Call Recording Laws - Friend, Foe, or a Draconian Law

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Introduction

Call recording envisions big brother watching and listening to all of our conversations and activities. The National Security Agency (NSA) is monitoring and listening to everything, and they can hack into every person's personal life, but not to worry, because Will Smith will battle the corrupt NSA agents and expose the truth.[1] Despite the fanciful and negative cliché that call recording and invasion of privacy has played in our movie lives, the act of call recording has proven to be a very beneficial and productive option in our current business world. A number of companies, mostly large call centers, deploy call recording and utilize the technology to improve productivity, training, customer service, and company policies. For those that do take advantage of recording their calls, customer interaction and improvement typically blossoms, and in the end, the customer typically ends the call satisfied and willing to continue business with them.[2]

Recording calls is one of the many pieces that help these businesses achieve and meet customer demands. However, despite this tool being an important piece in the overall business cogwheel, customers and privacy laws are in a constant battle against it. This paper will address the issues concerning call recording in a business environment and how, despite their efforts to improve customer service, the laws regarding call recording has made it near impossible to implement. Customers who demand amazing

[1] Enemy of the State (1998)
[2] Hadyn Luke, How workplace training can improve customer service skills and ultimately sales performance, https://www.mycustomer.com/community/blogs/hadyn-luke/how-workplace-training-can-improve-customer-service-skills-and-ultimately (January 1, 2016)

customer service also condemn the very tool that is used to improve this service. Privacy is an important concern, but there must be a balance between privacy and customer expectations. Additionally, despite the laws being passed to combat privacy issues, they have created more confusion and pressure for businesses than actually addressing privacy concerns. Finally, although the legislature's desire to appease the masses and the concern for privacy, they must make it easier on companies, and not focus on punishment as the current laws have presented, but rather encourage a transparency of business by requiring specific types of companies to record all calls with customers. By changing the current laws from punishment focused to a transparency objective, the laws will not only improve customer interactions with business, but will also create a business/customer friendly environment that will improve overall customer satisfaction and reduce bad business practices.

Due to the fact that many States have their own privacy and call recording laws, in addition to the Federal government having a defined recording law, this paper will reference and focus on California's call recording law and draw most of its conclusions from California (CA) focused litigations and holdings.

I. A Brief History

Puffs of smoke seen from a distance, mirrors reflecting the sun, and drums pounding to a specific rhythm were some of the earliest forms of long distance communication.[3] As technology improved, the development of the telegraph and the work of Alexander Bell,[4] the era of telecommunications as we know it today began to

[3] Wikipedia, *History of Communication*, https://en.wikipedia.org/wiki/History_of_communication (accessed 08. 20, 2019)
[4] Jason Morris, *History of the Telephone*, http://www.nationalitpa.com/history-of-telephone (accessed 08. 20, 2019)

take shape. Although technology has changed, and we no longer use smoke signals when communicating over long distance, the essence of communication remains the same. Businesses and customers utilize telecommunications to grow, to sell, to inform, and to express themselves. We live in an era of smartphones, social media, and instant chat. To tweet is no longer something you whistle, but rather a type of communication that is 280 characters. With the steady growth of communication, two values have collided: The demand for increase in privacy rights, and the contradicting demand for customer service.

a. Great Customer Service Is Difficult With So Many Hurdles

Customers demand great customer service, but they also demand privacy. The two are in constant battle, a business wants to excel, yet is chilled by the effects of privacy laws and the difficulty in complying with these laws. Although technology continues to improve, it is a catch 22, [5] because such advances in technology also make it more difficult to comply with call recording laws. As one piece of technology advances, such as the ability to locate individuals via an IP, [6] another technology develops, which allows ones location to be masked.[7]

Companies are in the business of making money, every company needs customers, and those running a business realize that retaining a customer is a lot less expensive than new customer acquisition.[8]

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[5] Wikipedia, *Catch-22 (logic),* https://en.wikipedia.org/wiki/Catch-22_(logic) (accessed 08. 20, 2019)
[6] What Is My IP Address, *How Your IP Address Could Lead Anyone to Your Front Door*, https://whatismyipaddress.com/find-me (accessed 08. 20, 2019)
[7] Rob Mardisalu, How to Hide My IP Address (March 5, 2019), https://thebestvpn.com/hide-ip/
[8] Taylor Landis, *Customer Retention marketing vs. Customer Acquisition Marketing*, https://www.outboundengine.com/blog/customer-retention-marketing-vs-customer-acquisition-marketing/ (02.28, 2019), AND Will Tidey, *Acquisition vs. Retention: The Important of Customer Lifetime Value*, https://www.huify.com/blog/acquisition-vs-retention-customer-lifetime-value (02.17, 2019) AND Linda Bustos, *Customer Acquisition vs. Retention [Infographic],* https://www.getelastic.com/customer-acquisition-vs-retention-infographic (03.06, 2015)

Customers demand a lot, studies have shown that they expect great service from a company, or else they will take their business elsewhere.[9] A recent study coordinated by Oracle found that "eighty-six percent of consumers will pay more for a better customer experience. Eighty-nine percent of consumers began doing business with a competitor following a poor customer experience. Seventy-nine percent of consumers who shared complaints about poor customer experience online had their complaints ignored and fifty percent of consumers give a brand only one week to respond to a question before they stop doing business with them."[10]

With the focus on customer service so abundant, the battle between providing such service, yet also balancing privacy rights and laws has proven to be a difficult task.

II. The Need for Customer Service, but the Battle Between Privacy and the Technology

a. Cake and Eat It (Too)

We all are familiar with the phrase, "you can't have your cake and eat it (too)."[11] This proverb has been used for over four hundred years, and although the phrasing has been nitpicked and considered out of order and confusing, a majority of people understand the basic meaning.[12] One cannot eat your entire cake, and then demand to have the same whole cake.[13] Once it is eaten, it is gone. Yet, when it comes to privacy and customer service, many customers demand both. Customers want to call into a

[9] Oracle Corporation, *2011 Customer Experience Impact Report – Getting to the Heart of the Consumer and Brand Relationship*, http://www.oracle.com/us/products/applications/cust-exp-impact-report-epss-1560493.pdf (2011)
[10] Oracle Corporation, *2011 Customer Experience Impact Report – Getting to the Heart of the Consumer and Brand Relationship*, http://www.oracle.com/us/products/applications/cust-exp-impact-report-epss-1560493.pdf (2011)
[11] Wikipedia, *Your can't have your cake and eat it*, https://en.wikipedia.org/wiki/You_can%27t_have_your_cake_and_eat_it (accessed 08.20, 2019)
[12] Id.
[13] Id.

business and have every need, desire, and question answered to their full satisfaction. When communicating with a business, this demand puts a heavy toll on the agent speaking with the customer. Yet, that same customer may protest when the company records their call or maintains too much personal information about them.[14]

Although Google has led us to believe the answer is at the end of a short simple search, such results are not the same in the business world when dealing with complex policies and procedures. These individual agents on the front line, those on the phones all day speaking with the customers, have to follow guidelines and procedures within the company infrastructure, and also be able to adapt and adjust quickly when presented with out of the box questions or concerns.

