S T A T E O F N E W Y O R K

8548

2011-2012 Regular Sessions

I N A S S E M B L Y

July 20, 2011

Introduced by M. of A. LENTOL -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to requiring electronic recordation of custodial interrogations

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Short title. This act shall be known and may be cited as the "uniform electronic recordation of custodial interrogations act".

S 2. The criminal procedure law is amended by adding a new article 66 to read as follows:

ARTICLE 66

UNIFORM ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT

SECTION 66.00 DEFINITIONS.
66.05 ELECTRONIC RECORDING REQUIREMENT.
66.10 NOTICE AND CONSENT NOT REQUIRED.
66.15 EXCEPTIONS.
66.20 NOTICE OF INTENT TO INTRODUCE UNRECORDED STATEMENT.
66.25 PROCEDURAL REMEDIES.
66.30 RULES RELATING TO ELECTRONIC RECORDING.
66.35 LIMITATION OF LIABILITY.
66.40 SELF-AUTHENTICATING.
66.45 NO RIGHT TO ELECTRONIC RECORDING OR TRANSCRIPT.
66.50 RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.

S 66.00 DEFINITIONS.

AS USED IN THIS ARTICLE:

1. "CUSTODIAL INTERROGATION" MEANS QUESTIONING OR OTHER CONDUCT BY A LAW ENFORCEMENT OFFICER WHICH IS REASONABLY LIKELY TO ELICIT AN INCRIMINATING RESPONSE FROM AN INDIVIDUAL AND OCCURS WHEN REASONABLE INDIVIDUALS IN THE SAME CIRCUMSTANCES WOULD CONSIDER THEMSELVES IN CUSTODY.

2. "ELECTRONIC RECORDING" MEANS AN AUDIO RECORDING OR AUDIO AND VIDEO RECORDING THAT ACCURATELY RECORDS A CUSTODIAL INTERROGATION. "RECORD ELECTRONICALLY" AND "RECORDED ELECTRONICALLY" HAVE A CORRESPONDING MEANING.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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3. "LAW ENFORCEMENT AGENCY" MEANS A GOVERNMENTAL ENTITY OR PERSON AUTHORIZED BY A GOVERNMENTAL ENTITY OR STATE LAW TO ENFORCE CRIMINAL LAWS OR INVESTIGATE SUSPECTED CRIMINAL ACTIVITY. THE TERM INCLUDES A NONGOVERNMENTAL ENTITY THAT HAS BEEN DELEGATED THE AUTHORITY TO ENFORCE CRIMINAL LAWS OR INVESTIGATE SUSPECTED CRIMINAL ACTIVITY. THE TERM DOES NOT INCLUDE A LAW ENFORCEMENT OFFICER.

4. "LAW ENFORCEMENT OFFICER" MEANS:

(A) AN INDIVIDUAL EMPLOYED BY A LAW ENFORCEMENT AGENCY WHOSE RESPONSIBILITIES INCLUDE ENFORCING CRIMINAL LAWS OR INVESTIGATING SUSPECTED CRIMINAL ACTIVITY; OR

(B) AN INDIVIDUAL ACTING AT THE REQUEST OR DIRECTION OF AN INDIVIDUAL DESCRIBED IN PARAGRAPH (A) OF THIS SUBDIVISION.

5. "PERSON" MEANS AN INDIVIDUAL, CORPORATION, BUSINESS TRUST, STATUTORY TRUST, ESTATE, TRUST, PARTNERSHIP, LIMITED LIABILITY COMPANY, ASSOCIATION, JOINT VENTURE, PUBLIC CORPORATION, GOVERNMENT OR GOVERNMENTAL SUBDIVISION, AGENCY, OR INSTRUMENTALITY, OR ANY OTHER LEGAL OR COMMERCIAL ENTITY.

