

Minimum Services Task Force Report & Recommendations *REVISED*

INTRODUCTION

At the April 2006 meeting of the Real Estate Commission, the Nevada Association of REALTORS® presented its concerns regarding the state of minimum services for listings in Nevada. For more than a year, the Commission has heard comments and discussed other states' implementation of minimum services legislation and the U.S. Department of Justice's ("DOJ") response.

The Commission decided to implement a formal process to study actions taken in other jurisdictions and then to determine what actions, if any, should be taken in Nevada. To that end, the Commission appointed the Minimum Services Task Force ("Task Force") to be comprised of licensees and legal representatives of the Real Estate Division and professional trade organizations.

CHARGE

The Commission directed the Task Force to review other jurisdiction's law regarding minimum services requirements; to research the DOJ's response and any litigation instituted by the DOJ; to review Nevada's real estate laws in NRS 645 and NAC 645, and Nevada's agency law; to determine what the impact of minimum services legislation might be on existing Nevada law; and to make recommendations for changes or clarification to existing Nevada statutes and/or regulations. The Task Force was instructed to meet for at least one full day and one half-day, if necessary, and to make a report to the Commission at its July 2006 meeting.

The Task Force presented its initial Report and Recommendations to the Commission on July 18, 2006. Due to time constraints, the Task Force had been unable to complete Recommendation No. 1. Thus, the Commission directed the Task Force to meet one more day in order to complete its work on Recommendation No. 1, defining "agency." This Revised Report and Recommendation is the result of that subsequent meeting.

BACKGROUND

The Task Force began its work by discussing the various business models serving the marketplace, and the issues being experienced by real estate licensees. The business models currently in use range from "traditional" full-service brokerages to "entry only" brokerages that enter a listing onto the Multiple Listing Service (MLS) and essentially walk away. In between are "fee-for-service" brokerages that offer a menu of services from which the consumer may

choose, and pay a fee commensurate with the level of service. For purposes of this report, the terms “limited service brokerage” and “limited service listings” will be used.

Some “traditional” brokerages are also offering menu-driven services, and may accept listings where they do not provide full services. Examples could include builder listings, where the builder’s staff handles showings and contract negotiations, or business-savvy attorneys or investors who prefer to negotiate on their own behalf. Such arrangements are properly referred to as limited service listings. Therefore, it is important to remember that any recommendations made by the Task Force apply equally to “traditional” brokerages who enter into limited service arrangements as much as limited service brokerages.

Questions and issues that are facing licensees include: how does a licensee deal with a seller who has listed property with a limited service brokerage? Can the seller be contacted directly; what about negotiations? How can the buyer’s licensee avoid unintended dual agency when the seller asks questions or seeks other help from the licensee? What duties does the buyer’s licensee owe to a seller who is represented by a limited service broker? Who is responsible for notifying the seller’s broker that an offer has been accepted, or that escrow has closed? Can a client and licensee agree to waive any or all of the Duties Owed?

It is apparent that most brokerages are looking for ways to deal with “entry only” listings in a way that complies with Nevada law and protects the buyer’s licensee from unintended dual agency, while resulting in a successful transaction for both parties. Thus, direction from the Commission will benefit both the consumer and the licensee.

METHODOLOGY

In carrying out its assigned charges, the Task Force reviewed and studied the following:

- Current provisions of Nevada real estate licensing and agency law, with appropriate case decisions;
- Draft chapters from the *Nevada Law Guide*, “Nevada Law on Real Estate Agency” and “Nevada Law on Brokerage Agreements;”
- Legislation and/or regulations passed or proposed in other states including Alabama, Illinois, Iowa, Michigan, Missouri, New Mexico, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Virginia, Washington and Wisconsin (including background materials where available);
- Articles regarding these states’ actions and the opposition advanced by the DOJ;
- Correspondence from various state administrators;
- “Real Estate Brokerage: Factors That May Affect Price Competition,” a report by the General Accounting Office;
- Testimony presented to the Federal Trade Commission’s Workshop on Competition Policy and the Real Estate Industry; and
- Media articles from *USA Today* and online industry newsletters.

