

Beyond the Hypothetical: A Discussion of Implicit Bias, Inclusion and Ethics in the Practice of Real Estate

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Serving a Diverse Population in Real Estate

DIVERSITY, INCLUSION AND ELIMINATION OF BIAS



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NYS Bar New Category of CLE Credit

Diversity, Inclusion and Elimination of Bias courses, programs and activities must relate to the practice of law and may include, among other things, implicit and explicit bias, equal access to justice, serving a diverse population, diversity and inclusion initiatives in the legal profession, and sensitivity to cultural and other differences when interacting with members of the public, judges, jurors, litigants, attorneys and court personnel. [effective January 1, 2018].

Outline

- 1 **The Fair Housing Act**
- 2 **New York State, New York City and Local laws- Buffalo-Rochester-Syracuse-Albany**
- 3 **New York cases and Ethical considerations**

The Fair Housing Act

Title VIII of the Civil Rights Act of 1968

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The Fair Housing Act, as amended, prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status (including children under the age of 18 living with parents or legal custodians, pregnant women, and people securing custody of children under the age of 18), and disability.

The Fair Housing Act

Title VIII of the Civil Rights Act of 1968

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Sec. 802. [42 U.S.C. 3602] Definitions

(b) "Dwelling" means 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.

(c) "Family" includes a single individual.

(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 [of the United States Code], receivers, and fiduciaries...

(h) "Handicap" means, with respect to a person--

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance....

[42 U.S.C. 3602 note] Neither the term "individual with handicaps" nor the term "handicap" shall apply to an individual solely because that individual is a transvestite.

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The Fair Housing Act

Title VIII of the Civil Rights Act of 1968

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- (a) 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, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
- (b) 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.
- (c) 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.
- (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
- (e) For profit, to 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 particular race, color, religion, sex, handicap, familial status, or national origin.

The Fair Housing Act

Title VIII of the Civil Rights Act of 1968

Sec. 805. [42 U.S.C. 3605] Discrimination in Residential Real Estate-Related Transactions

(a) In General.--It shall be 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, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) Definition.--As used in this section, the term "residential real estate-related transaction" means any of the following:

- (1) The making or purchasing of loans or providing other financial assistance--
 - (A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or
 - (B) secured by residential real estate.
- (2) The selling, brokering, or appraising of residential real property.

(c) Appraisal Exemption.--Nothing in this title prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.

The Fair Housing Act

Title VIII of the Civil Rights Act of 1968

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Sec. 806. [42 U.S.C. 3606] Discrimination in provision of brokerage services

After December 31, 1968, it shall be 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 in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, handicap, familial status, or national origin.

The Fair Housing Act

Title VIII of the Civil Rights Act of 1968

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- Rental advertisements that request applicants of only a particular race or national origin.
- Advising applicants that an available property is unavailable based on the applicant's race, religion, national origin, sex, family status or disability.
- Applying and enforcing inconsistent rental policies based on a tenant's race, religion, national origin, sex, family status or disability.
- Setting different terms and conditions for the sale or rental of a property.
- Refusing to approve a loan, or imposing different rates and terms on a loan based on the above factors.
- Refusing to accommodate the reasonable needs of disabled tenants or buyers, such as providing convenient parking or allowing a tenant to keep a service animal inside the property.
- Asking a rental applicant or prospective buyer whether they have a disability or requesting to see a person's medical records.
- Prohibiting disabled tenants from making reasonable modifications to a rental area at their own expense.

The New York State Human Rights Law

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Protects all of the same characteristics as the federal Fair Housing Act but also makes it illegal to discriminate based on creed, age, sexual orientation, marital status, or military status.

5. (a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:

(1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available.

(2) To discriminate against any person because of race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith.

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status, or any intent to make any such limitation, specification or discrimination.

The New York City Human Rights Law

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**THERE'S
NO ROOM
FOR HOUSING
DISCRIMINATION
IN NYC**

Discrimination may sound like this:

"Installing a ramp is expensive and would ruin the appearance of the building."

"I don't accept vouchers."

"I don't have to make that repair; undocumented tenants don't have the same rights as other tenants."

