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New Policy On Recording Statements Is Major Shift For DOJ

Law360, New York (June 02, 2014, 12:15 PM ET) -- The U.S. Department of Justice has announced a new policy with respect to the electronic recording of statements made by individuals in custodial situations prior to a person's initial appearance before a judicial officer. Beginning July 11, 2014, there will be a "presumption" that all such statements should be videotaped, or audiotaped if video is not available, so long as the facility where the individual is held has suitable recording equipment. Agents and prosecutors will also be encouraged to consider electronic recording in other circumstances, even when the new presumption does not apply. This announcement, issued May 22, 2014, reflects a significant policy shift for the DOJ.

The presumption applies to interviews of persons in the custody of the Federal Bureau of Investigation, the Drug Enforcement Agency, the Bureau of Alcohol, Tobacco, Firearms and Explosives, and the United States Marshals Service in connection with any federal crime. Individuals in noncustodial situations are excluded from the presumption, though agents and prosecutors are encouraged to consider recording such statements. Additionally, the presumption applies only when an individual is in a "place of detention."

According to the policy, this detention includes "not only federal facilities, but also any state, local, or tribal law enforcement facility, office, correctional or detention facility, jail, police or sheriff's station, holding cell, or other structure used for such purpose." The presumption does not apply when a person is waiting for transportation to, or is en route to, a "place of detention." Electronic recording "will begin as soon as the subject enters the interview area or room and will continue until the interview is completed." Recordings under the policy may be made covertly or overtly.

There are four exceptions to the new presumption. First, if the interviewee indicates that he or she is willing to give a statement, but only if it is not electronically recorded, then the recording need not take place. Second, there is an exception for public safety and national security. Under this exception, "[t]here is no presumption of electronic recording where questioning is done for the purpose of gathering public safety information under New York v. Quarles, [467 U.S. 649 (1984]."

Under Quarles, the ordinary Miranda rules can be avoided in situations where the law enforcement officials have an objectively reasonable need to protect the public from immediate danger, such as a situation where a police officer believes that a loaded firearm is hidden in a public area and worries that it may fall into the hands of a defendant's accomplice or injure an innocent bystander. The public safety and national security exception also covers "those limited circumstances where questioning is undertaken to gather national security-related intelligence or questioning concerning intelligence, sources, or methods, the public disclosure of which would cause damage to national security." In either of these scenarios, though the presumption does not apply, recording is not prohibited and the decision whether or not to record should, wherever possible, be "the subject of consultation between the agent and the prosecutor."

The third exception applies when recording is not reasonably practicable, for example, due to "equipment malfunction, an unexpected need to move the interview, or a need for multiple interviews in a limited timeframe exceeding the available number of recording devices." Finally, there is a "residual exception." Under this exception, the presumption does not apply "where the Special Agent in Charge and the United States Attorney, or their designees, agree that a significant and articulable law enforcement purpose requires setting it aside." The policy states that this exception should be used "sparingly."

The DOJ has made clear that this shift is only a "policy for internal Department of Justice guidance" and is not intended to create any rights or benefits to the individual in having these statements recorded.

Additionally, this policy does not apply outside of the United States. However, the policy states that recording may be "appropriate outside the United States where it is not otherwise precluded or made infeasible by law, regulation, treaty, policy, or practical concerns such as the suitability of recording equipment."

While this policy constitutes a major shift for the federal government, it should be noted that some states already have their own rules or policies regarding the recording of custodial interviews. See, e.g.,725 ILCS 5/103-2.1(b), (b-5) (oral, sign language, or written statements of an accused made as the result of a custodial interrogation conducted in a place of detention are presumed inadmissible unless electronically recorded for certain categories of serious crimes, such as homicide, certain sex crimes, aggravated arson, aggravated kidnapping, aggravated vehicular hijacking, home invasion, armed robbery, and certain forms of aggravated battery committed on or after certain dates); Tex. Crim. Proc. Code art. 38.22(3)(a) (no oral or sign language statements of an accused as the result of a custodial interrogation may be admitted into evidence unless "an electronic recording, which may include motion picture, video tape, or other visual recording, is made of the statement"); State v. Barnett, 789 A.2d 629, 632-33 (N.H. 2001) ("[I]mmediately following the valid waiver of a defendant's Miranda rights, a tape recorded interrogation will not be admitted into evidence unless the statement is recorded in its entirety …. Failure to record the complete interrogation will not result in the wholesale exclusion of the interrogation. Rather, where the incomplete recording of an interrogation results in the exclusion of the tape recording itself, evidence gathered during the interrogation may still be admitted in alternative forms, subject to the usual rules of evidence."); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) ("[I]n

the exercise of our supervisory power to insure the fair administration of justice, we hold that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention. If law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial."); Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985) ("[T]he rule that we adopt today requires that custodial interrogations in a place of detention, including the giving of the accused's Miranda rights, must be electronically recorded.").

The DOJ's new policy on this matter is a rather late-coming adoption of the realities of technological advances and the almost universal availability of this technology. The new policy specifically addresses what has long been deemed as very persuasive evidence, a person's own statements, and the extensive challenges that arise to determine the admissibility of any such statement. While the actual implementation of this policy has yet to take effect, the future consequences will likely greatly reduce the frequency of challenges to the admissibility of these statements.

However, this new policy specifically fails to include two key circumstances that routinely occur. The first is immediately post-arrest, where an individual is not taken to a "detention facility" but instead to another location, such as the FBI offices, for interviews before being taken to the jail. The second circumstance that is specifically outside this policy is when a defendant "proffers" information to law enforcement agents with the hope of reducing their punishment. As these proffers usually occur after a person has made an appearance before a judicial officer, they are not covered by this policy and yet it is common that many defendants provide information that could be used to impeach them later should they become a witness or that is exculpatory to some other defendant.

Government disclosure of material exculpatory and impeachment evidence is required by the constitutional guarantee to a fair trial.[1] The law thus requires the disclosure of any exculpatory and impeachment evidence when such evidence is material to guilt or punishment.[2] However, even if required to be disclosed, it is not required by this new policy to be recorded.

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[1] Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 154 (1972).

[2] Brady, 373 U.S. at 87; Giglio, 405 U.S. at 154.
