



REAL ESTATE TRANSACTIONS AND PRACTICE AMID THE COVID-19 VIRUS

OPEN HOUSES: Local associations and MLSs should note that the association and/or MLS does not have the authority to prohibit Open Houses; however, they can make *recommendations* that Open Houses be suspended during this time or that precautions be taken if holding an Open House. Brokerages and Teams must be mindful of existing Listing Agreement language and Broker Duty requirements when establishing Open House policies.

In the event you have a seller who is reluctant to hold an Open House: You should honor your client's request. Explain the possible impact that limiting access to the listed property could have on the amount of time it will take to sell, the eventual purchase price, and the marketing plan and discuss feasible marketing alternatives, such as video tours and other methods to virtually tour a property. Also, is it important to get your client's directive in writing.

In the event you wish to discontinue holding Open Houses during this time, but the seller does not: The NMAR Exclusive Right to Sell Listing Agreement (Form 1106) does not specifically require you to hold an Open House. However, the Listing Agreement does require you to assist the seller in identifying qualified buyers, which arguably includes holding Open Houses, unless expressly excluded in the Listing Agreement. Further, Broker Duties requires brokers to exercise reasonable care when working with consumers and to honor the terms of written agreements. You should discuss with your seller concerns surrounding the Coronavirus and alternative ways to market the property other than holding the Open House. If the seller is not dissuaded and you refuse to hold the Open House, he/she may pursue a complaint against you, and it would be at the discretion of a judge and/or NM Real Estate Commission to decide whether you had good cause to refuse to hold the Open House given the current environment. While I cannot provide a definitive answer on the outcome, your concerns about holding an Open House under current conditions would most likely be justified, under both the Listing Agreement and Broker Duties.

If your seller is insisting on holding an Open House and you are so willing to do so: If you do hold an Open House, consider the following: Ask visitors to disinfect their hands upon entering the home, limit the amount of people in the home, provide alcohol-based hand sanitizers at the entryway and soap and disposable towels in bathrooms. If you decide to do any cleaning at your client's home, be sure to check with your client in advance about any products you plan to use. After the Open House, recommend that

your client clean and disinfect their home, especially commonly touched areas like doorknobs and faucet handles.

SHOWINGS:

Seller wishes to suspend showings or place special requirements on showings during this time: Again, you should explain to the seller the possible impact that limiting access to the listed property could have on the amount of time it will take to sell, the eventual purchase price, and the marketing plan and discuss feasible marketing alternatives, such as video tours and other methods to virtually tour a property. Get your client's directive in writing. Notify buyers' brokers through the MLS or otherwise if the seller has elected to suspend showings or has any special showing instructions/requirements. Also, request that buyers' brokers and buyers disinfect their hands upon entering the home and that they limit the amount of people in the home. Provide alcohol-based hand sanitizers at the entryway and soap and disposable towels in bathrooms. After showings, recommend that your client clean and disinfect their home, especially commonly touched areas like doorknobs and faucet handles.

If you do not feel comfortable showing property: If you have a Buyer-Broker Agreement, you have contractually agreed to assist the buyer in locating properties. Even without a Buyer-Broker Agreement, Broker Duties require the exercise of reasonable care when working with a buyer, which includes locating and showing the buyer properties. You should discuss alternatives to physically touring properties, such as virtual tours, and explain that some sellers have elected not to allow showings or have specific requirements for showings during this time. In the event buyers wish to see a property that the seller has made available for showings, suggest to the buyers that they wash their hands thoroughly and/or use alcohol-based hand sanitizers before and after the showing and that they minimize touching of surfaces within the house.

Driving potential clients to see homes: You may refuse to do so; however, be sure that any change to your business practices is applied equally to all clients. You may refuse to drive clients who show signs of illness or reveal recent travel to areas of increased risk of the Coronavirus (see below for more on this), or you may decide to stop driving clients in your car altogether and simply arrange to meet clients at a property. If you do continue to drive clients in your car, it is a good idea to frequently clean and disinfect surfaces like door handles and seatbelt latches, and to ask clients to use hand sanitizer when getting in and out of the car.

