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Feature Article

Michael J. Denning
Heyl, Royster, Voelker & Allen, P.C., Rockford

Eavesdropping – Easier Than Ever!

Almost every modern smart phone includes an "app" or tool to record sound. Most people, whether they know it or not, can record conversations with others simply by activating an application and hiding their smart phone in their pocket or in another nearby location. A distrustful or unhappy patient could record a conversation with a doctor. A doctor could record an interaction with a problematic patient. The defense lawyer must be ready to advise clients on whether it is legal to make these recordings and must ultimately know whether any such recording may be admissible in a trial concerning allegations of medical malpractice.

Illinois, like most states, has laws dealing with "eavesdropping" and the electronic recording of conversations. In comparison to other states, the Illinois eavesdropping law is among the strictest. It requires **both parties** to consent to the recording or transcription of a private conversation. In fact, before the eavesdropping statute was amended in 2014, not only did the statute require the consent of both parties for a recording, but it was irrelevant as to whether the parties intended for the conversation to be private. This meant that both the context and location of the communications did not factor into determining whether the parties could record, as both parties had to consent no matter the circumstances. The statute was struck down as unconstitutional in *People v. Clark*, 2014 IL 115776.

Prior Eavesdropping Statute Unconstitutional

In *Clark*, the defendant used an eavesdropping device to record a conversation between himself, opposing counsel, and the judge while in court, without the consent of the other individuals. *Clark*, 2014 IL 115776, ¶ 1. The defendant was charged with two counts of eavesdropping. According to the defendant, there was no court reporter and no recording device present in the court room, so he recorded for the purpose of keeping an accurate record. Defendant filed a motion to dismiss the indictment, arguing that the statute violated his substantive due process rights and his First Amendment right to gather information by recording public officials performing their public duties. *Id*. ¶ 3.

The court found the eavesdropping statute to be overbroad and extended beyond its legislative purpose in protecting private conversations. *Id*. ¶ 21. Essentially, the statute criminalized the recording of all conversations except in limited situations and it deemed all conversations to be private and not subject to recording even if the parties involved in the communication had no expectation of privacy. The court noted that individuals have an interest in the privacy of their communications, but "the statute's blanket ban on audio recordings sweeps so broadly that it criminalizes a great deal of wholly innocent conduct, judged in relation to the statute's purpose and its legitimate scope." *Id*. ¶ 22.

The Eavesdropping Statute Today

Following *Clark*, the Illinois legislature passed a new eavesdropping statute allowing for people to record communications while in public places without the consent of both parties. However, the statute still protects "private" communications:

> (a) A person commits eavesdropping when he or she knowingly and intentionally:
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> (1) Uses an eavesdropping device, in a surreptitious manner, for the purpose of overhearing, transmitting, or recording all or any part of any private conversation to which he or she is not a party unless he or she does so with the consent of all of the parties to the private conversation;
>
> (2) Uses an eavesdropping device, in a surreptitious manner, for the purpose of transmitting or recording all or any part of any private conversation to which he or she is a party unless he or she does so with the consent of all other parties to the private conversation;
>
> (3) Intercepts, records, or transcribes, in a surreptitious manner, any private electronic communication to which he or she is not a party unless he or she does so with the consent of all parties to the private electronic communication.

720 ILCS 5/14-2(a)(1-3).

The statute defines "private conversation" as "any oral communication between 2 or more persons, whether in person or transmitted between the parties by wire or other means, when one or more of the parties intended the communication to be of a private nature under circumstances reasonably justifying that expectation." 720 ILCS 5/14-1(d). The key language to interpret is "reasonable expectation." What is a "reasonable expectation" of a private communication?

Can a Patient Record a Visit Without the Consent of the Physician?

To answer this question, one must look to factors such as the location and context of the communication. The statute's objective is to allow people to record communications while in public when there is no "reasonable expectation" of privacy. Even though the statute does not directly define "reasonable expectation," it does state that it "shall include any expectation recognized by law, including, but not limited to, an expectation derived from a privilege, immunity, or right established by common law, Supreme Court rule, or the Illinois or United States Constitution." 720 ILCS 5/14-1(d). During the Senate debate hearings for this bill, one senator stated that a "protected conversation would be attorney-client communications." S.B. 1342, 98th Gen. Assemb., 141st Reg. Sess. (Ill. 2014), at 72. Therefore, following this reasoning, if the communications between a physician and patient are protected by physician-patient privilege, there should be a "reasonable expectation" of privacy and a person would need consent from both parties to record it. Thus, patient/physician communications in the medical setting are more likely to be protected from recording due to their uniquely and historically private nature.

It would stand to reason then that absent the physician's consent, a patient cannot legally record communications during a visit in the physician's office, as there is almost certainly a "reasonable expectation" of privacy during that

conversation. For the same reasons, a physician certainly cannot legally record an interaction with a patient without their knowledge and consent.

Furthermore, the statute explicitly states that any recording obtained in violation of the act is inadmissible in a civil trial. See 720 ILCS 5/14-5. Interestingly, this portion of the statute does allow for the admission of such evidence if all parties to the conversation consent to its admission. One could imagine a narrow scenario where both the plaintiff/patient and the defendant/doctor might agree to the admission of such a recording, and then argue different interpretations of it.

Conclusion

Recorded communications are becoming increasingly more common in today's society. The discoverability and use of illegally obtained recordings in the doctor/patient setting are issues that seem almost certain to arise with the advent and prevalence of the smart phone.

About the Author

Michael J. Denning, a partner with the Rockford office of *Heyl, Royster, Voelker & Allen, P.C.*, concentrates his practice in civil defense litigation, including medical malpractice and nursing home litigation; auto, premises and trucking litigation; and the defense of toxic tort and asbestos claims. In addition to defending long term care facilities in malpractice litigation and personal injury claims, Mr. Dennning also handles a myriad of administrative issues for facilities, including involuntary discharge proceedings, licensure issues, fraud and abuse claims, and other litigation. He has presented physicians, nurses and nursing assistants for deposition in numerous professional liability cases. Mr. Denning is a certified arbitrator for the Seventeenth Judicial Circuit Court. He is listed on the Law Bulletin Publishing Company's 2013 list of "40 Under Forty" up-and-coming attorneys in Illinois, and has been recognized as a "Rising Star" by Illinois Super Lawyers (2012-2014). He served as the Editor-in-Chief of the *Northern Illinois University Law Review* and was awarded the NIU Scribes award in 2001 for legal scholarship. After graduating, he served as Senior Law Clerk to Justice Tom Lytton of the Illinois Appellate Court, Third District.

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