



## JORNAYA TALKS MORTGAGE **What is TCPA and Why is it So Confusing w/ Eric Troutman**

The Telephone Consumer Protection Act (TCPA) is by far one of the most confusing laws to hit our ecosystem. It requires prior express written consent for non-emergency autodialed, prerecorded, or artificial voice calls to wireless phone numbers, as well as for pre recorded telemarketing calls to residential wireline numbers. But there's more, as the Czar of TCPAWorld Eric Troutman describes in this episode of Jornaya Talks Mortgage. Troutman, one of the country's prominent class action defense lawyers and nationally recognized in TCPA litigation and compliance, talks with

Jornaya Head of Consumer Finance Mike Eshelman about the intricacies of this law and how to maintain compliance.

### **TRANSCRIPT**

#### **Speaker 1 (00:08):**

All right. Welcome to the Jornaya talks mortgage podcast. I'm your host, Mike Eshelman the Head of Consumer Finance at Jornaya. Today, I'm very honored and excited to be joined by the TCPA world famous Eric Troutman. And for those of you who don't know Eric he's also known as the TCPA czar. He's one of the country's prominent class action defense lawyers and is nationally recognized in the telephone consumer protection act litigation and compliance. He runs the GoTo blog for all of your TCPA news and updates@tcpaworld.com. I highly recommend adding that to your regular read. I get constant emails being updated for what's going on in the world of TCPA from Eric's blog. So, number one, thank you so much for joining the podcast. Number two, awesome content that you have there, there's a ton of stuff that you're constantly posting. So appreciate all that you're doing so welcome to the podcast.

#### **Speaker 2 (01:13):**

Thanks Mike. Happy to be here and thanks for shouting out TCPA world.com. It really is kind of incredible how that website has caught fire. We've got so much traffic. It really just goes to show how much interest there is in the TCPA and how important it is to so many people.

**Speaker 1 (01:30):**

Well, I know if I didn't say you're going to say it 20 times through the podcast, because it is such an important piece of the TCPA world. So I'm sure we're gonna be talking about it quite a bit more through this podcast. Cause I mean, we're not going to get into the weeds of all the little nuances going on in the TCPA world today, but I mean, you do have a lot of the weeds going on posted there regularly. We have the Supreme court decision coming up. I saw you post that earlier today. You had the FCC commissioner on your podcast where you posted that update to TCPAworld.com recently. You are the TCPA industry.

**Speaker 2 (02:16):**

Well, I don't know what to say about that. I take this very seriously. I've made it my professional life for the last 10 years. I've immersed myself in it completely. And it's nice to be recognized. So thanks, Mike.

**Speaker 1 (02:29):**

Absolutely. I am really curious about your career and how you got started. So you went to law school saying I'm going to law school. I'm going to be a TCPA lawyer, right? That's exactly how it happened.

**Speaker 2 (02:45):**

That's exactly how it happened. No, so I went to law school to be a great trial lawyer. That's all I wanted to do was try cases. And when I came out of law school, I was fortunate enough to land as a first year at a small firm in a terrible place called Bakersfield. I shouldn't say, I mean, it's a great town for some people. It's just not a great town for me. But it was a great opportunity though. I will say that to, to get, to try cases of the first year I can civil litigation virtually unheard of great opportunity for me. I moved on to a regional firm here in California. That was again, very gracious and allowed me to try cases. As a fairly young lawyer, I'm going to talk to a second or third year lawyer, I'm trying to retrieval.

**Speaker 2 (03:28):**

And that's really what I thought I was going to do with my life. It just randomly turned out that I was trying a series of fraud trials involving the Armenian mafia of all things for big financial services client actually a mortgage lender and they their in house counsel flew out and watch me try the cases and we got to be pretty good friends and she had developed some confidence in my capabilities as a, as a litigator. And not long after that, she gave me a call and said, Hey, you know, I've got this class action lawsuit. If there was something called the TCPA, now it's not the big firm down in LA. But do you know, opposing counsel, I'm having a tough time getting this guy calling to call us back and look at the complaint and sure enough, I know counsel, so I give him a call and 20 minutes later, I've got the extension and four hours later, I've got this case, this new class action.

