



**House
Legislative
Analysis
Section**

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**MALICIOUS TELEPHONE
MESSAGES**

**House Bill 4080 as introduced
First Analysis (5-30-01)**

**Sponsor: Rep. Mary Ann Middaugh
Committee: Energy and Technology**

THE APPARENT PROBLEM:

The Michigan Penal Code imposes criminal penalties for making threats or using certain kinds of language (“vulgar, indecent, obscene, or offensive language”) in the course of a telephone conversation. However, these provisions in the code were written before the widespread use of such telephone-related technology as answering machines and voice mail, technologies which have the capability to take telephone messages involving threats or offensive language even when there is no actual telephone conversation between two people. So when a Family Independence Agency worker in Van Buren County received threatening voice mail messages at his office, the prosecuting attorney was unable to prosecute because a voice mail message is not a telephone “conversation.” Legislation has been introduced to address this issue.

THE CONTENT OF THE BILL:

The Michigan Penal Code currently makes it a misdemeanor, punishable by imprisonment for up to six months and a fine of up to \$500, to use any service provided by a “communications common carrier” (such as a telephone service) with the intent to “terrorize, frighten, intimidate, threaten, harass, molest, or annoy” or to disturb the peace and quiet of anyone by means of any of a number of specified actions. Among these actions are, in the course of a telephone conversation, (a) to threaten physical harm or damage, (b) to use any “vulgar, indecent, obscene, or offensive” language or (c) to suggest any “lewd or lascivious” act.

The bill would amend the code to substitute the phrase “telephone conversation or message” for the current language referring only to “telephone conversation,” and double the maximum misdemeanor fine to \$1,000. The bill also would substitute “communications provider” for “communications common carrier,” and delete “interference with any communications device” from the crime of deliberately refusing or failing to disengage a connection between a telephone and

another telephone and other equipment for transmitting messages by telephone.

MCL 750.540e

BACKGROUND INFORMATION:

The Michigan Penal Code (Public Act 328 of 1931) was written with a chapter (Chapter LXXXII) on crimes involving telegraphs and telephones. Although the code does not define “communications common carriers,” this phrase applied initially to telegraph and telephone services, which were regulated public (“common”) utilities. With the late 20th century explosion of communications technology and the progressive deregulation of public utilities, including telephone companies, this chapter of the code has been amended a number of times to take into account just such changes. In the mid-1960s, for example, there were a series of amendments added by Public Act 319 of 1966 that increased privacy protections from eavesdropping devices, while in the mid-1990s there were a number of amendments to protect cable- and satellite-dish television companies from the unauthorized diversion of their services through the use of illegal decoder devices (“converter boxes”).

The section of this chapter of the penal code that proscribes the malicious use of services provided by communications common carriers was added by Public Act 328 of 1969, and was amended once in 1988 by Public Act 395. As added in 1969, the section addressed malicious use of service provided by “communications common carriers,” which is to say, telegraphs and telephones. The 1988 amendment added the acts of repeatedly making telephone calls and hanging up when the telephone is answered, making unsolicited commercial (telemarketing) calls after 9 p.m. or before 9 a.m., and deliberately tying up someone’s telephone line as misdemeanor offenses under the code. The 1988 amendment also changed language in subsection (2) of section 540e,

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to substitute “is” for “shall be” and “communication” for “message” in the second sentence of the subsection, which now reads “An offense is committed under this section if the communication either originates or terminates or both originates and terminates in this state and may be prosecuted at the place of origination or termination.”

Case law on this section of the penal code has ruled both (a) on its validity [in *People v Taravella* (1984) 133 Mich App 515] and (b) that the U.S. Constitutional privilege against self-incrimination would not be violated by use as evidence at a trial (in prosecution for falsely reporting by telephone that a police officer had been shot and needed assistance) of tape recordings of the defendant’s voice (which had been obtained with the defendant’s consent but without advising him of his rights to remain silent or to an attorney), where the tape recordings (and voice prints prepared from the tape) were offered only for the physical characteristics of the defendant’s voice and not for the substance of what was said on the tapes [*People v Henderson* (1976) 69 Mich App 418].

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the increased penal fine could increase the amount of revenues received by local libraries under the state constitution. The bill also could increase local correctional costs or local penal fine revenues, to the extent that the changes in the bill broadened the application of three of the listed offenses: including telephone messages as well as telephone conversations among two of the code’s listed telephone offenses, and deleting “interference with communications service” as an element of an offense that addresses the deliberate refusal to disengage in a telephone connection. (5-22-01)

ARGUMENTS:

For:

The bill would update this section of the Michigan Penal Code to recognize the advances in telecommunications technology, including answering machines and voice mail, that people may use maliciously and contrary to the obvious intent of this section of the code, which is to criminalize the malicious use of telephones. However, because the penal code actually only prohibits malicious behavior “in the course of a telephone conversation” (emphasis added), the Van Buren prosecuting attorney was unable to prosecute in a case where an employee of the state Family Independence Agency

received threatening voice mail messages, without actually having a conversation with the caller who left the message. The bill would take care of such situations by adding to two of the “malicious use” section of the penal code that such behavior was a misdemeanor whether it involved an actual telephone conversation or a message left by telephone. (One other subsection of this section of the penal code already criminalizes “falsely and deliberately reporting by telephone or telegraph message” (emphasis added) that someone has been hurt, suddenly taken ill, died, or the victim of a crime or an accident.) Moreover, by increasing the maximum fine from \$500 to \$1,000 could help deter more people from this kind of activity.

Response:

What would be the effect of two other proposed changes in the bill? The bill would replace the phrase “communications common carriers” (that is, telegraphs and telephones) with the term “communications provider,” and strike “interference with any communications device” from the crime of deliberately refusing or failing to disengage a connection between a telephone and another telephone or between a telephone and other equipment for transmitting messages by telephones (such as, presumably, modems, for example). Given the expanded technology for communicating, should the bill address all currently available modes for communicating malicious or obscene messages? Moreover, although a 1996 amendment to another section of this part of the penal code [540c(6)] added definitions of “telecommunications,” there is no definition in the code of “communications provider.”

Also, perhaps the bill should include some way of addressing a problem reported mostly by elderly people, who receive repeated telephone calls that disconnect when they answer. This kind of behavior is prohibited under the Michigan Penal Code when it is done maliciously, and reportedly what is going on is that these elderly people are simply receiving automatically-dialed telemarketing calls that disconnect upon being answered if there is no live telemarketing employee available to speak. (State and federal law prohibits use of prerecorded messages in telemarketing calls, but does not prohibit automatic dialing. So if an automatically dialed telemarketing call is answered and no telemarketing employee is available to speak, the call is automatically disconnected.) Although such telemarketing calls are not done maliciously, the effect – that of frightening people, who *think* that the calls are being made for malicious or obscene purposes – is the same. Should or could this problem be addressed as well?

POSITIONS:

The Van Buren County prosecuting attorney supports the bill. (5-23-01)

Verizon (a telecommunications corporation) indicated support for the bill. (5-23-01)

Analyst: S. Ekstrom

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.