

## *Recording the Police in Michigan: Protecting Yourself from Arrest in a Post-Occupy World*

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In recent months, we have all read stories about police officers arresting people, reporters and non-reporters alike, for taking footage of officers at work during traffic stops, while conducting interviews, or when making arrests in public places. In many of these cases, the police have relied upon their state's wiretapping laws to justify the arrests on the theory that it is unlawful to record the spoken words of anyone—including a police officer—without permission. Some clients have contacted us about whether the police can arrest reporters for such conduct in Michigan. Because I am also a criminal defense attorney, I have taken a special interest in this issue.

### *So, What's the Law in Michigan?*

Michigan has both a wiretapping and an eavesdropping statute. Wiretapping is prohibited under MCL 750.540. Any person who willfully and maliciously taps or otherwise makes an unauthorized connection to any electronic medium of communication, including the internet, a computer, or computer network, is guilty of a felony punishable by up to 2 years in prison, a fine of \$1,000, or both. MCL 750.540(5)(a). This is obviously much different than the wiretapping laws referenced in the stories we've seen in the news.

Michigan's eavesdropping statute, on the other hand, covers conduct much closer to what we've seen in the news. Under MCL 750.539c, it is unlawful for any person—regardless of whether they are present during a private conversation—to willfully use any device to eavesdrop upon the conversation of others without the consent of all of the parties to the conversation. It is also unlawful to knowingly aid or employ someone else to eavesdrop. The Legislature has defined "eavesdropping" to mean overhearing, recording, amplifying, or transmitting any part of the private conversation of others without the permission of all persons engaged in the conversation. MCL 750.539a(2). Eavesdropping is a felony punishable by up to 2 years in prison, a fine of \$2,000, or both. MCL 750.539c.

As you might have already guessed, the big question is: when is a conversation private? Although the eavesdropping statute does not define the phrase "private conversation," it does define the phrase "private place," which is a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance. MCL 750.539a(1). In *People v. Stone*, 463 Mich. 558 (2001), the Michigan Supreme Court used the definition of "private place" to define a private conversation as one in which a person reasonably expects to be safe from such intrusions or surveillance. Since the Court has tied the definition of private conversation to the definition of private place, it is important to note that a private place "does **not** include a place to which the public or substantial group of the public has access." MCL 750.539a(1) (emphasis added).

### *Recording Police in Public*

In light of *Stone*, it would appear to be legally impossible for anyone to have a private conversation in a public place. In *Dickerson v. Rafael*, 222 Mich. App. 185 (1997), *aff'd in part, rev'd in part* 461 Mich. 851 (1999), the Michigan Court of Appeals and the Michigan Supreme Court ruled that, under the right set of circumstances, a conversation in a public place can be deemed private. There, a daughter secretly transmitted a "heart-to-heart" conversation with her mother in a public park to person sitting in a nearby van, where it was recorded by a company hired by a television program. Few people

were in the park, and although it was apparent that some strolled by during the conversation, no one stopped to listen. Further, the daughter had chosen to confront her mother at work, and in an attempt to find a space to speak with her daughter away from her co-workers, the mother moved the conversation to the park. The Michigan Supreme Court held that reasonable minds could differ on whether the conversation was intended to be private under these circumstances, and that it was therefore a question for the jury to decide.

But the private family moment in *Dickerson* is very different from police officers performing their public duties in a public place. Generally speaking, the police are not having “heart-to-heart” conversations with suspects and other members of the public; they are public servants publicly enforcing the public acts of the Legislature. If a police officer is aware that a reporter is filming him or her on a public street, in a park, or anywhere else that the public, or a substantial group of the public, has a lawful right to be present, it would be difficult for the officer to argue that the parties intended the conversation to be private in the *Dickerson* sense.