And I wasn't a class litigator at the time. I was just a "lowly" trial lawyer. But the bottom line is I got very immersed with the case deeply embedded in that particular client who was a very large player in the market. And before I knew it, I was their national TCPA council. And not long after that, I became essentially the de facto TCPA defense lawyer for the entire banking industry which was a hat I wore not unlike the hat I have on right now and proudly and for some time but that was the beginning of my career. It was, it was one case and I absolutely fell in love with the statutes realized how important the statute was, how immensely complicated the law was, how nuanced litigation in the space was. And most importantly, how big the exposure was and how seriously you had to take these cases. And unsurprisingly, not everyone recognized all of that. As early as I did, I had a big jump on my competition and it was frankly you know, you get lucky once in a while in life. And I, opportunistically, recognized everything that the statute was and kind of poured my career into it to make sure that I would be the best defense lawyer, the most knowledgeable defense lawyer out there. And I dare say, I think I've done it.

**Speaker 1 (05:36):**

Yeah. I mean, your name comes up quite a bit. We have mutual clients. And I mean it's nice. Number one, you're fascinating to hear on stage. I saw you speak at the LeadsCouncil industry impact. I went to the Orange County location. Gosh, back when we were allowed to actually see people in person. But it was fascinating to hear how complicated the law is, but both from both sides. So your side is defending, and then also there was someone else on stage discussing what they do for their clients and going back and forth. But before, I want to take a sidestep. Let's focus more on kind of the 101 and the 201 of what is TCPA. You know, what's the definition where you see a lot of businesses go wrong when dialing leads when dialing consumers to get business when they're in violation of TCPA. So can you give us the definition of TCPA and what the law actually is?

**Speaker 2 (06:45):**

All right, well, you just asked an impossible question. No one knows what the law actually is, and that is what makes the TCPA so fun and frustrating to deal with. It's also what makes the TCPA undoubtedly unconstitutional. But we'll set aside those issues for the moment at a high level, the TCPA essentially forbids you from using certain regulated technology that the statute just doesn't define very well to make calls to cell phones without consent, right? I mean, just most basically that's what the statute is about now, depending on the type of call you're making, you will depend on what type of consent you have to have. If you're calling a cell phone versus a landline, there are different rules. If you're using an automated telephone dialing system, as opposed to a prerecorded voice message, there are different rules. If you are using a prerecorded voice message, there's a ton of ticky tack rules in terms of what that message has to have.

**Speaker 2 (07:40):**

And all of this kind of lives alongside the FTC DNC rules and the TSR, I, which the telemarketing sales and rules which are similar to, but completely distinct from and have different defenses. Then there's the TCPS. So if you're making just informational calls, right servicing calls, there's going to be one set of rules that apply to you that are not frankly that tricky, where else still pretty tricky, but not as bad if you're making marketing calls. So it's, it's really a very challenging area. And if you're making marketing calls, you don't understand the TCPA and the DNC rules, you should not be making marketing calls, just stop what you're doing. Don't make any more, give somebody a call that knows how to do this stuff because you are in harm's way. And you're going to get yourself in big trouble.

The statutes have a massive, massive exposure, \$500 minimum statutory damages up to \$1,500 per call per phone call. So you're talking about billions of dollars at stake in many of these cases. And unfortunately, this is important for all of you that, you know, kind of wonder why is your care? If you are an officer or director or a compliance person, or a person who makes the phone call or a collection manager, you could personally be held liable, not just your company, you sir, or Madam can be personally held liable for your personal fortune in one of these cases. So that's something that you need to keep in mind,

**Speaker 1 (09:07):**

Which is wild, right? I mean, this is something that's having to cut checks out of your personal bank account. Should something go awry? What you're talking about and marketing calls to be clear, we're talking, responding to leads that you're purchasing, correct?

**Speaker 2 (09:24):**

Oh, absolutely. If you purchase a lead and you make a phone call to somebody that you've never met before to provide them ostensibly with information, but really with the hopes of selling them a good or a service, your marketing, okay. Of course your marketing. And you've got to make sure that you've got the requisite consent to make that phone call. If you do fine, no big deal, great. You're doing, you know, you're doing the conflict. The consumer wants. You're helping them out, give them some information. Hopefully you're selling your product along the same, along the lines, nothing wrong with that. But you know, in the ecosystem of weaves these days, we know how risky it can be. We know there's low cost, but low quality providers out there. They're going to give you a bunch of junk and you're going to be liable for making phone calls.