Agents receive most of this information, guidelines, and procedures through training, and when handling specific unpredictable issues, such information must be obtained from the customer themselves, or reviewing past interactions. Such interactions are phone recordings, data stored in a customer-relationship management (CRM), or by chance, the agent remembers prior exchanges of communication. But, if such information is collected, a thin line is drawn, and the customer's privacy may be invaded at the same time. At what point does a customer believe his/her data should be stored? Is every communication between a customer and a company's agent private? Must permission always be asked to record or write anything personal down? To make a note of a customer's feelings, concerns, and demands from a company?

These questions and quibbles have been plaguing the legal system for a number of years. As telecommunications continues to advance, so has the ability to record, capture,

[14] This does not pertain to every customer, but is a generalization based on the number of suits and complaints regarding call recording that is discussed in this paper.

store information, as well as transcribe speech to text. One of the biggest debates amongst courts, business owners, and customers, is what should privacy entail when communicating with a business and finding a balance between being fair, equitable, and transparent to ensure customers are protected?[15]

b. Privacy – From Business

Privacy has been a cornerstone of America. It is depicted countless times in movies, books, and litigation. The Fourth Amendment protects one's right from unlawful searches and seizures.[16] Such inherent protections prevent the government from coming into our personal lives un-announced, because, we as Americans want to live free, and not constantly be looking over our shoulder thinking someone is attempting to invade this freedom. This sense of privacy has culminated over the years, and has grown stronger and stronger with each generation. The reasoning for this demand for privacy varies, from times of too much invasion of government and encroaching personal freedoms, to times where not enough government intervention risked the security of the nation. The major shift from too much encroachment from the government and privacy most notably took place in Katz v. United States.[17] In *Katz*, the government listened to phone conversations between Katz relaying gambling bets between Los Angeles and the East Coast. The government failed to obtain a warrant to listen to the calls that were made while Katz was in a public telephone booth. Katz closed the door to the booth, and the court held that such an action by Katz indicated a reasonable expectation of privacy

[15] As evident in recent and past courtroom litigations.
[16] Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (https://www.law.cornell.edu/constitution/fourth_amendment)
[17] Katz v. United States, 389 U.S. 34 (1967)

between him and the public outside the booth, thus, an invasion of privacy occurred. The government could no longer listen to whomever they chose and wherever, proper procedures had to be put in place, as the test used in many proceeding trials was the reasonable expectation of privacy.[18]

As technology expanded and improved, the ability for businesses and individuals to track, accumulate, and record information became more feasible. Individuals no longer feared only the government from invasion of such privacy, but the fear of businesses or individuals tracking their every move became a legitimate concern. The Fourth Amendment protected individuals from government action, but it lacks power in controlling individuals and private companies. To combat such fears, the federal government, as well as many states, enacted statutes that addressed this issue.[19] These statutes became widely known as invasion of privacy statutes. In particular, California enacted the invasion of privacy statute § 632 in 1967 to address the concern of recording or eavesdropping telecommunication conversations.[20] The statute has evolved over time, and now includes the recording of cellular phones.[21] As the statute has evolved, so has the penalty for violating the statute at an ever increasing rate. An excerpt of the act:

> (a) A person who, intentionally and **without the consent of all parties** to **a confidential communication**, uses an electronic amplifying or **recording device** to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio . . . **shall be punished by a fine . . . per violation** (emphasis added)

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[18] Id.
[19] Wikipedia, *Privacy laws of the United States*, https://en.wikipedia.org/wiki/Privacy_laws_of_the_United_States (accessed 08.20, 2019)
[20] California Penal Code § 630, et seq.
[21] Cal. Penal Code § 632.7 ". . . between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished by a fine . . ." (https://codes.findlaw.com/ca/penal-code/pen-sect-632-7.html)

Cal. Penal Code § 632

California Penal Code § 632 requires both parties to consent to the recording, and if one party does not reasonably know they are being recorded and does not consent, the breaching party may pay a fine depending on any prior convicted violations which could reach up to ten thousand dollars ($10,000) per violation.[22]

The act addressed the concerns of citizens and their privacy, and prevented businesses from recording them without knowledge of such recording.[23] However, the act, like so many before and after, became a piggy bank for lawyers and individuals. The ten thousand dollar per violation penalty could quickly rack up hefty fines for businesses, and create a deterrent for companies from engaging in such activity. But before we dive deeper into the possible abuse of litigation that has occurred under this act, let's discuss what call recording is, and why it is even needed.

c. What Is Call Recording

Call recording has been around for a number of years. Most customers are familiar with the phrase "this call may be recorded and monitored for training purposes." The reason for this notification is to ensure compliance with recording laws, and notify customers. The recorder is in fact a computer, running most likely a Windows based operating system and special software that is designed to properly record the call, capturing both the dialed number, extension, length of the call, and any other details associated with the particular recording. [24] This data is stored in a database, and the actual

[22] Cal. Penal Code § 632: "If the person has previously been convicted of a violation of this section or Section 631 , 632.5 , 632.6 , 632.7 , or 636 , the person shall be punished by a fine not exceeding ten thousand dollars ($10,000) per violation . . ."
[23] Kight v. CashCall, Inc. 200 Cal. App. 4th 1377, 1392 (2011)
[24] Information and features of call recording gathered from authors experience in the call recording industry and software development, as well as from Versadial Solutions call recording offering and feature list https://www.versadial.com/call-monitoring-software-adutante/ (accessed 08.20, 2019)

audio recording is also stored on the PC server. The company recording the call can then search for the specific call, or conduct a general search for all calls during a period of time.[25]

The employee accessing the call recording software can play the call back, listening to the details (the voice of both the agent and the customer), make notes, flag the call for review, and a plethora of other interactions. Call recording has developed over time, and as technology advanced with hardware and storage capabilities, the ability to retain these calls has grown exponentially over the years.

So what happens with all this data? How is it used? Recordings play a variety of roles within a business. The company may use the recording for training purposes, pulling from an actual customer call, and assisting the agent where they require the most attention, either on their personal skills, or perhaps their product knowledge and company procedures.[26] Made up scenarios can go so far, but actual recordings and situations assist many companies with proper training and handling of customer interactions.

