



JUDICIAL TRAINING & EDUCATION UPDATE

Prior training updates (102) can be accessed by clicking on: [Judicial Training Blog](#)



USING TRANSCRIPTS OF AUDIO RECORDINGS DURING TRIAL The “*Olkon*” Cautionary Jury Instruction & Protecting Your Court Reporter

GENERAL RULE: Transcripts of audio recordings to be played during trial may be provided to the jury to help the jury or judge understand what is being said in the recording. The following are 7 facts about using audio recordings and transcripts at trial that judges and attorneys need to know.

1) AUDIO RECORDING MUST BE ADMITTED INTO EVIDENCE: If an audio recording is to be played for the jury at trial it is critical that the audio recording be admitted into evidence. Proper foundation regarding authenticity should be established and *Crawford* issues should be resolved before the recording’s admission. Playing a recording to the jury that has not been admitted into evidence may be reversible error. *State v. Holmes*, WL 2371767 (Minn. 2013).

Transcript: Whenever an audio recording is admitted into evidence the court should require a transcript of the recording to be produced as a “court exhibit” (assuming proper foundation regarding authenticity can be established). That issue should be discussed and resolved prior to commencement of trial.

Statutory Exception: In any hearing or trial of a criminal offense (including DWI’s), evidence of an audio or video recording prepared by a peace officer in a law enforcement vehicle shall not be excluded on the ground that a written transcript was not prepared and available at or prior to trial. M.S. 634.36.

2) THE NEED TO PROVIDE TRANSCRIPTS TO THE JURY DURING AUDIO PLAYBACK IS GENERALLY CAUSED BY TWO CIRCUMSTANCES:

1. Inability to understand a portion of the tape under the circumstances in which it will be replayed.
2. The need to identify the speakers, especially if two or more persons talk at the same time.

Judicial Discretion: The decision to furnish jurors with copies of a transcript to assist them in listening to the audio recording, is subject to the sound discretion of the trial judge.

Cautionary Jury Instruction: If a transcript is used, the jury should be clearly instructed that the transcript is not to control. The tape is to control. (See “*Olkon*” cautionary jury instruction, section 6 below).

3) PROCEDURE FOR USE OF A TRANSCRIPT DURING THE AUDIO PLAYBACK:

1. Once the audio recording is admitted into evidence, a transcript of the audio recording should be admitted as a “court exhibit.”
2. Foundation for the transcript is established by having the person who prepared the transcript (or took the statement) testify that he/she has listened to the recording and the transcript is an accurate transcription.
3. The judge should give jurors the “*Olkon*” cautionary jury instruction (see section 6 below),
4. The transcript should be distributed to the jury immediately prior to playing the recording, and immediately picked up from the jury after the recording is played. The transcript is not placed in evidence other than as a “court exhibit.” The transcript does NOT go back to the jury room.
5. In the ordinary case, furnishing a copy of the audio transcript will not be prejudicially cumulative.

4) WHO HAS RESPONSIBILITY FOR PRODUCING THE TRANSCRIPT?

In some areas of the state there is a debate between prosecutors, defense attorneys and the courts as to whose responsibility it is to produce a transcript of an audio recording to be played during trial. Responsibility for producing a transcript is a matter best left to the discretion of the trial judge. My personal practice has been, with some exceptions, to require the party offering the recording to produce the transcript.

5) PROTECT YOUR COURT REPORTER – OR THEY MAY SUFFER THE CONSEQUENCES:

If the trial judge allows an audio recording to be played during trial without requiring someone to produce a transcript and the case is appealed, it may be your court reporter who suffers the consequences. On appeal a transcript of the audio recording is almost always required to be produced as part of the court record. **If a transcript of the audio recording is not provided during trial then responsibility for producing the transcript for appeal will likely fall to your court reporter.** For example:

Minn. R. Crim. P. 28.02 Subd 9 states: If the parties have stipulated to the accuracy of a transcript of videotape or audiotape exhibits and made it part of the district court record, it becomes part of the record on appeal and it is not necessary for the court reporter to transcribe the exhibits. If no such transcript [*of the audio recording*] exists, a transcript need not be prepared unless expressly requested by the appellant or the respondent [*i.e. a transcript of the audio recording is almost always requested*]. If the exhibit must be transcribed, the court reporter need not certify the correctness of this transcript. (*Emphasis added*).

6) OLKON CAUTIONARY INSTRUCTION ON USE OF TRANSCRIPT OF AUDIO RECORDING

Whenever jurors are provided copies of a transcript of the audio recording to assist them in listening to the tape, the court should read the following “Cautionary Instruction on Use of Transcript of Tape Recording” *State v. Olkon*, 299 N.W.2d 89 (Minn. 1980).

You will each be provided with what is reported to be a transcript of the taped conversation. Because of the nature and quality of the tape, portions of the recording are difficult to hear from a distance. As a result, copies of the transcript will be provided to you to assist you in listening to the tape and will be collected from you at the conclusion of the playing of the tape. Any difference in understanding of meaning or meaning what was said may be caused by such factors as the inflection of a voice or inaccuracies of the transcript, and you should rely upon what you hear rather than what you read if you find a difference between the tape and the transcript. The transcript is not to control. The tape recording is to control. The transcript will not be available to you during your deliberations in reaching a verdict. *State v. Olkon*, 299 N.W.2d 89 (Minn. 1980).

7) REPLAYING AUDIO RECORDING DURING DELIBERATIONS: If the jury requests to listen to the audio recording during deliberations, they should be returned to the courtroom and furnished with the transcript of the recording to use while the recording is replayed. The “*Olkon*” cautionary jury instruction should be reread to the jury. Minn. Crim. R. Pro. 26.03, subd. 20(2)(b) states: “Any jury review of depositions, or audio or video material must occur in open court. The court must instruct the jury to suspend deliberations during the review.” There should be no testimony or statements made by defense counsel or the prosecutor. *State v. Kraush-aar*, 470 N.W.2d 509, 516 (Minn.1991); *State v. Nordstrom*, WL 1577069 (Minn.App.2000); *State v. Washington*, 725 N.W.2d 125, 136 (Minn.App.2007).

RESOURCE: Prof Simon’s “JUDGES JURY TRIAL BENCH BOOK,” ([Judicial Training Blog](http://JudicialTrainingBlog.com); www.PendletonUpdates.com); Paul Young, Criminal Division Chief Attorney, Anoka County Attorney’s Office.

Hon. Alan F. Pendleton, Anoka County District Court, Anoka, Mn 55303; 763-422-7309