If these are not legitimate leads and pausing for a moment, Mike, on the personal liability. Yeah, it's crazy. It's absolutely crazy. It's one of the only areas in the law anywhere where someone can be liable personally, for something that they do while operating as part of a company. You know, if Chevron dumps a bunch of oil into the Atlantic it is very unlikely that the CEO or any of the officers or the directors that approve that conduct are going to ever be held liable. It's not the way it works, not gonna be held personally liable, right? Chevron will be held personally liable

apologies for the good folks at Chevron. We know you don't actually go about doing this and just using an example right. The bottom line is if a big company or a small company, if anybody does something that violates the law, 99% of the time, the company is going to be held liable.

Not any of the individuals, even the individuals that are directing the conduct, are not gonna be held liable under the TCPA. That's not the case. If the company, violate the TCPA, the people who were involved with the decision to violate the TCPA, the people that were making the phone calls, creating the diarrhea list, the people that were responsible for making sure the company complies with the TCPA, all of these folks are going to be held personally liable potentially for these violations. And plaintiff's lawyers, you know, they just love adding these people in because they know it creates a whole bunch of leverage on the company to settle the case. It's disgusting. Stop. I really hate it. bush league in my opinion, but it is the law. So you have to really pay attention. I mean, I say it, this is the law. It might not be the law, right? There's majority positions, minority positions on everything in the world, but this is certainly a risk that this could happen. So you have to take them off seriously.

**Speaker 1 (11:54):**

Yeah. One thing that when, when I'm speaking with clients or or speaking with potential clients, we sometimes hear, I don't make that many phone calls. I don't really use automated technologies. I just send autoresponder texts to new leads letting them know, Hey, I received your information. I'm going to be calling you. And it's just, it's automated. It's set up in my lead management system. So I'm not at risk for TCPA. It's not something that's really a concern for us. So text is involved and TCPA though, correct? It's just the same as a dial or is it different?

**Speaker 2 (12:40):**

Well, so text messages are interesting because one could argue that they're not even a call subject to the TCPA, but that argument will fail because even though the statute doesn't say text message, the case law is crystal clear that a text message is a call. And the FCC has also said that the text message of the call for purposes of the TCPA. So you don't get away with, you know, I had a text, my phone call, but text messages are only subject to the TCPA. If they're made using an autodialer and ATVs now we could talk for an hour and a half about what the definition of and all of Valerie is because no one really knows, right. In some jurisdictions, we know they require the use of a random or sequential number generator. So yeah, in those jurisdictions, if you're just contacting your consumer or a lead that someone that has specifically reached out to you, and you're not just randomly firing off messages, sure.

**Speaker 2 (13:34):**

A text message is not going to get you in trouble in those jurisdictions, but in other jurisdictions, any sort of automation of the sort you're talking about, the ability to transmit a message, even one-to-one without human intervention could be viewed as an automated message. That is to say the use of an ATD yes. Where it becomes crystal clear, at least in some jurisdictions is

where you have a platform that can send a blast, right? A thousand, 10,000, a hundred thousand text messages all at once. Right? Most of our addictions will look at that and say, you know, again, if it's, if it's from a list of numbers, right, the ninth circuit, and the second circuit is definitely going to say, those are ATDs from automated text message and some jurisdictions, Hey, look, it's still not random. As long as you've got a thousand intelligently derived phone numbers is not going to be the use of an ATDs. But you know, again, this is jurisdiction by jurisdiction. So you can't say, Hey, I'm sending a text. That's not going to trigger the TCPA. That's not true at all. I mean, that's, that's, that's your analysis. You're in big trouble, but it is true that in some jurisdictions, a text message might be perfectly lawful. Whereas other jurisdictions that same text message will get you in a pile of trouble.

