## Federal Issues in Real Estate Brokerage

Two major areas of focus for federal legislation affecting the listing and sale of real property include fair housing and misrepresentation.

Title VIII, the federal fair housing legislation lays out what real estate licensees can and can not do when working with people in a protected class.

The objective of studying fair housing restrictions and requirements is to open the doors to equal opportunity in housing.

By providing equal access to housing through systematic procedures, we make housing more available to everyone.
In addition, equal access includes advertising properties for sale or for lease. Those who run these advertisements must analyze their advertising to be sure that it provides equal access t housing through systematic procures.

The Equal Housing Opportunity logo, the outline of a house with an equal sign in the middle, commits that whoever displays it practices real estates sales and/or leasing with equal access to all properties.

Every person has the same opportunities to purchase, lease, and occupy real estate.
Federal fair housing legislation prohibits the following acts by real estate licensees

1. Refusing to show, sell, or rent a property to a specific buyer
2. Providing different professional service for different consumers depending upon their inclusion in a protected class
3. Panic selling (persuading owners to sell because the neighborhood is changing socially)
4. Discriminatory advertising or statements
5. Threats or interference with a person's fair housing rights

Under Title VIII, the federal fair housing legislation, was approved by Congress in 1968 and signed by President Lyndon Johnson. In 1988, it was amended by adding two additional protected classes as well as changing the complaint process and changing the cap on damages.

President Lyndon Johnson signs Title VIII.

Today there are seven protected classes:

1. Race
2. Color
3. Religion
4. Sex
5. National Origin
6. Handicap


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7. Familial Status

The National Association of REALTORS includes a "memory peg" in some of its fair housing courses:
"REALTORS can really sell houses fast now!"
The 1968 Title VIII dealt with several discriminatory practices which were, unfortunately, prevalent in the sale and leasing of real estate at that time. These three practices included:

1. Steering – guiding buyers to certain locations to segregate them.
2. Block Busting – spreading panic among home owners from the threat of minorities moving into their neighborhood, based on the belief that minority home ownership drastically reduced the value of their properties.
3. Redlining – identifying specific areas or neighborhoods be excluded because they include a large number of minority home owners or home buyers. Redlining commonly occurred both in the real estate and lending industries.

In 1988, Congress amended Title VIII to add the two new protected classes, handicap and familial status.

Prior to that time, it was frequently difficult for a handicapped person to rent, lease, or buy a residence due to his disability. When he could rent, lease, or purchase, it was seldom equipped for his handicap.

In addition, single persons with children found it difficult to rent or lease a residence.

Therefore, by adding these two classes to the protections of Title VIII, they were more able to find housing.
Within the Title VIII description of handicap, the following conditions are specifically listed:

1. A disability of walking, seeing, or hearing
2. A history of mental illness
3. Heart disease, cancer, cerebral palsy
4. Multiple Sclerosis, diabetes
5. AIDS and HIV

In addition, it includes individuals who have successfully completed or are participating in a drug treatment program.
However, Title VIII also specifically excludes the following situations or conditions which are **NOT** disabilities and therefore do not include the person who meets these descriptions within the protected class:

1. Smokers
2. Users of illegal substances (unless they have successfully completed or are participating in a drug treatment program)
3. Persons who pose a threat to the health and safety of others
4. Transvestites


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It is helpful to look at the history of fair housing to understand why the struggle for equal protection under the law still exists. 1968, while not "current events" is still recent history when you consider that the first civil rights decision in this country's history was the landmark Dred Scott decision by the United States Supreme Court in 1856, prior to the Civil War. In 1866, the 13th and 14th amendments were added to the Constitution and the Civil Rights Act was passed. In 1874, the Supreme Court's Plessy versus Ferguson decision set up the "separate but equal" standard. Just over fifty years ago in 1954, the court ruled in Brown vs. the Board of Education in Topeka, Kansas, that schools must be integrated.

Are there exemptions to Title VIII? Yes and no! Let's deal with the "No" answer first. There are no exemptions from fair housing requirements and prohibitions in the areas of race and color. In other words, when it comes to some owners' right to discriminate in the sale or lease of their properties, they are strictly forbidden to discriminate on the basis of race or color.

