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BRE Course and Instructor Evaluation

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PREFACE:

This is the textbook for our course, *Fair Housing, 2nd Edition*. It is one of the five, three-hour courses required by the California Bureau of Real Estate (BRE). We call these the “Five Mandatory Courses”:

1. **Ethics**: Describes the real estate license law enforced by the BRE and the *Code of Ethics and Professional Conduct* as practiced by members of the National Association of REALTORS®.

2. **Agency**: Explains the common law of agency as applied to California real estate brokerage.

3. **Trust Funds**: Details the fiduciary responsibilities of brokers when acting as escrows for their clients’ real estate transactions.

4. **Fair Housing**: Describes the federal and California fair housing and lending laws.

5. **Risk Management**: Provides licensees with the knowledge needed to avoid costly disputes with their clients arising from professional errors and omissions in the performance of their duties.

To save space and make the text more readable, we use the following abbreviations and terms:

- **BPC**: The Business and Professional Code of California.
- **BRE**: Bureau of Real Estate
- **CAR®**: California Association of REALTORS®.
- **CC**: The Civil Code of California

You can find the complete California codes at [www.leginfo.ca.gov/calaw.html](http://www.leginfo.ca.gov/calaw.html). Unless otherwise stated, all cases are California cases. In citing cases, we specify only the names of the litigants and the year of the decision.

The forms cited in this course are from the California Association of REALTORS®.

In addition to the above terms and abbreviations, we also follow a few typographic conventions.

We use margin notes to provide definitions and short footnotes. We use the symbol  to direct your attention to an adjacent margin note.

Side bars like this one are used for long notes. Content in the margin notes, side bars, and in the appendices is not tested in the final exam.

*This is a “margin note” used for definitions and footnotes.*
First 15 pages only.
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1 INTRODUCTION

Federal and state laws prohibit discrimination in the sale, rental, and financing of real estate when based on legally-prohibited considerations called “protected classes.” These are the “fair housing and lending laws,” the subject of this course.

This course also covers the laws which provide the disabled with access to public accommodations and facilities. The disability laws are relevant to licensees who run brokerages or manage commercial properties; whereas the fair housing and lending laws are relevant to all practicing residential brokers and salespersons.

1.1 OVERVIEW

The remainder of this section summarizes the laws covered in this course, defines the “protected classes,” and describes the relationship between federal and state law.

Section 2 describes the fair housing and the disability laws.

Section 3 describes both federal and state fair lending laws.

Section 4 describes actions to assure compliance with the fair housing laws.

1.2 TERMINOLOGY

When we do not qualify the term “discrimination,” we mean “discrimination on a prohibited basis”; that is any action taken for or against an individual based on the individual’s “protected class.”

Consider the protected class of religion. If you broadly define a religion as a set of beliefs concerning a “higher power”; then there are innumerable ways by which you could categorize individuals based on religion:

- By adherence to a holy book – Christians, the Old and New Testaments; Jews, the Pentateuch; Mormons, The Book of Mormon; and so on.

- By belief in God – theists, agnostics, and atheists.

- By conception of God – monotheists polytheists, animists, deists.

- By belief in supernatural systems – astrology, reincarnation, guardian angels, voodoo, witchcraft, etc.
No matter how you categorize an individual by religion, it is illegal to take into consideration that individual’s religious beliefs when brokering real estate properties or loans. Thus, all of the following actions are illegal:

- An agent intentionally sells homes with bad Feng Shui to buyers he dislikes.
- A Mormon mortgage broker gives better terms to Mormon borrowers than to gentiles.
- A property manager prefers Pastafarian over Rastafarian tenants.
- A devout Christian refuses to show properties to Yaqui shamans.

The term “protected class” has several variants used both in the laws and the literature about the laws, all of which are equivalent; these include “protected classifications,” “protected categories,” “protected groups,” and the term, “discrimination on a prohibited basis.”

We refer to two sets of protected classes: one federal, the other state. There are seven federally protected classes (race, color, religion, sex, national origin, familial status, and disability) and five additional state protected classes (sexual orientation, marital status, ancestry, source of income, and age). Rather than enumerate the protected classes each time we need to refer to them, we use the term “federally protected classes” and “State protected classes.”

