

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

SECTION 1. LEGISLATIVE MANAGEMENT STUDY - UNIFORM ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS ACT. During the 2011-12 interim, the legislative management shall consider studying the feasibility and desirability of adopting the Uniform Electronic Recording of Custodial Interrogations Act. The legislative management shall report its findings and recommendations, together with any legislation necessary to implement the recommendations, to the sixty-third legislative assembly.

11.0168.01000

Sixty-second
Legislative Assembly
of North Dakota

SENATE BILL NO. 2125

Introduced by

Government and Veterans Affairs Committee

(At the request of the Commission on Uniform State Laws)

1 A BILL for an Act to adopt the Uniform Electronic Record of Custodial Interrogations Act.

2 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

3 **SECTION 1.**

4 **Definitions.**

5 In this Act:

- 6 1. "Custodial interrogation" means questioning or other conduct by a law enforcement
 7 officer which is reasonably likely to elicit an incriminating response from an individual
 8 and occurs when reasonable individuals in the same circumstances would consider
 9 themselves in custody.
- 10 2. "Electronic recording" means an audio recording or an audio and video recording that
 11 accurately records a custodial interrogation.
- 12 3. "Law enforcement agency" means a governmental entity or person authorized by a
 13 governmental entity or by state law to enforce criminal laws or investigate suspected
 14 criminal activity. The term includes a nongovernmental entity that has been delegated
 15 the authority to enforce criminal laws or investigate suspected criminal activity.
- 16 4. "Law enforcement officer" means:
- 17 a. An individual:
- 18 (1) Employed by a law enforcement agency; and
- 19 (2) Whose responsibilities include enforcing criminal laws or investigating
 20 criminal activity; or
- 21 b. An individual acting at the request or direction of an individual described in
 22 subdivision a.
- 23 5. "Place of detention" means a fixed location under the control of a law enforcement
 24 agency where individuals are questioned about an alleged crime or delinquent act.

1 The term includes a jail, police or sheriff's station, holding cell, and correctional or
2 detention facility.

3 6. "State" means a state of the United States, the District of Columbia, Puerto Rico, the
4 United States Virgin Islands, or any territory or insular possession subject to the
5 jurisdiction of the United States.

6 7. "Statement" means a communication whether it is oral, written, electronic, nonverbal,
7 or in sign language.

8 **SECTION 2.**

9 **Electronic recording requirement.**

10 1. Except as otherwise provided by sections 4 through 9 of this Act, a custodial
11 interrogation, including the giving of any required warning, advice of the rights of the
12 individual being questioned, and the waiver of any rights by the individual, must be
13 electronically recorded in its entirety if the interrogation relates to a felony or relates to
14 a delinquent act as defined in section 27-20-02. A custodial interrogation at a place of
15 detention must be recorded by both audio and video means.

16 2. If a law enforcement officer conducts a custodial interrogation to which subsection 1
17 applies without electronic recording, the officer shall prepare a written report
18 explaining the reason for not complying with this section and summarizing the
19 custodial interrogation process and the individual's statements.

20 3. A law enforcement officer shall prepare the report required by subsection 2 as soon as
21 practicable after completing the interrogation.

22 4. As soon as practicable, a law enforcement officer conducting a custodial interrogation
23 outside a place of detention shall prepare a written report explaining the decision to
24 interrogate outside a place of detention and summarizing the custodial interrogation
25 process and the individual's statements made outside a place of detention.

26 5. This section does not apply to a spontaneous statement made outside the course of a
27 custodial interrogation or a statement made in response to questions asked routinely
28 during the processing of the arrest of an individual.

29 **SECTION 3.**

1 **Notice and consent not required.**

2 Notwithstanding any other provision of law, a law enforcement officer conducting a custodial
3 interrogation is not required to obtain the individual's consent to the recording nor to inform the
4 individual being interrogated that an electronic recording is being made of the interrogation. This
5 Act does not permit a law enforcement officer or a law enforcement agency to record a private
6 communication between an individual and the individual's legal counsel.