PUBLIC COMMENT

The Task Force's meetings were properly noticed, however, no member of the public attended the first two meetings. Several members of the public attended the Task Force's third meeting on August 28, 2006. Their comments were taken in two blocks: at the beginning of the meeting, and again at the end. The public comment is summarized and attached as Appendix A.

ISSUES IDENTIFIED

The Task Force discussed and identified several concerns presented by the emergence of limited service listings in the marketplace. The issues identified were:

1. Nevada real estate licensing law does not define "agency" or the various types of brokerage agreements that licensees may enter into, such as "exclusive right to sell" or "exclusive agency." There is also confusion between the statutory definition of "exclusive agency representation"—a type of *representation* (NRS 645.320) — and the "exclusive agency" type of *agreement*.
2. Nevada real estate licensing law does not address whether agency can be waived. Some limited service agreements disavow any agency relationship between the broker and the client.
3. Nevada real estate licensing law does not address what Duties Owed, if any, may be waived by a client to a brokerage agreement.
4. In some instances, the advertisement of "entry-only" listings is confusing to the public and to licensees. Properties that are listed under a limited service arrangement are sometimes marketed as "for sale by owner" when they are, in fact, subject to an exclusive agreement.
5. Sellers who are subject to limited service agreement frequently do not understand the services that they will not be receiving from their listing broker, and then expect the buyer's licensee to provide those services such as explaining offers, preparing counteroffers and explaining seller's disclosure requirements.
6. Nevada real estate licensing law is unclear whether a buyer's agent can be directed by the listing broker to negotiate directly with the seller and further does not provide a definition of "negotiate." NRS 645.635(2)¹ appears to allow such contact when the listing broker has provided written permission, however, there are no guidelines or forms defining what constitutes written permission.

¹ **NRS 645.635 Additional grounds for disciplinary action: Unprofessional and improper conduct relating to real estate transactions.** The Commission may take action pursuant to NRS 645.630 against any person subject to that section who is guilty of: . . . 2. Negotiating a sale, exchange or lease of real estate directly with a client if he knows that the client has a brokerage agreement in force in connection with the property granting an exclusive agency or an exclusive right to sell to another broker, unless permission in writing has been obtained from the other broker.

7. Buyers brokers who do negotiate directly with a seller are often asked by the sellers for assistance and advice on responding to offers. By providing such assistance, these licensees fear they are breaching their duties to their clients and that they may be implying an agency relationship with the seller that could result in an unintended—and undisclosed—dual agency.

TASK FORCE FINDINGS

The issues identified above fall generally into three core areas: agency, consumer choice, and licensee duties. The Task Force focused its attention and discussion on these areas, and its findings and recommendations seek to:

- 1. Confirm that Nevada is an agency state.**
 - A person who performs one act on behalf of another in furtherance of a real estate transaction is acting as an agent.
 - Regardless of the level of service chosen by a consumer, there are basic fiduciary duties that a licensee must perform to ensure that the consumer is protected.

- 2. Encourage informed consumer choice.**
 - Consumers should have the right to select the level of service they want from a real estate licensee.
 - Nevada law should ensure that consumers are making an informed decision regarding the level of service they receive.

- 3. Protect licensees from unintended and undisclosed dual agency.**
 - Nevada law should not unreasonably restrict or limit emerging business models.
 - Licensees who engage in limited service arrangement should be required to provide written permission to contact a client directly.
 - Consumers who select to receive limited service should be advised of the limitations of the cooperating licensee's role in representing the other party in the transaction.

RECOMMENDATIONS

RECOMMENDATION NO. 1:	Define the term “agency” in Nevada law.
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Rationale:

Such a definition does not currently exist, although there is a general assumption that Nevada recognizes only agency relationships in real estate transactions.

Proposed action:

Support a statutory change, or adopt a regulation, in compliance with administrative rulemaking procedures, which reads:

“Agency” means a fiduciary relationship between a principal and an agent arising out of a brokerage agreement whereby the agent is engaged to do certain acts on behalf of the principal in dealings with a third party.

