

A Test of Our Fairness

by

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Fred Freiberg*

I WAS ASKED TO FOCUS MY REMARKS ON HOW TESTING has been used in the enforcement of fair housing laws. While the chosen topic is stated in the past tense, I will additionally discuss what we need to do to ensure that testing is used more extensively and effectively in the future.

I am humbled by the fact that I have had the extreme good fortune of having a long rewarding career doing work that I love. I have supervised thousands of fair housing testing investigations in more than two dozen states, and I have personally participated in hundreds of tests. The litigation that resulted from these testing investigations opened up tens of thousands of housing units and recovered millions of dollars in damages and civil penalties. I have been named as a witness in hundreds of civil rights lawsuits, and I have provided deposition and trial testimony on approximately forty occasions. During this time, I have had the privilege of working with some extraordinarily dedicated and courageous individuals (e.g., complainants, testers, test coordinators, civil rights attorneys and others) who have taught me why fair housing testing really matters. I want to share some of what I have learned.

After working as a test coordinator and a tester for over thirty-two years, I know that testing is still the single most important investigative tool that we have in our arsenal to uncover, document, and challenge illegal housing discrimination. It is fitting that we assemble in Detroit to discuss fair housing testing because the Fair Housing Center-Detroit (FHC) has established an impressive record over the past thirty years for consistently and effectively using testing evidence to challenge discriminatory housing practices through the courts.

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Let me begin by offering a definition of fair housing testing. Testing is an investigative tool used to gather evidence. A testing investigation typically has three characteristics. First, at least one person participates in the investigation. Second, the investigation is covert. And, third, the investigation is conducted to obtain a comparison. Testing is conducted to compare how different types of people are treated by a housing provider and/or to compare the practices of a housing provider against the requirements of fair housing laws. Later, I will share some examples of testing and refer to the fact that the tests were recorded. Since 1979, most of the enforcement testing that I have participated in has been recorded using concealed audio recorders. Either I was working in states that only required one-party consent to record a conversation or I was working for the Department of Justice which used recorders in virtually all of its fair housing testing investigations.¹

Over the years, I have attended a number of major fair housing conferences sponsored by governmental and nongovernmental entities in which only one workshop was devoted to the subject of fair housing testing. Two years ago, I attended a United States Department of Housing and Urban Development (HUD) fair housing conference held in Anaheim, California in which *no* workshops were structured around the topic of fair housing testing. I fail to understand how one can organize a conference intended to equip organizations and agencies with the tools and resources to enforce fair housing laws but exclude testing as a major topic for discussion. Testing remains one of the most effective investigative tools used to gather evidence of housing discrimination. Indeed, it is my opinion that no organization, public or private, can credibly claim to have a fair housing enforcement program if it does not also have a testing capability.

Testing is an essential investigative tool in fair housing law enforcement for two basic reasons. First, testing investigations frequently provide the vital corroborative evidence that victims of housing discrimination need to meet the legal burden of proof in a trial or administrative hearing. Without testing, acts of housing discrimination often go unchallenged or complainants lose their fair housing cases, along with any hope of securing the housing or a meaningful remedy. In many

1. A strong cautionary note is in order. While one-party consensual recording is lawful under federal law, there are about a dozen states that require two-party consent to covertly record conversations. No fair housing enforcement program should begin equipping testers with concealed audio recorders unless legal research confirms that such recording is lawful under the applicable state law and that the recordings will be admissible in court.

housing discrimination cases, testing is needed to verify or substantiate the claims.

