A LAWYER'S GUIDE TO THE CHICAGO POLICE DEPARTMENT'S ELECTRONIC RECORDING OF INTERROGATIONS

Prepared by Sheri H. Mecklenburg General Counsel to the Superintendent of the Chicago Police Department

| I. | INTF | RODUCTION | 1 |
|------|---------------------------------|---|------|
| II. | THE LAW | | 1 |
| | A. | Presumption of inadmissibility unless electronically recorded | 2 |
| | B. | Offenses which mandate electronic recording | 2 |
| | C. | Definitions: electronic recording, custodial interrogation, | |
| | | place of detention | 3 |
| | D. | Required Retention | |
| | E. | Admissibility of unrecorded interrogations | 3 |
| | | 1. When the presumption can be overcome | 3 |
| | | 2. Impeachment | 4 |
| | | 3. Exceptions to Inadmissibility of Unrecorded Statements | 4 |
| | F. | Confidentiality and Disclosure | 5 |
| | G. | Juvenile Version of the Law | 5 |
| III. | THE ELECTRONIC RECORDING SYSTEM | | 5 |
| | A. | The system in general | 5 |
| | B. | The control box: Turning the equipment on and off | 6 |
| | C. | When will the recording be turned on? When will the | |
| | | recording be turned off? | 7 |
| | D. | How will I know when the recording has been turned on, | |
| | | off or restarted? | 7 |
| | E. | What if the lights in the room are turned off? | 8 |
| | F. | What if an attorney goes into the room to confer with his/her | |
| | | client? How will the privilege be maintained? | 8 |
| | G. | Saving and inventorying the recording | 9 |
| | H. | Is there any way to view a specific part of the recording | |
| | | without watching it all? | 11 |
| | I. | Who can access the recording? | 12 |
| | J. | What if the equipment is used to record an interrogation | |
| | | that is not covered by this Law? | 12 |
| IV. | DISCOVERY | | 13 |
| | A. | Discovery of the Recorded Interrogation | 14 |
| | B. | Discovery of the Felony Review Portions of the Interrogation | 15 |
| | C. | Discovery of Computer Records Associated with the Recording | 15 |
| | D. | Discovery of polygraph recordings/mobile equipment recordings | . 16 |
| V. | CONCLUSION | | 17 |

A LAWYER'S GUIDE TO THE CHICAGO POLICE DEPARTMENT'S ELECTRONIC RECORDING OF INTERROGATIONS

I. <u>INTRODUCTION</u>

On July 18, 2005, the Chicago Police Department ("CPD") will begin digital recording of custodial interrogations in places of detention of persons suspected of a homicide, pursuant to 725 ILCS 5/103.21. CPD has been developing a system for recording interrogations for more than two years, and have invested substantially in training our investigators on the system. CPD's system is custom-designed and already is setting the standard for other jurisdictions. Even before the system was implemented, jurisdictions from around the country and abroad have visited CPD to view the system.

CPD realizes that, at least initially, there will be many questions from lawyers involved in cases in which there is a recording of the interrogation. The purpose of this Guide is to answer many of these questions. This Guide will first review the statute governing electronically recorded interrogations in Illinois. This review of the statute does not serve as a substitute for reading the law but rather serves to put CPD's system in context. This Guide then will explain the state-of-the-art system which CPD has designed and implemented. Finally, this Guide will address the discovery process for obtaining a copy of a digitally recorded interrogation.

II. THE LAW

On July 18, 2003, the Illinois State legislature passed 725 ILCS 5/103-2.1, requiring electronic recording of custodial interrogations of persons accused in homicide investigations ("the Law"). The Law allowed two years from that date for implementation, thus becoming effective on July 18, 2005.

A. Presumption of Inadmissibility unless electronically recorded.

The Law provides that statements made by a suspect in a homicide case during a custodial interrogation at a place of detention are presumed inadmissible unless the entire interrogation is electronically recorded. Specifically, under the Law, "an oral, written or sign language statement of an accused made as a result of a custodial interrogation at a police station or other place of detention shall be presumed to be inadmissible as evidence against the accused in any criminal proceeding" brought under certain homicide offenses as defined under the Criminal Code of Illinois, "unless (1) an electronic recording is made of the custodial interrogation and; (2) the recording is substantially accurate and not intentionally altered." 725 ILCS 5/103-2.1(b), (d).