Now, let's deal with the "yes" answer. There are three exemptions which allow property owners to discriminate:

1. The "for sale by owner" exemption
2. The "Mrs. Murphy's" exemption
3. The "housing for older persons" exemption

In addition, while no one may advertise properties in any way that directs people to or away from them based on their inclusion in a protected class, an owner of or a real estate agent for a property that is handicapped accessible may advertise that the property offers these accommodations!

The "For Sale By Owner" exemption applies when a property owner meets the following requirements:

1. Does not own more than three single family houses at any one time; and
2. The property is being sold, rented, or leased without the use of a real estate agent; and
3. The owner does not reside in the property at the time of the sale or was not the most recent resident; and
4. The property must be sold, rented, or leased without the use of discriminatory advertising.

However, remember that in none of these exemptions may the discrimination be based on race or color!

The "Mrs. Murphy's" exemption applies when the following conditions apply:

1. The owner occupies the property which has four or fewer units, i.e. a duplex, tri-plex, or four-plex apartment building; and


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2. The property is sold, leased, or rented without the use of discriminatory advertising. Discriminatory advertising means ads that express a preference, limitation, or exclusion based on inclusion in a protected class.

Remember, the "Mrs. Murphy's" exemption can not include discrimination based on race or color! Another group may legally discriminate in the sale, lease, rental, or occupancy of its owned real estate, religious organizations. These organizations may

1. Limit the sale, lease, rental, or occupancy to persons of the same religion or
2. Give preference to persons of the same religion

However, the "religions organization" exemption may not include discrimination based on race or color!

The "housing for older persons" exemption has two distinct types of exemption, both of which require that the housing is provided under federal or state programs and meets one of the two following requirements:

1. Housing intended for and solely occupied by persons 62 years of age or older
2. Housing intended for and operate for occupancy by persons 55 years of age or older.

The exemption for housing for "55 Years & Older" requires that the following requirements be met:

1. Eighty percent of the occupants of the property must include at least one person fifty-five years of age or older; and
2. The property must publish and follow policies and procedures that demonstrate the intent to be for occupants 55 years old and older; and
3. The property must comply with the rules issued by the Secretary of HUD (The Department of Health, Education, and Welfare) for verification of the occupancy by the 55+ year old residents.

Remember, even this exemption can not include discrimination on the basis or race or color! Compliance with the restrictions and requirements of Title VIII demands that real estate professions use the following procedures:

1. Use factual and objective criteria
2. Use systematic procedures in presenting information
3. Keep good records
4. Offer a variety of choices
5. LET THE CUSTOMER SET THE LIMITS!

The compliance technique which we've called "Letting the customer set the limits" requires explanation. Because real estate agents may not direct potential tenants or buyers either to or aware from a property based on their inclusion in a protected class, agents must show properties in areas chosen by the customer or client. For example, if an out-of-town purchaser wants the real estate agent to select properties for her to see and the agent chooses the neighborhoods on his own, he could be guilty of steering. On


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the other hand, if the agent asks the buyer to qualify the area by saying she'd like to be no more than 15 minutes driving time from work or within 5 minutes of a certain school or day care facility, the agent may then choose properties in these areas that meet the buyers other requirements (financing, wants and needs).

Advertising may be the greatest liability for real estate professionals. Agents tend to advertise their listings based on the persons who might lease or buy them rather than describing the benefits of the property itself.

Title VIII prohibits advertising

1. Makes, prints, or publishes any statement, notice, or advertisement in connection with the sale or rental of housing that
2. Expresses a preference, limitation or discrimination based on race, color, religion, sec, handicap, familial status or national origin.

To write ads that meet the requirements of the law, the ad must focus on describing the property not the owner, purchaser, or neighbors.

Let's test our "fair housing" ad writing skills.