Prior to 1991, when the Civil Rights Division of the Department of Justice established its own internal testing program and long before HUD started funding private fair housing groups to conduct testing in the mid-1980s, the first federal agency to extensively use testing in response to housing discrimination complaints was the Department of Defense (DOD). Since the passage of the federal Fair Housing Act forty years ago, all branches of the military subject to DOD regulations have required military bases in the United States to assist enlisted personnel who reported discrimination while seeking off-base housing.² The bases use existing military personnel to conduct tests in response to complaints that are received.³

Federal courts have also uniformly recognized the value of testing in corroborating complaints of housing discrimination, whether the testing was informally arranged by an individual complainant, conducted by an established fair housing group, or conducted by a government enforcement agency.⁴ For example, the United States Court of Appeals for the Seventh Circuit stated:

It is frequently difficult to develop proof in discrimination cases and the evidence provided by testers is frequently valuable, if not indispensable. It is surely regrettable that testers must mislead commercial landlords and home owners as to their real intentions. . . . Nonetheless, we have long recognized that this requirement of deception was a relatively small price to pay to defeat racial discrimination. The evidence produced by testers . . . is a major resource in society's continuing struggle to eliminate the subtle but deadly poison of racial discrimination.⁵

Also, Judge Damon J. Keith commented on the value of testing in a fair housing case, stating that the "evidence gathered by a tester may . . . be the only competent evidence available to prove that the defendant has engaged in unlawful conduct."⁶

The truth is that testers are often the "first responders" after an act of housing discrimination is reported. It is evidence initially gathered by testers that empowers individuals and organizations to assert their fair

2. See 32 C.F.R. § 192.5 (2009) (Equal Opportunity in Off-Base Housing).

3. 32 C.F.R. § 192.3 (DOD regulations and manuals refer to testers as "verifiers").

4. *Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1355 n.19 (5th Cir. 1979); *Wharton v. Knefel*, 562 F.2d 550, 554 n.18 (8th Cir. 1977); *Zuch v. Hussey*, 394 F. Supp. 1028, 1051 (E.D. Mich. 1975), *aff'd without opinion*, 547 F.2d 1168 (6th Cir. 1977); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 650 (N.D. Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975); see also *United States v. Wisconsin*, 395 F. Supp. 732, 734 (W.D. Wis. 1975).

5. *Richardson v. Howard*, 712 F.2d 319, 320 (7th Cir. 1983).

6. *Zuch*, 394 F. Supp. at 1051.

housing rights and to challenge illegal housing discrimination. So potent is this investigative tool that when the state of Wisconsin was struggling to pass a state-wide open housing law in 1965 over the numerous objections of the real estate industry, the only way passage could be assured was to include, among other things, a ban on all testing.⁷ This ban survived until the Department of Justice sued the state of Wisconsin and obtained a decision in 1975 that the state's ban on testing was unenforceable because it "chills the exercise of the right to equal housing opportunity"⁸ and is "an obstacle to the accomplishment of the principal objective of Congress in passing the Fair Housing Act . . . that is . . . to provide fair housing throughout the United States."⁹

It is also my view that private or public fair housing enforcement agencies that choose to use testing *only* to verify complaints of discrimination fail to understand the insidious nature and stealth qualities of contemporary housing discrimination. A reactive or purely complaint driven approach to fair housing law enforcement will never substantially reduce housing discrimination in our society.

The second reason that testing is fundamental to the enforcement of fair housing laws is that it can and should be used in a proactive manner to uncover and document systemic forms of housing discrimination that persist in harming individuals and communities. While at the Department of Justice, I worked on dozens of systemic testing investigations that revealed differences in treatment so subtle that it would be virtually impossible for an ordinary home seeker to suspect illegal housing discrimination was occurring. The comparison that only testing provides disclosed that some housing providers could be very inventive, even artful, in misrepresenting housing as unavailable or unavailable to show, providing qualitatively inferior service or information, offering unfavorable terms and conditions, or steering people based on race or another protected characteristic. Testing not only documented the discriminatory conduct, but it frequently disclosed the devious and deceptive methods employed to cover up their unlawful conduct so that the unsuspecting home seeker would find no reason to file a housing discrimination complaint.

This is not to suggest that overt racial discrimination in housing is a relic of the past. Recently, I was involved in investigating a complaint of race discrimination filed by an African American woman who

7. WIS. STAT. ANN. § 106.04 (West 2000).

8. *United States v. Wisconsin*, 395 F. Supp. at 733.