RECOMMENDATION NO. 2:	Define the types of real estate agency agreements in Nevada law.
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Rationale:

Such definitions do not currently exist and would be useful to eliminate confusion with the statutory definition of “exclusive agency representation.”

Proposed action:

Note: This proposed action is solely contingent upon the Commission’s action on Recommendation No. 1, as the following proposed language presupposes that “agency” is defined.

Adopt a regulation, in compliance with administrative rulemaking procedures, which reads:

1. For purposes of NRS 645.320, “exclusive agency representation” means an agency relationship that consists of one broker and one client, as exemplified through brokerage agreements including but not limited to:

a. “Exclusive right to sell or lease listing agreement” means an agency agreement that meets the requirements of NRS 645.320 and does both of the following: (1) grants the broker the exclusive right to represent the seller in the sale or lease of the seller’s property; and (2) provides the broker with the expectation of receiving compensation if the broker, the seller, or any other person or entity produces a purchaser or tenant in accordance with the terms specified in the listing agreement or if the property is sold or leased during the term of the listing agreement to anyone other than to specifically exempted persons or entities.

b. “Exclusive agency listing agreement” means an agency agreement between a seller and broker that meets the requirements of NRS 645.320 and does both of the following: (1) grants the broker the exclusive right to represent the seller in the sale or lease of the seller’s property; (2) provides the broker with the expectation of receiving compensation if the broker or any other person or entity produces a purchaser or tenant in accordance with the terms specified in the listing agreement or if the property is sold or leased during the term of the listing agreement, unless the property is sold or leased solely through the efforts of the seller or to the specifically exempted persons or entities.

c. “Exclusive buyer’s brokerage agreement” means an agency agreement between a purchaser and broker that meets the requirements of NRS 645.320 and does both of the following: (1) grants the broker the exclusive right to represent the purchaser in the purchase or lease of property; (2) provides the broker with the expectation of receiving compensation in accordance with the terms specified in the exclusive agency agreement or if a property is purchased or leased by the purchaser during the term of the agency agreement unless the property is specifically exempted in the agency agreement. The agreement may authorize the broker to receive compensation from the seller or the seller’s agent and may provide that the purchaser is not obligated to compensate the broker if the property is purchased or leased solely through the efforts of the purchaser.

2. Nothing contained in this section prevents agency relationships described in NRS 645.193(2) and (3), with proper disclosures.

RECOMMENDATION NO. 3:	Prohibit a broker who has taken an exclusive right to sell listing from advertising the property as “for sale by owner.”
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Rationale:

Such advertising misleads the public to believe that the owner is representing himself when, in fact, the owner is exclusively represented. Such advertising is confusing to the public and to other licensees and should be prohibited.

Proposed action:

Amend NAC 645.610, in compliance with administrative rulemaking procedures, to include a section which reads:

A licensee who is representing a seller under an exclusive right to sell or lease listing agreement or an exclusive agency listing agreement shall not advertise such property to the public as “for sale by owner” or otherwise mislead the public to believe that the seller is not represented by a licensee.

RECOMMENDATION NO. 4:	Clarify that the Duties Owed may not be waived, except the requirement to present all offers and define “presenting all offers.”
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Rationale:

NRS 645.252 sets forth the duties that a licensee owes to all parties in a transaction; NRS 645.254 sets forth additional duties owed by a licensee who has entered into a brokerage agreement to represent a client in a real estate transaction. Together, these sections are commonly referred to as “Duties Owed.” NRS 645.254(3)(b) requires a licensee to “promote the interests of his client” by “presenting all offers made to or by the client as soon as is practicable.” For purposes of this report, this duty will be called “Duty 3(b).”

The Task Force recommends (1) that Duty 3(b) be more fully defined, and (2) that a consumer be allowed to waive Duty 3(b) with written, informed consent. (See Recommendation No. 5, below.) Defining Duty 3(b) will further clarify those services which are typically encompassed in the course of handling offers and contracts.