The property we're advertising offers the following characteristics:

1. One bedroom
2. One bathroom
3. Living room
4. Dining room
5. Kitchen
6. 650 square feet of living space
7. Small, unfinished basement

Does the following advertisement meet the fair housing requirements:

"Cozy, one-bedroom home. Great for empty nesters. Close to walking path and transportation. Quiet neighborhood. Unfinished basement provides great space for an office."

Is this advertisement acceptable?

- "One bedroom, one bath home in quite neighborhood. Great location for a mature person with no schools nearby." Is this advertisement okay?

- "One bedroom cottage in close-in neighborhood. Near shopping, schools, interstate highways, and transportation. Adjacent to a large, treed city park."

In setting up systems that protect agents from fair housing complaints, use the "Equal Professional Service" model. The model includes the following steps:


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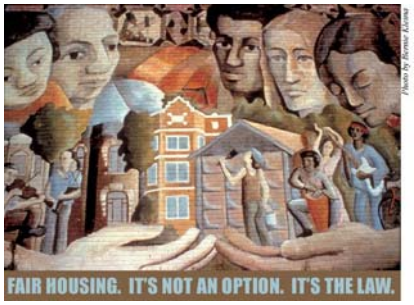
1. Use systematic procedures
2. Use objective (not subjective) information
3. Make sure that the customer sets the limits
4. Offer a variety of choices

## Fair Housing Complaints & Filing Procedures

Under Title VIII, aggrieved persons, including real estate agents and testers, may file a complaint when they have been injured by a discriminatory housing practice.




Why are real estate professionals included? They too many be the victim of discrimination. For example, as an agent shows a member of a protected class a house, the agent and the buyer walk around in the back yard to see the landscaping. They notice that the neighbor from the house behind has walked out into the yard and is staring at them in a threatening manner with what appears to be a hand gun tucked into his jeans, both the prospective buyer and the agent have been victimized by the neighbor!

If the victim of fair housing discrimination files a complaint and is adjudicated the recipient of illegal bias, the person found guilty of the discrimination could be forced to pay both actual and punitive damages.

Actual damages include out-of-pocket costs, for example what the plaintiff spent obtaining alternate housing and any additional rent or costs associated with this housing. They also include damages for injuries such as emotional distress, humiliation, mental anguish, and other psychological conditions.

In addition, civil penalties (once limited to $1,000 per claim) can now be $10,000 or more depending on the number of prior offenses committed by the defendant.

These penalties can be imposed by an Administrative Law Judge. The ALJ may hear a fair housing complaint or it may be tried before a jury in a federal court.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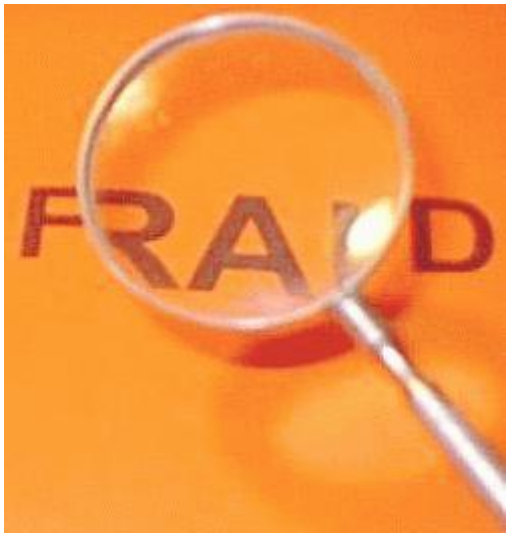
## Misrepresentation & Fraud

Why study misrepresentation? Consistently for a number of years, the largest percentage of lawsuits against real estate licensees has been for misrepresentation or fraud!




Our course's **MISSION** is to make you aware of what constitutes misrepresentation and how you can protect yourself against the charge of misrepresentation!
By **definition**, misrepresentation means a "false representation of a material fact or the failure to disclose a known property defect, which results in damage to the purchaser!

