

FAIR HOUSING LESSON 8

I. Course Outline and Objectives

This section of the course consists of the following topics:

- A. Introduction to fair housing
- B. Fair housing and working with sellers
- C. Fair housing and working with buyers
- D. Fair housing and advertising
- E. Fair housing complaint procedures and penalties.

The objectives of this part of the course will be to briefly discuss the history of fair housing; list the classes protected under the Federal fair Housing Act and local fair housing laws and regulations; identify potential steering situations and suggest ways to avoid them; examine advertising terms, phrases, symbols, and so on, that do not convey discriminatory preferences or impose limitations; and point out potential fair housing penalties and damages.

II. Introduction to Fair Housing

Fair housing is the legal tenet that every person has the same opportunity to purchase, lease, and occupy residential property. To this end, certain activities are prohibited by fair housing laws. These activities include

1. refusing to show, sell, or rent a property
2. treating different people differently when showing, selling, or renting property
3. inducing panic selling or blockbusting
4. steering
5. employing discriminatory advertising or using discriminatory statements
6. using threats or interfering with someone's fair housing rights.

To maintain an environment of affording all people equal housing opportunities, federal fair housing laws prohibit discrimination based on seven human characteristics. These are race, color, religion, sex, sexual orientation (transgender) handicap, familial status, and national origin. A way to remember these protected classes is with the sentence **REALTORS** (race) **can** (color) **really** (religion) **sell** (sex) **houses** (handicap) **fast** (familial status) **now** (national origin). In addition to the above, Colorado laws (1) state that "housing" includes both residential and commercial property and (2) prohibit discrimination based on creed (belief or a set of fundamental beliefs), ancestry (line of descent), and marital status. Note that creed, ancestry, and marital status are not found in Federal Fair Housing Laws, and that housing providers in Colorado may discriminate on the basis of marital status if they are complying with local zoning ordinances.

Several Colorado cities have local fair housing laws granting protections over and above state and federal law.

Denver includes sexual orientation (transgender), military status, parenthood and age (over 40).

Aspen includes affectional or sexual orientation (transgender), political affiliation, age, and family responsibility.

Boulder includes sexual orientation, (transgender), pregnancy and parenthood.

Crested Butte includes sexual orientation, (transgender), political affiliation, age, and family responsibility.

Telluride includes sexual orientation, gender (including pregnancy and childbirth) age, family responsibility, military status, and political affiliation.

Question: Do you believe you are in one or more of the classes protected by either federal or local law?

Answer: You are. Everyone is protected by fair housing laws. These laws don't exist for someone else, they exist for all of us.

Familial Status

Discrimination based on familial status would include such things as singling out families with children under the age of 18 living with parents or legal guardians, people securing custody of children under 18, and pregnant women.

Handicapped

Note that the Fair Housing Act uses the term **handicapped** rather than **disability**. Although the two terms may be thought of as being the same, handicapped is used with the Fair Housing Act, which obviously applies to housing, whereas disability is used with the Americans with Disabilities Act (ADA), which applies to employment and commercial establishments. Handicapped, as used in fair housing, refers to someone with a physical or mental impairment seriously limiting a major life activity, with a record of such an impairment, or who is regarded as having such an impairment. Some examples of handicapped people would be those with difficulties in walking, seeing, or hearing; those with heart disease, cancer, cerebral palsy, multiple sclerosis, diabetes, AIDS, HIV, mental illness; and those who have successfully completed or are participating in a drug treatment program.

The following are not considered to be disabled under federal law: transvestites, users of illegal substances, smokers, and people who pose a threat to the health and safety of others.

Fair Housing Exemptions

There are no exemptions to the Civil Rights Act of 1866, which prohibits discrimination based on race. Again, that law states that "all citizens of the United States shall have the same right to inherit, purchase, lease, sell, hold and convey real and personal property as is enjoyed by white persons." Thus discrimination based on race or color is always illegal.

There are, however, exemptions to the Fair Housing Act of 1968. The following are exempted from coverage: FSBOs, Mrs. Murphys, religious organizations and private clubs, and housing for older people.

For Sale By Owner Exemption

The law does not apply to an individual selling his/her own property as long as

- 1) the owner does not own, or have any ownership interest in, more than three single-family houses at any one time,
- 2) the house is sold or rented without the use of a real estate agent, broker, or any other person in the business of selling or renting dwellings,
- 3) the owner does not reside in the property at the time of sale, and was not the most recent resident prior to sale (This exemption applies to only one sale in a two year period.), and
- 4) the house must be sold or rented without using discriminatory advertising.

