

Florida Realtors Legal Update



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BEWARE: Targets for Plaintiff's Attorneys



- Knowledge is key to not falling victim
 - Violating the Fair Housing Act
 - Having a website not accessible to people with disabilities
 - Texting using an autodialer without recipient's consent
 - Using a copyrighted image without permission



BEWARE: Targets for Plaintiff's Attorneys



- **Violating the Fair Housing Act**
 - Advertising: Pay close attention to all public-facing marketing materials
 - Protected Classes: Know all protected classes
 - ✦ Federal FHA includes Race, Color, Religion, National Origin, Sex, Disability, and Familial Status
 - ✦ NAR adds sexual orientation & gender identity
 - ✦ Orange County adds age, marital status, and sexual orientation
 - ✦ Miami/Dade and Broward add source of income (Section 8, e.g.)
 - Testers: Fair Housing testers may call to test your response to their questions, posing as prospects

BEWARE: Targets for Plaintiff's Attorneys



- Current FHA serial filers in Florida
 - Criminal background mentioned in property for rent
 - ✦ Advertising says something like “no criminal background”
 - ✦ An individual will call and ask if his felony for a victimless crime many years ago means he can't or shouldn't apply
 - ✦ If the person answering the phone discourages application, broker served with complaint
 - ✦ Settlement amount typically comparable to attorney fees
 - ✦ Scores of cases (so far) have settled
 - “No Section 8”
 - ✦ Advertising material mentions source of income
 - ✦ Specific to Miami Dade, Broward, possibly other counties

BEWARE: Targets for Plaintiff's Attorneys



- Having a website not accessible to all (Americans with Disabilities Act)
 - Complaints/demand letters argue that companies need to make websites accessible to people with vision, hearing, and other disabilities
 - The demand typically requires hiring a coder to improve websites and mobile apps to ensure they interact with special software the disabled person needs to interact with the site
 - Some recent developments have gone against plaintiff's attorneys
 - Still an unsettled/evolving issue

BEWARE: Targets for Plaintiff's Attorneys

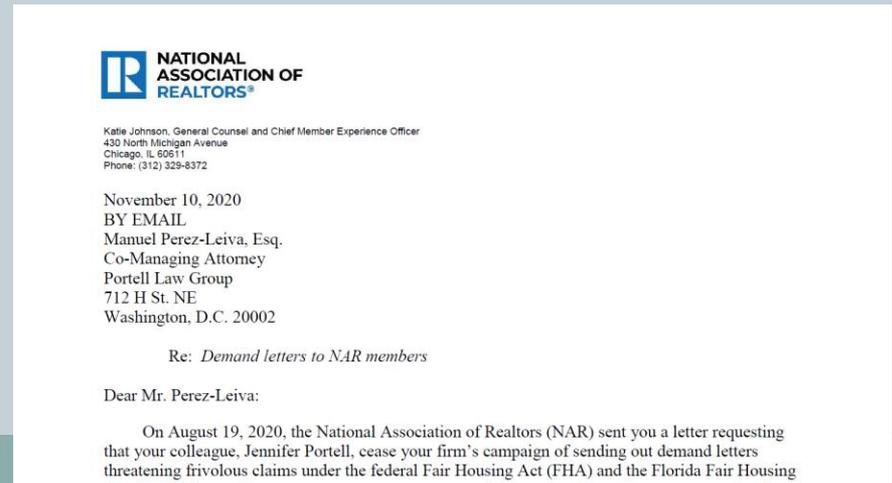
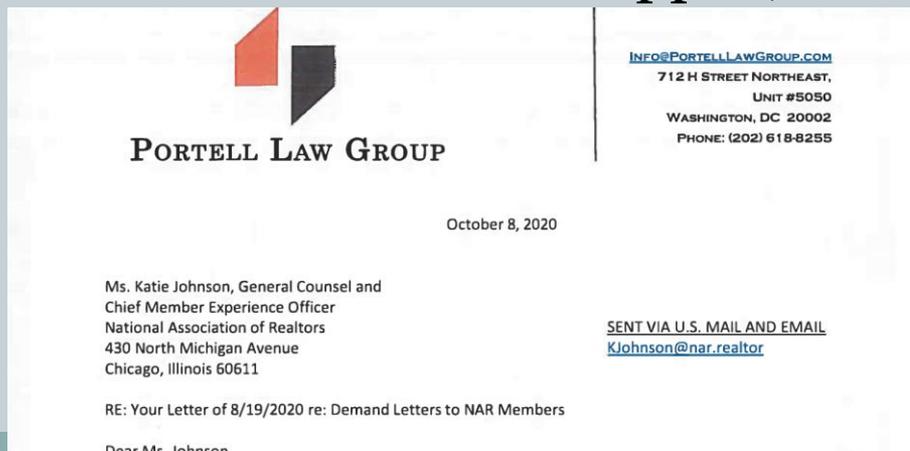