B. Offenses which mandate electronic recording

The "homicide" offenses to which this Law applies are: First Degree Murder (Section 9-1 of the Criminal Code, 720 ILCS 5/9-1); Intentional Homicide of an Unborn Child (Section 9-1.2 of the Criminal Code, 720 ILCS 5/9-1.2); Second Degree Murder (Section 9-2 of the Criminal Code, 720 ILCS 5/9-2); Voluntary Manslaughter of an Unborn Child (Section 9-2.1 of the Criminal Code, 720 ILCS 5/9-2.1); Involuntary Manslaughter and Reckless Homicide (Section 9-3 of the Criminal Code, 720 ILCS 5/9-3); Involuntary Manslaughter and Reckless Homicide of an Unborn Child (Section 9-3.2 of the Criminal Code, 720 ILCS 5/9-3.2); Drug-induced Homicide (Section 9-3.3 of the Criminal Code, 720 ILCS 5/9-3.3). In addition, on July 11, 2005, the Governor signed a separate bill that requiring electronic recording of interrogations of a person charged with a DUI that resulted in a death. See Public Act 94-0117.

C. <u>Definitions</u>: electronic recording, custodial interrogation, place of detention.

Under the Law, "electronic recording" is defined as motion picture, audiotape or videotape or digital recording. 725 ILCS 5/103-2.1. CPD has chosen to digitally record both audio and video, although a simple audio recording alone would satisfy the Law.

The Law defines a custodial interrogation as "any interrogation during which (I) a reasonable person in the subject's position would consider himself or herself to be in custody and (ii) during which a question is asked that is reasonably likely to elicit an incriminating response." 725 ILCS 5/103-2.1(a). The Law further defines a "'place of detention' as a building or a police station that is a place of operation for a municipal police department or county sheriff department or other law enforcement agency, not a courthouse, that is owned or operated by a law enforcement agency at which persons are or may be held in detention in connection with criminal charges against those persons." Id.

D. Required Retention

Every electronic recording made pursuant to the Law must be preserved until such time as the defendant's conviction for any offense relating to the statement is final and all direct and *habeas corpus* appeals are exhausted, or the prosecution of such offenses is barred by law. 725 ILCS 5/103-2.1c).

E. Admissibility of unrecorded interrogations

1. When the presumption can be overcome

The presumption of inadmissibility of a statement made in the course of an unrecorded interrogation may be overcome *by a preponderance of the evidence* that the statement was reliable and voluntary, based upon the totality of the circumstances. 725 ILCS 5/103-2.1(f).

2. Impeachment

An unrecorded statement is always admissible for purpose of impeachment. 725 ILCS 5/103-2.1(d), (e).

3. Exceptions to Inadmissibility of Unrecorded Statements

The Law provides certain specific exceptions to the presumption of inadmissibility, referred to as "Section (e) exceptions." 725 ILCS 5/203-2.1(e). The State bears the burden of proving, *by a preponderance of the evidence*, that one of these exceptions applies to allow admissibility:

- (1) a statement made by an accused in open court at his or her trial, before a grand jury, or at a preliminary hearing;
- (ii) a statement which was made during a custodial interrogation that was not recorded as required by the Law because electronic recording was not feasible;
- (iii) a voluntary statement, whether or not the result of a custodial interrogation, that goes to the credibility of the accused as a witness;
- (iv) a spontaneous statement that is not made in response to a question;
- (v) a statement made after question that is routinely asked during the processing of the arrest of the suspect;
- (vi) a statement made during a custodial interrogation by a suspect who requests that the electronic recording not be made, provided that the request is electronically recorded;
- (vii) a statement made during a custodial interrogation conducted outside of Illinois;
- (viii) a statement made at a time when the interrogators are unaware that a death has in fact occurred; or

(ix) any other statement that may be admissible under law.

F. Confidentiality and Disclosure

The Law provides that any electronic recording of a statement made pursuant to the Law "shall be confidential and exempt from public inspection and copying, as provided under Section 7 of the Freedom of Information Act, and the information shall not be transmitted to anyone except as needed to comply with this Section." 725 ILCS 5/103-2.1(g). Section 7 of the Freedom of Information Act provides an exemption for disclosure of, among other things, certain records of law enforcement agencies.