6. "PLACE OF DETENTION" MEANS A FIXED LOCATION UNDER THE CONTROL OF A LAW ENFORCEMENT AGENCY WHERE INDIVIDUALS ARE QUESTIONED ABOUT ALLEGED CRIMES OR OFFENSES. THE TERM INCLUDES BUT IS NOT LIMITED TO A JAIL, POLICE OR SHERIFF'S STATION, HOLDING CELL, AND CORRECTIONAL OR DETENTION FACILITY.

7. "STATE" MEANS A STATE OF THE UNITED STATES, THE DISTRICT OF COLUMBIA, PUERTO RICO, THE UNITED STATES VIRGIN ISLANDS, OR ANY TERRITORY OR INSULAR POSSESSION SUBJECT TO THE JURISDICTION OF THE UNITED STATES.

8. "STATEMENT" MEANS A COMMUNICATION WHETHER ORAL, WRITTEN, ELECTRONIC, OR NONVERBAL.

S 66.05 ELECTRONIC RECORDING REQUIREMENT.

1. EXCEPT AS OTHERWISE PROVIDED BY SECTION 66.15 OF THIS ARTICLE, A CUSTODIAL INTERROGATION AT A PLACE OF DETENTION, INCLUDING THE GIVING OF ANY REQUIRED WARNING, ADVICE OF THE RIGHTS OF THE INDIVIDUAL BEING QUESTIONED, AND THE WAIVER OF ANY RIGHTS BY THE INDIVIDUAL, MUST BE RECORDED ELECTRONICALLY IN ITS ENTIRETY BY BOTH AUDIO AND VIDEO MEANS WHEN SUCH INTERROGATION RELATES TO ANY FELONY OFFENSE DESCRIBED IN THE PENAL LAW.

2. IF A LAW ENFORCEMENT OFFICER CONDUCTS A CUSTODIAL INTERROGATION TO WHICH SUBDIVISION ONE OF THIS SECTION APPLIES WITHOUT ELECTRONICALLY RECORDING IT IN ITS ENTIRETY, THE OFFICER SHALL PREPARE A WRITTEN OR ELECTRONIC REPORT EXPLAINING THE REASON FOR NOT COMPLYING WITH THIS SECTION AND SUMMARIZING THE CUSTODIAL INTERROGATION PROCESS AND THE INDIVIDUAL'S STATEMENTS.

3. A LAW ENFORCEMENT OFFICER SHALL PREPARE THE REPORT REQUIRED BY SUBDIVISION TWO OF THIS SECTION AS SOON AS PRACTICABLE AFTER COMPLETING THE INTERROGATION.

4. THIS SECTION DOES NOT APPLY TO A SPONTANEOUS STATEMENT MADE OUTSIDE THE COURSE OF A CUSTODIAL INTERROGATION OR A STATEMENT MADE IN RESPONSE TO A QUESTION ASKED ROUTINELY DURING THE PROCESSING OF THE ARREST OF AN INDIVIDUAL.

S 66.10 NOTICE AND CONSENT NOT REQUIRED.

NOTWITHSTANDING ANY LAW TO THE CONTRARY, A LAW ENFORCEMENT OFFICER CONDUCTING A CUSTODIAL INTERROGATION IS NOT REQUIRED TO OBTAIN CONSENT TO ELECTRONIC RECORDING FROM THE INDIVIDUAL BEING INTERROGATED OR TO INFORM THE INDIVIDUAL THAT AN ELECTRONIC RECORDING IS BEING MADE OF THE INTERROGATION. THIS ARTICLE DOES NOT PERMIT A LAW ENFORCEMENT OFFICER OR A LAW ENFORCEMENT AGENCY TO RECORD A PRIVATE COMMUNICATION BETWEEN AN INDIVIDUAL AND SUCH INDIVIDUAL'S LAWYER.

S 66.15 EXCEPTIONS.

