

## **Broker Summit 2021**

### **Fair Housing & Advertising**

Social media has become an integral part of how we do business in real estate and it's easy to understand why. Social media has enabled us to reach larger audiences, quickly list properties, generate interest, and grow clientele all with a simple click. Growing a business has never been easier, but, despite its perks, social media has created some unexpected avenues of legal liability. One particular area of concern is Fair Housing law and the unintentional discrimination that has subsequently stemmed from advertising for housing on social media platforms.

As Realtors® continue to rely on virtual platforms for advertising, it's paramount that brokers and their agents understand that advertisements for housing must comply with the basic requirements under the law and advertising via social media is no exception. Online advertisements are not exempt from federal, state and local Fair Housing laws. In fact, it's arguably more important that online advertisements are fair housing compliant since agents are reaching a much larger audience compared to traditional in-print advertising.

Broker supervision will play an important role in maintaining Fair Housing compliance as we enter a new era of conducting business online. If an agent violates the Fair Housing Act, the agent's firm is liable for that action. A meaningful internal policy that addresses fair housing can act as a great defense to a Fair Housing claim alleged against an agent or a brokerage. Such a policy will not automatically absolve the broker from liability, but it's a good place to start. Firms are strongly encouraged to monitor their agents' online advertising and other practices that may potentially violate Fair Housing law. The less control a broker has over an online housing advertisement means a greater potential for legal liability. Alternatively, the more supervision a

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broker exercises means a lesser likelihood that discriminatory content slips through the cracks and reaches the audience.

### **Facebook Woes**

Fair Housing advocacy groups across the country are working diligently to combat discrimination in online housing practices. In 2018, Facebook was sued by the National Fair Housing Alliance over its data collection practices and the effect that those practices had on discrimination in the housing industry. The lawsuit alleged that Facebook's advertising platform violated the Fair Housing Act by target marketing to certain users and excluding others from seeing advertisements for housing based on their race, sex, familial status, and other protected classifications.

Facebook argued that it was merely acting as an "interactive service provider" and, therefore, not liable for violating the Fair Housing Act. In making this assertion, Facebook relied on a case from 2008 in which Craigslist successfully convinced the Court that, as an "interactive service provider", it could not be held liable for discriminatory posts made by 3<sup>rd</sup> party users because Craigslist did not help create the discriminatory posts and because interactive service providers are immune from liability for content created by 3<sup>rd</sup> parties.

The Department of Justice intervened in the case and determined that Facebook should not be afforded the same immunity as Craigslist because, unlike Craigslist, Facebook collected user data and used the users' demographics to purposefully exclude members of protected classes from seeing certain advertisements for housing. Facebook played an active role in creating discriminatory content that violated Fair Housing law. For those reasons, the DOJ determined that Facebook should be liable, as a publisher, for those discriminatory advertisements.

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The case was settled in 2019 and, as part of the settlement agreement, Facebook agreed to pay 1.95 million dollars in damages as well as make comprehensive changes to its online housing, employment, and credit advertising platform. The most important change was the removal of targeted marketing practices based on protected classifications such as race, color, sex, national origin, disability, religion, and familial status.

Shortly after the initial lawsuit was filed, the Department of Housing and Urban Development (HUD) filed its own complaint against Facebook, alleging that Facebook's targeted marketing and data collection practices enabled online housing discrimination. Despite the settlement agreement, HUD expressed that it would still be pursuing its own complaint against Facebook and seeking the maximum civil penalties. The interest and attention that this case generated from HUD, as well as the Department of Justice, indicates that regulatory bodies are paying attention to the way real estate professionals conduct themselves on social media, especially in the context of fair housing. This is likely not the last we'll hear of this issue.

### **Are you a publisher and does it matter?**

Determining who is and who is not a "publisher" is important when considering liability for Fair Housing violations. This distinction matters, because the publisher of the advertisement will be held liable along with the creator of the advertisement. What does this mean for real estate professionals? Simply put, a Realtor® who publishes online content (blogs, social media posts, listings, etc.) may find themselves liable for third party comments that violate State or Federal Fair Housing law or at the very least explaining why they aren't liable. Brokerages would be wise to implement some type of "Take Down" policy that outlines a procedure for monitoring and/or removing inappropriate or discriminatory material from the brokerage's public-facing social media pages. Agents are solely responsible for monitoring their personal

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business pages and should be aware that they face liability as a publisher of whatever content they create.

Remember, an employing broker bears the ultimate responsibility for any adverse actions, including Fair Housing issues, that arise out of an agent's practice within that brokerage. Thus, brokers have great incentive to adopt policies that promote fair housing compliance and to set standards for an agent's behavior – particularly online. This is especially relevant now, as we navigate the changes created by COVID-19. Increased remote work and online business outreach may very well be the new normal. Now, more than ever, is the time for brokerages to keep a watchful eye on social media usage and online activity.

Michigan Realtors® has created a model social media policy which may be useful for brokerages looking for additional guidelines in using social media responsibly and safely. The policy should be viewed as a risk-reduction tool that will provide real estate professionals with a framework to keep their social media usage professional, ethical, and compliant under the law. The model policy can be found at [law.mirealtors.com](http://law.mirealtors.com).