"They told me the apartment was available, but then when they saw I was black, they changed their mind."

The New York City Human Rights Law

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Protected Classes under the Human Rights Law:

- Age
- Alienage or Citizenship Status
- Color
- Disability
- Gender
- Gender Identity
- Lawful Occupation
- Lawful Source of Income (including housing subsidies): The term lawful source of income includes without limitation income derived from social security, or any form of federal, state or local public assistance or housing assistance including section 8 vouchers.
- Marital or Partnership Status
- Race
- Religion/Creed
- National Origin
- Pregnancy
- The Presence of Children
- Sexual Orientation
- Status as a victim of domestic violence, stalking, and sex offenses
- Status as a Veteran or Active Military Service Member

The New York City Human Rights Law

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You are covered under the Law if you reside in an/a:

- Apartment building or multiple family dwelling
- Co-op
- Condominium
- Government-assisted housing
- Residential hotel *.
- * SRO (Single Room Occupancy) and hotels may be considered public accommodations.

You are not covered by the Law if:

- You are a resident of a two-family house where the owner or a member of the owner's family resides in that house and the available housing accommodation was not advertised.
- You rent a room or rooms in non-government assisted housing where the owner resides.

The New York City Human Rights Law

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Unlawful practices based on an individual's membership in a protected class include:

- Refusing to sell, rent, or lease housing
- Misrepresenting the availability of housing
- Setting different terms, conditions, or privileges for the sale, rental, or lease of housing
- Providing different housing services or facilities
- Posting discriminatory advertising or marketing that indicates a preference, limitation, or discrimination based on a protected class (e.g., 'no children' or 'married couples only')
- Refusing to provide a reasonable accommodation for a person with a disability
- Steering a potential homebuyer or renter to, or away from, an area on the basis of race or national origin
- Pressuring, for profit, homeowners to sell by exploiting ethnic, racial, or other demographic changes (blockbusting)
- Threatening, coercing, or intimidating individuals because they exercise their fair housing rights or assist others in doing so

The New York City Human Rights Law

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Unlawful lending and credit practices include:

- Refusing to make a mortgage loan to a qualified applicant due to protected class
- Refusing to provide information regarding loans due to protected class
- Imposing different terms or conditions on a loan or credit card, such as different interest rates, points, or fees due to protected class
- Discriminating in appraising properties due to protected class
- Denying conventional mortgages in certain communities (redlining) due to protected class

The New York City Human Rights Law

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Reasonable Accommodation for Persons with Disabilities in Housing:

- The New York City Human Rights Law protects the rights of people with disabilities by requiring landlords, coops, and condominiums to make a reasonable accommodation for disabled tenants, shareholders, or owners.
- A reasonable accommodation can be structural, such as a ramp at the building entrance to provide wheelchair access or installing grab bars in a bathroom.
- A reasonable accommodation can also involve a policy change such as permitting a tenant who is blind or has a psychological disability to have a guide dog or companion animal, despite a building's 'no pets' policy.
- The Law also requires the landlord to pay for an accommodation if it is deemed reasonable – that is architecturally and financially feasible.

Governor Cuomo Announces Initiative to Strengthen State's Anti-Discrimination Efforts

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- To uncover discrimination in home rental and sale transactions and ensure housing providers comply with these laws, the Governor launched the Fair Housing Enforcement Program.
- Three fair housing agencies were hired to partner with the state to complete the enforcement program: Housing Opportunities Made Equal (HOME) in Buffalo, CNY Fair Housing in Syracuse, and Westchester Residential Opportunities in Westchester, Rockland and Putnam counties.
- The Governor also released findings from 123 housing complaints that resulted in settlements for individuals who allegedly experienced housing discrimination based on race, color, national origin, disability and familial status.

Fair Housing Enforcement Program

A regional breakdown of these 123 cases is below – note that some cases had complaints involving more than one basis of discrimination.

Housing discrimination based on race:

DHR resolved 41 housing discrimination complaints based on race, color or national origin. Of those, 17 cases were from New York City, nine were from the Hudson Valley, seven were from Long Island, three were from Finger Lakes Region, three were from the Capital Region, one was from Central NY, and one was from Western NY.

