## Contents

Welcome  |  2  
Course Overview  |  2  

### Day 1

**Unit 1—Pre-Litigation Case Analysis, Conciliation, and Recording Case Outcomes**  |  4  
Fair Housing Laws and Resources  |  4  
Elements of Proof  |  5  
Factual Analysis  |  7  
Conciliation and Consent Orders  |  7  
Guidance for Effective Post-Cause Enforcement  |  10  

### Day 2

**Unit 2—Transitioning From Investigation to Litigation**  |  14  
Determining "Reasonable Cause"  |  14  
Forums for Fair Housing Cases  |  14  

**Unit 3—Prompt Judicial Action and Injunctive Relief**  |  17  
HUD Administrative Proceedings  |  17  
State/Local Administrative Proceedings  |  18  
Court Proceedings  |  18  
Standards for Obtaining Preliminary Injunctive Relief  |  18  

**Unit 4—Discovery**  |  21  
Administrative Proceedings  |  21  
Court Proceedings  |  21  
Developing a Systematic Approach to Discovery  |  21  

### Day 3

**Unit 5—Damages**  |  27  
Introduction  |  27  
Available Damages  |  27  
Actual (Compensatory) Damages  |  28  
Civil Penalties and Punitive Damages  |  30  
Attorney Fees  |  32  
Recommended Approach in Quantifying Damages  |  36  
Managing Expectations  |  37  

**Unit 6—Trial Preparation**  |  39  
Trial Preparation Sequence  |  39  

**Unit 7—Pre-Trial Conferences and Motion Practice**  |  47  
Pre-Hearing Conference (Administrative Proceedings) and Pre-Trial Conferences (Court)  |  47  
Preparing for the Pre-Hearing or Pre-Trial Conference  |  48  
Motion Practice  |  48  

### Day 4

**Unit 8—Trials**  |  51  
Administrative Hearings  |  51  
Trials in Federal or State Court  |  53  
Common Evidence Issues  |  53  
Preserving Issues During and After the Trial  |  55  

**Appendix 1: Emotional Harm Checklist**  |  57  
**Appendix 2: Case Study and Participant Exercises**  |  62  

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Table of Contents  |  1
Welcome

On behalf of the United States Department of Housing and Urban Development’s (HUD) Office of Fair Housing and Equal Opportunity (FHEO), we welcome participants to the National Fair Housing Training Academy’s (NFHTA) Litigating Fair Housing Cases course. We hope that you are excited about participating in this training opportunity to 1) develop your skills as fair housing professionals to better serve in your respective roles within your organizations and 2) help your agency successfully perform its duties of assisting those who are experiencing housing discrimination. As part of this nation’s fair housing infrastructure, you and your agency are obligated to enforce the fair housing laws. This work builds FHEO’s legacy of advancing justice for all in the United States. Welcome, and enjoy the training course!

Course Overview

The Litigating Fair Housing Cases course is designed to engage those that are involved in Fair Housing Initiatives Program (FHIP) and Fair Housing Assistance Program (FHAP) litigation to understand and apply the methods and strategies for effective fair housing enforcement. Topics include pre-cause/pre-litigation case analysis, transitioning from investigation to litigation, prompt judicial action, and injunctive relief, discovery, damages and attorney fees, pre-trial preparation, post-filing conciliation, motion practice, and trials. Participants will engage with experts to learn time-saving techniques in litigation and will learn from the review and discussion of a variety of cases. This course is practical, based on actual cases, and highly interactive as participants will have many opportunities to ask questions, strategize, share their experiences, and learn from peers.

Learning Objectives

1. Understand the importance of taking cause cases to enforcement and methods to overcome impediments to prompt enforcement.
2. Recognize the advantages of counsel’s involvement during the investigation and prior to the determination of cause or issuance of a charge of discrimination.
3. Become aware of the availability of HUD funds to support post-cause enforcement.
4. Learn how to review an investigation and determination as to reasonable cause for legal and factual sufficiency.
5. Understand and apply theories of liability in fair housing cases.
6. Utilize discovery methods in administrative and court proceedings with a systematic approach for conducting effective and efficient discovery.
7. Identify the available damages in fair housing cases and ways to quantify damage amounts in a given case.
8. Apply an organized, systemic approach to trial preparation.
9. Learn ways to effectively engage in post-charge settlement of fair housing cases.
10. Explore types of dispositive and non-dispositive motions that may be filed in fair housing cases and best practices for responding to motions.
11. Learn to effectively handle post-hearing or post-trial issues, including the review of initial decisions, judicial review, requests for attorney fees, and enforcement of orders and judgments.
12. Understand the importance of recording enforcement outcomes in the HUD Enforcement Management System (HEMS).
Pre-Requisites

- Reliable, high-speed internet access.
- A quality workspace complete with desk, ergonomic chair, sufficient lighting, printer, copier, and storage space.
- An open mind for class involvement and participation.
- A quiet, distraction-free space.
## Unit 1—Pre-Litigation Case Analysis, Conciliation, and Recording Case Outcomes

### Fair Housing Laws and Resources

| **Fair Housing Act (FHA)** | Overview of the FHA’s protected class categories; prohibitions; affirmative requirements under 42 U.S. Code (U.S.C.) §§ 3603, 3604, 3605, 3606, and 3617; and exemptions.  
  • Overview of HUD-Department of Justice (DOJ) joint statements and other guidance.  
  • Fair Housing Policy Statements, Notices & Other Documents.  
| **State Fair Housing Statutes and Local Ordinances** | State and local civil rights statutes and ordinances vary in terms of their protected class categories, available relief, administrative prerequisites, and statutes of limitations.  
  • Counsel working for FHAP agencies must pay particular attention to the laws or ordinances enforced by the FHAP.  
  • HUD provides significant resources to substantially equivalent agencies in the form of training, technical assistance, and funding. FHAP agencies, in turn, must demonstrate a commitment to thorough and professional complaint processing. This includes all phases of complaint processing from accurate identification of issues at intake, through complete and sound investigations, to following through on administrative or judicial enforcement to ensure that victims of unlawful housing discrimination obtain full remedies and the public interest is served.  
  • HUD reimburses state and local FHAP agencies for each complaint, provided that the complaint investigation is timely and complete, effective enforcement is taking place, and that state or local fair housing laws, both by statute and judicial interpretations, remain substantially equivalent to the Fair Housing Act. 24 C.F.R., Part 115, Certification and Funding of State and Local Fair Housing Enforcement Agencies. See also Importance of Understanding Substantial Equivalency Certification (below). |
| **Court and Administrative Decisions** | • Federal and state court decisions.  
  • HUD Office of Administrative Law Judges (ALJ) and HUD Secretary decisions.  
Leading practitioner’s manual: JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL (2000), which is a four-volume set of binders offering practical commentary and relevant pleading forms and documents for all stages of a fair housing case from pre-filing intake to judgment.

Importance of Understanding Substantial Equivalency Certification

It is not unusual for state courts and hearing officers, in deciding cases under state statutes and local ordinances, to discount federal court decisions, HUD regulations, and HUD guidance when the case is being adjudicated under state or local law rather than the FHA. This is especially concerning when federal court decisions, HUD regulations, and HUD guidance support a finding of liability in a fair housing case pending before a state or local FHAP.

HUD grants substantial equivalency certification to a state or local agency only if that agency enforces a law that provides substantive rights substantially equivalent to the FHA. 42 USC § 3610(f); 24 CFR § 115.205. Upon determination by HUD that a state or local law is substantially equivalent to the FHA, HUD will issue a “substantial equivalency certification” to the state or local agency. This certification permits a state or local agency to investigate complaints on HUD’s behalf and otherwise obtain HUD funding for activities promoting fair housing. See, e.g., Fair Housing; State and Local Laws; Recognition of Substantially Equivalent Laws, 51 Fed. Reg. 11577 (Apr. 4, 1986).

An agency retains its substantial equivalency status for HUD complaint referral and funding, provided that the state or local fair housing law and court decisions interpreting the state or local fair housing law remain consistent with interpretations of the FHA. See 24 C.F.R. §§ 115.204(e) & 115.211(a). For this reason, state or local courts or hearing officers should be alerted to the importance of aligning with federal court decisions, HUD regulations, and HUD guidance in interpreting a state or local fair housing law.

Elements of Proof

Disparate Treatment


There is no need for FHAP agencies or HUD investigators to conduct a McDonnell Douglas prima facie case analysis where direct evidence supports the determination of reasonable case. HUD Memorandum, Elements of Proof, at 1 & n.2 (Sept. 4, 2018) (“If the case presents credible direct evidence, the investigator need not utilize a prima facie case analysis.”) (citing Ring v. First Interstate Mortg., Inc., 984 F.2d 924, 927 (8th Cir. 1993); Soules v. HUD, 967 F.2d 817, 824 (2d Cir. 1992); Order on Secretarial Review, HUD v. Graham, HUDOHA 19-JM-0014-FH-002, Slip Op. at 4 (Feb. 5, 2020)).

Indirect, circumstantial evidence: Direct evidence of discrimination is rarely available, however. United States v. Real Estate Development Corp., 347 F. Supp. 776, 783 (N.D. Miss. 1972) (“most persons will not admit publicly that they entertain any bias or prejudice against members of the [African-American] race.”).

The “prima facie case” concept—approved by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) for use in Title VII employment discrimination cases involving indirect, circumstantial evidence of disparate treatment—applies to fair housing discrimination cases. See, e.g., Cinnamon Hills Youth Crisis Center, Inc. v. St. George City, 685 F.2d 917, 919 (10th Cir. 2012) (McDonnell Douglas framework “entrenched” in the FHA context); Lindsay v. Yates, 578 F.3d 40 (6th Cir. 2009); Soules v. HUD, 967 F.2d 817, 822 (2d Cir. 1992); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038 (2d Cir. 1979).

The prima facie case approach is discussed in the HUD Memorandum, Elements of Proof (Sept. 8, 2018).

1 The elements of proofs for fair housing cases are located in the case law for the applicable jurisdiction. For an overview of elements of proofs in fair housing cases, see also HUD Memorandum, Elements of Proof (Sept. 4, 2018).
In *Texas Dep’t of Housing & Comm. Affairs v. The Inclusive Communities Project, Inc.*, 576 U.S. 519, 529 (2015) (hereinafter cited as “ICP”), the Supreme Court held that disparate impact claims are cognizable under the FHA. Prior to the ICP decision, HUD in 2013 promulgated a three-part, burden-shifting standard for DI claims under the FHA:

1. The plaintiff has the burden of proving a “[d]iscriminatory effect”, showing that the challenged practice (i) “actually or predictably results in a disparate impact on a group of persons or (ii) creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin”. 24 C.F.R. § 100.500(a) & (c)(1). This first element in a DI case is commonly referred to as the plaintiff’s “prima facie case.” *ICP*, 576 U.S. at 543.

2. The defendant then has the burden to prove that the challenged practice “[i]s necessary to achieve one or more substantial, legitimate, nondiscriminatory interests” of the defendant. 24 C.F.R. § 100.500(b)(i) & (c)(2). Additionally, the “legally sufficient justification must be supported by evidence and may not be hypothetical or speculative.” *Id.* § 100.500(b)(ii)(2).

3. If the defendant satisfies this burden, the “plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.” *Id.* § 100.500(b)(ii) & (c)(3).


The following is a list of non-McDonnell Douglas cases. Sample proof elements for these claims are listed in the HUD Memorandum, Elements of Proof. Since the proof elements may vary slightly by jurisdiction, counsel should also check relevant case law.

Reasonable Modification

Reasonable Accommodation
- Design and Construction
- Harassment—Several types of claims:
  - Hostile Environment—Any Protected Class
  - Sexual Harassment—Hostile Environment
  - Sexual Harassment—Quid Pro Quo (Complainant Acquiesces)
  - Sexual Harassment—Quid Pro Quo (Complainant Refuses)
- Coercion, Intimidation, Threats, Interference
  - Based on Protected Class Membership
  - Based on Protected Activity
Factual Analysis

Make sure that all aggrieved persons have been identified and given an opportunity to file or sign a complaint. 42 U.S.C. § 3602(i); see also 24 C.F.R. § 103.9.

- Standing under the FHA is broad as permitted by Article III of the Constitution. Trafficante, 409 U.S. at 209.

Pre-charge analysis should address whether there is factual support for each required proof element under applicable law(s) and theory or theories of liability.

- Is there a factual or legal basis supporting each element of proof and for overcoming each claimed defense?
- Are there key admissions by any parties?
- Is there reasonable cause to believe discrimination occurred or will occur?

If not, can these be addressed via additional investigation or subsequent discovery?

Determining that all parties with liability have been named as respondents or defendants. See 24 C.F.R. § 100.7; Meyer v. Holley, 537 U.S. 280 (2003).

Analysis of the respondent’s/defendant’s claimed defenses. There are three general categories of defenses as set forth in HUD’s Title VIII Handbook, at 7-9 to 7-11:

1. Claim of exemption;
2. Denial or dispute of complainant’s factual allegations; and/or
3. Dispute as to what the law requires.

Is there evidence or legal basis for rebutting the respondent’s/defendant’s claimed defenses?

Conciliation and Consent Orders

Although this course addresses the litigation of fair housing cases, every fair housing case will involve efforts to conciliate or settle the claims. The remainder of this unit will address conciliation and consent orders.

Conciliation

“Conciliation” is the attempted resolution of issues raised by a complaint through informal negotiation involving the aggrieved person, the respondent, and the agency representative. 24 C.F.R., Part 103. “In conciliating a complaint, the Agency will attempt to get a just resolution of the complaint and to obtain assurances that the respondent will satisfactorily remedy any violations of the rights of the aggrieved person…and take such action as will assure the elimination of the discriminatory housing practices or the prevention of their occurrence in the future.” 24 C.F.R. § 103.300(b). The terms of a conciliation agreement will be reduced to writing. The agreement shall seek to protect the interests of the aggrieved person, other persons similarly situated, and the public interest. 24 C.F.R. § 103.310(a)(emphasis added).

Effective Conciliation

Effective conciliation provides both substantive individual relief for the complainant(s) and meaningful public interest relief.

Substantive individual relief includes both monetary relief and other affirmative relief required to make the complainant(s) whole (such as approval or restoration of a housing opportunity or approval of a reasonable accommodation request).
**Statutory Mandate**

The Act mandates that conciliation efforts be made during the period beginning with the filing of a complaint and ending with the dismissal of the complaint or filing of a charge. 42 U.S.C. § 3610(b)(1); 24 CFR, Part 103, Subpart E, §§ 103.300–103.335; HUD Title VIII Handbook, Chapter 11, Conciliation.

**Challenges to the Adequacy of Agency Conciliation Efforts**


An administrative proceeding may be stayed to allow for conciliation. Alternatively, failure to engage in conciliation may result in the reversal of the finding of discrimination or in setting aside the damage award, with a remand of the case with orders to conciliate. See, for example, Mountain Side Mobile Estates Partnership v. HUD, 56 F.3d 1243, 1249-59 (10th Cir. 1995); Kelly v. HUD, 3 F.3d 951, 957-58 (6th Cir. 1993); Morgan v. HUD, 985 F.2d 1451, 1456-1457 (10th Cir. 1993); Baumgardner v. HUD, 960 F.2d 572, 579 (6th Cir. 1992). But cf. HUD v. Sparks, HUDALJ 05-92-1274-8, Slip. Op. at 23-27 (Feb. 14, 2003).

**Confidentiality**

Conciliation agreements are public documents. 42 U.S.C. § 3610(b)(4)(“Each conciliation agreement shall be made public unless the complainant and respondent otherwise agree and the Secretary determines that disclosure is not required to further the purposes of this title.”); 24 C.F.R. § 103.330(b); HUD's Title VIII handbook, Chapter 11, at pp. 11-39 to 11-40.

Requests by Parties for Non-Disclosure of Conciliation Agreements

Situations that may warrant non-disclosure if privacy cannot be preserved through other means, such as redaction (Achtenberg Memorandum, Confidentiality of Conciliation Agreements (April 27, 1995)):

- A complainant alleges sexual harassment and the parties feel that public knowledge of the matter would be embarrassing or humiliating.
- A complainant alleges discrimination based on a physical or mental disability and does not want identifying information disclosed because of the nature of the disability.
- A complainant resident of a shelter for domestic violence may be concerned about her safety if the agreement were made public.

Procedures for Parties Requesting Non-disclosure

Non-disclosure of conciliation agreements is highly disfavored. HUD's Title VIII Handbook, Chapter 11, Conciliation, at 11-39 to 11-40, states as follows:

> Provisions relating to confidentiality of conciliation agreements, or to particular provisions of a conciliation agreement, are not favored. A party’s request for specific exceptions to the requirement of public disclosure should be forwarded to the appropriate [supervisors or officials] together with supporting information describing the justification for an exception, before execution of a conciliation agreement.

See also Achtenberg, HUD Memorandum, Confidentiality of Conciliation Agreements (April 27, 1995) (“Achtenberg Memorandum”).

Secretary-Initiated Investigation

Non-disclosure of conciliation agreements is not permitted in Secretary-Initiated investigations: “Under no circumstances should a conciliation agreement between the Secretary and a respondent in a Secretary-Initiated investigation be confidential.” Achtenberg Memorandum.
Address all three purposes served by a conciliation agreement according to 24 C.F.R. § 103.300(b):

1. Just resolution of the complaint.
2. Assurances that the respondent will remedy any violations of the rights of the aggrieved person.
3. Assurances that the respondent will take action to assure elimination of discriminatory housing practices, or prevention of their occurrence, in the future.

Three categories of relief are available to aggrieved persons and the public interest in conciliation as listed in 24 C.F.R. § 103.315(a)(1)-(3):

1. Monetary relief in the form of damages, including out-of-pocket and emotional distress damages caused by humiliation or embarrassment, lost housing opportunity, and attorney fees.
2. Other equitable relief including, but not limited to, access to the dwelling at issue, or to a comparable dwelling, the provision of services or facilities in connection with a dwelling, retrofitting, or other specific relief.
3. Injunctive relief appropriate to eliminate discriminatory housing practices affecting the aggrieved person or other persons.

Sample monetary, equitable relief, and public interest provisions:

- FHEO Charges/Consent Decrees/Conciliation Agreements
- DOJ Civil Rights Division Housing Section Cases
- Private settlements

After a charge of discrimination has been issued, the resolution or settlement of a charge before issuance of a final decision takes the form of a consent order:

24 C.F.R. § 180.450.

Resolution of charge or notice of proposed adverse action.

At any time before a final decision is issued, the parties may submit to the ALJ an agreement resolving the charge . . . or notice of proposed adverse action. A charge under the Fair Housing Act can only be resolved with the agreement of the aggrieved person on whose behalf the charge was issued. If the agreement is in the public interest, the ALJ shall accept it by issuing an initial decision and consent order based on the agreement.

HUD consent orders are the best source of guidance in drafting such documents. The HUD consent orders also contain many helpful examples of monetary compensation, equitable relief, and public interest provisions.
Guidance for Effective Post-Cause Enforcement

Fair housing cases should not languish following a finding of cause—the case should either be promptly conciliated (resulting in meaningful, rather than de minimis, public interest relief) or proceed promptly to enforcement. Whether resolved by conciliation or an enforcement, case outcomes should be carefully recorded.