9. *Id.* at 734.

was seeking to rent an apartment through a real estate company based in Brooklyn, New York.¹⁰ Five recorded tests conducted by the Fair Housing Justice Center (FHJC) revealed differential treatment based on race.¹¹ The testing yielded evidence of an outright refusal to provide service to African American prospective renters. When, on five separate occasions, African American persons visited the real estate office, they were informed that no agents were available to assist them and that an agent would call them later to schedule an appointment to view apartments.¹² No African American tester was ever called back.¹³ Each time a white tester visited the same real estate office, usually on the same day, agents took testers out to view available housing or made arrangements to show available rental units.¹⁴

Let me share with you three elementary lessons that I have learned about housing discrimination from my work in this field:

- First, most illegal housing discrimination is not reported.
- Second, most housing providers who willfully violate fair housing laws try to conceal their unlawful conduct to elude detection.
- Third, housing discrimination takes many different forms so that a “one size fits all” approach to testing is not likely to detect violators or result in greater compliance.

For years, I have talked about the changing nature of housing discrimination by suggesting that we replace our image of a *slammed door*, which once characterized much of housing discrimination, and replace it with the image of a *revolving door*, where people are politely and courteously escorted in, out of, and ultimately away from the desired housing. Housing providers who discriminate in ways that, by design, prevent an ordinary home seeker from suspecting illegal discrimination reduce the chances that a housing discrimination complaint will be filed. Today, discriminatory housing practices can be concealed by common courtesies, disguised by good manners, and obscured by inauthentic gestures of kindness. The only way to ferret out more subtle housing discrimination and ensure that housing is available and accessible to all on a non-discriminatory basis is to continually test the housing market.

10. Complaint, *Lee v. Bais Seller Realty & Constr. Inc.*, No. 08-2556 (E.D.N.Y. June 26, 2008), available at http://www.helpusa.org/site/DocServer/Bais_Realty_Complaint.062608.pdf?docID=2022.

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

Everyone has their own way of talking about systemic testing investigations. A former state official in Wisconsin once told me that he affectionately thought of testers as “the unmarked squad cars in the housing market” enforcing fair housing laws. More recently, a fair housing attorney and veteran told me that he likened testers to “sappers,” the special forces who, among other things, are deployed to hostile areas in order to secure them in advance of troop movements. Regardless of how one talks about this activity, the reality is that testing is the only investigative method that enables us to observe the ordinary or “unvarnished” practices of housing providers and identify unlawful discriminatory practices that may be infecting housing transactions and limiting access to housing.

Federal courts also have found systemic testing to be persuasive in the absence of a bona fide home seeker.¹⁵ The testing program that I helped to establish and directed at the Department of Justice conducted a systemic testing investigation in Parsippany, New Jersey. Three tests were conducted over a short period of time at a rental office that controlled access to 458 rental units in three apartment complexes.¹⁶ In every test, rental agents misrepresented to African American testers that rental units were not available while telling white testers about available rental units.¹⁷ This evidence led the DOJ to file a “pattern and practice” lawsuit in federal court against a large rental management company.¹⁸ In rejecting defendants’ motion for summary judgment, the court found:

[T]he tests at issue are particularly probative. They all occurred within one month and yielded virtually identical results. The timing and uniform results of these tests give rise to a permissible inference that racial discrimination is not a sporadic event but, instead, is part of the way that Defendants do business.¹⁹

Systemic testing provides a unique opportunity to proactively identify violators of fair housing laws, protect unwitting consumers from being subjected to unlawful housing discrimination, and open up housing opportunities to all.

As an investigative tool, testing offers some other unique advantages over other types of investigations. The test coordinator controls

15. *United States v. Balistrieri*, 981 F.2d 916, 929 (7th Cir. 1992), *cert. denied*, 510 U.S. 812 (1993).

16. *United States v. Garden Homes Mgmt., Corp.*, 156 F. Supp. 2d 413, 415-16 (D.N.J. 2001).

17. *Id.* at 416-18.

18. *Id.* at 413.

19. *Id.* at 421.

the development of the evidence, selecting the people who might be witnesses (testers), deciding the approach, and determining how tester experiences will be documented. With this control, however, comes an enormous responsibility. Since the aim of all enforcement testing is to gather credible, objective, and admissible evidence, the test coordinator must carefully design and thoughtfully supervise the investigative process from beginning to end.