Mrs. Murphy's Exemption

The Mrs. Murphy's exemption applies to an owner-occupied building with four or fewer units. That is, if an owner lives in a dwelling of four or fewer units, the Fair Housing Act of 1968 does not apply. However, the house must be sold or rented without using discriminatory advertising.

NOTE: The FSBO and Mrs. Murphy exemptions do not apply to advertising. It is always unlawful to use discriminatory advertising or statements.

Religious Organizations and Private Club Exemption

Religious organizations or private clubs owning dwellings may limit the sale, rental, or occupancy of those dwellings to members. Exempted dwellings may not be used for commercial purposes, and membership must not be restricted because of race, color, or national origin.

Housing for Older People

Housing for older people is also exempt from the Fair Housing Act of 1968. To qualify, such housing must meet one of the following three criteria:

- 1) it must be senior housing provided under federal or state programs,
- 2) it must be housing intended for and solely occupied by persons 62 years old or older,
- 3) it must be housing intended and operated for occupancy by people 55 years of age or older.

Qualifying as 55 and Over Housing

To qualify as housing for people 55 years old and older, the following conditions must exist:

- 1) at least 80 percent of the occupied units must be occupied by at least one person 55 years old or older,
- 2) the housing or community must publish and comply with policies that demonstrate the intent to be housing for older people,
- 3) the housing or community must comply with HUD rules for verification of occupancy.

Any agent selling property in a community for older persons should obtain written verification from the community that all rules and regulations are being complied with, lest the community later lose its status as one for older people. When marketing property for people 55 and over use the term "senior housing" or "55 and over housing," rather than "adult housing." The term adult does not necessarily mean someone over 55.

III. Historical Background

Today's federal fair housing laws are a culmination of many earlier laws and constitutional rights ensuring us all of the rights we deserve. Looking briefly at the history of federal fair housing laws helps us understand fair housing as it exists today. (This discussion looks briefly at those declarations and laws that helped bring about fair housing, not at those that impeded such progress.)

Declaration of Independence

The Declaration of Independence affirms "that all men were created equal."

13th Amendment

The 13th Amendment guaranteed everyone due process and equal protection under the law.

Civil Rights Act of 1866

The Civil Rights Act of 1866 states that “all citizens of the United States shall have the same rights to inherit, purchase, lease, sell, hold and convey real and personal property as is enjoyed by white persons.” The intent of the statute is to prohibit discrimination based on race or color in real estate transactions. Although it does not address religion, sex, national origin, and so on (these come later), it does prohibit all discrimination based on race and color. Even though this law had the teeth to eliminate discrimination, it was unused until the case of Jones vs. Mayer in 1968.

Jones vs. Mayer

The case of Jones vs. Mayer resurrected the Civil Rights Act of 1866. The case involved a builder who refused to sell a house to a qualified black person. The builder was not only required to sell to the buyer, but at the previous price. The Supreme Court ruled that in that case that the intent of Congress when passing the Civil Rights Act of 1866 was to prohibit any discrimination based on race or color in real estate transactions

Federal Fair Housing Law of 1968

The Federal Fair Housing Law of 1968 was the first of a comprehensive set of statutes governing private and public housing in the country. Whereas the Civil Rights Act of 1866 prohibits discrimination on the basis of race alone, the Fair Housing Law of 1968 prohibits discrimination on the basis of race, color, religion, and national origin.

Fair Housing Act Amendments

In 1974, an amendment to the Fair Housing Act made “sex,” whether male or female, a protected group. In 1988 “handicap” and “familial status” were added by amendment.

IV. Working With Sellers

Though unusual, there are times when a seller may ask an agent not to show a house to a member of a protected class. Always keep fair housing issues in mind when working with sellers. To this end, let's look at the following case study.

Case Study

(This case study is paraphrased from NAR's Fair Housing Study Book.)
An elderly Caucasian couple lists their home for sale at \$130,000 with sales associate Smith. They wish to move into a condominium. Their home, an older structure in good condition, is in a neighborhood where many Italians live. After an open house, Smith receives two offers to purchase the home. The first is from Mr. and Mrs. Jorge Rivera; the second, from Mr. and Mrs. Tony Castiglione. The first offer is full price; the second, \$123,500. The Riveras were prequalified, they want to close as soon as possible, and their offer does not include an inspection contingency. The Castiglione's offer is contingent on the sale of their home, which has been on the market for six months, and on a satisfactory inspection. The sellers instruct Smith to communicate their acceptance of Mr. and Mrs. Castiglione's offer.

