

23400 Michigan Avenue, Suite 101
Dearborn, MI 48124
Tel: 1-(866) 534-6177 (toll-free)
Fax: 1-(734) 943-6051
Email: contact@legaleasesolutions.com
www.legaleasesolutions.com

Eavesdropping Law under Michigan and Federal Law

Introduction

A local city assessor (“assessor”) has been harangued by a citizen (“citizen”) for years. Citizen’s complaint is that assessor had over-assessed her property. Earlier, citizen had lost this argument while her suit against assessor was tried by the Michigan Tax Tribunal. However, from then on citizen made it her personal mission to cause havoc for assessor. Citizen filed complaints against assessor at a variety of levels. Citizen also spoke against assessor at every City Council Meeting. In fact, citizen’s attacks on assessor were at a very personal level. Recently, citizen had recorded a face to face conversation she had with assessor in a public office. This conversation was recorded without the knowledge of assessor. Citizen then took the tape recording and supplied it to a State Regulatory Agency claiming that assessor had perjured himself before the Michigan Tax Tribunal.

Discussion

1. WHETHER RECORDING A FACE TO FACE CONVERSATION WITHOUT KNOWLEDGE/CONSENT OF THE OTHER PARTY VIOLATES EITHER A FEDERAL OR MICHIGAN LAW

18 USC 2511 in its pertinent part prohibits any person who intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication. The term “oral communication” is defined in 18 USC § 2510 (2) as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication.”

18 USC 2511(2)(d) acts as an exception to the prohibition of tape recordings of communications. This provision permits a person who is not acting under color of law to intercept a wire or oral communication when such person is a party to the communication or where one of the parties to the communication gives prior consent to such interception. However, such communication should not be intercepted for the purpose of committing any criminal or tortious act under state or federal law. The language and legislative history of the statute clearly demonstrate that the privilege is not extended if the intercepting party acted with the purpose of committing a criminal, tortious, or injurious act. *Boddie v. American Broadcasting Cos.*, 731 F.2d 333, 338 (6th Cir. Ohio 1984).

According to Federal law, it seems that citizen did not violate a federal statute as she was a party to the communication. However, when considering the fact that citizen never missed an opportunity to cause havoc to assessor and spoke against him in every possible situation, it can be argued that citizen had tortuous intentions, and therefore, is not within her rights to intercept the communication pursuant to the conditions laid down in 2511(2)(d).

When it comes to state law, Michigan prohibits eavesdropping upon private conversation. According to MCL § 750.539(a)(2) "Eavesdrop" or "eavesdropping" means "to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse...." MCL § 750.539(c) prohibits eavesdropping upon private conversation. The statute provides:

"Any person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than \$2,000.00, or both."

Therefore, Michigan law is stricter than Federal law as it apparently bars both consensual and participant monitoring, and expressly forbids recording without the permission of all parties involved. However, the Michigan Court of Appeals in *Sullivan v.*

Gray, 117 Mich. App. 476, 481 (Mich. Ct. App. 1982) observed that the statutory language explicitly excludes participant recording from the definition of eavesdropping by limiting the subject conversation to “the private discourse of others”. The statute contemplates that a potential eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on. *Id.* If the Legislature had the intent to include participants within the definition, the phrase “of others” would have been excluded or changed to “of others or with others.” *Id.*

In short, it appears that citizen did not violate either Federal or State law as she was party to the conversation. An argument can be made under Federal law that since citizen was acting with the intention to tortuously interfere with the assessor’s duties/functions, that she did in fact violate the Federal law.

2. WHETHER THE TRANSMISSION OF THE TAPE TO THE STATE REGULATORY AGENCY IS ‘PUBLICATION’ WHICH RISES TO THE LEVEL OF DEFAMATION

The Michigan Court of Appeals has laid out the cause of action for defamation as: (a) a false and defamatory statement concerning plaintiff; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). *Sawabini v. Desenberg*, 143 Mich. App. 373, 379 (Mich. Ct. App. 1985). See also *Burden v. Elias Bros. Big Boy Restaurants*, 240 Mich. App. 723, 726 (Mich. Ct. App. 2000).