**Speaker 1 (14:42):**

Yeah. It's interesting. There's a with those nuances and I'd imagine ringless voicemail, you know, runs into similar confusion too. Now you're shaking your head. No ringless voicemail is like one of those, those words that immediately triggered something for you.

**Speaker 2 (14:59):**

Yeah, no, we're really fortunate with bad news these days, there was a moment in time there. And, you know, I know the guys at Beau apps and I like these folks that they're good people, but yeah, there was a moment there when, when people thought ringless voicemail might be TCPA compliant there was an argument that was raised originally. That was just a terrible argument about it being a title, three information service, not a title two telecommunication service, which just makes no sense in context. So that argument was rejected kind of routinely by courts, I think, properly. So but there was a subsequent argument that was being brought on behalf of ringless voicemail that David King, who was the founder of Bo apps, the director op program company he had submitted some, some declarations explaining kind of how the technology actually works and why it doesn't actually interface with the wireless carriers at all.

**Speaker 2 (15:49):**

And therefore it doesn't actually use a cell phone number to send a message and therefore wouldn't trigger the requirements of the TCPA. But even those arguments have been rejected. In fact, just yesterday, sorry, just Thursday. A couple of days before this was recorded court in Florida refused to give an Airwalker Tory appeal to the case where he had decided that room with voicemail or subject to the TCPA and the district court concluded essentially this isn't even a close call. It's easy, it's obvious there's no need to get the appellate court's opinion on it because there's no substantial basis for disagreement on this. I mean, everyone just agrees. So it, you know, it's not, it's not good if you're using ringless voicemail, the TCPA compliant solution you should probably do something else. This is not going to get it done.

**Speaker 1 (16:36):**

Got it. I heard ya. All right. So something we commonly hear from lenders, they feel that they need to stop dialing. They, and this is again, going back to the marketing calls, they buy a lead

and they have a lead. Typically those leads get work for three or four weeks, you know, pretty aggressively lots of phone calls trying to get the consumer on the phone. And then some drip calls down the line to try and get that consumer when the lead has been aged 30, 60, or close to 90 days. But as soon as that 90 day point hits the feeling is they have to stop calling because of the TCPA. But that's not exactly true. Is it consent given until it's revoked? Or can you, can you touch on, you know, how that is? I believe it to be a misconception, if you can confirm that. And if so, why is that a confusing point for people?

**Speaker 2 (17:35):**

Well, it's confusing because the TCPA and the TSR are two different bodies of law that cover the same conduct and confuse people all the time. And people think that if they're complying with one, they're complying with the other and they have to comply with both in order to comply with the other, it is a little confusing, but here's the bottom line, the TSR, right? Telemarketing sales rules say that your inquiries are only good for 90 days, right? The TCPA doesn't have any such language. An inquiry is irrelevant largely to TCPA purposes. What matters for TCPA is whether or not you have express written consent to make a marketing call. Yes or no. If you do have express written consent, that consent does not evaporate. It doesn't just go away. Okay. So you can keep calling after 90 days under the TCPA. Now, if that phone number is a residential line and it's on the national DNC, well, that's where the 90 days comes in, right?

And it's a gray area, frankly, it's not black and white, whether or not an inquiry and goes away because when you have that written consent, that should trump inquiry. You notice even under the TCPA, under the TSR, but I respect companies that are more conservative and they say, Hey, look, if this number is on the DMC, I'm going to call him for 90 days. I'm going to shut it off. That's fine. Right? I'm not gonna tell you not to do that, but do that for numbers on the DMC. Don't do that for every phone number. Because the TCPA doesn't require that.

**Speaker 1 (18:55):**

Yeah. We know a lot of people who are using trigger events, they're monitoring consumers and trying to understand the best time to give them a call. And so if they're monitoring aged leads that are beyond 90 days and they receive some sort of information, whether it's from Jornaya, or it's a credit trigger or something else to say this consumer's back in market lenders want to call. They want to be present when the consumer is making a decision so they can try and win the business. So it sounds like if I understand correctly from you from a TCPA standpoint, they have consent and they're able to call, but they should be looking a little bit further to see if this number is on the do not call list. And is it a residential line because that's kind of the next layer of scrutiny as to whether or not they should be dialing further.

