

Florida Realtors Legal Update



JOEL MAXSON
ASSOCIATE GENERAL
COUNSEL

BEWARE: Targets for Plaintiff's Attorneys



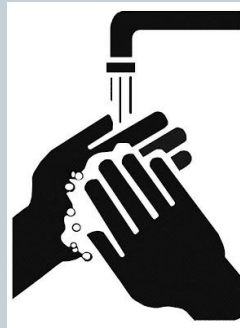
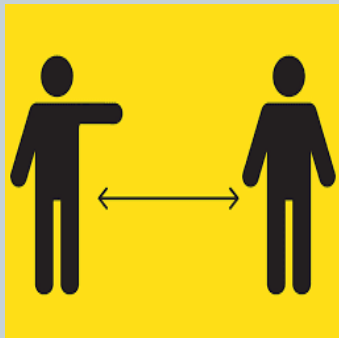
- Violating the Fair Housing Act (advertising “no children,” **advertising “no criminal background”**)
- Having a website not be accessible to all (Americans with Disabilities Act)
- Texting using an autodialer without recipient’s consent (TCPA violation)
- Using a copyrighted image without permission



COVID-19



- On 3/29/2021, Governor DeSantis signed into law Senate Bill 72
- Provides business liability protection from lawsuits about COVID-19 related injury or death
- Practical takeaway, though, is to keep implementing and enforcing conservative business practices!



COVID-19



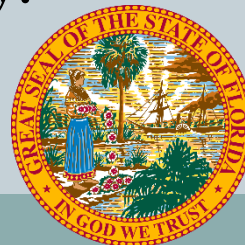
- Plaintiff now has a heavier burden
 - Physician's affidavit required – must connect the plaintiff's injury to the business' actions or inactions
 - Must prove gross negligence by clear and convincing standard
 - The law applies retroactively and creates a one-year statute of limitations
 - Plaintiff must prove that the business did not make a good faith effort to comply with public health standards or guidance



COVID-19



- What does “good faith effort” look like?
 - Business is protected if it used good faith effort to “substantially comply with authoritative or controlling government-issued health standards or guidance at the time the cause of action accrued.”
 - What about multiple layers of government and agencies?
 - ✦ If more than one set of standards exist, good faith effort to comply with any one of those sets of standards confers immunity
 - Conservative recommendation: follow current CDC & OSHA guidance and follow them. Keep an eye on local (or state) rules, to implement any that apply.



COVID-19



- One more thing...FL Governor Executive Order 21-81
 - Filed April 2, 2021
 - No government entity or agency may issue vaccine passports or otherwise certify vaccination
 - Businesses can't require vaccination to gain access or service

Section 2. Businesses in Florida are prohibited from requiring patrons or customers to provide any documentation certifying COVID-19 vaccination or post-transmission recovery to gain access to, entry upon, or service from the business.

Don't forget your
COVID-19 vaccination 

Make sure you keep this record card in your purse or wallet

For more information on the COVID-19 vaccination or what to do after your vaccination, see www.nhs.uk/covidvaccine

COVID-19 immunisation
Enjoy life. Protect yourself.



Name	
1	Name of vaccine: <input type="text"/>
	Batch no: <input type="text"/> Date vaccine given: <input type="text"/>
Don't forget to attend your appointment to have your second dose of vaccine. You will have the best protection after two doses.	
Second appointment date: <input type="text"/>	
2	Name of vaccine: <input type="text"/>
	Batch no: <input type="text"/> Date vaccine given: <input type="text"/>
Public Health England gateway number: 2020311. Product code: COV2020311	

