

RESOLUTION 07-07-2016 (As Amended)

DIGEST

Welfare and Institutions Code: Electronic Recording of Custodial Interrogation of Minors
Adds Welfare and Institutions Code section 625.01 to require custodial interviews of minors suspected of committing a crime to be recorded by a law enforcement officer.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Welfare and Institutions Code section 625.01 to read as follows:

1 §625.01

2 Electronic recording of custodial interrogation of minor; Exceptions; Admission of
3 unrecorded statements; Failure to comply with requirement

4 (a) Except as otherwise provided by Penal Code section 859.5, a custodial interrogation
5 of a minor shall be electronically recorded in its entirety. A statement that is electronically
6 recorded as required pursuant to this section creates a rebuttable presumption that the
7 electronically recorded statement was, in fact, given and was accurately recorded by the
8 prosecution's witnesses, provided that the electronic recording was made of the custodial
9 interrogation in its entirety and the statement is otherwise admissible.

10 (b) The requirement for the electronic recodation of a custodial interrogation pursuant to
11 this section shall not apply under any of the following circumstances:

12 (1) Electronic recording is not feasible because of exigent circumstances. The exigent
13 circumstances shall be recorded in the police report.

14 (2) The minor to be interrogated states that he or she will speak to a law enforcement
15 officer only if the interrogation is not electronically recorded. If feasible, that statement shall be
16 electronically recorded. The requirement also does not apply if the minor being interrogated
17 indicates during interrogation that he or she will not participate in further interrogation unless
18 electronic recording ceases. If the minor being interrogated refuses to record any statement, the
19 officer shall document that refusal in writing.

20 (3) The custodial interrogation took place in another jurisdiction and was conducted by
21 law enforcement officers of that jurisdiction in compliance with the law of that jurisdiction,
22 unless the interrogation was conducted with intent to avoid the requirements of this section.

23 (4) The interrogation occurs under circumstances which would require recording pursuant
24 to Penal Code Section 859.5. Under such circumstances, the interrogation shall be recorded in
25 compliance with that section.

26 (5) A law enforcement officer conducting the interrogation or the officer's superior
27 reasonably believes that electronic recording would disclose the identity of a confidential
28 informant or jeopardize the safety of an officer, the minor being interrogated, or another
29 individual. An explanation of the circumstances shall be recorded in the police report.

30 (6) The failure to create an electronic recording of the entire custodial interrogation was
31 the result of a malfunction of the recording device, despite reasonable maintenance of the
32 equipment, and timely repair or replacement was not feasible.

33 (7) The questions presented to a minor by law enforcement personnel and the minor's
34 responsive statements were part of a routine processing or booking of that minor. Electronic

35 recording is not required for spontaneous statements made in response to questions asked during
36 the routine processing of the arrest of the minor.

37 (c) If the prosecution relies on an exception in subdivision (b) to justify a failure to make
38 an electronic recording of a custodial interrogation, the prosecution shall show by clear and
39 convincing evidence that the exception applies.

40 (d) A minor's statements that were not electronically recorded pursuant to this section
41 may be admitted into evidence in a criminal proceeding or in a juvenile court proceeding, as
42 applicable, if the court finds that all of the following apply:

43 (A) The statements are admissible under applicable rules of evidence.

44 (B) The prosecution has proven by clear and convincing evidence that the statements
45 were made voluntarily.

46 (C) Law enforcement personnel made a contemporaneous audio or audio and visual
47 recording of the reason for not making an electronic recording of the statements. This provision
48 does not apply if it was not feasible for law enforcement personnel to make that recording.

49 (D) The prosecution has proven by clear and convincing evidence that one or more of the
50 circumstances described in subdivision (b) existed at the time of the custodial interrogation.

51 (e) Unless the court finds that an exception in subdivision (b) applies, all of the following
52 remedies shall be granted as relief for noncompliance:

53 (A) Failure to comply with any of the requirements of this section shall be considered by
54 the court in adjudicating motions to suppress a statement of a minor made during or after a
55 custodial interrogation.

56 (B) Failure to comply with any of the requirements of this section shall be admissible in
57 support of claims that a minor's statement was involuntary or is unreliable, provided the evidence
58 is otherwise admissible.