The Task Force reached this conclusion by studying Ohio statutes and the changes made to reflect the emergence of limited service brokerages. Ohio law presents very similar duties to Nevada’s Duties Owed, and allows for the duties related to presenting and explaining offers to be waived. The DOJ has looked favorably on Ohio’s approach.

The Task Force believes that this approach will codify that the basic Duties Owed may not be waived, while providing some flexibility for consumer choice in a changing marketplace.

Proposed actions:

Adopt a regulation, in compliance with administrative rulemaking procedures, which reads:

1. A licensee shall not accept a waiver of any duty required by NRS 645.252.
2. For purposes of NRS 645.254, the term “presenting all offers” includes, without limitation: accepting delivery of and conveying offers and counteroffers; answering a client’s questions regarding offers and counteroffers; and assisting a client in preparing, communicating and negotiating offers and counteroffers.

Propose a statute, or support a statutory change, to read:

A client may choose to waive the duty of presenting all offers in NRS 645.254(3)(b) upon signing a waiver of duty statement as may be prescribed by the Division.

RECOMMENDATION NO. 5:	Require that a consumer who chooses to waive his right to have offers presented sign a disclosure and waiver.
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Note: This recommendation is contingent upon passage of the statute proposed above.

Rationale:

This works in conjunction with Recommendation No. 4. The Task Force concludes that such an approach allows the consumer to choose those services he wants and those he does not want. The Task Force believes that a mandatory state form is necessary to ensure that the consumer is making an informed choice.

Proposed action:

Recommend that the waiver form prescribed by the proposed statute include the following:

- A statement of the duty to present all offers;
- The terms of NAC 645.XXX (see Recommendation No. 4);
- A statement that the client desires to waive the duty under NRS 645.254(3)(b);
- A statement that a real estate transaction has significant legal and financial consequences;
- A statement that no other licensee in the transaction is required to perform the waived duty on behalf of the client;
- A statement that legal counsel or other professionals should be consulted by the client; and
- A statement that the client should take steps to inform himself of the steps he must take to fulfill the terms of any contract.
- A statement that the waiver is revocable in writing.
- A statement that the licensee shall present all offers or no offers; in other words, the licensee may not choose which offers to present.

A sample form is attached as Appendix B. This form would be in addition to the Duties Owed form now required.

RECOMMENDATION NO. 6:	Clarify that a licensee does not violate Nevada law by negotiating with another broker's client, provided there is written authorization; clarify that such negotiation does not create dual agency; provide a form for such written authorization.
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Rationale:

NRS 645.635(2) permits a licensee to negotiate directly with a client whom he knows is represented by a broker, if the broker permits such contact in writing. The proposed regulation would codify this arrangement in a positive way. It would also provide protection for licensees who may deal directly with limited service clients, but who are concerned that such direct dealings would be found to imply an agency relationship that was not intended, thus resulting in an undisclosed dual agency. Defining “negotiate” would provide much needed guidance to licensees in complying with the statute. Finally, a standardized form would remove any guesswork by the cooperating licensee. A sample is attached as Appendix C.

Proposed action:

Adopt a regulation, in compliance with administrative rulemaking procedures, which reads:

1. A broker who has the exclusive authority to represent a client under a written exclusive agency agreement, exclusive right to sell agreement, or exclusive purchaser agency agreement may authorize other licensees to negotiate directly with that client. The authorization shall be in writing on a form prescribed by the Division. The broker shall provide a copy of the authorization to any cooperating broker upon request.

2. Negotiations conducted by a licensee with a seller, purchaser, lessor, or tenant pursuant to the authorization described in paragraph 1 of this section shall not create or imply an agency relationship between that licensee and the client of that exclusive broker.

3. As used in this section, “negotiate” means any the following:
 - (a) Delivering or communicating an offer, counteroffer, or proposal;
 - (b) Discussing or reviewing the terms of any offer, counteroffer, or proposal;
 - (c) Facilitating communication regarding an offer, counteroffer, or proposal and preparing any response as directed.

