

LEGAL-EASE

Real Estate Advertisements and the Fair Housing Act

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"Man does not live by words alone, despite the fact that sometimes he has to eat them."
Adlai Stevenson

We live in an age where we must choose our words carefully when we advertise real estate for sale or lease. This is because real estate advertisements can be the basis for claims under the federal Fair Housing Act. Advertisers cannot in their marketing materials discriminate on the basis of race, color, religion, sex, handicap, familial status, or national origin. Fortunately, most Realtors[®] generally understand their obligations not to discriminate. If there is a risk of claims involving real estate advertisements, that risk largely comes in two forms. The first involves advertisements dealing with handicaps or familial status where some Realtors[®] may not be fully aware of what is prohibited under the law. The second involves advertisements which do not blatantly discriminate but nevertheless violate the law because they subtly steer groups protected against discrimination under our fair housing laws toward or away from property. In many cases, fair housing violations arising in these two areas are wholly unintended and committed by persons who do not think of themselves as prejudiced. This article will discuss permissible and impermissible real estate advertising under the Fair Housing Act to help Realtors[®] avoid potential liability in this area.

Liability Under Fair Housing Act

Under the Fair Housing Act, real estate advertisements cannot include material which discriminates against any person because of race, color, religion, sex, handicap, familial status, or national origin. Real estate advertisements also cannot show any preference toward or against people in any of the above categories. For example, it would be unlawful for an advertisement to communicate, directly or indirectly, that the target market for a particular subdivision was white people seeking entry level housing. Unlawful discrimination can be in the form of catch words, phrases, pictures, or even symbols which imply that a dwelling is not available to any person protected against discrimination under federal law. Advertisers cannot also select forums for advertising (newspapers, magazines, radio stations, or television stations) designed not to reach people protected under federal fair housing laws. Similarly, advertisements such as billboards cannot be placed in locations where, for example, they will be seen by only white people.

Some courts look at the entire advertising package rather than focusing on whether one advertisement states a preference. Other courts have imposed liability based on one particular advertisement. Whether an advertisement is discriminatory is subject to interpretation based on the particular facts and circumstances of the case. To avoid liability, Realtors[®] should do three things: (a) be sensitive to the risk; (b) attempt to advertise in ways designed to reach the broadest and most diverse audience possible; and (c) include a disclaimer in their advertisements which states that they will not discriminate on the basis of race, color, religion, national origin, sex, handicap, or familial status. While

such a disclaimer will not eliminate liability for advertisements which otherwise discriminate, it is one factor which is considered in determining whether there was an intent to discriminate.

Prohibited Terms and Phrases

The federal regulations suggest that advertisers of real estate for sale or rent avoid the use of terms and phrases such as "restrictive, exclusive, private, integrated, board approval, traditional, or membership approval" as possibly being discriminatory. Additionally, logos and colloquialisms which imply or suggest race, color, religion, sex, handicap, or familial status will violate the Fair Housing Act. For example, an advertisement for a vacation community billed as a "Redneck Riviera" would likely violate the Act as implying that it is primarily for white people.

Prohibited phrases which discriminate on the basis of race, color, or national origin might include "home in nice Italian neighborhood" or "home for Asian war veterans." Prohibited phrases which discriminate on the basis of religion include such statements as "Christian home" and "Jewish home". Advertisers cannot use the legal name of an entity which contains a religious reference such as "Peterson's Catholic home" or a religious symbol, such as a cross standing alone, because the same could indicate a religious preference.

An advertisement which says "no wheelchairs" discriminates on the basis of handicap. An advertisement that limits the number or ages of children or states a preference for adults, couples, or singles discriminates on the basis of familial status. Even directions to a home or subdivision can be found to be in violation of the Fair Housing Act. For example, directional references indicating that the property is near a subdivision or neighborhood whose residents are known to be primarily black can be viewed as an unlawful signal of racial preference in the sale of the property. Similarly, an advertisement which states that it is in walking distance of a particular synagogue can be viewed as an unlawful preference toward a particular religious group. Advertisers can avoid liability under the Fair Housing Act by avoiding these terms or phrases or any comparable terms or phrases.

Selective Use of Advertising Media or Content

Advertisers of real estate who use only media geared toward selective groups run the risk of being found to have violated the Fair Housing Act. For example, a developer who exclusively uses a Korean language newspaper to advertise the sale of new homes in a housing market with a sizable non-Korean population is likely violating the law. Similarly, if the advertiser selectively uses human models of one race or national origin, for example, the advertisement may violate the Act. If the advertiser uses certain photographs or drawings that suggest a preference for one gender or adults only, he or she may violate the Act.

Advertisers cannot target a particular segment of the population such as blacks without directing additional advertising to other groups as well. Even the selective use of a racially mixed model by a developer of multiple communities may be viewed as preferential. For example, if the developer uses black models to advertise a community in a neighborhood with a large black population and only white models elsewhere, the advertisements as a whole would likely be seen as discriminatory.

Violations

In several recent cases, advertisers have been found liable for discriminatory advertising because very few or none of the people appearing in their advertisements were minorities. One court found two real estate companies liable for \$30,000 in compensatory damages because they used only

white people in their newspaper advertisements. A leasing/managing agent of two luxury rental complexes was found liable of violating the Fair Housing Act by using advertising that used only white models and therefore indicated a preference based on race or color. The agent was ordered to pay \$20,000 in compensatory damages.

A newspaper publisher was found liable for running an ad that included "perfect for single or couple." The court said that the advertisement suggested that the property owner would not rent the apartment to a family with children. An apartment advertisement that stated "mature person preferred" violated the Act because it discriminated against families with children.