Importance of Obtaining Meaningful Public Interest Relief

The following guidance is from J. Pelletier, Memorandum: Fair Housing Assistance Program Requirements Related to Conciliation and Conciliation Agreements (Oct. 10, 2017).

Role of the Agency

As a signatory, the agency has an affirmative obligation to not sign an agreement simply because the other parties agree to it if the conciliator or responsible agency officials believe that the relief provided is inadequate to either address the alleged harm or to prevent the conduct from reoccurring in the future.

A conciliation agreement is a single agreement—it may not include separate side agreements or agreements only between a complainant and a respondent.

Damages and Public Interest Relief

The monetary relief afforded to the complainant should not be de minimis; it should compensate the complainant(s) for the harm alleged and be at least commensurate with relief obtained in other similar cases. Meaningful public interest relief includes provisions to eliminate discriminatory housing practices and provide remedies for other potential aggrieved persons and to prevent such discrimination in the future.

Pursuant to FHAP Performance Standard #5, the agency must consistently and affirmatively seek and obtain the type of relief designed to prevent recurrences of discriminatory practices. The performance assessment will include, but not be limited to:

- An assessment of the types of relief sought by the agency with consideration for the inclusion of affirmative provisions designed to protect the public interest. 24 CFR § 115.206(iii).
- A review of the adequacy of the relief sought and obtained in light of the issues raised by the complaint. 24 CFR § 115.206(v).

Steps to inject more effective public interest provisions in conciliation agreements include:

- Think about the allegations or facts of the case and what has been discovered in the investigation; tailor the public interest relief accordingly.
- Include provisions relating to reviewing existing respondent policies (non-discrimination, reasonable accommodation, unit transfer, etc.), and revising as necessary. This can include rescinding onerous policies (e.g., a requirement to document a disability annually).
- Include provisions relating to developing/implementing written policies (non-discrimination, reasonable accommodation, unit transfer, etc.) with approval of the final document by the FHAP.
- Include policies related to the distribution of FHAP outreach materials.
- Require the display of the fair housing poster in a conspicuous area.
As applicable, require the respondent to apply relief in the agreement to all properties—not just to the subject property at issue in the complaint being conciliated/settled.

Think outside of the box. Include non-traditional provisions that are calculated to change future interactions.

Importance of Moving Cause Cases to Enforcement (Administrative or Judicial)

Approximately 80 percent of housing discrimination complaints filed with a government agency are handled by FHAPs.

Adverse results from the failure to engage in timely enforcement efforts:

- Losing of evidence or witnesses.
- Exacerbating the complainant’s damages.
- Causing complainants and respondents to have less respect for the agency, the agency’s enforcement efforts, or fair housing in general.

Possible reasons for failure to engage in prompt post-charge enforcement efforts and steps that can be taken to address each concern:

- The counsel is unfamiliar with and lacks experience in fair housing enforcement procedures and mechanisms:

  [Fair housing] law, though fairly simple in its substantive commands, is extremely complicated procedurally. With certain limited exceptions, federal law prohibits discrimination in virtually every aspect of a housing transaction based on race, color, religion, national origin, sex, handicap, and familial status. Most states and scores of localities have similar laws. For the most part, the problem lies not in knowing whether a particular act is unlawful, but in knowing what to do about that act once it has occurred.

  ROBERT G. SCHWEMM, FORWARD TO JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL (2000).

  ▪ There are many resources and training opportunities available to prepare counsel for litigating fair housing cases.
  ▪ The counsel is responsible for many other types of cases other than fair housing cases and gives lesser priority to fair housing cases.
  ▪ The agency mistakenly views fair housing cases as too insignificant to warrant a large expenditure of time and resources.

  ▪ The Supreme Court in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972), stated that eradication of housing discrimination vindicates “a policy Congress considered to be of the highest priority.” More recently, the Supreme Court noted that fair housing enforcement serves “an overriding societal priority.” Meyer v. Holley, 537 U.S. 280, 290 (2003).

  ▪ Housing discrimination cases comprise many of the most noteworthy civil rights cases.
  ▪ The counsel may base the decision to proceed to a hearing primarily on the likelihood of obtaining a favorable decision. If there is any risk of an adverse decision, the counsel may insist that the case be conciliated.
  ▪ The counsel is concerned with having the case tried before a hearing officer unfamiliar with fair housing or unfairly sympathetic to housing providers.

  ▪ As noted above, there are a variety of fair housing training opportunities available for agency staff, counsel, commissioners, and hearing officers.

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• The agency is concerned that an unsuccessful hearing may harm the reputation of the agency.
  - A successful hearing enhances the credibility and visibility of the agency. Such attention and publicity may lead to greater public awareness of and compliance with fair housing requirements.
  - A successful hearing may result in remedial relief provisions that benefit the aggrieved person and the public interest far more than could have been obtained through settlement.

**Availability of HUD's Special Enforcement Effort (SEE) Funds.**

Another impediment to fair housing enforcement is an agency’s belief that it lacks sufficient funds needed for post-cause enforcement. HUD recognizes that litigation costs may also be a significant impediment to effective fair housing enforcement, particularly in cases necessitating expert witnesses.


HUD, by regulation and Congressional funding, provides for “special enforcement effort (SEE) funds to enhance a state or local FHAP agency’s enforcement of the agency’s fair housing law.” 24 C.F.R. § 115.305. Among other requirements, an agency is eligible to receive SEE funds by satisfying at least three of the following six criteria:

1. The agency enforced a subpoena or made use of its prompt judicial action authority within the past year.
2. The agency has held at least one administrative hearing or has had at least one case on a court’s docket for civil proceedings during the past year.
3. At least ten percent of the agency’s fair housing caseload resulted in written conciliation agreements providing monetary relief for the complainant as well as remedial action, monitoring, reporting, and public interest relief provisions.
4. The agency is currently engaged in, or has engaged with in the last three years, at least one major fair housing systemic investigation requiring an exceptional amount of funds expenditure.
5. The agency’s administration of its fair housing law received meritorious mention for its fair housing complaint processing or other fair housing activities that were innovative. The meritorious mention criterion may be met by an agency’s successful fair housing work being identified and/or published by a reputable source.
6. The agency has completed the investigation of at least 10 fair housing complaints during the previous funding year.

An agency will also be ineligible if 20 percent or more of the agency’s fair housing complaints resulted in administrative closures or the agency is currently on a Performance Improvement Plan (PIP) or its certification or interim certification had been suspended during the federal fiscal year in which SEE funds are sought.

³ Nonetheless, by electing to have the case heard in federal district court, the aggrieved party as intervener may add supplemental claims that provide for an award of expert witness fees. These include 42 U.S.C. §§ 1981 & 1981 for claims based on race, color, or national origin. See 42 U.S.C. § 1988(c) (providing for expert witness fees in cases under Sections 1981 & 1981a). Expert witness fees may also be obtained for claims involving other protected classes, such as disability, by adding supplemental state law claims providing for an award of expert witness fees.
Importance of Counsel’s Involvement Before the Cause Determination is Issued

Another important factor in obtaining effective enforcement is the involvement of counsel before the cause determination is issued. Advantages of counsel’s involvement before the cause determination is issued (including involvement before the completion of the investigation) include the following:

- Prevents evidentiary “gaps” in the investigation by making sure there is evidence as to each element of the fair housing claims alleged in the complaint.
- The counsel’s knowledge of fair housing laws and elements of proof benefits staff engaged in fair housing investigations.
- Helps to ensure that appropriate procedures have been followed throughout the investigation.
- Counsel is well informed of the facts and ready to litigate.

Importance of Recording Enforcement Outcomes

An essential requirement for participation in the FHAP program is that FHAP agencies record enforcement outcomes in HEMS. The need for effective recording of enforcement outcomes is two-fold:

- Information is necessary to assess an agency’s performance.
- Data is necessary for HUD’s statistical analysis/program analysis.

Recording enforcement outcomes is similarly a required component for participation in the FHIP program. Enforcement outcomes are a required item in FHIP grant reports. Similar to the FHAP requirements, information is necessary to assess a FHIP organization’s grant performance. Often, enforcement efforts or goals are specifically included in a FHIP’s statements of work (SOW) items. While FHIP organizations do not use HEMS, most FHIPs maintain complaint databases, which include the reporting of enforcement outcomes.
Unit 2—Transitioning From Investigation to Litigation

Determining "Reasonable Cause"

Though Congress referred to “reasonable cause” in 42 U.S.C. § 3610(g), Congress did not define the term.

The regulations provide little additional guidance. The regulations simply acknowledge that the reasonable cause determination consider “whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action in federal court.” 24 C.F.R. § 103.400(a)(1) & (2).

- Congress’ failure to define “reasonable cause” is not peculiar to the Fair Housing Act. For example, Congress did not define “reasonable cause” under Title VII with respect to employment discrimination claims, 42 U.S.C. § 2000e-5(b), or for purposes of certain enforcement actions under the Americans with Disabilities Act. 42 U.S.C. § 12188(b)(1)(B).

- Reasonable cause is a lesser standard than a preponderance of the evidence and probable cause. Helpful guidance is found in the Memorandum, Reasonable Cause (June 15, 1999) and Implementation of the Fair Housing Amendments Act of 1988, 54 F.R. 3232, § 103.400 Reasonable Cause Determination (Jan. 23, 1989).

- “The quantum of evidence needed to show reasonable cause is thus some measure between mere suspicion and a preponderance of the evidence.” Memorandum, Reasonable Cause, at 2.

Forums for Fair Housing Cases

<table>
<thead>
<tr>
<th>Forums for Fair Housing Cases</th>
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<tbody>
<tr>
<td><strong>HUD Administrative Proceedings</strong></td>
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<tr>
<td>HUD administrative hearings—42 U.S.C. § 3612(d):</td>
</tr>
<tr>
<td>• Federal Rules of Evidence apply in the presentation of testimony and documents in hearings before an ALJ. 42 U.S.C. § 3612(c); 24 C.F.R. § 180.620.</td>
</tr>
<tr>
<td>• Available relief:</td>
</tr>
<tr>
<td>▪ An ALJ may award compensatory damages and assess civil penalties—a fine paid to the government. 42 U.S.C. § 3612(g)(3); 24 C.F.R. §§ 180.670(b)(3) &amp; 180.671.</td>
</tr>
<tr>
<td>▪ Punitive damages cannot be recovered in a HUD administrative proceeding. See, e.g., <em>Banai v. HUD</em>, 102 F.3d 1203, 1207 n.4 (11th Cir. 1997).</td>
</tr>
<tr>
<td>• Advantages of proceeding before an ALJ include a faster process.</td>
</tr>
<tr>
<td><strong>Jury trial:</strong></td>
</tr>
<tr>
<td>• There is no right to a jury trial in proceedings before an ALJ. A jury trial can be demanded in federal and state courts. <em>Curtis v. Loether</em>, 415 U.S. 189 (1974).</td>
</tr>
<tr>
<td>• The charge of discrimination is based on the FIR and the determination of reasonable cause. 24</td>
</tr>
</tbody>
</table>
Parties to the administrative proceeding:

- **HUD**—the charging party; appears through its Office of General Counsel. 24 C.F.R. § 180.310(a); 24 C.F.R. § 180.305(a).

- **Aggrieved Person**
  - “Aggrieved person” or “complainant”—The individual or entity on whose behalf HUD brings the charge and the person injured or threatened with injury as a result of an alleged violation of the Fair Housing Act. 42 U.S.C. § 3602(i); 24 C.F.R. § 180.100.
  - Intervention—The complainant or aggrieved person may become a party to the administrative proceeding by intervening as a matter of right within 50 days after the charge is filed. 42 U.S.C. § 3612(c); 24 C.F.R. § 180.310(b). The complainant may retain counsel.

- **Respondent**—The individual or entity accused of having violated the act or having liability for another’s violation. 42 U.S.C. §§ 3602(n) & 3610(a)(2)(A); 24 C.F.R. §§ 180.100 & 180.310(a).
  - The respondent may appear on its own behalf or be represented by an attorney. 24 C.F.R. § 180.305.

**Election**

The charge of discrimination is based on the final investigative report (FIR) and the determination of reasonable cause. 24 C.F.R. § 103.405(a). See also 42 U.S.C. § 3610(g)(2); 24 C.F.R., § 103 Subpart F—Issuance of Charge; 24 C.F.R., § 180—Consolidated HUD Hearing Procedures.

Within 20 days after service of the charge, the complainant, respondent, or aggrieved person may elect to have the case heard in a federal district court. 42 U.S.C. § 3612(a); 24 C.F.R. § 180.410(b)(1). See also **HUD v. Northern Mtg. Real Estate Serv., Inc., HUDALJ 11-M-070-FH-30 (Jan. 27, 2012)**. An opposing party has no right to object to the election. HUD loses jurisdiction following an election.

Upon timely election by the complainant, respondent, or aggrieved person, the Chief ALJ will dismiss the administrative proceeding and HUD will refer the matter to the DOJ. 24 C.F.R. § 180.410(c).

Within 30 days of the election, the Attorney General shall commence and maintain the civil action in the federal district court on behalf of the aggrieved person. 42 U.S.C. § 3612(o); 24 C.F.R. § 180.410(b)(1). The aggrieved person may intervene as a party in the court action. 42 U.S.C. § 3612(o)(2); 24 C.F.R. § 180.410(b)(1).

State and local FHAPs have different election procedures; typically, election involves the filing of the complaint in state court rather than an administrative or public hearing. Like the HUD process, an opposing party has no right to object to the election. Unlike the HUD process, the state or local FHAP agency generally will not lose jurisdiction following an election.

If no election is made, the charge proceeds to a hearing before an ALJ. 42 U.S.C. § 3612(b). At the hearing, HUD’s Office of General Counsel will prosecute the charge on behalf of the complainant. The complainant, as noted above, may intervene as a party to the proceeding and has the option of retaining separate legal representation. 42 U.S.C. § 3612(b).

State or local FHAP administrative forum:

- Generally similar to the HUD administrative procedure.
- Counsel should be very familiar with the state statute or local ordinance.
- Counsel should carefully check for any administrative rules that may apply.

Potential advantages of the administrative hearing process:

- Administrative hearings may be somewhat less formal.
In many state or local FHAP administrative proceedings, the rules of evidence do not strictly apply. The administrative process may also be quicker than court proceedings.

Potential advantages of electing to have the case heard in court:

- Right to demand a jury trial.
- Availability of punitive damages.

From a tactical standpoint, it is not surprising for aggrieved persons to elect to have claims heard in a federal district court to potentially recover punitive damages. Nonetheless, respondents, perhaps due to greater familiarity with federal court rules of procedure or a desire to delay, occasionally elect to have fair housing claims heard in federal district courts. Such an election, however, will subject respondents to potential liability for punitive damages. See, for example, U.S. v. Space Hunters, Inc., 429 F.3d 416 (2d Cir. 2005)(punitive damages available against the respondent, a “recidivist” violator of the FHA, after the respondent elected to have claims adjudicated in federal district court).

FHIP/Private action in federal or state court (42 U.S.C. § 3613):

- State court—Pleadings standards may differ from federal court pleadings standards.

Guidance in drafting charges and complaints:

- Wayne N. Outten & Jack A. Raisner, Plaintiff’s Pleadings: Pitfalls to Avoid When Drafting the Complaint (2013).
- Jeffrey S. Gutman, Shriver National Center of Poverty Law, Federal Practice Manual for Legal Aid Attorneys, 4.1—Drafting the Complaint (2014).
- Advanced Legal Writing: Do’s and Don’ts in Making Your Points (April 8, 2014).
Unit 3—Prompt Judicial Action and Injunctive Relief

HUD Administrative Proceedings

<table>
<thead>
<tr>
<th>Injunctive Relief During Investigations</th>
<th>42 U.S.C. § 3610(e) and 24 C.F.R. § 103.500 permit the Secretary to authorize a prompt judicial action proceeding on behalf of an aggrieved person “at any time following the filing of a [Title VIII] complaint.”</th>
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<tbody>
<tr>
<td>Cases Warranting Prompt Judicial Action</td>
<td>Some complaints involve circumstances requiring urgent attention, such as when aggrieved persons may be about to be evicted from their home or apartment, lose their home through foreclosure, lose a house they seek to buy, or lose some other unique housing opportunity. In these circumstances, it may be imperative to take immediate action—even before the complaint is fully investigated—to prevent something from happening or to otherwise maintain the status quo.</td>
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<td>Factors to Be Considered</td>
<td>When considering whether a complaint requires prompt judicial action, one should carefully assess the allegations and determine if any or all of the following factors are present:</td>
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<td>• The immediate threat of injury, loss, or damage alleged by the aggrieved person is serious.</td>
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<td>• There is evidence indicating the unique characteristics of the dwelling or housing benefit involved (such as size, layout, cost, location, amenities, evidence of scarcity of comparable housing in the local market, etc.).</td>
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<td>• There is a relatively high degree of certainty that irreparable injury, loss, or damage will occur unless injunctive relief is granted immediately.</td>
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<td>• There is persuasive evidence that an alleged discriminatory housing practice has, in fact, occurred and a significant likelihood that the aggrieved person will succeed on the merits of the case.</td>
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<td>• The dwelling continues to be available and/or controlled by the respondent.</td>
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<td>• The aggrieved person continues to wish to rent or purchase the subject dwelling or obtain the housing benefit, or the respondent has prevented the aggrieved person from inspecting the dwelling in question (as by false denial of availability or steering), but the aggrieved person retains an interest in the dwelling based on its advertised specifications, its location, etc.</td>
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<td>Counsel should look to standards for obtaining preliminary injunctions in their jurisdiction. Sufficient evidence will need to be gathered to meet those standards.</td>
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<td>Examples:</td>
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<td>• A couple obtains legal guardianship of their 9-year-old granddaughter. After they ask the park owner to add the child to the site lease for their mobile home, the park owner obtains an eviction order directing them to remove their mobile home from the park within 10 days of the date of the order.</td>
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</table>
• An aggrieved person provides convincing evidence that a respondent is likely to alter or destroy records critical to the investigation of the allegations in the complaint.

• An aggrieved person alleges that a respondent is in the process of constructing a multifamily building whose design is in substantial noncompliance with the Design and Construction Requirements. If the construction is completed as planned, the aggrieved person will not be able to live there and it will be more difficult, more expensive, or impossible for respondents to correct the inaccessible features.

Under the regulations, HUD’s general counsel, acting on behalf of the Secretary, must formally request the Attorney General (DOJ) to petition a U.S. District Court to grant temporary or preliminary “injunctive relief” on behalf of an aggrieved person who: has filed a housing discrimination complaint AND believes that he/she is under an imminent threat of serious and irreparable injury, loss, or damage from the respondent; OR alleges facts that indicate the respondent’s actions subject the aggrieved person to an ongoing, continuing course of serious and irreparable injury, loss, or damage for which prompt judicial action might be an appropriate remedy.

State/Local Administrative Proceedings

State and local agencies may apply different procedures.

