

LAW IN ORDER

The Warren Report

TENANT SELECTION AND THE LAW

Developing Useful Tenant Selection Criteria and Applicant Disclosures

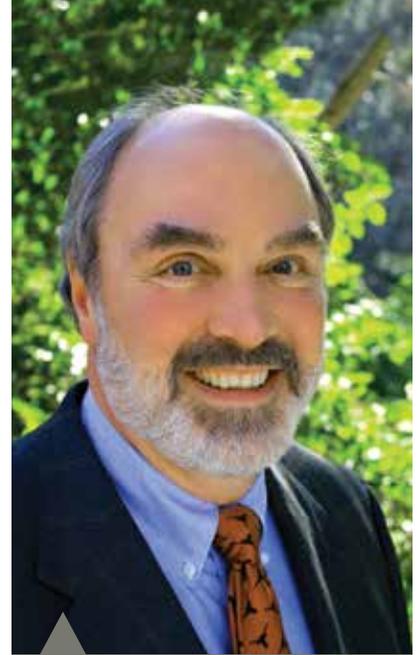
Those who rent residential real estate need tenant selection criteria. It is not simply an option or a preferred practice. It is the law.

Section 92.3515(a) of the Texas Property Code states that at the time an applicant is provided with a rental application, the landlord shall make available to the applicant printed notice of the landlord's tenant selection criteria (the Criteria). The statutory provision goes on to provide that this printed notice must contain the grounds for which the rental application may be denied. The Property Code suggests that criminal history, previous rental history, current income and credit history are to be included in the Criteria, along with an obligation to provide complete and accurate information. Those suggestions, however, are not all-inclusive. They are simply guidelines about what the threshold inquiries ought to be.

The Texas legislature enacted this section of the Property Code in its 2007 session. The law took effect

January 1, 2008. The statute provides that applicants shall sign an acknowledgment indicating that the notice was made available to them. The acknowledgment must include a statement to the effect that the applicant: (1) had an opportunity to review the Criteria, (2) the basics of what the Criteria includes, and (3) a provision that if the Criteria is not met, the application may be rejected and the application fee (if any) will not be refunded. The preferred provision, of which the foregoing is a summary version, is literally quoted in the statute. If the notice is not provided, and the applicant is rejected, the landlord must return the full amount of both any application fee and application deposit.

Is it sufficient to simply focus upon criminal history, previous rental history, current income and credit history? Perhaps in the Criteria itself; but the Criteria is often accompanied by other landlord disclosures, like your privacy policy, your general rental criteria, your animal policies, your occupancy policy, and greater detail about how you will



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utilize criminal background data.

Let us begin with the suggested topics from the Property Code. The first such item is **CRIMINAL HISTORY**. This has taken on added importance recently, because on April 4, 2016, the U.S. Department of Housing and Urban Development (HUD) published a 10-page paper entitled *Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records*. This guidance was the subject of an earlier *Law in Order: The Warren Report* published in the July/August 2016 *Window on Rental Housing* magazine. The title of that *Warren Report* was *Done the Crime. Done the Time. Now What?* Due to the importance of how to use the criminal history of an applicant and avoid housing discrimination, a bit of highlighting from that earlier *Warren Report* is appropriate.

If the Criteria you currently use enables you to deny an applicant simply because of arrests (and does not require convictions), you will have a problem. Likewise, if your Criteria have a blanket prohibition against renting to anyone with a conviction, no matter when the conviction occurred, what the underlying crime entailed, or what the convicted person has done since then, you had better beware. Automatically disqualifying "anyone with a conviction" will very

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likely now result in a violation of fair housing laws.

To avoid a violation, landlords must always be able to show that there is a substantial, legitimate, nondiscriminatory interest supporting any policy which denies housing to an individual based upon the use of criminal history. The new rule about criminal history data is that we need convictions.

Simply being arrested or charged is not enough. A blanket prohibition against renting to any person with any conviction record, moreover, will not suffice. The housing provider must consider when the conviction occurred, and what the underlying crime entailed. The prospective landlord must also take into account what the convicted person has done since the date of the conviction. The nature and severity of the underlying crime that the individual was convicted of is also extremely important. A landlord must accurately distinguish between criminal conduct that indicates a demonstrable risk to resident safety and/or property, and criminal conduct that does not.