### 1.3 LAWS

The fair housing law is comprised of federal, state, and local statutes; regulations, and case law. In this course, we cover only the federal and state fair housing laws. Depending on where you sell real estate, however, the fair housing law may include municipal statutes that expand the State fair housing laws to include additional protected groups. For example, in the County of San Francisco, municipal statutes append to the State protected classes those of gender identity, weight, height, and place of birth (source).

The fair housing laws covered in this course are summarized below:

<table>
<thead>
<tr>
<th>Federal Law</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1866</strong> Civil Rights Act of 1866</td>
<td>All citizens regardless of race have equal property rights. Commonly regarded as the original fair housing law. It prohibits discrimination based on race.</td>
</tr>
<tr>
<td>42 USC §1982</td>
<td></td>
</tr>
<tr>
<td><strong>1968</strong> Fair Housing Act (FHA)</td>
<td>The most important fair housing law. It includes three statutes (1) Title VI of the Civil Rights Act, 1968; (2) Fair Housing Amendments Act, 1988; (3) Housing for Older Persons Act of 1995</td>
</tr>
<tr>
<td>42 USC §3601 et seq</td>
<td></td>
</tr>
<tr>
<td><strong>1975</strong> Equal Credit Opportunity Act</td>
<td>Financial institutions may not discriminate in lending. An important law for mortgage brokers and other licensees when acting as “arrangers of credit.”</td>
</tr>
<tr>
<td>15 USC §1691 et seq</td>
<td></td>
</tr>
<tr>
<td><strong>1975</strong> Home Mortgage Disclosure Act</td>
<td>Residential lenders licensed by the state must report the outcome of each loan application by protected class.</td>
</tr>
</tbody>
</table>
Federal fair housing laws recognize seven protected classes: race, color, religion, sex, national origin, familial status, and disability. The state protected classes include the seven federally protected classes with five additional classes: sexual orientation, marital status, ancestry, source of income, and age.

A “non-protected” class does not refer to a non-minority such as a white/male. White/males belong to two protected classes: race and sex. A “non-protected” class is a classification of people not in any federal or state protected class. Examples of non-protected classes are “trumpet players,” “cigar smokers,” and “people with FICO scores below 650.”

The twelve protected classes are explained below. The state protected class names are in blue. These classes and remarks about their legal definitions follow:
1. **Race/Ethnicity**: Generally refers to one’s genetic ancestry from ancient times. The usual categories are Hispanic, White, Asian, Black, and Native American.

2. **Color**: Similar to race but broader in its meaning. Examples: Northern Italians discriminating against darker-skinned Sicilians; light-skinned Blacks discriminating against dark-skinned blacks; and discrimination against albinos.

3. **Religion**: The protected characteristic of religion or belief includes any religion and any religious or philosophical belief. It also includes a lack of any such religion or belief.

4. **Sex/Gender**: These terms are synonymous. “Sex” is the term used in federal fair housing law; “gender” in the California law. Sexual harassment is considered a form of gender discrimination.

   In 2012, Governor Jerry Brown signed into law the Gender Nondiscrimination Act which expands the meaning of gender to include “gender identity” (a person’s deeply felt internal sense of being male or female) and “gender expression” (one’s behavior, mannerisms, appearance and other characteristics that are perceived to be masculine or feminine) (source).

5. **National Origin/Ancestry**: California law enumerates “national origin” and “ancestry” as separate protected classes while federal law refers only to “national origin.” But the Department of Justice defines national origin and ancestry as “the country of an individual’s birth [national origin] or where his or her ancestors originated [ancestry]”. Therefore the federal term “national origin” includes the California classes of national origin and ancestry.

6. **Familial Status**: Families with children including fetuses.

   The Fair Housing Act (FHA), with some exceptions, prohibits discrimination in housing against families with children under 18. In addition to prohibiting an outright denial of housing to families with children, the Act also prevents housing providers from imposing any special requirements or conditions on tenants with custody of children. For example, landlords may not locate families with children in any single portion of a complex, place an unreasonable restriction on the total number of persons who may reside in a dwelling, or limit their access to recreational services.

