

When
Words
*Come Back to
Haunt You*

A Primer on the Use and Admissibility
of Surreptitiously Recorded
Conversations in Civil Cases

By Jonathan Tukel



Fast Facts:

You must counsel a client contemplating recording a conversation to operate the equipment himself or risk making any tape useless, as well as subjecting himself to criminal and civil penalties.

The attorney representing a client making a recording must not listen to the conversation as it is being taped, to avoid becoming an eavesdropper, and no person other than those participating in the conversation should be present for the recording.

It is commonly understood, from news reports and shows like *Law and Order*, that statements surreptitiously recorded by a partner in crime are a staple of criminal trials. Such evidence is rightly believed to be highly effective, as it frequently allows a jury to hear a crime being discussed, if not actually committed. The opponent of such evidence is often placed in the position of asking, to paraphrase Chico Marx, “Well, who you gonna believe, me or your own ears?”¹

Although the rules regarding the admissibility of such tape recordings in civil actions are less discussed, in many instances such evidence is completely lawful and therefore admissible. Given the proliferation of technology making it much easier to create high quality, surreptitious recordings, knowledge of the rules governing the admissibility of that evidence is increasingly important

for civil practitioners. Advance knowledge of the rules makes it possible for you and your client to create a situation in which a lawful, admissible surreptitious recording is obtained.

Consider what action you would take in the following situations:

- During negotiations, one of the purchasers of an automobile dealership, whom you represent, recorded a key conversation without the knowledge of anyone else. May your client use the tape recording in the ensuing litigation?²
- During a divorce, your client installed a device that, without his wife's knowledge, recorded her telephone conversations with her priest, marriage counselor, attorney, and friends. Should you use the tape recordings to impeach the wife's deposition testimony?³
- A client claims that he ordered his stockbroker to sell certain securities, which the broker denies. During the disputed call, your client had a friend listen in, without the broker's knowledge; the friend's version of that conversation supports your client's claims. May the friend testify in a suit against the broker?⁴

This article is intended to give the civil practitioner an overview of federal and Michigan law regarding the admissibility of tape-recorded evidence and highlights some of the traps that can beset a lawyer unfamiliar with this practice area.

An Overview of State and Federal Law

The terminology of surreptitious recording is straightforward. Generally, and in this article, the situation in which an individual authorizes someone else to tape a conversation in which the individual is a participant is referred to as "consensual monitoring" because a participant in the conversation has consented to the taping. The situation in which a participant in a conversation operates equipment that secretly records his or her conversation with others is referred to as "participant" monitoring. Thus, A recording his or her own conversation with B constitutes participant monitoring. A authorizing C to secretly record A's conversation with B, when C is not a party to the conversation, is an example of consensual monitoring. As we will see, this is an important distinction. While federal law permits both participant and consensual monitoring, Michigan law permits only participant monitoring.

The starting point regarding the admissibility of any tape-recorded conversation is the federal wiretapping statute,⁵ generally known as Title III. Under Title III, an "interception" is the "aural acquisition," using a device such as a tape recorder,⁶ of (1) a land line or cellular telephone call (a "wire communication")⁷ or (2) a subjectively private interpersonal conversation that takes place under circumstances in which it is objectively reasonable to expect that the conversation is private (an "oral

communication").⁸ Title III prohibits all interceptions unless an exception applies.⁹

Under both state and federal law, determining the admissibility of intercepted conversations requires two inquiries: (1) has the evidence been obtained in violation of the law and (2) if so, does the fact that the evidence was obtained unlawfully render it inadmissible? Because Title III does not preempt more restrictive state laws,¹⁰ if the evidence is admissible under federal law, the same two questions must then be addressed under Michigan law.

Consensual Monitoring

Outside the law-enforcement context, the key provision regarding tape recordings of communications is 18 USC 2511(d), which permits a person who is not acting under color of law to intercept a wire or oral communication "where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act" under state or federal law. Thus, any party to a conversation may record it or lawfully authorize someone else to record it for him as long as his purpose is not criminal or tortious. An example of an improper purpose is to obtain a recording to commit extortion. Title III thus permits both consensual monitoring and participant monitoring. Participant monitoring and consensual monitoring are the only means permitted by Title III for private citizens to record telephone calls and nonpublic conversations. The only other lawful method of intercepting a conversation is by court order, and only a law enforcement officer may apply for a court order.¹¹

