

# Fair Housing Rx

## *What to do When a Fair Housing Complaint is Filed Against You*

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There are few things that will get a REALTOR® reaching for his or her bottle of antacids more quickly than to receive notice of a fair housing complaint. This is particularly the case when the REALTOR® did not intend to violate any fair housing laws and does not believe that a violation of those laws has occurred. REALTORS® faced with fair housing complaints often start to question whether the complaining party maybe knows something that the REALTOR® doesn't know. Even when the REALTOR® is completely innocent, he or she still worries about the possibility of paying a huge fine, or losing his or her real estate license. Once the antacids have begun to have their desired effect, there is usually the opportunity for calmer reflection on the merits of the complaint and how best to respond to it.

According to a recent government press release, the U.S. Department of Housing and Urban Development ("HUD") received some 156,000 calls on their toll-free fair housing complaint line last year. That total was a 21% increase over the number they received in the previous year. There is a big gap between calls made to the complaint line and actual investigations of potential violations. Of those calls it received, HUD performed full investigations on approximately 6% of those calls, or roughly 9,000 complaints. (These numbers are in addition to the complaints that were handled at the state and local level.) Clearly not everyone who thinks that he or she may have been a victim of discriminatory housing practices has a good claim, or the number of investigations would be much higher. Still, if an investigation is begun, the potential consequences to a REALTOR® are significant.

Civil penalties can result if there is a finding that discrimination has occurred ranging from \$10,000.00 to \$100,000.00, plus any award of monetary damages, punitive damages, and/or attorney's fees to the aggrieved party. The Georgia Real Estate Commission may also investigate the matter as well, although they are more likely to get involved only after the fair housing violation has first been investigated by other governmental agencies. If there has been a finding of a violation of our fair housing laws, the Commission may initiate an administrative hearing to suspend or revoke a REALTOR'S® license. So just who can file a fair housing complaint, how do they do it, and what happens when they do? This article will explore these issues.

### **Federal and State Enforcement Arms**

There are both state and federal fair housing laws. The federal laws are found in Title VIII of the Civil Rights Act ("Fair Housing Act") first passed in 1968 and amended in 1988. The federal Act prohibits discrimination in the sale or rental of any dwelling based on race, color, religion, sex, national origin, disability or familial status (the presence of children under 18 or of a pregnant woman). HUD is responsible for administering the Fair Housing Act, including the handling of complaints of discriminatory housing practices. The Georgia Fair Housing Law is contained in O.C.G.A., Article IV of Title 8, which mirrors the requirements of the federal law. Complaints filed in Georgia are handled by the Commission on Equal Opportunity ("GA-CEO"). Both HUD and GA-CEO have established detailed procedures for the handling of complaints, and they are quite similar.

If a complaint is filed with HUD, the first determination made is whether the matter falls under the jurisdiction of a state or local authority. If it does, the complaint is forwarded to that agency. HUD will only become involved further if the state or local agency fails to initiate its investigation on the complaint within thirty days. As a practical matter, the GA-CEO will handle the majority of complaints concerning alleged discriminatory housing practices regarding property in Georgia. For that reason, most of this article will focus on the Georgia state process. However, HUD procedures and timelines are in most cases identical to those in Georgia law. The typical phases of the administrative process are the filing of the complaint, the investigation and conciliation processes, the reasonable cause determination, and the administrative hearing. At any time the aggrieved party may also commence a civil action in either federal or state court. If a trial commences in that civil action, some of the administrative procedures described hereafter will be halted. The attorneys general (at both state and federal levels) may commence legal action as well under certain circumstances.

### **Filing the Administrative Complaint**

Anyone can file a complaint with the GA-CEO if he or she believes there has been discrimination in the sale or rental of any dwelling in Georgia. It does not have to be filed by the aggrieved person; it may be filed by any entity, including individuals or community groups acting on behalf of another. The entity filing the complaint is referred to as the "complainant," and the party against whom the complaint is filed is referred to as the "respondent." There is no charge for filing a complaint, either with the GA-CEO or with HUD. Complaints may be filed in person, by telephone, or by mail. At the time the complaint is filed, which must happen within one year of the alleged discrimination, the complainant is notified that he or she also has the option of filing a civil lawsuit in state or federal court not later than two years after the occurrence of the alleged discriminatory housing practice.

A complaint sets forth the name and address of the aggrieved person and the respondent, a description and address of the dwelling involved, and a concise statement of the facts (including dates) constituting the alleged discriminatory housing practice. The complaint must be signed by the complainant under penalty of perjury. Within ten days of the filing of the complaint, the Administrator of the GA-CEO will serve a copy on the respondent, either by certified mail or by personal delivery. The respondent then has ten days to file his or her answer, which must also be signed under penalty of perjury. Then the investigation commences.

### **Investigative Process**

The Administrator has thirty days after a complaint is filed to begin the investigative process, which includes a type of mediation referred to as a conciliation process. The investigator will contact the aggrieved person, the respondent, and other persons identified as having information, documents or records pertaining to the alleged housing discrimination. He or she will seek the voluntary cooperation of all parties to obtain access to the dwelling involved, copies of any necessary relevant materials or documents, and written statements or recorded testimony from witnesses. If voluntary cooperation is not forthcoming, the Administrator of the GA-CEO has the authority to issue subpoenas and to conduct formal discovery (i.e., written interrogatories, depositions and the like) just as if the case were pending in the superior court.

