

Why Michigan Police Agencies Should Embrace a Policy to Record Certain Custodial Interrogations

By Gene King, LEAF Coordinator

In the past few years, the Michigan Municipal League Liability and Property Pool has paid significant settlements to some plaintiffs who alleged they became the victim of civil rights violations because of police work that they described as less than professional. In these cases, had there been a video or audio tape of the custodial interrogations, the content of the tapes might have corroborated the prosecution's assertion that the officers acted appropriately. On the other hand, a tape that documented inappropriate conduct by the officers would have provided a means for management and/or the prosecutor to identify it and take some action to fix it.

Without graphic documentation of the custodial interrogations, the department management, the prosecutor, and the defense team, which the MML provided, could not overcome the allegation of inappropriate behavior that was the cause of the civil rights violations in these cases. The cost to the MML Pool was several million dollars. Since the MML Pool is not an insurance company but a group of municipal entities that share risk, that is a whole lot of your money!

Recently, MML's Risk Management has called for its member law enforcement agencies to adopt the Law Enforcement Action Forum's Model Policy for *AUDIO/VISUAL RECORDING OF CUSTODIAL INTERROGATIONS*. This does not result only from the cases discussed above, but also arises from the proliferation of similar cases in the past few years. The technology for creating audio-visual records of police interrogations has improved and the public and the courts have come to expect that law enforcement will keep pace.

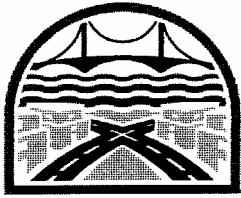
As a historical frame of reference, the first call for mandatory taping came just ten years after Miranda. In 1975, the American Law Institute in *A Model Code of Pre-Arrest Procedure* ss130.4 (3) recommended recording interrogations to eliminate disputes over the veracity of the statements. In the last couple of years, the courts and the legislature have thrust recording requirements on law enforcement agencies in Alaska, Illinois, New Jersey, Minnesota, Massachusetts, Maine, Texas, Wisconsin, and Washington D.C. Legislators from several other states are considering similar measures. Michigan is one of them.

A Hot Topic for Law Enforcement

As you read this, the Michigan Legislature has bills pending to make custodial recording mandatory. The Michigan Bar Association has convened a Task Force on Custodial Interrogations. Chief Ervin Portis of the Jackson Police Department is representing the Michigan Chief's of Police Association on the Task Force. Chief Portis says the MACP, MSA and PAAM all adamantly oppose mandatory recording of custodial interrogations. Nevertheless, all are working with the American Bar Association to achieve consensus on best practices for recording custodial interrogations. If the members reach consensus, the Task Force will then be looking for departments to participate in the testing of those practices.

Newspaper headlines nationwide have reported several situations in which a suspect, who had confessed to a crime, was later found to be innocent. Michigan has had several cases beyond those the MML Pool covered. Research on false confessions has revealed why people falsely confess. Unfortunately, one major cause of false confessions -- and one that is gut wrenching for any professional law enforcement officer -- is coercion or inappropriate behavior by law enforcement. To make matters worse, the victims of coercion are often vulnerable individuals with diminished capacity or a mental impairment, individuals who abuse substances, or individuals who are ignorant of the law.

Law Enforcement Action Forum NEWSLETTER



Volume 13, Issue 3

October 2006



**MICHIGAN MUNICIPAL LEAGUE LIABILITY & PROPERTY POOL
MICHIGAN MUNICIPAL LEAGUE WORKERS' COMPENSATION FUND
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Read the Convincing Research

The support to tape custodial interrogations for the most serious incidents is becoming quite compelling. The web sites listed below are good sources to garner a better understanding of the issues. They are the Innocence Project at www.innocenceproject.org and the California Commission on the Fair Administration of Justice at www.ccfaj.org/rr-false-official.html. Both are credible sources and offer very pointed discussions of some of the latest research on the topic of taping interrogations.

The International Association of Chiefs of Police recently offered some similar thoughts about taping interrogations in a brief and concise manner. Use this link to go to http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=855&issue_id=42006 (Jack Collins, "Chief's Counsel, Recording Interrogations," *The Police Chief*, Vol. 73, no. 4, April 2006. John M. (Jack) Collins is General Counsel for the Massachusetts Chiefs of Police Association. His article is a synopsis of today's police environment and talks about the Sullivan Report listed below.)