Each state or local agency that enforces a substantially equivalent fair housing law, however, must grant the agency authority to “seek prompt judicial action for appropriate temporary or preliminary relief pending final disposition of a complaint” and obtain “injunctive or other equitable relief.” 24 C.F.R. § 115.204(b)(1)(i) & (iv).

Court Proceedings

Under the FHA, available relief includes preliminary and permanent injunctive relief:

• Relief which may be granted in cases brought by private persons:

  In a civil action . . . the court may award to the plaintiff actual and punitive damages, and subject to subsection (d), may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate). 42 U.S.C. § 3613(c)(1)(emphasis added).

• Injunctive relief is also available under other fair housing laws, such as Sections 1981 & 1982. See, for example, Johnson v. Railway Express Agency, Inc, 421 US 454, 459 (1975)(injunctive relief available under Section 1981); Jones v Alfred H Mayer Co, 392 US 409, 414 & n13 (1968)(injunctive relief available under Section 1982).

Standards for Obtaining Preliminary Injunctive Relief

A party seeking preliminary injunctive relief must show (i) a likelihood of success on the merits; (ii) that the party will suffer irreparable harm without preliminary relief; (iii) the balance of equities between the party’s harm in the absence of preliminary relief and the defendant’s harm from the preliminary relief favors the party; and (iv) the public interest favors granting the injunctive relief. Winter v. Natural Resources Def. Council, Inc., 555 U.S. 7, 20 (2008); Gresham v. Windrush Partners, Ltd., 730 F.2d 1417, 1423 (11th Cir. 1984). A strong showing on one factor may offset a lesser showing on another factor. Arthur R. Miller and Charles A. Wright, Federal Practice and Procedure, Civil § 2984(1970). See also JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL §§ 4.13-4.14, at pp. 4-39 to 4-43 (2000) (discussing
standards for obtaining a temporary restraining order or preliminary injunctive relief).

(i) Likelihood of success on the merits. This requirement is readily met in some cases, such as cases involving testing evidence, where there is clear evidence of liability. In other cases, it may be more difficult to establish a likelihood of success absent further investigation or discovery.

(ii) Irreparable injury. Due to our national policy against race discrimination in housing, irreparable injury is presumed once a plaintiff has demonstrated a likelihood of success on the merits. Cousins v Bray, 297 F. Supp. 2d 1027, 1041 (S.D. Ohio 2003), appeal dismissed, Nos. 04-3614& 04-3955, 137 F. Appx. 755 (6th Cir. May 13, 2005). See also Silver Sage Partners, Ltd. v. City of Desert Hot Springs, 251 F.3d 814, 827 (9th Cir. 2001)(same); Rogers v. Windmill Pointe Village Club Ass’n, Inc., 967 F.2d 525, 528-29 (11th Cir. 1992)(same); Mical Commun’ns, Inc. v. Sprint Telemedia, Inc., 1 F.3d 1031, 1035-36 (10th Cir. 1993)(holding that irreparable injury is presumed “[w]hen the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations”)(collecting cases from the 6th, 7th, and 8th Circuits); Remed Recovery Care Centers v. Township of Willistown, 36 F Supp 2d 676, 688 (E.D. Pa. 1999)(“A violation of the [FHA] creates a presumption of irreparable harm that a defendant must rebut in order for a preliminary injunction not to issue.”); Stewart B McKinney Found., Inc v. Town Plan and Zoning Comm’n of the Town of Fairfield, 790 F. Supp. 1197, 1208 (D. Conn. 1992)(“Irreparable harm may be presumed in this case because . . . the plaintiff has presented sufficient evidence to establish that its rights under the [FHA] have been violated.”).

(iii) Balance of equities. In most cases, a plaintiff “will clearly suffer harm if preliminary relief is not granted and the defendant is permitted to sell or lease to a third party.” JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL, § 4.14, at p. 4-42 (2000). In one fair housing case arising in a rental context, the court found the balance of equities to favor granting the injunction where the plaintiff was current on all rent escrow payments. Cousins, 297 F. Supp. at 1041 (“Plaintiffs are paying rent, so Defendants cannot claim any harm suffered as a result of an arrearage.”).

(iv) Harm to the public interest if the injunction is not issued. The FHA states that “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.” 42 U.S.C. § 3601. The Supreme Court in Traficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972), stated that eradication of housing discrimination vindicates “a policy Congress considered to be of the highest priority.” The Court has repeatedly emphasized this policy. Texas Dept’ of Hous. & Cnty. Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519, 524 (2015)(FHA’s central purpose is to “eradicate discriminatory practices within a sector of our Nation’s economy”); Meyer, 537 U.S. at 290 (fair housing enforcement serves “an overriding societal priority.”).

Given the important goal in federal and state civil rights statutes to remedy instances of housing discrimination, courts have found that the public interest favors the issuance of preliminary injunctive relief. For example, United States v. Edward Rose & Sons, 246 F. Supp. 2d at 755 (“[W]here there has been a showing of housing discrimination, preliminary injunctive relief serves the public interest by carrying out the stated policy of the United States in 42 U.S.C. § 3601.”), aff’d, 384 F.3d 258 (6th Cir. 2004); United States v. Puerto Rico, 764 F. Supp. 220, 225 (D.P.R. 1991)(granting injunction and emphasizing “the public interest that all citizens have in seeing vigorous enforcement of civil rights legislation like the Fair Housing Act.”).

FHIP organizations, in seeking injunctive relief, will likely include other federal and state civil rights claims such as 42 U.S.C. §§ 1981–1982. The standards for obtaining injunctive relief under Sections 1981 & 1982 are similar to the standards applicable to FHA claims:

- Section 1981 is just like Section 1982. Section 1981, as originally designed in 1866, was intended to uproot the institution of slavery and to eradicate its badges and incidents and this purpose requires that the court adopt a broad outlook in enforcing Section 1981. Dawson v. Pastrick, 441 F. Supp. 133 (N.D. Ill. 1977), aff’d in part and rev’d in part on other grounds, 600 F.2d 70 (7th Cir. 1979).
- The same, if not broader public policy, is reflected in Section 1982. The Supreme Court, in upholding the constitutionality of Section 1982 in reaching private housing transactions, noted
that “The remaining question is whether Congress has power under the Constitution to do what 1982 purports to do: to prohibit all racial discrimination, private and public, in the sale and rental of property.” Jones, 392 U.S. at 437–444 (emphasis added).

Administrative Proceedings

All of the methods of discovery in a court action are available to the parties in an administrative proceeding, pursuant to 24 C.F.R., Part 180, Subpart E—Discovery.

The four main methods of formal discovery are:
3. Requests for production of documents, the inspection of property, mental and physical examinations, etc. 24 C.F.R. § 180.525.

Physical or mental examination of a party—Available upon motion to the ALJ. 24 C.F.R. §§ 180.500(c)(5) and 180.525(d).

Completing discovery—Complete 15 days prior to the hearing date, or by such other time as may be set by the ALJ. 24 C.F.R. § 180.500(a).

An aggrieved person who does not intervene in the administrative proceeding is treated as a party for purposes of the discovery requirements. 24 C.F.R. § 180.500(e).

Subpoenas—Upon written request of a party, the ALJ may issue a subpoena requiring the attendance of a witness for purposes of providing testimony at a deposition or hearing and/or requiring the production of documents and records. 24 C.F.R. § 180.545.

Upon failure of a party or deponent to provide discovery, the party seeking discovery may file a motion to compel discovery. 24 C.F.R. § 180.540.

Court Proceedings

The same discovery methods are available in court proceedings. F.R. Civ. P. 26-37. These include interrogatories, depositions, requests for the production of documents, inspections of property, mental and physical examinations, requests for admissions, etc.

Developing a Systematic Approach to Discovery

During discovery, counsel should obtain all pertinent documents through requests for the production of documents. Counsel should depose all decision-makers.

As important as records and depositions can be in establishing a fair housing case, preparing a plaintiff for a deposition can be even more crucial. Successful motions for summary judgment (MSJs) are often won as a result of factual admissions made by a plaintiff who is insufficiently prepared for a deposition. Preparation is critical as most plaintiffs have no experience in being deposed. Plaintiffs should be alerted to such questions that are likely to be asked and guided in organizing accurate
answers in preparation for the deposition. Plaintiffs should also be alerted to certain key prompts, such as “please state all facts that you believe support your claim of discrimination” or “why do you believe your [protected class status] was a factor in the decision?” Moreover, the plaintiff should be alerted not to permit the defense counsel to put words in the plaintiff’s mouth at the deposition. Answers to what appear to be innocuous leading questions (such as “the rental agent never made you feel uncomfortable or unwelcome when you applied for rental?”) can be used as a basis for the MSJ.

The first step in framing discovery requests (drafting interrogatories, requests for production of documents, requests for admissions, and preparing deposition questions) is to focus on each essential element of the claim. For example, in a reasonable accommodation case, discovery should address the following:

The plaintiff is a person with a disability and the defendant knew or should have known that the plaintiff was a person with a disability. The plaintiff requested a reasonable accommodation in the rules, policies, practices, or services of the defendant.

- **Example—Request to Admit:** Do you admit receiving a letter from the plaintiff dated July 29 in which she requested an accommodation to permit her sole use of an accessible parking space?
  - The requested accommodation may be necessary to afford the plaintiff an equal opportunity to use and enjoy the dwelling. The requested accommodation would not have imposed any “fundamental alteration in the nature of a program” or “undue financial and administrative burden.” Joint Statement of DOJ & HUD, Reasonable Accommodations Under the Fair Housing Act, at 7-8 (May 17, 2004)(emphasis added).

- **Example—Request to Admit:** Do you admit that the defendant would incur no financial or monetary expense in reassigning the plaintiff’s assigned parking space to a space across the parking lot and closer to her unit?
  - The defendant’s “response” to the Request to Admit was “admitted.” While a small cost associated with assigning the parking space would not defeat the plaintiff’s claim for a reasonable accommodation, the unqualified admission strengthened the plaintiff’s case.

- **Example—Document Request:** For the time period from January 1, 2015 to the present date, please produce copies of all documents and financial records showing monetary expense(s) or cost(s) involved in (i) designating assigned parking spaces for Cooperative Units No. 1900, 1902, 1904, 1906, 1908, 1910, 1912, 1914, 1916, 1918, 1920, 1924, 1926, 1928, 1930, 1932, and/or 1934; (ii) re-designating or reassigning parking spaces for Cooperative Units No. 1900, 1902, 1904, 1906, 1908, 1910, 1912, 1914, 1916, 1918, 1920, 1924, 1926, 1928, 1930, 1932, and/or 1934; (iii) designating assigned parking spaces for any other unit at the Cooperative property; and (iv) re-designating or reassigning parking spaces for any other unit at the Cooperative property.
  - The defendant refused the plaintiff’s request to make such accommodation or failed to respond or delayed responding to the request such that it amounted to a denial.

- **Example—Request to Admit:** Do you admit that the defendant, from July 26, 2019 to the current date, has not granted the plaintiff’s reasonable accommodation request for an assigned parking space closer to her unit?
A defendant should be asked as early as possible to identify in writing any claimed defenses. Discovery may then focus on the defenses identified by the defendant.

The sample interrogatories and document request below seek to confirm a defendant’s asserted non-discriminatory reasons.

**Discovery as to the Defendant’s Alleged Non-Discriminatory Reason(s)**

*Interrogatory No. 1:* State each and every nondiscriminatory reason you intend to allege or assert in defense of the conduct alleged as discriminatory in the complaint.

Response to Interrogatory No. 1:

*Interrogatory No. 2:* With respect to each nondiscriminatory reason (if any) listed above, identify the following:

A. All evidence upon which you may rely to support the claimed or alleged non-discriminatory reasons.

B. All persons with any knowledge of the facts which you believe support your claimed or alleged nondiscriminatory reasons.

C. Any documents upon which you may rely to establish or support the claimed or alleged non-discriminatory reasons.

D. For each document identified in response to subparagraph C above, identify the custodian of the document.

Response to Interrogatory No. 2:

*Document Request No. 1:* Please produce copies of each and every document and/or record referred to, listed, or identified in response to Interrogatories No. 1 and No. 2 above.

Response to Document Request No. 1:

To illustrate, the above discovery requests were asked in a racial harassment case. The resident manager harassed the tenant and her high school-aged daughter after the daughter gave birth to a biracial child. The defendants gave the following answers to the above discovery requests:

Interrogatory: State each and every nondiscriminatory reason you intend to allege or assert in defense of the discriminatory conduct as alleged by the plaintiffs in the complaint.

Response: Defendants object to the use of the term “nondiscriminatory reason” in Interrogatory No. [1]. The discriminatory conduct alleged by Plaintiffs consists of alleged verbal harassment by Defendants’ resident manager. Defendants have denied Plaintiffs’ allegations of racial harassment in their entirety. Defendants do not have a “nondiscriminatory reason” for conduct that they deny ever took place. Plaintiffs voluntarily submitted a notice of intent to vacate the apartment on May 27 and did not mention the alleged racial harassment in their notice.

Defendants then answered “N/A” to Interrogatory No. 1 and Document Request No. 1.

The discovery responses are useful because of all the defenses that will not be raised such as the plaintiffs’ criminal record, payment history, the statements on the plaintiffs’ rental application, the plaintiffs’ maintenance of the unit, etc.

Another housing discrimination case involved the denial of a request for a loan modification. The defendant lender listed a single defense:
Interrogatory: State each and every reason you intend to allege or assert in defense of the discriminatory conduct as alleged by the plaintiff in the complaint.

Response: Subject to and without waiving its general objections, Defendant responds that Plaintiff’s request for a mortgage loan modification was denied because she had insufficient income. Investigation continues. (emphasis added)

Discovery then focused on the single defense: insufficient income. The plaintiff (Black) had unemployment at the time she sought a loan modification. At that time, unemployment could be used to qualify for a loan modification. Responses to document requests showed over 20 loan modification files in which comparable (White) borrowers with unemployment income were granted loan modifications by the lender.

Discovery should also be used to identify all persons involved in the challenged conduct.

Sample Questions—Pertinent Witnesses

Identify each and every person who had contact with the complainant/plaintiff when (i) the complainant/plaintiff called to inquire as to the availability of an apartment unit and (ii) the complainant/plaintiff visited the respondent/defendant’s rental office.

Identify each person involved in the consideration of the complainant/plaintiff’s reasonable accommodation/modification request.

Identify who made the final decision to terminate the complainant/plaintiff’s tenancy/evict the plaintiff.

Identify each and every person who was involved in the decision to deny the complainant/plaintiff’s loan application.

Electronically Stored Information (ESI)

Obtain all electronically stored information (ESI) and social media.

- Cases that do not involve some form of ESI and social media are rare.
- The definitions of ESI and documents should be broad to encompass all such information.
- Most court rules contain a broad definition of “document” that includes ESI. The definition in the applicable court rules should be incorporated into the discovery requests. The following are sample definitions:

*Definition of “Document.”* The term "document" as used herein shall be defined to the broadest extent possible and shall include, without limitation, any written, printed, typed or other graphic matter of any kind or nature or any writing, records, data, documentation, electronic data, correspondence, memoranda, notes, letters, email, telegraphs, telex communications, calendars, planners summaries or records of telephone conversations and personal communications or interview, diary entries, drawings, sketches, graphs, charts, interoffice memoranda and documents or copies thereof, photograph, phonorecord, tape recording or other data compilation from which information can be, or could have been, obtained; it shall also mean all copies of documents by whatever means including computer information from all office and personal desktop computer/workstations, office and personal notebook computers, home computers, computers of personal assistants/secretaries/staff, palmtop devices, network file servers/mainframes/computers, including data files, emails and background information, including (1) active data information which is readily available and accessible to users, including word processing documents, spreadsheets, databases, email messages, and the like; (2) replicate data includes “file clones” created by built-in automatic backup features designed to help users recover data lost due to a computer malfunction; (3) backup data information copied to removable media tapes, tape archives, replaced/removed drives, floppy diskettes and other portable media (CD’s and zip cartridges); and (4) residual data information which is deleted, but recoverable
from the computer system and all access control lists. "Document" or "documents" shall also include all drafts and copies which are not identical to the original, such as those bearing markings, comments, or other notations not present on the original.

Definition of "Electronic Data." The term "electronic data," when used in this document, means all information of all kinds maintained by electronic data process systems including all non-identical copies of such information. Electronic data includes, but is not limited to, computer programs (whether private, commercial, or work-in-progress), programming notes or instructions, and input and/or output used or produced by any software program or utility, including electronic mail messages and all information referencing or relating to such messages anywhere on the computer system, social media platforms (including, but not limited to, Facebook, LinkedIn and Google+), video sharing (including, but not limited to, YouTube and Vimeo), live-streaming (including, but not limited to, Periscope and Blab), microblogging (including, but not limited to, Twitter and Tumblr), blogging (including, but not limited to, WordPress, Blogger and LiveJournal), social news (including, but not limited to, Digg and Reddit), content curation (including, but not limited to, Paper.li and Pinterest), messengers (WhatsApp and Marco Polo), input and output used or produced by any software program or utility, including electronic mail messages and all information referencing or relating to such messages anywhere on the computer system, social media platforms (including, but not limited to, Facebook, LinkedIn and Google+), video sharing (including, but not limited to, YouTube and Vimeo), live-streaming (including, but not limited to, Periscope and Blab), microblogging (including, but not limited to, Twitter and Tumblr), blogging (including, but not limited to, WordPress, Blogger and LiveJournal), social news (including, but not limited to, Digg and Reddit), content curation (including, but not limited to, Paper.li and Pinterest), messengers (WhatsApp and Marco Polo), word processing documents and all information stored in connection with such documents, electronic spreadsheets, databases (including all records and fields and structural information, charts, graphs and outlines, arrays of information and all other information used or produced by any software), operating systems, source code of all types, programming languages, linkers and compilers, peripheral drivers, PIF files, batch files, any and all ASCII files, and any and all miscellaneous files and/or files fragments, regardless of the media on which they reside and regardless of whether said electronic data consists in an active file, deleted file, or file fragment. “Electronic data” includes any and all information stored on computer memories, hard disks, floppy disks, CD-ROM drives, Bernoulli Box drives and their equivalent, magnetic tape of all types, microfiche, punched cards, punch tape, computer chips (including, but not limited to, EPROM, PROM, RAM, and ROM), or on or in any other vehicle for digital data storage and/or transmittal. The term “electronic data” also includes the file, folder tabs, and/or containers and labels appended to, or associated with, any physical storage device associated with the information described above.

Credibility

In some cases, it is important to obtain information as to a party’s or witness’s credibility. This could involve obtaining evidence as to a party or witness’s prior testimony or statements, or information as to their criminal record. See, for example, F.R. Evid. 609 (Impeachment by Evidence of a Criminal Conviction). It also involves obtaining evidence from other witnesses who can dispute what the respondent or witness says. This can be accomplished through depositions and interviews of other witnesses.

- **Third-party discovery.** All available discovery, information, and records from third parties should be obtained and may require the use of a subpoena. Other third-party records may be obtained through public records databases, including court records.