Exclusion Under Title III of Unlawfully Obtained Evidence

If an interception violates Title III, "no part of the contents" of the intercepted communication and "no evidence derived therefrom" may "be received in evidence in any trial, hearing, or other proceeding in or before any court" or state or federal agency.¹² Thus, a conversation intercepted by a third party without prior authorization from one of the participants is not admissible. An example of this is the divorce proceeding hypothetical example set forth in the introduction. While some federal courts of appeals have read an interspousal-communication exception into Title III,¹³ meaning that it is not unlawful for one spouse to intercept the other's conversation, the United States Court of Appeals for the Sixth Circuit and Michigan state courts have rejected that interpretation.¹⁴ Thus, anyone in Michigan who uses a device to intercept a spouse's wire or oral communications with a third party violates Title III, even in the context of divorce proceedings, and any recording of the conversation is inadmissible in any state or federal proceeding. Additionally, parents have no right to consent on behalf of minor children to the interception of a conversation in which that parent is not a participant.¹⁵

The Michigan Eavesdropping Statute

The Michigan eavesdropping statute¹⁶ provides that any “person who is present or who is not present during a private conversation and who wilfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto” violates the statute.¹⁷ The statute defines “eavesdrop” as “to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse.”¹⁸ The statute thus seemingly bars both consensual and participant monitoring, as it twice (in the definition of “eavesdrop” and in the statutory prohibition) expressly forbids recording without the permission “of all parties.” However, in *Sullivan v Gray*,¹⁹ the Michigan Court of Appeals interpreted the statute as permitting participant monitoring. “The statute contemplates that a potential eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on. Had the legislature desired to include participants within the definition, the phrase ‘of others’ might have been excluded or changed to ‘of others or with others.’”²⁰ The Michigan Court of Appeals has reaffirmed the *Sullivan* rationale,²¹ but the Michigan Supreme Court has expressly reserved ruling on its soundness.²²

The *Sullivan* panel recognized that its decision led to an “anomaly.”²³ The anomaly is that the Michigan statute permits participant monitoring, but prohibits consensual monitoring:

While a participant may record a conversation with apparent impunity [sic], his sole consent is insufficient to make permissible the eavesdropping of a third party. Thus, while a participant may record a conversation, he apparently may not employ third parties to do so for him. However, this result, although incongruous on its face, is not necessarily an inconsistency. An individual may not expect those he converses with to record their discourses. Still, absent a request that discussions be held “off the record,” it is only reasonable to expect that a conversation may be repeated, perhaps from memory or from the handwritten notes of a party to the conversation.²⁴

Thus, a participant may “record and utilize conversations he participates in”²⁵ (participant monitoring is lawful), but the participant may not delegate that authority to a third party (consensual

monitoring is unlawful) because the third party becomes an eavesdropper.²⁶ For the same reasons, permitting a third party to simply listen to a conversation as it unfolds, without the consent of all parties (assuming the listening is accomplished through a “device” such as a telephone or speakerphone), renders that third party an unlawful eavesdropper.²⁷ Consequently, you must counsel a client contemplating recording a conversation to operate the equipment himself or risk making any tape effectively useless (and subjecting himself to criminal and civil penalties). The attorney representing a client making a recording must not listen to the conversation as it is being taped, lest he become a third-party eavesdropper, and no person other than those participating in the conversation should be present.

The *Sullivan* Anomaly in Practice

The *Sullivan* anomaly arises from interpreting the words “without the permission of all persons engaged in the discourse” as meaning “without the permission of all persons engaged in the discourse, unless one participant himself records the discourse.” In practice, the *Sullivan* anomaly does not actually protect individuals from nonconsensual listening by a third party, as the opinion contemplated it would. Under *Sullivan*, a participant at one end of a telephone conversation may record it, and because the recording is lawful, may play it for a third party,²⁸ but if the third party listens as the recording is being made, he is an eavesdropper subject to civil and criminal penalties.²⁹ Of course, from the perspective of the party to the conversation not consenting to its being recorded, the privacy interest invaded is the same regardless of whether the third party overhears the conversation in real time, or five minutes after it takes place, through a recording. And any expectation of privacy is undermined in exactly the same manner regardless of whether the third party learns the contents of the conversation by listening to a tape or by having overheard the conversation as it was being recorded.



The Exclusion of Evidence for a Violation of the Michigan Statute

As long as *Sullivan* remains valid, participant recordings are lawful and thus necessarily admissible. However, what about the anomaly recognized by the Michigan Court of Appeals? If a participant authorizes a third party to record a conversation, both have violated the Michigan statute, but not Title III. The Michigan statute, unlike Title III, contains no statutory exclusionary rule. Is that evidence admissible?

