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Millennial Homeowners

A CLOSER LOOK AT THE CHALLENGES FACING THIS GENERATION

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This is the second of two Legal Ease articles covering two pressing issues for Georgia REALTORS®. Please see page 12 for our first helping of legal knowledge.

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REAL ESTATE IN THE **Age of Home Surveillance.** WHAT DO WE TELL OUR CLIENTS?

They are everywhere. Luxury properties, fixer-uppers, high-rises, and neighborhoods both urban and suburban. Sometimes you can see them; more often you cannot. Sometimes they even follow you as you move. They may watch you; they may listen to you; or they may do both. But, one thing is for sure — the prevalence of video and audio surveillance equipment in properties throughout the market

is affecting the way selling agents interact and communicate with their clients when viewing homes. Increasingly, the message to buyers should be, “Mum’s the word,” when inside a prospective house.

The Law

Under federal and Georgia law, some types of surveillance are legal, and others are not. Whether the surveillance is only video, or whether any audio surveillance is involved makes a difference.

The main factor that determines legality is whether the audio conversation recorded is considered private and whether the video recorded is in an area where the parties being recorded had a reasonable

expectation of privacy. Conversations and actions that are considered public can be recorded under federal and state law. If conversations and actions are private or occur in a place where the parties had a reasonable expectation of privacy, then there are restrictions. Under federal and Georgia law, a private audio conversation cannot be recorded unless (i) one person in the conversation consents; or (ii) the person making the recording is a participant in the conversation.

Different standards regarding consent apply to video recording. Georgia prohibits video recording in a private place unless all parties consent. However, there is an exception that allows a property

owner to use audio and/or video recording devices for security purposes to record the activities of persons in areas around and in the house where there is no reasonable expectation of privacy. Ga. Code Ann. §16-11-62; 16-11-66.

The questions, then, are what is a private place, and where does a person have a reasonable expectation of privacy? This is an issue that the courts decide based upon the particular facts of each case. It is likely that a prospective buyer does not have a reasonable expectation of privacy when walking through someone else's home that is on the market for sale or lease, though we are unaware of any case law specifically addressing this issue. Practically, since prospective buyers, agents and other interested visitors should not expect their actions or conversations while viewing the house to be private, both audio and video recordings would be allowed in most areas of the house. There may be some areas, such as bathrooms, that could be considered private, even in a house up for sale.

Despite the concern over the legality of surveillance devices, the fact remains that they are prevalent throughout the market and are becoming more commonplace. Often, there are not specific laws, rules or regulations governing the obligations of agents in these situations. So, what is an agent to do?

Listing Agents: Lights, Camera ... Civil Action?

At this time, there is no duty on the part of a listing agent to determine whether the house is equipped with hidden recording devices, nor is there a duty to disclose the existence of these devices. Further, since such devices in a listed home are allowed, there is no duty on the property owner to disclose. Still, these situations are always up for interpretation, and nothing prevents someone from claiming "invasion of privacy." Having a frank discussion with the seller at the beginning of the listing regarding whether the house is equipped with either audio or video surveillance devices could avoid the awkward or even contentious situation of discovering equipment when showing the house and having to deal with an unhappy prospective buyer who learns that his or her entire conversation with their agent while visiting a home has been recorded. If there is such

equipment in the house, then it is best to advise the seller to conspicuously disclose this fact. In addition to the risk of the seller having to defend an invasion of privacy claim, it could cost the seller a sale if the buyer learns of the equipment and gets mad and decides that he or she will never buy that particular property. A disclosure on a sign-in sheet at an open house, a note on the MLS listing sheet, or a notice on the front door of the house are all good methods of disclosure. This disclosure could function as consent of the buyer to the recording if that should ever become an issue. Of course, there is always the possibility that the seller will not be forthright with his or her agent regarding the existence of such equipment and plans to use the information gleaned through the surveillance to secure a negotiating advantage. Asking the seller to make a written disclosure up front may prompt the seller to reconsider these plans.

Selling Agents: Advise Clients "Less Said, Best Said," when Viewing Potential Homes

Similarly, there is no legal duty for the selling agent to discover information about surveillance equipment on a property. However, if the selling agent is aware that the house is equipped for surveillance, the agent should inform any client or agent who will be entering the house. Further, whether or not the selling agent is aware of surveillance, selling agents can help protect buyers by advising them of the possibility of surveillance, and encouraging them not to speak too candidly when viewing homes as comments heard or actions viewed by the property owner during walk-throughs can tip negotiations in the seller's favor. A seller may be less willing to negotiate on price if the seller heard the buyer exclaim that she just had to have the house.

Also, an insulted seller may not want to negotiate if the seller heard the buyer make negative comments about how the house is decorated. Selling agents should caution buyers to refrain from commenting about the property or the transaction when walking through a property and to simply maintain a calm, neutral demeanor. Even porches and decks can be suspect places, so encourage your client not to discuss the property until well away from it. Selling

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