- **Post-charge/complaint evidence.** As discriminatory acts can occur after the filing of a lawsuit, counsel should continue to monitor the respondents’/defendants’ post-charge or post-complaint conduct and actions. Counsel should also be alert to the need to obtain post-charge or post-complaint records and evidence pertaining to the aggrieved person/plaintiff, such as additional evidence as to damages. Discovery responses should be promptly supplemented, as necessary, with the new information and evidence.

- **Chronology of events.** Plaintiffs should be asked to write an informal chronology of events giving rise to the complaint. This should be provided for counsel purposes only to avoid the risk that the document becomes discoverable. The chronology should:
  
  - Aid in maintaining or refreshing recollection events in the following months, if not years, as the case proceeds to a hearing or to court.
  - Aid in establishing damages, including emotional distress damages.
• Be supplemented to include subsequent events and to include a refreshed recollection of earlier events.

This systemic approach to discovery, particularly framing discovery requests to address the proof elements for each claim in the case (third-party discovery), should guide the way depositions and other discovery methods are conducted.
Unit 5—Damages

Introduction

The calculation of damages can be one of the most difficult challenges in fair housing cases. Too often all of the time and attention are spent establishing liability, with a calculation of damages addressed in an abbreviated fashion prior to a settlement conference or on the eve of trial.

The process of calculating damages, however, should be no different than determining liability: Damages, like liability, depend on the particular facts of the case and the application of the law to the facts. While there is no yardstick against which a particular set of facts can be measured, there is a body of law that has developed over decades where courts, HUD (including Secretary of HUD and ALJ decisions), DOJ, and state agencies and commissions have considered fair housing cases and arrived at amounts for damages.

Counsel should be mindful that calculating damages in fair housing cases is an art, not a science. The approach is to compare cases that have similar evidence about psychological harm to the evidence in the case that is being considered and calculate a figure accordingly.

For example, several recent cases involving the reasonable accommodation of an accessible or designated parking space have resulted in large awards of damages. One case before the California Department of Fair Employment and Housing settled for $1 million in 2005 after a jury awarded the complainant $250,000 in compensatory damages and was debating the punitive damage award. The evidence showed that the complainant had developed a degenerative knee disability and, after she was denied an accessible parking space in a better location, was forced to crawl up and down 16 steps to enter her home for a two-year period.

Counsel for FHAP agencies should also be aware that fair housing investigators use a damages worksheet to calculate damages for cause cases. The information gathered from this worksheet regarding the plaintiff’s circumstances can be useful in the calculation of damages.

Available Damages

<table>
<thead>
<tr>
<th>HUD Administrative Hearing</th>
<th>In an administrative proceeding, upon finding that any respondent has engaged in or is about to engage in a discriminatory housing practice, the ALJ may grant actual damages. Such damages are compensatory and include, but are not limited to, damages for emotional distress such as humiliation and embarrassment, out-of-pocket expenses, and lost housing opportunity. 42 U.S.C. 3612(g)(3); 24 C.F.R. § 180.670(b)(3)(i).</th>
</tr>
</thead>
<tbody>
<tr>
<td>State or Local Administrative Proceeding</td>
<td>State or local administrative proceedings generally provide for the same types of damages that are available in HUD administrative proceedings.</td>
</tr>
</tbody>
</table>

### Actual (Compensatory) Damages

Actual (compensatory) damages consist of two types: economic and non-economic.

#### Economic Damages

Out-of-pocket and other expenses:
- Economic damages compensate aggrieved persons for quantifiable financial losses that result from an act of discrimination. The types of losses vary significantly from case to case and may include costs associated with the discrimination or with the pursuit of the case. Typical out-of-pocket losses for individuals may include differences in rent payments, lost wages due to discrimination or activities associated with the case, mileage and hotel costs associated with the discrimination or with the investigation or trial of the case, reimbursement for storage of household goods, the cost of searching for alternative housing, legal fees, etc.
- Fair housing organizations are also entitled to compensation for their out-of-pocket losses, including staff time, administrative overhead, and other expenses associated with their investigation or litigation of a case and for the frustration of their organizational mission. The organizations may also be awarded damages that represent payment of future expenses such as monitoring a property for compliance by testing. These damages, awarded for the diversion of resources and frustration of missions, both past and future, are sometimes substantial depending on the evidence.

#### Non-Economic Damages

Two types: emotional distress and lost housing opportunity.

1. **Emotional distress damages.** Damages for mental and emotional distress have been available under the FHA since its initial passage in 1968. It is well established through numerous court and administrative decisions that the “actual damages” that may be awarded under the Act include damages for embarrassment, humiliation, and mental or emotional distress caused by acts of discrimination. Stewart v. Furton, 774 F.2d 706, 710 (6th Cir. 1985). An early Supreme Court fair housing decision described the injury to a victim of housing discrimination as a “dignitary tort”: an injury to the personhood of an individual. Curtis, 415 U.S. at 185 n.10.
   - The fact that the damages for emotional distress are not capable of precise measurement does not prevent the damages from being awarded. Courts do not require exact proof of the degree or amount to be awarded for emotional distress damages. HUD v. Housing Auth. of the City of Las Vegas, HUDALJ 09-94-1016-1 (Nov. 6, 1995).
   - Medical evidence or expert testimony concerning physical symptoms is not required. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997); Johnson v. Hale, 940 F.2d 1192 (9th Cir. 1991); Human Rights Commission v. LaBrie, FH/FL ¶18,173 (Vt. 1995). Such damages can be inferred from the circumstances, as well as proven by testimony.

   Indeed, the typical evidence supporting emotional distress damages comes from the complainant or complainants: “[w]ithout a doubt, the most important factor in determining a damage award for intangible injuries is the testimony of the victim.” Heifetz and Heinz, Separating the Objective and the Speculative: Assessing Compensatory Damages in Fair Housing Cases, 26 John Marshall L. Rev. 3, at 19 (1992).

   Other witnesses, including family members, friends, co-workers, and neighbors are also helpful
witnesses to establish that psychological harm has occurred or that it has resulted from the specific act of discrimination that is claimed.

Medical witnesses such as counselors, physicians, psychologists, or psychiatrists may also be used to establish emotional distress damages.

Unlike the determination of liability (which is based on an objective analysis from the perspective of a reasonable person in the aggrieved person’s position—e.g., 24 C.F.R. § 100.600(a)(2)(i)(C); Ragin v. New York Times Co., 923 F.2d 995, 999-1000 (2d Cir. 1991)), emotional distress damages are based on a more subjective analysis of the injuries actually suffered by the aggrieved person:

- Housing discriminators must take their victims as they find them, and damages are based upon the injuries actually suffered by the aggrieved party, not by those which would be imputed to an ordinary or reasonable person. The aggrieved party’s pre-existing emotional condition is to be taken into consideration in determining the level of emotional distress and an amount of compensation that would be appropriate. HUD v. Flowers, HUDALJ 09-99-0004-8, Slip. Op. at 7 (Jan. 22, 2001). See also Heifetz & Heinz, at 21–22.

Requesting damages for emotional distress places an aggrieved person’s medical health at issue, which can be traumatic for an aggrieved person.

Courts are split as to whether “garden-variety” claims for emotional distress damages sufficiently place an aggrieved person’s mental condition in controversy for purposes of an F.R. Civ. P. 35 mental examination.

2. **Lost housing opportunity.** Damages for loss of a housing opportunity are available when housing is made unavailable by an act of discrimination. See, for example, Krueger v. HUD, 115 F.3d 487, 492-93 (7th Cir. 1997); Banai v. HUD, 102 F.3d 1203, 1208 (11th Cir. 1997); Douglas v. Metro Rental Services, Inc., 827 F.2d 252, 254 (7th Cir. 1987); Phillips v. Hunter Trails Community Ass’n, 685 F.2d 184, 190 (7th Cir. 1982); and HUD v. Woodward, HUDALJ 15-AF-0109-FH-03, Slip Op. at 3-4 (May 9, 2016)(citing cases). These damages are based on a comparison between the housing that was denied as a result of housing discrimination and the housing that the complainants ultimately acquired. Considerations of the differences between the housing opportunities could include space; amenities; safety; convenience; location in relationship to schools, churches, and other activities; the stability of the neighborhoods; and other factors that are not quantifiable as out-of-pocket losses such as by payment of higher rent.

Because damages for a lost housing opportunity are compensable for non-quantifiable, intangible losses resulting from the stress involved in finding alternative housing, courts often consider these damages together with the damages for emotional distress. HUD v. Elroy R. & Dorothy Burns Trust, HUDALJ 09-92-1622-1, Slip. Op. at 18, n.19 (June 17, 1994).

A HUD ALJ described the loss of a housing opportunity in one case as follows:

Complainants’ search for housing was consonant with [the complainants’] placement of their children at the center of their lives. Their goal was to find housing in a secluded neighborhood close to their children’s activities, and with a yard where the children could play safely. They also wanted a house designed to be amenable to their practice of homeschooling. The subject house fulfilled these goals. Because Respondents denied Complainants the desired housing, the [complainants] were forced to find a less satisfactory apartment. The transient nature of the apartment building, the traffic near their apartment, and the incidents of crime in the neighborhood emphasize the gap between the housing Complainants wanted and the housing Respondents' action forced them to obtain. Furthermore, the apartment is far away from the family’s activities and shopping and has no fenced-in area for the children to play.

Both Complainant parents and Complainant children lost the opportunity to live in, what was for them, an ideal environment, and they must be compensated for that lost opportunity.

Civil Penalties and Punitive Damages

**Civil Penalties**

Civil penalties may be awarded in court or administrative proceedings. 42 U.S.C. § 3612(g)(3). The ALJ’s decision may also provide for a civil penalty imposed against a respondent as necessary to vindicate the public interest. 42 U.S.C. § 3612(g)(3); 24 C.F.R. §§ 180.670(b)(3)(iii)(A)(1) & § 180.671. A civil penalty may be imposed separately against each individual respondent. 42 U.S.C. § 3612(g)(3); 24 C.F.R. § 180.671(e).

**Amounts**

The amount of the civil penalty, as originally enacted, was $10,000 if the respondent had not been found in a prior administrative hearing, civil action, licensing or regulatory proceeding to have violated the Fair Housing Act or any state or local law. 42 U.S.C. 3612(g)(3); 24 C.F.R. § 180.671(a)(1). The amounts are updated yearly and can be found at 24 C.F.R. § 180.671(a)(2).

**Factors Used to Determine the Amount of the Civil Penalty**

Six factors are used to determine the amount of the civil penalty—24 C.F.R. § 180.671(c):

1. Whether that respondent has previously been adjudged to have committed unlawful housing discrimination.
2. The respondent’s financial resources.
3. The nature and circumstances of the violation.
4. The degree of that respondent’s culpability.
5. The goal of deterrence.
6. Other matters as justice may require.

**Housing-Related Hate Act**

Additionally, under factors (iii), (iv), (v), and (vi), the ALJ shall take into consideration—in favor of imposing a maximum civil penalty—whether the respondent has engaged in a “housing-related hate act.”

A housing-related hate act consists of any act violating Section 818 of the Fair Housing Act, 42 U.S.C. § 3617, involving or accompanied by “actual violence, assault, bodily harm, and/or harm to property; intimidation or coercion that has such elements; or the threat or commission of any action intended to assist or be a part of any such act.” 24 C.F.R. § 180.671(c)(2).

There is no right to punitive damages in federal or state administrative proceedings. Punitive damages cannot be recovered in administrative proceedings. See, for example, Banai v. HUD, 102 F.3d 1203, 1207 n.4 (11th Cir. 1997).

**Punitive Damages**

To obtain punitive damages, a plaintiff must file an FHA case in court, as stated in 42 U.S.C. § 3613(c)(1), or a complainant or aggrieved person must make an election to have the case heard in court.

- Congress amended the FHA in 1988 to eliminate a previous $10,000 cap on punitive damages (H. Rept. No. 100-711, at 17).
- This is unlike Title VII, where punitive and compensatory damages are subject to statutory caps or limits. See 42 U.S.C. 1981a(b)(3).
### Standard for Awarding Punitive Damages

The FHA and Sections 1981 and 1982 do not articulate a standard for awarding punitive damages.

- Punitive damages serve "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." *Smith*, 461 U.S. at 54; *Hamad v. Woodcrest Condominium Ass’n*, 328 F.2d 224, 238 (6th Cir. 2003)(adopting Smith standard in a fair housing case); *Marr v. Rife*, 503 F.2d 735, 744 (6th Cir. 1974)(“willful or wanton conduct”). See also ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND PRACTICE § 25:10, at 25-54 to 25-55 (2017)("The fact that many decades have now passed since the Fair Housing Act’s enactment...the circumstances in the modern era that would justify denial of a punitive award in a case of intentional discrimination are increasingly rare).

- In *Smith v. Wade*, 461 U.S. 30 (1983), in a case filed under 42 U.S.C. § 1983, the Supreme Court held that punitive damages could be awarded upon a finding of reckless or callous disregard of or indifference to the plaintiff’s rights.

- In *Kolstad v. American Dental Ass’n*, 527 U.S. 526 (1999), the Court held, in a Title VII employment discrimination action, that the standard is not the “egregious” conduct of the defendant. Rather, the standard is whether the defendant acted with knowledge that the action violated the law or with reckless indifference to the plaintiff’s rights.

### Jury Instructions

Jury instructions provide the best statement of the factors warranting a punitive damage award. Not all federal circuit courts of appeals have promulgated pattern jury instructions for civil cases. As a result, plaintiffs must look to other circuits and court decisions for sample punitive damage instructions in fair housing cases. Ninth Circuit Court of Appeals Manual of Model Jury Instructions—Civil, § 5.5 Punitive Damages, at p. 96 (2007).


### Gross Rental Amounts

Gross rental amounts have been used as a basis for determining punitive damages in fair housing cases. *Miller v. Apartments and Homes, Inc.*, 646 F.2d 101 (1981)(district court did not err in assessing punitive damages based on the defendants’ gross rental amounts); *Fair Housing of Marin v. Combs*, 2000 U.S. Dist. LEXIS 4737 (N.D. Cal. 2000).

### Punitive/Compensatory Damages Ratios

Further, courts permit high punitive/compensatory damages ratios in fair housing cases, in contrast to other types of cases, because economic damages are generally small in fair housing cases. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *Lincoln v. Case*, 340 U.S. 283, 293-94 (5th Cir. 2003) (ratio exceeding 10:1 “far less troubling” in fair housing cases); *U.S. v. Big D. Enterprises, Inc.*, 184 F.3d 924, 932-34 (8th Cir. 1999)(upholding 100:1 punitive to compensatory damages ratio in fair housing case).

### Principal’s Liability for Punitive Damages

Respondeat superior cannot be used as a basis for punitive damages. To hold an employer or principal liable for punitive damages, the employer or principal must have either participated in the discriminatory acts or ratified the discriminatory acts of an employee or agent.

The Supreme Court, in a Title VII action, adopted agency standards as the basis for determining a principal’s liability for punitive damages:

(a) the principal authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal was reckless in employing him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.
Kolstad v. American Dental Ass’n, 527 U.S. 526, 542-543 (1999)(quoting Restatement (Second) of Agency § 217 C (1957)). See also Preferred Properties v. Indian River Estates, Inc., 276 F.3d 790, 799-800 (6th Cir.) (applying Kolstad to a fair housing case), cert. denied, 536 U.S. 959 (2002). See also Marr v. Rife, 503 F.2d 735, 744-45 (6th Cir. 1974)(principal may be liable for punitive damages under the FHA if by action or knowledgeable inaction principal was involved in the wrongdoing); Darby v. Heather Ridge & Dart Properties, Inc., 827 F. Supp. 1296, 1298 (E.D. Mich. 1993)(“[E]vidence submitted to the jury regarding the employer’s inconsistent statements about whether its employees received any training concerning civil rights laws. From this a jury could reasonably draw inferences that the defendants had ‘failed to act to prevent known or willfully disregarded actions of [its] employees.”’); Washington v. Krahn, 467 F. Supp. 2d 899 (E.D. Wis. 2006)(punitive damages available where the defendant “was a hands-on property owner” that “monitored vacancies, advertised for tenants…established the criteria for selecting tenants…and required the [apartment managers] to give him their impressions of prospective tenants and he personally chose among prospective tenants based on their applications and the [managers’] comments.”).

For example, in Asbury v. Brougham, 866 F.2d 1276 (10th Cir. 1989), the defendant investigated a discrimination complaint the plaintiff filed with HUD. Despite obtaining evidence substantiating the complaint, the defendant took no steps to remedy the complaint. The Eighth Circuit upheld an award of punitive damages, reasoning that the “jury could have drawn the inference that [the defendant’s] failure to apologize or otherwise remedy the situation, after personally investigating [the plaintiff’s] claim . . . was an acceptance and ratification of discriminatory conduct.” Id. at 1283.

In another case involving post-complaint actions by a defendant in a housing discrimination case, the court held the owner of a small apartment complex liable for punitive damages even though the owner had not been directly involved in the discriminatory conduct or knew of the incident at the time it occurred. The court held the owner liable for punitive damages, however, for taking no action after the filing of the complaint to inform rental agents about the requirements of the fair housing laws:

Mr. Hampton made absolutely no efforts either prior to or after the filing of this lawsuit to ensure that Ms. Dowell or any other of his rental agents were informed about the need to rent in accordance with the law. . . . [I]n this regard I find Mr. Hampton’s total ignoring of his duties under these laws to be knowledgeable inaction in light of his eighteen years as an owner of rental properties and his admission that he has not, even after the filing of this lawsuit, instructed his rental agent about the legal requirements of renting.


## Attorney Fees

### Policy


### Computing Attorney Fees

Lodestar approach. The Supreme Court has adopted the “lodestar” approach, involving the calculation of the number of hours expended on the litigation multiplied by a reasonable hourly rate, as the most useful starting point for determining a fee award. Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air, 478 U.S. 546, 563 (1986); Blum v. Stenson, 465 U.S. 886, 888 (1984); Hensley v. Eckerhart, 461 U.S.

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1 The Court in Kolstad modified subsection (c), by adding that “an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer’s good-faith efforts to comply with Title VII.” 527 U.S. at 545 (citation omitted).


- Hours spent on unsuccessful claims should be excluded from fee petitions. Hensley, 461 U.S. at 440.

- The Supreme Court has also "reject[ed] the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." City of Riverside, 477 U.S. at 574.

- Adjustments to the lodestar amount. The lodestar amount may then be adjusted upward or downward based on the 12 factors articulated by the Fifth Circuit in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). See Hensley, 461 U.S. at 429-430 & nn. 3-4 (approving 12 factors set forth in Johnson); Blanchard v. Bergeron, 489 U.S. 87, 93 (1989)(same). See also Perdue v. Kenny A., 559 U.S. 542, 554 (2010)("there is a 'strong presumption' that the lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee").

- Courts, however, have rejected the use of mathematical formulas to reduce fee awards. See, for example, id. at 435, n.11("Such a ratio provides little aid in determining what is a reasonable fee in light of all of the relevant factors."). Indeed, little reduction may occur when the successful and unsuccessful claims are interrelated. Id. at 439("Given this interrelated nature of the facts and legal theories . . . the District Court [need not] apportion the [expenses] mechanically on the basis of . . . success or failure [by particular parties].").