G. Juvenile Version of the Law - 705 ILCS 405/5-401.5

The Legislature also enacted a similar law applicable to juveniles, to render inadmissible any unrecorded statement of a minor who is charged with an act that if committed by an adult would be brought as one of the homicide offenses covered by the adult version of the Law. The juvenile version differs in that, unlike the adult version, a court is not excluded from the definition of "place of detention."

III. THE CHICAGO POLICE DEPARTMENT ELECTRONIC RECORDING SYSTEM

A. The system in general

Although the law requires only an electronic recording, CPD has chosen to implement a state-of-the art digital recording system. CPD had this system designed to its own unique specifications, at a cost of millions of dollars. CPD has installed the digital recording equipment in 38 rooms, which includes all interrogation rooms at each of the five Detective Areas, three interrogation rooms at the Homan Square facility and two polygraph rooms. CPD also has acquired portable equipment in the event that our officers conduct custodial interrogations in

places of detention outside CPD facilities, such as a county jail, or if the interrogation moves outside the facility, such as to the scene of the crime during a reenactment. This Guide will describe only the permanently-installed system.

In each of the rooms where the equipment is installed, the actual camera lens is placed unobtrusively in an upper corner of the room, near the ceiling. The camera is stationary but is installed at an angle designed to capture all parts of the room. A microphone also is installed in the ceiling, designed to pick up discussions even at a whisper.

B. The control box: Turning the equipment on and off

A metal control box is installed on the wall outside of each interrogation room. The control box, about 8 inches squared, has a hinged door which locks. The keys shall be maintained by supervisors. The inside of the control box contains a screen or monitor and a red button in the lower left corner. Pushing the red button causes the monitor to display live viewing of the inside of the room, serving as an "electronic peephole."

The control box also contains a black "on-off" switch located in the upper right corner of the inside of the box. The detective simply pushes the switch to the "on" position to start the recording. When the recording equipment is on, a red light will appear at the top of the control box to alert those outside the room that the room is in use with recording equipment. If the equipment were inadvertently turned off, the system emits a long, low beep in the interrogation room to notify the interrogator that the recording equipment has been turned off.

The control box contains two earphone jacks to allow someone outside the room to listen to the interrogation as they watch it on the monitor. This could be useful for another detective working on the same case, for a supervisor or for a felony review Assistant States Attorney.

C. When will the recording be turned on? When will the recording be turned off?

CPD does not need the consent of the homicide suspect to record because the Law creates an exception to the eavesdropping statute for the recording of statements by homicide suspects during a custodial interrogation. If a suspect requests that his statements not be recorded, law enforcement is permitted to turn off the equipment, provided that the suspect's request is recorded. Law enforcement is not obligated, however, to turn off the recording even at the request of the suspect.

CPD will turn on the recording when the suspect is placed in the interrogation room or, in the event that a witness becomes a suspect, as soon as the officers have reason to believe that the person is a suspect. The recording will be left on continuously while the suspect is in the interrogation room. The recording also will continue to run if the suspect is taken from the room for a short and temporary break, such as to use the bathroom.

The recording will be turned off when the interrogation is over. The recording also may be turned off when the suspect is out of the room for an extended period, such as if a suspect is to stand in multiple lineups. The detective will restart the recording equipment when the interrogation continues. The ending time of the first video and the beginning time of the second video will document the length of the break.

D. How will I know when the recording has been turned on, off or restarted?

The date and digital clock reflecting real time of the interrogation will be displayed continuously on the bottom of the recording, as well the Area and room where the recording took place. The digital clock is tied to the CPD clock system and cannot be changed. The digital clock at the bottom of the recording runs from the time that the equipment is turned on until the

time that it is turned off, showing the time and length of the interrogation, as well as certain points in the interrogation.

As soon as the recording equipment is turned off, the signal for that recording will be sent to the computer hard drive Storage Area Network ("SAN") at CPD headquarters. The SAN is a huge computer contained in its own room. The recording is now in its own computer file on the SAN. If the recording equipment is turned back on, a new recording file is created. A new recording file technologically cannot be made to continue from a prior recording file. Each recording file must be saved separately, resulting in its own inventory number. *See* Section IIIG, below, for discussion of *Saving and Inventorying the Recording*.

