20 Professional Practices

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FAIR HOUSING LAWS

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Federal and state governments have enacted laws prohibiting discrimination in the national housing market. The aim of these **fair housing laws,** or **equal opportunity housing laws,** is to give all people in the country an equal opportunity to live wherever they wish, provided they can afford to do so, without impediments of discrimination in the purchase, sale, rental, or financing of property.

State Fair Housing Laws. While states have enacted fair housing laws that generally reflect the provisions of national law, each state may have slight modifications of national law. For that reason, it is incumbent upon real estate students to learn their state laws and, in particular, note where these laws differ from national fair housing laws.

Fair Housing and Local Zoning. The Fair Housing Act prohibits a broad range of practices that discriminate against individuals on the basis of race, color, religion, sex, national origin, familial status, and disability. The Act does not pre-empt local zoning laws. However, the Act applies to municipalities and other local government entities and prohibits them from making zoning or land use decisions or implementing land use policies that exclude or otherwise discriminate against protected persons, including individuals with disabilities.

Civil Rights Act of 1866

The original fair housing statute, the Civil Rights Act of 1866, prohibits discrimination in housing *based on race.* The prohibition relates to selling, renting, inheriting, and conveying real estate.

Executive Order 11063. While the Civil Rights Act of 1866 prohibited discrimination, it was only marginally enforced. In 1962, the President issued Executive Order 11063 to *prevent discrimination in residential properties financed by FHA and VA loans*. The order facilitated enforcement of fair housing where federal funding was involved.

Civil Rights Act of 1968

Title VIII (Fair Housing Act). Title VIII of the Civil Rights Act of 1968, known today as the Fair Housing Act, prohibits discrimination in housing *based on race, color, religion, or national origin*. The Office of Fair Housing and Equal Opportunity (FHEO) administers and enforces Title VIII under the supervision of the Department of Housing and Urban Development (HUD).

Forms of illegal discrimination

The Fair Housing Act specifically prohibits such activities in residential brokerage and financing as the following.

Discriminatory misrepresentation. An agent may not conceal available properties, represent that they are not for sale or rent, or change the sale terms for the purpose of discriminating. For example, an agent may not inform a minority buyer that the seller has recently decided not to carry back second mortgage financing when in fact the owner has made no such decision.

Discriminatory advertising. An agent may not advertise residential properties in such a way as to restrict their availability to any prospective buyer or tenant.

Providing unequal services. An agent may not alter the nature or quality of brokerage services to any party based on race, color, sex, national origin, or religion. For example, if it is customary for an agent to show a customer the latest MLS publication, the agent may not refuse to show it to any party. Similarly, if it is customary to show qualified buyers prospective properties immediately, an agent may not alter that practice for purposes of discrimination.

Steering. Steering is the practice of directly or indirectly channeling customers toward or away from homes and neighborhoods. Broadly interpreted, steering occurs if an agent describes an area in a subjective way for the purpose of encouraging or discouraging a buyer about the suitability of the area.

For example, an agent tells Buyer A that a neighborhood is extremely attractive, and that desirable families are moving in every week. The next day, the agent tells Buyer B that the same neighborhood is deteriorating, and that values are starting to fall. The agent has blatantly steered Buyer B *away* from the area and Buyer A *into* it.

Blockbusting. Blockbusting is the practice of inducing owners in an area to sell or rent to avoid an impending change in the ethnic or social makeup of the neighborhood that will cause values to go down.

For example, Agent Smith tells neighborhood owners that several minority families are moving in, and that they will be bringing their relatives next year. Smith informs homeowners that, in anticipation of a value decline, several families have already made plans to move.

Restricting MLS participation. It is discriminatory to restrict participation in any multiple listing service based on one's race, religion, national origin, color, or sex.

Redlining. Redlining is the residential financing practice of refusing to make loans on properties in a certain neighborhood regardless of a mortgagor's qualifications. In effect, the lender draws a red line around an area on the map and denies all financing to applicants within the encircled area.

Title VIII exemptions

The Fair Housing Act allows for exemptions under a few specific circumstances. These are:

- a privately owned single-family home where no broker is used and no discriminatory advertising is used, with certain additional conditions
- rental of an apartment in a 1-4 unit building where the owner is also an occupant, provided the advertising is not discriminatory
- facilities owned by private clubs and leased non-commercially to members
- facilities owned by religious organizations and leased non-commercially to members, provided membership requirements are not discriminatory

Jones v. Mayer

In 1968, the Supreme Court ruled in *Jones v. Mayer* that all discrimination in selling or renting residential property based on race is prohibited under the provisions of the Civil Rights Act of 1866. Thus, while the Federal Fair Housing Act exempts certain kinds of discrimination, anyone who feels victimized by discrimination *based on race* may seek legal recourse under the 1866 law.

Equal Opportunity in Housing poster

In 1972, HUD instituted a requirement that brokers display a standard HUD poster. The poster affirms the broker's compliance with fair housing laws in selling, renting, advertising, and financing residential properties. Failure to display the poster may be construed as discrimination.

Fair Housing Amendments Act of 1988

Amendments to federal fair housing laws prohibit discrimination based on sex and discrimination against handicapped persons and families with children.

Exemptions. Federal fair housing laws do not prohibit age and family status discrimination under the following circumstances:

- in government-designated retirement housing
- in a retirement community if all residents are 62 years of age or older
- in a retirement community if 80 % of the dwellings have one person who is 55 years of age or older, provided there are amenities for elderly residents

- in residential dwellings of four units or less, and single family houses if sold or rented by owners who have no more than three houses

Discrimination by the client

Fair housing laws apply to home sellers as well as to agents, with the exception of the exemptions previously cited. If an agent goes along with a client's discriminatory act, the agent is equally liable for violation of fair housing laws. It is thus imperative to avoid complicity with client discrimination. Further, an agent should withdraw from any relationship where client discrimination occurs.