7. **Handicap/Disability**: This protected class, called “handicap” in federal law, is the most complicated of all of the protected classes and is the basis for most fair housing complaints (source).

In 2009, 19.5 million people, or 9.9% of the civilian non-institutionalized population aged 16 to 64, had a disability (source).
As defined by federal law, a handicap is a physical or mental impairment which substantially (California law omits "substantially") limits one or more of a person’s major life activities, or a record of having had such impairment (e.g., a "reformed alcoholic"), or one regarded as having such impairment. Excepted from this definition are those disabled by illegal drugs or as a result of any other illicit activity.

The California definition is stricter than the federal definition referring to any physical and mental impairments that are “disabling, potentially disabling, or mistakenly perceived as disabling or potentially disabling” (Government §12926). The California definition also includes “medical condition.”

The term “mental” or “physical impairment” may include conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury, and mental illness. The term “major life activity” may include seeing, hearing, walking, breathing, performing manual tasks, self-care, learning, speaking, or working. The FHA also protects persons who have a record of having an impairment or are regarded as having such an impairment.

8. **Sexual Orientation:** Sexual orientation means the attraction a person feels towards one sex or another (or both), which determines who they form intimate relationships with or are attracted to.

9. **Marital Status:** An individual’s state of marriage, non-marriage, divorce or dissolution, separation, widowhood, annulment, or other marital state.

10. **Ancestry:** Similar to the protected class of Nationality but more inclusive as it includes descent from stateless people such as Jews, Romanis, and Kurds.

12. **Source of Income:** When State legislators included this class they had in mind individuals receiving federal or state relief such as AFDC or SSI. This class is now considered to include any lawful source of income or even a mysterious but verifiable source of income.

12. **Age:** Age is not a federally protected class but is a State protected class except for legally designated senior communities (CC §51.2) (more later).

**Illegal Immigrants**

Effective January 2008, immigrants and foreign citizens acquired limited protections against housing discrimination. Specifically landlords may not discriminate based on either immigration or citizenship status. Landlords are prohibited from making any inquiry into immigration or citizenship status or requiring any prospective tenant to make a statement about his immigration or citizenship status.

The law permits landlords to request social security numbers and other information about the immigration or citizenship status of their tenants.
The vast majority of fair housing complaints are based on just two of the twelve protected classes – disability and race. In 2010, there were 10,155 housing discrimination complaints filed with HUD and its Fair Housing Assistance Program partners (FHAP); 45% for disability and 34% by race and the gap between them has been growing every year (source).

"FHAP Partners" are the non-profit and government agencies certified by HUD’s Office of Fair Housing and Equal Opportunity (FHEO) to enforce local fair housing laws which are substantially equivalent to the FHA. In California this includes the Department of Fair Employment and Housing (DFEH), the largest civil rights enforcement agency in the United States, and also numerous small, non-profit fair housing groups (list) which receive funding from HUD to enforce and promote fair housing at the municipal level. These fair housing groups form the National Fair Housing Alliance - a consortium of more than 220 private, non-profit fair housing organizations.

First 15 pages only.

1.5

Federal vs. State Law

For the most part, federal fair housing laws are a subset of State fair housing laws; in-other-words, State law is more restrictive than federal law. For example, as has already been pointed out, State law has twelve protected classes while federal law has just seven. Then why, may you ask, do we need to know both sets of laws? There are two reasons.

First, because violators of both federal and State fair housing laws can be sanctioned by either federal or State authorities, victims may sue violators in either a federal or State court, and both federal and State regulators can compel you to adhere to their mandates.

Second, under the judicial doctrine of “preemption,” federal legislation trumps state legislation of the same subject matter. This means that where federal and State fair housing laws conflict, federal law takes precedence. Fortunately, these two bodies of law do not conflict in any important way.

Since federal fair housing violations are de facto state fair housing violations with comparable enforcement procedures and remedies, HUD subsidizes California’s Department of Fair Employment and Housing (DFEH) to enforce its fair housing laws. Consequently, it is rare that HUD adjudicates the federal laws in California.
An important, albeit rare exception, are “pattern-or-practice” cases filed by HUD and prosecuted by the Department of Justice (DOJ). These cases involve major investigations against prominent offenders. In 2010, for example, the DOJ had only 46 pattern-or-practice cases (source).

