

LEGAL UPDATE

Audio/Visual Surveillance & Wire Fraud Protection

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Topics covered:

- Video/audio surveillance devices on properties
- Wire Fraud and other cyber crime issues

Video/Audio Surveillance Devices on Properties



Audio Surveillance

- Generally requires the consent of at least one party being recorded, and sometimes both parties
- Idaho = consent not required

Video Surveillance

Test:

Would person being recorded have a reasonable expectation of privacy in the location where the recording is taking place?

TORT

A violation of a duty imposed by general law or otherwise upon all persons in relation to each other for which a court will provide a remedy in the form of an action for damages.

RIGHT OF PRIVACY

The four categories of tortious invasion of privacy in Idaho are:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name and likeness.

Baker v. Burlington Northern, Inc., 99 Idaho 688 (1978)

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Lohan to Sue Jewelry Store Over Surveillance Tape

3/8/2011 9:43 AM PST by TMZ Staff



Like

100

[Lindsay Lohan](#) is preparing to sue **Kamofie & Company** jewelry store -- claiming they had no right to cash in from the sale of the infamous surveillance tape ... because Lindsay never gave them the right to use her image for profit ... TMZ has learned.

EXCLUSIVE



Addressing Surveillance Devices on a Property

- Listing agreements
- Buyer representation agreements
- MLS disclosures

Language in Listing Agreements

- Seller acknowledges and understands that while the marketing services selected above will facilitate the showing and sale of the Property, there are risks associated with allowing access to and disseminating information about the Property that are not within the reasonable control of the Firm, including but not limited to:
 - (ii) control of visitors during or after a showing or an open house, including the taking and use of photographs and videos of the Property

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- **WARNING:** IT MAY BE A CRIME UNDER FEDERAL AND STATE LAWS TO LISTEN TO OR RECORD AN ORAL COMMUNICATION THROUGH THE USE OF ANY ELECTRONIC, MECHANICAL, OR OTHER DEVICE WITHOUT THE CONSENT OF A PARTY TO THAT COMMUNICATION. If there is a video/audio/surveillance device(s) on the Property, Seller is advised: (i) that no audio surveillance device may be turned on during any showings, open houses, investigations, examinations or inspections of the Property; and (ii) that the placement of any video surveillance device should not violate a visitor's reasonable expectation of privacy.

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RECORDINGS WITHIN THE PROPERTY:

- a. In the event Owner has a recording system in the Property which records or transmits audio, Owner understands that recording or transmitting of audio may result in violation of state and/or federal wiretapping laws. Owner hereby releases and indemnifies Broker, Broker's designated agents, sub-agents, sales associates, and employees from any liability which may result from any recording or transmitting in the Property.
- b. Seller understands that while potential purchasers viewing the Property should not engage in photography, videography, or videotelephony in the Property without prior written permission, such recordings or transmissions may occur. Seller should remove any items of a personal nature Seller does not wish to have recorded or transmitted. Owner hereby releases Broker, listing sales associates and employees from any liability which may result from any recording or transmission in the Property.

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Recordings Within the Property: If Owner records or allows remote monitoring of audio or video within the Property, Owner understands recording or transmitting audio or video of prospective purchasers or their representatives may result in violation of state and/or federal laws. Further, Owner acknowledges that prospective purchasers may photograph or video the interior of the Property. Owner should remove any items of a personal nature that Owner does not want photographed, recorded or transmitted, such as family photos, paperwork and other personally identifiable information. Owner hereby releases and indemnifies Broker, its agents and employees, from any liability which may result from Owner's recording or transmitting of audio or video on the Property, and from any other person photographing, recording or transmitting any audio, images, or video of the Property.

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CRIMINAL VIDEO VOYEURISM

Idaho Code Section 18-6609

A person is guilty of video voyeurism when, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires of such person or another person, or for his own or another person's lascivious entertainment or satisfaction of prurient interest, or for the purpose of sexually degrading or abusing any other person, he uses, installs or permits the use or installation of an imaging device at a place where a person would have a reasonable expectation of privacy, without the knowledge or consent of the person using such place.