Examples of potential client discrimination are:

- refusing a full-price offer from a party
- removing the property from the market to sidestep a potential purchase by a party
- accepting an offer from one party that is lower than one from another party

Violations and enforcement

Persons who feel they have been discriminated against under federal fair housing laws may file a complaint with the Office of Fair Housing and Equal Opportunity (FHEO) within HUD, or they may file suit in a federal or state court.

Filing an FHEO complaint. Complaints alleging fair housing violations must be filed with the Office of Fair Housing and Equal Opportunity within one year of the violation. HUD then initiates an investigation in conjunction with federal or local enforcement authorities.

If HUD decides that the complaint merits further action, it will attempt to resolve the matter out of court. If efforts to resolve the problem fail, the aggrieved party may file suit in state or federal court.

Filing suit. In addition to or instead of filing a complaint with HUD, a party may file suit in state or federal court within two years of the alleged violation.

Penalties. If discrimination is confirmed in court, the respondent may be enjoined to cease practicing his or her business. For example, a discriminating home builder may be restrained from selling available properties to buyers. Also, the plaintiff may be compensated for damages including humiliation, suffering, and pain. In addition, the injured party may seek equitable relief, including forcing the guilty party to complete a denied action such as selling or renting the property. Finally, the courts may impose civil penalties for first-time or repeat offenders.

Fair financing laws

Parallel anti-discrimination and consumer protection laws have been enacted in the mortgage financing field to promote equal opportunity in housing.

Equal Credit Opportunity Act (ECOA). Enacted in 1974, the Equal Credit Opportunity Act requires lenders to be fair and impartial in determining who qualifies for a loan. A lender may not discriminate on the basis of race, color, religion, national origin, sex, marital status, or age. The act also requires lenders to inform prospective borrowers who are being denied credit of the reasons for the denial.

Home Mortgage Disclosure Act. This statute requires lenders involved with federally guaranteed or insured loans to exercise impartiality and non-discrimination in the geographical distribution of their loan portfolio. In other words, the act is designed to prohibit redlining. It is enforced in part by requiring lenders to report to authorities where they have placed their loans.

Exhibit 20.1 Equal Opportunity in Housing Poster

U. S. Department of Housing and Urban Development

EQUAL HOUSING OPPORTUNITY

We Do Business in Accordance With the Federal Fair Housing Law

(The Fair Housing Amendments Act of 1988)

It is illegal to Discriminate Against Any Person Because of Race, Color, Religion, Sex, Handicap, Familial Status, or National Origin

- In the sale or rental of housing or residential lots
- In advertising the sale or rental of housing
- In the financing of housing
- In the provision of real estate brokerage services
- In the appraisal of housing
- Blockbusting is also illegal

Anyone who feels he or she has been discriminated against may file a complaint of housing discrimination:
1-800-669-9777 (Toll Free)
1-800-927-9275 (TTY)
www.hud.gov/fairhousing

U.S. Department of Housing and Urban Development
Assistant Secretary for Fair Housing and Equal Opportunity
Washington, D.C. 20410

Previous editions are obsolete — form HUD-928.1 (6/2011)

Americans with Disabilities Act (ADA)

Purpose. The ADA, which became law in 1990, is a civil rights law that prohibits discrimination against individuals with disabilities in all areas of public life, including employment, education, transportation, and facilities that are open to the general public. The purpose of the law is to make sure that people with disabilities have the same rights and opportunities as everyone else.

The Americans with Disabilities Act Amendments Act (ADAAA) became effective on January 1, 2009. Among other things, the ADAAA clarified that a

disability is "a physical or mental impairment that substantially limits one or more major life activities." This definition applies to all titles of the ADA and covers private employers with 15 or more employees, state and local governments, employment agencies, labor unions, agents of the employer, joint management labor committees, and private entities considered places of public accommodation. Examples of the latter include hotels, restaurants, retail stores, doctor's offices, golf courses, private schools, day care centers, health clubs, sports stadiums, and movie theaters.

Components. The law consists of five parts.

- Title I (Employment) concerns equal employment opportunity. It is enforced by the U.S. Equal Employment Opportunity Commission.
- Title II (State and Local government) concerns nondiscrimination in state and local government services. It is enforced by the U.S. Department of Justice.
- Title III (Public Accommodations) concerns nondiscrimination in public accommodations and commercial facilities. It is enforced by the U.S. Department of Justice.
- Title IV (Telecommunications) concerns accommodations in telecommunications and public service messaging. It is enforced by the Federal Communications Commission.
- Title V (Miscellaneous) concerns a variety of general situations including how the ADA affects other laws, insurance providers, and lawyers.

Real estate practitioners are most likely to encounter Titles I and III and should acquire familiarity with these. In advising clients, licensees are well-advised to seek qualified legal counsel.

Requirements. The ADA requires landlords in certain circumstances to modify housing and facilities so that disabled persons can access them without hindrance.

The ADA also requires that disabled employees and members of the public be provided access that is equivalent to that provided to those who are not disabled.

- Employers with at least fifteen employees must follow nondiscriminatory employment and hiring practices.
- Reasonable accommodations must be made to enable disabled employees to perform essential functions of their jobs.
- Modifications to the physical components of a building may be necessary to provide the required access to tenants and their customers, such as widening doorways, changing door hardware, changing how doors open, installing ramps, lowering wall-

mounted telephones and keypads, supplying Braille signage, and providing auditory signals.

- Existing barriers must be removed when the removal is "readily achievable," that is, when cost is not prohibitive. New construction and remodeling must meet a higher standard.

- If a building or facility does not meet requirements, the landlord must determine whether restructuring or retrofitting or some other kind of accommodation is most practical.

Penalties. Violations of ADA requirements can result in citations, business license restrictions, fines, and injunctions requiring remediation of the offending conditions. Business owners may also be held liable for personal injury damages to an injured plaintiff.

PROPERTY DISCLOSURES

Residential property condition
Environmental issues
Warranties
Inspections
Homeowners' associations

Residential property condition

Seller's disclosure form. Many states require sellers to make a written disclosure about property condition to a prospective buyer. This seller disclosure may or may not relieve the agent of some liabilities for disclosure. The residential property condition disclosure is the seller's written summary of the property's condition at the time of contracting for sale. The disclosure is entered on state-approved forms.