In this course, we discuss the federal fair housing laws in detail. Only those aspects of the State laws which augment the federal laws are described.
This chapter describes the federal and state fair housing laws. It is organized into four sections.

This section gives an overview of the fair housing laws. It defines “fair housing,” details impediments to fair housing, and describes the agencies which enforce the fair housing laws.

The second section, describes the three major federal fair housing laws: (1) the Civil Rights Act of 1866, and (2) the Fair Housing Act (FHA), and (3) The American with Disabilities Act (ADA).

The third and last section describes the major state fair housing laws:

- Unruh Civil Rights Act
- California Fair Employment and Housing Act
- CC §54: “Blind and Other Physically Disabled Persons”
- BRE’s Article 10: “Discrimination and Panic Selling”

2.1 Enforcement Agencies

The agency charged with enforcing the housing laws at the State level is the Department of Employment and Fair Housing (DFEH). At the federal level, there are two agencies which enforce these laws: (1) HUD’s Office of Fair Housing and Equal Opportunity and (2) the Department of Justice (DOJ).

The DOJ plays a small but important role in the enforcement of the federal fair housing laws; that role is to use its immense legal resources to prosecute complex “pattern-or-practice” lawsuits against major organizations such as banks, state governments, and Fortune 500 companies. In these cases, the DOJ attempts to show that the defendant has systematically engaged in discriminatory activities by means of its policies and procedures.

In California, HUD has delegated its enforcement of the fair housing laws to the DFEH (California’s fair housing laws are substantially equivalent to the federal fair housing laws).

DFEH’s mandate is to protect the people of California from discrimination in employment, housing and public accommodations pursuant to the California Fair Employment and Housing Act, the Unruh Civil Rights Act, and the Ralph Civil Rights Act (which concerns victims of hate crimes).

The California Supreme Court affirmed that DFEH hearing officers, although not part of the legal system, have the right to award monetary damages for emotional distress (Konig v. FEHC, 2002).
2.2 **FORMS OF DISCRIMINATION**

With important exceptions to be presented later, the fair housing laws compel you to ignore your client’s “protected attributes.” These laws require you to not discriminate positively or negatively, directly or indirectly, overtly or covertly, individually or systematically.

### 2.2.1 TRADITIONAL CONCEPT OF NEIGHBORHOOD

Racial and religious discrimination in housing before 1970 was considered socially beneficial because it promoted the traditional concept of neighborhood. That concept conceived the ideal neighborhood as culturally homogenous with its members sharing a common ancestry, religion, values, and economic level.

Real estate and lending professionals, in cooperation with government, worked together to keep neighborhoods culturally homogenous. This resulted in the discriminatory practices described in this section, namely: steering, racial zoning, redlining, and restrictive covenants. From the perspective of the real estate industry before 1970, these discriminatory practices were desirable because they maximized home values.

### 2.2.2 OVERT DISCRIMINATION

The overt discriminatory acts of racial zoning, discriminatory covenants, and blockbusting discussed in the following sub-sections are illegal and, today, rare. Generations ago, their use was commonplace and to a large extent these overt forms of discriminatory acts account for the patterns of de facto segregation which still exist today.

#### 2.2.2.1 RACIAL ZONING

Racial zoning was used to separate the races through the turn of the century and well into the 1900’s. The following 1912 Virginia statute was typical for its time:

> The map so prepared and certified and corrected shall be prima facie evidence of the boundaries and racial designation of such districts ... Nothing contained herein shall preclude persons of either race employed as servants by person of the other race from residing upon the premises of which said employer is the owner or occupier. (source)

Racial zoning laws were declared unconstitutional in 1917 ([Buchanan v. Warley](https://law.justia.com/cases/federal/us/244/320.html)) when the U.S. Supreme Court decided these laws interfered with the rights of owners to dispose of their property to whomever they pleased.

After the 1917 decision, other means of perpetuating racial zoning were found. Real estate boards and commissions adopted policies, some written