SECTION ONE

2013-2014 BROKER-IN-CHARGE ANNUAL REVIEW COURSE

FAIR HOUSING REVIEW

Outline:
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Fair Housing
Federal and North Carolina Fair Housing Laws
Federally Non-Protected Class
"Handicapping Condition" and Reasonable Requests
HUD Occupancy Standards
Current Status of Fair Housing Violations
Recent HUD Administrative Actions
Fair Housing Considerations in Advertising

Learning Objective: Upon completing this Section, brokers should have a revived understanding of state and federal fair housing laws, whether involving the sale or rental of property for themselves or for others, particularly if engaged in residential property management either directly or through unlicensed salaried employees of the broker, as well as their responsibility as brokers-in-charge for the acts of their associated agents and the company's potential civil liability arising from its associated agents' conduct and advertising.

INTRODUCTION

This Section will first review applicable federal and state fair housing laws, how they differ, what reasonable accommodations or modifications might include, HUD's position regarding reasonable occupancy standards, a summary of several administrative actions initiated by the U.S. Department of Housing and Urban Development (hereinafter HUD) in the past two years, and a brief review of recommended guidelines in advertising to avoid fair housing violations.

Are brokers-in-charge responsible for their associated agents' compliance with fair housing laws and rules? Perhaps more so for provisional brokers, since brokers-in-charge are responsible for basically *everything* a provisional broker does. Why? Because unlike "full" brokers, provisional brokers may only be on active status when they have a supervising broker-in-charge. Under **Rule A.0506(d)** that broker-in-charge:

> "*...shall* ***actively and directly supervise*** *the provisional broker* in a manner which reasonably assures that the provisional broker performs all acts for which a real estate license is required in accordance with the Real Estate License Law and Commission rules. *A supervising broker who fails to supervise a provisional broker as prescribed in this Rule may be subject to disciplinary action by the Commission*."

[Italics added.]

Further, **Commission Rule A.1601** plainly states: "Conduct by a licensee which violates the provisions of the State Fair Housing Act constitutes improper conduct in violation of G.S. 93A-6(a)(10)." G.S.93A-6(a)(10) states that the Commission may discipline a licensee if it adjudges the licensee to be guilty of: "any other conduct which constitutes improper, fraudulent or dishonest dealing."

Understand that ***state and federal fair housing laws apply to ALL individuals***; all are enjoined from violating these laws and may be subject to civil sanctions for transgressions. Brokers who violate fair housing proscriptions may be subject to disciplinary action under Rule A.1601 and G.S. 93A-6(a)(10) in addition to incurring civil liability for their acts. A *broker-in-charge*, as a representative of the company, *has an interest, if not duty, to ensure that* ***all licensees affiliated with the company are conducting brokerage in accordance with applicable laws and rules*** *not merely to avoid disciplinary action, but to minimize the possibility of the company incurring* ***civil liability*** *for the acts of its agents*, regardless of whether the broker-in-charge has any ownership interest in the company.

FAIR HOUSING

Hopefully by now most brokers understand the limitations imposed *on everyone* by fair housing laws and regulations when advertising properties for residential lease or sale. Even if a property owner falls within an exemption that allows him/her to legally "discriminate in his/her heart," they still may not "publish" that intent or prejudice by articulating it either orally or in writing. In other words, ***no one may announce an intent to discriminate based on a protected class, whether in writing or orally, when marketing a residential property for sale or lease***. [See 24 Code of Federal Regulations (CFR) 100.75 reprinted at the end of this Section.] Brokers who violate fair housing most often make their misstatements in the "remarks" section of advertising and these remarks most frequently relate to familial status by stating "no children allowed." If the community is not registered as an over-55 community, then those remarks are always illegal.

Federal & North Carolina Fair Housing Laws

The *protected classes are the same under both federal and North Carolina fair housing laws*. The North Carolina Fair Housing Act is found at **Chapter 41A of the North Carolina General Statutes**. The law broadly defines a "***real estate transaction***" as "*... the sale, exchange, rental, or lease of real property.*" "***Real property***" is equally broadly defined as: "*... a building, structure, real estate, land, tenement, leasehold, interest in real estate cooperatives,*

condominium, and hereditament, corporeal or incorporeal, or any interest therein." [G.S. 41A-3(7) & (8).] The protected classes under federal and state law prohibit discrimination based upon:

- Race
- Color
- National origin
- Religion
- Sex/Gender
- Handicap (Disability)
- Familial status (children under the age of 18 living with parents or legal custodians; pregnant women and people securing custody of children under 18)

Brokers should understand that *marital status* is not a protected class. ***"Familial status"*** *relates solely to the presence of children, not the marital status of the parents or custodians*. Also, while it may be illegal to discriminate based on age in hiring and lending situations, *age is not a protected class under fair housing laws*, other than for minors under familial status.

Differences in Exemptions under Federal and State Law

Both federal and state law provide for extremely limited situations where the property owner need not comply with fair housing laws in the sale or lease of residential property. *While an* ***owner*** *may refuse to lease or sell in these limited situations despite protected class status, the owner nonetheless may* ***never*** *announce in any way his/her intent to discriminate, whether in advertising the property or in his/her statements to others. The exemptions discussed below only apply to owners who* ***personally*** *lease or sell property they own.* ***If the owner employs a broker to assist him/her in the lease/sale of his/her property, then the exemptions do*** **not** ***apply***. Thus, while owner exemptions generally are inapplicable in any transaction involving a broker, brokers nonetheless should be acquainted with the exemptions, as a broker may encounter an unrepresented owner who attempts to use one of the exemptions when the broker is acting as a tenant or buyer agent.

Exemptions under Federal and North Carolina Law

Federal law exempts an owner from compliance with fair housing laws in both the sale and lease of real property *so long as* the owner personally sells or leases the property without the assistance of any other person to whom the owner gives consideration and the owner does not publish his/her intent to discriminate in writing or orally. The federal exemption is further restricted to the sale of only one dwelling annually where the owner was not the most recent resident during any two-year period.

North Carolina's exemption is more restrictive and thus supersedes federal law regarding the sale of property. [The general rule is that the more restrictive law controls; thus state law may require more than the federal standard, but not less.] ***In North Carolina, an owner may*** **never** ***discriminate in the*** **sale** ***of his/her property****, but may quietly discriminate when leasing a single family dwelling s/he owns* ***so long as*** *the owner or a member of his/her family occupies the dwelling*. The same exemption applies to North Carolina owners who are leasing a one to four family dwelling in which either the owner or a member of the owner's family occupies one of the units. Under *federal law*, the *exemption* does not extend to members of the owner's family, but

*only applies if the **owner** occupies one of the units*. Because state law is more permissive than federal law, it would appear that owners would *not* be exempt from complying with federal law merely because a family member, rather than the owner, inhabits the property.

Other limited exemptions apply under both federal and state law to non-commercial property owned by a religious organization that gives preferential treatment to its members, so long as membership in the religion is not restricted based on a protected class, and to property owned by a private club that treats its members preferentially *so long as* the club is not open to the public and lodging is provided as an incident to the club's primary purpose. Lastly, North Carolina law also exempts the leasing of rooms in a single-sex dormitory only from compliance with the gender aspect of fair housing laws. While this is *not an exemption* under federal law, it is doubtful that this practice would be considered a violation of the federal act. Note that ***none of the exemptions discussed in these three paragraphs apply if the owner employs a broker or pays another person to assist the owner in selling or leasing his/her property***.

Commercial Property

Further, North Carolina law expressly exempts from its Act: "the sale, rental, exchange, or lease of commercial real estate. For the purposes of this Chapter, *commercial real estate means real property which is not intended for residential use*." [G.S. 41A-6(a)(7); italics added.] ***However***, while commercial transactions generally may be exempt from the Act, anyone involved in the *design or construction of multifamily housing first available for occupancy after March 13, 1991 must comply with both state and federal fair housing laws regarding accessibility to the building and the public and common areas, as well as features within the units*, such as doors, kitchens and bathrooms wide enough to accommodate wheelchairs, light switches and other environmental controls in accessible locations, and reinforced bathroom walls to allow later installation of grab bars. Failure to comply with these laws in the design and construction of multifamily housing is an unlawful discriminatory housing practice.