Additionally, such stored calls can be accumulated and transcribed with speech analytics.[27] Speech analytics are machine learning tools that convert the spoken word into text.[28] This text can be analyzed by a server and provide indicators of trends, or common issues and threads spoken by agents or customers. Some speech recognition software can even go as far as determining the mood or tone of the people speaking, so as to alert managers to issues before they get out of control.[29]

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[25] Id.
[26] Versadial Solutions, *Sales Training and Coaching*, https://www.versadial.com/adutante-quality-control-and-evaluation/ (accessed 08.20, 2019)
[27] Versadial Solutions, *Speech Analytics for Your Recorded Calls*, https://www.versadial.com/speech-analytics-for-your-recorded-calls/ (accessed 08.20, 2019)
[28] Wikipedia, *Speech analytics*, https://en.wikipedia.org/wiki/Speech_analytics (accessed 08.20, 2019)
[29] Id.

In the alternative, many companies may use the recordings as a cover your behind (CYA) tool.[30] Utilizing recorded conversations to squash any litigation issues, or preventing he said / she said situations when there is a dispute between a customer and an employee. By listening to calls, companies can be proactive and reduce their liability by taking initiative and altering certain procedures and company requirements because of their concern with customer and company relations.

Recordings have proven to assist businesses in a variety of ways, and providing customer service is one of the lucrative benefits in utilizing this technology. However, implementing this technology has proven sometimes fatal, as many businesses have felt the bite of the call recording laws with heavy fines and penalties.

d. The Bite / The Burden – State Enacted Privacy Laws

Businesses have been using call recording for a number of years, however, we live in a global economy, the world which once used smoke signals to communicate now can walk the street and speak to someone three thousand miles away on their cell phone. As technology improved, and the world as we know it shrank, States began to enact laws that address the telecommunications industry.[31] Due to the risk of eavesdropping and concerns of privacy over phones and radios, each State followed either the direction of the Federal Government's eavesdropping law by being a one-party consent,[32] or the State took it a step further and enacted a two-party consent recording law. This split amongst states created many conflicts because the law failed to truly recognize how

[30] Versadial Solutions, *Reduce Business Liability*, https://www.versadial.com/reduce-business-liability/ (accessed 08.20, 2019)
[31] Justia, *Recording Phone Calls and Conversations* (Collection of State enacted eavesdropping laws) https://www.justia.com/50-state-surveys/recording-phone-calls-and-conversations/ (last updated January 2018)
[32] 18 USC § 2511(2)(d)

telecommunications would grow and yet also shrink and simplify the ability to quickly reach individuals in other states. The States that adopted a two-party consent law wanted to ensure the utmost privacy for its citizens, but such demand for privacy also stifles business and communication between these two party consent states and single party consent states.

The most heavily debated case regarding which consent law triumphs was *Kearny v. Salomon Smith Barney, Inc.*[33] In *Kearny*, the issue was between citizens in California calling into the state of Georgia to discuss their investment options with Salomon Smith Barney (Smith). The Georgia call recording laws made it clear it was a one-party state,[34] but California is a two-party state,[35] meaning both parties need to consent to be recorded compared to only one-party of the conversation needing to consent in Georgia. Smith, under the impression that Georgia required only one-party to consent to recording, never had a notification at the beginning or during the call because the employees already knew they were being recorded and consented to such actions, thus, qualifying Georgia's one-party consent statute. The California citizens sued because they never knew they were being recorded, and they did not consent to such recording. The case went all the way to the California Supreme Court to determine which law applied. The California Supreme Court held that California law prevailed, because the citizen's privacy would be impacted more than those of Georgia's citizens, because California's right to privacy is inalienable, and recording their conversation without their consent would invade this right.[36]

[33] Kearney v. Salomon Smith Barney Inc., 137 P.3d 914 (Cal. 2006)
[34] Ga. Code §§ 16-11-62(1), 16-11-66
[35] Cal. Penal Code § 632
[36] Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 937 (Cal. 2006)

This decision had a huge impact within the business community. Businesses had to not only try and figure out their State's recording laws and privacy rights, but also those of other states. The issue and concern was the ability to determine from which state a customer was calling from, or which state the individual was located at. Based on this determination, the business would then need to comply with the specific regulation in place for that State. The court in *Kearny* felt such a burden was easily overcome due to the fact of caller id, and technology that could decipher area codes and locations.[37]

However, we no longer live in the days of *Kearny*, although only decided in 2006, the number of individuals with cell phones has nearly doubled, from 230 million to 396 million in 2017.[38] Additionally, the use of land lines has dropped exponentially. In 2006, around 90% of homes had a land line, and only 15% had cell phones for their main home number. In 2017, only 43.8% of households had a land line and a whopping 52.5% have a cell phone as their main home line.[39]

This trend appears to continue, and in 2019 one can only imagine the decrease in having an actual land line as cell phones become the main platform for verbal communication. With the growth of cell phones, phone numbers now travel with the person, and when a person moves from one state to another, the area code no longer specifically applies to where you are calling from or to. Additionally, with the advent of Voice over Internet Protocol (VoIP) phones, individuals can be located anywhere when calling, and specific locations are difficult to decipher. VoIP service providers can give

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[37] Id. at 936

[38] Arne Holst - Statista, *Number of mobile cellular subscriptions in the United States from 2000 to 2017 (in millions),* https://www.statista.com/statistics/186122/number-of-mobile-cellular-subscriptions-in-the-united-states-since-2000/ (09.3, 2018)

[39] Felix Richter, Landline Phones Are a Dying Breed, https://www.statista.com/chart/2072/landline-phones-in-the-united-states/ (05.17, 2019)

anyone a phone number with an area code that does not directly relate to their physical geographical location.[40]

Thus, the *Kearny* court's reasoning that the burden on businesses to determine where an individual customer is located has created a much heavier toll than previously anticipated. The ability to determine exact locations has become nearly unpredictable or feasible. Individuals can move, travel, utilize Virtual Private Networks (VPN),[41] hide their location, use cloud based telephone services, and fail to update their exact location. Although technology has improved in identifying some locations, the ability to properly decipher where an individual is physically located is beyond the reach of most standard businesses.