Owner's role. State legislation requires owners of previously occupied single family homes and buildings containing 1-4 dwelling units to provide the disclosure to prospective buyers if they are selling, exchanging, or optioning their property. Some exceptions and exemptions apply. When required, the disclosure must be transmitted to the prospective buyer no later than when the buyer makes an offer.

A typical form requires the seller to affirm whether or not problems exist in any of the listed features and systems of the property. In denying that a problem exists, the seller claims to have no knowledge of a defect. If a defect does in fact exist, the seller can be held liable for intentional misrepresentation. A third possible response to a property condition question is that of "no representation." Here, the seller makes no claim of knowledge as to whether a problem exists. With this answer, the seller is no longer held liable for a disclosure of any kind relating to a particular feature, whether a defect is known or otherwise.

Once the seller has signed the form and delivered it to the buyer, the buyer must acknowledge receipt and knowledge of the property condition disclosures, along with other provisions set forth on the form.

Licensee's role. The residential property re-seller must comply with the property condition disclosure requirement whether an agent is employed in the transaction or not. If an agent is involved in the transaction, the agent must disclose any and all material facts he or she knows or should reasonably know about the property, regardless of what the seller may have disclosed on the form.

Right of rescission. Sellers who fail to complete and deliver the property condition disclosure statement to buyers in a timely fashion effectively give the buyer a subsequent right under certain conditions to rescind the sale contract and re-claim their deposits. The buyer's right to cancel persists until closing or occupancy, whichever comes first.

Property condition and material facts. As explained in the chapter on agency, an agent has the duty to inform the client of all material facts, reports, and rumors that might affect the client's interests in the property transaction. A material fact is one that might affect the value or desirability of the property to a buyer if the buyer knew it. Material facts include

- the agent's opinion of the property's condition
- adverse facts about property condition, title defects, environmental hazards, and property defects

In recent years, the disclosure standard has been raised to require an agent to disclose items that a practicing agent *should know,* whether the agent actually had the knowledge or not, and regardless of whether the disclosure furthers or impedes the progress of the transaction.

Facts not considered to be material, and therefore not usually subject to required disclosure, include such items as property stigmatization (e.g., that a crime or death occurred on the property) and the presence of registered sex offenders in the neighborhood (in accordance with Megan's Law, federal legislation that requires convicted offenders to register with the state of residence; in some states, agents must provide registry information to buyers).

The agent may be held liable for failing to disclose a material fact if a court rules that the typical agent in that area would detect and recognize the adverse condition. There is no obligation to obtain or disclose information that is immaterial to the transaction, such as property stigmas.

An agent who sees a "red flag" issue such as a potential structural or mechanical problem should advise the seller to seek expert advice. Red flags can seriously impact the value of the property and/or the cost of remediation. In addition to property condition per se, they may include such things as

- environmental concerns
- property anomalies, such as over-sized or peculiarly shaped lot
- neighborhood issues

- poor construction
- signs of flooding
- poor floorplan
- adjacent property features

The following exhibit is part of a typical property condition disclosure form showing the level of detail that is expected in a seller's disclosure.

Exhibit 20.2 Property Condition Disclosure Form

Buyers and seller should be aware that any agreement executed between the parties will supercede this form as to any abligations on the part of the seller to repair items identified below and/or the obligation of the buyer to accept such items "as is".

INSTRUCTIONS TO THE SELLER

Complete this form yourself and answer each question to the best of your knowledge. If an answer is an estimate, clearly label it as such. The Seller hereby authorizes any agent(s) representing any party in this transaction to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the subject property.

PROPERTY ADDRESS _____ **CITY** _____

SELLER'S NAMES(S) _____ **PROPERTY AGE** _____

DATE SELLER ACQUIRED THE PROPERTY_____ **DO YOU OCCUPY THE PROPERTY?** _____

IF NOT OWNER–OCCUPIED. HOW LONG HAS IT BEEN SINCE THE SELLER OCCUPIED THE PROPERTY? _____

(Check the one that applies) THIS PROPERTY IS A ☐ SITE BUILT HOME ☐ NONSITE BUILT HOME

- ☐ Range
- ☐ Oven
- ☐ Microwave
- ☐ Dishwasher
- ☐ Garbage Disposal
- ☐ Trash Compactor
- ☐ Water Softener Alarm
- ☐ 220 Volt Wiring
- ☐ Washer/Dryer Hookups
- ☐ Central Heating
- ☐ Heat Pump
- ☐ Central Air Conditioning
- ☐ Wall/Window Air Conditioning
- ☐ Window Screens
- ☐ Rain Gutters
- ☐ Fireplace(s) (Number _____)
- ☐ Gas Starter for Fireplace
- ☐ Smoke Detector/Fire
- ☐ Burglar Alarm
- ☐ Patio/Decking/Gazebo
- ☐ Irrigation System
- ☐ Sump Pump
- ☐ Garage Door Opener(s)
- ☐ (Number of openers _____)
- ☐ Intercom
- ☐ TV Antenna/Satellite Dish
- ☐ Pool
- ☐ Spa/Whirlpool Tub
- ☐ Hot Tub
- ☐ Sauna
- ☐ Current Termite Contract
- ☐ Access to Public Streets
- ☐ Other_____
- ☐ Other_____

Garage:	☐ Attached	☐ Not Attached	☐ Carport	
Water Heater:	☐ Gas	☐ Solar	☐ Electric	
Water Supply:	☐ City	☐ Well	☐ Private Utility	Other_____
Waste Disposal:	☐ City Sewer	☐ Septic Tank	☐ Other _____	
Gas Supply:	☐ Utility	☐ Bottled	☐ Other _____	

Roof(s): Type _____ **Age(approx)** _____

Other Items: _____

To the best of your knowledge, are any of the above NOT in operating condition? ☐ **YES** ☐ **NO**
If YES, then describe (Attach additional sheets if necessary);

ARE YOU (SELLER) AWARE OF ANY DEFECTS/AMLFUNCTIONS IN ANY OF THE FOLLOWING?

