

Fair Housing

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Real estate brokers are subject to a web of federal, state and local fair housing laws that are intended to eradicate discriminatory conduct in the sale or rental of dwellings and promote residential integration. The methods of enforcing these laws are varied and the penalties that can be exacted for a violation are severe. For most real estate firms, the practical effect of a finding of liability is a serious financial loss, coupled with public embarrassment and reputational loss. Noncompliance with fair housing laws is a risk that responsible real estate brokers simply cannot assume as a cost of doing business. Thus, to reduce risk, real estate brokers should consider offering comprehensive education and training of all sales associates and staff to ensure a thorough understanding of the obligations and prohibitions outlined in fair housing laws.

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Training Module with 2 Exercises

Fair Housing Laws

Federal Law



The body of federal law that is commonly called the fair housing laws consists of the Civil Rights Act of 1866 and Title VIII of the Civil Rights Act of 1968 (Title VIII).

The 1866 Act provides that:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, sell, hold, and convey real and personal property.



In 1968, the United States Supreme Court held that the 1866 Act prohibits all forms of racial discrimination in real estate, whether committed by government or by private parties. See *Jones v. Mayer*, 392 U.S. 40988 S.Ct. 218620 L.Ed.2d 1189 (1968). Persons suing under the 1866 Act are entitled to recover actual and punitive damages, and their attorney fees and costs.

Title VIII is a comprehensive fair housing law that addresses not only racial discrimination, but also discrimination on the basis of other protected classes: race, color, religion, national origin, sex, handicap¹ and familial status. Title VIII prohibits five different types of discrimination:

- **To refuse to sell or rent, or to otherwise make unavailable, a dwelling because of a person's membership in a protected class**
- **Discrimination in the terms, conditions or privileges of a sale or rental of housing, or in the provision of services in connection with same**
- **Use of advertising that expresses a preference for or against certain persons because of their membership in a particular protected class**
- **Representations that a dwelling is not available for sale or rent, when in fact the dwelling is available**
- **Attempts to induce a person to sell or rent a dwelling by referring to the prospective entry of persons of a particular race, color, sex, religion, national origin, handicap or familial status**

In addition to prohibiting specific practices involving the sale or rental of dwellings, Title VIII also prohibits redlining, including discrimination in financing and insuring of housing, as well as discrimination in access to Boards of REALTORS®, Multiple Listing Services, or other services, organizations or facilities that relate to the business of selling or renting dwellings.

Further, a housing provider may be found to have violated Title VIII through what is known as disparate impact liability. Under disparate impact liability, no intent to discriminate is required. Instead, the housing provider may be in violation of Title VIII where a facially-neutral policy or practice has a disparate impact on one of Title VIII's seven protected classes if the policy or practice is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider or the interest could be served by another practice that has a less discriminatory effect.

Enforcement

The federal government has broad authority to enforce Title VIII. In 1988, Congress amended Title VIII to add handicapped persons and families with children as protected classes, and also to dramatically strengthen the enforcement procedures under Title VIII. A person who believes he or she is a victim of a discriminatory housing practice may bring an action directly in federal court and recover actual and punitive damages, as well as reasonable attorney fees and costs. Also, the United States Attorney General may bring an action where a pattern or practice of discrimination has occurred, as opposed to a single isolated act. The Attorney General may secure injunctive relief

¹ While discrimination against "the disabled" is prohibited by other civil rights laws, the FHA uses the term "handicapped." The two words handicap and disability are used interchangeably throughout this chapter.

and damages for victims of discrimination, together with civil penalties of \$55,000 for a first offense, and \$110,000 for any subsequent offense.

In addition to suing directly in federal court, an aggrieved person — that is, a person who believes he or she has been a victim of discrimination — may file a complaint with the Department of Housing and Urban Development (HUD). In addition to aggrieved persons, fair housing agencies may file complaints if they can show that they devoted significant resources to identify and act against discriminatory practices and did so to the detriment of their other efforts on behalf of equal access to housing. HUD will investigate the complaint to determine whether or not there is reasonable cause to believe that a violation has occurred, and HUD will attempt to resolve the complaint through conciliation. If reasonable cause is found, HUD will issue a charge against the respondent. The respondent, the aggrieved person, and HUD have 20 days to determine whether to resolve the charge before a HUD administrative law judge (ALJ) or before a federal district judge. The matter will be removed to a federal district court if any one of the parties with the right to remove the matter so elects. If no election is made, and the case proceeds before a HUD ALJ, an attorney from HUD will represent the aggrieved party before the HUD ALJ. If the case is removed to a federal district court, then an attorney from the Department of Justice will prosecute the case.

In addition to suing directly in federal court, an aggrieved person may file a complaint with the Department of Housing and Urban Development (HUD).

Both ALJs and federal courts may award the aggrieved person actual damages and issue injunctions to prevent any further discriminatory practices. An aggrieved person may recover attorney's fees as well, in either forum. If the respondent is found to have committed a discriminatory housing practice, a HUD ALJ may also assess civil penalties, if necessary, to vindicate the public interest. These penalties are limited to \$11,000 if there are no prior offenses, \$27,500 if there is one prior offense within five years, and \$55,000 if there are two prior offenses within seven years. But if the prior offenses were committed by the same individual, rather than the same firm, then additional penalties may be imposed without regard to the time limitations. ALJs may also assess multiple civil penalties in cases where multiple violations have occurred. For instance, if a landlord advertises that a property is not available to families with children, the ALJ could assess one penalty against the landlord; if the landlord also unlawfully refuses to rent to a family with children that inquires about the property, the ALJ could assess a second penalty against the landlord.

If the case proceeds to federal court, the judge does not have authority to impose civil penalties, but may impose actual and punitive damages in favor of an aggrieved person shown to have been injured by a discriminatory housing practice; injunctive relief; as well as reasonable attorney's fees and costs to the prevailing party, other than the United States.

State and Local Fair Housing Laws

Title VIII expressly recognizes that state and local governments may also enact fair housing statutes and ordinances. Title VIII authorizes the Secretary of HUD to review state and local ordinances and certify those that are substantially equivalent to Title VIII. If a state or local statute is deemed by HUD to be substantially equivalent to Title VIII, then HUD will refer all complaints it receives from that jurisdiction to the state or local agency for processing. HUD regulations make clear that substantially equivalent state or local statutes may include those that provide broader protection than Title VIII.

Thus, in addition to the seven protected classes under Title VIII, state or local ordinances may include a prohibition against discrimination for additional classes, such as:

- **Age**
- **Source of income**
- **Marital status**
- **Sexual orientation**
- **Occupation**
- **Gender identity**

Conduct Prohibited by the Fair Housing Laws

Refusals to Sell or Rent

Any refusal to sell or rent a dwelling because of race, color, sex, religion, national origin, handicap or familial status violates Title VIII. A refusal to sell can, for example, include applying more stringent qualification criteria for minority prospects than for nonminority prospects or a flat out refusal to sell to a person because of their national origin. Title VIII only applies to discrimination in the sale or rental of dwellings. The 1866 Act applies to the sale or rental of any type of real estate, but only applies to discrimination based upon race.

Steering

Steering is conduct designed to influence a person's housing choice based upon race, religion, sex, color, national origin, handicap or familial status. The classic example of racial steering is a real estate agent directing minority prospects to integrated or all-minority neighborhoods, and white prospects to all-white neighborhoods. Evidence of steering is often gathered through the use of testers. Lawsuits challenging steering are often brought by the testers themselves or the fair housing organizations that employ them.



Blockbusting

Blockbusting, also known as panic peddling, refers to the suggestion, during an effort to solicit a listing, that the seller should sell or otherwise dispose of the property because persons of a particular race, religion, sex, national origin, color, handicap or familial status are moving into the neighborhood. Title VIII specifically prohibits blockbusting. Real estate professionals should exercise great caution when engaging in listing solicitations in neighborhoods known to be experiencing racial transition.



Advertising

While HUD regulations do not require that all advertising of residential real estate for sale, rent or financing include an equal housing opportunity logo, statement or slogan, HUD may view their inclusion as evidence of compliance with the Fair Housing Act's (FHA) prohibitions against discriminatory advertising. HUD regulations do require the prominent display of HUD's fair housing posters, which are available online and from HUD area offices, in the following locations:

- **At brokerage offices and any other places of business where covered dwellings are offered for sale or rent; and**
- **At dwellings under new construction, beginning with the commencement of construction and maintained throughout construction and until such dwellings are sold or rented.**

As a rule of thumb, ads should focus on property descriptions, rather than descriptions of potential buyers or tenants.

Title VIII prohibits the use of advertising that indicates a preference for or against prospective buyers or tenants of a particular race, religion, sex, color, national origin, handicap or familial status. As a rule of thumb, ads should focus on property descriptions, rather than descriptions of potential buyers or tenants. Stating that a property is near a jogging trail (focusing on location) is more acceptable than saying that it's great for joggers (focusing on potential buyer or tenant). Also keep in mind that violations of the Fair Housing Act can occur even when there is no overt discriminatory reference or intent. The determinative consideration is whether a reasonable reader would find the reference discriminatory.