RECOMMENDATION NO. 7:	Permit continued communication between a licensee and another broker's client where the purchase agreement was negotiated pursuant to NRS 645.635(2).
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Rationale:

The steps and recommendations presented thus far take the licensee only part of the way through a transaction. Once a purchase agreement is presented and negotiated between a licensee and a limited service client, the licensee may not continue communicating with the client without risking a violation of NRS 645 and/or becoming a dual agent. Such communication is often crucial to facilitate a successful closing, and should be allowed under Nevada law.

Proposed action:

Consider supporting legislation to allow continued communication between a licensee and another licensee's client where the purchase agreement was negotiated pursuant to NRS 645.635(2). Consider specifying that such communication does not in and of itself create an agency relationship between the licensee and the other client.

This report and the recommendations contained herein are respectfully submitted by the following members of this Task Force:

- Deanne M. Rymarowicz, Esq., Chairman
- Gail J. Anderson
- Christine M. Guerci, Esq.
- Teresa McKee, Esq.
- Kim Pedersen
- Pat Schweigert
- Mike West

APPENDIX A

PUBLIC COMMENT FROM AUGUST 28, 2006

(First session)

Andy Maline, agent, broker/salesman, One Cap Realty, 5440 W. Sahara

Mr. Maline stated that he searched the statutes and that a definition of agency seems pretty straightforward. Rather than define a list of acts that an agent may take, Mr. Maline's suggested definition is "any and all acts, activity, and inactivity, that may be in the best interest of the principal." He concluded that it needs to be clear that agency is separate from compensation.

William Houts, broker, Creative Realty, Henderson

Fiduciary responsibility, limited services acknowledge buyers/sellers need more assistance, what they really want is more fees; Mr. Houts stated that a buyer's agent representing a sale to a seller could be accused of coercing the seller after the fact. Buyer's agents can inherit dual agency very easily, and questioned whether "MLS entry only" listings are the equivalent of being unrepresented. Mr. Houts stated that the situation for buyer's agents is scary at best. Mr. Houts stated that he would rather call it fee for service than limited service, and that the perception is that it's more about the money than the service. Mr. Houts expressed concern about parties from out of state being allowed to do business in Nevada.

Linda "Red" Wallin, owner/manager, Century 21 Express

Ms. Wallin, stated that she agrees with the previous comments. Ms. Wallin stated that she has a lot of restrictions put on her to do fair and honest business, and wonders how she is protected by a letter from a seller's broker telling her that she can meet with his client. Ms. Wallin stated that she would like limited service companies to live by the same rules as other brokers.

Joan Kuptz, owner, Remax Advantage

Ms. Kuptz stated that she agrees with the previous speakers. Ms. Kuptz expressed concern regard how this will affect E & O insurance premiums. Anyone who enters into negotiations with a seller opens themselves up to being sued, no matter what happens. People want decreased fees, but not a decrease in service. Ms. Kuptz stated that the DOJ doesn't get it, and that she would hate to see people in our state cave to the DOJ. Anyone who believes there is no competition in the industry has their head in the sand.

Harry Hall, Remax Advantage, 8548 W. Lake Mead, Las Vegas

Mr. Hall stated that he agrees with other speakers. Mr. Hall stated that we need to have duties for each agent, and that a buyer's agent writing up a counteroffer to an offer crosses the line. Agents need to be on one side or the other. Mr. Hall stated that limited service agents are taking money and not representing people, and that we need to start going after these people who make agents cross the line.

Gary Coles, Venture Realty Group, Las Vegas

Mr. Coles stated that he sympathizes with the panel as they are in a tough situation. He expressed a concern that the public does not understand the difference between fees and services, and they

don't understand what they are getting, even with full service. Mr. Coles stated that people not in the state are putting a burden on the state. Regarding fiduciary duties, Mr. Coles stated that he is seeing more single agency where someone is representing one party, and that there is no way to determine boundaries for that individual. Mr. Coles explained that in a new home sub-division, the agent represents only the builder, however they write up everything, may arrange a lender and other tasks; is that crossing the line? Mr. Coles stated that there is a need to protect the public and make it clear what an agent can do, representing only the seller or only the buyer.