	YES	NO	UNKNOWN		YES	NO	UNKNOWN
Interior Walls	☐	☐	☐	Central Heating	☐	☐	☐
Ceilings	☐	☐	☐	Central Air Conditioning	☐	☐	☐
Floors	☐	☐	☐	Electrical System	☐	☐	☐
Windows	☐	☐	☐	Exterior Walls	☐	☐	☐
Doors	☐	☐	☐	Roof	☐	☐	☐
Insulation	☐	☐	☐	Basement	☐	☐	☐
Plumbing	☐	☐	☐	Foundation	☐	☐	☐
Sewer/Septic	☐	☐	☐	Slab	☐	☐	☐
Heat Pump	☐	☐	☐	Driveway	☐	☐	☐
				Sidewalks	☐	☐	☐

If any of the above is/are marked YES, Please explain:

_____

_____

_____

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ww. kr-ba.com
jtk10-02

Exhibit 20.2 Property Condition Disclosure Form, page 2

C. ARE YOU (SELLER) AWARE OF ANY OF THE FOLLOWING?

	YES	NO	UNKNOWN
1. Substances, materials, or products which may be an environmental hazard such as, but not limited to: asbestos, radon gas, lead-based paint, fuel or chemical storage tanks, and/or contaminated water on the subject property	❑	❑	❑
2. Features shared in common with adjoining landowners, such as, but not limited to, walls, fences, and driveways, whose use or responsibility for maintenance may have an effect on the subject property	❑	❑	❑
3. Any authorized changes in roads, drainage, or utilities affecting the property, or contiguous to the property	❑	❑	❑
4. Any changes since the most recent survey of this property was done	❑	❑	❑
Most recent survey of the property: _____ [check here ❑ if unknown]			
5. Any encroachments, easements, or similar items that may affect your ownership interest in the property	❑	❑	❑
6. Room additions, structural modifications, or other alterations or repairs made without necessary permits	❑	❑	❑
7. Room additions, structural modifications, or other alterations or repairs not in compliance with building codes	❑	❑	❑
8. Is heating and air conditioning supplied to all finished rooms?	❑	❑	❑
If the same type of system is not used for all finished rooms, please explain. _____			
9. Landfill (compacted or otherwise) on the property or any portion thereof	❑	❑	❑
10. Any settling from any cause, or slippage, sliding, or other soil problems	❑	❑	❑
11. Flooding, drainage, or grading problems	❑	❑	❑
12. Any requirement that flood insurance be maintained on the property	❑	❑	❑
13. Property or structural damage from fire, water, wind, storm, earthquake/tremor, landslide or wood destroying organisms	❑	❑	❑
14. Any zoning violations, nonconforming uses, and/or violations of "setback" requirements	❑	❑	❑
15. Neighborhood noise problems or other nuisances	❑	❑	❑
16. Subdivisions and/or deed restrictions or obligations	❑	❑	❑
17. A Homeowners Association (HOA) which has any authority over the subject property	❑	❑	❑
Name of HOA: _____			
HOA Address: _____			
Monthly Dues: _____ Special Assessments: _____			
18. Any "common area" (facilities such as, but not limited to, pools, tennis courts, walkways, or other areas co-owned in undivided interest with others)	❑	❑	❑
19. Any notices of abatement or citations against the property	❑	❑	❑
20. Any lawsuit(s) or proposed lawsuit(s) by or against the seller which affect or will affect the property	❑	❑	❑
21. Is any system, equipment or part of the property being leased	❑	❑	❑
If yes, please explain, and include a written statement regarding payment information.			
22. Any exterior wall covering of the structure covered with exterior insulation and finishing systems (EIFS), also known as "synthetic stucco"	❑	❑	❑
If yes, has there been a recent inspection to determine whether the structure has excessive moisture accumulation and/or moisture related damage? (The Tennessee Real Estate Commission urges any buyer or seller who encounters this product to have a qualified professional inspect the structure in question for the preceding concern and provide a written report of their finding.)	❑	❑	❑
If yes, please explain. If necessary, please attach an additional sheet.			

_____

_____

D. CERTIFICATION: I/we certify that the information herein, concerning the real property located at _____, is true and correct to the best of my/our knowledge as of the date signed. Should any of these conditions change prior to conveyance of title to this property, these changes will be disclosed in addendum(a) to this document.

_____ Transferor (Seller) _____ Date

_____ Transferor (Seller) _____ Date

Parties may wish to obtain professional advice and/or inspections of the property and to negotiate appropriate provisions in the purchase agreement regarding advice, inspections, or defects.

TRANSFEREE/BUYER'S ACKNOWLEDGMENT: I/we understand that this disclosure statement is not intended as a substitute for any inspection, and that I/we have a responsibility to pay diligent attention to and inquire about those material defects which are evident by careful observation.

I/we acknowledge receipt of a copy of this disclosure.

_____ Transferee (Buyer) _____ Date

_____ Transferee (Buyer) _____ Date

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Environmental issues

Health hazards occur within structures, on real estate parcels, and in the area surrounding real estate. They may occur naturally or as a result of human activity. Environmental laws regulate some, but not all, health hazards that affect real estate. Real estate agents, owners, and sellers have various responsibilities for detecting, disclosing, and remediating regulated hazards. Some important issues are reviewed below. There is further information in the "Environmental Controls" section of Chapter 8.

Lead-based paint. This hazard cannot be absorbed through the skin, but it becomes dangerous when it is ingested or inhaled. It can be found in most homes built before 1978 and can be present in the air, drinking water, food, contaminated soil, deteriorating paint, and dust from the paint. Children are particularly susceptible because young children are known to eat chips of the paint, allowing the lead to enter their bloodstreams. Homebuyers and renters are required to be given the EPA-HUD-US Consumer Product Safety Commission's booklet, "Protect Your Family from Lead in Your Home" and must be informed if lead-based paint is present in the home. Buyers may have a risk assessment performed prior to purchasing the home.

