Fair Housing

This course looks at the history of fair housing and examines in depth the most pertinent legislation in force today. Discrimination can be subtle or overt and sometimes unintentional. It is crucial that real estate practitioners are aware of and compliant with the laws that govern housing discrimination.

Chapters:

• Chapter One: A Historical Look at Fair Housing
• Chapter Two: Exemptions, Prohibited Actions, and Real-Life Court Cases
• Chapter Three: Handicaps and Familial Status

Learning Objectives:

• Relate the history of Fair Housing legislation
• Discuss the Fair Housing Act of 1968 and Amendments to that Act
• Explain the importance of Fair Housing in the RE industry and how this act is enforced
• Identify exemptions under the Fair Housing Act of 1968
• Discuss the amendments which were later added to the Fair Housing Act
• Explain which actions are prohibited under the Fair Housing Act
• Explain the amendments of 1988, made to the Fair Housing Act
• Discuss actions that would qualify as violations of the amendments dealing with familial status
• Define “handicap” under the law of the Fair Housing Act
Chapter one: A Historical Look at Fair Housing

Overview
Our first chapter will cover the history behind fairhousing. We will begin with a look at the formative years of the country and how the attitude towards African-Americans and slavery changed from the “three-fifths” rule, to the Civil Rights Acts of the 1860s and 1960s. We will also summarize the various court cases and legislation that have led to the fair housing laws that are in place today.

Defining Fair
Dictionary definitions describe fair as being:
• Free of favoritism or bias
• Impartial
• Just to all parties
• Equitable
• Consistent with rules

So, it’s like the Golden Rule – do unto others as you would have them do unto you. It’s as easy as good versus evil or right versus wrong. In his book “All I really need to know I learned in Kindergarten”, Robert Fulgham gives some rules to live by:

• Share everything
• Play fair
• Don’t hit people
• Clean up your own mess
• Say you’re sorry when you hurt someone

So doing the right thing should be clear and easy. Unfortunately, that is not always the case. We may try to be fair and play by the rules; but that won’t work until we know the rules. And even then, we may get into trouble if we slide around the rules a little or misinterpret them.

Fair housing laws are there for the protection of everyone and their intent is to offer equal protection. You need to understand the laws concerning fair housing, in order to do the right thing – as a person – and you have a particular responsibility in your capacity as a real estate agent. You have daily contact with others such as buyers, sellers, landlords, tenants and other agents who may inadvertently, or blatantly, violate the law. You need to act properly, bring violations to the attention of others, and protect yourself from liability. This course is a national offering and we will concentrate on Federal laws that apply to all. In addition, there may be (and probably are), local and state laws concerning Fair Housing in your locale. You need to be diligent in keeping up with those as well.

Beginning of Housing Discrimination
Not surprisingly, the beginning of housing discrimination in America can be traced to the first colonial settlements. Even in the early 1600s, in the Jamestown Colony, there were differences in the treatment of black and white indentured servants. As the colonies grew, slavery of people of African descent became increasingly common. For the most part, slavery was not considered immoral by society.

Neither the Declaration of Independence nor the American Revolution produced any rights or freedom for the black man. Even Article I of the U.S. Constitution treated slaves as “three-fifths” of a person for purposes of determining a state’s population for representation in Congress. Prior to the Civil War, the courts refused to recognize any rights for persons of African descent, whether they were slaves or free. The federal government did nothing to prohibit discrimination, and even those states that had abolished slavery treated blacks as inferior.

The ideology of the time is well illustrated in the 1857 U.S. Supreme Court case entitled Dred Scott v. Sanford, in which the Court held that persons of African descent were not “citizens” of the United States, and therefore they were not entitled to any rights. According to the Court, the black man had no rights the white man was bound to respect. The Court stated that this principle applied to all African-American persons, slave or free:

“In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, or intended to be included in the general words used in that memorable instrument.”

End of Slavery
Shortly before the Civil War, the abolitionist movement gained strength. Abraham Lincoln’s Emancipation Proclamation --- at least on paper --- marked the end of
slavery, although it did little to advance civil rights at the time.

The History of Fair Housing

Let’s take a historical perspective and see how we got to where we are today. In 1776, the Declaration of Independence stated:

“We hold these truths to be self-evident, that all men are created equal. That they are endowed by their creator with certain unalienable rights, that are among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed…….”

Most think that the signers intended “all men” to include people of every race and both sexes. There is little doubt that “the pursuit of happiness” included the right to own one’s own home.

In 1787, however, Article 1 of the U.S. Constitution was adopted which stated that slaves were to be counted as “three-fifths” of a person in determining a state’s population for congressional representation. Most slaves were of African descent and were the target of early forms of discrimination. Other groups that arrived later also felt the stings of discrimination. Today, the U.S. is truly a Melting Pot; but unfortunately discrimination and unfair treatment still exist.

The three-fifths compromise is found in Article 1, Section 2, Paragraph 3 of the United States Constitution:

“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”

Pre-Civil War

In our early history, the rights of African Americans were further eroded by the 1857 Supreme Court decision in Dred Scott v. Sanford. Dred Scott was a slave who was taken to Missouri, a free state at the time. He sued, claiming that a person on free soil was entitled to freedom. The Supreme Court declared that Scott was not a citizen of Missouri and not entitled to sue in its courts. It declared that Blacks, either free or slave, could not claim U.S. citizenship and basically had no rights. Furthermore, Congress had no right to ban slavery in any U.S. Territory. This court decision created resentment in the north and pushed the nation closer to the Civil War. At the end of the Civil War, the Thirteenth Amendment was enacted to abolish slavery and to give Congress authority to enact appropriate legislation to enforce the abolishment of slavery. It said:

“Neither slavery nor involuntary servitude.... shall exist within the United States.” It further stated that “Congress shall have the power to enforce this article by appropriate legislation.”

Civil Rights Act of 1866

In 1866, the reconstruction Congress passed the Civil Rights Act of 1866, which guaranteed property rights to all citizens regardless of race. The Act specifically provided that all citizens shall have the same rights as white citizens to inherit, purchase, and sell real and personal property. The Civil Rights Act of 1866 stated:

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

Governmental discrimination was also prohibited by the Fourteenth Amendment (enacted in 1868) and the Fifth Amendment’s due process clause that applies to the federal government. But soon thereafter, the nation’s commitment to civil rights deteriorated.

In retrospect, the 1866 Civil Rights Act guarantee of equal rights to all races was, unfortunately, an empty promise. For over a century, the courts prohibited racial discrimination only with regard to “state” (governmental) discrimination, such as racial zoning or the court enforcement of racially-restrictive covenants governing real property; therefore, the 1866 Act was essentially ineffective in combating private discrimination.

The first major setback to the legal rights of African-Americans came in the U.S. Supreme Court’s decision in the Civil Rights Case (1883). In that case, the Court held that the equal protection clause of the U.S. Constitution (i.e., the 14th Amendment) did not prohibit private acts of discrimination, rather it
merely prohibited discrimination that was the product of government action. The Fourteenth Amendment, passed in 1868, built on this by saying:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without the due process of law; not deny to any person within its jurisdiction the equal protection of the law.”

For another century or so, courts prohibited racial discrimination primarily concerning governmental, or “state”, discrimination such as racial zoning or racial discrimination of restrictive covenants that were enforced by courts.

**How the Definition of “Fair” was Changing**

In 1883, the Supreme Court held that the equal protection clause of the 14th Amendment did not prohibit private acts of discrimination, only government acts. In 1896, in Plessy v. Ferguson, the court held that the enforcement of racial segregation of private or public facilities did not violate the Constitution as long as separate facilities were equal. This created the “separate but equal” policy that legitimatized segregation in all aspects of society, including rights in real property. This was not overturned until almost 60 years later.

**Buchanan v. Warley**

On the other hand, some of the more blatant forms of racial discrimination by the government were outlawed by the Court. In 1917, in Buchanan v. Warley, the U.S. Supreme Court struck down a local zoning law that limited African-Americans and other minorities to specific areas of town. The Court held that governmental zoning laws that discriminate, based upon race, violate the equal protection clause of the Fourteenth Amendment. This court case did not, however, ban any form of private discrimination. Again, private persons were free to discriminate based upon race.

**Shelley v. Kraemer**

In 1948, the Supreme Court ruled in Shelley v. Kraemer, that the enforcement by a state court of a private, racially restrictive covenant constituted a “government involvement that was sufficient to violate the equal protection clause of the Fourteenth Amendment.” It remained that way until the Supreme Court decided in 1972 that the recording of deeds with racial restrictions violated the Fifth Amendment to the constitution and the Federal Fair Housing Law that had been passed in 1968.

