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Your Legal Questions Answered

BY MATTHEW JOHNSON, ESQ.

QUESTION: As a listing agent, what should I tell a seller who wants to have audio or video surveillance equipment activated at their property during showings?

ANSWER: The use of audio or video surveillance or recording equipment raises significant statutory privacy concerns under New Hampshire law.



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New Hampshire law has not evolved to catch up to the new use and proliferation of recording technologies. These systems, which used to be very expensive and hard to install, are

now relatively affordable and user-friendly. For purposes of legal compliance, it matters what type of system is in use. If a seller wishes to record audio of visitors to their property, they need to understand that New Hampshire is a two-party consent state. That means that you cannot record another person's statement or communication without their advance consent. Failure to obtain that consent creates potential criminal liability for the seller.

With respect to video recordings that do not have an audio component to them, the law is more muddled. The New Hampshire Supreme Court has said that you can record an individual without their consent so long as that person would have no reasonable expectation of privacy. This is a vague term, and to my knowledge the court has never applied this concept to a recording of a property showing. There is a good argument to be made that a potential buyer looking at a publicly marketed property for a showing should have no reasonable expectation of privacy. However, the law is



very unsettled in this regard, so my advice would be for the seller to obtain the consent of any buyer in advance of a recording, in order to be safe. If the buyer does not consent to the recording, then I recommend that the system not be operated.

QUESTION: I have heard discussion that the Americans with Disabilities Act applies to my website. Is that true?

ANSWER: This is an emerging hot-button area in the law.

Recently, larger e-commerce sites such as Amazon have been targeted by lawsuits alleging that their websites violate the Americans with Disabilities Acts because they are not accessible to those who are visually impaired. To my knowledge, these cases have resulted in settlements and revamped websites. The sky is frankly the limit in terms of who could be targeted, given the proliferation of and ubiquity of websites for marketing and commerce. Thus, my recommendation to real estate professionals is to retain, as part of your overall marketing budget, a consultant who can assist you with revamping your website to make it accessible to the visually impaired.

Of course, you can defer doing this until a routine upgrade of your website, or if a challenge is brought to the website. However, the law is still developing, and it is unclear what the overall remedy

or sanction would be if a consumer challenged your website on accessibility grounds and was successful.

QUESTION: What do I do with all the emails and text messages I have related to my real estate transactions?

ANSWER: As a risk management tool, and for licensing purposes, you need to maintain secure copies of all emails, text messages and any other form of communication between you and the other parties involved in a real estate transaction.

The Real Estate Commission has never made a definitive ruling on this subject, but I strongly suspect that if the question was posed to the Commission, it would consider emails and text messages as part of the transaction file that must be maintained pursuant to statute and regulation. Equally important, given the proliferation of email and text message communications, these documents are often your best evidence and your best defense against any charges that you did something improperly or did not provide proper advice. Often the existence of contemporaneous documentation that supports your version of what happened in the transaction will cause a case either not to be filed, or, if filed to be resolved promptly and efficiently.

Please make sure you are taking steps to secure this type of information on a regular basis and have it maintained so that if you need it, it is accessible and recoverable. You can use a cloud-based service, but if you do so, you need to make sure to engage in sufficient due diligence to ensure the service can and will hold onto the records and have the technology to provide them back to you when and if you need them. ↑

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