

# Senior Housing Advertising: Sending the Right Message under the FHAA

Victoria M. de Lisle

Robert W. Mouton

Follow this and additional works at: <http://scholarship.law.marquette.edu/elders>



Part of the [Elder Law Commons](#)

---

### Repository Citation

de Lisle, Victoria M. and Mouton, Robert W. (2000) "Senior Housing Advertising: Sending the Right Message under the FHAA," *Marquette Elder's Advisor*: Vol. 2: Iss. 1, Article 9.

Available at: <http://scholarship.law.marquette.edu/elders/vol2/iss1/9>

This Featured Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Elder's Advisor by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# Senior Housing Advertising: Sending the Right Message Under the FHAA

*The Fair Housing Amendments Act prohibits discrimination in housing advertisements. Here are some strategies to use to avoid potential trouble.*

**By Victoria M. de Lisle and  
Robert W. Mouton**

As the senior housing industry continues to grow, so does the number of administrative complaints and lawsuits that are directed at senior housing providers. This trend is due to two factors: first, an increase in legislative and regulatory activity directed at the senior housing industry, and second, a willingness on the part of judicial and administrative bodies to recognize new and expanded theories of liability. Senior housing providers confront a wide range of potential plaintiffs: current and prospective residents, facility employees, neighborhood associations, fair hous-

ing organizations, and governmental entities. This article addresses the liability senior housing providers face for advertising discrimination under federal law and offers some strategies to stay out of court.

## **Fair Housing Act and Amendments: In General**

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968) prohibits discrimination in the sale or rental of a dwelling on the basis of race, color, sex, religion, or national origin. In 1988 Congress adopted the Fair Housing Amendments Act (FHAA) to add handicap and familial status to the list of prohibited grounds for discrimination.<sup>1</sup> The FHAA applies to all housing, whether or not the housing has been financed with federal funds or supported by federal loan guarantees.<sup>2</sup> The FHAA also prohibits discrimination in the financing of housing, the provision of brokerage and appraisal services, and the printing and publication of housing advertisements.<sup>3</sup>

The U.S. Department of Housing and Urban Development (HUD) is responsible for administering and enforcing the provisions of the FHAA. Individuals who believe they have suffered discrimination may file a complaint with the regional office of HUD or a state fair housing agency, or may initiate a lawsuit in federal court. Because HUD's practice is to mediate the parties' dispute before filing charges with an administrative law judge, there is an inherent incentive for aggrieved parties to file a civil lawsuit in the hope of forcing a quick and lucrative settlement.

*Victoria M. de Lisle, J.D.*, is a senior associate at Locke Liddell & Sapp LLP in New Orleans, specializing in finance, real estate, and senior housing law. *Robert W. Mouton, J.D., M.B.A.*, is a partner at Locke Liddell & Sapp LLP in New Orleans, specializing in finance, real estate, and estate planning. An earlier version of this article was published in the 1999 NHC REVIEW.

## Discrimination in Advertising

### **Section 3604(c) and the Advertising Regulations**

Any advertisement with respect to housing that indicates a preference or discrimination based on race, religion, sex, handicap, familial status, or national origin violates Section 3604(c) of the FHAA. Publishers, advertising agencies, and the parties who place the advertisements are all potential targets of an advertising discrimination claim.<sup>4</sup> HUD initially issued regulations governing the appropriate use of words, phrases, and human models in advertisements.<sup>5</sup> In 1996 HUD repealed these regulations and as of the writing of this article, it has not issued replacement regulations. From an enforcement perspective, however, HUD is operating as if the repealed regulations are still in effect.

The advertising regulations provide suggestions and guidance, rather than mandatory requirements, with one notable exception. The regulations require all printed advertising materials to contain the equal housing opportunity (EHO) logo or statement.<sup>6</sup> The logo consists of a symbol and a slogan, which, as a general rule, should always appear together. There are some limited instances where the slogan can be used alone, such as when the advertisement is smaller than four column inches. The regulations also contain specific size guidelines for the logo.<sup>7</sup> It is a common misconception among senior housing providers that the use of a disclaimer, such as "This facility does not discriminate on the basis of race, color, religion, national origin, sex, or handicap" is an adequate substitute for the EHO logo or statement. It is not.

### **Wording Restrictions**

Senior housing providers should carefully review written advertising materials for any use of discriminatory words and phrases. Obviously, words that are indicative of race, color, national origin, religion, or handicap, such as "Caucasian," "crippled," and "Black," should not appear in advertisements in a context that suggests a housing preference or limitation. HUD's regulations also caution against the use of certain catchwords in a discriminatory context, such as "restricted," "exclusive," and "private," which might suggest to the reader that certain groups are unwelcome in a com-

munity.<sup>8</sup> Senior housing facilities, by their nature, must structure their advertising to target applicants within a certain age group. This raises questions of discrimination under the familial status provisions of the FHAA. However, provided the facility satisfies the requirements of the "housing for older persons" exemption, an advertisement that contains age restrictions on admission will not violate Section 3604(c).<sup>9</sup>

Following the publication of the advertising regulations, HUD experienced a massive influx of advertising discrimination complaints. In response, HUD issued a memorandum in 1995 urging fair housing organizations not to file "unreasonable" advertising discrimination claims. The memorandum clarified that facially neutral advertisements do not create liability under Section 3604(c) and cautioned that complaints over the use of phrases such as "desirable neighborhood" and "master bedroom" should not be filed.<sup>10</sup> Despite HUD's efforts, the tide of administrative complaints and civil lawsuits for discrimination in advertising continues to rise. For this reason, senior housing providers should avoid using any phrase that creates the impression that a particular type of resident is not welcome or that the housing is not available on an equal opportunity basis. As an example, the use of the term "active" to describe residents in a community may imply that disabled applicants need not apply.<sup>11</sup> An additional word of caution is warranted for housing providers with a religious affiliation. Advertisements that use the legal name of an entity that contains a religious reference, such as "XYZ Episcopal Home," or those that contain a religious symbol, such as a cross, standing alone, may indicate a religious preference in violation of the FHAA.<sup>12</sup> In order to overcome any taint of discrimination, facilities that do not fit within the religious exemption from the FHAA should always include in their print materials a disclaimer that the facility does not discriminate on the basis of race, color, sex, religion, handicap, familial status, or national origin.