Fee enhancement. In rare cases, courts have granted a fee enhancement based on the Johnson factors. Edwards v. Flagstar Bank, FSB, 297 F.3d 431, 435-436 (6th Cir. 2002)(upholding district court’s attorney's fee enhancement, consisting of a 50 percent increase to the "loadstar" amount), cert. denied, 537 U.S. 1227 (2003).

Fees for fees. Recovery for time spent pursuing an attorney’s fee award (or “fees for fees”) is also compensable. See, for example, Commissioner, INS v. Jean, 496 U.S. 154, 161-62 (1990)(citing cases); American Federation of Government Employees v. FLRA, 994 F.2d 20, 22 (D.C. Cir. 1993)(discussing rationale for awarding "fees for fees"); Williamsburg Fair Housing Committee v. Ross-Rodney Housing Corp., 599 F. Supp. 509, 521-22 (S.D.N.Y. 1984)($37,732.50 awarded for time spent on the application for fees in housing discrimination action).

Aggrieved party’s entitlement to recover attorney’s fees and costs. Following the issuance of the initial decision, any prevailing party, except for HUD, may apply for attorney fees and costs. 42 U.S.C. § 3612 (p); 24 C.F.R. § 180.705.

An aggrieved person may recover attorney fees and costs from a respondent if the aggrieved party intervenes in the administrative proceeding and is a “prevailing party,” unless there are “special circumstances” that render such recovery unjust. 24 C.F.R. § 180.705(b).

A “prevailing party” for purposes of an attorney fees award is a party who succeeds “on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.” Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Farrar v. Hobby, 506 U.S. 103, 111-112 (1992)(“plaintiff ‘prevails’ when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.”); cf. Buckhannon Board and Care Home, Inc. v. West Virginia Dept of Health & Human Resources, 532 U.S. 598 (2001) (rejecting “catalyst theory” as the basis for attorney fee award as the prevailing party under the Fair Housing Act and Americans with Disabilities Act [ADA]).

Attorney Fees—Administrative Proceedings

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Typically, the prevailing party test is satisfied where there is a monetary award. A consent decree reduced to a judgment may also satisfy the prevailing party test. See, e.g., Buckhannon Board and Care Home, 532 U.S. at 604; Farrar, 506 U.S. at 111; Texas State Teachers Ass’n. v. Garland Independent School Dist., 489 U.S. 782, 792-93 (1989); Maher v. Gagne, 448 U.S. 122, 129-130 (1980).

- “Special circumstances” that could render the recovery of attorney’s fees unjust. There are several instances in which an ALJ may find that “special circumstances” render the recovery of attorney fees and costs unjust. The most common objection to the recovery of attorney fees is that the services of counsel for an aggrieved person intervening in the administrative proceeding were merely duplicative of the services of HUD’s counsel. The inquiry into the contribution of the intervenor primarily entails determining whether the governmental litigant adequately represented the intervenor’s interests by diligently prosecuting the case, whether the intervenor proposed different theories and arguments, and whether the work the intervenor performed was of important value to the court. See Donnell v. United States, 682 F.2d 240, 247 (D.C. Cir. 1982), cert. denied, 459 U.S. 1204 (1983). Intervenor may be denied fees where his participation was unnecessary in light of the efforts of the prevailing government litigant. In this regard, the “special circumstances” which would deny an award are those “where, although [intervenors] received the benefits sought in the lawsuit, their efforts did not contribute to achieving those results.” Id. at 247; HUD v. Dutra, HUDALJ 09-93-1753-8, at 4 (May 13, 1997).

- A respondent may also argue that its financial condition or ability to pay constitutes a “special circumstance.” Inability to pay, however, is entitled to substantial weight only in cases of real or extreme hardship. HUD v. Bangs, HUDALJ 05-90-0293-1 (Apr. 16, 1993).


This standard is also set forth in the applicable regulations: “(a) If the respondent is the prevailing party, HUD will be liable for reasonable attorney’s fees and costs to the extent provided under the Equal Access to Justice Act (5 U.S.C. 504) and HUD’s regulations at 24 CFR part 14…” 24 C.F.R. § 180.705(a).


Prevailing Respondent’s Recovery of Attorney Fees from an Aggrieved Party that Intervenes in the Administrative Proceeding. An aggrieved person intervening in the proceeding may be liable for the respondent’s attorney fees and costs if the aggrieved person’s involvement in the administrative proceeding is found to have been frivolous or vexatious, or for purposes of harassment. 24 C.F.R. § 180.705(a).

Federal Rule of Civil Procedure 54 allows a party to move for attorney’s fees so long as the movant specifies the “judgment and the statute, rule, or other grounds entitling the movant to the award.” F. R. Civ. P. 54(d)(2)(B)(ii). The FHA is one of several statutory exceptions to the “American rule” that generally governs litigation in the United States, which holds that “litigants must pay their own attorney’s fees.” Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 415 (1978).

The FHA provides for an award of attorney’s fees to a prevailing party: “In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.” 42 U.S.C. § 3613(c)(2).
The Fair Housing Act does not define “prevailing party.” Rather, the Act states that the term shall have the same meaning as in Section 1988. 42 U.S.C. 3802(o) (“Prevailing party” has the same meaning as such term has in section 722 of the Revised Statutes of the United States (42 U.S.C. 1988).”). The Civil Rights Attorney’s Fees Award Act of 1976, as amended, 42 U.S.C. § 1988 (“Section 1988”), provides for an award of attorney’s fees as an element of costs, as well as an award of fees charged by expert witnesses, to prevailing parties enforcing the provisions of Sections 1981 & 1982. As such, the determination of a party’s status under the Fair Housing Act as a prevailing party is the same as the determination under Section 1988.


A “prevailing party,” for purposes of attorney’s fees, is a party that succeeds “on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.” Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Farrar v. Hobby, 506 U.S. 103, 111-112 (1992) (“plaintiff ‘prevails’ when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.”); cf. Buckhannon Board and Care Home, Inc. v. West Virginia Dept of Health & Human Resources, 532 U.S. 598 (2001) (rejecting “catalyst theory” as the basis for attorney’s fee award as the prevailing party under the Fair Housing Act and ADA). Typically, the prevailing party test is satisfied where there is a monetary award. Nonetheless, relief such as a consent decree, if reduced to a judgment, may also satisfy the prevailing party test. See, for example, Buckhannon Board and Care Home, 532 U.S. at 604; Farrar, 506 U.S. at 111; Texas State Teachers Ass’n. v. Garland Independent School Dist., 489 U.S. 782, 792-93 (1989); Maher v. Gagne, 448 U.S. 122, 129-130 (1980).

In court proceedings, the phrase “prevailing party,” as set forth in 42 U.S.C. §§ 1988 & 3614(c)(2), suggests that a prevailing defendant is just as entitled to attorney’s fees as a prevailing plaintiff. As courts have noted, however, this “provision, which sounds fully discretionary, actually is not. In fact, a district court’s discretion not to grant attorney’s fees and costs in civil rights cases is tightly cabined.” New Jersey Coalition of Rooming & Boarding House Owners v. Mayor of Asbury Park, 152 F.3d 217, 225 (3d Cir.1998) (internal citations omitted). Indeed, a prevailing plaintiff “should ordinarily” recover attorney’s fees “unless special circumstances would render such an award unjust.” Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

As explained by the Court in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-03 (1968) (footnotes omitted):

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a “private attorney general,” vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress, therefore, enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.
It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust. Because no such circumstances are present here, the District Court on remand should include reasonable counsel fees as part of the costs to be assessed against the respondents.

With respect to prevailing defendants, the Supreme Court in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), held that to avoid discouraging the filing of civil rights claims attorney’s fees should be awarded to a prevailing defendant only if the plaintiff’s action was frivolous, unreasonable, or without foundation:

In sum, a district court may, in its discretion, award attorney’s fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.

In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one’s belief that he has been the victim of discrimination, no matter how meritorious one’s claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

That § 706(k) (42 U.S.C. § 2000e-5) allows fee awards only to prevailing private plaintiffs should assure that this statutory provision will not, in itself, operate as an incentive to the bringing of claims that have little chance of success. To take the further step of assessing attorney’s fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent’s attorney’s fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. And, needless to say, if a plaintiff is found to have brought or continued such a claim in bad faith, there will be an even stronger basis for charging him with the attorney’s fees incurred by the defense.

Id. at 421–22.

The Piggie Park (prevailing plaintiff) and Christiansburg Garment Co. (prevailing defendant) standards have been applied in court proceedings under all civil rights statutes.

**Recommended Approach in Quantifying Damages**

To properly address and quantify damages, if not liability as well, the following steps should be taken in every fair housing case:

- A worksheet on damages should be completed for each complainant/plaintiff. The worksheet should list all individuals with knowledge of the complainant/plaintiff’s damages, especially emotional distress damages.

- Each complainant/plaintiff should prepare a statement or chronology of events, including events that show emotional distress and other damages.

- All medical, financial, and other records should be obtained that may bear weight on items of damages or potential damages. These records, however, will likely be discoverable, so counsel should carefully consider the need for these records.
• Although not relevant to actual damages, for civil penalties and punitive damages, all financial records for each defendant/respondent should be requested, including rent rolls (which can show gross rental amounts), records of all real property owned and indications of their value, tax returns, and any other records showing the defendant/respondent’s assets.

• Research as to other cases, including:
  • Federal and state court decisions and settlements.
  • DOJ Housing and Civil Enforcement Section Cases, including complaints, verdicts, and settlements/consent orders.
  • HUD ALJ and HUD Secretary decisions. Decisions are also available on Lexis and Westlaw. A significant number of the HUD decisions involve damage calculations, in contrast to court decisions that seldom address damages.
  • HUD Fair Housing Enforcement Activity, containing charges and conciliation agreements 2011–2019.

Managing Expectations

Many, if not most, aggrieved persons/plaintiffs begin the litigation process with the expectation of “winning” a full trial on the merits, obtaining moral vindication, and receiving an award of substantial damages and the desired housing.

What they often experience in the litigation process is long delays, only to have their allegations vigorously challenged, if not vilified, followed by small cash settlements.

Private settlements in court often end up with nondisclosure and non-disparagement agreements. These are disfavored as they do not further the policy of informing the public regarding fair housing requirements and remedies. Private, nondisclosed settlements are prohibited in HUD proceedings. As to state and local FHAPs, the rules and policies may vary based on the state and local laws for the jurisdiction. Settlements may also be governed by contractual requirements. Counsel should be aware of these issues prior to appearing for a settlement conference or negotiating a settlement.

Though fair housing statutes, like other civil rights statutes, provide for an award of attorney’s fees following successful litigation, in most instances their attorneys will receive a third of any settlement amount with no contribution by the respondents/defendants.

Some aggrieved persons/plaintiffs do not feel vindicated with justice having been served.

The relatively few aggrieved persons/plaintiffs that proceed to trial “win” less than half of the time.

• Those who are successful at trial will likely encounter yet another lengthy process as the case proceeds through the appellate process.

• Others who are unsuccessful may find that their counsel are then unwilling to pursue the case on appeal.

There are several steps that counsel can take to manage client expectations:

• Set realistic goals for the litigation.

• Private counsel should carefully draft retainer agreements to define the scope of the representation (i.e., whether representation will extend to the appeal process—for example, whether a one-third contingency fee will be calculated on the gross settlement or net settlement amount). The

2 As HUD notes on its website, the list of ALJ decisions does not show subsequent orders or decisions that may have been issued on appeal to the Secretary of HUD or to a federal circuit court of appeals. As such, ALJ decisions do not necessarily represent the final decisions in cases. See, for example, HUD v. Nelson, HUD ALJ 05-068-FH (ALJ Aug. 24, 2006), rev’d, HUD ALJ 05-068-FH (HUD Sept. 26, 2006).
agreement should make clear that there are inherent risks in any litigation and that counsel makes no promise or guarantee regarding the likely success or outcome of the case.

- Aggrieved persons should be informed that counsel for HUD and the FHAP represent their agencies, not the aggrieved person and that the aggrieved person may retain their own counsel.

- Counsel should share with the aggrieved person/plaintiff the compensatory damages, punitive damages/civil penalties, awards, verdicts, and conciliations/settlements in similar cases.

The availability of attorney fees, particularly for FHAP counsel, is subject to the American Rule (each party bears their own attorney fees). Unless a state statute or local ordinance provides for the award of attorney fees, FHAP counsel will likely be precluded from obtaining attorney fees.

For example, in Seeberger v. Davenport Civil Rights Comm’n, 923 N.W.2d 564 (Iowa), cert. denied, 140 S. Ct. 109 (2019), the Iowa Supreme Court upheld the denial of attorney fees for the FHAP counsel. As a result of the Seeberger decision, FHAPs in Iowa took steps to amend their ordinances to provide for attorney fees for their FHAP counsel.
Unit 6—Trial Preparation

Trial preparation should be kept in mind beginning with the investigation and not JUST when a charge or complaint has been filed.

Every step in the investigation and during the formal discovery process following the issuance of a charge or filing of a complaint in court should be undertaken for the purpose of documenting and preserving evidence that may be used to successfully litigate the case at a hearing or trial.

Trial Preparation Sequence

There is no single approach to trial preparation applicable to every case. For example, a case may involve a purely legal issue. In such cases, the parties may stipulate to the pertinent facts, 24 C.F.R. § 180.630, permitting the ALJ to then address the dispositive legal issue. In most cases, however, liability may be established through the evidence at trial.

Most discrimination cases involve disputed issues of fact as to both liability and damages, with the ALJ or court/jury determining liability and damages.

There are six suggested steps to use in preparing for a trial or hearing in a housing discrimination case. They include:

- Legal research as to the controlling legal standards.
- Determining who will testify and organizing documents and exhibits.
- Preparing for the direct examination of witnesses.
- Preparing for the cross-examination of witnesses.
- Preparing an opening statement.
- Preparing a rough draft of points for the closing argument.

All of these materials should be organized and placed in a trial notebook.

1. Legal Research as to the Controlling Legal Standards

The first step in trial preparation involves detailed research as to the controlling legal standard applicable to the fair housing claims (a great deal of research, of course, should have been completed prior to drafting the charge or court complaint).

- Legal research will begin with the text of the FHA and any applicable HUD regulations and policy statements.

Next, relevant fair housing decisions should be carefully reviewed. This includes decisions of the Supreme Court, the particular circuit court of appeals with jurisdiction over the appeal of the case, and HUD’s ALJs and Secretary. Next, other state and federal cases should be reviewed.

Case law and other materials should be read in their entirety to suggest legal arguments and strategies to be used at the hearing or trial. For example, decisions may include important rulings on evidence issues, potential defenses, as well as items of damages and other kinds of available relief. Research concerning potentially relevant issues should be categorized and preserved for later reference.

Treatises and law review articles may also be reviewed.
After conducting legal research, counsel may wish to draft or prepare a detailed outline of proposed findings of fact and conclusions of law to be presented to the ALJ, including evidence (testimony and exhibits) that addresses the proof elements for each claim. 24 C.F.R. § 180.665 (governing the parties’ filings of briefs and proposed findings). Although proposed findings are typically prepared after the hearing, counsel could benefit by having a rough draft prepared before the hearing. Counsel may wish to refer to the items of fact during the hearing to ensure that evidence is presented on each point.

If the case will be tried before a jury, counsel instead should draft proposed jury instructions. F. R. Civ. P. 51(a)(1). The court’s scheduling order will set a deadline for submission of proposed jury instructions.

Additionally, a short prehearing statement should be drafted, containing a statement of the law applicable to the case, 24 C.F.R. § 180.435(b)(5), and address other issues required by the judge or that may arise during the hearing. 24 C.F.R. § 180.435(b); see also 24 C.F.R. § 180.105(b)(“In the absence of a specific provision, the Federal Rules of Civil Procedure shall serve as a general guide.”). If the case will be tried before a jury, counsel should draft a trial brief. F. R. Civ. P. 16(c)(7).

Legal research and drafting of a prehearing statement or proposed findings serve numerous purposes. Determining the controlling legal standard applicable to a case ensures that every aspect of trial preparation is directed to the applicable elements of the claim and available relief. Counsel’s thinking is sharpened and more focused through the discipline of drafting a prehearing statement or proposed findings. Careful drafting may reveal any deficiencies or weaknesses in the case that must be addressed. The prehearing statement or proposed findings help ensure that each essential aspect or element of the case is fully addressed at the hearing or trial. Simply put, it is a mistake to delay drafting proposed findings until after the hearing has been concluded.

It may be unrealistic to expect an ALJ to grasp the factual intricacies of a case in a brief 15–20-minute opening statement. If the ALJ does not request or order that a prehearing statement or proposed findings be prepared and filed prior to the hearing, counsel should consider drafting and filing a prehearing memorandum. Regardless of the manner in which it is accomplished, counsel must ensure that the ALJ has a meaningful opportunity to obtain familiarity with counsel’s position prior to the hearing.

Legal research may also alert counsel to the need to amend the charge of discrimination. 24 C.F.R. § 180.425.

Legal research should also identify evidentiary issues likely to arise at the hearing. Motions in limine should be drafted on evidentiary issues that may arise and should be filed before the trial or used at trial, as appropriate.

Finally, as trial preparation continues, the prehearing statement, trial brief, proposed findings, and other pleadings should be continually reviewed and revised as necessary.
For example, an aggrieved person’s housing costs and expenses may change. These records may need to be documented and introduced as exhibits.

The additional records may be obtained through informal means, such as being voluntarily provided by a party or witness. Other records can only be obtained through formal discovery.

The Federal Rules of Evidence govern the admissibility and authenticity of exhibits. 42 U.S.C. § 3612(c); 24 C.F.R. § 180.620.

Particular attention should be given to documents and records that may be challenged as to admissibility or authenticity.

Failure to file a written objection may result in the waiver of any challenge to authenticity. F.R. Civ. P. 26(a)(3)(B)(14-day deadline in federal court proceedings); 24 C.F.R. § 180.645(c)(administrative proceedings). As necessary, the internal, confidential list of proposed exhibits should note exhibits or documents that may be challenged, along with the legal basis supporting or challenging admission or authenticity.

Subpoenas should be prepared for witnesses or record custodians in possession of pertinent documents and exhibits needed at trial.

Counsel should calendar a date, sufficiently in advance of the hearing, for requesting the ALJ to issue the subpoenas. 24 C.F.R. § 180.545.

The trial notebook should include an exhibit chart listing each exhibit as being offered into evidence and any ruling on the admissibility of the exhibit. Under no circumstances should counsel “forget” to offer an exhibit into evidence.

3. Preparing for the Direct Examination of Witnesses

The first step is to identify witnesses with the evidence necessary to establish liability, damages, and civil penalty (if sought), or to dispute anticipated defenses.

Points should be established by a primary witness and, if necessary, on a contested matter, supported by one or perhaps two corroborative witnesses. Overproving points may bore the judge or jury and/or make it appear that counsel lacks confidence in the case.