Acknowledging whether or not an advertisement is discriminatory is not always clear, a 1995 Fair Housing and Equal Opportunity Memo was published in order to set forth helpful guidelines that are still applicable today. The following are some of the guidelines regarding acceptable and unacceptable advertising phrases from that 1995 Memo.

The entire 1995 Fair Housing and Equal Opportunity Memo is available at:
www.hud.gov/offices/fheo/disabilities/sect804achtenberg.pdf



Advertising Guidelines for Acceptable/Unacceptable Phrases

RACE, COLOR AND NATIONAL ORIGIN

- **Unacceptable:** Wording that describes the housing, the current or potential residents, and neighbors or neighborhood in racial or ethnic terms (e.g., white family homes, no Irish)
- **Acceptable:** Racially and ethnically neutral terms (e.g., master bedroom, rare find, desirable neighborhood)

RELIGION

- **Unacceptable:** Ads with blatant phrases (e.g., no Jews, Christian home)
- **Unacceptable:** Ads that use the legal name of an entity containing a religious reference (e.g., Roselawn Catholic Home), or a religious symbol such as a cross, unless there is a disclaimer indicating that the property does not unlawfully discriminate
- **Acceptable:** Secular terms such as Merry Christmas, Happy Easter, or images of Santa Claus, an Easter Bunny, or a St. Valentine's Day graphic

SEX

- **Unacceptable:** Ads that indicate a gender preference (e.g., males/females only apply), except where a shared living arrangement applies to the property
- **Acceptable:** Commonly used physical descriptions of housing units which are not preferential or limiting terms (e.g., mother-in-law's suite, bachelor apartment)

HANDICAP

- **Unacceptable:** Ads that disallow handicap accessories (e.g., no wheelchairs)
- **Acceptable:** Phrases which describe a property's features, services, facilities, or neighborhood (e.g., great view, fourth-floor walk-up, walk-in closets, jogging trails, walking distance to bus stop)

FAMILIAL STATUS

- **Unacceptable:** Ads that limit the number or ages of children allowed or express a preference for adults, couples or singles (see Older Persons' Exemption later in this section)
- **Acceptable:** Descriptions of properties, their services and facilities (or lack thereof), or their neighborhood (e.g., two-bedroom, cozy family room, no bicycles allowed, quiet streets)

Ad Placement

Using advertising media solely in selective publications targeted at members of a particular protected class can also lead to discriminatory results and may violate the Fair Housing Act. For example, problems may arise when an advertisement is placed in particular geographic or zoned edition of major metropolitan newspapers or in smaller newspapers that reach a particular segment of the community. Use consistent language about the properties and communities when advertising in several small newspapers that reach different audiences. These principles apply regardless of whether the advertisement is placed in a print or online publication.

Use of Models

Caution should be exercised when using human models in real estate advertising. Courts around the country have held that the use of racially exclusive human models to advertise dwellings may violate Title VIII, and a claim can be successful even when there was no intent to discriminate. HUD regulations state that, if human models are used, the models should reasonably represent the majority and minority populations in the relevant metropolitan area, as well as both sexes and families with children. The ads should indicate that housing is open to all without regard for any protected characteristic.

Using advertising media solely in selective publications targeted at members of a particular protected class can also lead to discriminatory results and may violate the Fair Housing Act.

Target Marketing

Brokers often struggle with how to create an effective marketing plan that focuses on one or more parts of the population without running afoul of the Fair Housing Act. Target marketing is a popular technique used by real estate professionals to drive business, but it can lead brokers astray if they're not careful.

When planning a marketing strategy, brokers should avoid basing their marketing decisions on prospective clients' membership (or nonmembership) in any of the classes protected by the federal Fair Housing Act or by their state or local fair housing laws. For example, brokers should not focus on only Hispanic buyers, to the exclusion of African Americans or Asians or Caucasians. Nor should brokers market their services only to Christians, to the exclusion of non-Christians, or advertise in publications designed to reach seniors, to the exclusion of families with children.

The rule not to market on the basis of membership in a protected class applies even if the protected class is one that the real estate professional belongs to. There is, however, nothing wrong with a broker marketing his or her brokerage as having agents with certain language skills that would be of interest to people of a certain national origin. The broker just needs to be sure that the client's decision to work with his or her brokerage comes from the clients themselves. Brokers should not assign a particular sales associate to represent all members of a group he or she is a member of.

In general, brokers will usually be on safe ground if they niche market in accordance with the rule for composing ads for properties: focus on the property's characteristics, not those of the prospective buyer or tenant. For instance, a niche marketing plan that is based on any of the following property types is perfectly lawful and can be quite effective:

Real estate professionals may market directly to first-time home buyers and clients who are relocating.

- **Luxury communities**
- **Fixer-uppers**
- **Condominiums**
- **Single-family homes**
- **Resort housing**
- **Properties in foreclosure**
- **Homes on the historic register**

An exception to these general rules about focusing on the property characteristics is that, real estate professionals may market directly to first-time home buyers and clients who are relocating. A brokerage may also focus on seniors by developing expertise on issues that are of interest to seniors (for example, retirement planning and reverse mortgages). Brokers should be sure, however, to make their knowledge and services available to anyone who has an interest in them, regardless of age, familial status or any other protected characteristic. Brokers should never refuse or forget to show families with children properties that are not qualified senior housing just because many seniors live there.

Handicapped Discrimination

In 1988, Congress amended Title VIII to include handicapped persons and families with children as protected classes. These amendments took effect on March 12, 1989.

The definition of handicap includes both physical and mental handicaps. Specifically included, according to HUD regulations, are alcoholics and persons with the HIV virus, AIDS, and other communicable diseases. On the other hand, Title VIII specifically excludes from the definition of handicap persons who are current abusers of controlled substances. Nothing in the Fair Housing Act would require a dwelling to be made available to an individual who poses a direct threat to the health and safety of other individuals or whose tenancy would result in substantial damage to the property of others.

HUD regulations state that real estate brokers or agents may not inquire whether a person has a handicap, or the extent of any handicap, in evaluating a person's qualifications to buy or rent a dwelling. A broker or agent may, however, ask questions about a prospect's rental history or other relevant issues — so long as the same questions are asked of every prospect.

Title VIII prohibits property owners from refusing to permit handicapped occupants of a dwelling to make reasonable modifications to a unit, at the tenant's expense, in order to allow the handicapped tenant to fully enjoy the premises. The property owner may, however, condition modifications to the interior of a unit on the tenant's agreement to restore the unit to its original condition when the handicapped person's occupancy ends. The property owner may also require that all modifications be done in a safe and workmanlike manner. Examples of reasonable modifications that must be permitted include:

- **Installation of grab bars around bath tubs and toilet seats**
- **Widening of a door to permit passage of a wheelchair**
- **Installation of a flashing light in lieu of a door bell**
- **Relocation of environmental controls**

In addition to requiring the tenant to agree to pay for the modification and the restoration of the unit, a property owner may, where appropriate, create an escrow account into which the tenant will pay a monthly amount necessary to cover the cost of restoring the interior modifications made by the tenant. While permissible, such escrow accounts should be used only where the modifications are unusual and the expense of restoration is significant. HUD has made clear that it will carefully review the necessity of any escrow account that is the subject of a discriminatory housing practice allegation.

Title VIII also requires property owners, as well as homeowner associations where property is owned, to make reasonable accommodations in any rules or regulations governing the housing development that are necessary to permit the tenant or owner to fully enjoy the premises. In addition, homeowner associations must allow owners to make reasonable modifications to their units to fully enjoy the premises. Examples of reasonable accommodations that must be permitted include:

- **The allowance of a seeing eye dog, notwithstanding a no-pet rule**
- **Assignment of a parking space to a handicapped tenant near the tenant's building entrance, notwithstanding a first-come, first-served policy governing tenant parking**
- **Waiver of a rule banning vans in a building parking lot when a van is necessary to a handicapped person's transportation**

New Construction

Title VIII further provides that all covered multifamily dwellings, must meet certain basic accessibility and adaptability requirements. A covered multifamily dwelling includes all units in a building of four or more dwelling units if the building has an elevator, and ground-floor dwelling units in a building of four or more dwelling units without an elevator.

HUD regulations also define "first occupancy" to mean the building's first use for any purpose. Design and construction requirements do not apply to nonresidential buildings that are rehabilitated for residential use and are first used for residential purposes after March 13, 1991. Simply put, the first occupancy requirements limit the applicability of the design and construction requirements only to new construction.

The design and construction requirements that covered multifamily dwellings must meet include:

- **Public and common use areas that are readily accessible to and usable by handicapped persons**
- **Doors that are sufficiently wide to allow passage by a wheelchair**

HUD regulations state that real estate brokers or agents may not inquire whether a person has a handicap, or the extent of any handicap, in evaluating a person's qualifications to buy or rent a dwelling.

- **The inclusion of the following features of adaptable design:**
 - an accessible route into and through the unit
 - reinforcements in bathroom walls to allow later installation of grab bars around the toilet, tub, shower stall and shower seat, where provided
 - usable kitchens and bathrooms, such that an individual in a wheelchair can maneuver about the space
 - light switches, electrical outlets, thermostats and other environmental controls in accessible locations

HUD's regulations further state that design and construction requirements do not apply to townhouses or other cluster arrangements without elevators, where four or more single-family homes share common walls, and each individual dwelling has two or more stories. In short, HUD has defined a ground-floor unit to mean units where the entire unit is on a ground floor.