59 (C) If the court finds that a minor was subject to a custodial interrogation in violation of
60 subdivision (a) in a criminal action, the court shall provide the jury with an instruction, to be
61 developed by the Judicial Council, that advises the jury to view with caution the statements made
62 in that custodial interrogation.

63 (f) The interrogating entity shall maintain the original or an exact copy of an electronic
64 recording made of a custodial interrogation until all proceedings are final or the prosecution for
65 that offense is barred by law. The interrogating entity may make one or more true, accurate, and
66 complete copies of the electronic recording in a different format.

67 (g) For the purposes of this section, the following terms have the following meanings:

68 (i) "Custodial interrogation" means any interrogation involving a law enforcement
69 officer's questioning that is reasonably likely to elicit incriminating responses, and in which a
70 reasonable person in the subject's position would consider himself or herself to be in custody,
71 beginning when a minor should have been advised of his or her constitutional rights, including
72 the right to remain silent, the right to have counsel present during any interrogation, and the right
73 to have counsel appointed if the minor is unable to afford counsel, and ending when the
74 questioning has completely finished.

75 (ii) "Electronic recording" means a video recording that accurately records a custodial
76 interrogation.

77 (iii) "Law enforcement officer" means a person employed by a law enforcement agency
78 whose duties include enforcing criminal laws or investigating criminal activity, or any other
79 person who is acting at the request or direction of that person.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem: A valid waiver of the *Miranda* rights requires the prosecution show by a preponderance of the evidence that the waiver was knowing, intelligent, and voluntary. Recent decisional law and the social sciences warn that the admissions and confessions of juveniles require special caution due to their lack of experience, maturity and judgment. “[T]o ignore the very real differences between children and adults--would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults.” (J.D.B. v. North Carolina (2011) 564 U.S. 261, 131 S. Ct. 2394, 2408.) Courts must use special care in scrutinizing the record to determine whether a minor's custodial statement is truly voluntary. (see, In re Joseph H. (2015) 237 Cal. App. 4th 517.) When a juvenile's waiver is at issue, consideration must be given to factors such as the juvenile's age, experience, education, background, and intelligence, and whether he or she has the capacity to understand the warnings given, the nature of the Fifth Amendment rights, and the consequences of waiving those rights. (People v. Nelson (2012) 53 Cal. 4th 367, 375.)

A mere summary recital by a police officer that the minor waived his *Miranda* rights followed by an alleged paraphrased confession as is usually found in most police reports simply does not permit a court to give the due consideration to the factors it must in its determination of the voluntariness of the waiver or the subsequent statement. Both verbal and nonverbal indications of coercion are not preserved for later in court review.

The Solution: Add Welfare and Institutions Code section 625.01 which mandates the video recording of a custodial interrogation of a minor who is suspected of committing a crime. The usually objection of cost or unavailability of video recording equipment no longer is viable in the digital age. Many law enforcement departments are already equipped with digital video recording devices both in the field and at the station. Indeed, technology has advanced to the point where even an inexpensive cell phone has a digital video recorder capable of DVD quality recording. A video of the interrogation preserves for both counsel and the court the best record upon which expert testimony, argument and ultimately a proper ruling may be based. Like Penal Code section 859.5, upon which this resolution is modeled, exceptions and remedies for noncompliance are set forth in the statutory language.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

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RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution adds Welfare and Institutions Code section 625.01 to require custodial interviews of minors suspected of committing a crime to be recorded by a law enforcement officer. This resolution should be approved in principle because, even though electronic recording is an administrative burden, it removes any reasonable doubt about what a suspect said, protects law enforcement officers from unfair attacks on their integrity, and helps expedite fair resolutions.

Currently, Penal Code section 859.5 requires the electronic recording of custodial interviews of minors who are murder suspects. Because minors are particularly susceptible to undue influence in general, it would be beneficial to record all interviews involving minor suspects to ensure that any statements are made knowingly and voluntarily.

In addition, recording suspect interviews benefits law enforcement by dispelling any claims of heavy-handed tactics or misstating what was said. (See Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins* (Spring 2005) *Journal of Criminal Law and Criminology*.) Recently, the Department of Justice adopted a policy of recording suspect interviews. (See Johnson, *New DOJ Policy Urges Agents To Videotape Interrogations* (May 21, 2014) NPR.)