**Brown v. Board of Education**

Finally, in 1954, the U.S. Supreme Court rendered its landmark decision in Brown v. Board of Education, reversing the “separate but equal” decision in Plessy. The Brown case outlawed segregation in schools and marked the beginning of the end of the era of legalized segregation. It stated that:

“In the field of education ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”

The court further ruled, in Brown v. Board of Education, that segregation was unconstitutional.

Although some states and municipalities enacted fair housing laws, the federal government neglected to pass any laws to prevent housing discrimination. In fact, to a certain extent, the federal government was counterproductive in efforts to defeat segregation. For example, the Federal Housing Administration (FHA) instructed its staff and appraisers to consider the racial makeup of a neighborhood. Also, it is important to note that discrimination in housing was certainly not limited to African-Americans. Other minorities and religious groups were commonly discriminated against, as were women.

The events listed occurred in the following order:

1. Adoption of Article 1 of the U.S. Constitution, designating slaves as 3/5s of a person.
2. Dred Scott v. Sanford, in which the courts decided that African Americans could not claim U.S. citizenship.
3. Congress passed the Civil Rights Act of 1866, which guaranteed certain property rights to all citizens regardless of race.
4. Plessy v. Ferguson, in which the court held that the enforcement of racial segregation of private or public facilities did not violate the Constitution as long as separate facilities were equal.
5. Buchanan v. Warley, in which the U.S. Supreme Court struck down a local zoning law that limited African-Americans and other minorities to specific areas of town.
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the end of legalized segregation.

**Fair Housing Legislation**

In 1962, President Kennedy signed Executive Order
11063, entitled “Equal Opportunity in Housing.” It
prohibited discrimination in the sale, rental or use of all
residential housing that was owned, operated or financed
by the federal government. It had good intentions but
little real impact on the housing market in general, as it
lacked judicial enforcement.

In 1964, Congress passed Title VI to the Civil Rights
Act of 1964, which prohibited discrimination in public
accommodations, in all federally assisted programs, and in employment on the basis of:
- Race
- Color
- Religion
- Sex
- National origin

Likewise, this didn’t have much effect because it did
not prohibit discrimination in the private housing
market. President Lyndon Johnson introduced fair
housing legislation in 1966. It languished in congress
and was debated for about three years.

An important case was heard in California in 1967.
Reitman v Mulkey concerned a husband and wife who
were refused the right to rent a property because of
race. The legal issue was “whether Article I, Sec. 26 of
California Constitution, prohibiting state from denying
right of any person to decline to sell, lease or rent
his real property to such person as he in his absolute
discretion chooses, would involve the state in private
racial discriminations to an unconstitutional degree
and deny to any person the equal protection of the laws
within the meaning of the 14th?”

**The Fair Housing Act**

The real change in fair housing came in 1968, a year
that is considered the birth of modern fair housing.
In March, the Kerner Commission Report said that
America was heading for two societies that were
separate, but unequal.

In addition to the assassination of Rev. Martin Luther
King Jr., two historic events occurred that year that
forever changed the housing market.
First, in April, Congress enacted the Fair Housing
Act (Title VIII of the Civil Rights Act of 1968). This
Act bans discrimination on the basis of race, color,
religion and national origin in most types of housing
transactions. The Act also contains a variety of
remedies to attack housing discrimination including
private discrimination. Then, on April 4, Dr. Martin
Luther King, Jr. was assassinated. The ensuing debate
led to a swift passage of the Fair Housing Act (Title
VIII of the Civil Rights Act of 1968), just 7 days later.

Second, in June, the U.S. Supreme Court rendered its
decision in Jones v. Alfred H. Mayer Co., and held that
the Civil Rights Act of 1866 banned private, as well as
government, racial discrimination in housing. Thus the
1866 Act was given new life, and could be used to fight
racial discrimination.

The Fair Housing Act outlaws a variety of private
discriminatory acts, including refusal to rent or
sell, discrimination in the terms of sale or rental,
blockbusting, and discrimination in advertising and in
the use of real estate services. The Fair Housing Act
prohibited Discrimination in most types of housing on
the basis of:
- Race
- Color
- Religion
- National origin

**Amendments to the Fair Housing Act**

In 1974, Congress passed the Housing and Community
Development Act, which added “sex” as another
prohibited basis for discrimination. This prohibited
sexual harassment, but not discrimination for sexual
orientation. Also, in 1974, the Fair Housing Act
was expanded to include prohibition of gender
discrimination. Later that year the Equal Credit
Opportunity Act was passed by Congress, which
prohibited credit discrimination in housing based on
the basis of:
- Race
- Color
- Religion
- National origin
- Gender or marital status
- Age

Throughout the years there have been several additions
to the FHA that have made it more effective and
inclusive. For this exercise, we will take a look at some
of these changes and give some perspective as to when
they were implemented.

1970s-Introduction
In the 1970s, various federal legislations were enacted to prohibit discrimination in federal programs, and to include additional protected classes. After the enactment of the Fair Housing Act, the U.S. Supreme Court rendered several important decisions favorable to attacking housing discrimination.

1972-Trafficante v. Metropolitan Life Insurance Company
In 1972, the Court held in Trafficante v. Metropolitan Life Insurance Co. that the Fair Housing Act should be broadly construed, and that HUD’s interpretation of the Act should be given great weight. Of tremendous practical importance, the Court also upheld the right of housing organizations and other residents to sue persons or municipalities that violated the Fair Housing Act.

1973-Rehabilitation Act
Congress enacted Section 504 of the Rehabilitation Act of 1973, prohibiting discrimination against handicapped persons in all federally-assisted programs, including housing.

1975-Age Discrimination Act
Later, Congress enacted the Age Discrimination Act of 1975, which prohibited discrimination on the basis of age in programs receiving federal financial assistance.

1980s
1980-Gender-Based Discrimination
In 1980, President Carter expanded Kennedy’s executive order to include gender-based discrimination, and to grant HUD additional authority to issue regulations to further fair housing in federal programs.

1982-Havens Realty Corp. v. Coleman
In 1982, the Court rendered an important decision entitled Havens Realty Corp. v. Coleman, which permitted housing organizations and “testers” to sue in racial steering cases. These court cases enable private and public organizations to investigate fair housing violations and to file actions for civil penalties and damages.

1988-Fair Housing Amendments Act
The 1988 Fair Housing Amendments Act was signed into law by President Ronald Reagan in September of 1988. It contained many significant provisions that strengthened the 20 year old Fair Housing Act. The 1988 Amendment was enacted to expand the coverage of the Fair Housing Act and to enhance enforcement of the Act.

It extended federal civil rights protection to families with children and to persons with physical and mental handicaps. It instituted tougher enforcement policies by HUD and added sanctions and remedies for violations. The Amendment also modified the administrative process for HUD complaints, and essentially provides that HUD had a higher degree of authority to enforce the Fair Housing Act.

The Act removed the cap on punitive damages and monetary awards were now possible for actual damages as well as for non-economic injuries such as embarrassment, humiliation and mental anguish.

The Amendment also extended Title VIII to other discriminatory practices, relating to real estate loans for repairs and improvements, certain secondary market activities, and real estate appraisals.

So we see that true fairness and equality was a long time coming, under the law. However, it has accelerated rapidly in recent years. It is still being debated as to the state of actual fairness and equality in today’s world.

Chronology of Court Cases
Following is a chronology of court cases that have had an important impact on fair housing in the United States.

1857 - Dred Scott v. Sanford:
Persons of African descent, whether they are slaves or free, are NOT “citizens” of the United States entitled the privileges and immunities of white citizens.

1883 - Civil Rights Case:
14th Amendment prohibits discrimination only if it is the product of state (government) action. The 14th Amendment does not prohibit private acts of discrimination.

1896 - Plessy v. Ferguson:
Court sets forth “separate but equal” rule, thus permitting institutionalized segregation.

1917 - Buchanan v. Warley:
Court strikes down racial zoning law (on “equal protection” grounds) which had specifically limited African-Americans and other minorities to specific areas of town.

**1948 - Shelley v. Kramer:**
Court held that state court enforcement of private restrictive covenants (based upon race) amounted to sufficient “government” involvement to violate the equal protection clause of the 14th Amendment.

**1948 - Hurd v. Hodge:**
The “Shelley” rule applies equally to federal courts (in this case, the District of Columbia), as well as state courts.

**1954 - Brown v. Board of Education:**
Court finally reverses Plessy decision ending the “separate but equal” era.

**1967 - Reitman v. Mulkey:**
Court held that the California State Constitutional Amendment, which effectively nullified California’s fair housing laws, violated the equal protection clause, since the Amendment encouraged private racial housing discrimination.

**1968 - Jones v. Alfred H. Mayer Company:**
Court gives new life to the 1866 Civil Rights Act by holding that Section 1982 bars racial discrimination (private as well as public) in the sale of rental of property.