Families with Children

Title VIII forbids property owners or agents from refusing to sell or rent a dwelling to an otherwise qualified prospect simply because the prospect has children under the age of 18 in the household. Familial status protection encompasses a parent or guardian who has legal custody, as well as those in the process of acquiring legal custody, of children under the age of 18, and pregnant women.

While Title VIII prohibits discrimination based upon familial status, the statute does not preempt reasonable state or local regulation limiting the number of persons who may occupy a particular dwelling. HUD regulations further provide that when state or local law does not include occupancy limitations, property owners may adopt their own limitations, provided that such limitations do not operate unreasonably to limit or exclude families with children. HUD has stated that an "occupancy policy of two persons in a bedroom, as a general rule, is reasonable" under the Fair Housing Act. (It has also stated that additional occupants might be reasonable if there are additional rooms, like a den or a study.)

HUD regulations further assert that property owners may not establish dual-purpose facilities where certain sections of a housing complex are reserved for adults only and other sections for families with children. Such policies would be analyzed under the same standard as if the segregation were on the basis of race.

On the other hand, HUD regulations state that Title VIII is not intended to limit the ability of property owners to develop and implement reasonable rules relating to the use of facilities associated with dwellings, such as weight rooms, swimming pools or saunas, as long as the rules are based upon legitimate health or safety considerations and are not unduly restrictive. Courts examine whether such rules are discriminatory in the "terms, conditions, and privileges" available to families with children.

Older Persons' Exemption

Notwithstanding Title VIII's prohibition on discrimination against families with children, Title VIII specifically authorizes the exclusion of children from qualified housing for older persons. Qualified housing for older persons includes any housing provided pursuant to a state or federal program designed to accommodate the needs of senior citizens, as well as two other types of housing:

- **Housing intended for, and exclusively occupied by, persons 62 years of age or older**
- **Housing intended for residents age 55 and older, where 80 percent of the units are occupied by at least one person 55 years of age or older per unit, a statement is published by the housing provider that it adheres to policies and procedures that demonstrate the intent to provide for senior housing, and the facility or community complies with HUD's regulatory requirements for age verification of residents**

Title VIII specifically authorizes the exclusion of children from qualified housing for older persons.

To satisfy the age-55-or-over exemption, a property manager must carefully monitor the ages of the occupants in the units to ensure that at all times no less than 80 percent of the units are occupied by at least one person 55 years of age or older. Additionally, the owner must publish and adhere to policies and procedures that demonstrate an intent to provide housing to persons 55 years of age or older. Such policies and procedures include advertising used to market the development, lease provisions, and the development's rules and regulations. Real estate professionals should rely only on the written assertions of owners or managers, that the licensees have seen for themselves, that a property is exempt based on the ages of the residents, and on the existence and enforcement of such policies and procedures.

Prior regulations also mandated that the development provide significant facilities and services specifically designed to meet physical or social needs of persons over 55 years of age. Even though it's no longer required by the FHA, some state laws still require properties to provide significant facilities and services in order to qualify for the 55-or-older exemption.

It is important to note that, while the housing for older persons' exemptions does exempt a housing provider from the prohibition against familial status discrimination, the exemptions do not exempt a housing provider from discrimination based on any other protected characteristic.

Compliance Program

An effective fair housing compliance program consists of four basic components:

- **The firm's policy and public commitment to fair housing**
- **Agent education and training in methods that ensure compliance with the fair housing laws**
- **Regular and systematic documentation of the firm's practice of providing equal opportunity and service**
- **Identification and correction of failures in compliance**

The Firm's Policy and Public Commitment

All REALTORS® and REALTOR-ASSOCIATES® are bound by the REALTOR® Code of Ethics, which prohibits REALTORS® from denying equal professional services to any person for reasons of race, color, religion, sex, handicap, familial status, national origin, sexual orientation or gender identity. The Code, however, does not represent the firm's personal commitment to fair housing. The firm's personal commitment to fair housing, as expressed through a compliance program as outlined in this section, is important for two reasons:

1. There is no obligation for a plaintiff, a tester, or a fair housing agency to give advance warning before it files a complaint. Adoption of a compliance program only after a complaint has been filed will be viewed as self-serving and not reflective of a true commitment.
2. Everyone is presumed to know the legal obligations of fair housing. Thus, simply acknowledging awareness of one's legal duty will not defeat a pattern of practice case, or even a claim for punitive damages. The conduct necessary to overcome such claims must be outward, overt and resolute programs designed affirmatively to ensure compliance with the law. The fact that a company has not yet experienced any fair housing complaints is not a valid reason to avoid public commitment to fair housing compliance.

Over the years, HUD and NAR have developed various mechanisms to demonstrate their commitment to fair housing. The first was the Voluntary Affirmative Marketing Agreement (VAMA) between HUD and NAR, which laid out a number of specific requirements relating to fair housing practices and was replaced in 1996 by the Fair Housing Partnership Agreement (Partnership Agreement). The Partnership Agreement provided for the development of a REALTOR® Fair Housing Declaration (see Figure 6-1) that REALTORS® may use to promote fair housing to the public and within their firms. While the Partnership Agreement is no longer in effect, the Declaration is still relevant and may be used as an important tool to raise awareness and commitment to fair housing.



Figure 6-1 REALTOR® Fair Housing Declaration

REALTOR® Fair Housing Declaration

I agree to:

Provide equal professional service without regard to the race, color, religion, sex, handicap, familial status, national origin, sexual orientation or gender identity of any prospective client, or customer, or of the residents of any community.

Keep informed about fair housing law and practices, improving my clients' and customers' opportunities and my business.

Develop advertising that indicates that everyone is welcome and no one is excluded, expanding my clients' and customers' opportunities to see, buy or lease property.

Inform my clients and customers about their rights and responsibilities under the fair housing laws by providing brochures and other information.

Document my efforts to provide professional service, which will assist me in becoming a more responsive and successful REALTOR®.

Refuse to tolerate noncompliance.

Learn about those who are different from me, and celebrate those differences.

Take a positive approach to fair housing practices and aspire to follow the spirit as well as the letter of the law.

Develop and implement fair housing practices for my firm to carry out the spirit of this declaration.



The implementation of a firm's public commitment begins by creating a written policy. A sample of a company fair housing policy, as well as other helpful information and materials, including the Equal Services Checklist (see checklist on next page), can be found in NAR's Fair Housing Handbook, available at www.store.realtor. Once a brokerage policy is in place, it's critical that the broker make sure that all agents and associates are familiar with and have committed to that policy. The appointment of a "Fair Housing Officer" in a firm can be helpful in this regard, by making someone responsible for the following:

- **Keeping current on developments in fair housing law**
- **Providing fair housing training**
- **Answering fair housing questions**
- **Tracking your company's compliance with fair housing law**

EQUAL SERVICES CHECKLIST



Develop policies or procedures concerning treatment of prospects and clients during their initial contact with your firm.

For example:

- Hospitality (greeting, refreshments, etc.)
- Explaining the services offered by your firm relative to their needs
- Obtaining initial prospect information (name, address, phone number)
- Assignment to agents
- Explaining your commitment to fair housing laws
- Keeping records of these contacts
- Follow-up

Obtain objective information regarding the prospect's or customer's needs and wants.

For example:

- Identify objective needs, such as price, size, features, and location.
- Respond to subjective requests in such a way to elicit objective criteria.
- Determine whether the customer knows what they are financially qualified to buy.

Let the customer set the limits in the housing search.

- Provide prospective buyers and renters with complete and accurate information on the availability of housing, alternative methods of financing, and other facts affecting the choice of location (such as schools, employment or transportation).
- Allow the prospect to make the choices:
 1. Features in a house or apartment
 2. Price
 3. Financing options
 4. Communities or areas

Offer a variety of choices:

- In financing options
- In location
- In types/styles of houses

Require good recordkeeping for all prospects and inquiries:

- Housing requested
- Housing options and alternatives offered
- Service provided

Establish a method of monitoring contacts and evaluating service being provided.

Agent Education and Training

A commitment to fair housing compliance that is not coupled with agent education and training is, at best, a commitment in name only. Remember that a brokerage firm could be held liable for the discriminatory acts of its agents, whether or not the firm has committed to fair housing compliance.

Keeping this in mind, it is the broker's responsibility — and in the broker's best interest — to make sure agents know that:

- **Stereotyping and prejudice have no place in the marketing of real estate**
- **Nondiscriminatory qualification criteria must be applied uniformly**
- **Judgments about whether a prospect will fit in a neighborhood because of the prospect's race, color, religion, sex, national origin, handicap, familial status, sexual orientation or gender identity cannot be a basis for showing or failing to show a particular listing**
- **All prospects must be treated courteously and professionally**
- **All prospects must be given equivalent service and assistance during any showings, and in completing rental applications or offer forms**
- **Failure to adhere to these policies will be grounds for dismissal**
- **Prospective agents who will not commit to these policies will not be hired**

Even the most thorough fair housing training program will fail if the corporate culture does not place a high value on it. This means that the company's officers, or the principal of the firm, must take the program seriously. If management does not take the program seriously, neither will the agents. A company must make noncompliance with fair housing obligations strictly taboo, not merely a calculated risk of doing business.