- Nationwide cases
 - Since the federal government has not created an official rule, plaintiff's attorneys have been litigating
 - They target very large companies, like Domino's Pizza, Netflix, and Winn Dixie
 - Courts do not have a consensus about whether a website is a "place of public accommodation" and other issues
 - Big cases take time – Winn Dixie case filed in 2017, ruling went in favor of plaintiff; appeal went in favor of company very recently; next step is currently unknown (motion for rehearing en banc?)

BEWARE: Targets for Plaintiff's Attorneys



- Serial filer in Florida (2020) for website accessibility
 - Sent scores of demand letters to Florida Realtors, alleging violations of FHA, then attempted to schedule a call
 - Legal arguments were not the same as nationwide ADA cases
 - Attempted to expand this practice nationwide
 - NAR sent two cease and desist letters threatening action
 - Demand letters stopped; website came down



BEWARE: Targets for Plaintiff's Attorneys



- Another potential website accessibility serial filer (2021)
 - NAR Deputy General Counsel warns of a new group targeting Realtors under website “Pursuit of Respect USA”
 - Like the 2020 threat, cites FHA instead of ADA
 - Like the 2020 threat, nationwide but based in Florida
 - Like the 2020 threat, demand letters sent instead of filing cases
 - Website has odd wording like this:
 - ✦ “We are advocacy groups that want equality for all, we required the end to decimation on all websites were the blind or deaf can access without prediction. We demand equal access for all. In today’s world and epically now with more access to the internet is required.”
 - NAR has prepared a response letter to a boilerplate demand letter from this group – email joelm@far.org if interested

BEWARE: Targets for Plaintiff's Attorneys



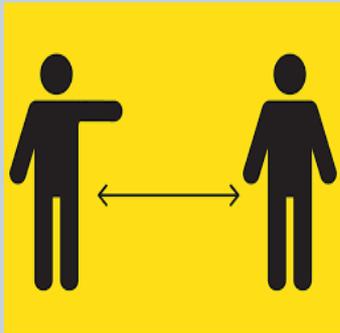
- TCPA violation using an autodialer
 - Consumers who receive texts sent using autodialing software must give consent first
 - ✦ Express written consent for marketing
 - ✦ More general, broadly construed consent for updates where a relationship exists (appointment reminders, dentist/doctor offices, for example) – could be as simple as someone voluntarily providing a phone number



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:
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



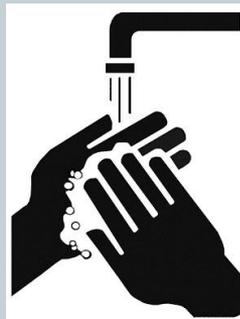
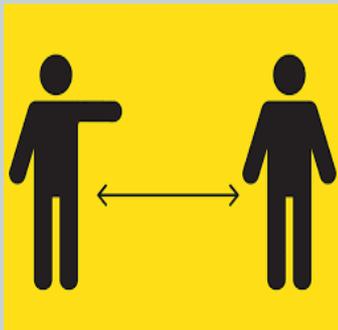
- Florida Realtors form COVID-19/Coronavirus In-Person Access Acknowledgement
- Designed for in-person access to property generally
- Pushes liability away from Realtor and brokerage firm and onto the parties, who:
 - Confirm in-person access is their idea
 - Acknowledge the risks and fully assume them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

ed portions of this form, except differentiated additions, have been approved by the Colorado Real Estate Commission (CREC) (Mandatory 1-14)

RM HAS IMPORTANT LEGAL CONSEQUENCES AND THE PARTIES SHOULD CONSULT LEGAL COUNSEL BEFORE SIGNING.

**CONTRACT TO BUY AND SELL REAL ESTATE
(RESIDENTIAL)**

Date: _____

LOW APPRAISAL

AGREEMENT

REEMENT. Buyer, identified in § 2.1, agrees to buy, and Seller, identified in § 2.3, agrees to sell the Property described below on the terms and conditions set forth in this contract (Contract).