COVID-19



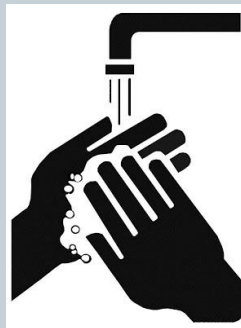
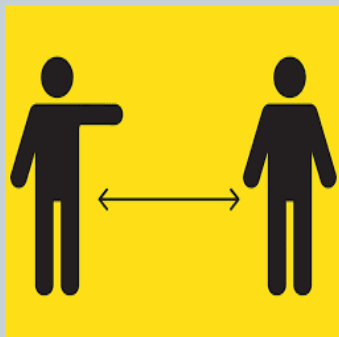
- Florida Realtors form COVID-19/Coronavirus In-Person Access Acknowledgement
- Designed for in-person access to property generally
- Pushes liability away from Realtor and brokerage firm and onto the parties, who:
 - Confirm in-person access is their idea
 - Acknowledge the risks and fully assume them
 - Promise to minimize risks
 - Promise that, to their knowledge, they aren't sick
 - Promise they will notify others if they get sick later
 - Promise to follow current CDC guidelines

COVID-19



- **Practical Recap**

- Create a plan, implement and enforce the plan
 - ✦ Don't include vaccination proof as part of that plan
 - ✦ Feel free to use FR COVID-19 In-Person Access Form as part of that plan
- Tip: review practices conservative companies adopt
- Hopefully, the new law will heavily discourage lawsuits or provide a liability shield, if needed



Seller's Market Contract Issues



- Escalation Clauses

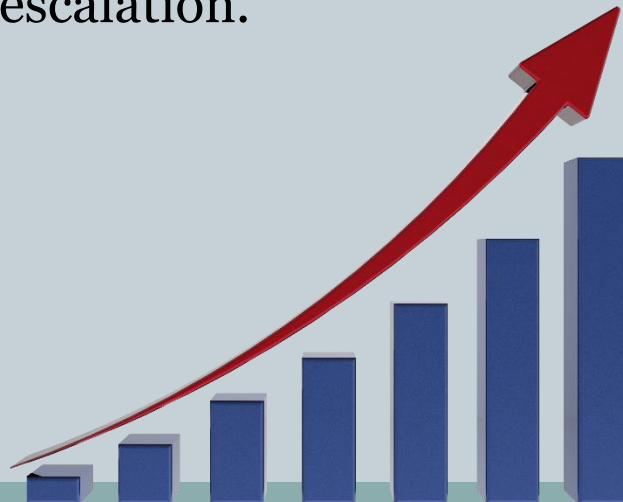
- The Florida Realtors Forms Committee is working on a form
- The gist is that buyers include a clause where they offer to increase their purchase price to beat other offers – common terms include:
 - ✦ Amount buyer is willing to go above the current highest offer
 - ✦ Buyer's maximum purchase price
 - ✦ Net proceeds to seller, instead of straight purchase price
 - ✦ Seller obligation to show a copy of the offer buyer is beating
 - ✦ Whether the increased amount is included in financing
 - ✦ Obligation of both sides to sign/initial to ensure proper formation
 - ✦ What happens if more than one offer has an escalation clause

Seller's Market Contract Issues



- Escalation Clause Sample

- Buyer agrees to pay \$_____ more than the next highest Offer, but not to exceed a final purchase price of \$_____.
- In the event the Seller seeks an escalation of the Buyer's purchase price, Seller shall provide Buyer a copy of the competing purchase offer to justify the escalation.



Seller's Market Contract Issues



- Escalation Clauses

- Most hotline calls about these clauses center around one central truth: it's just an offer
 - ✦ Seller can accept, reject, counter, or ignore any offer
 - ✦ Seller doesn't have to "play ball" with buyer's escalation clause
 - ✦ If seller wants to delete the escalation clause and counter at buyer's cap, they can
 - ✦ If seller wants to ignore buyer's escalation clause offer and go with a lower offer (cash, for example), they can
 - ✦ If seller wants to request highest and best, they can
 - ✦ If seller wants to share buyer's offer terms with another buyer, they can

