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MODEL LEGISLATION, 2009 STATE LEGISLATIVE SESSIONS

**AN ACT DIRECTING THE ELECTRONIC RECORDING
OF CUSTODIAL INTERROGATIONS**

SECTION 1. LEGISLATIVE INTENT

Because properly recorded interrogations provide the best evidence of the communications that occurred during an interrogation; prevent disputes about how an officer conducted himself or treated a suspect during the course of an interrogation; prevent a defendant from lying about the account of events he originally provided to law enforcement; spare judges and jurors the time necessary and need to assess which account of an interrogation to believe; and enhance public confidence in the criminal process, it is the legislature's intent to require the video and audio recording of all custodial interrogations in [State].

SECTION 2. DEFINITIONS

A. "Place of detention" means a jail, police or sheriff's station, holding cell, correctional or detention facility, or other place where persons are questioned in connection with criminal charges or juvenile delinquency proceedings.

B. "Custodial interrogation" means any interrogation involving a law enforcement officer's questioning that is reasonably likely to elicit incriminating responses and in which a reasonable person in the subject's position would consider himself to be in custody, beginning when a person should have been advised of his Miranda rights and ending when the questioning has completely finished.



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

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

SECTION 3. ELECTRONIC RECORDING PROCEDURES

A. All statements made by a person during a custodial interrogation relating to a crime described in the following sections of the [insert jurisdiction] Criminal and Juvenile Codes shall be electronically recorded: [insert section numbers].

B. If any part of the interrogation necessarily takes place outside of a place of detention, audio recording is an acceptable alternative to audio and visual recording.

C. In places of detention, the camera shall be simultaneously focused upon both the interrogator and the suspect.

SECTION 4. PRESUMPTION OF INADMISSIBILITY

Except as provided in Sections 5 and 6 of this Act, all statements made by a person during a custodial interrogation that are not electronically recorded, and all statements made thereafter by the person during the custodial interrogations, including but not limited to statements that are electronically recorded, shall be inadmissible as evidence against the person in any criminal or juvenile delinquency proceeding brought against the person.

SECTION 5. OVERCOMING THE PRESUMPTION OF INADMISSIBILITY

The presumption of inadmissibility of statements provided in Section 4 of this Act may be overcome, and statements that were not electronically recorded may be admitted into evidence in a criminal or juvenile delinquency proceeding brought against the person, if the court finds:

- A. That the statements are admissible under applicable rules of evidence;
- B. That the statements are proven by [insert applicable burden of proof] to have been made voluntarily, and are reliable;
- C. That, unless unfeasible to do so, law enforcement personnel made a contemporaneous audio and visual record of the reason for not making an electronic recording of the statements; and
- D. That it is proven by [insert applicable burden of proof] that one or more of the following circumstances existed at the time of the custodial interrogation:
 1. The questions put forth by law enforcement personnel, and the person's responsive statements, were part of the routine processing or "booking" of the person;
 2. Before or during a custodial interrogation, after having consulted with his or her lawyer, the person unambiguously declared on videotape that he or she would only respond to the officer's questions if his or her statements were not electronically recorded;
 3. The custodial interrogation necessarily took place in another jurisdiction and was conducted by officials of that jurisdiction in compliance with the law of that jurisdiction;
or
 4. Exigent circumstances existed which prevented the making of, or rendered it not feasible to make, an electronic recording of the custodial interrogation.

SECTION 6. EXCEPTIONS

Statements, whether or not electronically recorded, which are admissible under applicable rules of evidence, and are proven by clear and convincing evidence to have been made by the person voluntarily, and are reliable, may be admitted into evidence in a criminal or juvenile delinquency proceeding brought against the person if the court finds the custodial interrogation occurred before a grand jury or court.

SECTION 7. MONITORING REQUIREMENT

A. Compliance with the electronic recording requirement shall be monitored by the Judicial Council [or analogous [State] law enforcement practice committee] through the submission of forms developed by the Judicial Council to survey recorded interrogations and outcomes and identify any patterns of noncompliance. These forms shall be submitted by the trial judge and the prosecutor for:

1. cases in which recorded interrogations were introduced as evidence in a criminal case;
2. cases in which interrogations were not recorded but were nonetheless introduced as evidence in a criminal case;
3. cases in which interrogations were recorded and a plea of guilty to felony charges was entered and accepted by the court; and
4. cases in which interrogations were not recorded and a plea of guilty to felony charges was entered and accepted by the court.

B. Compliance with the electronic recording requirement shall be monitored by the Department



of Public Safety [or analogous [State] law enforcement practice committee] through the submission of forms by the interrogating officer(s) in each case of an unrecorded interrogation, both those not presumed inadmissible into evidence under Section 5, Subsection D clauses 2, 3 and 4 under this Act, or those inadmissible under this Act. These forms shall be developed by the Department of Public Safety, with the expectation that the reporting forms shall identify any patterns of noncompliance.

SECTION 8. 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.



SECTION 9. EFFECTIVE DATE

This Act shall take effect on [date].