



Episode 09: Smile! You're on Camera

Let's be honest -- REALTORS face an ever-changing industry. With emerging tech, growing trends, and a booming market, it's vital to keep up. Join me, Gilbert Gonzalez, CEO for the San Antonio Board of Realtors, as I get real with experts on what REALTORS need to know about this industry. It's time to get real.

GG (00:23): The ability of obtaining a surveillance system for a property is far easier than before with cameras starting at around \$75, they come in the form of doorbell cameras, outside cameras, inside cameras, some are obvious and some are hidden. The reason people want cameras on their property is oftentimes for security purposes. These are clearly vetted, lawful reasons, but what happens when the cameras for security are used during the home selling process to get leverage during the negotiations on the sale of the property. So today we're going to talk a little bit about the law and I do think it's important. We start off with a good legal disclaimer as any good lawyer would do so need to make it clear that the conversation today is not intended to be legal advice and should not be relied on for specific circumstances listeners may be facing, always consult with your attorney and your broker for how to handle the issue of recording conversations on a property.

GG (01:15): So today I would like to invite our guest Assistant Professor of Law at St. Mary's University, Donna Colthorp. Thank you so much for joining us.

DC: Thanks for having me.

GG: So you are a former law clerk for Chief Justice Phil Hardberger of the Fourth Court of Appeals, a former law clerk for the U.S. District Court Judge Edward Prado. You've served as a First Assistant Federal Public Defender for the Western District of Texas. And you've had a strong background contributing substantial work to many significant cases argued in the Supreme Court. Have you, by any chance had the opportunity to work on cases regarding the recording of conversations?

DC (01:55): Yeah, sure. In, in criminal work, the government often gathers information, that may be primarily now, gathers information about crimes through technology. So I worked on many cases involving the gathering of information over the internet. I worked on at least two cases involving wiretapping and then a couple of cases involving searches of technology early on a search of a client's cell phone, just as cell phones were being used to, you know, basically keep our entire lives and whether or not it was constitutional to search that cell phone.

GG (02:41): I think that the law is definitely a lot different today with the amount of technology and the amount of recordings that happen in people's lives, as opposed to before where it was just a telephone.

DC (02:52): Yeah. And the Supreme Court is surprisingly cognizant of the, and I say that because they're very secluded sheltered people, but they're surprisingly cognizant of the rapidly changing landscape and of how much we have invested our technology with ourselves. You know, our family pictures, our all of our data, all of our documents and the Supreme Court has been really receptive and willing to protect our privacy interests in our technology.

GG (03:32): So I want to talk a little bit about technology in a home with recording of conversations. Is it called wiretapping?

DC (03:43): It's called wiretapping no matter who does it. So, and, and, and even though we're talking about digital communications now wiretapping is, is what we called it when, when the messages came over the wires and we just never stopped calling it that. So on the criminal side, on the civil side, wiretapping is the correct term.

GG (04:05): So that's even if it's the government who's investigating a case and listening, or it's two people having a conversation, it's always going to be called wiretapping. And is the analysis the same for both when you go through it?

DC (04:21): It is it is the same in one really important aspect, and that is that to decide whether it's okay to record and more importantly, to use a recording. You look at the privacy interests, the expectation of privacy that the person has in, in the communications or in the images. Sometimes we're talking about pictures. That interest might be a little bit more closely protected in the criminal context, because in the criminal context, you're talking about what the government can do to private citizens. And we we are very protective of privacy rights against the government. The rights might be a little bit less in this, on the civil side, a little bit looser. And also on the civil side, you're going to have to show some money damages, some injury if, if somebody violates your rights

GG (05:18): And the idea is that the government has large amounts of resources and authority. So it's a, it's more restrictive on them as opposed to individual citizens.

DC (05:30): Well, yeah, and not to get all patriotic, but the founding premise of our country is that the government is small and the person is big. And so it's almost in our DNA that the government cannot intrude into our personal space without a really, really good reason.