In fact, this issue of location identification has plagued many emergency 911 centers. Around 1999 the Nation's Emergency 911 system needed to make a major overhaul.[42] Most systems were still utilizing old technology, and with the increase in telecommunication tools such as cell phones and VoIP that individuals were using, a change needed to occur across the United States. This change was labeled Enhanced 911, or E911.[43] It called for a variety of upgrades and adjustment to emergency 911 centers to stay ahead of cellular phones and there services. However, making such a change takes

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[40] Jackson Weber, *Scammers and VoIP: What you need to know about illegal phone scams*, https://www.voipreview.org/blog/scammers-and-voip-what-you-need-know-about-illegal-phone-scams (01.08, 2019)

[41] Whats My IP, *What is a VPN?,* https://www.whatismyip.com/what-is-a-vpn/: A Virtual Private Network is a connection method used to add security and privacy to private and public networks, like WiFi Hotspots and the Internet. Virtual Private Networks are most often used by corporations to protect sensitive data. However, using a personal VPN is increasingly becoming more popular as more interactions that were previously face-to-face transition to the Internet. Privacy is increased with a Virtual Private Network because the user's initial IP address is replaced with one from the Virtual Private Network provider. Subscribers can obtain an IP address from any gateway city the VPN service provides. **For instance, you may live in San Francisco, but with a Virtual Private Network, you can appear to live in Amsterdam, New York, or any number of gateway cities.** (accessed 08.20, 2019)

[42] 911.gov, *Next Generation 911*, https://www.911.gov/issue_nextgeneration911.html (access 08.20, 2019)

[43] Wireless Communications and Public Safety Act of 1999 (911 Act), https://www.congress.gov/106/plaws/publ81/PLAW-106publ81.pdf

time, and years went by as 911 centers, also known as Public Safety Answering Points (PSAPS), started to adhere to E911 requirements. As soon as most made it to compliance with the E911 standards, this technology became outdated and a new set of standards began to roll out. These standards have been labeled Next Generation 911, or NG911.[44]

This new standard will usher in a variety of technological efficiencies; however, one thing to note was the focus on tracking and location services.[45] Because cell phone towers can only be accurate to a certain degree, even emergency 911 call centers struggle to properly and accurately identify the location of individuals calling 911 on their cell phones.[46] Thus, the move to NG911 hopes to address this concern, and provide accurate location tracking of individuals. Yes, the movies make it appear your location can easily be tracked and located by bouncing signals off of cell towers; but such depictions in the movies do not always correlate to real life, and for that matter, no common business, small, medium, or large, will have the resources and access to such location tracking tools.

The days where a phone number was attached to a physical location no longer applies, and the ability to track individuals on cell phones is a real issue. The court in *Kearny* may have foreseen this issue, and assumed technology would catch up, but for most businesses, the cost and ability to properly track locations if calling a cell phone has been a burden not likely to be easily overcome in the near future.

With location tracking being a technological issue, the ability to keep up *Kearny* has proven to be a struggle not only for public safety but for businesses as well. Adding

[44] https://www.911.gov/issue_nextgeneration911.html
[45] https://cdn.ymaws.com/www.nena.org/resource/resmgr/Standards/NENA_08-505.1_VoIP_Location_.pdf
[46] https://www.ems1.com/technology/articles/115694048-Do-dispatchers-know-where-you-are-when-you-dial-911/

to technological issues, *Kearny* also ushered in the need for proper notification and consent. Businesses have struggled with this endeavor as well.

e. Notifications, Consent, and Announcements – Not Advanced As We Would Like

The "better safe than sorry"[47] approach was one many businesses attempted to adhere to after the holding in *Kearny* came out. To comply with *Kearny*, businesses became focused with making sure all parties were aware that the call may be recorded. What many do not realize, is despite our technological advances with telecommunication devices, the ability to notify individuals that a call may be recorded still has challenges.

Most companies have a phone system which is referred to as a Private Branch Exchange, or PBX. This PBX, is located within the place of business, or in the cloud.[48] This PBX does a few things, but most commonly, it correctly directs your call to the appropriate person and extension.[49] Many years ago, an actual person, typically an operator, would answer your call, and then discover who you wanted to speak with, and manually connect your phone line to the line of the person you were trying to reach.[50] Thus, creating the exchange between both telephones. In today's business environment, the modern PBX replaced the individual, and the box itself connects you to the correct person, typically by entering the extension number of the individual you want to speak with.[51]

[47] https://idioms.thefreedictionary.com/better+safe+than+sorry
[48] https://azure.microsoft.com/en-us/overview/what-is-the-cloud/
[49] https://www.3cx.com/pbx/pbx-phone-system/
[50] https://bebusinessed.com/history/history-of-pbx/
[51] Id.

The PBX also has a feature called "Auto Attendant."[52] This feature is the voice that you hear when you call into a place of business. The PBX answers the call, and provides the caller with a greeting, and during this greeting you may hear, "this call may be recorded for training purposes." Thus, the announcement can automatically be made to all persons who call into a place of business. However, such a feature is not typically available for outbound calls. A call initiated by the business agent, and calling a customer or potential customer bypasses the auto attendant all together. Although some technologies allow large call centers to have auto dialers that initiate the connection, and can provide such an announcement before the physical connection is made with the agent, most businesses cannot afford this feature. Additionally, the use of auto dialers itself can be a whole slew of other Federal Communications Commission (FCC) issues.[53]

In a typical business environment, such automated dialing systems are not appropriate due to the nature of most outbound calls. Many outbound calls entail notifying a specific customer that something is not correct with their order, or there was a delay, or a possible abuse or fraud by someone else using their data. Attempting to utilize an automated system to notify would prove to be difficult. During outbound calls, the most reliable and feasible option is to require the individual agent to announce that the call may be recorded. Additionally, some businesses may even have to delay the recording process, and require the agent to initiate it manually. Such a reliance on an individual agent not only limits their effectiveness on the phone, but a business has to constantly monitor for lack of announcements, or flag any non-compliance.

[52] https://www.3cx.com/pbx/auto-attendant/
[53] 991 Telephone Customer Protection Act (TCPA) (47 U.S.C. 227 , 47 CFR 64.1200)

Business are not left with many options when it comes to notifications and consent, and the burden requiring such notifications often times proves to be too great to overcome. Requiring many businesses to choose not to record, and thus, ultimately lacking in any type of quality control or training opportunities.

Although the court in *Kearny* assumed technology would allow for such notifications and compliance, the growth in the telecom industry and the ways we communicate has failed to keep up with the compliance. This lack of maintaining compliance has led to numerous class action lawsuits. Lawsuits where the courts have attempted to interpret and clarify the understanding of the California recording statutes.[54]

III. The Gray Area of California Call Recording Laws

a. What is Confidential Communication

The number of lawsuits and class actions utilizing Cal. Penal Code § 632 continues in the courts today. Many businesses attempt to comply with the regulation, but as previously discussed, compliance can be a heavy burden for many companies. Adding to the frustration of this compliance is the language that many statutes have. Under Cal. Penal Code § 632, the statute applies to the term "confidential communication" and is defined in section (c) of the statute:

> (c) For the purposes of this section, "confidential communication" means any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto . . .

