



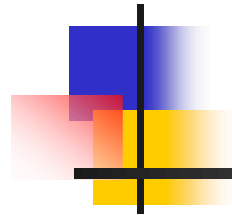
# Recording Interrogations: Best Practice in Massachusetts

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Commonwealth v. DiGiambattista,  
442 Mass. 423 (2004)



"Ruse" + Offer of Leniency --» Suppression

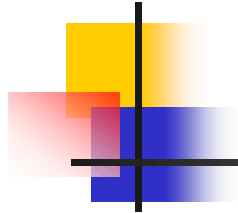
Jury Instruction - Unrecorded Interrogations



# The Holding

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- Misrepresentation by a “ruse” that overstates strength of the evidence
- Plus, “minimization” technique that amounts to implied promise of leniency
- Equals - Confession suppressed as involuntary.



## “Ruse” as Misrepresentation

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- Videotape “prop” with false label
- Fake, artificially thick file
- Hypothetical question, “If I told you...” that assumes a false fact, “Would there be any reason for you to be on that videotape?”
- Implied assertion= We have videotaped ID of you at scene of crime.



## The risks of “ruses” that overstate case against suspect

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- “The specter of coercion arises . . . from the possibility that an innocent defendant, confronted with apparently irrefutable (but false) evidence of his guilt, might rationally conclude that he was about to be convicted wrongfully and give a false confession . . . .”



## “Minimization” as implied promise of leniency

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- The technique of “minimization”
- Court found this Reid technique was so powerfully used in this particular case as to imply a promise of leniency
- Use of “minimization” tactic itself does not automatically render confession involuntary



## Conclusion – Conviction Reversed; Confession Suppressed

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- “false statements concerning ostensibly irrefutable evidence of guilt”
- + Improper offer of leniency (in this case implied under all circumstances)
- = Commonwealth cannot meet its burden to prove voluntariness beyond a reasonable doubt.



## Part 2 - New Jury Instruction on Unrecorded Interrogations

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- “We are hesitant to impose a rigid rule of exclusion”
- “We are not, however, satisfied with preservation of the status quo”
- Result = jury instruction whenever prosecutor offers unrecorded statements from a “custodial” or a stationhouse interrogation.



# Custodial or Stationhouse Interrogation

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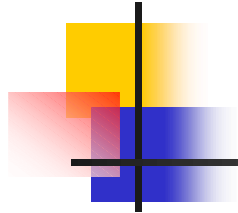
- “Thus, when the prosecution introduces evidence of a defendant’s confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention (e.g., a police station). . . .”



## In which “complete interrogation” was not recorded

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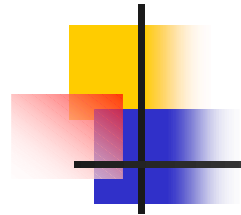
- “... and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction . . .”



## The instruction

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- "...the State's highest court has expressed a preference that such interrogations be recorded whenever practicable..."
- "...because of the absence of any recording . . . [the jury] should weigh evidence of the defendant's alleged statement with great caution and care."



## The supplemental instruction

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- “Where voluntariness is a live issue and the humane practice instruction is given, the jury should be advised that the absence of a recording permits ... them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt.”

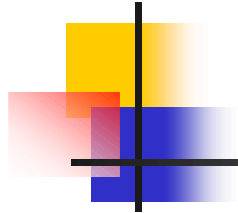


“without regard to the alleged reasons for not recording...”

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- “Where we now mandate a jury instruction, not a rule of exclusion, we think the instruction is appropriate for any custodial interrogation, or interrogation conducted in a place of detention, without regard for the alleged reasons for not recording that interrogation.”

# Concerns



- Legal: How will the courts further define the case?
- Practical: What steps should police officers and law enforcement professionals take?



## Is There Custodial Interrogation/ Place of Detention

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- Police Station Yes
- Jail/Prison Yes
- Police Car ?
- Suspect's Home
  - If not arrest No
  - If under arrest-S/W Yes



# What Needs to be taped?

(When does the tape recorded get turned on?)

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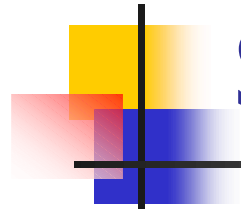
- Can you develop rapport first?
- Should the tape recorder automatically be turned on?
- Should you tape the refusal?
  - What if person refuses?
- Can you tape any ways?



## Special Issue: The Massachusetts Wiretap Law

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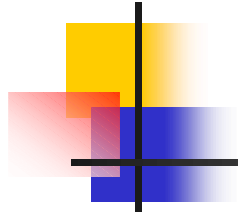
- Do you have two-party consent?-
  - Ch. 272, s. 99 (B)(4) "The term 'interception' means to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given authority by all parties to the communication;.."
- OK to tape, provided it is not "secret"
  - I.E. - "Emergency 911..you're call is being recorded.."



# Specific Types of Interviews

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- Drug Suspect-
  - Is confessing and providing information as CI at the same time
- Witness who becomes Suspect/defendant?
  - Do you stop and suddenly pull out recorder?
- Non-custodial but clearly target
  - Fully intend to use statements against the person
  - Where is interview?



