

# Social & Fair

---

**LOCATION**

**DATE**

Becky Gean, Esq.



# What is Fair Housing Law?

- Fair housing laws prohibit discrimination in **any activity** relating to the sale or rental of dwellings, financing or insuring housing, the terms and conditions related to housing, or harassment based on an individual's **race, color, religion, disability, familial status, national origin, or sex** (the “protected classes”).



# Additional Protected Classes in Michigan

- **Michigan Elliott-Larsen Civil Rights Act (1976)**
  - Age
  - Marital Status
- **Check your local ordinances!** Many local governments have added additional protected classes.



# Sexual Orientation & Gender Identity

- A ballot drive was initiated in Michigan to expand the definition of “sex” in the ELCRA to include “sexual orientation” and “gender identity”.
- Passage of this ballot initiative appears unlikely.
- ***Rouch World, LLC v. Michigan Department of Civil Rights***
  - Suit to expand the definition of “sex” in the MI ELCRA to include:
    1. Sexual Orientation; and
    2. Gender Identity.
  - The MI Supreme Court has agreed to hear the case, bypassing the MI Court of Appeals.
  - This case sets up a potential landmark ruling that would extend civil rights protections to LGBTQ individuals.

# NAR Code of Ethics

## Article 10

REALTORS® shall not deny equal professional services to any person for reasons of race, color, religion, sex, handicap, familial status, national origin, **sexual orientation, or gender identity**. REALTORS® shall not be parties to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, **sexual orientation, or gender identity**. REALTORS®, in their real estate employment practices, shall not discriminate against any person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, **sexual orientation, or gender identity**.



# Prohibited Practices

1. Steering
2. Blockbusting
3. Refusal to sell or rent
4. Disparate Impact
5. Discriminatory Advertising



# Advertising & Fair Housing

# Advertising – The Minimum Standard

## MCL 339.2512e

**Any advertising** displayed or published on or after January 1, 2018 that includes the name of an associate broker or salesperson, or a cooperating group of associate brokers or salespersons employed by the same real estate broker, shall include all of the following: a) The telephone number or street address of the employing broker. b) **The licensed business name of the employing broker**, in equal or greater type size than the name of the associate broker, salesperson, or cooperating group.





# How is This Important for Fair Housing?

- Requiring the **identification of the broker** as the primary point of contact and supervision dovetails with the fact that the **employing broker is responsible for any liability, including fair housing issues**, arising from the practice of agents within that brokerage.
- Incentive for brokers to adopt standards for fair housing compliance and training!
- The best defense is the adoption of meaningful internal policies/procedures – a focus on advertising is a good place to start.



# Advertising & Fair Housing Law

## 42 USC § 3604(c)

[Unlawful] to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.



# Consequences

- HUD imposes civil penalties for advertisements that violate FH law.
- A first-time violation can cost up to \$20,000 (up to \$100,000 if DOJ involved). Plus, costs of defending a suit in court.
- Liability extends to both the creator and the publisher. (MLS is not immune from scrutiny!)
- Remember, brokers are vicariously liable for the actions of their salespersons.



# Golden Rules of Advertising

- **Describe the Property, not the person!**
- Advertisements for housing should not state or imply a **preference** based on an individual's protected class.
  - Ex) "Family Neighborhood"
- Perception is reality. Context is important.
  - Ex) "Exclusive Neighborhood" or "Traditional Neighborhood".
- Advertisements for housing cannot be marketed directly **to or away** from members of a protected class



# Cautionary Word Lists

## HUD Guidance

- HUD has published guidance in an attempt to address some of the confusion surrounding the use of particular words & phrases.

## Cautionary Word Lists

- Fair Housing Centers and other advocacy groups have published “cautionary word lists” to help publishers keep their advertisements compliant.
- Great tools – but not a failsafe.



# Minimizing Liability

- A potential Fair Housing violation is not necessarily avoided by cross-referencing with a word list!
- Discrimination can be implied through context & perception.
- Word choice mixed with context – unintended discrimination?
- **As a rule – JUST DESCRIBE THE PROPERTY!**



# Social Media & Advertising



# Advertising & Social Media

## 42 USC § 3604(c)

[Unlawful] to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.