**1972 - Trafficante v. Metropolitan Life Insurance Company:**
In the Court’s first Title VIII decision the Court held that Fair Housing Act should be broadly construed, and that Title VII (federal employment discrimination) court cases can be used to interpret Title VIII and that HUD’s interpretations of the Act should be entitled to “great weight.”

**1977 - Village of Arlington Heights v. Metropolitan Housing Development Corporation:**
Court holds that a housing corporation and neighborhood residents had standing to challenge municipality’s denial of rezoning, which was alleged to have racially disproportional impact. (But Court also held that some “discriminatory intent or purpose was required to prove unconstitutional behavior.”)

**1979 - Gladstone Realtors v. Bellwood:**
Court upholds municipality and residents’ standing to sue local real estate brokers for racial steering.

**1982 - Havens Realty Corp. v. Coleman:**
Extends standing to sue in racial steering cases to fair housing organizations and “testers” who investigate discrimination complaints.

**Chapter Two: Exemptions, Prohibited Actions, and Real-Life Court Cases**

**Overview**
In our second chapter, we will look at the main points of the Fair Housing Act of 1968. A bulk of the chapter will be spent discussing those actions that are prohibited by the Fair Housing Act. We will wrap things up with a section which includes real court cases that demonstrate what can happen when the Fair Housing Act is violated.

**Definitions**
Before we go any further, let’s look at some definitions under the act.

- **Dwelling** is any building, structure or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure or portion thereof.
- **Family** includes a single individual
- **Person** includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, jointstock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 (of the United States Code), receivers, and fiduciaries.
- **To rent** includes to lease, to sublease, to let and otherwise grant for a consideration the right to occupy premises not owned by the occupant.

**The Fair Housing Act of 1968**
In this chapter we will take a close look at the Fair Housing Act of 1968 and its provisions. There have been some modifications since then which will be included. First though, let’s take a look at a short case study.

**Jones v. Alfred H. Mayer Company**
In the case of Jones v. Alfred H. Mayer Company, the U.S. Supreme Court applied the Civil Rights Act of 1866 to prohibit any racially-based discrimination in housing. The ruling provides an interesting interplay between the 1866 act and the 1968 amendments to the federal Fair Housing Act, because the exemptions provided for in the 1968 law cannot be used to enforce any racial discrimination. Based on the 1866 law, if discrimination on the basis of race occurs, the aggrieved party can file an action in federal district court for an injunction and damages.

Originally enacted by Congress as Title VIII of the Civil Rights Act of 1968, the Fair Housing Act prohibits discrimination in housing on the basis of race, color, religion, or national origin. An amendment in the Housing and Community Development Act of 1974 added the prohibition against discrimination on the basis of sex. The Fair Housing Amendments Act of 1988 added provisions to prevent discrimination based on mental or physical handicap or familial status.

Although the Fair Housing Act of 1968 was clear in its intent to provide fair housing for the nation, it essentially lacked means for enforcement. Until 1988, the role of the U.S. Department of Housing and Urban Development (HUD) was limited to that of negotiator, trying to effect a voluntary conciliation between the affected parties through the force of persuasion.

Although aggrieved parties could always take their complaints to a federal court and seek civil damages, this often was not a reality because the victim of discrimination was often unable to afford the legal expense.

The major changes came 20 years later in the Fair Housing Amendments Act of 1988; which added protected status to families with children and persons with physical or mental handicaps. It also added new enforcement procedures. We will take a close look at those changes in the next module.

The Fair Housing Act prohibits discrimination in housing because of:

- Race or color
- National origin
- Religion
- Sex
- Familial status
- Handicap

**Exemptions**

Most housing is covered under the Act, both private and public. There are certain exemptions, which include:

1. Single-family housing sold or rented without the use of a broker
2. Owner occupied housing with no more than 4 units
3. Housing operated by organizations and private clubs that limit occupancy to members

These exemptions at first glance, seem far reaching. However, there are very specific requirements to be fulfilled.

1. Any single-family house sold or rented by an owner is exempt: PROVIDED that such private individual owner does not own more than three such single-family houses at any one time. Also, in the case of the sales of any such single-family house by a private individual owner not residing in such house at the time of sale or who was not the most recent resident of such house prior to such sales, the exemption granted shall apply only with regard to one such sale within any twenty-four month period. Further, it is stipulated that such a private owner may not own any interest in, nor is there reserved on his behalf, title to any right to all or the portions of the proceeds from the sale or rental of, more than three singlefamily homes at any one time.
   a. without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person, and
   b. without the publication, post or mailing, after notice, of any advertisement or written notice in violation of sections 804(c) of this title (discriminatory advertising); but nothing in this provision shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer title.

A person deemed to be “in the business of selling or
renting real estate” mentioned above, includes any one who:

• has, within the preceding twelve months, participated as principal in three or more transactions involving the sale or rental of any dwelling, or any interest therein, or
• has, within the preceding twelve months, participated as agent, other than in the sale of his own personal residence, in providing sales or rental facilities or sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein, or is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families.

Wow – that was quite a mouthful! But it is important that you understand the restrictions that are in force and how to deal with them. Let’s look at the other two exemptions.

1. The Act shall not apply to rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains one of such living quarters as his residence.

2. Nothing shall prohibit a religious organization, association, or society, or any other nonprofit or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin. Nor shall anything prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

**Prohibited Actions**

Now we will examine the specific actions that are prohibited under the Fair Housing Act. In summary, they prohibit any of the following actions based on race, color, national origin, religion, sex, familial status or handicap:

I. Refuse to rent or sell housing or to negotiate for housing
II. Make housing unavailable or deny a dwelling
III. Set different terms, conditions or privileges for sale or rental of a dwelling or in the provision of different housing services or facilities
IV. Falsely deny that housing is available for inspection, sale or rental
V. For profit, persuade owners to sell or rent (blockbusting)
VI. Discriminate in residential real-estate related transactions
VII. Deny anyone access to or membership in a facility or service (such as a multiple listing service) related to the sale of rental of housing
VIII. Threaten, coerce, intimidate or interfere with anyone exercising a fair housing right or assisting others who exercise that right.

Let’s take them one at a time and make sure we understand the details and nuances of each. We may encounter these kinds of acts every day in our business. It is important that each agent and each office follow these rules in a strict fashion. The key is to employ consistent policies.

I. **It is unlawful to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of a dwelling because of race, color, religion, sex, familial status, or national origin.**

Prohibited actions would include:

- Imposing different sales price or rental charges upon any person because of membership in a protected class
- Evicting tenants because they or their guests are members of a protected class

In one of the first cases tried after the Fair Housing Amendments Act, it cost a white seller $75,000 after he tried to renege on a contract to sell his house to an African-American couple. Gordon Blackwell owned property in Stone Mountain, Georgia. He listed his property as a 90 day exclusive listing with a local agency at $104,000 and subsequently lowered the asking price to $98,000.

The remarks section of a “profile sheet” he executed with the agency stated “Super motivated seller wants offer.” He verbally told the listing agent “Bring me an offer of $92,000 and I’ll take it.”
An offer was made by an African –American couple through their broker and after counteroffers were negotiated, Mr. Blackwell accepted an offer of $92,000 and signed papers.

After discovering that the purchasers were African American, the seller changed the terms of the contract to require the buyers to pay closing costs. He refused to discuss the matter any further with the listing agent, changed the locks on the house and refused to go to the closing. He subsequently rented the house to a white couple. Three days before they moved in, a Federal District Court issued a restraining order prohibiting Blackwell from renting or selling the property until the claim of racial discrimination was settled.

By the way, in this case the agent and his broker were not held liable because they had acted properly. They tried to dissuade the seller, recorded the events and walked away.

II. It is unlawful to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

Prohibited actions would include:
- Representing that covenants or other deed, trust, or lease provisions which purport to restrict the sale or rental of dwellings because of protected status preclude the sale or rental of a dwelling to any person from a protected class
- Limiting information, by word or conduct, regarding suitably priced dwellings available for inspection, sale or rental to members of a protected group
- Discouraging any person from inspecting, purchasing or renting a dwelling on account of membership in a protected group by exaggerating drawbacks, and failing to inform any person of desirable features of a dwelling or neighborhood
- Assigning any person to a particular section of a community, neighborhood or dwelling, or to a particular floor of a building because of protected status
- Discharging or taking another adverse action against an employee, broker or agent because he or she refused to participate in a discriminatory housing practice.

This section is how the Fair Housing Act addresses such “steering” issues. One well known case happened in the Chicago area and involved the use of testers. Testers can file suit and do not have to tell you they are testers, even if asked directly.