Equal Housing Logo

The equal housing opportunity logotype is a picture of a small house with the words "equal housing opportunity" directly beneath it. If Realtors[®] want to advertise that their practices are in accordance with the federal fair

housing laws, they may post this logotype. However, under federal regulations, this picture cannot be used without the words "equal housing opportunity" appearing directly beneath it. On the other hand, Realtors[®] can advertise using the words "equal housing opportunity" without including the picture of the small house. A place of business, such as a real estate office, which is subject to the Fair Housing Act, is required to post and maintain a fair housing poster at all places of business which participate in activities covered by the Act. The poster must be prominently displayed and readily apparent to all persons seeking housing or the services of a real estate broker. Specific requirements of the poster, such as size and language to include, should be obtained from HUD.

Advertisements for the sale, rent, or financing of residential real estate should contain the equal housing opportunity logotype, statement, or slogan to let the public know that the property is available to everyone without a discriminatory preference. The Equal Opportunity Slogan is "Equal Housing Opportunity." The Equal Housing Opportunity Statement is:

"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."

Advertisers of real estate cannot selectively use the equal opportunity logotype, statement, or slogan so that they appear in advertisements in some areas and not others nor when advertising some properties and not others. Advertisers should follow the guidelines in the federal regulations which set forth the standard for the use of the equal housing opportunity logotype, statement, and slogan. The choice of logotype, statement, or slogan will depend on whether the media used is auditory or visual. Furthermore, HUD has requirements as to the size of the logotype and/or typeface used in various types of advertisements. Advertisers should contact HUD for a copy of their guidelines.

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. Additionally, they should post the policy in a conspicuous location and make copies available to anyone using their advertising services. At the beginning of the real estate advertising section, publishers should publish a statement about laws prohibiting discrimination in the sale, rental, or financing of dwellings. The HUD guidelines include the following sample publisher's statement:

"All 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, or intention to make any such preference, limitation, or discrimination.' We will not knowingly accept any advertising for real estate which is in violation of the law. All persons are hereby informed that all dwellings advertised are available on an equal opportunity basis."

Advertisements That Do Not Violate the Act

If an advertisement for the sale or rent of real estate is neutral when read or viewed, it will not violate the Act. Examples of neutral phrases include "master bedroom" and "desirable neighborhood." Commonly used physical descriptions such as "mother-in-law suite" and "bachelor apartment" will not violate the Act.

Furthermore, advertisements containing descriptions of property such as "great view," "fourth floor walk-up," "walk-in closets," "jogging trails," and "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. Advertisements with descriptions of accessibility features such as "wheel chair ramp" don't violate the Act.

Advertisements of real estate for sale or rent may use such phrases as "two-bedroom," "cozy," or "family room." "No bicycles allowed" or "quiet streets" are not facially discriminatory and therefore do not violate the Act. Advertisements containing a description of the property such as "apartment complex with chapel" or "kosher meals available" do not on their face state a preference for persons likely to make use of those facilities and do not violate the Act.

Terms and symbols that have been secularized in society such as Santa Claus, Easter Bunny, St. Valentine's Day, Merry Christmas, or Happy Easter do not violate the Act.

Use of Models in Advertising

The use of models in display advertising campaigns should clearly and reasonably represent majority and minority groups in the geographic area, both genders, and families with children. Models should portray people in equal social settings and indicate to the general public that the housing is open to everyone and not just for an exclusive group.

What Constitutes Advertising of Real Estate Under the Act?

Advertising of real estate for sale or rent includes written and oral statements; notices by any person engaged in the sale or rental of a dwelling; flyers, posters, brochures, deeds, billboards, signs, and documents; words, phrases, photos, illustrations, symbols, or forms that convey the impression that housing is available or not available to particular groups because of race, religion, sex, color, handicap, familial status, or national origin.

It is a violation of the Act to express to brokers, agents, employees, prospective sellers, renters, or other persons, a preference for or against any purchaser or renter who might fall into a category of individuals in a protected class under federal law. Additionally, as previously discussed in this article, an advertiser cannot select an advertising media or location that denies information to a segment of the market protected under the Act.

Exemptions Under the Act

Advertising efforts under an affirmative action plan designed to remedy the effects of prior discrimination will not be scrutinized under the Act.

It is permissible to advertise "housing for older persons" provided that the housing meets certain senior housing requirements defined by the Fair Housing Act. A religious organization or non-profit institution operated by or in conjunction with a religious organization can limit the sale, rental, or occupancy of dwellings that it owns or operates for non-commercial purposes to persons of the same religion. A private club that, incident to its primary purpose, provides lodging for non-commercial purposes can limit the occupancy and give preference to its membership.

Complaints

The U.S. Department of Housing and Urban Development (HUD), the agency responsible for enforcing the Act, in reviewing advertising for compliance, will consider the selective use of advertising media, the equal opportunity logotype, and human models which indicate a prohibited preference. HUD will also look at the use of words, phrases, or symbols that may indicate an overt or covert discriminatory preference or limitation in selling or renting housing. A person can file a complaint up to one year after an alleged discriminatory practice has occurred or terminated. The complaint may be filed against any person who directs, controls or has the right to direct and control the conduct of another person in the sale, rental, advertising, financing, or brokerage of dwelling units. HUD can also independently investigate certain housing practices.

Conclusion

The Act may initially appear to be a trap for the unwary with regard to Realtor® advertising. However, following the suggestions in this article and using good common sense should eliminate most of the legal risks in this area.

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