### FAQ's about "material" facts:

**Q: What are the types of Misrepresentation?**
A: There are four types of misrepresentation as follows:

1. **Intentional misrepresentation or fraud** is defined as an intentionally false statement of a material fact which results in damage to the buyer.
2. **Negligent misrepresentation** means a false statement (with no real basis for believing it to be true) of a material fact which results in damage to the buyer.
3. **Conscious Ignorance** can best be described as the three monkeys, See no evil, Hear no evil, and Speak no evil! It means a false statement of a material fact without making a visual inspection of the property involved and which causes damage to the buyers.
4. The most frightening type is **innocent misrepresentation** which means that a licensee doesn't even need to make a false statement but damage occurs to the buyer and the licensee didn't make a thorough visual inspection of the property to identify any red flags.

**Q: How can I tell if it's a material fact?**
*A: If knowledge of the fact would impact a buyer's decision about buying a house, that fact is material!*

**Q: When showing properties, how do I know what to disclose and what I don't need to disclose?**
*A: If your purchaser client or customer has narrowed their choices to one or two properties, it's time to discuss material facts, suggesting the use of professionals such as inspectors to determine the nature of potential defects in the home.*

**Q: Do I need to disclose the material facts in every house I show?**
*A: If you believe that your purchaser seriously considers buying each property you show them, you may want to have a discussion about the importance of utilizing an "independent third party" professional or inspector to make a thorough inspection and*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*to discover any material facts or defects. However, with most purchasers, you will know when they are becoming seriously interested in a property or two and you must be sure that they don't overlook defects or potential defects that you observe as you show them.*

**Fraud**, intentional misrepresentation, occurs when a licensee **intentionally misleads** a client or customer by making a false statement or **consciously fails to disclose** a known defect.

**Here's an example:**
Sally Agent knows that the basement of a property has flooded in the past year and no correction/repairs have been made by the owner because her daughter is friends with the seller's daughter. Sally tells Johnny Smith, buyer, that "there's never been water in this basement!" (Or Sally simply fails to mention that she knows the basement has flooded)
**Has Sally intentionally misrepresented the situation to the buyer?** YES!

Missouri law is different from Kansas in relation to "psychologically impacted or stigmatized" properties. In Kansas, if the seller of the property shot and killed himself in his car in the garage of a property, must an agent disclose this fact to a potential buyer? In Kansas, we currently have no direction from state statute about whether we must disclose "psychological impact" about a property. Psychologically impacted properties include those in which there has been a murder, a suicide, or a haunting. **Missouri law specifies that these situations are NOT material (do not require disclosure)** If you are called in to list a property which suffers from one of these psychologically impacting situations, ask your broker for direction. One way to handle this situation is to ask the seller for written permission to answer a buyer's question about the situation truthfully. For example, if a buyer says "Was this the house in which the seller killed his wife and them shot himself last year?" With the seller's written permission, you can answer that question truthfully. Because these situations may be emotionally charged and therefore may create liability, be sure to secure your Broker's advice and act accordingly!
Now that we've defined and described misrepresentation, let's address methods for avoiding it!

Here's a list of disclosure steps that will reduce your risk of misrepresenting a property.

- ❑ First, be sure that the information is factual. (For example, there may be some physical symptom of a defect but the defect itself has been repaired and only the symptom remains.
- ❑ Know the law for the state in which you are working! Kansas and Missouri law differ in a number of key areas such as psychological impact.
- ❑ Always discus material facts and defects with your seller client. You must disclose materials facts even when sellers would prefer that you remain silent about them. Be sure that your seller clients understand your legal responsibilities.


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If the seller died of AIDS, must you disclose that or is it a psychological impacting situation?

NO! AIDS falls under the federal Fair Housing legislation as a handicap and therefore you CAN NOT DISCLOSE that a seller or prior tenant of a rental property suffered from or died from AIDS! Just as you can not answer questions about the race, color, religion, sex, or national origin of a seller or buyer, you can not answer questions and must not volunteer information about AIDS. The National Association of REALTORS® provides many resources for agents and brokers. In one of NAR's publications about fair housing issues, they suggest this "sample response."
"Justifiable reliance" means that courts have ruled that John Q. Public has the right to rely on statements made by real estate licensees. If you state that the "basement has always been dry," the buyer can rely on your statement to be correct and truthful.