Mold. This is a fungus that grows under moist conditions and causes allergic reaction for some people. The presence of mold in the home must be disclosed as a latent defect. Flooding and water damage must also be disclosed as both of those can lead to mold growth. Inspections do not always find mold because it often grows inside walls and ductwork. Most molds require removal by a professional.

Asbestos. While harmless in its original condition, it can cause lung cancer if its dust filters into the air. If it is found in a home during remodeling, it must be removed by professionals to prevent contamination. It can be found in roofing and siding, older insulation, textured paint, artificial ashes sold for gas fireplaces, some vinyl floor tiles, coatings for older hot water and steam pipes.

Air quality. The quality of air in a home can be adversely impacted by the presence of carbon monoxide, radon, deteriorating asbestos and lead-based paint, methamphetamine production, formaldehyde, and other toxic chemicals. Homes can and should be tested for many of these contaminants prior to purchase.

Water quality. Ground water is easily contaminated from septic tanks, agricultural runoff, highway de-icing, landfills, pesticides, animal waste, etc. Many people rely on ground water for drinking so must be aware that contaminated water can cause problems from mild stomach problems to cancer and death. The Environmental Protection Agency (EPA) sets standards for protecting ground water from contamination. It also offers advice and resources to facilitate the rehabilitation of contaminated ground water sources. One such means of protection is to advise private well users to have the water tested at least once a year.

Carbon monoxide. This is an odorless, colorless, toxic gas that can kill a person before its presence is known. It can be caused by unvented kerosene and gas space heaters; leaking chimneys; back-drafting from furnaces, gas water heaters, wood stoves, and fireplaces; gas stoves, gasoline powered equipment, vehicle

exhaust in garages, tobacco smoke. Carbon monoxide can be detected in a structure by a unit similar to a smoke alarm which should be included in every home, especially those with gas equipment and fireplaces or furnaces.

Faulty septic systems. Inspections of septic systems are important because these systems take wastewater from the property, remove most of the contaminants, and then put the water into the soil. If the system is faulty, it can be releasing contaminated water into the soil, thereby contaminating the soil. Potential buyers and septic system users should have the county health department conduct an inspection of the system.

Illegal drug manufacturing. Manufacturing illegal drugs such as methamphetamine produces highly toxic fumes that last a long time. Continued exposure to the fumes can cause fatal burns to the lungs, can damage the liver and spleen, and can lead to learning disabilities. Any property suspected as having been a place for drug manufacturing should be investigated prior to being sold or leased, and the possible health hazards must be disclosed to the potential buyer or renter.

Radon. This is the easiest hazard to detect and mitigate. It is an odorless, colorless, tasteless, and radioactive gas that is created in the ground where uranium and radium exist. Prolonged exposure to radon can cause lung cancer. It can enter the home through any cracks, gaps, or cavities, including crawl spaces and openings around pipes. It can be easily detected by a radon test, so home inspections should include this test.

Urea formaldehyde. This type of hazard is found in foam thermal insulation in homes built before 1980. The formaldehyde gas emissions from the insulation decrease over time, so most homes with the insulation no longer pose a threat. The most common sources of formaldehyde in a home are pressed wood products such as particleboard, hardwood plywood paneling, and medium density fiberboard. Plastic furniture, new carpeting, and other vinyl materials also emit formaldehyde gases during the first few months after installation. Formaldehyde can cause eye problems, nausea, breathing problems, and allergic reactions.

Leaking underground storage tanks. USTs have at least 10 percent of their volume underground and are used to store fuel oil, gasoline, and other toxic fluids. Tanks made of steel can corrode over time and leak their contents into the surrounding soil, contaminating groundwater. They also provide a potential for fire and explosion. Tank removal is expensive, so removal is not common. Therefore, potential buyers must be informed of the presence of a UST on the property and of the health and financial risks of purchasing a property that contains a UST.

Clean Air and Clean Water Acts. The Clean Air Act of 1963, since amended a number of times, was designed to control air pollution on a national level. Among other things, the act authorizes the setting of standards for controlling the emission of pollutants and monitoring air quality. It identifies hazardous air pollutants such as formaldehyde and regulates their use. Importantly, the act allows private citizens to sue other citizens to enforce the law.

The Clean Water Act, officially known as the Federal Water Pollution Control Act Amendments of 1972, together with revisions contained in the Clean Water

Act of 1977 and the Water Quality Act of 1987, is the primary federal law governing water pollution. It applies to all waters connected with navigable waters, but the interpretation of exactly which waters are covered remains open to dispute. The Clean Water Act does not directly deal with groundwater contamination, which is addressed in the Safe Drinking Water Act, Resource Conservation and Recovery Act, and the Superfund act.

Safe Drinking Water Act. Congress passed the Safe Drinking Water Act (SDWA) in 1974 (amended 1986 and 1996) to regulate and protect the public supply of drinking water. The act authorizes the setting of standards, protection of water sources, training of operators, funding of improvements, and dissemination of information. Under the act, water suppliers must report health risks to the EPA within 24 hours of discovery. Hydraulic fracturing (fracking) oil and gas production poses one of the greatest current threats to groundwater.

Property sellers generally must disclose the source of drinking water for the property and the presence, type and location of any septic system on the property. A water supply other than a municipal one and any septic system other than a standard one should be tested.

Brownfields Law. Brownfields are abandoned commercial or industrial sites that are likely to contain toxic material. The Small Business Liability Relief and Brownfields Revitalization Act (known as the Brownfields Law), passed in 2002 provides clean-up funds, liability protections, and tax incentives to reclaim contaminated properties. Under this law, owners who neither caused nor contributed to the contamination are released from liability for the clean up.

Environmental Protection Agency. The EPA was established on December 2, 1970 to bring together federal research, monitoring, standard-setting and enforcement activities into one agency dedicated to environmental protection. The EPA, working with state, local, and tribal governments, enforces the Clean Air and Clean Water Acts along with other environmental laws.