E. What if the lights in the room are turned off?

When the lights in the room are on, the recording (and the monitor in the control box) show the room in full color. In fact, the inside of the rooms have been painted a vivid blue to reduce the glare of the walls, because light colored walls cast significant glares during initial tests. However, if the lights in the room are turned off for any reason (such as to allow the suspect to sleep), the room will be completely dark but both the monitor and the recording still show the room clearly through infrared lighting. When the lights are turned off, both the monitor and the recording will switch from color to black-and-white. This change from color to black-and-white indicates that the lights have been turned off.

F. What if an attorney goes into the room to confer with his/her client? How will the privilege be maintained?

The control box contains a switch that requires a key to turn it. This is the "attorney switch." Before an attorney steps into the interrogation room to confer with his/her client, the

attorney will be given an "attorney key" to activate the attorney switch. Once activated, all video and audio signals will be blocked so as to maintain the confidentiality of the attorney-client discussions; the recording will continue to show the date and time but will display the words "no signal" on both the recording and the monitors. While the attorney switch is on, the attorney will hear a low-pitched tone or "beep" in the room approximately every 45 seconds, indicating that the attorney switch remains activated and that all video and audio signals remain blocked. The attorney will keep the key until finished and then, upon leaving, return the key to the detective. The attorney can watch as the detective turns the attorney switch to resume regular recording.

G. Saving and inventorying the recording

As the equipment is recording, the signal contemporaneously is sent to a temporary hard drive in the equipment room located at the unit of interrogation. Each unit's equipment room contains large-scale computer equipment as well its own cooling unit to prevent overheating of the equipment. Only authorized, trained personnel are permitted to enter the equipment room.

As previously noted, when the "off" button is pushed to stop the recording, the temporary hard drive at the unit's equipment room automatically will begin transmitting the recording to the long-term hard drive of the SAN located at Chicago Police Headquarters. The recordings will be stored on the hard drive of the SAN; there is no storage on tapes, CDs or DVDs. CPD does not yet know how long it will take to reach capacity of storage on the SAN. Some estimates are 18 months. CPD will retain the recording permanently but, in light of changing technology, CPD has not yet committed to a storage procedure when the SAN reaches capacity. Within the first year of the program, CPD will determine whether it will purchase a

new SAN as the current one reaches capacity or if there is a more efficient and economical storage procedure. CPD anticipates keeping the recordings stored on-line for five years and will explore archiving options for extended storage.

The signal can take up to eight hours to complete in the SAN, depending upon the length of the recording, although testing showed shorter periods for sending even long recordings. The recording cannot be retrieved from the network until the detective has properly stored the recording by entering certain case information into the computer. When the detective logs onto the computer, any video files from that detective's Area which have not yet been permanently stored on the network automatically will appear on the computer screen with the Area, date, time and room of the recording so that the detective will know which recording is associated with his case. The detective then enters the necessary information into the computer for permanent network storage including, among other things, the name of the case, the name of the suspect interrogated and the names of the detectives assigned to the case. CPD will allow the detective up to three (3) days to enter this information into the computer. Supervisors regularly will monitor the computer program to ensure that all recordings are timely stored.

Once the detective enters the information required, the recording is permanently stored. Each stored recording automatically will be labeled with an Inventory Number starting with a "V" to indicate that the number refers to a video. For example, a recording would be indicated by an inventory number "V01234." When an RD# (Records Division #) is entered into the video computer system, all "V" inventories associated with that RD# will appear, showing all recordings associated with that case. If the recording equipment was turned off and then turned back on during the course of the interrogation, a new recording file automatically was created

and stored under a separate "V" inventory number. There will be at least one "V" number for each suspect recorded. There may be more than one "V" number for a single suspect, if the video recording was turned off during a break in the interrogation. More than one "V" number also may indicate multiple suspects.

The signal will remain on the temporary hard drive located in the equipment room at the place of interrogation for approximately 14 days, as back up to insure against system failure.

The temporary hard drive has limited space and, therefore, after 14 days, will recycle and record over old interrogation signals. Long before that, the recording will have transferred to the SAN.