Case Study Discussion Questions

Q. Do you suspect discrimination? If so, why; if not, why?

A. Yes. It appears that the sellers' decision to accept the Castiglione offer isn't based on financial reasons.

Q. How would you handle the situation?

A. Smith should first discuss the superior value of the first offer, and remind the sellers that even if the Castigliones sell their home, their contract would close later than the Riveras because of the home-sale contingency. Then Smith should ask the sellers why the clearly superior offer is being rejected, and listen, without interruption, to their response. After hearing their response, if a discriminatory reason is given, or if the rationale is not reasonable, Smith should remind the sellers of their obligation to comply with fair housing laws as discussed when the listing was taken and agreed to in writing in the listing contract. Smith should document all facts and circumstances in an effort to protect him (her)self against possible future charges of being party to discriminatory practices. Before informing the Castigliones that their offer has been accepted, and before informing the Riveras that theirs has been rejected, Smith should discuss the circumstances of the situation with the broker. Proper guidance in responding to the buyers should be obtained before notifying them. It might be that the broker would want to talk to another authority to determine how to best protect all innocent parties. A seller is entitled to know who submits a contract. However, sometimes a seller will ask questions about a buyer's identity to obtain information about the buyer's race, color, religion, handicap status, sex, sexual orientation, (transgender), familial status, or national origin. A seller cannot use this information to discriminate. Sales associates should identify home buyers only by their name, occupation, present residence, or other qualities not relating to a protected class.

Case Law—HUD v. Banai (This case is paraphrased from NAR's Fair Housing Study Book.) In HUD v. Banai, the Banais hired Sylvia Arias, a rental agent the Manhattan Group Real Estate, to rent their home in Florida. Arias showed the home to an interested couple. She then called the Banais to inform them of the interested prospects. Mrs. Banai asked if the interested couple were black. Arias responded that they were, whereupon Mrs. Banai stated her refusal to rent to black people. Arias responded saying "We are not supposed to discriminate in that way," and relayed the incident to her broker. The broker informed Arias that the firm would have to terminate the listing agreement because it could not be a party to discriminatory practices. The listing was terminated, but Arias continued to work independently with the Banais.

The results of the case were that the Administrative Law Judge (ALJ) found the Banais in violation of the Fair Housing Act and ordered them to pay the complainants damages in the amount of \$70,000 and a civil penalty of \$10,000 to HUD.

The ALJ found that by answering the question about the complainants' race, Arias had "facilitated and participated in Mrs. Banai's refusal to rent to the complainants," thereby violating the Fair Housing Act. However, there was no evidence to suggest that Arias was a willing accomplice in the discrimination. In fact, she tried to dissuade Mrs. Banai from her decision, and she continued to assist the complainants in their housing search.

Arias was ordered to pay a civil fine of \$100 and attend fair housing training. Because Arias was employed by Manhattan, Manhattan was also vicariously liable for Arias' actions.

The ALJ found Manhattan less culpable than Arias, because it tried to dissuade Mrs. Banai from carrying out the discrimination, and when unsuccessful in that attempt, it terminated the agency relationship with the Banais. As the ALJ pointed out, there was nothing else the brokerage firm could have done. A civil penalty was not imposed on Manhattan because it immediately took appropriate action to disassociate itself from the Banias.

This decision marks the first time an ALJ found a sales associate in violation of the Fair Housing Act based on truthfully answering a landlord's inquiry about a prospect's race.

Case Law Discussion Questions

Q. Why is it dangerous to answer a seller's questions about a buyer's race?

A. Because now we have case law clearly indicating it is a violation of fair housing laws to truthfully answer an inquiry from a question about a prospect's race.

Q. What should you do if a seller asks you a question about a potential buyer's race?

A. Remind the seller of fair housing laws, and tell the seller you have no basis on which to answer that question because the law requires you to be color blind. If the seller pursues that line of questioning, cancel the listing. Moreover, you must support the buyer's efforts to fight discrimination.

Q. What else might indicate that Arias discriminated?

A. The fact that Arias continued to work with Banais, even after their discriminatory behavior.

Listing Procedures

Listing presentations provide an ideal opportunity for agents to discuss fair housing with sellers. The residential Exclusive Right-to-Sell Listing Contract (Agency) in Section 23 states that "The parties agree not to discriminate unlawfully against any prospective buyer because of the race, creed, color, sex, sexual orientation, (transgender) marital status, national origin, familial status, physical or mental handicap, religion or ancestry of such person." All other listing contracts also have nondiscrimination paragraphs, though they may be different section numbers. This nondiscrimination section should be gone over before the listing is signed, thus ensuring that your seller understands that a potential buyer can not be excluded based on a protected class. When obtaining a listing, always be sure to express a commitment to abide by fair housing laws, and obtain the seller's written commitment to abide by those laws (this is done by their signing the listing contract). When a seller refused to commit to abide by fair housing laws, an agent has no choice other than to refuse the listing. Any such a refusal by a seller must be reported to the broker. A seller may commit to fair housing laws upon signing the listing agreement and later endeavor to break those laws. Agents must recognize that sellers refusing to allow their property to be shown to someone in a protected class, or refusing to accept an bona fide offer from someone in a protected class is in violation of the law. Again, such behavior must be communicated to the broker, and if the behavior cannot be changed, the listing terminated. Keep in mind that sometimes discriminatory acts or statements may be very subtle. If discrimination is suspected, talk to the broker.