CRIMINAL VIDEO VOYEURISM

Idaho Code Section 18-6609

A person is guilty of video voyeurism when:

- (a) With the intent to annoy, terrify, threaten, intimidate, harass, offend, humiliate or degrade, he intentionally disseminates, publishes or sells or conspires to disseminate, publish or sell any image of another person who is identifiable from the image itself or information displayed in connection with the image and whose intimate areas are exposed, in whole or in part, or who is engaged in a sexual act;
- (b) He knew or reasonably should have known that the person depicted in the image understood that the image should remain private; and
- (c) He knew or reasonably should have known that the person depicted in the image did not consent to the dissemination, publication or sale of the image.

CRIMINAL VIDEO VOYEURISM

Idaho Code Section 18-6609

"Place where a person has a reasonable expectation of privacy" means:

- (i) A place where a reasonable person would believe that he could undress, be undressed or engage in sexual activity in privacy, without concern that he is being viewed, photographed, filmed or otherwise recorded by an imaging device; or
- (ii) A place where a person might reasonably expect to be safe from casual or hostile surveillance by an imaging device; or
- (iii) Any public place where a person, by taking reasonable steps to conceal intimate areas, should be free from the viewing, recording, storing or transmitting of images obtained by imaging devices designed to overcome the barriers created by a person's covering of intimate areas.

RESTRICTIONS ON USE OF DRONES

Idaho Code Section 21-213

(2)(a) [N]o person, entity or state agency shall use an unmanned aircraft system to intentionally conduct surveillance of, gather evidence or collect information about, or photographically or electronically record specifically targeted persons or specifically targeted private property including, but not limited to:

(i) An individual or a dwelling owned by an individual and such dwelling's curtilage, without such individual's written consent

(2)(a) No person, entity or state agency shall use an unmanned aircraft system to photograph or otherwise record an individual, without such individual's written consent, for the purpose of publishing or otherwise publicly disseminating such photograph or recording.

Buyer's Representation Agreements

SURVEILLANCE: Buyer is advised to be mindful of the fact that there could be video/audio/surveillance device(s) located on any property examined by Buyer and that Buyer or Buyer's representatives may be under surveillance during any such examination. Federal and State laws prohibit the interception of an oral communication through the use of any electronic, mechanical, or other device, whether or not recorded, without the consent of a party to that communication. However, video surveillance without consent is not illegal.

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USE OF PHOTOGRAPHS AND VIDEO: Unless a property owner has notified the public that photography and video recording is prohibited, it is permissible to photograph or video the interior of private property since the owner's permission to enter the property implies permission to do so. **However, under no circumstances may Buyer take photographs or videos that intrude on a property owner's reasonable expectations of privacy.**

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- **RECORDINGS WITHIN THE PROPERTY:** Prior to photographing, videographing or videotelephoning the property without prior written permission of the owner, Buyer should speak with an attorney. Buyer should be aware that the seller may have a security system that records or allows for remote monitoring of the property, including recording or broadcasting audio. Sellers may be able to listen to conversations in their properties and Buyer should be aware that any discussions of negotiation strategies held in the property may not be confidential. Buyer hereby releases Broker, buyer agent and employees from any liability which may result from any recording in the property.

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Recording in a Property: Buyer should be aware that an owner may utilize audio and/or video devices to monitor their property. Buyer should not discuss negotiation strategies or other confidential information within a property. Buyer hereby releases Broker, its agents and employees, from any liability which may result from any recordings occurring within a property.

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MLS Disclosures

- Field allowing for identification of surveillance devices
- Rule requiring disclosure by listing broker

SELLER REPRESENTATION AGREEMENTS

136 **16. ADVERTISING AUTHORIZATION.**

137 SELLER ☐does ☐does not agree to allow listing documents and information to be displayed on the Internet.

138 SELLER ☐does ☐does not agree to allow address to be displayed on Internet.

139 SELLER ☐does ☐does not agree to allow Broker to advertise said Property in print media.

140 SELLER ☐does ☐does not agree to allow Broker to advertise said Property in other advertising media.

141 SELLER ☐does ☐does not agree to allow Broker to place the Broker's sign on Property.

SELLER PROPERTY DISCLOSURE

<i>ELECTRICAL SYSTEMS SECTION</i>	None/Not Included	Working	Not Working	Do Not Know	Remarks
Security System(s)					
Garage Door Opener(s)/Control(s)					
Light Fixtures					
Smoke Detector(s)/Fire Alarm(s)					
Carbon Monoxide Detector(s)					

NO DUTY TO INSPECT

Unless otherwise agreed to in writing, a brokerage and its licensees owe no duty to a client to conduct an independent inspection of the property and owe no duty to independently verify the accuracy or completeness of any statement or representation made regarding a property. Unless otherwise agreed to in writing, a brokerage and its licensees owe no duty to conduct an independent investigation of either party's financial ability to complete a real estate transaction.