H. Is there any way to view a specific part of the video without watching it all?

The interrogators will, where practicable, note in their General Progress Reports the time that certain events occur during the interrogation, for the purpose of subsequently tracking the interrogation. These notations may reflect relatively insignificant events such as food, bathroom or nap breaks, or they may reflect significant events such as giving and/or waiving Miranda Rights, incriminating statements or a physical demonstration. When the detective inputs the case information into the computer for storage of the recording, the detective will have the option of filling in a screen for "Tracking Events." Tracking Events will provide a guide to facilitate watching the recording but are not meant to be, and are not represented as, a complete log of the interrogation. The complete and accurate record of the interrogation is the recording itself.

¹For example, a prosecutor or defense attorney might consider something significant in the interrogation that the detective did not note on the Tracking Events either due to inadvertence or because other events had just been logged and the detective did not feel it was necessary to separate the events. In addition, a detective in the middle of an interrogation may want to minimize his/her note taking in order to continue a discussion and rapport with the subject.

When the detective enters the Tracking Events on the computer screen, these entries are linked with the recording, so that the computer can access a specific part of the recording directly by hitting the Tracking Event on the computer. For discovery of the Tracking Event screen, *see* Section IV ("Discovery"), below. Even a hard copy of the Tracking Event screen guides an attorney to a specific portion by matching the notation with the time on the recording.

I. Who can access the recording?

Only certain Chicago Police Department members will have the ability to access a specific recording for viewing. The detectives initially entered into the computer as assigned to the case can view the recording, as well as the Cold Case unit and certain exempt members. Other members will not be able to watch a recorded interrogation. If another member of CPD has a legitimate reason to view the recording, an exempt command staff member can authorize that member to view it. The computer contains a screen called "Access History," which will show who has accessed the recording and when.

The Assistant States Attorneys also will have access to view the recordings. The computer "Access History" screen will reflect any access by CPD personnel *and* States Attorney personnel. For discovery of the computer Access History, *see* Section IV ("Discovery"), below.

J. What if the equipment is used to record an interrogation that is not covered by this Law, for instance a sexual assault suspect?

If a CPD member uses the equipment to record an interrogation of a suspect not covered by this Law, CPD will burn the recording to a DVD and notify the prosecutor's office of the existence of the DVD recording, but CPD will not permanently store it on the SAN.

IV. DISCOVERY

Discovery of recordings of interrogations, like all discovery, shall be in accordance with the Supreme Court Rules. 725 ILCS 5/114-15. The Supreme Court rules require the State to disclose to defense counsel any written or recorded statements made by the accused and also to inform defense counsel if there has been any electronic surveillance of conversations to which the accused was a party. S.Ct. Rule 412(a), (b). This obligation shall be performed as soon as practicable. S.Ct. Rule 412(d). The State may perform this obligation in any manner mutually agreeable or by notifying defense counsel that the material may be inspected...copied...during specified reasonable times; and making available to defense counsel at the time specified such material and suitable facilities or other arrangements for inspection, testing, copying, photographing of such material or information. S.Ct. Rule 412(e).

The State shall ensure that a flow of information be maintained between the various investigative personnel and the State sufficient to place within its possession or control all material and information relevant to the accused and the offense charged. S.Ct. Rule 412(f). Upon defense counsel's request for material or information which is discoverable if in the possession of the State, and which is in the possession of other governmental personnel, the State shall use diligent and good-faith efforts to cause the material to be made available to defense counsel and *if the State's efforts are unsuccessful*, the court shall issue suitable subpoenas or orders. S.Ct. Rule 412(g) (emphasis added). (Similarly, under 725 ILCS 5/114-15, a law enforcement agency shall provide *to the State* all material or information in its control that would tend to negate the guilt of the accused or reduce his punishment.)

A. Discovery of the Recorded Interrogation

In order for CPD to satisfy its obligation to provide the State with a copy of the recording, and to allow the State to satisfy its obligation to provide access to the defense, CPD has opened its network to the Office of the Cook County States Attorney so that the State will have the same access as CPD to the original computer files of recorded interrogations. When the detective enters the information in the computer to permanently store the recording, the recording will become accessible on the network to CPD *and* the State. The State will then make a duplicate of the recording for production to the defense.

The recordings are in a format that must be burned to a DVD-CD. Each DVD-CD allows up to approximately 4 hours of recording to be stored (whereas a regular CD has only 700 mb, which allows only 30-45 minutes of recording); therefore, the State may produce multiple DVD-CDs for a single interrogation. The format is in an Mpeg 4 file that can be played only on a computer. The recordings cannot be burned in a format that can be played on a regular VCR or DVD player.