IMPORTANT NOTE: ***Be aware*** that while sellers or landlords will not violate federal or state fair housing laws if they operate within the exemptions, they may still be liable in a civil lawsuit under the **Civil Rights Acts of 1866** *if they **discriminate in** **any** **real estate transaction**, residential or commercial, based on **race***. The Civil Rights Act of 1866 declares that "*... all ... citizens of the United States ...of every race and color ... shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, ... to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens ....*" This law has been interpreted to prohibit race-based discrimination in any form in both the renting and selling of housing or the lease, sale or purchase of any real estate and was not modified in any way by the passage of the 1968 Fair Housing Act. Therefore, it is possible for someone discriminated against based on race to have no right to sue under the Fair Housing Act (due to the application of an exemption), but to pursue a race-based claim under the Civil Rights Act of 1866.

General Prohibitions

Unless they fall within one of the limited exemptions, **no one** may take any of the following actions based on race, color, national origin, religion, sex, familial status or handicap:

- refuse to engage in a real estate transaction;

- refuse to rent or sell property;
- set different terms, conditions, or privileges for a sale or rental;
- provide different housing services or facilities;
- refuse to receive or fail to transmit a bona fide offer;
- indicate that property is not available when it actually is;
- refuse to negotiate;
- steer a person towards or away from particular property;
- threaten, intimidate, retaliate against or otherwise interfere with the use and enjoyment of property;
- for profit, persuade owners to sell or rent because persons from a protected class are moving into the area ("blockbusting");.

Additional Prohibitions Affecting Brokers

Generally, all of the foregoing apply to *any person in a real estate transaction*. Brokers in particular should be aware that the law also makes it an unlawful discriminatory practice for any person to: "offer, solicit, accept, use, or *retain a listing* of real property with the understanding that any person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith ..." [**G.S. 41A-4(a)(7)**.] A few lines later, G.S. **41A-4(b1)** again declares it an unlawful discriminatory practice "... for any person or other entity whose business includes engaging in residential real estate related transactions ..." to discriminate against any person based on a protected class and specifically includes those who make or purchase loans or provide financial assistance, as well as those who sell, broker or appraise residential real estate.

In addition to state law, ***Commission Rule A.1601*** states: "Conduct by a licensee which violates the provisions of the State Fair Housing Act constitutes improper conduct in violation of G.S. 93A-(6)(a)(10)." Thus, a broker who is aware that any property owner intends to discriminate against others based on a protected class in a sales or lease transaction should relinquish the listing or stop managing the property. *To retain the listing/property management violates the NC Fair Housing Act which simultaneously violates both Commission rules and License Law, subjecting the broker to both civil liability and disciplinary action.* Recall too that the owner has no right to claim any exemption if the owner employs a broker or pays any other person to assist him/her in the sale or lease of his/her property.

Housing for Older Persons Act of 1995

In 1988 Congress passed legislation amending the fair housing laws to create an exception for housing intended for senior citizens that would exempt such communities from complying with the familial status protected class. These laws were further amended in 1995 to clarify which housing projects qualify for "55 and over" status and, thus, are exempt from provisions of the Fair Housing Act that prohibit discrimination against families with children. The 1995 amendments deleted the previous requirement that the housing provide "significant facilities and services to meet the physical or social needs of older persons." To qualify as a "55 and over" housing community, the community must meet the following requirements.

1. The complex is specifically designed and operated for and occupied by elderly persons under a Federal, State or local government program; **or**

2. It is occupied solely by persons 62 years of age or older; **or**

3. It houses at least one person who is *55 or older in at least 80 percent (80%) of the occupied units* and adheres to policies and procedures that demonstrate an intent to house persons who are 55 or older.

The 1995 amendment made it easier for projects with large numbers of elderly residents to meet the "55 and over" requirements, thereby enabling the community to exclude buyers or renters who have young children. Senior housing communities must comply with all other aspects of fair housing laws; the lone exception is that they may lawfully exclude children.

Federally Non-Protected Class

Sexual Orientation or Preference

*Sexual orientation or preference is **not** a legally protected class under either North Carolina or federal fair housing laws at the present*, although there are some endeavors to elevate it to a protected status. The National Association of REALTORS® revised its Code of Ethics in 2011 to provide that, in addition to the fair housing classes, no Realtor may discriminate in any manner based on the sexual orientation of an individual. This prohibition extends to Realtors' real estate employment practices, their provision of professional services, advertising, or being a party to any plan or agreement to discriminate. Standard of Practice 10-4 states that "... 'real estate employment practices' relates to employees and independent contractors providing real estate-related services and the administrative and clerical staff directly supporting those individuals." Two considerations cited as explanations for the revisions included the comment that "The Obama Administration has signaled its intent to announce proposals ensuring that HUD's housing programs are open to all regardless of sexual orientation or gender identity...." and the fact that at least 21 states now have laws banning discrimination based on sexual orientation.

In 2012, HUD also conducted its first national survey to estimate discrimination against same-sex couples seeking rental housing. Todd Richardson, a HUD Associate Deputy Assistant Secretary, commented: "The groundbreaking study on housing discrimination against same sex couples is remarkable because its very existence indicates a national interest in the problem." The study concluded that same-sex couples face "significant hurdles" in their rental housing search virtually from the outset in that their email inquiries were responded to less frequently than email inquiries from heterosexual couples. It is believed that HUD is exploring this issue further and has requested that incidents of discrimination based on sexual orientation be referred to its regional offices.

Despite these trends, sexual orientation is not a protected class under either federal or North Carolina law and owners in North Carolina may discriminate on this basis, including in their advertising. A non-Realtor broker who is representing an owner who intends to discriminate due to a buyer or tenant's sexual preferences is not violating any laws or Commission rules if the broker remains in the transaction. Whether a broker who is a REALTOR® member may continue to represent such an owner without violating his/her Code of Ethics is a good question since the introduction to the Code of Ethics states in part: "While the Code of Ethics establishes obligations that may be higher than those mandated by law, in any instance where the Code of Ethics and the

law conflict, the obligations of the law must take precedence." In this instance, the owner wishes to discriminate on a legally permissible basis. The resolution of this issue will be for the trade association to determine.

"Handicapping Condition" & Reasonable Requests

An individual has a "handicapping condition"if the individual:

1) has a physical or mental disability (including hearing, mobility, or visual impairments, chronic alcoholism, chronic mental illness, AIDS, AIDS Related Complex, and mental retardation) *that substantially limits one or more major life activities*, or
2) has a record of such a disability, or
3) is regarded as having such a disability.

In addition to protections afforded under fair housing laws, individuals who have a handicapping condition may also be covered under the federal Americans with Disabilities Act.

"Reasonable Accommodations or Modifications"

What is the difference between an "accommodation" and a "modification?" An ***accommodation*** is a *change or variance in rules, services, practices or policies that allows a person with a handicapping condition to enjoy the housing, but doesn't alter application of the rule, policy, service or practice as to other tenants*. A ***modification*** *alters the physical characteristics of the dwelling or common areas of a building*. These requests generally arise only in lease transactions, because in a purchase, the buyer acquires and controls the property and may effect whatever changes s/he wishes.

In *lease transactions*, prospective tenants with a handicapping condition may request a landlord to *allow reasonable modifications to the dwelling or common use areas to enable the tenant to use the housing*. Generally, landlords may not refuse such reasonable requests, but the landlord may require the tenant to pay for the modifications. Further, if internal modifications would interfere with a future occupant's use, then the landlord may require the tenant, if reasonable and necessary, to restore the dwelling to its original condition at the end of the tenancy. The same is not true of external modifications, such as a wheelchair ramp; typically tenants may not be required to remove the external modification at the end of the tenancy. Modifications fall within one of the following three classifications, namely:

1. ***Modifications that don't need to be restored to the original condition***. As mentioned above, these include modifications that don't interfere with future occupants' use and modifications to the public and common use areas (often external);

2. ***Modifications that must be restored to original condition but don't require an escrow account***. Typically these modifications are relatively minor, easy to restore, and inexpensive, such as replacing a cabinet underneath a bathroom sink that was removed to allow wheelchair access.