Fair Housing Enforcement Program

These settlements include:

- ❖ A potential tenant in Rochester filed a complaint alleging that a broker at a real estate firm denied her the opportunity to view and apply for an apartment because of her race, and made false assertions of unavailability to dissuade her from pursuing the unit. The broker was required to pay money damages.
- ❖ An African-American mother of three alleged in her complaint that the management of the apartment building where she resides in Suffolk County refused to place her on a three-bedroom waiting list, while other Caucasian residents received immediate transfers to those units. As part of the settlement, management returned her security deposit and paid for moving expenses.
- ❖ A woman from Ossining received monetary damages to settle a complaint that alleged her building management denied her request to put a ramp in the building which would make it accessible for her daughter who uses a wheelchair due to her disability.
- ❖ A tenant in Saratoga Springs alleged that her landlord refused to renew her lease because she uses a cane and has multiple physical disabilities. She also alleged that the landlord refused to provide her with a handicap-accessible parking space. The landlord was required to pay money damages and excused a prior judgment it had taken against the tenant.
- ❖ A couple alleged that they were denied the opportunity to purchase an apartment in a Rye co-op because they had three minor children. During the course of the investigation evidence was found indicating that no children lived in the co-op. The couple received a monetary settlement to resolve the matter.
- ❖ A woman alleged that she was denied the opportunity to rent an apartment in Suffolk County because the landlord and realtor thought her infant child's crying would disturb the upstairs neighbors. The landlord paid monetary damages to resolve the case.

Fair Housing Enforcement Program

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- Under the new program, the Division of Homes and Community Renewal uses trained fair housing “testers” with diverse racial, gender, and economic backgrounds, who also represent parents, and persons with disabilities. These testers will act as potential renters or home seekers and will test for discriminatory bias amongst sellers and landlords.
- Testers will work in teams and will present similar incomes and career profiles to real estate agents and owners in an effort to obtain housing.
- The treatment the testers receive will be documented and the results analyzed. When possible discrimination is uncovered it will be investigated and prosecuted.
- The fair housing enforcement will also include investigations of real estate agents, owners and landlords who are all prohibited from discriminating in the rental or sale of housing in New York State.
- The Department of State will also promulgate regulations to specify that discriminatory conduct is prohibited by law and the Department will move to revoke the license of any real estate broker or salesperson that has been found to have engaged in discriminatory conduct by any city, state or federal agency or court of competent jurisdiction.

Buffalo Fair Housing Ordinance

Advertising

Disability

Familial Status

Housing Accommodation

Creates safe harbor for Landlords giving them only a few conditions where they can refuse renting

Enforced by Fair Housing Officer.

Rochester Ordinance Chapter 63 Monroe County Code Chapter 260

63-5 Discrimination in Housing and commercial Space.

Prohibits the refusal to show, sell, transfer, lease or transmit bona fide offer to buy rent or lease any real property, housing or commercial space due to discrimination.

Prohibits Print or advertisement

Constructed or to be constructed

Race creed color religion orientation or income

Syracuse Code section 8-4

Unlawful discriminatory practices

1: Employment

2: Public Accommodation

3: Housing-Commercial Spaces

4: General: Includes aiding and abetting

Fair Housing Justice Center, Inc.
v.
Edgewater Park Owners Coop., Inc.