Only strong witnesses should be called to testify. Unless testimony by a weak or equivocal witness (one that helps and hurts a party’s position) is necessary to prove an essential element of a claim or defense, the weak or marginal witnesses should not be called to testify.

If the witness’s testimony is important, the testimony should be presented in a party’s case-in-chief.

Waiting until rebuttal risks having the witness excluded, as not having been properly called in the party’s case-in-chief.

Moreover, the judge or jury may already have formed conclusions concerning the case prior to rebuttal testimony, blunting the impact of the witness’ belated testimony.

As to each witness, counsel must determine, from all of the information possessed by the witnesses, the particular information or testimony that each witness will provide.

Counsel should strive to present the testimony by each witness in the most persuasive fashion possible.

The following non-exhaustive list sets forth several common guidelines for preparing for direct examination:

- Each witness should be fully familiar with everything on paper that involves the witness. This includes all pertinent correspondence, memoranda, reports, and other records that may have been prepared, received, or viewed by the witness. The witness should also review any interviews, affidavits, deposition testimony, interrogatory responses, or other materials involving the witness. All potentially important areas in these documents and records should be reviewed with the witness. The witness is prepared to testify when the witness can accurately address any aspect
of the documents and records without needing to physically read or review them while testifying (note, however, that a witness should not have to remember every detail—sometimes there is so much detail that that is impossible—so the witness should be told about the possibility of “refreshing recollection” if necessary).

For example, an investigator, preparing to testify, should review and re-review all documents and records contained in the investigation file, especially any materials that the investigator has written or signed. The investigator must be completely familiar with any previous testimony the investigator has provided. The investigator should be able to testify at trial concerning relevant documents, records, and prior testimony without looking at the exhibit (unless necessary to refresh recollection).

- The attorney who will do the direct examination of a witness at the hearing should prepare that witness for testimony. Experienced counsel may develop detailed outlines or summaries for each witness that will testify on direct examination. Less experienced counsel may find it necessary, in preparing for direct examination, to write out each question and answer. The questions and answers should include specific questions and answers necessary to provide a foundation for the admission of exhibits introduced during each witness’s testimony. Leading questions must be avoided. If specific questions and answers are written out, care must be taken to ensure that the testimony does not appear rehearsed, that counsel does not become rigid or inflexible by failing to ask follow-up or supplemental questions due to unanticipated testimony, and that the written questions and answers are not provided to the witness, the opposing party, or the court or carried by a witness up to the witness stand. Regardless of the methodology used, each witness should be prepared to testify on direct examination by using the actual questions—from start to finish—that will be asked at the hearing.

- It is critical that direct examination be presented in an organized and logical progression. Testimony may be organized chronologically or in a more topical format (for example, pre-application stage; showing aggrieved person’s qualification; then contacts with the respondent; the events occurring after being denied unit; and damages). Irrespective of the organizational format, a direct examination should be presented in a fashion that begins and ends with important points. Less important or unfavorable matters should be addressed in the middle of the witness’ direct examination testimony. A party’s case must begin and finish with strong witnesses.

- Each witness should be prepared for cross-examination. The witness should be prepared to address and account for any inconsistencies in the documents and records involving that witness, as well as any differences or conflicts between the witness’s testimony and that of other witnesses. Ideally, counsel should roleplay cross-examination with the witness, using the same kinds of questions, tone of voice, and mannerisms that may be used by the opposing counsel at the hearing. It is imperative that each witness essentially experience cross-examination before doing so at the hearing. Thorough preparation and rehearsal (or roleplay) of testimony will reduce the need to have a witness refresh recollection, redirect a witness who wanders off track, answers in a narrative fashion, etc.

- Next, each party and witness should be instructed on certain “rules” for testifying:
  - Each witness must tell the complete truth, to the best of the witness’ recollection.
  - The witness must listen carefully to the question, and not answer until the question has been completed. If the question cannot be understood, the witness may ask to have the question rephrased. The witness should answer only that question, without volunteering other information. The witness should avoid narrative answers; such answers often omit significant, persuasive details and risk providing additional grounds for cross-examination. In answering, the witness should look at the ALJ (or jury in a jury trial). The witness should not look at counsel or the ALJ for help prior to answering difficult questions.
  - Absent certain exceptions, the witness may only be able to testify as to what the witness personally observed, heard, and did.
Clear, direct answers should be provided if at all possible. If the answer cannot be recalled, the witness should say “I do not remember” or “I do not recall.” The witness must not speculate on a possible answer (e.g., “he could have,” or “she probably did so.”). If precise dates, distances, etc. cannot be provided, the witness should only provide their best approximations.

Witnesses may feel the need to provide a more detailed explanation to a question, particularly in response to cross-examination questions. Witnesses should not force explanations in answers to cross-examination questions. If the witness is not provided an opportunity to fully explain an answer, counsel (on what is referred to as a “re-direct” examination) will have an opportunity to ask follow-up questions permitting the witness to provide a more detailed explanation, if necessary.

The witness should use his or her own vocabulary or terminology. The witness should act as naturally as possible, and not try to imitate someone else. The witness should avoid any exaggeration or understatement of facts and events.

When an objection is made, the witness should wait for the judge's ruling on the objection. If the objection is overruled, the witness may then answer. If the objection is sustained, the witness should wait for the next question. If interrupted, the witness must stop answering and wait for instruction by the judge.

The witness should remain serious, calm, and composed. Under no circumstances should the witness attempt to give a clever answer, lose his or her temper, or argue with counsel or the judge.

The witness (and parties) should be counseled on proper courtroom attire and practices. Parties and witnesses should dress professionally. Excessive mannerisms, reactions, furious notetaking, etc. should be minimized, if not avoided altogether.

Direct examination outlines should be prepared for each witness you will likely call to testify at trial.

Exhibits or documents that you plan to introduce during the direct examination testimony of each such witness should be listed at the point in the testimony where such exhibits will be introduced.

The witness testimony outlines should address all elements of claims, damages, civil penalty (if sought), defenses, etc.

Cross-examination is a difficult challenge at a trial or hearing, even for the most experienced attorney. Yet cross-examination, if successful, goes a long way to obtaining a favorable decision and may yield a high monetary award.

Initially, counsel must decide at the trial or hearing whether it is necessary at all to cross-examine a witness.

Occasionally, a witness fails to provide testimony that hurts the opposing party's claim or defense or merely testifies on insignificant or uncontested matters. In such situations, cross-examination may be declined, with counsel confidently stating, “No cross-examination, your Honor!”

On other occasions, the party calling the witness neglects to elicit significant information from the witness, or the witness—due to nervousness or forgetfulness—fails to provide anticipated testimony. Conducting cross-examination of a witness in such circumstances may provide the opposing party with a second opportunity to correct this mistake. In this situation, as well, cross-examination may be declined.

In most situations, however, cross-examination is necessary. For maximum effectiveness, cross-examination should be prepared in advance of the hearing. The “wait-and-see” approach to how the witness testifies on direct examination risks disaster.
The first question is whether the witness called by the other side may aid in proving your case. In such situations, the witness’s credibility should not be attacked or challenged as it would lessen the value of the favorable testimony to be elicited. Contrary to common perception, the first goal of cross-examination is to elicit favorable testimony from the witness.

- If at all possible, the witness on cross-examination should be forced to agree with facts supporting the cross-examining party's claims or defenses.
- Only after eliciting favorable testimony should any consideration be given whether it is advisable to have the witness' credibility be impeached or discredited.
- The reason for eliciting favorable testimony first is that the factfinder (ALJ or jury) will be initially inclined to accept the witness' testimony as plausible. Immediately attacking or impeaching the witness' credibility will impair the value of the witness' favorable testimony.

Effective cross-examination should be clear and concise, limited to 2–3, or perhaps 4 main points.

- Cross-examination should never seek to repeat the scope or sequence of direct examination.
- Likewise, wide-ranging cross-examination dilutes the impact of key cross-examination points and provides opportunities for the witness to damage the cross-examining party's case.
- The most important or persuasive points should be presented at the beginning and end of the cross-examination.

With rare exceptions, every question asked on cross-examination should be a concise, leading question, calling for a “yes” or “no” answer.

- Open-ended questions must never be asked on cross-examination. The witness should not be permitted to explain any answer. Perhaps the best way to understand a leading question is to view it not as a question at all, but as a direct statement followed by a question mark.
- There should be no surprises in the witness' testimony on cross-examination. Counsel conducting cross-examination should know how the witness should answer each question on cross-examination. Copies of prior testimony, records, and other materials should be highlighted, indexed, and available for immediate use in impeaching the witness in the event the witness on cross-examination fails to provide the desired and anticipated responses.

5. Preparing an Opening Statement

An opening statement provides the first opportunity to tell the ALJ or jury what the case is about. The goal of the opening statement is to chronologically or logically set forth the facts of the case that entitle your party to a favorable decision or verdict. Like other aspects of trial preparation, there are no fixed rules that govern the organization of an effective opening statement. The following is a sample outline for the opening statement:

- **Introduction**—A sentence or two that presents the theme of the case from your party's perspective. For example, “Your Honor, this is a case about . . . .” This provides a brief overview of the case.
- **Parties**—The complainant (and perhaps a key witness) should be briefly introduced and personalized in a way that lends sympathy and credibility to the party's position and pertinent actions.
- **What happened**—Counsel will then tell the story by presenting what happened chronologically. This must be factual, non-argumentative, and based on evidence that will be presented at trial. Again, these facts will show why the party is entitled to a favorable decision.
- **Basis of liability/non-liability**—This should be the high point in the opening statement. After addressing the facts, counsel will then summarize the factual basis and legal grounds for a finding of liability. This point should be delivered confidently and forcefully.

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1 See MAJET, FUNDAMENTAL OF TRIAL TECHNIQUES, at 50–60 (3rd Ed. 1992).
• Anticipating or refuting defenses—Generally, the charging party may take a brief opportunity to address the key point or two in the respondent’s defense, and then show the facts that the charging party will introduce that refute it. This is important since the charging party in the opening statement, unlike the closing argument, has no right of rebuttal.

• Damages—The charging party may address the amount of damages and relief sought in the case.²

• Conclusion—The parties can then conclude, for example, by expressing their appreciation for the opportunity to present their claims and by requesting a favorable decision.

6. Preparing a Closing Argument

Counsel, finally, should develop at least a rough outline for a closing argument in advance of the hearing. This ensures that the closing argument remains a consistent part of the overall trial strategy.

• Often, a judge will ask for a closing argument immediately after each party has rested their case. Depending on the pace of the hearing (e.g., a one-day trial), there may have been no time during the hearing for an oral argument to be prepared. Without some degree of advance preparation, a party may appear unprepared to deliver an effective closing argument.

• On the other hand, the closing argument cannot be finalized until after the hearing has concluded. Witnesses may provide unanticipated testimony favorable to a party's claim.

• A recommended technique is for counsel and the client or investigator to make notes of key statements during the trial that appeared particularly significant or persuasive to the judge or jury. This helps ensure that key points during the trial are not overlooked during the closing argument. These statements can be incorporated into the closing argument.

From a practical standpoint, at the conclusion of the trial, the judge or jury in all likelihood has sat for a long time. They are familiar with the case and often have formed certain views or opinions as to what occurred. Yet they remained concerned with the responsibility of deciding the case correctly and, if a decision is going to be rendered in favor of the charging party, how to arrive at a measure of damages and other affirmative relief. All of these factors need to be considered in structuring the closing argument.

Once again, no fixed rules govern the organization of an effective closing argument. The following is a sample outline for a closing argument:³

• Introduction—The introduction should be short and return to the theme of the case.

• Issues—The issue or issues of the case should be briefly framed in a fashion that necessarily leads to a conclusion in favor of the party’s position.

• What the trial proofs show actually happened—At this point, the judge or jury does not want to hear counsel review all of the facts and testimony. Though uncontested facts, if critical, may be emphasized, the focus in the closing argument is to address the key two or three critical contested points that may determine the outcome of the case. Though phrased as a closing “argument,” the thrust of a closing argument is to specifically identify the evidence (documents, testimony, admissions, etc.) showing your version of what happened is more plausible or believable than the version presented by the other party. The goal should be to go behind the facts into the (unlawful) motive or actions of the respondent to the reasons why the respondent acted the way they/it did. The judge or jury should feel comfortable that a ruling in your favor is the right thing to do in this case.

• Damages—After seeking to reach an emotional peak on the matter of liability, counsel for the charging party will then address the proposed items and amounts of damages the charging party should recover.

² In many cases, particularly in jury trials, a plaintiff will defer the subject of damages until closing argument. This prevents the defendant from arguing that the plaintiff’s primary motivation is financial.

³ MAUET, supra, at 286–300.
The amount should be presented in a fashion that appears reasonable, expressly acknowledging, of course, that the decisionmaker, with all due respect, may arrive at amounts above or below those that you have proposed. In a jury trial, counsel should show the jury the form of verdict, and specifically discuss how it should be answered.

- **Counsel for the respondent**—The counsel for the respondent, on the other hand, may note that the charging party has not proven the case and therefore should not receive any damages. The concern, from the respondent's perspective, is that the detailed discussion of damages may make it appear that the respondent has implicitly conceded the issue of liability.

- **Instructions**—In a jury trial, counsel should emphasize jury instructions that reflect favorably on their claims and demonstrate how the facts tie into the jury instructions. In a trial before an ALJ, counsel should tie the facts into applicable case law supporting the charging party's claims and defenses.

- **Refuting the other party's position**—Finally, key positions raised by the opposing party should be rebutted. The judge or jury should be told, bluntly, that the respondent failed to prove any viable defense.

- **Conclusion**—The closing argument should conclude dramatically on the key point or theme of the case.

Unlike the opening statement, the charging party should reserve a few minutes of its closing argument to be used for rebuttal. The rebuttal is limited to points and arguments raised in the respondent's closing argument.

To be effective, the rebuttal should begin with a short introduction, and then emphasize strong points in the charging party's case. At that point, the respondent's contentions may be restated and rebutted. The rebuttal then ends with a brief conclusion.
Pre-Hearing Conference (Administrative Proceedings) and Pre-Trial Conferences (Court)

ALJs typically direct that the parties participate in a pre-hearing conference. 24 C.F.R. § 180.440. A pre-hearing conference is generally conducted by telephone, though the ALJ can require that the parties or their counsel appear in person. 24 C.F.R. § 180.440(c). The federal court rules provide for a pre-trial conference. F.R. Civ. P. 16.

The items to be addressed at the pre-hearing conference include all matters needed for the orderly hearing of the charge according to 24 C.F.R. § 180.440(b); see also 5 C.F.R. § 556(c), including:

- Pre-trial motions.
- Identification, simplification, and clarification of the issues.
- Necessary amendments to the pleadings.
- Stipulations of fact and of the authenticity, accuracy, and admissibility of documents.
- Limitations on the number of witnesses.
- Negotiation, compromise, or settlement of issues.
- The exchange of proposed exhibits and witness lists.
- Matters of which official notice will be requested.
- Scheduling actions discussed at the conference.
- Such other matters as may assist in the disposition of the proceeding.

Federal courts require counsel to prepare detailed pre-trial orders. The pre-trial order “controls the course of the action unless the court modifies it.” F.R. Civ. P. 16(d)-(e).

Preparing Pre-Hearing Statements—The ALJ has the discretion to require that the parties prepare and file pre-hearing statements. 24 C.F.R. § 180.435(a). Unless the ALJ directs otherwise, the pre-hearing statements should address briefly the following matters according to 24 C.F.R. § 180.435(b):

- The issues involved in the proceeding.
- The facts stipulated by the parties and a statement that the parties have made a good-faith effort to stipulate to the greatest extent possible.
- The facts in dispute.
• The witnesses (together with a summary of the testimony expected) and exhibits to be presented at the hearing.
• A brief statement of applicable law.
• Conclusions to be drawn.
• The estimated time required for the presentation of the party’s case.
• Such other information as may assist in the disposition of the proceeding.

Preparing for the Pre-Hearing or Pre-Trial Conference

The best way for parties to prepare for a pre-hearing conference is to have completed as much trial preparation as possible. Trial preparation will enable counsel, the agency, and parties to articulate with credibility the factual and legal bases of the housing discrimination claim, to rebut the defenses and arguments of the opposing party, and articulate the factual and legal basis for the requested relief.

Thorough trial preparation should reveal any additional items that need to be addressed at the pre-hearing conference.

Thorough trial preparation will project competence, persuasiveness, and professionalism by counsel, the agency, and parties at the pre-hearing conference and, ultimately, at the hearing.

Motion Practice

Administrative Proceedings

Similar to a court case, counsel may draft and file dispositive and other motions. 24 C.F.R. § 180.430.

• Unless the motion is presented orally during counsel’s appearance before the ALJ, a motion must be presented in writing and include the relief requested and the legal basis supporting the request. 24 C.F.R. § 180.430(a).

• Responses to written motions are due within seven days of service of the motion. Failure to file a response to a motion may constitute a waiver of any objection to the relief requested in the motion. 24 C.F.R. § 180.430(b).

• The ALJ may request an oral argument on a motion. 24 C.F.R. § 180.430(c).

Court Proceedings

Motion practice, including motions for summary judgment, is governed by the federal court rules, the court’s local court rules, the court’s scheduling order, and the court’s own requirements pertaining to the filing of motions. The court’s own requirements are contained on its website and/or provided during a scheduling conference.

Counsel should carefully review all applicable sets of rules early in the proceedings. Failure to comply with all motion requirements risks summary denial of the motion and/or having it stricken from the record.

Motions range from challenges to the sufficiency of the pleadings (motions to dismiss), including defenses, motions to compel discovery, MSJs, and motions in limine (i.e., motions pertaining to the admissibility of evidence and permitted arguments).
**Responding to Motions for Summary Judgment**

It is nearly inevitable that counsel litigating a fair housing claim will be faced with having to respond to a MSJ. The Supreme Court in recent years has eased the standard for a defendant to obtain summary judgment. See *Celotex Corp v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Defense counsel views judges as more receptive to defenses than juries. As a result, a main goal of defense counsel in discovery and, more importantly, in depositions is to obtain critical factual concessions needed to have the claims determined by a judge as a matter of law rather than as a question of fact for the jury. Summary judgment may be obtained when a defendant can show that undisputed facts establish that the plaintiff cannot prove one or more required proof elements of the fair housing claim or where undisputed facts establish a meritorious defense.

Defending against an MSJ must begin well before the motion is filed. Indeed, defense of an MSJ should begin with the initial interview of the plaintiff at which time counsel should analyze (i) whether there is direct evidence of discriminatory intent or indirect, circumstantial evidence from which an inference of discrimination may be drawn, such as evidence that similarly situated applicants or tenants of a contrasting class were treated differently; and (ii) whether sufficient evidence exists to rebut the defendant's defenses.

In opposing an MSJ, counsel should consider carefully whether affidavits in support of the motion are based on personal knowledge and set forth facts that would be admissible at trial. If not, the affidavits or portions of the affidavits should be contested, with the judge asked to disregard them for purposes of considering the MSJ. Counsel should present evidence as to each proof element and rebut each claimed defense. Counsel must also show that defense counsel’s MSJ requires the court to weigh evidence or resolve factual issues that should only take place at trial, rendering summary judgment inappropriate. *Tolan v. Cotton*, 134 S.Ct. 1861, 1866 (2014).