First – a white tester went to a real estate office. An agent ran out a list of properties from MLS and crossed out two houses saying “You definitely don’t want these.” Those two properties were in census tract areas that were 98% to 100% African-American.

Second – African-American testers with income as good as the previous white tester were not offered the same properties. They were shown a list of available properties, by the same agent, which included properties in a different geographic area. An African-American tester asked to see properties is a specific geographic area. Three of the four properties the agent selected were outside the requested area and all were in racially mixed areas below the tester’s stated price range.

Third - a white tester was offered a list of 41 properties for sale and a similarly qualified African American tester was offered only 4 properties.

Several other tests were performed on the same real estate office. When the trial ended, a judge held the supervising broker personally liable for punitive damages of over $90,000 and attorneys fees in excess of $200,000.

III. It is unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

The bottom line is – treat every one the same! You should establish policies for yourself. Your office should have standard procedures and they should be reduced to writing. When you vary your procedures, you are putting yourself at risk for a discrimination suit.

In rental properties, do you perform credit checks of potential tenants? That’s OK – but you should be doing them for everybody. The due dates for rental checks and procedures for enforcement and penalties for late payments must be consistent across the board.
It is unlawful because of protected class status to:

- Use different provisions in leases or contracts of sale, such as those relating to rental charges, security deposits and the terms of a lease and those relating to down payment and closing requirements
- Use different qualification criteria or applications on sale or rental or rental standards or procedures, such as income standards, application requirements, application fees, credit analysis or sale and rental approval procedures
- Fail or delay maintenance or repairs of sale or rental dwellings
- Fail to process an offer for the sale or rental of a dwelling or to communicate an offer accurately

Prohibited actions would include:

- Indicating through words or conduct that a dwelling which is available for inspection, sale or rental has been sold or rented
- Providing false or inaccurate information regarding the availability of a dwelling for sale or lease to any person, including testers, regardless of whether such person is actually seeking housing based on protected class status

In the Bangs case, in Chicago, an award of $6,000 was made for an African-American who was denied an apartment that was then made available to white testers.

In Detroit, an apartment complex agreed to pay $425,000 in a Justice Department suit that alleged the 170 unit complex systematically refused to rent apartments to African-Americans by telling them that vacant apartments were not available.

V. It is unlawful to, for profit, induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a protected group.

This process is known as “blockbusting” and prohibited actions under this section would include:

- Engaging in conduct, including uninvited solicitations, that conveys to a person that a neighborhood is undergoing or is about to undergo a change in the race, color, religion, sex, handicap, familial status, or national origin, to encourage the person to offer a dwelling for sale or rent
- Encouraging any person to sell or rent a dwelling by asserting that the entry or prospective entry of persons of a particular protected class will result in undesirable consequences for the project, neighborhood, or community, such as an increase in criminal or antisocial behavior, or a decline in the quality of schools or other service or facilities

In establishing a discriminatory housing practice under this section, it is not necessary that there was in fact profit, as long as profit was a factor for engaging in the blockbusting activity.

VI. It is unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction,
The term “residential real estate-related transaction” is defined as:

1. The making or purchasing of loans, or providing other financial assistance for purchasing, constructing, improving, or maintaining a dwelling. Included in this section would be loans secured by residential real estate.
2. The selling, brokering, or appraising of residential real estate.

That casts a pretty wide net and probably encompasses all of you taking this seminar.

Prohibited acts under this section include:

- Refusing to provide information to any person concerning the availability of loans or other financial assistance, or providing information that is inaccurate or different because of membership in a protected class
- Refusing to purchase loans, debts, or securities, or imposing different terms and conditions for such purchase to persons of a protected group
- Using different policies, practices or procedures in evaluating or determining creditworthiness of any person in connection with the provision of any loan or other financial assistance for a dwelling because that person is a member of a protected class
- Determining the type of loan or other financial assistance to be provided with respect to a dwelling or fixing the amount, interest rate, duration or other terms for the loan or other financial assistance because of membership in a protected group

Examples of unlawful practices in appraising, selling or brokering residential real property include:

- An appraisal that improperly takes into consideration a person protected status in estimating value
- Using an appraisal that improperly takes into consideration the protected classes in estimating value in connection with the sale, rental, or financing of a dwelling where the person knows or reasonably should know that the appraisal was based on discriminatory factors.

VII. It is unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers’ organization or other service, organization or facility relating to the business of selling or renting dwellings, or to discriminate against him or her in the terms or conditions of such access, membership, or participation on account of membership in a protected group.

VIII. It is unlawful to coerce, intimidate, threaten, or interfere with any person exercising a fair housing right or on account of a person having assisted others in exercising such rights.

In the Simpson case a federal judge awarded $100,000 to a claimant Laura Pantoja, a native of Peru with a dark complexion, and $80,000 to her parents. Ms. Pantoja was harassed, intimidated and held up for two years from moving into a vacant home owned by her parents in Louisville, Kentucky. The neighbors made numerous unfounded complaints to the housing inspectors, issued subpoenas and wrote threatening letters.

Recent Court Cases
United States v. Matusoff Rental Company (S.D. Ohio) 4/5/07

On March 30, 2007, the Court issued an Order in United States v. Matusoff Rental Company (S.D. Ohio) finding that Defendant Roger Matusoff had engaged in a pattern or practice of discrimination on the basis of race and familial status and ordering him to pay a total of $535,000 to 26 aggrieved persons, $405,000 in compensatory damages (in damage awards ranging from $7,500 to $20,000) and $130,000 in punitive damages ($5,000 per victim). The court declined to enter injunctive relief and did not address the United States’ request for civil penalties.

After investigation, the United States filed a complaint on November 24, 1999, which was later amended. The amended complaint alleged that Defendant Roger Matusoff, the owner of three apartment complexes located in Xenia, Troy and Sidney, Ohio violated the Fair Housing Act by discriminating against several African-Americans and families with children, who were applying for housing. The complaint also alleged that Defendant Matusoff had engaged in a pattern or practice of discrimination based on race or color by instructing employees to identify the race of rental applications as a means to further the Defendant Matusoff’s policy of denying apartments to African Americans.
The case was referred to the Division after the Department of Housing and Urban Development (HUD) received a complaint, conducted an investigation, and issued a charge of discrimination.

Lindsay v. Yates (N.D. Ohio) 08/21/09
JoAnn and Gene Yates put a house on the market that they owned but no longer lived in. The Yates also owned the surrounding property. When Gene Yates passed away, their son helped JoAnn with her finances. The house remained on the market. The Lindsays made an offer for the property that was accepted. The Lindsays were qualified African American buyers. A few days later, the two families met face to face for the first time. A few days after that meeting, the Yates terminated the purchase agreement. JoAnn Yates claimed that she wanted to “keep it in the family.” The Lindsays believed that JoAnn Yates did not want to sell them the property because they were African American. The Lindsays’ only evidence was the suspicious timing of the Yates’s termination after meeting them. The trial court dismissed the Lindsays’ claims on summary judgment.

The court of appeals reversed and remanded the trial court’s decision stating that the short period of time between the initial meeting and the seller’s termination of the contract was enough additional evidence of discrimination to overcome summary judgment.

Chapter Three: Handicaps and Familial Status

Overview
In our third chapter we will discuss familial status and handicap discrimination, both of which were added to the Fair Housing Act in 1988. We will define familial status and provide numerous examples of what would be considered violations of the Fair Housing Act. We will also take a look at what needs to be done in order to be in compliance with the handicap requirements of the Fair Housing Act.

1988 Amendments
The Fair Housing Amendments Act of 1988 embodied significant changes. It added two protected classes; families with children and handicapped. It also enhanced HUD’s enforcement capabilities and introduced expanded and stiffer penalties for violations.

Familial Status
A HUD study done in 1978 concluded there was discrimination directed towards families with children. A survey of 79,000 rental units indicated that about 25% banned children entirely and about 50% more imposed limitations and restrictions on families with children. Some of these reported restrictions included:
• Excluding children below a certain age
• Limiting the number of children who could occupy a dwelling unit
• Segregating families with children in certain areas
• Charging higher security deposits or rental rates for families with children
• Denying families access to recreational and other facilities

The HUD regulations state that “families with children must be provided the same protections as other classes of persons protected by the Fair Housing Act.” Housing providers can, of course, still take action against families for other reasons such as evicting a family for property damage or failure to pay rent. The law defines “familial status” as one or more individuals (who have not attained the age of 18 years) being domiciled with:
• A parent or another person having legal custody of such individual, or
• The designee of such parent or other person having such custody, with the written permission of such parent or other person

The law further states that the protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is the process of securing legal custody of any individual who has not attained the age of 18 years.

The Act also prohibits advertising that indicates any preference, limitation, or discrimination based on protected class status. Photographs or words that indicate that children are not welcome would be deemed illegal.