Seller's Market Contract Issues



- Anticipating a Low Appraisal
 - Florida Realtors form language includes a financing contingency and an appraisal contingency
 - ✦ Both simply give a buyer a chance to get out of the contract penalty free (or go forward despite the low appraisal, when possible)
 - Newer “appraisal gap” clauses (buyer agrees to pay more, seller agrees to come down, or a combination) seem to be causing issues – extremely challenging to draft well
 - ✦ Recommend parties who want to use one get attorney-drafted language

A sample of a residential real estate contract form. The form is titled "CONTRACT TO BUY AND SELL REAL ESTATE (RESIDENTIAL)". It includes a large red stamp that reads "LOW APPRAISAL" diagonally across the center. The form contains various sections for legal disclaimers, agreement terms, and property details. At the bottom, there are checkboxes for "Joint Tenants", "Tenants In Common", and "Other" under the heading "title to the Property described below as". There is also a section for "Assignability and Inurement" with checkboxes for "Is" and "Is Not assignable by Buyer without Seller's consent".

Seller's Market Contract Issues



- What happened to my buyer's (excellent) offer?
 - Seller can accept, reject, counter, or ignore any offer
 - Seller has options when dealing with multiple offers
 - ✦ Highest and best
 - ✦ Go with the offer they like most
 - ✦ Get the buyers competing against one another
 - ✦ Wait until an offer meets the terms of the listing agreement
 - SOP 1-7 obligates the listing Realtor to provide written affirmation that the offer has been submitted (or that seller requested it not be submitted) if the buyer's Realtor sends a written request for the affirmation

NAR SOP 10-5 Hate Speech



- NAR Code of Ethics Standard of Practice 10-5 Became Effective 11/13/2020
 - This rule always applies, so it makes no difference if you're working, hanging out with friends, posting messages online, or attending a public or private event.
 - **REALTORS® must not use harassing speech, hate speech, epithets, or slurs based on race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity.**

NAR SOP 10-5 Hate Speech



- **Breaking Down this Rule**
 - Step 1: Did someone make a comment about a protected class?
If yes, go to step 2. If not, this is not an NAR COE issue
 - ✦ Advanced age
 - ✦ Weight
 - ✦ Political affiliation
 - Step 2: do any of the things said about a protected class fall into the category of hate speech, harassing speech, epithets or slurs?
 - ✦ For further discussion of what these mean, see Appendix XII

NAR SOP 10-5 Hate Speech



- NAR Published Appendix XII *Appropriate Interpretation of SOP 10-5* to help clarify the new SOP
 - For example, **harassing speech** could include such actions as:

circulation of written or graphic material that denigrates or shows hostility toward an individual or group based on a protected characteristic.”

NAR SOP 10-5 Hate Speech



- Appendix XII also includes the definition of epithet and slur

Epithet: “**1a:** a characterizing word or phrase accompanying or occurring in place of the name of a person or thing; **b:** a disparaging or abusive word or phrase”

Slur: “**1a:** an insulting or disparaging remark or innuendo: ASPERSION; **b:** a shaming or degrading effect: STAIN, STIGMA”

NAR SOP 10-5 Hate Speech



- This is one of the more serious violations of the Code of Ethics
 - Violation of public trust, alongside mishandling client funds and fraud
 - Not appropriate for citation policy, for boards that have adopted one
 - Sanctioning guidelines stiffer

NAR SOP 10-5 Hate Speech



- FAQs about this rule
 - This new rule is not retroactive – became effective on 11/13/2020
 - Associations need not monitor or police social media. An ethics complaint must be filed to start the process
 - This is not related to political speech (unless it turns into hate speech, harassing speech, etc. about a protected class)
 - The professional standards process has checks and balances to ensure fairness – grievance committee review, such as a formal confidential hearing, majority vote by a panel, a chance to appeal alleged procedural mistakes

Florida Realtors Legal Update



**THANKS FOR HAVING
ME!**

Joel Maxson

joelm@floridarealtors.org