- ❖ Plaintiff is a non-profit organization whose mission is to ensure that all people have equal access to housing opportunities in the New York City region by eliminating housing discrimination and creating open and inclusive communities and strengthening.
- ❖ Defendant is a Co-op in the Throgs Neck section of the Bronx and consists of 675 single-family unattached homes.
- ❖ In August 2009, Plaintiff began an investigation into Edgewater Park based on an article in the New York Times which described Edgewater Park and Silver Beach as not "open to just anyone" and mentioned that prospective buyers were required to obtain three references from current residents. Amelia Lewis was one of the real estate brokers who was referenced in the New York Times article about the two communities. In response to the New York Times article, Plaintiff decided to send both African-American and white testers to visit independently with Ms. Lewis to inquire about housing at Edgewater Park and Silver Beach. Plaintiff sought to determine whether the Co-ops three reference rule was acting as an obstacle to minority buyers.
- ❖ On September 18, 2009, a white tester posing as a married woman with no children, met with Lewis to discuss buying a home. Lewis informed the white tester that she would arrange for her to see five houses in Edgewater Park and one in Silver Beach, all at prices below \$300,000. On the same day, the white testers were shown eight homes in Edgewater Park and one in Silver Beach, as well as various communal areas and amenities at the Co-ops. Lewis told the white tester that the Co-ops were "very nice . . . mostly ethnic Irish, German, Italian . . . there's some Puerto Rican, not many" and that "they would love you, I can tell." When the white tester inquired about the reference policy and informed Lewis that she did not know any residents of the Co-ops, Lewis downplayed its importance, characterizing the Co-ops' reference policies as technicalities that she would help satisfy.

Fair Housing Justice Center, Inc.
v.
Edgewater Park Owners Coop., Inc.



❖ On September 29, 2009, the African-American testers, posing as a married couple, met with Lewis to inquire about homes in Silver Beach (not Edgewater Park) that were priced at or below \$300,000. Prior to the meeting, Lewis had told one of the African-American testers over the phone that she had one home available for \$250,000 in Silver Beach. Upon meeting the African American testers in person, the following conversation ensued:

Lisa Darden: Um, we want to get, um, information about, um, your co-op you were telling me about at . . .

Amelia Lewis: You have to know three people who live there.

Lisa Darden: We don't know anybody that lives there.

Amelia Lewis: Then, there's no way you're going to get in there.

Lisa Darden: There's [*7] no way?

Amelia Lewis: No.

Lisa Darden: You can't . . . we can't even apply?

Amelia Lewis: No, cause if you don't have three people...I was just going over this stuff with him . . .

❖ After the African-American testers told Lewis that they had read about the Co-ops in the newspaper and they seemed like wonderful communities, Lewis replied that "it's not wonderful for everybody," that "it's just . . . mostly Irish . . . and mostly Italian . . . very few people of any kind of, you know, ethnic color," that "they're very . . . kind of prejudice," that the African-American testers "wouldn't be happy there," and that "it's like Archie Bunker territory." Lewis also relayed a story about an incident that took place 15 or 20 years ago where a cross was burned in the yard of a house just outside of Edgewater Park.

❖ Citing the reference policy as a categorical bar, Lewis refused to show the African American testers any homes for sale in either one of the Co-ops. Instead, Lewis instructed her husband to show the African-American testers a home in a racially mixed area of the Bronx that was, according to Lewis "two blocks from the projects" and was priced above the testers' stated price range. Neither Plaintiff nor its testers ever spoke with a representative of Edgewater Park, or appeared at the offices of Edgewater Park with the purpose of submitting a housing application. Additionally, the testers did not attempt to obtain reference letters from any residents of Edgewater Park.

Fair Housing Justice Center, Inc.
v.
Edgewater Park Owners Coop., Inc.



- ❖ The Supreme Court has held that fair housing organizations have standing to sue under the Fair Housing Act. Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 n.19, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982).
- ❖ In Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898 (2d Cir. 1993), the Second Circuit affirmed several lower court rulings in favor of Open Housing Center, a New York City-based fair housing organization, which had asserted organizational standing based on resources it diverted to conduct investigations of defendant's discriminatory housing practices.
- ❖ To establish prima facie case of discrimination, plaintiffs must show "(1) that they are members of a protected class; (2) that they sought and were qualified to rent or purchase the housing; (3) that they were rejected; and (4) that the housing opportunity remained available to other renters or purchasers.
- ❖ Plaintiff argues that Edgewater Park's three reference rule was "intentionally designed and used to maintain the racial status quo at Edgewater Park." Specifically, Plaintiffs contend that the rule acts as a barrier to minority — especially African-American — buyers as the rule is not applied similarly to white prospective buyers as it is to African-American prospective buyers.
- ❖ Defendant argues that Plaintiff has produced no evidence which would allow the trier of fact to conclude that Edgewater Park's adoption and application of the three reference rule is predicated on discrimination. Defendant posits that "Plaintiff has discovered no documents . . . no written discovery responses . . . no factual testimony . . . which substantiate the allegation that the three reference rule was adopted, or has been applied, with discriminatory intent by Edgewater Park.
- ❖ Court found sufficient evidence in testimony, coops' statistical data, and research to deny Defendant's motion for summary judgment.

