



Making the Grade

Would you Pass a Fair Housing Test?

On New York City's Long Island, twenty-five undercover testers spent three years testing real estate agents for fair housing compliance. Most of the testing was "paired testing". For example, a white tester would look for housing meeting certain criteria. This would be followed by a minority tester looking for housing meeting the same criteria. The testers recorded some 240 hours of interactions with ninety-three agents. They uncovered what they believe is widespread evidence of unequal treatment against Asians, Hispanics and African-Americans in their search for housing. In fact, the testers allege that collectively, these minority groups did not receive equal treatment forty percent of the time. The testers recorded many cringe-worthy videos. It would be surprising if some real estate agents do not lose their licenses as a result of the testing.

The findings from the Long Island study may also lead to similar comprehensive testing in other cities. If testing for fair housing compliance comes to your neighborhood, will you pass the test? Below are several tips on how to ensure that you get a passing grade.

1. **Be equally available to show property to all buyers.** One of the videos from the testing showed an agent telling a minority buyer who wanted to see houses that she was available to show the buyer houses in about ten days from the date of the call. Now, it could have been that the agent was going on vacation, having surgery or had just had a death in her family (among countless other potential scenarios). Unfortunately, the agent offered no explanation whatsoever, giving the impression that the agent had little interest in actually showing houses to the minority buyer. If a real estate agent is not going to be available to show houses for an extended period of time, he or she should explain why that is the case to the buyer or offer to have another agent show houses to the buyer in a more timely manner.
2. **If you will not show buyers houses without a prequalification letter, make sure you get one from all buyers.** Another one of the videos showed a white agent telling a minority buyer that she absolutely will not show the buyer any houses until the buyer produced a prequalification letter. While there is nothing wrong with this practice, it is critically important that the REALTOR® make this request of all buyers and not just minority buyers. The implication of the video was that the agent only selectively requested prequalification letters.
3. **If you are going to ask for identification, ask for it from all buyers.** Asking for identification is a smart security measure. REALTORS® should get a copy of a driver's license or other similar identification from all buyers they do not know and to whom they are showing property. Ideally, the first meeting of the agent with a buyer who the agent does not know personally should be at the REALTOR®'s office so that the information about the buyer's identity can be obtained in a safe environment. The agent should explain that he or she asks all buyers whom the agent does not know personally for their driver's license, and that they are

kept in the agent's office along with the agent's calendar of showing appointments. When REALTORS® only selectively ask for driver's licenses, it can be seen as a form of discrimination.

4. **Ask all buyers who do not know where they want to live the same questions and show them all the same properties that meet their criteria.** Where a buyer wants to live should always be the buyer's choice to make. It should never be the area where the agent thinks the buyer would be comfortable or might want to live. If you ask buyers enough questions, you should be able to reduce the number of possible houses meeting the buyer's criteria to a manageable number. See the box titled "Questions for Buyers" for suggested questions to ask.

One of the allegations of the testers was that minority buyers were given fewer housing opportunities to consider than white buyers. While the housing opportunities presented to buyers should depend on their criteria, there should not be large disparities between housing opportunities presented to different groups of buyers.

5. **Use the taxi driver's question: "Where to?" when asking buyers where they would like to look for homes.** Most buyers know where they want to look for homes. In fact, with technology being what it is, many buyers have already identified the house or houses they would like to see. When buyers know where they want to live, there is no need to show them homes in other areas.

Buyers have the right to choose where they want to live and may base their decision on factors that are important to them. Some buyers may want to live in diverse areas while others may want particular neighborhoods where most of the residents look just like them. So long as the buyers are directing their REALTORS® to the neighborhoods in which they want to look, there are no fair housing implications for the housing choices they make or locations they select. Since buyers can lawfully steer themselves to any neighborhood they please, it is always best to first figure out if they know the answer to the "where to?" question.

6. **Share a comprehensive list of out-of-bounds topics up-front with all buyers.** Buyers regularly ask questions that real estate agents cannot answer. Sometimes buyers speak in code and other times they are very direct. Examples include "Who lives in this neighborhood?" "Will my children have other children in the neighborhood to play with?" "Will I be comfortable here?" "Is this a safe area?" "Can you take me to the area where a lot of _____ live?"

