

Selling real estate in an era of modern surveilling

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You either have firsthand experience or have heard stories of how modern surveillance techniques are entwined in the sale of real estate. Baby cameras, pet monitoring applications, security systems, and other surveillance equipment with varying degrees of technological and recording capabilities are now common features in homes. Some systems have no audio capabilities and are only available to view in real-time, while others may also record and store both audio and video data.

Real estate licensees and their clients must be aware of the nuances of video and audio surveillance laws to protect themselves from potential invasions of privacy, breaches of confidential information in violations of state and federal video and audio surveillance laws.

Video Surveillance

Under Pennsylvania law, a person may not videotape, photograph, or otherwise record a fully or partially nude person in a place where the person would have a *reasonable expectation of privacy* (hereinafter “REOP”) without the person’s *knowledge* and *consent*. This means that one cannot have surveillance equipment in a place where a reasonable person would believe they can get undressed (e.g., a bathroom) without first notifying the person and obtaining their consent. Where a property is being shown to prospective buyers, the seller should disable and/or remove any surveillance equipment in bathrooms or other locations that are subject to this heightened standard of privacy.

The REOP standard does not, however, have clear boundaries. Likely, a prospective buyer would not be able to successfully argue that they have a REOP everywhere in a seller’s home. Could a buyer successfully argue that he or she had a REOP in a bedroom of a home they were touring? Likely not, but life presents situations that can pose difficult questions. Does a nursing mother have a reasonable expectation of privacy as she nurses her child in a chair in the seller’s bedroom? To avoid any question of liability, a seller would be well advised to notify prospective purchasers that video equipment is located throughout the property and that special arrangements can be made to accommodate changing clothes, nursing, etc. Certainly avoid the placement of video equipment in bathrooms.

Regardless of the purpose of the video technology – nanny cam, baby monitor, live-feed-pet-recorder – sellers, buyers, and their real estate agents should keep a few points in mind: 1) use of video surveillance equipment is not *per se* illegal, so long as it is located in a place without a heightened standard of privacy, like a bathroom; 2) a place with a REOP is analyzed on a case-by-case basis and is subject to interpretation by a court; and 3) if there is any question of whether a person would have a REOP in a certain location where video surveillance equipment is operating, always notify the buyer and buyer’s agent and obtain consent before the showing takes place.

Even where video surveillance technology is restricted to places where no REOP is likely, notification to buyers and their agents may still be advisable. A buyer who discovers the presence of video surveillance in non-REOP areas may be offended regardless of whether the owner has followed a protocol that is legal. Notice to the effect that the home is equipped (and perhaps being sold with) a video security system for the protection of visitors as well as owners may put prospective buyers at ease.

Another choice is to remove or disable such equipment or obtain written consent from buyers and their agents in scenarios where the equipment is visually recording them in various locations throughout the home. While these suggestions would not seemingly be required in living rooms, hallways, dens and other locations where there is not a REOP, the practice prevents any potential argument that an invasion of privacy took place.

Audio Surveillance

Unlike video surveillance, the laws on audio surveillance are more strict and clearly defined. Under the Pennsylvania Wiretapping and Electronic Surveillance Control Act, which is more stringent than federal law, if a person has an expectation that his or her oral communication is not being recorded, no other person may intercept that communication without consent from all parties involved (subject to some caveats for law enforcement, court order, etc.). This law is definite and not subject to the interpretation of a REOP standard like discussed above for video recordings.

As applied to real estate transactions, buyers and their agents likely have an expectation that their oral communication during a showing is not subject to recording. Therefore, a seller should not be audio recording or otherwise intercepting audio from the buyer or buyer's agent, or any other parties, during a showing of their property. If a seller has audio devices, a video surveillance system with audio capabilities, or other recording devices in place, he or she may keep the devices in operation, only if he or she first obtains consent from all parties involved in the communication, which should be documented in writing. You can decide for yourself whether maintaining audio surveillance will enhance the prospect of selling the home!

While the laws discussed above must be followed by all parties involved in a real estate transaction, real estate licensees face additional penalties under the Real Estate Licensing and Registration Act, the Rules and Regulations of the State Real Estate Commission and perhaps also for violating the *Code of Ethics*.

As this is an emerging field, stay alert for new and changing rules and legislation, and don't forget to smile. You may be on candid camera.

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