7 **SECTION 4.**

8 **Exception for exigent circumstances.**

9 A custodial interrogation to which section 2 of this Act otherwise applies need not be
10 electronically recorded if recording is not feasible because of exigent circumstances. The law
11 enforcement officer conducting the interrogation shall electronically record an explanation of the
12 exigent circumstances before conducting the interrogation, if feasible, or as soon as practicable
13 thereafter.

14 **SECTION 5.**

15 **Exception for individual's refusal to be electronically recorded.**

- 16 1. A custodial interrogation to which section 2 of this Act otherwise applies need not be
17 electronically recorded if the individual to be interrogated indicates that the individual
18 will not participate in the interrogation if it is electronically recorded. If feasible, the
19 agreement to participate without recording must be electronically recorded.
- 20 2. If, during a custodial interrogation to which section 2 of this Act otherwise would apply,
21 the individual being interrogated indicates that the individual will not participate in
22 further interrogation unless electronic recording ceases, the remainder of the custodial
23 interrogation need not be electronically recorded. If feasible, the individual's
24 agreement to participate without further recording must be electronically recorded.
- 25 3. A law enforcement officer may not encourage, with intent to avoid the requirement of
26 electronic recording, an individual to request that a recording not be made.

27 **SECTION 6.**

28 **Exception for interrogation conducted by other jurisdictions.**

29 If a custodial interrogation occurs in another state in compliance with that state's law or is
30 conducted by a federal law enforcement agency in compliance with federal law, the

1 interrogation need not be electronically recorded unless the interrogation is conducted with
2 intent to avoid the requirement of electronic recording in section 2 of this Act.

3 **SECTION 7.**

4 **Exception based on belief that recording is not required.**

5 1. A custodial interrogation to which section 2 of this Act otherwise applies need not be
6 electronically recorded if the interrogation occurs when no law enforcement officer
7 conducting the interrogation has knowledge of facts in circumstances that would lead
8 an officer reasonably to believe that the individual being interrogated may have
9 committed a felony or delinquent act for which section 2 of this Act requires that a
10 custodial interrogation be recorded.

11 2. If, during a custodial interrogation, the individual reveals facts and circumstances
12 giving a law enforcement officer conducting the interrogation reason to believe that a
13 felony or delinquent act has been committed for which section 2 of this Act requires
14 that a custodial interrogation be electronically recorded, continued custodial
15 interrogation concerning that felony or delinquent act must be electronically recorded,
16 if feasible.

17 **SECTION 8.**

18 **Exception for safety of individual or protection of identity.**

19 A custodial interrogation to which section 2 of this Act otherwise applies need not be
20 electronically recorded if a law enforcement officer conducting the interrogation or the officer's
21 superior reasonably believes that electronic recording would disclose the identity of a
22 confidential informant or jeopardize the safety of an officer, the individual being interrogated, or
23 another individual. If feasible and consistent with the safety of a confidential informant, an
24 explanation of the basis for the belief that electronic recording would disclose the informant's
25 identity must be electronically recorded at the time of the interrogation. If contemporaneous
26 recording of the basis for the belief is not feasible, the recording must be made as soon as
27 practicable after the interrogation is completed.

28 **SECTION 9.**

29 **Exception for equipment malfunction.**

30 1. All or part of a custodial interrogation to which section 2 of this Act otherwise applies
31 need not be electronically recorded to the extent that recording is not feasible because

1 the available electronic recording equipment fails, despite reasonable maintenance of
2 the equipment, and timely repair or replacement is not feasible.

3 2. If both audio and video recording of a custodial interrogation are otherwise required by
4 section 2 of this Act, recording may be by audio alone if a technical problem in video
5 recording equipment prevents video recording, despite reasonable maintenance of the
6 equipment, and timely repair or replacement is not feasible.

7 3. If both audio and video recording of a custodial interrogation are otherwise required by
8 section 2 of this Act, recording may be by video alone if a technical problem in the
9 audio recording equipment prevents audio recording, despite reasonable maintenance
10 of the equipment, and timely repair or replacement is not feasible.

11 **SECTION 10.**

12 **Burden of persuasion.**

13 If the prosecution relies on an exception in sections 4 through 9 of this Act to justify a failure
14 to make an electronic recording of a custodial interrogation, the prosecution must prove by a
15 preponderance of the evidence that the exception applies.