One other plus to testing evidence is that expert testimony is not required to interpret the importance or probative value of the evidence. Testers are fact witnesses who testify about their encounters with housing providers. It is up to triers of fact to evaluate tester evidence as they would testimony offered by any other fact witnesses.

I moved to New York City in 2004 to organize a new fair housing group called the FHJC. My first challenge was to design a structure for our new testing program. Fortunately (or unfortunately), there are a lot of underemployed actors in New York City, and, consequently, we were able to develop a partnership with the Actors' Work Program of the Actors Fund. At the FHJC, we call our testing program the "Acting for Justice" Program because we employ, on a part-time basis, over fifty professional actors who do virtually all of the testing. Our testers are thoroughly vetted with criminal background checks, drug tested, and interviewed prior to hiring. The testers complete a training program and conduct at least one practice test before being assigned to work on an investigation. Because New York is one of the states that permits one-party consensual recording,²⁰ our testers are equipped with stereo digital audio recorders that have been modified for law enforcement purposes. Tester contacts are recorded and the recordings are preserved on evidence-grade computer disks.

We developed software tools that enable our test coordinator to assign financial characteristics and occupations to our testers, so that tester characteristics are credible and the testers are appropriately qualified. Finally, we developed a customized GIS mapping application which allows us to map 2000 census data. The mapping program enables us to methodically identify areas of interest for systemic testing investigations. These tools and resources have proved extremely useful in

20. N.Y. PENAL LAW § 250.05 (McKinney 2004); *Mena v. Key Food Stores Coop., Inc.*, 758 N.Y.S.2d 246, 250 n.7 (Sup. Ct. 1994); *Chin v. Am. Tel. & Tel. Co.*, 410 N.Y.S.2d 737, 738 (Sup. Ct. 1978); *People v. Cherry*, No. 97/2002, 2003 WL 21295254, at 3 (N.Y. Co. Ct. May 21, 2003).

investigating housing provider practices, in one of the largest and most complex housing markets in the nation.

Having described the value and advantages of testing, I must tell you that I am acutely aware that testing is no magic bullet. There are situations that cannot and should not be tested. There are fair housing cases in which the proof may be more readily available from other types of facts: witnesses, documentary evidence, or expert testimony. Also, I do not want to present an uncritical view of testing as it is currently conducted in our nation. James Baldwin once wrote “the price one pays for pursuing any profession or calling is an intimate knowledge of its ugly side.”²¹

The most obvious unseemly aspect of my profession is, of course, that one has fairly regular exposure to bigotry and egregious acts of housing discrimination. It would be dishonest to suggest that those of us who intimately experience and/or witness deplorable acts of housing discrimination are not impacted in some way by these experiences. It is also important to remember that simply because individuals voluntarily agree to act as testers and may not be seeking housing for themselves does not diminish the insult, humiliation, and harm that a real act of discrimination inflicts. Testers are human beings. We cannot immunize testers from feeling what others feel when subjected to the indignity of discrimination. During my years of work in this field, I have heard some in the housing industry express a concern that this repeated exposure to discrimination may cause testers and test coordinators to be less than objective on other investigations, and posit that it could lead to false accusations of discrimination. I have always been very sensitive and open to this notion, but have found little evidence to support it. Further, I trust the ability of our legal system to discern and reject any testing evidence that is biased, or testing cases that are without merit.

The ugly side to our work, as I see it, has more to do with the fact that testing is not used as extensively or as intelligently as it could be to aid with the enforcement of fair housing laws. My concern is that much of the housing discrimination that occurs in our country goes undetected because testing is so underutilized, or, in many cases, not utilized to its full potential.

Part of the explanation for the underutilization of testing is the paucity of resources devoted to supporting it. Nationally, there is a negligible amount of our federal budget each year dedicated to funding

21. James Baldwin, *The Black Boy Looks at the White Boy*, in *THE PRICE OF THE TICKET: COLLECTED NONFICITON* 302 (St. Martin's Press 1985).

enforcement testing by private fair housing groups. While insufficient resources account for the dearth of testing activity in many parts of the country and the high rate of turnover among test coordinators, it does not fully explain why testing is not always used to its full investigative potential.