3. ***Modifications that must be restored but are moderately expensive and require an escrow account***. An owner who permits more extensive modifications, such as lowering kitchen and bathroom counters or replacing all the kitchen cabinets, that will cost more to remediate, may lawfully request the tenant to deposit an agreed sum into an escrow account that will be held until the end of the tenancy and used to pay for the restoration of the premises. Note that any unused funds from such deposits that are not needed to pay for the restoration should be returned to the tenant.

Similarly, landlords *may not refuse to make reasonable* ***accommodations*** *in rules, policies, practices, or services if necessary for the disabled person to use the housing*. Examples of reasonable accommodations include:

- assigning a reserved parking space to a mobility-impaired tenant near his/her apartment when the complex offers tenants ample, unassigned parking;
- providing written material either orally or in large print or Braille to a visually-impaired tenant;
- reminding a developmentally challenged tenant that rent is due in three days;
- permitting a live-in aide to reside with a disabled tenant even if it violates "normal" policy;
- altering chemicals used for pest control or maintenance or, if alternate chemicals are ineffective, minimally providing an allergic tenant with several days notice prior to using the chemicals in his/her building.

"Assistance Animals"

One of the most frequently encountered accommodation requests is to owners with a "no pets" policy from tenants who have an assistance animal. Owners who have a "no pet" policy are prohibited by both state and federal law from refusing to rent to a person who has an assistance animal, whether in a vacation rental or short or long-term lease. *BICs should seek to ensure that their associated agents and employees clearly understand that* ***service animals and assistance animals are not "pets."*** Further, while the Americans with Disabilities Act (ADA) now defines "service animals" as canines (with a limited exception for miniature horses), under fair housing laws assistance animals are not limited to canines, but may also include cats, birds, ponies, monkeys or guinea pigs, to name a few. If a resident's need for an assistance animal is not obvious, then the owner may request verification both of the disability and the need for the animal. Typically both elements, disability and need, must be present and verified before an owner is obligated to make an accommodation.

If a community has a policy allowing pets that don't exceed a certain size and weight that policy may also need to be waived to accommodate the assistance animal. Brokers-in-charge might want to develop two policies: one that deals with animals or pets in general, and a separate set of rules that applies to assistance animals. Most likely there would be an overlap to some extent between the policies, such as requirements for vaccinations, neutering, cleaning up after the animal, using a leash, keeping the animal quiet and under control, and prohibiting aggressive or dangerous animals. Differences, however, would include that owners may not charge a pet deposit for assistance animals, although they may deduct from the tenant security deposit any damage caused by the assistance animal. If a tenant with an assistance animal adds another

animal to the household without proof of its assistive nature, the owner may charge a pet deposit for the unverified animal, but not for the assistance animal.

Access to Public Buildings

Multifamily buildings certified as ready for occupancy on and after March 13, 1991 that have an elevator and four or more units must satisfy the following requirements, namely:

- Public and common areas must be accessible to persons with disabilities
- Doors and hallways must be wide enough for wheelchairs
- All units must have:
  - An accessible route into and through the unit,
  - Accessible light switches, electrical outlets, thermostats & other environmental controls,
  - Reinforced bathroom walls to allow later installation of grab bars, and
  - Kitchen and bathrooms that can be used by people in wheelchairs.

If a building with four or more units has no elevator and will be ready for first occupancy after March 13, 1991, the above standards apply only to ground floor units. If building standards are more stringent under State or local law than the foregoing requirements, then the State or local standards prevail.

HUD Occupancy Standards

While prohibiting discrimination based on a protected class, federal fair housing laws also acknowledge that nothing in the Act "...limits the applicability of any *reasonable* local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." Given the lack of any guidelines, HUD's regional counsels varied in their assessment of what occupancy restrictions were reasonable under the Act. To address this confusion, former HUD General Counsel, Frank Keating, issued a memorandum in 1991 outlining factors regional counsel should consider when determining whether unlawful discrimination had occurred due to application of occupancy standards. In *December 1998, HUD issued a statement officially adopting the "Keating Memo" as its standard for deciding whether a landlord's occupancy standards are discriminatory*. The memo noted that there is a provision in HUD Handbook 7465.1 REV-2 that offers guidance concerning the factors *public housing agencies* may consider in establishing reasonable occupancy policies and that the memo did not override the guidance in the Handbook as to public housing agencies. Reprinted below is most of the March 20, 1991 Keating Memo explaining the factors HUD investigators should consider in evaluating the effect of occupancy policies adopted by housing providers on familial status.

Keating Memo

In order to assure that the Department's position in the area of occupancy policies is fully understood, I believe that it is imperative to articulate more fully the Department's position on reasonable occupancy policies and to describe the approach that the Department takes in its review of occupancy cases.

Specifically, the Department believes that ***an occupancy policy of two persons in a bedroom, as a general rule, is reasonable under the Fair Housing Act***. The Department of Justice has advised us that this is the general policy it has

incorporated in consent decrees and proposed orders, and such a general policy also is consistent with the guidance provided to housing providers in the HUD handbook referenced above. **However, the reasonableness of any occupancy policy is rebuttable,** and ... the Department will [not] determine compliance with the Fair Housing Act based solely on the number of people permitted in each bedroom.

... [HUD] believes that *in appropriate circumstances, owners and managers may develop and implement reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit*. In this regard, it must be noted that, in connection with a complaint alleging discrimination on the basis of familial status, the Department will carefully examine any such nongovernmental restriction to determine whether it operates unreasonably to limit or exclude families with children.

Thus, in reviewing occupancy cases, HUD will consider the size and number of bedrooms and other special circumstances. The following principles and hypothetical examples should assist you in determining whether the size of the bedrooms or special circumstances would make an occupancy policy unreasonable.

Size of Bedrooms and Unit

Consider two theoretical situations in which a housing provider refused to permit a family of five to rent a two-bedroom dwelling based on a "two people per bedroom" policy. In the first, the complainants are a family of five who applied to rent an apartment with two large bedrooms and spacious living areas. In the second, the complainants are a family of five who applied to rent a mobile home space on which they planned to live in a small two-bedroom mobile home. Depending on the other facts, issuance of a charge (of discrimination) might be warranted in the first situation, but not in the second. The size of the bedrooms also can be a factor suggesting that a determination of no reasonable cause is appropriate. For example, if a mobile home is advertised as a "two bedroom" home, but one bedroom is extremely small, depending on all the facts, it could be reasonable for the park manager to limit occupancy of the home to two people.

Age of Children

The following hypotheticals involving two housing providers who refused to permit three people to share a bedroom illustrate this principle. In the first, the complainants are two adult parents who applied to rent a one-bedroom apartment with their infant child, and both the bedroom and the apartment were large. In the second, the complainants are a family of two adult parents and one teenager who applied to rent a one-bedroom apartment. Depending on the other facts, issuance of a charge might be warranted in the first hypothetical, but not in the second.

Configuration of the Unit

The following imaginary situations illustrate special circumstances involving unit configuration. Two condominium associations each reject a purchase by a family of two adults and three children based on a rule limiting sales to buyers who satisfy a "two people per bedroom" occupancy policy. The first association manages a building in which the family of five sought to purchase a unit consisting of two bedrooms plus a den or study. The second manages a building in which the family of five sought to purchase a two-bedroom unit which did not have

a study or den. Depending on the other facts, a charge might be warranted in the first situation, but not in the second.

Other Physical Limitations of Housing

In addition to physical considerations such as the size of each bedroom and the overall size and configuration of the dwelling, the Department will consider limiting factors identified by housing providers, such as the capacity of the septic, sewer, or other building systems.

State and Local Law

If a dwelling is governed by State or local governmental occupancy requirements, and the housing provider's occupancy policies reflect those requirements, HUD would consider the governmental requirements as a special circumstance tending to indicate that the housing provider's occupancy policies are reasonable.

Other Relevant Factors

Other relevant factors supporting a reasonable cause recommendation based on the conclusion that the occupancy policies are pretextual would include evidence that the housing provider has: (1) made discriminatory statements; (2) adopted discriminatory rules governing the use of common facilities; (3) taken other steps to discourage families with children from living in its housing; or (4) enforced its occupancy policies only against families with children. For example, the fact that a development was previously marketed as an "adults only" development would militate in favor of issuing a charge. This is an especially strong factor if there is other evidence suggesting that the occupancy policies are a pretext for excluding families with children.

An occupancy policy which limits the number of children per unit is less likely to be reasonable than one which limits the number of people per unit.