HUD states that “Landlords and real estate agents rarely say ‘no kids.’” However they warn that you may suspect discrimination if comments are made such as:
• “Our building for children is full.”
• “A parent and a child may not share a bedroom at this facility.”
• “Only 3 people are allowed in a 2 bedroom apartment.”
• “Children are only permitted to live on ground floors.”
• “We can only rent to families with kids if you pay an extra security deposit.”
• “We take younger children, but no teenagers. They cause too much noise.”
• “I live in this house so I can discriminate against anyone I choose.”

Housing for Older Persons
Housing for older persons is exempt from the prohibition against familial status if:
• The HUD Secretary has determined that it is specifically designed for and occupied by elderly persons under a federal, state or local government or
• It is occupied solely by persons that are 62 or older or
• It houses at least one person who is 55 or older in at least 80 percent of the occupied units; has significant services and facilities for older persons; and adheres to a published policy that demonstrates an intent to house persons who are 55 or older. The requirement for significant services and facilities is waived if providing them is not practical and the housing is necessary to provide important housing opportunities for older persons.

The Ocean Parks Jupiter condominium Association in Florida was held for damages of over $20,000, by a federal judge, for banning children under 14 from their project.
A federal judge in California found that a mobile home park was in violation of the Fair Housing Act for refusing to allow children to use the park facilities. Children were denied use of the billiard room, Jacuzzi and shuffleboard court and use of the swimming pool was restricted. Total damages awarded were $42,500.

In a case in Oregon, in 2001, a mobile home park owner was assessed a civil penalty of $5,000 and $2,000 in damages for refusing to allow children in the park. At the time, there were only 71% of the units occupied by at least one person 55 or older and he had no method for verifying the age of the occupants, as required by law.

Occupancy Standards
The Fair Housing Act allows housing providers to adhere to any reasonable local, state, or federal regulations regarding the maximum number of persons permitted to occupy a dwelling. HUD also allows landlords to develop reasonable occupancy requirements on their own. However, these occupancy standards must not be a subterfuge to keep out children. They must be based on such things as:
• Size of the unit
• Number of bedrooms and their dimensions
• Configuration of the unit (a bedroom is not considered a bedroom if someone has to pass through another bedroom to access it)
• Physical limitations of the housing
• State and local laws and zoning
• Capacity of the building, such as water and sewer

Fair Housing Occupancy Standards
The Building Owners and Code Administrators (BOCA) have issued guidelines that require a minimum of 150 square feet for the first occupant and an additional 100 square feet for each additional occupant. Sleeping areas are required to have a minimum of 70 square feet for a single occupant and 50 square feet each for two or more people sharing a sleeping space.

HUD has a rule of thumb that generally two persons per bedroom is considered reasonable; but this reasonableness is judged on a case-by-case basis. When reviewing cases, HUD considers the size of the bedrooms and dwelling, the ages of the children, along with any discriminatory statements made and discriminatory advertising done.

The passage of the 1988 Fair Housing Amendments Act recognized the need to define and protect the rights of the disabled and built on the rights that were implemented under the Rehabilitation Act of 1973; which dealt with discrimination in programs, activities and housing that receive federal funds.

Protection for the Handicapped
The 1988 Act defined “handicap” quite broadly and added new provisions which dealt with disability discrimination.

Handicap was defined as:
1. A physical or mental impairment which substantially limits one or more of a person’s major life activities
2. A record of having such an impairment, or
3. Being regarded as having such an impairment
Specifically cited as examples of disabilities are:
- Hearing, mobility and visual impairments
- Chronic alcoholism
- Chronic mental illness
- Cerebral palsy
- Epilepsy
- AIDS
- People who use walkers
- People who use service dogs

The definition specifically excludes persons who are engaging in the illegal use of drugs, and transvestites.

Before we go any further, let’s look at some more definitions.
- **Physical impairment** is any physiological disorder or condition, cosmetic disfigurement or anatomical loss.
- **Mental impairment** is any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.
- **Major life activities** are functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

It is unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny a dwelling to any buyer or renter because of a handicap of—
1. That buyer or seller
2. A person residing in or intending to reside in that dwelling after it is sold, rented, or made available
3. Or any person associated with that buyer or renter

It is unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling because of a handicap of—
4. That buyer or seller
5. A person residing in or intending to reside in that dwelling after it is sold, rented, or made available
6. Or any person associated with that buyer or renter

Disability Rights in Housing
If you have a handicap, as defined previously, your landlord may not:
- Refuse to let you make reasonable modifications to your dwelling or common use areas, at your expense, if necessary for the handicapped person to use the housing (where reasonable, the landlord may permit changes only if you agree to restore the property to its original condition when you move.)
- Refuse to make reasonable accommodations in rules, policies, practices, or services if necessary for the handicapped person to use the housing.

Common use areas means rooms, spaces or elements inside or outside of a building that are made available for the use of residents of a building or the guests thereof.

An example would be a building with a policy of “no pets” which must allow a visually impaired tenant to keep a guide dog.

Another example would be an apartment complex that offers tenants ample unassigned parking for its tenants. They would be required to provide a reserved space near the apartment of a tenant who was mobility impaired.

Examples of reasonable modifications would be widening doorways, installing grab bars in bathrooms and lowering kitchen cabinets.

Title III of the Americans with Disabilities Act (ADA) was enacted in 1990. Its purpose is to prohibit discrimination on the basis of disabilities by public accommodations and allow equal opportunities in employment, transportation and access to goods and services.

It is aimed at public and commercial facilities and not at residential properties that are intended for nonresidential use. It specifically states that it does not apply to facilities “that are covered or expressly exempted from coverage under the Fair Housing Act of 1968.” It requires places of public accommodation to be designed, constructed and altered in compliance with accessibility standards outlined in the statute.

If you work with any kind of commercial properties, you need to be familiar with the specifics of the regulations. Included properties would be such things as hotels, restaurants, retail stores, day care centers and recreational facilities. The full text of the document may be found at [www.usdoj.gov/](http://www.usdoj.gov/). There is also a 15 page booklet entitled “ADA Guide for Small Businesses” that may be downloaded.

There are also requirements for new buildings that were first occupied after March 13, 1991. Buildings
that have 4 or more units and an elevator must have:
• Public and common areas that are accessible to persons with disabilities
• Doors and hallways wide enough for wheelchairs
• All units must have:
  • An accessible route into and through the unit
  • Accessible light switches, electrical outlets, thermostats and other environmental controls
  • Reinforced bathroom walls to allow later installation of grab bars
  • Kitchens and bathrooms that can be used by people in wheelchairs

If a building has four or more units and no elevator, these standards apply to ground floor units.

• **Accessible route** means a continuous unobstructed path connecting accessible elements and spaces in a building or within a site that can be negotiated by a person with a severe disability using a wheelchair and that is also safe for and usable by people with other disabilities.

• **Ground floor** means a floor of a building with a building entrance on an accessible route. A building may have more than one ground floor.

AIDS Disclosure

Let’s look at another sensitive area – AIDS disclosure. HUD takes the position that it is illegal for real estate agents to make unsolicited disclosures that a current or former occupant of a property has AIDS. If a prospective buyer directly asks a real estate agent if a current or former occupant has AIDS and you know that this is true, HUD advises that you should not respond. To do so would be in violation of the Fair Housing Act.

Discrimination against Lesbian, Gay, Bisexual, and Transgender Individuals

The Fair Housing Act does not specifically include sexual orientation and gender identity as prohibited bases. However, a lesbian, gay, bisexual, or transgender (LGBT) person’s experience with sexual orientation or gender identity housing discrimination may still be covered by the Fair Housing Act.

On January 20, 2011 HUD issued a proposed rule that takes certain measures aimed at protecting LGBT renters and homeowners from discrimination. Three of the provisions are:
• the term “family,” as used to describe eligible beneficiaries of public housing and voucher programs including LGBT applicants
• defining gender identity as “actual or perceived gender-related characteristics”
• specifying that any FHA-insured mortgage loan must be based only on the credit-worthiness of a borrower, without regard to characteristics such as sexual orientation and gender identity

Recent Court Cases

Religious Discrimination

**United States v. Triple H. Realty, et al. (D. N.J.)**
On September 29, 2006, the United States filed a complaint in United States v. Triple H. Realty, et al. (D. N.J.), a Fair Housing Act election case which was referred by the Department of Housing and Urban Development (HUD). Eight HUD complainants, non Jewish, Hispanic and/or African-American individuals, are former tenants of Cottage Manor Apartments in Lakewood, New Jersey. The complaint alleges that the defendants tried to force them to transfer from one building to another to make room for Orthodox Jews whom were courted as tenants in 2002-2004; that they were threatened if they objected; and, that the buildings in which non-Jewish tenants lived in the rear of the property had fewer amenities and were less well maintained than buildings at the front of the property that housed the new Jewish tenants. The complaint also alleges that the incoming Jewish tenants paid less rent for apartments comparable to theirs. The United States also alleges that the defendants’ conduct constitutes a pattern or practice of discrimination and a denial of rights to a group of persons.