In further clarification of this section, the court in *Flanagan*[55] supported the court in *Frio's*[56] test, in "that a conversation is confidential if a party to that conversation has

[54] As evident with the following cases in this paper.
[55] Flanagan v. Flanagan, 27 Cal. 4th 766, 768, 41 P.3d 575, 576 (2002)

an objectively reasonable expectation that the conversation is not being overheard or recorded." [57] This objective standard looks to the surrounding facts, and allows the court to determine whether, from an objective view, a person would reasonably believe that their type of conversation would be considered confidential.[58] In practice, the standard is a win for most businesses,[59] as one could argue that a majority of business communications and transactions are typically not confidential, because they include conversations regarding basic transactions, concerns, complaints, or service questions. However, the customer's logical counter argument is that all conversations are confidential, because it is no one's business to know what they are purchasing for their home, what type of service they have, or how much they paid for a specific item.

Additionally, since a test must be applied to consider such confidential communication, most litigation is already underway for a determination of whether the communication may be held by the trier of fact as a confidential or non-confidential. At this point, the cost expended and the time consumed has already burdened most businesses in combating Cal. Penal Code § 632.

b. Courts Are Starting to Move in the Right Direction with Confidential Communication Analysis

Most lawsuits utilizing Cal. Penal Code § 632 do so under a class action. Failing to proceed as a class action would not be beneficial, as the penalty for violation is limited, however, under a certified class, the fines can quickly add up into the millions. Thus, most cause of actions begins with proper class certification when bringing the suit.

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[56] Frio v. Superior Court, 203 Cal. App. 3d 1480, 250 Cal. Rptr. 819 (Ct. App. 1988), modified (Sept. 22, 1988)
[57] Flanagan v. Flanagan, 27 Cal. 4th 766, 768, 41 P.3d 575, 576 (2002)
[58] Id. (citing Frio, 203 Cal. App. 3d at 1489–90)
[59] Randy Tyler, James R. McCullagh, The Tricky Business of Call-Recording Litigation, Litigation, Spring 2014, at 35, 37

Recently, courts may have started putting their foot down on whether a true class certification is appropriate.[60]

As discussed above, courts have held that there is an objective standard regarding confidential communication, and in doing so, a factual basis and analysis must be conducted. But courts are starting to find out that such an analysis varies from customer to customer. In *Hataishi v. First American Home Buyers Protection Corp.*, the court took a major step in considering the individual objective standard of how a "confidential communication" should be viewed.[61] The court stressed that each individual's factual analysis would be required to establish if a reasonable objective person would believe their call was not being recorded, and factors to consider would be the specific individual's relationship with the company, the experience with similar companies in the industry, the expectation that other companies recorded or did not record these calls, and whether the individual may have or did not hear previous disclosures that calls are recorded by the company.[62]

In *Kight v. CashCall*, the court agreed with the reasoning in *Hataishi*, and found that due to the various factors to analyze, each individual may have a different objective standard to meet, since the relationship with each customer may vary.[63] With this approach, the court found that the plaintiff could not sustain its class certification, because each customer would need to be reviewed if they objectively understood their conversation to be confidential.[64]

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[60] Authors complete opinion and no factual statistics as of this writing to back it up, merely a notice in trending cases regarding class certification
[61] Hataishi v. First American Home Buyers Protection Corp. (2014) 223 Cal.App.4th 1454
[62] Id. at 1460
[63] https://casetext.com/analysis/kight-vs-cashcall-raising-the-bar-for-certification-in-call-recording-class-actions?sort=relevance&resultsNav=false
[64] Kight v. CashCall, Inc., 231 Cal. App. 4th 112, 130, 179 Cal. Rptr. 3d 439, 453–56 (2014)

With the subsequent holding in *CashCall*, a trend may be forming amongst the courts. It may be too early to waive a flag in victory for businesses, but for the moment, courts are making it harder to earn class certification under § 632, which will hopefully start to reduce the number of call recording lawsuits. However, despite the holding, businesses will still be financially dealing with the initial discovery stage and litigation matters, creating again, a concern for most businesses to forgo recording all together. Thus, customer service as a whole will continue to suffer.[65]

c. As § 632 Becomes More Defined Within The Courts, California Penal Code § 632.7 Is Starting To Be Used In Class Actions and Its Confusion Created With The Differing Statute Language Compared To § 632

Despite the subsequent holding in *CashCall* in determining a confidential communication, therein lies Cal Penal Code § 632.7.[66] Section 632.7 covers interception and wiretapping of calls, in particular, cell phones. However, there is no mention of "confidential communication," within the statute. Thus, leaving it up in the air as to whether all cellular phone communication requires no finding of a confidential communication.[67] Additionally, for a short period, § 632.7 may have applied only to third parties who intercept the cellular call and record or listen.

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[65] Based on the fact that companies who do properly utilize call recording do so to improve training and quality control over their customer and agent interactions.

[66] (a) Every person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has been convicted previously of a violation of this section or of Section 631, 632, 632.5, 632.6, or 636, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

[67] Id.

In *Young v. Hilton Worldwide, Inc*.[68] the court found that § 632.7 did not apply to a party that was part of the conversation, thus, helping some businesses argue that §632 will be the controlling statute when it concerns privacy and call recording, and the intent of § 632.7 was only to prosecute third parties who intercepted such calls.[69] It was argued the legislation created the statute in fear of cell phones being intercepted, because unlike landlines, radio waves used by cell phones could easily be intercepted by a third party.[70] However, despite this rational found in *Young*, it was short lived as subsequent courts and districts considered the holding in *Young* incorrect. In *Horowitz v. GC Servs. Ltd*.[71] and *Carrese v. Yes Online Inc.*[72] and a collection of other recent cases, the courts found that the language in the statute is clear and unambiguous in that it does not only apply to third party interception, but, also includes the parties that are part of the conversation.[73]

Thus, despite some positive direction for businesses by the courts in *Young*, the rest have not followed and § 632.7 still applies, and for that matter, applies even more broad than § 632. Because § 632 has "confidential communication" within the statute language, businesses could rely on the argument that the individual should not have a reasonable expectation of privacy because what was discussed was not confidential, or as previously discussed, businesses could rely on the fact that for the class certification to