Reporting Acts of Discrimination

When it appears that a seller is violating fair housing laws, to protect the potential buyer's rights and to be sure to avoid being seen as participating in discriminatory acts yourself, take the following steps.

What to do if:

The discriminating party is your client or not the client of anyone else.

Talk to the party who appears to be violating the law, and explain fair housing laws to that person. Ask that person to act in a non-discriminating fashion. This often resolves the matter and results in the home buyer obtaining access to housing as guaranteed by fair housing laws. Follow up with a letter summarizing your discussion.

The discriminating party is the client of another sales associate.

Talk to your broker. Either your broker or you should then talk to the other sales associate, and explain your concerns. Ask the other sales associate to ask their customer or client to stop the discriminatory behavior. Always follow up with a letter to the other associate summarizing the discussion, and always keep a copy of the letter.

The discrimination does not ended, and the discriminating party is your client.

Talk to your broker. Terminate the listing and end all business association with the discriminating party. Inform the buyer of what has occurred, and tell him/her you believe discrimination has taken place. Give the buyer information about where to file a complaint. Send follow-up letters to the client and the home buyer summarizing the discussions and actions taken.

The discrimination has not ended, and the discriminating party is not your client.

Talk to your broker. Inform the home buyer of what has occurred, and tell him/her you believe discrimination has taken place. Give the buyer information about where to file a complaint. Send a follow-up letter to the buyer summarizing the discussion. *The discrimination has not ended, and the discriminating party is another agent.* If the agent is a REALTOR, in addition to the above, file an ethics complaint with your local board alleging a violation of Article 10 of the NAR Code of Ethics. If the other agent is not a REALTOR, follow the above scenarios.

(Information about where to file complaints, etc will be provided in the **Complaint Procedures and Penalties** section.)

Protecting Your Fair Housing Rights

You may also have a cause of action against the discriminating party enabling you to file a complaint on your own behalf. Discrimination may be reported to HUD, state and local government human or civil rights agencies, or private fair housing groups. You may contact HUD at 800-669-9777.

Condominiums, Cooperatives, and Homeowner Associations

Federal fair housing laws apply to all residential property and vacant land that can be used for housing. Thus condominiums, cooperatives and houses in homeowner associations are covered. Condominium or homeowners associations, then, may not approve or disapprove buyers or residents based on race, color, religion, sex, handicap, familial status, or national origin. Furthermore, an association's bylaws and other restrictions may not limit the rights of persons to housing or its facilities because of race, color, and so on. Associations are subject of "reasonable accommodation" and "reasonable modification" provisions of the Fair Housing Act with regard to the disabled. Associations may claim the Housing for Older Persons exemption and lawfully exclude families with children if the association and property meet the previously discussed requirements of the exemption.

Deed and Property Covenants or Restrictions of Record

Historically some people have placed restrictions of property based on race, color, religion, sex, handicap, familial status, or national origin. These restrictions are void and unenforceable, with the exceptions for particular types of religious and private club housing and housing for the elderly. The publication of these void restrictions may, however, suggest to some people that the restrictions remain valid. To clarify matters, when asked to provide a copy of the covenants or restrictions of record relating to the use of property, include a message like the following:

These documents may contain restrictions or covenants based on race, color, religion, sex, handicap, familial status, or national origin. Such restrictions or covenants generally are void and unenforceable as violations of fair housing laws.

Be assured that all property is marketed and made available without discrimination based on race, color, religion, sex, handicap, familial status, or national origin. Should you have any questions regarding such restrictions, please contact your attorney.

Any attempt to limit your rights to housing because of race, color, religion, sex, handicap, familial status, or national origin should be immediately reported to your real estate broker.

Advertisement and Promotion

Fair housing prohibits the marketing, printing, or publishing of any statement or advertisement relative to the sale or rental of housing that expresses a preference or exclusion based on race, color, religion, sex, handicap, familial status, or national origin. Whether an advertisement or statement violates fair housing laws is often a matter of interpretation and intent, and very difficult to determine. If in doubt, ask whether the ad or statement expresses, or appears to do so, either a preference for a particular group at the expense of a protected group, or the exclusion of a protected group. A tip is to focus on describing the property, not on describing the purchaser, renter, seller, owner, or neighborhood. Consider an ad that says "Well-kept 3 bedroom home. Great for empty nesters. Close to" or "Well-kept 3 bedroom home. Super location for mature person. Close to" or "Retire in style in this well-kept 3 bedroom home. Close to" Could such an advertisement violate the Fair Housing Act?