**Speaker 2 (19:42):**

Yeah. You got it. Look, I can't give you specific legal advice. Right? You call, if we get too specific here, I can, I can help you walk through this, but at a high level, right? If folks want to contact an age lead, the first thing they gotta be thinking about is are we going to be annoying?

Somebody that doesn't want to hear from us? Or are we going to bait a lawsuit, even if right, you've got a solid defense, are you just gonna create a lawsuit for yourself when you have zero risk of conversion? Right? But to your point, Mike is, if you've got some objective trigger, these people are back in the market. Hey, Oh look, you still do have a delicate scent. It's never been revoked. Right? And you are confident that this number is still good for where you've got recycled number problems as well as this phone number no longer belongs to the consumer.

**Speaker 2 (20:27):**

It's an issue. But if you've got some kind of a soft pull or something, that's showing you the consumer and the phone numbers that belong to that consumer and they're back in the market. I mean, I get it right. You want to take that shot and make that phone call. Okay. You know, best to do it manually, but you don't have to, you can use the dial so long and you have that consent. It was revoked. But yeah, in that situation, you would definitely want to think about scrubbing against the DMC because maybe they're on that, on that DNC list. Maybe the inquiry time has passed and look again, I think you're probably going to be okay using that written UBR to express written consent. Sorry, not UVR. They don't get confused. I apologize. I just stopped using that express written consent to overcome even the TSR rules. You should be okay. But again, give us a call. It's complicated stuff. It's tricky, right? Gray areas here and there, and you don't want to rely on a podcast.

**Speaker 1 (21:21):**

Yeah. And I mean, we appreciate you being on here and it, one of the reasons it's important is, I mean, this is, this is tricky stuff when it comes to TCPA and where Joryana lives in that ecosystem with our TCPA Guardian is, you know, yes or no. When the consumer went through the form event where their TCPA disclosures, that the company has approved, where they present. So in real time, lenders can figure out, is it safe to dial this lead? Do we feel confident that this lead, this consumer saw the disclosures getting into all the mechanics to your point lenders should be having good advice from counsel as to what their practices are, right? They should be reaching out and making sure they're completely buttoned up, especially as they begin getting into this world. I mean, we see with rates as low as they are right now and mortgage we're having a field day in refinances. Home purchase applications are at 11-year high. People are buying leads to get more and more business where maybe they're not used to buying leads and they're implementing automated dialing technology. So there's a lot of new people coming into the space that they're just not as familiar with TCPA and it's a big deal. So again, another plug here, TCPA world.com. If you want to have an idea of just how big of a deal the TCPA really is.

**Speaker 2 (22:57):**

Well, look, I mean, if you're a new to this market and your plan is to make calls to leave and you don't know the TCPA, I mean, I don't want to tell you, like you just, you have to, I mean, it is, it is the most important thing in your world from a regulatory standpoint. If you are making calls, right. Either this body of law, that kind of governance, what you're doing and you know, Mike,



you've been coming up, the plug TCPA world a couple of times, bottom line is companies like Jornaya that are providing this third party verification. This stuff is a central, right. I defend TCPA cases all day long. Right. And I live in a very nice niche where most of my clients are big sophisticated companies and they all use some sort of third party verifier lecture.

And it is very rare that these days I receive a week that isn't backed by a token. Right. But just today, ironically, before I jumped on this, I got a lead for one of my clients and there's no token. And I say, Hey guys, what's worse? What's Jornaya? And they're like, Oh, you know the lead provider didn't give us one. And the back of my head, I'm thinking, Oh God, I don't know that there's a junk lead. It could be a totally viable lead. And of course, I'm going to argue that it is, and it may end up being, and hopefully it is, but that is just the conception now on both the defense side and the plaintiff side, where if you've got a lead that doesn't have a verification, I mean, like the assumption is, well, this is a bad leak.

Right. And, and that is, there's just going to show how important products like the TCPA guardian kind of really are. And it's just night and day. They're responsible, plaintiff's lawyer to June. I have back, we versus a plaintiff's lawyer to a non diabetic lead where, cause Jornaya lead presumptively, it's going to be valid. Although, you know, there are certainly instances where we still have to fight a big fight about that, but presumptively, right. You know, the ruling presumptively is in our favor and if it's not back then just seemingly nowadays for them to believe everything's against us. It's a, it's a really interesting kind of dichotomy out there in the TCPA landscape.

