

# Florida Realtors Legal Update



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# BEWARE: Targets for Plaintiff's Attorneys



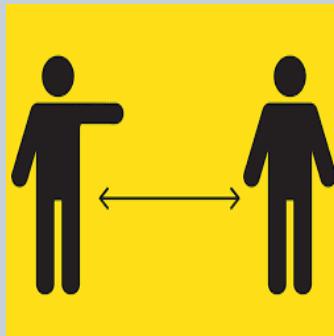
- Violating the Fair Housing Act (advertising “no children,” **advertising “no criminal background”**)
- Having a website not be accessible to all (Americans with Disabilities Act)
- Texting using an autodialer without recipient’s consent (TCPA violation)
- Using a copyrighted image without permission



# 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**

**NHS**

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](http://www.nhs.uk/covidvaccine)

**COVID-19 immunisation**  
Enjoy life. Protect yourself.

**Name**

**1** Name of vaccine: \_\_\_\_\_  
Batch no: \_\_\_\_\_ Date vaccine given: \_\_\_\_\_

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:** \_\_\_\_\_

**2** Name of vaccine: \_\_\_\_\_  
Batch no: \_\_\_\_\_ Date vaccine given: \_\_\_\_\_

Public Health England gateway number: 2020311. Product code: COV2020311

# COVID-19



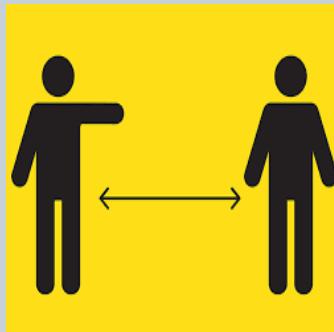
- Florida Realtors form COVID-19/Coronavirus In-Person Access Acknowledgement
- Designed for in-person access to property generally
- Pushes liability away from Realtor and brokerage firm and onto the parties, who:
  - Confirm in-person access is their idea
  - Acknowledge the risks and fully assume 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

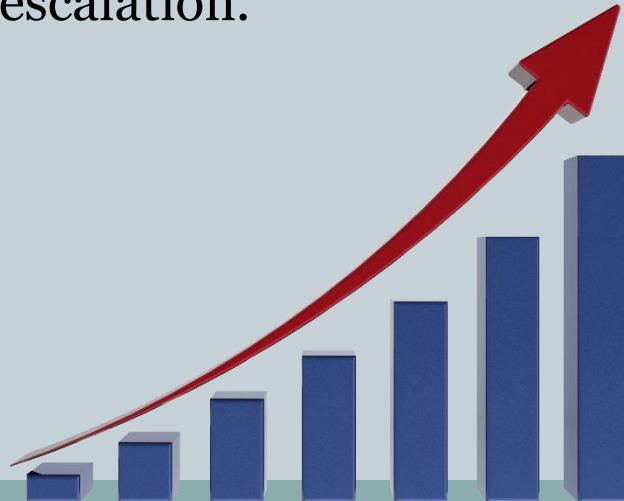
- The Florida Realtors Forms Committee is working on a form
- The gist is that buyers include a clause where they offer to increase their purchase price to beat other offers – common terms include:
  - Amount buyer is willing to go above the current highest offer
  - Buyer's maximum purchase price
  - 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



# 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!

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