1. A CUSTODIAL INTERROGATION TO WHICH SECTION 66.05 OF THIS ARTICLE OTHERWISE APPLIES NEED NOT BE RECORDED ELECTRONICALLY IF RECORDING IS NOT FEASIBLE BECAUSE OF EXIGENT CIRCUMSTANCES. THE LAW ENFORCEMENT OFFICER CONDUCTING THE INTERROGATION SHALL RECORD ELECTRONICALLY AN EXPLANATION OF THE EXIGENT CIRCUMSTANCES BEFORE CONDUCTING THE INTERROGATION, IF FEASIBLE, OR AS SOON AS PRACTICABLE AFTER THE INTERROGATION IS COMPLETED.

2. (A) A CUSTODIAL INTERROGATION TO WHICH SECTION 66.05 OF THIS ARTICLE OTHERWISE APPLIES NEED NOT BE RECORDED ELECTRONICALLY IF THE INDIVIDUAL TO BE INTERROGATED INDICATES THAT THE INDIVIDUAL WILL NOT PARTICIPATE IN THE INTERROGATION IF IT IS RECORDED ELECTRONICALLY. IF FEASIBLE, THE AGREEMENT TO PARTICIPATE WITHOUT RECORDING MUST BE RECORDED ELECTRONICALLY.

(B) IF, DURING A CUSTODIAL INTERROGATION TO WHICH SECTION 66.05 OF THIS ARTICLE OTHERWISE APPLIES, THE INDIVIDUAL BEING INTERROGATED INDICATES THAT THE INDIVIDUAL WILL NOT PARTICIPATE IN FURTHER INTERROGATION UNLESS ELECTRONIC RECORDING CEASES, THE REMAINDER OF THE CUSTODIAL INTERROGATION NEED NOT BE RECORDED ELECTRONICALLY. IF FEASIBLE, THE INDIVIDUAL'S AGREEMENT TO PARTICIPATE WITHOUT FURTHER RECORDING MUST BE RECORDED ELECTRONICALLY.

(C) A LAW ENFORCEMENT OFFICER, WITH INTENT TO AVOID THE REQUIREMENT OF ELECTRONIC RECORDING IN SECTION 66.05 OF THIS ARTICLE, MAY NOT ENCOURAGE AN INDIVIDUAL TO REQUEST THAT A RECORDING NOT BE MADE.

3. IF A CUSTODIAL INTERROGATION OCCURS IN ANOTHER STATE IN COMPLIANCE WITH THAT STATE'S LAW OR IS CONDUCTED BY A FEDERAL LAW ENFORCEMENT AGENCY IN COMPLIANCE WITH FEDERAL LAW, THE INTERROGATION NEED NOT BE RECORDED ELECTRONICALLY UNLESS THE INTERROGATION IS CONDUCTED WITH INTENT TO AVOID THE REQUIREMENT OF ELECTRONIC RECORDING SET FORTH IN SECTION 66.05 OF THIS ARTICLE.

4. (A) A CUSTODIAL INTERROGATION TO WHICH SECTION 66.05 OF THIS ARTICLE OTHERWISE APPLIES NEED NOT BE RECORDED ELECTRONICALLY IF THE INTERROGATION OCCURS WHEN NO LAW ENFORCEMENT OFFICER CONDUCTING THE INTERROGATION HAS KNOWLEDGE OF FACTS AND CIRCUMSTANCES THAT WOULD LEAD AN OFFICER REASONABLY TO BELIEVE THAT THE INDIVIDUAL BEING INTERROGATED MAY HAVE COMMITTED AN ACT FOR WHICH SECTION 66.05 OF THIS ARTICLE REQUIRES THAT A CUSTODIAL INTERROGATION BE RECORDED ELECTRONICALLY.