The question should be answered in the context of whether the ad intends to exclude, limit, or show a preference for prospects of a protected class. For example, does the writer intend to communicate that children are not welcome? If so the ad would be in violation of the Fair Housing Act.

The question should also be answered in the context of whether the message could be interpreted as an expression of a preference for a particular group at the exclusion of a protected group, or an exclusion of a protected group. Could the phrase "retire in style" reasonably be viewed as a preference for a person in a particular age category or without children?

If a "reasonable" person with children thinks the ad communicates a preference based on familial status, the law has been broken. A "reasonable" person would be one who thinks like the broadest spectrum of the group.

Jancik v. HUD

Jancik v. HUD addressed alleged violations of the Fair Housing Act based on racial and family status discrimination. Jancik owned a building in a large housing complex in suburban Chicago. He placed an advertisement that held the phrase "mature person preferred." Suspecting a fair housing violation, a group promoting fair housing called the Leadership Council for Metropolitan Open Communities decided to "test" the property. Gunderson, a white female, spoke with Jancik by phone, communicating that she was 36 years old. Hearing that, Jancik said "that's good—I don't want any teenagers in there." Jancik then asked Gunderson to disclose her national origin, to which she replied "Norwegian." Jancik asked if she was "black Norwegian or white Norwegian." Gunderson asked if Jancik was inquiring about her race, and he replied that he was. They arranged to meet the next day. Two hours later, Allen, an African-American female, phoned Jancik. Jancik asked her about her occupation, income, age, marital status, race, and whether she had children or pets. Allen did not reveal her race, but asked Jancik why he needed that information. He said he had to screen applicants because the building's tenants were middle-aged. He could not allow any one who made a lot of noise or had children or pets. Allen told him she had neither children nor pets, and arranged to meet with Jancik the next day.

When the testers arrived at the building the next day, both were told the unit was rented. The Council filed a complaint with HUD violations of advertising rules regarding familial status, and violations of interviewing rules regarding race and familial status. The Administrative Law Judge (ALJ) found that Jancik violated the Fair Housing Act, awarded damages, and assessed a civil penalty. Jancik appealed. The appellate court found that the Fair Housing Act prohibits making or publishing any statement or advertisement indicating any preference based on race or familial status. The standard used

to determine if a particular group is preferred in advertising for housing was the "ordinary reader" standard. An advertisement need not blatantly express a preference. An ad is considered to be in violation of the law if it would discourage an ordinary reader of a protected group from answering it. The court found that the "mature person" phrase discriminated against the familial status protected class. The court also noted Jancik's statement that he did not want families with children in the building.

With regards to the racial claim, the court found that Jancik did not expressly indicate a racial preference, but that his racial questions indicated an intent to discriminate. Because of his racial questions, and because he had never rented to a black person, Jancik was found by the court to have discriminated on the basis of race too. The ALJ's findings were affirmed.

Visual Presentation in Advertisements

The Fair Housing Act also applies to human models used in advertising. Human models must not suggest a preference or limitation based on race, color, religion, sex, handicap, familial status, or national origin. When models are used, they should reasonably represent the groups in the community, people of both sexes, families with children, and people with disabilities. Models should be cast in equal social settings, indicating that housing is open to all without regard to race, color, religion, sex, handicap, familial status, or national origin.

Example

Consider an advertisement for a townhome community running on consecutive Sundays in a local newspaper showing multiple photographs of young, Caucasian, single persons obviously living in and very much enjoying the townhome community. Does such an advertisement convey discriminatory preferences or limitations?

Answer

Probably so. To know for sure we would ask the following questions.

First, if there is no intent to discriminate, would people who are not Caucasian and who do not have children consider the advertisement discriminatory?

Second, does the advertisement suggest a preference for Caucasians and people without children?

Third, does the advertisement suggest a preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin?

If the advertisement does any of these, it would be considered discriminatory.

Target Marketing and Fair Housing

Most experienced agents will agree that target marketing is an efficient way to reach potential buyers for a listed property.

Target marketing, however, requires much more care when marketing a home than when marketing a pair of shoes. You can't "just do it." When marketing a home it is likely the agent will give thought to the type of person most likely to buy. When targeting potential buyers always be aware of whether race, color, religion, sex, familial status, handicap, or national origin are issues, since targeting on the basis of these is illegal.

Which of the following are illegal target marketing?

- 1) Advertising only in select editions of the newspaper.
- 2) Advertising only in areas populated by particular racial, ethnic or religious people.
- 3) Advertising only in small papers or free journals because these cater to particular racial, ethnic or religious people.