Under both federal and state law, the investigation is to be completed within 100 days of the filing of the complaint, although that period may be extended for up to one year. Even then the investigative period may be extended if the Administrator is unable to complete the investigation in one year. If a conciliation agreement (described in the next section) is reached, the investigation ends. If there is no conciliation agreement, the Administrator makes a finding as to whether reasonable cause exists to believe housing discrimination has occurred or will occur, and the process moves on to the next step.

### **Conciliation Process and Agreement**

Whenever feasible after the filing of a complaint, the Administrator is required to attempt to "conciliate the complaint." They will try to mediate a settlement between the aggrieved party and the respondent, if that can be done in a way that protects not only the aggrieved person, but the public interest as well. To foster a spirit that will facilitate settlement, nothing that is said or done by either party in the course of the conciliation process may be made public or used as evidence in any subsequent hearing or civil lawsuit if the conciliation is not successful. If a conciliation agreement is reached, however, it will be made public unless the parties request nondisclosure and the Administrator agrees that disclosure is not required in the public interest.

A conciliation agreement may include the payment of some sort of monetary damages paid to the aggrieved person. These could include damages caused by humiliation or embarrassment, and attorneys fees. It could also include access to the dwelling at issue (or a comparable dwelling), the providing of particular services or facilities in connection with a dwelling, or injunctive relief to eliminate the discriminatory housing practices. If such an agreement is entered into, a REALTOR<sup>®</sup> should include as part of the agreement that the complaining party waives their right to file a separate civil action. If this is not done, the REALTOR<sup>®</sup> could be in the unenviable position of having defended a full arbitration successfully, only to have the process begin all over again in the civil courts.

If a conciliation agreement is reached, the GA-CEO is then empowered to review compliance with the terms of any conciliation agreement. If there is reasonable cause to believe that a respondent has breached a conciliation agreement, the matter will be referred to the Attorney General with a recommendation that a lawsuit be filed to enforce its terms.

If the parties are unable to resolve all the issues, a conciliation agreement can, with the consent of the parties, provide that the dispute will be submitted to binding arbitration of their dispute. The parties would agree on who would arbitrate the matter, the procedural guidelines that would be followed, and may also agree to limit what type of relief may be awarded in a binding arbitration.

Whatever a conciliation agreement covers, the aggrieved party and the respondent may not enter into a private agreement. Since the Administrator is charged with protecting the public's interest, any conciliation agreement will only become binding when it has been signed by the Administrator. In looking out for the public's interest, the Administrator must consider provisions designed to eliminate and prevent the recurrence of the housing discrimination. It may seek to impose some remedial affirmative activities to overcome prior discriminatory practices, impose reporting requirements, or set up procedures for the monitoring of future activities by the respondent. For example, they could require periodic reporting of advertising activities by a REALTOR® or require the REALTOR® to attend some training regarding diversity issues.

While the Administrator is required to pursue conciliation wherever feasible, the process will be terminated if (a) one of the parties fails or refuses to cooperate in the process or fails to make a good faith effort to resolve the dispute, or (b) the Administrator finds for any reason that a voluntary agreement is not likely to result. Finally, if the aggrieved party has chosen to file a lawsuit in state or federal court, and the trial of that case has begun, the Administrator must terminate the conciliation process.

### **Reasonable Cause Finding**

When no conciliation agreement is reached and the GA-CEO has completed its investigation, a final investigative report will be prepared. The report will set forth the Administrator's determination, based on the facts known at the time of the decision, as to whether *reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur*. The Administrator is not permitted to consider any facts or circumstances not before it as a result of the investigation. In making the determination, the Administrator must consider whether the facts are sufficient to warrant the initiation of a civil action in state court. Note that at this stage, the discriminatory housing practice need not be proven. The Administrator only decides whether it is *reasonable* to believe that the discrimination has occurred or will occur. If so, the Administrator initiates a formal administrative hearing before a panel appointed by the Board of Commissioners. Three panel members are appointed from the Board of Commissioners of the GA-CEO, one of whom must be an attorney licensed to practice in Georgia. It is in that proceeding that the evidence must establish whether or not a discriminatory housing practice has actually occurred.

The investigator's final report will contain the names and dates of contact with all witnesses (unless a witness requests anonymity), a summary of the dates of correspondence and other contacts with the aggrieved person and the respondent, a summary description of all pertinent records and written statements, and the answers to any written interrogatories. Both sides to the dispute will be notified that the report is ready, and may request a copy.

If it is determined that there is no reasonable cause to believe discrimination has occurred or will occur, the complaint is dismissed. The Administrator is required to issue a short and plain written statement of the facts upon which the determination was based. The parties are notified by certified mail or personal service, and the dismissal is made public by way of a press release (unless the respondent requests that no press release issue). Even if no press release is issued, the fact of the dismissal and the names of the parties shall be considered public information available upon request.

