

Testimony of Fred Freiberg to the House Judiciary Committee
HB0392: Evidence – Interception of Oral Communications – Fair Housing Testing
Position: Favorable w/Amendment – February 4, 2025

The Honorable Delegate Luke Clippinger
Chair, House Judiciary Committee
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cc: Judiciary Committee Members and Staff

Chairperson Clippinger and Judiciary Committee Members:

I write as a fair housing practitioner with 49 years of experience conducting undercover fair housing testing investigations to voice my support for HB0392 which is intended to carve out an exemption to the all-party consent requirement for recording conversations under Maryland law. This legislation would permit fair housing testers working with Qualified Fair Housing Organizations (QFHOs), recognized civil rights organizations, or public fair housing enforcement agencies to gather recorded evidence of their interactions with housing providers to aid with the enforcement of fair housing laws.

Testing, as courts have uniformly recognized, is an investigative tool used to gather evidence in fair housing cases. A test involves one or more persons who inquire about housing opportunities. The investigations are covert in nature and designed to compare the conduct of providers of housing or housing-related services to the requirements of fair housing laws. Often two or more testers are matched on a test, making it possible to observe how home seekers of different races, national origins, etc. are being treated in the housing market. The value of testing is that it is uniquely capable of identifying whether all types of housing consumers are receiving the same information, service, treatment, and access to housing opportunities or housing services without regard to any of the protected characteristics under local, state, and federal fair housing laws.

Since 1976, I have supervised well over 12,000 testing investigations in more than twenty states. I have personally been involved in more than 1,500 undercover testing investigations. I have been named as a witness in nearly five hundred fair housing cases, and I have provided sworn deposition and trial testimony on roughly seventy occasions. I am considered one of the leading experts in the nation on the use of testing to uncover and document discrimination in fair housing and civil rights cases.

I was a founder and the first Executive Director of the Metropolitan Milwaukee Fair Housing Council (MMFHC) which opened its doors in 1978. By 1979, we began equipping our testers with concealed microcassette recorders. The decision to do this was prompted by the fact that, too often, testers testified that they spoke with a housing provider and described what was said, and the housing provider would testify that the testers were lying and, in some cases, denied that the interaction even took place. The subsequent use of recorders removed any doubt about what housing providers told testers of different races because now there was an *exact oral account* on a recording that captured the interaction. The MMFHC went on to file hundreds of fair housing cases supported with recorded testing evidence and established a significant track record of successful outcomes.

In late 1990, I moved to Baltimore, Maryland and briefly served as Associate Director of Baltimore Neighborhoods, Inc. (BNI). I was responsible for the oversight of BNI's fair housing testing program. I left the organization after five months to pursue a better career opportunity. One factor that motivated me to leave was the fact that I could not equip testers with concealed recorders to document their experiences. I recognized that building a vigorous and effective fair housing testing and enforcement program was going to be difficult, if not impossible, given that Maryland law required all-party consent to record conversations.

In 1991, I was hired to establish and direct the first fair housing testing program in the Civil Rights Division of the U.S. Department of Justice (DOJ). The decision to equip testers with recorders was made at the inception of the testing program. In the first seven years of DOJ's testing program, dozens of pattern and practice cases were brought by the Department using recorded testing evidence. While at DOJ, recording technology changed and microcassette recorders were replaced with far superior digital recorders. I received training on how to effectively use digital recorders in testing and how to preserve and control digitally recorded evidence so that it would be admissible in a court of law.

In 2004, I co-founded the Fair Housing Justice Center (FHJC), a regional civil rights organization based in New York City. I helped to construct and direct a robust testing program at the FHJC which employed and trained over two hundred testers, mostly professional actors. As New York State is one of the thirty-nine states that allow one-party consensual recording, FHJC testers use concealed digital recorders to record their telephonic and in-person communications with housing providers. FHJC investigations have aided in the filing of more than 160 fair housing lawsuits and most have included testing evidence. These cases have opened more than 81,000 housing units to previously excluded populations along with a total payment of \$55 million in damages and penalties. In August 2021, I stepped down as FHJC's Executive Director and now work part-time as FHJC's National Field Consultant. Now semi-retired, my wife and I made the decision in 2024 to move back to Baltimore where we currently reside.

I began working in the fair housing field in 1976 and can attest to the fact that the nature of housing discrimination has dramatically changed. Since fair housing laws were enacted, most housing providers have learned about their legal responsibilities and the possible enforcement consequences for non-compliance. Rather than follow the law, violators try, in a variety of ways, to conceal their discriminatory conduct. The overt discrimination that I routinely saw on tests in the 1970's eventually became more subtle as housing providers cleverly devised techniques to elude detection. As time passed, the characterization of housing discrimination as a "slammed door" had to be replaced with the image of a "revolving door" where unsuspecting home seekers are politely escorted in, out of, and away from the desired housing without even knowing that discrimination occurred. To respond to these changes, testing organizations have had to become more sophisticated in how to conduct these undercover investigations. Those of us who have worked in any of the thirty-nine one-party consent states have learned that the more extensive use of recorders to gather evidence in testing investigations often makes it possible to unravel discriminatory schemes and more easily document illegal conduct.