Which are illegal target marketing? All of them. The operative word in the above examples is "only." Obviously it may be wise to advertise in small papers or journals that target only particular groups, but such advertising should be done in conjunction with advertising in less limiting publications. It is legal to target only senior citizens, as expressed earlier, as long as the previously mentioned criteria are met. When advertising, remember that what is intended may not matter; instead, what may matter is how people view or interpret the information in the ad.

The REALTOR® Code of Ethics

REALTORS must abide by the Code of Ethics of the National Association of REALTORS as well as by fair housing laws.

Article 10 of the NAR Code of Ethics forbids REALTORS from denying equal professional services to anyone because of their race, color, religion, sex handicap, familial status, or national origin. Neither shall any REALTOR be a party to any plan or agreement to discriminate against any protected class.

Moreover, Standard of Practice 10-1 of the NAR Code of Ethics states that no REALTOR shall volunteer any information regarding the racial, religious or ethnic composition of a neighborhood or engage in any activity that may bring about panic selling. It goes on to say that REALTORS shall not print, display, or circulate any statement or advertisement with respect to the selling or renting of property that indicates any preference, limitation or discrimination based on race, color, religion, sex, sexual orientation, (transgender), handicap, familial status, or national origin.

Target Marketing Case Study

Mary listed a house that she suspects will sell to an older couple. She advertises the property in a popular senior citizen newspaper in the area. This is the only advertisement she runs. Another agent, Paula, listed a house very similar to Mary's listing. Paula, too, suspects that her listing will be purchased by an older couple. She advertises in the same paper as did Mary, and in a variety of other papers. Mary gets 3 call from senior citizens; Paula gets several more calls from senior citizens, couples with young children, and single people.

Q. Is there a violation of fair housing laws?

A. Mary may be violating fair housing laws. Since the publication advertised in is known to have a significant senior readership, advertising in that publication alone can be taken as showing a preference for senior buyers. Thus Mary's actions can be interpreted as discriminatory in an attempt to exclude families with children from responding and purchasing the property. (Moreover, Mary may be seen as violating agency laws as well, because her advertising campaign is not an effort to reach the largest possible number of buyers.) In addition Mary's advertisement stated that the house was "a rare find for a senior couple."

Q. Might that statement be discriminatory?

A. Yes, based on familial or marital status.

VI. Working With Buyers

When working with sellers, the listing presentation, signing of the listing contract, and so on are usually handled in a rather formal manner, making discussions about fair housing easy to segue to. Meeting new buying prospects, however, can be much less formal, causing agents to overlook the importance of fair housing discussions up front. Consistency can be established and maintained by using standard procedures when first talking with potential buyers. For example, a policy might properly be to discuss agency and fair housing, and execute proper forms and contracts, even though the agent or potential buyer may want to proceed on an informal basis.

Buyer Agency

Being a buyer's agent does not change an agent's obligations to fair housing practices. Although the buyer's agent has a fiduciary responsibility to the buyer, this does not preclude the legal obligation to act according to fair housing laws. It is always recommended that a buyer's agent always address fair housing with the buyer, as is done in the Commission approved buyer agency agreement. It is also recommended that the agent neither disclose nor talk about information regarding any protected class, other than to say the law prohibits such discussions.

The following is language suggested by the National Association of REALTORS to be presented to buyers:

It is the policy of (firm name) to abide by all local, state, and federal fair housing laws and not discriminate against any individual or group of individuals. The agent has no duty to disclose the racial, ethnic, or religious composition of any neighborhood, community, or building, now whether persons with disabilities are housed in any home or facility, except that the agent may identify housing facilities meeting the needs of a disabled buyer.

One might consider substituting “*The agent has no duty to disclose the . . .*” with “The agent shall not disclose . . .”

Moreover, one might consider including the other protected groups in the statement. If a buyer continues to ask about the racial or religious composition of a neighborhood, for example, refer the buyer to an appropriate source, such as census tract data, school districts, governmental offices, etc.

Situation

You are working with a buyer whom you suspect is being discriminated against. Do you report the discrimination? If so, why?

The answer is that you are required by law to report the discrimination. You have both a fiduciary duty to the buyer and an obligation to uphold fair housing laws. Understand that you must provide equal professional service to all.

Megan’s Law

Megan’s Law is a federal statute requiring sex offenders to register with local police so a potential buyer or renter can determine if such a person lives in an area. If a potential buyer asks if a sex offender lives in an area, you probably don’t know. You can, however, refer the prospects to the local police, where such information is on file.