Wire Fraud and Cyber Crime

REAL ESTATE IS A TARGET

- Small to mid-side companies
- Multiple players
- Focus is on closing transaction
- Large sums of money
- 2016 – Cyber crime cost businesses \$1.3 billion

Wire Fraud Scheme



Wire Fraud Prevention: Best Practices

- Education
- Implement standard notice for buyer clients
- Avoid handling disposition of funds
- Buyers: phone call before wiring money
- Develop security-conscious email & password practices

WIRE TRANSFER WARNING

248 **28. WIRE TRANSFER WARNING:** Electronic means of transferring money (i.e. ETF, wire transfer, electronic check, direct deposit, etc...)
249 are subject to sophisticated cyber fraud attacks. These attacks are even more prevalent in real estate transactions due to the large sums
250 of money being exchanged. SELLER is advised that Brokerage will not provide electronic transfer instructions by e-mail. Following money
251 transfer instructions contained in an email from any party is inherently dangerous and should be avoided. SELLER agree that if SELLER
252 use, or authorize the use of, electronic transfer of funds in a transaction they hereby hold the Brokerages, their agents, and the designated
253 title and escrow company harmless from any and all claims arising out of inaccurate transfer instructions, fraudulent interception of said
254 funds and/or any other damage relating to the conduct of third parties influencing the transfer process or stealing funds.
255

Wire Fraud Litigation

Bain v. Platinum Realty, LLC, No. 16-2326-JWL, 2018 WL 3105376 (D. Kan. June 25, 2018).

- Jury determines listing broker was 85% responsible for buyer's loss
- Buyer awarded \$167,129 in damages

Data Protection & Cybersecurity

10 Important Steps for Cyber Security

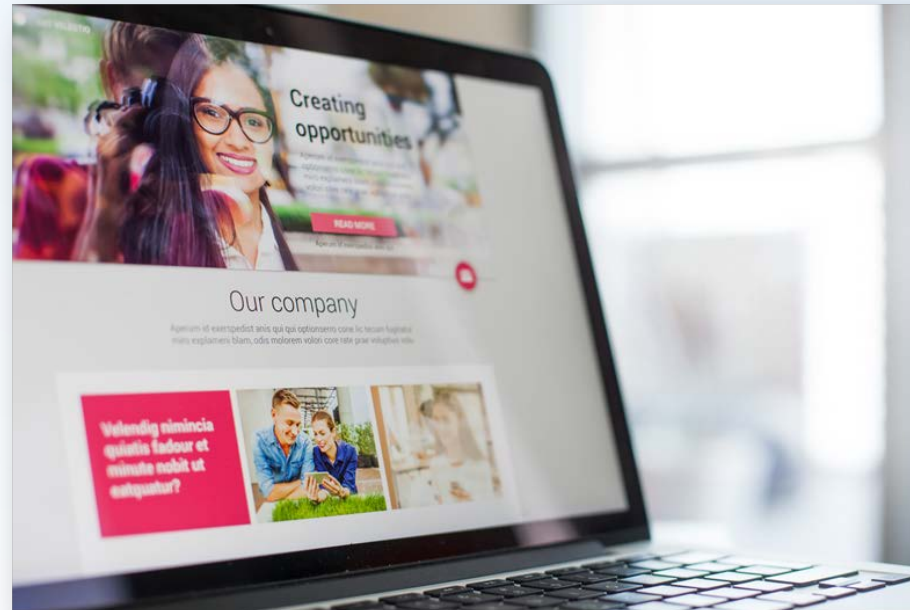
1. Start with security.
2. Control access to data sensibly.
3. Require secure passwords and authentication.
4. Store sensitive personal information securely and protect it during transmission.
5. Segment your network and monitor who's trying to get in and out.