That said, there are some practical considerations reporters should keep in mind. First, police officers are generally authorized to control the scene of an arrest or a traffic stop. If they think you are too close and may interfere or otherwise jeopardize the security or integrity of the scene, they can order you to move away to a reasonable distance. Second, officers will not debate with you. You may have a right to be present and film, but they still have a badge, a gun, and handcuffs. If you refuse to comply with any order—even if the officer is plain wrong—you will likely be arrested and you may even be charged with a crime. If you think an officer has acted improperly, the better course of action is to get the officer’s name and badge number and make a record of everything that was said. Your camera may do that for you. But if not, write it all down and contact a lawyer.

### ***Recording Police in Private***

Although most recordings will likely occur in public places, it is important to be aware of your surroundings and to consider whether the circumstances might render the conversation private. There are special rules to keep in mind for recordings of private conversations.

Michigan draws a distinction between private conversations in which you are a participant and those in which you are not. If a reporter is personally participating in a private conversation, then the reporter will benefit from Michigan’s one-party consent rule. In *Sullivan v. Gray*, 117 Mich. App. 476 (1982), the Michigan Court of Appeals ruled that the eavesdropping statute does not apply to a participant in a private conversation, because eavesdropping is defined as the overhearing or recording of “the private discourse *of others*.” In other words, the eavesdropper must be a third party who is not part of the conversation. *Id.* So, if a police officer approaches a reporter, the eavesdropping statute would not prohibit the reporter from recording the conversation, regardless of whether the officer consents.

### ***Third-Party Cameramen***

One might assume that if a reporter can record a private conversation under the one-party consent rule, then the reporter could also have a cameraman record the conversation. Although you might traditionally associate cameramen with broadcasters, more and more newspapers are posting video to their websites, and some are using cameramen to obtain the footage. Generally, cameramen are silent observers; they do not participate in the conversation. A prosecutor might try to argue that this makes cameramen the very type of third parties contemplated in *Sullivan*, and therefore eavesdroppers. This, however, would overlook that the hallmark of a private conversation is a reasonable expectation that the conversation will be safe from casual or hostile intrusion or surveillance. *Stone*. Anyone—including a police officer—who talks to a reporter while a third party points a camera at him cannot credibly claim that he believed the conversation would be safe from (rather obvious) surveillance. Indeed, it could be argued that the officer impliedly consented to be filmed.

Also, the United States Court of Appeals for the First Circuit recently affirmed that the public and the press have a constitutionally protected right to film the police in public places. *Glick v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011). Although the *Glick* decision is not binding law in the Sixth Circuit (the federal appellate circuit in which Michigan sits), other circuits and district courts have similarly ruled that the First Amendment protects the right to film police in public.

### ***Avoid Surreptitious Broadcasts***

Michigan courts have distinguished between recording a private conversation and surreptitiously broadcasting a private conversation to another location. For example, in *Dickerson*, the Court of Appeals concluded that the person in the van and his employer were third parties who did not have the mother's consent to record the conversation. The Michigan Supreme Court agreed that a live transmission by a participant does not exempt the third-party listener from having to obtain consent of all of the parties.

Although unaddressed in *Dickerson*, there is an open question as to whether a reporter would also be liable if he or she surreptitiously transmitted a conversation to a colleague nearby. Under MCL 750.539c, it is a felony to knowingly aid another person to eavesdrop on a private conversation. In this type of situation, the reporter arguably would not be personally recording the conversation under the one-party consent rule. And, by knowingly employing the means to transmit the conversation to a third party, who would be an eavesdropper under *Dickerson*, a prosecutor might argue that this constitutes knowingly aiding another person to eavesdrop. Given the potential for criminal and civil liability, it would be best to avoid to this kind of activity altogether.

Of course, the facts of each case will be unique, and the law may apply differently as the facts change. Because the penalties for violating the eavesdropping statute can be severe, take a proactive approach and, when in doubt, contact a lawyer before you make the recording.

***Please contact the author or other member of the Butzel Media Team if you have any questions about this or any other media law issue. Follow us on Twitter @medialawyers.***

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