## Best Practice: Basics

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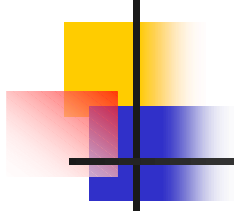
- Tape as early as possible
- Try to tape Miranda and consent/refusal
- Try to record unobtrusively
- Record the complete interrogation
- Preserve the tape



## **Our Best Practice: Massachusetts State Police General Order INV-16**

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- **GUIDELINES FOR ELECTRONIC RECORDING OF INTERROGATIONS**
- **Eleanor C. Sinnott, Esq., Chief Legal Counsel,  
Massachusetts State Police (508) 820-2328**
- “Officers shall, whenever it is practical, electronically record all custodial interrogations of suspects or interrogations of suspects conducted in places of detention.”



# Definitions

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- For the purpose of these guidelines, the following words and phrases are defined as follows:
- “custody” means circumstances in which a reasonable person would believe that his freedom of action has been curtailed such that he is not free to leave;
- “electronic recording” means preservation by analog (audio and/or VHS videotape) or digital (digital audio tape, CD and/or DVD non-rewritable discs) through the use of audio or audio/video recording equipment;
- “interrogation” occurs when an officer’s questions, actions or words (other than those normally attendant to arrest and custody), are reasonably likely to elicit an incriminating response from a suspect;
- “place of detention” means a police station, state police barracks, prison, jail, house of correction, a department of youth services secure facility or another secure facility where persons may be held in detention in relation to a criminal charge(s); and,
- “suspect” means a person who has either been charged with a crime or a person for whom there is a reasonable basis to believe that he may in the future be charged with a crime. Witnesses, victims and other persons who provide information to an officer are not considered suspects unless and until there develops a reasonable basis to change their status.



# Creating a Clear and Complete Record

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- To the extent it is practical, the officer should electronically record the entire interrogation of a suspect. To assist in the creation of the record, officers should do the following:
- Ensure that the recording device is functioning properly.
- Start the recording device.
- Inform the suspect that he is being recorded unless it is otherwise obvious.
- State the date, time, location and names of persons present. If a video recording device is used which imprints the time on the tape or disk, verify that the correct time is displayed.
- State the full name of the suspect.
- Execute appropriate departmental forms including but not limited to *Miranda* warning and waiver, and waiver of prompt arraignment (if applicable).
- If the officer must suspend the recording for any reason, he should record the reasons for stopping (*i.e.*, taking a break or a malfunction), the time the recording device is turned off, the time it is turned back on, and what transpired while the recording device was turned off.
- If the officer uses or refers to documents or other items during the interrogation, the officer should describe those documents or items on the record and mark them with a unique number (similar to an exhibit number at trial) and the officer's initials. If the officer is unable to write on the actual document or item, the officer may write on a bag, envelope or case in which the document or item is placed or on a piece of tape or label attached to the document or item.
- Conclude the recording by stating the date and the time the interrogation is completed.



# Protocol If Suspect Refuses to be Recorded

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- If a suspect refuses to make a recorded statement, the officer should record the refusal (if it is practical) and document it on a refusal form. (S.P. 609)
- If the suspect refuses to be recorded before the recording device is turned on, the officer should, if it is practical, turn on the recording device to record the refusal.
- The officer should identify himself and the suspect, state the date, time and location, inform the suspect of any applicable rights (such as *Miranda*), and inform the suspect that there are potential benefits to recording the interrogation, including the fact that a recording will create a clear and complete record of what was said to the suspect, and what the suspect said during the interrogation.
- The officer should then ask the suspect on the record if he is willing to make an electronically recorded statement.
- The officer should advise the suspect that if at any time he changes his mind and decides that he does want the interview to be recorded, he should let the officer know and the officer will turn on the recording device.
- If the suspect still refuses, the officer should turn off the device, execute a signed refusal form, and proceed with the interview



# Suspect refuses to have his refusal recorded

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(note: Mass. two party consent to record law)

- If the suspect objects to having his refusal electronically recorded, the officer may proceed without recording the refusal or the interrogation.
- The officer should advise the suspect of the benefits of recording, execute a signed refusal form, and proceed with the interview.



## Suspect refuses after recording device has been turned on.

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- If, during the course of a recorded interrogation, a suspect decides that he will no longer answer questions unless the recording device is turned off, the officer should again advise the suspect of the potential benefits of recording the interrogation.
- If the suspect still refuses, the officer should turn off the recording device execute a signed refusal form, and proceed with the interview.