Special circumstances also may be found where the housing provider limits the total number of dwellings he or she is willing to rent to families with children. For example, assume a landlord owns a building of two-bedroom units, in which a policy of four people per unit is reasonable. If the landlord adopts a four person per unit policy, but refuses to rent to a family of two adults and two children because twenty of the thirty units already are occupied by families with children, a reasonable cause recommendation would be warranted.

If your review of the evidence indicates that these or other special circumstances are present, making application of a "two person per bedroom" policy unreasonably restrictive, you should prepare a reasonable cause determination. The Executive Summary should explain the special circumstances which support your recommendation.

CURRENT STATUS OF FAIR HOUSING VIOLATIONS

Do we really in 2013 still have issues with discrimination based on race, color, national origin, gender, familial status or disability/handicapping condition? The good news is that things have improved, but the bad news is a lot of subtle discrimination persists, the methods have just been refined. The Office of Policy Development and Research within HUD has conducted

national studies roughly every ten years since the late 1970s to determine the prevalence of discrimination and its basis. The most frequent and revealing survey method has been its "paired tester" method where one tester is Caucasian and the other tester is a different race, color or ethnicity, and each contacts the property owner or the owner's agent inquiring about the same property. The testers record the responses each receives.

HUD Studies

In 1977 when the first study was conducted, discrimination was blatant with frequent incidents of "door slamming," i.e., doors literally being closed almost immediately after being opened upon the owner seeing the individual's race, color, ethnicity, etc.. The most recent HUD study was conducted in 2012. Paired testers (one white and the other either black, Hispanic, or Asian) conducted over 8000 tests in 28 metropolitan areas from randomly selected housing based on recent advertisements. The testers were matched by age and gender and each presented as equally and unambiguously qualified to rent or purchase the property. As noted in an article in the July 2013 newsletter of the Association of Real Estate License Law Officials (ARELLO), the study found that minority renters and purchasers are told about and shown fewer properties; the range was from 11-18% fewer rentals or sales respectively for blacks and 10-19% fewer for Asians. While Hispanic renters were told about 12% fewer units and shown 7% fewer units than their white counterpart, the difference in treatment between white and Hispanic purchasers was not statistically significant.

As stated in the ARELLO article, "*HUD Study: Subtle Housing Discrimination Persists*," (July 2013):

> The report debunks some widely held assumptions about when and where discrimination is most likely to occur. *It does not find substantial differences in the incidences or severity of discrimination across metropolitan areas or in particular regions of the country, suggesting that housing discrimination remains a national problem*. HUD and Urban Institute officials said that the subtle forms of discrimination documented by the study are not as obvious as those experienced in the 1960s and are hard to detect without proactive testing, especially in the sales market where discrimination is higher than the rental market. HUD Secretary Shaun Donovan said, "Fewer minorities today may be getting the door slammed in their faces, but we continue to see evidence of housing discrimination that can limit a family's housing, economic and educational opportunities. It's clear that we still have work to do to end housing discrimination once and for all."

[Italics added.]

As noted in HUD's Executive Summary of the report titled "*Housing Discrimination Against Racial and Ethnic Minorities 2012*," a copy of which may be found on HUD's website (www.HUD.gov),

> ... Moreover, the results presented here do not reflect the experience of the average or typical minority homeseeker, because testers presented themselves as unambiguously well-qualified for the advertised homes and apartments about which they inquired. Evidence from other research suggests that when testers pose as more marginally qualified homeseekers, more discrimination occurs..... For

all these reasons, ***results reported here probably understate the total level of discrimination that occurs in the marketplace***.

[Emphasis added.]

Thus, while we are better now than we were 50 years ago, we still have a long way to go. It appears that the two classes comprising the majority of housing discrimination complaints nationally arise from either familial status or disability. According to legal counsel for the NC Human Relations Commission, the agency that initially investigates fair housing complaints in North Carolina, roughly 40% of complaints in North Carolina relate to discrimination based on race, 40% are based on disability, only 10% or so relate to familial status, and the remaining 10% is a potpourri of the four remaining protected classes. Note too that in North Carolina there are four racial categories, namely: Caucasian, African, Asian, and Native American.

As mentioned earlier, some states have enacted legislation protecting other statuses beyond the classes protected under fair housing laws. The protected classes most frequently created by state or local laws pertain to one or more of the following categories:

- marital status
- sexual preference or orientation
- age
- military status
- students
- source of income (typically related to government assistance, housing vouchers,etc)

Types of Discrimination

There are two types of discrimination from a legal standpoint: one is disparate treatment and the other is disparate impact. What is the difference? Most of the previous discussion has focused on ***disparate treatment***, i.e., treating someone differently, whether in conditions, terms, benefits, information, access, etc., because of race, color, gender, national origin, religion, familial status or disability. ***Disparate impact*** is where a policy or procedure that appears neutral on its face in fact has a disproportionately negative impact on a protected class, resulting in discrimination against members of a protected class.

Disparate Impact Test

HUD has always maintained that even though a "disparate impact" or "discriminatory effect" standard is not expressly stated in the Fair Housing Act, a person still may be liable for violating the intent of the Act if their conduct has a disproportionate discriminatory effect on a protected class. Eleven of the twelve federal appellate courts that have ruled on the issue over the past few decades have agreed with HUD's position. However, because the Act failed to provide a standard, and variations in practice were emerging nationally, HUD proposed a rule in 2011 to provide a uniform national standard for evaluating how conduct that has a discriminatory effect may violate the Fair Housing Act. After public comment and discussion, the revised rule became effective **March 18, 2013** and may be found in *Subpart G of Title 24 Code of Federal Regulations, Part 100*, reprinted at the end of this Section.

Under the recently issued rule that formalizes previous policy, a person may be guilty of violating the Fair Housing Act, *even if s/he had no intent to discriminate*, if the person's conduct, policy or practice has a discriminatory effect *unless* there is a "legally sufficient justification" for the conduct, policy or practice. According to the new rule, a practice has a ***discriminatory effect***

> ...where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.

In asserting a claim under this rule, the complaining party must initially show that the practice has caused or predictably will cause a discriminatory effect as defined above. If shown, the burden of proof then shifts to the responding party/defendant to argue/show "... that the challenged practice is necessary to achieve one or more [of his/her] substantial, legitimate, nondiscriminatory interests." If the responding party sustains their burden, then the burden shifts back to the complaining party to show that the legitimate nondiscriminatory interests of the offender could be served by a practice that has a lesser discriminatory effect. If a claimant can prove intentional discrimination, then the fact that a legally sufficient justification may exist for a policy cannot be used as a defense to the discrimination claim.

Permissible Owner Actions

What may owners lawfully request from tenants or purchasers without running afoul of the Fair Housing Act? A potential tenant or purchaser has no entitlement under the Act to housing s/he cannot afford. To that end, an owner may utilize nondiscriminatory criteria designed to evaluate the applicant's character, credit history and income information, including proof of wages, criminal background checks and credit searches. An owner may refuse to rent to an individual if there is documented reliable information showing the individual has a history of violent, disruptive or destructive behavior. An owner is not required to rent to users or dealers of illegal drugs, primarily because the possession of these drugs is criminal, whereas an alcoholic may be protected under disability since alcohol sales and consumption is legal. Further, the Fair Housing Act does not address or in any way limit what an owner asks for the property; rather, the owner is free to set rent at whatever amount s/he wishes and/or the market will bear *so long as* the owner is requesting that amount from all applicants. If the owner offers to rent to some applicants for $1100 per month, but tells other applicants who are members of a protected class that rent is $1300 per month, then the owner has violated the Act by treating the applicants disparately (differently).

Reasonable Restrictions on Children

Owners may establish restrictions that are reasonably necessary for the health and safety of children or for protection of the property. While children generally may not be banned from using certain provided facilities, owners may require that children have adult supervision when using those facilities. For example, it is perfectly reasonable for an owner to prohibit children under a specified age (14? 16?) from swimming in the community pool without having an adult present. Similarly, children under a certain age may be prohibited from using the clubhouse or other amenities unless an adult is present. *Owners should establish and consistently follow community policies that are uniformly applied.* An owner would unlawfully discriminate if s/he charged a tenant a higher security deposit because the tenant has children and the owner anticipates greater wear and tear on the unit.