GG (05:54): When we talk about wiretapping, is it only the spoken words? Cause we, I want to talk about video recordings that involve audio, but is there a difference between just video, and video and audio?

DC (06:09): Civil purposes, States are going to have statutes that cover all of that. Texas' statute covers visual recordings and wiretapping, probably they're going to have different language, but the rules are different words that describe that activity, but the rules are going to be the same. So would the rules are gonna apply for visual images for, for video for audio.

GG (06:34): So one of the questions I always get with regards to wiretapping is this idea that Texas is a one party consent state. Would you mind giving us a rundown on what that means?

DC (06:46): Sure. Nobody can never believe this is the case. And yet it's the case in almost every state in the country and in the federal system that only one person has to consent to have a conversation recorded. That one person can be the initiator of the conversation and can be the recorder. So in the federal, so in the, on the criminal side, that means that the government agent can be the consenter, right? On the civil side. That means if you decide, you know, you're having it, you want to record your

boyfriend, getting ready to say something really stupid. And you consent to that recording. Then you have, you have satisfied the consent portion of, of the statute. That doesn't mean you have, you couldn't be sued for violating his privacy. That means that you have passed the is there consent to that conversation?

GG (07:44): With regards to a house, my house is for sale, and I want to record the traffic that comes in and out of my house to see it. Am I considered a party to the conversation when I record two other people coming into my house? Or are the parties to the conversation just those two individuals who are there in the property?

DC (08:10): Wow. That's a really hard question. Because it's your house... So let me just say that this is pretty much the question on everybody's tongue right now, just like, we're just like almost there in the case law with the advent of things like Alexa and Siri, these questions are, these are, these are the questions my law students are giving me right now with that criminal law. And so I'm going to be, I'm going to kind of hedge my bets and say that under a traditional understanding of consent, I would say that you have the right to record within your home. However, I could see just given how prevalent recording devices are right now and how pesky they're becoming. I could see a court saying, well, yeah, you have a right to consent to record in your home, but you don't have a right to pick up people's private conversations on the patio or in the bedroom, right? That, that, that they have some kind of privacy interests apart from your ability to record in your own home, it would require some new law.

GG (09:29): And I think it's great that you said that because I think that we are looking for absolute answers and direction, but this is absolutely new and it is changing. And the court hasn't been completely clear on how to treat this

DC (09:44): And thank goodness. I'm always glad when cases that are kind of personally disappointing, haven't made it to the, to the court yet. And I have to say that I, you know, I think that that kind of recording is a bad idea. And I think a lot of recording that's happening right now is a bad idea. And I think you do it at your own risk from a business perspective. I don't think it's a good idea, but from a legal perspective, I think it's a really bad idea because we don't know where we're headed.

GG (10:18): Okay. So it's a bad idea to you as a homeowner to record the conversation of people who are coming into your home?

DC (10:26): Certainly to use it, right? I mean, if you, if you had some kind of security, you know, I don't want someone leaving with my vase, right? Interest in, in recording rights, that's one thing, but to use what they say as part of your negotiations, I think is bad business and could end up being legally bad as far as privacy.

GG (10:55): Because using that information is to your advantage. And therefore, it's just not fair.

DC (11:02): Right. Exactly. Exactly.

GG (11:04): Now does a part of this change when it's a retail store, I've been using the home example, but what happens if I'm walking into Best Buy, can Best Buy record me? And the reason why I ask is because we are talking about a home, but we are also talking about a transaction, a business transaction, people are coming into a home to see if they'd like to purchase it. It's not like they're my friend and I invited them to a barbecue. These are people wanting to participate in a business transaction. So is there a different analysis for retail?