How can this be done? Begin by thinking about what an apartment community is, and what is expected of it. In an apartment community, people of all age groups reside in close proximity. Efforts should be undertaken by the landlord, within reason, to minimize the possibility of harm to the safety of other residents and their property. A focus on convictions for things like murder, rape, sexual assault, molestation, assault, battery, arson, terrorism, burglary and theft can easily jeopardize the safety of other residents and their property. Within that list of crimes, moreover, some could have a much more significant impact than others.

In your tenant selection criteria, where you discuss criminal history, you should disclose that to the extent

you are able, you will consider the nature, severity and recency of criminal conduct found in an applicant's criminal history. You also should disclose that you will take into consideration what that applicant has done since his or her conviction(s), if any. This is the expectation contained in the April 2016 HUD Guidance.

There also can be crimes that automatically and permanently cause the rejection of an applicant. Convictions for drug manufacturing or distribution, or crimes which have made an applicant subject to a lifetime registration requirement under a state sex offender registration program can cause automatic rejection.

Another thing the Property Code



suggests should be considered in your tenant selection criteria is **PREVIOUS RENTAL HISTORY**. What do former landlords say about your applicant? To gain access to one's previous rental history, a landlord must often rely upon the information disclosed on the application. The TAA application asks an applicant to provide a home address, and contact information for the landlord's representative for the two most recent leased residences.

In addition, the TAA application inquires whether an applicant has been evicted or required to move out, or whether an applicant vacated a dwelling before the end of the lease term without the owner's consent. There are also questions on the TAA

application concerning whether an applicant has previously been sued for rent or for property damage. With this information, the prospective landlord is able to analyze whether leasing to the current applicant would be a prudent decision or not.

A good rental history can mean different things to different landlords. For that reason, it is important for your Criteria to specify what is important to you. Does a previous eviction bother you? Even if there is an eviction, would you afford the applicant an opportunity to provide you with verifiable documentation that the landlord acted irresponsibly, and did not have a sound basis for that eviction case? Obviously, one does not want to rent to an appli-

cant who is likely to cause physical damage to the property. Your Criteria can alert your applicant that this is one of the things which could disqualify them. In your Criteria, you should also inform the applicant that specific conduct from their previous tenancies could be a deal breaker.

In addition, the Texas Property Code suggests tenant selection criteria which investigate the

CURRENT INCOME of the applicant. For this category to make sense, you must insist that the current income be verifiable. Identify what your verification process will entail. Consider specifying what type of documentation the applicant must provide you to verify their income. If you will require past tax returns, paycheck stubs, employer verifications, or bank statements, state that in your Criteria. You need not simply rely upon an applicant's statement of current income provided on the application. There is a good chance the number provided on the application will not be as accurate as you would expect.

Make sure whatever application form you use is thoroughly complet-

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Your
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more than
the four
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Section
92.3515(a)
of the Texas
Property
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ed. Do not allow an applicant to get sloppy and write partial answers to the questions. The information you obtain from an applicant on the application is the beginning point of any inquiry. Do everything you can to ensure it is complete and accurate.

Ideally, you will have an opportunity to meet with an applicant face-to-face before the lease is signed. Use this interaction to verify information. Look at an applicant's original driver's license and cross check its data with the information contained in the application. See whether the application's "current address" matches the address on the driver's license. Insist upon seeing an original photo ID and compare the photo with the applicant. A copy can be altered easily. Identity theft is real and prevalent.

Beware of an applicant who asks you how a particular question on the application ought to be answered. Someone who asks you "What's the best way to answer this question?" raises a big red flag.

As you look into current income, and have multiple paycheck stubs from an applicant, compare them side-by-side. As you study them in chronological order, see what is happening with year-to-date income. If pay stubs have been altered, possibly not every alteration to complete the scam has been made. Look for different type fonts or print sizes. This could suggest that someone altered the form to remove negative information and replace it with positive information.