RECENT HUD ADMINISTRATIVE ACTIONS

The following are summaries of administrative charges or consent orders HUD has filed against various persons seeking to enforce the Fair Housing Act. HUD's Office of Fair Housing and Equal Opportunity and its partners in the Fair Housing Assistance Program investigate approximately 10,000 housing discrimination complaints each year. The recitation of facts below generally is taken directly from HUD's press release announcing the charge or settlement. The full release may be found on HUD's website. The majority of the cases relate to familial status, followed by disability, with only a few pertaining to race or national origin.

Race

HUD filed charges against the owners and managers of a mobile home park in Montgomery, Alabama for refusing to rent to an African-American family and for excluding African-Americans as a matter of policy. The CEO of the company told company employees that he didn't want any more African Americans moving into his mobile home parks. Accordingly, employees refused to process a lot rental application from an African American family who had just purchased a mobile home in the park, telling them that their application was denied based on the credit check results, although none was conducted. The family was required to move their mobile home out of the park after their lot rental application was denied. The owners and managers allegedly preferred to rent to Hispanics and allowed certain Hispanic applicants to move into the park without submitting a rental application or undergoing a background check.

National Origin

Two cases involved discrimination based on national origin. In one, charges were filed against an owner and manager of a mobile home park in Albert Lea, Minnesota who refused to rent to a Mexican-American couple. The park manager had stated to several people that she "didn't want any more Mexicans" living at the mobile home park because they were "too much trouble." The park manager asked the wife if her husband was Mexican or from Mexico and when the wife said yes, the manager told her that she had had "enough of them here" and "didn't want any more." The manager also asked the wife if she had a social security card, whether she was born in the United States and referred to both the husband and Mexicans in general using an ethnically disparaging slang word. Other Mexican-American residents confirmed the manager's frequent use of ethnic slurs.

The second case involved an apartment complex in Lancaster, Pennsylvania that refused to renew the leases of three Burmese families, allegedly because of various lease violations. HUD's investigation showed that the non-renewal letters were only sent to the Burmese families, even though other tenants had similar or worse violations. Further, housing staff stated to several different persons, including Lutheran Children & Family Services staff and HUD's investigators, that the company no longer would accept rental referrals for refugees from Lutheran Refugee Services. The owner of the complex entered into a consent order with HUD under which the owner/company donated $12,000 to Lutheran Refugee Services, agreed to provide fair housing training for all its employees, and include the phrase "Equal Housing Opportunity" of the fair housing logo in all newspaper and other rental advertisements.

Disability/Handicapping Condition

Five cases involved discrimination against persons with disabilities.

Case 1: A woman who was the legal guardian and caregiver for her adult brother who is autistic responded to an ad for a house for rent in Charleston, West Virginia. When the woman told the landlord that her brother had been diagnosed with autism, the landlord required her to purchase a $1 million insurance policy, to sign a document accepting all legal liability for her brother and his actions, and to provide him with a doctor's note confirming her brother's condition before he would rent the house to her. The woman filed a complaint with HUD.

At the trial, the landlord acknowledged that he never met the brother, that he never imposed similar insurance and liability requirements on non-disabled tenants, and that he believed that "persons diagnosed with autism and mental retardation pose a greater risk in terms of liability" and he worried the brother might start a fire or attack neighbors. HUD found the landlord guilty of discrimination (disparate treatment) based on disability and ordered the landlord to pay $18,000 in damages to the woman and her brother and $16,000 in civil penalties to the government.

Case 2: The owner and management company of an apartment complex in Atlanta, Georgia was charged with failing to make a reasonable accommodation to a disabled tenant. The tenant already resided at the complex, but experienced a health event that required her to have a ground floor apartment. She requested to move to a ground floor apartment and provided the manager with medical documentation from her physician verifying her disability and need, but the manager denied the tenant's request, even though a ground floor apartment was available. The owner and manager entered into a settlement agreement with HUD in which they agreed to pay $10,000 to the tenant, inform all of the company's agents, employees, officers and board members of the settlement terms, and require ll management staff at the complex to attend fair housing training conducted by HUD or an agency/facility approved by HUD.

Case 3: In 2012 HUD filed charges against Bank of America for imposing unnecessary and burdensome requirements on borrowers who relied on disability income to qualify for home loans. Such borrowers were required to provide personal medical information and documentation of their disability as well as proof that their disability benefits would continue in order to qualify for a loan. The Fair Housing Act makes it illegal to inquire about the nature and severity of a disability except in limited circumstances that were not applicable in this situation. A HUD Assistant Secretary for Fair Housing and Equal Opportunity stated: "Mortgage companies may verify income and have eligibility standards but they may not single out homebuyers with disabilities to delay or deny financing when they are otherwise eligible." The case was referred to the Department of Justice.

Case 4: An owner in Albuquerque, New Mexico was charged with violating the Act for refusing to allow a disabled tenant to make reasonable and necessary modifications to the rental home. The tenant already lived in the home, but developed a serious medical condition requiring the tenant to use a wheelchair. The tenant wrote the landlord a letter explaining his situation and requesting permission to install a wheelchair ramp, to remove a shower door, to install a higher commode and lower the kitchen sink. The tenant stated his willingness to use a licensed contractor, to pay the expenses related to the modifications, and, if necessary, the tenant would pay to restore the property to its original condition at the end of the tenancy.

The landlord granted the request to install a ramp, but denied all other requests. When the tenant renewed his request, the owner withdrew a prior offer to renew the tenant's lease and instead terminated the lease.

Case 5: Unbelievable as it may seem, an owner, architect, builder and designers of a condominium complex in Pevely, Missouri were charged in late 2012 by HUD for building a multifamily complex that was inaccessible to persons with disabilities. Among the barriers were steps and inaccessible curb ramps that prevented people in wheelchairs from accessing the units, the clubhouse and many of the common areas. Additionally, the kitchens were too narrow to use a wheelchair, thermostats and mailboxes could not be reached by persons in wheelchairs, and there was knob-style hardware on the front doors. Terri Porter, a HUD Regional Director commented: "Everyone involved in the design and construction of new multifamily dwellings need to be aware of their responsibility under the Fair Housing Act and do all they can to build housing that meets the law's requirements." Those requirements include accessible common areas, bathrooms and kitchens, wider doors, and environmental controls that can be reached by people in wheelchairs.

Familial Status

The greatest number of recent charges and orders address discrimination based on familial status. The following cases briefly describe some of the discriminatory practices presently occurring nationally.

Case 1: A condominium association in Minnetonka, Minnesota has an association residency policy that states that "no apartment may be sold, leased or rented to any person who has a child under the age of 18," yet the complex is not certified as an over-55 housing community only. The association told several owners that they were prevented from leasing their units to families with children because of the association's policy. HUD filed charges, stating "Condo associations that don't meet federal requirements as housing for older persons don't have the right to turn away families with children."

Case 2: Similarly, a homeowner association and property managers for a condo complex in Edina, Minnesota were charged with discriminating based on familial status due to an association policy prohibiting minors from living in the buildings for more than a certain period of time, even though the property did not meet federal qualifications for housing for older persons. When a unit owners' children came to live with the owner for more than 30 days, the association notified the owners that they were out of compliance with association policy and not only levied a fine against the owners, but also filed a lawsuit in Minnesota state court seeking an order prohibiting the owners' children from living with them. HUD intervened and filed charges against the association.

Case 3: A homeowners association in Gibsonton, Florida had an occupancy policy allowing a maximum of six people per unit. Nonetheless, a family with six children signed a one year lease to rent a four bedroom unit. After they moved in, the management company told the family about the association's occupancy policy and that the family was out of compliance. Three months later, the family received a letter from the association's attorney threatening to evict the family unless they complied with the county's occupancy standards within thirty days. Applicable *county* occupancy ordinances allowed up to *eleven* people to live in a four bedroom townhome.

HUD intervened and the association agreed to stay any eviction action pending HUD's investigation. The family moved out a year later and purchased a home, but because the association's policy remain unchanged, HUD filed charges against the homeowners association and management company for unlawful discrimination due to overly restrictive private occupancy policies.