Lastly, companies should endeavor to educate individual sellers and buyers since they may be the single greatest source of pressure on a broker to discriminate or steer. Sellers must understand that the firm will not accept a listing on those conditions, and a clause to this effect should be included in the listing contract. As to how to handle questions from prospective buyers regarding the ethnic or racial make-up of a community, a smart response would be to direct buyers to other sources of such information.

Documentation of the Firm's Fair Housing Compliance Policy

When confronted with an allegation of a discriminatory housing practice, especially one grounded upon the use of testers, a real estate broker or agent, or their legal counsel, is likely to be presented with detailed written records in which the complainants have identified the specific conduct of the agent that has led to the charge. At a minimum, the complainants will have their own vivid recollection of the events that occurred.

The real estate broker or agent, on the other hand, may only have a hazy memory of the prospect as one of hundreds encountered in the last month or year. The broker or agent may have no written records with which to refresh this recollection or establish that the prospect was in fact afforded equal professional service, unless required to keep them by their brokerage's policies.

For this reason, it is imperative that brokers instruct their agents to keep records of the name, address, phone number and the perceived race and national origin of each prospect, as well as their stated requirements for housing and the price they can afford. To the extent that prospects are willing to see several properties that satisfy their criteria, the agent should record the address of the properties offered to the prospects, whether they were shown, and when they were shown. The form that may be used for this purpose is the Equal Service Report. (See Figures 6-2 and 6-3.)

Properly used, the Equal Service Report, or its equivalent, may provide a strong defense against a charge of steering or disparate treatment. In addition to the Equal Service Report, agents should be instructed to keep records of qualifying information and of when an offer was received. If any standard practices were not followed, or if additional qualifying information was required, the agent should record the reasons why deviations from regular

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office policies occurred. These records should be kept for at least two years, and in many instances, longer in accordance with state law.

Brokers should also consider developing or purchasing a brochure that can be given to all prospective buyers and tenants. The brochure should inform the prospect of laws requiring equal opportunity in housing and the firm's commitment to those policies. A brochure developed by NAR for this purpose is *What Everyone Should Know About Equal Opportunity in Housing*. You can obtain copies of this brochure by going to www.store.realtor.

Brokers should also develop and encourage agents to use a follow-up survey to send to all prospective buyers and tenants who, after two weeks, cease to be in active contact with the firm. The survey should ask the prospect to provide certain data concerning how they were served by the firm. When returned, the data from the survey may provide an early warning of any potential complaints. The survey should also provide a critique of an agent's performance in terms of affording equal service. Finally, the survey may alert the firm to reasons why a prospect found alternative housing, and permit the firm to adjust its own marketing strategies as appropriate.

Identifying and Correcting Failures in Performance

Identifying and correcting failures of performance by agents may be the most difficult component of a fair housing compliance program for a broker to implement, but it is arguably the most important. While a second chance is available in almost every other walk of life, it is not available as a means to avoid legal liability, especially under the fair housing laws.

Brokers must be alert to subtle indications that agents are insensitive to their fair housing responsibilities. Agents who use racial slurs or make excessive use of racial, ethnic or sexual humor, will very likely carry these attitudes into their business affairs. When brokers observe this type of behavior, they should address it immediately by putting the agent on notice that this behavior must change or, if warranted, terminating the agent.

Brokers should also take care to regularly review and modify their procedures to respond to changes in the law and new fair housing issues.



To help avoid legal liability, be alert to indications that agents are insensitive to fair housing responsibilities.



Figure 6-2 Equal Service Report

Instructions

The NATIONAL ASSOCIATION OF REALTORS® is committed to the provision of equal housing opportunities. The Prospect Equal Service Report is designed to incorporate basic prospect information; needs and wants; properties shown; and a record of service provided. This report will help you keep uniform records for all prospects. The form is not a checklist of service to be provided; the level and type of service you provide will be determined by your firm and should be consistent. The report will, however, document your consistency and provide two fair housing tools:

1. It provides you with evidence of your firm's compliance with the law, which may be an invaluable defense in the event you become involved in a housing discrimination complaint.
2. It allows you and your agents to monitor and review compliance with your fair housing policy and make corrections before you get involved in a discrimination complaint.

You should complete or update the report during or following each contact with the prospect. The report is composed of the following components:

- **Prospect Information**

(Space is provided for two adults in a household.)

Recording race or national origin — Recording the perceived race or national origin of a prospect is invaluable in your efforts to document equal professional service and to monitor your firm's compliance with the law and your equal opportunity policy.

- **Prospect Needs and Wants**

(Note: the "Prospect Equal Service Report — Rentals" form is recommended for rental prospects.)

Housing for older persons — If you receive a request for housing for older persons, record whether a member of the household is over age 55.

- **Service Provided** — Complete the questions financially qualifying the prospect, attaching qualification forms, if any. Then list your contact dates with the prospect.

- **Property Shown** — Complete the three sections on the back of the report. Use space provided to indicate prospect's comments, clarifying the prospect's needs and wants.

Part 1 — Record the prospect's initial requests for specific properties and whether these were shown.

Part 2 — List any properties or areas offered for general consideration, such as a computer printout for a specific community.

Part 3 — List properties offered or shown by address. Space is provided to indicate who selected the property shown.

- **Disposition** — Indicate that the prospect bought property or that no further service was provided. List additional materials, such as community profiles or the Home Guide, that you provided the prospect.

Figure 6-2 Equal Service Report, continued

Date:	Sales Associate:	Office:
PROSPECT INFORMATION		
Name:	Name:	
Address:	Address:	
Home phone:	Home phone:	
Work phone:	Work phone:	
<input type="checkbox"/> Owns now <input type="checkbox"/> Rents now <input type="checkbox"/> Must sell to purchase <input type="checkbox"/> Owns now <input type="checkbox"/> Rents now <input type="checkbox"/> Must sell to purchase		
Race/national origin:*		Race/national origin:*
<i>*For affirmative marketing purposes. Information on the perceived race or national origin of the prospect is sought to assist in monitoring the firm's commitment to equal professional service. Article 10 of the NATIONAL ASSOCIATION OF REALTORS® Code of Ethics states in part: REALTORS® shall not deny equal professional services to any person for reasons of race, color, religion, sex, familial status, handicap, national origin, sexual orientation or gender identity. REALTORS® shall not be parties to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, familial status, handicap, national origin, sexual orientation or gender identity.</i>		
Prospect came to us as a result of:		
<input type="checkbox"/> Walk in <input type="checkbox"/> Past customer <input type="checkbox"/> Sign <input type="checkbox"/> www.NAR.REALTOR <input type="checkbox"/> Other website:		
Referral (source):		<input type="checkbox"/> Phone solicitation <input type="checkbox"/> Mail solicitation
<input type="checkbox"/> Ad (source): <input type="checkbox"/> Other:		
PROSPECT NEEDS AND WANTS		
Prospect wishes to: <input type="checkbox"/> Purchase <input type="checkbox"/> Rent <input type="checkbox"/> Possession Date:		
Prospect's price range preference:	Purchase price range:	Rental: (use rental form)
Prospect requested locations:		
Type of home:	# of bedrooms:	# of baths:
<input type="checkbox"/> Dining Room <input type="checkbox"/> Family Room <input type="checkbox"/> Fireplace <input type="checkbox"/> Garage Other features:		
Does prospect desire information regarding housing for older persons? <input type="checkbox"/> Yes <input type="checkbox"/> No		
If so, is any member of prospect's household over 55? <input type="checkbox"/> Yes <input type="checkbox"/> No		
SERVICE PROVIDED		
Was prospect asked questions regarding his/her finances? <input type="checkbox"/> Yes <input type="checkbox"/> No		
If yes, indicate information obtained.		
Income:	Down payment:	Other (specify):
Was prospect offered information on financing options? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Indicate any rate information provided.		
<input type="checkbox"/> Conventional/fixed rate: <input type="checkbox"/> Adjustable rate: <input type="checkbox"/> FHA/VA: <input type="checkbox"/> Other (specify):		
Did you financially qualify the prospect? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Not applicable		
If yes, attach worksheets.		If yes, qualified purchase price:
Did you refer the prospect elsewhere for financial qualification? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Not applicable		
If yes, to whom:		If yes, qualified purchase price:

Continued on the next page.

Figure 6-2 Equal Service Report, continued

Contact Dates and Comments _____

PART 1

Did the prospect initially request information on or ask to view any specific property(s)? Yes No
 (Requests made prior to assistance being provided to the prospect.)

If yes, list address for each request. Include street address, unit # and community. Use additional sheets if necessary.