# The Publisher Debate

- ***Are you a publisher and does it matter?***
- The publisher of a discriminatory housing advertisement will be held liable for a Fair Housing violation (just as the creator of the advertisement).
  - *Craigslist* (2006)
  - *Roommates.com* (2009)
  - *NFHA v. Facebook* (2018)



# Facebook Woes

## ***NFHA v. Facebook (2018)***

- FB's online advertising platform allowed advertisers to exclude certain individuals from viewing ads for housing based on their membership to a PC.
- FB argues, "We're not the publisher!"
- DOJ said that FB was liable as a publisher.
  - Doing more than just acting as a passive ISP.
  - Participating in the creation of discriminatory advertising.
  - FB's data collection/algorithm facilitated this new form of discrimination.
- Case settled and FB agreed to make comprehensive changes to its advertising platform and pay \$1.9 million in damages.



# Publisher Liability – Where to Draw the Line?

- If I post a listing or ad for housing social media, and other users make discriminatory comments that violate FH law, am I liable for those discriminatory comments since I'm the publisher of the ad? Maybe...
- **Less control means more potential liability!** If you're controlling and monitoring...less likelihood that a discriminatory comment will fall through the cracks.
- How do you do damage control? Do you have a Social Media Policy?



# Be Proactive!

- Brokerages are encouraged to implement some type of social media policy.
- Having a social media policy in place won't necessarily absolve a brokerage from all liability, but...
- It pays to be proactive!
- ***“If you're explaining yourself, you're already losing.”***
- Social media policy can be a great risk aversion tool.



# Social Media Policy – Purpose and Scope

- Model Social Media Policy
  - Available at MR “Legal Resource” page.
  - Designed for brokerage use; can be adopted by local associations as well.
- The Policy offers a framework to guide real estate professionals in keeping their social media usage compliant under the law.



# HUD Guidelines

# HUD Guidance -- Religion

- No blanket phrases!
  - “Christians Only ” or “No \_\_\_\_\_”.
- Religious words/symbolism? – Cross, Star of David, Crescent Moon, etc.
  - Could imply a preference. What’s the perception?
  - Not wholly forbidden – just dangerous.
- Secular v. Religious
  - Merry Christmas, Happy Easter, Mardis Gras, Santa Claus.



# HUD Guidance – Familial/Marital Status

- **Stick to descriptions about the property!**
- **Marital Status** – Do not express preference for/against couples or singles.
- **Familial Status** – Do not express a preference for/against families with children under 18!
  - Do not limit the ages or number of children allowed.
  - Do not place extra restrictions on families w/ children.
- City ordinances may limit the number persons per rental unit.





# HUD Guidance – Human Models

- Be aware of the perception that comes with an advertisement that has little to no diversity present.
- Many businesses feel that using human models is too risky and invites accusations.
- HUD encourages you to do your best to show models that represent diversity with respect to protected classifications.



# **Seller Narratives & Buyer Love Letters**

# Seller Narratives. No. Please No.

- **What are seller narratives?**
  - A seller's statement to potential buyers about why the property is special.
  - Typically – property description that doesn't describe the "property", but instead describes an ideal occupant.
- **Fair Housing trouble? Yes.**
  - Well intended, but creates a direct focus on the occupant – both present and future.
  - Can be viewed as indicating a preference.



# Love Letters...Or Liability Letters?

- **What are buyer love letters?**
  - Personal letter/photo(s) from the buyer that accompany an offer in an attempt to appeal to the seller on a more emotional level.
- **Fair Housing trouble? Maybe....**
  - Seller could learn information about a buyer relative to a protected classification.
  - Entertaining a Buyer's Letter and then turning down the offer could raise the question, was it the offer or something else?
  - Innocent intentions...potentially awkward ramifications.
- **In 2021, Oregon passed legislation banning love letters.**



# Hypotheticals

# Hypothetical #1

- Salesperson Brown, who is new in the business, obtains her first listing. She advertises listing on her personal business page as “perfect for newly marrieds or other empty nesters.”
- Her brokerage receives a complaint which asserts that Salesperson Brown has violated both the Fair Housing Act and the Michigan Elliott-Larsen Civil Rights Act by discriminating on the basis of familial status.
- The supervisory broker argues that the Company should not be liable because Salesperson Brown’s comments were not posted on the Company’s website nor included in any of the Company’s advertising.
- The supervisory broker also produces evidence that the Brokerage conducts Fair Housing Act seminars annually that its agents are all required to attend. For these reasons, the broker believes that the Brokerage should not be liable for the actions of one rogue (inexperienced) agent. Is the Brokerage correct?