Case 4: A New York based broker and her real estate company have been charged by HUD for allegedly refusing to rent or show units in a 24 unit apartment building in Holyoke, Massachusetts to families with children because she could not certify that the building was free of lead-based paint. The broker had advertised a three bedroom unit for rent on Craigslist. When contacted by a tester who said she had a 5 year and 6 year old, the broker allegedly said "This apartment does not have a lead certificate and the law says I can't rent to anyone with children under five." The broker refused to show the apartment for the same reason to another tester who had a 2 year old.

HUD's position is that while property owners may tell families about housing units that have not been remediated for lead paint, *the presence of lead-based paint cannot be used as a reason to refuse to rent*. As stated by John Trasvina, HUD Assistant Secretary for Fair Housing and Equal Opportunity, "Laws to make apartment buildings lead free should not be used as an excuse to make them child-free."

Case 5: The owners and manager of an apartment complex in Philadelphia, Pennsylvania have been charged by HUD with discriminating against children in both their advertising and in statements the manager made to prospective tenants. A continuous advertisement on Craigslist for the complex stated: "This would be a good place for a mature couple. Too many stairs for young children." When a tester with a five year old child inquired about renting, she allegedly was told that residents didn't want children running up and down the stairs. When the tester asked to see the unit anyway, the manager allegedly replied: "Well I most definitely will not rent to people with children so there really is no use." The manager also allegedly commented when showing the unit to another tester posing as a married man with no children that some people with children had contacted her anyway, even though the ad clearly stated that the unit was not for children.

Case 6: Lastly, HUD settled a case in 2011 against USA4SALE Network, Inc. USA4SALE sponsored a website where the public could post items for sale. It printed a rental advertisement on its webpage that said "No children, No kids." In settling the charges, USA4SALE agreed to develop a screening filter to better flag potentially discriminatory content in ads for human review and to train its employees in fair housing advertising guidelines. It further agreed to donate $7,500 to a HUD-funded state fair housing organization and to contribute another $7,500 to a HUD-approved local fair housing group.

FAIR HOUSING CONSIDERATIONS IN ADVERTISING

While advertising issues will be covered in depth in Section Two, it seems logical to discuss the impact of fair housing laws on advertising in this Section. *What statements may a person make without violating fair housing laws?* North Carolina law provides in **G.S. 41A-4(a)(6)**:

> It is an unlawful discriminatory housing practice for ***any person in a real estate transaction,*** because of race, color, religion, sex, national origin, handicapping condition, or familial status to:
> (7) Make, print, circulate, post, or mail or cause to be so published a statement, advertisement, or sign, or use a form or application for a real estate transaction, or make a record or inquiry in connection with a prospective real estate transaction, which indicates directly or indirectly, an intent to make a limitation, specification, or discrimination with respect thereto ....

In other words, **NO ONE may state, orally or in writing, that he or she is making any decision in a real estate transaction based upon any of the protected classes, whether in a lease or sale of real property, *even though* the individual may otherwise be exempt from the requirements of the Act**. [See also the corollary federal regulation, 24 CFR 100.75, "Discriminatory advertisements, statements and notices," reprinted in part at the end of this Section.] *Additional advertising guidelines may be found in **Title 24** of the Code of Federal Regulations **Part 109***, which may be accessed on HUD's website at www.hud.gov/offices/fheo/library/part109.pdf or by searching for "HUD Advertising guidelines." HUD offers the following suggestions to avoid violating fair housing laws when advertising; they include:

1) Describe the *physical attributes of the dwelling and property itself*, rather than the people who might live there.

2) Mention the amenities, e.g., cycling paths, tennis courts, etc., not the participants.

3) State the geographic location, rather than referring to landmarks, e.g., "649 W. Main Street," instead of "across from Christ the King Episcopal church."

Words, Phrases and Photos

It does not appear that HUD has undertaken to compile a list of acceptable and unacceptable words or phrases when advertising residential property for sale or lease. Some guidance is provided in **24 CFR 109.20** reprinted at the end of this Section. General consensus seems to hold that the following words or phrases are unacceptable due to a discriminatory inference or connotation; thus, *these terms should be avoided in advertising property for lease or sale*.

> **Impermissible terms include**: able-bodied, active, adult only, no alcoholics, no blind/impaired, no children, couples only, male only, female only, restricted, exclusive, etc.
> **Permissible terms include:** no drugs, no drinking, near parks/golf course, gated, luxury condo, fixer-upper, family room, great for family, quiet residential area, near bus/metro.

Note the distinction between "no alcoholics" (impermissible) versus "no drinking" or "no alcohol" (both permissible). Why the difference? The first focuses on a person who may be a member of one or more protected classes, whereas the latter phrases relate to prohibited *conduct*, not a person. Further, the only time one may permissibly state "adult only" or "no children" is if the dwelling is in an approved/certified over-55 community. A list of acceptable and

unacceptable words and phrases compiled by the Miami Valley Fair Housing Center Inc in Dayton, Ohio is reprinted with permission at the end of this Section for consideration and discussion.

Brokers must exercise caution not only in the words they choose to promote a property, but also in any **photographs** they may use to promote the property or a development if those pictures include people. If people are pictured in the photographs, then there either needs to be diversity within the photo or the broker should have multiple photos of the development depicting a variety of people who look different from each other. Using one particular couple or family in all advertising could be construed as conveying a subtle message that only other folks who look like those depicted are welcome to purchase or lease property in that community. (See **24 CFR 109.20**.) Note too that ***where one advertises, both geographically and the choice of forum, may be considered as evidence of discriminatory intent by HUD***. See **24 CFR 109.25** reprinted at the end of this Section.

Access to Broker Organizations and Services

As regards access to certain specialized advertising forums, **G.S. §41A-4(d)** states:

> It is an unlawful discriminatory housing practice to deny any person who is otherwise qualified by State law access to or membership or participation in any real estate brokers' organization, multiple listing service, or other service, organization, or facility relating to the business of engaging in real estate transactions, or to discriminate in the terms or conditions of such access, membership, or participation because of race, color, religion, sex, national origin, handicapping condition, or familial status.

Lastly, as our population becomes more multi-cultural, brokers may have the opportunity to work with non-English speaking people and should be cautious about refusing to work with non-English speaking consumers. A blanket refusal without exception may be viewed as discriminating based on national origin. Brokers are not required to provide translators for non-English speaking persons. However, if the non-English speaking person is accompanied by their own translator who is able to facilitate effective communication between the broker and the client or customer, the broker should have some legitimate reason other than the language barrier if s/he chooses not to work with the individual.

Sample Ads

#1. Perfect retirement nest. Quaint 2BR, 2B stone bungalow, 1640 SF, new HVAC; kitchen remodeled; fenced private yard. Quiet neighborhood. $235,000.
Remarks: walkable community. 3 blocks from town center, ½ block from synagogue.
Call Mary Jones, XYZ Realty, at 929-783-6294.

Issues?

#2. Wanted Christian SWF over 30 to share 3 BR, 3B house. $500/mo rent plus 1/3 utilities. Call Lynn at 910-357-9732.

Issues?

Florida Fair Housing Case

An actual case that caused some ripples within the real estate brokerage community in late 2012/early 2013 was a case involving a Florida broker named Jeff, who was affiliated with a real estate company, Charles Rutenberg Realty. Jeff had paid for an IDX feed listing available local properties which he displayed on his website. An independent fair housing tester initially found a listing for a condo on Realtor.com that named the realty company as the listing broker, but not the individual agent. The remarks section of the listing contained the following comment: "Adunt (*sic*) community no children under 16." The tester then found the same listing on Jeff's website and concluded that he must be the individual listing agent. The tester further learned that the condo community was not, in fact, certified as an over-55 community and filed a civil suit in federal district court against the condo community, Jeff, and the realty company in November 2012.

Was there a fair housing violation? Yes; the ad clearly expressed the impermissible intent to discriminate based on familial status. The error was so glaringly patent from a regulatory standpoint that one wonders what, if any, proofing or content review system the real estate company employs to screen ads before releasing them to the public.

The condo association was dismissed from the lawsuit when it was able to show that it had repealed its policy prohibiting the rental or sale of units to families with children under 16 years of age in 1994, nearly 20 years earlier. The realty company agreed to settle the case, because it was the listing broker responsible for its affiliated agent's mistake, even though the individual listing agent was never identified. The good news is that when the tester/plaintiff realized that Jeff was not the listing agent who had authored the ad, she voluntarily dismissed him from the lawsuit, leaving only the listing company.