Price: _____ Was property shown? _____

If shown, buyer's comments indicating preferences. _____

If not shown, why not? _____

Was any written information provided? Yes No

PART 2

Were additional properties or areas offered to the prospect for general consideration? Yes No

List areas of properties. _____

PART 3

List properties shown or offered for consideration, including those selected by prospect. Include street address, unit # and community. Use additional sheets if necessary. In the first column, indicate who selected the property: P = Prospect, A = Real estate agent

Property A _____

Property B _____

Property C _____

Property D _____

Property	P/A	Price	Was property shown?	If shown, buyer's comments indicating preferences. If not shown, why not?	Was written information on property provided?
A					
B					
C					
C					

DISPOSITION

List materials (such as *What Everyone Should Know About Equal Opportunity in Housing*) provided:



Figure 6-3 Equal Service Report — Rentals

Instructions

The NATIONAL ASSOCIATION OF REALTORS® is committed to the provision of equal housing opportunities. The Prospect Equal Service Report is designed to incorporate basic prospect information; needs and wants; properties shown; and a record of service provided. This report will help you keep uniform records for all prospects. The form is not a checklist of service to be provided; the level and type of service you provide will be determined by your firm and should be consistent. The report will, however, document your consistency and provide two fair housing tools:

1. It provides you with evidence of your firm's compliance with the law, which may be an invaluable defense in the event you become involved in a housing discrimination complaint.
2. It allows you and your agents to monitor and review compliance with your fair housing policy and make corrections before you get involved in a discrimination complaint.

You should complete or update the report during or following each contact with the prospect. The report is composed of the following components:

- **Prospect Information**

(Space is provided for two adults in a household.)

Recording race or national origin — Recording the perceived race or national origin of a prospect is invaluable in your efforts to document equal professional service and to monitor your firm's compliance with the law and your equal opportunity policy.

Housing for older persons — If you receive a request for housing for older persons, record whether a member of the household is over age 55.

- **Service Provided/Property Shown**

Indicate prospect's comments clarifying needs and wants.

Application — Record if and when you gave the prospect an application and indicate for which unit. Record if and when the prospect returned the application. Keep the application on file with this report.

Application requirements — Record what applicant requirements were told to the prospect. Indicate any dollar amounts for application fees, credit check fee and deposit. Indicate whether fees were refundable.

- **Disposition** — Indicate that the prospect rented a unit or that no further service was provided. List any additional materials you provided the prospect, such as community profiles or brochures.

Continued on the next page.

Figure 6-3 Equal Service Report — Rentals, continued

Date:	Agent:	Office:			
PROSPECT INFORMATION					
Name:	Name:				
Address:	Address:				
Home phone:	Home phone:				
Work phone:	Work phone:				
Race/national origin:*	Race/national origin:*				
<i>*For affirmative marketing purposes. Information on the perceived race or national origin of the prospect is sought to assist in monitoring the firm's commitment to equal professional service. Article 10 of the NATIONAL ASSOCIATION OF REALTORS® Code of Ethics states in part: REALTORS® shall not deny equal professional services to any person for reasons of race, color, religion, sex, familial status, handicap, national origin, sexual orientation or gender identity. REALTORS® shall not be parties to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, familial status, handicap, national origin, sexual orientation or gender identity.</i>					
Prospect came to us as a result of:					
<input type="checkbox"/> Ad (source):	<input type="checkbox"/> For Rent Sign	<input type="checkbox"/> Website:			
<input type="checkbox"/> Referral (source):	<input type="checkbox"/> Other:				
Prospect is: <input type="checkbox"/> Current Tenant <input type="checkbox"/> Previous Tenant					
PROSPECT NEEDS AND WANTS					
Prospect preferences: _____		Possession date: _____			
Rent range: _____	Size and type of unit: _____	# bedrooms: _____			
Other features: _____					
Does prospect desire information regarding housing for older persons? <input type="checkbox"/> Yes <input type="checkbox"/> No					
If so, is any member of prospect's household over 55? <input type="checkbox"/> Yes <input type="checkbox"/> No					
Requested locations: _____					
SERVICE PROVIDED					
Did the prospect initially request information on or ask to view any specific property(ies)? <input type="checkbox"/> Yes <input type="checkbox"/> No					
If yes, list address for each request. Include street address, unit # and community.					
Property A _____					
Property B _____					
Property C _____					
Property D _____					
Property	Rent	Deposit	Was unit shown?	If shown, prospect's comments and preferences. If not shown, why not?	Application offered?
A					
B					
C					
C					
Did you offer to put the prospect on a waiting list for any property requested? <input type="checkbox"/> Yes <input type="checkbox"/> No					
If so, indicate which properties: _____					
Were other properties offered to the prospect? <input type="checkbox"/> Yes <input type="checkbox"/> No					



CASE SUMMARIES

Broker Liability for Discrimination by Agents

In **Meyer v. Holley**, 537 U.S. 280, 123 S. Ct. 824 (U.S. 2003) — the Supreme Court of the United States ruled that traditional principles of law applied when determining direct and vicarious liability under the FHA. Reversing the appellate court decision, the Supreme Court found there to be no public policy or other reason why the FHA would impose personal liability on a corporate officer, here the broker of a brokerage company, for the acts of an agent.

Questions from and Discriminatory Conduct of Clients

In **Coldwell Banker Real Estate Corp. v. DeGraft-Hanson**, Nos. A03A2032 & A03A2033, 266 Ga. App. 23 (Ga. Ct. App. Mar. 3, 2004), the court ruled that a brokerage is not liable for the discriminatory actions of the seller when the brokerage was not acting in violation of the fair housing laws. When the listing broker brought prospective buyers to the property who were African American, the seller refused entry to the property because of their race and thereafter asked that the listing should state that the property should not be shown to “blacks.” The listing broker told the seller that was illegal and ended its relationship with the seller shortly thereafter. The prospective buyers brought a lawsuit against the listing broker for violating the fair housing laws because of the seller’s actions, but the courts dismissed the lawsuit because there was no evidence that the listing broker had played any role in the seller’s discriminatory conduct.

In **Hannah v. Sibcy Cline REALTORS®**, 769 N.E.2d 876, 147 Ohio App. 3d 198 (Ohio Ct. App. 2001), an Ohio court ruled that a real estate professional does not have a duty to provide information about the racial composition of a neighborhood, even if the client requests the information. Following their purchase of a home, buyers claimed that their salesperson breached her fiduciary duty when she refused to provide demographic information about the town where their home was located. The salesperson told the buyers that the FHA prevented her from sharing this information. The appellate court affirmed the lower court’s ruling in favor of the salesperson.

Disparate Impact Liability

In **Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.**, No. 13-1371, 135 S.Ct. 2507 (2015), the Supreme Court of the United States ruled that a disparate impact theory could be used to prove liability in cases brought under the FHA. A Texas municipality was accused of disproportionately distributing low-income tax credits to predominately black inner-city areas, resulting in a disparate impact on minorities in violation of the FHA. Disparate-impact claims challenge practices of housing providers that have a disproportionately adverse effect on minorities without having to demonstrate that there was intentional discrimination. The Supreme Court stated that a disparate-impact liability theory could be used in FHA cases, but limited its scope in order to ensure that housing providers could still maintain a policy that serves a legitimate business interest. After a plaintiff establishes a prima facie case showing of disparate impact, the burden shifts to the defendant to prove the challenged practice is necessary to achieve one or more substantial, legitimate, non-discriminatory interests. The burden then shifts back to the plaintiff to show the existence of another practice with a less discriminatory effect that would still serve the defendant’s legitimate business interest. In addition, central to this burden-shifting framework is the requirement that a plaintiff be able to show a causal connection between a specific policy or policies of a defendant and the disparate impact.

Pattern of Discriminatory Practice

In ***United States v. Garden Homes Mgmt., Corp.***, 156 F. Supp.2d 413 (D.N.J. 2001), a court determined that a pattern of discriminatory conduct could serve as the basis for FHA liability based on the licensee's conduct. Three apartment complexes under common ownership were investigated by the U.S. Department of Justice and a New Jersey fair housing organization for possible FHA violations. In each of three tests, the white and black testers were treated differently by the leasing agent. The government filed a lawsuit alleging FHA violations, naming the housing complexes and one of its owners individually. The court found that more than one instance of discriminatory conduct could constitute a pattern, and that FHA liability was nondelegable and so an owner could be liable for FHA violations of its rental agent, but the owner can avoid liability if the owner can show that they were not involved in anti-discriminatory conduct. Therefore, the allegations moved to the jury for resolution.

Standing to Sue

In ***NAACP v. City of Kyle***, No. A-05-CA-979 LY, 2006 WL 1751767 (W.D. Tex. June 16, 2006), a Texas federal court ruled that a home builder's trade association had standing to bring a lawsuit over a city's ordinance that allegedly violated the FHA. The city ordinance required that all new homes have certain features such as a garage. These changes caused the entry level price for new homes increase to \$138,000, up from \$100,000. The trade association alleged that the proposed changes would have disproportional adverse effect on minorities because it increased the price of entry level housing. The city filed a motion to dismiss the lawsuit, claiming the association lacked standing to bring a lawsuit against the city for violations of the FHA. The court ruled that the association had standing to sue because: (i) an association has standing if the association's members would be able to bring the lawsuit on their own; (ii) the interests the association seeks to protect are related to the association's purpose; and (iii) neither the claim nor the resolution of the lawsuit involves the actual participation of an association member.