You might also read *Memorandum and Order Granting Defendants' Motions to Suppress*, in a Detroit DEA case written by the Honorable Avern Cohen in a United States District Court, Eastern District of Michigan, Southern Division, *U.S. v JaJuana Lewis and Theotrice Chambers, Case No. 04-80359*. In Section III, Discussion, Judge Cohen lays out a well-documented discussion on video recording custodial interrogations. It is worth reading because it is concise and points directly to the research and opinions that are driving this issue. Because he has been a federal judge of long standing in Michigan, Judge Cohen represents the mindset of the legal community. In short, he lays out a very good argument for videotaping but does not rule on the issue. Instead, he succinctly rules that the prosecution cannot support that they gave the defendants Miranda, which effectively throws out their confessions.

The reality is that video and audio recordings are commonplace in today's society. The public generally knows it has no expectation of privacy in a public place, and it is rapidly learning it has none in the workplace. (See LEAF Newsletter, "A Public Employers Right to Search in the Workplace," Dec 2005) Look at how many television stations broadcast reality or "most outrageous" programs about police, the courts, or private sector businesses catching and prosecuting bad guys. The programs show or imply that there are all kinds of video tapes available as evidence. Look at the cop reality shows that run only police produced videos. With common use of in-car cameras, the recording of police activity is commonplace. The public is beginning to have an expectation that police will document their allegations with visual or audio proof of what actually occurred.

Other than the administrative issue of cost and logistics, the research on recording custodial interrogations debunks many of the arguments that investigators and officers use to prevent the implementation of this technology. Even the issue of expense is rapidly becoming a non-issue as recording equipment becomes less expensive and more easily attainable. Generally, when it comes to the logistics, the problem is only as big as the desire to solve it. As you review the research cited in this Newsletter, you will see that many departments in the country are already taping. A discussion with LEAF members also leads to the conclusion that several in Michigan are already taping for serious crimes.

Another article of interest is the "Sullivan Report", written by Thomas P. Sullivan, former United States Attorney for the Northern District of Illinois (www.law.northwestern.edu/depts/clinic/wrongful/Causes/CustodialInterrogations.htm). The study examines public acceptance and expectations about recording custodial interrogations. Sullivan's report documents his analysis of research, including reports from the International Association of Chiefs of Police and a study commissioned by John E. Reid and Associates concerning recording interrogations. Among his conclusions are:

We are now accustomed to being recorded in private buildings, government offices, tollbooths, stores, warehouses, factories and airports, and during many of our telephone calls. Police cars are equipped with cameras to record traffic stops. Videotaped depositions now take place routinely. We rely on video to solve disputes in sports events, and to memorialize important occasions such as births, birthdays, weddings, holidays and vacations. We do so because the recordings enable us to replay past events in real-time, and thus to have a far more accurate and complete understanding of what occurred than still pictures or oral recountings can provide. These reasons apply with equal force to the questioning of suspects in police custody.

Jurors are coming to expect recordings when questioning takes place in police station interview rooms. When no recordings are made, defense lawyers are quick to argue that unfavorable inferences should be drawn.

This practice has been a long time coming, but as shown by my informal survey, it has already been adopted by a significant number of law enforcement agencies throughout the country as a wise and effective police practice.

The Law on Recording Custodial Interrogations

While the discussion on this topic is compelling, it does not address what the law says. LEAF turned to its Legal Advisor, Audrey Forbush of O'Connor, DeGrazia, Tamm and O'Connor, PC who said that, in brief, the United States Supreme Court has rejected the idea that due process requires the police to record custodial interrogations (*California v. Trombetta*, 467 U.S. 479; 104 S Ct 2528; 81 L.Ed.2d 413 (1984)). The Michigan Court of Appeals has also rejected the notion that the Michigan Constitution requires a custodial interrogation to be recorded in *People v. Fike*, 228 Mich.App 178, 185; 577 NW2d 903 (1998).

Audrey continued that the Michigan Court of Appeals recently revisited the *Fike* decision in *People v. Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004). In that case, they rejected the defendant's argument about recording custodial interrogations. The Court noted that, in *Fike*, *supra*, the Court "clearly and explicitly rejected the defendant's argument that testimony arising out of his custodial interrogation should be suppressed because it was not tape recorded." In *Geno*, the Court specifically said:

We clearly and explicitly rejected the defendant's argument that testimony arising out of his custodial interrogation should be suppressed because it was not tape recorded. We relied heavily on the fact that this is not required by the United States Constitution, stating: "the courts of this state should reject unprincipled creation of state constitutional rights that exceed their federal counterparts." *Id.*, 185, quoting *Sitz v Dep't of State Police*, 443 Mich 744, 763; 506 NW2d 209 (1993).