Steering

Steering occurs when an agent makes choices for or assumptions about a prospective buyer based on race, color, national origin, religion, familial status, sex, or handicap, or on perceived changes in the composition of a community and attempts to guide or “steer” the prospect in certain directions as a result. Any time an agent shows a potential buyer homes in some areas or neighborhoods and not in others when not receiving guidance from the buyer, the agent may be steering or be thought to be steering. (Obviously the appearance of steering can be as detrimental to one’s career as steering itself.) To be safe, always act consistent with the knowledge that it is never the agent’s job to make decisions for a buyer, but rather to provide the buyer with information and choices to help the buyer make his or her decision. The agent should act as a problem solver, not a decision maker.

City of Chicago v. Matchmaker Real Estate Sales Center Inc.

This case involves two communities, Chicago Lawn and West Lawn, separated by railroad tracks. The homes in both communities are very similar. The average sale price for a three bedroom home in Chicago Lawn was around \$50,000, and the average price in West Lawn, \$70,000. At the time of the dispute, West Lawn was a stable neighborhood and was over 95 percent Caucasian. Chicago Lawn, at that time, was changing racially from Caucasian to Hispanic and African American residents.

Caucasian and African-American testers were sent into Matchmaker and asked to see three-bedroom homes. All teams had similar incomes and were similarly qualified to purchase a home. All asked to see three-bedroom homes in Chicago Lawn at a cost of about \$65,000. In test one (there were five over all) the teams asked to see three-bedroom homes in Chicago Lawn that were selling for about \$65,000. The same sales associate worked with both sets of testers. The Caucasian testers were told about and shown homes in only West Lawn; the African-American testers were told about and shown homes only in Chicago Lawn. This pattern continued in subsequent tests over an 11 month period. In one instance the sales associate even made comments about the changing racial makeup of the Chicago Lawn community.

The court found that the sales associates and firm discriminated on the basis of race because of unequal treatment. The associates and firm were ordered to pay monetary and punitive damages. In addition, the sales associates and broker had to pay the complaining party's attorneys' fees.

Whereas the broker was not assessed punitive damages, in part because of his attempts to implement fair housing policies in the firm and community, he was held liable for the sales associates' discriminatory behavior.

Q. In this example, how could discrimination have been avoided?

A. The following would have helped the firm avoid discrimination:

The establishment of systematic procedures that offers a variety of choices and assure that the customer/client sets the limits. The establishment of record maintenance, documentation, and examination systems to pinpoint and correct problems. While the sales associates at Matchmaker did collect objective information, such as price, down payment, general location, and so on, they neither allowed the buyers to set all their own limits, nor offered the buyers a full range of choices. Often Caucasian requested homes in a price range that existed only in the Chicago Lawn (racially mixed) area, and the agents didn't give the Caucasians the choice of seeing them. At the same time, African-American testers were routinely steered to residences below their price range in the racially-mixed area.

VII. Complaint Procedures and Penalties

What To Do When Rights Have Been Violated

Anyone who thinks they are suffering from housing discrimination may fill out a Housing Discrimination Complaint form (available through downloading), write HUD a letter, or telephone the HUD Hotline. The complaint should be filed within one year after the alleged violation, but should be filed as soon as possible.

The Housing Discrimination Form or letter should be sent to:

U.S. Department of Housing and Urban Development 451 7th Street S.W.,
Washington, DC 20410 Telephone: (202) 708-1112 TTY: (202) 708-1455

Calls may be made to the toll-free Hotline number: 1-800-669-9777, or one may call the Colorado Civil Rights Division at 1-800-262-4845, or for the hearing impaired, 1-800-927-9275.

What Happens When a Complaint is Filed?

HUD will notify you upon receiving the complaint. Normally, HUD will also notify the alleged violator and permit that person(s) to submit an answer and investigate the complaint and determine whether there is reasonable cause to believe the Fair Housing Act has been violated. If HUD cannot complete an investigation within 100 days of receiving the complaint, the person filing will be so informed.

If a complaint is justified, HUD will try to reach an agreement with the person complained against. Any conciliation agreement must protect the one filing the complaint and the public interest. If an agreement is signed, HUD will take no further action on the complaint. If HUD has reasonable cause to believe that a conciliation agreement is breached, it will recommend that the Attorney General file suit.

If HUD has determined that the State or local agency has the same fair housing powers as it does, HUD will refer a complaint to that agency for investigation and notify the person filing the complaint of the referral. The agency receiving the referral must begin work on the complaint within 30 days or HUD may take back the complaint.

What If Immediate Help Is Required?