DC (11:36): So this is going to figure into the expectation of privacy. And that question is going to be a question that is a, that the court's going to ask right away. So the nature of the transaction, the nature of the location of the conversation, can other people hear the conversation? Is it the kind of conversation that a person might want to keep private? All of that is going to answer the question, whether the person has an expectation of privacy. So if I'm at Best Buy, and I think I've heard people doing this, and I'm conducting, you know, my personal business as I walk up and down the aisle, most courts are not going to be very interested in me saying that I had an expectation of privacy in that conversation. I brought past you get into Best Buy. But if I'm in a room by myself in a home, I'm looking at even though it's a retail, even though it's a business transaction, my expectation is going to be heightened. It may not be high enough, but it's going to be higher than it would be in Best Buy.

GG (12:47): And I think you mentioned it's a sliding scale. So I want to ask about the expectation of privacy and what that means. And you mentioned it earlier that it might, it's, it's, it's a sliding scale on, of where it goes and your expectations. Can you tell us a little bit about how courts view the expectation of privacy?

DC (13:08): Expectation of privacy just means, do you, is it a conversation that you personally have demonstrated you would like to keep private? So you've put your hand over the phone, like this, or you've walked into a closet to talk or you've you have headphones on so that other people can't hear, what's going, I'm trying to think technology. So other people can't hear what's going on. You've indicated that you want the conversation private. In the criminal context, there's a second question, which is, is that reasonable for you to want for you to believe that that was a private conversation? Would other people think it was a private conversation? If you're talking in a park, if you're talking on a crowded street, if you're talking on a bus at the top of your voice your expectation of privacy is going to be almost nil because what you've indicated is you don't care, right? So in your example, you have a couple who's talking about what price, you know, what's the absolute price they would pay for this home, right? They'd be willing to pay a million bucks for this home and they say it in your bedroom and you hear them say it, you have that recorded. If they, if they've also said on Facebook, we're looking for a house we're going to pay up to a million dollars. Then they're not going to have much of an expectation of privacy in what they said in your bedroom. They've already broadcasted.

DC (14:45): As you get closer to your, to a home, the expectation of privacy starts going up until it's almost insurmountable when a person is behind his front door. And I want to give you an example of how, just how almost insurmountable that is. A few years ago, the Supreme Court considered a case in which law enforcement officers were using heat sensing technology. This was back when it was brand new, before Iraq, right? And what they would do is they would drive up and down streets and they would flash this. I don't know how it works exactly, but I've seen pictures of it. It's kind of amazing. They would shoot these beams at homes and they were looking for hotspots inside the home because they wanted to see if people had marijuana grows in their house. So somebody challenged that as a, as an intrusion into the home, in violation of the fourth amendment. And if you look at the images, all, you can see are colors, right? Green, yellow, red, depending on how hot it is, that's all you can see. And the Supreme Court said that doesn't matter that violation of the wall between us and the world, even, even only to grab our heat signatures violated our expectation of privacy. That's, that's how profound how profoundly we believe in protecting the home.

GG (16:14): Wow. That's a great example. So my followup question professor is how do, how about those heat sensors when you go through TSA?

DC (16:24): Well, when you go through TSA you can always walk away. And so there is there's this notion and I have challenged this notion and lost, there's this notion that you don't have to, you don't have to get on that plane. Right? And and all, so there's that. And the other thing, so there's two other things. One is the government can do things in a routine checkpoint kind of way, if it does them to everybody for good reasons. And so that kind of search is going to, it's going to satisfy that requirement. They're doing it to everybody. They have a good reason nobody's singled out. So yeah.

GG (17:07): So the analysis is always gonna depend on the situation. So one of the questions I asked though, is how about is it is a different analysis for the homeowner versus a visitor to the home?