In ***Lane v. Cole***, 88 F. Supp.2d 402 (E.D. Pa. 2000), the court allowed a property guest's lawsuit for violations of the FHA to proceed to trial. Following her rental, a tenant invited to her apartment a friend and her two children, who were black. When the other tenants and the landlord learned the tenant had black visitors, they engaged in threatening behavior to both the tenant and the guests. The tenant and guests brought a lawsuit for violations of the FHA against the landlord. The landlord moved to dismiss the allegations brought by the guests, claiming they lacked standing to bring FHA allegations because they were not the party renting the property. The court ruled that the FHA allows an "aggrieved person," or person who has suffered some type of injury, to bring a lawsuit for FHA violations so long as the discriminatory harm suffered is unique and identifiable. Since the guests had suffered harm from the landlord's discriminatory housing practice of conditioning leasing on the exclusion of black guests, the guests had stated a valid claim under the FHA.

National Origin Discrimination

In ***Housing Rights Ctr. v. Donald Sterling Corp.***, 274 F. Supp. 2d 1129 (C.D. Cal. 2003), a court ruled that a property owner violated the FHA by favoring tenants with a particular national origin over other applicants. A housing group alleged that the landlord violated the FHA because he improperly used national origin as a consideration, as he sought Korean tenants for his apartments. The court found that using "Korean" in building names impermissibly signaled a preference for a certain group, while inquiring about a tenant's national origin could serve no other purpose except a discriminatory one. Therefore, the court entered a preliminary injunction barring landlord from using the word "Korean" in its building names and from inquiring about the national origin of his tenants.

Familial Status Discrimination

In ***United States of America v. Westwater Commons Corp.***, 02 Civ. 5241 (WCC), Consent Decree (S.D.N.Y. filed Nov. 25, 2002), a New York federal court approved a consent decree between the federal government and a co-op building for the co-op's alleged violations of the FHA by denying purchaser's application because she had children living with her who were under 18 years old. The purchaser and her 14-year old were interviewed by the co-op board after her offer to purchase a unit in the building was accepted. The purchaser's unit was above a co-op board of director's unit, and the evidence showed that the only reason her application was rejected was because the board member did not want children living above her unit. The purchaser filed a complaint with HUD, and HUD issued a "Charge of Discrimination" against the co-op board. The purchaser then filed a lawsuit alleging familial status discrimination. The parties agreed to settle the case, and to the entry of a Consent Decree, wherein the co-op was enjoined from any further violations of the Fair Housing Act's prohibition on familial discrimination, and the co-op agreed to pay the purchaser a sum of \$102,500.

Handicap Discrimination Against Disabled Individuals

In ***United States of America v. Space Hunters, Inc.***, No. 00 Civ. 1781 (RCC), 2004 WL 2674608 (S.D.N.Y. Nov. 23, 2004), the court upheld a jury verdict in favor of a deaf individual who was discriminated against when a tenant referral company refused to accept calls from relay operator services. The U.S. Department of Justice filed a lawsuit against the tenant referral company after HUD issued a Charge of Discrimination against the company on behalf of the prospective tenant. The appellate court upheld the jury's finding that refusing to communicate through a relay service constituted intentional discrimination against an individual with a disability.

In ***Giebeler v. M&B Assoc.***, 343 F.3d 1143 (9th Cir. 2003), the court ruled that a tenant's request to have a co-signer on his lease because his disability prevented him from qualifying financially for the apartment was a reasonable accommodation request that the landlord should not have rejected. An individual with AIDS wanted to rent an apartment but he was unable to meet the income requirements because his illness limited his ability to work. The tenant requested that the landlord make an accommodation for his illness by allowing his mother to act as a co-signer on the lease. When the landlord refused, the tenant filed a lawsuit for violations of the FHA. A federal appellate court ruled that the FHA required the landlord to make accommodations in evaluating the financial means of disabled individuals, when such means are directly impacted by the disability. The court found in favor of the tenant because his request was reasonable since he was not seeking to pay the landlord any less money in rent and he was not seeking to alter the obligations of tenancy (i.e., the requirement to pay rent in a timely fashion).

In ***Canady v. Prescott Canyon Estates Homeowners Assoc.***, 60 P.3d 231 (Ariz. Ct. App. 2002), the court ruled that senior living communities are not immune from the FHA prohibition on discrimination against individuals with disabilities. An elderly couple entered into an agreement to purchase a unit in a senior living community, and they planned to live with their severely disabled 26-year old son, but were denied because the community had a rule that no one under the age of 55 could live in the community. The parents and the seller then filed a complaint and eventually a lawsuit against the community, alleging disability discrimination. The trial court dismissed the lawsuit because there is an FHA exemption for qualified "housing for older persons," but the appellate court reversed and reinstated the case, finding that while there is an exemption from charges of discrimination based on familial status, nowhere in the FHA is there an exemption for handicap discrimination by a "housing for older persons" community.

In ***Marks v. BLDG. Mgmt. Co.***, No. 99 CIV 5733 (THK), 2002 WL 764473 (S.D.N.Y. Apr. 26, 2002), the court ruled that a landlord does not have to make economic accommodations to individuals with disabilities. A tenant living in a rent-controlled apartment in New York City told the building management company that her AIDS diagnosis required her to live in warmer climates during the winter and that she would sublet her apartment during that time. The property manager prohibited subletting of apartments, and rejected the tenants request for accommodation to sublet the apartment. When she sublet the apartment, the landlord began eviction proceedings against the tenant. The court ruled that The court found in favor of the landlord because the tenant's accommodation request had nothing to do with her AIDS and instead was motivated by her economic situation and the FHA did not require the landlord to grant the tenant's accommodation request.

Which Act Applies?

The following cases look at how to determine which of the federal statutes that prohibit discrimination against the disabled is applicable: the Fair Housing Act (FHA), the Americans with Disabilities Act (ADA) or the Rehabilitation Act (Rehab Act).

In **Robinson v. Gorman**, 145 F. Supp. 2d 201 (D. Conn. 2001), a landlord refused to reasonably accommodate a tenant with a disability by permitting an aide to live with her. The court ruled that:

1. Tenant's claims could not be brought under state or federal fair housing laws because tenant's unit was in an owner-occupied building with only two units. Under the federal FHA, there is an exemption for owner-occupied buildings with no more than four units; under state fair housing laws, the exemption applied to owner-occupied buildings with no more than two units.
2. The ADA was not applicable because it only governs discrimination in "places of public accommodation," like a hotel or inn, not residential housing.

However, the court determined that tenant's claims could be heard under the Rehab Act. The Rehab Act provides that "no otherwise qualified individual with a disability ... shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving" federal funding. Since the landlord received federal rent payments for the premises, the court held that tenant's lawsuit should be allowed to proceed.

In **Hanks v. Tilley**, 15 Nat'l Disability L. Rep. §155 (M.D.N.C. 1999), a tenant who at times required a wheelchair, requested permission to install temporary ramps, a removable above-ground swimming pool and a portable whirlpool on the leased property, all at her own expense. When the landlord refused to allow such improvements, the tenant sued, claiming that the landlord's failure to allow her to make reasonable modifications to the property was unlawful under the ADA.

The trial court granted the landlord's motion to dismiss, holding that Title III of the ADA does not apply to residential housing, but only to "places of public accommodation" such as hotels, motels, convention centers, restaurants, schools and other facilities accessible to the public. The court addressed the possibility of the tenant having brought her claim under the FHA, instead of the ADA, but concluded that the tenant would not have been successful there either because of the exemption for landlords who do not own more than three single-family residences.



Resources

NAR's Field Guide to Fair Housing

www.nar.realtor, see "Library" section to access Field Guides

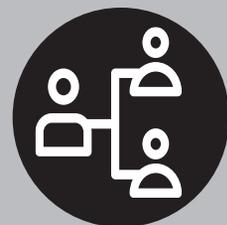
NAR's Field Guide to Complying with the Americans with Disabilities Act (ADA)

www.nar.realtor, see "Library" section to access Field Guides

At Home with Diversity

www.nar.realtor/designations-and-certifications/at-home-with-diversity

Fair Housing



Talking Points

- Real estate brokers are subject to federal, state and local fair housing laws. These laws are intended to eradicate discriminatory conduct in the sale or rental of dwellings.
- Serious financial loss plus public embarrassment and reputational loss are practical effects of a finding of liability for most real estate firms.
- Fair housing cases are sometimes excluded from errors and omissions insurance policies.
- The available risk reduction techniques available include comprehensive education and training of all sales associates, adoption of a strict fair housing compliance policy, and action to ensure that salespeople adhere to that policy.
- 3. Use of advertising that expresses a preference for or against persons of a particular race, color, religion, sex, national origin, handicap or familial status.
- 4. Representations that a dwelling is not available for sale or rent, when in fact the dwelling is available.
- 5. Attempts to induce a person to sell or rent a dwelling by referring to the prospective entry of persons of a particular race, color, sex, religion, national origin, handicap or familial status.