(B) IF, DURING A CUSTODIAL INTERROGATION UNDER PARAGRAPH (A) OF THIS SUBDIVISION, THE INDIVIDUAL BEING INTERROGATED REVEALS FACTS AND CIRCUMSTANCES GIVING A LAW ENFORCEMENT OFFICER CONDUCTING THE INTERROGATION REASON TO BELIEVE THAT AN ACT HAS BEEN COMMITTED FOR WHICH SECTION 66.05 OF THIS ARTICLE REQUIRES THAT A CUSTODIAL INTERROGATION BE RECORDED ELECTRONICALLY, CONTINUED CUSTODIAL INTERROGATION CONCERNING THAT ACT MUST BE RECORDED ELECTRONICALLY, IF FEASIBLE.

5. A CUSTODIAL INTERROGATION TO WHICH SECTION 66.05 OF THIS ARTICLE OTHERWISE APPLIES NEED NOT BE RECORDED ELECTRONICALLY IF A LAW ENFORCEMENT OFFICER CONDUCTING THE INTERROGATION OR THE OFFICER'S SUPERIOR REASONABLY BELIEVES THAT ELECTRONIC RECORDING WOULD DISCLOSE THE IDENTITY OF A CONFIDENTIAL INFORMANT OR JEOPARDIZE THE SAFETY OF AN OFFICER, THE INDIVIDUAL BEING INTERROGATED, OR ANOTHER INDIVIDUAL. IF FEASIBLE AND CONSISTENT WITH THE SAFETY OF A CONFIDENTIAL INFORMANT, AN EXPLANATION OF THE BASIS FOR THE BELIEF THAT ELECTRONIC RECORDING WOULD DISCLOSE THE INFORMANT'S IDENTITY MUST BE RECORDED ELECTRONICALLY AT THE TIME OF THE INTERROGATION. IF CONTEMPORANEOUS RECORDING OF THE BASIS FOR THE BELIEF IS NOT FEASIBLE, THE RECORDING MUST BE MADE AS SOON AS PRACTICABLE AFTER THE INTERROGATION IS COMPLETED.

6. (A) ALL OR PART OF A CUSTODIAL INTERROGATION TO WHICH SECTION 66.05 OF THIS ARTICLE OTHERWISE APPLIES NEED NOT BE RECORDED ELECTRONICALLY TO THE EXTENT THAT RECORDING IS NOT FEASIBLE BECAUSE THE AVAILABLE ELECTRONIC RECORDING EQUIPMENT FAILS, DESPITE REASONABLE MAINTENANCE OF THE EQUIPMENT, AND TIMELY REPAIR OR REPLACEMENT IS NOT FEASIBLE.

(B) IF BOTH AUDIO AND VIDEO RECORDING OF A CUSTODIAL INTERROGATION ARE OTHERWISE REQUIRED BY SECTION 66.05 OF THIS ARTICLE, RECORDING MAY BE BY AUDIO ALONE IF A TECHNICAL PROBLEM IN THE VIDEO RECORDING EQUIPMENT PREVENTS VIDEO RECORDING, DESPITE REASONABLE MAINTENANCE OF THE EQUIPMENT, AND TIMELY REPAIR OR REPLACEMENT IS NOT FEASIBLE.

(C) IF BOTH AUDIO AND VIDEO RECORDING OF A CUSTODIAL INTERROGATION ARE OTHERWISE REQUIRED BY SECTION 66.05 OF THIS ARTICLE, RECORDING MAY BE BY VIDEO ALONE IF A TECHNICAL PROBLEM IN THE AUDIO RECORDING EQUIPMENT PREVENTS AUDIO RECORDING, DESPITE REASONABLE MAINTENANCE OF THE EQUIPMENT, AND TIMELY REPAIR OR REPLACEMENT IS NOT FEASIBLE.

7. IF THE PROSECUTION RELIES ON ANY EXCEPTION SET FORTH IN THIS SECTION TO JUSTIFY A FAILURE TO RECORD ELECTRONICALLY A CUSTODIAL INTERROGATION, THE PROSECUTION MUST PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE EXCEPTION APPLIES.

S 66.20 NOTICE OF INTENT TO INTRODUCE UNRECORDED STATEMENT.

