



2022 Stellar MLS Virtual Broker Summit

10:45 AM-11:30 PM // Wednesday, May 4, 2022



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Happy Star Wars Day!



Surveillance

The two primary surveillance statutes in Florida:

- 1) § 934.03, Florida Statutes (wiretap act - oral communications)
- 2) § 810.145, Florida Statutes (voyeurism - video communications)

BUT!

BOTH statutes require that the person recorded must have an expectation of privacy for there to be a violation:

- 1) § 934.02(2), Florida Statutes (oral)
- 2) § 810.145(1)(c), (2)(a)-(b), Florida Statutes (video)

Surveillance

This “expectation of privacy” language is important, since consent is not required to record audio in Florida unless both statements are true:

1. The speaker must have an actual subjective expectation of privacy, and
2. The circumstances must show a “societal recognition” that the expectation is *reasonable*.

Surveillance

Further, the video surveillance statute also does not apply if:

- 1) A security system has a conspicuous written notice OR
- 2) The cameras are installed in such a manner that they are clearly and immediately obvious.



Surveillance

The 4th DCA held in the 2021 case of *Silversmith v. State Farm Insurance Company*, 324 So. 2d 317, that a homeowner did not need an insurance appraiser's consent to record video and audio of the appraisal, since:

- Nothing in the policy precluded audio/video recording of an appraisal inspection, and
- The insurer's appraiser had no legitimate expectation of privacy while in the insured's home for the inspection.

Surveillance

Though this case dealt with an appraiser, it seems reasonable to conclude that a court could apply it to real estate showings. In other words, a court could find that a buyer or prospective tenant has no reasonable expectation of privacy during a showing in another person's property.



Surveillance

- That said, it is likely a good idea to either (a) not record audio, or (b) disclose that people attending a showing may be recorded.
- Option (b) can also comply with the video surveillance “safe harbor.”
- It is an especially good idea to remind prospective buyers and prospective tenants that recording devices are everywhere and to refrain from discussing sensitive info during a showing.



Beach Access

Once Upon a Time: Article X, Section 11, Florida Constitution

“The title to lands . . . including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people.”



Beach Access

But what about the portion of the beach that is *not* “below the mean high water line?” And what about access from the right of way to the beach itself?

Since 1974: “Customary use.”

But is it a “taking?” And how is it established?



Beach Access

§ 163.035, Florida Statutes.

- Passed in 2018 after some counties passed ordinances establishing “customary use” after trespassing disputes between new landowners and long-time residents.
- Intended to codify the Florida Supreme Court’s 1974 procedure to establish customary use.
- Multiple requirements but the most important is that the county or city intending to establish customary use must bring a court action - with notice to affected property owners - where a judge can declare customary use.

Beach Access

Buending v Town of Redington Beach, 10 F.4th 1125 (11th Cir. 2021)

- Town passed ordinance a month before the statute went into effect.
- Landowners obtained summary judgment on grounds town did not comply with the law.
- 11th Circuit reversed on grounds that town could defend the pre-existing ordinance on grounds of long-term customary use.

Beach Access

What is the takeaway?

- Be cautious when stating in listing that property has “beach access.”
- If customary use of the access has not been established by a judicially-tested ordinance or court case, that access could be taken away.





Article 12 Changes

These changes went into effect **Jan 1, 2022.**

**MLSs were required to implement the changes no later than
March 1, 2022.**

Policy Statement 8.4: MLS participants and subscribers must not represent that their brokerage services to a client or customer are free or available at no cost to their clients, unless the participant or subscriber will receive no financial compensation from any source for those services. (Also amending SOP 12-1)



Article 12 Changes

Policy Statement 8.4 and Amended Standard of Practice 12-1

What does this mean?

Realtors® and other MLS participants and subscribers cannot say “we work for free” or “we don’t charge for our services.”

Unless: Realtors® and other MLS participants actually will not receive *any* compensation at all for all services provided.



Article 12 Changes

- **New MLS Policy Statement 8.8 – Requiring Disclosure of Buyer Agent Compensation:**
- MLSs must include the listing broker offer of compensation for each active listing displayed on its consumer-facing website(s) and in MLS data feeds provided to participants and subscribers.
- MLS must permit MLS participants or subscribers, at their discretion, to share such information through IDX and VOW displays, or through any other form or format provided to clients and consumers.
- Info about the offer of compensation must be accompanied by a disclaimer stating that the offer is made only to participants of the MLS where the listing is filed.



Article 12 Changes

What does this mean?

The offer of compensation will now be displayed on all MLS public-facing websites for consumers to view. Should a participant or subscriber wish to display this on their IDX or VOW display, they also have that option.

However, this doesn't apply to client portals or MLS printouts.



New DOJ Website Accessibility Guidance

- Issued on March 18, 2022 (Press release number 22-262)
- Guidance found at: <https://beta.ada.gov/web-guidance/>
- Applies to “businesses that are open to the public”
- Conservatively, Realtors® should act as if their business is open to the public until explicit guidance to the contrary.

New DOJ Website Accessibility Guidance

- Businesses have flexibility in how they comply with the ADA's general requirements of nondiscrimination and effective communication. But they must comply with the ADA's requirements.
- The Department of Justice does **not** have a regulation setting out detailed standards, but the Department's longstanding interpretation of the general nondiscrimination and effective communication provisions applies to web accessibility.
- Existing technical standards provide helpful guidance concerning how to ensure accessibility of website features. These include the *Web Content Accessibility Guidelines (WCAG)* and *Section 508 Standards*, which the federal government uses for its own websites.

New DOJ Website Accessibility Guidance

Examples (not a complete list):

- Color Contrast in Text
- Color Text Cues (colorblindness)
- Text Alternatives (“alt text”) in Images
- Online Forms (screen readers)
- Video Captions (synchronized captions and close captioning)
- Text Size and Zoom Capabilities
- *Ability to Report Accessibility Issues*

New DOJ Website Accessibility Guidance

Takeaways:

- The federal government still does not have clear standards for web accessibility.
- However, web accessibility is a “priority” for the DOJ.
- The DOJ has reached agreements with companies such as Rite Aid, Teacher’s Test Prep, Inc., H&R Block, and Peapod (grocery delivery) concerning website accessibility.
- Realtors® should treat website accessibility as a priority.

Appraisal Gap Clauses

- Have been around for a few years but have become increasingly prevalent within the last year.
- Usually some variation of “buyer agrees to pay \$X over appraised value.”
- There have been no Florida court opinions yet about enforceability.
- The clauses members have inquired about on the hotline are invariably *ambiguous*.

Ambiguity

- The thing all drafters of contracts strive to avoid.
- The written contract is not the parties' agreement- it is a description of the parties' agreement, which exists in their minds.
- If properly drafted, a contract (mostly) captures the parties' intent.
- A contract is like an iceberg- the part you can read is only a portion of the parties' intent.



Ambiguity



Ambiguity

Let's bring it closer to home.

- “Sofa”
- “Furnished”
- “Turn-key”



Ambiguity

Back to Appraisal Gaps

- What does the buyer perceive?
- What does the seller perceive?
- If fundamentally different, it will be up to a court to determine intent.
- Again, as of now, no appellate court in Florida has opined on these clauses.



Questions? Call the Legal Hotline
(407) 438-1409

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