Gender-based Discrimination

**United States v. William E. Brewer and Lena P. Brewer (E.D. Tenn.)**
On April 16, 2007, the Court approved and entered the Consent Order resolving United States v. William E. Brewer and Lena P. Brewer (E.D. Tenn.), a Fair Housing Act pattern or practice case which alleged sexual harassment discrimination. The Consent Order requires the Defendants to pay $110,000 in monetary damages to nine women, and a $15,000 civil penalty. The Consent Order also requires the Defendants to transfer all managerial responsibilities to an independent manager. The complaint, which was filed on December 22, 2005, alleged that from at least 2004 through the present, Defendant Mr. Brewer had subjected female
tenants to severe, pervasive, and unwelcome sexual harassment, entering the dwellings of female tenants without permission or notice, and threatening to evict female tenants when they refused or objected to his sexual advances. The Division commenced its investigation of the defendants in late 2004 based on a referral from the City of Knoxville.

**Disability vs. Age Restriction**

**Canady v. Prescott Canyon Estates Homeowners Assoc Court of Appeals of Arizona**

Ralph and Margaret Canady entered into an agreement to purchase a house that was owned by Pamela Garapich. The house was located in Prescott Canyon Estates residential community. The community’s covenants, conditions, and restrictions required that at least one person in each home be age fifty-five or older and prohibited anyone under the age of thirty-five from living in the community. The Canady’s had planned for their 26-year-old son, Scott, to live with them as he had a severe developmental disability that prevented him from living alone. When the president of the association learned of the purchase agreement, he informed Ms. Garapich that the Canady’s son would not be allowed to live there because of the covenants’ prohibition of people under age thirty-five. The purchase agreement was dissolved and the Canady’s and Ms. Garapich filed a complaint against the association. The State brought an action against the association, and the Canady’s and Ms. Garapich were allowed to intervene as plaintiffs. The trial court granted summary judgment in favor of the defendants, holding that the age restriction was a sanctioned form of discrimination under the Fair Housing Act’s exemption for “housing for older persons” and that it did not discriminate based on disability.

Legal Issue: Whether “housing for older persons” is exempt from the provisions which prohibit discrimination against disabled persons.

Court’s Ruling: Reversed and remanded. The federal Fair Housing Act is intended to eliminate discrimination and therefore, must be construed broadly. However, exceptions to the Act, such as the “housing for older persons” exemption, must be interpreted narrowly. The court held that the federal Fair Housing Act imposes an affirmative duty to reasonably accommodate a disabled person.

Reasonable accommodations include not enforcing a restrictive covenant that would prevent a disabled person from living in a particular community.

**Age Restriction Amendment to By-Laws Defective**

**Wilson v. Playa De Serrano**

In 1993, Wilson and his mother bought a lot in Playa de Serrano. Playa de Serrano was created in the late 1960s and designed for “adults”. In 2002, the owners of Playa de Serrano passed an amendment to the by-laws that stated that the subdivision was meant to be an age restricted community, and provided ways in which the Board could impose and verify the restriction Legal Issue: Whether Playa de Serrano’s Declaration that it is an “adult” community is enough to allow it to restrict occupancy to those over the age of fifty-five?

Court’s Ruling: The court found that a deed restriction is an agreement between all the property owners in a subdivision and the individual owners. The court held that for the restriction to apply it must be specifically contained in the recorded declarations. Playa de Serrano should have adopted it when it was created in 1969. The court found that the subdivision’s Declaration did not expressly restrict occupancy to those over the age of fifty-five or give Playa de Serrano, its Board or majority of its owners the ability to limit occupancy to those over the age of fifty-five.

The court also held that the use of the word “regulation” in the subdivision’s delegation of power to the Board did not support the passage of the 2002 restriction on occupancy. Furthermore, the use of the term “adult townhouse development” in Playa de Serrano’s Declaration does not show that the subdivision was intended to be a community for those over fifty-five, because when the subdivision was created, an “adult” was anyone over the age of twentyone. The court further found that Playa de Serrano’s compliance with FHAA was not enough, by itself to show that it had the authority to impose the agerestriction on its members.

**Occupancy Limits**

**Reeves v. Rose**

The Reeves are black and have two children. They went to Rose and inquired about renting a two bedroom apartment, but were denied by Rose’s agent who, they allege, told them they could have
only one child in a 2 bedroom apartment. The agent stated that she told them they could have no more than three people in a two-bedroom apartment. Reeves contacted the Fair Housing Center (FHC) of Metropolitan Detroit, which then conducted an investigation of Rose for possible discrimination on the basis of race and familial status. A test was done for evidence of familial status discrimination, but no familial discrimination was found. Tests were conducted for evidence of race discrimination. In one of the tests, a white man asked for a unit for himself, his wife and their two children and he was told one was available.

Reeves claimed that Rose’s policy discriminates against families with children, and sued Rose for both familial and racial discrimination

Legal Issue: On appeal, Rose asserts that they have a three person limit for a two bedroom apartment, and that policy conforms to applicable building codes. Rose further asserts that the occupancy restriction is non-discriminatory because it is based on the legitimate reason of preventing overcrowding and wear and tear on the apartments. Rose also denies that the agent told the Reeves that they could have only one child in a two-bedroom apartment and asserts that if she did, she acted on her own to violate company policy.

Court’s Ruling: Reeves raised a genuine issue of material fact as to whether the agent’s statement that Rose permitted only one child per apartment constitutes discrimination on the basis of familial status. Since HUD regulations indicate that two persons per bedroom, without reference to its size, is reasonable and specifically indicate that the age of the children is a relevant factor in evaluating reasonableness, Rose’s policy, being more restrictive, may be unreasonable. The mere fact that an occupancy restriction is part of a municipal ordinance does not remove from the reasonableness inquiry for discrimination purposes.

Reasonable Accommodation

Bently v. Peace & Quiet Realty 2 LLC

Bently lived on the fourth floor of a rent-stabilized four-story walk up apartment building. She lived there for twenty-four years and had recently renewed her lease for two years at $820.64 per month. In 2004, Bently underwent cancer surgery to remove lymph nodes, her uterus, and one third of her colon. The surgery made it difficult for her to climb the stairs to her apartment. When apartment B2 on the second floor of the building became available, Bently and an attorney from Legal Aid contacted the landlord, Peace and Quiet Realty, about moving to that apartment. The landlord did not respond. Later, apartment A2 on the first floor became available. Again, Bently and her attorney contacted the landlord about the possibility of moving to apartment A2. Bently received no response. The landlord claims that he offered Bently apartment A2 at $1,000.30 per month. The rent for A2 had been $833.58. Bently filed a complaint alleging causes of action under the Fair Housing Act and New York State and the New York City Human Rights laws. Bently claims that under the Fair Housing Act, the landlord should allow her to move into apartment A2 at the prior rent. Peace and Quiet moved to dismiss.

Legal Issue: Whether Bently’s request for apartment A2 was a request for an accommodation within the scope of the Fair Housing Amendments Act of 1988.

Court’s Ruling: The court found that a move between units of an apartment building is an accommodation within the purpose of the FHAA because the scope of the word “dwelling” under the FHAA includes an apartment building, not just an apartment unit. The court also held that even though Bently’s accommodation included a request that the rent not increase, the accommodation directly relates to her handicap and is within the scope of the FHAA. Finally, the court held Bently’s request that the rent not increase did not automatically make the request unreasonable. The court held that the provisions of the FHAA were to be read literally.

Chapter Four: Advertising and the Fair Housing Enforcements

Overview

In this module we detail the advertising regulations for fair housing so that you can understand your responsibilities and give you guidance in how to protect yourself. We will also address the procedures for enforcement by HUD and others.
Advertising
The first thing we will examine is the advertising regulations that apply to housing. We have to be circumspect in our wording and actions.

In 1972, in the United States v. Hunter, the Court of Appeals said that even though a homeowner or landlord may have a dwelling that is exempt from coverage under the Fair Housing Act, they are not free to employ discriminatory advertising. Also, the Hunter case is important because it established that HUD’s advertising rules:
- Apply to newspapers and other media, even if the ads were drafted by someone else
- The provision does not violate the First Amendment’s guarantee of freedom of the press
- That whether an advertisement violates the Act will be determined by how an “ordinary reader” would interpret the ad

The Fair Housing Act, as amended says it is illegal “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 that indicates any preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make such preference, limitation, or discrimination.”