If immediate help is needed to stop a serious violation of the Fair Housing Act, HUD may authorize the Attorney General to go to court to seek temporary or preliminary relief, pending the outcome of a complaint. This can be done if (1) irreparable harm is likely to occur without HUD's intervention or (2)

there is substantial evidence that a violation of the Fair Housing Act has occurred. For example, if a builder agrees to sell a house, but after learning the buyer is black refused to honor the agreement, after receiving the buyer's complaint, HUD may authorize the Attorney General to go to court to prevent a sale to another buyer until HUD investigates the complaint.

What Happens After the Investigation?

If after investigating a complaint, HUD finds reasonable cause to believe that discrimination has in fact occurred, it will inform the person complained against (respondent). The case will be heard in an administrative hearing within 120 days, unless either side wants the case heard in Federal district court. In either case, there is no cost to the person making the complaint (complainant). If the case goes to an administrative hearing, HUD attorneys litigate on behalf of the complainant, unless the complainant wants his own attorney. An Administrative Law Judge will consider the evidence from both sides. If the evidence suggests discrimination has occurred, the respondent can be ordered to:

1. compensate for actual damages, including humiliation, pain, and suffering;
2. provide injunctive or other equitable relief, such as making the house available to the complainant; pay the Federal Government a civil penalty, not to exceed \$10,000 for a first violation and \$50,000 for a
3. third violation within seven years, to vindicate the public interest; and
4. pay reasonable attorney's fees and court costs.

If either the complainant or respondent choose to go to Federal District Court, the Attorney General will file a suit and litigate it on the complainant's behalf. Just as with an Administrative Law Judge, the District Court can order relief, award actual damages, and attorney's and court costs.

In addition, the complainant may file suit, at his expense, in Federal District or State Court within two years of an alleged violation. If the complainant cannot afford an attorney, the Court may appoint one. A suit may be brought even after filing a complaint if no conciliation agreement has been signed and an Administrative Law Judge has not commenced a hearing. A court may award actual and punitive damages and attorney's fees and costs.

Remedies and Penalties

Damages and Injunctive Relief: Damages are money recoverable by one suffering a loss or injury due to breach of contract. Actual damages are those that are a direct result of a wrong, as opposed to special or punitive damages which are awarded as a punishment or deterrent to the wrongdoer. Actual damages can be levied by both administrative and federal courts. They include-out-of-pocket costs, such as additional costs incurred by the plaintiff in obtaining alternate housing or in required rents. Actual damages can also be injuries, such as humiliation, emotional distress, mental anguish, and so on.

Injunctions are actions in which a court forbids someone from doing something or forces someone to do something. They may be temporary, permanent, or mandatory. Injunctions may be issued by a court of law to prevent additional discrimination from taking place. For example, a temporary or permanent injunction may forbid a property owner from selling or renting a property until a case in question is settled. A mandatory injunction may require a wrongdoer to take steps to prevent an illegal action from happening again. A real estate firm, for instance, might be required to establish office procedures, keep adequate records, and provide adequate training to prevent future illegal discrimination.

Civil Remedies: An administrative law judge may award actual damages plus a civil penalty of a \$10,000-\$50,000 fine, depending on the number and type of prior offenses; a court may award actual and punitive damages plus a \$50,000-\$100,000 fine, depending on the number and type of previous offenses. Civil penalties are paid to the U.S. Treasury, not the aggrieved person.

Criminal Remedies: For failure to appear or to produce under a subpoena, or for producing false or incomplete documents, a fine up to \$100,000 and one year of imprisonment may be imposed. If there is intimidation by force or threat, a fine up to \$1,000 and one year imprisonment may be levied; if there is bodily injury, a fine of up to \$10,000 and 10 years imprisonment (up to life if death results) may be imposed.

Civil Rights Commission Remedies: The Civil Rights Commission may order (1) the property that has been denied to be sold or rented to the complainant, (2) reinstatement and back pay to a person fired or discriminated against because that person complied with the law, and (c) a financial institution to grant financing, actual damages, and fines from \$10,000-\$50,000.

Court Remedies: Courts may award injunctive relief, may impose the same orders as the Civil Rights Commission (covered above), and may impose punitive damages.

VIII. Office Provisions and Requirements

There are several general office matters that require concern relative to fair housing laws. For example, your office should have the fair housing poster displayed in a conspicuous place; the fair housing logo should be on your business cards; the fair housing logo should be included in your ads in magazines, grocery stores, and malls; and the fair housing logo should be on your listing brochures?

IX. Working with the Public

Your office policy should address fair housing and equal opportunity. Does your policy forbid or encourage certain acts or procedures relative to fair housing? Sometimes, it's not what you do, but what you don't do. We sometimes treat people differently not out of malice, but out of practice. Numerous studies done about the treatment of minorities and women have shown that they do not receive the same amount of time, information or sales effort from real estate agents as do white male prospective clients and customers. The same evidently holds true for the disabled.