Disclosure obligations and liabilities. As discussed in an earlier chapter, licensees are expected to be aware of environmental issues and to know where to look for professional help. They are not expected to have expert knowledge of environmental law nor of physical conditions in a property. Rather, they must treat potential environmental hazards in the same way that they treat other material facts about a property: disclosure. It is advisable to have an attorney draft the appropriate disclosures to lessen the broker's liability should problems occur in the future.

The Lead-based Paint Act of 1992 requires a seller or seller’s agent to disclose known lead problems in properties built before 1978. The licensee must give the buyer or lessee a copy of the EPA-HUD-US Consumer Product Safety Commission booklet, “Protect Your Family from Lead in your home.”

Further, the 1996 lead-based paint regulation requires sellers or lessors of almost all residential properties built before 1978 to disclose known lead-based paint hazards and provide any relevant records available. The seller is not required to test for lead but must allow the buyer a ten-day period for lead inspection. Only a licensed lead professional is permitted to deal with testing, removal or

encapsulation. It is the real estate practitioner's responsibility to ensure compliance.

Under CERCLA and the Superfund Amendment of 1986, current landowners as well as previous owners of a property may be held liable for environmental violations, even if "innocent" of a violation. Sellers often carry the greatest exposure, and real estate licensees may be held liable for improper disclosure.

In sum, for their own protection, licensees should be careful to:

- be aware of potential hazards
- disclose known material facts
- distribute the HUD booklet
- know where to seek professional help.

Warranties

Purpose and scope. Home warranties, or home service contracts, cover service, repair, or replacement of a home's major systems and appliances. Warranties are usually purchased for one year at a time with the annual cost determined by the following:

- the location of the property – prices vary from state to state due to cost of living and property regulations in the specific area
- the type of property – single family homes have different price points than mobile homes or multifamily properties
- the size of the property – smaller homes have cheaper coverage options than large homes. often, the home's square footage determines the cost of the warranty
- the amount of coverage – standard coverage plans may exclude certain parts of the property, resulting in a lower price for the plan. The excluded items can be covered with a more extensive plan at a higher cost

Home warranties are often included in the purchase price of a home or are purchased by the buyer at the time of the home purchase.

Limitations. Purchasers of home warranties need to fully understand their coverage limitations in order to have realistic expectations of the warranty. Similarly, it is important for a homeowner to understand what may not be covered in the warranty. These items may include

- conditions that existed prior to the effective coverage of the warranty
- failures caused by something other than normal wear and tear
- improperly installed or modified items
- damages caused by failure of another system or appliance, such as kitchen cabinets being damaged from a plumbing leak in the pipes under the sink, called consequential damages
- outdoor items such as sprinklers or swimming pool
- repairs to faucets
- refrigerators, washers and dryers, or garage door openers are often not covered

Basically, unless an item is specifically listed in the warranty contract, it will not be covered.

With a home warranty, the homeowner must go through the warranty company to have the service performed. The company usually has established relationships with specific service providers and may use only those providers for service under the warranty. The homeowner is typically charged a service fee on top of the annual fee for each repair job.

Inspections

Process. Property inspections may identify builder oversights or the need for major repairs. They may also identify the need for regular maintenance to keep the property in good condition. In addition to looking for structural issues, plumbing and electrical problems, and roof and foundation issues, inspections can uncover termites or other pests that are damaging the structure. Inspections can also uncover environmental issues that have a detrimental impact on the property.

Termite inspections. Termites are destructive pests that exist in all states except Alaska. They cause an estimated $50 billion in damage to buildings each year. They often cause extensive damage to the property before the owner even realizes there is a problem. Termites eat wood from the inside out, so they are not easily discovered except by professional inspectors. Having homes inspected annually for termites can prevent substantial damage and cost.

The most common type of termite is the subterranean termite. They are often confused with winged ants, but they are much more destructive. Termite inspectors look for the following indications that termites are present in the structure:

- swarms of termites inside the home
- termite excrement
- termite bodies found in spider webs near the structure
- the presence of termite mud tubes by which termites traverse open spaces between sources of wood; the tubes protect the termites from dehydration and predators; their diameter is similar to that of a drinking straws
- areas on the property that serve to harbor termites, such as wood fencing, mulch, piles of firewood, dead tree limbs, etc.
- a hollow sound when a wood beam is tapped
- long, deep grooves in wood

Because termites cause such extensive damage and can live inside the structure of a home for years, a termite inspection should be part of any home buying transaction as well as a periodic event.

Exhibit 20.3 For Your Protection…

CAUTION

U.S. Department of Housing and Urban Development
Federal Housing Administration (FHA)

OMB Approval No: 2502-0538 (exp. 04/30/2018)

For Your Protection: Get a Home Inspection

Why a Buyer Needs a Home Inspection

A home inspection gives the buyer more detailed information about the overall condition of the home prior to purchase. In a home inspection, a qualified inspector takes an in-depth, unbiased look at your potential new home to:

Evaluate the physical condition: structure, construction, and mechanical systems; Identify items that need to be repaired or replaced; and
Estimate the remaining useful life of the major systems, equipment, structure, and finishes.

You Must Ask for a Home Inspection

A home inspection will only occur if you arrange for one. FHA does not perform a home inspection.

Decide early. You may be able to make your contract contingent on the results of the inspection.

Appraisals are Different from Home Inspections

An appraisal is different from a home inspection and does not replace a home inspection. Appraisals estimate the value of the property for lenders. An appraisal is required to ensure the property is marketable. Home inspections evaluate the condition of the home for buyers.

FHA Does Not Guarantee the Value or Condition of your Potential New Home

If you find problems with your new home after closing, FHA cannot give or lend you money for repairs, and FHA cannot buy the home back from you. Ask a qualified home inspector to inspect your potential new home and give you the information you need to make a wise decision.

