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p.20

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p.28

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HUNTING LEASES p.18 ■ THE BENEFITS OF SAYING NO p.32

IS YOUR SELLERS' SURVEILLANCE PUTTING THEM AT RISK?

Technology makes it easy for homeowners to order toilet paper with a voice command, but there are legal considerations when listings have devices that can record audio or video.

by Wes Bearden

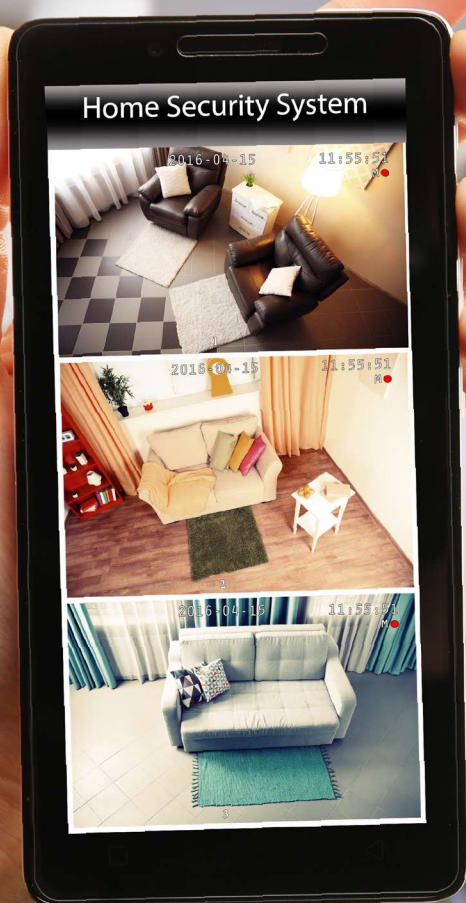


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Selling a home can be frustrating to homeowners. They're asked to allow strangers into their home. They may never receive feedback and are left to wonder, "Why didn't that last buyer bite?" What do anxious sellers do? They get an extra set of ears.

Many homeowners have installed security cameras and smart-home devices. These installations can be an ultra high-tech security system or a simple baby monitor, and they all can be abused.

A number of notable cases have emerged where sellers listened to a potential buyer's showing. Sometimes it's to gain advantage in negotiations, while other times it's simply to better stage the property. So, can a seller covertly record or monitor a buyer's showing?

The rules in Texas

Both the Federal Electronic Communications Privacy Act (ECPA) and Section 16.02 of the Texas Penal Code prohibit audio recordings without the consent of at least one individual who is part of the conversation. The Texas rule, commonly referred to as the one-party rule, requires at least one party to consent to recording conversations.

What that rule allows is any individual to covertly—and legally—record his own conversations with a broker, neighbor, or other party. Whenever you speak, it's best to follow the old saying: Say what you mean and mean what you say. The other person in the conversation may be recording every word.

Why a seller cannot record audio of a showing

Texas law does not allow audio recording or audio monitoring of conversations that you are not a part of. If the seller is not present and participating in the showing, he cannot record it. Even though the conversation happens inside a seller's home, he is prohibited from recording any conversations that he is not a part of.

Buyers have an expectation of privacy that their conversations during a showing are only between the parties participating in those discussions.

But what about video?

Many homes today have security cameras installed that record video. Some have audio recording, similar to a baby monitor, and some without.

The ECPA does not prohibit video recording. In fact, silent video—like from security cameras—is generally allowed as long as it isn't in an area where an individual would have a reasonable expectation of privacy. For instance, silent bathroom video recording is not allowed. But silent video recording of the foyer, kid's playroom, exterior of a home, and a garage are likely permitted.

Is your listing breaking the law?

Most professional alarm and security camera installers are familiar with the law. Normally, they install video cameras without audio and are leery to place inside cameras in any location other than a foyer.

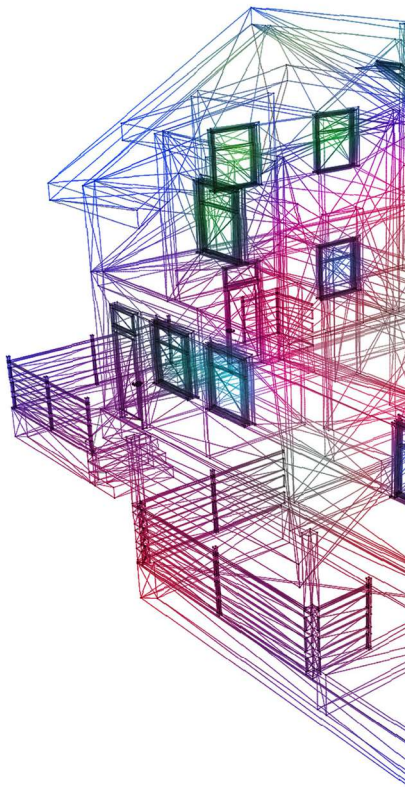
However, when your seller is a do-it-yourselfer, you may want to ask questions. Have sellers tell you what the system will record. If audio is recorded, the seller may have a problem. If it is silent video, have sellers show you where the cameras are located. Make sure they aren't video recording in a private area, such as a bathroom. Courts have traditionally upheld individual privacy rights over the property rights in a residential home. Consider limiting the use of cameras to the exterior of the residence.

Violating state and federal recording laws can involve criminal penalties. In addition, Texas, like many states, recognizes several types of common law invasion of privacy claims. At its essence, invasion of privacy protects a person against unreasonable intrusion upon his seclusion, solitude, or private affairs. Even though recording may be in the seller's house, courts have found that a visiting party can have a valid claim when the homeowner overreaches.

Illegal recording is a felony offense in Texas, and anyone who has been recorded in violation of the law can bring a civil suit to recover \$10,000 for each occurrence, actual damages in excess of \$10,000, punitive damages, attorney's fees, and court costs.

Help your sellers avoid criminal or civil liability by encouraging them to concentrate on feedback given with consent and leave the mics and hidden cameras out. ❖

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HELP YOUR BUYERS BE SMART ABOUT SURVEILLANCE

- Don't discuss confidential negotiations within a home.
- Be careful about over-enthusiasm of particular features in a residence.
- Realize that most video recordings are legal. You and your client's body language and gestures sometimes tell more than you think.
- If talking on the telephone, make sure that the owner's neighbors can't overhear your conversations. Neighbors are often nosier than the owner.
- If you are really worried that someone is playing unfair, turn on a faucet. The audio tones from running water create white noise that masks voice tones and makes it difficult for microphones to do their job.

Don't be too paranoid. Be security smart, but don't let it ruin your real purpose to be at the house.

If a seller is not present and participating in the showing, he cannot record audio ... even if the conversation happens inside the seller's home.