Frederick v. Wells Fargo Home Mortgage

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- ❖ Plaintiffs claim that the Defendants engaged in a concerted effort, through their employees, to wrongfully deny Plaintiffs' mortgage loans under the Federal Housing Administration's 203(k) program.
- ❖ More specifically, Plaintiffs allege that the Corporate Defendants "knowingly and willfully designed, implemented and maintained facially neutral Fair Housing Act underwriting policy overlays that effectively robbed Plaintiffs of their lawful entitlement to rental income credits, making FHA mortgage loans and home ownership unavailable to otherwise qualified Plaintiffs, in furtherance of a racially charged overarching scheme and conspiracy."
- ❖ Plaintiffs assert that their claims "arise from Corporate Defendants' use of a facially-neutral FHA overlay (and Individual Defendants' implementation of that overlay) which had the effect of discriminating against Plaintiffs because of their African-Caribbean American heritage."
- ❖ Essentially, Plaintiffs assertions were based on the standard Federal Housing Administration loan application, which included sex, race and ethnicity identifying questions.
- ❖ Plaintiffs have failed to allege sufficiently that Defendants intentionally discriminated against Plaintiffs, which is fatal to their civil rights claims. "To establish a claim under § 1981, a plaintiff must allege facts in support of the following elements: (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute (i.e., make and enforce contracts . . .)."

Sandra Barkley v. Olympia Mortgage Co. et al

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- ❖ Plaintiffs, eight first-time homebuyers, bring suit against real estate companies, lenders, appraisers, and lawyers, claiming that defendants conspired to sell them over-valued, defective homes financed with predatory loans and targeted them because they are minorities. They allege that defendants discriminated against them in violation of federal anti-discrimination statute's, including the Fair Housing Act
- ❖ Plaintiffs also assert state-law claims as well as violations of New York's consumer protection statute, New York General Business Law § 349, and state and local anti-discrimination statutes, including the New York State Human Rights Law, Executive Law § 296(5), and Title 8 of the New York City Administrative Code
- ❖ Plaintiffs claim that defendants were part of a fraudulent property-flipping scheme. They allege that defendants bought damaged properties at foreclosure auctions or estate sales. United Homes then performed some cosmetic repairs and, shortly thereafter, sold the properties, often at double the purchase price. Plaintiffs allege that United Homes worked together with appraisers, mortgage lenders, and lawyers, who facilitated the sales by preparing significantly overvalued appraisals and originating loans and mortgages that were correspondingly inflated. Finally, these mortgages were quickly sold at a premium in the secondary market or insured by the Fair Housing Administration, thus allowing lenders to collect at an inflated price if borrowers defaulted.
- ❖ Plaintiffs allege that defendants targeted persons of limited financial means and savvy who had never before purchased homes. They claim that United Homes reached out to such customers by billing itself as a "one-stop shop" for first-time homebuyers. According to the complaints, once these buyers signed on with United Homes, they were handed off to cooperating lenders and lawyers, who rushed the transactions to completion at breakneck speed so that plaintiffs had little time to seek independent advice.