# Analysis #1

- Brokerage is incorrect. If an agent violates the Fair Housing Act, the agent's firm is liable for that action.
- This is true regardless of any written policies in place or how much effort the firm has put in trying to train its agents.
- For this reason, firms are strongly encouraged to monitor their agent's advertising.



# Hypothetical #2

I am a broker and some of my agents put Christian crosses on their signs. Are there any consequences for me permitting this practice? Can I make this agent stop this practice?





# Analysis #2

- Many agents claim that it's free speech and representative of who they are as business-people.
- However, the fair housing laws analyze these scenarios from perspective of a protected class...
- Placing crosses or any other religious symbols on real estate signs may be interpreted as an attempt to discourage buyers of other faiths.

# Hypothetical #3

I plan on stating on the MLS and in other advertising that the seller's home is in a "family neighborhood". Can use this type of description?



# Analysis #3

- **NO** – A reference to a “family neighborhood” may be interpreted as an attempt to discourage buyers who are not families with children.
- Real estate advertising should not include statements that either suggest that families with children are NOT welcome or that they are the ONLY people welcome.

# Hypothetical #4

I own a 2-bedroom rental home. Can I restrict large families from leasing this property due to the house's limited capacity?



# Analysis #4

- Landlords can restrict the number of persons that may occupy a home or apartment and, in fact, many municipalities license rental units for a particular number of occupants.
- But...a restriction should never refer to “large families” or a specific number of children.

# Hypothetical #5

I plan to start an ad campaign marketing exclusively to single women. I also plan to incorporate a donation to women's charities into this ad campaign. Is this allowable?



# Analysis #5

- While it is permissible to set up a program which donates money to one or more “women’s charities,” an ad campaign **should not be targeted** at women (as opposed to men) or single persons (as opposed to married persons).
- Unlike the Fair Housing Act, the Michigan Elliott-Larsen Civil Rights Act also prohibits discrimination based upon marital status.

# Hypothetical #6

I have a buyer who wants me to find out the local school's test scores. When I went to the website with the scores, I noticed that they were broken down by many different demographics including race. Can I provide my buyers with this list?





# Analysis #6

- REALTORS® should not distribute demographic information broken down by race (or any other protected classification).
- Instead, provide buyers with a list of the various websites from which they can obtain MEAP score information.



# Hypothetical #7

I have a prospective buyer that wants to see a home in a neighborhood that I consider to be very dangerous. However, this neighborhood is primarily made up of a number of ethnic minorities. What can I do?



# Analysis #7

- REALTORS® should never refuse to show (or even discourage a buyer from seeing) a particular house that a buyer-client has asked to see based upon the REALTOR'S® assumption that the buyer would not like the neighborhood.
- This is opening yourself up to a potential steering claim (intentional or not).



# Hypothetical #8

I have a prospective buyer who is Hispanic. He told me that he wants to live in an “Hispanic neighborhood.” Is it ok to direct him to a neighborhood that is traditionally Hispanic?



# Analysis #8

- The client needs to be told that it is illegal for you to direct him/her to particular neighborhoods based upon ethnicity or nationality of the residents in that neighborhood.
- If the client identifies a particular geographic area in which he wishes to live, the REALTOR® can honor the client's request to limit the search to that neighborhood. The REALTOR® would be well-advised to have a written record as to the client's specific request.



# Hypothetical #9

We had a buyer come to our office who has plainly stated that he does not want a woman representing him. What should I tell him?



# Analysis #9

- The Fair Housing Act prohibits a broker from matching clients with agents on the basis of gender (or on the basis of any other protected class).
- Client can request specific agent by name if he/she has one in mind.



**Questions?**

**Becky Gean**

**[bgean@mirealtors.com](mailto:bgean@mirealtors.com)**