

Laura Prouse ([00:00](#)):

Joining us today for COVID forms and best practices in a COVID world, I'm Laura Prouse with CRES Insurance Services. Today we're welcoming attorney Mark Carlson from the Carlson Law Group. Mark has been defending real estate professionals since 1993, and has worked with CRES for over 20 years as a founding member of our legal panel. Along with Mark, we have Dave Miller, regional vice president with Fidelity National Home Warranty. Dave manages the CRES advantage home warranty plan, which ties in with the CRES real estate errors and omissions insurance. We have a lot to cover today, so I'll hand it over to you, Dave and Mark.

Dave Miller ([00:35](#)):

Oh, thank you, Laura. Thank you Mark for being here today. We have so many questions that come to us when in the field, so this is going to be hopefully very valuable for so many real estate professionals out there. I'll just get started with the first one. Mark, what coronavirus forms has CAR released to help real estate professionals transact during this pandemic?

Mark Carlson ([00:56](#)):

Well Dave, first let me start by saying that today is August 12th. So tomorrow, August 13, there may be something different. So the forms have been coming out like the cookies out of the Keebler Elves factory. So far, we've got forms that we can sort of break down into four different categories. The first is office opening and how to conduct showings of a house, just sort of generically. Rules and for entry, there's the BPPP form, which is the Best Practices and Guidelines and Prevention Plan.

Mark Carlson ([01:37](#)):

And then there's the PRE, which is the Posted Rules of Entry. And just let me back up a little bit with that. The purpose of those two forms was that Cal/OSHA, and along with the California Department of Public Health, as I'm sure you've seen in other industries, have been releasing industry guidelines for restaurants, for gyms, for whatever. Every segment they've been releasing guidelines, although the practice of real estate and real estate licensees in California, because they're statutorily defined as independent contractors, Cal/OSHA really hasn't stepped into that field in the past. So we may question whether Cal/OSHA has jurisdiction over these matters, but since the California Department of Public Health joined in the issuance of the industry guidance real estate transactions, that's the name of the brochure, the Department of Public Health most likely does have jurisdiction over how real estate agents and brokers conduct themselves.

Mark Carlson ([02:47](#)):

So the BPPP and the PRE forms really just mirror what recommendations and guidance are included within that publication. So it governs things like how to conduct an open house, clean between showings, don't touch, hand rails don't sweep after to raise the air and whatnot, and just sort of the nuts and bolts on how to conduct the showings. And then also for the real estate brokers, to adopt an official policy, which is a little bit of a nuanced situation there. Because as most people will agree that Cal/OSHA doesn't have jurisdiction over real estate agents, brokers need to be careful about not creating or not adopting an internal standard of care that can be used against them. So we can always argue that, "Hey, listen, I know that's what Cal/OSHA recommended or the California Department of Public Health recommended, but that really isn't the standard. Here's what the industry was doing."

Mark Carlson ([03:58](#)):

We could make that argument, I think, in this setting. However, if a particular real estate brokerage adopted all of those recommendations within a policy and procedure manual, now that policy and procedure manual for sure would be able to be used as to establish the office standard of care. So CAR is recommending that the broker sign the BPPP, and I would agree with that so long as that's all that you do or that the brokerage does. And then moving along to the actual showing of properties, you've got the first step, you have to have the posted rules of entry. And that's changed a little bit. It was actually just a pictogram showing someone in a mask showing someone washing hands, staying six feet apart. There were just a bunch of little drawings that originally were released, and that has been changed to be a little bit more inclusive of recommendations on what you're supposed to do while you're at the property.

Mark Carlson ([05:10](#)):

And then moving along to, "Okay, now I've got somebody that actually wants to see a property," and then there's been a change in forms, or an evolution I should say, in the forms that CAR has released. First it was just the PEAD, the property entry advisory and declaration. And that is kind of the original or the very first version, was sort of a simple, "I declare I don't have symptoms. I declare I haven't been around somebody that has symptoms. I understand that entering into a house imposes some sort of risk. I'm going to wear a mask," things of that nature that's sort of what we see going into grocery stores on a regular basis. Then CAR started or thought, "Well, we've got different situations. We have a seller who may be going into a property, or may just want to dictate what other people can do while they're on their property."