I would suggest that, in addition to being resource-constrained, many fair housing enforcement organizations and agencies also fail to use appropriate technology and lack access to high-quality training programs for their professional staff. This is evident when I observe test coordinators who have never learned to be creative and “think outside the box” about investigative techniques, information sources, and testing approaches. It is obvious to me that there is a problem when, instead of conducting serious investigations into housing market practices, I see tests being conducted in large numbers to meet arbitrary or unrealistic numerical goals set in funding proposals or, worse yet, established for political reasons.²² It is clear to me there is a problem when test coordinators demonstrate a lack of knowledge about the law, rules of evidence, and housing market practices. I am concerned when I see fair housing enforcement organizations resist using technology, tools, and resources that would expand the quality and reach of their investigations. Finally, I am especially alarmed when I read newspaper articles and organizational press releases announcing that fair housing enforcement organizations or agencies continue to use scarce testing resources to conduct “studies” in order to report what can only be described as self-serving “levels of discrimination” with *no* enforcement action taken.

Before closing, let me suggest that we have a unique opportunity, whether we are testers, test coordinators, attorneys, housing industry professionals, human rights officials, public officials, or interested citizens, to move beyond discussions about whether testing is a good idea, whether testing is fair to housing providers, or whether testing is an appropriate investigative tool. Instead, it is time to for all of us to discuss what can be done to ensure that testing is used more extensively and more effectively all across this nation.

22. See News Release, DOJ, Acting Attorney General Announces Results of Operation Home Sweet Home (October 26, 2007), www.usdoj.gov/opa/pr/2007/october/07_CRT_858.html (in which the DOJ announced “an all-time high number of paired testings” and that, in 2006, “the number of tests was over 20 percent higher than the number conducted in any other year”). Based on data available from the Housing and Civil Enforcement (HCE) website, however, it is apparent that the recorded number of completed tests resulted in very few testing cases being filed by DOJ when compared to previous years.

Abolitionist John Brown referred to the system of slavery as “wicked, cruel, and unjust,”²³ terms that equally apply to systemic housing discrimination whether based on race, disability, national origin, sexual orientation or other factors. We have also come to understand what the late senator from New York, Jacob Javits, told us forty years ago in arguing for the passage of the federal Fair Housing Act. Senator Javits noted that the impact of housing discrimination extends well beyond the direct victim of discrimination and, in his words, “harms the whole community.”²⁴ Housing discrimination persists and is still one of the most pernicious and intractable domestic problems facing our nation. It restricts housing choice, balkanizes communities, and perpetuates a host of social and economic inequalities.

Token resources and empty rhetoric about fair housing being the law will never suffice as an alternative to vigorous law enforcement. Another expensive national housing discrimination testing study that tells us in very imprecise terms what we already know, namely that illegal housing discrimination persists at unacceptable levels in our metropolitan areas, squanders scarce enforcement resources.²⁵ More fair housing poster contests and the invention of cartoon characters, like HUD’s “Franklin the Fair Housing Fox,” distract, but do little to help people overcome discriminatory barriers and access housing. What is needed is increased enforcement activity that makes testing the centerpiece of a more coordinated and comprehensive fair housing law enforcement strategy. As a nation, we need to muster the political will to mount a vigorous and sustained campaign to challenge illegal housing discrimination, reduce inequality, and repair the harm that has been inflicted on our communities from discrimination and segregation. In my view, this is an imperative that we ignore at our own peril. For the nation, it will be a test of our fairness.

23. John Brown, Speech to the Court at his Trial (November 2, 1859), www.nationalcenter.org/JohnBrown'sspeech.html.

24. 114 CONG. REC. 2708 (1968).

25. Turner, Margery et al., Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000, THE URBAN INSTITUTE (November 2002); Phase II HDS—Asians and Pacific Islanders (May 2003); Phase III—Native Americans (September 2003), www.huduser.org/publications/hsgfin/hds.html.