IF THE PROSECUTION INTENDS TO INTRODUCE IN ITS CASE IN CHIEF A STATEMENT MADE DURING A CUSTODIAL INTERROGATION TO WHICH SECTION 66.05 OF THIS ARTICLE APPLIES WHICH WAS NOT RECORDED ELECTRONICALLY, THE PROSECUTION, PURSUANT TO SECTION 240.45 OF THIS CHAPTER, SHALL SERVE THE DEFENDANT WITH WRITTEN NOTICE OF THAT INTENT AND OF ANY EXCEPTION ON WHICH THE PROSECUTION INTENDS TO RELY.

S 66.25 PROCEDURAL REMEDIES.

1. UNLESS THE COURT FINDS THAT ANY EXCEPTION IN SECTION 66.15 OF THIS ARTICLE APPLIES, THE COURT SHALL CONSIDER THE FAILURE TO RECORD ELECTRONICALLY ALL OR PART OF A CUSTODIAL INTERROGATION TO WHICH SECTION 66.05 OF THIS ARTICLE APPLIES IN DETERMINING WHETHER A STATEMENT MADE DURING THE INTERROGATION IS ADMISSIBLE, INCLUDING WHETHER IT WAS VOLUNTARILY MADE.

2. IF THE COURT ADMITS INTO EVIDENCE A STATEMENT MADE DURING A CUSTODIAL INTERROGATION THAT WAS NOT RECORDED ELECTRONICALLY IN COMPLIANCE WITH SECTION 66.05 OF THIS ARTICLE, THE COURT, ON REQUEST OF THE DEFENDANT, SHALL GIVE A CAUTIONARY INSTRUCTION TO THE JURY.

S 66.30 RULES RELATING TO ELECTRONIC RECORDING.

1. THE SUPERINTENDENT OF STATE POLICE SHALL PROMULGATE RULES AND REGULATIONS TO IMPLEMENT THIS ARTICLE AND MONITOR ENFORCEMENT OF THE RULES BY EACH LAW ENFORCEMENT AGENCY THAT IS A GOVERNMENTAL ENTITY OF THIS STATE.

2. THE RULES ADOPTED UNDER SUBDIVISION ONE OF THIS SECTION SHALL ADDRESS THE FOLLOWING TOPICS:

(A) HOW AN ELECTRONIC RECORDING OF A CUSTODIAL INTERROGATION MUST BE MADE;

(B) THE COLLECTION AND REVIEW OF ELECTRONIC RECORDINGS, OR THE ABSENCE THEREOF, BY SUPERVISORS IN EACH LAW ENFORCEMENT AGENCY;

(C) THE ASSIGNMENT OF SUPERVISORY RESPONSIBILITIES AND A CHAIN OF COMMAND TO PROMOTE INTERNAL ACCOUNTABILITY;

(D) A PROCESS FOR EXPLAINING NONCOMPLIANCE WITH PROCEDURES AND IMPOSING ADMINISTRATIVE SANCTIONS FOR A FAILURE TO COMPLY THAT IS NOT JUSTIFIED;

(E) A SUPERVISORY SYSTEM EXPRESSLY IMPOSING ON INDIVIDUALS IN SPECIFIC POSITIONS A DUTY TO ENSURE ADEQUATE STAFFING, EDUCATION, TRAINING, AND MATERIAL RESOURCES TO IMPLEMENT THIS ARTICLE;

(F) A PROCESS FOR MONITORING THE CHAIN OF CUSTODY OF AN ELECTRONIC RECORDING; AND

(G) A PROCEDURE TO ENSURE THAT THE ELECTRONIC RECORDING OF ALL OR PART OF A CUSTODIAL INTERROGATION IS IDENTIFIED, ACCESSIBLE AND PRESERVED.