Sandra Barkley v. Olympia Mortgage Co. et al

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- ❖ Plaintiffs contend that defendants exploited New York City's racially segregated housing market and engaged in "reverse redlining," the practice of intentionally extending credit to members of minority communities on unfair terms. Specifically, plaintiffs allege that United Homes concentrated its business in minority census tracts and targeted minorities for the alleged scam by creating advertisements that featured minority homebuyers and selectively running these ads in minority communities.
- ❖ Plaintiffs allege that United Homes was in cahoots with corrupt mortgage lenders and appraisers, who tendered purposefully inflated property value assessments. They further allege that lawyers, who were supposed to offer protection and wise counsel to their clients, instead acted as point men for the conspiracies, facilitating the accelerated closings of unconscionable loans, all the while offering false assurances and parroting the conspiracies' company line.
- ❖ In sum, the allegations paint clear, consistent pictures of a carefully orchestrated scheme that victimized minority homebuyers and saddled them with debt beyond their means to repay.
- ❖ The first question for the court was whether plaintiffs have sufficiently pled race discrimination in violation of federal law.
- ❖ The four elements of a Section 1985(3) claim are: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; [and] (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of a citizen of the United States."

**Sandra Barkley v.
Olympia Mortgage Co. et al**

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- ❖ Defendants claimed that plaintiffs failed to allege discriminatory intent
- ❖ Plaintiffs allege that the various actions constituting the fraud "were taken deliberately and with racially discriminatory intent:"
 - ✓ United Homes used advertising featuring minority consumers.
 - ✓ The company placed ads in the *Caribbean Life* community newspaper that serves the West Indian immigrant community, while not advertising in community papers that are part of the same newspaper chain but serve primarily white neighborhoods.
 - ✓ Each plaintiff's claimed that he or she was shown housing stock in minority neighborhoods only.
 - ✓ Finally, two plaintiffs alleged that United Homes used race-conscious outreach strategies such as being paired with an African-American salesman, Barry Braxton, who told them he "takes care of 'his own.'"
- ❖ The court found that taken together, these allegations permitted the inference that defendants sought to lure minority homebuyers into the fraudulent transactions. The Court noted that in making such an inference, a factfinder might determine that defendants had harbored ill will toward racial minorities, *or* that they had used race as a proxy, doing business exclusively with minorities out of the biased perception that those individuals would be especially vulnerable to fraud.

**Sandra Barkley v.
Olympia Mortgage Co. et al**

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- ❖ In typical housing discrimination cases—involving the failure to rent or sell a property to a minority individual—plaintiffs must allege: "(1) that they are members of a protected class; (2) that they sought and were qualified to rent or purchase the housing; (3) that they were rejected; and (4) that the housing opportunity remained available to other renters or purchasers."
- ❖ In contrast to the typical failure-to-sell case, plaintiffs here allege that defendants engaged in the practice of reverse redlining, or the targeting of minorities and *only* minorities for sales on unfair terms.
- ❖ To establish a prima facie case of discrimination based on reverse redlining, a plaintiff must show: (1) that she is a member of a protected class; (2) that she applied for and was qualified for loans; (3) that the loans were given on grossly unfavorable terms; and (4) that the lender continues to provide loans to other applicants with similar qualifications, but on significantly more favorable terms.
- ❖ Defendants contended that the fourth element of a reverse-redlining claim may *only* be established with evidence of disparate treatment, the Court disagreed and it made a strong prediction as to the survival and success of plaintiff's claims past discovery.
- ❖ The Court was correct in its prediction.

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<https://www.justice.gov/crt/case/united-states-v-jpmorgan-chase-bank-na-sdny>

Fair Housing Justice Center v. Crown Nursing Home Associates, Inc., et al.
<http://www.fairhousingjustice.org/newsletters/opening-acts-may-5-2017>

Central New York Fair Housing v. Waterbury, et al.
<http://www.relmanlaw.com/civil-rights-litigation/cases/Waterbury.php>

Keep an open mind

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**Considering the New York Rules of Professional
Conduct
and
Diversity, Inclusion and Elimination of Bias
In
The Practice of Real Estate**

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Why are we here?

Categories of CLE Credit as Defined in the Program Rules 22 NYCRR 1500.2(c)-(g)

(c) Ethics and Professionalism may include, among other things, the following: the norms relating to lawyers' professional obligations to clients (including the obligation to provide legal assistance to those in need, confidentiality, competence, conflicts of interest, the allocation of decision making, and zealous advocacy and its limits); the norms relating to lawyers' professional relations with prospective clients, courts and other legal institutions, and third parties (including the lawyers' fiduciary, accounting and record-keeping obligations when entrusted with law client and escrow monies, as well as the norms relating to civility); the sources of lawyers' professional obligations (including disciplinary rules, judicial decisions, and relevant constitutional and statutory provisions); recognition and resolution of ethical dilemmas; the mechanisms for enforcing professional norms; substance abuse control; and professional values (including professional development, improving the profession, and the promotion of fairness, justice and morality).