Radon Gas Testing and other safety/health issues

The United States Environmental Protection Agency and the Surgeon General of the United States have recommended that all houses should be tested for radon. For more information on radon testing, call the toll-free National Radon Information Line at 1-800-SOS-Radon or 1-800-767-7236.

Ask your home inspector about additional health and safety tests that may be relevant for your home.

Be an Informed Buyer

It is your responsibility to be an informed buyer. You have the right to carefully examine your potential new home with a qualified home inspector. To find a qualified home inspector ask for references from friends, realtors, local licensing authorities and organizations that qualify and test home inspectors.

HUD-92564-CN (5/14)

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Environmental inspections. Home inspections should include looking for common environmental issues that can affect the property and the residents of the property. Environmental hazards can have a significant impact on the sale of a property. An environmental site assessment (ESA) may be conducted to identify environmental impairments and protect parties against becoming involved in contamination issues. Such assessments are performed in three phases. A Phase 1 ESA identifies potential problems on or near the subject property. A Phase 2 ESA involves active testing of soil, water, and other components of the subject property.

Environmental impact statements. When a project is federally funded, the responsible parties must provide an environmental impact statement (EIS) detailing how the project will affect the environment. Privately funded projects are also often required to prepare an EIS before any permits are issued. An EIS is expected to address air and water quality issues, noise, health and safety, wildlife, vegetation, water and sewer requirements, traffic, population density, and other issues as appropriate.

Agent disclosure duties. Most states require disclosure of known material facts regarding residential properties of one to four units. If a licensee knows the result of an inspection, this is a material fact to be disclosed. Disclosure of environmental issues on commercial and industrial properties is often not mandated. Where disclosure is not required, real estate licensees should suggest the use of a professional environmental audit.

Homeowners' associations

States have various requirements for a seller's property condition disclosure statement to be completed by the seller and furnished to the buyer. Any such disclosure is likely to include whether the property is subject to a common interest property plan (e.g. condominium), whether the plan imposes any restrictions, whether membership in a Homeowners' Association (HOA) is obligatory, and the identity of the HOA, if any.

State law will typically require the association or management company to provide association documents to the buyer to satisfy the seller disclosure requirements. These documents may be attached to or delivered in conjunction with the sale contract. The contract itself usually specifies the timing of the disclosures. There may be a place on the contract for the buyer to acknowledge receipt and knowledge of the HOA disclosures. In some states, the seller's agent gathers and provides the documents to a buyer or buyer's agent before the writing of an offer.

A typical HOA disclosure package includes

- declarations
- articles of incorporation
- bylaws
- articles of organization
- operating agreements
- rules and regulations
- party wall agreements
- minutes of annual owners' meeting

- minutes of directors' or managers' meetings
- financial documents: balance sheet, income and expenditures, budget, reserve study, unpaid assessments, audit report, list of fees and charges
- list of insurance policies
- list of assessments by unit type

The seller is responsible for making the disclosures, but the buyer must exercise due diligence in the reading and understanding of them. The agent's responsibility is to make sure the disclosures are made.

OTHER PROFESSIONAL PRACTICES

Codes of ethics
Job performance
Duties to clients
Duties to customers
Disclosure
Wholesaling
Love letters
Professional relationships

Codes of ethics

The real estate industry has developed a code of professional standards and ethics as a guideline in serving the real estate needs of consumers. This professional code has emerged from three primary sources:

- federal and state legislation
- state real estate licensing regulation
- industry self-regulation through trade associations and institutes

Federal legislation focuses primarily on anti-discrimination laws and fair trade practices. State laws and licensing regulations focus on agency and disclosure requirements and regulating certain brokerage practices within the state jurisdiction. Real estate trade groups focus on professional standards of conduct in every facet of the business.

By observing professional ethics and standards, licensees will serve clients and customers better, foster a professional image in the community, and avoid regulatory sanctions and lawsuits.

Today's professional ethics are not only important for one's career; they are also legal imperatives.

Trade associations representing the real estate industry have instituted their own codes of ethics and professional practices covering every facet of brokerage activity. For the latest Code of Ethics of the National Association of REALTORS®, see https://www.nar.realtor/about-nar/governing-documents/code-of-ethics/2023-code-of-ethics-standards-of-practice .

The standards of most codes for real estate licensees concern the following general areas of practice.

Job performance

A professional real estate agent must understand the skills and knowledge the profession requires and make a commitment to maintain and improve expertise in these areas. Of particular importance are:

- market knowledge
- real estate laws
- evolving standards of practice

Other aspects of professional performance that are usually supported include:

- promoting exclusive listings
- promoting the professionalism of the real estate industry
- promoting arbitration of disagreements rather than litigation
- obtaining transactional agreements between parties in writing
- submitting offers and counteroffers in a timely and objective manner
- keeping the funds of others separate from broker and personal funds
- providing equal professional services to all persons
- providing services only within the agent’s area of competence or with the assistance of a specialist
- observing the highest standards of truthfulness in advertising
- cooperating with real estate boards and commissions in their enforcement of standards

A real estate professional must recognize the limits of the agent's role and avoid practicing other professions beyond the agent's qualifications, such as law, investment counseling, securities brokerage, and tax advising.

Duties to clients

Most codes of ethics uphold the commitment to fulfill fiduciary duties. Specific applications include:

- honestly representing market value and property condition
- respecting rights and duties of other client-agent relationships
- submitting all offers
- avoiding commingling and conversion
- keeping transaction documents current
- maintaining confidentiality
- managing client property competently

Duties to customers

Some of the guidelines for working with customers are:

- honestly representing market value and property condition
- avoiding calling a service "free" that in fact is contingent on receiving a commission
- advertising truthfully

Disclosure

In compliance with applicable laws and to promote respect for the real estate profession, licensees should be careful to disclose

- that the agent is going to receive compensation from more than one party in a transaction
- property defects if they are reasonably apparent; however there is no duty to disclose a defect which it would require technical expertise to discover
- any interest the agent has in a listed property if the agent is representing a party concerning the property
- any profits made on a client's money
- the agent's identity in advertisements
- the agent's representation of both parties in a transaction
- the existence of accepted offers
- identity of broker and firm in advertising as required by state law

Wholesaling

Real estate wholesaling is a method of profiting from a real estate transaction without actually buying any real estate. The wholesaler finds a willing seller, puts the property under contract, and finds a third-party buyer willing to buy at a higher price than what the wholesaler has agreed to pay the original seller. At closing, the wholesaler assigns the contract to the ultimate buyer; the ultimate buyer settles with the original seller and pays the wholesaler the difference in the two contracts as a fee.