As of yet, there is nothing from the Courts or the Legislature that requires recording of custodial interrogations.

Advice of LEAF's Legal Counsel

Although the Courts do not mandate it, Audrey believes that the electronic recording of custodial interrogations is a practical and potentially powerful law enforcement tool. These recordings can both eliminate disputes over what took place when police questioned the suspect and can also have a great evidentiary value as well. The recording also provides the department's management with a powerful tool to audit the competency and effectiveness of their department performance in this area.

Adhering to a policy of recording custodial interrogations will prevent suspects, who confess and/or implicate themselves, from claiming that the police

1. Never read them their Miranda Rights
2. Continued questioning them even though they had asked for a lawyer, or
3. Threatened, forced, and/or abused them.

Furthermore, they cannot claim they did not say what they said!

Audrey suggests that, before we get our collective righteous indignation in an uproar over custodial recordings when the Courts do not mandate them, that we step back, take a breath, and relax a little. She sees this issue as the "Oatmeal" commercial for today's law enforcement. You know the commercial where the guy tells you "It is just the right thing to do!" She points to a more personal example to which almost everyone can relate. This is one of those situations where, as a kid, you knew that, technically, you didn't have to do a chore, but it really is the right thing to do, especially since Dad or Mom were probably going to say to do it because "I said so"!

Audrey was very frank in her comments. She believes that Michigan law enforcement is facing one of those right thing situations. More and more states will be adopting legislation that mandates the recording of all felony custodial interrogations. She points to the Court of Appeals in *Fike*, *supra* at 188, in which Judge Fitzgerald called for the Legislature to promulgate a statute mandating electronic recording of interrogations. That was in 1998. The past use of such recordings and the research on them support the benefits of this practice and far outweigh the negatives.

Audrey said the tide is rising and departments should get onboard with the decision to record all in-custody interrogations for incidents involving any form of homicide or incidents involving serious injury before the legislature

mandates it. She recommends adopting the *LEAF Model Policy for the Audio/Visual Recording of Custodial Interrogations* as a demonstration to the courts and the legislature that Michigan Law Enforcement understands the importance of protecting the rights of not only the general public but also those who are accused of crimes.

Post a Sign

When audio/visual surveillance is used, departments need to post a sign announcing the practice at the entry points to the facility. In *People v DeGeer*, 140 Mich App 46; 363 N.Wed 37 (1985) the court ruled that where a sign indicates that a conversations are recorded, an individual only has a limited expectation of privacy, and the recording does not violate the his constitutional rights. An unpublished Michigan Court of Appeals decision (June 17, 2004) in *People v Crider*, Jackson Circuit Court NO. 245900 reaffirmed *DeGeer*. In this case, the plaintiff made a cell phone call about a weapon while in an interview room that was under electronic surveillance. The call led to police being able to seize the weapon. The Court ruled that the defendant had no justifiable or legitimate expectation of privacy in the department's interview room because there was a sign in the lobby announcing that the premises were under audio surveillance.

MML Risk Management Services Supports Recordings

The Michigan Municipal League's Risk Management Services agrees that Michigan's Law Enforcement community must move in the direction of voluntary recording of custodial interrogations before control is lost to a mandate from the Legislature. That is why the Director of Risk Management, Mike Forster, asked the Law Enforcement Action Forum to develop a Model Policy for the LERC Manual for members to use. Mike said the issue is one in which no matter what the defendant or plaintiff alleges the facts, as presented by the tapes, will speak for themselves. He supports Audrey's reasoning on the need to adopt a recording policy and believes that it is the right thing to do. Department managers will have tools to evaluate and correct the actions of their officers as they do with in-car video. The tapes will also reduce the ability of plaintiff attorneys to claim unreasonable civil rights violations that are so expensive to defend.

LEAF Provides Assistance

LEAF has added the Sample Policy and Procedure for the *AUDIO/VISUAL RECORDING OF CUSTODIAL INTERROGATIONS* to Chapter 21 of the *Manual for Law Enforcement Risk Control*. LEAF has also updated the *Sample Policy and Procedures for DEPARTMENT AUDIO AND VISUAL MEDIA RECORDING*, which was the former in-car video recording policy. You can also find it in Chapter 21 of the *Manual for Law Enforcement Risk Control*. The Manual is located on the web at mml.org under the Insurance tab.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance with the loss prevention techniques suggested herein might reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.