[68] Young v. Hilton Worldwide, Inc., No. 2:12-CV-01788-R-PJWX, 2014 WL 3434117 (C.D. Cal. July 11, 2014)
[69] Id. at 2
[70] Id.
[71] Horowitz v. GC Servs. Ltd. P'ship, No. 14CV2512-MMA RBB, 2015 WL 1959377(S.D. Cal. Apr. 28, 2015)
[72] Carrese v. Yes Online Inc., No. CV1605301SJOAFMX, 2016 WL 6069198 (C.D. Cal. Oct. 13, 2016)5)
[73] Horowitz v. GC Servs. Ltd. P'ship, No. 14CV2512-MMA RBB, 2015 WL 1959377, at *11 (S.D. Cal. Apr. 28, 2015)

move forward, each individual of the class would need to be interviewed to gain insight whether they deemed such conversation to be confidential.[74]

With the courts recent holdings in *Horowitz* and *Carrese*, and the lack of "confidential communication" articulated within § 632.7, businesses will be unable to make similar confidential communication arguments like that of § 632. Instead, any call to a cell phone will require such clear and explicit notification of being recorded regardless of the expectation of confidential information being discussed. Such feats will be deemed impossible for most companies, as the technology to distinguish between a cell number and a landline is prohibitive for most, and the ability to ensure proper notification has also proven to be a challenge which was discussed earlier in this article.[75]

Therefore, § 632.7 may bring in another flood of class action lawsuits that will require businesses to balance whether it is worth it to record in the first place.

d. Under § 632 Confidential Communication Was Also A Weapon Employed To Combat Commonality For Class Certification, But § 632.7 Is Another Ballgame

In *Zaklit v. Nationstar*,[76] this difference in statute language may have been a deciding factor that Zaklit contemplated when trying to obtain class certification. Zaklit originally filed a class action seeking certification with a claim that Nationstar violated Cal Penal Code § 632 and § 632.7.[77] However, during class certification, Zaklit revised the complaint, and only wanted to assert a class certification under Cal Penal Code § 632.7 and those involving cell phone conversations.[78] As only speculation, as the author

[74] In case you fell asleep reading this, its discussed on previous pages
[75] Again, if you fell asleep, was discussed earlier
[76] Zaklit v. Nationstar Mortg. LLC, No. 515CV2190CASKKX, 2017 WL 3174901 (C.D. Cal. July 24, 2017)
[77] Id.
[78] Id. at 8

of this article is not privy to strategy, such a change to the certification may have been done due to the previously held cases involving the individual expectation of privacy inquiries and concerns that courts were finding under § 632.

The facts of *Zacklit* were similar in nature to a previously held case *Raffin v. Medicredit, Inc.*.[79] Similar to *Zacklit*, Raffin had a particular call script and policy that the agent needed to obtain personal information, before informing the customer the call may be recorded. The *Zaklit* court's reasoning coincided with *Raffin*:

> "If § 632.7 requires a defendant to provide a recording advisory before any conversation has begun, then the answer to Raffin's question is subject to common proof because all class members were subject to Medicredit's policy of not issuing a recording advisory until after it had gathered some personal information about the class member. But if § 632.7 does not so require, then whether a particular class member gave consent will not depend on Medicredit's policy. Rather, we would need to examine the surrounding circumstances of each call to determine whether consent was given. This showing would involve individualized proof.
>
> Zaklit v. Nationstar Mortg. LLC, No. 515CV2190CASKKX, 2017 WL 3174901, at *4 (C.D. Cal. July 24, 2017)

Thus, the court in *Zaklit* was persuaded with the reasoning in *Hataishi* and *CashCall* in regards to individual inquiry for commonality for class certification,[80] but because *Zacklit*, as in *Raffin*, stuck to a particular policy that applied to "all" putative class members, there was no need to conduct an individual inquiry to each class member if they consented either expressly or impliedly.[81] Additionally, the court found that by narrowing the class to only those who had a cell phone call for the first time, and no

[79] Raffin v. Medicredit, Inc., No. 15-cv-4912-GHK-PJW, 2017 WL 131745 (C.D. Cal. Jan. 3, 2017)
[80] Zaklit v. Nationstar Mortg. LLC, at 7
[81] Id. at 5

pervious conversations or interactions, this too would bypass the requirement of individual inquiry for each class member and reach commonality.[82]

The *Zaklit* facts differ to that of *Torres v. Nutrisystem,*[83] where class certification was denied not only under § 632 but also § 632.7. The court reasoned that the issue of confidentiality struck out § 632 as a similar analysis would partake as discussed in *CashCall*.[84] Additionally, the "commonality" for class certification may also be thwarted under the inquiry regarding obtaining consent.[85] Due to the type of calls Nutrisystem would receive, and the timing of when their notification occurred, the court looked at a sample of different callers (potential class members) and reviewed their interaction with Nutrisystem.[86] The court found that a particular caller called in at 7:42 p.m. and heard the disclosure the call may be recorded before abandoning the call, only to call back a minute later at 7:43 p.m. and bypass the disclosure and immediately transfer to a representative.[87] Contrast this with a caller who called in and heard the disclosure before abandoning the call, and then a few months later call back and bypass the disclosure and immediately transferred themselves to a representative.[88] Such contrasting interactions raise the question of which class members did not consent to being recorded. It would be somewhat clear that the first caller that heard the disclosure a minute before their next call may have consented to being recorded, but the question of whether the second caller, who called back a few months later also consented would be a factual inquiry.[89] Thus, the

[82] Id. at 8
[83] Torres v. Nutrisystem, Inc., 289 F.R.D. 587 (C.D. Cal. 2013)
[84] Id.
[85] Id. at 594
[86] Id.
[87] Id. at 592–93
[88] Id.
[89] Id. at 594

court in *Torres* felt such commonality regarding consent for § 632.7 would be difficult to obtain and denied class certification.[90]

Therefore, when tackling § 632.7, the courts have thus far focused on the consent of the call, rather than the inquiry of whether the customer had a reasonable expectation of privacy and the call was confidential in nature. One thing is clear between *Zacklit* and *Torres*, businesses that have a clear system and policy may be in more trouble than those who are willy-nilly with their procedures. Thus, in a sense, turning traditional business conduct on its head, as most businesses conduct themselves with clear standard operating procedures and policies. Forgoing proper procedures would cause miss-information for customers and inconsistent expectations. As customers rely on consistent interactions and answers from businesses they deal with. Thus, another reason call recording and the statutes around them create more confusion than clarity, because courts can allow class certification to be narrowed to a point to create commonality as long as those specific businesses were consistent with their procedures.

It is true, one can argue that if such procedures are in place, then an agent can be trained to immediately announce that call may be recorded and go through an entire notification before continuing. However, how many customers would remain listening to such a notification because the preconception that such a notification is a spam call. Instead, the call may be from your bank, or an important notification regarding other issues, yet, such information would never reach the customers ears because most have been conditioned to hang up the call when a non-friendly or robotic announcement begins the conversation. Thus, although requiring businesses to announce such a notification may be obtainable, doing so may thwart the very nature of the call.