If it is determined that there is reasonable cause to believe discrimination has occurred, a "charge" may be issued and the parties are notified by certified mail or personal service. (However, if the aggrieved person has filed a civil lawsuit regarding the discrimination and a trial in that action has commenced, no charge may be filed.)

### **Issuance of a Charge**

A "charge" is a short and plain written statement of the facts upon which the Administrator has found reasonable cause to believe housing discrimination has occurred. Within twenty days after the receipt of the charge, the complainant or the respondent may elect to forego the administrative proceeding before the Board of Commissioners and have the matter decided in a civil action under the Georgia Fair Housing Law. The Administrator can also make such an election, and must do so within thirty days of the

issuance of the charge. If any party makes such an election, the Attorney General is notified to commence the civil action in the appropriate superior court.

### **Administrative Hearing**

After the issuance of a charge, the Administrator has ten days to obtain from the Board of Commissioners a date, time and place for a hearing, and to notify the parties of those details. The administrative proceeding has its own complex set of procedures and timelines, which we will not attempt to describe here. The parties will have additional opportunities to use formal discovery procedures to gather evidence and prepare their arguments, and a formal hearing will be held before a panel of three Commissioners, at least one of whom will be an attorney. The panel has the power to award monetary and/or punitive damages and attorney's fees as mentioned earlier, plus civil penalties to vindicate the public interest. Those civil penalties can be up to \$10,000.00 if a first offense, \$25,000.00 if a second offense within five years, or up to \$50,000.00 if a third offense within seven years.

### **Prompt Judicial Action and Other Action by the Commission**

It is important to note that at any time after an administrative complaint is filed, the Administrator has other options as well. The GA-CEO may authorize the Attorney General to file a civil action in order to request appropriate temporary or preliminary relief pending the final disposition of the complaint such as a temporary restraining order or a preliminary injunction. If a civil action to obtain such preliminary relief is filed, it will not affect the initiation or continuation of any conciliation or other administrative proceedings (as will a trial in a civil action). Further, the GA-CEO has the right to refer the matter to the Attorney General to pursue enforcement of criminal penalties (a violation is a misdemeanor carrying a fine of up to \$1,000.00), or to take any other steps to inform any federal, state or local agency that has an enforcement interest.

### **Action by the Attorney General**

As stated, the Attorney General can become involved in a charge of discriminatory housing practices at several stages in the process. These include the following: (1) when there is reasonable cause to believe that there is a "pattern" of such discriminatory practices; (2) if an investigation results in a finding of reasonable cause and any party elects to forego the administrative hearing in favor of a civil action; (3) when the Administrator seeks the Attorney General's assistance in enforcing a conciliation agreement; or (4) when the Administrator seeks the prompt judicial action referred to in the prior section.

If the Attorney General becomes involved and files a lawsuit on behalf of the aggrieved person(s), the procedures and timelines involved are substantially different, and even an overview of those processes is beyond the scope of this article. Again, the civil action can result in monetary and/or punitive damages and an award of attorney's fees to the aggrieved party, and additional civil penalties up to \$100,000.00.

It is important to note that there is as yet no clear, definitive answer as to just what must be proven in such a civil action in order to find that there has been a fair housing violation. The issue is whether the claimant should be required to prove that the respondent *intentionally* discriminated against them, or whether it should be sufficient to show that their actions *had the effect* of totally or disproportionately excluding some protected group. Federal courts have issued rulings on both sides of the fence. This is a huge issue, and should not be taken lightly.

### **Immediate Action Required**

There are three steps that should be taken immediately after the receipt of a fair housing complaint. First, you should always notify your broker of the situation so that he or she can help you plan your defense. Second, your insurance carrier should also be notified as quickly as possible. Many REALTORS® have both a general liability policy and an errors and omissions policy. If they are not with the same carrier, you should notify both companies immediately and determine whether the insurance policy provides defense costs for the handling of the complaint/investigation process. While the specific time period within which notification must be made will change from carrier to carrier, in most cases in Georgia it will be thirty days or less. If you wait too long, you may lose the benefit of the coverage and significantly increase your out-of-pocket expenses if you are required to bear the cost of an attorney to present your defense.

Third, while I am not one to recommend the hiring of an attorney unnecessarily, this is an area where getting legal advice early can significantly improve the odds of a favorable outcome. Some REALTORS®

may initially think that they do not need representation because they have not violated any fair housing law. However, since the process is adversarial, an attorney can help the REALTOR® evaluate the merits of the case, prepare a proper defense, and if there has been a technical violation of the law, advise the REALTOR® on how best to conciliate or resolve the claim.

While the best course of action is to take all reasonable precautions to not engage in any discriminatory housing practice, sometimes even the most careful REALTOR® can nevertheless find themselves on the receiving end of a complaint. If this occurs, recognize that the process of investigating the complaint is slow, bureaucratic, and at times appears to be giving every benefit of the doubt to the complainant. While the system was likely designed this way intentionally to prevent violations of our fair housing laws, know that in the end, the cases that lack merit usually end up being dismissed.

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