If you ask for a tax return, check to see who prepared it. Verify that the tax form is actually signed. If the tax preparer is identified, contact them by phone to see whether they indeed prepared the tax form you are presented with. If someone has a salaried position, they ought to have a W-2 form. If someone is a non-salaried contractor, they ought to have annual 1099 IRS forms. Make sure your leasing personnel know what the important documents are, what they look like, what information they should contain, and what to look for to ensure their accuracy.

Another item the Texas Property Code suggests should be included on your tenant selection criteria is

CREDIT HISTORY. Your applicant's credit history can be determined from their credit report. This will be prepared by a neutral third-party, the credit bureau, and is designed to tell you about a particular individual's credit worthiness. Remember, if the applicant becomes your tenant you are going to rely upon this person to make a series of timely payments to you. The credit report will show total debt and monthly debt payments. This information, along with information about how much one earns, enables you to conduct an accurate analysis of whether they ought to be able to meet their rent obligations.

Credit reports also will show history on each credit account. The histories show whether your applicant always, sometimes, or never pays on time. The credit report will also frequently identify prior residences. You can match these against the prior residences disclosed by an applicant on the application itself. Credit reports will also provide information about bankruptcies, accounts sent to collections, and evictions. Similar topics appear on the TAA rental application, so you are presented with another opportunity to compare information from two different sources (the credit bureau and applicant) to see if it is contradictory. Get an applicant's credit report directly from the issuer. Do not accept a photocopy the tenant brings along for you. It is too easy for a tenant to alter the content of a report they provide.

Credit reports may provide you with a credit score. A credit score is a single number that summarizes a person's credit history. The higher the number is (which will range between 300 and 850) the better. A credit score is positively influenced by payments made on time and by the total number of credit accounts an individual has at any given time. Data in the report could suggest an undue reliance on credit cards.

Your Criteria can include more than the four suggested categories from Section 92.3515(a) of the Texas Property Code. For example, you could have a category which you identify as "**NEGATIVE INFORMATION.**" This section of your Criteria could refer to

things like open bankruptcies which have not been discharged, collection claims filed by a property management company or apartment complex, and what your minimum income formula would be to rent the particular unit. This is often a multiple of the monthly rent, and three times the monthly rent is a common earnings threshold for tenant qualification.

ANIMAL POLICIES also ought to be addressed in the document containing your Criteria. Consider addressing the breed, weight, and size of an animal which a prospective resident could have. In that regard, it is noteworthy that the law draws a distinction between service animals and pets. More specifically, *you can exclude pets of a particular breed, size or weight, but you cannot use breed restrictions, or size and weight restrictions, as an automatic exclusion for service animals.*

Suppose you did not want pit bulls living at your property. They may be too big, too aggressive, or not covered under your insurance policy. Let us assume, in addition, that you allow pets at your community. As long as the pit bull was not an emotional support animal or service animal, you could use breed, size and weight restrictions to exclude that animal from your property. However, if someone stated that this particular pit bull was an emotional support animal or a service animal for a person with a disability, a different analysis would have to be undertaken. Neither breed, size, nor weight limitations may be applied, in and of themselves, to deny an accommodation request for an assistance animal in the context of residential fair housing law. Make that distinction clear in your Criteria.

You are within your rights to ask someone who is seeking a reasonable accommodation for an assistance animal to provide documentation. When the request is for an assistance animal that provides emotional support, documentation may be requested from a physician, psychiatrist, social worker, or other mental health professional. You may insist, within reason, that such documentation address how, and conclude whether, *the animal in question provides emotional support*

that alleviates one or more of the identified symptoms or effects of an existing disability that the requesting individual currently has.

In addition, the document containing your Criteria is also an appropriate place to state your **OCCUPANCY POLICY**. That is where you specify how many persons may occupy the rental property. It is often based, at least in large part, upon the number of bedrooms being rented. Some landlords like a policy of two persons per bedroom. It must be understood, however, that such a hard and fast rule is complicated and may not always be legally correct. How old must one be before they are counted in a formula determining how many persons can occupy a bedroom? How are children and infants treated in the occupancy policy? Once you determine your occupancy policy, which requires careful legal analysis, you may want to include your policy in the document containing your tenant selection criteria.