### **Use of Human Models**

Advertisements depicting photographs of residents and staff present more complicated problems. Courts have held that the FHAA does not require that each advertisement depict minority human models in precise proportion to their representa-

tion in the surrounding population. However, the HUD regulations provide that all photographs should “reasonably represent” the majority and minority populations in the metropolitan area. The relevant “metropolitan area” is the area where the advertisements will be seen, not just the geographic area where the facility is located. Facilities may rely on census data for determining the relative population percentages in an area. For example, if census data indicates that the minority population in the targeted area is 20 percent, then one out of five people in the advertisement should be a member of that minority group. If an advertisement depicts only one or two people, it is not necessary to use a minority model as one of the two people. However, in this situation, providers should consider running a series of advertisements that depicts minorities as 20 percent of the total population in order to comply with HUD’s guidelines.

It is important to keep in mind that it is not a defense to a Section 3604(c) complaint that a facility does not have any minority residents or that it uses its own residents as human models. If the facility has no representative minority residents, it must use nonresident models in a facility advertisement.<sup>13</sup> Moreover, the minority models should be “clearly recognizable.” Photographs of minority models that are not easily recognizable as minorities are an invitation to file a claim or lawsuit for discriminatory advertising. Finally, advertising materials should portray all persons “in an equal social setting.” Courts interpreting this HUD guideline have found that advertisements portraying minorities as caregivers or service providers to white residents convey a clear message of exclusion in violation of Section 3604(c).<sup>14</sup>

Although the most common and high-profile advertising discrimination cases have involved allegations of racial discrimination, advertising discrimination claims based on disability are still prevalent. For this reason, senior housing facilities, especially those that provide a certain level of care for their residents, should include disabled models or residents in their advertising materials.

### **Enforcement**

Judicial analysis of a Section 3604 claim for discrimination in advertising is fairly straightforward. It is not necessary for the plaintiff to prove an intent to discriminate. It is sufficient if the advertising has a discriminatory impact on prospective res-

idents. Most courts have identified the relevant standard as the “ordinary reader’s natural interpretation” of the advertisement in question. The ordinary reader is neither the most nor the least sensitive reader. Under this standard, most courts have no difficulty concluding that advertisements showing only white models express a preference for such persons as residents.<sup>15</sup> Courts have considered relevant the duration and frequency of an advertisement as well as the number of models used. For example, the message of exclusion is stronger if an advertisement is run repeatedly or if it uses a large number of human models, none of whom are representative of minority groups.

Although intent is not an element of an advertising violation, it is relevant for purposes of awarding punitive damages. Some advertising discrimination claims have led to judgments against senior housing providers of over \$1 million. Thus, it is not surprising that most advertising discrimination claims are settled long before they get to court. The settlements generally include payment of a lump sum for the plaintiff’s damages, attorney’s fees, and costs, an agreement by the senior housing facility to bring its advertising materials into compliance with federal law, and a commitment to spend a portion of the facility’s advertising budget to target minority communities. In some cases, the facility is asked to waive some or all of the entry fees for qualified minority residents.

### **Conclusion**

It is relatively easy to comply with Section 3604(c) and the HUD regulations. Senior housing providers should consider implementing the following internal procedures to reduce the risk of an advertising discrimination claim:

1. Requesting legal counsel to review all printed advertising materials concerning the facility
2. Using the EHO logo or statement in all print advertising
3. Making a concerted effort to place advertisements in minority-oriented publications
4. Using human models that are representative of both sexes and all minority racial groups in the entire metropolitan area
5. Reading and rereading all advertising copy to ensure that it does not contain any words that may convey a message of exclusion to some groups

6. Avoiding the use of racially mixed models to advertise in one community but not others<sup>16</sup>

---

### Endnotes

1. 42 U.S.C. § 3601 *et seq.*
2. David S. Schless, *American Seniors Housing Association Compliance Guide*, reprinted in PAUL GORDON, *DEVELOPING RETIREMENT COMMUNITIES*, 621 (2d ed. 1993) (hereinafter “Compliance Guide”).
3. *Id.* at 622.
4. Memorandum dated January 9, 1995, from Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity (hereinafter “Memorandum”).
5. 24 C.F.R. part 109.
6. 24 C.F.R. part 109, Appendix I.
7. *Id.*
8. See Memorandum *supra* note 4.
9. 42 U.S.C. § 3067(b).
10. See Memorandum *supra* note 4.
11. See Compliance Guide *supra* note 2 at 629.
12. *Id.*
13. See Compliance Guide *supra* note 2 at 630.
14. See *Ragin v. N. Y. Times Co.*, 923 F.2d 995 (2d Cir. 1991), *cert. denied* 112 S.Ct. 81 (1991).
15. See *Ragin v. Harry Macklowe Real Estate Co.*, 801 F.Supp. 1213 (S.D.N.Y. 1992), *rev'd in part, aff'd in part and remanded* 6 F.3d 898 (2d Cir. 1993).
16. See Compliance Guide *supra* note 2 at 631.