(Second session)

Andy Maline

Mr. Maline suggested a language change from "present" offers to "deliver" offers. Mr. Maline further stated that buyer's agency has not been addressed. He further stated that he is concerned that it appears that the DOJ has precipitated this, and we shouldn't be concerned with the DOJ as we are a republic of states.

William Houts

Mr. Houts said that "abandoned" is the correct term for clients of limited service brokers, as many companies take up front fees. Mr. Houts suggested that "oral agreement" should be removed from the statute [defining brokerage agreements]. Mr. Houts further stated that one broker will never return phone calls and will only accept faxes or emails as he is in the 602 area code.

Andy Maline

Mr. Maline stated that (1) sellers don't know what the agents are doing, and (2) there needs to be language that indemnifies him.

Bob Manning, Prudential Americana Group

Mr. Manning stated that limited services are on the buyer's side as well. He explained that in a limited service arrangement on the buyer's side, the agent will send the buyer a list of homes, the buyer contacts the sellers and finds the home he wants, and the agent will write up the contract. Mr. Manning stated that the Task Force needs to address this side.

APPENDIX B

WAIVER OF PRESENTATION OF OFFERS

If you have entered into a brokerage agreement with a real estate licensee, he/she has specific statutory duties to you. Under NRS 645.254(3)(b), one of those duties is “presenting all offers made to or by the client as soon as practicable.”

“Presenting all offers” includes without limitation: accepting delivery of and conveying offers and counteroffers; answering a client’s questions regarding offers and counteroffers; and assisting a client in preparing, communicating and negotiating offers and counteroffers.

Under Nevada law these duties cannot be waived by the licensee. However, you can enter into an agreement waiving the licensee’s obligation to perform the duty to present all offers. **By signing below you are agreeing that the licensee who is representing you will not present any offers made to or by you.**

AGREEMENT TO WAIVER

By signing below I agree and understand:

- **That the licensee who represents me shall not present any offers made to or by me, as defined above.**
- **That a real estate transaction has significant legal and financial consequences.**
- **That in any proposed transaction, the other licensee(s) involved represents the interests of the other party, does not represent me and cannot perform the waived duty on my behalf.**
- **That I should seek the assistance of other professionals such as an attorney.**
- **That it is my responsibility to inform myself of the steps necessary to fulfill the terms of any purchase agreement that I may execute.**
- **That this waiver may be revoked by me in writing.**

Seller Date

Licensee Date

Seller Date

Brokerage Name

APPENDIX C

AUTHORIZATION TO NEGOTIATE DIRECTLY WITH SELLER

Nevada law permits a real estate licensee to negotiate a sale or lease directly with the seller or lessor with written permission from the listing broker. This form grants that permission with respect to the below-named Seller(s) and the listed property.

- Seller agrees, and the Seller's broker authorizes, that a Buyer's agent or broker may present offers (including subsequent counteroffers) and negotiate directly with the Seller.
- "Negotiate" means (a) delivering or communicating an offer, counteroffer, or proposal; (b) discussing or reviewing the terms of any offer, counteroffer, or proposal; and/or (c) facilitating communication regarding an offer, counteroffer, or proposal and preparing any response as directed.
- Seller understands and agrees that, after accepting an offer, additional contact from the Buyer's agent may be required to obtain disclosures and other documents related to the transaction.
- **SELLER ACKNOWLEDGES AND AGREES THAT BUYER'S AGENT DOES NOT REPRESENT THE SELLER**, and negotiations pursuant to this authorization do not create or imply an agency relationship between the Buyer's agent and the Seller. Seller understands that he/she should seek advice from Seller's broker and/or financial advisers or legal counsel.
- Seller acknowledges that Seller's broker will provide a copy of this authorization to the Buyer's agent or broker upon request, prior to presenting an offer.

Seller's Name(s): _____

Seller's Signature(s): _____ / ____ / ____
Date Time

Property Address: _____

City: _____ Zip: _____ Contract listing date: _____

Company Name: _____

Seller's Agent Name: _____ Signature: _____
Date ____ / ____ / ____ Time _____

Seller's Broker Name: _____ Signature: _____
Date ____ / ____ / ____ Time _____