**Moving for Summary Judgment**

An MSJ or motion for partial summary judgment is appropriate for a plaintiff as to liability when undisputed facts establish each proof element of a fair housing claim and there is no defense raised by the defendant. Though MSJs in favor of plaintiffs are less frequent that MSJs by defendants, MSJs should be considered by plaintiffs where the facts are not in dispute.

**Motion in Limine**

Counsel is well-advised to file motions in limine as to important evidentiary issues. In the view of many courts, if the evidence issue is genuinely important to counsel, counsel is expected to brief the evidentiary issue with legal authority for admitting or excluding the evidence or argument before the trial.

Examples of motions in limine in fair housing cases include:

- Challenges to the admissibility of evidence as to other rental properties owned and/or operated by defendants other than the three properties mentioned in the plaintiff’s amended complaint. *Fair Housing Rights Center in Southeast Penn. v. Morgan Properties Mtg, Co.*, No. 16-4677 (E.D. Pa. June 29, 2018).

- **Motion in limine** to challenge attempts to discredit the testimony of a tester based on the fact that the tester, posing as a prospective tenant, may give false information to a housing provider:

  It is surely regrettable that testers must mislead commercial landlords and homeowners as to their real intentions to rent or buy housing. Nonetheless, we have long recognized that this requirement of deception was a relatively small price to pay to defeat racial discrimination. The evidence provided by testers both benefits unbiased landlords by quickly dispelling false claims of discrimination and is a major resource in society’s continuing struggle to eliminate the subtle but deadly poison of racial discrimination. We have discovered no case in which the credibility of testimony provided by a tester has been questioned simply because of the tester’s ‘professional’ status. Indeed, tester evidence may well receive more weight because of its source. Testers seem more likely to be careful and dispassionate observers of the events which lead to a discrimination suit than individuals who are allegedly being discriminated against. In sum, we see no reason to question the credibility of Mrs. Elbert simply on the grounds that she was acting as a tester and find that plaintiffs are entitled to a new trial because of the district court’s incorrect treatment of Mrs. Elbert’s key testimony. We think that the circumstances of the case are sufficiently questionable that an incorrect basis for evaluating Mrs. Elbert’s credibility, even taken by itself, amounts to reversible error.


Sources for Sample Motions and Responses to Motions

There are several useful sources and sample of motions and responses to motions that have been filed in fair housing cases:

- The several volumes set of John Relman’s *Housing Discrimination Practice Manual* (2000) contains numerous motions and motion responses filed in fair housing cases.
- Similar fair housing cases filed in federal court often contain numerous pleadings, motions, and responses, which can all be downloaded using the federal court Public Access to Court Electronic Records (PACER) service.
- DOJ’s fair housing cases also contain helpful trial court motions and briefs, as well as statements of interest. Likewise, appellate briefs filed by the DOJ also contain helpful arguments and case citations.
ALJs are appointed pursuant to the federal Administrative Procedure Act (APA), 5 U.S.C. § 551 and 42 U.S.C. § 3612(b).


- One of the ALJs is randomly assigned to the trial. The ALJ assigned to the trial has authority similar to that exercised by a federal judge in a federal district court trial. This includes the right to administer oaths or affirmations to witnesses, rule on evidence issues, and otherwise regulate pretrial and trial proceedings. 24 C.F.R. § 180.205; 5 U.S.C. § 556(c).

The goal of the ALJ is to “conduct a fair, expeditious, and impartial hearing,” ensuring that the rights of all parties are preserved and respected. 24 C.F.R. § 180.205.

The administrative hearing must commence within 120 days after the charge has been issued unless the ALJ finds that it is impracticable to do so. 42 U.S.C. 3612(g)(1); 24 C.F.R. § 180.600(a).

- Failure of a party to appear at the hearing, without a showing of good cause for the failure to appear, may result in a default. 24 C.F.R. § 180.615.

The regulations provide that the hearings be conducted in accordance with the APA, 5 U.S.C. §§ 551-559, and 24 C.F.R. § 180.605. In practice, the hearings are similar to a bench trial in a federal district court, except that the case is heard by an ALJ rather than a federal district court judge.

**Hearing**

“Hearing” means a trial-type proceeding that involves the submission of evidence, either by oral presentation or written submission, and briefs and oral arguments on the evidence and applicable law. 24 C.F.R. § 180.100(c).

- The hearing begins with opening statements by each of the parties. The ALJ has the discretion to set a time limit for the parties’ opening statements.

- Following opening statements, the charging party (HUD) proceeds to call witnesses needed to establish each of the legally required elements of the housing discrimination claims to be adjudicated at the hearing.

- In the process of calling witnesses to testify, the charging party will introduce relevant exhibits used to establish the claims and substantiate the testimony of its witnesses. This is referred to as the charging party’s “case-in-chief.” The respondent, of course, will have an opportunity to cross-examine every witness called during the charging party’s case-in-chief.

- The charging party will then “rest” after it has completed its case-in-chief, by calling all of its witnesses and seeking to introduce all of its exhibits. If the aggrieved person has intervened as a party, the aggrieved person as the intervening party may then proceed, if necessary, with his or her case-in-chief. Again, the respondent will have an opportunity to cross-examine each witness called by the aggrieved person as an intervening party.

- Once the intervenor rests, the respondent may move for dismissal, specifying the grounds and basis for its assertion that the charging and/or intervening parties have failed to establish one or
more of the housing discriminating claims. If the motion for dismissal is denied in whole or in part, which typically occurs, the respondent will then proceed with its case-in-chief. This consists of the respondent calling witnesses to rebut one or more essential elements or to establish one or more defenses to the housing discrimination claims. The charging and intervening party will have an opportunity to cross-examine each witness called by the respondent.

- The respondent will “rest” after it has completed its case-in-chief, by calling all of its witnesses and seeking to introduce all of its exhibits. At that point, the charging and intervening party may present “rebuttal” testimony and exhibits, if necessary, to address any unanticipated items in the respondent’s case-in-chief that had not been adequately addressed in the charging and intervening party’s case-in-chief. Rebuttal witnesses are also subject to cross-examination.

- After the charging and intervening parties have completed their rebuttal, the respondent is entitled to present its rebuttal. Once all of the parties have rested in their presentation of rebuttal testimony and exhibits, the hearing proceeds to the closing arguments. Often, the charging party will reserve a portion of its allotted time for the closing argument to be used for rebuttal after the respondent has completed its closing argument.

### Exhibits

One copy of each exhibit introduced at the hearing shall be provided to the ALJ and to each of the parties. 24 C.F.R. § 180.645(b). The authenticity of documents submitted as proposed exhibits is admitted unless written objection is filed prior to the hearing. 24 C.F.R. § 180.645(c).

- During the hearing, counsel should maintain an exhibit chart of all proposed exhibits to be introduced at the hearing. During the hearing, the exhibit chart should be updated with a checkmark or other notes indicating that the proposed exhibit has been offered into evidence; the court’s ruling admitting or excluding the exhibit, or deferring the decision on its admissibility to a later point in the trial; and, occasionally, a checkmark or other notes indicating the need to make a separate record.

  - Making a separate record out of the presence of the judge or jury facilitates appellate review. Failure to do so risks having the appellate court decline to review issues as to the admissibility of exhibits.

### Issuing a Decision

The ALJ is required to issue a decision within 60 days after the hearing is concluded, unless impracticable. 42 U.S.C. 3612(g)(2); 24 C.F.R. § 180.670(b).

If the ALJ finds that the respondent engaged in or is about to engage in a discriminatory housing practice, the ALJ may order the following relief:

- **Actual (compensatory) damages.** The ALJ may order the respondent to pay actual (compensatory) damages to the aggrieved person, including out-of-pocket damages and damages caused by humiliation and embarrassment. 42 U.S.C. 3612(g)(3); 24 C.F.R. § 180.670(b)(3)(i).

- **Injunctive relief.** Injunctive and other equitable, non-monetary relief may be ordered as necessary. The only exception is that the ALJ’s order may not affect any sale, lease, or other contract consummated, before the initial decision is issued, with a bona fide person lacking actual knowledge of the charge. 42 U.S.C. 3612(g)(4); 24 C.F.R. § 180.670(b)(3)(ii).

- **Civil penalty.** The ALJ’s decision may also provide for a civil penalty imposed against a respondent as necessary to vindicate the public interest.
Trials in Federal or State Court

Trials in federal and state courts are similar to administrative hearings. The main exception, as noted above, is that jury trials are available in state and federal courts along with the availability of punitive damages. Also, the rules of procedure will often be different in federal and state courts.

Common Evidence Issues

The following are common evidentiary issues that may arise in fair housing cases.

<table>
<thead>
<tr>
<th>Real Estate Records</th>
<th>Real estate records, if recorded, may be admitted under F. R. Evid. 803(14), as a record of documents affecting an interest in a property.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lease Agreements</td>
<td>Lease agreements may be admitted as business records, under F. R. Evid. 803(6), or as containing statements establishing or affecting an interest in property, under F. R. Evid. 803(15). See also <em>States v. Seymour Orlofsky, Inc.</em>, 1981 U.S. Dist. LEXIS 10292, Slip. Op. at 4 (S.D. N.Y. 1981)(court in fair housing case ordering that “[t]he records to be produced shall be the vacancy lists, rent roll analysis and prospective applications not used.”).</td>
</tr>
<tr>
<td>Telephone Records</td>
<td>Respondent’s telephone records may be admitted as business records under F. R. Evid. 803(6).</td>
</tr>
<tr>
<td>Handwritten or Typed Log of Activities</td>
<td>Such notes and other records may be admitted as business records, under F. R. Evid. 803(6), if prepared in the ordinary course of business.</td>
</tr>
<tr>
<td>Medical Records</td>
<td>Medical records may be admitted under F. R. Evid. 803(4), to the limited extent to which the records contain statements made for purposes of medical diagnosis or treatment. All other medical records require the testimony of the treating physician or medical provider to be admitted into evidence. Note, however, that the records must be authenticated in order to be admitted into evidence.</td>
</tr>
</tbody>
</table>
Although parties commonly seek to treat every physician as an expert witness, a treating physician may be treated by a plaintiff as a fact witness and, as such, no expert report is required under F. R. Civ. P. 26(a)(2):

Rule 26(a)(2)(B), by its terms, provides that a party needs to file an expert report from a treating physician only if that physician was “retained or specially employed to provide expert testimony.” In this case, Fielden did not retain Dr. Fischer for the purposes of providing expert testimony because there is evidence that Dr. Fischer formed his opinions as to causation at the time that he treated Fielden and there is no evidence that Dr. Fischer formed his opinion at the request of Fielden’s counsel. The Advisory Committee Notes also support the conclusion that Fielden did not need to file an expert report from Dr. Fischer. The Note to Rule 26 states that “[a] treating physician . . . can be deposed or called to testify at trial without any requirement for a written report.” Fed.R.Civ.P. 26(a), cmt. 1993 Amendments, subdivision (a), para. (2)). Under a straightforward reading of the rule and its advisory note, Fielden did not need to file an expert report from Dr. Fischer.

Fielden v. CSX Transp., Inc., 482 F.3d 866, 869 (6th Cir. 2007); Notes of Advisory Committee on Rules—1993 Amendment.

Federal courts take judicial notice of state statutes. Lamar v. Micou, 114 U.S. 218, 223 (1885) (“The law of any state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice without plea or proof.”). Unlike state statutes, for which judicial notice should be taken, municipal ordinances must be put into evidence. Getty Petroleum Marketing, Inc. v. Capital Terminal Co., 391 F.3d 312, 320 (1st Cir. 2004).


In general, statements made during conciliation may not be used as evidence in a subsequent hearing or trial. 42 U.SC. § 3610(d); 12 C.F.R. § 103.330.

Charts or spreadsheets may be used to summarize investigations that involved voluminous numbers of documents. These summaries may be admitted into evidence as long as original records remain available for examination or copying. F. R. Evid. 1006.

A FIR is potentially admissible, as an exception to the hearsay rule, pursuant to F. R. Evid. 803(8). Subsection (C) of Rule 803(8), as applied to civil actions, permits the admission of reports setting forth “factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.”

In an early decision, the Supreme Court noted that administrative findings in racial discrimination claims are admissible under F.R. Evid. 803(8) in a federal civil trial. Chandler v. Roudebush, 425 U.S. 840, 863 n.39 (1976). Further, in Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 170, 175 (1988), the Court held that “portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion.”

In a fair housing case, the court of appeals in Denny v. Hutchinson Sales Corp., 649 F.2d 816, 820-822 (10th Cir. 1981), found that the trial did not abuse its discretion by refusing to admit a report prepared...
by the Colorado Civil Rights Commission (CCRC). Likewise, in *HUD v. Krueger*, HUDALJ 05-93-0196-1, at 11 & n.9 (June 7, 1996), aff’d sub nom. *Krueger v. Como*, 115 F.3d 487 (7th Cir. 1997), the ALJ held that the FIR, containing notes of statements made to the HUD investigator by the defendant’s other tenants, was inadmissible because the report contained inadmissible hearsay.

In other cases, courts have admitted all or parts of an FIR. See, e.g., *Aylett v. HUD*, 54 F.3d 1560, 1563-65 (10th Cir. 1995)(considering investigator’s testimony and interview notes); *Stein v. Creekside Seniors*, LP, No. 14-432 (D. Idaho Mar. 4, 2016)(citing determination and other portions of the FIR); *Fayson v. Schmadl*, 126 F.R.D. 419, 422 (D.D.Cir. 1988)(FIR prepared by HUD equal opportunity specialist was admissible under F.R. Evid. 803(8)(C); court noted that “this disposition in no way prevents S & L from placing before the jury relevant evidence showing deficiencies in the Report or from arguing that the Report should be entitled to little weight.”).

The FIR should not be used to try to prove the case; rather, the evidence described in the FIR must be presented through witnesses with first-hand knowledge of the evidence or documents proving the FHA violation. Additionally, the FIR likely contains some information that helps the complainant and some that hurts. As a result, counsel must give careful consideration before seeking to introduce the FIR, into evidence.

Numerous decisions in employment cases have addressed the admissibility of investigative reports. These decisions are important because courts in fair housing cases often find Title VII decisions persuasive in deciding FHA cases.

- Early federal circuit courts of appeals’ decisions seemed to suggest that it may be a reversible error for a district court to exclude an EEOC probable cause determination from a Title VII trial. *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1096 (5th Cir. 1994); *Gilchrist v. Jim Siemons Imports, Inc.*, 803 F.2d 1488 (9th Cir. 1986).
- In recent decisions, however, the majority of the federal circuit courts of appeals have concluded that the decision of whether to admit EEOC or state-agency findings rests with the sound discretion of the district court. See, e.g., *Paolitto v. Crawford & Russell, Inc.*, 151 F.3d 60, 64-65 (2d Cir. 1998); *Hall v. Western Prod. Co.*, 988 F.2d 1050, 1057-1058 (10th Cir. 1993); *Barfield v. Orange Cty.*, 911 F.2d 644, 650-51 (11th Cir. 1990); *Johnson v. Yellow Freight Sys., Inc.*, 734 F.2d 1304, 1309 (8th Cir. 1984); *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924, 929-30 (7th Cir. 1984); *Walton v. Eaton Corp.*, 563 F.2d 66, 75 & n.12 (3d Cir. 1977)(en banc). See also *Cruz v. Aramark Servs., Inc.*, 213 Fed. App’x 329, 332 (5th Cir. 2007)(“While the EEOC report may fall within [Rule 803(6)’s] hearsay exception, the same cannot be said of the entire EEOC file,” concluding that Rule 803(6) “applies to the EEOC’s report and determination, but it does not apply to the underlying material collected during the EEOC investigation because that evidence independently must be admissible.”).

Preserving Issues During and After the Trial

Preserving issues for appeal can be a challenge even for the most seasoned trial counsel. To properly preserve issues for appeal, clear objections should be made during trial, F. R. Civ. P. 46 (objection must sufficiently state the grounds for the request or objection). A motion in limine will not preserve an evidentiary issue for appeal absent a ruling by the trial court. Trial courts frequently reserve decisions on evidentiary issues until the evidence is considered in its context during the trial. Counsel should make sure to obtain clear and definitive rulings on the record as to each evidentiary issue. In the event the trial court denies a motion in limine prior to trial, counsel should renew the motion when the evidentiary issue arises during the trial to avoid potential waiver of the right to appeal the ruling.

A motion for summary judgment under F. R. Civ. P. 56 does not necessarily preserve an issue for appeal. The denial of a motion for summary judgment is not a final disposition of an issue. Rather, the denial of summary judgment indicates that the trial court believes there are genuine questions of material fact. A motion for judgment as a matter of law (JMOL) must be presented twice to preserve an argument
for appeal. First, under F. R. Civ. P. 50(a) the JMOL motion must be made before the case goes to the jury. Second, it must be renewed in a post-trial motion under F. R. Civ. P. 50(b). F. R. Civ. P. 50 is strictly construed, and counsel prior to trial should carefully research circuit precedent as to JMOL motions. See, for example, Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 546 U.S. 394 (2006) (appellate review unavailable where defendant challenged insufficiency of the evidence in a JMOL motion under F.R. Civ.P. 50(a) before the case was submitted to the jury but failed to renew its JMOL motion after the unfavorable verdict or in a motion for new trial under Rule 59).
# Appendix 1: Emotional Harm Checklist

The following checklist can aid in identifying elements of emotional harm. While this type of checklist is useful as a guide or outline for obtaining information from a complainant, such a checklist should not simply be sent to an aggrieved person to complete.