(d) Skills must relate to the practice of law and may include, among other things, problem solving, legal analysis and reasoning, legal research and writing, drafting documents, factual investigation (as taught in courses on areas of professional practice), communication, counseling, negotiation, mediation, arbitration, organization and trial advocacy.

(e) Law Practice Management must relate to the practice of law and may encompass, among other things, office management, applications of technology, state and federal court procedures, stress management, management of legal work and avoiding malpractice and litigation.

(f) Areas of Professional Practice may include, among other things, corporations, wills/trusts, elder law, estate planning/administration, real estate, commercial law, civil litigation, criminal litigation, family law, labor and employment law, administrative law, securities, tort/insurance practice, bankruptcy, taxation, compensation, intellectual property, municipal law, landlord/tenant, environmental law, entertainment law, international law, social security and other government benefits, and alternative dispute resolution procedures.

(g) Diversity, Inclusion and Elimination of Bias courses, programs and activities must relate to the practice of law and may include, among other things, implicit and explicit bias, equal access to justice, serving a diverse population, diversity and inclusion initiatives in the legal profession, and sensitivity to cultural and other differences when interacting with members of the public, judges, jurors, litigants, attorneys and court personnel. [effective January 1, 2018].

RULE 1.2: Scope of Representation and Allocation of Authority between Client and Lawyer

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

A closer look:

Rule 1.2(d): A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

What can you do?

The lawyer may be permitted to withdraw.

N.B.: The client's victims may sue the law firm for aiding and abetting the client's wrongful conduct.

See also, **Rule 1.2(f): A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.**

For example, a lawyer may refuse to draft documents that the lawyer believes will be part of an illegal scheme.

Again, the lawyer may withdraw from representation if the lawyer believes the client's conduct is fraudulent or unlawful.

Rule 1.2(g): A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

This is an ethical consideration.

Consider the Standards of Civility.

Rule 1.4: Communication

(a) A lawyer shall:

(1) promptly inform the client of:

(i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

In your practice, there may be times when communication with your client is impacted by a language barrier.

What do you need to do?

Consider: Communicating through an intermediary.

Consider: Hiring an interpreter.

Remember: Confidentiality (see Rule 1.6)

Consider: Document your file to protect against claims.

RULE 1.14: Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client [confidentiality], but only to the extent reasonably necessary to protect the client's interests.

Again, consider communication.

RULE 1.16: Declining or Terminating Representation

(a) A lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to: (1) bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or

(2) present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

(1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged; or

(4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action with which the lawyer has a fundamental disagreement;

(5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;

(8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;

(9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(10) the client knowingly and freely assents to termination of the employment;

(11) withdrawal is permitted under Rule 1.13(c) or other law;

(12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or

(13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

Let's break this down:

Rule 1.16(a)(4): the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

Discriminatory behavior is a form of harassment. Consider the Civil Rights Act and the Americans with Disabilities Act.

Rule 1.16(c)(2): the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent

Reasonable belief is enough.

Rule 1.16(c)(4): the client insists upon taking action with which the lawyer has a fundamental disagreement

"Subparagraph (c)(4) is a powerful weapon against a client who will not cease and desist from an action that the lawyer considers to be repugnant, immoral, or stupid." Simon's New York Rules of Professional Conduct Annotated, Roy Simon and Nicole Hyland at p. 953.

Rule 1.16(c)(13): the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules

When you terminate representation, what do you say to your client and others? A statement that *professional considerations* require termination of representation should be sufficient.

If in a court proceeding, you can provide an affidavit under seal to the Court, however, you continue to have a duty of confidentiality.

Breakdown of communications is another reason. What's that?