PROPERTIES AND PROPERTY.
Buyer, Buyer, _____
title to the Property described below as Joint Tenants Tenants In Common Other _____

Assignability and Inurement. This Contract Is Is Not assignable by Buyer without Seller's written consent. Except as so restricted, this Contract inures to the benefit of and is binding upon the heirs, personal

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

Florida Realtors Legal Update



**THANKS FOR HAVING
ME!**

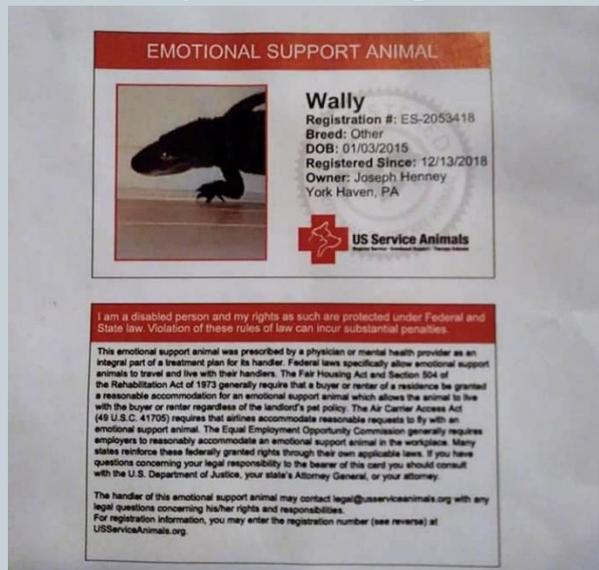
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Assistance Animals



- Abuse of the system?
 - National Service Animal Registry (private company)
 - 2011 estimate: 2,400 requests
 - 2019 estimate: 200,000 requests
 - Wally the alligator is a Pennsylvania internet sensation



Assistance Animals



- **New Florida law effective July 1, 2020**
 - Tenants who misrepresent facts when seeking proof for the need for an emotional service animal (ESA) commit a second-degree misdemeanor
 - An ESA certificate received through a website is, by itself, not enough to establish the need for an ESA
 - If someone claims more than one ESA, they will need documentation for each animal
 - Landlords and property managers should still use extreme care when fielding an accommodation request

Assistance Animals



- Case #1 (Tenant Wins)
 - Minor son had mental health disabilities
 - Pit bull assistance animal was requested for a duplex
 - Association denied the request because it was a dangerous breed
 - Tenant won because a veterinarian found no signs of aggression in that *specific* pit bull



Assistance Animals



- **Case #2 (Owner Wins)**

- Association attempted to enforce a 25 lb. weight limit rule
- Owner provided 3 doctor's notes in response to increased questioning, but also mentioned a separate knee issue in addition to these notes from a psychiatrist
- Dr. Note 1: *Due to mental illness, Mr. Bhogaita has certain limitations regarding social interaction and coping with stress and anxiety. In order to help alleviate these difficulties, and to enhance his ability to live independently and to fully use and enjoy the dwelling unit, I am prescribing an emotional support animal that will assist Mr. Bhogaita in coping with his disability*



Assistance Animals



- Case #2 (Owner Wins)

- Dr. Note 2: *[The unit owner] has a therapeutic relationship with this specific dog, Kane. As an emotional support animal, Kane serves to ameliorate otherwise difficult to manage day to day psychiatric symptoms in Mr. Bhogaita.*
- Dr. Note 3: *[Bhogaita's condition] limits his ability to work directly with other people, a major life activity. Currently he has been hired to perform technical support work from home. He is able to work with the assistance of his emotional support animal. Otherwise his social interactions would be so overwhelming that he would be unable to perform work of any kind.*

Assistance Animals



- Case #2 (Owner Wins)
 - Association continued to ask for more information
 - ✦ Please list each individual disability that you feel your pet is required for in order for you to offset the effects of those individual disabilities. Originally you claimed one disability, now you are claiming another disability...
 - ✦ Please provide documentation from a medical professional(s)...your psychiatrist has not indicated that you need an oversized pet for this disability
 - ✦ Please indicate the number of sessions you have had with those additional physicians...
 - ✦ Please provide all information related to the professional training your pet has received

Assistance Animals



- **Case #2 (Owner Wins)**
 - Association repeated these request, which the owner ignored – final request included a threat of arbitration
 - Owner filed a complaint with HUD and FL Commission on Human Relations
 - Owner won the case based on constructive denial (association never actually said no), received \$5,000 in compensatory damages and attorney fees of \$127,512

Assistance Animals



- Case #3 (Landlord Wins)
 - Tenant with schizophrenia and severe learning disabilities was permitted to have a dog
 - Tenant was evicted for not using a pooper scooper and not walking dogs in a designated area (also given the option to create a fenced in area)
 - Landlord prevailed in court
 - ✦ Key fact 1: landlord granted accommodations and offered to compromise and work towards a solution (fenced in area)
 - ✦ Key fact 2: violation of the rule harmed neighbors' health, safety, and comfort