Perhaps because of *Sullivan's* interpretation, the Michigan courts have never addressed that question. However, in criminal cases in which the Fourth Amendment exclusionary rule is inapplicable (as it will be in all civil cases between private parties), the Michigan Supreme Court has consistently refused to judicially create a suppression rule when the legislature did not provide one in the statute at issue.³⁰ The Michigan Court of Appeals followed a similar analysis in a criminal case in refusing to suppress evidence for a violation of the eavesdropping statute.³¹ The same analysis should apply to a violation of the Michigan statute in the civil context. Because the legislature enumerated the exclusive remedies in the eavesdropping statute for its violation, and those remedies do not include the suppression of evidence, a violation of the statute should not render a recording inadmissible.

No other provision of Michigan law bars the admission of evidence acquired in violation of the eavesdropping statute. *Cluett v Rosenthal*,³² a venerable precedent, holds that evidence unlawfully obtained by a private party is nevertheless admissible. “[T]hough papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they are obtained, whether lawfully or unlawfully”³³ *Cluett* retains its vitality in cases that do not involve governmental action.

The Practical Consequences of Violating the Eavesdropping Statute

Notwithstanding the technical admissibility of evidence obtained in violation of the eavesdropping statute, there are practical limitations that render evidence obtained in violation of the statute unavailing. The Michigan statute and Title III make it a felony not only to eavesdrop unlawfully,³⁴ but also for anyone to “use” or “divulge” information that he or she knows or has reason to know was obtained in violation of the respective statute,³⁵ and that person is also liable to the aggrieved party for damages.³⁶ Playing an unlawful recording in court or a deposition

constitutes an unlawful “use” and subjects an attorney who does so to the civil and criminal penalties.³⁷

Conclusion

Tape-recorded evidence is very powerful because it allows the jury to hear the events in a controversy unfold, as if they had happened in the jury’s presence. Awareness of the rules will assist you in placing your clients on the favorable side of such evidence, and may spare you some personal grief as well. ■



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FOOTNOTES

1. *Duck Soup* (Paramount Pictures, 1933).
2. See *Sullivan v Gray*, 117 Mich App 476; 324 NW2d 58 (1982).
3. See *United States v Wuliger*, 981 F2d 1497 (CA 6, 1992).
4. See *Navarra v Bache Halsey Stuart Shields, Inc.*, 510 F Supp 831 (ED Mich, 1981).
5. 18 USC 2510 through 2520.
6. 18 USC 2510(4).
7. 18 USC 2510(1).
8. 18 USC 2510(2).
9. 18 USC 2511.
10. See, e.g., *United States v Hall*, 543 F2d 1229, 1240 n 6 (CA 9, 1976); *Navarra*, 510 F Supp at 833–834.
11. 18 USC 2516.
12. 18 USC 2515.
13. *Simpson v Simpson*, 490 F2d 803 (CA 5, 1974), cert den 419 US 897; 95 S Ct 176; 42 L Ed 2d 141 (1974).
14. *Wuliger*, 981 F2d at 1507; *Young v Young*, 211 Mich App 446, 450–452; 536 NW2d 254 (1995).
15. *Williams v Williams*, 229 Mich App 319; 581 NW2d 777 (1998).
16. MCL 750.539a through 750.539j.
17. MCL 750.539c.
18. MCL 750.539a(2).
19. *Sullivan*, n 2 *supra*.
20. *Sullivan*, 117 Mich App at 481.
21. See *Dickerson v Raphael*, 222 Mich App 185, 198; 564 NW2d 85 (1997), rev'd on other grounds, 461 Mich 851; 601 NW2d 108 (1999); *Lewis v LeGrow*, 258 Mich App 175, 185; 670 NW2d 675 (2003).
22. See *Dickerson v Raphael*, 461 Mich 851; 601 NW2d 108 (1999).
23. *Sullivan*, 117 Mich App at 482.
24. *Id.*
25. *Id.*
26. See *id.*; *Dickerson*, 222 Mich App at 198–199; *Lewis*, 258 Mich App at 185.
27. *Sullivan*, 117 Mich App at 482.
28. *Id.*
29. MCL 750.539c (felony provision); MCL 750.539h (civil damages provision).
30. *People v Hawkins*, 468 Mich 488, 507; 668 NW2d 602 (2003); *People v Anstey*, 476 Mich 436, 444; 719 NW2d 579 (2006); *People v Earls*, 477 Mich 1119, 1119; 730 NW2d 241 (2007).
31. *People v Livingston*, 64 Mich App 247; 236 NW2d 63 (1975).
32. *Cluett v Rosenthal*, 100 Mich 193, 198; 58 NW 1009 (1894).
33. *Id.*
34. 18 USC 2511(4)(a); MCL 750.539c.
35. 18 USC 2511(c) (divulge); 18 USC 2511(d) (use); MCL 750.539e (use or divulge).
36. 18 USC 2520; MCL 750.539h.
37. See *Wuliger*, n 14 *supra*.

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