

Modern-day smarthome, surveillance and security systems employ the use of obvious or hidden recording devices. The ability to conceal video and audio recording devices can be seen in any number of household items, from alarm clocks to stuffed animals. However, the use of such technology during a property showing may be problematic for real estate licensees. New York has a set of laws specifically addressing the use of audio and video recording devices. Licensees should be aware of the legalities in the use of recording devices.

When listing a property, sellers have been known to make some rather obscure requests or demands of the listing agent. One such request that is getting more popular is the use of surveillance and security equipment to monitor the activity of licensees and consumers during the property showing. Many sellers have heard of issues with showings involving consumers and licensees throughout the country. Surveillance and security systems have been used in showings to help prevent theft or unauthorized property access for purposes other than a showing. Surveillance/security systems have recorded unwanted activity ranging from prescription drug theft to an ongoing affair between two licensees.

New York has a set of laws addressing the use of recording devices, including security and surveillance systems. According to Penal Law §250.00(2): “Mechanical overhearing of a conversation’ means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.” The next section, Penal Law §250.05, sets forth the crime of “eavesdropping” where “a person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation or intercepting or accessing of an electronic communication.” The crime of eavesdropping is a Class E felony.

The elements of eavesdropping are very clear. An individual is prohibited from recording audio of a conversation unless they are present and are a party to the conversation or if they have received the express consent of all parties to record the conversation. Despite what is permitted under the law, licensees have other legal issues to consider when using or encountering recording devices as part of their real estate practice.



By S. Anthony Gatto, Esq.
NYSAR GENERAL COUNSEL



By Liz Celeone, Esq.
NYSAR ASSOCIATE COUNSEL



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Under Article 12-A of the Real Property Law, all real estate licensees have an obligation to be honest and trustworthy with all parties involved. This includes consumers, other transaction-related service providers and other real estate licensees. If a licensee has knowledge that a homeowner is making use of an audio recording device in a property where showings are taking place, the licensee must disclose such information to any other licensee and consumer viewing the property prior to the showing, even if the seller says not to. This includes brokerage customers being shown the property. However, just disclosing the audio recording is not sufficient; the licensee must get the consent of all parties involved. As always, it is highly recommended that such consent be done in writing and acknowledged by the parties.

Licensees should be wary of making audio recordings of a client without disclosing such a fact, as this might be interpreted as a breach of the licensee’s fiduciary duty to the client. Licensees engaging in such a practice should only do so upon seeking the advice of competent legal counsel.

New York places such an emphasis on the prohibition of eavesdropping that another law was passed to protect individuals from having such illegal recordings used against them. The Civil Practice Law and Rules (CPLR) is a set of laws that govern the procedure in civil judicial proceedings in all courts of the state and before all judges. According to CPLR §4506: “The contents of any overheard or recorded communication, conversation or discussion, or evidence derived therefrom, which has been obtained by conduct constituting the crime of eavesdropping, as defined by section 250.05 of the penal law, may not be received in evidence in any trial, hearing or proceeding before any court or grand jury, or before any legislative committee, department, officer, agency, regulatory body, or other authority of the state, or a political subdivision thereof.”

A person is guilty of the felony offense of eavesdropping when he or she engages in the “intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.” Furthermore, CPLR §4506 bars the use of eavesdropping evidence obtained by private individuals in violation of eavesdropping as there is a strong public policy of protecting citizens against eavesdropping. Due to the severe penalty associated with eavesdropping, as well as obligations under Article 12-A, licensees should avoid any involvement in an activity that would constitute eavesdropping. 🌱