Be warned! Do not make statements of fact unless they are factual, truthful, and correct! You create liability for yourself and your firm when you make such statements.

How can you provide information to a potential buyer without creating liability? Use the seller's statement of condition form which provides a vehicle for transmitting this kind of information and places the liability where it belongs—on the seller!

**What's a "red flag?" It's any indication or a material fact or defect.**

Examples of red flags include the following list, but there are many more!

- Brown water spots on the ceiling
- Cracks in the foundation walls
- Rotten wood in framing or siding
- Shiny or glossy soil

One of the potentially hazardous materials found in older homes is asbestos. Asbestos was once commonly used in exterior siding shingles, floor tiles, ceiling tiles, interior wall sheeting, as well as insulating covering for boiler pipes. Because of the many building materials that contained asbestos, its appearance can take many forms. This slide illustrates four of the most common appearance of asbestos in housing. Learn to recognize the "red flags" of potentially hazardous materials such as asbestos.
The following list of locations for asbestos in houses can be found, with a great deal of information about asbestos and other housing environmental hazards, on www.epa.gov, specifically at http://www.epa.gov/asbestos/pubs/ashome.html#1.


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- *"STEAM PIPES, BOILERS, and FURNACE DUCTS insulated with an asbestos blanket or asbestos paper tape. These materials may release asbestos fibers if damaged, repaired, or removed improperly.*
- *RESILIENT FLOOR TILES (vinyl asbestos, asphalt, and rubber), the backing on VINYL SHEET FLOORING, and ADHESIVES used for installing floor tile. Sanding tiles can release fibers. So may scraping or sanding the backing of sheet flooring during removal.*

- *CEMENT SHEET, MILLBOARD, and PAPER used as insulation around furnaces and wood burning stoves. Repairing or removing appliances may release asbestos fibers so may cutting, tearing, sanding, drilling, or sawing insulation.*
- *DOOR GASKETS in furnaces, wood stoves, and coal stoves. Worn seals can release asbestos fibers during use.*
- *SOUNDPROOFING OR DECORATIVE MATERIAL sprayed on walls and ceilings. Loose, crumbly, or water-damaged material may release fibers. So will sanding, drilling, or scraping the material.*
- *PATCHING AND JOINT COMPOUNDS for walls and ceilings, and TEXTURED PAINTS. Sanding, scraping, or drilling these surfaces may release asbestos.*
- *ASBESTOS CEMENT ROOFING, SHINGLES, and SIDING. These products are not likely to release asbestos fibers unless they are sawed, drilled, or cut.*
- *ARTIFICIAL ASHES AND EMBERS sold for use in gas-fired fireplaces. Also, other older household products such as FIREPROOF GLOVES, STOVE-TOP PADS, IRONING BOARD COVERS, and certain HAIRDRYERS.*
- *AUTOMOBILE BRAKE PADS AND LININGS, CLUTCH FACINGS, and GASKETS."*

Lead-based paint, once believed to be the most durable paint, was at times required in building homes and public buildings. Therefore, a vast -number of homes built before it was banned in 1978, contain lead lead–based painted interiors. Today, scientists have found that lead can be ingested from the flaking, pealing, or "dusting" of lead paint into air, drinking water, and food, especially dangerous to small children. Children's small body weight means that if they breathe or ingest lead paint, the concentration in their blood streams can be even more deadly than in adults with their larger body mass.

EPA posts the following list of places where lead can be found in housing:

*"*In general, the older your home, the more likely it has lead-based paint. **

- *Paint. Many homes built before 1978 have lead-based paint. The federal government banned lead-based paint from housing in 1978. Some states stopped its use even earlier. Lead can be found:*
  - *In homes in the city, country, or suburbs.*
  - *In apartments, single-family homes, and both private and public housing.*
  - *Inside and outside of the house.*
- *In soil around a home. (Soil can pick up lead from exterior paint, or other sources such as past use of leaded gas in cars.)*
- *Household dust. (Dust can pick up lead from deteriorating lead-based paint or from soil tracked into a home.)*
- *Drinking water. Your home might have plumbing with lead or lead solder. Call your local health department or water supplier to find out about testing your water. You cannot see, smell, or*