Today, racial discrimination in housing, in most instances, is so subtle that ordinary consumers have no way of knowing they have been discriminated against. If consumers are unaware that they have been victimized by an act of housing discrimination, they do not file complaints. If no complaints are filed, no enforcement action is taken by government enforcement agencies, and the discrimination simply continues. The "invisibility" of housing discrimination ensures its sustainability. The only way to document and compare how home seekers of different races or national origins are being treated is to conduct proactive systemic testing investigations.

Given the more nuanced and stealth-like nature of contemporary housing discrimination, it is imperative, in my view, that testers record their in-person and telephonic conversations with housing providers so that those initially reviewing the test results and the triers of fact who decide the outcome of the case can hear the *exact words* used by the tester and housing provider during a test. I have attended many fair housing trials where judges or juries heavily relied on the recorded evidence to help them determine whether the discriminatory conduct occurred as alleged in violation of fair housing laws. Recorded evidence enhances our ability to hold housing providers accountable for their discriminatory conduct and makes it possible for plaintiffs to prevail in cases, even where subtle discrimination is occurring.

I note that a version of this bill appears to exclude electronic communications from the definition of conversations that may be recorded by testers. To be meaningful, this new law needs to permit testers to record oral conversations when, as part of an investigation, they are a party to a conversation, regardless of whether it is in-person or over the telephone or over an intercom system. I strongly urge that the bill be amended to allow testers to record oral communications that are in-person and electronic.

In September 2022, I penned an article in *Shelterforce* about this critical issue¹. Recording laws in eleven states, including the State of Maryland, are currently hobbling efforts to enforce fair housing laws effectively and vigorously by making it unlawful for testers to record conversations with housing providers. These restrictive all-party consent requirements prevent fair housing law enforcement organizations from gathering the strongest possible evidence in housing discrimination cases and chills the ability of testers to assist others to exercise their rights under fair housing laws.

At a Senate Judicial Proceedings Committee hearing on a cross-filed bill (SB0107), three issues came up which I would like to address in my testimony.

First, the proposed bill would allow fair housing testers to engage in one-party consensual recording only. The tester making the recording is always a party to the conversation being recorded. By definition, this is entirely different than the illegal practices of wiretapping or eavesdropping.

Second, a concern was raised about whether a tester might record a conversation where a person or persons speaking with the tester offers information which might implicate them in some type of wrongdoing unrelated to fair housing laws. The proposed bill is clear that any tester recordings can only be used to support enforcement of fair housing laws.

Third, a question was raised about whether testers are properly trained to avoid any abuses during these investigations. Testers receive training and only work under the supervision of an investigator or test coordinator who provides oversight of the investigation from beginning to end. Testers receive written instructions and assigned characteristics that they are asked to adhere to during a test. Testing occurs in every state regardless of whether recordings are permitted. Equipping testers with audio recorders provides an excellent quality control and is the best way to ensure that testers are adhering to their test assignments and following the guidelines that were provided in their training. The use of concealed recorders not only provides strong evidence in cases where housing discrimination occurs, but it also ensures that testers are complying with testing program guidelines and procedures when conducting any test. Also, to achieve more consistency in the quality of testing investigations conducted across the nation, I am one of the five core trainers in a national training program for fair housing test coordinators called ISTEP (Investigative Support for Testing & Enforcement Programs) which is funded by HUD. Since 2012, ISTEP has provided training to over 380 test coordinators working in over 105 fair housing testing programs across the nation.

I urge Maryland to show leadership on this issue. There is an opportunity to demonstrate to the states requiring all-party consent to record that carving out an exception for fair housing testers is not going to violate any privacy rights. Testers typically speak with

¹ <https://shelterforce.org/2022/09/06/press-record-to-catch-fair-housing-violators-if-you-can/>

rental agents, landlords, real estate agents, loan officers and others who engage in commercial speech when discussing the products and services that they are offering in the open marketplace. Housing providers who persist in lying to and deceiving people based on race, national origin, or other protected characteristics about the availability of housing, the terms and conditions, whether housing is available to show, etc. are not deserving of any protection by the State.

I was hoping to testify in person at a hearing held by your Committee on Tuesday, February 4, but unfortunately, I am going to be out-of-state conducting trainings and meetings on that day. I appreciate the fact that you are seriously considering this important modification to Maryland law to facilitate the use of concealed recorders by fair housing testers. If this bill passes the Maryland legislature and is enacted into law, it will most certainly strengthen the enforcement of fair housing laws throughout the State of Maryland.

Thank you for the opportunity to provide this testimony.

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