[90] Id. at 595

e. Some Alternatives to Notifications, But Still Confusing and Difficult.

Although § 632.7 may bring in another rash of class action suits regarding Call recording. There may be new creative ways that some businesses can try and test the waters to establish notification of call recording and obtain consent. In *Maghen v. Quicken Loans,*[91] the court found that consent does not always have to be a verbal expressed consent.[92] Maghen, prior to speaking with anyone at Quicken, filled out a form that required him to agree to all Terms and Conditions of Lending Tree (a facilitator between customers and multiple lending affiliates). The terms and conditions stated that any one of the 200 lenders may contact the individual filling out the form, and such contact may include communication via telephone (on a recorded line)."[93] Maghen was then provided an email prior to being contacted that calls and all communications would also be recorded[94], additionally, during Maghen's initial call, the agent informed him that calls were to be recorded.[95] Maghen was then accidentally disconnected and then reconnected, and subsequently transferred to a new agent; however, this new transferred call did not notify Maghen that the call was recorded in the beginning of the conversation.[96] The court in *Maghen* concluded, that despite Maghen not being verbally notified that each new conversation with an agent was recorded in the beginning, he consented to such recording because he agreed to Lending Tree's terms and conditions that contained the recording notification as well as verbally consenting to the first agent he spoke with. Therefore, the notification and consent was within Cal. Penal Code §

[91] Maghen v. Quicken Loans Inc., 680 F. App'x 554 (9th Cir. 2017)
[92] "consent to a recording already has been given prior to the call. Maghen's agreement to Lending Tree's Terms of Use is sufficient to establish consent." Maghen v. Quicken Loans Inc., 94 F. Supp. 3d 1141, 1146 (C.D. Cal. 2015), aff'd in part, dismissed in part, 680 F. App'x 554 (9th Cir. 2017)
[93] Id. at 1143
[94] Id.
[95] Id. at 1144
[96] Id.

632.7 and a complete defense. The court shed some light as to the types of consent regarding call recording compliance, and although not applied to § 632, one would assume the court will allow similar types of compliance.

However, despite the finding in *Maghen*, the Court failed to clarify whether the agreed to terms when Maghen filled out the form was enough to complete consent, or the terms coupled with Maghen's initial verbal consent allowed for subsequent calls to be recorded. Additionally, the subsequent calls with Maghen were conducted with little time between, leaving the question if the court took this into factor as well, or if such initial consent would allow ALL future conversations to be consented to.

In *Zaklit v. Nationstar Mortg. LLC*,[97] which was previously discussed, Nationstar attempted to argue that each customer received a billing statement that stated all service calls may be recorded.[98] Thus, Nationstar argued, similar to *Maghen*, the customer, based on this notification on the billing statement as well as all other previous communications would have impliedly consented. However, the Court distinguished from *Maghen*, in that, under *Maghen*, the customer expressly consented by agreeing to the terms when checking the box and submitting the form.[99] Thus, agreeing to the contract, contrast this with a billing statement; the court deemed such a document is not necessarily an active or expressed consent as no check box was ticked when submitting a form.[100]

Perhaps a future litigation on this specific set of facts similar to *Maghen* may help shed more light. However, the brief discussion in *Zaklit* may show that courts are willing to assume that an affirmative action by the customer to agreeing to a contract and terms

[97] Zaklit v. Nationstar Mortg. LLC, No. 515CV2190CASKKX, 2017 WL 3174901, at *5 (C.D. Cal. July 24, 2017)
[98] Id. at 8
[99] Id.
[100] Id.

that include language and clear notifications that all communications may be recorded is enough to achieve a certain degree of consent.

IV. How Can We Solve Such a Calamity of Confusion Under § 632 and § 632.7?

The continued struggle in complying and interpreting the privacy acts regarding call recording has gone on for a number of years. It appears once one issue is resolved, another one is created. Due to the constant evolution of the technology we use to communicate, and the ongoing challenges businesses face in complying, more issues and nuances will surely continue. The balance between customer service, and customer privacy will always be plagued, unless the legislation either clarifies § 632 and § 632.7, or place some form of exceptions and leniency with certain types of businesses when complying with the call recording laws. Additionally, as discussed below, there are already key privacy acts in place that cover what many people would consider confidential information. Thus, having repetitive and draconian statutes on similar issues appears to stifle most businesses in their attempt to grow and improve customer relations.

a. Payment Card Industry and the Health Insurance Portability and Accountability Act

Most individuals are typically concerned about their private information being retained and listened to or viewed by a non-authorized party. The Payment Card Industry (PCI)[101] as well as the Health Portability and Accountability Act (HIPPA)[102] have been put into place to help combat such security risks. These two acts are important, as they ensure that credit card information (PCI) and medical records (under HIPPA) are kept in

[101] https://en.wikipedia.org/wiki/Payment_Card_Industry_Data_Security_Standard
[102] https://www.paubox.com/blog/what-is-hipaa

a secure location and encrypted or erased from all records.[103] These types of measures help maintain confidentiality of private information.

Most individuals value this information, and stand behind these two acts. For a majority of customers, these two acts cover a majority of confidential and privacy concerns, yet, § 632 and § 632.7 add additional penalties and strain on businesses to attempt to provide absolute consent, in a multitude of ways. Even customers that somehow bypass such notification intentionally may bring a cause of action based on a § 632 and § 632.7 violation.

Thus, I raise the consideration of new legislation that in its essence lessens the burden on businesses, yet also empowers the customer.

b. § 632 and § 632.7 Must Have Unknown Intentional Third Party Interception

Under § 632, most of the confusion appears to be whether a customer assumed their conversation was confidential. Such inquiries are fact specific, and thus, despite the holdings of many cases, the issue continues to plague the court system because not all businesses or customers communicate the exact same way as previously litigated. Therefore, there will always be an issue of whether confidentiality should reasonably be assumed.

Additionally, with § 632.7 cell phone recording and the removal of "confidential communication" from the statutory language, the doors have swung wide open to litigation, as now, a majority of Americans have cell phones, rather than landlines. Thus, despite a customer's reasonable expectation of confidentiality, a plaintiff can bring a § 632.7 claim.

[103] Id.