Once the State has produced a copy of the recording to the defense, the defense can burn duplicate copies on their own equipment. Because it is the State's obligation to produce a copy of the recording, once the State has fulfilled that obligation, CPD will return to the court any subpoena which requests additional copies of the recording for failure to comply with Supreme Court Rule 412 and to inform the court that the recording is available from the State. If CPD is forced to make duplicate copies, it will be very expensive and CPD will require a fee from the person seeking the duplicate.

B. <u>Discovery of the Felony Review Portions of the Interrogation</u>

During the interrogation, a prosecutor on-site *may* have burned to a DVD-CD parts of the interrogation for purposes of felony review. The equipment room at the unit's premises contains additional monitors for viewing by a felony review assistant, a supervisor or another detective involved in the case. The equipment room also has limited ability to burn a DVD-CD from the temporary hard drive, which may be utilized by the felony review assistant. This equipment burns hour-for-hour and the burner can be turned off and on manually to capture only parts of the interrogation, such as the Miranda rights or the actual confession. The felony review assistant can control the burner for purposes of reviewing the case. Because this burner can be turned off and on for partial recordings, any DVD-CD made on this equipment will contain a watermark and words indicating the location of where the recording was burned (e.g., Detective Division, Area 1) followed by the words "not an official document" to show that it is not the official document of the Chicago Police Department. Only a copy burned from the permanently stored SAN file is the official document of the recording.

C. Discovery of Computer Records Associated With the Recording

The information entered into the computer for storage of, or access to, the recorded interrogations also will be accessible through the computer network to the Office of the States Attorney and will be available for discovery from the State. For example, the State will have access through the network to the computer screens for storage, Tracking Events and Access History, and will be able to produce it to the defense. The State also will be able to run the RD# through the computer to ensure that the State has produced all videos associated with a case.

D. <u>Discovery of polygraph recordings/mobile equipment recordings</u>

The recording equipment located in the polygraph rooms is not equipped to send a signal to the SAN. Recordings made in the polygraph rooms will be recorded directly onto a DVD-CR. Upon finishing, the polygraph operator will label the DVD-CR with the case information and hand the DVD-CR to the detective. The detective will upload the DVD-CR into the SAN back at the Area, so that it is available on the network to the State to produce to the defense. The polygraph recording will automatically, upon being uploaded, receive its own "V" inventory number. The polygraph recording will display the date and real time of the polygraph, the date and place of the upload and, in place of the location of the polygraph, will contain the words "DVD," indicating that it was transferred directly to a DVD and then uploaded to the SAN.

The detective will send the original DVD to CPD's Records Division. The DVD contents will have been duplicated on the network and therefore there will be no need to produce the DVD separately. Nevertheless, upon request by the State or by subpoena issued by the court, CPD will provide to the State or the court, free of charge, two copies of the DVD – one for the State and one for the defense. The request should indicate "Polygraph Digital Recording DVD." Additional copies will not be provided by CPD except upon court order and for a fee.

Similarly, recordings made on the mobile equipment will indicate the words "DVD" in place of the location of the recording. Like the procedure with recordings in the polygraph rooms, CPD will upload those recordings to the SAN to make it available on the network. CPD will follow the same inventory and discovery procedures for a recording by the mobile equipment as CPD does for a recording in a polygraph room. The initial request should indicate "Mobile Equipment Recording of Interrogation DVD."

V. CONCLUSION

CPD has invested millions of dollars in state-of-the-art digital recording equipment which far exceeds the requirements of the Law. CPD has designed and implemented this sophisticated recording system to protect the constitutional rights of the accused as well as to protect CPD officers from false accusations of misconduct. CPD is confident that this digital recording system will ensure the integrity of the process and further will promote the public's confidence in the Chicago Police Department, homicide convictions and our criminal justice system. CPD has provided this Guide in an effort to make the recording process transparent, so that every attorney, whether prosecutor or defense, will fully understand the Chicago Police Department's Electronic Recording of Interrogations.

This Guide has been prepared by Sheri H. Mecklenburg, General Counsel to the Superintendent of the Chicago Police Department.