

Police and D.A.s Endorse Video Recording of Interrogations

By Kristine Hamann¹

**(An earlier version of this article was published in the
New York Law Journal on August 8, 2011)**

New York State's law enforcement has made dramatic progress towards its goal of video recording the entire custodial interview of a suspect. There are 387 video recording facilities in New York State, in either police agencies or prosecutors' offices, and the number is growing. This is the culmination of a gradual shift in approach from the days when only summary statements from suspects were recorded.

Law enforcement's commitment to the recording of interrogation was announced on December 14, 2010 at a press conference led by Derek Champagne, District Attorney of Franklin County and President of the District Attorneys Association. Police and prosecutors from around the state stood together and endorsed statewide protocols spearheaded by the Best Practices Committee of the N.Y. District Attorneys Association²

The statewide protocols were based on a review by the Best Practices Committee of early video recording pilot projects. The review was conducted in conjunction with the New York City Police Department (NYPD), the New York State Police, the state Chiefs of Police Association and the state Sheriff's Association. After many conversations and drafts between police and district attorneys, a state standard emerged that could be used in all jurisdictions — urban, rural and suburban. As the protocols were created by experienced members of law enforcement, they reflected the practical realities of investigations and crime fighting, as well as regional differences.

The pilot projects demonstrated that when the entire police interrogation is recorded, no words will be forgotten, no nuances will be lost, and the conduct of the questioner and the questioned can be fully evaluated. The ability to solve crimes is enhanced

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² The Best Practices Committee, formed in 2009, is made up of district attorneys and experienced assistant district attorneys from 30 New York State counties of every size. It is a sub-committee of the Fair and Ethical Administration of Justice Committee, which is chaired by District Attorney William Fitzpatrick of Onondaga County. The Committee's last major initiative was the development of statewide identification procedures that have been adopted by law enforcement around the state. See NYLJ, Dec. 14, 2010. The identification procedures have been implemented or are in the process of being implemented in police departments around the state.

because a suspect's own words can be reviewed in detail and analyzed in the light of the other evidence of the case. Though experience shows that guilty suspects rarely provide fully candid statements to the police, what they say or do not say to the police, is revealing and probative.

Video recording is equally important to assess the possibility of a false confession. A review of wrongful convictions has demonstrated that false confessions are possible, even when the confession is to an extremely serious crime such as rape or murder. Some argue that juveniles or those who are mentally impaired may be especially susceptible to making a false confession. This issue, as well as any others that could affect the voluntariness and truthfulness of a suspect's statement, can be resolved by viewing a video recording of the entire interrogation. Judges and juries will have a firm basis upon which to evaluate the entire questioning process. Did the police supply the suspect with critical evidence? Was the suspect coerced or threatened? Did the suspect appear to understand the questions? Was the suspect susceptible to suggestion? Questions such as these can be resolved by reviewing the recording.

District Attorney Gerald Mollen of Broome County, which includes the city of Binghamton, was the first law enforcement official in New York State to advocate for the full video recording of interrogations. After an evidence-tampering scandal in the early '90s, where the police falsified fingerprints in several cases, D.A. Mollen believed that there had to be a better way to preserve critical evidence. With little funding, but a great deal of conviction and resolve, D.A. Gerald Mollen began in 1993 to use his significant persuasive powers to convince his police departments to create video recording facilities. Over the course of the next decade, one department after another changed their practices and began recording the entirety of a defendant's interrogation in major felony cases.

Initially D.A. Mollen was met with a great deal of resistance, but as the officers grew more comfortable with the technology, their opposition turned to support. They soon discovered that the recordings were helpful to the prosecution of the case. Valuable details of a defendant's statement were preserved, claims of improper police behavior were easily thwarted, and juries could evaluate the credibility of the defendant's statements on their own.

D.A. Mollen had many visitors who came to see what he had accomplished. His vision began to be replicated in other areas of the state. Starting in 2006, grants from the Division of Criminal Justice Services (DCJS) and from the New York State Bar Association spurred the creation of additional video recording facilities. With this financial support, the police departments in Rochester and Schenectady joined in nudged along by District Attorneys Michael Green and Robert Carney. Gradually,

video recording facilities were being opened in small police departments in counties all around the state, including Cayuga, Chenango, Chautauqua, Clinton, Columbia, Dutchess, Franklin, Fulton, Genesee, Greene, Herkimer, Jefferson, Madison, Niagara, Oneida, Ontario, Orange, Otsego, Rensselaer, Sullivan, Tioga, Ulster and Washington and Wyoming.

The pilot projects allow law enforcement to experiment with various protocols and equipment and provide an opportunity to see how the recordings play out in a trial. It has taken up to two years from the time a grant application is submitted to getting an interview location up and running. Some departments will share facilities; other departments will need several facilities depending on geography and volume of arrests. Since there are over 550 police departments in New York State, there is much work to be done.