The legislation must review these two acts, and clarify the terms of the statute for businesses and the courts, and yet still provide proper privacy to the customer. When § 632 was originally written in 1967, the ability for businesses to record their calls was typically a luxury for large companies that had the financial means. However, as personal computers, software, and technology evolved, the ability to record for most business has become fairly common.[104] In 1992, § 632.7 was added by the legislature to properly cover recording of cellular phones, as there was concern § 632 may only cover landlines.[105] The legislation most likely did not foresee the way technology would evolve, and how recording calls would be utilized by most companies. Today, businesses are able to take advantage of call recording to train their agents, as well as combat any litigation or disputes.[106] Thus, despite the efforts put in place by the legislation, these two acts must be reviewed to properly address the real concerns that customers have in regards to their privacy in the present times.

Today, social media has placed most citizens in a clear glass house. Companies, customers, and the like continue to interact in a variety of other forms of communication. Customers who once thought a company was untouchable, can easily voice their opinion about them for all to see. Yet, the legislation under § 632 and § 632.7 still hold that there is some form of reasonable confidentiality involved when communicating with these companies. In a society that freely posts what they had for lunch that day, and a President that tweets cringe worthy comments[107] the expectation of privacy and confidentiality of our personal lives is slowly dissolving. Yet, statutes are still in place that appear to over

[104] Personal knowledge from author and his years within the recording industry, plus, google it.
[105] Simpson v. Best W. Int'l, Inc., Case No.: 3:12-cv-04672-JCS, at *12 (N.D. Cal. Nov. 9, 2012)
[106] Sole opinion of the author and current trade usage
[107] At the time of this article Donald Trump was president, if this article was found in a fault, try googling it, or if google does not exist anymore use one of you search for information tools.

burdensome businesses. My argument is not to absolve of all privacy laws, but rather to review current priorities and focus on the true invasions. Thus, I suggest the legislation focus on these invasions of privacy under § 632 and § 632.7. Something to the effect of:

> **A person *not intentionally a party to* the conversation, or affiliated with any party intended on the call, may not *maliciously or intentionally* use an electronic amplifying or recording device to eavesdrop upon or record the communication.**
>
> **For the purpose of this section, "affiliated" refers to any person, business, or entity in which a partnership or relationship has previously been establishment or attempting to be established with either party to the conversation.**
>
> **For the purpose of this section, any call recorded and stored by an intended party to the conversation may reasonably request in writing access to the recording if a dispute arises for said conversation.**

I understand such a suggestion may have its drawbacks. But by focusing the legislative language on third parties, invading the privacy between customers and businesses, the burden of businesses to attempt to constantly comply with mutual consent and notification will lessen the burden, allowing businesses to take advantage that call recording offers to better train and interact with their customers.[108] Additionally, I also intentionally left out the requirement for confidential communication. This term has created enough litigation already, because the dispute now involves whether a reasonable person believed such information was confidential or not. Privacy concerns regarding confidential information of most customers are already covered under other acts, such as PCI and HIPPA.

c. Transparency of Businesses to Customers

For many customers, such a change to the recording privacy laws may open the door of some abuse, however, with every suggestion there is always a silver lining. Some

[108] See discussion above.

customers may feel their words are gold, and permission to record them should always be the highest priority, however, advocates to record may also point out that although some invasion of privacy may occur, the overall benefit outweighs such invasion. Consider the transparency that occurs when there is knowledge that such a call is being recorded. When children are unsupervised, or believe they are unsupervised, it typically leads to disastrous results, in which rooms become a mess, some other child gets hurt, or an adult walks in and a strange odor emanates from the room as if they child continues to sit in their filth.[109] Adults act very much the same way, but when the feeling of being monitored and held accountable comes into play, most act accordingly. A voice record of interactions can not only be used as a shield, but also a sword. A customer, who deems the interaction inappropriate, and knows the call is being recorded can refer to and use the recording as evidence. There is a verbal record documented for use not only by the customer, but also the business to resolve disputes.

The concern of gaining consent will become moot, as customers become aware that any call may be recorded, and it shall slowly become the expectancy of businesses to record. Other policies and compliance acts concerning personal credit cards and health information[110] are already in place to protect what most deem confidential information. Thus, with the expectation of all calls between a customer and a business being recorded, the power of utilization of these calls becomes a level playing field.

d. Access to Calls for Customers

Although access to the recordings may cause some turmoil and headaches for businesses, the goal of most legislation is the protection and best interests of the

[109] Ask a parent
[110] See PCI and HIPPA

population at large. By loosening the current call recording laws, there must be a balance. Such a balance will allow customers access to the recordings in case of any dispute arises. Most, if not all call recording software allows a business to quickly and easily find specific calls. [111] Additionally, because most recording software is designed to resolve disputes, the ability to share, download, and distribute is typically built in.[112] Thus, such concerns regarding access to these recordings will not be as heavy of a burden as attempting to comply with § 632 and § 632.7 as discussed above.

Additionally, businesses that comply, and have a goal to improve business operations should not fear opening the door to these recordings, as it will make them more transparent to customers, rather than a fortress unwilling to share and improve their customer experience.[113]

I will not go into the details of such requirements and disclosure of these recordings to customers. However, the legislation has already attempted to make such requirements of businesses to disclose some business records when demanded by customers. The California Consumer Privacy Act of 2018 will require "businesses to respond to consumer requests for personal information collected or sold within the past 12 months preceding the consumer's verifiable request."[114] Thus, it appears such burdens on businesses to provide such information is something the legislation has considered and willing to implement. Time will tell if this will create more issues, but considering such requirements are going to be implemented as early as 2020, the requirement of call recording requests by customers may not be very far-fetched.

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[111] Authors experience in the call recording field and software development
[112] Id.
[113] https://telnyx.com/resources/call-recording-improves-transparency-quality-prevents-liability
[114] https://www.dpoadviser.com/ccpa-12-month-look-back-provision/

e. In The Name of Consumer Advocacy

Such changes and access to recordings for customers will also garner points for consumer advocacy. Would you rather be a company that is transparent and open to communication with its customers, or one that hides behind a wall, allowing agents to say what they must to close the deal, only to find out what was promised was merely cannon fodder. Such communications continue to plague the customer and business relationship, yet there are ways to open the door and reduce such disputes before they reach lawsuits. Costing not only the business, but also the customer and the relationship that was formed.

By allowing businesses to more freely record, and allow customers access to recordings to resolve disputes, customers and businesses will benefit due to the transparency created. Both can resolve disputes quickly, businesses can reduce training time of agents, and customer experiences and interactions will improve.

V. Conclusion

Such changes to the legislation will not occur overnight, but the above article is something to consider. Will we be better off, from a customer side, and from a business side, in a world where call recording is expected? Can we utilize this tool to protect customers and businesses, improve these relationships, and encourage business growth and transparency? Only time will tell, but one thing is for sure, the current call recording laws make such progress difficult for businesses, and the continued class action suits will continue to plague them.