16 **SECTION 11.**

17 **Notice of intent to introduce unrecorded statement.**

18 If the prosecution intends to introduce in its case in chief a statement made during a
19 custodial interrogation to which subsection 1 of section 2 of this Act applies which was not
20 electronically recorded, the prosecution, not later than the time specified by the North Dakota
21 Rules of Criminal Procedure, shall serve the defendant with written notice of that intent and of
22 any exception on which the prosecution intends to rely.

23 **SECTION 12.**

24 **Procedural remedies.**

25 1. Unless the court finds that an exception in sections 4 through 9 of this Act applies, the
26 court shall consider the failure to make an electronic recording of all or part of a
27 custodial interrogation to which section 2 of this Act applies as a factor in determining
28 whether a statement made during the interrogation is admissible, including whether it
29 was voluntarily made or is reliable.

- 1 2. If the court admits into evidence a statement made during a custodial interrogation that
2 was not electronically recorded in compliance with section 2 of this Act, the court, upon
3 request of the defendant, shall give cautionary instructions to the jury.

4 **SECTION 13.**

5 **Handling and preservation of electronic recording.**

- 6 Each law enforcement agency shall establish and enforce procedures to ensure that the
7 electronic recording of any or all of a custodial interrogation is identified, accessible, and
8 preserved in the manner required by state law and rules of court.

9 **SECTION 14.**

10 **Rules relating to electronic recording.**

- 11 1. The attorney general shall adopt and enforce rules to implement this Act.
12 2. The rules adopted under subsection 1 must address the following topics:
13 a. The manner in which an electronic recording of a custodial interrogation must be
14 made;
15 b. The collection and review of electronic recording data, or the absence thereof, by
16 superiors within the law enforcement agency;
17 c. The assignment of supervisory responsibilities and a chain of command to
18 promote internal accountability;
19 d. A process for explaining noncompliance with procedures and imposing
20 administrative sanctions for failures to comply that are not justified;
21 e. A supervisory system expressly imposing on specific individuals a duty to ensure
22 adequate staffing, education, training, and material resources to implement this
23 Act; and
24 f. A process for monitoring the chain of custody of electronic recordings of custodial
25 interrogations.
26 3. The rules adopted under subsection 1 for video recording must contain standards for
27 the angle, focus, and field of vision of a recording device which reasonably promote
28 accurate recording of a custodial interrogation at a place of detention and reliable
29 assessment of its accuracy and completeness.
30 4. Each law enforcement agency shall adopt and enforce rules providing for
31 administrative discipline of a law enforcement officer found by a court or a supervisor

1 of the agency to have violated the terms of this Act. The rules must provide a range of
2 disciplinary sanctions reasonably designed to promote compliance with this Act.

3 **SECTION 15.**

4 **Limitation of liability.**

5 1. A law enforcement agency that has enforced rules adopted pursuant to section 14 of
6 this Act which are reasonably designed to ensure compliance with the terms of this Act
7 is not subject to civil liability for damages arising from a violation of this Act.

8 2. This Act does not create a cause of action against a law enforcement officer.

9 **SECTION 16.**

10 **Self-authentication.**

11 1. In any pretrial or posttrial proceeding, an electronic recording of a custodial
12 interrogation is self-authenticating if it is accompanied by a certificate of authenticity
13 sworn under oath or affirmation by an appropriate law enforcement officer.

14 2. This Act does not limit the right of a defendant under law other than this Act to
15 challenge the authenticity of an electronic recording of a custodial interrogation.

16 **SECTION 17.**

17 **No right to electronic recording and transcript.**

18 1. This Act does not create a right of an individual to require a custodial interrogation to
19 be electronically recorded.

20 2. This Act does not require preparation of a transcript of an electronic recording of a
21 custodial interrogation.

22 **SECTION 18.**

23 **Relation to Electronic Signatures in Global and National Commerce Act.**

24 This Act modifies, limits, and supersedes the federal Electronic Signatures in Global and
25 National Commerce Act [15 U.S.C. 7001 et seq.] but does not modify, limit, or supersede
26 section 101(c) of that Act [15 U.S.C. 7001(c)] or authorize electronic delivery of any of the
27 notices described in section 103(b) of that Act [15 U.S.C. 7003(b)].