FEDERAL AND STATE FAIR HOUSING LAWS:

Unique issues the Coronavirus presents: When an infectious disease, such as Coronavirus, is associated with a special population or nationality, fear and anxiety may lead to social stigma and potential discrimination. You must be mindful of your obligations under the Fair Housing Act and New Mexico's Human Rights and be sure not to discriminate against any particular segment of the population. While the Coronavirus

outbreak began in Wuhan, China, that does not provide a basis for treating Chinese persons or persons of Asian descent differently.

The U.S Centers for Disease Control and Prevention (CDC) has issued Level 3 Travel Warnings for all of China, South Korea, Iran and most countries in Europe, and a Level 2 Travel Alert for *all other countries*.

The impact of this on your ability to inquire into a client or customer's travel activity: The CDC's Travel Health Notices have two components. First, a Level 3 Health Warning advises against all non-essential travel. Secondly, for travelers returning from a Level 3 country, the CDC advises that a person stay home and avoid contact with others, and to not go to work or school for a period of 14 days. [CDC link for travelers](#). A Level 2 Alert advises returning travelers to "*limit contact with others and monitor your health for 14 days.*" (Even a Level 1 Watch advises a returning traveler to "Pay attention to your health ... for 14 days after you leave.")

Given the federal agency's documented advisories, you would not be exposed to a fair housing violation if you relied on the most up-to-date information from the CDC before asking clients/customers if they have traveled within the last 14 days to an affected country. The brokerage has discretion to permit its agents to ask this type of question.

Presently, the CDC's Level 2 Alert is a global warning. Travelers returning from any country abroad are advised to monitor their health and limit interactions with others for 14 days after returning to the United States.

TENANTS:

The Force Majeure provision of our residential rental agreement does not specially address pandemics/epidemics. NM law does not have a general definition of Force Majeure and defers to the exact wording in the contract. NM law does define an "Act of God" as "*an unusual, extraordinary, sudden and unexpected manifestation of the forces of nature for which no human is responsible*", such as hurricanes, floods and tornadoes; this does not [generally/arguably] include an epidemic or pandemic.

Tenant's refusal to allow entry into a property for purposes of showing when tenant fears being exposed to the Coronavirus: Tenants are required to allow entry. There is no law that would give the tenant the right to refuse entry based upon an unfounded fear that a prospective buyer might infect them with the Coronavirus. If the tenant is refusing entry on this basis, then you may obtain a statement from the prospective buyer that they have no signs of any cold, flu or other respiratory illness. This may reassure the tenant. But regardless of whether a statement is given to the tenant, the tenant would still be required to allow entry.

Ultimately, you need the cooperation of the tenant to show the property. The legal remedy against a tenant who refuses entry is for the owner or property manager to obtain relief

from the court for the tenant's breach of the rental agreement and the NM Owner Resident Relations Act. This can be a lengthy and cumbersome process.

Moratoriums on evicting tenants: There is no statewide moratorium, but there may be some localities that have imposed a freeze on all evictions. At this time, we are aware of only two NM cities that have addressed this.

ABQ will not be proceed with any nonpayment evictions at any of their affordable housing units at this time unless there is a public safety concern. The Albuquerque Housing Authority is also taking steps to prevent and stop any evictions and anyone with questions regarding this matter is asked to contact them directly.

In Santa Fe, the mayor is prohibiting the eviction of residential and commercial property tenants whose ability to pay has been adversely impacted by the public health emergency,”

With this said, even in areas with no moratorium on evictions, landlords may face delays in getting before courts on a petition for a Writ of Restitution. Also, a judge may exercise his/her equitable power to grant a tenant some relief from eviction. But currently, if you are not in Santa Fe, you can proceed with serving a 3-Day Notice of Non-Payment of Rent; however, if the tenant expresses that the Coronavirus or issues related thereto have caused him/her to fall behind on the rent; you should confer with the owners of the property to determine how they wish for you to proceed.

[CLICK HERE FOR MORE CONCONVIRUS RESOURCES FROM NAR](#)