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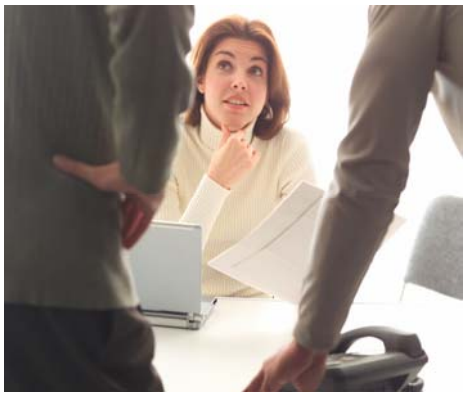
*taste lead, and boiling your water will not get rid of lead. If you think your plumbing might have lead in it:*
  - *Use only cold water for drinking and cooking.*
  - *Run water for 15 to 30 seconds before drinking it, especially if you have not used your water for a few hours.*
- *The job. If you work with lead, you could bring it home on your hands or clothes. Shower and change clothes before coming home. Launder your work clothes separately from the rest of your family's clothes.*
- *Old painted toys and furniture.*
- *Food and liquids stored in lead crystal or lead-glazed pottery or porcelain.*
- *Lead smelters or other industries that release lead into the air.*
- *Hobbies that use lead, such as making pottery or stained glass, or refinishing furniture.*
- *Folk remedies that contain lead, such as "greta" and "azarcon" used to treat an upset stomach.* "[1]

Another potential hazard, especially in older homes and farm properties, comes from buried fuel tanks. In the early years of the 1900's, home owners frequently fueled their furnaces and automobiles or tractors and farm equipment from fuel tanks on their property. They buried these tanks for safety and convenience as well as appearance. Later, homes heated with oil were generally fueled from buried tanks.

You may find a potential listing which has such buried tanks. There are a number of potential hazards caused by buried tanks; however, the most common is contamination of the soil around the tank and contamination of ground water in the area of the tank. Also, tanks out of service must be removed or sealed in specific manners to pass environmental inspections.

Here's a list of techniques you can employ to avoid misrepresenting property:



- ❑ Check the accuracy of all information before sharing it with potential purchasers.
- ❑ Avoid exaggerating the benefits of a property, frequently called "puffing"!
- ❑ Always make thorough visual inspections of properties which you plan to list or which your buyer clients or customers consider purchasing, looking for "red flags" indicating potential material facts or defects.
- ❑ Follow-up those "red flags" by asking questions of the seller or listing agent and always suggest the use of third party experts to inspect potential hazards or defects.
- ❑ Identify opinions as opinion! Never allow purchasers to believe that you are stating fact. (Remember "justifiable reliance.")
- ❑ Generally, exercise caution, follow solid procedures and systems.
- ❑ Never practice law, accounting, architecture, engineering, etc. by sounding like an expert in those fields. You are a real estate agent not an accountant!

[1] More information about lead based paint can be found at this EPA link: http://www.epa.gov/lead/index.html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Effective disclosure benefits everyone involved in the real estate transaction! Protect yourself, the seller, and the buyer as well as other agents and your brokers by practicing risk reduction practices!

When a licensee misrepresents, he or she faces severe penalties[2]!

1. The transaction may not close or it may be rescinded through legal action after closing if it is based on a misrepresentation.
2. The injured party in a suit may receive out of pocket costs as well as damages.

**Actual damages** represent the cost of correcting the defect that was misrepresented.

**Punitive damages** may be awarded by the court to penalize or punish the offending agent and broker as well as to discourage real estate practitioners from misrepresenting.

In addition, it is a breach of the National Association of REALTORS® Code of Ethics to misrepresent. Therefore a REALTOR® may also be the recipient of a complaint under the Code of Ethics.

[2] **When a Kansas real estate licensee misrepresents**, the customer may be able to recover losses from the real estate recovery revolving fund. When revolving fund monies are paid to an offended client or customer, the agent's license will be revoked. The agent must pay back those monies before he or she may receive a new license including interest!


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