Real estate agents need just say no to questions they are not allowed to answer and provide a good explanation of why this is the case. The more complicated explanation to a buyer asking an inappropriate question is that our fair housing laws make it illegal to steer buyers to or away from given areas based on race, color, religion, nationality, sex, handicap and familial status. The more simplistic answer to such buyers is that our fair housing laws prohibit real estate agents from telling buyers about the makeup of an area in which they are considering buying. REALTORS® should also explain that, as members of the National Association of REALTORS®, they have additionally agreed to treat sexual preference and gender identity as protected classes, even though they are not yet protected under federal law.

7. **Do not use data sources to discriminate.** Most REALTORS® have been taught to refer buyers to data sources when they are asked questions like, "How safe is this neighborhood?" or "Who lives in this neighborhood?" However, in certain contexts, data sources can also be used to discriminate. In one of the videos from the testing, a white real estate agent

volunteers to a white couple interested in a home in a particular neighborhood that she strongly recommends that the buyers check with the police about gang activity in the neighborhood. The white real estate agent later tells a black buyer about how nice the people are who are living in the same neighborhood. This certainly sounds like the real estate agent is not so subtly steering white buyers away from the neighborhood, without saying so directly, and black buyers to the neighborhood. The agent appears to be trying to steer using “code” and it is almost certainly unlawful.

Encouraging white buyers to follow the school bus to see the composition of a neighborhood, but not black buyers, is another example of the same type of subtle steering. My recommendation is not to volunteer any of these data sources except in response to a specific request from a buyer where the data source answers a question being asked by the buyer. If the buyer specifically asks about the demographic make-up of the community, the agent can explain that while he or she cannot discuss the make-up of the community, the local Chamber of Commerce should keep that information. However, warning a buyer away from a neighborhood through strong suggestions that they should check certain records that are available to the public pertaining to a neighborhood goes too far and should not be done. The safest answer to buyer questions about the make-up of a neighborhood is to simply encourage buyers to spend time in the neighborhood to ensure that it suits their needs and desires.

8. **Do not disparage neighborhoods to some, but not to others.** The testing also revealed real estate agents badmouthing neighborhoods to some buyers and not to others. So, for example, in one video, a white real estate agent makes a casual comment when driving with a white tester that when a particular minority group began to move into a neighborhood, they really took over and the neighborhood went downhill. It is hard not to explain this as anything other than steering. With regards to neighborhoods, the safest lesson is to follow the rule that if you do not have something nice to say, do not say anything at all.

In speaking about neighborhoods, real estate agents should even be careful not to make comments like, “This neighborhood is really gentrifying.” While this may be more a statement about economics rather than race, it is often heard by some buyers as the neighborhood is becoming more affluent - and more white. Simply saying that there are a lot of new owners who are renovating their homes would be a much safer comment.

9. **Be careful with “Coming Soon” signs.** Over the last decade, a large number of homes have been sold where the primary form of advertising has been “Coming Soon” signs placed on the property. Some REALTORS® have questioned whether this method of advertising has deprived minority groups of equal housing opportunities in violation of our fair housing laws. When the primary means of advertising a property is a “Coming Soon” sign, the exposure of the property is largely being limited to the existing residents in a neighborhood (and to the listing agent’s network) but not to the broader public. If the neighborhood happens to be largely made up of a particular racial, religious or ethnic group, it could be argued that the limited advertising shows a preference for the group or groups already living in the neighborhood in possible violation of our fair housing laws. This argument will almost certainly be on the basis of some fair housing complaints in the future as this issue plays out over the next decade. It must be remembered that listing a property in a multiple listing service can help to defeat claims of discriminatory advertising because, by its very nature, it is offering the housing opportunity to the broadest possible market of potential buyers. REALTORS® using “Coming Soon” signs should do so sparingly knowing that there may be a heightened risk of a fair housing claim with this practice.

In conclusion, it's accurate to say that fair housing is becoming increasingly complex. The biggest challenge may well be that buyers often want answers to questions that we are not permitted to answer by law. Real estate agents have learned to refer buyers to data centers (such as the local Chamber of Commerce) when questions are asked by buyers that the real estate agent cannot answer. However, we are now seeing that when no question has been asked by the buyer about what the data might reveal, such referrals to data sources may well be a form of steering. With the penalty for violating our fair housing laws often being the loss of an agent's license, real estate agents need to keep a close eye on the trends in this area. The best way to succeed when being tested is to scrupulously treat everyone the same and strictly comply with our fair housing laws.

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