RULE 5.3: Lawyer's Responsibility for Conduct of Nonlawyers

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if: (1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or (2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and (i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or (ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

Duty to supervise and properly train staff.

Consider paralegal interactions with clients.

Consider intake procedures.

RULE 7.3: Solicitation and Recommendation of Professional Employment

(a) A lawyer shall not engage in solicitation:

(1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or

(2) by any form of communication if:

(i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule;

(ii) the recipient has made known to the lawyer a desire not to be solicited by the lawyer;

(iii) the solicitation involves coercion, duress or harassment;

(iv) the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer; or

(v) the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

(b) For purposes of this Rule, “solicitation” means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request.

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions:

(1) A copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial district or judicial department wherein the lawyer or law firm maintains its principal office. Where no such office is maintained, the filing shall be made in the judicial department where the solicitation is targeted. A filing shall consist of:

(i) a copy of the solicitation;

**(ii) a transcript of the audio portion of any radio or television solicitation;
and**

(iii) if the solicitation is in a language other than English, an accurate English-language translation.

(2) Such solicitation shall contain no reference to the fact of filing.

(3) If a solicitation is directed to a predetermined recipient, a list containing the names and addresses of all recipients shall be retained by the lawyer or law firm for a period of not less than three years following the last date of its dissemination.

(4) Solicitations filed pursuant to this subdivision shall be open to public inspection.

(5) The provisions of this paragraph shall not apply to:

(i) a solicitation directed or disseminated to a close friend, relative, or former or existing client;

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at persons affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

(iii) professional cards or other announcements the distribution of which is authorized by Rule 7.5(a).

(d) A written solicitation shall not be sent by a method that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail or that requires a signature on the part of the recipient.

(e) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(f) Any solicitation made in writing or by computer-accessed communication and directed to a pre-determined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient's potential legal need.

(g) If a retainer agreement is provided with any solicitation, the top of each page shall be marked "SAMPLE" in red ink in a type size equal to the largest type size used in the agreement and the words "DO NOT SIGN" shall appear on the client signature line.

(h) Any solicitation covered by this section shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) The provisions of this Rule shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.

Is your advertisement targeted?

Consider: “Do you wish your lawyer spoke fluent Spanish?”

Also, *Shapiro v. Ky. Bar Ass’n*, 486 U.S. 466 (1988) involving targeting mailings to defendants in foreclosure proceedings. “If your home is being foreclosed, please call me today.”

RULE 8.3: Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

(c) This Rule does not require disclosure of:

(1) information otherwise protected by Rule 1.6; or

(2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

What's your duty to report?

N.Y. State Opinion 1004: The inquiring attorney asked whether he was required to report an attorney on the opposite side of a real estate transaction whom he believed was charging an unreasonable fee.

Held: duty to report only if the attorney concluded that the "setting of the fee reflects adversely on that attorney's fitness to practice law or involves dishonesty."

Consider Matter of Lodes, 118 A.D.3d 54 (2nd Dept. 2014), failure to report a long-term kick-back scheme perpetrated by a state Senator who was also an attorney.

RULE 8.4: Misconduct

A lawyer or law firm shall not:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;**
- (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;**
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**
- (d) engage in conduct that is prejudicial to the administration of justice;**
- (e) state or imply an ability:
 - (1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or**
 - (2) to achieve results using means that violate these Rules or other law;****
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;**
- (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status, sexual orientation, gender identity, or gender expression. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or**
- (h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.**

Racist and sexist comments have been held to constitute discrimination.

Hiring practices: an EEOC or NYS Human Right Division violation can trigger this violation.

Also consider, Part 1210 (Statement of Client's Rights) of Title 22 of the Official Compilation of Codes Rules, Regulations of the State of New York:

STATEMENT OF CLIENT'S RIGHTS

10. You may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, gender identity, gender expression, age, national origin, or disability.

For a free, downloadable copy of the New York Rules of Professional Conduct:

<https://www.nysba.org/DownloadAsset.aspx?id=50671>

Recommended reading: Simon's New York Rules of Professional Conduct Annotated, Roy Simon and Nicole Hyland, published by Thomson Reuters

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