As a matter of law, Courts have the discretion to determine whether the words in question, alleged by plaintiff to be defamatory, are capable of defamatory meaning. *Sawabini v. Desenberg*, 143 Mich. App. 379. A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *Id.*

To constitute a publication it is necessary that the defamatory matter be communicated to some one other than the person defamed. In the case at hand, the fact that the citizen communicated the defamatory remarks to a third person would appear to constitute ‘publication’ as it is understood in Michigan law.

3. WHETHER PUBLICATION OF UNAUTHORIZED RECORDING TO A REGULATORY AGENCY MAKES THAT PUBLICATION PROTECTED

No support was found in either Federal or State law which would protect publication of an unauthorized recording. Federal law prohibits intercepted wire or oral communications to be used as evidence. It also prohibits the person from disclosing information contained in such communication. The related provision is contained in 18 USC § 2515, which reads in pertinent parts as follows:

“Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States....”

Further, 18 USC 2511(1)(c) prohibits any person who intentionally discloses, or endeavors to disclose the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of the statute.

In the instant case, pursuant to 18 USC 2511(2)(d), and as discussed above, citizen arguably committed no offence by intercepting her communication with assessor as she was a party to the communication. However, by virtue of 18 USC § 2515 she cannot use the recording as evidence.

Michigan also prescribes punishment for using or divulging information unlawfully obtained. Again, per the holding of *Sullivan v. Gray*, in the case at hand, it does not appear that the information was obtained unlawfully as citizen was party to the conversation. However, if the information was found to be unlawfully obtained, citizen would be guilty of a

felony if she were to use or divulge the information. According to MCL § 750.539e any person who uses or divulges information which he knows was obtained by eavesdropping or surveillance is guilty of a felony, punishable by imprisonment in a state prison not more than 2 years, or by a fine of not more than \$2,000.00.

Moreover, Michigan has long recognized the common-law tort of invasion of privacy. *Beaumont v. Brown*, 65 Mich. App. 455, 460 (Mich. Ct. App. 1975). A participant to a conversation may not unilaterally nullify other participants' expectations of privacy with regard to the conversation by secretly broadcasting the conversation. *Dickerson v. Raphael*, 461 Mich. 851, 2 (Mich. 1999). In *Dickerson*, the Supreme Court of Michigan held that while determining whether a conversation is private, courts are to consider whether the participant intended and had reasonably expected the conversation to be private at the time and under the circumstances involved. *Id.* at 1. Courts should see that the participants intended and reasonably expected the conversation to be private, and not whether the subject matter was intended to be private. *Id.* Therefore, it is likely that the participant should not broadcast the recorded conversation without the consent of all parties.

Invasion of privacy actions has evolved into four distinct tort theories: (1) the intrusion upon another's seclusion or solitude, or into another's private affairs; (2) a public disclosure of private facts about the individual; (3) publicity that places someone in a false light in the public eye; and (4) the appropriation of another's likeness for the defendant's advantage. *Id.* at 461.

4. STATUS OF SLAPP LAWSUITS IN MICHIGAN OR/AND IN THE FEDERAL SIXTH CIRCUIT

Strategic Lawsuits Against Public Participation ("SLAPP") refer to suits intended to intimidate and silence critics by burdening them with legal proceedings until they abandon their criticism or opposition. The plaintiff's goal is to force the defendant to succumb to fear, intimidation, mounting legal costs or by exhaustion simply abandon the criticism. Numerous

states have enacted anti-SLAPP legislation to counter the hardships SLAPP defendants have to go through. However, research shows that Michigan does not have such an anti-SLAPP legislation.

It should be noted that Tennessee, which falls within the Sixth Circuit enacted the Tennessee Anti-SLAPP Act of 1997. Tennessee Code §§ 4-21-1001 to 4-21-1004 contains the Anti-SLAPP provisions.

LEGALEASE SOLUTIONS