DC (17:20): Yeah, that's really the question. That's, I mean, this literally is the question and, and I would say from a non-government, so I would say two things if the government is capturing it and there's some, there's some reason to believe that, well, no, it's absolutely true that in some jurisdictions, the government is kept capturing Alexa data, and porch cam data. If the government is capturing it then there's gonna be a kind of expectation of privacy in the home and has the visitor sacrifice that for some commercial reason or because that visitors on notice, in the, can the home owner take context, the fact that the visitor has moved behind closed doors into a home is going to elevate her expectation of privacy. I don't think that it would that without more, it would be enough to create a cause of action, but depending on how you've used it, or what kind of information you gathered, I think there could be an expectation of privacy.

GG (18:39): I want to delve absolutely into that more because I have some great questions and examples I want to go through, but I also feel like it's important to say there are some places where it's unquestioned that a person always has an expectation of privacy, such as bathrooms, changing rooms, locker rooms. Camera's placed in such a way where they're invading someone's clothing. Those are absolutely not questioned. Whether they're in a house, your house, anybody's house, public spaces, those are just the court has held those expectations of privacies, you cannot get into.

DC (19:10): That's absolutely true. If you were showing a home, you absolutely would not want to put a camera or any kind of recording device in a bathroom.

GG (19:19): The difference between the camera, going back to the expectation of privacy and its location. I was thinking about a couple of examples. My house is by a mailbox and peoples will always walk back and forth in the front of my house to go get their mail. It's one of those community mailboxes. And my Nest doorbell is outside and it picks up all every time somebody walks by and picks up the video and it picks up the audio. Do those people walking in front of my house have an expectation of privacy?

DC (19:47): No, they do not. And so far porch cams, property cams, if they're looking outward away from your home in the front yard, toward the street, there's just no expectation of privacy as you pass someone's home. If they're looking backward into the backyard, right? In general, your enclosed backyard, the back of the house has some increased expectation apart.

GG (20:17): So if I think about the doorbell camera and the UPS guy who drops off a package and he's on his phone, and he's telling whoever on the other side of that phone call, hey, yesterday, we committed this crime. This is where we, we left the body or something exaggerated. I turned that over to the police. What would the court say with regards to his expectation of privacy?

DC (20:39): The court would almost certainly say he has no expectation of privacy, but again, I'm going to hedge because that is coming up in Florida, I think where neighborhoods, whole neighborhoods are voluntarily turning over their porch cam data, and that's being litigated.

GG (20:59): We definitely want to have you back when that case is decided. So now, now bringing it to a little bit closer to home, there's a potential buyer who comes to my house and is talking to her agent at the front door about how they already know this is the perfect home and she'll pay whatever it costs. Do they have an expectation of privacy for that conversation happening in front of the door before they enter?

DC (21:27): Probably not. That's what I would say. Probably not. I think that's such a bad idea. But probably if you thought that it would help you, you could use that, that tape.

GG (21:46): And I think the advice we want to give at this point is buyers should just assume whenever they go to a house they're being recorded, whether they are, they are not.

DC (21:55): Right. And I don't see, I mean, I just, I guess I keep saying such a bad idea because I think, I think catching people unaware is generally not a good way to begin negotiations. And so if you felt like you needed to do that again for security reasons, I just, I would just post a notice that you have recording devices.

GG (22:18): And I definitely want to talk about notice, but I would also want to take the hypothetical into the home.

DC: Okay.

GG: Gone inside the house and people happen to have cameras inside their home. And I have that same conversation with my agent. Hey, this house is great. Yes, there's some repairs, but I'm willing to overcome that. And I'm, you know, this house is just perfect for us. So let's put in an offer. Is the, is the analysis the same or does that person, now that they're inside my house, have a greater expectation of privacy.

DC (22:53): Probably in this context, the person, the visitor does, not that her expectation of privacy probably does not rise to the level of the homeowners, first because she's a visitor second because the homeowner has consented to the recording. But the fact that she's behind closed doors by herself with her agent is going to increase somewhat her level, her expectation of privacy. And the other thing I don't know is whether there's any kind of confidentiality requirements between like any kind of privilege between an agent and a customer, but that would also figure into my analysis.