## Emotional Harm Checklist

<table>
<thead>
<tr>
<th>Background</th>
</tr>
</thead>
<tbody>
<tr>
<td>✓ Where are you from?</td>
</tr>
<tr>
<td>✓ Where are you currently living?</td>
</tr>
<tr>
<td>✓ How long have you lived in this area?</td>
</tr>
<tr>
<td>✓ What is your age?</td>
</tr>
<tr>
<td>✓ What is your occupation?</td>
</tr>
<tr>
<td>✓ What are your interests?</td>
</tr>
<tr>
<td>✓ How often have you taken primary responsibility for finding housing?</td>
</tr>
<tr>
<td>✓ Were/are there other members of your household who were/are depending on you to find housing?</td>
</tr>
<tr>
<td>✓ Have you ever been involved in a housing discrimination lawsuit before?</td>
</tr>
<tr>
<td>✓ Have you ever been involved in any litigation before?</td>
</tr>
<tr>
<td>✓ Have you experienced prior incidents of discrimination? (If yes, at a later point in the interview, after the client has fully described his/her reaction to the current discrimination, ask whether the client’s reaction to the current discrimination is different from reactions to prior acts of discrimination. If it is, ask the client to what he/she attributes the differences in reaction.)</td>
</tr>
<tr>
<td>✓ How would you describe your identity as a member of a protected class(es)?</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>The Housing Search</th>
</tr>
</thead>
<tbody>
<tr>
<td>✓ How long had you been searching for housing before this incident?</td>
</tr>
<tr>
<td>✓ Why were you looking for housing?</td>
</tr>
<tr>
<td>✓ What were you looking for in your new home (more room, a home in a particular neighborhood, proximity to schools, work, recreation, relatives/friends)?</td>
</tr>
<tr>
<td>✓ What was your price range?</td>
</tr>
<tr>
<td>✓ What features or amenities did you hope to find?</td>
</tr>
<tr>
<td>✓ What symbolic importance, if any, did this new home hold for you? For example, was this the first time you were “on your own”? Was the move something for which you had been saving? Was it to be a symbol of independence or financial achievement? Was it the reward for hard work or “playing by the rules”? Was there an immediate need for housing for you?</td>
</tr>
<tr>
<td>✓ Were you reluctant to continue home-seeking because of concerns of being exposed to similar discrimination? Did you give up on the effort?</td>
</tr>
<tr>
<td><strong>Subject Premises (SP)—Dwelling that Is the Subject of the Present Controversy:</strong></td>
</tr>
<tr>
<td>---</td>
</tr>
<tr>
<td>✓ Fully describe the SP. If you were not allowed to see the SP, describe the ad that attracted you to the SP (if the client became interested in the SP as a result of an ad, get a copy of the ad and find out how long the ad ran).</td>
</tr>
<tr>
<td>✓ Describe in detail what attracted you to the SP. Was there anything special about this property or its location that was particularly attractive to you?</td>
</tr>
<tr>
<td>✓ What plans, if any, had you made for moving in, renovating, etc. How emotionally invested were you?</td>
</tr>
<tr>
<td>✓ How far along in the acquisition process had you gotten before being rejected?</td>
</tr>
<tr>
<td>✓ What actions, if any, had you taken in reliance or the belief that you would be moving into a new home? (These can range from telling family and friends, to leaving a prior dwelling or, in some cases, actually moving into the SP.)</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th><strong>Discriminatory Event</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>✓ Chronologically describe in detail what happened. What was the sequence of events that constitutes the violations of law? (Let the client determine where the chronology begins and ends. At each significant event, stop and ask the client what he/she was thinking/feeling. Consider audio/videotaping the interview, if the client is amenable and it will not curtail the information flow, as a way of capturing all of the communication from the client.)</td>
</tr>
<tr>
<td>✓ Did anyone witness any portion of these events? If so, who (name, address, phone/e-mail, etc.)? What portion of the events did he/she witness? What aspects of your reaction to the discriminatory events did he/she witness, if any? Is the witness willing to be of assistance?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Aggravating Circumstances</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>✓ Was abusive language used? (Try to get a precise quotation, or as close as possible.)</td>
</tr>
<tr>
<td>✓ Was this a “public” humiliation in any sense? (Was it loud enough to be heard by others?)</td>
</tr>
<tr>
<td>✓ Where did the discriminatory act(s) take place?</td>
</tr>
<tr>
<td>✓ Were family members, friends, or associates present?</td>
</tr>
<tr>
<td>✓ Was anyone else told a discriminatory or false reason for your treatment?</td>
</tr>
<tr>
<td>✓ How did the presence of others affect you?</td>
</tr>
<tr>
<td>✓ Were there any other outrageous circumstances, such as mocking, laughter, disdain, or other forms of rudeness by the offending party (or parties)?</td>
</tr>
<tr>
<td>✓ Were you lied to by the discriminator(s)? If so, when/how did you find out? How did you feel when you found out?</td>
</tr>
<tr>
<td>✓ On how many occasions were you in contact with the perpetrator(s)?</td>
</tr>
<tr>
<td>✓ Describe what was said or done on each occasion.</td>
</tr>
<tr>
<td>✓ What was the immediate psychological reaction to the discriminatory treatment?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Emotional Symptoms</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>✓ Did you experience any of the following common symptoms you believe were related to the incident? (Provide details/examples under each applicable category):</td>
</tr>
<tr>
<td>▪ Emotional numbing, feeling stunned.</td>
</tr>
<tr>
<td>▪ Staying home from work or school. (If yes, ask the client to provide dates. For days missed at work, was there a loss the client requests he/she be paid? What excuse was given to the employer? Were there any negative ramifications of his/her absence?)</td>
</tr>
</tbody>
</table>
Withdrawal (usually to the home/bed).
Helplessness on the job or at school for missed days (get copies of time/attendance records or pay stubs for corroboration).
Anger (if yes, describe the intensity).
Feelings of inadequacy.
Anxiety.
Inability to face day-to-day responsibilities.
Panic attacks.
A constant reliving of the incident (interference with concentration).
Diminished self-esteem.
Negative changes in appearance ("letting yourself go").
Confusion.
Loss of control over matters that affect you.
Irritability, lack of patience.
Feelings of shock or disbelief.
Feeling unwanted, unworthy, or unappealing.
Tension.
Mood swings.
Humiliation.
Morbid sadness.
Sleep disturbance.
Mirthless smiling, sighing.
Embarrassment.
Inability to make decisions.
Depression.
Engaging in self-destructive acts (overeating, smoking, drinking, involvement with drugs, inappropriate use of medications, etc.).
Lethargy, inability, or unwillingness to get out of bed or leave home.
Increased dependency on others.
Lack of humor.
Blaming oneself for what happened.
Feeling generally discouraged.

How has this incident changed you? (Ask the client to compare his/her feelings and behavior before the incident with the feelings and behavior described above.)

In what ways have your reactions to the incident changed over time, for better or worse?

Who have you talked to about this? Did you tell your children/spouse/coworkers, others? If not, why not? If so, how did you explain the discrimination to them?
Physical Symptoms

- Have you experienced any physical reactions to the discriminatory treatment? Provide complete details under each category (the physical symptoms may be new to the client or an exacerbation of past ailments. For example, the client may either experience a stomach ulcer for the first time or an aggravation of an existing ulcer).

- Have you experienced any of the following physical symptoms as a result of the incident?
  - Hypertension.
  - Crying (if yes, describe the occasions on which you cried before the incident and compare with frequency and extent of crying after the incident).
  - Ulcers or upset stomach/indigestion.
  - Headaches (including migraines).
  - Asthma.
  - Arthritis.
  - Loss of appetite.
  - Loss of sleep/insomnia.
  - Diminished interest in physical pleasures (sex, exercise, eating).
  - Easily startled (hyper-arousal).
  - Neck/back pain.

- In the case of both psychological and physical reactions, was a doctor or health care provider consulted? Whom did you consult? For what length of time? What was the cost of this treatment? Was medication prescribed or increased?

- Were your interactions with friends or family affected? If so, how? (This is a common and often destructive result of discrimination. Pay particular attention to this inquiry. Methodically probe into each affected relationship, including spouse and children. Consider calling the affected person as a witness to corroborate changes in behavior.)

- Describe whether and/or how you told your wife, husband, partner, children, or friends about the incident. Describe your feelings when you told them.

- If you have not told people you would ordinarily confide in about the incident, why not?

Employment/Education Consequences

- Has the incident affected you on the job/at school?
- Has the job/school performance been adversely affected? In what ways? Provide details.
- Have there been any job performance evaluations/school tests since the incident? Any changes from pre-incident evaluations?
- Has the incident affected your relationship with peers or superiors on the job/with other students or faculty? How so?
- Has the incident changed the way you interact with or view people of the same class (race, gender, national origin, etc.) as the discriminator(s)?
✓ Has the incident changed your outlook:
  ▪ On life?
  ▪ Regarding current events (becoming more conscious of racism and other forms of discriminatory behavior)?
  ▪ On your beliefs? (Do you find yourself thinking, “I worked hard, played by the rules, and still was not treated fairly”?)
  ▪ Regarding your prospects for the future?
  ▪ Regarding the faith you had placed in those upon whom you had relied? (“My parents never prepared me for this.”)
  ▪ Your trust or faith in others.

✓ How often do you think about the incident? Has that changed over time?

✓ Has this situation resulted in a breakdown of family relationships (separation/divorce)?

✓ Have there been other stress-producing events in your life that would account for the above-listed changes? What are they? When did they occur? How did you react to them? How was/is your reaction to the other stressors different from your reaction to the discriminatory treatment?

✓ Could these or other stressors be the cause of any of the changes listed above? If not, why not?

✓ Who can corroborate any of the psychological and/or physical changes listed above? (It is often very helpful, though not legally necessary, to have family members, friends, work associates, and health care professionals corroborate the changes experienced.)

✓ Have you continued the search for housing? Have you modified the search in any way? (Restricted the search to neighborhoods where you are not likely to encounter future discrimination, felt it necessary to “announce” your membership in the protected class over the phone?)

✓ What will it take for you to feel fully recovered? Therapy? If so, how long do you think the therapy will be needed?

✓ Would validation or vindication at trial aid the healing process?

✓ How long will it take to fully recover?

Adapted from EMOTIONAL HARM IN HOUSING DISCRIMINATION CASES: A NEW LOOK AT A LINGERING PROBLEM, 30 FORDHAM URB. L. J. 1143 (March 2003).
Appendix 2: Case Study and Participant Exercises

Case Study: Crawford v. Michaels, Jones & M&M Properties

Complainant’s Claims

Respondents John Michaels ("Michaels") and Debora Michaels-Jones ("Jones"), a married couple, are each members of M&M Properties, LLC ("M&M Properties"), a Colorado limited liability corporation. Respondent Michaels is the managing member of M&M Properties. Respondent Jones serves as the resident agent for M&M Properties.

Respondent M&M Properties holds the title to a 5-bedroom home located at 12345 Main Street, Denver, CO 80122 ("subject property"). Respondent M&M Properties uses the subject property as its registered office and mailing address. At all relevant times, Respondents Michaels and Jones have resided in and shared a bedroom at the home. They rent the remaining four bedrooms to tenants. Each bedroom has a locked door.

On June 15, 2020, Respondent Michaels placed the following Craigslist advertisement for a room rental at the subject property:

1 room available for rent in a 5 bedrooms [sic] home. Professional [sic] only. Pretty and quiet [sic] neighborhood near W. Sixth Ave. and US 77. Right across the street from Thunder Valley Motocross Park. Great backyard view of the park. All utility [sic], water, internet are included in the rent. No drugs! No criminal history! You must be neat!

Please response [sic] with your brief description about yourself, race and age; and a recent picture of you. PET FREE HOME!

If interested, please contact John (303-987-6543).

Complainant Celeste Crawford ("Crawford") is Black. On June 16, 2020, Crawford viewed the Craigslist advertisement and contacted Michaels via text message. Michaels called Crawford back that afternoon. During their telephone conversation, as they were talking about the room rental, Michaels asked Crawford to provide a selfie or picture of herself. Crawford refused. Michaels stated that a selfie was required to continue the conversation and the rental process. Consequently, their conversation ended.

Two days later, on the morning of June 18, 2020, Crawford received a follow-up text message from Michaels asking whether she was still looking for a place to live. Michaels's text message stated that the room featured in the Craigslist advertisement was still available. Crawford responded by calling Michaels. During their telephone conversation, Michaels again asked Crawford for her selfie. Crawford refused. Michaels stated that she was still not comfortable with doing that. Nevertheless, they agreed to meet at the house later that day so that she could see the rental room.

Michaels met Crawford in person that afternoon. Upon seeing Crawford exit her car in front of the home, Michaels stated: “You are? Ooooooohh!” Michaels then refused to allow Crawford to view the room or enter the house. Crawford asked Michaels why he would not let her enter the home. Michaels did not answer the question. Instead, as Crawford remained on the porch, Michaels quizzed Crawford
about her cooking habits, whether she was neat, and whether she was a professional and could verify her college graduation. The discussion concluded with Michaels telling Crawford that he could not rent the room to her because she is Black and his wife would not like it. Michaels further explained that the three other tenants were professionals from the Philippines. Renting a room for her would make the house uncomfortable for the other tenants.

On June 19, 2020, Michaels sent another text to Crawford. The text misrepresented the availability of the rental unit at the subject property: "At the time we spoke I had decided to rent out a room to another person, leaving out [sic] not having a chance to see a room." Michaels said that he "didn’t offer for you to come in because of a pending verification of references for another person before you came. I didn’t want you to go through the hole [sic] process just to to [sic] give you a room.”

On July 6, 2020, Crawford filed a housing discrimination complaint against the respondents. The complaint was served via certified mail on respondents Michaels and Jones. The charge was also served via certified mail on M&M Properties, LLC through Jones, as its resident agent. Certified mail receipts signed by Michaels and Jones showed that they received the charge on July 15, 2020.

On July 29, 2020, two weeks after receiving the charge, Michaels, Jones, and M&M Properties filed a civil complaint in the Denver County Court against Crawford. In the two-count civil complaint, Michaels, Jones, and M&M Properties allege that Crawford filed a groundless housing discrimination complaint with the FHAP and therefore is liable for “abuse of process” and for “business and commercial disparagement.”

On January 25, 2021, the FHAP filed a Charge of Discrimination against respondents Michaels, Jones, and M&M Properties. The FHAP seeks compensatory damages from the respondents, including damages for lost housing opportunity and emotional distress. The FHAP also seeks public interest and other relief as appropriate under the circumstances of this case.

Respondents’ Defenses

In their position statement provided to the FHAP, the respondents admit that a Craigslist advertisement was placed for a room rental at the subject property. The respondents deny that Crawford was asked to provide a selfie or otherwise discouraged from applying because of her race. The respondents further state that Crawford never filled out an application or otherwise applied for the rental.

As to the reference to race in the Craigslist advertisement, the respondents state that the fair housing laws bar discrimination based on race, not merely asking about race, the same way questions about race are listed on job applications and other government forms. According to the respondents, Michaels was simply attempting to gather as much pertinent information on the potential roommate as possible in order to find the candidate that best suited the living arrangement.

Respondents also claim that the FHAP’s charge of retaliation should be dismissed because the respondents have an absolute right to file their civil complaint under the First Amendment of the U.S. Constitution and Article II, Section 10 of the Constitution of Colorado.
The respondents’ counsel moves for a directed verdict, arguing that Michaels alone placed the Craigslist advertisement and met with Crawford. Counsel contends that Jones and M&M Properties should be dismissed from the case.

How would you respond to this motion? Please identify the sections of the Fair Housing Act, HUD’s implementing regulations, and case law (if any) that provide a basis for holding Jones and M&M Properties liable.
Participant Activity 2

Discuss obstacles to fair housing enforcement and ways to overcome each obstacle.

List the advantages of counsel’s involvement before the cause determination is issued, including counsel’s involvement prior to the completion of the investigation.

Is there anything you would have recommended be done in the *Crawford* case upon the filing of the complaint and/or during the investigation? For example, could testing have been conducted? Please explain.
Participant Activity 3

List the sections or subsections of the FHA or your state or local fair housing statute or ordinance that may have been violated in the *Crawford* case.

List the HUD regulations, guidance, and policy statements that may apply to the *Crawford* case.
Participant Activity 4

Using the HUD Memorandum, Elements of Proof, list the elements of proof for each claim in the Crawford case.
Participant Activity 5

Identify potential equitable and public interest provisions that could be sought in the Crawford case.
Participant Activity 6

How does your office interpret the standard of reasonable cause? Is that too high or too low of a standard? If so, why?

What impact does a higher or lower standard have on case processing?
Participant Activity 7

Assume that Ms. Crawford has been unable to find alternative housing. Do you believe that prompt judicial action or injunctive relief would be appropriate? Why or why not? What information would you need to make this determination?

If so, what would be the appropriate forum to seek injunctive relief? What policies, if any, does your agency use in determining whether to pursue injunctive relief?
## Participant Activity 8

How would you prioritize discovery in the *Crawford* case?

What are the first three steps you would take in conducting discovery and why would you take these steps?

Have you worked on similar cases? What did you find to be most effective or least effective?
Participant Activity 9

Why is it important to confirm each nondiscriminatory reason (in a disparate treatment case) or defense (in other cases)?
Participant Activity 10

You have been asked to submit a settlement proposal. You need to calculate Crawford’s damages—e.g., out-of-pocket or economic damages and non-economic damages (emotional distress and lost housing opportunity).

A difficult challenge is listing specific amounts for each of the claimed damages. What approach or approaches do you use in coming up with a specific amount or amounts?

What have you found to be most effective or least effective in arriving at a damages estimate?

Have you worked on similar cases and, if so, what amounts did you request or recover?
Participant Activity 11

What are the four separate standards for awarding attorney fees to a prevailing party in a fair housing case? Explain the policy underlying each of the four standards.

What factors are used to compute an attorney fee award? What circumstances can lead to a reduction of a fee award? What factors can lead to the enhancement of a fee award?
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<th>Participant Activity 12</th>
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<td>What steps can you take to help manage the expectations of your client/aggrieved person as to the probability of success on the merits, amount of claimed damages, and realistic time frame for the case to be concluded?</td>
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<td>What approaches have you used that have worked? What approaches have not worked?</td>
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Participant Activity 13

In your group, develop a persuasive trial plan using the elements of proof for each claim.

Map out the witnesses and exhibits that will be used to prove each element of the claim.

Select a member of your group to report out your trial plan.
Participant Activity 14

Some attorneys claim that it is inevitable that a defense attorney will file a motion for summary judgment (MSJ) in a discrimination case. Do you agree?

What are some best practices you recommend for defending against an MSJ?

Select a member of your group to report your suggestions.
Participant Activity 15

At trial, the respondents may argue that it is lawful to place an advertisement asking rental applicants about their race and to request a recent picture if no adverse actions were taken against Crawford or others based on this information.

Discuss how you could address this argument in a motion *in limine*. What arguments would you raise?
Develop a sentence or two of introduction to use in the beginning of the opening statement, setting up the theme/story of the case. Select a group member to present your theme/story of the case.

What do you regard as the most compelling proof of liability? How will you present this evidence?

What do you regard as the most important point respondents will likely raise as a defense to liability? How do you plan to address and rebut this defense?
Select volunteers to play the roles of FHAP counsel and Crawford.
Briefly roleplay (with round-robin-type questioning) the direct examination of Crawford. The testimony should address liability under 42 U.S.C. §§ 3604(a), (c), & (d) and 3617.
In our case study, Crawford (i) was directed in the ad to provide a brief description, including her race; (ii) was asked to provide a selfie or picture; (iii) heard Michaels say “You are? Oooooohh!” when he first saw her; (iv) was quizzed about her cooking habits, whether she was neat, and whether she was a professional and could verify her college graduation; (v) was told that Michaels could not rent the room to her because she is Black and his wife would not like it; and (vi) was told that renting the room to her would make the house uncomfortable for the other tenants.

What records or exhibits would you seek to enter into evidence to establish all items of damages that may be recovered by Crawford?

Do you need to retain an expert witness or witnesses? What are some advantages and risks in retaining an expert witness?
Participant Activity 19

1. As a group, what would be the two or three main points that you would use during the cross-examination of Michaels?

2. Two participants, one serving as Crawford’s counsel and the other as Jones, roleplay the cross-examination of Jones.
Participant Activity 20

Briefly outline your closing argument in the *Crawford* case.
Be prepared to share with the other participants.