Broker's liability for IDX feeds

The case raises the question, however, as to *a broker's liability for the content of others' listings that the broker receives through IDX feeds*. Must a broker review all the listings s/he posts on his/her personal website? The question has not been answered definitively as of November 2013. The most culpable person is the individual who writes the copy for the ad, followed by the broker-in-charge, at least in North Carolina, since the broker-in-charge is responsible for all advertising emanating from his/her office, and ultimate civil liability probably will rest on the real estate company for the acts of its associated agents.

However, as noted by Laurie Janik, legal counsel for the National Association of REALTORS® in a March 13, 2013 Inman News article titled "Agent dragged into fair housing lawsuit over listing he didn't represent," *fair housing laws don't really care who wrote the content; rather, "Liability attaches by virtue of the act of publishing the discriminatory content."* However, Ms. Janik observes that brokers may find a defense in the **Communications Decency Act of 1996 (CDA)** which states in relevant part: "...no provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

While there don't appear to be any reported court opinions yet regarding a broker's liability for IDX content appearing on the broker's website, there are at least two federal court opinions

within the past decade holding that websites serving as intermediaries that allow users to post their own ads or commentary enjoy certain protections under the CDA that would *not* normally exist for print publications, such as newspapers. Such websites will be liable for content it creates, but not necessarily liable for the content posted by others. Both cases involved fair housing violations in ads for rental housing posted by others. Neither website (Craigslist and Roomate.com) was held liable for the remarks posted by others.

Suggestions

One of several suggestions to avoid the liability issue is for MLS feeds to exclude the "remarks" section from the information it transmits on its IDX feeds, as that typically is where the offending comments are found. Another suggestion is that an MLS install automated software that will review all content for any fair housing violations upon the listing being entered into the system. Another is that listing brokers, as part of membership in the cooperative listing system, agree to indemnify and hold all other brokers harmless from any liability arising from the content or images contained in that listing broker's advertisements/marketing, whether copyright or fair housing issues. Another is that individual brokers post disclaimers on his/her website stating that s/he is not liable for any content of IDX feeds; however, posting a disclaimer will not alter the legal reality as to liability. In other words, posting a disclaimer will not absolve me from liability if the law says I am liable, nor will the failure to post a disclaimer impose liability where there is none.

MLS Disclaimer

As to disclaimers, brokers should also understand that the standard "Information deemed reliable but not guaranteed" disclaimer that appears at the bottom of many cooperative listing service's printouts is for the benefit of the listing service, not any individual broker, for reasons similar to those expressed above. The listing service is not creating the content of the displayed property information; like these websites, it merely provides the forum in which others may submit information they have written and for which the listing service is attempting to disclaim any responsibility.

Answers to Advertising Examples

#1: The best of intentions resulted in a fair housing violation by mentioning the proximity to a particular religious establishment in the remarks section. The reference to "retirement nest" also is questionable, since it might create an inference that the owner seeks to exclude children. The term "walkable community" is not believed to be problematic.

#2: Technically, this ad violates fair housing laws by expressing a preference based on gender, race and religion. Even if Lynn is the owner of the property, thus allowing her to discriminate in her heart under both state and federal law when leasing property that is also her primary residence, she nonetheless is not supposed to blatantly advertise her intent to discriminate. If Lynn is not the owner of the property, then she is not supposed to discriminate based on any protected class, but apparently the reality is that many enforcement agencies and courts accord the same exemptions to a non-owner occupant who seeks to share their living space as is accorded owner-occupants under the law.

Federal Fair Housing Regulations

Title 24 Code of Federal Regulations Subpart G—Discriminatory Effect

§100.500 Discriminatory effect prohibited.

Liability may be established under the Fair Housing Act based on a practice's discriminatory effect, as defined in paragraph (a) of this section, even if the practice was not motivated by a discriminatory intent. The practice may still be lawful if supported by a legally sufficient justification, as defined in paragraph (b) of this section. The burdens of proof for establishing a violation under this subpart are set forth in paragraph (c) of this section.

(a) *Discriminatory effect*. A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.

(b) *Legally sufficient justification*. (1) A legally sufficient justification exists where the challenged practice:

(i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. 3612, or defendant, with respect to claims brought under 42 U.S.C. 3613 or 3614; and

(ii) Those interests could not be served by another practice that has a less discriminatory effect.

(2) A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative. The burdens of proof for establishing each of the two elements of a legally sufficient justification are set forth in paragraphs (c)(2) and (c)(3) of this section.

(c) *Burdens of proof in discriminatory effects cases*. (1) The charging party, with respect to a claim brought under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.

(2) Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.

(3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

(d) *Relationship to discriminatory intent*. A demonstration that a practice is supported by a legally sufficient justification, as defined in paragraph (b) of this section, may not be used as a defense against a claim of intentional discrimination.

[78 FR 11482, Feb. 15, 2013]

24 CFR 100.75 Discriminatory advertisements, statements and notices.

(a) It shall be unlawful to make, print or publish, or cause to be made, printed or published, any notice, statement or advertisement with respect to the sale or rental of a dwelling which indicates any preference, limitation or discrimination because of race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation or discrimination.

(b) *The prohibitions in this section shall apply to all **written or oral notices or statements** by a person engaged in the sale or rental of a dwelling*. Written notices and statements include any applications, flyers, brochures, deeds, signs, banners, posters, billboards or any documents used with respect to the sale or rental of a dwelling.

(c) Discriminatory notices, ***statements*** and advertisements include, but are not limited to:

(1) Using words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group of persons because of race, color, religion, sex, handicap, familial status, or national origin.

(2) *Expressing to* agents, brokers, employees, *prospective sellers or renters or any other persons* a preference for or limitation on any purchaser or renter because of race, color, religion, sex, handicap, familial status, or national origin of such persons.

(3) Selecting media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Refusing to publish advertising for the sale or rental of dwellings or requiring different charges or terms for such advertising because of race, color, religion, sex, handicap, familial status, or national origin.

(d) 24 CFR part 109 provides information to assist persons to advertise dwellings in a nondiscriminatory manner and describes the matters the Department will review in evaluating compliance with the Fair Housing Act and in investigating complaints alleging discriminatory housing practices involving advertising.

Below are excerpts from 24 CFR Part 109 - HUD's Advertising Guidelines

§ 109.20 Use of words, phrases, symbols, and visual aids.

The following words, phrases, symbols, and forms typify those most often used in residential real estate advertising to convey either overt or tacit discriminatory preferences or limitations. In considering a complaint under the Fair Housing Act, the Department will normally consider the use of these and comparable words, phrases, symbols, and forms to indicate a possible violation of the act and to establish a need for further proceedings on the complaint, if it is apparent from the context of the usage that discrimination within the meaning of the act is likely to result.

(a) *Words descriptive of dwelling, landlord, and tenants.* White private home, Colored home, Jewish home, Hispanic residence, adult building.

(b) *Words indicative of race, color, religion, sex, handicap, familial status, or national origin--*

(1) *Race*--Negro, Black, Caucasian, Oriental, American Indian.

(2) *Color*--White, Black, Colored.

(3) *Religion*--Protestant, Christian, Catholic, Jew.

(4) *National origin*--Mexican American, Puerto Rican, Philippine, Polish, Hungarian, Irish, Italian, Chicano, African, Hispanic, Chinese, Indian, Latino.

(5) *Sex*--the exclusive use of words in advertisements, including those involving the rental of separate units in a single or multi-family dwelling, stating or tending to imply that the housing being advertised is available to persons of only one sex and not the other, except where the sharing of living areas is involved. Nothing in this part restricts advertisements of dwellings used exclusively for dormitory facilities by educational institutions.

(6) *Handicap*--crippled, blind, deaf, mentally ill, retarded, impaired, handicapped, physically fit. Nothing in this part restricts the inclusion of information about the availability of accessible housing in advertising of dwellings.

(7) *Familial status*--adults, children, singles, mature persons. Nothing in this part restricts advertisements of dwellings which are intended and operated for occupancy by older persons and which constitute *housing for older persons* as defined in Part 100 of this title.

(8) *Catch words*--Words and phrases used in a discriminatory context should be avoided, e.g., *restricted, exclusive, private, integrated, traditional, board approval or membership approval.*

(c) *Symbols or logotypes.* Symbols or logotypes which imply or suggest race, color, religion, sex, handicap, familial status, or national origin.