GG (23:40): Whether or not it's kind of like a conversation with your lawyer is privileged and you, you're not allowed to record that. And I think it goes back to what you said earlier. There's in the criminal context, there is that second analysis, whether there's a subjective expectation of privacy, one that society would consider reasonable. So I think the courts are going to have to take this and decide, do does is society willing to say, when you go into someone's house for this context, you do have an expectation of privacy.

DC (24:10): Right. Exactly. Exactly. If I can tell you that, I would be happy to say that if I were visiting a house it would be surprising and disappointing to me to hear that I was being recorded, without notice.

GG (24:24): It, it would be, you would be, it would not be a very good feeling when you're walking away from this transaction, but the courts haven't decided this, right? Like the courts have not said society does consider it reasonable. Cause it's all, it's nebulous still.

DC (24:38): Exactly. I could not find I did, I did some searching yesterday. I cannot find a case in Texas anyway, that has resolved this question.

GG (24:46): And now you've mentioned a couple of times it would not be, it would not make you feel well. And I think a lot of that comes from the surprise of not knowing that that conversation was being recorded. And I want to talk a little bit about when a seller may be able to record a person because they have given some kind of implied consent. So you mentioned a sign on the front door. How would that change your analysis?

DC (25:13): If, if there is notice then there's not going to be an expectation of privacy. You and I talked earlier about jail conversations and that's a perfect example. When a, when a person in jail picks up the phone to call somebody and they get phone privileges and they can usually at some cost, call their relatives. There's a sign right there before they dial that says these conversations are being recorded and can be used against you. And in fact, they are recorded and they are sometimes used against them, but they're on notice and every court that's ever considered it has said, you know, read the sign. So same thing if you're being recorded in Best Buy. If you're in a location where you can, the cameras are very visible. So if I walk into the living room and I see the recording device, or I see the camera up in the corner on ceiling then I, I don't think any court is going to say, I have an expectation of privacy.

GG (26:16): So there's that idea of, you know, it's happening. And then you can't argue, it goes back to that idea where you mentioned earlier that if somebody posted it on Facebook, they were willing to pay something. And then they want to argue later, is that same kind of analysis? Yes. Like you knew what you were getting into.

DC (26:35): Mhmm. You were on notice and you could have turned around and walked away or asked to have their recording devices turned off.

GG (26:41): So, so there's a benefit to all, if this is going to happen for a home that's for sale, put a sign up, tell people be honest and forthright with it. Yeah.

DC (26:52): Yeah. I think right now, given the courts all across the country are interested in technology. And I mean, we are just bombarded with information about other people that we don't even want right now. And I think that we should be cautious about any use of technology and err on the side of privacy, we should always err on the side of privacy.

GG (27:17): Right. Agree. 100%. So I wanted to walk through just some of the scenarios again, kind of like in a speed round and ask your general risk tolerance on these. Are you ready?

DC: I am.

GG: All right. I'm in my house and I invite you to see it and give you a tour with your agent. Can I generally record our conversations?

DC: Generally yes.

GG: Because I'm a party to the conversation.

DC: Right.

GG: Okay. So now same scenario, but this time you are in a separate room and while your agent's giving you a tour and I just stay on the other side of the house, can I still record that conversation? Or it has the risk changed?

DC (27:58): Probably you can probably do it, but the risk has changed. The expectation of privacy has increased, but the big factor there would be that the person is in a room talking to somebody that works for her, that she trusts.

GG (28:13): So if now if it's only video and no audio?

DC (28:19): Oh well so if it's only video and no audio that comes down to that damages part of the civil side, you know, what, what said is not something that you could use, so you couldn't use it in negotiations. Could you use it to accuse her, of stealing your vase? Yeah.

GG (28:38): Gotcha. And I think I bring that scenario up only by way of if a consumer is really concerned about somebody damaging their property or somebody stealing something, they don't need to record the audio. The video is enough.