3. THE RULES ADOPTED UNDER PARAGRAPH (A) OF SUBDIVISION TWO OF THIS SECTION FOR VIDEO RECORDING SHALL CONTAIN STANDARDS FOR THE ANGLE, FOCUS, AND FIELD OF VISION OF A RECORDING DEVICE WHICH REASONABLY PROMOTE ACCURATE RECORDING OF A CUSTODIAL INTERROGATION AT A PLACE OF DETENTION AND RELIABLE ASSESSMENT OF ITS ACCURACY AND COMPLETENESS.

4. EACH LAW ENFORCEMENT AGENCY THAT IS A GOVERNMENTAL ENTITY IN THIS STATE SHALL ADOPT AND ENFORCE RULES PROVIDING FOR ADMINISTRATIVE DISCIPLINE OF A LAW ENFORCEMENT OFFICER FOUND BY A COURT OR THE AGENCY TO HAVE VIOLATED THIS ARTICLE. THE RULES SHALL PROVIDE A RANGE OF DISCIPLINARY SANCTIONS REASONABLY DESIGNED TO PROMOTE COMPLIANCE WITH THIS ARTICLE.

S 66.35 LIMITATION OF LIABILITY.

1. A LAW ENFORCEMENT AGENCY THAT IS A GOVERNMENTAL ENTITY IN THIS STATE WHICH HAS IMPLEMENTED PROCEDURES REASONABLY DESIGNED TO ENFORCE THE RULES PROMULGATED PURSUANT TO SECTION 66.30 OF THIS ARTICLE AND ENSURE COMPLIANCE WITH THIS ARTICLE IS NOT SUBJECT TO CIVIL LIABILITY FOR DAMAGES ARISING FROM A VIOLATION OF THIS ARTICLE.

2. NOTHING IN THIS ARTICLE SHALL BE CONSTRUED AS TO CREATE A RIGHT OF ACTION AGAINST ANY LAW ENFORCEMENT OFFICER.

S 66.40 SELF-AUTHENTICATING.

1. IN ANY PRETRIAL OR POST TRIAL PROCEEDING, AN ELECTRONIC RECORDING OF A CUSTODIAL INTERROGATION IS SELF-AUTHENTICATING IF IT IS ACCOMPANIED BY A CERTIFICATE OF AUTHENTICITY SWORN UNDER OATH OR AFFIRMATION BY AN APPROPRIATE LAW ENFORCEMENT OFFICER.

2. THIS ARTICLE DOES NOT LIMIT THE RIGHT OF AN INDIVIDUAL TO CHALLENGE THE AUTHENTICITY OF AN ELECTRONIC RECORDING OF A CUSTODIAL INTERROGATION UNDER ANY LAW OF THIS STATE OTHER THAN THIS ARTICLE.

S 66.45 NO RIGHT TO ELECTRONIC RECORDING OR TRANSCRIPT.

1. THIS ARTICLE DOES NOT CREATE A RIGHT OF AN INDIVIDUAL TO REQUIRE A CUSTODIAL INTERROGATION TO BE RECORDED ELECTRONICALLY.

2. THIS ARTICLE DOES NOT REQUIRE PREPARATION OF A TRANSCRIPT OF AN ELECTRONIC RECORDING OF A CUSTODIAL INTERROGATION.

S 66.50 RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.

THIS ARTICLE MODIFIES, LIMITS, AND SUPERSEDES THE ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT, 15 U.S.C. SECTION 7001 ET SEQ., BUT DOES NOT MODIFY, LIMIT, OR SUPERSEDE SECTION 101(C) OF THAT ACT, 15 U.S.C. SECTION 7001(C), OR AUTHORIZE ELECTRONIC DELIVERY OF ANY OF THE NOTICES DESCRIBED IN SECTION 103(B) OF THAT ACT, 15 U.S.C. SECTION 7003(B).

S 3. Severability. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid and after exhaustion of all further judicial review, the judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part of this act directly involved in the controversy in which the judgment shall have been rendered.

S 4. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized to be made on or before such date.