In 1989, HUD published “Advertising Guidelines” which detail the type of advertising prohibited under the Fair Housing Act. The guidelines categorize discriminatory advertising into three groups.
1. Advertising that contains words, phrases, symbols or visual aids that indicate discriminatory preference or limitation
2. Advertising that selectively uses advertising media or content such as human model or logos to indicate an illegal preference or limitation
3. Fair Housing policies and practices in discriminatory advertising that are prohibited under the Act

**Words, Phrases, Symbols and Forms**
The Guidelines list the following words, phrases, symbols and forms that most often are used in residential real estate advertising to convey either overt or tacit discriminatory preferences or limitations:

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

**Words indicative of race, color, religion, sex, handicap, familial status, or national origin:**
- Race – African American, Caucasian, Asian, American Indian
- Color – White, Black, colored
- Religion – Protestant, Christian, Muslim, Catholic, Jew
- National origin – Mexican American, Puerto Rican, Philippine, Polish, Hungarian, Irish, Italian, Chicano, African, Hispanic, Chinese, Indian, Latino
- Sex – the exclusive use or words in advertisements, including those involving the rental of separate units in a single or multi-family dwelling, stating or intending to imply that the housing being advertised is available to persons of only one sex and not another, 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.
- Handicap – crippled, blind, deaf, mentally ill, retarded, impaired, handicapped, physically fit.
- Familial status – adults, children, singles, mature persons.
- Catch words – words or phrases used in a discriminatory context should be avoided; such as restricted, exclusive, private, integrated, traditional, board approval or membership approval.

**Symbols or logotypes:** symbols or logotypes which imply or suggest race, color, religion, sex, handicap, familial status or national origin.

**Colloquialisms:** words or phrases used regionally or locally which imply or suggest race, color, religion, sex, handicap, familial status or national origin.

**Directions to real estate for sale or rent (use of maps or written instructions):** Directions can imply a discriminatory preference 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, congregational or parochial may also indicate a
religious preference. Area (location) preference: Names of facilities which cater to a particular racial, national origin or religious group, such as a country club or private school designations, or names of facilities which are used exclusively by one sex may indicate a preference.

Selective Use
The selective use of advertising media or content is the second area of potential discrimination. The Guidelines mention the following specific examples:

Selective geographic advertisements: This may involve the strategic placement of billboards; brochure ads 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.

Selective use of equal opportunity slogan or logo: When placing ads, 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.

Selective use of human models: This 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.

In Spann v. Colonial Village a Virginia Condominium and apartment complex agreed to pay $835,000 to settle a law suit. The suit was filed by Girardeau Spann, a black law professor, and two fair housing organizations. It alleged that Colonial Village used exclusively White human models in their ads which did not reasonably represent the mix of majority and minority groups in the Metropolitan D.C. area.

Policies and Practices
The third section of the Guidelines addresses Fair Housing policies and practices. Here are practices that HUD considers to be evidence of compliance:

Use of Equal Opportunity logotype, statement or Slogan: All advertising of residential real estate for sale, rent or financing should contain an equal housing opportunity logotype, statement, or slogan as a means of educating the home-seeking public that the property is available to all persons regardless of race, color, religion, sex, handicap, familial status, or national origin. The choice of logotype, statement or slogan will depend on the type of media used (visual or auditory) and, in space advertising, on the size of the ad.

HUD includes tables in the Guidelines that serve as a guide to the size of the logotype in display advertising. In general, the size of the logo should be no smaller than ½ inch by ½ inch. It is not required in ads of less than four column inches.

In other types of advertising, if other logos are used, the Equal Housing Opportunity logo should be at least as large as the largest of the other logos. If no other logos are used, 3% to 5% of an advertisement may be devoted to an equal opportunity statement. The statement should read:

“We are pledged to the letter and spirit of U.S. policy for the achievement of equal housing opportunity throughout the nation. We encourage and support an affirmative advertising and marketing program in which there are no barriers to obtaining housing because of race, color, religion, sex, handicap, familial status, or national origin.”

Use of human models: Human models in photographs, drawings, or other graphic techniques may not be used to indicate exclusiveness because of race, color, religion, sex, handicap, familial status, or national origin. If models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority or minority groups in the Metropolitan area, both sexes, and, when appropriate families with children. Models, if used, should portray
persons in an equal social setting and indicate to the
general public that the housing is open to all without
regard to race, color, religion, sex, handicap, familial
status, or national origin, and is not for the exclusive
use of one such group.

Coverage of local laws: Where the Equal Housing
Opportunity statement is used; the ad may also include
a statement regarding the coverage of any local
fair housing or human rights ordinance prohibiting
discrimination in the sale, rental or financing of
dwellings.

Notification of fair housing policy:
1. Employees: All publishers of advertisements,
advertising agencies, and firms engaged in the sale,
rental or financing of real estate should provide a
printed copy of their nondiscrimination policy to
each employee and officer
2. Clients: All publishers of advertisements and
advertising agencies should post a copy of their
nondiscrimination policy in a conspicuous location
wherever persons place advertising and should
have copies available for all firms and persons
using their advertising services.
3. Publishers’ Notice: All publishers should publish at
the beginning of the real estate advertising section a
notice that “all of the real estate advertised herein is
subject to the Federal Fair Housing Act which makes
it illegal to advertise any preference, limitation or
discrimination because of race, color, religion, sex,
handicap, familial status, or national origin. We
will not knowingly accept any advertising for real
dwellings which are in violation of the law. All persons
are hereby informed that all dwellings advertised
are available on an equal opportunity basis.”

In 1995, HUD published a memo entitled “Guidance
Regarding Advertisements Under §804 (c) of the
Fair Housing Act.” This was an attempt to provide
guidance in the way HUD chose to accept and
investigate allegations under the Act. It was in response
to frequently asked questions and to advise people of
HUD’s position on certain issues.

1995 HUD memo outlining the guidelines for
advertising:

They stated that publishers and advertisers are
responsible under the act for making, printing, or
publishing an ad that violates the act on its face. If
it clearly discriminates by expressing preference or
limitation for or against a protected group, the publisher
would be liable. HUD gives an example, though,
where they would not accept a complaint against a
newspaper for running an ad which includes the phrase
“female roommate wanted” because the ad does not
indicate whether the requirements for the shared living
exception have been met. HUD says that publishers can
rely on the representations of the person placing the ad
that shared living arrangements apply to the property in
question. Persons placing such ads, however, are
responsible for satisfying the conditions for the
exemption. Thus, an ad for a female roommate could
result in liability for the person placing the ad if the
housing being advertised is actually a separate dwelling
unit without shared living spaces.

Here are some specific guidelines that have been
promulgated by HUD.
1. Race, Color, National Origin. Real estate ads
should state no discriminatory preference or
limitation on account of race, color, or national
origin. Use of words describing the housing, the
current or potential residents, or the neighbors
or neighborhood in racial or ethnic terms such as
“White family home” or “no Irish,” will create
liability. However, ads which are facially neutral
will not create liability. Thus complaints over use
of phrases such as “master bedroom”, “rare find,”
or “desirable neighborhood” should not be filed.
2. Religion. Ads should not contain an explicit
preference, limitation, or discrimination on religion
such as “no Jews” or “Christian Home.”
Ads which use the legal name of an entity which
contains a religious reference such as “Roselawn
Catholic Home” or those which contain a religious
symbol such as a “cross” standing alone may
indicate a religious preference. However, if such an
ad includes a disclaimer such as “This home does
not discriminate on the basis of race, color, religion,
national origin, sex, handicap or familial status”, it
will not violate the Act. Ads containing descriptions
of properties (apartment complex with chapel) or
services (kosher meals available) do not on their
face state a preference for persons likely to make use
of those facilities, and are not violations of the act.
The use of secularized terms or symbols relating to
religious holidays such as “Santa Clause”, “Easter
Bunny” or “St. Valentines Day” images or phrases
such as “Merry Christmas”, “Happy Easter” or the
like does not constitute a violation of the Act.
3. Sex. Ads for single family dwellings or separate
units in a multi-family dwelling should contain no
specific preference, limitation or discrimination based on sex. Use of the term “master bedroom” does not constitute a violation of either the sex or discrimination provisions or the race discrimination provisions of the Act. Terms such as “mother-in law suite” are commonly used as physical descriptions of housing units and do not violate the Act.

4. Handicap. Real estate ads should not contain specific exclusions, limitations or other indications of discrimination based on handicap such as “no wheelchairs.” Ads containing descriptions of properties such as (“great view”, “fourth floor walk-up”, “walk-in closets”), services or facilities (“jogging trails”), or neighborhoods (“walk to bus stop”) do not violate the Act. Advertisements describing the conduct required of residents such as “non-smoking” or “sober” do not violate the Act. Ads containing descriptions of accessibility features such as “wheelchair ramp” are lawful.