**Speaker 1 (25:05):**

Yeah. It's really become kind of the gold standard in terms of you know, as you're mentioning it, we get requests all the time for the visual playback. So our client will come and say, here's the token. I need that visual playback. I want to see the video of the event itself and what was present on the form so that we can prove that TCPA disclosures were presented. They were very legible right next to the submit button or whatever the situation may be. Right. So if you have that in hand and you're able to speak with opposing counsel and say, here's, here's what we have there, the disclosures crystal clear. I mean, it just helps that conversation with that particular case quite a bit.

**Speaker 2 (25:48):**

Yeah, no, I absolutely 100% absolutely. Again, you know, unfortunately nothing is Bulletproof these days, but, but it's like, you know, if you're going to go to battle, you might as well have all the weapons you can have and you know, you go in without a Gemini and it's like, you're definitely missing a pretty critical piece of your honor know, I'll tell ya,

**Speaker 1 (26:09):**

I heard your podcast, unprecedented podcast, you had the FCC commissioner on and there was a discussion. I mean, you brought up to her and I thank you very much. But the discussion was around technology and leveraging technology. And just using the tools and the weapons that are out there. So it's, you know, what is your thought on why lead generators, who don't have tokens on there? I mean, do you, oftentimes they're trying to skirt something or they just haven't been asked by their clients who are buying the leads to have a third party, independent verification on their to protect themselves.

**Speaker 2 (26:56):**

Oh, look, man, I have no idea why anybody does anything. And I gave up long ago trying to figure out people's motivations. I'm happy to prognosticate about what the FCC and the Supreme court might do, but in terms of why any business person does or doesn't do something who knows. I mean, I will say you know, when Commissioner Riley was on it was, it was great to have him on, it was great to have him talk about the importance of technology. And I think he gave us a really interesting quote along the lines of, you know, the heat. He believes that you've got to trust technology, trust, business records over the, on the verifiable, right? Just word of some random person that's gonna Sue you and say, Oh yeah, I know I didn't give consent. Oh yeah. I definitely took away consent, revoked consent when all the evidence is on the contrary.

**Speaker 2 (27:43):**

But there's still gaps in the law. Right. And you know, there's a big petition out there right now that we brought on behalf of one of our clients that we're trying to try to make web form submission safe again, right. Where you've got all these professional plaintiffs right now suing saying, Hey, it wasn't me. You know, somebody submitted something on your website. It wasn't me. And that's a gap, right? That's a problem in the law. And right now the law is against you. Right. So you're going in always right with that issue where if someone says it wasn't me you know, of course, we're going to credit that by and large, they're going to say you know, business proved that it was then, and that's challenging to do so again, without Alisa drew nigh or third-party verification you know, you gotta have, at least then if you're going to start to try to make that showing having the IP addresses of course critical. But you know, it's a, it's a challenging world out there and hopefully the commission will help us out give us the ruling that we need on that petition so that the evidentiary hurdles aren't so challenging.

**Speaker 1 (28:45):**

Yeah. Well, Eric, I mean, thank you for all that you are doing in the space. It is, it is fantastic. Not only to have the news post up there and see those emails coming into my inbox, but as you mentioned, bringing, you know, helping with those letters, helping to make web forms safe, again, it is an incredible resource for so many lenders and well outside the mortgage space as well. Right. it's a critical, critical part of their business and being able to convert leads and having this hanging over their head as just, you know, I mean, it's like an annoying fly buzzing

around constantly having to tickle tiptoe around everything. But thanks for all that you do. Thanks for joining the podcast for everyone that's out there. Thanks for listening to the Jornaya Talks Mortgage podcast, again, visit [TCPAworld.com](http://TCPAworld.com). Check out the TCPA guardian product that we have. And if you're interested at all, please contact us. We'd be happy to show you what we have and how it works to help protect those leads that you're responding to. So with that being said, Eric Trauman. Thank you very much. Thank you. Bye bye.