In May of 2011, DCJS announced \$477,846 in grants have been awarded to 22 upstate counties for either initial implementation or further expansion of video recording facilities.³ In all, DCJS has invested more than \$2 million in federal grant money to support this initiative. The New York State Bar Association contributed \$200,000. With the awarding of these grants, 58 of the state's 62 counties in New York State either have at least one video recording facility in a police department or are in the process of implementing a facility.⁴

NYS Video Recording Protocols: The protocols developed by the Best Practices Committee with the state's police agencies provide guidance as to when and how to conduct a video recorded interrogation of a suspect in custody on a qualifying offense. A series of circumstances where recording may not be practicable is outlined, for example, the equipment breaks, the interview room is in use, the suspect refuses to be recorded, or the suspect is at a location that has no recording device. Similarly, statements are not expected to be recorded if the statement is made spontaneously or if a suspect is questioned in the field about evidence critical to the investigation, such as "Where is the gun?" or "Where is your accomplice?"

The offenses qualifying for recording are left to the discretion of each jurisdiction. Some departments have begun with homicides, while others have chosen to begin with less serious crimes so that the kinks are worked out with less significant consequences. Already these growing pains are being resolved and the numbers of

³ The counties receiving this new funding are: Allegany, Cayuga, Chenango, Delaware, Dutchess, Essex, Jefferson, Lewis, Montgomery, Oneida, Onondaga, Oswego, Orange, Orleans, Putnam, Saratoga, Schuyler, St. Lawrence, Steuben, Wayne, Westchester and Yates.

⁴ Manhattan, Queens, Bronx, Staten Island and Brooklyn have video recording capabilities in their District Attorneys' offices and are awaiting the results of the NYPD pilot programs in Brooklyn and the Bronx.

qualifying offenses are expanding where resources and logistics permit. In jurisdictions where video recording is well established, such as Broome, Monroe, Albany and Schenectady Counties, some departments record all felonies.

Capacity is a significant factor in choosing qualifying offenses. In New York State there were 585,000 adult arrests in 2010. It would be physically impossible to record statements made by suspects in all of these felonies and misdemeanors given the facilities and funding available. Choices must be made. The NYPD has two pilot programs, one in Brooklyn and one in the Bronx, where suspects charged with felonious assault are video recorded. From these two programs, NYPD will work through the technical and logistical issues that arise in a big city.

The protocols allow the police departments to choose whether to have the camera in view or hidden from the suspect. If the camera is covert, as most are, the investigator is required by the protocols to tell the suspect that the interrogation is being recorded only if the suspect inquires.

Legal issues are also addressed. The protocols alert the officer to the suspect's right to remain silent, the right to counsel, and the suspect's rights when an attorney comes to the police facility. When questioning a juvenile, the protocols suggest the use of simplified Miranda warnings that make it easier for a juvenile to understand their rights. However, these are complex issues, which cannot be fully explained in a protocol. Thus, training on these legal issues, as well as on the practical implementation of video recording interrogations, is being conducted by DCJS, with the help of the Best Practices Committee.

Moving Forward: We have learned many lessons from the pilot programs. Technical problems plagued some of the new facilities, while logistics became an issue in others. In one homicide case, the soundproofing in the wall fell in front of the concealed microphone making the statement hard to hear; in another the audio and the video were not synchronized. Some found the position of the parties problematic, for example, in the case where the fixed camera on the wall only recorded the side of a suspect's hoodie after he shifted in his chair. These problems are being resolved through shared experience.

In these difficult financial times, cost remains a significant issue. Video recording is expensive. Though cameras and DVDs are reasonably priced - the costs range anywhere from \$5,000 to \$35,000 per room – they are just a small part of the overall budget needed to record statements. A soundproof room must be built, with proper lighting and sound recording abilities. Recordings have to be copied, stored, redacted and transcribed. Translators are needed, particularly in counties where many

languages are spoken. Grand jury rooms and courtrooms must be equipped to display the recordings. Since the statements are recorded from beginning to end, they can be very long. One statement extended over a 24 hour period. Someone must listen to the recording and evaluate its contents. This is a time consuming task for law enforcement personnel. Finally, equipment must also be upgraded and replaced as the project moves forward

Despite the financial obstacles, video recording of interrogations has taken hold in New York. It is a program that helps law enforcement and suspects alike. With the generous funding from DCJS and the New York State Bar Association, the state has moved far towards its goal of video recording all felonies. Studies are needed to evaluate its overall effect on the criminal justice system. Questions include: are there more pleas and fewer trials, are there less wrongful convictions, does it inhibit a suspect's willingness to speak, and does it improve our ability to solve crimes? These questions will be answered as we move forward. In the meantime, we know that the video recording of interrogations will continue to expand and that New York is well served by creating a more transparent and open criminal justice system.