Fair Housing Laws that Apply to Real Estate Brokers

Federal Law

Fair housing laws consist of:

- Civil Rights Act of 1866, 42 U.S.C. § 1982 (hereinafter the 1866 Act) — Prohibits all forms of racial discrimination in real estate, whether committed by government or by private parties. Persons suing under the 1866 Act are entitled to recover actual and punitive damages, and their attorney fees and costs.
- Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* (hereinafter, Title VIII) — Addresses not only racial discrimination, but also discrimination on the basis of religion, color, national origin, sex, handicap and familial status. Five types of discrimination are prohibited:
 1. Refusal to sell or rent or to otherwise make unavailable a dwelling because of a person's protected characteristic.
 2. Discrimination in the terms, conditions or privileges of sale or rental of housing or in the provision of services in connection with the same.
- Title VIII also prohibits redlining, including discrimination in financing and insuring of housing, as well as discrimination in access to REALTOR® boards and associations, MLSs, or other services, organizations, or facilities that relate to the business of selling or renting dwellings. Title VIII prohibits actions that have a disparate impact on persons of a protected class.

Enforcement

- Congress amended Title VIII to add handicapped persons and families with children as protected classes.
- A person who believes he or she is a victim of discriminatory housing practices may bring action in federal court and recover actual and punitive damages, as well as reasonable attorney fees and costs.
- The United States Attorney General may bring an action where a pattern or practice of discrimination has occurred, as opposed to a single isolated act.
- In addition to suing directly in federal court, an aggrieved person may file a complaint with the Department of Housing and Urban Development (HUD).
- Fair housing agencies may file complaints if they can show that they devoted significant resources to identify and act against discriminatory practices and did so to the detriment of their other efforts on behalf of equal access to housing.

- Both HUD administrative law judges (ALJs) and federal courts may award the aggrieved person actual damages and issue injunctions to prevent any further discriminatory practices. An aggrieved person may recover attorneys' fees as well.
- If the respondent is found to have committed a discriminatory housing practice, an ALJ may also assess civil penalties.
- Additional civil penalties may be imposed in an amount based on whether the individual has been adjudged to have committed a discriminatory housing practice and when such discriminatory practice occurred.
- If the case proceeds in federal court, the judge does not have authority to impose civil penalties, but may impose punitive damages in favor of an aggrieved person shown to have been injured by a discriminatory housing practice.

State and Local Fair Housing Laws

- State and local statutes may include broader coverage than Title VIII.
- If a state or local law is deemed by HUD to be substantially equivalent to Title VIII, then HUD will refer all complaints from that jurisdiction to the state or local agency.
- State or local ordinances may include coverage for discrimination based upon additional classes, such as:
 - Age
 - Source of income
 - Marital status
 - Sexual preference
 - Occupation

Conduct Prohibited by the Fair Housing Laws

Refusals to Sell or Rent

- **Violation of Title VIII** — Any refusal to sell or rent a dwelling because of race, color, sex, religion, national origin, handicap or familial status. This can include applying more stringent qualification criteria for minority than non-minority prospects.
- **Violation of 1866 Act** — Refusal to sell or rent any type of real estate because of race.

Steering

- Conduct designed to influence a person's housing choice based upon race, religion, sex, color, national origin, handicap or familial status.
- Evidence of steering is often gathered through the use of testers.
- Testers can bring lawsuits challenging steering themselves or through the fair housing organizations that employ them.

Blockbusting

- Also known as panic peddling.
- Blockbusting refers to the suggestion, during an effort to solicit a listing, that the seller should sell or otherwise dispose of a property because persons of a particular race, religion, sex, national origin, color, handicap or familial status are moving into the neighborhood.
- Blockbusting is specifically prohibited by Title VIII.

Advertising

- HUD regulations do not require that advertising of residential real estate for sale or for rent, or for financing, include an equal housing opportunity logo, statement, or slogan as a means of advising homebuyers and sellers of their fair housing rights. However, HUD may view their inclusion as evidence of compliance with the Fair Housing Act's prohibitions against discriminatory advertising.
- HUD regulations do require prominent display (for example, businesses, individual, and new construction dwellings for sale or rent) of HUD's fair housing posters, which are available from HUD area offices and contain a fair housing slogan and logo.
- Title VIII prohibits use of advertising that indicates a preference for or against prospective buyers or tenants of a particular race, religion, sex, color, national origin, handicap or familial status.
- Ads should focus on property descriptions, and not on the potential buyer.

Advertising Guidelines for Acceptable/ Unacceptable Phrases

Race, Color and National Origin

- **Unacceptable:** Words describing the housing, current or potential residents and neighbors, or neighborhood in racial or ethnic terms (for instance, white family homes, no Irish).
- **Acceptable:** Racially neutral terms (including master bedroom, rare find, desirable neighborhood).

Religion

- **Unacceptable:** Ads with blatant phrases (such as no Jews, Christian home). Ads that use the legal name of an entity containing a religious reference (for instance, Roselawn Catholic Home) or a religious symbol (like a cross) unless there is a disclaimer indicating that the property does not unlawfully discriminate.
- **Acceptable:** Secular terms (like Merry Christmas, Happy Easter) or images (such as Santa Claus, Easter Bunny, St. Valentine's Day graphics).

Sex

- **Unacceptable:** Ads that indicate a gender preference (such as male/females only apply) except where there are shared living arrangements.
- **Acceptable:** Commonly used physical descriptions of housing units that are not preferential or limiting terms (for instance, mother-in-law's suite, bachelor apartment).

Handicap

- **Unacceptable:** Ads that disallow handicap accessories (for instance, no wheelchairs).
- **Acceptable:** Phrases that describe a property's features, services, facilities, or neighborhood (including great view, fourth-floor walk-up, walk-in closets, close to parks, close to public transportation).

Familial Status

- **Unacceptable:** Ads that limit the number or ages of children allowed or express a preference for adults, couples or singles.
- **Acceptable:** Descriptions of properties, their services, facilities (or lack thereof), their neighborhood (for instance, two-bedroom, cozy family room, no bicycles allowed, quiet streets).

Ad Placement

- **Do not** use advertising media in selective publications.
- **Do** use consistent language about the properties and communities when advertising in several small newspapers that reach different audiences.

Use of Models

- When using human models in advertising, make special efforts to use models from various protected classes and who are representative of the community.

Target Marketing

- Brokers should be sure not to base their company's marketing decisions on prospective clients' membership (or non-membership) in any of the classes protected by the Fair Housing Act or by their state or local fair housing laws.
- It is acceptable for a broker to market their company as having licensees with certain language skills that would be of interest to people of a certain national origin.
- Brokers should not assign a particular sales associate to represent all members of a group that he or she is a member of; the decision to work with a brokerage and/or a sales associate should come from the clients themselves.
- It is appropriate to create niche marketing on the basis of a property's characteristics. The following list includes some examples:
 - Luxury communities
 - Fixer-uppers
 - Condominiums
 - Single-family homes
 - Resort housing
 - Properties in foreclosure
 - Homes on the historic register
- Real estate professionals may market directly to first-time home buyers and clients who are relocating.
- Brokerages can focus on senior citizens by developing expertise on issues that are of interest to seniors (for example, retirement planning, and reverse mortgages). However, this knowledge must also be made available to anyone who expresses interest, regardless of age and familial status.
- Never refuse or forget to show families with children properties that are not qualified as senior housing just because many seniors live there.

Handicapped Discrimination

- Title VIII was amended in 1988 to include handicapped persons and families with children as protected classes.
- Definition of handicap includes the following:
 - Physical handicaps
 - Mental handicaps
 - Alcoholics
 - Persons with the HIV virus, AIDS
- Definition of handicap excludes:
 - Current abusers of controlled substances
 - Persons presenting a current threat to the health, safety or property of others
- Real estate brokers or agents may not inquire whether a person has a handicap, or the extent of any handicap, in evaluating a person's qualifications to buy or rent a dwelling.
- If the same questions are asked of every person, a broker or agent may ask questions about a prospect's rental history or other relevant information.
- Title VIII prohibits property owners from refusing to permit handicapped occupants of a dwelling to make reasonable modifications to a unit, at the tenant's expense, to allow the handicapped tenant to enjoy the premises fully.
- The property owner may condition modifications to the interior of a unit on the tenant's agreement to restore the unit to its original condition when the handicapped person's occupancy ends. The property owner may require all modifications be done in a safe and workmanlike manner.
- Examples of reasonable modifications that must be permitted include the following:
 - Installation of grab bars around bathtubs and toilet seats
 - Widening of a door to permit passage of a wheelchair
 - Installation of a flashing light in lieu of a doorbell
 - Relocation of environmental controls
- A property owner may, where appropriate, create an escrow account into which the tenant will pay a monthly amount to cover the cost of restoring the interior modifications made by the tenant. This type of escrow account should be used only when the modifications are unusual and the cost of restoration is significant.

- Title VIII also requires property owners and homeowner associations to make reasonable accommodations in any rules or regulations governing housing developments that are necessary to permit the tenant to enjoy the premises fully.
- Examples of reasonable accommodations that must be permitted include the following:
 - The allowance of a seeing eye dog, notwithstanding a no-pet rule
 - Assignment of a parking space to a handicapped tenant near the tenant's building entrance, notwithstanding a first-come, first-serve policy governing tenant parking
 - Waiver of a rule banning vans in a building parking lot when a van is necessary to a handicapped person's transportation

New Construction

Covered Multifamily Dwelling — A building of four or more dwelling units if the building has an elevator.