Mark Carlson ([06:14](#)):

So now there's the PEADS, which is designed just for a seller to sign before people come into a property. Then there was a question about, "Well, who could be on a property?" And different jurisdictions have different rules, so CAR created the PEADV for visitor form, and that's meant to be used by home inspectors, appraisers, people that are there that aren't necessarily prospective buyers, or the seller or the occupant. They're just there to do a particular job and then be out of the property. So in that circumstance, you would use the PEADV form. Then CAR released the PEADLR, which is intended to be used in a lease situation. So the language that was dealt in the context of a sales transaction was changed a bit to pertain to a lease transaction. Not very complicated, just got to be diligent in selecting the right form.

Mark Carlson ([07:22](#)):

So now assuming that you've had a showing, and you've got a buyer who's interested in making an offer on a property, so now what do you do? Well, CAR has created a couple of forms, or a handful of forms, that are meant to deal with contract performance. Before I get to those though, I missed an important part. None of the BPP forms, or the PRE, or any of the PEADs are legally mandated forms. You don't have to use those particular forms. According to the industry guidance real estate transactions by OSHA and the Department Public Health, you have to give those the warnings that are included within those documents, but you're not obligated to actually use those documents. They're very convenient and they're being updated by CAR, like I said, regularly, so I would recommend that those be used.

Mark Carlson ([08:23](#)):

But if an office has an in-house attorney that has other recommendations that so long as the content of what's required by OSHA and the Department of Public Health, that would be sufficient. Now getting to

the CVA, the Coronavirus Addendum. Now this is a form that is optional, but we see that a lot of licensees are using it in every transaction, and that's not what it was meant to be used for. So what the Coronavirus Addendum does is it says, "Okay, buyer and seller, we're in an interesting time right now, and we recognize that there may be delays. The appraiser may be delayed, the home inspection may be delayed. My loan may be delayed." And so if there is a delay that's caused specifically by something related to COVID, then we will issue another form which is called the end NUCC, the Notice of Unforeseen Coronavirus Circumstance, and then we will agree on what to do at that particular point in time.

Mark Carlson ([09:35](#)):

Now, the form understandably... I don't mean this as a criticism to CAR, but the form really is, "Okay, if something comes up, we'll agree what to do at that particular time." so it kind of is a bit squishy. There's language in there that I think could be used to say that if a circumstance came up appropriately, that both sides have the right to cancel, but then there's other part of the form that really doesn't specifically say that. It says, "Okay, we will agree and figure out what we're going to do. Maybe we'll extend escrow, if that solves the problem, and then if we can't solve the problem after the extension of escrow, then we'll revisit whether or not we want to cancel."

Mark Carlson ([10:20](#)):

So it creates a bit of ambiguity in a purchase contract, and it should be gone over with a seller and a buyer at the time that an offer is presented as to whether or not that seller and buyer want for it to be used. If I'm representing a buyer, or if I had a real estate agent client that was representing a buyer, I would say [inaudible 00:10:41], because you want to give your buyer some wiggle room if there's a problem down the road. If I'm representing a listing agent, I would probably would tell the seller, "Let's not use that form, because we want to be able to get this deal closed, and we don't want to create ambiguity."

Dave Miller ([11:01](#)):

You're talking about the NUCC, correct?

Mark Carlson ([11:03](#)):

No, that's the CVA, so I'm talking first about the CVA, and then there's also the CVALR for leases.

Dave Miller ([11:11](#)):

Gotcha, okay.

Mark Carlson ([11:12](#)):

But getting to just the general terms of, "Okay, during the course of this performance..." I'm sort of paraphrasing what the CVA says. During the course of the performance of the contract, there might be something that comes up related to COVID that makes it either impossible for me to perform, or makes it difficult for me to perform, and then therefore we're going to... On the difficulty side, let's say for example, I can't get an appraiser out. Then we're going to agree to kick out the close of escrow date 30 days so I've got more time to get the appraiser. Then if there is something that comes up, then that's when you would use the NUCC, either for just the straight NUCC for sales, or the NUCCLR for leases. And that is a form where the buyer or the tenant would say, "Okay, here's what happened. Here's the

circumstance that arose as to why I can't close or why I need more time to close," and then the buyer or hopefully the seller would agree, and then they would agree with the circumstance and allow for more time or both parties cancel.

Mark Carlson ([12:21](#)):

Now again, you could read the CVA to say, just because the buyer or the tenant submits an NUCC, the seller can say, "Well, I don't think that that's sufficient cause, and I'm going to refuse to do anything." And that's where the ambiguity can create some conflict in certain circumstances. So as an example, let's say that I'm a buyer and I just can't get the kind of loan that I want because the lending market is tightened up. Now currently, thankfully that's not the case, but I just don't like the loan that I have, or that I was qualified for or approved for, and so I'm going to send in the NUCC. The seller could say, "No, sorry. If the terms of the loan that you were approved for meet what's provided for in the purchase contract, you still have to purchase." But on the flip side, let's say that the buyer loses his job or her job, and can't qualify for a loan at all.