# Discretionary Decision not to Record

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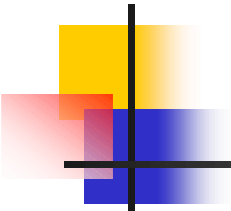
- On rare occasions, an officer may decide not to record an interrogation, even where it is practical to do so, if that officer believes that recording the interrogation will jeopardize the safety of an officer, the suspect, or any other person, or it is ill-advised under the circumstances to record the interrogation.
- If an officer decides, without conferring with the suspect, that it is unsafe or ill-advised under the circumstances to record the interrogation, the officer should document in his interview or case report the reason(s) why the interrogation was not recorded.
- If, after conferring with the suspect, an officer decides that it is unsafe or ill-advised under the circumstances to record the interrogation, the officer should nonetheless advise the suspect of the potential benefits of recording the interrogation. If the suspect still does not want the interrogation to be recorded, the officer should document in his interview or case report the reason(s) why he did not record the interrogation, execute a signed refusal form, and proceed with the interview.



# Recording Device Malfunctions

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- If the recording device malfunctions, the officer conducting the interrogation must make a decision whether and how to continue the interrogation, and he must document what occurred.
- If the recording device can be restarted or replaced immediately, the officer should state on the record that the device malfunctioned, how long the device was not working, and whether or not the suspect made any statements that were not recorded.
- If the recording device cannot be restarted or replaced immediately, the officer should include in his interview or case report the fact that the device malfunctioned and whether or not the suspect made any statements that were not recorded.
- If the recording device cannot be restarted or replaced immediately, the officer should ask the suspect whether he wishes to continue the interrogation without a recording device, or whether he wishes to suspend the interrogation until an operable recording device is available.
- If the suspect consents to continuing the interrogation without a recording device, that consent and the interrogation should be documented in some manner, such as in a signed written statement by the suspect or in the officer's interview or case report.



# Inoperable or Unavailable Recording Device

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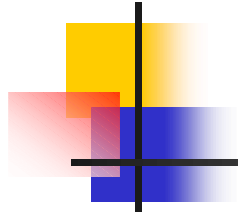
- If there is no recording device available or the recording device is inoperable, the officer should defer the interrogation until an operable recording device can be obtained.
- If it is impractical to defer the interrogation, and the suspect consents to continuing the interrogation without a recording device, that consent and the interrogation should be documented in some manner, such as in a signed written statement by the suspect or in the officer's interview or case report.
- If, under the circumstances, it is impractical to seek or obtain the suspect's consent to continuing the interrogation without a recording device, the ultimate decision to continue should be made by the officer on a case-by-case basis.



# Preservation and Copying of Original Recordings

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- The officer who conducted the interrogation must take steps to preserve the original recording. The storage medium should be removed from the recording device, clearly labeled, and appropriately stored. If the interrogation is recorded digitally, the officer should preserve at least one whole copy which must be clearly labeled and appropriately stored.
- To the extent it is practical, statements from multiple suspects should not be recorded on the same tape or disk.
- As soon as it is practical, an officer who records the statements of a suspect should create at least one exact copy of the original recording. The copy should be clearly labeled as a copy and appropriately stored.
- Once the copy has been made, the copy, and not the original, should be used to make additional copies. Additionally, copies, and not the original, should be used to prepare a written transcript, to comply with discovery obligations, and for all other purposes.

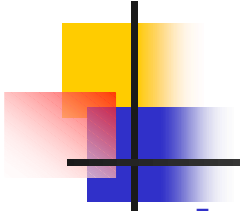


# Storage

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- The officer shall preserve all written forms and notes or records of all statements by a suspect that were not electronically recorded in the original case file.
- All electronically recorded interrogations shall be preserved according to the state records retention law and department policy as criminal evidence. The original storage device shall be labeled as such and any copies labeled as such. Each original and copy shall be authenticated by the interrogator with the following information:
  - Date and time of recording;
  - Location of the interrogation;
  - Name of person interrogated;
  - Name of person(s) conducting the interrogation; and
  - Departmental assigned case number or incident report number.

# ELECTRONIC RECORDING MODEL REFUSAL FORM

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- Name: \_\_\_\_\_
  - Date of Birth: \_\_\_\_ / \_\_\_\_ / \_\_\_\_    Type of Recording Device: \_\_\_\_\_
  - Person(s) Present: \_\_\_\_\_
  - Date: \_\_\_\_\_ Time: \_\_\_\_\_ Location: \_\_\_\_\_
  - \_\_\_\_\_ I have requested that this interview **not** be recorded.
  - \_\_\_\_\_ I have requested that this interview **no longer** be recorded.
  - **To be read to suspect:** There are potential benefits to the electronic recording of interviews. For example, the electronic recording of this interview will create a complete record of what was said to you today and what you said in return.
  - As you know, we have a recording device available for the purpose of electronically recording this interview and are ready and willing to electronically record this interview.
  - At your request, we will conduct this interview without electronically recording (or any further recording) of your statements. If, at any time, you change your mind and decide that you do want to electronically record this interview, please let me know and we will turn on the recording device. I am going to ask you to initial and sign this form:
  - Do you understand the information that I have read to you?

\_\_\_\_\_  
YES                      NO
  - Do you still request that this interview **not** be recorded?

\_\_\_\_\_  
YES                      NO
  - Signature: \_\_\_\_\_ Date: \_\_\_\_\_
  - Witness: \_\_\_\_\_