Ground Floor Dwelling — A building of four or more dwelling units without an elevator.

"First Occupancy" — The building's first use for any purpose.

The design and construction requirements that covered multifamily dwellings must meet include the following:

- Public and common use areas readily accessible to and usable by handicapped persons
- Doors that are sufficiently wide to allow passage by a wheelchair
- The inclusion of the following features of adaptable design:
 - An accessible route into and through the unit
 - Reinforcements in bathroom walls to allow later installation of grab bars around the toilet, tub, shower stall and shower seat, where provided
 - Usable kitchens and bathrooms, such that an individual in a wheelchair can maneuver about the space
 - Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations
- These requirements do not apply to townhouse or other cluster arrangements without elevators where four or more single-family homes share common walls

Families with Children

- Title VIII forbids property owners or agents from refusing to sell or rent a dwelling to an otherwise qualified prospect because the prospect has children under the age of 18 in the household.
- Familial status protection encompasses a parent or guardian who has legal custody of children under the age of 18, as well as pregnant women.
- HUD regulations provide that when state or local law does not include occupancy limitations, property owners may adopt their own limitations, provided that such limitations do not operate unreasonably to limit or exclude families with children.
- HUD regulations also state that property owners may not establish dual-purpose facilities where certain sections of a housing complex are reserved for adults only and other sections for families with children.
- Title VIII not intended to limit the ability of property owners to develop and implement reasonable rules relating to the use of facilities associated with dwellings, such as weight rooms, swimming pools, or saunas, as long as they are based upon legitimate health or safety considerations and are not unduly restrictive.

Older Persons' Exemption

- Title VIII specifically authorizes the exclusion of children from housing for older persons.
- Housing for older persons includes any housing provided pursuant to a state or federal program designed to accommodate the needs of senior citizens. The older person exemption also includes the following types of housing:
 - Occupied solely by persons 62 years of age or older
 - Where 80 percent of the units are occupied by at least one person 55 years of age or older per unit, and for whom the development is intended and marketed as housing for persons 55 or older
- Property owners must do the following:
 - Carefully monitor the ages of the occupants in the units to ensure that, at all times, no less than 80 percent of units are occupied by at least one person who is 55 years of age or older
 - Publish and adhere to policies and procedures (for instance, advertising used to market the development, lease provisions, and the development's rules and regulations) that

demonstrate an intent to provide housing to persons 55 years of age or older

- Real estate professionals should rely only on the written assertions of owners or managers, that the licensees have seen for themselves, that a property is exempt based on the ages of the residents and on the existence and enforcement of such policies and procedures.
- Prior regulations mandate that the development provide significant facilities and services specifically designed to meet physical or social needs of persons over 55 years of age. Congress removed the facilities and services language from the regulations in 1995.
- Some state laws still require properties to provide significant facilities and services to qualify for the 55-or-older exemption.

Program for Compliance

Effective program of compliance consists of the following components:

- A firm's policy and public commitment to fair housing
- Agent education and training in methods that ensure compliance with the fair housing laws
- Regular and systematic documentation of the firm's practice of affording equal opportunity and service
- Identification and correction of failures in performance

The Firm's Policy and Public Commitment

- All REALTORS® and REALTOR-ASSOCIATES® are bound by the REALTOR® Code of Ethics, which requires REALTORS® to provide equal professional services to all persons. The Code, however, does not represent a firm's personal commitment to fair housing.
- A firm's personal commitment to fair housing is important for two reasons:
 1. There is no obligation for a plaintiff, a tester, or a fair housing agency to give advance warning before it files a complaint. Adoption of a compliance program only after a complaint has been filed will be properly viewed as self-serving and not reflective of a true commitment.

2. Everyone is presumed to know the legal obligations of fair housing. Thus, simply acknowledging awareness of one's legal duty will not defeat a pattern of practice case, or even a claim for punitive damages. The conduct necessary to overcome such claims must be outward, overt and resolute programs designed affirmatively to ensure compliance with the law. The fact that a company has not yet experienced any fair housing complaints is not a valid reason to avoid public commitment to fair housing compliance.
- The implementation of a firm's public commitment begins by creating a written policy. Then a firm must make sure that all agents and associates are familiar with and have committed to that policy.
 - Appoint a Fair Housing Officer for the firm who is responsible for the following items:
 - Keeping current on developments in fair housing law
 - Providing fair housing training
 - Answering fair housing questions
 - Tracking the company's compliance with fair housing law

Agent Education and Training

- The legal doctrine of respondeat superior (which makes an employer responsible for the conduct of its employees) may render a company liable for discriminatory acts committed by its agents regardless of whether the company has committed itself to fair housing compliance.
- Make sure agents know the following:
 - Stereotyping and prejudice have no place in the marketing of real estate.
 - Nondiscriminatory qualification criteria must be applied uniformly.
 - Subjective judgments about whether a prospect will fit in a neighborhood cannot be a basis for showing or failing to show a particular listing.
 - Judgments about whether a prospect will fit in a neighborhood because of the prospect's race, color, religion, sex, national origin, handicap or familial status cannot be a basis for showing or failing to show a particular listing.
 - All prospects must be treated courteously and professionally.
 - All prospects must be given equivalent service and assistance during any showings and in completing rental applications or offer forms.

- Failure to adhere to these policies will be grounds for dismissal.
- Prospective agents who will not commit to these policies will not be hired.

Documentation of the Firm's Fair Housing Compliance Policy

- When confronted by allegations of discriminatory housing practice, remember the following:
 - Complainants will most likely provide detailed written records identifying the specific conduct of the broker or agent that led to the charges. Brokers or agents, however, may be likely to have a hazy memory and may not have written records to refresh his or her memory.
- Brokers must instruct agents to keep records of the names, addresses, phone numbers, and the perceived race of prospects, as well as their stated requirements for housing and the price they can afford. The agent should record the address of the properties offered to the prospects, whether they were shown, and when they were shown.
- If properly used, the Equal Service Report, or its equivalent, should provide a strong defense against a charge of steering or disparate treatment.
- Agents should also be instructed to keep records of qualifying information and when an offer was received. If any standard practices were not followed, or if additional qualifying information was required, the agent should record the reasons why deviations from regular office policies occurred.
- Brokers should keep records for at least two years.
- Brokers should develop a brochure informing prospective buyers and tenants of laws requiring equal opportunity in housing and the firm's commitment to those policies. NAR's brochure, *What Everyone Should Know About Equal Opportunity in Housing* is a good example.
- Brokers should develop, and encourage agents to use, a follow-up survey to send to all prospective buyers and tenants who, after two weeks, cease to be in active contact with the firm. The survey should ask the prospect to provide certain data concerning how he or she was served by the firm.
 - The data from the returned surveys should provide an early warning of any potential complaints.
 - The data should also provide critiques of agents' performances in terms of affording equal service.

- Survey results should alert the firm to reasons why a prospect found alternative housing, and permit the firm to adjust its own marketing strategies as appropriate.

Identifying and Correcting Failures in Performance

- Brokers must be alert to subtle indications that agents are insensitive to their fair housing responsibilities.
 - Agents who use racial slurs, or make excessive use of racial, ethnic or sexual humor will very likely carry these attitudes into their business affairs.
 - Short cuts, such as qualifying prospects on a hit or miss basis may also indicate an agent's insensitivity to his or her responsibilities.

- When brokers observe this type of behavior, they should address it immediately.
- Agents who engage in this conduct should be counseled, put on notice that this behavior must change, and, if necessary, asked to leave the firm.
- Brokers should regularly review and modify their procedures to respond to changes in the law and new fair housing issues.

Situational Questions and Answers

Situation

- Jane Jones, who has a hearing disability, is a tenant of ABC Properties, which has a *strict* no-pets policy.
- Jane has asked to be exempted from this policy so that she can utilize an assistance dog in her apartment.
- This dog would help Jane by alerting her when the doorbell and phone ring. (Jane has a device that allows her to utilize the phone once she knows it has rung.)
- The property manager of ABC Properties, Jack Smith, has refused Jane's request, noting that an exception to the no pets policy would only be made in the case of a seeing-eye dog.

Question

Has Jack done anything wrong in refusing Jane's request?

Answer

- Jack violated the Fair Housing Act by refusing to provide a *reasonable accommodation* to a tenant with a handicap.
- Permitting Jane to keep an "assistance dog" in her unit would have imposed *no undue financial or administrative burden and would not have undermined the basic purpose* of the no-pets policy.
- Jack's failure to provide this reasonable accommodation *subjects the owner of ABC Properties to liability* under the Fair Housing Act.

Situation

- Irving Patel contacts Bob Broker for help in finding a home to purchase.
- Bob perceives Irving as being of East Indian descent.
- Bob takes Irving and his family to five or six homes, all of which are located in areas with high concentrations of East Indian residents.
- When Irving asks why Bob has only shown him homes in these areas, Irving replies: "I thought these were the neighborhoods you would feel most comfortable in!"

Question

Has Bob done anything wrong by making this assumption?

Answer

- Bob's assumption, which is based on his perception of Irving's national origin, unlawfully limits the Patels' housing choice.
- Bob failed to ask Irving to specify which neighborhoods he was interested in.
- Bob has violated the Fair Housing Act by steering.