(d) *Colloquialisms.* Words or phrases used regionally or locally which imply or suggest race, color, religion, sex, handicap, familial status, or national origin.
(e) *Directions to real estate for sale or rent (use of maps or written instructions).* Directions can imply a discriminatory preference, limitation, or exclusion. For example, references to real estate location made in terms of racial or national origin significant landmarks, such as an existing black development (signal to blacks) or an existing development known for its exclusion of minorities (signal to whites). Specific directions which make reference to a racial or national origin significant area may indicate a preference. References to a synagogue, congregation or parish may also indicate a religious preference.
(f) *Area (location) description*. Names of facilities which cater to a particular racial, national origin or religious group, such as country club or private school designations, or names of facilities which are used exclusively by one sex may indicate a preference.

§ 109.25 Selective use of advertising media or content.

The selective use of advertising media or content when particular combinations thereof are used exclusively with respect to various housing developments or sites can lead to discriminatory results and may indicate a violation of the Fair Housing Act. For example, the use of English language media alone or the exclusive use of media catering to the majority population in an area, when, in such area, there are also available non-English language or other minority media, may have discriminatory impact. Similarly, the selective use of human models in advertisements may have discriminatory impact. The following are examples of the selective use of advertisements which may be discriminatory:
(a) *Selective geographic advertisements*. Such selective use may involve the strategic placement of billboards; brochure advertisements distributed within a limited geographic area by hand or in the mail; advertising in particular geographic coverage editions of major metropolitan newspapers or in newspapers of limited circulation which are mainly advertising vehicles for reaching a particular segment of the community; or displays or announcements available only in selected sales offices.
(b) *Selective use of equal opportunity slogan or logo*. When placing advertisements, such selective use may involve placing the equal housing opportunity slogan or logo in advertising reaching some geographic areas, but not others, or with respect to some properties but not others.
(c) *Selective use of human models when conducting an advertising campaign.* Selective advertising may involve an advertising campaign using human models primarily in media that cater to one racial or national origin segment of the population without a complementary advertising campaign that is directed at other groups. Another example may involve use of racially mixed models by a developer to advertise one development and not others. Similar care must be exercised in advertising in publications or other media directed at one particular sex, or at persons without children. Such selective advertising may involve the use of human models of members of only one sex, or of adults only, in displays, photographs or drawings to indicate preferences for one sex or the other, or for adults to the exclusion of children.

The following list of acceptable and unacceptable words and phrases and those which should be used with caution, e.g., those which might not always be considered discriminatory, such as "seniors only" if it is a certified over-55 community, **are reprinted here with permission of the Miami Valley Housing Center Inc in Dayton, Ohio which maintains and periodically revises the list**. The attached list is scheduled to be reviewed and possibly revised in 2014.

Miami Valley Fair Housing Center, Inc.
21-23 East Babbitt Street
Dayton, OH 45405-4968
937-223-6035 • Fax 937-223-6279
Jim McCarthy, President/CEO

FAIR HOUSING ADVERTISING WORD AND PHRASE LIST

Revised 05/01/09

This word and phrase list is intended as a guideline to assist in complying with state and federal fair housing laws. It is not intended as a complete list of every word or phrase that could violate any local, state, or federal statutes.

This list is intended to educate and provide general guidance to the many businesses in the Miami Valley that create and publish real estate advertising. This list is not intended to provide legal advice. By its nature, a general list cannot cover particular persons' situations or questions. The list is intended to make you aware of and sensitive to the important legal obligations concerning discriminatory real estate advertising.

For additional information, contact the Miami Valley Fair Housing Center at (937) 223-6035.

BOLD — not acceptable	*ITALIC — caution*	STANDARD — acceptable

able-bodied
Active
adult community
adult living
adult park
adults only
African, no
Agile
AIDS, no
Alcoholics, no
Appalachian, no
American Indians, no
Asian
Assistance animal(s)
Assistance animal(s) only
Bachelor
Bachelor pad
Bisexuals, no (City of Dayton)
Blacks, no
blind, no
board approval required
Catholic
Caucasian
Chicano, no
children, no
Chinese
Christian
Churches, near
college students, no
Colored
Congregation
Convalescent home
Convenient to
Couple
couples only
Credit check required
crippled, no
Curfew
Deaf, no
Den
disabled, no
domestics, quarters
Drug users, no
Drugs, no
employed, must be
empty nesters

BOLD — not acceptable *ITALIC — caution* STANDARD — acceptable

English only
Equal Housing Opportunity
ethnic references
Exclusive
Executive
families, no
families welcome
family room
family, great for
*female roommate***
*female(s) only***
*55 and older community**
fixer-upper
gated community
Gays, no
Gays, no (City of Dayton)
Gender
golden-agers only
golf course, near
group home(s) no
guest house
handicap accessible
handicap parking, no
Handicapped, not for
healthy only
Hindu
Hispanic, no
HIV, no
Homosexuals, no (City of Dayton)
*housing for older persons/seniors**
Hungarian, no
Ideal for . . . (should not describe people)
impaired, no
Indian, no
Integrated
Irish, no
Italian, no
Jewish
kids welcome
Landmark reference
Latino, no
Lesbians, no
Lesbians, no (City of Dayton)
*male roommate***
males(s) only**
*man (men) only***
Mature
mature complex
mature couple
mature individuals
mature person(s)
membership available
Membership approval required
Mentally handicapped, no
Mentally ill, no
Mexican, no
Mexican-American, no
Migrant workers, no
Military, no (State of Ohio)
Mormon Temple
Mosque
Mother in law apartment
Muslim
Nanny's room
Nationality
Near
Negro, no
Neighborhood name
Newlyweds
Nice
non- smokers
# of bedrooms
# of children
# of persons
# of sleeping areas
Nursery
nursing home
Older person(s)
one child
one person
Oriental, no
Parish
perfect for . . . (should not describe people)
pets limited to assistance animals
pets, no
Philippine or Philippinos, no
physically fit
play area, no
preferred community
Prestigious
Privacy
Private
Private driveway
Private entrance
Private property
Private setting
Public transportation(near)
Puerto Rican, no

BOLD — not acceptable *ITALIC — caution* STANDARD — acceptable

Quality construction
quality neighborhood
Quiet
Quiet neighborhood
references required
religious references
Responsible
Restricted
retarded, no
Retirees
Retirement home
safe neighborhood
school name or school district
se habla espanol
seasonal rates
seasonal worker(s), no
Secluded
section 8 accepted/ welcome
section 8, no
Secure
security provided
*senior adult community**
*senior citizen(s)**
senior discount
*senior housing**
*senior(s)**
*sex or gender***
Shrine
single family home
single person
*single woman, man***
singles only
*sixty-two and older community**
Smoker(s), no
Smoking, no
*Snowbirds**
sober
Sophisticated
Spanish speaking
Spanish speaking, no
Square feet
Straight only
student(s)
Students, no
Supplemental Security Income (SSI), no
Synagogue, near
temple, near
tenant (description of)
Townhouse
traditional neighborhood
traditional style
tranquil setting
Transgenders, no (City of Dayton)
two people
Unemployed, no
Verifiable Income
walking distance of , within
Wheelchairs, no
White
White(s) only
winter rental rates
*winter/summer visitors**
*woman (women) only***

****** Permitted to be used only when complex or development qualifies as housing for older persons***

******* Permitted to be used only when describing shared living areas or dwelling units used exclusively as dormitory facilities by educational institutions.***

All cautionary words are unacceptable if utilized in a context that states an unlawful preference or limitation. Furthermore, all cautionary words are "red flags" to fair housing enforcement agencies. Use of these words will only serve to invite further investigation and/or testing.

This word and phrase list is intended as a guideline to assist in complying with state and federal fair housing laws. It is not intended as a complete list of every word or phrase that could violate any local, state, or federal statutes.

This list is intended to educate and provide general guidance to the many businesses in the Miami Valley that create and publish real estate advertising. This list is not intended to provide legal advice. If you are in need of legal advice, please see an attorney. By its nature, a general list cannot cover particular persons' situations or questions. The list is intended to make you aware of and sensitive to the important legal obligations concerning discriminatory real estate advertising.