, but leaves it to individual states to decide where and for what types of crimes this mandate applies, as well as the means by which recording must be done. The uniform Act permits states to vary the scope of the mandate based upon local variations in cost, perceived degree of need for different categories of criminal or delinquent wrongdoing, or other pressing local considerations. The National Conference contends that combined

audio and video recording remains the ideal, and the advantages of recording exist wherever custodial interrogation occurs and for whatever criminal or delinquent wrong is involved.

RECOMMENDATION OF NORTH DAKOTA COMMISSION ON UNIFORM STATE LAWS

The North Dakota Commission on Uniform State Laws consists of nine members. The primary function of the commission is to represent North Dakota in the National Conference. The National Conference consists of representatives of all states, and its purpose is to promote uniformity in state law on all subjects on which uniformity is desirable and practicable and to serve state government by improving state laws for better interstate relationships. Under North Dakota Century Code Sections 54-35-02 and 54-55-04, the state commission may submit its recommendations for enactment of uniform laws or proposed amendments to existing uniform laws to the Legislative Management for its review and recommendation during the interim between legislative sessions.

The Uniform Electronic Recording of Custodial Interrogations Act was among the 2010 recommendations of the North Dakota Commission on Uniform State Laws for introduction in the 2011 legislative session. The uniform Act was introduced as Senate Bill No. 2125 (attached as [Appendix B](#)).

Testimony in support of Senate Bill No. 2125 from a member of the North Dakota Commission on Uniform State Laws indicated that a movement is underway throughout the country to adopt a readily available and inexpensive method of electronically recording interrogations in an effort to put an end to disputes about what occurs in an interrogation. The testimony indicated that as recordings of custodial interviews become more common, law enforcement gains experience with the process and its results. Law enforcement acknowledges, according to the testimony, that recordings yield a far better record of what occurred than the participants' testimony. It was noted that recordings of custodial interrogations almost always yield an incontestable record of what was said and done. It was also noted that an increasing number of state legislatures have been enacting laws and state supreme courts have begun issuing rulings that either require or strongly urge that electronic recordings be made of custodial interviews in major felony investigations. The testimony indicated that recording statutes have been enacted in nine states and the District of Columbia and that recent rulings in three state supreme courts have resulted in statewide recordings. It was noted that the National Conference has identified over 580 police and sheriff departments in 36 states that have voluntarily adopted the practice of using electronic devices to record custodial interrogations.

Testimony in support of Senate Bill No. 2125 from a district judge and a member of the North Dakota Commission on Uniform State Laws indicated that a study of the uniform Act would allow law enforcement agencies to fully consider the uniform Act and get information from jurisdictions in which interrogations are recorded. The testimony also noted that a study would allow for an indepth review of the costs of implementing the uniform Act and of the potential savings.

Testimony in opposition to Senate Bill No. 2125 from the chiefs of police from Bismarck and Wahpeton expressed concerns that the quantity of interviews the bill would require to be recorded would require the installation of recording equipment in additional interview rooms and would involve substantial logistical issues of indexing, storing, and retrieving of the recordings in order to establish an appropriate chain of custody as required for use in court proceedings. The Bismarck chief of police estimated a potential fiscal impact of up to \$14,000 for the additional recording equipment in addition to the storage requirements for the recordings. The testimony also indicated a concern about the establishment of the specific procedural requirements and whether those requirements would lead to additional legal challenges concerning statements made by the person who is interrogated which in turn would make it more difficult and time consuming for law enforcement officers to do their jobs. Finally, the testimony indicated that he was unaware of significant issues that exist in North Dakota with the current law enforcement practices of conducting custodial interviews or interrogations of a person suspected of committing crimes. It was noted that the bill appears to be implementing specific, stringent, and expensive requirements to address a problem that does not appear to exist. It was also noted that this bill tends to call into question the honesty, integrity, and ethics of the excellent law enforcement officers of the state and is not warranted.

Testimony from the North Dakota Association of Counties indicated that there were mixed opinions on the bill from sheriffs, state's attorneys, and trial lawyers. According to the testimony, experienced trial lawyers were comfortable with the bill because it would reduce the amount of litigation on the issue of whether the interview was conducted properly.

In response to the testimony, an amendment was adopted to conduct a study of the Uniform Electronic Recording of Custodial Interrogations Act during the 2011-12 interim.

SUGGESTED STUDY APPROACH

The committee, in its study of the feasibility and desirability of adopting the Uniform Electronic Recording of Custodial Interrogations Act, may wish to approach this study as follows:

- Receive information from the National Conference and the North Dakota Commission on Uniform State Laws regarding the adoption

- of the Uniform Electronic Recording of Custodial Interrogations Act;
- Seek information and recommendations of the Attorney General, the North Dakota Association of Counties, the North Dakota Peace Officers Association, the North Dakota State's Attorneys Association, the North Dakota Association for Justice, the State Bar Association of North Dakota, and other interested parties regarding the adoption of the Uniform Electronic Recording of Custodial Interrogations Act; and
 - Develop recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:2