10 Important Steps for Cyber Security

6. Secure remote access.
7. Apply sound security practices when developing new products.
8. Make sure your service providers implement reasonable security measures.
9. Put procedures in place to keep your security current and address vulnerabilities that may arise.
10. Secure paper, physical media, and devices.

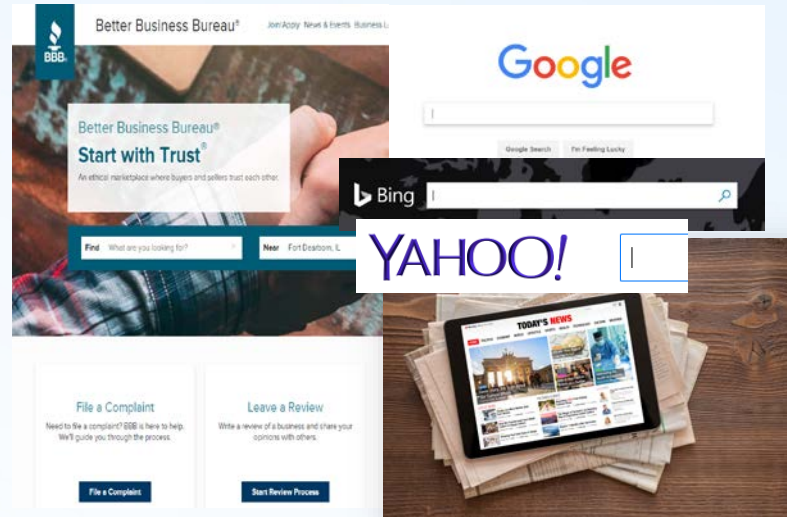
Best Practices for Vetting Vendors

Review the Vendor's Website



- ✓ Check how long the vendor has been in business.
- ✓ Review vendor's areas of expertise.
- ✓ Consider vendor's business strategies.

Check References and News



- ✓ Request vendor provide references to learn previous customers' experience.
- ✓ Obtain information about vendor through third-party websites.
- ✓ Conduct an online search of vendor.

Establish Expectations



Copyright

Address issues related to use of any intellectual property created under the agreement, including through a work-made-for hire or licensing provision.

Standards of Performance

Require vendor's products and service follow industry standards.

Indemnification

Seek protection against third-party claims related to the vendor's products or service.

Assignment

Require consent be obtained prior to vendor transferring any obligations to a third party.

Termination for Convenience

Seek the ability to terminate the contract for any reason.

Cyber Insurance

Cyber Insurance

- Review current policy
- Consult a specialist
- Ask about post-breach triage services
- Review regularly
- Remember E&O/Crime coverage/social engineering endorsement

NAR Resources

- **Wire Fraud Landing Page:** <https://www.nar.realtor/topics/wire-fraud>
- **Sample Wire Fraud Notices:** <https://www.nar.realtor/data-privacy-security/wire-fraud-notices>
- **Video Alerts and Education:**
 - <https://www.nar.realtor/videos/wire-fraud-alert-for-buyers>
 - <https://www.nar.realtor/videos/window-to-the-law-data-security-program-basics>
 - <https://www.nar.realtor/videos/window-to-the-law-cyberscams-and-the-real-estate-professional>
 - <https://www.nar.realtor/videos/window-to-the-law/window-to-the-law-creating-a-cybersecurity-program>
- **Data Privacy and Security:** <http://www.nar.realtor/topics/data-privacy-and-security/resources>
- **Cyber and Fidelity Insurance Report:** <https://www.nar.realtor/reports/cyber-and-fidelity-insurance-report>
- **Vetting the Vendor Checklist:** <http://nar.realtor/vetting-the-vendor-checklist>

Additional Resources

FTC

- NIST: <https://www.ftc.gov/news-events/blogs/business-blog/2016/08/nist-cybersecurity-framework-ftc>
- Start with Security: <https://www.ftc.gov/system/files/documents/plain-language/pdf0205-startwithsecurity.pdf>

FBI

- Field Office Finder Guide: <https://www.fbi.gov/contact-us/field-offices>
- IC3: <https://www.ic3.gov/default.aspx>

QUESTIONS?

THANK YOU!

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