Some states require the wholesaler in such transactions to hold a real estate license.

Love letters

Buyers sometimes try to enhance the attractiveness of a purchase offer by attaching a personal note to the offer. This appeal to the seller, called a "love letter," typically mentions such things as why the buyer particularly likes the home, how the buyer imagines family life in the home, and how well the buyer will care for the home.

The practice is discouraged in some states and by some real estate associations as creating the possibility of liability for fair housing violations. Since the letter may divulge information about such characteristics of the buyer as race, religion, or familial status, it could be construed as providing an unlawful basis for the seller's decision to accept or reject an offer.

Some sellers explicitly refuse to accept these love letters. Best practice is to avoid the use of love letters and find other ways to make the offer attractive.

Professional relationships

Professional conduct excludes disparagement of competitors. Real estate professionals also

- forgo pursuit of unfair advantage
- arbitrate rather than litigate disputes
- respect the agency relationships of others
- conform to accepted standards of co-brokerage practices

For more Fair Housing information:

HUD's central fair housing site:
www.hud.gov/program_offices/fair_housing_equal_opp

Fair housing laws:
www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_and_related_law
www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview

Complaint procedures, with state links:
www.hud.gov/program_offices/fair_housing_equal_opp/online-complaint

Advertising guidelines vis a vis fair housing:
www.hud.gov/program_offices/fair_housing_equal_opp/advertising_and_marketing

20 Professional Practices Snapshot Review

FAIR HOUSING LAWS	● enacted to create equal opportunity and access to housing and housing finance
	● state laws generally reflect federal fair housing laws; federal laws do not pre-empt local zoning laws but prohibit them from discriminating
Civil Rights Act of 1866	● no discrimination in selling or leasing housing *based on race*
	● Executive Order 11063: no race discrimination involving FHA- or VA-backed loans
Civil Rights Act of 1968	● Title VIII (Fair Housing Act): no housing discrimination *based on race, color, religion, national origin*
	● certain exceptions permitted
Forms of illegal discrimination	● discriminatory misrepresentation, advertising, and financing; unequal services; steering; blockbusting; restricting access to market; redlining
Title VIII exemptions	● privately-owned single-family with no broker and no discriminatory advertising; 1-4 unit apartment building where owner is resident and no discriminatory advertising; private club facilities leased to members; religious organization-owned facilities for members and no discrimination
Jones v. Mayer	● no race discrimination, without exception
Equal Opportunity in Housing Poster	● must be displayed by brokers
Fair Housing Amendments Act of 1988	● no discrimination *based on sex or against the handicapped or families with children*
Discrimination by the client	● agent liable for complying with client's discriminatory acts
Violations and enforcement	● file HUD complaint, sue in court, or both; may obtain injunction, damages; violators subject to prosecution
Fair financing laws	● Equal Credit Opportunity Act: no discrimination in housing finance based on race, color, religion, sex, marital status, age; Home Mortgage Disclosure Act: no redlining
Americans with Disabilities Act	● no discrimination against those with disabilities; applies to employment, education, transportation, public facilities; equivalent access
	● Titles I (employment) and III (public accommodation) most common for real estate agents
PROPERTY DISCLOSURES	
Residential property condition	● written seller disclosure may be required; may or may not relieve agent of some liabilities
	● seller discloses known problems; agent discloses known material facts known or should have known; failure to disclose grants right of rescission to buyer
	● agent should advise seller of red flag issues detected; may include environmental concerns, property size and shape, neighborhood, construction quality, flooding, floorplan, adjacent property

Environmental issues	● duties of detecting, disclosing, remediating for owner and agent vary; typically include: lead-based paint, mold, asbestos, air quality, water quality, carbon monoxide, septic system, drug manufacturing, radon, formaldehyde, underground tanks
	● agents need to be familiar with requirements of EPA, CERCLA/Superfund Act, Clean Air and Water Acts, Lead-based Paint Act, among others
	● licensees must be aware of issues, know where to find professional help, disclose
Warranties	● agents should inform clients of limitations of home warranties; not a substitute for inspection
Inspections	● inspections can reveal structural, electrical, plumbing, roof, foundation, pest, environmental issues; agent must disclose inspection results if known
Homeowners' Associations	● agent must make sure existence, requirements, mandates, costs of homeowners' association are disclosed
OTHER PROFESSIONAL PRACTICES	● codes of ethics provide self-regulating standards of conduct covering all facets of the profession; serve clients, customers, and the public; avoid sanctions and liability; cover practices such as job performance, duties to clients and customers, disclosures, non-discrimination, professional relationships
Job performance	● maintain knowledge of market, laws, practices; recognize limits of agent's role
Duties to clients	● fiduciary duties; truthful representation of facts; respect client relationships; submit offers; avoid illegal practices; document transaction
Duties to customers	● truthful representation of facts; truthful advertising
Disclosure	● compensating parties; property defects; agent's interest in property; use of client funds; agent's identity in advertising
Wholesaling	● acting as an intermediary in a transaction by contracting to purchase, assigning the contract to another buying, and taking the difference as a fee; licensing may or may not be required
Love letters	● personal notes from buyers to sellers to enhance attractiveness of an offer
Non-discrimination	● compliance with fair housing laws
Professional relationships	● no disparagement of competitors; no unfair advantage; respect for others; arbitration of disputes
Residential property condition disclosure	● where required, re-seller of residential property must complete and deliver to buyer on or before offering; failure gives buyer right to rescind prior to closing or occupancy; agents must disclose material facts; buyers must acknowledge receipt