Mark Carlson ([13:17](#)):

Then the buyer would submit and say, "I lost my job," and submit the NUCC explaining the loss of the job, and then that would be a circumstance where the buyer and the seller would then have to either see if an extension can solve the problem or whether it just needs to be canceled. And then the other two forms, and probably should have started with these, is the RLACAA, and that's the Residential Listing Agreement Coronavirus Addendum or Amendment. And that's an important form for a listing agent, because what that form says is it makes the seller commit to what's going to be allowed or not allowed in showing properties.

Mark Carlson ([13:59](#)):

I'm going to allow people in there without masks. No, I'm not going to allow people in there unless they have a mask. I'm going to allow one showing a day. I will allow multiple showings a day. You know, obviously the current regulations are that you have to stagger them. You can't have more than one buyer in at a time. But that's where the seller... You put it in writing so that there's no ambiguity as to what the seller is going to allow and not allow within the house during the listing marketing period.

Mark Carlson ([14:30](#)):

So again, these have been updated and changed a bit. So as of August 12th, that's accurate, but always go back to the CAR forms if somebody is viewing this video two weeks, three weeks, whatever from now, and see if there are any changes and updates to those particular forms.

Dave Miller ([14:55](#)):

Oh, I appreciate that. There are so many forms, we probably overwhelmed a lot of people. But now to make it even more interesting, you mentioned a little bit earlier OSHA and the California Department of Public Health have now released that industry guidelines, the real estate transactions. Now, how does that relate to what we've already talked about, and what's required under these guidelines? And how are they different from the best practices that we've all been hearing about already?

Mark Carlson ([15:21](#)):

Yeah, so as with everything, people have their own opinions as to what things mean, and I think that's where this term best practices came from. So initially, you had for example, the county of Los Angeles, the city of Los Angeles, that said, "You can only show properties under these specific circumstances. You can't do open houses, but you can do if it's vacant or unoccupied," and that was a big thing. So Long Beach said unoccupied, whereas the LA city said vacant, meaning you can only show it if there's nobody living there, not that you just get somebody out of the house. So all this ambiguity was floating through all the different county and city local ordinances. And so the CAR trying to get its hands around all these different rules started talking about best practices, and it was giving guidance as things were unfolding. And in this time period, it was every other day there was something new, or at least twice a week there was something new coming out.

Mark Carlson ([16:35](#)):

And so when Cal/OSHA and then the California Department of Public Health released their industry guidelines for real estate transactions, the BPPP form was created by CAR. That basically took those suggestions, requirements, recommendations, however you want to phrase it, because that publication by Cal/OSHA and Public Health is a mix of shalls, shoulds, mays. It was kind of complicated. So there really is no difference between the concept of best practices and what's required under the industry guidelines real estate transactions publications. And again, so long as the BPPP form and the PRE, the Posted Rules of Entry, are used, at least as of today, you're going to be in compliance with the guidelines set by Cal/OSHA and the Department of Public Health.

Dave Miller ([17:38](#)):

Okay. Now, regarding that PRE... What'd you call it there? The... Of entry?

Mark Carlson ([17:46](#)):

Yeah, the Posted Rules of Entry.

Dave Miller ([17:48](#)):

The Posted Rules of Entry. How does that work with the agents in the PPE, and even the PEAD form?

Mark Carlson ([17:55](#)):

So the PPE, and that's personal protective equipment, is touched upon in both the Best Practices Guidelines and Protection Plan and the Posted Rules of Entry. And what that says is, "Okay, we have to have hand sanitizer at the property. Some people have to wear masks. There has to be clean equipment there to be able to clean between showings." And so the guidelines basically say, "Buyers that come in, visitors that come in, you have to be wearing a mask at this point in time." So the question is, well what if they don't have a mask? Now, either the listing agent or the selling agent who's there with their clients has to figure out how to get that particular visitor a mask to enter to be compliant with the industry guidelines for real estate transactions.