DC (28:53): Right. And if that's the concern, oh my gosh, why not put signs up saying you are being recorded, then you never have to get there. Why would you want to go litigate your stolen base when you could have prevented it?

GG (29:05): You know, and some of the, the articles that we're reading said, put those signs up anyways. Even if you're not recording,

DC (29:12): Yeah, exactly. It's like beware of dog signs.

GG (29:15): But they have, you know, a little poodle. So next scenario, my house is for sale and I'm not present while you come to see the property, how risky is it to record the conversations that are happening between the people who come to see the house... first for the doorbell camera recording outside?

DC: Probably no risk.

GG: And then next is for the camera that records you inside.

DC (29:42): Probably more risk and especially given depending on how it was going to be used and what you were recording. Probably more risk. I think the agency relationship between what the real with the real estate agent factors in somewhat in both, in both cases.

GG (29:59): Does the risk change at all if there's a sign on the front door?

DC (30:02): No, you don't have, there is no risk. The visitors should keep their mouth shut.

GG (30:09): Got it. So then my final question what if two burglars break into my house and record all their conversations and they sue me because I tell police about their plans. What's my risk there?

DC (30:21): There are cases like this. You think this is funny, but there are cases where burglars have sued homeowners for not keeping their property up, you know? And so the burglar gets injured while

they're breaking and entering and they've sued for... Oh my gosh. Okay. So two burglars entered. They record their own conversation?

GG (30:39): I record their conversation on my cameras. Yeah.

DC (30:41): You record their conversation on your camera. They've broken in...

GG (30:47): They're stealing my stuff and talking about...

DC (30:50): There's just absolutely no expectation of privacy there. No court is going to say you can't, they can't use that.

GG (30:57): I mean, I just think it's a perfect example of how it just, it's all about the intent. It's all about the scenario and it changes and it's very hard. It's a very hard decision to make right now. The courts haven't been cleared on this topic.

DC (31:11): Yeah. Let me, let me break that one down because now that I've quit laughing, I can actually do it like a judge. So, so the the burglars are gonna argue that they expected their conversations to be private because they were in a home where everybody was sleeping. Why else would they do it while people were sleeping? That's going to be their argument. The court's going to say, yeah, whatever. No, no reasonable burglars should expect that a homeowner is not going to try to protect himself by having recording devices. So even if they had an expectation of privacy, it's not one, the courts are willing to protect. That's what they would say.

GG (31:49): It's a crazy, crazy scenarios that are going on there. And I wanted to throw you for a curve ball. Thank you for entertaining that one. Professor, thank you so much for spending the time with me to help me dive into this topic and give our members something to think about. I'll finish this the same way we started this conversation, which is, this is not intended to be legal advice. I just kind of wanted to have more of a, a conversation that our members should always talk to their brokers and their lawyers for specific legal advice on how they handle their situation.

DC (32:18): Absolutely. This was a lot of fun though.

GG (32:21): I also want to let you know that I alluded to it earlier that while the conversations for this podcast surrounding the legal issues of other property, we're talking about legal, I'm not diving into the code of ethics that all REALTORS® agree to abide by under article one of the REALTOR® code of ethics that REALTOR® is expected, treat all parties, honestly. And I do believe the code of ethics calls for REALTOR® to always put consumers coming into the house on notice that the property is being recorded. So even though the law is ambiguous, the code of ethics, I think does put an obligation on our members to be fair and be honest, that conversations are being recorded.

DC (33:00): Yeah, that's good to know.

GG (33:02): So thank you so much for your time today. I greatly appreciate it. And again, when you hear the, the decision come out of that Florida case, we definitely want to have you back.

Speaker 3 (33:11): I will let you know. Thanks so much. It was fun.

GG (33:17): Thank you for listening. And please check back with us next month, where we'll be recording more conversations about real estate, and as always, with the consent of our guests.