

Effective Trial Work in the Electronic Age
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The era of recorded statements, whether audio or video, of child witnesses, taped undercover drug buys or police interrogations has given rise to new problems for criminal defense lawyers. We cannot be effective advocates in the courtroom without planning for how we will use recorded statements in our cases. We must plan for both the most persuasive presentation to the judge or jury at the trial level and for best preserving the record at the appellate level.

In *State v. Ruiz-Velez*, 2008 WI App 169, the Court of Appeals held that court reporters must take down and if required, transcribe recorded statements as they are played in court. While the *Ruiz Velez* decision pertained to a recorded interview of a child in a sexual assault case, it has been applied in other settings involving other types of recorded statements as well, see *State v Huff*, 2009 WI App 92.

But this ruling is likely to be short lived; the Director of State Courts has filed a petition with the Wisconsin Supreme Court¹ requesting that SCR 71.01 be amended so that reporters will not be required to transcribe the playing of recordings in court. The Supreme Court has scheduled a hearing on this petition for October 29, 2009. The petition requires that parties litigating a case precisely identify what portion of a recording was played in court so that it can be identified for the record. The petition does not address who would be responsible for creating a transcript of recordings played in court in the event of an appeal.

Regardless of the result of the upcoming petition, trial lawyers must learn how to make an effective and persuasive presentation in the court when there are recorded statements. The following are my suggestions:

A. Listening to the Tape

1. Be sure you listen to the entire recording yourself and clearly understand what is being said and how it plays a role in your case.
2. If you can't understand words on the tape, try playing it at a slower speed, this may clarify things for you.
3. Play the recording for your client and discuss its contents.
4. Listen to the recordings of all witnesses. What they told the police or how the police got them to give a statement can be very different from the summary contained in the police report.

¹ Petition 09-05, a copy of which is attached.

B. Transcript Preparation

1. If the case will be litigated, get a transcript prepared for either the entire recording or whatever portions you intend to use in court whether in direct or cross examination.
2. Get transcripts prepared early; tape recordings of interrogations and interviews can be difficult to understand and take a long time to prepare. It takes an experienced secretary approximately eight hours to accurately transcribe an hour of tape.
3. Transcripts do not have to be prepared by court reporters; anyone can do them. If you don't have a secretary, look into hiring one or hiring a student on a case by case basis.
4. Have your transcriber type in line numbers in the left margin just as court reporters do. Have them enter the time on the tape at five minute or other regular intervals so you can easily locate the audio or video when you need to as you prepare for court.
5. Review the transcript while playing the recording before the copy is finalized and inform your transcriber of errors. The transcriber can listen to the tape again and correct errors. The transcriber must personally re-listen to the tape and make changes in order to certify the transcript.

C. Pretrial Motions

1. For Miranda Goodchild motions: If you don't have the resources to get a transcript prepared for a motion hearing (or trial), move the court to require the state to prepare it since they have the burden of proving the admissibility of your client's statements.
2. Be sure the state creates a copy of the recording for the court to review.
3. Do not waive the Miranda Goodchild hearing and just agree to let the judge listen to the tape. After the prosecutor finishes their usual questions, highlight whatever the detective did that you will be arguing was a violation of your client's rights. Be prepared to use the tape to impeach the officer if necessary.

D. Jury Trials

1. Be prepared to be able to use the transcript in court. You can see if opposing counsel will stipulate to the admission of the document or if

necessary be prepared to lay the foundation for admissibility. Even if the transcript is not 100% perfect, the parties can agree it is reasonably accurate and use it in court. Even the best transcriber may make errors or find portions of the tape to be unintelligible (which should be noted in the transcript as it occurs).

2. Prepare your chapters for direct and cross examination and mark in your chapters exactly when you plan to play the tape and the exact starting and ending point.
3. Have copies of the transcript for everyone in the courtroom to follow along as an electronic recording is played. Copies should be made for the judge, opposing counsel and all jurors.
4. If you are using portions of a statement to impeach a witness, the best practice to only play the relevant portion and create a separate document for each bit of impeachment so the jury does not hear or see extraneous materials. Number each partial transcript and put the same numbers in your cross preparation so you always know where you are. This should include the precise starting and ending time of each sound or visual bite you may use in court.
5. The best way to use the recordings is to make separate audio and/or video files of each individual segment. These can be made on a computer with Windows Movie Maker or the equivalent program on a Mac. Fancy editing software is not required.
6. If the DA is planning to play a recording in a jury trial, review what they intend to play carefully so you can object to the admission of whatever extraneous, irrelevant, inadmissible or prejudicial. If they prepared a transcript for the jurors, make sure these sections are not included in the transcript given to the jury. We must ensure that sloppiness does not result in the jury hearing or seeing something they shouldn't.
7. Don't wait until the last minute to review what the prosecutor intends to introduce. File motions asking the court to require your opponent to inform you of what they intend to play in court and create a transcript in advance of trial so you have enough time to review it for errors.