Mark Carlson ([18:52](#)):

There is not a directive as to whether it has to be the listing agent or whether it has to be the selling agent. So I think the safest thing for all real estate licensees to do is to have some PPE with you, have masks. Early on, there was a requirement of slippers, boot coverings, shoe coverings, and gloves. That's since been amended out of the BPPP form. Or, the Posted Rules of Entry form, sorry. So at this point,

there just has to be cleaning materials there to be used. They don't have to be posted at the front door, but they just have to be somewhere on the property so that there can be cleaning between the showings. And the occupants... Again, sorry to sound like a broken record, but they have to enter with masks on.

Dave Miller ([19:58](#)):

Mark, who pays for all that? Is it the seller that's showing the property? Is it their responsibility to have those sanitized stations around the house? Or is it, like you were talking about, the agent? Is it the responsibility of the agent to incur those costs?

Mark Carlson ([20:14](#)):

Well unfortunately, there's no guidance on allocation of costs. So in these forms, there isn't a, "Okay, seller is going to pay for this, and agents are going to pay for that." But I think that that's something that should be thought about when you're using the listing agreement, the RLACAA, because that would be something where you could put that in. And it's a good point. I'm glad you asked, because what if I'm a seller who has an antique piece of furniture next to the doorway, where people would commonly come in and touch it or could touch it? But you don't want to be using... Or the seller doesn't want Windex being used or disinfectant to be used on the surface of the antique.

Mark Carlson ([21:03](#)):

So that would be something where you would say, "Okay, if I'm cleaning this particular piece of furniture, seller wants me to use this particular cleaning device, or cleaning solution or whatnot." So that'd be something that agents are going to have to do now which they didn't have to do before. I'm showing a property with a unique type of marble countertops or carpet that's expensive or unique, or Persian rugs that are unique. So when I have to do this cleaning, and here's what the BPPP asks me or tells me I have to do, how am I supposed to do it? And you'd want to have that list within the RLACAA.

Dave Miller ([21:47](#)):

You think that most agents are doing those cleanings between showings, or is a seller making arrangements to have somebody do those for them? Or are they doing it themselves?

Mark Carlson ([21:57](#)):

Well, I would say that... Because I've been a part of a broker owner group with the South End regional board of realtors, that's more the larger brokerages. So I think the larger companies are really trying to educate their agents to handle it themselves to make sure it gets done. Whether a particular agent does that, or whether agents who haven't looked carefully at this are trying to push that down to the seller, it's difficult to say.

Dave Miller ([22:34](#)):

Let me open Pandora's box quickly here. What if an agent says that they're going to clean after the open house, and come to find out they didn't, and somebody gets infected. Is there a potential lawsuit there?

Mark Carlson ([22:46](#)):

Yeah. Well, with any showing where there's people from different households, creates a risk that didn't exist before you went into the house. So the question is, at least in my mind, since we've never in our

history as a nation have dealt with something like this... Perhaps maybe back in 1918, when we had the Spanish flu, of which there's no records as to what agents were doing or not doing back then. And to be quite honest, I'm not even sure if real estate licenses were issued back in 1918, but there really isn't a whole lot of guidance. So it's one of those things where I have to just say, "I don't know," and sorry to sound like an attorney and dodge the question, but I see a lot of causation problems. How can I say, as someone who's infected, that I picked up the virus at a particular showing, and I didn't pick it up at the hardware store or the grocery store or somewhere else that I had been?

Mark Carlson ([23:46](#)):

And that's going to be the difficulty.

Dave Miller ([23:49](#)):

Excellent. Well, that's all I have for today. We're going to do these risk management seminars down the road, and they're going to include property management, disclosure, certain claims that are happening in the marketplace right now. So we wanted to focus on just the CAR forms today and all of those new regulations that we talked about from OSHA and the Department of Public Health. So I appreciate all your feedback on these issues today and look forward to seeing both of you down the road for our next installment.

Mark Carlson ([24:18](#)):

Well, if there's been as much activity in the past three months over the next three months, then we're going to have to do a session two of this to bring everybody up to date, because it's... Again, it changes rapidly.

Laura Prouse ([24:31](#)):

I was just going to say that. Mark, you did a great job of covering everything and making it very... Can't say overly complicated information, but a lot of information, digestible. So thank you for that, and I agree. We'll probably have to do another segment in the near future. But for now, I think we'll just say thank you all for watching and to let you know, this webinar will be available on the CRES insurance website on the homepage. It'll be listed under the claim prevention blog tab. So Mark and Dave, thank you very much, and I'm sure we'll be circling back soon.

Mark Carlson ([24:57](#)):

All right. Thank you for the interview.