The document containing your Criteria is also a good location to include your **PRIVACY POLICY**. Essentially, the law requires that when you ask somebody to provide you their Social Security number, you are to provide them your privacy policy. We know from earlier in this article that at the time an applicant is presented with a rental application, the landlord is to make available to the applicant printed notice of the landlord's tenant selection criteria. Since a request for disclosure of a Social Security number is made in the application, this would also be the time that you want to disclose what you will do with private information obtained in the context of the application process.

Essentially, many landlords state they will not disclose nonpublic personal information except as permitted by law. They will also make statements to the effect that they will restrict access to nonpublic personal information

to those employees who need such information to provide products and services to the applicant and tenant. A typical privacy policy also includes statements about the type of physical, electronic and procedural safeguards which are utilized to comply with federal standards guarding against improper disclosure of nonpublic personal information.

Who performs background checks? A quick Google search leads to the site www.top10bestbackgroundcheck.com. In no particular order, and without rendering an opinion as to the accuracy, quality or cost of these services, here are some of the background check services identified on this webpage: www.beenverified.com; www.instantcheckmate.com; www.Spokeo.com; www.truthfinder.com; and www.peoplelooker.com.

If you want to search for credit information, you need to have the permission of the applicant before you do so. If you utilize the TAA rental application, a grant of permission is contained on that, plus the application is signed by the applicant.

Even when using a third-party service, it is important that an individual's rights under the Fair Credit Reporting Act be preserved. Consumers are protected against unfair or inaccurate results generated during background checks; they must be told whether information in their file has been used against them, and such consumers have a right to know what is in their file. Consumers also have a right to dispute inaccurate information about them, and the right to seek damages for violations of the Fair Credit Reporting Act. As you might expect, therefore, it is important that the company you utilize obtains and reports accurate information, and makes (or enables you to make) full and legal disclosures.

Who will your tenant selection criteria affect? As the Property Code

provides, everyone who is provided a rental application is to be provided a copy of the Criteria. Make it a practice that anyone over the age of 18 who wants to live at your community completes an application.

What do you do if you want to reject an applicant? Section 92.352 of the Texas Property Code provides that an applicant is deemed rejected by the landlord if the landlord does not give notice of acceptance of the applicant on or before the seventh day after either: (1) the date the applicant submits a completed rental application to the landlord on an application form furnished by the landlord, or (2) the date the landlord accepts an application deposit if the landlord does not furnish the applicant an application form.

The TAA application contains a similar provision in its application agreement. There, the landlord is to notify the applicant whether or not they have been approved within seven days after the date landlord receives a completed application. An application will be considered disapproved if the landlord fails to notify the applicant of approval within such seven days. The notification of the applicant may be in person, by mail or by telephone, according to the TAA form, unless the applicant has specified that the notification is to be by mail.

Every landlord wants an ideal tenant; and an ideal tenant originates as an ideal applicant. Carefully craft your tenant selection criteria and related applicant disclosures so they work for, and not against, achievement of that goal. Then thoroughly analyze the information you receive to make an informed choice whether your applicant is a person you can approve and feel confident about. Be careful out there. 🍷

The document containing your Criteria is also a good location to include your **PRIVACY POLICY**.

BILL WARREN is in his 37th year as a lawyer. His law practice focuses on a variety of issues and cases, the majority of which address the concerns of those active in the multi-family industry. He founded and manages Warren Law Firm. In addition, he serves as Of Counsel for the Texas Apartment Association and as Legal Counsel of the Austin Apartment Association. Bill is also a Credentialed Mediator in Texas. He writes and speaks regularly, and as author of Law In Order: **The Warren Report** he has had over 120 articles published. His topics cover all nature of issues pertaining to rental housing, from onsite to the boardroom to the courtroom. Bill has been Board Certified in Civil Trial Law by the Texas Board of Legal Specialization for 30 years, and is also a Fellow of the College of the State Bar of Texas. He can be reached at Warren Law Firm, 1011 Westlake Drive, Austin, Texas 78746, (512) 347-8777, or through his firm's website at www.WLFTexas.com.