5. Familial Status. Ads may not state an explicit preference, limitation, or discrimination based on familial status. Ads may not contain limitations on the number or ages of children, or state a preference for adults, couples or singles. Ads describing the properties (“two bedrooms”, “cozy”, “family room”) services and facilities (“no bicycles allowed”) or neighborhoods “quiet streets”) are not facially discriminatory and do not violate the Act.

Fair Housing Enforcement
The 1988 Fair Housing Amendments Act contained elements to put some teeth in the enforcement process. Let’s investigate some definitions first.

“Aggrieved person” includes any person who –

1. Claims to have been injured by a discriminatory housing practice; or
2. Believes that such person will be injured by a discriminatory housing practice that is about to occur. “Complainant” means the person (including the Secretary of HUD) who files a complaint under Section 810.

“Respondent” means –

1. The person or other entity accused in a complaint of an unfair housing practice; and
2. Any other person or entity identified in the course of investigation and notified as required with respect to respondents so identified under Section 810 (a).

“Conciliation” means the attempted resolution of issues raised by a complaint, or by the investigation of such complaint, through informal negotiations involving the aggrieved person, the respondent, and the Secretary.

“Conciliation agreement” means a written agreement setting forth the resolution of the issues in conciliation.

As a general rule, there are three enforcement options available for victims of housing discrimination:

1. Enforcement through HUD
2. Enforcement through the Department of Justice
3. Enforcement by means of a private lawsuit filed in Federal District Court.

HUD remains the most common and important way to seek relief. They offer free legal representation, have an established procedure in place to offer comparatively rapid resolution of the issues and it will be tried before an administrative court judge with experience in fair housing issues.

Filing a Complaint
An aggrieved person may file a complaint with Secretary of HUD, within one year after an alleged discriminatory housing practice has occurred or terminated. Complaints may be filed by telephone by calling 1-800-669-9777 or by mail to the nearest HUD regional office. You may also log on to the hud.gov web site and fill out a complaint form online.

Each complaint must contain:

- Your name and address
- The name and address of the person your complaint is against (the respondent)
- The address or other identification of the housing involved
- A short description of the alleged violation
- The dates of the alleged violation

If HUD determines that your state or local agency has the same fair housing powers as they do, HUD will refer your complaint to that agency for investigation and notify you of the referral. That agency must begin work on your complaint within 30 days or HUD may take it back.

When your complaint is received by HUD they will:

- Notify the alleged violator of your complaint, within 10 days, and permit that person to submit an answer, also within 10 days
- Investigate your complaint and determine whether
there is reasonable cause to believe the Fair Housing Act has been violated
• Notify you if it cannot complete an investigation within 100 days of receiving your complaint

In the event that immediate action is required, HUD may authorize the Attorney General to go to court to seek temporary or preliminary relief, pending the outcome of your complaint, if:
• Irreparable harm is likely to occur without HUD’s intervention; or
• There is substantial evidence that a violation of the Fair Housing Act occurred
An example would be a situation where a builder agrees to sell a house but after learning the buyer is black, fails to keep the agreement. The buyer files a complaint with HUD and they may authorize the Attorney General to go to court to prevent a sale to another buyer until HUD investigates the complaint.

The HUD Secretary is charged with engaging in conciliation, to the extent feasible, prior to filing a charge or entering a dismissal. A conciliation agreement may provide for binding arbitration of the dispute. Such arbitration may result in awarding of appropriate relief, including monetary relief. Each conciliation agreement shall be made public and include:
• The names and dates of contacts with witnesses
• A summary and the dates of correspondence and other contacts with the aggrieved person and the respondent
• A summary description of other pertinent records
• A summary of witness statements
• Answers to interrogatories

If HUD’s investigation reveals that reasonable cause exists, they will issue a formal charge. In the absence of reasonable cause, they will dismiss the complaint.

Within 3 business days after issuing a charge, HUD must file it with the Office of Administrative law judges and serve it on the complainant and the respondent. Either party may, within 20 days, choose to have the charges decided by civil action. If the parties agree to have the matter settled through the HUD administrative process, a hearing must be held within 120 days of issuance of the charge.

Within 60 days after the conclusion of the hearing, the Administrative Law Judge must issue an “Initial decision”, which will become final unless reviewed by the Secretary of HUD within 30 days. The Secretary may affirm the decision, modify it, set aside the decision or remand it for further proceedings.

If the Administrative Law Judge determines that a discriminatory practice has occurred, the following relief may be ordered:
• Actual damages – including humiliation, pain and suffering, mental anguish plus out-of-pocket expenses
• Equitable relief – for example, make the dwelling available to you
• Injunctive relief – preventing the respondent from discriminating in the future
• Civil penalties – to vindicate the public interest, the respondent may be fined up to $11,000 for a first offense, $27,500 if there has been a prior offence within 5 years and up to $55,000 if there have been two or more offences within the past 7 years.

Of course, there is the right of appeal. Any party adversely affected by a final decision may file a petition for review in an appropriate U.S. Court of Appeals, within 30 days.

If a discriminatory housing practice has been found in a business that is subject to licensing and regulation by a government agency, HUD is required to notify the agency of the final decision and to recommend that appropriate disciplinary action be taken.

**Enforcement by the Department of Justice**
The Fair Housing Act authorizes the Attorney General to bring civil actions in certain instances:
• If there is cause to believe that any person or group is engaged in a pattern or practice of resistance to the full enjoyment of any rights granted by this title
• If there is cause to believe that any group of persons has been denied any rights and such denial raise an issue of general public importance
• If the Secretary of HUD refers a case of discriminatory practice to the Attorney General
• If there is a breach of a conciliation agreement entered into by HUD

These civil actions pursued by the Attorney General may result in a penalty up to $55,000 for a first violation and up to $110,000 for any subsequent violation.

**Private Law Suits**
The last course of action would be to file a civil action in an appropriate Federal District Court or State Court. Any aggrieved person may file suit, at their own expense, within two years of an alleged violation. You may even bring suit after filing a complaint with HUD, if you have not signed a conciliation agreement and an Administrative Law Judge has not started a hearing.

A court may award actual and punitive damages and attorney’s fees and costs. The Fair Housing Amendments Act also removed the former $1,000 cap on punitive damages.

Recent Court Cases

United States v. Arlington Park Racecourse, LLC and Churchill Downs, Inc., (N.D. Ill.)

On March 1, 2007, the Court entered a consent decree (PDF version) resolving all claims in United States, et al. v. Arlington Park Racecourse (N.D. Ill.). The complaint, filed September 30, 2005, alleged that the defendant, owners and operators of the Arlington Park Racecourse in Arlington Heights, Illinois, discriminated on the basis of familial status in violation of the Fair Housing Act. Specifically, the complaint alleged that defendants excluded families with children from housing provided to seasonal workers who live at the racetrack. Under the terms of the consent decree, Defendants will construct 48 new units of housing with private bathrooms and air conditioning by the beginning of the 2007 racing season. This new housing will be made available to the seasonal workers with families. Defendants will also install air conditioning in 127 units of housing that will continue to be available for seasonal workers with families. The consent decree also allows Defendants to restrict six existing buildings to licensed workers only, provided that they do so on a nondiscriminatory basis. Under the terms of the consent decree, Defendants have also agreed to pay a $10,000 civil penalty to the United States, and damages and other relief to resolve HOPE’s claims.

Memphis Center for Independent Living and the United States v. Milton and Richard Grant Co. et al. (W.D. Tenn.)

On February 15, 2007, a federal court in Memphis approved a consent decree resolving Memphis Center for Independent Living and United States v. Grant, et al. (W.D. Tenn.). The Department’s suit, which was filed on November 6, 2001, joined a case filed on January 25, 2001, by the Memphis Center for Independent Living (“MCIL”), a disability rights organization, alleging that the defendants failed to design and construct the Wyndham Apartments in Memphis and Camden Grove Apartments in Cordova, Tennessee, with required features for people with disabilities. The consent decree requires the Richard and Milton Grant Company, its principals and affiliated entities, and their architects and engineers, to retrofit apartments and public and common use areas at the two complexes, and to provide accessible pedestrian routes from front entrances of ground floor units to public streets and on-site amenities. The defendants must establish a Community Retrofit Fund of $320,000, administered by the MCIL, to enable qualified individuals in Shelby County, Tennessee, to modify residential dwellings to increase their accessibility to persons with disabilities. The defendants also are required to pay $10,000 in compensatory damages to the MCIL and $110,000 in civil penalties to the government, and to undergo training on the requirements of the Fair Housing Act and the Americans with Disabilities Act. The consent decree will remain in effect for three years.